IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CHERYL HOOK, DAVID SEMAN, BARBARA BROWN, LARRY ONDAKO and JULIA ONDAKO, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

NEMACOLIN WOODLANDS, INC., a Pennsylvania corporation, d/b/a, NEMACOLIN WOODLANDS RESORT; NEMACOLIN, INC., a Pennsylvania corporation; and NWL, CO., a Pennsylvania corporation,

Defendants.

Case No.: 2:21-cv-00387-MPK

Magistrate Judge Maureen P. Kelly

MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION
FOR PRELIMINARY APPROVAL OF AMENDED CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiffs Cheryl Hook, David Seman, Barbara Brown, Larry Ondako and Julia Ondako ("Plaintiffs") and Defendants Nemacolin Woodlands, Inc. d/b/a Nemacolin Woodlands Resort, Nemacolin, Inc., and NWL, Co. ("Nemacolin" or "Defendants," collectively the "Parties"), request preliminary approval of the class action Amended Settlement Agreement and Release ("Amended Settlement Agreement") reached by the Parties to resolve this action. Plaintiffs present the proposed Amened Settlement Agreement, attached hereto as **Exhibit A**, on behalf of themselves and all persons who held a Nemacolin Woodlands Resort 400 Club Membership.

Specifically, the term "Class" or "400 Club Class" as used in the Amended Settlement Agreement, is defined as all natural, living persons in the United States who obtained a Nemacolin Resort 400 Club Membership during the period beginning January 1, 1989 and ending on March 23, 2021, who did not sell, transfer, terminate, cancel, or otherwise relinquish his or her Nemacolin Resort 400 Club Membership in any way, and which sale, transfer, termination, cancellation, or other relinquishment of his or her Nemacolin Resort 400 Club Membership is evidenced by documentation maintained by Nemacolin. *See* Exh. A, at § 1.6. Nemacolin's records reflect that there are approximately three-hundred and forty-seven (347) members of the 400 Club Class. *Id.*, at § 1.8.

Under the Amended Settlement, Nemacolin will fund a non-revisionary, cash settlement fund in the amount of Ten Million Dollars ($10,000,000.00) (the "Settlement Fund") which will provide substantial and immediate benefits for the Settlement Class. The terms of the *pro rata* payment allocation and distribution process are detailed in the Amended Settlement Agreement and its Exhibits, and are described below. Pursuant to the Amended Settlement Agreement, Nemacolin will also directly pay the Settlement Administrator's costs associated with disseminating Class Notice, distributing funds, and any escrow, administrative and/or bank related fees and costs associated with executing the Amended Settlement Agreement.

The undersigned counsel for the Parties who have executed the Amended Settlement Agreement, respectfully and jointly submit that the terms of the Amended Settlement Agreement

are fair, reasonable, and adequate, and should be preliminarily approved. The Settlement provides significant and immediate benefits for the Settlement Class while avoiding protracted litigation and all risks of continued litigation, including the risk of delay and the risks presented by Nemacolin's defenses. Moreover, the Settlement allows any Class Member who wishes to opt out of the Settlement and pursue his or her individual claim the opportunity to do so.

At this first stage of the settlement approval process, the Parties respectfully request that the Court: (l) find the terms of the proposed Amended Settlement Agreement fair, reasonable, and adequate and grant preliminary approval to the proposed Settlement; (2) preliminarily approve the Parties' stipulation in the Amended Settlement Agreement that the proposed Settlement Class be certified pursuant to Fed. R. Civ. P. 23 for purposes of administering the Settlement; (3) appoint each of the named Plaintiffs as Class Representatives; (4) appoint Joy D. Llaguno of Hook & Hook PLLC as Class Counsel for the Settlement Class; (5) approve Settlement Services, Inc. as the Settlement Administrator to provide notice to the Settlement Class and administer the Settlement; (6) approve the proposed Notice of Class Action Settlement (attached as **Exhibit 1** to the Amended Settlement Agreement) as to form and content, as well as the other Amended Settlement Agreement Exhibits, and direct that notice of the proposed Settlement be provided to the Settlement Class in accordance with the provisions of the Amended Settlement Agreement; and (7) schedule a Final Approval Hearing to take place at the Court's convenience, approximately 60-90 days after the date that notice of this Settlement is issued by the Settlement Administrator to the Settlement Class.

II. FACTUAL BACKGROUND

A. Procedural History

On March 23, 2021, class representatives David Seman and Cheryl Hook initiated this action by filing their Complaint alleging that Nemacolin wrongfully terminated Nemacolin Woodlands Resort 400 Club Memberships, and asserting claims against Nemacolin for (i) breach of contract, (ii) breach of implied contract and/or quasi contract, (iii) unjust enrichment, (iv) violation of the Pennsylvania Unfair Trade Practices Consumer Protection Law, and

(v) fraudulent representation. ECF 1. On May 6, 2021, Nemacolin filed their Motion to Dismiss Plaintiffs' Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) and to Strike Certain Allegations Pursuant to Fed. R. Civ. P. 12(f). ECF 5. Plaintiffs filed their First Amended Complaint on May 27, 2021, and Nemacolin filed their Answer and Affirmative Defenses on June 11, 2021. ECF Nos. 11, 16. On January 25, 2022, the Class Representatives filed the operative Second Amended Complaint (the "Complaint") on behalf of themselves and similarly situated individuals, and on February 8, 2022, Nemacolin filed their Answer and Affirmative Defenses to Plaintiffs' Second Amended Complaint. ECF Nos. 38-39. Nemacolin has denied and continues to deny that it has engaged in any acts or omissions that violate any legal requirements.

Prior to settlement discussions, the Parties had been engaged in extensive pre-certification discovery, including written discovery, exchanging documents and electronically stored information ("ESI"), and were set to begin the depositions of the named Plaintiffs, Defendants' corporate officers, and real estate agent Marian Silverstein. *See* Declaration of Joy D. Llaguno ("Llaguno Decl.,"), at ¶¶ 2-3. The Parties engaged in multiple rounds of ESI search terms and custodians, and participated in lengthy meet and confer conferences to resolve discovery disputes and facilitate the exchange of relevant documents and ESI. *Id.* at ¶ 4. To date, Defendants have produced over 2,200 pages and Plaintiffs have produced over 1,300 pages of relevant documents in discovery. *Id.*

On May 6, 2022, Plaintiffs moved to compel the deposition testimony of Joseph Hardy and Maggie Hardy Knox, and on May 13, 2022, Nemacolin filed their opposition and further moved the Court for a Protective Order Pursuant to Fed. R. Civ. P. 26(c) as to the Deposition of Margaret Hardy Knox. After the Parties submitted their respective briefing, a hearing on the motions was held on May 24, 2022, and the Court granted Plaintiffs' motion to compel the depositions. *See* ECF Nos. 68-69. 5. The Parties briefed many of the issues in this action through motions practice, including dispositive motions, as well as mediation statement and other materials submitted to the mediator. Llaguno Decl., ¶ 5.

On August 2, 2021, the Court appointed Attorney Carole Katz to serve as the mediator (the "Mediator"). ECF 27. On May 20, 2022, the Parties participated in an arm's length full-day mediation session before the mediator to attempt to resolve the Action. *See* Ex. A, at ¶ C; Llaguno Decl., ¶¶ 6-7. On or about May 20, 2022, the Mediator provided the Court with a status update regarding the mediation, informing the Court that the Parties wanted to extend discovery to afford themselves an opportunity for further investigation into certain issues and to prepare for a second mediation session to take place on June 13, 2022. Exh A, at ¶ D. On May 23, 2022, the Parties filed their Joint Motion to Extend Case Management Deadlines with Respect to Class Certification Discovery, which was granted on May 24, 2022, requesting an extension of time to engage in an additional mediation session before the Mediator on June 13, 2022. ECF Nos. 66, 72. The Parties did not reach an agreement during the second mediation session before the Mediator, but made substantial progress and continued settlement discussions over the following weeks, and the parties reached a settlement in principle on July 1, 2022. *See* Llaguno Decl., at ¶ 8; Settlement Agreement, at Exh. A, ¶ F-G; ECF 82, at ¶ 4.

On September 19, 2022, the Parties submitted their prior Joint Motion for Preliminary Approval of Class Action Settlement, jointly requesting preliminary approval of the Parties' previously proposed class action Settlement Agreement (the "Initial Settlement Agreement"). *See* ECF Nos. 87-88. On October 12, 2022, the Court conducted the hearing on the Parties' prior Joint Motion. ECF No. 90. The Court granted the prior Joint Motion, preliminary approved the Initial Settlement Agreement, and entered the Settlement Schedule. *See* ECF Nos. 90, 92.

While effectuating the Initial Settlement Agreement, the Parties encountered certain issues with the Notice List and class size. *See* ECF Nos. 96, 98, 100. On October 21, 2022, the Parties jointly moved for a stay of the Preliminary Approval Order and Settlement Schedule, and requested a conference with the Court to apprise the Court of the issues. ECF No. 94. The Court entered an Order staying the Order preliminarily approving the Initial Settlement Agreement, and encouraged the Parties to constructively address the class size issues. ECF Nos. 97, 100. Counsel for the Parties participated in extensive discussions to resolve the issues with the class size and Notice List,

including without limitation, an in-person meeting where the parties reviewed Nemacolin's business records to determine the number of class members. *See* ECF No. 101. In addition, Nemacolin retained a third-party investigator to review the class list. *See id.* Based on the most recent list of individuals who were members of the 400 Club as reflected in the document maintained by Nemacolin, as well as data obtained from the third-party investigator, the Parties determined there are approximately three hundred and forty-seven (347) Class Members. *See* Amended Settlement Agreement §§ 1.22, 13.1. As a result, the Parties were able to resolve the issues with the class size, and have executed an Amended Settlement Agreement.

Based upon their discovery, investigation, and evaluation of the facts and law relating to the matters in the pleadings, mediation sessions, and fruitful, months-long settlement discussions between the Parties, the Parties have agreed to fully, finally, and forever resolve, discharge, and settle all Released Claims in this Action on a class-wide basis pursuant to the terms of the Amended Settlement Agreement. Amended Settlement Agreement, at Exh. A, at ¶ G. The Class Representatives and Nemacolin have conducted a comprehensive investigation into the facts, and have analyzed the relevant legal issues encompassing the claims and defenses asserted in the Action. *Id.* at ¶ H; Llaguno Decl, at ¶¶ 2-5, 11-14. The Class Representatives and Class Counsel believe that the claims asserted in this Action have merit. Exh. A, at ¶ H; Llaguno Decl, at ¶ 12. Nemacolin has denied and continues to deny that it has engaged in any wrongdoing and has denied and continues to deny liability for any and all causes of action asserted in this Action. Amended Settlement Agreement, at ¶ H.

The Parties have considered the uncertainties of trial and the benefits to be obtained by settlement, and have considered the costs, risks, and delays associated with continued prosecution of this complex and time-consuming litigation and the likely appeals of any rulings in favor of either the Class Representatives or Nemacolin. Amended Settlement Agreement, at ¶ J; Llaguno Decl., ¶ 12. The Parties have concluded that continued litigation could be protracted, expensive, and disruptive to their business and/or lives, and that it is desirable that the Action be fully, finally, and forever resolved, discharged, and settled in the manner and upon the terms and conditions set

forth in this Amended Settlement Agreement in order to limit the inevitable expense, inconvenience, burden, and uncertainty of further litigation. Amended Agreement, at ¶ K. The Parties desire to enter into a compromise and settlement to avoid the uncertainty and expense of litigation, and to achieve a fair and reasonable resolution of the Action. *Id.* at ¶¶ L-M.

III. THE PROPOSED AMENDED SETTLEMENT

The terms of the Amended Settlement are contained in the Amended Settlement Agreement filed herewith as Exh. A, and its accompanying exhibits. *See* Amended Agreement, at Exh. A and Exhs. 1-3 attached thereto. The Amended Settlement establishes a Ten Million Dollar ($10,000,000.00) non-reversionary common fund[1], which is a beneficial result for the Settlement Class in light of the alleged claims and defenses. *Id.* at § 3. Each Settlement Class Member who was sent notice, and who does not opt-out of the Class, will receive an automatic payment of a *pro rata* share of the Net Settlement Fund during the First Distribution, without requiring them to take any action or fill out a claim form, and may receive an additional cash payment from any remaining unclaimed funds during a Second Distribution. *Id.*, at §§ 3, 5.

The material terms of the Amended Settlement Agreement include the following:

A. The Settlement Class

The Settlement Agreement provides for certification of the following "400 Club Class" for settlement purposes only:

> [A]ll natural, living persons in the United States who obtained a Nemacolin Resort 400 Club Membership during the period beginning January 1, 1989 and ending on March 23, 2021, who did not sell, transfer, terminate, cancel, or otherwise relinquish his or her Nemacolin Resort 400 Club Membership in any way, and which sale, transfer, termination, cancellation, or other relinquishment of his or her Nemacolin Resort 400 Club Membership is evidenced by documentation maintained by Nemacolin..

Agreement, § 1.6. Excluded from the Class are officers and directors of the Nemacolin Defendants;

[1] The Amended Settlement Agreement increases the common fund from the previously proposed $8,525,000.00 common fund contemplated in the Initial Settlement Agreement.

family members of the officers and directors of the Nemacolin Defendants; any parents, subsidiaries, affiliates, of the Nemacolin Defendants; and any entity in which the Nemacolin Defendants have a controlling interest; any natural, living person who sold, transferred, terminated, cancelled, or otherwise relinquished his or her Nemacolin Resort 400 Club Membership; any person deceased as of December 14, 2022 who had a Nemacolin Resort 400 Club Membership; all judges assigned to hear any aspect of this litigation, as well as their immediate family members; all persons and entities that have released the Released Claims described herein prior to the Court's preliminary approval of the Settlement Class; and government entities. *Id.* The Parties agree based on the most recent list of individuals who are members of the 400 Club as reflected in the document maintained by Nemacolin, that there are approximately three hundred and forty-seven (347) persons in the 400 Club Class. *Id.* at § 1.8.

B. Settlement Consideration and Distribution Procedures

The Amended Settlement Agreement provides for Nemacolin to fund a gross, non-revisionary, Settlement of Ten Million Dollars ($10,000,000.00) (the "Settlement Fund") for: (1) payments to the Settlement Class, (2) Class Representative Service Awards of up to twenty-five Thousand Dollars ($25,000.00), and (3) Court-approved Attorney Fees and Expenses. *Id.*, § 3.2. The Amended Settlement Agreement also provides that Nemacolin will directly pay the Settlement Administrator's costs associated with disseminating the Class Notice, locating Settlement Class Members, distributing checks to Settlement Class Members, and any escrow, administrative, and/or bank related fees and costs associated with the Settlement Administrator's distribution of payments. *Id.,* at § 3.2.3. After deducting the Court-approved Service Awards to the Class Representatives and Attorney Fees and Expenses from the Settlement Fund (the "Net Settlement Fund"), 400 Club Class members who do not opt-out (the "Settlement Class") shall be paid from the Net Settlement Fund in an amount equal to the Settlement Class Member's proportionate share of the Net Settlement Fund. *Id.*, at §§ 3.2.4, 5, 15.

Within twenty (20) days of the Effective Date of the Amended Settlement Agreement, the Settlement Administrator shall mail each Settlement Class Member a Cash Payment on a *pro rata*

basis in proportion to the total number of Settlement Class Members (the "First Distribution"). *Id.*, § 5.2. The checks mailed during the First Distribution will be valid for ninety (90) days after issuance. *Id.*, § 5.2.1. Settlement Class Members who are not located or whose checks are not cashed within ninety (90) days after the Distribution Date shall be rendered ineligible for a Cash Payment and ineligible to share in the distribution of the Net Settlement Fund. *Id.* at § 5.4. For any unclaimed amounts remaining in the Net Settlement Fund after the First Distribution (in other words, any checks that remain uncashed more than ninety (90) days after they were mailed to a Settlement Class Member), a second distribution shall be made to Settlement Class Members that cashed their initial check (the "Second Distribution"). *Id.*, § 5.3. 120 days after the Second Distribution Date, the residue of the Settlement Fund, if any, shall be distributed to *cy pres* recipients to be agreed upon by the Parties. *Id.* § 5.6. In no event shall any unclaimed amounts remaining in the Net Settlement Fund after distribution revert to Nemacolin. *Id.*

C. Service Awards and Attorneys' Fees and Costs

At least twenty (20) days prior to the Final Approval Hearing, Class Counsel will petition the Court for payment of an Attorney Fee Award not to exceed thirty percent (30%) of the Settlement Fund, reimbursement of out-of-pocket costs not to exceed twenty-five thousand dollars ($25,000.00), and a Service Award for each Class Representative, not to exceed twenty-five thousand dollars ($25,000.00) per Class Representative. *Id.*, at § 15. Nemacolin does not intend to oppose Class Counsel's petition for Service Awards, Attorney Fees and Expenses. *Id.* Plaintiffs' arguments in support of the payment of attorneys' fees and costs, and service awards, will be made available to the Settlement Class before the conclusion of the time period to opt out or file objections to the Settlement. *Id.*

D. Release of Claims

Plaintiffs and Class Members who do not opt out will release the "Released Parties" from the "Released Claims." *Id.* § 10.

> "Released Claims" mean any and all claims or causes of action of every kind and description against Nemacolin reasonably related to the Nemacolin Resort 400 Club Memberships as set forth in the Action that the Releasors shall release, consisting of all known and unknown complaints, claims, grievances, allegations of wrongdoing, liabilities, obligations, agreements, controversies, compensatory damages, consequential damages, exemplary damages, actions, causes of action in law or equity, suits, matters, petitions, rights, demands, costs, losses, restitution, disgorgement, penalties, fees, expenses (including attorneys' fees, costs, and expenses), and punitive damages, known or unknown […], including claims that relate in any way to their alleged benefits as a former 400 Club member, asserted or unasserted, suspected or unsuspected, discovered or undiscovered, latent or patent, fixed or contingent, that is, has been, could reasonably have been, or in the future might reasonably be asserted by Releasors ……

Id. at § 1.29.

> The "Released Parties" means (1) Nemacolin and Nemacolin Defendants; (2) Nemacolin's past, present, or future subsidiaries, parent companies, divisions, affiliates, partners or any other organization units of any kind doing business under their names, or doing business under any other names, or any entity now or in the past controlled by, controlling, or under the common control with any of the foregoing and doing business under any other names, and each and all of their respective affiliates and subsidiaries, and each of their respective predecessors, successors, and assigns, whether inside or outside the United States; and (3) each of the present and former officers, directors, partners, shareholders, agents, employees, attorneys (including any consultants hired by counsel), advisors, independent contractors, representatives, beneficial owners, insurers, trusts, accountants, heirs, executors, and administrators, and all persons, acting by, through, under the direction of, or in concert with them related to the Action.

Id. at § 1.30.

E. <u>Class Notice Plan</u>

The Amended Settlement Agreement provides for Settlement Services, Inc. to serve as the Settlement Administrator. *Id.* at § 1.35. The Settlement Administrator was selected by Defense Counsel, and approved by Plaintiffs' counsel, and is subject to Court approval. *Id.* The Settlement Administrator has not had any prior engagements with Plaintiffs' counsel. Llaguno Dec., ¶ 15. Upon Court approval, the Settlement Administrator shall, in cooperation with the Parties, be responsible for creating, administering, and overseeing the Settlement Fund, effectuating Class Notice (including data standardization and de-duplication of the Notice List, updating addresses,

reasonable efforts to update addresses for undeliverable notices, and printing and mailing the Class Notice), drafting and submitting the CAFA notice required by 28 U.S.C. § 1715, and deploying and operating an automated toll-free contact center, including Interactive Voice Response (which does not provide a live operator) to obtain documents and answer questions from Class Members. *Id*., at § 6.

Subject to the Court's approval, the form of Notice to Class Members shall be substantially in the form of **Exhibit 1** to the Settlement Agreement. *See* Exh. 1 to Amended Agreement. The proposed Notice is based on the model notice provided by the Federal Judicial Center and contains all the information required by Fed. R. Civ. P. 23(c)(2)(B). *See id.;* Llaguno Decl., ¶ 10.

Within seven (7) days of the Court's entry of the Preliminary Approval Order, Nemacolin shall update the Class data to provide the Settlement Administrator the Notice List. *Id.,* at § 7.2. *Id.* The Parties represent and warrant that the Notice List will include all Class Members to the best of their knowledge based on the most recent list of individuals who were members of the 400 Club as reflected in the document maintained by Nemacolin.. *Id.* No later than ten (10) days after the Preliminary Approval Order, the Settlement Administrator will mail the Notice to all individuals on the Notice List via first class mail through the United States Postal Service, postage pre-paid. *Id.*, at §§ 7.3, 1.23. Following the mailing of the Notice, the Settlement Administrator shall provide Defense Counsel and Class Counsel with written confirmation of the mailing. *Id.*, at § 7.4. Unless the Settlement Administrator receives a Notice returned from the U.S. Postal Service, that Notice shall be deemed mailed and received by the individual to whom it was sent five (5) days after mailing. *Id.*, § 7.5. In the event that subsequent to the first mailing of a Notice, and prior to seven (7) days before the Opt-Out Deadline, the Notice is returned to the Settlement Administrator by the United States Postal Service with a forwarding address for the recipient, the Settlement Administrator shall re-mail the notice to that address, and the Notice will be deemed mailed at that point. *Id.* The Notice shall be deemed received by the individual once it is mailed for the second time. *Id.* No later than thirty (30) days after the Effective Date of the Settlement

Agreement, the Settlement Administrator, upon Court approval, will file under seal the list of the names and addresses of all Class Members to whom Notice was sent. *Id.* at § 7.6

The Settlement Administrator shall make available upon request copies of the Settlement Agreement and Exhibits, including the Class Notice, as well as the operative Complaint, the Preliminary Approval Order, application for attorney's fees and class representative service awards, and the Final Approval Order. *Id.*, at § 7.7; Notice, at Exh. 1 to Agreement. Class Counsel will also make these documents and information available on Class Counsel's website. *See id.* The Settlement Administrator will establish and operate a toll-free telephone number, including Interactive Voice Response, to obtain documents and answer questions. *Id.*; Agreement at § 6.1.

The Settlement Administrator shall maintain reasonably detailed records of its activities under the Settlement Agreement, which will be made available to Class Counsel and Defense Counsel, the Parties, and their representatives promptly upon request. *Id.*, at § 6.3. The Settlement Administrator shall also provide reports and other information to the Court as the Court may require. *Id.* Should the Court request or should it be reasonably advisable to do so, the Parties, in conjunction with the Settlement Administrator, shall submit a timely report to the Court summarizing the work performed by the Settlement Administrator. *Id.*

F. Opt-out and Objection Rights

Class Members may exclude themselves from the Settlement Class by submitting a request for exclusion to the Settlement Administrator postmarked by the Opt-Out Deadline, which shall be no earlier than thirty (30) days after the Notice Mailing Date and not later than fifteen (15) days prior to the Final Approval Hearing. *Id.* at §§ 1.25, 11. The request to opt out must: (a) identify the case name and number of the Action; (b) identify the name, address and telephone number of the person requesting exclusion; (c) be personally signed by the person requesting exclusion; and (d) contain a statement that indicates a desire to be excluded from the Settlement Class. Any request to opt out purporting to opt out on behalf of anyone other than the individual signing the request to opt out shall be void. *Id.* Any Class Member who does not opt out shall be deemed to be part of the Settlement Class upon the expiration of the Opt-Out Deadline. *Id.,* at § 11.3. A Class Member

shall have the right to revoke a request for exclusion if a notice of the Class Member's election to revoke his or her exclusion is sent to the Settlement Administrator, personally signed by the Class Member and containing a concise statement of the reasons for revoking his or her request for exclusion, and postmarked on or before the Opt-Out Deadline. *Id.* § 11.7.

Class Members may object to the Settlement by sending Class Counsel and Defense Counsel, and filing with the Court a written objection that is postmarked by the Objection Deadline, which shall be no earlier than thirty (30) days after the Notice Mailing Date and not later than fifteen (15) days prior to the Final Approval Hearing. *Id.,* at §§ 1.24, 12.3. The written objection must include: (a) the case name and number of the Action; (b) the name, address, telephone number of the Settlement Class Member objecting and, if represented by counsel, of his/her counsel; (c) a specific, clear and concise statement of the reasons or grounds for the Settlement Class Member's objection, the facts supporting the objection, and/or the legal grounds and authority on which the objection is based; and (d) a statement of whether he/she intends to appear at the Final Approval Hearing, either with or without counsel. *Id.* at § 12.3. The Settlement Class Member (and his or her attorney, if individually represented, including any former or current counsel who may be entitled to compensation for any reason related to the objection) must sign the objection and mail a copy to Defense Counsel and Class Counsel. *Id.* at § 12.4. Class Counsel and Nemacolin shall have the right to respond to any objection no later than five (5) days prior to the Final Approval Hearing, by filing a copy of the response with the Court, and serving a copy, by regular mail, hand or overnight delivery, to the objecting Member of the Settlement Class or their attorney, and the other Party's counsel. *Id.* § 12.6. The Settlement Administrator shall forward copies of any written objections to Class Counsel and Defense Counsel within seven (7) calendar days after the Objection Deadline, and shall file a list reflecting all objections with the Court no later than seven (7) calendar days before the Final Approval Hearing. *Id.* § 12.7. The Court shall have the ultimate determination of whether an Objection has been appropriately made. *Id.*

The Parties respectfully request that the Court provisionally approve the Amended Settlement, enter the Parties' proposed Preliminary Approval Order, and allow notice of the proposed Amended Settlement to be sent to the Class Members.

IV. ARGUMENT

A. Applicable Legal Standard

"The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re Gen. Motors Corp. Fuel Tank Products Liab. Litig*., 55 F.3d 768, 784 (3d Cir. 1995); *Jackson v. Wells Fargo Bank, N.A.,* 136 F.Supp.3d 687, 700 (W.D. Pa. 2015) ("There is an overriding public interest in settling class action litigation, and it is to be encouraged by the courts"); *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2009) (noting the "strong judicial policy in favor of class action settlement"). When a proposed class-wide settlement is reached, Rule 23 requires that the settlement be submitted to the Court for preliminary approval. Fed. R. Civ. P. 23(e).

"Under Rule 23, a settlement falls within the 'range of possible approval,' if there is a conceivable basis for presuming that the standard applied for final approval—fairness, adequacy, and reasonableness—will be satisfied." *In re Nat'l Football League Players' Concussion Injury Litig*., 301 F.R.D. 191, 198 (E.D. Pa. 2014); *see also Jackson*, 136 F.Supp.3d at 699. The first and primary concern of the Court is whether there are any obvious deficiencies within the proposed Settlement. *In re NFL Players*, 301 F.R.D. at 198 (citing *In re Linerboard Antitrust Litig.,* 292 F.Supp.2d at 638). In making its preliminary determination, courts "consider whether the negotiations occurred at arm's length, whether there was significant investigation of Plaintiffs' claims, and whether the proposed settlement provides preferential treatment to certain class members." *Id*.; *see Jackson,* 136 F.Supp.3d at 699. The court's determination is guided by: "(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgement; (8) the range

of reasonableness of the settlement fund in light of the best possible recovery; [and,] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Jackson*, 136 F.Supp.3d at 700 (W.D. Pa. 2015) (citing *In re Warfarin, 391* F.3d at 535).

If the proposed settlement is preliminarily acceptable, the court then directs that notice be provided to all class members who would be bound by the proposed settlement in order to afford them an opportunity to be heard on, object to, and opt out of the settlement. *In re NFL Players*, 301 F.R.D. at 198; *see also* Fed. R. Civ. P. 23(c)(3), (e)(1), (e)(5). The final step in settlement approval is typically discerned through a "fairness" hearing, where the court assesses whether the settlement is fair, reasonable and adequate. *See* Fed. R. Civ. P. 23(e)(2); *Harlan v. Transworld Systems, Inc.*, 302 F.R.D. 319, 324 (E.D. Pa. 2014); *Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 438-39 (E.D. Pa. 2008). If the court concludes that the settlement is fair, reasonable and adequate, then settlement will be given final approval. *Id.*

B. The Settlement Agreement is the Product of Informed, Non-Collusive Negotiations After Significant Investigation of Plaintiffs' Claims.

"Whether a settlement arises from arm's-length negotiations is a key factor in deciding whether to grant preliminary approval." *In re Nat'l Football League*, 301 F.R.D. at 198; (citing *In re CIGNA Corp. Sec. Litig.*, No. 02-8088, 2007 WL 2071898, at *2 (E.D. Pa. July 13, 2007) (presumption of fairness exists where parties negotiate at arm's-length, assisted by a mediator); *accord Jackson*, 136 F.Supp.3d at 700; *Gates*, 248 F.R.D. at 444 (stressing the importance of arm's-length negotiations and highlighting the fact that the negotiations included "two full days of mediation"); *see also* 4 Alba Conte & Herbert Newberg, Newberg on Class Actions, § 11:41 (4th ed. 2010) (noting that courts usually adopt "an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval"); *Linerboard*, 292 F. Supp. 2d at 640 ("[A] presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel"). This deference reflects an understanding that vigorous negotiations between seasoned counsel protect against collusion and advance the fairness

considerations of Rule 23(e). *See In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158, 184 (E.D. Pa. 1997) (settlement was the product of "good faith, arms' length negotiations[,]" which eliminated "the risk that a collusive settlement agreement may [have been] reached").

Here, the Settlement was reached following arm's length negotiations presided over by a well-qualified and neutral mediator, Carole Katz. The Parties participated in two mediation sessions, including a full-day session where the parties submitted comprehensive memoranda of the issues, claims, and defenses, and relevant documents to the mediator. Llaguno Decl., ¶¶ 6-7. Class Counsel and Nemacolin's counsel vigorously advocated their respective clients' positions during negotiations, and were prepared to proceed to class certification, summary judgment, and trial, if no settlement was reached. *Id.* The mediation sessions took place after the Parties had conducted significant discovery, including exchanging over 3,500 pages of relevant documents and ESI. *Id.*, ¶¶ 3-6. Further, the Parties were represented by experienced counsel during the course of settlement negotiations. *Id.*, ¶¶ 7-10, 21-25. Counsel for the Parties participated in extensive discussions to address issues regarding the class size. *See* ECF No. 101. The Parties then spent significant time negotiating the terms of the final written Amended Settlement Agreement that is now presented to the Court for approval. Llaguno Decl., ¶¶ 10-11. At all times, these negotiations were at arm's length and while, courteous and professional, the negotiations were intense and hard fought on both sides. *Id.*, ¶¶ 6-14. Finally, the issues of service awards, attorney fees, and costs were not discussed until the Parties agreed on the material terms of the Settlement. *Id.,* at ¶¶ 19, 27.

The proposed Amended Settlement Agreement is also the product of significant investigation of Plaintiffs' claims. In addition to the preparation and analysis of over 3,500 pages of documents exchanged in discovery, as part of their factual investigation, Class Counsel conducted lengthy interviews with and analyzed relevant documents from over approximately twenty-five (25) class members. *Id.*, ¶¶ 2-5. Class Counsel also engaged with damages experts and obtained hundreds of relevant recorded documents from the County Recorder's Office. *Id*. The substantial information and discovery obtained in this case enabled the parties to reasonably

assess the respective strengths, risks, and value. The Amended Settlement was achieved through well-informed and arm's-length negotiations, which supports granting preliminary approval under Rule 23(e)(2)(B).

C. The Proposed Amended Settlement Provides Substantial Benefits for the Settlement Class and There Are No Deficiencies to Cast Doubt on its Fairness.

When considering whether "the relief provided for the class is adequate," Rule 23(e) counsels the court to consider: "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; [and] (iii) the terms of any proposed award of attorney's fees, including timing of payment[.]" Fed. R. Civ. P. 23(e)(2)(C)(i)-(iii). Courts have afforded significant weight to the opinions of class counsel based on a thorough analysis of the facts. *See, e.g., In re Gen. Instruments Sec. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001); *Stewart v. Rubin*, 948 F. Supp. 1077, 1099 (D.D.C. 1996), *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997) ("[A] court should defer to the judgment of experienced counsel who have competently evaluated the strength of the proof."); *Petruzzi's, Inc. v. Darling-Del. Co., Inc.*, 880 F. Supp. 292, 301 (M.D. Pa. 1995) ("The opinions and recommendation of such experienced counsel are indeed entitled to considerable weight.").

Here, the proposed Settlement certainly meets the requirements for preliminary approval, and has no obvious deficiencies or concerns. Under the terms of the Amended Settlement Agreement, the non-reversionary Settlement Fund will provide significant monetary recovery to the Settlement Class without subjecting them to the risks and delay of further litigation and potential appeals. To compensate the Settlement Class for the allegedly improper termination of 400 Club Memberships, every Settlement Class Member will receive an immediate and automatic payment of approximately $20,000.00, without having to submit a claims form. Amended Settlement Agreement, at § 5; *see In re Certainteed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 216 (E.D. Pa. 2014) ("[I]f the parties were to continue to litigate this case, further proceedings would be complex, expensive and lengthy, with contested issues of law and fact…That a settlement would eliminate delay and expenses and provide immediate benefit to the class militates in favor

of approval."); *Deitz v. Budget Renovations & Roofing, Inc.*, No. 4:12-cv-0718, 2013 WL 2338496, at *5 (M.D. Pa. May 29, 2013) ("The Court sees no reason to needlessly expend judicial resources on a matter that neither party has any interest in continuing to litigate."). In addition, Class Members may receive additional cash payments from any unclaimed funds during a Second Distribution. *See* Amended Settlement Agreement, at § 5.3. The Settlement is fair to the Settlement Class as a whole, and provides no preferential treatment to some Class Members over others. *See id.* All 400 Club Class Members receive equal treatment, and no interests are excluded, as they will each receive a *pro rata* share of the Net Settlement Fund.

As detailed above, the complexity, expense, uncertainty, and likely duration of the litigation support approval of settlement process. The Amended Settlement Agreement defines a clearly identifiable and ascertainable Settlement Class, contains the material economic terms of the agreement, the manner and form of notice to be given to the Settlement Class, the contingencies or conditions to the Settlement's final approval, and other relevant terms. In addition, Nemacolin has agreed to pay the costs of settlement administration separately and independent from the Settlement Fund. Moreover, the Parties agreed to a maximum attorney fee of 30% of the Settlement Fund, which is squarely within the percentage for common fund class action cases. *See* Newberg on Class Actions § 14:6 (indicating that attorneys' fees of between 22% and 33% is normal for common fund cases); *Jackson v. Wells Fargo Bank*, N.A., 136 F.Supp.3d 687, 715 (W.D. Pa. 2015) (noting that "[class action] fee awards…typically range from 19% to 45% of the settlement fund").

Class Counsel and Plaintiffs have considered the complexities of this litigation, the risks and expense of continuing this case through discovery, class certification, summary judgment, and trial against Nemacolin, and the likely appeal(s) even if Plaintiffs do prevail at trial or earlier stages. Llaguno Decl., ¶¶ 12-13. After weighing these against the guaranteed recovery to the Settlement Class, and what Class Counsel believe to be the significant monetary benefits to the Settlement Class, Class Counsel firmly believe the Amended Settlement represents a desirable resolution of this litigation. *Id.* at ¶¶ 11-14, 24-25. In the opinion of Class Counsel, who has significant experience litigating complex litigation and class actions, the Amended Settlement

represents a highly favorable result for the Settlement Class, especially given the risks of continued litigation. *Id.* During the litigation to date, Nemacolin has asserted numerous defenses against liability and damages, and although Plaintiffs do not believe those defenses would prevail at trial, they nevertheless pose a risk of defeating Plaintiffs' claims or reducing their ultimate value.

Accordingly, although Plaintiffs are confident in the strength of their case against Nemacolin and the likelihood of success at each stage, the outcome is nonetheless uncertain. *See In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 273 (E.D. Pa. 2012) ("Plaintiffs not only face the risk that they will not succeed in establishing liability and damages, but also the risks associated with certifying and maintain a class."); I*n re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.*, 269 F.R.D. 468, 487 (E.D. Pa. 2010) ("If it would be difficult for a plaintiff to establish liability, this factor favors settlement."). Moreover, even if Plaintiffs were successful through trial in the district court, there would very likely be one or more lengthy appeals, including potentially an interlocutory appeal under Fed. R. Civ. P. 23(f). *See Jackson, N.A.,* 136 F.Supp.3d at 701; *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995).

The degree of uncertainty and the risk of protracted litigation support preliminary approval of the proposed Settlement.

D. The Proposed Service Awards to the Named Plaintiffs are Justified and Should be Preliminarily Approved.

In recognition of their service to the Class, Class Counsel seeks preliminary approval of modest service awards of twenty-five thousand dollars ($25,000.00) for each of the five (5) named Plaintiffs in an aggregate amount not to exceed one hundred twenty-five thousand dollars ($l25,000.00), and to be allocated in the proposed Final Approval Order based upon the discretion of the Court. Amended Agreement, at § 15, 1.33. "[C]ourts routinely approve incentive awards to compensate named plaintiffs for services they provided and the risks they incurred during the course of the class action litigation." *Cullen v. Whitman Med. Corp*., l97 F.R.D. l36, l45 (E.D. Pa. 2000) (internal citation omitted). It is particularly appropriate to compensate named plaintiffs with service awards where they have actively assisted counsel in their prosecution of claims for

the benefit of a class. *See Briggs v. Hartford Fin. Servs. Grp. Inc*., No. 07–CV–5190, 2009 WL 2370061, at *16 (E.D.Pa. July 31, 2009) ("[I]t is surely proper to provide reasonable incentives to individual plaintiffs whose willingness to participate as lead plaintiffs allows class actions to proceed and so confer benefits to broader classes of plaintiffs.").

Here, the named Plaintiffs have taken significant and meaningful steps to advance the interests of Class members, and have done so at substantial personal risk. Llaguno Decl., ¶ 16. As this case turns primarily on communications between the parties, Plaintiffs were uniquely integral to the discovery process and exchange of ESI. *Id.*, at ¶ 17. Plaintiffs spent significant time responding to discovery, obtaining information and documents, and permitted and assisted counsel in producing over 1,300 pages of emails, correspondence, and relevant documents, which necessarily revealed personal details about their lives. *Id.* Plaintiffs permitted the search of their personal email accounts for ESI and relevant communications with Defendants, and permitted disclosure of private information, including without limitation, personal financial information, and risked their reputation in the community for prosecuting this action. *Id.*

Plaintiffs travelled to Pittsburgh and incurred significant costs to attend the full-day mediation session with Carole Katz and Defendants. *Id.*, at ¶ 18. Indeed, Plaintiff Barbara Brown travelled from out of state in North Carolina, and Plaintiff Cheryl Hook travelled from West Virginia to attend the meditation in Pittsburgh, Pennsylvania. *Id.* Plaintiffs Cheryl Hook, David Seman, Barbara Brown, Larry Ondako and Julia Ondako also made themselves available for the second mediation session scheduled for June 13, 2022. *Id.* Plaintiffs played an active role in the mediations, and ensured that the interests of the Class were fairly protected. *Id.* In addition, Plaintiffs assisted Class Counsel in addressing the issues that arose in connection with the Initial Settlement Agreement, and ensured that the Amended Settlement Agreement remained fair for the Settlement Class in light of the increase in the class size. *Id.*

Based on Plaintiffs' time, efforts, and loyalty to the Class, the proposed Service Awards to compensate the Class Representatives are certainly deserved. Given that Settlement Class Members will automatically receive approximately twenty thousand dollars ($20,000.00), the

requested Service Award is fair, reasonable, and proportionate to the benefits conferred to Class Members. *See e.g., In re Linerboard Antitrust Litig.,* CIV.A. 98-5055, 2004 WL 1221350, at *19 (E.D. Pa. June 2, 2004) ("the Court notes that the amount requested, $25,000, is comparable to incentive awards granted by courts in this district and in other circuits."); *Godshall v. Franklin Mint Co*., 01-CV-6539, 2004 WL 2745890, at *6 (E.D. Pa. Dec. 1, 2004) (approving $20,000 service awards noting it would only reduce the payment to the class by "approximately 5%"). Plaintiffs will submit more specific proposals regarding allocations of service awards to the named Plaintiffs, but at this time submit that the proposed maximum aggregate amount, which represents 1.25% of the Settlement Fund, should be preliminarily approved as fair and reasonable.

E. Class Counsel's Request for Attorneys' Fees and Costs are Reasonable.

Rule 23(h) provides for an award of attorneys' fees and costs in a certified class action where it is "authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The Settlement Agreement provides that any award for payment of attorneys' fees and costs is subject to Court approval, and will be limited to thirty percent (30%) of the gross Settlement Fund. Amended Settlement Agreement, at §§ 15, 1.3-1.4; *see In re Rite Aid Corp. Sec. Litig*., 396 F.3d 294, 303 (3d Cir. 2005), *as amended* (Feb. 25, 2005) (discussing with approval statistical data from three studies of attorneys' fees awarded in class action settlements finding "an average percentage fee recovery of 31%...a median percentage recovery range of 27-30%...and… [that] recoveries in the 25-30% range were 'fairly standard'"); *Frederick v. Range Resources–Appalachia*, LLC, C.A. No. 08–288 Erie, 2011 WL 1045665, at *9 (W.D.Pa. Mar.17, 2011) (noting that "several courts in this circuit have observed that fee awards under [the percentage] approach typically range from 19% to 45% of the settlement fund") (citing *Lazy Oil Co. v. Witco Corp.,* 95 F.Supp.2d 290, 341 (W.D.Pa.1997). The Parties did not discuss the issue of attorneys' fees and costs until after a conditional agreement on relief to the Class was reached. Llaguno Decl., ¶ 27. Plaintiffs' counsel advanced all costs on behalf of Plaintiffs and the Class. *Id.*, ¶ 28. Plaintiffs' counsel has not been paid any fee for legal services or expenses, and their compensation is wholly contingent upon successful resolution of this matter. *Id.* Plaintiffs' counsel intends to submit a motion for attorneys'

fees and costs at least twenty (20) days prior to the Final Approval Hearing, which will be made available to Class Members. Agreement, at § 15; Exh. 1. As such, Settlement Class Members will have an opportunity to object or otherwise respond to Class Counsel's petition for Attorney Fees and Expenses. Accordingly, counsel's request for attorneys' fees and reimbursement of out-of-pocket costs should be preliminarily approved.

F. The Proposed Settlement Class Satisfies the Requirements for Certification and Should be Provisionally Certified.

A court must determine whether the proposed Settlement Class satisfies the requirements of Rule 23. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 296 (3d Cir. 2011). As a general matter, an action may be certified for class treatment for settlement purposes. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Gen. Motors,* 55 F.3d at 777-78. At the preliminary approval stage, a court may conditionally certify the class for purposes of providing notice, leaving the final certification decision for the subsequent fairness hearing. *See* Manual for Complex Litigation (Fourth) § 21.632 (2004).

Under Rule 23(a), Plaintiffs must demonstrate that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Plaintiffs seek class certification under Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. CIV. P. 23(b)(3). However, when a court is "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem v. Windsor*, 521 U.S. 591, 620 (1997).

1. The Settlement Class Satisfies Numerosity and is Ascertainable.

To meet the numerosity requirement of Rule 23(a)(l), "the class size only need be large enough that it makes joinder impracticable." *Fry v. Hayt, Hayt & Landau*, l98 F.R.D. 46l, 467 (E.D. Pa. 2000). In the Third Circuit, numerosity is generally met where "the potential number of plaintiffs exceeds 40." *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001). Here, the proposed Class meets the numerosity requirement because, based on the most recent list of individuals who were members of the 400 Club as reflected in the document maintained by Nemacolin, as well as data obtained from a third-party investigator, the Class includes approximately three hundred and forty seven (347) people. *See* Amended Agreement, at § 1.8. In addition, the Class is ascertainable as the Class of persons who obtained a 400 Club membership can be determined through Nemacolin's business records. *See id.*

2. The Settlement Class Seeks Resolution of Common Questions.

The commonality requirement of Rule 23(a)(2) is satisfied if the Plaintiffs share at least one question of fact or law with the grievances of the prospective class. *See Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir. 200l); *Baby Neal for and by Kanter v. Casey,* 43 F.3d 48, 56 (3rd Cir. 1994); *see also In re Flat Glass Antitrust Litig.,* 191 F.R.D. 472, 478 (W.D. Pa. 1999) ("The Third Circuit has a very "low threshold for commonality."). A common question is one that "arises from a common nucleus of operative facts regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants." *Id.*

Here, the commonality requirement is satisfied because this action presents common questions of law and fact, including, *inter alia,* (i) whether Nemacolin wrongfully terminated 400 Club Memberships of Plaintiffs and the Class, (ii) whether Nemacolin breached membership contracts with Plaintiffs and the Class; (iii) whether 400 Club Members are entitled to damages, and (iv) the proper measure of damages. These are central questions with common proof that can be answered on a Class-wide basis, satisfying the commonality requirement under Rule 23(a)(2).

3. The Claims of the Named Plaintiffs are Typical of the Settlement Class.

Rule 23(a)(3) requires that the class representatives' claims be "typical of the claims ... of the class." *In re Nat'l Football League Players*, 301 F.R.D. at 200. "Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members and if based on the same legal theory." *Hoxworth v. Blinder, Robinson & Co., Inc*., 980 F.2d 912, 923 (3d Cir. 1992); *see In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 532 (3d Cir. 2004) (finding typicality where "claims of representative plaintiffs arise from the same alleged wrongful conduct"); *Seidman v. Am. Mobile Sys., Inc.,* 157 F.R.D. 354, 360 (E.D. Pa. 1994) ("The threshold for establishing typicality is low…and Rule 23(a)(3) will be satisfied as long as the factual or legal position of the representatives are not markedly different from that of other members of the class.").

Here, the typicality requirement of Rule 23(a)(3) is satisfied for purposes of preliminarily approving the Settlement as Plaintiffs' claims are predicated on the same alleged conduct by Nemacolin. Plaintiffs' claims involve the same membership interests and assert the same alleged injuries as all Class members. Any liability for the alleged resulting damage to each Class Member does not depend on individual circumstances, and there are no unique facts or circumstances that would render Plaintiffs claims atypical from those of Class members. Rather, in order to prevail, the Plaintiffs and each Class Member will be required to make the same factual presentation and legal argument with respect to the common questions of liability. The common issues necessarily share "the same degree of centrality" to Plaintiffs' claims, such that in litigating the liability issues, Plaintiffs reasonably can be expected to advance the interests of all Class Members. *Franks v. O'Connor Corp*., No. CIV. A. 92-0947, 1993 WL 76212, at *5 (E.D. Pa. Mar. 17, 1993).

4. A Class Action is the Superior Means to Adjudicate the Dispute and Common Questions Predominate Over Any Questions Affecting Individual Class Members.

Under Rule 23(b)(3), class certification is appropriate if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only

individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Predominance is normally satisfied when there is an essential common factual link between all Class Members and the Defendant for which the law provides a remedy. *Lake v. First Nationwide Bank*, 16 F.R.D. 615, 625 (E.D. Pa. 1994). Superiority is satisfied where "in terms of fairness and efficiency, the merits of a class action [outweigh] those of 'alternative available methods of adjudication.'" *Montgomery Cty., Pa. ex rel. Becker v. MERSCORP, Inc.*, 298 F.R.D. 202, 216 (E.D. Pa. 2014). Efficiency is a primary focus in determining whether the class action is the superior method for resolving the controversy. *Id.* Considerations include "the inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually." *Lake*, 156 F.R.D. at 626.

Common questions of law and fact predominate here. The core common question in this case — whether Nemacolin improperly terminated 400 Club memberships — is "sufficiently cohesive to warrant adjudication by representation." *Vinole v. Countrywide Home Loans, Inc*., 571 F.3d 935, 944 (9th Cir. 2009) (citation and quotation marks omitted). The Settlement Class Members' claims for relief are founded upon common legal theories and a common set of operative facts regarding the alleged termination of their 400 Club Memberships. As the proposed Settlement Class is defined, there are no individual questions governing the purported loss of 400 Club memberships. Thus, Class Members have an interest in the adjudication of the issues of law and fact that predominates this litigation.

In addition, the Settlement Agreement renders this class action superior to other potential avenues of recovery for Plaintiffs and the Class. Certification of the Settlement Class will serve judicial economy and eliminate the burden to class members of litigating their disputed claims individually. Class Members' claims are also highly uniform so they can be resolved much more efficiently on a class basis than through hundreds of individual actions. Indeed, this case effectuates the fundamental goals of Rule 23: (l) to promote judicial economy through the efficient resolution of multiple claims in a single action; and (2) to provide persons with smaller claims,

who would otherwise be economically precluded from doing so, the opportunity to assert their rights. *See* Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 1754. Nonetheless, the Settlement fully preserves the due process rights of each individual plaintiff seeking damages by providing for an adequate period to opt out or object to the Settlement. Accordingly, provisional certification of the Settlement Class for settlement purposes only is warranted.

5. Class Counsel and Plaintiffs Meet the Adequacy Requirements.

Rule 23(a)(4)'s adequacy prong requires that "the representative parties will fairly and adequately protect the interests of the class." The Third Circuit has repeatedly counseled that "[a]dequate representation depends on two factors: (a) the Plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation; and (b) the Plaintiffs must not have interests antagonistic to those of the class." *Weiss v. York Hosp.*, 745 F.2d 786, 811 (3d Cir. 1984) (quoting *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3d Cir. 1975)); *see also In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 312 (3d Cir. 1998). Both factors are satisfied here.

i. Class Counsel Has More Than Adequately Represented the Class.

Plaintiffs are represented by counsel that is highly experienced and skilled in matters relevant to this litigation. *See* Llaguno Decl., ¶¶ 21025. Plaintiffs' counsel possesses substantial experience in class actions and other complex commercial and consumer litigation throughout the country. *Id.* Plaintiffs' counsel has been heavily involved in a variety of class action litigation, ranging from defending nationwide class actions involving complex financial services on behalf of financial institutions, to prosecuting wage and hour class action claims on behalf of employees. *Id.* Plaintiffs' counsel has the ability and experience to successfully prosecute the claims brought in this action, and fairly and adequately represent the interests of the Class.

ii. The Class Representatives' Interests Are Not Antagonistic to Those of the Class.

There is nothing to suggest that Plaintiffs have interests antagonistic to those of the Settlement Class. *See Dietrich v. Bauer,* 192 F.R.D. 119, 126 (S.D.N.Y. 2000) ("[G]auging the adequacy of representation requires an assessment whether the class representatives have interests antagonistic to those of the class they seek to represent."). Here, Plaintiffs and Settlement Class Members are equally interested in proving the case as alleged in the Second Amended Complaint, and are committed to obtaining appropriate compensation. Plaintiffs and each member of the Settlement Class are aligned in asserting their 400 Club membership interests against Nemacolin. All Settlement Class Members will receive settlement distributions from the Settlement Fund on a *pro rata* basis—an objective methodology that values claims using the same criteria. There are no fundamental conflicts of interest among Plaintiffs or Settlement Class Members, and the named Plaintiffs do not have interests antagonistic to the Settlement Class. The named Plaintiffs contributed substantial time and resources during discovery by working with Plaintiffs' counsel in fact-gathering, discovery, and negotiations, and have ensured the interests of the Class are protected throughout this litigation. Plaintiffs' time, effort, and loyalty to the Settlement Class demonstrate that Plaintiffs are more than adequate Class Representatives.

Accordingly, the Parties respectfully request that the Court provisionally certify the Settlement Class for settlement purposes only.

G. <u>The Proposed Notice Provides Adequate Notice to Class Members and Satisfies Due Process.</u>

For any class certified under Rule 23(b)(3), class members must be afforded "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Notice of a class action settlement must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Bozak*

v. FedEx Ground Package Sys., Inc., No. ll Civ. 738, 20l4 WL 37782ll, at *3 (D. Conn. July 3l, 20l4) (approving notice that provides "notice to the Eligible Settlement Class Members of the terms of the Settlement and the options facing the Settlement Class"); *Wade v. Werner Trucking Co.*, No. l0 Civ. 270, 20l4 WL 2535226, at *l (S.D. Ohio June 5, 20l4) (approving "Settlement Notice and Option Form proposed by the Parties" as "fully and accurately inform[ing] the . . . Class Members of all material elements of the Litigation and the Agreement").

Here, the proposed Notice of Class Action Settlement (*see* **Exhibit 1** to the Settlement Agreement) and manner of distribution negotiated and agreed upon by the parties in the Settlement Agreement is "the best notice practicable." The proposed Notice is based on the model notice provided by the Federal Judicial Center and contains all the information required by Fed. R. Civ. P. 23(c)(2)(B). *See id.;* Llaguno Decl., ¶ 10. The Notice describes the allegations and claims in plain language, defines a class member, includes contact information for the Settlement Administrator and counsel, and summarizes the Settlement terms, including the relief the Settlement will provide to the Settlement Class, the procedures and deadlines for opting out of the Settlement or submitting objections, the consequences of taking or foregoing the various options available to Class Members, and the date, time, and place of the Final Approval Hearing. *Id.* The Notice also informs Settlement Class Members that remaining in the Settlement will release certain claims against certain parties and describes the scope of the release. *Id.* at § 7. The Notice informs class members that they may appear at the final fairness hearing in person or through an attorney. *Id.* at §§ 11-12. Pursuant to Rule 23(h), the proposed Notice also sets forth the maximum amount of attorneys' fees and costs that may be sought by Plaintiffs and Class Counsel. It also identifies and provides contact information for the Settlement Administrator, Class Counsel, Defense Counsel, and the Court. *See id.*, § 11. Class Members will be able to contact the Settlement Administrator for inquiries or to obtain information and documents regarding the Settlement, and will also be able to access case documents on Class Counsel's website. Finally, it directs Class Members to PACER as an alternative means to access case documents and relevant information.

The notice plan is also adequate. The Settlement Administrator will mail the notice to all Class Members by U.S. First Class Mail. Agreement, at § 7.3. Class Members will have at least sixty (60) days from the Notice Date to opt out of the Settlement or object to the Settlement. *Id.* at § 1.24-1.25; *see also* Proposed Settlement Schedule. At least twenty (20) days before the Final Approval Hearing, Class counsel will file a motion for attorneys' fees and costs, and for Class Representative Service Awards, which will also be made available to Class Members. *Id.* at 15.1; Exh 1. This notice program meets the requirements of Rule 23 and should be approved.

H. The Court Should Schedule a Final Approval Hearing.

The Court should schedule a Final Approval Hearing to obtain all information required to determine that class certification is proper and that the Settlement should be finally approved. *See* MANUAL FOR COMPLEX LITIGATION, (Fourth) § 21.633 (2008). Accordingly, the Parties request that the Court schedule the time and date of the Final Approval Hearing on a date convenient to the Court, approximately sixty (60) to ninety (90) days after the date that notice of this Settlement is issued by the Settlement Administrator to the Class.

V. CONCLUSION

In light of the foregoing, the Parties respectfully request that the Court grant this Motion for preliminary approval of the Amended Settlement and certify the proposed class.

Date: January 13, 2023 Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was electronically filed and served via the Court's ECF system this 13th day of January, 2023, on all registered parties and counsel of record.

/s/ Joy D. Llaguno
Joy D. Llaguno