

Filed in District Court  
State of Minnesota

STATE OF MINNESOTA

Sep 1 2022 10:14 AM

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT  
Case Type: Other Civil; Complex Case

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PETER DUGGAN and BEATRICE,  
ROBISON, on behalf of themselves and  
all others similarly situated,

Plaintiffs,

v.

WINGS FINANCIAL CREDIT UNION,

Defendant.

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Court File No.: 19AV-cv-20-2163

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

Plaintiffs Peter Duggan and Beatrice Robison, by counsel, have submitted a Settlement Agreement and Release with Wings Financial Credit Union (the “Settlement Agreement” or the “Settlement”) to this Court and has moved under Minnesota Rule of Civil Procedure 23.05 for an order: (1) preliminarily approving the terms and conditions set forth in the Settlement Agreement, (2) certifying the Settlement Class for purposes of providing notice to Settlement Class Members, (3) appointing Class Counsel; (4) approving the form and method of notice to Settlement 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 memorandum in support, and the record of proceedings, and now finds that the proposed Settlement should be preliminarily approved, conditionally certifies the Settlement Class, appoints Class Counsel, approves the form and method

of notice to Settlement Class Members, and sets a date for a final hearing on whether the Settlement is fair, reasonable and adequate to the Settlement Class.

**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 Plaintiffs and Defendant in the above-captioned case (the “Parties”).

**Preliminary Approval**

3. Minnesota Rule of Civil Procedure 23.05(a) 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 Settlement 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, Settlement Class Members receive the benefits of the settlement, and the defendant is released. Minn. R. Civ. P. 23.05. The current motion addresses the first stage: “preliminary approval.”

4. In deciding whether to grant “preliminary approval” to a proposed settlement, the Court evaluates two issues: (1) whether the settlement appears “fair, reasonable, and adequate” upon a preliminary review; and (2) whether the proposed Settlement Class meet the requirements for class certification under Minn. R. Civ. P. 23.01 and 23.02. In making these determinations regarding class actions, Minnesota courts consider federal decisions on Federal Rule of Civil Procedure 23 “instructive.” *Lewy 1990 Tr. ex rel. Lewy v. Inv. Advisors, Inc.*, 650 N.W.2d 445, 452 (Minn. Ct. App. 2002).

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

“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 policy “favoring the voluntary resolution of litigation through settlement is particularly strong in the class action context.” *Khoday v. Symantec Corp.*, No. 11-CV-180 (JRT/TNL), 2016 WL 1637039, at \*5 (D. Minn. Apr. 5, 2016), *report and recommendation adopted*, No. 11-CV-0180 (JRT/TNL), 2016 WL 1626836 (D. Minn. Apr. 22, 2016), *aff’d sub nom. Caligiuri v. Symantec Corp.*, 855 F.3d 860 (8th Cir. 2017). 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)). A court’s decision on the fairness of a class action settlement will be affirmed absent a clear abuse of discretion. *Van Horn*, 840 F.2d at 607.

5. 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 Settlement 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 Minn. R. Civ. P. 23.05(a)(3) (“The court may approve a settlement, voluntary dismissal, or compromise that would bind Settlement Class Members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.”).

6. All of the *Van Horn* factors support approval of the Settlement. The Amended Class Action Complaint (the “Complaint”) alleged that Defendant assessed overdraft fees and non-sufficient funds fees against its members in breach of Defendant’s contract and in violation of

Minnesota law. The Settlement Agreement is fair, reasonable, and adequate because it provides class-wide relief in the form of direct payments and forgiveness of Uncollected Fees to Settlement Class Members, which is precisely the type of relief that Plaintiffs sought on behalf of themselves and the Settlement Class in this lawsuit. The Settlement provides meaningful compensation, estimated to be half of the actual alleged damages. Second, Defendant, a credit union represented by sophisticated counsel, is able to fund the \$1,100,000 settlement (the “Settlement Fund”). 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.

7. The additional Federal Rule of Civil Procedure 23(e)(2) factors also support preliminary approval. First, Plaintiffs have participated in this litigation since its inception in order to achieve relief for themselves 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, and 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 direct deposited or mailed in the form of a check 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 Plaintiffs’ motion for attorneys’ fees will be made prior to the Settlement Class Members’ deadlines to object to or exclude themselves from the Settlement, 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 Settlement Class Members based on the number of disputed fees they were charged. For all of these reasons, the Court finds that preliminary approval is warranted so that notice of the Settlement can be disseminated to the Settlement Class.

*The Settlement Class Satisfy the Requirements for Certification.*

8. The Court also finds that the requirements for class certification are met. Class certification under Minnesota Rule of Civil Procedure 23 requires satisfying the four mandatory requirements of Rule 23.01 and one of the subsections of Rule 23.02. *Lewy 1990 Tr. ex rel. Lewy v. Inv. Advisors, Inc.*, 650 N.W.2d 445, 451–52 (Minn. Ct. App. 2002). In this case, the Settlement Class satisfy all the requirements of Rule 23.01 (numerosity, commonality, typicality, and adequacy of representation) and the two requirements of subsection (c) of Rule 23.02 (predominance and superiority). *Id.*

9. Numerosity is satisfied if there are merely forty or more Settlement Class Members. *Lewy 1990 Tr.*, 650 N.W.2d at 452. Commonality is satisfied if there is “behavior causing a common effect must be subject to some dispute.” *Id.* at 453. Typicality is satisfied “when the claims of the named plaintiffs arise from the same event or are based on the same legal theory as the claims of the Settlement Class Members.” *Id.* “[A]dequacy means the representative parties’ interests must coincide with the interests of other Settlement Class Members and that the parties and their counsel will competently and vigorously prosecute the lawsuit.” *Id.* Predominance is satisfied “where generalized evidence may prove or disprove elements of a claim.” *Id.* at 455. Finally, superiority is satisfied when “collective adjudication promises substantial efficiency

benefits or makes it possible for Settlement Class Members with small claims to bring suit and enforce the substantive law.” *Id.* at 457.

10. Here, each element is met. Numerosity is met because, based on the number of fees charged, there are thousands of Settlement Class Members—many more than the 40 needed. Commonality is met because the bank’s behavior of charging fees in a systematic way to the Settlement Class Members had a common effect. Typicality is met because the Plaintiffs were subject to the same treatment as the other Settlement Class Members and her claims are based on the same theories as the Settlement Class Members. Adequacy is met because the Plaintiffs share the same interests as the class in recovering the disputed fees and they and their counsel have vigorously pursued the litigation. Predominance is met because the Plaintiffs’ and Settlement Class’ claims can all be proven from generalized evidence of what the bank’s agreements permitted with respect to the fees at issue and the bank’s standard practices and procedures for assessing those fees. Finally, a class action is superior because it allows all of the relatively small claims to be resolved in one proceeding. Thus, all of the requirements for class certification are met, and the Court certifies the following Settlement Class for settlement purposes:

All current and former Wings consumer checking account customers, who were charged an Overdraft Fee on a Debit Card Transaction that was authorized into a positive available balance, but settled against a negative balance, and/ or were charged more than one Retry Fee on the same ACH item processed more than once during the Class Period. “Class Period” means for Settlement Class Members seeking recovery of Overdraft Fees charged on APPSN Transactions, the period from April 2, 2018 to May 17, 2019; for Settlement Class Members seeking recovery for NSF Retry Fees, the period from January 1, 2015, through May 1, 2019.

Defendant does not oppose certifying these Settlement Class for purposes of settlement.

11. The Court appoints KalieGold PLLC and The Kick Firm as Class Counsel, and appoints Plaintiffs as Class Representative. Minn. R. Civ. P. 23.07. The Court finds that these

firms have the requisite experience and skill to represent the Settlement Class and that they have done so in litigating this action and achieving the Settlement.

*Notice to the Settlement Class.*

12. Upon the granting of preliminary approval, the court “must direct notice in a reasonable manner to all Settlement Class Members who would be bound by a proposed settlement” to inform them of its terms and their rights. Minn. R. Civ. P. 23.05(a)(2).

13. Under Minn. R. Civ. P. 23.03(b), the notice must concisely and clearly state in plain, easily understood language:

- (A) the nature of the action,
- (B) the definition of the class certified,
- (C) the class claims, issues, defenses, and Wings’ non-admission of liability,
- (D) that a Settlement Class Member may enter an appearance through counsel if the member so desires,
- (E) that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- (F) the binding effect of a class judgment on Settlement Class Members under Rule 23.03(c).

14. The proposed Notice in the form attached to the Settlement Agreement as Exhibits 1-2 meet these requirements. Furthermore, the manner of distribution of (1) the Long Form Notice by posting to the settlement website and (2) the Notice by email or first class United States mail to Settlement Class Members, is hereby approved by this Court as the best notice practicable to the Settlement Class. The form and manner of notice proposed in the Settlement comply with Rule 23.03(c) and the requirements of Due Process.



15. The Settlement Administrator shall send to each Settlement Class Member no later than thirty (30) days from the date of this Order, a copy of the short form Notice as set forth in the Settlement. The date on which the Notice is sent is referred to herein as the “Notice Date.”

*Settlement Class Member Responses*

16. A Settlement Class Member who wishes to exclude himself or herself, or itself, 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 sixty (60) days after the Notice Date (the “Opt Out Period”). Any Exclusion Letter shall identify the Settlement Class Member, state that the Settlement Class Member wishes to exclude himself or herself, or itself, from the Settlement Agreement, and shall be signed and dated. Settlement 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. 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.

17. Settlement 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 sixty (60) days after the Notice Date (the “Objection Deadline”), and must include (a) the objector’s name, address, telephone number, the last four digits of his or her, or its, 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 Settlement Class Member, must be duly admitted to practice law before this Court, and must file a written appearance. Copies of the appearance must be served on Class Counsel and counsel for Defendant Any Settlement Class Member who does not make his or her or its 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.

*Plaintiffs' Motion for Final Approval and for Attorneys' Fees, and Final Approval Hearing*

18. Class Counsel shall file a motion for final approval and for approval of attorneys' fees and costs and Plaintiffs' service awards, along with any supporting materials, fifteen (15) days after the Notice Date.

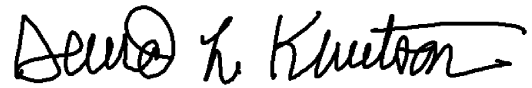
19. After the time for objections and opt-out requests has passed, the Court will consider whether to grant final approval, taking into account any objections raised by Settlement Class Members. A final approval hearing (the "Final Approval Hearing") shall be held before the undersigned at 8:30 a.m., on January 25, 2023, at the Dakota County District Court, 1560 Highway 55, Hastings, Minnesota, via Zoom video conference, 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 23.08.

20. 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.

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

**SO ORDERED.**

Dated: August 31, 2022



Knutson, David  
Aug 31 2022 2:14 PM

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David L. Knutson  
Judge of District Court