UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

IN RE: LIBERTY REFUND ANTICIPATION LOAN LITIGATION	
	MDL No: 2334
This Document Relates to: **All Cases**	No: 1:12-cv-02949-JBG
	Honorable Joan B. Gottschall

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION.

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure ("FRCP") and the Court's Order Preliminarily Approving Class Action Settlement Agreement (the "Preliminary Approval Order"), Plaintiffs Timothy Rowden, Zaneta Houston, Daphne Shorter, Charles Madubuike, George Washington Jr., Margaret Washington, Pamela Patterson, Keonna Brown, Heather Reyes, Ronald Topping, Kevin Goodwin, Douglas Glover, Shamira Jones, William Reynolds and Terrance Patterson ("Plaintiffs" or "Plaintiff Class Representatives") respectfully submit this memorandum of law in support of final approval of the proposed settlement (the "Settlement") of this class action and the Plan of Allocation of the Net Settlement Fund.

The Settlement provides for the payment of $5.3 million in cash by Defendants JTH Tax, Inc., d/b/a Liberty Tax Service, and Liberty Tax, Inc. (formerly JTH Holding, Inc.) (collectively "Defendant" or "Liberty Tax") into a common fund for the benefit of the Class, with no provisions for revision to the Defendant. Plaintiffs and Class Counsel firmly believe that the Settlement represents an excellent benefit for the Class that clearly satisfies the standard of approval, as discussed herein. This Settlement is the product of extensive investigation, aggressive litigation and arm's-length negotiations facilitated by a neutral Conference Attorney for the Seventh Circuit's Settlement Conference Office. The Settlement was negotiated by experienced and informed counsel with a firm understanding of the strengths and weaknesses of their clients' respective claims and/or defenses. While Plaintiffs are confident in the merits of the claims alleged, Defendant has mounted vigorous defenses that add substantial risk to Plaintiffs' ability to prevail at key benchmarks for the case (pending appeal, anticipated motion to dismiss, renewed motion for class certification, summary judgment, *Daubert* challenges, etc.)

and ultimately prove liability and damages at trial. Accordingly, the terms and conditions of the Settlement were fairly negotiated and reflect a fully informed and hard-fought compromise.

Additionally, the Settlement enjoys the support of the Class. The notice plan was implemented in accordance with the Preliminary Approval Order and the Settlement Agreement, which included individual postcard and email notices, supplemented by publication notice in *USA Today*. As of October 17, 2015, not one individual has objected[1] to the Settlement and only five (5) individuals have requested to be excluded (a small fraction of one percent of the Class). *See* Declaration of Settlement Administrator ("Decl. of Settlement Admin."), ¶ 12; Joint Declaration of Hank Bates and Kenneth Grunfeld ("Joint Decl."), ¶ 28.

Accordingly, Plaintiffs and Class Counsel respectfully request that the Court finally approve the Settlement and Plan of Allocation as fair, reasonable, and adequate.

II. HISTORY, BACKGROUND AND SETTLEMENT OF THE ACTION.[2]

A. OVERVIEW OF THE LITIGATION.

In November 2011, Plaintiffs filed the first of a number of purported class action complaints (the "Related Actions")[3] against Liberty Tax alleging, *inter alia*, violations of state refund anticipation loan laws and state consumer protection laws. The Related Actions alleged, among other things, that Liberty Tax employed deceptive, fraudulent, and unlawful business practices in the marketing, enrollment, and administration of Refund Anticipation Loans, short-

[1] The deadline for objections is November 3, 2015. To the extent any objections are filed, Plaintiffs will provide a supplemental pleading by November 27, 2015.

[2] The Court is respectfully referred to the Joint Declaration for a more detailed description of the history and background of the Litigation, which is incorporated herein for all purposes.

[3] The Related Actions include class action cases filed against Liberty Tax in nine states: Arkansas, California, Florida, Illinois, Maryland, Minnesota, New York, North Carolina, and Wisconsin.

term loans or extensions of credit that are secured and repaid directly from the consumer's IRS tax refunds.

On April 16, 2012, the Related Actions were consolidated and transferred to this Court as MDL No. 2334 *In Re: Liberty Refund Anticipation Loan Litigation* ("the Litigation"). (*See* ECF Nos. 1 and 2). Following consolidation, Plaintiffs filed a Consolidated Amended Complaint (*see* ECF No. 20), and the Court appointed Carney Bates & Pulliam, PLLC and Golomb & Honik as Class Counsel, and Cafferty Faucher, LLP as Liaison Counsel (*see* ECF No. 21).

In July 2012, Defendants moved to compel arbitration and stay proceedings. (*See* ECF Nos. 25-27). In response, Plaintiffs sought leave to conduct limited, arbitration-related discovery (ECF Nos. 29-31), which the Court granted in part on October 4, 2012 (ECF No. 42). During the next several months, Plaintiffs and Defendant engaged in arbitration-related discovery.

On February 8, 2013, Plaintiffs filed a Response in Opposition to Defendant's Motion to Compel Arbitration and Stay Proceedings (ECF No. 54), which was supplemented on February 28, 2013 (ECF No. 63). Defendant filed its reply brief on March 15, 2013. (ECF No. 75).

On February 21, 2014, Plaintiffs filed a Motion for Class Certification and Stay of Briefing. (*See* ECF Nos. 104-105). The Court denied Plaintiffs' Motion without prejudice, with the understanding that Plaintiffs' request for class certification remains pending as a placeholder, and no rights are waived. (ECF No. 106).

On July 23, 2012, the Court granted, in part, and denied, in part, Defendant's Motion to Compel Arbitration and Stay Proceedings. (ECF No. 118). Defendant filed a Notice of Appeal on August 21, 2014, appealing the Court's ruling. (ECF No. 121).

On March 18, 2015, following arms' length negotiations, including mandatory mediation required by the United States Court of Appeals for the Seventh Circuit before a Conference

Attorney for the Seventh Circuit's Settlement Conference Office, the Parties reached an agreement in principle to resolve the Litigation, which was memorialized in a Memorandum of Understanding. Thereafter, the parties worked together to use the terms and conditions contained in the Memorandum of Understanding to develop the Stipulation, including its exhibits.

In light of the Settlement, on July 2, 2015, Plaintiffs filed a Motion for Indicative Ruling to Effect Terms of Class Action Settlement ("Plaintiffs' Motion for Indicative Ruling"), wherein Plaintiffs requested an indicative ruling that the Court would accept limited remand from the Seventh Circuit Court of Appeals to effect the terms of the Settlement, and, in turn, grant preliminary approval of the Settlement, direct that notice be disseminated to members of the Class, and schedule and conduct a Fairness Heating. (ECF No. 128.) On July 17, 2015, this Court entered an order granting Plaintiffs' Motion for Indicative Ruling. (ECF No. 128.)

Shortly after entry of the Court's July 17th Order, the parties filed a Motion for Remand with the Seventh Circuit Court of Appeals, which the Seventh Circuit granted on July 29, 2015.

Following remand, Plaintiffs filed an Unopposed Motion for Preliminary Approval of Class Action Settlement (ECF No. 134), which the Court granted on September 9, 2015 (ECF No. 139).

B. SETTLEMENT TERMS.

Defendant shall establish a cash settlement fund of $5.3 million (the "Settlement Fund") for the benefit of eligible Settlement Class Members. The Settlement Agreement defines the Settlement Class as follows:

> All Liberty Tax customers in nine states – California, North Carolina, Wisconsin, Minnesota, Maryland, Illinois, Arkansas, Florida and New York – who used Liberty Tax for tax preparation services and received a Refund Anticipation Loan or other loan

> product, Electronic Refund Check, Electronic Refund Deposit or a similar financial product provided by Republic Bank which were facilitated by Liberty Tax from 2009 through 2012.

In exchange for the consideration from the Defendant, the Action will be dismissed with prejudice upon final approval of the Settlement, and the Settlement Class Members will thereby release all claims which have been or could have been asserted against the Defendant by any member of the Settlement Class in this Action, as set forth in the Settlement Agreement.

III. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT.

A. THE LAW FAVORS AND ENCOURAGES SETTLEMENTS.

"Compromises of disputed claims are favored by the courts." *Clarion Corp. v. Am. Home Prods. Corp.*, 494 F.2d 860, 863 (7th Cir. 1974); *Nat'l Cas. Co. v. White Mts. Reinsurance Co. of Am.*, 735 F.3d 549, 556 (7th Cir. 2013) (recognizing that "the law generally favors and encourages settlements."). This policy is especially strong with respect to class action litigation, which is notoriously complex. *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."); *Amadeck v. Capital One Fin. Corp.*, 80 F. Supp. 3d 781, 788 (N.D. Ill. 2015) (same); *see also Armstrong v. Bd. of Sch. Dir. of Milwaukee*, 616 F.2d 305, 313 (7th Cir. 1980), *overruled on other grounds at* 134 F.3d 873 (7th Cir. 1998) ("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 strain such litigation imposes upon already scarce judicial resources." (internal quotation and citation omitted); Newberg & Conte, *Newberg on Class Actions*, §11.41 (3d ed. 1992) ("[T]he compromise of complex litigation is encouraged by the courts and favored by public policy").

B. THE ROLE OF THE COURT IN DETERMINING WHETHER TO APPROVE A CLASS ACTION SETTLEMENT.

Rule 23 requires court approval of any voluntary compromise of a class action and requires notice regarding the proposed settlement be provided to all class members. In considering whether to approve a proposed settlement, a court is tasked with determining whether the settlement is fair, reasonable, and adequate. *Wong v. Accretive Health, Inc*., 773 F.3d 859, 862 (7th Cir. 2014) ("A district court may approve a class action settlement if it finds it to be fair, adequate, and reasonable."); *Isby,* 75 F.3d at 1196 (noting court's inquiry in approving a class action settlement should be "whether the proposed settlement is lawful, fair, reasonable, and adequate."); *Wilkins v. HSBC Bank Nev., N.A*., No 14 C 190, 2015 U.S. Dist. LEXIS 23869, at *13 (N.D. Ill. Feb. 27, 2015) ("A court may approve a settlement that would bind class members only if, after proper notice and a public hearing, the court determines that the proposed settlement is fair, reasonable, and adequate." (internal quotations omitted)); *Swift v. Direct Buy, Inc*., No. 2:11-cv-401-TLS, 2013 U.S. Dist. LEXIS 152618, at *15 (N.D. Ind. Oct. 24, 2013) ("A district court must scrutinize and evaluate a class action settlement to determine whether it is fair, reasonable, and adequate." (internal quotations omitted)); *cf. Lambrecht v. Taurel*, No. 1:08-cv-68-WTL-TAB, 2010 U.S. Dist. LEXIS 75633 (S.D. Ind. June 8, 2010) ("*Eli Lilly*"). In this regard, a court may afford a presumption of fairness when, as here, the settlement is reached following arm's-length negotiations. *Manual for Complex Litigation*, §30.43 at 289 (3d ed. 2002); *Newberg on Class Actions*, §11.42 (3d ed. 1992) ('[A]n initial presumption of fairness is usually involved if the settlement is recommended by class counsel after arm's-length bargaining."); *Armstrong*, 616 F.2d at 325; *Susquehanna Corp. v. Korholz*, 84 F.R.D. 316, 321 (N.D. Ill. 1979).

Importantly, in reviewing a proposed settlement, a court should not substitute its own judgment of fairness and adequacy for that of the litigants and their counsel (*Armstrong*, 616 F.2d at 315) or transform settlement approval proceedings into a mini-trial on the merits. *See Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*, 834 F.2d 677, 684 (7th Cir. 1987); *Armstrong*, 616 F.2d at 314-15; *see also E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985) (in considering a settlement, a district court must "refrain from resolving the merits of the controversy or making a precise determination of the parties' respective legal rights"). Consistent with this approach, evaluations of fairness, reasonableness, and adequacy require that the facts be viewed in a light most favorable to the settlement and that the terms of the settlement are viewed in their entirety and not in isolation. *Isby*, 75 F.3d at 1199.

When viewed under these standards, it is clear that the Settlement is fair, reasonable, and adequate and, as such, is entitled to final approval.

C. THE SETTLEMENT IS ENTITLED TO A PRESUMPTION OF FAIRNESS.

"[I]t may be presumed that the agreement is fair and adequate where . . . a proposed settlement is the product of arm's-length negotiations, sufficient discovery has been taken to allow the parties and the court to act intelligently, and counsel involved are competent and experienced." *Goldsmith v. Tech. Solutions Co.*, No. 92 C 4374, 1995 U.S. Dist. LEXIS 15093, at *10, n.2 (N.D. Ill. Oct. 10, 1995); *Gillespie v. Equifax Info. Servs., LLC*, No. 05-C-0138, 2009 U.S. Dist. LEXIS 131242, at *10 (N.D. Ill. 2009) ("A settlement proposal arrived at after arms-length negotiations by fully informed, experienced and competent counsel may be properly presumed to be fair and adequate."); *Susquehanna*, 84 F.R.D. at 321.

Here, the Settlement was intensely negotiated by attorneys with substantial experience in class action litigation. *See* Joint Decl. at ¶ 30 and Exs. 1 and 2. Moreover, at the time the Settlement was reached, each side had a keen understanding of the strengths and weaknesses of Plaintiffs' claims and Defendants' defenses. *See id*. at ¶¶ 18, 26, 34. Based on their knowledge of the factual and legal issues applicable to this case, as well as their years of experience, it is the considered judgment of Class Counsel that the Settlement is in the best interest of the Class.

Furthermore, throughout the course of this litigation, Plaintiffs' and Defendants' counsel have zealously and vigorously represented the interests of their respective clients, without a trace of collusion. In fact, the Settlement was only reached with the help of a neutral Conference Attorney for the Seventh Circuit's Settlement Conference Office. *See* Joint Decl. at ¶ 14. As such, there is no reason to doubt that the Settlement was achieved in good faith through arm's-length negotiations and that Plaintiffs were represented by experienced and competent counsel who professionally handled this matter in the best interest of the Class. Against this backdrop, the Settlement is entitled to a presumption of fairness and adequacy. *Goldsmith*, 1995 U.S. Dist. LEXIS 15093, at *10 n.2; *Gillespie*, 2009 U.S. Dist. LEXIS 131242, at *10.

D. ALL CRITERIA FOR APPROVING THE SETTLEMENT ARE SATISFIED.

In evaluating whether a settlement is fair, reasonable, and adequate, courts within the Seventh Circuit apply the factors articulated in *Isby*:

> These include the strength of plaintiffs' case compared to the amount of defendants' settlement offer, an assessment of the likely complexity, length and expense of the litigation, an evaluation of the amount of opposition to settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement.

75 F.3d at 1199; *Wong*, 773 F.3d at 863 (restating factors); *In re Southwest Airlines Voucher Litig.*, No. 11 C 8176, 2013 U.S. Dist. LEXIS 120735, at *19 (N.D. Ill. Aug. 26, 2013) (same).

For the reasons discussed below, the *Isby* factors all weigh in favor of the Settlement. Consequently, the Court should grant final approval of the Settlement.

1. The Strength of Plaintiffs' Case As Compared to the Amount of the Settlement.

The most important factor in assessing a class settlement is the strength of the plaintiff's case on the merits compared with the amount offered in the settlement. *Synfuel Techs., Inc. v. DHL Express (USA), Inc*., 463 F.3d 646, 653 (7th Cir. 2005). "In conducting this analysis, the district court should begin by 'quantifying the net expected value of continued litigation to the class.'" *Id*. (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284-85 (7th Cir. 2002). Integral to this analysis is the court's "consideration of the various risks and costs that accompany continuation of the litigation." *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 309 (7th Cir. 1985). Thus, in weighing this factor, a court must assess the value of the proposed settlement against the total amount that the class could recover, discounted by the weaknesses and risks inherent in the class's claims.

Here, while Plaintiffs and their counsel believe that their claims and allegations were and are meritorious, they also recognize the possibility that their claims would not succeed and they would be unable to secure the substantial relief for the Class achieved by the Settlement, and might even fail to obtain any relief at all. Indeed, this Action called for resolution of numerous complex issues of law and fact at considerable time and expense to the parties and the Court, including whether Defendant could compel arbitration. This is a threshold issue that, prior to Settlement, was up on appeal to the Seventh Circuit. Thus, Plaintiffs faced the significant risk that the Seventh Circuit could accept Defendant's position and compel arbitration, thereby extinguishing the class's claims in this Action.

Additionally, even if Plaintiffs were able to prevail at the appellate level on the issue of arbitration, substantial merits issues would remain, requiring lengthy discovery, extensive motions practice, expert testimony, weeks of trial, and months of likely additional appeals. More specifically, Plaintiffs anticipate that, were this litigation to proceed, Defendant would file a motion to dismiss all claims in the Amended Consolidated Complaint and sometime thereafter file a motion for summary judgment on various issues of law, likely raising the following arguments, among others:

- Whether Defendant disclosed to consumers for which it facilitated RAL Products the interest rate, calculated as required by TILA;
- Whether Defendant's Tax Refund Administrative Fee is a "finance charge" within the meaning of TILA and whether the Defendant's practices and omissions uniformly violated state RAL and consumer protection laws;
- Whether Plaintiffs are entitled to restitution; and
- Whether Plaintiffs were damaged by Defendant's alleged TILA, RAL and consumer protection law violations.

Although Plaintiffs remain confident that they would prevail on each of these legal issues, Plaintiffs also recognize the risks inherent in continued litigation, particularly since there is a paucity of case law addressing this specific factual context. Those risks are exemplified by the dismissal of a similar action against CCH, Incorporated, a tax preparation company, premised on fees it charges for similar refund processing products related to its Complete Tax online tax preparation services, including alleged violations of TILA. *See Palmer et al. v. CCH Inc.*, No. 12-CH-12181 (Ill. Ch. Court May 17, 2013) (Order Granting Motion to Dismiss). The plaintiff and purported class in that case received nothing.

In addition to these merits issues, Plaintiffs also faced the hurdles of obtaining class certification and maintaining certification throughout trial and likely appeals. These hurdles pose a significant risk because if class certification were denied or overturned, the Class's claims would be extinguished and the value of each individual Plaintiff's case would be reduced to a point such that continued litigation would be infeasible.

In comparison, the Settlement provides a significant recovery for the Class. Specifically, the Settlement results in monetary benefits to the members of the Class now, not some distant time in the future. Moreover, the value of the Settlement to individual Class Members is remarkable. As set forth in Plaintiffs' Consolidated Amended Complaint, the fee charged for Defendant's RAL Products was typically $29.95 or more. The Settlement requires Liberty Tax to pay over $5 million into a settlement fund out of which eligible class members will receive their pro rata share. Pursuant to the Plan of Allocation, it is anticipated that an eligible Class Member could receive between $30 to $100, depending on the number of tax years the Class Member purchased a Financial Product during the Class Period. *See* Long Form Notice, Section 5, located on the website www.LibertyTaxSettlement.com and attached to Plaintiffs' Fee Brief as Exhibit 3. Thus, the Settlement provides fair and reasonable value to Class Members now, while avoiding the substantial risks and costs of continued litigation, including no recovery at all after years of litigation. Accordingly, this factor favors approval of the Settlement. *See Amadeck*, 80 F. Supp. 3d at 789-90 (finding a recovery per claimant of $34.60 on TCPA claim with $500 statutory recovery available per violation fell within range of reasonableness); *see, e.g., In re Cendant Corp. Sec. Litig.*, 264 F.3d 201, 242 (3d Cir. 2001) (approving a settlement that amounted to 9.25% of total damages); *In re Ravisent Techs., Inc. Sec. Litig.*, Civ. Action No. 00-CV-1014, 2005 U.S. Dist. LEXIS 6680, at *33 (E.D. Pa. Apr. 18,

2005) (finding a percentage of recovery amounting to 12.2% was within the range of reasonableness and further noting that a study by Professor John C. Coffee, Jr., Adolf A. Berle Professor of Law at Columbia University Law School, determined that since 1995, class action settlements have typically recovered 'between 5.5% and 6.2% of the class members' estimated losses); *In re PaineWebber Pshps. Litig.*, 171 F.R.D. 104, 131-2 (S.D.N.Y. 1997) (finding a recovery of between 7% to 20% within the range of reasonableness in light of the best recovery at trial and all the attendant risks of litigation).

2. Assessment of the Complexity, Length, and Expense of Litigation.

As noted above, continued litigation of Plaintiffs' claims would no doubt entail intensive, lengthy, and costly proceedings. Indeed, prior to Settlement, Plaintiffs were faced with defending Defendant's appeal to the Seventh Circuit, which by itself would have added considerable expense and time to this Action, which is already almost four years old. Further, and assuming an appellate ruling favorable to Plaintiffs, Plaintiffs would face vigorous opposition on any renewed Motion for Class Certification, with Defendant likely challenging Plaintiffs' ability to satisfy each of the requirements of FRCP 23. Against this backdrop, the issue of the propriety of class certification in this Action is far from a "foregone conclusion," heightening the litigation risks confronting the Plaintiffs in this Action. *See Coburn v. Daimlerchrysler Servs. N. Am., L.L.C.*, 218 F.R.D. 607, 610 (N.D. Ill. Oct. 28, 2008) (noting that "it is not a foregone conclusion that" the proposed class, which was limited to Illinois and Iowa, was appropriate). Moreover, any order granting class certification would be subject to modification or reversal at anytime. *See Gen. Tel. Co. of Sw v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982).

Plaintiffs also believe that further pre-trial proceedings in this case would be marked by complex, expensive, and contested discovery, dispositive motions, detailed expert reports and related discovery, and *Daubert* motions. *See Unite Nat'l Ret. Fund v. Watts* ("*Shell Derivative*"), No. 04-CV-3603, 2005 U.S. Dist. LEXIS 26246, at *10 (D.N.J. Oct. 28, 2005) ("The Court assumes that should this litigation have ensued, the parties would have engaged in a significant amount of discovery, pre-trial motions, an extensive trial followed by post-trial motions and an appeal, all of which would be at great expense.").

Even assuming Plaintiffs were able to surmount the foregoing pre-trial hurdles, their claims would be subject to the unpredictability of a lengthy, complex, and expensive jury trial. At trial, a jury would have been presented with the Defendant's denial of wrongdoing. While Plaintiffs and their counsel believe they would be able to provide convincing evidence, they also understand the risks of trail. *See In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 697 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) (defense verdict after 37-day bench trial, which included 9,360 pages of transcript from 24 witnesses, thousands of pages of deposition transcripts, and 1,033 trial exhibits that filled more than 22 3.5 inch binders).

Lastly, even if Plaintiffs prevailed at trial, the Defendants have fought strenuously throughout the life of this litigation, and there is no reason to believe they would not have made post-trial motions and pursued additional appeals to the Seventh Circuit. This would obviously involve further delay and expense, possibly postponing final resolution of Plaintiffs' claims for years. *See In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985) (delay from appeals is a factor to be considered).

The Settlement avoids all of these delays, uncertainties, complexities, and expenses and offers immediate and substantial benefits to the Class. Consequently, this factor weighs in favor

of approving the Settlement. *Wilkins v. HSBC Bank Nev., N.A.*, No. 14 C 190, 2015 U.S. Dist. LEXIS 23869, at *24 (N.D. Ill. Feb. 27, 2015) (finding that like other consumer class actions, continued litigation of the action would involve significant discovery and motion practice, expert testimony, and lengthy trial and appeal, all of which weigh in favor of approval of the proposed settlement).

3. Lack of Opposition to the Settlement.

Courts view the absence of opposition to a settlement by affected parties as a factor strongly supporting judicial approval of the settlement. *See Berndt v. Cleary Bldg. Corp.*, No. 11-cv-791-wmc, 2013 U.S. Dist. LEXIS 171316, at *3 (W.D. Wis. Dec. 5, 2013) (relying on the lack of objections as evidence of the settlement's fairness, reasonableness, and adequacy); *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1021 (N.D. Ill. 2000) (holding that the fact that "99.9% of class have neither opted out nor filed objections . . . is strong circumstantial evidence in favor of the settlement[ ].").

To date, no Class member has filed an objection to any aspect of the Settlement, and only five (5) Class members have requested to be excluded. Joint Decl. at ¶ 28; Decl. of Settlement Admin. at ¶ 12.[4] Thus, the Settlement enjoys the overwhelming support of the Class. Hence, this factor favors final approval of the Settlement.

4. Opinion of Competent Counsel.

The support for the Settlement from the parties' experienced counsel also weighs in favor of final approval. *See Am. Int'l Group, Inc. v. ACE INA Holdings, Inc.*, No. 07 C 2898, 2011 U.S. Dist. LEXIS 84219, at *39-40 (N.D. Ill. July 26. 2011) ("The court is entitled to

[4] The objection and exclusion deadlines have not passed, with the objection deadline purposefully set to fall after the filing (and posting on the settlement website) of this motion and the petition for attorneys' fees and costs. Class Counsel will provide the Court with an update regarding any objections or additional exclusions by November 27, 2015.

rely heavily on the opinion of competent counsel" in approving a settlement.). As set forth above, both parties were represented by well-respected law firms that have extensive experience in complex litigation and that vigorously pursued their respective clients' interests. Accordingly, the assessment of counsel for the parties on the fairness of the Settlement is entitled to great deference. *See Goldsmith*, 1995 U.S. Dist. LEXIS 15093, at *10 n.2; *Susquehanna*, 84 F.R.D. at 321.

5. The Stage of the Proceedings and Amount of Discovery Completed.

The relevant question here is "whether the plaintiffs had sufficient information on the merits of the case to enter into a settlement, and whether the Court has sufficient information to evaluate such a settlement." *Parker v. Time Warner Entertainment Co., L.P.*, 631 F. Supp. 242, 259 (E.D.N.Y. 2009). In this regard, although the Settlement was reached in a relatively early stage of the litigation, the case has been ongoing for a long time already, and there has been an extensive and thorough exchange of information relative to the issues and merits of the Action to justify approval of the proposed Settlement.

More particularly, Plaintiffs negotiated the Settlement on a fully informed basis and with a thorough understanding of the merits and value of the parties' claims and defenses. As set forth fully in the Joint Declaration, the Settlement was reached only after Class Counsel conducted an extensive factual investigation into the Defendant's alleged misconduct, thoroughly researched the law pertinent to the Class's claims and the Defendant's defenses, responded to the Defendant's Motion to Compel Arbitration, filed a Motion for Class Certification, and participated in mandatory mediation at the Seventh Circuit. *See* Joint Decl. ¶¶ 7-17. Because of Class Counsel's experience in litigating these types of claims regarding these types of products, Plaintiffs and Class Counsel were able to adequately assess the strengths and weaknesses of Plaintiffs' case and assess the adequacy of the Settlement in light of the strengths

and weaknesses of their position. *See Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 587 (N.D. Ill. 2011) (quoting *Armstrong*, 616 F.2d at 325) (finding the claims had clearly reached the stage where the parties were "'fully . . . able to evaluate the merits of plaintiffs' claims.'"); *see also Cohn*, 375 F. Supp. 2d at 855 ("In assessing the merits of the Settlement, plaintiffs' counsel considered the factual and legal questions that were disputed in the derivative actions. The Court is convinced the proposed Settlement was reached after counsel had conducted an extensive investigation . . . .").

Further, this case is somewhat unique insofar as the allegations chiefly focus on disclosures or lack thereof, and whether they are required by law, and therefore assessing the core issues in this case and a reasonable settlement were more straightforward than a case that turns on, for example, internal company documentation. The core disputes between the parties relate to legal questions, many of them of first impression, that have been fully researched and vetted by Plaintiffs prior to and during the prosecution of this action. Accordingly, the extent of investigation and research completed and the stage of the proceedings weigh in favor of final approval of the Settlement. *See Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 263 (S.D.N.Y. 1998) (recognizing that "[b]ecause much of the point of settling is to avoid litigation expenses such as full discovery, it would be inconsistent with the salutary purposes of settlement, to find that extensive pre-trial discovery is a prerequisite to approval of a settlement.").

E. THE PLAN OF ALLOCATION OF THE NET SETTLEMENT FUND IS FAIR, ADEQUATE AND REASONABLE AND SHOULD BE APPROVED.

Approval of a plan of allocation of settlement proceeds is governed by the same overarching standard of fairness applied to the Settlement. *See In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 U.S. Dist. LEXIS 88886, at *13 (N.D. Cal. Nov. 26, 2007)

("The court turns next to the proposed plan of allocation, which must be fair, reasonable and adequate.").

Here, the Net Settlement Fund will be distributed to Authorized Claimants, *i.e.*, members of the Class who submit timely and valid Proofs of Claim, in accordance with the Plan of Allocation set forth in the Notice. The Plan of Allocation treats all Class members in the same manner: everyone who submits a valid and timely Proof of Claim, and who has not excluded himself or herself from the Class, receives a *pro rata* share of the Net Settlement Fund in the proportion that his or her recognized claim(s)[5] bears to the total of all recognized claims submitted.

In sum, the Plan of Allocation, which has been fully disclosed to members of the Class, ensures an equitable *pro rata* distribution of the Net Settlement Fund among Authorized Claimants, making it fair, reasonable, and adequate. As such, the Plan of Allocation should be approved.

IV. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE AND WARRANTED.

Here, in its Preliminary Approval Order, the Court previously determined that certification of the action for settlement purposes is appropriate. Specifically, the Court found that the Settlement Class satisfied each of the requirements of Federal Rule of Civil Procedure 23 in that (a) the Class size is sufficiently numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the Class; (c) the claims or defenses of the Plaintiffs are typical of the claims or defenses of the Class; (d) Plaintiffs and Class Counsel will fairly and adequately protect the interests of the Class; (e) the common questions of law and fact

[5] Some Class Members utilized the RALs in multiple years during the Class Period and therefore have multiple claims; each use of the service within the four year period 2009-2014 is a separate claim for the purposes of the pro rata distribution of the Net Settlement Fund.

predominate; and (f) the class mechanism is the superior method for fairly and efficiently adjudicating the controversy. For these same reasons, this Court should finally certify the Settlement Class for settlement purposes.

V. THE METHOD AND FORM OF CLASS NOTICE SATISFIES RULE 23(e).

Rule 23(e) requires that notice of a proposed compromise of a class action "shall be given to all members of the class in such manner as the district court directs." Fed. R. Civ. P. 23(e). To comply with Rule 23(e), notice need only be "reasonably calculated, under all the circumstances." *Weeks v. Kellogg Co.*, Case No. 09-08102 (MMM) (RZx), 2011 U.S. Dist. LEXIS 155472, at *40 (C.D. Cal. Nov. 23, 2011); *Browning v. Yahoo! Inc.*, 2007 U.S. Dist. LEXIS 86266 (N.D. Cal. Nov. 16, 2007) (recognizing "[t]here are tradeoffs involved in any form of notice," especially with a large settlement class and rejecting objectors challenges to notice, stating "the notice need not have been perfect"); *see also In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 197 (5th Cir. 2010) (internal quotation omitted) ("a settlement notice need only satisfy the broad reasonableness standards imposed by due process.").

Here, notice was accomplished through: (a) individual postcards mailed to 651,733 Class Members and email notices to the three Class Members for whom no address was available; and (b) publication of notice in *USA Today*. *See* Decl. of Settlement Admin. at ¶¶ 6-11. In addition, the settlement administrator maintained a website that is designed to address the Settlement and established a call center with a toll-free number and Interactive Voice Response (IVR) system. *Id.* at ¶¶ 14-15. More particularly, the Settlement website provides an explanation of the litigation, the Settlement, and important dates; allows for on-line Claim Form submissions; and posts copies of: (i) the Order Preliminarily Approving Class Action Settlement Agreement; (ii) the Settlement Agreement; (iii) the full Class Notice; (iv) the postcard Class Notice; (v) the

published Legal Notice; (vi) Plaintiffs' Consolidated Amended Complaint; and (vii) the Claim Form. In addition, the foregoing motion and Plaintiffs' application for attorneys' fees and costs will be posted on the Settlement website upon filing. Class Members are able to obtain copies of these documents through the Settlement website, 24 hours a day. Indeed, through October 15, 2015, the Settlement website statistics show 44,972 visits; 223,370 page views; 3,349 downloads of the Claim Form; and 2,531 downloads of the full Class Notice, the postcard Class Notice and the Legal Notice. *Id*. at ¶ 14. Similarly, for this same time period, the call center has logged a total of 32,571 calls. *Id*. at ¶ 15.

Moreover, the content of the notices sufficiently advised Class Members of the essential terms of the Settlement; the rights of Settlement Class Members to share in the recovery, to request exclusion from the Class, or to object to the Settlement; and the date, time and place of the final approval hearing. Thus, the notices provided the necessary information for Class Members to make an informed decision regarding the proposed Settlement. The notices also contained information regarding counsel's fee application, the proposed plan for allocating the Settlement proceeds among Class Members, and the requested service awards to class representatives. Finally, the claims form – which can be conveniently submitted on-line or in paper form – is straightforward and simple to complete, only requires information that is readily available, and does not require submission of any documentation.

In sum, the form and manner of notice and claims procedure fulfill all of the requirements of Rule 23 and due process.

VI. CONCLUSION.

In accordance with Rule 23 and applicable case law, the Settlement fairly, adequately, and reasonably resolves the disputed allegations of the Action. For all of the foregoing reasons, including the numerous risks associated with the continued litigation of the Action, the approval

of members of the Class, the informed and arm's-length nature of the parties' negotiation, and the informed opinion of the parties' highly experienced counsel, the Settlement should be finally approved.

Dated: October 19, 2015

Respectfully submitted,

BY: /s/ Kenneth Grunfeld

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Liaison Counsel

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on October 19, 2015, I filed the foregoing document via the Court's ECF system, which will cause a true and correct copy of the same to be served electronically on all ECF-registered counsel of record.

/s/ Kenneth Grunfeld
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