No. 21-1087

In the United States Court of Appeals for the Fourth Circuit

PIA MCADAMS,
Objector-Appellant,

v.

DEMETRIUS ROBINSON; TAMARA ROBINSON
Plaintiffs-Appellees,

v.

NATIONSTAR MORTGAGE, LLC
Defendant-Appellee,

On Appeal from the United State District Court for the District of Maryland
No. 8:14-cv-03667-TJS
Hon. Timothy J. Sullivan

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court act within its discretion in approving a class settlement that included a release limited to claims "that were or could have been asserted by the Class Representative or Class Members in connection with the submission of loss mitigation applications during the Class Period"?

2. Where the class-wide settlement was reached after six years of hotly contested litigation and months of court-supervised, arm's length negotiations, did the district court act within its discretion in finding the settlement to be fair, reasonable, and adequate?

3. Where class counsel engaged in six years of contested litigation, including extensive motions practice and discovery, did the district court act within its discretion in approving an attorney's fees request that amounted to a significant *negative* multiplier of class counsel's lodestar?

4. Did the district court act within its discretion in approving a class notice that explained the nature of the case, the amount of settlement, the amount of attorney's fees, and the consequences of not opting out, but did not provide an estimate of individual claimants' potential recovery?

5. Did Magistrate Judge Sullivan have jurisdiction under 28 U.S.C. § 636(c) to grant final approval of the settlement where both Plaintiff-Appellee and

Defendant-Appellee consented to having a magistrate judge conduct the approval proceedings?

Plaintiff-Appellee Demetrius Robinson joins in and adopts Defendant-Appellee Nationstar's discussion regarding the scope of the release and the adequacy of the class notice.

STATEMENT OF THE CASE

I. The Course of Litigation

In response to the sharp increase during the 2007-2008 financial crisis in the number of mortgage borrowers delinquent on their debt, and thus in the number of loss mitigation applications—that is, requests from borrowers to mortgage servicers like Nationstar to change the terms of their payment obligations to avoid delinquency or foreclosure—the Consumer Financial Protection Bureau ("CFPB") issued regulations setting strict procedures for loan servicers' administration of such applications. *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696, 10814 (Feb. 14, 2013). These regulations, which implemented the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.*, and were codified at 12 C.F.R. § 1024.41 ("Section 1024.41"), became effective on January 10, 2014.

Section 1024.41 does not "impose[] a duty on a servicer to provide any borrower with any specific loss mitigation option." 12 C.F.R. § 1024.41(a). Rather,

it imposes procedural safeguards for the administration of loss mitigation applications. *See* 78 Fed. Reg. at 10817-18 (explaining CFPB's decision not to adopt substantive rules regarding loss mitigation). For example, the regulation sets deadlines for servicers to notify borrowers of the receipt of their loss mitigation applications and whether the applications are complete, 12 C.F.R. § 1024.41(b)(2)(i)(B) (5 business days from receipt), sets deadlines to make a determination regarding the loss mitigation options available to the borrower, *id.* § 1024.41(c)(1)(ii) (30 days after receipt of complete application), requires servicers to provide specific reasons for denial of loan modification options, *id.* § 1024.41(d), and requires servicers to provide an appeal process, *id.* § 1024.41(h). The regulation also delays (but does not substantively alter) servicers' rights to initiate foreclosure proceedings while a loss mitigation application is being processed, *id.* § 1024.41(f), (g), sometimes referred to as "dual tracking."

Borrowers can sue to recover actual damages resulting from a servicer's violations of Section 1024.41, along with costs and attorney's fees. *Id.* § 1024.41(a) (citing 12 U.S.C. § 2605(f)). Borrowers may also recover statutory damages—capped at $1 million in class actions—if the servicer engaged in a "patten or practice" of noncompliance. 12 U.S.C. § 2605(f)(2).

Plaintiffs-Appellees Demetrius Robinson and Tamara Robinson filed this action on November 21, 2014. JA 4. The Robinsons had fallen behind on their

mortgage and had applied to Nationstar, their servicer, for a loan modification on March 7, 2014. JA 40. The First Amended Class Action Complaint ("FAC") alleged that Nationstar violated Section 1024.41 and Maryland law with respect to that loss mitigation application, and that this violation was part of a "pattern and practice" of noncompliance, JA 47, resulting from Nationstar's "fail[ure] to bring its system for processing loss mitigation applications into compliance with the new RESPA regulations." JA 28.[1] The FAC alleged that Nationstar, as a pattern and practice, failed to timely notify borrowers whether their applications were complete, failed to evaluate all loss mitigation options, failed to provide specific reasons for its determinations with respect to those options, failed to timely process appeals, and failed to pause foreclosure proceedings while a loss mitigation application was pending. JA 48.

On September 9, 2019, after a motion to dismiss, two motions for summary judgment, a contested motion for class certification, and more than four years of contentious class discovery, the district court certified two classes: a nationwide class composed of "[a]ll persons in the United States that submitted a loss mitigation application to Nationstar after January 10, 2014, and through the date of the Court's

[1] Nationstar later conceded that at the time the Robinsons submitted their application, it had not yet updated its systems to comply with Section 1024.41. JA 130.

certification order;" and a Maryland subclass. JA 124. The Court appointed Mr. Robinson as Class Representative.[2]

In the same order, the district court granted Nationstar summary judgment with respect to several of Mr. Robinson's individual claims, finding, as relevant here, no dispute that Nationstar had not instituted foreclosure proceedings against the Robinsons' property while their loss mitigation application was pending, and thus that Nationstar had not, as to Mr. Robinson, violated the "dual tracking" provisions of the regulation. JA 108-09.

II. The Settlement Process

The parties engaged in extensive, painstaking negotiations, overseen by two different magistrate judges. The parties conducted an unsuccessful in-person settlement conference before Magistrate Judge Schulze on October 26, 2016, and, after additional litigation, conducted a second, again unsuccessful, in-person settlement conference before Magistrate Judge Sullivan on April 9, 2019. JA 148. After the court issued its rulings on class certification and summary judgment, the parties reinitiated settlement negotiations with the aid of Magistrate Judge Sullivan, who conducted a lengthy series of telephonic conferences with counsel. JA 21, 148. With Magistrate Judge Sullivan's facilitation, the parties exchanged numerous offers

[2] The district court granted summary judgment against Tamara Robinson, holding that she was not a "borrower" under Section 1024.41. JA 105.

and counter-offers, which ultimately resulted in an agreement-in-principle for a class-wide, opt-out, common fund settlement. On June 25, 2020, the parties filed their Notice of Settlement. JA 21, 148. On June 26, 2020, the case was referred for further proceedings to Magistrate Judge Sullivan. JA 139. The parties thereafter negotiated the formal settlement agreement ("Settlement Agreement"), which was submitted to the court on August 14, 2020 with a motion for preliminary approval. JA 171-234.

The Settlement Agreement provides for a $3 million non-reversionary settlement fund. JA 174-76. Plaintiff agreed to cap attorney's fees and expenses at $1,300,000, and a service award for the class representative at $5,000, with both amounts subject to court approval. JA 177. The costs of notice and administration were capped at $300,000. JA 177. Thus, the Settlement Agreement guaranteed a *net* fund to be distributed to claimants of *at least* $1,395,000.

As with all settlements, the Settlement Agreement contains a release. For class members who do not opt-out, the Settlement Agreement releases claims "that were or could have been asserted by the Class Representative or Class Members in connection with the submission of loss mitigation applications during the Class Period." JA 186. The term "loss mitigation application" means "an oral or written request for a loss mitigation option that is accompanied by any information required by a servicer for evaluation for a loss mitigation option." 12 C.F.R. § 1024.31; *see*

also JA 203. The release does not apply to claims arising out of any other loan servicing conduct. Thus, for example, the release does not have any impact on the substantive rights of either borrowers or Nationstar under the loan documents, or on either substantive or procedural rights of borrowers or Nationstar in foreclosure proceedings other than those directly connected to "loss mitigation applications." In addition, because the Class Period covers only loss mitigation applications submitted from January 10, 2014 to September 9, 2019, the release does not impact claims arising from loss mitigation applications submitted after September 9, 2019.

On August 19, 2020, Magistrate Judge Sullivan granted preliminary approval of the Settlement Agreement and authorized the sending of notice to the class. JA 269. The notice he approved described the lawsuit, defined the class, explained how to opt-out, and made clear that unless a class member opted out they could not "sue or be part of any other lawsuit against Defendant about the issues in this case." JA 202-04; *see also* JA 244, JA 246, JA 252.[3] The notice directed class members to the class website, a toll-free number, and a mailing address for more information. JA 203.

[3] Class members were provided with email notice that directed them to the settlement website. The website included a detailed FAQ, the long-form settlement notice, the FAC, the Settlement Agreement, and the Preliminary Approval Order. https://respaclassaction.com/Home (last visited June 15, 2021).

The notice also informed class members to submit a Claim Form to recover from the settlement. JA 194, 203, 209, 243-44, 274. Magistrate Judge Sullivan approved the Claim Form in his preliminary approval ruling. JA 277.

The Settlement Administrator successfully reached 97.2% of the 348,153 class members. JA 686. As of the date of the motion for final approval, 47,974 class members had filed claims, and 137 had opted out. JA 687, JA 715-16. Only one—Objector-Appellant McAdams—filed a substantive objection to the settlement. JA 729.

III. Objections to the Settlement

Over a month after Magistrate Judge Sullivan granted preliminary approval, Objector-Appellant McAdams filed a putative class action against Nationstar in California state court. JA 555-85. To preserve all of her rights against Nationstar, McAdams could have opted out of the settlement. She chose not to opt-out, but to instead file an objection. As relevant here, McAdams argued that the Settlement Agreement's release was overbroad, JA 536, 555, that the settlement was inadequate, JA 541-44, that the attorney's fees requested were excessive, that Nationstar's agreement not to oppose the motion for fees was inappropriate, JA 544-46, and that the notice did not sufficiently inform class members of the settlement distribution plan, JA 548-49.

After considering these objections during a hearing held on December 10, 2020, Magistrate Judge Sullivan explained from the bench why he considered the settlement to be fair, reasonable, and adequate. JA 810-16. With respect to the release, Magistrate Judge Sullivan determined that "a broad release like the one in this case is appropriate and class settlement courts may permit the release of claims based on the identical factual predicate." JA 816. He also rejected McAdams's last-minute argument, which she had not raised in her written objections, that because she had not consented to referral of the case to a magistrate judge, he lacked authority to grant final approval. JA 793, 815. Magistrate Judge Sullivan also issued a written order granting final approval where he reiterated his findings. JA 831-40.

SUMMARY OF ARGUMENT

First, Objector-Appellant objects to the scope of the release. The release, however, is proper. The law on the scope of class action releases is settled: "[i]n class action settlements, parties may release not only the very claims raised in their cases, but also claims arising out of the 'identical factual predicate,'" as long as class members are adequately represented. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015) (quoting *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 248 (2d Cir. 2011)). Whether a particular release meets that standard is for the district court to decide as a matter of discretion, and here, where the case alleges that Nationstar violated the specific regulation promulgated by CFPB governing loss

mitigation applications, a release of claims arising out of "submission of loss mitigation applications" is appropriate.

Moreover, Mr. Robinson adequately represented the class. "[W]here different claims within a class involve the identical factual predicate, adequate representation of a particular claim is determined by the alignment of interests of class members, not proof of vigorous pursuit of that claim." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 113 (2005). Mr. Robinson's interests are aligned with the rest of the class, and Objector-Appellant has not made any showing of a fundamental conflict between Mr. Robinson and other class members.

Second, Objector-Appellant argues that the district court failed to analyze the necessary Federal Rule of Civil Procedure 23(e) factors in determining whether the settlement was fair, reasonable, or adequate. In particular, Objector-Appellant argues that the district court was required to determine the possible ranges of a potential recovery. The district court considered all of the relevant factors, and Objector-Appellant's attempt to require the district court to do more is not supported by Fourth Circuit precedent. *See In re Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Practices & Prod. Liab. Litig.*, 952 F.3d 471, 484 (4th Cir. 2020).

Third, Objector-Appellant objects to what she characterizes as an "extraordinary" award of attorney's fees. The district court's approval of attorney's

fees that, at time of approval, amounted to only 84% of class counsel's lodestar is unremarkable and well within the district court's discretion.

Finally, Objector-Appellant contests Magistrate Judge Sullivan's jurisdiction to enter a final approval order because Objector-Appellant did not consent to the exercise of jurisdiction by a magistrate judge under 28 U.S.C. § 636(c). But every court to have considered the question has held that objectors are not parties whose consent is needed before such a referral.

STANDARD OF REVIEW

"In reviewing a district court's decision to approve a class-action settlement as fair, reasonable, and adequate, [the Court] give[s] considerable deference thereto because the court 'is exposed to the litigants, and their strategies, positions[,] and proofs,' and 'is on the firing line and can evaluate the action accordingly.'" *In re Lumber Liquidators*, 952 F.3d at 484 (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000)). Review of awards of attorney's fees is similarly "sharply circumscribed." *Berry*, 807 F.3d at 617.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Approving the Scope of the Settlement Release

"In class action settlements, parties may release not only the very claims raised in their cases, but also claims arising out of the 'identical factual predicate.'" *Berry*, 807 F.3d at 616 (quoting *In re Literary Works*, 654 F.3d at 248); *accord In re*

MI Windows and Doors, Inc., Prod. Liab. Lit., 860 F.3d 218, 225 (4th Cir. 2017). The law is well established: parties to a class action may release all claims based on the same factual predicate regardless of whether those claims were, or even could have been, brought in the class action. *See, e.g.*, *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. 1981); *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800, 805 (8th Cir. 2004). A court may even approve a release of claims against nonparties to the suit, *see Wal-Mart Stores, Inc.*, 396 F.3d at 109; *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268 (9th Cir. 1992), or over which the court does not have jurisdiction, *see Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 374, 378 (1996).

Plaintiff-Appellee adopts Nationstar's discussion regarding the scope of the release. Plaintiff-Appellee writes separately to address Objector-Appellant's and *amici*'s arguments regarding the adequacy of the representation and the effect of the release.

A. Mr. Robinson adequately represented the class.

"[W]here different claims within a class involve the identical factual predicate, adequate representation of a particular claim is determined by the alignment of interests of class members, not proof of vigorous pursuit of that claim." *Wal-Mart Stores, Inc.*, 396 F.3d at 113. "'Adequacy does not require complete identity of claims or interests between the proposed representative[s] and the class,'

but there must be 'sufficient similarity of interest such that there is no affirmative antagonism between the representative[s] and the class.'" *Sharp Farms v. Speaks*, 917 F.3d 276, 297 (4th Cir. 2019) (quoting Newberg on Class Actions § 3:58).

Objector-Appellant does not raise any serious argument regarding whether the interests of class members are aligned. Nor does she explain any specific conflict within the class. Instead, Objector-Appellant argues that because the court granted summary judgment with respect to several of Mr. Robinson's individual claims, any settlement release that releases similar claims of other class members is overbroad. But, as explained in Nationstar's appellee brief, this argument ignores that claims are appropriately released if, as in this case, they arise out of the same factual predicate as the claims that were or could have been made in the Complaint.

That some class members may be able to recover a greater amount if they proceed on an individual basis also does not undermine the fairness or adequacy of the settlement. Damages vary between class members in every class action, and the opportunity to opt-out exists precisely to accommodate unique circumstances. *See Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 432 (4th Cir. 2003) ("Rule 23(c)(2) permits members of a class maintained under section (b)(3) to opt out of the class, providing an option for those Plaintiffs who wish to pursue claims against [the defendant] requiring more individualized inquiry."); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534 (3d Cir. 2004) ("[T]he [third-party payors] had the option

to opt-out of the proposed settlement if it was in their interest to bring their claims separately.").

Objector-Appellant's citation to *Sharp Farms* is inapposite. There the court considered a class action of current and former members of a nonprofit cooperative marketing association. The settlement class, which sought dissolution of the association and distribution from its reserve fund, consisted of two distinct groups—one which had directly contributed to the reserve fund, and one which had not. 917 F.3d at 280. The class members who had contributed to the fund maintained that those who had not contributed had no legal entitlement to the fund. *Id.* at 297. Because the theories of recovery directly conflicted with one another and because distributing to the group that had not contributed would necessarily reduce the amount of the fund to be distributed to the group that had, the court held that there was a "fundamental conflict" between the two subgroups. *Id.*

Nothing of the sort is at issue here. There is no fixed fund to distribute between any subgroups. And none of the class members' claims conflict with one another. Mr. Robinson had every incentive to maximize the settlement for the entire class, and nothing in the record provides a basis to question his adequacy. Objector-Appellant has provided no evidence of any conflict that is "more than merely speculative or hypothetical." *Gunnells*, 348 F.3d at 430 (quoting Moore's Federal Practice § 23.25[4][b][ii] (2002)); *see also, e.g.*, *id.* at 430–31 (no fundamental

conflict where class members shared "common objectives and the same factual and legal positions" and had "the same interest in establishing the liability"); *Ward v. Dixie Nat. Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) (variation in damages did not undermine named representative's ability to adequately represent the class); *Kurtz v. Costco Wholesale Corp.*, 818 F. App'x 57 (2d Cir. 2020) (finding no fundamental conflict where the named plaintiff "sacrificed potentially higher-value . . . damages claims in order to advance lower-value, but more easily certifiable, claims"); *In re Uponor, Inc., F1807 Plumbing Fittings Prod. Liab. Litig.*, No. 11-MD-2247 ADM/JJK, 2012 WL 2325798, at *4 (D. Minn. June 19, 2012) (rejecting argument that "class representatives must raise every state law claim available to be considered adequate"), *aff'd*, 716 F.3d 1057 (8th Cir. 2013).[4]

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[4] *Amici*'s argument that Mr. Robinson would not have had standing to pursue state law claims on behalf of consumers outside of Maryland, Amicus Br. at 21 n.4, is similarly misguided. "Nothing . . . suggests that the claims of the named plaintiffs must in all respects be identical to the claims of each class member." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 51 (1st Cir. 2018) (citing *Gratz v. Bollinger*, 539 U.S. 244, 262-68 (2003)). "[T]he question of standing is not: Are there differences between the claims of the class members and those of the class representative? Rather, the pertinent question is: Are the differences that do exist the type that leave the class representative with an insufficient personal stake in the adjudication of the class members' claims?" *Id.* (holding that named plaintiffs had standing to prosecute claims on behalf of class members under twenty-six state laws even though the named plaintiffs themselves had not made purchases in all of those states); *Langan v. Johnson & Johnson Consumer Cos., Inc.*, 897 F.3d 88, 93 (2d Cir. 2018) (same); *Mayor of Balt. v. Actelion Pharms. Ltd.*, 995 F.3d 123, 134 (4th Cir. 2021).

B. Objector's and *Amici*'s concerns regarding the scope of the release are misplaced.

Contrary to Objector-Appellant's representation, the release does not "purport[] to include . . . wrongful foreclosure claims." Objector-Appellant's Br. at 17. Nor does it provide Nationstar with "blanket immunity to foreclosure proceedings." Amicus Br. at 22. As this litigation arose out of Nationstar's failure to bring its system into compliance with Section 1024.41, the release, by its terms, applies only to claims that were or could have been brought concerning class members' "submission of loss mitigation applications." The release says nothing about claims challenging other aspects of Nationstar's mortgage servicing or foreclosure practices, such as, for example, failures to ensure that declarations in support of notices of default are supported by adequate evidence, JA 573, or failures to adequately process mortgage payments.

Amici's assertion that the settlement will have a significant impact on individual homeowners' ability to protect their homes from foreclosures is wrong. *See* Amicus Br. at 17. The release applies only to claims arising out of loss mitigation applications submitted during the "Class Period"—that is from January 10, 2014 to September 9, 2019. The settlement will therefore have very limited, if any, future effect. The most recent loss mitigation applications covered by the release are those submitted in September 2019, more than a year and a half ago as of this writing.

Amici also purport to list examples of large recoveries that would have been precluded by the settlement release. But—even assuming those claims are released by the settlement in this case—*amici* provide no evidence that a significant portion of the class would be entitled to such large recoveries such that there is reason to believe that the district court abused its discretion in finding the Settlement Agreement to be fair, reasonable, and adequate.

Moreover, if, as *amici* fear, Nationstar attempts to preclude claims or defenses unrelated to the issues in this litigation, Amicus Br. at 16-20, the courts to consider that argument in subsequent litigation will evaluate whether the claims alleged to have been released arise out of the same factual predicate as the claims at issue here. *See, e.g.*, *Hesse v. Sprint Corp.*, 598 F.3d 581, 591 (9th Cir. 2010) (holding, on appeal from grant of summary judgment to defendant in subsequent litigation, that a settlement did not release plaintiff's claims because the claims did "not share an identical factual predicate with the claims resolved in the . . . Settlement").

Although it is for those courts to make the final determination, it is worth noting that many of the examples provided by *amici* are completely outside the scope of the release. For example, there is no indication in *May v. Nationstar Mortg., LLC*, 852 F.3d 806, 811 (8th Cir. 2017), the case relied on most heavily by *amici*, that the plaintiff submitted a loss mitigation application at all, much less during the relevant class period. The jury there awarded the plaintiff actual and punitive damages for

invasion-of-privacy and Federal Credit Reporting Act claims, *id.* at 812-13, claims clearly outside the scope of the release. *See also Wilcox v. Servis One Inc.*, Case No. 1:19-cv-02535 (D. Md.) (did not involve Nationstar, and does not appear to have involved a loss mitigation application submitted by plaintiff); *Schneck v. SunTrust Mortgage, Inc.*, Case No. 1:11-cv-01878 (D. Md.) (did not involve Nationstar, nor did it involve the submission of a loss mitigation application during the class period); *In re. Bolthouse*, Case No. 0:10-17021 (D. Md. Bnkr.) (same).

And, although other examples provided by *amici* appear to have involved loan modifications in some manner, the central claims in many of those cases do not arise out of the plaintiffs' *submission* of loss mitigation applications, but rather Nationstar's conduct in servicing the loans *after* they were modified. *See, e.g.*, *Dotson v. Nationstar*, No. 15-C-151 (Cir. Ct. Boone Cty., W. Va.) (alleging that Nationstar misrepresented the status of plaintiffs' account, refused mortgage payments, and assessed illegal fees); *Evans v. Nationstar*, No. 15-C-316 (Cir. Ct. Cabell Cty., W. Va.) (alleging that Nationstar failed to adjust the terms of plaintiff's account as agreed and returned payments); *Ferda v. Nationstar*, No. 15-C-14 (Cir. Ct. Brooke Cty., W. Va.) (alleging that Nationstar misrepresented the amounts due, charged illegal default fees, and refused plaintiff's payments). Thus, even if class members here had similar claims, they would have very strong arguments (to be decided by the courts in their individual cases) that those claims were *not* released.

II. The District Court Considered All Necessary Factors in Finding that the Settlement Is Fair, Reasonable, and Adequate, and that Finding Was, Therefore, Well Within the District Court's Discretion.

Contrary to Objector-Appellant's argument on appeal, Magistrate Judge Sullivan considered all of the necessary factors in determining that the settlement is fair, reasonable, and adequate.

In determining the fairness of a settlement, courts in this Circuit consider "(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 [the] class action litigation." *In re Lumber Liquidators*, 952 F.3d at 484 & n.8 (citing *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991), and noting that "our factors for assessing class-action settlements almost completely overlap with the new Rule 23(e)(2) factors"). To evaluate the adequacy of the settlement, courts are to consider "(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 defendant[] and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement." *Id.*

Magistrate Judge Sullivan considered all of these factors. *See* JA 810-15. With respect to the fairness of the settlement, Magistrate Judge Sullivan noted that the

case "had been litigated for six years and undergone extensive motion practice," JA 812, and that there had been "extensive discovery," JA 813. He explained that the settlement "was negotiated at arms length through the assistance of myself as the preferred magistrate judge. . . I will tell you that things were very contentious and all the counsel for both the plaintiff and defendant dug in and were fierce advocates for their respective parties and the negotiations were protracted because they were one inch at a time. And that's why it took so long, but that's what happened here." JA 811-12. And he considered class counsel's extensive experience litigating complex class actions, finding that "[c]lass counsel effectively and adequately represented the class." JA 811.

With respect to the adequacy of the settlement, Magistrate Judge Sullivan considered the strength of plaintiff's case, but explained that "Nationstar had very strong defenses and that can't be ignored." JA 813. Judge Sullivan noted that "[l]itigation in this case absent settlement would have likely been lengthy and it would certainly be quite, quite expensive." JA 814. Judge Sullivan acknowledged that Nationstar was solvent and would be able pay a judgment. JA 814. And Judge Sullivan observed that only "113 people have opted out . . . . This is a relatively low number. 13.8 percent of class members have submitted claims, which is a high number. That shows me that class members' support for the settlement favors approval." JA 815.

In *In re Lumber Liquidators*, the fact "that only 94 of the 178,859 class members who responded to the class-action settlement notice opted out of the settlement (about 0.05%), and 12 class members objected thereto (about 0.006%) . . . provide[d] further support for the settlement's adequacy." 952 F.3d at 485-86. The support for the settlement is even greater here—with only 113 of 348,153 class members (about 0.03%) opting out and only one class member substantively objecting (about 0.0003% of the class).

Rather than engaging with the relevant factors, Objector-Appellant makes only conclusory assertions that the settlement amount is insufficient and argues that Plaintiff-Appellee and class counsel were required to provide the court with a mathematical analysis of net expected value.[5] This is not a requirement under either Fourth Circuit precedent or Federal Rule of Civil Procedure 23. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d at 159 (listing factors); *see also, e.g.*, *Marshall v. Nat'l Football League*, 787 F.3d 502, 517 (8th Cir. 2015) (rejecting argument that the district court

[5] *Amici* assert that the Settlement Agreement "appears to constitute an impermissible reverse auction." Amicus Br. at 14. In a reverse auction, defendants cherry pick from competing class actions the one where class counsel is willing to accept a lower recovery. This could not be further from the facts of this case. McAdams did not file her competing class action until *after* the district court had granted preliminary approval of the settlement. The instant action was the *only* class action challenging Nationstar's processing of loss mitigation applications at the time the parties reached a settlement. Indeed, were this Court to vacate and reverse, it might well *create* a reverse auction situation where none otherwise existed, which could rebound to the detriment of the class.

needed to evaluate the settlement in light of the best possible recovery); *Lane v. Facebook, Inc.*, 696 F.3d 811, 823 (9th Cir. 2012) ("While a district court must of course assess the plaintiffs' claims in determining the strength of their case relative to the risks of continued litigation, it need not include in its approval order a specific finding of fact as to the potential recovery for each of the plaintiffs' causes of action." (citation omitted)). Put simply, a mathematical approach is not required. Magistrate Judge Sullivan clearly *did* consider "the relative strength of the plaintiffs' case on the merits" and "the existence of any difficulties of proof or strong defenses," *see* JA 813-14, which is precisely what this Court instructed in *In re Lumber Liquidators*, 952 F.3d at 484. Accordingly, he acted within his discretion in approving the settlement as fair, reasonable, and adequate.

III. Attorney's Fees Equal to 84 Percent of Counsel's Lodestar Are Reasonable

The district court approved an attorney's fee and expenses award of $1.3 million (which included approximately $217,000 in expenses). Class counsel submitted detailed, contemporaneous billing records to the district court that showed that the fee award and cap resulted in an award of only 84 percent of counsel's lodestar, even when calculated using the hourly rates set forth in Appendix B of the District of Maryland's Local Rules, which are much lower than the rates class counsel has received in other cases. JA 282-520.

Objector-Appellant makes no complaint about class counsel's qualifications, the number of hours class counsel devoted to this case, counsel's proposed rates, or any litigation activity class counsel engaged in. Instead, Objector-Appellant objects to Nationstar's agreement not to oppose Plaintiff's request for fees as long as that request did not exceed $1.3 million—a so-called "clear sailing" provision.

Clear sailing provisions are not inherently objectionable, and in fact are fairly standard in negotiated class settlements; their presence just means that the court should subject the reasonableness of the fee request to heightened scrutiny. *See Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 84 (1st Cir. 2015). Magistrate Judge Sullivan expressly found that "[t]here's no collusion here," JA 812, a finding that was amply supported by the record. In addition, class counsel provided the district court with complete billing records, and the requested fee award was more than 15 percent below counsel's lodestar even using the parsimonious Local Rules hourly rates. As Magistrate Judge Sullivan acknowledged, "[l]awyers routinely complain that these rates are too low, especially the rates that pertain to more experienced attorneys. Counsel seeks 86 percent of their reasonable fee under the lodestar method. This is a significant reduction." JA 817-18. Since the necessity of class counsel's extensive work on this six-year-old case, the propriety of the requested rates, and the accuracy of the billing records are undisputed, Nationstar's agreement not to oppose the fee request mattered not at all.

Objector-Appellant also argues that the district court was not allowed to award fees according to the lodestar method and was required to limit the fee award to 33% or less of the common fund. It is well established that courts have discretion whether to apply either the lodestar method or the percentage method, *see Payne v. Spring Commc'ns Co. L.P.*, No. 1:11-cv-3434-CCB, 2012 WL 13006270, at *2 (D. Md. Nov. 30, 2012), and it is generally agreed that the lodestar award is a "presumptively reasonable award (hence its name), as it provides a court with precisely the information needed to assess the cost of counsel's legal services," whereas the percentage approach "risks deviation from the baseline," *see* Newberg on Class Actions § 15:52. Here, Objector-Appellant combines fees and expenses to make the misleading argument that the attorney's fees account for 43.33% of the settlement fund. Objector-Appellant's Br. at 28. In fact, the attorney's fee award accounts for around 36% of the fund. The district court did not abuse its discretion in using the lodestar method to evaluate the propriety of the fee request. JA 817-18.

The requested fee award's reasonableness is further demonstrated by the fact that it resulted in a significant downward multiplier. Courts generally hold that "lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorneys' fee." *Jernigan v. Protas, Spivok & Collins, LLC*, No. ELH-16-03058, 2017 WL 4176217, at *3 (D. Md. Sept. 20, 2017). Here, the fee award is a negative multiplier of class counsel's lodestar, which is generally recognized as per se reasonable. *See,*

e.g., *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 578 (E.D. Va. 2016) (noting that a negative multiplier "is comfortably below the range of multipliers other courts have found to be reasonable" and citing cases).[6]

IV. Magistrate Judge Sullivan Had Authority to Approve the Settlement Agreement.

Despite having known that the case had been referred to Magistrate Judge Sullivan pursuant to 28 U.S.C. § 636(c) five months before filing her objections, Objector-Appellant waited until the fairness hearing itself to raise for the first time an objection to his jurisdiction to approve the settlement because she had not consented to the referral. JA 793.

Objector-Appellant provides no authority for the proposition that consent of absent class members is required to refer class actions to magistrate judges. Four other Circuits that have considered the issue have unanimously decided the opposite. *See Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1076 (9th Cir. 2017); *Day v. Persels & Assocs., LLC*, 729 F.3d 1309, 1316 (11th Cir. 2013); *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 181 (3d Cir. 2012); *Williams v. Gen. Elec. Cap. Auto Lease, Inc.*, 159 F.3d 266, 269 (7th Cir. 1998). There is good reason for that outcome. A requirement that referral to a magistrate requires the consent of

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[6] Indeed, while the fee award was only 84% of class counsel's lodestar (using the Local Rules hourly rates) at the time of the award, that percentage is now even lower because the time subsequently spent by class counsel on this appeal will not be separately compensated.

every absent class member—in this case over 300,000 individuals—would mean that such referral would be practically barred in the class action context. *See Williams*, 159 F.3d at 269 ("From a practical standpoint, such a rule would virtually eliminate § 636(c) referrals to magistrate judges in all potential class actions, because it would *de facto* transform all such cases into 'opt-in' style actions and fundamentally change the capacity of the judgment (whether the result of full-blown litigation or settlement) to bind both sides in the absence of express consents."). There is nothing in 28 U.S.C. § 636(c) or the Constitution that requires that outcome.

Nor does the Supreme Court's decision in *Devlin v. Scardelletti*, 536 U.S. 1 (2002), which was decided before three of the cases cited above, alter the analysis. There the Supreme Court was careful to note that absent class members "may be parties for some purposes and not for others." *Id.* at 10. "The named plaintiffs serve as representatives of the class and in that capacity are authorized to decide matters of litigation strategy, such as which claims to assert or drop, what discovery to take, what motions to file, and so forth. Deciding whether to consent to a magistrate judge is a matter of litigation strategy of the same order." *Koby*, 846 F.3d at 1077.

Finally, to the extent Objector-Appellant's argument is something other than that her consent was necessary pursuant to 28 U.S.C. § 636(c), any such argument

is waived.[7] "Absent exceptional circumstances, . . . [This Court] do[es] not consider issues raised for the first time on appeal." *Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 603 (4th Cir. 2004).

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's final approval of the settlement in this case.

Dated: June 15, 2021

Respectfully Submitted,

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[7] Objector-Appellant handwaves at a "potential conflict of interest" presented by Magistrate Judge Sullivan having overseen the settlement negotiations. But Objector-Appellant does not allege that Magistrate Judge Sullivan had any sort of personal interest in the case, nor does she argue for his recusal under 28 U.S.C. § 455.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of authorities, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments), this brief contains 6,384 words.

/s/ Jonathan K. Tycko
Jonathan K. Tycko

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I certify that this brief complies with the typeface and type style requirements because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Jonathan K. Tycko
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