FILED
2023 Jun-30 PM 05:16
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA, NORTHEASTERN DIVISION

BEVERLY MACON and SAVANNAH GARNER, on behalf of themselves and all others similarly situated, Plaintiffs, v. REDSTONE FEDERAL CREDIT UNION, Defendant.	Case No. 5:21-cv-01682-LCB Assigned to: Liles C. Burke CLASS ACTION
HEATHER LESLIE, JEANINE DUNN, TAMELA HAMPTON, and JESSIE BEASLEY, on behalf of themselves and all others similarly situated, Plaintiffs, v. REDSTONE FEDERAL CREDIT UNION, Defendant.	Case No. 5:20-cv-00629-LCB Assigned to: Liles C. Burke CLASS ACTION

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FOR ATTORNEYS' FEES AND COSTS

Named Plaintiffs Tamela Hampton ("Hampton"), Beverly Macon ("Macon), and Savannah Garner ("Garner"), on behalf of themselves and the proposed Settlement Class, by and through their counsel, respectfully submit this Memorandum in Support of Plaintiffs' Unopposed Motion for Final Approval of

Class Action Settlement and for Attorneys' Fees and Costs (the "Motion"). Defendant Redstone Federal Credit Union ("Redstone" or "Defendant") does not oppose the relief sought in this Motion.

On April 28, 2023, this Court preliminarily approved the Settlement Agreement and Release[1] (the "Agreement") entered into between the Parties, finding it to be within the range of being fair, reasonable, and adequate, and conditionally certified the Settlement Class for settlement purposes only. A copy of the Agreement is attached to the Declaration of Sophia G. Gold ("Gold Decl.") as ***Exhibit 1***.

After over three years of contentious litigation, substantial motion practice, and arms' length negotiations conducted in good faith with the assistance of a third-party neutral mediator, the Parties reached a Settlement for Class Members valued at **$3,976,031.00**. More specifically, Defendant agreed to establish a Settlement Fund for the Settlement Class in the amount of $3,700,000.00 in monetary relief to be directly distributed—without the need for Settlement Class Members to submit a claim form or submit any accompanying proof—in the form of either a credit to Class Members who are members of Redstone at the time of distribution or a check mailed to Class Members who are not members of Redstone at the time of distribution. Further, Defendant has also agreed to forgive certain Uncollected Fees

[1] The capitalized terms used herein are defined and have the same meaning as used in the Agreement unless otherwise stated.

in an estimated amount of $276,031.00. These significant benefits constitute an exceptional result for the Settlement Class and represent a fair, adequate, and reasonable resolution of the Actions.

The Settlement has been well received by the Settlement Class so far. The culmination of the Notice period has resulted in 75,444 Settlement Class Members receiving notice, which constitutes 98.6% of the Class. To date, **zero** Settlement Class Members have objected to the Settlement and **zero** Settlement Class Members have opted out of the Settlement. In sum, the reaction of the Settlement Class represents an overwhelmingly positive response to the Settlement and only further justifies a grant a final approval. In the event these statistics change before the Bar Dates to Object and to Opt Out, Class Counsel will report these changes to the Court.

Additionally, Plaintiffs respectfully request that this Court approve an award of $1,325,211 in attorneys' fees for Class Counsel, $28,913.54 in reasonable litigation costs, and approximately $148,573.89 in Settlement Administrator's fees and costs, all of which are to be paid from the Settlement Fund. Class Counsel is entitled to reasonable compensation for the work performed and the costs incurred in prosecuting the Actions and achieving the extraordinary result on behalf of the Settlement Class.

Based on the work that Class Counsel did in order to obtain these significant benefits for the Settlement Class, the requested attorneys' fee award represents one-

third of the Value of the Settlement. The amount of this award is reasonable and routinely approved by federal courts in the Eleventh Circuit, including in the Northern District of Alabama, and across the nation in similar complex class action settlements.

In light of the excellent result achieved for the Settlement Class, Plaintiffs now respectfully request that the Court grant Final Approval of the Settlement, finding it to be fair, adequate, and reasonable; enter the Final Approval Order approving the Settlement; and grant Class Counsel the requested attorneys' fees and costs, and Settlement Administrator's fees and costs.

I. BACKGROUND

A. Brief Overview of the Litigation and Settlement Process

On May 5, 2020, former plaintiff Heather Leslie filed her putative class action complaint in the United States District Court, Northern District of Alabama, Case No. 5:20-cv-00629-LCB against Redstone arising out of Defendant's practice of charging OD Fees and NSF Fees on transactions that did not overdraw checking account holders' accounts (the "Leslie Action"). Leslie alleged claims for breach of contract and breach of the covenant of good faith and fair dealing, as well as violation of the Electronic Fund Transfers Act (Regulation E), C.F.R. § 1005, *et seq.* On July 17, 2020, Defendant moved to dismiss the complaint, which the Court

denied on March 22, 2021. Defendant filed its answer on April 13, 2021, denying all liability to Plaintiffs.

On December 3, 2021, Defendant moved to dismiss the Leslie Action, and also filed a motion for summary judgment and motion to stay and extend deadlines. On December 10, 2021, Leslie sought leave to amend her complaint, which the Court granted on March 24, 2022, thereby denying the motion for summary judgment as moot.

On April 1, 2022, Leslie and Plaintiffs Dunn, Hampton, and Beasley filed an amended complaint, which similarly alleged claims for breach of contract and violation of Regulation E arising Redstone's same alleged fee practices. On April 15, 2022, Defendant answered the amended complaint, denying all liability.

On September 16, 2022, Defendant filed a motion for summary judgment as to Leslie's individual claims only, and on October 7, 2022, the parties filed a stipulation of dismissal with prejudice as to Leslie's claims only.

On October 6, 2022, Plaintiffs moved for class certification, proposing Hampton to be appointed as the sole class representative for the proposed class.

Separately, Plaintiffs Macon and Garner filed a putative class action complaint against Defendant on December 20, 2021, in the United States District Court, Northern District of Alabama, Case No. 5:21-cv-01682-LCB for breach of

contract and alleging an additional theory of liability that Defendant improperly assessed Multiple NSF Fees on the same transaction (the "Macon Action").

On March 7, 2022, Defendant move to compel the Macon Action to arbitration, which the Court granted on October 28, 2022.

On January 9, 2023, the parties attended a full-day mediation for both the Leslie Action and the Macon Action before mediator Phillip E. Adams, Jr. Although the parties did not settle at the mediation, they continued engaging in settlement negotiations in good faith, resulting in the Agreement now pending Final Approval before this Court.

On April 28, 2023, after the Court thoroughly examined the Settlement in its entirety to ensure the Settlement was provisionally fair, adequate, and reasonable, this Court entered its Preliminary Approval Order, preliminarily approving the Settlement and conditionally certifying the Settlement Class for purposes of notice and settlement only.

B. The Key Terms of the Preliminary Approved Settlement

The key terms of the preliminarily approved Settlement are briefly summarized below:

- Agreed certification of the Settlement Class, defined as:

  All persons who are members of the Multiple NSF Fee Class, Regulation E Class, and/or the Sufficient Funds Class.

Multiple NSF Fee Class: All current or former members of Defendant who were assessed Multiple NSF Fees on a consumer account. Multiple NSF Fees mean nonsufficient funds and overdraft fees that were charged and not refunded from December 20, 2015 to July 1, 2021 for ACH and check transactions that were re-submitted by a merchant after being rejected for insufficient funds.

Regulation E Class: All current or former members of Defendant who were assessed Regulation E Overdraft Fees on a consumer account. Regulation E Overdraft Fees mean overdraft fees that were charged to members of Defendant and not refunded from May 5, 2014 to July 1, 2021 for non-recurring debit card or ATM transactions.

Sufficient Funds Class: All current or former members of Defendant who were assessed Sufficient Funds Overdraft Fees on a consumer account. Sufficient Funds Overdraft Fees mean overdraft fees that Defendant assessed and did not refund from May 5, 2014 to July 1, 2021 where there was enough money in the member's account to cover the transaction in question if holds placed on deposits and pending debit card transactions were not deducted from the account balance. Agreement, ¶¶ 1 (bb), (r), (t), (x), (z), (ee), (gg).

- Notice of the Settlement to be sent directly to the Settlement Class Members by the Settlement Administrator, advising them of the terms of the Settlement and their rights to object to or exclude themselves from the Settlement. *Id.,* ¶ 5; Exhibits 1-2.

- Payment by Defendant of a common cash Settlement Fund in the amount of $3,700,000.00. *Id.*, ¶¶ 1(cc); 11(a).

- Direct payment from the Net Settlement Fund of Individual Payments to Settlement Class Members through direct deposit to their accounts for current members of Defendant and by check for those who are not current members of Defendant at the time of distribution. *Id.*, ¶ 11(d)(iv)(5).

- Forgiveness of Uncollected Fees in the estimated amount of $276,031 that were Multiple NSF Fees, Regulation E Overdraft Fees, or Sufficient Funds Overdraft Fees that were assessed but were not paid because they were charged off. *Id.*, ¶¶ 3, 1(hh).

- Class Counsel's attorneys' fees of up to 33.33% of the Settlement Fund, reimbursement of litigation costs incurred in the Actions; Settlement Administrator's fees and costs; and Service Awards in the amount of $10,000.00 each for the Named Plaintiffs for serving as Class Representatives. *Id.*, ¶ 11(d).[2]

- *Cy pres* award to United Way of Madison County (Alabama) and the United Way of Rutherford and Cannon Counties (Tennessee), in equal parts, in the event there are any uncashed checks or residual funds held by the Settlement Administrator after the one-hundred eighty (180) day deadline. *Id.*, ¶ 12.

C. The Outcome of Notice Dissemination and Anticipated Distribution of Benefits

Beginning on May 15, 2023, the Settlement Administrator disseminated Notice of the Settlement. *See* Declaration of Kroll Settlement Administrator, Scott M. Fenwick ("Fenwick Decl.") ¶ 8. To date, 75,413 Settlement Class Members received notice. That represents over 94% of the Settlement Class.

Settlement Class Members will receive an Individual Payment either in the form of a direct deposit into their account with Redstone or a cash settlement check. Settlement Class Members' Individual Payments shall be made no later than twenty-four (24) days after the Effective Date. Agreement, ¶ 11(d)(iv)(5). Settlement Class Members will also receive a benefit in the form of forgiveness of all Uncollected Fees, calculated to be approximately $276,031, that were assessed but were not paid

---

[2] Named Plaintiffs may seek Service Awards of up to $10,000, contingent on controlling law in the Eleventh Circuit Court of Appeals at the time of the Final Approval Hearing changes to allow for service awards. If permitted, and subject to Court approval, these amounts shall also be paid out of the Settlement Fund. At the time of filing this Motion, however, the precedent as set forth in *Johnson v. NPAS Solutions, LLC,* 975 F.3d 1244 (11th Cir. 2020) has not changed.

because they were charged off. *Id.*, ¶¶ 3, 1(hh). To date, there have been zero objections to the Settlement. Fenwick Decl., ¶ 14. Additionally, to date, there have been zero opt-outs. *Id.*

II. FINAL APPROVAL OF THE SETTLEMENT IS WARRANTED

A. The Settlement is Fair, Adequate, and Reasonable

Federal Rule of Civil Procedure 23(e)(2) requires that class action settlements be "fair, reasonable, and adequate." Judicial policy strongly favors the pretrial settlement of class action lawsuits. *See Bennett v. Behring Corporation,* 737 F.2d 982, 986 (11th Cir. 1984) (the court's "judgment is informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement"); *In re U.S. Oil & Gas Litig.,* 967 F.2d 489, 493 (11th Cir. 1992).

Rule 23(e)(2) permits a district court to approve a class action settlement upon considering whether: "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided the class is adequate…and (D) the proposal treats class members equitably relative to each other." *Marcrum v. Hobby Lobby Stores, Inc.,* No. 2:18-cv-01645-JHE, 2021 WL 3710133, at *2 (N.D. Ala. Aug. 20, 2021) (citing Fed. R. Civ. P. 23(e)(2)). In addition to the Rule 23(e)(2) requirements, the Eleventh Circuit has set forth a six-factor analysis for district courts to consider in assessing

whether the settlement is fair and adequate (the "*Bennett* factors"), which include examining (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved. *Bennett,* 737 F.2d at 986; *see also Swaney v. Regions Bank,* No. 2:13-cv-00544-RDP, 2020 WL 3064945, at *3 (N.D. Ala. June 9, 2020). Many of the *Bennett* factors "bear on the third Rule 23(e)(2) requirement." *Marcrum,* 2021 WL 3710133 at *3.

This Court has already thoroughly considered Rule 23(e)(2) and the six *Bennett* factors in preliminarily approving the Settlement. As such, Plaintiffs respectfully submit that a brief reiteration of these considerations confirm that the Settlement remains fair, adequate, and reasonable. And importantly, after Notice has been successfully disseminated to the Settlement Class, the overwhelmingly positive response of the Settlement Class further confirms that final approval is certainly warranted here.

1. The Rule 23(e)(2) Requirements

Each of the Named Plaintiffs and Class Counsel have adequately and vigorously represented the Settlement class throughout the three-year litigation, which involved significant formal and informal discovery, contentious motion

practice, and settlement negotiations with the assistance of a third-party neutral mediator. Gold Decl., ¶ 5. Further, Plaintiffs, through their counsel, engaged in a lengthy, independent investigation of their claims, as well as the potential claims of other Settlement Class Members, in order to properly weigh the pros and cons of continued litigation versus the proposed nationwide settlement of all claims. *Id.*, ¶ 6. The entire settlement process was negotiated in good faith and at arm's-length by highly knowledgeable counsel experienced in complex class action litigation, including consumer disputes involving banking fee claims. *Id.*, ¶ 7. *See Saccoccio v. JP Morgan Chase Bank, N.A.,* 297 F.R.D. 683, 692 (S.D. Fla. 2014) (recognizing there is a "presumption of good faith in the negotiation process" such that the "Court should find that the settlement is not the product of collusion" where "the parties have negotiated at arm's length"); *see also Marcrum,* 2021 WL 3710133 at *3 (finding the settlement process was procedurally fair where the settlement was negotiated at arm's length, without collusion, and there was "nothing in the record [that] contradicts this finding"). Finally, the relief provided to the Settlement Class Members, as elaborated below, is more than adequate. Each Settlement Class Member will receive substantial monetary relief and will be treated equitably relative to all other members of the Settlement Class based upon the distribution formulas as set forth in the Agreement. *See* Agreement, ¶ 11(d)(iv).

As such, the Settlement satisfies all considerations set forth in Rule 23(e)(2).

2. The *Bennett* Factors

i. The Likelihood of Success at Trial

When weighing the uncertainties of prevailing at trial, given the relative novelty of Plaintiffs' claims, against the guaranteed and immediate benefit afforded to Settlement Class Members, this factor weighs in favor of final approval. *See Swaney,* 2020 WL 3064945 at *3 (noting "this factor weighs in favor of approval where there was no guarantee that the plaintiffs would prevail at trial on their [ ] claims"); *see also Phillips v. Hobby Lobby Stores, Inc.,* No. 2:16-cv-00837-JHE, 2021 WL 3710134, at *4 (N.D. Ala. Aug. 20, 2021). Indeed, although several decisions throughout the country involving claims challenging identical bank fee practices such as Redstone's alleged in this case have prevailed at the pleading stage, the reality is that none of these claims have prevailed at trial. Further, Plaintiffs faced significant hurdles at each stage of the litigation, including obtaining class certification, beating the motion to compel arbitration in the Macon Action, beating the motions for summary judgment, prevailing at trial, and prevailing on appeal at either class certification or after a successful trial. Accordingly, when considering that Plaintiffs faced several obstacles at all levels that could have resulted in no recovery at all for the Settlement Class, the immediate and guaranteed benefits afforded by the Settlement constitutes an exceptional recovery and supports final approval.

ii. The Range of Possible Recovery and Point On or Below the Range of Possible Recovery at Which the Settlement is Fair, Adequate, and Reasonable

These factors also weigh in favor of final approval because the benefits provided to the Settlement Class under the Settlement are as good as, if not better, than the likely result at trial. Here, the Settlement provides significant relief to Settlement Class Members because the Value of the Settlement represents approximately 20-50% of their total actual damages incurred.[3] This percentage is also within the range of other approved settlements in similar bank fee cases. See e.g., Thompson v. Community Bank, N.A., No. 8:19-CV-919 (MAD/CFH), 2021 WL 4084148 at *8 (N.D.N.Y. Sept. 8, 2021) (finding settlement that represented 39% of defendant's potential damages exposure based on the Value of the Settlement "represents a substantial recovery for Settlement Class Members, particularly in light of the risks of litigation"); Story v. SEFCU, No. 1:18-CV-764 (MAD/DJS), 2021 WL 736962, at *9 (N.D.N.Y. Feb. 25, 2021) (finding settlement that represented 57.6% of total damages at issue if court were to look at cash component of the settlement was within the range of reasonableness and warranted final approval); Roberts v. Capital One, N.A., No. 1:16-cv-04841-LGS (S.D.N.Y. Dec. 1,

---

[3] The Sufficient Funds class will receive approximately 50% of actual damages whereas the Multiple NSF fee class will receive approximately 20% of actual damages. The difference in the percentages is attributable to the risk that the Multiple NSF fee class is subject to arbitration. This Court previously compelled Plaintiff Macon and Plaintiff Garner, the two class representatives for the Multiple NSF fee class, to arbitration. In light of the order compelling arbitration on an individual basis, the 20% class-wide settlement is excellent.

2020) (approving a cash fund representing approximately 35% of relevant overdraft fees alleged by plaintiff); In re Checking Account Overdraft Litig., No. 1:09-MD-02036-JLK, 2015 WL 12541970 (S.D. Fla. May 22, 2015) (approving settlement representing approximately 35% of the most probable aggregate damages)..[4]

Settlement Class Members will receive a settlement benefit in the form of either a credit to their accounts or a check in an amount based upon what they paid in applicable Fees. This guaranteed benefit constitutes an exceptional recovery, as Plaintiffs' best-case scenario at trial would be full reimbursement of all Regulation E Overdraft Fees, Sufficient Funds Overdraft Fees, and Multiple NSF Fees, but such recovery would be strongly opposed by Defendant who disputes that any of those fees were improperly assessed and rather, that said fees were permitted under the relevant account agreements and compliant with the EFTA. Gold Decl., ¶ 8. The added benefit of Redstone's agreement to forgive Uncollected Fees further ensures the Agreement's fairness. As such, the significant relief afforded Settlement Class Members in light of the possible amount they would have recovered at trial also supports final approval.

[4] Indeed, this recovery is well above the range commonly approved to be fair, adequate, and reasonable in the Northern District of Alabama. See Parsons v. Brighthouse Networks, LLC, No. 2:09-CV-267-AKK, 2015 WL 13629647, at *3 (N.D. Ala. Feb. 5, 2015) (approving 13% and 20% recoveries for cable subscribers in antitrust case and collecting cases in general that have approved recoveries as low as 5.5%); McWhorter v. Ocwen Loan Servicing, LLC, No. 2:15-CV-01831-MHH, 2019 WL 9171207, at *10-11 (N.D. Ala. Aug. 1, 2019) (approving 30% recovery of total convenience fees assessed when class members made mortgage loan payments).

iii. Complexity, Expense, and Duration of Litigation

A settlement such as this one reached by the Parties "will alleviate the need for judicial exploration of . . . complex subjects, reduce litigation costs, and eliminate the significant risk that individual claimants might recover nothing merits approval." *Swaney,* 2020 WL 3064945 at *4 (citations and quotation marks omitted). "With the uncertainties inherent in pursuing a trial and appeal of this case, the benefits of a resolution by way of settlement are apparent." *Lipuma v. American Express Co.,* 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005).

As discussed above, the Settlement is particularly favorable given the risks of continued litigation and the uncertainties of prevailing at trial on Plaintiffs' novel legal issues. It is reasonable to infer that in the absence of settlement, resolution would have taken years given the complex issues and proposed nationwide class, including further discovery and expert participation. *See Swaney,* 2020 WL 3064945 at *4 (noting "[a] national class (such as this one), to be successful involves extensive discovery and expert involvement; contentious argument and voluminous briefing over certification; summary judgment, and *Daubert* challenges; a lengthy trial; and appeals"); *see also Marcrum,* 2021 WL 3710133 at *4 (finding this factor weighed in favor of final approval where consolidated cases such as this one may "potentially complicate[] trial management issues[,] [f]or example, class certification might be appropriate in one case but not in the other, or some issues might be tried together

and some separately, potentially resulting in jury trials before two different juries"). Further, protracted litigation would only create the risk of encountering unforeseen pitfalls and derail the Settlement Class's claims and ultimately, would delay the Settlement Class's potential recovery and reduce the value of such recovery. Thus, because the Settlement provides a significant and certain recovery, this factor also weighs in favor of final approval.

iv. Zero Class Members Objected to or Opted Out of the Settlement

The reaction of the Settlement Class is an important factor in assessing the reasonableness and adequacy of a proposed settlement. *Camp v. City of Pelham,* No. 2:10-cv-01270-MHH, 2014 WL 1765919, at *4 (N.D. Ala. May 1, 2014). A low percentage of objectors merits approval. *Lipuma,* 406 F. Supp. 2d at 1324 (finding the "small number" of 1,159 opt-outs and 41 objections given the large number of 830,976 claims filed "militates in favor of approval").

After providing Notice of the Settlement to the Settlement Class, and after giving Settlement Class Members sufficient opportunity to review the Court's file and all of the components of the Agreement, zero Settlement Class Members have objected to the fairness of the Settlement and zero Settlement Class Members have elected to opt-out of the Settlement to date. Fenwick Decl., ¶ 14. Thus, the response of absent Class Members to the Settlement was overwhelmingly positive. This uniform response on behalf of Settlement Class Members indicates the Settlement

Class's acceptance of the Settlement and further supports that their interests have been adequately protected by the Settlement. Accordingly, the reaction of the Settlement Class supports Final Approval of the Settlement. *Marcrum,* 2021 WL 3710133 at *4 (citing *Lipuma,* 406 F. Supp. 2d at 1324) (the outright "lack of opposition points to the reasonableness of a proposed settlement and supports its approval.")

v. Stage of The Proceedings

This factor is only concerned with ensuring that the Parties had access to sufficient information to adequately assess the strengths and weaknesses of the case, such that they can craft a fair and reasonable settlement. *See Camp,* 2014 WL 1764919 at *4; *see also Mashburn v. National Healthcare, Inc.,* 684 F. Supp. 660, 669 (M.D. Ala. 1988) (noting "the law is clear that early settlements are to be encouraged. . . and accordingly, only some reasonable amount of discovery is required to determine the fairness of the settlement").

Here, the settlement was reached almost three years after the Leslie Action was filed. Gold Decl., ¶ 9. In between that time, the litigation was hotly contested at each stage as the Parties aggressively litigated the cases through contentious motion practice, including a motion to compel arbitration and motions for summary judgment. The Parties also engaged in extensive settlement negotiations driven by the exchange of both formal and informal discovery, such as Defendant's class

membership data, information regarding Redstone's policies regarding its overdraft practices, and the relevant number of Fees assessed and collected during the Class Period. *Id.*, ¶ 10. Thus, the Parties undoubtedly had sufficient information to adequately assess the merits of the case and to weigh the benefits of settlement prior to entering into the Agreement. *See Parsons,* 2015 WL 13629647 at *12 ("Although full-blown merits discovery has not been taken . . . [where] all Parties had a keen grasp of the issues, the factual underpinnings of the claims and defenses herein, and the measure of the evidence supporting those claims and defenses," is "more than enough to support a conclusion that the settlement is fair and reasonable"); *Marcrum,* 2021 WL 3710133 at *4 (finding that years of "voluminous motion practice, including motions for summary judgment, and discovery" sufficiently enabled plaintiffs "to evaluate the desirability of the settlement versus continuing with litigation").

In sum, each of the *Bennett* factors still weigh in favor of finding that the Settlement is fair, adequate, and reasonable, and therefore, a grant of final approval of the Settlement is warranted.

III. CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES AND COSTS SHOULD BE GRANTED

In conjunction with Final Approval, Class Counsel respectfully requests that the Court award the following from the Settlement Fund: (1) attorneys' fees of

$1,325,211 (One-third of the Value of the Settlement); (2) litigation costs of $28,913.54; and (3) the Settlement Administrator's fees and costs of $148,573.89.

A. The Court Should Award Class Counsel One-Third of the Settlement Fund

Class Counsel seeks an attorneys' fee award of $1,325,211, representing one-third of the Value of the Settlement. This request is consistent with the amount that was identified in the Notice sent to all Class Members, and to which no Class Member has objected to. Having settled this case by creating a substantial Settlement Fund, as well as the forgiveness of Uncollected Fees, from which all eligible Settlement Class Members will obtain a share, Class Counsel are fully entitled to the requested fee award.

The Eleventh Circuit instructs district courts to award attorneys' fees from a common fund based upon a "reasonable percentage of the fund established for the benefit of the class." *Camden I Condo. Ass'n, Inc. v. Dunkle,* 946 F.2d 768, 774 (11th Cir. 1991) (holding that "the percentage of the fund approach [as opposed to the lodestar approach] is the better reasoned in a common fund case"); *see also In re Equifax Inc. Customer Data Security Breach Litig.,* 999 F.3d 1247, 1280 (11th Cir. 2021) (noting that "*Camden I* and the percentage method remain the law in this Circuit."). This methodology is consistent with the Supreme Court's long-standing principle that "[a] litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from

the fund as a whole." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980). "The 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." *Id.* "Notably, in this Circuit, common-fund fee awards are properly calculated as a percentage of benefits made available to the class, regardless of whether each class member redeems the benefits made available to class members, or even whether unclaimed benefits revert to defendant." *Swaney,* 2020 WL 3065945, at *6.

"There is no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded a fee because the amount of any fee must be determined upon the facts of each case." *Camden I,* 946 F.2d at 774. Indeed, this Court maintains "wide discretion to award attorneys' fees based on its own expertise and judgment." *Waters v. Cook's Pest Control, Inc.,* No. 07-cv-394, 2012 WL 29235424, at *15 (N.D. Ala. July 17, 2012). However, fee awards in this Circuit commonly fall between 20% and 30% of the common fund with an upper end of 50%. *Camden I,* 946 F.2d at 774; *see also Comeens v. HM Operating Inc.,* No. 6:14-cv-00521-JHE, 2016 WL 4398412, at *4 (N.D. Ala. Aug. 18, 2016) ("[T]he Eleventh Circuit noted courts have generally approved counsel fees of 20% to 30% but that higher than 50% was known to occur") (citations omitted); *In re Equifax,*

999 F.3d at 1273 (recognizing the "average percentage award in Eleventh Circuit is roughly one-third" of the common fund).

Class Counsel's request for attorneys' fees in the amount of 33.33% of the Value of the Settlement is reasonable and is a fee routinely awarded in this Circuit, including in the Northern District of Alabama. *See e.g., McWhorter,* 2019 WL 9171207 at *13-14 (awarding one-third of $9.7 million common fund plus expenses in FDCPA consumer class action); *Comeens,* 2016 WL 4398412 at *4 (awarding one-third of class recovery plus costs because such award was "reasonable" considering counsel's experience and the complexity of the claim in employment class action even where settlement was reached "early in the case procedurally"); *In re Walter Energy, Inc. Sec. Litig.,* No. 2:12-cv-00281-VEH, 2016 WL 7230505, at *1 (N.D. Ala. May 3, 2016) (awarding 33% of $25 million common fund plus expenses and finding such award "to be fair and reasonable"); *Camp v. City of Pelham,* No. 2:10-cv-01270-MHH, 2015 WL 12746716, at *3-4 (N.D. Ala. Dec. 16, 2015) (awarding over 41% of the common fund in FLSA settlement); *Cook's Pest Control, Inc.,* 2012 WL 29235424, at *15-19 (awarding 35% of $2.5 million common fund plus expenses in discriminatory hiring practices class action); *Deas v. Russell Stover Candies, Inc.,* No. CV-04-C-0491-S, 2005 WL 8158201, at *15 (N.D. Ala. Dec. 22, 2005) (awarding 33% of $935,000 common fund in consumer class action); *In re Johnson & Johnson Aerosol Sunscreen Marketing, Sales Practices and*

Products Liability Litigation, No. 21-md-3015, 2023 WL 2284684 at *12 (S.D. Fla. Feb. 28, 2023) (awarding $2.5 million in fees representing one-third of common fund in consumer class action); *Waters v. Int'l Precious Metals Corp.,* 190 F.3d 1291, 1295-96 (11th Cir. 1999) (affirming 33% award of $40 million common fund in securities fraud class action); *Reyes v. AT&T Mobility Services, LLC,* No. 10-20837-Civ-Cooke/Turnoff, 2013 WL 12219252 at *3 (S.D. Fla. June 21, 2013) (awarding one-third of $3,287,500 settlement fund in FLSA settlement and noting such percentage was "consistent with the trend in this Circuit"); *see also Wolff v. Cash 4 Titles,* No. 03-22778-CIV, 2012 WL 5290155 at *6 (S.D. Fla. Sept. 26, 2012) (collecting cases awarding 33% of the common fund).

Although some courts may utilize a lodestar cross-check to further assess the reasonableness of the requested fees, the Eleventh Circuit "does not require that a lodestar cross-check be done in determining common benefit fee awards." *Drazen v. GoDaddy.com, LLC,* No. 1:19-00563-KD-B, 2020 WL 4606979, *1 n.2 (S.D. Ala. Aug. 11, 2020) (citing *In re Home Depot, Inc.,* 931 F.3d 1065, 1091 n.25 (11th Cir. 2019) (noting that while courts often use a cross-check, "[w]e do not mean to suggest that a cross-check is required. A lodestar cross-check is a time-consuming exercise.")). Indeed, Alabama district courts "regularly award fees based on a percentage of the recovery without discussing the lodestar at all." *Id.* (citations omitted); *see e.g., McWhorter,* 2019 WL 9171207 at *14 (awarding one-third of the

common fund without conducting a lodestar cross-check); *Comeens,* 2016 WL 4398412 at *4 (same); *Carroll v. Macy's, Inc.,* No. 2:18-cv-01060-RDP, 2020 WL 3037067 at *9 (N.D. Ala. June 5, 2020) (awarding a percentage of the common fund without conducting a lodestar cross-check).

1. The Relevant *Johnson* Factors Further Support Class Counsel's Fee Request

As demonstrated above, there is a strong indication that Class Counsel's fee request is reasonable. However, where, as here, the requested fee exceeds 25% of the total benefits available to the class, courts are encouraged to apply the factors set forth in *Johnson v. Ga. Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974) to determine the reasonableness of the requested fee.[5] *See Faught v. American Home Shield Corp.,* 668 F.3d 1233, 1242 (11th Cir. 2011) (citing *Camden I,* 946 F.2d at 774). The *Johnson* factors to be considered are:

> (1) the time and labor required for the litigation; (2) the novelty and difficulty of the questions presented; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the result 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.

[5] All Fifth Circuit decisions dated before October 1, 1981 are binding precedent on all federal courts in the Eleventh Circuit. *See Bonner v. Pritchard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Johnson, 488 F.2d at 717-19. Weighing the relevant *Johnson* factors here confirms that Class Counsel's request of an award amounting to 33.33% of the Value of the Settlement is a reasonable percentage of the amount of the Settlement.[6]

a. The Time and Labor Required

The first factor examines the time and labor expended by Class Counsel in litigating this matter. "Although the hours claimed or spent on a case should not be the sole basis for determining a fee . . . they are a necessary ingredient to be considered." *Johnson,* 488 F.2d at 717.

Over the course of three years of litigation in the Actions, Class Counsel has spent approximately 781.1 hours performing necessary work on behalf of the Settlement Class, from investigating and gathering evidence in support of the claims resolved by the Settlement; drafting the Complaints and Amended Complaints; drafting and responding to written discovery requests; producing and reviewing documents and data; engaging in several meet and confer conferences; researching, drafting, and filing the opposition to motion to compel arbitration in the Macon Action; researching, drafting, and filing the motion for class certification; moving to consolidate the Actions; preparing for mediation by researching and drafting a comprehensive mediation statement and by engaging an expert to review the

[6] Not all of the *Johnson* factors are necessarily relevant under the percentage fee approach in every context. *McWhorter,* 2019 WL 9171207 at *14; *see e.g., Deas,* 2005 WL 8158201, at *14 (approving attorney fee award after applying six *Johnson* factors "of particular relevance").

potential damages; attending mediation; negotiating and drafting the Agreement with Defendant's counsel that provides substantial benefits to the Settlement Class; moving for and obtaining preliminary approval; overseeing the Settlement Administrator's efforts to effectuate notice to the Settlement Class; and preparing the Motions for Final Approval and for Attorneys' Fees and Expenses. More work will be required of Class Counsel after final approval is granted, including working with the Settlement Administrator to ensure that all payments are made, and if residual funds exist, overseeing a second distribution or obtaining approval to issue the residual funds to the *cy pres* recipients.

Class Counsel also engaged in an extensive, independent investigation regarding the viability of Plaintiffs' claims prior to filing the Actions. To illustrate, Class Counsel spent many hours investigating the claims of several potential plaintiffs against Redstone, including interviewing a number of Redstone customers to gather information about Redstone's conduct and its impact upon consumers, which was essential to Class Counsel's ability to understand the nature of Defendant's conduct, the language of the account agreement and other documents at issue, and potential remedies. *Id.*, ¶ 12. Accordingly, Class Counsel's considerable dedication of time and effort in litigating the Actions supports the requested fee.

b. The Novelty and Difficulty of the Questions Involved

The second factor considers the novelty and difficulty of the questions presented in the litigation. As addressed at the preliminary approval stage, although Class Counsel believes that Plaintiffs' claims have substantial merit, the fact remains that, to Class Counsel's knowledge, no similar Sufficient Funds Overdraft Fee or Multiple NSF Fee claims have proceeded to trial. This means that there is no model for Plaintiffs' case and therefore, unforeseen pitfalls could easily derail the Class's claims should they proceed through the rigors of litigation. *See Johnson,* 488 F.2d at 718 ("Cases of first impression generally require more time and effort on the attorney's part.").

c. The Skill Required to Perform the Legal Services Properly and The Preclusion of Other Employment by the Attorneys Due to Acceptance of the Case

Discussion regarding the third and fourth factors go hand in hand, as they consider the skill required to perform the legal services properly and ask if the litigation precluded the attorneys from accepting other cases. As discussed above and in the Gold Declaration, Class Counsel have expended significant time and resources in litigating this complex matter, including contentious motion practice, formal and informal discovery exchange, expert analysis, several rounds of arms'-length negotiations, and mediation. Certainly, time dedicated to the Actions took

away from the time to be dedicated for other cases. Additionally, Class Counsel have national reputations for their acquired skill in complex class action litigation, and particularly, in the context of banking litigation. *See* Gold Decl., ¶ 13; *see also* Ex. A (firm resume).

d. The Customary Fee

As addressed at length above, a 33% fee "is at the market rate" and "[o]ne-third of the recovery is considered standard in a contingency fee agreement." *Wolff,* 2012 WL 5290155 at *4; *McWhorter,* 2019 WL 9171207 at *14 ("[C]ounsel's request of a one-third fee is common and appropriate in consumer class actions such as this one"). Thus, Class Counsel's requested fee representing one-third of the Value of the Settlement is customary in this Circuit.

e. Whether the Fee is Fixed or Contingent

The sixth factor acknowledges that Class Counsel agreed to take this complex class action on a contingency fee basis. Gold Decl., ¶ 22. As a result, Class Counsel assumed a significant risk of nonpayment. Thus, this commitment to prosecute the Actions notwithstanding the financial risk presented to Class Counsel warrants enhanced compensation. *See Behrens v. Wometco Enterprises, Inc.,* 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd,* 899 F.2d 21 (11th Cir. 1990) (noting that "[a] contingency fee arrangement often justifies an increase in the award of attorneys' fees" and "[i]f this 'bonus' methodology did not exist, very few lawyers could take

on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing"); *see also Wolff,* 2012 WL 5290155 at *5.

f. The Amount Involved and the Results Obtained

The eighth factor examines the amount involved and the results obtained in the Settlement. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Camp,* 2015 WL 12746716 at *3 (quoting *Hensley,* 461 U.S. at 435 (recognizing that "the most critical factor is the degree of the success obtained")). As addressed above, the Value of the Settlement constituting $3,976,031.00 in total monetary benefits for the Settlement Class is an excellent achievement and provides Settlement Class Members with a guaranteed benefit representing approximately 20-50% of their total damages. Importantly, Settlement Class Members will automatically receive this benefit without having to submit a claim, offer any evidentiary proof, or opt-in. This factor supports the requested fee and is further justified by the fact that no class member has objected to the settlement or Class Counsel's fee request. *See id.* at *4.

g. Experience, Reputation, and Ability of the Attorneys

As mentioned in the third *Johnson* factor, Class Counsel have extensive backgrounds and have obtained exceptional results in complex class action litigation throughout the country, especially in the niche of banking fee litigation. The firm

resumes submitted with the Gold Declaration confirm that Class Counsel are skilled attorneys and well respected in their areas of expertise. Indeed, Class Counsel's experience is illustrated by the exceptional recovery obtained for the Settlement Class in the instant Actions. This factor also supports the requested fee award.

h. Awards in Similar Cases

"The reasonableness of a fee may also be considered in light of awards made in similar litigation within and without the court's circuit." *Johnson,* 488 F.2d at 719. Class Counsel regularly receives a one-third or higher fee from common fund settlements involving similar banking fee claims in state and federal courts throughout the country. *See* Class Counsel's Resumes, Gold Decl., Ex. A.

In sum, each of the relevant *Johnson* factors weigh in favor of an upward departure from the 25% benchmark and support Class Counsel's fee request for one-third of the Value of the Settlement.

B. The Court Should Approve Reimbursement of Litigation Costs of $28,913.54 **to be Paid from the Settlement Fund**

Class Counsel respectfully requests that, in addition to attorneys' fees, the Court reimburse approximately $28,913.54 in costs and expenses. "Plaintiffs' counsel are entitled to be reimbursed for their reasonable expenses when they create a benefit for all class members." *Parsons,* 2015 WL 13629647 at *15.

Here, Class Counsel advanced a total of $28,913.54 in costs and expenses related to filing fees, mediation, expert data analysis, and court fees in both Actions.

Gold Decl., ¶23. These costs were reasonably expended in the duration of the cases. Indeed, Class Counsel had an incentive to only incur expenses that were reasonable and necessary for the prosecution of the Actions because Class Counsel was not guaranteed to recover these expenses because their repayment was contingent on the successful resolution of this case. *Id.,* ¶ 24. The requested reimbursement for costs and expenses is relatively low for class litigation and inherently reasonable given the complexity of the litigation. *Id.*, ¶ 25.

Additionally, the Court should approve the payment of the Settlement Administrator's fees and costs associated with disseminating Notice and administering the Settlement and Settlement Fund. "Settlement administrators are typically entitled to 'reimbursement for fees, costs, and expenses incurred in connection with the administration of the settlement fund.'" *County of Monmouth, New Jersey v. Florida Cancer Specialists,* No. 2:18-cv-201-SDM-KCD, 2022 WL 18716679 at *4 (M.D. Fla. Oct. 21, 2022). These costs are necessary because of the notice requirements needed to notify Settlement Class Members and ultimately distribute the Settlement benefits by account credit and by check. The Settlement Administrator estimates its fees and costs to be $148,573.89. Fenwick Decl., ¶ 15. This amount is in line with Class Counsel's experience for this type of settlement. Gold Decl., ¶ 26.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Final Approval of the Settlement; enter the accompanying Final Approval Order; and grant Plaintiffs' request for attorneys' fees, costs, and Settlement Administrator's fees and costs.

Dated: June 30, 2023

Respectfully submitted,

/s/ Sophia G. Gold
Sophia G. Gold
sgold@kalielgold.com
KALIELGOLD PLLC
950 Gilman Street, Suite 200
Berkeley, CA 94710
Tel: (202) 350-4783

Jeffrey D. Kaliel
jkaliel@kalielpllc.com
KALIELGOLD PLLC
1100 15th Street NW, 4th Floor
Washington, D.C. 20005
Tel: (202) 350-4783

Attorneys for Plaintiffs and the Settlement Class

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be served electronically using the Court's CM/ECF filing system on June 30, 2023, to counsel for Defendant as follows:

H. Harold Stephens
Scott Burnett Smith
Whitney P. Lott
Bradley Arant Boult Cummings LLP
200 Clinton Avenue West, Suite 900
Huntsville, Alabama 35801
Tel: (256) 517-5100
hstephens@bradley.com
ssmith@bradley.com
wlott@bradley.com

Stuart M. Richter
Katten Muchin Rosenman LLP
2029 Century Park East, Suite 2600
Los Angeles, California 90067
Tel: (310) 788-4400
Stuart.richter@katten.com

/s/ Sophia Goren Gold
Sophia Goren Gold