STATE OF NORTH CAROLINA FORSYTH COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 4279
TERRI MOOSE, individually and on behalf of all others similarly situated, Plaintiff, v. ALLEGACY FEDERAL CREDIT UNION, Defendant.	**INTERIM ORDER ON MOTION TO APPROVE SETTLEMENT**

1. In this class action, Plaintiff Terri Moose objects to Defendant Allegacy Federal Credit Union's practice of assessing overdraft fees for debit-card transactions that she refers to as "APSN" or "Authorize Positive, Settle Negative" transactions. Her complaint includes individual and class claims for breach of contract, unjust enrichment, and unfair or deceptive trade practices under N.C.G.S. § 75-1.1. Although the case has been pending for nearly three years, Moose and her counsel have not moved to certify a class. Now, after reaching a settlement, the parties have jointly moved for an order approving the dismissal of Moose's individual claims with prejudice and the putative class claims without prejudice. (*See* ECF No. 92.)

2. Courts around the country have observed that "[t]he class action device, while capable of the fair and efficient adjudication of a large number of claims, is also susceptible to abuse and carries with it certain inherent structural risks." *Officers for Just. v. Civ. Serv. Comm.*, 688 F.2d 615, 623 (9th Cir. 1982). For better or worse, "the fate of the class members is to a considerable extent in the hands of" a self-selected representative—the named plaintiff—who may not adequately

represent their interests. *Culver v. City of Milwaukee*, 277 F.3d 908, 910 (7th Cir. 2002). "Often the class representative has a merely nominal stake" so that "the real plaintiff in interest is then the lawyer for the class, who may have interests that diverge from those of the class members." *Id.* Ever present is the "danger that the lawyer will sell out the class in exchange for the defendant's tacit agreement not to challenge the lawyer's fee request." *Id.*; *see also Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998) ("The premise of a class action is that litigation by representative parties adjudicates the rights of all class members, so basic due process requires that named plaintiffs possess undivided loyalties to absent class members.").

3. To guard against abuse and protect absent class members, the trial court must approve any class-wide settlement. *See* N.C. R. Civ. P. 23(c). Approval comes only after giving notice to the class and conducting a fairness hearing to confirm that the settlement is "fair, reasonable, and adequate." *Ehrenhaus v. Baker*, 216 N.C. App. 59, 72–73 (2011) (citation and quotation marks omitted). This satisfies the basic due process rights of absent class members by giving them a chance to support or oppose the settlement and perhaps to opt out. At the same time, judicial supervision is essential to ferret out abuse—everything from "sweetheart deals" between the named parties to excessive fee awards for class counsel. *Id.* at 72–73, 95–97 (citation and quotation marks omitted).

4. Sometimes, as in this case, the named plaintiff will reach an individual settlement and choose not to adjudicate or settle claims on a class-wide basis. Even

then, some measure of judicial supervision is needed because, without it, "there is an unacceptable risk that parties may abuse the class-action mechanism in myriad ways." *Moody v. Sears Roebuck & Co.* (*Moody I*), 191 N.C. App. 256, 269 (2008). Thus, "when a plaintiff seeks voluntary dismissal of a pre-certification class-action complaint, the trial court should engage in a limited inquiry to determine (a) whether the parties have abused the class-action mechanism for personal gain, and (b) whether dismissal will prejudice absent putative class members." *Id.* If abuse or prejudice is evident, the trial court "retains discretion to address the issues." *Id.* at 270; *see also Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1315 (4th Cir. 1978) (highlighting the need to consider the amounts paid to the plaintiff and the "compensation to be received by plaintiff's counsel, in order to insure that, under the guise of compromising the plaintiff's individual claim, the parties have not compromised the class claim to the pecuniary advantage of the plaintiff and/or his attorney").

5. To make this limited inquiry, trial courts typically require counsel to report the reason for the dismissal, what the plaintiff personally gained from the settlement, the amount of counsel fees that the defendant paid to the plaintiff's counsel (if any), whether the agreement restricts the plaintiff's right to file other litigation against the defendant, and other material terms that might affect absent class members. When considering potential prejudice to class members, one area of special concern is "tolling of the statute of limitations." *Moody v. Sears Roebuck & Co.* (*Moody II*), 2008 NCBC LEXIS 14, at *4 (N.C. Super. Ct. Aug. 6, 2008).

6. In support of their motion, the parties deny any abuse and say that practical considerations drove their decision to settle. Moose's counsel claim that they overestimated the damages that the putative class would recover if successful, partly because Allegacy stopped assessing overdraft fees for APSN transactions in May 2020. Administrative costs associated with a class-wide settlement supposedly would consume any recovery, making an individual settlement preferable. The motion also states that the settlement includes payments from Allegacy to Moose and her counsel, but because the parties agreed to keep the amounts secret, they disclosed the agreement and its terms only for the Court's *in camera* review.

7. There are too many red flags here to ignore. In return for dismissing the complaint and abandoning the class they purported to represent, Moose and her counsel received generous payments that dwarf the amount that she could have reasonably expected to recover through ordinary bilateral litigation of her individual claims. The complaint lists just four overdraft fees—less than $150—that Allegacy supposedly should not have charged Moose. To settle the case, Allegacy agreed to pay *several hundred times* that figure. Maybe the complaint undercounted the number of wrongful fees. And maybe Moose could have trebled her damages. *See* N.C.G.S. § 75-16. Even so, the disparity strongly suggests that the settlement had less to do with the value of Moose's case and more to do with the risks of potential class-wide litigation.

8. Just as concerning is the lopsided allocation of the settlement proceeds between Moose and her counsel. Moose is to receive less than five percent of the total;

her counsel get the rest. Although class-wide settlements commonly include fee-shifting provisions, those provisions are "subject to the trial court's approval in a fairness hearing" and depend on counsel's success in obtaining results for the class. *Ehrenhaus v. Baker*, 243 N.C. App. 17, 30 (2015). This is different. As things stand now, there is no class-wide settlement, and there will be no fairness hearing. Moose's counsel are set to take the lion's share of the recovery without obtaining any relief for the class and without a judicial determination that the fees are reasonable. If that doesn't suggest a sweetheart deal or a collusive payoff, it's hard to fathom what would.

9. This Court has approved many precertification dismissals in the past, none with terms so favorable to the plaintiff's counsel. In most cases, the amount of the settlement was facially reasonable and excluded any fee shifting. *See, e.g.*, *Bennett v. Com. Coll. of Asheboro*, 2016 NCBC LEXIS 24, at *6 (N.C. Super. Ct. Mar. 22, 2016) (approving dismissal of class claims when plaintiff's counsel "did not receive attorney's fees and the Named Plaintiffs received modest consideration totaling less than $10,000"). Or the settlement payment was "consistent with the amount that Plaintiffs may have received in the settlement or other disposition of any bilateral arbitration or litigation with Defendant." *Rickenbaugh v. Power Home Solar, LLC*, 2022 NCBC LEXIS 57, at *8 (N.C. Super. Ct. June 10, 2022). Indicia of abuse—that is, a suspiciously generous individual settlement, most of which ends up in the pockets of the plaintiff's counsel—were absent in those cases but are present here in spades.

10. The parties' stated reason for choosing an individual settlement over a class-wide settlement is also dubious. They contend that administrative costs would have consumed any recovery for the class. But that makes little sense: surely, a class-wide settlement would garner as much as or more than Moose recovered for her individual claims. Would administrative costs exhaust the whole fund? Unlikely. Regardless, the Court has no way to test the parties' assertion because they have given no estimates of the number of APSN transactions at issue, the size of the putative class, or what it would cost to notify the class. Without that information, the Court is left with the impression that Moose's counsel made a self-interested calculation to take ninety-five percent of her individual settlement in lieu of a smaller share of a class-wide settlement. Something is obviously amiss when counsel decides that half a loaf is better than none in terms of their own fees but that none is just fine for the class.

11. Furthermore, despite the parties' assurances, the Court cannot conclude that this settlement will not prejudice absent class members. A dismissal of the class claims without prejudice will preserve their right to pursue individual relief or to pursue another class action. But the parties do not mention tolling or the effect of the statute of limitations on the class members' claims. These are very real issues given that this litigation began three years ago and given that Allegacy appears to have stopped its allegedly improper practices in May 2020.

12. For all these reasons, the Court declines to approve the parties' agreement in its current form. Before settling on a remedy, though, further steps are needed.

13. First, the parties must file their settlement agreement publicly. Sunshine is a proven disinfectant. At a minimum, the putative class members deserve to see what Moose and her counsel gained through this on-again, off-again class action. The public, too, has a keen interest in overseeing not only how courts decide the rights of litigants but also how they protect those who are absent. And having reviewed the settlement agreement *in camera*, the Court sees no reason to believe that public disclosure would harm the parties or reveal truly secret information. *See Moody II*, 2008 NCBC LEXIS 14, at *8 (stressing the public's right "to know what happened"); *In re: High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 230 (5th Cir. 2008) (reversing sealing of class-action fee awards because "[a]ttorneys' fees, after all, are not state secrets that will jeopardize national security if they are released to the public"); *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) ("Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.").

14. Second, supplemental submissions are in order. The parties must report with supporting evidence the size of the putative class, what it might cost to notify the class of a settlement, how many overdraft fees Moose incurred for APSN transactions within the limitations period, an estimate of her individual damages, how many overdraft fees the absent class members incurred for APSN transactions within the limitations period, and an estimate of damages that the class could recover if successful. In addition, Moose's counsel must report and substantiate their billing rates, the time they spent on this litigation, and any other costs and expenses. And

Moose's counsel must also identify by case name, number, and county all class actions that they have brought in North Carolina relating to APSN transactions; whether each case is pending or has been resolved; and for any case that has been resolved, whether the resolution took the form of an individual or class-wide settlement.

15. Third, following receipt of these submissions, the Court will hold an in-person hearing. All counsel of record must attend and shall be prepared to discuss whether it would be appropriate to "hold a certification hearing," to "certify the class," and to "order that notice be given to class members" and, if so, at whose expense. *Moody I*, 191 N.C. App. at 270 n.7; *accord Moody II*, 2008 NCBC LEXIS 14, at *8. Out-of-state counsel listed on the complaint who have not moved to appear pro hac vice must also attend.

16. Accordingly, the Court **ORDERS** as follows:

a. The parties shall file their settlement agreement on the Court's electronic docket on or before 28 August 2023.

b. The parties shall submit their supplemental materials—jointly or separately, as needed—on or before 11 September 2023.

c. The Court will issue a notice of hearing at a later date.

SO ORDERED, this the 21st day of August, 2023.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases