IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CAROL TIMS, individually, and on behalf of all others similarly situated, Plaintiff, v. LGE COMMUNITY CREDIT UNION, Defendant.	Case No. 1:15-cv-04279-TWT

MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARD

Class counsel overcame an assortment of significant risks and negotiated a settlement with Defendant LGE Community Credit Union ("LGE") that provides $1.31 million in cash benefits to the settlement class and disclosure changes. As compensation for their successful efforts, class counsel request the Court, in accordance with the settlement agreement, approve a fee of $436,666.66 (one third of the $1.31 million common fund) and reimbursement of their litigation expenses. Additionally, the requested expenses of $54,219.95 are reasonable and were all necessarily incurred on behalf of the settlement class. As a result, the motion for fees and expenses should be approved.

Further, at the appropriate time, the Court should be prepared to approve a service award $10,000 for the class representative, Carol Tims. The settlement

could not have occurred but for Mrs. Tims' temerity in standing up to Defendant and their willingness to devote her time and scant resources to ensure the success of this litigation. The award is thus reasonable and justified.

BACKGROUND

The background of this litigation is described in the motion for final approval of class settlement. *See* Dkt. No. 176. Herein, attention is focused specifically on class counsel's efforts to investigate and pursue claims on behalf of the settlement class.

A. Initial Investigation and Litigation. Class counsel's first involvement in this case began over seven years ago when they were approached by Plaintiff Carol Tims to investigate potential legal claims against LGE for what she perceived to be wrongful overdraft fees. *See* Joint Declaration of E. Adam Webb and Richard D. McCune ("Joint Decl."), ¶¶ 7-8 (Dkt. No. 144-2). Class counsel undertook a detailed investigation to better understand Defendant and its overdraft practices. *Id.* at ¶¶ 9-10.

Several drafts of the complaint were prepared, revised, and proofed. *Id.* at ¶ 11. On December 9, 2015, the original complaint was filed by Mrs. Tims against LGE, asserting claims for breach of contract (including via the covenant of good faith and

fair dealing), unjust enrichment, money had and received, negligence, and violation of the Electronic Funds Transfer Act ("EFTA"). *See* Dkt. No. 1.

On March 25, 2016, LGE moved to dismiss for failure to state a claim. *See* Dkt. No. 16. Among other things, the motion alleged Mrs. Tims' breach of contract and money had and received allegations were insufficient, and the unjust enrichment claim failed as a matter of law in light of the existence of the contract. *See* Dkt. No. 16-1. On April 25, 2016, Mrs. Tims filed an amended complaint. *See* Dkt. No. 29.

In response, LGE filed a renewed motion to dismiss as to the amended complaint. *See* Dkt. No. 30. Mrs. Tims responded to the motion on May 31, 2016. *See* Dkt. No. 31. Defendant filed a reply in further support of its motion on June 17, 2016. *See* Dkt. No. 34. On July 13, 2016, the parties filed a joint motion to stay consideration of Defendant's motion to dismiss for 60 days to allow for the parties to engage in settlement discussions. *See* Dkt. No. 36. This Court granted the joint motion on July 14, 2016. *See* Dkt. No. 37.

Over the next several months, the parties continued their settlement discussions and received additional time from the Court to continue these efforts. *See* Dkt. Nos. 44, 46. Eventually, the settlement talks reached an impasse and Mrs. Tims requested that the Court lift the stay and proceed to a ruling on LGE's motion to dismiss. *See* Dkt. No. 51. After the stay was lifted, the Court entered an order granting LGE's

motion to dismiss and entered judgment in favor of Defendant. *See* Dkt. Nos. 67, 68. Mrs. Tims appealed. *See* Dkt. No. 69.

On August 24, 2019, the Eleventh Circuit Court of Appeals reversed the dismissal of Mrs. Tims' amended complaint and remanded the case for further proceedings. On September 9, 2019, Defendant filed its answer to the amended complaint. *See* Dkt. No. 74. Following a period of active litigation, the parties decided to again discuss settlement. *See* Joint Decl. ¶¶ 31-36.

B. Mediation and Settlement.

On September 14, 2020, the parties filed a joint motion to stay the case pending mediation, which motion the Court granted and extended twice. *See* Dkt. Nos. 109, 110, 112, 113, 114, 115. On January 26, 2021, the parties participated in mediation before Hunter Hughes, III. *See* Joint Decl. ¶ 38. With the assistance of Mr. Hughes, the parties ultimately came to an agreement to settle the claims alleged in the FAC on the terms set forth in the Settlement Agreement. *Id.* On February 3, 2021, the parties informed the court that they had reached a settlement in principal. *Id.* at ¶ 39.

The parties thereafter worked to finalize the specific terms of the agreement. *Id.* at ¶ 40. Initial drafts of the agreement were prepared and reviewed by the parties. *Id.* Over the next few weeks, the parties exchanged multiple redlined drafts of the

agreement, which included fine tuning how notice and eventually payments could most efficiently be disseminated to the class members. *Id.*

During this time period, the parties also exchanged multiple drafts of (1) the notices to ensure that the Settlement was accurately and appropriately described to the class, and (2) the allocation formula, which was designed to fairly divide payments among class members in accordance with Plaintiff's theories and to do so in a logistically feasible manner. *Id.* at ¶ 41. The allocation formula was developed in coordination with Plaintiff's expert to disperse funds in rough proportion to the categories of challenged fees. *Id.*

In conjunction with these discussions, we obtained advice from potential settlement administrators, who also submitted competitive bids to provide notice and administer the settlement. *Id.* at ¶ 42. The parties did not negotiate the amount of fees and expenses or service award to the class representative which LGE would not oppose until after the key provisions of the settlement, including the amount of the direct relief to the class, was agreed upon. *Id.* at ¶ 43. Consensus was reached on final drafts of the agreement, notices, and allocation formula in April 2021. *Id.* at ¶ 44.

As part of the original Settlement Agreement, Plaintiff's expert was slated to review PDF versions of individual account statements for LGE customers during the time periods of December 2009 through May 2010 and January 2011 through May

2011, in order to make up for gaps in LGE records and identify potential class members during these periods. *Id.* at ¶ 45. However, due to various unforeseen challenges, a review of these PDF statements was unable to be completed in a timely fashion. *Id.* at ¶ 46.

Therefore, the parties reconvened with Mr. Hughes to renegotiate the settlement terms and exclude the time periods of December 2009 through May 2010 and January 2011 through May 2011 from the settlement classes. *Id.* at ¶ 47. On March 21, 2022, the parties came to an amended agreement to settle this matter on the terms set forth in an Amended Settlement Agreement. *See* Dkt. No. 140. Updated drafts of the agreement and notices were then prepared. *See* Joint Decl. ¶ 48.

C. Post-Settlement Activities. Class counsel prepared and filed a detailed motion for preliminary approval of the settlement. *See* Dkt. No. 144. The motion was granted by the Court. *See* Preliminary Approval Order.

Class counsel has subsequently worked with KCC – the appointed settlement administrator – to ensure that all settlement class members were provided notice in accordance with the notice program and the Court's preliminary approval order. *See* Supplemental Joint Declaration of E. Adam Webb and Richard D. McCune ("Supp. Joint Decl.") ¶ 4 (Dkt. No. 176-2). In doing so, class counsel (1) worked with KCC and Defendant to ensure the class list included all necessary data points and

information to provide notice and calculate awards pursuant to the allocation formula and was timely provided by Defendant; (2) edited the email and postcard notices, the claim form, and the content of the settlement website; (3) ensured the settlement fund was timely funded; (4) ensured notice was timely sent; (5) answered direct, individual inquiries from settlement class members; (6) monitored the undeliverables and claims response; and (7) sent out *thousands* of emails to settlement class members reminding them to file claims. Supp. Joint Decl. ¶ 5.

Class counsel has also prepared and filed a motion for final approval and will appear at the final approval hearing. *Id.* at ¶ 6. Even if the settlement is approved, class counsel's work will continue past the final approval hearing and not conclude until all claims are paid and the settlement fully consummated. *Id.* at ¶ 7. This process will likely take months of additional work. *Id.*

ARGUMENT AND CITATION OF AUTHORITY

A. The Requested Fee of One-Third of the Common Fund Is Reasonable. For decades, it has been established that when a representative party confers a substantial benefit upon a class, its counsel is entitled to attorneys' fees based upon the benefit obtained. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This common benefit doctrine is an exception to the general rule that each party must bear its own litigation costs. The doctrine serves the "twin goals of

removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class and of equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts." *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1202 (N.D. Ill. 1989) (citation omitted). The common benefit doctrine stems from the premise that those who receive the benefit of a lawsuit without contributing to its costs are "unjustly enriched" at the expense of the successful litigant. *Van Gemert*, 444 U.S. at 478. Courts have also recognized that appropriate fee awards in cases such as this encourage redress for wrongs caused to entire classes of persons and deter future misconduct of a similar nature. *See, e.g.*, *Deposit Guar. Nat'l Bank v. Rope*, 445 U.S. 326, 338-39 (1980). Adequate compensation promotes the availability of counsel for aggrieved persons:

> If the plaintiffs' bar is not adequately compensated for its risk, responsibility, and effort when it is successful, then effective representation for plaintiffs in these cases will disappear . . . . We as members of the judiciary must be ever watchful to avoid being isolated from the experience of those who are actively engaged in the practice of law. It is difficult to evaluate the effort it takes to successfully and ethically prosecute a large plaintiffs' class action suit. It is an experience in which few of us have participated. The dimensions of the undertaking are awesome.

Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1375-76 (D. Minn. 1985).

The controlling authority in the Eleventh Circuit on fees in common fund cases is *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774-75 (11th

Cir. 1991), which held that such fees must be determined based on the percentage of the benefit to the class, as opposed to the lodestar approach that focuses on the time expended by class counsel multiplied by their hourly rates. *E.g.*, *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1362 (S.D. Fla. 2011) ("The Eleventh Circuit made clear in *Camden I* that percentage of the fund is the *exclusive* method for awarding fees in common fund class actions") (emphasis added).

The Court has substantial discretion in determining the appropriate fee percentage. *Camden I*, 946 F.2d at 774 ("There is no hard and fast rule . . . because the amount of any fee must be determined upon the facts of each case"). Nonetheless, awards commonly fall between a lower end of 20% and an upper end of 40%. *Id.* Moreover, following *Camden I,* fee awards in the Eleventh Circuit have averaged around one-third of the class benefit. *See Wolff v. Cash 4 Titles*, 2012 WL 5290155, *5-6 (S.D. Fla. Sept. 26, 2012) (noting that fees in the Eleventh Circuit are "roughly one third" and listing cases awarding fees of 30 percent or more); *see also, e.g., Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1195-96 (11th Cir. 2019) (affirming one-third); *Waters v. Int'l Precious Metals Corp.,* 190 F.3d 1291, 1292-98 (11th Cir 1999) (same); *George v. Academy Mortgage Corp. (UT)*, 369 F. Supp. 3d 1356, 1383 (N.D. Ga. 2019) (awarding one-

third); *Champs Sports Bar & Grill Co. v. Mercury Payment Sys., LLC*, 275 F. Supp. 3d 1350, 1356 (N.D. Ga. 2017) (same); *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 2012 WL 12540344, *6 and n.6 (N.D. Ga. Oct. 26, 2012) (same and collecting cases); *Morefield v. NoteWorld, LLC,* 2012 WL 1355573, *5 (S.D. Ga. Apr. 18, 2012) (one-third); *Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1240 (S.D. Fla. 2006) (one-third). Here, class counsel's fee request of one-third of the common fund that was created through their efforts falls within the accepted range.

Camden I requires courts to check the appropriateness of the percentage through analysis of the *Johnson* factors and the additional criteria:

> (i) time and labor required; (ii) novelty and difficulty of the relevant questions; (iii) skill required to properly carry out the legal services; (iv) preclusion of other employment; (v) customary fee; (vi) whether the fee is fixed or contingent; (vii) time limitations imposed by the clients or the circumstances; (viii) results obtained, including the amount recovered for the clients; (ix) experience, reputation, and ability of the attorneys; (x) "undesirability" of the case; (xi) nature and the length of the professional relationship with the clients; and (xii) fee awards in similar cases (xiii) the time required to reach a settlement; (xiv) whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel; (xv) any non-monetary benefits conferred upon the class by the settlement; and (xvi) the economics involved in prosecuting a class action.

Camden I, 946 F.2d at 775; *George*, 369 F. Supp. 3d at 1376. As applied here, these factors confirm the reasonableness of the requested fee.

1. Substantial Time and Labor Was Required. Class counsel spent an enormous amount of time on this case. Joint Decl. ¶¶ 7-48; Supp. Joint Decl. ¶ 2. Their work included extensive pre-suit investigation; communications with Plaintiff; preparing complaints, motions, and responses to dispositive motions; taking written and document discovery; negotiating several case management orders and similar documents; researching and drafting voluminous mediation briefs; exchanging extensive informal damages discovery and working with an expert to analyze extensive billing data; mediating, negotiating, and drafting the settlement; preparing the approval papers; working with the settlement administrator on the notice program; and communicating with the settlement class members. *Id.* Moreover, to see the settlement through to final conclusion will necessitate many hours of additional work answering questions from settlement class members and overseeing cash distributions. Supp. Joint Decl. ¶ 7.

All told, class counsel's coordinated work paid great dividends for the settlement class. Each of the above-described efforts was essential to achieving the settlement before the Court. Supp. Joint Decl. ¶ 3. The substantial time and labor class counsel devoted to prosecuting and settling these actions readily justify the fee that is being requested.

2. The Issues Involved Were Novel and Difficult. The case involved

difficult factual issues. For example, it is very difficult to identify – let alone establish liability based upon – the overdraft fee practices that lie at the heart of this litigation. Class counsel had to decipher a complex industry and analyze voluminous documents and data that covered nearly a decade. Supp. Joint Decl. ¶ 8. Moreover, the case presented novel legal issues, such as the enforceability and applicability of the contractual provisions that Defendant includes in its form contracts, whether Defendant had sufficient records and information to allow the class members to be ascertained and individual damages calculated, and whether a class comprised of nearly 16,000 customers could be managed and certified. Supp. Joint Decl. ¶ 9. The uncovering of Defendant's practices and positioning of this case for class certification and a victory on the merits presented challenges most law firms are simply not able to meet. *Id.* The second *Johnson* factor supports the requested fee.

3. Class Counsel Possessed the Necessary Skill to Effectively Litigate the Case. Litigation of this case required counsel highly trained in class action law and procedure as well as counsel familiar with the specialized issues at bar. Supp. Joint Decl. ¶ 10. As evidenced by their résumés (Exh. 1 & 2 to Joint Decl.) and their work in litigating the case, class counsel possess these attributes. The third *Johnson* factor supports the requested fee.

4. Class Counsel Were Precluded From Taking on Other Employment. If class counsel had not taken on this case, they would have been able to spend significant time on other matters. Supp. Joint Decl. ¶ 11. Although this is true whenever lawyers handle multistate class actions, class counsel is a very small firm with limited manpower. Over seven years, they have turned down multiple cases because of the time and attention that this case required. *Id.*. The fourth *Johnson* factor supports the requested fee. *In re Equifax Inc. Customer Data Security Breach Litig.*, 2020 WL 256132, *33 (N.D. Ga. Mar. 17, 2020) ("Given the demand for their services attributable to their high level of skill and expertise, but for the time and effort they spent on this case the plaintiffs' lawyers would have spent significant time on other matters").

5. The Requested Fee Is Customary. Individual contingency cases in Georgia typically call for a fee of one-third to 40 percent of the recovery. Supp. Joint Decl. ¶ 12. In the class action context, however, the fee is typically only one-third. As a result, the fee requested here is reasonable, customary, and standard in Georgia. *Id.* Moreover, consistent with this usual practice, class counsel and each of the class representatives entered into contingent fee agreements providing for payment of one-third to forty percent of any recovery. *Id.* The willingness of the class representatives to enter into such an agreement provides further evidence the

requested award is reasonable. *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989) ("The presence of a pre-existing fee agreement may aid in determining reasonableness"). The fifth *Johnson* factor supports the fee.

6. These Actions Were Prosecuted Entirely on a Contingent Basis. Because class counsel took these cases on a contingency fee basis, had they not achieved a recovery, they would have received nothing and, in fact, would have suffered substantial out-of-pocket losses because they were advancing all the litigation expenses, which easily could have amounted to hundreds of thousands of dollars. Supp. Joint Decl. ¶ 13. Uncompensated expenditures of such magnitude can severely damage or destroy firms of the small size of class counsel's firm. *Id.* Such risk must be compensated and is a critical factor in analyzing the reasonableness of a fee. *See, e.g., Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd,* 889 F.2d 21 (11th Cir. 1990).

Public policy concerns such as ensuring the continued availability of experienced counsel to represent classes of injured plaintiffs holding small individual claims – also support the requested fee.

It was extremely risky for class counsel to bring these cases. Supp. Joint Decl. ¶¶ 8-10. Risk should be evaluated as of the time class counsel filed suit, not in hindsight. *See, e.g.*, *Skelton v. General Motors Corp.*, 860 F.2d 250, 258 (7th

Cir. 1988), *cert. denied*, 493 U.S. 810 (1989) ("The point at which plaintiffs settle with defendants . . . is simply not relevant" to evaluating class counsel's risk). The sixth *Johnson* factor supports the requested fee.

7. Class Counsel Worked Under Time Pressures. Class counsel does not contend that this factor justifies either a higher or lower fee as time pressure in cases of this sort is commonplace.

8. Class Counsel Achieved an Excellent Settlement. The amount at issue and the result obtained justify the requested fee. The amount of the settlement recovered for the Sufficient Funds Class represents approximately 40 percent of their most likely recoverable trial damages. Joint Decl. ¶¶ 90-91. If approved, settlement class members will receive their payments in a few months, as opposed to years down the line (if at all).

The eighth *Johnson* factor supports the requested fee.

9. Class Counsel Are Highly Experienced and Are Well Respected. Webb, Klase & Lemond and McCuneWrightArevalo have been litigating class action cases for well over a decade and have been appointed lead counsel, settlement class counsel, and to leadership positions in many prior class cases. Joint Decl. ¶¶ 2-6; Firm Résumés. Their efforts have been lauded by prior courts. *E.g.*, *Jenkins v. Trustmark Nat'l Bank*, 300 F.R.D. 291, 307 (S.D. Miss. 2014)

(finding counsel's training and participation "added immense value to the representation of this large Settlement Class"). Class counsel's knowledge and experience was likely essential in reaching the result they have achieved here.

In evaluating the quality of representation by class counsel, the Court should also consider the quality of opposing counsel. *See Camden I*, 946 F.2d at 772 n.3; *Ressler v. Jacobson*, 149 F.R.D. 651, 654 (M.D. Fla. 1992). Defendant has been represented by skilled counsel from Honigman LLP and The Maxim Law Firm, P.C. requiring equally competent representation for the class. *See generally Walco Invs. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997) ("Given the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results"). Indeed, Defendant's lead attorney Brandon Wilson has considerable experience defending class actions. They were highly skilled adversaries and their tireless, inventive representation of LGE makes the settlement all the more impressive. Supp. Joint Decl. ¶ 14. The ninth *Johnson* factor supports the requested fee.

10. The Case Qualifies as "Undesirable." The risk of non-recovery and presence of difficult legal or factual issues has been held to make a case undesirable, warranting a higher fee. *Morgan v. Public Storage*, 301 F. Supp. 3d 1237, 1256-57 (S.D. Fla. 2016). Here, all such criteria are present. Moreover, it is

believed that this is the first case brought against Defendant for the practices at issue. Supp. Joint Decl. ¶ 15. That no prior counsel endeavored to take on the case and challenge Defendant suggests the case was an undesirable one. "[C]ounsel should be rewarded for taking on a case from which other law firms shrunk." *In re Checking Account Overdraft Litig.*, 830 F.Supp.2d at 1364. The tenth *Johnson* factor supports the requested fee.

11. Class Counsel Had No Prior Relationships with Plaintiff. Class counsel did not have a prior relationship with Plaintiff. This lack of an existing relationship with any of the clients heightened the risks since class counsel did not know their client prior to this case. The lack of an existing relationship also made it unlikely that any other benefit would result from the representation. The eleventh *Johnson* factor also supports the requested fee.

12. The Requested Fee Comports with Awards in Similar Cases. The fee sought here matches the fee typically awarded in similar cases. *See* Section A, *supra* (collecting cases). Legions of decisions have found that a one-third recovery in common fund class action cases is appropriate. *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000) ("Empirical studies show that . . . fee awards in class actions average around one-third of the recovery"); *also, e.g.*, *T.S. Kao, Inc. v. North Am. Bancard, LLC*, No. 1:16-cv-04219-SCJ (N.D. Ga. Aug.

20, 2019) (awarding one-third of $15 million settlement); *Smith v. Floor & Décor Outlets of Am., Inc.,* No. 1:15-cv-04316-ELR (N.D. Ga. Jan. 10, 2017) (awarding one-third of $14 million settlement); *Lunsford v. Woodforest Nat'l Bank*, No. 1:12-CV-103-CAP (N.D. Ga. May 19, 2014) (approving one-third fee of $7,750,000 fund); *In re Profit Recovery Group Int'l, Inc. Sec. Litig*., No. 1:00-cv-1416-CC (N.D. Ga. May 26, 2005) (one-third); *In re Clarus Corp. Sec. Litig*., No. 1:00-CV-2841-CAP (N.D. Ga. Jan. 6, 2005) (one- third); *In re Pediatric Servs. of Am., Inc. Sec. Litig*., No. 1:99-CV-0670-RLV (N.D. Ga. Mar. 15, 2002) (one-third).

13. Other *Camden I* Factors: The other factors noted in *Camden I* also support the requested fee, namely counsel had sufficient time and opportunity to evaluate the strengths and weaknesses of the case and engage in informed negotiations prior to reaching a settlement (Joint Decl. ¶¶ 6-80), to date no class members have objected to the settlement or the requested fee (Supp. Joint Decl. ¶ 18), the settlement provides significant non-monetary benefits to class members that remain customers of LGE, namely practice changes that will enable customers to avoid future unwanted overdraft fees and, perhaps most importantly, the economics involved in prosecuting a class action favor the requested fee.

14. The Court Should Honor the Parties' Agreement. The fee requested by class counsel is clearly supported by the *Johnson* factors. Moreover, the

parties' agreement should be given deference because it resulted from adversarial negotiations *after* the terms of the settlement were decided. *Ingram*, 200 F.R.D. at 695. As one court explained:

> The Court finds that the fee and expense negotiations were conducted at arm's length, only after the Parties had reached agreement on all terms of the Settlement. There is no evidence in this case that the Settlement, or the fee and expense agreement, was in any way collusive. Under these circumstances, the Court gives great weight to the negotiated fee in considering the fee and expense request.
>
> Such agreements between plaintiffs and defendants in class actions are encouraged, particularly where the attorneys' fees are negotiated separately and only after all terms of the settlement have been agreed to between the Parties. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (noting that negotiated, agreed upon attorneys' fees are the "ideal" toward which the Parties should strive and stating that "[i]deally, of course, litigants will settle the amount of a fee").

Manners v. Am. Gen. Life Ins. Co., 1999 WL 33581944, *28 (M.D. Tenn. Aug. 11, 1999) (some internal citations omitted).

Many reasons support deferring to the parties' agreement. There is no one "reasonable fee" mandated by applicable law, but as long as the requested fee is one that the Court agrees is within the range of what is reasonable, it should be approved. The parties' agreement reflects the realities of the marketplace as the competing pressures and motives that drove the parties' positions ensured the fee was reasonable. If courts routinely reduce fees agreed upon by the parties, the inevitable result will be to make fee negotiations more difficult and discourage

qualified attorneys from taking risky and expensive class actions such as this case.

B. The Expense Request Is Appropriate. Class counsel also request reimbursement for a total of $54,219.95 in litigation expenses. Settlement ¶ 10(d)(i); Supp. Joint Decl. ¶ 23; *Mills v. Electric Auto-Lite Co*., 396 U.S. 375, 391-92 (1970). The requested sum corresponds to specific out-of-pocket expenses incurred while prosecuting and settling the actions and includes expert fees, mediator fees, and necessary filing and administrative expenses (e.g., filing and service fees, PACER charges, copies, postage, delivery fees, etc.). Supp. Joint Decl. ¶ 23. All such expenses were reasonably and necessarily. *Id.* The expense request is reasonable and should be approved.

C. A Service Award Is Warranted for the Class Representative. Pursuant to the settlement, class counsel request a service award of $10,000 for the class representative, Carol Tims. Settlement ¶ 10(d)(ii); Supp. Joint Decl. ¶ 24. But for Mrs. Tims' service and willingness to bear the risk of pursuing this matter, other settlement class members would have received nothing.

Service awards compensate named plaintiffs for the services they provide and the risks they incur during the course of class action litigation. *See, e.g., Ingram,* 200 F.R.D. at 695-96 ($300,000 service awards); *Mercury Payment*, 275 F. Supp. 3d at 1356 ($20,000 service awards); *Spicer v. Chicago Bd. Options*

Exchange, Inc., 844 F. Supp. 1226, 1267-68 (N.D. Ill. 1993) (collecting cases approving awards ranging from $5,000 to $100,000).

Prior to the Eleventh Circuit's decision in *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244, 1255 (11th Cir. 2020)[1], courts "routinely approve(d) service awards to compensate class representatives for the services they provide and the risks they incur on behalf of the class." *In re: Equifax*, 2020 WL 256132, at *40. Class counsel make this request in order to preserve the issue going forward, but acknowledge that this Court is likely to deny the request without prejudice. *E.g.*, *Callen v. Daimler AG*, Dkt. No. 96, Case No. 1:19-cv-01411-TWT (N.D. Ga. Nov. 7, 2022) (approving settlement but denying incentive award request without prejudice and reserving jurisdiction until issue is settled). The Court should retain jurisdiction to enter the requested incentive award at the appropriate time.

CONCLUSION

The requests for a $436,666.66 fee from the $1.31 million common fund, reimbursement of $54,219.95 in litigation expenses are reasonable and should be

[1] The Eleventh Circuit recently denied *en banc* review notwithstanding four dissenters. *See* 43 F.4th 1138 (11th Cir. Aug. 3, 2022). A petition for writ of certiorari has been filed with the United States Supreme Court regarding this issue. *See* Docket No. 22-389 (U.S. *filed* Oct. 21, 2022). The Ninth Circuit recently rejected the Eleventh Circuit's conclusion in *Johnson*, finding that reasonable incentive awards can be awarded. *See In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785-87, n.13 (9th Cir. 2022).

approved. A service award should also be approved at the appropriate time. Plaintiff's request for final approval should be GRANTED.

DATED this 10th day of November, 2022.

Respectfully submitted,

BY: WEBB, KLASE & LEMOND, LLC

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TYPE AND FONT CERTIFICATION

The undersigned certifies that this brief complies with Local Rule 5.1(B) regarding typefaces and fonts.

/s/ G. Franklin Lemond, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2022, 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.
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