UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

JASON SMITH, on Behalf of Himself and All Others Similarly Situated, Plaintiff, v. **RESCARE, INC.** Defendant.	CASE NO. 3:13-CV-5211 UNITED STATES DISTRICT JUDGE ROBERT C. CHAMBERS

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

I. OVERVIEW

This class settlement is made on behalf of consumers residing in the United States who applied for positions with ResCare, Inc. ("ResCare") and whose consumer reports were obtained by ResCare to determine employability.[1] Class Counsel now moves the Court to order final approval of the $840,000.00 cash settlement. In addition, Class Counsel requests a contingency fee award of thirty three percent (33%) of the common fund.

The original Complaint filed on March 15, 2013 alleged that ResCare failed to comply with the Fair Credit Reporting Act's (FCRA) disclosure and authorization requirements as a precondition to obtaining consumer reports for employment purposes. (Doc. 1, ¶¶ 31, 35); 15 U.S.C. 1681b(b)(2)(A). Further, Smith alleged that ResCare failed to provide additional disclosures when denying employment based upon the results of the reports. (Doc. 1, ¶¶ 39, 43). 15 U.S.C. 1681b(b)(3)(A). Counts I and II of the Complaint were subsequently

[1] All defined terms shall have the same meanings they have in the Stipulation of Settlement.

dismissed with prejudice (Doc. 25). ResCare has denied all of Smith's claims and further denies any wrongdoing and liability to Smith or any putative class members in any amount.

Prior to the instant action, present Class Counsel engaged in a connected precursor FCRA class action against ResCare filed in the Western District of Kentucky, Louisville Division captioned *Kevin W. Ross v. ResCare, Inc., et al.,* 3:11-CV-00083-JGH (*"Ross"). Ross* involved the same class claims involving the procurement and use of consumer report for employment purposes. The Parties engaged in significant pre-trial discovery and litigation, including the review of thousands of pages of documents, contentious depositions and full briefing on summary judgment.[2] After the voluntary dismissal of *Ross*, Smith filed this case.

In the midst of discovery in this matter, the Parties agreed to mediate. In March, 2014, the Parties retained the Honorable C. Cleveland Gambill (Ret.) to facilitate a private mediation in Louisville, Kentucky that involved arm's-length, contentious, lengthy, and complicated negotiations. Ultimately, an agreement was reached weeks later that provides significant monetary relief to approximately 4,500 Class Members. The present settlement is one that has been the subject of Class Counsel's efforts since early 2011.[3]

Despite denying any wrongdoing, ResCare has consented to Smith's request to enter an order of Final Approval of the Class Action Settlement and authorize distribution of settlement proceeds to the Class. The settlement agreement itself specifically articulates ResCare denial. (Doc. 53 at 3, 10). But Smith's challenge was greater than merely proving that ResCare violated the law. Indeed, Smith alleged a "willful" violation of the FCRA. 15

[2] The case was ultimately settled on an individual basis following ResCare's Offer of Judgment and subsequent filing of its Motion to Dismiss.

[3] Taken together, these efforts included depositions of numerous ResCare management employees and significant formal discovery on nearly all issues, including the production of thousands of documents.

U.S.C. § 1681n. In response, ResCare argued that its understanding of the law was not unreasonable—and not willful.

The settlement (Doc. 53) provides for an $840,000.00 ***all cash*** settlement. Additional terms such as the amount of the service awards, attorney's fees and costs were only negotiated after the class claims had been settled and relief secured for the class members. And as part of that settlement, Class Counsel negotiated the narrowest release possible. As explained below, this settlement is an excellent result for the Class. It provides a meaningful monetary payment to each class member without the risks of further and extended litigation. Moreover, the settlement has not engendered a single objection.

Out of 4,148 class members that received notice, only one opted-out of the settlement—a .02% opt-out rate.[4] (Affidavit of David W. Epperly, ¶¶ 5-11, attached as Exhibit "1").

II. THE SETTLEMENT, NOTICE, AND CLAIMS PROCESS

A. Settlement Terms

1. The Class

The court preliminarily approved the following settlement class definition:

> All natural persons residing in the United States who applied for employment with ResCare during the Class Period and about whom ResCare procured a Consumer Report and as a result of ResCare procuring a Consumer Report, were denied employment based in whole or in part on the contents of the Consumer Report and to whom either a copy of the Consumer Report or a copy of the Summary of Rights was not provided.

2. Consideration provided to class members

In accordance with the Memorandum Opinion and Order dated February 3, 2015 (Doc 56), ResCare deposited $840,000.00 into a Settlement Fund to pay Class Members, the cost of notice and administration, attorney fees and costs, and service awards. If this court grants

[4] In calculating the opt-out rate, Class Counsel assumed that all class members who were mailed a notice were successfully found and notified unless their notice was returned as undeliverable, thus yielding a .02% opt-out rate. (Ex.1, Epperly Aff. ¶¶ 5-11).

final approval, the class members who timely filed a claim form will receive a pro rata sum calculated after a deduction from the Settlement Funds has been made for the payment of attorney fees and the cost of Notice and administration of the settlement and service award.

The Settlement Agreement also permits Class Counsel to seek an attorney fee and reimbursement of costs up to 33% of the Settlement Fund, and allows Smith to seek a service award up to $7,500.00.

3. The narrow release

Class members who have not opted out will release ResCare and related persons from all claims resulting from or arising under the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq*., as amended ("FCRA"), or any similar or comparable state or local laws.

4. Class notice

The notice program designed to reach as many Class Members as possible using First-Class-U.S. mail. Both ResCare, as well as a third-party consumer-reporting agency, HireRight Solutions, Inc., provided the names and addresses for the notices. The Class Administrator reports raw numbers demonstrating a 92.13% effective delivery rate, which is an acceptable, and even exceptional, rate. *See In re Serzone*, 231 F.R.D. 221, 236 (S.D. W. Va. 2005) (approving notice program where direct mail portion was estimated to have reached 80% of class members); *Martin v. United Auto Credit Corp.*, 3:05cv00143 (E.D. Va. Aug. 29, 2006) (Final Order approving class notice with approximately 85% delivery rate).

B. The notice process is complete.

In accordance with the Preliminary Approval Order, Class Counsel retained Epperly Re: Solutions, a forensic accounting and consulting firm, to accomplish the settlement's notice and claims process. The class notice was the best available given the factors of this case. While it is

almost always difficult to obtain current addresses and identification information for class members, especially when a consumer may be facing difficulty finding employment, the Parties and Epperly were able to minimize the problem in this case. Class Counsel directly supervised all of Epperly's actions, and there were many communications, decisions and consultations required between the administrator and Class Counsel throughout the notice process.

On May 4, 2015, Epperly initially sent 4,502 Notices by First Class U.S. Mail. (Ex.1, Epperly Aff. ¶ 5). Of the mailed notices, 1,595, relative to 1,198 class members were undeliverable. (Ex.1, Epperly Aff. ¶ 6). 844 notices were re-mailed using updated addresses. (Ex.1, Epperly Aff. ¶P 7-10). 354 notices were returned with no forwarding addresses. (Ex.1, Epperly Aff. ¶ 11).

In addition to the mailed notices, Epperly also established a website, www.rescareclassaction.com, so that consumers and anyone else could access all the information in the notice, as well as the Settlement Agreement, Preliminary Approval Order, and Class Counsel's and Epperly's contact information. (Ex.1, Epperly Aff. ¶ 18). Notice sent by first class mail to each class member satisfies the requirements of due process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812–13 (1985). Epperly's website: (1) enabled Class Members to access and download the Class Notice; (2) enabled Class Members to download an exclusion form, (3) provided a list of critical dates and deadlines in the settlement process; and (4) provided relevant updates and information with respect to the settlement and approval process. In addition to the website, Epperly also established a dedicated, toll-free number. (Ex.1, Epperly Aff. ¶ 19).

At a 92.13% "locate" and delivery percentage, the notice process was a success. (Declaration of Matthew A. Dooley, attached as Exhibit "2").

C. Settlement results

Class members will received an unconditional and meaningful cash payment. Consumers will release only the narrowest of claims, and obtain cash without having to commence litigation of their own (indeed, the period of limitations for most claims would have long ago expired, or the class member would have at least had to overcome ResCare's statute of limitation defense).

Class Members who submitted a claim will receive payments of approximately $500.00, more than five times the statutory minimum under the FCRA.[5] More importantly, Class Members have been apprised of their FCRA rights and possible inaccuracies contained in their consumer reports. Through the detailed notice process and the receipt of Settlement funds, Class Members are now armed with sufficient information to guard their personal and professional reputations.

D. Class member reaction

The lack of any objection and substantive opt outs (1 exclusion request) speaks volumes about the settlement's fairness. The collective voice of the Class is overwhelmingly positive.

The one opt-out request is minimal. Given the size of the class and their experience in previous cases, Class Counsel expected a number of objections directing animus towards ResCare, class actions generally, and/or the counsel that bring them, but none were made here.

III. ARGUMENT

A. The proposed settlement is fair and adequate and should be approved.

1. The standard for judicial approval of class action settlements

[5] This recovery is an estimate based upon the number of claims submitted. Assuming the Court awards the requested attorney fees and incentive award, approximately, $284,700 will be distributed to 1,003 valid claimants equally.

Judicial policy strongly favors resolution of litigation prior to trial. *See, e.g. S.C. Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990) ("[t]he voluntary resolution of litigation through settlement is strongly favored by the courts") (citing *Williams v. First Nat'l Bank, 216* U.S. 582 (1910)). Settlement spares the litigants the uncertainty, delay and expense of a trial and appeals while simultaneously reducing the burden on judicial resources. As the Court in *S.C. Nat'l Bank* observed:

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

749 F. Supp. at 1423 (quoting *Armstrong v. Bd. of Sch. Directors of City of Milwaukee*, 616 F.2d 305, 313 (7th Cir. 1980) overruled by *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998)); *see also* Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy.").

But to safeguard the interests of the absent class members, all class settlements and the later dismissal of the case requires Court approval. Fed. R. Civ. P. 23(e)(1)(A). The Rule 23(e) imposes two basic requirements on the parties and the Court before the approval and dismissal of a class settlement. First, the Court must determine that notice was directed "in a reasonable manner to all class members." Fed R. Civ. P. 23(e)(1)(B). Second, the Court must determine that the settlement "is fair, reasonable, and adequate." The parties address each of these requirements in turn.

Federal jurisprudence strongly favors resolution of class actions through settlement. *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1029 (N.D. Cal. 1999); *see* Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11.41

(4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). Rule 23 requires Court review of the resolution of a class action such as this one. Specifically, the Rule provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). Court approval is required to ensure that the parties gave adequate consideration to the rights of absent class members during settlement negotiations. *Henley v. FMC Corp.*, 207 F. Supp. 2d 489, 492 (S.D. W. Va. 2002) (*citing In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991)). The Court may approve a settlement only after a hearing and upon finding that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Approval of a class action settlement is committed to the "sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in light of the relevant circumstances." *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001). Additionally, "there is a strong initial presumption that the compromise is fair and reasonable." *Id.* (quoting *S. Carolina Nat'l Bank*, 139 F.R.D. at 339).

In determining whether a given settlement is reasonable, the court should avoid transforming the hearing on the settlement into a trial on the merits regarding the strengths and weaknesses of each side of the case. *Flinn v. F.M.C. Corp*, 528 F.2d 1169, 1172–73 (4th Cir. 1975). Ultimately, the approval of a proposed settlement agreement is in the sound discretion of the Court. *Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 501 (E.D. Va. 1995) (citing *Jiffy Lube*, 927 F.2d at 158).

2. The notice to the Class Members was reasonable.

In a settlement class maintained under Rule 23(b)(3), the class notice must meet the

requirements of both Federal Rules of Civil Procedure 23(c)(2) and 23(e). Federal Rule 23(c)(2) requires that notice to the class must be "the best practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c). The Rule also requires that the notice inform potential class members that (1) they have an opportunity to opt out; (2) the judgment will bind all class members who do not opt out; (3) and any member who does not opt out may appear through counsel. *Id.* The Court must consider the mode of dissemination and the content of the notice to assess whether such notice was sufficient. *See* Federal Judicial Center, Manual for Complex Litigation § 21.312 (2004).

With a nearly 93% delivery rate, it appears that there is truly no better alternative that could have been attempted. As one court explained, "[w]hat amounts to reasonable efforts under the circumstances is for the Court to determine after examining the available information and possible identification methods . . . 'In every case, reasonableness is a function of [the] anticipated results, costs, and amount involved.'" *Fisher v. Va. Elec. & Power Co.*, 217 F.R.D. 201, 227 (E.D. Va. 2003) (citations omitted). The Supreme Court has also concluded that direct notice satisfies due process, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812–13 (1985), and other courts—including this court and others within the Fourth Circuit—have approved mailed- notice programs reaching a similar percentage of the class. *See In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 236 (S.D. W. Va. 2005)(approving notice program where direct mail portion was estimated to have reached 80% of class members); *Martin v. United Auto Credit Corp.*, 3:05cv00143 (E.D. Va. Aug. 29, 2006) (final order approving class notice with approximately 85% delivery).

ResCare also served notice of this settlement upon the state attorneys general and federal authorities as required by the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C.

§ 1715. None of these agencies or states objected to the Settlement.

3. Under the Jiffy Lube factors, the settlement is fair and reasonable.

The Court must judge the fairness, reasonableness and adequacy of the settlement using what is often called the *Jiffy Lube* test. *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 158.

The *Jiffy Lube* analysis first requires a determination as to the settlement's fairness. The fairness factors are critical to the protection of the class members from unscrupulous class counsel and focus on the arm's-length nature of negotiations. *See In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1383 (D. Md. 1983); *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 335, 339

(D.S.C. 1991). Four sub-factors are used to evaluate fairness: (i) the posture of the case at the time of settlement; (ii) the extent of discovery that has been conducted; (iii) the circumstances surrounding the negotiations; and (iv) the experience of counsel. *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 158-59; *see also In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d at 663-64; *Strang*

v. JHM Mortg. Sec. Ltd. P'ship, 890 F. Supp. 499, 501 (E.D. Va. 1995).

A proposed class action settlement is considered presumptively fair where there is no evidence of collusion and the parties, through capable counsel, have engaged in arm's-length negotiations. *See S.C. Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991). Here, the Parties agreed to settle only after conducting sufficient merits-related discovery, both formally and informally, much of which was adduced during the *Ross* litigation. The fact that the parties had fully litigated *Ross*—inclusive of taking in-depth depositions and reviewing thousands of documents, reproduced again for use in this case—provided counsel with a deep and granular understanding of ResCare's policies and procedures as well as the strengths and

weaknesses of the case. The Parties also conducted extensive and substantive settlement discussions leading up to and throughout a full day of mediation facilitated by a private neutral mediator.

The posture of the case at the time of settlement is also a factor that supports approval. *See In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d at 664 (approving of proposed settlement despite the fact that it was reached "early" in litigation). While Smith was prepared to seek class certification, ResCare was prepared to not only oppose certification, but also seek summary judgment. And while Class Counsel disagreed with the merits of ResCare's defensive theories, the opportunity to obtain such a favorable result for the Class through settlement could not be overlooked.

There are undeniable advantages to the Parties and to the docket when opposing counsel are already up to speed on the legal and factual issues in a case and in a field of practice. *See S.C. Nat'l Bank*, 139 F.R.D. at 339 (concluding fairness met where settlement discussions "were, at times, supervised by a magistrate judge and were hard fought and always adversarial," and those negotiations "were conducted by able counsel" with substantial experience in the area of law).[6]

The Parties also engaged in discovery sufficient to aid counsel in evaluating the claims and defenses. These facts further demonstrate that the settlement was the product of arm's-length negotiations by experienced counsel, and thus warrants final approval. *See In re Jiffy Lube*, 927 F.2d at 159; *see also Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 501-02 (E.D. Va. 1995)(concluding fairness requirement met where "plaintiffs' counsel, with their wealth of experience and knowledge in the securities-class action area, engaged in sufficiently extended and detailed settlement negotiations to secure a favorable settlement for the Class").

[6] *See discussion infra; see also* Ex. 2.B

4. The settlement is adequate.

The Court must also determine whether the proposed class settlement is substantively "adequate." Pursuant to the Fourth Circuit's guidance in *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, the adequacy inquiry is guided by evaluating: (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement. *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 159.

Smith has at all times believed that this is a strong case supported by documentary evidence and deposition testimony. ResCare likewise presented a confident defense in the adequacy of its FCRA compliance. Importantly, Smith's claims were premised on the theory that ResCare willfully violated the FCRA. *See* 15 U.S.C. § 1681n. Only in the case of willful noncompliance, may a consumer may recover statutory and punitive damages. 15 U.S.C. § 1681n. Without the certainty afforded both sides in the approval of the class settlement, all parties would have proceeded with a long, expensive litigation process, likely culminating in a trial, followed by a likely appeal. In short—even in the best-case scenario relief was still years away.

The determination of when it is appropriate to settle a case is one that is entrusted to experienced class counsel. Settlement is the only means by which the parties can control the outcome of the litigation, alleviating both the risk and cost inherent in further litigation. This case was no exception, and in fair consideration of the strengths and weaknesses (as well as with significant involvement by the mediator), Class Counsel felt that settlement was appropriate at this juncture. The old adage, "a bird in hand is worth two in the bush" applies with particular

force in this case. *See Cardiology Assocs., P.C. v. Nat'l Intergroup, Inc.*, 85 CIV. 3048 (JMW), 1987 WL 7030, at *2 (S.D.N.Y. Feb. 13, 1987) (concluding that because continued prosecution of the action would have been expensive and time-consuming, and would have involved substantial risks, it [was] not unreasonable for the plaintiff class to take a 'bird in the hand'"); *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 547 (D. Colo. 1989) (noting that [i]t has been held prudent to take a bird in the hand instead of a prospective flock in the bush'" in weighing the value of an immediate recovery against the mere possibility of future relief after protracted and expensive litigation") (quoting *State of W. Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 740 (S.D.N.Y. 1970) *aff'd*, 440 F.2d 1079 (2d Cir. 1971)); *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d at 667. Given the risks to both sides, and the possibility that the Plaintiffs may not prevail at trial, the *Jiffy Lube* factors militate in favor of the adequacy of the settlement.

5. The settlement is reasonable.

By its terms, the settlement provides substantial monetary consideration to the Class. Additionally—while not conceding liability—ResCare changed its procedures and processes that were at the heart of this case. The fact that no class members objected to the settlement is an excellent indication of its reasonableness.

B. The Court should approve the request for service payment, attorney's fees, and reimbursement of expenses.

1. The Court should award a service payment to Smith.

Smith requests a service award of $7,500.00 which is to be deducted from the settlement fund, for his service as the named class representative. In this case, Smith took an active role in the case, participated in the crafting of the pleadings, and was responsive to Class Counsel throughout the litigation. Such an award has been regularly approved within the Fourth Circuit. *See, e.g., Beverly v. Wal- Mart Stores, Inc.*, No. 3:07cv469; *Williams v. Lexis Nexis Risk Mgmt.*,

No. 3:06cv241; *Cappetta v. GC Servs. LP*, No. 3:08cv288-JRS (E.D. Va. April 27, 2011); *Makson v. Portfolio Recovery Assoc., Inc.*, No. 3:07cv982-HEH (E.D. Va. Feb. 9, 2009); *Daily v. NCO*, No. 3:09CV31-JAG*; Conley v. First Tennessee*, No. 1:10CV1247-TSE*; Lengrand v. Wellpoint*, No. 3:11Cv333-HEH. Particularly in light of historical service awards both within and outside this Circuit, the requested service awards are appropriate. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 976–77 (9th Cir. 2003); *In re Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). "An empirical study published in 2006 suggests that incentive awards are granted in only about a quarter of class suits (28%) and that the average award per class representative is about $16,000, with the median award per class representative being closer to $4,000." 4 Newberg on Class Actions § 11:38. The award sought here is well within the average range and appropriate for this matter. Indeed, the Class Notice advised that up to $7,500.00 would be requested Smith, and no Class Member objected.

2. An award of attorney's fees is proper where Class Counsel has obtained a substantial recovery for the class.

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

Since *Blum*, virtually every Circuit Court has joined the Supreme Court in endorsing the percentage-of-recovery method. *See In re GMC*, 55 F.3d 768, 821–22 (3d Cir. 1995); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047–50 (9th Cir. 2002); *In re Thirteen Appeals*

Arising out of the San Juan DuPont Plaza Hotel Fire Litig., 56 F.3d 295 (1st Cir. 1995); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 515–16 (6th Cir. 1993); *Camden I. Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Swedish Hosp. Corp v. Shalala*, 1 F.3d 1261, 1268–70 (D.C. Cir. 1993); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 49 (2d Cir. 2000).

In the Fourth Circuit, attorney's fees in common-fund cases are almost universally awarded on a percentage-of-the-recovery basis. *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05cv00187, 2007 WL 119157, at *1 (M.D.N.C. Jan 10, 2007); *DeLoach v. Philip Morris Cos.*, No. 00-1235, 2003 WL 23094907, at *3 (M.D.N.C. Dec. 19, 2003) (citing, with approval for this same proposition, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 215 (D. Me. 2003)); *see also Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 502 (E.D. Va. 1995) (explaining "[a]lthough the Fourth Circuit has not yet ruled on this issue, the current trend among the courts of appeal favors the use of a percentage method to calculate an award of attorneys' fees in common fund cases.").

The Fourth Circuit has not established a benchmark for fee awards in common-fund cases, but district courts within the Fourth Circuit have noted that most fee awards range from 25 percent to 40 percent of the settlement fund. Percentage-fee awards are exactly what the name suggests—class counsel's fees are determined as a percentage of the total settlement fund. Courts recognize the importance of incentivizing experienced class counsel to take on risky cases. *See, e.g., In re Microstrategy, Inc. Sec. Litig.*, 172 F. Supp. 2d at 788. In fact, a comprehensive study of attorney's fees in class action cases notes "a remarkable uniformity in awards between roughly 30% to 33% of the settlement amount." Theodore Eisenberg &

Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. of Empirical Legal Studies 27, 31, 33 (2004).

ResCare does not oppose Class Counsel's fee request. And not one of over 4,500 class members objected to the requested fee award. In this case, Class Counsel shouldered the entire risk of the litigation, appropriately staffed it with experienced counsel, spent significant time investigating the case prior to filing, conducted the back and forth of discovery, vigorously litigated, and finally negotiated for a significant period of time, effectively concluding on the date of this filing, to reach this result for the Class. Doing so required zealously litigating a complex federal case while at the same time attempting to identify the terms where the parties might find compromise.

a. A crosscheck of time incurred by attorneys and paralegals provides support for the requested fee.

A crosscheck is not required to determine the fairness of a fee when the percentage of recovery method is used. However, sometimes request that attorneys estimate the number of hours spent in the litigation and a statement of the hourly rates for all attorneys and paralegals involved as a cross-check to determine the percentage of the common fund that should be awarded. *Manual for Complex Litigation (Fourth)* § 21.724. In this case, Class Counsel has provided the following estimate of their billable time, ***not*** including expenses.

Law Firm	**Attorney Hours**
Consumer Litigation Associates, P.C.	77.00
O'Toole McLaughlin Dooley & Pecora	753.77
Bailey & Glasser, LLP	138.00

The requested fee is $283,333.33. The total estimated fee for all attorneys and paralegals in this case is $239,772.00. And after adding costs and expenses in the amount of $7,430.75, the

gross multiplier is only 1.15.

Such a low multiplier is well within the range of fairness. Courts nationwide have—many times over—approved multipliers larger than the one Class Counsel requests here, sometimes in cases in which much less work was completed. *See, e.g., In re Charger Commc'n, Inc., Sec. Litig. No. MDL 1506*, 4:02CV1186CAS, 2005 WL 4045741, at *1, *18 (E.D. Mo. June 20, 2005)(approving lodestar multiplier of 5.61); *In re Excel Energy, Inc., Sec., Derivative & ERISA Litig.*, 364 F. Supp. 2d 980, 989 (D. Minn. 2005) (approving a multiplier of 4.7 in a case that only involved document review, and was resolved without any depositions after two days of mediation).

IV. CONCLUSION

Based upon the foregoing, the parties respectfully request that the Court enter an order finally approving the Settlement Agreement, awarding the requested service award to Smith in the amount of $7,500, and awarding attorney fees and costs to Class Counsel in the amount of $283,333.33.

Respectfully submitted,

PLAINTIFF,
on behalf of himself and all similarly situated individuals

/s/ John W. Barrett
BAILEY & GLASSER, LLP
John W. Barrett (WVSB #7289)
209 Capitol Street
Charleston, West Virginia 25301
Telephone: (304) 345-6555
Facsimile: (304) 342-1110
Email: jbarrett@baileyglasser.com

O'TOOLE McLAUGHLIN DOOLEY & PECORA, CO., LPA
Matthew A. Dooley (admitted pro hac vice)
Anthony R. Pecora (admitted pro hac vice)
5455 Detroit Road
Sheffield Village, Ohio 44054
Telephone: (440) 930-4001
Facsimile: (440) 934-7208
Email: mdooley@omdplaw.com
apecora@omdplaw.com

CONSUMER LITIGATION ASSOCIATES, P.C.
Leonard A. Bennett (admitted pro hac vice)
763 J. Clyde Morris Boulevard
Suite 1A
Newport News, Virginia 23601
Telephone: (757) 930-3660
Facsimile: (757) 930-3662
Email: lenbennett@clalegal.com

Counsel for Smith and the putative Class

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FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

JASON SMITH, on Behalf of Himself and All Others Similarly Situated, Plaintiff, v. **RESCARE, INC.** Defendant.	CASE NO. 3:13-CV-5211 UNITED STATES DISTRICT JUDGE ROBERT C. CHAMBERS

Certificate of Service

I hereby certify that on this 3rd day of August, 2015 I electronically filed the foregoing **Plaintiff's Memorandum in Support of Motion for Final Approval of Settlement, Attorney Fees and Costs, and Service Award** with the Clerk of the Court using CM/ECF system, which will automatically send notification of such filing to counsel of record.

/s/ *John W. Barrett*
John W. Barrett