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 UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND FOR DIRECTION OF NOTICE

Tyler W. Hudson
Eric D. Barton
Melody R. Dickson
WAGSTAFF & CARTMELL, LLP
4740 Grand Avenue, Suite 300
Kansas City, MO 64112
(816) 701-1100
thudson@wcllp.com
ebarton@wcllp.com
mdickson@wcllp.com

E. Adam Webb
Matthew C. Klase
WEBB, KLASE & LEMOND, LLC
1900 The Exchange, S.E., Suite 480
Atlanta, GA 30339
(770) 444-0773
Adam@WebbLLC.com
Matt@WebbLLC.com

Counsel for Plaintiffs and the Class

INTRODUCTION

After four-and-a-half years of fiercely contested litigation – and a mere two weeks before the start of a scheduled class trial – Plaintiffs and Defendant Central Payment Co., LLC ("CPAY") agreed to settle this certified class action. If approved, the Settlement will provide critical monetary relief to the Class, which consists of current and former CPAY merchants that were allegedly overcharged for payment processing services.[1]

Pursuant to the Settlement, CPAY has agreed to establish a settlement fund of up to **$84 million** to pay cash benefits to the 185,883 Class members, as well as to cover notice and administration costs, attorneys' fees and expenses, and service awards. Every current customer will be paid their share automatically and every former customer will be paid their share if they submit a simple claims 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, this Settlement is fair, reasonable, and adequate, and merits preliminary approval.

Additionally, the notice program provided for in the Settlement – which includes direct individual notice to Class members via email and/or U.S. mail and a detailed settlement website – comports with Rule 23, due process, and best practices.

Respectfully, the Court should (1) preliminarily approve the Settlement, (2) direct notice to the Class pursuant to the proposed notice program, (3) reaffirm its prior certification of the Class, (4) reappoint Wagstaff & Cartmell, LLP and appoint Webb, Klase & Lemond, LLC as counsel for the Class (hereinafter "Class Counsel"), (5) reappoint Plaintiffs as the Class

[1] The Settlement is being filed herewith as Exhibit A to the accompanying Joint Declaration of Tyler W. Hudson and Matthew C. Klase ("Joint Decl.").

Representatives, (6) schedule a final approval hearing, and (7) grant the related relief requested herein. For the Court's convenience, a proposed order approved by the parties is filed herewith.[2]

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 credit and debit card payments made by their customers. Plaintiffs allege that CPAY (1) violated 18 U.S.C. § 1962(c) ("RICO") by scheming to fraudulently overbill its customers, (2) fraudulently concealed material facts from its customers concerning its pricing practices, (3) breached the covenant of good faith and fair dealing by engaging in arbitrary, unreasonable, and capricious pricing practices that exceeded its customers' expectations, and (4) breached the terms of the parties' contracts via its pricing practices. *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. Throughout this case, CPAY has fervently denied Plaintiffs' allegations.

II. Procedural History[3]

A. Initial Investigation, Early Litigation, and Discovery.

Following an extensive investigation by counsel that included a thorough 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 straightforward breach of contract action. Joint Decl., ¶¶ 13-23. Plaintiffs alleged that CPAY imposed fees that were not

[2] 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.

[3] An extremely detailed summary of the pleadings, motion practice, appeals, discovery, and settlement negotiations is set forth in the accompanying Joint Declaration of Tyler W. Hudson and Matthew C. Klase.

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 difficult, expensive, and contentious discovery process. *Id.* at ¶¶ 25-34, 36-42, 49-67.

CPAY aggressively opposed providing the discovery that Plaintiffs believed they needed to prove their claims, determine the scope of the subject pricing practices, and ascertain the parameters of the putative class. The parties had many meet and confer sessions on these issues and called upon the Court to resolve disputes they were unable to resolve themselves. *Id.* at ¶¶ 27-28, 31-32, 49-53.

After obtaining and analyzing approximately 35,000 pages of internal CPAY documentation, Class Counsel determined the case should be amended to add claims for RICO violations and fraudulent concealment. *Id.* at ¶¶ 32-35; Dkt. 46. CPAY moved to dismiss these new claims, the first of many motions it filed to narrow the scope of the case. Joint Decl., ¶ 43. After receiving thorough briefing, the Court denied the motion to dismiss. *Id.* at ¶¶ 44-47; Dkt. 87. CPAY then answered the first amended complaint. Dkt. 96.

Meanwhile, the parties continued to press forward with pre-certification discovery. Plaintiffs engaged two experts to help prove the case could be litigated with common evidence and their Rule 23 burdens could otherwise be met: (1) fee and transaction database expert Arthur Olsen and (2) payment processing industry expert Dr. Karl Borden. Joint Decl., ¶¶ 36-40. These experts analyzed the voluminous record (which by this time contained data with *millions* of fee and transaction records for the putative class members), submitted lengthy reports, and were both deposed. *Id.* at ¶¶ 62-64. CPAY, in turn, retained its own expert – payment processing experienced certified public accountant Ian Ratner. *Id.* at ¶ 65. Mr. Ratner issued a detailed report and was deposed. *Id.* at ¶¶ 65-66.

Party depositions were also taken, with CPAY deposing both Plaintiffs and Plaintiffs taking a Rule 30(b)(6) deposition of CPAY. *Id.* at ¶¶ 60-61.

This mountain of pre-certification discovery provided Class Counsel with the evidence they needed to not only evaluate the merits of Plaintiffs' claims but also refine the definition of the Class and seek certification. *Id.* at ¶ 67. On July 30, 2019, Plaintiffs moved for certification of the Class, filing a 60-page brief in support. *Id.* at ¶ 68; Dkts. 88-91. CPAY opposed this motion with a 72-page brief of its own (*id.* at ¶ 70; Dkt. 109) and Plaintiffs replied with a 64-page brief (Joint Decl., ¶ 73; Dkt. 121).

CPAY also moved to strike Dr. Borden's opinions and moved for summary judgment on the Plaintiffs' individual claims, asserting a variety of legal arguments that, if successful, would have ended the litigation. Joint Decl., ¶¶ 71, 74; Dkts. 99, 117. Plaintiffs vehemently opposed these motions. Joint Decl., ¶¶ 73, 75; Dkts. 113, 134.

The combined briefing and evidence submitted on the motions for class certification, to strike, and for summary judgment exceeded well over 1,000 pages. On February 11, 2020, after taking time to digest these voluminous materials, 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. The Court also appointed Tyler Hudson of Wagstaff & Cartmell, LLP as counsel for the Class. Dkt. 142.

B. The Class Certification Appeal, First Mediation, and Merits Discovery.

CPAY promptly sought leave from the Eighth Circuit to appeal the class certification decision. Joint Decl., ¶ 78; Dkt. 146-1. Although Plaintiffs opposed this petition, it was granted. Joint Decl., ¶ 79; Dkt. 148. At CPAY's request, and over Plaintiffs' objection, this Court stayed litigation until the appeal was resolved. Joint Decl., ¶¶ 86-88; Dkts. 159, 162, 169.

While the appeal was pending, the parties commenced their first round of settlement negotiations, working through experienced class action mediator Hunter Hughes. Joint Decl., ¶¶ 82-84. The parties made a good faith effort to reach a Class settlement, exchanging detailed statements and participating in a full-day of mediation, but ultimately remained far apart in negotiations. *Id.*

The parties thereafter briefed and argued the class certification appeal before the Eighth Circuit. *Id.* at ¶¶ 89-96. Recognizing the critical nature of the appeal, Class Counsel retained appellate specialists Gupta Wessler, PLLC to assist with litigating the appeal. *Id.* at ¶ 90. After thorough briefing and argument, which was presented by Mr. Hudson, the Eighth Circuit affirmed this Court's class certification decision in full on December 30, 2020. *Id.* at ¶ 97; *Custom Hair Designs by Sandy, LLC v. Central Payment Co., LLC*, 984 F.3d 595 (8th Cir. 2020).

Demonstrating the aggressiveness that it had shown throughout the case, CPAY did not give up the certification fight. It 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. Plaintiffs devoted substantial resources to opposing these efforts to defeat certification. *Id.* at ¶ 116.

After the stay was lifted in this Court, the parties resumed merits discovery. Plaintiffs served two new sets of requests for production, noticed multiple depositions (including of CPAY founders Matt and Zach Hyman), and served subpoenas on non-parties First National Bank of Omaha ("FNBO") (CPAY's member bank) and TSYS (CPAY's payment processor). *Id.* at ¶¶ 78, 80-81, 100-01. CPAY opposed many of these efforts, resulting in additional meet and confer sessions, and an additional hearing before Magistrate Judge Zwart. *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 FNBO and TSYS, all of which Class Counsel carefully reviewed, coded, catalogued, and analyzed to prepare for depositions and trial. *Id.* at ¶ 99, 102.

Plaintiffs then proceeded to take an additional eight fact witness depositions, specifically CPAY founders Matt and Zach Hyman, former CPAY Sales Director Chris Lombardi, former CPAY Director of Operations Tommy Chang, former CPAY Chief Technology Officer Brian O'Reilly, former CPAY Chief Operating Officer Eric Barth, FNBO Corporate Representative Virginia Wageman, and TSYS Corporate Representative Julie Ortman. *Id.* at ¶¶ 117-24. Given that many of these witnesses were not expected to appear at trial, and this could very well be Plaintiffs' only chance to question them, preparation for these depositions was extensive. *Id.* at ¶ 117.

Merits expert discovery was also voluminous, expensive, and time consuming. Plaintiffs retained two merits experts, Mr. Olsen and certified public accountant and fraud examiner Steve Browne. *Id.* at ¶¶ 126-27. These gentlemen spent months reviewing and analyzing the extensive record (including the many millions of fee and transaction records in CPAY's internal data) and submitted detailed reports. *Id.* at ¶¶ 125, 127-28.

After deposing these experts, CPAY submitted lengthy reports from its own experts – Mr. Ratner and payment processing industry expert Pat Moran. *Id.* at ¶¶ 129-31. Plaintiffs deposed these experts and assisted Mr. Olsen and Mr. Browne to prepare their lengthy rebuttal reports. *Id.* at ¶¶ 133-34, 136. Plaintiffs also retained an additional rebuttal expert, Steve Beene, a veteran of the payment processing field who rebutted Mr. Moran's opinions concerning

industry standards. *Id.* at ¶¶ 134-35. CPAY then deposed all three experts on their rebuttal reports. *Id.* at ¶ 138.

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. This investigation and evidence provided the parties with ample basis to evaluate their claims and defenses and engage in informed settlement negotiations.

C. Class Notice, Additional Motion Practice, and Arbitration Appeal.

While discovery was ongoing, Mr. Olsen used CPAY's data to ascertain the identities of the Class members and Class Counsel retained Epiq Systems ("Epiq") to administer the process of sending notice to the Class members in accordance with Rule 23. Joint Decl., ¶¶ 110-13. After the Court approved the notice plan, Epiq provided individual notice via email and/or mail to 185,932 Class members in accordance with the approved plan. *Id.* at ¶¶ 114-15; Dkt. 268. 49 Class members timely excluded themselves from the Class, leaving 185,883 Class members. Dkt. 268.

The parties engaged in substantial motion practice after the Court's class certification decision was affirmed by the Eighth Circuit. First, CPAY moved to stay the claims of approximately 20 percent of the Class that it claimed were contractually bound to arbitrate their claims and also 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 by the Court. 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). Plaintiffs opposed, CPAY replied, and this Court denied the motion. 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 (and the arbitration appeal) remained unresolved at the time the Settlement was reached. *Id.*

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. Plaintiffs opposed these motions and CPAY replied. 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. CPAY opposed these motions and Plaintiffs replied. Joint Decl., ¶¶ 148-50; Dkts. 254, 263, 270, 282.

As was the case with the prior dispositive motions, the briefing and record on these motions was overwhelming, consisting of thousands of pages. After digesting this information, the Court ultimately entered an order denying all of the motions, indicating it would reconsider certain issues during the trial. Dkt. 297.

D. Trial Preparation, Second Mediation, and Eventual Settlement.

By 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 on the pending motions and denied 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.

The parties agreed to hold a second mediation with Mr. Hughes on January 7, 2022. *Id.* at ¶ 165. Substantial progress was made toward a resolution but the parties ultimately remained too far apart. *Id.* Thus, the parties continued to press forward to trial.

Plaintiffs sought trial depositions from two additional CPAY witnesses, which CPAY opposed, resulting in a CPAY motion for protective order and a decision from Magistrate Judge Zwart 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.

Plaintiffs, meanwhile, were working with a jury consulting firm (Sound Jury Consultants) and had also retained experienced local trial counsel David Domina to assist with the trial of the case. *Id.* at ¶¶ 173-74.

Although the parties were both 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. *Id.* at ¶ 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 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 arms-length, adversarial, and extremely hard-fought. *Id.* at ¶ 178.

After the Court was notified of the Settlement, 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.

The Settlement has averted multiple additional years of complex, highly contentious litigation. *Id.* at ¶ 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.

III. 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); Order Denying Certiorari, *Central Payment Co., LLC v. Custom Hair Designs by Sandy, LLC*, No. 21-51 (U.S. Nov. 1, 2021) (refusing review). 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 (and no less than $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 185,883 Class members are eligible to receive a cash payment under the Settlement. *Id.* at ¶¶ 68-71. The Class members that are current customers will automatically be issued payments without the need to submit a claim. *Id.* at ¶ 68. The Class members that are former customers are eligible to receive cash payments by submitting a simple claim form. Settlement ¶ 69; Ex. 2D (claim form). The precise amount that is actually paid out will depend on the number of valid claims submitted by former customers but, as noted, 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."[4] Settlement, Ex. 1. This allocation method was chosen to ensure that Class members are fairly compensated relative to each other. Joint Decl., ¶¶ 190-91.

Following a competitive bid process, the parties are proposing that Epiq be appointed as settlement administrator. Epiq is a well-known administration firm that has successfully administrated numerous class action settlements and claims processes. Joint Decl., ¶ 213; Dkt. 209-1 (Epiq Experience Brochure). The Court previously appointed Epiq as the administrator of the class notice program. Dkt. 219.

The parties' proposed notice program, which is set forth in section VI of the Settlement, calls for direct individual notice to the Class members. Specifically, all Class members for which an email address is reasonably available in CPAY's records will be sent direct email notice to their last known email address. For Class members for which an email address is not reasonably available in CPAY's records, or for which email notice is attempted but is not successful, notice will be sent 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. Epiq will attempt to locate updated address information for mailed postcard notices that are returned as undeliverable. *Id.*

Notice will also be provided via a settlement website, which will include a detailed long-form notice, key case documents, and additional information. Former customers will be able to electronically submit claims for payments via the settlement website. *Id.* The email, postcard, and long form notices will be substantially in the forms attached as Exhibits 2A-2D and 3 to the

[4] 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.

Settlement. Epiq will also establish and maintain a toll-free telephone line that Class members can call and receive answers to frequently asked questions. *Id.* at ¶ 48.

The email and postcard notices sent to current customers will inform them that they will automatically receive a payment if the Settlement is approved and becomes final. Settlement, Exs. 2A-2B. The email and postcard notices sent to former customers will inform them that they need to submit a claim to receive a payment and will direct them to the settlement website to submit a claim online (via hyperlink in the email notice) or, if they prefer, to download a hard copy claim form. Settlement, Exs. 2C-2D. The postcard notices sent to former customers will also include a hard copy claim form that former customers may tear off, fill out, and return by mail, postage prepaid. *Id.* at Ex. 2D.

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.

Pursuant to the Settlement, Class Counsel may seek, and CPAY will not oppose, an award of attorneys' fees in a total amount of up to one-third of the $84 million settlement

amount, plus reimbursement for their litigation expenses. Settlement ¶¶ 80-81. Class Counsel will also apply for service awards of up to $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. The parties negotiated and reached agreement regarding fees and service awards only after reaching agreement on all other material terms of the Settlement. *Id.* at ¶ 84; Joint Decl., ¶ 184.

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.

ARGUMENT

I. Overview of the Class Settlement Approval Process

Pursuant to Rule 23(e), a class action settlement must be approved by the 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.). By this motion, Plaintiffs respectfully ask the Court to take the first step and enter an order preliminarily approving the Settlement and directing class notice, pursuant to the parties' proposed notice program, under Rule 23(e)(1).

II. The Proposed Settlement Meets the Standards for Preliminary Approval

The approval of a proposed class settlement is within the sound discretion of the Court. *Elliott v. Sperry Rand Corp.*, 680 F.2d 1225, 1227 (8th Cir. 1982) ("[Approval of a class

settlement] is committed to the sound discretion of the trial judge. Great weight is accorded his views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly"). However, given that public policy favors settlement agreements, "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).

At the preliminary approval stage, there is no need to conduct a trial on the merits. *Newberg on Class Actions*, § 13:10 (4th ed. 2002). Rather, the Court merely "makes a preliminary evaluation of the fairness of the settlement." *Cortez*, 2012 WL 12931431 at *1 (citing *Manual of Complex Litig.* § 21.632 (4th ed. 2010)); *also Lechner v. Mutual of Omaha Ins. Co.*, No. 8:18cv22, 2020 WL 5982022, *3 (D. Neb. Oct. 8, 2020) (Bataillon, J.) (same).

Indeed, while evaluating a motion for preliminary approval, courts conduct an initial assessment of the factors that will be evaluated at the final settlement approval stage. Fed. R. Civ. P. 23(e)(1). The ultimate touchstone for that analysis is whether the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Courts in this Circuit must consider four factors in making this determination, 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*, 2020 WL 5982022 at *4)).

Additionally, since 2018, Rule 23(e)(2) has set forth additional criteria for the Court's consideration, some of which overlap considerably with the aforementioned factors. *See* Fed. R. Civ. P. 23(e)(2) (court must 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 the costs, risks, and delay of trial and appeal, the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, the terms of any proposed award of attorney's fees, including timing of payment, and any agreement required to be identified under Rule 23(e)(3); and (d) the proposal treats class members equitably relative to each other). It is "appropriate for the Court to consider the Rule 23(e)(2) factors along with the *Van Horn* factors." *Swinton v. SquareTrade, Inc.*, No. 4:18-CV-00144-SMR-SBJ, 2020 WL 1862470, *5 (S.D. Iowa Apr. 14, 2020).

As discussed below, the Settlement here is absolutely fair, reasonable, and adequate and readily satisifes all applicable standards for preliminary approval.

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. Here, the Settlement makes up to $84 million in cash available. Joint Decl., ¶ 208. The $84 million amount 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, 209.

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 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. These men are practiced salesmen and 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, proposed 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 proposed 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, arms-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. The parties thereafter worked diligently to draft the written settlement agreement and exhibits. Joint Decl., ¶¶ 180-85.

Throughout the 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 cases against payment processing companies and other financial institutions. *Id.* at ¶¶ 7-10, 201.[5] Class Counsel was 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

[5] The qualifications detailed in this memorandum and in the accompanying Joint Declaration also support the addition of Webb, Klase & Lemond as Class Counsel pursuant to Rule 23(g).

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, lending further credence to the arm's length nature of the negotiations. Joint Decl., ¶¶ 82-84, 164-65.

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 four-and-a-half 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 Settlement 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 Remaining Rule 23(e) Factors Support Granting Preliminary Approval, While the Remaining *Van Horn* Factors Are 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 will file their fee application, which will provide the supporting basis for their request, at least 30 days in advance of the deadline for Class members to opt-out or object, and it will be available on the settlement website after it is filed. Thus, Class members can comment on or object under Fed. R. Civ. P. 23(h) prior to the 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 and fourth *Van Horn* factors, meanwhile, weigh 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"). And although Class Counsel is not aware of

any opposition to the Settlement, it is premature to assess this factor at this time, as notice has not yet been distributed. Joint Decl., ¶ 212.

III. The Court Has Already Certified the Class, Appointed the Class Representatives, and Appointed Class Counsel

When a settlement is reached *before certification*, a court must determine whether to certify the settlement class. *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 prior to the Settlement being 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 preliminary approval, the Court should reaffirm the certification of the Class.

The Court should also reappoint Plaintiffs as the Class Representatives. These merchants have gone above-and-beyond the call of duty since this case was filed in service to the Class, including making themselves available for conferences with Class Counsel, gathering and producing all of their written documentation, responding to written discovery, sitting for lengthy depositions and deposition preparation, keeping themselves abreast of the proceedings, preparing to take time away from their business for trial and travel to Nebraska for up to two weeks, and for subjecting themselves to the time, expense, and risk of complex class action litigation. Joint Decl., ¶ 194. They are well-suited to continue in the role as Class Representatives.

The Court should also reappoint Wagstaff & Cartmell, LLP and appoint Webb, Klase & Lemond, LLC as Class Counsel. These firms' attorneys have worked tirelessly on behalf of the Class since the inception of this case and have the resources and experience needed for this critical role. Joint Decl., ¶¶ 4-10.

IV. The Proposed Notice Program Complies with Rule 23 and Due Process

Before a proposed class settlement may be finally approved, the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). Where certification was pursuant to Rule 23(b)(3), the notice must also comply with Rule 23(c)(2)(B), which requires:

> the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B); *see also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (to satisfy due process, the notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

The proposed notice program here (Settlement ¶¶ 51-58, Exs. 2A-2D, 3) meets all applicable standards. The notice program includes direct notice to Class members sent via email and/or first class U.S. Mail, the establishment of a settlement website – where Class members can view the full settlement agreement, the detailed long-form notice, and other key case documents – and the establishment of a toll-free telephone number where Class members can get additional information. Moreover, the proposed forms of notice (Settlement Exs. 2A-2D) inform Class members, in clear and concise terms, about the nature of this case, the Settlement, and their rights, including all of the information required by Rule 23(c)(2)(B). The Court should approve the proposed notice program.

V. The Court Should Schedule a Final Approval Hearing and Related Dates

The next steps in the settlement approval process are to notify Class members of the proposed Settlement, allow members an opportunity to opt out or file objections, and hold a final approval hearing. To those ends, the parties propose the following schedule:

Last day for CPAY to provide the settlement administrator with updated class data	**10 days after entry of preliminary approval order**
Notice deadline	**30 days after entry of the preliminary approval order**
Last day for Plaintiffs and Class Counsel to file motion for final approval of the Settlement and motion for attorneys' fees, expenses, and service awards	**60 days after entry of the preliminary approval order**
Opt-out/objection deadline	**90 days after entry of the preliminary approval order**
Last day for the parties to file any responses to objections and any replies in support of final settlement approval and/or application for fees, expenses, and service awards	**14 days before final approval hearing**
Final approval hearing	**[TBD]**
Claims deadline	**150 days after entry of the preliminary approval order**

CONCLUSION

For the reasons set forth above and in the accompanying materials, Plaintiffs and Class Counsel respectfully request that the Court enter an order: (1) granting preliminary approval of the proposed Settlement; (2) reaffirming certification of the Class; (3) reappointing Plaintiffs as Class Representatives; (4) reappointing Wagstaff & Cartmell, LLC and appointing Webb, Klase & Lemond, LLC as Class Counsel; (5) approving the proposed notice program, including the proposed forms of notice, and directing that notice be disseminated pursuant to such notice program and Federal Rule 23(e)(1); (6) appointing Epiq as settlement administrator and directing Epiq to carry out the duties and responsibilities of the settlement administrator specified in the settlement; (7) setting deadlines for Class members to request exclusion from the Class and to

object to the settlement, and for Class members that are former customers to submit claims for settlement payments; (8) staying all non-settlement-related proceedings in this lawsuit pending final approval of the Settlement; and (9) scheduling a final approval hearing and related dates in connection with the final approval of the Settlement pursuant to Federal Rule 23(e)(2).

The sooner that the order is entered, the sooner notice (and eventually, much needed cash relief) can be distributed to the small business Class members, many of which have struggled with the COVID-19 pandemic.

Dated: March 4, 2022

Respectfully submitted,

WAGSTAFF & CARTMELL, LLP

/s/ *Tyler W. Hudson*
Tyler W. Hudson MO#53585
Eric D. Barton MO#53619
Melody R. Dickson MO#61865
4740 Grand Avenue, Suite 300
Kansas City, MO 64112
(816) 701-1100
thudson@wcllp.com
ebarton@wcllp.com
mdickson@wcllp.com

/s/ *Matthew C. Klase*
E. Adam Webb (Ga. Bar No. 743910)
Matthew C. Klase (Ga. Bar. No. 141903)
WEBB, KLASE & LEMOND, LLC
1900 The Exchange, S.E.
Suite 480
Atlanta, GA 30339
(770) 444-0773
Adam@WebbLLC.com
Matt@WebbLLC.com

Counsel for Plaintiffs and the Class

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 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 8,430 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