

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

JONATHAN MCCANN

Plaintiff,

v.

SHIRLEY S. HILL, *et al.*

Defendants

Case No. 20-6435 (NLH/JS)

**ORDER ON
PRELIMINARY
APPROVAL ON AMENDED
CLASS ACTION
SETTLEMENT**

This case came before the Court on Plaintiff's Unopposed Supplemental Motion for Preliminary Approval of Amendment to Class Action Settlement, ECF No. 64. Based upon the Court's review of the Memorandum of Law in Support of Plaintiff's Motion for Preliminary Approval, the Declaration of Adam Garner, and the Declaration of Joseph R. Barton ("Barton Decl.") and the exhibits attached thereto, the Court will grant preliminary approval of the Settlement (including as amended by the Amendment to the Class Action Settlement Agreement), and find as follows:

Preliminary Approval of the Settlement

1. Preliminary approval is the first step in the class settlement process. The request for preliminary approval only requires an "initial evaluation" of the fairness of the proposed settlement. *Manual for Complex Litigation* § 21.632 (4th ed. 2004). The purpose of preliminary approval is to determine "whether to direct notice of the proposed settlement to the class, invite the class's reaction, and schedule a fairness hearing." William B. Rubenstein *et al.*, *Newberg on Class Actions* § 13:10 (5th ed. 2013).

2. In granting preliminary approval, the Court considers "whether to direct notice of the proposed settlement to the class, invite the class's reaction, and schedule a fairness hearing."

William B. Rubenstein *et al.*, *Newberg on Class Actions* § 13:10 (5th ed. 2013). Preliminary approval is not binding, and it is granted unless a proposed settlement is obviously deficient.” *Shapiro v. All. MMA, Inc.*, No. CV 17-2583 (RBK/AMD), 2018 WL 3158812, at *2 (D.N.J. June 28, 2018) *Atis v. Freedom Mortg. Corp.*, No. CV 15-03424 (RBK/JS), 2018 WL 5801544, at *2 (D.N.J. Nov. 6, 2018) (applying same “obviously deficient” standard); *Rudel Corp. v. Heartland Payment Sys., Inc.*, No. 16-cv-2229, 2017 WL 4422416, at *2 (D.N.J. Oct. 4, 2017) (same).

3. The Court finds that the Settlement as amended by the Amendment to the Class Action Settlement Agreement is the result of serious, informed, and non-collusive negotiations. The assistance of a professional mediator reinforces that the Settlement is non-collusive. *See Alves v. Main*, No. 01-cv-789, 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012) (“The participation of an independent mediator in settlement negotiations virtually [e]nsures that the negotiations were conducted at arm’s length and without collusion between the parties.”), *aff’d*, 559 F. App’x 151 (3d Cir. 2014).

4. The proposed Settlement provides substantial relief to the Class and falls within the range of reason. The Amendment to the Class Action Settlement Agreement provides for the payment of an additional \$562,055.79 to the Class (the “Additional Class Settlement Amount”), which combined with consideration under the existing Settlement of \$950,000.00 will result in a total gross recovery of \$1,512,055.79. Class Counsel represents this is approximately 29% of the maximum amount that Class members could likely recover at trial. This result exceeds that reached in class settlements approved by other courts of this Circuit in complex class action cases. *See In re Corel Corp. Sec. Litig.*, 293 F.Supp.2d 484, 490 (E.D.Pa.2003) (approving a settlement amounting to 15% of provable damages); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 144 (E.D.Pa.2000) (“The settlement that was achieved represents approximately seventeen percent of

single damages to the class, an amount significantly higher than the proportion of damages obtained in settlement agreements approved by other courts.” (citing *In re Crazy Eddie Sec. Litig.*, 824 F.Supp. 320, 324 (E.D.N.Y.1993)); *In re Ikon Off. Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 183 (E.D. Pa. 2000) (approving monetary settlement of 5.2% to 8.7% of best possible recovery for class members).

5. The Amendment to the Settlement Agreement does not suffer from any obvious deficiencies, such as preferential treatment of the Class representative. No class member or group of Class members will receive unduly favorable treatment under the terms of the Settlement Agreement.

6. The Court finds that there are no grounds to doubt the fairness of the Amendment to the Settlement Agreement and concludes that the proposed Settlement is within the range of possible settlement approval, such that notice to the class is appropriate.

Plan of Allocation

7. The Modified Plan of Allocation is materially the same as that previously preliminarily approved by the Court, except that the Additional Cash Settlement Amount will be allocated and distributed among Class Members who signed releases, had an account balance at the time the Plan was terminated, and under the original Plan of Allocation would have received more than the minimum payment.

8. The original Plan of Allocation (and the Modified Plan of Allocation) provided that the claims of Class Members who executed releases will be discounted by 75% for purposes of calculating their pro rata allocation of the Settlement Fund, reflecting the greater risk that such Class Members might be barred from recovery based on Defendants’ assertion of this affirmative defense. *See In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 494 (E.D. Pa. 2003) (approving

plan of allocation providing for discounted relief for subset of Class based on the “liability factor, that is, plaintiffs' counsel's estimation of the strengths and weaknesses of the evidence of [defendant's] liability” as between different class members' claims). While the original Plan of Allocation was fair, reasonable, and adequate, the additional cash payment will offset the 75% discount and will not reduce the amount that any Class Member would have received under the Original Plan of Allocation.

9. The Court finds that the Modified Plan of Allocation is fair, reasonable, and adequate, and preliminarily approves the Modified Plan of Allocation.

Class Notice

10. The Court approves the Proposed Supplemental Class Notice (attached as Exhibit 3 to the Barton Declaration) and directs its distribution to the Class.

11. The contents of the Proposed Supplemental Class Notice fully complies with due process and Federal Rule of Civil Procedure 23.

12. Pursuant to Federal Rule of Civil Procedure 23(c)(2)(B), a notice must provide:

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

Fed. R. Civ. P. 23(c)(2)(B). Notice sent by first class mail is sufficient when the names and addresses of the class members are known. *See Giercyk v. Nat'l Union fire Ins. Co. of Pittsburgh, PA*, No. 2:13-CV-6272-MCA-MAH, 2016 WL 7209649, at *3 (D.N.J. Oct. 13, 2016); *In re Ocean Power Techs., Inc., Sec. Litig.*, No. 14-3799 (FLW) (LHG), 2016 WL 7638464, at *2 (D.N.J. June 7, 2016). Here, the names and addresses of the Class Members are known, and thus notice to the

Class by first class mail is appropriate.

13. A proper notice should “(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).” Fed. R. Civ. P. 23(c)(2)(B); *see* Manual for Complex Litigation, *supra*, § 21.312. Here, information on these subjects was previously provided to the Class. ECF No. 53 at ¶ 19; ECF No. 54. The Proposed Supplemental Class Notice provides information regarding (i) the Amendment’s terms and operations; (ii) the procedure and timing for objecting to the Amended Settlement or the Modified Plan of Allocation; and (iii) the date and place for the Fairness Hearing. Given the previously issued Class Notice, this is sufficient.

Class Action Settlement Procedures

14. The Settlement Administrator will send the Supplemental Class Notice by no later than October 11, 2022, and post the Supplemental Class Notice and other documents about the Amended Settlement to the settlement website by October 11, 2022.

15. The Settlement Administrator will submit a declaration confirming compliance with the Supplemental Class Notice procedures by November 10, 2022.

16. Any Class Member who wishes to object to the Modified Plan of Allocation shall timely inform the District Court in writing of his or her intent to object to this Settlement and/or to appear at the Fairness Hearing by following the procedures set forth in the Proposed Supplemental Class Notice (“Objection”). Any objections will be limited to the Modified Plan of Allocation. To be considered timely, the Objection must bear a postmark that is no later November

10, 2022. The Objection must set forth at least the following: (a) the full name, address and contact information for the Objector and the name and address of counsel (if represented by counsel); (b) a written statement of any and all objections to this Settlement and any supporting papers and arguments; (c) the signature of the Objector (or his attorney).

17. Any Class Member or other person who fails to make his, her or its Objection in the manner provided shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness or adequacy of the proposed settlement as incorporated in the Settlement Agreement, to the Judgment, to the Plan of Allocation, to the award of attorneys' fees and reimbursement of expenses to Plaintiffs' Counsel, unless otherwise ordered by the Court. To the extent that any objections or comments are transmitted to Settlement Administrator, or the Parties' counsel, but are not filed with the Court, those persons are hereby directed to file such objections with the Court.

18. The Settlement Fund will be deemed and considered to be *in custodia legis* of the Court and will remain subject to the jurisdiction of the Court until such time as such funds will be distributed pursuant to the Settlement Agreement and/or the order of the Court.

19. The Independent Fiduciary will issue its opinion by October 14, 2021.

20. Class Counsel will file any supplemental declaration in support of their Motion for Attorneys' Fees or Costs by October 27, 2022.

21. Defendants will file any motion or brief in support of additional findings requested of the Court on Final Approval by December 2, 2022.

22. Neither Defendants nor Defendants' counsel will have any responsibility for the Plan of Allocation or will make any application for or take any position on attorneys' fees or reimbursement of expenses submitted by Co-Lead Class Counsel.

23. Class Counsel shall file a Motion for Final Approval of the Settlement by December 2, 2022.

24. The Court will hold a final fairness hearing on December 16, 2022 at 11:00 am at the United States District Court for the District of New Jersey, Mitchell H. Cohen Building & U.S. Courthouse, 4th & Cooper Streets, Courtroom 3A, Camden, NJ 08101. The Court may continue the date of the final fairness hearing if necessary without further notice to the Class, but any such continuance will be publicized on the settlement website.

It is so ORDERED this 23rd day of September, 2022.

s/ Noel L. Hillman
Hon. Noel L. Hillman
United States District Judge