IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JOHN MEEHAN, *on behalf of himself and all similarly situated individuals*,	)	
Plaintiff,	)	
	)	Civil Action No. 1:22-cv-1073
v.	)	
CAPITAL ONE, N.A.,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR
FINAL APPROVAL OF CLASS SETTLEMENT

Under Federal Rule of Civil Procedure 23 and this Court's May 17, 2023 Preliminary Approval Order (ECF No. 27), Plaintiff John Meehan, on behalf of himself and the class members, submits this Memorandum in Support of Motion for Final Approval of Class Settlement.

INTRODUCTION

Plaintiff filed this Class Action because Defendant Capital One, N.A. ("Capital One") held him liable for several debit card transactions that were performed by another without Plaintiff's authorization. Plaintiff alleged that Capital One failed to investigate disputed transactions on a transaction-by-transaction basis and then failed to apprise him of its reasons for denying his several disputes.

Plaintiff alleged that Capital One violated the Electronic Fund Transfer Act ("EFTA") in multiple ways: (1) by failing to investigate his disputes of unauthorized debit card use, in violation of 15 U.S.C. § 1693f(a); (2) by holding him liable for transactions that were unauthorized, in violation of 15 U.S.C. § 1693g; and (3) by failing to provide him with sufficient notice explaining its reasons for denying his EFTA disputes, in violation of 15 U.S.C. § 1693f(d).

After several months of hard-fought litigation, Plaintiff and Capital One reached a settlement that provides significant relief to the class members, including: (1) an automatic payment of $500,000 to be shared on a *pro rata* basis by 3,425 class members; and (2) the implementation of a claims process that allows class members to recover actual economic damages in addition to the automatic payment.

As of October 31, 2023, class members had submitted 446 claims, including 430 valid claims, plus 10 late filed claims that Capital One agreed to deem timely filed.[1] The class members' claims total 7,773 disputed transactions valued at $615,101.49.[2] Thus, if approved, the settlement will provide the following consideration to class members:

Description	**Amount**
Automatic Payment Shared Pro Rata Between Class Members	$500,000
Possible Claims Process Payments	$615,101.49
Attorney's Fees and Costs[3]	$500,000

[1] The deadline to submit claims was October 15, 2023. However, pursuant to Section 4.3.1.2.4 of the Settlement Agreement, Plaintiff and Capital One agreed that the 10 late-filed claims that were received as of October 31, 2023 were to be deemed timely filed. Those 10 claims totaled 93 disputed transactions representing a disputed amount of $5,050.01. There was also 1 timely-filed claim, in the amount of $617.10, that was received after October 31, 2023. Thus, the numbers in this brief vary slightly from those submitted in support of the Motion for Attorney's Fees, Costs, and Class Representative Service Award.

[2] Capital One is still in the process of reviewing the claim forms to ensure that the disputed transactions were not authorized. This number may decrease if Capital One invokes the process in Section 4.3.1.2.3 to deny claims. The parties will be able to update the Court on this process at the Final Approval hearing on December 15, 2023.

[3] In a traditional common fund settlement, attorneys' fees and costs, class notice and administration, and the service award would be deducted from the common fund. Here, Plaintiff negotiated these amounts separately to maximize the class members' recovery. The Court should still count these amounts as consideration to the class members, as they are a benefit that the class is receiving as part of the settlement.

Estimated Costs of Class Notice and Administration	$65,000
Service Award	$10,000
TOTAL:	**$1,690,101.49**

This is an excellent financial result for class members, who—at most—could have collectively recovered $500,000.00 in statutory damages under the EFTA, as well as their actual damages (much of which will be paid under the settlement to those who submitted claims). This significant consideration was achieved despite Capital One's potentially viable defenses to the litigation, which posed risks to this case at several junctures, including class certification, summary judgment, and trial. As proof of the exceptional result achieved on behalf of the class, *none* of the more than 3,400 class members objected to the settlement and *only six persons* have excluded themselves after receiving the court-approved notice. (Decl. of Continental DataLogix LLC ¶¶ 17–18, ECF No. 28-1). For these reasons and the others explained below, the proposed settlement satisfies Rule 23(e)(2)'s requirements that a class settlement be fair, reasonable, and adequate.

THE CLASS ACTION SETTLEMENT

a. The Settlement Class

Under the Settlement Agreement, the parties agreed to resolve the claims of a nationwide class defined as:

> All persons residing in the United States of America (including its territories and Puerto Rico) who, from September 21, 2021 through February 27, 2023, disputed to Defendant one or more Multi-dispute Claims.

(Settlement Agreement § 4.1.1.) "Multi-dispute Claims" "means a claim submitted to Capital Once where a customer disputed five or more card-present, customer-in possession debit card transactions as being unauthorized but was denied reimbursement as to some or all of the disputed transactions." (*Id.* § 2.3.)

b. Consideration to the Settlement Class

The class action settlement provides significant and meaningful automatic cash payments to consumers nationwide. It also gave class members the opportunity to seek additional relief through a claims process.

First, Capital One will make an automatic cash payment of $500,000, which class members will share on a pro rata basis. (Settlement Agreement § 4.3.1.1.) Since notice and administration, attorneys' fees and costs and service awards will be paid (subject to court approval) separate from the cash payments available to consumers, the class members will receive an automatic payment of almost $146.

Second, class members were given the opportunity to recover actual economic damages in the amount of their losses caused by unauthorized transactions. *(Id.* § 4.3.1.2.) This portion of the Settlement allowed class members who did not authorize the disputed charges to receive the full economic value of their claim. As of October 31, 2023, class members had submitted 440 claims deemed valid (an approximately 13% claims rate), totaling 7,773 disputed transactions valued at $615,101.49.

Third, Capital One will pay the costs of notice and administration separately from the settlement payments. (*Id.* § 4.2.6.) Capital One will also separately pay any service award and attorneys' fees and costs that the Court may award at Final Approval. (*Id.*)

The relief provided by the proposed class action settlement is significant. All consumers will receive an automatic cash payment, and many will receive additional relief equaling their actual economic damages suffered.

c. Class Action Fairness Notice

Capital One provided notice of the proposed settlement under the Class Action Fairness Act of 2005, 28 U.S.C. § 1715 ("CAFA"). The CAFA Notice was sent to the Attorney General of

the United States and to the attorneys general of all states and the District of Columbia and all U.S. territories. Additionally, no class member has objected to the Settlement.

d. Attorneys' Fees, Costs, and Service Awards

Class Counsel has separately applied for attorneys' fees and costs in the amount of $500,000. (ECF No. 39.) Plaintiff also applied for a service award of $10,000 for his role as class representative to compensate him for his efforts in prosecuting this case, including retaining counsel, assisting in discovery, and trial preparation. (*Id.*)[4]

e. Release of Claims

In return for this consideration, the class members will provide the following release to the Released Parties:

> Upon the Effective Date, each member of the Settlement Class who has not validly excluded himself or herself, on behalf of themselves and their respective spouses, heirs, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors, assigns, and all those acting or purporting to act on their behalf, acknowledge full satisfaction of, and shall be conclusively deemed to have fully, finally, and forever settled, released, and discharged all the Released Parties of and from all claims, rights, causes of action, suits, obligations, debts, demands, agreements, promises, liabilities, damages, losses, controversies, costs, expenses, and attorneys' fees of any nature whatsoever arising before the Effective Date whether known or unknown, matured or unmatured, foreseen or unforeseen, suspected or unsuspected, accrued or unaccrued which he or she ever had or now has under the EFTA, state equivalents, or common law resulting from, arising out of, or regarding Defendant's alleged: (a) failure to provide the Settlement Class with an explanation of its decision to deny their disputes of unauthorized use; (b) failure to investigate the Settlement Class Members' disputes of unauthorized use; and (c) decision to hold the Settlement Class Members liable for unauthorized transactions (the "Released Claims").
>
> Subject to the Court's approval, the Settlement Class Members' Released Claims shall be dismissed with prejudice and released as against the Released Parties, even if the Settlement Class Member never received actual notice of the settlement prior

[4] Plaintiff is aware of an additional 7 Claims that were received after October 31, 2023. These amount to $1,525.01. Plaintiff's counsel would request permission from the Court to cover those Claims out of any attorneys' fee award.

> to the Final Approval Hearing, never submitted a Claim Form, or never cashed a check received in connection with this settlement.

(Settlement Agreement § 4.4.1.)

f. Notice and Exclusions

Class Notice was sent through a combination of email and U.S Mail to each class member. The final class included 3,425 class members. (*See* Decl. of Continental DataLogix LLC ¶ 3.) On June 17, 2023, the Settlement Administrator sent the Class Notice via email to 3,382 class members for whom a valid email address was provided. (*Id.* ¶ 6.) Of the 3,382 emails sent, only 113 were identified as undeliverable. (*Id.* ¶ 9.) The same day, the Settlement Administrator sent the Class Notice via U.S. Mail to all 3,425 class members. (*Id.* ¶ 5.) If a mailed notice was returned undeliverable—of which there were 235 sixty days after mailing—the Settlement Administrator used Accurint, a LexisNexis search service, to find an updated address. (*Id.* ¶ 7.) The Settlement Administrator was able to update 140 addresses. (*Id.*) The Settlement Administrator eventually received 61 additional Class Notices returned as undeliverable. (*Id.*) On August 16, a reminder postcard was mailed to all class members who had not yet submitted a claim form. (*Id.* ¶ 10.) Six of those postcards were returned undeliverable and then remailed. (*Id.* ¶ 11.) The Settlement Administrator also sent reminder postcards via email, of which 23 were returned undeliverable. (*Id.* ¶ 12.) In total, by either U.S. Mail, email, or both, the Settlement Administrator presumes that 3,420 class members received the Class Notice.

Additionally, the Settlement Administrator posted important settlement documents, such as the operative Complaint, the Class Notice, the Settlement Agreement, and the Preliminary Approval Order to the settlement website. (*Id.* ¶ 14.) The website also included a portal for class members to obtain their unique Claim Form and procedural information regarding the status of the

Court-approval process, such as an announcement when the Final Approval Hearing is scheduled, when certain orders had been entered, and when payment will likely be mailed. (*Id.*)

The deadline for requesting exclusion from the class was November 15, 2023. (*Id.* ¶ 16.) As of the date of this filing, only six persons requested to be excluded from the Settlement. (*Id.* ¶¶ 17–18.)

LEGAL STANDARD

"Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strains such litigation imposes upon already scarce judicial resources." *S.C. Nat. Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990) (quoting *Armstrong v. Board of Sch. Directors*, 616 F.2d 305, 313 (7th Cir. 1980)). Rule 23 of the Federal Rules of Civil Procedure requires a court to approve a class-action settlement. *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 571 (E.D. Va. 2016). "First, the Court considers the fairness of the settlement, and then turns to its adequacy." *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 839 (E.D. Va. 2016). Ultimately, the Court has discretion over approval of the proposed settlement. *Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 501 (E.D. Va. 1995) (citing *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

ARGUMENT

I. The Notice Program Satisfied the Requirements of Rule 23(c)(2)(B).

When a class is "certified for purposes of settlement under Rule 23(b)(3)," a district court "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). This notice may be provided by "United States mail, electronic means, or other appropriate means." *Id*. The Rule also requires that the notice inform potential class members that: (1) they have an opportunity to opt out; (2) the judgment will bind all class members who do not

opt out; (3) and any member who does not opt out may appear through counsel. *Id.* In assessing the sufficiency of the notice, the Court must consider both the method of delivery and the notice's content. *See* Federal Judicial Center, *Manual for Complex Litigation* § 21.312 (4th ed. 2004).

Class members were identified using Capital One's internal records, which contained the class members' names, addresses, and email addresses. (Decl. of Continental DataLogix LLC ¶ 3). Using this information, the Settlement Administrator identified and compiled a final class list that included 3,425 class members. (*Id.*) As explained in detail above, the Settlement Administrator then mailed and emailed the Class Notice to the class members, updating addresses when possible and sending reminders via both modes of communication. (*Id.* ¶¶ 4–12.) In total, by either U.S. Mail, email, or both, the Settlement Administrator presumes that 3,420 class members received the Class Notice. (*Id.* ¶ 13.)

As this Court has held, "[w]hat amounts to reasonable efforts under the circumstances is for the Court to determine after examining the available information and possible identification methods . . . 'In every case, reasonableness is a function of [the] anticipated results, costs, and amount involved.'" *Fisher v. Va. Elec. & Power Co.*, 217 F.R.D. 201, 227 (E.D. Va. 2003) (citations omitted). Here, all but five class members (3,420 of 3,425 or 99.9%) received some form of Class Notice. (Decl. of Continental DataLogix LLC ¶ 13.) Courts—including this one and others within the Fourth Circuit—have approved mailed-notice programs that reached a much smaller percentage of class members than this class notice reached. *See In re Serzone*, 231 F.R.D. 221, 236 (S.D. W. Va. 2005) (approving notice program where direct mail portion was estimated to have reached 80% of class members); *Martin v. United Auto Credit Corp.*, No. 3:05-cv-143 (E.D. Va. Aug. 29, 2006) (granting final approval where class notice had approximately 85%

delivery). The notice process here, notably, went a step further and combined mail and email notice. Its effectiveness is further supported by the nearly 13% claims rate.

In sum, the parties have complied fully with the Court's Preliminary Approval Order and have taken reasonable steps to ensure that the class members were notified—in the best and most direct manner possible—of the settlement's terms and significant benefits.

II. The Settlement Satisfies the Requirements of Rule 23(e)(2)

"Rule 23(e) of the Federal Rules of Civil Procedure obliges parties to seek approval from the district court before settling a class-action lawsuit." *In re: Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Pracs. & Prod. Liab. Litig*., 952 F.3d 471, 483 (4th Cir. 2020) (citing Fed. R. Civ. P. 23(e)). When a court "reviews a proposed class-action settlement, it acts as a fiduciary for the class." *1988 Tr. for Allen Child. Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513, 525 (4th Cir. 2022). "In fulfilling this role, the district court must conclude that a proposed settlement is 'fair, reasonable, and adequate,'" which are the three requirements established by Rule 23(e)(2) of the Federal Rules of Civil Procedure. *Id*. (citing Fed. R. Civ. P. 23(e)(2)). "In determining whether a settlement is fair, reasonable, and adequate," Rule 23(e)(2) requires the court to consider:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorneys' fees, including timing of payments; and

(iv) any agreement required to be identified under Rule 23(e)(3);

(D) the proposal treats class members equitably relative to each other.

Galloway v. Williams, 2020 WL 7482191, at *4 (E.D. Va. 2020) (quoting Fed. R. Civ. P. 23(e)(2)). In making this assessment, district courts are provided with "considerable deference" because "the court 'is exposed to the litigants, and their strategies, position[s], and proofs, and is on the firing line and can evaluate the action accordingly.'" *Lumber Liquidators*, 952 F.3d at 484 (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000)).[5]

A. Plaintiff and Class Counsel Have Adequately Represented the Class.

Rule 23(e)(2)'s first factor examines whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). This assessment is "redundant of the requirements of Rule 23(a)(4) and Rule 23(g), respectively." *In re Flint Water Cases*, 571 F. Supp. 3d 746, 780 (E.D. Mich. 2021) (quoting Albert Conte & Herbert Newberg, *Newberg on Class Actions* § 13:48 (5th ed. June 2021 update)). Rule 23's adequacy requirements are met if: "(1) the named plaintiff[s] [have] interests common with, and not antagonistic to, the Class's interests; and (2) the plaintiff[s'] attorney is qualified, experienced and generally able to conduct the litigation." *Gibbs v. Stinson*, 2021 WL 4812451, at *16 (E.D. Va. Oct. 14, 2021) (quoting *Milbourne v. JRK Residential Am., LLC*, 2014 WL 5529731, at *8 (E.D. Va. Oct. 31, 2014)).

[5] On December 1, 2018, "Rule 23(e)(2) was amended to specify factors for assessing the 'fairness, reasonableness, and adequacy' of a class-action settlement." *Lumber Liquidators*, 952 F.3d at 484 n.8. Prior to this, the Fourth Circuit developed and applied its "own multifactor standards" for fairness and adequacy. *See, e.g.*, *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991). Because the Fourth Circuit's prior considerations "almost completely overlap with the new Rule 23(e)(2) factors," *Lumber Liquidators*, 952 F.3d at 484 n.8, decisions prior to the amendment to Rule 23(e)(2) continue to be relevant.

This first factor is easily satisfied. Plaintiff's interests are fully aligned with those of the class members because he shared a common claim and similar injuries. *See, e.g.*, *Stinson*, 2021 WL 4812451, at *16 (finding that the plaintiffs were adequate in a comparable case because they had "no interests antagonistic to the class's interest" and shared "identical interest of establishing Defendants' liability based on the same questions of law and fact"). Indeed, in its Preliminary Approval Order, the Court already found that "the Named Plaintiff will fairly and adequately protect the interests of the Settlement Class." (ECF No. 27 ¶ 3.) Nothing has changed since then to warrant revisiting that conclusion.

As to Class Counsel, this Court and others have repeatedly found them to be qualified, experienced, and adequate under Rule 23. *See, e.g.*, *Galloway v. Williams*, 2020 WL 7482191, at *8 (E.D. Va. Dec. 18, 2020) ("Class Counsel and their firms have extensive backgrounds in complex and class action litigation and consumer protection litigation. And, in particular, members of Class Counsel have significant experience in litigating class action lawsuits . . . ."); *Heath v. Trans Union*, No. 3:18-cv-720, ECF No. 60 at 9:7–9 (E.D. Va. Aug. 6, 2019) ("Class counsel is qualified and more than able to handle this. Their reputation in this district, and I am sure in others, are sterling."); *Clark v. Trans Union, LLC*, 2017 WL 814252, at *13 (E.D. Va. Mar. 1, 2017) ("This Court echoes the sentiments previously stated about Clark's counsel because they pertain here with equal vigor."); *Campos-Carranza v. Credit Plus, Inc.*, No. 1:16-cv-120, ECF No. 80 at 5:3–7 (E.D. Va. Feb. 17, 2017) ("I think this is an extremely, as I say, extremely fair, reasonable, and adequate settlement."); *Dreher v. Experian Info. Sols., Inc.*, 2014 WL 2800766, at *2 (E.D. Va. June 19, 2014) ("Dreher's counsel is well-experienced in the arena of FCRA class action litigation."); *Burke v. Seterus, Inc.*, No. 3:16-cv-785, ECF No. 41 at 9:19–22 (E.D. Va. 2017) ("Experience of counsel on both sides in this case is extraordinary. Ms. Kelly and Ms. Nash

and their colleagues are here in this court all the time with these kinds of cases and do a good job on them."); *see also* ECF No. 30-1 ¶ 10 ("In each of the class cases where I have represented plaintiffs in a consumer protection case, including cases such as the instant case, the Court found me to be adequate class counsel.") (Declaration of Kristi C. Kelly).

B. Negotiations were at arm's length and involved the use of a respected mediator.

The second factor examines whether the settlement "was negotiated at arm's length" Fed. R. Civ. P. 23(e)(2)(B); *see also Flint Water Cases*, 571 F. Supp. 3d at 780 (explaining that the second factor requires courts to "consider whether the negotiations were conducted at arm's length with no evidence of collusion or fraud"). "Courts presume the absence of fraud or collusion unless there is evidence to the contrary." *Id*. (quoting *UAW v. Gen. Motors, Corp.*, 2006 WL 891151, at *21 (E.D. Mich. Mar. 31, 2006)). Here, there is no evidence suggesting the presence of collusion or fraud between the parties.

To help confirm that negotiations were at arm's length, courts look at several other factors, including the presence of a mediator. As the leading class action treatise explains: "There appears to be no better evidence of [a truly adversarial bargaining process] than the presence of a third party mediator." Conte & Newberg, *supra*, § 13:48; *see also Flint Water Cases*, 571 F. Supp. 3d at 780 ("highly experienced mediators" provided "ample protections in their roles"). Here, Plaintiff and Capital One agreed to utilize the services of the Honorable Diane M. Welsh (Ret.), a former United States Magistrate Judge with significant mediation experience. Prior to this mediation, the parties worked together on the class data needed to identify the class, but did not make any progress on the other key terms of the settlement. Only at that mediation did the parties make significant progress toward a settlement. That mediation took place in Philadelphia, Pennsylvania—requiring

travel for both parties—and involved a full-day in-person session involving several attorneys from both sides and multiple representatives of Capital One.

Courts also consider the posture of the case at the time of the settlement. *See, e.g.*, *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 571 (E.D. Va. 2016). "Considering the posture of the case at the time of settlement allows the Court to determine whether the case has progressed far enough to dispel any wariness of 'possible collusion among the settling parties.'" *Id*. Here, there should be no concerns that the case did not progress far enough because the parties had made significant progress before a settlement was reached.

After Capital One answered the Complaint, the parties exchanged discovery requests and scheduled a settlement conference before Magistrate Judge John Anderson. When Capital One made its participation in that settlement conference contingent on Plaintiff agreeing to discuss settlement on an individual basis only, a stipulation to which Plaintiff's counsel did not agree, the conference did not go forward. The parties then responded to the other's discovery and engaged in several meet and confers. During those meet and confers, the parties developed a detailed ESI protocol, which resulted in several additional document productions, which totaled thousands of pages. Plaintiff's counsel then deposed two Capital One fact witnesses: (1) the Capital One employee who decided Plaintiff's disputes; and (2) the Capital One employee who considered Plaintiff's rebuttal (*i.e.*, follow-up dispute). Plaintiff then drafted a proposed Amended Complaint that hardened the theories of liability on which this settlement is now based. This litigation history reaffirms that there was no possible collusion among the parties.

C. The Relief Provided to the Class is Adequate.

Rule 23(e)(2)(C) requires the Court to consider whether the relief is adequate, considering:

> (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of

> processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3).

Fed. R. Civ. P. 23(e)(2)(C). These subfactors overlap with the factors that the Fourth Circuit has held are required to evaluate a class settlement's fairness, reasonableness, and adequacy. *In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices and Prods. Liab. Litig.*, 952 F.3d 471, 484 n.8 (4th Cir. 2020) (citing *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991)). An analysis of each factor shows that this settlement is fair, reasonable, and adequate.

The first Rule 23(e)(2)(C) sub-factor requires the Court to evaluate the settlement against the costs, risks, and delay of trial and appeal. This factor strongly supports approval of the Settlement. While Class Counsel strongly believes in the strength of this case, they also acknowledge that there are substantial risks associated with continued litigation. To start, case law regarding the EFTA is sparse and Plaintiff's theories, for all intents and purposes, would have been a matter of first impression in this Court. Capital One also has been adamant that it has defenses to Plaintiff's claims, including a *bona fide* error defense under the EFTA. While Class counsel remained confident that the Court would rule in Plaintiff's favor, there was no such guarantee. Had Capital One to dug in on its defenses, this case could have involved substantial briefing at the class certification and summary judgment stages, as well as a trial and appeals. The settlement avoids this significant cost, risk, and time by providing significant settlement benefits to the class members.

Rule 23(e)(2)(C)'s second sub-factor requires the Court to evaluate the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims. Here, class members will receive significant settlement benefits without having

to submit a claim form or any proof of their damages. To be sure, cash payments will be automatically distributed. This is important because "[t]he use of objective criteria to determine settlement distribution is a hallmark of fairness." *Flint Water Cases*, 571 F. Supp. 3d at 781. Of course, class members will have the opportunity to obtain *additional* compensation through the straightforward claims process, but that process need not be completed for class members to benefit from the automatic cash payment. Because an automatic cash payment is based on objective criteria and does not require any action by class members, this factor weighs strongly in favor of approving the settlement.

Rule 23(e)(2)(C)'s third sub-factor requires the Court to evaluate the request for attorney fees, including the timing of the request. The focus of this analysis is whether there are signs that "counsel sold out the class's claims at a low value in return for [a] high fee." Conte & Newberg, *supra*, § 13:54. There are no such indications here. As outlined above, there is no sign that Class Counsel left any money on the negotiating table. Instead, they have obtained $500,000 for automatic payments to class members, and class members made claims for an additional $615,101.49. This is significant consideration for the class members' claims.

The requested attorneys' fee, meanwhile, was negotiated separate from the class relief and under the supervision of Judge Welsh. *Flint Water Cases*, 571 F. Supp. 3d at 782. In any event, the requested attorneys' fee comprises less than one third of the total settlement package. As to the timing of Class Counsel's request, "courts are to consider this to prevent situations in which the request for attorney fees is unknown and could upset the compensation to claimants at the time of final approval." *Id.* There is no such concern here. Instead, the proposed attorneys' fee was included in the Class Notice, and no class member or regulator objected to the proposed amount.

Finally, there are no agreements that need to be identified under Rule 23(e)(3).

D. The Settlement Treats Class Members Equitably Related to Each Other.

The final factor under Rule 23(e)(2) requires a court to consider whether "the proposal treats class members *equitably* relative to each other." Fed. R. Civ. P. 23(e)(2)(D) (emphasis added). This factor considers whether class members have been treated in a fair and impartial manner, but "[t]here is no requirement that all class members in a settlement be treated *equally*." *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 876 (S.D. Iowa 2020) (emphasis in original) (citation omitted). And when considering this factor, a court "must balance the claims of those with potentially substantial damages with those with potentially minimal or insignificant damages." *Id*. (citation omitted).

The settlement here achieves this balance. First, class members each will receive—automatically—an equal share of the $500,000 payment. Second, through the claims process, each class member had the opportunity to identify the unauthorized transactions for which they were held liable. A class member's recovery under the claims process, therefore, corresponded to the aggregate value of the disputed transactions that were made from their Capital One bank account. Class members, therefore, will be treated equitably relative to each other.

CONCLUSION

For all these reasons, Plaintiff respectfully requests that the Court grant his Motion for Final Approval of the Class Action Settlement.

Respectfully submitted,
PLAINTIFF

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