**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF NORTH CAROLINA**
**CASE NO. 5:21-cv-00488-BO**

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| PHILIP BULLS, DEAN BRINK, CARMIN NOWLIN, NICHOLAS PADAO, and RAPHAEL RILEY, *on behalf of themselves and others similarly situated*, | ) |
| Plaintiffs, | ) |
| v. | ) |
| USAA FEDERAL SAVINGS BANK, and USAA SAVINGS BANK, | ) |
| Defendants. | ) |

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT**

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, named plaintiffs Philip Bulls, Dean Brink, Carmin Nowlin, Nicholas Padao, and Raphael Riley (collectively, "Plaintiffs"), with no opposition from Defendants USAA Federal Savings Bank and USAA Savings Bank (collectively, "USAA Bank"), respectfully submit this memorandum in support of their unopposed motion for final approval of this class action settlement.

## I. SUMMARY OF ARGUMENT

Plaintiffs, with no opposition from USAA Bank, seek final approval of their hard-fought settlement that will provide substantial and direct economic benefits to approximately 247,696 Class Members.[1]

On September 6, 2024, this Court granted preliminary approval of the settlement and ordered dissemination of direct notices to class members.[2] Since that date, notice to class members has been provided in accordance with the Court's Order.[3] Importantly, not a single class member has filed an objection to this settlement.[4] Nor has any class member provided notice to the parties or the Court that he or she wishes to be heard at a final fairness hearing.

This is no surprise. The approximately $64,202,800 settlement in this case—which will trigger substantial direct payments to hundreds of thousands of class members upon final approval and once the appeals period has concluded—is an outstanding resolution for this Settlement Class of military families and USAA Bank customers.

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[1] *See* Declaration of Cameron R. Azari ("Azari Decl.") (Dkt. 142) at ¶ 13 and Memorandum of Law in Support of Motion for Preliminary Approval of Settlement ("Prelim. Approval Memo") (Dkt. 133), hereby incorporated by reference.

[2] Order Granting Preliminary Approval of Class Action Settlement ("Order on Prelim. Approval"), Sept. 6, 2024 (Dkt. 139).

[3] *See* Azari Decl. at ¶ 12.

[4] *Id*. at ¶ 25.

The factors considered by the Court for its determination of the fairness, adequacy, and reasonableness of this settlement support its final approval. For that reason, Plaintiffs respectfully request that the Court grant the agreed Motion for Final Approval of Class Action Settlement, grant final certification of the Settlement Class, and find that the Distribution Plan and notice to class members under this Settlement satisfies due process and Federal Rule 23.

## II. BACKGROUND

In the interest of judicial economy, Plaintiffs refer here to, and incorporate to the extent helpful to the Court, the detailed discussion of the procedural history and litigation efforts in this case as presented in their memorandum supporting preliminary approval, previously considered by the Court before it granted preliminary approval.[5]

### A. Settlement class

The proposed Settlement Class is defined as:

> All USAA Bank Customers who (1) received and deposited a remediation check as a result of the Servicemember Civil Relief Act Remediation ("SCRA Remediation") or the Military Lending Act Remediation ("MLA Remediation"), or (2) were identified to receive remediation based upon the SCRA Remediation, the MLA Remediation, the Extended Vehicle Protection Remediation, or the Debt Protection Remediation, but did not successfully cash or deposit such remediation payment.[6]

[5] Prelim. Approval Memo (Dkt. 133).

[6] Excluded from the Class are all persons who have executed a release of the rights claimed in this action; USAA Bank; USAA Bank's officers and directors at all relevant times, as well as members of their immediate families and their legal representatives, heirs, successors, or assigns; and any entity in which USAA Bank has or had a controlling interest. Also excluded from the Class are federal, state, and local governments and all agencies and subdivisions thereunder; and any judge to whom this Action is or has been assigned and any member of his immediate family. *See* Prelim. Approval Memo, Ex. A (Settlement Agreement) (Dkt. 133-1) at ¶ 6.

USAA Bank used its records to identify the Settlement Class Members and to provide Epiq Class Action and Claims Solutions ("Epiq"), the settlement administrator, with sufficient information to provide notice and distribute payments under the Settlement.[7]

**B. Settlement consideration**

USAA Bank will pay $64,202,833.59 for the settlement of this case.[8] The net settlement amount[9] will be paid directly to class members with distribution to the class in conformity with the distribution plan previously approved preliminarily by the Court.[10]

**C. Release**

Upon final approval of the Settlement Agreement, the class representative Plaintiffs and all Settlement Class members who have not opted out of the preliminary settlement will fully and finally release all claims against USAA Bank, and the pending claims shall be dismissed with prejudice, as per the terms of the Settlement Agreement.[11]

**D. Notice**

Epiq, the court-appointed settlement administrator, completed the notice plan that was approved by the Court.[12] The notice plan provided for direct notice to class members based upon the comprehensive customer account information on class members which USAA Bank provided to Epiq. As per the Court's order, Epiq sent direct notices to the Settlement Class of over 247,000

[7] *See* Azari Decl. at ¶ 13.

[8] *See* Prelim. Approval Memo, Ex. A (Settlement Agreement) at ¶ 56 (Dkt. 133-1).

[9] The net settlement amount is the Settlement Fund less Administrative Costs, Service Awards to the Class Representatives, and the Fee and Expense Award. *See* Prelim. Approval Memo (Dkt. 133) at 6.

[10] *See* Prelim. Approval Memo, Ex. A (Distribution Plan is attached as Exhibit A to Settlement Agreement) (Dkt. 133-1).

[11] Prelim. Approval Memo, Ex. A (Settlement Agreement) at § IX (Dkt. 133-1).

[12] *See* Azari Decl. at ¶ 12.

members. These notices were just like the notices approved by the Court and included contact information for counsel. The notice program was a success, reaching over 98% of identified Class Members.[13]

Under the Court's order, November 21, 2024 was the deadline for class members to file any objection to the Settlement Agreement or to request exclusion from the Settlement Class.[14] Only three members of Settlement Class opted out and no members filed an objection.[15]

The notice to state officials required by the Class Action Fairness Act (CAFA) has also been completed, pursuant to 28 U.S.C. § 1715(d).[16]

## III. ARGUMENT

### A. The settlement class should be certified.

In the order granting preliminary approval, this Court conditionally certified the Settlement Class under Rule 23.[17] The same analyses apply here, and the Settlement Class should be certified for settlement purposes under Rule 23(e) for the reasons set forth in Plaintiffs' class certification motion[18] and in Plaintiffs' motion for preliminary approval of the Settlement Agreement.[19]

[13] Azari Decl. at ¶ 21.

[14] Order on Prelim. Approval (Dkt. 139) at ¶ 27.

[15] *See* Azari Decl. at ¶ 25.

[16] *See id.* at ¶ 10.

[17] Order on Prelim. Approval (Dkt. 139) at ¶ 4.

[18] Class Cert. Memo. (Dkt. 71).

[19] Prelim. Approval Memo. at 9–29 (Dkt. 133).

## B. The settlement agreement should be given final approval by the Court because it is fair, adequate, and reasonable.

It is well established that "[t]he voluntary resolution of litigation through settlement is strongly favored by the courts," a policy that "is particularly appropriate [] in class actions."[20] In order to protect the interests of the entire class of potential plaintiffs to a class action lawsuit, the Federal Rules of Civil Procedure require that class action settlements purporting to release claims by absent class members first be approved by the court.[21] "Though the parties [to a class action] enjoy a 'strong initial presumption that the compromise is fair and reasonable,'" [22] and a court should "not decide the merits of the case or resolve unsettled legal questions,"[23] the court must determine the reasonableness of each settlement on a case-by-case basis.

In *Jiffy Lube*, the Fourth Circuit "provided the framework for a reviewing court to determine whether a settlement meets the fair, reasonable and adequate standards . . . ."[24]

### 1. The *Jiffy Lube* factors relied upon to determine the fairness of a class action settlement weigh strongly in favor of final approval here.

In judging the fairness of a class action settlement, courts in the Fourth Circuit look primarily at whether a "settlement was reached as a result of good-faith bargaining at arm's length,

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[20] *S.C. Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990); Alba Conte and 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.").

[21] *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991); MANUAL FOR COMPLEX LITIG. (FOURTH) § 21.62 (2004) (citing Fed. R. Civ. P. 23(e)).

[22] *Manuel v. Wells Fargo Bank*, No. 3:14-cv-238, 2016 U.S. Dist. LEXIS 33708, at *8 (E.D. Va. March 15, 2016) (quoting *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001)).

[23] *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981).

[24] *Manuel*, 2016 U.S. Dist. LEXIS 33708, at *8.

without collusion."[25] The four factors that the Fourth Circuit has "identified as bearing on this inquiry,"[26] weigh in favor of finding that the settlement here is fair to the Settlement Class:

> (1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of [ ] class action litigation.[27]

First, by the time a settlement was finally reached in this matter, the parties had engaged in extensive discovery and litigation. Thus, Plaintiffs had "sufficiently developed the case to appreciate the merits of their claims" and, following robust mediation efforts, reached a fair and reasonable arm's-length resolution.[28]

Second, Plaintiffs' substantial discovery efforts were more than sufficient to confirm the strength of Plaintiffs' claims and to bring the parties to the negotiating table with a clear-headed assessment of the strengths and challenges of the case.

Third, the substantive negotiation of this settlement took place during four separate mediation sessions before two different skilled mediators, retired federal magistrate judge Elizabeth Laporte and retired federal district court judge Layn Phillips.[29] The mediation efforts "left the parties and their counsel fully informed of all pertinent factual and legal issues."[30]

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[25] *In re Jiffy Lube Sec. Litig*., 927 F.2d at 159; *Berry v. Schulman*, 807 F.3d 600, 615 (4th Cir. 2015).

[26] *Schulman*, 807 F.3d at 614.

[27] *In re Jiffy Lube Sec. Litig*., 927 F.2d at 159.

[28] *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 224 (S.D. W. Va. 2005).

[29] Declaration of Knoll Lowney (Dkt. 134) at ¶¶ 16–17.

[30] *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 840–841 (E.D. Va. 2016).

Ultimately, the settlement resulted in large part from a mediator's proposal, further evidencing a hard-fought, arm's-length negotiation.[31]

Fourth, both parties were well represented by counsel. Class Counsel has extensive experience in this District—Smith & Lowney and Hagens Berman have been appointed settlement class counsel in similar class actions before this Court[32]—and across the country handling cases on behalf of large classes of consumers such as the servicemembers in this case.[33]

In sum, consideration of each of the four "fairness factors" here demonstrates that this settlement was reached fairly and is a fair and just resolution of claims for the Settlement Class.

**2. Similarly, application of the *Jiffy Lube* factors to determine the adequacy and reasonableness of a class action settlement favor an order granting final approval in this case.**

The Fourth Circuit has adopted five considerations for courts determining the adequacy and reasonableness of a proposed class action settlement, *i.e.*, determining whether the benefits to the plaintiffs are altogether adequate and reasonable under the circumstances of the case:

> (1) the relative strength of the plaintiff's 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 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.[34]

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[31] *See In re NeuStar, Inc. Sec. Litig.*, No. 1:14-cv-885, 2015 U.S. Dist. LEXIS 129463, at *25 (E.D. Va. Sept. 23, 2015) (negotiations through skilled mediator "dispel any apprehension of collusion between the parties").

[32] *E.g., Childress, et al. v. JPMorgan Chase Bank, N.A.*, et al., No. 5:16-cv-298-BO (E.D.N.C. May 31, 2016) (Smith & Lowney appointed co-lead class counsel); *Childress, et al. v. Bank of America, N.A.*, No. 5:15-cv-231-BO (E.D.N.C. June 1, 2015) (Smith & Lowney and Hagens Berman appointed co-lead class counsel).

[33] *See In re NeuStar,* 2016 U.S. Dist. LEXIS 129463, at *26-27.

[34] *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 159.

These considerations weigh strongly in favor of finding this settlement adequate and reasonable.

First, Plaintiffs' case against USAA Bank is strong; it is upon this strength that Plaintiffs were able to negotiate the significant settlement here.

Second, however, USAA Bank remains a formidable opponent with a host of defenses available to it, which it has relied upon since the start of this case. For example, USAA Bank has maintained throughout this litigation that the class members have already received *full payment* for any interest rate benefits owed. If Plaintiffs lost on that argument, there very well may have been no recovery in this case.

Third, in the absence of settlement there is little reason to doubt that this case would be litigated before this Court, and on appeal at the Fourth Circuit, for many additional years.

Fourth, though USAA Bank would appear to be on solid financial ground, as one court noted in approving final settlement of a class action case against Wells Fargo Bank "[the court] takes nothing for granted in the present economy."[35]

Last, not a single member of the Settlement Class filed an objection to this Settlement, and only three class members elected to opt out of the settlement.[36] This support from the class, including "by failure to object," is a "proper consideration for the trial court" and plainly weighs in favor of final approval.[37]

This Settlement Agreement satisfies the requirements of fairness, adequacy, and reasonableness, and for the reasons stated above, should be given final approval by the Court.

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[35] *Manuel*, 2016 U.S. Dist. LEXIS 33708, at *11.

[36] *See* Azari Decl. at ¶ 25.

[37] *Flinn v. F.M.C. Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975).

### C. The Court should give final approval to the notice plan adopted here as well, satisfying as it has the requirements of Rule 23.

Before giving final approval to a class action settlement, the court must also "review the notice directed at the class members to ensure compliance with Rule 23."[38] Rule 23(c) requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[39] Such notice must "clearly and concisely state in plain, easily understood language" the nature of the claims and the definition of the class settling claims, and provide for an informed opportunity to opt-out of the settlement, including by objection, within a reasonable time and with understanding of the "binding effect of a class judgment" on class members.[40]

Courts in this Circuit have held e-mail notice sufficient to satisfy the requirements of Rule 23, especially "where the number of class members is substantial."[41] Additionally, the Supreme Court has held that direct mailing to class members satisfies due process and "protects" the "interests of the absent plaintiff class members … when those plaintiffs are provided with a request for exclusion that can be returned within a reasonable time to the trial court."[42] Plaintiffs more than satisfy these requirements with the plan adopted in the settlement.

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[38] *Burke v. Shapiro, Brown & Alt, LLP*, No. 3:14-cv-838, 2016 U.S. Dist. LEXIS 65120, at *10 (E.D. Va. May 17, 2016); *accord* MANUAL FOR COMPLEX LITIG. (FOURTH) § 21.312.

[39] Fed. R. Civ. P. 23(c)(2)(B).

[40] *Id.*

[41] *Robinson v. Nationstar Mortg. LLC*, No. TDC-14-3667, 2020 U.S. Dist. LEXIS 265530, at *4-5 (D. Md. April 13, 2020); *see also In re Novant Health, Inc.*, No. 1:22-cv-697, 2024 U.S. Dist. LEXIS 107949 (M.D.N.C. June 17, 2024) (approving notice plan where settlement administrator notified class members first by e-mail and then by first class mail).

[42] *Phillips Petro. Co. v. Shutts*, 472 U.S. 797, 812–14 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

Here, the notice plan preliminarily approved by the Court and implemented immediately following the court's Order explained the nature of the proceeding in plain English to the class of servicemember families, with straight-forward direction on what claims would be released and how a class member could elect to opt out and/or object to any part of the Settlement Agreement.[43] The direct notice by email and physical mail more than satisfies the test of reasonableness.[44]

For these reasons, Plaintiffs respectfully ask the Court to find that the class action notice requirements of Rule 23 have been well satisfied here.

## IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs, with no opposition from Defendant USAA Bank, respectfully ask the Court to grant their unopposed motion for final approval of the settlement in this matter.

Submitted this the 7th day of January, 2025.

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[43] *See* Azari Decl. at ¶¶ 14, 15, 17.

[44] Federal Judicial Center, *Judge's Class Action Notice and Claims Process Checklist and Plain Language Guide* at 3 (2010) ("The lynchpin in an objective determination of the adequacy of a proposed notice effort is whether all the notice efforts together will reach a high percentage of the class. It is reasonable to reach between 70–95%."); *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 258 (E.D. Va. 2009) ("[T]he opinion of qualified counsel is entitled to significant respect[,] . . . and given that qualified counsel endorses the proposed allocation, the allocation need only have a reasonable and rational basis.")

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Final Approval of Settlement** has been electronically filed with the Clerk of Courts using the CM/ECF system, which will send notification of such filing to the following:

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