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

RENEE GALLOWAY, et al., Plaintiffs, v. JAMES WILLIAMS, JR., Defendants.	Case No. 3:19-cv-00470-REP

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiffs, by Counsel, submit this Memorandum in support of their Motion for Final Approval of Class Action Settlement.

I. INTRODUCTION

This class settlement resolves claims asserted against twenty-four defendants—Big Picture Loans, LLC, Ascension Technologies, LLC, James Williams Jr., Michelle Hazen, Henry Smith, Alice Brunk, Andrea Russell, Tina Caron, Mitchell McGeshick, Gertrude McGeshick, Susan McGeshick, Giiwegiizhigookway Martin, Jeffery McGeshick, Roberta Ivey, June Saad, Columbia Pipe & Supply Co., Timothy Arenberg, Terrance Arenberg, DTA Trinity Wealth Transfer Trust, Deborah M. Arenberg Living Trust, Amlaur Resources, LLC, Brian Jedwab, James Dowd; Simon Liang, and Brian McFadden (Settling Defendants)—in nine cases filed in this district and throughout the country: *Lula Williams, et al. v. Big Picture Loans, LLC et al.*, No. 3:17-cv-00461 (E.D. Va.) (*Williams*); *Renee Galloway, et al. v. Big Picture Loans, LLC*, No. 3:18-cv-00406 (E.D. Va.) (*Galloway I*); *Renee Galloway, et al. v. Matt Martorello et al.*, No. 3:19-cv-00314 (E.D. Va.) (*Galloway II*); and *Renee Galloway, et al. v. James Williams, Jr. et al.*,

No. 3:19-cv-00470 (E.D. Va.) (*Galloway III*); *Dana Duggan v. Big Picture Loans, LLC et al.*, No. 1:18-cv-12277 (D. Mass.) (*Duggan*); *Richard Lee Smith, Jr. v. Big Picture Loans, LLC et al.*, No. 3:18-cv-01651 (D. Or.) (*Smith*); *Christine Cumming, et al. v. Big Picture Loans, LLC et al.*, No. 5:18-cv-03476 (N.D. Ca.); *Chris Kobin v. Big Picture Loans, LLC et al.*, 2:19-cv-02842 (C.D. Ca.) (*Kobin*); and *Victoria Renee McKoy, et al., v. Big Picture Loans, LLC at al.*, 1:18-cv-03217 (N.D. Ga.) (*McKoy*).[1] The Settling Defendants include the tribal officials, the tribal business entities, and the passive investors not associated with Matt Martorello.

The settlement was reached after more than three years of contentious litigation in which the defendants pursued every procedural and legal challenge available. At the time the parties notified the Court of the settlement in October 2019, there were 636 docket entries in the *Williams* matter alone and the Court had issued well over one hundred rulings on virtually every issue imaginable, from sovereign immunity to motions to dismiss to privilege waivers to over thirty contested discovery motions. In *Williams* and *Galloway I*, over a million pages of documents have been produced; thirty-four witnesses have been deposed; and 145 subpoenas have been issued. Even after the parties commenced settlement negotiations, resolution was not swift, requiring three in-person mediation sessions with well-respected mediator Nancy A. Lesser, an in-person settlement conference with the Honorable David J. Novak, and numerous informal telephone conferences between sessions. And of course this settlement came after the tribal entities had obtained a favorable Fourth Circuit ruling as to the *Williams* plaintiffs.

[1] The settlement also releases claims against other individuals and entities not named as defendants ("Released Parties"). The settlement does not release claims against Matt Martorello, Justin Martorello, Rebecca Martorello, Jeremy Davis, Eventide Credit Acquisitions, LLC, Bluetech Irrevocable Trust, Kairos Holdings, LLC, Liont, LLC, or any other entities owned, directly or indirectly, by Matt Martorello, Justin Martorello or Rebecca Martorello ("Non-Settling Defendants").

Importantly, the proposed settlement does not release or settle the claims against the primary parties from whom damages are sought—Martorello and his connected co-defendants.

The proposed settlement provides three substantial benefits to the Class in the forms of monetary and debt-collection relief for over 491,000 class members. First, Big Picture and Ascension have agreed they will not collect payments of more than 2.5 times the original principal amount of any loan provided during the class period. Second, Big Picture and Ascension also will cancel and cease collection of all loans that are more than 210 days in default and they will not sell, transfer, or assign any interest in these charged-off loans or future loan proceeds from the charged-off loans. Third, the settlement includes a cash "Settlement Fund" that will provide a cash payment to Class members who already repaid their loans and paid more than 2.5 times the principal amount. Defendants have agreed to pay $8.7 million to establish this Fund from which those class members will be eligible to make a claim. Each claimant will receive a pro rata share of the fund after settlement administration expenses and any court-awarded attorneys' fees, litigation costs, and class representative service awards have been deducted. As the Court recently acknowledged, the financial benefits and debt relief that the settlement provides to consumers are "significant." Dkt. No. 92 at 22.

Importantly, the proposed settlement does not require a general class member release. None of the main claims in these actions—those against the Martorello parties—are released. That litigation continues. And even as to these settling defendants, no class member has to release a claim for their individual damages. Every consumer benefits from the debt relief and related non-cash benefits. But only those class members who affirmatively elect to obtain a cash claim payment release their individual claim.

The Court granted preliminary approval of the settlement on December 20, 2019. Dkt. No. 65. The settlement administrator commenced sending notice on September 10, 2020. The settlement administrator reports that class members' initial reaction to the settlement has been positive—4,245 eligible class members already have submitted claims for a class payment and the settlement administrator has not received any objections. The deadline to file objections is November 10, 2020 and the deadline to submit claims is September 10, 2021. Before the final approval hearing that is scheduled to take place on December 15, 2020, Plaintiffs will provide the Court with an update on the total number of claims, objections, and delivered notices.

Pursuant to Federal Rule of Civil Procedure 23, Plaintiffs now seek final approval of the proposed class action. Plaintiffs specifically request that the Court (1) confirm certification of the proposed Settlement Class; (2) approve the proposed settlement, including Class Counsel's request for $2,871,000 in fees inclusive of costs and $5,000 service awards for each Plaintiff; and (3) find that the notice sent to class members satisfies due process. For the reasons described below, the settlement is fair, reasonable, and adequate and should be approved.

II. BACKGROUND OF THE LITIGATION AND CLAIMS TO BE SETTLED

Plaintiffs Lula Williams, Gloria Turnage, George Hengle, Dowin Coffy, and Felix Gillison, Jr. filed the first of nine related actions alleging state usury law and RICO violations against Big Picture Loans, LLC, Ascension Technologies, Inc., Daniel Gravel, James Williams Jr., Gertrude McGeschick, Susan McGeshick, Giiwegiizhigookway Martin (Tribal Defendants) and Matt Martorello. *See Lula Williams, et al. v. Big Picture Loans, LLC et al.*, No. 3:17-cv-00461 (E.D. Va.). The Tribal Defendants filed four motions to dismiss, asserting that the Court lacked subject matter jurisdiction due to tribal sovereign immunity, Plaintiffs had failed to state a claim on which relief can be granted, Plaintiffs had failed to exhaust tribal remedies, Plaintiffs had sued them in an inconvenient forum, the Court lacked personal jurisdiction over the

individual defendants, and Plaintiffs lacked Article III standing to assert their claims. Dkt. Nos. 22, 24, 26, 28. The parties conducted jurisdictional discovery, a process that required the Court's assistance to resolve various disputes, including the withholding of documents on assertions of attorney-client privilege. Dkt. Nos. 49, 111, 116. After the jurisdictional discovery period, the Court granted the tribal officers' motion to dismiss for failure to state a claim (Dkt. No. 117), but denied the remaining motions to dismiss, including Big Picture and Ascension's motion to dismiss on the basis of sovereign immunity, Dkt. No. 124, a decision which Big Picture and Ascension appealed. Dkt. No. 135.

The *Williams* Plaintiffs allege that Martorello, Big Picture, and Ascension violate Virginia's usury laws and the Racketeer Influenced and Corrupt Organizations Act (RICO) in making the high interest loans to class members. After filing *Williams*, Plaintiffs Renee Galloway, Dianne Turner, Earl Browne, Rose Marie Buchert, Regina Nolte, Teresa Titus, and Kevin Minor (*Galloway I* Plaintiffs) filed a second action in this district on behalf of people living in Virginia, California, Illinois, Indiana, Ohio, Washington, and states with similar usury laws who received a loan with an interest rate greater than 12% from Red Rock or Big Picture Loans. *Galloway I*, No. 3:18-cv-00406 (E.D. Va.). And in Massachusetts, Oregon, Georgia, and California, Plaintiffs filed similar complaints against these same defendants for violations of state usury laws and RICO. *Duggan* (D. Mass.); *Smith* (D. Or.); *Cumming* (N.D. Ca.); *Kobin* (C.D. Cal.); and *McKoy* (N.D. Ga.).

Plaintiffs have aggressively pursued discovery about all aspects of the lending scheme. In *Williams* and *Galloway I*, Plaintiffs served multiple sets of written discovery requests, deposed numerous witnesses, and issued over a hundred subpoenas, many of which required separate actions to enforce. Ex. 1 (Kelly Decl.) ¶ 26; Ex. 2 (Terrell Decl.) ¶ 11. As a result of their efforts,

Plaintiffs received information that allowed them to identify other alleged participants and ultimately to file *Galloway II* (against Martorello's family members, companies, and trusts) and this action (against tribal officers and council members). Ex. 1 (Kelly Decl.) ¶ 27. Defendants in *Galloway II*, including Settling Defendants Columbia Pipe & Supply, Terrance and Timothy Arenberg, DTA Trinity Wealth Transfer Trust, Deborah M. Arenberg Living Trust, Amlaur Resources, LLC, Brian Jedwab, James Dowd, Simon Liang, and Brian McFadden, each filed multiple motions to dismiss, to which Plaintiffs diligently responded. *Id*. Those motions remained undecided at the time of settlement.

The discovery Plaintiffs received in *Williams* and *Galloway I* also alerted Plaintiffs to the fact that at the time they briefed subject matter jurisdiction they had not been privy to information that is material to a determination of the sovereign immunity issue. Ex. 1 (Kelly Decl.) ¶ 28. Just before the Fourth Circuit reversed the Court's decision on sovereign immunity, the Court set an evidentiary hearing to consider whether Defendants had made material misrepresentations to the Court that implicated the Court's and the Fourth Circuit's sovereign immunity decisions. *See* Dkt. No. 246. The parties were preparing position papers, witness and exhibit lists, discovery designations, and other prehearing filings related to the evidentiary hearing when they commenced settlement negotiations. Ex. 1 (Kelly Decl.) ¶ 28.

Ultimately, after months of arms-length negotiations, and with the assistance of Nancy Lesser and Judge Novak, the parties reached an agreement in principle. Ex. 3 (Bennett Decl.) ¶ 19. The terms of that agreement are incorporated into the Settlement Agreement. Although Martorello participated in the negotiations, Plaintiffs were unable to reach an agreement with him and the other Non-Settling Defendants. Litigation continues on multiple fronts against the Non-Settling Defendants. In July, the Court held a two-day evidentiary hearing on whether

Martorello made material misrepresentations that may have impacted its or the Fourth Circuit's decisions on sovereign immunity. *See Williams*, Dkt. Nos. 875, 878. Eventide Credit Acquisitions, LLC filed a motion to intervene in this settlement, which the Court denied. Dkt. No. 92.

Each case that is being settled here alleges violations of the Racketeer Influenced and Corrupt Organizations Act and various state law claims based on Defendants' lending practices, including usury, unjust enrichment, and unfair and deceptive acts and practices laws. Plaintiffs allege that the Settling Defendants violated these laws by their involvement in a scheme to charge excessive annual interest on consumer payday loans made to consumers across the country. In each case, the Settling Defendants have vigorously denied Plaintiffs' allegations, disputed that state and federal law were applicable to the loans, disputed that Plaintiffs' claims properly stated a violation of those laws, asserted that the courts lack subject matter jurisdiction due to tribal sovereign immunity, contested the Court's personal jurisdiction, and raised other unique defenses. Although the Settling Defendants have not conceded liability, they ultimately were motivated to settle the litigation to avoid possible findings that their lending practices violated state and federal laws. Similarly, Plaintiffs were motivated to obtain significant and immediate relief for consumers and avoid substantial litigation risks and uncertainties, including what would have been exhaustive appeals of any favorable decisions.

With these factors in mind, both through formal and informal settlement negotiations, the parties arrived at the proposed settlement, which resolves all of the claims raised against the Settling Defendants in the nine cases. The Settling Defendants deny liability and that a class is appropriate for Rule 23 certification on the claims asserted in this action, but Settling Defendants do not oppose the certification of the Settlement Class for the purpose of resolving this action. In

its preliminary approval order, this Court found conditionally and in the specific context of this settlement, that the prerequisites for a class action under Rules 23(a) and (b)(3) had been satisfied. Dkt. Nos. 65, 84, 97 (Preliminary Approval Order).

III. CLASS ACTION SETTLEMENT

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

Under the Settlement Agreement, the parties agreed to resolve the claims against the Settling Defendants of a "Settlement Class" defined as:

> All consumers residing within the United States or its territories who executed loan agreements with Red Rock Tribal Lending, LLC or Big Picture Loans, LLC (including loans assigned to Big Picture Loans, LLC) from June 22, 2013 to December 20, 2019; provided, however, that "Settlement Class" and "Settlement Class Member" shall exclude: (i) all consumers who would otherwise qualify for membership in the "Settlement Class" for which the consumer previously has released all claims as to the Settling Defendants; (ii) the Settling Defendants' officers, directors, and employees; (iii) the Settling Defendants' attorneys; (iv) the Plaintiffs' attorneys; and (v) any judge who has presided over either mediation or disposition of this case and the members of his or her immediate family.

The Settlement Class consists of approximately 491,018 individual consumers.

The proposed settlement equitably provides meaningful relief to consumers nationwide. For loans that remain outstanding, Big Picture and Ascension have agreed to collect no more than 2.5 times the original principal amount of the loan in payments over the life of the loan. This cap confers a substantial benefit to Settlement Class members, many of whom have loans with interest rates that otherwise would allow for the collection of principal and interest well in excess of 2.5 times the original loan amount. *See* Dkt. No. 23 (Amended Complaint) ¶¶ 1, 290, 293, 296, 299, 304, 310, 313, 318, 328, 336, 344, 349, 353, 357, 360, 363, 374, 376, 378, 380, 385, 387, 388, 390, 392, 396, 399, 401, 402, 405, 406, 408, 410. Big Picture and Ascension also have agreed to cancel and cease collection of all loans that are more than 210 days in default,

bringing closure to Settlement Class members unable to pay back their loans. The Settling Defendants will not sell, transfer or assign any interest in these charged-off loans or future loan proceeds from the charged-off loans. The approximately 361,731 Settlement Class Members whose loans remain outstanding will receive these benefits without having to prove any harm or take any affirmative actions. In other words, they will not be required to submit any forms or make any claims against the fund to receive the benefits.

In addition to the debt relief for Settlement Class Members with outstanding loans, the Settling Defendants have agreed to pay $8.7 million into a "Settlement Fund" from which Settlement Class Members who have repaid their loans at a rate of more than 2.5 times the principal may submit a claim to receive a cash payment. American Legal Claims Services (ALCS), who is administering the settlement, analyzed data provided by Defendants and found that 129,287 Settlement Class Members (26.33%) are eligible to submit a claim. Ex. 4 (ALCS Decl.) ¶ 8. Each claimant will receive a pro rata share of the Settlement Fund after settlement expenses and any court-awarded fees and service awards are deducted. Claimants who paid more interest on their loans will receive a larger cash award. As of October 23, 2010, 4,245 eligible Settlement Class Members had submitted claims. Ex. 4 (ALCS Decl.) ¶ 9. If no more claims are submitted and the Court approves the requested fees, service awards, and administration expenses, approximately 122 claimants will receive between $5,000 and $12,000, approximately 1,600 claimants will receive between $1,000 and $5,000, 922 claimants will receive between $500 and $1,000, 1,400 claimants will receive between $50 and $500, and the remaining

claimants will receive up to $50. Ex. 4 (ALCS Decl.) ¶ 9. This is an excellent result, particularly in light of the real risks and delays involved in litigating the substantive merits of the claims.[2]

Plaintiffs also respectfully request that the Court approve the requested service awards for their role as class representatives to compensate them for their efforts in prosecuting this case, including retaining counsel, assisting in discovery (including depositions), and keeping abreast of the litigation. Plaintiffs' substantial efforts in advancing the class interests are particularly noteworthy considering that many of them were offered $5,000 at the outset of the case to dismiss their claims. Ex. 5 (Caddell Decl.) ¶ 44. Settling Defendants have agreed not to oppose the application for the service award, which is being sought in the amount of $5,000 each, for a cumulative maximum of $210,000. The parties have agreed that any Court-approved service awards will be paid to Plaintiffs out of the Settlement Fund. Dkt. No. 18-1 (Settlement Agreement) at § 10.11.

Class Counsel also respectfully request an award for attorneys' fees and costs in the amount of $2,871,000, which constitutes thirty-three percent (33%) of the cash consideration provided for by and as set forth in the Settlement Agreement.

B. The settlement administrator disseminated notice as directed by the Court.

In the Preliminary Approval Order, the Court approved and ordered that ALCS serve as settlement administrator and send notice to Settlement Class Members. Dkt. No. 97 ¶ 6. ALCS received the class list from Settling Defendants, which included Settlement Class Member contact information and loan information. Ex. 4 (ALCS Decl.) ¶ 3. ALCS identified 491,018 unique Settlement Class Members. *Id.*

[2] These amounts will decrease as additional claims are submitted. Plaintiffs will update the Court on the claims rate before the final approval hearing.

On September 10, 2020, ALCS transmitted notice to 447,724 Settlement Class Members via email. *Id*. ¶ 4. ALCS mailed notices to 43,294 Settlement Class Members for whom: (1) ALCS did not have an email address according to the data provided by Settling Defendants; or (2) whose email addresses were not verified. *Id*. Notices were also mailed to the 17,179 Settlement Class Members who were initially sent an email notice, but whose notices could not be successfully delivered after three attempts. *Id*. ¶ 5.

As of October 23, 2020, ALCS had received 9,343 notices returned by the U.S. Postal Service as undeliverable without a forwarding address. *Id*. ¶ 6. ALCS attempted to update the addresses or those Settlement Class Members. *Id*. Through this process, it obtained new addresses for and re-mailed 7,743 of those Class Members' notices. *Id*. After the attempts to email, mail, and obtain valid addresses from the most commonly used sources, 1,600 notices—only .33% of Settlement Class Members—were returned as undelivered. *Id*.

ALCS also established the Settlement Website, www.bplsettlement.com, which contains documents and information about the settlement. *Id.* ALCS established and maintains a Telephone Assistance Program (TAP) dedicated to this case to receive calls from Settlement Class Members with questions about the settlement. As of October 23, 2020, ALCS had received 2,693 calls to TAP. *Id*. ¶ 11.

The notice materials also included Class Counsel's contact information so that Settlement Class Members can call Class Counsel or send Class Counsel an email with questions about the settlement. Class Counsel have received and responded to these emails and calls directly received from consumers. Ex. 3 (Bennett Decl.) ¶ 22; Ex. 6 (Drake Decl.) ¶ 15.

C. Class Members support the settlement, and there are no governmental objectors.

As of October 23, 2020, no Settlement Class Member has objected to the settlement. Ex. 4 (ALCS Decl.) ¶ 10. Settling Defendants served the required Class Action Fairness Act notices

on the state and federal attorneys general on December 6, 2019. Dkt. No. 36. Counsel has not received any objections from any agency.

D. Settlement Class Members who submit a claim will release monetary claims.

Settlement Class Members who receive cash payments will release any individual claims they have against the Released Parties. Dkt. No. 18-1, Settlement Agreement § 12. Settlement Class Members do not release claims they have against Martorello or any other Non-settling Defendant. Settlement Class Members do not release any claims for non-monetary relief.

Settlement Class Members who do not receive a check for a cash award from the Settlement Fund do not release individual claims against Settling Defendants. Rather their release only waives their rights to bring a class action, collective action, or mass action against the Settling Defendants related to claims asserted in the actions as well as claims that could have been asserted in the actions. *Id.*

IV. ARGUMENT

A. The settlement is fair, reasonable, and adequate and should be approved.

1. <u>The notice to Settlement Class Members was reasonable and satisfied due process.</u>

Rule 23(e) requires the Court to "direct notice [of a class settlement] in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). The Court must consider the mode of dissemination and the content of the notice to assess whether such notice was sufficient. *See* Federal Judicial Center, *Manual for Complex Litigation* § 21.312 (4th 2004). Rule 23(c)(2) requires any notice to a class certified under Rule 23(b)(2) to be "adequate." Fed. R. Civ. P. 23(c)(2). This standard differs from the "best notice practicable" standard for notice issued to a Rule 23(b)(3) class. Although the Settlement Class was certified under Rule 23(b)(2), the direct notice ALCS issued in this case satisfies the more stringent Rule 23(b)(3) test, and thus indisputably satisfies due process.

The standard for notice in Rule 23(b)(3) cases requires notice to be sent to all class members who can be identified "through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). "What 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).

The parties and ALCS have fully and successfully implemented the notice program approved by the Court (Dkt. No. 97 ¶ 7) and as the Court directed. Settlement Class Members could be easily identified because loan records maintained by Settling Defendants include borrowers' names, addresses, and, where available, email addresses. Ex. 4 (ALCS Decl.) ¶ 3. ALCS took reasonable measures to update the provided contact information (*id.* ¶¶ 3, 6) and conserved costs by sending notice by initially sending notice by email and only mailing the notice if an email bounced back as undeliverable or no email existed for a particular Settlement Class Member. As a result of ALCS's efforts, settlement notice was successfully delivered to 99.67% of Settlement Class Members. Courts—including this Court 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. 3:05cv00143 (E.D. Va. Aug. 29, 2006) (granting final approval where class notice had approximately 85% delivery).

The notice program that ALCS implemented satisfies Rule 23 and due process and should be finally approved.

2. The Settlement Agreement is fair and reasonable under *Jiffy Lube* and Rule 23(e).

Rule 23(e)(2) provides that a court may approve a settlement "only after hearing and only on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Rule 23(e)(2) was amended in 2018 to require courts to consider several factors including "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 Rule 23(e) factors are consistent with the factors—known as the *Jiffy Lube* factors—that courts have long applied in this Circuit. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991). The *Jiffy Lube* factors require a court to first determine whether the settlement is "fair and reasonable," and then whether the settlement is "adequate." *Id.* Because the *Jiffy Lube* factors substantially, if not completely, overlap with the amended Rule 23(e)(2) factors, courts in this Circuit continue to assess the *Jiffy Lube* factors when making a determination about whether to approve a settlement. *See In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mkt., Sales Pracs. & Prods. Liab. Litig.*, 952 F.3d 471, 484, n. 8 (4th Cir. 2020).

"The fairness analysis asks whether the parties settled the case through good-faith, arm's length bargaining and considers (1) the posture of the case at the time settlement was proposed; (2) the extent of discovery conducted; (3) the circumstances surrounding settlement negotiations; and (4) the experience of counsel in the area of law." *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 839 (E.D. Va. 2016) (citing *In re: NeuStar, Inc. Sec. Litig.*, No. 1:14–cv–885,

2015 WL 5674798, at *10 (E.D. Va. Sept. 23, 2015)). A proposed class action settlement is considered presumptively fair where there is no evidence of collusion and the parties, through capable counsel, have engaged in arm's-length negotiations. *See S.C. Nat'l Bank v. Stone*, 139 F.R.D. 325, 339 (D. S.C. 1991). Each of these factors is satisfied here, and the settlement is reasonable and fair.

i. The posture of the case at settlement and the extensive discovery demonstrate that the parties were fully informed in reaching the settlement. "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.'" *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 571 (E.D. Va. 2016). The second *Jiffy Lube* fairness factor—the extent of discovery—ensures that all parties 'appreciate the full landscape of their case when agreeing to enter into the Settlement.'" *Id.* at 572. Here, there should not be any wariness of possible collusion considering the advanced posture of each one of these cases, as well as the broader litigation as a whole.

At the time the parties negotiated this settlement, *Williams* had been on file for two years; the parties had conducted jurisdictional discovery; the Fourth Circuit had issued its sovereign immunity decision; and the parties in *Galloway I* were preparing for an evidentiary hearing on whether the *Williams* sovereign immunity decisions should be revisited due to material information received after sovereign immunity was briefed in the district court. Ex. 1 (Kelly Decl.) ¶ 26. The information Plaintiffs received through discovery in *Williams* and *Galloway I* also prompted Plaintiffs to file *Galloway II* and *Galloway III* against other co-conspirators involved in this nationwide scheme. *Id.* ¶ 27. And *McKoy*, *Cumming*, *Smith*, and *Duggan* had

been on file for nearly a year. The plaintiffs in those cases were conducting jurisdictional discovery and briefing jurisdictional issues when the case settled. Ex. 5 (Caddell Decl.) ¶ 35.

The parties aggressively pursued discovery before the case settled. Defendants produced had produced over a million pages of documents in the Virginia actions alone and Class Counsel spent hundreds of hours reviewing them. The parties took numerous depositions in *Williams* and *Galloway I*. The parties pursued data and documents from third parties, issuing dozens of subpoenas to state attorney generals, attorneys involved in advising the co-conspirators about the enterprise's legality, companies that maintain loan level data, and individuals involved in the day-to-day operation of the online lending business. While *Williams* and the *Galloway* cases were being litigated in this Court, the plaintiffs in *McKoy*, *Cumming*, *Smith*, and *Duggan* were busy conducting their own discovery. Ex. 5 (Caddell Decl.) ¶ 35. As a result of their efforts, the parties were well aware of the strengths and weaknesses of their claims and defenses by the time they commenced mediation, which supports a finding that the settlement is fair. *See In re Lumber Liquidators*, 952 F.3d at 484 (posture of litigation and extent of discovery factors satisfied where motions to dismiss and for summary judgment had been litigated, discovery was complete, thirteen depositions had been taken, and counsel had reviewed "vast quantities" of documents).

ii. The extensive, formal mediation efforts of the parties demonstrate that the settlement is fair and reasonable. "The third *Jiffy Lube* fairness factor seeks to 'ensure that counsel entered into settlement negotiations on behalf of their clients after becoming fully informed of all pertinent factual and legal issues in the case.'" *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d at 840 (quoting *In re Mills Corp Sec. Litig.*, 265 F.R.D. 246, 255 (E.D. Va. 2009)). "Courts look to the number of meetings between the parties to discuss settlement, the quality of those

negotiations, and the duration of time over which negotiations took place." *Id.* (citing *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 665 (E.D. Va. 2001)).

In this case, the parties engaged in extensive, formal mediation efforts with the assistance of Nancy A. Lesser and Judge Novak. Ex. 3 (Bennett Decl.) ¶ 19. The first two mediations took place in Washington D.C. on July 2 and August 5, 2019. *Id*. The third mediation was held in Washington D.C. on August 26, 2019. *Id*. The parties finally reached agreement after attending a settlement conference with Judge Novak. Between formal mediations, the parties also engaged in extensive informal mediation efforts, including countless telephone calls with Ms. Lesser and between counsel. *Id*. At all times, the negotiations were conducted at arm's length and in good faith. The third fairness factor is satisfied. *In re Lumber Liquidators*, 952 F.3d at 484-85 (fairness factor analysis "is intended primarily to ensure that a settlement is reached as a result of good-faith bargaining at arm's length, without collusion") (quoting *Berry v. Schulman*, 807 F.3d 600, 614 (4th Cir. 2015)).

iii. The experience of counsel also demonstrates that the settlement is reasonable and fair. "The final *Jiffy Lube* 'fairness' factor looks to the experience of class counsel in this particular field of law." *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d at 841 (quoting *In re Mills*, 265 F.R.D. at 255). For starters, Class Counsel's experience and track record of success litigating complex class actions against tribal payday lenders is second to none. *See, e.g. Hayes v. Delbert Servs. Corp.*, 3:14-cv-00258-JAG, Dkt. No. 193 at 9-12 (Jan. 20, 2017) (approving a $15 million class action settlement for Virginia consumers arising from a rent-a-tribe lending scheme); *Gibbs v. Plain Green, LLC*, 3:17-cv-00495-MHL, Dkt. No. 141 (December 13, 2019) (approving $15,903,721 class action settlement for the benefit of approximately 1,045,248 consumers); *Turner v. ZestFinance, Inc.*, 3:19-cv-293-DJN, Dkt. No. 115 (July 9, 2020)

(approving $18,500,000 class action settlement for the benefit of 366,494 class members). This Court and many others have found the attorneys here are extremely qualified to represent a consumer class.[3] And Class Counsel have been found qualified in comparable litigation. *Hayes*, 3:14-cv-00258-JAG, Dkt. No. 193 at 9-12; *Turner*, 3:19-cv-293-DJN, Dkt. No. 115 at 6. Indeed, during the final approval hearing in *Gibbs* the Court observed, "I really don't want anybody to get too big of a head, frankly, but it is clear that these attorneys are amply able to represent class counsel. I've read their declarations. I've seen them in the way they have managed this moving set of targets, including in lots of hard-fought and thoughtfully presented briefing on both sides. And that means everybody is working hard on behalf of their clients, but it is certainly the case that this group of attorneys possess ample experience and have a track record of success litigating complex class actions, particularly in these particular cases." Trnscr. of Final Approval of Class Action Settlement Agreement Hearing at 20:19-21:14, *Gibbs*, 3:1-cv-495 (E.D. Va.).

Class Counsel endorse the Settlement as fair and adequate under the circumstances. Ex. 1 (Kelly Decl.) ¶ 35; Ex. 3 (Bennett Decl.) ¶ 19; Ex. 6 (Drake Decl.) ¶ 14; Ex. 2 (Terrell Decl.) ¶ 17; Ex. 7 (Wessler Decl.) ¶ 11; Ex. 5 (Caddell Decl.) ¶ 36. Courts recognize that the opinion of experienced and informed counsel in favor of settlement should be afforded substantial consideration in determining whether a class settlement is fair and adequate. *See Jiffy Lube*, 927

[3] *Dreher v. Experian Info. Sols., Inc.*, Case No. 3:11-cv-624 (JAG) (E.D. Va.); *Tsvetovat, v. Segan, Mason, & Mason, PC*, No. 1:12-cv-510 (TSE) (E.D. Va.); *Conley v. First Tenn. Bank*, No. 1:10-cv-1247 (TSE) (E.D. Va.); *Jenkins v. Equifax Info. Servs., LLC*, No. 3:15-cv-443 (E.D. Va.); *Manuel v. Wells Fargo Nat'l Ass'n*, No. 3:14CV238, 2015 WL 4994549, at *15 (E.D. Va. Aug. 19, 2015) (finding Class Counsel "is experienced in class action work, as well as consumer protection issues, and has been approved by this Court and others as class counsel in numerous cases"); *see Soutter v. Equifax Info. Servs., LLC*, No. 3:10CV107, 2011 WL 1226025 (E.D. Va. Mar. 30, 2011) ("[T]he Court finds that Soutter's counsel is qualified, experienced, and able to conduct this litigation. Counsel is experienced in class action work, as well as consumer protection issues, and has been approved by this Court and others as class counsel in numerous cases."); *Williams v. Lexis-Nexis Risk Mgt.*, No. 3:06CV241 (E.D. Va. 2008).

F.2d at 159; *see also Strang v. JHM Mortgage Sec. Ltd. P'ship*, 890 F. Supp. 499, 501–02 (E.D. Va. 1995) (concluding requirement met where "plaintiffs' counsel, with their wealth of experience and knowledge in the securities class action area, engaged in sufficiently extended and detailed settlement negotiations to secure a favorable settlement for the Class").

3. Under *Jiffy Lube*, the settlement is adequate.

"The second *Jiffy Lube* factor, adequacy, requires the court to 'weigh the likelihood of the plaintiffs' recovery on the merits against the amount offered in the settlement.'" *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d at 841 (quoting *In re: NeuStar, Inc.*, 2015 WL 5674798, at *11). The relevant adequacy factors to be considered may include: (1) the relative strength of the plaintiff's case on the merits; (2) any difficulties of proof or strong defenses the plaintiff would likely encounter if the case were to go to trial; (3) the expected duration and expense of additional litigation; (4) the solvency of the defendant and the probability of recovery on a litigated judgment; (5) the degree of opposition to the proposed settlement; (6) the posture of the case at the time settlement was proposed; (7) the extent of discovery that had been conducted; (8) the circumstances surrounding the settlement negotiations; and (9) the experience of counsel in the substantive area and class action litigation. *See Jiffy Lube*, 927 F.2d at 159.

While Plaintiffs' Counsel firmly believe in the merits of Plaintiffs' claims, recovery of money from Settling Defendants posed problems. For example, buttressed by the Fourth Circuit's decision in *Williams* that Big Picture and Ascension are entitled to sovereign immunity, each of the Settling Defendants asserts they are immune from suit. Plaintiffs strongly believe that the Fourth Circuit would have decided the issue differently had it had the benefit of a complete record, but Plaintiffs acknowledge the risk they faced. The Settling Defendants would have appealed any decision on sovereign immunity, increasing the expected duration and expense of additional litigation. Ex. 3 (Bennett Decl.) ¶ 20. Plaintiffs also faced risk that the Court would

dismiss the individual tribal defendants, tribal council members, and the scheme's lenders either for lack of jurisdiction or for lack of sufficient facts supporting liability under RICO. Mitigating these risks at this juncture allows Plaintiffs to obtain immediately substantial debt reduction and debt cancellation relief for the entire class. In other words, settling now reduces or stops exorbitant interest from continuing to accrue for the majority of the class and gets money in the pockets of Settlement Class Members who already have paid off their debts without further delay. Plaintiffs continue to oppose the usurious lending practices and to aggressively pursue compensation from the Non-Settling Defendants in the ongoing litigation against them.

The deadline to object to the settlement is on November 10, 2020. To date, however, no Class Member has objected. "Such a lack of opposition … strongly supports a finding of adequacy, for '[t]he attitude of the members of the Class, as expressed directly or by failure to object, after notice to the settlement is a proper consideration for the trial court.'" *In re Microstrategy*, 148 F. Supp. 2d at 668 (quoting *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975)). As the Court has previously explained, "[b]ecause 'the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.' The lack here of any objections to the settlement … strongly compel[s] a finding of adequacy." *Id.* (citing *Sala v. Nat'l R.R. Passenger Corp.*, 721 F. Supp. 80, 83 (E.D. Pa. 1989)). Courts recognize that where the class as a whole supports a settlement, it should be approved. *In re: Lumber Liquidators*, 952 F.3d at 485-86 (finding settlement adequate where only 94 of 178,859 class members opted out and 12 class members objected).[4] Even a small majority of support

[4] *See also In re Beef Industry Antitrust Litig.*, 607 F.2d 167, 180 (5th Cir. 1979); *Laskey v. Int'l Union*, 638 F.2d 954 (6th Cir. 1981) (finding small number of objectors demonstrates fairness of a settlement); *Shlensky v. Dorsey*, 574 F.2d 131 (3rd Cir. 1978) (same); *Bryan v. Pittsburgh Plate Glass Co. (PPG Indus., Inc.)*, 494 F.2d 799, 803 (3d Cir.) (approving settlement where 20 percent opted out or objected); *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20 (2d Cir. 1987)

creates a presumption in favor of approval. *See Reed v. Gen'l Motors Corp.*, 703 F.2d 170, 174 (5th Cir. 1983) (approving class action settlement where more than 40 percent of class objected or opted out); *Cotton v. Hinton*, 559 F.2d 1326, 1333 (5th Cir. 1977) (nearly 50 percent opted out or objected; settlement nevertheless approved). Before the final approval hearing, Plaintiffs will respond to any objections received.

If the Court approves the settlement, then Settlement Class Members will receive real relief. Settlement Class Members with outstanding loans will have the interest on their loans reduced to 2.5 times the principal amount. Any Settlement Class Member in default for more than 210 days will have his or her loan cancelled. And the Settling Defendants will cease all collection efforts, which benefits all Settlement Class Members with outstanding loans. 361,729 Settlement Class Members will receive these benefits from the settlement through a reduction of their total payment amount or by the charge off of their past due loans without having to undertake any claims process. Settlement Class Members who have repaid their loans at a rate of more than 2.5 times the principal will receive a cash payment if they submit a valid claim form. Already 4,245 eligible Settlement Class Members have submitted claims. The claims deadline is not until September 21, 2021 and Plaintiffs anticipate more claims will be submitted.

The opinion of all Counsel involved is that the terms of the Settlement Agreement represent a fair, reasonable, and adequate resolution of the claims alleged. The Court should conclude likewise.

(approving settlement with thirty-six objecting); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979) (granting approval where sixteen percent objected).

4. The settlement is fair, reasonable, and adequate under Rule 23(e)(2).

The Rule 23(e) factors—whether the class representatives and class counsel have adequately represented the class; whether the proposal was negotiated at arm's length; whether the relief provided for the class is adequate taking into account the costs, risks, and delay of trial and appeal, the effectiveness of distributing relief to the class, the terms of any proposed award of attorney's fees, including timing of payment, and any agreement required to be identified under Rule 23(e)(3); and whether the proposal treats class members equitably relative to each other—have been largely addressed above.

Plaintiffs and their counsel have adequately represented the Settlement Class, as the Court acknowledged in the Preliminary Approval Order. Dkt. No. 97 ¶¶ 2-3. The settlement was negotiated at arm's length with the assistance of two experienced mediators. The relief is adequate particularly when the Settling Defendants' sovereign immunity defense is considered. Settlement Class Members are treated equitably under the settlement regardless of whether they still have an outstanding loan. Plaintiffs request a reasonable attorneys' fee for their counsel's work securing the settlement, as discussed in greater length below. And there is no other agreement required to be identified under Rule 23(e)(3).

B. The Court should award service awards, attorneys' fees, and costs.

1. The Court should award the well-earned service awards to Plaintiffs.

Plaintiffs request—and Defendants do not oppose—a modest award of $5,000 each for Plaintiffs' participation in the settled cases and service to the Settlement Class. Plaintiffs put their reputations on the line to assist with a nationwide lawsuit to combat predatory lending across the country. Ex. 1 (Kelly Decl.) ¶ 40. Plaintiffs took an active role as some answered discovery and testified in depositions. Some Plaintiffs were previously offered $5,000 to settle the claims individually. Ex. 5 (Caddell Decl.) ¶ 44. Plaintiffs understand their roles as

representatives of the class as a whole and were answerable to counsel in prosecuting the case. Ex. 6 (Drake Decl.) ¶ 13. Service awards in this amount and range are reasonable and have been regularly approved by judges in the Eastern District of Virginia.[5] Particularly in light of historical service awards both within and outside this District, the service awards sought here are appropriate. *See, e.g.*, *Staton v. Boeing Co.*, 327 F.3d 938, 976–77 (9th Cir. 2003); *In re Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). An empirical study published in 2006 suggests that the average award per class representative is about $16,000[.]" 4 *Newberg on Class Actions* § 11:38 (4th ed.).

To date, there have been no objections to or comments regarding the Service Awards, and Plaintiffs properly earned them through their extensive participation in the case. Ex. 6 (Drake Decl.) ¶ 13; Ex. 8 (Haac Decl.) ¶ 9. The Court should therefore approve the awards. *See Manuel v. Wells Fargo Nat'l Assn*, 3:14-cv-238-DJN, 2016 WL 1070819, at *6 (E.D. Va. Mar. 15, 2006) (approving award of $10,000 for named plaintiff); *Hayes* at Dkt. No. 201 (awarding each of the class representatives a service award of $5,000); *Gibbs* at Dkt. No. 141 (awarding each class representative a service award of $7,500); *Turner* at Dkt. No. 111 (approving class representative awards of $5,000 for each named plaintiff).

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[5] *See, e.g.*, *Gibbs v*, 3:17-cv-00495-MHL; *Turner*, 3:19-cv-293-DJN; *Hayes*, 3:14-cv-258-JAG; *Manuel v. Wells Fargo Nat'l Ass'n*, No. 3:14cv238(DJN), 2016 WL 1070819, at *6 (E.D. Va. Mar. 15, 2016); *Beverly v. Wal-Mart Stores, Inc.*, No. 3:07cv469; *Williams v. Lexis Nexis Risk Mgmt.*, No. 3:06cv241; *Cappetta v. GC Servs. LP*, No. 3:08cv288-JRS (E.D. Va.); *Makson v. Portfolio Recovery Assoc., Inc.*, No. 3:07cv982-HEH (E.D. Va. Feb. 9, 2009); *Daily v. NCO*, No. 3:09CV31-JAG; *Conley v. First Tenn.*, No. 1:10CV1247-TSE (E.D. Va.); *Lengrand v. Wellpoint*, No. 3:11CV333-HEH (E.D. Va.); *Henderson v. Verifications Inc.*, No. 3:11CV514-REP (E.D. Va.); *Pitt v. K-Mart Corp.*, No. 3:11CV697 (E.D. Va.); *James v. Experian Info. Sols.*, No. 3:12CV902 (E.D. Va.); *Manuel v. Wittstadt*, No. 3:12CV450 (E.D. Va.); *Shami v. Middle E. Broadcast Network*, No. 1:13CV467-CMH (E.D. Va.); *Goodrow v. Freidman & MacFadyen*, No. 3:11CV20 (E.D. Va.); *Berry v. LexisNexis Risk & Info. Analytics Grp., Inc.*, No. 3:11CV274 (E.D. Va.); *Marcum v. Dolgencorp, No.* 3:12CV108 (E.D. Va.); *Kelly v. Nationstar*, No. 3:13CV311 (E.D. Va.); *Wyatt v. SunTrust Bank*, No. 3:13CV662 (E.D. Va.).

2. <u>The requested attorneys' fees and costs are appropriate and should be awarded.</u>

The parties agreed that Class Counsel would seek an award for attorneys' fees, costs, and class administration expenses in an amount not to exceed 33% of the monetary portion of the settlement.

i. A percentage-of-the-fund award is appropriate and reasonable here. The Supreme Court has consistently calculated attorneys' fees in common fund cases on a percentage-of-the-fund basis. *See Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165–67 (1939); *Boeing Co. v. van Gemert*, 444 U.S. 472, 478–79 (1980); *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984); *see also Report of the Third Circuit Task Force, Court Awarded Attorney Fees*, 108 F.R.D. 237, 242 (Oct. 8, 1985) (noting that fee awards in common funds cases have historically been computed based on a percentage of the fund).

In the Fourth Circuit, attorneys' fees in common fund cases such as this one are almost universally awarded on a percentage-of-the-recovery basis. *Manuel*, 2016 WL 1070819, at *5–6; *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05cv00187, 2007 WL 119157, at *1 (M.D.N.C. Jan 10, 2007); *see DeLoach v. Philip Morris Cos.*, No. 00-1235, 2003 WL 23094907, at *3 (M.D.N.C. Dec. 19, 2003) (citing, with approval for this same proposition, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 215 (D. Me. 2003)); *see also Strang*, 890 F. Supp. at 502 (explaining "[a]lthough the Fourth Circuit has not yet ruled on this issue, the current trend among the courts of appeal favors the use of a percentage method to calculate an award of attorneys' fees in common fund cases.").

In fact, the lodestar method is used in only a small percentage of 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 et al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. Law Review 937, 945 (2017) (finding 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) (lodestar method used in 12% of settlements).

This is for good reason. As Vanderbilt Law Professor Brian Fitzpatrick,[6] one of the leading experts on class action attorneys' fees, has explained, the percentage-of-the-fund method is the superior method for awarding attorneys' fees because it "better align[s] the interests of class counsel and the class": "the more the class recovers, the more class counsel are paid." Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043 (2010). Class action scholars likewise generally agree that a percentage-of-the-fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and nonmonetary value of the judgment or settlement." *See* American Law Institute, Principles of the Law of Aggregate Litigation § 3.13(b) (2010).

The Fourth Circuit has not established a benchmark for fee awards in common funds cases, but district courts within the Fourth Circuit have noted that most fee awards range from 25 to 40 percent of the settlement fund.[7] This Court has recognized the importance of incentivizing

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[6] Professor Fitzpatrick is a law professor at Vanderbilt University who focuses his research on class action litigation. He is the author of the most comprehensive examination of federal class action settlements and attorneys' fees that has even been published. *See* Brian T. Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Awards, 7 J. Empirical L. Stud. 811 (2010). His study has been relied upon by a number of courts, scholars, and testifying experts.

[7] 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 demonstrates "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).

experienced class counsel to take on risky cases. *See In re Microstrategy*, 172 F. Supp. 2d at 788. In fact, a comprehensive study of attorneys' fees in class action cases notes "a remarkable uniformity in awards between roughly 30% to 33% of the settlement amount." Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Studies 27, 31, 33 (2004). This holds true even in instances where the class recovery runs into the hundreds of millions of dollars. *See Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295 (1st Cir.1995) (approving award of 30% of $220 million); *In re Combustion, Inc.*, 968 F. Supp. 1116, 1136 (W.D. La. 1997) (awarding 36% percent of $125 million); *In re Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (approving award of 36% of $3.5 million settlement fund); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) (granting attorneys' fees in amount of 33 1/3% of $1.5 million settlement fund); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (awarding 33.3% of $3.8 million settlement fund); *Kidrick v. ABC TV & Appliance Rental*, No. 3:97cv69, 1999 WL 1027050, at *1-2 (N.D. W. Va. May 12, 1999) (awarding 30.6% of approximately $400,000 settlement fund, noting that "[a]n award of fees in the range of 30% of the fund has been held to be reasonable. . . . Fees as high as 50% of the fund have been awarded.") (internal citations omitted).

Consistent with their practice before this Court, Class Counsel request $2,871,000, which amounts to 33% of the cash Settlement Fund, rather than a percentage calculated against non-cash value. As with any class case that they agree to take on, Class Counsel live by the result that they obtain for class members. That is true in cases that yield large fees as well as in cases which result in one below the reasonable lodestar incurred. In this case, where Class Counsel bore the risk of the litigation entirely and advanced significant funds in furtherance of the litigation, Class

Counsel submit that the fee sought is reasonable. Class Counsel have consistently taken the position in all cases that the attorneys' fees should be based on a percentage of the recovery obtained for the class. This has been true even in cases where the result is an objectively small fee such as in *Milbourne v. JRK Residential America, LLC*, No. 3:12-cv-861 (E.D. Va.) and *Mayfield v. Memberstrust Credit Union*, 3:07-cv-506 (E.D. Va.), where the class size was so small that counsel's fee ended up being $8,300, well below the actual time counsel had invested in the case. Indeed, in *Conley v. First Tennessee*, 1:10-cv-1247, Dkt. No. 37 (E.D. Va.), counsel took this position with respect to a class of 350 consumers and resulted in recovery of an approved fee of only $20,000. The same is true in another case, *Lengrand v. Wellpoint*, No. 3:11-cv-333-HEH, Dkt. No. 42 (E.D. Va.), in which counsel requested only 20% of the class recovery, $8,550, where the class size was very small. In each case, the standards of Rule 23 demand 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.

ii. A cross-check against 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-of recovery method is used. However, courts have, on occasion, requested information regarding an estimate of Class Counsel's lodestar as a cross-check in determining the percentage of the common fund that should be awarded. *Manual for Complex Litigation (Fourth)* § 21.724.

Here, the requested award includes not only Class Counsel's attorneys' fees, but also expenses Class Counsel have incurred in prosecuting the Settling Defendants' part of the case. Class Counsel estimate that their combined lodestar attributable to these Defendants exceeds $4,238,589 in fees. Ex. 1 (Kelly Decl.) ¶ 24; Ex. 3 (Bennett Decl.) ¶ 24; Ex. 6 (Drake Decl.) ¶ 16; Ex. 2 (Terrell Decl.) ¶ 14; Ex. 7 (Wessler Decl.) ¶ 12; Ex. 5 (Caddell Decl.) ¶ 40. Class

Counsel have also incurred over $202,709 in expenses prosecuting this case for which they have not been reimbursed. Ex. 1 (Kelly Decl.) ¶ 24; Ex. 3 (Bennett Decl.) ¶ 26; Ex. 6 (Drake Decl.) ¶ 17; Ex. 2 (Terrell Decl.) ¶ 16; Ex. 7 (Wessler Decl.) ¶ 13; Ex. 6 (Caddell Decl.) ¶ 42. Counsel's expenses include ordinary costs that are passed on to clients such as transcript processing, research fees, depositions, and mailing, to name a few categories.

As the Court would expect, beyond the jurisdictional discovery and motions practice, and the Fourth Circuit appeal, most of Class Counsel's time and expenses have been incurred in litigation against the Martorello parties and their Stalingrad defense. Although certain attorney time was obviously mixed between the two sets of Defendants, much of it was not. Accordingly, to enable the Court's crosscheck, Class Counsel have parsed their time records and done their best to exclude time spent on issues solely related to the Non-Settling Defendants. For example, Class Counsel excluded time responding to Martorello's motions to dismiss and to prosecuting their cases against him after the settlement was reached. Class Counsel also have excluded expenses dedicated solely to prosecuting their claims against the Non-Settling Defendants.

Counsel's hourly rates are reasonable for this district and complex, class action litigation. Class Counsel from districts other than this one have adjusted their rates to conform to rates routinely charged in Richmond. Ex. 6 (Drake Decl.) ¶¶ 15-16; Ex. 2 (Terrell Decl.) ¶ 15; Ex. 7 (Wessler Decl.) ¶ 12; Ex. 6 (Caddell Decl.) ¶ 41.

Multiplying the hours reasonably expended by Counsel's hourly rates, Class Counsel's lodestar attributed to these Defendants is $4,238,589.36, with costs of $202,708.70, totaling 4,441,298. The requested $2,871,000 fee thus represents a de-multiplier of 0.65 on the value of the time spent. Plaintiffs' request is well-within the range of fees approved in other cases, many of which approve substantial multipliers on Class Counsel's time. *See Berry*, 807 F.3d at 617;

see also Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1051 n.6 (9th Cir. 2002) (noting multipliers of up to 19.6); *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."); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (finding that requested fee amount with a lodestar multiplier of 7.89 was not unreasonable "[g]iven the outstanding settlement in this case and the noticeable skill of counsel"); *In re Charger Commc'n, Inc., Sec. Litig.*, No. MDL 1506, 4:02CV1186CAS, 2005 WL 4045741, at *1, *18 (E.D. Mo. June 20, 2005) (approving lodestar multiplier of 5.61); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005) (awarding fee with 15.6 multiplier); *In re Doral Fin. Corp. Sec. Litig.*, No. 05-cv-04014-RO (S.D.N.Y. Jul. 17, 2007) (same with 10.26 multiplier); *In re Excel Energy, Inc., Sec., Derivative & ERISA Litig.*, 364 F. Supp. 2d 980, 989 (D. Minn. 2005) (approving a multiplier of 4.7 in a case that only involved document review, and was resolved without any depositions after two days of mediation); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (awarding lodestar multiplier of 6.96 despite the fact that the parties engaged mostly in informal discovery and took no depositions); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y 2002) (describing multiplier of 4.65 as "modest" in a case in which plaintiffs conducted no depositions, only interviews, and confirmatory discovery consisted of tens of thousands of pages of documents); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (awarding 3.97 multiplier, reasoning that multipliers between 3 and 4.5 were common); *In re WorldCom, Inc., Sec. Litig.*, 388 F. Supp. 2d 319, 353 (S.D.N.Y. 2005) (awarding multiplier of 4).

Particularly in light of the result achieved, the requested fee is a reasonable, appropriate award for this case.

V. CONCLUSION

The settlement is an excellent result considering the contentiousness of the litigation, the lengthy litigation process, and the fact that Plaintiffs continue to litigate against the Non-Settling Defendants. Plaintiffs respectfully request that it be approved.

RESPECTFULLY SUBMITTED AND DATED this 30th day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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