UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MONIQUE SYKES, et al.,

Plaintiffs,

vs.

MEL S. HARRIS AND ASSOCIATES, LLC, et al.,

Defendants.

Index No. 09-cv-08486

Hon. Denny Chin

LEUCADIA DEFENDANTS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

Plaintiffs Monique Sykes, Rea Veerabadren, Kelvin Perez and Clifton Armoogam ("Lead Plaintiffs"), on behalf of themselves and class members (as defined below), and defendants Leucadia National Corporation, L-Credit, LLC, LR Credit, LLC, LR Credit 10, LLC, LR Credit 14, LLC, LR Credit 18, LLC, LR Credit 21, LLC, Joseph A. Orlando and Philip M. Cannella (the "Leucadia Defendants") entered into a Stipulation of Settlement and a First Amendment to Stipulation of Settlement (together with exhibits, the "Leucadia Settlement Agreement") that, if approved by the Court, would settle all claims that have been or could have been asserted as to the Leucadia Defendants in this action.[1] The Leucadia Defendants deny all wrongdoing in connection with the allegations made against them in this action, but nevertheless agreed to settle because it avoids burdensome litigation and resolves all of the claims made against them.

By order dated November 16, 2015, the Court took the first step in the settlement approval process and granted preliminary approval of the Leucadia Settlement Agreement. The Court also directed that notice be sent to the class members through a variety of means, established procedures for class members to object to the Leucadia Settlement Agreement, and set a date for the final fairness hearing. Well under one one-hundredth of a percent of class members have objected to the Leucadia Settlement Agreement, and well under one one-hundredth of a percent of class members have opted out of the Leucadia Settlement Agreement.

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[1] In a separate settlement agreement, Plaintiffs also have settled with the other defendants in this case, thus resolving all claims brought in this class action. While approval of the Leucadia Settlement Agreement is not dependent on approval of the other defendants' settlement agreement (the "Mel Harris/Samserv Settlement Agreement"), both agreements are being presented to the Court at the same time and, if both are approved by the Court and such approval becomes final, the agreements will be jointly administered and implemented.

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Leucadia Defendants respectfully submit this memorandum of law in support of Plaintiffs' motion for final approval of the Leucadia Settlement Agreement. The terms of the Leucadia Settlement Agreement are fair, reasonable and adequate. Therefore, the Leucadia Defendants respectfully request that the Court grant final approval of the Leucadia Settlement Agreement.

BACKGROUND

A. Factual Allegations

This action arises out of the collection of (or attempts to collect) consumer debt from putative class members by defendant Mel S. Harris and Associates, LLC (the "Mel Harris Firm"). The Mel Harris Firm pursued collection of such debt on behalf of its client, defendant LR Credit, LLC or one of its subsidiaries (collectively "LR Credit"). LR Credit is a limited liability corporation formed by defendant L-Credit, LLC, an indirectly owned subsidiary of defendant Leucadia National Corporation, and Rushmore Recovery Management, LLC for the purpose of purchasing and collecting consumer debt.

The Mel Harris Firm used a variety of methods to collect the consumer debt purchased by LR Credit, including filing collection lawsuits in New York State Courts. In some of the collection lawsuits, the Mel Harris Firm used defendant Samserv, Inc. to serve the summons on the individuals who owed the debt.

The Complaint[2] alleges that the collection activities of the Mel Harris Firm (and affiliated individuals), Samserv, Inc. (and affiliated individuals) and the Leucadia Defendants violated the Fair Debt Collection Practices Act ("FDCPA"), the Racketeering Influenced and Corrupt Organizations Act ("RICO"), the New York General Business Law ("GBL") § 349 and, for

[2] The term "Complaint" refers to the Third Amended Class Action Complaint and Jury Demand filed on or about May 16, 2011.

certain of the affiliates of the Mel Harris Firm who are attorneys, the New York Judiciary Act § 487. Lead Plaintiffs' allegations of wrongdoing include that, when an individual who had been sued failed to respond to the summons, the Mel Harris Firm sometimes obtained a default judgment against the individual by filing an affidavit of merit that stated that LR Credit had personal knowledge about the debt that was owed even though Lead Plaintiffs allege that LR Credit did not have such knowledge.

The Leucadia Defendants deny any wrongdoing in connection with the collection of consumer debt on behalf of LR Credit.

B. Initial Proceedings

Plaintiff Monique Sykes filed an initial complaint on or about October 6, 2009. Approximately two months later, on or about December 28, 2009, Ms. Sykes was joined by Ruby Colon, Rea Veerabadren, and Fatima Graham in filing an amended class action complaint that, among other things, named additional defendants and sought to pursue claims on behalf of not only the named plaintiffs, but all others similarly situated. These plaintiffs (and several others) filed a second amended class action complaint on or about March 31, 2010, again naming additional defendants.

Defendants filed motions to dismiss in May 2010, challenging all of the claims made by plaintiffs as well as the jurisdiction of the Court. In a December 29, 2010 opinion, the Court dismissed (*i*) plaintiff Fatima Graham's FDCPA claims, (*ii*) plaintiffs' claims alleging a distinct Leucadia RICO enterprise, a distinct Mel Harris RICO enterprise and a distinct Samserv RICO enterprise, (*iii*) the substantive RICO claims against David Waldman, Joseph Orlando, Philip Cannella, Benjamin Lamb, Michael Mosquera, John Andino, Husam Al-Atrash and Assmat Abdelrahman and (*iv*) the RICO conspiracy and GBL claims against David Waldman, Joseph

Orlando and Philip Cannella. The Court denied the motions to dismiss with respect to all other claims. *Id.*

On April 15, 2011, plaintiffs moved for certification of a class pursuant to Fed. R. Civ. P. Rule 23(b)(1)(A), (b)(2) and/or (b)(3). While their motion was pending, plaintiffs filed a third amended complaint (pursuant to a stipulation with defendants) that added a new plaintiff (Clifton Armoogam), removed five plaintiffs from the complaint based on their agreement to accept Fed. R. Civ. P. Rule 68 Offers of Judgment from defendants, and added an additional defendant.

On September 4, 2012, the Court issued an opinion granting Lead Plaintiffs' motion to certify a Fed. R. Civ. P. Rule 23(b)(2) class and a Fed. R. Civ. P. Rule 23(b)(3) class.

In an October 2, 2012 letter to the Court, Class Counsel advised the Court that the parties had agreed to submit the case to mediation. As ordered by the Court, the parties submitted a scheduling order on December 10, 2012 that continued a stay of all proceedings to allow the parties to mediate, but set deadlines for the completion of discovery.

C. Mediation

In November 2012, the parties agreed to mediate before former California Superior Court Judge Daniel Weinstein. Both before and at the December 5, 2012 day-long mediation session, the parties made presentations setting out their factual and legal positions. The parties were unable to resolve the claims at the mediation session or during subsequent discussions that continued, with Judge Weinstein's assistance, through January 2013. In a February 7, 2013 letter, Lead Plaintiffs advised the Court that the settlement discussions had reached an impasse.

D. Class Certification Order and Second Circuit Appeal

In their February 7, 2013 letter, Lead Plaintiffs also submitted to the Court a draft class certification order. *Id.* Based on defendants' disagreement with the wording of Lead Plaintiffs' proposed order, the Court requested additional briefing. On March 28, 2013, the Court rejected

defendants' request to clarify the language submitted by Lead Plaintiffs and entered plaintiffs' proposed order certifying a Fed. R. Civ. P. Rule 23(b)(2) class and a Fed. R. Civ. P. Rule 23(b)(3) class and appointing Emery Celli Brinckerhoff & Abady LLP, New Economy Project (f.k.a. Neighborhood Economic Development Advocacy Project) and MFY Legal Services, Inc. as Class Counsel.

Defendants filed Fed. R. Civ. P. Rule 23(f) petitions with the United States Court of Appeals for the Second Circuit seeking leave to file an interlocutory appeal regarding the Court's March 28, 2013 class certification order. After the Second Circuit granted those petitions on July 19, 2013, the Court stayed all proceedings in the action pending resolution of the appeal. On February 10, 2015, the Second Circuit issued an opinion affirming the Court's class certification order.

E. Negotiation and Execution of the Leucadia Settlement Agreement

In October 2014 – while defendants' Rule 23(f) appeal of the Court's class certification order was pending – the Leucadia Defendants' counsel and Class Counsel discussed whether their respective clients had any interest in re-engaging in settlement discussions. The parties decided to pursue discussions and, between October 2014 and December 14, 2014, Lead Plaintiffs and the Leucadia Defendants engaged in rigorous, arm's-length negotiations, including numerous telephonic meetings, an in-person meeting and the exchange of factual information regarding certain of the consumer debt portfolios.[3]

On December 14, 2014, Lead Plaintiffs and the Leucadia Defendants entered into a binding term sheet that included the basic terms of their settlement and required that they execute

[3] While the December 2012 mediation session involved all of the parties to the litigation, the discussions that occurred from October 2014 to mid-December 2014 and the December 14, 2014 term sheet that resulted from those discussions involved only Lead Plaintiffs and the Leucadia Defendants.

a settlement agreement by January 31, 2015 setting out the settlement terms in more detail. The parties notified this Court and the Second Circuit that they had executed a term sheet on January 14, 2015.

The Settling Parties agreed to extend the deadline for execution of the settlement agreement several times to allow them sufficient time to negotiate the settlement agreement and for Lead Plaintiffs to prepare a plan of allocation. Throughout January, February and March, the Settling Parties engaged in numerous telephonic meetings regarding the documents and exchanged drafts of the agreement and collateral documents. On March 18, 2015, the Settling Parties executed the Stipulation of Settlement.

At the time their Stipulation of Settlement was executed, the Leucadia Defendants and Lead Plaintiffs agreed (with the Court's approval) that they would refrain from filing their settlement with the Court and seeking preliminary approval of it until Lead Plaintiffs explored whether they could reach a settlement with the Mel Harris Firm and affiliated individuals (Mel S. Harris, Michael Young, David Waldman, Kerry Lutz and Todd Fabacher) (collectively, the "Mel Harris Defendants") and Samserv Inc. and affiliated individuals (William Mlotok, Benjamin Lamb, Michael Mosquera, and John Andino) (collectively, the "Samserv Defendants," and together with the Mel Harris Defendants, the "Non-Settling Defendants"). On September 17, 2015, Lead Plaintiffs advised the Leucadia Defendants that they had reached agreements in principle with the Non-Settling Defendants. On October 28, 2015, the Court held a status conference at which it set a deadline of November 12, 2015 by which the parties were required to submit to the Court motions for preliminary approval of their respective settlements.

On November 12, 2015, Lead Plaintiffs entered into a Stipulation of Settlement with the Non-Settling Defendants and Lead Plaintiffs, and the Leucadia Defendants and Lead Plaintiffs

executed the First Amendment to Stipulation of Settlement. In an effort to, among other things, avoid Class Member confusion, the parties to both agreements agreed that, to the extent possible, the approval process should be based upon one set of implementing documents and be jointly administered and implemented.

F. Discovery and Information Exchange

Substantial discovery had been conducted by the Settling Parties prior to executing the Leucadia Settlement Agreement. Defendants produced over 500,000 pages of documents (320,000 of which were produced by the Leucadia Defendants) and Lead Plaintiffs produced over 5,000 pages. The Settling Parties served and responded to interrogatories. Fourteen depositions were taken, including depositions of three representatives of the Leucadia Defendants and of each of the Lead Plaintiffs. The three Leucadia-related individuals who were deposed were among the most knowledgeable individuals regarding the Leucadia Defendants' involvement in LR Credit's purchase and collection of consumer debt.

The Settling Parties exchanged information regarding their factual and legal positions during the mediation that occurred in December 2012 and January 2013. In addition, as agreed in the term sheet, the Leucadia Defendants obtained from the Mel Harris Firm additional factual data regarding class members that Lead Plaintiffs deemed necessary for development of the plan of allocation.

G. Experts

Throughout the pendency of the action, including during the mediation and settlement discussions, Lead Plaintiffs and the Leucadia Defendants have been advised by various consultants and experts, including individuals with expertise in consumer protection and consumer finance issues.

H. Preliminary Approval of Settlement

On November 12, 2015, Plaintiffs filed a Motion for Preliminary Approval of Class Action Settlement ("Motion for Preliminary Approval"). The Leucadia Defendants submitted a memorandum in support of the Motion for Preliminary Approval.

On November 16, 2015, the Court preliminarily approved the Leucadia Settlement Agreement, as well as the Mel Harris/Samserv Settlement Agreement (collectively, the "Settlement Agreements"). Among other things, the Court's Preliminary Approval Order found that the proposed settlements, as evidenced by their respective Settlement Agreements and Lead Plaintiffs' allocation plan, were sufficiently fair, reasonable and adequate to warrant providing notice to the classes and scheduling a fairness hearing. The Court also (*i*) approved, as to form and content, the individual notices, claim forms and publication notice submitted by the parties to the Court, (*ii*) approved the retention of Epiq Services as Class Administrator and (*iii*) authorized the Class Administrator to distribute notice in accordance with the procedures set out in the Preliminary Approval Order. The Preliminary Approval Order set out procedures for class members to object to the fairness, reasonableness or adequacy of the proposed Settlement Agreements, including the allocation plan, and scheduled a fairness hearing for May 11, 2016.

I. Notice Distribution

In January 2016, consistent with the terms of the Preliminary Approval Order, the Class Administrator mailed or caused to be mailed the individual notices and claim forms. On January 21, 2016, the Class Administrator caused the publication notice to be published once in each of the following publications: *Albany Times Union, AM New York*, *Buffalo News*, *El Diario la Prensa, Metro New York*, the *New York Daily News*, and the *New York Post*. The Class Administrator also established a website on which it posted the individual notices, claim forms, publication notice, allocation plan and Settlement Agreements, as well as other key court filings

and relevant court opinions. Class Counsel also mailed a postcard reminder to eligible class members to remind them to submit a claim form.

Consistent with the requirements of the Class Action Fairness Act ("CAFA"), the Leucadia Defendants also caused notice of the proposed settlement to be sent to the appropriate state and federal officials ("CAFA Notice") through an affiliate of the Class Administrator, Epiq Legal Noticing ("Epiq"). Epiq identified 58 officials, including the Attorney General of the United States, the Attorneys General of each of the 50 states, the District of Columbia and the U.S. Territories and the NY Superintendent of Financial Services, to receive the CAFA Notice. On November 20, 2015, Epiq transmitted CAFA Notice Packages by certified mail to 57 state officials and by United Parcel Service to the Attorney General of the United States.

SUMMARY OF PROPOSED SETTLEMENT

A. The Settlement Classes

For purposes of the settlements, Lead Plaintiffs and the Leucadia Defendants (as well as the Mel Harris Defendants and the Samserv Defendants) have agreed to certification of two settlement Classes, a Rule 23(b)(2) Class and an overlapping Rule 23(b)(3) Class. The Rule 23(b)(2) Class consists of "all persons or entities who have been or could have been sued by the Mel Harris Firm (or by any other counsel as directed by the Mel Harris Firm) as counsel for the Leucadia Defendants, including LR Credit, in actions commenced in any court located in the State of New York and where default judgments were or could have been sought." [Stipulation of Settlement at § I.A.73] The Rule 23(b)(3) Class consists of "all persons or entities who have been sued by the Mel Harris Firm (or by any other counsel as directed by the Mel Harris Firm) as counsel for the Leucadia Defendants, including LR Credit, in actions commenced in any court located in the state of New York and where Default Judgments were obtained; *provided* that, for

the avoidance of doubt, all members of the Rule 23(b)(3) Class are also members of the Rule 23(b)(2) Class." [Stipulation of Settlement at § I.A.80]

These settlement Classes are analogous to the Rule 23(b)(2) and Rule 23(b)(3) classes certified by the Court in its March 28, 2013 order, but extend the reach of each Class to include similarly situated individuals throughout New York State (and not just individuals in New York City). For purposes of this settlement, the claims of all of these individuals arise from the same operative facts that have been pled by Lead Plaintiffs in this action.

B. The Settlement Terms

1. Monetary Relief

The Leucadia Defendants created a settlement fund to which Leucadia National Corporation caused to be contributed $46,000,000. [Stipulation of Settlement at § III.A.1] Leucadia National Corporation additionally caused to be contributed to that fund L-Credit's share of the additional debt payments collected by LR Credit since January 1, 2015. [Stipulation of Settlement at § III.A.1] While the March 18, 2015 Stipulation of Settlement called for Leucadia National Corporation to hold the settlement fund in an interest-bearing account under its control, pursuant to the terms of the First Amendment to Stipulation of Settlement, the Leucadia Defendants transferred the monies held in the settlement account (over $50,000,000) into an escrow account under the control of the Class Administrator at the time the Court preliminarily approved the Leucadia Settlement Agreement. [First Amendment at § A] In addition, pursuant to the terms of the First Amendment to Stipulation of Settlement, the continuing collection of consumer debt from class members was suspended soon after preliminary approval and will remain suspended during the period in which approval of the Leucadia Settlement Agreement is under review by the Court or any appellate court. [First Amendment at § B] No interest is accruing on the consumer debt during this suspension period.

[*Id*.] LR Credit instructed the counsel currently engaged to collect consumer debt on its (and its subsidiaries') behalf to work with Lead Plaintiffs and Class Counsel to effect this suspension. As approved by the Court in the preliminary approval order, such counsel's cost of implementing the suspension (an aggregate amount of $500,000) was paid out of the settlement fund established by the Leucadia Defendants.

The Leucadia Defendants paid for the costs of providing notice to the settlement Classes – which amount was in addition to the contributions the Leucadia Defendants made to the settlement fund.

If the Leucadia Settlement Agreement is approved by the Court and that approval becomes final (and no longer subject to appeal), the settlement fund held by the Class Administrator (plus any interest that has accrued and less any administration expenses or tax expenses incurred before or as of the date the settlement approval becomes final[4]) will be transferred to Lead Plaintiffs for distribution to eligible class members. [First Amendment at § A] Once the settlement fund is transferred to Lead Plaintiffs, the Leucadia Defendants will have no interest in the fund; no monies will be returned to the Leucadia Defendants.

After certain deductions are made from the fund transferred to Lead Plaintiffs – including for administration expenses, service awards made to Lead Plaintiffs by the Court, tax expenses and the attorneys' fees and expenses awarded to Class Counsel by the Court – Lead Plaintiffs and Class Counsel will oversee distribution of the settlement fund pursuant to the terms of the allocation plan that they have prepared and submitted to the Court, which plan also is subject to Court approval. [Stipulation of Settlement at § III.A.4]

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[4] Both "administration expenses" and "tax expenses" are defined by the Leucadia Settlement Agreement. [Stipulation of Settlement at § I.A.3 and § I.A.95].

2. Other Relief

If the settlement is finally approved, the Leucadia Defendants, in consideration for the release provided in the Leucadia Settlement Agreement, will transfer to an entity to be designated by Lead Plaintiffs all the consumer debt portfolios that LR Credit held as of December 14, 2014 (including any default judgments that were obtained against any class members). The Leucadia Defendants have additionally agreed to entry of a permanent injunction against L-Credit, LLC and LR Credit, LLC (and its subsidiaries) barring those companies from (*i*) purchasing any additional consumer debt portfolios or (*ii*) seeking any additional default judgments or pursuing collection activities on any consumer debt portfolios they have already purchased. [Stipulation of Settlement at § III.C.3]

ARGUMENT

THE SETTLEMENT IS FAIR AND REASONABLE AND SHOULD BE APPROVED

I. The Standard for Approval of Class Action Settlements

Rule 23(e) requires court approval for a class action settlement to ensure that it is procedurally and substantively fair, reasonable and adequate. Fed. R. Civ. P. 23(e). Determination of whether a proposed settlement is fair, reasonable and adequate involves two inquiries: (*i*) an examination of the procedural process by which the settlement was reached to ensure that negotiations were fair and conducted at arm's length and (*ii*) a substantive analysis of the settlement itself. *D'Amato v. Deustche Bank*, 236 F.3d 78, 85-87 (2d Cir. 2011). Courts examine procedural and substantive fairness in light of the "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) (internal quotation and citation omitted); *accord TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) (noting "the paramount

policy of encouraging settlements"). Here, procedural and substantive considerations support approving the Leucadia Settlement Agreement.

A. The Settlement is Procedurally Fair

In assessing procedural fairness, courts examine the negotiating process leading to settlement. *Wal-Mart Stores, Inc.*, 396 F.3d 96 at 116; *D'Amato*, 236 F.3d at 85. A "presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores*, 396 F.3d at 116 (quoting *Manual for Complex Litigation, Third,* § 30.42 (1995)); *see also D'Amato*, 236 F.3d at 85.

The Leucadia Settlement Agreement was negotiated by experienced, informed counsel. The Leucadia Defendants were represented by counsel with extensive experience litigating complex class actions and thorough familiarity with the factual and legal issues of the case. Lead Plaintiffs were also represented by experienced and knowledgeable counsel. As discussed above, substantial amounts of both documentary and testimonial discovery was undertaken. Both Lead Plaintiffs and the Leucadia Defendants retained and consulted with several experts, including consumer finance and damages experts. These efforts allowed the Leucadia Defendants and Lead Plaintiffs to understand the strengths and weaknesses of the parties' respective positions. In addition, the negotiations were vigorous, took place at arm's length and were hard-fought. The material settlement terms were reached only after months-long settlement discussions, including, as discussed above, several mediation and negotiation sessions with former California Superior Court Judge Daniel Weinstein.

The arm's length nature of the negotiations, the participation of experienced counsel, and counsel's investigation and evaluation of the relevant claims and defenses, strongly supports the conclusion that the settlement is presumptively fair, reasonable, and adequate.

B. Substantive Fairness: Application of the *Grinnell* Factors Supports Approval of the Settlement

The proposed settlement is also substantively fair. In the Second Circuit, courts evaluate the substantive fairness of a class action settlement according to the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). The *Grinnell* factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class; (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 the trial; (7) the ability of the defendants to withstand a greater judgment; (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. 495 F.2d at 463. "In finding that a settlement is fair, not every factor must weigh in favor of settlement, rather the court should consider the totality of these factors in light of the particular circumstances." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (internal quotation and citation omitted).

i. *Grinnell* Factor 1: Litigation Through Trial Would be Complex, Expensive, and Long

Courts in this Circuit have noted that where a settlement results in "substantial and tangible present recovery, without the attendant risk and delay of trial," settlement is favored. *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001); *see also In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000) ("Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them."), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001).

Although the parties have already spent considerable time and expense in litigating this matter, as discussed below, further litigation would cause additional expense and delay. While substantial discovery has been completed, additional discovery – including expert discovery – remains to be completed. In addition, any trial of this case would be lengthy and complex. Lead Plaintiffs' claims arise under federal and state law, including civil RICO, and raise numerous factual issues concerning the consumer debt collection industry. And, even if Lead Plaintiffs were to prevail at trial, post-trial motions and the potential for appeal could prevent the class members from obtaining any recovery for several years, if at all. *See Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[E]ven if . . . a class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery.").

The Leucadia Settlement Agreement makes monetary and injunctive relief available to class members promptly and efficiently while avoiding the expense, delay and uncertainty of continued litigation. The Court should therefore find that the first *Grinnell* factor weighs in favor of final approval.

ii. *Grinnell* Factor 2: The Reaction of the Class Has Been Positive

The reaction of the class members to the settlement has been positive. The individual notice, claim form, publication notice and allocation plan (collectively, the "Notice Package") described the settlement terms and informed eligible class members of the process for (*i*) objecting to, (*ii*) excluding themselves from or (*iii*) declining relief provided by the settlement. The individual notices also provided eligible class members with the anticipated

amount of settlement relief for which they were eligible.[5] The Notice Package thus clearly provided class members with adequate information to determine whether they wished to remain in the settlement, but object to any of its terms, or to request exclusion (if they are members of the Rule 23(b)(3) class) or decline the nominal restitution (if they are eligible members of the Rule 23(b)(2) class).

In light of the extensive and clear notice provided to class members, it is clear that the reaction of class members to the settlement is extremely positive: Only two objections have been submitted. Put differently, well under one one-hundredth of a percent of class members filed objections to the settlement. And only 36 class members – or well under one one-hundredth of a percent of eligible class members – have excluded themselves or declined nominal restitution.

Moreover neither of the objections that have been submitted has any merit. One – from a member of both the Rule 23(b)(2) and Rule 23(b)(3) settlement classes[6] – complains about the amount of the settlement relief she is due under the settlement. This objector asserts that her anticipated settlement payment of $100 is too low and that she is entitled to receive the total amount (*i.e.*, $700) that she allegedly paid to the Mel Harris Firm. (*See* Objection No. 60000001). Courts routinely overrule objections from class members that the anticipated relief they will receive under the settlement is too low. *See, e.g., Hicks v. Stanley*, 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) (overruling class member objections that settlement amount was too low; "[t]here are obstacles that the plaintiffs would face in continued litigation with defendants, and it is uncertain whether they would overcome these obstacles to prove both

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[5] Class Counsel also mailed a postcard to eligible class members to remind them to submit a claim form so that they would receive the relief due to them under the settlement.

[6] The Leucadia Defendants have not named the individual objectors for privacy reasons.

liability and damages . . . . settlement amount represents a fair payment to plaintiff class due to the risk that protracted litigation may be fruitless"); *Taft v. Ackermans*, 2007 WL 414493, at *7 (S.D.N.Y. Jan. 31, 2007) (overruling objections that the settlement amount was insufficient because, among other things, Lead Plaintiffs faced serious challenges in establishing liability and damages); *In re PaineWebber Ltd. P'Ships, Litig.*, 171 F.R.D. 104, 131 (S.D.N.Y. 1997) (noting that "the fact that the settlement fund may equal only a fraction of the potential recovery at trial does not render the settlement inadequate" particularly in light of the considerable risks a class would face at trial). That the settlement "does not provide for a full recovery of legal damages . . . is the hallmark of compromise." *Id*. at 131.

Consistent with the objections reviewed in those cases, this objection fails to consider the risks involved in continuing litigation, including the significant defenses that the Leucadia Defendants (as well as the Mel Harris Defendants and the Samserv Defendants) would raise, the delay in obtaining any relief even if this objector was to prevail on her claim, that the settlement represents a compromise between the parties, and that, absent the settlement, this objector might not receive any payment at all. If this settlement is finally approved, this objector will receive an immediate payment in a substantial amount.[7] The Court should thus accord no weight to this objection.

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[7] Moreover, if this objector wished to pursue the full relief to which she believes she is entitled (*i.e.*, $700), she could have opted-out of the settlement and brought an individual claim.

This objection may also be read to be complaining about the plan of allocation – *i.e.*, that the total settlement amount is fair, reasonable and adequate, but that the amount allocated to her is not fair, reasonable or adequate. To the extent this objection is that the amount she will receive is a result of a faulted allocation plan, the Leucadia Defendants leave it to Lead Plaintiffs to respond.

The other objection that was submitted focuses primarily on the attorneys' fees to be awarded to Class Counsel. (*See* Objection No. 600000002). The Leucadia Defendants leave it to Lead Plaintiffs to respond to this objection, but note that Class Counsel has litigated this case since 2009 and has at all times vigorously prosecuted plaintiffs' claims. In any event, objections regarding the amount of attorneys' fees do not undermine the fairness, reasonableness or adequacy of the settlement amount.[8][9]

A positive reaction of the class to the proposed settlement favors its approval. *See Tiro v. Pub. House Inv., LLC*, 2013 WL 4830949, at *7 (S.D.N.Y. Sept. 10, 2013) ("Where relatively few class members opt-out or object to the settlement, the lack of opposition supports court approval of the settlement."); Newberg on Class Actions 13:54 (5th ed.) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."). The small number of exclusions/declinations and objections relative to the size of the class in this case supports approval of the settlement. *See Wal-Mart Stores, Inc.*, 396 F.3d at 118 (concluding that only 18 objections from a class of five million was indicative of the adequacy of the settlement); *D'Amato*, 236 F.3d at 86-87 (holding that the district court properly concluded that 18 objections from a class of 27,883 weighed in favor of settlement approval); *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 619 (S.D.N.Y. 2012) (where 16 out of 1500 class members requested exclusion from the settlement, the "response demonstrate[d]

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[8] This objector also complains that the IRS will tax monies awarded to him through settlement. Whether or not any relief this objector receives will be taxed (the Leucadia Defendants cannot provide this objector with any tax advice), such an objection is irrelevant to the fairness, reasonableness or adequacy of the settlement.

[9] In addition, Epiq received an opt-out request that also purportedly serves as an objection (*See* Opt-Out No. 900000040). As this is an opt-out request, the class member(s) has no standing to object to the settlement.

strong support for the settlement."). In this case, the class members' reaction is overwhelmingly positive. This factor thus clearly weighs in favor of approving the settlement.

iii. *Grinnell* Factor 3: Discovery Has Advanced Far Enough to Allow the Settling Parties to Responsibly Resolve the Case

The third *Grinnell* factor looks to the "stage of the proceedings and the amount of discovery completed." *Wal-Mart*, 396 F.3d at 117. When evaluating the level of discovery completed, "the question is whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement." *In re Bear Stearns Cos. Inc. Sec., Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) (internal quotation and citation omitted). Further, "the pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . [, but] an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 176 (quoting *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 263 (S.D.N.Y. 1998)).

The discovery here more than meets this standard. As discussed above, the Leucadia Defendants provided Lead Plaintiffs with hundreds of thousands of pages, including purchase agreements for consumer debt portfolios, documents related to Leucadia's corporate structure, emails between the Leucadia Defendants and the Mel Harris Defendants, internal Leucadia emails, and many other documents. Lead Plaintiffs also produced over 5,000 pages. Both the Leucadia Defendants and Lead Plaintiffs have served and responded to interrogatories. Fourteen depositions have been taken, including three representatives of the Leucadia Defendants and each of the Lead Plaintiffs. The Leucadia Defendants have also consulted with four experts, including experts on consumer finance, the consumer credit industry, the mechanics of debt

collection, court processes and procedures for obtaining default judgments in New York State court, and damages. The parties also informally exchanged additional information in connection with the December 2012 mediation session with Judge Weinstein, and as part of later settlement negotiations.

The litigation began over six years ago and settlement efforts only began in earnest after the parties had undertaken substantial fact-finding efforts. The parties are fully informed of their own positions, and of those held by their adversary, and "have a clear view of the strengths and weaknesses of their cases." *In re Warner Commcn's Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986). This factor thus weighs in favor of settlement approval.

iv. *Grinnell* Factors 4 and 5: Plaintiffs Would Face Real Risks if the Case Proceeded

"Litigation inherently involves risks," both in establishing liability and damages. *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997). Indeed, "[i]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *In re Ira Haupt & Co.*, 304 F. Supp. 917, 934 (S.D.N.Y. 1969). In weighing the risks of continued litigation, the Court "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *In re Austrian*, 80 F. Supp. 2d at 177 (internal quotation and citation omitted).

Lead Plaintiffs in this case face substantial and considerable risk in connection with establishing liability and damages. Lead Plaintiffs will face an uphill battle to establish that the Leucadia Defendants committed any RICO, FDCPA or GBL violations. First, few civil RICO actions end favorably for plaintiffs. According to a survey conducted by Judge Victor Marrero, between 2004 and 2007, 100% of cases filed in the Southern District of New York (36 out of 36)

that reached the merits on RICO claims resulted in judgments against the plaintiffs. *See Gross v. Waywell*, 628 F. Supp. 2d 475, 480 (S.D.N.Y. 2009). The Leucadia Defendants are confident Lead Plaintiffs will similarly fail to establish civil RICO liability because they will be unable to show the existence of an enterprise or a common intent to engage in fraudulent conduct. *See* 18 U.S.C. § 1961(4).

Second, with respect to Lead Plaintiffs' FDCPA claim, Lead Plaintiffs allege that defendants violated the FDCPA by misrepresenting to the state courts whether they could substantiate the amounts plaintiffs owed. (Compl. ¶ 111). But a significant question exists as to whether or not the FDCPA permits a plaintiff to assert claims for a false statement that was made to a party other than the debtor. *See. e.g., O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938 (7th Cir. 2011) (holding that § 1692e only applies to false statements made by debt collectors to *consumers*).

Third, Lead Plaintiffs will only prevail on their GBL § 349 claim if they can demonstrate that the Leucadia Defendants' allegedly deceptive acts proximately caused plaintiffs' injury. *See Douyon v. N.Y. Med. Health Care, P.C.*, 2012 WL 4486100, at *14 (E.D.N.Y. Sept. 28, 2012). Here, Lead Plaintiffs allege that they never received the affidavits of service or merit before default judgment was entered against them. If Lead Plaintiffs never saw the allegedly misleading statements, those statements cannot have proximately caused any injury.

Finally, Lead Plaintiffs will also face significant risks in establishing damages. The Leucadia Defendants have experts that will present analyses and methods for calculating damages showing impediments to Lead Plaintiffs' recovery. Although the Leucadia Defendants are confident of their ability to demonstrate that Lead Plaintiffs are not entitled to the substantial damages they seek, they are also aware that the presentation of complex expert testimony

involves risk that the proposed settlement avoids. *See In re Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 54 (S.D.N.Y. 1993) ("[T]he magnitude of damages often becomes a battle of experts at trial, with no guarantee of the outcome in the eyes of the jury"). The proposed Settlement alleviates these uncertainties. Therefore, these factors weigh in favor of settlement approval.

v. *Grinnell* Factor 6: Maintaining Class Through Trial Presents Risk

Federal Rule of Civil Procedure 23(c) authorizes a court to decertify a class at any time before final judgment. Fed. R. Civ. P. 23(c)(1)(C). As the Leucadia Defendants have previously argued, and as this Court has previously recognized, should defendants ultimately be found liable on some or all of the alleged claims, "individual issues may exist as to causation and damages as well as to whether a class member's claim accrued within the applicable statute of limitations." *Sykes v. Mel Harris & Assocs. LLC*, 285 F.R.D. 279, 293 (S.D.N.Y. 2012), *aff'd*, 780 F.3d 70 (2d Cir. 2015). This Court noted that these problems could be handled through various management tools, including decertifying the classes after a liability trial. *Id.* The proposed settlement eliminates the need to employ such tools. Accordingly, this factor also weighs in favor of final approval.

vi. *Grinnell* Factor 7: Leucadia Defendants' Ability to Withstand a Greater Judgment

A "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Aboud v. Charles Schwab & Co., Inc.*, 2014 WL 5794655, at *4 (S.D.N.Y. Nov. 4, 2014) (internal quotation and citation omitted); *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *9 (S.D.N.Y. May 9, 2014) (Courts "generally do not find the ability of a defendant to withstand a greater judgment to be an impediment to settlement when the other factors favor the settlement."). This is a neutral factor and should not preclude the Court from granting final approval of the settlement.

vii. *Grinnell* Factors 8 and 9: The Settlement Fund is Substantial, Even in Light of the Best Possible Recovery and the Attendant Risk of Litigation

The settlement is an exceptional outcome for class members. In addition to the significant settlement fund, which will be distributed according to the Court-approved allocation plan, the Leucadia Defendants will transfer to an entity designated by Class Counsel all debt portfolios that it owns (including any default judgments obtained against any class members) and agree to entry of a permanent injunction against L-Credit, LLC and LR Credit, LLC (and its subsidiaries), barring these entities from purchasing any additional consumer debt portfolios. Class Counsel has expressed its intent to work with the New York State courts to have the default judgments vacated and to stop collections of any additional debt from class members and to have the entity to which the debts will be transferred cancel the debt as a gift to low-income debtors and the Leucadia Defendants have agreed to cooperate with Class Counsel in their efforts.

The determination of whether a settlement amount is reasonable does not involve use "of a mathematical equation yielding a particularized sum." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 178 (internal quotation and citation omitted). "Instead, 'there is a range of reasonableness with respect to a settlement – a range which recognize[s] the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). Moreover, "[m]uch of the value of a settlement lies in the ability to make funds available promptly." *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1396, 1405 (E.D.N.Y. 1985), *modified on other grounds*, 818 F.2d 179 (2d Cir. 1987). When "settlement assures immediate payment of substantial amounts to class members, even if it means sacrificing 'speculative

payment of a hypothetically larger amount years down the road,'" settlement is reasonable. *Gilliam v. Addicts Rehab. Ctr. Fund*, 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008) (quoting *Teachers' Ret. Sys. of Louisiana v. A.C.L.N., Ltd.*, 2004 WL 1087261, at *5 (S.D.N.Y. May 14, 2004)).

If the settlement is finally approved, class members will receive payments pursuant to the allocation plan, collection activities on class members' debts will be ceased, and the relevant Leucadia Defendants will be enjoined from purchasing additional consumer debt portfolios or seeking any additional default judgments or pursuing collection activities on any already-purchased consumer debt portfolios. In addition, Class Counsel intends to take steps to have the default judgments vacated and the debt eliminated. The settlement relief is more than reasonable. The eighth and ninth *Grinnell* factors thus also weigh in favor of final approval.

CONCLUSION

For the reasons set out above, the Leucadia Defendants respectfully request that the Court, after considering the relevant issues and holding a fairness hearing, issue an order approving the settlement set out in the Leucadia Settlement Agreement as fair, reasonable, and adequate.

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