DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street, Denver, CO 80202	DATE FILED: April 24, 2023 9:59 AM FILING ID: B331DBF048928 CASE NUMBER: 2020CV32226
TIM MAZZA, individually and on behalf of all similarly situated persons, Plaintiff, v. AIR ACADEMY FEDERAL CREDIT UNION, Defendant.	▲ COURT USE ONLY ▲
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AMENDED <u>UNOPPOSED</u> MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, AND MEMORANDUM OF LAW IN SUPPORT THEREOF

I. INTRODUCTION

Subject to Court approval, Plaintiff Tim Mazza ("Plaintiff") and Defendant Air Academy Federal Credit Union ("AAFCU") are pleased to announce they have reached a class action settlement of this Lawsuit.[1] The Class includes all persons (1) who entered into an automobile finance agreement with GAP protection in Colorado that was made with or assigned to AAFCU; (2) who paid off their finance agreements before the maturity date (an "Early Payoff"); (3) whose Early Payoffs occurred during the Class Period of **July 1, 2014 to March 31, 2021**; and (4) who did not receive a GAP Refund from AAFCU within 45 days after the Early Payoff, prior to the filing of the lawsuit on July 1, 2020.[2]

In exchange for a release of the claims in this Lawsuit, AAFCU (1) has directly paid full GAP Refunds to each Class member in the collective amount of **$1,149,422.78**; (2) will pay full interest at a rate of 8% per annum compounded annually on the unpaid refund amounts for a collective total of **$344,945.39**; and (3) has implemented and agreed to maintain changes to its refund practices so that from April 1, 2021 forward GAP Refunds are made to all Colorado customers within a reasonable time after an Early Payoff. In total, AAFCU has paid and will pay approximately **$1,494,368** as a result of the filing of this Lawsuit and as consideration for the Settlement. This does not include the *hundreds of thousands of dollars* in refunds that will be paid by AAFCU in the future due to the Settlement's Business Practice Change.

[1] The terms of this settlement follow the basic structure of the settlement the Court approved in *Rael v. Red Rocks Credit Union* on September 8, 2022, which received no objections or opt outs from the Settlement Class.

[2] Capitalized terms in this Motion shall have the same meanings as defined in the Settlement Agreement attached as **Exhibit 1**.

Per the terms of the Settlement, AAFCU has agreed to deposit the **$344,945.39** in interest into a Settlement Fund to pay for (a) the cost of directly mailing Notice of this Settlement to the Class and administering the terms of the Settlement (estimated to be between **$29,000** to **$30,000**), (b) a Service Award of **$500** to Plaintiff Tim Mazza for serving as the Class Representative; and (c) a Fee and Expense Award of approximately **$315,000** to reimburse Class Counsel for the time and expenses incurred representing the Class, subject to final approval by the Court.

The Settlement provides a "complete win" for Plaintiff and the Class. AAFCU has paid and will pay the *maximum* damages that each Class member could have obtained had they prevailed at trial. The Settlement's Business Practice Change further ensures that GAP refunds will be promptly paid to all Colorado customers in the future, thereby obviating the need for injunctive relief.

Plaintiff respectfully requests the Court: (1) certify the proposed Class for settlement purposes only; (2) appoint Plaintiff and his counsel as the Class Representative and Class Counsel; (3) grant preliminary approval of the Settlement; (4) direct that Notice of the Settlement be provided to the Class in the form and manner set forth in the Settlement; (5) appoint Atticus Administration, LLC ("Atticus") as the Settlement Administrator; and (5) set the relevant deadlines for a Final Approval Hearing. AAFCU does not oppose this Motion.

II. STATEMENT OF FACTS

A. Factual Background.

Plaintiff entered into an automobile finance agreement ("Finance Agreement") in Colorado that was assigned to AAFCU. *See* Complaint, filed on July 1, 2020, ¶ 12. As part of the Finance Agreement, Plaintiff paid for 48 months of Guaranteed Asset Protection ("GAP") at a cost of

$300.00. *Id.*, ¶ 13. GAP is an insurance-like benefit that provides that if a customer's car is "totaled" and the insurance payout on the vehicle is less than the amount owed under the Finance Agreement, then the creditor (AAFCU) will waive the difference. *Id.*, ¶ 4.

Plaintiff contends that under Colorado law, if a customer pays off their Finance Agreement early, the creditor is required to issue a prorated credit or refund the cost of GAP coverage for the unused term of the Finance Agreement pursuant to 4 Colo. Code Regs. § 902-1:8 (h). *Id.*, ¶ 7. This unused amount is referred to in the automobile finance industry and by the Colorado Legislature as "unearned" GAP fees. *Id.* Plaintiff alleges that the failure to issue a credit or refund of unearned GAP fees after an Early Payoff constitutes a breach of contract because Colorado's refund obligations are an implied term of every GAP Agreement. *See, e.g., McShane v. Stirling Ranch Prop. Owners Assoc., Inc.*, 393 P.3d 978, 982 (Colo. 2017) ("Contractual language must be interpreted in light of existing law, the provisions of which are regarded as implied terms of the contract, regardless of whether the agreement refers to the governing law."). Plaintiff further contends this practice constitutes a violation of the Colorado Consumer Protection Act, Colo. Rev. Stat. §§ 6-1-101, *et seq.* ("CCPA").

Plaintiff paid off his Finance Agreement early on November 5, 2019, with approximately 46 months remaining on his contract term. Complaint, ¶ 13. AAFCU failed to issue a credit or refund of the unearned GAP fees after the Early Payoff. *Id.*, ¶ 14. Plaintiff alleges this was part of a systemic problem that affected a larger class of AAFCU's Colorado customers. *Id.*, ¶¶ 9, 16-29.

B. Procedural History

1. On July 1, 2020, Plaintiff filed a class action complaint on behalf of himself and all

similarly situated Colorado consumers seeking full GAP refunds plus interest and injunctive relief. Plaintiff further notified the Attorney General for the State of Colorado of the allegations in the Lawsuit and the evidence supporting Plaintiff's allegations.

2. On July 9, 2020, the Lawsuit was consolidated under Case Number 20CV32226 with other similar actions against credit unions and finance companies for their alleged failures to issue GAP Refunds.

3. On December 3, 2020, AAFCU moved to dismiss the Complaint, which Plaintiff opposed on December 24, 2020. The briefing was completed on December 31, 2020.

4. On March 1, 2021, the Court denied AAFCU's motion to dismiss.

5. On March 15, 2021, AAFCU moved to compel arbitration, which Plaintiff opposed on April 5, 2021. The briefing was completed on April 16, 2021.

6. On April 1, 2021, AAFCU altered its business practices to ensure that, on a go-forward basis, it would make refunds to customers in accordance with Rule 8(h).

7. On May 21, 2021, the Court granted AAFCU's motion to compel arbitration and stayed the Action pending arbitration.

8. On June 4, 2021, Plaintiff moved for reconsideration of the Court's May 21, 2021 Order, which AAFCU opposed on June 25, 2021.

9. On August 2, 2021, the court denied Plaintiff's motion for reconsideration.

10. On November 17, 2021, Plaintiff filed his complaint in the Arbitration matter in JAMS Case ID: 29982.

11. On December 8, 2021, Plaintiff filed an Amended Arbitration Demand on behalf of himself and the Class.

12. On February 11, 2022, AAFCU moved to dismiss the Amended Arbitration Complaint, which Plaintiff opposed on March 21, 2022.

13. On April 1, 2022, AAFCU filed an Objection to Class Action Claim.

14. On May 17, 2022, the Arbitrator denied the motion to dismiss and deferred ruling on AAFCU's Objection to Class Action Claim until the Parties conducted discovery.

15. The Parties thereafter engaged in discovery and settlement discussions.

16. On January 25, 2023, the Parties entered into a Term Sheet for this proposed settlement.

17. In March 2023, the Parties executed the Settlement Agreement attached hereto as **Exhibit 1**.

18. On March 20, 2023, pursuant to the terms of the Settlement, the Arbitrator entered an order referring the case back to the Court for consideration of the Settlement.

19. On March 24, 2023, Plaintiff filed a notice with the Court informing the Court that a settlement had been reached and that Plaintiff would file a Motion for Preliminary Approval of Class Action Settlement.

C. Settlement Negotiations.

The settlement negotiations in this matter have been lengthy, principled, and were conducted at arm's length. Declaration of Jason M. Frank ("Frank Decl."), ¶ 13. The parties began engaging in serious settlement discussions in the Fall of 2022. *Id.* On January 25, 2023, the parties reached an agreement on all material settlement terms for the Class. *Id.* The parties thereafter drafted and executed the long-form Settlement Agreement attached as **Exhibit 1**.

III. SUMMARY OF THE PROPOSED SETTLEMENT

The terms of the proposed Settlement are set forth in the Stipulation re: Air Academy Federal Credit Union Class Action Settlement and Release (the "Settlement"), attached hereto as **Exhibit 1.**

A. Consideration for the Settlement's Release.

In exchange for a release of the claims in this Lawsuit, AAFCU (1) has directly paid full GAP Refunds to each Class member in the collective amount of **$1,149,422.78**; (2) will pay full interest at a rate of 8% per annum compounded annually on the unpaid refund amounts for a collective total of **$344,945.39**; and (3) has implemented and agreed to maintain changes to its refund practices so that GAP Refunds are made to all Colorado customers within a reasonable time after an Early Payoff. In total, AAFCU has paid and will pay approximately **$1,494,368** as a result of the filing of this Lawsuit and as consideration for the Settlement. This does not include the *hundreds of thousands of dollars* in refunds that will be paid by AAFCU in the future due to the Settlement's Business Practice Change.

1. GAP Refunds.

Per the terms of the Settlement, AAFCU will provide an affidavit to Class Counsel and the Administrator verifying that it directly paid full GAP refunds to the Class members by either mailing them a check or depositing the money into their account at AAFCU. Settlement, ¶ 89. Class Counsel has reviewed the amount of each refund to verify the refunds were calculated using the Pro Rata Method required by 4 Colo. Code Regs. § 902-1:8 (h). Frank Decl., ¶ 17. In total,

[3] The start date for the interest is 45 days after the Early Payoff of the Class member's finance agreement.

AAFCU paid approximately **$1,149,422.78** in GAP Refunds to the Class members. *Id.*

2. Interest and the Settlement Fund.

In addition to the GAP Refunds, AAFCU has also agreed to deposit **$344,945.39** into a Settlement Fund to pay for the interest that accrued from the date of each Class member's respective Early Payoff to the date the GAP Refund check was issued, calculated at 8% per annum and compounded annually pursuant to C.R.S. § 5-12-102(1)(b). Settlement, ¶ 90. The interest amount was calculated from the 45th day after the Early Payoff to the date of the refund. *Id.* Subject to Court approval, the Settlement Fund will be used to pay (a) the cost of providing Notice and Administration of this Settlement (estimated to be between **$29,000** and **$30,000**), (b) a Service Award of **$500** to Plaintiff Tim Mazza for serving as the Class Representative; and (c) a Fee and Expense Award of **$315,000** to reimburse Class Counsel for their time and expenses incurred representing the Class, subject to final approval by the Court. *Id.*, ¶¶ 91-93, 121, Exs. A, B. In total, as a result of this Lawsuit and this Settlement, AAFCU has paid and will pay approximately **$1,494,368** (**$1,149,422.78** in refunds plus **$344,945.39** in interest). Frank Decl., ¶ 19.

3. Business Practice Change.

After Plaintiff filed this Lawsuit, AAFCU implemented changes to its refund policies and procedures so that, from **April 1, 2021** forward, AAFCU ensures that it will issue a GAP Refund to customers in Colorado within a reasonable time after receipt of an Early Payoff of the Finance Agreement. Settlement, ¶ 88. Customers are not required to take any action after an Early Payoff to receive the GAP Refund. *Id.* The GAP Refund amount is calculated using the Pro Rata Method unless otherwise required by law, and no cancellation fee will be charged unless expressly

authorized in the customer's GAP Agreement. *Id.* These policies and procedures apply to all Colorado customers whose Finance Agreements with GAP protection have been or will be assigned to AAFCU. *Id.* Under the proposed Settlement Agreement, AAFCU agrees it will continue to issue a GAP Refund to its Colorado customers after an Early Payoff in conformance with 4 Colo. Code Regs. § 902-1:8 (h). *Id.* AAFCU's agreement to maintain this Business Practice Change is a material term of the proposed Settlement Agreement. *Id.* Cumulatively, this prospective relief is worth *hundreds of thousands of dollars* to future AAFCU customers each year. Frank Decl., ¶ 19.

4. **Attorneys' Fees & Costs.**

Plaintiffs' counsel will seek a fee and expense award of approximately **$315,000**. Any fee and expense awards approved by the Court will be paid from the Settlement Fund. Settlement, ¶¶ 90, 92.

To date, Class Counsel have incurred at least **679 hours** litigating this case for a total lodestar of **$474,437.50**. *See* Frank Decl., ¶¶ 22, 24-26 and Declaration of Franklin D. Azar ("Azar Decl."), ¶¶ 12-13. This includes time spent briefing an opposition to AAFCU's Motion to Dismiss and Motion to Compel Arbitration while the case was before this Court, as well as filing and litigating the case in arbitration, including drafting a Complaint and Amended Complaint, drafting motions related to class certification and AAFCU's Motion to Dismiss Plaintiff's Complaint, and engaging in informal discovery and settlement negotiations. Class Counsel have also incurred approximately **$3,419.58** in expenses. Azar Decl., ¶¶ 14-15. Class Counsel's **$315,000** fee request equates to approximately **21%** of the total cash value of the Settlement, not including the *hundreds of thousands of dollars* of future GAP Refunds that will be paid under the

Settlement's Business Practice Change each year. Frank Decl., ¶ 23. Class counsel will file a separate Motion for Fees, Costs and Service Awards pursuant to the proposed schedule set forth in this motion, subject to approval by the Court.

5. **Service Award.**

The proposed Settlement provides that the Class Representative may request a Service Award in the amount of **$500** to be paid out of the Settlement Fund. Settlement, ¶ 124.

6. **Notice and Administrative Costs.**

The proposed Settlement provides that the cost of providing Notice of this Settlement to the Class and administering the Settlement will be paid out of the Settlement Fund. Settlement, ¶ 90-91. The proposed Settlement Administrator, Atticus, has agreed to cap these costs at **$30,000** based on the present terms of the Settlement. *See* Declaration of Christopher Longley ("Longley Decl."), Ex. B.

B Release.

In exchange for the above consideration, Plaintiff and each Class Member will release AAFCU and its related entities and persons (the "Class Releasees") from any claims arising from or relating in any way to the Class Member's entitlement to a GAP Refund after an Early Payoff that occurred during the Class Period or interest on such GAP Refund (the "Class Released Claims"). Settlement, ¶ 84. Notwithstanding the foregoing, the Class Releasees do not include any third-party Dealers or GAP Administrators, including without limitation, those identified in the Class Members' GAP Agreements or Finance Agreements. *Id.*

C. Notice Plan.

The Settlement provides that a post-card Notice of Settlement will be mailed to every Class

member by the Settlement Administrator within fourteen (14) days after preliminary approval. Settlement, ¶¶ 98, 101. A copy of the proposed Notice of Settlement is attached to the Settlement as **Exhibit B.** The Notice of Settlement will include a QR code that Class members can scan to link them to a Settlement Website maintained by the Settlement Administrator. *Id.* The Settlement Website will include a detailed Long-Form Notice that explains the Settlement's terms and Class member's rights and options. *Id.*, ¶ 103. A copy of the proposed Long Form Notice is attached to the Settlement as **Exhibit A**. *Id.* The Settlement Website will also include key pleadings, such as the Settlement, the Complaint, the Motion for Preliminary Approval and supporting papers, the Motion for Fees, Costs and Service Awards and the Motion for Final Approval. *Id.*

Within thirty (30) days after mailing the Notice of Settlement, Class Members will have the right to mail a Request for Exclusion from the Class ("Opt-Out") or file an Objection to the Settlement with the Court. Settlement, ¶¶ 105-106, 110-111. The instructions for submitting Opt-Outs and Objections are detailed in the Long Form Notice and Settlement Agreement. *Id.*, **Ex. A**.

IV. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS

A. The Proposed Settlement Class Should Be Preliminarily Certified.

As a prerequisite for directing notice of the Settlement to the Class, the Court should determine whether the Class meets the requirements for class certification. C.R.C.P. 23(e). Class certification requires that all four elements of Rule 23(a) and at least one prong under Rule 23(b) are satisfied. *LaBerenz v. Am. Family Mut. Ins. Co.*, 181 P.3d 328, 333 (2007).

1. The Proposed Settlement Class Meets the Requirements of Rule 23(a).

Rule 23(a) imposes four prerequisites for class certification: (1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact

common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class ("adequacy"). *Jackson v. Unocal Corp.*, 262 P.3d 874, 880 (Colo. 2011). All four prerequisites are satisfied here.

a. Numerosity.

Based on AAFCU's records, the proposed settlement class includes approximately **5,035** members, which readily satisfies the numerosity requirement. *See* C.R.C.P. 23(a)(1); *see also Vinh Nguyen v. Radient Pharm. Corp*., 287 F.R.D. 563, 569 (C.D. Cal. 2012) ("[A] proposed class of at least forty members presumptively satisfies the numerosity requirement.").

b. Commonality.

Rule 23(a)(2)'s commonality requirement is satisfied if "there are questions of law or fact common to the class." C.R.C.P. 23(a)(2); *see also LaBerenz*, 181 P.3d at 338. "[E]ven a single common question" satisfies this requirement. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). The commonality requirement is satisfied when the class members' claims "depend upon a common contention," of such a nature that "determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke." *Id*. at 350.

In the present case, Plaintiff is challenging a single policy that affects all Class Members, *i.e.*, AAFCU's policy of failing to refund unearned GAP fees after an Early Payoff, including failing to pay interest on those unpaid amounts. The foundational common questions underlying each Class member's breach of contract claim are as follows:

- Does Colorado law require a creditor like AAFCU to issue a refund of unearned GAP fees after an Early Payoff? *See* 4 Colo. Code Regs. § 902-1:8 (h) (if a "consumer credit sale . . . is prepaid prior to maturity . . . the creditor must refund to the consumer the

unearned fee or premium paid for GAP").

- Are Colorado's mandatory refund obligations an implied term of every Class member's GAP contract? *See, e.g.*, *McShane*, 393 P.3d at 982 ("Contractual language must be interpreted in light of existing law, the provisions of which are regarded as implied terms of the contract, regardless of whether the agreement refers to the governing law.").

- Does AAFCU owe interest on the unpaid GAP refunds? *See* C.R.S. § 5-12-102 (parties are entitled to interest at a rate of 8% per annum compounded annually from the date the moneys were "wrongfully withheld or after they become due to the date of payment").

These questions present common issues of law that will drive the resolution of this case and, thus, satisfy the "commonality" requirement. *Wal-Mart*, 564 U.S. at 350.

c. Typicality

Plaintiff's claims are typical of the Class because, like every other Class member, he did not receive a refund of his unearned GAP fees after an Early Payoff, nor did he receive any interest on those unpaid fees. Complaint, ¶¶ 13-14; Declaration of Tim Mazza ("Mazza Decl."), filed herewith, ¶ 3. Thus, because Plaintiff suffered an injury from the same conduct endured by all other Class members, the typicality requirement is satisfied. *Ammons v. Am. Family Mut. Ins. Co.*, 897 P.2d 860, 863 (1995) (The typicality requirement is usually met "[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented . . . irrespective of varying fact patterns which underlie individual claims.").

d. Adequacy.

Adequacy requires that "the representative parties will fairly and adequately represent the interests of the class" and do not have "interests antagonistic to the class." *Steiner v. Ideal Basic Indus., Inc.*, 127 F.R.D. 192, 194 (D. Colo. 1987). The adequacy requirement "also requires this

court to determine whether plaintiffs' attorneys are qualified, experienced and able to conduct the proposed litigation." *Id*. at 195.

Here, Plaintiff and Class Counsel do not have any known conflicts of interests with the Class. Frank Decl., ¶¶ 21, 27; Azar Decl., ¶ 12; Mazza Decl., ¶ 6. Plaintiff has retained experienced Class Counsel who have successfully litigated other class action cases concerning GAP refunds across the country. Frank Decl., ¶ 26.

2. The Proposed Class Satisfies the Requirements of Rule 23(b)(3).

Plaintiff's proposed class action also meets the requirements of Rule 23(b)(3), which requires that (1) questions of law or fact common to the class members predominate over any questions affecting only individual members; and (2) a class action is superior to other methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3)

a. Common Issues Predominate.

The predominance inquiry focuses on "whether the proof at trial will be predominantly common to the class or primarily individualized." *Jackson*, 262 P.3d at 889 (citing *Medina v. Conseco Annuity Assur. Co.*, 121 P.3d 345, 348 (Colo. App. 2005)). "Often, the issue most relevant to this inquiry is 'whether the plaintiff advances a theory by which to prove or disprove 'an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position.'" *Id*.

Here, as established above, the common questions are ones that can be decided as a matter of law, because AAFCU's failure to issue GAP refunds to the Class was based on the same uniform policy that affected all class members. *Supra*, § IV.A.1.b. As such, the predominance requirement is satisfied, because the resolution of these issues will not turn on facts unique to individual class

members. *Jackson*, 262 P.3d at 889.

b. Superiority.

Here, a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Livingston v. U.S. Bank, N.A.*, 58 P.3d 1088, 1090 (Colo. App. 2002). The superiority prong is satisfied when the class members' relatively small damages would cause each claim to be too costly to litigate individually. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). The average refund owed was approximately **$228.00** per Class member. Frank Decl., ¶ 17. This amount is far too small to economically litigate on an individual basis. Moreover, having over 5,035 separate lawsuits is not practical. Thus, a class action is clearly superior to individual lawsuits.

In sum, all of the prerequisites for class certification are satisfied, and the Court should certify the Class for settlement purposes only.

V. THE COURT SHOULD GRANT PRELIMINARY SETTLEMENT APPROVAL

A. Legal Standards for Settlement Approval

The standard for evaluating a proposed class action settlement under C.R.C.P. 23 is the same as under Fed. R. Civ. P. 23. *Thomas v. Rahmani-Azar*, 217 P.3d 945, 947 (Colo. App. 2009) (Because the Colorado class action statute is substantially identical, "federal case law is highly instructive."). It is a two-stage process designed to ensure the fairness of any class action settlement. *Pliego v. Los Arcos Mexican Rests., Inc.*, 313 F.R.D. 117, 128 (D. Colo. 2016).

In the first stage, the Court "determines whether a proposed settlement is within the range of possible approval and whether or not notice should be sent to class members" so that they may have the opportunity to object to the settlement's terms at a final approval hearing or "opt-out" of

the settlement entirely. *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1063 (C.D. Cal. 2010). "The object of preliminary approval is for the Court 'to determine whether notice of the proposed settlement should be sent to the class, not to make a final determination of the settlement's fairness'" and thus, "the standard that governs the preliminary approval inquiry is less demanding than the standard that applies at the final approval phase." *Pliego*, 313 F.R.D. at 128. There is a strong policy favoring class action settlements, and the Court should approve a class action settlement that "is fair, adequate, and reasonable." *Thomas*, 217 P.3d at 947.

B. The Settlement Is Fair, Reasonable, and Adequate.

In the Tenth Circuit, the following factors are analyzed in determining whether a settlement is fair, adequate and reasonable: (1) whether the proposed settlement was fairly and honestly negotiated; (2) the judgment of the parties that the settlement is fair and reasonable; (3) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; and (4) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation. *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002). The proposed Settlement meets these standards.

First, the proposed Settlement was a product of serious arm's-length negotiations between the parties. Frank Decl., ¶ 13. Plaintiff conducted sufficient discovery to make an informed assessment of the strengths and weaknesses of the Class's claims, including reviewing documents about AAFCU's refund policies, practices and procedures and analyzing the data for over 5,035 customers, with the assistance of a statistical and damages expert, to calculate the potential GAP refunds and interest owed to the Class. *Id.*, ¶¶ 10-12. Class Counsel is also highly experienced in this type of litigation, having spent over four years litigating GAP refund cases across the

country, and briefing arbitration issues in the other Colorado GAP cases pending before this Court. *Id.*, ¶ 26.

Second, the parties believe the Settlement is a fair and reasonable compromise of this dispute. Frank Decl., ¶ 27. In fact, the Settlement provides the maximum relief each Class member could realistically obtain in damages if they prevailed at trial. *Id.* Not only did the Class receive full refunds, AAFCU is also paying full interest at the maximum 8% interest rate per annum (compounded annually) provided by Colorado law. C.R.S. § 5-12-102. And, AAFCU has changed its practices so that it will promptly provide GAP refunds in the future, thereby obviating the need for injunctive relief. This is a complete win for the Class.

Third, while Plaintiff believes the Class has strong claims, there is certainly a risk that the Court or trier of fact could conclude otherwise. Frank Decl., ¶ 28. There have been no Colorado cases interpreting the requirements of 4 Colo. Code Regs. § 902-1:8 (h), including, but not limited to, the issues of whether an assignee creditor, like AAFCU, is the entity responsible for issuing the GAP refund and whether this regulation is incorporated by law into every GAP Agreement. Even if GAP refunds were required, AAFCU has viable arguments that it is not required to pay interest on those amounts, and that the statute of limitations does not go back to July 1, 2014. *Id.* Thus, getting full relief for the Class now is a far better alternative than incurring the risks and uncertainties of further litigation.

Fourth, as noted above, the value of an immediate recovery that provides full relief for the Class and future AAFCU customers obviously outweighs the risk and expense of further litigation.

Fifth, Class counsel's fee and cost request of **$315,000** is only **21%** of the value of the Settlement. Frank Decl., ¶ 23. This is well below the customary fee requests approved in class

action settlements, where courts typically award multipliers of 2 to 3 times the lodestar and the average award is one-third of the recovery. *See, e.g., Tennille v. W. Union Co.*,No. 09-cv-00938, 2013 U.S. Dist. LEXIS 182992, at *47 (D. Colo. Dec. 31, 2013) (2-3 times the lodestar) (citing *Lucas v. Kmart Corp.,* No. 99-cv-01923-JLK-CBS, 2006 U.S. Dist. LEXIS 51420, at *19 (D. Colo. July 27, 2006); *Brody v. Hellman*, 167 P.3d 192, 203 (Colo. App. 2007) ("'Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one–third of the recovery,'" and approving award of 30% of $50 million common fund) (citation omitted); *Cordova-Gonzalez v. TW Lath-N-Stucco, Inc.*, No. 21-cv-01617-CMA-MDB, 2023 U.S. Dist. LEXIS 18907, at *18 (D. Colo. Feb. 3, 2023) ("'From a percentage of the fund perspective, the customary fee in this District is approximately one-third of the total economic benefit to the class.'") (quoting *Tennille*, 2013 U.S. Dist. LEXIS 182992, at *45).

Sixth, a Service Award of $500 falls well within the standard award approved in class action settlements as fair and reasonable. *See, e.g., Rhodes v. Nat'l Collection Sys., Inc.*, No. 15-cv-02049-REB-KMT, 2018 WL 2214649, at * 1 (D. Colo. May 11, 2018).

In sum, the proposed Settlement is fair, reasonable and adequate in all respects.

D. The Notice Is the Best Notice Practicable and Approval Is Warranted.

Before conducting a final fairness hearing, the Court must "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." C.R.C.P. 23(c)(2). Here, each Class member will receive direct mail notice of the Settlement with the key information and deadlines, as well as a consumer-friendly link to a Settlement Website for further instructions. Settlement, Exs. A, B. The Notice follows the established format of a typical class action notice and includes

the requisite information needed to apprise the members of the Class of the Settlement and explains their rights and options with respect thereto. Accordingly, approval of the Notice is warranted.

VI. PROPOSED TIMELINE

Pursuant to the Settlement, Plaintiff proposes the following dates and deadlines:

Event	Date
Filing of Preliminary Approval Motion	**April 12, 2023**
AAFCU to Send Class Info to Atticus	**April 26, 2023**
Mailing of Notice of Settlement	**May 10, 2023**
Deadline to file Fees, Expense and Service Award Motion	**May 26, 2023 (14 days prior to objection/exclusion deadline)**
Exclusion Deadline	**June 9, 2023 (within 30 days after mailing Notice of Settlement)**
Atticus to Send List of Exclusions/Objections to Counsel	**June 14, 2023**
Deadline for AAFCU to Challenge Exclusions/Objections	**June 28, 2023**
Deadline for Atticus Administration, LLC to file Declaration re exclusions/objections, number of claims submitted	**June 30, 2023 (within 21 days of exclusion/objection deadline)**
Deadline to file Final Approval Motion	**July 6, 2023**
Final Approval Hearing	**July 20, 2023 1:30 p.m. MT**

VII. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant this Motion.

Respectfully submitted this 24th day of April, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2023, a true and correct copy of the foregoing **AMENDED <u>UNOPPOSED</u> MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT AND NOTICE TO CLASS, AND MEMORANDUM OF LAW IN SUPPORT THEREOF** was filed via Colorado Courts E-Filing and served upon:

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