UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOE ALMON, JON CARNLEY, CYNTHIA CLARK, JACKIE DENSMORE, JENNIFER KREEGAR, HAROLD MCPHAIL, JB SIMMS, and KENNETH TILLMAN, on behalf of themselves and all others similarly situated, Plaintiffs, v. CONDUENT BUSINESS SERVICES, LLC d/b/a DIRECT EXPRESS, COMERICA, INC., and COMERICA BANK, Defendants.	§	Case No. 5:19-cv-01075-XR

MOTION FOR FEES, EXPENSES, AND SERVICE AWARDS AND APPROVAL OF CY PRES BENEFICIARIES

Class Representatives Joe Almon, Jon Carnley, Cynthia Clark, Jackie Densmore, Jennifer Kreegar, JB Simms, and Kenneth Tillman ("Class Representatives"), and Plaintiff Harold McPhail ("Plaintiff") hereby submit this request for fees, expenses, and service awards pursuant to the Court's Order Granting Preliminary Approval (Doc. 97) ("PA Order") and Federal Rule of Civil Procedure 23(b)(3) and (e). Class Representatives and Plaintiff also request that the Court approve the potential *cy pres* beneficiaries identified herein.

INTRODUCTION

Court-appointed Class Counsel Webb, Klase & Lemond, LLC and The Vaught Firm, LLC (collectively, "Class Counsel"), on behalf of the Settlement Classes and the Class Representatives, respectfully move this Court for an award of attorneys' fees of Eight Hundred

Seventy-Two Thousand Four Hundred Twenty-Five Dollars and Fifty Cents ($872,425.50), out-of-pocket litigation costs and expenses that Class Counsel incurred in prosecuting this action in the amount of Twenty-Nine Thousand One Hundred Fifty-Seven Dollars and Seventy-Eight Cents ($29,157.78), and Service Awards for the Class Representatives and Plaintiff in the total amount of Sixteen Thousand Dollars ($16,000.00).

Consistent with 15 U.S.C. § 1693m(a)(3), Defendants have agreed to pay Class Counsel's fees and costs above and beyond the One Million Two Hundred Thousand Dollars ($1,200,000.00) Settlement Fund that has been established in this case. And this fee amount was agreed upon ***after*** the parties reached an agreement on the amount of the Settlement Fund. *See* Declaration of E. Adam Webb and G. Franklin Lemond, Jr., ¶ 14 ("Joint Decl.") (Exhibit 1 hereto). But even if you evaluate the agreed upon attorneys' fees within the traditional "percentage of the common fund" framework, the fee request is thirty-eight percent (38%) of the total settlement value, which is within the acceptable range approved by Texas district courts. *Id.* at ¶ 21. Since even before the Complaint was filed, Class Counsel has been working diligently on this case, devoting extensive resources to this action. *See* Doc. 95, ¶¶ 6-10. In light of the results achieved, the requested fee is fair and reasonable.

Class Counsel spent a total of $29,157.78 in reimbursable litigation-related costs and expenses. *See* Joint Decl., ¶ 27. This amount includes Class Counsel's total out-of-pocket expenses, including, *inter alia*, case fees, legal research expenses, expert fees, and travel expenses. *Id.* at ¶ 28. Class Counsel request the Court order reimbursement of this amount.

Finally, Class Counsel seeks Service Awards on behalf of the Class Representatives and Plaintiff in the amount of $2,000 each for a total of $16,000 to be paid in accordance with the Settlement Agreement. *Id.* at ¶ 33.

Class Counsel's efforts to date have been without compensation of any kind, and the fee has been wholly contingent upon the result achieved. *Id.* at ¶ 15. For the reasons set forth below, Class Counsel respectfully submit that the requested fees and Service Awards, and the cost and expense reimbursements, are fair and reasonable under the applicable legal standards, and, in light of the contingency risk undertaken and the result achieved, should be awarded by the Court.

CASE HISTORY

A full recitation of the history of the case is set forth in the briefing for preliminary approval and the declaration in support. *See* Plaintiffs' Motion and Memorandum of Law for Preliminary Approval, pp. 3-5 ("Litigation History"), pp. 5-6 ("Settlement Negotiations") (Doc. 92); *see also* Joint Declaration in Support (Doc. 92-1). Details of the case as it relates to the request set forth in this motion, including the efforts of Class Counsel, the Class Representatives and Plaintiff, and the costs and expenses incurred as a result of the litigation, are set forth herein and within the attached declaration at paragraphs 6-38.

ARGUMENT

As set forth in Plaintiffs' Motion for Preliminary Approval, as part of the Settlement Agreement in this matter, Defendants have agreed to pay any attorneys' fees that are awarded by the Court separate, apart, and ***in addition to*** the Settlement Fund of One Million Two Hundred Thousand Dollars ($1,200,000.00) and the costs of notice and administration up to Two Hundred Fifty Thousand Dollars ($250,000.00). The Settlement Agreement's provision for a separate fee award paid directly by Defendants is not only within the range generally deemed reasonable under a common fund analysis, but is consistent with 15 U.S.C. § 1693m(a)(3). Importantly, the Settlement Agreement is not conditioned upon the Court's approval of the fee award. *See*

Settlement Agreement, ¶ 84. However, under established precedent, Class Counsel's fee request should be granted.

I. Legal Standard for Awarding Attorneys' Fees.

Federal Rule of Civil Procedure 23(h) provides that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized . . . by the parties' agreement." The Fifth Circuit has "'encourage[d] counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorney's fees.'" *Bridges v. Ridge Nat. Res., LLC,* 2020 WL 7496843, at *1 (W.D. Tex. June 23, 2020) (quoting *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974)). "An agreed upon award of attorneys' fees and expenses is proper in a class action settlement, so long as the amount of the fee is reasonable under the circumstances . . . In fact, courts have encouraged litigants to resolve fee issues by agreement, if possible." *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 322 (W.D. Tex. 2007) (citing Fed. R. Civ. P. 23(h) and collecting cases). "Accordingly, courts are authorized to award attorney fees and expenses where all parties have agreed to the amount, subject to court approval." *Id.* Additionally, in cases brought under the Electronic Funds Transfer Act, plaintiffs are entitled to an award of attorney's fees under 15 U.S.C. § 1693m(a)(3). *See* 15 U.S.C. § 1693m(a)(3); *Hicks v. GTC Auto Sales, Inc.*, 2016 WL 11480194, at *1 (N.D. Tex. June 9, 2016). Here, Defendants have agreed to pay Class Counsel a fee of $872,425.50, subject to this Court's approval, and do not oppose this request. *See* Settlement Agreement, ¶ 83.

Moreover, where, as here, Class Counsel obtains a common fund for the Settlement Classes, the common fund doctrine entitles Class Counsel to a reasonable attorneys' fee award from the Settlement Fund. *See Welsh v. Navy Fed. Credit Union*, 2018 WL 7283639, at *15

(W.D. Tex. Aug. 20, 2018) ("the Supreme Court has consistently recognized the common fund doctrine to permit attorneys who obtain a recovery for a class to be compensated from the benefits achieved as a result of their efforts.") (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (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 . . . Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.") (citations omitted)).

Thus, although courts may alternatively apply the lodestar method to calculating attorneys' fees, "Courts have recognized the best approach, in a common fund or variant case, is to use the percentage method with the *Johnson* factors as a cross-check." *Bridges*, 2020 WL 7496843, at *2. The *Johnson* factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the legal issues; (3) the skill required to perform the legal service properly; (4) the preclusion of other employment by the attorney as a result of taking the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or other circumstances; (8) the monetary amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) whether the case is undesirable; (11) the nature and duration of the professional relationship with the client; and (12) awards in similar cases.

Welsh, 2018 WL 7283639, at *16 (citing *Johnson*, 488 F.2d at 717-19). The Fifth Circuit endorses "the district courts' use of the percentage method cross-checked with the *Johnson* factors," and "has never reversed a district court judge's decision to use the percentage method." *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012) (footnotes

omitted).[1] "Indeed, district courts in this Circuit regularly use the percentage method blended with a *Johnson* reasonableness check." *Id.* at 643.

II. Class Counsel's Fee Request Is Reasonable.

In determining the reasonableness of the fee award sought here, "[t]he first step under the [percentage] method requires determining the actual monetary value conferred to the class members by the settlement." *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1075 (S.D. Tex. 2012) (alteration in original) (internal quotation marks omitted) (quoting *Bussie v. Allamerica Fin. Corp.,* 1999 WL 342042, at *2 (D. Mass. May 19, 1999)). "The next step is to determine the appropriate percentage benchmark." *In re Heartland Payment*, 851 F. Supp. 2d at 1080. "The final step in applying the percentage method is to determine whether the benchmark . . . should be adjusted in light of the *Johnson* factors." *Id.* at 1086.

Here, the actual monetary value conferred to the Settlement Classes is $1,200,000. In addition to this amount, Defendants have agreed to pay an additional $250,000 to cover the costs

[1] The Court's decision on this Motion is not governed by *In re High Sulfur Content Gasoline Prod. Liab. Litig.*, 517 F.3d 220 (5th Cir. 2008), where the Fifth Circuit held "[t]his circuit requires district courts to use the 'lodestar method' to 'assess attorneys' fees in class action suits.'" *Id.* at 228 (quoting *Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 850 (5th Cir. 1998)). As the Fifth Circuit subsequently clarified in *Union Asset Mgmt.*, the *High Sulfur* decision does not govern a common fund case like the present one because (1) the *High Sulfur* decision "overstate[d]" the *Strong* decision "it quote[d], which said that the Circuit 'uses' the lodestar method rather than 'requires' it"; (2) *High Sulfur* "did not involve a traditional common fund, and implied that the percentage method might be proper in other circumstances"; and (3) *High Sulfur* "only addressed how to allocate a lump-sum attorneys' fee award among the plaintiffs' multiple attorneys rather than how to allocate a common fund between class counsel and the class itself." 669 F.3d at 644 (footnotes and citations omitted). If the Court nonetheless decides that the lodestar method should play a role in its fee analysis including as a cross-check to the percentage of the fund approach, Class Counsel will promptly provide the Court with the materials it needs to determine the reasonable hours worked on the case, the reasonable hourly rates, and any applicable multiplier. Class Counsel's preliminary cross-check, however, has revealed that the requested fee is ***far less than*** the lodestar calculation.

of notice and administration of the settlement, and to pay Class Counsel's requested fee ($872,425.50) and expenses ($29,157.78), for a total of $901,523.28. Thus, the total settlement value in this case is $2,251,583.28. Class Counsel's requested fee makes up 38% of the total settlement value. Such a request is reasonable, meets the benchmark in the Fifth Circuit, and is supported by the *Johnson* factors.

A. Class Counsel Obtained Substantial Value to be Conferred Upon the Class.

In this case, Plaintiffs sought to recover damages on behalf of the certified classes for Defendants' alleged violations of EFTA and Regulation E. *See* Doc. 83 at 1. In the class action context, damages for violations of EFTA and Regulation E are subject to the statutory cap imposed by Congress in 15 U.S.C. § 1693m(a)(2)(B). This statute provides that in the class action context the total recovery allowed per statutory violation "shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the defendant." 15 U.S.C. § 1693m(a)(2)(B). Because Plaintiffs have identified three potential statutory violations by Defendants, the maximum damages recoverable in this case on behalf of the certified classes is $1,500,000 (3 x $500,000). Therefore, the Settlement Amount that Defendants have agreed to pay as part of the settlement ($1,200,000) represents eighty percent (80%) of the possible damages that could be recovered at trial in this case.

The actual amount of the monetary value conferred to the Settlement Classes by the Settlement is $1,200,000, none of which can revert to Defendants. *See* Settlement Agreement, ¶ 76. Unlike some class action settlements that confer benefits *other* than cash, this Settlement is easy to value because it provides meaningful and immediate monetary relief in the form of a $1,200,000 cash fund.

B. Thirty-Eight Percent of the Settlement Fund Is a Reasonable Benchmark Percentage.

"No general rule exists as for what is a reasonable percentage of a common fund," but "[f]ifty percent 'is the upper limit on a reasonable fee award to assure that fees do not consume a disproportionate part of the recovery obtained for the class, though somewhat larger percentages are not unprecedented.'" *Torregano v. Sader Power, LLC*, 2019 WL 969822, at *3 (E.D. La. Feb. 28, 2019) (quoting *In re Combustion, Inc.*, 968 F. Supp. 1116, 1133 (W.D. La. 1997)). Class Counsel's requested fee (roughly 38%) is well within the range approved by Texas district courts. *E.g.*, *Erica P. John Fund, Inc. v. Halliburton Co.*, 2018 WL 1942227, at *9 (N.D. Tex. Apr. 25, 2018) ("Numerous courts in this Circuit have awarded fees in the 30% to 36% range."); *Wolfe v. Anchor Drilling Fluids USA Inc.*, 2015 WL 12778393, at *3 (S.D. Tex. Dec. 7, 2015) (awarding forty percent); *Frost v. Oil States Energy Servs.*, 2015 WL 12780763, *2 (S.D. Tex. Nov. 19, 2015) (one-third).

For comparison, a typical contingent fee arrangement in non-class action cases provides that the attorney representing the plaintiff receives 35 to 45 percent of the plaintiffs' recovery, exclusive of costs. *See* Joint Decl., ¶ 22. This fact is relevant to determining the appropriateness of the award here because the Court's ultimate task is to approximate the reasonable fee that a competitive market would bear. *See Aichele v. City of Los Angeles*, 2015 WL 5286028, at *6 (C.D. Cal. Sept. 9, 2015) (quoting *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998); *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, *16 (D.N.J. 2005)) ("In defining a 'reasonable fee' in representative actions, the law should 'mimic the market,'" and "[a]ttorneys 'regularly contract for contingent fees between 30% and 40%'"); *Gaskill*, 160 F.3d at 363 ("When a fee is set by a court rather than by contract, the object is to set it at a level that will approximate what the market would set . . . The Judge, in other words, is trying to mimic the

market in legal services."); *cf. Arete Partners, L.P. v. Gunnerman*, 2010 WL 11614545, at *2 (W.D. Tex. June 23, 2010) (citing *Barger v. Sutton*, 2004 WL 825998, at *2 (W.D. Tex. Apr. 13, 2004)) ("a one-third contingency fee is customary in both Austin and San Antonio, Texas"). Because 38% is at or below the percentage typically awarded in contingency litigation, Class Counsel's request for 38% of the total settlement value is reasonable and should be approved.

C. Class Counsel's Fee Request Is Reasonable Under a *Johnson* Factors Cross-Check.

The purpose of a cross-check under the *Johnson* factors is to ensure that a fee is reasonable and thereby ensures "fairness to the class and to the class attorneys." *Welsh*, 2018 WL 7283639, at *16 (citing *Erica P. John Fund*, 2018 WL 1942227, at *8). "While the *Johnson* factors must be addressed 'rarely are all the *Johnson* factors applicable; this is particularly so in a common fund situation.'" *In re Dell Inc.*, 2010 WL 2371834, at *15 (W.D. Tex. June 11, 2010) (quoting *Di Giacomo v. Plains All Am. Pipeline*, 2001 WL 34633373, at *9 (S.D. Tex. Dec. 19, 2001)), *aff'd, appeal dismissed sub nom. Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632 (5th Cir. 2012). "In evaluating these factors, the Fifth Circuit has explained that courts should 'give special heed to the time and labor involved, the customary fee, the amount involved and the result obtained, and the experience reputation and ability of counsel.'" *Welsh*, 2018 WL 7283639, at *16 (quoting *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998)). As explained below, a *Johnson* cross-check demonstrates that Class Counsel's request for 38% of the total settlement value is reasonable and will ensure fairness to the Settlement Class and Class Counsel.

1. The Time and Labor Required Supports Approval of the Fee.

Under this factor, courts examine whether "the time and labor expended was reasonably required for the results achieved" in the case. *See Bridges*, 2020 WL 7496843, at *4. Class

Counsel has invested substantial time and resources into pursing the Class's claims. From the inception of the case through July 12, 2024, Class Counsel and the attorneys and staff at their law firms have spent over 1,700 hours prosecuting this case, all of which were reasonably required to achieve the significant cash relief the Settlement will confer on the members of the Settlement Classes. Class Counsel undertook a lengthy and thorough discovery process involving substantial written and deposition discovery, reviewed tens of thousands of pages of documents Defendants produced. In addition, Defendants vigorously defended the case, requiring Plaintiffs to engage in substantial motion practice including responding to its motion to dismiss and its motion for summary judgment, and fending off its opposition to class certification.

Moreover, Class Counsel's significant experience and in-depth knowledge of the subject matter gained through years of previous experience litigating claims like those here allowed Class Counsel to efficiently achieve this excellent result with no wasted effort. Simply put, Class Counsel's experience in class litigation brought great value to the Settlement Classes and was instrumental in bringing about the favorable result for the members of the Settlement Classes.

2. The Novelty and Difficulty of the Issues Support Approval of the Fee.

Considerations courts analyze to determine uniqueness and difficulty of the issues involved in a case include, among others, the type of case, whether a case has a significant risk of no recovery, whether class counsel has litigated similar cases in the past, the volume of discovery and pretrial practice in the case, and the duration of the litigation. *See Bridges*, 2020 WL 7496843, at *4; *In re Heartland*, 851 F. Supp. 2d at 1083; *Klein v. O'Neal, Inc.*, 705 F.

Supp. 2d 632, 677 (N.D. Tex. 2010). This case – like many consumer class actions – presented novel, complex, and difficult issues on several fronts.

As an initial matter, this case involved claims that were by their nature difficult to detect. Plaintiffs claimed Defendants failed to comply with EFTA and Regulation E for years – conduct that persisted without a lawsuit seeking redress and remediation. Only Class Counsel's understanding of EFTA and Regulation E allowed the case to be filed in the first instance.

Class certification presented another set of novel and complex issues. Class Counsel was able to overcome numerous defenses to class certification, including Defendants' arguments challenging ascertainability, commonality, and damages. Class Counsel also had to defend the Court's class certification order from Defendant's 23(f) petition to the Fifth Circuit. Navigating all of these difficult issues supports approval of the requested fee.

3. The Skill Required to Perform the Legal Services Properly Supports Approval of the Requested Fee.

"This factor is evidenced where 'counsel performed diligently and skillfully, achieving a speedy and fair settlement, distinguished by the use of informal discovery and cooperative investigation to provide the information necessary to analyze the case and reach a resolution.'" *In re Heartland*, 851 F. Supp. 2d at 1083 (quoting *King v. United SA Fed. Credit Union*, 744 F. Supp. 2d 607, 614 (W.D. Tex. 2010)).

From both a qualitative and quantitative perspective, the Settlement confirms that Class Counsel provided the members of the Settlement Classes with outstanding legal services in litigating this case and securing the Settlement. Comerica and Conduent are well-funded defendants represented by well-respected law firms. The Settlement Classes are represented by Webb, Klase & Lemond, LLC and The Vaught Firm, LLC, highly respected law firms with substantial experience representing consumers in class litigation, including litigation against

financial institutions. *See* Doc. 92-1, ¶¶ 51-52. These firms have been actively involved in prosecuting this case from its inception.

The Court has recognized that the Class Counsel is "qualified, experienced, and generally able to conduct the proposed litigation" based on the fact that Class Counsel have previously been lead or co-lead counsel in numerous class actions both in this judicial district and in several other federal judicial districts, thus finding them adequate to represent the class and appointing them Class Counsel. *See* Doc. 83 at 25-26. Other courts have also recognized the skill and benefits conferred by Class Counsel. *See Patti's Pitas, LLC v. Wells Fargo Merch. Servs., LLC*, 2021 WL 9564432, at *2 (E.D.N.Y. Feb. 8, 2021); *Al's Pals Pet Care v. Woodforest Nat'l Bank, NA*, 2019 WL 387409, at *4 (S.D. Tex. Jan. 30, 2019).

4. The Preclusion of Other Employment by the Attorney as a Result of Taking the Case Supports Approval of the Requested Fee.

This factor examines "the extent to which class counsel were precluded from accepting other work due to the responsibilities involved in litigating this case." *See Klein*, 705 F. Supp. 2d at 677-78. Considerations can include whether class counsel "turned away cases to permit time to prosecute" the action, the length and frequency of time investments in the case to the exclusion of other employment, and whether the strength of class counsel's commitment to the action "resulted in the loss of other work." *Id.* "The reality of complex cases is that work is not easily shifted to other attorneys in a firm not familiar with the matter, with the result that substantially less time becomes available to . . . Class Counsel to attend to other matters." *In re Heartland*, 851 F. Supp. 2d at 1084. As a result, "[t]ime devoted to this litigation and its resolution necessarily limited the time available for other litigation." *Id.*

Here, the work of Class Counsel in the management and litigation of this complex proceeding "necessarily infringed upon the time and opportunity they would have had available

to accept other employment." *Id.* The contentiousness of this case and the many novel and complex issues raised required Class Counsel to expend significant time and financial resources. The time and resources required to resolve this case prevented Class Counsel from pursuing other work. *See* Joint Decl., ¶ 23.

5. The Requested Fee Is Within Range of the Customary Fee in Common Fund Cases, Supporting the Requested Fee.

In the Fifth Circuit, fee awards of up to 40% have been customarily approved in common fund cases. *See, e.g.*, *Jasso v. HC Carriers, LLC*, 2022 WL 16927813, at *6 (S.D. Tex. Oct. 19, 2022), *report and recommendation adopted sub nom.*, 2022 WL 16924117 (S.D. Tex. Nov. 14, 2022); *Singer v. Wells Fargo Bank, N.A.*, 2020 WL 10056302 at *2 (W.D. Tex. July 14, 2020); *Sarabia v. Spitzer Indus., Inc.*, 2018 WL 6046327 at *4 (S.D. Tex. Nov. 11, 2018) (collecting cases); *Matthews v. Priority Energy Servs., LLC*, 2018 WL 1939327, at *1 (E.D. Tex. Apr. 20, 2018), *report and recommendation adopted*, 2018 WL 2193030 (E.D. Tex. May 11, 2018); *In re Combustion, Inc.*, 968 F. Supp. 1116, 1139-40 (W.D. La. 1997) (36%).

Class Counsel's request for 38% of the total settlement amount is consistent with these cases. Moreover, given that Defendants have agreed to pay any fees awarded to Class Counsel in addition to the $1,200,000 Settlement Fund, unlike a traditional common fund case, approval of Class Counsel's requested fee will not diminish what class members receive. The requested fee should be approved.

6. The Contingent Nature of the Requested Fee Supports Its Approval.

"Consideration of this factor is designed to 'demonstrat[e] the attorney's fee expectations when he accepted the case.'" *In re Dell*, 2010 WL 2371834, at *17 (quoting *Johnson*, 488 F.2d at 718). "District courts within this circuit have found upward adjustments appropriate if counsel took the case on a contingency basis . . . But merely taking a case on a contingency basis does

not merit an upward adjustment if the benchmark reflects the market rate." *In re Heartland*, 851 F. Supp. 2d at 1084 (citing *Klein,* 705 F. Supp. 2d at 678; *In re Dell*, 2010 WL 2371834, at *17). Here, Class Counsel took this case on a contingency basis. Class Counsel's customary contingency fee is 40% or more of the total recovery for cases that resolve before an appeal and 45% or more for cases that are appealed. *See* Joint Decl., ¶ 22. Class Counsel's fee request is consistent with these customary percentages.

7. Time Limitations Imposed by the Client or Other Circumstances Factor Is Inapplicable.

This factor is "inapplicable to this case, and [is] therefore neutral." *In re Dell*, 2010 WL 2371834, at *18.

8. The Monetary Amount and the Results Obtained Supports Approval of the Requested Fee.

"The United States Supreme Court and the Fifth Circuit have held 'the most critical factor in determining the reasonableness of a fee award is the degree of success obtained.'" *In re Dell*, 2010 WL 2371834, at *18 (quoting *In re Enron*, 586 F. Supp. 2d at 796). Here, as in *Klein*, "the results obtained for the class are significant" due to the fact that the result obtained ($1,200,000) is 80% of what is recoverable in this case ($1,500,000), due to the statutory cap on damages imposed by 15 U.S.C. § 1693m(a)(2)(B). *See Klein* 705 F. Supp. 2d at 678.

Here, there are over 100,000 members of the Settlement Classes who are eligible to file a claim to receive settlement relief. As the record reveals, this was a heavily litigated case that would not have been initiated but for Plaintiffs' and Class Counsel's efforts. No other Direct Express cardholders included in the classes have asserted similar class claims at any prior time in any court. Class Counsel were successful in achieving certification of nationwide classes of cardholders, overcoming numerous challenges by Defendants. Solely through the exceptional

work of Class Counsel do the Settlement Classes have an opportunity to file a claim to compensate them for a portion of their losses. Thus, the Settlement provides an excellent recovery under any standard and supports Class Counsel's fee request.

9. The Experience, Reputation, and Ability of Class Counsel Supports Approval of the Requested Fee.

As addressed above, Class Counsel are highly experienced in litigating complex class actions. In addition to other active cases, Class Counsel have also been appointed and served as class counsel in several other class action cases across the country. Doc. 92-1, ¶¶ 51-52. Recognizing Class Counsel's outstanding experience, reputation, and ability, this Court likewise appointed these firms as Class Counsel under Rule 23(g).

Class Counsel's experience litigating class actions, particularly in the class action field, allowed them to fully understand the issues attendant to such litigation, properly value the risks of continued litigation compared to benefits derived from the Settlement, and efficiently resolve this case in a manner that achieves the goals of the litigation. Doc. 92-1, ¶¶ 51-52. Thus, this factor supports approval of the requested 38% of the total settlement value.

10. The Undesirability of this Case Due to the Risk of Non-Recovery Supports Approval of the Requested Fee.

This case was undesirable due to the risk involved and the effort required. "[T]he 'risk of non-recovery' and 'undertaking expensive litigation against . . . well-financed corporate defendants on a contingent fee' has been held to make a case undesirable, warranting a higher fee." *Erica P. John*, 2018 WL 1942227, at *12 (quoting *Braud v. Transport Serv. Co.*, 2010 WL 3283398, at *13 (E.D. La. Aug. 17, 2010)).

First, the risk of non-payment was high in this case. It would not have been economically feasible for the Class Representatives or the Plaintiff to retain lawyers on an hourly basis or to

pay the costs of litigation, which would quickly surpass the amount in controversy for an individual plaintiff. As a result, Class Counsel undertook the representation of the Class Representatives and Plaintiff and the class on a fully contingent basis and would recover nothing for expenses or time incurred unless the case succeeded. *See* Joint Decl., ¶ 13. Thus, in taking the case, Class Counsel accepted a high risk of not being compensated for their efforts, supporting approval of the fee award here. *See In re Combustion*, 968 F. Supp. at 1132 ("The rationale behind awarding a percentage of the fund to counsel in common fund cases is the same as that which justifies permitting contingency fee arrangements in general . . . The underlying premise is the existence of risk – the contingent risk of nonpayment").

Second, in bringing this lawsuit on behalf of Plaintiff and the Settlement Classes against Defendants, Class Counsel undertook expensive litigation against well-financed corporate defendants on a contingency fee basis. This "case carried risks that required in-depth investigation and considerable . . . discovery to analyze the merits of" the class's claims, which further "justifies the benchmark percentage" that Class Counsel requests. *Bridges*, 2020 WL 7496843, at *4.

11. The Nature and Duration of the Professional Relationship with the Client Supports the Requested Fee.

Class Counsel has represented Class Representatives and Plaintiff for the entirety of this action. The Class Representatives have remained engaged and active in the prosecution of this action for the past five years. Joint Decl.,¶ 35. This span and scope is extensive even in the realm of lengthy class action litigation.

12. Awards in Similar Cases Supports the Requested Fee.

"Courts often look at fees awarded in comparable cases to determine if the fee requested is reasonable." *In re Heartland*, 851 F. Supp. 2d at 1086 (internal quotation marks omitted)

(quoting *DeHoyos*, 240 F.R.D. at 333). Courts may examine "empirical studies" or "[s]pecific cases" under this factor. *See id.*

Class Counsel has previously sought and been awarded fees between 30% and 40% in other common fund cases. *See Al's Pals Pet Care*, 2019 WL 387409, at *4; *Lunsford v. Woodforest Nat'l Bank*, 2014 WL 12740375, at *6 (N.D. Ga. May 19, 2014). Class Counsel's fee request is consistent with these specific, comparable cases, and is therefore reasonable. Accordingly, Rule 23(h), Fifth Circuit case law, and the *Johnson* factors show that Class Counsel's request for 38% of the total settlement amount is reasonable and should be awarded to Class Counsel.

III. Class Counsel's Requested Expense Reimbursement Should Be Approved.

"In addition to being entitled to reasonable attorneys' fees, class counsel in common fund cases are also entitled to reasonable litigation expenses from that fund." *In re Heartland*, 851 F. Supp. 2d at 1089 (internal quotation marks omitted) (quoting *Radosti v. Envision EMI, LLC*, 760 F. Supp. 2d 73, 79 (D.D.C. 2011)).

As detailed in the Joint Declaration, Class Counsel requests reimbursement for $29,157.78 in costs and expenses expended by Class Counsel. *See* Joint Decl., ¶ 27. This request is reasonable. Class Counsel can, if requested, provide this Court with documents detailing these costs. These costs were reasonably and necessarily incurred in the prosecution of this case and are the types of costs included in a bill for professional services that are not absorbed as part of firm overhead. *Id.* These costs are typical expenses in complex class action litigation like this case. Defendants do not object, as shown by its agreement to pay Class Counsel's requested costs and expenses, subject to this Court's approval. *See* Settlement

Agreement, ¶ 83. Class Counsel respectfully requests the Court award $29,157.78 for expense reimbursement.

IV. The Court Should Approve $2,000 Service Awards.

"Service awards are used in class action lawsuits to compensate named plaintiffs for the services they provide." *Del Carmen v. R.A. Rogers, Inc.*, 2018 WL 6430835, at *2 n.2 (W.D. Tex. Oct. 18, 2018). *See also DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 340 (W.D. Tex. 2007). Service awards are supported by the text of Rule 23(e)(2)(D), which requires a court reviewing a proposed settlement to consider whether "the proposal treats class members equitably relative to each other." While this "equitable treatment requirement most obviously protects absent class members from being subjected to excessive incentive awards," the requirement "also protects class representatives from having absent class members free ride on their efforts." Newberg on Class Actions § 17:4 (5th ed.) (footnote omitted) ("In other words, if the class representatives face particular risks in serving the class and/or undertake valuable work on behalf of the class but cannot recover any of the costs of those efforts through an incentive award, they have a fair argument that the settlement is not treating them equitably relative to the absent class members").

Pursuant to the Settlement Agreement, Class Counsel requests that the Court award the Class Representatives and Plaintiff a Service Award of $2,000 each. Such an award is "justified in light of [their] willingness to devote [their] time and energy to this . . . representative action and reasonable in consideration of the overall benefit conferred on the settlement class." *DeHoyos*, 24 F.R.D. at 339; *see also, e.g.*, *Blackmon*, 2022 WL 3142362, at *5 (approving service award of $12,500). First, each named Plaintiff made the difficult decision to put his or her name on a lawsuit against abundantly resourced corporations, without which this lawsuit

could not have been initiated. Joint Decl., ¶ 35. In addition, each named Plaintiff provided detailed information as to their claims and relationship with Defendants that was vital to Class Counsel's investigation and litigation of the class claims. *Id.* Furthermore, the named Plaintiffs have remained active in the case, communicating with Class Counsel during subsequent phases of the case, including providing feedback and reviewing and approving the terms of the Settlement as being in the best interests of the Settlement Classes. Plaintiffs' participation required particular commitment considering the lengthy duration of this case. *Id.* Thus, Class Counsel's request for Service Awards of $2,000 for each named Plaintiff is reasonable, justified, and should be approved.

V. The Court Should Approve the Proposed *Cy Pres* Beneficiaries.

Paragraph 76 of the Settlement Agreement sets forth the circumstances under which monies in the Settlement Fund could be distributed to *cy pres* beneficiaries as follows:

> In the event funds remain in the Settlement Fund ninety (90) days after the reissued checks are mailed, such funds shall be distributed to Class Members that previously cashed their checks if there are sufficient remaining funds to warrant such a distribution, and shall otherwise be distributed via *cy pres* to such recipient(s) as are agreed on by the Parties, and as will be provided in the Final Approval Order.

See Settlement Agreement, ¶ 76. In the event that any monies remain after this procedure is followed, Plaintiffs respectfully request that Court approve the following *cy pres* beneficiaries: U.S. Vets, MASSPIRG, Georgia Watch, and Texas Appleseed.

U.S.VETS is registered as a 501(c)(3) nonprofit organization that seeks to end veteran homelessness and empower veterans and families through housing, comprehensive services and advocacy. MASSPIRG is a 501(c)(4) advocate for the public interest of citizens of Massachusetts. MASSPIRG's Consumer Watchdog team works to make sure consumers are

informed and empowered to protect themselves in today's rapidly changing marketplace by reforming credit bureaus, stopping predatory loan sharks, and ending unfair banking practices.

Georgia Watch is a non-profit, nonpartisan 501(c)3 organization that protects and informs consumers so all Georgians prosper and their communities thrive. Georgia Watch's financial protection initiative focuses on ensuring laws are in place to protect consumers' financial wellbeing, such as preventing predatory lending, and on opening doors to the financial mainstream. Georgia Watch also assists consumers with financial literacy by teaching the importance of bank accounts and credit ratings, effective ways to avoid becoming a victim of identity theft and fraud. Texas Appleseed is a nonpartisan, nonprofit focused on bringing about policies that are fair, just, and equitable for all Texans. Texas Appleseed's fair financial services initiative advocates for just and equitable solutions to problems that negatively impact the financial well-being of Texans.

"The equitable doctrine of *cy pres* ensures that undistributed or unclaimed funds are put to their 'next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.'" *Duncan v. JPMorgan Chase Bank, N.A.*, 2016 WL 4419472, at *17 (W.D. Tex. May 24, 2016) (quoting *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) (citation omitted)). A *cy pres* distribution is appropriate "only when it is not feasible to make further distributions to class members." *Klier*, 658 F.3d at 475 (internal quotation marks omitted) (citation omitted). "It is infeasible to make further distributions when (1) remaining class members cannot be identified or chose not to participate; (2) the claim amounts are too small to make individual distributions economically viable, and/or (3) the class members' damages claims are fully satisfied by the initial distribution." *Duncan*, 2016 WL 4419472, at *17 (citing *Klier*, 658 F.3d at 475 & n.15).

When a *cy pres* distribution is appropriate, the funds should be "distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated." *Klier*, 658 F.3d at 474 (citation omitted); *see also In re Heartland*, 851 F. Supp. 2d at 1077 (approving *cy pres* distributions where the recipient organizations "reasonably approximate the interests pursued by the class"). Here, the work done by the recommended organizations to assist veterans and advocate for consumer protections in the banking and finance industry is "reasonably approximate the interests pursued by the class." *In re Heartland Payment*, 851 F. Supp. 2d at 1077. Therefore, Class Counsel respectfully request that the Court approve these proposed *cy pres* beneficiaries to receive the monies remaining in the Settlement Fund, if any, after the procedures set forth in Paragraph 76 of the Settlement Agreement are followed.

CONCLUSION

Class Counsel's request for a fee of $872,425.50 is not only consistent with 15 U.S.C. § 1693m(a)(3), but is within the range generally deemed reasonable under a common fund analysis, which is further supported by the *Johnson* factors cross-check. In addition, Class Counsel's request for expense reimbursement in the amount of $29,157.78 should be approved because expenses in this amount were reasonably incurred. Service Awards of $2,000 for each Class Representative should be approved in recognition of their important contributions to this litigation. Finally, Plaintiffs' proposed *cy pres* beneficiaries should be approved by the Court.

DATED this 15th day of July, 2024.

Respectfully submitted,

BY: WEBB, KLASE & LEMOND, LLC

/s/ E. Adam Webb

E. Adam Webb
Georgia Bar No. 743910
G. Franklin Lemond, Jr.
Georgia Bar No. 141315

1900 The Exchange, S.E.
Suite 480
Atlanta, Georgia 30339
(770) 444-9325
(770) 217-9950 (fax)

VAUGHT FIRM, LLC

Allen R. Vaught
TX Bar No. 24004966

6122 Palo Pinto Ave.
Dallas, Texas 75214
(214) 675-8603
(214) 261-5159 (fax)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2024, I caused the foregoing document to be electronically filed with the Clerk of Court using the CM/ECF system which automatically sends email notification of such filing to all attorneys of record.

/s/ G. Franklin Lemond, Jr
G. Franklin Lemond, Jr.