IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

JANYCE LEWIS, et al.,	)	
Plaintiffs	)	
	)	
V.	)	**Case No.: 3:12-cv-00026-GEC**
	)	
CHARLOTTESVILLE REDEVELOPMENT &	)	
HOUSING AUTHORITY, et al.,	)	
Defendants	)	

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

Introduction

Plaintiffs ask this Court to provide final approval of a proposed settlement in this action because the settlement terms are fair, reasonable, and adequate. *See*. Fed. R. Civ. P. 23(e)(2). For purposes of settlement, Plaintiffs sought and received certification of a class under Rule 23(b)(3) of all current and former Charlottesville public housing residents since June 7, 2007 who were subject to the Charlottesville Redevelopment and Housing Authority's (CRHA) 2003 resolution regarding utility allowances. Plaintiffs and Defendants had reached a settlement agreement which the parties believe fairly and adequately resolves Plaintiffs' claims. After reviewing those terms, this Court gave preliminary approval to the settlement terms. (Dkt. 83). Notice has now been sent to the class members as instructed by the Court, and no class member opted out. Only one person filed an objection, and that objection raised unique damages claims

not pertinent to the class or the terms of the settlement. The provisions of this settlement distribute significant relief to class members, ameliorate excess utility charges going forward, provide for customary attorney's fees and costs, and establish a beneficial use of any unclaimed funds without reversion to Defendants.

Once the Court determines that a settlement class should be certified, the Court must then follow a three-step process prior to granting final approval of a proposed settlement. *Levell v. Monsanto Research Corp.*, 191 F.R.D. 543, 547 (S.D. Ohio 2000). First, the Court must preliminarily approve the proposed settlement. *Id*. Second, members of the class must be given notice of the proposed settlement. *Id.* Third, the Court must hold a hearing, after which the Court decides whether the proposed settlement is fair, adequate, and reasonable to the class as a whole, and consistent with the public interest. *Id.* These three steps protect the class members' procedural due process rights and enable the Court to fulfill its role as the guardian for the class's interests. The first two steps have been already taken. For the third step, the decision to approve or reject a proposed settlement is committed to the Court's sound discretion. *City Partnership Company v. Atlantic Acquisition L.P.*, 100 F.3d 1041, 1043-44 (1st Cir. 1996).

As more fully set forth below, the evidence amply demonstrates that the settlement is fair, reasonable and adequate. Therefore Plaintiffs request that the Court grant final approval to the terms of the settlement.

I. Description of the Litigation and the Proposed Settlement

A. The claims and defenses in issue

The Plaintiffs are low-income residents and former residents of federally-subsidized public housing owned by the Charlottesville Redevelopment and Housing Authority ("CRHA"). The Plaintiffs brought this case against CRHA under the United States Housing Act ("Housing Act"), 42 U.S.C. § 1437 *et seq.*, 42 U.S.C. § 1983, and the Virginia law of contract. A complete description of the legal and factual basis for the claims, the procedural history of this case, and the positions of the parties was provided in Section I of Plaintiffs' memorandum seeking preliminary approval. (Dkt. 77-1).

Briefly, under the Housing Act, 42 U.S.C. § 1437a(a)(1)(A), and its implementing regulation, 24 C.F.R. § 965.505, tenants residing in CRHA's units may be charged no more than thirty percent of their adjusted gross income as rent and utilities. This thirty percent figure must include an allowance for the "monthly cost of a reasonable consumption of [tenant-paid] utilities . . . by an energy-conservative household of modest means, consistent with the requirements of a safe, sanitary, and healthful living environment." 24 C.F.R. § 965.505(a). CRHA is required to follow specific procedures in determining the allowance. 24 C.F.R. §§ 965.505(d) and 24 C.F.R. 965.507. Plaintiffs claim that CRHA violated the U.S. Housing Act and its implementing regulations by failing to properly review and update the 2003 electric utility allowance and thus improperly charging tenants for excess utilities. Plaintiffs also allege that in 2003, CRHA promised in Policy Resolution 2058 to pay a $50 savings bond to any resident whose household did not exceed the annual utility allowance, and that this resolution constituted an enforceable

promise to pay money under Va. Code § 8.01-27. No resident has received a savings bond under Resolution 2058.

Defendants contend that the 2003 utility allowances can only be invalidated if shown to be arbitrary, capricious, or an abuse of discretion, and that the Plaintiffs will be unable to prove that the allowance is invalid under these terms. They also deny that Policy Resolution 2058 is a contractual obligation, and state that the CRHA board never approved a budget authorizing this expenditure. (Answer ¶ 6). They also argue that the right to receive savings bonds, if one existed, expired at the end of 2003 and is now time barred. (Mem. In Supp. of Mot. to Dismiss 2d Am. Compl.) Finally, they argue that Plaintiffs' claims are time limited to two years, under 42 U.S.C. § 1983, and five years, under contract.

B. The proposed settlement

The parties negotiated the proposed settlement with the assistance of Magistrate Judge Waugh Crigler. This involved both in-person meetings with decision-makers and counsel in court, and conference calls. The terms of the settlement required approval from both HUD and Virginia's Department of Risk Management. The settlement included provisions for distribution of a lump sum payment by CRHA following notice to the proposed class members, and these have happened. It also provides for prospective relief in the form of an agreed utility allowance and excess utility billing rate going forward, as well as credits to the affected residents. The proposed settlement provides the following essential terms:

1. Retrospective relief:

The class will receive a gross recovery of $160,000.00, to be distributed as follows:

Distributed to eligible class members as recovery for overcharge:	$94,500.00
Distributed to eligible class members as savings bond value:	6,600.00
For administration of class costs: actual costs not to exceed	2,000.00
Incentive awards to class plaintiffs:	6,000.00
Attorneys' fees and court costs:	$ 50,000.00

The net class recovery includes a money distribution to eligible class members based on the excess utility charges actually paid by class members; all class members who have paid excess utility charges incurred from June 7, 2007, to May 31, 2013 (the date CRHA stopped charging under the 2003 utility allowance) will receive a reimbursement of at least 33.043 percent of their total excess utility payments. The net class recovery will also include providing $50.00 to each class member who was eligible to receive the savings bond for staying below the assigned utility allowance, as can be determined from the records of the CRHA. The numbers regarding these overcharges, the estimated percentage of reimbursement, and the number qualified to receive the $50.00 payment are shown in the schedules attached to this Court's preliminary approval Order. (Dkt. 83).

All disbursement checks will be subject to a 60 day expiration, after which time any unclaimed funds will form a *cy pres* trust. Class members will not need to fill out any claims form. The balance of the *cy pres* trust will be disbursed to Albemarle Housing Improvement Program (AHIP) to be held in trust for the use by then-current tenants of CRHA facilities for monetary assistance toward the purchase of energy-efficient cooling equipment or other energy efficient devices**.**

The class representatives, Ms. Lewis, Ms. Cooper, Mr. and Mrs. Folley, Ms. Gladden, and Ms. Tinsley, will receive an incentive award of $1,000 each.

The settlement payment includes $50,000 in attorneys' fees and costs, payable to Legal Aid Justice Center. This payment represents less than one-quarter of the total hours spent by Plaintiffs' attorneys on this case multiplied by the respective lodestar rates of those attorneys representing reasonable rates for attorneys of comparable experience in the same market area. (See Declaration attached as Exhibit 2). The amount of attorneys' fees was disclosed to class members on the notice.

As provided in the agreement, Class Counsel mailed notice of settlement to the class members based on addresses provided by CRHA for current and former residents. For those individuals for whom there is no current address on file at CRHA, Class Counsel consulted with Defendants and made reasonable efforts to investigate the current addresses for those individuals. The notice informed the Class Member that they may opt out, along with clear instructions to anyone wishing to do so.

2. <u>Prospective relief</u>:

CRHA agrees to fix the utility rate billed to tenants at $.074 per kilowatt hour of excess electric usage for a period of five (5) years from the date the settlement becomes final. Excess utility allowances will be calculated for the same five (5) year period according to the 2010 HUD calculator study, attached as Attachment 1 to the Proposed Preliminary Approval Order.

CRHA also agrees to provide a credit of $15.00 per month for each of the 251 units actually charged for utilities for thirty-six (36) months from the date of settlement, and a credit of

$5.00 per month for each of the 251 units actually charged for twenty-four (24) months thereafter. These credits may be used for any purpose associated with the lease, not merely for excess utility charges.

The provisions of this settlement distribute significant relief to class members as well as ameliorating excess utility charges going forward, provide for customary attorney's fees and costs, and establish a beneficial use of any unclaimed funds without reversion to Defendants. This evidence amply demonstrates that the settlement is facially sound and reasonable in light of the parties' claims and defenses.

II. Administration of the Proposed Settlement and the Only Objection Received

Class Counsel was able to obtain initial addresses for all but eight Class Members as stated in the Declaration attached as Exhibit 1. After notices were sent out to 383 class members initially, 45 notices were returned because of invalid addresses. Of these, new addresses were obtained for some Class Members and a second and third mailing was completed to an additional 83 addresses, of which 21 letters were returned. Thus Class Counsel did not locate valid addresses for 41 out of 436 total class members. Consequently, the notices that were mailed to approximately 94% of the Class Members were not returned as invalid.

Notices of the proposed settlement were posted at CRHA's units and on Class Counsel's website. (https://www.justice4all.org/current-initiatives/crha-utilities-class-action-proposed-settlement/lewis-et-al-v-crha-selected-court-filings/). This page also included the proposed settlement agreement, the notices, and other pertinent documents about the settlement. This link was prominently displayed in the drop down menu under Current Initiatives from the home page,

https://www.justice4all.org/. The proposed settlement was also featured in several news stories, including the Daily Press, WCAV, Washington Post, Richmond Times-Dispatch and the C-ville. on October 1, 2013.

No Class Member opted out of the proposed settlement. Only one Class Member, Jill Dunnivan, filed an objection. (Dkt. 87). The basis for her objection was that her circumstances show far more damages her than the settlement terms would provide. She does not raise any objection for the class as a whole nor does she provide a reason why the proposed settlement is not fair, adequate, and reasonable for the class.

Not counting attorney time spent on administering the class, the cost of locating addresses and sending notices notices to date is approximately $1,833.00. (Declaration attached as Exhibit 1). The expected cost of sending the checks and accounting for the settlement checks will be at least $800.00. Thus, not counting the attorney time spent on administering the class, the costs of administration exceed $2,000.00.

In distributing the refund checks, Class Counsel intends to send checks to these Class Members whose notices were not returned. Thus, 93% of the Class Members will have checks mailed to them. Class Counsel intends to hold the money due the other Class Members in trust for sixty days after the checks are issued. If these people can be found or if they come to claim their money, then Counsel will issue checks to them. Otherwise, after sixty days this money will revert to the *cy pres* fund.

III. The Requirements for Final Approval of a Class Settlement Are Satisfied.

Fed. R. Civ. P. 23(e)(1-2) imposes two basic requirements on the parties and on the Court before the approval of a class settlement and dismissal. First, the Court must determine that notice was directed "in a reasonable manner to all class members." Fed. R. Civ. P. 23(e)(1)(B). Second, the Court must determine that that the settlement "is fair, reasonable, and adequate." The principal underlying concern for the Court in reviewing a proposed class settlement is the protection of class members whose rights may not have received sufficient consideration in settlement negotiations. *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

A. The notice to the Class Members was reasonable and the best practicable.

Due process in the class action context requires that the notice be "reasonably certain to inform those affected." *Vancouver Women's Health Collective Soc'y v. A.H. Robbins Co., Inc.*, 820 F.2d 1359, 1364 (4th Cir. 1987). The Supreme Court has concluded that direct notice satisfies due process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812-13 (1985). Other courts have approved mailed-notice programs that reached a comparable or even smaller percentage of class members than the notice sent in this case. *See In re Serzone*, 231 F.R.D. 221, 236 (S.D. W. Va. 2005) (approving notice program where direct mail portion was estimated to have reached 80% of class members); *Martin v. United Auto Credit Corp.*, 3:05cv00143 (E.D. Va. August 29, 2006); *Williams v. LexisNexis*, No. 3:06CV241 (E.D.Va. July 8, 2008); *Beverly*

v. ChoicePoint, No. 3:09CV541 (E.D.Va. May 1, 2009)(the court approving of class notice with approximately 85% delivery).

As the Eastern District of Virginia has held, "[w]hat amounts to reasonable efforts under the circumstances is for the Court to determine after examining the available information and possible identification methods . . . 'In every case, reasonableness is a function of [the] anticipated results, costs, and amount involved.'" *Fisher v. Va. Elec. & Power Co.*, 217 F.R.D. 201, 227 (E.D. Va. 2003) (citations omitted). Class Counsel's efforts to provide class members with notice of the class action and proposed settlement provides clear evidence that Class Member were given the best notice practicable under the circumstances. Ninety-four percent of the Class Members were mailed notices that were not returned, media coverage was obtained in multiple outlets, and information was made available through the internet. All this was accomplished at very little cost to the class and, thus, very little reduction in the recovery to each Class Member.

In this case, the notice met the requirements of Rule 23(c)(2) of "best practicable" and 23(e) of "reasonable", because it included the following: (1) the case caption; (2) a description of the class; (3) a description of the claims; (4) a description of the Settlement; (5) a statement of the attorneys' fees to be paid to Plaintiffs' Counsel and the additional payments to be made to class representatives; (7) the Fairness Hearing date; (8) a statement that class members may hire their own attorney if they wish; (9) a statement of the procedure and deadline for filing objections to the Settlement; (10) a statement of the procedure and deadline for filing requests

for exclusion; (11) a statement of the consequences of exclusion; (12) a statement of the consequences of remaining in the Class; and (13) the manner in which to obtain further information. *See also In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 496 (D.N.J. 1997). Thus, the Court should find that the notice satisfies Rule 23.

Defendant also served notice on the relevant state and federal authorities as required by the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §1715. This mandatory notice was provided on November 8, 2013. Pursuant to 28 U.S.C. §1715(d), no final approval order should issue until ninety days have passed since that notice.

B. The settlement is fair, reasonable, and adequate for the class.

Approval of a class action settlement is committed to the "sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in light of the relevant circumstances*." In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp.2d 654, 663 (E.D. Va. 2001). Additionally, "there is a strong initial presumption that the compromise is fair and reasonable." *Id.* (*quoting S. Carolina Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991)). The Fourth Circuit has bifurcated the analysis into consideration of fairness of negotiations of the settlement and the adequacy of the consideration to the class. *Jiffy Lube*, 927 F.2d at 158-59; *see also In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1383-84 (D. Md. 1983); *Beaulieu v. EQ Indus. Services, Inc.*, 2009 WL 2208131 (E.D.N.C. 2009). While the Court must assess the strength of plaintiffs' claims, it should "not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79,

88 n.14 (1981). Moreover, where a settlement is the result of genuine arm's-length negotiations, there is a presumption that it is fair. *City P 'ship Co. v. Atlantic Acquisition Ltd P 'Ship,* 100 F.3d 1041, 1043 (1st Cir. 1996); *Rolland v. Cellucci,* 191 F.R.D. 3, 6 (D. Mass 2000). Finally, the number of objections and opt-outs can be considered in making this determination.

1. Fairness: The proposed settlement was the result of "arm's-length" negotiations under the supervision of an experienced mediator.

Factors relating to the fairness of a proposed settlement include (1) the posture of the case at the time the proposed settlement was reached, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the settlement negotiations, and (4) counsel's experience in the type of case at issue. *Jiffy Lube,* 927 F.2d at 158-59.

a. Posture at time of settlement

At the time of settlement, the parties had conducted three rounds of briefing on motions to dismiss, including one oral argument. Plaintiffs had also propounded extensive discovery, and the parties engaged in a multi-day mediation before an experienced and impartial mediator, Magistrate Judge Crigler. The settlement now before the court is the result of extensive negotiation conducted by parties minutely familiar with each other's positions on the merits of the case. It bears the hallmarks of an arms-length agreement reached by parties with knowledge of the facts and the strengths and weaknesses of each other's positions.

b. Extent of discovery

The discovery taken in this case includes the review of Defendants' database files of excess utility payments made by class members, the inspection of hundreds of pages of

documents at Defendants' office and online in the records of the CRHA board meetings, and the review of Defendants' answers to Requests to Admit and Interrogatories. A deposition of CRHA under Rule 30(b)(6) was scheduled for later in the week of the final mediation in this case. The discovery conducted showed not only that the Defendants acted uniformly with regard to the class, but that they had given no serious consideration to revising the utility allowance since 2003. This discovery also allowed the Plaintiffs to understand the Defendants' system of billing for excess utilities and the extent of the Plaintiffs' overpayments in the years since 2007. By the time the parties reached settlement, the essential facts of the case were undisputed with regard to Defendants' excess utility billing practices and their adoption and continued use of the 2003 allowance. As such, the settlement was reached with an understanding of the merits of the case and the possible defenses by CRHA.

c. Circumstances surrounding negotiation

As set forth above, the settlement discussions were conducted before an experienced and impartial mediator. These negotiations occurred in person three times in the Charlottesville federal court, as well as by phone in conversations between the mediation sessions. The follow-up negotiations ultimately produced a substantial improvement in the settlement for the class. These facts show the circumstances of the settlement were fair.

d. Opinion of counsel

Class Counsel for Plaintiffs have experience with class actions and civil rights actions. They endorse the settlement as fair and adequate under the circumstances. Courts recognize that the opinion of experienced and informed counsel in favor of settlement should

be afforded substantial consideration. *See Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *In re MicroStrategy Inc. Sec. Litig.*, 148 F. Supp.2d 654, 665 (E.D. Va. 2001); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981).

After initial discovery and vigorous settlement negotiations, counsel for the parties have agreed to the settlement as a just and appropriate resolution of all claims. Class Counsel recommend this settlement to the Court based upon their collective experience as federal court litigators and class counsel. The Class Settlement Agreement is the product of extensive arm's-length negotiations, which were undertaken in good faith after factual investigation, discovery, and legal analysis.

2. The settlement is adequate in relation to the strength of Plaintiffs' Claims.

In evaluating the proposed Class Settlement, the Court should also consider the strength of Plaintiffs' case on the merits balanced against the amount offered in the Class Settlement. *See M. Berensen Co., Inc. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 823 (D. Mass. 1987); *Plummer v. Chemical Bank*, 579 F. Supp. 1364, 1370, 1372-74 (S.D.N.Y. 1984). In this process, however, a court must "avoid deciding or trying to decide the likely outcome of a trial on the merits." *In re Nat 'l Student Marketing Litig.*, 68 F.R.D. 151, 155 (D.D.C. 1974). In light of the fact that the class members will receive, at a minimum, a cash reimbursement of 34.043 percent of the excess utility fees they paid, and that there are substantial risks involved in continued litigation, the settlement is more than reasonable.

An analysis of the adequacy of these terms, relevant factors to be considered may include: (1) the relative strength of the plaintiffs' case on the merits, (2) any difficulties of proof or strong defenses the plaintiffs would likely encounter if the case were to go to trial, (3) the expected duration and expense of additional litigation, (4) the solvency of the defendants and the probability of recovery on a litigated judgment, and (5) the degree of opposition to the proposed settlement. *See In re Jiffy Lube*, 927 F.2d at 159; *Clark v. Experian Information Solutions, Inc.*, 2004 WL 256433 (D.S.C. 2004).

While Plaintiffs believe that they were likely to prevail in their claims, the Defendants presented a number of potential arguments that could defeat liability or limit damages. In particular, the Defendants have argued that the Plaintiffs must show they were conservative users of electricity to set the damages for each person who paid overcharges. If they prevailed in this argument and Plaintiffs were required to show that they were conservative users of electricity in order to prevail, it is possible that a jury would not judge their energy usage to be sufficiently conservative.

Although extensive discovery has been conducted, much work would still be necessary to bring this case to trial. No depositions have been conducted, and at a minimum counsel had planned for a two-day 30(b)(6) deposition of CRHA personnel and the engineers who conducted the 2003 and 2010 utility studies. In addition, the parties would likely move for summary judgment, given the apparent lack of factual dispute thus far in the case. A trial on the merits of this action or on damages would entail considerable expense and would not necessarily end the litigation, given the right of appeal. Avoiding such expense and potential delay will save both

the parties and the Court significant time, money, and precious judicial resources, and is a further appropriate reason for the Court to approve the agreement. *See Slomovics v. All For A Dollar, Inc.*, 906 F. Supp. 146, 149 (E.D.N.Y. 1996) (stating that where litigation is potentially lengthy and will result in great expense, settlement is in the best interest of the class members); *see also Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (noting the important justifications including reduction of litigation and litigation-related expenses favoring the settlement of class action lawsuits).

"Thus, the old adage, 'a bird in hand is worth two in the bush' applies with particular force in this case." *See Cardiology Assoc's, P.C. v. Nat'l Intergroup, Inc.,* No. 85 Civ. 3040, 1987 WL 7030, at *2 (S.D.N.Y. Feb. 14, 1987) (concluding that because continued prosecution of the action would have been expensive and time-consuming, and would have involved substantial risks, "it [was] not unreasonable for the plaintiff class to take a 'bird in the hand'"); *Alvarado Partners, L.P. v. Mehta*, 723 F.Supp. 540, 547 (D.Colo. 1989) (noting that "[i]t has been held prudent to take 'a bird in the hand instead of a prospective flock in the bush'" in weighing the value of an immediate recovery against "the mere possibility of future relief after protracted and expensive litigation") (quoting *Chas. Pfizer & Co.*, 314 F.Supp. at 740)." *In re Microstrategy, Inc. Sec. Litig.*, 148 F.Supp.2d at 667.

3. The lack of opt outs and one objection also show the settlement is proper.

No member of the class chose to opt out of the settlement and only one member expressed an objection. This low number, only one away from absolute zero, also shows the settlement terms are fair and adequate. *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 257

(E.D.Va. 2009)(relying on *In re Jiffy Lube, Flinn, and In re Microstrategy*, to find the adequacy manifest in "[t]he attitude of the members of the Class, as expressed directly or by failure to object," is a proper consideration for the trial court and that a small number of opt-outs weighs significantly in favor of the settlement's adequacy)(citations omitted). The substance of the one objection concerns facts unique to that objector and this objection is not relevant to the class as a whole. Consequently, the lack of opt outs and this one objection provide further evidence that the settlement is fair, reasonable, and adequate.

CONCLUSION

For the reasons stated above, the Plaintiffs request this Court to give final approval to the the terms of the settlement. Plaintiffs propose entry of the Order attached as Exhibit 3.

Respectfully submitted this 7th day of January, 2014.

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