

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION**

DANNY L. WALKINGSTICK,)
WHITNYE A. FORT, on behalf of the)
themselves and all other similarly)
situated,)
Plaintiffs,)
v.)
SIMMONS BANK,)
Defendant.)

Case No. 6:19-cv-03184-RK

Hon. Roseann A. Ketchmark

**SUGGESTIONS IN SUPPORT OF
PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES,
REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS TO CLASS
REPRESENTATIVES**

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INTRODUCTION

After engaging in motion practice over the legal claims; taking significant discovery into the underlying facts, including production of thousands of pages of documents and numerous depositions; briefing class certification (including expert reports and depositions); having an expert project damages; participating in multiple mediation sessions with Judge Morton Denlow (ret.); and engaging in months of additional negotiations, the parties reached the proposed class action Settlement Agreement and Release (the “Settlement”), ECF No. 155-1, at pp. 6–126, that the Court preliminarily approved under Federal Rule of Civil Procedure 23(e)(1) on June 29, 2022. ECF No. 160.

The Settlement, which was the result of hard-fought, arm’s-length negotiations, provides for Defendant Simmons Bank (“Simmons”) to pay \$3,250,000.00 into a non-reversionary cash Settlement Fund for the proposed Settlement Class and provides for Defendant to forgive additional uncollected fees of Settlement Class members in the amount of \$753,234.00, for a total Value of the Settlement of \$4,003,234.00. Declaration of Lynn A. Toops in Support of Plaintiffs’ Motion for Award of Attorneys’ Fees, Reimbursement of Expenses, and Service Awards to Class Counsel (“Toops Decl.”) ¶¶ 2–4. The Settlement represents a significant portion of the damages potentially recoverable at trial, and the Settlement monies will be distributed to the members of the Settlement Class without the need for them to complete a claim form or take any additional steps. *Id.* The Settlement represents an excellent result for the Settlement Class in this

litigation and was obtained against a well-funded defense by Simmons, which was represented by an international law firm. *Id.*

This result is even more remarkable because, although the Class Representatives believe in the merits of their claims, this litigation was inherently risky and complex. Toops Decl. ¶ 5. The claims involve intricacies of banking practices, and the Class Representatives faced risks at each stage of litigation. *Id.* For instance, the Class Representatives faced the hurdle of having the Court certify a class adversarially and having that ruling potentially immediately appealed. *Id.* Without a certified class, no class member would likely receive any recovery. *Id.* And summary judgment, trial, and appeal present significant risks in any case. *Id.*

Against these risks, it was through the skill and hard work of Class Counsel and the Class Representatives that the Settlement was achieved for the benefit of the Settlement Class members. Class Counsel maintain a national class action practice and have particularly specialized skill in bank fee class actions. Toops Decl. ¶ 6 (citing *Holt v. CommunityAmerica Credit Union*, No. 4:19-CV-00629-FJG, 2020 WL 12604384, at *1 (W.D. Mo. Dec. 8, 2020) (awarding counsel one-third of the value of the settlement as attorneys' fees in bank fee class action settlement); *Chambers v. Together Credit Union*, No. 19-CV-00842-SPM, 2021 WL 1948452, at *2 (S.D. Ill. May 14, 2021) (same); *Hinton v. Atlantic Union Bank*, No. 3:20-cv-651-JAG, ECF No. 30 (E.D. Va. Mar. 31, 2022) (same); *Bodnar v. Bank of Am., N.A.*, No. CV 14-3224, 2016 WL 4582084, at *4 (E.D. Pa. Aug. 4, 2016) (same, 33% fee award); *Liggio v. Apple Fed. Credit Union*, No. 18-cv-01059, ECF No. 39 (E.D. Va. Dec. 6,

2019) (same, one-third fee award); *Thornton v. German Am. Bancorp*, No. 49D01-2007-PL-022667 (Ind. Comm'l Ct. July 15, 2022) (same); *Darty v. Scott Credit Union*, No. 19L0793 (Ill. Cir. Ct. July 13, 2022) (same); *James v. Georgia United Credit Union*, No. 19-A-09050-7 (Ga. Super. Ct. Mar. 10, 2022) (same); *Hall v. MidwestOne Bank*, No. LACV082148 (Iowa Dist. Ct. Feb. 21, 2022) (same); *Harris v. Centier Bank*, No. 45D01-2101-PL-000072 (Ind. Super. Ct. Jan 28, 2022) (same); *Pryor v. Eastern Bank*, No. 1984CV03467-BLS1 (Mass. Bus. Ct. Jan. 3, 2022) (same); *Howell v. Eastman Credit Union*, No. C42517 (Tenn. Cir. Ct. Oct. 20, 2021) (same); *Yarski v. Knoxville TVA Employees Credit Union*, No. 3-220-19 (Tenn. Cir. Ct. July 21, 2021) (same); *Almon v. Independence Bank*, No. 19-CI-00817 (Ky. Cir. Ct. June 18, 2021) (same); *MJ Evans Beauty v. Bremer Bank, N.A.*, No. 27-cv-19-19390 (Minn. Dist. Ct. Apr. 15, 2021) (same); *Norwood v. The Camden Nat'l Bank*, No. BCD-CV-2020-13 (Me. Bus. Ct. Dec. 11, 2020) (same); *Johnson v. Elements Fin. Credit Union*, No. 49D01-2001-PL-004706 (Ind. Comm'l Ct. Oct. 29, 2020) (same); *Plummer v. Centra Credit Union*, No. 03D01-1804-PL-001903 (Ind. Super. Ct. Oct. 2, 2020) (same); *Terrell v. Fort Knox Fed. Credit Union*, No. 19-CI-01281 (Ky. Cir. Ct. Oct. 2, 2020) (same); *Hawley v. ORNL Fed. Credit Union*, No. B9LA0107 (Tenn. Cir. Ct. Jun. 15, 2020) (same); *Martin v. L&N Fed. Credit Union*, No. 19-CI-002873 (Ky. Cir. Ct., Jun. 8, 2020); *Tisdale v. Wilson Bank & Trust*, No. 19-400-BC (Tenn. Bus. Ct. Mar. 18, 2020) (same); *Hill v. Ind. Members Credit Union*, No. 49D02-1804-PL-016174 (Ind. Super. Ct. Jan. 21, 2020) (same); *Graves v. Old Hickory Credit Union*, No. 19-475-II (Tenn. Chanc. Ct. Sept. 3, 2019) (same)).

In addition, the Class Representatives have actively participated in the lawsuit—including being deposed and participating in mediation. Toops Decl. ¶ 2. And they have communicated with counsel and assisted in prosecuting the case. *Id.* Without the Class Representatives investing the time and energy to pursue this litigation on behalf of the Settlement Class members, there would be no recovery at all.

This case also exemplifies the public good that can be accomplished through the class action device; no Class Member had a large enough claim to retain counsel to pursue it individually, but in the aggregate, Simmons pocketed millions of dollars in fees that the Class Representatives strongly believed the law did not permit. In counsel's experience, a settlement in this range is likely to be viewed favorably by the Settlement Class members, who will appreciate receiving compensation from this lawsuit without having to expend any resources of their own. Toops Decl. ¶ 13. Through the efforts of the Class Representatives and the advocacy of Class Counsel, Simmons has agreed to refund millions of dollars and forgive other fees.

Under Rule 23(h) and the law relating to the common fund doctrine, Class Counsel and the Class Representatives are entitled to be compensated from the Settlement Fund for having achieved a benefit for the thousands of other Settlement Class members. In connection with the Settlement, the Class Representatives requests that from the Settlement Fund the Court approve payments of: (1) attorneys' fees to Class Counsel in the amount of \$1,334,411.33, which represents one-third of the Value of the Settlement; (2) reimbursement of

litigation expenses to Class Counsel in the amount of \$98,087.95, comprised largely of expert fees and mediation and deposition costs; and (3) a service award to the Class Representatives in the amount of \$10,000 each. These requests are all contemplated by the Settlement, are in-line with other awards in the Eighth Circuit and in this District, including in other bank fee settlements such as *Holt v. CommunityAmerica Credit Union*, No. 4:19-CV-00629-FJG, 2020 WL 12604384, at *1 (W.D. Mo. Dec. 8, 2020) (awarding counsel one-third of the value of the settlement as attorneys' fees in bank fee class action settlement), and are fair and reasonable given the work involved, the risks overcome, and the results achieved for the Settlement Class.

STATEMENT OF FACTS

I. The parties vigorously litigated this case.

After Class Counsel's pre-suit investigation, on May 22, 2019, Plaintiffs filed their original Class Action Complaint ("Initial Complaint") alleging that Simmons had a "systemic policy" of charging overdraft fees on debit card transactions that were authorized on sufficient funds but later settled negative due to intervening transactions on their checking accounts. Plaintiffs twice amended their complaint, filing an Amended Class Action Complaint on August 9, 2019, ECF No. 23, and then the operative Second Amended Complaint on October 2, 2019, ECF No. 39 ("Second Amended Complaint"). In the Second Amended Complaint, Plaintiffs replaced their original theory with allegations that Defendant purportedly charged fees (the "Challenged Fees") "on accounts that were never actually overdrawn." *Id.* The Second Amended Complaint asserts three claims on this basis: (i) Breach of

Contract; (ii) Breach of the Covenant of Good Faith and Fair Dealing; and (iii) Unjust Enrichment. *Id.*

Simmons moved to dismiss the Second Amended Complaint, and the parties fully briefed the motion. ECF Nos. 46–48, 53, 56. On January 16, 2020, the Court denied the motion to dismiss in its entirety. ECF No. 59. Simmons then answered the Second Amended Complaint. ECF No. 60.

The Parties have conducted extensive discovery in this case. Toops Decl. ¶ 2. Defendant has produced over 7,600 pages of documents, two expert reports, and millions of rows of account data. *Id.* Plaintiffs have taken the depositions of Defendant’s corporate representatives, as well as Simmons’s CEO, Marty Casteel, as well as Defendant’s expert witnesses, Sonja Kwon and Bob Birmingham. *Id.* Defendant has likewise taken the depositions of Plaintiffs Fort and Walkingstick, and of Plaintiffs’ expert witness, Arthur Olsen. *Id.* The parties have briefed class certification, which has not yet been ruled upon. ECF Nos. 109–135. In litigating the matter, Class Counsel incurred a total lodestar that exceeds the requested percentage fee, and they advanced litigation expenses, out of pocket, totaling no less than \$98,087.95, the majority of which were expert fees (\$56,175), mediation fees (\$17,876.14), and deposition costs (\$12,686.92). Toops Decl. ¶ 8.

II. The parties engaged in hard-fought negotiations, including several mediation sessions, to reach the proposed Settlement.

On March 2, 2021, the Court granted the Parties’ joint motion to stay the litigation pending a mediation that was scheduled for April 19, 2021. ECF Nos. 123, 126. On April 19, 2021, the Parties participated in good faith in the scheduled

mediation (the “Mediation”) before Judge Morton Denlow (ret.) (the “Mediator”). Toops Decl. ¶ 3. At the conclusion of the Mediation, the Parties arrived at a settlement in principle. *Id.*

For several weeks after the Mediation, the parties worked on memorializing the settlement in principle into a written term sheet. *Id.* On July 26, 2021, the parties fully executed a written term sheet (“Term Sheet”), which memorialized the parties’ good-faith intention to resolve this litigation, subject to the parties executing a formal settlement agreement setting forth all of the details of settlement. *Id.*

The details turned out to be tricky.

Eventually, the Parties participated in additional mediation sessions and calls with the Mediator to try to bridge their differences on the final detailed terms of settlement. *Id.* In addition, the Parties engaged in exhaustive direct discussions and negotiations. *Id.* Throughout this process, the Court extended the deadlines for the Parties to submit a final agreement for approval. ECF Nos. 141, 143, 145, 147, 151.

Finally, on May 4, 2022, the parties executed the Settlement.

III. The Settlement provides significant benefits to Class Members, valued at \$4,003,234.00, including a \$3,250,000.00 cash Settlement Fund and \$753,234.00 in automatic debt forgiveness.

Under the terms of the Settlement, Simmons will pay \$3,250,000.00 in cash to resolve the claims. Settlement ¶ 64. The Settlement Fund will be used to pay the Court-approved costs of notice and administration fees (estimated to be \$78,000), attorneys’ fees (up to one-third of the Value of the Settlement), and service awards

(up to \$10,000 to each Plaintiff), with the remaining Net Settlement Fund to be distributed to the Class Members. Settlement ¶¶ 81, 91. Distributions to Class Members will be by direct credit to the account of current customers and by check mailed directly to former customers. Settlement ¶ 91. Class Members' payments will be based on the amount of unrefunded Challenged Fees paid, with a *de minimis* cash award of \$5. Settlement ¶ 84. None of the cash will revert to Simmons; any uncollected funds will be paid in a second distribution to Class Members or to a cy pres charity, or both. Settlement ¶¶ 92, 96.

In addition to the cash payment, Simmons will forgive and not attempt to collect the Challenged Fees on accounts with a negative balance, up to \$500 per overdrawn account. Settlement ¶ 98. As part of this debt forgiveness, Defendant will also update any negative reporting to ChexSystems for Class Members receiving debt relief. Settlement ¶ 99. The total debt forgiveness will amount to \$753,234.00, for a total Value of the Settlement of \$4,033,234.00. Toops Decl. ¶ 4.

IV. The Court has found the Settlement to be a fair, reasonable, and adequate compromise on a preliminary basis.

On June 29, 2022, the Court granted preliminary approval to the Settlement, finding that, on a preliminary basis, the Settlement appears to be a fair, reasonable, and adequate compromise. ECF No. 160. The Court ordered notice of the Settlement to be disseminated to the Settlement Class, which the Settlement Administrator has accomplished. *Id.* Settlement Class members have until September 29, 2022, to decide whether to opt out, object, or do nothing. ECF No. 162.

SUGGESTIONS IN SUPPORT OF THE MOTION

I. The Court should approve attorneys' fees to Class Counsel from the Settlement Fund in the amount of one-third of the Value of the Settlement, which is the routine amount awarded and which is reasonable under the circumstances.

In conjunction with final approval the Court should approve payment to Class Counsel in the amount of one-third of the Value of the Settlement. One-third of the Value of the Settlement is the amount routinely awarded in the Eighth Circuit and is fair and reasonable under the circumstances and the relevant factors.

A. Courts in the Eighth Circuit routinely award attorneys' fees in the amount of one-third of the value of a class action settlement.

Under Rule 23(h) and “the ‘common fund’ doctrine, Class Counsel is entitled to an award of reasonable attorneys’ fees from the settlement proceeds” in a class action. *Tussey v. ABB, Inc.*, No. 06-CV-04305-NKL, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019) (citing Fed. R. Civ. P. 23(h); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole”)).

“In the Eighth Circuit, use of the percentage of the fund method when awarding attorneys’ fees in a common fund case is not only approved, but also ‘well established.’” *In re NuvaRing Prod. Liab. Litig.*, No. 4:08 MDL 1964 RWS, 2014 WL 7271959, *2 (E.D. Mo. Dec. 18, 2014). Indeed, in common fund cases, the percentage of the benefit approach is “recommended.” *Tussey*, 2019 WL 3859763, at *2; *see also Johnson v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) (approving

percentage method of awarding fees); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) (same); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (same).¹ The percentage-of-the-benefit approach aids litigants and the courts because it “directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.” *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 120 (2d. Cir. 2005); *see also Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (percentage-of-benefit is “a method of more closely aligning the lawyer’s interests with those of his client by giving him a stake in a successful outcome”). “[U]nder the percentage approach, the class members and the class counsel have the same interest—maximizing the recovery of the class.” Silber and Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel’s Response*, 17 Rev. Litig. 525, 534 (Summer 1998). The percentage-of-the-benefit approach is particularly appropriate where none of the settlement funds will revert to the defendant. *Barfield v. Sho-Me Power Elec. Co-op.*, No. 2:11-CV-4321NKL, 2015 WL 3460346, at *4 n.1 (W.D. Mo. June 1, 2015).

Courts determine the total benefit to the class “based on both the monetary and the non-monetary value of the settlement.” *Tussey*, 2019 WL 3859763, at *2; *see*

¹ A Court has discretion to use the percentage-of-the-benefit method or the lodestar cross-check method in determining a fee, but the percentage-of-the-benefit method better aligns counsel and the class and encourages the most efficient resolution of the litigation. *In re NuvaRing Prod. Liab. Litig.*, 2014 WL 7271959, at *4. Even when a lodestar cross-check is done, it “need entail neither mathematical precision nor bean counting” and a court “need not scrutinize each time entry” and can rely on “representation[s] by class counsel as to total hours.” *Id.*

also Principles of the Law of Aggregate Litigation, A.L.I., § 3.13(b) (May 20, 2009) (“a percent-of-the-fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and the nonmonetary value of the settlement.”). Thus, savings to class members or elimination of their debts is appropriately considered as part of the total value of a settlement. *Tussey*, 2019 WL 3859763, at *2 (including tax avoidance and injunctive relief in addition to monetary relief as being the basis for the total value of the settlement for determining an appropriate common-fund fee); *Barfield*, 2015 WL 3460346, at *4 (including administrative costs paid separately by defendant as being part of the total value of the settlement); *Holt*, 2020 WL 12604384, at *1 (including both cash fund and debt forgiveness in the total value of bank fee settlement for purposes of awarding one-third fee). As courts have observed, “[i]n bank fee litigation, forgiveness of debts owed is routinely included in the value of the settlement.” *Hash v. First Financial Bancorp*, No. 1:20-cv-01321-RLM-MJD (S.D. Ind. Nov. 22, 2021), ECF No. 91 (collecting cases).

As to the appropriate percentage to award to Class Counsel, Senior Judge Laughrey observed in *Tussey* that “[c]ourts in this Circuit and this District have frequently awarded attorney fees of 33 1/3%–36.” 2019 WL 3859763, at *4 (citing *In re U.S. Bancorp Litig.*, 291 F.3d at 1038 (36% fee award reasonable); *Barfield*, 2015 WL 3460346, at *4 (1/3 fee and expense award is a reasonable percentage); *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 1057, 1061–62 (D. Minn. 2010) (33% fee reasonable); *Carlson v. C.H. Robinson Worldwide, Inc.*, No. 02-3780, 2006

WL 2671105, at *8 (D. Minn. Sept. 18, 2006) (35.5% fee award reasonable); *In re E.W. Blanch Holdings, Inc. Sec. Litig.*, No. 01-258, 2003 WL 23335319, at *3 (D. Minn. June 16, 2003) (awarding 33.3% of a \$20 million settlement); *KK Motors v. Brunswick Corp.*, No. 98-2307, ECF No. 67, pp. 2–3 (D. Minn. Mar. 6, 2000) (awarding one-third of a \$30 million settlement); *In re Airline Ticket Comm'n Antitrust Litig.*, 953 F. Supp. 280, 285–86 (D. Minn. 1997) (awarding 33.3% of \$86.9 million fund); *see also In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 996 (D. Minn. 2005) (listing various settlements, including *In re Select Comfort Corp. Secs. Litig.*, No. 99-884, 2003 U.S. Dist. LEXIS 26409 (D. Minn. Feb. 28, 2003) (awarding 33.3% of the \$5,750,000 settlement), and *In re Control Data Sec. Litig.*, No. 85-1341 (D. Minn. Sept. 23, 1994) (awarding 36.96% of \$8 million fund)); *see also Caligiuri v. Symantec Corp.*, 855 F.3d 860, 866 (8th Cir. 2017) (affirming 33% fee) (quoting *Khoday v. Symantec Corp.*, No. 11-cv-180, 2016 WL 1637039, at *9 (D. Minn. Apr. 5, 2016)); *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017) (affirming one-third fee); *Holt*, 2020 WL 12604384, at *1 (awarding one-third of the total value of bank fee settlement that included both a cash settlement fund and debt forgiveness).

Finally, although the Eighth Circuit has not formally established fee-evaluation factors, it has approved consideration of several factors, none of which is determinative. Specifically, in *Caligiuri*, the Eighth Circuit held that it was appropriate in evaluating the fee to look at various factors, including: (1) the benefit conferred on the class; (2) the risk to which plaintiffs' counsel was exposed (i.e., whether their fee was fixed or contingent); (3) the difficulty and novelty of the legal

and factual issues of the case; (4) the skill of the lawyers, both plaintiffs' and defendants'; (5) the reaction of the class; and (6) the comparison between the requested attorney fee percentage and percentages awarded in similar cases. 855 F.3d at 866. Evaluation of these factors assists a court in determining a reasonable fee. *Id.*

B. An award of attorneys' fees of one-third of the Value of the Settlement is appropriate in this case.

The Court should award Class Counsel the standard fee of one-third of the Value of the Settlement in this case. Not only is this amount common in the Eighth Circuit, six of the seven factors identified in *Caligiuri* support approving the requested fee. 855 F.3d at 866 (listing factors). The remaining factor (the reaction of the class) is expected to also favor approval of the fee but is not yet definitively known because the deadline to object has not yet passed. Toops Decl. ¶ 4 (“In counsel’s experience, a settlement in this range is likely to be viewed favorably by the class members who will appreciate receiving compensation from this lawsuit without having to expend any resources of their own.”).

First, the benefit conferred by the Settlement is substantial and valued at \$4,003,234.00, including \$3,250,000 in cash refunds and \$753,234.00 in outstanding fees due that will be forgiven. Toops Decl. ¶ 4. This represents a substantial portion of the alleged damages in this case, and it will be distributed directly to Settlement Class members, with no need to submit a claim, and no reversion of any funds to Simmons. *Id.* This factor supports granting the requested fee. *Caligiuri*, 855 F.3d at 866.

Second, the risks of the litigation for Class Counsel were high. Toops Decl. ¶ 5. Class Counsel took this case on a 100% contingency basis, meaning that Class Counsel labored and advanced their own funds to prosecute the case all at the risk of never being paid for their work or reimbursed for their expenses. Class Counsel devoted their time and energy to this matter, instead of pursuing other income, all at the risk of never getting paid and, at best, being paid at some point potentially many years down the road. Had Defendant prevailed on the merits, on class certification, or on appeal, Class Counsel might have recovered nothing for the time and expense they invested in representing the Class. This factor supports granting the requested fee. *Caligiuri*, 855 F.3d at 866.

Third, this case involved complexities of bank processing and law that are novel and evolving. To even be able to identify the alleged inappropriate fees requires special knowledge and skill, as do the theories surrounding the alleged fees, not to mention the specialized knowledge of class action procedure required to achieve certification, let alone settlement. This factor supports granting the requested fee. *Caligiuri*, 855 F.3d at 866.

Fourth, the complexity of the case is further shown by the skill of the lawyers involved on both sides of the case. Class Counsel has a national class action practice involving many areas of complex litigation, but particularly bank fees of this very type. *See supra*, pp. 2–3 (collecting some of the bank fee cases brought by Class Counsel). Class Counsel has been recognized by courts across the country for their skill. *Id.* On the other side of the case, Defendant is represented by an international

law firm that is one of the largest in the country and is a formidable opponent. This factor supports granting the requested fee. *Caligiuri*, 855 F.3d at 866.

Fifth, the requested one-third fee is the same amount that Class Counsel has been awarded in similar bank fee litigation in this Court, *Holt*, 2020 WL 12604384, and in class action litigation in general in courts across the country. *See supra*, pp. 2–3 (collecting cases awarding Class Counsel a fee of one-third of the value of the settlement in bank fee class actions). This factor supports granting the requested fee. *Caligiuri*, 855 F.3d at 866.

Thus, all of these factors support the Court’s discretion in approving the requested attorneys’ fee amount of one-third of the Value of the Settlement, which is an amount routinely awarded in the Eighth Circuit, and is well within the Court’s discretion to award. *See id.*; *Barfield*, 2015 WL 3460346, at *4 (collecting cases awarding one-third fees).

II. The Court should approve reimbursement from the Settlement Fund of the litigation expenses advanced by Class Counsel.

The Court should also approve reimbursement to Class Counsel of litigation expenses they advanced in prosecuting this case. The requested reimbursements are all reasonable litigation expenses, and Class Counsel had every incentive to only incur reasonable expenses because reimbursement was contingent on the outcome of the case.

A. Courts in the Eighth Circuit recognize that class counsel who recover a common fund are entitled to reimbursement of reasonable litigation expenses from that fund.

It is well-established that “[a]n attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees *and expenses* involved.” *Tussey*, 2019 WL 3859763, at *5 (emphasis added) (quoting Alba Conte, 1 Attorney Fee Awards § 2:19 (3d ed.); *see also Sprague v. Ticonic*, 307 U.S. 161, 166–67 (1939) (recognizing a federal court’s equity power to award expenses from a common fund)). “Counsel in common fund cases may recover those expenses that would normally be charged to a fee-paying client.” *Tussey*, 2019 WL 3859763, at *5 (quoting *In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, No. MDL 05-1708, 2008 WL 682174, at *4 (D. Minn. Mar. 7, 2008)). “Reimbursable expenses include many litigation expenses beyond those narrowly defined ‘costs’ recoverable from an opposing party under Rule 54(d), and includes: expert fees; travel; long-distance and conference telephone; postage; delivery services; and computerized legal research.” *Id.* (collecting cases).

As to amount, “reducing litigation expenses because the district judge thinks costs too high in general is not permissible.” *Id.* (internal quotations omitted). And, in general, courts approve requested expense reimbursements because class counsel bring the case on a contingent basis, “so they had a strong incentive to keep costs to a reasonable level.” *Id.* Courts in this district have noted that expenses equal to or slightly greater than 4% of the relief obtained for the class “should be viewed as generally reasonable.” *Id.* (citing Theodore Eisenberg & Geoffrey P. Miller, *Attorney*

Fees in Class Action Settlements: an Empirical Study, 1 J. OF EMPIRICAL LEGAL STUDIES 27, 70 (2004)); *see also Keslar v. Bartu*, 201 F.3d 1016, 1017 (8th Cir. 2000) (per curiam) (finding no abuse of discretion in \$17,000 cost award when case settled for only \$70,000).

B. The requested reimbursement of expenses is reasonable in this case.

The Court should approve reimbursement of the requested litigation expenses here. Class Counsel has advanced litigation expenses totaling no less than \$98,087.95. Toops Decl. ¶ 8. The bulk of these expenses were expert fees (\$56,175), mediation fees (\$17,876.14), and depositions (\$12,686.92), all of which are normal reimbursable litigation expenses. *Id.* The remaining expenses are likewise normal costs of litigation, such as hosting discovery documents with a third-party litigation support vendor, filing and service fees, travel, copies, and courier fees. *Id.* As repayment of these expenses was contingent on judgment or settlement, Class Counsel's incentive was to incur only those expenses necessary to resolve the case. The requested expenses are well under the 4% figure that courts generally view as reasonable. *See Tussey*, 2019 WL 3859763, at *5 (holding that expenses of even 4% of the settlement value are generally reasonable).

III. The Court should approve service awards to the Class Representatives of \$10,000 each.

Finally, the Court should award each of the Class Representatives a service award of \$10,000. This amount is common in the Eighth Circuit and is justified by the efforts of the Class Representatives and the results they achieved.

A. Courts in the Eighth Circuit commonly award class representative service awards of \$10,000 or more.

Apart from Class Counsel, “[a]t the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class.” 5 *Newberg on Class Actions* § 17:1 (5th ed. 2015). “Courts often grant service awards to named plaintiffs in class action suits to ‘promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits.’” *Caligiuri*, 855 F.3d at 867 (quoting *Yarrington*, 697 F. Supp. 2d at 1086). Otherwise, most people could not afford to spend the time and effort to pursue what would provide only a modest individual recovery for the effort involved but would also benefit thousands of other people who do not have to expend any time or resources. *See id.* Relevant considerations in determining whether to grant a service award include actions plaintiffs took to protect the interests of the class; the degree to which the class has benefitted from those actions; and the amount of time and effort plaintiffs expended in pursuing the litigation. *In re U.S. Bancorp Litig.*, 291 F.3d at 1038.

As to amount, “courts in this circuit regularly grant service awards of \$10,000 or greater.” *Caligiuri*, 855 F.3d at 867 (8th Cir. 2017) (approving \$10,000 service award) (citing *Huyer v. Njema*, 847 F.3d 934, 941 (8th Cir. 2017) (affirming approval of settlement that included \$10,000 service awards to named plaintiffs); *Holt*, 2020 WL 12604384, at *1 (approving \$10,000 service award in bank fee class action); *Jones v. Casey’s Gen. Stores, Inc.*, 266 F.R.D. 222, 231 (S.D. Iowa 2009) (approving \$10,000 service awards to each of nine plaintiffs). And much higher

service awards are not uncommon. *See, e.g., Zilhaver v. UnitedHealth Group, Inc.*, 646 F. Supp. 2d 1075, 1085 (D. Minn. 2009) (approving \$15,000 service awards to two representatives); *Tussey*, 2019 WL 3859763, at *6 (approving \$25,000 service awards to each of three representatives); *In re Charter Commc'ns, Inc., Sec. Litig.*, No. MDL 1506, 2005 WL 4045741, at *25 (E.D. Mo. June 30, 2005) (approving \$26,625 service award).

B. A \$10,000 service award to each Class Representative is appropriate in this case.

A \$10,000 service award to each of the Class Representatives is appropriate here. Not only is that amount common, the Class Representatives have earned it through their service to the Class that has resulted in the Settlement that benefits thousands of others. The Class Representatives have regularly consulted with Class Counsel, provided documents and information, reviewed pleadings, and participated in the settlement process. Toops Decl. ¶ 9. Not only that, each was deposed. Without the Class Representative's efforts, the over \$4 million in benefits for the Class would never have been achieved. These factors support granting a \$10,000 service award to each Class Representative. *Caligiuri*, 855 F.3d at 867–68; *In re U.S. Bancorp Litig.*, 291 F.3d at 1038.

CONCLUSION

In connection with final approval of the Settlement, the Court should enter an order approving and awarding payment of the requested attorneys' fees, expenses, and service awards from the Settlement Fund.

Dated: September 14, 2022

Respectfully submitted,

s/ Lynn A. Toops

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CERTIFICATE OF SERVICE

I certify that a copy of this document was served on the following parties by the Court's ECF system on September 14, 2022:

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