STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

NICHON ROBERSON, on behalf of herself and all others similarly situated, Plaintiff, v. ECI GROUP, INC.; ECI MANAGEMENT, LLC; and DEKALB-LAKE RIDGE, LLC, Defendants.	Civil Action File No. 17-A-64506-4 CLASS ACTION JURY TRIAL

Plaintiff Nichon Roberson's Unopposed Motion For Preliminary Approval Of The Class Settlement And Class Notice

Michael B. Terry
Naveen Ramachandrappa
BONDURANT, MIXSON & ELMORE, LLP
1201 W Peachtree St NW Ste 3900
Atlanta, GA 30309
404-881-4100

Shimshon Wexler
The Law Offices of Shimshon Wexler, PC
315 W Ponce de Leon Ave Suite 250
Decatur, Georgia 30030
678-699-1938

Bryant T. Lamer
SPENCER FANE LLP
1000 Walnut St Ste 1400
Kansas City, MO 64106
816-474-8100
Pro Hac Vice Admitted

Attorneys for Plaintiff Nichon Roberson on behalf of herself and the Class

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Introduction

Plaintiff Nichon Roberson and Defendants ECI Group, Inc., ECI Management, LLC, and DeKalb-Lake Ridge, LLC (collectively, "ECI") have reached a negotiated settlement (the "Class Settlement") to resolve their claims on a class-wide basis. Therefore, Roberson now moves, unopposed, for this Court to certify the Class for the purpose of settlement; grant preliminary approval of the Class Settlement; approve the proposed forms to notify Class members of the Class Settlement; set deadlines for the submission of Class member claims, requests for opt-out, objections to the Class Settlement, and motions for attorney fees and Class representative service awards; and scheduling a final approval hearing to consider any objections and to make a final ruling on approval of the Class Settlement. A copy of a proposed order is attached to this motion as Exhibit 1, and a proposed order is also being separately filed on the Court's docket.

As detailed below, the Class Settlement requires ECI to be solely responsible for the expense associated with Class Notice and settlement administration and to separately make available $2,400,000.00 to satisfy Class Members claims, thereby providing thousands of Class Members potential relief for security deposit claims spanning a twenty-year time period. A copy of the comprehensive settlement agreement is attached to this motion as Exhibit 2.

The Class will obtain these benefits without the substantial risk of continued litigation and the substantial delay that would occur if this Class Settlement is not approved. If this action were instead to proceed through class certification, interlocutory appeal, trial, and a final judgment appeal, there is a material risk that the Class will not receive any relief or that the same relief that can be obtained now will not be available for many more years. As such, the Class Settlement is fair, reasonable, and adequate, and this Court should grant preliminary approval.

Factual and Procedural Background

This is a class action on behalf of ECI residential apartment tenants for alleged violations

of the Georgia security deposit statute. *See* O.C.G.A. § 44-7-35.[1] The named Plaintiff and proposed Class Representative is Nichon Roberson. Nichon Roberson and her mother, Rosie Roberson, rented an apartment at The Columns at Lake Ridge complex in Dunwoody, Georgia for a one-year lease to begin on May 27, 2014 and end on May 26, 2015. At the time, Nichon was a physician applying for residency, and she is now currently a resident physician in the Atlanta area. Nichon's mother suffered from Alzheimer's disease and was under Nichon's care and supervision during their time at Lake Ridge. Nichon renewed her lease for another one-year period to begin on May 27, 2015 and end on April 26, 2016. After April 26, 2016, Nichon continued to rent at Lake Ridge, on a month-to-month basis.

Defendants are ECI Group, Inc., ECI Management LLC, and DeKalb-Lake Ridge, LLC. The Columns at Lake Ridge is one of around twenty-five apartment complexes owned, operated, and managed by the ECI Defendants during the last twenty years in Georgia. Today, ECI owns, operates, and manages around 4,000 to 5,000 individual apartment units across Georgia.

When Roberson agreed to rent at Lake Ridge, she alleges that she was required to pay a $437.50 refundable security deposit, which was in addition to her monthly rent of $875.00 (her monthly rent was later increased to $945.00). And when Roberson's occupancy ended on August 11, 2016, she alleges that ECI was required to take four steps before retaining any part of her security deposit. *First*, within three business days, ECI was required to inspect the apartment and create a list of any alleged damage to the premises. O.C.G.A. § 44-7-33 (b) *Second*, within the same three business days, ECI was required to provide the damages list to Roberson. *See*

[1] The Georgia General Assembly made certain amendments to the Georgia security deposit statute, and such amendments are effective as of July 1, 2018. Unless otherwise specified, any references or citations to the Georgia security deposit statute are to statute before such amendments, and the amendments do not apply to the Class, given that the Class does not include claims arising after June 30, 2018.

O.C.G.A. § 44-7-33 (c). *Third*, within five business days, Roberson had the right to inspect the apartment to determine whether ECI's list was accurate. O.C.G.A. § 44-7-33 (b). *Fourth*, within one month, ECI was required to either provide Roberson "the full security deposit" or a written statement listing the exact reasons for retaining her deposit. O.C.G.A. § 44-7-34 (a).

Roberson alleges that ECI, however, did not take the required steps before retaining her deposit. Roberson alleges that, on August 15, 2016, ECI unilaterally conducted an inspection of Nichon's apartment and completed the list of damages without Nichon's presence or signature. Roberson further alleges that ECI did not provide this list of damages to Nichon within three business days. Indeed, Roberson alleges that she did not even know that ECI had withheld her security deposit until Roberson received a collection notice on September 16, 2016.

Based on these allegations, which ECI disputes, on May 19, 2017, Roberson filed her complaint with this Court. *See* May 19, 2017 Class Action Compl. The Summons and Complaint were served on ECI on May 24, 2017, and the case was initially assigned to Judge Mike Jacobs, but was later re-assigned by Clerk of the Court to Judge Johnny Panos. *See* May 31, 2017 Reassignment Of Related Action. The case was re-assigned because Judge Panos has been hearing another action, *Wexler v. Post Properties, Inc.*, Civil Action File No. 16A-60559E-4, which is a previously filed and related action. Although the parties in this action and *Wexler* are different, the same types of legal claims have been made in both cases, and the parties in both cases have all expressly recognized that there is some, but not complete, overlap between the cases. *See, e.g.*, Defs.' Br. in Supp. of Mot. to Dismiss at 7 ("Defendants acknowledge that the Court has recently ruled otherwise in the matter of *Wexler v. Post Properties, Inc. et al*, No. 16A: 60559E-4 ….). Judge Panos is also hearing at least one other security deposit class action. *See Tucker v. Columbia Residential, LLC*, Civil Action File No. 17-A-6651-4.

In any event, in her complaint, Roberson asserts a single claim under the Georgia security deposit statute against ECI Group, Inc., ECI Management, LLC, and DeKalb-Lake Ridge, LLC, and Roberson seeks to recover damages on behalf of herself and on behalf of a class of all other Georgia citizens who had their security deposits improperly withheld.

Roberson and the Proposed Class request the express remedies provided by the Georgia security deposit statute: (1) "[t]he failure of a landlord to provide each of the written statements with the time periods specified … shall work a forfeiture of all his rights to withhold any portion of the security deposit or to bring an action against the tenant for damages to the premises" and (2) "[a]ny landlord who fails to return any part of a security deposit which is required to be returned to a tenant pursuant to this article shall be liable to the tenant in the amount of three times the sum improperly withheld plus reasonable attorney's fees." O.C.G.A. § 44-7-35 (b)-(c).

On July 24, 2017, ECI moved to dismiss the Complaint, arguing first that there can be no recovery from ECI Group or ECI Management because neither is a party to the lease, and second that there is no requirement that ECI provide the damages list to tenants within three business days of termination of the occupancy. *See* Defs.' Br. in Supp. of Mot. to Dismiss at 3, 6-7.

On December 8, 2017, the Court denied ECI's motion to dismiss. The Court held that, "[i]n attempting to discern the meaning of the security deposits in the *Wexler* matter, … [and] [h]aving revisited that decision in light of the arguments raised in the instant case, construing the statutes *in pari materia* and applying the rules of statutory [construction], the Court must reach the same conclusion: the final damage list compiled pursuant to Section 33 (b) must be provided to the tenant within the stated three-day period." Dec. 8, 2017 Order Denying Defs.' Mot. to Dismiss at 5. The Court also held that "[t]he complaint sufficiently states that [all] Defendants have liability, either directly as landlords or via veil-piercing or through a joint venture theory."

Id. at 6; *see also id.* at 5-6 ("Plaintiff argues that ECI Group and ECI Management have liability to Plaintiff both directly as landlords and through vicarious or joint liability theories.").

Because ECI moved to dismiss when they filed their answer, discovery was automatically stayed for a ninety-day period. *See* O.C.G.A. § 9-11-12 (j). But, once the Court denied the motion to dismiss, the discovery stay ended, and on January 17, 2018, Roberson served a first set of requests for production and interrogatories.

The parties disagree over these discovery requests, particularly as it relates to the proper scope of class discovery and the alleged burden imposed by these requests. ECI takes the position that no discovery should be had, except as it relates to Roberson's claims and any ECI policies or procedures that applied to Roberson's security deposit. By contrast, Roberson takes the position that, because this is a class action, she is entitled to and must be able to take discovery regarding Roberson's claims, claims of any other tenants residing at Lake Ridge, and claims of tenants residing at any ECI apartment complex in Georgia.

However, as part of the parties' conferral over these discovery disputes, the parties recognized that, before either side invested time and money into motions practice, the parties should explore settlement. Therefore, on July 13, 2018, the parties jointly moved for the Court to amend the Consent Scheduling Order and to enter a six-month stay of all proceedings and deadlines to allow for mediation. On July 18, 2018, the Court granted the motion. *See* Jul. 18, 2018 Order Amending May 17, 2018 Scheduling Order & Staying All Proceedings.

On September 20, 2018, counsel for the parties participated in an in-person mediation with Ralph Levy of JAMS serving as the independent, non-party mediator. Although the parties made important and substantial progress towards a class settlement, the mediation did not end with a successful settlement agreement and the parties agreed to continue negotiations directly.

Those direct negotiations continued for some time, until it became necessary for the parties to resume litigation. On February 4, 2019, Roberson filed an unopposed motion to amend the scheduling order. On February 7, 2019, the Court granted the motion.

Roberson then proceeded, on June 26, 2019, to file a first amended complaint, which restated her claims and requested relief. *See* Jun. 26, 2019 1st Am. Compl. Then on July 1, 2019, Roberson filed a comprehensive motion to compel class discovery, seeking to resolve by order from this Court the significant dispute over class discovery between the parties.

Recognizing that the class discovery motion and other pre-trial litigation presents substantial risks to both sides, the parties again sought to negotiate to resolve this action on a class-wide basis. Therefore, beginning on July 30, 2019 and continuing through November 22, 2019, the parties stipulated to staying various deadlines to allow the parties to maintain the status quo while they continued negotiating. Finally, on November 27, 2019, the parties reached agreement on the material terms for the Class Action Settlement, with additional non-material terms and details to be supplied later, and the parties notified the Court of this agreement. *See* Nov. 27, 2019 Not. Of Settlement at 1.

The parties had intended for the motion for preliminary approval to be submitted in early 2020; however, the parties needed additional time to finalize the non-material terms and details, in particular the class notice and claim forms. And then, when the parties were ready to submit these materials to the Court, the COVID-19 pandemic began bearing down on Georgia, and the Supreme Court issued a judicial emergency declaration and a series of extensions, which precluded this Court from setting any deadlines for class opt-outs, claims, *etc.* As a result, the parties' ability to submit this motion for preliminary approval was substantially delayed.

With the Supreme Court's latest extension order reinstating deadlines and authorizing

this Court to set deadlines for class opt-outs, claims, *etc.*, Roberson now moves for this Court to certify the following Class for the purpose of settlement:

> (a) Any person; (b) who had an agreement for the rental of real property with any of the Defendants, or any of their subsidiaries or affiliated entities or persons, including but not limited to DeKalb-Lake Ridge, LLC; (c) who had all or some of their security deposit not returned within one month of the termination of the lease due, at least in part, to alleged damage to the premises; (d) had all or some of their security deposit retained during the time period beginning on May 19, 1997 and continuing through June 30, 2018; and (e) did not receive a list of alleged damage to the premises within three business days of termination of the occupancy.

Ex. 2, Comprehensive Settlement Agreement, at 1.

Argument

1. The Court Should Certify The Class For Settlement Purposes.

Generally speaking, Georgia law follows federal law with regard to whether a court should certify a class for settlement purposes. *See, e.g.*, *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 953 (1975) ("Since there are only a few definitive holdings in Georgia on this particular section of the Georgia Civil Practice Act, we also look to federal cases to aid us.").

"Federal courts have long recognized a strong policy and presumption in favor of class action settlements." *Gevaerts v. TD Bank, N.A.*, No. 11:14-cv-20744-RLR, 2015 WL 6751061, at *4 (S.D. Fla. Nov. 5, 2015). "Settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and uncertainties and preventing lawsuits." *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977). "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (cites omitted). However, the Court must find that the other requirements of Rule 23 (a) and (b) are satisfied. *Id.* "Subdivisions (a) and (b) focus court attention on whether a

proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Id.* at 621.

That unity is present here for three reasons.

First, the case law emphasizes that class certification is an appropriate and important remedy in consumer cases, particularly where, as here, if class certification is denied, the costs of an individual lawsuit would exceed the recovery any individual Class member could receive. *See, e.g.*, *Lilly v. Jamba Juice Co.*, No. 13-cv-02998-JST, 2014 WL 4652283, at *4 (N.D. Cal. Sept. 18, 2014) (finding that "where the injury to any individual consumer is small, but the cumulative injury to consumers as a group is substantial, [] the class action mechanism provides one of its most important social benefits"); *Laumann v. NHL*, 105 F. Supp. 3d 384, 407 (S.D.N.Y. 2015) (finding that, in consumer cases, class actions are "an important enforcement device"); *McDowell Valley Vineyards, Inc. v. Sabate USA, Inc.*, No. C-04-078 SC, 2004 WL 1771574, at *5 (N.D. Cal. Aug. 6, 2004) (finding that consumer class actions "serve important roles in the enforcement of consumers' rights").

Second, Roberson easily satisfies the four requirements of Rule 23 (a)—numerosity, commonality, typicality and adequacy.

Numerosity—"The numerosity requirement is satisfied if the proposed class is so numerous that joinder of all members is impracticable." *In re Tri-State Crematory Litig.*, 215 F.R.D. 660, 689 (N.D. Ga. 2003). "[W]hile there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors." *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986).

Here, numerosity is easily established, given that, the Columns at Lake Ridge is one of around twenty-five apartment complexes owned, operated, and managed by the ECI Defendants

during the last twenty years in Georgia. Today, ECI owns, operates, and manages around 4,000 to 5,000 individual apartment units across Georgia.

Commonality—"To satisfy the commonality requirement, Plaintiff must show the presence of questions of law or fact common to the entire class." *In re Tri-State Crematory Litig.*, 215 F.R.D at 690. "The commonality requirement 'does not require that all the questions of law and fact raised by the dispute be common or that the common questions of law or fact predominate over individual issues." *Delta/AirTran Baggage Fee Antitrust Litig.*, 317 F.R.D. 675, 693 (N.D. Ga. 2016). Indeed, "for purposes of Rule 23(a)(2) even a single common question will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). The Eleventh Circuit has described the commonality requirement as a "low hurdle" to overcome. *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1356 (11th Cir. 2009).

Typicality—Typicality is satisfied when the plaintiff's claims and the class's claims "arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc.,* 741 F.2d 1332, 1337 (11th Cir. 1984). The plaintiff's "interest in prosecuting [her] own case must simultaneously tend to advance the interests of the absent class members." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006). However, "[t]he interests and claims of Named Plaintiffs and class members need not be identical to satisfy typicality." *DG v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010).

Rather, "[w]hen the class representative's claim and the claims of the other 'class members are based on the same legal or remedial theory, differing fact situations of the class members do not defeat typicality'." *In re Quick Cash, Inc.*, 541 B.R. 526, 534 (Bankr. D.N.M. 2015) (quoting *DG*, 594 F.3d at 1198).

Here, commonality and typicality will also easily be established, given that there is one

central, common legal question in this case—does the Georgia security deposit statute require ECI to provide a tenant with the list of damages within three business days in order to withhold the tenant's security deposit for damage done to the premises?

ECI says the answer is no, while Roberson says the answer is yes. But whoever is correct, the answer will be the same for the ***entire*** class, regardless of individual circumstances, and this answer will decide the major question of liability in the case.

Adequacy—Adequacy is established when "class members share common objections and the same factual and legal positions and have the same interest in establishing the liability of defendants." *In re Delta/AirTran*, 317 F.R.D. at 680.

Adequacy is also established here. Roberson has the same material interests as the rest of the Class. Roberson and the Class all share the same factual and legal positions given that Roberson and the Class are all asserting the same claim that the list of alleged damage to the premises was not provided within three business days—*i.e.*, a statutory claim that applies to the entire Class. Meanwhile, Class Counsel has extensive experience litigating class actions, including specifically litigating other Georgia security deposit class actions before this Court. *See* Aff. of N. Ramachandrappa, attached as Exhibit 4 to this motion; Aff. of B. Lamer, attached as Exhibit 5 to this motion; Aff. of S. Wexler, attached as Exhibit 6 to this motion.

Third, Roberson satisfies the two additional requirements of Rule 23 (b)(3)—predominance and superiority. Among other things, this class action is based on a statutory cause of action, which means that every class member's claim depends on the same uniform language from the statute, not from any individual lease or contract. In fact, Georgia statutory law prohibits any contractual diminishment of the rights under the security deposit statute, so there is no need to review any individual lease or contract. *See, e.g.*, O.C.G.A. § 44-7-2 (b) ("In any

contract, lease, license agreement, or similar agreement, oral or written, for the use or rental of real property as a dwelling place, a landlord or tenant may not waive, assign, transfer, or otherwise avoid any of the rights, duties, or remedies contained in the following provisions of law: … Article 2 of this chapter, relating to security deposits[.]"). On top of prohibiting any contractual diminishment, the security deposit statute also affirmatively and expressly bars claims against tenants for damages to the premises if the tenant is not provided with the list of damages within three business days. *See* O.C.G.A. § 44-7-35 (b).

As a result, there is a strong case for predominance and superiority because there will be no individual leases to consider and no need to evaluate the individual damage allegedly done to the premises. In fact, even in a case where the tenant caused catastrophic fire damage, the Court of Appeals held that the security deposit statute still barred a claim for damages. *See, e.g.*, *State Farm Fire & Cas. Co. v. Bajalia*, 216 Ga. App. 707, 708 (1995) ("Although State Farm argues there should be an exception … for catastrophic damages not anticipated under the lease, it has provided no authority to support this interpretation and this court will not find such an exception where the legislature has clearly not provided one.").

Further, because the average class member's damages are a few hundred dollars at most, this case presents a "negative value suit"; *i.e.*, a case where an individual suit will cost a Class member more than they could recover. One of the "most compelling rationale[s] for finding superiority in a class action" is "the existence of a negative value suit." Ca*stano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996). That is because where, as here, the costs of litigating exceed the potential recovery, there is no alternative to class actions for fairly and efficiently adjudicating the controversy. Further, even if the cost of individual lawsuits did not exceed the

potential recovery, proceeding on an individual basis would result in duplicative, unnecessary work for the parties and the Court.

2. The Court Should Preliminarily Approve The Class Settlement.

Approval of a class action settlement occurs in two steps.

First, the district court conducts a preliminary evaluation of the fairness and adequacy of the settlement to determine whether there is good reason to schedule a full fairness hearing and notify the settlement class. *See* Manual for Complex Litigation (Fourth) § 21.632; *In re Skinner Group, Inc.*, 206 B.R. 252, 261-62 (Bankr. N.D. Ga. 1997); *McNamara v. Bre-X Minerals Ltd.*, 214 F.R.D. 424, 426 (E.D. Tex. 2002); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 562 (D.N.J. 1997), *aff'd*, 148 F.3d 283 (3d Cir. 1998). This is generally "made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties." Manual for Complex Litigation (Fourth) § 21.632.

"The purpose of this cursory examination is to detect defects in the settlement that would risk making 'notice to the class, with its attendant expenses, and a hearing ... futile gestures.'" *In re Electronic Data Sys. Corp. "ERISA" Litig.*, No. 6:03-MD-1512, 2005 WL 1875545, at *4 (E.D. Tex. June 30, 2005) (quoting Newberg on Class Actions § 11:25 (4th ed. 2002)). "A preliminary fairness assessment 'is not to be turned into a trial or rehearsal for trial on the merits,' for 'it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.' Rather, the Court's duty is to conduct a threshold examination of the overall fairness and adequacy of the settlement in light of the likely outcome and the cost of continued litigation." *In re Inter-Op Hip Prosthesis Liability Litig.*, 204 F.R.D. 330, 350 (N.D. Ohio 2001) (cites omitted). If the settlement appears to be fair and adequate upon a preliminary examination, then the district court directs the plaintiff to send

notice of the proposed settlement to the class.

Second, after receiving any comments and objections from the class members, the court conducts a final fairness hearing on settlement approval. Manual for Complex Litigation, Fourth, § 21.632; *In re Skinner*, 206 B.R. at 261-62; *McNamara*, 214 F.R.D. at 426; *In re Prudential Ins.*, 962 F. Supp. at 562. At this final hearing, the district court evaluates the settlement in light of "(1) the existence of fraud or collusion [among the parties in reaching] the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings [at which the settlement was achieved] and the amount of discovery completed; (4) the probability of the plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and the substance and amount of opposition to the settlement." *Leverso v. SouthTrust Bank of Ala., N.A.*, 18 F.3d 1527, 1531 n.6 (11th Cir. 1994).

The district court evaluates these six factors in light of "the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). "Particularly in class action suits, there is an overriding public interest in favor of settlement." *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). "[A]ccordingly class-action settlements will be disapproved only upon 'considerable circumspection." *Mashburn v. Nat'l Healthcare*, Inc., 684 F. Supp. 660, 667 (M.D. Ala. 1988) (quoting *Jamison v. Butcher & Sherrerd*, 68 F.R.D. 479, 481 (E.D. Pa. 1975)).

This means that, "in evaluating the terms of the compromise in relation to the likely benefits of a successful trial, the trial judge ought not try the case in the settlement hearings. .... It cannot be overemphasized that neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute." *Cotton*, 559 F.2d at 1330.

"Neither should it be forgotten that compromise is the essence of a settlement. The trial court should not make a proponent of a proposed settlement 'justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes.'" *Id.* (quoting *Milstein v. Werner*, 57 F.R.D. 515, 524-25 (S.D.N.Y.1972)). "In performing this balancing task, the trial court is entitled to rely upon the judgment of experienced counsel for the parties. Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Cotton*, 559 F.2d at 1330 (cite omitted).

Here, this settlement is at the first stage—preliminary approval—in which the Court conducts a preliminary examination to determine whether the settlement appears to be fair, reasonable and adequate and that there is good reason to give notice to the Class. Looking towards the factors for final approval identified in *Cotton* and *Bennett*, the Court should grant preliminary approval of the Class Settlement and order that notice to the Class be given.

(1) Fraud Or Collusion In Reaching The Settlement

"Where the parties have negotiated at arm's length, the Court should find that the settlement is not the product of collusion." *Saccoccio v. JPMorgan Chase Bank, N.A.*, 297 F.R.D. 683, 692 (S.D. Fla. 2014). Here, the Settlement was the result of hard-fought negotiations, which required the intervention of an independent third-party mediator, Ralph Levy, which were suspended and then restarted numerous times, the parties continued to litigate and negotiate various issues. Courts have consistently held that the presence of an independent mediator belies any suggestion of fraud or collusion. *See, e.g.*, *Montoya v. PNC Bank, N.A.*, No. 14-2-474-CIV-Goodman, 2016 WL 1529902, at *8 (S.D. Fla. Apr. 13, 2016) (use of mediator indicates that there is "no suggestion of fraud or collusion"); *In re WorldCom, Inc. ERISA Litig.*,

No. 02-Civ-4816, 2004 WL 2338151, at *6 (S.D.N.Y. Oct. 18, 2004) (presence of mediator negates any suggestion of collusion).

(2) Complexity, Expense, And Duration Of Litigation

In the event that this action was not settled, Roberson and the Class faced the prospect of a long and potentially expensive litigation. For one, given that this case is still in the middle of class discovery, if there is no settlement, the action would likely continue for another two to four years before a final, non-appealable judgment was reached. The early settlement accomplished in this matter provides the Class with the opportunity to avoid that delay, and to obtain a recovery now. Further, this matter would have likely included a meaningful amount of additional expense. Indeed, if this matter continued through class certification, trial and appeal, it is likely that Class Counsel would incur over a million dollars in attorneys' fees and over a quarter of a million dollars in expenses (for experts, depositions and ESI).

In addition, while Roberson believes that resolution of this case involves a straight-forward statutory question, it is admittedly a question of first impression that has never been directly decided by the Georgia Court of Appeals or the Georgia Supreme Court. While Roberson believes that her and the Class's legal position is the correct one, there is nonetheless substantial risk to Roberson and the Class in continuing to litigate this issue. Indeed, in the related class action of *Tucker*, the defendant moved for judgment on the pleadings based on the new statutory amendment, and ECI may very well do the same here, and ultimately the Court of Appeals would have to decide all of these issues.

(3) The Stage Of The Proceedings At Which The Settlement Was Achieved

As stated above, the Settlement has been achieved at a relatively early stage in the litigation; *i.e.*, while Roberson's motion to compel class discovery remains pending and before

any class certification motion was due to be filed.

This fact militates in favor of approving the Settlement for at least two reasons. First, by settling early in the litigation, the Class avoids the risk of losing the motion to compel, the motion for class certification, any interlocutory appeal from such class certification orders, and any jury trial. Second, an early settlement allows Class members to obtain recovery several years sooner than they would if this case proceeded through trial and appeal.

With respect to the amount of discovery completed, although the Settlement occurred before class discovery was completed, Roberson and Class Counsel were able to make an informed decision regarding the settlement amount. Indeed, before mediation, ECI provided to Class Counsel data from which the parties were able to make reasonable and good faith estimates regarding Class damages. *See* Aff. of J. George, attached to this motion as Exhibit 3. The estimates and other information regarding the data were shared with the mediator.

(4) The Probability Of Success On The Merits

Although Roberson believes strongly in her claims, given the early stage of this litigation, Roberson and the Class face numerous hurdles before obtaining a final judgment. Among other things, Roberson and the Class would have to prevail on their pending motion to compel class discovery, then file a motion for class certification, likely take or defend against an interlocutory appeal on class certification, defeat summary judgment, succeed at trial, and then take or defend a second and final appeal on the final judgment. And as set forth above, because the Georgia Court of Appeals and Georgia Supreme Court have never ruled on the question presented here, there are substantial risks to both sides which factor heavily in favor of settlement.

(5) The Range Of Possible Recovery

The Class Settlement offers possible recovery for *twenty years* of potential claims. By

itself, this factor weighs in favor of approving the settlement. Although Roberson believes strongly that a twenty-year statute of limitations applies, ECI is likely to challenge whether a six-year statute of limitation period would apply instead. As a result, the Class Settlement is favorable to the Class in providing for the broader statutory period.

Meanwhile, any individual class member can receive up to their total security deposit in terms of potential recovery. In other words, if an individual class member had a $1,000 security deposit fully withheld, the individual class member may receive the entire $1,000 through this Class Settlement. *See* Ex. 2, Comprehensive Settlement Agreement, at 2.

And though the individual class member loses the ability to receive treble damages, compromise is necessary for settlement to occur, and importantly, the class member receives the benefit of finality and resolution of all claims and potential counter-claims against the class member, which could potentially result in the class member receiving nothing at all.

(6) The Opinions Of Class Counsel, The Class Representatives, And The Substance And Amount of Opposition

As stated above, Class Counsel has extensive experienced litigating class actions on both the plaintiff and defense sides. Class Counsel would not have agreed to the settlement, and would not request approval from this Court, if they did not believe that this settlement was fair, reasonable and adequate. Ex. 4, Ramachandrappa Aff.; Ex. 5, Lamer Aff.; Ex. 6, Wexler Aff. Moreover, this Court has already preliminarily approved a settlement in a related class action against Post Properties, in which the total amount available to the class was $2 million—*i.e.*, $400,000 less in total available relief to the Class.

3. The Court Should Approve The Proposed Schedule For Final Settlement Approval, Class Notice Forms, The Administrator, And The Claim Forms.

A proposed order is attached as Exhibit 1, and a proposed order is also being separately

filed on the Court's docket. The proposed order sets forth the following schedule, which is also contained in the Comprehensive Settlement Agreement between the parties:

- within 15 calendar days of the Court's preliminary approval order, the ECI Defendants shall provide the Class Action Administrator with the information needed to administer the Class, including but not limited to, names of Class members (to the extent known), last known addresses of known Class members, and any other information the Class Action Administrator deems necessary for administration;

- within 60 calendar days of the Court's preliminary approval order, the Class Action Administrator shall provide notice to Class members using a methodology that will ensure notice is received by at least 70 percent of Class members as set forth below, and such notice shall include a copy of the Claim Form;

- within 90 calendar days of the Court's preliminary approval order, Roberson and Class Counsel shall file motions for Class Representative Service Award and Class Counsel fees and expenses;

- within 150 calendar days of the Court's preliminary approval order (and such date shall constitute the Deadline for Class Claims, Opt-Outs, and Objections), Class Members must submit any claims, requests to opt out of the Class, or objections;

- no earlier than 30 calendar days from the Deadline for Class Claims, Opt-Outs, and Objections, the Court shall hold a final approval hearing.

The parties agree that Kurtzman Carson Consultants ("KCC") shall serve as the Class Action Administrator and perform the duties, tasks, and responsibilities associated with providing Class Notice and administering the settlement, and the Court is asked to appoint KCC as Class Action Administrator.

The parties also agree to the forms of notice, short form and long form, and the claims form, all of which are attached as exhibits to this motion. *See* Short Form Notice, attached to this motion as Exhibit 7; Long Form Notice, attached to this motion as Exhibit 8; Claim Form, attached to this motion as Exhibit 9. These documents do not contain specific dates, but rather have placeholders that indicate how many days the deadline runs from the entry of the Court's

preliminary approval order. Once the Court issues its preliminary approval order, those dates will be filled in with date-certain deadlines.

Conclusion

For those reasons, this Court should grant Roberson's motion for preliminary approval of the class and class notice. Signature and certificate of service pages follow.

Roberson submits this motion on August 3, 2020.

/s/ Naveen Ramachandrappa

Michael B. Terry
Ga. Bar No. 702582
Naveen Ramachandrappa
Ga. Bar No. 422036
BONDURANT, MIXSON &
ELMORE, LLP
1201 W Peachtree St NW
Ste 3900
Atlanta, GA 30309
Tel: 404-881-4100
Fax: 404-881-4111
terry@bmelaw.com
ramachandrappa@bmelaw.com

Shimshon Wexler
Ga. Bar No. 436163
THE LAW OFFICES OF SHIMSHON
WEXLER, P.C.
315 W Ponce de Leon Ave Suite 250
Decatur, Georgia 30030
Tel: 678-699-1938
Fax: 678-609-1482
swexleresq@gmail.com

Bryant T. Lamer
Pro Hac Vice Admitted
SPENCER FANE LLP
1000 Walnut Street, Suite 1400
Kansas City, MO 64106
Tel: (816) 474-8100
Fax: (816) 474-3216
blamer@spencerfane.com
adwyer@spencerfane.com

Attorneys for Plaintiff Nichon Roberson on behalf of herself and the Class

Certificate of Service

I certify that, on August 3, 2020, I served a copy of **Plaintiff Nichon Roberson's Motion Unopposed Motion For Preliminary Approval Of Class Settlement And Class Notice** by email on the following counsel of record for the ECI Defendants:

Daniel Diffley
David B. Carpenter
Kristi Ramsay
ALSTON & BIRD LLP
1201 W Peachtree St NW
Atlanta, GA 30309
dan.diffley@alston.com
david.carpenter@alston.com
kristi.ramsay@alston.com

/s/ Naveen Ramachandrappa