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 PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, LITIGATION COSTS, AND SERVICE AWARDS

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I. INTRODUCTION

It is well established that attorneys who obtain a recovery on behalf of a class of plaintiffs may request an allocation from the common benefit for attorneys' fees and expenses. In accord with this well-known principle and as set forth in the Settlement Agreement and Release (ECF No. 57) (the "Settlement Agreement"), Class Counsel[1] request that the Court award attorneys' fees in the amount of $240,000, representing 30% of the $800,000 monetary recovery (the "Settlement Fund"), reimbursement of litigation expenses in the amount of $10,094.38, and service awards for the two Plaintiffs in the amount of $5,000 each.

Class Counsel's efforts here resulted in an excellent recovery for the Class. Settlement Class Members who do not exclude themselves will automatically receive a *pro rata* distribution from the $800,000 Settlement Fund, after deduction for any court-approved attorneys' fees and expenses, service awards, and costs of settlement notice and administration. The cash component of the settlement (the "Settlement") represents a recovery of 22% of class wide damages, making this Settlement in line with other settlements of similar claims. Settlement Class Members will also receive the benefit of credit repair to their Santander Consumer USA ("SC") accounts. Specifically, within sixty (60) days of the Effective Date, SC will request that the credit bureaus delete SC's reporting of the trade lines of Plaintiffs and other Settlement Class Members.

As set forth below, the request for attorneys' fees and costs to be awarded as a percentage of the fund is in line with prevailing standards in the Eighth Circuit and district courts in Arkansas. *See In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (concluding that district court

[1] "Class Counsel" refers collectively to Carney Bates & Pulliam, PLLC and Bailey & Glasser, LLP.

did not abuse its discretion by applying percentage-of-the-benefit method to award "36% of the guaranteed $3.5 million fund amount"); *Nelson v. Wal-Mart Stores, Inc.*, Civil Action Nos. 2:04CV0000171 WRW, 2:05CV000134 WRW, 2009 WL 2486888, at *2 (E.D. Ark. Aug. 12, 2009) (awarding attorneys' fees of one-third of the settlement fund). Further, the fee request is supported by the time and labor expended by Class Counsel, the quality and efficiency of their work, customary fees, and the risks Class Counsel assumed in undertaking and litigating this action (the "Action"). The Settlement Class was notified of Class Counsel's intent to seek an award of fees not to exceed 30% of the Settlement Fund, as well as reimbursement of out-of-pocket litigation costs, and, to date, not one Settlement Class Member has objected. *See* Declaration of Jennifer M. Keough Regarding Notice Administration ("Keough Decl.") at ¶ 18.

Additionally, this Court should award each Plaintiff a service award in the amount of $5,000 for serving as Class Representative. Without their efforts in representing the Settlement Class, there would be no settlement.

In sum, the proposed fee, cost, and service awards reflect the quality and efficiency of Plaintiffs' and Class Counsel's efforts, are fair and reasonable, and should be approved.

II. SUMMARY OF THE PROCEEDINGS

A. Plaintiffs And Class Counsel Vigorously Litigated On Behalf Of The Class For More Than Two Years.

A detailed procedural history of this litigation is contained in Plaintiffs' Motion for Final Approval, being filed contemporaneously herewith. In summary, this Action has now been pending for more than two and half years. Over the course of those years, Class Counsel has worked diligently to effectively advance the interests of the Class. These litigation efforts include the following: (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.

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 an agreement in principle as to the terms of a settlement. On April 1, 2021, the Parties executed the Settlement Agreement which is currently before the Court for final approval. ECF No. 57.

B. The Settlement.

Defendant has agreed to pay $800,000 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. Class Members who do not exclude themselves will be eligible to receive a *pro rata* distribution of the Net Settlement Fund, relative to the total dollar amount of Convenience Fees paid by the Settlement Class Member. *Id.,* ¶ 3.2.3. 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. If the Settlement is approved, SC will request that the credit bureaus delete SC's reporting of the trade lines associated with accounts of Settlement Class Members. *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 Settlement Class Member through the date of entry of the Final Approval Order. *See id*. at ¶¶ 1.32-1.34 and 10.1-10.8.

II. ARGUMENT

A. Legal Standard For Awarding Attorneys' Fees.

Courts in this jurisdiction use "two main approaches to analyzing a request for attorney fees," the percentage of fund method and the lodestar method. *Caligiuri v. Symantec Corp*., 855 F.3d 860, 865 (8th Cir. 2017) (citing *Johnston v. Comerica Mortg. Corp*., 83 F.3d 241, 244 (8th Cir. 1996)). "It is within the discretion of the district court to choose which method to apply, as well as to determine the resulting amount that constitutes a reasonable award of attorney's fees in a given case." *Id.* The Supreme Court has consistently held that the percentage of the recovery approach is an appropriate methodology for awarding fees to plaintiffs' counsel in a common fund case. *See Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984) ("Under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class"); *see also Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 164-65, 59 S. Ct. 777, 779 (1939); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 123, 5 S. Ct. 387, 390 (1885).

Courts in the Eighth Circuit routinely use the percentage-of-the-fund method when awarding attorney fees from a common fund. *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999). Regardless of which method is used, ultimately, the fee must be "reasonable under the circumstances" to be approved. *In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.,* No. MDL 05-1708 DWF/AJB, 2008 WL 682174, at *6 (D. Minn. Mar. 7, 2008), amended in part, No. MDL 05-1708 DWF/AJB, 2008 WL 3896006 (D. Minn. Aug. 21, 2008).

B. The Percentage Of The Fund Method Is Appropriate In This Common Fund Case.

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

Thus, a reasonable percentage of the Settlement Fund is an appropriate basis on which to award Class Counsel a fee in this common fund case. *See Huyer v. Buckley,* 849 F.3d 395, 399 (8th Cir. 2017) (noting that courts within the Eighth Circuit frequently award attorneys' fees on a percentage basis, typically between 25% and 36% of a common fund); *Caligiuri*, 855 F.3d 860 (affirming fee award of one-third of the gross settlement fund); *In re U.S. Bancorp Litig.*, 291 F.3d at 1038 (affirming fee award to class counsel of 36 percent of settlement fund); *Petrovic*, 200 F.3d at 1157 ("It is well established in this circuit that a district court may use the 'percentage of the

fund' methodology to evaluate attorney fees in a common-fund settlement"); *Nelson*, 2009 WL 2486888, at *2 (awarding attorneys' fees in the amount of one third of the total settlement fund).

Class Counsel assumed significant risk in prosecuting this litigation entirely on a contingency fee basis. Bearing this risk and facing formidable obstacles and uncertainties involved in this complex litigation, Class Counsel's efforts resulted in securing a Settlement of $800,000. A fee award based on a percentage of the common fund they created is reasonable compensation for their efforts.

C. The Requested 30% Fee Is Reasonable Under the Circumstances.

In determining the "percentage of recovery" to award in common fund class action cases, district courts in the Eighth Circuit commonly consider the following factors:

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

See, e.g., In re Xcel Energy Inc. Securities Derivative and "ERISA" Litig., 364 F. Supp. 2d 980, 993 (D. Minn. April 8, 2005); *In re Monosodium Glutamate Antitrust Litigation*, 2003 WL 297276, at *1-2 (D. Minn. Feb. 6, 2003); *see also Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719-720 (5th Cir. 1974) (This Fifth Circuit case, which sets out twelve factors which cover the same considerations outlined above, is often cited by courts in the Eighth Circuit and elsewhere). Because not all factors apply to every case, a court should use its discretion to tailor the considerations to the individual facts of the case before it. *Griffin v. Jim Jamison*, 188 F.3d 996, 997 (8th Cir. 1999) ("Nor is it necessary for district courts to examine exhaustively and

explicitly, in every case, all of the factors that are relevant to the amount of a fee award."). Consideration of the applicable factors here strongly supports the requested fee award.

1. Time and Labor Required and the Risk Assumed by Class Counsel.

Class Counsel took this case on a fully contingent basis, investing time, effort, and money with no guarantee of ever getting paid. Consideration of the efforts and time expended by Class Counsel, the skill required to perform the legal services, and the risk assumed by Class Counsel establish that the requested fee is reasonable and fair.

Since the inception of this litigation, Class Counsel have exerted substantial efforts to move this case along expeditiously, including, among other things, (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; (5) successfully opposing Defendant's motion to transfer; (6) successfully opposing Defendant's motion to dismiss; (7) researching, drafting and filing a motion to remand; (8) propounding discovery and reviewing the data and documents produced in response to discovery; (9) responding to discovery propounded on Plaintiffs; (10) drafting a mediation statement and participating in a full-day mediation session; and (11) successfully negotiating the Settlement now before the Court. Even after the Settlement was reached between the Parties, Class Counsel devoted significant hours to finalize the comprehensive settlement documents.

Collectively, Class Counsel have expended more than 576.75hours of attorney time to litigate and resolve this dispute. *See* Declaration of Randall K. Pulliam ("Pulliam Decl.") at ¶ 19; Declaration of James Kauffman ("Kauffman Decl.") at ¶ 12. All work performed by Class Counsel was necessary, performed without duplication, and successfully advanced this litigation toward Settlement. As such, the effort and time expended by Class Counsel in navigating the complex

legal and factual issues presented in this litigation supports the requested fee. *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1063 (D. Minn. 2010) (finding the efforts and time of counsel, among other factors, justified an award of attorneys' fee of 33 1/3% of the settlement fund).

Similarly, consideration of the contingent nature of the representation also weighs in favor of the requested fee. *Yarrington*, 697 F. Supp. 2d at 1062 ("Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees." (citation omitted)). Indeed, "[t]he risk of no recovery in complex cases of this sort is not merely hypothetical. Precedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy." *In re Xcel,* 364 F. Supp. 2d at 994. Bearing the full risk of no recovery at all, Class Counsel proceeded knowing that there was a chance that Plaintiffs might not prevail and that, even if Plaintiffs did prevail, there was a chance that the case would take years to bring to trial and would not be resolved without a lengthy appeal. Thus, the contingent nature of the representation in this Action further supports the fee award requested herein. *See Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981) ("Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result."); *Maley v. Del Global Techs. Corp.,* 186 F. Supp. 2d 358 (S.D.N.Y. 2002) ("Class Counsel undertook a substantial risk of absolute non-payment in prosecuting this action, for which they should be adequately compensated.").

2. The Results Achieved.

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

question that in this case, Class Counsel have achieved a very favorable result. The Settlement Class will benefit greatly from the $800,000 Settlement Fund negotiated by Class Counsel, plus the credit repair. Although success at trial could have potentially yielded more, Class members faced the risk of not being above to recover any potential judgment had litigation continued, as well as the risks of certifying the Class and maintaining certification throughout trial, and proving liability and damages in the face of vigorous opposition by Defendant. Accordingly, in light of the risks of continued litigation and considering the value of time and money and the probability of lengthy litigation in the absence of a settlement, the Settlement is a fair, reasonable and adequate result, which could not have been achieved without the effort, persistence, and experience of Class Counsel.

3. The Novelty and Difficulty of the Legal and Factual Issues, the Significant Skill of Experienced Counsel, and the Customary Fee for Similar Work.

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

Here, the risks of continued litigation are substantial. Defendant has vigorously denied Plaintiffs' allegations of wrongdoing and consistently challenged Plaintiffs' right to recovery in this Court, filing a motion to transfer venue, a motion to compel arbitration, and a motion to dismiss. Plaintiffs anticipate that Defendant would also have vigorously opposed class certification and moved for summary judgment if this case were to continue. Thus, continued litigation of the

Action would have been even more lengthy and expensive, and the possibility of Plaintiffs litigating this case on a class basis and prevailing through judgment is uncertain.

Notwithstanding the complexity and difficulty of the issues involved in this case, Class Counsel were able to negotiate an excellent recovery for the Settlement Class. The work they performed in this litigation reflect their skill and experience in complex class litigation. The firm resumes of Carney Bates & Pulliam, PLLC and Bailey & Glasser LLP attest to their national reputations and extensive experience in the area of complex class litigation, and particularly in litigation challenging convenience fees. *See* Pulliam Decl. at Ex. 1; Kauffman Decl. at Ex. 1. Accordingly, the quality and skill involved in the services performed by Class Counsel support the requested fee.

Moreover, the requested fee is directly in line with fees awarded to Class Counsel in similar, complex class litigation in Arkansas and throughout the country, as detailed in the declarations of counsel. *See e.g. Phillips v. Caliber Home Loans, Inc.*, No. 19-CV-2711 (WMW/LIB), 2022 WL 832085, at *7 (D. Minn. Mar. 21, 2022) (awarding attorneys' fees of 33.33% of the Settlement Fund); *Econo-Med Pharmacy, Inc. v. Roche Diagnostics Corp*., Case No. 1:16-cv-00789-TWP-MPB (S.D. Ind.) (TCPA class action awarding Class Counsel fees of $5.6 million, or one-third of the settlement amount of $17 million); *Williams v. State Farm Mutual Automobile Ins. Co*., Case No. 4:11-cv-00749-KGB (E.D. Ark.) (slip opinion) (June 1, 2018) (awarding Carney Bates & Pulliam, PLLC fees of $6.5 million, or 30% of the settlement amount of $21.7 million); *see also Huyer*, 849 F.3d at 399 (noting that courts within the Eighth Circuit frequently award attorneys' fees between 25% and 36% of a common fund); *Caligiuri*, 855 F.3d 860 (affirming fee award of one-third of the gross settlement fund).

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

4. Time Limitations Imposed by Client or Circumstances, the Undesirability of the Case, and the Preclusion of Other Employment.

The customary fee in a class action lawsuit is contingent. This is so because virtually no individual possesses a sufficiently large stake in such litigation to justify paying attorneys on an hourly basis. At the same time, class actions are notoriously lengthy and hard to predict. Thus, consideration of the undesirability of the case and the fact that Class Counsel risked their time and effort with the possibility of no recovery at all, supports the fee request of 30% of the Settlement. Moreover, had Class Counsel not taken a role in this litigation, they would have been free to allocate their time and resources elsewhere.

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

To date, no Class Member has objected to the fee request. *See* Keough Decl. at ¶ 18; Pulliam Decl. at ¶ 12. The lack of objections by Class members is further support of the reasonableness of the requested fee. *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995) ("The fact that only a handful of class members objected to the settlement similarly weighs in [class counsel's] favor."); *In re Xcel Energy*, 364 F. Supp. 2d at 1002 ("[S]ilence can be read as an endorsement of the results received and the services rendered by plaintiff's counsel."); *see also In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 327 (E.D.N.Y. 1993) (holding that the lack of objections to the requested fee supported its reasonableness).

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

Attorneys who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses and costs from the fund. *See Jorstad v. IDS Realty Trust*, 643 F.2d 1305, 1315 (8th Cir. 1981); *Phillips*, 2022 WL 832085, at *7 (awarding reimbursement of litigation costs that included "filing fees, travel costs, mediation, photocopying, mail and telephone costs, and other incidental expenses related to the litigation."). Class Counsel are seeking reimbursement of costs and expenses in an aggregate amount of $10,094.38 for prosecuting this action on behalf of the Class. As set forth in the Pulliam and Kauffman Declarations, these expenses were incurred on an ongoing basis, are directly related to the prosecution and settlement of this Action, and include expenses for such items as mediation, travel and food for mediation, fees related to obtaining Plaintiffs' mortgages and various documents, and copying costs. *See* Pulliam Decl. at ¶¶ 21-23; Kauffman Decl. at ¶ 27.

Accordingly, Class Counsel respectfully request reimbursement for these reasonable expenses in the amount of $10,094.38.

IV. THE CLASS REPRESENTATIVES ARE ENTITLED TO SERVICE AWARDS.

"Service award payments are regularly made to compensate class representatives for their help to a class." *In re Zurn Pex Plumbing Prods. Liab. Litig.*, No. 08-MDL-1958 ADM/AJB, 2013 WL 716460, at *2 (D. Minn. Feb. 27, 2013). Here, Plaintiffs devoted time in the oversight of, and participation in, the litigation on behalf of the Class. Specifically, Plaintiffs gathered and communicated information to Class Counsel, reviewed pleadings, had general oversight over the case, and participated in the mediation and settlement of this Action. *See* Pulliam Decl. at ¶ 25; Kauffman at ¶ 28. Consequently, the requested service award of $5,000 to each of the Class

Representatives is appropriate and should be approved. *See Caligiuri,* 855 F.3d at 867 (stating "courts in this circuit regularly grant service awards of $10,000 or greater" and affirming service awards of $10,000 each); *see also Phillips*, 2022 WL 832085, at *7 (awarding service awards of $5,000 for each of the six plaintiffs); *Khoday v. Symantec Corp*., Case No. 11-cv-180 (JRT/TNL), 2016 WL 1637039, at *12 (D. Minn. April 4, 2016) (approving service awards to the named plaintiffs in the amount of $10,000 each); *Zilhaver v. UnitedHealth Group, Inc*., 646 F. Supp. 2d 1075, 1085 (D. Minn. 2009) (awarding service awards of $15,000 each).

V. CONCLUSION.

For all the foregoing reasons, Plaintiffs respectfully request that the Court award Class Counsel attorneys' fees of 30% of the Settlement Fund, or $240,000, award Class Counsel reimbursement of litigation expenses in the amount of $10,094.38, and award service awards of $5,000 each for the two Class Representatives.

Dated: August 12, 2022

Respectfully submitted,

RANDALL K. PULLIAM (ABN 98015)
E. LEE LOWTHER III (ABN 2013142)
CARNEY BATES & PULLIAM, PLLC
519 W. 7th St.
Little Rock, AR 72201
Tel: (501) 312-8500
Fax: (501) 312-8505
rpulliam@cbplaw.com
llowther@cbplaw.com

Counsel for Plaintiffs and the Proposed Settlement Class