IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

VIRGINIA IS FOR MOVERS, LLC, and ABIGAIL MCALLISTER, individually and on behalf of all others similarly situated, Plaintiffs, v. APPLE FEDERAL CREDIT UNION, Defendant.	Case No. 1:23-cv-00576-DJN-IDD

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS FROM CLASS ACTION SETTLEMENT

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Introduction

Plaintiffs Virginia is for Movers, LLC, and Abigail McAllister, on behalf of themselves and a class of similarly situated customers of Defendant Apple Federal Credit Union, respectfully submit this memorandum in support of Plaintiffs' Motion for Approval of Fees, Expenses, and Service Awards from Class Action Settlement. The Settlement[1]—which was the result of hard-fought, arms' length negotiations between experienced counsel, after significant litigation, including depositions of the parties and experts, and after an initial mediation facilitated by United States Magistrate Judge Ivan D. Davis and then subsequent mediation with retired United States District Court Judge Gerald Rosen—provides substantial monetary relief for the benefit of the Settlement Class. The Settlement includes Defendant's agreement to pay $2,500,000 into a non-reversionary common fund (a significant ports of the estimated damages) and to forgive and charge-off $35,530 in debts owed by Class Members. The Settlement is an excellent recovery, particularly in light of the continued litigation risks and delays faced by Plaintiff and the settlement class. In conjunction with final approval of the Settlement, the Court should recognize the efforts of Class Counsel and the Class Representatives in achieving this Settlement and should approve payments from the Settlement Fund for attorneys' fees of $845,176.67 (one-third of the Value of the Settlement), litigation expenses of $65,655.02, and a service award of $15,000 to each Class Representative. The Settlement is not contingent on any particular award, but these requested amounts are fair and reasonable and are consistent with amounts consistently awarded in the Fourth Circuit and to Class Counsel in similar cases.

[1] The capitalized terms in this Memorandum have the same meaning as the capitalized terms in the class action Settlement Agreement and Release, ECF No. 71-1.

Facts

I. Plaintiffs sue Apple FCU in a class action for charging overdraft fees they allege violate Regulation E and Apple FCU's contracts.

On April 28, 2023, Named Plaintiff Virginia is for Movers filed a putative class action complaint that alleged two claims for breach of contract and violations of Regulation E of the Electronic Fund Transfers Act, 12 C.F.R. §§ 1005 *et seq.*, based on Defendant Apple Federal Credit Union's ("Apple FCU") assessment of overdraft fees for debit card payments that were approved on a positive balance and but purportedly settled days later on a negative balance. ECF No. 1.

On July 10, 2023, Apple FCU filed a motion to dismiss the Complaint. ECF No. 10. On July 24, 2023, before responding to Defendant's motion to dismiss the Complaint, Virginia is for Movers filed an amended complaint alleging the same two claims for relief as were alleged in the original complaint. ECF No. 14.

On August 10, 2023, after the Court granted Virginia is for Movers leave to amend to add a second named plaintiff, Virginia is for Movers and Abigail McAllister filed a second amended complaint alleging the same claims—breach of contract and violations of Regulation E—as were alleged in the two prior complaints. ECF Nos. 14–17.

On August 31, 2023, Defendant filed a motion to dismiss the second amended complaint. ECF No. 18. After briefing, and additional briefing ordered by the Court, on March 13, 2024, the Court denied that motion. ECF Nos. 25, 26, 30–34, 36.

On August 27, 2024, the Parties participated in a settlement conference in the chambers of Magistrate Judge Ivan D. Davis. *See* ECF No. 44. That mediation did not result in a settlement. *See* ECF No. 50.

II. After denial of Apple FCU's motion to dismiss and a failed attempt at mediation, the parties engage in substantial discovery and litigation.

The parties then engaged in discovery. Both Plaintiffs and Apple FCU answered interrogatories and produced documents. Declaration of Lynn A. Toops ("Toops Decl.") ¶ 3. The two owners of Plaintiff Virginia is for Movers, LLC, were deposed, along with Plaintiff McAllister. *Id/* Plaintiffs' counsel took a Rule 30(b)(6) deposition of Apple FCU, through multiple witnesses over multiple days. *Id.* Apple FCU and Defendant each produced expert reports, and each side deposed the others' experts. *Id.* On January 10, 2025, Apple FCU filed a motion in limine to exclude Plaintiffs' expert's opinions regarding the identity of class members and damages incurred by those class members. ECF No. 66.

III. A subsequent mediation results in the parties' agreement to settle.

On January 14, 2025, the parties participated in a second mediation, this time with the Honorable Gerald R. Rosen (ret.) as mediator. The mediation resulted in the Settlement. That same day, the parties notified the Court that they had reached a settlement. ECF No. 67. The Court scheduled a preliminary approval hearing for February 19, 2025, at 11:00 a.m. The parties then negotiated the final terms of the detailed Settlement and included exhibits.

Settlement Terms

On February 5, 2025, the parties executed the Settlement, which provides the following:

I. Settlement Classes

The Settlement will resolve the claims of the Settlement Classes, defined as:

APSN Fee Class: Members of Defendant who were assessed APSN Fees.

Regulation E Class: Members of Defendant who were assessed Regulation E Fees.

Settlement ¶¶ 1(c), (w).

"APSN Fees" means overdraft fees that Defendant charged and did not refund on signature Point of Sale debit card transactions that posted to Class Member accounts from January 7, 2021 to March 31, 2024, where there was a sufficient available balance at the time the transaction was authorized, but an insufficient available balance at the time the transaction was paid. *Id.* ¶ 1(b).

"Regulation E Fees" means overdraft fees that Defendant assessed and did not refund from April 28, 2022 to March 31, 2024 for debit card payments and ATM withdrawals or transfers. *Id.* ¶ 1(v)

For purposes of settlement, Defendant does not oppose class certification. *Id.* ¶ 2.

II. Settlement benefits

The Settlement provides meaningful immediate relief to Settlement Class Members in the form of direct cash payments and debt forgiveness.

A. $2.5 million non-reversionary cash Settlement Fund

Apple FCU has agreed to pay $2,500,000 cash into a non-reversionary Settlement Fund for the benefit of the Settlement Classes. *Id.* ¶¶ 1(y), 8. The Settlement Fund will be used to pay Settlement Class Member Payments, any attorneys' fees and expenses that the Court may award to Class Counsel, any service awards, and the costs of administration. *Id.* ¶ 8.

Settlement Class Members do not need to submit a claim form to receive a payment. *Id.* ¶ 8(d)(iv). If the Settlement becomes effective, current members of Apple FCU automatically will receive payment by account credit, and former members automatically will be sent payment by check sent to the last known address. *Id.* ¶ 8(d)(iv)(5). The Settlement Fund will be distributed to Settlement Class Members according to the distribution plan set out in the Settlement, which is to provide *pro rata* payments to each Settlement Class Member based on the number of fees incurred. *Id.* ¶ 8(d)(iv). Because damages for Regulation E claims are capped at $500,000 in a class action

and APSN Fees make up the bulk of the damages, 92.5% of the Net Settlement Fund is allocated for APSN Fees and 7.5% is allocated to pay in relation to Regulation E Fees. *Id.*

If any amounts remain in the Net Settlement Fund due to uncashed or returned checks, those funds will not revert to Apple FCU. *Id.* ¶ 8(d)(v). Instead, if a second round of distribution to those Class Members who were successfully paid in the first distribution would result in an average payment amount of $5.00 or more then there will be a second distribution to Class Members. After a second distribution, or if no second distribution is indicated, any remaining funds will be paid on a *cy pres* basis 50% to the United Way of the National Capital Area for programs benefitting persons in the Alexandria, Arlington, Fairfax/Falls Church, Loudon County, and Prince William County regions and 50% to Mobile Hope, or to one or more other *cy pres* organizations chosen by the Court. *Id.* ¶ 10.

B. Forgiveness of Uncollected Fees

In addition to the Settlement Fund, Apple FCU will forgive approximately $35,530 in APSN Fees and Regulation E Fees that were assessed but were not paid. *Id.* ¶¶ 1(z), 3.

Preliminary approval

On February 19, 2025, the Court held a preliminary approval hearing. ECF No. 74. At the hearing, the Court certified the Settlement Classes; found the Settlement to be within the range of a fair, reasonable, and adequate compromise; directed that notice be sent to the Class Members; and scheduled a final approval hearing to consider final approval, along with any request for fees, expenses, and service awards. *Id.*

Argument

In conjunction with final approval of the Settlement, the Court should also approve the requested payments of attorneys' fees, expenses, and service awards from the Settlement Fund.

I. The requested attorneys' fees of one-third of the value of the settlement are reasonable.

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). Rule 23(h) allows for the award of "reasonable attorneys' fees and nontaxable costs that are authorized by law or the parties' agreement."

In determining a reasonable fee in a class action, courts generally use either the "lodestar" method or the "percentage" method. *In re Microstrategy, Inc.*, 172 F. Supp. 2d 778, 786 (E.D. Va. 2001). The percentage method awards fees as a percentage of the benefit secured for the class; the lodestar method awards fees based on the 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. *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 463 (S.D.W. Va. 2010). Ultimately, the determination of a reasonable fee is in the discretion of the district court. *Id.* "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 obtained." *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 629 (4th Cir. 1995) (citations and quotations omitted).

Here, the Court should use the percentage 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 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 benefit 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, and there is no reversion of the fund to Defendant. The contingent percentage fee is also the market rate for this type of class action.

Indeed, in four similar class actions challenging a financial institution's assessment of overdraft fees, courts in this District recently awarded one-third of the value of the settlements, based on the percentage method. *See Mawyer v. Atl. Union Bank*, No. 3:21-cv-00726, ECF No. 58 (E.D. Va. Mar. 16, 2023) (Novak, J.) (awarding one-third of $900,000 settlement using percentage method); *Garrett v. Call Fed. Credit Union*, No. 3:23-cv-678-HEH, ECF No. 57 (E.D. Va. Feb. 18, 2025) (Hudson, J.) (awarding one-third of the value of a settlement comprised of a $650,000 cash fund and $133,920 in debt forgiveness, using percentage method); *Hinton v. Atl. Union Bank*, No. 3:20-cv-00651-JAG, ECF No. 29 (E.D. Va. Mar. 30, 2022) (Gibney, J.) (awarding one-third of $1.6 million settlement using percentage method); *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 in this District 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 value of the settlement also 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"); *Deem v. Ames True Temper, Inc.*, No. 6:10-cv-01339, 2013 WL 2285972, at *5 (S.D.W. Va. May 23, 2013) (recognizing the "presumptive reasonableness" of a fee award of one-third of the common fund); *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.").

"A court must also consider the overall benefit to the class, including non-monetary benefits, when evaluating the fee request." *Bell v. Pension Committee of ATH Holding Co.*, No. 1:15-cv-02062, 2019 WL 4193376, at *2 (S.D. Ind. Sept. 4, 2019) (citing *Spano v. Boeing Co.*, No. 06-743, 2016 WL 3791123, at *1 (S.D. Ill. Mar. 31, 2016) (citing Manual for Complex Litigation, Fourth, § 21.71, at 337 (2004))). "An assessment of the non-monetary benefits and relief obtained as part of a settlement is important so as to encourage attorneys to obtain future meaningful relief." *Id. See also In re Mexico Money Transfer Litig. (W. Union & Valuta)*, 164 F. Supp. 2d 1002, 1033 (N.D. Ill. 2000) ("Even where the relief accorded is non-monetary, an award of cash for attorneys fees is appropriate."), *aff'd sub nom. In re Mexico Money Transfer Litig.*, 267 F.3d 743 (7th Cir. 2001). "[A] percent-of-the-fund approach should be the method utilized in most common fund cases, with the percentage being based on both the monetary and the non-monetary value of the settlement." *Martin v. Caterpillar Inc.*, No. 07-CV-1009, 2010 WL 11614985, at *3

(C.D. Ill. Sept. 10, 2010) (emphasis original) (quoting Principles of the Law of Aggregate Litigation, A.L.I., at § 3.13(b) (May 20, 2009)).

"In bank fee litigation, forgiveness of debts owed is routinely included in the value of the settlement" for purposes of computing the fee. *Hash v. First Fin. Bancorp*, No. 1:20-CV-01321-RLM-MJD, 2021 WL 12269064, at *3 (S.D. Ind. Nov. 22, 2021) (citing *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, No. 6:15MN02613 (D.S.C. Jan. 9, 2020), ECF No. 233 (for fee calculation, including in total value of $70 million settlement $43 million in cash and $27 million in debt forgiveness); *In re: Checking Account Overdraft Litig. (Commerce Bank)*, No. 1:09-MD-02036-JLK, 2013 WL 11319243, *11-12 (S.D. Fla. Aug. 2, 2013) (for fee calculation, including in total value of $23.2 million settlement $18.3 million in cash and a change in posting practice with value of $4.9 million); *In re: Checking Account Overdraft Litig. (JP Morgan Chase Bank)*, No. 09-MD-02036-JLK (S.D. Fla. Dec. 19, 2012), ECF No. 3134 (for fee calculation, including in $162 million settlement value $110 million in cash and change in overdraft fee policy with an estimated value of $52 million over a two-year period)). Indeed, this district has followed this practice. *See Garrett*, No. 3:23-cv-678-HEH, ECF No. 57 (awarding one-third of the total value of a settlement comprised of a $650,000 cash fund and $133,920 in debt forgiveness, using percentage method applied to the total value of $783,920).

One-third of the total value of a bank-fee settlement, including forgiveness of debt, is also the fee that has been routinely awarded to Class Counsel in other similar cases. Toops Decl. ¶ 5.

In this case, Class Counsel engaged in significant litigation and discovery to obtain a Settlement of $2,500,000 in cash plus $35,530 in debt forgiveness. This result justifies awarding the standard one-third contingency fee. *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 629 (4th Cir. 1995) (The "most critical factor in determining the reasonableness of a fee award is the degree of

success obtained."). *See also Garrett*, No. 3:23-cv-678-HEH, ECF No. 57 (one-third fee); *Mawyer*, No. 3:21-cv-00726, ECF No. 58 (same); *Hinton*, No. 3:20-cv-00651-JAG, ECF No. 29 (same); *Liggio*, No. 1:18-cv-01059-LO-MSN, ECF No. 39 (same).

II. The expenses requested for reimbursement are all normal costs of litigation and 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). Fourth Circuit courts have awarded expense reimbursement for items 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). Courts also recognize that, when Class Counsel advance expenses on a case taken on contingency, Class Counsel have every reason to incur only reasonable expenses necessary for the prosecution of the case because they risk never recovering their expenses if the litigation does not result in a favorable verdict or settlement. *Tussey v. ABB, Inc.*, No. 06-CV-04305-NKL, 2019 WL 3859763, at *5 (W.D. Mo. Aug. 16, 2019) (approving reimbursement of $2,256,805 in expenses and noting that "Class Counsel brought this case without guarantee of reimbursement or recovery, so they had a strong incentive to keep costs to a reasonable level, and they did so.")

Class Counsel's expenses here all fall into the normal categories of litigation expenses and were all reasonably incurred in pursuing this litigation. Toops Decl. ¶ 6. Over 87% of the expenses

were expended on expert fees ($29,225), deposition costs ($15,036.87), and mediation fees ($12,900.13). *Id.* The remainder were normal costs for travel, court fees, courier fees, and the like. *Id.* The Court should, therefore, approve the requested reimbursement of expenses as reasonable.

III. The requested service awards are reasonable given the substantial participation of the Class Representatives in the litigation.

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)). Service awards have been regularly approved by judges in this District in cases such as this one where the class representative took a role in prosecuting the claims on behalf of the class. *E.g.*, *Garrett*, No. 3:23-cv-00678-HEH, ECF No. 57 ($10,000 service award in $783,920 settlement); *Hinton*, No. 3:20-cv-00651-JAG, ECF No. 29 ($7,500.00 service award in $1.6 million settlement); *Ryals v. HireRight Sols., Inc.*, No. 3:09-cv-625, ECF No. 127 at 10 (E.D. Va. Dec. 22, 2011) ($10,000 service award); *Manuel v. Wells Fargo Bank, N.A.*, No. 3:14CV238(DJN), 2016 WL 1070819, at *6 (E.D. Va. Mar. 15, 2016) (Magistrate Judge Novak approving a $10,000 service award). Plaintiffs request, and Defendant does not oppose, a service award for each Class Representative in the amount of $15,000.00, for their service as Class Representatives.

Because this case was litigated so vigorously, Plaintiffs were called upon in ways not normally required of the average representative to expend significant time and energy and to endure the stress of litigation—all for the benefit of the absent Class Members. Toops Decl. ¶ 7. Ms. McAllister and both owners of Virginia is for Movers, LLC were deposed, which not only took a significant amount of their time but is also stressful for non-lawyers. *Id.* Plaintiffs also participated in extensive written and document discovery. *Id.* And Plaintiffs personally participated

in the settlement conference with Magistrate Judge Davis. *Id.* A settlement conference with a United States federal magistrate judge can be intimidating and stressful for any nonlawyer, and that was amplified in this case because one of the Plaintiffs had to participate from bed, having just suffered an emotionally traumatic medical event. *Id.* Additionally, the nature of Plaintiffs' claims against the credit union necessarily put their finances at issue and publicly disclosed financial difficulties, creating notoriety regardless of the success of the claim. *Id.* Plaintiffs should be commended for taking action to protect the interest of thousands of credit union members who were affected by Defendant's policies. The Court should approve the requested service award.

Conclusion

In conjunction with final approval of the Settlement, the Court should enter the proposed order approving the requested payments of attorneys' fees, expenses, and service awards.

Respectfully submitted,

Dated: March 5, 2025

/s/ Devon J. Munro

Devon J. Munro (VSB # 47833)
MUNRO BYRD, P.C.
120 Day Ave. SW, First Floor
Roanoke VA 24016
(540) 283-9343
dmunro@trialsva.com

Lynn A. Toops, *pro hac vice*
Vess A. Miller, *pro hac vice*
COHEN & MALAD, LLP
One Indiana Square, Suite 1400
Indianapolis, Indiana 4204
(317) 636-6481
ltoops@cohenandmalad.com
vmiller@cohenandmalad.com

J. Gerard Stranch, IV, *pro hac vice*
STRANCH, JENNINGS & GARVEY, PLLC
223 Rosa L. Parks Ave. Ste. 200
(615) 254-8801
gstranch@stranchlaw.com

Counsel for Plaintiffs and the Settlement Classes

CERTIFICATE OF SERVICE

I certify that on March 5, 2025, I filed a copy of the foregoing document with this Court's Electronic Case Filing (ECF) system, to be served electronically on all counsel of record.

/s/Devon J. Munro
Devon J. Munro