IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

PAUL MOORE,	*	
Plaintiff,	*	
v.	*	
REALPAGE UTILITY MANAGEMENT, INC.,	*	**Case No.: 8:20-CV-00927-PX**
	*	Hon. Paula Xinis
Defendant.	*	

* * * * * * * * * * * *

MEMORANDUM IN SUPPORT OF MOTION FOR FINAL SETTLEMENT APPROVAL

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TABLE OF CONTENTS

I. INTRODUCTION **1**

II. THE SETTLEMENT **3**

A. Litigation Background **3**

B. Settlement Negotiations **4**

C. The Proposed Settlement Class **5**

D. The Proposed Settlement Benefits **6**

E. Administration of Settlement Benefits **7**

F. The Settlement Administrator and Notice Plan **8**

III. LEGAL STANDARD **9**

IV. FINAL APPROVAL IS APPROPRIATE **10**

A. THE SETTLEMENT IS FAIR AND ADEQUATE **10**

1. Fairness 10

a. The Posture of the Case at the Time Settlement Was Proposed and the Extent of Discovery Conducted *10*

b. Circumstances Surrounding the Negotiations and the Experience of Class Counsel *11*

2. Adequacy 12

a. The Relative Strength of Plaintiff's Case on the Merits and the Existence of Any Difficulties of Proof or Strong Defenses the Plaintiffs are Likely to Encounter if the Case Goes to Trial *13*

b. The Anticipated Duration and Expense of Litigation *15*

c. The Solvency of the Defendant *16*

d. The Degree of Opposition to the Settlement *17*

e. The Effectiveness of Any Proposed Method of Distributing Relief to the Class *17*

f. The Terms of Any Proposed Award of Attorney's Fees *18*

g. Any Agreement Required to be Identified *19*

3. The Proposal Treats Class Members Equitably 19

B. THE PROPOSED SETTLEMENT CLASS IS CERTIFIABLE 19

1. The Class Is Identifiable and Ascertainable 20

2. The Criteria of Fed. R. Civ. P. 23(a) Are Satisfied 20

a. Fed. R. Civ. P. 23(a)(1) - Numerosity *20*

b. Fed. R. Civ. P. 23(a)(2) - Commonality *21*

c. Fed. R. Civ. P. 23(a)(3) - Typicality *22*

d. Fed. R. Civ. P. 23(a)(4) - Adequacy *22*

3. The Criteria of Fed. R. Civ. P. 23(b)(3) Are Satisfied 23

C. The Notice to the Class Comports with Fed. R. Civ. P. 23 24

D. RUM Complied with the Notice Requirements of CAFA 26

V. CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Aleti v. Metro. Baltimore, LLC, 479 Md. 696 (2022) 4

Boger v. Citrix Sys., Inc., No. 19-CV-01234-LKG, 2023 WL 3763974 (D. Md. June 1, 2023) 11

Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977) 22

Cymbalista v. JPMorgan Chase Bank, N.A., No. 20 CV 456 (RPK)(LB), 2021 WL 7906584 (E.D.N.Y. May 25, 2021) 18, 19

Decohen v. Abbasi, LLC, 299 F.R.D. 469 (D.Md. 2014) ....passim

Deiter v. Microsoft Corp., 436 F.3d 461 (4th Cir. 2006). 22

EQT Prod. Co. v. Adair, 764 F.3d 347 (4th Cir. 2014) 20, 21

Erny on behalf of India Globalization Cap., Inc. v. MuKunda, No. CV DKC 18-3698, 2020 WL 3639978 (D. Md. July 6, 2020) 2, 9

Galola v. Snyder, 328 Md. 182 (1992) 4

George v. Baltimore City Public Schools, 117 F.R.D. 368 (D. Md. 1987) 22

In re Abrams & Abrams, P.A., 605 F.3d 238 (4th Cir. 2010) 23

In re Bendectin Productions Liability Litigation, 749 F.2d 300 (6th Cir. 1984) 14

In re Kirschner Med. Corp. Sec. Litig., 139 F.R.D. 74 (D. Md. 1991) 23

In re MI Windows & Doors, Inc., Prod. Liab. Litig., 860 F.3d 218 (4th Cir. 2017) 7

In re Mid-Atl. Toyota Antitrust Litig., 605 F.Supp. 440 (D. Md. 1984) 2

In re: Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Pracs. & Prod. Liab. Litig., 952 F.3d 471 (4th Cir. 2020) ....passim

In re: Whirlpool Corp. Front-loading Washer Prod. Liab. Litig., No. 1:08-WP-65000, 2016 WL 5338012 (N.D. Ohio Sept. 23, 2016) 19

McAdams v. Robinson, 26 F.4th 149 (4th Cir. 2022) 3

Moore v. RealPage Util. Mgmt. Inc., No. 8:20-CV-00927-PX, 2023 WL 2599571 (D. Md. Mar. 22, 2023) 4, 10

Moore v. RealPage Util. Mgmt., Inc., 476 Md. 501, 264 A.3d 700 (2021) 10

Newman v. Stein, 464 F.2d 689 (2d Cir. 1972) 14

Peoples v. Wendover Funding, Inc., 179 F.R.D. 492 (D. Md. 1998) 22

Protective Committee for Indep. Stockholders of TMT Trailer Ferry v. Anderson, 390 U.S. 414 (1968) 16

Robinson v. Nationstar Mortg. LLC, No. 8:14-CV-03667-TJS, 2020 WL 8256177 (D. Md. Dec. 11, 2020) 3, 9

Wal–Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011) 21

West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970) 14

STATUTES

28 U.S.C. § 1715 26

Md. Code Ann., Bus. Reg. § 7-101 1

Md. Code Ann., Com. Law § 13-101 3

Md. Code Ann., Com. Law § 14-201 3

Md. Code Ann., Cts. & Jud. Pro. § 3-401 3

RULES

Fed. R. Civ. P. 23 .... passim

TREATISES

1 Newberg on Class Actions (5th ed.) 20, 21, 22

Plaintiff Paul Moore ("Representative Plaintiff"), acting individually and on behalf of the Settlement Class defined below, respectfully submits this Memorandum in Support of the Motion for Final Approval of Class Action Settlement (the "Final Approval Motion").

I. INTRODUCTION

This lawsuit concerns Representative Plaintiff's allegations that Defendant RealPage Utility Management ("RUM") unlawfully charged him and other Maryland tenants monthly administrative fees for sending them utility bills, when RUM was not licensed as a collection agency under the Maryland Collection Agency Licensing Act, Md. Code Ann., Bus. Reg. §§ 7-101 *et seq*. RUM has vigorously defended this lawsuit, including filing a motion for judgment on the pleadings which the Court denied after full briefing.

Following the Court's decision, after multiple days of mediation supervised and facilitated by the Hon. Ronald B. Rubin (Ret.) and months of follow-up negotiations involving the parties and Judge Rubin, the parties reached a proposed settlement. RUM agreed to pay $1.8 million into a Common Fund – representing a disgorgement of all profits that RUM made in connection with the monthly billing services it provided to its customers in relation to the Settlement Class Members during the Class Period – and to apply for the collection agency license Representative Plaintiff alleged RUM must have. RUM has also agreed to pay settlement administration costs, and an incentive payment to the Representative Plaintiff. *See* ECF No. 73-1, Settlement Agreement.

The parties submitted the Settlement Agreement to the Court, and jointly requested preliminary approval of that settlement. *See* ECF No. 73, Joint Motion for Preliminary Approval of Class Action Settlement, and for Approval of the Form, Manner and Administration of Notice.

This Court preliminarily approved the proposed settlement and approved notice by Order entered pursuant to Fed. R. Civ. P. 23(e)(1), which permits notice to a class where the proposed settlement class is "likely" to meet the class certification requirements of Rule 23 and the proposed settlement is "likely" to meet the "fair, reasonable and adequate" requirements of Fed. R. Civ. P. 23(e)(2). *See* ECF No. 74, Preliminary Approval Order.

As directed by the Preliminary Approval Order, the Settlement Administrator is disseminating the Court-approved notice to Settlement Class members contemporaneously with the filing of this memorandum. Among other things, that notice directs Settlement Class members to the website www.MooreClassSettlement.com, where the Settlement Agreement, a long-form notice, this memorandum, and other documents concerning the settlement may be viewed and downloaded. The notices to Settlement Class members are attached as **Exhibits 1, 2 and 3**.

Now, pursuant to Fed. R. Civ. P. 23(e)(2), Representative Plaintiff submits this memorandum in support of final approval of the proposed class settlement. As notice is being sent the same day this memorandum is being filed, Settlement Class members will have the full notice period to review this memorandum and the terms of the settlement while making their determination whether to opt-out or object.

Although this memorandum covers much of the same ground as the memorandum in support of preliminary approval (ECF No. 73-2), that is appropriate because "the standard, and the factors to be considered, at the final approval stage are exactly the same" and "the court is guided by exactly the same analysis" as at the preliminary approval stage. *Erny on behalf of India Globalization Cap., Inc. v. MuKunda*, No. CV DKC 18-3698, 2020 WL 3639978, at *2 (D. Md. July 6, 2020) (*citing In re Mid-Atl. Toyota Antitrust Litig.*, 605 F.Supp. 440, 442 (D. Md. 1984)); *see also Robinson v. Nationstar Mortg. LLC*, No. 8:14-CV-03667-TJS, 2020 WL 8256177, at *3 (D. Md. Dec.

11, 2020), *aff'd sub nom. McAdams v. Robinson*, 26 F.4th 149 (4th Cir. 2022) ("[n]othing has changed since the Court granted preliminary approval, and thus the Court maintains its approval.")

The Settlement Agreement should be granted final approval, so that the Settlement Class may take advantage of the substantial benefits it offers to them.

II. THE SETTLEMENT

A. Litigation Background

RUM provides a "utility billing services platform" that assists third-party landlords in collecting utility charges. Complaint ¶¶ 15, 16. RUM contracts directly with landlords to provide billing services for them, and bills tenants on a monthly basis. *Id.* ¶¶ 3, 14, 20, 50, 51, 64. RUM, however, was not licensed to act as a collection agency in Maryland. *Id.* ¶¶ 5, 36.

Representative Plaintiff received bills from RUM "seeking to collect allocated utility charges and administrative fees from him, concerning his apartment house residence." *Id.* ¶ 50; *see also id.* ¶¶ 51, 53, 63. The bills itemize charges for water, sewer, and gas services, and separately assess an "Administrative Service Fee." *Id.* ¶ 52. Each bill included a flat Administrative Service Fee of $5.50. *Id.* Representative Plaintiff alleges that the Administrative Service Fee requires tenants "to pay [RUM] for billing them" and "is a fee imposed on tenants to pay [RUM] for its unlicensed collection activity." *Id.* ¶¶ 4, 17.

The Complaint asserts claims for declaratory judgment pursuant to the Maryland Declaratory Judgment Act, Md. Code Ann., Cts. & Jud. Pro. §§ 3-401 et seq. (Count I), violation of the Maryland Consumer Debt Collection Act, Md. Code Ann., Com. Law §§ 14-201 et seq., violation of the Maryland Consumer Protection Act, Md. Code Ann., Com. Law §§ 13-101 et seq. (Count III), and money had and received and unjust enrichment (Counts VIII – X).

RUM vigorously denied liability. Among other things, it filed a motion for judgment on the pleadings, asserting that nothing RUM did or did not do caused damages to Plaintiff which

are recoverable under Maryland law. *See, e.g.*, ECF No. 59. Indeed, RUM argued that the Maryland Supreme Court has generally prohibited tenants from recovering, for lack of licensure alone, amounts paid to unlicensed landlords. *See id*. In support of that argument, RUM relied upon recent authority from the Maryland Supreme Court denying plaintiffs recovery for the lack of a collection license alone. *See*, *e.g.*, *Aleti v. Metro. Baltimore, LLC*, 479 Md. 696, 722-23 (2022). RUM asserted that the same rationale prevented Plaintiff and the Class from recovering here. RUM also maintained that it had other defenses, including that it is not required to be licensed as a collection agency, and defenses to class certification.

Although the Court denied RUM's motion for judgment on the pleadings, the Court noted that that RUM had argued that "because Moore agreed to pay an Administrative Service Fee as part of his lease agreement, the fee is part of the lawful debt owed to the landlord, and so cannot constitute an injury stemming from the statutory violations." *Moore v. RealPage Util. Mgmt. Inc*., No. 8:20-CV-00927-PX, 2023 WL 2599571, at *3 (D. Md. Mar. 22, 2023). The Court held that the argument failed at the pleadings stage because the lease was not part of the record. *See id*. However, RUM almost certainly would have raised the argument again at the summary judgment stage. That defense, or others RUM raised or would raise, could conceivably have been resolved in RUM's favor and undermined Representative Plaintiff's claims.

B. Settlement Negotiations

The Parties began discussing the potential for a negotiated resolution in 2022 and ultimately agreed to engage the Hon. Ronald B. Rubin (Ret.) as mediator. *See* **Exhibit 4**, Declaration of Benjamin H. Carney ("Carney Decl.") ¶ 16. Judge Rubin conducted a mediation session on May 31, 2022, another session on June 9, 2022, and the parties continued negotiations supervised by Judge Rubin through July, 2022. *Id*. ¶ 17.

Then, the parties reached an impasse in their negotiations, and RUM filed the motion for judgment on the pleadings discussed above, which the Court denied. *See* ECF No. 59.

Following the Court's decision, the parties resumed mediation on May 2, 2023, and engaged in additional negotiations with Judge Rubin following mediation which were ultimately successful and resulted in the Settlement Agreement. *See* **Exhibit 4**, Carney Decl. ¶¶ 16 - 20.

The Parties' mediation efforts were both lengthy and intensive, included multiple mediation sessions supervised by Judge Rubin, and months of extended additional arms-length negotiations. *See id*. In addition to these mediation sessions, Class Counsel and RUM also exchanged informal discovery and information relating to their respective positions. *See id*. The negotiations between the parties were characterized by substantial compromise on both sides, mutual give-and-take, and the absence of collusion. *See id*. ¶ 21. These extended arms-length efforts to reach compromise resulted in the Settlement Agreement. *See id*.

Prior to mediation, the Parties each conducted extensive research into the applicable facts and law relating to the practices challenged by Representative Plaintiff in this case. For example, Class Counsel engaged in extensive research of the facts and applicable statutory and case law in the course of drafting the Complaint, briefing the certified question to Maryland's highest court, and briefing the motion for judgment on the pleadings in this Court. *See id*. ¶¶ 11 - 18. For its part, RUM has also conducted extensive research into the applicable facts and law and has provided substantial information concerning the allegations in the Complaint and putative class member collections in connection with mediation. *See* Settlement Agreement ¶¶ 4 - 5.

C. The Proposed Settlement Class

The Settlement Agreement contemplates certification of the following settlement Class:

> All persons to whom RUM sent a monthly statement pertaining to utility usage concerning a Maryland residence, which included an administration fee, during the Class Period.

> Excluded from the Settlement Class are all employees, officers and directors of RUM, and all employees of the Court.

Settlement Agreement ¶ 11(jj) (the "Settlement Class").

RUM has represented that there are approximately 233,000 persons in the Settlement Class. *Id*. And, RUM has provided detailed information to facilitate notice to them. *Id*. ¶ 14.

D. The Proposed Settlement Benefits

The crux of the Representative Plaintiff's allegations is that RUM violated the law by charging administrative service fees for sending utility bills to him and others, and that RUM should not retain benefits it obtained from them for its unlicensed activity. The relief provided by the proposed settlement directly relate to these claims.

First, RUM has agreed to an Injunctive Relief Order which requires it to apply to obtain the collection agency license which Representative Plaintiff alleged is required and maintain it. *See* Settlement Agreement ¶ 23 & Exhibit 6. That is what Representative Plaintiff alleged was necessary all along. *See* Complaint, *e.g.*, ¶¶ 5-8.

Second, RUM has agreed to pay $1,800,000 into a Common Fund – representing a disgorgement of all profits that RUM made in connection with the monthly billing services it provided to its customers in relation to the Settlement Class Members during the Class Period. *See* Settlement Agreement ¶ 21(b). The Common Fund will be used to make payments to Settlement Class Members who file valid claims in proportion to the administrative fees charged to them., after deduction of Court-approved attorney's fees and expenses *See id.* ¶ 21(d).

Third, RUM has agreed to pay all costs for the administration of the settlement separate and apart from the Common Fund, subject to a right to recoup administration payments from any amounts left in the Common Fund after distribution to Settlement Class Members is complete, and before any *cy pres* payment. *See id*. ¶¶ 20, 21(f). And, RUM has agreed to pay the

Representative Plaintiff an incentive fee of $15,000, separate from the Common Fund, subject to Court approval – an award that will not affect relief to other Settlement Class members. *Id.* ¶ 22.

In exchange for the benefits to Settlement Class members, the proposed settlement will result in a release of claims of Settlement Class members "resulting from, arising out of, or regarding the factual predicate alleged in the Litigation, including but not limited to RUM's inclusion of administrative service fees in RUM's billing statements and RUM's alleged unlicensed collection activity." Settlement Agreement ¶ 11(cc).[1]

E. Administration of Settlement Benefits

Under the Agreement, Settlement Class Members must file a simple claim form to obtain a settlement payment. Settlement Agreement ¶ 21(c)(2). To complete the claim form, Settlement Class Members must provide their name, their email address (if any), and any unique claimant ID code and/or other information required by the Settlement Administrator to confirm that the individual requesting the Settlement Payment is a Settlement Class Member. *Id.* In addition, a Claim Form shall not be complete unless the Settlement Class Member provides their mailing address and selects whether to receive their Settlement Payment in the form of a paper check, or an electronic debit or gift card. *Id.* Each Settlement Class Member who files a timely and valid claim ("Authorized Claimant") shall be entitled to a *pro rata* payment from the Settlement Fund, in accordance with a formula established by the Settlement Administrator which will result in the *pro rata* distribution of the Settlement Fund in proportion to the amount of administration fees charged to the Authorized Claimant submitting a Valid Claim as compared to the total amount of administration fees charged to all Authorized Claimants. *Id.* Authorized Claimants who were

[1] The release is limited to claims sharing the "factual predicate" of the Complaint, consistent with Fourth Circuit authority. *See In re MI Windows & Doors, Inc., Prod. Liab. Litig.*, 860 F.3d 218, 225 (4th Cir. 2017).

charged more in administration fees will receive larger payments than Authorized Claimants who were charged less in administration fees; and, each Authorized Claimant's payment amounts will increase or decrease proportionally based upon the total number of valid claims filed. *Id*. Settlement Class Members who are not Authorized Claimants will not receive a payment under the Settlement. *Id*.

Considering that the settlement recoups the profits RUM made in connection with the monthly billing services it provided to its customers in relation to the Settlement Class Members during the Class Period, this settlement represents a remarkable recovery for the Class. The recovery is directly in line with the relief requested in the Complaint, which demanded, *inter alia*, disgorgement of profits. *See* Complaint, *ad damnum* clause ¶ B.

F. The Settlement Administrator and Notice Plan

The Settlement Administrator proposed by Plaintiffs and appointed by the Court is Continental DataLogix LLC. *See* ECF No. 73-1, Settlement Agreement ¶ 10.

The Settlement Administrator's duties are defined in the Settlement Agreement and include, *inter alia*, undertaking E-mail and mailing address verifications for Settlement Class members and conducting appropriate research to correct an incorrect address and timely disseminating a second notice, distributing the Notice pursuant to the Settlement Agreement and Orders of the Court, accepting and reporting on Requests for Exclusion received by the Exclusion Deadline, establishing and maintaining a Settlement Website, opening an account for the deposit of the Common Fund, remitting payment from the Common Fund for settlement benefits payable to Settlement Class members, and other duties.

The plan for disseminating notice of the settlement to Settlement Class members, approved by the Court's Preliminary Approval Order (ECF No. 74), is designed to accord with Fed. R. Civ. P. 23(e). *See* Settlement Agreement part IV. Notices is being distributed by the

Settlement Administrator to the Settlement Class Members by E-mail, or if no E-mail address is available, by first-class mail. *See id*. The Settlement Administrator, Continental DataLogix, is disseminating Court-approved notice the same day that this memorandum is filed, and is maintaining the website www.MooreClassSettlement.com, on which this memorandum and other important documents relating to this settlement are available. *See* Settlement Agreement ¶ 17.

III. LEGAL STANDARD

Federal Rule of Civil Procedure Rule 23(e) sets forth the protocol for the Court's consideration of class action settlements. Final approval of a class-action settlement is appropriate on a finding that the settlement "is fair, reasonable, and adequate after considering whether":

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

The same factors guiding preliminary approval of class action settlements apply to final approval. *See Erny on behalf of India Globalization Cap., Inc.*, 2020 WL 3639978, at *2; *Robinson*, 2020 WL 8256177, at *3.

IV. FINAL APPROVAL IS APPROPRIATE

In the Fourth Circuit, the inquiry into whether a class settlement satisfies Fed. R. Civ. P. 23(e)(2) is guided by the "fairness" and "adequacy" factors enumerated in *In re: Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Pracs. & Prod. Liab. Litig.*, 952 F.3d 471, 484 (4th Cir. 2020) ("*Lumber Liquidators*"). As discussed in part A, below, consideration of the fairness and adequacy factors demonstrates that settlement approval here is warranted.

In addition, a proposed settlement class must meet the class certification requirements of Fed. R. Civ. P. 23 "for purposes of judgment on the proposal." *See* Fed. R. Civ. P. 23(e)(1)(B)(ii). As discussed in part B, below, each of the certification requirements is met.

A. THE SETTLEMENT IS FAIR AND ADEQUATE

1. Fairness

The four "fairness" factors are "(1) the posture of the case at the time settlement was proposed; (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel in the area of [the] class action litigation." *Lumber Liquidators*, 952 F.3d at 484. Each factor supports the fairness of this settlement.

a. The Posture of the Case at the Time Settlement Was Proposed and the Extent of Discovery Conducted.

The substantial and lengthy litigation in this case supports settlement approval. This case was filed in early 2020. RUM immediately noticed the removal of this case to this Court. ECF No. 1. Thereafter, the parties litigated whether a question of law should be certified to the Maryland Court of Appeals (now, the Maryland Supreme Court), briefed the certified question, and obtained a decision. *See Moore v. RealPage Util. Mgmt., Inc.*, 476 Md. 501, 264 A.3d 700 (2021). Then, the parties engaged in further litigation, including the filing, briefing, and decision on RUM's motion for judgment on the pleadings. *See Moore*, 2023 WL 2599571.

The posture of the case at the time settlement was proposed thus supports settlement approval. *See*, *e.g.*, *Boger v. Citrix Sys., Inc.*, No. 19-CV-01234-LKG, 2023 WL 3763974, at *9 (D. Md. June 1, 2023) ("the parties … litigated this matter for three years before they reached the proposed Settlement… the parties have had sufficient opportunity to understand the issues and the evidence in this case, and to reach a well-informed settlement.").

The question certified to the Maryland Supreme Court, and the question presented to this Court in RUM's motion for judgment on the pleadings were questions of law, so no formal discovery was necessary to the briefing and decision on those motions and no formal discovery has been conducted. However, RUM provided substantial information in informal discovery in connection with mediation, has represented that the Settlement Class consists of approximately 233,000 members, and that the $1.8 million Common Fund represents disgorgement of its profits. Accordingly, the posture of litigation factor supports settlement approval.

b. Circumstances Surrounding the Negotiations and the Experience of Class Counsel

Lumber Liquidators and Fed. R. Civ. P. 23(e)(2)(B) require consideration of whether the proposed settlement is a product of arms-length negotiations. *Id.* The settlement in this case is the product of months of arms-length negotiations and three mediation sessions supervised by a neutral retired Judge – the Hon. Ronald B. Rubin (Ret.). *See Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 475 (D.Md. 2014) (the parties engaged in "nine months of arms-length negotiations and mediation overseen by Magistrate Judge Susan K. Gauvey.") As in *Decohen*, "[t]here is no indication in the record of bad faith or collusion in the settlement negotiations" and the parties "represent that the settlement negotiations were at arms-length." *Decohen*, 299 F.R.D. at 480; *see also* ECF No. 73-1, Settlement Agreement ¶ 6 (representing that the parties' negotiations were at "arms-length"); *see also* **Exhibit 4**, Carney Decl. ¶ 20.

Furthermore, the Settlement Agreement itself reflects that it is the product of negotiations informed by specific facts concerning the Settlement Class members. The Settlement Agreement specifies the approximate number of potential Settlement Class members (233,000) (Settlement Agreement ¶ 11(jj)) and contains a representation by RUM that the agreed $1,800,000 Common Fund represents a disgorgement of all profits that RUM made in connection with the monthly billing services it provided to its customers in relation to the Settlement Class Members during the Class Period. This is the relevant information for reaching an informed settlement here. Accordingly, the settlement is the product of arms-length, informed negotiation.

Class Counsel are also "experience[d]… in the area of [the] class action litigation." *Lumber Liquidators*, 952 F.3d at 484. After all, *Decohen* held that class counsel in that case – led by Benjamin H. Carney, the same lead Class Counsel here – were adequate in part due to "significant litigation and appellate experience" and "recogni[tion] in various national publications for excellence in their field." *Decohen*, 299 F.R.D. at 480. Class Counsel's experience has only increased in the nearly ten years since *Decohen* was decided. Class Counsel have been certified as adequate class counsel in dozens of other class action settlements in state and federal courts. *See* **Exhibit 4**, Carney Decl. ¶¶ 3, 7, 10. And in this case, Class Counsel pursued this case from the Circuit Court for Montgomery County, where it was filed, to this Court, to the Maryland Supreme Court, and back; defeated RUM's motion for judgment on the pleadings; and, as a result of those efforts, obtained a substantial settlement for the Settlement Class. Class Counsel is adequate.

2. Adequacy

Whether the relief provided for the Class is adequate under Fed. R. Civ. P. 23 is guided by five factors in the Fourth Circuit: "(1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (3) the anticipated duration and expense of additional litigation; (4) the

solvency of the defendant[ ] and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement." *Lumber Liquidators*, 952 F.3d at 484 (citation omitted). Each of these factors supports the settlement's adequacy.

a. The Relative Strength of Plaintiff's Case on the Merits and the Existence of Any Difficulties of Proof or Strong Defenses the Plaintiffs are Likely to Encounter if the Case Goes to Trial

Class Counsel believes that, at trial, Representative Plaintiff and the Class would prevail on their claims against RUM and, through evidence, be able to prove that RUM violated the law through its actions and damaged Representative Plaintiff and Class Members.

Despite Class Counsel's belief as to the strength of the case on the merits, many significant hurdles would need to be overcome before Representative Plaintiffs and the Class could establish their entitlement to relief on a class-wide basis. RUM contested liability and moved for judgment as a matter of law on Representative Plaintiff's claims. Although Representative Plaintiff prevailed on RUM's motion for judgment in this Court, RUM would have opposed Representative Plaintiff's motion for class certification, would have likely filed additional dispositive motions, and would have vigorously defended itself at trial. Moreover, to the extent RUM was not successful at trial, it would almost certainly appeal after any unfavorable judgment. Accordingly, as a practical matter, Representative Plaintiff and the Class faced substantial challenges to obtain a litigated judgment in their favor. The Settlement Agreement in this case avoids these issues, provides a real monetary recovery now, and accomplishes an exemplary result without the need for further litigation or a full trial.

Representative Plaintiff has no guarantee of winning either in the trial or appellate courts. There is no certainty in litigation and any success in this case depends almost entirely upon the Court's interpretation of the controlling statutory language and the jury's determination of fact.

"It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced." *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) ("*Pfizer*"). In *Pfizer*, another consumer class action, Judge Wyatt offered the following example:

> In *Upson v. Otis*, 155 F.2d 606, 612 (2d Cir. 1946), approval of a settlement was reversed, the Court saying (at 612): "on the facts presented to the district judge, the liability of the individual defendants was indubitable and the amount of recovery beyond doubt greater than that offered in the settlement. Accordingly, it was an abuse of discretion to approve the settlement." The action was then tried and plaintiffs obtained a judgment, twice considered by the Court of Appeals (168 F.2d 649, 169 F.2d 148 (1948)). We are told, however, that "the ultimate recovery . . . turned out to be substantially less than the amount of the rejected compromise."

Id. at 743-44.

In another example demonstrating the enormous risks of litigation, a class action against the manufacturer of the drug Bendectin was originally settled. The Sixth Circuit reversed approval of that settlement. *In re Bendectin Productions Liability Litigation*, 749 F.2d 300 (6th Cir. 1984). Thereupon, as reported in *The Wall Street Journal* (March 13, 1985), the plaintiffs tried the case and, by jury verdict, lost the millions of dollars for which they had originally bargained.

Litigation risk, moreover, does not end with the trial. In this case, post-trial motions and appeals would be almost a certainty. History records numerous instances where favorable jury verdicts have been overturned by the trial court, a court of appeals, or even the Supreme Court. As Judge Friendly noted of the vagaries of appellate review: "Platus warned long ago 'what a ticklish thing it is to go to law,' and the ticklishness does not diminish as the pinnacle is reached." *Newman v. Stein*, 464 F.2d 689, 695 (2d Cir. 1972).

Experienced counsel in this case, who negotiated at arm's length and possess all relevant information, strongly recommend the settlement to the Court. *See* **Exhibit 4**, Carney Decl. ¶ 22. Class Counsel believe that Representative Plaintiff and the Class have a strong case against

RUM. As evident from the above discussion, however, it is by no means certain that Representative Plaintiff and the Settlement Class Members would have obtained a result better than that achieved through this settlement—a settlement which recovers disgorgement of all profits that RUM made in connection with the monthly billing services it provided to its customers in relation to the Settlement Class Members during the Class Period.

And the benefits provided in the proposed settlement are adequate even if the Representative Plaintiffs' case on the merits is strong. The proposed settlement recovers RUM's profits, in addition to RUM's agreement to apply for the collection agency license Representative Plaintiff alleged was required. Considering these results, it is perhaps possible but certainly not clear that Plaintiff and the Class could have obtained more after a trial. Or, judgment could have been entered in favor of RUM after dispositive motions or a trial, leaving Representative Plaintiff and the Class with nothing.

Accordingly, these factors support the adequacy of the settlement.

b. The Anticipated Duration and Expense of Litigation

The anticipated duration and expense of additional litigation factor supports the adequacy of the settlement. *See Lumber Liquidators,* 952 F.3d at 484. Although Class Counsel believes the trial of this case would be manageable and superior to other means of adjudicating the controversy, the issue here is the extent to which the anticipated complexity and costs of proceeding to trial favor settlement.

Before any trial, the parties would have engaged in substantial litigation – including litigating dispositive motions, discovery matters, and motions concerning class certification. Had this matter proceeded to trial, RUM would have attempted to present evidence to demonstrate that its actions complied with the law and did not damage Representative Plaintiff or Settlement

Class members. Although Class Counsel is confident Representative Plaintiff's position on the applicable law is correct, there is no guarantee the Court or jury would agree.

Moreover, the expense of taking this case through trial would have been considerable. A substantial amount of additional formal discovery (including many important depositions) and extensive motion practice would have to be completed. Trial preparation would require great effort and expense. Both the Class and RUM would have incurred substantial expenses, which would have detracted from any eventual recovery. Class Counsel anticipates that a class trial of this case would take approximately two weeks. *See* **Exhibit 4**, Carney Decl. ¶ 23.

Avoiding the delay and risk of protracted litigation is a primary reason for counsel to recommend and the court to approve a settlement. *Protective Committee for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424 (1968) (court must consider "the complexity, expense, and likely duration" of the litigation). Here, that delay and risk would be substantial. Accordingly, this factor weighs in favor of settlement approval.

c. The Solvency of the Defendant

The next *Lumber Liquidators* "adequacy" factor, the "solvency of the defendant and the likelihood of recovery on a litigated judgment," also supports settlement approval. *See* 952 F.3d at 484 Even though Class Counsel believes that Representative Plaintiff would prevail at trial, such a litigated judgment would not be available to the Class until this complex case was fully litigated and all appeals exhausted. The availability of a real monetary recovery now, as opposed to at some point in the far-off future, supports settlement approval.

Class Counsel has no reason to believe that this settlement substantially taxes RUM's net worth. But, as this settlement recovers all profits that RUM made in connection with the monthly billing services it provided to its customers in relation to the Settlement Class Members

during the Class Period and requires RUM to maintain the collection agency license Plaintiff alleged was required, this factor weighs in favor of settlement approval.

Thus, for purposes of this settlement, the inquiry does not turn solely on whether Defendants could withstand a greater judgment. *See also Decohen*, 299 F.R.D. at 480 ("Although Capital One could likely afford to pay a much larger judgment, because the other factors favor adequacy, this factor [solvency of the defendant] may be given less weight. Accordingly, the Court will find that the settlement is adequate.") (citations omitted).

d. The Degree of Opposition to the Settlement

The final *Lumber Liquidators* "adequacy" factor, the "degree of opposition to the settlement," is unknown at this time. *See* 952 F.3d at 484. Notice is being sent to Settlement Class members at the time this memorandum is filed, so no Settlement Class members have had the opportunity to weigh in on the settlement. This factor is, for now, neutral.

e. The Effectiveness of Any Proposed Method of Distributing Relief to the Class

Fed. R. Civ. P. 23(e)(2)(C)(ii) requires consideration of "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." That factor supports settlement approval here.

The Settlement Agreement contemplates a straightforward *pro rata* method of distributing relief to the Class. Settlement payments will vary among Settlement Class members depending on how much they were charged in administrative fees. *See* Settlement Agreement ¶ 21(d). To facilitate the calculation of payments to Settlement Class members, RUM has provided Settlement Class members' names; b) last known addresses; c) last known E-mail addresses; d) move-in dates; e) total Administration Fees charged; and e) move-out dates. *See id.* ¶ 14.

Under the Settlement Agreement, Settlement Class Members are required to file simple claim forms to choose the manner of payment of their settlement benefits, and may select to receive a check, or an electronic debit card, or an electronic gift card. Claim forms can be filed electronically, or by mail. *Id.* ¶ 21(c)(2). A sample claim form is attached as Exhibit 6 to the Agreement. Settlement Class Members have 180 days from the date of Notice to file a claim. *Id.* ¶ 11(g).

This simple protocol for *pro rata* distribution of settlement payments supports adequacy. Such "*[p]ro rata* distribution schemes are sufficiently equitable and satisfy the requirements of Rule 23(e)(2)(D)." *Cymbalista v. JPMorgan Chase Bank, N.A.*, No. 20 CV 456 (RPK)(LB), 2021 WL 7906584, at *9 (E.D.N.Y. May 25, 2021) (citations omitted).

f. The Terms of Any Proposed Award of Attorney's Fees

Fed. R. Civ. P. 23(e)(2)(C)(iii) requires consideration of the "terms of any proposed award of attorney's fees, including timing of payment." *Id.* This factor supports settlement approval.

The Settlement Agreement reflects that Class Counsel intends to request Court approval of an award of 1/3 of the Common Fund as attorney's fees. *See* Settlement Agreement ¶ 21(c)(1). Contemporaneous with the filing of this memorandum, Representative Plaintiff is filing a motion for an award of attorney's fees, discussing why that award should be approved. For all the reasons supporting that motion, the requested attorney's fee award also supports the adequacy factor here.

The timing of the payment of attorney's fees also supports adequacy. Class Counsel only gets paid after the Settlement is finally approved, the time for appeal has passed, and Settlement Class members are guaranteed to be paid also. *See* Settlement Agreement ¶ 11(k) & 21(c)(1) (attorney's fees to be paid within 10 days after the "Effective Date", which is after the time for any appeal has passed). Thus, the Settlement Agreement does not include a so-called "quick pay

clause" which "allows class counsel to be paid in short order, even if an appeal is taken." *In re: Whirlpool Corp. Front-loading Washer Prod. Liab. Litig.*, No. 1:08-WP-65000, 2016 WL 5338012, at *20 (N.D. Ohio Sept. 23, 2016). Although most courts have held that "quick pay" clauses do not impair the adequacy of a settlement because "they serve the socially-useful purpose of deterring serial objectors," such terms have invited some judicial scrutiny. *Id.*

Accordingly, the proposed attorney's fee award supports the settlement's adequacy.

g. Any Agreement Required to be Identified

Fed. R. Civ. P. 23(e)(2)(C)(iv) requires "a statement identifying any agreement made in connection with the propos[ed settlement]."*Id.* The parties have submitted and identified the Settlement Agreement, which is the only agreement Class Counsel is aware of which was made in connection with the proposed settlement. *See* **Exhibit 4**, Carney Decl. ¶ 22.

3. The Proposal Treats Class Members Equitably

The final Fed. R. Civ. P. 23(e)(2) factor is whether the settlement proposal "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D).

Here, as described above, the amount of Settlement Class members' monetary recovery under the proposed settlement will be based upon the amounts charged to them. Settlement Class members who were charged more will be entitled to a larger payment amount. *See* Settlement Agreement ¶ 21(c)(2). Settlement Class members will treated equitably by the *pro rata* distribution protocol proposed here, so this final adequacy factor also weighs in favor of settlement approval. *See Cymbalista*, 2021 WL 7906584, at *9 (*pro rata* distributions are equitable).

B. THE PROPOSED SETTLEMENT CLASS IS CERTIFIABLE

In addition to the fairness and adequacy considerations discussed above, a proposed settlement class must meet the class certification requirements of Fed. R. Civ. P. 23 "for purposes

of judgment on the proposal." *See* Fed. R. Civ. P. 23(e)(1)(B)(ii). As discussed below, each of the class certification requirements is met here.

1. The Class Is Identifiable and Ascertainable

"A class cannot be certified unless a court can readily identify the class members in reference to objective criteria." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). This "implicit" requirement of Rule 23 is that a proposed class be "definite," in other words, "ascertainable with reference to objective criteria."1 Newberg on Class Actions § 3:1 (5th ed.)

Here, the proposed Settlement Class is not only ascertainable but it has been ascertained. RUM has represented that the Settlement Class consists of approximately 233,000 persons. *See* Settlement Agreement ¶ 11(jj). And, the settlement administrator is providing E-mailed and Mailed notice to the class members using a Class List produced by RUM with contact information for Settlement Class members.

Furthermore, the elements of membership in the Settlement Class can be evaluated based entirely upon objective criteria. Each Settlement Class member is a person 1) to whom RUM sent a monthly statement pertaining to utility usage concerning a Maryland residence, 2) which included an administration fee, 3) during the Class Period. *See* Settlement Agreement ¶ 11(jj).

2. The Criteria of Fed. R. Civ. P. 23(a) Are Satisfied

Each of the explicit Fed. R. Civ. P. 23(a) class certification requirements are also met.

a. Fed. R. Civ. P. 23(a)(1) - Numerosity

The proposed Settlement Class meets the numerosity requirement of Fed. R. Civ. P. 23(a)(1), as it consists of approximately 233,000 persons. *See* Settlement Agreement at ¶ 11(jj).

A class of that size is so numerous that joinder of all members is presumptively impracticable. *See, e.g., Decohen*, 299 F.R.D. at 477 ("classes with as few as 25 to 30 members 'have been found to raise the presumption that joinder would be impracticable.'") (citation omitted); *see*

also W. Rubenstein, *Newberg on Class Actions* § 3:12 (5th ed.) ("a class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone") (citing numerous cases).

b. Fed. R. Civ. P. 23(a)(2) - Commonality

The commonality, typicality, and adequacy inquiries "are similar and overlapping." *Decohen*, 299 F.R.D. at 477 (citation omitted). "To establish commonality, the class members must 'have suffered the same injury,' and 'their claims must depend upon a common contention.'" *Id.* (*quoting Wal–Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011) (internal quotations omitted)).

Here, Settlement Class members all suffered the same alleged injury – charges for administration fees assessed in bills sent by RUM. Those injuries resulted from the same allegedly unlawful practice of the Defendants – sending utility bills to consumers like Representative Plaintiff assessing those administration fees without a collection agency license. The lawsuit and Settlement Agreement concern the question, for all Settlement Class Members, of the legality of RUM's alleged actions in sending utility bills without a collection agency license and charging administrative fees for doing so. This "common contention" binds all of the Settlement Class members' claims together. *See Wal-Mart*, 131 S.Ct. at 2551; *Decohen*, 299 F.R.D. at 477.

Whether RUM's actions did, in fact, violate the law is subject to a common answer. *See EQT Prod. Co.*, 764 F.3d at 360 ("what matters to class certification ... [is] the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.") (*quoting Wal–Mart*, 131 S.Ct. at 2551 (emphasis in original, internal quotation marks omitted)). Either RUM violated the law and damaged Settlement Class Members by sending them utility bills without a collection agency license and charging them for doing so, or it did not.

The commonality requirement is, therefore, satisfied.

c. Fed. R. Civ. P. 23(a)(3) - Typicality

The same facts which support commonality support the "similar and overlapping" requirement of typicality. *Decohen*, 299 F.R.D. at 477 (citation omitted). Representative Plaintiff's claims are typical of Settlement Class member's claims because each claim arises from the same practice and course of conduct by the same defendant. *See Peoples v. Wendover Funding, Inc*., 179 F.R.D. 492, 498 (D. Md. 1998) ("[t]he test for determining typicality is whether the claim or defense arises from the same course of conduct leading to the class claims, and whether the same legal theory underlies the claims or defenses."). Typicality is satisfied if, by pursuing his claims, the Representative Plaintiff "simultaneously tend[s] to advance the interests of the absent class members." *Deiter v. Microsoft Corp*., 436 F.3d 461, 466–67 (4th Cir. 2006).

Here, Representative Plaintiff faced the same allegedly unlawful collection practices which affected the entire Settlement Class – utility bills sent to him, which assessed administrative fees, when RUM was not licensed as a collection agency. The same legal theory underlies every Settlement Class member's claims. As a result, the typicality requirement is satisfied.

d. Fed. R. Civ. P. 23(a)(4) - Adequacy

Once again, the same facts which support commonality and typicality support the "similar and overlapping" requirement of adequacy. *Decohen*, 299 F.R.D. at 477 (citation omitted).

The requirement of adequate representation assures that absent class members, who will be bound by the result, are protected by a vigorous, competent prosecution of the case by someone sharing their interests. *See* 1 Newberg, *supra*, § 3.21; *see also George v. Baltimore City Public Schools*, 117 F.R.D. 368, 371 (D. Md. 1987). This ensures "that the relationship of the representative parties' interest to those of the class are such that there is not likely to be divergence in viewpoint or goals in the conduct of the suit." *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3d Cir. 1977).

Representative Plaintiff does not have any conflict with the proposed Settlement Class and exhibited a dedication to this case. *See* **Exhibit 4**, Carney Decl. ¶ 29.

Furthermore, Class Counsel are experienced in handling consumer class actions and complex consumer litigation and have served as certified class counsel in dozens of consumer class actions. *See id*. ¶¶ 3, 7. And the contingent-fee nature of Class Counsel's representation (*see id.* ¶ 24) aligns their interests with those of the Settlement Class. *See In re Abrams & Abrams, P.A.*, 605 F.3d 238, 246 (4th Cir. 2010) ("an attorney compensated on a contingency basis has a strong economic motivation to achieve results for his client, precisely because of the risk accepted. As the Seventh Circuit has explained, '[t]he contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client.'").

The adequacy requirement is, therefore, satisfied.

3. The Criteria of Fed. R. Civ. P. 23(b)(3) Are Satisfied.

After finding that all four requirements of Fed. R. Civ. P. 23(a) are met, class certification is appropriate if any one of three criteria in part (b) of the Rule is satisfied. Certification here is appropriate under Fed. R. Civ. P. 23(b)(3), which permits class certification where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.*

The inquiry into whether certification is warranted under (b)(3) boils down to two requirements: "that 1) common questions of fact or law predominate and 2) a class action is superior to other methods of adjudications." *In re Kirschner Med. Corp. Sec. Litig.*, 139 F.R.D. 74, 78 (D. Md. 1991). Here, as noted above, the common questions of law and fact are the only issues. This case turns on RUM's actions in sending Representative Plaintiff and Settlement Class Members utility bills assessing administrative fees when RUM had no collection agency license.

Moreover, absent class certification and settlement, class members would be effectively foreclosed from relief. The administrative fees Representative Plaintiff challenges were $5.50 per month. Those charges are substantial to him, but absent a class action, it would be absurd to file or pursue a lawsuit – let alone a case traveling state Circuit Court, this Court, and the Maryland Supreme Court – over those charges in light of the great expense and cost of litigation. Settlement Class Members have no reason to pursue their claims individually. These circumstances show that the "interest of members of the class in individually controlling the prosecution of separate actions," Fed. R. Civ. P. 23(b)(3)(A), is low, and class certification would serve Settlement Class members.

Furthermore, (b)(3) certification is supported because Class Counsel is unaware of any other "litigation concerning the controversy already commenced by members of the class." Fed. R. Civ. P. 23(b)(3)(B); *see also* **Exhibit 4**, Carney Decl. ¶ 30.

Finally, under Fed. R. Civ. P. 23(b)(3)(C) & (D), the fact that this case is the subject of a class action Settlement Agreement means that concentration of claims in this forum is particularly desirable for the purposes of settlement, and few difficulties are likely to be encountered in the management of a class action which is for settlement purposes only.

For all of these reasons, the class certification requirements of Fed. R. Civ. P. 23 are met.

C. The Notice to the Class Comports with Fed. R. Civ. P. 23

The Preliminary Approval Order approved the parties' proposed plan for distributing notice to Settlement Class members. Pursuant to the Settlement Agreement, the Settlement Administrator shall provide a declaration concerning its compliance with the Court-ordered notice plan. *See* ECF No. 73-1 ¶ 27(c). Class Counsel will file that declaration with the Court when it is available.

The content and distribution of that notice is governed by Fed. R. Civ. P. 23(c)(2):

> the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:
> **(i)** the nature of the action;
> **(ii)** the definition of the class certified;
> **(iii)** the class claims, issues, or defenses;
> **(iv)** that a class member may enter an appearance through an attorney if the member so desires;
> **(v)** that the court will exclude from the class any member who requests exclusion;
> **(vi)** the time and manner for requesting exclusion; and
> **(vii)** the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2).

The notice plan agreed by the parties and approved by the Court meets each of the Fed. R. Civ. P. 23(c)(2) requirements and maximizes notice to Settlement Class members of the proposed settlement and, if desired, their right to participate in the settlement approval process.

First, a postcard or E-mailed notice is being sent to all Settlement Class members which fairly apprises Settlement Class members of the action and their rights: each mailed notice identifies this lawsuit, describes what the lawsuit is about, informs recipients how they can know they are a Settlement Class member, describes the proposed settlement, identifies the size of the common fund, identifies the amount of incentive payment and attorney's fees to be requested by the Representative Plaintiff and Class Counsel, identifies counsel for the Settlement Class, states that a class member may enter an appearance through an attorney if the member so desires, states that the court will exclude from the class any member who timely requests exclusion, and states that the effect of a class judgment on Settlement Class members is binding. *See* **Exhibits 1 & 2**.

Second, the Settlement Administrator is establishing the Settlement Website, www.MooreClassSettlement.com, that enables Settlement Class members to read the Long Form Settlement Notice (**Exhibit 3**), which discusses in detail each of the categories of information required under Fed. R. Civ. P. 23(c)(2). The Settlement Website also allows Settlement Class

members to review other important information concerning this litigation, including this memorandum, the operative Complaint, the Settlement Agreement, and other important documents. *See* Settlement Agreement ¶ 17.

For all these reasons, the notice program satisfies the requirements of due process and Fed. R. Civ. P. 23.

D. RUM Complied with the Notice Requirements of CAFA

The Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715(b), requires that "[n]ot later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve" notice on certain state and local officials. *Id.* In addition, "[a]n order giving final approval of a proposed settlement may not be issued earlier than 90 days after" CAFA notices are sent. *Id.* § 1715(d).

Here, the Settlement Agreement was filed in this Court on January 5, 2024. *See* ECF No. 73-1. The Settlement Administrator, on behalf of RUM, timely sent CAFA notices to the appropriate parties on January 12, 2024. *See* **Exhibit 5**, Declaration of Frank Barkan on Implementation of CAFA Notice. And no final approval order will be issued before the Court's final fairness hearing is scheduled for May 28, 2024, which is more than 90 days after January 12. Accordingly, CAFA's notice requirements are satisfied.

V. CONCLUSION

For the reasons set forth above, Representative Plaintiff respectfully requests that the Court grant final approval of the settlement and enter the attached proposed Final Approval Order.

Respectfully submitted,

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