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

DARLENE GIBBS, *et al., on behalf of themselves and all others similarly situated,*

Plaintiffs,

v. Case No: 3:17-cv-00495-MHL

PLAIN GREEN, LLC. *et al*,

Defendants.

TAMARA PRICE, *et. al.*, *on behalf of themselves and all others similarly situated,*

Plaintiffs,

v. Case No: 3-18-cv-711-MHL

MOBILOANS, LLC,

Defendant.

DARLENE GIBBS, *et al., on behalf of themselves and all others similarly situated,*

Plaintiffs,

v. Case No: 3:18-cv-00654-MHL

MARK CURRY, *et al*,

Defendants.

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

Plaintiffs, Darlene Gibbs, Stephanie Edwards, Lula Williams, Patrick Inscho, Isabel DeLeon, Tamara Price, Sherry Blackburn, George Hengle, Regina Nolte, Sharon Burney, Chastity

McNeil and Lawrence Mwethuku, for themselves and the Settlement Class Members, by Counsel, submit this Memorandum in support of their Motion for Preliminary Approval of Class Settlement, Conditionally Certifying Class for Purposes of Settlement, Appointing Class Counsel, Directing Notice to the Class, and Scheduling Final Fairness Hearing.

I. INTRODUCTION

This settlement resolves three class-action cases alleging various violations of state and federal laws pending in this district against five defendants—Great Plains Lending, LLC, Plain Green, LLC, MobiLoans, LLC, Mark Curry, and Sentinel Resources, LLC. *Gibbs, et al. v. Plain Green, LLC, et al.*, Case No. 3:17-cv-00495-MHL (E.D. Va.); *Price, et al. v. MobiLoans, LLC*, Case No. 3:18-cv-711-MHL (E.D. Va.); *Gibbs, et al. v. Curry*, *et al*., Case No. 3:18-cv-00654-MHL (E.D. Va.). As the Court is aware, the resolution in these matters arise from the same facts and have been litigated as part of a bankruptcy proceeding and various adversary proceedings that have been hotly contested in the Northern District of Texas that has been pending since 2017. *In re Think Finance, LLC, et al.*, Case No. 17-33964 (Bankr. N.D. Tex.).

After formal discovery, numerous substantive motions, a thorough exploration of the Parties' claims and defenses, and arms'-length negotiations, the Parties entered into a Class Action Settlement Agreement and Release (the "Settlement Agreement"), a copy of which is attached to the Motion for Preliminary Approval. The Settlement Agreement proposes the settlement of all claims for the putative classes pleaded against the Defendants in the case listed above. It also includes the terms of a consensual bankruptcy plan that results in significant monetary benefits to the class members, which is attached as an Exhibit to the Settlement Agreement.

Pursuant to Federal Rule of Civil Procedure 23, the Plaintiffs and Defendants now seek preliminary approval of the proposed class action settlement and support this memorandum in support of their Motion. Specifically, the Parties request that the Court preliminarily and

conditionally certify the proposed Class and the proposed class settlement by entering the proposed Order of Preliminary Approval of Class Action Settlement, a copy of which is attached to the Motion for Preliminary Approval.[1] A final motion and proposed order supporting the fairness of the proposed settlement will be submitted after members of the Settlement Class have received notice and have had an opportunity to object/comment or opt-out, and prior to the Court's Final Approval Hearing. For the reasons set forth in detail below, the proposed settlement is reasonable, fair, and adequate, and it should be approved by the Court.

II. THE CLAIMS TO BE SETTLED & PLAINTIFFS' INVESTIGATION

These cases have been fiercely litigated by both sides, and have grown in scope of allegations and parties since the complaint in the first case almost two years ago. As this Court is aware, Plaintiffs filed the first of several related actions against Think Finance, its former chief executive officer, and its wholly-owned subsidiaries. *See Gibbs v. Rees*, Case No. 3:17-cv-386-MHL (E.D. Va.) (filed on May 19, 2017) (hereafter *Gibbs I*). In that case, Plaintiffs alleged that Think Finance's lending operation constituted a "rent-a-tribe," where it originated high-interest loans through entities formed under tribal law in an attempt to evade state and federal laws. Those allegations are "not unique," and "[c]ourts across the country have confronted" these "transparent attempts to deploy sovereign immunity to skirt state and federal consumer protection laws." *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 126 (2d Cir. 2019) (internal citations omitted).

After filing against Think Finance, Plaintiffs subsequently filed a case against the tribal lending entities, Plain Green and Great Plains, on July 11, 2017. *See Gibbs v. Plain Green, LLC*, Case No. 3:17-cv-495 (E.D. Va.) (hereafter *Gibbs II*). During the course of *Gibbs I*, Plaintiffs obtained a significant amount of discovery, prompting the filing of several cases against other co-

[1] All capitalized terms used herein have the meanings set forth in this memorandum or in the Settlement Agreement.

conspirators involved in this nationwide scheme. *See Gibbs v. Curry*, 3:18-cv-654 (E.D. Va.) (filed on Sept. 25, 2018) (hereafter *Gibbs III*).[2] Plaintiffs also sued another tribal lender, MobiLoans, LLC. *Price v. MobiLoans, LLC*, Case No. 3:18-cv-711-MHL (E.D. Va.) (filed on October 17, 2018).

In October 2017, *Gibbs I* was halted due to the filing of Think Finance's bankruptcy in October 2017, resulting the imposition of the automatic stay. *See Gibbs I*, Case No. 3:17-cv-495 (E.D. Va.) at ECF 87 (Think Finance's notice of filing bankruptcy). The Court ultimately transferred *Gibbs I* to the United States Bankruptcy Court for the Northern District of Texas, Dallas Division as a result of the bankruptcy filing. *In re Think Finance, LLC, et al.*, Case No. 17-33964 (Bankr. N.D. Tex.). As part of the bankruptcy proceedings, adversary proceedings were filed against the Debtor defendants. Plaintiffs also filed proofs of claims, asserting putative class claims alleging the same violations of state and federal consumer lending laws alleged in the adversary proceeding and in the Virginia litigation. The case was fiercely litigated in Bankruptcy Court. In addition to engaging in extensive discovery, numerous contested motions were filed and heard including motions for application of Bankruptcy Rule 7023, summary judgment, and class certification. On the eve of trial, the parties agreed to certain "essential terms" that formed the basis for settlement of that case. Ultimately, after months of arms-length negotiations, and with the assistance of the Hon. David R. Jones, Chief United States Bankruptcy Judge for the Southern District of Texas, the parties reached a Global Settlement of the Bankruptcy case. The terms of that agreement are incorporated into the Settlement Agreement here.

Each of these cases alleges violations of the Racketeer Influenced and Corrupt Organizations Act and various state law claims based on Defendants' lending practices, including

[2] Plaintiffs also filed *Gibbs v. Haynes Investments, LLC*, Case No. 3:18-cv-00048 (E.D. Va.), which is not encompassed within this settlement.

usury and unjust enrichment laws. Generally, Plaintiffs alleged that Defendants violated these laws by charging excessing annual interest on consumer payday loans made to consumers across the country. Throughout the pendency of each of these cases, as well as *Gibbs I* and the related bankruptcy proceeding, the Parties have engaged in substantial discovery and motions practice, including the production of over a million pages of documents and over forty depositions of critical witnesses in the Defendants' lending operations, various expert witnesses and the Plaintiffs. The Parties have fully discovered the facts and defenses at issue in the case.

Throughout the pendency of each of the cases, the Defendants have vigorously denied the Plaintiffs' allegations, disputed that state and federal law were applicable to the loans, disputed that the Plaintiffs' claims properly stated an offense, contested the Court's personal jurisdiction, and raised other legal defenses. Though Defendants did not concede liability, it is apparent that they felt vulnerable to at least a potential finding that its loans violated federal and state law. Similarly, Plaintiffs were motivated to obtain significant and immediate relief for consumers and avoid substantial litigation risks and uncertainties.

Therefore, after significant settlement efforts, both through formal and informal settlement negotiations, the Parties have arrived at the proposed Settlement, which resolves all of the claims raised in the three cases. Defendants deny liability and that a class is appropriate for Rule 23 certification on the claims asserted in this action, but Defendants do not oppose the certification of the Settlement Class for the purpose of resolving this action.

III. THE PROPOSED SETTLEMENT OF THE CLASS CLAIM.

A. Settlement Class.

Under the Settlement Agreement, the Parties agreed to resolve the claims of the Class of persons defined as follows (the "Settlement Class"):

> All persons within the United States to whom Great Plains Lending has lent money; all persons within the United States to whom Plain

> Green lent money prior to June 1, 2016; and all persons within the United States to whom MobiLoans lent money prior to May 6, 2017.

Based on a review of their records, Defendants estimate that the Settlement Class consists of approximately 1,037,091 individual consumers.

B. The Consideration Provided To The Settlement Class Under The Settlement Agreement.

The proposed Settlement provides significant and meaningful relief to consumers nationwide. Generally, as detailed below, Class Members receive injunctive relief, in the form of loan forgiveness and other associated relief, as well as cash payments. Plaintiffs achieved the proposed settlement in the face of substantial Rule 23 defense leverage. Plaintiffs also recognized that Defendants faced multiple actions nationwide, threatening both the options and resources available for Class Settlement. Nevertheless, Plaintiffs were able to negotiate a settlement structure that will provide real benefits to consumers nationwide, both in the form of injunctive relief, as well as loan relief and/or cash payments to Class Members.

Because the Plaintiffs' and Class Members' loans are held by three separate lending entities, the injunctive relief was tailored to each lending entity as follows:

- Great Plains: As of the date the Effective Date, Great Plains will: (1.) cancel all outstanding consumer loans that it originated and owns at the time of the signing of the Settlement Agreement as disputed debt; (2.) cease collecting, selling, transferring, or assigning all outstanding consumer loans; (3.) will not sell personal identifying information obtained from its current or former borrowers; (4.) will assist Think Finance, LLC in the deletion of any tradelines that may be reported in its name; and (5.) will wind up its business and dissolve. (Doc No. 114-1, Settlement Agreement § 4.01.)

- Plain Green: As of the date the Effective Date, Plain Green will: (1.) cancel all outstanding consumer loans that it originated prior to June 1, 2016 that it owns at the time of the signing of the Settlement Agreement as disputed debt; (2.) cease collecting, selling, transferring, or assigning all outstanding consumer loans that it originated prior to June 1, 2016; (3.) will not sell personal identifying information obtained from borrowers at origination in relation to any loans it owns at the time of the signing of this Settlement Agreement that were originated by Plain Green prior to June 1, 2016; and (4.) will assist Think Finance, LLC in the deletion of any tradelines that may be reported in its name for loans originated by Plain Green prior to June 1, 2016. (Doc No. 114-1, Settlement Agreement § 4.02.)
- MobiLoans: For each loan that MobiLoans originated prior to May 6, 2017 in conjunction with services provided by Think Finance, MobiLoans will: (1.) cancel the portion of each consumer loan that was in existence prior to May 6, 2017 and remain in existence as of the Effective Date; (2.) cease collecting, selling, transferring, or assigning the portion of each consumer loan that was in existence prior to May 6, 2017 and remain in existence as of the Effective Date; (3.) will not sell personal identifying information regarding any obligor a loan that was in existence prior to May 6, 2017 and remain in existence as of the Effective Date; (4.) use commercially reasonable effort to cooperate with Think Finance to remove and prevent reporting of derogatory tradelines originated by MobiLoans prior to May 6, 2017 and remaining in existence as of the Effective Date and reported in its name; and (5.) cease using the services of each Excluded Entity in Arizona, Arkansas, Colorado, Connecticut, Illinois, Indiana, Kentucky, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York,

North Carolina, Ohio, South Dakota and Virginia. (Doc No. 114-1, Settlement Agreement § 4.03.)

In addition to this injunctive relief, each of the Defendants is making a monetary payment, which shall be distributed to the Class Members in accordance with the Chapter 11 Bankruptcy Plan in the *Gibbs I/Think Finance Bankruptcy* case. Each Defendant is contributing as follows:

- Great Plains will pay Four Hundred Thousand Dollars ($400,000.00), plus the Reserve Amount, which is the amount owed by Great Plains to GPLS under their Servicing Agreement, and the residual amount remaining on the One Million Dollar ($1,000,000) Holdback at the time Great Plains' dissolution is completed;
- Plain Green will pay Nine Hundred, Seventy-Five Thousand Dollars ($975,000.00);
- MobiLoans will pay Nine Hundred, Seventy-Five Thousand Dollars ($975,000.00); and
- Mark Curry and Sentinel Resources will pay Ten Million Dollars ($10,000,000.00).

As outlined in the attached Chapter 11 Bankruptcy Plan, a copy of which is attached as an Exhibit to the Settlement Agreement (Doc. 114-1, at 57), the payments will be allocated as follows amount class members using tiered formula, as follows:

- Tier 1: the following states: Arizona, Arkansas, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Ohio, South Dakota, Vermont, Virginia, and Wisconsin. Tier 1 would receive 70% of the Litigation Trust Proceeds; and
- Tier 2: the following states: Alabama, Alaska, California, Delaware, Florida, Georgia, Hawaii, Iowa, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas,

Washington, West Virginia, Washington D.C., and Wyoming. Tier 2 would receive 30% of the Litigation Trust Proceeds.

- Tier 3: states other than Tier 1 states and Tier 2 states. Tier 3, which include Nevada and Utah, would not receive any monetary payments, but will still receive injunctive relief under this Settlement and the terms of the Chapter 11 Bankruptcy Plan.

As summarized above, the relief provided by the Settlement is significant. All consumers will receive a financial benefit in the form of a cash payment or loan elimination. The value of this relief is not included in the Settlement Fund, but will exceed $5,000,000 in outstanding balances. In addition, the injunctive relief provided by the Settlement to all Class Members, regardless of their loan status, is significant. Defendants have also agreed not to sell or transfer any remaining unpaid accounts, that they will not sell Class Members' personal identifying information to third parties, including other internet lenders, and they will work with Think Finance to remove credit reporting regarding the loans, as described above. These benefits to Settlement Class Members have also not been calculated as within the Settlement Fund, but constitute real benefits for Settlement Class Members.

Finally, these benefits will be provided to Class Members without Class Members submitting any forms or making any claims against the fund. Class Members will receive these benefits without having to prove any harm or take any affirmative actions.

C. The Required Class Action Fairness Act Notice.

The Class Administrator will assist the Defendants' counsel in preparing and providing notice of the proposed settlement to be served under the Class Action Fairness Act of 2005 ("CAFA"). 28 U.S.C. § 1715. The CAFA Notice will be sent to the Attorney General of the United States and to the attorneys general of all states and the District of Columbia and all U.S. territories, within ten days after the filing of the Settlement Agreement with the Court. (Doc No.114-1,

Settlement Agreement § 7.07.) To account for the deadlines under governing law, the Parties request that the Final Approval Hearing be scheduled no earlier than 90 days from the date of the mailing of the CAFA Notice.

D. Attorneys' Fees and Expenses; Service Award.

Class Counsel shall make an application to the Court for an award for attorneys' fees, costs, and class administration expenses in an amount not to exceed 33 percent of the Monetary Compensation portion of the Settlement.[3] Defendants shall not oppose or object to this application. The Parties have agreed that the award of attorneys' fees and costs will be paid out of the Monetary Compensation portion of the Settlement in the amount approved by the Court. (Doc No. 114-1, Settlement Agreement § 5.02.)

Plaintiffs will also apply for a service award for their role as Class Representatives to compensate each Plaintiff for his/her effort in prosecuting this case including retaining counsel, assisting in discovery, and keeping abreast of the litigation. Defendants have agreed not to oppose the application for the service award, which will be sought in the amount of $7,500 each, for a cumulative maximum of $90,000. The Parties have agreed that the Named Plaintiff service awards will be paid out of the Monetary Compensation portion of the Settlement in the amount approved by the Court. (*Id.* § 5.03.) Each Named Plaintiff will only receive one service award, regardless if he or she had causes of action in other cases or against multiple Defendants.

E. The Release Of Claims.

In return for the consideration provided to the Settlement Class described above, and without showing of monetary harm or willfulness whatsoever, Class Members will release all claims against the Released Parties, as follows:

[3] Class Counsel made additional concessions regarding their right to practice law. *See* Order, *Gibbs v. Curry*, Civ. No. 3:18-cv-654 (E.D. Va. Jun. 19, 2019) (ECF No. 64).

> Any and all claims, causes of action, suits, obligations, debts, demands, agreements, promises, liabilities, damages, losses, controversies, costs, expenses and attorneys' fees of any nature whatsoever, whether based on any federal law, state law, common law, territorial law, foreign law, tribal law, contract, rule, regulation, any regulatory promulgation (including, but not limited to, any opinion or declaratory ruling), common law or equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, punitive or compensatory, as of the date of the Final Fairness Approval Order and Judgment, that relate to and/or arise out of loans made by and/or in the name of Great Plains, Plain Green prior to June 1, 2016, and/or MobiLoans prior to May 6, 2017.

(*Id.* § 12.02.)

F. Notice and Exclusions.

Class Notice will be a combination of e-mail notice to verified e-mail addresses and/or U.S. Mail to each Settlement Class Member identified on the Class List. The Class Administrator will attempt to identify current class member addresses and will also attempt to locate alternate addresses for any returned mail. If an alternate address is located, the notice will be re-mailed to the Settlement Class Member at their new address. Additionally, the Class Administrator will establish and maintain a website on which pertinent information will be made available to Class Members, including the Settlement Agreement, the Settlement Class Notice, the Preliminary Approval Order, the proposed Final Judgment, and, if not included in the Preliminary Approval Order, and any court order setting a date and time for the Final Fairness Hearing. The website will also include a portal through which any Settlement Class Member could determine if he or she is eligible to receive a Cash Award.

Any Class Member who desires to be excluded from the class must advise the Class Administrator in writing of that intent, and their opt-out request must be postmarked no later than the Opt-Out Deadline. The Settlement Class Member's Opt-Out request must contain the Class Member's full name, address, and telephone number. Further, the Settlement Class Member must include a statement in the written request that he or she wishes to be excluded from the Settlement

Agreement in this Action and the Global Settlement. The request must also be signed by the Settlement Class Member. Requests for exclusion that do not comply with any of the foregoing requirement are invalid. (*Id.* § VIII.)

IV. ARGUMENT

A. Elements of Certification for Settlement Class.[4]

There is a strong judicial policy within this Circuit favoring resolution of litigation prior to trial. *See, e.g., S.C. Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990) ("The voluntary resolution of litigation through settlement is strongly favored by the courts.") (citing *Williams v. First Nat'l Bank*, 216 U.S. 582 (1910)). Settlement spares the litigants the uncertainty, delay, and expense of a trial and appeals while simultaneously reducing the burden on judicial resources. As the court in *Stone* observed:

> In the class action context in particular, there is an overriding public interest in favor of settlement. Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strains such litigation imposes upon already scarce judicial resources.

749 F. Supp. at 1423 (quoting *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 313 (7th Cir. 1980)).

Rule 23 permits courts to preliminarily certify a class for purposes of effectuating a settlement of the case. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 793-94 (3rd Cir. 1995) (collecting cases and authority). A court may grant preliminary approval of a class action where the class proposed for settlement satisfies the four prerequisites of Rule 23(a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation), as well as one of the three subsections of Rule 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). If the Court determines a settlement class should be certified, the Court must then

[4] It is understood and agreed by the Parties that if the Settlement Agreement is not consummated pursuant to the terms set forth therein, the certification of the Settlement Class shall be void, and Defendants shall be deemed to have reserved their respective rights to oppose any and all class certification issues.

follow a three-step process prior to granting final approval of a proposed settlement. *Levell v. Monsanto Research Corp*., 191 F.R.D. 543 (S.D. Ohio 2000).

First, the Court must preliminarily approve the proposed settlement. *Id.* at 547. Second, members of the class must be given notice of the proposed settlement. *Id.* Third, a final fairness hearing must be held, after which the Court must decide whether the proposed settlement is fair, adequate, and reasonable to the class as a whole, and consistent with the public interest. *Id.* This protects the class members' procedural due process rights and enables the Court to fulfill its role as the guardian for the class's interests. *Id.* Approval of a class action settlement is committed to the "sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in light of the relevant circumstances." *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001). Additionally, "there is a strong initial presumption that the compromise is fair and reasonable." *Id.*

B. Consideration of the Rule 23(a) And Rule 23(b) Elements.

Rule 23 governs the certification of class actions. In considering a settlement at the preliminary approval stage, the first question for the Court is whether a settlement class satisfies the requirements set forth in Rule 23, and thus may be conditionally certified for settlement purposes. Under Rule 23(a), one or more members of a class may sue as representative parties on behalf of a class if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and/or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a).

Here, the Parties have reached a proposed agreement on behalf of the Settlement Class, which should be certified.

1. The Class Meets all Rule 23(a) Requirements.

a. Numerosity.

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." There is no set minimum number of potential class members that fulfills the numerosity requirement. *See Holsey v. Armour & Co.*, 743 F.2d 199, 217 (4th Cir. 1984). However, where the class numbers 25 or more, joinder is usually impracticable. *Cypress v. Newport News General & Nonsectarian Hosp. Ass'n,* 375 F.2d 648, 653 (4th Cir. 1967) (18 class members sufficient).

The numerosity requirement is easily met here. As detailed above, there are approximately 1,037,091 members in the Settlement Class, including the named Plaintiffs. Joinder of this many individuals is neither possible nor practical, so the first prong of the certification test has been met. *See Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 425 (4th Cir. 2003).

b. Commonality.

Rule 23(a)(2) requires that the court find that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). "Commonality is satisfied where there is one question of law or fact common to the class, and a class action will not be defeated solely because of some factual variances in individual grievances." *Jeffreys v. Commc'ns Workers of Am., AFL-CIO*, 212 F.R.D. 320, 322 (E.D. Va. 2003). And the common issue must be such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. The standard is a liberal one that cannot be defeated by the mere existence of some factual variances in individual grievances among class members. *Jeffreys*, 212 F.R.D. at 322; *Mitchell-Tracey v. United Gen. Title Ins. Co.*, 237 F.R.D. 551, 557 (D. Md. 2006) (finding that factual differences among class members will not necessarily preclude certification "if the class members share the same legal theory.").

Here, by definition, members of the Settlement Class share multiple questions of law and fact. The Settlement Class Members are alleged to be the subject of a practice whereby Defendants, in violation of federal and state law, charged usurious interest rates on consumer loans. The practices at issue with respect to this claim are identical across Settlement Class Members. The theories of liability as to all Settlement Class Members therefore arise from the same practices and present basic questions of law and fact common to all members of the Settlement Class. *See* FED. R. CIV. P. 23(a).

c. Typicality.

In the typicality analysis, "[a] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Lienhart v. Dryvit Sys., Inc.,* 255 F.3d 138, 146 (4th Cir. 2001). "Nevertheless, the class representatives and the class members need not have identical factual and legal claims in all respects. The proposed class satisfies the typicality requirement if the class representatives assert claims that fairly encompass those of the entire class, even if not identical." *Fisher v. Va. Elec. & Power Co.,* 217 F.R.D. 201, 212 (E.D. Va. 2003). "The typicality requirement mandates that Plaintiffs show (1) that their interests are squarely aligned with the interests of the class members and (2) that their claims arise from the same events and are premised on the same legal theories as the claims of the class members." *Jeffreys*, 212 F.R.D. at 322. Commonality and typicality tend to merge because both of them "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n.5 (2011).

Here, Plaintiffs' claims arise from Defendants' practices concerning consumer loans. As discussed in the previous section, these are the same claims advanced on behalf of the Settlement

Class Members, and Plaintiffs are members of the Settlement Class. Consequently, in seeking to prove their claims, Plaintiffs will necessarily advance the claims of Settlement Class Members. This is the hallmark of typicality. *See Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2001) (citing Rule 23(a)(3)).

d. Adequacy of Representation.

"Finally, under Rule 23(a)(4), the class representatives must adequately represent the interests of the class members, and legal counsel must be competent to litigate for the interests of the class." *Jeffreys,* 212 F.R.D. at 323. "Basic due process requires that the named plaintiffs possess undivided loyalties to absent class members." *Fisher*, 217 F.R.D. at 212 (citing *Broussard v. Meineke Disc. Muffler Shops,* 155 F.3d 331, 338 (4th Cir. 1998)).

The adequacy of representation requirement is met here. Plaintiffs understand and have accepted the obligations of a class representative, have adequately represented the interests of the putative class, and have retained experienced counsel who have handled numerous consumer-protection class actions. Plaintiffs' lead counsel has effectively handled numerous consumer-protection and complex class actions, typically as lead or co-lead counsel. *See, e.g.*, *Clark v. Trans Union, LLC*, No. 3:15CV391, 2017 WL 814252, at *13 (E.D. Va. Mar. 1, 2017) ("This Court echoes the sentiments previously stated about Clark's counsel because they pertain here with equal vigor.") (citing *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 3:14cv238, 2016 WL 1070819, at *3 (E.D. Va. Mar. 15, 2016) ("[T]his Court would have difficulty overstating Class Counsel's experience in the area of FCRA class action litigation.")); Final Approval Hr'g Trans., *Campos-Carranza v. Credit Plus, Inc.*, Case No. 1:16-cv-120, at 5:3-7 (LMB/MSN) (E.D. Va. Feb. 17, 2017) ("I think this is an extremely, as I say, extremely fair, reasonable, and adequate settlement. Again, the claims -- and I think being generous on the time limit for the claims was also appropriate. So I have no difficulty in signing this order."); *Thomas v. FTS USA, LLC*, 312 F.R.D.

407, 420 (E.D. Va. 2016) ("the Court finds that Thomas'[s] counsel is qualified, experienced, and able to conduct this litigation so as to fully and adequately represent both classes. 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 around the country."); *Ceccone v. Equifax Info. Servs. LLC*, No. 13-CV-1314 KBJ, 2016 WL 5107202, at *6 (D.D.C. Aug. 29, 2016) ("Given these qualifications, and in light of Class Counsel's conduct in court and throughout these proceeding, this Court concludes that Class Counsel is qualified to prosecute the interests of this class vigorously."); *Dreher v. Experian Info. Sols., Inc.*, No. 3:11-CV-00624-JAG, 2014 WL 2800766, at *2 (E.D. Va. June 19, 2014) ("Dreher's counsel is well-experienced in the arena of FCRA class action litigation."); Fairness Hr'g Tr., *Burke v. Seterus, Inc.*, 3:16-cv-785, at 9:19-22 (E.D. Va. 2017) ("Experience of counsel on both sides in this case is extraordinary. Ms. Kelly and Ms. Nash and their colleagues are here in this court all the time with these kinds of cases and do a good job on them."); *James v. Experian Info. Sols., Inc.*, No. 3:12CV902 (E.D. Va. Oct. 29, 2014) (ruling on final approval in open court and finding "experience of counsel on both sides is at the top level of representation in cases of this sort and, indeed, perhaps beyond that"); *Soutter v. Equifax Info. Servs.*, *LLC*, 2011 U.S. Dist. LEXIS 34267, at *28 (E.D. Va. Mar. 30, 2011) (stating "the 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."); (Declaration of Leonard A. Bennett ¶¶ 11-12 (attached as Ex. A); Declaration of Kristi Kelly ¶ 9 (attached as Ex. B); Declaration of Anna Haac ¶ 6 (attached as Ex. C.).

Plaintiffs have no antagonistic or conflicting interests with the Settlement Class Members. Both Plaintiffs and the Settlement Class Members seek monetary and injunctive relief for the Defendants' allegedly unlawful actions. The Plaintiffs are members of the Settlement Class.

Considering the identity of claims, there is no potential for conflicting interests in this action. The Plaintiffs have also been very active in this litigation, including reviewing discovery, preparing for and sitting for deposition, participating in the claims process in the Bankruptcy case, and staying abreast of the case as well as settlement efforts. (Bennett Decl. ¶¶ 25-26; Kelly Decl. ¶ 14.) Accordingly, the Class is adequately represented to meet Rule 23's requirements.

2. The Class Also Satisfies Rule 23(b)(3)'s Requirements.

The proposed settlement contemplates permitting opt-outs pursuant to Rule 23(b)(3). An action may be maintained as a class action if the four Rule 23(a) elements described above are satisfied, and in addition, "the Court finds that the questions of law or fact common to the members of the Class predominate over any questions affecting only individual members, and that a Class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3).

a. Predominance.

If the Settlement Class is to be certified under Rule 23(b)(3), the common issues of law and fact shared by the Settlement Class Members must "predominate" over individual issues. Rule 23(b)(3)'s predominance inquiry focuses on whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 362 (4th Cir. 2004); *Lienhart v. Dryvit Sys., Inc.,* 255 F.3d 138, 142 (4th Cir. 2001). This criterion is normally satisfied when there is an essential, common factual link between all class members and the defendants for which the law provides a remedy. *Talbott*, 191 191 F.R.D. 99, 105 (W.D. Va. 2000) (citing *Halverson v. Convenient FoodMart, Inc.*, 69 F.R.D. 331 (N.D. Ill. 1974)). And, predominance exists where the resolution of class members' individual claims depends on examining common conduct by a defendant. *Jeffreys,* 212 F.R.D. at 323 (finding predominance

because class members' claims were based on same acts by defendant and the determinative "question in each individual controversy" was common).

The predominance requirement is satisfied here because the essential factual and legal issues regarding the Settlement Class Members' claims are common and relate to alleged standardized practice. *Talbott*, 191 F.R.D. at 105 ("Here, common questions predominate because of the standardized nature of [defendant's] conduct."). Nothing more is necessary to satisfy predominance.

b. Superiority.

Finally, the Court must determine whether a class action is superior to other methods for the fair and efficient adjudication of this controversy under Rule 23(b)(3). The factors to be considered here in determining the superiority of the class mechanism are: (1) the interest in controlling individual prosecutions; (2) the existence of other related litigation; (3) the desirability of concentrating the litigation in one forum; and (4) manageability.[5] *Hewlett v. Premier Salons Int'l, Inc.*, 185 F.R.D. 211, 220 (D. Md. 1997); *accord Newsome v. Up To Date Laundry, Inc.*, 219 F.R.D. 356, 365 (D. Md. 2004).

Efficiency is the primary focus in determining whether a class action is indeed the superior method of adjudicating the controversy. *Talbott*, 191 F.R.D. at 106. In examining these factors, it is proper for a court to consider the "inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually." *Haynes v. Logan Furniture Mart, Inc.,* 503 F.2d 1161, 1165 (7th Cir. 1974).

In *Jeffreys*, for instance, the court found that because "the facts and issues involved are identical for all class members, class members have little incentive and few resources to pursue

[5] A trial court may disregard management issues in certifying a settlement class, but the proposed class must still satisfy the other requirements of Rule 23. *Amchem*, 521 U.S. at 620. Therefore, this criterion is not material to the Court's analysis in this posture.

litigation on their own, the class members are dispersed over several states, and there are few manageability concerns, the class action is the best method of resolving the matter." 212 F.R.D. at 323. The same is true here. Common issues predominate in the Settlement Class. Further, the individual claims of the members of the Settlement Class are small, thus providing little incentive for individual litigation, and the members of the Settlement Class have few resources to pursue litigation on their own. *See also Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.") (quoting *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir. 1997)).

A class action in this case is superior to other available methods for the fair and efficient adjudication of the case because a class resolution of the issues described above outweighs the difficulties in management of separate, individual claims and allows access to the courts for those who might not gain such access standing alone, particularly in light of the relatively small amount of the damage claims that would be available to individuals. Moreover, apart from the fact that the settlement allows a recovery of actual damages, certification permits individual claimants to opt-out and pursue their own actions separately if they believe they can recover more in an individual suit. Thus, both predominance and superiority are satisfied. Accordingly, the Court should conditionally certify the Settlement Class for settlement purposes.

C. The Settlement Is Fair, Reasonable, And Adequate, And Should Be Preliminarily Approved.

After the analysis of the Rule 23(a) and (b) elements, the Court must then decide whether the proposed settlement is fair, reasonable, and adequate. Although pretrial settlement of class actions is favored, "Rule 23(e) provides that 'a class action shall not be dismissed without the approval of the court." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991) (citations omitted). "To this end, 'the role of the Court reviewing the proposed settlement of a class action

under Fed. R. Civ. P. 23(e) is to assure that the procedures followed meet the requirements of the Rule and . . . to examine the settlement for fairness and adequacy.'" *In re MicroStrategy*, 148 F. Supp. 2d at 663.

"[T]he Fourth Circuit [has] adopted a bifurcated analysis, separating the inquiry into a settlement's 'fairness' from the inquiry into a settlement's 'adequacy.'" *Id*. These safeguards ensure that "a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Amchem*, 521 U.S. at 621; *see also In re Jiffy Lube*, 927 F.2d at 158 ("The primary concern addressed by Rule 23(e) is the protection of class members who rights may not have been given adequate consideration during the settlement negotiations."). In this case, each set of factors weighs in favor of approving the Settlement.

1. The Settlement Is Fair.

When evaluating the fairness of a settlement, the Court must evaluate the settlement against the following criteria: "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel." *In re Jiffy Lube*, 927 F.2d at 159. The fairness inquiry ensures that "the settlement was reached as a result of good-faith bargaining at arm's length, without collusion." *Id*. These factors point persuasively to the conclusion that the settlement here is fair.

The proposed settlement in this case was reached only after significant work was conducted in these cases. As discussed above, the Plaintiffs conducted significant discovery into the lending enterprise, completed extensive briefing, and thoroughly investigated the facts and claims at issue. The Parties also engaged in extensive, good faith, arm's-length negotiations in numerous separate mediations supervised by an independent mediator, Rodney Max, and the Chief United States Bankruptcy Judge, David R. Jones from the Southern District of Texas on at least three occasions. These independently support the conclusion that the posture of the action and the discovery

conducted is such that the proposed settlement is fair, reasonable, and adequate. This action has been appropriately litigated by the Parties and sufficient discovery has been obtained by both Plaintiffs and Defendants to assess the strength of their respective claims and defenses. Courts have found that, where a settlement is the result of genuine arms'-length negotiations, there is a presumption that it is fair. *See*, *e.g.*, *City P'ship Co. v. Atlantic Acquisition Ltd. P'Ship*, 100 F.3d 1041, 1043 (1st Cir. 1996).

Pursuant to the Settlement, the Settlement Class Members are guaranteed a substantial recovery with significant and valuable injunctive relief. Given the substantial relief obtained for Class Members, when contrasted against the risks associated with litigating this matter, the proposed settlement is fair and appropriate for approval. *See S.C. Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991) (concluding fairness met where "discovery was largely completed as to all issues and parties," settlement discussions "were, at times, supervised by a magistrate judge and were hard fought and always adversarial," and those negotiations "were conducted by able counsel" with substantial experience in the area of securities law).

Finally, Plaintiffs' counsel is highly experienced in consumer class action litigation, and they endorse the settlement as fair and adequate under the circumstances. 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*, *e.g.*, *In re MicroStrategy*, 148 F. Supp. 2d at 665.

2. The Settlement Terms Are Adequate And Reasonable.

In assessing the adequacy of the Settlement, the Court should look to the following factors: "(1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and

the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement." *In re Jiffy Lube*, 927 F.2d at 159.

While it is too early to address the last factor, application of the other relevant factors confirms that the proposed settlement is adequate and should be preliminarily approved.

a. The relative strength of the Plaintiffs' case and the difficulty in proving liability.

As noted, the Defendants have disputed Plaintiffs' claims since the inception of these cases and have raised a number of defenses to Plaintiffs' class claims. Given the Parties' arguments, the potential risks and expenses associated with continued prosecution of the Lawsuit, the likelihood of appeals, the certainty of delay, and the ultimate uncertainty of recovery through continued litigation, the proposed settlement is adequate.

b. The anticipated duration and expense of additional litigation.

Aside from the potential that either side will lose at trial or on appeal, the Parties anticipate incurring substantial additional costs in pursuing this litigation further. The level of additional costs would significantly increase as the Parties continue to litigate here and in other jurisdictions. Thus, the likelihood of substantial future costs favors approving the proposed Settlement.

Even more importantly, the long delay threatened by continued litigation, interlocutory appeal, and terminal appeal would prevent the imminent wind-down of the Great Plains, Plain Green, and Mobiloans in numerous states. Between now and the very end of a contested path, thousands of additional consumers could be harmed by their lending practices.

c. The solvency of the Defendants and the likelihood of recovery.

Although the Defendants are solvent and in theory could pay a class judgment in one or two of the pending cases, the primary concern related to solvency was whether or not Great Plains, MobiLoans, and Plain Green would be immune from a lawsuit under the doctrine of tribal sovereign immunity. If that finding was made, no funds would be available from those entities

regardless of their ability to pay. Additionally, many of these Defendants are facing numerous lawsuits across the country, exposing them to significant liability, which could severely limit their ability to provide meaning cash relief to Settlement Class Members. And finally, Plaintiffs had to contend with the challenges associated with the pending Bankruptcy in the *Think Finance* case. This factor weighs heavily in favor of approval of the Settlement.

D. The Proposed Notice and Notice Plan Satisfy Rule 23.

Following preliminary approval, the class members must be given notice concerning the nature of the settlement and of their rights. Rule 23(e)(1) requires that: "The court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Rule 23(c)(2)(B) sets forth the contents of a notice to be sent to members of a Rule 23(b)(3) class:

> For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through an attorney if the member so desires; that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment on members under Rule 23(c)(3).

The proposed Notice to the Settlement Class, which is attached as an Exhibit to the Settlement Agreement, satisfies all of these requirements. (Doc. 114 -1, at 138.) The proposed Notice in this case was reviewed and approved by Dr. Shannon Wheatman of Kinsella. Dr. Wheatman is an unparalleled expert in her field. She has designed the notice plan for over 500 complex settlements (including the unique notice program in *Berry v. LexisNexis Risk & Information Analytical Group*, Case No. 3:11-cv-754 (E.D. Va.)), which was challenged before and approved by the Fourth Circuit) and helped design the Federal Judicial Standards notice guidelines for class action settlements. Dr. Wheatman has authored numerous publications evaluating the most effective methodologies for achieving effective notice in class action

settlements, and has been accepted as a testifying expert on class action notice in courts across the country. (Declaration of Shannon Wheatman ¶ 2 (attached as Ex. D).) As set forth in her declaration, the proposed Notice in this case used clear and concise language and will be easily understood by Class Members. (*Id*. at ¶¶ 4-6.)

The proposed notice program will provide individual direct notice. As set forth in the Settlement Agreement, to accomplish the contemplated class notice, Great Plains, Plain Green, and MobiLoans will instruct Think Finance to provide all personal identifying information and loan level data for Settlement Class Members to the Class Administrator in order to generate a list of the Class Members. The Settlement Administrator will be responsible for transmitting the approved class action notices, after it has electronically checked and updated Settlement Class Member addresses using its industry's best practices. To the extent that any of the mailed Class Notices are returned as undeliverable, the Class Administrator will attempt to locate alternate addresses for any returned mail and shall promptly re-mail the Settlement Class Notice. Apart from individual mailed notice, the Notice Plan also provides that Settlement Class Members will have access to a website, which will include a portal through which any Settlement Class Member could determine if he or she is eligible to receive a Cash Award and contain all relevant documents regarding the Settlement, including Settlement Agreement, the Settlement Class Notice, the Preliminary Approval Order, the proposed Final Judgment, and, if not included in the Preliminary Approval Order, and any court order setting a date and time for the Final Fairness Hearing.

The Settlement's robust notice and administration plan will ensure the maximum number of Class Members will receive notice of their loan cancelations and the payments to which they are entitled. There is no claim form. The notice program and distribution of settlement payments will be overseen by RSM US LLP ("RSM"), a reputable organization with deep experience in the field. (Declaration of Frank Barkan ¶ 2 (attached as Ex. E).) Class Notice will be sent in accordance

with Fed. R. Civ. P. 23(c) in the manner approved by the Court by a combination of e-mail notice to verified e-mail addresses and/or U.S. Mail to each Settlement Class Member identified on the Class List. (*Id*. at ¶ 4.)

As the Manual for Complex Litigation recognizes, mail notice is the ideal method of informing class members of a class settlement where such members can be identified, while notice through an internet website is a supplemental means of providing notice. *See* MCL, § 21.311; *see also Henggeler v. Brumbaugh & Quandahl P.C., LLO*, 2013 U.S. Dist. LEXIS 155235, at *14–15 (D. Neb. Oct. 25, 2013) ("The court finds that the proposed notice is clearly designed to advise the class members of their rights. The Agreement provides for individual mailed notices to each of the class members. Individual notice is the best notice practicable.").

For these reasons, the proposed Notices and Notice Plan represent the "best notice that is practicable under the circumstances," and it therefore meets the notice requirements of Rule 23. Consequently, the Notices and Notice Plan should be approved by the Court.

V. CONCLUSION

The Settlement is an excellent result considering the contentiousness of the litigation and the lengthy mediation process. The terms of the Settlement, as well as the circumstances surrounding negotiations and its elimination of further costs caused by litigating this case through trial and appeal, satisfy the structures for preliminary approval. Therefore, for the reasons discussed above, the Court should grant preliminary approval of the proposed Settlement.

Respectfully submitted,
PLAINTIFFS

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June, 2019, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system which will send a notification of such filing (NEF) to all counsel of record.

/s/Leonard A. Bennett

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