UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

JOSEPH SELF AND MALINDA SELF, **PLAINTIFFS**
on behalf of themselves and all others
similarly situated,

v. **CASE NO. 4:24-cv-142-LPR**

CADENCE BANK **DEFENDANT**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, LITIGATION COSTS, AND SERVICE AWARDS

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I. INTRODUCTION

Plaintiffs Joseph Self and Malinda Self ("Plaintiffs" or "Class Representatives") have reached a Settlement[1] with Defendant Cadence Bank ("Defendant") that provides significant benefits to Settlement Class Members. More specifically, the Settlement provides for a common fund of $4,500,000 (the "Settlement Fund") for the benefit of the Settlement Class, as well as the forgiveness of APSN Fees[2] up to $682,000 that Settlement Class Members owe to Defendant on accounts that were closed during the Class Period (the "Charged-Off Amounts").[3] Every dollar of the Settlement Fund will be used for the benefit of Settlement Class Members. None will revert to Defendant. The Settlement Fund represents approximately 40% of compensatory damages that could have been recovered at trial. There is no claims process. Instead, each Settlement Class Member who does not opt out will automatically receive a *pro rata* distribution from the Settlement Fund less any court-approved attorneys' fees and expenses, service awards, and costs of settlement notice and administration. Similarly, Settlement Class Members who do not exclude themselves will also receive forgiveness of the Charged-Off Amounts.

As compensation for their efforts in successfully litigating this action (the "Action") and consistent with the Settlement Agreement, Class Counsel respectfully request attorneys' fees of one-third of the Settlement Fund, or $1,500,000, and reimbursement of Class Counsel's out-of-pocket litigation costs of $27,766.64, to be paid out of the Settlement Fund. As detailed more fully

[1] The Settlement Agreement was previously filed with the Court on January 3, 2025 in conjunction with Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement. *See* ECF No. 24-1.

[2] All capitalized terms not specifically defined herein shall have the same meaning as set forth in the Settlement Agreement.

[3] Plaintiffs will file their Motion and Memorandum in Support of Motion for Final Approval of Class Action Settlement on April 24, 2025, as set out in the Preliminary Approval Order and Settlement Agreement.

herein, the requested attorneys' fees and litigation costs are fair and reasonable based on, *inter alia*, the time and labor required to perform the legal service properly; the amount involved in the case and the results obtained; the customary and contingent nature of the fee; the experience and ability of counsel; the novelty and difficulty of the issues involved; the time limitations imposed by the circumstances; the reaction of the Settlement Class; and fee awards in similar class action litigation. Indeed, Professor Brian Fitzpatrick, today's preeminent expert on attorneys' fees in class litigation, agrees. *See* Declaration of Brian Fitzpatrick ("Fitzpatrick Decl.") at ¶¶ 9-30.

Plaintiffs and Class Counsel also seek a service award for each Plaintiff in the amount of $5,000 in recognition of their role as the Settlement Class Representatives in prosecuting the litigation on behalf of the Settlement Class. This request is reasonable, consistent with service awards approved in similar class action settlements, and fully justified by the law and Plaintiffs' involvement in this case.

Thus, for the reasons stated herein as well as the accompanying declarations, Class Counsel and Plaintiffs respectfully request that the Court approve the requested attorneys' fees, litigation costs, and service awards.

II. SUMMARY OF THE PROCEEDINGS

A. OVERVIEW OF PLAINTIFFS' CLAIMS

The Complaint alleges, on behalf of Plaintiffs and all others similarly situated, that Defendant breached its contract with certain consumer account holders through its assessment and collection of APSN Fees. Plaintiffs specifically allege that the moment debit card transactions are authorized on a consumer's account with positive funds to cover the transaction, Defendant immediately reduces the consumer's checking account for the amount of the purchase, sets aside funds in the checking account to cover that transaction, and adjusts the consumer's displayed

"available balance" to reflect that subtracted amount. As a result, Plaintiffs allege that customers' accounts will always have sufficient funds available to cover these transactions because Defendant held the required funds. Nevertheless, Plaintiffs contend, despite Defendant putting aside sufficient available funds for debit card transactions at the time those transactions are authorized, that Defendant later assessed APSN Fees on those same transactions when they settled days later into a negative balance. Plaintiffs allege that this practice of assessing APSN Fees on Authorize Positive, Settle Negative Transactions breaches contract promises made by Defendant in its customer account contracts with consumers.

Plaintiffs further allege Defendant's practice of assessing APSN Fees on debit card transactions authorized on sufficient funds fundamentally misconstrues and misleads consumers about the true nature of Defendant's processes and practices and assert claims for unjust enrichment and violation of the Arkansas Consumer Protection Act ("ADTPA"), specifically A.C.A § 4-88-107(a)(10). Defendant disputes these allegations and any liability.

B. PROCEDURAL POSTURE

On January 11, 2024, Plaintiffs, individually and on behalf of a purported class, filed a lawsuit in the Circuit Court of Pulaski County, Arkansas, which Defendant removed to the United States District Court for the Eastern District of Arkansas on February 16, 2024. *See* ECF No. 1.

On March 7, 2024, the Parties filed a Joint Motion to Stay All Proceedings or, in the alternative, to Extend Deadlines (ECF No. 11), wherein they jointly requested that the Court stay the Action for 120 days to allow them to satisfy contractual pre-dispute resolution procedures and pursue potential settlement of Plaintiffs' claims.

On March 11, 2024, this Court entered an order granting the Parties' Motion and staying this Action for 120 days.

On May 30, 2024, the Parties attended a full day mediation session before neutral JAMS Mediator Jed Melnick, at which the Parties reached an agreement in principle.

On July 3, 2024, the Parties filed a Notice of Settlement and Joint Motion to Extend Stay (ECF No. 19). Therein, the Parties notified the Court that they were in the process of memorializing their agreement in principle into a formal written Settlement Agreement and exhibits. The Parties explained that as part of that process, they were analyzing voluminous bank records to identify specific amounts payable to putative Settlement Class Members. As the 120-day stay was set to expire on July 9, 2024, the Parties requested the Court extend the stay for 180 days to allow them to finish their review and finalize and file a complete set of settlement papers along with a motion for preliminary approval, which request this Court granted on July 9, 2024 (ECF No. 19).

On October 10, 2024, the Parties fully executed the Settlement Agreement, memorializing the terms and conditions of the Settlement and embodying all relevant exhibits thereto. Following execution of the Settlement Agreement, Ankura Consulting Group, LLC completed the calculations of the amounts Settlement Class Members paid in APSN Fees during the Class Period.

On January 3, 2025, Plaintiffs filed an Unopposed Motion for Preliminary Approval of Class Action Settlement, a supporting memorandum of law, and the Joint Declaration of Randall Pulliam and Lynn Toops in Support of Preliminary Approval ("Joint Declaration of Class Counsel I"), along with a copy of the Settlement Agreement.

On January 16, 2025, this Court entered the Preliminary Approval Order.

C. THE SETTLEMENT

Pursuant to the terms of the Settlement, Defendant shall establish a non-reversionary cash Settlement Fund of $4,500,000 for the benefit of Settlement Class Members. *See* Settlement

Agreement at ¶ 27. In accordance with paragraphs 26 and 36 of the Settlement Agreement, the Settlement Class shall include:

> all current and former holders of Cadence Bank checking Accounts who, during the Class Period, were assessed at least one APSN Fee. Excluded from the Settlement Class are: (i) Defendant, its parent, subsidiaries, affiliated entities, and directors; (ii) all Settlement Class Members who make a timely election to be excluded; (iii) current and former holders of Cadence Bank checking accounts who are or were represented separately by other counsel and have entered into separate individual settlement agreements prior to the Opt-Out Deadline related at least in part to APSN Fees assessed during the Class Period; and (iv) all judges assigned to this litigation and their immediate family members.

Unless a Settlement Class Member submits a valid and timely request for exclusion, he or she is entitled to receive monetary benefits from the Net Settlement Fund on a *pro rata* basis, relative to the amount of APSN Fees paid by the Settlement Class Member. *See* Settlement Agreement at ¶¶ 57-58 and 60. Joint or co-account holders on a single class account shall be entitled to a single settlement payment per account, which shall be made payable to the person listed in Defendant's records as the primary account holder. *Id*. at ¶ 59. Settlement Payments to Current Account Holders will be made in the form of a credit to the Settlement Class Members' Accounts, notice of which shall be made by Defendant in or with the account statement on which the credit is reflected. *Id*. at ¶ 61. In the event any funds cannot be successfully credited to a Current Account Holder's account, the Settlement Administrator will issue and mail a settlement payment check to the Current Account Holder. *Id*. at ¶ 62. The Settlement Administrator will also issue and mail a settlement payment check to all Past Account Holders. *Id*. at ¶ 63.

Based on records obtained from Defendant, the estimated sum of all APSN Fees paid by Settlement Class Members during the Class Period is approximately $11,290,068. *See* Joint Declaration of Class Counsel I at ¶ 8. Thus, the Settlement Fund of $4,500,000 represents approximately 40% of that sum. *Id*.

No funds from the Settlement will revert to Defendant. Unclaimed money from uncashed checks that remains in the Net Settlement Fund 30 days after the latest issued check shall be disbursed (i) in a secondary distribution to Settlement Class Members, if the average check amount would equal or exceed $10.00 and this is otherwise feasible, or (ii) if a secondary distribution is not feasible, to a *cy pres* recipient agreed upon by the Parties and approved by the Court, or (iii) if the Parties are unable to agree on a secondary distribution plan or on the *cy pres* recipient, as directed by the Court. *See* Settlement Agreement at ¶ 64.

In addition to the monetary benefits set forth above, the Settlement provides that Defendant shall forgive, waive, and not collect from Settlement Class Members the Charged-Off Amounts, *i.e.* APSN Fees up to $682,000 that Settlement Class Members owe to Defendant on an Account that was closed during the Class Period. *Id*. at ¶¶ 4 and 35. Should the Charged-Off Amounts otherwise exceed $682,000, forgiveness shall be applied to relevant accounts on a pro rata basis. *Id*. at ¶ 35. Consequently, the total value of the Settlement is $5,182,000 (the "Settlement Value"), *i.e.* the Settlement Fund of $4,500,000 plus the Charged-Off Amounts of $682,000. *See id*. at ¶ 28.

In exchange for the consideration from the Defendant, the Action will be dismissed with prejudice upon final approval of the Settlement, and the Settlement Class Members will thereby release all Released Claims against the Released Parties. *See id*. at ¶¶ 20-23 and 70-72.

III. THE REQUESTED AWARD OF ATTORNEYS' FEES IS REASONABLE AND APPROPRIATE.

A. THE LEGAL STANDARD FOR AWARDING ATTORNEYS' FEES.

"Courts utilize two main approaches to analyzing a request for attorney fees," the percentage of the fund method and the lodestar method. *Caligiuri v. Symantec Corp*., 855 F.3d 860, 865 (8th Cir. 2017) (citing *Johnston v. Comerica Mortg. Corp*., 83 F.3d 241, 244 (8th Cir.

1996)). "It is within the discretion of the district court to choose which method to apply, as well as to determine the resulting amount that constitutes a reasonable award of attorney's fees in a given case." *Id.* The Supreme Court has consistently held that the percentage of the fund approach is an appropriate methodology for awarding fees to plaintiffs' counsel in a common fund case. *See Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984) ("Under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class"); *see also Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 164-65, 59 S. Ct. 777, 779 (1939); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 123, 5 S. Ct. 387, 390 (1885).

Courts in the Eighth Circuit and in Arkansas routinely and customarily use the percentage of the fund method when awarding attorney fees from a common fund. Indeed, "[i]n the Eighth Circuit, use of a percentage method of awarding attorney fees in a common-fund case is not only approved, but also well established." *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1061 (D. Minn. 2010) (internal quotation marks omitted) (also noting that "[a]warding attorney fees based on the percentage of the common fund recovered is a routine calculation of fees"); *Rawa v. Monsanto Co*., 934 F.3d 862, 870 (8th Cir. 2019) (affirming fee award of 28% of the Settlement, or $6,020,000); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) (stating fee awards based on the percentage of the fund method are "well established"); *Cleveland v. Whirlpool Corp.,* No. 20-CV-1906 (WMW/JFD), 2022 WL 2256353, at *9 (D. Minn. June 23, 2022) ("A typical calculation of attorneys' fees in a class action involves the common-fund doctrine, which is based on a percentage of the common fund recovered."); *Plymouth Cnty. Ret. Sys. v. Patterson Cos., Inc*., 2022 WL 2093054, at *1 (D. Minn. June 10, 2022) (approving 33-1/3% fee on $63 million settlement).

The percentage of the recovery approach aids litigants and the courts because it "directly

aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d. Cir. 2005); *see also Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (percentage of the benefit is "a method of more closely aligning the lawyer's interests with those of his client by giving him a stake in a successful outcome"). "[U]nder the percentage approach, the class members and the class counsel have the same interest—maximizing the recovery of the class." *See* Silber and Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel's Response*, 17 Rev. Litig. 525, 534 (Summer 1998). The percentage of the recovery is particularly appropriate where none of the settlement fund will revert to the defendant. *Barfield v. Sho-Me Power Elec. Co-op.*, No. 2:11-CV-4321NKL, 2015 WL 3460346, at *4 n.1 (W.D. Mo. June 1, 2015).

Consistent with the foregoing, Professor Fitzpatrick's empirical research shows that the trend—both within and outside the Eighth Circuit—is for courts to utilize the "percentage" method in awarding attorneys' fees in the context of class action common fund settlements. *See* Fitzpatrick Decl. at ¶¶ 12-17. In his declaration, Professor Fitzpatrick goes on to explain why the "percentage of the fund" is preferable to the lodestar method in common fund settlements in general. Amongst other reasons, he explains that the lodestar method encourages churning up hours rather than securing the best deal possible for the class even at the expense of future work by the attorneys, sets up a conflict between the interests of the Class (which is to get the best deal possible) with that of the attorneys (which is to increase hours), and needlessly increases judicial workload. *Id*. at ¶ 12. Moreover, if the lodestar is appropriate or desirable, it is only in those circumstances when a settlement's benefits are difficult or complicated to value, and, concomitantly, it is difficult to identify what a percentage of that fund (in attorneys' fees) would even be. *Id*. at ¶¶ 12-13.

In applying the percentage method of compensation, courts determine the total benefit to the class "based on both the monetary and the non-monetary value of the settlement." *Tussey v. ABB, Inc.*, No. 06-CV-04305-NKL, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019); *see also* Principles of the Law of Aggregate Litigation, A.L.I., § 3.13(b) (May 20, 2009) ("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 nonmonetary value of the settlement."). Thus, consideration of injunctive or declaratory relief, as well as savings to settlement class members or elimination of their debts is appropriately considered as part of the total value of a settlement. *Tussey*, 2019 WL 3859763, at *2 (including tax avoidance and injunctive relief in addition to monetary relief as being the basis for the total value of the settlement for determining an appropriate common-fund fee); *Barfield*, 2015 WL 3460346, at *4 (including administrative costs paid separately by defendant as being part of the total value of the settlement). Accordingly, and as numerous courts recognize, "[i]n bank fee litigation, forgiveness of debts owed is routinely included in the value of the settlement" when awarding fees. *Hash v. First Fin. Bancorp*, No. 1:20-cv-01321-RLM-MJD, 2021 WL 12269067, at *3 (S.D. Ind. Nov. 22, 2021) (collecting cases); *see also 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 [settlement value]"). For example, in *Walkingstick v. Simmons Bank*, No. 6:19-cv-03184-RK (W.D Mo. Nov. 15, 2022), ECF No. 167, a district court in this Circuit awarded counsel (including Cohen & Malad, LLP) a fee of one-third of the total value of a bank fee settlement comprised of a $3.25 million fund and $753,234 in debt forgiveness. *See also Murray v. Earthlink*, Case No. 4:18-cv-00202-JM, (E.D. Ark. February 6, 2025), slip opinion at pg. 2 (Judge James M. Moody, Jr. awarded Class Counsel

(including Carney Bates & Pulliam, PLLC) a fee of 32% of $85 million settlement amount, or $27.2 million); *Williams v. State Farm Mutual Automobile Ins. Co*., Case No. 4:11-cv-00749-KGB (E.D. Ark. June 1, 2018), slip opinion at p. 12 (Judge Kristine Baker awarding Class Counsel (including Carney Bates & Pulliam, PLLC) fees of $6.57 million, or 30% of the settlement amount of $21.9 million).

B. THE PERCENTAGE OF THE FUND METHOD IS APPROPRIATE IN THIS COMMON FUND CASE.

The common fund doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 746 (1980). One way to spread litigation costs proportionately among those who benefit from the lawsuit is to assess attorneys' fees against the entire common fund. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-58 (1975); *see also Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-94 (1970) (assessing fees against common fund spreads cost of representation proportionately among those benefitted).

Thus, a reasonable percentage of the Settlement Fund is an appropriate basis on which to award Class Counsel a fee in this case. *See Huyer v. Buckley,* 849 F.3d 395, 399 (8th Cir. 2017) (noting that courts within the Eighth Circuit frequently award attorneys' fees on a percentage basis, typically between 25% and 36% of a common fund); *Caligiuri*, 855 F.3d 860 (affirming fee award of one-third of the gross settlement fund); *Koenig v. U.S. Bank N.A. (In re U.S. Bancorp Litig.)*, 291 F.3d 1035, 1038 (8th Cir. 2002) (affirming fee award to class counsel of 36 percent of settlement fund); *Petrovic*, 200 F.3d 1157 ("It is well established in this circuit that a district court may use the 'percentage of the fund' methodology to evaluate attorney fees in a common-fund settlement"); *Nelson v. Wal-Mart Stores, Inc.,* No. 2:05CV000134WRW, 2009 WL 2486888, at *1 (E.D. Ark. Aug. 12, 2009) (awarding attorneys' fees in the amount of one third of the total

settlement fund).

Class Counsel assumed significant risk in prosecuting this litigation entirely on a contingency fee basis. Bearing this risk and facing formidable obstacles and uncertainties involved in this complex litigation, Class Counsel's efforts resulted in securing a Settlement Fund of $4,500,000, as well as the forgiveness of the Charged-Off Amounts. A fee award based on a percentage of the common fund they created is reasonable compensation for their efforts. *See* Fitzpatrick Decl. at ¶¶ 19-30.

C. THE RELEVANT FACTORS SUPPORT CLASS COUNSEL'S REQUESTED FEE AWARD.

In determining fee awards, courts in the Eighth Circuit typically consider some or all of the relevant factors listed in *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714, 717–19 (5th Cir. 1974). *See In re Target Corp. Customer Data Security Breach Litig*., 892 F.3d 968, 977 (8th Cir. 2018); *In re Xcel Energy Inc. Securities Derivative and "ERISA" Litig*., 364 F. Supp. 2d 980, 993 (D. Minn. April 8, 2005). The *Johnson* factors are:

> (1) The time and labor required; (2) The novelty and difficulty of the questions; (3) The skill requisite to perform the legal service properly; (4) The preclusion of other employment by the attorney due to acceptance of the case; (5) The customary fee for similar work in the community; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or the circumstances; (8) The amount involved and the results obtained; (9) The experience, reputation, and ability of the attorneys; (10) The undesirability of the case; (11) The nature and length of the professional relationship with the client; and (12) Awards in similar cases.

In re Xcel Energy, 364 F. Supp. 2d at 993. Because not all factors apply to every case, a court should use its discretion to tailor the considerations to the individual facts of the case before it. *See Huyer*, 849 F.3d at 398–400 (affirming trial court's award of one-third of the common fund after review of Johnson factors 1- 5 only); *Swinton v. SquareTrade, Inc*., 454 F. Supp. 3d 848, 886 (S.D. Iowa 2020) ("Many of the *Johnson* factors are related to one another and lend themselves to being

analyzed in tandem."); *Khoday v. Symantec Corp.,* No. 11-CV-180 (JRT/TNL), 2016 WL 1637039, at *9 (D. Minn. Apr. 5, 2016), *report and recommendation adopted,* No. 11-CV-0180 (JRT/TNL), 2016 WL 1626836 (D. Minn. Apr. 22, 2016) ("Many of the factors overlap, and not all of the individual factors will apply in every case, affording the Court wide discretion in the weight to assign each factor.")

As demonstrated below, consideration of all the applicable factors strongly supports the requested fee award.

1. Time and Labor Required.

Consideration of the efforts and time expended by Class Counsel establishes that the requested fee is reasonable. Class Counsel have exerted substantial efforts since this Action started. As discussed herein and in the accompanying declarations, the litigation has been hard-fought, entailing substantial and time-consuming investigation, research, document review, and settlement negotiations. Specifically, Class Counsel researched and analyzed all factors involved in Plaintiffs' claims as well as possible defenses available to Defendant, drafted the operative complaint advancing Plaintiffs' claims, opposed the removal of this action to federal court, engaged in informal discovery and reviewed the data and documents produced in response, prepared written mediation statements and participated in a full-day mediation, engaged in further settlement negotiations with Defendant's Counsel, conducted confirmatory discovery, and have worked with the Settlement Administrator to implement the Court-approved notice plan. *See* Joint Declaration of Randall K. Pulliam and Lynn A. Toops in Support of Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards ("Joint Decl. of Class Counsel II") at ¶¶ 35-36. Clearly, Class Counsel have been fully committed to the prosecution of this Action and have devoted substantial time and resources to this Action. All work performed by Class Counsel was necessary, performed without

duplication, and successfully advanced this litigation toward Settlement. As such, the effort and time expended by Class Counsel in navigating the complex legal and factual issues presented in this litigation supports the requested fee. *Yarrington*, 697 F. Supp. 2d at 1063 (finding the efforts and time of counsel, among other factors, justified an award of attorneys' fee of 33 1/3% of the settlement fund).

2. The Result Achieved.

Many courts consider the result achieved to be the most important factor in determining whether the fee requested is reasonable. *See In re Flight Transp. Corp. Sec. Litigation*, 685 F. Supp. 1092, 1095 (D. Minn. 1987) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). There is no question that in this case, Class Counsel have achieved a very favorable result.

First, the Settlement Class will benefit greatly from the $4,500,000 Settlement Fund negotiated by Class Counsel. This amount is equal to approximately 40% of the compensatory damages alleged by Plaintiffs. *See* Joint Declaration of Class Counsel I at ¶ 8. There is no reverter of any funds to Defendant. Thus, every dollar of the Settlement Fund will be used for the benefit of Settlement Class Members. Moreover, there is no claims process. Rather, Settlement Class Members will automatically receive a payment unless he or she excludes himself or herself. In addition, the Settlement Class will also benefit from Defendant's waiver and forgiveness of the Charged-Off Amounts, up to $682,000. *See id*. at ¶ 10.

Second, Class Counsel recognize that in contrast to the tangible, immediate benefits of the Settlement, the outcome of continued litigation and a trial against Defendant is uncertain. At the time of settlement, there was a pending motion to remand. Moreover, the Settlement was reached prior to (i) full motions for class certification and summary judgment, (ii) the conclusion of both fact and expert discovery, and (iii) trial preparation. The Settlement removes these risks and

uncertainties and assures that Settlement Class Members will receive compensation for their claims now, without further litigation and expense. *See Stuart v. State Farm Fire & Cas. Co.*, No. 4:14-CV-4001, 2020 WL 2892819, at *3 (W.D. Ark. June 2, 2020) (finding settlement "has the benefit of providing substantial benefits to Class Members now, without further litigation, under circumstances where the liability issues are still vigorously contested among the Parties and the outcome of any class trial or appeal remain uncertain," and finally approving the settlement).

Third, there is no guarantee that, even if Defendant's liability could be established, the damages awarded would have been higher than the current Settlement amount. *See Burnett v. Nat'l Ass'n of Realtors*, No. 4:19-CV-00332-SRB, 2024 WL 2842222, at *4 (W.D. Mo. May 9, 2024) ("[E]xperience proves that, no matter how confident trial counsel may be, they cannot predict with 100% accuracy a jury's favorable verdict.").

In short, the benefits secured through Settlement were achieved through the work and skill of Class Counsel and will benefit all Settlement Class Members without the need to take any affirmative action like submitting a claim form, while avoiding the risk and uncertainty of further litigation and a possible trial. *See* Fitzpatrick Decl. at ¶¶ 25 and 27. Accordingly, consideration of this factor weighs in favor of Class Counsel's fee request.

3. <u>The Novelty and Difficulty of the Legal and Factual Issues, the Significant Skill of Experienced Counsel, and Awards in Similar Actions.</u>

"Most class actions are inherently complex and settlement avoids the costs, delays and multitudes of other problems associated with them." *In re Telectronics Pacing Sys. Accufix Atrial "J" Leads Prods. Liab. Litig.*, 137 F. Supp. 2d 985, 1013 (S.D. Ohio 2001) (citation omitted); *Marshall v. Green Giant Co.*, 942 F.2d 539, 549 (8th 1991) ("It goes without saying that class actions are very complex and represent a significant drain on the court in terms of time and

management.").

The complexity of this case is considerable and arises from both its substantive allegations and the damages analyses that must be undertaken if Plaintiffs are to prevail at trial. The complexity of this litigation translates into considerable and material risk that Plaintiffs would not secure a recovery that would be greater than the amount of money recovered through the Settlement. In fact, there is a significant risk here that Class Counsel could prosecute this case for several more years (through full discovery, including expert discovery, class certification, summary judgment, trial and the inevitable appeals that would follow) and, in the end, recover less than the proposed Settlement, or nothing, for the Class. *See In re Ikon Office Solutions Sec. Litig.*, 194 F.R.D. 166, 179 (E.D. Pa. 2000) (noting where large sums of money are at issue, litigation is guaranteed to be long, drawn-out, and any plaintiff's verdict would be appealed by defendants, further extending litigation); *accord In re Aetna Inc. Sec. Litig.*, No 1219, 2001 WL 20928, at *6 (E.D. Pa. Jan. 4, 2001) ("The risk of delay could have deleterious effects on any future recovery").

Notwithstanding the complexity and difficulty of the issues involved in this case, Class Counsel was able to negotiate an excellent recovery for the Settlement Class. Class Counsel respectfully submit that the work they performed in this litigation reflect their skill and experience in complex class litigation. *See also* Fitzpatrick Decl. at ¶¶ 7 and 28. Additionally, the firm resumes of Carney Bates & Pulliam, PLLC and Cohen Malad attest to the national reputation and extensive experience of Class Counsel in the area of complex class litigation. *See* Joint Decl. of Class Counsel I at Exs. A-B. Accordingly, the quality and skill involved in the services performed by Class Counsel support the requested fee.

Moreover, the requested fee is directly in line with fees awarded in similar, complex class litigation in the Eighth Circuit and Arkansas. *See Walkingstick v. Simmons Bank*, No. 6:19-cv-

03184-RK (W.D Mo. Nov. 15, 2022), ECF No. 167 (awarding Class Counsel (including Cohen & Malad, LLP) attorneys' fees of one-third of the value of the settlement in bank fee litigation); *Holt v. CommunityAmerica Credit Union*, No. 4:19-cv-00629-FJG (W.D. Mo. Dec. 8, 2020), ECF No. 51 (awarding Class Counsel (which included Cohen & Malad, LLP) attorneys' fees of one-third of the $3,078,436 value of the settlement in bank fee litigation); *Bingollu v. One Source Tech., LLC*, No. 22-CV-77 (DTS), 2024 WL 4249549, at *4 (D. Minn. Sept. 20, 2024) (finding request for one-third of the settlement fund "reasonable"); *Niewinski v. State Farm Life Ins. Co.*, No. 23-04159-CV-C-BP, 2024 WL 4902375, at *5 (W.D. Mo. Apr. 1, 2024) (granting attorneys' fees of one-third of $65,000,000 settlement); *Phillips v. Caliber Home Loans, Inc.*, No. 19-CV-2711 (WMW/LIB), 2022 WL 832085, at *7 (D. Minn. Mar. 21, 2022) (awarding Class Counsel (which included Carney Bates & Pulliam, PLLC) attorneys' fees of one third of the Settlement Fund); *Williams v. State Farm Mutual Automobile Ins. Co*., Case No. 4:11-cv-00749-KGB (E.D. Ark. June 1, 2018), slip opinion at p. 12 (awarding Class Counsel (which included Carney Bates & Pulliam, PLLC) fees of $6.57 million, or 30% of the settlement amount of $21.9 million); *see also Huyer*, 849 F.3d at 399 (noting that courts within the Eighth Circuit frequently award attorneys' fees between 25% and 36% of a common fund); *Caligiuri*, 855 F.3d 860 (affirming fee award of one-third of the gross settlement fund).

As stated by Professor Fitzpatrick in the accompanying Declaration,

> "According to my empirical study, the lodestar method is now used to award fees in only a small percentage of class action cases. . . . The other large-scale academic studies of fees agree. *See, e.g.,* Theodore Eisenberg et al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. Law Review 937, 945 (2017) (hereinafter "Eisenberg-Miller 2017") (finding the lodestar method used only 6.29% of the time from 2009-2013, down from 13.6% from 1993-2002 and 9.6% from 2003-2008). Rather, courts overwhelmingly pay class action lawyers a percentage of what they recover. See Fitzpatrick, *Empirical Study*, supra, at 832 *Comerica*, 83 F.3d at 244-45; *In re Xcel Energy, Inc. Sec., Derivative, & ERISA Litig.,* 364 F.Supp.2d 980,

992 (D. Minn. 2005) (explaining the "strong policy reasons behind the . . . preference for the percentage of recovery method").

Fitzpatrick Decl. at ¶ 13.

Thus, the requested fee in this litigation reasonably reflects the work accomplished by Class Counsel.

4. The Customary and Contingent Nature of the Fee, Time Limitations Imposed by Client or Circumstances, the Undesirability of the Case, and the Preclusion of Other Employment.

The customary fee in a class action lawsuit is contingent. This is so because virtually no individual possesses a sufficiently large stake in such litigation to justify paying attorneys on an hourly basis. In this regard, it has been a long-recognized rule that an attorney is entitled to a larger fee when the compensation is contingent rather than being fixed on a time or contractual basis. *See Jones v Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981) ("Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured compensation regardless of result"); *Allshouse v. Joshua Agency, LLC*, No. 1:21-CV-1032, 2023 WL 6166474, at *4 (W.D. Ark. Sept. 21, 2023) (finding that contingency nature of the representation, "with no guarantee of success and significant risk of no recovery," along with other factors supported fee request of 40% of the settlement fund).

In this case, Class Counsel undertook the litigation and advanced the costs on a contingent basis, bearing the full risk of no recovery at all. They undertook this litigation knowing that they could easily litigate this case for years, expend hundreds of attorney hours, and tens of thousands of dollars in expenses, and then lose at summary judgment or at trial. *See Brissette v. Heckler*, 784 F.2d 864, 865-66 (8th Cir. 1986) (reversing and remanding based on district court's failure to take "into account any contingency factor" in awarding attorneys' fees where plaintiff prevailed in "a

case with a high risk of loss, which would, if lost, produce no fee").

Additionally, class actions are notoriously lengthy and hard to predict, and had Class Counsel not taken a role in this litigation, they would have been free to allocate their time and resources elsewhere.

Thus, consideration of the customary and contingent nature of the fee, the undesirability of the case and the fact that Class Counsel risked their time and effort with the possibility of no recovery at all, supports the fee request of one-third of the Settlement Fund. *See Lake View Sch. Dist.,* 351 Ark. at 93 (noting that contingent fees range from 33 1/3% to 40%).

5. The Absence of Objections by Members of the Class to Fees Requested by Counsel.

As set forth above, notice has been issued and Class Counsel have received no objection to their fee request. The objection period remains open, and Class Counsel will address any objections that may come. Consequently, at this juncture, the lack of objections by Settlement Class Members is further support of the reasonableness of the requested fee. *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995) ("The fact that only a handful of class members objected to the settlement similarly weighs in [class counsel's] favor."); *In re Xcel Energy*, 364 F. Supp. 2d at 1002 ("[S]ilence can be read as an endorsement of the results received and the services rendered by plaintiff's counsel."); *see also In re Crazy Eddie Sec. Litig*., 824 F. Supp. 320, 327 (E.D.N.Y. 1993) (holding that the lack of objections to the requested fee supported its reasonableness).

IV. CLASS COUNSEL ARE ENTITLED TO BE REIMBURSED FOR THEIR REASONABLE LITIGATION EXPENSES.

Attorneys who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses and costs from the fund. *See Jorstad v. IDS Realty*

Trust, 643 F.2d 1305, 1315 (8th Cir. 1981); *Phillips*, 2022 WL 832085, at *7 (awarding reimbursement of litigation costs that included "filing fees, travel costs, mediation, photocopying, mail and telephone costs, and other incidental expenses related to the litigation."). 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*, 2019 WL 3859763, at *5. Here, Class Counsel are seeking reimbursement of costs and expenses in an aggregate amount of $27,766.64 for prosecuting this action on behalf of the Class. As set forth in the Joint Declaration of Class Counsel II, these expenses were incurred on an ongoing basis for such items as filing and pro hac vice fees, mediation, forensic investigation and consulting witnesses, online research, Federal Express, travel to hearings and mediation, and postage, which represent expenses directly related to the prosecution of this Action. *See* Joint Decl. of Class Counsel II at ¶¶ 42-43.

Accordingly, Class Counsel respectfully request reimbursement for these reasonable expenses as part of the requested fee award.

V. CLASS REPRESENTATIVES ARE ENTITLED TO A SERVICE AWARD.

"Service award payments are regularly made to compensate class representatives for their help to a class." *In re Zurn Pex Plumbing Prods. Liab. Litig.*, No. 08-MDL-1958 ADM/AJB, 2013 U.S. Dist. LEXIS 27155, at *6 (D. Minn. Feb. 27, 2013) (approving service awards of $7,500 and $5,000); *Niewinski v. State Farm Life Ins. Co.*, No. 23-04159-CV-C-BP, 2024 WL 4902375, at *5 (W.D. Mo. Apr. 1, 2024) (approving service awards of $25,000); *Stuart*, 2020 WL 2892819, at *3 (approving service awards of $9,500 each); *Braden v. Foremost Ins. Co. Grand Rapids, Michigan*, No. 4:15-CV-4114, 2018 WL 4903268, at *5 (W.D. Ark. Oct. 9, 2018) (approving service awards of $10,000 each); *Caligiuri*, 855 F.3d at 867 (affirming service awards of $10,000 each and noting

"courts in this circuit regularly grant service awards of $10,000 or greater"). Here, Plaintiffs devoted time in the oversight of, and participation in, the litigation on behalf of the Settlement Class. Specifically, Plaintiffs' efforts included: (1) initial factual investigation, including collecting documents; (2) reviewing the complaint and other case filings, including pleadings relating to Plaintiffs' motion to remand; (3) working with Class Counsel concerning case developments and informal discovery; (4) participating in the mediation process; and (5) reviewing and discussing the terms of the Settlement reached in this case. *See* Joint Decl. of Class Counsel II at ¶ 46. Consequently, the requested service awards of $5,000 to each Class Representative is appropriate, consistent with service awards in similar cases, and should be approved.

VI. CONCLUSION.

For all the foregoing reasons, Plaintiffs respectfully request that the Court award Class Counsel attorneys' fees of one-third of the Settlement Fund, or $1,500,000, award Class Counsel reimbursement of litigation expenses in the amount of $27,766.64 and award service awards of $5,000 each for the two Class Representatives.

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Respectfully submitted,

By: */s/ Randall K. Pulliam*

Randall K. Pulliam (ABN 98015)
CARNEY BATES & PULLIAM, PLLC
One Allied Drive, Suite 1400
Little Rock, Arkansas 72202
Telephone: (501) 312-8500
Email: rpulliam@cbplaw.com

Lynn Toops (*admitted pro hac vice*)
COHEN & MALAD, LLP
One Indiana Square, Suite 1400
Indianapolis, IN 46204
Telephone: (317) 636-6481
Email: ltoops@cohenandmalad.com

Attorneys for Plaintiffs