IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALGHADEER BAKERY & MARKET, INC., on behalf of itself and all others similarly situated, Plaintiff, v. WORLDPAY US, INC., Defendant.	CIVIL ACTION NO. 1:16-cv-03627-MLB
ACEBEDO & JOHNSON, LLC, IDL QUAD GROUP, LLC, and MEDICAL LEGAL CONSULTANTS OF GREATER ATLANTA, LLC, on behalf of themselves and all others similarly situated, Plaintiffs, v. WORLDPAY US, INC., Defendant.	CIVIL ACTION NO. 1:18-cv-02688-MLB

MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

Class counsel overcame an assortment of significant risks and negotiated a settlement with Defendant Worldpay US, Inc. ("Worldpay") that provides $15 million in cash benefits to the settlement class and sweeping practice changes. As compensation for their successful efforts, class counsel request the Court, in accordance with the settlement agreement, approve a fee of $5 million (one third of the $15 million common fund) and reimbursement of their litigation expenses.

The reasonableness of the requested fee is supported by declarations from (a) class counsel, (b) Hunter Hughes, the mediator who helped the parties reach the settlement, and (c) former Georgia Attorney General Mike Bowers who, after reviewing the record, has opined:

> This is one of the finest pieces of legal work I have ever encountered. . . . What was achieved was quite an accomplishment, especially because it was done on pure contingency, a matter of sheer daring. It deserves substantial rewarding.

See Declaration of Michael J. Bowers ("Bowers Decl.") ¶ 35 (Exh. A hereto). Additionally, the requested expenses of $44,396.96 are reasonable and were all necessarily incurred on behalf of the settlement class. As a result, the motion for fees and expenses should be approved.

The Court should also approve service awards of $10,000 for each of the four class representatives. The settlement could not have occurred but for these brave merchants' temerity in standing up to Defendant and their willingness to

devote their time and scant resources to ensure the success of this litigation. The awards thus are reasonable and justified.

BACKGROUND

The background of this litigation is described in the motion for final approval of class settlement. *See* Dkt. 82 in Case No. 16-cv-3627-MLB; Dkt. 33 in Case No. 18-cv-2688-MLB. Herein, attention is focused specifically on class counsel's efforts to investigate and pursue claims on behalf of the settlement class.

A. Initial Investigation. Class counsel's first involvement in this case began nearly four years ago when they were approached by Plaintiff Alghadeer Bakery to investigate potential legal claims against Worldpay for what it perceived to be overbilling on its monthly merchant statements. *See* Joint Declaration of E. Adam Webb and Matthew C. Klase ("Joint Decl."), ¶ 7 (Dkt. 77-2 in Case No. 16-cv-3627-MLB); Dkt. 28-2 in Case No. 18-cv-2688-MLB). Class counsel undertook a detailed investigation to better understand Defendant and its billing practices. *Id.* at ¶¶ 8-10. Plaintiff's owner was interviewed and its documents digested. *Id.* Most notably, the contract terms, which set forth agreed-upon pricing information, and the fine print terms and conditions governing the contract, were analyzed, as well as dozens of monthly billing statements. *Id.* Class counsel also spoke with an industry expert about the practices and reputation of Worldpay and researched online

complaints concerning its billing practices. *Id.* On August 26, 2016, following a thorough investigation of the law and the facts, class counsel filed a class action complaint against Worldpay. *Id.* at ¶¶ 12-13.

B. Early Litigation. Worldpay vigorously defended the case from its inception, first removing the case to federal court and seeking to dismiss. Joint Decl. ¶¶ 14-15. This forced class counsel to amend the complaint, which provoked another motion to dismiss. *Id.* at ¶¶ 16-20. Class counsel opposed the motion on the merits. *Id.* at ¶ 19. In the meantime, class counsel fielded calls from more than a dozen other Worldpay merchants that made similar overbilling allegations. *Id.* at ¶ 21. Counsel carefully vetted the merchants for inclusion in the case and negotiated a tolling agreement with Worldpay to ensure several (including Acebedo, IDL Quad, and MLC) could be added at the appropriate time. *Id.* at ¶¶ 22-24.

After the Court denied the motion to dismiss as to the Bakery and ordered limited discovery, class counsel prepared interrogatories and requests for production and responded to Worldpay's requests. *Id.* at ¶¶ 22, 25. The parties were able to stipulate as to the governing contract version, and Worldpay answered. *Id.* at ¶¶ 26-27.

After preliminary settlement discussions failed to bear fruit, Worldpay sought partial summary judgment on the Bakery's declaratory relief and unjust enrichment claims. *Id.* at ¶¶ 28-30. Class counsel thoroughly briefed this motion and sought to

defer ruling pending discovery. *Id.* at ¶ 31. Class counsel also opposed several notices of authority submitted by Worldpay in support of its motion. *Id.* at ¶¶ 32-33.

While the summary judgment motion was pending, the parties engaged in significant discovery on the breach of contract claim. *Id.* at ¶¶ 34-44. Worldpay initially resisted class discovery but after the parties briefed and presented oral argument on the issue, the Court ruled class discovery could go forward. *Id.* at ¶¶ 35, 37, 40-41. The parties exchanged detailed interrogatories, requests for production, and requests for admissions, met and conferred on these requests on numerous occasions, and responded. *Id.* at ¶¶ 36, 38, 44. Detailed confidentiality and ESI protocols were negotiated. *Id.* at ¶ 43. Subpoenas were also served and over 4,000 pages of documents were exchanged and reviewed. *Id.* at ¶ 44.

By early May 2018, it became clear that the claims of Acebedo, IDL Quad, and MLC were not dependent on the outcome of Worldpay's motion for summary judgment as to the Bakery, so class counsel terminated the tolling agreement and filed a new case against Worldpay which added a cause of action for fraudulent inducement and attacked several new fee practices that were not at issue in the existing case. *Id.* at ¶¶ 45-47. Worldpay moved to dismiss the new fraud claim and class counsel opposed this motion. *Id.* at ¶ 49.

Class counsel was able to obtain Worldpay's and the Court's consent to the consolidation of the cases and discovery proceeded simultaneously in both actions. *Id.* at ¶ 48. Worldpay produced an additional 45,000 pages of documents, all of which were reviewed and analyzed by class counsel. *Id.* at ¶ 51.

C. Preparation for Settlement Negotiations, Mediation, and Agreement.

After the Court granted Worldpay's partial motion for summary judgment against the Bakery, a stay was granted so the case could be mediated by renowned Atlanta neutral Hunter Hughes. Capitalizing on experience they gained in prior payment processing cases, class counsel prepared a detailed, itemized list of information that their data expert Arthur Olsen needed to estimate class-wide damages. *Id.* at ¶ 52. Class counsel diligently worked to ensure Worldpay provided the necessary data, which included nearly 6,000 pages of contracts and billing statements, as well as hundreds of thousands of lines of billing data for 200 sample merchant customers. *Id.* at ¶¶ 57, 60. Counsel reviewed and organized this information, which in turn allowed Mr. Olsen to isolate all instances of overcharges in the sample merchant accounts and extrapolate the findings across the entire class using aggregate revenue figures provided by Worldpay. *Id.* at ¶¶ 61-64.

Class counsel provided Mr. Olsen's analysis to Defendant in advance of the mediation with a 37-page mediation brief that addressed critical class and merits

issues, laying out substantial support for Plaintiffs' litigation positions. *Id.* at ¶ 64. Counsel also studied Defendant's voluminous mediation statement and coordinated with the Plaintiffs to prepare for the mediation. *Id.* at ¶ 65.

This extensive preparation did not initially bear fruit as the mediation was unsuccessful. *Id.* at ¶ 66. However, the parties met following the mediation and agreed to resume discussions after further expert analysis of damages incurred by "old paper" merchants (i.e., those merchants with the stronger claims). *Id.* at ¶¶ 68-70. Worldpay provided the additional data and it was promptly "crunched" by the parties' experts, with the results and an additional round of mediation briefs being exchanged. *Id.* at ¶ 71. After several weeks of further negotiations, both directly and through Mr. Hughes, the parties were finally able to reach agreement on the terms. *Id.* at ¶¶ 74-75. The settlement resulted from arm's length, difficult negotiations that succeeded in large part due to Mr. Hughes' active and continuous involvement. *Id.*; Declaration of Hunter Hughes ("Hughes Decl.") ¶ 8 (Dkt. 82-1 in Case No. 16-cv-3627-MLB; Dkt. 33-1 in Case No. 18-cv-2688-MLB).

Class counsel prepared drafts of the settlement agreement, the allocation formula, and the proposed notices to the class and sent them to Worldpay's counsel for their comments. *Id.* at ¶¶ 76-77. Over the next few months, the parties exchanged multiple redlined drafts of these documents, which included fine tuning how notice and

payments could most fairly and efficiently be disseminated to the class members. *Id.* In conjunction with these discussions, class counsel obtained advice from potential settlement administrators, which submitted bids to provide notice and administer the settlement. *Id.* at ¶ 78. The parties did not negotiate the amount of class counsel's fees and expenses or the proposed service awards to the class representatives until after the key provisions of the settlement, including the amount of the direct relief to the settlement class, was agreed upon. *Id.* at ¶ 79; Hughes Decl. ¶ 9. Consensus was reached on final drafts of the agreement, notices, and allocation formula in November 2019. Joint Decl. ¶ 80.

D. Post-Settlement Activities. Class counsel prepared and filed a detailed motion for preliminary approval of the settlement. *See* Dkt. 77 in Case No. 16-cv-3627-MLB; Dkt. 28 in Case No. 18-cv-2688-MLB. Following a hearing, the motion was granted by the Court. *See* Preliminary Approval Order.

Class counsel has subsequently worked on a near daily basis with KCC – the appointed settlement administrator – to ensure that all settlement class members were provided notice in accordance with the notice program and the Court's preliminary approval order. *See* Supplemental Joint Declaration of E. Adam Webb and Matthew C. Klase ("Supp. Joint Decl.") ¶ 4 (Dkt. 82-3 in Case No. 16-cv-3627-MLB; Dkt. 33-3 in Case No. 18-cv-2688-MLB). In doing so, class counsel (1) worked with KCC and

Defendant to ensure the class list included all necessary data points and information to provide notice and calculate awards pursuant to the allocation formula and was timely provided by Defendant; (2) edited the email, postcard, and long form notices, the claim form, and the content of the settlement website and telephone line scripts; (3) ensured the settlement fund was timely funded; (4) ensured notice was timely sent; (5) answered direct, individual inquiries from *more than 700* settlement class members via telephone, email, or U.S mail; (6) monitored the undeliverables and claims response; and (7) sent out *hundreds-of-thousands* of emails to settlement class members reminding them to file claims. Supp. Joint Decl. ¶ 5.

Class counsel has also prepared and filed a motion for final approval and will appear at the final approval hearing. *Id.* at ¶ 6. Even if the settlement is approved, class counsel's work will continue past the final approval hearing and not conclude until all claims are paid and the settlement fully consummated. *Id.* at ¶ 7. This process will likely take more than a year of additional work. *Id.*

ARGUMENT AND CITATION OF AUTHORITY

A. The Requested Fee of One-Third of the Common Fund Is Reasonable. For decades, it has been established that when a representative party confers a substantial benefit upon a class, its counsel is entitled to attorneys' fees based upon the benefit obtained. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478

(1980). This common benefit doctrine is an exception to the general rule that each party must bear its own litigation costs. The doctrine serves the "twin goals of removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class and of equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts." *In re Gould Sec. Litig*., 727 F. Supp. 1201, 1202 (N.D. Ill. 1989) (citation omitted). The common benefit doctrine stems from the premise that those who receive the benefit of a lawsuit without contributing to its costs are "unjustly enriched" at the expense of the successful litigant. *Van Gemert*, 444 U.S. at 478. Courts have also recognized that appropriate fee awards in cases such as this encourage redress for wrongs caused to entire classes of persons and deter future misconduct of a similar nature. *See, e.g.*, *Deposit Guar. Nat'l Bank v. Rope*, 445 U.S. 326, 338-39 (1980). Adequate compensation promotes the availability of counsel for aggrieved persons:

> If the plaintiffs' bar is not adequately compensated for its risk, responsibility, and effort when it is successful, then effective representation for plaintiffs in these cases will disappear . . . . We as members of the judiciary must be ever watchful to avoid being isolated from the experience of those who are actively engaged in the practice of law. It is difficult to evaluate the effort it takes to successfully and ethically prosecute a large plaintiffs' class action suit. It is an experience in which few of us have participated. The dimensions of the undertaking are awesome.

Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1375-76 (D. Minn. 1985).

The controlling authority in the Eleventh Circuit on fees in common fund cases is *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991), which held that such fees must be determined based on the percentage of the benefit to the class, as opposed to the lodestar approach that focuses on the time expended by class counsel multiplied by their hourly rates. *E.g.*, *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1362 (S.D. Fla. 2011) ("The Eleventh Circuit made clear in *Camden I* that percentage of the fund is the *exclusive* method for awarding fees in common fund class actions") (emphasis added).

The Court has substantial discretion in determining the appropriate fee percentage. *Camden I*, 946 F.2d at 774 ("There is no hard and fast rule . . . because the amount of any fee must be determined upon the facts of each case"). Nonetheless, awards commonly fall between a lower end of 20% and an upper end of 40%. *Id.* Moreover, following *Camden I,* fee awards in the Eleventh Circuit have averaged around one-third of the class benefit. *See Wolff v. Cash 4 Titles*, 2012 WL 5290155, *5-6 (S.D. Fla. Sept. 26, 2012) (noting that fees in the Eleventh Circuit are "roughly one third" and listing cases awarding fees of 30 percent or more); *see also, e.g., Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1195-96 (11th Cir. 2019) (affirming one-third); *Waters v. Int'l Precious*

Metals Corp., 190 F.3d 1291, 1292-98 (11th Cir 1999) (same); *George v. Academy Mortgage Corp. (UT)*, 369 F. Supp. 3d 1356, 1383 (N.D. Ga. 2019) (awarding one-third); *Champs Sports Bar & Grill Co. v. Mercury Payment Sys., LLC*, 275 F. Supp. 3d 1350, 1356 (N.D. Ga. 2017) (same); *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 2012 WL 12540344, *6 and n.6 (N.D. Ga. Oct. 26, 2012) (same and collecting cases); *Morefield v. NoteWorld, LLC,* 2012 WL 1355573, *5 (S.D. Ga. Apr. 18, 2012) (one-third); *Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1240 (S.D. Fla. 2006) (one-third).

That fee awards are typically one-third of the class benefit is supported by Mr. Hughes, who has mediated "several hundred class and collective action settlements" and is well-versed in the law. Hughes Decl. ¶¶ 10-11. According to Mr. Hughes:

> In my experience, more than 75% of these settlements I have been affiliated with provided for fees of one-third of the class fund. The remaining such common fund cases have had fee awards as high as approximately 40% of the fund down to approximately 20%.

Id. at ¶ 10. Here, class counsel's fee request of one-third of the common fund that was created through their efforts falls within the accepted range.

Camden I requires courts to check the appropriateness of the percentage through analysis of the *Johnson* factors and the additional criteria:

> (i) time and labor required; (ii) novelty and difficulty of the relevant

> questions; (iii) skill required to properly carry out the legal services; (iv) preclusion of other employment; (v) customary fee; (vi) whether the fee is fixed or contingent; (vii) time limitations imposed by the clients or the circumstances; (viii) results obtained, including the amount recovered for the clients; (ix) experience, reputation, and ability of the attorneys; (x) "undesirability" of the case; (xi) nature and the length of the professional relationship with the clients; and (xii) fee awards in similar cases (xiii) the time required to reach a settlement; (xiv) whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel; (xv) any non-monetary benefits conferred upon the class by the settlement; and (xvi) the economics involved in prosecuting a class action.

Camden I, 946 F.2d at 775; *George*, 369 F. Supp. 3d at 1376. As applied here, these factors confirm the reasonableness of the requested fee.

1. Substantial Time and Labor Was Required. Class counsel spent an enormous amount of time on this case. Joint Decl. ¶¶ 6-80; Supp. Joint Decl. ¶ 2. Their work included extensive pre-suit investigation; communications with Plaintiffs; preparing complaints, motions, and responses to multiple dispositive motions; taking copious amounts of written and document discovery; negotiating several case management orders and similar documents; researching and drafting voluminous mediation briefs; exchanging extensive informal damages discovery and working with an expert to analyze extensive billing data; mediating, negotiating, and drafting the settlement; preparing the approval papers; working with the settlement administrator on the notice program; and communicating with

the settlement class members. *Id.* Moreover, to see the settlement through to final conclusion will necessitate many hours of additional work answering questions from settlement class members, overseeing cash distributions, and ensuring Defendant follows through on making agreed-upon practice changes. Supp. Joint Decl. ¶ 7.

All told, class counsel's coordinated work paid great dividends for the settlement class. Each of the above-described efforts was essential to achieving the settlement before the Court. Supp. Joint Decl. ¶ 3. The substantial time and labor class counsel devoted to prosecuting and settling these actions readily justify the fee that is being requested. Bowers Decl. ¶ 14.

2. The Issues Involved Were Novel and Difficult. The case involved difficult factual issues. For example, it is very difficult to identify – let alone establish liability based upon – the overcharge practices that lie at the heart of this litigation. Class counsel had to decipher a complex industry that defies transparency; comprehend byzantine billing practices; and analyze voluminous documents and data that covered nearly a decade. Supp. Joint Decl. ¶ 8; Bowers Decl. ¶ 15. Moreover, the case presented novel legal issues, such as the enforceability and applicability of the contractual provisions that Defendant includes in its form contracts in an attempt to exculpate itself from overbilling,

whether the fraudulent inducement claims presented individual reliance issues that could defeat certification, whether Defendant had sufficient records and information to allow the class members to be ascertained and individual damages calculated, and whether a nationwide class comprised of nearly 300,000 merchants could be managed and certified. Supp. Joint Decl. ¶ 9; Bowers Decl. ¶ 15. The uncovering of Defendant's purported overbilling and positioning of this case for class certification and a victory on the merits presented challenges most law firms are simply not able to meet. Supp. Joint Decl. ¶ 10; Bowers Decl. ¶¶ 15-16. The second *Johnson* factor supports the requested fee.

3. Class Counsel Possessed the Necessary Skill to Effectively Litigate the Case. Litigation of this case required counsel highly trained in class action law and procedure as well as counsel familiar with the specialized issues at bar. Supp. Joint Decl. ¶ 10. As evidenced by their résumé (Exh. 1 to Joint Decl.) and their work in litigating the case, class counsel possess these attributes. Bowers Decl. ¶ 17. The third *Johnson* factor supports the requested fee.

4. Class Counsel Were Precluded From Taking on Other Employment. If class counsel had not taken on this case, they would have been able to spend significant time on other matters. Supp. Joint Decl. ¶ 11. Although this is true whenever lawyers handle multistate class actions, class counsel is a very small firm

with limited manpower. Over three-and-a-half years, they have turned down multiple cases because of the time and attention that this case required. *Id.*; *also* Bowers Decl. ¶ 18. The fourth *Johnson* factor supports the requested fee. *In re Equifax Inc. Customer Data Security Breach Litig.*, 2020 WL 256132, *33 (N.D. Ga. Mar. 17, 2020) ("Given the demand for their services attributable to their high level of skill and expertise, but for the time and effort they spent on this case the plaintiffs' lawyers would have spent significant time on other matters").

5. The Requested Fee Is Customary. Individual contingency cases in Georgia typically call for a fee of one-third to 40 percent of the recovery. Supp. Joint Decl. ¶ 12; Bowers Decl. ¶ 19. In the class action context, however, the fee is typically only one-third. Hughes Decl. ¶¶ 10-11. As a result, the fee requested here is reasonable, customary, and standard in Georgia. *Id.* Moreover, consistent with this usual practice, class counsel and each of the class representatives entered into contingent fee agreements providing for payment of one-third to forty percent of any recovery. Supp. Joint Decl. ¶ 12. The willingness of the class representatives to enter into such an agreement provides further evidence the requested award is reasonable. *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989) ("The presence of a pre-existing fee agreement may aid in determining reasonableness"). The fifth *Johnson* factor supports the fee.

6. These Actions Were Prosecuted Entirely on a Contingent Basis. Because class counsel took these cases on a contingency fee basis, had they not achieved a recovery, they would have received nothing and, in fact, would have suffered substantial out-of-pocket losses because they were advancing all the litigation expenses, which easily could have amounted to hundreds of thousands of dollars. Supp. Joint Decl. ¶ 13. Uncompensated expenditures of such magnitude can severely damage or destroy firms of the small size of class counsel's firm. *Id.* Such risk must be compensated and is a critical factor in analyzing the reasonableness of a fee. *See, e.g., Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd,* 889 F.2d 21 (11th Cir. 1990).

Public policy concerns such as ensuring the continued availability of experienced counsel to represent classes of injured plaintiffs holding small individual claims – also support the requested fee. *See* Bowers Decl. ¶¶ 20, 33.

It was extremely risky for class counsel to bring these cases. Supp. Joint Decl. ¶ 14. Not only is certifying fraudulent inducement claims challenging, but courts (including this Court) have recently determined that one-sided contract provisions requiring merchants to dispute fees in a timely manner are enforceable. *See* Dkt. 63 in Case No. 16-cv-3627-MLB; *also, e.g.*, *Cobra Tactical, Inc. v.*

Payment Alliance Int'l, Inc., 315 F. Supp. 3d 1342, 1350-51 (N.D. Ga. 2018) (dismissing breach claim on grounds merchant did not provide timely notice of challenged fees in accordance with contract). Even though Plaintiffs overcame the contract language by providing timely notice, the question then became whether the Plaintiffs' notices were sufficient for all class members or just themselves. Supp. Joint Decl. ¶ 15. This is an unsettled issue under Georgia law. *Id.*; *also* Dkt. 43 in Case No. 16-cv-3627-MLB.

Such dispositive risks cannot be ignored. Indeed, risk should be evaluated as of the time class counsel filed suit, not in hindsight. *See, e.g.*, *Skelton v. General Motors Corp.*, 860 F.2d 250, 258 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989) ("The point at which plaintiffs settle with defendants . . . is simply not relevant" to evaluating class counsel's risk). The sixth *Johnson* factor supports the requested fee. *Also* Bowers Decl. ¶¶ 20-21.

7. Class Counsel Worked Under Time Pressures. Class counsel does not contend that this factor justifies either a higher or lower fee as time pressure in cases of this sort is commonplace.

8. Class Counsel Achieved an Excellent Settlement. The amount at issue and the result obtained justify the requested fee. The amount of the settlement recovered for "old paper" merchants (i.e., $9 million) represents

approximately 38 percent of their most likely recoverable trial damages and 160 percent of Worldpay's estimate of their damages. Joint Decl. ¶¶ 91-92. The amount of the settlement recovered for "new paper" merchants (i.e., $6 million) represents a lesser percentage of recoverable trial damages given the rulings made by the Court to date and the strength of Defendant's remaining defenses. *Id.* at ¶¶ 91, 93. This is a "very substantial recovery [obtained] under challenging conditions."[1] Bowers Decl. ¶ 23. If approved, settlement class members will receive their payments in a few months, as opposed to years down the line (if at all).

The importance of the equitable relief can also not be overlooked and is extremely valuable to the settlement class. Joint Decl. ¶ 95. Indeed, the practice changes allow current customers to avoid costly fee increases, preserve their right to challenge fee errors and discrepancies, and even the

[1] That the entire fund may not be claimed does not impact the fee analysis. Fees are based on the total amount available to the class rather than the amounts claimed. *See, e.g.*, *Van Gemert*, 444 U.S. at 480 (class members' "right to share the harvest of the lawsuit, whether or not they exercise it, is a benefit of the fund created by the efforts of . . . class counsel"); *Poertner v. Gillette Co.*, 618 Fed. Appx. 624, 628-29 and n.2 (11th Cir. 2015); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437-38 (2d Cir. 2007); *Williams v. MGM-Pathe Comms. Co.*, 129 F.3d 1026 (9th Cir. 1997) (holding a court abused its discretion by calculating fees based upon actual claims); *Pinto v. Princess Cruise Lines*, 513 F. Supp. 2d 1334, 1339 (S.D. Fla. 2007) ("the percentage applies to the total fund created, even where the actual payment following the claims process is lower").

playing field in future fee disputes. Joint Decl., ¶ 95. When the impact of this relief is combined with the $15 million settlement fund, it is clear the settlement is "quite an accomplishment." Bowers Decl. ¶ 35; Joint Decl. ¶ 97. The eighth *Johnson* factor supports the requested fee.

9. Class Counsel Are Highly Experienced and Are Well Respected. Webb, Klase & Lemond have been litigating class action cases for well over a decade and have been appointed lead counsel, settlement class counsel, and to leadership positions in many prior class cases. Joint Decl. ¶¶ 2-4; Firm Résumé; Bowers Decl. ¶ 26. Their efforts have been lauded by prior courts. *E.g.*, *Jenkins v. Trustmark Nat'l Bank*, 300 F.R.D. 291, 307 (S.D. Miss. 2014) (finding counsel's training and participation "added immense value to the representation of this large Settlement Class"). Class counsel's knowledge and experience was likely essential in reaching the result they have achieved here.

In evaluating the quality of representation by class counsel, the Court should also consider the quality of opposing counsel. *See Camden I*, 946 F.2d at 772 n. 3; *Ressler v. Jacobson*, 149 F.R.D. 651, 654 (M.D. Fla. 1992). Defendant has been represented by skilled counsel from Arnall Golden Gregory, LLP, requiring equally competent representation for the class. *See generally Walco Invs. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997) ("Given the quality of defense

counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results"). Indeed, Defendant's lead attorneys Ed Marshall and Theresa Kananen have considerable experience defending class actions and an encyclopedic knowledge of the payment processing industry. They were highly skilled adversaries and their tireless, inventive representation of Worldpay makes the settlement all the more impressive. Supp. Joint Decl. ¶ 16. Undoubtedly, Arnall Golden Gregory has been a well-regarded Atlanta firm for decades and they "put up a good fight." Bowers Decl. ¶ 26. The ninth *Johnson* factor supports the requested fee.

10. The Case Qualifies as "Undesirable." The risk of non-recovery and presence of difficult legal or factual issues has been held to make a case undesirable, warranting a higher fee. *Morgan v. Public Storage*, 301 F. Supp. 3d 1237, 1256-57 (S.D. Fla. 2016). Here, all such criteria are present. Moreover, it is believed that these are the first two cases brought against Defendant for the practices at issue, despite the fact that merchant websites have for years included numerous complaints about such practices. Supp. Joint Decl. ¶ 17. That no prior counsel endeavored to take on the case and challenge Defendant suggests the case was an undesirable one. *Also* Bowers Decl. ¶ 27. "[C]ounsel should be rewarded for taking on a case from which other law firms shrunk." *In re Checking Account*

Overdraft Litig., 830 F.Supp.2d at 1364. The tenth *Johnson* factor supports the requested fee.

11. Class Counsel Had No Prior Relationships with Plaintiffs. Class counsel did not have a prior relationship with any of the Plaintiffs. This lack of an existing relationship with any of the clients heightened the risks since class counsel did not know their clients prior to this case. The lack of an existing relationship also made it unlikely that any other benefit would result from the representation. Bowers Decl. ¶ 28. The eleventh *Johnson* factor also supports the requested fee.

12. The Requested Fee Comports with Awards in Similar Cases. The fee sought here matches the fee typically awarded in similar cases. *See* Section A, *supra* (collecting cases); Hughes Decl. ¶¶ 10-11. Legions of decisions have found that a one-third recovery in common fund class action cases is appropriate. *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000) ("Empirical studies show that . . . fee awards in class actions average around one-third of the recovery"); *also, e.g.*, *T.S. Kao, Inc. v. North Am. Bancard, LLC*, No. 1:16-cv-04219-SCJ (N.D. Ga. Aug. 20, 2019) (awarding one-third of $15 million settlement); *Smith v. Floor & Décor Outlets of Am., Inc.,* No. 1:15-cv-04316-ELR (N.D. Ga. Jan. 10, 2017) (awarding one-third of $14 million settlement); *Lunsford v. Woodforest Nat'l Bank*, No. 1:12-CV-103-CAP (N.D. Ga. May 19, 2014)

(approving one-third fee of $7,750,000 fund); *In re Profit Recovery Group Int'l, Inc. Sec. Litig*., No. 1:00-cv-1416-CC (N.D. Ga. May 26, 2005) (one-third); *In re Clarus Corp. Sec. Litig*., No. 1:00-CV-2841-CAP (N.D. Ga. Jan. 6, 2005) (one-third); *In re Pediatric Servs. of Am., Inc. Sec. Litig*., No. 1:99-CV-0670-RLV (N.D. Ga. Mar. 15, 2002) (one-third).

13. Other *Camden I* Factors: The other factors noted in *Camden I* also support the requested fee, namely counsel had sufficient time and opportunity to evaluate the strengths and weaknesses of the case and engage in informed negotiations prior to reaching a settlement (Bowers Decl. ¶ 30; Joint Decl. ¶¶ 6-80), to date no class members have objected to the settlement or the requested fee (Supp. Joint Decl. ¶ 20), the settlement provides significant non-monetary benefits to class members that remain customers of Worldpay, namely practice changes that will enable merchants to avoid future unwanted fee increases without penalty and level the playing field in future fee disputes (Bowers Decl. ¶ 32), and, perhaps most importantly, the economics involved in prosecuting a class action favor the requested fee. Indeed:

> To incentivize counsel to undertake a matter of this magnitude against experienced and well-paid defense counsel, the fee award must represent a sufficient premium over the time value of the work invested to justify the economic risks faced by class counsel. Without such a premium the economics of the practice of law will preclude good lawyers from pursuing cases such as these and leave our society

worse off.

Id. at ¶ 33.

14. The Court Should Honor the Parties' Agreement. The fee requested by class counsel is clearly supported by the *Johnson* factors. Moreover, the parties' agreement should be given deference because it resulted from adversarial negotiations *after* the terms of the settlement were decided. Hughes Decl. ¶¶ 8-9; *also Ingram*, 200 F.R.D. at 695. As one court explained:

> The Court finds that the fee and expense negotiations were conducted at arm's length, only after the Parties had reached agreement on all terms of the Settlement. There is no evidence in this case that the Settlement, or the fee and expense agreement, was in any way collusive. Under these circumstances, the Court gives great weight to the negotiated fee in considering the fee and expense request.
>
> Such agreements between plaintiffs and defendants in class actions are encouraged, particularly where the attorneys' fees are negotiated separately and only after all terms of the settlement have been agreed to between the Parties. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (noting that negotiated, agreed upon attorneys' fees are the "ideal" toward which the Parties should strive and stating that "[i]deally, of course, litigants will settle the amount of a fee").

Manners v. Am. Gen. Life Ins. Co., 1999 WL 33581944, *28 (M.D. Tenn. Aug. 11, 1999) (some internal citations omitted).

Many reasons support deferring to the parties' agreement. There is no one "reasonable fee" mandated by applicable law, but as long as the requested fee is one that the Court agrees is within the range of what is reasonable, it should be

approved. The parties' agreement reflects the realities of the marketplace as the competing pressures and motives that drove the parties' positions ensured the fee was reasonable. If courts routinely reduce fees agreed upon by the parties, the inevitable result will be to make fee negotiations more difficult and discourage qualified attorneys from taking risky and expensive class actions such as this case.

B. The Expense Request Is Appropriate. Class counsel also request reimbursement for a total of **$44,396.96** in litigation expenses. Settlement ¶ 77; Supp. Joint Decl. ¶ 23; *Mills v. Electric Auto-Lite Co*., 396 U.S. 375, 391-92 (1970). The requested sum corresponds to specific out-of-pocket expenses incurred while prosecuting and settling the actions and includes expert fees, mediator fees, and necessary filing and administrative expenses (e.g., filing and service fees, PACER charges, copies, postage, delivery fees, etc.). Supp. Joint Decl. ¶ 23. All such expenses were reasonably and necessarily.[2] *Id.*; Bowers Decl. ¶ 34. The expense request is reasonable and should be approved.

C. A Service Award Is Warranted for the Class Representatives. Pursuant to the settlement, class counsel request service awards of $10,000 for each of the four class representatives. Settlement ¶ 79; Supp. Joint Decl. ¶ 24.

[2] The settlement allows up to $75,000 for expenses but class counsel has chosen to limit their request to the hard costs they already incurred. *See* Supp. Joint Decl. ¶ 23. They do not seek reimbursement for the expenses they will incur from this point forward (which may be substantial). *Id.*

Service awards compensate named plaintiffs for the services they provide and the risks they incur during the course of class action litigation. *See, e.g., Ingram,* 200 F.R.D. at 695-96 ($300,000 service awards); *Mercury Payment*, 275 F. Supp. 3d at 1356 ($20,000 service awards); *Spicer v. Chicago Bd. Options Exchange, Inc.*, 844 F. Supp. 1226, 1267-68 (N.D. Ill. 1993) (collecting cases approving awards ranging from $5,000 to $100,000).

Here, the actions of the named Plaintiffs demonstrate the reasonableness of the requested service awards. Indeed, not only did the representatives devote substantial time to this litigation (such as by contacting class counsel, submitting to interviews, forwarding relevant documents, responding to multiple sets of discovery, participating in conferences and keeping themselves abreast of the proceedings), the Plaintiffs exposed themselves to substantial risk that they could have been held liable for Defendant's legal fees and expenses if they lost the case. *Id.* at ¶ 24. But for the class representatives' service and willingness to bear this risk, other settlement class members would have received nothing. *Id.*

CONCLUSION

The requests for a $5 million fee from the $15 million common fund, reimbursement of $44,396.96 in litigation expenses, and service awards of $10,000 for each of the class representatives are reasonable and should be approved.

DATED this 27th day of April, 2020.

Respectfully submitted,

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TYPE AND FONT CERTIFICATION

The undersigned certifies that this brief complies with Local Rule 5.1(B) regarding typefaces and fonts.

/s/ E. Adam Webb
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2020, I caused the foregoing document to be electronically filed with the Clerk of Court using the CM/ECF system which automatically sends email notification of such filing to all attorneys of record.

/s/ E. Adam Webb
E. Adam Webb