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

FRENZETTA WILSON and RONNIE DICKERSON, on behalf of themselves and all others similarly situated,

Plaintiffs,

NO. 4:20-cv-00152-KGB

v.

SANTANDER CONSUMER USA,

Defendant.

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

**TABLE OF CONTENTS**

# TABLE OF AUTHORITIES

**Cases**

**Rules**



**Code**



**Other Authorities**

## I. INTRODUCTION.

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure ("FRCP") and the Court's Order Preliminarily Approving Class Action Settlement, dated June 1, 2022 (the "Preliminary Approval Order"), Plaintiffs Frenzetta Wilson and Ronnie Dickerson ("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 achieved in this Action resolves all claims asserted by Plaintiffs and the Class and represents an excellent recovery for Settlement Class Members. Pursuant to the Settlement Agreement and Release (ECF No. 57) (the "Settlement Agreement"), Defendant Santander Consumer USA ("SC" or "Defendant," and collectively with Plaintiffs referred to as the "Parties") has agreed to make available $800,000.00 in cash (the "Settlement Fund"). There is no reverter and the entirety of the fund will be for the benefit of the Settlement Class. As part of the Settlement, Settlement Class Members will also receive a credit repair. Specifically, SC will request that the credit bureaus delete SC's reporting of the trade lines associated with any accounts with SC.

Plaintiffs firmly believe that this Settlement is in the best interests of the Settlement Class and satisfies the criteria for final approval as discussed herein. Plaintiffs and Class Counsel have adequately represented the Settlement Class, obtaining an excellent Settlement to which no class member or governmental entity has objected. 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, and it was reached only after intensive litigation, discovery, and a full-day mediation session. The Settlement Fund of $800,000, represents approximately 22% of the total amount of Convenience Fees that Plaintiffs allege were

improperly collected by Defendant. There is no claims process; instead, each Settlement Class Member who does not opt out of the settlement will receive a payment on a *pro rata* basis. 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, motion for summary judgment, *Daubert* challenges, etc.) and ultimately prove liability and damages at trial. 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 $240,000, or 30% of the Settlement Fund, as well as reimbursement of litigation expenses in the amount of $10,094.38. Additionally, Plaintiffs are requesting a service award of $5,000 each for recognition of their service as the Class Representatives. 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 was implemented in accordance with the Preliminary Approval Order and the Settlement Agreement, with notice reaching 99.37% of the Settlement Class through individualized mailed notice, supplemented by a dedicated Settlement Website and call center, which is within the range endorsed by the Federal Judicial Center. *See* Declaration of Jennifer M. Keough Regarding Notice Administration ("Keough Declaration") at ¶¶ 8-10. Additionally, the Settlement enjoys the support of the Settlement Class. As stated above, as of the filing of this

Memorandum,[1] no Settlement Class Member has filed an objection nor requested to be excluded from the Settlement. *Id*. at ¶¶ 16, 18.

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; and (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.

## II. OVERVIEW OF THE LITIGATION.

On January 13, 2020, Plaintiffs, individually and on behalf of a purported class, filed a lawsuit in the Circuit Court of Jefferson County, Arkansas, which was removed to the United States District Court for the Eastern District of Arkansas on February 14, 2020. The Action brought a claim against SC for violation of the Texas Debt Collection Act ("TDCA") in connection with SC's practice of collecting additional processing fees ("Convenience Fees") when borrowers paid their car loan payments by telephone, interactive voice recognition ("IVR"), or the internet.

On March 11, 2020, Defendant filed a Motion to Transfer Venue with a supporting memorandum of law and declaration (ECF Nos. 6-8); a Motion to Compel Arbitration and Stay Plaintiff Betina Ingram's claim with a supporting memorandum of law and declaration (ECF Nos. 9-11); and a Motion to Dismiss with a supporting memorandum of law (ECF Nos. 12 and 13). Defendant's Motion to Dismiss was based on their argument that Plaintiffs' claims were "time-barred . . . as the Complaint was filed more than two years after the claims accrued." (ECF No. 13

[1] The deadline for objections and exclusions is August 29, 2022.

at 1.) Moreover, as argued in the Motion, and later confirmed through discovery, "since at least April 2017, SC has not assessed nor has it received any portion of Speedpay Fees." (*Id.* at 3.)

On March 12, 2020, Plaintiffs filed a Motion to Remand and a supporting memorandum of law (ECF Nos. 14 and 15).

On March 17, 2020, the Parties filed a Joint Motion to Modify Briefing Schedule on Pending Motions (ECF No. 16).

On April 9, 2020, Plaintiff Betina Ingram filed a Notice of Voluntary Dismissal, dismissing her individual claim against SC (ECF No. 18).

On April 10, 2020, Defendant filed its response in opposition to Plaintiffs' Motion to Remand (ECF No. 21), and Plaintiffs filed their (i) response in opposition to Defendant's Motion to Dismiss (ECF No. 22); and response in opposition to Defendant's Motion to Transfer (ECF No. 23). Plaintiffs' primary argument in opposition to Defendant's Motion to Dismiss was that a four-year statute of limitations applied to claims brought under the TDCA, and therefore Plaintiffs' claims were timely even though they accrued more than two years before filing suit.

On April 29, 2020, Plaintiffs filed their reply in further support of their Motion to Remand (ECF No. 24), and Defendant filed its (i) reply in further support of Motion to Dismiss (ECF No. 25), and (ii) reply in further support of Motion to Transfer (ECF No. 26).

On July 10, 2020, Defendant filed a Motion to Stay Discovery and a supporting memorandum of law (ECF Nos. 31 and 32), which Plaintiffs timely opposed (ECF No. 34).

On March 15, 2021, this Court entered an order denying as moot (i) Defendant's Motion to Compel Arbitration and Stay Plaintiff Betina Ingram's Claim; and (ii) Defendant's Motion to Stay Discovery, and further denying (iii) Defendant's Motion to Transfer; (iv) Defendant's Motion to Dismiss; and (v) Plaintiffs' Motion to Remand. ECF No. 36.

On April 8, 2021, SC filed its Answer.

On June 4, 2021, the Parties filed a Stipulation of Dismissal of Claims of Plaintiff Devon Byrd (ECF No. 44).

On September 3, 2021, the Parties filed a joint motion to stay all proceedings in the Action pending mediation scheduled for November 3, 2021 (ECF No. 46), which the Court granted that same day (ECF No. 47).

On October 1, 2021, the Parties filed a joint motion for an amendment to the Court's September 3, 2021 Order, seeking to extend the deadlines set forth therein due to the rescheduling of the mediation to December 1, 2021. (ECF No. 48.)

On December 1, 2021, the Parties participated in a full-day mediation session conducted by Bruce Friedman, Esq. With the assistance of the mediator, the Parties reached mutually agreeable terms of a settlement.

Following mediation, the Parties filed a Joint Status Report on December 9, 2021, informing the Court that the Parties had reached an agreement in principle and were working on memorializing the terms of the agreement and requesting an extension of the stay. (ECF No. 49.) The Parties jointly filed two additional Status Reports informing the Court of the status of their negotiations. (*See* ECF Nos. 50 and 52.)

On April 1, 2021, the Parties fully executed the Settlement Agreement (ECF No. 57), which memorialized the terms and conditions of the proposed Settlement and embodied all relevant exhibits thereto.

On April 12, 2022, Plaintiffs filed an Unopposed Motion for Preliminary Approval and supporting memorandum of law (ECF Nos. 55 and 56). And, on June 1, 2022, this Court entered

the Preliminary Approval Order, conditionally certifying the Settlement Class, preliminarily approving the Settlement, and approving the notice program set forth in the Settlement Agreement.

## III. THE PROPOSED SETTLEMENT.

### A. SETTLEMENT BENEFITS.

Defendant has agreed to pay $800,000.00 in cash for the benefit of eligible Settlement Class Members, inclusive of any administrative and court-awarded fees and expenses. The Settlement Agreement defines the Settlement Class as follows:

> all persons in the U.S. who have a car loan with SC with a Texas choice of law provision who paid a convenience fee in connection with a loan payment made online, over the phone, or by interactive voice recognition (IVR) during the period of January 13, 2016 to the date of approval of the Settlement, who do not properly and timely exclude themselves from the Settlement.

Settlement Agreement, ¶ 1.6. Thus, 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 total dollar amount of Convenience Fees paid by the Settlement Class Member. *Id.,* ¶ 3.2.3.

Based on records obtained from Defendant, the sum of all Convenience Fees paid by Settlement Class Members during the Class Period is $3,680,483. *Id*. at ¶ 3.2.4. Thus, the Settlement Fund representes approximately 22% of that sum.

No funds from the Settlement will revert to Defendant. Unclaimed money from uncashed checks that remains in the Net Settlement Fund after 180 days after the Distribution Date will be disbursed to the Arkansas Jump$tart Coalition, a non-profit organization that seeks to improve the personal financial literacy of Arkansas's youth, as a *cy pres* award. *Id*. at ¶ 5.5.

In addition to the monetary benefits, the Settlement provides Settlement Class Members with credit repair benefits. Within sixty (60) days of the Effective Date, SC will request that the

credit bureaus (*i.e*. every credit bureau that SC has reported to on any Settlement Class Member) delete Defendant's reporting of the trade lines associated with any account with SC, as it relates to Plaintiffs or any Settlement Class Member. *Id*. at ¶ 3.3.1.

In exchange for this 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 claims against SC and the other Releasees relating to any Convenience Fee paid by any Class Member through the date of entry of the Final Approval Order. *See id*. at ¶¶ 1.32-1.34 and 10.1-10.8.

**B. NOTICE.**

In accord with Section 7 of the Settlement Agreement and the Court's Preliminary Approval Order, notice to Settlement Class Members was made by mailing the Notices by first-class US mail. *See* Keough Decl. at ¶ 8. In addition, the Notice was posted on the Settlement Website. *See id*. at ¶ 13.

The Notices included the following information: (1) a plain and concise description of the nature of the Action and the proposed Settlement, (2) the right of Settlement Class Members to request exclusion from the Settlement Class or to object to the Settlement, (3) specifics on the date, time, and place of the Final Approval Hearing, and (4) information regarding Class Counsel's anticipated motion for attorneys' fees, reimbursement of litigation costs, and request for service awards for the two Class Representatives.

Moreover, in accord with the Settlement Agreement and the Court's Preliminary Approval Order, the current motion, along with Plaintiffs' Motion for Award of Attorneys' Fees, Litigation Costs, and Service Awards ("Plaintiffs' Motion for Attorneys' Fees"), will be posted on the Settlement Website

### 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 30% of the Settlement Fund, or $240,000.00, to compensate them for all of the work already performed in this case, all of 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 $10,094.38, 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. *See* Plaintiffs' Motion for Attorneys' Fees, being filed contemporaneously herewith. 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. THE LAW FAVORS AND ENCOURAGES SETTLEMENTS.

Courts favor settlements of disputed claims. As the Eighth Circuit has noted, "[a] strong public policy favors agreements, and courts should approach them with a presumption in their favor." *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) (internal quotation omitted); *see also 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."); Newberg & Conte, *Newberg on Class Actions*, §11.41 (3d ed. 1992) ("[T]he compromise of complex litigation is encouraged by the courts and favored by public policy").

This policy is especially applicable to class action litigation, which is notoriously complex. *Marshall v. Green Giant Co.*, 942 F.2d 539, 549 (8th Cir. 1991) ("It goes without saying that class actions are very complex . . . ."); *see*, *e.g.*, *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Other courts agree:

> In the class action context in particular, "there is an overriding public interest in favor of settlement." *Cotton v Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources.

*Armstrong v. Bd. of Sch. Dir. of Milwaukee*, 616 F.2d 305, 313 (7th Cir. 1980), *overruled on other grounds at* 134 F.3d 873 (7th Cir. 1998); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (justifications for settlement of class actions include "the reduction of litigation and related expenses, [and] . . . the general policy favoring the settlement of litigation").

### B. THE ROLE OF THE COURT IN DETERMINING WHETHER TO APPROVE A CLASS ACTION SETTLEMENT.

A class action shall not be dismissed or compromised without the approval of the Court. Fed. R. Civ. P. 23(e). "Under Rule 23(e), the district court acts as a fiduciary who must serve as guardian of the rights of absent class members." *Kloster v. McColl (In re Bankamerica Corp. Sec. Litig.)*, 350 F.3d 747, 751 (8th Cir. 2003) (quoting *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975)).

Courts in the Eighth Circuit recognize the overarching principle that the Court "should not substitute [its] own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." *Grove v. Principal Mut. Life Ins. Co.*, 200 F.R.D. 434, 445 (S.D. Iowa 2001) (quoting *Petrovic*, 200 F.3d at 1148-49). As the Supreme Court explained: "Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power to approve

or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed. . . . The options available to the District Court [are] accept[] the proposed settlement[,] reject [it] . . or . . try the case." *Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986).

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

In determining whether a proposed settlement is fair, reasonable, and adequate, courts are to consider 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 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; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

FRCP 23(e)(2); *In re Centurylink Sales Pracs. & Sec. Litig.,* No. CV 18-296 (MJD/KMM), 2021 WL 3080960, at *6 (D. Minn. July 21, 2021).

The factors codified in Rule 23(e)(2) are substantially similar to those adopted by the Eighth Circuit in *Grunin v. Int'l House of Pancakes*, 513 F.2d 114 (8th Cir. 1975):

> (1) the strength of the case for plaintiffs on the merits, balanced against the amount offered in the settlement;
> (2) the defendant's overall financial condition and ability to pay;
> (3) the complexity, length, and expense of further litigation; and
> (4) the amount of opposition to the settlement.

*Id.* at 124; *see also Browne v. P.A.M. Transport, Inc*., Case No. 5:16-CV-5366, 2020 WL 4430991, at *2 (W.D. Ark. July 31, 2020); *Uponor*, 716 F.3d at 1063; *In re Eng'g Animation Sec. Litig.*, 203

F.R.D. 417, 422 (S.D. Iowa 2001). In addition to the four *Grunin* factors, courts in the Eighth Circuit have also historically considered three additional factors: (1) the experience of counsel; (2) the negotiation process; and (3) the extent of discovery and stage of the proceedings. *See Van Horn*, 840 F.2d at 607. It is well-established, however, that "[t]he most important consideration in this context is 'the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.'" *Eng'g Animation*, 203 F.R.D. at 422 (quoting *Petrovic*, 200 F.3d at 1150). In this regard, the "reasonableness" of a settlement is not susceptible to a mathematical equation yielding a particularized sum. 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. Briles v. Tiburon Fin., LLC*, Case No. 8:15CV241, 2016 WL 4094866, at *1 (D. Neb. Aug. 1, 2016). The Settlement proposed in this case falls well within the "range of reasonableness."

As demonstrated below, the Settlement satisfies each of the criteria for final approval.

### D. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE, WARRANTING FINAL APPROVAL.

#### 1. Plaintiffs and Class Counsel Have Adequately Represented the Class, Obtaining an Excellent Settlement to Which No Settlement Class Member or Governmental Entity Has Objected.

Both Plaintiffs and Class Counsel have adequately represented the Settlement Class in this case. The Plaintiffs have adequately represented all Settlement Class Members in this action by achieving a Settlement that provides for approximately 22% of the sum of all challenged Convenience Fees SC collected from all Settlement Class Members during the Class Period, as well as securing the additional benefit of credit repair for all Settlement Class Members. Plaintiffs have been actively involved throughout the course of the litigation and settlement, assisting Class Counsel in investigating claims on an individual basis, reviewing case documents, remaining

apprised of the litigation, responding to discovery, and overseeing settlement negotiations. Moreover, Plaintiffs' efforts, including the risks each voluntarily took as well as the time each expended supporting the litigation, were crucial to achieving the results for the Settlement Class.

Class Counsel have also fully and adequately represented all members of the Settlement Class. Class Counsel vigorously litigated this case including: (1) substantial pre-filing and continuing investigation; (2) researching the law applicable to Plaintiffs' claims and Defendant's defenses; (3) researching, drafting, and filing the complaint; (4) successfully opposing Defendant's motion to transfer; (5) successfully opposing Defendant's motion to dismiss; (6) researching, drafting, and filing a motion to remand; (7) propounding discovery and reviewing the data and documents produced in response to discovery; (8) responding to discovery propounded on Plaintiffs; (9) drafting a mediation statement and participating in a full-day mediation session; and (10) successfully negotiating the Settlement now before the Court. Class Counsel's efforts demonstrate that they vigorously and zealously represented the Class. It is Class Counsel's informed opinion that this Settlement represents an excellent result and is in the best interest of the Class. *See* Declaration of Randall K. Pulliam ("Pulliam Decl.") at ¶ 9-14; Declaration of James L. Kauffman ("Kauffman Decl.") at ¶¶ 14, 22-23; *see also Pelletz v. Weyerhaeuser Co*., 255 F.R.D. 537, 543 (W.D. Wash. 2009) (where plaintiffs' attorneys are qualified and well informed, their opinion regarding settlement is entitled to significant weight).

Lastly, to date, no Settlement Class Member has objected to the Settlement. *See* Keough Decl. at ¶ 18. And, while no governmental entity is a party to this litigation, notice was issued to the appropriate federal and state officials in accordance with the 28 U.S.C. § 1715 (*see* ECF No. 58), and to date, no governmental entity has raised an objection or concern about the Settlement. *See* Pulliam Decl. at ¶ 12. These factors all weigh in favor of final approval.

**2. The Settlement Was the Result of Informed, Arm's Length Negotiations Between the Parties and Has No Obvious Deficiencies.**

Because settlements are the result of a process by which opposing parties attempt to weigh and balance the factual and legal issues that neither side chooses to risk taking to final resolution, many courts afford a presumption of fairness when the settlement is reached following arm's-length negotiations. *Manual for Complex Litigation*, §30.43 at 289 (3d ed. 2002); Newberg & Conte, *Newberg on Class Actions*, §11.42 (3d ed. 1992) ('[A]n initial presumption of fairness is usually involved if the settlement is recommended by class counsel after arm's-length bargaining."); 3B *Moore's Federal Practice* ¶23.1.24[2] (2d ed. 1992). Indeed, courts in the Eighth Circuit recognize an initial presumption that the compromise is fair and reasonable. *See Ortega v. Uponor, Inc.*, 716 F.3d 1057, 1063 (8th Cir. 2013) ("A settlement agreement is 'presumptively valid.'") (citation omitted); *Cleveland v. Whirlpool Corp.,* Case No. 20-cv-1906, 2022 WL 2256353, at *4 (D. Minn. June 23, 2022); *Spencer v. Comserv Corp.*, No. 4-84-794, *et al.*, 1986 WL 15155, at *8 (D. Minn. Dec. 30, 1986).

In this case, the Court has already granted preliminary approval of the Settlement. This preliminary determination establishes an initial presumption that the settlement was negotiated at arm's length and that the settlement is fair, reasonable, and adequate. *See* Newberg & Conte, *Newberg on Class Actions*, §11.41, at 11-91. Additionally, as set forth in the accompanying Pulliam and Kauffman Declarations, the Settlement was reached only after extensive factual investigation, motions practice, and fulsome discovery. Pulliam Decl. at ¶¶ 10-11, 19; Kauffman Decl. at ¶¶ 14, 22. Further, the Settlement was negotiated by fully informed and experienced counsel, with a firm understanding of their respective clients' positions, and with the assistance of a skilled and neutral mediator, Bruce Friedman, Esq. Throughout the settlement discussions, Class

Counsel and counsel for Defendant each vigorously advanced their respective claims and defenses. Pulliam Decl. at ¶ 11; Kauffman Decl. at ¶ 22. Thus, no doubt exists that this Settlement is entitled to a presumption of fairness.

Additionally, there are no obvious deficiencies in the Settlement Agreement. 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 costs, service awards, and costs of settlement notice and administration. Plaintiffs' request for attorneys' fees, litigation costs, and service awards are reasonable and directly in line with prevailing standards in the Eighth Circuit. *See* Plaintiffs' Motion for Attorneys' Fees. No funds from the Settlement will revert to Defendant. Unclaimed money from uncashed checks that remains in the Net Settlement Fund after 180 days after the Distribution Date will be disbursed to the Arkansas Jump$tart Coalition, a non-profit organization that seeks to improve the personal financial literacy of Arkansas's youth, as a *cy pres* award.

Lastly, there is no unfair or preferential treatment of any Settlement Class Member. *See In re Zurn Pex Plumbing Prod. Liab. Litig.*, No. 08-MDL-1958 ADM/AJB, 2012 WL 5055810, at *6 (D. Minn. Oct. 18, 2012) ("There are no grounds to doubt the fairness of the Settlement, or any other obvious deficiencies, such as unduly preferential treatment of a class representative or segments of the Settlement Class, or excessive compensation for attorneys."). Here, payments to Settlement Class Members will be made on a *pro rata* basis. Thus, each Settlement Class Member is given fair and equal treatment.

In sum, the Settlement was achieved through arm's-length negotiations conducted by competent counsel, contains no obvious deficiencies, and treats Settlement Class Members equally. Accordingly, there are no grounds to doubt the Settlement's fairness.

**3. The Settlement Provides Exceptional Relief for the Settlement Class.**

"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 Eng'g Animation Sec. Litig.*, 203 F.R.D. 417, 422 (S.D. Iowa 2001) ("[t]he most important consideration in this context is 'the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.'" (quoting *Petrovic*, 200 F.3d at 1150)). When determining if the relief provided for the class is adequate, Rule 23 instructs courts to 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). Consideration of each of these sub-factors weighs in favor of final approval.

*i.* *Continued litigation would be risky, complex, lengthy, and expensive.*

Courts have consistently held that the expense and possible duration of litigation are major factors to be considered in evaluating the reasonableness of a settlement. *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). The Eighth Circuit also recognizes that the ability to avoid delay and expense, and reap the benefits of settlement sooner, rather than later,

weighs heavily in favor of approving a settlement. *See*, *e.g.*, *Petrovic*, 200 F.3d at 1149; *DeBoer v. Mellon Mortg. Co.*, 64 F.3d, 1171, 1177 (8th Cir. 1995).

While the maximum value of the claims in this Action would be larger if the Plaintiffs succeeded in certifying a class and obtaining a judgment, when the maximum value of those claims are discounted by the identifiable risks, experience dictates that the interests of the Class are better served by the proposed Settlement. *See Holden,* 665 F. Supp. at 1413 (recognizing that a settlement valuation based on the optimal amount a class could recover is inappropriate and a settlement just needs to be reasonable, adequate, and fair); *see also West Virginia v. Chas. Pfizer & Co*., 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir. 1971) ("In considering the proposed compromise, it seems also to be of importance that (if approved) the substantial amounts of money are available for class members now, and not at some distant time in the future. The nature of these actions is such that a final judgment, assuming it to be favorable, could only be obtained after years of expensive litigation. It has been held proper to take the bird in hand instead of a prospective flock in the bush.") (citations omitted); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993) (noting that even a favorable jury verdict "is no guarantee of ultimate success").

More particularly, the proposed Settlement provides Settlement Class Members immediate benefits without the risks and costs of further litigation, which are significant. *See Holden*, 665 F. Supp. at 1413-14 (noting that "many of the immediate and tangible benefits" of settlement would be lost through continued litigation, making the proposed settlement "an attractive resolution" of the case). Defendant raised numerous defenses to the claims advanced by Plaintiffs and the Class. Most concerning is Defendant's statute of limitations defense. Indeed, in the time since the Parties executed the Settlement Agreement, a court ruled that the two-year statute of limitations applied

to claims under the TDCA concerning the collection of Convenience Fees. *Williams v. PHH Mortg. Corp.*, 2022 WL 1747005 (S.D. Tex. May 31, 2022). Because SC stopped collecting Conveneince Fees more than two years before this action was filed, a similar limitations ruling would bar the claims of Plaintiffs and every member of the Settlement Class.

Thus, continued litigation of this Action would undoubtedly add considerable risk, expense, and time to this litigation. Moreover, Defendant would have vigorously contested any motion seeking certification of a litigation class. An unfavorable ruling for Defendant at the class certification stage would have likely resulted in an appeal pursuant to Rule 23(f), further lengthening and complicating this matter. Thus, because this case is settling prior to the resolution of motions for class certification and summary judgment, and prior to completion of expert discovery and trial preparation, there is no question that continued litigation would greatly increase the expense and duration of this Action.

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); *In re Aetna Inc. Sec. Litig.*, No. 1219, 2001 WL 20928, at *6 (E.D. Pa. Jan. 4, 2001) (risk of delay could have deleterious effects on future recovery). Avoiding these unnecessary expenditures of time and resources clearly benefits all Parties and the Court.

Thus, continued litigation would be risky, 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 this factor militates in favor of the proposed Settlement.

*ii.* *The Settlement provides meaningful, automatic payments to Settlement Class Members.*

Under the Settlement, each Settlement Class Member is entitled to an automatic payment of his or her *pro rata* distribution unless he or she submits a timely request for exclusion. As such, the method to distribute relief is both simple and efficient.

Moreover, the relief provided to Settlement Class Members under the Settlement is significant. As previously noted, the Settlement creates a Settlement Fund of $800,000.00, which equates to approximately 22% of the total Convenience Fees alleged to have been wrongfully collected by Defendant. Further, as an additional benefit, Settlement Class Members will receive a credit repair. SC will request that the credit bureaus delete SC's reporting of the trade lines associated with any accounts with SC. Thus, the Settlement provides meaningful relief with no obligation that requires a Settlement Class Member to submit a claim form in order to receive benefits.[2]

*iii.* *The requested attorneys' fees are reasonable and in line with similar awards approved in the Eighth Circuit.*

As detailed in Plaintiffs' Motion for Attorneys' Fees, Class Counsel request 30% of the Settlement Fund, which is directly in line with similar awards approved in the Eighth Circuit. *See* Plaintiffs' Motion for Attorneys' Fees at pp. 11-12.

[2] Defendant is a solvent company, and there is no indication that it will be unable to pay or will incur undue hardship as a result of the Settlement. Accordingly, consideration of Defendant's financial condition weighs in favor of final approval of the Settlement. *See Risch v. Natoli Eng'g Co., LLC*, No. 4:11CV1621 AGF, 2012 WL 324099, at *3 (E.D. Mo. Aug. 7, 2012); *Kandice Simmons & Tamika v. Enter. Holdings*, 2012 WL 718640, at *3 (E.D. Mo. Mar. 6, 2012).

Further, pursuant to the Settlement Agreement, Class Counsel will not receive any payment until five (5) days after the Effective Date or entry of an order approving the application for attorneys' fee (whichever is later). *See* Settlement Agreement at ¶ 15.5. Thus, the percentage requested and the timing of the payment also weigh in favor of final approval.

iv. *The Settlement provides for a non-reversionary common fund.*

As noted above, there is no claims process; instead, each Settlement Class Member who does not opt out will automatically receive a check. Any unclaimed money from uncashed checks that remains in the Net Settlement Fund after 180 days after the Distribution Date will be disbursed as a *cy pres* award to the Arkansas Jump$tart Coalition, for use in improving financial literacy. No funds from the Settlement will revert to Defendant. Thus, consideration of each of these four subfactors weigh in favor of final approval.

**4. The Settlement Treats All Settlement Class Members Equitably, and Enjoys the Support of the Settlement Class.**

Under the Settlement, there is no unfair or preferential treatment of any Settlement Class Member. Payments to Settlement Class Members will be made on a *pro rata* basis. Thus, each Settlement Class Member is given fair and equal treatment.

Moreover, the reaction of the Settlement Class underscores the propriety of the Settlement and assures that this Court should approve the Settlement. *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); *DeBoer*, 64 F.3d at 1178 (same). Pursuant to the Preliminary Approval Order, copies of the Mail Notice were mailed to approximately 35,000 potential Class Members. Keough Decl. at ¶¶ 8-10. The Notice describes the nature and procedural history of the Action and the terms of the Settlement. *See id.* at Ex. B. As of August 12, 2022, not one Settlement

Class member has objected, and not one Settlement Class Member has requested to be excluded. *See id*. at ¶¶ 16, 18. 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 In re Eng'g Animation Sec. Litig.*, 203 F.R.D. at 422 ("[T]he Court notes there was minimal opposition to this settlement. This weighs in favor of finding it fair."); *see also Mengelkoch v. Bemidji State Univ.*, No. 99-1383 DWF/RLE, 2002 WL 27126, at *2-3 (D. Minn. Jan. 8, 2002) (where only three objections were filed, the court approved settlement of class action); *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 Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001) ("The vast disparity between the number of potential class members who received notice and the number of objectors creates a strong presumption . . . in favor of the Settlement . . ."). Therefore, there is no doubt that this factor weighs in favor of the proposed Settlement.

## V. THE NOTICE PROGRAM SATISFIES RULE 23 AND DUE PROCESS, AND CONSTITUTES THE BEST NOTICE PRACTICABLE.

The Court has already determined that the notice program in this case adequately satisfies Rule 23 and due process. (ECF No. 59.) The Settlement Administrator has now fully implemented the notice program, providing an estimated 99.37% of Settlement Class Members with notice, which is at the high end of the range endorsed by the Federal Judicial Center. *See* Keough Decl. at ¶ 10. *see also* MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES, p. 27 (3d ed. 2010) (the norm is in the 70-95% range). The Settlement Administrator continues to maintain the Settlement Website and toll-free phone line and to respond to inquiries from Settlement Class Members. *Id*. at ¶¶ 12, 14. Accordingly, the notice provided to Settlement Class

Members fulfills all of the requirements of Rule 23 and due process and constitutes the best notice practicable under the circumstances.

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

In its Preliminary Approval Order, the Court determined that certification of this 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 Class size is sufficiently numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the Class; (c) the claims or defenses of the Plaintiffs are typical of the claims or defenses of the Class; (d) Plaintiffs and Class Counsel will fairly and adequately protect the interests of the Class; (e) the common questions of law and fact predominate; and (f) the class mechanism is the superior method for fairly and efficiently adjudicating the controversy. For these same reasons, none of which have changed, this Court should finally certify the Settlement Class for settlement purposes.

## VII. 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 previously filed with the Court: (i) granting final approval of the Settlement as fair, reasonable, and adequate; (ii) granting final certification to the Settlement Class; and (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(c) and due process and constitutes the best notice practicable under the circumstances.

Dated: August 12, 2022

Respectfully submitted,

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