UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EDWARD SCHWARTZ, on behalf of himself and others similarly situated, Plaintiff, vs. AVIS RENT A CAR SYSTEM, LLC, and AVIS BUDGET GROUP, INC., Defendants.	Civil Action No. 11-4052 (JLL) (JAD)
DANIEL KLEIN and STEPHANIE KLEIN, on behalf of themselves and others similarly situated, Plaintiffs, vs. BUDGET RENT A CAR SYSTEM, INC. and AVIS BUDGET GROUP, INC., Defendants.	Civil Action No. 12-7300 (JLL) (JAD)

MEMORANDUM OF LAW OF PLAINTIFFS AND THE CLASSES IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

These two largely identical cases, against related corporate defendants whose business is the rental of automobiles and other vehicles, have been hotly litigated for years—*Schwartz* since 2011 and *Klein* since 2012. In *Schwartz*, the Court certified a nationwide litigation class, and the Third Circuit denied defendants' petition for Rule 23(f) review of that ruling. After plaintiffs in *Klein* defeated a motion to dismiss and discovery began, *Klein* was placed on hold pending the outcome of the motion for class certification in *Schwartz*.

After extensive and sometimes contentious arms-length negotiations, the parties in both cases have reached a settlement, which is memorialized in the parties' January __, 2016 Settlement Agreement and Release (the "Settlement Agreement" or "SA"),[1] The Settlement Agreement and its exhibits are attached as Exhibit 1 to the Declaration of Bruce D. Greenberg ("Greenberg Decl."). As detailed below, the Court should preliminarily approve the Settlement Agreement because, among other things, it provides substantial benefits to Class Members, includes a comprehensive notice plan, and satisfies the requirements of FED. R. CIV. P. 23(e). The Court should also amend the Class Period, approve the notice plan, and appoint plaintiffs as representatives of the respective classes and their counsel as Class Counsel.[2]

[1] The capitalized terms used in this Memorandum are defined in Section I of the Settlement Agreement.

[2] The parties agree that certification of the Settlement Class in Klein pursuant to this motion is for purposes of settlement only, and not for purposes of liability. Specifically, defendants do not agree that *Klein* would be appropriate for certification of a liability class if for any reason the Settlement is not approved.

II. FACTUAL BACKGROUND

A. History of the Litigations.

1. Schwartz v. Avis

Schwartz was filed on July 14, 2011. Doc. No. 1. Plaintiff Edward Schwartz, on behalf of himself and all other Avis renters nationwide, alleged that Avis misrepresented and intentionally concealed that Avis would charge customers who rented vehicles online through Avis's website, www.avis.com, and accepted Avis's offer of frequent flyer miles in connection with those rentals. Though Avis appeared to represent that frequent flyer miles would be provided without charge, as most frequent flyer miles are, in fact, Avis would charge $.75 per rental day for the receipt of frequent flyer miles. *Schwartz* charged that Avis had violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. ("CFA"), and also alleged that Avis's conduct constituted a breach of contract.

The Complaint alleged in detail how, during the online rental process, Avis discloses numerous fees, charges, and extras but has not then stated that there would be any charge for frequent flyer miles. Only after a renter has picked up a vehicle has Avis "disclosed," in a document left on the seat of the vehicle for the renter to discover as he or she is about to drive away, and in a receipt provided after the rental has ended, that there has been such a charge. Even then, Mr. Schwartz contended, the "disclosures" are made only in code, a code that is not even the same in the two after-the-fact documents. The Complaint also argued how a "disclosure" of the frequent flyer charge on its website was in fact no disclosure at all, alleging that few if any renters would ever find it.

After plaintiff filed an Amended Complaint to attach an exhibit that was inadvertently omitted from his initial pleading, Doc. No. 4, Avis moved to dismiss on November 16, 2011. Doc. No. 11. After full briefing, the Court dismissed plaintiff's CFA claim without prejudice and with leave to replead on May 29, 2012. Doc. No. 39. The Court denied the remainder of defendant's motion to dismiss, but allowed defendant to move again to dismiss if plaintiff refiled. *Id*.

On June 18, 2012, plaintiff filed a Second Amended Complaint. Doc. No. 44. On July 9, 2012, Avis again moved to dismiss. Doc. No. 47. This time, however, on September 18, 2012, the Court dismissed plaintiff's CFA claim to the extent that it alleged affirmative misrepresentations, but denied dismissal of the CFA claim to the extent that it alleged intentional omissions, and the Court also permitted the breach of contract claim to proceed. Doc. Nos. 56, 57.

On March 8, 2013, plaintiff moved to file a Third Amended Complaint, in order to add defendants who were related to Avis as a result of what plaintiff had learned in discovery. Doc. No. 73. Avis filed opposition, Doc. No. 82, but Judge Hammer granted plaintiff's motion on May 20, 2013, Doc. Nos. 92, 93.

On March 14, 2014, defendants filed a motion for summary judgment. Doc. No. 120. That motion contended that plaintiff lacked standing to bring any claims. *Id*. After full briefing had been completed, and additional submissions ordered by the Court (*see* Doc. No. 127) had been made by both sides, the Court conducted oral argument on that motion on July 9, 2014. Doc. No. 143. The parties then each submitted post-argument letters. Doc. Nos. 144, 145. On August 6, 2014, the Court issued an opinion and an Order denying defendants' motion for summary judgment. Doc. Nos. 151, 152.

As directed by Judge Hammer, the moving papers, opposing papers, and reply papers on plaintiff's motion for class certification, which sought a nationwide class, and the moving and opposition papers on defendants' motion to strike plaintiff's expert, Vicki Morwitz, were all filed with the Court on July 16, 2014. Doc. Nos. 146-150. Defendants filed their reply on their motion to exclude Dr. Morwitz on August 13, 2014. Doc. No. 154.

On August 28, 2014, the Court issued an opinion and an Order granting plaintiff's motion to certify a nationwide class on all claims and denied defendants' motion to strike Dr. Morwitz. Doc. Nos. 157, 158. Defendants filed a Rule 23(f) petition with the Third Circuit, seeking to overturn the certification of the class. Plaintiff filed opposition, and the Third Circuit denied the petition.

During the course of the case, both sides served and responded to considerable paper discovery and took and defended multiple depositions. The discovery that plaintiff took included discovery from every major United States airline and, despite defendants' resistance, from defendants' web-tracking data company. There were also appearances before Judge Hammer on more than one occasion regarding discovery disputes.

The proceedings also included extensive expert discovery involving the behavioral sciences, as to which plaintiff retained Dr. Morwitz and defendants retained an expert of their own. That discrete discipline became relevant to the case a year after plaintiff filed it, when the Third Circuit's decision in *Marcus v. BMW of North America, Inc.*, 687 F.3d 583 (3d Cir. 2012), set forth the analysis applicable to omissions-based CFA claims.

2. Klein v. Budget

Klein was filed on November 27, 2012. The defendants there were Budget and a parent entity. Similar to the allegations in *Schwartz*, plaintiffs Daniel and Stephanie Klein alleged that

they had rented from Budget and had been wrongly charged $.75 per rental day for frequent flyer miles, as a result of defendants' alleged misrepresentations and intentional omissions, in violation of the CFA and in breach of the rental contract. The Kleins sought to proceed on behalf of a nationwide class of renters from Budget.

Defendants moved to dismiss *Klein* on January 28, 2013. Doc. No. 12. After full briefing, the Court issued an opinion and Order on April 24, 2013 granting that motion in part and denying it in part, along some of the same lines as in *Schwartz*. Doc. Nos. 26, 27. The parties then began the discovery process, but later agreed to stay that case until class certification was resolved in *Schwartz*, since the issues in the two cases were so similar. See Doc. No. 49 (July 7, 2014 Order of Judge Dickson staying discovery on this ground). Because of this— and presumably because of the time that had passed— the Court ordered an administrative dismissal of *Klein* on January 26, 2015. Doc. No. 53.

B. The Terms of the Settlement Agreement.

The Settlement Agreement, if approved, will provide substantial benefits to nationwide classes in *Schwartz* and *Klein*. The settlement offers all class members a choice of cash or discounts on future vehicle rentals, and it also ends defendants' allegedly deceptive practices.

For the class in *Schwartz*, if all class members chose the discounts, the total worth of the settlement would be $10,924,556, according to defendants' calculations. That sum is more than what defendants have asserted that the maximum single damages would be if plaintiff and the class tried the case and won. Even if every class member opted to receive cash, the value of the settlement would be $4,126,135, again using defendants' figures, an extraordinary 50% recovery.

Similarly, in *Klein*, the settlement provides those class members with substantial value**.** According to defendants' figures, if all class members chose the discounts, the *Klein* settlement would have a total value of $2,853,525, while if everyone opted for cash, the value of that settlement would be $1,195,782.

The settlement also includes injunctive relief. Defendants will cease certain practices that plaintiffs have challenged, and will change their respective websites to disclose more completely and thoroughly any charge for frequent flyer miles.

Finally, defendants have agreed to pay, and not to object to, Class Counsel's attorneys' fees and expenses in the aggregate amount of no more than $3,050,000. *See* SA at §12. Those fees and expenses will be paid separate and apart from the relief provided to the Class. *See* SA at §12(e). Thus, the Class recovery will not be reduced by a single cent on account of the payment by Avis of Class Counsel's fees and expenses. This information will be clearly communicated to Class Members in the Class Notice.

C. Notification to Class Members.

The Settlement Agreement contains a robust notice and administration plan, the cost of which will be paid by defendants. *See* SA at §3. The Administrator will provide notice to the classes by email or, if no email address is available, by United States first class mail, in substantially the same form as that attached as Exhibits B and D to the Settlement Agreement. *See* SA at §3(c). In addition to this email and direct-mail notification, the Administrator will create a dedicated website and a toll-free voice response system providing Class Members with information about the Action and the Settlement. *See* SA at §3(a). Additionally, there will be summary notice by publication. *See* SA at §3(b). Defendants will bear all notice costs, which shall be in addition to and not deducted from the settlement benefits to the classes. *See* SA at

§3(d).

Class Members will be able to claim settlement benefits, either cash or discounts, using a simplified claim form that can be completed electronically and submitted to the claims administrator by clicking an appropriate box upon completion. Class Members will also have the option of filing a claim by regular mail.

Consistent with FED. R. CIV. P. 23(c) and (e), all Class Members will be provided with a reasonable opportunity to object to, or to exclude themselves from, the Settlement. *See* SA §§8, 10. In exchange for this consideration, upon the Effective Date following the entry of the Final Approval Order, defendants will receive a release for any claims that relate to the subject matter of these lawsuits by plaintiffs and those Class Members who do not timely exclude themselves, as more fully set forth in the Settlement Agreement. *See* SA at §13.

III. ARGUMENT

Before a class-action settlement can be finally approved, the Court must determine "after a hearing" that it is "fair, reasonable, and adequate." *See* FED. R. CIV. P. 23(e)(2). The Court must also "direct notice in a reasonable manner to all class members who would be bound by the proposal." *See* FED. R. CIV. P. 23(e)(1). Approval of a class-action settlement depends on "whether the settlement is fair, adequate, and reasonable." *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 965 (3d Cir. 1983). *See also, e.g., In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534 (3d Cir. 2004) ("A class action may not be settled under Rule 23(e) without a determination by the district court that the proposed settlement is 'fair, reasonable and adequate.'") (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995), *cert. denied*, 516 U.S. 824 (1995)).

"Review of a proposed class action settlement is a two-step process: preliminary approval and a subsequent fairness hearing." *Jones v. Commerce Bancorp*., No. 05-5600(RBK), 2007 U.S. Dist. LEXIS 52144, at *4 (D.N.J. July 16, 2007). "The purpose of having a preliminary stage is to ensure that there are no obvious deficiencies in the settlement that would preclude final approval." *Singleton v. First Student Mgmt*., LLC, No. 13-744(JEI/JS), 2014 U.S. Dist. LEXIS at *15 (D.N.J. Aug. 6, 2014); *Accord*, Fed. Jud. Ctr., *Manual for Complex Litig., Fourth*, § 21.632, at 320-21 n.976 (2014) (citing *In re Amino Acid Lysine Antitrust Litig.*, MDL No. 1083, 1996 U.S. Dist. LEXIS 5308, at *11 (N.D. Ill. Apr. 22, 1996), for the proposition that a preliminary review makes a determination as to "whether a proposed settlement is within the range of reasonableness" while also raising potential questions for the fairness hearing).

Instead, the Court's duty during preliminary review is "'to ascertain whether there is any reason not to notify the class members of the proposed settlement and to proceed with a fairness hearing.'" *In re Prudential Sec. Inc. Ltd. Pshps. Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (quoting *Armstrong v. Board of School Directors of the City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980)). A proposed class action settlement is entitled to a presumption of fairness. *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010); *McCoy v. HealthNet, Inc*., 569 F. Supp. 2d 448, 458 (D.N.J. 2008). This approach is consistent with the principle that "[c]ompromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910).

Because, as discussed below, there are no "obvious deficiencies" in the Settlement Agreement, the standards for granting preliminary approval are readily satisfied here. Plaintiffs respectfully submit that this Settlement is fair, adequate, and reasonable; that the requirements for final approval will be satisfied; and that Class Members will be provided with notice in a

manner that satisfies the requirements of due process and FED. R. CIV. P. 23(e). Therefore, plaintiffs respectfully request that this Court enter the proposed order granting preliminary approval, which will: (i) preliminarily approve the proposed Settlement; (ii) certify the Settlement Classes pursuant to the provisions of FED. R. CIV. P. 23; (iii) schedule a Final Approval Hearing to consider final approval; and (iv) direct that notice of the proposed Settlement and hearing be provided to Class Members in a manner consistent with the agreed-upon notice plan in the Settlement Agreement.

A. The Court Should Preliminarily Approve the Settlement.

There are no "obvious deficiencies" in the settlement here. On the contrary, the settlement is an excellent one for the Classes. As described *supra*, the settlement affords all Class Members a choice of cash or discounts on future rentals, an important option given the very small amounts of money (often, less than $1.00) in dispute for many Class Members. The settlement also provides prospective injunctive relief, to ensure that defendants more fully disclose their charges going forward.

The settlement in *Schwartz* would be worth nearly $11 million, more than the damages that Mr. Schwartz and the certified litigation class could have obtained if they succeeded at trial.[3] At the other extreme, if every class member chose the cash option, defendants would pay out $4,126,135, a recovery of about 50% of single damages. Likewise, the settlement in *Klein* would provides value of $2,853,525 if all class members opted for the discounts, while if everyone chose cash, the value of that settlement would be $1,195,782.

[3] "[S]ingle damages, not treble or punitive damages, are the appropriate yardstick by which the fairness of a proposed class action settlement should be measured." *In re American Family Enters.*, 256 B.R. 377, 425 (D.N.J. 2000). Thus, the potential for a treble damages recovery under the CFA does not enter the analysis of whether the settlement is fair, reasonable, and adequate.

Additionally, the injunctive relief component of the settlement that requires defendants to maintain certain changes to their websites that they had made after these cases began regarding the disclosure of a surcharge on frequent flyer miles has significant value. That relief benefits not only class members, but also other persons who, in the future, rent vehicles from defendants. As a result of this settlement, the actions of defendants that plaintiffs challenged as misleading will not recur.

In light of the applicable legal standards, the criteria for granting preliminary approval of these complex class action lawsuits are met. The settlement was reached as a result of extensive, arduous, arm's-length negotiations between experienced counsel. Moreover, Class Counsel, as well as counsel for defendants, believe the Settlement is in the best interests of their respective clients. The Settlement will also remove the uncertainties and risks to both parties from proceeding further in these two lawsuits. For these reasons, preliminary approval should be granted.

B. Certification of the Proposed Class for Purposes of Settlement Only is Appropriate.

Both the Supreme Court and the Third Circuit have recognized that the benefits of a proposed settlement of a class action can be realized only through the certification of a settlement class. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); *In re GMC Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 782-800 (3d Cir. 1995). As such, plaintiffs seek preliminary certification of the Settlement Class set forth above and in the Settlement Agreement, for settlement purposes only.

For the Court to certify a class for settlement, the "[s]ettlement [c]lass[] must satisfy the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation, as well as the relevant 23(b) requirement." *In re GMC Pick-up Truck Fuel Tank Prods. Liab.*

Litig., 55 F.3d at 778. In addition, plaintiffs seek certification of the Settlement Class pursuant to Rule 23(b)(3), which provides that certification is appropriate where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members [predominance], and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy [superiority]." FED. R. CIV. P. 23(b)(3).

As discussed below, these requirements are met for purposes of settlement in this case. Indeed, in *Schwartz*, this Court already determined, in a litigated context, that the criteria for class certification were satisfied. That remains true in *Schwartz* now, and (for the same reasons) is also so in *Klein*.

1. Numerosity Under Rule 23(a)(1).

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). "[G]enerally, if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the [numerosity requirement] of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-227 (3d Cir. 2001). The Court in *Schwartz* rightly determined, in certifying a litigation class, that the class there is sufficiently numerous, since Avis has thousands of customers nationwide who paid the surcharges at issue. The same is true of Budget, for the *Klein* matter. Numerosity is therefore easily satisfied.

2. Commonality Under Rule 23(a)(2).

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). "Commonality does not require perfect identity of questions of law or fact among all class members." *Reyes v. Netdeposit, LLC*, No. 14-1228, 2015 U.S. App. LEXIS 15577, at *35 (3d Cir. Sept. 2, 2015). Instead, "even a single common question will do." *Id.*

(quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011)). "[F]actual differences among the claims of the putative class members do not defeat certification." *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 310 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999).

The test for commonality is "easily met." *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). "Again, th[e] bar is not a high one," *Reyes*, 2015 U.S. App. LEXIS 15577, at *35 (citation omitted), especially in the context of a settlement class.

In this case, myriad common questions of law and fact exist. These include (among other things) whether defendants breached their contracts with renters, whether defendants violated the CFA, and whether plaintiffs and the class are entitled to injunctive relief. Commonality is therefore satisfied, just as the Court found when it certified a litigation class in *Schwartz*.

3. Typicality Under Rule 23(a)(3).

Rule 23(a)(3) requires that a representative plaintiff's claims be "typical" of those of other class members. FED. R. CIV. P. 23(a)(3). "As with numerosity, the Third Circuit has 'set a low threshold' for satisfying typicality, holding that '[i]f the claims of the named plaintiffs and class members involve the same conduct by the defendant, typicality is established….'" *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 107 (D.N.J. 2012) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183-84 (3d Cir. 2001)).

Here, all of the claims of plaintiffs and the Class Members in both cases arise out of the same alleged conduct of Avis and Budget, respectively, in charging for frequent flyer miles without revealing that to customers. The Court found that this requirement was met in *Schwartz*, and it is likewise satisfied in *Klein*.

4. Adequacy of Representation Under Rule 23(a)(4).

The final requirement of Rule 23(a) is that "the representative part[y] will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). In determining the adequacy of representation, the court should "'evaluate [both] the named plaintiffs' and … counsel's ability to fairly and adequately represent class interests.'" *Gotthelf v. Toyota Motor Sales, U.S.A., Inc.*, 525 Fed. Appx. 94, 100-101 (3d Cir. 2013) (alterations in original) (quoting *In re Comty. Bank of N. Va. & Guaranty Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 622 F.3d 275, 291 (3d Cir. 2010)). In doing so, "the district court ensures that no conflict of interest exists between the named plaintiffs' claims and those asserted on behalf of the class, and inquires whether the named plaintiffs have the ability and incentive to vigorously represent the interests of the class." *Gotthelf*, 525 Fed. Appx. at 101 (citing *In re Comty. Bank*, 622 F.3d at 291). There is a "relatively low threshold" for adequacy of representation. *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 923 (3d Cir. 1992).

In certifying the litigation class in *Schwartz*, the Court found Mr. Schwartz to be adequate, in that he rented from Avis and sustained injury from Avis'salleged violations of the CFA and breach of contract in connection with the disclosure of surcharges for frequent flyer miles. The Kleins are in the same posture as regards Budget, having rented from Budget and being charged, unbeknownst to them, for frequent flyer miles. Plaintiffs have ample incentive to represent their respective classes, and they have the same claims, on the same facts, as Class Members do.

Class Counsel are similarly adequate, as the Court concluded in *Schwartz*. They have invested considerable time and resources into the prosecution of these actions, including investigating the allegations at issue, drafting the Complaints, briefing multiple motions to dismiss, taking and defending significant discovery, including expert discovery, defeating

defendants' motions for summary judgment and to strike Dr. Morwitz as an expert, winning certification of a nationwide class and defeating defendants' Rule 23(f) petition, engaging in protracted and difficult settlement negotiations, as well as negotiating and drafting the Settlement Agreement. Plaintiff's counsel are highly experienced, as reflected in the firm resumes attached to the Greenberg Decl. as Exhibit 2. The adequacy requirement is, accordingly, met here.

5. The Requirements of Rule 23(b)(3)Are Met.

Plaintiffs seek to certify the Settlement Classes under Rule 23(b)(3), which has two components: predominance and superiority. *See* FED. R. CIV. P. 23(b)(3). "Parallel with Rule 23(a)(2)'s commonality element, which provides that a proposed class must share a common question of law or fact, Rule 23(b)(3)'s predominance requirement imposes a more rigorous obligation upon a reviewing court to ensure that issues common to the class predominate over those affecting only individual class members." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) (en banc) (citing *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 266 (3d Cir. 2009)). When assessing predominance and superiority, the Court may consider that the class will be certified for settlement purposes only, and that a showing of manageability at trial is not required. *See Amchem*, 521 U.S. at 618 ("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, see FED. R. CIV. P. 23(b)(3)(D), for the proposal is that there be no trial."). "Predominance is a test readily met in certain cases alleging consumer … fraud …," especially where the class is being certified for settlement purposes. *Id*. at 625.

The Third Circuit has reiterated that the focus of the predominance "inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Sullivan*, 667 F.3d at 298. "To determine

whether common issues predominate over questions affecting only individual members, the Court must look at each claim upon which the [p]laintiff seeks recovery and … determine whether generalized evidence exists to prove the elements of the plaintiff's claims on a simultaneous, class-wide basis, or whether proof will be overwhelmed by individual issues." *O'Brien v. Brian Research Labs, LLC*, 2012 U.S. Dist. LEXIS 113809, at *23 (D.N.J. Aug. 9, 2012) (citations omitted). Predominance "does not require the absence of all variations in a defendant's conduct or the elimination of all individual circumstances." *Reyes*, 2015 U.S. App. LEXIS 15577, at *41.

Superiority requires the Court to consider whether or not "a class action is a superior method of fairly and efficiently adjudicating the controversy." *Sullivan*, 667 F.3d at 296. Rule 23(b)(3) provides a non-exhaustive list of factors to be considered when making this determination. *McCoy*, 569 F. Supp. 2d at 457. Since manageability is not a consideration in a settlement class context, these factors include: "(i) the class members' interests in individually controlling the prosecution or defense of separate actions; (ii) the extent and nature of any litigation concerning the controversy already begun by or against class members; [and] (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum." *Id.* (quoting FED. R. CIV. P. 23(b)(3)).

Here, the common questions of law and fact identified *supra* predominate over any questions that may affect individual Class Members, as the Court already concluded in a litigation context in *Schwartz*. The issues are subject to generalized proof, and are questions that are common to all class members. *See Sullivan*, 667 F.3d at 299. Therefore, the predominance prong of Rule 23(b)(3) is satisfied.

The second prong of Rule 23(b)(3)—that a class action must be superior to other available methods for the fair and efficient adjudication of the controversy—is also readily satisfied. *See* FED. R. CIV. P. 23(b)(3). The Settlement Agreement provides members of the Settlement Class with the ability to obtain prompt, predictable, and certain relief, and contains well-defined administrative procedures to assure due process. This includes the right of any Class Members who are dissatisfied with the Settlement to object to, or to exclude themselves from, the Settlement. The Settlement also would relieve the substantial judicial burdens that would be caused by repeated adjudication of the same issues in thousands of individualized trials against Avis and Budget, by going forward with this case as a class action.

Since the surcharges were $.75 per day, few if any Class Members have much interest in pursuing separate actions for relief. Thus, a class action is plainly superior.

In sum, because the requirements of Rule 23(a) and Rule 23(b)(3) are satisfied, as they were in the contested context in *Schwartz*, where the Court certified a litigation class, certification of the proposed Settlement Class is appropriate.

C. The Court Should Approve the Notice Plan.

Under FED. R. CIV. P. 23(e), Class Members who would be bound by a settlement are entitled to reasonable notice of it before the settlement is ultimately approved by the Court. *See* Fed. Jud. Ctr., *Manual for Complex Litig.* Fourth, § 30.212. And because plaintiffs seek certification of the Settlement Classes 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 efforts." FED. R. CIV. P. 23(c)(2)(B)). In order to satisfy these standards and comply with the requirements of due process, notice must be "reasonably calculated to reach interested parties." *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995) (citations omitted). *See also DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1176

(8th Cir. 1995) ("Notice of a settlement proposal need only be as directed by the district court... and reasonable enough to satisfy due process.").

The notice plan in this case is the best notice practicable under the circumstances to reach all Class Members. Through defendants' databases, the email addresses and mailing addresses of customers throughout the United States will be compiled and provided to the Settlement Administrator. The Settlement Agreement calls for the Administrator to use this information to provide all Class Members with a direct email or first-class mailing. *See* SA at §3(c). Notice of the settlement will also be posted on a dedicated website created by the Administrator. *See* SA at §3(a). Finally, a summary notice will be issued by publication as well. *See* SA at §3(b).

Finally, the substance of the proposed Class Notice—which is attached as Exhibits B and D to the Settlement Agreement—will meet all necessary legal requirements and provide a comprehensive explanation of the Settlement in simple, non-legalistic terms. *See* FED. R. CIV. P. 23(c)(2)(B). Accordingly, it is respectfully requested that the Court approve the notice plan.

D. A Final Approval Hearing Should be Scheduled.

Lastly, the Court should schedule a fairness hearing to decide whether to grant final approval to the Settlement; to address Class Counsel's request for attorneys' fees and expenses, and to determine whether to dismiss this action with prejudice. *See* Fed. Jud. Ctr., *Manual for Complex Litig.* Fourth, § 30.44; *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 600 (3d Cir. 2010). Plaintiffs respectfully request that the Court set the final hearing for a date in mid-May 2016 if such a date is acceptable to the Court.

IV. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court enter an Order: (1) preliminarily certifying settlement classes in these two cases pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3); (2) preliminarily approving the Settlement Agreement; (3) directing notice to Class Members consistent with the notice plan in the Settlement Agreement; and (4) scheduling a Final Approval Hearing.

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Dated: January 22, 2016

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