IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CUSTOM HAIR DESIGNS BY SANDY, LLC, and SKIP'S PRECISION WELDING, LLC, on behalf of themselves and all others similarly situated, Plaintiffs, v. CENTRAL PAYMENT CO., LLC, Defendant.	CASE NO. 8:17-cv-00310-JFB-CPZ

BRIEF IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

On March 9, 2022, the Court preliminarily approved the parties' Settlement and notice plan. Dkt. 329. Notice having since been distributed to the Class, Plaintiffs now respectfully move for final approval of the Settlement.

As previously reported, the Settlement is the product of four-and-a-half years of fiercely contested litigation involving complex and challenging factual and legal issues. The Settlement follows far-reaching written and oral discovery, numerous substantive rulings from this Court, a fully litigated interlocutory appeal, hard fought negotiations between qualified counsel, and multiple sessions with an experienced class action mediator. And, most importantly, the Settlement will provide significant monetary relief to customers of Defendant Central Payment Co., LLC ("CPAY" or "Defendant") that allegedly were overcharged for payment processing services.

Indeed, pursuant to the Settlement CPAY has agreed to establish a settlement fund of up to **$84 million** to pay cash benefits to the 185,884 Class members, as well as to cover notice and administration costs, attorneys' fees and expenses, and service awards. Class members that are current customers will receive payments *automatically*, without the need to submit a claim or take any other action. Former customers are eligible to receive cash payments by submitting a very simple claim form. No matter how many claims are submitted by former customers, under no circumstances will CPAY pay less than **$58.8 million** in the Settlement.

By any objective measure, the Settlement is fair, reasonable, and adequate. Moreover, the Settlement provides for a robust notice program that readily satisfies due process and Rule 23. This notice program has been successfully implemented by the settlement administrator.

The reaction of the Class thus far has been very positive, further supporting the conclusion that the Settlement is fair, reasonable, and adequate. As of May 5, 2022, only three Class members have opted-out of the Settlement and no objections have been submitted. By contrast, 4,320 claims by former customers have already been filed (in addition to the 27,164 current customers that will be automatically issued payments without the need to submit a claim).

For the foregoing reasons and the others detailed below, the Settlement meets the standards for final approval and should be approved.[1]

BACKGROUND

I. Factual Background

Plaintiffs and Class Representatives Custom Hair Designs by Sandy, LLC and Skip's Precision Welding, LLC are two small business merchants that retained CPAY to process their card payment transactions. Plaintiffs allege that CPAY engaged in billing practices that violated 18 U.S.C. § 1962(c) ("RICO"), fraudulently concealed material facts, breached the covenant of good faith and fair dealing, and breached the parties' contracts. *See generally* Dkt. 46. Plaintiffs filed this case on behalf of themselves and a nationwide class of merchants consisting of current and former CPAY customers. CPAY has always vehemently denied Plaintiffs' allegations.

II. Procedural History

A. Initial Investigation, Early Litigation, and Discovery.

In early 2017, after Plaintiffs became embroiled in billing disputes with CPAY, they retained counsel to investigate CPAY's billing practices. Joint Declaration of Tyler W. Hudson and Matthew C. Klase ("Joint Decl."), ¶ 13 (Dkt. 328-1). Following a diligent investigation by

[1] Plaintiffs and Class Counsel are authorized to state that CPAY does not oppose the relief requested in this motion. The arguments and contentions contained herein, however, are attributable solely to Plaintiffs and Class Counsel.

counsel that included a comprehensive review of CPAY contracts and customer billing statements and publicly available complaints and documents, this case was originally filed on August 21, 2017, as a simple breach of contract action. *Id.* at ¶¶ 14-23. Plaintiffs alleged that CPAY imposed fees that were not identified in its customer contracts and discount rates that were greater than those identified in such contracts. *Id.* at ¶¶ 14, 23. After CPAY answered, the parties commenced what would become a contentious and costly discovery process. *Id.* at ¶¶ 25-34, 36-42, 49-67.

Plaintiffs persistently and aggressively pursued discovery they deemed necessary to prove their claims. The parties met and conferred numerous times and often called upon the Court to resolve discovery disputes. *Id.* at ¶¶ 27-28, 31-32, 49-53. A review of the approximately 35,000 pages of internal CPAY documentation that was obtained led Class Counsel to file a first amended complaint adding RICO and fraudulent concealment claims. *Id.* at ¶¶ 32-35; Dkt. 46. CPAY moved to dismiss these new claims (*id.* at ¶¶ 44-47), but the Court denied the motion (Dkt. 87) and CPAY answered (Dkt. 96).

In the meantime, the parties continued to press forward with pre-certification discovery. Plaintiffs engaged two class experts: (1) fee and transaction database expert Arthur Olsen and (2) payment processing industry expert Dr. Karl Borden. Joint Decl., ¶¶ 36-40. CPAY, in turn, retained its own expert – payment processing-experienced certified public accountant Ian Ratner. *Id.* at ¶ 65. These experts submitted lengthy reports and were deposed. *Id.* at ¶¶ 62-66.

Plaintiffs were also deposed, as was CPAY's Rule 30(b)(6) designee. *Id.* at ¶¶ 60-61.

On July 30, 2019, following nearly two years of revealing discovery, Plaintiffs moved for certification of the Class. *Id.* at ¶ 68. CPAY also moved to strike Dr. Borden's opinions and

moved for summary judgment on the Plaintiffs' individual claims. Joint Decl., ¶¶ 71, 74; Dkts. 99, 117. All motions were fervently contested. Joint Decl., ¶¶ 73, 75; Dkts. 113, 134.

On February 11, 2020, after taking time to digest the voluminous briefing and evidence, the Court certified the Class, denied summary judgment to CPAY, and denied the motion to strike Dr. Borden's opinions. Joint Decl., ¶ 76; Dkt. 142.

B. The Class Certification Appeal and Merits Discovery.

CPAY sought – and obtained over Plaintiffs' objection – leave from the Eighth Circuit to appeal the class certification decision. Joint Decl., ¶¶ 78-79; Dkts. 146-1, 148. This Court – also over Plaintiffs' objection – stayed litigation until the appeal was resolved. Joint Decl., ¶¶ 86-88; Dkts. 159, 162, 169.

On December 30, 2020, after thorough briefing and oral argument (*id.* at ¶¶ 89-96), the Eighth Circuit affirmed this Court's class certification decision in full (*id.* at ¶ 97). *Custom Hair Designs by Sandy, LLC v. Central Payment Co., LLC*, 984 F.3d 595 (8th Cir. 2020). CPAY sought *en banc* review of the Eighth Circuit's decision, which was denied, and then eventually certiorari review from the Supreme Court, which was also denied. Joint Decl., ¶¶ 97, 116.

After the stay was lifted in this Court, the parties resumed merits discovery. Plaintiffs continued to pursue discovery, and the Court was again called upon to resolve such disputes. *Id.* at ¶¶ 101, 105.

Ultimately, more than 400,000 additional pages of internal documents and records were produced by CPAY and 7,000 pages of records were produced by non-parties First National Bank of Omaha ("FNBO") (CPAY's member bank) and TSYS (CPAY's payment processor). *Id.* at ¶ 99, 102. Plaintiffs also took an additional eight fact witness depositions of knowledgeable employees of CPAY, TSYS, and FNBO. *Id.* at ¶¶ 117-24.

Plaintiffs also retained two merits experts, Mr. Olsen and certified public accountant and fraud examiner Steve Browne (*id.* at ¶¶ 126-27), CPAY retained two experts of its own, Mr. Ratner and payment processing industry expert Pat Moran (*id.* at ¶¶ 129-131), and Plaintiffs retained an additional rebuttal expert, payment processing industry expert Steve Beene (*id.* at ¶¶ 134-35). These gentlemen submitted a total of seven expert reports, with each report being scrutinized in a separate deposition. *Id.* at ¶¶ 125-38.

In the end, the discovery process resulted in the production of more than 450,000 pages of documents and millions of data transaction and fee records, the taking of 21 depositions, and the preparation of 10 expert reports and more than 100 written discovery responses. *Id.* at ¶ 11.

C. Class Notice, Further Dispositive Motion Practice, and Trial Preparation.

While discovery was ongoing, Mr. Olsen used CPAY's data to ascertain the identities of the Class members and individual notice was provided to the Class in accordance with a notice plan approved by the Court. Joint Decl., ¶¶ 110-15; Dkt. 268.

CPAY also moved to stay the claims of approximately 20 percent of the Class that it claimed were contractually bound to arbitrate any disputes and separately moved for leave to assert arbitration as an affirmative defense. Joint Decl., ¶ 104; Dkts. 187, 191. These motions were thoroughly briefed (Joint Decl., ¶¶ 107-09; Dkts. 201, 203, 215) and were ultimately denied. Dkt. 153. CPAY promptly appealed this decision to the Eighth Circuit (Joint Decl., ¶ 155; Dkt. 290) and sought to stay further litigation in this Court while this appeal was pending (Joint Decl., ¶ 156; Dkt. 296), which motion was opposed and denied. Joint Decl., ¶ 158, Dkts. 299, 301, 303. CPAY then moved the Eighth Circuit to stay the case and Plaintiffs opposed. Joint Decl., 159. This motion to stay (and the arbitration appeal) remained unresolved at the time the Settlement was reached.

While its arbitration motions were pending, and after merits discovery was completed, CPAY filed three additional motions: a motion to decertify the Class, a motion for partial summary judgment on several elements of the Class claims, and a motion to preclude testimony from Plaintiffs' expert Steve Browne. Joint Decl., ¶¶ 141-42; Dkts. 232, 238, 242. These motions were thoroughly briefed. Joint Decl., ¶¶ 144-47; Dkts. 257, 259, 260.

Plaintiffs also filed two motions of their own: a motion for summary judgment on all elements of the express breach of contract claim except damages, as well as a motion to preclude testimony from CPAY's expert Pat Moran and to limit testimony from CPAY's expert Ian Ratner. Joint Decl., ¶ 143; Dkts. 232-34. These motions were likewise exhaustively briefed. Joint Decl., ¶¶ 148-50; Dkts. 254, 263, 270, 282.

By early December 2021, the aforementioned motions were still pending and CPAY moved to continue the January 31, 2022 trial date. Joint Decl., ¶ 152. After Plaintiffs opposed, the Court issued its opinion denying all pending motions and denying a continuance. *Id.* at ¶¶ 154, 157; Dkt. 297.

As a result, the parties' trial preparations were in full swing. Witness lists, exhibit lists, and deposition designations were exchanged, as were objections thereto. Joint Decl., ¶¶ 160-64, 170. Plaintiffs also sought trial depositions from two additional CPAY witnesses, which CPAY opposed, resulting in a CPAY motion for protective order and a decision from the Court authorizing the depositions with restrictions. *Id.* at ¶¶ 166-67; Dkt. 322.

The parties also filed their omnibus motions in limine and Plaintiffs filed responses to CPAY's omnibus motions. Joint Decl., ¶¶ 168-69, 172. The parties also worked collaboratively to prepare the pre-trial order and emailed it to Magistrate Judge Zwart on January 14, 2022. *Id.* at ¶ 171.

D. Mediation and Settlement.

After the Class was certified in February of 2020, the parties agreed to engage in settlement discussions. Joint Decl., ¶ 82. To assist, the parties retained well-respected mediator Hunter Hughes. *Id.* The parties decided on Mr. Hughes not only because he is one of the most experienced class action neutrals in the country, but also because he has unique experience mediating class cases involving payment processor overbilling – having mediated and resolved three such prior cases. *Id.*; *also* Declaration of Hunter Hughes ("Hughes Decl.") ¶ 9 (filed herewith).

The parties scheduled their first mediation session for April 9, 2020. Hughes Decl., ¶ 10. In advance of this date, the parties each submitted lengthy mediation statements with supporting documents, some of which were exchanged by the parties and others which were submitted solely to Mr. Hughes. Joint Decl., ¶ 83.

The parties participated in a full-day mediation via Zoom on April 9th. *Id.* at ¶ 84; Hughes Decl., ¶ 10. Negotiations were at arm's length and hard fought. Joint Decl., ¶ 84; Hughes Decl., ¶ 10. Despite the efforts of Mr. Hughes and all parties, only limited progress was made and the mediation was unsuccessful. Joint Decl., ¶ 84; Hughes Decl., ¶ 11.

The parties did not seriously entertain settlement again until after the Court denied all dispositive motions in December of 2021. Joint Decl., ¶ 165. At that time – with trial a mere month away – the parties re-engaged Mr. Hughes to recommence discussions, settling on a mediation date of January 7, 2022. Hughes Decl., ¶¶ 12-13. Prior to this date, Mr. Hughes convened multiple telephone calls with the parties on both the structure and substance of a potential settlement. *Id.*

The parties participated in a mediation via Zoom on January 7th. Negotiations were at arm's length and often very contentious. *Id.* at ¶ 13. By the end of the session, the parties were

in general agreement on the structure of a settlement (with current customers being paid automatically and former customers filing claims), which mirrored the structure of prior payment processing class cases mediated by Mr. Hughes. *Id.* at ¶ 14. However, after much back-and-forth, the parties were unable to reach agreement on the amount of monetary relief to be provided to the Class. *Id.* at ¶ 15. Mr. Hughes declared an impasse but encouraged the parties to continue talking amongst themselves prior to trial. *Id.*

Although the parties were positioning themselves to try the case on January 31, 2022, settlement talks recommenced while counsel for the parties were in communication to fulfill their pre-trial deadlines and obligations. Joint Decl., ¶ 176. Counsel exchanged numerous settlement offers via telephone during the week of January 10th and, on January 17, 2022 (the day before the pretrial conference), consensus on the substantive terms was ultimately reached and a memorandum of understanding was executed. *Id.* at ¶¶ 176-77. These negotiations, like every other aspect of this litigation, were entirely arm's length, adversarial, and extremely hard-fought. *Id.* at ¶ 178.

Thereafter, the parties worked diligently to finalize the Settlement, including preparing (a) a detailed written agreement, (b) the notices that will be made available to the Class informing them of the Settlement, and (c) the claim form for former customers. *Id.* at ¶ 180. The parties negotiated and reached agreement regarding attorneys' fees and expenses and service awards only after reaching agreement on all other material terms of the Settlement. Joint Decl., ¶ 184; Settlement, ¶ 84; Hughes Decl., ¶ 17.

The Settlement averted multiple additional years of complex, highly contentious litigation. Joint Decl., ¶ 186. Had the parties not reached the Settlement, they would have immediately proceeded to take two trial depositions, try the case (assuming the Eighth Circuit

denied CPAY's requested stay), litigate the resulting appeals, litigate the arbitration appeal, and litigate the resulting certiorari petitions. *Id.* The Settlement provides much needed, immediate relief to small businesses, many of which have struggled through the pandemic.

E. Preliminary Approval.

On March 9, 2022, the Court entered an Order granting preliminary approval of the proposed Settlement, reaffirming certification of the Class, and directing that, pursuant to Fed. R. Civ. P. 23(e)(1), Class notice be disseminated pursuant to the approved notice program. Dkt. 329.

III. The Settlement Terms

The full Settlement terms are set forth in the Settlement Agreement, which is filed at Dkt. 328-2, Ex. A. The following is a summary of the Settlement terms.

A. The Class.

The Class has already been certified by this Court pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3). Dkt. 142; *also Custom Hair*, 984 F.3d at 595 (affirming certification). The Class is defined as:

> All of CPAY's customers that, from January 1, 2010, to October 31, 2020 (a) were assessed the TSSNF Fee (a/k/a TSYS Network Fee); (b) were assessed the PCI Noncompliance Fee; (c) had their contractual credit card discount rates increased above their contractual rate by CPAY; and/or (d) had credit card transactions shifted by CPAY from lower-cost rate tiers to higher-cost rate tiers.

Entities or persons affiliated with CPAY or the Court are excluded. Settlement ¶ 43.

B. The Relief.

Pursuant to the Settlement, CPAY will pay up to $84 million (minimum of $58.8 million) to establish a settlement fund which will provide cash benefits to the Class members and also cover attorneys' fees and expenses, service awards, and notice and administration costs. Settlement ¶¶ 39, 62. All of the 185,884 Class members are eligible to receive a cash payment

under the Settlement. *Id.* at ¶¶ 68-71. The 27,164 Class members that are current customers will automatically be issued payments without the need to submit a claim. *Id.* at ¶ 68; Declaration of Peter Sperry of Epiq ("Sperry Decl.") ¶ 8 (filed herewith). The 158,720 Class members that are former customers are eligible to receive cash payments by submitting a simple claim form. Settlement ¶ 69; Ex. 2D (claim form); Sperry Decl., ¶ 8.

The notices sent to former customers inform them that they must submit claims to receive payments. Former customers may submit claims online – via the settlement website – or may alternatively submit claims by mail via the postage-prepaid claim form attached to the postcard notices. The deadline for former customers to submit claims ("claims deadline") is August 6, 2022. Sperry Decl. ¶ 23; Dkt. 329, p. 13. The precise amount that is actually paid out will depend on the number of valid claims submitted by former customers but no matter how many claims are submitted, under no circumstances will the total amount paid out be less than $58.8 million. Settlement ¶ 73.

There is good reason to pay current customers automatically while requiring former customers to file a claim. Current customers are active merchants (i.e., active business entities) for which CPAY maintains current email and physical address information. Thus, a high percentage of the payments sent to such customers are likely to be received and negotiated. Former customers, however, may not be active entities (e.g., the merchant may have gone out of business sometime during the 11-year Class period) and the address information possessed by CPAY may be outdated. Thus, if payments were automatically sent to former customers, the cash rate would likely be very low. The proposed claim process gives former customers an opportunity to provide updated address and payee information so as to ensure payments are routed to the correct location and recipients. Joint Decl., ¶ 189.

The settlement administrator will use the damage calculations of Plaintiffs' expert Arthur Olsen to ensure that each Class member is allocated its actual *pro rata* share of the "net settlement amount." Settlement, Ex. 1. By way of example, if a Class member's individual damages were calculated by Mr. Olsen to be 0.00052 percent of the total Class's total "out-of-pocket" loss, that Class member will receive an allocation of 0.00052 percent of the "net settlement amount."[2] *Id.* This allocation method was chosen to ensure that Class members are fairly compensated relative to each other. Joint Decl., ¶¶ 190-91.

All current customers and former customers that timely submit a claim form will receive a notification via email when the settlement payments are ready for distribution and will be given the option to receive their payments electronically via PayPal or Venmo, in lieu of having a check mailed to their physical address. Settlement ¶¶ 68-69; Joint Decl., ¶ 192. If the Class member does not timely make a selection to receive the payment via PayPal or Venmo, the settlement administrator will automatically mail a check to the Class member's physical address on file. Settlement ¶¶ 68-69; Joint Decl., ¶ 192. This method of distribution puts the Class member in control of how it will receive its payment. Joint Decl., ¶ 193. Selecting payment via PayPal or Venmo will enable the Class member to get paid electronically and avoid the hassle of taking a check to a bank for deposit/negotiation. *Id.* It will also allow the Class member to get paid quickly, as opposed to waiting for a check to be printed, mailed, and delivered. *Id.*

C. Attorneys' Fees and Expenses and Service Awards.

Under the Settlement, Class Counsel is permitted to seek attorneys' fees in the total amount of one-third of the $84 million settlement amount, plus reimbursement for their litigation

[2] The "net settlement amount" is $84 million, minus the total of (a) the amounts awarded by the Court for Class Counsel's fees and expenses; (b) the amounts awarded by the Court for service awards to Plaintiffs; (c) the total costs of notice and administration; and (d) any taxes paid from the settlement fund. Settlement, Ex. 1.

expenses. Settlement ¶¶ 80-81. Class Counsel are filing herewith their fee application, requesting attorneys' fees equal to one-third of the $84 million settlement amount plus reimbursement of $1,209,102.88 in litigation expenses. Class Counsel are also requesting service awards of $15,000 for each of the Plaintiffs/Class Representatives to compensate them for the substantial efforts and commitment on behalf of the Class. *Id.* at ¶ 83. Any attorneys' fees, expenses, and service awards granted will be paid from the common settlement fund. Settlement ¶¶ 82-83.

D. Release.

In exchange for the benefits afforded by the Settlement, Class members will release CPAY from claims relating to the issues that were or could have been asserted in this case. The release is set forth in more detail in paragraphs 76-79 of the Settlement.

IV. The Notice Program Directed by the Court Is Being Implemented and Satisfies All Applicable Standards.

The notice program set forth in Section VI of the Settlement (Settlement ¶¶ 51-58) and approved by the Court in its preliminary approval Order (Dkt. 329, ¶¶ 14-20) has been and, for those customers who have been difficult to track down, is still being, implemented. *See generally* Sperry Decl., ¶¶ 7-19. Such notice program includes the following:

Direct Notice to Class Members: Direct notice was sent to the entire Class. Pursuant to the Court-approved notice program, CPAY provided the settlement administrator a listing of the current or last known mail and email addresses of all Class members, identifying those who are current customers and those who are former customers. Sperry Decl., ¶ 7.

By April 8, 2022 (the "notice deadline" set by the Court, *see* Dkt. 329, ¶ 18), the settlement administrator timely sent direct notice to Class members. Specifically, for all Class members for which an email address was reasonably available in CPAY's records, the settlement

administrator timely sent direct email notice to their last known email address. Sperry Decl., ¶¶ 10, 15. For Class members for which an email address was not reasonably available in CPAY's records, or for which email notice was attempted but was not successful, the settlement administrator timely sent notice via a postcard notice mailed to their last known mailing address in CPAY's records or, as applicable, a more current address available through the United States Postal Service National Change of Address database. *Id.* at ¶¶ 11-13, 16-18. The settlement administrator has been, and is, attempting to locate updated address information for mailed postcard notices returned as undeliverable, resending postcards to any such located addresses. *Id.* at ¶¶ 12, 17. As of the filing of this motion, individual notice has been successfully delivered to 98.3% of Class members that are current customers and 96.3% of former customers. *Id.* at ¶¶ 14, 19.

Settlement Website and Toll-Free Number: The settlement administrator timely established the settlement website (https://CentralPaymentClassAction.com) which includes a detailed long-form notice, key case documents, and additional information. Former customers can electronically submit claims for payments via the settlement website. *See* https://CentralPaymentClassAction.com/Home/SubmitClaim. The settlement administrator also timely established a toll-free telephone line that Class members can call with questions. As of May 5, 2022, the settlement website has received 5,088 unique visitors and the toll-free telephone line has received 541 calls. *Id.* at ¶¶ 20-21.

CAFA Notice: Notice was sent to the appropriate government entities in compliance with the Class Action Fairness Act, 28 U.S.C. § 1715. Sperry Decl., ¶ 4.

The Court-approved notice program satisfies all applicable standards, including Fed. R. Civ. P. 23(e)(1) and 23(c)(2)(B). The fees and costs of the settlement administrator, in

implementing the notice and claims programs, distributing the settlement payments, and performing the other administrative tasks described in the Settlement, will be paid from the settlement fund. Settlement ¶ 67. The settlement administrator's current estimate for notice and administration costs is $154,931. Sperry Decl., ¶ 26.

V. The Response from the Class Has Been Very Positive.

The response from the Class to date has been very positive. The deadline to opt-out or object to the Settlement is June 7, 2022. As of May 5, 2022, only three Class members have opted-out and zero objections have been submitted. Sperry Decl., ¶¶ 24-25.[3] By contrast, as of May 5, 2022, 4,320 claims by former customers have already been submitted (in addition to the 27,164 current customer accounts that will be issued payments without the need to submit a claim). *Id.* at ¶¶ 8, 23.

ARGUMENT

I. Overview of the Class Settlement Approval Process.

Pursuant to Rule 23(e), a class action settlement must be approved by a court before it can become effective. The process for court approval is comprised of two principal steps:

(1) Preliminary approval of the proposed settlement and direction of notice to the class; and

(2) A final approval hearing, at which argument concerning the fairness, adequacy, and reasonableness of the settlement is presented.

See, e.g., *Cortez v. Nebraska Beef, Inc.*, No. 8:08cv90, 2012 WL 12931431, *1 (D. Neb. Feb. 9, 2012) (Bataillon, J.). In granting preliminary approval of the Settlement and directing that notice be disseminated to the Class, the Court took the first step in the process. Moreover, as

[3] The final numbers of opt-outs and objections will be provided to the Court in advance of the July 25, 2022 final approval hearing. Pursuant to the procedure established by the Court in the preliminary approval Order, the parties will address in their reply papers any objections that may be submitted before the objection deadline. *See* Dkt. 329, ¶ 29.

summarized above, the settlement administrator has been and is implementing the notice program as directed by the Court. Dkt. 329; *see also generally* Sperry Decl.

By this motion, Plaintiffs and Class Counsel respectfully request that the Court take the final step by granting final approval of the Settlement. Preliminary approval required the Court to determine that it would "likely be able to . . . approve the proposal under Rule 23(e)(2)." Fed. R. Civ. P. 23(e)(1)(B). Nothing has since undermined this Court's initial findings that final approval would be likely; in fact, the positive reaction of the Class has further substantiated the Court's initial conclusions and further supports final approval.

II. Rule 23(e)(2) and the *Van Horn* Factors.

Given that public policy favors class action settlements, "courts should approach them with a presumption in their favor." *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999); *In re Uponor, Inc., F1807 Plumbing Fittings Prod. Liab. Litig.*, 716 F.3d 1057, 1063 (8th Cir. 2013) (settlement agreements are presumptively valid). The ultimate touchstone for final approval of a class action settlement is whether the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

To make that assessment, courts in this Circuit must consider four factors, commonly known as "the *Van Horn* factors": (1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988); *also In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 931 (8th Cir. 2005). Courts may also consider the experience and opinion of counsel on both sides and whether the settlement resulted from arm's length negotiations (*DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995)); as well as the timing of the settlement,

including the extent and breadth of discovery (*Lechner v. Mutual of Omaha Ins. Co*., No. 8:18cv22, 2020 WL 5982022, *4 (D. Neb. Oct. 8, 2020) (Bataillon, J.)).

Additionally, since 2018, Rule 23(e)(2) has set forth additional criteria for the Court's consideration, some of which overlap considerably with the *Van Horn* factors. Specifically, Rule 23(e)(2) requires courts to consider whether:

> (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 attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). It is "appropriate for the Court to consider the Rule 23(e)(2) factors along with the *Van Horn* factors." *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 861 (S.D. Iowa 2020).

III. The Settlement Is Fair, Reasonable, and Adequate and Should Be Approved.

A. The Settlement Represents a Strong Result for the Class Given the Strength of their Claims and the Substantial Risk and Complexity Associated with Continued Litigation (*Van Horn* Factors 1 and 3; Fed. R. Civ. P. 23(e)(2)(C)).

"The single most important factor in determining whether a settlement is fair, reasonable, and adequate is a balancing of the strength of the plaintiff's case against the terms of the settlement." *Van Horn*, 840 F.2d at 607; *Huyer v. Njema*, 847 F.3d 934, 939 (8th Cir. 2017) ("The first factor is the 'single most important factor'") (quoting *Van Horn*). Here, the Settlement makes up to $84 million in cash available (with a minimum of $58.8 million to be paid out regardless of the number of claims that are filed by former customers). Joint Decl., ¶ 208. This is not only the largest known settlement ever achieved in a class overbilling case

against a merchant acquirer, but the recovery is believed to be the highest damage percentage ever recovered in such a case. *Id.* at ¶¶ 12, 208-09 (estimating that the $84 million monetary settlement amount represents approximately 42% of the Class's $201.1 million "out-of-pocket" losses).

Current customer Class members will receive their payments automatically while former customer Class members will receive their payments if they return a simple one-page claim form noting their current contact information. *Id.* at ¶ 188. All payments will be issued via check unless the Class member specifically directs the settlement administrator to make their payments electronically via PayPal or Venmo. *Id.* at ¶¶ 192-193.

This unprecedented recovery is particularly strong given the significant risks, challenges, complexities, and expense of continued litigation. For instance, at trial CPAY intended to present the testimony of its founders Matt and Zach Hyman. Joint Decl., ¶ 198. It is plausible that the jury could have believed their story that they had FNBO's preapproval to raise rates and did not intend to mislead their merchants by implementing the disputed fee practices (especially if their industry expert Mr. Moran was permitted to testify that such fee practices are industry standard). *Id.* Additionally, the jury may have decided that CPAY did receive sufficient preapproval from FNBO prior to increasing its fees and thus the disputed fee practices complied in full with the contract (especially since FNBO's corporate representative was set to testify live at trial and had suggested in her deposition that FNBO did provide preapproval). Obviously, if the jury accepted the Hymans' testimony and believed their side of the story, then the Class was likely to be defeated at trial.

In addition to the prospect of losing at trial, Plaintiffs also faced the prospect of losing on appeal on any number of legal grounds. *Id.* at ¶ 199. For instance, CPAY argued that Plaintiffs

failed to plead a valid RICO enterprise and the RICO enterprise they intended to pursue at trial was different than that reflected in the amended complaint. CPAY also contended that it had no liability for fees disclosed in the contract or rate increases disclosed in notices that did not have alleged misrepresentations (e.g., PCI non-compliance fees and TSSNF fees explicitly referenced in the contract and rate increases without stated reasons). *Id.* at ¶ 200. Although this Court denied summary judgment on these issues, a panel of the Eighth Circuit may have decided the issues differently, which could have wiped out any recovery for these charges that comprised more than $125 million of the alleged $201.1 million Class-wide damages and the entire RICO claim.

CPAY also alleged that its contractual class waiver and notice-of-dispute provisions were applicable and enforceable. *Id.* at ¶ 201. This Court disagreed when it denied CPAY's first motion for summary judgment, but an appellate panel may have seen things differently. For example, Class Counsel Webb, Klase & Lemond litigated two cases where courts dismissed claims against payment processors based on the plaintiff-merchants' failure to comply with similar contractual notice provisions. *E.g.*, *Zam & Zam Super Market, LLC v. Ignite Payments, LLC*, 736 Fed. Appx. 274, 277-78 (2d Cir. 2018) (affirming dismissal because merchants failed to provide timely notice of fee disputes); *Cobra Tactical, Inc. v. Payment Alliance Int'l, Inc.*, 315 F. Supp. 3d 1342, 1350-51 (N.D. Ga. 2018) (dismissing for similar reason). Although Class Counsel believe the Court got this issue right in this case, the risk that the Eighth Circuit may have sided with CPAY could not be ignored.

Moreover, CPAY was already pursuing an appeal of the Court's denial of its arbitration motions. Joint Decl., ¶ 202. If this appeal was successful, roughly 20% of the Class (which made up approximately 40% of the Class damages) would have been eliminated.

CPAY, via its expert Mr. Ratner, also argued that the true Class damages were only a fraction of the $201.1 million calculated by Mr. Olsen. *Id.* at ¶ 203. If the jury believed Mr. Ratner over Mr. Olsen in this "battle of the experts," the Class would have surely recovered much less at trial then the proposed Settlement provides.

Finally, CPAY maintained that the evidence adduced after the Class was certified proved that the trial would be consumed by individualized issues such that the Class should be decertified. *Id.* at ¶ 204. Again, although this Court disagreed, CPAY would have pressed this issue throughout trial and on appeal in response to an adverse verdict. If a panel of the Eighth Circuit sided with CPAY, then the entire Class verdict necessarily would have been reversed and the Class would be left with nothing.

While Plaintiffs absolutely believe that these obstacles could be surmounted, they are indicative of the substantial risks that the Class would face if the litigation were to continue to trial and through the appeals process. CPAY's history of appeals in this case, including filing a petition to the United States Supreme Court to review this Court and the Eighth Circuit's class certification decisions, confirms that CPAY was prepared to defend this case through all potential appeals. The Settlement provides considerable monetary relief while allowing Class members to avoid the risks of potential adverse decisions by the jury, this Court in post-trial motions, or on appeal.

The Settlement also provides another significant benefit that would not be available if the litigation were to continue – prompt relief. Proceeding through the pending interlocutory appeal, the trial, and the inevitable subsequent appeals and certiorari petition would add years to the resolution of this litigation and could have added millions in additional expense. "Weighing the uncertainty of relief against the immediate benefit provided in the settlement" leads to the

conclusion that the Settlement is a fair, reasonable, and adequate result for the Class. *In re Wireless Tel.*, 396 F.3d at 933.

B. The Settlement Is the Product of Arm's Length Negotiations by Experienced Counsel and Is Informed by Extensive Discovery and Litigation (Fed. R. Civ. P. 23(e)(2)(B)).

Where the "Settlement is the product of arm's length negotiations conducted by capable counsel with extensive experience in complex class action litigation, the Court begins its analysis with a presumption that the Settlement is fair and should be approved." *Yarrington v. Solvay Pharma., Inc.*, No. 09-CV-2261 (RHK/RLE), 2010 WL 11453553, *7 (D. Minn. Mar. 16, 2010) (citing *Newberg on Class Actions*, § 11:41 (4th ed. 2002)); *also, e.g.*, *CFGenome, LLC v. Streck, Inc.*, No. 4:16-cv-03130, 2020 WL 2750635, *2 (D. Neb. May 11, 2020) (in assessing a class settlement, "[t]he experience and opinion of counsel on both sides may be considered, as well as whether a settlement resulted from arm's length negotiations, and whether a skilled mediator was involved") (citing *DeBoer*, 64 F.3d at 1178).

The Settlement here is the product of extensive, fiercely contested, arm's length negotiations that originally commenced on April 9, 2020, and led to terms being reached on January 17, 2022. Joint Decl., ¶¶ 82-84, 164-65, 175-77; Hughes Decl., ¶¶ 8-15. Throughout such negotiations, the parties were represented by experienced and well-qualified counsel on both sides. Class Counsel have extensive experience prosecuting and resolving class actions and other complex cases, including multiple prior cases against payment processing companies and other financial institutions. Joint Decl., ¶¶ 7-10, 201. Class Counsel were uniquely situated to analyze the strengths and weaknesses of this case, given this vast experience. *Id.*

Moreover, in negotiating the Settlement, Class Counsel were well informed about the facts and law specific to this case, as a result of their pre-filing investigation, their ongoing legal research and investigation, the parties' abundant motion practice, and their extensive discovery

efforts – which included, *inter alia*, consultation with multiple experts, reviewing and analyzing more than 450,000 pages of documents and millions of transaction and fee data records, analyzing over 100 written discovery responses, taking or defending a total of 21 depositions, and researching and analyzing numerous complex legal issues. *See generally* Joint Decl.; *see also supra* Background II. Class Counsel were thus well-situated to evaluate the relative strengths and weaknesses of the parties' positions, and to negotiate a fair, reasonable, and adequate settlement. Moreover, all settlement negotiations except the last round were overseen by experienced class action mediator Hunter Hughes, who has attested to the arm's length nature of the negotiations. Joint Decl., ¶¶ 82-84, 164-65; Hughes Decl., ¶¶ 10, 13.

C. Plaintiffs and the Experienced Class Counsel Have Zealously Represented the Class (Fed. R. Civ. P. 23(e)(2)(A)).

Plaintiffs and Class Counsel have prosecuted this action on behalf of the Class with vigor and dedication for nearly five years. As detailed above, Class Counsel have thoroughly investigated the factual and legal issues involved, conducted extensive discovery, and engaged in substantial litigation of the legal issues in furtherance of prosecuting the claims here. Likewise, Plaintiffs were actively engaged – each produced pertinent documents, responded to written discovery requests, sat for a deposition, and communicated with Class Counsel up to and including evaluating and approving the proposed Settlement. Joint Decl., ¶ 194.

D. The Settlement Treats Class Members Equitably (Fed. R. Civ. P. 23(e)(2)(D)).

Pursuant to the Settlement, all Class members have the opportunity to receive a payment from the settlement fund pursuant to an allocation formula that is well-designed to ensure they will be fairly compensated relative to one another. Settlement, Ex. 1; Joint Decl., ¶¶ 190-91; *see also supra* Background III.B. And while Class members that are former customers are required to submit claims to receive payments, the claim process and claim form are simple and user-

friendly (including the ability to submit claims online via the settlement website or via mail), and having a claim process for former customers is reasonable and appropriate under the circumstances here given that many of them may no longer be in business and given the related practical unavailability of reliable contact and payee information.

E. The Reaction of the Class to the Settlement to Date Has Been Very Positive (*Van Horn* Factor 4).

The deadline to opt-out or object is June 7, 2022. As of May 5, 2022, only three Class members have opted-out since notice of the Settlement was sent, and zero Class members have objected. Sperry Decl., ¶¶ 24-25. Class members that are current customers will receive their payments without taking any action so long as they do not opt out. The deadline for Class members that are former customers to file claims is August 6, 2022. Dkt. 329, ¶ 39; Sperry Decl., ¶ 23. As of May 5, 2022, 4,320 claims have already been filed. Sperry Decl., ¶ 23.

The positive reaction from the Class thus far further supports the conclusion that the settlement is fair, reasonable, and adequate. *E.g.*, *Keil v. Lopez*, 862 F.3d685, 698 (8th Cir. 2017) (describing 14 objections out of 3.5 million class members as "minuscule"); *Swinton*, 454 F. Supp. 3d at 879 (characterizing fact that only 0.0236% of class either opted out or objected to be "insignificant" settlement opposition that weighed in favor of approval). Plaintiffs will provide updated claims, opt-out, and objection numbers, and the parties will submit a proposed final approval order, in advance of the July 25, 2022 final approval hearing.

F. The Remaining Rule 23(e) Factors Support Granting Preliminary Approval, While the Remaining *Van Horn* Factor Is Neutral.

The proposed method of distributing relief is simple and straightforward. Fed. R. Civ. P. 23(e)(2)(C)(ii) (court must consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims"). Class members that are current customers will be automatically paid, while Class members that are former

customers need only submit a short, simple claim form with an updated address to get their payments. Claim forms can be returned via mail or filled out electronically via the settlement website, and there will be a hyperlink in the email notice to the appropriate page on the settlement website for submitting claims. Settlement ¶ 55, Exs. 2C-2D. When payments are ready for distribution, Class members will be given the opportunity to select whether they want to receive their payments via check or electronically via PayPal or Venmo. Settlement ¶¶ 68-69.

Rule 23(e)(2)(C)(iii) requires the Court to consider "the terms of any proposed award of attorney's fees, including timing of payment." Here, the Settlement provides that Class Counsel will seek attorneys' fees and expenses in a total amount not to exceed one-third of the $84 million settlement amount, subject to Court approval. Settlement ¶¶ 80-81. A one-third award is consistent with the normal range awarded in this Circuit. *See, e.g., Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017) (affirming fee equal to one-third of $24 million fund, finding it to be reasonable and in line with other awards in the Eighth Circuit); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (affirming attorneys' fee award of 36% in class action settlement); *Lechner v. Mutual of Omaha Ins. Co.*, No. 8:18cv22, 2021 WL 424421, *2 (D. Neb. Feb. 8, 2021) (granting fee request of one-third and finding it to be typical in class action litigation) (Bataillon, J.); *Ray v. Lundstrum*, Nos. 8:10CV199, 4:10CV3177, 8:10CV332, 2012 WL 5458425, *4-5 (D. Neb. Nov. 8, 2012) (approving fee request of one-third of settlement fund and finding it to be reasonable) (Bataillon, J.).

Class Counsel's fee application is being filed herewith and will be posted on the settlement website as soon as possible. Thus, Class members will have ample opportunity to comment on or object to such fee application under Fed. R. Civ. P. 23(h) prior to the objection deadline and final approval hearing. As with the payments to Class members, any attorneys'

fees and expenses awarded by the Court will be paid from the settlement fund following the effective date of the Settlement.

Next, there are no agreements between the parties other than the Settlement. Fed. R. Civ. P. 23(e)(3) ("the parties seeking approval must file a statement identifying any agreement made in connection with the proposal"); Joint Decl., ¶ 214.

The second *Van Horn* factor, meanwhile, weighs neither for nor against the Settlement. Because there is no evidence or suggestion that CPAY is financially incapable of either paying the Settlement or continuing with this litigation, Defendant's financial condition is neutral here. *Marshall v. National Football League*, 787 F.3d 502, 512 (8th Cir. 2015) (finding the defendant's financial condition to be a neutral factor when the defendant was "in good financial standing, which would permit it to adequately pay for its settlement obligations or continue with a spirited defense in the litigation").

IV. The Court Should Reaffirm Certification of the Class.

If a settlement is reached *before certification*, a court must determine whether to certify the settlement class before it can approve the settlement. *See, e.g.*, *Manual for Complex Litig.,* § 21.632 (4th ed. 2014); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-14 (1997). Here, however, this Court certified the Class nearly two years before the Settlement was reached. Dkt. 142. Specifically, the Court found that the requirements of Rule 23(a) and Rule 23(b)(3) were all met. *Id.* The Eighth Circuit affirmed this ruling and the Supreme Court denied a petition for certiorari to further review it. The Court has also denied a subsequent motion to decertify the Class. Dkt. 297. In granting final approval, the Court should reaffirm the certification of the Class.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval of the Settlement.

Dated: May 6, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2022, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Tyler W. Hudson

CERTIFICATE OF COMPLIANCE

I hereby affirm that the foregoing brief contains 7,624 words, as determined by the word-count function of Microsoft Word, including the caption, all text, headings, footnotes, and quotations, and therefore complies with NECivR 7.1(d).

/s/ Tyler W. Hudson