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Attorneys for Plaintiff Ellen Baskin and the Class

ELLEN BASKIN, KATHLEEN O'SHEA and SANDEEP TRISAL, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. P.C. RICHARD & SON, LLC (d/b/a P.C. Richard & Son) and P.C. RICHARD & SON, INC. (d/b/a P.C. Richard & Son), *Defendants*.	SUPERIOR COURT OF NEW JERSEY OCEAN COUNTY – LAW DIVISION DOCKET NO. OCN-L-000911-18 Civil Action **NOTICE OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

TO: William S. Gyves
Glenn T. Graham
KELLEY DRYE & WARREN LLP
One Jefferson Road
Parsippany, New Jersey 07054

PLEASE TAKE NOTICE that on April 26, 2024 at 9:00 a.m., or as soon thereafter as counsel may be heard, Plaintiff Ellen Baskin, on behalf of herself and on behalf of the proposed Settlement Class, shall move before the Superior Court of New Jersey, Law Division, Ocean County, Hon. Valter H. Must, J.S.C., for the entry of an Order, pursuant to Rules 4:32-1 and 4:32-2, granting preliminary approval of the proposed class action settlement on the terms and conditions set forth in the Stipulated Settlement Agreement and Release (hereinafter sometimes referred to as "Settlement" or "Agreement")[1], a copy of which is attached as Exhibit 1 to the Certification of Chant Yedalian.

PLEASE TAKE FURTHER NOTICE that Plaintiff, on behalf of herself and on behalf of the proposed Settlement Class, shall further move the Court for an Order:

1. Certifying the Settlement Class for settlement purposes;

2. Appointing Plaintiff Ellen Baskin as the Class Representative for the Settlement Class;

3. Appointing Chant Yedalian of Chant & Company A Professional Law Corporation, Bruce D. Greenberg of Lite DePalma Greenberg & Afanador, LLC, and Charles J. LaDuca and Peter Gil-Montllor of Cuneo Gilbert & LaDuca, LLP, as Class Counsel for the Settlement Class.

4. Appointing Atticus Administration, LLC as the Settlement Administrator.

5. Approving the proposed notice to the Settlement Class, including the Claim Form-R, Short-Form Claim Form, Mailed Notice A, Mailed Notice P, Email Notice A, Email Notice P, Targeted Internet Notice, and Full Notice, attached to the Agreement as Exhibits A through H, respectively;

6. Directing notice to be made to the Settlement Class as described in the Agreement;

7. Preliminarily approving the Settlement subject to final review by the Court;

8. Establishing deadlines for Settlement Class members to submit a request for exclusion from the Settlement and to submit objections to the Settlement; and

9. Setting a final approval and fairness hearing on September 27, 2024, or as soon thereafter when the Court is available.

[1] Capitalized terms shall have the same meanings as in the Agreement, unless indicated otherwise.

PLEASE TAKE FURTHER NOTICE that in support of this Motion, Plaintiff shall rely on the Certifications of Chant Yedalian, Bruce D. Greenberg, Charles J. LaDuca, Peter Gil-Montllor, Ellen Baskin, Christopher Longley, and Cathy Winter, the attached Memorandum of Law, and any and all Exhibits attached herewith.

PLEASE TAKE FURTHER NOTICE that a proposed form of Order is submitted herewith in accordance with Rule 1:6-2(a).

PLEASE TAKE FURTHER NOTICE that no dates have been fixed for any pretrial conference, arbitration, calendar call or trial.

PLEASE TAKE FURTHER NOTICE that Plaintiff's counsel Chant Yedalian and Bruce D. Greenberg have conferred with counsel for defendants P.C. Richard & Son, LLC and P.C. Richard & Son, Inc. (collectively "Defendants") and Defendants have represented, including on March 25, 2024, that they do not oppose this motion.

PLEASE TAKE FURTHER NOTICE that, although this Motion is unopposed, a hearing and oral argument are requested. Although this is a preliminary approval hearing, and not a final approval hearing, a hearing and oral argument are requested to ensure compliance with Rule 4:32-2(e)(1)(C) which states: "The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate."

LITE DEPALMA GREENBERG & AFANADOR, LLC

Date: March 27, 2024

/s/ Bruce D. Greenberg

Bruce D. Greenberg, Esq.
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, Bruce D. Greenberg, hereby certify that a true and correct copy of Plaintiff's Notice Of Unopposed Motion For Preliminary Approval Of Class Action Settlement, Memorandum of Law, Proposed Order, Certifications of Chant Yedalian, Bruce D. Greenberg, Charles J. LaDuca, Peter Gil-Montllor, Ellen Baskin, Christopher Longley, and Cathy Winter, and any and all Exhibits attached to these documents were e-filed on March 27, 2024 and sent to Defendants' counsel via e-Courts, with copies sent via overnight mail and e-mail to:

William S. Gyves
Glenn T. Graham
KELLEY DRYE & WARREN LLP
One Jefferson Road
Parsippany, New Jersey 07054

/s/ Bruce D. Greenberg
Bruce D. Greenberg, Esq.

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Attorneys for Plaintiff Ellen Baskin and the Class

ELLEN BASKIN, KATHLEEN O'SHEA and SANDEEP TRISAL, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. P.C. RICHARD & SON, LLC (d/b/a P.C. Richard & Son) and P.C. RICHARD & SON, INC. (d/b/a P.C. Richard & Son), *Defendants*.	SUPERIOR COURT OF NEW JERSEY OCEAN COUNTY – LAW DIVISION DOCKET NO. OCN-L-000911-18 Civil Action **[PROPOSED] ORDER GRANTING MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND SCHEDULING FAIRNESS (FINAL APPROVAL) HEARING**

The Court has received the Stipulated Settlement Agreement and Release (hereinafter sometimes referred to as "Settlement" or "Agreement") entered into between plaintiff Ellen Baskin ("Baskin" or "Plaintiff") and defendants P.C. Richard & Son, LLC and P.C. Richard & Son, Inc. (collectively "P.C. Richard" or "Defendants").

After reviewing the Agreement and other documents filed in support of the Motion For Preliminary Approval Of Class Action Settlement, and having considered the arguments by the

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respective parties, THE COURT HEREBY ORDERS THE FOLLOWING:[1]

1. The Court hereby grants preliminary approval of the proposed Settlement upon the terms and conditions set forth in the Agreement. The Court preliminarily finds that the terms of the proposed Settlement are fair, adequate and reasonable and comply with Rules 4:32-1 and 4:32-2.

2. The Court orders that the following Settlement Class is preliminarily certified for settlement purposes only: All consumers who engaged in a sale or transaction using an American Express ("AmEx") credit or debit card at any P.C. Richard & Son store within the United States at any time during the period November 12, 2015 through August 18, 2016 and were provided an electronically printed receipt at the point of the sale or transaction, on which receipt was printed the expiration date of the consumer's AmEx credit card or debit card.

3. The Court finds that, for purposes of the Settlement, the above-defined Settlement Class meets all of the requirements for class certification. The Court further finds that, for purposes of the Settlement, the requirements of Rules 4:32-1 and 4:32-2 are satisfied and that (a) the Settlement Class is ascertainable, (b) the members of the Settlement Class are so numerous that joinder is impracticable, (c) there are questions of law and fact common to the Settlement Class members which predominate over any individual questions, (d) the representative Plaintiff's claims are typical of the claims of the Settlement Class members, (e) the Class Representative and Class Counsel have fairly, adequately, reasonably and competently represented and protected the interests of the Settlement Class throughout the litigation, including appeals, and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

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[1] Capitalized terms in this Order shall have the same meanings as in the Agreement, unless indicated otherwise.

4. The Court appoints plaintiff Ellen Baskin as the Class Representative for the Settlement Class.

5. The Court appoints Chant Yedalian of Chant & Company A Professional Law Corporation, Bruce D. Greenberg of Lite DePalma Greenberg & Afanador, LLC, and Charles J. LaDuca and Peter Gil-Montllor of Cuneo Gilbert & LaDuca, LLP as Class Counsel for the Settlement Class.

6. The Court appoints Atticus Administration, LLC as the Settlement Administrator.

7. The Court preliminarily finds that the Settlement is the product of serious, informed, non-collusive negotiations conducted at arm's-length by the Parties and with the assistance of mediator Honorable Arlander Keys (Ret.) through two mediations. In making these preliminary findings, the Court considered, among other factors, the potential statutory damages claimed in the lawsuit on behalf of Plaintiff and members of the Settlement Class, Defendants' potential liability, the risks of continued litigation including trial outcome, delay and potential appeals, the substantial benefits available to the Settlement Class as a result of the Settlement, and the fact that the proposed Settlement represents a compromise of the Parties' respective positions rather than the result of a finding of liability at trial. The Court further preliminarily finds that the terms of the Settlement have no obvious deficiencies and do not improperly grant preferential treatment to any individual member of the Settlement Class.

8. The Court approves the proposed manner of the notice of Settlement set forth in the Agreement. The Court also approves of the Claim Form-R, Short-Form Claim Form, Mailed Notice A, Mailed Notice P, Email Notice A, Email Notice P, Targeted Internet Notice, and Full Notice, attached to the Agreement as Exhibits A through H, respectively.

9. The Court finds that the proposed manner of the notice of Settlement set forth in

the Agreement, and Exhibits A through H, which the Court approves of, as set forth in paragraph 8, above, constitutes the best notice practicable under the circumstances and is in full compliance with the United States Constitution, the New Jersey Constitution, Rules 4:32-1 and 4:32-2, and the requirements of due process. The Court further finds that the notice fully and accurately informs Settlement Class members of all material elements of the lawsuit and proposed class action Settlement, of each member's right to be excluded from the Settlement, and each member's right and opportunity to object to the proposed class action Settlement and be heard at the fairness (final approval) hearing.

10. Settlement Class members will have until sixty (60) calendar days from the first date of posting the Full Notice to the Settlement Class on the Settlement Website, to exclude themselves from the Settlement (the "Opt-Out Deadline"). Settlement Class members may opt out by timely sending a written request to the Settlement Administrator postmarked no later than the Opt-Out Deadline. The written request must include the Settlement Class member's name, address, telephone number, and signature, and a statement requesting that the Settlement Class member be excluded as a Class member from *Baskin, et al. v. P.C. Richard & Son, LLC, et al.*, Docket No. OCN-L-000911-18. The Settlement Administrator shall promptly provide a copy of any opt-out request to counsel for each of the Parties. Settlement Class members who timely opt out of the Settlement: (a) will not be a part of the Settlement; (b) will have no right to receive any benefits under the Settlement; (c) will not be bound by the terms of the Settlement; and (d) will not have any right to object to the terms of the Settlement or be heard at the fairness (final approval) hearing.

11. Any Settlement Class member, on his or her own, or through an attorney hired at his or her own expense, may object to the terms of the Settlement. Any such objection must be

mailed to the Settlement Administrator. To be effective, any such objection must be in writing and include the contents described in paragraph 13 below, and must be mailed and postmarked no later than thirty (30) days before the date of the fairness hearing. Any objections not raised properly and timely will be waived. The Settlement Administrator shall promptly provide a copy of any such objection to counsel for each of the Parties.

12. Any Settlement Class member, on his or her own, or through an attorney hired at his or her own expense, may object to Class Counsel's motion for an award of attorneys' fees and costs and/or the Class Representative's motion for an incentive (or service) award. Such motion will be filed and posted on the Settlement Website no later than sixty (60) calendar days before the date of the fairness hearing. Any objection must be mailed to the Settlement Administrator. To be effective, any such objection must be in writing and include the contents described in paragraph 13 below, and must be mailed and postmarked no later than thirty (30) days before the date of the fairness hearing. Any objections not raised properly and timely will be waived. The Settlement Administrator shall promptly provide a copy of any such objection to counsel for each of the Parties.

13. To be effective, any objection described in paragraph 11 or paragraph 12 above must contain all of the following information:

A. A reference at the beginning to this matter, *Baskin, et al. v. P.C. Richard & Son, LLC, et al.*, Docket No. OCN-L-000911-18.

B. The objector's full name, address, and telephone number.

C. Proof of Settlement Class membership consisting of the original or a copy of either: (1) a valid Claim Number assigned to the cardholder in this matter that begins with the letter A; (2) a valid Notice Number assigned to the cardholder in this matter that begins with the letter P together with proof that the cardholder used his or her own personal AmEx credit or debit card for one or more of the subject transactions at P.C. Richard during the period November 12, 2015 through August 18, 2016; or (3) the cardholder's receipt that contains the expiration date of cardholder's credit or debit card and shows that cardholder made a transaction at any P.C. Richard store at any time during the period November 12, 2015 through August 18, 2016, together with proof that that cardholder used his or her personal AmEx credit or debit card for one or more of the subject transactions.

D. A written statement of all grounds for the objection, accompanied by any legal support for such objection.

E. Copies of any papers, briefs, or other documents upon which the objection is based.

F. A statement of whether the objector intends to appear at the fairness hearing. If the objector intends to appear at the fairness hearing through counsel, the objection must also state the identity of all attorneys representing the objector who will appear at the fairness hearing.

G. Regarding any counsel who represents the objector or has a financial interest in the objection: (1) a list of cases in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the preceding five years, and (2) a copy of any orders concerning a ruling upon counsel's or the firm's prior objections that were issued by the trial and/or appellate courts in each listed case.

H. A statement by the objector under oath that: (1) he or she has read the objection in its entirety, (2) he or she is a member of the Settlement Class, (3) states the number of times in which the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, (4) identifies the caption of each case in which the objector has made such objection, and (5) attaches any orders concerning a ruling upon the objector's prior such objections that were issued by the trial and/or appellate courts in each listed case.

14. By this Order, all Settlement Class members, unless and until they have timely excluded themselves from the Settlement as set forth in this Order, are hereby enjoined from filing, commencing, prosecuting, intervening in or participating as plaintiff, claimant, or class member in, any other lawsuit or administrative, regulatory, arbitration or other proceeding in any jurisdiction that concerns any claim(s) or cause(s) of action arising out of the facts alleged in Plaintiff's Complaint or which is otherwise covered within the scope of the Release by the Settlement Class set forth in paragraph 11 of the Agreement.

15. Class Counsel's motion for an award of attorneys' fees and costs shall be filed no later than sixty (60) calendar days before the date of the fairness hearing.

16. The Court will hold a fairness (final approval) hearing on ____________________, at _______ [a.m.] [p.m.], to consider the fairness, reasonableness and adequacy of the proposed Settlement as well as the award of attorneys' fees and costs to Class Counsel and incentive (or service) award to the Class Representative. The Court reserves the right to adjourn or continue the fairness (final approval) hearing without further notice to the Settlement Class members.

IT IS SO ORDERED.

Dated: ______________

By: ____
Valter H. Must, J.S.C.

This Motion was:

[ ] Opposed

[x] Unopposed

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Attorneys for Plaintiff Ellen Baskin
and the Class

ELLEN BASKIN, KATHLEEN O'SHEA and SANDEEP TRISAL, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. P.C. RICHARD & SON, LLC (d/b/a P.C. Richard & Son) and P.C. RICHARD & SON, INC. (d/b/a P.C. Richard & Son), *Defendants*.	SUPERIOR COURT OF NEW JERSEY OCEAN COUNTY – LAW DIVISION DOCKET NO. OCN-L-000911-18 Civil Action **CERTIFICATION OF BRUCE D. GREENBERG IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

Bruce D. Greenberg, of full legal age, hereby certifies as follows:

1. I am one of the attorneys for the named Plaintiff Ellen Baskin. As such, I have personal knowledge of the following facts herein stated. If called as a witness, I could and would testify competently to the following:

2. I am an attorney at law of the State of New Jersey, and a member of the law Firm of Lite DePalma Greenberg & Afanador, LLC. I have been involved in this case as New Jersey counsel and co-lead counsel for Plaintiff since February 2019.

3. I submit this Certification in support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement.

Qualifications of Counsel

4. I was admitted to the New Jersey Bar and the Bar of the United States District for the District of New Jersey in 1982. I was admitted to the Bar of the Third Circuit Court of Appeals in 1999 and to the Bar of the United States Supreme Court in 2010.

5. After law school, I served as a law clerk for Hon. Daniel J. O'Hern, an Associate Justice of the Supreme Court of New Jersey, for the 1982-83 Term. From 1983 until the present, I have been in private practice, first at the firm now known as Greenbaum Rowe Smith & Davis, LLC, where I was an associate and, later, a partner, and since 1996 at my current firm. I have handled complex litigation and appellate matters at both firms. More than 40 of my cases have been officially reported, including landmark cases in consumer protection, class actions, and other areas of law.

6. At my current firm, I have handled plaintiffs' class action litigation for over 25 years. I have served as co-lead counsel, liaison counsel, or a member of an executive committee in numerous cases, in New Jersey and elsewhere, that have resulted in many

millions of dollars of recovery for class members. A number of those cases are referred to in my biography page from our law firm's website, www.litedepalma.com, a true copy of which is attached as Exhibit A. I have been listed in New Jersey Super Lawyers each year since 2005, the first year that that list appeared, in Best Lawyers in America each year since 2019, and I am a Fellow of the American Academy of Appellate Lawyers (one of only 350 Fellows nationwide, and one of only four New Jersey Fellows). I have an AV rating from Martindale-Hubbell.

7. I have a number of publications in the areas of consumer protection and class action law. Those include:

"Class Action Litigation"- Chapter 21 in New Jersey Federal Civil Procedure (New Jersey Law Journal Books, 1st Ed.1999, 2nd Ed. 2008, and annual supplements through 2024)

"Keeping the Flies Out of the Ointment: Restricting Objectors to Class Action Settlements," 84 St. John's L. Rev. 949 (2010) (cited in In re Kentucky Grilled Chicken Coupon Marketing & Sales Practices Litig., 2011 WL 5599129 (N.D. Ill. Nov. 16, 2011); Hernandez v. Restoration Hardware, Inc., 4 Cal. 5th 260, 409 P.3d 281 (Cal. 2018)); City of North Royalton v. McKesson Corp. (In re Nat'l Prescription Opiate Litig.), 976 F.3d 664 (6th Cir. 2020) (Moore, J., dissenting).

"Attorneys' Fees in New Jersey Class Actions," New Jersey Lawyer Magazine, April 2015

"Don't Eviscerate Consumer Fraud Act," 204 N.J.L.J. 658 (June 6, 2011)

"In Consumer Class Actions, New Jersey Still Stands Tall," 203 N.J.L.J. 382 (February 7, 2011)

Additionally, since 2010, I have written the New Jersey Appellate Law blog, www.appellatelaw-nj.com, New Jersey's foremost appellate law blog, which extensively covers developments in New Jersey consumer protection and class action law, among other areas.

8. I have also been a panelist or moderator for numerous continuing legal education programs regarding class action litigation. Those include (within the last ten years alone):

Speaker, "Introduction to Class Actions in State and Federal Court." Bergen County Bar Association, March 23, 2022

Speaker, "Class Action Litigation in 2020: What You Need to Know." New Jersey ICLE, February 10, 2020

Speaker, "Class Actions: Perspectives on Key Issues," New Jersey State Bar Association Annual Meeting, May 17, 2019

Co-Moderator, "Significant Developments in Class Actions," New Jersey ICLE, April 11, 2018

Moderator, "Prevailing Trends in Class Action Litigation," New Jersey ICLE, November 29, 2016

Speaker, "The Evolving Nature of Class Actions," New Jersey State Bar Association Annual Meeting, May 19, 2016

Speaker, "Latest Developments in Class Action Litigation," New Jersey State Bar Association Annual Meeting, May 14, 2015

Presenter, "Who Needs *The Second City*?: Class Certification from A(ykroyd) to Lovit(Z): A Three-Act Play," American Bar Association's 18th Annual National Institute on Class Actions, October 24, 2014

I also delivered the 27th Annual Alice and Stephen Evangelides Memorial Lecture, at the Rutgers University Department of Political Science/Eagleton Institute of Politics on February 9, 2016, titled "Class Action Litigation: Who Benefits?"

9. In sum, I believe my experience and expertise as a consumer attorney, and my genuine interest in protecting consumer rights, adequately qualify me to serve as Class Counsel on behalf of the best interests of the consumer class.

10. I do not know of any conflict of interest between myself or my firm and any member of the proposed class that should or would preclude me from representing the proposed class.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: March 26, 2024

Bruce D. Greenberg

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EXHIBIT A

LITE DEPALMA GREENBERG & AFANADOR

Bruce D. Greenberg

Member | Newark Office
973.877.3820 | bgreenberg@litedepalma.com

Legal Assistant: Elvira Palomino
973.877.3833 | epalomino@litedepalma.com

Practice Areas

Class Action Litigation

Appellate Law

Federal Securities Litigation

Antitrust

Consumer Fraud

Product Liability

Committee on Character

Complex Commercial Litigation

Educations

J.D., Columbia University

B.A., cum laude, University of Pennsylvania

Bar Admissions

U.S.Supreme Court

U.S. Court of Appeals, Third Circuit

U.S. District Court, District of New Jersey

New Jersey

Bruce D. Greenberg is a highly experienced litigator who draws on his more than 35 years of practice to provide sophisticated representation to clients in appellate and complex commercial litigation. Bruce has successfully handled dozens of cases in federal and state courts around the country, and has briefed and argued numerous appeals before the Supreme Court of New Jersey, New Jersey's Appellate Division, and the U.S. Court of Appeals for the Third Circuit, as well as one case in the Colorado Court of Appeals. The moderator at a recent seminar introduced Bruce, a panelist, as "the Dean of the New Jersey Supreme Court Bar." He also represents applicants before the Supreme Court of New Jersey Committee on Character (on which he previously served for fifteen years).

During lower-court proceedings, Bruce focuses on winning the matter at hand while also laying the groundwork for a strong position on appeal. He is regularly asked to take over on appeal cases that were handled in lower courts by other counsel. A "lawyers' lawyer," Bruce has been retained by other attorneys to prosecute appeals in their own personal partnership, matrimonial, counsel fee, and legal malpractice matters.

Some of Bruce's appellate work has led to multimillion-dollar victories for his clients. More than 40 of his cases have been officially reported, including significant decisions on mass torts, class actions, restrictive employment covenants, land use, real estate brokerage, and other topics. Additional subjects of his successful appeals have included medical malpractice, rent control, and other complex commercial litigation.

"To be successful in appellate work," says Bruce, "you must have the oral argument skills and quick reactions of a superb debater, combined with the technical and analytical proficiency of a legal scholar. You must understand the appellate process inside and out, as well as the rules and preferences of the individual courts. With more than three decades of experience in trial-level and appellate practice, I believe I offer my clients all of these capabilities."

FOR CLIENTS

Bruce has extensive experience handling complex products liability, antitrust, securities fraud, and consumer fraud class actions across the country, at the trial and appellate levels. He also represents businesses, large and small, and individual clients in commercial litigation and appeals, and represents individual applicants to the New Jersey Bar before the Supreme Court of New Jersey Committee on Character.

As lead and co-lead counsel in numerous class action cases, Bruce has helped his clients win significant victories. These include *Varacallo v. Massachusetts Mutual Life Ins. Co.,* 226 F.R.D. 207 (D.N.J. 2005), an insurance sales practices case that resulted in a nationwide class settlement worth over $750 million, *In re STEC, Inc. Securities Litig.*, No. cv-09-1304 (JVS) (C.D. Cal.)., which produced a settlement of $35.75 million for a nationwide class, *Cole v. NIBCO, Inc.*, No. 13-CV-7871-FLW-TJB (D.N.J.), a case involving defective plumbing piping, tubing and fixtures, where a $43.5 million nationwide class settlement was achieved, *Schwartz v. Avis Rent A Car System, LLC,*No. 2:11-CV-4052-JLL-JAD (D.N.J.), a nationwide consumer fraud and breach of contract class settlement worth up to $13 million, *Desio v. Insinkerator,* No. 2:15-CV-00346-SMJ (E.D. Wash.), a products case that settled for $3.8 million for a nationwide class, *In re Samsung DLP Television Class Action Litig.*, No. 07-2141(GEB) (D.N.J.), a case involving defective televisions that produced in a highly valuable nationwide settlement, and *DeMarco v. AvalonBay Communities, Inc.*, No. 15-CV-628-JLL-JAD (D.N.J.), a consolidation of three cases that alleged that the defendant's negligence caused a massive fire that destroyed an entire building at the residential complex known as Avalon at Edgewater, located in Edgewater, New Jersey. In that case, Bruce achieved a settlement that enabled all tenants whose homes were destroyed to claim and recover 100% of their losses from the tragic fire.

In *Pedersen v. Ford Motor Co.*, No. GIC 821797(Cal. Super. Ct.), Bruce negotiated a four-state consumer fraud settlement that afforded full benefit of the bargain relief. This favorable settlement was the direct result of his efforts as co-lead counsel in constituent New Jersey and Pennsylvania cases. Bruce was also instrumental in *In re Motorola Securities Litig.*, Civ. No. 03-C-287 (N.D. Ill.), where Lite DePalma Greenberg Afanador, as co-lead counsel, achieved a $193 million settlement for a nationwide class just three business days before trial was to begin.

Bruce has also served as an executive committee member or as liaison counsel in many class action cases. For example, he acted as liaison counsel for the commercial cases in *In re Insurance Brokerage Antitrust Litig.*, MDL No. 1663, No. 04-5184-FSH (D.N.J.), which resulted in settlements totaling over $200 million for a nationwide class. Bruce was liaison counsel in *In re N.J. Tax Sales Certificates Antitrust Litig.*,No. 3:12-CV-1893-MAS-TJB (D.N.J.), which achieved settlements, upheld by the Third Circuit Court of Appeals, worth over $10 million for a class of New Jersey property owners.

Bruce has had frequent successes as an executive committee member in class action cases. Such cases include *Henderson v. Volvo Cars of North America, LLC,* No. 2:09-CV-4146-CCC-JAD (D.N.J.), a case involving catastrophic transmission failures that conferred millions of dollars in settlement benefits on 90,000 class members, *In re Shop-Vac Marketing and Sales Practices Litig.*, No. 4:12-MD-2380 (M.D. Pa.), a case that involved misrepresentation of the peak horsepower of wet/dry vacuums, where he helped achieve a nationwide settlement worth over $100 million, and *In re Volkswagen Timing Chain Product Liability Litig.*, No. 16-CV-2765-JLL-JAD (D.N.J.), which resulted in a settlement for a nationwide class whose value exceeds $40 million.

Bruce was appointed liaison counsel and a member of the Direct Purchaser Plaintiffs' steering committee in *In re Liquid Aluminum Sulfate Antitrust Litigation,* No. 16-md-2687(JLL)(JAD) (D.N.J.), a multidistrict litigation that alleges price-fixing, bid-rigging, and market allocation by sellers of aluminum sulfate. That case is ongoing, and has so far produced over $65 million in settlements for the Direct Purchaser class.

LITE DEPALMA GREENBERG & AFANADOR

Bruce has also been very successful in New Jersey state court class actions. Some of his cases there include *Summer v. Toshiba America Consumer Products, Inc.*(Superior Ct., Bergen County) (settlement worth over $100 million for nationwide class); *Delaney v. Enterprise Rent-A-Car Co.* (Superior Ct., Ocean County) (settlement for New Jersey class worth over $7 million); *Barrood v. IBM* (Superior Ct., Mercer County) (full benefit of the bargain settlement for nationwide class); and *DeLima v. Exxon Corp.* (Superior Ct., Hudson County) ($4.5 million settlement for New Jersey class).

FOR THE PROFESSION

Bruce writes frequently on a range of legal topics, with a focus on appellate issues. He is the creator and author, since 2010, of New Jersey's foremost appellate blog, New Jersey Appellate Law (http://appellatelaw-nj.com), which focuses on New Jersey appeals, appellate law and appellate practice, with special attention to decisions of the Supreme Court of New Jersey, the Appellate Division, and the Third Circuit Court of Appeals.

Bruce is the author of the chapter entitled "Supreme Court Review" in *New Jersey Appellate Practice Handbook* (New Jersey ICLE 10th ed. 2015, and prior editions dating back to the 5th edition), and co-author, with Allyn Z. Lite and, currently, Susana Cruz Hodge, of the chapter entitled "Class Action Litigation" in *New Jersey Federal Civil Procedure* (NJLJ Books 2019, and prior editions dating back to 1999). He has written a number of law review articles, on topics including procedural fairness, class actions, and the right to a civil jury trial. Several of Bruce's articles have been cited with approval by the Supreme Court of New Jersey, the Appellate Division, and courts in other jurisdictions.

Bruce is as comfortable at the podium as he is before the keyboard. He has lectured on class actions and appellate practice for New Jersey and Pennsylvania Continuing Legal Education, Strafford Publications, the American Conference Institute, the New Jersey State Bar Association, and the New Jersey Association for Justice. In 2016, Bruce delivered the 27th Annual Alice and Stephen Evangelides Memorial Lecture at Rutgers University's Eagleton Institute of Politics, on the subject of "Class Action Litigation: Who Benefits?" He has also been a presenter at the American Bar Association's Class Actions Institute.

Bruce has served as an expert witness on attorneys' fees in class actions and on the effect of class action waivers on the ability of clients to attract counsel. He testified as an expert witness at a Chancery Division trial in a commercial lawsuit, on the subject of the reasonableness of attorneys' fees, a case that ended favorably to Bruce's side. He also has spoken on civil trial preparation, mass torts, and other subjects.

Bruce is listed in *Best Lawyers in America* for his work in appellate practice. He has been named to the "New Jersey Super Lawyers" list in appellate practice by *New Jersey Monthly* magazine every year since 2005, and he earned a "Top 100" ranking among all "New Jersey Super Lawyers" in 2014. Bruce was also listed in ALM's 2012 "New Jersey's Top Rated Lawyers" list, in the category of Commercial Litigation, and holds an "AV" rating from Martindale-Hubbell. Additionally, Bruce has been elected as a Fellow of the American Academy of Appellate Lawyers, one of only four New Jersey attorneys so honored, and one of only 350 nationwide.

Bruce is active in numerous legal and professional associations and has held a range of leadership positions in these organizations. From 2008 through 2016, he served as co-chair of the New Jersey State Bar Association's (NJSBA) Class Actions Committee. He was chair of the NJSBA's Appellate Practice Committee from 2004 through 2006. He is also a member of the NJSBA's Land Use Law Section.

The Supreme Court of New Jersey appointed Bruce to serve on its Committee on Character in 1991 and reappointed him to that position for additional terms through 2006, when Bruce reached the term limit for service on that Committee. He was one of the founding members of the New Jersey Law Firm Group, a consortium of law firms committed to advancing the hiring of minority lawyers, for which he served as chair from 1990 to 1994. Bruce has also been a mediator for the Essex County Chancery Division Mediation Program and an arbitrator/mediator for the county's Arbitration/Settlement Program.

Prior to joining Lite DePalma Greenberg & Afanador, Bruce was a partner at one of New Jersey's largest law firms. After graduating from the Columbia University School of Law, he clerked for Justice Daniel J. O'Hern of the Supreme Court of New Jersey from 1982 to 1983. While in law school, Bruce was a Harlan Fiske Stone Scholar and served as Writing and Research Editor of the *Columbia Journal of Law & Social Problems*.

FOR THE COMMUNITY

In conjunction with the Southern Poverty Law Center, Bruce served as co-counsel for the plaintiffs in *Ferguson v. JONAH*, a consumer fraud case against an organization that purported to offer gay conversion therapy, a scientifically discredited practice. After a month-long jury trial, the defendants were required to pay damages, and they later agreed to shut down their operations. Bruce has also represented the National Federation of the Blind in cases in New Jersey, including, most recently, against a community college that had not complied with federal laws that require accommodation of the blind.

Notable Decisions

In re New Jersey Tax Sales Certificates Antitrust Litigation, 750 Fed. Appx. 73 (3d Cir. 2018) (affirming approval of class action settlement of antitrust matter worth over $10 million)

Bohus v. Restaurant.com, Inc., 784 F.3d 918 (3d Cir. 2015) (reversing District Court decision that Shelton v. Restaurant.com, Inc., 214 N.J. 419 (2013), was to be applied only prospectively)

In re Accutane Litigation, 235 N.J. 229 (2018) (finding that mass tort plaintiffs had not adduced sufficient proofs to overcome presumption of labeling adequacy contained in New Jersey Product Liability Act).

In re Accutane Litigation, 234 N.J. 340 (2018) (excluding plaintiffs' experts in mass tort action and adopting factors of Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), but not Daubert itself, for the first time in New Jersey)

Spade v. Select Comfort Corp., 232 N.J. 504 (2018) (answering certified questions regarding meaning of "aggrieved consumer" in, and whether regulations alone may provide a cause of action under, the Truth in Consumer Contract, Warranty and Notice Act)

LITE DEPALMA GREENBERG & AFANADOR

Ferguson v. JONAH, 445 N.J. Super. 129 (Law Div. 2014) (cost of reparative therapy necessitated by damage caused by defendants' "gay conversion therapy" was compensable under New Jersey Consumer Fraud Act)

Shelton v. Restaurant.com, Inc., 214 N.J. 419 (2013) (answering certified questions regarding the Truth in Consumer Contract, Warranty and Notice Act)

Cornett v. Johnson & Johnson, 211 N.J. 362 (2012) (certain state law claims not pre-empted by Medical Device Amendments to federal Food, Drug and Cosmetic Act)

May L. Walker v. Carmelo Guiffre, NJ Supreme Ct. (January 25, 2012), rejecting importation of restrictive federal fee-shifting standards into New Jersey law

Kieffer v. High Point Ins. Co., 422 N.J. Super. 38 (App. Div. 2011) (affirming dismissal of complaints seeking payment of "diminution in value" by auto insurers where insurance policies expressly excluded such payments)

Cornett v. Johnson & Johnson, 414 N.J. Super. 365 (App. Div. 2010) (manufacturing defect, failure to warn, and certain warranty claims not pre-empted by Medical Device Amendments to federal Food, Drug and Cosmetic Act)

Kaufman v. Allstate New Jersey Ins. Co., 561 F.3d 144 (3d Cir. 2009) (first opinion in the United States interpreting key provisions of the Class Action Fairness Act of 2005)

Bosland v. Warnock Dodge Inc., 197 N.J.543 (2009) (Consumer Fraud Act does not require victimized consumer to give pre-suit notice to seller).

Mason v. City of Hoboken, 196 N.J. 51 (2008) (catalyst doctrine for attorneys' fees reaffirmed in Open Public Records Act case).

New Jersey v. Sprint Corp., 531 F. Supp. 2d 1273 (D. Kan 2008) (sustaining complaint for securities fraud under new Tellabs standard).

In re Motorola Securities Litigation, 2007 WL 487738 (N.D. Ill. March 29, 2007) (denying in substantial part defendants' motions for summary judgment in certified nationwide securities fraud class action; case settled on eve of trial for $190 million).

Zeno v. Ford Motor Co., Inc., 480 F. Supp. 2d 825 (W.D. Pa. 2007) (denying defendant's motion for summary judgment in certified class action for breach of contract; case later settled for full benefit of the bargain recovery).

Muise v. GPU, Inc., 391 N.J. Super. 90 (App. Div. 2007) (reversing Law Division's refusal to obey appellate mandate to certify class).

*NCP Litigation Trust v. KPMG,*399 N.J. Super. 600 (Law Div. 2006) ("deepening insolvency" theory stated claim against accounting firm)

Dabush v. Mercedes-Benz USA, 378 N.J. Super. 105 (App. Div. 2005) (consumer fraud plaintiff did not show ascertainable loss)

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Varacallo v. Massachusetts Mutual Life Ins. Co., 226 F.R.D. 207 (D.N.J. 2005) (approving nationwide class action settlement of insurance sales practices case worth over $768 million to class members, and noting that this was third largest insurance sales practices settlement ever).

Muise v. GPU, Inc., 371 N.J. Super. 13 (App. Div. 2004) (re-certifying large portion of class that was erroneously decertified by lower court)

McGrogan v. Till, 167 N.J. 414 (2001) (addressing statute of limitations for legal malpractice)

Lamorte Burns & Co. v. Walters, 167 N.J. 285 (2001) (the leading New Jersey case regarding employees' duty of loyalty and related doctrines)

Varacallo v. Mass. Mut. Life Ins. Co., 332 N.J. Super. 31 (App. Div. 2000) (reversing denial of certification of New Jersey class, resulting in the first certified class against MassMutual, which ultimately led to nationwide federal class action settlement worth over $750 million)

Rivkin v. Dover Tp. Rent Leveling Bd., 143 N.J. 352 (1996) (federal Civil Rights Act claim not available where adequate post-deprivation remedy exists)

Sica v. Wall Tp. Bd. of Adjustment, 127 N.J. 152 (1992) (enhanced burden of proof for use variances does not apply to inherently beneficial uses)

North Bergen Action Group v. North Bergen Tp. Planning Bd., 122 N.J. 567 (1991) (height variances are bulk variances, not use variances, under New Jersey's Municipal Land Use Law)

Recent Publications

Co-author, "Civil Trial Preparation" (New Jersey ICLE, 2000, 2001, 2004, 2007, 2009, 2014, 2017 eds.)

Sunday Dialogue, "Putting the Justices on TV," The New York Times, December 10, 2011 (Letter to the Editor)

"Keeping the Flies Out of the Ointment: Restricting Objectors to Class Action Settlements," 84 St. John's L. Rev. 949 (2010) (cited in In re Kentucky Grilled Chicken Coupon Marketing & Sales Practices Litig., 2011 WL 5599129 (N.D. Ill. Nov. 16, 2011))

"New Jersey Supreme Court Review"- Chapter 4 in New Jersey Appellate Practice Handbook (New Jersey ICLE, 5th ed. 1999, 6th Ed. 2002, 7th Ed. 2005, 8th Ed. 2008, 9th Ed. 2011, 10th Ed. 2015)

"Don't Eviscerate Consumer Fraud Act," 204 N.J.L.J. 658 (June 6, 2011)

"In Consumer Class Actions, New Jersey Still Stands Tall," 203 N.J.L.J. 382 (February 7, 2011)

"Class Action Litigation"- Chapter 9 in New Jersey Federal Practice and Procedure (New Jersey Law Journal Books, 1st Ed.1999, 2nd Ed. 2008, and annual supplements)

"New Jersey's 'Fairness and Rightness' Doctrine," 15 Rutgers L.J. 927 (1984) (cited in People in Interest of Z.B., 757 N.W.2d 595 (S.D. 2008); *State v. P.Z.*, 152 N.J. 86 (1997); *State v. Yoskowitz*, 116 N.J. 679 (1989); and *State v. Consolidated Apartments, Inc.*, 2007 WL 2188692 (App. Div. July 31, 2007))

"Justice Daniel J. O'Hern: A Law Clerk's Tribute," 30 Seton Hall L. Rev. 1062 (2000)

LITE DEPALMA GREENBERG & AFANADOR

"The Right to a Civil Jury Trial in New Jersey," 47 Rutgers L. Rev. 1461 (1995) (cited in *Brennan v. Orban*, 145 N.J. 282 (1996); *Lyn-Anna Properties v. Harborview Development*, 145 N.J. 313 (1996); and *State v. One 1990 Honda Accord*, 154 N.J. 373 (1998))

"25 Years of the New Jersey Antitrust Act," 26 Seton Hall L. Rev. 637 (1996)

News & Events

Bruce D. Greenberg was recognized in The Best Lawyers in America © for 2024 for his work in the Appellate Practice.

Bruce D. Greenberg has been named to the Super Lawyers®list for 2023 for his work in Appellate Practice. He has been recognized on the Super Lawyers®list since 2005.

Bruce D. Greenberg was recognized in The Best Lawyers in America © for 2023 for his work in the Appellate Practice.

Bruce D. Greenberg was quoted in the New Jersey Law Journal about the practice of designating most Appellate Division decisions as "unpublished" and "not precedential," rather than "published" and "precedential." To read this article, click here.

Bruce D. Greenberg co-authored, with Hon. Gary K. Wolinetz of the Middlesex County Superior Court, an article in the October 2022 issue of New Jersey Lawyer magazine titled "New Jersey's Constitutional Right to a Civil Jury Trial: 'Inviolate' But Not 'Absolute."

Bruce D. Greenberg spoke on a panel titled "Effective Oral Argument in the Trial and Appellate Courts" at the New Jersey State Bar Association's Annual Meeting and Convention. Other panelists included Justice Barry Albin of the Supreme Court of New Jersey and Judges Patty Shwartz of the Third Circuit Court of Appeals, Clarkson Fisher, Jr. of New Jersey's Appellate Division, and Karen Williams of the United States District Court for the District of New Jersey.

Bruce D. Greenberg was a panelist at a seminar titled "Introduction to Class Actions in State and Federal Courts." The seminar was sponsored by the Bergen County Bar Association.

Bruce D. Greenberg was quoted in the New Jersey Law Journal regarding the Supreme Court of New Jersey's decision to proceed with only six members following the retirement of Justice Fernandez-Vina.

Bruce D. Greenbergwas a panelist on a New Jersey ICLE program titled "Appellate Advocacy Perfected." Other panelists included Appellate Division judges Clarkson Fisher and Patrick DeAlmeida.

LDGA attorneys named to *The Best Lawyers in America* © for 2022.

Bruce D. Greenberg was recognized in *The Best Lawyers in America* © New Jersey for his work in the Appellate Practice.

Mindee Reubenwas recognized in *The Best Lawyers in America* © Pennsylvania for her work in Antitrust Law and Litgation.

LITE DEPALMA GREENBERG & AFANADOR

Bruce D. Greenberg was interviewed on "The Bold Sidebar" podcast, which covers "all things New Jersey Supreme Court," according to the podcast's host, Jeff Horn. The interview covers a group of Supreme Court cases, some already decided and others still pending before the Court. The listen to the interview, click here

Four LDGA Attorneys Named to 2021 "Super Lawyers" List:

Joseph J. DePalma, **Bruce D. Greenberg**, **Victor A. Afanador** and **Susana Cruz Hodge** were all named to the 2021 list of "New Jersey Super Lawyers." Mr. Greenberg has been included on that list every year since 2005, when the listing was first introduced and Mr. DePalma has appeared every year since 2007. Mr. Afanador has been named to the "New Jersey Super Lawyers" list for five consecutive years and Ms. Hodge has been named to the "New Jersey Super Lawyers" list for the second consecutive year. Ms. Hodge was named to the "Rising Stars" list for six consecutive years. **Mr. Greenberg** has also been named "Top 100" list for the third time, including the last two years in a row.

Bruce D. Greenberg was elected to be a member of the American Academy of Appellate Lawyers. Academy membership is limited to 500 members in the United States who have a reputation of recognized distinction as appellate lawyers. There are only three other Academy members from New Jersey, only one of whom is also from a private law firm.

Bruce D. Greenberg has been selected by his peers for inclusion in *The Best Lawyers in America* © 2021 for his work in Appellate Law.

Bruce D. Greenberg was named to New Jersey Super Lawyers Top 100 list. To read more on this listing, click here.

Bruce D. Greenberg was a presenter on a New Jersey ICLE webinar titled "Do's and Don'ts of Appellate Practice." The other presenters were Appellate Division Judges Ellen Koblitz and Thomas Sumners, Jr., and Marie Hanley, Chief Counsel to the Appellate Division.

Bruce D. Greenberg was quoted in a Law360 article about the effect of a recent Appellate Division decision that allowed trial testimony to be offered by live remote video, rather than in person, in certain circumstances.

Bruce D. Greenberg was quoted in The New York Times regarding class actions against rental car companies for allegedly improper charges that arise out of "cashless tolling."

Bruce D. Greenberg has been selected by his peers for inclusion in *The Best Lawyers in America* © 2020 for his work in Appellate Law.

Bruce D. Greenberg was named to the 2019 list of "New Jersey Super Lawyers." Mr. Greenberg has been included on that list every year since 2005, when the listing was first introduced.Â¹

Bruce D. Greenberg was a speaker at New Jersey ICLE's, "Current Developments on the Admissibility of Expert Testimony in New Jersey."

LITE DEPALMA GREENBERG & AFANADOR

Bruce D. Greenberg was quoted in a New Jersey Law Journal articleregarding the case of *Skuse v. Pfizer.* There, the Appellate Division ruled that, in the circumstances of that case, an employer's arbitration clause was ineffective when it was sent to the employee by e-mail.

Bruce D. Greenberg was a speaker at New Jersey Association for Justice's, "New Jersey Law on Expert Evidence: What You Need to Know After the Accutane Decision."

Bruce D. Greenberg was selected by his peers for inclusion in *The Best Lawyers in America* © 2019 in the field of Appellate Law.

Bruce D. Greenberg was a moderator and **Susana Cruz Hodge** was a panelist at the New Jersey Institute for Continuing Legal Education's seminar titled "Significant Developments in Class Actions" on April 11, 2018.

Bruce D. Greenberg was a Co-Moderator at New Jersey ICLE's, "Significant Developments in Class Actions."

On February 6, 2018, the United States District Court for the Eastern District of Washington granted final approval of a nationwide class action settlement worth $3.8 million In *Desio v. Insinkerator*, No. 2:15-cv-00346- SMU. **Bruce D. Greenber**g of LDG was co-lead counsel for the Class. The case involved allegedly defective water filters used in Insinkerator F-201 hot water dispensing systems.

Bruce D. Greenberg was a speaker at New Jersey ICLE's, "A Lawyer's Guide to New Jersey Civil Trial Preparation."

Bruce D. Greenbergwas quoted in an article in the New Jersey Law Journal regarding the effect of two recent Supreme Court of New Jersey decisions regarding the Truth in Consumer Contract, Warranty, and Notice Act ("TCCWNA"). To read this article, click here.

Bruce D. Greenberg was a speaker at HB Litigation Conferences, "Reversed and Remanded: The Impact of Recent Appellate Court Rulings on Mass Torts."

Bruce D. Greenberg was quoted in an article in Law360 regarding the Third Circuit's increasing unwillingness to apply the standing doctrine of *Spokeo, Inc. v. Robins* to bar plaintiffs from proceeding. To read this article, click here.

Today, the United States District Court for the District of New Jersey granted the motion of the plaintiffs and the class of former Russell Building tenants whom they represent and preliminary approved a proposed classwide settlement. By order of the Court, a Court-approved notice of the settlement, with details about its terms and former Russell tenants' options regarding the settlement, will go out by mail or e-mail to all former Russell Building tenants for whom AvalonBay has addresses within 20 days. The Court will conduct a hearing on July 11, 2017 at 10:30 A.M. to decide whether to grant final approval to the settlement and allow it to go into effect. click here.

Bruce D. Greenberg was a Moderator at New Jersey ICLE's, "Prevailing Trends in Class Action Litigation."

LITE DEPALMA GREENBERG & AFANADOR

Bruce D. Greenberg was appointed as a member of the Executive Committee in *In re Volkswagen Timing Chain Product Liability Litigation*, No. 16-2765(JLL)(JAD)(D.N.J.). The case involves allegations that Volkswagen and Audi vehicles have defective timing chains that can cause their engines to fail suddenly and unexpectedly, resulting in thousands of dollars in damages.

Bruce D. Greenberg and **Susana Cruz Hodge** were quoted in a Law360 article about their participation on a panel titled "The Evolving Nature of Class Actions" at the New Jersey State Bar Association's Annual Meeting. To read this article, click here.

Bruce D. Greenberg was a speaker at NJSBA's, "The Evolving Nature of Class Actions."

Bruce D. Greenberg was a moderator at NJSBA's, " Ferguson v. JONAH: Inside the Gay Conversion Therapy Case."

Bruce D. Greenbergwas a speaker at New Jersey Association for Justice's, "The Rules for Winning Appeals."

Bruce D. Greenberg was a speaker at the 27th Annual Alice and Stephen Evangelides Memorial Lecture, "Class Action Litigation: Who Benefits?"

Bruce D. Greenberg was quoted in an article on Law360, "NJ Cases To Watch In The 2nd Half of 2015". To read this article, click here.

Bruce D. Greenberg was quoted in a Law360.com article titled "The Biggest NJ Court Decisions of 2015: Midyear Report." To read this article, click here.

Bruce D. Greenberg was mentioned in an article in Law360 as a member of the successful trial team in Ferguson v. JONAH. For a more complete description of the trial result, click here.

Bruce D. Greenberg was quoted in an article on Law360.comabout the Appellate Division's recent decision in Daniels v. Hollister, which rejected the Third Circuit's view that, in order to certify a class of consumers, each class member must be individually ascertainable at the time of class certification.

Bruce D. Greenberg was a speaker at NJSBA's, "Latest Developments in Class Action Litigation."

Joseph J. DePalmaand **Bruce D. Greenberg** were included in the list of 2015 "New Jersey Super Lawyers." Mr. Greenberg has been included in the "New Jersey Super Lawyers" list every year since 2005, when the listing was first introduced, and Mr. DePalma has appeared every year since 2007. **Susana Cruz Hodge** and **Jeffrey A. Shooman** were listed among the 2015 "New Jersey Rising Stars."Â¹

Bruce D. Greenberg was quoted in an article in the Star-Ledger regarding the class action complaint that Lite DePalma Greenberg Afanador filed on behalf of persons affected by the fire at the Avalon at Edgewater residential complex in Edgewater, New Jersey, which destroyed class members' homes and property. Click here to view this article. Click here to read the Complaint.

Bruce D. Greenberg was quoted in an article on Law360.com, "New Jersey Cases To Watch in 2015" (January 2, 2015). Click here to view the article.

LITE DEPALMA GREENBERG & AFANADOR

Bruce D. Greenberg was quoted in an article in the Philadelphia Inquirer, "N.J. high court might choose to resolve affordable-housing dispute" (December 28, 2014). Click here to view the article.

Bruce D. Greenberg was quoted in an article on Law360.com, "NJ High Court Takes On Arbitration, Atty Conduct In 2014" (December 22, 2014). Click here to view this article.

Bruce D. Greenberg was a presenter at the American Bar Association's 18th Annual National Institute on Class Actions, "Who Needs The Second City?: Class Certification from A(ykroyd) to Lovit(Z): A Three-Act Play."

Bruce D. Greenberg was a speaker at Morris County Bar Association's, "New Jersey Appellate Practice: Tips From the Bench and Bar." Other panelists included Supreme Court Justice Anne Patterson, Appellate Division Judge Jack Sabatino, and retired Appellate Division Judges Edwin Stern and Francine Axelrad.

Bruce D. Greenberg was a speaker at NJSBA's "Hot Topics in Class Actions."

Bruce D. Greenberg spoke at the "Mass Tort Litigation Conference with Judge Marina Corodemus (Ret.)," HarrisMartin, April 4, 2014.

Bruce D. Greenbergspoke on "Appellate Practice: Lessons Learned From on High," New Jersey ICLE, March 25, 2014.

Bruce D. Greenberg was a panelist at a Morris County Bar Association seminar entitled "Building a Trial Record and Arguing it on Appeal," on September 16, 2013. Other panelists included Supreme Court Justice Anne Patterson, Appellate Division Judge Jack Sabatino, and retired Appellate Division Judges Edwin Stern and Francine Axelrad.

Victor A. Afanador, **Bruce D. Greenberg**, **Susana Cruz Hodge** and **Danielle Y. Alvarez** were mentioned in an article on Law360.com, "Newark Doesn't Have To Cover Cop For Shooting: NJ Court" (July 29, 2013), covering a New Jersey appeals court's decision that the city of Newark was not required to indemnify a police officer for a $2.8 million civil judgment stemming from an off-duty shooting.

Bruce D. Greenberg spoke on "Class Actions Today â¦ and Tomorrow," New Jersey State Bar Association, May 19, 2011

Bruce D. Greenberg served as a moderator for "Consumer Class Actions & Beyond: Threatened or Alive and Well?" New Jersey ICLE, April 27, 2011

Bruce D. Greenberg spoke on "Significant Developments in Class Actions," New Jersey ICLE, June 24, 2009 (webinar).

Bruce D. Greenberg was reappointed as co-Chair of the New Jersey State Bar Association's Class Actions Committee. He has served as co-Chair since 2008. Mr. Greenberg succeeded Allyn Z. Lite, who served as co-Chair for four years.

Bruce D. Greenberg spoke on "Hot Topics in Class Action Litigation," New Jersey State Bar Association, May 17, 2007.

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Bruce D. Greenberg spoke at the "Appellate Bench-Bar Conference," New Jersey State Bar Association, May 18, 2006.

Bruce D. Greenberg spoke on "The Future of Class Actions in New Jersey- Alive and Well?!," New Jersey ICLE, May 19 and June 17, 2005

Bruce D. Greenbergserved as a moderator for "Appellate Practice in New Jersey: 2005," New Jersey ICLE, March 8 and March 30, 2005.

Bruce D. Greenberg completed a two-year term as Chair of the New Jersey State Bar Association's Appellate Practice Committee. He has served on that committee for more than ten years.

Bruce D. Greenbergwas quoted in the New Jersey Law Journal in connection with his victory in the Appellate Division in a case in which he represented an attorney in a dispute with his former law partner.

Bruce D. Greenbergwas quoted in the New Jersey Law Journal regarding his victory in the Supreme Court of New Jersey case of Walker v. Giuffre.

Bruce D. Greenberg and **Katrina Carroll** were mentioned in the New Jersey Law Journal in connection with their success in defeating a motion by Wells Fargo Bank to dismiss a class action case that LDG brought against the bank and its predecessor.

Bruce D. Greenberg was quoted in the New Jersey Law Journal about the decision of the Supreme Court of New Jersey to answer certified questions posed by the Third Circuit Court of Appeals in *Shelton v. Restaurant.com* in which he was brought in on appeal as co-counsel and won the appeal before the Supreme Court.

Bruce D. Greenberg was quoted in the Newark Star-Ledger article about Bosland v. Warnock Dodge, Inc., a New Jersey Supreme Court decision that rejected an attempt to reduce protections for consumers under the New Jersey Consumer Fraud Act. Mr. Greenberg had submitted a friend of the court brief in the case on behalf of Consumers League of New Jersey, whose reasoning was adopted by the Supreme Court in its unanimous opinion.

Bruce D. Greenberg was quoted in the *New Jersey Law Journal* regarding *Chin v. DaimlerChrysler Corp.*, in which plaintiffs' attorneys' efforts had been the catalyst for relief worth over $54 million to purchasers and lessees of Chrysler vehicles.

Bruce D. Greenberg was quoted in the *New Jersey Law Journal* about the mechanics of the Judicial Panel on Multidistrict Litigation. The article focused on the Pet Food Products Liability Litigation, in which Lite DePalma Greenberg Afanador filed more cases than any other firm in the nation.

Bruce D. Greenberg was quoted in an article in the National Law Journal about the use of confidential witnesses in class action securities cases. A similar version of that article appeared in the New Jersey Law Journal as well.

Bruce D. Greenbergwas quoted in the *New Jersey Lawyer* newspaper on the subject of the impact of the Class Action Fairness Act on New Jersey class action cases.

LITE DEPALMA GREENBERG & AFANADOR

Bruce D. Greenberg presented a seminar for the Insurance Society of Philadelphia entitled "Class Actions in New Jersey Courts." The seminar was approved for continuing legal education credit in Pennsylvania.

Bruce D. Greenberg was a panelist at the New Jersey State Bar Association's Appellate Bench-Bar Conference in Atlantic City. Other panelists were Supreme Court of New Jersey Associate Justice Roberto Rivera-Soto, Appellate Division Presiding Judge Mary Catherine Cuff, and Appellate Division Judges Michael Winkelstein and Anthony J. Parrillo.

Allyn Z. Lite was the moderator and **Bruce D. Greenberg** was a panelist on the subject of "Hot Topics in Class Action Litigation" at the New Jersey State Bar Association annual convention. Other panelists included Superior Court Judges Jonathan N. Harris and Marina Corodemus, J.S.C. (retired).

Bruce D. Greenberg was a featured speaker at the New Jersey Association of Justice's Meadowlands Seminar. His topic was "Consumer Class Action Caselaw Updates."

Â¹The Super Lawyers List is issued by Thompson Reuters. A description of the selection methodology can be found at www.superlawyers.com/about/selection_process_detail.html. No aspect of this advertisement has been approved by the Supreme Court of New Jersey.

*No aspect of this advertisement has been approved by the Supreme Court of New Jersey. See Award Methodology.

Blogs

August 29, 2019

GETTING YOUR VIEWS, OR YOUR COMPANY'S VIEWS, HEARD IN SOMEONE ELSE'S APPEAL

Most people want to avoid litigation. But sometimes we wish we could play a role in an appeal that does not involve us directly, a case we don't have to be a part of. One reason for that is when someone else's appeal involves an issue whose decision would affect us as well. When you learn of such a case, you need not sit helplessly by, hoping that "your side" will win. You can take an active role by seeking to become an amicus curiae, or "friend of the court."

April 25, 2019

LAW SCHOOL APPLICATIONS AND THE COMMITTEE ON CHARACTER

Candidates for admission to the New Jersey Bar find that their lives are an open book to the Supreme Court of New Jersey Committee on Character. They can tell that from the Character and Fitness Questionnaire ("CFQ") that all candidates must complete. The CFQ asks for detailed information about everything from addresses to education to employment to driving history, and much, much more.

February 28, 2019

DEALING WITH YOUR TROUBLESOME PAST BEFORE THE COMMITTEE ON CHARACTER

For some New Jersey Bar candidates, the Supreme Court of New Jersey Committee on Character is a formidable hurdle. Candidates with a criminal record, a history of alcohol or drug addiction or financial irresponsibility, incidents of dishonest conduct in school, at work, or as an attorney in another jurisdiction, or any of a number of other things likely will not have smooth sailing before the Committee on Character.

LITE DEPALMA GREENBERG & AFANADOR

March 29, 2018

CAN GOVERNMENT AGENCIES OBJECT TO CLASS ACTION SETTLEMENTS?

The so-called Class Action Fairness Act of 2005 ("so-called" since it is heavily weighted in favor of class action defendants, though that's a subject for another post), known as CAFA, requires that when a settlement of a class action is proposed, defendants must give notice of that settlement to "appropriate state and federal officials." 28 U.S.C. sec.1715. In general, the "appropriate" officials are those who have "regulatory or supervisory responsibility with respect to the defendant."

March 8, 2018

DON'T SAY "FK YOURSELF" TO AN ETHICS OFFICIAL**

Non-lawyers don't always believe that there are Rules of Professional Conduct by which attorneys must abide. One of those Rules is RPC 3.2, which states that "[a] lawyer â¦ shall treat with courtesy and consideration all persons involved in the legal process." Recently, in a case where the facts are truly unbelievable, though undisputed, the Supreme Court of New Jersey reprimanded an attorney who had egregiously violated that rule in dealing with the Office of Attorney Ethics ("OAE").

January 25, 2018

Some Notes About Footnotes In Appellate Briefs

Footnotes are a subject about which there are differing and, in some instances, surprisingly strong views. A militant anti-footnote jurist was Justice Robert Clifford of the Supreme Court of New Jersey, who sought to abolish footnotes from the Court's opinions. He once wrote (quoting John Barrymore) that having to read footnotes was "like having to run downstairs to answer the doorbell during the first night of the honeymoon." In re Opinion 662 of the Advisory Committee on Professional Ethics, 133 N.J. 22, 32 (1993) (Clifford, J., concurring).

December 7, 2017

How Can I Get My Case, Or My Company's Case, To The New Jersey Supreme Court?

Every client, and every attorney, thinks that his or her case is the most important case in the judicial system. (We are right, of course). If the result at the trial level or the Appellate Division is not what we wanted, we then think about going to the New Jersey Supreme Court. It is not easy to get there. But here are some tips about how to do it.

November 22, 2017

Misstatements on Law School Applications: A Pitfall in the Committee on Character Process

It is always a good idea to be candid in completing an application to law school. Applicants are seeking admission to a school that will lead to a career in a profession where candor is one of the highest values. And if the law school discovers a misrepresentation, that could result in denial or revocation of admission, or some sort of discipline if the applicant is already enrolled at the law school.

November 2, 2017

"Does Anybody Really Care About Time?" As Lawyers, We Must

When the pop group Chicago sang "Does anybody really care about time?" their response was "If so, I can't imagine why." As lawyers, we must care about time. There are deadlines for everything. And while some

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deadlines can be adjusted, either on consent of an opposing party or with the approval of a court, others cannot be changed, or can be altered only on certain conditions. We must know which deadlines fall into which categories.

July 6, 2017

More Appellate Courts Reject the Third Circuit's "Ascertainability" Doctrine

In 2015, my colleague Kyle A. Shamberg wrote this post about the Third Circuit Court of Appeals's doctrine of "ascertainability." That doctrine prevents the certification of a class unless all members of that class can be precisely identified. In consumer cases, involving purchases such as aspirin or weight-loss pills, where consumers do not register their purchases, it is often impossible to identify all the purchasers. The Third Circuit's approach mistakenly blocks class certification in such cases, meaning (as a practical matter) that no one can recover for a defendant seller's wrongdoing.

April 13, 2017

Two-Judge Panels in the Appellate Division: What's Up With That?

We all generally assume that appellate courts consist of an odd number of judges. That way, there is no risk of an evenly divided court. Thus, the Supreme Court of the United States has nine Justices. The Supreme Court of New Jersey has seven Justices. And panels of the Court of Appeals for the Third Circuit, and other Circuit Courts of Appeals, consist of three judges.

January 19, 2017

Addiction Issues and The Supreme Court Committee On Character

Issues such as alcoholism or drug addiction present potential impediments to admission to the New Jersey Bar. Those issues are frequently the subject of hearings before the Supreme Court of New Jersey Committee on Character. But candidates who can show that they have dealt with their addictions can still be admitted, as the case of In re Strait, 120 N.J. 477 (1990), shows.

December 22, 2016

Oral Arguments In Appellate Courts: Some Do's And Don'ts

In over 30 years of doing appellate work, I've learned some things do, and not to do, regarding oral arguments on appeal. Here are three of each, in no particular order:

October 13, 2016

Leapfrog: Direct Certification of Cases By The Supreme Court

Sometimes, parties who are going into the appellate process would love to skip the Appellate Division and go right to the Supreme Court. There's not "an app for that," but there are two Court Rules, Rule 2:12-1 and 2:12-2, that offer ways to leapfrog the Appellate Division and get to the Supreme Court.

August 18, 2016

A Legal Fiction: The "Unpublished" Appellate Division Opinion

When New Jersey's Appellate Division issues an opinion, it is designated as either "published" or "unpublished." Under Rule 1:36-2(a), "[o]pinions of the Appellate Division shall be published only upon the direction of the panel issuing the opinion."

June 9, 2016

What Happens When Two Appellate Panels Disagree?

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When two trial level judges disagree about the same legal issue, that is not a big problem. A decision by one trial level judge does not bind another trial judge, and a different judge is free to reach a different result. Any dispute between trial level decisions can be sorted out by an appellate court. That is the rule in both the New Jersey and federal systems

March 3, 2016

To Win on Appeal, Know the Standard of Review

Parties who lose at the trial level take comfort in knowing that they can go to a higher court for review. But not all appellate review is created equal. Both the party who appeals (the "appellant") and the party who opposes the appeal (in New Jersey state court, the "respondent," and in federal court, the "appellee") need to know what level of review is implicated by any particular appeal.

December 17, 2015

Perpetrators of Consumer Fraud Can No Longer Blame Their Victims

We often hear the phrase "caveat emptor," which means "let the buyer beware." But New Jersey courts at all levels, including the Supreme Court, have said that caveat emptor "no longer prevails in New Jersey." As far back as the 1960's, beginning with cases involving the sale of automobiles and real property, our Supreme Court began to repudiate caveat emptor. That trend continued in succeeding decades. Thus, the time is long past when a seller who commits a consumer fraud can hide behind caveat emptor.

October 8, 2015

The Final Hurdle for New Lawyers: The New Jersey Supreme Court's Committee On Character

Before being able to practice law, aspiring lawyers must go through at least nineteen years of education (twelve years through high school, four years of college, and three years of law school). Then they must pass one or more bar examinations. But no one can become an attorney unless the Committee on Character in their state clears them to practice.

September 17, 2015

Simple Language and Clear Principles: The Maxims of Equity

Complex litigation is often fraught with legalese. Frequently, complex litigation seems more concerned with technicalities than what is fair and reasonable. But there is a refreshing body of law that expresses itself in plain English and focuses on what is right and just. That body of law is known as the "maxims of equity."

April 30, 2015

Getting The Other Side to Pay Your Attorneys' Fees

It's all well and good to win your case, but most of the time you still have to pay your attorneys. Our courts follow what is known as the "American Rule." Under that rule, a party, even one who wins the case, generally cannot shift its attorneys' fees to the other side. The reason for this is the policy decision that adopting a "loser pays" regime would deter all but the wealthy from having access to the courts, since even a party with a valid claim might be afraid to sue given the risk, no matter how small, of having to pay the other side's attorneys' fees.

April 2, 2015

I Want to Appeal That Terrible Decision Right Away. Can I?

When a judge makes a bad decision, whether on a motion or at trial, a disappointed party's first reaction is

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"Appeal at once!" But there are special rules about how quickly an appeal can be brought, and it's important to know when an immediate appeal is or is not allowed. The rules about appealability differ between state and federal courts.

ELLEN BASKIN, KATHLEEN O'SHEA and SANDEEP TRISAL, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. P.C. RICHARD & SON, LLC (d/b/a P.C. Richard & Son) and P.C. RICHARD & SON, INC. (d/b/a P.C. Richard & Son), *Defendants*.	SUPERIOR COURT OF NEW JERSEY OCEAN COUNTY – LAW DIVISION DOCKET NO. OCN-L-000911-18 Civil Action

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

This is a class action under the Fair and Accurate Credit Transactions Act ("FACTA"). After a long and winding road through four courts in two jurisdictions, including the New Jersey Supreme Court (*Baskin v. P.C. Richard & Son, LLC*, 246 N.J. 157 (2021)), and two intensive settlement mediations with a retired United States Magistrate Judge, a class-wide settlement has been achieved.

Plaintiff, Ellen Baskin, on behalf of herself and on behalf of the proposed Settlement Class, now therefore respectfully moves the Court for an Order granting preliminary approval of the proposed class action settlement. This Motion is unopposed by Defendants.

II. FACTUAL SUMMARY

A. The P.C. Richard Defendants

The named defendants, P.C. Richard & Son, LLC and P.C. Richard & Son, Inc., collectively P.C. Richard, are a well-known consumer electronics and home appliance retailer on the east coast, with most stores concentrated in New Jersey and New York. *See* accompanying Certification of Cathy Winter, ¶¶ 3, 9 and Exhibit A attached thereto.

B. FACTA

The FACTA, which is a subset of the Fair Credit Reporting Act ("FCRA"), provides that any merchant that accepts credit and/or debit cards is prohibited from printing on electronically printed receipts "more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction." 15 U.S.C. § 1681c(g)(1). A merchant who "willfully" fails to comply with FACTA is liable for (1) actual damages, if any, or statutory damages of not less than $100 and not more than $1,000, (2) punitive damages as may be awarded by the court, and (3) attorney's fees and costs. 15 U.S.C. § 1681n.

C. The Federal Lawsuit

Plaintiff's counsel in this case was first retained by a New York resident named Kathleen O'Shea because P.C. Richard had issued her a receipt in violation of FACTA. Based on this FACTA violation, a letter was sent to P.C. Richard (together with a then not-yet-filed federal complaint) demanding that defendants cease and desist from their FACTA violations. A lawsuit was thereafter filed on November 18, 2015 in New York federal court entitled *O'Shea v. P.C. Richard & Son, LLC, et al.*, No. 2:15-cv-09069-KPF (S.D.N.Y. 2015). *See* accompanying Certification of Chant Yedalian, ¶ 4.

Although P.C. Richard had been served with the cease and desist letter, it continued to commit FACTA violations until August 18, 2016. While the federal lawsuit was ongoing, another customer and New York resident, Sandeep Trisal, received from P.C. Richard a credit/debit card receipt on May 2, 2016 which contained, among other things, Mr. Trisal's card's expiration date, the last four digits of his card number, the brand of his card, his full name, his full physical address, his telephone number, and his email address. When the federal court learned P.C. Richard was still committing FACTA violations, the court allowed leave to file an amended complaint to add Mr. Trisal as an additional named plaintiff. Yedalian Cert. ¶ 5.

Although Mr. Trisal was added as a plaintiff to join Ms. O'Shea in the federal action, P.C. Richard successfully obtained dismissal of the federal action based on the argument that a federal court does not have Article III subject matter jurisdiction over a FACTA expiration date violation case that seeks statutory damages. Yedalian Cert. ¶ 6.

However, Article III applies only to federal court jurisdiction. Article III does not apply to state courts. "[T]he constraints of Article III do not apply to state courts and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). See, *e.g.*, *In re Camden County*, 170 N.J. 439, 448 (2002) (citing and quoting *Crescent Park Tenants Ass'n v. Realty Equities Corp. of New York*, 58 N.J. 98, 107-08 (1971)) (New Jersey's Constitution does not contain a "case or controversy" requirement).

D. <u>This State Court Lawsuit</u>

Plaintiff Ellen Baskin, a New Jersey resident, received from P.C. Richard two credit/debit card receipts on May 24, 2016. Each of those receipts contained, among other things, Ms. Baskin's card's expiration date, the last four digits of her card number, the brand of her card, her full name, her full physical address, and her telephone number. Complaint ¶ 37; Yedalian Cert. ¶ 7.

Therefore, plaintiffs from the federal lawsuit, Ms. O'Shea and Mr. Trisal, together with Ms. Baskin, filed this lawsuit in this Court. Complaint ¶¶ 4, 11-13; Yedalian Cert. ¶ 8.

E. <u>Dismissal of Entire Lawsuit And All Class Claims By The Law Division</u>

P.C. Richard filed a motion to dismiss in the Law Division. That court granted the motion to dismiss as to all three plaintiffs, and also dismissed the class allegations.

F. <u>On Appeal, Appellate Division Reinstates Ms. Baskin's Individual Claims</u>

Plaintiffs appealed the Law Division's dismissal. In a published opinion, the Appellate Division reinstated Ms. Baskin's individual claims but affirmed the dismissal of the class allegations. *Baskin v. P.C. Richard & Son, LLC*, 462 N.J. Super. 594 (App. Div. 2020).

G. <u>New Jersey Supreme Court Reinstates, In Full, The Class Claims</u>

Plaintiffs petitioned the New Jersey Supreme Court for review.

The New Jersey Supreme Court accepted the petition for review for purposes of addressing only the class claims, and, in a unanimous opinion, reversed and reinstated the class claims. *Baskin v. P.C. Richard & Son*, 246 N.J. 157 (2021).

III. SETTLEMENT DISCUSSIONS, MEDIATIONS, AND RESULTING MOU

Shortly after Plaintiff's victory in the New Jersey Supreme Court, the parties commenced settlement discussions. These discussions led to the exchange of information. Many mediators were also proposed and vetted by the parties in an attempt to reach agreement to participate in a mediation. Ultimately, the parties agreed to mediate with Hon. Arlander Keys, U.S.M.J. (Ret.). Yedalian Cert. ¶ 12.

Judge Keys implemented a pre-mediation submission process to try to ensure a productive mediation. The parties prepared and provided extensive pre-mediation submissions, including video, audio and written submissions, along with mediation briefs. Yedalian Cert. ¶ 13.

The parties also continued negotiations between themselves leading up to the mediation, with the desire of trying to make as much progress as they could before the commencement of the mediation. Yedalian Cert. ¶ 14.

The first mediation was held in New York on September 9, 2021. Although the parties did not reach a settlement during the first mediation, substantial progress was made, and the parties agreed to hold another mediation with Judge Keys. Yedalian Cert. ¶ 15.

That second mediation was scheduled for October 14, 2021. The parties again prepared and submitted substantial submissions to Judge Keys before the second mediation. Yedalian Cert. ¶ 16.

With Judge Keys' continuing assistance, the parties reached an agreement, in principle, on key terms of a class-wide settlement. Yedalian Cert. ¶ 17.

In the months that followed, the parties finalized the memorialization of all key terms of a class-wide settlement in a written and fully signed Memorandum of Understanding of Settlement ("MOU"). Yedalian Cert. ¶ 18.

IV. SUBPOENAS AND DISCOVERY FROM AMERICAN EXPRESS ENTITIES, AND DISCOVERY FROM P.C. RICHARD, CONCERNING CLASS MEMBER INFORMATION

In order to identify Settlement Class members, and try to maximize the acquisition of email and/or postal mail addresses for those Settlement Class members for notice purposes, per the MOU, P.C. Richard was to compile, certify and provide several items of information, including American Express ("AmEx") ID numbers and other data concerning affected stores that processed American Express transactions. Yedalian Cert. ¶ 19.

Also per the MOU, Plaintiff was to subpoena AmEx for customer transaction information so that appropriate notice could be given to settlement class members. Yedalian Cert. ¶ 20.

On September 1, 2022 P.C. Richard provided Plaintiff's counsel with information to be used to subpoena AmEx entities. Yedalian Cert. ¶ 21.

On September 21, 2022, Plaintiff served subpoenas on AmEx entities. The subpoenas required depositions/production concerning information about approximately 94,325 transactions, which were made by approximately 60,892 unique customers who used a consumer AmEx card. Yedalian Cert. ¶ 22.

AmEx did not provide any information within sixty days and its Subpoena Response Unit became unresponsive following this period. As a result, Plaintiff's counsel wrote directly to the CEO of AmEx. That caused the matter to be escalated to the Office of the General Counsel for AmEx, which then got involved and assured Plaintiff's counsel that the AmEx entities would comply with the subpoenas. Numerous communications thereafter transpired between Plaintiff's counsel and AmEx. Yedalian Cert. ¶ 23.

Over the course of 2023 and into early 2024, AmEx provided several batches of customer transaction information. Plaintiff's counsel diligently analyzed the data, noticed substantial issues with the data and notified AmEx concerning several of the batches. Plaintiff's counsel also engaged the assistance of third-party administrator Atticus Administration, LLC, which provided further review and analysis of data. This process resulted in a final dataset provided by AmEx on January 9, 2024. Yedalian Cert. ¶ 24.

Per the MOU, to the extent P.C. Richard had any settlement class member information that might be used to supplement data received from AmEx, P.C. Richard was to provide such information to Plaintiff. Plaintiff's counsel received this supplemental data from P.C. Richard. Yedalian Cert. ¶ 25.

The data from both AmEx and P.C. Richard was then merged, further analyzed and further sorted. Yedalian Cert. ¶ 26.

V. RESULTS OF THE CLASS MEMBER INFORMATION SECURED

Out of the approximately 60,892 customers who are members of the settlement class, Plaintiff has secured a mail and/or email address as follows:

47,775 (have mail and email address)

5,223 (have mail address only)

127 (have email address only)

53,125 (have mail and/or email address) Yedalian Cert. ¶ 27.

Thus, out of the approximately 60,892 settlement class members, Plaintiff has secured a mail and/or email address for 53,125 settlement class members (and for most of those 53,125 settlement class members, specifically 52,998 of them, Plaintiff secured a mail address). Yedalian Cert. ¶ 28.

As a result, as will be discussed in Section XII below, the parties are proposing to satisfy the Rule 4:32 requirement of notice to the Settlement Class through a combination of regular mail, email, and internet notice.

VI. THE LONG-FORM SETTLEMENT AGREEMENT, INCLUDING NOTICE DOCUMENTS TO THE CLASS

In addition to working on securing class member information, the Parties also worked on a long-form class-wide settlement agreement, including notice documents to the settlement class. Yedalian Cert. ¶ 29.

The Stipulated Settlement Agreement and Release ("Settlement" or "Agreement"), a copy of which is attached to the Yedalian Cert. as Exhibit 1,[1] is a product of all of the extensive negotiations and exchanges between the Parties. The notice documents are attached to the Agreement as Exhibits A-H. Yedalian Cert. ¶ 30.

VII. SUMMARY OF THE SETTLEMENT TERMS

Subject to the Court's approval, the Parties have agreed to settle this matter upon the terms and conditions set forth in the Agreement. A summary of the terms of the Settlement is as follows:

- This Settlement concerns approximately 60,892 Settlement Class members, each of whom used a consumer AmEx card for transactions occurring at P.C. Richard stores during the Settlement Class Period. Winter Cert. ¶ 5.

- For the purposes of the Settlement only, the Parties have stipulated to the certification of the following Settlement Class: "All consumers who engaged in a sale or transaction using an AmEx credit or debit card at any P.C. Richard & Son store within the

---

[1] Capitalized terms shall have the same meanings as in the Agreement, unless indicated otherwise.

United States at any time during the period November 12, 2015 through August 18, 2016 and were provided an electronically printed receipt at the point of the sale or transaction, on which receipt was printed the expiration date of the consumer's AmEx credit card or debit card." Agreement ¶ 1.

- P.C. Richard agrees to fund the class action settlement by establishing a common fund in the amount of $4,900,000 ("Cash Fund"). Agreement ¶ 2(a). The Cash Fund is non-reversionary, meaning any unclaimed funds (from uncashed checks, etc.) will not revert back to P.C. Richard. Agreement ¶ 2(c).

- All Eligible Settlement Class Members for whom the Parties have a valid mailing address will receive a mailed settlement check, without the Eligible Settlement Class Members having to submit any claim form or take any other action. Agreement ¶¶ 3(a) and 3(b).

- To the extent a mailing address is not available for an Eligible Settlement Class Member but an email address is available, then the Eligible Settlement Class Member will be sent Email Notice A (Exhibit E to the Agreement) whereby they will be informed of, and provided, the opportunity to submit a mailing address to receive a settlement check. Agreement ¶ 4(b) and Exhibit E.

- To the extent the records show that a cardholder used an AmEx card for a transaction at P.C. Richard during the Settlement Class Period, but it is unknown whether the AmEx card used is a consumer card or a non-consumer business card, then such cardholders for whom a mail and/or email address is available will receive Mailed Notice P (Exhibit D to the Agreement) and/or Email Notice P (Exhibit F to the Agreement), and they will be provided an opportunity to submit a Short-Form Claim Form (Exhibit B to the Agreement) to establish they are an Eligible Settlement Class Member. Agreement ¶¶ 3(d), 4(a) and 4(b).

- Targeted Internet Notice and notice on a dedicated Settlement Website will be provided to try to reach any remaining potential Settlement Class members for whom a name and/or mailing address and/or email address are not known. Such potential Settlement Class members will also have the opportunity to submit Claim Form-R (Exhibit A to the Agreement), along with documentary proof, to establish they are an Eligible Settlement Class Member. They will have 180 days from the date Full Notice is first posted on the Settlement Website to submit a claim via mail, facsimile or electronically through the Settlement Website. Agreement ¶¶ 3(d), 4(c) and 4(d).

- After subtracting from the Cash Fund Class Counsel's attorneys' fees and costs, an incentive award payment to the Class Representative (discussed further below), and Administration Costs, the remaining amount ("Net Cash Fund") will be divided by the total number of Eligible Settlement Class Members to determine each Eligible Settlement Class Member's pro-rata share ("Pro-Rata Share"). For purposes of determining the Pro-Rata Share, each Eligible Settlement Class Member will be counted once, and may not receive more than the Pro-Rata Share, regardless of whether they made one or more than one transaction during the Settlement Class Period. An Eligible Settlement Class Member's Pro-Rata Share shall not under any circumstances exceed $1,000. Agreement ¶ 2(b).

- If any funds from the Net Cash Fund remain due to uncashed settlement checks or for any other reason, any and all such residual funds will be distributed *cy pres* to the following 501(c)(3) charity: Electronic Privacy Information Center (https://epic.org/about/non-profit/). Agreement ¶ 2(c). As stated above, no part of the Cash Fund will revert back to P.C. Richard.

- As part of the Settlement, ""P.C. Richard shall implement a written company policy which states that it will not print more than the last five digits of the credit or debit card number or the credit or debit card expiration date upon any printed receipt provided to any customer that uses a credit or debit card to transact business with P.C. Richard." Agreement ¶ 2(e).

- Notice by mail and/or email will be provided to all Eligible Settlement Class Members and potential Settlement Class members for whom cardholder transaction data and a mailing and/or email address are known. Targeted Internet Notice and Settlement Website notice will be provided to try to reach any remaining potential Settlement Class members for whom neither a name, nor mailing address or email address are known. Agreement ¶ 4(a)-(d) and Exhibits C-H.

- Settlement Class members will have until sixty (60) calendar days from the first date of posting the Full Notice to the Settlement Class to exclude themselves from the Settlement (the "Opt-Out Deadline"). Agreement ¶ 5(a).

- Settlement Class members will have until thirty (30) days before the fairness hearing scheduled by the Court to object to the Settlement, and/or Class Counsel's motion for an award of attorneys' fees and costs and/or the Class Representative's motion for incentive award. Agreement ¶ 6.

- Class Counsel's motion for an award of attorneys' fees and costs, and for Class Representative's incentive award will be filed and posted on the Settlement Website no later than sixty (60) calendar days before the fairness hearing scheduled by the Court. Agreement ¶ 6(b).

- Class Counsel will apply to the Court for an incentive award of up to $5,000 for the named Plaintiff, to be paid from the Cash Fund, to compensate her for her services as Class Representative. Agreement ¶ 8.

- Class Counsel will apply to the Court for an award of attorneys' fees of up to

$1,633,333.33 (which represents 33⅓% of the Cash Fund), to be paid from the Cash Fund. Class Counsel will also apply to the Court for an award of Class Counsel's litigation costs of up to $65,000, also to be paid from the Cash Fund. Agreement ¶ 9.

- The Settlement will be administered by Atticus Administration, LLC, which will serve as the Settlement Administrator, subject to the Court's approval. Agreement ¶ 2(d).

VIII. STANDARDS FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENTS

A. Class Settlements Are Favored

"[T]he beginning point of this analysis is the strong public policy in this state in favor of settlements." *Dep't of Pub. Advocate, Div. of Rate Counsel v. N.J. Bd. of Pub. Utils.*, 206 N.J. Super. 523, 528 (App. Div. 1985). "As in all cases, our courts have long subscribed to policy that encouraged the settlement of lawsuits between the parties, inclusive of class action proceedings." *Schmoll v. J.S. Hovnanian & Sons, LLC*, 2006 WL 1520751 *2 (Law Div. 2006), *aff'd* 394 N.J. Super. 415 (App. Div. 2007).

B. In Applying Rule 4:32, New Jersey Courts Can Look To Federal Cases

In applying Rule 4:32, New Jersey state courts may look to federal cases involving class actions for guidance. "[W]hile New Jersey courts, in construing our class action rule, are not bound by the interpretations given the federal rule, … our courts have consistently looked to the interpretations given the federal counterpart for guidance." *Delgozzo v. Kenny*, 266 N.J. Super. 169, 188 (App. Div. 1993).

C. The Preliminary Approval Process Is The First Step Of Settlement Approval

A settlement of class litigation must be reviewed and approved by the Court. Rule 4:32-2(e)(1)(A). This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final review after notice has been distributed to the class members for their comment or objections. This Motion concerns the first step.

"The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is 'within the range of possible approval.'" *Armstrong v. Board of School Directors of the City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980) (quoting Manual for Complex Litigation § 1.46, at 53-55 (West 1977)). The purpose of this hearing is "to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Ibid.* "[I]f the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the class members of a formal fairness hearing.'" *In re Portal Software, Inc. Sec. Litig.*, 2007 WL 1991529 *5 (N.D. Cal. 2007) (quoting Manual for Complex Litigation, Second § 30.44 (1985)).

At the second step of the approval process (usually referred to as the fairness hearing or final approval hearing), after class members have been notified of the proposed settlement and have had an opportunity to be heard, the court makes a final determination whether the settlement is "fair, reasonable and adequate." *Armstrong*, 616 F.2d at 314.

Thus, the preliminary approval of the trial court is simply a conditional finding that the settlement appears to be within the range of acceptable settlements. As Professor Newberg comments, "The strength of the findings made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal may vary. The court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid subject only to any objections that may be raised at a final hearing." *Newberg on Class Actions*, 4th Ed., § 11:26.

IX. THE CLASS

In reviewing a class action settlement, the fundamental question "is not whether . . . plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 [here, Rule 4:32] are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). This action meets these governing standards.

Unlike most cases, this case made its way to the New Jersey Supreme Court and we have the benefit of its opinion (*Baskin v. P.C. Richard & Son, LLC*, 246 N.J. 157 (2021)) applying class certification requirements to the particulars of this very case. Therefore, the New Jersey Supreme Court's *Baskin* opinion will be cited extensively below in addressing class certification factors.

> Rules 4:32-1 and -2 govern class actions in New Jersey. Rule 4:32-1 sets forth the requirements for maintaining a class action. Subsection (a) of that rule requires a putative class to satisfy four general prerequisites in order to sue as a class:
>
> > (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. [R. 4:32-1(a).]
>
> Those prerequisites are "frequently termed 'numerosity, commonality, typicality and adequacy of representation.'" *Dugan v. TGI Fridays, Inc.*, 231 N.J. 24, 47, 171 A.3d 620 (2017) (quoting *Lee*, 203 N.J. at 519, 4 A.3d 561).
>
> In addition to the prerequisites of subsection (a), plaintiffs pursuing class certification must also satisfy one of the three requirements of subsection (b). Of importance to this case are the subsection (b)(3) requirements, pursuant to which the court must
>
> > find [ ] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Baskin, 246 N.J. at 173.

Each of these requirements is applied below to the Settlement Class.

A. Numerosity

> Rule 4:32-1 does not specify a minimum number of class members necessary to satisfy the numerosity requirement of subsection (a). Federal courts deciding class certification issues governed by Federal Rule of Civil Procedure 23(a), the Federal Class Action Rule -- which served as the model for Rule 4:32-1, see *In re Cadillac*, 93 N.J. at 424-25, 461 A.2d 736 -- have stated that "[t]here is no set numerical cutoff used to determine whether a class is sufficiently numerous; courts must examine the specific facts of each case to evaluate whether the requirement has been satisfied." *In re Toys "R" Us*, 300 F.R.D. 347, 367 (C.D. Cal. 2013). However, "[a]s a general rule ... classes of 20 are too small, classes of 20-40 may or may not be big enough depending on the circumstances of each case, and classes of 40 or more are numerous enough." *Id.* at 367-68 (quoting *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988)).
>
> New Jersey courts frequently describe the numerosity requirement without numerical precision. See *Dugan*, 231 N.J. at 64-65 & n.12, 171 A.3d 620 (concluding that the proposed class of 263,000 "clearly includes numerous claimants"); *Lee*, 203 N.J. at 512, 4 A.3d 561 (determining that the trial court described the class as sufficiently numerous because it included "well over 10,000 members"); *In re Cadillac*, 93 N.J. at 425, 461 A.2d 736 (affirming the trial court's finding that "[a] class of approximately 7,500 plaintiffs is sufficiently numerous").

Baskin, 246 N.J. at 173-174.

Applying these principles governing numerosity, *Baskin* held that Ms. Baskin's Complaint which alleged that "'there are, at a minimum, thousands (i.e., two thousand or more)' of class members is sufficient" to satisfy numerosity. *Baskin*, 246 N.J. at 179. Of course, now, the evidence has borne out Ms. Baskin's numerosity allegation, as there are in fact approximately 60,892 Settlement Class members. Winter Cert. ¶ 5.

B. Commonality

Rule 4:32-1(a)(2) requires that there be "questions of law or fact common to the class." "Commonality does not mean that all issues must be identical as to each member, but it does require that plaintiffs identify some unifying thread among the members' claims that warrants class treatment." *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 156 (S.D.N.Y. 2008) (quotation marks and alterations omitted). "[A] single common question is sufficient." *Delgozzo*, 266 N.J. Super. at 185.

Here, all Settlement Class members share two common legal questions – whether P.C. Richard violated FACTA by printing the credit/debit card expiration date on customer receipts, and whether its practice of doing so was "willful." As in other FACTA cases that certified classes, those common questions focus on Defendants' conduct and culpability in violating FACTA. *See*, *e.g.*, *Tchoboian v. Parking Concepts, Inc.*, 2009 WL 2169883 *5 (C.D. Cal. 2009), petition for permission to appeal grant of certification denied October 20, 2009, 9th Cir. Docket No. 09-80132) ("The overriding legal issue is whether [defendant']s alleged noncompliance was willful so that the class members are entitled to statutory damages. Moreover, whether [defendant] violated FACTA is a combined question of law and fact common to all members."); *Medrano v. WCG Holdings, Inc.*, 2007 WL 4592113 *2 (C.D. Cal. 2007) ("There is a common core of salient facts across the class. Each member of the proposed class received a non-compliant receipt from [Defendant] after the applicable compliance deadline."); *Kesler v. Ikea U.S., Inc., et al.*, 2008 WL 413268 *3 (C.D. Cal. 2008) ("In this case, the facts and legal issues of each class member's claim are nearly, if not entirely, identical. There is a common core of salient facts across the class. Each member of the proposed class received a non-compliant receipt from IKEA after the December 4, 2006 FACTA compliance deadline. The overriding legal issue is whether IKEA's noncompliance was willful, so that the class members are entitled to statutory damages.")

"[T]hat defendants' noncompliance was a consistent result of how their receipt-printing equipment was programmed, the significant questions of defendants' conduct and willfulness present a common nucleus of operative facts." *Baskin*, 246 N.J. at 179.

C. <u>Typicality</u>

Rule 4:32-1(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Typicality is satisfied where the class representative's claims "have the essential characteristics common to the claims of the class." *Laufer v. U.S. Life Ins. Co.*, 385 N.J. Super. 172, 180 (App. Div. 2006) (quoting *In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 425 (1983)). And "[s]ince the claims only need to share the same essential characteristics, and need not be identical, the typicality requirement is not highly demanding." *Ibid.* (quoting 5 James W. Moore et al., Moore's Federal Practice, § 23.24[4] (3d ed. 1997)).

Here, Plaintiff and all other Settlement Class members allege the same injury, violation of their FACTA rights resulting from the same course of conduct — the printing of their card's respective expiration dates on credit/debit card receipts. Accordingly, this lawsuit is based on conduct that is not unique to Plaintiff, but on standardized, uniform conduct that is common to all Settlement Class members. Moreover, the same relief, specifically, statutory damages under 15 U.S.C. § 1681n, is sought for all Settlement Class members for P.C. Richard's "willful" violation of FACTA. Accordingly, the typicality requirement is satisfied. See *Laufer*, 385 N.J. Super. at 181 (finding typicality where plaintiff's and Class members' claims "rel[ied] upon the same legal theory"); *Tchoboian*, 2009 WL 2169883 *5 (C.D. Cal. 2009) (holding that typicality is satisfied because "[Plaintiff]'s claim is, in fact, 'substantially identical' to the claims of the proposed class members-namely, he alleges that [defendant] issued him a noncompliant receipt in willful violation of the FACTA"); *Medrano*, 2007 WL 4592113 *3 (same); *Kesler*, 2008 WL 413268 *4 (same).

D. <u>Adequate Representation</u>

Rule 4:32-1(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "[A]dequacy of representation entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000).

"The determination whether a putative class representative can fairly and adequately protect the interests of the class is closely related to the requirement of typicality." *Laufer*, 385 N.J. Super. at 181-82 (citing *In re Cadillac*. 93 N.J. at 425). To satisfy adequacy, "the plaintiff must not have interests antagonistic to those of the class." *Id.* at 182 (quoting *Delgozzo*. 266 N.J. Super. at 188). *Laufer* taught that this does not mean that the interests of the named plaintiff and the absentee class members need be identical: the class representative "only needs to be adequate." *Id.*

Here, there are no conflicts of interest between Plaintiff and Settlement Class members. They all assert identical claims for statutory damages arising from the same facts, *i.e.*, P.C. Richard's printing of the expiration date of the respective credit or debit card on receipts. *Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541, 545 (N.D. Cal. 2005) (no conflict where claims asserted by plaintiff and class members arise from defendants' use of form letters allegedly violating the Fair Debt Collection Practices Act).

The adequacy of proposed Class Counsel is presumed. *Gross v. Johnson & Johnson*, 303 N.J. Super. 336, 342-343 (Law Div. 1997). Plaintiff is represented by highly capable and competent counsel experienced in class action litigation, including FACTA lawsuits. Yedalian Cert. ¶¶ 57-80; accompanying Certifications of Bruce D. Greenberg, ¶¶ 4-9; Charles LaDuca, ¶¶

4-8; and Peter Gil-Montllor ¶¶ 4-8. Moreover, Plaintiff's counsel has zealously advocated and pursued these FACTA claims for more than eight (8) years and through four (4) courts, including the New Jersey Supreme Court. Yedalian Cert. ¶ 4-11, 52.

E. <u>Rule 4:32-1(b)(3) Requirements Are Also Met</u>

Plaintiff seeks certification pursuant to Rule 4:32-1(b)(3), which authorizes certification if the Court finds that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Rule 4:32-1(b)(3)'s predominance and superiority factors are satisfied.

1. Predominance of Common Questions

"[T]o establish predominance, plaintiff does not have to show that there is an 'absence of individual issues or that the common issues dispose of the entire dispute,' or 'that all issues [are] identical among class members or that each class member [is] affected in precisely the same manner.'" *Baskin*, 246 N.J. at 175.

Instead, the predominance "inquiry tests whether the proposed class is 'sufficiently cohesive to warrant adjudication by representation.'" *Iliadis v. Walmart*, 191 N.J. 88, 108 (2007) (quoting *Amchem Prods*., *Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). The Court must make a "pragmatic assessment," and decide the "significance of common questions" and whether the benefit from answering common questions in a class action outweighs the problems of individual cases. *Id.* Importantly, "[p]redominance does not require that all issues be identical among class members or that each class member be affected in precisely the same manner." *Id.* at 108-109.

Another question the Court should consider in connection with predominance is whether the action presents a "common nucleus of operative facts." *Lee,* 203 N.J. at 520 (quoting *Iliadis*.

191 N.J. at 108). *Cf. Pogostin v. Leighton.* 216 N.J. Super. 363, 377 (App. Div. 1987) (affirming certification of class for purposes of settlement).

Taking the facts alleged in the Complaint, as is required, *Lee*. 203 N.J. at 523, those allegations demonstrate that common questions of law and fact predominate over any individual issues. That common issues predominate is evidenced by the fact that all Settlement Class members' claims involve the very same conduct by P.C. Richard—the printing of receipts that contain the expiration date of the credit or debit card.

Whether P.C. Richard violated FACTA "willfully" is the central issue that clearly predominates over any individual issues. Whether it did so depends upon facts concerning its own conduct — conduct that applies uniformly to all class members in this case.

That common issues predominate is also bolstered by the fact that the available remedy in this case is statutory damages. As explained in the FACTA case of *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 719 (9th Cir. 2010), "irrespective of whether Bateman and all the potential class members can demonstrate actual harm resulting from a willful violation, they are entitled to statutory damages."

Our Supreme Court held that Ms. Baskin's class-wide FACTA claim satisfies the predominance requirement as follows:

> In order to prove that defendants violated FACTA, plaintiffs must demonstrate that defendants willfully printed receipts containing credit or debit card expiration dates. See 15 U.S.C. §§ 1681c(g)(1), 1681n. Accordingly, the common nucleus of operative facts is, as plaintiffs pled, whether defendants programmed their equipment to print the expiration dates of customers' credit/debit cards on receipts; the answer to that question will apply to all class members. Put differently, if plaintiffs are successful in establishing defendants' willful noncompliance with FACTA, then statutory damages are available to all class members uniformly.
>
> Accepting as true plaintiffs' allegations that defendants' noncompliance was a consistent result of how their receipt-printing equipment was programmed,

> the significant questions of defendants' conduct and willfulness present a common nucleus of operative facts. See *Iliadis*, 191 N.J. at 108, 922 A.2d 710. Resolving those questions as a class offers the benefit of consistency. See *Lee*, 203 N.J. at 520, 4 A.3d 561.
>
> *Baskin*, 246 N.J. at 179.

2. Superiority

To determine whether the superiority requirement is satisfied, a court must compare a class action with alternative methods for adjudicating the parties' claims.

> Determining superiority necessarily involves a comparison of alternative procedures. *In re Cadillac*, 93 N.J. at 436, 461 A.2d 736. That comparison involves considerations of fairness to the parties and judicial efficiency, as well as of class members' financial wherewithal or incentive to pursue "a claim that might cost more than its worth." *Lee*, 203 N.J. at 520, 4 A.3d 561. Plaintiffs sufficiently addressed those considerations in their complaint….
>
> Plaintiffs alleged in their complaint that a class action is superior because individual statutory damages will be relatively small; thus, "the expense and burden of individual litigation makes it economically infeasible and procedurally impracticable for each [class member] to individually seek redress for the wrongs done to them." They further allege it is unlikely that individual class members will bring FACTA claims and that, even if individual litigation were brought, the class action is still superior because individual claims would "present the potential for varying, inconsistent or contradictory judgments and would increase the delay and expense to all parties and the court system resulting from multiple trials of the same factual issues."
>
> *Baskin*, 246 N.J. at 180-181.

Unless Settlement Class members can show actual harm, they can recover, at most, statutory damages in an amount between $100 and $1,000 per violation. Given the number of Settlement Class members and the relatively small potential damages, a class action "is a superior vehicle—and perhaps the only practical vehicle" for them to get recompense. *See Lee*, 203 N.J. at 528. As in *Lee*, which involved damages of about $40, 203 N.J. at 528, few if any Settlement Class members would file actions for the small damage amount available here. *See also Iliadis*, 191 N.J. at 104-105 (citing numerous authorities for the idea that small damages to "the little guy" would go unredressed absent class treatment, since few victims would sue for such damages). In *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006), a case involving the *identical* remedy provisions of the FCRA[2], the Seventh Circuit held as follows: "Rule 23(b)(3) was designed for situations such as this, in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate."

The United States Supreme Court has similarly held. *Phillips Petroleum Co., v. Shutts*, 472 U.S. 797, 809 (1985) ("this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available"); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980) ("damages claimed by the two named plaintiffs totaled $1,006.00. Such plaintiffs would be unlikely to obtain legal redress…. This, of course, is a central concept of Rule 23.").

In sum, as explained in another FACTA case, the purpose of the rule is "to allow integration of numerous small individual claims into a single powerful unit." *Bateman*, 623 F.3d at 722.

Like the Supreme Court's opinion in *Baskin*, all of the above authorities clearly dictate that the superiority requirement is satisfied.

Consideration of the factors listed in Rule 4:32-1(b)(3) bolsters this conclusion. Ordinarily, these factors are: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action. However,

[2] "FACTA and other provisions of the FCRA [the Fair Credit Reporting Act] share the same statutory damages provision, see 15 U.S.C. § 1681n." *Bateman,* 623 F.3d at 715.

when a court reviews a class action settlement, the fourth factor does not apply. In deciding whether to certify a *settlement* class, a district court "need not inquire whether the case, if tried, would present intractable management problems." *Amchem*, 521 U.S. at 620. However, even if this fourth factor, concerning difficulties in management, were applicable to class *settlements*, as *Baskin* explained the fourth factor supports the superiority of class certification in this case:

> Additionally, trying these cases individually could result in inconsistent verdicts. In fact, if forced to proceed individually, there is nothing stopping one attorney from bringing numerous plaintiffs into small claims court and trying each claim one at a time. Such an approach would not foster judicial efficiency; nor would it be fair to defendants, who could be exposed to inconsistent results.
>
> *Baskin*, 246 N.J. at 182.

The remaining factors set forth in Rule 4:32-1(b)(3)(A), (B) and (C) all favor class certification in this case.

First, Settlement Class members have no particular interest in individually controlling the prosecution of separate actions. Statutory damages cannot exceed $1,000, and there is no other known pending separate action filed or prosecuted by any other class members. Moreover, any Settlement Class member who desires to pursue actual damages can opt-out of the Settlement. As *Baskin* also explained:

> The imposition of the willfulness requirement makes it more difficult for an individual plaintiff to bring a FACTA claim for statutory damages because it is unlikely a plaintiff appearing pro se in small claims court will know how to demonstrate willfulness.
>
> Moreover, as plaintiffs pled, individual damages are likely to be small and, as a result, individual class members are unlikely to have the financial wherewithal or incentive to bring a claim. See *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund*, 192 N.J. at 384, 929 A.2d 1076 (noting the concern that, when class members lack the financial wherewithal to bring a claim, "absent a class, the individual class members would not pursue their claims at all, thus demonstrating superiority of the class action mechanism").
>
> *Baskin*, 246 N.J. at 181-182.

Second, and as explained above, the parties are not aware of any other pending litigation regarding the FACTA violations at issue in this case.

Third, it is desirable to concentrate the litigation in this forum because many of the alleged FACTA violations occurred within New Jersey. Moreover, Plaintiff and P.C. Richard have reached a Settlement. "With the settlement in hand, the desirability of concentrating the litigation in one forum is obvious." *Elkins v. Equitable Life Ins. of Iowa*, 1998 WL 1337471 *19 (M.D. Fla. 1998); *Strube v. American Equity Life Ins. Co.*, 226 F.R.D. 688, 697 (M.D. Fla. 2005) (third and fourth factors are "conceptually irrelevant in the context of a settlement").

Finally, FACTA is a consumer protection statute which serves not just to compensate, but also to "deter" future violations. *Bateman*, 623 F.3d at 718. This "deterrent purpose" of FACTA is served by certification: "we are quite sure that certification of a class here would preserve, if not amplify, the deterrent effect of FACTA." *Id.* at 723. Superiority is satisfied.

X. THE PRESUMPTION OF FAIRNESS

As a general matter, there is a strong policy in favor of settlement of litigation. *E.g., Nolan v. Lee Ho*, 120 N.J. 465, 472 (1990) ("Settlement of litigation ranks high in our public policy") (citation omitted); *Borough of Haledon v. Borough of North Haledon*, 358 N.J. Super. 289, 305 (App. Div. 2003); *Jannarone v. W.T. Co.*, 65 N.J. Super. 472, 476 (App. Div. 1961). That policy is even more applicable in class action cases. See *Chattin v. Cape May Greene, Inc.*, 216 N.J. Super, 618, 626 (App. Div. 1987); *Morris County Fair Housing Council v. Boonton Tp.*, 197 N.J. Super. 359, 366 (Law Div. 1984), *aff'd o.b.,* 209 N.J. Super. 108 (App. Div. 1986).

While the recommendations of experienced counsel proposing the settlement are not conclusive, they should be highly persuasive to the Court, as New Jersey federal courts have held. *E.g., Varacallo v. Mass Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D. N.J. 2005) ("Class

Counsel's approval of the Settlement also weighs in favor of the Settlement's fairness"); *In re Prudential Ins. Co. of America Sales Practices Litig.*, 962 F. Supp. 450, 543 (D. N.J. 1997), *aff'd in relevant part*, 148 F.3d 283 (3d Cir. 1998), cert. denied. 525 U.S. 1114 (1999); *In re American Family Enterprises*, 256 B.R. 377, 421 (D. N.J. 2000). Counsel's views should be afforded "great weight," particularly where, as here, they are capable and competent, have experience with this type of matter, and have been intimately involved in this litigation. *Nat'l Rural Telecomm. Coop. v. DirecTV*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("'Great weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.") This is because "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 378 (9th Cir. 1995).

XI. THIS SETTLEMENT IS FAIR AND REASONABLE

The Settlement is well within the range of reasonableness and preliminary approval should be granted. No single criterion determines whether a class action settlement is fair and reasonable. "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice v. Civil Service Commission of City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). Indeed, "one factor alone may prove determinative in finding sufficient grounds for court approval." *Nat'l Rural Telecomm. Coop. v. DirecTV*, 221 F.R.D. 523, 525 (C.D. Cal. 2004); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993), *cert. denied*, 512 U.S. 1220 (1994).

Some of the factors to considered in evaluating the reasonableness of this Settlement are as follows:

A. <u>Risks of Continuing Litigation</u>

Absent this Settlement, there are very real risks involved in continued litigation, including extensive delays, potential appeals and the possibility that Settlement Class members may ultimately end up with no recovery. Yedalian Cert. ¶ 31.

1. "Willfulness"

In order to recover any statutory damages and other remedies under 15 U.S.C. § 1681n, Plaintiff must show that P.C. Richard engaged in "willful" conduct. However, in connection with the earlier federal action, P.C. Richard took a staunch position that its conduct is not willful, and filed a motion to dismiss. This included the argument that it relied on its merchant bank concerning the contents of receipts. While the matter was before the New Jersey Supreme Court, it is Plaintiff's view that P.C. Richard took a different position on willfulness. As a result, Plaintiff then took the position that certain representations constitute binding admissions, and Plaintiff tried to use that to the benefit of the class in connection with settlement discussions and mediations. With the Settlement achieved, none of the issues or positions concerning willfulness need to be hashed out through any further litigation. Any uncertainties, disputes and potential delays concerning further litigation, and any potential further appeals, and risks associated therewith, are avoided by this Settlement. Yedalian Cert. ¶ 33.

2. Class Certification

The Parties have sharply divergent positions on class certification in this case, absent a settlement. P.C. Richard has denied that for any purpose other than that of settling this lawsuit, this action is appropriate for class treatment. Yedalian Cert. ¶ 34.

It is Plaintiff's view that, absent a class settlement, were the issue of certification to be litigated through a contested motion for class certification, the New Jersey Supreme Court's *Baskin* opinion in this case would overwhelmingly support class certification. However, in litigation, there are no guarantees. Despite how strongly Plaintiff feels about the prospect of prevailing on a contested class certification motion, there is still a potential risk of loss absent a settlement. In addition, any further litigation carries at a minimum, delays and potential appeals. Yedalian Cert. ¶ 35.

B. Substantial Benefits of Settlement Compared to Risks of Continued Litigation

This is an outstanding Settlement that provides substantial benefits. Yedalian Cert. ¶ 36.

First, it establishes a sizeable Cash Fund of $4,900,000. Agreement ¶ 2(a).

Second, this significant all Cash Fund is a true, non-reversionary, common fund. Agreement ¶ 2(a). This non-reversionary aspect means that any unclaimed funds (from uncashed checks, etc.) will not revert back to P.C. Richard, but will instead be provided to a 501(c)(3) charity. Agreement ¶ 2(c). Non-reversionary common fund settlements, are favored over reversionary settlements. *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1058-1059 (9th Cir. 2019).

Third, the non-reversionary nature of this settlement is particularly favored because the pecuniary benefits provided consist of an all-cash fund (rather than including things like vouchers, coupons, etc., instead of, or in combination with, cash). *Roes, 1-2*, 944 F.3d at 1053. ("The danger of unjustifiably inflating the settlement value of coupons is even more grave when the value of unused coupons will revert back to defendants.").

Fourth, this is also an outstanding settlement because all Eligible Settlement Class Members for whom the Parties have a valid mailing address will receive a mailed settlement check, *without* having to submit any claim form or take any other action. Agreement ¶¶ 3(a) and 3(b). Most consumer class settlements (FACTA or otherwise) do not have this feature. Instead, even for those consumer class settlements where there is an all-cash common fund established, the settlements almost always require class members to submit a claim form as a condition of receiving payment or other benefits. The reality of consumer class action cases is that claim form response rates (meaning class members submitting a claim form) are often relatively low. A Federal Trade Commission study found that even in instances where postcard or email notice is feasible because class members' mailing or email addresses are known, the claim form response rates are respectively 6% (postcard) and 3% (email) with each such type of direct notice.[3]

Here, Plaintiff's counsel diligently and meticulously pursued customer transaction data from AmEx and P.C. Richard and recovered a mailing address for 52,998 out of the approximately 60,892 Settlement Class members. Again, for all valid mailing addresses recovered, they will be mailed a settlement check, without the Eligible Settlement Class Members having to submit any claim form or take any other action. Plaintiff and Plaintiff's counsel negotiated and obtained this outstanding feature and result that greatly benefits the Settlement Class. Agreement ¶¶ 3(a) and 3(b).

The first four issues discussed above, their respective interactions, and potential effects were further explained in *Roes, 1-2,* 944 F.3d at 1058-1059:

> While we have not disallowed reversionary clauses outright, we generally disfavor them because they create perverse incentives. *See In re Volkswagen*, 895 F.3d at 611-12. For example, allowing unclaimed funds to revert to defendants even where class members who do not respond or submit a claim are bound by

[3] See page 11 of the study, attached at Exhibit 2 to Yedalian Cert. Full report previously posted at https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysissettlement-campaigns/class_action_fairness_report_0.pdf.

> the class release creates an incentive for defendants to ensure as low a claims rate as possible so as to maximize the funds that will revert. This perverse incentive might lead defendants to negotiate for a subpar notice process, a more tedious claims process, or restrictive claim eligibility conditions. See *id.* at 611. Moreover, "[a] reversion can benefit both defendants and class counsel, and thus raise the specter of their collusion, by (1) reducing the actual amount defendants are on the hook for, especially if the individual claims are relatively low-value, or the cost of claiming benefits relatively high; and (2) giving counsel an inflated common-fund value against which to base a fee motion." *Id.* As a result, we have identified reversionary clauses as a "subtle sign[] that class counsel have allowed pursuit of their own self-interests ... to infect the negotiations." *Allen*, 787 F.3d at 1224. (alteration in original) (quoting *In re Bluetooth*, 654 F.3d at 947).

Fifth, the amount of gross funds recovered (before deducting any other amounts such as fees or costs) equals approximately an $80.47 recovery per Settlement Class member.[4] This is an excellent value, particularly when the propriety of awarding full statutory damages to Settlement Class members who do not claim actual monetary loss is strongly disputed. Many FACTA defendants have argued that lack of "actual harm" precludes, if not any award of statutory damages to begin with, at the very least "excessive" statutory damages. Since it remains to be seen how courts will resolve such constitutional challenges to statutory damage awards under FACTA, the value negotiated by the Parties represents a fair compromise well within the range of reasonableness. Yedalian Cert. ¶ 41.

"The proposed settlement is not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." *Officers for Justice*, 688 F.2d at 625; *see In re NFL Players Concussion Injury Litig*., 821 F.3d 410, 447 (3rd Cir. 2016) (cautioning against "making the perfect the enemy of the good" in settlement approval proceedings). Moreover, as long as the Settlement is reasonable, it does not matter that under the best case scenario, the potential value of the case may be much higher. *In re Cendant Corp.,*

[4] This is calculated by dividing the $4,900,000 Cash Fund by the total number of estimated Settlement Class members of 60,892.

Derivative Action Litigation, 232 F.Supp.2d 327, 336 (D. N.J. 2002) (approving settlement which provided less than 2% value compared to maximum possible recovery); *In re Heritage Bond Litigation*, 2005 WL 1594403 *27-28 (C.D. Cal. 2005) (median amounts recovered in settlement of shareholder class actions were between 2% - 3% of possible damages).

The cash benefits are also reasonable when compared to the value of benefits in other FACTA cases. For example, in *In re Toys "R" Us–Delaware, Inc.—Fair And Accurate Credit Transactions Act (FACTA) Litigation*, No. cv–08–01980 MMM (FMOx), 295 F.R.D. 438, 447 (C.D. Cal. January 17, 2014), the Court found that the benefit of non-cash vouchers having a maximum combined value of $30.00 was reasonable in a case alleging nationwide FACTA violations against a much larger corporate defendant.

Sixth, another benefit of this Settlement is that P.C. Richard "shall implement a written company policy which states that it will not print more than the last five digits of the credit or debit card number or the credit or debit card expiration date upon any printed receipt provided to any customer that uses a credit or debit card to transact business with P.C. Richard." Agreement ¶ 2(e). This FACTA compliance policy ensures that P.C. Richard will not continue to violate the law, willfully, inadvertently or otherwise. Yedalian Cert. ¶ 43.

Such non-pecuniary benefits are properly considered in judging the results of the lawsuit. *See, e.g.*, *Craft v. County of San Bernardino*, 624 F.Supp.2d 1113, 1121, (C.D. Cal. 2008) (taking into account fact that, in addition to monetary aspects, the defendant stopped the practices at issue). This is especially true with a consumer protection statute such as FACTA which serves both a compensatory and "deterrent purpose." *Bateman*, 623 F.3d at 718. "In fashioning FACTA, Congress aimed to 'restrict the amount of information available to identity thieves.'" *Ibid.* The non-pecuniary benefits achieve that substantial purpose.

Although Plaintiff here achieved both the Cash Fund *and* non-pecuniary benefits, courts also approve class settlements where *only* nonpecuniary benefits in the form of business reforms are achieved. *See*, *e.g.*, *Kirsch v. Delta Dental of New Jersey*, 534 F. App'x 113, 114 (3d Cir. 2013) (affirming, over objections made by objector, district court's approval of class action settlement where the settlement included business reforms but no monetary relief, as well as affirming attorneys' fee award to class counsel); *Sutter v. Horizon Blue Cross Blue Shield of New Jersey*, 2012 WL 2813813 *10 (App. Div. 2012) (affirming, over objections made by objector, court's approval of class action settlement where the settlement included business reforms but no monetary relief, as well as affirming $4 million attorneys' fee award to class counsel).

Seventh, a further benefit of the Settlement is a provision that ensures that if there is an intervening change, modification, reversal or clarification of the law before final approval of the Settlement, the Settlement and Settlement benefits will continue to remain valid, enforceable and available to Settlement Class members. Agreement ¶ 10.

The significance of this benefit cannot be understated. For example, as explained by the Ninth Circuit in *Bateman*, in 2008 (while many FACTA lawsuits were then pending) Congress enacted the Credit and Debit Card Receipt Clarification Act ("Clarification Act"). The Clarification Act retroactively granted a temporary immunity from statutory damages for FACTA violations to those defendants that printed an expiration date "between December 4, 2004, and June 3, 2008 [the date the Clarification Act was enacted]." *Bateman*, 623 F.3d at 717. Stated another way, the effect of the Clarification Act was that it wiped out liability for statutory damages for all then-pending FACTA expiration date cases. As a result of the change of law imposed by the Clarification Act, many FACTA class action cases were dismissed without any recovery for consumers. Yedalian Cert. ¶ 47.

Even before the Clarification Act was enacted, it was apparent that many defendants believed that this immunity bill (H.R. 4008) was almost certain to pass. As a result, some defendants chose to settle by demanding and extracting very favorable terms to them while many others refused to budge at all knowing that complete immunity was on the horizon. Yedalian Cert. ¶ 48.

Class Counsel had extensive first-hand experience of the devastating impact of the Clarification Act that gutted many cases. Yedalian Cert. ¶ 49.

This provision ensures that Settlement benefits will continue to remain valid, enforceable and available to Settlement Class members. Agreement ¶ 10.

C. <u>The Settlement Is The Product of Extensive Arm's-Length Negotiations And With The Assistance of Judge Keys, Through Two Mediations</u>

As discussed above, the Settlement is the product of extensive, adversarial, arm's-length discussions, negotiations, correspondence, factual and legal investigation and research, and careful evaluation of the respective parties' strengths and weaknesses, and only after more than eight (8) years of litigation, through four (4) courts, including the New Jersey Supreme Court. Yedalian Cert. ¶ 52.

The Settlement was also achieved after two mediations and with the assistance of Judge Keys. Judge Keys has provided "nearly two decades of distinguished service as a United States Magistrate Judge for the Northern District of Illinois." As a mediator he has mediated "hundreds of cases involving state and federal consumer protection laws with a special expertise in class action matters, including matters brought under the: Fair and Accurate Credit Transactions Act (FACTA)."[5]

"The assistance of an experienced mediator in the settlement process confirms that the

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[5] https://www.jamsadr.com/keys/ (last accessed February 9, 2024). Yedalian Cert. at Exhibit 3.

settlement is non-collusive." *Satchell v. Fed. Express Corp.*, 2007 WL 1114010 *4 (N.D. Cal. 2007).

XII. PROPOSED NOTICE TO THE CLASS SHOULD BE APPROVED

"If a class is certified pursuant to R. 4:32-1(b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, consistent with the due process of law." Rule 4:32-2(b)(2). In a class settlement, "[t]he court shall direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Rule 4:32-2(e)(1)(B).

Like its federal counterpart, both of these subsections of Rule 4:32-2 do not require that notice be actually received by all possible class members. *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994). This recognizes the reality that it is not always possible for all class members to receive notice. To satisfy due process, notice need only be given in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Thus, in instances where the identities or addresses of class members are not known, courts allow for published notice in newspapers or through internet notice. *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 786 (7th Cir. 2004) (notice by publication and website adequate where individual notice impossible; also recognizing increasing importance of website notice as a substitute form of notice); *Battle v. Liberty National Life Ins. Co.*, 770 F. Supp. 1499, 1515, fn.47 (N. D. Ala. 1991) (individual notice not required where absent members are not identified and cannot be located through diligent efforts) *aff'd*, 974 F.2d 1279 (11th Cir. 1992).

Where email addresses are available, courts permit email notice in lieu of mailed notice.

Browning v. Yahoo! Inc., 2007 WL 4105971 *4-7 (N.D. Cal. 2007) (email notice sent to class members and mailed notice sent to those class members for whom an email address was not known).

As explained below, the notice plan in this case aptly satisfies due process because it consists of a combination of mailed notice, emailed notice, targeted internet notice via targeted ads, and website notice.

A. Mailed Notice

Here, as discussed above, Plaintiff's Counsel has recovered a mailing address for 52,998 out of the approximately 60,892 Settlement Class members. Yedalian Cert. ¶¶ 27-28. For all valid mailing addresses recovered, they will be provided Mailed Notice. Agreement ¶ 4(a).

B. Email Notice

Plaintiff's Counsel has recovered an email address for 47,902 out of the approximately 60,892 Settlement Class members. Yedalian Cert. ¶¶ 27-28. For all valid email addresses recovered, they will be provided Email Notice. Agreement ¶ 4(b).

C. Targeted Internet Notice

To the extent that a mailing or email address is not available for any Settlement Class members, Targeted Internet Notice consisting of targeted internet ads will be provided. Agreement ¶ 4(c). Using hyperlinks, these ads will allow viewers to click through to the Settlement Website and review it and documents posted on the Settlement Website, including the long-form Full Notice. *See* accompanying Certification of Christopher Longley, ¶ 20.

D. Settlement Website Notice

The Settlement Administrator will provide a viewable and printable Full Notice via a Settlement Website containing a description of the settlement terms. Agreement ¶ 4(d).

E. <u>Professional Opinion Of The Settlement Administrator Regarding Notice</u>

The Settlement Administrator, Atticus Administration, LLC, has provided a Certification setting forth a detailed plan and its expert opinion concerning the notice plan, including the methodology, process, means of targeting and delivery and response mechanism, and analysis as to its sufficiency. Longley Cert. ¶¶ 13-33.

F. <u>The Contents of the Notice Documents Should Also Be Approved</u>

Rule 4:32-2(b)(2) provides that class "notice shall state the following in concise, clear and easily understood language: (A) the nature of the action; (B) the definition of the class certified; (C) the class claims, issues or defenses; (D) that a class member may enter an appearance through counsel if the member so desires; (E) that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and (F) the binding effect of a class judgment on class members [except for those who exclude themselves]."

The following notice documents in this case comply with these requirements:

Exhibit C to Agreement - Mailed Notice A

Exhibit D to Agreement - Mailed Notice P

Exhibit E to Agreement - Email Notice A

Exhibit F to Agreement - Email Notice P

Exhibit G to Agreement - Targeted Internet Notice (hyperlinks through to Settlement Website);

Exhibit H to Agreement - Full Notice

For the smaller percentage of Settlement Class members who may need to submit a claim because their name, mail, email address, or type of card used is unknown, they may use one of the following claim forms (as may be applicable to them), which should also be approved:

Exhibit A to Agreement - Claim Form-R

Exhibit B to Agreement - Short-Form Claim Form

XIII. CONCLUSION

The proposed class action Settlement is well within the range of reasonable settlements. It was achieved as the result of informed, extensive, and arm's-length negotiations conducted by experienced counsel after two mediations and with the assistance of Judge Keys (Ret.). Moreover, the Settlement was achieved only after more than eight (8) years of litigation, through four (4) courts, including the New Jersey Supreme Court, where Plaintiff obtained a substantial and unanimous victory.

Plaintiff respectfully requests that the Court grant preliminary approval of the proposed settlement, sign and enter the proposed Order submitted herewith, and set a final approval hearing on or about September 27, 2024.

LITE DEPALMA GREENBERG & AFANADOR, LLC

Date: March 27, 2024

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Attorneys for Plaintiff Ellen Baskin
and the Class

ELLEN BASKIN, KATHLEEN O'SHEA and SANDEEP TRISAL, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. P.C. RICHARD & SON, LLC (d/b/a P.C. Richard & Son) and P.C. RICHARD & SON, INC. (d/b/a P.C. Richard & Son), *Defendants*.	SUPERIOR COURT OF NEW JERSEY OCEAN COUNTY – LAW DIVISION DOCKET NO. OCN-L-000911-18 Civil Action **CERTIFICATION OF CHARLES J. LADUCA IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

Charles J. LaDuca, of full legal age, hereby certifies as follows:

1. I am one of the attorneys for the named Plaintiff Ellen Baskin. As such, I have personal knowledge of the following facts herein stated. If called as a witness, I could and would testify competently to the following:

2. I am an attorney at law, approved *pro hac vice* in this case. I am licensed to practice before all of the courts of the District of Columbia and the State of New York. I am also admitted to the Second, Third, Sixth, Seventh, Ninth, and District of Columbia federal Circuit Courts of Appeals, and the federal District Courts for the Western, Southern, and Northern Districts of New York.

3. I submit this Certification in support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement.

Qualifications of Counsel

4. As an attorney, I have had extensive experience in consumer related lawsuits, including complex cases, coordinated matters, multidistrict litigations ("MDL") and class actions and other representative suits.

5. I have been appointed class counsel on several occasions in both state and federal courts.

6. My firm has devoted the majority of its practice to the representation of clients involved in consumer protection, products liability, antitrust, securities and corporate governance. Examples of CGL's success are: (1) working to recover approximately two billion dollars for homeowners with defective construction materials; (2) helping to recover billions of dollars in shareholder litigation (notably, the firm served as Washington counsel for the plaintiffs

in the *Enron Securities Litigation, In re Enron Corp. Sec. Litig.*, No. H-01-3624 (S.D. Tex. 2006)); (3) obtaining settlements in *Automotive Parts Antitrust Litigation* ("*Auto Parts*"), 12-md-02311 (E.D. Mich.), a case based on the largest antitrust conspiracy in history where CGL recovered more than $400 million; (4) obtaining compensation for Holocaust survivors (*see Rosner, et al. v. United States*, No. 01-cv-1859 (S.D. Fla.), the firm acted as Co-Lead Counsel in a case on behalf of survivors of the Holocaust in Hungary whose fortunes were misappropriated by the U.S. government in the final days of World War II); and, (5) in several jurisdictions, ending the practice of jails subjecting minor law violators to unconstitutional strip searches. In 1991, with two California firms, the firm brought the so-called "Joe Camel" case, *Mangini v. RJ Reynolds Tobacco Co*., 7th Cal. 4th 1057 (1994), which alleged essentially that R. J. Reynolds Tobacco Company's Joe Camel Advertising Campaign illegally tricked children into smoking cigarettes.

7. Some of my cases relevant to my qualifications are: *Stewart, et al. v. Nurture, Inc.*, 21-cv-1217 (S.D.N.Y.) (alleging baby foods tainted with significant and dangerous levels of toxic heavy metals); *In re: CertainTeed Corp. Roofing Shingle Products Liability Litig*., MDL No. 1817 (E.D.Pa.) (alleging defective organic shingles litigation, firm served as Co-lead Counsel in an MDL that secured a settlement valued at more than $700 million); *In re Building Materials Corp. of Amer. Asphalt Roofing Shingle Prods. Liab. Litig*., MDL No. 2283 (D.S.C.) (Co-Lead Counsel in an MDL valued at approximately $240 million); *In re: Kitec Plumbing System Products Liability Litig*., MDL No. 2098 (N.D. Tex.) (Co-Lead Counsel to a $125 million settlement concerning defective Kitec Plumbing Systems sold throughout the United States); *In re Zurn Pex Plumbing Litig*., MDL No. 1958 (D. Minn.); *In re Uponor, Inc. F1807 Plumbing Prods. Liab. Litig*., MDL No. 2247 (D. Minn.); *In re: CertainTeed Fiber Cement Siding Litig.*,

MDL No. 2270 (E.D. Pa.); *In re IKO Roofing Shingle Products Liability Litig*., MDL No. 2104 (M.D. Il.); *Gold, et al. v. Lumber Liquidators*, 15-cv-5373 (N.D. Ca.) (concerning defective flooring and misrepresentations); *Melillo, et. Al. v. Building Products of Canada*, Case No. 618-11 (Vermont St. Ct.) (Co-Lead Counsel to a settlement valued at approximately $39-$100 million); *In re: Groupon, Inc. Mktg and Sales Practices* Litig., MDL No. 2238 (D.D.C.).

8. In sum, I believe my experience and expertise as a consumer attorney, and my genuine interest in protecting consumer rights, adequately qualify me to serve as Class Counsel on behalf of the best interests of the consumer class.

9. I do not know of any conflict of interest between myself or my company and any member of the proposed class which should or would preclude me from representing the proposed class.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: March 21 2024

CJLaD
Charles J. LaDuca

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Attorneys for Plaintiff Ellen Baskin and the Class

ELLEN BASKIN, KATHLEEN O'SHEA and SANDEEP TRISAL, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. P.C. RICHARD & SON, LLC (d/b/a P.C. Richard & Son) and P.C. RICHARD & SON, INC. (d/b/a P.C. Richard & Son), *Defendants*.	SUPERIOR COURT OF NEW JERSEY OCEAN COUNTY – LAW DIVISION DOCKET NO. OCN-L-000911-18 Civil Action **CERTIFICATION OF PETER GIL-MONTLLOR IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

Peter Gil-Montllor, of full legal age, hereby certifies as follows:

1. I am one of the attorneys for the named Plaintiff Ellen Baskin. As such, I have personal knowledge of the following facts herein stated. If called as a witness, I could and would testify competently to the following:

2. I am an attorney at law, approved *pro hac vice* in this case. I am licensed to practice before all of the courts of the State of New York. I am also admitted to the federal District Courts for the Eastern and Southern Districts of New York, the Southern District of California, the District for the District of Columbia, and the Eastern District of Pennsylvania.

3. I submit this Certification in support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement.

Qualifications of Counsel

4. I am an attorney with extensive experience in consumer related civil lawsuits, including complex cases, coordinated matters, multidistrict litigations ("MDL") and class actions and other representative suits.

5. I have been appointed Lead Counsel or Class Counsel for plaintiffs on several occasions in federal courts. *See, e.g., In Re Generic Pharmaceutical Pricing Antitrust Litigation,* MDL No. 2724 (E.D. Pa.); *In Re Packaged Seafood Products Antitrust Litigation* MDL, No. 2670 (S.D. Cal.). I also represent plaintiff classes in several other non-MDL cases in which plaintiffs allege consumer protection claims, antitrust claims, and forced labor claims.

6. I have extensive experience with cases, like the instant matter, which allege violations of the FACTA, including the case *Pasini v. Fishs Eddy*. 16-cv-354-PGG

(S.D.N.Y.). Since 2017 I have worked on FACTA cases with Mr. Chant Yedalian, who I consider an expert in the statute and in litigating its private cause of action.

7. I have personally handled all aspects of consumer protection litigation, including filing complaints, opposing motions to dismiss, engaging in extensive fact discovery including depositions and extensive collection of millions of electronic documents and structured data, defending depositions of named plaintiffs, working with experts to prepare economic liability and damages reports, filing and defending motions for class certification, other dispositive briefing, and negotiations for settlement.

8. In sum, I believe my experience and expertise as a consumer attorney and my work to date in FACTA litigation, including but not limited to this matter, adequately qualify me to serve as Class Counsel on behalf of the best interests of the consumer class.

9. I do not know of any conflict of interest between myself or my company and any member of the proposed class which should or would preclude me from representing the proposed class.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: March 25, 2024

P. G. Montllor (NH)
Peter Gil-Montllor

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Attorneys for Plaintiff Ellen Baskin
and the Class

ELLEN BASKIN, KATHLEEN O'SHEA and SANDEEP TRISAL, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. P.C. RICHARD & SON, LLC (d/b/a P.C. Richard & Son) and P.C. RICHARD & SON, INC. (d/b/a P.C. Richard & Son), *Defendants*.	SUPERIOR COURT OF NEW JERSEY OCEAN COUNTY – LAW DIVISION DOCKET NO. OCN-L-000911-18 Civil Action **CERTIFICATION OF ELLEN BASKIN IN SUPPORT OF APPROVAL OF CLASS ACTION SETTLEMENT**

Ellen Baskin, of full legal age, hereby certifies as follows:

1. I am the named Plaintiff in the above-entitled action and I make this Certification in support of approval of the class Settlement.

2. I have personal knowledge of the matters stated herein, except those matters stated upon information and belief and, as to those matters, I believe them to be true. If called to testify, I could and would competently testify to the matters stated in this Certification.

3. I am a New Jersey resident.

4. On May 24, 2016, I received from a P.C. Richard & Son store, in New Jersey, two credit/debit card receipts. Each of those two electronically printed customer receipts was provided to me at the store and at the point of the sale or transaction, and each receipt had printed on it my credit/debit card's expiration date.

5. To my knowledge, there are no conflicts of interests between myself and other Settlement Class members which should or would preclude me from serving as their representative in this case. I am not aware of any legal or factual issues relevant to these proceedings which differ from those confronting other proposed Settlement Class members generally.

6. I have remained steadfast throughout this matter, including through appeals all the way to the New Jersey Supreme Court.

7. To date, I believe I have done everything that can be reasonably expected of me to fairly, adequately and vigorously pursue and protect the interests of the proposed class.

8. I will continue to participate in this lawsuit, and will do all things required of me to fairly, adequately and vigorously pursue and protect the interests of the proposed Settlement Class.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: February 14, 2024

Ellen Baskin

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Attorneys for Plaintiff Ellen Baskin and the Class

ELLEN BASKIN, KATHLEEN O'SHEA and SANDEEP TRISAL, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. P.C. RICHARD & SON, LLC (d/b/a P.C. Richard & Son) and P.C. RICHARD & SON, INC. (d/b/a P.C. Richard & Son), *Defendants*.	SUPERIOR COURT OF NEW JERSEY OCEAN COUNTY – LAW DIVISION DOCKET NO. OCN-L-000911-18 Civil Action **CERTIFICATION OF CHRISTOPHER LONGLEY OF ATTICUS ADMINISTRATION ON ADEQUACY OF NOTICE PLAN AND ADMINISTRATION**

CHRISTOPER Q. LONGLEY, ESQ, of full legal age, hereby certifies as follows:

1. I have personal knowledge of the matters stated herein. If called to testify, I could and would competently testify to the matters stated in this Certification.

2. I am the Chief Executive Officer at the class action notice and settlement administration firm, Atticus Administration LLC ("Atticus").

3. By way of background, Atticus is a class action notice and claims administration company formed by an experienced team of executives with more than 35 years of combined experience in implementing claims administration and notice solutions for class action settlements and judgments. With executives that have had extensive tenure at three nationally recognized claims administration companies, collectively the management team at Atticus has overseen more than 3,000 class action settlements and has distributed more than $3 billion to class members.

4. I personally have been responsible in whole or in part for the design and implementation of more than 1,000 class action administrative plans, including many FACTA cases. These FACTA cases include *Redman v IMAX Chicago Theaters*, 1:13-cv-07892 (N.D. Ill.), *Torres v. Kwong Yet Lung,* 2:14-cv-02223 (D. Nev.), *Torres v. Pick-a-Part Auto Wrecking*, 1:16-cv-019515 DAD-BAM (E.D. Cal), *Moskowitz v Atlanta Hawks*, 2017-cv-288354 (Ga. Superior Court Fulton County), *Phan v Big Saver Foods*, BC-636343 (CA Superior Court, 2017), *Pasini v Fishs Eddy*, 1:16-cv-00354-PGG (NY 2018), *Medrano v Party City Corporation*, STK-CV-UBT-2016-11721(CA Superior Court, San Joaquin County), *Viesse v Tacoma Screw,* 2:16-cv-01915 (WA District Court), *Shami v Tubby Todd Bath Co*, Index No 512800/2019 (NY 2021), *The Body Shop FACTA Settlement*, No.2017-L-000604 (CA Superior Court, Los Angeles County), *Tran v Fastenal Company*, BC-717323 (LA Superior Court), among others.

5. Prior to founding Atticus, I was the President of Dahl Administration LLC, a nationally recognized class action notice and claims administration company. Prior to my notice and claims administration experience, I was employed in private industry with an emphasis on marketing. Prior to that I was employed at a private law practice, and I am currently an attorney in good standing on inactive/retired status for the state of Minnesota.

6. My work consists of a wide range of class actions that includes employment and consumer cases, including false advertisement, false labeling, FACTA, Data Breach, TCPA and other consumer related matters.

7. This Certification will describe the notice program that we recommend deploying in this matter, including considerations and target audience analysis that informed the development of the proposed plan.

Atticus' Work on This Matter Commenced Before The First Mediation

8. Atticus' work on this matter commenced before the first mediation. Certain information concerning the potential class was exchanged before the first mediation, and Atticus commenced work by assisting Plaintiff's counsel in formulating possible class notice plans that may be feasible.

Atticus' Work on This Matter Continued After The Mediations As American Express Data Continued to be Produced

9. Over the course of 2023 and into early 2024, the subpoenaed American Express entities ("AmEx") provided several batches of customer transaction information. Atticus assisted Plaintiff's counsel in the review and analysis of data.

10. Working with Plaintiff's counsel, Atticus expended over 100 hours of data work on the American Express batches of information from 2023 to early 2024. This process resulted in a final dataset provided by AmEx on January 9, 2024.

11. To the extent P.C. Richard had any settlement class member information which may be used to supplement data received from AmEx, P.C. Richard was to provide such information to Plaintiff. Plaintiff's counsel received this supplemental data from P.C. Richard and provided it to Atticus.

12. Working with Plaintiff's counsel, Atticus merged the data from AmEx and P.C. Richard, and then further analyzed and further sorted the data.

Mailed Notice

13. Typically, Atticus will send direct mail notice to class or putative class members when class member mailing addresses are known.

14. Usually in FACTA cases, class members are largely "unlocatable" for noticing purposes and can only be reached through a published notice effort.

15. In this case, however, through our work with Plaintiff's counsel, we have located 52,998 class members' last known address for direct notice purposes. This represents more than 87% of the approximately 60,892 customers who are members of the settlement class. Based on our experience in FACTA related cases, as well as consumer class actions generally, securing this high percentage of class members' last known mailing addresses is extraordinary.

16. Therefore, Atticus will, upon Court approval, mail notices to the 52,998 Settlement Class members to their last known address via pre-paid postage first class mail through the United States Postal Service. Prior to mailing the notice, Atticus will verify the last known address using the National Change of Address ("NCOA") database maintained by the

United States Postal Office, and, if an updated address is found, that updated address shall be used in lieu of the last known address and be treated as the new last known address for purposes of this mailing and any subsequent mailings.

17. Atticus uses a variety of tools for skip-tracing purposes in order to find addresses that have no forwarding location. These tools include Experian or IDI, and other professional resources to locate class members. Any mailed notices that are returned will be processed, skip-traced and re-mailed.

Email Notice

18. In addition to recovering mailing addresses, our work with Plaintiff's counsel has also resulted in us recovering an email address for 47,902 out of the approximately 60,892 Settlement Class members.

19. For all valid email addresses recovered, Atticus will send electronic mailed (E-Mail) notice.

Targeted Internet Notice

20. Of the approximately 60,892 Settlement Class members, there are approximately 7,767 for whom neither a mailing address or email address is known. In cases where the class is unknown or unlocatable, or parts of the class are unknown or unlocatable, Atticus will engage in a published notice campaign as the "best practicable" under the circumstances. Published notice in such cases can either be print published notice, or digital notice, including internet banner ads, or other forms of "on-line" notice. Accordingly, we believe that, in addition to direct mail and email notice, the best practicable notice program under the circumstances is to employ a digital notice marketing campaign that combines state of the art internet banner ad notices, key word acquisition and internet marketing tactics. Using hyperlink, these ads will allow viewers to click

through to the Settlement Website and review it and documents posted on the Settlement Website, including the long-form Full Notice. A toll-free telephone number will also be established and this will further apprise potential Settlement Class members of their rights and options in the settlement. The Settlement Website, as well as the Mailed Notice, Email Notice, and Full Notice shall each refer to this toll-free telephone number, which Settlement Class members may call.

Class Definition

21. I understand that as part of the Settlement, the Parties have stipulated to the certification, for settlement purposes only, of the following settlement class (the "Settlement Class"): All consumers who engaged in a sale or transaction using an American Express ("AmEx") credit or debit card at any P.C. Richard & Son store within the United States at any time during the period November 12, 2015 through August 18, 2016 and were provided an electronically printed receipt at the point of the sale or transaction, on which receipt was printed the expiration date of the consumer's AmEx credit card or debit card.

Targeted Internet Notice: Target Audience and Plan

22. In order to develop the Targeted Internet Notice plan, the Settlement Class demographic characteristics were profiled using GfK MRI 2017 Double-Base data. GfK MRI (Gesellschaft Fur Konsumschung and Media Mark Research Intelligence) data is used by advertising agencies and other communications professionals to understand the socio-economic characteristics, purchasing patterns, interests and practices along with information consumption of a target group. It aids in the proper selection of advertising to reach the target group.

23. Because P.C. Richard & Son is not measured specifically in this syndicated data source, a broad MRI is used to profile an over inclusive target group definition, which allows

Atticus to target an audience most like the Settlement Class definition. The following target group definition was used to ensure that the notice plan reaches a consumer group most likely to include potential Settlement Class members:

Known shoppers and the demographic profile of likely shoppers of any one of the many P.C. Richard & Son electronics and appliance store locations:

- Home or apartment owner with spouse, and one or more children, the purchaser of appliances or electronics is more likely female 54% rather than male 46%.
- Middle to moderately high-income levels with annual incomes ranging from $85,000 to $250,000 per year.
- Target is defined as class member or potential class member.
- Micro targeting for home improvement type projects, kitchen remodels or newly acquired homes and or apartments, with a greater degree of knowledge of product consideration for work being performed.
- 96% have access to the internet for purchasing decisions and to research product information.
- Have a familiarity with P.C. Richard & Son and the types of product choices they provide. Live near (within a 20- mile radius) of one of the 65 store locations in the multi-state area (NJ, NY, PA, CT).

24. To supplement the direct mail and email notice, Atticus will utilize a programmatic approach to purchasing internet advertising, which enables the notice plan to target potential and unlocatable Settlement Class members with targeted and tailored communications. Purchasing display and mobile inventory programmatically provides the highest reach for internet publication, allows for multiple targeting layers, and causes banner

advertisements to be systematically shown to persons most likely to be Settlement Class members based on our micro targeting efforts as defined in our demographic profile analysis.

25. The internet campaign will implement multiple targeting layers to ensure that notice is delivered to the persons most likely to be Settlement Class members, inclusive of search targeting, demographic targeting, category contextual targeting, keyword contextual targeting, site retargeting, and purchase data targeting. This enables Atticus to utilize, for example, search terms that an individual has entered into a web browser (like Google or Bing for example), to deliver banner ads to individuals most likely to be Settlement Class members based on our analysis of the target audience. Targeting users who are currently browsing or have browsed content categories such as P.C. Richard & Son products, will help qualify impressions to ensure messaging is served to the most relevant audience. The purpose of such targeting is to ensure that likely Settlement Class members are exposed to the notice while simultaneously minimizing the chance that notice is misdirected to individuals who are unlikely to be a member of the proposed Settlement Class.

26. The internet banner notice portion of the notice program will be implemented using a sixty-day (60) desktop and mobile campaign and utilizing standard IAB sizes (160 x 600, 300 x 250, 728 x 90, 300 x 60 and 320 x 50). A frequency cap will be imposed to maximize reach at 80% of our target audience. The banner notice is designed to result in serving approximately 20,000,000 impressions within the vicinity of the P.C. Richard & Son store locations during the notice campaign period.

Response Mechanisms

27. All Eligible Settlement Class Members for whom the Parties have a valid mailing address will receive a mailed settlement check, without the Eligible Settlement Class Members having to submit any claim form or take any other action.

28. To the extent a mailing address is not available for an Eligible Settlement Class Member but an email address is available, then the Eligible Settlement Class Member will be sent Email Notice A (Exhibit E of Agreement) whereby they will be informed of, and provided, the opportunity to submit a mailing address to receive a settlement check.

29. To the extent the records show that a cardholder used an AmEx card for a transaction at P.C. Richard during the Settlement Class Period, but it is unknown whether the AmEx card used is a consumer card or a non-consumer business card, then such cardholders for whom a mail and/or email address is available will receive Mailed Notice P (Exhibit D of Agreement) and/or Email Notice P (Exhibit F of Agreement), and they will be provided an opportunity to submit a Short-Form Claim Form (Exhibit B of Agreement) to establish they are an Eligible Settlement Class Member.

30. As discussed above, Targeted Internet Notice and Settlement Website notice will be provided to try to reach any remaining potential Settlement Class members for whom a name and/or mailing address and/or email address are not known. Such potential Settlement Class members will also have the opportunity to submit Claim Form-R (Exhibit A of Agreement), along with documentary proof, to establish they are an Eligible Settlement Class Member. They will have 180 days from the date Full Notice is first posted on the Settlement Website to submit a claim via mail, facsimile or electronically through the Settlement Website.

31. The Settlement Website will also allow Settlement Class members to view general information about the Settlement, relevant Court documents (such as the settlement agreement and preliminary approval Order) and important dates and deadlines pertinent to the Settlement.

32. Additionally, as explained in paragraph 20 above, a dedicated toll-free telephone number will be implemented which Settlement Class members may call with any questions or comments. The toll-free telephone number will utilize an interactive voice response ("IVR") system to provide Settlement Class members with responses to "Frequently-Asked-Questions" and provide important information regarding the Settlement, and the option to speak with a representative. This toll-free telephone number will be accessible 24 hours a day, seven days a week, with the option of a representative available during Atticus' regular business hours.

Conclusion

33. The notice program outlined above includes direct mail and email notice, and an integrated published notice effort that uses state-of-the-art Targeted Internet Notice and marketing techniques to enhance our notice campaign. As explained above, we have located 52,998 class members' last known mail address for direct notice purposes, which represents more than 87% of the approximately 60,892 customers who are members of the Settlement Class. The Targeted Internet Notice portion of the plan is designed to reach 80% of the remaining Settlement Class for whom neither a mailing address or email address is known. In my professional opinion, I believe that these efforts, together with direct mailed and email notice combine for the best notice practicable under the circumstances.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: March 25, 2024

Christopher Longley

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ELLEN BASKIN, KATHLEEN O'SHEA and SANDEEP TRISAL, on behalf of themselves and all others similarly situated, Plaintiffs, v. P.C. RICHARD & SON, LLC (d/b/a P.C. Richard & Son) and P.C. RICHARD & SON, INC. (d/b/a P.C. Richard & Son), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: OCEAN COUNTY DOCKET NO. OCN-L-000911-18 Civil Action **CERTIFICATION OF CATHY WINTER**

CATHY WINTER, being of full age, hereby certifies as follows:

1. I am the Chief Financial Officer of defendants P.C. Richard & Son, LLC and P.C. Richard & Son, Inc. (collectively, "P.C. Richard").

2. I submit this certification to facilitate the parties' efforts to effect a class-wide settlement of the allegations set forth in the Class Action Complaint in the captioned matter. Unless indicated otherwise, the information set forth below is based on my personal knowledge or knowledge I have developed from my review of P.C. Richard records relevant to this dispute.

3. During the time period relevant to this matter, P.C. Richard operated a chain of sixty-five retail consumer electronics and home appliance stores in New York, New Jersey, Connecticut and Pennsylvania.

4. From November 12, 2015 through August 18, 2016 (the "Settlement Class Period"), there were approximately 94,325 transactions at P.C. Richard stores in which a customer used an American Express credit card ("Amex Card") to make a purchase and, in connection with that purchase, the customer's receipt, if printed, reflected his or her Amex Card's expiration date.

5. Of the approximately 94,325 transactions referenced in paragraph 4 above, P.C. Richard has identified that those transactions were made by approximately 60,892 unique customers who made a consumer purchase (i.e., a purchase made using a consumer Amex Card) at a P.C. Richard store during the Settlement Class Period, and these unique customers may have received a receipt reflecting his or her Amex Card's expiration date.

6. P.C. Richard has the name, mailing address and telephone number for substantially all of those 60,892 customers. In addition, we have email addresses for approximately 33,854 of those customers.

7. P.C. Richard's inquiry, which I directly supervised, has revealed that, from April 12, 2016 through August 18, 2016, every Amex Card receipt printed at a P.C. Richard store reflected the expiration date of the customer's Amex Card.

8. P.C. Richard ceased printing Amex Card expiration dates on customer receipts on August 19, 2016.

9. Attached hereto as Exhibit A is a list of all P.C. Richard stores in operation during the Settlement Class Period.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the statements made by me are willfully false, I am subject to punishment.

June 7
Dated: ~~May~~ __, 2022

Cathy Winter

Cathy Winter

EXHIBIT A

P.C. Richard Store Locations

Exhibit A

Store #	Store Name	Street Address	City	State	Zip
1	OZONE PARK	103-54 94th Street	Ozone Park	NY	11417
2	ELMONT	239-10 Linden Boulevard	Elmont	NY	11003
3	OCEANSIDE	555 Atlantic Avenue	Oceanside	NY	11572
4	BELLMORE	701 Sunrise Highway	Bellmore	NY	11710
5	PLAINVIEW	203 South Service Road	Plainview	NY	11803
6	BABYLON	221 Route 109	West Babylon	NY	11704
7	ELWOOD	4067 Jericho Turnpike	Elwood	NY	11731
8	HAUPPAUGE	2095 Express Drive North	Hauppauge	NY	11788
9	PATCHOGUE	545 Sunrise Highway	Patchogue	NY	11772
14	RIVERHEAD	1685 Old Country Road	Riverhead	NY	11901
15	LEVITTOWN	2999 Hempstead Turnpike	Levittown	NY	11756
16	CARLE PLACE	109 Old Country Road	Carle Place	NY	11514
17	BAYSIDE	42-99 Francis Lewis Blvd.	Bayside	NY	11361
18	REGO PARK	92-63 Queens Boulevard	Rego Park	NY	11374
26	FOREST HILLS	113-14 Queens Boulevard	Forest Hills	NY	11375
27	SOUTHAMPTON	320 County Road 39	Southampton	NY	11968
28	DEER PARK	470 Commack Road	Deer Park	NY	11729
29	ASTORIA	35-18 Steinway Street	Astoria	NY	11102
30	GREENVALE	51 Northern Boulevard	Greenvale	NY	11548
31	KINGS HIGHWAY	450 Kings Highway	Brooklyn	NY	11223
32	FLATBUSH	2143 Flatbush Avenue	Brooklyn	NY	11234
33	BAYRIDGE	576-80 86th Street	Bay Ridge	NY	11209
34	BENSONHURST	1984 86th Street	Brooklyn	NY	11214
35	RALPH AVE	2259 Ralph Avenue	Brooklyn	NY	11234
37	ROCKVILLE CENTRE	307 Sunrise Highway	Rockville Centre	NY	11570
39	COLLEGE POINT	13603 20th Avenue	College Point	NY	11356
41	WAYNE	519 Route 46 West	Wayne	NJ	07470
42	PARAMUS	317 Route 17 South	Paramus	NJ	07652
43	HANOVER	243 State Route 10	Hanover	NJ	07981
44	ROXBURY	10 Commerce Boulevard	Succasunna	NJ	07876
45	EAST BRUNSWICK	327 Route 18	East Brunswick	NJ	08816
46	YONKERS	2323 Central Park Avenue	Yonkers	NY	10710
47	WATCHUNG	1515 Route 22	Watchung	NJ	07060
48	WEST NEW YORK	5200 John F. Kennedy Blvd	West New York	NJ	07093
50	FORDHAM ROAD	2501 Grand Concourse	Bronx	NY	10468
51	ATLANTIC AVE	590 Atlantic Avenue	Brooklyn	NY	11217
52	RARITAN	501 State Route 28	Raritan	NJ	08869
53	UNION SQUARE	120 East 14th Street	New York	NY	10003
54	STONY BROOK	2229 Route 347	Stony Brook	NY	11790
55	NEW HYDE PARK	713 Hillside Avenue	New Hyde Park	NY	11040
56	BAY PLAZA, BRONX	356 Baychester Avenue	Bronx	NY	10475
57	UPPER EAST SIDE	205 East 86th Street	New York	NY	10028
58	JERSEY CITY	727 State Highway 440	Jersey City	NJ	07304
59	WOODBRIDGE	885 St. Georges Avenue	Woodbridge	NJ	07095
61	WOODSIDE	50-02 Queens Boulevard	Woodside	NY	11377
62	UNION, NJ	2264 Route 22	Union	NJ	07083
63	BAYSHORE	1345 Sunrise Highway	Bay Shore	NY	11706
64	UPPER WEST SIDE	2372 Broadway	New York	NY	10024
65	CHELSEA (23RD ST)	53 West 23rd Street	New York	NY	10010
66	STATEN ISLAND	2399 Richmond Avenue	Staten Island	NY	10314
67	NANUET	293 West Route 59	Nanuet	NY	10954
68	EATONTOWN	90 State Route 36	Eatontown	NJ	07724
69	BRICK	550 Route 70	Brick	NJ	08723
70	MOUNT LAUREL	1450 Nixon Drive	Mount Laurel	NJ	08054
71	LAWRENCEVILLE	3350 Brunswick Pike (RT1)	Lawrenceville	NJ	08648
72	MANALAPAN	55 US 9	Manalapan	NJ	07726
75	CARTERET	1159 Roosevelt Avenue	Carteret	NJ	07008
80	NORWALK	444 Connecticut Avenue	Norwalk	CT	06854
81	MILFORD	1574 Boston Post Road	Milford	CT	06460
82	NORTH HAVEN	19 Universal Drive	North Haven	CT	06473
83	DANBURY	110 Federal Road	Danbury	CT	06811
86	NEWINGTON	3440 Berlin Turnpike	Newington	CT	06111
87	MANCHESTER	230 Hale Road	Manchester	CT	06042
89	ENFIELD	136 Elm Street	Enfield	CT	06082
90	NE PHILADELPHIA, PA	2420 Cottman Avenue	Philadelphia	PA	19149

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Attorneys for Plaintiff Ellen Baskin and the Class

ELLEN BASKIN, KATHLEEN O'SHEA and SANDEEP TRISAL, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. P.C. RICHARD & SON, LLC (d/b/a P.C. Richard & Son) and P.C. RICHARD & SON, INC. (d/b/a P.C. Richard & Son), *Defendants*.	SUPERIOR COURT OF NEW JERSEY OCEAN COUNTY – LAW DIVISION DOCKET NO. OCN-L-000911-18 Civil Action **<u>CERTIFICATION OF CHANT YEDALIAN IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT</u>**

Chant Yedalian, of full legal age, hereby certifies as follows:

1. I am one of the attorneys for the named Plaintiff Ellen Baskin. As such, I have personal knowledge of the following facts herein stated. If called as a witness, I could and would testify competently to the following:

2. I am an attorney at law, admitted *pro hac vice* in this case. I am licensed to practice before all of the courts of the State of Texas and the State of California. I am also admitted to the Second, Fifth, Sixth, Ninth, Eleventh, and District of Columbia federal Circuit Courts of Appeals, and the federal District Courts for the Central, Northern, Eastern and Southern Districts of California, the Eastern District of Wisconsin, and the Western District of Tennessee.

3. I submit this Certification in support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement.

<u>The Federal Lawsuit</u>

4. I was first retained by a New York resident named Kathleen O'Shea because P.C. Richard had issued her a receipt in violation of the Fair and Accurate Credit Transactions Act ("FACTA"). Based on this FACTA violation, a letter was sent to P.C. Richard & Son, LLC and P.C. Richard & Son, Inc. (collectively "P.C. Richard") (together with a then not-yet-filed federal complaint) demanding that defendants cease and desist from their FACTA violations. A lawsuit was thereafter filed on November 18, 2015 in New York federal court entitled *O'Shea v. P.C. Richard & Son, LLC, et al.*, No. 2:15-cv-09069-KPF (S.D.N.Y. 2015).

5. Although P.C. Richard had been served with the cease and desist letter, it continued to commit FACTA violations until August 18, 2016. While the federal lawsuit was ongoing, I was informed that another customer and New York resident, Sandeep Trisal, received

from P.C. Richard a credit/debit card receipt on May 2, 2016 which contained, among other things, Mr. Trisal's card's expiration date, the last four digits of his card number, the brand of his card, his full name, his full physical address, his telephone number, and his email address. When the federal court learned P.C. Richard was still committing FACTA violations, the court allowed leave to file an amended complaint to add Mr. Trisal as an additional named plaintiff.

6. Although Mr. Trisal was added as a plaintiff to join Ms. O'Shea in the federal action, P.C. Richard successfully obtained dismissal of the federal action based on the argument that a federal court does not have Article III subject matter jurisdiction over a FACTA expiration date violation case which seeks statutory damages.

<u>This State Court Lawsuit</u>

7. Plaintiff Ellen Baskin, a New Jersey resident, received from P.C. Richard two credit/debit card receipts on May 24, 2016. Each of those receipts contained, among other things, Ms. Baskin's card's expiration date, the last four digits of her card number, the brand of her card, her full name, her full physical address, and her telephone number. Complaint ¶ 37.

8. Therefore, plaintiffs from the federal lawsuit, Ms. O'Shea and Mr. Trisal, together with Ms. Baskin, filed this lawsuit in New Jersey state court. Complaint ¶¶ 4, 11-13.

<u>Dismissal By The Law Division And Appeals That Followed</u>

9. P.C. Richard filed a motion to dismiss in the Law Division. That court granted the motion to dismiss as to all three plaintiffs, and also dismissed the class allegations.

10. Plaintiffs appealed the Law Division's dismissal. In a published opinion, the Appellate Division reinstated Ms. Baskin's individual claims but affirmed the dismissal of the class allegations. *Baskin v. P.C. Richard & Son, LLC*, 462 N.J. Super. 594 (App. Div. 2020).

11. Plaintiffs petitioned the New Jersey Supreme Court for review. The New Jersey Supreme Court accepted the petition for review for purposes of addressing only the class claims, and, in a

unanimous opinion, reversed and reinstated the class claims. *Baskin v. P.C. Richard & Son*, 246 N.J. 157 (2021).

Settlement Discussions, Mediations, And Resulting MOU

12. Shortly after Plaintiff's victory in the New Jersey Supreme Court, the parties commenced settlement discussions. These discussions led to the exchange of information. Many mediators were also proposed and vetted by the parties in an attempt to reach agreement to participate in a mediation. Ultimately, the parties agreed to mediate with Hon. Arlander Keys, U.S.M.J. (Ret.).

13. Judge Keys implemented a pre-mediation submission process to try to ensure a productive mediation. The parties prepared and provided extensive pre-mediation submissions, including video, audio and written submissions, along with mediation briefs.

14. The parties also continued negotiations between themselves leading up to the mediation, with the desire of trying to make as much progress as they could before the commencement of the mediation.

15. The first mediation was held in New York on September 9, 2021. Although the parties did not reach a settlement during the first mediation, substantial progress was made, and the parties agreed to hold another mediation with Judge Keys.

16. That second mediation was scheduled for October 14, 2021. The parties again prepared and submitted substantial submissions to Judge Keys before the second mediation.

17. With Judge Keys' continuing assistance, the parties reached an agreement, in principle, on key terms of a class-wide settlement.

18. In the months that followed, the parties finalized the memorialization of all key terms of a class-wide settlement in a written and fully signed Memorandum of Understanding of Settlement ("MOU").

<u>Subpoenas And Discovery From American Express Entities, And Discovery From P.C. Richard, Concerning Class Member Information</u>

19. In order to identify Settlement Class members, and try to maximize the acquisition of email and/or postal mail addresses for those Settlement Class members for notice purposes, per the MOU, P.C. Richard was to compile, certify and provide several items of information, including American Express ID numbers and other data concerning affected stores that processed American Express transactions.

20. Also per the MOU, Plaintiff was to subpoena American Express for customer transaction information so that appropriate notice may be given to settlement class members.

21. On September 1, 2022 P.C. Richard provided Plaintiff's counsel with information to be used to subpoena American Express entities.

22. On September 21, 2022, Plaintiff served subpoenas on American Express entities ("AmEx"). The subpoenas required depositions/production concerning information about approximately 94,325 transactions, which were made by approximately 60,892 unique customers who used a consumer American Express card.

23. AmEx did not provide any information within sixty days and its Subpoena Response Unit became unresponsive following this period. As a result, I wrote directly to the CEO of AmEx. That caused the matter to be escalated to the Office of the General Counsel for AmEx, which then got involved and assured me that the AmEx entities will comply with the subpoenas. Numerous communications thereafter transpired between Plaintiff's counsel and AmEx.

24. Over the course of 2023 and into early 2024, AmEx provided several batches of customer transaction information. Plaintiff's counsel diligently analyzed the data, noticed

substantial issues with the data and notified AmEx concerning several of the batches. Plaintiff's counsel also engaged the assistance of third-party administrator, Atticus Administration, LLC, which provided further review and analysis of data. This process resulted in a final dataset provided by AmEx on or about January 9, 2024.

25. Per the MOU, to the extent P.C. Richard had any settlement class member information which may be used to supplement data received from AmEx, P.C. Richard was to provide such information to Plaintiff. Plaintiff's counsel received this supplemental data from P.C. Richard.

26. The data from both AmEx and P.C. Richard was then merged, further analyzed and further sorted.

Results Of The Class Member Information Secured

27. Out of the approximately 60,892 customers who are members of the settlement class, Plaintiff has secured a mail and/or email address as follows:

47,775 (have mail and email address)

5,223 (have mail address only)

127 (have email address only)

53,125 (have mail and/or email address)

28. Thus, out of the approximately 60,892 settlement class members, Plaintiff has secured a mail and/or email address for 53,125 settlement class members (and for most of those 53,125 settlement class members, specifically 52,998 of them, Plaintiff secured a mail address).

The Long-Form Settlement Agreement, Including Notice Documents To The Class

29. In addition to working on securing class member information, the Parties also worked on a long-form class-wide settlement agreement, including notice documents to the settlement class.

30. The Stipulated Settlement Agreement and Release ("Settlement" or "Agreement"), a copy of which is attached hereto as Exhibit 1,[1] is a product of all of the extensive negotiations and exchanges between the Parties. The notice documents are attached to the Agreement as Exhibits A-H.

The Settlement Warrants Preliminary Approval

31. Absent this Settlement, there are very real risks involved in continued litigation, including extensive delays, potential appeals and the possibility that Settlement Class members may ultimately end up with no recovery.

32. My co-counsel and I considered several factors in evaluating the reasonableness of this Settlement, including the following:

"Willfulness"

33. In order to recover any statutory damages and other remedies under 15 U.S.C. § 1681n, Plaintiff must show that P.C. Richard engaged in "willful" conduct. However, in connection with the earlier federal action, P.C. Richard took a staunch position that its conduct is not willful, and filed a motion to dismiss. This included the argument that it relied on its merchant bank concerning the contents of receipts. While the matter was before the New Jersey Supreme Court, it is Plaintiff's view that P.C. Richard took a different position on willfulness. As a result, Plaintiff then took the position that certain representations constitute binding

[1] Capitalized terms shall have the same meanings as in the Agreement, unless indicated otherwise.

admissions, and Plaintiff tried to use that to the benefit of the class in connection with settlement discussions and mediations. With the Settlement achieved, none of the issues or positions concerning willfulness need to be hashed out through any further litigation. Any uncertainties, disputes and potential delays concerning further litigation, and any potential further appeals, and risks associated therewith, are avoided by this Settlement.

Class Certification

34. The Parties have sharply divergent positions on class certification in this case, absent a settlement. P.C. Richard has denied that for any purpose other than that of settling this lawsuit, this action is appropriate for class treatment.

35. It is my view that, absent a class settlement, were the issue of certification to be litigated through a contested motion for class certification, the New Jersey Supreme Court's *Baskin* opinion in this case would overwhelmingly support class certification. However, in litigation, there are no guarantees. Despite how strongly I feel about the prospect of prevailing on a contested class certification motion, there is still a potential risk of loss absent a settlement. In addition, any further litigation carries at a minimum, delays and potential appeals.

Substantial Benefits of Settlement Compared to Risks of Continued Litigation

36. I believe this is an outstanding Settlement which provides for substantial benefits.

37. *First*, it establishes a sizeable Cash Fund of $4,900,000. Agreement ¶ 2(a).

38. *Second*, this significant all Cash Fund is a true, non-reversionary, common fund. Agreement ¶ 2(a). This non-reversionary aspect, means that any unclaimed funds (from uncashed checks, etc.) will not revert back to P.C. Richard, but will instead be provided to a 501(c)(3) charity. Agreement ¶ 2(c). Non-reversionary common fund settlements, are favored over reversionary settlements.

39. *Third*, the non-reversionary nature of this settlement is particularly favored because the pecuniary benefits provided consist of an all-cash fund (rather than including things like vouchers, coupons, etc., instead of, or in combination with, cash).

40. *Fourth*, this is also an outstanding settlement because all Eligible Settlement Class Members for whom the Parties have a valid mailing address will receive a mailed settlement check, *without* the Eligible Settlement Class Members having to submit any claim form or take any other action. Agreement ¶¶ 3(a) and 3(b). Most consumer class settlements (FACTA or otherwise) do not have this feature. Instead, even for those consumer class settlements where there is an all-cash common fund established, the settlements almost always require class members to submit a claim form as a condition of receiving payment or other benefits. The reality of consumer class action cases is that claim form response rates (meaning class members submitting a claim form) are relatively low. In a study of consumer class action claim form response rates by the Federal Trade Commission ("FTC"), the study found that even in instances where postcard or email notice is feasible because class members' mailing or email addresses are known, the claim form response rates are respectively 6% (postcard) and 3% (email) with each such type of direct notice.[2] Here, Plaintiff's counsel diligently and meticulously pursued customer transaction data from AmEx and P.C. Richard and recovered a mailing address for 52,998 out of the approximately 60,892 Settlement Class members. Again, for all valid mailing addresses recovered, they will be mailed a settlement check, without the Eligible Settlement Class Members having to submit any claim form or take any other action. Plaintiff and

[2] See page 11 of this study. Due to volume, a true and correct copy of relevant pages of this study are attached hereto as Exhibit 2. The full report was previously posted at https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysissettlement-campaigns/class_action_fairness_report_0.pdf.

Plaintiff's counsel negotiated and obtained this outstanding feature and result that I believe greatly benefits the Settlement Class. Agreement ¶¶ 3(a) and 3(b).

41. *Fifth*, the amount of gross funds recovered (before deducting any other amounts, such as fees or costs) equals approximately an $80.47 recovery per Settlement Class member.[3] I believe this is an excellent value, particularly when the propriety of awarding full statutory damages to Settlement Class members who do not claim actual monetary loss is strongly disputed. Many FACTA defendants have argued that lack of "actual harm" precludes, if not any award of statutory damages to begin with, at the very least "excessive" statutory damages. Since it remains to be seen how courts will resolve such constitutional challenges to statutory damage awards under FACTA, the value negotiated by the Parties represents a fair compromise well within the range of reasonableness.

42. The cash benefits are also reasonable when compared to the value of benefits in other FACTA cases. For example, in *In re Toys "R" Us–Delaware, Inc.—Fair And Accurate Credit Transactions Act (FACTA) Litigation*, No. cv–08–01980 MMM (FMOx), 295 F.R.D. 438, 447 (C.D. Cal. January 17, 2014), the Court found that the benefit of non-cash vouchers having a maximum combined value of $30.00 was reasonable in a case alleging nationwide FACTA violations against a much larger corporate defendant.

43. *Sixth*, another benefit of this Settlement is that P.C. Richard "shall implement a written company policy which states that it will not print more than the last five digits of the credit or debit card number or the credit or debit card expiration date upon any printed receipt provided to any customer that uses a credit or debit card to transact business with P.C. Richard."

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[3] This is calculated by dividing the $4,900,000 Cash Fund by the total number of estimated Settlement Class members of 60,892.

Agreement ¶ 2(e). I believe this FACTA compliance policy ensures that P.C. Richard will not continue to violate the law, willfully, inadvertently or otherwise.

44. Such non-pecuniary benefits are properly considered in judging the results of the lawsuit.

45. Although Plaintiff here achieved both the Cash Fund *and* non-pecuniary benefits, courts also approve class settlements where *only* nonpecuniary benefits in the form of business reforms are achieved.

46. *Seventh*, a further benefit of the Settlement is a provision which assures that if there is an intervening change, modification, reversal or clarification of the law before final approval of the Settlement, the Settlement and Settlement benefits will continue to remain valid, enforceable and available to Settlement Class members. Agreement ¶ 10.

47. The significance of this benefit cannot be understated. For example, as explained by the Ninth Circuit in *Bateman*, in 2008 (while many FACTA lawsuits were then pending) Congress enacted the Credit and Debit Card Receipt Clarification Act ("Clarification Act"). The Clarification Act retroactively granted a temporary immunity from statutory damages for FACTA violations to those defendants that printed an expiration date "between December 4, 2004, and June 3, 2008 [the date the Clarification Act was enacted]." *Bateman*, *supra*, 623 F.3d at 717. Stated another way, the effect of the Clarification Act was that it wiped-out liability for statutory damages for all then pending FACTA expiration date cases. As a result of the change of law imposed by the Clarification Act, many FACTA class action cases were dismissed without any recovery for consumers.

48. Even before the Clarification Act was enacted, it was apparent that many defendants believed that this immunity bill (H.R. 4008) was almost certain to pass. As a result,

some defendants chose to settle by demanding and extracting very favorable terms to them while many others refused to budge at all knowing that complete immunity was on the horizon.

49. I had extensive first-hand experience of the devastating impact of the Clarification Act that gutted many cases.

50. This provision ensures that Settlement benefits will continue to remain valid, enforceable and available to Settlement Class members. Agreement ¶ 10.

The Settlement Is The Product of Extensive Arm's-Length Negotiations And With The Assistance of Judge Keys, Through Two Mediations

51. The Settlement was achieved after two mediations and with the assistance of Judge Keys. According to his profile page, Judge Keys has provided "nearly two decades of distinguished service as a United States Magistrate Judge for the Northern District of Illinois." I am informed that, as a mediator, he has mediated "hundreds of cases involving state and federal consumer protection laws with a special expertise in class action matters, including matters brought under the: Fair and Accurate Credit Transactions Act (FACTA)."[4]

52. The Settlement is the product of extensive, adversarial, arm's-length discussions, negotiations, correspondence, factual and legal investigation and research, and careful evaluation of the respective parties' strengths and weaknesses, and only after more than eight (8) years of litigation, through four (4) courts, including the New Jersey Supreme Court.

53. Of course, none of my co-counsel's and my assessments were performed in a vacuum. We engaged in the necessary due diligence that made it possible for Plaintiff and us to exercise informed judgment.

[4] See https://www.jamsadr.com/keys/ (last accessed February 9, 2024). A true and correct .PDF webcapture of the relevant pages is attached hereto as Exhibit 3.

54. We did a thorough investigation of the facts, law and potential exposure and issues related to possible trial. We made an objective assessment of the facts, the law and risks. In sum, our efforts allowed us to effectively evaluate and exercise informed judgment on the strengths and weaknesses of the claims and defenses involved in the case.

55. We concluded, after taking into account the sharply disputed factual and legal issues involved in the case, the defenses asserted by P.C. Richard, the risks of continued litigation including trial outcome and potential appeals, and the substantial benefits to be provided pursuant to the Settlement, that the proposed Settlement is fair, adequate and reasonable.

56. My opinion regarding the Settlement is also based in substantial part on my experience and qualifications, a brief summary of which is set forth in paragraphs 57-80, below.

Qualifications of Counsel[5]

57. I am an attorney and a consumer activist.

58. As an attorney, I have had extensive experience in consumer related lawsuits, including complex cases, coordinated matters, multidistrict litigations ("MDL") and class actions and other representative suits.

59. I have been appointed class counsel on several occasions in both state and federal courts.

60. I have extensive experience with cases, like the instant matter, which allege violations of the FACTA.

[5] Concurrently with this filing, my co-counsel in this matter, Bruce D. Greenberg of Lite DePalma Greenberg & Afanador, LLC, and Charles J. LaDuca and Peter Gil-Montllor of Cuneo Gilbert & Laduca, LLP, are each providing their own Certification concerning their respective qualifications of counsel.

61. I was among one of the first attorneys in the nation to prosecute FACTA cases and have extensive experience prosecuting FACTA cases from start to finish.

62. I have personally handled various aspects of FACTA litigation, including, but not limited to, class certification.

63. My efforts have resulted in the certification of several FACTA class actions where certification was contested by the defense. *See, e.g.*, *In Re: Toys "R" Us – Delaware, Inc. – Fair And Accurate Credit Transactions Act (FACTA) Litigation*, MDL 08-01980 MMM (FMOx), 300 F.R.D. 347 (C.D. Cal. 2013); *Tchoboian v. Parking Concepts, Inc.*, SACV09-422 DMG (ANx), 2009 WL 2169883 (C.D. Cal. 2009) (C.D. Cal.); *McGee, et al. v. Ross Stores, Inc, et al.*, C06-7496 CRB (N.D. Cal.); *Klimp v. Rip Curl, Inc., et al.*, SACV07-1383 JVS (FFMx) (C.D. Cal.).

64. In addition to successfully certifying FACTA class actions on a contested basis, I have successfully prosecuted to conclusion many FACTA cases, including against some of the largest merchants in the United States (Party City, FedEx Office And Print Services, Toys "R" Us, AMC theatres, Ross Stores, Stein Mart, etc.). These facts not only demonstrate experience but they also provide specific examples of the fact that I have the wherewithal and resources necessary to take on and successfully prosecute FACTA class actions against the largest of merchants.

65. Of course, along the way to class-wide recoveries, I have had extensive experience litigating many issues in FACTA class action cases.

66. For example, about 16 years ago, I successfully opposed a motion to dismiss in the seminal case of *Pirian v. In-N-Out Burgers*, SACV-06-1251 DOC-MLGx, 2007 WL 1040864 (C.D. Cal. 2007), which set favorable pleading standards for FACTA claims.

67. Throughout the years, I have opposed many motions to dismiss in FACTA cases and continued to secure favorable results in favor of consumers. See, as examples, *Deschaaf v. American Valet & Limousine, Inc.*, 234 F.Supp.3d 964 (D. Ariz. Feb. 15, 2017); *De Cesare, et al v. Lab. Corp. of Am. Holdings*, 2016 WL 3483205 (C.D. Cal. May 31, 2016).

68. I have conducted extensive discovery and investigations in FACTA cases, including extensive expert related work concerning various payment card processing issues, including payment platforms, equipment and software, intermediaries involved in payment card acquisition and processing, and related data and processes.

69. I have also fiercely and successfully pursued discovery through discovery motions, when necessary. See, *e.g.*, *In Re Toys "R" Us-Delaware, Inc. Fair And Accurate Credit Transactions Act (FACTA) Litigation*, 2010 WL 4942645 (C.D. Cal. 2010).

70. I have successfully defeated motions for summary judgment in FACTA cases. *E.g.*, *Edwards v. Toys "R" Us*, 527 F.Supp.2d 1197 (C.D. Cal. 2007); *Tchoboian v. Fedex Office & Print Services, Inc.*, 2011 WL 12842230 (C.D. Cal. 2011).

71. I have handled several putative class action cases before the Judicial Panel On Multidistrict Litigation. I have argued before the Judicial Panel On Multidistrict Litigation. I have also served as a lead counsel on behalf of plaintiffs in an MDL. *In Re: Toys "R" Us – Delaware, Inc. – Fair And Accurate Credit Transactions Act (FACTA) Litigation*, MDL 08-01980 MMM (FMOx) (C.D. Cal.); *In Re: The TJX Companies, Inc. Fair and Accurate Credit Transactions Act (FACTA) Litigation*, MDL Case No. 07-md-1853 (D. Kansas).

72. I have litigated several appeals in FACTA cases. I have also argued before several courts of appeal in FACTA cases.

73. Among appeals, my co-counsel here, Bruce D. Greenberg, and I have the distinction of obtaining the first published opinion issued in a FACTA case by the highest state court of any state. *Baskin v. P.C. Richard & Son*, 246 N.J. 157 (2021). In *Baskin*, after the New Jersey trial court (the Superior Court of New Jersey, Law Division, Ocean County), and the Appellate Division both held that Plaintiff's class allegations should be dismissed, the New Jersey Supreme Court accepted our petition for review, heard oral argument, and in a unanimous opinion reversed and reinstated the class claims.

74. I have also persevered and have been successful with appeals in other FACTA cases. *E.g.*, *Jeffries v. Volume Services America, Inc.*, 928 F.3d 1059 (D.C. Cir. 2019).

75. I have also persevered and litigated a FACTA case through bankruptcy, on a class-basis, resulting in a $37 million dollar judgment. *Potikyan v. JS Dreams, Inc. (Johnny Rockets - Commons At Calabasas), et al.*, No. CV13-6237 JEM (C.D. Cal.) (judgment entered Nov. 17, 2016).

76. Although FACTA litigation is a relatively new area of the law (given the statute's most recent effective date of December 4, 2006), I am no stranger to "cutting-edge" litigation involving consumer rights. I have been involved in various novel and "cutting edge" litigation involving the enforcement of consumer rights, including statutory rights and constitutional rights. I am a sincere believer in protecting the rights of consumers and am committed to act in their best interests. For example, I have personally (as a party and lead attorney) filed lawsuits to help preserve access to the court and jury system. I filed *Yedalian v. Kaiser Foundation Health Plan, Inc., et al.* (Los Angeles Superior Court Case No. BC288469), which was a lawsuit against several of California's largest HMO's challenging the enforceability of their arbitration clauses and asserting that their

representations to their patient members - that binding arbitration is a member's only means of legal recourse to resolve disputes with their HMO - are false and misleading and violate state consumer protection laws. *Yedalian* ultimately resulted in a landmark settlement with the Kaiser and PacifiCare groups of defendants (respectively the State's largest and fifth largest HMO's) requiring the HMO's to provide written notification to patient members concerning their rights when disputes arose.

77. My expertise in protecting consumer rights has been recognized and sought by various organizations. For example, when the late Peter Jennings decided to air a special, multiple-part series on consumer arbitration clauses on ABC World News Tonight with Peter Jennings, the producers of the show requested my services as a consultant, and I agreed to provide same, ultimately resulting in information and materials which were used in the series, including an interview of one of my clients whose then pending case was featured on the series as a result of my consulting services. My work and experiences have been featured in multiple other venues including radio, television, newspapers, magazines, etc.

78. My work on behalf of consumers does not end with my legal efforts as an attorney. I believe I am especially well suited to represent consumers because, in addition to my legal experience, I am a consumer activist. I have worked hand-in-hand with various consumer protection organizations including the Foundation for Taxpayer and Consumer Rights ("FTCR"), Cal PIRG, AARP, Congress of California Seniors, Sierra Club and others to promote and preserve consumer rights. For example, I along with the FTCR and the California Nurses Association held the very first campaign in Oakland, California spearheading the movement to defeat Proposition 64 (which sought to amend California's

Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq.). This was followed by editorial board meetings and rallies and other grass-root type events throughout California to defeat Proposition 64, in which I actively participated. Several of the organizations I have worked with including the FTCR and AARP have written articles about my consumer related efforts.

79. In addition to working with consumer organizations, I have also worked with members of the community such as musicians and other artists to create content to educate and galvanize the public on consumer related issues. An example of one such project, which I produced, directed, and co-wrote, is a video parody about the high cost of prescription medications confronting seniors and other residents of the United States (viewable at www.todaysspecial.org).

80. In sum, I believe my experience and expertise as a consumer attorney, my genuine interest in protecting consumer rights, and my work to date in FACTA litigation, including but not limited to this matter, adequately qualify me to serve as Class Counsel on behalf of the best interests of the consumer class.

81. I do not know of any conflict of interest between myself or my company and any member of the proposed class which should or would preclude me from representing the proposed class.

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Exhibits 4-13

82. A copy of the cases that are attached hereto as Exhibits 4-13 are identified by Exhibit Number and corresponding Case in the following table:

Exhibit Number	**Case**
Exhibit 4	*Browning v. Yahoo! Inc.*, 2007 WL 4105971 (N.D. Cal. 2007)
Exhibit 5	*Elkins v. Equitable Life Ins. of Iowa*, 1998 WL 133741 (M.D. Fla. 1998)
Exhibit 6	*In re Heritage Bond Litigation*, 2005 WL 1594403 (C.D. Cal. 2005)
Exhibit 7	*In re Portal Software, Inc. Sec. Litig.*, 2007 WL 1991529 (N.D. Cal. 2007)
Exhibit 8	*Kesler v. Ikea U.S., Inc., et al.*, 2008 WL 413268 (C.D. Cal. 2008)
Exhibit 9	*Medrano v. WCG Holdings, Inc.*, 2007 WL 4592113 (C.D. Cal. 2007)
Exhibit 10	*Satchell v. Fed. Express Corp.*, 2007 WL 1114010 (N.D. Cal. 2007)
Exhibit 11	*Schmoll v. J.S. Hovnanian & Sons, LLC,* 2006 WL 1520751 (Law Div. 2006)
Exhibit 12	*Sutter v. Horizon Blue Cross Blue Shield of New Jersey,* 2012 WL 2813813 (App. Div. 2012)
Exhibit 13	*Tchoboian v. Parking Concepts, Inc.*, 2009 WL 2169883 (C.D. Cal. 2009)

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: March 27, 2024

Chant Yedalian

EXHIBIT "1"

Baskin, et al. v. P.C. Richard & Son, LLC, et al.
(Superior Court of New Jersey, Ocean County – Law Division, Docket No. OCN-L-000911-18)

STIPULATED SETTLEMENT AGREEMENT AND RELEASE

The parties to this Stipulated Settlement Agreement and Release ("**Settlement**" or "**Agreement**") are plaintiff Ellen Baskin ("**Baskin**" or "**Plaintiff**") and defendants P.C. Richard & Son, LLC and P.C. Richard & Son, Inc. (collectively "**P.C. Richard**" or "**Defendants**"). Baskin and P.C. Richard are collectively referred to as the **Parties**.

The Parties have agreed, subject to court approval, to a class-wide settlement on the following terms:

1. **The Settlement Class.**

As part of the settlement, the Parties stipulate to the certification, for settlement purposes only, of the following settlement class (**"Settlement Class"**): All consumers who engaged in a sale or transaction using an American Express ("AmEx") credit or debit card at any P.C. Richard & Son store within the United States at any time during the period November 12, 2015 through August 18, 2016 and were provided an electronically printed receipt at the point of the sale or transaction, on which receipt was printed the expiration date of the consumer's AmEx credit card or debit card.

2. **Settlement Benefits to the Class.**

(a) **Cash Fund**: P.C. Richard will establish a common fund in the amount of $4,900,000 (**"Cash Fund"**). P.C. Richard's maximum exposure under this settlement is $4,900,000 and under no circumstances shall it be required to pay any additional amounts. The Cash Fund will be funded as follows: (i) $250,000 within 10 days after the entry of the order in which the court grants preliminary approval to the settlement; and (ii) the remainder of the Cash Fund will be funded within 10 days of the Settlement Date as defined below. P.C. Richard's payments towards the Cash Fund shall be transferred to a bank account designated and maintained by the Settlement Administrator designated in paragraph 2(d) hereof for purposes of this settlement.

(b) **Distributions From The Cash Fund:** After subtracting from the Cash Fund Class Counsel's attorneys' fees and costs (see paragraph 9 hereof), an incentive (service) award payment to the Class Representative (see paragraph 8 hereof), and Administration Costs (as defined in paragraph 2(d) hereof), the remaining amount (**"Net Cash Fund"**) will be divided by the total number of Eligible Settlement Class Members (as defined in paragraph 3 hereof) to determine each Eligible Settlement Class Member's pro-rata share (**"Pro-Rata Share"**). For purposes of determining the Pro-Rata Share, each Eligible Settlement Class Member will be counted once, and may not receive more than the Pro-Rata Share, regardless of whether they made one or more than one transaction during the Settlement Class period of November 12, 2015 through August 18, 2016 (**"Settlement Class Period"**). An Eligible Settlement Class Member's Pro-Rata Share shall not under any circumstances exceed $1,000. Each Eligible Settlement Class Member will be mailed a check in the amount of the Pro-Rata Share, to be paid from the

Net Cash Fund. Distribution of settlement checks will begin no earlier than 30 days after the Settlement Date (as defined in paragraph 12 hereof). All settlement checks will be distributed no later than 90 days after the Settlement Date. All settlement checks will have an expiration date stated on them that will be calculated as 180 days from the date the check is issued.

(c) **Distribution of Residue**: If any residual funds from the Net Cash Fund remain due to uncashed settlement checks or for any other reason, any and all such residual funds will be distributed *cy pres* to one or more 501(c)(3) charities to be designated by Plaintiff and proposed to the Court in connection with the motion for preliminary approval. Plaintiff hereby designates Electronic Privacy Information Center (https://epic.org/about/non-profit/). If, for any reason, any or all of the selected charity(ies) are not approved by the Court, any such decision by the Court shall not affect the enforceability of the settlement because the Parties agree that Plaintiff may propose alternative charity(ies) until the Court determines that, in the Court's view, each charity(ies) proposed would be a proper recipient(s) of the residue, and, if that fails, the Parties agree that the Court may itself propose and select charity(ies).

(d) **Administration of Settlement**: The Parties agree that, subject to the Court's approval, Atticus Administration, LLC shall serve as the settlement administrator (**"Settlement Administrator"**). If, for some reason, the Court does not approve of Atticus Administration, LLC, or Atticus Administration, LLC does not serve as settlement administrator, the Parties shall jointly select another third party settlement administrator to serve as the settlement administrator, subject to the Court's approval. All fees and costs incurred or charged by the Settlement Administrator to administer the Settlement (**"Administration Costs"**), including but not limited to check issuance, Settlement Website (as defined in paragraph 4(d) hereof), notice to Settlement Class Members, the toll-free telephone number (referenced in paragraph 4(e) hereof), and envelope and postage charges, will be paid from the Cash Fund.

(e) **Implementation of FACTA Compliance Policy:** Not later than twenty days after the Settlement Date, P.C. Richard shall implement a written company policy which states that it will not print more than the last five digits of the credit or debit card number or the credit or debit card expiration date upon any printed receipt provided to any customer that uses a credit or debit card to transact business with P.C. Richard.

3. **Eligible Settlement Class Members.**

An **Eligible Settlement Class Member** shall be determined as follows:

(a) **Through American Express Information:** As part of this Settlement, P.C. Richard provided to Plaintiff a certification setting forth a list of all P.C. Richard stores within the United States during the Settlement Class Period which included each store's address, store number, phone number, fax number, and American Express Merchant ID number(s). Using this information, Plaintiff then subpoenaed the appropriate American Express related entities (with which subpoena(s) Defendants were required to cooperate and did cooperate) for customer information for each of the approximately 94,325 credit and debit card retail transactions where an American Express card was used during the Settlement Class Period. For each of the transactions, the subpoena(s) sought, among other things, the cardholder's name, the cardholder's mailing address, the cardholder's email address, the cardholder's telephone number, the retail store where the transaction was processed, the date of the transaction, the amount of the transaction, the American Express card number for the transaction, and whether a consumer card was used or whether a non-consumer business card was used for the transaction. The subpoenaed American Express entities provided several batches of information to Plaintiff, the last of which was provided on or about January 9, 2024. To the extent this information identifies the cardholder's name, the cardholder's mailing address and/or email address, and that a consumer card was used during the Settlement Class Period, the cardholder shall be deemed an Eligible Settlement Class Member and shall be entitled to receive a settlement check in the amount of the Pro-Rata Share without having to submit any claim or take any other action. To the extent this information identifies the cardholder's name, and the cardholder's mailing address and/or email address, but the information is deemed insufficient to determine whether a consumer card was used during the Settlement Class Period, the cardholder shall be provided notice and be given an opportunity to submit a Claim Form (as defined in paragraph 3(d) hereof) and confirm that he or she used a consumer card; if such cardholder submits a valid and timely Claim Form, the cardholder shall then be deemed an Eligible Settlement Class Member and shall be entitled to receive a Settlement check in the amount of the Pro-Rata Share.

(b) **<u>Through P.C. Richard's Information</u>:** To the extent the subpoena process set forth in paragraph 3(a), above, either (i) did not provide sufficient customer information to determine whether a customer is an Eligible Settlement Class Member, or (ii) lacks a mailing or email address to allow for the dissemination of direct notice, then, to the extent P.C. Richard has information that can be used to determine whether a customer is an Eligible Settlement Class Member or allows for the dissemination of direct notice, P.C. Richard provided this information to Plaintiff on October 18, 2023. To the extent the information from P.C. Richard identifies the cardholder's name, the cardholder's mailing address and/or email address, and that a consumer card was used during the Settlement Class Period, the cardholder shall be deemed an Eligible Settlement Class Member and shall be entitled to receive a settlement check in the amount of the Pro-Rata Share without having to submit any claim or take any other action. To the extent the information from P.C. Richard identifies the cardholder's name, and the cardholder's mailing address and/or email address, but the information is deemed insufficient to determine whether a consumer card was used during the Settlement Class Period, the cardholder shall be provided notice and be given an opportunity to submit a Claim Form and confirm that he or she used a consumer card; if such cardholder submits a valid and timely Claim Form, the cardholder shall then be deemed an Eligible Settlement Class Member and shall be entitled to receive a Settlement check in the amount of the Pro-Rata Share.

(c) **<u>Through Other Notice</u>:** To the extent the subpoena process set forth in paragraph 3(a), above and P.C. Richard's information in paragraph 3(b), above, either (i) does not provide sufficient customer information to determine whether a customer is an Eligible Settlement Class Member, or (ii) lacks a mailing or email address to allow for the dissemination of direct notice, then, notice shall be given pursuant to paragraphs 4(c) and (d), below.

(d) **<u>Claim Forms for Certain Settlement Class Members</u>:** To the extent it cannot be determined that a cardholder is an Eligible Settlement Class Member based on the subpoena process set forth in paragraph 3(a), above, and P.C. Richard's information in paragraph 3(b), above, then all such cardholders as well as any and all unidentified Settlement Class members will have 180 days from the date Full Notice, as that term is defined below, is first posted on the Settlement Website to submit a claim ("**Claims Period**") and establish that they are an Eligible Settlement Class Member using **Claim Form-R** (in the form attached hereto as **Exhibit A**), unless the Settlement Administrator has provided to the cardholder a **Short-Form Claim Form** (in the form attached hereto as **Exhibit B**) in which case the cardholder may use the Short-Form Claim Form. The Short-Form Claim Form (or its electronic version) may be used only where the Settlement Administrator has determined that the records show that the cardholder used an American Express (**"AmEx"**) credit or debit card for one or more transactions at P.C. Richard during the Settlement Class Period, but it is unknown whether the AmEx card used is a consumer card or a non-consumer business card. Settlement Class members may submit a Claim Form-R (or a Short-Form Claim Form if they were provided one by the Settlement Administrator), together with any required documentation, by postal mail or by facsimile. Claim forms may be submitted to the Settlement Administrator's postal address or the Settlement Administrator's facsimile number. Alternatively, Settlement Class members may submit a claim by completing and submitting an electronic version of Claim Form-R (or, if they are eligible, an electronic version of the Short-Form Claim Form), and uploading and submitting it together with any required documentation on the internet through the Settlement Website. Each Settlement Class member may submit only one claim, regardless of whether they made one or more credit or debit card transactions during the Settlement Class Period. For Claim Form-R, a valid claim will require that a Settlement Class member produce evidence that he or she received a customer receipt from P.C. Richard at any time during the Settlement Class Period that displays the expiration date of his or her AmEx credit or debit card, and to state that he or she used their own personal card for such transaction. In addition to stating that he or she used their own personal card for the subject transaction, proof of claim for Claim Form-R may consist of the original or a copy of either (1) a customer receipt containing the expiration date of his or her AmEx credit or debit card showing that he or she made a transaction at any P.C. Richard store at any time during the Settlement Class Period, or (2) an AmEx credit or debit card statement (which will be encouraged to be in redacted form) showing that he or she made a transaction at any P.C. Richard store at any time during the Settlement Class Period. If eligible to submit a Short-Form Claim Form, the Settlement Class member must timely submit a completed Short-Form Claim Form and state that he or she used their own personal card for such transaction. The Parties have the right to inspect and audit all claims received, including any proof submitted in connection therewith.

4. **Notice to the Settlement Class.**

The Parties agree that notice of the proposed settlement will be provided to the Settlement Class through the following methods, but the Parties also agree that should the Court require any different, or modified, means or content of any notice(s) such shall not affect the enforceability of the settlement and the Parties agree to adopt any such different or modified means or content of notice:

(a) Mailed Notice: Beginning no later than 30 days after the Court's preliminary approval of the settlement, all cardholders for whom a mailing address is available shall be given direct mailed notice (**"Mailed Notice"**). Mailed Notice shall be **Mailed Notice A** (in the form attached hereto as **Exhibit C**) for all Eligible Settlement Class Members who are known to have used a consumer card. Mailed Notice shall be **Mailed Notice P** (in the form attached hereto as **Exhibit D**) for all cardholders for whom the Settlement Administrator does not have sufficient information to determine whether a consumer card was used. All costs for the Mailed Notice shall be paid from the Cash Fund.

(b) **Email Notice:** Beginning no later than 30 days after the Court's preliminary approval of the settlement, all cardholders for whom an email address is available shall be given direct notice by email (**"Email Notice"**). Email Notice shall be **Email Notice A** (in the form attached hereto as **Exhibit E**) for all Eligible Settlement Class Members who are known to have used a consumer card. Email Notice shall be **Email Notice P** (in the form attached hereto as **Exhibit F**) for all cardholders for whom the Settlement Administrator does not have sufficient information to determine whether a consumer card was used. All costs for the Email Notice shall be paid from the Cash Fund.

(c) **Targeted Internet Notice:** To the extent that a mailing or email address is not available for any Settlement Class members, targeted internet notice (**"Targeted Internet Notice"**) consisting of targeted internet ads will be provided. Samples of Targeted Internet Notice, prepared by the Settlement Administrator, are attached hereto as **Exhibit G**. All costs for the Targeted Internet Notice shall be paid from the Cash Fund.

(d) **Settlement Website Notice:** Beginning no later than 30 days after the Court's preliminary approval of the settlement, the Settlement Administrator will provide a viewable and printable on-line long-form notice ("**Full Notice**"), which will be in a form attached hereto as **Exhibit H**, via a settlement website (**"Settlement Website"**) containing a description of the settlement terms. All costs for the Settlement Website shall be paid from the Cash Fund. It is expressly understood and agreed that as a condition to being engaged, the Settlement Administrator shall agree to be solely responsible for the Settlement Website's compliance with the Americans With Disabilities Act and all state law analogues.

(e) **Telephone Number For Settlement Class Members:** The Mailed Notice, Email Notice, Settlement Website, and Full Notice shall refer to the Settlement Administrator's toll-free telephone number, which Settlement Class members may call.

(f) **Paper Copies:** If any Settlement Class member requests a paper copy of the Full Notice or of the long-form settlement agreement, it shall be the Settlement Administrator's obligation to provide and pay for same, including postage costs, from the Cash Fund.

5. **Opt-Outs.**

(a) **The Opt-Out Process:** Settlement Class members will have until sixty (60) calendar days from the first date of posting the Full Notice to the Settlement Class per paragraph 4(d) above, to exclude themselves from the Settlement (the "**Opt-Out Deadline**"). Settlement Class members may opt out by timely sending a written request to the Settlement Administrator postmarked no later than the Opt-Out Deadline. The written request must include the Settlement Class member's name, address, telephone number, and signature, and a statement requesting that the Settlement Class member be excluded as a Class member from *Baskin, et al. v. P.C. Richard & Son, LLC, et al.*, Docket No. OCN-L-000911-18. The Settlement Administrator shall promptly provide a copy of any opt-out request to counsel for each of the Parties. Settlement Class members who timely opt out of the Settlement: (a) will not be a part of the Settlement; (b) will have no right to receive any benefits under the Settlement; (c) will not be bound by the terms of the Settlement; and (d) will not have any right to object to the terms of the Settlement or be heard at the fairness (final approval) hearing.

6. **Objections to the Settlement or to the Fee Motion.**

(a) Any Settlement Class member, on his or her own, or through an attorney hired at his or her own expense, may object to the terms of the Settlement. Any such objection must be mailed to the Settlement Administrator. To be effective, any such objection must be in writing and include the contents described in paragraph 6(c), and must be mailed and postmarked no later than thirty (30) days before the fairness hearing scheduled by the Court, or as the Court otherwise directs. Any objections not raised properly and timely will be waived.

(b) Any Settlement Class member, on his or her own, or through an attorney hired at his or her own expense, may object to Class Counsel's motion for an award of attorneys' fees and costs and/or the Class Representative's motion for incentive (or service) award. Such motion will be posted on the Settlement Website no later than sixty (60) calendar days before the fairness hearing scheduled by the Court, or as the Court otherwise directs. Any objection must be mailed to the Settlement Administrator. To be effective, any such objection must be in writing and include the contents described in paragraph 6(c), and must be mailed and postmarked no later than thirty (30) days before the fairness hearing scheduled by the Court, or as the Court otherwise directs. Any objections not raised properly and timely will be waived.

(c) To be effective, any objection described in paragraph 6(a) or paragraph 6(b) must contain all of the following information:

A. A reference at the beginning to this matter, *Baskin, et al. v. P.C. Richard & Son, LLC, et al.*, Docket No. OCN-L-000911-18.

B. The objector's full name, address, and telephone number.

C. Proof of Settlement Class membership consisting of the original or a copy of either: (1) a valid Claim Number assigned to the cardholder in this matter that begins with the letter A; (2) a valid Notice Number assigned to the cardholder in this matter that begins with the letter P together with proof that the cardholder used his or her own personal AmEx credit or debit card for one or more of the subject transactions at P.C. Richard during the period November 12, 2015 through August 18, 2016; or (3) the cardholder's receipt that contains the expiration date of cardholder's credit or debit card and shows that cardholder made a transaction at any P.C. Richard store at any time during the period November 12, 2015 through August 18, 2016, together with proof that that cardholder used his or her personal AmEx credit or debit card for one or more of the subject transactions.

D. A written statement of all grounds for the objection, accompanied by any legal support for such objection.

E. Copies of any papers, briefs, or other documents upon which the objection is based.

F. A statement of whether the objector intends to appear at the fairness hearing. If the objector intends to appear at the fairness hearing through counsel, the objection must also state the identity of all attorneys representing the objector who will appear at the fairness hearing.

G. Regarding any counsel who represents the objector or has a financial interest in the objection: (1) a list of cases in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the preceding five years, and (2) a copy of any orders concerning a ruling upon counsel's or the firm's prior objections that were issued by the trial and/or appellate courts in each listed case.

H. A statement by the objector under oath that: (1) he or she has read the objection in its entirety, (2) he or she is a member of the Settlement Class, (3) states the number of times in which the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, (4) identifies the caption of each case in which the objector has made such objection, and (5) attaches any orders concerning a ruling upon the objector's prior such objections that were issued by the trial and/or appellate courts in each listed case.

7. **Class Representative and Class Counsel.**

P.C. Richard shall not take a position with respect to the designation and appointment of Baskin as class representative (**"Class Representative"**) for the Settlement Class, and Chant Yedalian of Chant & Company A Professional Law Corporation, Bruce D. Greenberg of Lite DePalma Greenberg & Afanador, LLC, and Charles J. LaDuca and Peter Gil-Montllor of Cuneo Gilbert & Laduca, LLP as class counsel (**"Class Counsel"**) for the Settlement Class.

8. **Incentive (Service) Award to Plaintiff.**

Baskin will request to receive an incentive payment of up to $5,000, to be paid from the Cash Fund, to compensate her for her services as Class Representative. The award, if and when issued by the Court, will be paid from the Cash Fund by the Settlement Administrator delivering a check payable to "Ellen Baskin" within 10 days of the Settlement Date. This award will be in addition to any other benefit to which Baskin will be entitled under the settlement as a Settlement Class member. P.C. Richard shall not take a position as to Baskin’s request for an incentive award.

9. **Class Counsel's Fees and Costs.**

As part of the settlement, Class Counsel will request to receive an award of attorneys' fees of up to 33⅓% of the Cash Fund ($1,633,333.33), to be paid from the Cash Fund, plus an award of Class Counsel's litigation costs of up to $65,000, also to be paid from the Cash Fund. The awards, if and when issued by the Court, will be paid from the Cash Fund by the Settlement Administrator delivering a check or wire transfer to Class Counsel within 30 days of the Settlement Date. All attorneys' fees and costs paid to Class Counsel pursuant to this settlement shall be allocated between Class Counsel pursuant to the terms of the prior agreement among Class Counsel. P.C. Richard shall not take a position as to Class Counsel’s request for attorneys’ fees and costs.

10. **Settlement Shall Survive Any Intervening Change of Law.**

The Parties agree and intend that the settlement and its validity and enforceability shall not be affected by any future change, modification, reversal or clarification of the law, nor shall any future change, modification, reversal or clarification of the law provide either of the Parties with grounds to oppose preliminary or final approval of the settlement.

11. **<u>Release by the Settlement Class</u>**.

As of the Settlement Date, and except as to such rights or claims created by the settlement, Baskin and each Settlement Class member who does not timely opt-out of the settlement forever discharge and release P.C. Richard & Son, LLC and P.C. Richard & Son, Inc. as well as each of their insurers, predecessors, successors, corporate affiliates, corporate parents and corporate subsidiaries, and all of their respective officers, shareholders, directors, managers, members, partners, employees, attorneys, and agents, from any and all suits, claims, debts, liabilities, demands, obligations, guarantees, costs, expenses, attorneys' fees, damages, actions or causes of action, in law or equity, of whatever kind or nature, direct or indirect, known or unknown, arising out of the facts alleged in Plaintiff's Complaint concerning customer receipts printed at P.C. Richard stores from November 12, 2015 through August 18, 2016, or that could have been alleged in Plaintiff's Complaint concerning customer receipts printed at P.C. Richard stores from November 12, 2015 through August 18, 2016.

12. **<u>Settlement Date</u>.**

The settlement shall become effective (**"Settlement Date"**) upon the entry of a final order and judgment (**"Judgment"**) by the Court and the Judgment becoming final by virtue of it having become final and nonappealable through (i) the expiration of all allowable periods for appeal or discretionary appellate review without an appeal or request for discretionary appellate review having been filed, or (ii) final affirmance of the Judgment on appeal or remand, or final dismissal or denial of all such appeals and requests for discretionary review. The Court shall retain continuing jurisdiction over the interpretation, implementation and enforcement of the settlement.

13. **<u>Agreement Is Fully Enforceable, and any Disputes Shall Be Decided By Court</u>.**

The Parties agree that this Agreement shall be fully enforceable by the Court, including but not limited to by motion. To the extent that there is any disagreement concerning the contents of any claim form, Mailed Notice, Email Notice, Targeted Internet Notice and/or Full Notice, and/or deciding where or how the Targeted Internet Notice shall be made, the Parties agree that the Court shall resolve any such differences and the Court shall look to and use the terms of this Agreement in resolving any such differences.

14. **<u>Mutual Full Cooperation To Effectuate Settlement</u>.**

The Parties agree to cooperate and take all steps necessary and appropriate to effectuate the Settlement. The Parties shall diligently work together in good faith to seek preliminary and final court approval of the Settlement. Class Counsel shall prepare the preliminary and final approval motion and proposed orders concerning same. Class Counsel shall provide counsel for P.C. Richard a reasonable opportunity to review all preliminary and final approval papers. In the event that the Court fails to issue a preliminary approval order, or fails to issue a final approval order, the Parties agree to use their best efforts, consistent with this Agreement, to cure any defect(s) identified by the Court.

15. **Parties To Bear Own Attorney Fees and Costs Except As Otherwise Provided Herein.**

The Parties shall each bear their own attorneys' fees and costs, except as provided in this Agreement.

16. **Agreement Binding.**

This Agreement is binding upon, and inures to the benefit of, the Parties and their respective heirs, trustees, executors, administrators, successors and assigns.

17. **Counterparts.**

This Agreement may be executed and delivered in counterparts, each of which, including but not limited to pages transmitted by facsimile or in electronic PDF file format, when so executed and delivered, shall be deemed to be an original.

18. **Headings and Interpretations.**

The paragraph titles, headings, and captions in this Agreement are inserted as a matter of convenience and for reference, and in no way define, limit, extend, or describe the scope of this Settlement or any of its provisions. Each term of this Settlement is contractual and not merely a recital.

19. **Modification.**

This Agreement may not be changed, altered, or modified, except in a writing signed by the Parties and their counsel and approved by the Court.

AGREED TO AND ACCEPTED:

Plaintiff:

ELLEN BASKIN March 22, 2024

Ellen Baskin

By: Ellen Baskin

Counsel for Plaintiff and the Settlement Class:
CHANT & COMPANY
A Professional Law Corporation

March 22, 2024

By: Chant Yedalian

Counsel for Plaintiff and the Settlement Class:
LITE DEPALMA GREENBERG & AFANADOR, LLC

March 21 2024

By: Bruce D. Greenberg

Counsel for Plaintiff and the Settlement Class:
CUNEO GILBERT & LADUCA, LLP

March _21_, 2024

By: Charles J. LaDuca
Peter Gil-Montllor

Defendant:
P.C. RICHARD & SON, LLC

March 27, 2024

By: Cathy Winter
Chief Financial Officer

Defendant:
P.C. RICHARD & SON, INC.

March 27, 2024

By: Cathy Winter
Chief Financial Officer

Counsel for Defendants:
KELLEY DRYE & WARREN LLP

March 27, 2024

By: William S. Gyves
Glenn T. Graham

EXHIBIT “A”

CLAIM FORM-R

Baskin, et al. v. P.C. Richard & Son, LLC, et al.
Superior Court of New Jersey, Ocean County – Law Division
Docket No. OCN-L-000911-18

I. Your Information

Please clearly print or type your information in the spaces below:

Name:____

Street Address:____

City:________________ State:________________ Zip Code:________________

Phone Number:________________ E-mail Address (Optional):________________

II. Please provide either: (1) an original or copy of your customer receipt, OR (2) an original or copy of your credit or debit card statement

You must provide proof **in either one of the following two ways:**

Option (1): You may attach an original or a copy of your customer receipt that contains the expiration date of your American Express ("AmEx") credit or debit card and shows that you made a transaction at any P.C. Richard store at any time during the period November 12, 2015 through August 18, 2016. By completing this Claim Form-R you also confirm that you used your own personal AmEx card for the transaction.

OR

Option (2): You may attach an original or a copy of your American Express ("AmEx") credit or debit card statement showing that you made a transaction at any P.C. Richard store at any time during the period November 12, 2015 through August 18, 2016. By completing this Claim Form-R you also confirm that you used your own personal AmEx card for the transaction. Before providing your statement or copy of your statement, please redact (meaning you may white-out or mark-over) information contained in your credit or debit card statement to prevent it from showing things like your account numbers, your other purchases, etc. The only information that is required to show on your statement for purposes of making a claim under this Settlement is your name, address, and all of the details of your transaction from any P.C. Richard store, including the date and amount of your purchase.

You may make only one claim regardless of whether you have made one or more than one eligible credit or debit card transaction. Accordingly, if you had more than one eligible transaction you only need to provide proof of either one receipt or one statement showing that you made one credit or debit card transaction at any P.C. Richard store at any time during the period November 12, 2015 through August 18, 2016.

III. Please Sign This Form

I declare that the facts stated in this Claim Form are true and accurate.

Signature:____

INSTRUCTIONS FOR THE CLAIM FORM-R
Use this form only if you have NOT received written notice by postal mail or e-mail with a Claim Number or Notice Number

I. Deadline For Returning Your Completed Claim Form-R

If you have NOT received written notice by postal mail or e-mail with a Claim Number or Notice Number, then, to become an Eligible Settlement Class Member and obtain a payment you must complete and return a valid Claim Form-R **by no later than [DATE]**.

You may submit the Claim Form-R by U.S. mail, fax, or on-line submission.

If you are mailing the Claim Form-R, your completed Claim Form-R (together with the required documentation) must be mailed to the following address **postmarked no later than [DATE]:**

Atticus Administration LLC
P.O. BOX 64053
St. Paul, MN 55164

You may also send your Claim Form-R (together with the required documentation) by facsimile to the following facsimile number 1-???-???-????, **by no later than 11:59 p.m. Eastern Time on [DATE]**.

You may also submit your claim by completing and submitting an electronic version of the Claim Form-R (and uploading and submitting the required documentation) on the internet at www.ReceiptSettlement.com, **by no later than 11:59 p.m. Eastern Time on [DATE].**

II. You Must Complete Section I Of The Claim Form

You must complete Section I entitled "Your Information" by clearly printing or typing your information in the appropriate spaces. You must complete all of the spaces, except for your E-mail address which is optional.

III. You Must Also Provide The Necessary Document With Your Claim Form

As explained in Section II of the Claim Form, you must provide proof **in either one of the following two ways:**

Option (1): You may attach an original or a copy of your customer receipt that contains the expiration date of your American Express ("AmEx") credit or debit card and shows that you made a transaction at any P.C. Richard store at any time during the period November 12, 2015 through August 18, 2016. By completing this Claim Form-R you also confirm that you used your own personal AmEx card for the transaction.

OR

Option (2): You may attach an original or a copy of your American Express ("AmEx") credit or debit card statement showing that you made a transaction at any P.C. Richard store at any time during the period November 12, 2015 through August 18, 2016. By completing this Claim Form-R you also confirm that you used your own personal AmEx card for the transaction. Before providing your statement or copy of your statement, please redact (meaning you may white-out or mark-over) information contained in your credit or debit card statement to prevent it from showing things like your account numbers, your other purchases, etc. The only information that is required to show on your statement for purposes of making a claim under this Settlement is your name, address, and all of the details of your transaction from any P.C. Richard store, including the date and amount of your purchase.

You may make only one claim regardless of whether you have made one or more than one eligible credit or debit card transaction. Accordingly, if you had more than one eligible transaction you only need to provide proof of either one receipt or one statement showing that you made one credit or debit card transaction at any P.C. Richard store at any time during the period November 12, 2015 through August 18, 2016.

Although you may submit either the original or a copy of either your receipt or card statement, if you decide to send an original, it is encouraged that you make and keep a copy for yourself. We will not be responsible for original documents that are lost.

IV. You Must Sign In The Space Provided In Section III Of The Claim Form

You must also sign the Claim Form in the space provided in Section III of the Claim Form.

EXHIBIT "B"

SHORT-FORM CLAIM FORM

Baskin, et al. v. P.C. Richard & Son, LLC, et al.
Superior Court of New Jersey, Ocean County – Law Division
Docket No. OCN-L-000911-18

I. Your Information

[Preprinted] Name:____

[Preprinted] Street Address:____

[Preprinted] City:_______ [Preprinted] State:______ [Preprinted] Zip Code:___________

[Preprinted] Phone Number:________________ [Preprinted] E-mail Address:________________

II. Your Transaction Information

The records show that you used an American Express ("AmEx") credit or debit card for the following transaction(s)**:**

[Preprinted transaction record(s)]

III. Please Sign This Form

By completing this Short-Form Claim Form, I declare that I used my own personal American Express card for at least one transaction that is referenced in Section II above.

Signature:____

INSTRUCTIONS FOR THE SHORT-FORM CLAIM FORM
Use this form only if you have received written notice with a Notice Number that begins with the letter P

I. Deadline For Returning Your Completed Short-Form Claim Form

If you have already received written notice by postal mail or e-mail which contains a Notice Number that begins with the letter P, this means that the records show that you used an American Express ("AmEx") credit or debit card for one or more transactions at P.C. Richard during the period November 12, 2015 through August 18, 2016, but it is unknown whether the AmEx card you used is your personal card or a non-consumer business card.

Therefore, if you received written notice by postal mail or email which contains a Notice Number that begins with the letter P, in order to obtain a payment, in an amount up to $1,000.00, you must submit a Short-Form Claim Form attesting that at least one transaction shown in the records was made with your personal American Express ("AmEx") credit or debit card. Once you timely submit your Short-Form Claim Form and it is approved you will become an Eligible Settlement Class Member.

You may submit the Short-Form Claim Form by U.S. mail, fax, or on-line submission.

If you are mailing the Short-Form Claim Form, your completed form must be mailed to the following address **postmarked no later than [DATE]:**

Atticus Administration LLC
P.O. BOX 64053
St. Paul, MN 55164

You may also send your completed Short-Form Claim Form by facsimile to the following facsimile number 1-???-???-????, **by no later than 11:59 p.m. Eastern Time on [DATE]**.

You may also submit your Short-Form Claim Form by completing and submitting an electronic version of the Short-Form Claim Form on the internet at www.ReceiptSettlement.com, **by no later than 11:59 p.m. Eastern Time on [DATE].**

II. You Must Sign In The Space Provided In Section III Of The Claim Form

You must also sign the Short-Form Claim Form in the space provided in Section III of the Short-Form Claim Form.

EXHIBIT "C"

A court ordered this Notice.
This is not a solicitation from a lawyer.

A proposed settlement has been reached in a pending class action lawsuit against P.C. Richard & Son, LLC and P.C. Richard & Son, Inc. (collectively "P.C. Richard") and your legal rights may be affected by the lawsuit and a proposed settlement of the lawsuit.

The class action lawsuit, *Baskin, et al. v. P.C. Richard & Son, LLC, et al.*, Superior Court of New Jersey, Ocean County – Law Division, Docket No. OCN-L-000911-18, alleges that P.C. Richard violated the Fair and Accurate Credit Transactions Act or FACTA, 15 U.S.C. §1681c(g), by printing on customer receipts the customer's credit card or debit card expiration date. P.C. Richard disputes the class action allegations and denies that it violated FACTA. Both sides have agreed upon a proposed settlement of the class action lawsuit to avoid the uncertainty and cost of a trial, and to provide benefits to class members.

P.C. RICHARD & SON SETTLEMENT
C/O ATTICUS ADMINISTRATION
PO BOX 64053
ST PAUL, MN 55164

BARCODE

CLAIM NUMBER: **A**<<CLAIM # >>
<<FIRST NAME>> <<LAST NAME>>
<<ADDRESS 1>> <<ADDRESS 2>>
<<CITY> <<STATE>> <<ZIP>>

WHO IS INCLUDED? You received this Notice because transaction records show you are a member of the class. You are a member of the class if you used your personal American Express ("AmEx") credit or debit card at any P.C. Richard & Son store within the United States at any time during the period November 12, 2015 through August 18, 2016 and were provided an electronically printed receipt at the point of the sale or transaction, on which receipt was printed the expiration date of your AmEx credit card or debit card.

WHAT CAN I GET? If the settlement is approved and becomes final, each class member may be entitled to a payment in an amount not to exceed $1,000. The actual amount of the payment depends on the number of class members who are ultimately determined to be eligible settlement class members. P.C. Richard shall also implement a written company policy which states that they will not print more than the last five digits of the credit or debit card number or the credit or debit card expiration date upon any printed receipt provided to any customer that uses a credit or debit card to transact business with P.C. Richard.

YOU DO NOT NEED TO SUBMIT A CLAIM FORM OR DO ANYTHING ELSE IF YOU WOULD LIKE TO RECEIVE PAYMENT. You are receiving this Notice because records show you are an eligible settlement class member. There is nothing more you need to do in order to obtain a payment, if the settlement becomes final. If you do nothing, and the settlement is approved and becomes final, you will remain in the class, receive a payment from the settlement, and be bound by the terms of the settlement, including the release of claims, and all of the Court's orders and judgment.

OTHER OPTIONS. If you do not want to be legally bound by the settlement, you must exclude yourself by [**DATE, 2024**]. If you stay in the settlement, you may object to it by [**DATE, 2024**]. A more detailed Full Notice is available to explain your options, including how to exclude yourself or object. Please visit the website at: www.ReceiptSettlement.com or call the toll-free number 1-8XX-XXX-XXXX for a copy of the more detailed Full Notice. On **[DATE, 2024], at X:X0 X.m**. the Court will hold a fairness hearing to determine whether to approve the settlement, settlement Class Counsel's request for attorneys' fees and costs, and an incentive award for the settlement Class Representative. You or your own lawyer, if you have one, may appear and speak at the fairness hearing at your own expense, but you do not have to. The date and time of the fairness hearing may be changed without further notice. This Notice is only a summary. For more information, including updates on dates and times, call or visit the website below.

Questions? Call 1-8XX-XXX-XXXX or visit www.ReceiptSettlement.com

EXHIBIT "D"

A court ordered this Notice.
This is not a solicitation from a lawyer.

A proposed settlement has been reached in a pending class action lawsuit against P.C. Richard & Son, LLC and P.C. Richard & Son, Inc. (collectively "P.C. Richard") and your legal rights may be affected by the lawsuit and a proposed settlement of the lawsuit.

The class action lawsuit, *Baskin, et al. v. P.C. Richard & Son, LLC, et al.*, Superior Court of New Jersey, Ocean County – Law Division, Docket No. OCN-L-000911-18, alleges that P.C. Richard violated the Fair and Accurate Credit Transactions Act or FACTA, 15 U.S.C. §1681c(g), by printing on customer receipts the customer's credit card or debit card expiration date. P.C. Richard disputes the class action allegations and denies that it violated FACTA. Both sides have agreed upon a proposed settlement of the class action lawsuit to avoid the uncertainty and cost of a trial, and to provide benefits to class members.

P.C. RICHARD & SON SETTLEMENT
C/O ATTICUS ADMINISTRATION
PO BOX 64053
ST PAUL, MN 55164

BARCODE

NOTICE NUMBER: **P**<<NOTICE # >>
<<FIRST NAME>> <<LAST NAME>>
<<ADDRESS 1>> <<ADDRESS 2>>
<<CITY> <<STATE>> <<ZIP>>

WHO IS INCLUDED? You are a member of the class if you used your personal American Express ("AmEx") credit or debit card at any P.C. Richard & Son store within the United States at any time during the period November 12, 2015 through August 18, 2016 and were provided an electronically printed receipt at the point of the sale or transaction, on which receipt was printed the expiration date of your AmEx credit card or debit card.

WHAT CAN I GET? If the settlement is approved and becomes final, each class member may be entitled to a payment in an amount not to exceed $1,000. The actual amount of the payment depends on the number of class members who are ultimately determined to be eligible settlement class members. P.C. Richard shall also implement a written company policy which states that they will not print more than the last five digits of the credit or debit card number or the credit or debit card expiration date upon any printed receipt provided to any customer that uses a credit or debit card to transact business with P.C. Richard.

TO BE ELIGIBLE FOR PAYMENT, YOU MUST SUBMIT A SHORT-FORM CLAIM FORM AND ESTABLISH YOU ARE A CLASS MEMBER. You are receiving this Notice because records show that you used an AmEx credit or debit card for one or more transactions at P.C. Richard during the period November 12, 2015 through August 18, 2016, but it is unknown whether the AmEx card you used is your personal card or a non-consumer business card. If you would like to become an eligible settlement class member, and receive payment if the settlement becomes final, you must submit a Short-Form Claim Form and declare that you used your own personal AmEx card for at least one transaction that is referenced in your Short-Form Claim Form. You can submit a Short-Form Claim Form online at www.ReceiptSettlement.com using your Notice Number printed on the front of this post card or you may call 1-8XX-XXX-XXXX and ask that your Short-Form Claim Form be mailed to you. The deadline to submit a Short-Form Claim Form is [**DATE, 2024]**. If you are a class member and submit a Short-Form Claim Form, and the settlement is approved and becomes final, you will also remain in the class, and be bound by the terms of the settlement, including the release of claims, and all of the Court's orders and judgment.

OTHER OPTIONS. If you are a class member and do nothing, and the settlement is approved and becomes final, you will not receive a payment, but you will remain in the class, and be bound by the terms of the settlement, including the release of claims, and all of the Court's orders and judgment. If you do not want to be legally bound by the settlement, you must exclude yourself by [**DATE, 2024]**. If you stay in the settlement, you may object to it by [**DATE, 2024]**. A more detailed Full Notice is available to explain your options, including how to exclude yourself or object. Please visit the website at: www.ReceiptSettlement.com or call the toll-free number 1-8XX-XXX-XXXX for a copy of the more detailed Full Notice. On **[DATE, 2024]**, **at X:X0 X.m**. the Court will hold a fairness hearing to determine whether to approve the settlement, settlement Class Counsel's request for attorneys' fees and costs, and an incentive award for the settlement Class Representative. You or your own lawyer, if you have one, may appear and speak at the fairness hearing at your own expense, but you do not have to. The date and time of the fairness hearing may be changed without further notice. This Notice is only a summary. For more information, including updates on dates and times, call or visit the website below.

Questions? Call 1-8XX-XXX-XXXX or visit www.ReceiptSettlement.com

EXHIBIT "E"

Email Notice A

Subject: Notice of P.C. Richard & Son Class Action Settlement

***A court ordered this Notice*.**
This is not a solicitation from a lawyer.

CLAIM NUMBER: **A**<<CLAIM # >>

WHAT IS THIS ABOUT? A proposed settlement has been reached in a pending class action lawsuit against P.C. Richard & Son, LLC and P.C. Richard & Son, Inc. (collectively "P.C. Richard") and your legal rights may be affected by the lawsuit and a proposed settlement of the lawsuit.

The class action lawsuit, *Baskin, et al. v. P.C. Richard & Son, LLC, et al.*, Superior Court of New Jersey, Ocean County – Law Division, Docket No. OCN-L-000911-18, alleges that P.C. Richard violated the Fair and Accurate Credit Transactions Act or FACTA, 15 U.S.C. §1681c(g), by printing on customer receipts the customer's credit card or debit card expiration date. P.C. Richard disputes the class action allegations and denies that it violated FACTA. Both sides have agreed upon a proposed settlement of the class action lawsuit to avoid the uncertainty and cost of a trial, and to provide benefits to class members.

WHO IS INCLUDED? You received this Notice because transaction records show you are a member of the class. You are a member of the class if you used your personal American Express ("AmEx") credit or debit card at any P.C. Richard & Son store within the United States at any time during the period November 12, 2015 through August 18, 2016 and were provided an electronically printed receipt at the point of the sale or transaction, on which receipt was printed the expiration date of your AmEx credit card or debit card.

WHAT CAN I GET? If the settlement is approved and becomes final, each class member may be entitled to a payment in an amount not to exceed $1,000. The actual amount of the payment depends on the number of class members who are ultimately determined to be eligible settlement class members. P.C. Richard shall also implement a written company policy which states that they will not print more than the last five digits of the credit or debit card number or the credit or debit card expiration date upon any printed receipt provided to any customer that uses a credit or debit card to transact business with P.C. Richard.

[---]

[For cardholders for whom the Settlement Administrator has a postal mailing address:]

YOU DO NOT NEED TO SUBMIT A CLAIM FORM OR DO ANYTHING ELSE IF YOU WOULD LIKE TO RECEIVE PAYMENT. You are receiving this Notice because records show you are an eligible settlement class member. There is nothing more you need to do in order to obtain a payment, if the settlement becomes final. If you do nothing, and the settlement is approved and becomes final, you will remain in the class, receive a payment from the settlement, and be bound by the terms of the settlement, including the release of claims, and all of the Court's orders and judgment.

[---]

[For cardholders for whom the Settlement Administrator does not have a postal mailing address:]

YOU DO NOT NEED TO SUBMIT A CLAIM FORM, BUT YOU DO NEED TO PROVIDE YOUR MAILING ADDRESS IF YOU WOULD LIKE TO RECEIVE PAYMENT. You are receiving this Notice because records show you are an eligible settlement class member. However, we do not have a mailing address for you where a settlement check may be mailed to you, if the settlement becomes final. Please reply to this email [hyperlink] and provide your current mailing address. Otherwise, if you do not timely provide your current mailing address, you will not receive a payment. If you do nothing, and the settlement is approved and becomes final, you will not receive a payment from the settlement, but you will remain in the class, and be bound by the terms of the settlement, including the release of claims, and all of the Court's orders and judgment.

[---]

OTHER OPTIONS. If you do not want to be legally bound by the settlement, you must exclude yourself by [**DATE, 2024]**. If you stay in the settlement, you may object to it by [**DATE, 2024]**. A more detailed Full Notice is available to explain your options, including how to exclude yourself or object. Please visit the website at: www.ReceiptSettlement.com or call the toll-free number 1-8XX-XXX-XXXX for a copy of the more detailed Full Notice. On **[DATE, 2024], at X:X0 X.m**. the Court will hold a fairness hearing to determine whether to approve the settlement, settlement Class Counsel's request for attorneys' fees and costs, and an incentive award for the settlement Class Representative. You or your own lawyer, if you have one, may appear and speak at the fairness hearing at your own expense, but you do not have to. The date and time of the fairness hearing may be changed without further notice. This Notice is only a summary. For more information, including updates on dates and times, call 1-8XX-XXX-XXXX or visit www.ReceiptSettlement.com.

WHO REPRESENTS ME? The Court appointed lawyers to represent you and other class members. These lawyers are called Class Counsel. Class Counsel are Chant Yedalian of Chant & Company A Professional Law Corporation, Bruce D. Greenberg of Lite DePalma Greenberg & Afanador, LLC, and Charles J. LaDuca and Peter Gil-Montllor of Cuneo Gilbert & Laduca, LLP. You do not need to pay for these lawyers out of your own pocket. Class Counsel will ask the Court to approve payment of up to $1,633,333.33 for attorneys' fees, to be paid from the cash fund of $4,900,000 ("Cash Fund") established for this settlement, plus an award of Class Counsel's litigation costs of up to $65,000, also to be paid from the Cash Fund. The fees and costs would pay Class Counsel for investigating the facts and law, prosecuting the matter as well as appeals, negotiating the settlement, causing P.C. Richard to change its receipt printing processes and implement a new written policy concerning FACTA, and implementing the settlement. Class

Counsel will also ask the Court to approve payment of up to $5,000, to be paid from the Cash Fund, to Ellen Baskin as an incentive award for her services as the Class Representative. If you want to be represented by your own lawyer, you may hire one at your own expense, but you do not have to.

EXHIBIT "F"

Email Notice P

Subject: Notice of P.C. Richard & Son Class Action Settlement

A court ordered this Notice.
This is not a solicitation from a lawyer.

NOTICE NUMBER: **P**<<NOTICE # >>

WHAT IS THIS ABOUT? A proposed settlement has been reached in a pending class action lawsuit against P.C. Richard & Son, LLC and P.C. Richard & Son, Inc. (collectively "P.C. Richard") and your legal rights may be affected by the lawsuit and a proposed settlement of the lawsuit.

The class action lawsuit, *Baskin, et al. v. P.C. Richard & Son, LLC, et al.*, Superior Court of New Jersey, Ocean County – Law Division, Docket No. OCN-L-000911-18, alleges that P.C. Richard violated the Fair and Accurate Credit Transactions Act or FACTA, 15 U.S.C. §1681c(g), by printing on customer receipts the customer's credit card or debit card expiration date. P.C. Richard disputes the class action allegations and denies that it violated FACTA. Both sides have agreed upon a proposed settlement of the class action lawsuit to avoid the uncertainty and cost of a trial, and to provide benefits to class members.

WHO IS INCLUDED? You are a member of the class if you used your personal American Express ("AmEx") credit or debit card at any P.C. Richard & Son store within the United States at any time during the period November 12, 2015 through August 18, 2016 and were provided an electronically printed receipt at the point of the sale or transaction, on which receipt was printed the expiration date of your AmEx credit card or debit card.

WHAT CAN I GET? If the settlement is approved and becomes final, each class member may be entitled to a payment in an amount not to exceed $1,000. The actual amount of the payment depends on the number of class members who are ultimately determined to be eligible settlement class members. P.C. Richard shall also implement a written company policy which states that they will not print more than the last five digits of the credit or debit card number or the credit or debit card expiration date upon any printed receipt provided to any customer that uses a credit or debit card to transact business with P.C. Richard.

TO BE ELIGIBLE FOR PAYMENT, YOU MUST SUBMIT A SHORT-FORM CLAIM FORM AND ESTABLISH YOU ARE A CLASS MEMBER. You are receiving this Notice because records show that you used an AmEx credit or debit card for one or more transactions at P.C. Richard during the period November 12, 2015 through August 18, 2016, but it is unknown whether the AmEx card you used is your personal card or a non-consumer business card. If you would like to become an eligible settlement class member, and receive payment if the settlement becomes final, you must submit a Short-Form Claim Form and declare that you used your own personal AmEx card for at least one transaction that is referenced in your Short-Form Claim Form. You can submit a Short-Form Claim Form online at www.ReceiptSettlement.com using your Notice Number shown near the top of this email or you may call 1-8XX-XXX-XXXX and ask that your Short-Form Claim Form be mailed to you. The deadline to submit a Short-Form Claim Form is [**DATE, 2024]**. If you are a class member and submit a Short-Form Claim Form, and the settlement is approved and becomes final, you will also remain in the class, and be bound by the terms of the settlement, including the release of claims, and all of the Court's orders and judgment.

OTHER OPTIONS. If you are a class member and do nothing, and the settlement is approved and becomes final, you will not receive a payment, but you will remain in the class, and be bound by the terms of the settlement, including the release of claims, and all of the Court's orders and judgment. If you do not want to be legally bound by the settlement, you must exclude yourself by [**DATE, 2024]**. If you stay in the settlement, you may object to it by [**DATE, 2024]**. A more detailed Full Notice is available to explain your options, including how to exclude yourself or object. Please visit the website at: www.ReceiptSettlement.com or call the toll-free number 1-8XX-XXX-XXXX for a copy of the more detailed Full Notice. On **[DATE, 2024], at X:X0 X.m**. the Court will hold a fairness hearing to determine whether to approve the settlement, settlement Class Counsel's request for attorneys' fees and costs, and an incentive award for the settlement Class Representative. You or your own lawyer, if you have one, may appear and speak at the fairness hearing at your own expense, but you do not have to. The date and time of the fairness hearing may be changed without further notice. This Notice is only a summary. For more information, including updates on dates and times, call 1-8XX-XXX-XXXX or visit www.ReceiptSettlement.com.

WHO REPRESENTS ME? The Court appointed lawyers to represent class members. These lawyers are called Class Counsel. Class Counsel are Chant Yedalian of Chant & Company A Professional Law Corporation, Bruce D. Greenberg of Lite DePalma Greenberg & Afanador, LLC, and Charles J. LaDuca and Peter Gil-Montllor of Cuneo Gilbert & Laduca, LLP. You do not need to pay for these lawyers out of your own pocket. Class Counsel will ask the Court to approve payment of up to $1,633,333.33 for attorneys' fees, to be paid from the cash fund of $4,900,000 ("Cash Fund") established for this settlement, plus an award of Class Counsel's litigation costs of up to $65,000, also to be paid from the Cash Fund. The fees and costs would pay Class Counsel for investigating the facts and law, prosecuting the matter as well as appeals, negotiating the settlement, causing P.C. Richard to change its receipt printing processes and implement a new written policy concerning FACTA, and implementing the settlement. Class Counsel will also ask the Court to approve payment of up to $5,000, to be paid from the Cash Fund, to Ellen Baskin as an incentive award for her services as the Class Representative. If you want to be represented by your own lawyer, you may hire one at your own expense, but you do not have to.

EXHIBIT "G"

Digital Ad Samples

Search Ads

Class Action Lawsuit| P.C. RICHARD & SON
Ad www.ReceiptSettlement.com
A Class Action Settlement May Affect Your Rights. Baskin, et al v P.C Richard & Son Superior Court of New Jersey, Ocean County – Law Division Docket No. OCN-L-000911-18

P.C. Richard & Son| Class Action Settlement
Ad www.ReceiptSettlement.com
A Class Action Settlement May Affect Your Rights. Baskin, et al v P.C Richard & Son Superior Court of New Jersey, Ocean County – Law Division Docket No. OCN-L-000911-18

Mobile

P.C. RICHARD & SON | Class Action Settlement
Ad www.ReceiptSettlement.com
A Class Action Settlement May Affect Your Rights. Baskin, et al v P.C Richard & Son. Superior Court of New Jersey, Ocean County – Law Division Docket No. OCN-L-000911-18. Visit the website to learn more.

Display Ads

P.C. RICHARD & SON
A class action lawsuit may affect your rights.
Visit the Settlement Website to learn more.

Baskin, et al v P.C Richard & Son
Superior Court of New Jersey, Ocean County – Law Division Docket No. OCN-L-000911-18

LEARN MORE

P.C. RICHARD & SON
If you made a purchase at any P.C. Richard & Son store your rights may be affected

LEARN MORE

CLASS ACTION SETTLEMENT
If you made a purchase at any P.C. Richard & Son store your rights may be affected.

LEARN MORE

EXHIBIT "H"

SUPERIOR COURT OF NEW JERSEY
OCEAN COUNTY – LAW DIVISION

ELLEN BASKIN, KATHLEEN O'SHEA and SANDEEP TRISAL, on behalf of themselves and all others similarly situated, Plaintiffs, v. P.C. RICHARD & SON, LLC (d/b/a P.C. Richard & Son) and P.C. RICHARD & SON, INC. (d/b/a P.C. Richard & Son), Defendants.	Docket No. OCN-L-000911-18 Hon. Valter H. Must, J.S.C.

NOTICE OF CLASS ACTION LAWSUIT AND SETTLEMENT

YOU ARE NOT BEING SUED, BUT READ THIS NOTICE CAREFULLY, YOUR LEGAL RIGHTS MAY BE AFFECTED

You may be a part of a pending class action lawsuit against P.C. Richard & Son, LLC and P.C. Richard & Son, Inc. (collectively "P.C. Richard") and your legal rights may be affected by the lawsuit and a proposed Settlement of the lawsuit. Please read the rest of this notice to find out more.

What is this About?

A class action lawsuit is pending against P.C. Richard. The lawsuit alleges that P.C. Richard violated the Fair and Accurate Credit Transactions Act or FACTA, 15 U.S.C. §1681c(g), by printing on customer receipts the customer's credit card or debit card expiration date. P.C. Richard disputes the class action allegations and denies that it violated FACTA. The Court has not yet decided in favor of either the Class or P.C. Richard. Instead, both sides have agreed upon a proposed Settlement of the class action lawsuit to avoid the uncertainty and cost of a trial, and to provide benefits to Class members. P.C. Richard does not admit any violation of FACTA by agreeing to the proposed Settlement.

What is a Class Action?

In a class action, one or more people called Class Representatives sue on behalf of a group of people (referred to as the Class) who have similar claims. One court resolves the issues for all of the people who are a part of the Class (referred to as Class members), except for those people who exclude themselves from the Class. The Class Representative in this case is Ellen Baskin.

Am I a Class Member?

You are a member of the Class if you used your personal American Express ("AmEx") credit or debit card at any P.C. Richard & Son store within the United States at any time during the period November 12, 2015 through August 18, 2016 and were provided an electronically printed receipt at the point of the sale or transaction, on which receipt was printed the expiration date of your AmEx credit card or debit card.

Why Am I Receiving This Notice?

If you are a member of the Class, your legal rights will be affected by the Settlement unless you exclude yourself from the Class. The Superior Court of New Jersey, Ocean County – Law Division, authorized this notice to inform Class members about this case and proposed Settlement and Class members' options.

What are The Settlement Benefits and What Can I Get From the Settlement?

P.C. Richard will establish a common fund in the amount of $4,900,000 ("Cash Fund").

If you are a Class member, you may be entitled to an amount up to $1,000.00.

Please refer to the section below entitled "How Can I Get Payment?" to find out what you need to do to receive a payment.

If the Court approves the proposed Settlement, P.C. Richard shall also implement a written company policy which states that they will not print more than the last five digits of the credit or debit card number or the credit or debit card expiration date upon any printed receipt provided to any customer that uses a credit or debit card to transact business with P.C. Richard.

How Can I Get Payment?

Did you receive written notice with a Claim Number that begins with the letter A?: If you have already received written notice by postal mail or e-mail which states that you are an Eligible Settlement Class Member and assigns you a Claim Number which begins with the letter A, there is nothing more you need to do in order to obtain a payment, in an amount up to $1,000.00, if the Settlement becomes final.

Did you receive written notice with a Notice Number that begins with the letter P?: If you have already received written notice by postal mail or e-mail which contains a Notice Number that begins with the letter P, this means that the records show that you used an AmEx credit or debit card for one or more transactions at P.C. Richard during the period November 12, 2015 through August 18, 2016, but it is unknown whether the AmEx card you used is your personal card or a non-consumer business card.

Therefore, if you received written notice by postal mail or email which contains a Notice Number that begins with the letter P, in order to obtain a payment, in an amount up to $1,000.00, you must submit a Short-Form Claim Form attesting that at least one transaction shown in the records was made with your personal AmEx credit or debit card. Once you timely submit your Short-Form Claim Form and it is approved you will become an Eligible Settlement Class Member.

If you are mailing the Short-Form Claim Form, your completed form must be mailed to the following address **postmarked no later than [DATE]:**

Atticus Administration LLC
P.O. BOX 64053
St. Paul, MN 55164

You may also send your completed Short-Form Claim Form by facsimile to the following facsimile number 1-???-???-????, **by no later than 11:59 p.m. Eastern Time on [DATE]**.

You may also submit your Short-Form Claim Form by completing and submitting an electronic version of the Short-Form Claim Form on the internet at www.ReceiptSettlement.com, **by no later than 11:59 p.m. Eastern Time on [DATE].**

If you have NOT received written notice by postal mail or e-mail with a Claim Number or Notice Number, then you must submit a Claim Form-R in order to obtain payment: If you have NOT received written notice by postal mail or e-mail with a Claim Number or Notice Number, then, to become an Eligible Settlement Class Member and obtain a payment, in an amount up to $1,000.00, you must complete and return a valid Claim Form-R. The Claim Form-R requires you to provide proof in either one of the following two ways:

Option (1): You may attach an original or a copy of your customer receipt that contains the expiration date of your American Express ("AmEx") credit or debit card and shows that you made a transaction at any P.C. Richard store at any time during the period November 12, 2015 through August 18, 2016. You must also state that you used your own personal AmEx card for the transaction.

OR

<u>Option (2)</u>: You may attach an original or a copy of your AmEx credit or debit card statement showing that you made a transaction at any P.C. Richard store at any time during the period November 12, 2015 through August 18, 2016. You must also state that you used your own personal AmEx card for the transaction. Before providing your statement or copy of your statement, please redact (meaning you may white-out or mark-over) information contained in your credit or debit card statement to prevent it from showing things like your account numbers, your other purchases, etc. The only information that is required to show on your statement for purposes of making a claim under this Settlement is your name, address, and all of the details of your transaction from any P.C. Richard store, including the date and amount of your purchase.

You may make only one claim regardless of whether you have made one or more than one eligible credit or debit card transaction. Accordingly, if you had more than one eligible transaction you only need to provide proof of either one receipt or one statement showing that you made one credit or debit card transaction using your personal AmEx card at any P.C. Richard store at any time during the period November 12, 2015 through August 18, 2016.

Although you may submit either the original or a copy of either your receipt or card statement, if you decide to send an original, it is encouraged that you make and keep a copy for yourself. We will not be responsible for original documents that are lost.

If you are mailing the Claim Form-R, your completed form (together with the required documentation) must be mailed to the following address **postmarked no later than [DATE]:**

Atticus Administration LLC
P.O. BOX 64053
St. Paul, MN 55164

You may also send your Claim Form-R (together with the required documentation) by facsimile to the following facsimile number 1-???-???-????, **by no later than 11:59 p.m. Eastern Time on [DATE]**.

You may also submit your claim by completing and submitting an electronic version of the Claim Form-R (and uploading and submitting the required documentation) on the internet at www.ReceiptSettlement.com, **by no later than 11:59 p.m. Eastern Time on [DATE].**

Please visit www.ReceiptSettlement.com to get a copy of the Claim Form-R or to complete and submit the Claim Form-R on the internet.

If the Court approves the proposed Settlement and the decision becomes final, payments will be distributed no later than 90 days after the Settlement Date. Please be patient.

<u>If I Received a Claim Number That Begins With the Letter A, or I Submit a Valid and Timely Claim, What Will be the Amount of My Payment?</u>

P.C. Richard will establish a common fund in the amount of $4,900,000 ("Cash Fund"). After subtracting from the Cash Fund Class Counsel's attorneys' fees and costs, an incentive (service) award payment to the Class Representative, and Administration Costs (which include notice and other costs), the remaining amount ("Net Cash Fund") will be divided by the total number of Eligible Settlement Class Members to determine each Eligible Settlement Class Member's pro-rata share ("Pro-Rata Share"). For purposes of determining the Pro-Rata Share, each Eligible Settlement Class Member will be counted once, and may not receive more than the Pro-Rata Share, regardless of whether they made one or more than one transaction during the Settlement Class Period.

The Settlement Class Period is the time during the period November 12, 2015 through August 18, 2016. An Eligible Settlement Class Member's Pro-Rata Share shall not under any circumstances exceed $1,000. Each Eligible Settlement Class Member will be mailed a check in the amount of the Pro-Rata Share, to be paid from the Net Cash Fund. All settlement checks will have an expiration date stated on them that will be calculated as 180 days from the date the check is issued.

If any residual funds from the Net Cash Fund remain due to uncashed settlement checks or for any other reason, any and all such residual funds (including any funds remaining from un-cashed checks) will be distributed *cy pres* to the following 501(c)(3) charity: Electronic Privacy Information Center (https://epic.org/about/non-profit/).

<u>What Am I Giving Up to Receive Settlement Benefits?</u>

Unless you exclude yourself, you are a Class member, and that means you will be legally bound by all orders and judgments of the Court, and you will not be able to sue, or continue to sue P.C. Richard or any of the other persons or entities referenced in the "Release by the Settlement Class" paragraph below, about the issues in this case. You will not be responsible for any out-of-pocket costs or attorneys' fees concerning this case if you stay in the Class.

Staying in the Class also means that you agree to the following release of claims, which describes exactly the legal claims that you give up:

<u>Release by the Settlement Class</u>. As of the Settlement Date, and except as to such rights or claims created by the settlement, Baskin and each Settlement Class member who does not timely opt-out of the settlement forever discharge and release P.C. Richard & Son, LLC and P.C. Richard & Son, Inc. as well as each of their insurers, predecessors, successors, corporate affiliates, corporate parents and corporate subsidiaries, and all of their respective officers, shareholders, directors, managers, members, partners, employees, attorneys, and agents, from any and all suits, claims, debts, liabilities, demands, obligations, guarantees, costs, expenses, attorneys' fees, damages, actions or causes of action, in law or equity, of whatever kind or nature, direct or indirect, known or unknown, arising out of the facts alleged in Plaintiff's Complaint concerning customer receipts printed at P.C. Richard stores from November 12, 2015 through August 18, 2016, or that could have been alleged in Plaintiff's Complaint concerning customer receipts printed at P.C. Richard stores from November 12, 2015 through August 18, 2016.

Can I Exclude Myself From the Settlement and What Will That Mean For Me?

Yes. If you don't want to receive benefits from this Settlement, but you want to keep the right to sue P.C. Richard or any of the other persons or entities referenced in the "Release by the Settlement Class" paragraph above, about the issues in this case, then you must take steps to exclude yourself from the Settlement. To exclude yourself from the Settlement you must include your name, address, telephone number, and your signature on correspondence requesting that you be excluded as a Class member from *Baskin, et al. v. P.C. Richard & Son, LLC, et al.*, Docket No. OCN-L-000911-18. To be effective, you must mail your request for exclusion, **postmarked no later than** **[Opt-Out Deadline]**, to the Settlement Administrator at the following address:

Atticus Administration LLC
P.O. BOX 64053
St. Paul, MN 55164

If you request to be excluded from the Settlement, then: (a) you will not be a part of the Settlement; (b) you will have no right to receive any benefits under the Settlement; (c) you will not be bound by the terms of the Settlement; and (d) you will not have any right to object to the terms of the Settlement or be heard at the fairness (final approval) hearing.

If I Don't Exclude Myself, Can I Sue for the Same Thing Later?

No. Unless you exclude yourself from the Settlement, you give up the right to sue P.C. Richard and the other persons and entities referenced in the "Release by the Settlement Class" paragraph above, for the claims that this Settlement resolves. If you have a pending lawsuit against P.C. Richard or any of the other persons or entities referenced in the "Release by the Settlement Class" paragraph above, for any of the claims that this Settlement resolves, speak to your lawyer in your case immediately. You must exclude yourself from this Settlement to continue your own lawsuit. Remember, the exclusion deadline is **[Opt-Out Deadline]**.

What if I Don't Like the Settlement?

If you are a Class member, you can object to the Settlement if you do not like any part of it. You must give reasons why you think the Court should not approve it. You can also object to the Class Representative's service (or incentive) award. You can also object to Class Counsel's attorney's fees and costs. The Court will consider your views. To object, you must send a letter saying that you object to the proposed settlement of *Baskin, et al. v. P.C. Richard & Son, LLC, et al.*, Docket No. OCN-L-000911-18. Your letter must include all of the following:

A. A reference at the beginning to this matter, *Baskin, et al. v. P.C. Richard & Son, LLC, et al.*, Docket No. OCN-L-000911-18.

B. Your full name, address, and telephone number.

C. Proof of Settlement Class membership consisting of the original or a copy of either: (1) a valid Claim Number assigned to you in this matter that begins with the letter A; (2) a valid Notice Number assigned to you in this matter that begins with the letter P together with proof that that you used your personal American Express ("AmEx") credit or debit card for one or more of the subject transactions at P.C. Richard during the period November 12, 2015 through August 18, 2016; or (3) your customer receipt that contains the expiration date of your credit or debit card and shows that you made a transaction at any P.C. Richard store at any time during the period November 12, 2015 through August 18, 2016, together with proof that that you used your personal AmEx credit or debit card for one or more of the subject transactions.

D. A written statement of all grounds for your objection, accompanied by any legal support for such objection.

E. Copies of any papers, briefs, or other documents upon which your objection is based.

F. A statement of whether you intend to appear at the fairness hearing. If you intend to appear at the fairness hearing through counsel, the objection must also state the identity of all attorneys representing you who will appear at the fairness hearing.

G. Regarding any counsel who represents you or has a financial interest in the objection: (1) a list of cases in which the such counsel and/or counsel's law firm have objected to a class action settlement within the preceding five years, and (2) a copy of any orders concerning a ruling upon counsel's or the firm's prior objections that were issued by the trial and/or appellate courts in each listed case.

H. A statement by you under oath that: (1) you have read the objection in its entirety, (2) you are member of the Settlement Class, (3) states the number of times in which you have objected to a class action settlement within the five years preceding the date that you file your objection, (4) identifies the caption of each case in which you have made such objection, and (5) attaches any orders concerning a ruling upon your prior such objections that were issued by the trial and/or appellate courts in each listed case.

You must mail your objection to the Settlement Administrator at the following address:

Atticus Administration LLC
P.O. BOX 64053
St. Paul, MN 55164

Any and all objections must be postmarked no later than **[objection deadline]**.

What's the Difference Between Objecting to the Settlement And Excluding Yourself From the Settlement?

Objecting is simply telling the Court that you don't like something about the Settlement. You can object only if you stay in the Class. Excluding yourself is telling the Court that you don't want to be part of the Class. If you exclude yourself, you have no right to object because the Settlement no longer affects you.

What Happens if I Do Nothing At All?

If you do nothing, you will remain in the Class and be bound by the terms of the Settlement and all of the Court's orders and judgment. This also means that if the proposed Settlement is approved by the Court, you agree to the release of claims set forth under the heading "What Am I Giving Up to Receive Settlement Benefits?" above, which describes exactly the legal claims that you give up. You will not be responsible for any out-of-pocket costs or attorneys' fees concerning this lawsuit if you remain in the Class.

Do I Have a Lawyer in the Case?

The Court appointed lawyers to represent you and other Class members. These lawyers are called Class Counsel. Class Counsel are Chant Yedalian of Chant & Company A Professional Law Corporation, Bruce D. Greenberg of Lite DePalma Greenberg & Afanador, LLC, and Charles J. LaDuca and Peter Gil-Montllor of Cuneo Gilbert & Laduca, LLP. You will not be charged for these lawyers. If you want to be represented by your own lawyer, you may hire one at your own expense.

How Will Class Counsel and the Class Representative Be Paid?

Class Counsel will ask the Court to approve payment of up to 33⅓% of the Cash Fund ($1,633,333.33) for attorneys' fees, to be paid from the Cash Fund, plus an award of Class Counsel's litigation costs of up to $65,000, also to be paid from the Cash Fund. The fees and costs would pay Class Counsel for investigating the facts and law, prosecuting the matter as well as appeals, negotiating the Settlement, causing P.C. Richard to change its receipt printing processes and implement a new written policy concerning FACTA, and implementing the Settlement. Class Counsel will also ask the Court to approve payment of up to $5,000, to be paid from the Cash Fund, to Ellen Baskin for her services as the Class Representative.

When and Where Will the Court Decide Whether to Approve the Settlement?

The Court will hold a fairness hearing at **[time]** on **[date]**, at 100 Hooper Avenue, Courtroom #6, 1st Floor, Toms River, New Jersey 08754, before Judge Valter H. Must. At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate, and whether the Class Representative and Class Counsel have fairly, adequately, reasonably and competently represented and protected the interests of the Class. If there are objections, the Court will consider them. After the hearing, the Court will decide whether to approve the Settlement, including fees and costs to Class Counsel and service payment to the Class Representative. Class Counsel does not know how long these decisions will take. The date and time of the fairness hearing may be changed without further notice. For updates on dates and times, call the Settlement Administrator at 1-???-???-???? or visit the website www.ReceiptSettlement.com.

Do I Have to Come to the Fairness Hearing?

No. Class Counsel will answer any questions that the Court may have. But you are welcome to come to the hearing. You may also pay your own lawyer to attend, but it's not necessary.

May I Speak at the Fairness Hearing?

Yes. If you would like to speak at the fairness hearing, you may do so as long as you have not excluded yourself from the Class.

You cannot speak at the fairness hearing if you exclude yourself from the Class.

Are There More Details About the Settlement and How Do I Get More Information?

This notice summarizes the proposed Settlement. More details are contained in a Settlement agreement that you may obtain through the Settlement Administrator. For more information, you may: (1) visit the website www.ReceiptSettlement.com; (2) write the Settlement Administrator at the following address: [insert]; or (3) call the Settlement Administrator at 1-???-???-????. You may also view the Court file at 100 Hooper Avenue, Toms River, New Jersey 08754.

EXHIBIT "2"

Consumers and Class Actions:

A Retrospective and Analysis of Settlement Campaigns

AN FTC STAFF REPORT

Federal Trade Commission
September 2019

at the time.[17] FTC staff also tested alternative approaches to displaying energy efficiency information on EnergyGuide labels—the yellow tag displayed on most appliances that contains information on the energy usage of the appliance—using a randomized, controlled design. That study found that consumers understand energy usage using operating costs better than they understand usage based on a technical, kilowatt hour metric.[18] In addition, a 1998 FTC study by Murphy et al. on food health claims concluded, among other things, that advertising disclosures concerning high levels of risk-increasing nutrients were likely to be more effective if presented in plain English.[19]

The Notice Study's findings suggest that the most effective way to display information to consumers is likely to be context-specific. For example, in contrast to prior research documenting the superiority of plain English phrasing, the Notice Study found that, in the context of the class action settlement notice studied, a long-format email with formal, legal writing improved respondents' understanding of the nature of the email (*i.e.*, they were more likely to understand that the email pertained to a class action settlement or a refund, rather than representing a promotional email). At the same time, our study also found that an email using a bulleted list with easier-to-understand language improved respondents' understanding of next steps required to receive settlement compensation.

1.6 Related Research on Class Action Claims and Compensation

Several recent studies have addressed consumer outcomes in class action settlements. However, FTC staff has not identified any attempts to conduct an empirical analysis of consumer class actions at the scope and scale presented in this report.[20]

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[17] James M. Lacko and Janis K. Pappalardo, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms*, Federal Trade Commission Bureau of Economics Staff Report (2007), *https://www.ftc.gov/reports/improving-consumer-mortgage-disclosures-empirical-assessment-current-prototype-disclosure*.

[18] For a discussion of this research, *see* Joseph Farrell, Janis K. Pappalardo, and Howard Shelanski, *Economics at the FTC: Mergers, Dominant-Firm Conduct, and Consumer Behavior*, Review of Industrial Organization, 37 (4), (2010).

[19] Dennis Murphy, Theodore H. Hoppock, and Michelle K. Rusk, *A Generic Copy Test of Food Health Claims in Advertising*, Federal Trade Commission Bureau of Economics Staff Report (1998), *https://www.ftc.gov/reports/generic-copy-test-food-health-claims-advertising*

[20] While we focus on prior quantitative studies in this section, qualitative examinations of class actions can also provide useful insight into settlement outcomes for consumers. Noteworthy articles include: Alexander W. Aiken, Class Action Notice in the Digital Age. Univ. Penn. L. Rev., Vol. 165, No. 967, 2017; Elizabeth Cabraser, Esq. and Andrew Pincus, Esq., Claims-Made Class Action Settlements, 99 Judicature, no. 3 (2015); Scott Dodson, An Opt-In Option for Class Actions, Mich. L. Rev., Volume 115, Issue 2, 2016; Robert H. Klonoff et al., *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. Pitt. L. Rev. 727, 731 (2008).

Of the research we reviewed, we found only three empirical studies that examined compensation or claims rates. These studies typically examined a very small number of cases, or had a more limited scope than the current study based on industry focus or data availability. The law firm Mayer Brown LLP conducted a study of putative employee and consumer class actions filed in or removed to federal court in 2009 and used public access to case dockets to construct a dataset.[21] The study was able to identify 40 class actions that resulted in settlement, of which participation rates were available for only six cases.[22] A 2015 study by Fitzpatrick and Gilbert assembled a dataset of fifteen class action settlements related to overdraft fees in consumer checking accounts.[23] Two of these cases required class members to file claims.[24] Finally, as part of its 2015 Arbitration Study, the Consumer Financial Protection Bureau studied class action settlements related to consumer financial products. Using a dataset constructed with public access to court records, the study found that the median claims rate was 8% for the 105 settlements for which data was available.[25]

In comparison, the FTC Administrator Study examines a broad set of cases, spanning various consumer industries, including consumer privacy, product malfunctions, debt collection, and checking account overdraft practices. The sample is large enough to provide meaningful results. Moreover, information obtained by the FTC from class action administrators was significantly more detailed than datasets constructed with publicly available case docket information, allowing for a more extensive analysis of settlement characteristics and outcomes. For example, given the detail in the data, this is the first study to examine how claims rates differ across email and mail notice.

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[21] Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 7 (Dec. 11, 2013), *https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf*.

[22] For the six cases, the participation rates ranged from 0.000006% to 98.72%.

[23] Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & Bus. 767 (2015).

[24] These two cases had compensation rates of 1.76% and 7.39%.

[25] Consumer Financial Protection Bureau, Arbitration Study, Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a), March 2015.

Chapter 2: Administrator Study

2.1 Summary of Results

This analysis represents the first systematic, empirical examination of a broad set of consumer class action cases, and the findings represent the most reliable quantitative descriptions of consumer class action settlements to date. This study reveals several relationships between aspects of the class action cases in the sample, such as claims rates, notice types, check cashing rates, and redress amounts. Specifically, the study found:

- *Overall Claims Rate:* Across all cases in our sample requiring a claims process, the median calculated claims rate was 9%, and the weighted mean (*i.e.*, cases weighted by the number of notice recipients) was 4%. We calculated these claims rates as a percentage of direct notice recipients.

- *Claims Rates by Method:* The claims rates varied by method. On average, campaigns that primarily used notice packets with claim forms to inform class members about the settlement had claims rates of approximately 10%.[26] In contrast, the average claims rate for campaigns using primarily postcards and email was about 6% and 3%, respectively. Notably, campaigns that utilized postcard notices with a detachable claim form had average claims rates more in line with the 10% notice packet claims rate.

- *Approval, Objection, and Exclusion Rates:* The vast majority (86%) of submitted claims in our sample received approval (*i.e.*, the claims administrator determined that the consumer qualified for compensation). Objection and exclusion rates were miniscule; only 0.01% of notice recipients excluded themselves from the settlement and 0.0003% objected to the proposed settlement.

- *Publication and Direct Notice*: The use of publication notice along with direct notice does not appear to have a significant relationship with the claims rate in our sample.

- *Compensation Amounts and Check Cashing Rates*: Half of the settlements in our sample provided median compensation of $69 or more, and a quarter provided median compensation of $200 or more. There does not appear to be a statistically significant

[26] Throughout the analysis, averages are represented as weighted means where the weights are assigned based on the size of the denominator. For claims rates, weights are equivalent to the number of notice recipients. *See* Section 2.3 for further details.

relationship between median compensation and claims rates, but there is a statistically significant relationship between median compensation and check cashing rates.[27] For cases in our sample that required a claims process, the average check cashing rate was 77%.

- *Notice and Claim Form Language*: In a supplementary examination of qualitative notice and claim form characteristics, we found that visually prominent, plain English language describing payment availability has a significant relationship with the claims rate. Conversely, we did not find a statistically significant relationship between other notice and claim form characteristics, such as form length and documentation requirements, and the claims rate.

2.2 Data Collection

We assembled the dataset with subpoenaed data from seven of the nation's largest class action administrators.[28] We identified the seven administrators using FTC's experience with consumer redress, a review of class action aggregator websites, and consideration of hundreds of class action settlement websites. The submittals included data for the ten largest settlements (gauged by number of notices) from each administrator, in the years 2013, 2014, and 2015. We asked administrators to provide data only from Rule 23(b)(3) class actions that used a claims process, provided direct mailed or emailed notice to at least some class members, and involved consumer issues.[29]

We worked closely with each administrator to understand their unique data and caseload limitations. If an administrator's caseload fell short of ten consumer cases in any of the specified years, we instructed the administrator to supplement their initial production with cases from adjacent years, direct payment cases, and state cases involving consumer issues similar to those covered by federal statutes. The inclusion of these additional cases enabled us to assemble a sufficiently large dataset to allow for statistical analyses while remaining representative of consumer class action settlements.

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[27] We conduct all statistical significance testing at $p<.05$ using a two-tailed t-test, unless otherwise noted.

[28] To obtain this information, the Commission issued orders pursuant to Section 6(b) of the FTC Act seeking specific class action-related information from the administrators. *See* Appendix A: FTC 6(b) Order.

[29] For purposes of this study, we asked the administrators to define "class actions involving consumer issues" as any class action involving federal or state laws prohibiting (1) unfair or deceptive acts or practices in consumer transactions; (2) consumer credit or leasing (including debt collection, credit reporting, and loan servicing); (3) consumer privacy; or (4) common law fraud pertaining to the sale of goods or services.

Administrators also provided information on the number of unique recipients of class action notices and the breakdown of notice recipients across different notice categories. After conducting a detailed examination of each case, we augmented the dataset by assigning each case to a category, based on the type of practice involved in the lawsuit and the case's qualitative notice and claim form characteristics. In cases where administrators did not provide key data points (*e.g.*, the number of unique notice recipients), we used supplementary data provided by the administrator to approximate those key points.[30]

The final dataset contains 149 cases.[31] In presenting the subsequent analyses, we divided these cases into categories: cases requiring all notice recipients to file a claim to receive compensation (claims made), cases requiring none of the class members to file a claim to receive compensation (direct payment), cases requiring some of the recipients to file a claim and providing other recipients with direct payment (hybrid with subclasses), and cases providing recipients with the option to file a claim to receive more favorable compensation (hybrid with option). We further divided the claims made cases into those with standard documentation requirements (standard claims made) and those with varying documentation requirements (non-standard claims made). Standard claims made up the majority of cases in our dataset, comprising 70% of the overall sample. Section 2.5, below, provides more details on this categorization.

2.3 Description of Outcome Measures

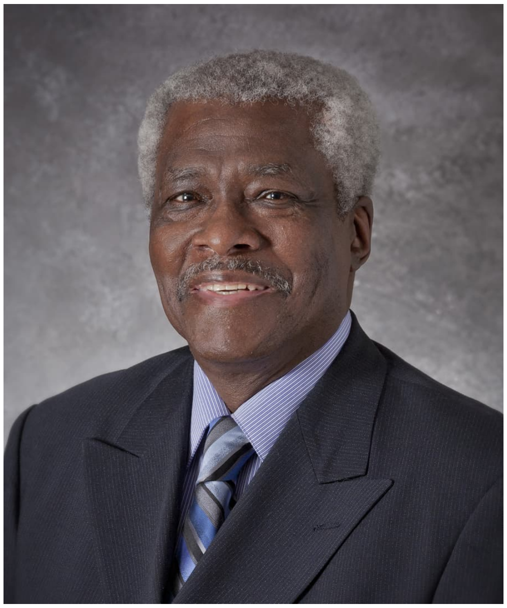
Using the data provided by the administrators, we calculated several outcomes to gauge claims results across the different types of class action cases in the sample. First, we computed the claims, objection, and exclusion rates, all as a percentage of total notice recipients. Second, we determined both the claims approval and denial rates as a percentage of number of claims

[30] For example, if a notice campaign involved multiple rounds of notice, and provided data on the total number of notices sent (but not on the total number of unique notice recipients), we could estimate the number of unique notice recipients if the administrator provided the reason for sending multiple rounds of notice and the counts associated with each round of notice.

[31] Administrators inadvertently provided 17 cases that did not meet the FTC orders' definition of cases involving consumer issues. Additionally, we could not use 27 cases in the analysis because the administrator did not produce useful data points (*e.g.*, because the defendant company—rather than the administrator—handled approval of claims and disbursement of checks, or because the administrator was not able to provide the breakdown between the claims-eligible and ineligible population). Finally, in 6 cases, the vast majority of notice recipients were unlikely to have been eligible to file a claim for monetary relief. These cases primarily involved vehicle repair, where all owners of a particular vehicle received notice due to a malfunction, but only some incurred repair expenses (and were therefore eligible for compensation through the settlement). We excluded these 50 cases from all analyses.

EXHIBIT "3"

JAMS Local Solutions. Global Reach.



Hon. Arlander Keys (Ret.)

MEDIATOR ARBITRATOR
REFEREE/SPECIAL MASTER
NEUTRAL EVALUATOR HEARING OFFICER

Hon. Arlander Keys (Ret.), joins JAMS after nearly two decades of distinguished service as a United States Magistrate Judge for the Northern District of Illinois. During his time on the bench, Judge Keys presided over thousands of civil and criminal matters in both the pretrial and trial stages of litigation. In civil matters, his focus was on the supervision of pretrial discovery, including ruling on motions to compel and motions to quash, and conducting settlement conferences in cases referred to him by district judges for settlement negotiations.

As a labor lawyer with the National Labor Relations Board and, later, as Regional Counsel for the Federal Labor Relations Authority, the Judge's primary focus was on settling cases. Judge Keys is widely known for his persistence in and ability to bring parties together in a constructive dialogue. In this regard, he has conducted over 2,000 settlement conferences in nearly every area of law.

ADR Experience and Qualifications

- Significant mediation experience in the labor and employment arena, in both individual and class contexts, involving allegations of discrimination based on race, sex, religion, age, national origin, disability, hostile working environment, and sexual harassment

- Mediation of hundreds of cases involving state and federal consumer protection laws with a special expertise in class action matters, including matters brought under the:
  - Fair and Accurate Credit Transactions Act (FACTA)
  - Federal Truth in Lending Act (TILA)
  - Fair Debt Collection Practices Act (FDCPA)
  - Fair Credit Reporting Act (FCRA)
  - Telephone Consumer Protection Act (TCPA)
- Extensive experience in mediation of personal injuries and other torts, defamation, intellectual property, business/commercial disputes, securities violations, and anti-trust issues

Representative Matters

- **Banking**
  - Mediated and settled hundreds of matters in the banking and financial services contexts, including FDIC bank takeovers (including D&O liability and contribution issues), mortgage foreclosure, real estate transactions, and sub-prime lending
- **Civil Rights**
  - Mediated and settled hundreds of cases alleging false arrest, excessive force, malicious prosecution, wrongful death and wrongful conviction against the City of Chicago, Cook County, Cook County Jail, and surrounding suburban villages, as well as the Illinois State Polic
- **Employment**
  - Mediated ADA claim involving legacy airline carrier and alleged failure to accommodate by requiring employees returning to work after disability leave to compete with other employees for vacant positions for which they were qualified and which they needed in order to accommodate their disability and continue working; Mediated and settled hundreds of single plaintiff and multiple plaintiff discrimination cases and numerous class action cases running into the tens of millions of dollars. Particular expertise in Fair Labor Standards Act (FLSA) and Employee Retirement Income Security Act (ERISA) matters, as well as employment contract enforcement including covenants not to compete. Extensive expertise in adjudicating cases brought under Section 301 of the Labor Management Relations Act (Taft-Hartley Act)
- **Insurance Coverage**
  - Mediated and settled many cases involving whether insurance companies properly denied (or decreased) coverage for particular losses, including numerous ERISA cases involving individual and group insurance policies. Skilled in the insurance and reinsurance coverage markets
- **Intellectual Property**
  - Mediated and settled matter involving multiple design trademark infringement claims between competitive manufacturers of automobile accessories; Mediated matter arising

out of design trademark infringement claim involving global tennis shoe manufacturers; Supervised discovery in, tried and/or settled thousands of cases in the patent, trademark, and copyright arenas, including involvement in many Markman hearings

- **Personal Injury/Torts**
  - Settlement of multi-million dollar case brought under the FTCA alleging medical negligence in delivery performed by caesarian section and resulting permanent physical and mental impairments; Mediated and settled multi-million dollar claim of alleged excessive force filed against City, Police Department and six individual officers involving death of an individual who had resisted arrest; Mediated and settled many personal injury cases arising under state law and federal statues (Federal Tort Claims Act and the Jones Act). The state law claims ranged from automobile accidents, slip and fall, premises liability and product liability, and wrongful death, while the federal claims generally involved claims under the Federal Employees Liability Act (FELA), the Federal Tort Claims Act (FTCA), and the Jones Act
- **Professional Liability**
  - Extensive experience in resolving fee disputes between attorneys and clients. Adjudicated, mediated, and settled numerous legal malpractice and medical malpractice cases
- **Securities**
  - Adjudicated, mediated, and settled numerous cases involving fraud and misrepresentation and shareholders derivative actions

Honors, Memberships, and Professional Activities

Completed Virtual ADR training conducted by the JAMS Institute, the training arm of JAMS.

- Namesake, Hon. Arlander Keys Scholarship, Richard Linn American Inn of Court (Scholarship dedicated to fostering the principles of professionalism, ethics and civility in the practice of intellectual property law open to applicants enrolled in a Juris Doctorate program at an ABA-accredited Historically Black College and University (HBCU) law school in the United States.), 2021-Present
- Appointed by the Chief Judge of the United States District for the Northern District of Illinois to the 11-member Racial Justice Diversity Committee for the Northern District of Illinois, which is charged with independently reviewing and making recommendations on any procedures or practices that might be helpful in aiding the Court in addressing racial disparities and evaluating methods that may help overcome any barriers to achieving the goal of equal justice for all. This includes, but is not limited to, obtaining data and studying diversity at all staffing levels of the district court, as well as the general bar, trial bar, court monitors, special masters and receivers, CJA panels and lawyers who serve as lead and liaison counsel in MDL proceedings, 2020-Present

- Appointed by the Chief Judge of the United States District Court for the Northern District of Illinois as Chair of the 13-member Magistrate Judge Merit Selection Panel to screen hundreds of applicants for vacant Magistrate Judge positions and to make recommendations to the full Court for appointments to the Court. Also to consider and make recommendations to the Court for reappointments of Magistrate Judges after serving their 8-year terms, 2019-Present
- Selected by Illinois United States Senators Richard Durbin and Mark Kirk to serve on 5-person committee to screen applicants and make recommendations to the Senators of candidates for the position of United States Marshal for the Northern District of Illinois
- Selected jointly by the City of Chicago and the American Civil Liberties Union (ACLU) to serve as independent consultant (monitor) in overseeing compliance by the Chicago Police Department with the terms of a voluntary settlement agreement regarding the City of Chicago's stop and frisk policy, which settlement agreement avoided a federal lawsuit
- Annual participation in Chicago Public Schools primary and secondary educational programs related to *Pathways to the Bench*, a personal narrative about my rise from the cotton fields of Mississippi during the Jim Crow era to the federal bench
- Member, American Bar Association
- Member and First Vice President (2002-2003) and President (2003-2004), Federal Bar Association, Chicago Chapter
- Member, Cook County Bar Association
- Member, Illinois Judicial Council
- Member and First Co-Vice President (2000-2012) and Member, Judicial Advisory Committee (2012-present), Just the Beginning Foundation
- Liaison for the United States District Court, Seventh Circuit Bar Association
- Advisory Committee Member, Study of the Rules of Practice and Internal Operating Procedures of District Bankruptcy Courts

ADR Profiles

- "Arlander Keys," 2018 ADR Champions, *The National Law Journal*, June, 2018

Background and Education

- United States Magistrate Judge, United States District Court for the Northern District of Illinois, Eastern Division, 1995-2014
- Honorary Doctor of Laws, The John Marshall Law School, 2004
- Presiding Magistrate Judge, United States District Court for the Northern District of Illinois, Eastern Division, 1998-2003
- Adjunct Professor of Administrative Law, John Marshall Law School, 1998-2004
- Administrative Law Judge, Office of Hearings and Appeals, Social Security Administration, Department of Health and Human Services, 1986-1995 (Chief Administrative Law Judge, 1988-1995)

- Regional Counsel, Federal Labor Relations Authority, Chicago Region, 1980-1986
- Trial Attorney/Trial Expert, National Labor Relations Board, Chicago, 1975-1980
- J.D., DePaul University College of Law, 1975
- B.A., in Political Science, DePaul University, 1972
- Vietnam Veteran, United States Marine Corps, 1963-1967

EXHIBIT "4"

2007 WL 4105971
Only the Westlaw citation is currently available.
NOT FOR CITATION
United States District Court, N.D. California,
San Jose Division.

Chuck BROWNING, individually and on behalf of all persons similarly situated, Plaintiff,
v.
YAHOO! INC.; ConsumerInfo.com, Inc.; and Experian North America, Inc., Defendants.

No. C04–01463 HRL.
|
Nov. 16, 2007.

Attorneys and Law Firms

Clay Lowe, Lowe & Grammas LLP, Peter A. Grammas, Lowe, Grammas, Hitson & Dana LLP, Birmingham, AL, Gordon John Finwall, Finwall Law Offices, San Jose, CA, for Plaintiff.

Richard Joseph Grabowski, Marc Kirby Callahan, Marc Stephen Carlson, Jones Day, Irvine, CA, John W. Edwards, Jones, Day, Reavis & Pogue, Menlo Park, CA, Jerome R. Doak, Jones Day, Dallas, TX, for Defendants.

ORDER GRANTING JOINT MOTION FOR FINAL APPROVAL OF AMENDED SETTLEMENT AND DISMISSING ACTION WITH PREJUDICE

HOWARD R. LLOYD, United States Magistrate Judge.

I. INTRODUCTION

***1** Chuck Browning saw on Yahoo!'s website the offering for a service called Yahoo! Credit Manager. The offering allegedly represented that, by subscribing to it, he would be able to "improve" his credit score, to actually "learn how to boost it in seconds." Browning subscribed (for $79.95 per year). The Credit Manager service was provided by Yahoo!'s purported "co-branded partner," ConsumerInfo.com, Inc. ("CIC"). CIC is owned by Experian, one of the country's major credit reporting organizations.

The Credit Repair Organization Act ("CROA"), 15 U.S.C. § 1679, is intended to protect the public from unfair or deceptive advertising and business practices by credit repair organizations. Specifically, CROA focuses on providing consumers of credit repair organization services with information necessary to make informed decisions concerning the purchase of such services. To that end, a company in the "credit repair" business must adhere to a host of specified regulations: e.g., (1) a written contract with the consumer specifying the payment terms, and (2) full disclosure of the consumer's statutory rights-including cancellation options.

No one disputes that neither Yahoo!, CIC, nor Experian complied with the requirements of CROA. The real questions in the litigation that followed were: (1) whether or not Defendants were credit repair organizations subject to CROA; (2) whether the claims Browning ultimately brought were appropriate for class action treatment; and, finally, (3) what was the effect here of an earlier Alabama federal court's denial of class certification against CIC for CROA violations?

As this court intends to approve the settlement discussed at length below, it does not formally reach the first or third question. As to the second, it answers in the affirmative with respect to a settlement class.

II. PRESENT PROCEDURAL POSTURE

In February 2006, the parties jointly moved for certification of the tentative settlement class and preliminary approval of the proposed settlement. After the Preliminary Approval hearing and several interim orders, the parties eventually proffered an Amended Settlement Agreement. The Amended Settlement entirely resolves the claims brought by Browning, on behalf of himself and the settlement class, against CIC, Experian and Yahoo!. Defendants agree to certification of the settlement class and to offer certain relief but deny that they fall within the Credit Repair Organization Act's definition of a "credit repair organization," deny all claims alleged, and deny that the case could be certified as a class action for trial purposes.

On December 27, 2006, this Court certified the tentative settlement class, preliminarily approved the parties' Amended Settlement Agreement, approved and directed a plan for giving notice to class members, appointed Class Counsel, and appointed the Settlement Administrator. ("Prelim. Approval Order"). The Court also set deadlines for objecting to the settlement and for requesting exclusion from the settlement class.

***2** On July 31, 2007, the Court held a Final Fairness Hearing at which the moving parties and certain objectors appeared and were heard. The order that follows addresses Plaintiff's motion for an award of attorney's fees and expenses, the objections made by class members to the Amended Settlement, and the joint motion for Final Approval of the Amended Settlement.

III. BACKGROUND

A. The *Helms* Litigation

The direct antecedent to this case is a proposed class action filed in Alabama federal court captioned, *Helms v. ConsumerInfo.com, Inc.,* No. CV–03–HS–1439–M (N.D. Ala., filed June 17, 2003). The *Helms* suit alleged (1) violations of CROA; (2) unjust enrichment and money had and received; (3) constructive trust; and (4) conspiracy (Complaint ¶¶ 22–42). As with *Browning,* the claims against CIC arose out of statements made on its website which allegedly subjected CIC to CROA regulations.

The *Helms* case was litigated for more than two years, with both parties conducting depositions, answering interrogatories, and responding to document requests. In 2004, the *Helms* parties filed cross motions for summary judgment, and Plaintiff moved for class certification. The *Helms* court granted in part and denied in part both motions for summary judgment. *Helms v. ConsumerInfo.com, Inc.,* 436 F.Supp.2d 1220, 1238–39 (N.D.Ala.2005). That court held that "the representations of defendant imply that its services will help customers improve their credit ratings," *id.* at 1232, and that CIC was therefore within the statutory definition of a "credit repair organization." *Id.* at 1229–34. However, because this determination was an issue of first impression, the *Helms* court sua sponte certified its summary judgment order for interlocutory appeal to the Eleventh Circuit. *Id.* at 1224.

The *Helms* court subsequently denied class certification. *Helms v. ConsumerInfo.com, Inc.,* 236 F.R.D. 561, 567–70 (N.D.Ala.2005). Then, the Eleventh Circuit granted CIC's request for interlocutory appeal on the summary judgment. After completion of appellate briefing, the parties reached a tentative agreement on the settlement that is the subject of the instant motion, and the Eleventh Circuit proceedings were stayed.

B. The *Browning* Litigation

In the meantime, in April 2004, Chuck Browning had filed this putative nationwide class action against Yahoo! Inc. alleging the same claims, noted above, that were pled in *Helms.*[1] Then, after the denial of class certification in *Helms,* Browning sought leave to file a Second Amended Complaint to add CIC and the Experian Entities[2] ("Experian") as defendants in his case. He alleged that Yahoo! and the prospective new defendants were intertwined business entities: Experian is CIC's parent corporation; CIC provided the Credit Manager product to Yahoo!; and the three parties maintained a "prominent co-branded partnership" in providing the products or services which allegedly violated CROA. Although this Court granted the motion to amend, in doing so it wrote that it was "skeptical about whether plaintiff will be able to satisfy it that he can maintain a class action here against CIC—particularly where he admittedly seeks to revisit the earlier denial of class certification against CIC in Alabama."

IV. DISCUSSION

A. Jurisdiction

***3** This Court has jurisdiction over the claims the members of the class asserted in this proceeding, personal jurisdiction over the settling parties (including all class members), and subject matter jurisdiction to approve the Amended Settlement.

B. Class Definition and Scope of Release[3]

1. *Class Definition*

The parties agreed to the certification of a settlement class generally defined as people in the United States who, between June 17, 1998 and December 27, 2006, entered into an agreement over the Internet with the Defendants to purchase one of certain enumerated credit-monitoring or credit score products. This definition is subject to exclusions based on people with a relationship to the Defendants or this case, and people who validly excluded themselves as set forth below.

Timely Exclusions: The Settlement Administrator received 1,183 timely exclusion requests from class members. See Keough Supp. Aff., (Docket No. 196). These individuals have properly excluded themselves from the settlement class, and neither this Order nor the Final Judgment shall be binding upon them. The Clerk of the Court is directed to maintain, for five years, the record of class members who have timely excluded themselves and to provide a certified copy of such records to the Defendants, at their expense.

Untimely Exclusions: As of October 5, 2007, nine class members had made untimely requests for exclusion. *Id.* Each of these nine persons are thus settlement class members and bound by this order and the Final Judgment.[4]

2. *Scope of the Release*

The parties agreed to a release of CROA claims and of claims where their stated basis is about improvement of a consumer's credit record, history, or rating. At the insistence of the Court, this release was written to limit its scope to the claims raised in this litigation.

C. Relief Offered in the Settlement

The Court approves of the multifaceted relief offered to the class members in this settlement. Defendants have agreed to remedial relief, in-kind relief and are responsible for payment of certain litigation costs.

1. *Remedial Relief*

CIC and Experian agree to specific deletions to or modifications of language on particular websites. CIC further agrees not to make certain statements in selling credit scores or credit monitoring to Internet consumers. The Yahoo! product at issue is no longer offered.

The changes to language on the website address the unique CROA claims asserted by Plaintiff. Such relief is intended to change or remove language which suggested to consumers that their purchase of Defendants' products or services could result in the improvement of their credit rating or history. For example, language such as, "you get personalized tips and analysis and learn how to boost your credit rating" and "get on the road to good credit" will be changed to "you get information regarding factors that affect a credit score" and "get on the road to credit knowledge," respectively. Statements like "increase your purchasing power" and "find and dispute mistakes that could be hurting your credit rating" will be deleted.

2. *In–Kind Relief*

***4** Defendants are also offering in-kind relief, providing each eligible settlement class member with the choice of either a free Experian credit score (retail value of $5.00 at the time of settlement) or two months of free credit monitoring (retail value of $9.95 per month at the time of the settlement). Because the settlement class consists of consumers who previously purchased similar products or services, class members are likely to be interested in such relief.

The credit score will be based on batched process and on the settlement class member's Experian credit report. Each settlement class member electing the credit-monitoring benefit will be enrolled in credit monitoring and thereafter automatically charged the then-applicable rate unless the member affirmatively cancels enrollment (any time after submitting the benefit code) prior to the expiration of the 60–day, settlement-benefit period.

3. *Attorney's Fees, Class Notice, and Settlement Administration*

As explained in Part VII of this order, Defendants will be paying a $2.55 million award of attorney's fees and expenses. They will also bear the costs of providing class notice and of administering the settlement. Although Defendants have not quantified such costs here, significant resources were expended to notify the 14 million class members.[5]

D. Notice to the Class and Governmental Entities

1. *Notice to Governmental Entities*

At the Court's direction, Defendants sent notice that would satisfy the Class Action Fairness Act of 2005 ("CAFA").[6] Such notice was directed to the United States Attorney General, to the attorneys general in all 50 states and the District of Columbia, and to 11 other state agencies that specifically monitor the credit industry. 28 U.S.C. § 1715(b). Notice was also provided to the Federal Trade Commission, the agency charged with enforcing CROA.

2. *Notice to the Class*

Defendants and the Settlement Administrator implemented the approved four-part notice program within the Court's deadlines. See Keough Affs., (Docket No. 139, 141, 142). To effect notice, they: (1) established an official settlement website which posted the Long–Form Notice and other settlement documents; (2) emailed notice to more than 14 million tentative class members identified from consumer records; (3) mailed the Long–Form Notice to more than 3.9 million tentative class members whose email notice was undeliverable or where no email address could be located; and (4) published notice in one daily and in one weekend issue of the national edition of USA Today.

Email notice was particularly suitable in this case, where settlement class members' claims arise from their visits to Defendants' Internet websites. *See, e.g. Lundell v. Dell, Inc.,* 2006 WL 3507938, at *1 (N.D.Cal. Dec.5, 2006). The Court reviewed and approved these notices before they were disseminated and found that they were written in plain language.

The Court concludes that the notice was reasonably calculated under the circumstances to apprise the settlement class of the pendency of this action, all material elements of the Amended Settlement, and the opportunity for settlement class members to exclude themselves from, or object to, or comment on the settlement and to appear at the Final Fairness Hearing on their own behalf or through counsel. This notice program satisfied both Federal Rule of Civil Procedure 23(c)(2)(B) (certification notice requires "best notice practicable under the circumstances") and Rule 23(e)(1)(B) (settlement notice must be directed "in a reasonable manner to all members who would be bound").[7] It also properly informed class members of the amount of attorney's fees requested by Class Counsel as required by Federal Rule of Civil Procedure 23(h)(1). Notice given was due, adequate, and sufficient. It complied with the Federal Rules of Civil Procedure, due process, and any other applicable rules of the court.

V. OBJECTIONS TO SETTLEMENT

***5** There were 139 objectors to the settlement, some of whom appeared through counsel at the Final Fairness Hearing.[8] Even though some objectors failed to provide certain identifying information about themselves as required by the Preliminary Approval Order, the Court denied Plaintiff's motion to strike those objections and considered them as well at the hearing.

The objections fall into the following six categories: (1) objections to the benefits offered, (2) objections to the notice, (3) objections to the requested amount of attorney's fees, (4) objections to the scope of the release, and (5) irrelevant or incomprehensible objections.

A. Objections to Benefits Offered

1. *Objections to the In–Kind Relief*

Some objectors protest that the in-kind relief has little value. However, the credit score and credit monitoring benefits are likely to have some value to this class, which consists of individuals who previously purchased Defendants' credit score or credit monitoring products. The Court has been informed that the credit score will provide a numerical score that informs a class member where his or her credit standing falls in a range as compared with other consumers. This information is valuable for anyone interested in keeping up with his or her personal finances, not only those planning a major purchase. Finally, and perhaps most importantly, these objections do not sufficiently consider the value of the remedial relief offered or the considerable risks involved with continued litigation.

Some objectors complained that the Amended Settlement is a "coupon settlement"[9] or that the benefits are not transferable on a secondary market. However, the in-kind relief offered in this case is not a "coupon settlement" because it does not require class members to spend money in order to realize the settlement benefit. Further, the objectors cite no controlling authority requiring an in-kind benefit to be transferable. Transferability is typically offered in order to avoid the criticism that the class members must spend money to obtain a benefit, which is not the case here. The question is not whether a better benefit could theoretically be provided, but whether the settlement is "fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1027 (9th Cir.1998).

Finally, some objectors complain that they should get a full cash refund. This is tantamount to complaining that the settlement should be "better," which is not a valid objection. *Id.* at 1027. It also fails to recognize that settlement, as a product of compromise, typically offers less than a full recovery. *See EEOC v. Hiram Walker & Sons, Inc.,* 768 F.2d 884, 889 (7th Cir.1985). Such objections fail to consider the limited nature of the class release and the vulnerability and risk of proceeding with the case on the merits.

The Court concludes that the relief afforded to class members, although modest, is appropriate and valuable given the circumstances.

2. *Objections to the Automatic–Renewal Element*

***6** Some settlement class members object to the automatic-renewal element of the credit-monitoring benefit. The Court has already found that this automatic-renewal element, also called a negative option, was fairly and reasonably disclosed.[10] The disclosure of automatic renewal will also be repeated when settlement class members go to the website to choose and obtain their settlement benefit.

The objectors did not address the adequacy of disclosure, but rather speculated that some consumers might forget to cancel or have difficulty in cancelling. Although the Court appreciates this concern, such speculation is not a basis for denying approval of an otherwise fair and reasonable settlement. Weight is given to the fact that settlement class members are not required to accept automatic renewal to receive a settlement benefit. Members may avoid it by choosing the credit score benefit or by cancelling credit-monitoring within the 60–day benefit period. The presence of the negative option has been weighed in the context of the other aspects of the settlement, and in that context, it is fair, reasonable and adequate.

3. *Objections to the Claims Process*

Some objectors complain about the two-step process for obtaining a settlement benefit. First, the class member selects a benefit by completing a registration form that can be submitted online or mailed to the Settlement Administrator (Garden City Group). After completing this step, the Settlement Administrator will email the class member a benefit code. Then, the class member must enter this code on a CIC website. After the code is submitted, the consumer will receive the chosen settlement benefit from CIC.

Objectors complain that the two-step aspect of the process is burdensome, that the claims process requires technical acumen, and that obtaining a benefit requires the class member to provide identifying information. None of these arguments are persuasive. Only the Settlement Administrator has the resources to handle step one. Only the Defendants have the technology (and the sensitive personal information about each class member) to perform step two. Class members have all demonstrated their ability to navigate the Internet through past dealings with Defendants. Finally, if the Defendants did not ask (over a secure site) for personal identifying information about a class member, it could not match up the member with the corresponding credit information. The objections to the claims process thus fail.

B. Objections to Notice

A few objectors say that class members may have been reluctant, after receiving the e-mail inviting them to visit the settlement website, to actually click on the site. Such claimed reluctance was due to concern that the email notice was an Internet "phishing" scam.[11] The objectors present anecdotal evidence that some class members sought advice from online technical or consumer protection forums to address these concerns. There, many were told it was probably an internet identity theft scam and were advised to delete the e-mail without visiting the website. (*See* Docket No. 184). Supposedly, this may have been so, even though visiting the settlement website did not require an individual to divulge personal identifying data.

***7** Class Counsel respond that the email notice was designed with the intent to maximize the number of notice recipients. The long form of the notice was intentionally not included in the email over concern that it would trigger spam filters. The decision was thus made to place the long form of the notice on a website and to use the email to provide brief notice and to direct interested class members to the website. Counsel also note that the phone number listed on the website as well as the inclusion of identifying information about the case were mechanisms for class members to verify the legitimacy of the notice.

The Court acknowledges evidence indicating that some number of class members may have deleted the email notice out of concern that it was an identity theft scam. However, no objector has presented evidence of how widespread this concern was throughout the class. There are tradeoffs involved in any form of notice, especially with a settlement class of this size. For approval, the notice need not have been perfect. Rather, it needed to be the "best notice practicable under the circumstances" and directed "in a reasonable manner to all members who would be bound." Fed.R.Civ.P. 23(c) (2)(B); Fed.R.Civ.P. 23(e)(1)(B). The email notice program adopted in this case met these requirements.

C. Objections to the Requested Attorney's Fees

The objections to the attorney's fees largely consisted of vague objections to the amount sought and to claims that the fees were not sufficiently tied to the benefits. These objections are fully addressed in Part VII of this order and dismissed. That analysis is adopted here.

D. Objections to the Scope of the Release

Some objectors assert that the release is too broad.[12] The Court is satisfied that this is not so. The earlier, more expansive, versions of the release were rejected by this Court. The release language, as approved here, does not purport to release all claims based on class members' purchase of credit monitoring or credit scores. Rather, it is intended to release only the claims raised in this litigation and is approved by the Court in reliance on Defendants' representation that no other putative (or certified) class actions alleging CROA violations are pending against any Defendant. (Docket No. 194). After such considerations, the Court finds the release to be fair and reasonable.

E. Irrelevant or Incomprehensible Objections

1. *Incomprehensible Objections*

Roughly 10% of the objection letters were incomprehensible. The very nature of these objections makes it impossible for the Court to address them, but such objections are to be expected from a settlement class including 14 million people. These objections are overruled.

2. *Irrelevant Objections*

a. Objections About a Class Member's Particular Credit Report

Another 10% of the class members who objected complained, not about the class settlement, but about alleged errors in the class member's own particular credit report. For instance, some class members complained that a lender's tradeline included an incorrect balance, or that a particular line of credit should no longer be reported. Such objections are irrelevant to the determination of whether the settlement should be finally approved.

b. Objections About Original Purchase of Product or Service

***8** Another group of class members objected not to the automatic-renewal element of this settlement, but to the automatic renewal of their original purchases of Defendants' products. In those transactions, consumers who signed up for a trial membership in credit monitoring received it initially at no charge. If the consumer did not cancel the service within the trial period, the service continued and the consumer was thereafter charged.

These objections are irrelevant to the allegations of CROA liability in this lawsuit and to the extent that such objections are relevant, they have been addressed above in Part V, Section A2.

c. Objections about invalid "free credit report" settlements

Objector Joshua Hazan objected to the provision of a "free credit report" as a settlement benefit, citing *Acosta v. Trans Union, LLC,* 240 F.R.D. 564, 573 (C.D.Cal.2007) [superseded by, 243 F.R.D. 377, 390]. This objection is misplaced because this settlement does not offer a free credit *report* as a settlement benefit—it offers a credit *score* or credit monitoring. Although federal law entitles an individual to a free annual credit report from Experian, there is no law requiring free credit scores or monitoring.

These matters are irrelevant to the current proceeding and are, therefore, overruled.

The objections give scant, if any, recognition to the significant hurdles faced by the Plaintiff and the class on the merits of the CROA claim, or on the risk, expense, complexity and likely duration of further litigation. In particular, and despite an express invitation from the Court, no objector ever addressed whether a class could or should be certified here for trial purposes given the failure to obtain certification in *Helms.* The few objections that purport to consider the viability of Plaintiff's claim either do so in a conclusory manner, or paint an unreasonably rosy picture of the prospects of success for this class. Plaintiff would likely face serious difficulty obtaining superior benefits through litigation than those conferred by the Amended Settlement. Accordingly, all objections which have been submitted have been considered by the Court and are OVERRULED.

VI. MOTION FOR FINAL APPROVAL

A. Final Certification of Settlement Class

In order to certify a settlement class, the requirements of Rule 23 must generally be satisfied and each are considered here. *See Hanlon,* 150 F.3d at 1019 (*citing Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)). In assessing Rule 23 requirements in the settlement context, a "court need not inquire whether the case, if tried, would present intractable management problems ... for the proposal is that there be no trial." *Amchem,* 521 U.S. at 620.

1. *The Requirements of Rule 23(a)*

For certification of a settlement class, Rule 23(a) requires: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. In granting preliminary approval, this Court held that the requirements of Rule 23(a) were satisfied and that the "tentative settlement class is superior to individual lawsuits." The *Helms* court, under nearly identical circumstances, also found that they were met. *Helms,* 236 F.R.D. at 564–67.

***9 Numerosity.** The class of approximately 14 million individuals is so numerous that joinder of all members is impracticable. Fed.R.Civ.P. 23(a)(1); *see Hanlon,* 150 F.3d at 1019.

Commonality. Further, this case involves common issues of fact and law for the class arising out of the construction and application of CROA to the Defendants and their services and products. Fed.R.Civ.P. 23(a)(2).

Typicality. The claims of the named Plaintiff are typical of the settlement class, and depend for their resolution on the construction and application of CROA to the Defendants and their services and products. Fed.R.Civ.P. 23(a)(3).

Adequacy. And finally, with respect to legal adequacy, two questions must be resolved: (1) do the named plaintiff and his or her counsel have any conflicts of interest with other class members, and (2) will the named plaintiff and plaintiff's counsel vigorously prosecute the action on behalf of the class? *Hanlon,* 150 F.3d at 1020. Here, Browning and Class Counsel do not have any conflicts of interest with the class members. Importantly, the settlement makes all class members eligible for the same relief. *Id.* at 1021. Furthermore, Class Counsel vigorously pursued the class claims through extended litigation in *Helms,* followed by successfully obtaining leave of court to add CIC and Experian to this class action after certification was denied in *Helms.* As such, the named Plaintiff and counsel have fairly and adequately protected class interests. Fed.R.Civ.P. 23(a)(4).

2. *Requirements of Rule 23(b)(3)*

For certification under Rule 23(b)(3), a class action must meet two more requirements: (1) common questions must "predominate over any questions affecting only individual members"; and (2) class resolution must be "superior to other available methods of fair and efficient adjudication of the controversy." *Amchem,* 521 U.S. at 615; Fed.R.Civ.P. 23(b)(3).

Predominance. In this case (and as the *Helms* court found), questions of law or fact common to members of the settlement class concerning the application and construction of CROA predominate over any questions affecting only individual members.

Superiority. It was this requirement which caused the *Helms* court to deny class certification. That court reasoned that class litigation would not be a superior method of adjudication when damages, if aggregated by the class trial procedure, could be "grossly disproportionate to the conduct at issue." *Helms,* 236 F.R.D. at 564–68.[13] However, this reasoning does not apply here because the appropriate relief is agreed upon by the parties. Moreover, a settlement class need not be "manageable" as a trial class action because no trial will occur. *Amchem,* 521 U.S. at 619. This Court determined in its Preliminary Approval Order that the requirements of Rule 23(b)(3) had been met, and the objectors do not suggest otherwise.

Finding the requirements of Rule 23(a) and Rule 23(b)(3) satisfied, the Court confirms and finally approves the settlement class certification.

B. Final Approval of Settlement

***10** This Court may approve the class action settlement after hearing and upon a finding that the settlement is "fair, reasonable, and adequate." Fed.R.Civ.P. 23(e)(1)(C). Therefore, the question is "not whether the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion." *Hanlon,* 150 F.3d at 1027. It is "the settlement taken as a whole ... that must be examined for overall fairness." *Id.* at 1026.

A settlement under Rule 23(e) requires that the Court balance a number of factors, including: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout trial; (4) the amount offered in settlement; (5) the extent of discovery completed; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *Churchill Vill., LLC v. Gen. Elec.,* 361 F.3d 566, 575 (9th Cir.2004). Courts also consider (9) the absence of collusion in the settlement process. *Id.*

1. ***The Strength of Plaintiff's Case***

In considering the strength of Plaintiff's case, legal uncertainties at the time of settlement—particularly those which go to fundamental legal issues—favor approval. *See Glass v. UBS Fin. Servs., Inc.,* 2007 WL 221862, at *3 (N.D.Cal.2007). Here, there is uncertainty as to whether Defendants fall within CROA's definition of a "credit repair organization."[14] Because Plaintiff's allegations are based on CROA's provisions regulating "credit repair organizations," the question of whether Defendants are within that definition is crucial to whether CROA's regulations apply to Defendants. Furthermore, Plaintiff's case was weakened by other *Helms* court decisions. The summary judgment order undermined the CROA fraud allegations and the denial of class certification would be a particularly difficult hurdle to moving forward with this litigation. This level of uncertainty weighs heavily in favor of approval.

2. ***Risk, Expense, Complexity, and Likely Duration of Future Litigation***

As previously noted, further litigation carries a risk that the appellate courts will ultimately adopt an interpretation of CROA adverse to the class. *See Hillis,* 237 F.R.D. at 516–17; *Helms v. ConsumerInfo.com, Inc.,* No. 05–13335–W (11th Cir. Jan. 24, 2006). Should this Court (or the Ninth Circuit on appeal) adopt such an interpretation, the class' CROA claims will be extinguished and the class would receive no recovery for those claims.

If this settlement is not approved, further litigation before this Court would be time consuming, complex and expensive. The Court reasonably anticipates a motion for class certification and competing motions for summary judgment centered upon competing interpretations of CROA. Regardless of how this Court might have ruled on the merits of the legal issues, its decisions would almost certainly be met by one party with an appeal, and the parties would have faced the expense, delays and uncertainties inherent in litigating an appeal. While litigating in this Court, counsel would also be dealing with the currently stayed appeal in the Eleventh Circuit. Accordingly, this factor supports approval of the Amended Settlement.

3. *Risk to Maintaining Class Action Status Throughout Trial*

***11** When Class Counsel were denied class certification on behalf of a similar class in *Helms,* they sought leave of this Court to file a Second Amended Complaint naming CIC and Experian as defendants. In granting that motion, this Court stated it was "skeptical" that a trial class could be certified. It again noted its skepticism when granting preliminary approval. Developments in the law since the filing of the Second Amended Complaint further underscore the risk that class certification for trial would not have been obtained. Notwithstanding this, Class Counsel was able to negotiate a settlement that provides a benefit to approximately 14 million consumers and, through the remedial relief, to the general public as well.

For the reasons stated, there is a substantial risk that Plaintiff would not be able to obtain and maintain class certification. This factor weighs in favor of approval.

4. *Amount Offered*

In considering the amount offered in the settlement, the Court may also look at the difficulties Plaintiff would have in proceeding with litigation. *In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d 454, 459 (9th Cir.2000). The benefits offered were discussed in Part IV, Section C.

The Court finds that the consideration offered here—remedial and in-kind relief plus additional expenses incurred by Defendants—is adequate to support the proposed settlement, given the uncertainty of Plaintiff's legal claims under CROA, coupled with denial of class certification in other, similar district court cases. The amount offered provides the class with a greater recovery than it would likely achieve through litigation, and does so in a more expedient and certain manner. This factor weighs in favor of approving the Amended Settlement.

5. *Extent of Discovery Completed and Stage of Proceedings*

In assessing this factor, it is appropriate to consider the antecedent to this case, *Helms,* given the agreement of the parties that the discovery from *Helms* applied in *Browning.*

Helms was filed in 2003 and was litigated for more than two years, with both parties conducting depositions, answering interrogatories, and responding to document requests. During discovery, CIC reportedly produced millions of emails, tens of thousands of documents, and more than 100,000 recordings of phone calls. The parties filed competing motions for summary judgment which were resolved by the court. Eventually, the district court denied class certification. On the issue of whether Defendants were subject to CROA, the parties completed appellate briefing before the Eleventh Circuit.

Browning was filed against Yahoo! in 2004. It, too, has involved discovery and motion practice, including a motion to dismiss by Yahoo! and the aforementioned motion to add two additional defendants. Furthermore, this Court has exercised considerable scrutiny over the settlement, issuing several interim orders in response to the parties' initial proposed settlement.

***12** Finally, the parties engaged in multiple rounds of mediation. As a result, the parties and this Court are well positioned to assess the strength of this case and the comparative benefits of the proposed settlement. *See Young v. Polo Retail, LLC,* 2007 WL 951821, at *4 (N.D.Cal. Mar.28, 2007). Accordingly, this factor weighs in favor of approving the Amended Settlement.

6. *Experience and Views of Counsel*

The settlement is the product of arm's length negotiations that were conducted by counsel who are experienced in class action litigation. Counsel for both sides believe that the Amended Settlement reflects the relative strengths and weaknesses of the parties' respective claims and defenses, as well as the substantial risks presented in continuing the litigation.

Moreover, the settlement was the product of mediation by a qualified and experienced lawyer, Rodney A. Max,[15] who reported that the case was "professionally, ethically, and reasonably mediated, negotiated and resolved." Max Aff., (Docket No. 132–7). The mediator recommended the settlement to the Court as being "fair, reasonable, and adequate." *Id.*

The experience and views of counsel weigh in favor of approval.

7. *Presence of Governmental Participant*

The court, in requiring CAFA notice to be sent to various governmental entities,[16] intended to provide an opportunity for comment or objection by such entities. Defendants provided a thorough case history and kept these entities informed of the developments in the case. However, no governmental entity sought to participate in the settlement proceedings by objection or comment. *See* Keough Aff., (Docket No. 167).

The fact that the agency responsible for CROA enforcement—the FTC—did not object to the settlement is significant. CIC and the FTC previously entered into a consent decree which required CIC to make certain disclosures in connection with its negative option marketing.[17] Given this history, the Court's preliminary approval order specifically addressed the negative option feature of this settlement. That order noted this Court's belief that offering a choice of settlement benefits—one of which did not have the negative option—avoided the potential problems cited by the FTC in its opposition to a negative option in a class action settlement. *See Chavez v. Ne tflix, Inc.,* No. CGC–04–434884 (Cal.Super.Ct. October 27, 2005). As evidenced by that case, the FTC has previously objected where it believed a negative option in a settlement was either inadequately disclosed or inappropriately structured.

Because numerous governmental agencies (including the FTC) were given notice of the settlement and have not objected, this factor weighs in favor of the settlement.

8. *Reaction of Class Members to Proposed Settlement*

The next factor that the court must consider is the reaction of the class to the proposed settlement. *Hanlon,* 150 F.3d at 1026. Of the 14 million settlement class members who were sent notice, 139 objected to the Amended Settlement. See Keough Aff. and Supp. Aff., (Docket Nos. 167, 196). Statistically, this indicates that there was 1 objector for every 100,720 class members. This objection rate is low, even compared to objection rates in other, similar class action settlements.[18] The relatively low percentage of objectors weighs in favor of approval.

9. *Absence of Collusion in Settlement Process*

***13** Finally, this court should satisfy itself that the settlement was not the product of collusion. *See Young,* 2007 WL 951821, at *3. Here, the original proposed settlement was the product of mediation arising out of *Helms* and settlement negotiations covering both *Helms* and *Browning.* Max Aff., (Docket No. 132–7). This negotiation process spanned more than a year.

The initial mediation was discontinued because the parties could not reach agreement. The Eleventh Circuit ordered the case to a second mediation. The mediator reported that these negotiations were contentious, with the parties staking out aggressive positions. *Id.* After several meetings, the parties reached an agreement on the substance of the relief to be provided to the settlement class. *Id.* Then, the negotiations broke off for a second time when the parties were unable to agree on attorney's fees. *Id.* The mediator initiated one last effort, submitting a "mediator's proposal" on the attorney's fees which was ultimately accepted. *Id.*

Further, the Amended Settlement was reached in accordance with this Court's interim orders following the initial motion for preliminary approval of the settlement. Accordingly, the Court is satisfied that the settlement procedure was without collusion. This factor weighs in favor of approving the Amended Settlement.

Approval of settlements in class action lawsuits is left to the "sound discretion of the trial court." *Hillis,* 2007 WL 1953464, at * 9. After consideration of the above factors and because public and judicial policies strongly favor settlement of class action law suits, *id.* at * 9, the Court GRANTS the joint motion for final approval of the Amended Settlement. On balance, the settlement is fair, reasonable and adequate, was determined without fraud or collusion, and is in the best interests of the settlement class.

VII. MOTION FOR ATTORNEY'S FEES AND EXPENSES

Also before the Court is Class Counsel's Motion for Award of Attorney's Fees and Reimbursement of Expenses. (Docket No. 176). The motion seeks, and CIC and Experian have agreed to pay, $2.55 million for Class Counsel's attorney's fees and expenses. This figure was proposed by the mediator. Max Aff., (Docket No. 132–7). Class Counsel contend that their fee request is appropriate under both a lodestar and percentage-of-the-fund analysis.

Lodestar Comparison: The motion for Attorney's Fees is supported with declarations and detailed records showing that 4,798.7 hours were spent on the litigation (*Helms* and *Browning*) and giving a full breakdown of expenses. The lodestar amount during this period for attorney time calculated at prevailing market rates is $2,688,647.50. The market rates utilized, the hours expended, and the expenses incurred appear reasonable and appropriate. Class Counsel's request of $2.55 million, which includes expenses of $47,642.86, is below the lodestar without including the multipliers that typically increase the award of attorney's fees to plaintiffs' attorneys in class action settlements with a risky outcome if litigated to conclusion.

14** ***Percentage–of–Recovery Comparison: The reasonableness of the requested fee and the lodestar analysis are further supported by a percentage-of-recovery analysis.[19] To begin the analysis, the Court concludes that $35 million[20] is one possible estimate of the total monetary benefit created to the class based on the in-kind relief. The $2.55 million requested in attorney's fees and expenses therefore represents approximately 7.3% of this estimated total benefit, falling within the 25% benchmark applied in the Ninth Circuit. *Vizcaino v. Microsoft Corp.,* 290 F.3d at 1043, 1047 (9th Cir.2002), *cert denied sub nom. Vizcaino v. Waite,* 537 U.S. 1018, 123 S.Ct. 536, 154 L.Ed.2d 425 (2002).

As such, the fee request is reasonable, given the length, novelty and complexity of the litigation, the quality of representation, the risk of nonpayment, the time and labor required, the benefits obtained for the class through the settlement, multipliers applied in similar cases, and the comparisons to a lodestar and percentage-of-recovery analysis. The motion for an award of attorney's fees of $2.55 million (inclusive of $47,642.86 in litigation expenses) is GRANTED. The award shall be paid in accordance with the terms of the Amended Settlement.

VIII. CONCLUSION

1. The Court designates Chuck Browning as the class representative, and E. Clayton Lowe, Jr. and Peter A. Grammas as Class Counsel.

2. Plaintiff's motion for attorney's fees and expenses is granted. *See* Part VII.

3. The Amended Settlement Agreement is expressly incorporated herein by this reference, and the Court directs the parties to implement it.

4. The applicable requirements of Federal Rule of Civil Procedure 23 having been satisfied, the settlement class is finally certified as all natural persons in the United States who:

> between June 17, 1998 and December 27, 2006, entered into an agreement over the internet with [CIC] or any Experian Entity to purchase any **Credit Check or Credit Monitoring (which were formerly known as CreditCheck® Monitoring Service), Credit Manager (including Yahoo! Credit Manager), Triple Alert, or Triple Advantage credit-monitoring product (and/or any credit score sold on a website also selling any of the foregoing credit monitoring products)**[21] and paid [CIC] or any Experian Entity for that credit-monitoring product (and/or such a credit score) but did not later obtain complete refunds from any source of the full amount paid for that credit-monitoring product (and/or credit score).

A full opportunity having been afforded to class members to participate in the Final Fairness Hearing and all objectors having been heard, all settlement class members who have not timely excluded themselves are bound by this Order and the Final Judgment.

Those individuals who timely excluded themselves are not part of the settlement class. Also excluded are Defendants' officers, directors, and employees; Defendants' and Plaintiff's attorneys; Magistrate Judge Lloyd and the members of his immediate family; anyone who enrolled in credit monitoring pursuant to a free trial offer but never became a paying member of the credit-monitoring program; and anyone who was a named plaintiff (as opposed to a putative class member) in a lawsuit pending against any defendant as of December 26, 2006.

***15** 5. Upon the Effective Date (i.e., the date when all appellate rights with respect to this order and the Final Judgment are exhausted):

1. the Released Defendants[22] shall forever be released and discharged from any and all legal or equitable claims ... that the named Plaintiff and settlement class members ("the *Browning* class") had based on any Released Party's violation of [CROA]; and

2. the Released Defendants shall forever be released and discharged from any and all legal or equitable claims ... that [the *Browning* class] had based on any Released Party's selling, providing or performing (or representing that such person can or will sell, provide, or perform) the service of improving a consumer's credit record, history, or rating (including providing advice or assistance to the consumer with regard to improving the consumer's credit record, history, or rating), where the stated basis of the claim is about improvement of a consumer's credit record, history, or rating; and

3. the Released Marketing Partners or Marketing Affiliates[23] shall forever be released and discharged from any and all legal or equitable claims ... that [the *Browning* class] had based on any Released Party's violation of [CROA], insofar as and to the extent that [the Released Marketing entities] advertised, promoted, marketed, provided and/or sold [the enumerated products or services]

4. [the Marketing Entities] shall forever be released and discharged from any and all legal or equitable claims ... that [the *Browning* class] had based on any Released Party's selling, providing or performing (or representing that such party can or will sell, provide, or perform) the service of improving a consumer's credit record, history, or rating (including the service of providing advice or assistance to the consumer with regard to improving the consumer's credit record, history, or rating), where the stated basis of the claim is about improvement of a consumer's credit record, history, or rating, insofar as and to the extent that [the Released Marketing Entities] advertised, promoted, marketed, provided, and/or sold [the enumerated products or services].

All released claims refer to those arising on or before the Effective date.

6. All objections having been overruled, and final approval to the Amended Settlement having been granted, the Second Amended Complaint shall be, and is, dismissed with prejudice. No member of the settlement class (including his or her past, present or future agents, legal representatives, trustees, parents, estates, heirs, executors and administrators) may hereafter assert any claim, demand, action, suit or cause of action, whether class or individual, against any Released Party based in whole or in part upon any released claim.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2007 WL 4105971

Footnotes

1 Browning is represented in this case by plaintiff's counsel in *Helms:* Lowe & Grammas LLP (formerly Lowe, Grammas, Hitson & Dana LLP).

2 The term "Experian Entities" shall mean Experian North America, Inc. and any company that is a subsidiary, parent, corporate affiliate or division of Experian North America, Inc., and shall also include Credit Expert, LLC.

3 For full text of the class definition and release, *see* the Amended Settlement Agreement (Docket No. 132–2) or Part VIII, Nos. 4–5 of this order.

4 Class members marked as "late" in Exhibit 1 of Keough Second Supp. Aff., did not file timely exclusions. (*See* Docket Nos. 196, 197). This list includes:

No. 1184	Sergey Golod (WA)	No. 1189	Keishana White (IN)
No. 1185	Lisa Mace (NC)	No. 1190	Sally Barnhill (OH)
No. 1186	Charles Patrick (TN)	No. 1191	Susan Shelton (TX)
No. 1187	Teresa Crook (GA)	No. 1192	Matthew Maurer (PA)
No. 1188	Carmelita VazQuez (PA)		

Any additional late exclusions submitted to the Settlement Administrator, who are not identified by name in Exhibit 1, also remain in the class.

5 Cost of notice and settlement administration in similar case involving class of 6.6. million—with same settlement administrator—estimated to exceed $1,000,000. *Hillis v. Equifax Consumer Services, Inc.,* 2007 WL 1953464, at *5 (N.D.Ga.).

6 The Court ordered this notice even though at the time there was no clear authority as to whether CAFA retroactively applied to cases filed prior to 2005.

7 In class-action settlements, it is common practice to provide a single notice program that satisfies both of these notice standards. *See* DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION § 21.31 (4th ed.2005).

8 *See* Keough Aff. and Supp. Aff., (Docket Nos. 167, 196); Edward F. Siegel represented objectors Richard Oster, Jeff Heinrich and Norman Palmer. Attorney J. Garrett Kendrick appeared for Joshua Hazan. Objectors Rodney Ashburn and Aron Noelle Griffis appeared through attorney John W. Davis. Attorney Lawrence W. Schonbrun represented Marty Evans and Michael Weiss.

9 Raymond Cooper was among the putative class members who primarily objected to this settlement as a "coupon" settlement. (Docket No. 143). However, Cooper also excluded himself from the class. (Docket No. 167). In any event, all of his objections were raised by other class members and accordingly considered.

10 The notices explain how a class member who chooses the credit monitoring benefit may cancel membership to avoid automatic renewal. All of the notices included on the first page (in bold, 14–point type) plain language disclosing the automatic-renewal.

11 A phishing scam involves Internet "fraudsters" who send spam or pop-up electronic messages to lure personal information from unsuspecting victims. *See* FTC Consumer Alert, *available at,* www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt127.shtm

12 Although, broad releases are sometimes approved in class action settlements. *See* *Wal–Mart Stores, Inc. v. Visa USA, Inc.,* 396 F.3d 96, 106 (2d Cir.2005). Note that an even broader release was recently approved in a similar case. *Hillis,* 2007 WL 1953464, at *12.

13 It noted that the violation was at most, a technical violation of a complex statutory scheme and that "[t]he damages resulting would be devastating and largely out of proportion with the culpability of defendant's conduct." *Helms,* 236 F.R.D. at 569.

14 Two district courts in the Eleventh Circuit reached contrary conclusions on this legal issue. *Helms,* 436 F.Supp.2d at 1238 (finding that CIC fell within the definition, but certifying ruling for interlocutory appeal); *Hillis v. Equifax Consumer Servs., Inc.,* 237 F.R.D. 491, 513–517 (N.D.Ga.2006) (decided after *Helms,* with similar CROA claims against similar defendant; finding as a matter of law that plaintiff failed to show defendant was a credit repair organization; the case then settled).

15 Max is an Alabama lawyer and mediator who has practiced law for over 30 years and who has, for the past ten years, focused his practice on the mediation of hundreds of complex civil cases in 26 states and the District of Columbia.

16 For details, *see* Part IV, Section D1.

17 *See FTC v. ConsumerInfo.com,* No. CV SACV 05–801 AHS (MLGx), Stip. Final J. (C.D.Cal. Aug. 15, 2005).

18 *See, e.g., Glass,* 2007 WL 221862, at *5 (approving a settlement with 8 objectors in a class of 13,176, an objection rate of 1 objector for every 1,647 class members).

19 Objectors dispute the application of a percentage-of-recovery analysis because it does not take into account actual redemption rates. Class Counsel maintain that attorney's fees may be based on the projected total amount of benefit created. *Williams v. MGM–Pathe Communications Co.,* 129 F.3d 1026 (9th Cir.1997); *Young,* 2007 WL 951821, at *8. The objectors correctly distinguish the cases cited by Class Counsel as common fund cases. But, because this analysis is applied for the limited purpose of confirming the reasonableness of the requested fee and lodestar amount, the authority is sufficiently analogous.

20 Determined by multiplying the retail value of the credit score ($5.00) by half of the number of class members (7 million). Some class members wouldresumably choose the benefit of two months free credit-monitoring ($9.95 per month). This estimate does not include the additional benefit derived from the remedial relief.

21 Bold language hereinafter "the enumerated products and services."

22 i.e., Defendants and their present or former officers, directors, employees, attorneys, agents, administrators, successors, assigns, subsidiaries, partners, corporate affiliates, sister corporations, parents, divisions, and predecessors.

23 i.e., any entity which (or individual who) during the class period was a defendant's marketing partner or affiliate that advertised, promoted, marketed, provided, or sold any [enumerated product or service] on a website also selling any of the foregoing credit-monitoring products (hereinafter, "Marketing Entities").

End of Document

EXHIBIT "5"

1998 WL 133741
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida.

Brenda G. ELKINS and Jerry Bedenbaugh, Individually and On Behalf of A Class of Persons Similarly Situated, Plaintiffs,
v.
EQUITABLE LIFE INSURANCE COMPANY OF IOWA, Equitable of Iowa Companies and Equitable American Life Insurance Company, Defendants.

No. CivA96–296–Civ–T–17B.
|
Jan. 27, 1998.

Attorneys and Law Firms

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER NUNC PRO TUNC

KOVACHEVICH, J.

INTRODUCTION

***1** 1. The matter of the final approval of the proposed settlement of this class action lawsuit came on for hearing on December 19, 1997. The hearing ("Fairness Hearing"), as set forth in the Court's Hearing Order dated August 14, 1997 ("Hearing Order"), was convened at 10:25 a.m., with plaintiffs appearing through counsel and defendants appearing through counsel and by a company representative. Although the Fairness Hearing was well publicized, as described below, no Class Members attended the Fairness Hearing. The proposed settlement, embodied in the parties' First Amended Stipulation of Settlement (including Exhibits A through L), dated July 18, 1997 and filed with the Court on August 8, 1997, was thoroughly briefed by the parties, and was supported with affidavits and declarations of fact and of expert witnesses. Oral presentations of plaintiffs' and defendants' counsel were received at the Fairness Hearing. At the conclusion of the Fairness Hearing, with the parties having met their burden for final approval of the settlement and for the proposed award of attorneys' fees and expenses, the Court requested and received from the parties a proposed form of order, called Final Order and Judgment, finally approving the settlement, certifying the Class, and awarding plaintiffs' counsel the requested fees and expenses, which the Court then signed, to be effective December 19, 1997. The Court also informed the parties it would be supporting the Final Order and Judgment with additional findings of fact and conclusions of law, to be entered *nunc pro tunc,* and instructed the parties to present proposed findings of fact and conclusions of law for the Court's consideration.

2. Now, having further considered the evidence and other submissions of the parties, and all objections to the settlement, the Court makes the following findings of fact and conclusions of law, effective as of December 19, 1997, to be added to and made a part of the Court's Final Order and Judgment dated December 19, 1997, *nunc pro tunc.* Further, the Final Order and Judgment dated December 19, 1997 is also modified as follows, as of December 19, 1997, *nunc pro tunc:*

a. The date December 19, 1997 in clause (iv) in the second sentence of paragraph 2 of the Final Order and Judgment is changed to the correct and actual date, August 14, 1997;

b. The sixteen subparagraphs numbered B.1.(b)(i) through B.1.(b)(xvi) in paragraph 8 (Release and Waiver) of the Final Order and Judgment are renumbered B.1.(b)(1) through B.1.(b)(16), to reflect their correct and actual numbers;

c. The words "and enjoined," unintentionally omitted before, are added to the first clause following the semicolon in the first sentence of paragraph 10 of the Final Order and Judgment, immediately following the words "and all persons are barred"; and

d. The first sentence of paragraph 15 of the Final Order and Judgment is changed to read as follows:

> Neither this Final Order and Judgment (including the Court's Findings of Fact and Conclusions of Law thereto and therefor) nor the Stipulation of Settlement (including any document referred to in the Stipulation of Settlement and any action taken to implement the Stipulation of Settlement) is, may be construed as, or may be used as an admission by or against defendants of: (i) the validity of any claim, or (ii) any actual or potential fault, wrongdoing or liability, or (iii) any fact or legal issue in another case.

***2** e. Clause (i) beginning on the first line of paragraph 1 of the Final Order and Judgment is changed to read as follows:

> (i) the First Amended Stipulation of Settlement, dated as of July 18, 1997 and filed with the Court on August 8, 1997; and

Otherwise, the Court's Final Order and Judgment is unchanged, and remains effective as of December 19, 1997.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. *BACKGROUND*

A. *The Complaint*

3. Representative plaintiffs Brenda G. Elkins and Jerry Bedenbaugh ("plaintiffs" or "named plaintiffs") filed this action on behalf of themselves and a putative nationwide class on February 14, 1996. They amended their complaint on July 26, 1996, and filed their Second Amended Class Action Complaint (hereinafter the "Complaint" or "Compl. ¶ ___") on July 17, 1997.

4. Defendant Equitable Life Insurance Company of Iowa ("Equitable of Iowa") answered plaintiffs' amended Complaint on August 22, 1996, and all three defendants, including Equitable of Iowa, Equitable of Iowa Companies and Equitable American Life Insurance Company (collectively the "defendants") answered the Second Amended Class Action Complaint on August 6, 1997.

5. This action is brought on behalf of a nationwide class of persons or entities (the "Class" or "Class Members") who have or had an ownership interest in certain life insurance policies upon which Equitable of Iowa was or is obligated and that were issued between January 1, 1984 and December 31, 1996 (the "Class Period"), with certain persons and entities excluded by definition. The Class is fully described in the Final Order and Judgment. The Complaint asserts claims based upon, among other things, negligent misrepresentation, negligent supervision, breach of contract, breach of duty of good faith and fair dealing, breach of fiduciary duty, fraudulent inducement and common law fraud. It seeks (i) compensatory and punitive damages, (ii) attachment, impounding, disgorgement or the imposition of a constructive trust, (iii) declaratory and injunctive relief, and (iv) expenses and attorneys' fees.

6. At the heart of the Complaint are plaintiffs' allegations that defendants induced Class Members to purchase whole life and universal life insurance policies issued by Equitable of Iowa[1] based upon uniform, misleading and deceptive sales practices. In particular, the Complaint alleges: (i) that defendants misled Class Members into believing that their life insurance policies would remain in force after the payment of a single out-of-pocket premium or a fixed or limited number of out-of-pocket premiums; (ii) that defendants induced Class Members to use the cash values of existing permanent life insurance policies to purchase new Equitable of Iowa policies; and (iii) that defendants sold life insurance principally as an investment, savings or retirement plan, without adequately disclosing that the product being sold was life insurance. Plaintiffs also allege: (a) that defendants injured Class Members through its policies, practices and actions concerning dividend scales, interest crediting rates and monthly deduction rates, as well as how it administered and serviced the life insurance policies owned by Class Members; (b) that defendants misled Class Members to believe that the dividend scales and interest rates illustrated at the time their policies were sold were reasonable, were not likely to change, or would not change in an amount sufficient to cause the policies to perform differently than was represented at the time of sale; (c) that defendants improperly decreased dividend scales and interest crediting rates on Class Members' policies to compensate for the "Deferred Acquisition Cost" or "DAC tax," when the policies did not permit such decreases; and (d) that defendants' "direct recognition practices" (*i.e.,* its reduction of dividends or interest credits on Class Members' policies with outstanding policy loans) were improper.

***3** 7. Defendants strongly deny the wrongdoings alleged by plaintiffs. These denials, including defendants' explanation of Equitable of Iowa's conduct and practices, are set out in § 3 of the Notice of Class Action (Ex. A to the Declaration of Jeffrey D. Dahl ("Dahl Decl."). *See also* Declaration of Richard L. Bailey ("Bailey Decl.") (No. 2), ¶¶ 10–14.

B. *The Parties*

1. *The Class Representatives*

8. **Plaintiff Brenda G. Elkins ("Ms.Elkins").** Ms. Elkins is a resident of Arizona. When she purchased her four Equitable of Iowa life insurance policies in 1990, and when she filed this class action lawsuit in 1996, she was a resident and citizen of Florida. Ms. Elkins claims she was induced to buy her policies based on misrepresentations that after five additional annual premiums were paid, no more premiums would be necessary, *i.e.,* her premiums would "vanish." She also claims to be a "twisting" (replacement) victim, in that she was improperly induced to terminate her existing life insurance policies, having cumulative death benefits of $200,000, to purchase new cash value life insurance policies from Equitable of Iowa, having cumulative death benefits of $700,000. In addition, she claims the four Equitable of Iowa policies were sold to her not as life insurance but as a retirement plan for herself and as investment plans for her daughters.

9. **Plaintiff Jerry Bedenbaugh ("Mr.Bedenbaugh").** Mr. Bedenbaugh is a resident and citizen of the State of Florida. He bought his $350,000 Equitable of Iowa life insurance policy in 1992, based on an allegedly misleading and inaccurate vanishing premium presentation. Like Ms. Elkins, Mr. Bedenbaugh also claims he was twisted, in that an existing cash value life insurance policy was cashed out to fund the purchase of his Equitable of Iowa policy. He also claims the Equitable of Iowa policy was sold to him as a retirement vehicle. Mr. Bedenbaugh, like Ms. Elkins, further alleges that the substantial commission and surrender charges attending the purchase of the Equitable of Iowa policy were not disclosed to him.

10. **Class Counsel.** Ms. Elkins, Mr. Bedenbaugh and the Class are represented by the law firms of Milberg Weiss Bershad Hynes & Lerach LLP and James, Hoyer & Newcomer, P.A. (collectively and individually "Co–Lead Counsel"). Plaintiffs and the Class are also represented by the law firms of Bonnett, Fairbourn, Friedman & Balint,

P.C.; Arnzen, Parry & Wentz, P.S.C.; Cantilo, Maisel & Hubbard, LLP; and Davis, Brown, Koehn, Shors & Roberts, P.C. All are experienced plaintiffs' counsel with expertise in the insurance, consumer and class action litigation fields. *See* Affidavit of Melvyn I. Weiss and John J. Stoia, Jr. in Support of Final Certification of the Class, Approval of Settlement and Award of Fees and Expenses ("Weiss/Stoia Aff.") ¶ 5.

2. *Defendants*

11. Defendant Equitable Life Insurance Company of Iowa is a stock life insurance company incorporated under the laws of the State of Iowa. Its principal place of business is Des Moines, Iowa. Defendant Equitable American Life Insurance Company was an Iowa corporation before it was merged into Equitable Life Insurance Company of Iowa in 1984. Defendant Equitable of Iowa Companies was an Iowa corporation with its principal place of business in Des Moines, Iowa until October of 1997, when it was merged into Equitable of Iowa Companies, Inc., a Delaware corporation. Bailey Decl. (No. 1) ¶ 6. Defendants are represented by their outside attorneys, Nyemaster, Goode, Voigts, West, Hansell & O'Brien, P.C., in the persons of Thomas M. Zurek and Gerald J. Newbrough.

C. *History Of The Litigation*

***4** 12. The claims of plaintiffs and the defenses of defendants have been vigorously contested in this case, and in precursor litigation in the Iowa District Court for Polk County in 1995. The parties' factual and legal skirmishes, plus numerous discovery disputes, are well-chronicled in their adversary papers and more recently in their submissions respecting the proposed settlement. Weiss/Stoia Aff. ¶¶ 20–25, 32–43; Bailey Decl. (No. 2) ¶¶ 10–15. *See also* Plaintiffs' Memorandum in Support of Application for Final Certification of the Class and of Approval of the Proposed Settlement ("Plaintiffs' Mem."). It is not necessary for the Court to itemize these contests and disputes in this Order.

13. It is also not necessary for the Court to recount the lengthy discussions and negotiations between the parties precipitating the proposed settlement, other than to note that these discussions and negotiations, which did not proceed substantively until plaintiffs had virtually completed their broad and thorough discovery, were intense, continuous and hard fought, and involved numerous capable and experienced attorneys on both sides. These negotiations took over a year to complete and ultimately culminated in the Stipulation of Settlement filed with this Court on July 18, 1997. Weiss/Stoia Aff. ¶¶ 49–54; Bailey Decl. (No. 2) ¶ 20. The discussions and negotiations respecting plaintiffs' attorneys' fees did not commence until all material terms of the proposed settlement had been agreed to by the parties. Weiss/Stoia Aff. ¶¶ 54, 56; Bailey Decl. (No. 2) ¶ 21.

14. By the end of the discovery process, Equitable of Iowa had produced and plaintiffs' counsel had reviewed voluminous materials, *e.g.,* papers, computer media and videotapes, relevant to the issues in this case. These materials included, *inter alia,* policy forms, product materials, training materials, sales illustrations software, other sales material, pricing and interest crediting materials, agent files, complaint files and relevant communications between Equitable of Iowa and its agents. In addition, plaintiffs' counsel deposed five officers of Equitable of Iowa familiar with its products, sales and marketing activities, pricing and interest crediting practices, complaint resolution procedures and other relevant matters. They also conducted extensive and on-going interviews of a senior actuary in the company, and interviewed the actuarial consulting firm retained by Equitable of Iowa on several occasions. Plaintiffs' counsel also conducted extensive informal discovery, including, *inter alia,* obtaining complaint files from various departments of insurance, and the review and analysis of media reports, SEC filings, state regulatory filings, industry bulletins and periodicals. They also utilized an expert for evaluation of Equitable of Iowa's sales illustrations. Bailey Decl. (No. 2) ¶ 19; Weiss/Stoia Aff. ¶¶ 32–43.

15. The Stipulation of Settlement, dated July 18, 1997, including Exhibit A thereto, was presented to the Court by the parties on July 18, 1997 at a previously scheduled status conference. The Stipulation of Settlement was presented with a proposed form of hearing order (now Exhibit K to the Stipulation of Settlement), which, *inter alia,* scheduled a fairness hearing on the proposed settlement and described the form and procedures of notice to the Class respecting the proposed settlement. The Court took the Stipulation of Settlement and the proposed hearing order under advisement.

***5** 16. On August 8, 1997, the parties filed their First Amended Stipulation of Settlement ("Stipulation of Settlement"), dated as of July 18, 1997, which was identical to their original Stipulation of Settlement, except Exhibits B through L to the Stipulation of Settlement were now also attached.

17. On August 14, 1997, after reviewing the Stipulation of Settlement, the Court signed the Hearing Order that, among other things, (i) preliminarily certified, for settlement purposes, the Class described in the Stipulation of Settlement, (ii) found that the Stipulation of Settlement was sufficient to warrant providing notice to the Class, and scheduled a final hearing to consider approval of the proposed settlement, (iii) directed the forms and methods of notice to the Class, (iv) authorized defendants to retain one or more class action administrators, (v) set forth procedures whereby Class Members could exclude themselves from the Class or object to any aspect of the proposed settlement, (vi) appointed Co–Lead Counsel for the Class and directed Co–Lead Counsel to make available to all Class Members the documents produced to Co–Lead Counsel by defendants as well as the deposition transcripts and accompanying exhibits generated in this action, and (vii) preliminarily enjoined Class Members who had not timely excluded themselves from the Class from participating in any lawsuit relating to the claims in this action or their underlying transactions, and preliminarily enjoined all persons from commencing or prosecuting a lawsuit as a class action in any jurisdiction, based on or relating to the claims or causes of action in this case and/or the "Released Transactions" (as defined in the Stipulation of Settlement). Paragraph 6(a) of the Hearing Order was corrected *nunc pro tunc* on September 2, 1997.

18. After issuance of the Hearing Order, extensive notice, describing the proposed settlement and Class Members' options in connection with the settlement, was provided to the Class, using the forms and methods proscribed in the Hearing Order. Among other things, this notice consisted of (i) comprehensive individual notice sent by first class mail to the approximately 109,000 Class Members (respecting the approximately 130,000 policies covered by the proposed settlement), and (ii) publication notice that appeared in the national editions of *The Wall Street Journal, USA Today* and *The Chicago Tribune* and also in *The Tampa Tribune, The Arizona Daily Star* and *The Arizona Citizen.* In addition, Equitable of Iowa established and operated a toll-free telephone information center—in consultation with and monitored by Co–Lead Counsel—staffed with trained operators who provided Class Members with additional information about the proposed settlement. As of November 21, 1997, the class action information center had received approximately 6,627 calls on its policyowner hotline. The Court's findings concerning the notice provided to the Class are set forth in Part IV below.

D. *The Fairness Hearing*

***6** 19. On December 19, 1997, this Court held the Fairness Hearing to hear argument and consider evidence concerning the fairness, adequacy and reasonableness of the proposed settlement, which the parties had fully briefed and documented with declarations and affidavits, including extensive exhibits, in support of the settlement.

20. The Court considered all of the written objections of Class Members who objected to the settlement, including objections to plaintiffs' counsel's request for attorneys' fees and expenses. Although all objectors had the opportunity to appear in person or through counsel and present objections at the Fairness Hearing, no objectors availed themselves of that opportunity.

21. The Court considered the testimony submitted by plaintiffs in support of the settlement through (i) the joint affidavit of Melvyn I. Weiss and John J. Stoia, Jr. of Milberg Weiss Bershad Hynes & Lerach LLP; (ii) the affidavit of Terry M. Long of Lewis & Ellis, Inc. ("Long Aff."); (iii) the declaration of Geoffrey P. Miller, Professor of Law, New York University Law School ("Miller Decl."); and (iv) the affidavits of Co–Lead Counsel and other counsel (collectively, "Plaintiffs' Counsel Declarations") in support of plaintiffs' application for attorneys' fees and expenses.

22. The Court also considered the testimony submitted by Equitable of Iowa in support of the settlement through (i) the declarations of Richard L. Bailey; (ii) Exhibit A to the declaration of John Snyder of Milliman & Robertson, Inc. ("M & R Report") and the Declaration of Dale S. Hagstrom of Milliman & Robertson, Inc. ("Hagstrom Decl."); (iii) the declaration of Professor George L. Priest ("Priest Decl."), the John M. Olin Professor of Law and Economics, Yale Law School; (iv) the declaration of Thomas Tew ("Tew Decl."), former outside litigation counsel to the Florida Department of Insurance and presently with the law firm of Tew & Beasley, L.L.P.; and (v) the declaration of Jeffrey D. Dahl ("Dahl Decl."), of Rust Consulting, Inc., the Administrator retained in this action.

23. The Court has also considered the reaction of the state insurance departments to the proposed settlement. *See* Bailey Decl. (No. 2) ¶¶ 24–25.

24. At the conclusion of the Fairness Hearing, this court entered its Final Order and Judgment, which, among other things: (i) approved the settlement as fair, adequate and

reasonable, (ii) certified the Class, (iii) approved plaintiffs' request for attorneys' fees and expenses totalling $5 million, and (iv) ordered the parties to submit proposed findings of fact and conclusions of law for the Court's consideration.

II. *THE SETTLEMENT*

A. *Overview*

25. The settlement provides the Class with an innovative package of relief options that are specifically responsive to the allegations of the Complaint. Although the basic structure of the settlement resembles that employed in court-approved settlements of other life insurance sales practices class actions across the country—*see, e.g., Spitz v. Connecticut General Life Ins. Co.,* MDL No. 1136, Nos. CV95–3566–HLH & CV96–8484–HLH, Order (C.D.Cal. Jan. 13, 1997) (Weiss/Stoia Aff. Ex. 4); *In re Prudential Ins. Co. of Am. Sales Practices Litig.,* 962 F.Supp. 450 (D.N.J.1997); *Michels v. Phoenix Home Life Mut. Ins. Co.,* No. 95/5318, 1997 N.Y.Misc. LEXIS 171 (N.Y.Sup.Ct. Jan. 3, 1997) (Weiss/Stoia Aff. Ex. 2); *Willson v. New York Life Ins. Co.,* No. 94/127804, 1995 N.Y.Misc. LEXIS 652 (N.Y.Sup.Ct. Nov. 8, 1995), 228 A.D.2d 368 (1996), *appeal denied,* 677 N.E.2d 289 (1997) (Weiss/Stoia Aff. Ex. 1); *Natal v. Transamerica Life Insurance Co.,* Case No. 694829 (San Diego Superior Ct., July 28, 1997) (Weiss/Stoia Aff. Ex. 3)—that structure has been substantially modified to address the allegations in the Complaint and to meet the particular needs of individual Class Members. *See* Weiss/Stoia Aff. ¶¶ 8, 10–17.

***7** 26. Under the settlement, each Class Member will be offered the choice of Individual Claim–Review Relief through a Claim–Review Process or General Policy Relief. The Claim–Review Process provides all Class Members with the opportunity to submit policy-related claims to a two-tiered claim resolution system that is designed to be a fair, efficient and cost-free alternative to court litigation. Class Members who choose not to participate in the Claim–Review Process will be eligible to apply for one or more forms of General Policy Relief, which require no showing of fault or wrongdoing on defendants' part. The forms of relief made available under the settlement are summarized below and are described in detail in the Stipulation of Settlement.

B. *The Claim–Review Process*

27. Any Class Member who believes that he or she was misled by a misrepresentation or omission of material information or otherwise harmed by wrongdoing in connection with a policy covered by the settlement will have the opportunity to submit a claim for relief to the Claim–Review Process. The Claim–Review Process is described in detail at § IV of the Stipulation of Settlement.

28. Under the Claim–Review Process, which is provided to individual Class Members at no cost, the Class Member will submit a claim form describing his or her claim, along with all documents in his or her possession relating to the claim. The agent who sold the policy will be asked to provide a sworn statement about the claim and documents relating to the claim. Equitable of Iowa is obligated to investigate the Class Member's claim, as described in the Stipulation of Settlement, and to provide information obtained through that investigation, including relevant documents, to the Claim–Review Team that initially reviews the claim.

29. Under the Claim–Review Process, claims will initially be reviewed and scored, and relief (if any) will be awarded, by a Claim–Review Team appointed by Equitable of Iowa. The Claim–Review Team will evaluate claims using procedures, including detailed substantive evaluation and relief criteria, agreed to by plaintiffs and Equitable of Iowa and set forth in the Stipulation of Settlement (particularly, Exhibits A and B to the Stipulation of Settlement). For each claim, scores will be assigned to the several claim-resolution factors set forth in the Stipulation of Settlement for that type of claim, based on scoring guidelines set forth in the Stipulation of Settlement. The score ultimately assigned to a claim-resolution factor may not be averaged with the score assigned to any other claim-resolution factor; instead, relief will be awarded based on the highest score merited by any claim-resolution factor. Once scoring is complete, decisions to award relief must be based only on the relief criteria set forth in the Stipulation of Settlement.

30. The relief available through the Claim–Review Process varies depending on the type of claim and the highest score awarded it. The various types of relief are designed to provide substantial compensation that addresses the harm associated with each type of claim. If a Class Member submits a claim that alleges more than one type of misrepresentation, he or she may be able to choose between different relief options, depending on the scores awarded to the claim. Punitive or exemplary

damages may not be awarded.

***8** 31. Importantly, there is no cap on the aggregate relief for which Equitable of Iowa may be liable by way of awards made pursuant to the Claim–Review Process. Equitable of Iowa will provide relief to all Class Members who submit claims and establish their entitlement to relief under the Claim–Review Process, and each Class Member's award under the process will be determined without regard to the value of awards provided to other Class Members. Weiss/Stoia Aff. ¶ 10; Priest Decl. ¶ 35; Tew Decl. ¶ 10. c.

32. Claim–Review Team decisions will be binding on Equitable of Iowa. However, a Class Member who is dissatisfied with the Claim–Review Team's disposition of his or her claim may appeal, at Equitable of Iowa's expense, to a Claim–Appeal Panel, a panel of independent arbitrators selected by Co–Lead Counsel from a list approved by the parties. The Claim–Appeal Panel that reviews a claim on appeal may first attempt to informally resolve the claim. If this attempt is unsuccessful, the Claim–Appeal Panel will review the claim *de novo,* using the same criteria employed by the Claim–Review Team. A Class Member who appeals a decision of a Claim–Review Team will have the right to appear at an appeal hearing, either in person, by telephone, or through an attorney retained at the Class Member's expense. Equitable of Iowa may appear at such a hearing only through the method chosen by the Class Member. The outcome of an appeal is binding on the Class Member; Equitable of Iowa may seek reconsideration only if the Claim–Appeal Panel awards relief that is not specified under the Stipulation of Settlement.

33. To help ensure that claims are fairly evaluated and that relief is awarded in accordance with the Stipulation of Settlement, a Policyowner Representative selected by Co–Lead Counsel and compensated by Equitable of Iowa will participate as each Class Member's advocate throughout the Claim–Review Process. Among other things, the Policyowner Representative will be able to participate (but not vote) in Claim–Review Team discussions, submit materials from the discovery record and written statements for consideration in connection with individual claims, and, under circumstances specified in the Stipulation of Settlement, appear and present oral argument at appeal hearings.

34. The Claim–Review Process is not restricted to claims expressly alleged in the Complaint. Rather, so long as they comply with the requirements set forth in the Stipulation of Settlement, Class Members may, if they so desire, submit to the Claim–Review Process any claim with respect to a policy included in the Class definition. Stipulation of Settlement, Ex. A (Parts VIII.A.1(i) and VIII.A.2).

35. The settlement also provides for the resolution of certain claims outside the Claim–Review Process. Specifically, the settlement provides that Equitable of Iowa may require Class Members to resolve certain claims other than those submitted to the Claim–Review Process through certain procedures, called "Part VIII.A.ii Claim–Review Procedures," described in Part VIII of Exhibit A to the Stipulation of Settlement. *See* Stipulation of Settlement, Ex. A, Parts VIII.A. (ii) and VIII.A.3. In addition, if a Class Member can demonstrate that, through the exercise of reasonable care, he or she could not have known at the time the settlement became final of a released claim involving the administration or servicing of a policy (included within the Class definition) after its purchase, under the settlement Equitable of Iowa will be required to resolve that claim through the Part VIII.A.ii Claim–Review Procedures, even though the deadline for submission of claims to the Claim–Review Process has passed. *Id.; see also* Stipulation of Settlement, §§ IV.B and IX.B.4.

C. *General Policy Relief*

***9** 36. As an alternative to Individual Claim–Review Relief through the Claim–Review Process, the settlement makes six types of General Policy Relief available to Class Members. General Policy Relief is described in detail in § V of the Stipulation of Settlement. It is also described in the individual notice sent to Class Members pursuant to the Hearing Order. *See* Dahl Decl.Ex. A.

37. Depending on eligibility, every Class Member who does not choose to submit a claim to the Claim–Review Process may obtain or apply for one or more of the six types of General Policy Relief. Eligibility for specific types of General Policy Relief is based on characteristics of the policy that makes each policyowner a member of the Class, such as policy type, face amount and status (in-force or terminated) Class Members need not show fault, injury or damages to be entitled to General Policy Relief. Eligibility criteria are set forth in § V.B of the Stipulation of Settlement. They are also described in the individual notice to Class Members. *See* Dahl Decl.Ex. A.

38. The six types of General Policy Relief may be generally described as follows:

a. **Dividend Enhancement.** Eligible Class Members will receive Dividend Enhancement on each of their policies equal to a 60 basis-point enhancement to the unloaned interest component of the annual base dividend for the policy, plus another 60 basis-point enhancement to the unloaned interest component of the annual paid-up additions dividend for the policy (if it has paid-up additions), for the policy year ending on the policy's anniversary date following the date 120 days after the settlement is final. For policies that terminate after July 31, 1997, and before they are credited with dividend enhancement, Equitable of Iowa will pay dividend enhancement directly to the Class Members within 30 days after the date their policies would have been credited dividend enhancement had they not terminated.

b. **Interest Enhancement.** Eligible Class Members will receive Interest Enhancement on each of their policies. For policies where excess interest is used to purchase paid-up additions, Equitable of Iowa will pay interest enhancement by crediting each such policy with an amount equal to a 60 basis-point enhancement to the current interest rate applied to the unloaned policy value of the policy, including the unloaned value of any paid-up additions for the policy (if it has paid-up additions) for the policy year ending on the policy's anniversary date first following the date 120 days after the settlement is final. For policies where interest is applied to the policy account value or policy accumulation value, Equitable of Iowa will pay, within 120 days of the date the settlement is final, interest enhancement by crediting each such policy with an amount equal to a 60 basis-point enhancement of the policy's unloaned account value as it existed on July 31, 1997.

C. **Optional Premium Loans.** Eligible Class members may obtain Optional Premium Loans at a rate substantially equivalent to Equitable of Iowa's cost of borrowing. Optional premium loans are a special type of loan and are not policy loans pursuant to the policy loan provisions of the Class Members' policies. The maximum number of Optional Premium Loans an eligible Class Member may obtain will depend on the year his or her policy was issued. Optional Premium Loans can only be used to pay all or portions of one or more premiums due under the policies that make the Class Members eligible for Optional Premium Loans.

***10** d. **Enhanced Value Policies.** Eligible Class Members may apply for Enhanced Value Policies. Enhanced Value Policies are whole life and universal life insurance policies, issued by Equitable of Iowa from its current product line, enhanced with a financial contribution from Equitable of Iowa equal to 50% of the first year premium and, if the Class Member keeps the enhanced value policy in force for five years, an additional 25% of the first year premium. Enhanced Value Policies have relaxed underwriting requirements and special contestability and suicide provisions. Failure to make a timely election disqualifies otherwise eligible Class Members from this type of General Policy Relief.

e. **Enhanced Value Deferred Annuities.** Eligible Class Members may obtain Enhanced Value Deferred Annuities, which are non-qualified, single-premium, fixed, deferred annuities issued by Equitable of Iowa from its current product line, and enhanced with contributions from Equitable of Iowa. Each Enhanced Value Deferred Annuity will receive from Equitable of Iowa, at the end of its first policy year, a contribution equal to 2% or 3% of the annuity's premium, depending on the size of the premium, plus another contribution at the end of the fifth policy year equal to 1% or 1.5% of the annuity's premium, depending on the size of the premium. Each Enhanced Value Deferred Annuity will have its applicable surrender charge waived when the Class Member reaches age 59 1/2 or the annuity has been in force for four years, whichever is later. Failure to make a timely election disqualifies otherwise eligible Class Members for this type of General Policy Relief.

f. **Enhanced Value Immediate Annuities.** Eligible Class Members may obtain Enhanced Value Immediate Annuities, which are non-qualified, single-premium, fixed, life-contingent, immediate annuities issued by Equitable of Iowa from its current product line, and enhanced with contributions from Equitable of Iowa. Each Enhanced Value Immediate Annuity will receive, at the time of issue, a contribution equal to 2.5% of the annuity's premium. Failure to make a timely election disqualifies otherwise eligible Class Members for this type of General Policy Relief.

39. The parties designed each of the six types of General Policy Relief to respond to the various circumstances described in the Complaint and to assist Class Members (who do not wish to participate in the Claim–Review Process) in achieving financial security objectives that might have influenced their original purchasing decisions. The purpose of Dividend Enhancement is to enhance the dividend accumulation component of Class Members' in-force policies and thereby increase the policies' ability to bear the cost of future premiums. The purpose of Interest Enhancement is to enhance the cash accumulation component of Class Members' policies and thereby increase the policies' ability to bear the cost of mortality and administrative charges or future premiums. The purpose of Optional Premium Loans is to lessen the burden to Class Members of additional out-of-pocket

premiums, which may be due beyond those originally illustrated. Enhanced Value Policies are designed for Class Members who terminated their policies, or who have borrowed heavily against their policies and want a fresh start, to obtain new policies, enhanced by Equitable of Iowa, to help them attain their original insurance objectives. Enhanced Value Deferred Annuities and Enhanced Value Immediate Annuities are intended to address the savings and investment or income and cash flow objectives of Class Members whose need for life insurance death benefits may be outweighed by other considerations. *See* Stipulation of Settlement § V.A; Plaintiffs' Mem. pp. 14–15.

D. *Release*

***11** 40. In exchange for the settlement benefits described above, the Stipulation of Settlement releases defendants from all claims covered by the Release, which is set forth in full in § IX of the Stipulation of Settlement and in Appendix A (pp. 28–31) to the individual notice mailed to Class Members. Dahl Decl.Ex. A.

III. *CLASS CERTIFICATION*

A. *Introduction*

41. The legitimacy of a settlement class was recently confirmed by the Supreme Court in *Amchem Prods. v. Windsor,* 521 U.S. 591 117 S.Ct. 2231, 2252 (1997). There, the Court established that not only is the proposed settlement and its terms relevant to the class certification analysis, it alleviates the need to address potential management problems that might arise were the case to be tried. *Id.* at 2252. Most importantly, the Supreme Court reiterated the "dominant concern" that governs the proper analysis under each Rule 23 subsection: "whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Id.* at 2248. Here the proposed Class satisfies this dominant concern, as well as all other prerequisites to certification set forth in *Amchem* and Eleventh Circuit precedent.

B. *The Requirements Of Rule 23(a) Are Satisfied*

42. The four prerequisites of Rule 23(a) are that:

(1) the class be so numerous that joinder of all members is impracticable;

(2) there be questions of law or fact common to the class;

(3) the claims or defenses of the representative parties be typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a); *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2240.

a. *Numerosity*

43. The class must be so numerous that "joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). To meet this requirement, the class representatives need only show that it is difficult or inconvenient to join all the members of the class. *Phillips v. Joint Legis. Comm.,* 637 F.2d 1014, 1022 (5th Cir. Feb.23, 1981).[2]

44. Here, members of the Class live nationwide and number approximately 109,000. *See* Bailey Decl. (No. 1) ¶ 10. In these circumstances, joinder is impractical and the numerosity requirement is easily satisfied. *Cox v. American Cast Iron Pipe Co.,* 784 F.2d 1546, 1553 (11th Cir.1986) (generally, more than 40 class members satisfies numerosity).

b. *Commonality*

45. There must be "questions of law *or* fact common to the class." Fed.R.Civ.P. 23(a)(2) (emphasis added). Rule 23(a) does not require that *all* questions of law or fact be common to *all* class members. "The claims actually litigated in the suit must simply be those fairly represented by the named plaintiffs." *Cox,* 784 F.2d at 1557. Accordingly, the main inquiry is whether at least one issue exists that affects all or a significant number of proposed class members. *Kreuzfeld A.G. v.*

Carnehammar, 138 F.R.D. 594, 599 (S.D.Fla.1991).

***12** 46. The commonality requirement is also satisfied where plaintiffs allege common or standardized conduct by the defendant directed toward members of the proposed class. *See* *Kennedy v. Tallant,* 710 F.2d 711, 718 (11th Cir.1983) ("a single conspiracy and fraudulent scheme against a large number of individuals is particularly appropriate for class action"). One indicia of a common scheme to deceive alleged in the Complaint is the existence of uniform written materials on which the oral representations were based. *See, e.g.,* *Kirkpatrick v. J.C. Bradford & Co.,* 827 F.2d 718, 724–25 (11th Cir.1987) (observing that where oral communications are based on and consistent with, deceptive written materials, the fact that individual brokers provided information through oral communications does not preclude class certification). In such cases, any factual distinctions that may exist among class members are "far less important than the common issues bearing on the existence of a 'common scheme' of misrepresentations and omissions." *CV Reit, Inc. v. Levy,* 144 F.R.D. 690, 696 (S.D.Fla.1992) (citation omitted).

47. Plaintiffs allege that defendants engaged in a common course of conduct intended to defraud all Class Members through the use of substantially uniform omissions and misrepresentations. The Complaint alleges 22 common issues of fact and law, based on alleged standardized omissions and misrepresentations emanating from Equitable of Iowa. *See* Compl. ¶ 15. These common issues are susceptible to classwide proof that will not vary appreciably from one Class Member to another. The common issues include, *inter alia:*

• Whether defendants routinely engaged in fraudulent and deceptive acts and practices and courses of business in the sale of its life insurance policies;

• Whether defendants failed to supervise and train its agents who engaged in the schemes described in the Complaint and also failed to prevent its agents from violating uniformly applicable state insurance laws and regulations;

• Whether defendants engaged in deceptive acts and practices in the sale of "vanishing premium" policies by representing through policy illustrations, marketing materials and uniform sales presentations approved and prepared by it that the single prepayment of premiums made by Class Members at the time of purchase, or that the fixed number of premiums paid during a fixed period of years, would be sufficient to carry the cost of the policies for the life of the insured or to maturity;

• Whether defendants failed to disclose to those Class Members who believed they were purchasing "investment," "retirement" or "savings" plans, instead of life insurance, that a substantial part of their "investment" would be used to pay mortality charges for life insurance, pay agents' commissions and pay administrative charges to Equitable of Iowa and, thus, would not earn any interest or investment income whatsoever;

***13** • Whether defendants concealed from plaintiffs and Class Members that the dividends payable and excess interest crediting rates as illustrated in the uniform sales presentations and policy illustrations approved and prepared by them were not guaranteed at the illustrated levels and would likely decrease in future payment periods;

• Whether the dividend scales, excess interest crediting rates, values, assumptions, mortality experience, expenses, lapse rates, interest rate and investment return projections underlying Equitable of Iowa's policy illustrations lacked any reasonable basis in fact and were so flawed as to have an adverse impact on plaintiffs and Class Members; and

• Whether defendants failed to disclose to plaintiffs and Class Members material information concerning the impact or results of using some or all of an existing policy's cash value to purchase a new policy issued by Equitable of Iowa by means of a surrender or withdrawal/partial surrender of, or loan(s) from, the existing policy.

48. The primary theory of plaintiffs' Complaint is that defendants devised and implemented a scheme to sell, service and administer permanent life insurance policies through a nationwide common course of deceptive conduct that emanated from Equitable of Iowa's home offices in Des Moines, Iowa and was implemented through its nationwide sales force. *See* Compl. ¶¶ 24–28. Plaintiffs allege that all Class Members were injured, separately or in combination, by a broad array of centrally-orchestrated deceptive practices that permeated Equitable of Iowa's marketing and sales presentations (Compl.¶¶ 4, 24–25), agent training and supervision (Compl.¶ 28), illustration, dividend and interest crediting practices (Compl.¶¶ 26, 34) and investment strategies (Compl.¶ 34).

49. As alleged by plaintiffs, all of these practices and policies allegedly were determined and implemented in a

uniform fashion by Equitable of Iowa's home office management and would be proven at trial through common evidence. All Class Members thus share a common interest in establishing that defendants knew that deceptive sales practices were being utilized, and that Class Members suffered losses as a consequence of that conduct. In sum, the Complaint's allegations of a centralized scheme raise issues common to every Class Member, amply satisfying the commonality requirement of Rule 23(a)(2).

C. *Typicality*

50. The typicality requirement of Rule 23(a) is satisfied where the claims of the class representatives arise from the same broad course of conduct that gives rise to the claims of the other class members and are based on the same legal theory. *Appleyard v. Wallace,* 754 F.2d 955, 958 (11th Cir.1985) (typicality requirement met where named plaintiffs' claims have same essential characteristics as claims of class even if there are factual distinctions among the claims of the plaintiffs of the class); *Powers v. Stuart–James Co.,* 707 F.Supp. 499, 503 (M.D.Fla.1989) (Kovachevich, J.) ("The reasoning behind this requirement is that where all interests are sufficiently parallel, all interests will enjoy vigorous and full presentation."). Here, Ms. Elkins and Mr. Bedenbaugh are representative of both current and former Equitable of Iowa policyowners allegedly defrauded by the same deceptive sales practices and schemes allegedly utilized by defendants against other Class Members. *See* Miller Decl. ¶ 13 ("The claims of the representative class plaintiffs are typical of those of the Class as a whole."). Any slight factual differences that may exist between the named class representatives and other Class Members will not defeat typicality. *Appleyard,* 754 F.2d at 958.

d. *Adequacy Of Representation*

***14** 51. Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This requirement serves to protect the legal rights of absent class members. As the Supreme Court recently observed in *Amchem,* the adequacy "inquiry [under Rule 23(a)(4)] serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2236. The adequacy-of-representation requirement under Rule 23 is a two-prong test. First, the named class representatives must appear to be capable of prosecuting the actions through qualified, experienced and competent counsel. Second, there can be no antagonism or disabling conflict between the interests of the named class representatives and the interests of the members of the class. *See, e.g., Kirkpatrick,* 827 F.2d at 726, (citing *Griffin v. Carlin,* 755 F.2d 1516, 1532 (11th Cir.1985)).

52. This action meets both prongs of the "adequacy" test. First, plaintiffs' counsel are well-qualified to prosecute this litigation effectively and efficiently on behalf of plaintiffs and the Class. *See, e.g., In re Prudential,* 962 F.Supp. at 519–20 (finding the same legal counsel "extremely qualified" and "extremely committed to the class"); *Willson,* 1995 N.Y.Misc. LEXIS 652, at *28 (finding the same legal counsel competent and zealous, in a "vanishing premium" case that produced settlement for policyowners conservatively valued in excess of $300 million) (Weiss/Stoia Aff.Ex. 1); *In re Prudential Sec. Inc. Ltd. Partnerships Litig.,* 163 F.R.D. 200, 208 (S.D.N.Y.1995) (finding the same legal counsel "have successfully conducted numerous class actions, including class actions under the federal securities laws and RICO, in this Court and in federal district courts throughout the United States").

53. Second, there are no conflicts or antagonisms here between the named plaintiffs and the Class Members. All Class Members can claim to be harmed by defendants' alleged misconduct and all Class Members have the mutual incentive to establish the alleged fraudulent scheme. Consequently, plaintiffs' interests are co-extensive with those of other Class Members, and thus plaintiffs have every incentive to vigorously pursue these claims as representatives of the Class. *See In re Corrugated Container Antitrust Litig.,* 643 F.2d 195, 208 (5th Cir. Apr.1981) (" 'so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes' ") (citation omitted).

54. Furthermore, unlike personal injury actions, here the restitution and/or money damages sought are subject to objective quantification and are reasonably calculable without speculation.[3]

***15** 55. Nor is any impermissible intra-Class conflict or antagonism created by the settlement. *See Amchem,* 521 U.S. at ——, 117 S.Ct. at 2236. The settlement affords all eligible Class Members relief unfettered by monetary or numerical "caps." The settlement does not discriminate or allocate relief among different segments of the Class; every Claim Member is eligible for General Policy Relief or Individual Claim–Review Relief tailored to his or her individual circumstances. Under the settlement, Class Members are entitled to compensation based on the strength of their individual claims, and no theoretical subgroup's interest (such as Class Members with replacement claims) have been traded off to the benefit of any other theoretical subgroup (such as Class Members with vanishing premium claims). *Contrast* *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2236 (finding interest of currently injured Class Members not aligned with that of potentially injured Class Members). Nor is the settlement geared to protecting one part of the class at the expense of the other. Those were the sorts of class conflicts that alarmed the Supreme Court in *Amchem,* but they are absent here.

56. The settlement also incorporates procedural and substantive protections that virtually insure adequate representation. The settlement establishes specific and uniform criteria under which all claims for Individual Claim–Review Relief will be administered. Importantly, these criteria include rebuttable and conclusive presumptions favoring the claimants, and objective factors that operate to increase the claimants' scores in many cases. The settlement also provides individual representation to claimants through a Policyowner Representative appointed by plaintiffs' counsel and an independent, simplified appeals process. As the end product of plaintiffs' efforts on behalf of the Class, the settlement resoundingly confirms that all Class Members have been adequately represented in this litigation.

C. *The Requirements Of Rule 23(b)(3) Are Satisfied*

57. Rule 23(b)(3) authorizes certification where common questions of law or fact predominate over individual questions and the class action is superior to other available means of adjudication. *Amchem,* 521 U.S. at —— – ——, 117 S.Ct. at 2232–35.

a. *Common Legal And Factual Questions Predominate In This Action*

58. Where confronted with a class of purchasers allegedly defrauded over a period of time by a similar common thread or scheme to which all alleged non-disclosures or misrepresentations relate, "courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions, and that the issue may profitably be tried in one suit." *Blackie v. Barrack,* 524 F.2d 891, 902 (9th Cir.1975); *Kirkpatrick,* 827 F.2d at 725; *In re Prudential,* 962 F.Supp. at 510–11.

***16** 59. In this case, plaintiffs and the Class have allegedly been defrauded by the same common course of conduct. Although Class Members purchased their policies separately, plaintiffs allege that defendants induced them to do so through a uniform marketing scheme that was standardized, coordinated and ultimately deceptive. First, proof of defendants' alleged common course of conduct insures that common questions would predominate over individual issues at trial. *See, e.g.,* *Davis v. Avco Corp.,* 371 F.Supp. 782, 791–92 (N.D.Ohio 1974) (the fact that some of the class members received oral rather than written statements creates no impediment to class certification). Second, proof of defendants' alleged fraudulent concealment, the appropriateness of equitable relief and feasibility of classwide damages methodologies likewise insure predominance. *In re NASDAQ Market–Makers Antitrust Litig.,* 169 F.R.D. 493, 517 (S.D.N.Y.1996); *In re Prudential,* 962 F.Supp. at 512. Likewise, the damages issues in this case are suited for classwide resolution because Equitable of Iowa maintains computerized records of transactions with the Class Members. *In re NASDAQ,* 169 F.R.D. at 522; *see also* *In re Prudential,* 962 F.Supp. at 516 (use of class damage calculation methodology raised common question).

60. This is therefore not a case, as in *Amchem,* where the class members' claims vary widely in character. There, the class purported to preclude members who were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods, such that some class members suffered no physical injury, some had only asymptomatic pleural changes, others had lung cancer (some of whom were smokers), other disabling asbestosis, and still others mesothelioma—a disease with a latency period of 15 to 40 years. *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2240. Indeed, as to some class members, it was unclear

whether they would ever contract an asbestos-related disease and, if so, which one. *Id.*

61. Additionally, this case is distinguishable from *Motel 6,* which required individualized proof of "highly case-specific factual issues." *Jackson, et al. v. Motel 6 Multi–Purpose, Inc., et al.,* 130 F.3d 999, 1997 U.S.App. LEXIS 36132 (11th Cir.1997). There, specific fact inquiries included:

> [N]ot only whether a particular plaintiff was denied a room or was rented a substandard room, but also whether there were any rooms vacant when that plaintiff inquired; whether the plaintiff had reservations; whether unclean rooms were rented to the plaintiff for reasons having nothing to do with the plaintiff's race; whether the plaintiff, at the time that he requested a room, exhibited any non-racial characteristics legitimately counseling against renting him a room; and so on.... Indeed, we expect that most, if not all, of the plaintiffs' claims will stand or fall, not on the answer to the question whether Motel 6 has a practice or policy of racial discrimination, but on the resolution of these highly case-specific factual issues.

***17** *Id.,* at *18.

62. Here, by contrast, the Class is limited to purchasers of a particular product (a life insurance policy) from a particular company (Equitable of Iowa or Equitable American) through allegedly uniform and fraudulent sales practices, including uniform misrepresentations and omissions of material information, at the time of sale and thereafter, which was common to all Class Members. Furthermore, the Class Members are readily identifiable, and all can claim to have already suffered injury in the purchase of a product that was other than as represented. In short, defendants' alleged intentional company-wide development and implementation of fraudulent sales practices involving uniform misrepresentations and omissions of material fact provides the "single central issue" lacking in *Amchem* and avoids the predominance concerns of *Motel 6,* 1997 U.S.App. LEXIS 36132, at *15–*20. *See* *In re Prudential,* 962 F.Supp. at 511 n. 45. *See also* Miller Decl. ¶ 15 (contrasting personal injury claims in *Amchem* with economic damages here).

63. Defendants' alleged deceptive sales practices consisted, in part, of oral misrepresentations, which arguably may be susceptible to individual variation. However, these individual issues do not outweigh the substantial number of common questions, and therefore the commonality requirement has been met. *See* *In re Carbon Dioxide,* 149 F.R.D. 229, 234 (M.D.Fla.1993); *Walco Invs. v. Thenen,* 168 F.R.D. 315 (S.D.Fla.1996). Allegations of a common scheme of deception can establish predominance even where the scheme is implemented through oral misrepresentations by sales agents. *See, e.g.,* *In re Prudential,* 962 F.Supp. at 512–16; *In re American Continental Corp./ Lincoln Sav. & Loan Sec. Litig.,* 140 F.R.D. 425, 430–31 (D.Ariz.1992); *Davis,* 371 F.Supp. at 792. *See also* *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2250 ("Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.").

64. Predominance is not undermined by any theoretical choice of law issues that might also arise if this case were to be litigated. At the certification stage, the Court need only determine which state law is "likely" to apply. *See* *Randle v. SpecTran,* 129 F.R.D. 386, 393 (D.Mass.1988); *Gruber v. Price Waterhouse,* 117 F.R.D. 75, 82 (E.D.Pa.1987); *In re Pizza Time Theatre Sec. Litig.,* 112 F.R.D. 15, 19 (N.D.Cal.1986). Here, one option available to the Court, were this case to be tried, would be to apply the law of Iowa—the location of Equitable of Iowa's headquarters and principal place of business, and the source of the challenged marketing policies. *See, e.g.,* *Randle,* 129 F.R.D. at 393 ("high likelihood" that law of state where defendant's offices located and in which decisions regarding the timing and context of corporate disclosures were made would apply).[4] Iowa is the state from which Equitable of Iowa conducted its nationwide activities and from which its alleged campaign of fraud emanated.[5] The relationship of other states, by contrast, is limited to protecting the interests of policyowners residing in those states—interests that would be served by application of Iowa law.

***18** 65. Also, any state-by-state variations on the legal standards are neither particularly great nor insurmountable. *In re School Asbestos Litigation,* 789 F.2d 996 (3d Cir.1986); *Pizza Time,* 112 F.R.D. at 20 ("It is evident that the similarities in [the various states' common law concerning fraud] vastly outweigh any differences.").[6] Plaintiffs' counsel have already successfully done so in other cases involving the same legal theories asserted here. *See, e.g., In re Prudential,* 962 F.Supp. at 524–26.[7] *See also* Miller Decl. ¶ 27 (applicable state law can be grouped into two or three categories and is not so great as to undermine predominance of common questions of law or fact).

b. *A Class Action Is The Superior Means To Adjudicate Plaintiffs' Claims*

66. Rule 23(b)(3) considers whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[8] Rule 23(b)(3) lists four nonexclusive factors bearing on the superiority determination. *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2246. Applied here, these factors show that a class action is the only feasible method for the fair and efficient adjudication of the claims of most Class Members.

(1) *Interest In The Case*

67. The first superiority factor identified in Rule 23(b)(3) is "the interest of members of the class in individually controlling the prosecution or defense of separate actions." This factor addresses whether the interest of most class members in conducting separate lawsuits is so strong as to require denial of class certification. *See, e.g., Bonilla v. Trebol Motors Corp.,* No. 92–1795(JP), 1993 U.S.Dist. LEXIS 5775, at *4 (D.P.R.1993) (class action superior where individual class members have no interest in controlling litigation) (Weiss/Stoia Aff.Ex. 9); *In re Prudential,* 962 F.Supp. at 523–24 (same); *McClendon v. Continental Group, Inc.,* 113 F.R.D. 39, 45 (D.N.J.1986) (same). Considerations relevant to this inquiry include the degree of "cohesion" among class members, whether "the amounts at stake for individuals ... [are] so small that separate suits would be impracticable" and the extent to which "separate suits would impose ... [burdens] on the party opposing the class, or upon the court calendars...." *Amendments to Rules of Civil Procedure,* 39 F.R.D. 69, 104 (1966) (Rule 23, Advisory Committee's Notes).

68. Most Class Members in this case have little incentive or ability to prosecute their claims against defendants in separate individual actions. The Class is estimated to encompass approximately 109,000 former and current Equitable of Iowa policyowners located throughout the United States. Unlike the personal injury claims in *Amchem,* many of the policyowners' claims present "negative value" actions, as it would not be economically feasible for them to retain attorneys to pursue individual litigation against defendants.[9]

***19** 69. The likelihood that Class Members could obtain meaningful redress through individual actions is further diminished by the legal defenses available to defendants, defenses that would prevent or deter individual actions by Class Members. For example, most of the policies at issue were sold by Equitable of Iowa during the 1980s. As a consequence, should the benefits of tolling be lost upon a refusal to certify, many thousands of Class Members could find their claims time-barred by applicable statute of limitations, even if they eventually could find lawyers willing to represent them in separate lawsuits. *See General Motors Corp. v. Bloyed,* 916 S.W.2d 949, 957 (Tex.1996) ("[T]here was a strong likelihood that a large proportion of the class members' claims ... would have been barred by the statute of limitations.").

70. The relative absence of policyowner suits presently pending against Equitable of Iowa compared to complaints lodged by policyowners with the Company confirms that individual Class Members lack any compelling interest to control the prosecution of separate actions. *See, e.g., Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 105 F.R.D. 506, 510 (S.D.Ohio 1985) (finding that existence of small number of suits pending in other courts as a result of same underlying action represented that individual investors were not interested in pursuing suit alone).

(2) *Other Pending Proceedings*

71. In determining the superiority issue, the Court should also consider "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." The existence of other litigation may either indicate the availability of other methods to adjudicate the controversy or the superiority of class certification. 1 Herbert B. Newberg & Alba Conte *Newberg on Class Actions* § 4.30 at 4–121 (3d Ed.1992).

In addition to the companion action in Arizona, two other class action lawsuits were filed against defendants seeking to recover damages for putative classes similar to the Class in this case. *See* Weiss/Stoia Aff. ¶ 48. These two class actions, filed substantially *after* this case, have been resolved as part of this settlement. As a result, the existence of these suits does not undermine the propriety of class certification in this litigation.

72. The several individual actions pending against defendants will not, separately or collectively, "adjudicate ... the controversy" that underlies this class action litigation. Traditional alternatives to the class action device—joinder, intervention and consolidation—are not feasible and in any event would not permit resolution of the entire controversy.

c. *Manageability In This Forum*

73. Another factor set forth on Rule 23(b)(3) is "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." However, this factor is not significant and is conceptually irrelevant in the context of settlement. *See* *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2248 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems ... for the proposal is that there be no trial.").

***20** 74. With the settlement in hand, the desirability of concentrating the litigation in one forum is obvious; and for this purpose this forum is as good or better than any other, given the parties' and many of the Class Members' close ties to the forum. Without a settlement, the issue might be closer, but not controlling, in the Court's view, with other weightier factors all favoring certification.

75. Even if considered, however, the inquiry is whether reasonably foreseeable difficulties render some other method of adjudication superior to class certification. *In re Prudential,* 962 F.Supp. at 524–26; *In re Antibiotic Antitrust Actions,* 333 F.Supp. 278, 282 (S.D.N.Y.1971) ("defendants, after reciting potential manageability problems, seem to conclude that no remedy is better than an imperfect one"); *see also* *In re NASDAQ* 169 F.R.D. at 527 ("Manageability problems are significant only if they create a situation that is less fair and efficient than other available techniques.") (citation omitted). Because the Class includes only current or former Equitable of Iowa policyowners, identifying the Class Members and providing them with notice has not proved difficult.

IV. NOTICE AND JURISDICTION

A. *The Settlement Notice*

76. Upon consideration of the extensive record concerning the manner in which notice was provided to the Class, the Court reiterates its earlier findings (Hearing Order ¶ 7) and concludes that the form and methodology of notice in this case satisfied the requirements of applicable law, the rules of this Court, and due process under the federal constitution.

1. *Content of Notice*

77. The notice package mailed to each Class Member included at least one 31–page Class Notice (entitled "Notice of Class Action, Proposed Settlement, Fairness Hearing and Right to Appear"), at least one two-page cover letter and six-page question-and-answer brochure, and at least one customized Policy Information Statement, all as specified and required in paragraph 6(a) of the Hearing Order and §§ VI.A through VI.D of the Stipulation of Settlement. *See* Dahl Decl. ¶ 11 and Ex. A.

78. The 31–page Class Notice included (i) the case caption; (ii) a description of the litigation; (iii) a description of the Class; (iv) identification of Co–Lead Counsel for the Class; (v) a description of the proposed settlement, including the relief available to the Class Members and the Release to be given to defendants; (vi) the date and time of the Fairness Hearing; (vii) information about how Class Members could appear at the Fairness Hearing, individually or through counsel; (viii) the procedure and deadline for filing objections to any aspect of the proposed settlement; (ix) the manner in which Class Members could obtain access to discovery materials produced in this action and companion litigation; (x) information about obtaining a complete copy of the Stipulation of Settlement; (xi) the procedure and deadline for filing requests for exclusion from the Class; (xii) the consequences of being excluded from the Class; (xiii) the consequences of remaining in the Class; (xiv) a description of Equitable of Iowa's responsibility for plaintiffs' attorneys' fees and expenses, and of its

agreement to pay attorneys' fees and expenses awarded by the Court up to a maximum of $5 million; (xv) a description of the preliminary injunction issued by the Court in the Hearing Order; and (xvi) the procedure for obtaining additional information, including the toll-free number established to respond to Class Member inquiries. *See* Dahl Decl.Ex. A.

***21** 79. The individual notice materials provided to Class Members are clear and comprehensive documents that presented, in plain language and a reader-friendly format, detailed and accurate information about this action, the proposed settlement and the options available to Class Members. *See* Priest Decl. ¶ 25.

80. Individual notice of the settlement was supplemented by publication notice. This plain-language publication notice (called the "Summary Notice" in the Stipulation of Settlement and the Hearing Order) included (i) the case caption; (ii) a description of the Class; (iii) a brief description of the proposed settlement, including Individual Claim–Review Relief through the Claim–Review Process and General Policy Relief; (iv) identification of Co–Lead Counsel for the Class; (v) the date, time and location of the Fairness Hearing; (vi) information about appearing at the Fairness Hearing; (vii) information about and the deadline for filing objections to the settlement; (viii) information about and the deadline for filing requests for exclusion from the Class; (ix) the consequences of exclusion from the Class; (x) the consequences of remaining in the Class; (xi) a description of Equitable of Iowa's responsibility for plaintiffs' attorneys' fees and expenses, and of its agreement to pay attorneys' fees and expenses awarded by the Court up to a maximum of $5 million; (xii) a description of the preliminary injunction issued by the Court in the Hearing Order; (xiii) the procedure for obtaining additional information, including the toll-free number established to respond to Class Member inquiries; and (xiv) the manner in which Class Members could secure the notice package (individual notice materials) described above. *See* Dahl Decl.Ex. B.

81. Based on its review of the individual and publication notice materials and the expert testimony concerning those materials, the Court concludes that the notices provided to the Class were more than adequate, equalling or exceeding the requirements of Federal Rule of Civil Procedure 23 and due process. The individual and publication notices fairly apprised Class Members of the existence of this action, the terms of the proposed settlement and the three options available to Class Members, *i.e.,* remaining in the Class and not objecting to the proposed settlement, remaining in the Class and objecting to the settlement and electing out of the Class. The notices also set forth, in clear, precise and neutral language, all information material to making an informed and intelligent decision respecting the Class Members' three options, how to elect each of the options, and the effect of each option on electing Class Members. Fed.R.Civ.P. 23(c)(2); *In Re Prudential,* 962 F.Supp. at 526–29; *Mendoza v. United States,* 623 F.2d 1338, 1351–52 (9th Cir.1980); see also Priest Decl. ¶ 25.

2. *Form Of Notice*

82. The Hearing Order (as corrected *nunc pro tunc*) required that individual notice be sent, by first-class mail, postage prepaid at Equitable of Iowa's expense, no later than 60 days before the Fairness Hearing, to the last known address of each reasonably identifiable Class Member. Hearing Order ¶ 6(a). In accordance with the Hearing Order, approximately 133,000 notice packages (containing the individual notice materials described above) were mailed to the approximately 109,000 Class Members (respecting the approximately 130,000 separate policies involved in this action) by Rust Consulting, Inc., the Class Action Administrator, prior to October 20, 1997. In fact, almost all of these notice packages were mailed by September 10, 1997. Approximately 2,300 notice packages were mailed on or before October 3, 1997, and the final 116 notice packages were mailed on October 15, 1997. Dahl Decl. ¶¶ 10–16. In addition, Rust Consulting mailed additional notice packages to Class Members who requested them by mail or through telephone calls to the policyowner hotline. Dahl Decl. ¶ 22.

***22** 83. Also in accordance with the Hearing Order (¶¶ 6(c) and 6(d)), Rust Consulting caused notice packages that were returned by the United States Postal Service to be remailed to Class Members.

a. Approximately 491 notice packages were returned to Rust Consulting, Inc. by the United States Postal Service with forwarding addresses. These notice packages were promptly remailed in accordance with the Hearing Order. Dahl Decl. ¶ 19.

b. Approximately 16,804 notice packages were returned by the Postal Service without forwarding addresses. In accordance with the Hearing Order, Rust Consulting, Inc. caused the addresses for these notice packages to be researched, and new addresses were found for 9,464 of them; and they were remailed to the new addresses at least 40 days prior to the Fairness Hearing, as required in the Hearing Order. The balance of the returned notice packages (many of them duplicates) did not have reasonably obtainable forwarding addresses. Dahl Decl. ¶¶ 20, 21.

84. The Hearing Order further provided that the publication notice be published in certain newspapers at Equitable of Iowa's expense no later than 50 days before the Fairness Hearing. Hearing Order ¶ 6(b). In accordance with the Hearing Order, Equitable of Iowa published the publication notice on September 16, 1997 in the national editions of *The Wall Street Journal, USA Today,* and the *Chicago Tribune;* and also *The Tampa Tribune, The Arizona Daily Star* and *The Arizona Citizen.* These newspapers had a combined average daily circulation of approximately 4.9 million. Dahl Decl. ¶ 24.

85. As contemplated by the Stipulation of Settlement, Rust Consulting, Inc. also established and maintained a toll-free information hotline for Class Members to call for further information about the proposed settlement. The hotline was available Monday through Friday, from 8:00 a.m. to 10:00 p.m. Central Time, beginning on September 8, 1997. The telephone number for the hotline was included in the individual notice materials and publication notice. As of the close of business on November 21, 1997, Rust Consulting, Inc. had received 6,627 calls on the hotline. Hotline calls were monitored both on-site and off-site by plaintiffs' counsel, and Class Members using the hotline were given the opportunity to speak to Class Counsel. Dahl Decl. ¶¶ 26–37; Weiss/Stoia Aff. ¶ 30.

86. Notice of a proposed class action settlement is adequate when it is the best notice practicable, reasonably calculated, under the circumstances, to reach absent class members. Fed.R.Civ.P. 23(c)(2); *see also* *Phillips Petroleum,* 472 U.S. at 812; *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 173–77, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314–15, 318, 70 S.Ct. 652, 94 L.Ed. 865 (1950); and *Mendoza,* 623 F.2d at 1351. Here the court finds that the combination of the individual and publication notices described above clearly satisfied this standard.

***23** 87. A small percentage of the Class could not be located through reasonable effort, and for various reasons some individual notices that were mailed may not have been received. Supplementing individual notice with publication notice represents an appropriate balance between protecting Class Members and making class actions workable. *See Gross v. Barnett Banks, Inc.,* 934 F.Supp. 1340, 1345 (M.D.Fla.1995).

88. As a result of the parties' efforts, extensive and comprehensive notice of the proposed settlement was provided to the Class. This notice not only complied in full with the terms of the Hearing Order, but was the most effective and best practicable notice, reasonably calculated, under all the circumstances, to apprise Class Members of the pendency of this action, the issues before the parties, the terms of the proposed settlement, the effects of staying in the Class and the options available to Class Members, including their right to exclude themselves from the Class, object to any aspect of the proposed settlement, participate in the action *pro se* or through counsel, and appear at the Fairness Hearing. Accordingly, the notice provided to the Class constituted due, adequate and sufficient notice to all persons entitled to be provided with notice, and it exceeded the requirements of applicable law, the rules of this Court, and due process under the federal constitution.

89. In the course of implementing the settlement, the parties will provide an extensive second round of notice to Class Members, informing them of their options under the settlement and enabling them to take advantage of those options. Stipulation of Settlement, §§ VI.G–VI.I and Exs. C, G, H & I. The Court finds that the materials to be provided to the Class in the implementation of the settlement (the Post–Settlement Notice, the Post–Settlement Summary Notice, the Election Forms and the Claim Forms), together with the post-settlement notice methodology set forth in the Stipulation of Settlement, are reasonably calculated, under all the circumstances, to apprise Class Members of their rights pursuant to the settlement; constitute due, adequate and reasonable notice to all Class Members; and otherwise satisfy the requirements of applicable law, the rules of this Court, and due process under the federal constitution.

3. *Exclusion Requests*

90. As of November 19, 1997, the deadline for exclusions, only 191 Class Members, respecting only 260 separate life insurance policies, had timely excluded themselves from the Class.[10] See Dahl Decl. ¶¶ 38–40 and Exs. A–D thereto. The Court finds that the individuals and entities listed on Exhibit C to the Declaration of Jeffrey D. Dahl are excluded from the Class, and from this date forward are no longer bound by prior orders of the Court in this action and, unless otherwise ordered, will not be bound by the Final Order and Judgment (or any

further orders in this action). Any other requests for exclusion are denied as untimely or improperly made.

***24** 91. The Court has reviewed the exclusion requests and cannot infer from them a general dissatisfaction with the proposed settlement. They cover less than one-fifth of one percent of the life insurance policies covered by the settlement. Also, 21 of the 260 policies covered by the exclusion requests were owned by insurance companies (competitors of Equitable of Iowa), and 84 of the policies were owned by persons represented by several Alabama lawyer groups.

4. *Objections*

92. Not including any of the exclusion requests described above, a total of only six written communications were served upon counsel and/or filed with the Court in compliance with, or in an apparent attempt to comply with, the procedures for objecting to the proposed settlement.[11] Of these six communications, only four are proper objections, since two of the objections were not properly made. *See* Plaintiffs' Mem. pp. 58–63. The communication from Class Member David H. Fleck was by far the lengthiest and most detailed objection filed. *See id.* As discussed in detail in Part V.F. below, the objections, including the objection of Mr. Fleck, do not warrant disapproval of the settlement.

B. *Jurisdiction*

1. *This Court Has Original Jurisdiction To Implement The Settlement*

93. This Court has diversity jurisdiction under 28 U.S.C. § 1332. First, complete diversity exists between the named plaintiffs and defendants. *See* Compl. ¶¶ 8, 10, 11. Second, plaintiffs have alleged in good faith damages in excess of the $50,000 amount in controversy requirement in effect at the time the original pleadings were filed.[12] *See* Compl. ¶ 8 and pp. 45–57; *see generally* *St. Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283, 288–89, 58 S.Ct. 586, 82 L.Ed. 845 (1938) (the sum claimed by the plaintiff controls if the claim is apparently made in good faith).[13]

94. With complete diversity and the requisite amount in controversy established among the named parties, subject matter jurisdiction extends to the balance of the Class Members' claims under 28 U.S.C. § 1367. *See* *In re Brand Name Prescription Drugs Antitrust Litig.,* 123 F.3d 599, 607 (7th Cir.1997); *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.,* 77 F.3d 928, 931 (7th Cir.1996); *In re Abbott Labs.,* 51 F.3d 524, 528–29 (5th Cir.1995); *In re Prudential,* 962 F.Supp. at 503–05 (and authorities cited therein). With the enactment of § 1367, in the diversity jurisdiction context, there is no need for each Class Member to meet the required jurisdictional amount individually so long as there is complete diversity among the named parties, and the named plaintiffs have alleged claims that exceed the requisite amount in controversy. *Id.* That is the case here.[14]

2. *The Court Has Personal Jurisdiction Over The Class Members*

***25** 95. The court acquires personal jurisdiction over present and absent class members so long as class members have been afforded, through adequate notice, the right to exclude themselves from the class. *See* *Phillips Petroleum,* 472 U.S. at 811–12. As described above, notice to the Class has been more than adequate. Accordingly, this Court has acquired personal jurisdiction over present and absent Class Members who have not opted out of the Class. *See* *In re Prudential,* 962 F.Supp. at 507.

V. THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE AND SATISFIES CRITERIA APPLIED BY THE ELEVENTH CIRCUIT AND THIS COURT

96. The Eleventh Circuit and this Court consider seven factors in determining whether to approve settlements of class actions:

a. The likelihood of success at trial and potential recovery;

b. The complexity, expense and duration of litigation;

c. The terms of the settlement;

d. The procedures afforded to notify the class members of the proposed settlement, and to allow them to present their views;

e. The judgment of experienced counsel for the plaintiff class;

f. The substance and amount of opposition to the settlement; and

g. The stage of the proceedings at which the settlement was achieved.

Warren v. City of Tampa, 693 F.Supp. 1051, 1055 (M.D.Fla.1988); *In re Corrugated Container,* 643 F.2d at 212. Application of these criteria to the instant settlement compels the conclusion that the proposed Settlement is fair, adequate and reasonable.

A. *The Likelihood Of Success At Trial And Potential Recovery*

97. It is not necessary to try the merits of the case in connection with reviewing the settlement. *In re Corrugated Container,* 643 F.2d at 212; *Meyer v. Citizens & Southern Nat'l Bank,* 677 F.Supp. 1196, 1201 (M.D.Ga.1988). Thus, the Court can limit its inquiry to determining "whether the possible rewards of continued litigation with its risks and costs are outweighed by the benefits of the settlement." *Ressler v. Jacobson,* 822 F.Supp. 1551, 1553 (M.D.Fla.1992); *see also Mashburn v. National Healthcare, Inc.,* 684 F.Supp. 660, 670 (M.D.Ala.1988) (in the class action settlement context, courts do not decide the merits of the case or resolve unsettled legal questions). This inquiry is premised upon "balancing the probabilities, not assuring that the plaintiff class receives every benefit that might have been won after a full trial." *In re Chicken Antitrust Litig.,* 560 F.Supp. 957, 960 (N.D.Ga.1980) The expense of achieving a more favorable result for the class at trial must be considered. *Ressler,* 822 F.Supp. at 1555; *Young v. Katz,* 447 F.2d 431, 433 (5th Cir.1971). Factually, this was a complicated case. Plaintiffs and their counsel believe that their case was exceedingly strong; however, defendants nevertheless had a number of potentially strong defenses.

***26** 98. Plaintiffs are not required to justify the terms of their settlement based on speculation of what they might have obtained. " '[I]nherent in compromise is a yielding of absolutes and an abandoning of highest hopes.' " *Cotton v. Hinton,* 559 F.2d 1326, 1330 (5th Cir.1977) (citation omitted); *Bennett v. Behring Corp.,* 737 F.2d 982, 986 (11th Cir.1984). The risks of maintaining this litigation as a class action through trial and appeal weigh in favor of approving this settlement with its certain outcome, especially where, as here, the Class Members' individual claims are relatively small, and where Class Members have the right to opt-out and pursue their own remedy, if they so desire.

99. As for risks attendant to litigation, the following are examples of issues that could potentially present obstacles to plaintiffs' success at trial, if this case were not settled:

a. Proving that the practices complained of were systemic in nature;

b. Establishing the elements of the various causes of action and, in particular, overcoming defendants' contentions, among others, that: (i) the contract rights that plaintiffs assert are contradicted by the plain and unambiguous language of the policies that constitute their contracts with Equitable of Iowa, and thus are barred by the parol evidence rule and the contract merger doctrine; (ii) the fraud, negligent misrepresentation and other fraud-related claims asserted by plaintiffs are not tenable because (a) plaintiffs would not be able to establish actual, reasonable or justifiable reliance on the alleged misrepresentations, and (b) plaintiffs have alleged promises of future conduct or opinions rather than misrepresentations of existing fact; (iii) plaintiffs' cause of action for breach of fiduciary duty is defective because plaintiffs cannot show that Equitable of Iowa is a fiduciary to its insureds; and (iv) plaintiffs' cause of action for breach of the implied covenant of good faith and fair dealing is defective because the precontractual conduct alleged by the plaintiffs cannot provide the basis for such a claim;

c. Establishing that Class Members' claims are timely under applicable statutes of limitation;

d. Proving that Class Members were unaware that dividend scales, interest crediting rates or monthly deduction rates could fluctuate, and that such fluctuations would affect planned premium amounts, and the number of out-of-pocket premiums needed to maintain policy values;

e. Proving that Class Members were unaware of the economic effects of using existing policy values to fund the purchase of new insurance policies;

f. Proving that Class Members were unaware that they had purchased life insurance or that, because of the costs associated with providing the guaranteed benefits of life insurance, their cash values would not accumulate at the rates they might accumulate in other investment vehicles;

g. Proving that Equitable of Iowa's decision to reduce dividends or interest credits on certain policies due to the so-called "DAC Tax" was improper in light of the written provisions of those policies; and

***27** h. Proving that Equitable of Iowa's "direct recognition practices" were improper or contrary to express policy language.

B. *The Complexity, Expense And Duration Of Litigation*

100. The federal courts have long recognized that "[c]ompromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank,* 216 U.S. 582, 595, 30 S.Ct. 441, 54 L.Ed. 625 (1910). "Particularly in class action suits, there is an overriding public interest in favor of settlement." *Cotton,* 559 F.2d at 1331.

101. This litigation involves the marketing and sale of a variety of Equitable of Iowa life insurance products over a 13–year period of time involving approximately 130,000 insurance policies. Among other things, plaintiffs challenge the methods used to market Equitable of Iowa's products to consumers, the adequacy of its disclosures, and the training and supervision of its agents. The work necessary to prepare this case for trial would be complicated, enormous in scope, logistically difficult, time-consuming and expensive. Continued litigation, just to the point of trial, would be lengthy, complex and expensive.

102. In addition, the life insurance policies at issue in this case are complex and would require extensive actuarial and financial expert testimony to evaluate the assumptions underlying these policies and the illustrations through which they were marketed to consumers, and also arcane actuarial standards, statutory and insurance accounting practices, and sophisticated financial theory.

103. Trial of this case, which would likely last for many months, would require additional time and expense for consultation with additional experts (whom the jury might or might not believe), preparation of trial memoranda on various legal issues, and post-trial memoranda and appeals that would inevitably follow rulings on any final judgment, which could prolong the case for many years. Judicial economy and public policy will be well served, because the settlement will result in an efficient and economical procedure for aggrieved Class Members to obtain appropriate relief.

C. *The Terms Of The Settlement*

104. The terms of the settlement need not provide the optimal relief, so long as there appears to be a genuine *quid pro quo.* *Warren,* 693 F.Supp. at 1059. Here, *all* Class Members have a right to multiple types of relief based upon their individual circumstances. Additionally, the terms of the settlement were carefully crafted to tailor relief for those Class Members who felt they were harmed by defendants. Finally, this result was achieved through extensive negotiation by experienced and capable attorneys. Weiss/Stoia Aff. at §§ I–III.

D. *The Procedures Afforded To Notify The Class Members Of The Proposed Settlement, And To Allow Them To Present Their Views*

105. As discussed in detail in § IV.A. above, the procedures afforded to notify the Class of the proposed settlement and of the opportunity to exclude themselves and present their views have been more than adequate.

E. *Judgment Of Experienced Counsel For The Class*

***28** 106. Counsel for plaintiffs and the Class are experienced in this type of litigation. *See* Weiss/Stoia Aff. ¶¶ 5–7. *See also* Plaintiffs' Mem. § IV.B.4. Counsel have voiced their beliefs that the proposed settlement is fair, adequate and reasonable.

107. Even in class action contexts, "the trial court is entitled to rely upon the judgment of experienced counsel for the parties.... Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Ressler,* 822 F.Supp. at 1555 (quoting *Cotton,* 559 F.2d at 1330); *Holmes v. Continental Can Co.,* 706 F.2d 1144, 1149 (11th Cir.1983) (deference afforded to opinions of class counsel in class actions); *Behrens v. Wometco Enters.,*

118 F.R.D. 534, 539 (S.D.Fla.1988) (the court can rely upon the judgment of experienced counsel and should not substitute its judgment for that of counsel, absent fraud).

108. Absent the settlement, the plaintiffs faced a protracted, expensive, and uncertain trial. Weiss/Stoia Aff. at § V.D. Likewise, the settlement strikes a balance that protects the interests of all Class Members. Considering the wealth of experience of plaintiffs' counsel, their endorsement of the settlement strongly militates in favor of approval of the settlement.

F. *The Substance And Amount Of Opposition To The Settlement*

109. The settlement should be examined in light of the objections raised by Class Members. *Cotton,* 559 F.2d at 1331; *Meyer,* 677 F.Supp. at 1210. There have been only six objections received from a Class of approximately 109,000 policyowners, which is a *de minimus* number relative to the settlement. *Hill v. Art Rice Realty Co.,* 66 F.R.D. 449, 456 (N.D.Ala.1974) (receipt of only one objection is compelling evidence that the attitude of the overwhelming percentage of the class affected by the settlement supports the reasonableness and appropriateness of the settlement), *aff'd without op.,* 511 F.2d 1400 (5th Cir.1975).

110. The "general objection" of *Kyle Stewart* is that he does not want to "purchase" something additional from Equitable of Iowa, apparently referring to General Policy Relief. He also says he has no evidence to introduce, which may be an objection, or it may be an acknowledgement he has no claim. Whatever, the objection does not recognize that relief is available without documentary evidence, even under the Claim–Review Process, and the settlement does not require Class Members to purchase anything. Plaintiffs' counsel sent Mr. Stewart a letter offering to discuss his objection and further explain the favorable presumptions of the Claim–Review Process. Mr. Stewart did not respond and ultimately excluded himself from the Class. Therefore, Mr. Stewart's objection to the settlement also lacks standing, because only Class Members have standing to object. For all these reasons, Mr. Stewart's objection is overruled.

***29** 111. The objection of *Sheri Kephart* is that her options are limited to purchasing a new policy from Equitable of Iowa. Ms. Kephart's objection is an apparent reference to the types of relief available to former policyowners as General Policy Relief. This objection reflects a misunderstanding of the settlement's terms. Additional purchases are not required, and aggrieved policyowners may obtain significant relief in the form of Individual Claim–Review Relief through the Claim–Review Process. Weiss/Stoia Aff. ¶ 12. As with Mr. Kyle, plaintiffs' counsel wrote Ms. Kephart to offer to clarify and discuss the options available to her under the Claim–Review Process, but she did not respond to the offer. Weiss/Stoia Aff. ¶ 64. Accordingly, Ms. Kephart's objection is overruled.

112. The objection of *Patrick A. Staloch* concerns a policy purchased in 1981, *before* the Class Period. Therefore, because Mr. Staloch is not a Class Member with respect to this policy, he does not have standing to object. Moreover, the Class Period was determined based upon plaintiffs' investigation, discovery and conclusion that the alleged wrongdoing did not occur on a classwide basis before that time. Weiss/Stoia Aff. ¶¶ 44–47. Mr. Staloch's objection is overruled.

113. The objection of *Tom Kluzak* is that he feels it is "distasteful" that someone would "file a lawsuit on his behalf without [his] knowledge." Mr. Kluzak's objection is not an objection to the settlement itself, but to the class action device generally. The benefits of the settlement—obtained at no out-of-pocket expense to any policyowner—should not be denied to those policyowners who wish to participate, and, of course, Mr. Kluzak had the opportunity to opt-out. Mr. Kluzak's objection is overruled.

114. The objection of *John Hoppey, Jr.* does not appear to be an objection at all, but an "object[ion] to making any more premium payments." Like other Class Members, Mr. Hoppey will have an opportunity to submit a claim in the Claim–Review Process and support his contention that he should not have to make any more premium payments. Accordingly, Mr. Hoppey's objection is also overruled.

115. The sixth objection, that of David D. Fleck, is more substantial than the others, in size and in effort, and has received the Court's careful consideration. Mr. Fleck's objection is also an endorsement of the proposed settlement. He states on page two of his objection:

> I wish to compliment the parties and their attorneys for bringing these actions to this point and fashioning a Settlement Agreement under which the defendants offer the whole class member group

> benefits sufficient to merit the conclusion that, as to such group as a whole, the settlement is fair, adequate and reasonable.

116. Mr. Fleck does not complain about what is arguably the most important, at least most valuable, aspect of the proposed settlement, that being Individual Claim–Review Relief through the Claim–Review Process. His objection is only to General Policy Relief.

***30** 117. Mr. Fleck's objection to General Policy Relief is twofold—General Policy Relief should be different or more valuable, and it discriminates between Class Members. To correct these perceived problems, Mr. Fleck has drafted, and proposes to the Court for its consideration, a number of material changes to the Stipulation of Settlement.

118. Like the Court, the parties did not take Mr. Fleck's objection lightly. In their point-by-point responses they dealt with his objection, including his proposed modifications, explaining in reasonable and persuasive terms why, for practical, financial, and legal reasons, they could not or would not change the settlement to meet his specifications. Several of Mr. Fleck's proposed changes would have made General Policy Relief more like Individual Claim–Review Relief, in relief to Class Members and in expense to Equitable of Iowa, even though Class Members electing General Policy Relief would not have to demonstrate any wrongdoing by defendants or any harm to themselves. It is understandable why-the parties would not agree to these changes. Also, his personal claim of prejudice for not being eligible for Optional Premium Loans ignores the purpose of that particular type of General Policy Relief. Optional Premium Loans are to provide policyowners, whose policies have required modal premium, with special low interest loans to assist them in making out-of-pocket premium payments beyond those originally anticipated. However, Mr. Fleck's policy is a flexible premium universal life insurance policy. It does not have required premiums, and he can withdraw cash value from the policy without having to make a policy loan. Plaintiffs' Mem. pp. 59–62; Defendants' Mem. pp. 45–51.

119. It is not appropriate that the settlement be restructured to fit Mr. Fleck's real or perceived personal circumstances, and his proposed changes are not necessary to make the settlement fair, adequate and reasonable as to the Class. Mr. Fleck had the option to elect out of the Class, and he still has the option to elect Individual Claim–Review Relief and pursue a claim through the Claim–Review Process, if he believes he has been harmed by wrongdoings in connection with his policy. Class certification and approval of the proposed settlement cannot be denied on the strength of Mr. Fleck's objection. It is therefore overruled.

120. The Court finds that there is a rational basis for the parties' allocation of General Policy Relief. It is not discriminatory, in design or effect. *See* *Holmes,* 706 F.2d at 1148 (allocation permissible if "rationally based on legitimate considerations"; to provide different relief for different claims/needs).

121. Likewise, the issue here is whether the relief provided in the settlement, taken as a whole, is adequate and reasonable, not whether something more lucrative might make the settlement more favorable to Class Members or certain Class Members. *See* *In re Warner Communications Sec. Litig.,* 798 F.2d 35, 37 (2d Cir.1986) ("it is not a district judge's job to dictate the terms of a class settlement; he should approve or disapprove a proposed agreement as it is placed before him and should not take it upon himself to modify its terms"); *Cotton,* 559 F.2d at 1333 ("the settlement must stand or fall as a whole"); *Jeff D. v. Andrus,* 899 F.2d 753, 758 (9th Cir.1989) ("[C]ourts are not permitted to modify settlement terms or in any manner to rewrite agreements reached by parties."); *In re Domestic Air Trans. Antitrust Litig.,* 148 F.R.D. 297, 305 (N.D.Ga.1993) ("Court may only approve or disapprove the settlement as presented ... [i]t [ ] may not rewrite the settlement as requested by numerous objectors.").

***31** 122. Here, the settlement offers a range of valuable and innovative relief that corresponds to the allegations and claims asserted in the Complaint and to the separate needs of the individual Class Members. *See In re Xoma Corp. Sec. Litig.,* Master File No. C–91–2252 TEH, 1992 U.S.Dist. LEXIS 10502, at *10 (N .D.Cal. July 10, 1992) ("The Court must be concerned with ensuring fairness to the class as a whole, rather than with satisfying any particular plaintiffs' demands.") (Weiss/Stoia Aff. Ex. 11).

123. Finally, the Court finds the fact that so very few objections—only four with legal standing—were received from approximately 109,000 Class Members demonstrates that the response of the Class to the proposed settlement has been overwhelmingly positive.

124. The Court also notes that no governmental entities have appeared in this litigation. Before notifying Class Members of the proposed settlement, Equitable of Iowa

met with staff insurance officials in Iowa, its state of domicile, and briefed them on this action and proposed settlement. Equitable of Iowa characterizes the Iowa Insurance Department's reception to the settlement as positive. Equitable of Iowa also notified the insurance departments in the other states in which it does business of this action and the proposed settlement by mail, and none of these departments expressed reservations about the settlement to Equitable of Iowa or the Court. These reactions by the state insurance departments, although not essential, favor approval of the settlement.

G. *The Stage Of Proceedings At Which This Settlement Was Achieved*

125. This litigation had reached the stage at which "the parties certainly ha [d] a clear view of the strengths and weaknesses of their cases." *In re Warner Communications Sec. Litig.,* 618 F.Supp. 735, 745 (S.D.N.Y.1985), *aff'd* 798 F.2d 35 (2d Cir.1986).

126. "[P]laintiffs have conducted sufficient discovery to be able to determine the probability of their success on the merits, the possible range of recovery, and the likely expense and duration of the litigation." *Ressler,* 822 F.Supp. at 1554–55; *Mashburn,* 684 F.Supp. at 669. This is particularly true when it is remembered that settlements are strongly encouraged. *Id.* Since settlements are to be encouraged, it follows that "only some reasonable amount of discovery should be required to make these determinations." *Ressler,* 822 F.Supp. at 1555; *Mashburn,* 684 F.Supp. at 669; *In re Corrugated Container,* 643 F.2d at 211 (lack of presettlement discovery does not in itself invalidate settlement, since plaintiffs' negotiators had access to a plethora of information regarding the facts of their case); *Cotton,* 559 F.2d at 1332.

***32** 127. The investigation and thorough discovery undertaken by plaintiffs' counsel in this case illuminated the strengths and weaknesses of both claims and defenses. The benefits achieved by plaintiffs' counsel's investigation and discovery will also accrue to Class Members during the administration phase of the settlement. Significantly, the fruits of plaintiffs' counsel's investigation, discovery and analysis will benefit Class Members who elect to participate in the Claim–Review Process.

VI. *VALUATION OF THE SETTLEMENT*

128. The value of the settlement consists of the following elements: (i) the value of the Claim–Review Process, including the value of the process itself and the value of the uncapped, aggregate relief to be paid successful claimants; (ii) the value of the General Policy Relief; (iii) the attorneys' fees and expenses that Equitable of Iowa will pay to plaintiffs' counsel, which will not reduce the amount of relief being made available to the Class; and (iv) the substantial amounts that Equitable of Iowa has paid and expects to pay in settlement and administrative expenses for the benefit of the Class.

129. Although the innovative nature of the settlement makes it difficult to put a maximum value on the benefits to be provided to the Class, it is clear that the value of those benefits is substantial, and the Court so finds.

A. *Claim–Review Process*

130. Defendants' actuarial experts, Milliman & Robertson, have analyzed the potential recoveries under the Claim–Review Process for three hypothetical Class Members (claimants), each a male nonsmoker, age 40, and each owning a different one of Equitable of Iowa's more popular life insurance policies, all with $100,000 face amounts. Assuming scores of 4 (the highest available under the process), and depending on the age of the policy, the type of claim (performance, replacement or retirement/investment) and other factors that vary among claimants, Milliman & Robertson valued Individual Claim–Review Relief for these hypothetical claimants from a minimum of $3,990 up to a maximum of $23,554. M & R Report § III. Lewis & Ellis, Inc., plaintiffs' actuarial experts, have reviewed Milliman & Robertson's valuations and found them to be reasonable. Long Aff. ¶ 8.

131. Using Milliman & Robertson's analysis as a starting point, Lewis & Ellis, Inc., plaintiffs' experts, have estimated the potential value of relief awarded through the Claim–Review Process to a sample of one percent of Class Members who submit claims and whose scores exceed a "1." Depending on the distribution of the types of claims submitted and the scores awarded on those claims, Lewis & Ellis have determined that the value of Claim–Review Process awards to the one-percent sample would range from $2.8 million to $4 .1 million. Long Aff. ¶ 9 and App. 2 thereto.

B. *General Policy Relief*

132. Milliman & Robertson and Lewis & Ellis have both estimated that the General Policy Relief will make in excess of $271 million in economic value available to the Class. M & R Report p. 11; Long Aff. ¶ 6. Milliman & Robertson further estimated that, based on utilization rates consistent with historical marketing results for each form of General Policy Relief, it is likely that the total value of General Policy Relief that will actually be realized by the Class is $22.9 million. M & R Report p. 24. Lewis & Ellis has determined that "the best estimate of the economic value of the benefits that are likely to be utilized by Class Members under General Policy Relief" is $28.9 million. Long Aff. ¶ 7.

***33** 133. The Court finds these expert analyses credible and well-reasoned. No opponent of the settlement has proffered evidence disputing these analyses.

134. Without adopting any of the particular value estimates provided by these experts, the Court finds that the parties have established that significant and substantial value will be provided to the Class through this settlement. Although the actual amount of value that will be realized by the Class cannot be foretold with precision, the Court finds that it is reasonable to expect that as much as $28.9 million in economic value will actually be realized by the Class through General Policy Relief alone, plus the value of relief to be provided through the Claim–Review Process, for which Equitable of Iowa's aggregate liability is unlimited.

135. The Court notes several other factors that enhance the value of the settlement for the Class.

a. The Claim–Review Process provides every Class Member with an opportunity to have his or her individual claim reviewed in a timely, cost-free manner, with an assurance that claims will be evaluated in accordance with fair and objective evidentiary and relief criteria that have been agreed upon by the parties and approved by this Court. The involvement of a Policyowner Representative throughout the process and the right to appeal initial determinations to independent arbitrators enhance the fairness of the Claim–Review Process. Because every Class Member has access to the Claim–Review Process, every class Member therefore receives value from the settlement.

b. There is no cap on the aggregate value of the relief to be afforded claimants in the Claim–Review Process. Thus, every claimant who demonstrates his or her claim will receive the full relief to which he or she is entitled, as determined by the criteria specified in the Stipulation of Settlement, without regard to the value of relief provided to other Class Members. This aspect of the settlement distinguishes it from the usual class action settlement, in which a defendant agrees to pay a fixed sum of money that is then allocated among members of the class, and renders the settlement "a far superior approach to that taken in most fraud class action settlements." *Connecticut General,* MDL No. 1136, Order p. 3 (Weiss/Stoia Aff. Ex. 4); *see also* Tew Decl. ¶ 10; Priest Decl. ¶ 35.

C. Unlike class action settlements where the value of the relief provided depends entirely on future purchases that are highly contingent in nature and suspect in value, the General Policy Relief here is tailored to meet the allegations of the Complaint and the specific insurance and investment needs of the Class Members. *See* Priest Decl. ¶¶ 29–34; Tew Decl. ¶ 9.a.

136. The Court hereby approves the settlement and finds that it is fair, adequate and reasonable, in the best interests of the Class, and fully in accord with constitutional dictates.

VII. *FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO PLAINTIFFS' ATTORNEYS' FEES AND EXPENSES*

A. *Overview*

***34** 137. Only after all substantive terms of the proposed settlement were agreed upon, counsel for the parties negotiated terms under which Equitable of Iowa agreed to pay plaintiffs' counsel's fees and to reimburse plaintiffs' counsel's expenses up to a total of $5 million, subject to approval by the Court. *See* Weiss/Stoia Aff. ¶¶ 54, 56, 76; Bailey Decl. (No. 2) ¶ 21. The particulars of the fee agreement are set out in § X of the Stipulation of Settlement.

138. In accordance with the Stipulation of Settlement, plaintiffs' counsel have requested attorneys' fees and expenses in the total aggregate amount of $5 million. *See* Weiss/Stoia Aff. ¶¶ 56, 75.

139. The Court finds that the fee negotiations in this case were conducted at arm's-length, and only after all material terms of the settlement had been agreed upon. Weiss/Stoia Aff. ¶ 56. Because the previously negotiated settlement structure provided that the fee awarded would be paid by Equitable of Iowa, separate and apart from any

recovery to the Class, Equitable of Iowa had a particular incentive to bargain strenuously to keep the fee as low as possible. There is absolutely no evidence in this case that the settlement was in any way collusive.

140. Under these circumstances, the Court gives great weight to the negotiated fee in considering the fee request. *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 720 (5th Cir.1974) ("In cases of this kind, we encourage counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorney's fees."); *In re First Capital Holdings Corp. Fin.Prods.Sec.Litig.,* [1992 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 96,937, at 93,969 (C.D.Cal. June 10, 1992).

B. *The "Percentage of Recovery" or "Common Fund" Method*

141. The approach to determining an appropriate fee award in the Eleventh Circuit is the percentage of recovery approach. In *Camden I Condominium Ass'n v. Dunkle,* 946 F.2d 768 (11th Cir.1991), the Eleventh Circuit observed:

> The majority of common fund fee awards fall between 20% to 30% of the fund.... [A]n upper limit of 50% of the fund may be stated as a general rule, although even larger percentages have been awarded.

Id. at 774–75 (citations omitted). Even though the fees sought in this case are are less than 1.7% of the estimated total values of the settlement and less than 14.5% of the utilization value of GPR, they are well *below* the range of reasonableness set forth in *Camden I,* where the court recognizes that "[t]here is no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case." *Id.* at 774.

142. The court in *Camden I* enumerated the "*Johnson* factors" (established in *Johnson,* 488 F.2d 714) that the court may consider in determining the appropriate percentage of the fund to be applied to each case. In the instant case, a very favorable result was obtained as the result of the intensive, yet efficient, efforts of plaintiffs' counsel.

1. *The Results Obtained*

***35** 143. This settlement involves a creative and innovative two-part settlement structure to carefully craft relief for Class Members, tailored to the particular and complex facts of this action. Weiss/Stoia Aff. ¶ 17. Plaintiffs' counsel have carefully assessed the strengths and weaknesses of their case. Weiss/Stoia Aff. ¶¶ 44–47. Plaintiffs and their counsel felt that, based on their investigation, they could prove their case at trial—but a host of risks were involved, including the substantial risk of *no relief* for the Class. Weiss/Stoia Aff. ¶¶ 65–69. When all these factors are weighed, plaintiffs' counsel have obtained a very good result for the Class. These factors support the fee requested.[15]

2. *Economics Involved In The Prosecution Of The Class Action And The Experience Of Counsel*

144. "[T]he economics involved in prosecuting a class action" is one of the factors to be considered by the court in determining a fee. *Camden I,* 946 F.2d at 775. This action was prosecuted by plaintiffs' counsel on an "at-risk" contingent fee basis. Weiss/Stoia Aff. ¶ 85. Counsel would be paid only if they achieved a successful result for the Class. Courts have long recognized, particularly in this Circuit, that the attorneys' contingent risk is an important factor in determining the fee award. *See* *Jones v. Central Soya Co.,* 748 F.2d 586, 591 (11th Cir.1984); *see also* *Ressler,* 149 F.R.D. at 656.

145. Plaintiffs' counsel in this case are experienced class action and complex action attorneys, including extensive class action experience relating to life insurance company deceptive sales practices. Weiss/Stoia Aff. ¶ 5. Courts have recognized the importance of providing incentives to experienced counsel who take on complex litigation cases on a contingent fee basis so those cases can be prosecuted effectively. Weiss/Stoia Aff. ¶¶ 4–9. Conversely, defendants' counsel in this case are highly respected in the area of class action life insurance litigation, and were paid on a current basis. Plaintiffs' counsel, who assumed the risk of a successful result, should likewise be

compensated for their efforts by a premium above their hourly rates. *See* *Ressler,* 149 F.R.D. at 654 (competence of opposing counsel is a factor in establishing plaintiff's counsel's fee award).

3. *The Customary Fee For Similar Cases*

146. The requested fee is below the typical range of common fund awards to counsel in other class actions in the Southern and Middle Districts of Florida since the percentage-of-fund approach was adopted by the Eleventh Circuit in *Camden I. See, e.g., Lopez v. Checkers Drive–In Restaurants, Inc.,* 94–282–CIV–T–17C (M.D.Fla.1996) (awarding 30%) (Weiss/Stoia Aff. Ex. 13); *Minnick v.. Pages, Inc.,* 95–277–CIV–T–21C (M.D.Fla.1996) (awarding 30%) (Weiss/Stoia Aff. Ex. 14); *In Re: Belmac Corp. Sec. Litig.,* 92–1814–CIV–T–23–(C) (M.D.Fla.1994) (awarding 31%) (Weiss/Stoia Aff. Ex. 15); and *Ressler,* 149 F.R.D. at 653 (awarding 30%). Thus, this Court on at least four prior occasions awarded a percentage fee in a common fund case in excess of 30%—far more than counsel are seeking here.

4. *The Time And Labor Required*

***36** 147. The hours expended by plaintiffs' counsel in this litigation are set forth in the Affidavit of Melvyn I. Weiss and John J. Stoia, Jr. and Plaintiffs' Counsel Declarations. The total amount of time expended—particularly with regard to investigation and settlement negotiations—reflects the complexity of this action. Administration of the settlement will require additional time and expense. Under regular hourly rates the "lodestar" of plaintiffs' counsel in this action totals $2,038,170.13. Thus, even under the lodestar method, the fee requested would result in a multiplier much lower than the midrange of the multipliers in contingent fee awards in such cases. The multiplier here would be only 2.34, not including the extensive future work required by plaintiffs' counsel. *See* Weiss/Stoia Aff. ¶ 73. *See also* *Behrens* 118 F.R.D. at 548 ("the range of lodestar multipliers in large and complicated class actions runs from a *low* of 2.26 ... to a *high* of 4.5") (citations omitted, emphasis added).

148. Plaintiffs' counsel seek reimbursement of $227,513.13 in expenses incurred in this action as part of the entire $5 million negotiated fee and expense payment. Plaintiffs' counsel's expenses incurred to date for which reimbursement is sought appear reasonable.

5. *The Reaction Of The Class Confirms That The Requested Fee Is Reasonable*

149. The individual notice mailed to approximately 109,000 Class Members and the publication notice published in national newspapers across the country advised Class Members that counsel would apply for an award of fees and expenses not to exceed $5 million and that Class Members could object to the fee and expense application. Only *one* objection to the fee request has been made.[16] The lack of objections is itself important evidence that the requested fees are fair. *See,* *e.g., Ressler,* 149 F.R.D. at 656 (noting that the lack of objections is "strong evidence of the propriety and acceptability" of fee request); *Mashburn,* 684 F.Supp. at 695.

150. The evidence in this case, including the expert affidavits and declarations submitted by the parties, establishes that the General Policy Relief will make in excess of $271 million in economic value available to the Class. *See* Long Aff. ¶ 6; M & R Report p. 11. Milliman & Robertson estimate that the economic value of the General Policy Relief likely to be utilized by the Class will be $22.9 million. M & R Report p. 24. Lewis & Ellis further estimate that the economic value of the General Policy Relief likely to be utilized by the Class will be $28.9 million. Long Aff. ¶ 7. These estimates do not include the benefits conferred under the uncapped Claim–Review Process, estimated by Lewis & Ellis at between $2.8 million and $4.1 million per one percent of Class Members who participate in the process and obtain a score higher than "1." *Id.* at ¶ 9. They also do not include certain other substantial benefits to the Class, including the costs Equitable of Iowa has incurred and will continue to incur in providing notice to the Class, a cost which is ordinarily borne by plaintiffs; administering the class action information center; and implementing and administering the settlement. Moreover, it is important to note that the amount of fees and expenses to be paid by Equitable of Iowa are separate and apart from any recovery by the Class, and will in no way diminish the value of settlement benefits to be provided to the Class. *See* Weiss/Stoia Aff. ¶ 57.

***37** 151. Accordingly, the Court overrules the one objection to plaintiffs' request for $5 million in attorneys' fees and expenses, and hereby grants that request, with the fees and expenses to be paid in accordance with the Stipulation of Settlement. Furthermore, the Court hereby authorizes Milberg Weiss Bershad Hynes & Lerach LLP, Co–Lead Counsel herein and the primary law firm responsible for prosecution, coordination and oversight of this lawsuit and settlement, to allocate, in its sole discretion, the award of attorneys' fees and expenses.

The foregoing being the findings of fact and conclusions of law of this Court,

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp., 1998 WL 133741

Footnotes

1 Almost all of the life insurance policies involved in this action and the settlement were issued by Equitable of Iowa. The others were issued by defendant Equitable American Life Insurance Company and were assumed by Equitable of Iowa in 1984.

2 The decisions of the former Fifth Circuit before October 1, 1981 have been adopted as binding precedent in this Circuit. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*).

3 Unlike *Amchem,* this case presents no set of class members comparable to the "exposure only" plaintiffs who "claimed no damages and no present injury." *Amchem,* 521 U.S. at –––– – ––––, 117 S.Ct. at 2240–43. Here all Class Members can claim to have suffered a quantifiable, existing injury from defendants' alleged practices, as typified by the named plaintiffs. *See* Miller Decl. ¶ 15 ("All class members [here] suffered pecuniary and financial injury, in contrast to the diverse and complex individual medical conditions for which recovery was sought in *Amchem.* There are no significant fissures in this class, much less the chasm which was presented in *Amchem* between present and future claimants.").

4 *See also* *Fry v. UAL Corp.,* 136 F.R.D. 626, 631 (N.D.Ill.1991) (choice of law no obstacle to certification of class claims where law of state in which defendant maintained its corporate offices and from which alleged misrepresentations issued would be applied); *Kirschner,* 139 F.R.D. at 84 (law of the state of defendant's principal place of business and from which many of the allegedly false statements were made may apply); *Martin v. Heinold Commodities, Inc.,* 117 Ill.2d 67, 109 Ill.Dec. 772, 510 N.E.2d 840, 847 (Ill.1987) (law of defendant's principal place of business applied); *In re ORFA Sec. Litig.,* 654 F.Supp. 1449 (D.N.J.1987).

5 Under *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 821–22, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), Iowa law constitutionally may be applied to class members nationwide so long as Iowa has a sufficient aggregation of contacts to the class members' claims to ensure that application of Iowa law would not be arbitrary or unfair. Those conditions are satisfied when, as here, the named defendants maintain their business offices in Iowa, many of the alleged fraudulent statements emanated from that state, many Class Members are Iowa residents, and Iowa has a strong policy in preventing fraud from within its borders.

6 This is not a case, such as *Castano v. American Tobacco Co.,* 84 F.3d 734, 747–48 (5th Cir.1996), where a novel or "immature" tort is alleged. A definite "track record" exists for these types of cases against insurers. Such cases have been litigated through trial. *See, e.g., Cartwright v. The Equitable Life Assurance Society,* 276 Mont. 1, 914 P.2d 976 (Mont.1996) (vanishing premium case tried to jury and affirmed on appeal).

7 Any significant variations in state law encountered in a theoretical trial could be handled by the use of available management techniques. *See generally* L. Kramer, *Class Actions and Jurisdictional Boundaries: Choice of Law in Complex Litigation,* 71 N.Y.U.L.Rev. 547, 584–585 (1996) (application of multiple states laws feasible through "sensible use of the tools available to manage litigation," including the grouping of substantive laws as in *School Asbestos,* "careful [jury] instructions and the availability of special verdicts ...").

8 The majority rule is that a district court should consider the settlement when evaluating the superiority of a class action under Rule 23(b)(3). *In re Asbestos Litig.,* 90 F.3d 963, 975 (5th Cir.1996); *see also In re Dennis Greenman Sec. Litig.,* 829 F.2d 1539, 1543 (11th Cir.1987).

9 *See, e.g., In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 784 (3d Cir.), cert. denied, 516 U.S. 824, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." (quoting *Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326, 339, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980)).

10 The procedures for a current or former policyowner excluding himself or herself from the Class were set out in the Hearing Order and the individual and publication notices discussed above. Hearing Order ¶ 10; Dahl Decl.Exs. A–B thereto.

11 These objection procedures were established in the Hearing Order and communicated to the Class, in clear and precise language, in the individual and publication notices discussed above. Hearing Order ¶ 11; Dahl Decl.Exs. A–B thereto.

12 Because the original federal Complaint was filed in this Court on February 14, 1996, when jurisdiction is measured, the new amount in controversy threshold of $75,000 effective as of January 17, 1997 is inapplicable. *See* 28 U.S.C.A. § 1332 (1997 Supp.), Historical and Statutory Notes.

13 The question whether the jurisdictional amount is satisfied is answered by referring to the complaint, not to the ultimate outcome of the case. *Suber v. Chrysler Corp.,* 104 F.3d 578, 583 (3d Cir.1997) ("Once a good faith pleading of the amount in controversy vests the district court with diversity jurisdiction, the court retains jurisdiction

even if the plaintiff cannot ultimately prove all of the counts of the complaint or does not actually recover damages in excess of $50,000.") (citing *St. Paul,* 303 U.S. at 288); *In re Prudential,* 962 F.Supp. at 502–03.

14 The amount in controversy requirement is also met in this case by aggregating the Class Members' punitive damages claims in the Complaint. *See* *Tapscott v. MS Dealer Serv. Corp.,* 77 F.3d 1353, 1357 (11th Cir.1996).

15 While the requested fee would, at this point in time, represent a modest multiplier over the lodestar, that multiplier is justified by the substantial settlement benefits obtained, efficiency in achieving them, and concerted effort by all counsel to avoid wasted time and expense. Plaintiffs' counsel in this case sought to achieve a good result for the Class, irrespective of how much, or how little, time it took.

16 David H. Fleck objects to "the provisions of the proposed settlement under which the Defendants abandon responsibility for policing the amount of plaintiff attorney's fees and disbursements and impose the entire burden upon the Courts." Such a "policing by defendants" is not necessary—this Court may act as expert in such matters. *See* *Loranger v. Stierheim,* 10 F.3d 776, 781 (11th Cir.1994) (noting that court is expert in such matters and may use own judgment and experience in determining reasonable fees (citing *Norman v. Housing Auth. of City of Montgomery,* 836 F.2d 1292, 1303 (11th Cir.1988)). Also, the amount of attorneys' fees that the Court ultimately awards to plaintiffs' counsel does not affect whether the Court should approve the settlement and the fees and expenses paid to plaintiffs' counsel will *not* reduce or otherwise affect the relief available to Class Members.

End of Document

EXHIBIT "6"

2005 WL 1594403
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

In re HERITAGE BOND LITIGATION

No. 02–ML–1475 DT, CV 01–5752 DT (RCX), CV 02–382 DT(RCX), CV 02–993 DT(RCX), CV 02–2745 DT(RCX), CV 02–6484 DT(RCX), CV 02–6841 DT(RCX), CV 02–9221 DT(RCX), CV 02–6512 DT(RCX).
|
June 10, 2005.

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AMENDED ORDER AND OPINION

TEVRIZIAN, J.

ORDER AND OPINION GRANTING PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

ORDER AND OPINION GRANTING IN PART PLAINTIFFS' MOTION FOR AN AWARD OF COSTS AND EXPENSES TO NAMED PLAINTIFFS

ORDER AND OPINION GRANTING LEAD PLAINTIFFS' APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

ORDER AND OPINION DENYING APPLICATION BY MILLER, MILOVE & KOB FOR AWARD OF FEES, COSTS AND EXPENSES AS REQUESTED

I. *BACKGROUND*

A. *Factual Summary*
***1** Because the parties are generally familiar with the factual and procedural history of this case, the Court does not recount them here in full except as necessary to explain its decision in response to the issues raised herein. This action arose as a result of eleven different bond offerings that were issued between December 1996 and

March 1999. Each bond offering was issued to the public pursuant to an official statement specific to that offering. The money raised in the offerings was to be used to acquire, renovate, and operate hospitals designed to assist the elderly, particularly those chronically ill and suffering from Alzheimer's disease. However, due to the alleged wrongdoing of numerous parties, the hospitals went into bankruptcy or receivership within five years after the first bond offering, rendering the bonds worthless.

This class action began over three years ago when plaintiff Gilbert Kivenson filed a complaint in the Superior Court of the state of California for the county of Los Angeles on November 30, 2001. After Kivenson's action was removed to federal court, two other class action complaints were filed, one in Los Angeles Superior Court and one in the United States District Court for the Central District of California[1] The second state action was subsequently removed to federal court. Then, a fourth action was filed. Ultimately, the actions were consolidated and, on January 13, 2003, this Court appointed lead plaintiffs and lead counsel. Thereafter, on February 3, 2003, plaintiffs filed their Third Amended Consolidated Class Action Complaint, which stated claims against over forty defendants under various theories of federal and state law (all defendants collectively known as "Defendants"). After this Court ruled on seventeen motions to dismiss, the plaintiffs filed their Fourth Amended Consolidated Complaint on September 17, 2003.

As the litigation continued, it was marked by constant and varied motion practice. For example, in December 2003, Kasirer defendants filed a motion to stay action pending resolution of a criminal investigation, which was denied. On July 12, 2004, upon motion by Plaintiffs, the Court certified the class, Plaintiffs also filed motions for summary judgment, obtaining a $28 million judgment against Virgil Lim.[2] On December 6, 2004, the Court granted Class Plaintiffs' Motion for Leave to Amend Fourth Amended Complaint And to File A Fifth Amended Complaint. Some settlements were then reached

Shortly after this Court permitted the plaintiffs to file their Fifth Amended Consolidated Compliant on December 6, 2004, and a week before the expert reports were due, settlements were reached with the remaining defendants. The parties then entered into a full and final global settlement, requiring this Court's approval.

Presently before the Court are the following four motions: (1) Plaintiffs' unopposed Motion for Final Approval of Class Action Settlement;[3] (2) Plaintiffs' Motion for An Award of Costs and Expenses to Named Plaintiffs; (3) Lead Plaintiffs' Application for an Award of Attorneys' Fees and Reimbursement of Expenses; and (4) Motion and Application by Milove & Kob for Award of Fees, Costs and Expenses.

B. *Procedural History*

***2** On May 10, 2005, Plaintiffs filed a Motion for Final Approval of Class Action Settlement, which is before the Court.

On this same date, Plaintiffs filed a Motion for An Award of Costs and Expenses to Named Plaintiffs, which is presently before the Court

Also on May 10, 2005, Lead Plaintiffs filed an Application for an Award of Attorneys' Fees and Reimbursement of Expenses, which is also before the Court.

On the same day, Miller Milove & Kob filed an Application for Award of Fees, Costs and Expenses, which is before the Court.

II. *DISCUSSION*

A. *Standards*

1. Final Approval of Settlement And Determination of Good Faith

Federal Rule of Civil Procedure 23(e)(1)(A) provides: "The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class." Fed.R.Civ.P. 23(e)(1)(A). In deciding whether to approve a proposed settlement, the Ninth Circuit has a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Class Plaintiffs v. Seattle,* 955 F.2d 1268, 1276 (9th Cir.1992) (quoting *Linny v. Cellular Alaska P'ship,* 151 F.3d 1234, 1238 (9th Cir.1998). "There is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits." *Van Bronkhorst v. Safeco Corp.,* 529 F.2d 943, 950 (9th Cir.1976). Settlement spares the parties the costs of protracted litigation and eases the congestion of judicial calenders. *See id.* at 943. Consequently, in making its assessment pursuant to Rule 23(e), the Court's:

> intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Officers for Justice v. Civil Serv. Comm'n, etc., 688 F.2d 615, 625 (9th Cir.1982); *see also Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1027 (9th Cir.1998).

Therefore, "[a] settlement should be approved if it is fundamentally fair, adequate and reasonable." *Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1375 (9th Cir.1993) (citation omitted). This ultimate decision is in the "sound discretion of the district courts [which] appraise[s] the reasonableness of particular class-action settlements on a case-by-case basis." *Evans v. Jeff D.,* 475 U.S. 717, 742, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986). However, a settlement hearing is "not to be turned into a trial or rehearsal for trial on the merits," nor should the proposed settlement "be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Justice v. Civil Serv. Comm'n, etc.,* 688 F.2d 615, 625 (9th Cir.1982). To the contrary, a presumption of fairness arises where: (1) counsel is experienced in similar litigation; (2) settlement was reached through arm's length negotiations; (3) investigation and discovery are sufficient to allow counsel and the court to act intelligently. *Linney v. Alaska Cellular P'ship,* 1997 WL 450064, at *5 (N.D.Cal. July 18, 1997) ("The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery had taken place create a presumption that the agreement is fair."), *aff'd,* 151 F.3d 1234 (9th Cir.1998); *Ellis v. Naval Air Rework Facility,* 87 F.R.D. 15, 18 (N.D.Cal.1980), *aff'd,* 661 F.2d 939 (9th Cir.1981).

***3** To determine whether a proposed settlement is fair, adequate and reasonable, a court may consider "some or all" of the following factors: (1) the strength of plaintiffs' case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement." *Officers for Justice v. Civil Serv. Comm'n, etc.,* 688 F.2d 615, 625 (9th Cir.1982); *Linney,* 151 F.3d at 1242; *Torrisi,* 8 F.3d at 1375. "This list is not exclusive and different factors may predominate in different factual contexts." *Torrisi,* 8 F.3d 1376 (citation omitted). One factor alone may prove determinative. *See id.* However, "the settlement may not be the product of collusion among the negotiating parties." *In re Mego Fin., Corp. Sec. Litig.,* 213 F.3d 454, 458 (9th Cir.2000) (citations omitted).

Additionally, where the settlement involves the resolution of state law claims, the district court will apply the following criteria set forth by the California Supreme Court for determining whether a particular settlement is made in good faith: "a rough approximation of plaintiffs' total recovery, the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial." *Tech–Bilt, Inc. v. Woodward–Cyde & Assoc.,* 38 Cal.3d 488, 499, 213 Cal.Rptr. 256, 698 P.2d 159 (1985) (citations omitted). The California Civil Procedure Section 877.6 is known as a settlement bar statute. As provided in subsection (d) of Section 877.6, any party challenging the good faith of the proposed settlement bears the burden of proving the settlement was entered into in bad faith.

2. Awarding Named Plaintiffs Costs And Expenses In A Securities Action

The Private Securities Litigation Reform Act ("PSLRA") provides in pertinent part that, although class representatives must share the recovery in the same proportion as all other members of the class, "[n]othing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of the class." 15

U.S.C. § 78u–4(a)(4). Congress acknowledges the that class representatives should be reimbursed. H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 35 (1995) ("The Conference Committee recognized that lead plaintiffs should be reimbursed for reasonable costs and expenses associated with service as lead plaintiff, including lost wages, and grants the courts discretion to award fees accordingly.").

***4** The reasoning behind permitting lead plaintiffs' reimbursement for service rendered was made clear in the congressional record: "There provisions are intended to increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiffs' counsel. H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 32 (1995). Accordingly, with Congress' approval, and the discretion given to them by the PSLRA, courts have availed themselves of the power to grant remuneration to class representatives. *See In re Xcel Energy, Inc., Sec., Derivative & "Erisa" Litig.,* 2005 WL 840370 (D.Minn. April 8, 2005) (awarding $100,000.00 collectively to lead plaintiff group to be distributed among eight lead plaintiffs, who communicated with counsel throughout litigation, reviewed submissions, indicated a willingness to appear at trial, kept informed of settlement negotiations, and effectuated the policies underlying the federal securities laws) (citing *In re Dunn & Bradstreet Credit Servs. Customer Litig.,* 130 F.R.D. 366 (S.D.Ohio 1990) (awarding two class representatives $55,000.00 each and three class representatives $35,000.000 each)); *In re Inforspace, Inc. Sec. Litig.,* 330 F.Supp.2d 1203, 1216 (W.D.Wash.2004) (awarding $5,000.00 to one lead plaintiff and $6,600 to another as reimbursement for the costs and expenses they incurred as lead plaintiffs). These awards are generally in keeping with the public policy concerns cited in class actions. *See Denney v. Jenkens & Gilchrist,* 2005 WL 388562 (S.D.N.Y. Feb.18, 2005) (finding a "reasonable" fee to lead plaintiffs of $10,000.00 each, estimated to equal no more than 15% of the likely average recovery per class member for having taken seriously their role in arriving at a settlement that would be in the best interest of the entire class).

3. Attorneys' Fees

Generally, every litigant is required to bear his own attorney's fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 257–58, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). However, the United States Supreme Court has consistently recognized that an attorney who recovers a common fund may receive attorney's fee from the fund as a whole. *Boeing Co. v. Van Gemert et al.,* 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980); *see also Vincent v. Hughes Air West, Inc.,* 557 F.2d 759 (9th Cir.1977) (holding that "a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees[ ]"); *Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 271 (9th Cir.1989) (explaining the equitable principal underlying granting attorney fees in common fund cases: "Since the Supreme Court's 1885 decision in *Central Railroad & Banking Co. of Ga. v. Pettus,* 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885), it is well settled that the lawyer who creates a common fund is allowed an *extra* reward, beyond that which he has arranged with his client, so that he might share the wealth of those upon whom he has conferred a benefit. The amount of such a reward is that which is deemed "reasonable" under the circumstances.") (emphasis in original). This exception is justified because "persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Van Gemert,* 444 U.S. at 478; *see Mills v. Elec. Auto–Lite Co.,* 396 U.S. 375, 392, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); *In re Wash., Pub. Power and Supply Sys. Sec. Litig.,* 19 F.3d 1291, 1300 (9th Cir.1994) (*"WPPSS"*) (stating that the purpose of the "common fund" doctrine is to avoid unjust enrichment by allowing "those who benefit from the creation of the fund [to] share the wealth with the lawyers whose skill and effort helped create it"). By maintaining jurisdiction over the common fund, the court can assess attorney's fees against the entire award, ensuring that the fees are evenly distributed among those benefitted by the suit. *Id.*

***5** Fee shifting is appropriate in common-fund cases because the benefitting class is readily identifiable, the benefits are easily traceable, and the costs can be confidently shifted on those who benefit. *Alyeska Pipeline Serv. Co.,* 421 U.S. at 265. Though these criteria are not present where a litigant vindicates a general social grievance, they are satisfied "when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf." *Boeing Co.,* 444 U.S. 472 at 479, 100 S.Ct. 745, 62 L.Ed.2d 676.

Reasonable fees under the common-fund doctrine may be calculated either through the lodestar method or as a percentage of the recovery. *Six Mexican Workers v. Ariz. Citrus Growers,* 904 F.2d 1301, 1311 (1990). The circumstances of the case dictate the method adopted by the court. *Id.*

Lodestar calculations are determined by multiplying the number of hours reasonably expended during the litigation by a reasonable hourly rate. *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1029 (1998). Typically, this method is applied with injunctive relief class actions because the determination of the settlement's net value is too difficult. *Id.*

When applying the percentage method, courts award the attorneys a percentage from the fund as a whole. *Id.* This amount provides class counsel with a reasonable fee. *Id.* The Ninth Circuit has established twenty-five percent of the fund as the "benchmark" award that should be granted in common fund cases. *Paul. Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir.1989). The percentage may be adjusted upward or downward by applying the lodestar method on account of "unusual circumstances" found within the case. *Id.*

A. *Analysis*

1. Motion for Final Approval of Settlement And Determination of Good Faith

After three years of litigation, and with the active assistance of this Court, the parties have arrived at a full and final settlement (the "Settlement"). This Settlement follows significant discovery, careful investigation into the merits of this action, extensive consultation with experts and third parties, substantive rulings by this Court, and considerable negotiation and mediation. Through this process, the parties maintain that they were able to make a competent and informed decision regarding the benefits and burdens of continued litigation versus negotiated settlement. For the reasons discussed below, the Court approves the parties' Settlement, as it is fair, adequate and made in good faith.

a. The Settlement Is Fair and Adequate Under Rule 23(e)

1. The Settlement was the result of arms-length, informed, and court-assisted negotiations

The settlements reached in this action are the result of extensive arms-length negotiations and formal meditations by competent counsel experienced in securities law and state causes of action. The parties and their respective counsel have devoted a considerable amount of time, effort and resources to secure the current Settlement. The first group of defendants did not settle this action until March 2004, over two years after the litigation commenced, and over one year into the discovery process. The last major defendants to settle, the CBIZ defendants,[4] did so in January 2005, more than three years into the litigation. After the CBIZ settlement was reached, the remaining individual defendants agreed to settle the action and the settlement became global.

***6** In addition, the settlements were achieved after active litigation. For instance, only after plaintiffs moved for class certification did U.S. Trust, who opposed the class certification, settle. Similarly, the CBIZ defendants, who also opposed class certification, settled only after this Court certified the class. The Kasirer defendants sought to stay this action in December 2003, pending the outcome of related criminal investigations. Settlement with Kasirer defendants occurred only after the Court refused to stay the action against them, and after the two day deposition of Debra Kasirer. Moreover, settlement with defendants Stephen Goodman and Geri Ostlund occurred only after motions for summary judgment were filed against those defendants.

The Court finds no evidence to suggest that the settlements reached were the product of fraud or collusion, but of fair dealing among the parties. The length of time necessary to achieve the settlements and the active litigation of this case evidences that the settlements were reached in good faith. As the parties represented, and this Court acknowledged, "Throughout the settlement process, Class Plaintiffs proceeded slowly, and with careful consideration of the class in rejecting several of Defendants' settlement offers and counteroffers, notwithstanding the fact that amount of such offers were not insubstantial." Court Order Granting Settling Defendants' Joint Motion for Approval of the Stipulation and Amending Stipulation of Settlement ("Order Granting Stipulation of Settlement"), at 7:14–17 (C.D.Cal. Jan. 31, 2005).

Furthermore, certain settlements were reached through settlement conferences conducted by this Court, giving the Court firsthand knowledge of the good-faith nature of the negotiations. The mediation process was also supervised by four different mediators including Ret. Justice Elwood Lui, providing further indicia of the absence of collusion or fraud.

2. The strength of Plaintiffs' case and the risk, expense, complexity and likely duration of further litigation favor approval of the Settlement

" 'In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." ' *Nat'l Rural Telecom. Coop. v. DIRECTV, Inc.,* 221 F.R.D. 523, 526 (C.D.Cal.2004) (quoting 4 A. Conte & H. Newberg, *Newberg on Class Actions,* § 11:50 at 155 (4th ed.2002). This is especially true of class actions, and particularly for securities class actions because of their typical complexity. *Maley v. Del Global Tech. Corp.,* 186 F.Supp.2d 358, 364 (S.D.N.Y.2002); *In re Sumitomo Cooper Litig.,* 189 F.R.D. 274, 281 (S.D.N.Y.1999) ("class action suits in general have a well-deserved reputation as being most complex ....") (quotation omitted).

This action involved eleven different bond offerings that took place over the course of several years. Each offering had its own financial statement and facts and circumstances that were unique to it. The parties do not dispute that Plaintiffs' case has been, and would continue to be, exceptionally complex and risky to prosecute if litigation ensued. Plaintiffs brought this action against dozens of defendants under varied theories of liability of federal and state statutory law, including tort law, contact law, and theories of secondary liability and control person liability. Moreover, the wrongdoing alleged included both intentional wrongdoing and negligence.

***7** The complexity of this action would likely increase as it moved forward. According to Plaintiffs, they have reviewed approximately 1.1. million pages of documents produced by various defendants and have taken thirty-four depositions totaling forty deposition days. (Declaration of Brian Barry ("Barry Decl."), at ¶ 6). As summary judgment and trial approach, the relevant evidence would need to be extracted, sifted through, understood, processed, synthesized and ultimately presented to the Court and the jury in a reasonably cogent manner. Plaintiffs submit, and this Court agrees, that such a task would most likely increase the complexity of this action considerably.

Furthermore, the Court notes that several stages of litigation were not completed. For instance, expert discovery had not been finished. Moreover, given the large number of defendants, there is a likely chance that this case would go to trial, requiring pre-trial and post-trial motion practice. Furthermore, the fact that appellate practice would likely follow after completion of proceedings in this Court further militates in favor of final approval of this global settlement. *See Nat'l Rural,* 221 F.R.D. at 527.

Also favoring approval of the Settlement is the knowledge that, while Plaintiffs are confident of the strength of their case, it is imprudent to presume ultimate success at trial and thereafter. " 'It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced." *State of West Virginia v. Chas. Pfizer & Co.,* 314 F.Supp. 710, 743–44 (S.D.N.Y.1970), *aff'd* 440 F.2d 1079 (2d Cir.), *cert. denied, Cotler Drugs, Inc. v. Chas. Pfizer & Co.,* 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971); *see also In re Sumitomo Cooper Litig.,* 189 F.R.D. at 282 (discussing several instances where settlement was rejected by a court only to have the plaintiff's ultimate recovery be less than the proposed settlement).[5]

In the present matter, it is undisputed that all the settling defendants have explicitly denied wrongdoing and liability, and that all defendants have credible defenses to plaintiffs' claims. In addition, as to the majority of the settling defendants, the Court has not made any findings with respect to whether they were engaged in wrongful conduct or violated any law, regulation or duty. Therefore, continued litigation appears highly contentious, as both sides-Plaintiffs and Defendant-are diametrically opposed with respect to liability, and each party, especially plaintiffs, are subjected to significant obstacles, in that Plaintiffs bear the heavy burden of proving their case.

Settlement of this case has distinct advantages over the speculative nature of litigating this case to a verdict. As the court in *Strougo v. Bassini,* 258 F.Supp.2d 254, 260–61 (S.D.N.Y.2003) noted:

> Even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation and trial, the passage of time would introduce yet more risks in terms of

> appeals and possible changes in the law and would in light of the time value of money, make future recoveries less valuable than this current recovery.

***8** *Strougo,* 258 F.Supp.2d at 260–61 (citing, among other cases, *In re Agent Orange Prod. Liab. Litig.,* 611 F.Supp. 1396, 1405 (E.D.N.Y.1985) ("[M]uch of the value of a settlement lies in the ability to make funds available promptly.")

As discussed above, despite the perceived strength of Plaintiffs' case, further litigation would likely be protracted and complex, and pose great risk to Plaintiffs' possible recovery. These factors weigh heavily in favor of approving the Settlement.

3. The amount of the Settlement favors approval of the Settlement

The Settlement in this action requires the establishment of a fund with a total of $27,783,000.00, plus accumulated interest ("Settlement Fund"). The Settlement Fund is entirely comprised on cash, and is subject to potential increases depending upon the outcome of the M & S defendants'[6] actions against their insurers, and the outcome of the appeal in the Heritage insurance coverage action. The Settlement fund comprises approximately 36% of the class' net loss[7] of $78 million, which is established as the likely total amount that class members paid for the Heritage bonds less amounts received upon the sale of the Heritage bonds or distribution payments made on the bonds subsequent to their default. Although this Settlement results in Plaintiffs arguably receiving only a portion of the potential recovery, "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *See* *Officers for Justice,* 688 F.2d at 628 (citations omitted).

The Settlement was achieved despite substantial resistance from the Defendants" insurers. For example, the insurers for M & S and CBIZ defendants denied coverage causing both those defendants to initiate lawsuits against their insurers. Similarly, the insurers for the Heritage officers and directors completely denied coverage, which prompted the filing of the state action plaintiffs are currently litigating. The insurers of the Kasirer defendants filed an action seeking declaratory relief voiding their respective policies, and did not provide any insurance coverage for defendants Robert Kasirer and Debra Kasirer. Moreover, the insurers for the various Boehm defendants[8] threatened to file an action seeking declaratory relief. These are only a few of the hurdles that the parties effectively overcame to arrive at the Settlement.

Given the difficulty of bringing this Settlement to fruition, the diligent efforts of counsel, and relevant case law, the Court finds that the amount of settlement is fair, adequate and reasonable.

4. The large amount of discovery conducted and the advanced stage of this case favor approval of the Settlement

" 'The extent of discovery may be relevant in determining the adequacy of the parties' knowledge of the case." ' *Nat'l Rural,* 221 F.R.D. 527 (quoting *Manual for Complex Litigation,* (Third) § 30.42 (1995)). " 'A court is more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case." ' *Id.* (quoting 5 Moore's Federal Practice, § 23.85[2][e] (Matthew Bender 3d ed.)).

***9** As indicated above, this litigation has involved extensive motion practice as well as substantial formal and informal discovery. Plaintiffs assert that they have reviewed 1.1 million documents and produced several thousand documents to the Defendants'. Plaintiffs took thirty-four depositions, which includes all of the representative plaintiffs, and reviewed twenty-one deposition transcripts taken by the Securities and Exchange Commission. Merits discovery in this action was completed by September 2004, before all the parties had settled, and at the time the first settlement was reached, Plaintiffs had been litigating this action for over two years. When the final settlement was reached, Plaintiff assert that they had fully prepared their expert reports, as the deadline for exchanging such reports was one week away. It is sensible to believe that Plaintiffs and the various defendants had a reasonable understanding of both the strengths and weaknesses of their respective cases, as well as a rational idea of the potential amounts of recoverable damages.

This factor strongly favors approving the Settlement.

5. Experienced counsel's involvement in this action weights in favor of approving the Settlement

" 'Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." ' *Nat'l Rural,* 221 F.R.D. at 528 (quoting *In re Painewebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 125 (S.D.N.Y.1997)). A presumption of correctness is said to "attach to a class settlement reached in arm's-length negotiations between experienced capable counsel after meaningful discovery." *Manuel for Complex Litigation* (Third) § 30.42 (1995); *see also M. Berenson Co., Inc. v. Faneuil Hall Marketplace, Inc.,* 671 F.Supp. 819, 822 (D.Mass.1987) ("Where, as here, a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation, conducted by capable counsel, it is presumptively fair."); *In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litig. v. Baumer,* 1989 WL 73211 at *1, *2 (C.D.Cal. June 12, 1989) ("The recommendation of experienced counsel carries significant weight in the court's determination of the reasonableness of the settlement."). "Thus, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Nat'l Rural,* 221 F.R.D. at 528 (citations omitted).

In the present case, this Court has already determined that the parties are experienced by capable counsel. Order Granting Stipulation of Settlement at 7:17–19 ("[T]here is no dispute that the settlement reflects the determination of competent counsel experienced in securities and class action litigation."). There is no need to recount the Court's findings here.

This factor weighs in favor of finding the Settlement fair, adequate and made in good faith.

6. Lack of objection to the Settlement favors approval

***10** "It is established that the absence of a large number of objectors to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Nat'l Rural,* 221 F.R.D. at 529.

In the present case, the Court approved a "Notice" that was sent to thousands of possible class members and published nationally in the USA TODAY and INVESTORS BUSINESS DAILY newspapers. The Notice set forth the nature of the case, the terms of the proposed settlement, apprised class members of their ability to object to the settlement and the procedure to do so. The Notice further informed class members of their ability to opt-out of the class and individually pursue their own claims. To date, the Court has not been notified of one objection to the Settlement,[9] and only one person opted-out of the class. The Court finds the lack of class members that have manifested any disapproval of the Settlement further demonstrates the fairness, adequacy and reasonableness of the Settlement.

This factor weighs in favor of approving the Settlement.

7. The risk that class certification could not be maintained throughout litigation does not prevent approval of Settlement

On July 12, 2004, this Court granted Plaintiffs' motion for class certification in this action. *In re Heritage Bond Litig.,* 2004 WL 1638201 (C.D.Cal. July 12, 2004). However, under Rule 23, the Court may revisit its prior grant of certification at any time before final judgment. Fed.R.Civ.P. 23(c)(1)©) ("An order under Rule 23©)(1) may be altered or amended before final judgment."). Thus, it is conceivable that the class could be decertified or modified if the litigation were to continue. *See* Fed.R.Civ.P. 23(d) ("In the conduct of actions to which this rule applies, the court may make appropriate orders ... (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly."); *see also* *Armstrong v. Davis,* 275 F.3d 849, 872 n. 28 (9th Cir.2001). Given the complexity of this class action litigation, problems could arise which may justify decertification. As such, the Court acknowledges that some risk exists with respect to Plaintiffs not being able to maintain class action status throughout trial. However, the Court notes that to date, no defendant sought to decertify the class or has raised any concern as to maintenance of this action as a class action. Moreover, this Court views the possible risk of decertification does not prevent the Court from granting final approval to the Settlement. It is within the Court's discretion what weight, if any, is to be given to the nonexclusive factors used to determine whether final approval of a settlement should be granted. *See* *Linney,* 151 F.3d at 1242.

In exercising this Court's discretion, and based on the absence of any quantifiable threat or indication of decertification, the Court finds that this factor weighs in favor of approving the settlement

8. The presence of a government participant

***11** Although, as Plaintiffs state, federal prosecutors and the SEC conducted investigations of the Heritage scheme, there is no government participant in this class action. As a result, this factor does not apply to the Court's analysis.

a. The plan of allocation is fair and adequate

Approval of a settlement, including a plan of allocation, rests in the sound discretion of the court. *Class Plaintiffs,* 955 F.2d at 1284 (citing *Officers for Justice,* 688 F.2d at 625–26). "To warrant approval, the plan of allocation must also meet the standards by which the ... settlement was scrutinized—namely, it must be fair and adequate." *In re MicroStrategy, Inc. Sec, Litig.,* 148 F.Supp.2d 654, 668 (E.D.Va.2001) (citing *Class Plaintiffs,* 955 F.2d at 1284–85; *In re Oracle Sec. Litig.,* 1994 WL 502054, at *1 (N.D.Cal. June 18, 1994). However, "[a]n allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent counsel." *Maley,* 186 F.Supp.2d at 367 (citation omitted).

"A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable. It is also reasonable to allocate more of the settlement to class members with stronger claims on the merits." *Oracle,* 1994 WL 502054, at *1 (citing *In re Gulf Oil/Cities Serv. Tender Offer Litig.,* 142 F.R.D. 588, 596 (S.D.N.Y.1992)). Therefore, as noted in *MicroStrategy,* 148 F.Supp.2d at 669, "[a] plan of allocation ... fairly treats class members by awarding a pro rata share to every Authorized Claimant, [even as it] sensibly makes interclass distinctions based upon, *inter alia,* the relative strengths and weaknesses of class members' individual claims and the timing of purchases of the securities at issue."

As Plaintiffs point out, the Settlement Fund, assuming it is insufficient to satisfy all claims, will be distributed on a *pro rata* basis, with the exception of $6 million, contributed to the Settlement Fund by Boehm defendants Sabo & Green and Atkinson Andelson. Of the $6 million, $1 million, which was contributed by Sabo & Green, will be apportioned to the first seven bond offerings relevant to this litigation, with the remaining $5 million contributed by Atkinson Andelson, apportioned to the final four offerings.

The fact that there has been no objection to this plan of allocation favors approval of the Settlement. *See Maley,* 186 F.Supp.2d at 367 (reaction of the class supported approval of the plan of allocation as there was no objections despite more than 2,000 notices being distributed). The fact that the plan of allocation is recommended by experienced and competent counsel further cuts in favor of approving the Settlement. *Id.; see also In re Exxon Valdex,* 1996 WL 384623, at *5 (D.Alaska June 11, 1996) ("In light of the experience and views of counsel and the zeal with which they represent their clients, the court is satisfied that the Plan of Allocation is in the best interests of plaintiffs.").

***12** In light of the lack of objectors to the plan of allocation at issue, and the competence, expertise, and zeal of counsel in bringing and defending this action, the Court finds the plan of allocation as fair and adequate. This factor supports approving the Settlement.

c. The Settlement was the product of fair, arms-length, and good-faith, negotiations and therefore, under California Law, resolves the state causes of action in this case

As the Settlement disposes of state law claims, an analysis under California's "good faith settlement" provision, as viewed under California Code of Civil Procedure Section 877.6, is necessary. "A good faith settlement is one within 'the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries." ' *Alvarez v. Bridgestone/Firestone, Inc.,* 2003 WL 715905, at *1, *3 (N.D.Cal. Feb.24, 2003) (quoting *Tech–Bilt, Inc. v. Woodward–Cyde & Assoc.,* 38 Cal.3d 488, 499, 213 Cal.Rptr. 256, 698 P.2d 159 (1985)). Because the standard for finding a good faith settlement as contemplated in Section 877.6 is substantially similar to the standard as set forth under Rule 23(e) as discussed above, the Court need not restate its analysis here in concluding that the Settlement is fair, reasonable and made in good faith. However, the Court notes the following additional factors which the California Supreme Court has crafted for consideration: "a rough approximation of plaintiffs' total recovery, the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial." *Tech–Bilt, Inc.,* 38 Cal.3d at 499, 213 Cal.Rptr. 256, 698 P.2d 159 (1985) (citations omitted).

"Ultimately, a defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be." *Alvarez,* 2003 WL 715905, at *3 (citation omitted). "If the court finds evidence that would wholly or substantially negate a settling defendant's liability, the fact that the settlement was disproportionate to the claims made by plaintiffs' complaint is not in itself evidence of the lack of good faith." *Id.* (citation omitted). "The court should approve even a contested settlement, unless there is a showing 'that the settlement is so far out of the ballpark in relation to these factors to be inconsistent with the equitable objectives of the statute." ' *Id.* (quoting *Tech–Bilt,* 38 Cal.3d at 499–500, 213 Cal.Rptr. 256, 698 P.2d 159).

By applying the *Tech–Bilt* factors, the Court finds that approving the Settlement is warranted. As stated above, no party disputes the fact that the total Settlement Fund of $27,783,000.00, which accounts for approximately 36% of the class' net losses, is a significant settlement. Moreover, there is no dispute that the allocation of the Settlement Fund among plaintiffs is fair and reasonable. Furthermore, no party challenges Plaintiffs' assertion that the settlement comports with the various defendants' proportionate liability. Plaintiffs allege that the collapse of Heritage was caused by the wrongdoing of dozens of parties ranging from law firms, appraisers, the bonds' trustee, accountants, the officers and directors of Heritage, and various other entities and individuals that profited from the Heritage scheme. The alleged malfeasance spans about three years and concerns eleven different bond offerings. The Settlement Fund, therefore, is comprised of settlements reached with many different parties. As Plaintiffs point out, over forty defendants contributed to this settlement, with no defendant contributing more than 44% to the Settlement Fund. Although the Court cannot determine, with any certainty, each settlor's proportionate liability, the Court is satisfied that counsel for Plaintiffs and the various defendants have decided on settlements that reasonable reflect proportionate liability. As noted above, the parties' counsel is shown to experienced, competent and knowledgeable in securities and class action litigation.

***13** In addition, the Court "recogn[izes] that a settlor ... [will likely] pay less in settlement than he would if he were found liable after a trial." *Tech–Bilt, Inc.,* 38 Cal.3d at 499, 213 Cal.Rptr. 256, 698 P.2d 159. In doing so, this Court:

> [R]eiterates the parties' concern that if litigation were to continue, the majority of the bond offerings would be subject to credible statute of limitations defenses. Therefore, given the substantial procedural hurdles that the Class Plaintiffs face, the settlement amount appears reasonable, especially when considering that the potential amount of recovery would likely be reduced to a mere fraction of that amount if certain claims were determined to be time-barred.

Order Granting Stipulation of Settlement, at 8:26–9:6. In full view of Plaintiffs' allegations of widespread wrongdoing, the credible defenses that Defendants' have, and no opposition to this motion, the Court finds that the settlements at issue are reasonably proportionate to each defendant's alleged liability, and not "grossly disproportionate" so as to prevent approval of the Settlement. *See e.g. Alvarez,* 2003 WL 715905, at *4–*5 (finding that credible defenses in litigation concerning multiple parties militated in favor of finding settlement to be reasonably proportionate to liability).

An analysis of the *Tech–Bilt* factors persuasively demonstrates that Settlement is fair, adequate and made in good faith. As such, approval of the Settlement is warranted on these grounds.

Upon careful review of the Settlement, the substantial proposed benefit to the class, the complexity of the case, the risks associated with pursuing the case to judgment, the absence of any objection, and based on the foregoing discussion, this Court concludes that the Settlement satisfies the criteria for Rule 23(e) and California Code of Civil Procedure Section 877.6, as it is fair, reasonable, and adequate. As such, the Court approves the Settlement.

2. Motion for Reimbursement of Lead Plaintiffs'

Costs And Expenses

Class Representatives David Sinow ("Sinow"), Howard Preston ("Preston"), Langdon Parrill ("Parrill"), Barrett Anderson ("Anderson"), Laurence Pilgeram ("Pilgeram"), Scott McKenry ("McKenry"), Gilbert Kivenson ("Kivenson") and Ralph Allman ("Allman") (collectively, "Class Representatives" or "Lead Plaintiffs") move pursuant to Rule 23(e) and 15 U.S.C. § 78u–4(a)(4) for an order awarding costs and reimbursement of expenses. Lead Plaintiffs assert that they have incurred costs and expenses as follows: Sinow, $60,000.00, Preston, $10,000.00; Parrill, $10,000.00; Anderson, $10,000.00; Pilgeram, $30,000.00; McKenry, $10,000.00; Kivenson, $10,000.00; and Allman, $10,000.00. (Signed Declarations by Lead Plaintiffs setting forth these amounts and the rationale behind them are attached to the Declaration of Jill Levine ("Levine Decl."), Exhs A—H).

As a preliminary matter, the Court notes that although Lead Plaintiffs couch their request as a motion for "costs and expenses," upon careful consideration and review of the motion, the Court finds that Lead Plaintiffs also request reasonable incentive awards. As such, the Court determines whether "costs and expenses" and/or incentive awards are appropriate in this matter. The Court first turns to whether an award of "costs and expenses" is appropriate.

***14** The PSLRA provides in pertinent part that, although class representatives must share the recovery in the same proportion as all other members of the class, "[n]othing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of the class." 15 U.S.C. § 78u–4(a)(4). However, the Court is mindful as to distinguish between "reasonable costs and expenses," and what appears to be a "compensation" or "incentive" award.

Typically, when an individual joins his claims with a class, they "disclaim any right to a preferred position in the settlement [of those claims]." *Officers for Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 632 (9th Cir.1982), *cert. denied,* 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983); Some courts have recognized that class representatives are entitled to some compensation for the risk and inconvenience incurred on behalf of the class. *In re Cont'l Ill. Sec. Litig.,* 962 F.2d 566, 571 (7th Cir.1992). This practice is not universally endorsed, but many courts will grant incentives if they are reasonable. *In re Chambers Dev. Sec. Litig.,* 912 F.Supp. 852, 863 (1995).

The court has discretion to decide whether enhancements fees should be awarded to class representatives and the appropriate amount of these fees. *Van Vranken v. Atl. Richfield Co.,* 901 F.Supp. 294, 299 (N.D.Cal.1995). When determining incentive awards, courts may consider the following: "1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation." *Id.; see also* *Denney v. Jenkins & Gilchrist,* 2005 WL 388562, at *31 (S.D.N.Y. Feb.18, 2005) ("In granting compensatory awards to the representative plaintiff in PSLRA class actions, courts consider the circumstances, including the personal risks incurred by the plaintiff in becoming a lead plaintiff, the time and effort expended by that plaintiff in prosecuting the litigation, any other burdens sustained by that plaintiff in lending himself or herself to prosecuting the claim, and the ultimate recovery.").

According to Plaintiffs, Class Representatives have been actively involved in every aspect of this litigation, either reviewing documents before filing, responding to discovery, preparing for, traveling to and attending their depositions and maintaining contact with Plaintiffs' counsel to monitor the litigation. In doing so, Plaintiffs maintain that Class Representatives have provided significant labor and spent time that would otherwise been dedicated to regular employment and business activities in an effort to ensure that the claims of the Class were effectively prosecuted.

***15** For the prosecution of this action, Lead Plaintiffs gathered documents from their own files to respond to Defendants' document requests, and reviewed, edited and signed verified responses to Defendants' interrogatories. (Levine Decl., ¶ 4). During the course of litigation, Class Representatives reviewed, among other things, various draft complaints, amended complaints, motion papers, interrogatories and document requests. *Id.* For these reasons, Lead Plaintiffs maintain that the amounts requested are reasonable. The following provides, in more detail, the reasons behind each class representative's request for an additional sum of money.

Class Representative Sinow declares that he has invested over 300 hours of time in participating in this litigation, which has reduced his time available to pursue his normal professions of teaching at the University of Illinois and his financial advisory business. (Levine Decl., Exh. F (Declaration of Plaintiff David Sinow ("Sinow Decl.")) at

¶¶ 1, 6, 8–9). Plaintiffs' request that Sinow receive reimbursement of $60,000.00, representing $200 per hour for 300 hours for diligently: (1) participating in Plaintiffs' motions; (2) reviewing all pleadings in this matter; and (3) regularly engaging in numerous conference calls with counsel throughout the three years of litigation on all matters, including hours spent on the proposed settlement. (Levine Decl., Exh. F at ¶¶ 2–6, 10).

Class Representative Preston, a physicist who received his doctorate degree from the University of California, Irvine, declares that he has invested approximately 65 hours for the benefit of the Class, which has interfered with his ability to concentrate fully on his business and usual employment. (Levine Decl., Exh. E (Declaration of Plaintiff Howard Preston ("Preston Decl.")) at ¶¶ 1, 6, 8–9). Preston states that he, among other things, actively monitored this case, worked with counsel during the discovery phase, reviewed pleadings at every stage of litigation, and responded to numerous document requests. (Levine Decl., Exh. E at ¶¶ 2–6). Levine requests reimbursement in the amount of $10,000.00, representing a rate of $150 per hour for approximately 65 hours.[10] (Levine Decl., Exh. E at ¶ 10).

Class Representative Parrill, who has an associate degree in industrial engineering and is retired, declares that he invested approximately 65 hours for the benefit of the Class. (Levine Decl., Exh. B (Declaration of Plaintiff Langdon Parrill ("Parrill Decl.")) at ¶¶ 1, 8, 6). Parrill states that he, *inter alia,* actively monitored this case, worked with counsel during the discovery phase, reviewed pleadings at every stage of litigation, and responded to numerous document requests. (Levine Decl., Exh. B at ¶¶ 3–5). Parrill requests reimbursement in the amount of $10,000.00, representing a rate of $150 per hour for approximately 65 hours. (Levine Decl., Exh. B at ¶ 9).

***16** Class Representative Anderson, a retired orthodontist, declares that he has invested approximately 65 hours for the benefit of the Class. (Levine Decl., Exh. A (Declaration of Barrett Anderson ("Anderson Decl.")) at ¶¶ 1, 6, 8). Anderson states that he, among other things, actively monitored this case, worked with counsel during the discovery phase, reviewed pleadings at every stage of litigation, and responded to numerous document requests. (Levine Decl., Exh. A at ¶¶ 3–5). Anderson requests reimbursement in the amount of $10,000.00, representing a rate of $150 per hour for approximately 65 hours. (Levine Decl., Exh. A at ¶ 9).

Class Representative Pilgeram, a molecular biologist/chemist with a Ph.D. from the University of California Berkeley, declares that he has invested over 200 hours of his time in rigorously and actively participating in the litigation, which has prevented him from obtaining his usual compensation of $350 per hour. (Levine Decl., Exh. D, (Declaration of Plaintiff Laurence Pilgeram ("Pilgeram Decl.")) at ¶¶ 1, 6, 8–9). Plaintiffs contend that reimbursement to Pilgeram of $30,000.00, representing $150 per hour for 200 hours, represents an hourly rate which is reasonable to the class and a fair compromise on the part of Pilgeram, who allegedly forfeited work opportunities which would have compensated him for an hourly rate of more than double that requested here.

Class Representative McKenry, a retired farmer, declares that he has invested approximately 65 hours for the benefit of the Class. (Levine Decl., Exh. C (Declaration of Scott McKenry ("McKenry Decl.")) at ¶¶ 1, 6, 8). McKenry states that he, among other things, actively monitored this case, worked with counsel during the discovery phase, reviewed pleadings at every stage of litigation, and responded to numerous document requests. (Levine Decl., Exh. C at ¶¶ 3–5). McKenry requests reimbursement in the amount of $10,000.00, representing a rate of $150 per hour for approximately 65 hours. (Levine Decl., Exh. C at ¶ 9).

Class Representative Allman, an orthodontist, declares that he has expended approximately 65 hours for the benefit of the Class, which has taken him way from his business and usual employment. (Levine Decl., Exh. G (Declaration of Plaintiff Ralph Allman ("Allman Decl.")) at ¶¶ 1, 8–9). Allman states that he, *inter alia,* actively monitored this case, worked with counsel during the discovery phase, reviewed pleadings at every stage of litigation, and responded to numerous document requests. (Levine Decl., Exh. G at ¶¶ 3–5). Allman requests reimbursement in the amount of $10,000.00, representing a rate of $150 per hour for approximately 65 hours. (Levine Decl., Exh. G at ¶ 9).

Class Representative Gilbert Kivenson ("Kivenson"), a retired patent agent, declares that he has expended approximately 65 hours for the benefit of the Class. (Levine Decl., Exh. H (Declaration of Plaintiff Gilbert Kivenson ("Kivenson Decl.")) at ¶¶ 1, 8–9). Kivenson states that he, among other things, actively monitored this case, worked with counsel during the discovery phase, reviewed pleadings at every stage of litigation, and responded to numerous document requests. (Levine Decl., Exh. H at ¶¶ 3–5). Allman requests reimbursement in the amount of $10,000.00, representing a rate of $150 per hour for approximately 65 hours. (Levine Decl., Exh. H at ¶ 9).

***17** The Court finds that Lead Plaintiffs are not in fact requesting "reasonable costs and expenses," but asking to be paid for their estimated time spent on the litigation at unjustified hourly rates. This is especially true of the $10,000.00 awards requested by Preston, Parrill, Anderson, McKenry, Allman and Kivenson. All of these plaintiffs chiefly base their request for $10,000.00 on hours spent on litigation, and do not demonstrate how such hours can be considered "reasonable costs and expenses." The aforementioned plaintiffs' assertions that they incurred "out-of-pocket expenses directly related to the prosecution of this litigation, including "photocopying documents, telephone charges, and travel[ ]" is inadequate for the Court to find that an award of $10,000.00 is warranted. (Levine Decl., Exhs. A–C, E, F–G). The Court is especially concerned of Anderson, Parrill, McKenry, and Kivenson's requests for $10,000.00 in compensation for hours spent on litigation because these plaintiffs are admittedly retired from employment. (Levine Decl., Exh. A–C, H at ¶ 8).

With respect to Sinow and Pilgeram, who seek compensation of $60,000.00 for 300 hours and $30,000.00 for 200 hours respectively, the Court also finds an inadequate basis to justify such amounts. These two plaintiffs' assertions that their "performance of ... duties as lead plaintiff has caused [them] to forgo business opportunities and has taken [them] away form [their] usual business" is insufficient to establish lost wages. (Levine Decl., Exhs. D & F). The Court is only presented with the lead plaintiffs' self-serving declarations. There is no proof that a disinterested party would have paid Sinow and Pilgeram at $200 per hour and $350 per hour respectively, the hourly rate they currently request the Court to accept. To the extent that Lead Plaintiffs request "reasonable costs and expenses" under the PLSRA, no such award is shown to be appropriate.

However, as discussed above, a close examination of the present motion reveals that Lead Plaintiffs' request is also one for reasonable incentive awards, or what is also known as a compensation award. It is within this Court's discretion to award incentive fees to named class representatives in a class action suit. *Van Vranken v. Alt. Richfield Co.,* 901 F.Supp. 294, 299 (N.D.Cal.1995) (holding that an incentive award of $50,000 proper where the named plaintiff helped litigation that lasted for many years, testified as a key witness at trial, and personally benefitted little from the litigation).

Here, several factors support Lead Plaintiffs' request for an incentive award. Litigation of this class action lasted for over three years before the case settled. Moreover, Lead Plaintiffs assisted Class Counsel throughout this lengthy and complicated case. However, in exchange for their participation, the Court is uncertain whether Lead Plaintiffs will receive great personal benefit. Lead Plaintiffs fail to state the amount of money each class representative will receive. Furthermore, no declaration submitted accurately quantifies how Lead Plaintiffs spent their time during this litigation. The Court is only presented with blanket statements as to how Class Representatives participated in this action. In addition, there is no showing that Lead Plaintiffs' participation placed them at risk of damaged reputation or retaliation.

***18** After evaluating the relevant factors, this Court finds that Lead Plaintiffs' initial request for incentive awards are excessive, and therefore reduces the amounts, and finds the following incentive awards just and reasonable under the circumstances: Sinow, $15,000.00, Preston, $5,000.00; Parrill, $5,000.00; Anderson, $5,000.00; Pilgeram, $12,500.00; McKenry, $5,000.00; Kivenson, $5,000.00; and Allman, $5,000.00. Lead Plaintiffs are entitled to such compensation for their efforts during this litigation.

3. Lead Counsel's Application for An Award Of Attorneys' Fees And Reimbursement of Expenses[11]

Class counsel members the Law Offices of Brian Barry ("Lead Counsel") and the law firm of Glancy Binkow & Goldberg ("Co–Lead Counsel") (collectively, "Class Counsel") request attorneys' fees equal to one-third (33 ⅓%) of the common fund ($27,783,000.00), which totals $9,60,073.90. For the reasons discussed below, this Court finds Class Counsels' fee request is reasonable and appropriate.

It is well settled in the Ninth Circuit that: "In a common fund case, the district court has discretion to apply either the loadstar method or the percentage-of-the-fund method in calculating a fee award." *Fischel v. Equitable Life Assurance Soc'y of the U.S.,* 307 F.3d 997, 1006 (9th Cir.2002). "Reasonableness is the goal, and mechanical or formulaic application of either method, where it yields an unreasonable result, can be an abuse of discretion." *Id.* at 1007. Thus, although the Ninth Circuit has "established 25% of the common fund as the 'benchmark' award for attorney fees [,]" *Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1376 (9th Cir.1993), "that rate may be unreasonable in some cases." *Fischel,* 307 F.3d at 1007 (citations omitted).[12]

Ultimately, the "benchmark percentage should be adjusted, or replaced by a loadstar calculation, when special circumstances indicate that the percentage recovery would be either too small or large in light of the hours devoted to the case or other relevant factors." *Torrisi,* 8 F.3d at 1376 (citing *Six Mexican Workers v. Ariz., Citrus Growers,* 904 F.2d 1301, 1131 (9th Cir.1990)). Courts may observe the following factors when determining whether the benchmark percentage should be adjusted: (1) the result obtained for the class; (2) the effort expended by counsel; (3) counsel's experience; (4) counsel's skill; (5) the complexity of the issues; (6) the risks of non-payment assumed by counsel; (7) the reaction of the class; and (8) comparison with counsel's loadstar. *See In re Quintus Sec. Litig.,* 148 F.Supp.2d 967, 973–74 (N.D.Cal.2001); *In re Medical X–Ray Film Antitrust Litig.,* 1998 WL 661515, at *7 (E.D.N.Y. Aug.7, 1998); *In re Crazy Eddie Sec. Litig.,* 824 F.Supp. 320, 326 (E.D.N.Y.1993); *see also* *Cullen v. Whitman Med. Corp.,* 197 F.R.D. 136, 147 (E.D.Pa.2000).

a. Class counsels' fee request of one-third of the common fund is reasonable under the circumstances[13]

***19** As a preliminary matter, the Court notes that courts in this circuit, as well as other circuits, have awarded attorneys' fees of 30% or more in complex class actions.[14] In applying the above factors, permitting Class Counsel a fee award of 33 ⅓% of the common fund is warranted.

(1) The settlement fund established for the class through the efforts of Class Counsel is an exceptional result

The result achieved is a significant factor to be considered in making a fee award. *Hensley v. Echerhart,* 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (holding that the "most critical factor is the degree of success obtained"). Here, no party disputes that the Settlement Fund of $27,783,000.00, which represents 36% of the class' total net loss (38% if the $2 million contributed by the Bank of New York is considered)[15] of approximately $78 million, is an exceptional result in this case. When the requested fee and expense award is deducted, the net amount of the settlement represented approximately 23% of the class' claimed loss. As Lead Counsel maintains, such a recovery percentage is considerable, and is greater than those obtained in cases where class counsel was awarded one-third of a common fund. *See Med. X–Ray* 1998 WL661515, at *7–*8 (increasing 25% benchmark to 33.3% where counsel recovered 17% of damages); *Crazy Eddie,* 824 F.Supp. at 326 (increasing 25% benchmark to 33.8% where counsel recovered 10% of damages); *In re Gen. Instruments Sec. Litig.,* 209 F.Supp.2d 423, 431, 434 (E.D.Pa.2001) (awarding one-third fee from $48 million settlement fund that was approximately 11% of the plaintiffs' estimated damages); *Corel,* 293 F.Supp.2d at 489–90, 498 (permitting one-third fee award from $48 million settlement fund which represented approximately 15% of class' total net damages); *Cullen,* 197 F.R.D. at 148 (awarding one-third in fees from settlement of class consisting of defrauded vocational students that was 17% of the tuition that class members paid).

Based on the significant results achieved through the efforts of Class Counsel in creating the Settlement Fund, and in light of relevant case law, this Court finds that this factor weighs strongly in favor of granting Lead Counsel's fee request of 33 ⅓% of the common fund.

(2) The effort, experience and skill of Class Counsel

The "prosecution and management of a complex national class action requires unique legal skills and abilities." *Edmonds v. U.S.,* 658 F.Supp. 1126, 1137 (D.S.C.1987). Here, the quality of Class Counsel's effort, experience and skill is demonstrated in the exceptional result achieved. *See* *Behrens v. Wometco Enters., Inc.,* 118 F.R.D. 534, 547–48 (S.D.Fla.1988). Based on this Court's intimate knowledge of this case, and the results obtained, the Court finds that Class Counsel performed at a high level of skill in litigating this action over three years. During the course of this action, counsel investigated and drafted several lengthy versions of the complaint, and engaged in varying and extensive motion practice. Lead Counsel states that it reviewed, analyzed and coded approximately 1.1 million documents, took 34 depositions and defended depositions of all of the representative plaintiffs throughout California, was engrossed in multiple settlement discussions, filed an appeal to the Ninth Circuit Court of Appeals, and is currently litigating the Heritage insurance appeal. According to Lead Counsel, this case alone accounted for over 73% of the Law Office of Brian Barry's total billable hours for the past three years, which precluded the law firm from participating in other cases. *See* *Vizcaino v. Microsoft*

Corp., 290 F.3d 1043, 1047–48 (9th Cir.) (according significant weight to the fact that the class counsel had to forgo "significant other work"), *cert. denied sub nom, Vizcaino v. Waite,* 537 U.S. 1018, 123 S.Ct. 536, 154 L.Ed.2d 425 (2002); *In re Public Serv. Co. of New Mexico,* 1992 WL 278452, at *1, *9 (S.D.Cal. July 28, 1992) (finding the fact that counsel was "precluded ... from accepting many other cases" weighed in favor of an award of one-third of the common fund).

***20** The experience of Class Counsel also justifies the fee award requested. *Gen. Instruments,* 209 F.Supp.2d at 432–33 (awarding a fee award of one-third of a common fund based in part on the experience of counsel in litigating securities class actions); *see also Public Serv. Co. of New Mexico,* 1992 WL 278452, at 8 (finding that the experience of counsel in complex litigation cases cut in favor of a one-third fee award of the common fund). Similarly, it is not disputed that Co–Lead Counsel specialize in representing plaintiffs in securities class actions. (*See* Firm Resumes attached to Barry Decl., Exh. 3, 4). The Court also notes that the quality of opposing counsel is important in evaluating the quality of Plaintiff's counsel's work. *See e.g., In re Equity Funding Corp. Sec. Litig.,* 438 F.Supp. 1303, 1337 (C.D.Cal.1977). There is also no dispute that the plaintiffs in this litigation were opposed by highly skilled and respected counsel with well-deserved local and nationwide reputations for vigorous advocacy in the defense of their clients.

This factor cuts in favor of approving Lead Counsel's fee request.

(3) The highly complex issues of this securities class action

Courts have recognized that the novelty, difficulty and complexity of the issues involved are significant factors in determining a fee award. *See, e.g., Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 718 (5th Cir.1974) ("Cases of first impression generally require more time and effort on the attorney's part ... [counsel] should not be penalized for undertaking a case which may 'make new law,' [but] appropriately compensated for accepting the challenge."). As Lead Counsel points out, and this Court agrees, a number of reasons exist as to why this case cannot be considered a garden variety securities class action.

Various issues litigated in this case concerned relatively uncharted territory. After the initial complaint was filed, the Sarbanes–Oxley Act (the "Act"), which extended the statute of limitations period for certain federal securities claims, was passed. Plaintiffs filed a new complaint naming additional defendants in an attempt to take advantage of the new limitations period. Various defendants moved to dismiss, and in opposing dismissal, Plaintiffs argued (1) the newly filed complaint against new defendants satisfied the Act's requirement that a new statute of limitations would apply only to proceedings after the Act's passage, and (2) that the Act applied retroactively. The Court notes the extensive legal research and analysis involved, as these issues were of first impression for district courts within the Ninth Circuit. Similarly, the Court agrees that the case was factually complex as it involved numerous bonds offered over a course of several years, each with its own official statement and unique set of facts. This case also involved a multitude of plaintiffs and over forty defendants. In addition, the action was based on theories of tort law, contract law, and federal and state statutory laws, and marked by extensive motion practice discovery (including numerous discovery motions, a motion for class certification, nineteen motions to dismiss, a motion for stay, and filing three motions for summary judgment), oral argument, and settlement negotiations. *Cullen,* 197 F.R.D. at 142 (granting attorneys' fees equal to one-third of the common fund due in part to the complexity of the litigation, acknowledging that the "litigation consisted of motions to dismiss, class certification motions, a multitude of discovery motions, many oral arguments and settlement conferences").

***21** The complexity of this case justifies the requested fees. This factor strongly weighs in favor permitting class plaintiffs to recover 33 ⅓% of the settlement fund.

(4) The risks of non-payment assumed by counsel

Courts consistently recognize that the risk of non-payment or reimbursement of expenses is a factor in determining the appropriateness of counsel's fee award. *See, e.g., Medical X–Ray,* 1998 WL 661515, at *7 (justifying fee award in part due to the fact that counsel spent several years engaged in litigation without certainty of compensation); *Crazy Eddie,* 824 F.Supp. at 326 (same).

Here, the Court notes that Plaintiffs' counsel proceeded entirely on contingency basis, while paying for all expenses incurred. There was no guarantee of any recovery, and thus, counsel was subjected to considerable risk of no compensation for time or no reimbursement for expenses. The Court again acknowledges Lead Counsel's representation, which was not challenged by any party, that it devoted over 73% of its total billable hours for the past three years to this case, indicating that the case was undeniably a heavy financial risk.

The risk of non-payment was also greater here, as most of the insurance carriers either disclaimed coverage or provided coverage under expansive reservations of rights. *See Safety Components,* 166 F.Supp.2d at 100 (finding that the threat of non-payment from "D & O" insurance carrier "weigh[ed] overwhelmingly" in favor of approval of the fee request of one-third of the common fund); *Cullen,* 197 F.R.D. at 149 (same). Specifically, as Lead Counsel points out, (1) the insurers for the M & S and CBIZ defendants denied coverage causing both those defendants to initiate lawsuits against their insurers, (2) the insurers for Heritage officers and directors denied coverage, prompting the state action that plaintiffs continue to litigate, (3) the insurers for the Kasirer defendants filed an action seeking to void the policy, and never provided coverage for Robert Kasirer and Debra Kasirer, and (4) the insurers for the *Boehm* defendants threatened to file an action seeking to void the policy as well.

Given the above discussion, Lead Counsel's requested fee award is justified by the significant risk assumed in litigating this case on contingency fee without any guarantee of compensation.

(5) The reaction of the class to the requested attorneys' fee

The existence or absence of objectors to the requested attorneys' fee is a factor is determining the appropriate fee award. *See* *Cullen,* 197 F.R.D. at 148–49. Here, the Court approved a Notice that was sent to possible class members that specifically stated that counsel would seek upwards of one-third of the Settlement Fund in attorneys' fees. The Notice also informed class members of their ability to object to the counsel's fee request or to opt-out of the class and pursue their claims individually. As discussed *supra,* to date, no class member has objected to the attorneys' fee request and only one person opted-out of the class. The absence of objections or disapproval by class members to Class Counsel's fee request further supports finding the fee request reasonable.

(6) Loadstar comparison

***22** Courts often compare an attorney's loadstar with a fee request made under the percentage of the fund method as a "cross-check" on the reasonableness of the requested fee. *See, e.g.,* *Vizcaino,* 290 F.3d at 1050; *Fischel,* 307 F.3d at 1007. "[T]he loadstar calculation can be helpful in suggesting a higher percentage when litigation has been protracted [and] may provide a useful perspective on the reasonableness of a given percentage award." *Vizcaino,* 290 F.3d at 1050. In securities class actions, it is common for a counsel's loadstar figure to be adjusted upward by some multiplier reflecting a variety of factors such as the effort expended by counsel, the complexity of the case, and the risks assumed by counsel. *See Ravisent,* 2005 WL 906361, at *12 (fee represented a multiplier of 3.1 of the loadstar); *Linerboard,* 2004 WL 1221350, at *16 (recognizing that from 2001 to 2003, the average multiplier approved in common fund cases was 4.35); *Cullen,* 197 F.R.D. at 150–51 (loadstar of $1.2 million would require a multiplier of 2.01 in order to match awarded fees of one-third of $7.3 million common fund); *Safety Components,* 166 F.Supp.2d at 103 (loadstar of $534,000.00 would require a multiplier of 2.81 in order to match awarded fees of $1.5 million); *Medical X–Ray,* 1998 WL 661515, at *7 (fee represented a multiplier on the attorneys' loadstar of 1.67); *Crazy Eddie,* 824 F.Supp. at 326–27 (the equivalent of a 1.72 multiplier was applied to the attorneys' loadstar).

Here, Lead Counsel maintains that the loadstar is $12,428,630.00, which accounts for: (1) 23,473 attorney hours billed by the Law Offices of Brian Barry at approximately $355.00 per hour for a total allowable loadstar of $8,350,793.00, (2) 8,486.50 attorney hours billed by the law firm Glancy Binkow & Goldberg at approximately $366.00 per hour for a total allowable loadstar of $3,109,050.00; (3) 610.50 attorney hours billed by the law firm of Cohen Milstein Hausfeld & Toll at approximately 316.00 per hour for a total allowable loadstar of $192,988.00; (4) 1,230.25 attorney hours billed by the law firm O'Neill Lysaght & Sun at approximately $265.00 per hour for a total allowable loadstar of $326,619.00; (5) 1,700.55 attorney hours billed by the law firm of Miller Milove & Kob at approximately $261.00 per hour for an allowable loadstar of $443,775.00; and (6) 26.20 attorney hours billed by the law firm of Blaise & Hightower at approximately $207.00 per hour for a total allowable loadstar of $5,405.00.[16] The $12,428,630.00 loadstar is nearly 3.5 million more than the fees requested by Lead Counsel. Had Class Counsel sought to recover its fees under the loadstar method, factors would arguably permit an upward adjustment. Assuming that Plaintiffs' loadstar amount is accurate, the Court finds that class plaintiffs' request for substantially less recovery is indicia that the fee amount requested is reasonable.

However, due to the general lack of evidence to support Class Counsel's loadstar amount, this factor is neutral. Although the Court is not readily suspicious of Class Counsel's loadstar amount, the Court is concerned with Lead Counsel's failure to provide information with respect to the hourly rates employed, the hours expended by whom, and the task(s) performed.

***23** Nevertheless, in careful consideration of the above factors, this Court finds thirty-three and one-third percent (33 ⅓%) of the common fund of $27,783,000.00 to be a reasonable percentage award. As such, this Court awards attorney's fees totaling $9,260,073.90.[17] Of this amount, 5% or $463,003.69 shall be paid to the law firm of Miller Milove & Kob ("MMK") as discussed further herein.

a. Class Counsel's Expenses Are Not Demonstrated To Be Reasonable

Lead Counsel originally sought reimbursement of $570,090.18 in expenses incurred in litigating this matter. For the following reasons, Lead Counsel's request was initially denied for the reasons set forth below.

"There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund." *Gen. Instruments,* 209 F.Supp.2d at 434 (citations and alterations omitted). The appropriate analysis in deciding which expenses are compensable is whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. *Harris v. Marhoefer,* 24 F.3d 16, 19 (9th Cir.1994) (citations omitted). "Thus [, reimbursement of] reasonable expenses, through greater than taxable costs, may be proper." *Id.* at 20.

Here, Lead Counsel maintains that its litigation expenses, including, but not limited to, photocopying costs, reporter's fees, mediation fees, expert fees, and attorney service fees, were reasonably incurred. (*See Barry Decl.,* at ¶¶ 53–56.). Although Lead Counsel offers what it considers to be a sufficient "itemization" of expenses, no such detailed enumeration of expenses exists. Instead, Lead Counsel provides an overly simplified, general, and therefore inadequate, summary of expenses by category including, but not limited to Expert and Consulting Fees, On–Line Legal Research, Travel Costs, and Photocopies, which this Court finds inadequate. *See Lyons v. Sutex Corp.,* 987 F.Supp. 271 (S.D.N.Y.1997) ("Plaintiff's counsel has not provided any documentary support for their claim of expenses other than a chart summarizing expenses by category (travel & lodging, meetings & conferences, translations, etc.). This makes it difficult for the Court to assess the propriety of these expenses. The Court is particularly alarmed at the following expense groups: Word Processing ($ 8,032.00) and Paralegal ($ 7,458.75). The Word Processing charge suggests billing for secretarial time. As for paralegal charges, plaintiff's counsel has provided no basis by which the Court can judge the reasonableness of this expense, such as time sheets, projects addresses or billing rates").

Here, for instance, Lead Counsel requests $81,617.50 for Expert and Consulting Fees without disclosing the identity, qualifications, contributions or rates of any expert. In addition, Lead Counsel requests photocopies of $225,374.92 without indicating the cost per page, making it difficult for the Court to give credence to that figure. In addition, the court is presented with general Storage/Office expenses of $48,540.40, Telephone/Fax costs of $2,600.91 and Parking of $17,977.00, none of which are properly documented.

***24** In light of the above, Lead Counsel's request for reimbursement of expenses was denied at that time.[18] However, because Class Counsel is entitled to reasonable reimbursement, the Court permitted counsel an opportunity to supplement the record with respect to its request for reimbursement of expenses following the hearing.

In a supplemental declaration submitted by Lead Counsel, an amended request for expenses in the sum of $644,093.94 was submitted consisting of $522,560.84 for Lead Counsel's expenses[19] and $121,533.10 for expenses of the Claims Administrator. The Court has reviewed the information provided by Lead Counsel and now finds that the expenses submitted to the Court in the total sum of $644,093.94 are appropriate. The Court Orders Lead Counsel to be reimbursed for its expenses the sum of $522,560.84 and orders that the Claims Administrator be reimbursed for its expenses the sum of $121,533.10.

4. *Miller Milove & Kob's Application for Award of*

Fees, Costs and Expenses[20]

The law firm of Miller Milove & Kob ("MMK") contends that the "lion's share of legal services provided were prior to the designation of Lead Counsel on January 13, 2003 and were necessary for the creation of the Settlement fund." (Miller Milove & Kob's Motion for an Award of Fees, Costs and Expenses ("MMK Motion") at 2:5–7). As such, MMK requests attorneys' fees of $1,276,022.50, and reimbursement of costs and expenses of $48,578.83. According to MMK, its fees, costs and expenses were incurred as a result of litigating this action, as well as the state court action filed in the Superior Court of the state of California for the county of San Diego on November 20, 2001 ("State Court Action").[21]

As the Ninth Circuit has held, "It is well established that an award of attorneys' fees from a common fund depends on whether the attorneys' 'specific services benefitted the fund-whether they tended to create, increase, protect or preserve the fund." ' *Class Plaintiffs v. Jaffe & Schlesinger, P.A.,* 19 F.3d 1306, 1308 (9th Cir.1994). An attorney submitting an application for an award of fees and expenses has the burden of establishing entitlement to such monies. *See In re Prudential Ins. Co. of Am. Sales Practice Litig.,* 148 F.3d 283, 333–34 (3d Cir.1998). For the reasons discussed below, MMK has failed to meet its burden.

1. MMK is not entitled to compensation from the Settlement Funds for time and expenses incurred in the State Court Action

With respect to MMK's purported assistance in this litigation, MMK contends that it benefitted the class because "First, the filing and prosecution of the ... State Court Action preserved statute of limitations, [and s]econd, the legal work benefitted the Plaintiff Class through development of evidence, legal analysis and allegations." (MMK Motion, at 12:20–26). MMK contends that it developed the core evidence and allegations of securities fraud from which this class arose, thereby paving the road for the present global settlement.

***25** There is no dispute that Miller Milove & Kob filed the first action in any court on behalf of the Heritage Bondholders. There is also no dispute that the filing of the State Court Action preserved the statute of limitations for claims against various defendants in this case.[22] The major contention here is whether the work performed in filing and litigating the State Court Action " 'benefitted the fund-whether [the actions of MMK] tended to create, increase, protect or preserve the fund." ' *Class Plaintiffs v. Jaffe & Schlesinger, P.A.,* 19 F.3d 1306, 1308 (9th Cir.1994).

Here, MMK seeks to recover monies from litigating a case that was dismissed after numerous unfavorable rulings and no recovery was obtained on behalf of the class.[23] Eventually MMK voluntarily dismissed the State Court Action. Based on these grounds, the Court finds that MMK's request for attorneys' fees and expenses for work performed in an unrelated and unsuccessful matter is inappropriate. *Wininger,* 301 F.3d at 577 (Ninth Circuit Court of Appeals affirming district court's decision to refuse to award fees for the unsuccessful efforts of counsel). Moreover, a review of the record reflects that MMK's efforts in the State Court Action had a harmful effect on the class, in that the adverse rulings against MMK in the state court complicated litigation and wasted resources as various defendants expended significant amounts of money litigating the State Court Action for over a year. (*See* Barry Decl. at ¶ 60.) The result of the State Court Action was less funds available to compensate the class. The Court agrees with Lead Counsel that the purported benefit of MMK's efforts in the State Court Action is neutralized or outweighed by the depletion of insurance policies and personal assets of the defendants.

"The equitable common fund/common benefit doctrine authorizes attorney fees only when the litigants preserve or create a common fund for the benefit of others as well as themselves." *Vizcaino v. Microsoft,* 290 F.3d 1043, 1051–52 (9th Cir.2002) (citations omitted). In light of the discussion above, MMK's efforts in the State Court Action can hardly be considered as preserving or creating a common fund. Although MMK's filing of the complaint in the State Court Action effectively preserved the statute of limitations, and thereby allowed Lead Plaintiffs an opportunity to file in federal court, such an act by MMK is not viewed as sufficient to merit compensation. In addition, although Lead Counsel admits to incorporating information from the State Court Action First Amended Complaint in this action, Lead Counsel contends, and MMK fails to sufficiently dispute, that such information was, for the most part, either: (1) in the public domain; (2) already in Co–Lead Counsel's possession (via documents or confidential witness statements); or (3) available in other complaints (e.g., the *Betker* complaints, the *SEC Receiver* complaint, the *Platt* and *Cornerstone* complaints, and the Rancho Bankruptcy filings). Where, as here, there is no clear showing of a connection between the conduct of counsel and the preservation or creation of a common fund for the benefits of others, the Court would be remiss to grant the requested fees and expenses. In short, MMK has simply failed to sufficiently demonstrate that it met its burden of proof that it is entitled to compensation from the Settlement Fund for time spent and expenses incurred in the State Court Action.

b. *Specific time and expenses MMK asserts it incurred in this federal action is not recoverable*

***26** As Lead Counsel points out, MMK's fee request includes approximately 450 hours spent drafting a duplicative compliant and moving for lead status in federal court. Such time spent is not compensable. *In re Cendant Corp. Litig.,* 404 F.3d 173, 204–05 (3d Cir.2005) (filing a duplicative complaint for consolidation with an already pending action does not confer a benefit on the class and is not compensable); *In re People Soft, Inc. Sec. Litig.,* No. C99–00472 WHA, Slip op. at 15 (N.D.Cal. Aug.24, 2001) ("[Non-lead counsel's] time spent vying to become class counsel or promoting their lead plaintiff candidate is not compensable. There was no material benefit to the class.").

Lead Counsel contends, and MMK does not deny, the following: (1) MMK "performed virtually none of the heavy lifting, in terms of briefing, depositions and mediation sessions that led to the substantial benefit to the class;"[24] (2) MMK "refused numerous requests to meaningfully contribute to the litigation fund which was used to generate the class recovery (MMK contributed only 1.8% of the $570,000.00 in out of pocket expenses risked by Class Counsel);" (3) MMK "refused to produce its client for deposition or produce documents to defendants despite formal requests;" and (4) MMK "failed to name as defendants the parties that ultimately provided the vast majority of the settlement fund." Nevertheless, MMK demands to be paid at a rate almost double of that of all other counsel. The Court finds MMK's argument for compensation untenable and unsupported by the record.

The Court agrees with Lead Counsel that MMK should be compensated only for the following requests made upon it by Co–Lead Counsel: (1) draft a discrete subsection of the oppositions to certain motions to dismiss the Third Amended Complaint; (2) issue a subpoena on the Marshall Group; (3) attend one deposition; and (4) employ one attorney to review, code and analyze documents at Co–Lead Counsel's office in Los Angeles. There is no adequate basis to disturb the presumption of correctness that applies to lead plaintiff's decision not to compensate non-lead counsel's fee submissions for work preformed after appointment of lead counsel. *See* *Cendant,* 404 F.3d at 195.

Accordingly, this Court finds that MMK's request for attorneys' fees of $1,276,022.50, and reimbursement of costs and expenses of $48,578.83 is unjustified. In this class action, MMK apparently performed only 3% to 5% of the authorized work and contributed only $10,032.00 of the costs. MMK has not convincingly established that its alleged contributions assisted in the creation or preservation of the Settlement Fund. Permitting MMK to recover would permit a windfall to an attorney who bears no true relationship to the actual efforts made to benefit the class. For these reasons, MMK's Application for Attorneys' Fees, Costs and Expenses is denied as requested. Instead, this Court awards MMK attorneys' fees totaling $463,003.69, constituting 5% of the $9,260,073.90 awarded to Lead Plaintiffs' counsel.[25] This sum of $463,003.69 shall be deducted from the $9,260,073.90 paid to Lead Plaintiffs' counsel. Finally, MMK shall be entitled to an award of costs and expenses totaling $10,032.00.

III. *CONCLUSION*

***27** In light of the foregoing, this Court:

(1) GRANTS Plaintiffs' Motion for Final Approval of Class Action Settlement, which defendants U.S. Trust Company, N.A., U.S. Trust Corporation, Jerold V. Goldstein, Clarke Underwood, Geraldine K. Ostlund, Richard Kuhl, Joel Boehm, Atkinson, Andelson, Loya, Ruud & Romo, Sabo & Green, Leo Dierckman, Stephen P. Goodman, HFS Consultants, formally known as Healthcare Financial Solutions and erroneously sued herein as Healthcare Financial Solutions Group, Inc., CBIZ Valuation Group, Inc., CBIZ Accounting, Tax & Advisory, Inc., Century Business Group, Inc., Michael Sobelman, and Sobelman, Cohen & Sullivan, LLP joined in bringing;

(2) GRANTS IN PART Plaintiffs' Motion for An Award of Costs and Expenses to Named Plaintiffs;

(3) GRANTS Lead Plaintiffs' Application for an Award of Attorneys' Fees and Reimbursement of Expenses; and

(4) DENIES Miller Milove & Kob's Application for Award of Fees, Costs and Expenses as requested.

IT IS SO ORDERED.

Not Reported in F.Supp.2d, 2005 WL 1594403

All Citations

Footnotes

1 *Preston v. U.S. Trust Corp., et al.,* Case No. BC266510 (L.A.Sup.Ct., Jan. 16, 2002); *Allman et al. v. O.V. Bertolini et al.,* Case No. 02–6484 MMM (C.D.Cal., Aug. 20, 2002).

2 Plaintiffs also filed motions for summary judgment against Stephen Goodman ("Goodman") and Geri Ostlund ("Ostlund"). Goodman and Ostlund reached settlement agreements with Plaintiffs before filing any responsive briefs.

3 On May 16, 2005, U.S. Trust Company, N.A. and U.S. Trust Corporation ("U.S. Trust defendants") joined in Class Plaintiffs' Motion for Final Approval of the Class Action Settlement. U.S. Trust defendants based their joinder on: (1) the Notice of Motion for Final Approval of the Class Action Settlement; (2) the Memorandum of Points and Authorities in Support of Final Approval of Settlement; (3) paragraphs 1 through 32 and Exhibit 1 of the declaration of Brian Barry in Support of Class Plaintiffs' Motion for Final Approval of the Settlement, an Award of Attorneys' Fees and Reimbursement of Expenses and Costs; (4) the pleadings filed on January 10, 2005 by U.S. Trust defendants in support of joint motion for approval of the stipulation and amending stipulation of settlement; (5) the Court's records; and (6) such further pleadings and evidence as may be submitted at or prior to the time of hearing of said motion ("Evidence Supporting Final Approval"). On May 17, 2005, defendants Jerold V. Goldstein, Clarke Underwood, Geraldine K. Ostlund and Richard Kuhl filed a Joinder in Class Plaintiffs' Motion for Final Approval of Class Action Settlement. On May 20, 2005, defendants Joel Boehm ("Boehm"), Atkinson, Andelson, Loya, Ruud & Romo ("Atkinson Andelson") and Sabo & Green filed a Joinder in Class Plaintiffs' Motion for Final Approval of Class Action Settlement based on the Evidence Supporting Final Approval. On the same date, defendants Leo Dierckman and Stephen P. Goodman separately joined in the motion for final approval of settlement. On May 23, 2005, HFS Consultants, formally known as Healthcare Financial Solutions and erroneously sued herein as Healthcare Financial Solutions Group, Inc. ("HFS") filed a Joinder in Class Plaintiffs' Motion for Final Approval of the Class Action Settlement based on the Evidence Supporting Final Approval. On May 24, 2005, defendants CBIZ Valuation Group, Inc., CBIZ Accounting, Tax & Advisory, Inc. and Century Business Group, Inc. (collectively, "CBIZ defendants") filed a Joinder in Class Plaintiffs' Motion for Final Approval of the Class Action Settlement based on the Evidence Supporting Final Approval. On May 25, 2005, Michael Sobelman and Sobelman, Cohen & Sullivan filed a Joinder in Class Plaintiffs' Motion for Final Approval of the Class Action Settlement based on the Evidence Supporting Final Approval.

4 CBIZ defendants are collectively, CBIZ Valuation Group, Inc., CBIZ Accounting, Tax & Advisory, Inc., and Century Business Services, Inc.

5 For example, the court in *In re Sumitomo Cooper Litig.,* 189 F.R.D. 274 (S.D.N.Y.1999), recounted an instance where "a class action against the manufacturer of the drug Bendectin was originally settled, but settlement approval was reversed by the Sixth Circuit." *Sumitomo Cooper,* 189 F.R.D. at 282 (citing *In re Bendectin Prod. Liab. Litig.,* 749 F.2d 300 (6th Cir.1984)). "Thereafter, as reported by THE WALL STREET JOURNAL (March 13, 1985), the plaintiffs tried the case and, by jury verdict, lost millions of dollars for which they had originally bargained." *Id.* In *Upson v.*

Otis [, 155 F.2d 606, 612 (2nd Cir.1946)], approval of settlement was reversed because " 'on the facts presented to the district judge, the liability of the individual defendants was indubitable and the amount of controversy beyond doubt greater than that offered in the settlement." ' *Sumitomo Cooper,* 189 F.R.D. at 282 (quoting *Upson,* 155 F.2d at 612). However, as the *Sumitomo* Court was informed, "the ultimate recovery turned out to be less than the rejected settlement." *Id.*

6 The M & S defendants consist of a group of employees employed by Miller & Schroeder.

7 As Plaintiffs point out, if Plaintiffs' counsel is awarded its requested fees and reimbursed expenses, the Settlement Fund, after the subtraction of the fees and expenses, would be no less than 23% of the class' net losses.

8 The Bohem defendants are collectively, Joel Boehm and the two law firms that employed Bohem: Sabo & Green LLP and Atkinson, Andelson, Loya, Ruud & Romo LLP ("Atkinson Andelson").

9 This Court received an untimely objection via mail by K. Martin on May 25, 2005, ten days after the filing deadline for oppositions. Due to its lateness, and because the document is not file stamped, and therefore not part of the Court's record, the Court does not consider K. Martin's letter in its analysis.

10 The Court notes that $150.00 per hour for 65 hours does not equal $10,000.00, but $9,750.00. Nevertheless, the Court acknowledges that the 65 hours is only an approximate number of hours spent. As such, the Court recognizes that $10,000.00 is only the approximate figure of reimbursement that class representatives Preston, Parrill, Anderson, McKenry, Kivenson and Allman seek to recover.

11 Although the application is styled as one brought by "Lead Plaintiffs," the Court notes that it is actually Lead Counsel who applies for an award of attorneys' fees and reimbursement of expenses.

12 Federal courts have consistently approved of attorney fee awards over the 25% benchmark. To this end, the Court notes that Lead Plaintiffs attach a list of over 200 cases where a fee of 30% or higher was awarded. Declaration of Brian Barry, ("Barry Decl."), Exh. 5. In *In re Activision Sec. Litig.,* 723 F.Supp. 1373, 1377–78 (N.D.Cal.1989), the Hon. Maralyn Hall Patel of the United States District Judge of the Northern District of California found, after a comprehensive review of fee awards, that the "better practice" would be to set the benchmark percentage at 30%. *Activision,* 723 F.Supp. at 1377–78.

13 The law firm of Miller Milove & Kob, who represents plaintiffs Lewis G. Herrmann and Archie Rotblatt (collectively "Herrmann Plaintiffs"), filed an Opposition to Class Counsel's request for attorneys' fees. According to Herrmann Plaintiffs, Class Counsel "should be paid substantially less than the twenty-five percent (25%) benchmark" because 25% is unreasonable in light of: (1) "[T]he limited risk, as the allegations and evidence were well developed by other counsel prior to appointment of Lead Counsel;" (2) "[P]rior rulings of this Court in the *Betker* action which paved the

way for the class action;" (3) "Lead Counsels' reliance upon the deposition transcripts from depositions conducted by the U.S. Securities and Exchange Commission ("SEC");" (4) "[T]he *Lundquist* NASD arbitration award which included findings supporting the care allegations of securities fraud;" (5) "[T]he Lundquist arbitration transcripts from the Fall of 2001, which included testimony of Settling Defendants Robert Kasirer, James Iverson, John Clarey and Victor Dhooge and which implicated many of the Settling Defendants, particularly the Attorney Defendants, i.e., Joel Boehm, Sabo & Green, and Atkinson Andelson Loya Ruud & Romo;" (6) "Lead Counsels' reliance upon other attorneys and cases to develop the case against U.S. Trust Company of Texas, N.A.;" (7) "[L]imited discovery conducted by Lead Counsel, although they claim to have taken many depositions, they do not indicate whose depositions were conducted and at least several depositions were for limited purposes, such as in connection with document production;" (8) "[T]he pressure exerted upon Settling Defendants by the SEC, the Department of Justice and the Internal Revenue Service;" (9) "[T]he action was not prepared for trial and Lead Counsel was never required to present admissible evidence of any defendants [sic] liability in opposition to a motion for summary judgment or otherwise;" (10)[T]he strength of the Plaintiffs' case and the results obtained." (Herrmann Plaintiffs' Objection to Application of Lead Counsel for Award of Attorneys Fees and Reimbursement of Expenses ("Herrmann Plaintiffs' Objection"), at 3:6–4:21).

Herrmann Plaintiffs' arguments are directed toward showing that the case was so well developed by the time Class Counsel was appointed, that an insignificant "risk of litigation" existed, and thus, Class Counsel is not entitled to a fee award of one-third of the settlement fund. *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 471 (2nd Cir.1974). According to Herrmann Plaintiffs, "[t]he accomplishments claimed by Lead Counsel were greatly assisted by others, including not only Miller Milove & Kob, but other counsel prosecuting Heritage Bond related claims for investors and the Federal government[, and thus *a]ny* competent counsel could have achieved significant results under those circumstances." (Herrmann Plaintiffs' Objection, at 4:22–25) (emphasis added). The Court does not speculate as to how other counsel might have litigated this securities class action. The Court has intimate knowledge, however, that this case was highly complex, and although other law firms may have contributed to the success of resolving this action, it was Lead Counsel who effectively spearheaded the litigation which resulted in a substantial recovery for the class. Herrmann Plaintiffs' attempt to undercut Class Counsel's vital and significant participation in this action is unpersuasive.

14 Courts in the Ninth Circuit have awarded attorney fees in amounts greater than the twenty-five percent (25%) "benchmark percentage." *See, e.g., In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d 454, 460 (9th Cir.2000) (affirming award of fees equal to one-third of total recovery); *In re Public Ser. Co. of New Mexico,* 1992 WL 278452, at *1, *12 (S.D.Cal. July 28, 1992) (awarding one-third); *Antonopulos v. North American Thoroughbreds, Inc.,* 1991 WL 427893, at *1, *4 (S.D.Cal. May 6, 1991) (awarding one-third); *In re M.D.C. Holdings Sec. Litig.,* 1990 WL 454747, at *1, *10 (S.D.Cal. Aug.30, 1990) (awarding 30% attorneys' fee plus expenses).

Moreover, courts in other districts have awarded attorney fees in amounts greater than 25% of the common fund. *See, e.g., In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.,* 56 F.3d 295, 300 (1st Cir.1995) (approving a fee of roughly 30.9%); *Nichols v. SmithKline Beecham Corp.,* 2005 WL 950616, at *1, *24 (E.D.Pa. April 22, 2005) (awarding fee equal to 30% of a $65 million fund which represented a multiplier of 3.15 of the loadstar); *In re Raviscent Tech. Inc. Sec. Litig.,* 2005 WL 906361, at *1, *12 (E.D.Pa. April 18, 2005) (acknowledging that attorneys' fees of 30–35% were commonly granted in awarding 30% in fees of a $7 million fund); *In re Corel Corp. Sec. Litig.,* 293 F.Supp.2d 484, 495–99) (E.D.Pa.2003) (awarding one-third of $7 million settlement fund plus expenses); *In re Combustion, Inc.,* 968 F.Supp. 1116, 1136–1141 (W.D.La.1997) (awarding fee equal to 36% of the settlement fund); *In re Gulf Oil/Cities Serv. Tender Offer Litig.,* 142 F.R.D. 588, 597 (S.D.N.Y.1992) (awarding fee of 30%).

15 Lead Counsel points out that many class members will receive a share of the $2 million contributed by the Bank of New York, from which Class Counsel does not seek fees.

16 The Court notes that Lead Counsel did not provide information with respect to the hourly rates employed, the hours expended by whom, and the task(s) performed. *See* *Common Cause v. Jones,* 235 F.Supp.2d 1076, 1078–79 (C.D.Cal.2002) (finding that the loadstar information provided by the lead counsel was without supporting data, and thus, meaningless). While the lack of particularity in Lead Counsel's papers prevents an accurate and detailed review of the loadstar value, the Court concludes that the other factors so strongly cut in favor of finding that the requested fee award of 33 ⅓% of the common fund is reasonable and appropriate, that the loadstar amount, under the particular facts of this case, bears little weight on this Court's analysis.

17 In awarding attorney fees, this Court is keenly aware of its duty to protect the interests of the class. *Vizcaino,* 290 F.3d at 1052 (" 'Because in common fund cases the relationship between plaintiffs and their attorneys turns adversarial at the feesetting stage, courts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the role of fiduciary for the class plaintiffs." ') *WPPSS,* 19 F.3d at 1302. Accordingly, fee applications must be closely scrutinized. Rubber-stamp approval, even in the absence of objections, is improper."); *see also* *In re Coordinated Pre-trial Proceedings in Petroleum Prods., Antitrust Litig.,* 109 F.3d 602, 608 (9th Cir.1997) ("In a common fund case, the judge must look out for the interests of the beneficiaries, to make sure that they obtain sufficient financial benefit after the lawyers are paid. Their interests are not represented in the fee award proceedings by the lawyers seeking fees from the common fund.") (citing *WPPSS,* 19 F.3d at 1300–01). This Court finds the requested attorneys' fee amount amply supported by the analysis set forth in today's ruling.

18 The fact that the Notice was sent to possible class members stating that Class Counsel would seek reimbursement of expenses in the approximate amount of $750,000.00, plus the expense incurred in claims administration including sending notice, did not permit the Court to automatically assume that the requested expenses were reasonable. Such an assumption would have lead the Court to impermissibly neglect its obligation to ensure that Class Counsel recovers only its reasonably justifiable expenses related to litigating this action.

19 Lead Counsel originally requested $570,090.18 in expenses. However, after Lead Counsel "reviewed all expenses thoroughly in accordance with the guidance provided by the Court at the hearing[,] ... certain items that were included in the initial request for reimbursement [were] removed and in-house copying charges from all firms [were] reduced to $0.15 per page." (Supplemental Declaration of Brian Barry in Support of Class Counsels' Application for Reimbursement of Costs and Expenses, ¶ 2). As indicated herein, Lead Counsel now requests $522,560.84 in expenses.

20 The Court notes that MMK failed to comply with Local Rules governing typeface size requirements. Although this Court does not consider MMK's failure to follow Local Rules as grounds for denying MMK's present request, the Court cautions MMK that future noncompliance may result in sanctions.

21 As a preliminary matter, and with respect to the State Court Action, the Court notes that it has the jurisdiction and authority to award fees and costs in connection with the state court proceedings. As the Ninth Circuit has stated:

> [J]urisdiction over a fund allows for the district court to spread the costs of the litigation among the recipients of the common benefit. *Id.; see also* *Vincent v. Hughes Air West, Inc.,* 557 F.2d 759, 774 n. 15 (9th Cir.1977) (stating that *either* "control over a fund or jurisdiction over the parties" is required in addition to "a finding of benefit-in-fact") (emphasis added). For instance, in *Angoff,* the First Circuit held the district court erred in refusing to allow attorneys' fees arising from a separate proceeding in state court when it "produced a benefit to the corporation on behalf of which the main action was brought.".... We are aware of no case restricting a district court's equitable powers to award attorneys' fees to the litigation directly before the court.

Wininger v. SI Mgmt. LP, 301 F.3d 1115, 1121 n. 3 (9th Cir.2002). The *Wininger* Court further stated that:

> The question presented is whether the district court's equitable jurisdiction allows it to award fees for hours spent working on something other than the present litigation. We hold that it does. The level of relatedness to the ongoing litigation is of less importance than the extent to which the non-[present]-litigation work was calculated to—and in fact did—bring about the common fund presently under the district court's control.

Wininger, 301 F.3d at 1121 n. 3 (emphasis added).

22 Specifically, the filing of the State Court Action preserved the statute of limitations for claims against Settling Attorney Defendants (Boehm, Sabo & Green and Atkinson Andelson).

23 On May 24, 2002, the state court granted all demurrers for all defendants on all claims in the State Court Action, with the exception of a demurrer on a single claim for breach of fiduciary duty. The claim was later abandoned by MMK when it filed its First Amended Complaint in the State Court Action. The demurrers were sustained based on state of limitations grounds and the lack of any facts supporting the claims asserted.

24 According to Lead–Counsel:

> MMK did not participate in:
>
> a) motion practice (save its small contribution to the first round of motions to dismiss);
>
> b) researching or drafting the miscellaneous criminal matters (or extensive briefing required by Judge Anderson) which resulted in the class obtaining some of the most useful documents in the case;
>
> c) the approximately fifteen motions to compel briefed and argued before Magistrate Judge Chapman;
>
> d) any of the three summary judgment motions filed with the Court;
>
> e) the numerous discussions and meetings with various defense counsel which resulted in agreements obviating the need for further motions to compel;
>
> f) any of the depositions (save one meaningless depositions);
>
> g) preparation of the many mediation sessions; [and]

h) the negotiation of the global settlement.

(MMK Motion at 8:9–23 (citing Barry Decl. at ¶ 11)).

25 This Court initially awarded MMK $277,802.21 in attorneys' fees, equaling 3% of the $9,260,073.90 awarded to Lead Plaintiffs' counsel. However, after oral argument, a careful review of the record, and in the Court's discretion, this Court increased the amount to 5%.

End of Document

EXHIBIT "7"

2007 WL 1991529
United States District Court,
N.D. California.

In re PORTAL SOFTWARE, INC. SECURITIES LITIGATION.

No. C-03-5138 VRW.
|
June 30, 2007.

Attorneys and Law Firms

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Joseph M. Barton, Solomon B. Cera, Gold Bennett Cera & Sidener LLP, San Franciscco, CA, for Interested Party.

ORDER

VAUGHN R. WALKER, United States District Chief Judge.

***1** Plaintiffs allege violation of the Securities Act of 1933 (the “ ′33 Act”) and the Securities Exchange Act of 1934 (the “′34 Act”) on behalf of investors who purchased securities of Portal Software, Inc, between May 20, 2003, and November 13, 2003, inclusive (the “class period”). In particular, plaintiffs assert that defendants violated generally accepted accounting principles (GAAP) by inflating artificially the price of Portal’s stock and making false and misleading statements on which plaintiffs relied, thereby incurring substantial financial losses from purchasing Portal stock at fraudulently inflated prices.

On August 17, 2006, the court denied defendants’ motion to dismiss plaintiffs’ claims under sections 11, 12(a)(2) and 15 of the ′33 Act and granted defendants’ motion to dismiss plaintiffs’ claims under sections 10(b)and 20(a) of the ′34 Act. Doc # 155. Additionally, because plaintiffs had amended their complaint four times but still had not satisfied the Private Securities Litigation Reform Act’s (PSLRA) heightened pleading requirements, the court dismissed plaintiffs’ claims under the ′34 Act with prejudice. *Id.*

The parties reached a settlement on March 9, 2007, Doc # 168, and now seek preliminary approval of various aspects of the settlement. In particular, plaintiffs seek: (1) provisional certification of the settlement class; (2) preliminary approval of the settlement reached by the parties; (3) approval of the proposed form of notice; (4) establishment of a schedule for class members to object to the settlement and (5) a hearing on final approval of the settlement at which class members may be heard. Doc # 167.

I

Portal provides billing and subscriber management solutions to its clients primarily through its “Infranet” software, for which Portal charges companies “license fees.” Doc # 135, ¶ 68. Portal also charges customers “service fees” for system implementation, consulting, maintenance and training. *Id.* Following the “dot-com” market crash of 2001, Portal lost many of its dot-com startup customers and incurred financial losses that wiped out more than 96% of its equity. *Id* ¶ 69.

Portal subsequently began to market its Infranet product to more established and sophisticated business customers, including telecommunications providers. *Id.* Portal’s new clients required greater software customization than had the dot-com startups, which in turn affected how Portal could recognize license fee revenues. *Id.* Plaintiffs contend that under GAAP, a software provider cannot recognize licensing revenues for software that requires customization for a client until a substantial portion of the modification has been completed. *Id* ¶¶ 4, 44(e), 69.

Although Portal historically could recognize revenue when it delivered its Infranet product to its dot-com clients, the greater customization required by Portal's new, more established clients required the company to defer recognizing revenue from many of its contracts until customization was complete. *Id* ¶ 153. Plaintiffs allege that during the class period, Portal began to manipulate its license fees to recognize more revenue "up-front." *Id* ¶¶ 70-71.

***2** On September 12, 2003, Portal completed a secondary offering to the public at a price of $13.25 per share, thereby generating $60 million in net proceeds. *Id* ¶ 9. On November 13, 2003, defendants announced that due to contract delays, revenue recognition deferrals and service execution issues, Portal expected net losses of $0.36 to $0.40 per share for the third quarter of fiscal year (FY) 2004. *Id* ¶ 10. These losses contrasted with the $0.04 net profits per share that Portal had previously projected for the quarter. *Id.* After this announcement, Portal's common share price plummeted more than 42.5% to $8.77 in after-hours trading. *Id* ¶ 113.

Plaintiffs' complaint alleges that the accounting fraud described above was undertaken by defendants to inflate Portal's reported revenue numbers, which were then used by defendants to create false and misleading statements regarding Portal's financial health and future business prospects. According to plaintiffs, these false and misleading statements artificially inflated Portal's stock price and allowed defendants to complete a $60 million secondary offering on September 12, 2003. Plaintiffs' claims for violations of the '33 Act are based on alleged false and misleading statements made in the registration statement and prospectus issued in connection with the secondary offering. *Id,* ¶¶ 142-165. Plaintiffs' claims for violations of the '34 Act are based on alleged false and misleading statements disseminated to the investing public via SEC filings and press releases. *Id,* ¶¶ 166-181.

II

A

Pursuant to FRCP 23, plaintiffs seek provisional certification of their settlement class, which comprises all purchasers of Portal securities during the class period.

FRCP 23(a) sets forth the preliminary requirements to certifying a class action: (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class and (4) the representative parties must be able fairly and adequately to protect the interests of the class. FRCP 23(a); see also, e g, *Armstrong v. Davis,* 275 F.3d 849, 868 (9th Cir.2001); *Walters v. Reno,* 145 F.3d 1032, 1045 (9th Cir.1998).

"In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (quoting *Miller v. Mackey Intl.,* 452 F.2d 424 (5th Cir.1971)) (internal quotation marks omitted). "A Rule 23 determination is wholly procedural and has nothing to do with whether a plaintiff will ultimately prevail on the substantive merits of its claim." *Little Caesar Enter. v. Smith,* 172 F.R.D. 236, 241 (E.D.Mich.1997). On a motion for class certification, the court "is bound to take the substantive allegations of the complaint as true." *Blackie v. Barrack,* 524 F.2d 891, 901 n17 (9th Cir1975). Nonetheless, the court is "at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case." *Hanon v. Dataproducts Corp.,* 976 F.2d 497, 509 (9th Cir.1992).

***3** The court first assesses whether the FRCP 23(a) requirements of numerosity, commonality, typicality and adequacy are met. Under FRCP 23(a)(1), the class must be "so numerous that joinder of all members is impracticable." Plaintiffs estimate that their proposed class contains "thousands" of members, Doc # 167 at 11, and assert that joinder would be impracticable because class members are geographically dispersed throughout the United States. The court agrees and finds that the numerosity requirement of Rule 23(a)(1) is satisfied.

The court also concludes that the commonality requirement is met. To satisfy FRCP 23(a)(2), "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir.1998). Plaintiffs allege, inter alia, that all class members paid artificially inflated prices for Portal stock due to defendants' misrepresentations. Doc # 167 at 12-13. Common issues of law and fact include whether defendants violated the Securities Act and, if so, whether the price of Portal stock was inflated artificially. All class members' claims share these and other common questions of law and fact.

Along these lines, the court concludes that the named plaintiffs' claims appear to be typical of the putative class. "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon,* 976 F.2d at 508 (internal quotation omitted). See also *Estate of Jim Garrison v. Warner Brothers et al,* 1996 WL 407849 at *2 (C.D.Cal.1996) ("Typicality in the antitrust context will be established by plaintiffs and all class members alleging the same antitrust violation by the defendants").

Here, the typicality requirement is satisfied by the class representatives-John Romeo and Pipefitters Local 522 & 633 Pension Trust Fund ("Pipefitters")-because their claims and those of the class members they seek to represent derive from the same set of operative facts. Romeo purchased 504,896 shares of Portal common stock during the settlement class period; Pipefitters purchased 2,500 shares of Portal stock in the secondary offering. Like the other settlement class members, class representatives allege they were damaged by their purchases of Portal common stock. Hence, the claims of the class representatives are typical of those of the settlement class.

Finally, FRCP 23(a)(4) provides that class representatives-both named plaintiffs and their counsel-must "fairly and adequately protect the interests of the class." Legal adequacy turns on two questions: "(1) do named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon,* 150 F.3d at 1020.

***4** Regarding the second inquiry, the court has no reason to doubt that plaintiffs' counsel acted vigorously on behalf of the class. Yet the first inquiry gives the court pause, as the representatives may have a conflict of interest with the class relating to the pooling of ′33 and ′34 Act claimants in this case. Such a conflict may exist if the representatives' proportionate financial interest in the ′33 and ′34 Act claims deviates significantly from the entire class's interest in these claims. For example, if the class representatives purchased a higher number of shares in the secondary offering (giving rise to ′33 Act claims) as compared to the class, the representatives may be tempted to divert settlement proceeds from ′34 Act to ′33 Act claims.

According to plaintiffs, Romeo purchased 504,896 shares of Portal common stock during the settlement class period and Pipefitters purchased 2,500 shares of Portal stock in the secondary offering. But this assertion does not establish that the representatives' financial interest with respect to these claims is proportionate with those of the entire class. That said, this conflict may have little consequence here due to the court's dismissal of the ′34 Act claims. Nonetheless, the court expects counsel to address this issue in its briefing for the final approval hearing.

In addition to satisfying the Rule 23(a) prerequisites, the class must also satisfy one of the three alternatives listed under Rule 23(b). *Walters,* 145 F.3d at 1045. Plaintiffs bear the burden of demonstrating that they have satisfied all four FRCP 23(a) elements and one FRCP 23(b) alternative. *Zinser v. Accufix Research Institute, Inc.,* 253 F.3d 1180, 1186 (9th Cir.2001). Failure to carry the burden on any FRCP 23 requirement precludes certifying a class action. *Burkhalter Travel Agency v. MacFarms Int'l, Inc.,* 141 F.R.D. 144, 152 (N.D.Cal.1991) (Jensen, J) (citing *Rutledge v. Electric Hose & Rubber Co.,* 511 F.2d 668 (9th Cir.1975)).

Plaintiffs have opted to proceed under FRCP 23(b)(3), which authorizes the court to certify a class action if "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and * * * a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FRCP 23(b)(3). See also *Zinser v. Accufix Research Inst, Inc.,* 253 F.3d 1180, 1189 (9th Cir.2001). The matters pertinent to such a finding include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action. *Id.*

The objective behind the two requirements of Rule 23(b)(3) is the promotion of economy and efficiency. See FRCP 23(b)(3) advisory committee notes. When common issues predominate, class actions achieve these objectives by minimizing costs and avoiding the confusion that would result from inconsistent outcomes. *Id.*

***5** To predominate, common questions "need not be dispositive of the litigation." *Romero v. Producers Dairy Foods, Inc.,* 235 F.R.D. 474, 489 (E.D.Cal.2006). Rather, the court must identify issues involved in the cases and determine which of them "are subject to generalized proof * * * applicable to the class as a whole" and which must be the subject of proof on behalf of individualized class members. *Id.* "Because no precise test can determine whether common issues predominate, the court must pragmatically assess the entire action and the issues involved." *Id.* Courts in securities cases, as in other cases, typically evince a greater willingness to certify classes involving individualized damages, as opposed to individualized liability issues. See *Alexander v. QTS Corp,* 1999 U.S. Dist LEXIS 11842 (ND Ill 1999).

Here, the common questions concern whether defendants violated the Securities Act and, if so, whether such violations affected the price plaintiffs paid for Portal stock. See, e g, *Freedman v. La-Pac Corp.,* 922 F.Supp. 377, 399-400 (D.Or.1996); *In re Emulex,* 210 F.R.D. 717, 721 (C.D.Cal.2002) (granting motion for class certification because "[t]he predominant questions of law or fact at issue in this case are the alleged misrepresentation defendants made during the class period and are common to the class"); *In re Unioil Sec Litig.,* 107 F.R.D. 615, 622 (C.D.Cal.1985) ("As plaintiffs' claim is based on a common nucleus of misrepresentations, material omissions and market manipulations, the common questions predominate over any differences between individual class members with respect to damages, causation or reliance."). Accordingly, the court finds that common questions of law and fact predominate over individual questions and that class treatment of this matter is superior to any other available means of adjudication.

B

The court next considers whether the proposed settlement should be preliminarily approved.

> "[The] preliminary determination establishes an initial presumption of fairness * * *." *In re General Motors Corp.,* 55 F.3d 768, 784 (3d Cir.1995) (emphasis added). As noted in the Manual for Complex Litigation, Second, "[i]f the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the class members of a formal fairness hearing * * *." Manual for Complex Litigation, Second § 30.44 (1985). In addition, "[t]he court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid." Newberg on Class Actions § 11.25 (1992).

Schwartz v. Dallas Cowboys Football Club, Ltd., 157 F Supp 2d 561, 570 n12 (ED Pa 2001). In other words, preliminary approval of a settlement has both a procedural and a substantive component.

***6** The court finds that the procedure for reaching this settlement was fair and reasonable and that the settlement was the product of arms-length negotiations. Doc # 167. Experienced counsel on both sides, each with a comprehensive understanding of the strengths and weaknesses of each party's respective claims and defenses, negotiated this settlement over an extended period of time in early 2007. Doc # 167 at 3-8.

The substantive fairness and adequacy of the settlement and plan of allocation confirms this view of the fair procedures used to reach the settlement. To evaluate adequacy, courts primarily consider plaintiffs' expected recovery balanced against the value of the settlement offer. See *Armstrong,* 616 F.2d at 314; *Grunin v. Int'l House of Pancakes,* 513 F.2d 114, 124 (8th Cir.1974).

The proposed settlement agreement provides that defendants will pay $3,250,000 in cash into a fund to be distributed to class members. Doc # 167 at 2. Considering the maximum provable damages in this case, $13 million, balanced against the value of the settlement offer, the settlement consideration seems reasonable, particularly in light of the court's dismissal of the '34 Act claims. Based on the risk of summary judgment, which defendants had filed before settlement, see Doc # 158, and the anticipated expense and complexity of further litigation, the court cannot say that the proposed settlement is obviously deficient or is not "within the range of possible approval." *Schwartz,* 157 F Supp 2d at 570 n12.

The court also preliminarily approves plaintiffs' proposed plan of allocation, which differentiates between the ′33 Act and the ′34 Act claimants. Lead counsel employed a damages consultant, Bjorn Steinholt, to draft a plan of allocation to ensure a fair distribution of the available settlement proceeds. Steinholt's proposed plan distinguishes between class members asserting ′34 Act claims, comprising all members who purchased Portal common stock during the class period, and those asserting ′33 Act claims, comprising members who purchased stock in the September 12, 2003, secondary offering. Doc # 170. Because the court dismissed the ′34 Act claims with prejudice, settlement class members asserting a ′34 Act claim will be allocated 5% of the total settlement proceeds, after fees and expenses. Doc # 170, ¶ 10. The remaining 95% of the total settlement proceeds, after fees and expenses, will be allocated to settlement class members with a ′33 Act claim. *Id.*

Courts frequently endorse distributing settlement proceeds according to the relative strengths and weaknesses of the various claims. See *In re Warner Communications Sec Litig.,* 618 F.Supp. 735, 745 (S.D.N.Y.1985), aff'd, 798 F.2d 35 (2d Cir.1986); *In re Agent Orange Prod. Liab. Litig.,* 611 F.Supp. 1396, 1411 (E.D.N.Y.1985) ("[I]f one set of claims had a greater likelihood of ultimate success than another set of claims, it is appropriate to weigh 'distribution of the settlement * * * in favor of plaintiffs whose claims comprise the set' that was more likely to succeed.") (quoting *In re Corrugated Container Antitrust Litig.,* 643 F.2d 195, 220 (5th Cir.1981)); *Petrovic v. AMOCO Oil Co.,* 200 F.3d 1140, 1152 (8th Cir.1999) (upholding distribution plan where class members received different levels of compensation and finding that no subgroup was treated unfairly). Distinguishing between the ′33 and ′34 Act claims seems appropriate here, as the court dismissed the ′ 34 Act claims with prejudice before settlement. Accordingly, the court cannot conclude that the plan of allocation is obviously deficient or is not "within the range of possible approval." *Schwartz,* 157 F Supp 2d at 570 n12.

***7** The court next takes up the form of notice. At the hearing on the present motion, the court instructed counsel to include their estimated lodestar in the notice to enable class members to assess the reasonableness of counsel's fee request. The declaration, Doc # 173, and amended notice, Doc # 174, Ex A-1, subsequently submitted by counsel comply with the court's request.

Plaintiffs propose that notice be disseminated to all class members who can be identified with reasonable effort to inform them of the terms of the settlement, their rights in connection with the settlement and the date of the final approval hearing. Doc # 167 at 19; Doc # 174, Ex A-1. Plaintiffs further propose that a summary notice, see Doc # 174, Ex A-3, be published in the national edition of *Investor's Business Daily.*

The court agrees with plaintiffs that notice by mail and publication is the "best notice practicable under the circumstances," as mandated by FRCP 23(c)(2)(B). See also *In re Domestic Air Transp. Antitrust Litig.,* 141 F.R.D. 534, 550-51 (N.D.Ga.1992) (providing that notice by mail to those class members who could be identified and by publication only to those who could not be identified satisfies due process requirements); *Manual for Complex Litigation* (4th ed 2004) § 21.311 ("Publication in magazines, newspapers, or trade journals may be necessary if class members are not identifiable after reasonable effort"). Accordingly, the court APPROVES the proposed form of notice, as to both form and content.

III

In sum, the court GRANTS plaintiffs' motion for provisional certification of the settlement class, APPROVES preliminarily the proposed settlement and plan of allocation and ORDERS the following schedule for further proceedings:

Date	Event
July 5, 2007	Notice mailed to settlement class and

	summary notice published
August 13, 2007	Deadline to postmark objections or opt out
August 20, 2007	Deadline for filing briefing in support of final approval of settlement
September 6, 2007, at 2:00 pm	Hearing on final approval of settlement

At the final approval hearing on September 20, 2007, at 2:00 pm, the court will determine: (1) whether the proposed settlement should be approved as fair, reasonable and adequate; (2) the merits of objections, if any, made to the settlement or any of its terms; (3) the amount of litigation costs, expenses and attorney fees, if any, that should be awarded to class counsel; and (4) other matters related to the settlement.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2007 WL 1991529, Fed. Sec. L. Rep. P 94,369

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EXHIBIT "8"

KeyCite Red Flag - Severe Negative Treatment
Superseded by Statute as Stated in Bateman v. American Multi-Cinema, Inc., C.D.Cal., October 24, 2008

2008 WL 413268
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

Cori KESLER
v.
IKEA U.S. INC. and Ikea U.S. West, Inc.

No. SACV 07–568 JVS (RNBx).
|
Feb. 4, 2008.

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Tentative Order Granting Motion for Class Certification

JAMES V. SELNA, District Judge.

***1** Plaintiff Cori Kesler ("Kesler") seeks class certification pursuant to Federal Rule of Civil Procedure 23. Defendants IKEA U.S ., Inc. and IKEA U.S. WEST, Inc. (collectively "IKEA") opposes the motion.

As a preliminary matter, the Court notes that it does not accept IKEA's assertions that Kesler's motion is untimely and doesn't comply with Local Rule 7–3. While the local rules require plaintiffs in putative class actions to file their motions for certification within 90 days of service of the complaint, and the 90 days have elapsed here, the Court finds there has been no undue delay. First, the parties' Amended Joint Rule 26(f) Report indicates that Kesler would file her motion for certification in "early December," and does not contain any objection by IKEA to that schedule. (Docket No. 24.) In fact, it appears she was prepared to do so, and only delayed filing until January because of IKEA's motion to stay the proceedings. (Lenkov Decl. Ex. B, p. 19, Email from Mr. Moore, dated December 13, 2007.) Kesler filed the motion five days after this Court's Order denying the motion to stay. (Docket No. 27.) Under these circumstances, the Court finds that there was no undue delay and accepts the motion.

Further, the Court notes that Kesler specifically identifies in her Notice of Motion two dates, November 12 and 19, 2007, on which Rule 7–3 meetings took place. (Notice of Motion p. 3.) While IKEA asserts that Kesler "fail[ed] and refus[ed] to meet and confer," it does not deny that the November meetings took place or that the motion was discussed during them. (Lenkov Decl. ¶ 12.) The Court is not convinced that Kesler refused to meet and confer.

The Court now turns to the merits of the motion.

I. *Background*

Kesler alleges that on December 31, 2006 she received from IKEA's Emeryville store a receipt for her credit card purchase that included the expiration date of the card in violation of the Fair and Accurate Credit Transactions Act ("FACTA"). 15 U.S.C. § 1681c(g); Kesler Decl. ¶¶ 2–3. This subsection of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, *et seq.,* prohibits persons who accept credit or debit cards from printing more than the last five digits of the card number or the expiration date. 15 U.S.C. § 1681c(g). The statute provides for two compliance deadlines: Machines in use before January 1, 2005 must have been brought into compliance before December 4, 2006, and machines first used after January 1, 2005 were required to comply immediately. Kesler does not allege actual damage, but requests statutory damages of not less than $100 and not more than $1,000 for each willful violation as provided for in the FCRA. 15 U.S.C. § 1681n (a)(1)(A).

Kesler requests certification of a class defined as follows:

> All consumers in the United States to whom Defendants, after December 4, 2006, provided an electronically printed credit or debit card receipt at the point of sale or

> transaction in violation of 15 U.S.C. § 1681c(g).

II. *Discussion*

***2** All class actions in federal court must meet the following four prerequisites for class certification:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

In addition, a plaintiff must comply with one of three sets of conditions set forth in Rule 23(b). Here, Kesler argues that her class should be certified because it meets the requirements of Rule 23(b)(3), under which a class may be maintained where common questions of law and fact predominate over questions affecting individual members and where a class action is superior to other means to adjudicate the controversy. (Opening Br. p. 8.)

The decision to grant or deny class certification is within the trial court's discretion. *Yamamoto v. Omiya,* 564 F.2d 1319, 1325 (9th Cir.1977). In doing so, a trial court is not permitted to make a preliminary inquiry into the merits. *Eisen v. Carlisle and Jacquelin,* 417 U.S. 156, 177–78, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Instead, the Court is only required to form a reasonable judgment. *Blackie v. Barrack,* 524 F.2d 891, 901 n. 17 (9th Cir.1975). The Court may require the parties to provide additional material from which the Court may make an informed judgment as to each requirement of class certification. *Id.*

A. *Rule 23(a) Prerequisites*

1. *Numerosity*

There are several factors a court may consider in determining whether a plaintiff has satisfied the numerosity requirement. First, a court may consider whether the size of the class warrants certification. *Gen. Tel. Co. of the Northwest, Inc. v. E.E.O.C.,* 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). Though there is no exact numerical requirement, a class of fifteen or fewer has been rejected. *Id.; Harik v. California Teachers Ass'n,* 326 F.3d 1042, 1051 (9th Cir.2003). "Although the absolute number of class members is not the sole determining factor, where a class is large in numbers, joinder will usually be impracticable." *Jordan v. Los Angeles County,* 669 F.2d 1311, 1319 (9th Cir.1982), *vacated on other grounds,* 459 U.S. 810, 103 S.Ct. 35, 74 L.Ed.2d 48 (1982). In *Jordan,* the Ninth Circuit determined that the proposed class sizes in that suit of 39, 64, and 71 were large enough such that the other factors need not be considered. *Id.*

Here, IKEA alleges that 2.4 million receipts containing credit card [1] expiration dates were printed during the period specified by the class definition, i.e. between December 4, 2006 and January 22, 2007 (the date on which IKEA began printing receipts without expiration dates). (Lenkov Decl. ¶ 4; Wallace Decl. ¶ 8.) The sheer number of potential class members justifies the Court's finding that the class in this case meets the numerosity requirement.

1 IKEA alleges that it did not print receipts that contained expiration dates for debit card transactions during the relevant time period. (Wallace Decl. ¶ 5.)

***3** IKEA argues that Kesler fails to meet the numerosity requirement because she does not define an ascertainable class. (Opposition Br. p. 7.) It argues that because IKEA cannot determine whether credit card users accepted or declined the receipt for a particular purchase, or whether those credit card users were "consumers" for the purposes of the statute, the class is unascertainable. (*Id.* p. 8.)

The Court disagrees. Class membership here is "objectively" ascertainable. *See, Johnson v. GMRI, Inc.,* 2007 U.S. Dist. LEXIS 27368 at 22, 2007 WL 963209 (E.D.Cal.2007). First, the statute provides for recovery of damages whenever a non-compliant receipt is "electronically printed," and is not limited to those receipts that are accepted by the purchaser. 15 U.S.C. § 1681c(g)(2). Neither does the Court interpret Kesler's definition of the class limits it to persons who "accepted" and retained their receipts. Second, the question whether or not a particular credit card user is a "consumer" within the meaning of the statute is an issue of objective fact that does not render the class unascertainable. *Cf ., De Bremaecker v. Short,* 433 F.2d 733, 734 (5th Cir.1970) (affirming a trial court finding that a class was not ascertainable where it could not determine whether a particular person was "active in the 'peace movement' "). Because the members of the class Kesler defines can be determined by application of objective criteria, the Court finds that the class is ascertainable and that, therefore, Kesler meets the numerosity requirement.

2. *Commonality*

Rule 23(a)(2) requires that questions of law or fact be common to the class. This requirement is permissively construed. *Hanlon v. Chrysler Corp.,* 140 F.3d 1011, 1019 (9th Cir.1998). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id.*

In this case, the facts and legal issues of each class member's claim are nearly, if not entirely, identical. There is a common core of salient facts across the class. Each member of the proposed class received a non-compliant receipt from IKEA after the December 4, 2006 FACTA compliance deadline. The overriding legal issue is whether IKEA's non-compliance was willful, so that the class members are entitled to statutory damages. (Opening Br. pp. 3, 6.) Accordingly, there is a common core of salient facts and legal issues. *Hanlon,* 150 F.3d at 1019; *see also Staton v. Boeing Co.,* 327 F.3d 938, 957 (9th Cir.2003). The Court therefore finds that the proposed class members share sufficient commonality to satisfy Rule 23(a)(2).

3. *Typicality*

Under Rule 23(a)'s "permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon,* 140 F.3d at 1020. There must be a demonstration that the "named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence...." *General Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 157, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).

***4** Here, Kesler's claim is, in fact, "substantially identical" to the claims of the proposed class members —namely, she alleges that IKEA issued her a receipt in willful violation of the FACTA. IKEA contends that Kesler is atypical because she was not issued a receipt with more than the last five digits of her card number printed on it. (Opposition Br. p. 9.) However, it is clear that Kesler and the absent class members each received a FACTA non-compliant receipt, whether that noncompliance was based on the number of digits or the expiration date is not critical to the typicality inquiry. [2] Further, even assuming that Kesler suffered no "out of pocket loss, identify theft, or risk thereof," these circumstances do not make her atypical of the class, where class recovery is not predicated on actual damages. (Opposition Br. p. 9.) In any event, variability of individual damage claims will not render a representative atypical.

2 Similarly, whether the receipt was for a *credit* or *debit* card transaction is likewise immaterial. (*Contrast,* Opposition Br. p. 10.)

Accordingly, the Court finds that Kesler meets the typicality requirement.

4. *Fair and Adequate Representation*

Representation is adequate if (1) class counsel are qualified and competent and (2) the class representative and his or her counsel are not disqualified by conflicts of interest. *Lerwill v. Inflight Motion Pictures, Inc.,* 582 F.2d 507, 512 (9th Cir.1978).

Class counsel must be experienced and competent. *See Hanlon,* 150 F.3d at 1021. When certifying a class, a court is required to appoint class counsel, unless a statute provides otherwise. Fed.R.Civ.P. 23(g)(1)(A). Kesler seeks appointment of Eric Grover of Keller Grover LLP ("Keller Grover") and J. Mark Moore of Spiro Moss Barness LLP ("Spiro Moss") as class counsel. (Opening Br. p. 8.) IKEA does not challenge their qualifications or competence. The Court finds that the proposed class counsel is qualified, competent, and have no known conflicts of interest with any proposed class representative.

Rule 23(a)(4) also requires that "the representative parties fairly and adequately protect the interests of the class." This requirement is to ensure that the named plaintiff and his or her counsel will pursue each class member's claim with sufficient "vigor." *Hanlon,* 150 F.3d at 1021; *see also Crawford v. Honig,* 37 F.3d 485, 487 (9th Cir.1994). The class representatives may not have interests antagonistic to the remainder of the class. *Lerwill v. Inflight Motion pictures, Inc.,* 582 F.2d 507, 512 (9th Cir.1978).

IKEA argues that there is such a conflict of interest between Kesler and the absent class members because Kesler is "close friends with her counsel." (Opposition Br. p. 12.) IKEA is correct that certain relationships between class counsel and class representatives can be cause for concern, "[s]ince possible recovery of the class representative is far exceeded by potential attorneys' fees, ... [so that] a class representative who is closely associated with the class attorney [might] ... allow settlement on terms less favorable to the interests of absent class members." *Apple Computer, Inc. v. Superior Court,* 126 Cal.App.4th 1253, 1264, 24 Cal.Rptr.3d 818 (Cal.Ct.App.2005). In this regard, it is well-settled that "an attorney may not serve both as class representative and as class counsel." *In re California Micro Devices Sec. Litig.,* 168 F.R.D. 257, 260 (N.D.Cal.1996) (citing *Susman v. Lincoln American Corp.,* 561 F.2d 86, 90 (7th Cir.1977)); *see also, Turoff v. May Co.,* 531 F.2d 1357, 1360 (6th Cir.1976) (denying class certification where three named plaintiffs were attorneys at class counsel's firm and the fourth was the "wife of one of them"); *Brick v. CPC International, Inc.,* 547 F.2d 185, 186 (2d Cir.1976) (denying class certification where plaintiff was an attorney and class counsel was his sole law partner in their two-member firm); *Kriger v. European Health Spa, Inc.,* 56 F.R.D. 104, 105 (E.D.Wis.1972).

***5** Here, Kesler does not deny that she is friends with Valerie Sharpe ("Sharpe"), who is "of Counsel" at Keller Grover. (Kesler Depo. 80:19–20.) Kesler testified that she has known Sharpe since the fourth grade, attended high school with her, sees her on a regular basis, and that she served as Sharpe's bridesmaid. (Kesler Depo. 81:6–82:2.)

However, the Court finds that the friendship between Kesler and Sharpe does not create a substantial potential for a conflict of interest between Kesler and the absent class members. Kesler has never worked for Keller Grover nor does she have any prospect of working for them. (*Id.* 83:25–84:14.) *Compare, Serna v. Big A Drug Stores, Inc.,* 2007 U.S. Dist. LEXIS 82023 (C.D.Cal.2007) (denying certification where the class representative was an employee of the law firm that served as class counsel); *Simon v. Ashworth, Inc.,* SACV 07–1324 GHK (AJWx) (Sept. 27, 2007) (denying certification where the class representative's father worked for the firm that served as class counsel and the class representative visited the law offices socially and had worked for the firm occasionally). Further, IKEA does not cite any authority that extends the rule beyond familial and business relationships to mere friendships. When class representative and class counsel share a familial relationship or a business partnership, their individual interests are inherently closely aligned so that there is an undeniable potential for conflict of interest with the absent class members. However, under these facts, the Court finds that this friendship does not have the same potential.

Second, any conceivable interest Kesler may have in helping her friend earn fees is undermined by the fact that Sharpe is not personally representing Kesler in this matter. Keller Grover's representation of Kesler came about after Sharpe mentioned the FACTA receipt requirements in casual conversation with Kesler in early January 2007. [3] (*Id.* 80:22; 84:15–24.) Later, Kesler "looked through [her] ... wallet because [she] ... was going to be filing [her] ... things," and noticed that she had a receipt with a credit card expiration date printed on it. (*Id.* 84:25–85:2.) Kesler then called Sharpe to tell her about it. (*Id.* 85:3.) Keller Grover filed this putative class action complaint naming Kesler as plaintiff on February 2, 2007. Elizabeth A. Acevedo, Eric A. Grover, Jade Erin Butman, and Denise L. Diaz are listed as Kesler's counsel of record from Keller Grover. Kesler clearly states that Ms. Sharpe is "not my lawyer when I'm talking to her." (Kesler Depo. 82:21–22.) Rather, Sharpe is Kesler's friend "and she happens to be a lawyer." (*Id.* 83:12–13.) Kesler further states that the last communication she had with Sharpe regarding the case was "[m]aybe a month or two ago when [Sharpe] ... told [Kesler] ... that Denise Diaz would be taking care of [the] ... case." (*Id.* 82:8–10.)

3 Keller Grover has not represented Kesler in any previous legal matter. (*Id.* 83:23–24.)

***6** Essentially, this is a case in which Kesler sought legal advice from a friend who was a lawyer, and that friend, Sharpe, referred her to Sharpe's law firm. There is little reason to think that Kesler might place the interests of the class counsel in obtaining attorney's fees above those of the absentee class members. The Court is satisfied the Kesler's interests are "sufficiently aligned with the absentees to assure that ... [the class representative's] monitoring [of class counsel] serves the interests of the class as a whole." *In re GMC Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 784 (3d Cir.1995).

IKEA also contests Kesler's adequacy as a representative on the grounds that Kesler has not been involved in the suit and is not concerned about her role as class representative. (Opposition Br. p. 11.) Courts have denied class certification for lack of adequate representation in cases where class representatives demonstrate disinterest in the case and "cede[ ] control" to counsel entirely. *Welling v. Alexy (In re Cirrus Logic Sec.),* 155 F.R.D. 654, 659 (N.D.Cal.1994) (finding in addition to the fact that the class representative "ceded control" to counsel, his background as a repeat securities class action plaintiff "raises serious questions regarding his suitability"); *see also, Howard Gunty Profit Sharing Plan v. Superior Court,* 88 Cal.App.4th 572, 577–78, 105 Cal.Rptr.2d 896 (Cal.Ct.App.2001) (finding that a "professional plaintiff" had inadequate knowledge and weak credibility). On the other hand, class representatives should not be disqualified solely based on their ignorance. *Surowitz v. Hilton Hotels Corp.,* 383 U.S. 363, 370–374, 86 S.Ct. 845, 15 L.Ed.2d 807 (1966); *Baffa v. Donaldson,* 222 F.3d 52, 61 (2d Cir.2000) (citing *Surowitz*).

Here, Kesler is fully aware that she and the absentee class members are each entitled to between $100 and $1,000 in statutory damages. (Kesler Depo. 114:24–25; 115:3–8.) She understands that vendors are liable for printing certain information on credit and debit card receipts. (Kesler Decl. 4.) The mere fact that she does not know what "FACTA" means does not render her an inadequate representative. (Kesler Depo. 43:1–25.) IKEA does not point to any testimony or other evidence that suggest that Kesler has been uninvolved in the proceedings, that she does not understand her responsibilities as class representative, or that she has ceded control of the case to class counsel. Indeed, she has demonstrated her commitment thus far by sitting for her deposition. Accordingly, the Court concludes that Kesler and class counsel will fairly and adequately represent the class.

The Court therefore finds that the requirements of Rule 23(a) are satisfied with respect to the class.

B. *Rule 23(b)*

Kesler seeks certification under Rule 23(b)(3). (Opening Br. p. 8 *et. seq.*) "Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Kamm v. Cal. City Dev. Co.,* 509 F.2d 205, 211 (9th Cir.1975) (quoting Committee notes). A class action may be certified where common questions of law and fact predominate over questions affecting individual members and where a class action is superior to other means to adjudicate the controversy.

1. *Predominance*

***7** The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor,* 521 U.S. 591 at 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). The Court must rest its examination on the legal or factual questions of the individual class members. *Hanlon,* 150 F.3d at 1022.

The Court agrees with Kesler that common questions of fact and law predominate over individual differences between proposed class members. The primary common question of law is whether IKEA's noncompliance was willful. (Opposition Br. p. 13.) While each putative class member's right to recovery depends on the fact that he or she is a "consumer" for the purposes of the FCRA, as noted above, the Court finds that this is an issue that pertains only to the predicate issue of ascertaining the members of the class and not to the predominance inquiry. Contrary to IKEA's arguments, the damages inquiry here is notably *not* individualized, because recovery is primarily predicated on statutory, not actual, damages. (Opposition Br. p. 15.)

The Court accordingly finds that common questions of law and fact predominate over individual differences between proposed members of the class.

2. *Superiority*

Next, the Court must consider if the class is superior to individual suits. *Amchem,* 521 U.S. at 615. "A class action is the superior method for managing litigation if no realistic alternative exists." *Valentino v. Carter–Wallace, Inc.,* 97 F.3d 1227, 1234–35 (9th Cir.1996). This superiority inquiry requires a comparative evaluation of alternative mechanisms of dispute resolution. *Hanlon,* 150 F.3d at 1023. Both parties emphasize various arguments under the heading of superiority and situate those arguments in the context of a series of recent decisions on motions to certify classes for FCRA claims. The Court addresses these arguments and concludes that class action is superior to individual suits for the purpose of enforcing these provisions of the FCRA.

a. *Disproportionate Damages*

IKEA argues that class certification should be denied on the grounds that the aggregate statutory damages sought by the class would violate IKEA's Due Process rights.[4] (Opposition Br. p. 19–24.) Essentially, IKEA claims that because the eventual damage award may be unconstitutional, *State Farm Mutual Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), the class should not be certified in the first place. This argument has persuaded other district courts to deny class certification of claims for statutory damages under the FCRA provision invoked here. 15 U.S.C. § 1681n. These courts found that the class actions were not superior to individual suits when the damages sought posed "disastrous consequences" to the defendant despite a lack of actual harm on the part of the plaintiff. *Spikings v. Cost Plus, Inc.,* 2007 U.S. Dist. LEXIS 44214 at *13 (C.D.Cal.. 2007); *Soualian v. Int'l Coffee and Tea LLC, et al.,* 2007 U.S. Dist. LEXIS 44208 at *11, 2007 WL 494033 (C.D.Cal.2007), on appeal App. Case No. 07–56377 (9th Cir.) (concluding that "[g]iven the disproportionate consequences to Defendant's business and the lack of any actual harm suffered by members of the potential class, ... Plaintiff fails to meet the superiority requirements); *Legge, et al. v. Nextel Communications, Inc., et al.,* 2004 U.S. Dist. LEXIS 30333 at *45–50, 2004 WL 5235587 (C.D.Cal.2004) (denying class certification and noting that "[a]llowing this case to proceed as a class action has potentially ruinous results—without concomitant benefit to the class). *See also, Price v. Lucky Strike Entertainment, Inc.,* CV 07–960–ODW (MANx) at p. 8 (C.D.Cal.2007); *Najarian v. Avis Rent a Car System, et al.,* 2007 U.S. Dist. Lexis 59932 at *14, 2007 WL 4682071 (C.D.Cal.2007).

4 IKEA also claims that inclusion of the expiration date on the receipts creates little risk of identity theft and actual harm, so that certification of the class is unjust. (Frank Decl. ¶ 25–31.) The actual risk posed by the violations is irrelevant, given that the FCRA does not require a showing of actual harm for recovery of statutory damages. Moreover, the Court is not free to ignore the fact that Congress has declared that printing the expiration date is unlawful.

***8** These decisions rely on heavily on *Kline v. Coldwell, Banker & Co.,* 508 F.2d 226 (9th Cir.1974), which reversed a district court order certifying a class based, in part, on the finding that the potential damages "shock[ed] the conscience." *Kline,* 508 F.2d at 234 (relying on *Ratner v. Chemical Bank New York Trust Co. .,* 54 F.R.D. 412 (S.D.N.Y.1972) for the proposition that class actions can be properly denied where plaintiffs seek "outrageous amounts" in statutory damages for technical violations). In light of joint and several liability for potential damages, the court found that the class action was not superior to other alternative methods of adjudication. *Id.* at 235.

Kline does not directly control this case, however. First, the reasoning in *Kline* turned on the drastic effect that joint and several liability would have on the potential individual liability of each of 2,000 co-defendants. *Id.* at 234. There are no issues of joint and several liability here. Second, the plaintiffs in *Kline* brought claims for treble damages on unlimited actual damages under the Sherman and Clayton Acts, whereas here the claims are for limited statutory damages under the FCRA. *Id.* at 235. Finally, the reasoning in *Ratner* that supports the outcome in *Kline,* does not apply here: The court in *Ratner* found the damages "outrageous" given that the alleged violations were merely technical, whereas here the class members are only entitled to damages if they can show willful violation of the statute.[5] *Ratner,* 54 F.R.D. at 416. *See, White v. E–Loan, Inc.,* 2006 WL 2411240 at *8 (N.D.Cal.2006). *Cf. Soualian,* 2007 U.S. Dist. LEXIS 44208 at *11 n. 8, 2007 WL 494033 (C.D.Cal.2007).

5 IKEA incorrectly insists that the alleged violations here are "technical." (Opposition Br. p. 23.)

This Court therefore declines to apply the *Kline* rule here. Instead, the Court holds that concerns about the constitutionality of any damage award are better addressed at the damages phase of the litigation and not as part of class certification. This approach is in accord with the Seventh Circuit's decision in a class action for statutory damages under the FCRA, in which the panel reversed a denial of class certification, noting that "constitutional limits are best applied after a class has been certified." *Murray v. GMAC Mortgage Corp.,* 434 F.3d 948, 954 (7th Cir.2006). *See also, Pirian v. In–N–Out Burgers,* 2007 WL 1040864 at *5 (C.D.Cal.2007) (noting that "concerns regarding excessive damages are best addressed if the class is certified and the damages are assessed.") (citing *Murray*).

A court in the Northern District has recently followed *Murray* and certified a class action under the FRCA, noting that if defendants succeed in opposing motions for class certification on the grounds that aggregate statutory damages are too high, that would mean that "the greater the number of violations of the FCRA, the less likely [it is that] a company can be held fully accountable ." *White,* 2006 WL 2411240 at *8 n. 8. In this same vein, Judge Easterbrook observed in *Murray* that "[m]aybe suits such as this will lead Congress to amend the [FCRA]; maybe not. While the statute remains on the books, however, it must be enforced rather than subverted." *Murray,* 434 F.3d at 954. This Court agrees that denying class certification based on the potential for high damage awards is inconsistent with the FCRA provision for statutory damages.

***9** Accordingly, the Court finds that the magnitude of the potential damage award does not affect the superiority of a class action for adjudication of this dispute.

b. *Alternative Methods of Enforcement*

IKEA argues that a class action is not superior because the class members can bring their claims individually without risk of economic loss, because the statute provides for recovery of attorney's fees. (Opposition Br. 16–18.) This argument has found favor with some district courts in similar cases for FCRA damages, *Spikings,* 2007 U.S. Dist. LEXIS 44214 at *15, *Price,* CV 07–960–ODW (MANx) at p. 10, but has been rejected by others, *White,* 2006 WL 2411240 at *9. This Court finds that a class action is the superior method of enforcement for cases under the FCRA because the available statutory damages are minimal. *Murray,* 434 F.3d at 953 (noting that the class action mechanism is "designed for situations such as this, in which the potential recovery is too slight to support individual suits"). The Court is not convinced that the fact that an individual plaintiff can recover attorney's fees in addition to statutory damages of up to $1,000 will result in enforcement of the FCRA by individual actions of a scale comparable to the potential enforcement by way of class action.

c. *Potential for Attorney Abuse*

The Court does not share IKEA's concern that class actions under the FCRA pose an unusual potential for attorney abuse. *Cf. Spikings,* 2007 U.S. Dist. LEXIS 44214 at *16; *Price,* CV 07–960–ODW (MANx) at p. 9. Moreover, IKEA does not allege or provide evidence for any abuse or impropriety in this action, other than to suggest generally that the statute "invite[s] attorneys to prompt friends, acquaintances, and even employees to make credit card purchases to create FACTA claims." (Opposition Br. p. 25.) Absent a showing of impropriety here, the Court does not take the vague potential for attorney abuse into account.

d. *Ex Post Compliance*

IKEA claims that this case should not be allowed to proceed as a class action because it brought itself into compliance with the FACTA on January 22, 2007. (Wallace Decl. ¶ 8.) Courts have found that quick compliance by defendants after a class action was filed "nullifie[s] any deterrence benefit that might have been derived from a class action," thereby making the class action inappropriate, *Soualian,* 2007 U.S. Dist. LEXIS 44208 at *12, 2007 WL 494033. *See also, Spikings,* 2007 U.S. Dist. LEXIS 44214 at *14; *Najarian,* 2007 U.S. Dist. Lexis 59932 at *15, 2007 WL 4682071. However, while the Court certainly encourages IKEA to comply with applicable laws, the fact that they have taken measures to ensure future compliance does not exonerate them of liability for past violations.

The Court concludes a class action is superior to individual suits in this case, particularly in light of the minimal statutory damages available to the individual plaintiff. The Court is unpersuaded by IKEA's arguments that potentially excessive damages, potential attorney abuses, or ex post compliance should alter that conclusion.

***10** Examination of the relevant 23(b)(3) factors similarly favor class certification. Rule 23(b)(3)'s non exclusive factors are: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

IKEA argues that this case would be unmanageable as a class action, largely based on the assertion that individual issues predominate. (Opposition Br. 16.) However, as discussed above, the Court finds that common issues predominate here. There is no other reason to believe the class would not be manageable.

Further, the Court finds that there is no advantage to either the judiciary or the litigants to giving individual members of the class control over the action.

IKEA argues that there is no reason to litigate this case in the Central District of California, particularly because the IKEA store in which Kesler received her non-compliant receipt is located in the Northern District. (Opposition Br. p. 18.) This objection is belied by the fact that IKEA stipulated to transferring the action here. (Reply Br. p. 13.) The Court notes that the class sought to be certified contains members who are presumably nationwide, and that there is at least one IKEA store in this District. (Grover Decl. Ex. A.) Therefore, the Court finds that the factor of consolidating the claims in this forum weighs neither for nor against certification in this case.

Finally, a class action here presents the advantage that aggregated wrongs are more likely to produce relief than disaggregated wrongs.

Accordingly, Kesler has fulfilled the requirements of Rule 23(b) (3).

V. *CONCLUSION*

For the aforementioned reasons, the Court grants Kesler's motion for class certification.

All Citations

Not Reported in F.Supp.2d, 2008 WL 413268

EXHIBIT "9"

KeyCite Yellow Flag - Negative Treatment
Disagreed With by In re Toys "R" Us - Delaware, Inc. - Fair and Accurate Credit Transactions Act (FACTA) Litigation, C.D.Cal., August 17, 2010

2007 WL 4592113
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

MEDRANO
v.
WCG HOLDINGS, INC., and Does 1 through 10.

No. SACV 07-0506 JVS (RNBx).
|
Oct. 15, 2007.

Attorneys and Law Firms

Greg Hafif, Ferris Ain, for Plaintiffs.

Steven Turner, Brian Sloan, for Defendants.

Plaintiff's Motion for Class Certification

JAMES V. SELNA, District Judge.

***1** Cause called and counsel make their appearances. The Court's tentative ruling is issued. Counsel make their arguments. The Court GRANTS the plaintiff's motion and rules in accordance with the tentative ruling as follows:

Plaintiff Manuel Medrano ("Medrano") seeks class certification pursuant to Federal Rule of Civil Procedure 23. Defendant WCG Holdings, Inc., ("WCG") opposes the motion.

I. *BACKGROUND*

Medrano alleges that on or about February 28, 2007 he received from WCG an electronically printed receipt that included the expiration date of the card in violation of the Fair and Accurate Credit Transactions Act ("FACTA"). 15 U.S.C. § 1681c(g). This subsection of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, et seq., prohibits persons who accept credit or debit cards from printing more than the last five digits of the card number or the expiration date. *Id.* The statute provides for two compliance deadlines: Machines in use before January 1, 2005 must have been brought into compliance before December 4, 2006, and machines first used after January 1, 2005 were required to comply immediately. Medrano does not allege actual damage, but requests statutory damages of not less than $100 and not more than $1,000 for each willful violation as provided for in the FCRA. 15 U.S.C. § 1681n (a)(1)(A).

Medrano requests certification of four subclasses: Subclasses A and B contain persons issued non-compliant receipts from machines operated by WCG anywhere in the country; and Subclasses C and D contain persons issued non-compliant receipts from machines at 101 E. Foothill in Pomona, California; Subclasses A and C contain persons issued non-compliant receipts from machines put into use on or after January 1, 2005; and Subclasses B and D contain persons issued non-compliant receipts from machines put into use before January 1, 2005. Given that Medrano and the other putative class members' claims to relief depend only on the fact that each received a non-compliant receipt printed by WCG after the applicable statutory deadline, the Court finds that subclasses are unnecessary.[1] Therefore, the Court bases its analysis of the requirements for class certification on one class with this definition: Consumers[2] to whom WCG provided a receipt containing information prohibited by the FACTA after the applicable statutory deadline.

II. *DISCUSSION*

All class actions in federal court must meet the following four prerequisites for class certification:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

In addition, a plaintiff must comply with one of three sets of conditions set forth in Rule 23(b). Here, Medrano argues that his class should be certified because it meets the requirements of Rule 23(b)(3), under which a class may be maintained where common questions of law and fact predominate over questions affecting individual members and where a class action is superior to other means to adjudicate the controversy.

***2** The decision to grant or deny class certification is within the trial court's discretion. *Yamamoto v. Omiya,* 564 F.2d 1319, 1325 (9th Cir.1977). In doing so, a trial court is not permitted to make a preliminary inquiry into the merits. *Eisen v. Carlisle and Jacquelin,* 417 U.S. 156, 177-78 (1974). Instead, the Court is only required to form a reasonable judgment. *Blackie v. Barrack,* 524 F.2d 891, 901 n. 17 (9th Cir.1975). The Court may require the parties to provide additional material from which the Court may make an informed judgment as to each requirement of class certification. *Id.*

A. *Rule 23(a) Prerequisites*

1. *Numerosity*

There are several factors a court may consider in determining whether a plaintiff has satisfied the numerosity requirement. First, a court may consider whether the size of the class warrants certification. *Gen. Tel. Co. of the Northwest, Inc. v. E.E.O.C.,* 446 U.S. 318, 330 (1980). Though there is no exact numerical requirement, a class of fifteen or fewer has been rejected. *Id.; Harik v. California Teachers Ass'n,* 326 F.3d 1042, 1051 (9th Cir.2003). "Although the absolute number of class members is not the sole determining factor, where a class is large in numbers, joinder will usually be impracticable." *Jordan v. Los Angeles County,* 669 F.2d 1311, 1319 (9th Cir.1982), *vacated on other grounds,* 459 U.S. 810 (1982). In *Jordan,* the Ninth Circuit determined that the proposed class sizes in that suit of 39, 64, and 71 were large enough such that the other factors need not be considered. *Id.*

Here, WCG alleges that since January 1, 2006, approximately 32,000 credit or debit card transactions have been made at its Wendy's restaurant. (Decl. of Ketan Sharma ¶ 1.) The sheer number of potential class members justifies the Court's finding that the class in this case meets the numerosity requirement.

2. *Commonality*

Rule 23(a)(2) requires that questions of law or fact be common to the class. This requirement is permissively construed. *Hanlon v. Chrysler Corp.,* 140 F.3d 1011, 1019 (9th Cir.1998). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id.*

In this case, the facts and legal issues of each class member's claim are nearly, if not entirely, identical. There is a common core of salient facts across the class. Each member of the proposed class received a non-compliant receipt from WCG after the applicable FACTA compliance deadline. The overriding legal issue is whether WCG's non-compliance was willful so that the class members are entitled to statutory damages. Accordingly, there is a common core of salient facts and legal issues. *Hanlon,* 150 F.3d at 1019: *see also Staton v. Boeing Co.,* 327 F.3d 938, 957 (9th Cir.2003). The Court therefore finds that the proposed class members share sufficient commonality to satisfy Rule 23(a)(2).

3. *Typicality*

***3** Under Rule 23(a)'s "permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon,* 140 F.3d at 1020. There must be a demonstration that the "named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence ...." *General Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 157 (1982).

Here, Medrano's claim is, in fact, "substantially identical" to the claims of the proposed class members-namely, he alleges that WCG issued him a receipt in willful violation of the FACTA. Accordingly, the Court finds that Medrano meets the typicality requirement.

4. *Fair and Adequate Representation*

Representation is adequate if (1) class counsel are qualified and competent and (2) the class representative and his or her counsel are not disqualified by conflicts of interest. *Lerwill v. Inflight Motion Pictures. Inc.,* 582 F.2d 507, 512 (9th Cir.1978).

Class counsel must be experienced and competent. *See Hanlon,* 150 F.3d at 1021. When certifying a class, a

Court is required to appoint class counsel, unless a statute provides otherwise. Fed.R.Civ.P. 23(g)(1)(A). Medrano seeks appointment of Greg Hafif of the Law Offices of Herbert Hafif, APC, as class counsel. The Court finds that the proposed class counsel is qualified, competent, and have no known conflicts of interest with any proposed subclass representative. WCG does not challenge their qualifications or competence,[3] nor does it contend that any class representative or counsel are disqualified by conflicts of interest.

Rule 23(a)(4) also requires that "the representative parties fairly and adequately protect the interests of the class." This requirement is to ensure that the named plaintiff and his or her counsel will pursue each class member's claim with sufficient "vigor." *Hanlon,* 150 F.3d at 1021; *see also Crawford v. Honig,* 37 F.3d 485, 487 (9th Cir.1994). The class representatives may not have interests antagonistic to the remainder of the class. *Lerwill v. Inflight Motion pictures, Inc.,* 582 F.2d 507, 512 (9th Cir.1978). In this case, WCG does not challenge the adequacy of Medrano as class representative. The Court finds that Medrano and his counsel will pursue the members' claims with adequate vigor.

The Court accordingly finds that the requirements of Rule 23(a) are satisfied with respect to the general class.

B. *Rule 23(b)*

Medrano seeks certification under Rule 23(b)(3). "Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Kamm v. Cal. City Dev. Co.,* 509 F.2d 205, 211 (9th Cir.1975) (quoting Committee notes). A class action may be certified where common questions of law and fact predominate over questions affecting individual members and where a class action is superior to other means to adjudicate the controversy.

1. *Predominance*

***4** The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor,* 521 U.S. 591 at 623 (1997). The Court must rest its examination on the legal or factual questions of the individual class members. *Hanlon,* 150 F.3d at 1022.

The Court agrees with Medrano that common questions of fact and law predominate over individual differences between proposed class members. Common questions of fact include when WCG put its credit and debit card transaction machines into service. Common questions of law include whether WCG's noncompliance was willful. The Court accordingly finds that common questions of law and fact predominate over individual differences between proposed members of the class.

2. *Superiority*

Next, the Court must consider if the class is superior to individual suits. *Amchem,* 521 U.S. at 615. "A class action is the superior method for managing litigation if no realistic alternative exists." *Valentino v. Carter-Wallace, Inc.,* 97 F.3d 1227, 1234-35 (9th Cir.1996). This superiority inquiry requires a comparative evaluation of alternative mechanisms of dispute resolution. *Hanlon,* 150 F.3d at 1023. Both parties emphasize various arguments under the heading of superiority and situate those arguments in the context of a series of recent decisions on motions to certify classes for FCRA claims. The Court addresses these arguments and concludes that class action is superior to individual suits for the purpose of enforcing these provisions of the FCRA.

a. *Disproportionate Damages*

WCG argues that class certification should be denied on the grounds that the aggregate statutory damages sought by the class would have a severe effect on WCG that is disproportionate to the harm suffered by the class. (Def.'s Opp. at 6-10.) Essentially, WCG claims that because the eventual damage award may be unconstitutional, *State Farm Mutual Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 416 (2003), the class should not be certified in the first place. This argument has persuaded other district courts to deny class certification of claims for statutory damages under the FCRA provision invoked here. 15 U.S.C. § 1681n. These courts found that the class actions were not superior to individual suits when the damages sought posed "disastrous consequences" to the defendant despite a lack of actual harm on the part of the plaintiff. *Spikings v. Cost Plus, Inc.,* 2007 U.S. Dist. LEXIS 44214 at *13 (C.D.Cal.2007); *Soualian v. Int'l Coffee and Tea LLC, et al.,* 2007 U.S. Dist. LEXIS

44208 at *11 (C.D.Cal.2007) (concluding that "[g]iven the disproportionate consequences to Defendant's business and the lack of any actual harm suffered by members of the potential class, the Court finds that Plaintiff fails to meet the superiority requirements); *Legge, et al. v. Nextel Communications, Inc., et al.,* 2004 U.S. Dist. LEXIS 30333 at *45-50 (C.D.Cal.2004) (denying class certification and noting that "[a]llowing this case to proceed as a class action has potentially ruinous results-without concomitant benefit to the class). *See also, Price v. Lucky Strike Entertainment, Inc.,* CV 07-960-ODW (MANx) at p. 8 (C.D.Cal.2007); *Najarian v. Avis Rent a Car System, et al.,* 2007 U.S. Dist. Lexis 59932 at *14 (C.D.Cal.2007).

***5** These decisions rely on heavily on *Kline v. Coldwell, Banker & Co.,* 508 F.2d 226 (9th Cir.1974), which reversed a district court order certifying a class based, in part, on the finding that the potential damages "shock[ed] the conscience." *Kline,* 508 F.2d at 234 (relying on *Ratner v. Chemical Bank New York Trust Co .,* 54 F.R.D. 412 (S.D.N.Y.1972) for the proposition that class actions can be properly denied where plaintiffs seek "outrageous amounts" in statutory damages for technical violations). In light of joint and several liability for potential damages, the court found that the class action was not superior to other alternative methods of adjudication. *Id.* at 235.

Kline does not directly control this case, however. First, the reasoning in *Kline* turned on the drastic effect that joint and several liability would have on the potential individual liability of each of 2,000 co-defendants. *Id.* at 234. There are no issues of joint and several liability here. Second, the plaintiffs in *Kline* brought claims for treble damages on unlimited actual damages under the Sherman and Clayton Acts, whereas here the claims are for limited statutory damages under the FCRA. *Id.* at 235. Finally, the reasoning in *Ratner* that supports the outcome in *Kline,* does not apply here: The court in *Ratner* found the damages "outrageous" given that the alleged violations were merely technical, whereas here the class members are only entitled to damages if they can show willful violation of the statute. *Ratner,* 54 F.R.D. at 416. *See, White v. E-Loan, Inc.,* 2006 WL 2411240 at *8 (N.D.Cal.2006). *Cf. Soualian,* 2007 U.S. Dist. LEXIS 44208 at *11 n. 8 (C.D.Cal.2007).

This Court therefore declines to apply the *Kline* rule here. Instead, the Court holds that concerns about the constitutionality of damage awards are better addressed at the damages phase of the litigation and not as part of class certification. This approach is in accord with the Seventh Circuit's decision in a class action for statutory damages under the FCRA, in which the panel reversed a denial of class certification, noting that "constitutional limits are best applied after a class has been certified." *Murray v. GMAC Mortgage Corp.,* 434 F.3d 948, 954 (7th Cir.2006). *See also, Pirian v. In-N-Out Burgers,* 2007 WL 1040864 at *5 (C.D.Cal.2007) (noting that "concerns regarding excessive damages are best addressed if the class is certified and the damages are assessed.") (citing *Murray*).

A court in the Northern District has recently followed *Murray* and certified a class action under the FRCA, noting that if defendants succeed in opposing motions for class certification on the grounds that aggregate statutory damages are too high, that would mean that "the greater the number of violations of the FCRA, the less likely [it is that] a company can be held fully accountable ." *White,* 2006 WL 2411240 at *8 n. 8. In this same vein, Judge Easterbrook observed in *Murray* that "[m]aybe suits such as this will lead Congress to amend the [FCRA]; maybe not. While the statute remains on the books, however, it must be enforced rather than subverted." *Murray,* 434 F.3d at 954. This Court agrees that denying class certification based on the potential for high damage awards is inconsistent with the FCRA provision for statutory damages.

***6** Accordingly, the Court finds that the magnitude of the potential damage award does not affect the superiority of a class action for adjudication of this dispute.

b. *Alternative Methods of Enforcement*

WCG argues that a class action is not superior because the class members can bring their claims individually without risk of economic loss, because the statute provides for recovery of attorney's fees. (Def.'s Opp. at 12.) This argument has found favor with some district courts in similar cases for FCRA damages, *Spikings,* 2007 U.S. Dist. LEXIS 44214 at *15, *Price,* CV 07-960-ODW (MANx) at p. 10, but has been rejected by others, *White,* 2006 WL 2411240 at *9. This Court finds that a class action is the superior method of enforcement for cases under the FCRA because the available statutory damages are minimal. *Murray,* 434 F.3d at 953 (noting that the class action mechanism is "designed for situations such as this, in which the potential recovery is too slight to support individual suits.”). The Court is not convinced that the fact that an individual plaintiff can recover attorney's fees in addition to statutory damages of up to $1,000 will result in enforcement of the FCRA by individual actions of a scale comparable to the potential enforcement by way of class action.

c. *Potential for Attorney Abuse*

The Court does not share WCG's concern that class actions under the FCRA pose an unusual potential for attorney abuse. *Cf. Spikings,* 2007 U.S. Dist. LEXIS 44214 at *16; *Price,* CV 07-960-ODW (MANx) at p. 9. Moreover, WCG does not allege or provide evidence for any abuse or impropriety in this action.[4] Absent such a showing, the Court does not take the vague potential for attorney abuse into account.

The Court concludes a class action is superior to individual suits in this case, particularly in light of the minimal statutory damages available to the individual plaintiff. The Court is unpersuaded by WCG's arguments that potentially excessive damages or potential for attorney abuses should alter that conclusion.

Examination of the relevant 23(b)(3) factors similarly favor class certification. Rule 23(b)(3)'s non exclusive factors are: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

In this case, there is no advantage to either the judiciary or the litigants to giving individual members of the class control over the action. No suitable alternative forum exists. A class action here presents the advantage that aggregated wrongs are more likely to produce relief than disaggregated wrongs.

Accordingly, Medrano has fulfilled the requirements of Rule 23(b) (3).

V. *CONCLUSION*

***7** For the aforementioned reasons, the Court certifies the class pursuant to Federal Rule of Civil Procedure 23.

All Citations

Not Reported in F.Supp.2d, 2007 WL 4592113

Footnotes

1 The Court does not, however, intend to limit the class to the single restaurant in the event that the defendant operates more than one restaurant. WCG claims in declarations filed with their opposition that WCG only operates one restaurant. Because no discovery has been exchanged, however, the Court does not limit the definition of class members at this time.

2 While Medrano's subclass definitions include all “persons,” the Court defines the class in terms of “consumers,” because the FCRA provides relief only for consumers. *See, e.g.* 15 U.S.C. § 1681n (a).

3 The Court notes WCG's allegations that Plaintiff and the law offices of Herbert Hafif have filed numerous complaints based on the FACTA in district courts. (Def.'s Opp'n at 2.) Without more, the Court does not construe this assertion as a challenge to the qualifications of proposed class counsel.

4 As mentioned above, the Court acknowledges WCG's observation that the Law Offices of Herbert Hafif have filed several similar actions. The Court does not, however, draw any independent conclusions from this observation.

End of Document

EXHIBIT "10"

2007 WL 1114010
Only the Westlaw citation is currently available.
United States District Court, N.D. California.

Derrick SATCHELL, Kalini Boykin, Valerie Brown, Rick Gonzales, Cynthia Guerrero, Rachel Hutchins, Tyrone Merrit, Kelvin Smith, Sr., and Ken Stevenson, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
FEDERAL EXPRESS CORPORATION, a Delaware Corporation, Defendant.

Nos. C03–2659 SI, C 03–2878 SI.
|
April 13, 2007.

Attorneys and Law Firms

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[PROPOSED] ORDER (1) PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT, (2) PROVISIONALLY CERTIFYING SETTLEMENT CLASSES, (3) DIRECTING DISTRIBUTION OF NOTICE OF THE SETTLEMENT, AND (4) SETTING A SCHEDULE FOR THE FINAL SETTLEMENT APPROVAL PROCESS

SUSAN ILLSTON, United States District Judge.

I. INTRODUCTION

***1** The Court certified this case as a class action on September 28, 2005, and the parties completed substantially all pre-trial preparation. Under the supervision of a mediator, Plaintiffs and Defendant FedEx Express ("FedEx Express") (collectively, the "Parties") engaged in lengthy settlement discussions over the course of several months in order to negotiate a settlement of this litigation. The terms of the proposed settlement ("Settlement") are set forth in this Preliminary Approval Order, which has been jointly approved and proposed by both Parties, and in the [Proposed] Consent Decree ("Decree") (attached hereto as Exhibit 1).

On April 9, 2007, the parties jointly submitted this [Proposed] Order, and Plaintiffs filed a Motion for an Order Preliminarily Approving Class Action Settlement, Provisionally Certifying Settlement Classes, Directing Distribution of Notice of the Settlement, and Setting a Schedule for the Final Settlement Approval Process. In their Motion, Plaintiffs requested that the Court grant conditional certification of settlement classes of African American and Latino hourly employees and African American Operations Managers under Rule 23(b)(3) for monetary relief (with a right to opt out of the settlement pursuant to Fed.R.Civ.Proc. 23(e)(3)) and under Rule 23(b)(2) for injunctive relief (with no opt out right). Plaintiffs also requested that the Court grant preliminary approval to the [Proposed] Consent Decree, including the injunctive relief, proposed plan of allocation to class members, and service payments to Class Representatives and 18 additional declarants ("Declarants"). Plaintiffs also requested that the Court approve a proposed Notice of Proposed Settlement of Class Action Lawsuit and Fairness Hearing ("Class Notice," attached hereto as Exhibit 2) and a proposed Claim Form (attached hereto as Exhibit 3).

Having reviewed the [Proposed] Consent Decree and

Motion, along with the files and records of this case, the Court now FINDS, CONCLUDES, and ORDERS as follows:

II. LITIGATION BACKGROUND

On December 12, 2002, Plaintiffs filed the *Satchell* case in the Alameda County Superior Court, which they amended on May 18, 2003. On June 6, 2003, Defendants removed the case to the Northern District of California pursuant to 28 U.S.C. §§ 1332 and 1441(b). On June 19, 2003, Plaintiffs filed the *Caldwell* case in the Northern District of California alleging that FedEx Express violated 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964 by discriminating against its African American and Latino employees on the basis of race and national origin. On September 25, 2003, the Court issued an order relating the *Caldwell* and *Satchell* cases, and on November 13, 2003, pursuant to a stipulation of the parties, the cases were consolidated for all purposes.

Plaintiffs' First Consolidated Amended Complaint was filed on November 12, 2003, and the operative Third Amended Consolidated Complaint was filed on November 14, 2006. The named plaintiffs are Derrick Satchell, Kalini Boykin, Valerie Brown, Rick Gonzales, Cynthia Guerrero, Rachel Hutchins, Tyrone Merritt, Kelvin Smith, Sr., and Ken Stevenson. Plaintiffs allege that, in violation of Title VII and Section 1981, FedEx Express discriminates against its African American and Latino hourly employees with respect to promotions, compensation, and discipline, and discriminates against its African American Operations Managers with respect to compensation and discipline. Specifically, Plaintiffs allege that FedEx Express's use of the Basic Skills Test ("BST") as a selection device for certain hourly jobs violates Title VII because the test has a disparate impact on African Americans and Latinos and cannot be justified by business necessity, and that FedEx Express uses overly subjective practices with respect to promotions, compensation, and discipline that both allow intentional discrimination against African Americans and Latinos and have a disparate impact on African Americans and Latinos which cannot be justified by business necessity.

***2** FedEx Express denied, and continues to deny, all of the allegations in the complaint, and specifically denies that it has discriminated against its African American and Latino employees, or that it has any liability in this matter.

On September 28, 2005, the Court certified two classes:

1. A "Minority Employee Class" consisting of all African–American and Latino Handlers, Freight Handlers, Material Handlers, Checker–Sorters, Customer Service Agents, Couriers, Swing Drivers, Ramp Transport Drivers, Ramp Area Drivers, Shuttle Drivers, Dangerous Goods Agents, Information Agents, Operations Agents, Ramp Agents, Service Assurance Agents, Truck Control Agents, Trace Representatives, Input Auditors, Team Leaders, and Dispatchers, working in defendant's Western Region, who are or were employed during the class period, who allege claims of employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (both disparate impact and disparate treatment), 42 U.S.C. § 1981, and for those class members working, or who worked, in California, the California Fair Employment and Housing Act; and

2. An "African–American Lower–Level Manager Class" consisting of all African–American Operations Managers working in defendant's Western Region during the class period who allege claims of employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (both disparate impact and disparate treatment), 42 U.S.C. § 1981, and for those class members working, or who worked, in California, the California Fair Employment and Housing Act.

The parties vigorously litigated the case, including filing numerous motions to compel discovery, summary judgment motions against six of the Class Representatives, and 21 motions *in limine.* The parties also substantially completed pretrial preparation, including the exchange of proposed exhibits and verdict forms.

III. CERTIFICATION OF SETTLEMENT CLASSES

For settlement purposes only, the Parties have proposed conditional certification of the following settlement classes:

For purposes of the injunctive and declaratory relief provided in the Decree, injunctive-relief classes certified under Federal Rule of Civil Procedure 23(b)(2) and consisting of:

1. All Minority employees of the AGFS or DGO Divisions of FedEx Express who are or were employed in the position of Handlers, Freight Handlers, Material Handlers, Checker–Sorters, Customer Service Agents, Couriers, Swing Drivers, Ramp Transport Drivers, Ramp Area Drivers, Shuttle Drivers, Dangerous Goods Agents, Information Agents, Operations Agents, Ramp Agents, Service Assurance Agents, Truck Control Agents, Trace Representatives, Import Auditors, Team Leaders, and Dispatchers in the COMATs that comprise the Western Region at any time between October 17, 1999, and the end of the Decree.

2. All African American employees of the AGFS and DGO Divisions of FedEx Express who are or were employed in the position of Operations Managers in the COMATs that comprise the Western Region at any time between October 17, 1999, and the end of the Decree.

***3** For purposes of the monetary relief provided in the Decree, a Settlement Class certified under Federal Rule of Civil Procedure 23(b)(3) and consisting of:

3. All Minority employees of the AGFS or DGO Divisions of FedEx Express who are or were employed in the position of Handlers, Freight Handlers, Material Handlers, Checker–Sorters, Customer Service Agents, Couriers, Swing Drivers, Ramp Transport Drivers, Ramp Area Drivers, Shuttle Drivers, Dangerous Goods Agents, Information Agents, Operations Agents, Ramp Agents, Service Assurance Agents, Truck Control Agents, Trace Representatives, Import Auditor, Team Leaders, and Dispatchers in the COMATs that comprised the Western Region at any time between October 17, 1999, and the Preliminary Approval Date, who do not timely opt out. All African American employees of the AGFS or DGO Divisions of FedEx Express who are or were employed in the position of Operations Managers in the COMATs that comprised the Western Region at any time between October 17, 1999, and the Preliminary Approval Date who do not timely opt out.

The Court previously considered and ruled upon Plaintiffs' Motion for Class Certification, and found that the classes proposed by Plaintiffs satisfied all requirements of Rule 23(a) and Rule 23(b) (2). The differences between the classes certified by the Court in September 2005 and the Classes certified by this order are that (1) the Classes certified by this order are divided into (a) opt-out Settlement Classes under Rule 23(b)(3) for monetary relief and (b) non-opt-out Classes under Rule 23(b)(2) with respect to injunctive relief; and (2) the Class Periods for membership in the respective Classes are defined as (a) October 17, 1999 through the date of Preliminary Approval for the Monetary Relief Settlement Class, and (b) October 17, 1999 through the end of the term of the Consent Decree for the Injunctive Relief Classes.

As with the Classes certified on September 27, 2005, the proposed injunctive-relief and Settlement Classes allege claims for race and national origin discrimination brought under the Civil Rights Act of 1964 (both disparate impact and disparate treatment), 42 U.S.C. § 1981, and, for those Class Members working, or who worked, in California, the California fair Employment and Housing Act.

Based on the previously filed class certification papers, and this Court's prior findings and rulings thereon, the Court hereby FINDS and CONCLUDES that the injunctive-relief classes set forth above satisfy all of the requirements for certification under Rule 23(a) and Rule 23(b)(2), and the COURT hereby CERTIFIES those injunctive-relief classes.

Based on the previously filed class certification papers, and this Court's prior findings and rulings thereon, the Court also hereby FINDS and CONCLUDES that the monetary-relief Settlement Class described above satisfies all of the requirements for certification under Rule 23(a). In addition, having carefully considered the papers filed in connection with this motion, the entire record in this case, the arguments of counsel, and the requirements of Rule 23(b)(3), the Court FINDS and CONCLUDES that the monetary-relief Settlement Class satisfies the requirements for certification under Rule 23(b)(3). Questions of law or fact common to the class predominate over individualized issues, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Because certification of the monetary-relief Settlement Class is proposed in the context of a settlement, the Court need not inquire whether the case, if tried as a class action, would present intractable management problems. The Court hereby CERTIFIES the monetary-relief Settlement Class as set forth above.

IV. APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL

***4** The Court previously found eight of the Class

Representatives to be typical and adequate, and appointed them as Class Representatives. In its Class Certification Order, the Court ordered Plaintiffs to add a Class Representative who had a claim regarding the BST, and Plaintiff did so. The Court hereby finds that the newly-named Class Representative, Tyrone Merritt, is also typical and adequate, and may serve as a Class Representative. Accordingly, for settlement purposes, this Court hereby appoints Derrick Satchell and Kalini Boykin as Class Representatives for the Operations Manager Class and Valerie Brown, Rick Gonzales, Cynthia Guerrero, Rachel Hutchins, Tyrone Merritt, Kelvin Smith, Sr., and Ken Stevenson as Class Representatives for the Minority Employee Class.

This Court previously appointed seven law firms as Class Counsel. Plaintiffs have proposed that Barry Goldstein be appointed additional Class Counsel. Mr. Goldstein has extensive experience and expertise in litigating, settling, and monitoring cases of this sort. Accordingly, for purposes of settlement and conditional certification of the Settlement Class, the following are appointed Class Counsel: Altshuler Berzon LLP; Barry Goldstein, of counsel to Goldstein, Demchak, Bailer, Borgen, and Dardarian; Law Office of John Burris; Law Offices of Michael S. Davis; Law Offices of Waukeen McCoy; Law Offices of Kay McKenzie Parker; Lieff, Cabraser, Heimann & Bernstein, LLP; and Schneider & Wallace.

V. PRELIMINARY APPROVAL OF CONSENT DECREE

The Court has reviewed the terms of the [Proposed] Consent Decree attached as Exhibit 1, including specifically the injunctive relief provisions and the plan of allocation, and the Plaintiffs' description of the settlement in the Motion papers. The Court has also read and considered the declarations of James M. Finberg and Barry Goldstein in support of preliminary approval. Based on review of those papers, and the Court's familiarity with this case, the Court concludes that the settlement and Consent Decree are the result of extensive, arms'—length negotiations between the Parties after lengthy and exhaustive litigation, including thorough discovery and extensive motion practice and pre-trial preparation. The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive. Based on that review, and the Court's familiarity with the issues in the case, the Court concludes that the proposed Consent Decree has no obvious defects and is within the range of possible settlement approval, such that notice to the Class is appropriate.

IT IS THEREFORE ORDERED THAT:

1. The [Proposed] Consent Decree and the settlement it embodies are hereby PRELIMINARILY APPROVED. Final approval and entry of the Consent Decree is subject to the hearing of any objections of members of the Settlement Class to the proposed settlement embodied in the Consent Decree.

2. Pending the determination of the fairness of the Consent Decree, all further litigation of this action is hereby STAYED, the trial scheduled to begin on May 7, 2007 is POSTPONED indefinitely and all rulings on all pending motions before the Court are hereby DEFERRED.

VI. APPROVAL OF THE FORM AND MANNER OF DISTRIBUTING CLASS NOTICE AND CLAIM FORM

***5** The Parties have also submitted for this Court's approval a proposed Class Notice and a proposed Claim Form, which the Court has carefully reviewed.

The proposed Class Notice appears to be the best notice practical under the circumstances and appears to allow Class Members a full and fair opportunity to consider the proposed Settlement and develop a response. The proposed plan for distributing the Class Notice and Claim Form, which is to be attached to the Class Notice, likewise appears to be a reasonable method calculated to reach all members of the Class who would be bound by the Settlement. Under this plan, the Claims Administrator will distribute the Class Notice to Settlement Class Members by first class U.S. Mail. There appears to be no additional method of distribution that would be reasonably likely to notify Class Members who may not receive notice pursuant to the proposed distribution plan.

The Class Notice fairly, plainly, accurately, and reasonably informs Class Members of: (1) appropriate information about the nature of this litigation, the settlement class, the identity of Class Counsel, and the essential terms of the Settlement and Decree, including injunctive relief and the plan of allocation; (2) appropriate information about Class Counsel's forthcoming application for attorneys' fees, the proposed service payments to Class Representatives and Declarants, and other payments that will be deducted from the settlement fund; (3) appropriate information about how to participate in the Settlement; (4) appropriate information about this

Court's procedures for final approval of the Settlement Agreement and Settlement, and about class members' right to appear through counsel if they desire; (5) appropriate information about how to challenge or opt-out of the Settlement, if they wish to do so; and (6) appropriate instructions as to how to obtain additional information regarding this litigation, the Settlement, and the Decree.

Similarly, the proposed Claim Form appears to allow members of the Settlement Classes a full and fair opportunity to submit a claim for proceeds in connection with the Settlement. Moreover, the Claim Form fairly, accurately, and reasonably informs Settlement Class Members that failure to complete and submit a Claim Form, in the manner and time specified, shall constitute a waiver of any right to obtain any share of the Settlement Payment.

The Court, having reviewed the proposed Class Notice and Claim Form (collectively "Notice Materials"), finds and concludes that the proposed plan for distributing them will provide the best notice practicable, satisfies the notice requirements of Rule 23(e), and satisfies all other legal and due process requirements. Accordingly, the Court hereby ORDERS as follows:

A. The form and manner of distributing the proposed Notice Materials are hereby approved.

B. Promptly following the entry of this Order, the Claims Administrator shall prepare final versions of the Notice Materials, incorporating into the Notice the relevant dates and deadlines set forth in this Order.

***6** C. Within twenty days following the Preliminary Approval Date, FedEx Express shall provide the Claims Administrator with computer readable information, in a format acceptable to the Claims Administrator, that contains the full names, social security numbers, FedEx Express employee ID, last known addresses and phone numbers, start dates and, as applicable, end dates of employment with FedEx Express from October 17, 1999 to the date of Preliminary Approval in class positions, class positions held (and date for each position, and status as casual, part-time, or full time), first date that the employee took and failed at least one portion of the BST, and the date of any subsequent passage of all portions of the BST.

D. Within twenty days following the Preliminary Approval Date, Class Counsel shall provide the Claims Administrator with a computer readable list of all known potential Settlement Class members and their mailing addresses. Prior to the mailing of the Notices, the Claims Administrator will combine these lists of potential Settlement Class members received from FedEx Express and Class Counsel and update any new address information for potential class members as may be available through the National Change of Address ("NCOA") system.

E. Within 40 days of the Preliminary Approval Date, the Claims Administrator shall mail, via first class postage, the Notice Materials to all known potential Settlement Class members at their last known address or at the most recent address that may have been obtained through the NCOA. The Claims Administrator will trace all returned undeliverable notices and re-mail to the most recent address available.

F. The Claims Administrator shall take all reasonable steps to obtain the correct address of any Class Members for whom the notice is returned by the post office as undeliverable and otherwise to provide the Class Notice. The Claims Administrator shall notify Class Counsel of any mail sent to Class Members that is returned as undeliverable after the first mailing as well as any such mail returned as undeliverable after any subsequent mailing(s).

G. The Claims Administrator shall take all other actions in furtherance of claims administration as are specified in the Decree.

VII. Procedures For Final Approval Of The Settlement

A. Fairness Hearing

The Court hereby schedules a hearing to determine whether to grant final certification of the Settlement Classes, and final approval of the Consent Decree (including the proposed plan of allocation, injunctive relief, payment of attorneys' fees and costs, and service payments to the Class Representatives and the Declarants) (the "Fairness Hearing") for *August 9, 2007* (date) at *3:30 p.m.* (time) [August 10, 2007, at 9:00 am, or another day and time approximately 100 days from Preliminary Approval Date]. If any attorney will be representing a class member objecting to the Consent Decree, the attorney shall file a notice of appearance with the Court and serve counsel for all parties at least 14 days before the Fairness Hearing.

B. Deadline To Request Exclusion From The Settlement

***7** Class members may exclude themselves, or opt-out, of the monetary relief provisions of the class settlement. Any request for exclusion must be in the form of a written "opt-out" statement sent to the Claims Administrator. Information on how to opt-out of the settlement shall be made available by the Claims Administrator. A person wishing to opt-out must sign a statement which includes the following language:

> I understand that I am requesting to be excluded from the class monetary settlement and that I will receive no money from the settlement fund created under the Consent Decree entered into by FedEx Express. I understand that if I am excluded from the class monetary settlement, I may bring a separate legal action seeking damages, but may receive nothing or less than what I would have received if I had filed a claim under the class monetary settlement procedure in this case. I also understand that I may not seek exclusion from the class for injunctive relief and that I am bound by the injunctive provisions of the Consent Decree entered into by FedEx Express.

To be effective, any opt-out statement must be sent to the Claims Administrator at the address provided in the Class Notice via First Class United States Mail, postmarked no later than 45 days after the Claims Administrator first mails the Class Notice to the Class. Only those class members who request exclusion in the time and manner set forth herein shall be excluded from the class for monetary relief purposes. Pursuant to Federal Rules of Civil Procedure 23(b)(3) and (c)(2), the terms and provisions of the Consent Decree concerning monetary relief shall have no binding effect on any person who makes a timely request for exclusion in the manner required by this Order.

The Claims Administrator shall date stamp the original of any opt-out statement and serve copies on both FedEx Express and Class Counsel via facsimile and overnight delivery within two (2) business days of receipt of such statement. The Claims Administrator will also file the original opt-out statements with the Clerk of the Court no later than five (5) days prior to the scheduled Fairness Hearing date. The Claims Administrator shall retain copies of all opt-out statements until such time as it has completed its duties and responsibilities under this Decree.

Class members shall be permitted to withdraw or rescind their opt-out statements by submitting a "rescission of opt-out" statement to the Claims Administrator. The rescission of opt-out statement shall include the following language:

> I previously submitted an opt-out statement seeking exclusion from the class monetary settlement. I have reconsidered and wish to withdraw my opt-out statement. I understand that by rescinding my opt-out I may be eligible to receive an award from the claims settlement fund and may not bring a separate legal action against FedEx Express seeking damages with respect to the Released Claims.

A class member wishing to submit such a rescission statement shall sign and date the statement and cause it to be delivered to the Claims Administrator no later than 52 days after the Claims Administrator first mails Class Notice.

***8** The Claims Administrator shall stamp the date received on the original of any rescission of opt-out statement and serve copies to counsel for FedEx Express and Class Counsel via facsimile and overnight mail no later than two business days after receipt thereof and shall file the date-stamped originals with the Clerk of the Court no later than five business days prior to the date of the Fairness Hearing. The Claims Administrator shall retain copies of all rescissions of opt-out statements until such time as the Claims Administrator is relieved of its duties and responsibilities under this Decree.

C. Defendant's Right to Rescind Agreement

If the number of individuals who opt out of the Settlement Class in the manner provided in this Order exceeds 50 (not including persons who have, before April 6, 2007, filed and served lawsuits, other than the Satchell and Caldwell lawsuits, alleging race or national origin discrimination in compensation, promotion, or discipline that allegedly occurred during the Class Period), then FedEx Express, at its sole option, shall have the right to void the Settlement on the fifth business day after the Court requires individuals to return rescission of class member opt-outs. If FedEx Express exercises this option, all of FedEx Express's obligations under the Consent Decree shall cease to be of any force and effect, and the Consent Decree and any orders entered in connection therewith shall be vacated, rescinded, canceled, and annulled, and the parties shall return to the status quo in the Civil Action as if the parties had not entered into the Consent Decree. In addition, in such event, the Consent Decree and all negotiations, court orders, and proceedings relating thereto shall be without prejudice to the rights of any and all parties thereto, and evidence relating to the Consent Decree and all negotiations shall not be admissible or discoverable in the Civil Action or otherwise.

D. Deadline for Filing Objections to Settlement and [Proposed] Consent Decree

Any Class Member who wishes to object to the fairness, reasonableness or adequacy of the Settlement Agreement or the Settlement must do so in writing, although Class Members objecting to the Settlement may also appear at the Fairness Hearing. To be considered, any objection to the final approval of the Consent Decree must state the basis for the objection and must be timely filed in writing, along with any other papers the class member wishes the Court to consider, with the Claims Administrator, at the address provided in the Class Notice, *via* First–Class United States mail, postage prepaid, postmarked no later than no later than 45 days after the date that Class Notice is first mailed by the Claims Administrator. An objector who wishes to appear at the Fairness Hearing, either in person or through counsel hired by the objector, must state his or her intention to do so at the time the objector submits his/her written objections. Any member of the class who does not timely file and serve such a written objection shall not be permitted to raise such objection, except for good cause shown, and any member of the class who fails to object in the manner prescribed herein shall be deemed to have waived, and shall be foreclosed from raising, any such objection.

***9** The Claims Administrator shall stamp the date received on the original of any objection and send copies of each objection to the Parties by facsimile and overnight delivery not later than two business days after receipt thereof. The Claims Administrator shall also file the date-stamped originals of any objections with the Clerk of Court within three business days after the time for filing objections ends.

If objections are filed, Class Counsel or counsel for FedEx Express may engage in discovery concerning the filed objections prior to the Fairness Hearing.

E. Deadline For Submitting Claims Form

A Class Member who does not opt out will be eligible to receive his or her proportionate share of the settlement benefit. To receive this share, such a Class Member must properly and timely complete a Claim Form in accordance with the terms of the Consent Decree. To be effective, the Claim Form must be sent to the Claims Administrator at the address provided in the Class Notice by First Class United States Mail, postage prepaid, postmarked no later than 70 days after the initial mailing of the Class Notice to class members. Failure to postmark a completed Claim Form by the Claim Filing Deadline shall bar the Settlement Class member from receiving any monetary award pursuant to the proposed Consent Decree. Settlement Class members who do not file timely and valid Claim Forms shall nonetheless be bound by the judgment and release in this action as set forth in the proposed Consent Decree, unless that Settlement Class member timely opts-out of the Settlement.

It shall be the sole responsibility of each member of the Settlement Class who seeks a monetary award to notify the Claims Administrator if the class member changes his or her address. Failure of a Settlement Class member to keep the Claims Administrator apprised of his or her address may result in the claim being denied or forfeited.

F. Deadline for Submitting Motion Seeking Final Approval.

No later than 35 days before the Fairness Hearing, Plaintiffs shall file a Motion for Final Approval of the Settlement and Consent Decree. On or before one week before the Fairness Hearing, the Parties may file with the Court a reply brief responding to any filed objections.

G. Deadline For Petition for Attorneys Fees

Class Counsel shall file with this Court their petition for an award of attorneys' fees and reimbursement of expenses no later than June 22, 2007. Class Counsel may file a reply to any opposition memorandum filed by any objector no later than one week before the Fairness Hearing.

H. Deadline for Petition For Approval Of Service Payments

Class Counsel shall file with this Court their petition for an award of service payments to the nine Class Representatives and to the 18 Declarants no later than 35 days before the Fairness Hearing. Class Counsel may file a reply to any opposition memorandum filed by an objector no later than one week before the Fairness Hearing.

VIII. PLAINTIFFS' AND CLASS MEMBERS' RELEASE

***10** If, at the Fairness Hearing, this Court grants Final Approval to the Settlement and Consent Decree, Named Plaintiffs and each individual Settlement Class Member who does not timely opt out will release claims, as set forth in Section VIII of the Consent Decree, by operation of this Court's entry of the Judgment and Final Approval, regardless of whether he or she submits a Claim Form or receives any share of the Settlement Fund.

IX. APPOINTMENT OF CLAIMS ADMINISTRATOR

Settlement Services, Inc. of Tallahassee, Florida is hereby appointed Claims Administrator to carry out the duties set forth in this Order and the Consent Decree.

X. DISPOSITION IF SETTLEMENT DOES NOT BECOME FINAL

Should this Court or any reviewing court on direct appeal and/or on writ of *certiorari* to the Supreme Court of the United States from a direct appeal to the U.S. Court of Appeals for the Ninth Circuit refuse to approve this Consent Decree or require modification to this Decree, the Decree (and the stipulated certification of settlement classes) shall be null and void, inadmissible and unusable in any future proceeding and the Decree shall not be considered a binding settlement agreement, unless Plaintiffs and FedEx Express each expressly and voluntarily approve in writing any such required modification by this Court or by the reviewing Court.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2007 WL 1114010

EXHIBIT "11"

2006 WL 1520751
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Chancery Division, General Equity Part, Burlington County.

Harry and Rita SCHMOLL, Husband and wife; Leonard and Eleanor Egnack, husband and wife, on behalf of themselves and (all others similarly situated), Plaintiffs,
and
Mount Laurel Township, Plaintiff–Intervenor,
v.
J.S. HOVNANIAN & SONS, LLC., and John Doe Corporations 1–5, Defendants.

BUR-C-00141-02
|
Decided Feb. 9, 2006.

Synopsis

SYNOPSIS

Background: Homeowners brought class action against builder, seeking equitable relief to require builder to inspect homes to determine if sufficient air combustion airflow existed in utility rooms as was required by construction code. The parties entered into a settlement and submitted it for approval.

Holdings: The Superior Court, Chancery Division, Burlington County, General Equity Part, Hogan, J.S.C., held that:

class settlement was fair and reasonable;

trial court was not required to defer on issue of attorney fees;

attorney fee request of $417,510.12 was excessive;

homeowners prevailed for purposes of Consumer Fraud Act's fee shifting provision; and

20% contingency enhancement of the lodestar was appropriate for purposes of fee shifting.

Ordered accordingly.

Attorneys and Law Firms

Philip Stephen Fuoco, Haddonfield and Joseph A. Osefchen (Philip Stephen Fuoco attorney); Steven P. DeNittis and Norman Shabel, Mount Laurel (Shabel & DeNittis, attorneys, Marlton), for plaintiffs Harry and Rita Schmoll, Leonard and Eleanor Egnack, and all others similarly situated.

Michael L. Mouber, Marlton, for plaintiff-intervenor, Mount Laurel Township. (Parker, McCay & Criscuolo, attorneys).

Richard Hunt, Marlton, for defendant J.S. Hovnanian & Sons.

Opinion

HOGAN, J.S.C.

***1** This decision represents the court's findings following the fairness hearing held on February 6, 2006, for the approval of the settlement of the above class action.

In addition to consideration of whether the class action settlement is fair, reasonable and adequate, the award of counsel fees and expenses is also at issue.

BACKGROUND
Plaintiffs' complaint in the Chancery Division primarily sought equitable relief to require the defendant builder to inspect the homes of the Holiday Village East Development in Mount Laurel Township, New Jersey, constructed after November 30, 1992, and which contain natural gas-powered furnaces, hot water heaters and clothes dryers located in the utility room of each home.

These inspections were allegedly required because of the allegation that defendant violated the New Jersey Uniform Construction Code. Plaintiffs contend there was insufficient air combustion airflow in the utility rooms.[1] All of the allegations have been denied by the defendants and have been vigorously opposed.

Plaintiffs sought a court determination that if an inspection found such violations, that defendant be ordered to make the necessary correction to the defects found. Plaintiffs also initially sought damages under various legal theories, but by the commencement of the trial those damage claims had been abandoned.

In the complaint, the plaintiffs recited numerous legal theories for liability, including implied warranty of habitability, implied covenant of construction in a workmanlike manner, negligence, strict liability as a mass builder and violations of the Consumer Fraud Act under *N.J.S.A.* 56:8–1, 56:8–166. At the fairness hearing and in their briefs, plaintiffs relied only upon the Consumer Fraud Act for the fee-shifting authority.

On August 1, 2003, Judge Bookbinder granted class certification to the owners of homes constructed by defendant in the Holiday East Development in Mount Laurel Township.

On February 6, 2004, Judge Bookbinder further permitted Mount Laurel Township to intervene as a party plaintiff and granted leave for the Township to file its own complaint, which it promptly did.

It appears that the purpose of Mt. Laurel's intervention was to protect its rights in the event the court entered equitable relief that directly or indirectly required the use of Township resources. They essentially "piggy backed" on plaintiffs' claim and sought no independent relief. The Township seeks no counsel fees or expenses.

On December 17, 2004, the court in a written decision denied defendant's motion to transfer the matter to the Law Division and to dismiss Mount Laurel's complaint. The Township's public nuisance cause of action was dismissed. In the same decision, plaintiffs' motion for partial summary judgment was denied.

Trial commenced on April 18, 2005, and proceeded on April 19 and 20, 2005. On June 29, 2005, the parties entered into a Stipulation of Settlement. Pursuant to the Stipulation of Settlement, on August 31, 2005, the court entered an Order of preliminary approval authorizing that a notice of settlement be sent to each class member and setting the date for the fairness hearing.

***2** As evidenced by the certification of mailings filed with the court and representation of counsel at oral argument, the court is satisfied the Order has been complied with and that proper notice consistent with due process has been afforded the class members. This initial notice provided for a fairness hearing on December 2, 2005, at 1:30 p.m.

On December 2, 2005, the court conducted a fairness hearing and considered the argument of counsel related to the award of counsel fees. Other than the named plaintiff Harry Schmoll, no general members of the class appeared. Defendant's counsel represented that they received no written objections from any class members and only received a few phone calls from individuals seeking information. Likewise, the court announced that it had received no written objections. All of the parties urged the Court to grant final approval of the settlement.

By letter of December 6, 2005, the court was notified by defendant's counsel that it appeared that the public notice of the settlement that was submitted at the December 5, 2005, fairness hearing contained a significant error, in that the notice provided a requirement to supply a carbon monoxide detector to class members. This was not a term that had been agreed to under the Stipulation of Settlement previously entered into and preliminarily approved by the court. By letter of December 7, 2005, plaintiffs' counsel agreed that the class notice was in error and that it had been published in the *Burlington County Times*[2] on November 3, 2005. On that same day, the court directed that all counsel appear on December 12, 2005, to resolve the issue.

On December 12, 2005, on the record the matter was discussed fully as to the process for going forward. The Court determined that even though it appeared that the correct notice was mailed to the class home owners, the fact that the public notice that was published in the newspaper was erroneous could lead to confusion among the class members and could adversely affect their decision-making as to whether to participate in the inspection process. The court, therefore, ordered that the class be re-noticed, and that the correct notice be republished, and that the court conduct a second fairness hearing on February 6, 2006.

By certification of Stephen DeNittis, Esq., dated January 9, 2006, Mr. DeNittis certifies that the revised notice was mailed to the class homeowners. The notice was also published in *The Central Record,* a weekly newspaper, which circulates in Mt. Laurel Township.

On February 6, 2006, counsel for the parties appeared for the fairness hearing. No clients or members of the public attended. As the court had no further questions, counsel agreed to rely on their oral arguments they made before the court at the first hearing on December 6, 2005.

THE SETTLEMENT

As in all cases, our courts have long subscribed to policy that encouraged the settlement of lawsuits between the parties, inclusive of class action proceedings. *Chattin v. Cape May Greene Inc.,* 216 *N.J.Super.* 618, 626, 524 *A.*2d 841 (App.Div.), *certif. denied,* 107 *N.J.* 148, 526 *A.*2d 209 (1987) (citing *Jannarone v. W.T. Co.,* 65 *N.J.Super.* 472, 168 *A.*2d 72 (App.Div.), *certif. denied,* 35 *N.J.* 61, 171 *A.*2d 147 (1961)). However, in class actions, settlements receive a scrutiny not otherwise provided to non-class action settlements before they become enforceable. Our court rules require notice of a proposed settlement of a class action to be given to the members of the class and the court must approve the settlement. *R.* 4:32–4. While individual parties to non-class actions are in a position to agree to the terms of a settlement, individuals of a class are generally not in that position; thus it becomes the responsibility of the court to determine if the class action settlement is fair and reasonable to the members of the class. *Chattin,* supra, 216 *N.J.Super.* at 627, 524 *A.*2d 841.

***3** Both the plaintiffs' counsel and defendant's counsel argue in favor of the approval of the settlement. There have been no written objections by class members after notice of the settlement. While no class members appeared at the hearing, nonetheless the court is obligated to independently consider the settlement as a substitute for the consents of the individual class members. Of course the fact that there is no opposition is a fact for consideration as well.

The standards for approval of class actions that have been developed in the federal courts have been followed by our state courts and generally involve nine factors for consideration. *Prudential Ins. Co. of Am. Sales Practices Litig.,* 148 *F.*3d 283, 317 (3d Cir.1998). They are listed below with the Court's comment:

1. The complexity, expense and likely duration of the litigation;

As will be further discussed, the court is not of the belief that this case was complex. It involved neither novel issues of law nor a complex fact pattern. The case was vigorously defended, which added to the burden of class counsel. The settlement had the effect of terminating an ongoing trial and its continued inherent expense.

2. The reactions of the class to the settlement;

The class posed no objections or requests for exclusion, which permits the inference of satisfaction with the proposed settlement.

3. The state of the proceeding and the amount of the discovery completed;

The trial had commenced before the settlement occurred.

4. The risk of establishing liability;

As will be further discussed, the risk of establishing liability based upon whether there were construction code violations was fairly low.

5. The risks of establishing damages;

This factor as it relates to damages is not so relevant as the relief sought was equitable. However, as to equitable relief, the risk was moderate, but on the low side of the moderate range.

6. The risks of maintaining the class action through the trial;

The risk of maintaining the class was not high. There have been no efforts by defendant to move to de-certify the class once the class was certified. There appears to be no basis in any event.

7. The ability of defendant to withstand a greater judgment;

Since the class is not seeking a money judgment, this factor is largely irrelevant. It is not disputed that defendant is a significant builder in the housing industry and could certainly withstand a greater judgment in terms of damages or equitable remedy.

8. The risk of reasonableness of the settlement fund in light of the best possible recovery;

9. The risk of reasonableness of the settlement in light of all the attendant risks of litigation.

Perhaps Factors 8 and 9 are the most helpful in evaluating the settlement. The court is satisfied that the settlement is reasonable in light of the best recovery possible. The fact of the matter is that the settlement provides the class with essentially the entire relief that they sought when the suit was commenced. The settlement provides the opportunity for the class members to voluntarily have their utility rooms inspected, and if there are violations, to have the defendant builder make the corrections at its cost. As indicated above, counsel for both parties are in agreement that the settlement is reasonable and in the interests of their clients.

***4** These factors must be considered in light of the fact that plaintiff only seeks equitable relief as there is no fund in court. Also, in considering the settlement as to fairness, the analysis does not turn on the merits of the case. *Eichenholtz v. Brennan,* 52 *F.*3d 478 (3d Cir.1995). Because it is a case for equitable relief rather than money damages, certain of these factors may have less bearing and others more importance.

After reviewing the settlement in light of the above factors, including reviewing the agreement itself and its related documents, and after considering the comments of counsel and their respective written submissions, the court can find no reason that suggests that this settlement should not be approved. The Court concludes and finds that the settlement is fair and reasonable in every respect.

COUNSEL FEES:

Plaintiffs' counsel seeks fees and cost in the amount of $417,510.12. Defendant's objections fall into two categories. First, that the court's determination of reasonable counsel fees should be deferred until it is determined how many of the class members actually participate in the settlement and as to those that do participate, how many of those class members' homes actually have air-combustion violations in their respective utility rooms. Defendant envisions the ability to potentially argue that in fact plaintiffs are not the prevailing party under the settlement and thus are not entitled to any award of fees.

Secondly, defendants object to the amount of the fees in the application as not being reasonable and in compliance with applicable case law.

The Timing Issue:

The applicable terms of the Stipulation of Settlement executed by the parties (emphasis added) provide:

> *3. The amount of attorney fees, if any to be paid by Hovnanian shall be determined by the Court, unless the parties can resolve the amount amicably. If the matter cannot be resolved, Class counsel shall submit their fee petition at least twenty-one days prior to the scheduled date of the fairness hearing and Hovnanian shall file their objections ten days thereafter. It is acknowledged and agreed that Mount Laurel is not seeking reimbursement of attorney's fees as a result of the lawsuit or of this settlement. The Court will either hear argument concerning fees at the fairness hearing, or, at its option, may schedule a separate hearing regarding same after acknowledging plaintiffs' Class counsels' request and Hovnanian's objections at the fairness hearing. It is acknowledged that Hovnanian intends to take the position that the fee argument should take place after the inspection results are received. The parties agree to abide by the Court's decision in this*

> *regard, and shall be allowed to supplement their respective positions subsequent to the fairness hearing, in the event the Court accepts Hovnanian position. The Court may consider all relevant evidence including testimony adduced to date, and may allow for a plenary hearing, as it deems necessary in making its fee determination.*

***5** While defendant urges the court to now exercise the deferral option, plaintiffs strenuously oppose such deferral. The court is bound to follow the same legal basis for determining counsel fees whether or not the issue is deferred. Plaintiffs' position is that the settlement concludes the active litigation and provides the full measure of the equitable relief they sought against defendant and that the award of attorney fees should not be based upon the proportionality of the monetary value of the settlement. Defendant, on the other hand, argues that they expect that the majority if not all of the participating class members' homes will be found to be compliant with the regulatory scheme of the Department of Community Affairs' "engineered approach to air combustion."[3] It asserts, even if there was a *de minimis* violation of the venting provisions of the Department's administrative building codes in place when the class member homes were constructed, that the end result will show that defendant is not liable or, in the alternative, that the violations were minimal, requiring only minimal alterations to the utility rooms, if any. This argument is the same defense defendant raised during the entire litigation, including during the trial. Defendant also argues that the court must take into consideration the results of the inspections to be made and factor into its fee determination the extent to which the class members' homes actually need repairs and the attendant cost.

Plaintiffs invoke *R.* 4:42, which they assert prohibits the entry of a delayed order for attorneys' fees and "requires that any fee award be made prior to the entry of an order for final judgment." They argue that the primary relief they sought was equitable and it is this relief which they received under the Stipulation of Settlement. As such they, therefore, have prevailed and are entitled to fee shifting under the Consumer Fraud Act. They further argue that the monetary value of their repairs resulting from the equitable relief is not the measure for determining the counsel fees.

Without question, plaintiffs were seeking equitable relief in the nature of a court order to provide the opportunity to the class members to have their homes inspected, and if a home is found to be in violation of the Department of Community Affairs' building codes as to combustion air in their utility rooms, then to require defendant to make such alterations at its expense. While defendant denied any violations and defended itself vigorously, after trial began, defendant agreed to settle the case and agreed to the following relief as summarized in the corrected Class Action Settlement Notice sent to each class member:

> *A. All members of the Class shall be given an opportunity to have their utility room inspected by the Mt. Laurel Building Department at no cost to the Class member in order to determine whether their utility room has adequate combustion air as required by the New Jersey Uniform Construction Code.*
>
> ***6** *B. If such an inspection reveals that there is inadequate combustion air, corrective work will be performed in accordance with specification previously approved by the Mt. Laurel Building Department. Hovnanian will be responsible for the cost and performance of such corrective work.*

The Stipulation of Settlement itself provides that the litigation is "hereby fully and finally settled, subject to the approval of the Court...."

What defendant now argues in support of deferring the attorney fees issue is that plaintiffs at best accomplished limited success and that waiting until all the inspections are complete will prove that there were very few or no violations and thus little if any liability. As will be discussed, while the question of limited success is a factor in whether to decrease a lodestar, it lends no support as to whether the fee issue should be deferred. If defendant wished to test its defenses that it had limited or no liability, it had the option to continue the trial to the end and receive a court ruling on the merits. Instead they chose to end the litigation and agreed to settle the merits of the dispute. The analysis required by the Supreme Court in *Rendine v. Pantzer,* 141 *N.J.* 292, 661 *A.*2d 1202 (1995), will be just as applicable in the future as it is today. What defendants are proposing would most likely lead to a plenary hearing on the attorney fees issue. In fact the Stipulation of Settlement contemplates that potential.

Our courts discourage a plenary hearing on the issues of attorney fees. "We hold to the common sense position that a plenary hearing should be conducted only when the certifications of counsel raise material factual disputes that can be resolved solely by the taking of testimony. We expect that such hearings will be a rare, not routine, occurrence." *Furst v. Einstein Moomjy, Inc.,* 182 *N.J.* 1, 24, 860 *A.*2d 435 (2004).

Citing *Blum v. Witco Chem. Corp.,* 829 *F.*2d 367, 377 (3d Cir.1987), the Court in *Furst* stated, "We strongly discourage the use of an attorney-fee application as an invitation to become mired in a second round of litigation."

The law seems clear that counsel fees in fee-shifting cases are not based on the dollar cost or dollar value of the relief obtained. *Furst, supra,* 182 *N.J.* at 24, 860 *A.*2d 435. *Szczepanski v. Newcomb Med. Ctr.,* 141 *N.J.* 346, 366, 661 *A.*2d 1232 (1995); *Grubbs v. Knoll,* 376 *N.J.Super.* 420, 432, 870 *A.*2d 713 (App.Div.2005). That being the case, whether or not the class members take advantage of the equitable relief granted them, and whether or not the costs to remedy any of the defects uncovered are minimal, would have no bearing on whether or not plaintiffs are entitled to fees under fee shifting. Therefore, postponing the attorney fee issue to some undefined date in the future would serve no positive purpose and would unjustifiably delay the attorney fee determination to which plaintiffs' attorneys are entitled. Likewise, such an indeterminate wait for the local housing code official to complete the inspection process would further exacerbate the strictures of *R.* 4:42.

***7** While the parties provided in their agreement an "option" for the court to delay the fee determination, such an option cannot bind the court. Clearly the intent for such a provision was to facilitate a settlement, while preserving to the time of the fair hearing the parties' opportunity to brief and argue to the court their respective positions on the issue.

The court declines to exercise the "option" and will not defer the attorney fee issue.

Plaintiffs' attorneys have submitted a joint petition for attorney fees and costs, which include certifications, memorandums and various exhibits supporting the application. The joint application is by the Law Firm of Philip Stephen Fuoco, and from the Law Offices of Shabel & DeNittis, P.C. These attorney certifications contain information regarding attorney hourly rates, background of counsel, and a description of the legal effort on behalf of plaintiffs, with each entry displaying the attorney who provided the service, the date of the service, the time in hours and tenths and a description of the service. At the conclusion is a summary of the total hours for each attorney, with a total raw fee before any adjustment or enhancements. These certifications contain an itemized statement of costs expended by the firms in furtherance of their case.

The Shabel firm's certification, signed by both Mr. Shabel and Mr. DeNittis, delineates in accordance with the Rules the class action experience for both Mr. Shabel and Mr. DeNittis with varying hourly rates approved by other courts. In this case, Mr. Shabel charges $395 per hour and Mr. DeNittis charges $250 per hour. These rates are consistent with the rates charged in many previous cases that these attorneys have litigated and which are detailed in their certification. The fees they have charged historically have been approved in the Superior Court in Burlington and Camden Counties. The court is satisfied that the rates are within the range of rates charged within the community of Burlington and Camden County where these lawyers practice. The Shabel Firm seeks $234,825.00 in raw fees, and $23,093.09 in costs.

Joseph A. Osefchen, Esq., executed the certification for the Fuoco firm. The certification provides the background of the attorneys who worked on the case, with a summary of hours worked and hourly rates and costs expended. Attached to the certification is a billing statement showing the services by category and within each category, the date, the attorney who provided the service, the time expended and a one-line abbreviated description of the service.[4] Also included is the same type of information for paralegal services. The total value of the fee the Fuoco firm seeks is $84,390.25 in raw fees plus $381.00 in costs, as set forth in the certification.

As in the Shabel firm certification, the Fuoco firm certification also provided the experience and hourly rates, $495 for Mr. Fuoco and $300 for Mr. Osefchen. Also included are the certifications of three practitioners who certify to the "range" of prevailing market rates for comparable services involving complex class action fee shifting in this legal community.[5]

***8** All of plaintiffs' counsel demonstrate significant legal experience, although they cite other class action cases in which they participated without providing information sufficient for a meaningful comparison with the present case.

Before any adjustments the two firms combined have set the proposed lodestar at $321,601.00, exclusive of $23,474.09 of out-of-pocket costs.

Plaintiffs' counsel have voluntarily reduced their proposed lodestar by an initial ten percent "across the board" or $32,160.17. They further reduced the lodestar by $7,015.00 for time expended when more than two plaintiffs' attorneys participated at a hearing; they are charging only for the two lowest billing rates.[6] Finally, they have reduced the lodestar further, deleting any billings for paralegal services, thereby reducing the un-enhanced lodestar to $278,340.08. Plaintiffs' counsel seeks a fifty percent enhancement of this amount, for a total fee of $417,510.12

Defendant, Hovnanian, after challenging the right to counsel fees, challenges the amount of fees themselves. They argue that the fees are unreasonable because the service time of 1,085 hours was "excessive and redundant," that the hourly rates are unreasonable and not in line with the Rules of Professional Conduct ("RPC"), and that the fees should not be enhanced.

In determining any application for counsel fees, the court must first analyze such a request in light of RPC 1.5(a), which sets forth the factors the Court must consider; secondly, *R.* 4:42–9(b), which sets forth the mechanism for the application; thirdly, the applicable fee-authorizing statute, which in this case is *N.J.S.A.* 56:8–19, the Consumer Fraud Act, which sets forth the authority. These items must not be analyzed independently of one another, but rather in conjunction with one another in order for the court to come to the appropriate conclusion.

Initially, the joint fee application is in substantial compliance with *R.* 4:42–9(b), in that the appropriate certifications have been filed, which address the applicable factors under RPC 1.5(a).

The factors with the court's comment are set forth below:

> RPC 1.5. Fees
>
> *(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:*
>
> *(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;*

Plaintiffs' counsel in their pleadings and arguments have consistently classified this law suit as "complex," which in part provides support for extensive fees. The court is not persuaded that this case raised novel or unique legal issues or factual issues such as to classify the matter as complex. Certainly, because it is a class action, the legal mechanics were more extensive, but not so much that the matter requires the platoon of four highly skilled and experienced class action lawyers from two different firms.

***9** Factually, this case involved whether the combustion air in utility rooms of a class of a few hundred homes met the standard of the New Jersey building code. It was argued by defendant that if such a defect existed at all, it was a de minimis variation from the standard. The potential problem was first discovered when homeowners were having repairs in the utility rooms and the issue arose on inspection by the Township inspector.

While the initial complaint of plaintiffs listed numerous causes of action, by the time of trial they had abandoned all of the causes, except for a violation of the Consumer Fraud Act. Plaintiffs abandoned their claim for damages and were seeking an equitable remedy by way of court-ordered remedy to such members of the class who had a violation and wanted it fixed. The Township code official has not sought a mandatory fix.

This case involved basic statutory and administrative code interpretation and determination of violations that are not novel or complex to determine. An inspection of the utility room in a participating home will quickly and definitively determine any violation.[7] The fact that the parties retained expert witnesses is certainly not unusual in a construction defect case.

This case has not raised any novel or complex theories of law. In the court's opinion, the need for plaintiffs to involve two law firms was excessive. There is nothing in the certifications that suggest that one firm or the other needed the expertise of the other to conduct this case. None of the certifications suggest specifically or generally that this case raised such complex or novel issues that one firm needed professional help from the other. In fact, the wide-ranging experience of all the lawyers demonstrates that either of these firms would be independently capable of representing this class well in what involved a fairly uncomplicated fact pattern. The reality is that these two firms divided the representation among themselves, resulting in not only duplication of services, such as review of documents and conferences among themselves, but also of services that were not efficiently provided because of the natural accrual of time and overhead between independent organizations.

> *(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;*

Plaintiffs' counsel failed to address this factor. The inference is that the complexity and nature of this case undertaking did not prevent either firm from representing other clients.

> *(3) The fee customarily charged in the locality for similar legal services;*

As discussed above, the court is satisfied that the hourly rates charged by the Shabel firm are in line with rates for similar services within the community in Burlington and Camden Counties. However, the rates of the Fuoco firm, and particularly the rate of Mr. Fuoco, for a case of this type is excessive. In the certification it is pointed out that Mr. Fuoco has participated in over 100 class actions involving ERISA, civil rights, consumer fraud and other causes of action. The highest rate he has had approved is $420. Here he seeks a rate of $495 without explanation as to what makes this case more complex than the example cases he has listed.[8] Clearly, with expertise should come efficiency. His firm performed only 255.65 hours out of the total of 1085 hours expended by both firms together. The supporting certifications of independent counsel state that $420 is in the range of rates for the community. Because of the lack of factual or legal complexity, the court finds that $420 is reasonably in the range for a case of this nature in the Burlington and Camden County community. The burden here is on counsel to demonstrate his fees follow the well-established standards.

***10** *(4) The amount involved and the results obtained;* The court is of the opinion that the results obtained by plaintiffs are significant. Plaintiffs have secured the opportunity to have the utility room in their homes inspected and a determination made as to whether it is in violation of the air combustion standard to which the parties and the Township have agreed. If there is a violation, defendant will make the necessary improvements at its expense. While the evidence at trial and in the pleadings is unsettled as to the exact expense, it has been suggested at various times by the parties that the cost could range from a few dollars to several hundred dollars per home.

> *(5) The time limitations imposed by the client or by the circumstances;*

The certifications do not address that there were any time limitations imposed by the client or circumstances.

> *(6) The nature and length of the professional relationship with the client;*

The certifications do not address this factor.

> *(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;*

The experience and skill of the lawyers was addressed in the certifications and has been heretofore discussed above.

> *(8) Whether the fee is fixed or contingent;*

While counsel did not include a copy of the contingent fee agreement to the fee application, they have certified that they have taken the case based solely upon a contingent fee arrangement, at no cost or risk to the class. Fees and costs are only recoverable from defendant, to the extent the court permits.

The court also must satisfy itself that there is legal authority to shift the fees. Here plaintiffs' rely upon *N.J.S.A.* 56:8–19 of the Consumer Fraud Act. This provision (emphasis added) provides:

> *Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefore in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.*

The primary relief sought and received by plaintiffs through this litigation, which concluded in a settlement, was equitable in nature. In fact plaintiffs abandoned any claim for damages that was originally part of their initial pleadings. Defendant entered the settlement without admission that it violated the Consumer Fraud Act. The question to be resolved is whether there can be fee shifting under the Consumer Fraud Act when the parties agree to an equitable solution, and when there is no court-determined or admitted violation of the Consumer Fraud Act. The answer must be in the affirmative. The words of the Consumer Fraud Act quoted above show the Legislature contemplated not only a private cause of action for monetary damages, but actions for equitable relief. The statute provides for the award of reasonable attorneys' fees in all actions under this section. *N.J.S.A.* 56:8–19. In Consumer Fraud actions, fee shifting applies in favor of the prevailing party when equitable remedies are achieved even if no monetary damages are awarded or agreed to in the case of a settled case. *See* *New Jerseyans for a Death Penalty Moratorium v. New Jersey Dep't. of Corrs.,* 185 *N.J.* 137, 883 *A.*2d 329 (2005) (where fee shifting was permitted in a non-damage case, under the Open Public Records Act).

***11** Defendant, though, argues in its brief and oral argument and insists that since it has not admitted liability under the act and the individual inspections have not yet been completed, that fee-shifting cannot apply. In other words, defendant maintains that in this settlement the plaintiffs are not the prevailing party for counsel fee purposes.

Clearly, the success of plaintiffs in this settlement demonstrates that they have prevailed. As stated in *H.I.P. v. K. Hovnanian at Mahwah VI, Inc.,* 291 *N.J.Super.* 144, 154, 676 *A.*2d 1166 (Law Div.1996), "Fundamentally, a prevailing party is one who achieves a substantial portion of the relief it sought." As in the instant case, the plaintiff there "achieved via settlement and consent order qualitatively and as a matter of principle, a large portion of what it hoped for by way of judgment." *Id.*; *see also, Ashley v. Atl. Richfield Co.,* 794 *F.*2d 128, 131 (3d Cir.1986); *Warrington v. Village Supermarket, Inc.,* 328 *N.J.Super.* 410, 417–19, 746 *A.*2d 61 (App.Div.2000).

The landmark case in New Jersey on this subject is *Rendine v. Pantzer,* 141 *N.J.* 292, 661 *A.*2d 1202 (1995). The analysis first requires the court to determine the lodestar fee by ascertaining the number of hours reasonably expended multiplied by a reasonable hourly rate. In the instant case both of plaintiffs' law firms together expended 1,085.60 hours of lawyer time. As previously stated, the use of two law firms to handle a case where there were no novel legal issues or complex factual or scientific issues was inappropriate.[9] While plaintiffs have prevailed substantially, in obtaining the right to have the class members' homes inspected on a voluntary basis, it is still far from clear what this legal exercise will practically accomplish, as there is no evidence yet as to how many homes will participate in the settlement, and of those who do participate how many violations may be found.

Undoubtedly, plaintiffs' attorneys also believe that their billings are excessive. While they gave no reason, they arbitrarily decided to reduce the application by ten percent across the board.

The court has examined the billing certifications submitted, entry-by-entry. The Shabel firm's billings are chronological and generally detailed. The Fuoco firm's billings are broken down by task and provide less detail. In either case, it is clear that significant time was spent in duplicative effort and consulting between the lawyers. For example, on October 16, 2002, Mr. DeNittis made an entry for a site inspection of *two* homes; he took photos and measurements and spoke to the parties, and the time billed for that task is 6.7 hours. Thereafter, there is an entry by Mr. Shabel for the same date that says, "site inspection w/ Steve DeNittis" for another 6.7 hours.[10] This represents a joint charge of $4321.50 for going to two homes and looking at their utility rooms. The billings are replete with services that both these attorneys partnered, but which were unnecessary given the nature of this case.

***12** Throughout the billings are charges for conferences between Mr. Shabel and Mr. DeNittis. For example, on November 19, 2002, they each charged 1.2 hours for a conference to discuss prior phone calls and again on November 21, 2002, they each charged 1.1 hours for a conference between themselves. These entries do not disclose what the conferences were about and are examples of the significant intra-office communication, which is not justified. On March 11, 2004, each of the attorneys charged 0.75 hours for reviewing the same fax from the Township solicitor. On March 20, 2005, and March 21, 2005, Mr. DeNittis spent 16 hours reviewing the "entire file." On March 22, 2005, Mr. Shabel spent 4 hours reviewing a draft witness list, an exhibit list and "important documents."

On March 23, 2005, Mr. DeNittis spent 6 hours on research and drafting on a motion in limine regarding Carl Walter. On March 24, 2005, 8.2 hours were spent drafting the Carl Walter motion and research on Vinciguerra report. On March 25, 2005, there was a charge for 6.2 hours for a draft of a motion in limine for Vinciguerra report. On March 26, 2005, 3.2 hours for research on whether the case is a jury trial or bench trial was billed, and on the same day another 8 hours to draft a third motion in limine. On March 28, 2004, there was a charge of 0.3 hours to "circulate" the motions to the other three attorneys. On the same day, March 28, Mr. Shabel charged 6 hours to review the motions. Also on March 28 Mr. Shabel charged 2.5 hours to have a conference with Mr. DeNittis, who also charged 2.5 hours for the same conference. Again, no detail is given of the purpose of such meeting. As well, the Fuoco firm also reviewed these motions.

On the next day, March 29, Mr. DeNittis charged 1 hour for a conference with Mr. Shabel and Mr. Shabel charged an hour for the same conference.[11] On March 30, 2005, the two attorneys each billed 1.5 hours for meeting with each other, with little detail. On April 1, 2005, Mr. DeNittis charged for 4 hours to "Review defendant's responses to Requests for Admissions, all of defendant's discovery requests." Likewise Mr. Shabel charged on the same day 3.5 hours for the exact same service. These are only illustrations of the types of entries that demonstrate to the court the inefficiencies and unjustifiable expenditure of time that runs throughout the Shabel firm billings. A review of these billings show no attempt to manage the time spent in any efficient manner.

Likewise, many of the billings for extensive communication between the two law firms appear unnecessary, as will be discussed.

As to the time expended by the Shabel firm, the court after a careful review of the time entries concludes that Mr. Shabel's time should be reduced from 177.50 hours to 100 hours and Mr. DeNittis' time should be reduced from 652.45 hours to 400 hours.

The Fuoco billings are set up by task. There are numerous tasks such as conference, conference with co-counsel, research, review, telephone, brief writing, and brief writing: class actions issues, among others. It is clear that this firm had relatively little interaction with the client class. Undoubtedly, the firm provided important and valuable services in the research and brief writing areas, but extensive conferences, telephone conferences and review of other lawyers' work appears out of line, certainly not completely necessary for a case of this nature. Of the 38.95 hours that Mr. Fuoco spent on this case, 7.85 hours was for reviewing documents that in many cases were prepared by one of the other lawyers or reviewed by other lawyers. It should be noted that the description of the various reviews is not informative. The entry merely states "review motions and briefs," or "review class issues," or "review discovery issues." Such a description makes it difficult if not impossible to cross check the entry.

***13** Like Mr. DeNittis, in the Shabel firm, Mr. Osefchen provided the majority of the services for his firm. While his services appear to be mostly in the area of research and brief preparation, under the task of "Conference" there are nearly 15 hours of entries showing conferences and telephone calls with the Shabel firm, with only a few exceptions. The entries provide little explanation. In addition, there is a task called "Conference co-counsel" with another 8.75 hours of telephone calls and conference with the Shabel firm, again with little explanation. Scattered throughout the billings there are further conferences with the Shabel firm and a task called "Strategy and Analysis," which also contains more conferences with the Shabel firm. The court does not question the fact that the two firms needed to communicate, but the nature of this case and the relief that was being sought did not justify the need for two firms with two separate overheads, to conduct such extensive inter- and intra-firm communication.

After carefully considering the time entries of the Fuoco firm, the court is reducing the hours expended by Mr. Fuoco from 38.95 hours to 25 hours and the time expended by Mr. Osefchen from 216.70 to 150 hours. The time reductions for these firms represent, in the court's opinion, a more appropriate expenditure of time in a case of this nature.

As indicated heretofore, clearly counsel jointly also recognized that their bill for services is too high, as they reduced their proposed lodestar voluntarily by ten percent.[12] They also further reduced the billings for joint appearances of counsel, when more than two attorneys appeared in court. While the court does not want to place their good faith in the category of "no good deed goes unpunished," the court believes that the excessive time expenditures warrants a further reduction.

Having reviewed the hourly rates, and the time expended, the court finds, with the appropriate adjustments, the lodestar for this case to be as follows:

PSF	From 38.95 Hrs to 25 Hrs	@	$420.00	=	$ 10,500.00
NS	From 177.50 Hrs to 100 Hrs	@	$395.00	=	39,500.00
SD	From 652.45 Hrs to 400 Hrs	@	$250.00	=	100,000.00
JAO	From 216.70 Hrs to 150 Hrs	@	$257.00	=	38,550.00

The lodestar is therefore $188,550. The Court finds that this sum represents the time reasonably spent by plaintiffs' lawyers multiplied by the hourly rates determined above in this case. The analysis of the time expenditures is not to suggest that there was an intentional effort on the part of counsel to inflate their bills; rather it demonstrates a lack of coordination and efficiency. This may be the result of having two independent firms representing the same client. Plaintiffs' counsel in their application did not seek costs for paralegal services, which they specifically removed.

Defendant argues that the potential violations are *de minimis,* and should inspections find violations, that the sum of money necessary to fix the violations is minor as compared to the significant fees that plaintiffs' counsel seeks. Our Supreme Court has substantially adopted the rule that fee-shifting statutes do not require proportionality between damage recoveries and counsel fee awards. However, at the same time the Court has stated:

> ***14** *Nevertheless, if the specific circumstances incidental to a counsel-fee application demonstrate that the hours expended, taking into account the damages prospectively recoverable, the interest to be vindicated, and the underlying statutory objectives, exceed those that competent counsel reasonably would have expended to achieve a comparable result a trial court may exercise its discretion to exclude excessive hours from the lodestar calculation.*
>
> [*Rendine v. Pantzer,* supra, 141 *N.J.* at 336, 661 *A.*2d 1202.]

Additionally, the Court continued: "Similarly, a trial court should reduce the lodestar fee if the level of success achieved in the litigation is limited as compared to the relief sought." *Id.* at 336, 661 *A.*2d 1202.

On the first point, while this is not a damage award case, and the remedy is equitable, the court in the discussion above has already taken into consideration the nature of this case, its lack of legal and factual complexity, and the homeowners' interests should they choose to avail themselves of the settlement provisions. The conclusion has been a reasonable reduction in both the hours and where appropriate, the hourly rate. The court concludes that the statutory objective of the Consumer Fraud Act has been accomplished, in giving these homeowners the opportunity to correct a potential air combustion violation, which while minor in cost to fix, could have significant impact on property and life if left unaddressed.

With regard to the second point concerning the level of success achieved, the Supreme Court has provided further guidance. The Court has "not established a per se requirement that there be a close relationship between recovery and fees awarded." *New Jerseyans For a Death Penalty Moratorium v. New Jersey Dep't. of Corrs., supra,* 185 *N.J.* at 154, 883 *A.*2d 329 (citing *N. Bergen Rex Transp., Inc. v. Trailer Leasing Co.,* 158 *N.J.* 561, 574, 730 *A.*2d 843 (1999)).

The consideration of the level of success is to be qualitative and not quantitative. "The fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the law suit." *Id.* at 154, 883 *A.*2d 329 (citing *Hensley v. Eckerhart,* 461 *U.S.* 424, 435, 103 *S.Ct.* 1933, 1939, 76 *L.Ed.*2d 40, 50 (1983)).

In determining the qualitative success the court should not merely add up the counts of the complaint and determine which counts were successful. Plaintiffs' complaint had many counts and varying theories of recovery, but following discovery and motions for summary judgment, the underlying focus on the Consumer Fraud Act surfaced. Plaintiffs pursued that cause of action up until the parties entered into a settlement following the commencement of trial. The stated goal of this suit was to correct what is perceived to be a potential air-combustion problem in the utility rooms of the class. That goal was initially pursued on several legal and equitable theories.

Ultimately, the goal was successful in that a settlement was reached where plaintiffs have achieved substantially the relief they sought. While defendant insists that plaintiffs have not prevailed in the settlement, such insistence is without support in the record. What became clear in the record as this case unfolded is that on many occasions defendant could have settled the merits of the case on terms similar to the present settlement. Defendant initially chose to proceed with the litigation, which was its right to do. Once trial had begun, defendant could have continued the trial and awaited a decision of the court, which may or may not have supported its position. Instead, defendant capitulated to the relief that plaintiffs sought all along, while not admitting to liability. The fact remains that plaintiffs prevailed in securing the relief to which they felt entitled and for which they brought the lawsuit. In the court's opinion, plaintiff achieved a considerable degree of qualitative success and on this basis the lodestar should not further be reduced on this basis.

Enhancement:
***15** The court has determined the lodestar to be $188,550. *Rendine* requires a consideration of "whether to increase that[the] fee to reflect the risk of nonpayment in all cases which the attorney's compensation entirely or substantially is contingent on a successful outcome." *Rendine, supra,* 141 *N.J.* at 337, 661 *A.*2d 1202. In this case it is represented that the attorneys took this case on a complete contingency. That is to say, that their clients would not be expected to pay any counsel fees under any circumstances. Likewise, the clients are not responsible to pay any of the out-of-pocket costs of suit.

In addition, there is no fund in court, and no damages by the time of trial were sought. Plaintiffs only sought equitable relief under the Consumer Fraud Act to provide them with the option to have their respective utility rooms inspected for air combustion violations and to have the defendant builder correct the violation at the builder's expense.

The Court in *Rendine,* in requiring a risk of non-payment consideration, also permits a trial court, in its discretion, to consider the likelihood of success in the enhancement consideration.

In examining the risk of nonpayment, plaintiffs' counsel had a significant risk. They had agreed with their clients that if the case were unsuccessful, they (the attorneys) would not be paid. While the court would not classify this case as "complex" in its facts or the law to be applied, in any class action there is a significant level of legal activity required. It is not disputed that should the inspections disclose air combustion violations the cost of the fix for an individual utility room will be fairly inexpensive, perhaps a few hundred dollars, or even much less. While proof by a plaintiff of difficulty in hiring an attorney is not a prerequisite to a contingency enhancement, in a case such as this where the relief is equitable in nature and the potential recovery is potentially minimal, it is not beyond reason that the utility room conditions might never be addressed without such a complete contingency arrangement provided by plaintiffs' attorneys, at the risk of receiving no compensation should the case have failed on the merits.

Defendant's counsel argues that plaintiffs' counsel have taken no steps to minimize the risk, but does not suggest what those steps might have been. To the contrary, the settlement that was reached by the parties was in substantial part available to defendant from the beginning of these proceedings. As in *Rendine,* plaintiffs' counsel's risk actually increased because of defendant's decision to litigate the case to trial, when there were natural points along the way that this same settlement may well have occurred. As early as February 3, 2003, plaintiffs' counsel, in a letter to defendant's counsel, made an offer to settle the litigation on suggested terms that are essentially the same as the resolution the parties entered into, only nearly two-and-a-half years later and after further litigation.

***16** Generally, defendants must not be deterred from defending themselves, but clearly when this case was first filed there was a calculation by defendant not to settle, and a second calculation to settle the matter two-and-a-half years later after the trial began. This strategy is clearly the prerogative of defendant and its counsel, but the effect was to heighten the risk to plaintiffs by way of outlay of additional time and expense.

Likewise, "cases in which the likelihood of success is unusually strong, a court may properly consider the inherent strength of the prevailing party's claim in determining the amount of contingency enhancement." *Rendine, supra,* 141 *N.J.* at 341, 661 *A.*2d 1202. Plaintiffs faced a risk of non-payment because of the nature of the equitable relief they sought. Nevertheless a court finding that there was a clear code violation, even a de minimis violation, which even defendant conceded, was a likely possibility. Had the trial continued to the end, and the Court found violations, the natural but not necessarily exclusive remedy would have been an Order to the defendant to inspect and fix the violations, which was the essential relief that the parties settled upon. While of course very few if any cases are "air tight," a review of the facts in this case as presented through certifications, the testimony at trial, and the building code provisions, leads the court to conclude that plaintiffs' likelihood of success was very good. This finding offsets to some degree the risk of the contingent fee arrangement.

Our Supreme Court in *Rendine, supra,* 141 *N.J.* at 343, 661 *A.*2d 1202 states:

> *We conclude that contingency enhancements in fee shifting cases ordinarily should range between five and fifty percent of the lodestar fee, with the enhancement*

> *in typical contingency cases ranging between twenty and thirty five percent of the lodestar.*

The nature of this class action case is one of limited public interest, in that it affects a relatively small universe of people who will participate, anywhere from a handful to several hundred. No new legal theory or even extensions of legal principles are involved. This case is a consumer case with a limited but important impact on the homeowners who fall into the class. After considering the risk of nonpayment as set forth above, the court finds that this case falls into a category best described as on the lower end of the moderate range for enhancement. Therefore, the court finds that a twenty percent enhancement of the lodestar is an appropriate enhancement in a fee shifting case of this nature.

The court in summary finds the lodestar to be $188,550. The enhancement shall be twenty percent or $37,700.10 for a total fee of $226,260 plus out-of-pocket expenses of $23,474.09,[13] for a total judgment of $249,734.09, payable by J.S. Hovnanian and Sons, LLC. Counsel for plaintiffs shall prepare a judgment consistent with this decision.

All Citations

Not Reported in A.2d, 2006 WL 1520751

Footnotes

1 The term air combustion refers to the amount of air or airflow into and out of an enclosed utility room that contains natural gas-burning appliances such as the home's heater or boiler, or gas clothes dryer. The applicable building codes have set standards to insure there is adequate ventilation to these appliances to prevent incomplete combustion and the buildup of various gases with their inherent dangers to the occupants of the home.

2 Actually, this reference in the December 7, 2005, letter was in error. Plaintiffs' counsel meant to say the *Central Record.* In response to a written inquiry by the court, Mr. DeNittis explained in his letter of January 24, 2006, that his earlier letter erroneously said the notice was published in the *Burlington County Times,* when in fact it was published in *The Central Record.*

3 This term refers to a regulatory interpretation approach to analyzing air combustion airflow, approved by the New Jersey Department of Community Affairs as part of the Stipulation of Settlement. This approach appears to provide more flexibility for finding compliance with the applicable construction code.

4 The quality of the description is not uniform, as will be discussed.

5 It should be noted that all three certifications are based on hourly rates of $420 for Mr. Fuoco and $257 for Mr. Osefchen.

6 This adjustment apparently does not consider which of the attorneys provided the services.

7 Even the potential repairs if a violation is found are not complex—replacing a door or a vent panel, for example.

8 Mr. Fuoco did not co-sign the certification for this application.

9 Because the contingent fee agreement was not provided the court, it is unclear as to whether both firms are parties to the agreement.

10 According to their letterhead, the Shabel firm is located in the adjoining community to the Hovnanian development.

11 While obviously a mistake, the March 29 entry of Mr. Shabel for the one hour conference with Mr. DeNittis actually states it was a conference with “Norman Shabel.”

12 There is no explanation as to why they selected ten percent as opposed to a different percentage.

13 Defendant’s counsel posed no objection to these costs and they appear to the Court to be appropriate.

End of Document

EXHIBIT "12"

2012 WL 2813813
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

John Ivan SUTTER, M.D., P.A., on behalf of himself and all others similarly situated,
Plaintiff–Respondent/Cross–Appellant,
and
Mario Criscito, M.D., Niranjan V. Rao, M.D., Robert I. Oberhand, M .D., and Alexander Dlugi, M.D.,
Plaintiffs/Objectors–Appellants/Cross–Respondents,
v.
HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY, Defendant–Respondent.
Union County Medical Society, Mercer County Medical Society, New Jersey Pediatric Society, New Jersey Association of Osteopathic Physicians and Surgeons, American College of Emergency Physicians, Vascular Society of New Jersey, New Jersey Pathology Society, Radiological Society of New Jersey, New Jersey Academy of Ophthalmology, New Jersey State Society of Anesthesiologists, Orthopedic Surgeons of New Jersey, and the New Jersey Chapter of the American College of Cardiology,
Appellants/Cross–Respondents.

Argued March 21, 2012.
|
Decided July 11, 2012.

On appeal from Superior Court of New Jersey, Law Division, Essex County, L–3685–02.

Attorneys and Law Firms

Neil L. Prupis argued the cause for appellants/cross-respondents Niranjan V. Rao, M.D., Robert I. Oberhand, M.D. and Alexander Dlugi, M.D. (Lampf, Lipkind, Prupis & Petigrow, and Chasan, Leyner & Lamparello, P.C., attorneys; Mr. Prupis, Bassel Bakhos, and Steven L. Menaker, on the joint brief).

Charles X. Gormally argued the cause for appellants/cross-respondents New Jersey Association of Osteopathic Physicians and Surgeons, American College of Emergency Physicians, Vascular Society of New Jersey, New Jersey Pathology Society, Radiological Society of New Jersey, New Jersey Academy of Ophthalmology, New Jersey State Society of Anesthesiologists, Orthopedic Surgeons of New Jersey, and New Jersey Chapter of the American College of Cardiology (Brach Eichler, L.L.C., attorneys; Mr. Gormally, on the joint brief).

Eric D. Katz argued the cause for respondent/cross-appellant John Ivan Sutter, M.D., P.A. (Mazie Slater Katz & Freeman, L.L.C., attorneys; Mr. Katz and David A. Mazie, of counsel and on the brief; John D. Gagnon, on the brief).

John M. Murdock (Benton Potter & Murdock, P.C.) of the Virginia and Washington D.C. bar, admitted pro hac vice, argued the cause for respondent Horizon Blue Cross Blue Shield of New Jersey (Epstein Becker & Green, P.C., and Mr. Murdock, attorneys; Mr. Murdock and Maxine H. Neuhauser, of counsel and on the brief; Michael J. Slocum, on the brief).

Kern Augustine Conroy & Schoppman, P.C., attorneys for appellants/cross-respondents Mario Criscito, M.D., Union County Medical Society, Mercer County Medical Society, and New Jersey Pediatric Society (Steven I. Kern, on the joint brief).

Before Judges FUENTES, KOBLITZ and HAAS.

Opinion

PER CURIAM.

***1** This case returns to us after we ordered a hearing on remand in *Sutter v. Horizon Blue Cross Blue Shield of New Jersey,* 406 *N.J.Super.* 86 (App.Div.2009). It involves the settlement of a class-action lawsuit instituted on April 12, 2002, by New Jersey physicians against Horizon Blue Cross Blue Shield of New Jersey, Inc. (Horizon), a major medical insurance provider. The objecting class-member physicians (objectors) appeal from the June 16, 2010 order, arguing that the settlement was not fair and reasonable and that the attorneys' fees awarded to class counsel were not properly considered under the law. Plaintiff class cross-appeals, arguing that appellants' claims regarding the fairness of the settlement should be dismissed as they admitted in another proceeding that the settlement provided value to them. After reviewing the record in light of the contentions advanced by both sides on appeal, we affirm.

We incorporate in this opinion the pertinent facts from our prior opinion. *Sutter, supra,* 406 *N.J.Super.* at 95–96. The original suit alleged that Horizon delayed and impeded compensation to the doctors whose patients were covered by Horizon. It was settled pursuant to an agreement that Horizon would simplify and expedite its claims processing and provide other relief through various specific measures. No financial relief was provided for class members.

Teresa Waters was retained by plaintiffs to value the settlement. Ms. Waters has a Ph.D. in economics with a concentration in health economics and industrial organization. She completed a valuation of the settlement's worth in 2006.

After our remand, Waters completed a new valuation of the settlement and testified at the fairness hearing. Waters worked with Research and Polling, Inc. (RPI), a survey research company, to construct a telephone survey about the value of the settlement to the class members. Waters calculated the value to the class in time saved by the more efficient insurance claim processing procedures. Her approach attributed value to time; in other words, a physician's billing clerk could spend his or her time performing other tasks if not handling Horizon issues. Overall, Waters opined that the settlement was worth $35.01 million for a class of just over 20,000 physicians, which worked out to $1741 per physician for the five-year period, or $348 per physician per year. The objectors did not present an expert, although they cross-examined Waters about her assumptions and technique.

Testimony was also taken at the remand hearing regarding class counsel's fee request. Class counsel Eric D. Katz testified that the firm had a contingent fee agreement with Sutter, as it did with "virtually all" of its other clients. Katz had "no idea" about his hourly billing rate. His partner, David A. Mazie, testified that three years earlier, in a declaratory judgment action, in addition to his contingency fee, the court awarded him an hourly rate of $525 an hour, which was an "arbitrary number" that he chose for the fee application. Other than that, he did not have any hourly clients; he handled only contingency fee cases.

***2** The judge admitted into evidence a certification submitted by Mazie to the United States District Court for the District of New Jersey in connection with *Beye v. Horizon,* 568 *F.Supp.*2d 556 (D.N.J.2008), in which he and a former partner were arguing over the division of fees, which showed hourly rates for Mazie ranging from $375 to $560, and for Katz from $275 to $435 in 2006–2008. Two other attorneys in the office billed at about $360 per hour, one at $425 per hour, and several billed between $160 and $270 per hour. Mazie claimed that these were only arbitrary "placeholder" rates necessitated by the office computer program, not actual rates billed to clients. He then said, "[I]f I were an hourly lawyer, and I'll concede this, these are the rates that we would charge."

After a five-day remand hearing, the judge issued a revised written opinion, incorporating the findings he made in the first decision and confirming the settlement, but reducing counsel fees and costs by 28% from $6,500,000 to $4,685,285.

I

In their cross-appeal, plaintiffs argue that the objectors' appeal regarding the settlement's value should be dismissed in its entirety because they admitted that one settlement provision had a value of at least $30 million. This argument rests on an incomplete reading of the objectors' pleading in a companion case, in which they indicated that plaintiffs had valued this provision in excess of $30 million. This argument is without sufficient merit to warrant discussion in a written opinion. *R.* 2:11–3(e)(1)(E).

II

The objectors argue that the judge should not have approved the settlement as it provided nothing of value to the class members. The court can approve a settlement "only after a hearing and on finding that the settlement ... is fair, reasonable, and adequate." *R.* 4:32–2(e)(1)(C). "If the settlement is fair and reasonable, it may be approved even though individual members of the class refuse to consent." *Chattin v. Cape May Greene,* 216 *N.J.Super.* 618, 627 (1987) (citations omitted). A settlement may be approved even if the majority of the class disapproves of its terms, but the overwhelming opposition of class members to a proposed settlement "is a significant consideration militating against court approval." *Id.* at 627–28 (citing *Pettway v. American Cast Iron Pipe*

Co., 576 *F.*2d 1157, 1215–18 (5th Cir .1978), *cert. denied,* 439 *U.S.* 1115, 99 *S.Ct.* 1020, 59 *L. Ed.*2d 74 (1979)).

The court has "considerable discretion" in determining whether a settlement is fair and reasonable, and, thus, its determination will be reversed only for an abuse of discretion. *Bryan v. Pittsburgh Plate Glass Co.,* 494 *F.*2d 799, 801 (3d Cir.) *cert. denied,* 419 *U.S.* 900, 95 *S.Ct.* 184, 42 *L. Ed.*2d 146 (1974);[1] *Chattin, supra,* 216 *N.J.Super.* at 628. An appellate court may find an abuse of discretion where the trial court's decision rests upon "a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 *F.*3d 768, 783 (3d Cir.), *cert. denied,* 516 *U.S.* 824, 116 *S.Ct.* 88, 133 *L. Ed.*2d 45 (1995). An appellate court may not substitute its findings for that of the trial court; it may only make an assessment of whether there is enough evidence to support such findings. *Cox v. Keystone Carbon Co.,* 894 *F.*2d 647, 650 (3d Cir.), *cert. denied,* 498 *U.S* . 811, 111 *S.Ct.* 47, 112 *L. Ed.*2d 23 (1990). Further, "[w]hen there are two permissible views of the evidence, the [trial court's] choice of one view cannot be clearly erroneous." *Ezold v. Wolf, Block, Schorr & Solis–Cohen,* 983 *F.*2d 509, 525 (3d Cir .1992).

A

***3** Objectors first argue that the approval of the settlement should be reversed because the judge did not consider the impact of a settlement from a similar case in Florida, *Love v. Blue Cross & Blue Shield Ass'n,* No. 03–21296, (S.D. Fla. April 20, 2008).

The *Love* lawsuit was instituted in the United States District Court for the Southern District of Florida after the *Sutter* suit was begun and raised largely the same issues against Horizon. The parties in *Love* reached a settlement agreement similar to this one, and the court entered a final order approving the *Love* settlement on April 20, 2008, which was after the *Sutter* final approval (February 2, 2007), but before our decision remanding for an expanded fairness hearing (March 25, 2009).

On remand, the judge acknowledged objectors' contention that he should consider the *Love* settlement when determining the fairness of this settlement "because *Love* settled (with a settlement agreement encompassing many of the same terms as the *Sutter* settlement), [the objectors] are receiving nothing of value in this matter." He rejected this argument, writing that,

> it would be improper to allow [o]bjectors to argue in hindsight that they have received nothing of value because of a subsequent settlement. The interplay between the *Sutter* settlement and *Love* settlement is nothing new to the parties and was a risk anticipated during the *Sutter* settlement negotiation. Furthermore, it could be equally argued that the *Love settlement may not have been as valuable had they not copied provisions from the Sutter settlement.*
>
> It should be noted that the *Love* settlement was not a factor that the Appellate Division directed this [c]ourt to consider on remand; no party raised this concern before the Appellate Division despite the fact that the *Love* settlement occurred while the appeal was going on. Nevertheless, if this [c]ourt considers any impact of the *Love* settlement, it would be that the [c]lass is likely to be without any cause of action if this settlement agreement is not approved, because *Love* potentially extinguishes the *Sutter* cause of action.
>
> [emphasis in the original.]

We agree and adopt the reasoning of the judge in this regard. He considered the *Love* settlement as it reasonably applied to the issues.

B

Objectors argue that the proposed settlement fails under the analysis set forth in *Girsh v. Jepson,* 521 *F.*2d 153 (3d Cir.1975), which is to be used when determining whether a class action settlement is fair and reasonable.[2] In *Girsh,* the United States Court of Appeals for the Third Circuit set forth nine factors to consider in determining whether a class action settlement is fair and reasonable. Those factors are:

> (1) the complexity, expense and likely duration of the litigation;
>
> (2) the reaction of the class to the settlement;
>
> (3) the stage of the proceedings and the amount of

discovery completed;

***4** (4) the risks of establishing liability;

(5) the risks of establishing damages;

(6) the risks of maintaining the class action through the trial;

(7) the ability of the defendants to withstand a greater judgment;

(8) the range of reasonableness of the settlement fund in light of the best possible recovery; and

(9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

[*Id.* at 157.]

The proponents of the settlement bear the burden of proving that the factors weigh in favor of approval. *In re Gen. Motors, supra,* 55 *F.*3d at 785–86. However, the findings required by the *Girsh* test are factual and will be upheld unless they are clearly erroneous. *Id.* at 786.

In his original opinion, the judge reviewed each of the *Girsh* factors in depth. The original appeal claimed that the *Girsh* factors were not properly addressed. *Sutter, supra,* 406 *N.J.Super.* at 99. Although we noted that assertion, we did not substantively review appellants' arguments regarding the *Girsh* factors.

In his second opinion, the judge noted that we had acknowledged his "extensive" review of the *Sutter* settlement. He therefore incorporated his February 2007 opinion into his second opinion and did not readdress the *Girsh* factors. We affirm substantially for the reasons expressed by the judge in his written opinion in which he reviewed each factor and the facts applicable to those factors.

The judge noted that, conservatively, there were 18,000 members of the class. There were 991 timely requests for exclusion and 74 untimely requests. Only six individuals and various medical societies, which are not members of the class, objected to the settlement. The judge's *Girsh* findings were not "clearly erroneous." *In re Gen. Motors, supra,* 55 *F.*3d at 785.

C

Objectors also attack the settlement by alleging flaws in Waters' October 2006 valuation and claiming that the judge should have considered these shortcomings in ruling on Waters' credibility and trustworthiness regarding her 2009 report. We find no abuse of discretion in the judge's determination to view Waters' more recent and more scientific report without reference to her earlier report. Although precise results may not be obtained through social science techniques, such as a telephone survey asking the responders to approximate future time-saving, it is an acceptable method of determining value in a case such as this. Objectors presented no expert testimony to the contrary.

The judge recognized that the use of questions regarding prospective estimates "are regularly used in survey research, and both governmental and private entities rely on such surveys to undertake future planning and forecasting." That finding was based on the evidence, as RPI's president testified that asking respondents to prospectively estimate something is "common" and "perfectly fine" in the survey field. He cited examples of the University of Michigan and the federal government using similar approaches in surveys. Because the reforms had not been implemented, the survey respondents would have had no basis on which to respond other than their opinion of the prospective savings.

***5** Next, appellants argue that Waters' evaluation was flawed because the survey assumed that any savings of time would translate to dollar savings. The judge's opinion accurately reflected the credible testimony that the business reforms would have "value" to physicians, either in actual dollars recouped or in time saved that would lead to fewer staff, or allow personnel to focus on other matters.

We find the other issues raised by objectors regarding Waters' evaluation to have insufficient merit to discuss in a written opinion and affirm substantially for the reasons expressed in the judge's opinion. *R.* 2:11–3(e)(1)(E).

The record provides ample support for the judge's decision that the settlement is fair.

III

Objectors further maintain that the judge erred in multiple respects by awarding counsel fees and costs to class counsel. As part of the settlement, defendant agreed to pay a maximum of $6.5 million in counsel fees and costs. The class does not receive the difference between the agreed-upon cap on fees and the amount awarded by the judge.

Rule 4:32–2(h) states that "in an action certified as a class action, an application for the award of counsel fees and litigation expenses, if fees and costs are authorized by law, rule, or the parties' agreement, shall be made in accordance with *R.* 4:42–9." *Rule* 4:42–9(b) requires that an application for counsel fees be supported by an affidavit addressing pertinent factors, including those listed in *RPC* 1.5(a). *RPC* 1.5(a) lists "factors to be considered in determining the reasonableness of a fee," which includes the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer:
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent.

There are two different methods for determining the fee—the lodestar method and the percentage of recovery method. *In re Gen. Motors, supra,* 55 *F.*3d at 820–21. Each has "distinct attributes suiting them to particular types of cases." *Id.* at 821. A "court making or approving a fee award should determine what sort of action the court is adjudicating and then primarily rely on the corresponding method of awarding fees." *Ibid.* The ultimate choice of methodology rests within the court's discretion. *Ibid.*

The judge originally awarded class counsel $6 million in fees, plus $500,000 for unreimbursed costs, using the "percentage of recovery" method. *Sutter, supra,* 406 *N.J.* at 103. We determined that the judge did not adequately review the counsel fee application and remanded for reconsideration, suggesting that the lodestar method was more appropriate under the circumstances. *Id.* at 105–06.

***6** The lodestar method uses the number of hours reasonably expended by counsel as its starting point. *In re Gen. Motors, supra,* 55 *F.*3d at 821. The number of reasonable hours is then multiplied by an hourly rate appropriate for the region and the lawyer's experience to get the "lodestar." *In re AremisSoft Corp. Sec. Litig.,* 210 *F.R.D.* 109, 128 (D.N.J.2002); *Rendine v. Pantzer,* 141 *N.J.* 292, 333–34, 337 (1995). "[T]he trial court's determination of the lodestar amount is the most significant element in the award of a reasonable fee because that function requires the trial court to evaluate carefully and critically the aggregate hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application." *Rendine, supra,* 141 *N.J.* at 335.

The court "should satisfy itself that the assigned hourly rates are fair, realistic, and accurate, or should make appropriate adjustments." *Id.* at 337. The hourly rate should be based on the current figure to account for the delay in payment, rather than those rates in effect when the services were performed. *Id.* at 337. In determining the reasonable hourly billing rate, the court should consider the rate for such services given the geographical area, the nature of the services provided, and the experience of the lawyer. *In re AremisSoft, supra,* 210 *F.R.D.* at 134. The court should also evaluate the rate of class counsel in comparison to rates "for similar services by lawyers of reasonably comparable skill, experience, and reputation in the community." *Furst v. Einstein Moomjy, Inc.,* 182 *N.J.* 1, 22 (2004) (citation omitted).

"[A] thorough judicial review of fee applications is required in all class action settlements." *In re Gen. Motors, supra,* 55 *F.*3d at 819. This is because " 'a defendant is interested only in disposing of the total claim asserted against it [and] the allocation between the class payment and the attorneys' fees is of little or no interest to the defense.' " *Id.* at 819–20 (quoting *Prandini v. Nat'l Tea Co.,* 557 *F.*2d 1015, 1020 (3d Cir.1977)). Further, the "divergence in financial incentives ... creates the 'danger ... that the [class] lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees.' " *Id.* at 820 (quoting *Weinberger v. Great N. Nekoosa Corp.,* 925 *F.*2d 518, 524 (1st Cir.1991)). Therefore, there is an "especially acute need for close judicial scrutiny of fee arrangements" in class action suits. *Ibid.*

On remand, the judge reexamined the fee application under the lodestar method. With regard to the number of hours reasonably expended, the judge stated:

> In this case the plaintiff's counsel has presented a reasonably detailed list of hours expended by each participating attorney in the firm. This court having had the benefit of handling the case for many years was aware of the nature and extent of the contested litigation both before the settlement between the original parties and after the settlement with the objectors. With almost 10 years of litigation, this court finds that the detailed number of hours and nature of the services appears reasonable and the court will approve the 5,528 hours as detailed in the certification submitted by class counsel.

***7** The judge then addressed the "more difficult task" of determining a reasonable hourly rate, given that "neither party provided comprehensive information in support of what the appropriate lodestar rate should be." In the absence of such information, the judge relied on his "experience in fee applications" and familiarity with rates awarded in other class action suits. Taking into account the "complicated nature" of the litigation and "the experience and reputation of class counsel's firm," the judge applied a "blended rate" and calculated the lodestar to be $2,987,750.

Citing *Rendine, supra,* the judge noted that the multiplier should be in the twenty-five to thirty-five percent range and, based on the contingent nature of the case and the out-of-pocket expenses expended by counsel (more than $600,000), used "the higher end" multiplier of thirty-five percent to reach a total fee of $4,685,285.

Fee determinations will be disturbed on appeal "only on the rarest occasions, and then only because of a clear abuse of discretion." *Rendine, supra,* 141 *N.J.* at 317.

A

Objectors maintain it was error to award counsel current rates. As stated previously, the reason for using "current rates" is to account for the "delay factor" in contingent cases. *Rendine, supra,* 141 *N.J.* at 337. Although *Rendine* was a fee-shifting case, as was the case it cited as authority for using current rates, *Pennsylvania v. Delaware Valley Citizens' Council,* 483 *U.S.* 711, 107 *S.Ct.* 3078, 97 *L. Ed.*2d 585 (1987), there is no authority to support appellants' claim that the "current rate" method is applicable only in fee-shifting cases. The United States Supreme Court recognized:

> When plaintiffs' entitlement to attorney's fee depends on success, their lawyers are not paid until a favorable decision finally eventuates, which may be years later[.] Meanwhile, their expenses of doing business continue and must be met. In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect present value.
>
> [*Pennsylvania v. Del. Valley Citizens' Council, supra,* 483 *U.S.* at 716, 107 *S.Ct.* at 3081–82, 97 *L. Ed.*2d at 592.]

The reasons supporting the "current rate" rule in fee-shifting cases are no different than in contingent litigation. Indeed, we cited and applied *Rendine's* counsel fee directive previously in *Yueh v. Yueh,* 329 *N.J.Super.* 447, 464–69 (App.Div.2000), a matrimonial case.

In support of their counsel fee application, class counsel presented their "effective hourly rate" by taking the actual fees collected in contingency cases by the two principal lawyers, Katz and Mazie, over the past three calendar years, and dividing them by the number of hours expended, yielding an "effective hourly rate" for Mazie of $2152 and for Katz of $1307. After the remand hearing, class counsel offered an "alternative analysis" using a "blended" rate for all lawyers in the firm of $995 per hour based on their actual fees in the contingency cases divided by the hours of all the firm's attorneys.

***8** The judge rejected class counsel's suggestions, finding that the rates were "artificially high based on the success of the firm on contingency cases as opposed to usual hourly billing rates." Instead, the judge cited to *In re Schering–Plough/Merck Merger Litigation,* No. 09–CV–1099, (D.N.J. March 25, 2010) (slip op. at 57), a settlement of a class-action suit in which the attorneys were awarded an hourly fee ranging from $465 to $681, as evidence of an appropriate rate in the community of class-action attorneys. Relying on *Schering–Plough* and other "similar situations" of which he was aware, the "experience and reputation" of class counsel and the "complicated nature" of the litigation, the judge reached the blended hourly rate of $550 for all attorneys. In setting the figure, he noted that over seventy-five percent of the work was completed by Mazie and Katz, and the other twenty-five percent was performed by other attorneys. He separated law clerks from the figure, and assigned a rate of $100 per hour for their work.

The *Rendine* Court recognized that there is "no such thing as a market hourly rate in contingent litigation." *Rendine, supra,* 141 *N.J.* at 342 (citation omitted). The hourly rate awarded by another court is therefore indicative of the prevailing rate. "Blended rates," in which one rate is used for all of the attorneys who worked on the case at differing rates, have been applied in other class-action cases. *See* *In re Rite Aid Corp. Securities Litigation,* 396 *F.*3d 294, 306 (3d Cir.2005). The judge did not abuse his discretion in considering prior hourly rates awarded counsel and deciding $550 was the appropriate rate.

B

Objectors next argue that the judge failed to make the necessary fact findings to support his acceptance of the hours class counsel claimed it expended on this litigation and had he made a careful review, the number of hours would have been reduced considerably. Objectors contend that it was improper to award fees for both lawyers to prepare for and attend hearings, depositions and conferences, and for "several hours of research into basic class action litigation issues." In their appellate brief, objectors contest many of the hours for which fees were awarded, such as all work done on the prior appeal.

Objectors had an opportunity to cross-examine class counsel on the hours they expended and failed to do so. It is not unreasonable for two lawyers to receive compensation for working together on class action litigation. The judge based his acceptance of the hours submitted in detailed certifications and time sheets on his many years of familiarity with the course of the litigation.

Counsel is entitled to be compensated for all time necessarily spent to obtain benefits for the client, including on appeals and activity after remand. *Pennsylvania v. Del. Valley Citizens' Council, supra,* 478 *U.S.* at 557–61, 106 *S.Ct.* at 3094–96, 92 *L. Ed.*2d at 451–54; *Tanksley v. Cook,* 360 *N.J.Super.* 63, 67 (App.Div.2003).

***9** Class counsel would have been entitled to attorney fees for time spent on the fee application, although they did not include such time in their certifications. *Hernandez v. Kalinowski,* 146 *F.*3d 196, 198–201 (3d Cir.1998). New Jersey courts have relied on *Hernandez* in holding that time spent on preparing counsel fee petitions is compensable. *R.M. v. Supreme Court of N.J.,* 190 *N.J.* 1 (2007) (claim brought under Civil Rights Act, 42 *U.S.C.* § 1983); *Tanksley, supra,* 360 *N.J.Super.* at 67 (claim brought under New Jersey Consumer Fraud Act, *N.J.S.A.* 56:8–1 to –20). *See also,* *Courier News v. Hunterdon Co. Prosecutor's Office,* 378 *N.J.Super.* 539, 547 (App.Div.2005) (compensation permitted for time spent preparing counsel fee petition in case brought under the Open Public Records Act, *N.J.S.A.* 47:1A–1 to –13). Furthermore, class counsel properly sought payment for appellate work done in this matter, including their defense of the original fee award.

The court should reduce hours if they are "excessive, redundant, or otherwise unnecessary." *Rendine, supra,* 141 *N.J.* at 335 (quoting *Copeland, supra,* 641 *F.*2d at 891) (quoting *Rode v. Dellarciprete,* 892 *F.*2d 1177, 1183 (3d Cir.1990)). The judge did not abuse his discretion by accepting the totality of the hours submitted by class counsel.

C

When the prevailing party has entered into a contingent-fee arrangement, a trial court should decide whether that attorney is entitled to a fee enhancement to reflect the risk of nonpayment. *Furst, supra,* 182 *N.J.* at 23; *Rendine, supra,* 141 *N.J* . at 337. "In determining and calculating a fee enhancement, the court should consider the result achieved, the risks involved, and the relative likelihood of success in the undertaking." *Furst, supra,* 182 *N.J.* at 23. It is the actual risks or burdens borne by the attorneys that determines whether an upward adjustment of the lodestar is appropriate. *Rendine, supra,* 141 *N.J.* at 339–40. The court also considers the legal risks and whether the case is significant and of broad public interest. *Id.* at 340–41. The *Rendine* Court concluded that enhancements "should range between five and fifty-percent of the lodestar fee, with the enhancement in typical contingency cases ranging between twenty and thirty-five percent of the lodestar." *Id.* at 343. "[E]nhancements should never exceed one-hundred percent of the lodestar, and an enhancement of that size will be appropriate only in the rare and exceptional case in which the risk of nonpayment has not been mitigated at all[.]" *Ibid.*

As part of the counsel fee award, the judge made the following findings about the multiplier:

> In this state the case law has suggested that multipliers, when used, should generally be in the 25–35% range. Considering that this litigation was contingent, the length of time that class counsel has been involved, and the fact that they expended over $600,000 in out of pocket costs that they risked not recovering, this court believes that a multiplier to enhance the fee is appropriate and that the higher end should be used. Using an enhancement of 35% equates to an adjusted fee of $4,033.463, plus net out-of-pocket expenses which this court approves in the amount of $651,822 for a total of $4,685,285.
>
> ***10** [citations omitted.]

Objectors do not contest the amount of the multiplier, but instead argue that it should not have been used at all, as the award was contrary to state and federal law. They argue that the judge should have taken heed of a recent case decided by the United States Supreme Court, *Perdue v. Kenny A.,* 559 *U.S.* ––––, 130 *S.Ct.* 1662, 176 *L. Ed.*2d 494 (2010), which addressed the issue of multipliers, referred to by the United States Supreme Court as "enhancements." This issue was recently resolved by the New Jersey Supreme Court in a manner contrary to objectors' position by *Walker v. Giuffre,* 209 *N.J.* 124 (2012), which supports the judge's use of a multiplier.

D

Although objectors acknowledge that they were permitted to question Mazie and Katz at the remand hearing, they argue they were "hamstrung" in their questioning because they were not permitted to depose them. Appellants give no authority for the right to depose opposing counsel regarding a fee request, and they do not cite to the record to show either where they made this request or the judge's reasons for denying it.

Our Supreme Court has made clear: "We strongly discourage the use of an attorney-fee application as an invitation to become mired in a second round of litigation." *Furst, supra,* 182 *N.J.* at 24 (citations omitted). The Court further noted that a trial court "should be able to determine in most cases the lodestar and any entitlement to an enhancement based on the supporting and opposing papers and argument of counsel." *Id.* at 25. The court may take testimony only if counsel's certifications concerning the reasonableness of the requested fees raise a genuine factual dispute. *Id.* at 26. Here, Mazie and Katz testified as to the very subjects on which appellants claim they needed more information. They had every opportunity to inquire into the various aspects of the fee request. We reject objectors belated complaint that they were denied depositions.

Objectors attempt to paint the picture of class counsel obtaining undeserved fees at the expense of an undesirable settlement for the class. The United States Supreme Court, however, has stated that there should not be "an undesirable emphasis" placed on the importance of money damages at the expense of injunctive or declaratory relief. *Blanchard v. Bergeron,* 489 *U.S.* 87, 95, 109 *S.Ct.* 939, 945, 103 *L. Ed.*2d 67, 77 (1989). Further, without the opportunity to shift fees, attorneys might face an "artificial disincentive" from "fully exploring all possible avenues of relief." *Ibid.* These policy reasons were accepted by our Court in *Szczepanski v. Newcomb Medical Center,* 141 *N.J* . 346, 357–58 (1995).

"Unitary adjudication through class litigation furthers numerous practical purposes, including judicial economy, cost-effectiveness, convenience, consistent treatment of class members, protection of defendants from inconsistent obligations, and allocation of litigation costs among numerous, similarly-situated litigants." *Iliadis v. Wal–Mart Stores, Inc.,* 191 *N.J.* 88, 104 (2007). Additionally, class actions help "equalize adversaries, a purpose that is even more compelling when the proposed class consists of people with small claims." *Ibid.* The equalization helps remedy the "incentive problem" of litigants who seek only a small recovery. *Ibid.* "In short, the class action's equalization function opens the courthouse doors for those who cannot enter alone ." *Ibid.*

***11** Affirmed.

All Citations

Not Reported in A.3d, 2012 WL 2813813

Footnotes

1 Since the New Jersey class action rule is modeled after the federal class action rule, federal cases are persuasive authority. *Saldana v. City of* Camden, 252 *N.J.Super.* 188, 194 n. 1 (App.Div.1991).

2 On January 10, 2011, plaintiffs moved for summary dismissal of this portion of appellants' brief pursuant to *Rule* 2:8–3(b), arguing that the *Girsh* factors were not part of our 2009 remand. The motion was deferred and we now deny this motion.

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EXHIBIT "13"

Only the Westlaw citation is currently available.

United States District Court,
C.D. California.
Razmig TCHOBOIAN
v.
PARKING CONCEPTS, INC., et al.

No. SACV 09-422 JVS (ANx).
July 16, 2009.

West KeySummary**Federal Civil Procedure 170A 182.5**

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak182.5 k. Consumers, Purchasers, Borrowers, and Debtors. Most Cited Cases

Claims concerning the constitutionality of any damage award in a Fair Credit Reporting Act were not proper to consider during a motion for class certification. A plaintiff claimed that the defendant had violated the act by printing more than five digits of his credit card and including the expiration date on the receipt. The plaintiff requested not less than $100 but not more than $1000 in statutory damages for each violation. The defendant claimed that the damages sought would have an effect on their company that was disproportionate to the harm suffered by the class. Fair Credit Reporting Act, § 605, 15 U.S.C.A. § 1681c.

Proceedings: (In Chambers) Order Granting Plaintiff's Motion for Class Certification

JAMES V. SELNA, Judge.
***1** Karla J. Tunis Deputy Clerk

Plaintiff Razmig Tchoboian ("Tchoboian") seeks class certification pursuant to Federal Rule of Civil Procedure 23. Defendants Parking Concepts, Inc., *et al.* ("PCI") oppose the motion.

I. *Background*

Tchoboian alleges that, on or after December 4, 2006, at the point of a sale or transaction, PCI provided him with several electronically printed receipts on each of which PCI printed more than the last five digits of his credit or debit card number and/or the expiration date of his credit or debit card in violation of the Fair and Accurate Credit Transactions Act ("FACTA"). 15 U.S.C. § 1681c(g); Compl. ¶ 31. This subsection of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, *et seq.*, prohibits persons who accept credit or debit cards from printing more than the last five digits of the card number or the expiration date. 15 U.S.C. § 1681c(g). The statute provides for two compliance deadlines: Machines in use before January 1, 2005 must have been brought into compliance before December 4, 2006, and machines first used on or after January 1, 2005 were required to comply by December 4, 2004.[FN1] Tchoboian does not allege actual damage, but requests statutory damages of not less than $100 and not more than $1,000 for each willful violation as provided for in the FCRA, as well as punitive damages, costs, and attorneys' fees. 15 U.S.C. § 1681n.[FN2]

FN1. 15 U.S.C. § 1681c(g) provides:

(1) In general. Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

(2) Limitation. This subsection shall apply only to receipts that are electronically printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card.

(3) Effective date. This subsection shall become effective-

(A) 3 years after the date of enactment of this subsection [enacted Dec. 4, 2003], with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is in use before January 1, 2005; and

(B) 1 year after the date of enactment of this subsection [enacted Dec. 4, 2003], with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is first put into use on or after January 1, 2005.

FN2. 15 USC § 1681n provides that: "Any person who willfully fails to comply with any requirement imposed under this title [15 USC § 1681 *et seq.*] with respect to any consumer is liable to that consumer in an amount equal to the sum of-(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $ 100 and not more than $ 1,000."

Tchoboian requests certification of a class defined as follows:

All consumers to whom Defendants, after December 3, 2006, provided an electronically printed receipt at the point of a sale or transaction at the parking facility located at 1400 Ivar Avenue in Hollywood, California ["the Ivar Facility"], on which receipt Defendants printed more than the last five digits of the consumer's credit card or debit card number.

Tchoboian also requests that this Court appoint Tchoboian as class representative and Chant Yedalian of Chant & Company A Professional Law Corporation, as class counsel for the Plaintiff Class.

II. *Legal Standard*

All class actions in federal court must meet the following four prerequisites for class certification:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

In addition, a plaintiff must comply with one of three sets of conditions set forth in Rule 23(b). Here, Tchoboian argues that the class should be certified because it meets the requirements of Rule 23(b)(3), under which a class may be maintained where common questions of law or fact predominate over questions affecting individual members and where a class action is superior to other means to adjudicate the controversy.

***2** The decision to grant or deny class certification is within the trial court's discretion. *Yamamoto v. Omiya,* 564 F.2d 1319, 1325 (9th Cir.1977). In doing so, a trial court is not permitted to make a preliminary inquiry into the merits. *Eisen v. Carlisle and Jacquelin,* 417 U.S. 156, 177-78, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Instead, the Court is only required to form a reasonable judgment. *Blackie v. Barrack,* 524 F.2d 891, 901 n. 17 (9th Cir.1975). The Court may require the parties to provide additional material from which the Court may make an informed judgment as to each requirement of class certification. *Id.*

III. *Discussion*

A. *PCI's Liability*

Before directly addressing whether this action satisfies Federal Rules of Civil Procedure 23(a) and 23(b)(3), this Court turns to PCI's argument that it was improperly named as a defendant in this action. PCI argues that Tchoboian should have brought this action against the Community Redevelopment Agency of the City of Los Angeles ("CRA/LA"), which owns the machines and financially benefits from the relevant transactions. (Opp. p. 1.) PCI contends that it is not a proper defendant because it only provides staffing, maintenance, janitorial, and related services for the Ivar Facility pursuant to two Parking Management and Operations Agreements ("PMOA"), and does not own or control the machines that accept the credit and debit cards. (*Id.*)

As set forth above, the pertinent portion of FACTA provides that:

> Except as otherwise provided in this subsection, no person that *accepts* credit cards or debit cards for the transaction of business shall *print* more than the last 5 digits of the card number or the expiration date upon any receipt *provided to the cardholder* at the point of the sale or transaction.

15 U.S.C. § 1681c(g) (emphasis supplied).

Thus, in order to be held liable, PCI would have to have accepted the cards, printed the non-complying receipts provided to the cardholders, or be liable for another's such conduct. Tchoboian has alleged just such conduct. (Compl.¶¶ 30-32.) PCI argues that the Court should look at the evidence behind the Complaint to determine whether PCI's conduct could fit within the provisions of the statute.

In *Eisen,* 417 U.S. at 177-78, the Supreme Court rejected a district court's finding, made after a preliminary hearing on the merits of the case, that the petitioner was more than likely to prevail on his claims. The district court's finding was made in connection with the determination as to whether the suit could be maintained as a class action. *Id.* The Supreme Court explained that:

> We find nothing in either the language or history of Rule 23 that gives a court any

authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it.... This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such (a)s soon as practicable after the commencement of (the) action.

***3** *Id.* (internal quotations omitted).

The Supreme Court further found that “[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.” *Id.* (internal quotations omitted). The Court also noted that “a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials.” *Id.* at 178.

To be sure, a court may look beyond the complaint and consider other material before it in order to form a reasoned judgment as to whether the requirements of Rule 23 have been met. *Blackie,* 524 F.2d at 900-01. Indeed, the Ninth Circuit has recognized “that courts are not only at liberty to but must consider evidence which goes to the requirements of Rule 23 [at the class certification stage] even [if] the evidence may also relate to the underlying merits of the case.” *Dukes v. Wal-Mart, Inc.,* 509 F.3d 1168, 1178 n. 2 (9th Cir.2007) (citing *Hanon v. Dataproducts Corp.,* 976 F.2d 497, 509 (9th Cir.1992)). The Ninth Circuit has also explained that:

> [A] court is bound to take the substantive allegations of the complaint as true, thus necessarily making the class order speculative in the sense that the plaintiff may be altogether unable to prove his allegations. While the court may not put the plaintiff to preliminary proof of his claim, it does require sufficient information to form a reasonable judgment.... neither the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies the Rule.... An extensive evidentiary showing of the sort requested by defendants is not required. So long as he has sufficient material before him to determine the nature of the allegations, and rule on compliance with the Rule's requirements, and he bases his ruling on that material, his approach cannot be faulted because plaintiffs' proof may fail at trial.

Blackie, 524 F.2d at 900-01.

The case of *Miller v. Mackey Intern., Inc.,* 452 F.2d 424, 428 (5th Cir.1971), is also instructive. There, the court found that “there is absolutely no support in the history of Rule 23 or legal precedent for turning a motion under Rule 23 into a Rule 12 motion to dismiss or a Rule 56 motion for summary judgment by allowing the district judge to evaluate the possible merit of the plaintiff's claims at this stage of the proceedings. Failure to state a cause of action is entirely distinct from failure to state a class action.”

Here, PCI has requested that the Court find that PCI did not violate FACTA. PCI has provided the Court with a detailed account of the method of payment for parking at the Ivar Facility and of PCI's involvement. (Opp. pp. 2-8.) PCI has cited to a variety of Declarations and Exhibits in support of its argument, including to the PMOAs. (*Id.*) Certain portions of the PMOAs set forth the scope of PCI's services. (Midolo Decl., Ex. B, part A.)

***4** The Court has reviewed the Complaint in this action as well as the evidence cited to by the parties as part of its determination of whether the Rule 23 requirements have been met. The Court finds, however, that to review the evidence in order to determine PCI's liability in this case would violate the principles set for in *Eisen* and would improperly convert this motion into a motion to dismiss or a motion for summary judgment. The question of whether PCI may ultimately be held liable or whether Tchoboian has failed to state a claim as to PCI's liability is not a proper consideration on this motion. Although both parties have referred to evidence, including the PMOAs, the Court finds that the question of whether PCI can be said to have violated FACTA is an improper determination on the merits. This question would be better considered after both parties have had the opportunity to fully address the question. For example, if the issue were brought up on a motion for summary judgment, the parties may want to provide additional facts supporting their positions, beyond what the Court now has in front of it.

The Court finds, therefore, that PCI's request for the Court to consider whether it may be held liable goes beyond the Court's consideration of whether Tchoboian has set forth sufficient allegations and sufficient information for the Court to form a reasonable judgment regarding class certification. The Court will therefore not provide an analysis of whether PCI is likely to be found to have violated FACTA on this motion.[FN3] The Court now turns to the Rule 23(a) and 23(b)(3) analysis.

FN3. The Court rejects PCI's standing argument as well as the portions of PCI's opposition that rely on the argument that PCI did not violate FACTA.

B. *Rule 23(a) Prerequisites*

1. *Numerosity*

There are several factors a court may consider in determining whether a plaintiff has satisfied the numerosity requirement. First, a court may consider whether the size of the class warrants certification. *Gen. Tel. Co. of the Northwest, Inc. v. E.E.O.C.,* 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). Though there is no exact numerical requirement, a class of fifteen or fewer has been rejected. *Id.; Harik v. California Teachers Ass'n,* 326 F.3d 1042, 1051 (9th Cir.2003). “Although the absolute number of class members is not the sole determining factor, where a class is large in numbers, joinder will usually be impracticable.” *Jordan v. Los Angeles County,* 669 F.2d 1311, 1319 (9th Cir.1982), *vacated on other grounds,* 459 U.S. 810, 103 S.Ct. 35, 74 L.Ed.2d 48 (1982). In *Jordan,* the Ninth Circuit determined that the proposed class sizes in that suit of 39, 64, and 71 were large enough such that the other factors need not be considered. *Id.*

Here, Tchoboian alleges that “there are, at a minimum, thousands (*i.e.* two thousand or more) of members that comprise the Plaintiff Class." (Compl.¶ 17.) "The fact that the size of the proposed class has not been exactly determined is not a fatal defect in the motion; a class action may proceed upon estimates as to the size of the proposed class." *In re Alcoholic Beverages Litigation,* 95 F.R.D. 321, 324 (D.C.N.Y.1982). The sheer number of potential class members justifies the Court's finding that the class in this case meets the numerosity requirement.

***5** In a related argument, PCI argues that the class is not ascertainable because there is no way to determine other than through individual trials who requested receipts from the POF machines, and who was provided a receipt by the Central Cashier, or by a cashier at the exit terminals. (Opp. pp. 12-13.) "A factor to consider for numerosity ... is whether the class is ascertainable. The class members need not be known at the time of certification, class membership must be objectively ascertainable; i .e., it must be possible for *the members to identify themselves as a member of the class." FN4* *Johnson v. GMRI, Inc.,* 2007 U.S. Dist. LEXIS 27368, 21-22, 2007 WL 963209(E.D.Cal. Mar. 28, 2007) (emphasis supplied) (citing *DeBremaecker v. Short,* 433 F.2d 733, 734 (5th Cir.1970) (class made up of residents of a State active in the peace movement does not constitute an adequately defined or clearly ascertainable class)) (quotations omitted).

FN4. Given that class membership need not be known at the time of class certification, PCI's argument that the proposed class members do not have standing because they have not demonstrated they received a non-compliant receipt fails. (*See* Opp. p. 16.)

Here, the Court finds that, although the class members are not currently known, they are objectively ascertainable, certainly by themselves on notice of the pendency of a certified class. In contrast to the vague characterization of the class members in *DeBremaecker,* the class members in the present action were either provided a receipt or they were not. The Court recognizes that there may be some difficulty in ascertaining the class. However, the Court can imagine methods of identifying the class members, including publishing a notice of the action and allowing class members to come forward. To the extent that this holding conflicts with the holding in *Deitz v. Comcast Corp.,* 2007 U.S. Dist. LEXIS 53188, at *25-26, 2007 WL 2015440(N.D.Cal. July 11, 2007) (denying certification where "[i]t would be impossible to determine without significant inquiry which subscribers owned" subject devices), the Court declines to follow that case.

2. *Commonality*

Rule 23(a)(2) requires that questions of law or fact be common to the class. This requirement is permissively construed. *Hanlon v. Chrysler Corp.,* 140 F.3d 1011, 1019 (9th Cir.1998). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id.*

In this case, there is a common core of salient facts across the class. Each member of the proposed class allegedly received a non-compliant receipt from PCI after the FACTA compliance deadline. In addition, there are substantial shared legal issues. The overriding legal issue is whether PCI's alleged non-compliance was willful so that the class members are entitled to statutory damages. Moreover, whether PCI violated FACTA is a combined question of law and fact common to all members. Although there may be some difficulty in determining who received a noncompliant receipt, the Court nevertheless finds that there is a common core of salient facts and legal issues. *Hanlon,* 150 F.3d at 1019; *see also Staton v. Boeing Co.,* 327 F.3d 938, 957 (9th Cir.2003). The Court therefore finds that the proposed class members share sufficient commonality to satisfy Rule 23(a)(2).

3. *Typicality*

***6** Under Rule 23(a)'s "permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon,* 140 F.3d at 1020. There must be a demonstration that the "named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence...." *General Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 157, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).

Here, Tchoboian's claim is, in fact, "substantially identical" to the claims of the proposed class members-namely, he alleges that PCI issued him a non-complaint receipt in willful violation of the FACTA. Accordingly, the Court finds that Tchoboian meets the typicality requirement.

4. *Fair and Adequate Representation*

Representation is adequate if (1) class counsel are qualified and competent and (2) the class representative and his or her counsel are not disqualified by conflicts of interest. *Lerwill v. Inflight Motion Pictures, Inc.,* 582 F.2d 507, 512 (9th Cir.1978).

Class counsel must be experienced and competent. *See Hanlon,* 150 F.3d at 1021. When certifying a class, a Court is required to appoint class counsel, unless a statute provides otherwise. Fed.R.Civ.P. 23(g)(1)(A). Tchoboian seeks appointment of Chant Yedalian of Chant & Company A Professional Law Corporation as class counsel. The Court finds that the proposed class counsel is qualified, competent, and have no known conflicts of interest with the proposed class representative. PCI does not challenge their qualifications or competence, nor does it contend that the class representative or counsel are disqualified by conflicts of interest.

Rule 23(a)(4) also requires that "the representative parties fairly and adequately protect the interests of the class." This requirement is to ensure that the named plaintiff and his or her counsel will pursue each class member's claim with sufficient "vigor." *Hanlon,* 150 F.3d at 1021; *see also Crawford v. Honig,* 37 F.3d 485, 487 (9th Cir.1994). The class representatives may not have interests antagonistic to the remainder of the class. *Lerwill,* 582 F.2d at 512.

PCI contends that Tchoboian is not an adequate class representative because he has "no clue" what amount of statutory damages he entitled to or how it should be determined. (Opp. p. 14.) The Court is not persuaded by this argument. Tchoboian is not required to have himself calculated a specific amount of statutory damages, nor is Tchoboian required to know how to perform the calculation himself. PCI further argues that Tchoboian is an inadequate representative because he did not name CRA/LA as a defendant in this action. Contrary to PCI's suggestion, there is no requirement that Tchoboian bring suit against all possible defendants. Moreover, Tchoboian has represented that he plans to join CRA/LA as a defendant. (Reply. p. 17.) In addition, the Court does not find that Tchoboian has failed to properly investigate this matter. [FN5]

FN5. Courts have denied class certification for lack of adequate representation in cases where class representatives demonstrate disinterest in the case and "cede[ ] control" to counsel entirely. *Welling v. Alexy (In re Cirrus Logic Sec.)*, 155 F.R.D. 654, 659 (N.D.Cal.1994) (finding in addition to the fact that the class representative "ceded control" to counsel, his background as a repeat securities class action plaintiff "raises serious questions regarding his suitability"); *see also, Howard Gunty Profit Sharing Plan v. Superior Court*, 88 Cal.App.4th 572, 577-78, 105 Cal.Rptr.2d 896 (Cal.Ct.App.2001) (finding that a "professional plaintiff" had inadequate knowledge and weak credibility). On the other hand, class representatives should not be disqualified solely based on their ignorance. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 370-374, 86 S.Ct. 845, 15 L.Ed.2d 807 (1966); *Baffa v. Donaldson*, 222 F.3d 52, 61 (2d Cir.2000) (citing *Surowitz*). The Court does not find that Tchoboian has inadequate knowledge, credibility, or that he has ceded control.

***7** The Court accordingly finds that the requirements of Rule 23(a) are satisfied with respect to the general class. The Court further finds that Tchoboian is an adequate class representative and Chant Yedalian of Chant & Company A Professional Law Corporation are appropriate class counsel.

C. *Rule 23(b)(3)*

Tchoboian seeks certification under Rule 23(b)(3). "Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 211 (9th Cir.1975) (quoting Committee notes). A class action may be certified where common questions of law or fact predominate over questions affecting individual members and where a class action is superior to other means to adjudicate the controversy.

1. *Predominance*

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). The Court must rest its examination on the legal or factual questions of the individual class members. *Hanlon*, 150 F.3d at 1022.

The Court agrees with Tchoboian that common questions of fact and law predominate over individual differences between proposed class members. Class members share the significant common questions of law as to whether PCI violated FACTA and whether such noncompliance was willful. PCI contends in response that any assessment of liability requires an individual factual determination of whether each class member was provided a noncompliant receipt. (Opp. p. 15.) The

Court recognizes that there may be some difficulty in determining who received noncompliant receipts. However, the Court finds that even to the extent that this is the case, the bulk of this action surrounds allegations regarding PCI's conduct. Thus, to the extent that there are individualized questions, common questions nevertheless predominate.

The Court accordingly finds that common questions of law and fact predominate over the possible need for proof for proposed members of the class. FN6

> FN6. To the extent that *Medrano v. Modern Parking, Inc.*, 2007 U.S. Dist. LEXIS 82024, *9 (C.D.Cal.2007), conflicts with this Court's holding, the Court declines to follow *Medrano.*

2. *Superiority*

Next, the Court must consider if the class is superior to individual suits. *Amchem*, 521 U.S. at 615. “A class action is the superior method for managing litigation if no realistic alternative exists.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir.1996). This superiority inquiry requires a comparative evaluation of alternative mechanisms of dispute resolution. *Hanlon*, 150 F.3d at 1023.

The Court finds that examination of the relevant 23(b)(3) factors favor class certification. Rule 23(b)(3)'s non exclusive factors are: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

***8** In this case, there is no indication that the class members would have a strong interest in individual litigation. The Court is not aware of any other pending litigation on this matter. Concentrating the litigation in this forum will serve the interests of judicial economy. Finally, the Court does not find that managing the class action is likely to be unduly difficult.

In addition, both parties emphasize various other arguments under the heading of superiority and situate those arguments in the context of a series of recent decisions on motions to certify classes for FCRA claims. The Court addresses these arguments and concludes that a class action is superior to individual suits for the purpose of enforcing these provisions of the FCRA.

a. *Disproportionate Damages*

PCI argues that class certification should be denied on the grounds that the aggregate statutory damages sought by the class would have a severe effect on PCI that is disproportionate to the harm suffered by the class. FN7 (Opp. p. 17.) PCI claims that because the eventual damage award may be unconstitutional, *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), the class should not be certified in the first place. This argument has persuaded other district courts to deny class certification of claims for statutory damages under the FCRA provision invoked here. 15 U.S.C. § 1681n. These courts found that the class actions were not superior to individual suits when the damages sought posed “disastrous consequences" to the defendant despite a lack of actual harm on the part of the plaintiff. *Spikings v. Cost Plus, Inc.*, 2007 U.S. Dist. LEXIS 44214 at *13 (C.D.Cal., 2007); *Soualian v. Int'l Coffee and Tea LLC, et al.*, 2007 U.S. Dist. LEXIS 44208 at *11 (C.D.Cal.2007), *appeal filed* Case No. 07-56377 (9th Cir.2007) (concluding that "[g]iven the disproportionate consequences to Defendant's business and the lack of any actual harm suffered by members of the potential class, the Court finds that Plaintiff fails to meet the superiority requirements); *Legge, et al. v. Nextel Communications, Inc., et al .*, 2004 U.S. Dist. LEXIS 30333 at *45-50,2004 WL 5235587 (C.D.Cal.2004) (denying class certification and noting that "[a]llowing this case to proceed as a class action has potentially ruinous results-without concomitant benefit to the class"). *See also, Price v. Lucky Strike Entertainment, Inc.*, CV 07-960-ODW (MANx) at p. 8 (C.D.Cal.2007); *Najarian v. Avis Rent a Car System, et al.*, 2007 U.S. Dist. Lexis 59932 at *14, 2007 WL 4682071(C.D.Cal.2007).

> FN7. PCI also claims that there is little risk of identity theft and actual harm, so that certification of the class is unjust. The Court find these factual assertions about the actual risk posed by the violations largely irrelevant, given that the FCRA does not require a showing of actual harm for recovery of statutory damages. *Arcilla v. Adidas Promotional Retail Operations, Inc.*, 488 F.Supp.2d 965, 974 (C.D.Cal.2007) (noting that "a consumer whose FCRA rights have been violated may elect either actual or statutory damages, with no requirement of having to present evidence of actual harm .... [t]he policies of deterrence and compensation that motivated FACTA and FCRA as a whole make it reasonable to believe that Congress intended to impose damages even when the plaintiff cannot offer evidence of pecuniary loss, which might often be difficult to obtain."). Moreover, it is apparent that Congress thought there was an actual risk of identity theft when it passed the FCRA.

These decisions rely heavily on *Kline*, which reversed a district court order certifying a class, based in part on the finding that the potential damages "shock[ed] the conscience." *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir.1974) (relying on *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y.1972), for the proposition that class actions can be properly denied where plaintiffs seek "outrageous amounts" in statutory damages for technical violations). In light of joint and several liability for potential damages, the court found that the class action was not superior to other alternative methods of adjudication. *Id.* at 235.

***9** *Kline* does not directly control this case, however. First, the reasoning in *Kline* turned on the drastic effect that joint and several liability would have on the potential individual liability of each of 2,000 co-defendants. *Id.* at 234. The same concern regarding joint and several liability is not present here.FN8 Second, the plaintiffs in *Kline* brought claims for treble damages on unlimited actual damages under the Sherman and Clayton Acts, whereas here the claims are for limited statutory damages under the FCRA. *Id.* at

235. Finally, the reasoning in *Ratner* that supports the outcome in *Kline,* does not apply here: The court in *Ratner* found the damages "outrageous" given that the alleged violations were merely technical, whereas here the class members are only entitled to damages if they can show willful violation of the statute.[FN9] *Ratner,* 54 F.R.D. at 416. *See, White v. E-Loan, Inc.,* 2006 WL 2411240 at *8 (N.D.Cal.2006). *Cf. Soualian,* 2007 U.S. Dist. LEXIS 44208 at *11 n. 8 (C.D.Cal.2007).

FN8. Although there are Doe Defendants in the present action, this case nevertheless does not present the joint and several liability issues involved in *Kline,* where there were roughly 2,000 co-defendants.

FN9. PCI asserts that the alleged violations here are technical. (Opp. p. 19.) However, Tchoboian alleges that PCI's violations were willful. (Compl.¶ 3.) A willful violation is not merely technical.

This Court therefore declines to apply the *Kline* rule to this case.[FN10] Instead, the Court holds that concerns about the constitutionality of any damage award are better addressed at the damages phase of the litigation and not as part of class certification. This approach is in accord with the Seventh Circuit's decision in a class action for statutory damages under the FCRA, in which the panel reversed a denial of class certification, noting that "constitutional limits are best applied after a class has been certified." *Murray v. GMAC Mortgage Corp.,* 434 F.3d 948, 954 (7th Cir.2006). *See also, Pirian v. In-N-Out Burgers,* 2007 WL 1040864 at *5 (C.D.Cal.2007) (noting that "concerns regarding excessive damages are best addressed if the class is certified and the damages are assessed") (citing *Murray*).

FN10. PCI also argues that *Kline* is instructive here because PCI had no dealings with Tchoboian. (Opp. p. 18.) The Court addresses this argument above.

A court in the Northen District has recently followed *Murray* and certified a class action under the FRCA, noting that if defendants succeed in opposing motions for class certification on the grounds that aggregate statutory damages are too high, that would mean that "the greater the number of violations of the FCRA, the less likely [it is that] a company can be held fully accountable ." *White,* 2006 WL 2411240 at *8 n. 8. In this same vein, Judge Easterbrook observed in *Murray* that "[m]aybe suits such as this will lead Congress to amend the [FCRA]; maybe not. While the statute remains on the books, however, it must be enforced rather than subverted." *Murray,* 434 F.3d at 954. This Court agrees that denying class certification based on the potential for high damage awards is inconsistent with the FCRA provision for statutory damages.

Accordingly, the Court finds that the magnitude of the potential damage award does not affect the superiority of a class action for adjudication of this dispute.[FN11]

FN11. In addition, in *Reiter v. Sonotone Corp.,* 442 U.S. 330, 344-45, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979), the Supreme Court found that the argument that "the cost of defending consumer class actions [would] have a potentially ruinous effect on small businesses

> in particular and [would] ultimately be paid by consumers in any event" is not an unimportant consideration. However, the Court found, that is a "policy consideration [ ] more properly addressed to Congress than to this Court." *Id.*

b. *Alternative Methods of Enforcement*

PCI argues that a class action is not superior because the class members can bring their claims individually without risk of economic loss, because the statute provides for recovery of attorney's fees. (Opp. p. 23.) This argument has found favor with some district courts in similar cases for FCRA damages, *Spikings,* 2007 U.S. Dist. LEXIS 44214 at *15, *Price,* CV 07-960-ODW (MANx) at p. 10, but has been rejected by others, *White,* 2006 WL 2411240 at *9. This Court finds that a class action is the superior method of enforcement for cases under the FCRA because the available statutory damages are minimal. *Murray,* 434 F.3d at 953 (noting that the class action mechanism is "designed for situations such as this, in which the potential recovery is too slight to support individual suits."). The Court is not convinced that the fact that an individual plaintiff can recover attorney's fees in addition to statutory damages of up to $1,000 will result in enforcement of the FCRA by individual actions of a scale comparable to the potential enforcement by way of class action.

c. *Potential for Attorney Abuse*

***10** The Court does not share PCI's concern that class actions under the FCRA pose an unusual potential for attorney abuse. *Cf. Spikings,* 2007 U.S. Dist. LEXIS 44214 at * 16; *Price,* CV 07-960-ODW (MANx) at p. 9. Moreover, PCI does not allege or provide evidence for any abuse or impropriety in this action. Absent such a showing, the Court does not take the vague potential for attorney abuse into account.

In summary, the Court concludes a class action is superior to individual suits in this case, particularly in light of the minimal statutory damages available to the individual plaintiff. The Court is unpersuaded by PCI's arguments that potentially excessive damages, purported superior alternatives, or potential attorney abuses should alter that conclusion.

Accordingly, Tchoboian has fulfilled the requirements of Rule 23(b)(3).

IV. *Conclusion*

For the aforementioned reasons, the Court grants Tchoboian's motion for class certification.[FN12] The Court appoints Tchoboian as class representative and Chant Yedalian of Chant & Company A Professional Law Corporation as class counsel.

> FN12. The Court need not address the parties' Requests for Judicial Notice. Moreover, the Court did not rely on Tchoboian or Yedalian's Declarations. Therefore, the Court need not address PCI's objections to evidence.

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