UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AL'S PALS PET CARE, LLC, DeFABIO SPINE AND SPORTS REHAB, LLC, JULIE RUDIGER, INC., MENA STONE & LANDSCAPING SUPPLIES, LLC, TULSA ART CENTER, LLC, BAN-A-PEST EXTERMINATION CO., INC., FLEETWOOD CHIROPRACTIC & REHABILITATION, PC, and BAYLEY PRODUCTS, INC., individually and on behalf of all others similarly situated,	§	
Plaintiffs,	§	CIVIL ACTION NO.
v.	§	4:17-CV-3852
WOODFOREST NATIONAL BANK, N.A., MERCHANTS' CHOICE PAYMENT SOLUTIONS, and PAYSAFE PAYMENT PROCESSING SOLUTIONS LLC,	§	
Defendants.	§	

DECLARATION OF JOHN ZAVITSANOS

Pursuant to 28 U.S.C. § 1746, I, John Zavitsanos make the following declaration:

1. My name is John Zavitsanos, my date of birth is March 27, 1962, and my business address is 1221 McKinney Street, Suite 2500, Houston, Texas 77010. I am over eighteen (18) years of age, have never been convicted of a felony or crime involving moral turpitude, am of sound mind, and am competent to make this Declaration. I have personal knowledge of the statements contained herein, and I declare under penalty of perjury that each of them is true and correct.

2. I graduated from Loyola University of Chicago in 1984 with a B.S. degree and then graduated from the University of Michigan, in 1987 with a J.D.

3. I have been licensed to practice in Texas by the Texas Supreme Court since November of 1987. My license to practice law has never been suspended or revoked and I am currently a

member in good standing with the State Bar of Texas. I am currently admitted to the United States Supreme Court, the United States District Courts for the Southern, Northern, Eastern, and Western Districts of Texas and the District of Colorado, and the United States Courts of Appeal for the Third and Fifth Circuits. I am board certified in Civil Trial Law by the Texas Board of Legal Specialization and the National Board of Trial Advocacy. I have tried over seventy-five cases, around of twenty-five of them in federal court.

4. I have represented clients in commercial litigation for more than twenty years. Between 1987 and 1993, I was associated with the firm of Baker & Botts. I worked on a variety of general civil litigation matters. Since July 1993, I have been employed by – and am currently a shareholder with – the firm of Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C. ("AZA").

5. I am personally familiar with the reasonable attorneys' fees and related litigation costs and expenses in the Texas market. I am familiar with the usual and customary rates charged by attorneys serving in contingent matters and in non-contingent fee matters and that have been accepted in cases. I am personally familiar with the hourly rates charged by other litigation counsel of similar skill, experience, and training and who regularly practice in this area of Texas.

6. Over the course of my career, I have undertaken the representation of clients on a contingency-fee basis in the Houston market, such that I am familiar with the contingency fees actually charged.

7. My law firm and I have also periodically represented plaintiffs in common fund class action cases brought in this and other federal district courts. In doing so, I have become familiar with court decisions and standards governing district court consideration of attorney fee applications in common fund class action cases that are settled within the Fifth Circuit.

8. I am aware of the factors under which the Fifth Circuit considers the reasonableness of percentage-based fee awards – referred to commonly as "the *Johnson* factors" – originally established in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). I am also familiar with numerous other opinions wherein district courts within the Fifth Circuit (including this Court) have awarded class counsel fees equal to one third, or more, of a common fund recovered for a settlement class.

9. I understand class counsel in this case are seeking a fee award of $5,000,000, which represents one third of the cash settlement fund of $15,000,000. I have been asked by class counsel to review the record of this case and give my opinion on the reasonableness of this requested fee.

10. To prepare myself to render such an opinion, I have done the following:

(A) reviewed Defendants' contract documents, the docket sheet, the complaint, Defendants' motion to dismiss the complaint, the amended complaint, the parties' mediation briefs, the settlement agreement, the unopposed motion for preliminary approval, the joint declaration of E. Adam Webb and Matthew Klase filed in support of preliminary approval, and the Court's preliminary approval order;

(B) interviewed E. Adam Webb and Andrew K. Meade concerning the claims, the scope of work performed by class counsel, the litigation risks, mediation preparation, the mediation, post-mediation negotiations, and the terms of the settlement;

(C) reviewed firm resumes for Webb, Klase & Lemond, LLC and Meade & Neese; and

(D) reviewed numerous decisions from the Fifth Circuit related to the award of attorneys' fees and expenses in class action cases.

11. Based on the foregoing activities, as well as my general experience and knowledge, it is my opinion that class counsel's request for fees of one third of the $15,000,000 common fund created by the settlement in this case is reasonable.

12. It is well established in the Fifth Circuit 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." *Barton v. Drummond Co.*, 636 F.2d 978, 982 (5th Cir. 1981). In calculating such a fee award, the Fifth Circuit is amenable to the use of the percentage of the fund method, "so long as the *Johnson* framework is utilized to ensure that the fee awarded is reasonable." *Union Asset Management Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 643 (5th Cir. 2012) ("district courts in [the Fifth] Circuit regularly use the percentage method," which "allows for easy computation[,] . . . aligns the interests of class counsel with those of the class members" and "reduces incentives to protract litigation"). The *Johnson* framework requires an analysis of the following factors:

(A) time and labor required;

(B) novelty and difficulty of the questions involved;

(C) the skill requisite to perform the legal services properly;

(D) the preclusion of other employment by the attorney due to acceptance of the case;

(E) the customary fee;

(F) whether the fee is fixed or contingent;

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

(H) the amount involved and the results obtained;

(I) the experience, reputation, and ability of the attorneys;

(J) the undesirability of the case;

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

(L) awards in similar cases.

13. In my opinion, an analysis of these factors and a review of recent decisions from district courts in this Circuit approving fee awards in common fund cases supports the one third request for attorneys' fees in this case.

14. **Time and labor required**: The number of hours class counsel were required to devote to this litigation to position the case for a favorable class settlement was significant. Class counsel undertook substantial factual research to ascertain the nature and extent of the overcharges and Defendants' "slamming" scheme, including interviewing many witnesses, reviewing thousands of pages of documents, and consulting with industry experts. They also conducted an enormous amount of legal research to effectively rebut the numerous dispositive legal arguments raised by Defendants. They also spent many hours analyzing the pre-mediation discovery provided by Defendants to effectively prepare for favorable settlement negotiations. I am told the negotiations themselves were lengthy and contentious. Had counsel not devoted such time and effort and demonstrated their ability to "go the distance," this case may not have settled at all, let alone on the favorable terms reflected in the settlement.

15. **The novelty and difficulty of the questions involved**: This factor, along with the results obtained, are compelling factors supporting the fees requested in this case. Based on my review of the documents in this case, it is apparent the payment processing industry is a complicated one with many moving pieces and parts. Determining whether Defendants (as opposed other involved

parties, such as the payment networks and the member bank) were overcharging Plaintiffs and the other class members, let alone ascertaining the nature and extent of the overcharges, is a complex task. This was compounded further by the fact that the contracts governing Plaintiffs' breach claims facially appeared to authorize the fee manipulations. Success hinged on not only establishing the overcharges but overcoming or distinguishing these one-sided contractual terms.

16. In my judgment, most able attorneys would not, without very substantial and original legal research, be able to assess the legality of Defendants' practices or the viability of the numerous contractual defenses which Defendants articulated in their motion to dismiss or otherwise raised in this proceeding.

17. Successfully representing the settlement class also required a mastery of unusually complex card transaction and fee data analytical issues, as it was necessary to understand the industry and governing legal framework sufficient to obtain from Defendants the appropriate data and to then determine for each potential class member whether they were subjected to the "subject fees" and the amount of their potential damages.

18. Moreover, a case like this is only viable as a class action. Pursuing a few hundred (or even a few thousand) dollars for individual plaintiffs, is not a feasible strategy. Given that this case would only work as a class, it is nearly certain that Defendants would have raised substantial hurdles at the class certification stage, such as the difficulties associated with certifying fraud claims and the individualized nature of Defendants' affirmative defenses. Class counsel undoubtedly took on numerous novel and difficult questions of law in tackling this case.

19. **The skill requisite to perform the legal services properly, and the reputation and experience of the attorneys**: Based on my review of their firm resumes, it is clear class counsel had the skill required to perform well in this complex class action. Webb, Klase & Lemond's experience

in complex and sophisticated class action litigation, including other cases against payment processors, was likely essential in reaching the result they have achieved here. Had they not had the requisite skill to perform the services necessary, it is doubtful they could have achieved the results obtained in this case. Meade & Neese was an ideal complement, with extensive experience in federal court in Houston and a deep understanding of Texas law.

20. **Preclusion of other employment because of this case**: Webb, Klase & Lemond and Meade & Neese are small firms. This case has necessarily taken up a significant amount of their time and, as small firms, they would have been forced to turn away other work that they otherwise could have accepted. In taking on large complex class action cases of this magnitude, you must allot resources for the peaks and valleys of the litigation. You simply cannot take on all the other cases that you would normally accept during the pendency of such cases.

21. **The customary fee**: In contingency cases in Houston, the customary fee after the point of filing the lawsuit ranges from 40-50 percent. The most traditional contingency fee agreement in my experience takes 40 percent of the recovery for the legal fee. In my study of class action common fund fee awards in this District, however, the most common fee awarded is one third of the fund, which is consistent with the fee being requested here. Therefore, the fee requested is reasonable, customary, and standard in this District.

22. **A contingent or fixed fee**: This case, like virtually all class actions, was undertaken on a contingency basis. Class counsel faced a substantial risk that they would invest millions of dollars of their time without receiving a fee. As a point of fact, up to this point class counsel have spent their time, the time of others at their firm, and tens of thousands of dollars in expenses without receiving any compensation.

23. An attorney's recovery for successful contingency work should factor in the risk of no return on the substantial amount invested, and the many other instances when there is no recovery at all. Class counsel have shared with me details of multiple losses in similar litigation against payment processing companies, cases where there was zero recovery after substantial work. Such risk is deserving of a substantial fee, one that is larger than it would have been had the attorney been paid by the hour on a regular basis. Without the potential of a premium to justify the risk, it would have made no practical sense for class counsel to take on the case.

24. **Time limitations**: Based on my review of the docket and my conversations with class counsel, they met all of the deadlines that this Court established to ensure that this case was litigated expeditiously. They have been more than diligent in their efforts to obtain and distribute substantial amounts to the class members.

25. **Amount involved and results obtained**: The result that will be obtained in the proposed settlement, when coupled with the risks undertaken by class counsel, is one of the most significant factors to be considered when assessing class counsel's fee request. Despite the enormous risks I have discussed previously, class counsel were able to obtain an incredible result for the settlement class. The common fund recovery of 28% of the estimated recoverable trial damages – without the risks and delays of dismissal, summary judgment, class certification, and appeals – is quite unusual in class litigation. When coupled with the important contract and practice changes, which will be of substantial benefit to current customers of Defendants that are subjected to fee increases in the future as well as all prospective future customers of Defendants, the settlement is an admirable result. Class counsel are to be commended for such a result. This factor supports the requested fee.

26. **The undesirability of the case**: This case was undesirable not because it was controversial but because of the number of significant legal risks it contained. Very few lawyers

would have placed their finances at such risk, fronting significant time and expense, given the many obstacles and likely delays. There is simply a very limited universe of firms that would have taken on this case. In my experience, many firms will not handle any contingency litigation. Many firms do not take on class actions. Thus, this factor weighs in favor of the fee request.

27. **The nature and length of the professional relationship with the client**: In some cases, having either a longstanding or strong relationship with a client justifies accepting a case with significant risks because other benefits may come from the relationship. In this case, however, no such client relationship previously existed with any of the class representatives. 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. This factor also supports the requested fee.

28. **Awards in similar cases**: Based on my experience as a long-time practitioner in the Fifth Circuit, I believe that the fee request of one third is consistent with other fee awards in common fund cases in the Fifth Circuit. Similar fee awards include, but are certainly not limited to, the following:

(A) *Wolfe v. Anchor Drilling Fluids USA Inc.*, 2015 WL 12778393 (S.D. Tex. Dec. 7, 2015) (Hoyt, J.) (awarding 40% of settlement amount);

(B) *Frost v. Oil States Energy Services,* 2015 WL 12780763 (S.D. Tex. Nov. 19, 2015) (awarding one third of settlement fund);

(C) *Campton v. Ignite Restaurant Group, Inc.*, 2015 WL 12766537 (S.D. Tex. June 5, 2015) (awarding one third of settlement fund);

(D) *Jenkins v. Trustmark Nat'l Bank*, 300 F.R.D. 291 (S.D. Miss. 2014) (awarding one third of $4 million common fund);

(E) *In re Combustion, Inc.*, 968 F. Supp. 1116 (W.D. La. 1997) (awarding 36% of $127 million settlement);

(F) *In re Shell Oil Refinery*, 155 F.R.D. 552 (E.D. La. 1993) (awarding "1/3 in fees from a settlement fund of $170,000,000");

(G) *Erica P. John Fund, Inc. v. Halliburton Co.*, 2018 WL 1942227 (N.D. Tex. Apr. 25, 2018) (awarding one third of $100 million fund);

(H) *Fairway Medical Center, LLC v. McGowan Enterprises, Inc.*, 2018 WL 1479222 (E.D. La. Mar. 27, 2018) (finding one third fee to be a reasonable benchmark in the Fifth Circuit and awarding one third of $3.7 million common fund);

(I) *In re Pool Prods. Distribution Mkt. Antitrust Litig.*, 2015 WL 4528880, *23 (E.D. La. July 27, 2015) (awarding one third); and

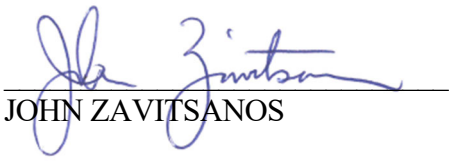
(J) *Burford v. Cargill, Inc.*, 2012 WL 5471985 (W.D. La. Nov. 8, 2012) (awarding one third).

There have certainly been class cases in which other percentages have been sought and awarded to class counsel but, given my analysis of the other *Johnson* factors as outlined herein, a one third fee is in-line with awards in similar cases.

29. Consideration of fee requests such as class counsel's should be informed, in my professional judgment, by an appreciation of the economics of attorney decision-making in future potential class action cases. If the judicial vehicle of the Rule 23 class action is to continue to serve as an efficient means for adjudicating the rights of those similarly situated, then the reward to successful attorneys must be sizeable. Indeed, a rational and free marketplace should reserve its largest economic rewards for those who take the greatest risk and demonstrate the greatest skill at providing a public service. The case record demonstrates significant evidence of both by class counsel.

30. In conclusion, based on my experience and my assessment of the work done by class counsel in accordance with the *Johnson* factors, their fee request of one third of the $15 million settlement fund is reasonable and justified. Class counsel undertook an incredibly risky case and, through their diligence, creativity, and skill, obtained an outstanding result. They are to be commended for such an extraordinary result and compensated in the reasonable manner requested.

31. I declare under penalty of perjury that the foregoing is true and correct, this 11th day of December, 2018.



JOHN ZAVITSANOS