IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

FRANCINE McCUMBER, ET AL. Plaintiffs, v. INVITATION HOMES, INC., a Maryland corporation Defendant.	Case No. 3:21-cv-02194-B Judge Jane J. Boyle

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND BRIEF IN SUPPORT THEREOF

TO THE COURT, ALL PARTIES, THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs Francine McCumber, Erin Dolce (f/k/a Erin Bird and Erin Bryd), Melissa Lynch, La Shay Harvey, Maryah Marciniak, Brian Majka, Chad Whetman, Tracy White, Rachel Osborn, Teresa Kerr (f/k/a Tereasa Maria Moore), and Jose Rivera (collectively "Plaintiffs") will and hereby do move this Court for an Order finally approving the settlement agreement reached with Defendant Invitation Homes, Inc.

This motion is based on the attached Memorandum of Points and Authorities, the supporting Declaration of Alex Tomasevic and its attached exhibits, the supporting Declaration of Kevin Tran of Angeion Group and its attached exhibits; the concurrently filed Motion for Attorneys' Fees, Costs, and Service Awards, and all other pleadings and papers on file in this action, and upon such other matters or arguments as may be presented to the Court at the time of the hearing.

Respectfully submitted,
Dated: March 15, 2024

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I. INTRODUCTION

This Motion seeks final approval of the parties' proposed $7,500,000 "late fees" class action settlement. This Honorable Court preliminarily approved the settlement as fair and reasonable on November 29, 2023. Dkt. No. 109.[1]

This case challenges Defendant Invitation Homes, Inc., and its predecessors' (collectively "Defendant" or "INVH," unless otherwise clarified) charges to tenants in 11 states for late payment of rent. In short, Plaintiffs – who come from each of the 11 represented states, including Texas – alleged that INVH's standard late fees in its form lease agreements amount to improper penalties under the consumer protection laws and/or common law of each of their states. Defendant has vigorously opposed this matter, which was litigated heavily in three different actions in three different states for a total of about five years.

The settlement provides significant monetary relief for tenants and will finally end lengthy and hotly contested litigation applying the laws of 11 different jurisdictions.

The basic terms of the settlement provide for:

- A total, non-reversionary class settlement of $7,500,000 to be funded by Defendant (the "Total Settlement Amount"), with up to 25% of that amount (or up to $1,875,000) in the form of debt forgiveness to certain class members who have high active balances owing to INVH.
- The Gross Settlement Amount covers all alleged damages, attorneys' fees (up to 33.0% of the Gross Settlement Amount), litigation costs (up to $30,000), costs of settlement administration (currently budgeted at $175,000 or less), and typical

[1] In a separate motion or application set to be heard on the same date as this motion, Plaintiffs move for approval of attorneys' fees, litigation costs, and representative service awards.

representative enhancement awards to the named Plaintiffs for their efforts in filing the case against their landlord, sticking with the case for all this time, working closely with counsel, and helping to achieve these results ($5,000 each, or $55,000 total).

- An experienced and neutral Settlement Administrator, Angeion Group, sent out direct written notice to all class members via email or mail that explained the settlement terms and gave everyone the option to participate in the settlement, object to it, or opt out of it with no obligation. The Settlement Administrator also established a settlement website and toll-free telephone support.

An objective evaluation of the settlement confirms that the relief negotiated at arms-length is fair, reasonable, and valuable. The Parties negotiated the settlement only after one failed mediation, then another separate full day of mediation with the Honorable Jeff Kaplan (Ret.). And the settlement provides Class Members with valuable relief for their claims in terms of real money or debt relief, not coupons or illusory equitable relief. The relief also does not require the submission of a claim. Further, by settling now, Class Members will not have to wait (possibly additional years) for relief (if any), nor will they have to bear the risk of class certification being denied or of Defendant prevailing at trial, or of recovering a smaller amount than obtained through this settlement, possible appeals, etcetera.

Overall, the settlement is an excellent result considering all the relevant circumstances. Accordingly, Plaintiffs seek approval of the proposed settlement as fair, reasonable, and adequate.

II. BACKGROUND[2]

A. The Claims

Defendant[3] operates in multiple states and rents out single-family residences. When tenants pay rent late (i.e., if not within a few days after the first of the month), Defendant assesses standard late charges under the lease – predominantly either a $95 flat fee, or 10% of monthly rent depending on the lease version. Plaintiffs allege that these late fees are excessive and amount to illegal penalties under the statutory and/or common laws of their state.

More specifically, Plaintiffs allege that INVH's standard fees are all illegal for the same reason. In all the relevant states, while landlords may institute appropriate "liquidated damages" provisions under certain circumstances, including to compensate the late payment of rent, they generally may only do so if: (a) it would be extremely difficult or infeasible to calculate actual damages from the late payment; *and* (b) the liquidated damages are a reasonable amount in light of the anticipated or actual harm. *See, e.g.*, Restatement (Second) of Contracts § 356(1) (Am. Law Inst. 1981) (the "Restatement"); Cal. Civ. Code § 1671(d); U.C.C. § 2-718(1). Most states, including all the states represented in this case, have adopted the Restatement into their common law or otherwise codified a statute similarly differentiating lawful liquidated damages provisions from unlawful late fee penalties.

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[2] Unless otherwise indicated, the factual support for these unopposed averments can be found in the accompanying Declaration of Class Counsel Alex Tomasevic ("Tomasevic Dec.").

[3] INVH was once privately held by New York's Blackstone Group. Blackstone took Invitation Homes public in February 2017. By that time, another large home rental firm—Waypoint Homes—had already merged with another—Colony Starwood—in 2016, to create "Starwood Waypoint Homes." Invitation Homes then merged with the new Starwood Waypoint Homes entity in November 2018 to create the current defendant: Invitation Homes, Inc. (NYSE: INVH). Part of Counsels' work and due diligence in this case was devoted to unpacking the byzantine structure of the various potentially liable parties and in combatting certain unique defenses raised by such facts (such as to "standing" to pursue claims against one company or another, and arguing over which legal entity was really the responsible party, if any).

Plaintiffs generally alleged that INVH's fees bare no reasonable relation to the alleged "damage" suffered by INVH, if any, arising from waiting a bit of extra for the rent payment. Most of the time, Plaintiffs posited, there is little or no damage to INVH from any late payments because the amounts due are usually (but not always) paid within a couple of days of the due date. Moreover, INVH has allegedly never attempted to conduct any analysis or "reasonable endeavor" to set the fee, often just picking arbitrary amounts to charge. At issue here are Defendant's late rent charges to tenants in Arizona, California, Colorado, Florida, Georgia, Illinois, Nevada, North Carolina, Tennessee, Texas, and Washington.

B. Procedural History

This case was originally filed in the Northern District of California by plaintiff Jose Rivera, only, on May 25, 2018. Mr. Rivera resided in one of INVH's California rental homes. In August of 2018, the remaining Plaintiffs joined Mr. Rivera in his California action and, in general, asserted claims under each of their respective states' laws. Eventually, however, the Northern District of California dismissed the claims of the non-resident tenants for lack of specific jurisdiction over their out of state claims. Those out-of-state plaintiffs (i.e., all of them except for Mr. Rivera) then re-filed, together, in federal district court in Maryland – Defendant's state of incorporation. That Maryland action, though, was transferred, in September of 2021, here to Dallas and this Court. Dallas is where INVH's headquarters sit. *See* Dkt. No. 31.

Mr. Rivera continued to conduct discovery and litigate his case in California, eventually filing his Motion for Class Certification. Defendant opposed and Plaintiff replied. The Northern District of California ruled on the fully briefed motion, however, by dismissing Mr. Rivera's claims on jurisdictional grounds and never ruling on the Rule 23 factors. Mr. Rivera eventually

re-joined his original co-plaintiffs in this Court. *See* Dkt. No. 93 (Amended Complaint adds Mr. Rivera). Class Counsel Nicholas & Tomasevic has always represented all plaintiffs in all cases.

Defendant denies all material allegations and has always vigorously defended all actions against it brought by these plaintiffs. For example, Mr. Rivera's California action included multiple motions to dismiss. Here, after Plaintiffs amended their complaint again in January of 2022, Defendant filed a Motion to Dismiss specifically targeting each claim from each state. Dkt. No. 58. The Court granted Defendant's motion in part and denied it in part. Dkt. No. 65. Plaintiff thereafter filed a Second Amended Complaint, Dkt. No. 66. Defendant then timely moved to dismiss that Amended Complaint. Dkt. No. 69. Defendant's new motion to dismiss was fully briefed when the parties went to their most recent mediation and reached a settlement.

C. Counsel's Investigation and Discovery

Prior to filing the suit, and continuing through the course of the litigation, Class Counsel conducted an extensive investigation into the factual and legal issues raised in this case. These investigative efforts included reviewing voluminous federal filings by Defendant, including SEC filings, as well as filings in states Defendant operated in or owned rental properties. Class Counsel, of course, also spent hours upon hours talking with the 11 named plaintiffs themselves and reviewing and analyzing their circumstances and documents. Counsel also searched for, identified, and interviewed numerous additional current and former tenants of Defendant, nationwide, speaking with them over the years about their experiences and compiling their supporting data and documents. As might be expected when dealing with 11 named plaintiffs to start, their referrals and contacts ballooned into contacts with many additional witnesses whose experiences were catalogued and fact-checked, and their documents gathered and analyzed.

Class Counsel also thoroughly researched and analyzed the legal issues regarding all claims which, naturally, involved the analysis of 11 states' laws, including each of their consumer protection statutes and their decisional law, and Defendant's defenses and potential defenses. From this research standpoint, the case was very much like 11 cases in one.

Moreover, the parties have conducted extensive discovery and investigation about the relative strengths and weaknesses of their respective positions and providing them with information needed to negotiate the proposed Settlement. Plaintiffs served and Defendant responded to multiple sets of written discovery requests, including Interrogatories and Document Requests. Eventually each named Plaintiff served their own discovery requests and Defendant responded. Also, and after the entry of a protective order, Defendant produced and Class Counsel reviewed about 10,000 additional pages of printable documents, but more material in the form of electronic data. All told, Class Counsel received and analyzed data concerning over 133,200 tenancies and 909,000 potentially relevant charges. Plaintiffs also deposed Defendant's Portfolio Director.

D. The Lengthy and Multi-Phased Settlement Discussions

The parties attended their first mediation in January of 2020. The case did not settle that day, but the parties continued to negotiate on a class-wide basis for a while thereafter with the assistance of the mediator, including by exchanging additional post-mediation settlement briefs. While that mediation and ensuing negotiations carried the benefit of forcing the parties to prepare and have serious good-faith discussions about the strengths and weaknesses of their case, the talks eventually stalled, and the case did not settle. The parties continued to litigate.

After two and half more years of additional litigation and discovery, the parties agreed to attend mediation again in August of 2022 before the Honorable Jeff Kaplan (Ret.). The parties

spent a whole day negotiating with Judge Kaplan's assistance. At the end of the day, Judge Kaplan made a Mediator's Proposal, which all parties accepted subject to some confirmatory details and data exchanges. The parties later arrived at an agreement about fees and costs. Defendant produced additional information and class data and the parties eventually finalized their written class settlement agreement which is attached to the accompanying Declaration of Alex Tomasevic as **Exhibit 1** (the "Settlement Agreement").

III. SUMMARY OF THE SETTLEMENT

A. The Settlement Classes

The proposed settlement classes are as follows:

1. Arizona tenants who were charged penalties or fees for paying rent that Defendant deemed as late or deficient between January 14, 2017, and the Preliminary Approval Date (Nov. 29, 2023).
2. California tenants who were charged penalties or fees for paying rent that Defendant deemed as late or deficient between January 14, 2018, and the Preliminary Approval Date.
3. Colorado tenants who were charged penalties or fees for paying rent that Defendant deemed as late or deficient between January 14, 2018, and the Preliminary Approval Date.
4. Florida tenants who were charged penalties or fees for paying rent that Defendant deemed as late or deficient between January 14, 2017, and the Preliminary Approval Date.

5. Georgia tenants who were charged penalties or fees for paying rent that Defendant deemed as late or deficient between January 14, 2015, and the Preliminary Approval Date.

6. Illinois tenants who were charged penalties or fees for paying rent that Defendant deemed as late or deficient between January 14, 2011, and the Preliminary Approval Date.

7. Nevada tenants who were charged penalties or fees for paying rent that Defendant deemed as late or deficient between January 14, 2017, and the Preliminary Approval Date.

8. North Carolina tenants who were charged penalties or fees for paying rent that Defendant deemed as late or deficient between January 14, 2017, and the Preliminary Approval Date.

9. Tennessee tenants who were charged penalties or fees for paying rent that Defendant deemed as late or deficient between January 14, 2015, and the Preliminary Approval Date.

10. Texas tenants who were charged penalties or fees for paying rent that Defendant deemed as late or deficient between January 14, 2019 and August 31, 2019;[4] and

11. Washington tenants who were charged penalties or fees for paying rent that Defendant deemed as late or deficient between January 14, 2018, and the Preliminary Approval Date.

[4] The reason for this Texas cutoff date is that, effective September 1, 2019, the Texas Legislature amended its late fee statute, and it now states that a late fee is considered per se "reasonable" if the fee is not more than 10 percent of the amount of rent. Tex. Prop. Code § 92.019(a). All of Defendant's fees were 10% or less. As a result, Plaintiffs' claims were dismissed by this Court insofar as they alleged improper late fees in Texas charged after August 21, 2019.

B. $7.5 Million Paid by Defendant on a Non-Reversionary Basis with No Claim Requirements

Per the settlement, defendant will fund a Total Settlement Amount of $7,500,000, of which up to 25% (or up to $1,875,000) will consist of debt relief and the rest shall be cash. Tomasevic Decl., Ex. 1, Settlement Agreement at § 2.33.

The Total Settlement Amount will also be used to cover Class Counsel's Costs of up to $30,000, Class Counsels Fees of up to 33.0% ($2,475,000), class representative service awards of up to $5,000 per representative (up to $55,000 total), and Settlement Administration Costs currently estimated to be $175,000 or less.

Regarding the individual payouts, Participating Class Members will fit into one of two buckets: a debt relief bucket or a net payout bucket. Regarding the debt relief component, many of the class members are, e.g., former tenants who vacated still owing considerable money to Defendant for things like unpaid rent or damage to their rental. The "Debt Relief" under the Settlement Agreement, in turn, applies to verifiable and active balances owed by Class Members whose outstanding balances with Defendant were more than $1,000 as of September 30, 2022, and who do not cure their balances before Final Approval. *Id.* at §§ 2.10, 4.2.4.1. Those debtors will receive (and only receive under the Settlement) an equal credit against their debt, with the sum total of all debt relief credits not to exceed the total earmarked for debt relief of $1,875,000.

All the other (non-debtor) class members on the other hand – those in the other bucket who do not opt out - will receive a flat and equal distribution of all remaining funds, i.e., an equal share of the Net Distribution Fund. *Id.* at § 4.2.4.1.

C. The Releases

In exchange for the consideration provided under the Settlement Agreement, Participating Class Members will release INVH and affiliated companies and agents only from any claims that were actually brought in this matter or based on the same factual predicate as this action, i.e. related to allegedly excessive late fees. Settlement Agreement at § 2.25. The named representatives only, considering their class representative awards, will provide broader "general" releases of all claims. *Id.* at § 5.2.

D. The Notice Process and Class Member Response

As the accompanying declaration of experienced class administrator Angeion Group confirms, direct written notice of the settlement was sent to all 150,690 class members as required by Sections VII and VIII of the Settlement Agreement and this Court's Order preliminarily approving the settlement. Declaration of Kevin Tran of Angeion Group ("Angeion Dec."), ¶¶ 5-6. More specifically:

1. Direct Notice Was Sent to Settlement Class Members

After preliminary approval, Defendant provided updated class member contact information to the Administrator and the Administrator then emailed class members with full copies of the Class Notice. *Id.* at § 7.2; Angeion Dec., ¶ 5. For those class members where email addresses were lacking, or where emails bounced back undelivered, the Administrator mailed the notice via First Class Mail after doing a search for updated addresses through the National Change of Address Database. Angeion Dec., ¶ 6.

2. Settlement Website and Toll-Free Number

The Settlement Administrator also established a dedicated, case-specific settlement website where Settlement Class Members could obtain further information about the case and the

Settlement. The settlement website was readable on mobile devices and included copies of key case documents, including but not limited to the Settlement Agreement and the operative Complaint. The Settlement Administrator also established a toll-free telephone number that Class members could call for more information. Angeion Dec., ¶ 9.

3. Opt-Outs and Objections

Class members could request to be excluded from the settlement. Settlement Agreement at § 8.1; Angeion Dec., ¶¶ 10-11, Ex. A. Alternatively, Class members could lodge objections to the settlement. Settlement Agreement at § 8.2. As of the date of this Motion,[5] 36 Class Members have excluded themselves and only nine (9) have objected,[6] meaning, at most, only 0.03 % of class members have attempted to express any disagreement (*implied* disagreement in the case of the exclusion requests) with the compromises reached. *See* Angeion Dec., ¶¶ 10-11; Tomasevic Dec., Ex. 4 (the printed objections received to date).

As also explained below and in Plaintiffs' separately filed responses to those objections, while the very few objections are heartfelt and understandable, they are largely not germane to the claims brought in this action and do not preclude finding this settlement to be, overall, fair and reasonable. For example, every objection received so far references alleged claims that are not a part of this case, like alleged instances of wrongful eviction (Tomasevic Dec., Ex. 4 *e.g.* A. Fowler

[5] By design, this Motion and the accompanying request for fees, costs, and service awards, is being served *before* the deadline to object so that class members, if they wish, can read the materials and thus have the benefit of seeing all the points, authorities, and discussions regarding the settlement to assist with making an informed decision. Plaintiffs will update the Court as necessary in a supplemental filing, or reply in support of approval, after the deadline to respond to the settlement closes and before our hearing.

[6] Counsel received 10 documents submitted through Angeion's objection portal, but only 9 were actual objections, with the 10th being a statement by a class member (Linda Frounder) affirmatively asking that this settlement be *approved*. *See* Tomasevic Dec., Ex. 4 (All "Objections").

Objection), cockroach infestations (T. Friesen Objection), failing to paint or otherwise repair the tenant's apartment (G. McCrae and T. Friesen Objections), allegedly unfairly raising rents (J. Pinzon Objection), and alleged unfair deductions from security deposits (J. Cuentas and T. Friesen Objections). While these complaints are understandable, they are not relevant to this settlement or the Court's analysis here because they are not a part of this case or settlement and thus these tenants are (and always were) free to pursue these issues separately. Overall, considering that, so far, only 0.03% of class members have chosen to exclude themselves or opt-out, and, furthermore, the objections received are largely for things *other* than for the late fee issues germane to this case, the reaction of class members is overwhelmingly positive here.

IV. DISCUSSION – THE SETTLEMENT IS WORTHY OF FINAL APPROVAL

A. The Settlement is Fair, Reasonable and Adequate

There are three principal steps for court approval of a class settlement under Rule 23(e): preliminary approval, notice to the class, and then a final approval hearing at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement are presented. Fed. R. Civ. P. 23(e). Here we are at the third and final step.

The law favors the compromise and settlement of class action suits. *See In re Deepwater Horizon*, 739 F.3d 790, 807 (5th Cir. 2014) (recognizing an "overriding public interest in favor of settlement that we have recognized [p]articularly in class action suits"); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement."). Approval of a proposed settlement "does not depend on establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable…the very uncertainty of outcome in litigation, as well as the avoidance of wasteful litigation and expense" lay behind the power to compromise. *Florida Trailer and Equipment Co.*

v. Deal, 284 F.2d 567, 571 (5th Cir. 1960). Ultimately, "[t]he gravamen of an approvable proposed settlement is that it be fair, adequate, and reasonable and is not the product of collusion between the parties." *Newby v. Enron Corp.*, 394 F.3d 296, 301 (5th Cir. 2004). The decision to grant approval of a class settlement is within the District Court's sound discretion. *Id.* at 300.

Prior to the amendment of Rule 23(e) in 2018, the Fifth Circuit adopted six factors—the "*Reed* factors"—for courts to use in determining whether a settlement is fair, reasonable, and adequate: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members. *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983); *Deepwater Horizon*, 739 F.3d at 820.

Like the *Reed* factors, revised Rule 23(e)(2) establishes factors for the Court's consideration which overlap considerably with the *Reed* factors. *See* Fed. R. Civ. P. 23(e)(2) (court must consider whether: (a) the class representatives and class counsel have adequately represented the class; (b) the proposal was negotiated at arm's length; (c) the relief provided for the class is adequate, taking into account the costs, risks, and delay of trial and appeal, the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, the terms of any proposed award of attorney's fees, including timing of payment, and any agreement required to be identified under Rule 23(e)(3); and (d) the proposal treats class members equitably relative to each other).

The Settlement here is fair, reasonable, and adequate under the circumstances of this case. There was no collusion or fraud. The Settlement readily satisfies all applicable standards for final settlement approval.

B. The Settlement is the Product of Extensive, Arms-Length Negotiations (*Reed* Factor 1; Fed. R. Civ. P. 23(e)(2)(B))

There is a strong presumption of fairness when a proposed class action settlement is reached through arm's-length negotiations between experienced counsel, following meaningful discovery. *See In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1063 (S.D. Tex. 2012); *Welsh v. Navy Fed. Credit Union*, No. 16-cv-1062-DAE, 2018 U.S. Dist. LEXIS 227456, at *33 (W.D. Tex. Aug. 20, 2018) ("Courts may presume that a proposed settlement is fair and reasonable, and lacking fraud or collusion, when it is the result of arms-length negotiations.").

Here, the Settlement is the product of hard-fought, arms-length negotiations between the parties and their experienced and well-informed counsel. The parties tried but refused to settle at the first mediation. Then, after more than two years of additional litigation, the parties participated in long mediation sessions with experienced and well-respected mediator—Hon. Jeff Kaplan (Ret.), former long-time Magistrate in the Northern District and former State Appellate Court Justice. Even then, the parties did not reach these compromises on their own, but rather, only after Judge Kaplan made a last-best-final Mediator's Proposal at the end of a lengthy day of negotiations. Throughout their negotiations, the Parties were represented by counsel experienced in the prosecution, defense, trial, and settlement of complex class actions. Tomasevic Dec., ¶¶ 2-22.

1. The Advanced Stage of the Proceedings and the Substantial Amount of Discovery and Litigation in the Several Cases that Comprise this Case Further Support Approval (Reed Factor 3; Fed. R. Civ. P. 23(e)(2)(A))

This factor asks merely whether "the parties have obtained sufficient information to evaluate the merits of the competing positions…and whether the parties have obtained sufficient information about the strengths and weaknesses of their respective cases to make a reasoned judgment about" settlement. *Welsh*, 2018 U.S. Dist. LEXIS 227456, *40 (internal quotation marks omitted).

The Settlement here is informed by counsels' substantial investigation and discovery regarding the legal and factual issues in the litigation. Before filing the case, Class Counsel conducted an extensive investigation into the factual underpinnings of the claim and the applicable law of all 11 states at issue. Class Counsel engaged in ongoing factual and legal investigation throughout the course of the litigation, including identifying and speaking to numerous potential fact and expert witnesses and speaking with class members across the country about their experiences. Class Counsel have also conducted extensive formal discovery in this case, including the serving of over a dozen sets of written discovery, the receipt and review of thousands of pages of printable material, and the receipt and analysis of class data. The parties sometimes fought over the proper scope of discovery. Further, there has been significant motions practice in this case, including multiple motions to dismiss and, in the California action, a fully briefed motion for class certification. In negotiating the Settlement, the parties and their counsel were significantly informed by this work and the Court's rulings.

In short, Plaintiffs and Class Counsel prosecuted this action on behalf of the Class with vigor and dedication for five years. Moreover, Plaintiffs themselves were actively engaged—each

provided pertinent information and documents and communicated regularly with Class Counsel up to and including evaluating and approving the proposed Settlement. Tomasevic Dec., ¶ 47. This strongly favors approval of the Settlement.

2. The Settlement Represents a Strong Result for the Settlement Class, Particularly Given the Risks, Complexities, and Likely Duration of Ongoing Litigation (Reed Factors 2, 4, & 5; Fed. R. Civ. P. 23(e)(2)(C))

The Settlement provides substantial monetary relief—$7.5 million—that is well-tailored to the alleged harm. Plaintiffs in this case allege that INVH charged excessive "late" fees that were not proper liquidated damages, but rather, illegal penalties. The settlement addresses the alleged harm by paying money meant to be, in essence, a partial refund of these fees. The $7.5 million Total Settlement Amount—which was reached pursuant to a Mediator's Proposal presented by Judge Kaplan following extensive mediation (the parties' second) —represents a substantial portion of what realistically could have been achieved in this case, even assuming Plaintiffs were able to overcome the various remaining hurdles to certification and other milestones, successfully try this case to judgment, and hold onto that judgment through appeals.

Of course, Defendant vehemently denied that its fees were in any way unreasonable or improper. Defendant had evidence that its fees were reasonable in relation to its actual damages and set fairly because actual damages are difficult to quantify precisely under the circumstances. *Cf. Cleven v. Mid-Am. Apt. Communities, Inc.*, 20 F.4th 171, 177 (5th Cir. 2021) (a late fee need only be "a reasonable estimate of uncertain damages to the landlord that are incapable of precise calculation and result from late payment of rent.").

Moreover, even if successful on the core question of liability, calculating the potential net class damages in this case with precision is very difficult (Defendant would argue impossible).

Even if Plaintiffs succeeded in obtaining a ruling that all fees were excessive or improper, that would have been just the start of the analysis, not the end. That is because even if Defendant is not entitled to the standard late charge as a *liquidated* damage, it would nonetheless be entitled to recover its *actual* damages as a potential setoff to any class member recovery here. *See, e.g.*, Tex. Prop. Code § 92.019(e); *Garrett v. Coast & S. Fed. Sav. & Loan Ass'n*, 511 P.2d 1197, 1203 (Cal. 1973) (Even if the charge is found to be void, the consumer does not "escape[] unscathed. He remains liable for the actual damages resulting from his default.").

Here, Defendants collected about $84 million in late fees in all the relevant jurisdictions over the relevant period as of mediation but had substantial evidence that they were entitled to a setoff of over $65 million for late or unpaid rent and property damage, leaving potentially only $19 million assuming Plaintiffs could prove that *every* late fee collected was unreasonable *every* time.

And, of course, INVH had defenses to class certification in the first instance. If Plaintiffs failed to certify a class, the practical result would not be $19 million, but rather, quite possibly, if not likely, no relief at all for the class. Thus, a pre-certification recovery of about 39.5% of estimated net damages is a strong result for Participating Class Members, particularly considering the significant risks and challenges, and the substantial complexity, of ongoing litigation. Courts in the Fifth Circuit regularly approve class settlements making far lower percentages of total potential damages available to class members. *See, e.g.*, *Hays v. Eaton Grp. Attys, LLC*, No. 17-cv-88-JWD-RLB, 2019 U.S. Dist. LEXIS 17029, at *28 (M.D. La. Feb. 4, 2019) ("[a]settlement can be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery," and citing cases) (internal quotation omitted); *In re Pool Prods. Distribution Mkt. Antitrust Litig.*, 310 F.R.D. 300, 316-17 (E.D. La. 2015) (approving $600,000 settlement

when the potential recovery was $23,951,893); *In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-cv-2165, 2009 U.S. Dist. LEXIS 19210 (E.D. La. Mar. 2, 2009) (approving $6.5 million settlement when potential recovery was $32 million).

While Plaintiffs absolutely believe that their obstacles to recovery were not insurmountable, they are indicative of the substantial risks that Plaintiffs and the proposed Class would face if the litigation were to continue. The proposed Settlement provides considerable, appropriately tailored relief while allowing Class Members to avoid the risks of unfavorable, and in some cases dispositive, rulings on these and other issues.

Next, the method for distributing the payments—direct payments via automatic account debt credits and mailed checks, without the need for Class Members to submit claims—further supports the reasonableness of the Settlement. Payments or credits will be issued for all class members, and all the $7.5 million will be spent in favor of the resolution without any possible reversion back to Defendant.

Finally, "[w]hen the prospect of ongoing litigation threatens to impose high costs of time and money on the parties, the reasonableness of approving a mutually-agreeable settlement is strengthened." *Klein v. O'Neal*, 705 F. Supp. 2d 632, 651 (N.D. Tex. 2010); *see also In re Heartland Payment Sys., Inc. Customer Data Breach Litig.*, 851 F. Supp. 2d 1040, 1064 (S.D. Tex. 2012) (approving settlement and noting that litigating case to trial would be "time consuming, and '[i]nevitable appeals would likely prolong the litigation, and any recovery by class members, for years'").

Here, the settlement also provides another significant benefit that would not be available if the litigation were to continue—prompt relief. Proceeding to trial could add years to the resolution of this litigation, given the legal and factual issues raised and likelihood of appeals, imposing great

burdens on the Parties and Courts no matter what the eventual outcome. This Settlement relief is fair, reasonable, and adequate.[7]

3. The Recommendation of Experienced Counsel also Favors Approval (Reed Factor 6)

"[W]here the parties have conducted an extensive investigation, engaged in significant fact- finding and Lead Counsel is experienced in class-action litigation, courts typically defer to the judgment of experienced trial counsel who has evaluated the strength of his case." *Schwartz v. TXU Corp.*, 2005 WL 3148350, at *21 (N.D. Tex. Nov. 8, 2005) (citation and internal quotations omitted); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) (in "evaluating the terms of the compromise in relation to the likely benefits of a successful trial…the trial court is entitled to rely upon the judgment of experienced counsel for the parties"); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 292 (W.D. Tex. 2007) (class counsel's opinion "is entitled to deference, especially in light of class counsel's significant experience in complex civil litigation and their lengthy opportunity to evaluate the merits of the claims").

Plaintiffs and Class Counsel have prosecuted this action with vigor and dedication for years (and spent substantial time prior to then investigating these claims). And counsel have extensive experience in the prosecution, defense[8] and settlement of class actions and other complex matters, including, specifically, landlord-tenant class actions. Indeed, Class Counsel has tried such

[7]There are no agreements between the Parties besides the Settlement to be considered under Fed. R. Civ. P. 23(e)(2)(C)(iv).

[8] The defense of this matter was led by attorney Aaron T. Winn, Esq., Partner with the multi-national firm Duane Morris, LLP and carrying the AV Preeminent Peer Review rating by Martindale-Hubbell. *See* https://www.duanemorris.com/attorneys/aarontwinn.html#tab_Resume (last accessed March 14, 2024). Mr. Winn specializes in class action litigation, has been recognized as one of California's "top class action attorneys," has been listed among the *National Law Journal's* "Top 100 Hall of Fame," and also in *The Best Lawyers in America*, 2023 and 2024. *Id.*

landlord-tenant class actions under the same theories (as well as other complex class actions). Tomasevic Dec., ¶ 5. Based on their experience and knowledge about this case, Counsel have weighed the benefits of the Settlement against the inherent risks, complexities, and expense of continued litigation, and they believe that the proposed Settlement is fair, reasonable, and adequate. That qualified and well-informed counsel endorse the Settlement as being fair, reasonable, and adequate further supports approving the Settlement. *See Marcus v. J.C. Penney Co.*, No. 13-cv-736, 2017 U.S. Dist. LEXIS 214427, at *10 (E.D. Tex. Dec. 18, 2017), *R&R adopted*, 2018 U.S. Dist. LEXIS 2387 (E.D. Tex. Jan. 4, 2018) ("Significant weight is given to the opinion of class counsel concerning whether the settlement is in the best interest of the class and the court is not to substitute its own judgment for that of counsel.").

4. The Positive Reaction from the Class Also Favors Approval (Reed Factor 6)

As noted above, pursuant to the Court's preliminary approval order, the Settlement Administrator sent direct notice to all Class Members. Angeion Dec., ¶¶ 5-6. Since then, relatively few Class Members have excluded themselves from the settlement. Many have affirmatively reached out to counsel to thank them for achieving the settlement and to talk glowingly about the result. To date, only nine class members have objected. Tomasevic Dec., ¶ 49.

The lack of significant objections demonstrates the fairness, reasonableness, and adequacy of the settlement. First, only 0.03% of members responded with either exclusions or objections to support approval. *Cf. Kang v. Wells Fargo Bank, N.A.*, 2021 WL 5826230, at *14 (N.D. Cal. Dec. 8, 2021) ("percentages of nearly 5% have been deemed so 'overwhelming[ly] positive' as to support approval of the class action settlement") (quoting *Chun-Hoon v. McKee Foods Corp.,* 716 F.Supp.2s 848, 852 (N.D. Cal. 2010) (approving settlement where 4.86% of the class opted out);

see also Churchill Village, LLC, v. General Electric, 361 F.3d 566, 577 (9th Cir. 2004) (that only 45 of the approx. 90,000 class members objected, and that only 500 opted out, supports the fairness of the settlement); *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 318 (3d Cir. 1998) (0.2% of class opting out was "truly insignificant").

Second, and more importantly, the objections are – with all due respect – misplaced. This is explained again in the forthcoming written response to each objection. To summarize, the objectors typically want things that are not or never were a part of this case. Indeed, *every* objection received so far references alleged claims that are not a part of this case, like alleged instances of wrongful eviction (Tomasevic Dec., Ex. 4, e.g. A. Fowler Objection), cockroach infestations (T. Friesen Objection), and failing to paint or otherwise repair the tenant's apartments. Such complaints are unfortunate, but not relevant today because they are not a part of this case or settlement and thus these claims are *not* released by this settlement. Tomasevic Dec., Ex. 1, Settlement Agreement at § 2.25 (only claims brought in this case are being released). At bottom, the reaction of class members is overwhelmingly positive here further supporting approval.

C. The Settlement Treats Class Members Equitably (Fed. R. Civ. P. 23(e)(2)(D))

The proposed Settlement does not grant preferential treatment to the Plaintiffs or to any segment of the Class. The settlement benefits will be distributed equally, i.e., nobody gets more cash or credit than anyone else. This distribution model, arrived at only after pouring over the transaction data, also has the advantage of being most administratively efficient, thus keeping transaction costs reasonable. Indeed, there is no claims process as part of this settlement, thus further reducing costs and the chances of illegitimate "claims" that could hamper fair distribution.

Finally, Class Representative Service Awards, such as those that will be requested separately for the Named Plaintiffs here, are commonly awarded in class actions, are well-justified

under the circumstances, and are appropriate in amount given the Plaintiffs' commitment and effort in the litigation over its several years.

D. The Court Should Confirm Certification of the Settlement Classes

The Court previously approved the definitions of the Settlement Classes in the Preliminary Approval Order. The Court should reaffirm certification of the Settlement Classes, in conjunction with final approval of the Settlement, because the standards of Rule 23(a) and Rule 23(b)(3) are satisfied, as explained during the Preliminary Approval stage.

E. The Settlement Class Notice Program Satisfied Rule 23 and Due Process

The Settlement Class Notice Program agreed to by the Parties and approved by the Court's Preliminary Approval Order was the best notice practicable under the circumstances, complied with each requirement of Rule 23(c) and (e) and constitutional due process. Those Court-approved notices provided direct notice to Settlement Class members by email and mail, sometimes multiple times. The substance of the notices explained the terms of the Settlement in common language (including all requested fees, costs, service awards, and releases), including the nature of the action; the definition of the Settlement Classes certified; the class claims being litigated and settled; that a class member may enter an appearance through an attorney if the member so desires; that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment. Direct notice was supplemented by online publication and toll free hotline support.

Similar class notice programs have been approved as satisfying the federal rules and due process. *See Bazerman v. Am. Airlines, Inc.*, No. 17-cv-11297-WGY, 2019 U.S. Dist. LEXIS 245494, at *6-8 (D. Mass. Apr. 8, 2019) (granting final approval); *see also Spegele v. Usaa Life Ins. Co.*, No. 17-cv-967-OLG, 2021 U.S. Dist. LEXIS 204744, at *14 (W.D. Tex. Aug. 26, 2021);

Wolfe v. Anchor Drilling Fluids USA Inc., No. 15-cv-1344, 2015 U.S. Dist. LEXIS 182835, at *5 (S.D. Tex. Dec. 7, 2015).

Further, pursuant to the Class Action Fairness Act and this Court's Preliminary Approval Order, American, assisted by the Settlement Administrator, provided notice of the Settlement to applicable federal and state governmental regulators. *See* Angeion Dec., ¶ 3. None of the regulators have objected to the Settlement.

V. CONCLUSION

For the foregoing reasons, and those contained in the supporting declarations, the accompanying Motion for Attorneys' Fees, Costs, and Service Awards, Plaintiffs respectfully request that the Court grant final approval of the Settlement and enter the proposed Final Approval Order and Judgment.

Respectfully submitted,

Dated: March 15, 2024

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ATTORNEYS FOR PLAINTIFFS FRANCINE MCCUMBER, ET AL.

CERTIFICATE OF CONFERENCE

As required by Local Rule 7.1(b), I certify that I have conferred with counsel for Defendant Invitation Homes, Inc. about the merits of Plaintiffs' Motion for Final Approval of Class Action Settlement. Defendant Invitation Homes, Inc. does not oppose Plaintiffs' motion.

Respectfully submitted,
Dated: March 15, 2024

NICHOLAS & TOMASEVIC LLP

/s/ Alex Tomasevic
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ATTORNEYS FOR PLAINTIFFS FRANCINE MCCUMBER, ET AL.

CERTIFICATE OF SERVICE

On March 15, 2024, electronically submitted the foregoing document with the Clerk of the Court for the U.S. District Court, Northern District of Texas, using the Court's electronic filing system pursuant to Local Rule 5.1(d). I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

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