IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY

KRISTIE SIX, on behalf of herself and all others similarly situated,

Plaintiff,

v. Case No. 5:21-cv-00451

LOANCARE, LLC

Defendant

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT, ATTORNEY'S FEES AND EXPENSES, AND SERVICE AWARD

Plaintiff Kristie Six, by counsel and on behalf of the conditionally certified class, hereby respectfully submits this Memorandum in Support of her Motion for Final Approval of Settlement, Attorneys' Fees and Costs, and Service Award. Plaintiff respectfully requests that the Court enter the parties' proposed Final Approval Order and Judgment:[1]

(1) Pursuant to Fed. R. Civ. P. 23(e), determining that the Settlement is fair, adequate, and reasonable and granting final approval in all respects of the terms and provisions of the Class Settlement and Release Agreement (ECF No. 60-1) ("Settlement Agreement"), which the Court preliminarily approved by Order entered on July 14, 2022 (ECF No. 63);

(2) Finally certifying the Settlement Class for settlement purposes only;

(3) Determining that the Notice Provided to the Settlement Cass satisfied Due Process requirements;

[1] Capitalized terms not otherwise defined herein have the same meaning as in the Parties' Settlement Agreement.

(4) Awarding Plaintiff and Class Representative Kristie Six a service award of $15,000 in recognition of her service to the class;

(5) Awarding Class Counsel their attorneys' fees from the settlement fund in the amount of $1,500,000.00, which represents one-third of the settlement fund;

(6) Awarding Class Counsel their litigation expenses from the settlement fund in the amount of $4,624.61;

(7) Awarding the Settlement Administrator its administrative costs and fees from the settlement fund;

(8) Dismissing on the merits and with prejudice the class and individual claims in this action without costs to Defendant LoanCare, LLC ("Defendant" or "LoanCare");

(9) Barring and enjoining Plaintiff and all Settlement Class Members and anyone claiming through or on behalf of any of them from commencing, instituting, asserting, or continuing to prosecute any action or proceeding in any court of law or equity, arbitration tribunal, administrative forum, or other forum of any kind, any of the Released Claims against any of the Released Persons, including during the pendency of any appeal from the Final Approval Order and Judgment;

(10) Releasing the Released Parties from the Released Claims;

(11) Finding that LoanCare provided proper and timely notice of the Settlement Agreement to the appropriate federal and state officials, pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. §1715 and that the Court reviewed the substance of the notice and finds that it complied with the applicable CAFA requirements; and

(12) Retaining jurisdiction over this action for the purpose of interpretation and enforcement of the Settlement Agreement, including oversight of settlement administration and distribution of settlement funds.

For the reasons set forth more particularly below, Plaintiff respectfully requests that the Court grant this Motion, which Defendant does not oppose.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Plaintiff is pursuing the class action entitled *Kristie Six, individually and on behalf of a class of similarly-situated persons v. Loancare, LLC* No. 5:21-cv-00451, currently pending before the United States District Court for the Southern District of West Virginia (the "Court"). On June 15, 2021, Plaintiff filed her Complaint (the "Complaint") against Defendants LoanCare and Lakeview Loan Servicing, LLC ("Lakeview") (collectively, "Defendants"), case number CC-41-2021-c-174, in the Raleigh County Circuit Court of West Virginia, entitled *Kristie Six, on behalf of herself and all others similarly situated, v. LoanCare, LLC and Lakeview Loan Servicing, LLC.* The Complaint asserted claims for violations of the West Virginia Consumer Credit Protection Act ("WVCCPA"), breach of contract, and unjust enrichment with respect to LoanCare's charging fees for optional payment services in connection with mortgage payments. Defendants removed the state court action here to the Southern District of West Virginia on August 12, 2021 (the "Action").

Defendants moved to dismiss Plaintiff's claims with prejudice on September 15, 2021. That motion was fully briefed by the parties, including supplemental filings following the issuance of an opinion by the United States Court of Appeals for the Fourth Circuit, *Alexander, et al v Carrington Mortgage Services*, 23 F.4th 370 (4th Cir. 2022). This Court had not ruled on the motion to dismiss before the parties settled this Action and moved for a stay, which is now in place.

The parties mediated their claims with experienced mediator Stephen Dalesio for a full day on April 11, 2022, and ultimately resolved the case late the next day after further arms-length

negotiations through the mediator.

Plaintiff has voluntarily dismissed her claims against Lakeview without prejudice.[2] The Settlement Agreement contemplates LoanCare's establishing a settlement fund totaling $4,500,000. This fund will be used to pay settlement payments to settlement class members, which payments will be allocated on a per-fee basis. Before payment of Plaintiff's attorney's fees and expenses, costs, administrative costs, and any service award to Plaintiff, this settlement fund represents approximately $216 per fee paid to LoanCare by the putative class members. This is a significant recovery relative to the maximum potential statutory recovery per class member, which is $1000 per WVCCPA violation adjusted for inflation from September 2015. The settlement fund will also be used to pay attorneys' fees and expenses, costs, any administrative costs, and service award to Plaintiff, subject to Court approval.

Defendants have denied and continue to deny any and all allegations and claims asserted against them in the Complaint and deny any and all allegations of wrongdoing and liability.

On June 21, 2022, Plaintiff filed her Unopposed Motion for Preliminary Approval of Settlement and Entry of Scheduling Order. ECF No. 60. Within ten days after the proposed settlement was filed and at least 90 days before the final approval hearing, the Settlement Administrator, ILYM, timely served, on June 29, 2022, the CAFA notices required under 28 U.S.C. §1715 on the appropriate Federal official and the appropriate state officials as follows: (1) United States Attorney General, (2) the West Virginia Attorney General, and (3) West Virginia Division of Financial Institutions (the primary regulatory or supervisory responsibility with respect

[2] The settlement provides that if the settlement obtains final approval by the court and LoanCare pays the Settlement Amount as contemplated by this settlement, Plaintiff will convert the "without prejudice" dismissal of Lakeview to a "with prejudice" dismissal through an appropriate filing with this Court.

to the Defendant, or who licenses or otherwise authorizes the Defendant to conduct business in the State of West Virginia). *See* 28 U.S.C. §1715; Declaration of Madely Nava of ILYM Group, Inc. ("ILYM Decl."). In response, the Settlement Administrator has not received or been advised of any objections to the Settlement. *Id.*

The Court granted Plaintiff's unopposed motion and preliminarily approved the Settlement on July 14, 2022, and appointed ILYM as Settlement Administrator. After preliminary approval, on July 28, 2022, the Settlement Administrator sent the approved Class Notice to the Class Members via first class U.S. Mail, postage prepaid using the addresses provided by Defendant.

No Class Member has opted out of or objected to the Settlement. Plaintiff submits that this is an outstanding settlement worthy of final approval, especially considering the continued expense, risks, and burdens of protracted and contested litigation. The Settlement is, in all respects, fair, adequate, and reasonable, and should be fully and finally approved.

II. PROPOSED SETTLEMENT

A. Terms of Parties' Settlement Agreement

The Settlement Class is:

> All natural persons (1) with a residential mortgage loan securing property in West Virginia, (2) subserviced by Loan Care, (3) who paid a fee to LoanCare for making a payment online, by telephone or voice recognition unit (VRU), from June 15, 2017 forward. Excluded from the Settlement Class are (i) LoanCare's employees, (ii) persons who timely and properly exclude themselves; and (iii) the federal district and magistrate judge assigned to this action, along with persons within the third degree of relationship to them.

ECF No. 63 at pp. 1-2.

The proposed settlement requires LoanCare to pay $4,500,000 into a Common Fund. This amount is a lump sum payment inclusive of: (1) all Settlement Payments; (2) Class Counsel's Attorneys' Fees and Expenses, including court costs; (3) Administrative Costs of the Settlement Administrator; and (4) any Class Representative service award.

Settlement Class Members will receive approximately $216 per fee paid to LoanCare before deduction of Attorneys' Fees and Expenses, Administrative Costs, and any service award. Settlement Payments will be distributed on a one check per loan basis such that Settlement Class Members will receive a single check with a per-fee settlement payment amount as consideration for fully resolving the settled claims. Co-borrowers shall be treated as a single Settlement Class Member and receive a single, shared Settlement Payment. The Settlement Agreement fully protects the rights of Settlement Class Members to make objections to the settlement or to opt-out of the settlement.

In consideration for the Settlement, the Class Representative and each Settlement Class Member have agreed to releases and covenants not to sue as detailed in Section 19 of the Settlement Agreement. ECF No. 60-1, Section 19.

Plaintiff's counsel selected and the Court approved ILYM as the Settlement Administrator, who will field calls and correspondence from Settlement Class Members, and disburse amounts from the Common Fund. The Settlement Administrator's fees and costs will be paid from the Common Fund.

B. Notice and Administration Provisions

"In the context of a class action, the due process requirements of the Fifth Amendment require '[r]easonable notice combined with an opportunity to be heard and withdraw from the class.'" *Groves v. Roy G. Hildreth & Son, Inc.*, No. 2:08-cv-820, 2011 WL 4382708 *3 (S.D.W. Va. Sept. 20, 2011) (quoting *In re Serzone Prods. Liability Litig.*, 231 F.R.D. 221, 231 (S.D.W. Va. 2005)); *see also Domonoske v. Bank of Am., N.A.*, 790 F. Supp. 2d 466, 472 (W.D. Va. 2011). Rule 23(c)(2) requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2);

see also Helmick v. Columbia Gas Transmission, No. 2:07-cv-743, 2010 U.S. WL 2671506, at *8 (S.D.W. Va. July 1, 2010); *Muhammad v. Nat'l City Mortgage, Inc.*, No. 2:07-cv-423, 2008 WL 5377783, at *3 (S.D.W. Va. Dec. 19, 2008). The notice must "inform potential class members of the nature of the action, that class members may make an appearance through counsel, that class members may exclude themselves from the settlement, and that the class judgment will have a binding effect on class members who are not excluded." *Groves*, 2011 WL 4382708, at *3; *Helmick*, 2010 WL 2671506, at *8. Silence on the part of potential class members receiving the notice equates to "tacit consent to the court's jurisdiction." *In re Serzone Prods. Liability Litig.*, 231 F.R.D. at 231; *see also Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions)*, 148 F.3d 283, 306 (3d Cir. 1998).

The type of notice to which a member of a class is entitled depends upon the information available to the parties about that person, and the possible methods of identification. *See In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1098 (5th Cir. 1977) (*citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). In determining the reasonableness of the effort required, the court must look to the "anticipated results, costs, and amount involved." *Burke v. Shapiro, Brown & Alt, LLP*, No. 3:14-cv-838, 2016 WL 2894914, at *4 (E.D. Va. May 17, 2016). "[D]ue process is satisfied 'where a fully descriptive notice is sent first-class mail to each class member, with an explanation of the right to opt out.'" *Domonoske*, 790 F. Supp. 2d at 472 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)).

The Parties' Notice of Proposed Class Settlement, attached as Exhibit A to the Settlement Agreement, provided a full description of the nature of the action, proposed settlement, and requested attorneys' fees. *See Domonoske*, 790 F. Supp. 2d at 472. The Notice described in plain English the terms and operation of the settlement, the considerations that caused Class Counsel to

conclude that the Settlement is fair and adequate, the procedure for objecting to and opting out of the Settlement, the date of the fairness hearing and the phone number for the Settlement Administrator to inquire about the fairness hearing.

Pursuant to the terms of the Settlement Agreement, Class Counsel conducted a competitive bidding process, the parties jointly selected a Settlement Administrator, and on July 14, 2021, this Court approved the selection of ILYM as Settlement Administrator. In accordance with the Settlement Agreement and this Court's Order, the Settlement Administrator distributed, via first class mail, the Court-approved Class Notice to the Class Members. All Class Members' addresses were updated according to the terms of the Settlement Agreement.

The Settlement Administrator has provided a Declaration, attached as Exhibit A to the Motion, stating in pertinent part as follows with respect to the Notice process:

- ILYM Group has extensive experience in administering Class Action Settlements, including direct mail services, database management, claims processing and settlement fund distribution services for Class Actions ranging in size from 26 to 4.5 million Settlement Class Members. ILYM Group was engaged by the Parties' Counsel and subsequently approved and appointed by the Court to provide notification services and claims administration, pursuant to the terms of the Settlement.
- On July 14, 2022, ILYM Group received the Court approved text for the Notice Packet from Counsel for Plaintiff. ILYM Group prepared a draft of the formatted Notice Packet, which was approved by the Parties' Counsel prior to mailing.
- On June 28, 2022, ILYM Group received the class data file from Counsel for Defendants, which contained the name, social security number, last known mailing address, and the total number of applicable fees paid per borrower. The data file was uploaded to ILYM's database and checked for duplicates and other possible discrepancies. The Class List contained 2,224 individuals.
- As part of the preparation for mailing, all 2,224 names and addresses contained in the Class List were then processed against the National Change of Address ("NCOA")

database, maintained by the United States Postal Service ("USPS"), for purposes of updating and confirming the mailing addresses of the Settlement Class Members before mailing of the Notice Packet. The NCOA contains requested change of addresses filed with the USPS. To the extent that an updated address was found in the NCOA database, the updated address was used for the mailing of the Notice Packet. To the extent that no updated address was found in the NCOA database, the original address provided by Counsel for Defendants was used for the mailing of the Notice Packet.

- On July 28, 2022, the Notice Packet was mailed, via U.S First Class Mail, to all 2,224 individuals contained in the Class List.
- As of the date of this declaration, 170 Notice Packets have been returned to ILYM's office. Of the 170 returned Notice Packets, 39 were returned with a forwarding address and promptly re-mailed to the forwarding address provided. ILYM Group performed a computerized skip trace on the 132 returned Notice Packets that did not have a forwarding address, in an effort to obtain an updated address for purpose of re-mailing the Notice Packet. As a result of this skip trace, 59 updated addresses were obtained and the Notice Packet was promptly re-mailed to those Settlement Class Members, via U.S First Class Mail. 9. As of the date of this declaration, a total of 98 Notice Packets have been re-mailed. Specifically, 39 were re-mailed as a result of a forwarding address provided by the USPS, 59 have been re-mailed as a result of ILYM Group's skip tracing efforts. As of the date of this declaration, a total of 73 Notice Packets have been deemed undeliverable as no updated address was found notwithstanding the skip tracing.
- As of the date of the declaration, ILYM Group has not received any objections to the Settlement. The deadline to file an objection to the Settlement was September 12, 2022.
- As of the date of the declaration, ILYM Group has not received any requests for exclusion. The deadline to request exclusion from the Settlement was September 26, 2022.
- **Accordingly, as of the date of the declaration, ILYM Group will report a total of 2,224 Participating Class Members, representing 100% of the 2,224 Settlement Class Members.**

III. THE SETTLEMENT MERITS FINAL APPROVAL

Settlement of class actions must be approved by the Court. Fed. R. Civ. P. 23(e); *In re: Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Practices & Prod. Liab. Litig.*, 952 F.3d 471, 483 (4th Cir. 2020); *Scardelletti v. Debarr*, 43 Fed. Appx. 525, 528 (4th Cir. 2002); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991); *Domonoske*, 790 F. Supp. 2d at 472. "The primary concern addressed by Rule 23(e) is the protection of class members whose rights may not have been given adequate consideration during the settlement." *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 158; *see also Groves*, 2011 WL 4382708, at *4.

Such approval typically involves a two-step process of "preliminary" and "final" approval. *See Manual for Complex Litigation* § 21.632, at 414 (4th ed. 2004); *Grice v. PNC Mortgage Corp. of Am.*, No. 97-3804, 1998 WL 350581, at *2 (D. Md. May 21, 1998) (endorsing Manual's two-step process); *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1992). In the first stage, the Parties submit the proposed settlement to the Court for preliminary approval. In the second stage, following preliminary approval, the Class is notified and a fairness hearing scheduled at which the Court will determine whether to approve the settlement. *See Bicking v. Mitchell Rubenstein & Assocs.*, No. 3:11-cv-78, 2011 WL 5325674, at *4 (E.D. Va. Nov. 3, 2011) ("Prior to granting final approval, the court must direct reasonable notice to all potentially affected class members, allow time for objection, and provide a 'fairness hearing.'"). The Court has already granted preliminary approval. "When the court reviews a proposed class action settlement, it acts as a fiduciary for the class." *Lumber Liquidators*, 952 F.3d at 483-84, citing *Sharp Farms v. Speaks*, 917 F.3d 276, 293-94 (4th Cir. 2019).

In determining whether a settlement meets the requirements of Rule 23, the Fourth Circuit has developed multifactor standards for assessing whether a class action settlement is "fair,

reasonable, and adequate" under Rule 23(e)(2). *Lumber Liquidators*, 952 F.3d at 484; *Scardelletti*, 43 Fed. Appx. at 528; *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 158. Under Rule 23(e)(2), "[t]he fairness analysis is intended primarily to ensure that a 'settlement is reached as a result of good-faith bargaining at arm's length, without collusion.'" *Berry v. Schulman*, 807 F.3d 600, 614 (4th Cir. 2015) (alteration omitted) (quoting *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 159).

"[W]e have identified four factors for determining a settlement's fairness, which are: (1) the posture of the case at the time settlement was proposed; (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel in the area of the class action litigation." *Lumber Liquidators*, 952 F.3d at 484 (citing *Jiffy Lube*, 927 F.2d at 159). The Court should be satisfied that "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *Samuel v. Equicredit Corp.*, No. 00-6196, 2002 WL 970396, at *1 n.1 (E.D. Pa. 2002); *In re Vitamins Antitrust Litig.*, MDL No. 1285, 2001 U.S. Dist. LEXIS 25071, at *29-30. "Absent evidence to the contrary, the Court should presume that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion." *Dijkstra v. Carenbauer*, No. 5:11-cv-00152, 2016 WL 6804980, at *2 (N.D. W.Va. July 12, 2016) (Bailey, J.), citing Newberg on Class Actions § 11.28 at 1159 (3d ed. 1992); *Polar Int'l Brokerage Corp. v. Reeve*, 187 F.R.D. 108, 112 (S.D.N.Y. 1999) (the court must look at the negotiating process leading to settlement in order to ensure that "the compromise be the result of arms'-length negotiations and that plaintiff's counsel have possessed the ... ability ... necessary to effectively represent the class's interests.") (*citing Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1983)).

In determining the adequacy of the proposed settlement, the Court must consider the: (1) relative strength of Plaintiff's case on the merits; (2) existence of any difficulties of proof or strong defenses Plaintiff is likely to encounter if the case proceeds to trial; (3) anticipated duration and expense of additional litigation; (4) solvency of defendant and likelihood of recovery of a litigated judgment; and (5) degree of opposition to the settlement. *Scardelletti*, 43 Fed. Appx. at 528; *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 159; *Groves*, 2011 WL 4382708, at *5; *Loudermilk Servs., Inc.*, 2009 WL 72818, at *3.

Consideration of the applicable factors reveals that the Parties' proposed Settlement Agreement merits final approval. The Parties' settlement was indeed the product of serious, informed, arm's-length, and non-collusive negotiations. Before settling this matter, the Parties seriously litigated this case at arm's-length. They exchanged written discovery, briefed a motion to dismiss and participated in informal negotiations and a full day mediation conducted by an experienced mediator. By the time mediation occurred, Plaintiff's Counsel and Defendant's Counsel, who are both experienced in not only prosecuting complex class action claims such as these but specifically "Pay-to-Pay" litigation, had "a clear view of the strengths and weaknesses" of their case and were in a strong position to make an informed decision regarding the reasonableness of a potential settlement. *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985) *aff'd*, 798 F.2d 35 (2d Cir. 1986).

The Settlement has no obvious deficiencies and does not grant preferential treatment to the class representative. The intrinsic value of the net settlement payment to Class Members is readily apparent when one considers the risks inherent in continued and protracted litigation and the expense and delay that accompany the appeal process.

The Settlement is particularly valuable to absent Class Members who, but for the Settlement, likely would be unaware of the existence of their legal claims. Even if they were aware, given the relatively small amounts of money involved, absent class members and attorneys who may represent them would have little financial incentive to prosecute individual actions. The alternative to bringing this case as a class action is bringing hundreds of individual claims against Defendant. Realistically, the alternative to a class action under the present circumstances is no action at all.

"It has long been clear that the law favors settlement." *United States v. Manning Coal Corp.*, 977 F.2d 117, 120 (4th Cir. 1992). This is particularly true in class actions. *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d Cir. 2011); *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998) (noting the "strong judicial policy in favor of settlements, particularly in the class action context"); *Reed v. Big Water Resort, LLC*, No. 2:14-cv-01583-DCN, 2016 WL 7438449, at *5 (D.S.C. May 26, 2016) (quoting same); William B. Rubenstein, 4 *Newberg on Class Actions* § 13.44, n.1 (5th ed. Dec. 2019 Update) (collecting cases).The proposed settlement serves the overriding public interest in settling litigation. *Adkins*, 2022 WL 327739 at *3, citing *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). The complexity, expense, and duration of class action litigation are factors that mitigate in favor of approval of a settlement. *Nicholes v. Combined Ins. Co. of Am.*, No. 5:16-cv-10203, 2019 WL 2575066, at *3 (S.D. W.Va. Feb. 22, 2019). While the Parties could have litigated the case to judgment and taxed the resources of the litigants and the Court, they chose instead rationally and reasonably to forgo the expense and uncertainty of continued litigation and focus their efforts on achieving a fair and adequate settlement that took the risks of further litigation into account.

Finally, the "opinion of class action counsel, with substantial experience in litigation of similar size and scope, is an important consideration." *Cox,* 2019 WL 164814, at *3 citing *Muhammad*, 2008 WL 4382708, at *4. "'When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight.'" *Id.* at *4 (quoting *Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000)). In the present case, appointed class counsel, who recommends the settlement, is skilled and experienced in consumer class actions and specifically in the litigation of Pay-to-Pay fees. *See e.g.*, *Muhammad*, 2008 WL 5377783, at *4 (recognizing that Plaintiff's counsel, Jonathan Marshall of the law firm Bailey & Glasser, LLP is "skilled and experienced in class action litigation, and have served as class counsel in several cases, including consumer lending cases"); *Alig v. Quicken Loans Inc.*, No. 5:12-CV-114, 2016 WL 10489897, at *23 (N.D.W. Va. June 2, 2016)("Jason Causey and the attorneys of Bordas & Bordas are experienced consumer class action litigators.").

IV. THE REQUESTED ATTORNEYS' FEES AND COSTS ARE REASONABLE

Awarding attorneys' fees as a percentage of the benefit to the class is the preferable and prevailing method of determining fee awards in class actions that establish common funds for the benefit of the class. The requested award of one-third of the common fund, for a total of $1,500,000.00, is reasonable under the circumstances of this case.

A. The Percentage of Fund Method is the Appropriate Measure for Determining Fees

"The percentage-of-the-fund method, also known as the common fund doctrine, allows attorney's fees to be based on a percentage of the total recovery to the Plaintiff class." *Berry v. Wells Fargo & Co.*, No. 3:17-cv-00304, 2020 WL 9311859, at *11 (D.S.C. 2020), citing *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The common fund doctrine is one

of the earliest recognized exceptions to the "American Rule" which generally requires that litigants bear their own costs and attorneys' fees. Premised on the equitable powers of the court, the common fund doctrine allows a person who maintains a suit that results in the creation, preservation or increase of a fund in which others have a common interest, to be reimbursed from that fund for the litigation expenses incurred. *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).

"Although the Fourth Circuit has not determined the preferred method for calculating attorney fees where the common fund has been generated on behalf of a class, nearly all circuits, as well as district courts within this Circuit, that have considered the issue have found that the trial court may use the percentage method." *Dijkstra v. Carenbauer*, No. 5:11-cv-152, 2015 WL 12750449, at *6 (N.D. W. Va. July 29, 2015); *see also Krakauer v. Dish Network, L.L.C.*, No. 1:14-cv-333, 2019 WL 7066834, at *4 (M.D.N.C. Dec. 23, 2019) ("district courts in the Fourth Circuit 'overwhelmingly' prefer the percentage method in common-fund cases"); *Good v. West Virginia-American Water Co.*, No. 14-1374, 2017 WL 2884535, at *20 (S.D. W. Va. July 6, 2017); *Kidrick v. ABC Television & Appliance Rental*, No. 3:97-cv-69, 1999 WL 1027050 *1 (N.D. W. Va. 1999) ("Where there is a common fund in a class settlement, application of a percentage method to calculate an attorney's fee award is now favored.") (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)); *Goldenberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998); *In re Thirteen Appeals Arising out of San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995); *In re Wash. Public Power Supply Sys. Litig.*, 19 F.3d at 1291, 1295 (9th Cir. 1994); *Gottlieb v. Barry*, 43 F.3d. 474 (10th Cir. 1994); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *Longden v. Sunderman*, 979 F.2d 1095, 1099 (5th Cir. 1992); *see also In re Cont'l Ill. Sec. Litig.*, 962 F.2d

566 (7th Cir. 1992); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454, 456 (10th Cir.), *cert. denied*, 488 U.S. 822 (1988); *Camden I Condo. Ass'n*, 946 F.2d 768, 773-774 (11th Cir. 1991); *Bebchick v. Wash. Met. Area Transit Comm'n*, 805 F.2d 396, 406-7 (D.C. Cir. 1986). In fact, some circuits mandate use of the percentage of fund method. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993); *Camden I Condo. Ass'n*, 946 F.2d at 774; *see generally* 1 Alba Conte, *Attorney Fee Awards* § 2.02 at 31 (2d ed. 1993); *Court Awarded Attorney Fees, Report of the Third Circuit Task Force* (*"Task Force Report")*, 108 F.R.D. 237 (1985) (Prof. Arthur R. Miller, Reporter).

The percentage method "is designed to allow courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure." *In re Prudential Ins. Co. Am. Sales Litig.*, 148 F.3d 283, 333 (3d Cir. 1998) (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995)). Percentage-based attorneys' fees:

> (1) align the interests of claimants and lawyers by rewarding superior performance and punishing failure;
>
> (2) minimize the need to evaluate the reasonableness of attorneys' efforts *ex post*, which is both time consuming and often hard to do; and
>
> (3) transfer the burden of financing lawsuits and other risks from claimants to attorneys who are better able to bear them.
>
> In keeping with the larger point of this Report, Judge Easterbrook also maintained that because claimants use contingent percentage fees almost exclusively, judges should use them when awarding fees in claimant representations.

Kirchoff v. Flynn, 786 F.2d 320, 326 (7th Cir. 1986); *see also Muhammad*, 2008 WL 5377783, at *7.

In its 1985 report, the Third Circuit Task Force recommended that in the traditional common fund situation, a district court "should attempt to establish a percentage fee arrangement."

Task Force Report, 108 F.R.D. 237, 255 (1985); *see also Muhammad*, 2008 WL 5377783, at *7. Since that time, the Third Circuit has, on several occasions, "reaffirmed that application of a percentage-of-recovery method is appropriate in common-fund cases." *In re Cendant Corporate PRIDES Litig.*, 243 F.3d 722 (3d Cir. 2001) (collecting cases).

In sum, there is a clear consensus among the federal and state courts, consistent with Supreme Court precedent, that the award of attorneys' fees in common fund cases should be based on a percentage of the recovery. This consensus derives from the recognition that the percentage of fund approach is the better-reasoned and more equitable method of determining attorneys' fees in such cases. *Muhammad*, 2008 WL 5377783, at *7.

B. The Percentage Requested by Class Counsel is Fully Supported by the Work Performed, Risks Taken, and Results Obtained

Both state and federal courts in West Virginia recognize the presumptive reasonableness of an attorneys' fee equal to one-third of a recovery. *Id.* As explained in *Eriksen Const. Co., Inc. v. Morey*, 923 F. Supp. 878, 881 (S.D. W. Va. 1996):

> The Court notes a one-third contingency fee is presumptively reasonable in West Virginia. *See Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 352 S.E.2d 73, 80 (1986). Nevertheless, a forty percent (40%) contingency fee is a common fee contract provision for cases that proceed to trial.

Id. This authority supports the requested award in this case.

Some courts also consider certain factors in analyzing the reasonableness of fees determined by the percentage of recovery method. *Muhammad*, 2008 WL 5377783, at *8. These factors can include:

> (1) the size of the fund created and the number of persons benefited; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Cendant, 243 F.3d at 733 (quoting *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000)) (citations omitted); *see also Muhammad*, 2008 WL 5377783, at *8. The *Gunter* Court instructed that there is no specific formula for analyzing these factors. "Each case is different, and in certain cases, one factor may outweigh the rest." *Gunter*, 223 F.3d at 195 n.1.

All of these considerations warrant an award of the requested fees in this case. The fund established for Class Members is substantial in light of the size of the class. Judging by the fact that no Class Member has opted out or objected to the proposed Settlement, the Class Members overwhelmingly support the settlement.

Additionally, class counsel are skilled and experienced in class action litigation, have served as class counsel in dozens of cases, and were particularly qualified to litigate this case. Bailey Glasser attorneys were appointed as lead class counsel in one of the first filed class action lawsuits in the country to challenge Pay-to-Pay fees, *Montesi v. Seterus, Inc.*, Case No. 50-2015-CA-010910-XXXX-MB (Fla. Cir. Ct. Palm Beach Cty.). *Montesi* was heavily litigated and the trial court certified a class of Florida borrowers over the defendant's opposition. It resulted in a seven-figure settlement, one of the first of its kind, and refunded a substantial amount of the fees collected by the defendant to the class of borrowers.

Bailey Glasser has acted as lead counsel in over a dozen cases involving Pay-to-Pay Fees across the country and is at the forefront of that litigation. In the course of their representation, Bailey Glasser attorneys have obtained contested class certification twice, in the matters, *Torliatt v. Ocwen Loan Servicing, LLC et. al,* No. 3:19-cv-04303-WHO (N.D. Cal.) and in *Williams v. Lakeview Loan Servicing, LLC et al.,* Case No 4:20cv-01900 (S.D. Tex.). Each of these cases involved intensive briefing before both at the trial and appellate courts on both the merits of the claims and the issues surrounding class certification.

During the course of their representation, Bailey Glasser attorneys have negotiated substantial recoveries for the classes they represent specifically in litigation challenging Pay-to-Pay fees. These matters include settlements that district courts have granted final approval including *Caldwell v. Freedom Mortgage Corp.*, No. 3:19-cv-02193-N (N.D. Tex.); *Elbert v. Roundpoint Mortgage Servicing, Corp.*, No. 3:20-cv-00250-MMC (N.D. Cal.); *Fernandez v. Rushmore Loan Servicing*, Case No. 8:21-cv-00621-DOC (C.D. Cal.); *Lembeck v. Arvest Central Mortgage Co.*, No. 3:20-cv-03277-VC (N.D. Cal.); *Phillips v. Caliber Home Loans*, No. 0:19-cv-02711 (D. Minn.); *Pierce v. Statebridge Co.*, No.1:20-cv-117 (M.D.N.C.); *Silveira v. M&T Bank*, No. 2:19-cv-06958-ODW (C.D. Cal.); and *Langston v. Gateway Mortgage*, 5:20-CV-01902 (C.D. CAL.). There are also additional pending settlements where Bailey Glasser attorneys represent the conditionally certified classes that district courts have granted preliminary approval and final approval is pending, including *Alexander v. Carrington Mortgage Services, LLC*, Case No. 1:20-cv-2369-TEB (D. Md.); *Wilson v. Santander Consumer USA, Inc.*, Case No. 4:20-CV-00152 (E.D. Ark.); *Torliatt v. Ocwen Loan Servicing, LLC et. al*, No. 3:19-cv-04303-WHO (N.D. Cal.); *Vannest v. Nationstar Mortgage, LLC*, 5:21-cv-00086 (N.D. W.Va.); *Cox v. New Rez, LLC d/b/a Shellpoint Mortgage Serv.*, 3:20-cv-00859 (S.D. W.Va.); *Thacker v. PHH Mortgage Corp.*, No. 5:21-cv-00174-JPB (N.D. W.Va.) (Bailey, J.). Bordas and Bordas also serves as class counsel in the *Vannest* and *Thacker* matters.

Each of these cases involved contested litigation over the merits of the claims and settlements that were informed by several district court rulings and appellate court opinions. For example, in *Alexander*, the trial court initially dismissed all claims, but on appeal, the Fourth Circuit reversed the dismissal and interpreted the FDCPA and Maryland statute to disallow Pay-to-Pay fees that are not expressly authorized by the borrowers' mortgage agreements. *See*

Alexander v. Carrington Mortg. Services, LLC, 23 F.4th 370, 372 (4th Cir. 2022). Accordingly, Bailey Glasser attorneys have brought a wealth of experience and knowledge of these claims to this matter, which helped streamline the negotiation process in this litigation.

The case involved complex issues related to Defendant's policies and application of state consumer protection law. Considering the possibility of appeals, resolution of the litigation could have taken years, and counsel bore a risk of nonpayment. The outcome of the case was hardly a foregone conclusion, but nonetheless class counsel accepted representation of the Plaintiff and the class on a contingent fee basis, fronting the costs of litigation. "In so doing, counsel have achieved a quite satisfactory settlement result." *Adkins v. Midland Credit Mgmt., Inc.*, No. 5:17-cv-04107, 2022 WL 327739, at *6 (S.D. W.Va. Feb. 3, 2022), quoting *Muhammad*, 2008 WL 5377783, at *8.

Finally, the one-third fee, for a total of $1,500,000.00, requested by counsel is consistent with fee awards in similar common-fund cases. *See Adkins*, 2022 WL 327739, at *7 (awarding one-third of CCPA settlement); *Cox v. BB&T*, No. 5:17-cv-01982, 2019 WL 164814, at **5-6 (S.D. W. Va. Jan. 10, 2019) (awarding one-third of CCPA settlement); *Dijkstra*, 2015 WL 12750449, at *7 (awarding one-third of settlement in CCPA settlement); *Archbold*, 2015 WL 4276295, at *6 (same); *Muhammad*, 2008 WL 5377783, at *8 (same); *Triplett v. Nationstar Mortgage, LLC*, No. 3:11-cv-238 (S.D. W. Va. 2012) (same); *Deem v. Ames True Temper, Inc.*, No. 6:10-cv-01339, 2013 WL 2285972 (S.D. W.Va. May 23, 2013) (awarding one-third in settlement involving pension and insurance claims); *Hackworth v. Telespectrum Worldwide, Inc.*, No. 3:04-cv-1271 (S.D. W. Va. 2004) (awarding fees of one-third amount of settlement in WARN Act class action settlement).

Accordingly, consideration of all of these factors overwhelmingly supports the requested award of one-third of the amount of the common fund established for the Class, for a total of $1,500,000.00.

C. The Requested Expenses are Reasonable

Consistent with the terms of the Settlement Agreement, the WVCCPA's fee-shifting provision entitles a consumer to recover "all or a portion of the costs of litigation" which includes not only "reasonable attorney fees" but "court costs and fees." W. Va. Code § 46A-5-104. West Virginia courts therefore award costs separately from attorney fees to prevailing plaintiffs in WVCCPA actions. *See Cox*, 2019 WL 164814, at *6; *Muhammad*, 2008 WL 5377783 at *9; *Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640, 664 (W. Va. 2012).

As set forth in the attached declaration of Jonathan Marshall, Class Counsel have incurred $4,624.61 in reasonable litigation expenses. The vast majority of these expenses were for professional mediation services. The other costs were incurred for filing fees, legal research, service of process, and printing/copying/postage.

D. The Proposed Service Award is Justified and Appropriate

Incentive or service awards reward representative plaintiffs' work in support of the class, as well as their promotion of the public interest. *Adkins v. Midland Credit Mgmt., Inc.*, No. 5:17-cv-04107, 2022 WL 327739, at *6 (S.D. W.Va. Feb. 3, 2022), citing *Archbold v. Wells Fargo Bank, N.A.*, No. 3:13-cv-24599, 2015 WL 4276295, at *6 (S.D. W.Va. July 14, 2015). Courts around the country have allowed such awards to named plaintiffs or class representatives. *See, e.g.*, *Adkins*, 2022 WL 327739, at *7 (awarding each class representative $10,000 out of $995,000 fund); *Dijkstra*, 2015 WL 12750449, at *6 (awarding $10,000 to sole class representative); *In re Celebrex (Celecoxib) Antitrust Litig.*, No. 2:14-CV-00361, 2018 WL 2382091, at *5 (E.D. Va.

Apr. 18, 2018) (awarding $300,000 to class representatives out of $94 million fund); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 480 (D.N.J. 2008) (awarding $60,000 to each class representative out of $215 million fund); *Worthington v. CDW Corp.*, No. C-1-03-649, 2006 WL 8411650, at *7 (S.D. Ohio May 22, 2006) (awarding $70,000 to class representatives out of $1.45 million fund); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F.Supp.2d 322, 342 (E.D. Pa. 2007) (awarding $75,000 to class representative out of $39.75 million fund); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 357-58 (N.D. Ga. 1993) (awarding $142,500 to class representatives out of $50 million fund); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (awarding $215,000 to several class representatives out of an $18 million fund); *see also Irvine v. Destination Wild Dunes Mgmt., Inc.*, 204 F. Supp. 3d 846, 851 (D.S.C. 2016) (awarding $30,000 to class representatives independent from $179,000 fund). One district court has gone so far as to say that incentive awards are "routinely approve[d]." *Id.*, citing *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D. Pa. 2000). The purpose of such awards is to encourage socially beneficial litigation by compensating named plaintiffs for their expenses on travel and other incidental costs, as well as their personal time spent advancing the litigation on behalf of the class and for any personal risk they undertook. *Id.*, citing *Muhammad*, 2008 U.S. Dist. LEXIS 103534, at *25; *Varcallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 257 (D.N.J. 2005).

Class members would have received nothing had Ms. Six not been willing to step up and file this action. Plaintiff gave her time and effort to prosecute the case. She participated in discovery and mediation as well as meetings with counsel and counsel's staff. She consulted with counsel regarding critical aspects of the settlement. She made herself available to counsel whenever she was needed and stood willing to do whatever tasks would be asked of her as the case

progressed. Accordingly, the proposed service award of $15,000.00 is justified and appropriate. *See Adkins*, 2022 WL 327739, at *7; *Cox*, 2019 WL 164814, at *6; *Archbold*, 2015 WL 4276295, at *6.

V. CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the Court grant this Motion and all relief requested herein, including entering the parties' proposed Final Approval Order and Judgment granting final approval of the Settlement Agreement, and for such other and further relief as the Court may deem appropriate and just.

Respectfully submitted,

Plaintiff,
By Counsel.

Respectfully Submitted,

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