DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 S. Potomac St. Centennial, CO 80112	
Plaintiff/Counterdefendant: Echelon Property Group, LLC v. **Defendant/Counterplaintiff**: Bobby Salandy	▲ **COURT USE ONLY** ▲
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MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT	

I. INTRODUCTION

The Settlement Agreement reached in this case—resolving claims of first impression alleging that Echelon's Late Fees, Notice Posting Fees, and Eviction Legal Fees are unlawful penalties under Colorado law—represents a clear victory for the Settlement Class Members. Not only has Echelon agreed to a Settlement Fund totaling $3,450,000 in monetary relief ($2,250,000 in debt forgiveness and $1,200,000 in cash), it's committed to implementing meaningful

prospective relief designed to help tenants seal their eviction records and protect their credit scores. And Class Members don't need to file a claim to receive these benefits.

Such strong relief wasn't obtained by accident; rather, the terms are the result of tireless work and effort on the part of Settlement Class Counsel and the Settlement Class Representative to investigate the claims, litigate the case, negotiate the Settlement, and achieve Court approval. This included substantial motions practice, oral, written, and third-party discovery, two formal mediation sessions with well-respected mediators, the defeat of Echelon's first motion for summary judgment, and the securing of class certification on an adversarial basis.

At this point, the Court has granted preliminary approval and notice—both a short form mail notice as well as a traditional long form notice—have been disseminated to the Settlement Class Members. The response has been overwhelmingly favorable. No Settlement Class Members have objected or requested exclusion, and members who've called Settlement Class Counsel with questions about the case or the Agreement have responded positively upon being advised of the Settlement's basis and benefits.

Given the response of the Class, coupled with the fact that the Settlement continues to meet each of the factors that courts weigh when determining whether a settlement is fair, reasonable, and adequate, the Court should grant final approval to the Settlement Agreement as set forth below.

II. THE FACTS, LAW, AND LITIGATION HISTORY

A brief review of the factual and procedural background is set forth below.

Echelon repeatedly filed eviction actions against Salandy

This lawsuit began with Echelon's fourth eviction filing against Salandy: on April 16, 2019, Echelon filed a Forcible Entry and Detainer Action against Salandy styled, *Echelon*

Property Group, LLC v. Bobby Salandy, Case No. 2019C37058 in the County Court for Arapahoe County. *See* Declaration of Attorney Steven Woodrow In Support of Motion for Preliminary Approval ("Woodrow Decl."), ¶ 9, a true and accurate copy of which is attached hereto as Ex. 1. Given that he had already paid thousands of dollars in late fees and other charges, rather than simply pay Echelon again, on April 25, 2019, Salandy filed an Answer, Class Action Counterclaims, and a Jury Demand challenging the fees stated in paragraph 9 of Echelon's form lease. *Id*. On April 30, 2019, Salandy filed an amended pleading together with a motion to transfer the case to the District Court for Arapahoe County. *Id*., ¶ 10. On April 30, 2019, the case was removed to the District Court for Arapahoe County and was assigned Case No. 2019CV112. *Id*., ¶ 11.

The Parties vigorously litigate Salandy's counterclaims

Following the transfer, the Parties proceeded to robustly litigate the lawsuit.[1] At the heart of Salandy and the Class's claims is the charge that Echelon's Late Fees, Notice Posting Fees, and Eviction Legal Fees are unlawful penalties as opposed to lawful liquidated damages. Under Colorado law, a contract clause that specifies the amount of damages in case of a breach—like late fees[2]—represents either *lawful liquidated damages* or *unlawful penalties*, but not both. As the Colorado Supreme Court has explained:

[1] Echelon moved to proceed with an expedited, bifurcated hearing on possession (eviction) only. The Court issued an order granting that motion, but later revised it after Salandy filed his motion to reconsider based on caselaw allowing a party to raise equitable defenses in Colorado eviction hearings. The Court's revised ruling made a determination adverse to Echelon, and Echelon moved thereafter moved for reconsideration.

[2] Courts across the Country have analyzed whether late fees represent lawful liquidated damages or unlawful penalties. *Sun Ridge Inv'rs, Ltd. v. Parker*, 1998 OK 22, ¶ 13, 956 P.2d 876, 878 ("In reviewing the case at bar, we find that the $5.00 per day 'additional rent' sought to be imposed for

> A liquidated damages provision is valid and enforceable if three elements are met: (1) "the parties intended to liquidate damages"; (2) "the amount of liquidated damages, when viewed as of the time the contract was made, was a reasonable estimate of the presumed actual damages that the breach would cause"; and (3) "when viewed again as of the date of the contract, it was difficult to ascertain the amount of actual damages that would result from a breach." *Klinger v. Adams Cty. Sch. Dist. No. 50*, 130 P.3d 1027, 1034 (Colo. 2006) (quoting *Rohauer v. Little*, 736 P.2d 403, 410 (Colo. 1987)). If any one of the elements is not met, the provision is an invalid penalty. *Id.* A penalty differs from a liquidated damages clause because "a penalty is designed to punish for a breach of contract[,] whereas liquidated damages are intended as fair compensation for the breach." 25A C.J.S. Damages § 200 (2016).

Ravenstar, LLC v. One Ski Hill Place, LLC, 2017 CO 83, ¶ 10, 401 P.3d 552, 555.

Echelon's form Lease, specifically Paragraph 9, contained provisions purportedly requiring tenants to pay Late Fees, Notice Posting Fees, and Eviction Legal Fees. Woodrow Decl., ¶ 4. Tenants who failed to pay the monthly rent by the fourth day of the month would incur a $75 Late Fee plus $10 for each following day the rent was late. On the fourth day of the month when rent was unpaid, Echelon would also assess a $20 Notice Posting Fee for posting a demand on the tenant's door seeking payment of rent or possession of the unit within three days. *Id*., ¶ 5. If rent remained unpaid three days after the notice was posted, Echelon would refer the case to its lawyers who would initiate forcible entry and detainer actions, and Echelon would charge tenants an additional $295 in Eviction Legal Fees. *Id*., ¶ 6.

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late-payment or non-payment of rent is a penalty."); *Harbours Condo. Ass'n, Inc. v. Hudson*, 852 N.E.2d 985, 992 (Ind. Ct. App. 2006) ("[T]he late fees calculated by the Association constitute an unenforceable penalty, not liquidated damages."); *Northport Condo. Marina Ass'n v. Pinder*, No. 188971, 1997 WL 33353655, at *1 (Mich. Ct. App. Mar. 21, 1997) (concluding late fees were liquidated damages); *Arbors Condo. Ass'n v. Abdella*, No. 240796, 2003 WL 22339475, at *4 (Mich. Ct. App. Oct. 14, 2003) (explaining that under Michigan law for the late fees to be liquidated damages the damages must be uncertain and the late fees must closely approximate the damage); *Bayol v. Zipcar, Inc.*, 78 F. Supp. 3d 1252, 1257 (N.D. Cal. 2015) (finding late fees at issue in that case were liquidated damages).

Through the lawsuit, Salandy claimed that these charges were assessed in the event of breach (a tenant's failure to pay on time) and that they sought to fix the damages payable to Echelon. *Id*. ¶ 7. Critically, however, Salandy alleged that the fees were penalties designed to punish tenants for failing to pay on time as opposed to amounts crafted to accurately compensate Echelon for its losses. *Id*. Echelon admitted in discovery that the Parties never intended to liquidate damages and that calculating the amount of damages Echelon would suffer in the event a tenant did not pay on time, as measured from the time the leases were entered, wouldn't have been difficult. *Id*., ¶ 8. As such, Salandy sought relief on behalf of himself and all other similarly situated on the grounds that the fees charged and collected by Echelon were unlawful penalties. *Id*. ¶ 10.

The Parties engaged in extensive written and oral discovery, both formally and informally as well. *Id*., ¶ 14. Through early engagements between the lawyers, Echelon's counsel was able to hone-in on the specific data Salandy needed. The Parties additionally engaged in formal discovery, including interrogatories and requests to produce and the depositions of two of Echelon's Rule 30(b)(6) designees. Salandy himself sat for a full day deposition. *Id*., ¶ 14. The Parties also litigated discovery disputes, which on two occasions resulted in conferences with the Court. *Id*., ¶ 15. Plaintiff also issued subpoenas to third parties, including Echelon's eviction counsel as well as RD Fuller, its collection agency. *Id*., ¶ 14. This greatly benefitted the Class by enabling Class Counsel to establish not only that Echelon's practices were widespread, but that the persons impacted could be identified and have their claims decided in a manageable way. *Id*.

On July 28, 2020, Echelon moved for summary judgment on the grounds that the voluntary payment doctrine supposedly barred Salandy's claims. *Id*., ¶ 16. Salandy filed his opposition on August 18, 2020, and on October 27, 2020, the Court denied Echelon's Motion for Summary

Judgment. *Id*. Thereafter, on February 25, 2021, Salandy filed his Motion for Class Certification. *Id*., ¶ 17.

The Parties' First Mediation Session

Following the denial of Echelon's Motion for Summary Judgment and Salandy's filing of his Motion for Class Certification, the Parties engaged in their first full day mediation session with CRS, including well-respected mediators Joe Epstein and Chad Atkins. *Id*., ¶ 18. Despite productive talks, the Parties were unable to reach an agreement on a class-wide basis. *Id*. Instead, both sides agreed to return to the litigation to brief class certification. *Id*., ¶¶ 18, 19.

The Court grants class certification in July 2021 and the Parties return to mediation

Following the first mediation session, the Parties proceeded to complete briefing on Salandy's motion for class certification. *Id*., ¶ 19. On July 21, 2021, the Court granted class Salandy's motion and certified the following class: all Echelon tenants "who, from April 2016 to the date of the order for possession against Salandy - August 5, 2019 - were charged the Fees and, like Salandy, had actions filed against them by Echelon for forcible entry and detainer." *See* Certification Order, 3.

Following certification, the Parties proceeded to negotiate the form and content of a class notice. Woodrow Decl. ¶ 22. This included resolving Echelon's demand for an additional notice (ostensibly pertaining to Settlement Class Member privacy rights). The Parties also began discussing the potential to revisit settlement discussions through a second mediation session. *Id.* Ultimately the Parties agreed to return to mediation, and the Court granted a stay of the case to afford the Parties time to complete their negotiations. *Id*., ¶ 23.

The Second Mediation

On September 29, 2021, the Parties engaged in a second full-day mediation session with Messrs. Epstein and Atkins. *Id*., ¶ 24. This was a productive session that featured additional rounds of good faith negotiations. *Id*. Indeed, during this time the Parties were essentially able to reach an agreement regarding the Settlement's prospective relief. *Id*. Unfortunately, however, and despite their best efforts, the Parties were unable to achieve a resolution of the Settlement's remaining terms. *Id*., ¶ 25. The Parties attempted follow up talks but, in the end, agreed to return to court. *Id*.

The Parties filed cross-motions for summary judgment and began preparing for a one-day trial set on Salandy's first counterclaim for January 19, 2022. *Id*., ¶ 26. While preparing for trial, which included seeking leave from the court to consummate the notice plan that was put on hold for the second mediation, the Parties continued to discuss a settlement framework and terms. *Id*. ¶ 27. These post-mediation talks ultimately led to an agreement in principle with respect to the relief to be made available to the certified class. *Id*. Only after this phase of the negotiations was complete did the Parties discuss and come to an agreement regarding reasonable attorneys' fees and an incentive award for Mr. Salandy in recognition of his service as the Class Representative (both of which, like the other terms of the Settlement, remain subject to the Court's approval). *Id*., ¶ 28.

As set forth below, the Parties' extensive efforts and arm's-length negotiations have produced settlement terms that are fair, reasonable, and adequate.

III. KEY TERMS OF THE SETTLEMENT AGREEMENT

The precise terms of the Settlement are set forth in the Agreement, a true and accurate copy of which is attached hereto as Exhibit 2. For convenience, a summary of the key terms follows.

A. Class Definition

The "Settlement Class" or "Class" is defined as certified by the Court on July 21, 2021: all Echelon tenants who, from April 2016 to the date of the order for possession against Salandy - August 5, 2019 - were charged the Fees and, like Salandy, had actions filed against them by Echelon for forcible entry and detainer. *See* Ex. 2 - Settlement Agrmt., § II.3.

At the time Salandy moved for preliminary approval, the Parties, based on information provided by Echelon, believed that there were 3,575 Settlement Class Members. Following further de-duplication work, the actual number of Settlement Class Members is 2,899. Woodrow Decl., ¶ 21. There is no corresponding reduction in Settlement benefits, however, which means that the average class member is set to receive an even larger benefit (mostly cash payments) than was originally negotiated.

B. Monetary Relief

The Settlement provides Class Members with a Settlement Fund totaling three million four hundred fifty thousand dollars ($3,450,000) total ("Settlement Fund"). *See* Ex. 2 - Settlement Agrmt., §§ II.41 and III.1.a. The Settlement Fund features a Cash Component of $1,200,000 and Debt Forgiveness of $2,250,000. *Id.*, § II.41. Settlement Class Members who still carry a balance with RD Fuller, the firm hired by Echelon to collect debts allegedly owed by tenants and former tenants qualify for Debt Forgiveness and will collectively see $2,250,000 forgiven. It remains the case that this includes approximately 885 of the (now 2,899) Class Members—an average of $2,542.37 per person. *Id*., § III.1.h.[3] The remaining 2,014 Class Members will receive a cash

[3] The Settlement Agreement required Class Counsel to provide a proposal to Echelon for how the $2.25 million in debt forgiveness was to be allocated, after which time Echelon would have a period to review and provide any objections to the proposal. Settlement Agrmt., § III.1.h. Class Counsel provided their proposal on February 3, 2022 and received no objections from Echelon. Woodrow Decl. ¶ 32.

payment from the Cash Component following deductions for Administration Expenses and any Incentive Award to the proposed Class Representative and any Fee Award to Class Counsel approved by the Court.[4] There is no claims process—every Class Member who remains in the settlement by not opting out will automatically receive debt forgiveness or a check. Any monies left in the Settlement Fund from uncashed checks are to be donated to the Colorado Coalition for the Homeless (assuming the Court approves the Cy Pres designee). *Id*., § II.13.

C. Prospective Relief

In addition to the $3,450,000 in monetary relief, the Settlement Agreement also requires that Echelon adopt certain prospective measures: For a period of twelve (12) months following the Effective Date, and subject to changes in applicable law, Echelon agrees not to oppose any motion by a Certified Class Member whose balances are forgiven to suppress an eviction or collection action filed against them by Echelon or any agent of Echelon, to cease negative credit reporting with respect to certain Certified Class Members, and to use a form lease that does not treat late fees and other fees as unlawful penalties. *Id*., § III.4.

D. Release of Liability

In exchange for the settlement benefits, Echelon and affiliated entities will receive a release of any claims relating to the charging of Late Fees, Notice Posting Fees, and Eviction Legal Fees. *Id*., § V. The Release includes unknown claims, though these are limited to claims that could have

[4] On May 2, 2022, the Court granted the request for reasonable attorneys' fees and incentive award (while also stating the subject would be further considered at the final approval hearing scheduled for May 12, 2022). As such, if administrative expenses are assumed to total $40,000 each Settlement Class Member entitled to a check will receive approximately $91.25. Woodrow Decl. ¶ 33.

been brought in the litigation. As such, this is not a general release of all claims but rather a complete release of claims that were or could have been brought in the case.

E. Notice

As set forth in Section IV below the Settlement also established a robust Notice Plan that features direct mail notice and a Settlement Website where Class Members can access key documents, including the Agreement and a copy of the traditional long form notice, and download an opt out form. *Id*., § IV.3.

IV. THE NOTICE COMPORTS WITH DUE PROCESS

As part of final approval, the Court should find that the Notice Plan comported with due process. A notice plan that reaches at least 70% of the class is reasonable. FEDERAL JUDICIAL CENTER, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* 3 (2010). Here, the Notice Plan was implemented in the wake of preliminary approval and was sent via mail to over 91% of the Class. *See* Declaration of Dana Boub ("Boub Decl."), a true and accurate copy of which is attached hereto as Ex. 3. The Court appointed RG/2 Claims Administration, LLC ("RG/2") to disseminate the notice. According to RG/2, the short form notice was mailed to the 2,899 Class members. Of these, 1,813 were returned undeliverable. Boub Decl. ¶ 8. The Administrator was able to remail notice to 1,562 Class Members and reduce the total number of undeliverable notice packets to 251. *Id*.

The Notice Plan included a direct mail "short form" notice that included key information and referred Settlement Class Members to the Settlement Website, URL https://www.rg2claims.com/salandysettlement.html (last visited April 29, 2022), where they could (and still can) access the Settlement Agreement, the long form notice, and other key settlement

and case documents. In terms of content, notice is "adequate if it may be understood by the average class member." Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11:53 at 167 (4th ed. 2002). Both the short form and the long form notice are written in plain English and are readily understandable. And the Notices advised each member that they could request exclusion (or object), that if they did so the Settlement, if approved, would not apply to them, and that they could enter an appearance through their own counsel.[5/6]

Settlement Class Members contacted Settlement Class Counsel with questions and comments about the Settlement. Woodrow Decl., ¶ 34. Many who reached out via telephone or email with questions wanted to know if they were included in the Settlement and what, if anything, they needed to do to receive the benefits. *Id.* The fact that the Settlement does not involve a claim form meant that Class Counsel was able to advise these individuals that they need not take any further action to participate. *Id.*

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[5] This is further consistent with the Court's Order of July 22, 2022, which stated, in pertinent part:

> Pursuant to C.R.C.P. Rule 23(c)(2) Salandy shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that: (A) The court will exclude him from the class if he so requests by September 30, 2021; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

Supp. Class Action Order ¶ 2. This mirrors federal practice, which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).

[6] Also under the federal rules, a class notice must set forth the nature of the action, define the class to be certified, identify the class claims and defenses at issue, and explain to class members that they may enter an appearance through counsel if so desired, that they may request exclusion, and that any judgment will be binding on all class members. *See* Fed. R. Civ. P. 23(c)(2)(B). The Notice in this case included all such information.

Given these facts, the Court should find that the Notice Plan sufficiently apprised the Settlement Class of its rights so as to comport with due process.

V. THE SETTLEMENT SHOULD RECEIVE FINAL APPROVAL

Following preliminary approval and notice to the Class, the final step in approving a class action settlement is for the Court to hold the final approval hearing. *See* Newberg, §11.25, at 38-39. At the final fairness hearing, the Court considers the reaction of the class members and determines whether to approve the settlement. *Helen G. Bonfils Found. v. Denver Post Emps. Stock Tr.*, 674 P.2d 997, 998 (Colo. App. 1983) ("The 'universally applied standard is whether the settlement is fundamentally fair, adequate, and reasonable.'").

As explained in the Motion for Preliminary Approval, the Court considers: the strength of the plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed; the experience and views of counsel; and the reaction of the class members to the proposed settlement. *Bruce W. Higley, D.D.S., M.S., P.A. Defined Ben. Annuity Plan v. Kidder, Peabody & Co.*, 920 P.2d 884, 891 (Colo. App. 1996) ("*Higley*"). Approval of a settlement will not be overturned absent a "strong showing of a clear abuse of discretion." *Higley*, 920 P.2d at 891 (quoting *Helen G. Bonfils Foundation*, 674 P.2d at 999).[7] Additionally, "[e]ven though, generally, the proposed settlement should be fair and reasonable and in the best interest of all those who will be affected by it, *see* 7B C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure: Civil 2d*, § 1797.1 (1986), there is no rule that settlements must benefit all class

[7] Because C.R.C.P. 23 is virtually identical to Fed. R. Civ. P. 23, cases applying the federal rule are instructive, *Higley*, 920 P.2d at 889 (citing *Rosenthal v. Dean Witter Reynolds, Inc.*, 883 P.2d 522 (Colo.App.1994), *aff'd in part, rev'd in part*, 908 P.2d 1095 (Colo.1995)).

members equally." *Higley*, 920 P.2d at 891 (citing *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501 (5th Cir.1981)).

As set forth below, each of these factors supports final approval here.

A. The strength of the Class Representative's case.

Salandy has a strong case, though admittedly it is a matter of first impression insofar as Salandy seeks to apply Colorado law regarding liquidated damages to residential late fees and related charges. As such, there is risk, and protracted litigation—including appeals—was almost guaranteed even if Salandy was successful. Indeed, Echelon's counsel made clear that they would vigorously contest his legal theories at trial, and there is always risk that the Court or trier of fact rules against Salandy and the Class. For this reason, courts considering class settlements have routinely recognized that, "it has been held proper to take the bird in hand instead of a prospective flock in the bush." *Kim v. Space Pencil, Inc.*, No. 11-CV-03796, 2012 WL 5948951, at *5 (N.D. Cal. Nov. 28, 2012) (quoting *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1323 (S.D. Fla. 2005)). As such, notwithstanding the strength of the claims and favorable evidence, the risk of proceeding to trial counsels in support of settling—especially on the favorable terms set forth in the Settlement Agreement.

B. The risk, expense, complexity, and likely duration of further litigation.

Prior to settling, Echelon was preparing a motion for summary judgment, and the case was set for trial on the issue of whether Salandy was entitled to a declaration under the lease that the Challenged Fees are unlawful penalties. That issue cut to the very heart of the case and essentially addressed the merits. If successful, Salandy would've needed to proceed to a second trial to prove damages. Assuming he could prevail there, this case could easily drag on through attempts to

decertify the class, post-judgment motion practice, and appeals.

As such, the remaining litigation was extraordinarily complex and it would take at least another year (possibly longer) for the Settlement Class to see any real recovery. Accordingly, the length and complexity of the remaining litigation favors approving the Settlement Agreement.

C. The risk of maintaining class action status throughout the trial.

There is no guarantee this case would have persisted as a class action through trials and appeals. Class actions are complex. Further, Echelon was prepared to argue that the class should be decertified. This presents additional risk. Further, it is likely that Echelon would've sought to elicit testimony at trial that could be used as a basis for decertification. As such, this factor also weighs in favor of approving the Settlement.

D. The amount offered in settlement.

To "judge the fairness of a proposed compromise," a court must "weigh[] the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." *Int'l Union*, 497 F.3d at 631 (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981)). Applied here, and notwithstanding the litigation that would remain absent a settlement, the Class Representative was (and remains) confident in the strength of his claims. The question is whether the amount of the relief provides sufficient compensation to the Settlement Class, and the answer is undoubtedly "yes." The reality is difficult to ignore: $3.45 million in monetary relief, plus prospective relief designed to help tenants seal their eviction filings and improve their credit is potentially more than could've been awarded at trial. This is especially so if Echelon were to claim any offsets in the form of actual damages. But that question, which presented addition risk, need not be answered. Indeed, Settlement Class Members will either receive substantial debt

forgiveness (worth thousands of dollars to certain class members) or a cash award (estimated at around $91 per person). This is not a case where Settlement Class Members are slated to receive coupons or checks for $5 after being made to submit onerous claim forms. To receive such relief, Settlement Class Members simply need to do nothing at all.

The strength of the Settlement supports preliminary approval.

E. The extent of discovery completed.

Class Counsel has conducted significant discovery into the claims and has vigorously litigated the case. This included informal and formal discovery, motion practice, written discovery, Rule 30(b)(6) depositions, and a motion to compel. Woodrow Decl. ¶ 31. Class Counsel also engaged in two full-day mediation sessions, and several follow up negotiations and were in the midst of preparing for trial when an agreement was reached. *Id*., ¶ 32. Sufficient information has been obtained for the Court to fairly judge the reasonableness of the Settlement. *Id*., ¶ 33.

F. The experience and views of counsel.

The opinion of proposed Class Counsel also supports approval. *See Marcus v. Kan. Dep't of Revenue*, 209 F.Supp.2d 1179, 1183 (D.Kan.2002) ("Counsels' judgment as to the fairness of the agreement is entitled to considerable weight"); *Saunders v. Berks Credit & Collections, Inc.*, No. CIV. 00–3477, 2002 WL 1497374, at *10 (E.D.Pa. July 11, 2002) ("The Court is therefore deferential to the reasoned judgment of the well-informed attorneys.") This is a good deal for the Settlement Class Members. Woodrow Decl. ¶ 33. This case challenges allegedly unlawful fees that were set forth in a form lease. *Id*., ¶ 3. Whether the Class Members could have recovered additional relief through trial isn't clear, and everyone receives the benefit of Echelon's

prospective business assurances. *Id.*, ¶ 33. The Settlement presents a demonstrably favorable outcome for the Class.

G. The reaction of the class members to the proposed settlement.

The reaction of the Settlement Class has been overwhelmingly favorable. There have been no opt outs or objections. Boub Decl. ¶ 10. While not dispositive, it certainly isn't suggestive of strong opposition. Furthermore, Class Counsel's law firm has received inquiries from over 20 Class Members. Woodrow Decl. ¶ 34. Each of them had questions directed to the nature of the benefits and the action, if any, they would need to take to participate. No one expressed objection or disappointment upon learning of the cash payments or debt forgiveness or the fact that they needn't take any further action to receive settlement benefits. *Id.*

Given this reaction, the Court should find that this factor supports final approval as well.

H. As a final consideration, the Settlement is free from traditional "red flags".

Although Class Counsel hasn't found a case in the Tenth Circuit applying such considerations, it is worth noting that this case doesn't feature any of the "subtle" warning signs that may indicate a settlement not "fair, reasonable, and adequate" under Rule 23(e)(2): (1) when counsel receive a disproportionate distribution of the settlement, or the class gets no monetary distribution but class counsel are well compensated; (2) when the parties negotiate "clear sailing" arrangements for the payment of attorney's fees wherein the defendant agrees not to object to the fee application presented to the court; and (3) when the agreement includes a "reversion" or "kicker" provision under which any reduction in attorney's fees reverts to the defendant rather than

being added to the class fund. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir. 2011).[8]

First, Class Counsel is not set to receive a disproportionate distribution of the Settlement. The basis for the request for 28% of the Settlement Fund was fully set forth in the Motion for an Award of Reasonable Attorneys' Fees.[9] This falls well within the range of fee awards for recoveries of this size and reflects the substantial risk assumed in taking the matter on. It is also worth noting that this isn't a case where class members will receive no relief. Class Members in collections will receive thousands in debt relief while those entitled to cash payments will receive over $90. In these difficult economic times, such relief has particular value.

Second, while the Settlement Agreement included a provision that Echelon wouldn't object to a fee request, that provision was negotiated *after* relief to the Class had been agreed upon. There was no opportunity to horse-trade fees for relief to the Class, and the mediators likewise ensured the negotiations were free of collusion. Also, the provision allowed Class Counsel to seek up to 30% in fees—Class Counsel requested only 28% here.

Lastly, there is no reversion. Unawarded fees would've never been taken from the Settlement Fund. Having said that, the common fund doctrine was established to ensure those who benefit from the work of Class Counsel share in the payment of the fees. It is often the case that

[8] It is worth noting that even in the Ninth Circuit, where these considerations are regularly analyzed, such concerns are more relevant before a class is certified—not like here, where the settlement was reached *following* certification. *See Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1125 (9th Cir. 2020).

[9] Pursuant to the Settlement, the Motion was posted to the Settlement Website shortly after it was filed—no objections to the request for fees were received. Woodrow Decl. ¶ 34.

the fee award results in a somewhat lower direct cash payment to the Class Members—they benefitted through the receipt of services.

Hence, to the extent the Court is inclined to weigh such considerations, none of them are suggestive of a collusive settlement or unfair result here.

VI. THE COURT SHOULD AFFIRM THE CERTIFICATION OF THE SETTLEMENT CLASS AND THE APPOINTMENT OF THE CLASS REPRESENTATIVE AND CLASS COUNSEL.

As a final matter, the Court should affirm the certification of the Settlement Class and the appointments of Bobby Salandy as the Settlement Class Representative and his attorneys as Settlement Class Counsel. The Settlement Class consists of the very same tenants that the Court certified as a Class in its Order RE: Class Certification entered July 21, 2021. Nothing in the record suggests that decertification would be appropriate. Rather, given the positive response to the Settlement by the Class, reaffirming certification through the Final Approval Order is prudent.

Likewise, the Court should reaffirm the appointment of the Class Representative and Class Counsel. Salandy has been a model class representative, has stayed current with respect to the case and settlement negotiations, and has always put the interests of the Class ahead of his own. Further, Settlement Class Counsel have faithfully and diligently prosecuted this case, which involved investigating the claims and litigating what is essentially a case of first impression applying long-standing principles of liquidated damages law to late fees and other charges in a residential lease, obtaining adversarial class certification, and settling the matter through two mediation sessions.

The Court should affirm the appointments through the Final Approval Order as well.[10]

VII. CONCLUSION

The Court should grant final approval to the Settlement achieved in this case. The Settlement represents an impressive result for class members and was achieved only through hard fought litigation and negotiations. Further the Notice Plan comports with due process, the reaction of the Class has been undeniably favorable, and the Settlement satisfies the remaining factors set forth in *Higley*, 920 P.2d at 891.

As such, and for all of the foregoing reasons, Counterclaim Plaintiff respectfully asks that the Court grant final approval to the Settlement Agreement, enter the Order Granting Final Approval, reaffirm the certification of the Settlement Class, reaffirm the appointment of Bobby Salandy as the Settlement Class Representative and the appointment of Steven L. Woodrow and Jason Legg as Settlement Class Counsel, and grant such further relief the Court deems reasonable and just.

Dated: May 4, 2022

Respectfully Submitted,

BOBBY SALANDY, individually and on behalf of a class of similarly situated persons,

/s/ Jason Legg
Class Counsel

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[10] The proposed Final Approval Order and Judgment incorporates the Court's May 2, 2022, award of reasonable attorneys' fees to Class Counsel. It also includes an incentive award to Class Representative Salandy of $10,000 in recognition of his service to the Class.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May 2022, a true and correct copy of the foregoing document was served on the following via ICCES, the Integrated Colorado Courts E-filing System, as follows:

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s/ Jason Legg
Jason Legg, Attorney for
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Representative