IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GEORGE HENGLE, *et al*.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 3:19-cv-00250 (DJN)
	:	
SCOTT ASNER, *et al*.,	:	
	:	
Defendants.	:	
	:	

MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND FOR SERVICE AWARDS AND ATTORNEYS' FEES

Plaintiffs George Hengle, Sherry Blackburn, Willie Rose, Elwood Bumbray, Tiffani Myers, Steven Pike, Sue Collins, Lawrence Mwethuku, Regina Nolte, and Jo Ann Falash ("Plaintiffs"), on behalf of themselves and the Settlement Class Members, by counsel, submit this Memorandum in Support of Motion for Final Approval of Class Settlement. Along with final approval of the class settlement, Plaintiffs ask the Court to enter an order for reasonable service awards and attorneys' fees.

INTRODUCTION

This case arises from the making and collection of high interest loans from online lending companies named Golden Valley Lending, Silver Cloud Financial, Majestic Lake Financial, and Mountain Summit Financial ("Tribal Lending Entities"). The Tribal Lending Entities were formed by the Habematolel Pomo of Upper Lake, a federally recognized Native American tribe. Because some of the Tribal Lending Entities may have been entitled to immunity as arms of a tribe, this case proceeded against the Executive Council of the Habematolel Pomo of Upper Lake. Plaintiffs also sued several of the Tribal Lending Entities' non-tribal business partners, including Joshua Landy and Scott Asner.

As soon as Plaintiffs filed this case in April 2019, Defendants vigorously defended against it, including by filing motions to dismiss that raised complex and novel issues of sovereign immunity and enforceability of tribal choice of law provisions. The Court denied those motions in an extensive 108-page opinion that addressed several matters of first impression in this District and the Fourth Circuit, including: (1) whether sovereign immunity extends to suits seeking to enjoin violations of state law; (2) whether online loans constitute off the reservation activity subject to state law; and (3) the enforceability of tribal choice of law provisions. *Hengle v. Asner*, 433 F. Supp. 3d 825 (E.D. Va. 2020).

Defendants filed interlocutory appeals of the Court's sovereign immunity and arbitration decisions. And they also asked this Court to certify the choice-of-law question under 28 U.S.C. § 1292(b). In granting this motion, this Court held that the enforceability of the choice-of-law provision "constitutes the strongest determining factor of the appropriate law to apply in this case and, ultimately, Plaintiffs' right to relief." *Hengle v. Asner*, 2020 WL 855970, at *9 (E.D. Va. Feb. 20, 2020). The Court also found that there was a substantial ground for difference of opinion on the question and resolution would likely materially advance the termination of the instant litigation. *See id*.

Defendants' appeal, in short, was high stakes. If they succeeded on any of the issues—sovereign immunity, arbitration, or choice-of-law—it could have disposed of the entire litigation (or at least the litigation for the Executive Council). On November 16, 2021, the Fourth Circuit affirmed this Court's decision. *Hengle v. Treppa*, 19 F.4th 324, 331 (4th Cir. 2021). In doing so, the Fourth Circuit made several critical holdings. For example, as to the sovereign immunity issues, the Fourth Circuit held that "substantive state law applies to off-reservation conduct" like internet lending, "and although the Tribe itself cannot be sued for its commercial activities, its

members and officers can be." *Id*. at 348. And while acknowledging "that contractual choice-of-law clauses should be enforced absent unusual circumstances," the Fourth Circuit held that "the circumstances here—unregulated usurious lending of low-dollar short-term loans at triple-digit interest rates to Virginia borrowers—unquestionably 'shock[s] . . . one's sense of right' in the view of Virginia law." *Id*. at 352 (citation omitted). After this decision, the Fourth Circuit denied Defendants' request to stay the mandate, and the Supreme Court denied their request to stay the case pending their petitions for writ of certiorari. *Treppa v. Hengle*, No. 21A237, 595 U.S. __ (Jan 10. 2022) ("The application for stay presented to The Chief Justice and by him referred to the Court is denied.").

Following this critical decision, as well as months of additional litigation, discovery, and mediations, Plaintiffs reached a settlement with Defendants that, if approved by the Court, will result in: (1) cancellation of more than $450 million in outstanding debts; and (2) creation of a $39 million settlement fund. Altogether, the proposed settlement provides benefits to class members worth almost half a billion dollars—without accounting for other valuable consideration, like the request of deletion of any negative credit reporting associated with the loans. The cost of administration was also paid separate from the settlement fund. And critically, the proposed settlement does not release valuable claims against other major players and co-conspirators, who have been sued in related litigation pending before this Court. *See, e.g.*, *Blackburn v. A.C. Israel Enterprises, Inc.*, No. 3:22-cv-146 (E.D. Va.).

The settlement consideration resembles and even exceeds some trailblazing settlements recently approved by this Court in similar cases. *See, e.g., Turner v. ZestFinance, Inc.*, No. 3:19-cv-293, ECF No. 114 (E.D. Va. July 9, 2020) (Novak, J.) (granting final approval of a class settlement providing $18.5 million in cash and $170 million in debt relief to borrowers); *Galloway*

v. Williams, No. 3:19-cv-470, ECF No. 115 (E.D. Va. Dec. 18, 2020) (Payne, J.) (approving settlement providing $8.7 million in cash and over $100 million dollars in debt relief for over 300,000 consumers); *Gibbs v. TCV V, L.P.*, No. 3:19-cv-789, ECF No. 95 (E.D. Va. Mar. 29, 2021) (Lauck, J.) (granting final approval of a class settlement providing $50 million in cash and $380 million in debt relief to borrowers). And tellingly, not even *one* of the more than 550,000 Settlement Class Members objected to the settlement and only 18 have excluded themselves after receiving the court-approved notice. Likewise, federal and state regulators were notified of the settlement (ECF No. 207), and none have objected to any settlement term.

For these reasons and the others explained below, the proposed settlement satisfies Rule 23(e)(2)'s requirements that a class settlement be fair, reasonable, and adequate. Similarly, Plaintiffs and Class Counsel request that the Court approve service awards of $10,000.00 per plaintiff and attorneys' fees of $13,000,000.00 (*i.e.*, one third of the cash consideration created by the settlement). This Court has routinely awarded similar service fees and attorneys' fees, and they are warranted here given the extraordinary efforts and results of this case. Indeed, when considering the settlement's total value—$489 million plus the additional relief of credit report deletion—the requested fee award is less than 3% of the settlement's overall value. And, like the settlement itself, no class member or regulator has objected to the requested fee or service awards. Accordingly, Plaintiffs and Class Counsel request that the Court award these amounts.

THE CLASS ACTION SETTLEMENT AND NOTICE PROGRAM

Under the Settlement Agreement, the parties agreed to resolve the claims of a nationwide class ("Settlement Class") defined as:

> All consumers residing within the United States who executed loan agreements with Golden Valley Lending, Inc., Silver Cloud Financial, Inc., Majestic Lake Financial, Inc., or prior to February 1, 2021, with Mountain Summit Financial, Inc.

ECF No. 185-1 § 3.2. These individuals were identified through records of the Tribal Lending Entities, which confirmed that there were 547,074 Settlement Class Members. Ex. 1, ALCS Decl. ¶ 4.

A. The Settlement terms provide significant and meaningful relief to consumers.

The Settlement provides significant consideration to Settlement Class Members, mainly in the form of debt cancellation, deletion of credit reporting, and cash payments. As to the debt cancellation, the Tribal Officials have agreed to eliminate the balance due on *all* outstanding debt originated by Golden Valley, Silver Cloud, and Majestic Lake Financial. *Id*. § 3.4.a.1. They have also agreed to eliminate the balance on all outstanding debt on loans originated by Mountain Summit before February 1, 2021. *Id*.[1] Collectively, this will result in the cancellation of around $450 million in outstanding loans. *Id*. The Tribal Officials have also agreed to request deletion of any negative credit reporting for the loans. *Id.* § 3.4.a.iv.

As to cash payments, Defendants Landy, Asner, Gortenburg, and Vittor will make monetary payments collectively totaling $39,000,000.00, which will be distributed to the Settlement Class Members. *Id. §* 3.4.b.i. As outlined in the Settlement Agreement, the payments will be allocated using a tiered formula after payment of service awards to Plaintiffs,[2] attorneys' fees, and costs as approved by this Court:

[1] The Tribal Officials also agreed to cease all collection activity on the loans as of March 2022. *Id.* § 3.4.a.ii. In other words, Settlement Class Members have not been subject to collections during the administration of the settlement. For any Class Members who did make payments, counsel for the Tribal Officials and Class Counsel worked with the ALCS to issue refunds for those payments to Class Members.

[2] This tiered formula has been approved by the Court in several other similar cases. *See, e.g.*, *Gibbs v. TCV, V, LLP*, No. 3:19-cv-789, ECF No. 95 (E.D. Va. Mar. 29, 2021); *Gibbs v. Plain Green, LLC*, No. 3:17-cv-495, ECF No. 141 (E.D. Va. Dec. 13, 2019); *Turner v. ZestFinance, Inc.*, No. 3:19-cv-293, ECF No. 114 (E.D. Va. July 9, 2020).

> Tier 1: The dollar amount of all payments made by each Settlement Class Member in Arizona, Arkansas, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, South Dakota, Vermont, Virginia, and Wisconsin so long as the Settlement Class Member paid the principal amount of his or her loan.
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> Tier 2: The dollar amount of payments made above the legal interest limits if the original principal amount was repaid and if the Settlement Class Member resided in Alabama, Alaska, California, Delaware, Florida, Georgia, Hawaii, Iowa, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Washington, Washington D.C., West Virginia, or Wyoming at the time the Settlement Class Member took out the loan; and
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> Tier 3: Settlement Class Members in Nevada and Utah will not receive cash payments.

Settlement Class Members in Tier 1 or Tier 2 who repaid the principal amount borrowed will receive a cash award based on a *pro rata* calculation rounded down to the nearest cent. *Id.* § 3.4.b.v.1. If a Settlement Class Member took out more than one loan during the class period, his or her claim amount will be calculated by determining the claim amount for each loan and adding them together. *Id.* § 3.4.b.iv.

The relief provided by the proposed class action settlement is significant. Every consumer will receive either a cash payment, debt cancellation, or both. The cash payment amounts depend on how much each consumer paid. For example, the named Plaintiffs will receive the following payments:

Plaintiff Name	**Estimated Payment**	**Cancellation**
George Hengle	$30.92	$690.00
Sherry Blackburn	$119.88	$0
Willie Rose	$143.05	$325.00
Elwood Bumbray	$54.32	$184.50

Tiffani Myers	$0	$2,489
Steven Pike	$47.30	$910.00
Sue Collins	$175.48	$10.00
Lawrence Mwethuku	$0	$997.50
Regina Nolte	$781.65	$0
Jo Ann Falash	$928.80	$1,050.00

Ex. 2, Kelly Decl. ¶¶ 20–21. The named Plaintiffs, like all other Settlement Class Members, will receive their pro rata portion of the consideration without needing to submit a claim form or taking any affirmative action, like proof of repayment.

B. Direct Notice was provided to the Settlement Class Members.

In its Preliminary Approval Order, the Court approved the proposed notice plan and ordered that the Class Notice be sent to Settlement Class Members by American Legal Claim Services, LLC (ALCS). ECF No. 209 ¶ 9. Consistent with the Court's Preliminary Approval Order, ALCS received a class list from the Tribal Officials that "contained 1,085,244 rows of loan level data." Ex. 1, ALCS Decl. ¶ 4. Among other things, this data included the borrowers' "name, mailing address, email address," as well as "other pertinent loan data" such as the "original principal amount, total amount paid, loan origination date and date of last payment." *Id*. Through these records, ALCS identified and compiled a final class list that containing "547,074 individual class members." *Id*.

On June 20, 2022, ALCS mailed the Class Notice "to 65,830 class members." *Id*. ¶ 5. ALCS "utilized several means of ensuring the most accurate mailing addressing for class members," including identifying addresses through the "National Change of Address through

USPS, skip-tracing, and manual updates from class members." *Id.* ¶ 4.[3] On June 21, 2022, "ALCS commenced the process of emailing" the Class Notice to the remaining "481,244 class members," whose emails were initially verified. *Id.* ¶ 5. This process was completed on July 7, 2022. *Id.* Of the "481,244 attempted emails, 19,630 were identified as undeliverable email addresses." *Id.* ACLS then mailed the Class Notice to these class members on July 18 or July 21, 2022. *Id.* ¶ 6.

ALCS "processed all Class Notices returned by USPS" from the initial mailing in June through the objection and opt-out deadline of September 6, 2022. *Id.* ¶ 7. If the mail returned by USPS did not contain an updated address, "ALCS conducted address searches using a national recognized location service to attempt to locate new address for these class members." *Id.* "Of the 85,460 mailed Notices, 21,943 were returned by USPS" as of September 12, 2022. Of those returned, "17,922 were remailed to updated addresses" and "4,021 Notices were deemed undeliverable." *Id.* In sum, 543,053 notices (*i.e.*, 99.27%) are presumed delivered and only 4,021 notices remain undelivered. *Id.* ¶ 8.

C. There Have Been No Objections and Minimal Opt-Outs.

None of the 547,074 class members have objected to the Settlement, and only eighteen consumers have opted-out. *Id.* ¶¶ 9–10. Similarly, Defendants also worked with ALCS to timely serve the required Class Action Fairness Act notices "to 57 federal and state officials, including the Attorney Generals of each of the 50 states, the District of Columbia, and the United States Territories." ECF No. 207 ¶ 2. None objected to the Settlement and, in fact, certain agencies reached out to compliment the Settlement.

[3] As the Court is aware, there were 101 Class Notices that were returned to the Court. (ECF No. 217). Class Counsel and ALCS worked together to promptly identify the error and re-mail any Class Notices that may have been impacted by the error. Class Counsel oversaw this process, which was completed on July 7, 2022. (ECF No. 220.)

D. The Settlement Provides Releases to Defendants but preserves remaining claims against other parties.

In return for the consideration above, Settlement Class Members will provide the releases below:

> **The Tribal Officials.** Each Plaintiff and each Settlement Class Member, on behalf of themselves and their respective heirs, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns, shall have fully, finally, and forever released the Tribal Released Parties, in their individual and official capacities, of any and all rights, duties, obligations, demands, actions, causes of action, liabilities, claims, grievances, suits, losses, damages, costs, fees, expenses, and controversies, whether arising under local, state, tribal, foreign, territorial or federal law (including, without limitation, under any consumer protection or unfair and deceptive practices laws) or equity, whether by constitution, statute, rule, regulation, any regulatory promulgation, contract, tort, common law, or any other theory of action, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, matured or un-matured, contingent or fixed, accrued or unaccrued, punitive or compensatory, choate or inchoate, liquidated or unliquidated, based on any fact known or unknown that could have been brought against them by Settlement Class Members related in any way to the loans described in subsection 1(a) above (the "Releases").
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> **Landy Released Parties.** Each Plaintiff and each Settlement Class Member, on behalf of themselves and their respective heirs, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns, shall have fully, finally and forever released and discharged the Landy Released Parties from any and all rights, duties, obligations, demands, actions, causes of action, liabilities, claims, grievances, suits, losses, damages, costs, fees, expenses, and controversies, whether arising under local, state, tribal, foreign, territorial or federal law (including, without limitation, under any consumer protection or unfair and deceptive practices laws) or equity, whether by constitution, statute, rule, regulation, any regulatory promulgation, contract, tort, common law, or any other theory of action, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, matured or un-matured, contingent or fixed, accrued or unaccrued, punitive or compensatory, choate or inchoate, liquidated or unliquidated, based on any fact known or unknown, including without limitation those that arise out of or relate in any way to any or all of the claims, causes of action, acts, omissions, facts, matters, transactions, or occurrences that were or could have been directly or indirectly alleged, described, set forth, referred to, or asserted in the Action, as well as including any claims known or unknown that each Settlement Class Member has or ever had against the Landy Released Parties.

Asner/Gortenburg Released Parties. Each Plaintiff and each Settlement Class Member, on behalf of themselves and their respective heirs, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns, shall have, fully, finally, and forever released and discharged the Asner/Gortenburg Released Parties from any and all rights, duties, obligations, demands, actions, causes of action, liabilities, claims, grievances, suits, losses, damages, costs, fees, expenses, and controversies, whether arising under local, state, tribal, foreign, territorial or federal law (including, without limitation, under any consumer protection or unfair and deceptive practices laws) or equity, whether by constitution, statute, rule, regulation, any regulatory promulgation, contract, tort, common law, or any other theory of action, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, matured or un-matured, contingent or fixed, accrued or unaccrued, punitive or compensatory, choate or inchoate, liquidated or unliquidated, based on any fact known or unknown, including without limitation those that arise out of or relate in any way to any or all of the claims, causes of action, acts, omissions, facts, matters, transactions, or occurrences that were or could have been directly or indirectly alleged, described, set forth, referred to, or asserted in the Action, as well as including any claims known or unknown that each Settlement Class Member has or ever had against the Asner/Gortenburg Released Parties.

Vittor Released Parties. Each Plaintiff and each Settlement Class Member, on behalf of themselves and their respective heirs, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns, shall have, fully, finally, and forever released and discharged the Vittor Released Parties from any and all rights, duties, obligations, demands, actions, causes of action, liabilities, claims, grievances, suits, losses, damages, costs, fees, expenses, and controversies, whether arising under local, state, tribal, foreign, territorial or federal law (including, without limitation, under any consumer protection or unfair and deceptive practices laws) or equity, whether by constitution, statute, rule, regulation, any regulatory promulgation, contract, tort, common law, or any other theory of action, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, matured or un-matured, contingent of fixed, accrued or unaccrued, punitive or compensatory, choate or inchoate, liquidated or unliquidated, based on any fact known or unknown, including without limitation those that arise out of or relate in any way to any or all of the claims, causes of action, acts, omissions, facts, matters, transactions, or occurrences that were or could have been directly or indirectly alleged, described, set forth, referred to, or asserted in the Action or the New Litigation, as well as including any claims known or unknown that each Settlement Class Member has or ever had against the Vittor Released Parties.

ECF No. 185-1 § 4.1. And critically, the Settlement does not include releases as to other key participants or beneficiaries, who are now part of separate litigation before this Court. *See Blackburn v. A.C. Israel Enterprises, Inc*., No. 3:22-cv-146 (E.D. Va.).

ARGUMENT

I. The Notice Program Satisfied the Requirements of Rule 23(c)(2)(B).

When a class is "certified for purposes of settlement under Rule 23(b)(3)," a district 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." Fed. R. Civ. P. 23(c)(2)(B). This notice may be provided by "United States mail, electronic means, or other appropriate means." *Id*. The Rule also requires that the notice inform potential class members that: (1) they have an opportunity to opt out; (2) the judgment will bind all class members who do not opt out; (3) and any member who does not opt out may appear through counsel. *Id.* In assessing the sufficiency of the notice, the Court must consider both the method of delivery and the notice's content. *See* Federal Judicial Center, *Manual for Complex Litigation* § 21.312 (4th ed. 2004).

In this case, Class Members were identified from the loan records, which contained the class members' names, addresses, and email addresses. Ex. 1, ALCS Decl. ¶ 4. Using this information, ALCS identified and compiled a final class list that containing "547,074 individual class members." *Id*. After they were identified, reasonable measures were taken to provide individual notice to Class Members through the Notice Program previously approved by the Court. As detailed above, ALCS mailed the Class Notice "to 65,830 class members" on June 20, 2022. *Id*. ¶ 5. ALCS "utilized several means of ensuring the most accurate mailing addressing for class members," including identifying addresses through the "National Change of Address through USPS, skip-tracing, and manual updates from class members." *Id*. ¶ 4. On June 21, 2022, "ALCS commenced the process of emailing" the Class Notice to the remaining "481,244 class members,"

whose emails were initially verified. *Id*. ¶ 5. This process was completed on July 7, 2022. *Id*. Of the "481,244 attempted emails, 19,630 were identified as undeliverable email addresses." *Id*. In accordance with the Notice Plan, ACLS then mailed the Class Notice to these class members on July 18 or July 21, 2022. *Id*. ¶ 6.

As this Court has held, "[w]hat amounts to reasonable efforts under the circumstances is for the Court to determine after examining the available information and possible identification methods . . . 'In every case, reasonableness is a function of [the] anticipated results, costs, and amount involved.'" *Fisher v. Va. Elec. & Power Co.*, 217 F.R.D. 201, 227 (E.D. Va. 2003) (citations omitted). Here, 543,053 notices (*i.e.*, 99.27%) are presumed delivered and only 4,021 notices remain undelivered. *Id*. ¶ 8. Courts—including this one and others within the Fourth Circuit—have approved mailed-notice programs that reached a much smaller percentage of class members than this class notice reached. *See In re Serzone*, 231 F.R.D. 221, 236 (S.D. W. Va. 2005) (approving notice program where direct mail portion was estimated to have reached 80% of class members); *Martin v. United Auto Credit Corp.*, No. 3:05cv143 (E.D. Va. Aug. 29, 2006) (granting final approval where class notice had approximately 85% delivery).

In sum, the parties have complied fully with the Court's Preliminary Approval Order and have taken reasonable steps to ensure that the Class Members were notified—in the best and most direct manner possible—of the Settlement's terms and significant benefits.

II. The Settlement Satisfies the Requirements of Rule 23(e)(2)

"Rule 23(e) of the Federal Rules of Civil Procedure obliges parties to seek approval from the district court before settling a class-action lawsuit." *In re: Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Pracs. & Prod. Liab. Litig.*, 952 F.3d 471, 483 (4th Cir. 2020) (citing Fed. R. Civ. P. 23(e)). When a court "reviews a proposed class-action settlement, it

acts as a fiduciary for the class." *1988 Tr. for Allen Child. Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513, 525 (4th Cir. 2022). "In fulfilling this role, the district court must conclude that a proposed settlement is 'fair, reasonable, and adequate,'" which are the three requirements established by Rule 23(e)(2) of the Federal Rules of Civil Procedure. *Id*. (citing Fed. R. Civ. P. 23(e)(2)). "In determining whether a settlement is fair, reasonable, and adequate," Rule 23(e)(2) requires the court to consider:

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

Galloway v. Williams, 2020 WL 7482191, at *4 (E.D. Va. 2020) (quoting Fed. R. Civ. P. 23(e)(2)). In making this assessment, district courts are provided with "considerable deference" because "the court 'is exposed to the litigants, and their strategies, position[s], and proofs, and is on the firing line and can evaluate the action accordingly.'" *Lumber Liquidators*, 952 F.3d at 484 (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000)).[4]

[4] On December 1, 2018, "Rule 23(e)(2) was amended to specify factors for assessing the 'fairness, reasonableness, and adequacy' of a class-action settlement." *Lumber Liquidators*, 952 F.3d at 484, n. 8. Prior to this, the Fourth Circuit developed and applied its "own multifactor standards" for fairness and adequacy. *See, e.g.*, *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991).

A. Plaintiffs and Class Counsel Have Adequately Represented the Class.

Rule 23(e)(2)'s first factor examines whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). This assessment is "redundant of the requirements of Rule 23(a)(4) and Rule 23(g), respectively." *In re Flint Water Cases*, 571 F. Supp. 3d 746, 780 (E.D. Mich. 2021) (quoting Albert Conte & Herbert Newberg, *Newberg on Class Actions* § 13:48 (5th ed. June 2021 update)). Rule 23's adequacy requirements are met if: "(1) the named plaintiff[s] [have] interests common with, and not antagonistic to, the Class' interests; and (2) the plaintiff[s'] attorney is qualified, experienced and generally able to conduct the litigation." *Gibbs v. Stinson*, 2021 WL 4812451, at *16 (E.D. Va. Oct. 14, 2021) (quoting *Milbourne v. JRK Residential Am., LLC*, 2014 WL 5529731, at *8 (E.D. Va. Oct. 31, 2014)).

This first factor is easily satisfied. As to the named Plaintiffs, their interests and those of members of the proposed class are fully aligned as they are all victims of the alleged usurious lending program. *See, e.g.*, *Stinson*, 2021 WL 4812451, at *16 (finding that the plaintiffs were adequate in a comparable case because they had "no interests antagonistic to the class's interest" and shared "identical interest of establishing Defendants' liability based on the same questions of law and fact"); *Williams v. Big Picture Loans, LLC*, 339 F.R.D. 46, 59 (E.D. Va. 2021) (finding that the plaintiffs were adequate in a comparable case because the "Plaintiffs' interests are in line with those of the broader classes"); *MacDonald v. Cashcall, Inc.*, 333 F.R.D. 331, 345 (D.N.J. 2019) ("There is nothing in the record to suggest that either proposed class representative has a claim or interest antagonistic to the remainder of the class: both MacDonald and Spearman took out loans from Western Sky allegedly at usurious interest rates."); *Brice v. Haynes Invs., LLC.*,

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Because the Fourth Circuit's prior considerations "almost completely overlap with the new Rule 23(e)(2) factors," *Lumber Liquidators*, 952 F.3d at 484, n. 8, decisions prior to the amendment to Rule 23(e)(2) continue to be relevant.

2021 WL 1916466, at *6 (N.D. Cal. Apr. 23, 2021) (same). Indeed, in its Preliminary Approval Order, the Court already found that "Plaintiffs have fairly and adequately represented the interest of the Settlement Class." ECF No. 209 ¶ 4. Nothing has changed since then to warrant revisiting that conclusion.

As to Class Counsel, this Court and others have repeatedly found them to be qualified, experienced, and adequate under Rule 23, including in tribal lending cases. *See, e.g.*, *Galloway v. Williams, Jr.*, 2020 WL 7482191, at *8 (E.D. Va. Dec. 18, 2020) ("(finding that "Class Counsel and their firms have extensive backgrounds in complex and class action litigation and consumer protection litigation" and further noting that counsel "have significant experience in litigating class action lawsuits against tribal lenders" (*citing, e.g.*, *Hayes v. Delbert Servs. Corp.*, No. 3:14-cv-258, ECF No. 193 ¶¶ 4, 14 (E.D. Va. Jan. 20, 2017)); *Turner v. Zestfinance, Inc.*, No. 3:19-cv-293 (E.D. Va.) ("[W]e have Ms. Kelly and Mr. Bennett here, who are well known to me as being experts in this field, but it looks like the other class counsel is like the all-star team of consumer litigation."); *Stinson*, 2021 WL 4812451, at *16 (finding that class counsel were adequate and noting that they had been involved for four years and "already obtained substantial relief for borrowers by securing two courts' approval of a class action settlement"). Indeed, when recently assessing this factor in a comparable case, this Court noted that the "experience of the counsel in the specific area of litigation I think also pretty much goes without saying on all sides. This is a group of lawyers who have developed a level of expertise that I think is unsurpassed in the country." *Gibbs v. Stinson*, No. 3:18-cv-676, Trans. of Final Approval Hr'g at 25:19-23 (E.D. Va. Aug. 16, 2022).

B. Negotiations were arm's length and involved the use of respected mediators.

The second factor examines whether the settlement "was negotiated at arm's length" Fed. R. Civ. P. 23(e)(2)(B); *see also Flint Water Cases*, 571 F. Supp. 3d at 780 (explaining that the second factor requires courts to "consider whether the negotiations were conducted at arm's length with no evidence of collusion or fraud"). "Courts presume the absence of fraud or collusion unless there is evidence to the contrary." *Id*. (quoting *UAW v. Gen. Motors, Corp.*, 2006 WL 891151, at *21 (E.D. Mich. Mar. 31, 2006)). Here, there is no evidence suggesting the presence of collusion or fraud between the parties.

To help confirm that the negotiations were arm's length, courts have looked at several other factors, including the presence of a mediator. As the leading class action treatise explains: "There appears to be no better evidence of [a truly adversarial bargaining process] than the presence of a third party mediator." Conte & Newberg, *supra*, § 13:48; *see also Flint Water Cases*, 571 F. Supp. 3d at 780 ("highly experienced mediators" provided "ample protections in their roles"). Here, Plaintiffs and the Tribal Defendants had lengthy negotiations and used United States Magistrate Judge Mark Colombell to help finalize the terms of their agreement. *See* Ex. 2, Kelly Decl. ¶ 23. Similarly, the remaining parties engaged in private mediation with Nancy Lesser, a former partner at Williams & Connolly with more than 25 years of experience as a mediator.[5] The involvement of both experienced mediators further establishes that there was no collusion among the parties.

Courts also consider the posture of the case at the time of the settlement. *See, e.g.*, *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 571 (E.D. Va. 2016). "Considering the posture of the case at the time of settlement allows the Court to determine whether the case has progressed far enough to dispel any wariness of 'possible collusion among the settling parties.'" *Id*. Here, there

[5] *See* Pax ADR, https://www.paxadr.com.

should be no concerns that the case did not progress far enough because the litigation spanned more than three years and included a high stakes appeal revolving around multiple core issues. If Defendants succeeded on any of the issues—sovereign immunity, arbitration, or choice-of-law—it could have disposed of the entire litigation. Following the Plaintiffs' victory on these key issues, as well as another victory in the Supreme Court where it refused to stay the case,[6] Plaintiffs reached this settlement. And before the settlement, Plaintiffs also conducted substantial discovery into the Individual Defendants' roles in the lending enterprises, as well as the benefits they received from the loans. This litigation history reaffirms that there was no possible collusion among the parties.

C. The Relief Provided to the Class is Adequate.

Rule 23(e)(2)(C) requires the Court to consider whether the relief is adequate, considering:

> (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).

Fed. R. Civ. P. 23(e)(2)(C). These subfactors overlap with the factors that the Fourth Circuit has held are required to evaluate a class settlement's fairness, reasonableness, and adequacy. *In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices and Prods. Liab. Litig.*, 952 F.3d 471, 484 n.8 (4th Cir. 2020) (citing *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991)). An analysis of each factor shows that this settlement is fair, reasonable, and adequate.

The first Rule 23(e)(2)(C) sub-factor requires the Court to evaluate the settlement against the costs, risks, and delay of trial and appeal. This factor strongly supports approval of the

[6] *Treppa v. Hengle*, No. 21A237, 595 U.S. __ (Jan 10. 2022) ("The application for stay presented to The Chief Justice and by him referred to the Court is denied.").

Settlement. While Class Counsel strongly believes in the strength of this case, they also acknowledge that there are substantial risks associated with continued litigation. To start, the Defendants had appealed the Fourth Circuit's decision to the Supreme Court. If the Supreme Court sided with the Defendants, most, if not all, of this case would have ended. Even if Plaintiffs were successful, it would cost hundreds of thousands of dollars in additional expenses plus significant time to litigate this case and would likely have taken at least one more year. Even after trial, it is likely that any verdict would have been appealed, leading to even more delay. Perhaps most importantly, the Settlement stopped collection of over $450 million in debt that would have continued to be collected during the ltigation. The Settlement avoids this significant cost, risk, and time by providing significant settlement benefits to the Class Members.

Rule 23(e)(2)(C)'s second sub-factor requires the Court to evaluate the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims. Here, Class Members will receive the settlement benefits without having to submit a claim form or any proof of their damages. Cash payments are automatically distributed on the tiered formula described above, which has been approved in five other class settlements and is based on the relief that class members would receive under their respective state laws. "The use of objective criteria to determine settlement distribution is a hallmark of fairness." *Flint Water Cases*, 571 F. Supp. 3d at 781. Here, because the distribution scheme is based on objective criteria and does not require any action by Class Members, this factor weighs strongly in favor of approving the Settlement.

Rule 23(e)(2)(C)'s third sub-factor requires the Court to evaluate the request for attorney fees, including the timing of the request. The focus of this analysis is whether there are signs that "counsel sold out the class's claims at a low value in return for [a] high fee." Conte & Newberg,

supra, § 13:54. There are no such indications here. As outlined above, there is no sign that Class Counsel left any money on the negotiating table. Instead, they have obtained a $39 million cash fund, along with $450 million in debt cancellation. This is significant consideration for the Class Members' claims. The attorneys' fee comprises the usual percentage of the settlement—one third of the cash value. But when measured against the Settlement's total value, Class Counsel is only seeking a three-percent fee. It is also important to note that the attorneys' fee component of the settlement was only discussed after all other material settlement terms had been finalized. And the attorneys' fees were also negotiated under the supervision of a third-party mediator, Nancy Lesser, who is experienced enough to notice if Class Counsel were compromising the class members' claims for their own benefit. *Flint Water Cases*, 571 F. Supp. 3d at 782. As to the timing of the attorney fee award request, "courts are to consider this to prevent situations in which the request for attorney fees is unknown and could upset the compensation to claimants at the time of final approval." *Id.* There is no such concern here. Instead, the proposed attorneys' fee was included in the class notice, and no class member or regulator objected to the proposed amount.

Finally, there are no agreements that need to be identified under Rule 23(e)(3).

D. The Settlement Treats Class Members Equitably Related to Each Other.

The final factor under Rule 23(e)(2) requires a court to consider whether "the proposal treats class members *equitably* relative to each other." Fed. R. Civ. P. 23(e)(2)(D) (emphasis added). This factor considers whether class members have been treated in a fair and impartial manner, but "[t]here is no requirement that all class members in a settlement be treated *equally*." *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 876 (S.D. Iowa 2020) (emphasis in original) (citation omitted). And when considering this factor, a court "must balance the claims of those

with potentially substantial damages with those with potentially minimal or insignificant damages." *Id*. (citation omitted).

The settlement here achieves this balance. For the monetary consideration, the settlement is structured to distribute amounts to individuals who suffered more substantial damages—those who repaid more unlawful amounts on their loans. This structure not only considers the total dollars paid by each borrower, but also accounts for the strength of each state's usury laws because some states allow for recovery of both principal and interest. *Compare, e.g.*, Va. Code § 6.2-1541 (declaring a loan void and permitting "any principal or interest paid on the loan" to be recoverable); *with* 41 P.S. § 502 (allowing Pennsylvania borrowers to recover excess interest paid, but not principal). Because of the difference in potential remedies, monetary payments will be distributed using a tiered formula that has been approved by this Court in five other cases. *See generally*, *e.g.*, *Turner v. ZestFinance, Inc.*, No. 3:19-cv-293, ECF No. 114 (E.D. Va. July 9, 2020); *Gibbs v. TCV V, L.P.*, No. 3:19-cv-789, ECF No. 95 (E.D. Va. Mar. 29, 2021). This formula creates these tiers:

> Tier 1: The dollar amount of all payments made by each Settlement Class Member in Arizona, Arkansas, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, South Dakota, Vermont, Virginia, and Wisconsin so long as the Settlement Class Member paid the principal amount of his or her loan.
>
> Tier 2: The dollar amount of payments made above the legal interest limits if the original principal amount was repaid and if the Settlement Class Member resided in Alabama, Alaska, California, Delaware, Florida, Georgia, Hawaii, Iowa, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Washington, Washington D.C., West Virginia, or Wyoming at the time the Settlement Class Member took out the loan; and
>
> Tier 3: Settlement Class Members in Nevada and Utah will not receive cash payments.

ECF No. 185-1 § 3.4.b.v.1. Settlement Class Members in Tier 1 or Tier 2 who repaid the principal amount borrowed will receive a cash award based on a *pro rata* calculation rounded down to the

nearest cent. ECF No. 185-1 § 3.4.b.v.1. And with respect to injunctive relief, all Settlement Class Members are treated the same: every dollar of outstanding debt will be cancelled.

In comparable cases, the Court has found that this type of structure treats class members equitably relative to each other. The result should be no different here.

II. The Requested Service Awards and Attorneys' Fees are Reasonable.

A. The Requested Service Awards Are Reasonable.

Plaintiffs request—and none of the Defendants oppose—a modest award of $10,000 for each of the ten Plaintiffs' participation and service to the Class. If approved, this award would reduce each class member's settlement amount by fewer than 50 cents. This amount is reasonable because Plaintiffs took an active role, which lasted more than three years. They also stuck their neck out for other class members and pursued the claims despite the embarrassing nature of the events—being financially vulnerable enough to take out a loan with an interest rate of more than 600% APR.

Service awards in this range are reasonable and this Court routinely awards them. *See, e.g.*, *Hayes v. Delbert Servs. Corp.*, No. 3:14-cv-258 (E.D. Va.); *Manuel v. Wells Fargo Nat'l Ass'n*, No. 3:14cv238, 2016 WL 1070819, at *6 (E.D. Va. Mar. 15, 2016); *Beverly v. Wal-Mart Stores, Inc.*, No. 3:07-cv-469 (E.D. Va.); *Williams v. Lexis Nexis Risk Mgmt.*, No. 3:06-cv-241 (E.D. Va.); *Cappetta v. GC Servs. LP*, No. 3:08-cv-288 (E.D. Va.); *Makson v. Portfolio Recovery Assoc., Inc.*, No. 3:07-cv-982 (E.D. Va. Feb. 9, 2009); *Daily v. NCO*, No. 3:09-cv-31 (E.D. Va.); *Conley v. First Tenn.*, No. 1:10-cv-1247 (E.D. Va.); *Lengrand v. Wellpoint*, No. 3:11-cv-333 (E.D. Va.); *Henderson v. Verifications, Inc.*, No. 3:11-cv-514-REP (E.D. Va.); *Pitt v. K-Mart Corp.*, No. 3:11-cv-697 (E.D. Va.); *James v. Experian Info. Sols.*, No. 3:12-cv-902 (E.D. Va.); *Manuel v. Wittstadt*, No. 3:12-cv-450 (E.D. Va.); *Shami v. Middle E. Broadcast Network*, 1:13-cv-467 (E.D. Va.);

Goodrow v. Freidman Freidman & MacFadyen, No. 3:11-cv-20 (E.D. Va.); *Berry v. LexisNexis Risk & Info. Analytics Grp., Inc.*, No. 3:11-cv-274 (E.D. Va.); *Marcum v. Dolgencorp*, No. 3:12-cv-108 (E.D. Va.); *Kelly v. Nationstar*, No. 3:13-cv-311 (E.D. Va.); *Wyatt v. SunTrust Bank*, No. 3:13-cv-662 (E.D. Va.).

In comparable cases, this Court has awarded similar—and sometimes higher—amounts. *Gibbs v. Stinson*, No. 3:18-cv-676, ECF No. 346 ¶ 20 (E.D. Va. Aug. 16, 2022) (awarding $20,000 service awards to each of the 13 class representatives); *Gibbs v. TCV, V, LLP*, No. 3:19-cv-789, ECF No. 95 (E.D. Va. Mar. 29, 2021) (approving a $7,500 service award)[7]; *Turner v. ZestFinance, Inc.*, No. 3:19-cv-293, ECF No. 114 (E.D. Va. July 9, 2020) (awarding $5,000 service awards to the 25 class representatives). A similar result is warranted here because Plaintiffs participated in years of litigation and were vital to achieving this excellent result. Ex. 2, Kelly Decl. ¶¶ 30–34. If they were unwilling to step up or quit during the lengthy litigation, none of this would have been possible.

B. The Requested Attorneys' Fees are Reasonable.

The multi-firm team of Class Counsel collectively seek an award of $13,000,000 for their attorneys' fees and costs. This request represents one third of the Settlement Fund's cash component. And when coupled with the overall value of the settlement, $489,000,000.00 plus additional relief like credit deletion, the requested award is less than 3% of the Settlement's total value.

i. Awarding a percentage fee is appropriate and reasonable.

[7]As part of the same global settlement, the Court approved an additional $7,500 to each of the named plaintiffs for service awards related to another defendant. *Gibbs v. Rees*, No. 3:20-cv-717, ECF No. 68 ¶ 21 (E.D. Va. Mar. 26, 2021). When considered together, the service awards for the plaintiffs in that settlement were $15,000.

Rule 23(h) gives the Court authority to "award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement" in class actions. Fed. R. Civ. P. 23(h). If the case results in a common fund for the class, the Court may award fees as a percentage of that common fund. The doctrine originates from the equitable principles of quantum meruit and unjust enrichment and aims to shift the expense of litigation from named plaintiffs, who obtained the fund's benefits, to the absent class members, who benefit from the fund but likely contributed little, or nothing, to the process. *Brundle ex rel. Constellis Emp. Stock Ownership Plan v. Wilmington Tr., N.A.*, 919 F.3d 763, 785 (4th Cir. 2019), as amended (Mar. 22, 2019). As the Fourth Circuit has explained, awarding fees as a percentage of the common fund "hold[s] the beneficiaries of a judgment or settlement responsible for compensating the counsel who obtained the judgment or settlement for them." *Id.* at 786.[8]

The collective preference for the percentage method is common sense. It is easily administered and saves valuable court and party resources, which heeds the Supreme Court's mandate that a "request for attorney's fees . . . not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The percentage method also aligns the interests of class counsel and the class members because it both motivates class counsel to generate the largest possible recovery for the class and rewards efficient litigation. This is because their fee increases with the class's take, removing any incentive to run up their hours in order obtain a higher fee.

A percentage fee also encourages early settlements because class counsel will not receive additional fees for unnecessary motions or discovery. *Johnson v. Metro-Goldwyn-Mayer Studios,*

[8] Most circuits either permit or require the percentage method. Conte & Newberg, *supra*, § 15:66. For example, the Eleventh and the District of Columbia Circuits require the use of the percentage method. *Id.* at n.6 (citing cases). The Third Circuit prefers the percentage method. *Id.* at n.7. And the First, Second, Fifth, Sixth, Eight, Ninth, and Tenth Circuits allow district courts to use either method. *Id.* at n.5 (citing cases).

Inc., 2018 WL 5013764, at *11 (W.D. Wash. 2018) ("the percentage-of-recovery method plays an important role in aligning the interests of the class and class counsel" and "[i]n such situations, class counsel is motivated to obtain the largest tangible benefit possible, to provide for the best possible notice to the class, and to assure that the claims process is not overly burdensome"); *In re Anthem, Inc. Data Breach Litigation*, 2018 WL 3960068, at *5 (N.D. Cal. 2018) ("By tying the award to the recovery of the Class, Class Counsel's interests are aligned with the Class, and Class Counsel is incentivized to achieve the best possible result."); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014) ("The percentage method better aligns the incentives of plaintiffs' counsel with those of the class members because it bases the attorneys' fees on the results they achieve for their clients, rather than on the number of motions they file, documents they review, or hours they work."); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268–69 (D.C. Cir. 1993) ("using the lodestar approach in common fund cases encourages significant elements of inefficiency," while "if a percentage-of-the-fund calculation controls, inefficiently expended hours only serve to reduce the per hour compensation of the attorney expending them").

On the other hand, the lodestar method is time consuming and requires lawyers to submit voluminous records that courts must then review and scrutinize in detail. Furthermore, a lodestar fee motivates class counsel to increase the number of hours they spend on a case to maximize their fees, no matter if that time advances the case or class members' interests. *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 821 (3d Cir. 1995) ("[T]he lodestar method has been criticized as giving class counsel the incentive to delay settlement in order to run up fees while still failing to align the interests of the class"). Indeed, the lodestar method is used in only some class-action cases, usually those involving fee-shifting

statutes or where the settlement provides injunctive relief that cannot be reliably calculated. *See, e.g.*, Theodore Eisenberg, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. Law Review 937, 945 (2017) (finding that the lodestar method used only 6.29% of the time from 2009–2013, down from 13.6% from 1993–2002 and 9.6% from 2003–2008); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811, 832 (2010) (finding that the lodestar method used in only 12% of settlements).

Although the Fourth Circuit has not explicitly required its use in class actions, the percentage method is overwhelmingly preferred by the district courts in this circuit. *Galloway v. Williams*, No. 3:19-cv-470, 2020 WL 7482191, at *5 (E.D. Va. Dec. 18, 2020) (noting in a comparable tribal-lending case, "Nevertheless, over time, certain customs have developed, both in the Fourth Circuit and across the country; for example, the favored method for calculating attorneys' fees in common fund cases is the percentage of the fund method."); *Thomas v. FTS USA, LLC*, No. 3:13-cv-825, 2017 WL 1148283, at *3 (E.D. Va. Jan. 9, 2017) ("District Courts within this Circuit have also favored the percentage of the fund method." (citations omitted)), *report and recommendation adopted,* No. 3:13-cv-825, 2017 WL 1147460 (E.D. Va. Mar. 27, 2017); *see also Kelly v. Johns Hopkins Univ.*, No. 1:16-cv-2835, 2020 WL 434473, at *2 (D. Md. Jan. 28, 2020); *Seaman v. Duke Univ.*, No. 1:15-cv-462, 2019 WL 4674758, at *2 (M.D.N.C. Sept. 25, 2019); *Cox v. Branch Banking & Tr. Co.*, No. 5:16-cv-10501, 2019 WL 164814, at *5 (S.D. W. Va. Jan. 10, 2019) (collecting cases and stating, "In sum, there is a clear consensus among the federal and state courts, consistent with Supreme Court precedent, that the award of attorneys' fees in common fund cases should be based on a percentage of the recovery. This consensus derives from the recognition that the percentage of fund approach is the better-reasoned and more equitable method of determining attorneys' fees in such cases."); *Krakauer v.*

Dish Network, LLC, No. 14-333, 2018 WL 6305785, at *2 (M.D.N.C. Dec. 3, 2018); *Phillips v. Triad Guar. Inc.*, No. 1:09-cv-71, 2016 WL 2636289, at *2 (M.D.N.C. May 9, 2016); *Archbold v. Wells Fargo Bank, N.A.*, No. 13-24599, 2015 WL 4276295, at *5 (S.D. W. Va. July 14, 2015) ("[T]he Court concludes that there is a clear consensus . . . that the award of attorneys' fees in common fund cases should be based on a percentage of the recovery.").

Unlike other circuits, the Fourth Circuit has not established a benchmark for fee awards in common-fund cases. Here, Class Counsel is requesting one third of the cash component. Standing alone, this is well within the 25-to-40-percent range that courts within the Fourth Circuit have held appropriate.[9] But when considered together with the debt cancellation, the total fee amounts to less than 3% of the value of the settlement. This amount is patently reasonable, and it is also below the appropriate range found by a comprehensive study of attorneys' fees in class action cases. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Studies 27, 31, 33 (2004) (noting "a remarkable uniformity in awards between roughly 30% to 33% of the settlement amount").

The requested percentage also tracks multiple decisions from this Court in comparable cases. *See, e.g.*, *Gibbs v. Plain Green, LLC*, No. 3:17-cv-495, ECF No. 141 ¶ 24 (E.D. Va. Dec. 13, 2019); *Gibbs v. TCV V, L.P.*, No. 3:19-cv-789, ECF No. 95 at 11–13 (E.D. Va. Mar. 29, 2021);

[9] Indeed, "empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in the class actions average around one-third of the recovery." 4 Newberg *on Class Actions* § 14:6 (4th ed.); *see also In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001) (review of 289 class action settlements shows "average attorney's fees percentage [of] 31.31%" with a median value that "turns out to be one-third."). In an analysis of such historic patterns, Silber and Goodrich explained that empirical evidence does not necessarily establish what a court should do in any given case, but it does provide guidance to the court in determining whether a fee is reasonable. Reagan W. Silber & Frank E. Goodrick, *Common Funds and Common Problems: Fee Objections and Class Counsel's Response*, 17 Rev. Litig. 525, 545–46 (1998).

Gibbs v. Rees, No. 3:20-cv-717, ECF No. 68 at 9–11 (E.D. Va. Mar. 26, 2021); *Turner v. ZestFinance, Inc.*, No. 3:19-cv-293, ECF No. 114 (E.D. Va. July 9, 2020); *Gibbs v. Stinson*, No. 3:18-cv-676 (E.D. Va.), ECF No. 346 ¶ 20 (E.D. Va. Aug. 16, 2022). And while Judge Payne explained in a similar internet-lending class settlement that "a percentage award of 33% of a common fund is a bit on the high side for this circuit and in general," he nonetheless reasoned that "it is certainly not outside of the realm of reasonable percentage awards, particularly given that the award will be inclusive of costs." *Galloway v. Williams*, No. 3:19-cv-470, 2020 WL 7482191, at *11 (E.D. Va. Dec. 18, 2020) (citing *In re Celebrex (Celecoxib) Antitrust Litig.*, No. 2:14-cv-361, 2018 WL 2382091, at *5 (E.D. Va. Apr. 18, 2018)).

In consumer class actions generally, and in tribal-lending cases specifically, there is extensive work necessary post-approval. This case is no exception. After Final Approval, Class Counsel will implement the settlement with help from ALCS and assist class members with any remaining issues they have with the debts. As the Court noted in a similar case: "I am going to approve that. It represents 33 percent of the monetary value. The lodestar multiplier is 3.86, but believing that number is going to fall for the reasons you just said about the continuing work." *Turner v. ZestFinance, Inc*., No. 3:19-cv-293, ECF No. 116 at 16:1-5 (E.D. Va. Aug. 4, 2020).

And as with any class case that they agree to take on, Class Counsel lives by the result that they obtain for the Class Members. Even though the fee here is large, Class Counsel has consistently advocated for fees based on the percentage method, even when it results in a small fee well below their lodestar. *See, e.g.*, *Milbourne v. JRK Residential Am., LLC*, No. 3:12-cv-861 (E.D. Va.); *Mayfield v. Memberstrust Credit Union*, No. 3:07-cv-506 (E.D. Va.) (fee of $8,300); *Thomas v. FTS USA, LLC*, No. 3:13-cv-825, 2017 WL 1148283, at *3 (E.D. Va. Jan. 9, 2017), *report and recommendation adopted,* No. 3:13-cv-825, 2017 WL 1147460 (E.D. Va. Mar.

27, 2017); *Conley v. First Tennessee*, No. 1:10-cv-1247 (E.D. Va.) (300 consumers and fee of $20,000); *Lengrand v. Wellpoint*, No. 3:11-cv-333, ECF No. 42 (E.D. Va.) (counsel requested only 20% of the class recovery, $8,550, because of the small class size). In each case, the standards of Rule 23 demanded that Class Counsel represent the interest of the class with the same attention, zeal, and competence whether the class is in the millions or not. In this case, where Class Counsel bore the risk of the litigation and advanced significant funds to advance the litigation, the requested fee is reasonable.

ii. ***A cross-check against Class Counsel's lodestar confirms the requested fee is reasonable.***

A cross-check is not required to determine the fairness of a fee when the percentage method is used. Courts, however, have at times used a lodestar estimate as a cross-check in assessing Class Counsel's fee request. *Manual for Complex Litigation (Fourth)* § 21.724. As this Court recently recognized, "where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Galloway*, 2020 WL 7482191, at *11.

Here, the requested award includes both attorneys' fees and costs. For fees, Class Counsel estimates that their total lodestar is approximately $2,909.938.00. Ex. 2, Kelly Decl. ¶¶ 25–27; Ex. 3, Bennett Decl. ¶¶ 36-38; Ex. 4, Wessler Decl. ¶ 14.[10] Class Counsel has also incurred $91,969.74 in unreimbursed expenses. These costs include filing fees, process server fees, federal express charges, travel, document storage fees, mediation fees, appellate formatting and copying services for the both the Fourth Circuit and United States Supreme Court and research charges. Ex. 2, Kelly Decl. ¶¶ 25–27; Ex. 3, Bennett Decl. ¶ 41. As a result, the total estimated fees and costs Class

[10] Counsel's hourly rates are reasonable. Ex. 2, Kelly Decl. ¶ 28; Ex. 3, Bennett Decl. ¶ 42; *see* Ex. 5, Pittman Decl.

Counsel has incurred to obtain this Settlement is $3,001,907.24. Class Counsel will also continue to accrue more time since Class Counsel is committed to complete all post-approval work, regardless of the actual time incurred. In past comparable cases, Class Counsel's actual post-approval work has been significant because of the large number of class members.

The requested $13,000,000.00 for fees and costs represents a 4.33 multiplier for Class Counsel. Considering the total value created by the Settlement, this multiplier is reasonable. *Berry v. Schulman,* 807 F.3d 600, 617 n.9 (4th Cir. 2015) (noting that using the lodestar method, "the district court multiplies the number of hours worked by a reasonable hourly rate. And it can then "adjust the lodestar figure using a 'multiplier' derived from a number of factors, such as the benefit achieved for the class and the complexity of the case") This multiplier is well-within the range approved in other settlements both in the Fourth Circuit and nationally.[11] Given the tremendous result achieved here, the requested fee is reasonable and appropriate. Ex. 5, Pittman Decl.

C. There has been no objection to the service awards or attorneys' fees.

As detailed above, ALCS sent Class Notice to all the Settlement Class Members. Of the 547,074 class members, ALCS estimates that 543,053 notices (*i.e.*, 99.27%) are presumed delivered and only 4,021 notices remain undelivered. Ex. 1 ¶ 8. It is now several weeks after the

[11] *See, e.g.*, *Skochin v. Genworth Financial, Inc.,* No. 3:19-cv-49, 2020 WL 6708388 (E.D. Va. Nov. 13, 2020) (finding 9.05 multiplier not unreasonable in lodestar cross-check analysis); *Spartanburg Reg'l Health Services District, Inc. v. Hillenbrand Industries, Inc.,* No. 7:03-cv-2141, 2006 WL 8446464 (D.S.C. Aug. 15, 2016) (approving fee award which resulted in multiplier above 6); *see also Lloyd v. Navy Federal Credit Union*, No. 3:17-cv-01280 (S.D. Cal. 2019) (approving fee which resulted in multiplier of 10.96); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp*., No. 03-cv-04578, 2005 WL 1213926 (E.D. Pa. May 19, 2005) (15.6 multiplier); *New Eng. Carpenters Health Benefits Fund v. First Databank*, No. 05-cv-11148, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (8.3 multiplier); *In re Doral Financial Corp. Securities Litigation*, No. 05-cv-4014 (S.D.N.Y. Jul. 17, 2007) (10.26 multiplier); *Beckman v. KeyBank*, N.A., 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers.").

objection deadline and neither Plaintiffs' Counsel nor ALCS have received any objection to the proposed settlement or the proposed service awards and attorneys' fees, which were listed in the class notice. Similarly, Defendants also worked with ALCS to timely serve the required Class Action Fairness Act notices "to 57 federal and state officials, including the Attorney Generals of each of the 50 states, the District of Columbia, and the United States Territories." ECF No. 207 ¶ 2. Not one has objected or even expressed any concern.

As the Fourth Circuit has explained, an "almost complete lack of objection to the fee request provides additional support for the district court's decision to approve it." *Berry*, 807 F.3d at 619 (citing *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3rd Cir. 2005)) (noting that only two of 300,000 class members objecting to fee request is a "rare phenomenon" and evidence that the district court did not abuse its discretion in awarding fees); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1174 (4th Cir. 1975) (finding that a class settlement reasonable where "[o]nly five class members of the class filed any dissent from the settlement"); *see also Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1204 (S.D. Fla. 2006) ("The lack of significant objection from the Class supports the reasonableness of the fee request."). Here, the lack of *any* objection—from more than half a million people—demonstrates the reasonableness of the service awards and attorneys' fees.

CONCLUSION

For all these reasons, Plaintiffs respectfully request that the Court grant this Motion for Final Approval of the Class Action Settlement, as well as their request for reasonable service awards and attorneys' fees.

Respectfully submitted,
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