

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

LISA HOLT, on behalf of herself and	)	
All others similarly situated,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:19-CV-00629-FJG
	)	
COMMUNITYAMERICA	)	
CREDIT UNION,	)	
	)	
Defendant.	)	

**ORDER PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT,  
CERTIFYING THE CLASSES, APPOINTING CLASS COUNSEL,  
DIRECTING NOTICE, AND SETTING DATE FOR FINAL APPROVAL HEARING**

Currently pending before the Court is Defendant’s Motion to Dismiss (Doc. # 20), and the plaintiff’s Motion for Preliminary Approval of Class Action Settlement, Certification of the Classes, Appointment of Class Counsel, Direction of Notice and Setting of Date for Final Approval Hearing (Doc. # 41).

Plaintiff Lisa Holt and Defendant Community America Credit Union, by their respective counsel, have submitted a Settlement Agreement and Release (the “Settlement Agreement” or the “Settlement”) to this Court and have applied under Rule 23 of the Federal Rules of Civil Procedure for an order: (1) preliminarily approving the terms and conditions set forth in the Settlement Agreement, (2) certifying the Classes for purposes of providing notice to Class Members, (3) appointing Class Counsel; (4) approving the form and method of notice to Class Members, and (5) scheduling a Final Approval Hearing to consider final approval of the Settlement Agreement. The Court has given due consideration to the terms of the Settlement Agreement, the exhibits to the

Settlement Agreement, the motion and suggestions in support of preliminary approval of the Settlement, and the record of proceedings, and now finds that the proposed Settlement should be preliminarily approved, conditionally certifies the Classes, appoints Class Counsel, approves the form and method of notice to Class Members, and sets a date for a final hearing on whether the Settlement is fair, reasonable and adequate to the Classes.

**ACCORDINGLY, IT IS HEREBY ORDERED:**

1. Terms capitalized herein and not otherwise defined shall have the meanings ascribed to them in the Settlement Agreement.
2. This Court has jurisdiction over the subject matter of this lawsuit and jurisdiction over Plaintiff and Defendant in the above-captioned case (the “Parties”).

**Preliminary Approval**

3. Federal Rule of Civil Procedure 23(e) requires court approval of class action settlements. In general, the approval process involves three stages: (1) notice of the settlement to the class after “preliminary approval” by the court; (2) an opportunity for class members to opt out of, or object to, the proposed settlement; and (3) a subsequent hearing at which the court grants “final approval” upon finding that the settlement is “fair, reasonable, and adequate,” after which judgment is entered, class members receive the benefits of the settlement, and the defendant is released. Fed. R. Civ. P. 23(e)(1)–(2), (4)–(5).

4. In deciding whether to grant “preliminary approval” to a proposed settlement, the Court evaluates two issues: (1) whether “the court will likely be able to” grant final approval to the settlement as a fair, reasonable, and adequate compromise;

and (2) whether “the court will likely be able to” certify the class for purposes of entering judgment on the settlement. Fed. R. Civ. P. 23(e)(1)(B).

*The proposed Settlement is fair, reasonable and adequate.*

5. “Settlement agreements are generally encouraged, and are presumptively valid.” Huyer v. Wells Fargo & Co., 314 F.R.D. 621, 626 (S.D. Iowa 2016) (citing In re Uponor, Inc., 716 F.3d 1057, 1063 (8th Cir. 2013)). “A strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor.” Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1148 (8th Cir. 1999) (quoting Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1, 921 F.2d 1371, 1383 (8th Cir. 1990)). This presumption is particularly strong “in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.” Cohn v. Nelson, 375 F. Supp. 2d 844, 852 (E.D. Mo. 2005). And the presumption is even stronger where the settlement is the product of arm’s-length negotiations facilitated by a mediator. Huyer, 314 F.R.D. at 626. The “guiding principle” is that “a class action settlement is a private contract negotiated between the parties” and thus the Court’s review is limited to ensuring “that the agreement is not the product of fraud or collusion and that, taken as a whole, it is fair, adequate, and reasonable to all concerned.” Marshall v. National Football League, 787 F.3d 502, 509 (8th Cir. 2015) (quoting In re Wireless Tel Fed. Cost Recovery Fees Litig., 396 F.3d 922, 934 (8th Cir. 2005)). A court’s decision on fairness will be affirmed absent a clear abuse of discretion. Van Horn v. Trickey, 840 F.2d 604, 607 (8th Cir. 1988).

6. In the Eighth Circuit, courts use four factors, commonly known as the Van Horn factors to evaluate the fairness of a proposed settlement, along with additional

factors recently codified in the 2018 amendment to Federal Rule of Civil Procedure 23(e)(2). Van Horn, 840 F.2d at 607; Swinton v. SquareTrade, Inc., No. 4:18-CV-00144-SMR-SBJ, 2020 WL 1862470, at \*5 (S.D. Iowa Apr. 14, 2020) (holding that it is “appropriate for the Court to consider the Rule 23(e)(2) factors along with the Van Horn Factors.”); In re Pre-Filled Propane Tank Antitrust Litig., No. 14-02567-MD-W-GAF, 2019 WL 7160380, at \*1 (W.D. Mo. Nov. 18, 2019). The four Van Horn factors are: (1) the merits of the plaintiffs’ case weighed against the terms of the settlement; (2) the defendants’ financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. Van Horn, 840 F.2d at 607. The additional Federal Rule of Civil Procedure 23(e)(2) factors are:

- (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.

No one factor is determinative, but the “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.3d at 607.

7. All of the Van Horn factors have been met. The Second Amended Class Action Complaint (the “Complaint”) alleged that Defendant assessed overdraft fees, non-sufficient funds fee and “Unspecified Transfer” fees against its members in breach

of Defendant's contract. See ECF No. 29-1 at 1. Plaintiff also brought claims for breach of the duty of good faith and fair dealing and unjust enrichment. *Id.* Plaintiff requested restitution of improper fees and actual damages, among other remedies. *Id.* at 30-31. The Settlement Agreement is fair, reasonable and adequate because it provides class-wide relief in the form of direct, cash payments to Class Members, which is precisely the type of relief that Plaintiff sought on behalf of herself and the Classes in this lawsuit. Second, Defendant, a credit union represented by sophisticated counsel, is able and has already agreed to fund the \$2,325,000 settlement (the "Settlement Fund") and forgive uncollected Multiple NSF Fees, "Authorize Positive Purportedly Settle Negative" (APPSN) Overdraft Fees, or Unspecified Transfer Fees that were assessed on members of the Classes but were not paid in the amount of \$753,436.00 (the "Uncollected Fees"), representing a total settlement value of \$3,078,436. Third, the complexity and expense of further litigation also weigh in favor of preliminarily approving the Settlement: in the absence of the Settlement, the parties would have engaged in extensive motion practice, including a possible appeal, and further discovery. Fourth, any objections will be heard by the Court at the Final Approval Hearing.

8. The additional Federal Rule of Civil Procedure 23(e)(2) factors have also been met. First, Plaintiff has participated in this litigation since its inception in order to achieve relief for herself and the Classes, and Class Counsel has achieved this desired result. Second, the Settlement is the result of arm's-length negotiations among experienced counsel on both sides, following almost a year of motion practice, discovery, a day-long mediation before an experienced mediator, and settlement negotiations. Third, the Settlement Fund plus forgiveness to all Class Members of any

Uncollected Overdraft Fees appears to be adequate when considering the substantial costs, risks, and delay of proceeding to a trial or a possible appeal. Furthermore, Class Members' pro rata portions of the Settlement Fund will be conveniently credited directly into their checking accounts (if they are current members of Defendant) or mailed in the form of a check (if they are not) without the need to submit a claim form. Fourth, any award of attorneys' fees will be subject to the review and approval of this Court at the Final Approval Hearing. And because Plaintiff's motion for attorneys' fees will be made prior to the Class Members' deadlines to object to or exclude themselves from the Settlement, Class Members will have the opportunity to review the attorneys' fees before deciding whether or not to opt out of or object to the Settlement. Finally, the proposed distribution of the Settlement Fund also appears preliminarily fair, reasonable, and adequate because it distributes the settlement funds pro rata to Class Members based on the amount of disputed fees they were charged. For all of these reasons, the Court finds that it "will likely be able to" grant final approval under Fed. R. Civ. P. 23(e)(2) and that preliminary approval is therefore warranted so that notice of the Settlement can be disseminated to the Classes.

*The Court is likely to certify the Classes for judgment on the Settlement.*

9. In deciding whether the court "will likely be able to certify" the classes for purposes of entering judgment on a settlement, the Court evaluates whether the proposed classes meet the four requirements of Rule 23(a) and any one of the requirements of the subsections of Rule 23(b), in this case, subsection 23(b)(3). See, e.g., In re Pre-Filled Propane Tank Antitrust Litig., 2019 WL 7160380, at \*3. Under Rule 23(a), the proposed class must satisfy the four "requirements of numerosity,

commonality, typicality, and fair and adequate representation.” Luiken v. Domino’s Pizza, LLC, 705 F.3d 370, 372 (8th Cir. 2013).

10. Numerosity is satisfied if there are merely twenty or more class members. Ark. Educ. Ass’n v. Bd. of Educ., 446 F.2d 763, 765 (8th Cir. 1971) (twenty class members sufficient to satisfy numerosity). Here, the APPSN Class, the Multiple NSF Fee Class, and the Unspecified Transfer Fee Class consist of 24,022, 20,764, and 10,530 current and former members, respectively; therefore, the numerosity requirement is satisfied.

11. Commonality requires only that there are common issues of law or fact and “is easily satisfied in most cases.” Hand v. Beach Entm’t KC, LLC, No. 4:18-CV-00668-NKL, 2020 WL 3163672, at \*26 (W.D. Mo. Apr. 27, 2020). Commonality exists if the claims “depend upon a common contention” that “is capable of classwide resolution,” such that “determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). Here, Plaintiff and the Class Members allege the same injury – the assessment of improper overdraft fees, insufficient funds fees and “Unspecified Transfer” fees – and the controversy turns on core legal issues of contractual interpretation common to all Class Members arising from Defendant’s fee assessment practices. Therefore, the commonality requirement is met.

12. Typicality just “means that there are ‘other members of the class who have the same or similar grievances as the plaintiff.’” Alpern v. UtiliCorp United, Inc., 84 F.3d 1525, 1540 (8th Cir. 1996). It is “fairly easily met,” and “[f]actual variations in the individual claims will not normally preclude class certification if the claim arises from the

same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory.” Postawko v. Mo. Dep’t of Corr., 910 F.3d 1030, 1039 (8th Cir. 2018).

Here, again, Plaintiff and the Class Members allege the same injury – the assessment of improper overdraft fees, insufficient funds fees and “Unspecified Transfer” fees so the typicality requirement is met.

13. “The adequacy requirement is met where: ‘1) the representatives and their attorneys are able and willing to prosecute the action competently and vigorously; and 2) each representative’s interests are sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge.’” Hand, 2020 WL 3163672, at \*28 (quoting Carpe v. Aquila, Inc., 224 F.R.D. 454, 458 (W.D. Mo. 2004)). Plaintiff and Class Counsel have competently and vigorously prosecuted this action on behalf of Plaintiff and the Classes, resulting in the Settlement. Plaintiff’s interests in this litigation are aligned to those of other Class Members because they were assessed the fees and are subject to the bank account agreements, and will therefore benefit in a like manner. The adequacy requirement is met.

14. The requirements of Rule 23(b)(3) are satisfied if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” “[T]he predominance requirement is relaxed in the settlement context.” Hand, 2020 WL 3163672, at \*28. In this Circuit, predominance is satisfied “if the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.” Stuart v. State Farm Fire & Cas. Co., 910 F.3d 371, 374–75 (8th Cir.

2018) (quotation and citation omitted). The test is not whether any individual issues exist, but is simply whether one or more of the central issues in the case is common to the class.” Id. (citation omitted). Here, the core issue of contractual interpretation is a “common, aggregation-enabling issue” to Class Members who were assessed an overdraft fee, non-sufficient funds fee, or “Unspecified Transfer” fee by Defendant. Furthermore, a class action is the superior method of adjudicating the present claims for all parties as Defendant’s members need not bring individual actions to obtain relief and Defendant can resolve all members’ claims through the Settlement. For these reasons, the predominance and superiority requirements are met.

15. The Court therefore finds that the requirements for preliminary approval have been met and conditionally certifies the following Classes for purposes of issuing notice of the Settlement:

- a. The “APPSN Fee Class” shall consist of those members of Defendant who were assessed fees that Defendant charged and did not refund on signature Point of Sale debit card transactions from December 19, 2014 to July 1, 2019 where there was a sufficient available balance at the time the transaction was authorized, but an insufficient available balance at the time the transaction was presented to Defendant for payment and posted to a member’s account.
- b. The “Multiple NSF Fee Class” shall consist of those members of Defendant who were assessed nonsufficient funds fees that were assessed and not refunded from August 6, 2015 to July 1, 2019 for

ACH and check transactions that were later re-submitted by a merchant after being rejected for insufficient funds.

- c. The “Unspecified Transfer Fee Class” shall consist of those members of Defendant who paid overdraft fees described as an “Unspecified Transfer Fee” on a member’s periodic monthly statement that were assessed and not refunded from October 23, 2014 through June 30, 2019.

16. The APPSN Class, the Multiple NSF Fee Class and the Unspecified Transfer Class are collectively referred to herein as the “Classes.”

17. The Court appoints Cohen & Malad, LLP, Branstetter, Stranch & Jennings, PLLC, and Kaniel PLLC as Class Counsel, and appoints Plaintiff as Class Representative. Fed. R. Civ. P. 23(g).

### **Notice to Class Members**

18. Once the court finds that the requirements for preliminary approval are met, it “must direct notice in a reasonable manner to all class members” to inform them of the proposed settlement. Fed. R. Civ. P. 23(e)(1)(B). Notice may be given by “United States mail, electronic means, or other appropriate means.” Fed. R. Civ. P. 23(c)(2)(B).

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).

19. The proposed Notice of Pending Class Action and Proposed Settlement in the form attached to the Settlement Agreement as Exhibit 1 (the “Long Form Notice”) and the Court Ordered Notice of Class Action Settlement in the form attached to the Settlement Agreement as Exhibit 2 (the “Notice”) meet the requirements of Federal Rule of Civil Procedure 23(c)(2)(B). Furthermore, the manner of distribution of (1) the Long Form Notice by posting to the settlement website and (2) the Notice (a) by e-mail to Class Members who are current members of Defendant and have agreed to receive notices from Defendant electronically or (b) by first class United States mail to Class Members who are not current members of Defendant or have not agreed to receive notices from Defendant electronically, is hereby approved by this Court as the best notice practicable to the Classes. The form and manner of notice proposed in the Settlement comply with Rules 23(c) and (e) and the requirements of Due Process.

20. Class Counsel shall cause the Settlement Administrator e-mail or mail to each Class Member no later than thirty (30) days from the date of this Order, a copy of the Notice as set forth in the Settlement. The date on which the Notice is sent is referred to herein as the “Notice Date.”

### **Class Member Responses**

21. A Class Member who wishes to exclude himself or herself from the Settlement Agreement, and from the release of claims and defenses provided for under the terms of the Settlement Agreement, shall submit an Exclusion Letter by mail to the Settlement Administrator. For an Exclusion Letter to be valid, it must be postmarked no later than thirty (30) days after the Notice Date (the “Bar Date to Opt Out”). Any

Exclusion Letter shall identify the Class Member, state that the Class Member wishes to exclude himself or herself from the Settlement Agreement, and shall be signed and dated. Class Members who submit a timely and valid request for exclusion from the Settlement shall not participate in and shall not be bound by the Settlement. Class Members who do not timely and validly opt out of the Settlement in accordance with the Notice shall be bound by all determinations and judgments in the action concerning the Settlement.

22. Not more than seven (7) days after the Bar Date to Opt Out, Class Counsel shall file a Notice of Opt Outs, listing the names of all persons or entities who timely and validly excluded themselves from the Settlement.

23. Class Members who have not excluded themselves shall be afforded an opportunity to object to the terms of the Settlement. To be valid and considered by the Court, the objection must be in writing and sent by first class mail, postage pre-paid, to the Settlement Administrator. The objection must be postmarked no later than thirty (30) days after the Notice Date (the "Bar Date to Object"), and must include (a) the objector's name, address, telephone number, the last four digits of his or her member number or former member number with Defendant, and the contact information for any attorney retained by the objector in connection with the objection or otherwise in connection with this case; (b) a statement of the factual and legal basis for each objection and any exhibits the objector wishes the Court to consider in connection with the objection; and (c) a statement as to whether the objector intends to appear at the Final Approval Hearing, either in person or through counsel, and, if through counsel, identifying the counsel by name, address, and telephone number. Any lawyer intending to appear at

the Final Approval Hearing must be authorized to represent a Class Member, must be duly admitted to practice law before the U.S. District Court for the Western District of Missouri, and must file a written appearance. Copies of the appearance must be served on Class Counsel and counsel for Defendant in accordance with the Federal Rules of Civil Procedure. Any Class Member who does not make his or her objection known in the manner provided in the Settlement Agreement, Long Form Notice and Notice shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness or adequacy of the Settlement.

24. Class Counsel shall file all objections received and any response thereto at least seven (7) days prior to the date of the Final Approval Hearing.

**Plaintiff's Motion for Attorneys' Fees, Plaintiff's Motion for Final Approval of the Settlement, and Final Approval Hearing**

25. Class Counsel shall file a motion for approval of attorneys' fees and costs, the Settlement Administrator's costs, and Plaintiff's service award, along with any supporting materials, fifteen (15) days after the Notice Date.

26. After the time for objections and opt-out requests has passed, the Court will consider whether to grant final approval, taking into account any objections raised by Class Members. Fed. R. Civ. P. 23(e)(2). Class Counsel shall file a motion for final approval of the Settlement fifteen (15) days after the Bar Date to Opt Out and the Bar Date to Object. A final approval hearing (the "Final Approval Hearing") shall be held before the undersigned at 12:00 o'clock, on November 20, 2020, at the Charles Evans Whittaker U.S. Courthouse, 400 E. 9<sup>th</sup> Street, Kansas City, Missouri 64106 for the purpose of: (a) determining whether the Settlement is fair, reasonable, and adequate and should be finally approved; (b) determining whether a Final Approval Order should

be entered; and (c) considering Class Counsel's application for an award of attorneys' fees pursuant to Rule 23(h).

27. If the Settlement does not become effective, the Settlement and all proceedings had in connection therewith shall be without prejudice to the status quo ante rights of the Parties, and all orders issued pursuant to the Settlement shall be vacated.

28. The Court may adjourn the date and/or time of the Final Approval Hearing without further notice to the Class Members, and retains jurisdiction to consider all further applications arising out of or connected with the proposed Settlement.

Accordingly, the Motion to Dismiss for Failure to State a Claim is hereby **DENIED** (Doc. # 20) and the Motion for Preliminary Approval of Class Action Settlement, Certification of the Classes, Appointment of Class Counsel, Direction of Notice and Setting of Date for Final Approval Hearing is hereby **GRANTED** (Doc. # 41).

**SO ORDERED.**

Dated: September 4, 2020  
Kansas City, Missouri

**/S/ FERNANDO J. GAITAN, JR.**  
Fernando J. Gaitan, Jr.  
United States District Judge