IN THE IOWA DISTRICT FOR JOHNSON COUNTY

ELISALYNN CLARK, on behalf of herself and all others similarly situated, Plaintiff, v. **HILLS BANK AND TRUST COMPANY**, Defendant.	)	**Case No. LACV080753**

ORDER APPROVING CLASS ACTION SETTLEMENT AND AWARDING ATTORNEYS' FEES, EXPENSES AND CLASS REPRESENTATIVE SERVICE AWARD

On October 9, 2020, the Court entered an Order certifying two Classes, appointing the Class Representative and class counsel for the Classes, granting Preliminary Approval to the proposed Settlement, directing Notice of the Settlement to the Settlement Class, and scheduling a hearing to consider whether to grant Final Approval to the Settlement and to consider the application for attorneys' fees, expenses, and a service award, as well as distribution of the Net Settlement Fund to the Settlement Class. Plaintiff Clark, by class counsel, has now moved for Final Approval of the Settlement and for approval of the payment of attorneys' fees, expenses, and a service award from the Settlement Fund. The Court has given due consideration to the terms of the Settlement, the exhibits to the Settlement, the motion and memorandum and declaration in support, and the record of proceedings, and now finds that the proposed Settlement should be and hereby is **GRANTED**.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Terms capitalized herein and not otherwise defined shall have the meanings ascribed to them in the Settlement.

2. This Court has jurisdiction over the subject matter of this lawsuit and jurisdiction over Plaintiff and Defendant in the above-captioned case.

Preliminary Approval

3. Iowa Rule of Civil Procedure 1.271 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. The current motion addresses the last stage: "final approval."

4. Iowa Rule of Civil Procedure 1.271(4) does not specify a particular standard concerning approval of class action settlement agreements. The Iowa Supreme Court, relying on federal case law construing Federal Rule of Civil Procedure 23(e), has held that the court should "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." *City of Dubuque v. Iowa Trust*, 587 N.W.2d 216, 222 (1988) (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank*, 55 F.3d 768, 785 (3rd Cir. 1995)). "In other words, the court must determine whether the settlement is fair, reasonable and adequate." *Id*. However, in making this determination, the court must keep in mind that "voluntary settlement of legal disputes should be encouraged, with the terms of settlement not inordinately scrutinized …." *Id*. at 221 (quoting *Fees v. Mutual Fire & Auto. Ins. Co.*, 490 N.W.2d 55, 58 (Iowa 1992)).

5. Although the Iowa Supreme Court has not specifically done so, many courts have developed multi-factor tests for considering whether a class action settlement is "fair, reasonable,

and adequate." William B. Rubenstein, Newberg on Class Actions § 13:48 (5th ed.). Courts evaluating a proposed settlement often use several factors, none of which is dispositive, to weigh whether the settlement is "fair, reasonable, and adequate." For example, in the Eighth Circuit, courts use four factors, commonly known as the *Van Horn* factors, along with additional factors recently codified in the 2018 amendment to Federal Rule of Civil Procedure 23(e)(2), to evaluate whether the court "will likely be able to" grant final approval to a settlement as being "fair, reasonable, and adequate." *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988); *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.").

The proposed Settlement is fair, reasonable, and adequate.

6. "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)). 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. Nat'l 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)).

7. 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. The Court finds these factors useful in evaluating the current settlement under Iowa Rule of Civil Procedure 1.271(4). All of the *Van Horn* factors support approval of the Settlement.

The Amended Petition alleged that Defendant assessed overdraft fees, and non-sufficient funds fees against its members in breach of Defendant's contract and in violation of Iowa law. The Settlement Agreement is fair, reasonable, and adequate because it provides class-wide relief in the form of direct payments to Settlement Class Members, which is precisely the type of relief that Plaintiff sought on behalf of herself and the Settlement Class in this lawsuit. The Settlement provides meaningful compensation, estimated to be 40% of the most likely recoverable damages. Second, Defendant, a bank represented by sophisticated counsel, is able to make the payments in the total amount of $740,000 to fund the Settlement, plus the payment of up to an additional $30,000 for Notice and administration expenses. 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, after Notice to the Settlement Class as directed by the Court, no Class member has objected to the Settlement or any part of it.

8. The additional Federal Rule of Civil Procedure 23(e)(2) factors also support preliminary approval. First, Plaintiff has participated in this litigation since its inception in order to achieve relief for herself and the Settlement Class, 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 motion practice, discovery, mediation, and further settlement negotiations. Third, the Settlement Fund appears to be adequate when considering the substantial costs, risks, and delay of proceeding to a trial or a possible appeal. Furthermore, Settlement Class Members' pro rata portions of the Settlement Fund will be conveniently delivered by direct deposit or mailed in the form of a check without the need to submit a claim form. Fourth, as set forth below the Court finds the requested award of attorneys' fees is reasonable. Finally, the proposed

distribution of the Settlement Fund also is fair, reasonable, and adequate because it distributes the Settlement funds pro rata to Settlement Class Members based on the number of disputed fees they were charged. For all of these reasons, the Court finds that the Settlement is "fair, reasonable, and adequate," and grants final approval. The Court reiterates and reaffirms is prior certification of the two Classes as set forth in the Preliminary Approval Order for purposes of entering judgment on the Settlement. The Court finds that Notice of the Settlement to the Settlement Class members was the best notice practicable and complied with the requirements of due process.

The requested attorneys' fees, expenses, and service award are reasonable and approved.

9. Class Counsel has requested that from the Settlement Fund they be paid $246,666.33 in attorneys' fees (33.33% of the Settlement Fund) and $42,315.50 in expenses. In addition, class counsel has requested that the Class Representative be paid from the Settlement Fund a service award in the amount of $10,000. Finally, class counsel has requested that the Court approve the method for distributing the Net Settlement Fund to the Settlement Class Members. For the reasons set forth below, the Court approves each of class counsel's requests.

Attorneys' Fees

10. Iowa Rule of Civil Procedure provides that the Court award attorneys' fees to class counsel where the class has made a recovery. This case, because there is no statutory basis for recovery of attorneys' fees directly from Defendant, is what is known as a common fund case in which it is appropriate for the Court to award a percentage of the total amount of settlement as payment of attorneys' fees to class counsel. *Johnston v. Comerica Mortg. Corp*., 83 F.3d 241, 246 (8th Cir. 1996). It is appropriate to award the contractually agreed upon percentage of one-third to Class Counsel as attorneys' fees. *King v. Armstrong*, 518 N.W.2d 336, 338 (Iowa 1994) (upholding the award of a 50% contingent attorney fee in a class action that settled for $65,000 because the

contingent fee agreement provided for such payment.). Iowa Rule of Civil Procedure 1.275(5), sets forth factors for the Court to consider in awarding attorneys' fees, all of which support the fees requested by class counsel:

a. The time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered.

b. Results achieved and benefits conferred upon the class.

c. The magnitude, complexity, and uniqueness of the litigation.

d. The contingent nature of success.

…

f. Appropriate criteria in the Iowa Rules of Professional Conduct.

11. Further, the criteria set forth in Rule 32:1.5 of the Iowa Code of Professional Responsibility also support the award of the requested fees. Rule 32:1.5 identifies the following relevant factors:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

12. Under the "common fund" doctrine, class counsel is entitled to an award of reasonable attorneys' fees from the settlement proceeds in a class action. *In re Iowa Ready-Mix Concrete Antitrust Litig.*, No. C 10-4038-MWB, 2011 WL 5547159, at *1 (N.D. Iowa Nov. 9, 2011) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole")); *see also* Fed. R. Civ. P. 23(h). The common fund doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense." *Boeing*, 444 U.S. at 478.

13. As to the appropriate method for determining fees after a class action settlement, "[i]t is well established in [the Eighth] Circuit that a district court may use the 'percentage of the fund' methodology to evaluate attorney fees in a common-fund settlement." *Iowa Ready-Mix Concrete,* 2011 WL 5547159, at *1 (citing *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999); *Flynn v. Sprint Commc'ns Co. L.P.*, No. 4:11-CV-00572-RP-TJS, 2012 WL 13026882, at *2 (S.D. Iowa Dec. 7, 2012) (same); *In re Life Time Fitness, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 847 F.3d 619, 623 (8th Cir. 2017) (finding district court properly "use[d] the percentage-of-the-benefit method to calculate the fee award"). Indeed, in common fund cases, the percentage of the benefit approach is "recommended." *See Johnson v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) (approving percentage method of awarding fees); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (same).[1] The percentage of the benefit approach aids

[1] A court has discretion to use the percentage-of-the-benefit method or the lodestar cross-check method in determining a fee, but the percentage-of-the-benefit method better aligns counsel

litigants and the courts because it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 120 (2d. Cir. 2005); *see also Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (percentage of fund is "a method of more closely aligning the lawyer's interests with those of his client by giving him a stake in a successful outcome"). "[U]nder the percentage approach, the class members and the class counsel have the same interest—maximizing the recovery of the class." Silber and Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel's Response*, 17 Rev. Litig. 525, 534 (Summer 1998).

14. Finally, although the Eighth Circuit has not formally established fee-evaluation factors, it has approved consideration of several, none of which is determinative. Specifically, in *Caligiuri*, the Eighth Circuit held that it was appropriate in evaluating the fee to look at various factors, including: (1) the benefit conferred on the class; (2) the risk to which plaintiffs' counsel was exposed (i.e., whether their fee was fixed or contingent); (3) the difficulty and novelty of the legal and factual issues of the case; (4) the skill of the lawyers, both plaintiffs' and defendants'; (5) the reaction of the class; and (6) the comparison between the requested attorney fee percentage and percentages awarded in similar cases. 855 F.3d at 866. Evaluation of these factors assists a court in determining a reasonable fee. *Id.*

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and the class and encourages the most efficient resolution of the litigation. *Life Time Fitness,* 847 F.3d at 622. Courts in the Eighth Circuit routinely approve lodestar cross-checks where the fee awarded is as high as 5.6 times the lodestar incurred. In the Eighth Circuit, courts routinely approve fee awards that amount to 2 to 5 times the lodestar incurred. *Nelson v. Wal–Mart Stores, Inc.*, No. 05-cv-000134, 2009 WL 2486888, at *2 (E.D. Ark. Aug. 12, 2009) (approving multiplier of 2.5 and citing cases within the Eighth Circuit approving multipliers of up to 5.6). Here, it is clear that even when checking the requested fee using the lodestar, the requested fee is reasonable as it amounts to a multiplier of 0.82—meaning that Class Counsel incurred a higher lodestar in this matter than they are seeking reimbursement for. Joint Decl. ¶ 23 (showing time broken down by firm with lodestar totaling $298,858.00).

15. Here, the Court finds that the relevant factors support awarding class counsel the requested 33.33% of the Settlement Fund, which is $246,666.33.

16. First, the benefit conferred by the Settlement is substantial and valued at $740,000, plus an additional $30,000 in Notice and administration expenses and changes to Defendant's disclosures regarding the challenged fees. This represents 40% of the most likely recoverable damages in this case, and it will be distributed directly to Settlement Class Members, with no need to submit a claim, and no reversion of any funds to Defendant. This factor supports granting the requested fee. *Caligiuri*, 855 F.3d at 866.

17. Second, the risks of the litigation for class counsel were high. Class counsel took this case on a 100% contingency basis, meaning that class counsel labored and advanced their own funds to prosecute the case all at the risk of never being paid for their work or reimbursed for their expenses. Class counsel devoted their time and energy to this matter, instead of pursuing other income, all at the risk of never getting paid and, at best, being paid at some point potentially many years down the road. Had Defendant prevailed on the merits, on class certification, or on appeal, class counsel might have recovered nothing for the time and expense they invested in representing the Settlement Class. *Id.* This factor supports granting the requested fee. *Caligiuri*, 855 F.3d at 866.

18. Third, this case involved complexities of bank processing and law that are novel and evolving. To even be able to identify the alleged inappropriate fees requires specialized knowledge and skill, as do the theories surrounding the alleged fees, not to mention the specialized knowledge of class action procedure required to achieve certification, let alone settlement. This factor supports granting the requested fee. *Caligiuri*, 855 F.3d at 866.

19. Fourth, the complexity of the case is further shown by the skill of the lawyers involved on both sides of the case. Class counsel has a national class action practice involving many areas of complex litigation, but particularly bank fees of this very type. Class counsel has been recognized by courts across the country for their skill. *Id.* On the other side of the case, Defendant is represented by one of the largest law firms in the Midwest and is a formidable opponent. This factor supports granting the requested fee. *Caligiuri*, 855 F.3d at 866.

20. Fifth, the requested one-third fee is the same amount that has been awarded in similar bank fee litigation and in class action litigation in general in courts across the country. This factor supports granting the requested fee. *Caligiuri*, 855 F.3d at 866.

21. Finally, no Settlement Class Member objected to the requested fee. This factor supports granting the requested fee. *Id.*

22. Thus, all of these factors support the Court's discretion in approving the requested attorneys' fee amount of 33.33% of the Settlement Fund. *See Caligiuri*, 855 F.3d at 866; *Barfield*, 2015 WL 3460346, at *4 (collecting cases awarding one-third fees).

Litigation and Notice and Administration Expenses

23. In addition to fees, "[a]n attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved." *Tussey*, 2019 WL 3859763, at *5 (quoting Alba Conte, 1 Attorney Fee Awards § 2:19 (3d ed.); *see also Sprague v. Ticonic*, 307 U.S. 161, 166–67 (1939) (recognizing a federal court's equity power to award costs from a common fund)). "Counsel in common fund cases may recover those expenses that would normally be charged to a fee-paying client." *Tussey*, 2019 WL 3859763, at *5 (quoting *In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, No. MDL 05-1708, 2008 WL 682174, at *4 (D. Minn. Mar. 7, 2008)). "Reimbursable

expenses include many litigation expenses beyond those narrowly defined 'costs' recoverable from an opposing party under Rule 54(d) and includes: expert fees; travel; long-distance and conference telephone; postage; delivery services; and computerized legal research." *Id.* (collecting cases).

24. Here, the requested expenses of $42,315.50 are reasonable and are comprised of routine litigation expenses that class counsel advanced to pursue this litigation.

Service Award

25. Apart from class counsel, "[a]t the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class." 5 *Newberg on Class Actions* § 17:1 (5th ed. 2015). "Courts often grant service awards to named plaintiffs in class action suits to 'promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits.'" *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017) (quoting *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1086 (D. Minn. 2010)). Otherwise, most people could not afford to spend the time and effort to pursue what would provide only a modest individual recovery for the effort involved but would also benefit thousands of other people who do not have to expend any time or resources. *See id.* Relevant considerations in determining whether to grant an incentive award include actions plaintiffs took to protect the interests of the class; the degree to which the class has benefitted from those actions; and the amount of time and effort plaintiffs expended in pursuing the litigation. *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002).

26. As to amount, "courts in th[e Eighth] circuit regularly grant service awards of $10,000 or greater." *Caligiuri*, 855 F.3d at 867 (8th Cir. 2017) (approving $10,000 service award) (citing *Huyer v. Njema*, 847 F.3d 934, 941 (8th Cir. 2017) (affirming approval of settlement that included $10,000 service awards to named plaintiffs); *Jones v. Casey's Gen. Stores, Inc.*, 266

F.R.D. 222, 231 (S.D. Iowa 2009) (approving $10,000 service awards to each of nine plaintiffs). And much higher service awards are not uncommon. *See, e.g.*, *Zilhaver v. UnitedHealth Group, Inc.*, 646 F. Supp. 2d 1075, 1085 (D. Minn. 2009) (approving $15,000 service awards to two representatives)); *Tussey*, 2019 WL 3859763, at *6 (approving $25,000 service awards to each of three representatives); *In re Charter Commc'ns, Inc., Sec. Litig.*, No. MDL 1506, 2005 WL 4045741, at *25 (E.D. Mo. June 30, 2005) (approving $26,625 service award).

27. Here, the requested service award is $10,000 for Plaintiff, which is well within the range normally approved. Moreover, the Class Representative should be rewarded for having brought this suit and benefitted over 14,000 other people who will each receive payments. Without the Class Representative, this recovery would not have been possible.

THEREFORE, THE COURT FINDS AND ORDERS AS FOLLOWS:

28. Pursuant to Iowa R. Civ. P. 1.271(4), the Court finds that the Settlement is fair, reasonable, and adequate and hereby GRANTS FINAL APPROVAL TO THE SETTLEMENT.

29. The Court approves and orders payment of attorneys' fees from the Settlement Fund in the amount of $246,666.33 to Class counsel.

30. The Court approves and orders reimbursement of expenses from the Settlement Fund in the amount of $42,315.50 to class counsel.

31. The Court approves and orders payment from the Settlement Fund of a service award in the amount of $10,000 to the Class Representative.

32. The Court approves the plan of distribution of the Net Settlement Fund to the Settlement Class and orders the parties to proceed with distribution as set forth in the Settlement.

33. Upon the Effective Date, Defendant is released from all claims as set forth in the Settlement.

34. This Order is a final judgment as it disposes of all claims against all parties.

ACCORDINGLY, THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED.

State of Iowa Courts

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LACV080753	ELISALYNN CLARK V. HILLS BANK AND TRUST COMPANY
Type:	ORDER FOR JUDGMENT

So Ordered

Chad A. Kepros

Chad Kepros, District Court Judge,
Sixth Judicial District of Iowa

Electronically signed on 2022-01-21 13:44:01