UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No.: 5:12-CV-00729-D

TERESA M. SPEAKS, TOBY SPEAKS, STANLEY SMITH, EDDIE BROWN, ROBERT POINDEXTER, MIKE MITCHELL, ROY L. COOK, ALEX SHUGART, H. RANDLE WOOD, ROBIN ROGERS and DANIEL LEE NELSON,	)
Plaintiffs,	)
vs.	)
U.S. TOBACCO COOPERATIVE, INC. f/k/a FLUE-CURED TOBACCO COOPERATIVE STABILIZATION CORPORATION,	)
Defendants.	)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION OF A SETTLEMENT CLASS AND PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT

NOW COME the Plaintiffs herein, by and through their counsel of record, pursuant to E.D.N.C. Local Rule 7.2 and Rules 23(a), (b)(3) and (e) of the Federal Rules of Civil Procedure and hereby submit this Memorandum in Support of Plaintiffs' Motion for an Order Certifying a Settlement Class and Preliminarily Approving the Stipulation of Settlement and Agreement of Class Action Compromise Settlement and Release ("Stipulation of Settlement" or "Stipulation"). Unless otherwise indicated, all capitalized terms herein shall have the meanings set forth in the Stipulation of Settlement.

I. Preliminary Statement.

The Parties to this action have agreed to settle all Settled Claims, subject to Court approval, in accordance with the Stipulation of Settlement dated September 6, 2017. Plaintiffs have entered into this agreement on behalf of themselves and a class to be certified, for settlement purposes only, of all past and present members and/or shareholders of the Defendant U.S. Tobacco Cooperative f/k/a Flue-Cured Tobacco Cooperative Stabilization Corporation ("U.S. Tobacco") from the date of its inception in 1946

through the Effective Date of the Settlement, without exclusion, except for those Class Members who exclude themselves by filing a timely request for exclusion ("Settlement Class").

The Settlement is fair, reasonable and adequate. It represents an excellent recovery for the Settlement Class, particularly in light of the difficulties, uncertainties, delays and expense that would ensue in attempting to obtain a final judgment of value equal to the Settlement. The principal reason for the Settlement is the immediate benefit and finality to be provided to the Settlement Class. Plaintiffs' Counsel carefully considered the risk that Plaintiffs and the Settlement Class might not have prevailed on their claims, and the further risk that Plaintiffs could have recovered substantially less than the benefits obtained through this Settlement.

As demonstrated herein, in light of the claims asserted, the posture of the litigation, the statutory framework and case law applicable to cooperatives like U.S. Tobacco, and the substantial benefits obtained for Settlement Class Members, Plaintiffs' Counsel respectfully submit that the Settlement Class should be preliminarily certified for purposes of this Settlement, the Settlement should be preliminarily approved, and the form and means of providing notice to the Settlement Class should be approved and authorized as set forth in the Notice Plan submitted to the Court herewith.

II. Background.

U.S. Tobacco is a cooperative of flue-cured tobacco farmers that was organized in 1946 as a non-profit cooperative marketing association with capital stock, pursuant to Chapter 54 of the General Statutes of North Carolina (the "North Carolina Cooperative Marketing Act"). U.S. Tobacco's principal place of business is in Wake County, North Carolina. While the majority of U.S. Tobacco's members reside in North Carolina, U.S. Tobacco's membership also includes, or has in the past included, tobacco farmers from the states of Virginia, South Carolina, Georgia, Florida and Alabama.

Until the passage of the Fair and Equitable Tobacco Reform Act of 2004 ("FETRA"), U.S. Tobacco administered the federal price support component of the Federal Tobacco Program for flue-cured tobacco pursuant to contracts with the United States Department of Agriculture and the Commodity

Credit Corporation ("CCC"). *See* 7 CFR 1464.1, *et. seq.* (attached hereto). Under this program, CCC made "nonrecourse" loans to U.S. Tobacco (a "cooperative marketing association," 7 CFR 1464.1(a)), that were used to make "price support advances available to eligible producers either directly or through auction warehouses." Id. "The tobacco on which producers receive[d] price support advances" served as "security for the loans." Id. The regulations administering the tobacco loan program provided that "[p]roducers will deliver their tobacco to auction warehouses which will display the tobacco and offer it for sale at auction. Each contract between an association and an auction warehouse will require the auction warehouse to see that producers are informed that price support advances are available for each lot of eligible tobacco offered for sale at auction when the final bid is less than the price support rate available for the grade of eligible tobacco comprising such lot." 7 CFR 1464.2(b)(1)(i). The advances were paid "to the producer at the time the warehouse operator settle[d] with the producer for the entire quantity of the producer's tobacco that ha[d] been displayed for inspection and offered for sale on any one day's auction market," and thereafter, "the warehouse operator [was] reimbursed by the association with funds borrowed from CCC." Id. The "level of price support" was set each year by CCC and the Department of Agriculture.

The Federal Tobacco Program Regulations further provided that "[t]he loans made to the associations [would] bear interest at the rate announced by CCC and *[would] be nonrecourse both as to principal and interest....*" 7 CFR 1464.5 (emphasis added). The Regulations were also clear as to the ownership interest that a producer had in any tobacco upon which he/she received a price support advance. "Tobacco loses its identity *as to original ownership* through commingling in the packing process, and individual producers may not redeem their tobacco once it has been pledged as security for the loan." Id. (emphasis added). U.S. Tobacco was then obligated to "sell the loan tobacco as provided in the loan agreements for each crop, and the net proceeds of sales of the loan collateral of each crop [were] applied to the loan account for such crop until the loan [was] repaid in full." Id. The Regulations further provided that "[i]f a producer receive[d] a monetary advance or other consideration in connection with or

for such tobacco, the producer *[would] be deemed ... to have lost beneficial interest in such tobacco unless the producer ha[d] a written agreement with the person who provide[d] the advance payment or consideration*" that "accurately and fully" provided, among other things, that "as a full and final settlement on the tobacco, the full sales price at the producer auction or the full loan proceeds [would] be paid to the producer" minus any price support advance received by him. 7 CFR 1464.7 (emphasis added). In the case of U.S. Tobacco members, no such "written agreements" exist.

Recognizing that price-support loans pursuant to the Federal Tobacco Program may not always be available in the future, in 1975, U.S. Tobacco's Board of Directors (the "Board") informed its membership about possible establishment of a capital reserve fund to retain a portion of the net gains from the sale of tobacco from the 1967 and 1968 crop years. *See* December 1975 Newsletter to Members. The Board subsequently voted to retain a portion of the profits from the 1969-1973 crop years as well.

In 1982, Congress enacted the "No Net Cost Tobacco Program Act of 1982" to "provide for the operation of the tobacco price support and production adjustment program in such a manner as to result in no net cost to taxpayers ...." PL 97-218. As such, producers were required to "contribute" an assessment, adjusted each year, to defray all of the costs associated with the operation of the Federal Tobacco Program. Id. The No Net Cost legislation further provided that loan agreements between U.S. Tobacco and CCC were to provide that "if the Secretary determine[d] that the amount in the [No Net Cost] Fund or the net gains [from sales of flue-cured tobacco in the 1982 and subsequent crop years] exceed[ed] the amounts necessary for the purposes specified," such excess would be "*released to the association by the Corporation and [could be] devoted to other purposes by the association* ...." Id. Between 1982 and 1984, U.S. Tobacco deposited the grower assessments into a No Net Cost Fund maintained by U.S. Tobacco. Because this caused an immediate negative tax obligation for members, in 1985, U.S. Tobacco transferred the funds into a No Net Cost Account maintained by the CCC, which allowed growers to offset the tax liability. Amendments to the No Net Cost Act in 1986 and 1993 required purchasers and importers of tobacco, respectively, to pay assessments as well. PL 99-272 (requiring payment of assessments by purchasers of tobacco); PL 103-66 (requiring payment of assessments by importers of

tobacco).

Beginning in approximately 1990, CCC agreed to release certain pledged tobacco inventory to U.S. Tobacco upon redemption of CCC's price support loans for the 1982-1984 crop years. The Board elected to retain and use the proceeds from the sale of this tobacco to establish reserves for the continued operation of the cooperative in the event the Federal Tobacco Program was terminated and for such other contingencies as might arise in the future. In accordance with the provisions of FETRA, CCC recently released certain additional tobacco inventory to U.S. Tobacco.

Beginning in 1975, the Board In anticipation of the end of the Federal Tobacco Program, and as a partial response to FETRA, U.S. Tobacco established a marketing program for the 2005 tobacco-marketing season, which provided certain cash advances to qualifying members who sold their tobacco to U.S. Tobacco pursuant to an exclusive marketing agreement. U.S. Tobacco also offered non-exclusive marketing agreements to its members for 2005, which allowed members to market surplus tobacco through U.S. Tobacco marketing centers, on a non-exclusive basis, at the end of the marketing season. Growers who signed exclusive marketing agreements for 2005 were paid an average of $1.40 per pound for qualifying tobacco. Growers who signed a non-exclusive marketing agreement, most of whom sold their tobacco under direct contract to manufacturers or other third parties, did not qualify for cash advances under the 2005 marketing plan, but were able to utilize U.S. Tobacco's marketing centers at the end of the marketing season to sell any surplus tobacco. U.S. Tobacco continued its marketing program for the 2006 marketing season, with certain variations. For the 2007 marketing season and beyond, U.S. Tobacco eliminated the distinction between exclusive and non-exclusive marketing agreements and offered a single non-exclusive agreement.

In addition to its ongoing marketing activities, U.S. Tobacco owns a wholly-owned subsidiary, which operates a facility in Timberlake, North Carolina (the "Timberlake Facility") for the manufacture of tobacco products, including, without limitation, tobacco strips, cut rag, puff stems and cigarettes. U.S. Tobacco markets products produced by the Timberlake Facility both domestically and internationally for

the benefit of its members. U.S. Tobacco also owns, through a separate subsidiary, a tobacco storage operation.

On October 31, 2012, the Plaintiffs filed this action in the United States District Court for the Eastern District of North Carolina on behalf of a broad class of individuals, proprietorships, partnerships, corporations and other entities that are or were shareholders and/or members of U.S. Tobacco from the date of its inception in 1946 to the present. The Plaintiffs allege, and U.S. Tobacco denies, that the fundamental purposes for which U.S. Tobacco was created had ceased to exist, and that the actions of U.S. Tobacco were unfair and would have the effect of divesting or eliminating the value of their equity interests in U.S. Tobacco. The Plaintiffs asserted claims for a judicial dissolution of U.S. Tobacco or, alternatively, for a distribution of U.S. Tobacco's assets, as well as claims for declaratory judgment. U.S. Tobacco asserts numerous defenses in the litigation and denies any wrongdoing or liability whatsoever. U.S. Tobacco further denies that this Action may be maintained as a class action, except pursuant to the Stipulation, for settlement purposes only.

Plaintiffs' Counsel have conducted a thorough and comprehensive investigation relating to the claims and the underlying events and transactions alleged in the Action. Plaintiffs' Counsel have analyzed the applicable law, evidence adduced through the public record, pre-trial discovery, voluntary document and information exchanges with U.S. Tobacco, ongoing meetings and discussions with the Plaintiffs and other members of the proposed Settlement Class, and information derived through the mediation process. In addition, Plaintiffs' Counsel have consulted at length with experts and authorities in the field of agricultural cooperatives generally, and the tobacco industry in particular, and have researched the applicable law with respect to the claims against U.S. Tobacco and the potential defenses thereto.

Since the filing of the Action, and in light of all of the above considerations, Plaintiffs' Counsel have conducted extensive discussions and arm's-length negotiations with Defendant's Counsel with respect to a possible compromise and settlement of this Action. To that end, the Parties on May 11 and

12, 2017 conducted a mediation in Raleigh, North Carolina with the assistance of the Honorable Frank W. Bullock, Jr. (Ret.), with a view to settling the issues in dispute and achieving the best relief possible consistent with the interests of the Settlement Class on the terms set forth in the Stipulation. The mediation process involved the exchange of discovery and the submission of mediation statements by both Parties to Judge Bullock.

Based upon the investigation of Plaintiffs' Counsel, as set forth above, and after considering (a) the substantial benefits that the Plaintiffs and the members of the Settlement Class will receive from settlement of this Action; (b) the attendant risks and costs of litigation; and (c) the desirability of permitting the Settlement to be consummated as provided in the Stipulation, the Plaintiffs have agreed to settle their claims pursuant to the terms and provisions of the Stipulation. The Plaintiffs and Plaintiffs' Counsel have carefully considered the Stipulation and have concluded and believe that the terms and conditions of the Stipulation are fair, reasonable and adequate and in the best interests of the Plaintiffs and the Settlement Class.

Plaintiffs respectfully submit that the Settlement is a fair, reasonable, and adequate compromise of this Action and the claims of the Class Members, and further merits preliminary approval as a settlement that is in the best interest of U.S. Tobacco. In summary, and as discussed further below, the proposed Settlement provides eligible Class Members with a cash settlement fund of $24,000,000.00 for producers who produced and marketed flue-cured tobacco between 1946 and the present.

Courts favor settlement, and there exists a "strong judicial policy in favor of settlements, particularly in the class action context." Hall v. Higher One Machines, Inc., 2016 WL 5416582, at *2 (E.D.N.C. Sept. 26, 2016) (citing In Re PaineWebber Ltd. P'ships Litig., 147 F.3d 132, 138 (2d Cir. 1998). In fact, "settlement only" classes have "becoming increasingly prominent." Id. (citing Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997)).

The Settlement proposed by the Parties in this case is an appropriate vehicle to address the substantial risks and uncertainties of continued litigation and to assure that a fair remedy is provided to all

Class Members who qualify under the Settlement.

III. The Legal Standard.

The Federal Judicial Center's Manual for Complex Litigation ("MCL 4th") describes the procedure for judicial review and approval of proposed class settlements as follows:

> Review of a proposed class action settlement generally involves two hearings. First, counsel submits the proposed terms of the settlement and the judge makes a preliminary fairness evaluation. In some cases this initial evaluation can be made on the basis of information already known to the court, supplemented as necessary by briefs, motions, or informal presentations by the parties. If the case is presented for both class certification and settlement approval, the certification hearing and preliminary fairness evaluation can usually be combined. The judge should make a preliminary determination that the proposed class satisfies the criteria of Rule 23(a) and at least one of the subsections of Rule 23(b) . . . . The judge must make a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.[1] MCL 4th, §21.632.

At the preliminary approval stage, the Court is not asked to make a final determination approving the Settlement. The Court's final decision comes only after receiving input from class members, additional submissions by the settling parties, and the completion of a formal fairness hearing. Neither formal notice to the class members nor a hearing is required for preliminary approval, which may be made and granted after an informal application by the parties, conducted in open-court, or in chambers, in the Court's discretion. MCL 4th, § 21.632.[2] Where, as here, a settlement agreement is reached prior to class certification, courts must review the proposed compromise to ratify both the propriety of certifying a class

[1] The Federal Rules also provide for judicial approval and notice to the class. Fed. R. Civ. Pro. Rule 23 (2017).

[2] Section 21.641 of the MCL 4th provides in pertinent part:

> Ordinarily counsel should confer with the judge to develop an appropriate review process . . . . Counsel should submit the settlement documents and a draft order setting a hearing date, and prescribing the notice to be given to class members, and fixing the procedure for presenting objections. Counsel may also be asked for statements about the status of discovery, the identity of those involved in settlement discussions, the arrangements and understandings about attorneys' fees, and the reasons why the settlement is believed to be in the best interest of the class. Counsel should be prepared to disclose and explain any incentive awards or other benefits to be received by the class representatives.

This memorandum addresses each of these issues.

and the fairness of the settlement. Amchem, 521 U.S. at 621 (stating that the "dominant concern" of the Rule 23(a) and (b) safeguards—"whether a proposed class has sufficient unity so that absent members can fairly be bound by decision of class representatives"—persists even where the case is resolved via settlement.)

Thus, at this stage, the question before the Court is whether the Settlement is within the range of possible approval. MCL 4th, § 21.632. For this purpose, the Court need not and should not engage in a trial on the merits.

In evaluating the proposed Settlement, the Court may consider a number of factors, and no one factor is determinative. MCL 4th, § 21.631. Among the relevant factors the Court may consider are: whether the Settlement has no obvious deficiencies and otherwise falls within the range of possible approval; whether the Settlement unreasonably grants preferential treatment to the Plaintiffs or segments of the class; whether the Settlement overcompensates Class Counsel; and whether the Settlement appears to be the product of serious, informed and non-collusive negotiations. If the Settlement passes scrutiny under these criteria, the Court should direct that notice under Rule 23(c) be given to the Class Members of a final fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement. MCL 4th, §§ 21.632, 21.633.

IV. The Class Should Be Certified For Settlement Purposes.

A. The Applicable Legal Standards Under Rule 23.

Before the court may evaluate a class action settlement under Rule 23(e) of the Federal Rules of Civil Procedure, the settlement class must meet the requirements of Rules 23(a) and (b). "A party seeking class certification must initially establish that a 'precisely defined class exists' and that she is a member of that class." Hall, *supra* at *2. Next, a party must establish that the settlement class meets the four (4) criteria set forth in Rule 23(a): (1) numerosity; (2) commonality; (3) typicality of the representative plaintiffs' claims; and (4) adequacy of representation. Id. (citing Gen. Tel. Co. of the SW v. Falcon, 457 U.S. 147, 161 (1982) (stating a class may only be certified if the court "is satisfied, after a rigorous

analysis, that the prerequisites of Rule 23(a) have been satisfied"). Once the requirements of Rule 23(a) are satisfied, a party must then show the class is maintainable pursuant to one of Rule 23(b)'s subdivisions. If subsections (a) and (b) are satisfied, the court evaluates whether the settlement is 'fair, reasonable and adequate.'" Id.; Fed. R. Civ. P. 23(e)(2).

Where a class action is the best means to secure economies of time, effort, and expense, to promote uniformity and to achieve equity and justice, the class should be certified. The Court should not consider the possibility of success on the merits, but only whether the statutory requisites for certification of a Settlement Class are satisfied. Lienhart v. Dryvit Sys., Inc., 255 F.3d 138 (4th Cir. 2001) (The merits of the underlying claims are not relevant to the appropriateness of class certification); 59 Am. Jur. 2d *Parties* § 87 (2017) (The trial court's proper focus in deciding whether to certify a class is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits but whether the requirements of class certification are met.).

These limitations on the scope of the Court's inquiry are particularly relevant in the context of a settlement, where the parties have agreed voluntarily to resolve their dispute by choosing to forgo full litigation of disputed issues. United States District Courts in North Carolina, in the Fourth Circuit and throughout the country regularly certify classes for settlement purposes. *See e.g.*, Mateo-Evangelio v. Triple J Produce, Inc., No. 7:14-CV-302-FL, 2016 WL 183485 (E.D.N.C. Jan. 14, 2016); Velazquez v. Burch Equip., L.L.C., No. 7:14-CV-00303-FL, 2016 WL 917320 (E.D.N.C. Mar. 8, 2016); Reed v. Big Water Resort, LLC, No. 2:14-CV-01583-DCN, 2016 WL 7438449 (D.S.C. May 26, 2016); Collins v. Covenant Trucking Co., No. 5:13-CV-257-D, 2014 WL 12546487 (E.D.N.C. Apr. 22, 2014); Covarrubias v. Capt. Charlie's Seafood, Inc., No. 2:10-CV-10-F, 2011 WL 2690531 (E.D.N.C. July 6, 2011).

In this case, Plaintiffs seek to have the underlying action certified as an "opt-out" settlement class, which is permitted under Rule 23(b)(3) of the Federal Rules of Civil Procedure. *See e.g.*, Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121, 114 S. Ct. 1359, 1361, 128 L. Ed. 2d 33 (1994); Berry v. LexisNexis Risk & Info. Analytics Grp., Inc., No. 3:11-CV-754, 2014 WL 4403524 (E.D. Va. Sept. 5, 2014); Berry v.

Schulman, 807 F.3d 600 (4th Cir. 2015).

Here, the Parties have stipulated to certification of the Settlement Class for settlement purposes,[3] but such certification is, of course, subject to review by the Court. The Settlement Class proposed in this case is consistent with the standards for certification of class actions generally under Rule 23 of the Federal Rules of Civil Procedure, and the liberal treatment afforded class action certifications.

Rule 23(a) of the Federal Rules of Civil Procedure provides in pertinent part that:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
> **(1)** the class is so numerous that joinder of all members is impracticable;
> **(2)** there are questions of law or fact common to the class;
> **(3)** the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> **(4)** the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. Pro. Rule 23(a) (2017).

The Fourth Circuit has held that Rule 23 should be interpreted liberally:

> [F]ederal courts should "give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case 'best serve the ends of justice for the affected parties and ... promote judicial efficiency.'"

Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 424 (4th Cir. 2003) (quoting In re A.H. Robins, 880 F.2d 709, 740 (4th Cir.1989)).

A party seeking class certification must first establish each of the four prerequisites set out in Rule 23(a). The **first** prerequisite is that "the class is so numerous that joinder of all members is impracticable." Tatum v. R.J. Reynolds Tobacco Co., 254 F.R.D. 59, 63 (M.D.N.C. 2008). The **second** prerequisite is that "there are questions of law or fact common to the class." Id. The **third** prerequisite is that "the claims of the representative party is typical of the claims of the class." Id. The **fourth** prerequisite is that "the representative party will fairly and adequately protect the interests of the class." Id. (citing Fed. R. Civ. P. 23(a)). "These prerequisites are commonly referred to as numerosity,

[3] U.S. Tobacco has not stipulated that this case may be certified for any purpose other than settlement, and U.S. Tobacco has expressly reserved its right to oppose class certification for any other purpose in the event the Settlement is not finally approved by the Court.

commonality, typicality, and adequacy." Id.

"Under Rule 23(b)(3), a class action is appropriate if the prerequisites of subdivision (a) are satisfied, and additionally the court finds:

> (5) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members (predominance of common issues);
>
> (6) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy (superiority)."

In re Southeast Hotel Properties Ltd. P'ship Inv'r Litig., 151 F.R.D. 597, 601 (W.D.N.C. 1993).

As discussed further below, all of the requirements necessary to certify this matter as a class action for purposes of the Settlement have been satisfied, and there are no impediments to the Court's certification of the Settlement Class pending the Final Approval Hearing.

B. A "Precisely Defined Class" Exists

There can be little debate but that the proposed Settlement Class is "precisely defined":

> All individuals, proprietorships, partnerships, corporations, and other entities that are or were shareholders and/or members of U.S. Tobacco at any time during the Class Period, without any exclusion, including any heirs, representatives, executors, powers-of-attorney, successors, assigns, or others purporting to act for or on their behalf with respect to U.S. Tobacco and/or the Settled Claims.

Each of the named Plaintiffs is a member of the proposed Class, as each either is or was a shareholder and/or member of U.S. Tobacco during the Class Period. Whether a proper class has been alleged is a question of fact and that will be determined on the basis of the circumstances of each case. 7A Charles Alan Wright and Arthur Miller, Federal Practice & Procedure Civil § 1760 (3d ed. 2017).

C. Rule 23(a) and (b) Requirements.

a. The Class Satisfies the Numerosity Requirement

The first prerequisite to certification is that the proposed class members are so numerous that it is impractical to bring them all before the court. *See supra* Section IV.A. "'No specified number is needed to maintain a class action.'" Brady v. Thurston Motor Lines, 726 F.2d 136, 145 (4th Cir.1984) (quoting

Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648, 653 (4th Cir.1967)). The Fourth Circuit has held that a class of eighteen people alone is sufficient to satisfy the numerosity requirement. *See* Cypress, 375 F.2d at 653; *see also* Rodger v. Electronic Data Systems Corp., 160 F.R.D. 532, 535 (E.D.N.C.1995) ("a class of as few as twenty-five to thirty members raises a presumption that joinder would be impracticable"); McLaurin v. Prestage Foods, Inc., 271 F.R.D. 465, 475 (E.D.N.C. 2010).[4]

There can be no serious dispute that the "numerosity" requirement is met in this case. Plaintiffs allege that the members of the Settlement Class number at least into the hundreds of thousands. (Amended Class Action Complaint, ¶ 71). U.S. Tobacco has had a total membership of more than 800,000 members over the course of its long history, although many of those members died or stopped farming decades ago. These numbers are more than adequate to establish numerosity and the impracticability of bringing all Settlement Class Members before the Court.

b. Common Questions of Law and Fact Predominate.

The second prerequisite to class action certification is that there are questions of law or fact common to the class. In re Southeast Hotel Properties Ltd. P'ship Inv'r Litig., 151 F.R.D. at 601; Fed. R. Civ. Pro. 23(a). In order for a class to be certified under Rule 23(b)(3), the questions of law or fact common to the members of the class must predominate over any questions affecting only individual members (predominance of common issues). In re Southeast Hotel Properties Ltd. P'ship Inv'r Litig., 151 F.R.D. at 601; Fed. R. Civ. Pro. 23(a).

For purposes of this motion and the Stipulation of Settlement, the predominant common issues of law and fact are whether the proposed Settlement is fair, adequate and reasonable, and whether the proposed Class Notice is adequate. All Class Members share a common interest in these issues, which, in the context of the proposed Settlement, outweigh any individual issues that might exist if this case were

[4] Professor Herbert Newberg's survey of court rulings on the numerosity issue concludes that any class consisting of 40 or more members presumptively fulfills the numerosity requirement. 1 Newberg on Class Actions § 3.05.

fully litigated on the merits. *See* Newberg on Class Actions § 4:63 (5th ed. 2017) (predominance-related manageability concerns do not bar certification for settlement.); *see e.g.*, In re American Intern. Group, Inc. Securities Litigation, 689 F.3d 229, 240–43 (2d Cir. 2012) (noting that management problems drop out of the predominance analysis in settlement class actions).

While it is not necessary for the Court to determine whether it would certify this case in the absence of the Settlement, Plaintiffs nonetheless believe there are an abundance of common issues of law and fact alleged in the underlying lawsuit that would justify certification and that, at a minimum, establish the existence of a certifiable class for purposes of the proposed Settlement. For example, Plaintiffs contend the common issues raised by their lawsuit include, but are not necessarily limited to, the following, consistent with rulings by the North Carolina state courts:

> (a) Whether U.S. Tobacco failed to allocate and identify the total equity among the members on a yearly basis;
>
> (b) Whether U.S. Tobacco violated and breached its fiduciary duty to Plaintiffs;
>
> (c) Whether U.S. Tobacco, by and through its corporate officers and agents, have intentionally and/or negligently breached the Plaintiffs' contractual rights and interest and property rights in violation of the By-Laws, Articles of Incorporation, federal and state statutes, and North Carolina and United States Constitutional prohibitions;
>
> (d) Whether the Plaintiffs are entitled to a judicial dissolution of U.S. Tobacco;
>
> (e) Whether the reasonable expectations of the members of U.S. Tobacco have been met or have been frustrated and no longer exist;
>
> (f) Whether the members of U.S. Tobacco are entitled to an allocation of the capital reserves of U.S. Tobacco and whether U.S. Tobacco should allocate the capital reserves to its members for the years in which the capital reserves were generated; and
>
> (g) Whether U.S. Tobacco has acted without business justification or otherwise unreasonably failed to allocate and distribute capital earnings, income, etc. to its members, and whether that conduct is unlawful or violative of Class Members' common law and statutory rights.

(*See* Amended Class Action Complaint, ¶ 72)

As explained further below, the Settlement proposed by the Parties effectively addresses the substance of Plaintiffs' underlying claims, and fairly compromises and resolves the disputes between U.S.

Tobacco and its former and/or present members by providing for substantial distributions from U.S. Tobacco. By defining and rewarding the rights and interests of members based on their past participation in U.S. Tobacco, the Settlement provides a comprehensive solution to the underlying claims of Class Members and a practical structure for U.S. Tobacco to continue to serve members in the future. Each member of the Settlement Class has a common interest in achieving these goals. Accordingly, for the purpose of preliminary certification of the Settlement Class, the requirements of commonality and predominance are more than adequately met.

c. The Claims of the Class Representatives are Typical of the Claims of the Class.

The third prerequisite is that the claims of the representative parties are typical of the claims of the class. The typicality requirement "helps ensure that the plaintiff's interests are 'aligned with those of the represented group, [so that] in pursuing his own claims, the named plaintiff will also advance the interests of the class members.'" William B. Rubenstein, Newberg on Class Actions § 3:29 (5th ed. 2017) (quoting In re American Medical Systems, Inc., 75 F.3d 1069, 1082 (6th Cir. 1996)). The typicality prerequisite emphasizes that the representatives ought to be aligned in interests with the represented group. Id. (quotations omitted). "A plaintiff with typical claims will pursue his or her own self-interest in the litigation and, in so doing, will advance the interests of the class members, which are aligned with those of the representative." Id.

In this case, Plaintiffs' interests are clearly aligned with the interests of the Settlement Class. The Claims of the Plaintiffs are identical to the claims of the Settlement Class, as all of the named Plaintiffs are and/or were members of US Tobacco. Furthermore, each of the named Plaintiffs has agreed to pursue, litigate and/or and resolve the claims of the Settlement Class on its behalf. Accordingly, the prerequisite is satisfied.

d. The Named Plaintiffs Will Adequately Represent the Class.

The fourth prerequisite to class certification is that the named class representatives will "fairly and adequately represent the interests of all members of the class." *See supra* Section IV.A. To fairly

and adequately represent the Settlement Class Members with respect to the Settlement in this case, the representative Plaintiffs must have no conflict with the members of the Settlement Class, and they must have a genuine personal interest, not a mere technical interest, in the outcome of the case. Newberg on Class Actions § 3:54 (5th ed. 2017). The focus of the named Plaintiffs; adequacy as class representatives is, thus, whether they are able to represent the interests of the proposed class. That test is readily met here.

There is no conflict of interest between the class representatives and the members of the Settlement Class. The Plaintiffs are individuals who are or were shareholders and/or members of U.S. Tobacco during the Class Period (*See* Amended Class Action Complaint ¶ 2). Plaintiffs possess a real and substantial interest in the claims alleged in the Amended Complaint. The relief obtained in the Settlement is responsive to the claims asserted, and it will benefit all eligible Class Members based on the nature and extent of their individual participation in U.S. Tobacco during the applicable time period, coupled with the total amount of tobacco sold through U.S. Tobacco.

Plaintiffs' personal interest in the litigation and their adequacy to serve as representatives of the Settlement Class are further established by their commitment to the vigorous prosecution of this Action and their active participation in the settlement process. Among other tasks, Plaintiffs reviewed the original Class Action Complaint in this matter, participated in numerous meetings and conference calls with their counsel, provided documents to their counsel and participated in in a two-day mediation of this matter. Plaintiffs consulted with Plaintiffs' Counsel on the appropriate form and scope of relief to be achieved through settlement, and they reviewed and provided input to Plaintiffs' Counsel on the substantive terms of the Settlement. Further, Plaintiffs' Counsel have significant experience in the type of action before the Court and have been able to fully and adequately represent the interests of the Settlement Class.

e. Certification of a Settlement Class is the Superior Method For Adjudication and Resolution of This Controversy.

Once the existence of a class has been established and the prerequisites to utilizing the class

action procedure have been satisfied—as they have been here for purposes of this Settlement—it is left to the discretion of the trial court to determine whether the case should properly proceed as a class action. Amchem, 521 U.S. at 630 ("The law gives broad leeway to district courts in making class certification decisions. . . . [The district court] has 'broad power and discretion ... with respect to matters involving the certification' of class actions.") (O'Connor, J., concurring in part and dissenting in part), *quoted in* Brown v. Nucor Corp., 785 F.3d 895, 902 (4th Cir. 2015); *see also* Haywood v. Barnes, 109 F.R.D. 568, 581 (E.D.N.C. 1986) ("this court has broad discretion to grant . . . class certification"). Central to this determination is whether a class action is superior to other available methods for adjudication of the controversy. *See supra* Section IV.A.[5] As the Supreme Court stated in Devlin v. Scardelletti, 536 U.S. 1 (2002) the "goals of class action litigation include "simplifying litigation involving a large number of class members" and "*preventing multiple suits*." Id. at 10-11 (emphasis added).

The superiority requirement is clearly met here. The damages allegedly suffered by large numbers of individual Class Members may be relatively small. The burden and expense of individual litigation, and the legal and practical difficulty of proving individual claims relating to events that occurred many years ago, make it highly unlikely that individual Class Members could obtain the relief achieved by this Settlement if they were forced to proceed on their own. Moreover, many of the claims asserted, including Plaintiffs' claim for judicial dissolution, present novel legal issues of first impression in North Carolina. The likelihood that individual Class Members would prevail on such claims, as in all litigation, is uncertain. Furthermore, the costs of litigating such claims will be enormous and any judgments obtained likely would be subject to expensive and time-consuming appeals, further delaying any recovery on behalf of Class Members. The only effective way to provide relief under these circumstances is through certification of the Settlement Class.

Given that the vast majority of U.S. Tobacco's past and present members reside in North Carolina, that U.S. Tobacco is headquartered in Wake County, and that many of the alleged wrongs

[5] *See* Fed. R. Civ. P. 23(b)(3) (to certify a class action, the court should find that a class action is superior to other available methods for the fair and efficient adjudication of the controversy (superiority)).

occurred here, there is no forum in which litigation of this Action is more suitable or appropriate for this Action to be litigated. Although there is a parallel class action proceeding in the North Carolina Superior Court, as described further below, this Court is a far superior forum for resolving the claims at issue, including pursuant to the proposed Settlement, especially considering how relatively well developed and clear-cut federal procedural and substantive law governing class actions is.

There are no difficulties likely to be encountered in the management of this Action as a class action for purposes of settlement. To the contrary, if the Settlement Class is certified and the Settlement is finally approved, Plaintiffs, the Settlement Class and U.S. Tobacco will all avoid the transactional costs of prosecuting and/or defending this and potentially multiple other lawsuits. For these reasons, this Court should exercise its discretion and certify this Action as an opt-out class action for purposes of settlement.

V. The Proposed Settlement Should be Preliminarily Approved.

A. The Settlement Falls Within the Range of Possible Approval.

The proposed Settlement is a product of extensive and detailed negotiations. This Court is familiar with the background of the Action and the facts and legal issues in dispute, and is in an excellent position to determine, on a preliminary basis, the fairness of the proposed Settlement. The Proposed Settlement is fair and does not contain any of the deficiencies outlined in the MCL 4th. The Settlement provides a broad range of benefits responsive to the various claims that members have made regarding U.S. Tobacco's assets, while recognizing U.S. Tobacco's statutory right to continue to operate on a cooperative basis for the benefit of those members who desire to patronize U.S. Tobacco going forward. Indeed, the Settlement provides a much broader range of benefits than U.S. Tobacco is required to provide under its existing By-Laws, and it will result in substantial cash distributions, which U.S. Tobacco would not otherwise be required to make except in the event of dissolution.

As discussed further below, the Settlement provides a range of different tangible benefits appropriate to the interests of eligible Class Members based on: (a) the number of years the Class Members actively produced and marketed flue-cured tobacco; and (b) the number of pounds of flue-cured

tobacco they produced and marketed during the Class Period. The key terms of the proposed Settlement are as follows:

1. Class Definition.

The Settlement Class is defined as "all individuals, proprietorships, partnerships, corporations, and other entities that are or were shareholders and/or members of U.S. Tobacco at any time during the Class Period, without any exclusion, including any heirs, representatives, executors, powers-of-attorney, successors, assigns, or others purporting to act for or on their behalf with respect to U.S. Tobacco and/or the Settled Claims. There shall be no exclusions from the Settlement Class, except for any putative Settlement Class Members who exclude themselves by timely filing an 'opt out' request in accordance with the requirements set forth in the Class Notice (as further described herein)."

2. The Settlement Fund.

U.S. Tobacco shall pay into the Settlement Fund the sum of Twenty Four Million Dollars ($24,000.000.00), said amounts to be held in escrow on behalf of the Settlement Class and paid and administered in accordance with the provisions of the Stipulation. Payments into the Settlement Fund shall be made according to the following schedule (collectively, the "Settlement Payment Dates"): (i) $10 million shall be paid upon the Effective Date ("the First Settlement Payment"); (ii) $5 million shall be paid two years after the First Settlement Payment ("the Second Settlement Payment"); (iii) $5 million shall be paid two years after the Second Settlement Payment ("the Third Settlement payment"); and (iv) $4 million to be paid one year after the Third Settlement Payment.

Upon receipt of each Settlement Payment, as described above, the Settlement Fund shall be divided by the Claims Administrator into two (2) separate funds, with Seventy-Five percent (75%) of the Settlement Fund to be paid into an account from which Group 1 Claims[6] will be paid, and Twenty-Five

[6] Group 1 Claims shall be distributed to Settlement Class Members who submit a Group 1 Claim on a pro rata basis, determined by the total pounds of flue-cured tobacco a Settlement Class Member marketed and sold during the Class Period relative to the total pounds of flue-cured tobacco from all Settlement Class Members who submit a Group 1 Claim. Notwithstanding the preceding sentence, no Settlement Class Member shall receive more than $15,000 for a Group 1 Claim.

percent (25%) of the Settlement Fund to be paid into an account from which Group 2 Claims[7] will be paid.

The payments made by U.S. Tobacco into the Settlement Fund and any interest thereon shall constitute the Settlement Fund. The Settlement Fund, net of any Taxes, shall be used to pay such attorneys' fees and expenses as may be awarded by the Court from the Settlement Fund to Plaintiffs' Counsel and the named Plaintiffs. The balance of the Settlement Fund after the above payments have been made shall be distributed to the Authorized Claimants as provided in the Settlement.

In the absence of a Settlement, Class Members have no assurance that U.S. Tobacco would distribute any monies to the Settlement Class. The Settlement avoids the need for Class Members to address difficult and uncertain legal issues relating to their rights, if any, in the funds of U.S. Tobacco. Instead, eligible Class Members are assured payment from a Settlement Fund of at least $24 million, beginning immediately upon the Effective Date of the Settlement. The Settlement provides further significant benefits to eligible Class Members, and it benefits U.S. Tobacco's members by ensuring that they have a financially sound cooperative that can continue to serve their interests going forward.

3. The Proposed Settlement is the Result of Non-Collusive Negotiations by Experienced And Competent Attorneys.

The proposed settlement is the result of intensive, arm's-length negotiations between counsel for Plaintiffs and Defendant. The attorneys representing the Parties to the Settlement are seasoned trial attorneys, with extensive experience in this type of litigation. In particular, the attorneys representing the Parties include counsel with experience in the litigation, certification, trial and settlement of corporate disputes, corporate dissolutions, products liability, and consumer class actions.

Settlement discussions began in earnest in February of 2017. After numerous telephone negotiations during the months of February, March and April, the Parties conducted a two (2) -day mediation session with the Hon. Frank W. Bullock on May 11 and 12, 2017. At the conclusion of the

[7] Group 2 Claims shall be distributed to Settlement Class Members who submit a Group 2 Claim on a pro rata basis, determined by the total number of crop years that a Settlement Class Member marketed and sold flue-cured tobacco relative to the total number of crop years of all Settlement Class Members who submit a Group 2 Claim.

mediation, the parties agreed to a preliminary term sheet, which ultimately led to the Settlement dated September 6, 2017, that is the subject of this Motion, as set forth in the Stipulation.

B. The Settlement Treats All Class Members Fairly.

The Settlement treats all Class Members fairly, according to the nature of their respective interests, and does not give undue preferential treatment to any single class member or group of class members. The primary consideration faced by the Court when analyzing a proposed settlement is whether or not the settlement is in the best interest of the class. MCL 4th, § 21.631- 642; 2 Newberg On Class Actions (3d ed. 1992 and 1996 Cum. Supp.) § 11.43; *see also* In re Corrugated Container Antitrust Litigation, 643 F.2d 195 (5th Cir. 1981). A settlement must provide fair and reasonable benefits in consideration for the class members' release of their claims. The settlement may not feature "unduly preferential treatment of class representatives or of segments of the class, . . . or excessive compensation for attorneys . . . ." MCL 4th, § 21.632. The Settlement fully comports with these standards.

As discussed at length herein, the proposed Settlement treats all Class Members fairly and appropriately in accordance with the nature of their individual interests in the benefits being provided under the Settlement. Although named Plaintiffs will be paid a relatively small class representative incentive award for prosecuting this Action, such payments are proper and routine. *See, e.g.,* Gaskill v. Gordon, 1995 WL 746091, *4 (N.D. Ill. 1995) *aff'd,* 160 F.3d 361 (7th Cir. 1998); *see also* In re Mego Financial Corp. Securities Litigation, 213 F.3d 454 (9th Cir. 2000). The remaining benefits received by the named Plaintiffs will, therefore, be determined on exactly the same basis as any other Class Member. The Settlement, thus, treats all Class Members fairly and does not give undue preferential treatment to named Plaintiffs or any single Class Member or group of Class Members.

C. Impact on Related Litigation

The proposed Settlement is contingent upon "dismissal, with prejudice, or issuance of an appropriate order precluding further pursuit of any *class-wide claims* on behalf of these class members, including but not to those associated with the actions Dan Lewis et al. v. Flue-Cured Tobacco Stabilization Corp., 05 CVS 188 (N.C. Super. Ct.); Kay W. Fisher et al. v. Flue-Cured Tobacco

Stabilization Corp., 05 CVS 1938 (N.C. Super. Ct.), as currently pending in the N.C. Superior Court." The Stipulation provides that this provision "shall not be construed to prevent any individual plaintiffs from opting out" of the Settlement and "pursuing their claims on an individual basis." If finally approved, therefore, the Settlement contemplates utilization of the Federal Anti-Injunction Act, 28 U.S.C. §2283, to "stay" further class-wide litigation in the related *Fisher/Lewis* state court litigation.[8]

The Federal Anti-Injunction Act allows a court to grant injunctive relief as to state proceedings "to protect or effectuate its judgment," a limitation known as the "relitigation exception." *See* MI Windows and Doors, Inc. Products Liability Litigation, 860 F.3d 218 (4th Cir. 2017) (citing Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 147 (1988)). The Anti-Injunction Act prohibits a federal court from granting an injunction "to stay proceedings in a State court," subject to three exceptions: (1) where such an injunction is "expressly authorized by Act of Congress"; (2) where the injunction is "necessary in aid of [the federal court's] jurisdiction"; or (3) where the injunction is entered "to protect or effectuate [the court's] judgments." 28 U.S.C. §2283 (2017). An injunction issued against parties to a state court proceeding is, for purposes of the Act, considered an injunction to stay the state court proceeding itself. Id; *see* Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 287 (1970). The "relitigation exception" was "designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." Chick Kam Choo, 486 U.S. at 147. This exception is founded on "concepts of *res judicata* and collateral estoppel and it permits an injunction where either of these doctrines would preclude the state court action to which the injunction is directed." Id. Under the doctrine of *res judicata*, "a judgment (1) on the merits in a prior suit bars (2) a second suit involving their parties or their privies (3) based on the same cause of action." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 58 L.Ed.2d 552 (1979).

If approved, Plaintiffs contend that each of the requirements for application of *res judicata* is satisfied in this case, and therefore, the final judgment approving this Settlement will be claim preclusive

[8] If the Settlement is approved, upon entry of the final order approving the Settlement, the Parties contemplate potentially submitting a motion pursuant to the Anti-Injunction Act, as and if may be appropriate, for an injunction to stay the *Fisher/Lewis* litigation.

with respect to the class allegations contained in the *Lewis/Fisher* matter. First, the final judgment will constitute a judgment "on the merits." In re MI Windows and Doors, 860 F.3d at 224; Young-Henderson v. Spartanburg Area Mental Health Ctr., 945 F.2d 770, 773 (4th Cir. 1991). Second, absent exercising the right to "opt out", Class Members will be bound by this judgment. Under established "class action" principles, class members are bound by the judgment entered in the class action as a party, so long as they are adequately represented, had fair notice of its class membership, and declined to opt out of the class. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1983); Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 (1996). Here, Class Members will be "adequately represented", the notice will sufficiently apprise Class Members of their right to "opt out", and any failure to "opt out" will bind Class Members to this settlement, including provisions that prohibit litigating other claims on a "class wide" basis.

Finally, the *Lewis/Fisher* state court proceeding is "based on the same cause of action" that will be resolved by the proposed Settlement. The intent of the parties determines the "preclusive effect" of a judgment. Keith v. Aldridge, 900 F.2d 736, 740-741 (4th Cir. 1990) ("If the parties intended to foreclose through agreement litigation of a claim, assertion of that claim in a later suit, whether or not formally presented in the earlier action, is precluded."). In addition, it is clear that a judgment approving a settlement agreement may involve the release of not only the claims presented in the class action, but also "claims arising out of 'identical factual predicate.'" Berry v. Schulman, 807 F.3d 600, 616 (4th Cir. 2015). In this case, the proposed Settlement clearly anticipates that litigation of further *class claims* will be foreclosed, and the claims in the instant case and the *Lewis/Fisher* case arise from the same factual predicate—membership in U.S. Tobacco and the accumulation of reserve funds by U.S. Tobacco. The proposed Settlement "fully and finally" settles and releases the "Released Claims," which captures the claims being litigated in the *Lewis/Fisher* matter.

Because "class members" in the *Lewis/Fisher* case will also (absent opt-out) be members of this proposed "properly entertained class," if this Court finally approves the Settlement in this case, the Anti-Injunction Act's "relitigation exception" will justify this Court enjoining prosecution of "class claims" in

the *Lewis/Fisher* matter.

VI. The Proposed Class Notice and Notice Plan Should be Approved by This Court.

The final requirement for class action status under Rule 23, is that adequate notice be given to members of the class. *See* Fed. R. Civ. P. Rule 23(c)(2).[9] This requirement is dictated by fundamental considerations of fairness and due process. *See* Marcia Robeson, 32 A.L.R. Fed. 102, *What constitutes "best notice practicable," required by Rule 23(c)(2)* (1977; Supp. 2017) ("The Advisory Committee's Note to Rule 23 described Rule 23(c)(2) as "not merely discretionary," and added that the "mandatory notice" pursuant to Rule 23(c)(2) "is designed to fulfill requirements of due process to which the class action procedure is of course subject."). The actual manner and form of the notice is largely within the discretion of the trial court, which has the option of reviewing the content of any notice before its dissemination. *See e.g.*, Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 113–14 (2d Cir. 2005) ("The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness.") (citing Soberal–Perez v. Heckler, 717 F.2d 36, 43 (2d Cir.1983); Fed. R. Civ. P. 23(e)). "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" Id. (quoting Weinberger v. Kendrick, 698

[9] Fed. R. Civ. Pro. 23(c)(2) provides:

> (2)(A) For any class certified under Rule 23(b)(I) or (2), the court may direct appropriate notice to the class.
>
> (B) For any class certified under Rule 23(b)(3), the court must direct to class members **the best notice practicable under the circumstances**. including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:
>
> - the nature of the action,
> - the definition of the class certified.
> - the class claims, issues. or defenses,
> - that a class member may enter an appearance through counsel if the member so desires,
> - that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
> - the binding effect of a class judgment on class members under Rule 23(c)(3).

Fed. R. Civ. Pro. 23(c)(2) (emphasis added).

F.2d 61, 70 (2d Cir.1982)). Notice is "adequate if it may be understood by the average class member." 4 Newberg § 11:53, at 167.

The Court should approve the proposed form of Class Notice and the proposed plan for dissemination of notice to Class Members. The MCL 4th, § 21.311 provides that when a class is certified and settled simultaneously, a single notice is generally used. A settlement class certification notice should advise class members of the following:

- define the class and any subclasses;
- describe clearly the options open to class members and the deadlines for taking action;
- describe the essential terms of the proposed settlement;
- disclose any special benefits provided to class representatives;
- provide information regarding attorneys' fees;
- indicate the time and place of the hearing to consider court approval of the settlement;
- describe the method for objecting to (or, if permitted, for opting out of) the settlement);
- explain the procedures for allocating and distributing settlement funds, and, if the settlement provides different kinds of relief for different categories of class members, clearly set forth those variations;
- explain the basis for valuation of nonmonetary benefits if the settlement includes them;
- provide information that will enable class members to calculate or at least estimate their individual recoveries, including estimates of the size of the class and any subclasses; and
- prominently display the address and phone number of class counsel and how to make inquiries.

MCL 4th, § 21.312.

The proposed Class Notice satisfies the aforementioned criteria. *See* Exhibits 1 *and* 2 (Class Notice and Class Publication Notice) attached to the Stipulation and incorporated herein by reference. The Class Notice (1) defines the Settlement Class; (2) describes clearly the options open to Class Members and the deadlines for taking action; (3) describes the essential terms of the proposed Settlement; (4) provides information regarding attorneys' fees and the maximum amount of attorneys' fees Plaintiffs' Counsel may request from the Court;[10] (5) indicates the time and place of the hearing to consider court

[10] The Notice Plan consistent with the Settlement Agreement provides in pertinent part: Class Counsel will

approval of the Settlement; (6) describes the method for objecting to and/or for opting out of the Settlement; (7) provides information that will enable Class Members to at least estimate their individual recoveries, including estimates of the size of the funds for Group 1 and Group 2 Claims; (8) prominently displays the address and phone number of class counsel and explains how to make inquiries; and (9) discloses the request for class representative incentive awards. In short, the proposed Class Notice enables Class Members to exercise their rights and make informed decisions regarding their views of fairness, adequacy, and reasonableness of the proposed Settlement. The proposed Class Notice, consequently, fulfills the requirement for adequate notice that comports with fairness and due process.

Plaintiffs are submitting with this Motion a Proposed Notice Plan that includes provisions for some or all of the following: (1) mass direct mailing of the Class Notice to the addresses of all known Class Members; (2) publication of a summary Publication Notice in local newspapers for states where the majority of U.S. Tobacco's members historically resided; (3) publication of a summary Publication Notice in a National magazine; (4) National Online Advertising; (5) National Paid Media Advertising; (6) a national Earned Media Program; (7) advertising in local TV or other media where the vast majority of U.S. Tobacco's members historically resided; (8) publication in trade magazines that many Class Members are expected to read; (9) the establishment of an Internet website and posting on the Internet of pertinent Class Settlement documents, where questions can be answered and claims forms and information may be requested; and (10) the establishment of a toll-free Settlement information hotline, where questions can be answered and application forms and information may be requested.

The Class Notice and the specifics of the Notice Plan have been the subject of intensive and exhaustive drafting by Kinsella Media LLC and Rust Consulting, Inc., and intensive and exhaustive negotiations between the Parties.[11] These documents reflect the best efforts of the Parties to develop a

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ask the Court for an award of attorneys' fees and class representative incentive awards that will not exceed the combined amount of $2 Million.

11 Kinsella Media, LLC and Rust Consulting, Inc. are two nationally recognized firms that assist with the notice and administration of complex litigation and class action settlements across the United States. *See* Notice Program

Notice Program that provides reasonable notice to the Settlement Class in "plain language" terms that can be easily understood, reflects the facts and circumstances unique to the Settlement, and provides widespread "reach" to Class Members at a reasonable proportional cost.

Dr. Shannon R. Wheatman has opined regarding the Parties' efforts and the Proposed Notice Plan. *See* Declaration of Shannon R. Wheatman (hereafter, "Wheatman Dec."). Dr.. Wheatman is a nationally renowned expert in the fields of advertising, media and communications with specific experience and concentration in notification programs for class actions. (*See* Wheatman Dec. ¶¶ 8-13). As one of the foremost national authorities on class action notice programs, Dr. Wheatman is in the unique position to provide assistance to the Court in the form of opinion testimony regarding the proposed notice program. Dr. Wheatman opines in pertinent part the following:

> The Notice Program is carefully crafted with multiple layers of notice including, significant Direct Notice, Paid Media Notice, and outreach through earned media.
>
> It is my opinion, based on my experience in the industry and the specific research conducted to develop the notice program, that the Notice Program and content of the Notices are adequate and reasonable under the circumstances and provide the best notice practicable. The Notice Program is consistent with the standards employed by KM in notification programs designed to reach class members. As designed, the Notice Program is expected to reach over 150,000 Class members with Direct Mail Notice and further to reach at least 70% of Adults 18+ and therefore provide robust publication notice to unknown Class members, including the "heirs" and "assigns" of form USTC members. The Notice Program, as designed, is fully compliant with Rule 23 of the Federal Rules of Civil Procedure.

(Wheatman Dec. ¶¶ 67-68)

The proposed Notice Program in the case *sub judice* clearly comports with both Federal law and Due Process. The program includes individual notice to all members who have been identified through reasonable efforts, as well as an expansive, national media notice program to reach Class Members for whom direct mailing notice cannot be provided. Notice of the proposed Settlement is being given as soon as possible after the Action was commenced and the Settlement was reached. Potential Class Members are being given an opportunity to either object or request exclusion from the Settlement Class within a

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and Declaration of Shannon R. Wheatman.

specified time in a manner similar to the current federal practice. In sum, the proposed Notice Program complies with fundamental considerations of fairness and due process.

The proposed Notice Program, thus, constitutes the best notice practicable under the circumstances that can be given to Class Members and provides individual notice to all members who could be identified through reasonable efforts. Plaintiffs respectfully contend that all reasonable concerns regarding this Notice Plan have been addressed and are alleviated. The proposed Class Notice and Notice Plan should, therefore, be approved by this Court.

VII. Class Counsel and Class Representatives

Plaintiffs also move for appointment of their respective counsel as class counsel and for appointment of class representatives. Rule 23(g)(1)(A) states that, in appointing class counsel, the Court must consider the following:

> (i) the work counsel has done in identifying or investigating potential claims in the action;
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
> (iii) counsel's knowledge of the applicable law; and
> (iv) the resources that counsel will commit to presenting the class.

In addition, the Court "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In considering all of these factors, they each weigh in favor of appointing the Plaintiffs' chosen attorneys as class counsel. Plaintiffs' counsel have significant experience in matters of this type, with counsel having more than twenty (20) years of class action experience, in both State and Federal Court. Counsel for the Plaintiffs have substantial knowledge of the applicable law, and have expended significant resources investigating the claims in this case and in negotiating the proposed Settlement. Having already devoted significant resources to this case, there is nothing to indicate that counsel will not continue to devote significant resources to the representation of the proposed Settlement Class.

With respect to the class representatives, each are members of the proposed Class, and there is no indication that the proposed class representatives have any conflict with any other Class Member.

Therefore, the proposed class representatives will fairly and adequately protect the interests of the class.

VIII. A Final Fairness Hearing Should be Scheduled.

The third and final step in the settlement approval process is the scheduling of the Final Fairness Hearing. At the Final Fairness Hearing, the Court will be provided with information relevant to its analysis and evaluation of the fairness and the adequacy of the Settlement. Proponents of the Settlement will provide evidence in support of Final Approval, and Class Members who have filed timely written objections may be heard regarding any concerns they may have about the Settlement.

CONCLUSION

For the foregoing reasons, the proposed Settlement "falls within the range of possible approval" warranting the dissemination of notice to Class Members of a Final Fairness Hearing. Accordingly, Plaintiffs respectfully request that this Court enter an order certifying the Settlement Class, preliminarily approving the proposed Settlement, approving the proposed form of Notice to the Settlement Class, setting a schedule for further proceedings on the Settlement, including the scheduling of a Final Fairness Hearing, and staying further proceedings in this Action pending the outcome of the proceedings on the Settlement, all as provided in the proposed Preliminary Order attached to the Stipulation as Exhibit 4.

Respectfully submitted this the 7th day of September, 2017.

SHIPMAN & WRIGHT L.L.P.

By: /s/ William G. Wright

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have this day served the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION OF A SETTLEMENT CLASS AND PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT** on all parties to this action by using the CM/ECF System, which will send notification of such filing to the following:

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This the 7th day of September, 2017.

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