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THE HONORABLE KEN SCHUBERT
Department 40
Noted for Hearing: September 24, 2021 at 11:00 a.m.
With Oral Argument

THE HONORABLE KEN SCHUBERT
Department 40
Noted for Hearing: September 24, 2021 at 11:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

STEVE R. MARICAL; EMILY J. ANDERSON, on
behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

BOEING EMPLOYEES' CREDIT UNION,

Defendant.

NO. 19-2-20417-6 KNT

**PLAINTIFF'S MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT**

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1 **I. INTRODUCTION**

2 Plaintiff moves for final approval of a class action Settlement¹ with defendant Boeing
3 Employees Credit Union (BECU) that provides a non-reversionary fund of \$6,000,000 for the
4 benefit of the Settlement Class and institutes important changes to BECU's practices. The
5 Settlement Fund represents approximately 42% of the challenged fees that Settlement Class
6 Members paid during the Class Period. The non-monetary relief is significant. BECU has
7 agreed to provide more information about its practices for assessing NSF and overdraft fees,
8 create a policy that allows members in good standing to request a refund of a fee every year,
9 and implement a checking account product that features no NSF or overdraft fees.

10 Notice has been sent and the reaction of the Settlement Class has been very positive.
11 Of more than 150,000 Settlement Class Members, only two opted out and no Class Member
12 has objected. Plaintiff asks that the Court grant his motion for final approval by: (1) approving
13 the Settlement as fair, reasonable, and adequate; (2) certifying the Settlement Class;
14 (3) finding the Settlement Class received the best notice practicable; (4) approving payment of
15 Settlement Administration Costs; (5) approving a service award for Plaintiff; and (6) awarding
16 attorneys' fees and costs to Class Counsel.

17 **II. STATEMENT OF FACTS**

18 **A. Plaintiff's claims**

19 Plaintiffs Steve Marical and Emily Anderson filed their complaint on August 2, 2019,
20 asserting a violation of the Washington Consumer Protection Act on behalf of a proposed
21 Sufficient Funds Class and claims for breach of contract and violation of the CPA on behalf of a
22 proposed Multiple NSF Class. Sub. Dkt. No. 1. Plaintiff Anderson subsequently withdrew her
23 request to represent the proposed classes for personal reasons. Sub. Dkt. No. 74.

24
25 _____
26 ¹ Unless defined, capitalized terms have the same meanings as those set forth in the Parties'
27 Settlement Agreement, attached as Exhibit 1 to the Terrell Declaration, or the Court's Order
Granting Plaintiff's Motion for Preliminary Approval of Class Action Settlement.

1 Plaintiff Marical, a BECU member, challenged two of BECU’s practices. First, Plaintiff
2 challenged BECU’s practice of assessing overdraft fees based on a member’s “available
3 balance,” as opposed to the “ledger balance,” which Plaintiff alleged was not properly
4 disclosed and was unfair and deceptive in light of the ways BECU presented information. The
5 amount of money in a member’s account at any given time is commonly called the “ledger
6 balance.” The ledger balance does not include pending debits or credits that have not yet
7 posted to the account. For purposes of assessing overdraft and NSF fees, however, BECU uses
8 a member’s “available balance,” which cannot be higher than the ledger balance and may be
9 lower. The available balance subtracts pending transactions members have authorized that
10 have not yet posted as well as “holds” BECU or members’ merchants have imposed.

11 Plaintiff also challenged BECU’s practice of charging an NSF fee each time a payee
12 presented a request for payment against insufficient available funds, regardless of whether
13 that payee had previously requested payment for the same underlying purchase.

14 BECU denies Plaintiff’s allegations. BECU contends that its Member Account
15 Agreement and Account Disclosures accurately explain its overdraft and NSF fee practices and
16 explain that the fees are based on available balance (and not ledger balance).

17 **B. The parties engaged in substantial discovery and motion practice.**

18 The parties litigated this matter for nearly two years. The Court granted BECU’s motion
19 to dismiss the contract claims asserted on behalf of the Multiple NSF Class, but found that
20 claims under the CPA stood independent of BECU’s contractual language and that those
21 claims survived on behalf of both proposed classes. Sub. Dkt. No. 27.

22 The parties engaged in discovery, propounding multiple sets of written discovery
23 requests. Terrell Decl. ¶ 3. Following numerous conferences about the scope of discovery,
24 BECU moved for a protective order, which the Court granted in part and denied in part. Sub.
25 Dkt. No. 46.

1 The parties negotiated an ESI protocol using specified search terms on the accounts of
2 specified custodians. Terrell Decl. ¶ 5. BECU produced over 51,000 pages of documents along
3 with nearly seven gigabytes of transaction data extracted from various computer databases.
4 *Id.* The parties conferred dozens of times about discovery. The data productions in particular
5 were the subject of numerous discussions as the parties determined what data Plaintiff
6 needed to prove his case, and what data BECU could reasonably produce. *Id.* Following
7 document production, Plaintiff deposed four BECU employees and executives. Both Plaintiff
8 Marical and Plaintiff Anderson were deposed. Plaintiff Marical's deposition lasted more than 7
9 hours. *Id.* ¶ 6.

10 Plaintiff moved for class certification and BECU opposed. Sub. Dkt. Nos. 58, 75. In its
11 opposition, BECU argued that (1) individual issues predominated over common issues because
12 each member's experience and understanding of the contract terms would differ;
13 (2) causation under the CPA was necessarily individualized; (3) expert testimony could not
14 establish what each consumer understood after reading the Account Agreement; and
15 (4) Plaintiff was atypical and subject to unique defenses (including that his claims were time
16 barred because he incurred pre-class period overdraft fees in the same circumstances).

17 The motion and opposition were supported by expert reports. Plaintiff retained Arthur
18 Olsen as an expert to analyze BECU's transactional data both for Plaintiffs individually and for
19 the proposed classes. Mr. Olsen has extensive experience with computerized banking systems
20 and, in particular, identifying which overdraft and NSF fees are being challenged under each
21 theory a plaintiff is advancing. Working with Mr. Olsen, Plaintiff's counsel analyzed BECU's
22 transactional data systems to determine the data fields that would allow analysis of its
23 transactional data to identify which overdraft and NSF fees were caused by various types of
24 transactions, and which transactions and ensuing fees resulted from the practices Plaintiff
25 challenged. Terrell Decl. ¶ 7.

1 Before Plaintiff filed his reply, the Court granted the parties' request to stay the case to
2 allow for mediation.

3 **C. Settlement negotiations**

4 On February 9, 2021, the parties participated in a mediation via Zoom that was
5 facilitated by experienced mediator Stewart Cogan. After negotiating well into the night, the
6 parties agreed to the structure of the settlement. Over the following months, the parties
7 negotiated the details, engaged in confirmatory discovery, drafted the settlement agreement
8 and supporting documents, and sought bids for settlement administration. Terrell Decl. ¶ 8.
9 The complete terms of the Settlement are detailed in the Settlement Agreement and Release.
10 *Id.* Ex. 1.

11 **D. Preliminary approval and notice**

12 The Court granted preliminary approval of the Settlement on June 9, 2021. Sub. Dkt.
13 No. 97. Class Administrator JND Legal Administration implemented the Notice Program
14 approved by the Court, as discussed below. Out of more than 150,000 Settlement Class
15 Members, only two opted out. Padelford Decl. ¶¶ 18-19, Ex. D. One Settlement Class Member
16 objected but, after speaking with Class Counsel, withdrew his objection. Terrell Decl. ¶ 12,
17 Exs. 2 & 3.

18 **III. STATEMENT OF ISSUES**

19 Whether the Court should finally certify the Settlement Class and grant final approval
20 of the Settlement as fair, reasonable, and adequate.

21 **IV. EVIDENCE RELIED UPON**

22 Plaintiff relies on the declarations of Beth E. Terrell, E. Michelle Drake, Walter Smith,
23 and Vanessa Padelford, the motion for preliminary approval of the Settlement, the motion for
24 an award of attorneys' fees and costs and class representative service award, and all pleadings
25 and papers filed in this action.

1 **V. ARGUMENT AND AUTHORITY**

2 **A. The Settlement is fair, adequate, and reasonable.**

3 When considering a motion for final approval of a class action settlement, a court’s
4 inquiry is whether the settlement is “fair, adequate, and reasonable.” *Pickett v. Holland Am.*
5 *Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001) (“it is universally stated that a
6 proposed class settlement may be approved by the trial court if it is determined to be ‘fair,
7 adequate, and reasonable’” (citing *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir.
8 1993)).²

9 In evaluating whether a class settlement is “fair, adequate, and reasonable,” courts
10 generally refer to eight criteria, with differing degrees of emphasis: the likelihood of success
11 by plaintiff; the amount of discovery or evidence; the settlement terms and conditions;
12 recommendation and experience of counsel; future expense and likely duration of litigation;
13 recommendation of neutral parties, if any; number of objectors and nature of objections; and
14 the presence of good faith and the absence of collusion. *Id.* at 192. This list is “not exhaustive,
15 nor will each factor be relevant in every case The relative degree of importance to be
16 attached to any particular factor will depend upon and be dictated by the nature of the
17 claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances
18 presented by each individual case.” *Id.* at 189 (citing *Officers for Justice v. Civil Serv. Comm’n*,
19 688 F.2d 615, 625 (9th Cir. 1982)).

20 The approval of a settlement agreement “is a delicate, albeit largely unintrusive
21 inquiry by the trial court.” *Pickett*, 145 Wn.2d at 189. Although the Court has discretion to
22 determine whether a proposed class action settlement should be approved,

23 the court’s intrusion upon what is otherwise a private consensual
24 agreement negotiated between the parties to a lawsuit must be limited
25 to the extent necessary to reach a reasoned judgment that the
agreement is not the product of fraud or overreaching by, or collusion

26 ² Because CR 23 is similar to its federal counterpart, federal cases interpreting Federal Rule of
27 Civil Procedure 23 are highly persuasive. *Pickett*, 145 Wn.2d at 188.

1 between, the negotiating parties, and that the settlement, taken as a
2 whole, is fair, reasonable and adequate to all concerned.

3 *Id.* (quoting *Officers for Justice*, 688 F.2d at 625). Moreover, as the court in *Pickett* observed,
4 “it must not be overlooked that voluntary conciliation and settlement are the preferred
5 means of dispute resolution.” *Id.* at 190 (quoting *Officers for Justice*, 688 F.2d at 625). In the
6 end, “[s]ettlement is the offspring of compromise; the question we address is not whether the
7 final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free
8 from collusion.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998); *see also*
9 *Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537, 544 (W.D. Wash. 2009).

10 1. Plaintiff’s likelihood of success supports final approval of the Settlement.

11 The existence of risk and uncertainty to Plaintiff at the time of settlement “weighs
12 heavily in favor of a finding that the settlement was fair, adequate, and reasonable.” *Pickett*,
13 145 Wn.2d at 192. Plaintiff and his counsel believe they have a strong case but are pragmatic
14 about the risks of litigation. Absent settlement, Plaintiff would have to clear substantial
15 hurdles to prevail.

16 First, Plaintiff would have to prevail on class certification. BECU opposed the motion on
17 several grounds, including its contentions that Plaintiff could not prove his CPA claim because
18 the challenged practices are disclosed and therefore cannot be unfair or deceptive and
19 Plaintiff cannot prove classwide causation. BECU also argued that Plaintiff’s claim is time
20 barred due to earlier overdraft fees he incurred and that overdraft programs provide a
21 valuable benefit to its customers. Sub. Dkt. No. 75. If the Court accepted any of these
22 arguments and denied Plaintiff’s motion, the other Class Members would be left with no
23 relief.

24 If Plaintiff prevailed, BECU would likely file a summary judgment motion contending
25 the challenged conduct is exempt from the CPA, that Plaintiff’s CPA claims are preempted by
26 federal law, that BECU’s conduct is not deceptive and that, even if it was, it did not cause the
27 alleged harm. Plaintiff recognizes the risk presented by these arguments even though he

1 believes his CPA claims should survive them. The parties are also cognizant of the risks
2 inherent in any trial. And if Plaintiff prevailed at trial, BECU would undoubtedly appeal.

3 This factor supports approval of the Settlement.

4 2. The discovery completed and evidence obtained supports final approval of the
5 Settlement.

6 Courts also consider the amount and nature of discovery and evidence developed at
7 the time of settlement. *Pickett*, 145 Wn.2d at 199. As described above, the parties engaged in
8 sufficient discovery to have a solid understanding of the strengths and weaknesses of their
9 positions. BECU produced a substantial amount of data and documents and Plaintiff deposed
10 four key BECU witnesses. Class Counsel are therefore in a position to recognize and represent
11 to the Court that the Settlement provides a very good result for the Class and should be
12 approved.

13 3. The comprehensive Settlement terms and conditions support final approval of
14 the Settlement.

15 The Settlement provides for comprehensive relief. BECU will pay \$6,000,000 and make
16 meaningful changes to its practices that address Plaintiff's complaints.

17 Class Members do not have to submit claims to receive a payment from the
18 Settlement Fund. The Net Settlement Fund will be distributed pro rata to Settlement Class
19 Members in proportion to the fees they paid during the Class Period. Settlement Agreement
20 ¶¶ 77-80. Any Class Member whose pro rata distribution totals less than \$5 will receive \$5; in
21 other words, no Class Member will receive less than \$5. *Id.* ¶ 80.³ The Class Administrator and
22 the parties are currently determining the amounts of Settlement Class Member Payments and
23 expect to have more information at or before the Final Approval Hearing. The amounts of the
24 payments depend in part on the Court's award of attorneys' fees and costs and approval of
25 the requested service award and Settlement Administration Costs. The \$6 million Settlement
26 Fund represents 42% of the approximately \$14 million in challenged fees. Terrell Decl. ¶ 11.

27 ³ The 929 Settlement Class Members without valid email or postal addresses will not receive payments. Padelford Decl. ¶ 10.

1 Settlement Class Members will also benefit from the significant changes BECU has
2 agreed to make to its practices. BECU will (1) publish prominently on its website a link to a
3 statement clearly describing BECU’s overdraft and NSF policies in detail, including the fact that
4 overdraft and NSF fees are calculated based on Available Balance rather than Ledger Balance
5 and describing the differences between those two Balances; (2) create a formal policy
6 governing refunds of NSF and Overdraft fees, by which BECU will, upon request from a BECU
7 member in good standing, refund at least one NSF or Overdraft fee annually; (3) create a
8 notification to be sent to any member receiving a NSF or Overdraft refund, informing the
9 member of the basis for the fee, and offering money management resources; (4) remind Class
10 Members of the options for opting in or out of the Courtesy Pay for Debit overdraft program,
11 which applies to Overdraft fees; and (5) within three years of Settlement, implement a
12 checking account product featuring no NSF or overdraft fees. Settlement Agreement ¶¶ 51-
13 55.

14 The Settlement compares favorably with settlements in similar cases. *See* Motion for
15 Final Approval of Class Action Settlement at 8, *Wodja v. Wash. State Emps. Credit Union*, No.
16 16-2-12148-4 (Pierce County May 11, 2018) (settlement represented approximately 47% of
17 the likely recovery at trial and, after payment of fees and costs, class members recovered
18 29.6% of overdraft fees imposed when the member’s ledger balance was sufficient to cover
19 the transaction); Order and Judgment Finally Approving Class Action Settlement, *Wodja* (June
20 22, 2018);⁴ *see also Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 583-84 (N.D. Ill. 2011)
21 (approving settlement fund representing approximately 10% of the class’s maximum potential
22 recovery for allegedly improper overdraft fees, and citing settlements with similar recoveries).

23 The funds distributed to the Settlement Class will be allocated in a manner that is fair
24 and reasonable, with no segment of the Class excluded from recovery. In sum, the relief the
25

26 _____
27 ⁴ The *Wodja* motion and order are attached as Exhibits 4 and 5 to the Terrell Declaration.

1 Settlement provides is significant and fair, especially considering the risks of continued
2 litigation and the defenses available to BECU.

3 4. Class Counsel’s recommendation and experience support final approval of the
4 Settlement.

5 “When experienced and skilled class counsel support a settlement, their views are
6 given great weight.” *Pickett*, 145 Wn.2d at 200. Class Counsel are experienced and skilled in
7 class action litigation, including claims challenging bank overdraft fees. Terrell Decl. ¶¶ 19-27;
8 Smith Decl. ¶¶ 2-4; Drake Decl. Ex. A. Class Counsel believe the Settlement to be an excellent
9 result for the Settlement Class based on their extensive experience litigating and resolving
10 class action cases and their evaluation of the risks in this case. Terrell Decl. ¶ 10; Smith Decl.
11 ¶ 8; Drake Decl. ¶ 7.

12 5. The expense and duration of continued litigation support final approval of the
13 Settlement.

14 Another factor for courts to consider in assessing the fairness of a settlement is the
15 expense and likely duration of the litigation had a settlement not been reached. *Pickett*,
16 145 Wn.2d at 188; *Officers for Justice*, 688 F.2d at 625. In applying this factor, courts weigh
17 the benefits of a settlement against the expense and delay involved in achieving an equivalent
18 or more favorable result at trial. *Young v. Katz*, 447 F.2d 431, 434 (5th Cir. 1971).

19 The Settlement guarantees a very favorable outcome for the Settlement Class while
20 avoiding lengthy, risky, and expensive litigation. If litigation continued, the Court would need
21 to rule on class certification and the parties’ likely summary judgment motions. Trial is always
22 risky, and often followed by an appeal. Thus, if the parties had not settled when they did, they
23 would have had to complete briefing on class certification and they would have briefed
24 motions for summary judgment and Plaintiff would have had to prevail on those motions, at
25 trial, and in any appeal before he and the other members of the Settlement Class would have
26 recovered anything. This Settlement avoids that uncertain outcome and provides relief now,
27 without increasing fees and costs. *See Nat’l Rural Telecommc’ns Coop. v. DIRECTV, Inc.*, 221

1 F.R.D. 523, 526 (C.D. Cal. 2004) (“The Court shall consider the vagaries of litigation and
2 compare the significance of immediate recovery by way of the compromise to the mere
3 possibility of relief in the future, after protracted and expensive litigation.”).

4 6. The Settlement Class’s reaction supports final approval of the Settlement.

5 A court may infer that a class settlement is fair, adequate, and reasonable when few
6 class members object. *See Pickett*, 145 Wn.2d at 200–01; *Nat’l Rural Telecommc’ns*, 221 F.R.D.
7 at 529 (“It is established that the absence of a large number of objections to a proposed class
8 action settlement raises a strong presumption that the terms of a proposed class settlement
9 action are favorable to the class members.”). A court can approve a class action settlement as
10 fair, adequate, and reasonable even over the objections of a large number of class members.
11 *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291–96 (9th Cir. 1992).

12 Out of over 150,000 Class Members, only two opted out. One Settlement Class
13 Member filed an objection but withdrew his objection after speaking with Class Counsel.
14 Terrell Decl. ¶ 12. The Settlement Class’s response demonstrates strong support for the
15 Settlement. *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 227 F.R.D. 553, 564 (W.D.
16 Wash. 2004) (“[T]he Class Members themselves have effectively voted heavily in favor of the
17 Settlement, by not opting out. In fact, 95% of Class Members have chosen to take part in the
18 Settlement.”).

19 7. The presence of good faith and the absence of collusion support final approval
20 of the Settlement.

21 In determining the fairness of a settlement, courts consider the parties’ good faith and
22 the absence of collusion between them. *Pickett*, 145 Wn.2d at 201. Courts recognize that
23 arm’s-length negotiations conducted by competent counsel with the assistance of a third-
24 party mediator are *prima facie* evidence of fair settlements. As the United States Supreme
25 Court has held, “[o]ne may take a settlement amount as good evidence of the maximum
26 available if one can assume that parties of equal knowledge and negotiating skill agreed upon
27 the figure through arms-length bargaining” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852

1 (1999); *see also Hughes v. Microsoft Corp.*, No. C98-1646C, 2001 WL 34089697, at *7 (W.D.
2 Wash. Mar. 26, 2001) (“A presumption of correctness is said to attach to a class settlement
3 reached in arms-length negotiations between experienced capable counsel after meaningful
4 discovery.”); *In re PPA Prods. Liab. Litig.*, 227 F.R.D. at 567 (approving settlement entered into
5 in good faith, following arm’s-length and non-collusive negotiations).

6 This Settlement is the result of extensive, arm’s-length negotiations that were assisted
7 by a respected mediator. Terrell Decl. ¶ 8. The settlement negotiations were as hard-fought as
8 the litigation, with experienced attorneys advocating vigorously for their clients’ interests. Like
9 the other factors, this factor supports final approval of the Settlement.

10 **B. The Settlement Class should be finally certified for settlement purposes.**

11 In its preliminary approval order, the Court found the requirements of Civil Rule 23(a)
12 and (b)(3) satisfied. For the reasons cited by the Court and in Plaintiffs’ motion for preliminary
13 approval, the Court should finally certify the Settlement Class. Sub. Dkt. No. 97 ¶¶ 3-9; Sub.
14 Dkt. No. 87 at 12-13.

15 **C. Settlement Class Members received the best practicable notice.**

16 In granting preliminary approval of the Settlement, the Court found the Notice
17 Program satisfies the requirements of due process and applicable law, provides the best
18 notice practicable, and constitutes sufficient notice to the Class. Sub. Dkt. No. 97 ¶¶ 13-14.
19 The Notice Program was fully implemented by Class Administrator JND.

20 JND sent the Email Notice on June 24, 2021, to 145,409 Class Members with valid
21 email addresses. Padelford Decl. ¶ 6, Ex. A. Only 2,859, or 2%, were undeliverable. *Id.* ¶ 7. JND
22 sent the Postcard Notice to 9,873 Class Members, which included 7,014 without a valid email
23 address and the 2,859 whose Email Notices were returned undeliverable. *Id.* ¶¶ 8-9. Of 1,248
24 undeliverable Postcard Notices, 455 were sent to updated addresses and only 127 of those
25 Notices were returned undeliverable a second time. *Id.* ¶ 9. A total of 151,494, or 99%, of
26 Class Members received either the Email Notice or Postcard Notice. *Id.* ¶ 11.

1 JND established a Settlement Website at www.NSFSettlement.com and posted
2 information about the settlement as well as the Long Form Notice, the Settlement Agreement,
3 and the motion for preliminary approval and order. *Id.* ¶ 12, Ex. C. As of September 9, there
4 were 4,009 unique visitors and 6,906 views of the Settlement Website. *Id.* ¶ 13. JND also
5 established a toll-free telephone number that was available 24 hours a day. *Id.* ¶ 14. The toll-
6 free number received 249 calls as of September 9. *Id.* ¶ 15. JND received and responded to
7 316 emails sent to case-specific email address info@nsfsettlement.com. *Id.* ¶¶ 16-17.

8 JND's Settlement Administration Costs should be approved for payment from the
9 Settlement Fund. As of July 31, JND incurred \$\$38,656.84 in Settlement Administration Costs
10 and estimates its total costs, assuming administration is complete in February 22, 2022, will
11 be \$89,810. *Id.* ¶ 22.

12 VI. CONCLUSION

13 Plaintiff respectfully requests that the Court finally certify the Settlement Class and
14 approve the Settlement as fair, reasonable, and adequate.

15 VII. LCR 7(5)(B)(VI) CERTIFICATION

16 I certify that this memorandum contains 3,711 words in compliance with the Local Civil
17 Rules.

18 RESPECTFULLY SUBMITTED AND DATED this 10th day of September, 2021.

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