UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
CASE NO. 5:21-CV-488-BO

PHILIP BULLS, DEAN BRINK, CARMIN NOWLIN, NICHOLAS PADAO, and RAPHAEL RILEY, *on behalf of themselves and others similarly situated,*	)
Plaintiffs,	)
v.	)
USAA FEDERAL SAVINGS BANK and USAA SAVINGS BANK,	)
Defendants.	)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS, AND PAYMENT OF CLASS REPRESENTATIVES' AWARDS

I. INTRODUCTION

The settlement of this matter—now preliminarily approved by the Court—resolves claims by over 200,000 military customers who assert that Defendants USAA Federal Savings Bank and USAA Savings Bank (collectively, "USAA" or "USAA Bank") failed to properly apply reduced interest rates and other benefits to their credit card accounts and loans, though USAA Bank was required to do so under the Servicemembers Civil Relief Act ("SCRA"), 50 U.S.C. § 3937, and its own proprietary military servicemember benefits program, and that USAA otherwise violated the Military Lending Act ("MLA"), 10 U.S.C. § 987, the Truth in Lending Act, 15 U.S.C. § 1601, *et seq*., and the state consumer protection laws of several states.

The Court preliminarily approved the Settlement Agreement and Release ("Agreement")[1] reached by the Parties in this matter on September 6, 2024. Plaintiffs, on behalf of the Class, now present their motion for attorneys' fees and costs and class representative service awards. USAA does not oppose this motion. As proposed in their Motion for Preliminary Approval and reflected in the Agreement, Plaintiffs request: (i) an award of 27.5% of the gross Settlement Amount for Class Counsel's attorney fees and costs, and (ii) Service Awards in the amount of $20,000 each for Class Representatives Philip Bulls, Dean Brink, Carmin Nowlin, Nicholas Padao, and Raphael Riley.

The request for attorney fees is more modest than what this Court found reasonable and awarded after the settlement of substantially similar cases against Chase Bank and Bank of America, highlighting the reasonableness of Plaintiffs' request here. *See Childress, et al. v. JPMorgan Chase Bank, N.A., et al. ("Chase")*, No. 5:16-CV-298-BO, DE 360 (E.D.N.C. Oct. 1, 2020) (granting 30% of gross common fund as reasonable attorneys' fees and $25,000 to primary

[1] All capitalized terms have the same meaning as in the Agreement. DE 133-1.

class representatives); *Childress, et al. v. Bank of America, N.A. ("Bank of America")*, No. 5:15-cv-231, DE 122 (E.D.N.C. Dec. 14, 2017) (granting 30% of gross common fund as reasonable attorneys' fees).

Like in *Bank of America* and *Chase*, Plaintiffs' application for a Fee & Costs Award and Awards to the Class Representatives is reasonable and fair given the circumstances of the litigation, the expertise and zealous advocacy demonstrated by Class Counsel throughout this matter, and the significant results ultimately achieved for the Class. For the additional reasons argued below, Plaintiffs respectfully request that the Court grant their motion.

II. PRELIMINARY STATEMENT IN SUPPORT OF THE MOTION

On behalf of a large, nationwide Class of military servicemembers, Class Counsel labored in earnest and achieved an excellent result.[2] The $64,202,833.59 gross Settlement Amount agreed to by the Parties will provide meaningful, direct compensation and relief to these servicemembers without the complication and uncertainty of a claims process for monetary relief, on top of previous payments to many Class Members. This is no coupon settlement. And, remarkably, the Settlement provides relief to a class of servicemembers stretching back in some cases to May 4, 2009. DE 133-1, Ex. A (Agreement) at ¶ 18. Under the Agreement, payments will be automatically sent directly to every Class Member, including direct deposits where feasible, as will a set of reminder notices and reissuances of checks, to ensure that the Settlement has the maximum benefit for servicemembers, veterans, and their families. *See* DE 133-1, Ex. A (Distribution Plan).

This Agreement ensures that substantial payments are made to hundreds of thousands of American military servicemembers and veterans.

[2] For the sake of brevity, Plaintiffs incorporate by reference the "Factual and Procedural History" set forth in their Memorandum of Law in Support of Motion for Preliminary Approval of Settlement (DE 133) ("Pls.' Prelim. Approval Mem.").

This is a remarkable achievement, especially given the significant obstacles faced by Plaintiffs in bringing and pursuing this litigation. USAA Bank defended this case aggressively and brought jurisdictional, procedural, and substantive legal challenges to Plaintiffs' allegations on several fronts before this Court, including arguing that all but one of the Class Representatives' CARD Act claims are barred by the statute of limitations and that Plaintiffs could not meet the requirements of Rule 23(a) and (b). The daunting nature of this litigation is also evident from the fact that, although it is a nationwide class action case against a major financial institution, no other class action attorneys filed suit on similar allegations because they were not willing to take the risk of pursuing this case against the bank. This left the three Plaintiffs' firms to litigate this matter to resolution, bearing all the risk and costs.

As this Court has witnessed, Class Counsel litigated this case with skill and dedication. Class Counsel faced USAA Bank's three dispositive motions, litigated contested discovery disputes (including with successful motions by Plaintiffs to compel discovery), and advanced a highly contested motion for class certification, all of which placed significant pressure on USAA Bank. Plaintiffs' achievements required persistence. For example, Plaintiffs conducted extensive discovery, reviewing approximately 24,000 records and deposing three USAA Bank representatives. *See* DE 134 (Lowney Decl.), at 5. After the issue of class certification was fully briefed by both Parties, the Parties agreed via joint motion to stay the Court's consideration of the Parties' motions so they could pursue mediation. *See* DE 113.

After a failed mediation attempt with retired chief United States Magistrate Judge Elizabeth Laporte, the Parties returned to hard fought litigation, including USAA's pending dispositive motions that threatened to dismiss this case entirely. But Plaintiffs' efforts to reach a favorable resolution of this case for the Class did not slow, and eventually the Parties engaged retired United

States District Court Judge Layn Phillips to resume mediation. The Parties were then able to resolve a portion of the monetary component of the Settlement with Judge Phillips. *See* DE 134 at ¶¶ 15-17. Even then, Class Counsel ensured the agreement would not be watered down, necessitating additional mediation proceedings to reach reasonable terms on all issues for the Class. *Id*. at ¶ 17. Each mediation involved numerous complex, time-consuming issues and required the Parties to overcome apparent impasses on several occasions. *See id.* at ¶ 18. All of these efforts have been to the benefit of the servicemembers and veterans who make up the Class. This Court previously described similar efforts and the results of Plaintiffs' counsel to be "extraordinary," and counsel litigated this case with equal commitment to the Class's interests. *Chase*, No. 5:16-CV-298-BO, DE 360, at 2 (E.D.N.C. October 1, 2020).

The specific risks faced in this litigation were significant and included the ever-present possibility that Plaintiffs might fail to recover at all, either by denial of class certification (either directly or on appeal), or losing USAA Bank's looming motions to dismiss and for summary judgment, or at a jury trial. Facing stiff opposition from experienced defense counsel, Class Counsel litigated this case without hesitation and with an eye toward trial preparation. The specific legal hurdles faced by Plaintiffs were many. Plaintiffs filed two motions to compel in order to get complete access to thousands of withheld documents. *See* DE 47 (Plaintiffs' Motion to Compel) and DE 81 (Plaintiffs' Second Motion to Compel). In the midst of navigating protracted discovery disputes, Plaintiffs moved for class certification. DE 70, 71. Class certification was aggressively challenged by USAA on various grounds, including that Plaintiffs had already been compensated through remediations under the consent order entered into between USAA and the United States Department of the Treasury, Office of the Comptroller of the Currency ("OCC"). *See* DE 95 (Defendant's Opposition to Plaintiffs' Motion for Class Certification). Indeed, when presented

with these same arguments in *Chase*, this Court recognized that "Class Counsel faced a genuine risk of non-recovery in this action." *Chase*, No. 5:16-CV-298-BO, DE 360 at 3 (E.D.N.C. Oct. 1, 2020).

The more than $64 million gross Settlement Amount achieved by Plaintiffs and Class Counsel is substantial in light of the above-stated risks and the real threat of dispositive, adverse rulings or a dramatic reduction in potential recovery. Under the relevant legal standards, Plaintiffs' request for a Fee & Expense Award and Service Award payments to the Class Representatives is reasonable and reflective of the efforts and success of the case.

III. ARGUMENT

A. The requested Fee & Expense Award is reasonable as a percentage of the common fund.

The award of attorneys' fees is "within the judicial discretion of the trial judge" and disturbed by the court of appeals only upon finding an abuse of discretion. *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978) (further citation omitted); *Berry v. Schulman*, 807 F.3d 600 (4th Cir. 2015).

The United States Supreme Court has "recognized consistently that 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." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs . . ."). It follows that a district court's "[j]urisdiction over the fund involved in the litigation allows a court to prevent [] inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Id.* at 478.

Where there is a common fund, or calculable monetary benefit to class members, the "overwhelmingly" preferred method to determine appropriate attorneys' fees is to base the award on a percentage of the monetary benefit obtained. *Kelly v. Johns Hopkins Univ.*, No. 1:16-cv-2835-GLR, 2020 U.S. Dist. LEXIS 14772 at *5 (D. Md. Jan. 28, 2020). *See also Jones v. Dominion Res. Servs., Inc.*, 601 F. Supp. 2d 756, 758 (S.D. W. Va. 2009) ("The percentage method has overwhelmingly become the preferred method for calculating attorneys' fees in common fund cases."). Although "[t]he Fourth Circuit has neither announced a preferred method for determining the reasonableness of attorneys' fees in common fund class actions nor identified factors for district courts to apply when using the percentage method," *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 463 (S.D. W.Va. 2010), "[w]ithin this Circuit, the percentage-of-recovery approach is not only permitted, but is the preferred approach to determine attorney's fees." *Kruger v. Novant Health, Inc.*, No. 1:14CV208, 2016 U.S. Dist. LEXIS 193107 at *6-7 (M.D.N.C. Sept. 29, 2016) (quoting *Savani v. URS Prof'l Sols. LLC*, 121 F. Supp. 3d 564, 568 (D.S.C. 2015)). Indeed, "[d]istrict courts within the Fourth Circuit have consistently endorsed the percentage method." *Deem v. Ames True Temper, Inc.*, No. 6:10-cv-01339, 2013 U.S. Dist. LEXIS 72981 at *12 (May 22, 2013) (citations omitted); *see also Archbold v. Wells Fargo Bank, N.A.*, No. 13-24599, 2015 U.S. Dist. LEXIS 92855 at *11 (S.D. W. Va. July 13, 2015) ("[T]he Court concludes that there is a clear consensus . . . that the award of attorneys' fees in common fund cases should be based on a percentage of the recovery."); *Teague v. Bakker*, 213 F. Supp. 2d 571, 583 (W.D.N.C. 2002); *Goldenberg v. Marriott PLP Corp.*, 33 F. Supp. 2d 434, 438 (D. Md. 1998); *Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 502 (E.D. Va. 1995).

The other circuit courts that have considered the propriety of the so-called percentage method have also endorsed its use. *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 481 (D. Md. 2014)

("District Courts in the Fourth Circuit, and the majority of courts in other jurisdictions, use the percentage of recovery method in common fund cases.").[3] This Court has likewise endorsed the percentage of recovery method in two Servicemembers Civil Relief Act class action settlements handled by undersigned lead counsel. *See Chase*, No. 5:16-CV-298-BO, DE 360 (E.D.N.C. Oct. 1, 2020); *Bank of America*, No. 5:15-cv-231, DE 122 (E.D.N.C. Dec. 14, 2017).

Further, "[c]ourts within the Fourth Circuit have cautioned against the lodestar approach in determining attorneys' fees in common fund cases such as this," *Kruger*, 2016 U.S. Dist. LEXIS 193107 at *3,[4] recognizing that, by contrast, the percentage method encourages efficiency and is the "more equitable" approach to determining fees. *Archbold*, 2015 U.S. Dist. LEXIS 92855, at *11 (stating a "clear consensus among the federal and state courts . . . that the award of attorneys' fees in common fund cases should be based on a percentage of the recovery" because "the percentage of fund approach is the better-reasoned and more equitable method of determining attorneys' fees in such cases."); *accord DeWitt v. Darlington Cty.*, No. 4:11-cv-00740-RBH, 2013 U.S. Dist. LEXIS 172624 at *19 (D.S.C. Dec. 6, 2013) ("The percentage-of-the-fund approach

[3] *See also*, *e.g.*, *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998); *In re Thirteen Appeals Arising out of San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995); *In re Wash. Pub. Power Supply Sys. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994); *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268–71 (D.C. Cir. 1993) (requiring use of the percentage of-recovery method); *Longden v. Sunderman*, 979 F.2d 1095, 1099 (5th Cir. 1992); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 773–74 (11th Cir. 1991) (requiring use of the percentage-of-recovery method); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454, 456 (10th Cir. 1988); *Bebchick v. Wash. Metro. Area Transit Comm'n*, 805 F.2d 396, 406–07 (D.C. Cir. 1986).

[4] Courts have recognized, *inter alia*, three significant drawbacks to use of the lodestar method in common fund cases: (1) it bears no relation to the success of the case and benefits to the class; (2) it discourages efficiency in litigation, including efforts toward early settlement of cases; and (3) it wastes limited court resources by requiring judges to sift through voluminous timekeeping records. *See, e.g., Strang*, 890 F. Supp. at 503 ("[T]he percentage method is more efficient and less burdensome than the traditional lodestar method, and offers a more reasonable measure of compensation for common fund cases."); Manual for Complex Litigation (Third) § 24.121 (1995) ("the lodestar method [has] proved difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation to reach a predetermined result. Accordingly, it has been criticized by courts, commentators, and members of the bar").

rewards counsel for efficiently and effectively bringing a class action case to a resolution, rather than prolonging the case in the hopes of artificially increasing the number of hours worked on the case to inflate the amount of attorney's fees on an hourly basis."); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (stating the lodestar method "create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits") (alterations in original) (citations and internal quotations omitted). Among other things, "the percentage method better aligns the interests of class counsel and class members because it ties the attorneys' award to the overall result achieved rather than the hours expended by the attorney." *Jones*, 601 F. Supp. 2d at 760.

As this Court previously noted, "[many] courts in the Fourth Circuit have held that attorneys' fees in the amount of 1/3 of the settlement fund is reasonable." *Chase*, No. 5:16-CV-298-BO, DE 360 at 2 (E.D.N.C. Oct. 1, 2020) (collecting cases). And the Middle District for North Carolina recently noted, "[c]ourts in the Fourth Circuit have found awards of approximately one-third of the class fund to be reasonable." *All. Ophthalmology, PLLC v. ECL Grp., LLC*, No. 1:22-CV-296, 2024 U.S. Dist. LEXIS 113914 at *42 (M.D.N.C. June 27, 2024). Indeed, attorneys' fees in common fund cases typically reflect "around one-third of the recovery." 5 *Newberg and Rubenstein on Class Actions* § 15:73 (6th ed.) (noting that a "33% figure provides some anchoring for the discussion of class action awards [to counsel]" and that "many courts have stated that . . . fee awards in class actions average around one-third of the recovery."); *accord* Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. of Empirical Legal Studies, 27, 31, 33 (2004) (finding that courts consistently award 30–33% of the common fund). On average, courts have "awarded percentages exceeding 30%." *Thomas v.*

FTS USA, LLC, No. 3:13cv825 (REP), 2017 U.S. Dist. LEXIS 45217, at *14 (E.D. Va. Jan. 9, 2017) (citing *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001) (reviewing 289 class action settlements and finding an "average attorney's fees percentage [of] 31.31%" and a median value of roughly one-third [of the common fund])); *see also In re Lorazepam & Clorazepate Antitrust Litig.*, 2003 WL 22037741, at *7 (D.D.C. June 16, 2003) (noting the well-established practice that "fee awards in common fund cases may range from fifteen to forty-five percent[.]").

The 27.5% attorneys' fee requested here is a reduction from the common 33.3% awarded in many common fund class action settlements and a lesser percentage award than what this Court awarded for the previous SCRA settlements with Chase and Bank of America. *See Chase*, No. 5:16-CV-298-BO, DE 360 (E.D.N.C. Oct. 1, 2020) (awarding 30%); *Bank of America*, No. 5:15-cv-231, DE 122 (E.D.N.C. Dec. 14, 2017) (awarding 30%). And it is well within the range of awards for common fund cases—in fact significantly less than the one-third of the gross Settlement Amount that itself "would be consistent with that awarded in other cases" by courts in this circuit. *Thomas*, 2017 U.S. Dist. LEXIS 45217 at *15; *see e.g., Chrismon v. Meadow Greens Pizza*, No. 5:19-cv-155-BO, 2020 U.S. Dist. LEXIS 119873 at *12 (E.D.N.C. July 7, 2020) (collecting cases).[5]

[5] *And see Kelly*, 2020 U.S. Dist. LEXIS 14772 at *8 ("Contingent fees of up to one-third are common in this circuit.") (collecting cases); *Temp. Servs., Inc. v. Am. Int'l Grp., Inc.,* No. 3:08-cv-00271-JFA, 2012 U.S. Dist. LEXIS 86474, at *22-23 (D. S.C. June 22, 2012) (approving class counsel's request for attorneys' fees in the amount of one-third of the common fund and observing that "[a] total fee of one-third of the class settlement for all work performed and to be performed in this case is well within the range of what is customarily awarded in settlement class actions. An award of fees in this range for work performed in the creation of a settlement fund has been held to be reasonable by many federal courts."); *Anselmo v. W. Paces Hotel Grp., LLC*, No. 9:09-cv-02466-DCN, 2012 U.S. Dist. LEXIS 164618, at *10 (D. S.C. Nov. 19, 2012) (finding that "[t]he approximate 33% for fees provided here is reasonable in light of all pertinent factors, including precedent and beneficial results obtained."); *Kidrik v. ABC Television & Appliance Rental, Inc.*, No. 3:97CV69, 1999 U.S. Dist. LEXIS 23693, at *4 (N.D. W. Va. May 12, 1999) (observing that awards of 30%, 35%, and even 50% have been held reasonable).

Here, the 27.5% fee request is also less than the 33.3% contingency fee that the named Plaintiffs agreed to in their retention agreements with Class Counsel. The out-of-pocket costs of years of litigation that Class Counsel incurred in litigating this matter will also come out of the 27.5% requested for the Fee & Expense Award, despite the provisions of Plaintiffs' retention agreements that reimbursement of costs would be separate and additional to the contingency fee. As such, Plaintiffs request for a Fee & Expense Award of 27.5% of the gross Settlement Amount is not only consistent with fee awards by this Court and in this Circuit, but reasonable and fair to the Class as a whole.

B. Application of commonly used factors to determine the reasonableness of Plaintiffs' fee application weigh in favor of the requested Fee & Expense Award.

Many courts in this circuit look to common factors in determining the reasonableness of an attorney fee application in a common fund case.[6] *See, e.g., In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 261 (E.D. Va. 2009); *Muhammed v. Nat'l City Mortg., Inc.*, No. 2:07-0423, 2008 U.S. Dist. LEXIS 103534 at *21 (S.D. W. Va. Dec. 19, 2008). These factors are: (1) the results obtained for the class; (2) objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the quality, skill, and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) public policy; and (7) awards in similar cases. *In re Mills Corp. Sec. Litig*., 265 F.R.D. at 261. Consideration of each of these factors supports the fee application made by Plaintiffs here.

1. Class Counsel achieved extraordinary results for the Class of over 200,000 military servicemembers, veterans, and their families.

As the Supreme Court has held and the Fourth Circuit has discussed, the most critical factor

[6] Because objections to the settlement are not due until November 21, 2024, the matter of objections by class members, *vel non*, cannot be fully addressed—as of October 24, 2024, counsel are informed that there have been no objections by members of the class to the preliminarily approved settlement, including the attorney fee amount requested.

in determining the reasonableness of an attorney fee award is "the degree of success obtained." *McDonnell v. Miller Oil Co.*, 134 F.3d 638, 641 (4th Cir. 1998) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). The approximately $64,200,000 gross Settlement Amount benefitting the Class of military servicemembers here reflects an enormous success given the circumstances of this case. Indeed, this Court previously found that the settlement in a similar case against Chase Bank provided "excellent results for the class," where the gross settlement amount was smaller than it is here and the defendant a much larger financial institution. *Chase*, No. 5:16-CV-298-BO, DE 360 at 2 (E.D.N.C. Oct. 1, 2020). The size of the fund and the number of persons benefitting from the Settlement also weigh in favor of the reasonableness of the 27.5% Fee & Expense Award requested by Plaintiffs. The result here is all the more extraordinary in light of the very real litigation risks faced by Plaintiffs in the matter, as described above and in Plaintiffs' motion for preliminary approval. *See id.* at 3 (noting the "genuine risk of non-recovery" in *Chase*, with substantially similar claims and hurdles as here); DE 133 at 13.

2. The Class is represented by nationally recognized and highly experienced Class Counsel who resolved this matter with skill and persistence.

As previously argued in Plaintiffs' Motion for Class Certification and Motion for Preliminary Approval, Class Counsel have vast experience in leading national class action and other complex civil litigation, including litigation against Chase Bank, Bank of America, American Express, Wells Fargo, and other large financial institutions, and including some of the largest and most successful class action cases in U.S. history. *See* DE 134 and 135. The Class Counsel firms have substantial relevant experience, with the two Class Counsel firms in this action appointed as co-lead class counsel in *Bank of America*, No. 5:15-CV-231-BO, DE 114 (E.D.N.C. Aug. 13, 2017). *And see* DE 134 ¶ 4; DE 135 ¶ 5.

Smith & Lowney, PLLC has extensive experience and expertise in prosecuting complex class actions, representing plaintiffs in similar consumer class actions against Bank of America and Chase Bank. *See* DE 134 ¶¶ 4, 5. Working closely with the Class Representatives in the foregoing actions, Smith & Lowney achieved notable settlements for servicemembers and veterans across the nation. *Id*. In fact, Smith & Lowney has become a leader in SCRA litigation, being the first firm to succeed in having a class certified with these claims, which they successfully defended in the Fourth Circuit. *See Childress v. JPMorgan Chase & Co.,* No. 5:16-CV-298-BO, 2019 U.S. Dist. LEXIS 110396 (E.D.N.C. July 2, 2019); *JPMorgan Chase & Co. v. Childress*, No. 19-281, 2019 U.S. App. LEXIS 24846 (4th Cir. Aug. 20, 2019). And in *Chase*, this Court previously found counsel to be "nationally recognized and highly experienced Class Counsel who revolved this matter with skill and persistence." *Id*., DE 360 at 2. Smith & Lowney used its substantial experience from *Bank of America* and *Chase*, and brought the same skill and persistence, to achieve the excellent settlement, here. Through great effort, Smith & Lowney worked with military families across the country to vindicate their rights and develop this lawsuit for several months before it was filed. Since its founding in 1996, Smith & Lowney has participated in numerous nationwide class actions on behalf of consumers, including litigation against First USA Bank that culminated in a nationwide settlement of claims for a class of over ten million consumers, and several other nationwide consumer class actions in state and federal courts across the United States. *See* DE 134 at ¶¶ 4-9 (identifying cases in which Smith & Lowney was appointed as class counsel). As it did in *Bank of America* and *Chase*, the firm took on the significant risk of developing and litigating a nationwide class action against one of the largest servicemember-oriented corporations in the world on behalf of servicemembers and veterans.

Providing national litigation support to the team is Hagens Berman Sobol Shapiro LLP, which is recognized as one of the largest and most successful plaintiff-side class action law firms nationwide, having litigated and settled many of the largest class action cases in history. *See* DE 135. Hagens Berman served as co-lead counsel in *Bank of America*, and their diligent work resulted in a favorable settlement for servicemembers and veterans across the country. *Id*. at ¶ 5.

In addition, since initiation of this action, Matt Ballew and Paul J. Puryear (now of Ballew Puryear PLLC) provided skilled support as local counsel. Ballew and Puryear ensured that all filings and appearances conformed to the practice and procedures of this Court, in compliance with Local Civil Rule 83.1, and brought their own experience and perspective to further improve representation to the Class, as well as assisted in deposition defense, mediation, and beyond.

Together, Smith & Lowney and Hagens Berman, the Class Counsel firms, and Ballew Puryear, have committed substantial time and resources to this litigation. Smith & Lowney has advanced all of the costs of bringing the case, including substantial investments in experts, discovery, and multiple mediation sessions, and to date, have received no reimbursement. *See* DE 134 at ¶ 11. Over the past three years, Smith & Lowney along with local counsel, have analyzed and developed the various legal theories and causes of action, conducted thorough discovery, engaged in extensive motions practice, and held three separate mediation sessions with two different mediators. *Id*. at ¶¶ 16-17. Class Counsel successfully argued a motion to compel and took on several important discovery disputes, reviewed large volumes of documents, retained and consulted experts, conducted depositions, and routinely engaged with our clients and other affected class members. *Id*. at ¶ 15.

Though the Parties were required to bring only a few contested matters before the Court, largely because Smith & Lowney's track record in preceding cases allowed the Parties to resolve

contested issues, the Parties conducted extensive discovery and presented most of the highly contested factual and legal disputes in the context of settlement negotiations, including several mediation sessions. Class Counsel amassed evidence, developed legal theories and expert testimony, and presented damages analyses for rigorous evaluation by the mediators and opposing counsel. And once the first mediation with Judge Laporte failed, Smith & Lowney spent considerable time preparing well-developed arguments in response to USAA Bank's pending dispositive motions. Through this extensive work, the Parties were able to evaluate the strengths and weaknesses of various claims and arrive at a hard-fought but fair resolution of this matter.

All told, Class Counsel demonstrated skill and dedication in zealously litigating this matter while also repeatedly engaging in good faith mediation. The result is a settlement that confers a substantial benefit on Class Members, most or all of whom USAA Bank contends suffered no damages.

3. Class Counsel overcame several obstacles in this complex, multi-state class action litigation to reach the Settlement with powerhouse Defendant USAA Bank.

The experience and innovation of Class Counsel, coupled with a demonstrated willingness to litigate this case through trial, if necessary, allowed Plaintiffs to overcome many of the obstacles faced in complex, multi-state class action litigation. In addition, Class Counsel leveraged their experience from *Bank of America* and *Chase* to prioritize Plaintiffs' discovery battles to obtain spreadsheets reflecting the calculation of prior refunds sent by USAA Bank, and then to refine the Settlement Distribution Plan to ensure the maximum possible payments to military servicemembers as quickly as possible.

As in *Bank of America* and *Chase*, the Distribution Plan of the net proceeds to the nationwide Class reflects an iterative process designed to maximize Class Member recovery. *See* DE 133-1, Ex. A at 33. Class Counsel has also ensured that the Settlement creates a non-

reversionary Net Settlement Amount for the Class that would be drawn on through successive attempts to maximize these recoveries.

This approach will provide significant economic benefits to the class. Settlement payments begin with a direct payment of over $30,000,000 in checks or direct deposits to servicemembers who did not receive or successfully deposit previous payments issued by USAA Bank. *Id*. The remainder of the gross Settlement Amount will generally be distributed to all Class Members who were previously issued an SCRA remediation payment from USAA Bank, allocated pro rata based upon amounts calculated in USAA's prior refund efforts, with an additional $50 payment for Class Members who were previously sent a payment from USAA Bank for the SCRA or MLA remediations

One additional innovation from the previous military servicemember settlements approved by the Court in *Chase* and *Bank of America* is that much of the Settlement will be paid through direct deposit, ensuring that more servicemembers and veterans receive settlement amounts quickly. All other payments will be made by check or, if the Class Member chooses, electronic payment. Such Class Members will be given both sufficient time to cash their checks and reminder mailings.

Any remaining money after distribution of these "Step One" payments will be redistributed to Class Members; there is no reversion of any funds to USAA. The Step Two payments will be distributed in proportion to Class Members' Step One payments. *Id*. In this way, the Settlement directs additional compensation to Class Members who waited several years longer for any remediation from USAA, helping to compensate for their lost time value of money. After the Step Two distribution, Class Members will again be sent reminder mailings and given approximately six months to deposit their checks.

Finally, in Step Three, any funds remaining will be used to pay outstanding settlement administration costs and untimely requests for reissuance of Step One and Step Two payments, with any final residual funds directed to *cy pres*.

The compensation of Class Members agreed to by the Parties in the Settlement of this matter was determined to be the most effective, flexible, and comprehensive method of payment available. This method also cuts through the complexities of multi-state litigation and ensures the maximum benefit for all Class Members.

Even after the Parties reached an agreement in principle through mediation, Class Counsel's work was far from complete. Class Counsel spent months negotiating a complex settlement agreement with USAA and have since been working with the settlement administrator to ensure that proper notice and payments are being sent to the over 200,000 members of the Class. *See* DE 134 at ¶¶ 15-18.

Finally, if the Court grants final approval of this Settlement, Class Counsel will remain actively engaged throughout the Settlement distribution period to ensure that the Settlement is fully disbursed according to the Final Approval Order to maximize the payments to Class servicemembers.

4. Class Counsel faced a genuine risk of non-recovery in this Action.

Plaintiffs and Class Counsel faced the genuine and ever-present risk of zero recovery in this case. First, a year prior to the filing of this lawsuit, USAA Bank issued payments to many Class Members pursuant to a consent order with the OCC concerning USAA's SCRA and MLA compliance practices. *See In re USAA Federal Savings Bank*, AA-EA-2018-90 (Jan. 7, 2019) [7]; *In*

[7] Available at https://www.occ.gov/static/enforcement-actions/ea2019-001.pdf

re USAA Federal Savings Bank, AA-ENF-2020-67 (Oct. 14, 2020).[8] At the time the suit was filed, it was unknown whether, and to what extent, the consent orders or USAA's previous payments to certain Class Members would preclude or partially preclude further recovery.

In fact, USAA has maintained throughout this litigation that the consent order and previous payments to customers reflected the full extent of its obligations. Had the Court, or a panel of the Court of Appeals, ultimately accepted such an argument, there would have been no recovery. This Court has previously recognized this very risk in *Chase*. *See* No. 5:16-CV-298-BO, DE 360 at 3 (E.D.N.C. Oct. 1, 2020).

As this Court has seen, Smith & Lowney's efforts to enforce servicemembers' rights through banking class actions is risky and making new law. Other cases brought before this Court by Smith & Lowney are on appeal to the Fourth Circuit or are currently stayed based upon banks' efforts to compel mandatory arbitration. *See e.g. Espin, et al. v. Citibank, N.A.*, No. 5:22-CV-383-BO-RN, DE 64 (E.D.N.C. Nov. 2, 2023). Similarly, over the course of this litigation, at least one court has limited servicemembers' rights under the MLA. *See Davidson v. United Auto Credit Corp.*, 65 F.4th 124 (4th Cir. 2023). Any of these issues had the potential to undermine Plaintiffs' claims here.

Moreover, had the Court denied Plaintiffs' motion for class certification or ruled adversely to Plaintiffs on USAA's looming motions to dismiss and for summary judgment, there would have been no recovery. Were a jury to find that Plaintiffs and other servicemembers were entitled to no further compensation, there would have been no recovery in this case. And finally, the Fourth Circuit could have set aside any recovery won for the class at trial. In each of these scenarios, Class

[8] Available at https://occ.gov/static/enforcement-actions/ea2020-059.pdf

Counsel would have borne the entire cost of litigation and servicemembers would have received nothing from this case.

5. Public policy considerations weigh strongly in favor of the Fee & Expense Award requested here.

Plaintiffs in this matter vindicated the rights of over 200,000 military servicemembers and veterans by challenging USAA Bank's alleged failure to provide federally required benefits to these servicemembers and their families. This Action benefitted not just the over 200,000 Class Members who hold accounts with USAA, but it should benefit other and future military personnel who will open or maintain accounts with USAA and other banks subject to the SCRA and their own proprietary military benefit programs. Because of this litigation, USAA and other banks will be ever mindful that servicemembers can and will bring legal action to vindicate their entitlement to the benefits Congress intended them to receive in recognition of their service to our country. This will likely serve as a deterrent against other banks' violations of the SCRA.

6. The Fee & Expense Award requested here reflects the fee percentage common in other cases.

As discussed above, the attorneys' fees request in this case falls well within the range of common fund attorney fee requests in this circuit and nationwide and is in fact below the one-third recovery commonly awarded in class cases that achieve comparably valuable results for class members. And the request is below the percentage this Court approved in both the *Chase* and *Bank of America* settlements under the SCRA.

C. The Service Award amounts requested for the Class Representatives are typical and justified.

As the Fourth Circuit observed, "[i]ncentive awards are 'intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private

attorney general.'" *Berry*, 807 F.3d at 612 (quoting *Rodriquez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009)). Such awards "are routinely approved in class actions to encourage socially beneficial litigation by compensating named plaintiffs for their expenses on travel and other incidental costs, as well as their personal time spent advancing the litigation on behalf of the class and for any personal risk they undertook." *Domonoske v. Bank of Am., N.A.*, 790 F. Supp. 2d 466, 467–77 (W.D. Va. 2011) (citations omitted).

Plaintiffs request Service Awards for the Class Representatives in this case as compensation for their active participation in this litigation from its inception nearly three years ago to the point of settlement. Specifically, Plaintiffs request an award of $20,000 each for Class Representatives Philip Bulls, Dean Brink, Carmin Nowlin, Nicholas Padao, and Raphael Riley. This award amount reflects the level of involvement of the Class Representatives throughout the pendency of this Action. *See* DE 134 at ¶ 24. They have assisted Class Counsel by providing detailed, often cumbersome records of their military service, tax returns and other personal financial documents, their applications for SCRA and MLA benefits, and their interactions with USAA related to their SCRA and MLA benefits and the remediation checks they may have received. *See id*. The Class Representatives here have also devoted their time by way of assisting Class Counsel in preparing complaints and initial disclosures, responding to discovery, and preparing declarations. And each Class Representative sat for in-depth depositions, which required substantial preparation, and missing work. *Id*. This on top of consulting with Class Counsel during the course of this litigation, monitoring the course of this case, and consulting with Class Counsel regarding the proposed terms of settlement makes each Class Representative's Service Award hard-earned. *Id*.

Courts commonly approve incentive awards similar to those requested in this case and the requested service payments are typical of awards provided to Class Representatives, including in the similar cases against Bank of America and Chase. *See, e.g., McCurley v. Flowers Foods, Inc.*, No. 5:16-cv-00194-JMC, 2018 U.S. Dist. LEXIS 228496, at *22 (D.S.C. Sep. 10, 2018) (awarding "$25,000.00, which is well within the range of reasonable incentive awards approved by the courts."); *McBean v. City of New York*, 233 F.R.D. 377, 391-92 (S.D.N.Y. 2006) (stating incentive awards of $25,000-$30,000 are "solidly in the middle of the range"); *Kay Co.*, 749 F. Supp. 2d at 473 (noting the "burdensome task" of serving as a class representative and awarding $15,000 incentive awards to six class representatives notwithstanding the lack of depositions or other testimony from them); *Chrismon*, 2020 U.S. Dist. LEXIS 119873 at *14 (approving $10,000 service award for pizza delivery driver class representative in case that was resolved quickly); *Bank of America*, No. 5:15-CV-231-BO, DE 122 (E.D.N.C. Dec. 14, 2017) (approving incentive awards of $15,000 for the original named plaintiffs and $10,000 for the plaintiffs added later, none of whom were deposed); *Chase*, No. 5:16-CV-298-BO, DE 360 (E.D.N.C. Oct. 1, 2020) (approving $25,000 service award to class representatives who had been involved throughout the entirety of the litigation). The representative servicemembers in this action should be recognized for their meaningful, and ultimately successful, efforts to secure compensation for their fellow servicemembers, and the sums requested here adequately recognize them for that service. As the court noted in *Kay*, "without class representatives, the entire class would receive nothing." *Kay Co.*, 749 F. Supp. 2d at 473.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs, without objection from USAA Bank, respectfully request that the Court grant their motion for a Fee & Costs Award (comprising 27.5% of the gross Settlement Amount) and Awards to the Class Representatives.

This the 24th day of October, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been electronically filed with the Clerk of Courts using the CM/ECF system.

This the 24th day of October, 2024.

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