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

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

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

CADENCE BANK **DEFENDANT**

MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I. INTRODUCTION

Pursuant to Rule 23 of the Federal Rules of Civil Procedure ("FRCP") and the Court's Order Granting Preliminary Approval of Class Action Settlement, dated January 16, 2025 (the "Preliminary Approval Order"), Plaintiffs Joseph Self and Malinda Self ("Plaintiffs" or "Class Representatives") respectfully submit this memorandum of law in support of final approval of the proposed settlement (the "Settlement") of this class action (the "Action").

The Settlement[1] before the Court resolves all claims against Defendant Cadence Bank ("Defendant") in exchange for a cash payment of $4,500,000 (the "Settlement Fund") for the benefit of the Settlement Class, as well as the forgiveness of APSN Fees up to $682,000.00 that Settlement Class Members owe to Defendant on accounts that were closed during the Class Period (the "Charged-Off Amounts"). 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

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

receive a *pro rata* distribution from the Settlement Fund, as well as forgiveness of the Charged-Off Amounts as applicable.

Plaintiffs firmly believe that this is an excellent Settlement, in the best interests of the Settlement Class, and satisfies the criteria for final approval as discussed herein. The deadline for objections and opt-outs has passed, and no Settlement Class Member or governmental entity has objected; no Class Member has opted out. The Settlement is the product of arm's-length negotiations by experienced and informed counsel with a firm understanding of the strengths and weaknesses of their clients' respective claims and defenses, following informal discovery and a full-day mediation session.

While Plaintiffs are confident in the merits of the claims alleged, Defendant has defenses that add substantial risk to Plaintiffs' ability to prevail at key benchmarks for the case—motion for class certification, interlocutory appeal thereof, motion for summary judgment, *Daubert* challenges, trial and post-trial appeal. Accordingly, the terms and conditions of the Settlement were fairly negotiated and reflect a fully informed and fair compromise.

By separate motion, Class Counsel are requesting attorneys' fees of one-third of the Settlement Fund, or $1,500,000, as well as reimbursement of litigation expenses in the amount of $27,766.64. ECF No. 31. Additionally, Plaintiffs are requesting a service award of $5,000 each for recognition of their service as the Class Representatives. *Id.* These amounts are fair and reasonable based upon the relief achieved in this Action; the skill, time, and effort required to obtain such relief; the complex legal issues and technical matters presented; the contingent nature of the representation; the risks assumed; and customary fees and awards in similar actions.

The notice plan for this action was successfully implemented in accordance with the Preliminary Approval Order and the Settlement Agreement, with notice reaching approximately

94.31% of the Settlement Class Members to whom notice was sent through individualized email and mailed notice, supplemented by a dedicated Settlement Website and call center. *See* Supplemental Declaration of Karen Rogan Re: Notice Procedures ("Supp. Rogan Decl.") at ¶ 12. Additionally, the Settlement enjoys the support of the Settlement Class. As stated above, no Settlement Class Member has filed an objection nor requested to be excluded from the Settlement. *Id*. at ¶¶ 16–17.

Plaintiffs further request this Court approve reimbursement of expenses and fees paid by Cadence Bank to Ankura Consulting Group, LLC ("Ankura") in the amount of $325,000 for Ankura's work in compiling and updating the class list by, among other things, processing transaction data and completing the calculations of amounts Settlement Class Members allegedly paid in APSN Fees during the Class Period.[2]

Accordingly, Plaintiffs respectfully submit that the Settlement satisfies all criteria for final approval, and specifically request this Court: (i) grant final approval of the Settlement as fair, reasonable, and adequate; (ii) grant final certification to the Settlement Class; (iii) find that the notice program as set forth in the Settlement Agreement and effectuated pursuant to the Preliminary Approval Order satisfies the requirements of Federal Rule of Civil Procedure 23(c) and due process and constitutes the best notice practicable under the circumstances; (iv) approving payment of notice and administration fees to the Settlement Administrator in the amount of

[2] Paragraph 31(f) of the Settlement Agreement states, in relevant part: "The Settlement Fund shall be used for the following purposes…Payment of costs and expenses of Defendant's consulting experts in compiling and updating the Class List." In addition, the Court's Preliminary Approval Order stated: "Subject to approval of invoices by class counsel, the Settlement Administrator and Ankura Consulting Group, LLC are authorized to be paid for services as provided in the Settlement." The Bank paid Ankura's fees—which exceeded $325,000—and has requested reimbursement from the Settlement Fund in the amount of $325,000. Class counsel have approved Ankura's invoices for this amount as set forth in the Settlement Agreement and the Court's Preliminary Approval Order.

$129,260; and (v) approve reimbursement of expenses and fees paid by Cadence Bank to Ankura in the amount of $325,000.

II. FACTUAL AND PROCEDURAL BACKGROUND

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 processed transaction data for nearly 3.9 billion transactions to calculate APSN Fees assessed during the Class Period, as alleged by Plaintiffs, in order to compile and update the Class List.. *See* ECF No. 24-1 at ¶ 57.

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 ("Joint Declaration of Class Counsel I") ECF No. 25, along with a copy of the Settlement Agreement.

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

III. THE SETTLEMENT

A. THE SETTLEMENT BENEFITS

As stated above, under the Settlement, Defendant shall establish a cash Settlement Fund of $4,500,000.00 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 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 $11,290,068.00. *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. 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 $682,000.00 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 $682,000.00, forgiveness shall be applied to relevant accounts on a pro rata basis. *Id*. at ¶ 35. Consequently, the total value of the Settlement is $5,182,000.00 (the "Settlement Value"), *i.e.* the Settlement Fund of $4,500,000.00 plus the Charged-Off Amounts of $682,000.00. *See* Settlement Agreement 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.

B. NOTICE TO THE SETTLEMENT CLASS

In accord with Section VIII of the Settlement Agreement and the Court's Preliminary Approval Order, notice of the proposed Settlement to Settlement Class Members was made by (1) email (the "Email Notice") for Settlement Class Members who are Current Account Holders and for whom Defendant has an email address; and (2) postal mail (the "Postcard Notice") for (i) Settlement Class Members who are Current Account Holders and for whom Defendant does not have an email address, (ii) Settlement Class Members for whom email notice was returned or bounced back as undeliverable, and (iii) Former Account Holders. *See* Supp. Rogan Decl. at ¶¶ 5–12.

The Notices included the following information: (1) a description of the class action and the proposed Settlement, (2) the rights of Settlement Class Members to request exclusion from the Settlement Class or to object to the Settlement and instructions about how to exercise those rights, (3) specifics on the date, time and place of the Final Approval Hearing, and (4) information regarding Class Counsel's anticipated fee application and the anticipated request for the Class Representatives' service awards. *See id*. at Exs. C–E.

Both the Email Notice and the Postcard Notice included a link for the Settlement Website, which included the following: (1) a more detailed Long Form Notice; (2) a "Contact Information" page with the Settlement Administrator's contact information; (3) important case documents, including the Settlement Agreement and the Court's Preliminary Approval Order; (4) important case dates and deadlines, including the deadlines to opt out and object; (5) a summary of Settlement Class Members' options; and (6) the date, time, and location of the Final Approval Hearing. *See Id.* Moreover, in accord with the Settlement Agreement and the Court's Preliminary Approval Order, Plaintiffs' Motion for Award of Attorneys' Fees, Litigation Costs, and Service Awards, along with the supporting memoranda, has been posted on the Settlement Website, and a copy of the final approval papers will be posted there as well.

C. CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, LITIGATION COSTS, AND SERVICE AWARDS

In accord with the Settlement Agreement, Class Counsel is requesting an award of attorneys' fees equal to one-third of the Settlement Fund, or $1,500,000, to compensate them for all the work already performed in this case, all the work remaining to be performed in connection with this Settlement, and the risks undertaken in prosecuting this case. Class Counsel is also seeking reimbursement of their out-of-pocket litigation costs in the amount of $27,766.64, as well as service awards for the two Class Representatives, in the amount of $5,000 each, to compensate them for their work on behalf of the Settlement Class. ECF No. 31. The enforceability of the Settlement Agreement is not contingent on the Court's approval of Plaintiffs' Motion for Attorneys' Fees, and any award granted by the Court will be paid out of the Settlement Fund.

IV. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT.

A. CRITERIA TO BE CONSIDERED IN ASSESSING WHETHER A CLASS ACTION SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE.

Federal Rule of Civil Procedure 23(e) requires judicial approval for the settlement of class action claims. A class action should be approved if the court finds it "fair, reasonable, and adequate." *Id*. at 23(e)(2). The Eighth Circuit has recognized a strong policy favoring settlements, especially in class action cases. *See Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1,* 921 F.2d 1371, 1383 (8th Cir. 1990) ("The law strongly favors settlements. Courts should hospitably receive them."); *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) ("A strong public policy favors agreements, and courts should approach them with a presumption in their favor." (internal quotation omitted)); *Pfizer v. Lord*, 456 F.2d 532, 543 (8th Cir. 1972) ("[T]he policy of the law encourages compromise to avoid the uncertainties of the outcome of wasteful litigation and expense incident thereto."); *see also In re Charter Commc'ns, Inc., Sec. Litig.*, No. 4:02-CV-1186 CAS, 2005 WL 4045741, at *4 (E.D. Mo. June 30, 2005) ("In the class action context in particular, there is an overriding public interest in favor of settlement." (citation and internal quotation marks omitted)); ("The Eighth Circuit recognizes that 'strong public policy favors settlement agreements, and courts should approach them with a presumption in their favor.'") *Beaver Cnty. Emps.' Ret. Fund v. Tile Shop Holdings, Inc.*, 2017 WL 2574005, at *2 (D. Minn. June 14, 2017) (cleaned up). This policy "'is particularly strong in the class action context.'" *Id*.

Rule 23(e)(2), as amended effective December 1, 2018, provides that in determining whether a settlement is "fair, reasonable, and adequate," the Court should consider whether:

(A) the class representatives and counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment;

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

Along with the Rule 23(e)(2) factors, courts in this Circuit also consider: "(1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement." *In re Wireless,* 396 F.3d 922, 932 (8th Cir. 2005) (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975)); *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988); *see also Whitley v. Baptist Health*, No. 4:16-CV-624-DPM, 2022 WL 16824654, at *1 (E.D. Ark. Nov. 8, 2022); *Cleveland v. Whirlpool Corp*., No. 20-cv-1906, 2022 WL 2256353, at *5 (D. Minn. June 23, 2022); *Anderson v. Travelex Insurance Servs. Inc*., No. 8:18-CV-362, 2021 WL 4307093, at *2 (D. Neb. Sept. 22, 2021).

B. THE SETTLEMENT SATISFIES THE CRITERIA FOR FINAL APPROVAL.

1. The Class Representatives and Class Counsel Have Provided Excellent Representation to the Settlement Class.

Rule 23(e)(2)(A)'s adequate representation inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *See, e.g., Garner v. Butterball, LLC*, No. 4:10CV01025 JLH, 2012 WL 570000, at *4 (E.D. Ark. Feb. 22, 2012); *Niewinski v. State Farm Life Ins. Co.*, No. 23-04159-CV-C-BP, 2024 WL 4902375, at *5 (W.D. Mo. Apr. 1, 2024). In this regard, the adequacy requirement is met when "the Class Representatives have no interests antagonistic to or in conflict with the Settlement Class and have retained experienced and competent counsel to prosecute th[e] matter on behalf of the Settlement Class." *Blackwell v. Kraemer N. Am., LLC*, No. 23-CV-1851 (KMM/LIB), 2024 WL 2014045, at *1 (D. Minn. May 7, 2024).

Here, the Settlement Class Representatives have adequately represented the Settlement Class in this action. They have been actively involved throughout the course of the litigation and Settlement, assisting Class Counsel in investigating the claims on an individual basis, reviewing case documents, remaining apprised of the litigation, submitting information necessary for informal discovery efforts and overseeing settlement negotiations. *See* Joint Declaration of Randall Pulliam and Lynn Toops in Support of Motion for Attorneys' Fees, ECF No. 33 ("Joint Declaration of Class Counsel II") at ¶¶ 45–46. These efforts, including the risks they voluntarily took as well as the time they expended advancing the litigation, were crucial to achieving the excellent result for the Settlement Class. *Id*. The Class Representatives have no conflict with the Settlement Class, assert no claim for individual relief, and were prepared to testify at trial. *Id*.

Class Counsel likewise have adequately represented the Settlement Class. Class Counsel are well-qualified and experienced class action litigators, and have extensive, nationwide experience in similar consumer class action, and in particular, bank fee class action litigation. *See* Joint Decl. of Class Counsel I at ¶¶ 3-6 and Exs. A and B; Joint Decl. of Class Counsel II at ¶ 34;

see also Plaintiff's Motion for Attorneys' Fees. In short, Class Counsel vigorously litigated this case by performing such tasks as: extensive pre-suit factual investigation, drafting the complaint and remand papers, engaging in informal discovery regarding the merits of Plaintiffs' claims and class certification, participating in a full-day mediation, achieving a very favorable Settlement on behalf of the Settlement Class, drafting the Settlement Agreement and all related exhibits, presenting the proposed Settlement to the Court and obtaining an order directing notice to the Settlement Class, and working with the Settlement Administrator to implement the Court-approved notice plan and to address any other issues that may arise. Moreover, Class Counsel have no conflicts of interest with the Settlement Class. Thus, this factor weighs in favor of the Settlement. *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) (granting final approval upon concluding "[t]he Class Representatives have adequately represented the class, the Settlement Agreements were negotiated at arm's-length by experienced counsel acting in good faith, including mediation with a nationally recognized and highly experienced mediator, and the Settlement Agreements were reached as a result of those negotiations.").

2. The Settlement Was Negotiated at Arm's Length by Experienced Counsel Informed Through a Developed Factual Record, With No Signs of Collusion

A settlement is fair, reasonable and adequate when it is reached after arm's-length negotiations between experienced counsel with the assistance of a neutral mediator. *Khoday v. Symantec Corp.*, No. 11-CV-180 (JRT/TNL), 2016 WL 1637039, at *8 (D. Minn. Apr. 5, 2016), *report and recommendation adopted*, No. 11-CV-0180 (JRT/TNL), 2016 WL 1626836 (D. Minn. Apr. 22, 2016). The pre-negotiation exchange of discovery further contributes to a settlement's fairness, reasonableness, and adequacy. *See id.* (noting a court may consider "the settlement's

timing, including whether discovery proceeded to the point where all parties were fully aware of the merits.").

Here, prior to and during the mediation process, the Parties prepared and reviewed detailed mediation statements and exchanged additional information and supporting materials outlining their respective legal positions regarding the merits of Plaintiff's claims, Rule 23 considerations, and the scope of damages. Joint Decl. of Class Counsel I at ¶¶ 17-19. During mediation before experienced mediator Mr. Jed D. Melnick of JAMS, counsel for the Parties vigorously defended their clients' positions. As part of the ongoing settlement negotiations, the Parties exchanged additional information related to the merits of Plaintiff's claims, as well as the size and nature of the class. That information allowed Class Counsel—attorneys with considerable experience—to make an informed assessment of the strengths and risks of the claims, and balance the benefits of settlement against the risks of further litigation. *Id.* at ¶ 18. At the end of a full-day mediation session, the Parties were able to reach an agreement in principle. This was followed by additional negotiations to memorialize the Settlement documents, as well as confirmatory discovery. *Id.* at ¶ 19. Thus, the Settlement here is the result of arm's-length negotiations between capable counsel and with the assistance of an experienced mediator, following a thorough investigation and development of the factual record through informal and confirmatory discovery.

Moreover, the Settlement itself bears no indicia of collusion: attorneys' fees were negotiated separately, after the parties had agreed on the substantive terms, there is no "clear sailing" provision, and there is no issue of a reverter. *See Cleveland,* 2022 WL 2256353, at *5 (finding the record reflected arm's length negotiations which demonstrated "a lack of collusion").

3. The Settlement Provides Meaningful Relief to the Settlement Class.

When determining if the relief provided for the Settlement Class is adequate, courts must take into account "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2). These factors are further informed by the four factors adopted by the Eighth Circuit in *Grunin* and *Van Horn*. Here, all factors weigh in favor of final approval.

i. The Merits of Plaintiffs' Case Balanced Against the Terms of the Settlement, and the Costs, Risks, and Delays of Continued Litigation Through Trial and Appeal.

"The single most important factor in determining whether a settlement is fair, reasonable, and adequate is a balancing of the strength of the plaintiff's case against the terms of the settlement." *In re Bankamerica Corp. Sec. Litig.*, 210 F.R.D. 694, 700 (E.D. Mo. 2002); *In re Target Corp. Customer Data Sec. Breach Litig.*, 892 F.3d 968, 978 (8th Cir. 2018) ("The first factor, a balancing of the strength of the plaintiff's case against the terms of the settlement, is the single most important factor." (internal quotation marks omitted; cleaned up)). In assessing the Settlement, the Court should weigh the strength of a plaintiff's case on the merits in light of the uncertainties of fact and law against the immediacy and certainty of the money offered in the settlement and the potential recovery by the class. *See Stuart v. State Farm Fire & Cas. Co.*, No. 4:14-CV-4001, 2020 WL 2892819, at *5 (W.D. Ark. June 2, 2020) (finding settlement "will result in substantial savings in time and resources to the Court and the litigants and will further the interests of justice" and granting final approval after review); *Braden v. Foremost Ins. Co. Grand Rapids, Michigan*, No. 4:15-CV-4114, 2018 WL 4903268, at *5 (W.D. Ark. Oct. 9, 2018) ("The

settlement of the Lawsuit on the terms, conditions, and limitations set forth in the Stipulation is approved and confirmed in all respects as fair, reasonable, and adequate and in the best interests of the Settlement Class, especially in light of the benefits made available to the Settlement Class and the costs and risks associated with the continued prosecution, trial, and possible appeal of this complex litigation.").

The Court's analysis of the benefits of the Settlement need only be a rough approximation of risks of continued litigation rather than an attempt to reach conclusions as to the merits of the case:

> In evaluating this factor, the Court's task is not to reach any conclusions as to the merits of the plaintiffs' case, nor should the Court substitute its opinion for that of plaintiffs' counsel and members of the class. . . . Rather, the determination herein generally will not go beyond "an amalgam of delicate balancing, gross approximation, and rough justice."

In re Employee Benefit Plans Sec. Litig., No. 3-92-708, 1993 WL 330595, at *4 (D. Minn. June 2, 1993) (citations omitted). In this regard, the "reasonableness" of a settlement "is not susceptible to a mathematical equation yielding a particularized sum." *Amos v. PPG Industries, Inc*., Case No. 2:05-cv-70, 2015 WL 4881459, at *3 (S.D. Ohio Aug. 13, 2015). Rather, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); *cf. Keil v. Lopez*, 862 F.3d 685, 696 (8th Cir. 2017); *Briles v. Tiburon Fin., LLC*, Case No. 8:15CV241, 2016 WL 4094866, at *5 (D. Neb. Aug. 1, 2016).

The Settlement amount of $4,500,000 in this case definitely falls within the "range of reasonableness." The Parties have determined, based upon Defendant's records, that the estimated sum of all APSN Fees paid by Settlement Class Members during the Class Period is approximately $11,290,068.00. Thus, the settlement consideration of $4,500,000.00 represents roughly 40% of the compensatory damages alleged by Plaintiffs. *See* Joint Decl. I at ¶ 8. In addition, Defendant

shall forgive the Charged-Off Amounts, up to $682,000. *See id*. at ¶ 10. Thus, the Settlement provides a Settlement Value of $5,182,000.00 for the benefit of Settlement Class Members. *See id*. at ¶ 11. This recovery is definitely within the range of reasonableness. *See Phillips v. Caliber Home Loans, Inc.*, No. 19-CV-2711 (WMW/LIB), 2022 WL 832085, at *2 (D. Minn. Mar. 21, 2022) (approving $5,000,000 non-reversionary common fund, representing approximately 29% of damages); *Keil*, 862 F.3d at 696 (finding settlement "representing 27 percent of the maximum recovery at trial, is a compromise well within the fair and reasonable range."); *Beaver Cnty. Employees' Ret. Fund v. Tile Shop Holdings, Inc.*, No. 014CV00786ADMTNL, 2017 WL 2574005, at *3 (D. Minn. June 14, 2017) (finding that recovery of $9.5 million, representing a recovery of approximately 6.8% to 9.5% of the Class's maximum damages was within the range of reasonableness). Class Counsel believe this is a significant recovery for the Settlement Class Members. *See In re Bankamerica*, 210 F.R.D. at 701 (recognizing that in weighing "the significance of immediate recovery by way of the compromise to the mere probability of relief in the future, after protracted and expensive litigation," it is "proper to take the bird in the hand instead of a prospective flock in the bush.").

In contrast to the tangible, immediate benefits of the Settlement, the outcome of continued litigation and a trial against Defendant is uncertain. *See Stuart*, 2020 WL 2892819, at *3 (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). And while Plaintiffs are confident in the strength of their claims, they nevertheless recognize that this litigation is inherently risky. Throughout these proceedings, counsel for the Defendant vigorously defended their client's position and demonstrated their commitment to

litigate this Action to its conclusion. Further, absent the instant Settlement, Plaintiffs would have to conduct formal discovery, which would involve the lengthy, costly, and uncertain process of obtaining relevant information from Defendant, as well as expert discovery. In addition, Plaintiffs would need to certify and maintain a class over Defendant's opposition and survive summary judgment. Plaintiffs then would need to prevail at trial and secure an affirmance on a likely appeal before recovering damages. Ultimately, continued litigation could add several more years before there is a resolution. Thus, because this case is settling prior to full motions for class certification and summary judgment, expert discovery and trial preparation, there is no question that continued litigation would greatly increase the expense and duration of this Action. *See Dekro v. Stern Bros. & Co.*, 571 F. Supp. 97, 100 (D. Mo. 1983) (settlement approved where "further litigation in this action would have been lengthy, complex, and expensive"); *In re Telectronics Pacing Sys.*, 137 F. Supp. 2d 985, 1013 (S.D. Ohio 2001) (settlement serves laudable goal of eliminating costs and time attendant to continued litigation) (citation omitted).

Moreover, the delay through trial, post-trial motions and the appellate process could deny the Class any recovery for years and add substantial time and costs to the litigation. *See In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig.,* 364 F. Supp. 2d 1013 (D. Minn. 2005) (finding settlement removed the risks, delay, and costs associated with continued litigation while delivering assured benefits to the Class and weighed in favor of final approval). Avoiding these unnecessary expenditures of time and resources clearly benefits all Parties and the Court. *Burnett*, 2024 WL 2842222, at *4 ("[E]xperience proves that, no matter how confident trial counsel may be, they cannot predict with 100% accuracy a jury's favorable verdict.").

In sum, the Settlement provides meaningful benefits to the Settlement Class now, while continued litigation would be complex, time consuming and expensive – with a substantial

likelihood that, even if Plaintiffs ultimately prevailed on liability, the Class would not recover a significantly greater amount than the amount presently provided for in the proposed Settlement. Therefore, this Court should find that these factors militate in favor of final approval the Settlement.

ii. Effectiveness of Any Proposed Method of Distributing Relief to the Class.

The Rule 23(e)(2)(C)(ii) requires that the "proposed method of distributing relief to the class" be "effective." Under the Settlement, Settlement Class Members who do not exclude themselves 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. Eligible Settlement Class Members who do not exclude themselves will also receive forgiveness of the Charged-Off Amounts. In short, Settlement Class Members will receive settlement benefits without the need to take any affirmative action. As such, the method of distributing relief to the Settlement Class is effective, and this factor weighs in favor of final approval.

iii. The Requested Attorneys' Fees and Costs Are Reasonable, Reflective of the Quality of Counsel's Skills and Work, and In Line with Similar Awards Approved in the Eighth Circuit.

As set forth in Plaintiffs' Motion for Attorneys' Fees, Class Counsel is seeking an award of attorneys' fees of $1,500,000 and reimbursement of out-of-pocket litigation expenses in the amount of $27,766.64 *See also* Joint Dec. of Class Counsel II at ¶¶ 42–43. Class Counsel's fee and expense requests are reasonable compared to the benefits Class Counsel has achieved for Settlement Class Members, the experience and ability of Class Counsel, and similar fee awards in the Eighth Circuit. *See* Plaintiffs' Motion for Attorneys' Fees.

In addition to the foregoing, Plaintiffs are also seeking award of a service award in the amount of $5,000 each for serving as the Class Representatives in this Action, which is both reasonable and directly in line with similar awards approved in the Eighth Circuit. *See id*.

iv. There Is No Agreement Required to Be Identified under Rule 23(e)(3).

Rule 23(e)(2)(C)(iv) requires consideration of "any agreement required to be identified under Rule 23(e)(3)." There are no additional agreements outside of the Settlement Agreement that require identification under Rule 23(e)(3).

v. Defendant's Financial Condition.

Defendant has already funded the Settlement Fund. Regardless, Defendant is a solvent company, and there is no indication that it will be unable to pay or will incur undue hardship because of the Settlement. Accordingly, consideration of Defendant's financial condition weighs in favor or is neutral to the fairness analysis. *See Risch v. Natoli Eng'g Co., LLC*, No. 4:11CV1621 AGF, 2012 WL 3242099, 9-10 (E.D. Mo. Aug. 7, 2012); *In re Target Corp. Customer Data Sec. Breach Litig.*, 892 F.3d at 978.

vi. The Lack of Opposition to the Settlement.

The number of class members who opt out of a class or who object to a settlement is relevant, though not conclusive, to whether the settlement is reasonable. *See Petrovic*, 200 F.3d at 1152 (identifying "the amount of opposition to the settlement" as a factor for the court to consider in approving a settlement agreement). The reaction of the Settlement Class here supports final approval of the Settlement. Pursuant to the Preliminary Approval Order, the Notices were mailed to 55,921 Settlement Class Members and emailed to 12,376 Settlement Class Members. *See* Supp. Rogan Decl. at ¶¶ 6, 9. The Notices describe the nature and procedural history of the Action and the terms of the Settlement and advise Settlement Class Members of their right to opt out or to

object. *See id.* at Exs. C–E. As of April 17, 2025, not one Settlement Class Member has objected, and not one Settlement Class Member has requested to be excluded. *See id*. at ¶¶ 16–17. The lack of any objections to the Settlement constitutes further support that the Settlement is fair, adequate and in the best interest of the Class. *See Zilhaver v. UnitedHealth Grp., Inc.,* 646 F. Supp. 2d 1075, 1080 (D. Minn. 2009) ("The Court also considers that after notice to over 23,000 class members, there has not been a single objection. Without any class objection, this factor strongly supports settlement approval."); *Kloster v. McColl (In re BankAmerica Corp. Sec. Litig.)*, 350 F.3d 747, 750 (8th Cir. 2003) (settlement determined to be fair and reasonable where there were ten objections out of "the hundreds of thousands of eligible class members"); *In re Eng'g Animation Sec. Litig.*, 203 F.R.D. 417, 422 (S.D. Iowa 2001) ("[T]he Court notes there was minimal opposition to this settlement. This weighs in favor of finding it fair."). Therefore, there is no doubt that this factor weighs in favor of the proposed Settlement.

Accordingly, consideration of each of Rule 23(e)(3)'s four subfactors, as well as the additional factors espoused by the Eighth Circuit in *Grunin* and *Van Horn*, weighs in favor of final approval.

4. The Settlement Treats Settlement Class Members Equitably Relative to Each Other.

Here, the Settlement Fund will be distributed to Settlement Class Members who do not opt out of the Settlement. Thus, the plan of allocation treats all Settlement Class members in the same manner: everyone who has not excluded himself or herself from the Settlement Class, receives a pro rata share of the net Settlement Fund based on the amount of alleged APSN fees charged to the account. In addition, forgiveness of the Charged-Off Amounts will be made on a pro rata basis, as applicable.

V. THE PLAN OF ALLOCATION OF THE SETTLEMENT FUND IS ADEQUATE, FAIR AND REASONABLE AND SHOULD BE APPROVED.

The approval of a plan of allocation of settlement proceeds is "governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate.'" *In re Ikon Office Solutions*, 194 F.R.D. 166, 184 (E.D. Pa. 2000) (citing *In re Computron*, 6 F.Supp.2d 313, 321 (D.N.J. 1998); *see also Telectronics*, 137 F. Supp. 2d at 985 (finding settlement and plan of allocation fair, adequate and reasonable). Generally, "a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable." *Ikon*, 194 F.R.D. at 184.

Here, the Settlement Fund will be distributed to Settlement Class Members who do not opt out of the Settlement. Thus, the plan of allocation treats all Settlement Class members in the same manner: everyone who has not excluded himself or herself from the Settlement Class, receives a pro rata share of the net Settlement Fund based on the amount of alleged APSN fees charged to the account. In addition, forgiveness of the Charged-Off Amounts will be made on a pro rata basis, as applicable.

In sum, the plan of allocation, which was fully disclosed to members of the Settlement Class, ensures an equitable distribution among eligible claimants, making it fair, reasonable, and adequate. As such, the plan of allocation should be approved.

VI. FINAL CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE AND WARRANTED.

Here, in its Preliminary Approval Order, the Court previously determined that certification of the action for settlement purposes is appropriate. Specifically, the Court found that the Settlement Class satisfied each of the requirements of Federal Rule of Civil Procedure 23 in that (a) the Settlement Class is sufficiently numerous that joinder of all members is impracticable; (b)

there are questions of law or fact common to members of the Settlement Class that predominate over questions affecting only individual members; (c) Plaintiffs' claims are typical of the claims of the Settlement Class and Plaintiffs and Class Counsel will fairly and adequately protect the interests of the Settlement Class; and (d) a settlement class action is the superior method for fairly and efficiently adjudicating this Action. *See* Preliminary Approval Order at ¶ 3. For these same reasons, this Court should finally certify the Settlement Class for settlement purposes.

VII. THE METHOD AND FORM OF CLASS NOTICE SATISFIES RULE 23.

FRCP 23(e) requires that notice of a proposed compromise of a class action be given to all members of the class in such manner as the court directs. Generally, notice need only be "reasonably calculated, under all the circumstances." *Petrovic*, 200 F.3d at 1153 ("The Supreme Court has found that the notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (internal quotation marks omitted)); *see also Grunin*, 513 F.2d at 121 ("the mechanics of the notice process are left to the discretion of the court subject only to the broad "reasonableness" standards imposed by due process.").

Here, notice was accomplished through: (a) individual Postcard and Email Notices; (b) creation and maintenance of a Settlement Website; and (c) establishment of a call center with a toll-free number. *See generally* Supp. Rogan Decl. Based on this notice plan, it is estimated that notice reached at least 94.31% of Settlement Class Members to whom notice was sent, which is directly in line with the range deemed reasonable by the Federal Judicial Center. *See id*. at ¶ 12; *see also* Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, at 3 (describing a notice plan as "reasonable" if it has a "reach between 70-95%").

Moreover, the content of the notices sufficiently advised Settlement Class Members of the essential terms of the Settlement; the rights of Settlement Class Members to share in the recovery, to request exclusion from the Settlement Class, or to object to the Settlement; and the date, time and place of the final approval hearing. Thus, the Notices provided the necessary information for Settlement Class Members to make an informed decision regarding the proposed Settlement. The Notices also contained information regarding Class Counsel's application for attorneys' fees and reimbursement of litigation expenses, the proposed plan for allocating the Settlement proceeds among Settlement Class Members, and the application for a service award to the Class Representatives. Finally, there is no claims process. Rather, Settlement Class Members will automatically receive a payment unless he or she excludes himself or herself.

In short, the form and manner of notice proposed here fulfill the requirements of FRCP 23 and due process.

VIII. THE SETTLEMENT ADMINISTRATOR'S NOTICE AND ADMINISTRATION FEES AND EXPENSES ARE REASONABLE AND SHOULD BE APPROVED.

Under the Settlement Agreement, payment of all notice and administration fees are to paid from the Settlement Fund. *See* ECF No. 24-1 at ¶31(d). The Settlement Administrator's total fees are $129,260, which includes costs and fees for the CAFA Notice Packet, updating the Class List through the National Change of Address Database, the Email Notice campaign, printing and mailing 56,411 Postcard Notices, creation and maintenance of the Settlement Website, set up and maintenance of the toll free phone number, set up and maintenance of the Settlement email, responding to Settlement Class Members questions, and preparing status updates and declarations as set forth in the Settlement Agreement. *See generally* Supp. Rogan Decl. The requested notice and administration fees comport with similar administrative costs approved in similar sized settlements. *See Harris v. Vector Marketing Corp.,* No. C–08–5198 EMC, 2012 WL 381202, at

*6 (N.D. Cal. Feb. 6, 2012) (awarding $250,000 in administration costs where class size was approximately 68,487). Accordingly, the Settlement Administrator's notice and administration fees and expenses are reasonable and should be approved.

IX. THE EXPENSES AND FEES INCURRED BY ANKURA WERE IN FURTHERANCE OF THE SETTLEMENT AND REIMURSEMENT OF THESE COSTS SHOULD BE APPROVED.

Under the Settlement Agreement, Ankura was charged with compiling and updating the Class List by, among other things, processing approximately 3.9 billion transactions and computing the amounts Settlement Class Members paid in APSN Fees during the Class. Ankura provided the initial computations for the Class List in early January 2025. The Class List was comprised of 77,935 persons, and for each included Account Numbers, Total Net APSN Fees, Account Status, Settlement Class Member names, mailing addresses, email addresses, and phone numbers. *See* ECF 34 at ¶ 5. And since the time the Class List was provided to the Settlement Administration in January 2025, Ankura has continued to monitor and update, where appropriate, the information in the Class List. For its work, Ankura incurred expenses and fees that exceeded $325,000, which expenses and fees were paid by Cadence Bank. However, Defendant requests—and pursuant to the Settlement Agreement and the Court's Preliminary Approval Order, Class Counsel have approved—reimbursement only in the amount of $325,000. The expenses and fees incurred by Ankura were in furtherance of the Settlement, and, as such, reimbursement of expenses and fees paid by Cadence Bank to Ankura is justified and appropriate. *See CASA de Maryland, Inc. v. Arbor Realty Tr., Inc*., No. CV DKC 21-1778, 2024 WL 1051120, at *9 (D. Md. Mar. 11, 2024) (granting final approval of settlement and approving reimbursement of expert fees, among others).

IX. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court enter an order, substantially in the form of the proposed Final Approval Order: (i) granting final approval of the Settlement as fair, reasonable, and adequate; (ii) granting final certification to the Settlement Class; (iii) finding that the notice program as set forth in the Settlement Agreement and effectuated pursuant to the Preliminary Approval Order satisfies the requirements of Federal Rule of Civil Procedure 23 and due process and constitutes the best notice practicable under the circumstances; (iv) approving payment of notice and administration fees to the Settlement Administrator in the amount of $129,260; and (v) approving reimbursement of expenses and fees paid by Cadence Bank to Ankura in the amount of $325,000.

Dated: April 24, 2025

Respectfully submitted,

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