UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY

TRACY AND DENNIS COX, on behalf of themselves and all others similarly situated, Plaintiffs, v. FIRST COMMUNITY BANK, Defendant.	Case No. 5:23-cv-00392 Judge Frank W. Volk

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR APPROVAL OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

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INTRODUCTION

In conjunction with final approval of the class actions settlement in this case, the Court should also approve the requested payments of attorneys' fees, expenses, and service award from the Settlement Fund. The Settlement provides substantial monetary relief for the benefit of the Settlement Class. Under the Settlement, Defendant will pay $4,800,000 into a non-reversionary common fund and will also forgive $500,000 in debt, which represents recovery of a significant portion of damages. Settlement Class Members will not have to file claim forms to receive the Settlement's benefits, which will automatically be provided by account credits or checks. The Settlement is an excellent recovery, particularly in light of the continued litigation risks and delays faced by Plaintiffs and the putative class. Having achieved this result for the Class Members, the Court should approve payments of attorneys' fees and expenses to Class Counsel and service awards to the Class Representatives, in the requested customary amounts.

BACKGROUND

I. The litigation.

On June 24, 2022, Plaintiffs filed a Class Action Complaint (the "Complaint") in the United States District Court for the Northern District of West Virginia. The Complaint alleged that Defendant charged what the Settlement refers to as the "Challenged Fees," which are (1) overdraft fees on debit card transactions that were authorized on a sufficient available balance and later settled against an insufficient available balance ("APSN Fees"); and (2) nonsufficient fund fees or overdraft fees on transactions that were resubmitted by a third-party after having previously been assessed a nonsufficient funds fee ("Retry Fees"). The Complaint alleges that charging the Challenged Fees gave rise to claims for: (1) breach of contract and breach of the duty of good faith and fair dealing; and (2) unjust enrichment. The gravamen of the Complaint is that the deposit account agreement ("Terms and Conditions of Your Account") attached to the

Complaint as Exhibit A and the other account disclosures attached to the Complaint as Exhibits B and C did not sufficiently disclose Defendant's practices and procedures relating to the Challenged Fees prior to August 1, 2020.

On September 13, 2022, Defendant filed its Answer to Class Action Complaint and Demand for Jury Trial in which Defendant denied all liability. Defendant also moved to transfer venue to this Court. Plaintiffs opposed the motion to transfer venue, but it was granted, and venue was transferred to this Court.

The parties then exchanged initial disclosures and engaged in significant discovery. Declaration of Lynn A. Toops in Support of Preliminary Approval, ECF No. ("Toops Prelim. Appr. Decl."), ECF No. 56-2, ¶ 2. Defendant answered interrogatories and produced thousands of pages of documents. *Id.* Plaintiffs performed a damages analysis and provided expert disclosures. *Id.*

The parties engaged in significant settlement discussions during the later months of 2023 and the early months of 2024, and during these discussions, the parties shared detailed information relating to their damages analyses. *Id.* ¶ 3.

Having completed substantial discovery, on May 6, 2024, the parties engaged in arm's-length settlement negotiations, in a mediation facilitated by Donald B. O'Dell, to attempt to resolve the matter through a class action settlement. *Id.* ¶ 4. Eventually, the parties arrived at agreed terms, subject to agreeing to the final detailed terms, which they eventually negotiated as set forth in the Settlement. *Id.*

II. Settlement terms.

On July 29, 2024, the parties executed the Settlement. The Settlement provides meaningful immediate relief to Settlement Class Members in the form of direct cash payments and forgiveness of debt valued at $5,300,000. *Id.* ¶ 4.

A. Cash benefits.

Defendant has agreed to establish a $4,800,000.00 cash Settlement Fund for the benefit of the Settlement Class. Settlement, Key Terms Page & ¶ 4.1. The Settlement Fund will be used to pay Settlement Class Member payments, any attorneys' fees and costs that the Court may award to Class Counsel, and any service awards. *Id.*

Settlement Class Members do not need to submit a claim form in order to receive a payment. Settlement ¶ 4.1. Current customers will receive a direct deposit of their settlement payment to their account, while former customers will be mailed their payments. *Id.* The Settlement Fund will be distributed to Settlement Class Members *pro rata* based on the amount of Challenged Fees that the Class member paid. *Id.*

If any amounts remain in the Net Settlement Fund due to uncashed or returned checks, these funds will not revert to Defendant. *Id.* Instead, if the remaining funds are sufficient to make another round of payments that would average $5 or more, there will be a second distribution. *Id.* After a second distribution, or if the $5 threshold is not met, the remaining funds will be paid to non-profit entity WVU Extension Financial Literacy Program on a *cy pres* basis. Settlement, Key Terms Page & ¶ 4.1.

B. Forgiveness of debt.

In addition to the $4.8 million cash payment, Defendant will forgive $500,000 in debt owed for fees on closed Class member accounts and will not be permitted to collect on those amounts. *Id.*

III. Preliminary approval.

On August 16, 2024, the Court granted preliminary approval to the Settlement. ECF No. 58. Notice has issued to Class Members, who will have until November 15, 2024, to object to, or opt out of, the Settlement. A final hearing is scheduled for November 25, 2024.

DISCUSSION

In conjunction with final approval of the Settlement, the Court should approve the requested payments of attorneys' fees, expenses, and service awards from the Settlement Fund. The request amounts are all reasonable and are in line with awards typically approved by Court in the Fourth Circuit and across the country.

I. The requested attorneys' fees are reasonable.

Rule 23(h) allows for the award of "reasonable attorneys' fees and nontaxable costs that are authorized by law or the parties' agreement." By common law, Plaintiffs' attorneys in a successful class action lawsuit are entitled to compensation from the benefits that are obtained as a result of the attorneys' efforts. *See, e.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980).

In determining a reasonable fee in a class action, courts generally use either the "lodestar" method or the "percentage of the fund" method. *In re Microstrategy, Inc.*, 172 F. Supp. 2d 778, 786 (E.D. Va. 2001). The percentage of the fund method awards fees as a percentage of the benefit secured for the Class; the lodestar method awards fees based on the value of Counsel's time spent litigating the claims. *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 681 (D. Md. Oct. 2, 2013). The Fourth Circuit has not specified a preference between these two options. *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 463 (S.D.W. Va. 2010). But other circuits generally favor the percentage of the benefit method. *See, e.g.*, *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 306 (1st Cir. 1995) (noting the percentage method is generally preferred in common fund cases); *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 723 (2d Cir. 2023) ("the trend in this [the Second] Circuit [is] applying the percentage method"); *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998) ("The percentage-of-recovery method is generally favored in cases involving a common fund"); *Florin v. Nationsbank of Georgia, N.A.*,

34 F.3d 560, 566 (7th Cir. 1994) (recognizing "that there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration"); *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) ("Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class."); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("we join the Third Circuit Task Force and the Eleventh Circuit, among others, in concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases."). The "percentage of the recovery" approach also has the advantage that it "award[s] counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007).[1]

Ultimately, the determination of a reasonable fee is in the discretion of the district court. *Kay Co.*, 749 F. Supp. 2d at 463. "With either method, the goal is to make sure that counsel is fairly compensated." *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 575 (E.D. Va. 2016). The "most critical factor in determining the reasonableness of a fee award is the degree of success

[1] In addition, "[t]he use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive." *Will v. Gen. Dynamics Corp.*, No. 06-698-GPM, 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010) (citing *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 979–980 (7th Cir. 2003) ("The client cares about the outcome alone" and class counsel's efficiency should not be used "to reduce class counsel's percentage of the fund that their work produced."); *In re Comdisco Sec. Litig.*, 150 F. Supp. 2d 943, 948 n. 10 (N.D. Ill. 2001) ("To view the matter through the lens of free market principles, [lodestar analysis] (with or without a multiplier) is truly unjustified as a matter of logical analysis."); *Gehrich v. Chase Bank USA.*, 2016 WL 806549 *13 (N.D. Ill. March 2, 2016) ("The central consideration is what class counsel achieved for the class rather than how much effort class counsel invested in the litigation"); *Silverman v. Motorola*, No. 07 C 4507, 2012 WL 1597388 *4 (N.D. Ill. 2012), *aff'd* 739 F.3d 956 (7th Cir. 2013) (declining to consider lodestar).

obtained." *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 629 (4th Cir. 1995) (citations and quotations omitted).

Here, the Court should use the percentage of the fund method. The Settlement creates a common fund in a class action for which there is no applicable fee-shifting statute. Thus, Class Counsel may only be compensated from the fund created as a result of their work. The percentage of the fund method is the superior method for awarding attorneys' fees to Class Counsel because, besides being onerous and difficult to perform, the lodestar method does not align the interests of Class Counsel with those of the Settlement Class. Under the lodestar method, Class Counsel's fee does not depend on how much the Settlement Class recovers, but, rather, on how many hours Class Counsel spent. In contrast, applying the percentage of the fund method aligns Class Counsel's interests with the Settlement Class's interests because the more the Settlement Class recovers, the more Class Counsel recovers. This is especially true here, where the Settlement value is reliably quantified. The contingent percentage fee is also the market rate for this type of class action.

Indeed, this District has recognized the "presumptive reasonableness" of a fee award of one-third of the benefits achieved. *Deem v. Ames True Temper, Inc.*, No. 6:10-cv-01339, 2013 WL 2285972, at *5 (S.D.W. Va. May 23, 2013). And in three similar class actions challenging a credit union's assessment of overdraft fees, courts in the Eastern District of Virginia recently awarded 33.33% of the common fund, based on the percentage of the fund method. *See Mawyer v. Atl. Union Bank*, No. 3:21-cv-726, ECF No. 58 (E.D. Va. Mar. 16, 2023) (Novak, J.); *Hinton v. Atl. Union Bank*, No. 3:20-cv-00651-JAG, ECF No. 29 (E.D. Va. Mar. 30, 2022) (Gibney, J.); *Liggio v. Apple Fed. Credit Union*, No. 1:18-cv-01059-LO-MSN, ECF No. 39 (E.D. Va. Dec. 6, 2019) (O'Grady, J.) (same).

Courts have noted that "any discussion of percentage awards should acknowledge the age-old assumption that a lawyer receives a third of his client's recovery under most contingency agreements." *Thomas v. FTS USA, LLC*, No. 3:13cv825 (REP), 2017 WL 1148283, at *5 (E.D. Va. Jan. 9, 2017), *report and recommendation approved in* 2017 WL 1147460 (E.D. Va. Mar. 27, 2017) (awarding fees of 33.33% and noting that "any discussion of percentage awards should acknowledge the age-old assumption that a lawyer receives a third of his client's recovery under most contingency agreements."); *see also Newberg on Class Actions* § 15:73 (5th ed.). A fee award of one-third of the settlement fund would be consistent with that awarded in other cases. *Sanchez v. Lasership, Inc.*, No. 1:12-cv-246 (GBL-TRJ), 2014 WL 12780145, at *1 (E.D. Va. Aug. 8, 2014) (approving fee award "representing one-third of the common settlement fund"); *Deem*, 2013 WL 2285972, at *5; *In re Titanium Dioxide Antitrust Litig.*, No. RDB-10-0318, 2013 WL 5182093, at *5 n.9 (D. Md. Sept. 12, 2013) ("[A] one-third contingent fee arrangement is a standard practice in this country, and Class Counsel's intention to request that portion of the settlement fund as attorneys' fees does not shock the Court."). *Earls v. Forga Contracting, Inc.*, No. 1:19-CV-00190-MR-WCM, 2020 WL 3063921, at *4 (W.D.N.C. June 9, 2020) ("Within the Fourth Circuit, contingent fees of roughly 33% are common.").

It is also the fee that has been routinely awarded to Class Counsel in other similar cases. Second Declaration of Lynn A. Toops ("Second Toops Decl.") ¶ 3.

As for the appropriate settlement value against which to apply the percentage, in "calculating the overall settlement value for purposes of the 'percentage of the recovery' approach," courts "include the value of both the monetary and non-monetary benefits conferred on the Class." *Fleisher v. Phoenix Life Ins. Co.*, No. 11-cv-8405, 2015 WL 10847814, at *15 (S.D.N.Y. Feb. 11, 2019) (citation omitted). This includes the value of debt forgiveness. *Coleman*

v. Alaska USA Fed. Credit Union, No. 3:19-cv-00229-HRH, slip op. at 17–18 (D. Alaska Nov. 17, 2021), ECF No. 93 ("The Court considers both cash and cash equivalents, such as debt forgiveness of the Uncollected Retry Fees, when determining the denominator," *i.e.*, the value of the settlement); *Moukengeshcaie v. Eltman, Eltman & Cooper, P.C.*, No. 14CV7539MKBCLP, 2020 WL 5995978, at *2-*4 (E.D.N.Y. Apr. 21, 2020), *report and recommendation adopted sub nom.*, 2020 WL 5995650 (E.D.N.Y. Oct. 8, 2020) (awarding percentage of overall value of settlement that included debt forgiveness); *Hash v. First Fin. Bancorp*, No. 1:20-cv-01321-RLM-MJD, 2021 WL 12269064, at *3 (S.D. Ind. Nov. 22, 2021) ("In bank fee litigation, forgiveness of debts owed is routinely included in the value of the settlement.") (collecting cases). That is because debt forgiveness provides a significant benefit. *Thompson*, 2021 WL 4084148, at *2, *8-*9; *CLRB Hanson Indus., LLC v. Weiss & Assocs., PC*, 465 F. App'x 617, 619 (9th Cir. 2012) (calling "forgiveness of indebtedness" a "cash-equivalent"); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 147 (E.D. Pa. 2000) (distinguishing between "debt forgiveness" and "non-monetary" relief); *Cosgrove v. Citizens Auto. Fin., Inc.*, No. 09-1095, 2011 WL 3740809, at *7 (E.D. Pa. Aug. 25, 2011) ("[D]ebt forgiveness provides a valuable award to class members[.]"). Debt forgiveness relieves class members of an obligation to repay money that the bank can pursue in debt collection actions. The debt forgiven is "legally enforceable":

> [The bank] could initiate proceedings to collect. Alternatively, [the bank] could sell the debt at a discount to another entity that might be more willing to undertake collection efforts. The Debt Portion relief immunizes recipients from worrying about or suffering through any efforts to collect on this debt. The Debt Portion relief will also benefit recipients in the form of the improved credit scores some class members will realize once [the Bank] reports the debt relief to the credit bureaus.

Farrell v. Bank of Am., N.A., 327 F.R.D. 422, 431 (S.D. Cal. 2018), *aff'd sub nom. Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 71 (Oct. 4,

2021). *See Gradie v. C.R. England, Inc.*, No. 2:16-CV-00768-DN, 2020 WL 6827783, at *11 (D. Utah Nov. 20, 2020) ("[D]ebt forgiveness [ ] eliminates [the defendant's] legal right to pursue what it views to be an enforceable and collectable amount, whether in an independent action or . . . as a counterclaim or offset.").

In this case, Class Counsel efficiently obtained a substantial recovery valued at $5.3 million, comprised of $4.8 million in a cash Settlement Fund and $500,000 in debt relief. This result justifies awarding the standard one-third contingency fee. *Carroll*, 53 F.3d at 629 (The "most critical factor in determining the reasonableness of a fee award is the degree of success obtained."). *See also Deem*, 2013 WL 2285972, at *5 (noting the "presumptive reasonableness" of a one-third fee)

II. The requested expenses are reasonable.

In addition to fees, courts regularly award litigation expenses advanced by counsel in class action cases. *See, e.g.*, *Kabore v. Anchor Staffing, Inc.*, No. L-10-3204, 2012 WL 5077636, at *10 (D. Md. Oct.17, 2012) ("It is well-established that plaintiffs who are entitled to recover attorneys' fees are also entitled to recover reasonable litigation-related expenses as part of their overall award."). The Fourth Circuit has explained that such costs and expenses may include "those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." *Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988) (internal quotations omitted). In general, courts approve requested expense reimbursements because class counsel brings the case on a contingent basis, "so they had a strong incentive to keep costs to a reasonable level" because they may never recover them at all. *Tussey v. ABB, Inc.*, No. 06-CV-04305-NKL, 2019 WL 3859763, at *5 (W.D. Mo. Aug. 16, 2019). Fourth Circuit courts have awarded costs such as "necessary travel, depositions and transcripts, computer research, postage, court costs, and photocopying." *Singleton*, 2013 WL

5506027, at *17 (D. Md. Oct. 2, 2013). Class Counsel's costs here all fall into these categories) and were all reasonably incurred in pursuing this litigation. Second Toops Decl. ¶ 4. The expenses include filing and pro hac vice fees, along with mediation fees, copies, and expert fees. *Id.* The Court should therefore approve the requested expenses.

III. The requested service awards are reasonable.

Apart from Class Counsel's fees and expenses, courts generally recognize that "[i]ncentive or service awards reward representative plaintiffs' work in support of the class, as well as their promotion of the public interest." *Deem*, 2013 WL 2285972, at *6 (citing *Jones v. Dominion Res. Servs., Inc.*, 601 F. Supp. 2d 756, 767 (S.D.W. Va. 2009)). Plaintiff requests, and Defendant does not oppose, a service award for each Plaintiff in the amount of $7,500.00, for a total of $15,000, for their service as Class Representatives. Service awards have been regularly approved by judges in this Circuit in cases such as this one where the class representatives took a role in prosecuting the claims on behalf of the class. *E.g., Hinton*, No. 3:20-cv-00651-JAG, ECF No. 29 ($7,500.00 service award); *Ryals v. HireRight Sols., Inc.*, No. 3:09cv625, ECF No. 127 at 10 (E.D. Va. Dec. 22, 2011) (Judge Gibney approving a service award to each class representative in the amount of $10,000); *Manuel v. Wells Fargo Bank, N.A.*, No. 3:14CV238(DJN), 2016 WL 1070819, at *6 (E.D. Va. Mar. 15, 2016) (Judge Novak approving a $10,000 service award). Plaintiffs amply fulfilled their duties as Class Representatives, and the requested Service Awards are appropriate.

In this litigation, Plaintiffs put themselves forward in litigating this case, kept abreast of the case's status, reviewed documents, and discussed with counsel various aspects of the case, including the Settlement. Second Toops Decl. ¶ 5. Additionally, the nature of Plaintiffs' claims against necessarily put their finances at issue and publicly disclosed financial difficulties, creating notoriety regardless of the success of their claim. *Id.* They should be commended for

taking action to protect the interest of thousands of bank customers who were affected by the bank's fee policies. The Court should approve the requested service awards as reasonable.

CONCLUSION

For the foregoing reasons, the Court should enter the proposed order approving the requested payments of attorneys' fees, expenses, and service awards.

Dated: November 1, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st of November, 2024, the foregoing was served via the Court's electronic filing system to all counsel of record.

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