

**IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA**

ALEX GOLDBLUM and BRIAN K. BOBAK,
individually and on behalf of all others similarly
situated;

Plaintiffs,

v.

101 KAPPA DRIVE ASSOCIATES # 1; 101
KAPPA DRIVE ASSOCIATES #1 GP, LLC;
PENNSYLVANIA CVS PHARMACY, LLC;
and BRIAN HAENZE d/b/a AUTO GALLERY
& ACCESSORIES and as TAG TOWING
AND COLLISION,

Defendants.

ANNETTE MORAN, ANTHONY IRA
BENTLEY, SR., ARIANA BRAZIER,
FRANK KAMARA, ARTHUR LOGAN,
GERALDINE WILSON, JANET LUKAC,
MATTIE GRIFFIN, JUDE CARPENTER and
LYNN ANDERSON, individually and on
behalf of all others similarly situated;

Plaintiffs,

v.

LOFTUS GROUP, LLC; PENNSYLVANIA
CVS PHARMACY, LLC; and BRIAN
HAENZE d/b/a AUTO GALLERY &
ACCESSORIES and as TAG TOWING AND
COLLISION,

Defendants.

CIVIL DIVISION – CLASS ACTION

No. GD-18-012108

**BRIEF IN SUPPORT OF PLAINTIFFS’
UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT,
CONDITIONAL CLASS
CERTIFICATION, AND FOR
AUTHORIZATION OF CLASS NOTICE**

CIVIL DIVISION – CLASS ACTION

No. GD-18-012128

Filed on behalf of Plaintiffs

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individually and on behalf of all others
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KAPPA DRIVE ASSOCIATES #1 GP, LLC;
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**BRIEF IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL
CLASS CERTIFICATION, AND FOR AUTHORIZATION OF CLASS NOTICE**

Plaintiffs Annette Moran, Anthony Ira Bentley, Sr., Ariana Brazier, Frank Kamara, Arthur Logan, Geraldine Wilson, Janet Luka, Mattie Griffin, Jude Carpenter, Lynn Anderson, and Alex Goldblum (collectively, “Plaintiffs” or “Settlement Class Representatives”) respectfully submit this brief in support of their Unopposed Motion for Preliminary Approval of Class Action Settlement, Conditional Class Certification, and for Authorization of Class Notice, asking this Court for an order granting preliminary approval of the proposed Class Action Settlement Agreement and Release (“Settlement” or “SA”), conditionally certifying the proposed class for settlement purposes, and authorizing the dissemination of notice to Settlement Class Members.¹

I. BACKGROUND

A. Factual and Procedural Overview.

Plaintiffs’ claims in these putative class actions arose out of alleged overcharges for nonconsensual towing services in the City of Pittsburgh, Pennsylvania. It was alleged that from September 18, 2012 through September 18, 2018, Defendant Pennsylvania CVS Pharmacy, LLC (“CVS” or “Defendant”) engaged Brian Haenze d/b/a Auto Gallery & Accessories and as Tag Towing and Collision (“Tag Towing”) to tow unauthorized vehicles parked in the Parking Lots. It was further alleged, that when conducting nonconsensual tows from the Parking Lots, Tag Towing and CVS, charged vehicle owners/operators towing fees above the maximum fee for a nonconsensual tow from a private parking area as then provided by Pittsburgh’s City Ordinances, at 5 Pittsburgh Code § 525.02 and § 525.05. (Doc. 9 ¶¶ 38-43; Doc. 11 ¶¶ 31-34, 36). The Amended Complaints alleged that Plaintiffs and Settlement Class Members all had their vehicle towed or hooked up to one of Tag Towing’s tow trucks and those vehicles were held (and not released) until

¹ The capitalized terms used in Plaintiffs’ Brief shall be construed according to their meaning as defined in the Settlement except as may otherwise be indicated.

they paid tow fees greater than the maximum set by the City of Pittsburgh. (Doc. 9 ¶¶ 50-93; Doc. 11 ¶¶ 43-52). At the time CVS engage Tag Towing to conduct these nonconsensual tows, the statutory maximum for a tow fee was between \$110 and \$135, yet Tag Towing routinely charged approximately \$220-\$250 per non-consensual tow. (Doc. 9 ¶¶ 38-43, 50-93; Doc. 11 ¶¶ 36-37, 43-52).

Plaintiffs initiated these cases against 101 Kappa Drive Associates #1; Loftus Group, LLC; and Tag Towing on September 18 and September 29, 2018 by way of class action complaints. (Doc. 1 & 1). Plaintiffs then filed the operative Amended Complaints on February 5, 2019, naming CVS and Defendant 101 Kappa Drive Associates #1 GP, LLC as additional defendants, and alleging violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (“UTPCPL”), 73 Pa. Stat. §§ 202-1, *et seq.*, the Pennsylvania Fair Credit Extension Uniformity Act (“PaFCEUA”), 73 Pa. Stat. §§ 2270.1, *et seq.*, and various common law causes of action. Doc. 11 & 9). Defendants thereafter filed Preliminary Objections to the Amended Complaints, which were subsequently fully briefed and argued by the Parties, and later overruled by the Court. (Doc. 15, 18–20 & 11–12, 16). Following the Court’s rulings on the Preliminary Objections, on December 16 and December 17, 2019, CVS answered the Amended Complaints, denying the asserted claims and asserting cross-claims against Tag Towing. ((Doc. 27 & 18). On January 8 and May 14, 2020, the Parties agreed to a voluntary discontinuance as to less than all defendants, dismissing the Settlement Class Representatives’ claims against Loftus Group, LLC; 101 Kappa Drive Associates #1; and 101 Kappa Drive Associates #1 GP, LLC without prejudice. (Doc. 32 & 21).

The Parties then engaged in written and oral discovery, and on March 22, 2021, the Court consolidated seven other related cases for discovery purposes in advance of Settlement Class Members filing their Motion for Class Certification. (Doc. 43 & 26).

During discovery, the Parties proceeded to engage in a possible resolution of this litigation, ultimately reaching the proposed Settlement.

B. Negotiation of the Proposed Settlement.

During Discovery the Parties commenced settlement discussions and after a series of series of arms'-length negotiations, including multiple offers and counteroffers, the Parties reached an agreement regarding the material terms of a settlement on December 29, 2022, which, if approved by the Court will resolve all claims that were raised, or could have been raised against CVS relating to non-consensual tows from the Parking Lots. After reaching an agreement on the material terms of a settlement, the Parties continued drafting and finalizing the Settlement and proposed exhibits, reaching a final set of documents, after which the proposed Settlement was subsequently executed by all Parties.

C. The Terms of the Proposed Class Action Settlement Agreement.

1. The Settlement Class Definition.

For settlement purpose only, Plaintiffs propose certification of the following Settlement Class pursuant to Pa. R. Civ. P. 1710 and 1714:

All owners or operators whose passenger cars, light trucks, or motorcycles, and scooters were non-consensually towed from the Parking Lots by Tag Towing within the Relevant Period, and who, as a result were charged and paid a fee in excess of the limits then set by 5 Pittsburgh Code §§ 525.05.

(SA ¶ 1.28).

2. Settlement Consideration.

Under the Settlement, CVS will pay up to a total of \$143,065.00.00 in monetary consideration. (SA ¶¶1.35 & 3.1). CVS's monetary obligations are as follows:

- A payment of \$38,065.00 to establish a Settlement Fund for direct monetary relief to Settlement Class Members, from which the Costs of Settlement Administration will also be paid (SA ¶¶ 1.29, 3.1(ii), & 3.1(iv));
- A payment of up to \$93,500.00 for Settlement Class Counsel's attorneys' fees, costs, and expenses, to the extent approved by the Court (SA ¶ 3.2(i)); and
- A payment of up to \$1,500.00 to each Settlement Class Representative as a Service Award (not to exceed a total of \$16,500.00), to the extent approved by the Court. (SA ¶ 3.3(i)).

a. Direct Monetary Relief to Settlement Class Members.

CVS will pay 38,065.00 into a Settlement Fund within thirty (30) days of the Effective Date. (SA ¶ 3.2(ii)). The Settlement Fund will be used by the Settlement Administrator to pay for the following:

- The Costs of Settlement Administration; and
- Distribution of all money remaining in the Settlement Fund (after the Costs of Settlement Administration are deducted), in equal *pro rata* shares to all Participating Settlement Class Members.

(SA ¶ 3.1(iv)).

Automatic Distributors. The Settlement Administrator will distribute the balance of the Settlement Fund (after Costs of Settlement Administration are deducted) in equal *pro rata* shares to all Participating Settlement Class Members (those who do not opt out of the Settlement). (SA

¶¶ 1.17 & 3.4(iii)) The final amount Participating Settlement Class Members' Settlement Checks will depend on numerous variables, including the total number of Approved Claims.

Payment Timing and Provisions for Residual Funds. The Settlement Administrator will make all payments to Participating Class Members required under the Settlement within thirty (30) calendar days of the Effective Date of the Settlement. (SA ¶ 3.1(v)). Participating Settlement Class Members receiving a Settlement Check will have the duration of the Check Cashing Period to negotiate their Settlement Checks. (SA ¶ 3.4(vi)). The Parties propose that the Check Cashing Period begin the day the Settlement Administrator issues the Settlement Checks and run for the next 120 days. (SA ¶ 1.2). The Settlement Administrator is authorized to reissue an expired, unredeemed, lost, destroyed, or never received Settlement Check upon the request of a Settlement Class Member if said request is made within 180 days from the start of the Check Cashing Period. (SA ¶ 3.4(vi)). If unclaimed or uncashed payments remain in the Settlement Fund 180 days after the Check Cashing Period begins, the parties will instruct the Settlement Administrator to disburse 50% of the residual funds to the Pennsylvania Interest on Lawyers Trust Account Board and to disburse the other 50% of the remaining funds to a *cy pres* recipient, 412 Food Rescue. (SA ¶ 3.5).

b. Attorneys' Fees, Costs, and Expenses of Litigation and Service Awards.

Separate from the monetary consideration directly available to Settlement Class Members through the Settlement Fund, CVS will pay up to \$93,500.00 in attorneys' fees, costs, and expenses, subject to Court-approval. (SA ¶¶ 3.2(i)). CVS will also pay Service Awards (to the extent approved by the Court) to the Settlement Class Representatives in the amount of \$1,500.00 each. CVS shall make the Service Award payments separate and apart from the Settlement Fund. (SA ¶ 3.3(i)).

Settlement Class Counsel will submit requests for approval of attorneys' fees, costs, and expenses and Service Awards in advance of the Opt-Out Deadline. (SA ¶ 2.7). CVS shall pay the Court-approved attorneys' fees, costs, and expenses, as well as Service Awards within thirty (30) days of the Effective Date. (SA ¶¶ 3.2(i) & 3.3(i)).

c. Injunctive Relief.

As part of the Settlement, CVS agrees to take reasonable steps to ensure no more than that permitted by the Pittsburgh City Ordinance is charged for a statutory lien for a non-consensual tow from the parking lot located at 4610 Centre Avenue, Pittsburgh, PA 15213 in the event that CVS permits towing in the future.² (SA ¶ 3.6). These reasonable steps include: (1) advising any tow company that CVS permits to tow from its parking lot of the tow company's obligation to comply with all Pittsburgh Code requirements governing tow fees and (2) providing signage in the parking lot that advises potential parkers that they may be towed if they are not patronizing CVS's property and further advises that the Pittsburgh Code specifies the maximum amount a tow truck operator may charge for a tow. (*Id.*).

d. Releases.

In exchange for the consideration provided by CVS under the Settlement, the Settlement Class Representatives and their related persons, will fully and finally release CVS and its related parties and/or entities from, including but not limited to, claims alleged in the Litigation, compensation, fees/costs, liquidated damages, penalties, interest, and all other relief under the UTPCPL, 73 P.S. §§ 201-1 *et seq.*, and all other state and local consumer protection or fair credit

² CVS currently does not permit towing from its Centre Avenue Store and the CVS store located at 6100 Penn Avenue, Pittsburgh, PA 15206 has closed.

laws and common law theories in contract or tort or arising or accruing during the time CVS engaged Tag Towing to conduct non-consensual tows from the Parking Lots. (SA ¶¶ 4.1 & 1.30).

Likewise, Participating Settlement Class Members, in exchange for the consideration provided by CVS under the Settlement, will fully and finally release CVS from claims alleged in the Litigation and for all associated compensation, fees/costs, liquidated damages, penalties, interest, and all other relief under the UTPCPL, 73 P.S. §§ 201-1 *et seq.*, and all other state and local consumer protection or fair credit laws and common law theories in contract or tort accruing during the time CVS engaged Tag Towing to conduct non-consensual tows from the Parking Lots and arising out of, or in connection with the claims or facts alleged in the Litigation. (SA ¶¶ 4.3 & 1.18).

The Parties further agree that by entering this Settlement, CVS does not release any rights to pursue Tag Towing for a claim of indemnification or contribution related to this Settlement. (SA ¶ 4.4). However, CVS shall not pursue Tag Towing for such a claim until after it has paid the Total Settlement Consideration pursuant to the Settlement. (*Id.*).

3. The Proposed Notice and Distribution Program.

Subject to the Court's approval, the Parties propose to individually notify each Settlement Class Member of the Settlement and their rights under it through email or U.S. mail. (SA ¶ 2.4(ii)). Within ten (10) days of preliminary approval, Settlement Class Counsel will provide available contact information for all Settlement Class Members to the Settlement Administrator. (SA ¶ 2.4(i)). Settlement Class Members identified by the Settlement Administrator for whom the Settlement Administrator has an email address will be sent a Settlement Notice in the form attached to the Settlement as Exhibit 3 via email. (SA ¶ 2.4(ii); *see also* SA Ex. 3). Settlement Class Members for whom the Settlement Administrator cannot determine an email address will receive

postcard notice consistent with the Settlement Notice set forth as Exhibit 4 of the Settlement, which will be sent by U.S. mail. (SA ¶ 2.4(ii); *see also* SA Ex. 4). The Settlement Administrator will update addresses and re-mail any notices marked as undeliverable. (SA ¶ 2.4(iii)). The Settlement Administrator will also create a Settlement Website that contains copies of the detailed Settlement Notice (SA Ex. 3) and other relevant case documents and information. (SA ¶ 2.4(ii)).

The proposed Settlement Notice includes a description of the material terms of the Settlement and the forms of relief available to Settlement Class Members; Settlement Class Members' estimated distribution; a date by which Settlement Class Members may object to or opt out of the Settlement; the date upon which the Final Approval Hearing will occur; and the address of the Settlement Website at which Settlement Class Members can access the Settlement Agreement and other related documents and information. (SA Ex. 3 & 4).

The Settlement Notices clearly inform Class Members that they do not have to take any action to receive a Settlement Check as the Settlement provides an automatic distribution to all Class Members who do not exclude themselves from the Settlement. (*See id.*).

Further, the Settlement Notices advise Settlement Class Members of their rights to exclude themselves or object to the Settlement and provide the deadline to do so, which the Parties propose will be sixty (60) days from the date by which the Settlement Administrator first mails Settlement Notices to Settlement Class Members. (SA ¶¶ 2.5, 2.6, 1.14, & 1.15). The Settlement Notice explains the full procedures for Settlement Class Members to exclude themselves or to object to any aspect of the Settlement. (*See* SA Ex. 3).

Finally, payments to Settlement Class members who do not otherwise exclude themselves object to the Settlement will be made pursuant to the following formula. First, to calculate each Settlement Class Member's estimated proportionate share of the Settlement Fund for the purposes

of Settlement Notice, each Settlement Class Member's share will be determined by dividing the Settlement Fund (less anticipated Costs of Settlement Administration) by the total number of Settlement Class Members identified in the Class List. (SA ¶ 3.4(ii)(a)). Second, to calculate each Settlement Class Members' actual share of the Settlement Fund, the same steps described above will be utilized, except that each Settlement Class Member's share will be increased *pro rata* for each Settlement Class Member who excludes themselves from the Settlement. (SA ¶ 3.4(ii)(b)).

II. ARGUMENT

A. The Requirements for a Class Action are Satisfied, and the Court Should Conditionally Certify the Settlement Class for Settlement Purposes.

Under Pennsylvania's rules of civil procedure, the proponent of class certification must demonstrate that the prerequisites under Rule 1702 are met. Pa. R. Civ. P. 1702; *see also Samuel-Bassett v. Kia Motors America, Inc.*, 34 A.3d 1, 16 (Pa. 2011). The prerequisites to certifying a class action are set forth in Pennsylvania Rules of Civil Procedure 1702: numerosity, commonality, typicality, adequacy of representation, and fairness and efficiency. Pa. R. Civ. P. 1702; *see also Kelly v. Cty. of Allegheny*, 546 A.2d 608, 610 (Pa. 1988). Additionally, Rules 1708 and 1709 specify the factors considered in determining the last two requirements of Rule 1702 (adequacy of representation and fairness and efficiency). *Id.* The Court may conditionally certify a class pending a final order on the merits. Pa. R. Civ. P. 1710(d).

In deciding whether to certify a class action, the court is vested with broad discretion. *Cambanis v. Nationwide Ins. Co.*, 501 A.2d 635 (Pa. Super. Ct. 1985) ("Pennsylvania Rules of Civil Procedure . . . grant the court extensive powers to manage the class action."). Decisions in favor of maintaining a class action should be liberally made. *D'Amelio v. Blue Cross of Lehigh Valley*, 500 A.2d 1137, 1141 (Pa. Super. Ct. 1985). As explained below, Plaintiffs satisfy Rule 1702, and this Court should conditionally certify this class action for settlement purposes.

1. The Class is so Numerous that Joinder of all Members is Impracticable.

Rule 1702(1) requires that the proposed class be “so numerous that joinder of all members is impracticable.” Pa. R. Civ. P. 1702(1). While there is no specific minimum number needed for a class to be certified, there is a general presumption that numerosity is satisfied where the potential number of plaintiffs exceeds 40. *See Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 595 (3d Cir. 2012). Ultimately, whether a class is sufficiently numerous is based on the circumstances surrounding each individual case. *Janicik v. Prudential Ins. Co. of Am.*, 451 A.2d 451, 456 (Pa. Super. Ct. 1982). And the Court should inquire “whether the number of potential individual plaintiffs would pose a grave imposition on the resources of the Court and an unnecessary drain on the energies and resources of the litigants should such potential plaintiffs sue individually.” *Temple Univ. v. Pa. Dept. of Public Welfare*, 374 A.2d 911, 996 (Pa. Commw. Ct. 1977).

Here, the Settlement Class is sufficiently numerous. During discovery, CVS produced lists of vehicles towed from the Parking Lots by Tag Towing, demonstrating that approximately 331 individuals were non-consensually towed from the Parking Lots by Tag Towing.

2. There are Questions of Law or Fact Common to the Settlement Class.

Rule 1702(2) requires common questions of law and fact to exist. Where the “class members’ legal grievances arise out of the same practice or course of conduct” undertaken by the defendants, Rule 1702(2) is satisfied. *Janicik*, 451 A.2d at 456; *see also Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652, 664 (Pa. 2009) (finding commonality where a claim alleged that a company charged more for records than permitted under the Medical Records Act). Numerous other fee overcharge cases, similar to this one, have had classes certified by this Court. *See Jones et al. v. Alder Highland Assoc’s, LLC et al.*, GD-18-012298 (Pa. Com. Pl. Ct. Jun. 29, 2021) (Ignelzi, J.) (Doc. 52); *Cohen et al. v. UPMC Presbyterian Shadyside et al.*, GD-18-012332

(Pa. Com. Pl. Ct. Jun. 29, 2021) (Ignelzi, J.) (Doc. 40); *Waldron et al. v. Eastside Ltd. Liab. Co., II et al.*, GD-18-012034 (Pa. Com. Pl. Ct. Jun. 29, 2021) (Ignelzi, J.) (Doc. 56); *Knight v. Home Depot U.S.A., Inc. et al.*, GD-18-012063 (Pa. Com. Pl. Ct. Jun. 29, 2021) (Ignelzi, J.) (Doc. 45); *Mahon et al. v. Penn Mgmt. Realty LLC et al.*, GD-18-012021 (Pa. Com. Pl. Ct. Jun. 29, 2021) (Ignelzi, J.) (Doc. 39); *Horsely v. Shakespeare Street Assoc's et al.*, GD-18-012027 (Pa. Com. Pl. Ct. Jun. 29, 2021) (Ignelzi, J.) (Doc. 50); and *Bruce et al. v. Countrywide Petroleum Co. et al.*, GD-18-012296 (Pa. Com. Pl. Ct. Jun. 21, 2023) (Ignelzi, J.) (Doc. 63).

Here, the proposed Settlement Class meets the commonality standard because the Settlement Class is limited to those individuals who allegedly had their vehicle non-consensually towed from the Parking Lots and were charged more than the statutory maximum fee then set by the Pittsburgh City Ordinance for the return of their vehicle. As such, Plaintiffs' and Settlement Class Members' alleged injuries all stem from the same allegedly unlawful conduct by CVS. These factual commonalities give rise to common legal issues such as whether CVS was allegedly a creditor and/or debt collector under the PaFCEUA; whether CVS allegedly employed Tag Towing to tow Plaintiffs' and the Settlement Class Members' vehicles; whether the state legislature granted CVS a lien against Plaintiffs and Settlement Class Members for the towing cost; and whether Tag Towing, allegedly charged fees and collected sums of money from Settlement Class Members in excess of those provided by 5 Pittsburgh Code § 525.02 while engaged by CVS to conduct non-consensual tows from the Parking Lots. For these reasons, Rule 1702(2)'s commonality requirement is satisfied.

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

Rule 1702(3) requires that the "claims or defenses of the representative parties are typical

of the claims or defenses of the class.” Pa. R. Civ. P. 1702(3). This requirement is intended to ensure that “the class representative’s overall position on the common issues is sufficiently aligned with that of the absent class members to ensure that her pursuit of her own interests will advance those of the proposed class members.” *Samuel-Bassett*, 34 A.3d at 30–31 (quoting *D’Amelio*, 500 A.2d at 1146). The typicality requirement is satisfied where the plaintiffs’ and class members’ claims arise “out of the same course of conduct and involve the same legal theories.” *Samuel-Bassett*, 34 A.3d at 30–31 (citing *Dunn v. Allegheny County Prop. Assessment Appeals & Review*, 794 A.2d 416, 425 (Pa. Commw. Ct. 2002)). This does not mean that the plaintiffs’ and class members’ claims must be identical; only that the claims are similar enough to determine that the representative party will adequately represent the interests of the class. *Klusman v. Bucks Cty. Court of Common Pleas*, 564 A.2d 526, 531 (Pa. Commw. Ct. 1989), *aff’d*, 574 A.2d 604 (Pa. 1990). A finding that a named plaintiff is atypical must be supported by a clear conflict and be such that the conflict places the Class members’ interests in significant jeopardy. *Id.*

Similar to commonality, typicality is established because Plaintiffs’ claims arise out of the same practice as the claims of each Settlement Class Member—Tag Towing’s and CVS alleged overcharging of vehicle owners/operators for tow fees above the maximum fee for a non-consensual tow from the Parking Lots as then provided by Pittsburgh’s City Ordinances. Because this case focuses on the same alleged conduct which affects both the named Plaintiffs and the Settlement Class, there are no differences between Plaintiffs’ overall position on the claims and those of the Settlement Class Members. Thus, typicality is satisfied.

4. The Representative Plaintiffs Will Fairly and Adequately Represent the Interests of the Settlement Class.

Rule 1702(4) requires that the “representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709.” Pa. R. Civ. P. 1702(4).

In turn, Rule 1709 lists three requirements:

- (1) whether the attorney for the representative parties will adequately represent the interests of the class,
- (2) whether the representative parties have a conflict of interest in the maintenance of the class action, and
- (3) whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.

Pa. R. Civ. P. 1709. The proposed class meets these requirements.

a. Counsel for Plaintiffs Have Adequately Represented the Interests of the Settlement Class and Will Continue to do so.

Plaintiffs here have retained competent counsel experienced in consumer class action litigation. Unless proven otherwise, courts will generally assume that members of the bar are adequately skilled in the legal profession. *Janicik*, 451 A.2d at 458. “Courts may also infer the attorney’s adequacy from the pleadings, briefs, and other material presented to the court, or may determine these warrant further inquiry.” *Id.* at 459. Plaintiffs seek to have Patrick D. Donathen of Lynch Carpenter, LLP,³ and Joshua P. Ward of J.P. Ward & Associates, LLC,⁴ appointed as Settlement Class Counsel. As evidenced by their resumes, Plaintiffs’ counsel have the requisite skill and experience to serve as Settlement Class Counsel.

b. There are no Conflicts of Interests Between the Representative Plaintiffs and the Settlement Class.

As with the adequacy of counsel requirement, the Court ““may generally presume that no conflict of interest exists unless otherwise demonstrated.”” *Haft v. U.S. Steel Corp.*, 451 A.2d 445, 448 (Pa. Super. Ct. 1982) (quoting *Janicik*, 451 A. 2d at 459). Plaintiffs are not aware of any “hidden collusive circumstances,” *Haft*, 451 A.2d at 448, that could pose conflicts of interest between Plaintiffs and members of the Settlement Class. Plaintiffs and the Settlement Class have

³ See **Exhibit B** attached to Plaintiffs’ Motion.

⁴ See **Exhibit C** attached to Plaintiffs’ Motion.

aligned interests: they were all subject to Tag Towing's and CVS's alleged uniform overcharging of Settlement Class Members for non-consensual tows from the Parking Lots. If Plaintiffs succeed in obtaining approval of the proposed Settlement, the benefits will inure to Plaintiffs and all Settlement Class Members in a manner calculated to equitably correspond to the amount of monetary harm suffered by each individual.

c. The Interests of Settlement Class Members Have Not Been Harmed by Lack of Adequate Resources.

The requirement that the representative plaintiff demonstrate access to adequate financial resources to ensure that interests of the class are not harmed may be met if “the attorney for the class representatives is ethically advancing costs.” *Haft*, 451 A.2d at 448; *see also Janicik*, 451 A.2d at 459–60. That is the case here: Settlement Class Counsel undertook this litigation pursuant to a standard contingent fee agreement, and up through this point in the litigation, counsel have advanced all costs required to maintain the litigation, such as initial filing fees, brief printing fees, and deposition fees. In connection with the final approval process, Settlement Class Counsel will ethically seek reimbursement of its costs and fees as described in the parties' Settlement Agreement, and Settlement Class Counsel's application will be filed and available for Settlement Class Members to review prior to the Objection Date, and subject to ultimate approval by the Court.

For these reasons, the requirements of Rule 1702(4) are satisfied.

5. A Class Action is a Fair and Efficient Method of Adjudicating the Controversy.

Rule 1702(5) requires that the court determine whether a class action provides a “fair and efficient method of adjudicating the controversy,” with reference to additional factors in Rule 1708. Pa. R. Civ. P. 1702(5). In turn, Rule 1708 lists the following factors for courts to consider:

In determining whether a class action is a fair and efficient method of adjudicating the controversy, the court shall consider among other matters the criteria set forth in subdivisions (a), (b) and (c).

- (a) Where monetary recovery alone is sought, the court shall consider
 - (1) whether common questions of law or fact predominate over any question affecting only individual members;
 - (2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;
 - (3) whether the prosecution of separate actions by or against individual members of the class would create a risk of
 - (i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;
 - (ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudication;
 - (4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;
 - (5) whether the particular forum is appropriate for the litigation of the claims of the entire class;
 - (6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
 - (7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.
- (b) Where equitable or declaratory relief alone is sought, the court shall consider
 - (1) the criteria set forth in subsections (1) through (5) of subdivision (a), and (2) whether the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final equitable or declaratory relief appropriate with respect to the class.
- (c) Where both monetary and other relief is sought, the court shall consider all the criteria in both subdivisions (a) and (b).

Pa. R. Civ. P. 1708.

a. Common Questions of Fact and Law Predominate.

The predominance inquiry under Rule 1708(a)(1), while “more demanding” than the commonality standard, requires “merely” that the “common questions of fact and law . . .

predominate over individual questions.” *Samuel-Bassett*, 34 A.3d at 23. “[A] class consisting of members for whom *most* essential elements of its cause or causes of action may be proven through simultaneous class-wide evidence is better suited for class treatment than one consisting of individuals from whom resolution of such elements does not advance the interests of the entire class.” *Id.* Where class members can demonstrate they were subjected to the same harm and they identify a “common source of liability,” individualized issues such as varying amounts of damages will not preclude class certification. *See id.* at 28 (citations and quotation marks omitted).

As explained above, the key issues in this case shared by Plaintiffs and Settlement Class Members involve Tag Towing’s and CVS’s alleged overcharging of vehicle owners/operators for tow fees above the maximum fee for a nonconsensual tow from the Parking Lot as then provided by Pittsburgh’s City Ordinances. Questions relating to Tag Towing’s and CVS’s alleged overcharging for tow fees for the return of Plaintiffs’ and Class Members’ vehicles would be the primary focus of the continued litigation, and those questions would be resolved with answers uniform to Plaintiffs and the Settlement Class. These legal and factual issues predominate over individualized questions, which would at most involve questions regarding the nature and amount of damages suffered by Plaintiffs and Settlement Class Members stemming from the alleged fee overcharges.

b. The Size of the Class and Manageability of the Case Weigh in Favor of Class Certification.

Rule 1708(a)(2) requires the Court to consider “the size of the class and the difficulties likely to be encountered in the management of the action as a class action.” Pa. R. Civ. P. 1708(a)(2). There are approximately 331 Settlement Class Members and proceeding as a class action here for settlement purposes is fully manageable. Here, the Parties have agreed to a settlement structure designed to permit the Settlement Administrator to make a straightforward

and simple determination of the amount each Settlement Class Member will receive under the Settlement. In these circumstances, there are no potential manageability problems weighing against class certification.

c. Prosecution of Separate Individual Actions Creates a Risk of Inconsistent Rulings.

Rule 1708(a)(3) requires the Court to consider whether prosecution of separate individual actions, as opposed to a class action, would create risks of inconsistent or varying rulings which would confront the defendant with incompatible standards of conduct, and whether adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of others or impair their ability to protect their interests. Pa. R. Civ. P. 1708(a)(3). Where, as here, the Plaintiffs and Settlement Class Members share an identical claim stemming from the same conduct on the part of the defendant, a class action “affords the speedier and more comprehensive statewide determination of the claim,” and is “the better means to ensure recovery if the claim proves meritorious or to spare [defendant] repetitive piecemeal litigation if it does not.” *Janicik*, 451 A.2d at 462–63. Indeed, because Plaintiffs sought to establish CVS’s liability under a theory that Tag Towing’s alleged uniform tow fee overcharging to discharge CVS’s lien on Plaintiffs’ and Settlement Class Members’ vehicles impacted all members of the Settlement Class, there is a substantial risk that individual actions would lead to varying outcomes. *Id.* at 462 (“Courts may, and often do, differ in resolving similar questions.”). Therefore, this factor weighs in favor of class certification.

d. The Extent and Nature of Litigation by Other Class Members Weighs in Favor of Class Certification, and this Court is an Appropriate Forum.

Rule 1708(a)(4) requires the Court to consider “the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues.” Pa. R.

Civ. P. 1708(a)(4). This factor weighs in favor of certification because there are no other actions against CVS related to its engagement of Tag Towing to conduct non-consensual tows from the Parking Lots, so there is no risk that class certification would impair the rights of other litigants in other actions.

Additionally, this Court is an appropriate forum because this county is where the acts and omissions relevant to the claims took place, and the residence of the named Plaintiffs and likely a substantial number of members of the Settlement Class. As a result, there is “no one common pleas court which would be better to hear the action.” *Baldassari*, 808 A.2d at 195 (quoting *Cambanis*, 501 A.3d at 641 n.19).

e. The Amounts at Issue, Complexities of the Issues, and Expenses of Litigation Justify a Class Action Rather Than Individual Actions.

Rule 1708(a)(6) requires the Court to consider whether, in light of the complexity of the issues and expenses of litigation, the separate claims of individual class members are insufficient in amount to support separate actions. Relatedly, Rule 1708(a)(7) requires the Court to consider whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

Here, both factors support class certification. Plaintiffs and Settlement Class Members were all allegedly charged over \$200 for discharge of the lien and release of the towed vehicle—making the amount of the overcharge for each member of the Settlement Class at least \$85. Further, each alleged individual overcharge is relatively modest in size, making it unlikely that the overcharges could be prosecuted or adjudicated economically on an individual basis. As such,

were the litigation to continue as individual actions rather than a class action, Settlement Class Members may not have the financial incentive to pursue litigation to vindicate their rights.

Importantly, the Settlement provides a reasonable compromise, that if approved, will accomplish a desirable outcome in one proceeding—those individuals who were subject to CVS’s alleged conduct will be able to recover for the alleged overcharges without having to bring their own lawsuit or file a claim. As a result, the Settlement Class Members will be entitled to compensation if this action is certified, and the Settlement is approved. When weighed against the prospects of individual litigation, the proposed Settlement here offers all the potential advantages of class certification—eliminating the possibility of numerous duplicative claims and redundant work for counsel and the courts, while providing a recovery for a large group without requiring each individual Settlement Class Member to shoulder the burden of litigation expenses despite potentially small recovery.

For these reasons, the factors described in Rule 1708(a)(6) & (7) both support certification.

B. The Court Should Preliminary Approve the Proposed Settlement.

Plaintiffs request that the Court preliminarily approve the proposed Settlement on the grounds that the proposal falls within the range of reasonableness and that approval on these terms will secure an adequate recovery in exchange for the releases of the claims raised in the action.

The approval of a class action comes in two stages. First, the proposal is submitted to the Court for a preliminary fairness evaluation. *Brophy v. Phila. Gas Works and Phila. Facilities Mgmt. Corp.*, 921 A.3d 80, 88 (Pa. Commw. Ct. 2007). If approval is granted, notice is given to the class members and a formal fairness hearing is scheduled where the Court can receive arguments and evidence in support of or in opposition to the proposal. *Id.* The “range of reasonableness” standard requires the Court to examine whether the proposed settlement secures

an “adequate’ (and not necessarily best possible) advantage for the class in exchange for the surrender of the members’ litigation rights.” *Dauphin Deposit Bank and Trust Co. v. Hess*, 727 A.2d 1076, 1079 (Pa. 1999). Factors relevant to the ultimate approval of the settlement (after the final fairness hearing) include:

1. the risks of establishing liability and damages;
2. the range of reasonableness of the settlement in light of the best possible recovery;
3. the range of reasonableness of the settlement in light of all the attendant risks of litigation;
4. the complexity, expense and likely duration of the litigation;
5. The State of the Proceedings and the Amount of Discovery Completed;
6. the recommendations of competent counsel; and;
7. the reaction of the class to the settlement.

Id. at 1079–80. A preliminary review of these factors demonstrates that the Settlement is within the range of reasonableness and should be approved. As explained above, the Settlement will obtain monetary benefits for the Settlement Class in the amount of \$38,065.00 and further provides non-monetary benefits in the form of agreed-upon injunctive relief.

1. The Risks of Establishing Liability and Damages.

“In evaluating the likelihood of success, a court should not attempt to resolve unsettled issues or legal principles but should attempt to estimate the reasonable probability of success.” *Dauphin Deposit Bank & Tr. Co. v. Hess*, 698 A.2d 1305, 1309 (Pa. Super. Ct. 1997), *aff’d*, 556 727 A.2d 1076 (1999). While Plaintiffs are confident of the strength of their claims, Plaintiffs and Settlement Class Members face significant risks to establishing liability and ultimately recovering. Here, CVS has raised reasonable defenses and objections to Plaintiffs’ claims that Tag Towing, as engaged by CVS, overcharged for tow fees, engaged in unfair or deceptive practices, breached a contract, or was otherwise unjustly enriched. Those defenses include but are not limited to: CVS did not conspire with Tag Towing to charge excess fees for non-consensual tows; Plaintiffs and Settlement Class Members did not pay any money to CVS; Tag Towing was an independent

contractor; Plaintiffs and Settlement Class Members were trespassers; and CVS received no tangible benefits from Plaintiffs and Settlement Class Members. As such, this factor weighs in favor of settlement.

2. The Range of Reasonableness in Light of the Best Possible Recovery and in Light of the Attendant Risks of Litigation.

The next two factors require the court to analyze the range of reasonableness of the settlement. “In deciding whether the settlement falls within a ‘range of reasonableness,’” a court needs “to examine whether the proposed settlement secures an ‘adequate’ (and not necessarily the best possible) advantage for the class in exchange for the surrender of the members’ litigation rights.” *Dauphin Deposit Bank*, 727 A.2d at 1079. “In this light, a court need not inquire into whether the ‘best possible’ recovery has been achieved. Rather, in view of the stage of the proceedings, complexity, expense and likely duration of further litigation, as well as the risks of litigation, the court is to decide whether the settlement is reasonable.” *Id.*

As explained above, the Settlement and distribution process is structured so that Settlement Class Members who file an Approved Claim will receive a *pro rata* share of the Settlement Fund. Here, the \$38,065 Settlement Fund will provide an estimated \$115 *per capita* recovery for approximately 331 Settlement Class Members, excluding the additional settlement benefits provided directly by CVS in the form of attorneys’ fees, cost, and expenses and agreed upon injunctive relief. This is far superior to the *per capita* cash recoveries in other approved unfair trade practices settlements. *Oslan v. L. Offs. Of Mitchell N. Kay*, 232 F. Supp. 2d 436, 442 (E.D. Pa. 2002) (approving unfair trade practices settlement where the class award was \$20,000 for 3,413 class members); *Saunders v. Berks Credit & Collections, Inc.*, No. CIV. 00-3477, 2002 WL 1497374, at *6 (E.D. Pa. July 11, 2002) (approving unfair trade practices settlements where the

class awards were \$12,300 and \$37,500 for classes that respectively contained 1,474 and 1,579 members).

This Settlement is particularly strong in light of the risks and delay-related downsides of continued litigation. But as discussed above, the risks of continuing litigation are substantial because Plaintiffs have no assurance of establishing liability or any entitlement to monetary relief. As such, these factors weigh in favor of settlement.

3. The Complexity, Expense, and Likely Duration of the Litigation.

The complexity, expense, and duration factor “captures the probable costs, in both time and money, of continued litigation.” *In re Cedant Corp. Litigation*, 264 F.3d 201, 233 (3d Cir. 2001). “Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them.” *Milkman v. Am. Travellers Life Ins. Co.*, 61 Pa. D. & C.4th 502, 543 (Pa. Com. Pl. Ct. 2002) (citing *In re NASDAQ Market-Makers Antitrust Litigation*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) (“[C]lass actions have a well deserved reputation as being most complex.”)).

By settling this matter now, Settlement Class Counsel and CVS avoid the further expenses of motions for class certification and summary judgment, preparation for trial, uncertainty of the trial outcome, and likely appeals from the judgment, all while providing a substantial and direct benefit to Settlement Class Members now as opposed to some uncertain amount at some point in the future. Thus, this factor strongly weighs in favor of settlement.

4. The State of the Proceedings and Amount of Discovery Completed.

“The purpose of the state of the proceedings and discovery completion factor is to ascertain the ‘degree of case development that class counsel have accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the

case before negotiating.” *Milkman*, 61 Pa. D. & C. 4th at 544 (quoting *In re Gen. Motors Corp. Pick Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 813 (3d Cir. 1995)). This ensures that “a proposed settlement is the product of informed negotiations” by providing for “an inquiry into the type and amount of discovery the parties have undertaken.” *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 319 (3d Cir. 1998).

Here, the Parties have been litigating this case for nearly five years. During that time, the Parties have briefed and argued multiple rounds of preliminary objections, engaged in extensive discovery, including written discovery as well as multiple depositions of Brian Haenze of Tag Towing. Further, the Parties ultimately reached an agreement after a series of arms’-length negotiations and multiple rounds of offers and counteroffers. As such, the Parties adequately appreciated the merits of the case when reaching the Settlement. Thus, this factor weighs in favor of settlement.

5. The Recommendations of Competent Counsel.

“The opinion of experienced counsel is entitled to considerable weight.” *Fischer v. Madway*, 485 A.2d 809, 813 (Pa. Super. Ct. 1984). Here, Settlement Class Counsel and CVS’s Counsel have negotiated this Settlement at arms’-length for months, and all Settlement Class Counsel is satisfied that this Settlement provides a more than adequate benefit to the Settlement Class and is in the best interest of the Settlement Class as it provides them with monetary relief that will reimburse them for the alleged tow fee overcharges. Thus, this factor weighs in favor of settlement.

6. The Reaction of the Class to the Settlement.

A court will inquire into the reaction of the Settlement Class in its determination of the reasonableness of the settlement. *Dauphin Deposit Bank*, 727 A.2d at 1080. This is a factor more

properly addressed at final approval, after notice and an opportunity for the Settlement Class to be heard. While notice of settlement has yet to be sent out, Settlement Class Counsel is confident there will be few Settlement Class Members who will opt out or object to the Settlement as the relief provided is close in amount to both Class Members' actual damages and the minimum statutory damage amount recoverable under the UTPCPL. As such, this factor weighs in favor of preliminary approval.

In the end, the issues of law and fact have been thoroughly investigated, and continued litigation would further delay relief to the Settlement Class and consume substantial resources of both the Parties and the Court. The relief afforded by the Settlement is excellent, when balanced against the risk faced by Plaintiffs on the merits of the case, and the time, risks, and expenses of further litigation. Nothing in the course of the settlement negotiations or the substance of the Settlement itself suggests any grounds to doubt its fairness. To the contrary, the arms-length nature of the negotiations, the participation of experienced lawyers and an able and attentive Court, as well as the value of aggregate relief support a finding that the Settlement is fair, reasonable, and more than adequate to justify notice to the Settlement Class and a hearing on final approval.

C. The Court Should Approve Notice to the Settlement Class.

Finally, as previously described, the proposed notice program should be approved. Rule 1714(c) provides that after a class has been certified, notice of any proposed settlement "shall be given to all members of the class in such manner as the court may direct." Pa. R. Civ. P. 1714(c). "Notice in a class suit must present a fair recital of the subject matter and proposed terms and inform the class members of an opportunity to be heard." *Tesauro v. Quigly Corp.*, 2002 WL 1897538, *3–4 (Pa. Com. Pl. Ct. Aug 14, 2002) (citing *Fischer v. Madway*, 485 A.2d 809, 811 (Pa. 1984)). The notice program in this case is robust, designed to individually reach as many

individual Settlement Class Members as possible, and therefore comports with the requirements of Pa. R. Civ. P. 1712 and 1714.

As described above, the Settlement Notice will be sent to all Settlement Class Members identified in the Class List and the Settlement Administrator is to take reasonable steps to identify Settlement Class Members' current addresses. As such, nearly all Settlement Class Members will be provided with direct email or mail notice of the Settlement. Further, the Settlement includes a description of the material terms of the Settlement and the forms of relief available to Settlement Class Members; Settlement Class Members' estimated distribution; a date by which Settlement Class Members may object to or opt out of the Settlement; the date upon which the Final Approval Hearing will occur; and the address of the Settlement Website at which Settlement Class Members can access the Settlement Agreement and other related documents and information. (SA. Ex. 3 & 4). This notice program meets or exceeds all requirements under Pennsylvania law and satisfies all constitutional considerations of fairness and due process. *See Wong v. First Union Nat. Bank*, 69 Pa. D. & C.4th 516 (Pa. Com. Pl. Ct. 2004) (quoting *Phillips Petroleum Co. v. Shutts*, 712 U.S. 797, 812 (1985) ("the procedure . . . where a fully descriptive notice is sent . . . to each class member, with an explanation of the right to 'opt out', satisfies due process.")).

III. CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request that the Court grant their motion and enter the proposed order preliminarily approving the Settlement, conditionally certifying the Settlement Class for settlement purposes, and authorizing Settlement Notice to be sent to Settlement Class Members.

Dated: April 11, 2024

Respectfully submitted,



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CERTIFICATE OF SERVICE

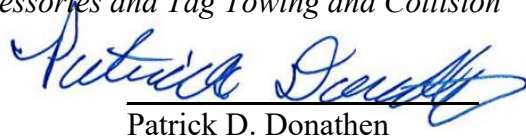
I hereby certify that on April 11, 2024, the foregoing was served by email and/or mail on the following:

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