UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

NATIONAL TRUCKING FINANCIAL RECLAMATION SERVICES, LLC, BRUCE TAYLOR, EDIS TRUCKING, INC., JERRY FLOYD, MIKE CAMPBELL, PAUL OTTO, TOWNES TRUCKING, INC., R&R TRANSPORTATION, INC., OHIO AUTO DELIVERY, INC., and EAGLE MOTOR FREIGHT, INC., individually, and on behalf of all others similarly situated, Plaintiffs, vs. PILOT CORPORATION, PILOT TRAVEL CENTERS, LLC D/B/A PILOT FLYING J, FJ MANAGEMENT, INC., CVC CAPITAL PARTNERS, JAMES A. "JIMMY" HASLAM, III, MARK HAZELWOOD, MITCH STEENROD, SCOTT WOMBOLD, JOHN FREEMAN, VINCENT GRECO and BRIAN MOSHER, Defendants.	Case No. 4:13-cv-00250-JMM

DEFENDANTS PILOT CORPORATION AND PILOT TRAVEL CENTERS LLC'S MEMORANDUM IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

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Defendants Pilot Corporation (f/k/a Pilot Oil Corporation) and Pilot Travel Centers LLC d/b/a Pilot Flying J (collectively, "Pilot Flying J") submit this memorandum in support of the Joint Motion for Final Approval of Class Action Settlement ("Joint Motion") (ECF No. 27). For the reasons stated below, Pilot Flying J requests that the Court grant the Joint Motion and enter the proposed Final Order and Judgment, attached as Exhibit 8 to the Joint Motion.

INTRODUCTION

Plaintiffs National Trucking Financial Reclamation Services, LLC, Bruce Taylor, Edis Trucking, Inc., Jerry Floyd, Mike Campbell, Paul Otto, Townes Trucking, Inc., and R&R Transportation, Inc. (collectively, "Plaintiffs") brought this putative class action against Pilot Flying J and various other corporate and individual defendants (collectively, "Defendants"). In the Consolidated Amended Class Action Complaint ("Complaint"), Plaintiffs allege that Pilot Flying J, through certain of its employees, engaged in a fraudulent scheme whereby it entered into diesel fuel rebate or discount programs with Plaintiffs and other similarly-situated customers for the purchase of diesel fuel for commercial use but failed to pay the full amounts of rebates or discounts owed. Plaintiffs seek to recover amounts they claim they were underpaid, as well as attorneys' fees, costs, and punitive damages. Plaintiffs also ask the Court to enter a permanent injunction preventing Defendants from engaging in the misconduct alleged in the Complaint.

Against that background, the parties engaged in arms-length settlement discussions over a two-month period in an attempt to bring the entire controversy to a close. The Revised Settlement Agreement, which was attached to the parties' Joint Motion for Preliminary Approval of Revised Class Settlement and approval of Revised Notice to Settlement Class Members as Exhibit 1 (ECF No. 14-1), is the end result of those discussions. It provides, among other things, that any class member who was not paid or was underpaid for diesel fuel rebates or discounts (or

both) will be compensated at ***100% of what he, she, or it is owed, plus interest calculated at six percent***. The class members' accounts will be subjected to a comprehensive audit by Pilot Flying J's Internal Auditing Department ("DIA"), with DIA's auditing process subjected to independent verification by Horne LLP ("Horne"), the Court-appointed independent auditor. Any class member can dispute the calculated amount and request that Horne review the calculation (at Defendants' expense). And class members will receive these benefits without incurring any costs of auditing, administration, or attorneys' fees, and without having to wait multiple years for this litigation to come to a close.

The Court may approve a class settlement if it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Several factors guide this inquiry, but the fairness of the proposed class settlement turns, in large part, on the amount and form of the relief offered against the plaintiffs' likelihood of success. *See In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 933 (8th Cir. 2005). Given the cost and uncertainty of continued litigation and the consideration provided to all class members under the settlement here, it is a near certainty that Plaintiffs and settlement class members would not receive any greater benefits than will be provided by this settlement. The settlement is fair, adequate, and reasonable for the class, as confirmed by the fact that no class member chose to object and only approximately one percent opted out.

This Court should grant final approval to the settlement and enter final judgment.

BACKGROUND

I. PROCEDURAL HISTORY

Plaintiff National Trucking Financial Reclamation Services filed this putative class-action lawsuit on April 24, 2013. Over the next two-and-a-half months, the remaining Plaintiffs filed nearly-identical actions in federal district courts across the country. On July 16, 2013,

Plaintiffs collectively filed the Complaint in this action seeking recovery for themselves and on behalf of a class of similarly-situated diesel-fuel purchasers.[1] (Compl. ¶ 1, ECF No. 8.)

Consistent with each Plaintiff's original complaint, the Complaint alleges that Defendants "represented to its commercial customers that it would provide rebates or discounts on diesel fuel purchased at Pilot and . . . Flying J truck stops operating throughout the United States, pursuant to diesel fuel price rebate . . . and discount agreements between Pilot and its commercial customers," but failed to do so. (Compl. ¶¶ 1-2, 26.) Specifically, Plaintiffs allege that Pilot Flying J "employees were intentionally defrauding customers by withholding diesel fuel price rebates and discounts . . . without the knowledge or approval of the customers, which resulted in Pilot [Flying J] charging a higher price for diesel fuel" than customers had agreed to. (*Id*. ¶¶ 31-32.) Defendants allegedly engaged in this scheme "for the dual purpose of increasing Pilot [Flying J]'s profitability and the sales commissions of Pilot [Flying J] employees." (*Id*. ¶ 33.)

Based on these and other allegations, Plaintiffs assert seven causes of action against Defendants: (1) common-law fraud; (2) violation of the 50 states' consumer protection statutes; (3) unjust enrichment; (4) conversion; (5) breach of contract; (6) violation of the Racketeer Influenced and Corrupt Organizations Act; and (7) fraudulent concealment. (*Id*. ¶¶ 67-114.)

II. THE PARTIES' SETTLEMENT AGREEMENT

In mid-May 2013, the parties began discussing the possibility of a resolution of this lawsuit. On July 13, 2013, following approximately two months of arms-length negotiations—including multiple in-person and telephonic meetings between Defendants' counsel and

[1] Ohio Auto Delivery, Inc. and Eagle Motor Freight, Inc. also filed actions against Defendants raising similar allegations. After reviewing the terms of the settlement, discussing it with Settlement Class Counsel, and resolving concerns they had, they made the decision to join as class representatives as set forth in their statements filed as Exhibits 6 and 7 to Plaintiffs' Memorandum in Support of Joint Motion for Final Approval of Class Action Settlement ("Plaintiffs' Memorandum") (ECF No 28).

Plaintiffs' counsel and many rounds of offers and counter-offers—the parties agreed on the essential terms of the settlement, other than the payment of the fees and costs of Plaintiffs' counsel. Thereafter, the parties negotiated the amount of attorneys' fees and costs to be requested by Plaintiffs' counsel.

On July 15, 2013, the parties formally entered into a written agreement for a nationwide settlement of Plaintiffs' claims on behalf of a class of diesel fuel purchasers from January 1, 2008 to July 15, 2013. On July 16, 2013, the parties filed a Joint Motion for Preliminary Approval of Class Settlement and Approval of Notice to Settlement Class Members (ECF No. 4), which this Court granted (ECF No. 10). The parties revised the settlement agreement on July 23, 2013, to expand the class period by three years—from January 1, 2005, to July 15, 2013 (the "Revised Settlement Agreement"). Specifically, the Revised Settlement Agreement defined the proposed "Settlement Class" as:

> all persons and entities in the United States who purchased over the road diesel fuel for commercial use in Class 7 and Class 8 vehicles (as Class 7 and Class 8 are defined by the United States Department of Transportation) from Defendants Pilot Corporation and Pilot Travel Centers LLC d/b/a Pilot Flying J pursuant to a diesel fuel rebate program or discount program (which rebate or discount program is defined as a cost-plus and/or retail-minus discount program (not to include discounts for payments made by cash, check, or major credit card at point of sale)), or both, from January 1, 2005, to the Execution Date of this Agreement.

(Rev. Settlement Agreement ¶¶ 3, 32, ECF No. 14-1.)

The key terms of the settlement are:

- Defendants shall pay 100% of the amount owed to each class member based on the audited results of DIA's investigation into the diesel fuel rebate and discount programs, plus interest calculated at six percent of the principal multiplied by the number of years (expressed in whole numbers or fractions of years) that have passed from the date that each original rebate payment was made or discount credit was applied to the date on which the principal is calculated, and minus any amount already paid to that class member as part of Defendants' voluntary payment program (*id*. ¶¶ 12, 29, 31, 41);

- A court-approved independent accounting firm, the "Independent Accountant," will review the work performed by members of DIA in order to confirm, to a reasonable degree of certainty, that the work performed (1) properly identifies the class members who are entitled to compensation and (2) accurately quantifies the amount of compensation due. At the conclusion of its review, the Independent Accountant will issue a report to the Court as to whether DIA met the accuracy criteria specified in the Revised Settlement Agreement (*id*. ¶¶ 20, 35-38);
- Settlement payments will be mailed to class members within 30 days of their payments being finally calculated (*id*. ¶ 41);
- Because the results of the audit may conclude that some class members received proper discount or rebate amounts, and thus are not entitled to any settlement payment, Defendants will inform those class members of the outcome of the audit process with an additional notice;
- Any class member who disagrees with the results of DIA's investigation may request that the Independent Accountant review the calculation, and if the class member is not satisfied with the Independent Accountant's determination, the class member may retain its own accountant, at its sole cost and expense, and subsequently file a motion with the Court to challenge the Independent Accountant's decision (*Id*. ¶ 40);
- Defendants agree to be permanently enjoined from deliberately and deceptively withholding price rebates or discounts from customers in the United States who purchase over the road diesel fuel for commercial use in Class 7 or Class 8 vehicles, without the knowledge or approval of the customers, and which results in Pilot Flying J charging its customers a higher price for diesel fuel than the agreed-upon price (*id*. ¶ 46);
- Defendants will pay all costs of providing notice to the Class and administration of the settlement (*id*. ¶ 45);
- Defendants will pay attorneys' fees and costs in an amount to be approved by the Court, but not to exceed 33.33% of the total principal amount owed or $14,000,000, whichever is less (*id.* ¶¶ 58-59);
- Defendants will pay incentive awards to the class representatives (*id*. ¶ 61); and
- The attorneys' fees, costs, and expenses and the incentive awards are to be paid over and above any payments to members of the Settlement Class and will not reduce the amount of any settlement payments made to class members (*id*. ¶ 58).

Pilot Flying J anticipates that the total amount paid to Settlement Class members will exceed $55 million, not including interest. (Aff. of Paul Pardue ("Pardue Aff.") ¶ 15, ECF No.

28-1.)[2] Pilot Flying J already has paid approximately $4.1 million in interest and anticipates paying more upon final approval of the settlement. (*Id*. ¶ 15.) The cost of the audit likely will exceed $4.5 million, which is in addition to the settlement's other class benefits. (*Id*. ¶ 17.)

In exchange for the consideration described above, Plaintiffs and members of the Settlement Class will release Defendants from all claims, actions, or causes of actions, whether known or unknown, that Plaintiffs or class members may have for any act, omission, harm, matter, cause, or event that has occurred at any time up to the Final Settlement Date (as that term is defined in the Revised Settlement Agreement) and relates to any error, omission, or act with respect to Defendants' diesel fuel sales or its rebate or discount program. (Rev. Settlement Agreement ¶¶ 23, 72.) Also, upon entry of a Final Order and Judgment, this action will be dismissed with prejudice, and all Released Claims (as defined in the Revised Settlement Agreement) will be deemed conclusively settled and resolved as to Plaintiffs and all Settlement Class members. (*Id.* ¶ 71.)

III. THE COURT'S PRELIMINARY APPROVAL ORDER

On July 23, 2013, the parties moved for preliminary approval of, the Revised Settlement Agreement. (ECF No. 14.) On July 24, 2013, this Court entered the Amended Class Settlement Preliminary Approval Order ("Preliminary Approval Order"), which:

- Conditionally certified for settlement purposes the Settlement Class;
- Preliminarily approved the terms of the Revised Settlement Agreement;
- Approved Horne as the Independent Accountant to review the work performed by DIA in calculating the compensation to be paid to eligible members of the Settlement Class;
- Appointed Total Class Solutions LLP ("TCS") as the class administrator, whose costs were to be paid by Defendants;

[2] Mr. Pardue's affidavit is attached as Exhibit 1 to Plaintiffs' Memorandum.

- Approved the parties' proposed Revised Class Action Settlement Notice ("Notice"), as well as the proposed methods and timing for dissemination of the Notice by mail and publication of the settlement by press release;

- Scheduled a hearing to determine whether the certification of the Settlement Class and the settlement should receive final approval;

- Ordered Settlement Class members who wish to be excluded from the settlement to mail their requests for exclusion to TCS, postmarked no later than 90 days after entry of the Preliminary Approval Order; and

- Ordered Settlement Class members who wish to object to the certification of the Settlement Class, the designation of Plaintiffs as class representatives, the appointment of Lead Counsel and Class Counsel, the settlement, the Revised Settlement Agreement, or Class Counsel's request for an award of attorneys' fees and expenses, to make any objection in writing, file it with the Court, and mail it to Class Counsel and Defendants' counsel, no later than 90 days after entry of the Preliminary Approval Order.

(Prelim. Approval Order, ECF No. 15.)

IV. THE PARTIES' COMPLIANCE WITH THE COURT'S ORDER

A. DIA Has Been Engaged in a Comprehensive Review of The Settlement Class Members' Accounts

DIA—through the efforts of 25 internal auditors and more than 30 contract auditors—has been engaged for the past seven months in determining whether each member of the Settlement Class is owed money and, if so, calculating the amount owed. (*See generally* Pardue Aff. ¶¶ 4-18.) The auditing process has consisted of a comprehensive examination into class members' accounts and their discount/rebate payments received since 2005. (Pardue Aff. ¶¶ 6-13.) Any account found to have a payment discrepancy is reviewed and verified by a team leader and repriced using historical pricing data. (*Id*. ¶¶ 11-12.) Peer review audits have sampled those accounts without a discrepancy to ensure accuracy. (*Id*. ¶ 12.) Once completed, DIA will have audited approximately 7,000 accounts and devoted more than 5,000 man hours to reviewing these accounts for potential non-payments or underpayments. (*Id*. ¶ 14.) To accomplish this

colossal task, auditors have been working, on average, in excess of 70 hours per week. (*Id*. ¶¶ 17-18.)

Further, in accordance with the Revised Settlement Agreement, DIA's work has been, and will continue to be, reviewed by Horne to confirm, to a reasonable degree of certainty, that DIA's work (1) fully identifies the class members who are entitled to compensation, and (2) accurately quantifies the amount of compensation owed. (*See* Aff. of Robert Heard Alexander, Jr. ("Alexander Aff.") ¶ 4, ECF No. 28-4.)[3] Horne partners have met with DIA's key team members on several occasions, and a team of Horne staff members spent multiple weeks shadowing and interviewing DIA's auditors. (*Id*. ¶ 6.) Horne has worked diligently over the past several months to implement procedures to verify DIA's methods and calculations, and its testing began on October 24, 2013. (*Id*. ¶ 7.) Thus far, Horne has found no exceptions in DIA's work and has found that Pilot Flying J has been focused on completing the project effectively, properly, and in conformity with the Settlement Agreement. (*Id*. ¶¶ 8, 9; *see also id*. ¶ 10 ("It is my opinion that the process as laid out in the Agreement is working as planned.").)

B. The Parties Provided Individual Notice to Members of the Settlement Class

After the Court granted preliminary approval to the settlement, the parties prepared final versions of the Notice and provided a copy to TCS. (Decl. of Compliance ¶ 3, ECF. No. 22.) On August 6, 2013, TCS sent a copy of the Notice by First Class Mail to approximately 4,395 Settlement Class members for whom Pilot Flying J possessed a United States postal address, after having first verified and updated the addresses utilizing the National Change of Address database. (*Id*. ¶ 6; *see also* Decl. of Lauran Schultz on Implementation & Adequacy of

[3] Mr. Alexander's affidavit is attached as Exhibit 4 to Plaintiffs' Memorandum.

Settlement Notice & Notice Plan ("Schulz Decl.") ¶¶ 22-23, ECF No. 28-2; Aff. of Timothy J. Taylor of Total Class Solutions ("Taylor Aff.") ¶¶ 9, 11, ECF No. 28-3.)[4]

On August 9, 2013, TCS completed a mailing to 986 additional United States addresses. (Decl. of Compliance ¶ 6; Taylor Aff. ¶ 12; Schultz Decl. ¶ 26.) TCS also mailed a copy of the Notice by First Class Mail to approximately 784 customers for whom Pilot Flying J possessed a Canadian mailing address, but who potentially may operate in the United States and who could have bought diesel fuel from Pilot Flying J stores in the United States. (Decl. of Compliance ¶ 6.) As of August 9—17 days after entry of the Preliminary Approval Order—86% of the Notices were mailed. (Schulz Decl. ¶ 24.)

Following these mailings, Pilot Flying J and TCS continued researching to complete or correct any addresses records that were initially incomplete or incorrect, including searching Secretaries of State databases, conducting Internet searches, and making telephone calls. (Decl. of Compliance ¶ 7; Schultz Decl. ¶ 28.) This research resulted in an additional 409 notices mailed on September 9, 2013, 407 notices mailed on October 17, 2013, and 151 notices mailed on October 22, 2013. (Schultz Decl. ¶¶ 25-26.) Additionally, on September 9, 2013, Notices were mailed to 46 attorneys representing customers who had sued Defendants. (Taylor Aff. ¶ 13.) As of October 23, 2013, only 210 Notices have been returned as undeliverable and have not been re-mailed. (Schultz Decl. ¶ 28; Taylor Aff. ¶ 14.) In order to locate addresses for those customers for whom Pilot Flying J did not have current or complete information, Pilot Flying J hired a private investigator to conduct searches. As a result of the actions described above,

[4] Mr. Schultz's declaration and Mr. Taylor's affidavit are attached as Exhibits 2 and 3, respectively, to Plaintiffs' Memorandum.

current addresses for nearly all of Pilot Flying J's customers were located. It is estimated that 97% of Settlement Class members have received the Notice. (Schultz Decl. ¶ 28.)

C. Members of the Settlement Class Received Information Relating to the Settlement Through the Settlement Website

On July 23, 2013, the settlement website, www.DieselRebateSettlement.com, was launched. (Schultz Decl. ¶ 29; Taylor Aff. ¶ 7.) The website—which was referenced on each page of the Notice—includes copies of the various court documents, including the Notice (in English and Spanish), the Revised Settlement Agreement, and the Preliminary Approval Order. It also provides information regarding the settlement, including key settlements dates, answers to frequently asked questions, and an email and postal address for the Class Administrator. (*Id*.) As of October 23, 2013, there had been 3,075 unique website visitors, viewing 6,351 website pages. (Schultz Decl. ¶ 30; Taylor Aff. ¶ 16.) Through the website, TCS has received and responded to 99 email messages regarding the settlement.[5] (*Id*.)

D. The Parties Provided Notice By Press Release

In accordance with the Preliminary Approval Order, Pilot Flying J publicized the settlement by issuing a press release through a national news wire service on July 23, 2013. (Decl. of Compliance ¶ 4; *see also* Schultz. Decl. Attachment 4.) The press release included the settlement website address to enable Settlement Class members to access information about the settlement online. (Decl. of Compliance ¶ 4.)

A search of the LexisNexis database "English Language News (Most recent Two Years)" with the terms "Pilot Flying J" and "settlement," displayed 109 results for the period July 23, 2013 through August 23, 2013. (Schultz Decl. ¶ 32.) Articles about the settlement were

[5] Pilot Flying J also set up an additional website, http://rebateeducation.pilotflyingj.com, which contains information about the settlement and a link to the settlement website established pursuant to the Revised Settlement Agreement.

published by the Associated Press, the Wall Street Journal, and USA Today, as well as by newspapers and business publications in such cities as Cleveland, Pittsburgh, Knoxville, Nashville, Akron, Memphis, Columbus, and Houston.

E. Defendants Complied with the Class Action Fairness Act's Notice Requirements

On July 23, 2013, Pilot Flying J mailed letters to each state's attorney general and the United States Attorney General. These letters and accompanying compact discs contained the notice materials required by the Class Action Fairness Act, 28 U.S.C. § 1715. (Decl. of Compliance ¶ 5.)

V. NO MEMBERS OF THE SETTLEMENT CLASS HAVE OBJECTED TO THE SETTLEMENT AND APPROXIMATELY ONE PERCENT HAVE OPTED OUT

Out of a class of more than 5,500 members, as of November 1, 2013, TCS had received only 59 (timely and untimely) unique requests for exclusion,[6] representing approximately one percent of the Settlement Class. (Taylor Aff. ¶ 17.) The Court has not received any objections to the settlement, the Revised Settlement Agreement, or Class Counsel's request for an award of attorneys' fees, costs, and incentive awards for Plaintiffs.

ARGUMENT

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the parties have moved the Court to certify a nationwide Settlement Class and to grant final approval to the parties' class action settlement on the terms set forth in the Revised Settlement Approval. The proposed settlement is fair and provides more than adequate relief to the members of the Settlement Class. It satisfies all requirements of Rule 23 and due process. Accordingly, the Court should grant final approval to the settlement.

[6] The parties treat an opt-out request made on behalf of a customer's multiple affiliated companies as one single request for exclusion. (*Id*. ¶ 17.)

I. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. The Standards for Final Approval of the Settlement

Rule 23(e) requires court approval of any settlement of a class action. Approval is appropriate if the proposed class settlement is "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), and "not a product of collusion," *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005). There is a strong presumption in favor of settlement of class action lawsuits. *See In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, 716 F.3d 1057, 1063 (8th Cir. 2013) ("A settlement agreement is 'presumptively valid.'" (quoting *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 921 F.2d 1371, 1391 (8th Cir. 1990))); *accord Wal-Mart Stores, Inc.*, 396 F.3d at 116; *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004); *Armstrong v. Bd. of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 313 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998).

Courts consider four factors in determining whether a settlement is fair, reasonable, and adequate: "(1) 'the merits of the plaintiff's case[] weighed against the terms of the settlement,' (2) 'the defendant's financial condition,' (3) 'the complexity and expense of further litigation,' and (4) 'the amount of opposition to the settlement.'" *Uponor, Inc.*, 716 F.3d at 1063 (quoting *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988)). The first factor is "[t]he most important consideration." *Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d at 933. As the following discussion demonstrates, the applicable criteria and policies support final settlement approval.

B. The Terms of the Settlement Are Objectively Reasonable, Particularly In Light of the Risks of Continued Class Litigation

The Revised Settlement Agreement provides real, meaningful relief to the class. (*See, e.g.*, Class Member Eagle Motor Freight, Inc.'s Subm. in Supp. of Class Settlement ("Eagle

Motor Freight Subm.") 8, ECF No. 28-7 (explaining that the settlement will provide Eagle Motor Freight, Inc. and class members with "an exceptional recovery"); Decl. of Ohio Auto Delivery, Inc. Supporting Settlement 3, ECF No. 28-6 ("When considered and understood, the settlement proposes fair and reasonable compensation, and it contains the necessary checks and balances to ensure that fair and reasonable compensation will be received.").)

Specifically, DIA has been engaged in determining amounts owed to class members based on non-payments or underpayments of fuel rebates or discounts. (*See* Pardue Aff. ¶¶ 4-18.) Their work is being reviewed and verified by Horne, the independent accountant appointed by this Court. (*See* Alexander Aff. ¶¶ 3-10.) After the auditing process determines that a class member is owed money, Pilot Flying J will send that class member a check for ***100 percent of what the class member is owed, plus interest calculated at six percent***. (Rev. Settlement Agreement ¶¶ 29, 41.) This process will continue until all class members' accounts have been reviewed. Pilot Flying J expects to pay a total of approximately $55 million, not including interest, to the Settlement Class. (Pardue Aff. ¶ 15.) Any class member who disputes the calculation may request that Horne review the calculation—at Defendants' expense—and, if that class member is not satisfied with Horne review, it may retain its own accountant and file a motion to challenge the calculation. (Rev. Settlement Agreement ¶ 40.)

Moreover, class members need not wait to receive their checks until any appeal of the settlement has been adjudicated; rather, checks are mailed within 30 days of DIA's calculating those amounts. (*Id*.¶ 41.) If this Court declines to approve the Revised Settlement Agreement or if the final approval is reversed on appeal, "all Settlement Payments" already made will "remain the property of the class members who received the Settlement Payments." (*Id*. ¶ 47.) Still further, Defendants agree to be permanently enjoined from withholding price rebates or

discounts from its customers without their knowledge or approval. (*Id*. ¶ 46.) Indeed, DIA has reviewed and approved every rebate payment issued to Pilot Flying J's customers since April 2013, and changes have been made to Pilot Flying J's system so that no pricing changes can occur without direct acknowledgement from the customer. (Pardue Aff. ¶ 16.)

In other words, all class members will have their accounts audited by a Court-overseen auditing process. Those who are entitled to compensation will receive more than what they are owed, do not have to wait for a lengthy litigation process to receive their compensation, and can retain the money even if the settlement ultimately falls through. And class members will receive these benefits without incurring any costs of administration or attorneys' fees. *See Wineland v. Casey's Gen. Stores, Inc.*, 267 F.R.D. 669, 676 (S.D. Iowa 2009) ("Another factor contributing to the reasonableness, fairness, and adequacy of the Settlement is the fact that the Settlement provides for reasonable attorneys' fees and expenses, as well as certain premiums for named Plaintiffs . . . and will not in any way diminish the benefit to any class member."). Class members who received the proper rebate amounts in the ordinary course of business will be notified of this fact, and they will be given an opportunity to challenge the auditors' decision.

This is especially fair in light of the substantial risks Plaintiffs would face if forced to litigate this class action through trial. Several key facts cast significant doubt on whether this action would be properly maintainable as a class action for trial purposes and make it unlikely that Plaintiffs would succeed on the merits of a classwide trial using common, classwide proof. For instance, the Complaint alleges that Defendants engaged in a fraudulent scheme that targeted only unsophisticated customers while Pilot Flying J continued to properly pay its sophisticated customers. (Compl. ¶¶ 38-41, 46.) If Plaintiffs' theory were correct, only those class members who were targeted by the scheme would have been injured and suffered damages and, thus, have

potentially viable claims. Because Rule 23 cannot be used to alter the nature of a plaintiff's claims, at least a significant portion of the class cannot succeed on the merits. Plaintiffs may be unable to prove fact of injury and damages with common, classwide evidence, thus making it unlikely that any class-action trial would be manageable, efficient, and fair, all as required by Rule 23(b)(3). *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432-33 (2013).

The first factor of the *Van Horn* test, therefore, weighs heavily in favor of settlement.

C. Defendants' Financial Condition Weighs in Favor of Approval

Neither Plaintiffs nor any member of the Settlement Class have suggested that Pilot Flying J's financial condition should have resulted in a better settlement. To the contrary, members of the Settlement Class have recognized that Defendants have offered an "exceptional recovery" that makes members of the Settlement Class completely whole for any underpayments and provides additional consideration in the form of interest payments and attorneys' fees. (Eagle Motor Freight Subm. 8.) Because Defendants are capable of paying for this settlement, they agreed to such a generous resolution in order to avoid a lengthy, expensive litigation. This factor, therefore, weighs in favor of final settlement approval. *See, e.g.*, *In re Zurn Pex Plumbing Prods. Liab. Litig.*, No. 08-MDL-1958 ADM/AJB, 2013 WL 716088, at *7 (D. Minn. Feb. 27, 2013) (factor weighed in favor of settlement approval where no class member "suggested that the Zurn Defendants' financial condition should have resulted in a better settlement"); *In re UnitedHealth Grp. Inc. S'holder Derivative Litig.*, 631 F. Supp. 2d 1151, 1157-58 (D. Minn. 2009) (finding that "the defendants' financial condition weighs in favor of approval" where the defendants could meet their settlement obligations and received substantial benefits from the settlement).

D. The Complexity and Expense of Further Litigation Weighs in Favor of Final Settlement Approval

The complexity and expense of class action litigation is well-recognized. *Zurn Pex Plumbing*, 2013 WL 716088, at *7 (citing *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 535 (8th Cir. 1975)). This case is no exception. If the Revised Settlement Agreement is not approved, Defendants intend to vigorously litigate this case, including filing motions to dismiss and for summary judgment and opposing class certification. Extensive litigation, including a class certification hearing, trial, and appeals, would expend significant time and resources for each party and the Court.

Further, Plaintiffs seek recovery for common-law claims of fraud, breach of contract, fraudulent concealment, conversion, and unjust enrichment and for violations of the consumer protection laws of the 50 states, on behalf of a nationwide class of Pilot Flying J's customers. If this lawsuit were to proceed to trial as a nationwide class action, the Court would be required to instruct the jury on the laws of up to 50 different states. This would result in a complex, unmanageable trial or, more likely, an inefficient series of state-by-state mini-trials.

The proposed settlement will relieve the parties and this Court of the inefficiencies and costs of litigating this putative class action. *See DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995) ("The parties to a class action are not required to incur immense expense before settling as a means to justify that settlement."); *Zurn Pex Plumbing*, 2013 WL 716088, at *7 ("[T]he various procedural and substantive defenses likely to be argued by the Zurn Defendants, the expense of proving class members' claims, the certainty that resolution under this settlement will foreclose any subsequent appeals, and the fear that, unsettled, the 'ultimate resolution of the action . . . could well extend into the distant future,' all weigh in favor of the

settlement's approval." (quoting *Snell v. Allianz Life Ins. Co. of N. Am.*, No. Civ. 97-2784 RLE, 2000 WL 1336640, at *16 (D. Minn. Sept. 8, 2000))); *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1013 (S.D. Ohio 2001) ("[A]bsent a settlement, there would no doubt be substantial time and expense devoted to motion practice, likely appeals from those motions, multiple trial preparations, trials, and appeals from trials."). Simply put, this settlement ensures that Plaintiffs and class members are made (more than) whole without the time and expense of complex litigation. *Cf. Air Lines Stewards & Stewardesses Ass'n v. Am. Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972) ("[T]he public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation."). The third factor, therefore, weighs in favor of settlement.

E. There Have Been No Objections to the Settlement

Out of a class of more than 5,500 members, the Court has not received any objections to the settlement. (Taylor Aff. ¶ 18.) Further, TCS reported that only 59 unique members—approximately one percent of the Settlement Class—have chosen to opt out of the settlement.[7] (*Id*. ¶ 17.) These facts further support the fairness and reasonableness of the settlement. *See Uponor, Inc.*, 716 F.3d at 1063 (affirming district court's grant of final settlement approval where only 26 out of 30,000 class members had objected to the settlement, which amounted to "only token opposition"); *Wineland*, 267 F.R.D. at 676 ("overwhelming support" in the form of no objections and only a few opt-outs "is strong circumstantial evidence supporting the fairness of the Settlement" (quoting *Mangone v. First USA Bank*, 206 F.R.D. 222, 227 (N.D. Ill. 2001))); *Telectronics*, 137 F. Supp. 2d at 1018 ("Generally, a diminutive amount of objectors may signify that a settlement is fair.").

[7] This number includes both timely and untimely submissions.

F. The Settlement Was Reached Through Good-Faith Bargaining Between Experienced Counsel

An important consideration relevant to the fairness determination is whether the settlement was reached through good-faith bargaining among the parties. *See Wal-Mart Stores, Inc.*, 396 F.3d at 116 (noting that a presumption of fairness, adequacy, and reasonableness may attach to a class settlement "reached in arm's-length negotiations between experienced, capable counsel"); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 122 (S.D.N.Y. 2009) ("Where a settlement is the 'product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation,' the negotiation enjoys a 'presumption of fairness.'" (quoting *In re Austria & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000))). In this case, the settlement was reached after substantial good-faith bargaining. Specifically, after more than two months of negotiations and multiple rounds of offers and counter-offers, the parties agreed on the settlement's essential terms on July 13, 2013. It was only after this agreement as to the class members' benefits that the parties negotiated a reasonable amount of attorneys' fees to be requested by Plaintiffs' counsel.

Moreover, the view of experienced counsel favoring the settlement is accorded "great weight" in appraising the fairness and adequacy of a proposed settlement. *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, No. 11-MD-2247 ADM/JJK, 2012 WL 2512750, at *7 (D. Minn. June 29, 2012), *aff'd*, 716 F.3d 1057 (8th Cir. 2013); *see also DeBoer*, 64 F.3d at 1178 (noting that the settling parties' views as to the propriety of the settlement are entitled to deference and affirming class settlement where "class counsel is experienced in this type of litigation"). Here, the Revised Settlement Agreement was negotiated between experienced, capable counsel. (*See* Ex. 5 to Pls.' Mem., ECF No. 28-5.) For instance, John W. (Don) Barrett,

the lead negotiating attorney for Plaintiffs, is one of the preeminent trial lawyers in America and has significant experience in complex, class-action litigation, including as lead counsel for the plaintiffs in *Cox v. Shell Oil Co*., a class-action case that resulted in the largest property-damage class settlement in the United States, and as a principal negotiator for the plaintiff class in *In re Inter-Op Hip Prosthesis Products Liability Litigation*, MDL No. 1401 (N.D. Ohio), in which he negotiated a $1.045 billion class settlement with the defendants. (Aff. of John W. (Don) Barrett 5-6, ECF No. 28-5.) Similarly, lead defense counsel Aubrey Harwell has more than four decades of commercial litigation experience, including in many cases receiving national attention. *See* http://www.nealharwell.com/attorneys/aubrey-b-harwell-jr.

Neither the substantive terms of the Revised Settlement Agreement nor its provisions regarding attorneys' fees and costs indicate that the Revised Settlement Agreement is the product of fraud, collusion, or Plaintiffs' or their attorneys' abandonment of the class' interests. Accordingly, this settlement is fair, reasonable, and adequate and should be given final approval.

II. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS

The Federal Rules of Civil Procedure allow a case to be certified as a class action only if the action satisfies all four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—and at least one of the three categories in Rule 23(b). These requirements also apply when a class is proposed to be certified for settlement purposes. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (holding that requests for settlement-only class certification are subject to Rule 23's certification requirements); *Simmons v. Enter. Holdings, Inc*., No. 4:10CV00625 AGF, 2012 WL 718640, at *1 (E.D. Mo. March 6, 2012) ("[T]his Court may, upon request of the parties, certify a class solely for purposes of settlement after making a determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of

the subsections of Rule 23(b)." (internal quotation marks, citation omitted)). In the context of settlement, "Rules 23(a) and (b) continue to serve the purpose of 'focus[ing] court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives.'" *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 239 (2d Cir. 2012) (quoting *Amchem*, 521 U.S. at 621) (alteration in original).

A trial court may consider the settlement in determining whether Rule 23 is satisfied because "[s]ettlement is relevant to class certification." *Amchem*, 521 U.S. at 619. For instance, a court "[c]onfronted with a request for settlement-only class certification . . . need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Id*.at 620 (citation omitted); *see also Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 335 (3d Cir. 2011) (Scirica, J., concurring) ("A key question in a litigation class action is manageability—how the case will or can be tried, and whether there are questions of fact or law that are capable of common proof. But the settlement class presents no management problems because the case will not be tried.").

As briefly described above, this action likely could not be properly certified as a national class action for trial purposes because of the differences in experiences among the class members and the variations among the state laws at issue. Because the parties are requesting certification of a settlement class, the proposed settlement, if approved, means that there would not be a trial and that the many case-management problems that could plague a trial class would not arise. Thus, Defendants are willing to stipulate, for settlement purposes only, that the proposed Settlement Class complies with Rule 23(a)'s and (b)(3)'s certification requirements.

A. Rule 23(a) Is Satisfied for Settlement Purposes

1. The Settlement Class Is So Numerous That Joinder of All Members Is Impracticable

The first prerequisite to class certification is that the class be so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). Here, the Settlement Class consists of more than 5,500 Pilot Flying J customers. For purposes of effecting the settlement, Pilot Flying J stipulates that the numerosity requirement is satisfied.

2. There Are Questions of Law or Fact Common to All Class Members for Settlement Purposes

The second prerequisite to class certification—the commonality requirement—is that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The commonality requirement is satisfied where the plaintiffs' claims depend on a "common contention" that is "capable of classwide resolution—which means 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." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). A single common question is sufficient to establish Rule 23(a)(2). *Id*. at 2556.

For purposes of effecting the settlement, Pilot Flying J stipulates to the existence of questions of law or fact common to all members of the proposed Settlement Class, including whether Defendants engaged in a scheme to withhold agreed-upon rebates and discounts from certain customers.

3. The Typicality Requirement Is Satisfied for Settlement Purposes

The third prerequisite to class certification is that Plaintiffs' claims be typical of the claims of the class. Fed. R. Civ. P. 23(a)(3). Typicality focuses on whether other class members have claims similar to the named plaintiff, *DeBoer*, 64 F.3d at 1174, and "is generally considered

to be satisfied if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory," *Ginardi v. Frontier Gas Servs., LLC*, No. 4:11-cv-00420-BRW, 2012 WL 1377052, at *2 (E.D. Ark. Apr. 19, 2012) (quoting *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561-62 (8th Cir. 1982)).

For purposes of effecting the settlement, Pilot Flying J stipulates that Plaintiffs' claims are typical of the claims of the Settlement Class. Plaintiffs allege that they have been damaged by the same conduct that allegedly damaged other members of the Settlement Class: Defendants' alleged scheme to wrongfully withhold or reduce agreed-upon discounts and rebates. Moreover, the claims of Plaintiffs and other members of the Settlement Class are based upon corresponding theories, such as fraud, fraudulent concealment, breach of contract, unjust enrichment, and violations of RICO and consumer fraud statutes. For purposes of the settlement, Plaintiffs' claims are not in conflict with or antagonistic to the claims of the Settlement Class as a whole.

4. Plaintiffs Will Fairly and Adequately Protect the Settlement Class' Interests

The fourth prerequisite is that Plaintiffs and their attorneys be able to fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a)(4). "The focus of Rule 23(a)(4) is whether: (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Garner v. Butterball, LLC*, No. 4:10CV01025 JLH, 2012 WL 570000, at *4 (E.D. Ark. Feb. 22, 2012) (quoting *Paxton*, 688 F.2d at 562-63). For purposes of effecting the settlement, Pilot Flying J stipulates that Plaintiffs will fairly, fully, and adequately protect the interests of the Settlement Class. Pilot Flying J is not aware of any interests Plaintiffs

or their counsel may have that would conflict with, or be adverse to, those of the class. There also is no dispute that Plaintiffs' counsel are experienced in prosecuting class litigation.

B. The Class Satisfies Rule 23(b)(3) for Settlement Purposes

Rule 23(b)(3) allows a class action to be maintained if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "To satisfy the 'predominance' standard, plaintiffs must show that [various elements] can be proven on a systematic, class-wide basis." *Blades v. Monsanto Co*., 400 F.3d 562, 569 (8th Cir. 2005). The predominance and superiority inquiries "will sometimes be easier to satisfy in the settlement context," *Am. Int'l Grp. Sec. Litig.*, 689 F.3d at 240, because the court "need not inquire whether the case, if tried, would present intractable management problems," *Amchem*, 521 U.S. at 620.

For purposes of effecting the settlement, Pilot Flying J stipulates to the existence of predominant questions of law and fact common to all members of the proposed Settlement Class based on Plaintiffs' allegations that Defendants engaged in a scheme to withhold or reduce agreed-upon rebates and discounts from certain class members for the purpose of increasing Pilot Flying J's profitability and its employees' sales commissions. Pilot Flying J further stipulates, for the purpose of this settlement, to the superiority of the Settlement Class and the Revised Settlement Agreement over continued litigation. As described above, the settlement will provide all injured class members with full, immediate compensation and ensures that Defendants do not engage in the alleged wrongful conduct in the future. The settlement also relieves Plaintiffs, Defendants, class members, and this Court from engaging in time-consuming, costly litigation.

To be sure, Plaintiffs allege violations of all 50 states' "deceptive trade practices" statutes and assert various common-law claims, which likely would have to be adjudicated under the laws of class members' respective home states. *See Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 821 (1985). Although adjudication under the laws of up to 50 states would make certification for trial difficult, state-law differences will not defeat a finding of predominance for a nationwide settlement class. *See In re Warfarin*, 391 F.3d at 530 (explaining that the "fact that there may be variations in the rights and remedies available to injured class members under the various laws of the fifty states in this matter does not defeat commonality and predominance"); *accord In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1059 (S.D. Tex. 2012); *In re Ky. Grilled Chicken Coupon Mktg.& Sales Prac. Litig.*, 208 F.R.D. 364, 385 (N.D. Ill. 2011); *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 974 (N.D. Ill. 2011). This is so because "the same concerns with regards to case manageability that arise with litigation classes are not present with settlement classes, and thus those [state-law] variations are irrelevant to certification of a settlement class." *Warfarin Sodium*, 391 F.3d at 529; *see also Gotthelf v. Toyota Motor Sales, U.S.A., Inc*., 525 F. App'x. 94, 102 n.13 (3d Cir. 2013).

Nor does the fact that questions of injury and damages are individualized preclude certification of the Settlement Class. Although the presentation of individualized proofs of injury and damages would make a class trial unmanageable and inefficient, that same concern is not present with settlement classes. *See, e.g., In re Oil Spill by Oil Rig Deepwater Horizon in the Gulf of Mex., on Apr. 20, 2010*, 910 F. Supp. 2d 891, 924 (E.D. La. 2012) ("[C]ertain causation issues remain that would have to be decided on an individual basis were the cases not being settled. . . . These limited individualized issues do not defeat predominance in light of the core

common issues that are appropriate for classwide treatment."). To the contrary, the Revised Settlement Agreement directly resolves issues of injury and damages: DIA will continue to determine amounts owed to class members based on non-payments or underpayments, if any; Horne will verify this auditing procedure; and class members may object to their findings. Because this proposed resolution of injury and damages questions will not pose any management concerns to the Settlement Class, common issues predominate in this settlement class. *See, e.g.*, *In re FEMA Trailer Formaldehyde Prod. Liab. Litig*., No. 2:07-MD-1873, 2012 WL 4513344, at *3 (E.D. La. Sept. 27, 2012) (finding predominance where, *inter alia*, "the Settlement sufficiently addresses issues of product identification, causation, injury and damages, which otherwise would be considered individual in a litigated class").

Accordingly, Rule 23's requirements for certification of the proposed Settlement Class are satisfied, and the class should be certified here.

III. THE PARTIES' NOTICE AND METHODS OF NOTICE DISSEMINATION SATISFY RULE 23 AND DUE PROCESS

Rule 23(c)(2)(B) requires that, "[f]or 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." Fed. R. Civ. P. 23(c)(2)(B); *see also Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 120 (8th Cir. 1975) (notice of a class action settlement must be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (quoting *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950))). The parties jointly proposed a notice plan that provided for the best notice practicable under the circumstances. This Court agreed:

> [T]he proposed plan for distributing the Revised Settlement Notice by first-class U.S. Mail, in combination with the appearance of same on the Class Administrator's website and Class Counsel's websites and with Pilot Flying J's planned publication of the Settlement by a press release issued through a national news wire service, is the best notice that is practicable under the circumstances and is reasonably calculated to reach the members of the Settlement Class and to apprise them of the Action, the terms and conditions of the Revised Settlement Agreement, their right to opt-out and be excluded from the Settlement Class, to object to the Revised Settlement Agreement, and to appear at the Fairness Hearing. There appear to be no additional modes of distribution that would be reasonably likely to notify members of the Settlement Class who would not receive notice pursuant to the proposed distribution plan. The proposed plan also satisfies the requirements of Federal Rule of Civil Procedure 23 and due process.

(Prelim. Approval Order, Part III.B.)

As described above, the parties and the Class Administrator have complied with the notice requirements set forth in the Preliminary Approval Order. (*See* Background, Part IV, *supra*.) The Notice informed Settlement Class members (1) of the nature of the action, (2) of the definition of the certified class, (3) of the class claims, issues or defenses, (4) that a class member may enter an appearance through an attorney if the member so desires, (5) that the Court will exclude from the class any member who requests exclusion, (6) of the time and manner for requesting exclusion, and (7) of the binding effect of a class judgment on members under Rule 23(c)(3) and the terms of the releases. (Schultz Decl. ¶¶ 17-18 & Attachment 2.) Dissemination was successful: 86% of the Settlement Class received individual notice by August 9, 2013, and 92% received individual notice by September 9, 2013. (*Id*. ¶ 24.) The settlement was also widely reported in both national and local news media. (*Id*. ¶ 32.)

The parties have, therefore, satisfied the notice requirements of Rule 23. *See, e.g.*, *Zimmer Paper Prods. Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90 (3d Cir. 1985) ("It is well settled that in the usual situation first-class mail and publication in the press fully satisfy the notice requirements of both Fed. R. Civ. P. 23 and the due process clause.").

CONCLUSION

The parties' Joint Motion for Final Approval of the Class Action Settlement should be granted, and the proposed Final Order and Judgment (attached as Exhibit 8 to the Joint Motion) should be entered.

Dated: November 15, 2013

Respectfully submitted,

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I hereby certify that on this 15th day of November, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall serve the following:

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