PHILADELPHIA COURT OF COMMON PLEAS

PETITION/MOTION COVER SHEET

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ASSIGNED TO JUDGE:	ANSWER/RESPONSE DATE: 05/05/2020

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CONTROL NUMBER: 20040969

(RESPONDING PARTIES MUST INCLUDE THIS NUMBER ON ALL FILINGS)

June (Month) Term, 2017 (Year)

No. 01889

FARLEY VS PENNSYLVANIA STATE EMPLOYEES CREDIT UNIO

Name of Filing Party: CODEY FARLEY-PLF

INDICATE NATURE OF DOCUMENT FILED:

☐ Petition *(Attach Rule to Show Cause)* ☒ Motion

☐ Answer to Petition ☐ Response to Motion

Has another petition/motion been decided in this case? ☒ Yes ☐ No

Is another petition/motion pending? ☐ Yes ☒ No

If the answer to either question is yes, you must identify the judge(s): JUDGE NINA WRIGHT PADILLA

TYPE OF PETITION/MOTION (see list on reverse side)	PETITION/MOTION CODE (see list on reverse side)
MOT/APPRVE CLASS STLMENT PEND	MTACS

ANSWER / RESPONSE FILED TO (Please insert the title of the corresponding petition/motion to which you are responding):

I. CASE PROGRAM

OTHER PROGRAM

Court Type: CLASS ACTION

Case Type: CLASS ACTION

II. PARTIES *(required for proof of service)*

(Name, address and **telephone number** of all counsel of record and unrepresented parties. Attach a stamped addressed envelope for each attorney of record and unrepresented party.)

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III. OTHER

By filing this document and signing below, the moving party certifies that this motion, petition, answer or response along with all documents filed, will be served upon all counsel and unrepresented parties as required by rules of Court (see PA. R.C.P. 206.6, Note to 208.2(a), and 440). Furthermore, moving party verifies that the answers made herein are true and correct and understands that sanctions may be imposed for inaccurate or incomplete answers.

(Attorney Signature/Unrepresented Party)	April 14, 2020 *(Date)*	CARY L. FLITTER *(Print Name)*	*(Attorney I.D. No.)*

The Petition, Motion and Answer or Response, if any, will be forwarded to the Court after the Answer/Response Date.
No extension of the Answer/Response Date will be granted even if the parties so stipulate.

CODEY FARLEY, individually and on behalf of all others similarly situated, Plaintiff vs. PENNSYLVANIA STATE EMPLOYEES CREDIT UNION Defendant.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY JUNE TERM, 2017 NO. 001889 CLASS ACTION

PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FOR APPROVAL OF ATTORNEY FEES AND LITIGATION EXPENSES (UNOPPOSED)

ORDER FOR FINAL JUDGMENT & DISMISSAL

MEMORANDUM, CERTIFICATIONS AND EXHIBITS IN SUPPORT OF THE MOTION

DATED: April 14, 2020

Hearing Date: April 27, 2020 @ 10:00 a.m.

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CODEY FARLEY, individually and on behalf of all others similarly situated, Plaintiff vs. PENNSYLVANIA STATE EMPLOYEES CREDIT UNION Defendant.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY JUNE TERM, 2017 NO. 001889 CLASS ACTION

PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FOR APPROVAL OF ATTORNEY FEES AND LITIGATION EXPENSES (UNOPPOSED)

Pursuant to Pa. R. Civ. P. 1714, Plaintiff Codey Farley seeks final approval of the Class Action Settlement preliminarily approved by this Court by Order docketed January 21, 2020.

Notice has been provided to the Class Members as ordered. Of the over 8,500 class members noticed, there have been no objections and only two exclusions. This settlement—which provides a cash fund of $16 million, the waiver of approximately $36.48 million in post-repossession deficiency balances claimed due plus correction of class members' credit reports—is an excellent result that readily meets the requirements for final approval. Plaintiff also seeks approval of Class Counsel fees and litigation expenses from the common fund in the amount of $6,400,000 and $22,808 respectively. For these reasons and those set forth in the accompanying Memorandum, final approval is warranted and should be granted.

A proposed form of Order for Final Judgment and Dismissal is attached.

Date: April 14, 2020

/s/ Cary L. Flitter

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CODEY FARLEY, individually and on behalf of all others similarly situated, Plaintiff vs. PENNSYLVANIA STATE EMPLOYEES CREDIT UNION Defendant.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY JUNE TERM, 2017 NO. 001889 CLASS ACTION

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FOR APPROVAL OF ATTORNEY FEES AND LITIGATION EXPENSES

I. MATTER BEFORE THE COURT

Representative Plaintiff Codey Farley submits this memorandum in support of his Motion for Final Approval of Class Action Settlement and for the Approval of Attorney Fees and Litigation Expenses. The Settlement Agreement dated January 7, 2020 ("Settlement Agreement") is attached as Exhibit 1. The Settlement Agreement calls for over 8,500 Pennsylvania consumers to (a) divide $16 million (after payment of fees, litigation expenses, and administration costs), (b) receive complete forgiveness of deficiency claims totaling about $36.48 million, and (c) receive valuable equitable-type relief in having the negative trade line data removed from their consumer credit reports, and other relief. The aggregate monetary relief is **$52.48 million**, before considering the value of the credit repair.

The Notice of Proposed Class Action Settlement (the "Notice") approved by the Court has been duly mailed to the Class Members. (*See* Ex. 2, Class Administrator Affidavit). The Notice informed Class Members of the terms and benefits the settlement provides, the right to exclude themselves, and the right to object to the settlement. (Ex. "3", Class Notice.) The Notice also informed Class Members that Plaintiff would apply for an award of Class Counsel fees in the amount of $6,400,000 from the common fund and for reimbursement of litigation expenses, subject to approval of the Court. (*See id.*)

No Class Member has objected to the settlement and only two Class Members have requested to be excluded. (Ex. 2, Class Admin. Aff. ¶¶ 8–9.) If the settlement is approved as presented, each Class Member who was sent a specified post-repossession notice (Class A) will receive a check for approximately $1,132.00, and each Class Member who was sent a specified post-auction notice of deficiency balance (Class B) will receive an additional check for $95.00, unless there were co-borrowers, in which case the payment(s) will be split. Auto loan deficiency balances being forgiven average approximately $8,340 per account. Twenty-six class members have elected not to accept forgiveness of the deficiency claim.[1] (*Id.* ¶ 7.)

As discussed below, the settlement is eminently fair and in the best interests of the Class. It is in line with class settlements approved throughout the Commonwealth involving similar claims of improper repossession practices. The settlement, as proposed, satisfies all of the criteria to be applied for both the approval of class action settlements and the award of Class Counsel fees and litigation expenses from a common fund.

[1] Recognizing that the forgiveness of debt may create an 'identifiable event' requiring the Credit Union to issue an IRS 1099C form, see 26 C.F.R. § 1.6050P-1, or be deemed "income" for tax purposes, and that historically a small number of borrowers wish to repay voluntarily, the settlement provided all class members with the option to decline the debt waiver.

II. QUESTIONS PRESENTED

Should the Court grant final approval of this proposed class action settlement providing for cash, debt forgiveness, credit reporting correction and other benefits where all elements for final settlement approval have been met and no class member has objected?

Suggested Answer: YES

Should the Court approve Class Counsel's contingency fees from the common fund in the amount of $6,400,000 and expense reimbursement of $22,808, representing 12.2% of the monetary value of the settlement, where all elements of Rule 1717 are satisfied and no Class Member has objected?

Suggested Answer: YES

Should the Court approve a service award to Representative Plaintiff Codey Farley in the amount of $12,500 in recognition of his service to the Class, where Mr. Farley has rendered valuable service toward this substantial class settlement?

Suggested Answer: YES

III. NATURE OF THE CASE

A. The UCC's Notice Requirements

As the Court has overseen this case since 2017 and the legal claims in issue were fully briefed in the motion for preliminary approval, Plaintiff will simply summarize the underlying claims here to provide context for this motion. This consumer class action is brought pursuant to Pennsylvania's Uniform Commercial Code ("UCC"), 13 Pa. C.S. § 9601, *et seq.*, which provides certain protections for consumers when their vehicles are repossessed. Non-judicial, or "self-help", vehicle repossession allows a secured creditor to take back a borrower's vehicle upon default with no writ or oversight from any court. This leaves the consumer vulnerable to abuses in the practice of auto repossession and overreaching by lenders and their repossession agents. *See Gibbs v. Titelman*, 502 F.2d 1107 (3d Cir. 1974).

Article 9 of Pennsylvania's UCC requires secured parties to provide consumers with specific, detailed notices after repossession but before sale of the collateral. This notice allows the

borrower an opportunity to protect his interest in the collateral. *Indus. Valley Bank & Trust Co. v. Nash*, 502 A.2d 1254, 1263 (Pa. Super. 1985) (quoting J.J. WHITE AND R.S. SUMMERS, UNIFORM COMMERCIAL CODE, § 26-9 (2d ed. 1980)).

Article 9 requires that "a secured party that disposes of collateral under section 9610 (relating to disposition of collateral after default) shall send to [borrowers and co-borrowers] a reasonable authenticated notification of disposition." 13 Pa. C.S. § 9611(b); *McCall v. Drive Fin. Servs., LP*, 2009 WL 8712847 (C.C.P. Philadelphia April 10, 2009); *Cosgrove v. Citizens Auto Fin.*, 2010 WL 3370760, *1 (E.D. Pa. Aug. 26, 2010). The UCC notification "must provide" consumer borrowers with timely and accurate notice of, *inter alia*, the borrower's right to redeem (or get back) their car by a certain date, the method of intended disposition (i.e., public or private sale), the time and place of a public sale, the borrower's right to obtain an accounting of her unpaid indebtedness, and other information. 13 Pa. C.S. § 9614(1)(i), importing § 9613(1); *Cubler v. TruMark Fin. Credit Union*, 83 A.3d 235, 236 & n.1 (Pa. Super. 2013). Notification that lacks any of this information "is insufficient as a matter of law." 13 Pa. C.S. § 9614(1)(i), and Official Comment 2 thereto.

B. PSECU's Repossession and Deficiency Notices—Plaintiff's Allegations

In November 2014, Mr. Farley purchased a used pickup truck from a car dealer. PSECU financed the transaction and took a security interest in the vehicle. The Retail Installment Sale Contract ("RISC")—a combined sale and finance instrument—is attached as Ex. 5.[2] Due to an

[2] The vast majority of Class Members entered into "Retail Installment Sale Contracts" ("RISC") with auto dealers that were later sold or assigned to PSECU. A RISC is a combined sale and finance document used to facilitate a credit sale. *See* Consumer Credit Code, 12 Pa. C.S. § 6202. A loan, in contrast, contemplates direct lending of funds to a borrower for his own purposes, where the obligation is initially payable on its face to the financial institution. The secured credit-sales evidenced by the RISCs of Class Members are generally referred to throughout as "Secured Obligations." Plaintiff occasionally uses the term "loan" in this memorandum and in the Class Notice in a non-technical sense, for clarity of expression. An example is referring to the "auto loan deficiency balance," *i.e.*, post-auction debt forgiveness that is a negotiated term of settlement under this agreement.

unanticipated sharp drop in income, Mr. Farley was unable to keep up with the required payments, and PSECU declared a default. In February 2017, PSECU repossessed Farley's vehicle.

On or about February 27, 2017, PSECU sent to Farley a "Notice of Repossession & Right to Redeem--Get Your Vehicle Back" ("Repossession Notice", attached as Ex. 6). Mr. Farley alleges the Repossession Notice PSECU sent to him and the members of putative Class A violated the UCC in three ways: (1) it misstated the borrower's redemption rights; (2) it misrepresented the amount needed to redeem; and (3) it failed to advise the borrower that he was entitled to an accounting. PSECU denies that it violated the UCC in any way and has vigorously defended these claims.

1. The Repossession Notice Does Not State that the Consumer has a Right to Redeem the Vehicle Until it is Sold.

The UCC and contract provides consumer debtors the right to redeem collateral after a repossession. The right to redeem "may occur at any time before a secured party . . . has disposed of collateral or entered into a contract for its disposition[.]" 13 Pa. C.S. § 9623(c). (*See also* Ex. 5, RISC ¶ 14b.) A notice that shortens the time for exercising the right to redeem violates the UCC. *See McCall*, Slip Op. at p. 3 (Ex. 4 hereto).

Plaintiff alleges that PSECU's notice misrepresented to Farley and other class members that they only had 15 days to redeem (i.e., buy back) the repossessed vehicle, although they could do so any time until sold. (Ex. 6, Farley Repossession Notice.)

2. The Repossession Notice Does Not Advise the Borrower that he is Entitled to an Accounting of any Unpaid Indebtedness, nor the Charge for an Accounting.

A repossession notice must "state[] that the debtor is entitled to an accounting of the unpaid indebtedness and state[] the charge, if any, for an accounting." 13 Pa. C.S. § 9614(1), incorporating § 9613(1)(iv); *Cubler*, 83 A.3d at 236 n.1. Here, the Notice crafted by PSECU does not advise the

borrower that he is entitled to an accounting of his unpaid indebtedness, nor the charge (if any) for such an accounting. (Ex. 6, Repossession Notice.) Plaintiff avers that this also renders PSECU's Notice non-compliant.

3. The Repossession Notice Overstates or Misstates the Storage Charge and the Cost to Redeem.

PSECU's Repossession Notice to Farley lists a lump sum storage fee of $375 to get his truck back. (*See* Ex. 6.) Farley alleged here that this overstates the storage charge and suggests that $375 is a required component of the cost to redeem.

The Superior Court has recognized that a secured party "must send the debtor a notice setting forth . . . (4) the amount that must be paid to the secured party to redeem the collateral." *Cubler*, 83 A.3d at 236 n.1. The Consumer Credit Code (a recodification of the former Motor Vehicle Sales Finance Act) also requires that the Repossession Notice provide "[a]n itemized statement of the total amount required to redeem[.]" 12 Pa. C.S. § 6254(c)(2).[3] The inclusion of such charges is commercially unreasonable. It bears note that PSECU vigorously disputes this averment, contending there is nothing improper about its storage charge disclosure.

4. PSECU's Deficiency Notice and the UCC.

If a deficiency is claimed due after the sale of a vehicle, the secured party must send a very specific letter explaining the deficiency, commonly called a "Deficiency Notice". 13 Pa. C.S. § 9616. Such notices are important to the scheme of repossession and resale to assure fairness and integrity of the resale process, which often results in a sizable deficiency claim against the

[3] The former Motor Vehicle Sales Finance Act has since been re-codified without significant alteration, into Pennsylvania's Consumer Credit Code. *See* Commerce and Trade—Motor Vehicle and Installment Sales—Codification, 2013 Pa. Legis. Serv. Act 2013-98 (H.B. 1128) (Purdon's).

consumer. *See* 13 Pa. C.S. § 9616, Official Comment 2 ("[T]he debtor or obligor is entitled to know the amount of a surplus or deficiency and the basis upon which [the figure] was calculated.").

Plaintiff contends that PSECU's Deficiency Notice fails to provide the disclosures as required by 13 Pa. C.S. § 9616. (Ex. 7, Farley Deficiency Notice). PSECU likewise disputes this claim. It bears note, as discussed below, that the "Deficiency Notice" claim is less serious and carries lower statutory damages. In the pleadings and in the settlement agreement, the "Repossession Notice" claim is Class A and the "Deficiency Notice" claim is Class B.

C. Uniform Statutory Damages

Plaintiff and the Class have sought statutory damages as a result of Defendant's (alleged) failure to comply with the UCC. For Class A—where the post-repo notice has been challenged—the UCC, at 13 Pa. C.S. § 9625(c) provides:

> **Persons entitled to recover damages; statutory damages in consumer-goods transaction.** If the collateral is consumer goods, a person that was a debtor or a secondary obligator at the time a secured party failed to comply with this chapter may recover for that failure in any event an amount not less than the credit service charge plus 10% of the principal amount of the obligation or the time price differential plus 10% of the cash price.

This damage figure can be determined from the installment sale contracts. (Ex. 5, Farley RISC.)

In the (individual) case of Mr. Farley, for example, his statutory damages would sum to: $8,917.65 (credit service, or finance charge) + $4,483.40 (10% of amount financed) = $13,401.00. *See id.* For Class B, the post-auction Deficiency Notice Class, the Code provides for $500 in statutory damages where the failure is part of a pattern or practice. 13 Pa. C.S. § 9625(e)(5).

IV. HISTORY OF THE LITIGATION AND THE LEAD-UP TO SETTLEMENT

Mr. Farley filed his Class Action Complaint in June 2017 alleging violations of the UCC as set forth above. On August 7, 2017, PSECU filed Preliminary Objections to venue, to which

Mr. Farley responded by filing his Amended Class Action Complaint. On September 14, 2017, PSECU again filed Preliminary Objections to venue.

Thereafter, the parties engaged in venue discovery and Plaintiff took the depositions of eight PSECU witnesses. These included the Vice President of Human Resources, the Chief Operating Officer of Transaction Services, the Director of Collections and Loss Prevention and Security, the Director of Loan and Account Origination and Processing, the Vice President of Finance, and the Vice President of Marketing and Membership Development. (Ex. 9, Certification of Cary L. Flitter ¶ 29.a.) Following venue discovery, briefing, and argument, on March 13, 2018, this Court entered an Order overruling PSECU's Preliminary Objections to Mr. Farley's Amended Class Action Complaint. (*Id.* ¶ 29.b.)

Soon after the Court's venue ruling, the parties served merits discovery on each other. PSECU produced thousands of detailed consumer file documents, which Class Counsel reviewed and catalogued. Plaintiff took four additional depositions in Harrisburg where PSECU is headquartered. (*Id.* ¶ 29.c.)

Class Counsel compiled spreadsheets listing important account details of class member accounts. PSECU also compiled its own spreadsheet which we tested for accuracy both internally and with assistance of an accounting expert, David Glusman, CPA of Marcum, LLP. This discovery and expert analysis allowed Plaintiff to determine the amount of classwide statutory damages potentially available, any claimed auto loan deficiency amounts claimed, and other relevant information even before the close of discovery and mediation. (*Id.* ¶ 29.d.)

On November 21, 2018, Plaintiff moved for leave to file a Second Amended Complaint to amplify Plaintiff's UCC claim and add an additional putative class representative. Specifically, Plaintiff sought to amend the complaint based on PSECU's practice of including unincurred

storage fees in the repossession notice under "total cost to redeem." PSECU opposed the motion, arguing that the proposed Second Amended Complaint: (a) improperly asserted a new cause of action barred by the statute of limitations; (b) was futile because the inclusion of storage fees in the cost to redeem did not violate the UCC; and (c) would require additional discovery, causing prejudice to PSECU. (*Id.* ¶ 29.e.)

Following oral argument on January 4, 2019, the parties stipulated to the filing of a Second Amended Complaint in the form proposed by Plaintiff, but with no additional plaintiff/class representative. PSECU filed an Answer denying any wrongdoing and asserting 17 affirmative defenses. PSECU included an affirmative defense of setoff, arguing that PSECU was entitled to set off deficiency debts alleged due against any statutory damages that may be recoverable. (*Id.*)

On May 30, 2019, Farley filed a Motion for Class Certification seeking certification of a Repossession Notice Class and a Deficiency Notice Class. PSECU filed an opposition to which Plaintiff replied. (*Id.* ¶ 29.g.)

Before, during, and after the submission of briefing on class certification, counsel for the parties had a series of negotiations over the prospect of a classwide settlement. In August 2019, following a day-long mediation at JAMS before the Hon. Diane Welsh, USMJ (ret.), the parties reached a class settlement in principle. (*Id.* ¶ 29.h.)

The parties agree that there are approximately 8021 Secured Obligations in Class A and approximately 3962 Secured Obligations in Class B. There are additional class members because co-borrowers are also class members and entitled to notice. (*Id.* ¶ 29.i.)

The written Settlement Agreement (Ex. 1) has been executed and filed. The Court preliminarily approved the class settlement on January 21, 2020. Notice as issued as directed. Mr. Farley now asks the Court to approve finally the class settlement.

V. NATURE AND TERMS OF THE SETTLEMENT

A. The Settlement Provides Cash, Debt Forgiveness and Valuable Credit Report Correction

As noted, the significant terms of the class-wide settlement are as follows:

1. PSECU has deposited $16 million into a settlement fund at PNC Bank. Those funds will be used to pay Class Members, costs of settlement administration, and approved Class Counsel fees and expenses. (Ex. 1, Sett. Agreement ¶ 2.06.)

2. PSECU will waive and eliminate about $36.48 Million in auto deficiency claims on Class Member Auto Finance Agreements, unless a Class Member doesn't want it. (*Id.* ¶¶ 2.10-2.13, 5.02.)

3. PSECU will advise all Consumer Reporting Agencies to whom it reports to delete entirely the applicable tradeline from the Class Members' credit reports. (*Id.* ¶ 2.09.)

The settlement also calls for cessation of collection upon signing (so that has happened) and satisfaction of deficiency judgments after approval.

B. Aggregate Relief to the Class is Excellent

If the settlement is approved as requested, each member of the more than 8,500 members of Class A will receive a check for about **$1,132** and each of the 4,265 members of Class B will receive **$95**. (All members of Class B are members of Class A, except one borrower) If there is a co-obligor on the loan, the payment is shared. The average amount of the auto loan deficiency forgiven by this settlement is about **$8,340 per account** where a deficiency balance was claimed by PSECU.[4] The settlement will also provide valuable credit reporting correction.

In some ways, this settlement represents a better result than could have been achieved through continued litigation. The $36.48 million waiver of deficiency balance claims is substantial and plainly improves the financial position of every affected class member. Stated aptly by one

[4] Put otherwise, not every borrower or account carried a deficiency balance. Some cars sold for surplus, some borrowers paid any deficiency balance over time and so on. The $8,340 is the average amount of claimed deficiency balance forgiven in those cases where a deficiency balance was asserted by PSECU to be due.

court: "Deficiency claims, particularly those involving consumers, are essentially a sword of Damocles, an inchoate anxiety, a second shoe that might or might not drop. Collection lawsuits precipitate adverse credit reports, and those can further hamper a consumer's ability to get on with her life." *Arvelo v. Park Fin. of Broward, Inc.*, 15 So. 3d 660, 663–64 (Fla. 3d Dist. Ct. App. 2009).

Moreover, the credit relief provided by this settlement is extraordinarily valuable. It should improve the credit rating of all the Class Members and allow each to enjoy more favorable borrowing options and interest rates in future credit opportunities. A notation of "repossession" and reporting of a deficiency balance is a highly negative factor in a consumer's credit report. This blemish can adversely impact a consumer when applying for a loan, a mortgage or even a job, where credit reports are run on candidates with increasing frequency. *See* Lea Shepard, *Seeking Solutions to Financial History Discrimination*, 46 CONN. L. REV. 993, 995 (2014) (noting that "approximately sixty percent of employers consult applicants' credit reports in making hiring decisions"). As part of this settlement, PSECU has agreed to request removal of the negative credit entry by deleting the entire tradeline. (Ex. 1, Settlement Agreement ¶ 2.09.)

To explain for the Court the benefits of this credit reporting relief, Plaintiff provides the expert report of Thomas A. Tarter, a court approved expert and career banker with more than 50 years of experience relating to matters of consumer credit. (Ex. 8, Tarter Report at pp. 2–3.) Mr. Tarter explains how all Class Members will benefit from the credit repair provisions in the Settlement Agreement, including lower interest rates, access to better credit terms and conditions, enhanced employment opportunities, lower insurance rates, better housing opportunities, and more. (*Id.* at pp. 16–17.)

In *Ciccarone v. B.J. Marchese, Inc.*, 2004 WL 2966932 (E.D. Pa. Dec. 22, 2004), a local car dealer and its principals were sued over an identity theft scam that caused credit harm and other

damage. *Id.* at *9–10. As part of the class-wide settlement, a fund was created of $2.45 million in cash, plus release from claimed loan obligations and credit report correction. Judge Shapiro carefully weighed the considerable value of the credit report correction. In so doing, the court recognized that a precise valuation is difficult to pinpoint, *id.* at *4, but determined the value of the credit report correction to be approximately equal to the cash component. *Id.* at *9–10.

Here, application of that approach would add some $16 million in value to the $16 million in cash – yielding $32 million in addition to the $36.48 million in debt forgiveness, for an aggregate settlement value of about $68.48 million. Other courts have similarly recognized the considerable value in a class settlement that provides for removal of negative reporting from a consumer's credit report. *See Cosgrove v. Citizens Auto. Fin., Inc.*, 2011 WL 3740809, at *7 (E.D. Pa. Aug. 25, 2011) (holding in a very similar repossession notice class action that the "additional obligation to correct negative entries on class members' credit reports is tangible and adds value to the settlement").

VI. LEGAL ARGUMENT

A. Final Approval of the Class Settlement Should be Granted

1. Factors Supporting Final Approval

The Pennsylvania Supreme Court has noted that "settlements are favored in class action lawsuits." *Dauphin Deposit Bank and Trust Co. v. Hess*, 727 A.2d 1076, 1080 (Pa. 1999); *accord Buchanan v. Century Federal Savings and Loan Assoc.*, 393 A.2d 704 (Pa. Super. 1978); *Milkman v. Am. Travellers Ins. Co.*, 61 Pa. D. & C. 4th 502, 513, 2002 WL 32170095 (Phila. C.C.P. Mar. 28, 2002). "The law favors settlement, particularly in class actions and other complex cases, to conserve judicial resources and reduce parties' costs." *Milkman*, 61 Pa. D. & C. 4th at 513.

Pennsylvania Rule of Civil Procedure 1714(a) provides that "no class action shall be compromised, settled, or discontinued without the approval of the court after hearing." In January

2020, this Court found preliminarily that the elements of Pa. R. Civ. P. 1702, 1708, and 1709 had been satisfied and certified the Classes for purposes of settlement. The second step was the dissemination of notice of the proposed settlement to all Class Members, which was carried out successfully by the class administrator, American Legal Claim Services. (*See generally* Ex. 2, Class Admin. Aff.) The third step is final approval. *See* MANUAL FOR COMPLEX LITIGATION, FOURTH, § 21.63 (2004); *Brophy v. Philadelphia Gas Works*, 921 A.2d 80, 88 (Pa. Commw. Ct. 2007) (describing the accepted procedure from proposed class settlement to preliminary approval to notice then final approval).

Final approval of this settlement requires the Court to consider whether the settlement falls within a "range of reasonableness" using a seven-part test. *Dauphin Deposit*, 727 A.2d at 1078. This test weighs the settlement against:

1) the risks of establishing liability and damages;
2) the range of reasonableness of the settlement in light of the best possible recovery;
3) the range of reasonableness of the settlement in light of all the attendant risks of litigation;
4) the complexity, expense, and likely duration of the litigation;
5) the state of proceedings and the amount of discovery completed;
6) the recommendations of competent counsel; and
7) the reaction of the class to the settlement.

Id. at 1078; *Milkman*, 61 Pa. D. & C. 4th at 513.[5] Each of these factors favors final approval of the settlement here.

a. The Risks of Establishing Liability and Damages

"The risks surrounding a trial on the merits are always considerable." *Milkman*, 61 Pa. D. & C. 4th at 533. A reviewing court "must recognize the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to

[5] The court's cogent opinion in *Milkman* was cited approvingly by the Commonwealth Court in *Brophy*, 921 A.2d at 88.

completion." *Id.* (internal citations omitted). In evaluating the likelihood of success, a court should not attempt to resolve unsettled legal issues or legal principles. *Buchanan*, 393 A.2d at 710.

Although confident in his claims, Plaintiff may face a number of risks if his case proceeds to contested certification and any trial. While the UCC is clear about the repossession notice requirements and statutory damages in the consumer context, there is little appellate authority in Pennsylvania on this claim as a class action. Although the authority on point supports Plaintiff's claims instantly, there has not been a plethora of cases involving the "storage fee disclosure" claim. PSECU denies that its Repossession and Deficiency Notices run afoul of the UCC's requirements, and there is always the potential for a court to agree. A lengthy appeal process would be likely, no matter how the case were decided at the trial level. These issues, and others, presented risks for the parties and played a role in the decision to reach a settlement. *See Dauphin Deposit*, 727 A.2d at 1079–80.

The Court's task here is to "attempt to make a reasonable estimate of the probability of success." *Buchanan*, 393 A.2d at 710. This undertaking sometimes presents a "delicate balancing problem." 3 STANDARD PA. PRACTICE 2D § 14:116 (basis for approval or disapproval of compromise, settlement or discontinuance of class action). The cash fund is substantial relief that will be available to the consumer Class Members now upon final approval—not years in the future. The credit reporting relief calls for PSECU to request that the consumer reporting agencies remove the entire applicable negative tradeline from Class Members' credit reports. (Ex. 1, Sett. Agreement ¶ 2.09). This adds greatly to the value of the settlement, as discussed above, but would not be awardable in a litigated resolution even if Plaintiff secured a verdict for greater damages.

Finally, complete forgiveness of some $36.48 Million in claimed auto loan deficiency is of enormous value. These debts will be wiped away forever, and any judgments previously entered in deficiency lawsuits will be satisfied within 60 days of the Effective Date following approval. (Ex. 1, Sett Agrmt, ¶ 2.13.) Even if Plaintiff were completely successful on class certification and every liability and damages claim, these deficiency balance claims—pled as offsets by PSECU—would still need to be addressed because Pennsylvania law merely creates a "rebuttable presumption" that the auction proceeds satisfy the loan balance, not an absolute bar (as in some jurisdictions). *See Savoy v. Beneficial Consumer Discount Co*., 468 A.2d 465, 467-68 (Pa. 1983).

b. The Settlement is Reasonable in Light of the Best Possible Recovery

In comparing a proposed settlement's value with the best possible recovery, the Court should not make a proponent of a proposed settlement justify each term of the settlement against a hypothetical or speculative measure of what concessions might have been gained. *Milkman*, 61 Pa. D. & C. 4th at 540. "Inherent in compromise is a yielding of absolutes[.]" *Id.*

Here, the monetary relief to the class is over $52.48 million, which, as noted, includes a cash fund of $16 million and waiver of approximately $36.48 million in auto loan deficiency balances claimed due by PSECU. This monetary relief alone is virtually equal to the best possible recovery on Plaintiff's claim that each of PSECU's repossession practices violated Pennsylvania law, which is approximately $53 million. But this is the *maximum possible* statutory damages for a six-year class of consumers and assumes all of Plaintiff's legal theories are accepted, the class is certified on contest over PSECU's objection, and, as noted, the credit union's deficiency claims would remain extant.[6]

[6] The class certification briefing on contest had been fully completed and submitted at the time of the parties' mediation session. As the mediation was successful, and defendant consented to class certification for the purposes of settlement, the contested class motion became moot.

Additionally, even a hypothetical $53 million judgment would not provide the equitable-type relief obtained here—the important credit report correction discussed *supra*. This factor weighs heavily in favor of granting final approval.

c. The Range of Reasonableness of the Settlement in Light of All the Attendant Risks of Litigation

In analyzing this factor, the test is not the adequacy of the settlement based on what could be the best possible outcome for the Class, but rather, whether the settlement is reasonable in light of the stage of the proceedings, and the complexity, expense and duration of further litigation. *Dauphin Deposit*, 727 A.2d at 1079.

If litigated further rather than resolved here, an appeal would also be foreseeable and likely, as our appellate courts have addressed these Article 9 consumer-notice provisions only a small handful of times. The litigation would potentially last for years, during which PSECU would have the opportunity to continue collection on the Class Members' loan deficiency balances claimed due, and during which time negative credit reporting would remain on Class Members' credit reports. This Settlement, with the generous three-pronged benefits, available *now*, is more beneficial than continued litigation of this case to some indeterminate future point in time.

d. The Complexity, Expense, and Likely Duration of the Litigation Favor Settlement

As a general rule, class action litigation is complex, time consuming and expensive. This case is no different. This case is nearly three years old, filed in June 2017. Voluminous discovery was exchanged and depositions taken before settlement negotiations began. *See* Sec. VI.A.1.e, *infra*. Liability is disputed and would have to be resolved by summary judgment or trial. The damage component is straightforward to calculate, but would grow more time-consuming should PSECU succeed on enforcing claims for auto loan deficiency balances and setoffs. Class

certification and trial would likely be followed by an appeal, in light of the disputed liability issue.[7] This case has the potential to continue to be contested for years, but for the proposed settlement. This weighs in favor of approval of class settlement. *See In re Bridgeport Fire Litig.*, 8 A.3d 1270, 1285–86 (Pa. Super. 2010) (complexity of class case and prospect for appeals weighs in favor of approving class settlement).

e. The Stage of Proceedings and the Amount of Discovery Completed

This prong addresses whether the case has progressed to a point where the parties have sufficient knowledge to reasonably determine that settlement is in the parties' best interest. "Through this lens, the court can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *Milkman*, 61 Pa. D. & C. 4th at 544.

There has been copious discovery in this case. Plaintiff propounded, and Defendant responded to, written Interrogatories and Document Requests. Class Counsel has reviewed thousands of pages of consumer loan files produced by PSECU. (Ex. 9, Flitter Cert. ¶ 29.c.) Both sides have compiled detailed spreadsheets listing important account details of Class Member accounts. Plaintiff took twelve depositions,[8] over multiple trips to Harrisburg, searching out facts

[7] Defendant in particular contests the theory from the Amended Complaint that challenges the manner in which "storage charges" are set forth in a lump-sum in the post repossession notice. PSECU argues that a storage charge disclosure is not required by the text of the UCC, and therefore there is no violation that would warrant award of the statutory damages under 13 Pa. C.S. § 9625(c)(2). Farley asserts that there is a requirement to disclose the amount needed to redeem in the Code, *see Cubler*, 83 A.3d at 236 n.1, as well as in the Pennsylvania Consumer Credit Code, 12 Pa. C.S. § 6254(c), and that these requirements should be read into the post-repossession notice. This contested point became an issue at mediation in deriving a figure for settlement that would be fair and reasonable.

[8] These depositions included the following nine PSECU officers/employees: (1) Thomas Ruback, Chief Operating Officer of Transaction Services; (2) Carol Noblit, Vice President of Finance; (3) Barbara Bowker, Vice President of Marketing and Membership Development; (4) Dominick Elsener, Director of Loan and Account Origination and Processing; (5) Catherine Tama-Troutman, Vice President of Human Resources; (6) Stephen J. Hemler, Director of Collections and Loss Prevention and Security; (7) William Munns, Collections Project Manager and Liquidations; (8) Brian Betza, Lead Manager of New Accounts and Loan Origination; and (9) Paula D'Agostino, Service Advisor Collector.

and details about the form notices used, the consumer nature of subject accounts, the maintenance of physical and electronic files, and PSECU's repossession practices. (*Id.* ¶¶ 29.c, 29.d, 29.i.)

Plaintiff and Class Counsel believe that they have engaged in sufficient discovery to fully evaluate the merits and potential value of the claims, and the relative risks to obtaining a greater recovery through further litigation or trial. Class Counsel does not believe that further discovery would have provided Plaintiff with any additional leverage to obtain a larger recovery. Put otherwise, "[C]ounsel had a good basis for deciding which settlement amounts to accept[.]" *In re Bridgeport Fire*, 8 A.3d at 1286.

f. Experienced Class Counsel Endorses this Settlement

In evaluating the fairness of a proposed settlement, the "opinion of experienced counsel is entitled to considerable weight." *Fischer v. Madway*, 485 A.2d 809, 813 (Pa. Super. 1984); *Milkman*, 61 D&C 4th at 545–46. Here, the settlement process involved arm's-length negotiations by experienced counsel with adequate information to represent the Class effectively through two years of tedious written discovery and depositions. The process also included a full day's mediation before a retired federal magistrate judge, Diane Welsh of JAMS. (Ex. 9, Flitter Cert. ¶ 29.h.). This is an excellent three-prong class settlement. Collections ceased with the signing of the class settlement agreement. (Ex. 1, Sett Agrmt. ¶ 2.10.) Significantly, the settlement is not subject to the vagaries of the current economy—$16,000,000 (less expenses of notice) is in escrow now at PNC bank, ready to be disbursed upon final approval pursuant to the agreement's terms. Class Counsel has concluded that it is in the best interests of the Class to settle at this time on the generous terms set forth in the Settlement Agreement. (Ex. 9, Flitter Cert. ¶ 30.)

g. The Reaction of the Class Supports Settlement: No Objections and Minimal Exclusions

Reaction of the Class is a key factor in weighing approval and reasonableness of the settlement. *See Dauphin Deposit*, 727 A.2d at 1080; *Buchanan*, 393 A.2d at 709.

Here, the reaction of the Class speaks volumes to the reasonableness of the settlement. The administrator mailed 8,513 notices to class members pursuant to the Order of preliminary approval. (Ex. 2, Class Admin. Aff. ¶¶ 3–4.) As noted, no class member objected to the settlement, and only two opted out. (*Id.* ¶¶ 8–9.) The lack of objection is entitled to substantial weight. *See Treasurer v. Ballard Spahr Andrews & Ingersoll LLP*, 866 A.2d 479, 486 (Pa. Commw. Ct. 2005). This settlement has been embraced by the Class and this factor weighs heavily in favor of approval.

2. <u>The Service Award to Plaintiff Farley is Appropriate</u>

An appropriate service award to the named Plaintiff is common in consumer class action settlements. *See, e.g.*, *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011). "The purpose of [incentive payments] is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation and to reward the public service of contributing to the enforcement of mandatory laws." *Id.* (internal quotation marks omitted). Courts have commonly relied on five factors: (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. *Milkman*, 61 Pa. D & C 4th at 570

(approving $10,000 service awards); *McCall v. Drive Financial Services, LP*, 2010 WL 4150875 (Phila CCP July 21, 2010) (approving incentive award of $7,500 in UCC repossession class case).

The Settlement Agreement calls for Mr. Farley to receive a service award in the amount of $12,500 for his services as Representative Plaintiff. (Ex. 1, Sett. Agreement ¶ 2.15.) Mr. Farley has met with counsel in person, engaged in many phone conversations about the status of the case, kept abreast of litigation and discovery mailed to him, and reviewed key pleadings and documents related to the case. Mr. Farley traveled to Philadelphia from Union County to attend the full-day mediation at JAMS. (Ex. 9, Flitter Cert. ¶ 31.) Mr. Farley has generally gone out of his way to serve the best interest of the Class at his own risk and expense and is giving up his right to seek statutory damages of $13,401 for his own individual claim. Mr. Farley will attend the final approval hearing (whether held live or through electronic means).

The proposed service award was described in the Class Notice at ¶ 19 and also drew no objection from any Class Member. The case that Mr. Farley brought and that bears his name has yielded a class settlement with a monetary value at **over $52M**—and much more when accounting for the credit repair benefit. The service award is in line with awards in comparable cases, is well-deserved, and should be approved.

3. ***Cy Pres* for Residual Funds**

Pennsylvania Rule of Civil Procedure 1716 provides:

> (a) Any order entering a judgment or approving a proposed compromise or settlement of a class action that establishes a process for the identification and compensation of members of the class shall provide for the disbursement of residual funds.
>
> (b) Not less than fifty percent (50%) of residual funds in a given class action shall be disbursed to the Pennsylvania Interest on Lawyers Trust Account Board to support activities and programs which promote the delivery of civil legal assistance to the indigent in Pennsylvania by non-profit corporations described in Section 501(c)(3) of the Internal

> Revenue Code of 1986, as amended. The order may provide for disbursement of the balance of any residual funds in excess of those payable to the Pennsylvania Interest on Lawyers Trust Account Board to the Pennsylvania Interest on Lawyers Trust Account Board, or to another entity for purposes that have a direct or indirect relationship to the objectives of the underlying class action, or which otherwise promote the substantive or procedural interests of the members of the class.

The award of residual funds to an entity for "purposes that have a direct or indirect relationship to the objectives of the underlying class action" has been part of the fabric of class action settlements for many years, and has fallen under the historical doctrine of "*cy pres*." Courts have long recognized the utility of *cy pres* remedies, particularly for undistributable funds and in consumer protection cases such as this. *See, e.g.*, *In re Baby Prods. Antitrust. Litig.*, 708 F.3d 163, 171–72 (3d Cir. 2013). A *cy pres* award of the undistributed *res* to benefit consumer education at three area law schools was approved by this Court in the repossession class settlement in *McCall*, 2010 WL 4150875 (award approved under common law of *cy pres*, before enactment of Rule 1716 in 2012).

The distribution provisions, including distribution of residual funds, is set forth in the Settlement Agreement at ¶ 3.06. Checks mailed to Class Members will be good for a period of 90 days. In the event the balance from uncashed checks exceeds $500,000, the agreement calls for a second distribution. (*See id.* ¶ 3.04.) Any second distribution will be mailed by the Administrator to those Class Members who determined to cash the first check. (*Id.*)

Whatever fund remains after the second distribution—or if the initial distribution leaves a residual fund of less than $500,000—shall be distributed as a *cy pres* remedy for the benefit of the settlement class. *Id*. The agreement calls for distribution as follows: (A) 50% to Pennsylvania Interest on Lawyers Trust Account ("IOLTA") pursuant to Pa. R. Civ. P. 1716(b); (B) 25% to

North Penn Legal Services ("NPLS"); and (C) 25% to Pennsylvania Legal Aid Network ("PLAN"). The *cy pres* fund shall be used for consumer education, counseling, and advocacy purposes as set forth in the Settlement Agreement at ¶ 3.06—consistent with the direction of Rule 1716(b).

Funding letters, where these non-profits discuss their mission and restricted use of the *cy pres* funds, are submitted as Exhibits 12 and 13. Patrick Cicero, Executive Director of PLAN, explains that PLAN's "sole mission is to fund and support civil legal aid to low income Pennsylvanians and victims of domestic violence, in areas such as defending foreclosures, defendant against collection actions, and other issues that affect life's most basic needs such as food, shelter, employment, healthcare, and family safety." (Ex. 12, PLAN Letter at p. 1). PLAN's network of "on-the-ground legal representation" reaches all 67 counties in Pennsylvania. (*Id.*)

Lori Molloy, Executive Director of NPLS, explains that NPLS's "mission is to solve civil legal problems and empower vulnerable populations through professional legal representation, advocacy, and education." (Ex. 13, NPLS Letter at p. 1.) NPLS serves a population of over 340,000 residing in twenty counties in northeastern Pennsylvania. (*Id.*) NPLS's service area includes Union County, PA, where Mr. Farley resides.

Both entities are worthy beneficiaries and agreed to by the parties.

B. Class Counsel Fees and Litigation Expenses Should be Approved in the Requested Amount

Plaintiff seeks Class Counsel fees of $6,400,000 under the established "common fund" approach, where fees are sought as a fair percentage of the aggregate recovery. Plaintiff will first discuss this approach – the substantive law permitting the fee award – and then will go on below to discuss the five factors this Court must also consider under Pa. R. Civ. P. 1717.

1. The Requested Fees are Fair and Reasonable Under the Percentage of Recovery Method

It has long been the law that one who successfully maintains a lawsuit that creates a common fund is entitled to reasonable compensation from the fund as a whole. *Trustees v. Greenough*, 105 U.S. 527, 533-34 (1882); *see also Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

This principle was adopted by Pennsylvania's Supreme Court over 100 years ago:

> Distribution of a fund is to be governed by equitable considerations. The right to charge a fund with costs and expenses depends on whether the litigation in which the costs and expenses were incurred was in promotion of the interests of those eventually found to be entitled to the fund. . . . Money paid for such purposes was paid to promote the interests of all who are entitled to share in the fund, and should be borne by the fund.

Schwartz v. Keystone Oil Co., 30 A. 297, 298 (Pa. 1894). The common fund doctrine has since been recognized at 42 Pa. C.S. § 2503(8), which allows an award of reasonable counsel fees "out of a fund within the jurisdiction of the court." *Id.*

In common fund cases, the preferred method of awarding fees is the "percentage of recovery" method. *See Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 464 (E.D. Pa. 2008) (the "percentage of recovery method is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure"). The amount of attorney fees sought here—$6,400,000—amounts to about **12.2%** of the $52.48M in monetary relief, i.e., the combined cash and debt forgiveness ($16,000,000 + $36,480,000 respectively = $52,480,000). In the repossession-practices class case of *Cosgrove*, Judge Schiller added the debt forgiveness to the cash component to compute the monetary "settlement fund . . . before considering the benefit of the credit repair," awarding class counsel the requested 11.7% of that monetary fund. 2011 WL 3740809 at *9.

If the Court assigns value to the credit repair benefit in an amount equal to the cash component as the *Ciccarone* court did, the combined value of the cash proceeds, debt forgiveness, and credit report correction would sum to $68.48M and the fees requested approximate **9.3%** of the common fund. 2004 WL 2966932 at *10 ("The most straightforward method for estimating the value of the equitable relief [credit report correction] is to have it equal the value of the monetary relief").[9] Finally, the fee request of $6,400,000 comes to 40% of the $16,000,000 cash-only component of the settlement. Under any scenario, the fees requested are reasonable, although it is both legally appropriate and equitable to value the entirety of the relief obtained when determining the amount of the Common Fund for purposes of approving class counsel fees.

The fees sought here at 12.2% of the common fund (before valuing the credit repair) fit perfectly within the range of common fund fee awards approved in similar class cases in this Court and elsewhere by class counsel here involving challenges to lender auto repossession practices. *See, e.g.*, *Benefield v. ESSA Bancorp, Inc.*, Phila. CCP No. 160901381 (approving fees at 8.5% of monetary relief of cash and debt forgiveness before accounting for value of credit repair) (Wright Padilla, J.); *Cosgrove*, 2011 WL 3740809 *8–9 (approving fees at 11.7% of monetary relief before valuing credit repair) (Schiller, J.); *Cubler v. Trumark Fin. Credit Union*, Phila. CCP No. 120401800 (final approval dated July 14, 2015) (approving fees at 16% of monetary relief before credit repair) (Colins, J.). In each of these cases, the fees approved were likewise between 40–42.5% of the cash-only component. This request is entirely in the accepted mainstream of prior approvals. Approvals, and below the 20%-50% of common fund range generally held reasonable. See *Milkman*, 61 D&C 4th at 568.

[9] There are other elements of relief to the class, such as the immediate cessation of collection activity and the satisfaction of any deficiency judgments already of record. (*See* Ex. 1, Settlement Agreement ¶¶ 2.06, 2.09, 2.13.) Farley does not attempt to value these separately here, but deems these benefits subsumed within the value assigned to the debt forgiveness and to the equitable-type relief.

The Court is to evaluate reasonableness of fees based on the seven factors articulated in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 201 (3d Cir. 2000), cited with approval by this Court in *Milkman*. Additionally, Pennsylvania Rule of Civil Procedure 1717 sets forth five factors to be considered "among other . . . factors" when awarding attorneys' fees in a class action. Pa. R. Civ. P. 1717. All of the *Gunter* and Rule 1717 factors are addressed below, respectively.

a. Size and Nature of the Common Fund Created, and the Number of Persons Benefited, Supports Approval

The monetary component has been discussed at length *supra*. When approved, PSECU will begin the process of removing entirely the class member/borrower's listing ("tradeline") by notifying the credit bureaus to delete the tradeline. (*See* Ex. "1", Sett Agrmt ¶ 2.09.) Thus, the notation of "repossession" as well as any history of late payments should come off of the class members' credit reports. Plaintiff also described above the value of the credit repair element as explained in detail by Mr. Tarter. (Ex. 8, Tarter Report at p. 8.)[10]

Over 8,500 Pennsylvania consumers will get a substantial check, and those with a deficiency balance on the PSECU books will have it wiped out, *without* the need to file a claim form of any kind. Given the risks of class certification, PSECU's steadfast denial of liability over the 'storage fee disclosure' claim and PSECU's demand for deficiency offsets, the resulting settlement and $52.48M+ common fund is substantial and will benefit every class member.

b. The Absence of Objections Supports the Request for Fees

The Notice of Class Action and Proposed Settlement approved by this Court was mailed to the Class of over 8,500 borrowers and co-obligors advising that Class Counsel would apply for an award of fees not to exceed $6,400,000 plus litigation expenses of up to $50,000. (Ex. 3, Class

[10] As the debt forgiveness and credit repair benefits have been addressed in detail as part of the settlement approval calculus *supra*, Farley simply incorporates that discussion here.

Notice.) The actual expenses, as discussed below, have come in lower. As noted, there have been no objections to this request for fees and expenses, nor to the settlement generally. (Ex. 2, Class Admin. Aff. ¶ 9.) The absence of any objection to the fees requested supports the award of fees sought. *See Gunter*, 223 F.3d at 191, 195 n.1.

c. The Skill and Efficiency of Class Counsel Supports Approval

The prevailing party's degree of success is a "critical consideration." *See Signora v. Liberty Travel, Inc.*, 886 A.2d 284, 293 (Pa. Super. 2005). Related factors include "the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *Mehling*, 248 F.R.D. at 465 (internal citations and quotations omitted). The goal is to ensure that competent counsel continue to undertake risky, complex and novel litigation for the benefit of large numbers of class members who might otherwise lack reasonable access to justice. *Milkman* at 569.

Here, Class Counsel has obtained a very substantial and definite cash, cash-equivalent, and equitable benefit for this class of consumers who had their vehicles repossessed. Counsel did so as efficiently as possible. This litigation was not facile. This area of the law is not heavily litigated. And it is nuanced—requiring a thorough understanding whether aspects of a credit union's repossession practices fail a test of commercial reasonableness as to a large group of consumer borrowers mostly *all in default of their loan obligations*.

Despite the inherent risks of the litigation, counsel was able to shepherd this case to a very favorable settlement. In the absence of this litigation, most of the Class Members lack any reasonable access to legal representation to pursue their small-value statutory claims under the

UCC. This is largely because this case raises arcane issues of consumer finance law and secured transactions in which most capable general practitioners do not practice.

But for this settlement, an adverse reporting will otherwise remain on a consumer's credit report for 7.5 years from default. *Seamans v. Temple University*, 744 F.3d 853, 860 (3d Cir. 2014). (*See also* Ex. 8, Tarter Report at p. 10.) UCC Article 9 under which Farley sued does not have a statutory fee-shifting provision. 13 Pa. C.S. § 9625(c). So, absent this suit by Mr. Farley and his chosen law firm Flitter Milz, most class members would have no reason to know that they even had a claim to bring, or a defense to deficiency. The class members, if they somehow learned of PSECU's non-compliance, would at best have to try to find a law firm to handle a modest individual damages case on a deferred, contingent fee.

As set forth in the certifications of Class Counsel, the Flitter Milz firm and its lawyers have a great deal of experience litigating consumer class actions (including repossession class actions) and are recognized as having expertise in the field. (*See* Exs. 9, 10, and 11). As recognized by Judge Schiller in a very similar repossession notice class action:

> [C]lass counsel [Flitter Milz] is highly experienced, having successfully litigated numerous consumer class actions. Class counsel submitted high-quality work to the Court throughout this litigation, and they pursued the case vigorously against able opposing counsel. These factors weigh in favor of the [fee] award.

Cosgrove, 2011 WL 3740809 at *9 (internal citation omitted). Moreover, PSECU has been represented by skilled and experienced attorneys at the McNees Wallace law firm who adeptly fought this case procedurally and on the merits. Vigorous advocacy "against able [defense] counsel" weighs in favor of approval of the fee request. *Id.*

d. The Magnitude, Complexity and Uniqueness of the Litigation

This case was of intermediate magnitude and complexity. One the one hand, there were only two parties and one statutory claim. There was no satellite or competing litigations as

sometimes happens in class litigation. At the same time, the case involved vehicle installment-sales to 8,500 Pennsylvania consumers, and data had to be collected on each and every one of them. Hundreds of loan files were produced so that counsel could review and audit spreadsheets with many data points relevant to the case. Some 8,500 repossession notices were produced, reviewed, and catalogued. (Ex. 9, Flitter Cert ¶¶ 29.c, 29.d, 29.i.) Counsel needed to understand the details of when this lender decides to repossess, what procedures are used to implement the notice schemes both before and after auction and how storage fees for repossessed vehicles are assessed and calculated.

One of the more significant issues in this litigation and in settlement negotiations was PSECU's assertion of claimed deficiency balance offsets. (New Matter to Second Amended Complaint ¶ 76). PSECU maintained throughout the case that some Class Members had an outstanding deficiency reflecting the spread between what the Class Member's car sold for at auction and the balance of any debt owed to PSECU. This argument has the potential to diminish or completely offset the recovery for the Class Members. Discovery into the repossession and auction process was necessary, as much goes in to a lender's proofs that a post-auction deficiency balance is due or proper. *See Savoy*, 468 A.2d at 467-68 (discussing secured party's burden under UCC to establish commercial reasonableness in sale of repossessed vehicle).

Each of the above factors added complexity, informed Class Counsel's approach in this case, and informed counsel's settlement strategy. Counsel weighed the amount of cash each Class Member might receive, the value of debt cancellation, and the value of credit report correction to the Class Members. The resultant Settlement Agreement attained relief which, as noted, in some ways exceeds the quantum of relief available at a trial in this matter. The effort to forge a settlement that combined substantial cash and debt forgiveness and credit report correction sooner

than later was not simple, and in some ways adds a complexity that a "litigation only" approach would not have. Both the legal theories employed and the multi-prong class settlement negotiated are rare, if not entirely unique, in the Pennsylvania jurisprudence and in this courthouse.

The debt forgiveness benefit also raised income tax issues. (Ex. 9, Flitter Cert. ¶29.j.) Since 2012, the IRS has taken the position that forgiveness of the claimed deficiency balance may be includable as "income" for tax purposes under IRS Regulations § 6050P and may require a financial institution to issue a 1099C form to the borrower. *See IRS Private Letter Ruling re: Baumgartner*, PLR 104257-12, Oct. 5, 2012 (attached as Ex. 14). Class Counsel conferred with specialized tax counsel. Having concluded that the forgiveness of deficiency claimed due may require the credit union to issue an IES 1099C form, counsel drafted the Settlement Agreement so that Class Members were afforded the *choice* of not having their deficiency forgiven after being fully advised that the forgiven amount may yield an IRS 1099C form and may constitute income, subject to taxation. See 26 C.F.R. § 1.6050P-1. Twenty-six class members submitted the form to decline the debt forgiveness; three thousand other class members will receive deficiency debt forgiveness.

Put otherwise, while the case did not present overwhelming factual issues, there were nonetheless complexities that required counsel knowledgeable in the law of secured transactions and repossessions, and the nuanced areas of auto finance, taxation, and class action practice.

Moreover, final approval by no means ends the complexities (or work) to be faced by Class Counsel. After notice of the proposed settlement issued, Flitter Milz attorneys and staff have fielded over 70 calls from Class Members, including at least one non-English-speaking gentleman who required counsel to hire a Korean-language translator. (Ex. 9, Flitter Cert. ¶ 32.)

If past experience is any indication of the post-approval work to follow in this case, Class Counsel can expect to deal with future phone calls and letters from Class Members, their family or lawyers related to: non-receipt of—or incorrectly made-out—checks, co-borrower/co-payee issues, credit reporting not yet been corrected, judgments of record that need to be satisfied, ongoing (if rogue) collection efforts, and the like. (*Id.*) Assuring that the settlement terms are carried out will require additional attention and monitoring by Class Counsel to ensure that all Class Members' credit reports are corrected as required. Class Counsel will not make any additional application for fees after Final Approval. This factor supports approval of the fees requested.

e. Class Counsel Undertook the Risk of Nonpayment

Class Counsel undertook and has handled this action on an entirely contingent fee basis. Flitter Milz has devoted well over one thousand hours of time and some $22,808 in expenses in prosecuting this action without any assurance of being compensated. (Ex. 9, Flitter Cert. ¶ 32.) The contingent nature of this representation is to be taken into consideration by the Court. See Pa. R. Civ. P. 1717(5); *Milkman*, 61 Pa. D. & C. 4th at 561–62.

The risk of no recovery in class cases of this type is real. There are many class actions in which counsel have expended thousands of hours, incurred considerable expenses, and yet received no remuneration despite their diligence and expertise. Even obtaining a favorable jury verdict is not a guarantee of success. *See, e.g.*, *Debbs v. Chrysler*, 810 A.2d 137 (Pa. Super. 2002) ($50 million class verdict vacated). While plaintiff is not suggesting that PSECU is in any financial extremis, even large financial institutions sometimes fail, leaving their creditors stuck.[11]

[11] *See, e.g.*, FDIC, *Bank Failures in Brief – 2009*, https://www.fdic.gov/bank/historical/bank/bfb2009.html (last updated Dec. 3, 2019) (listing the 140 bank failures in 2009).

Here, class counsel insisted that the $16M cash-portion of the settlement be placed into an interest-bearing escrow account at a large, federally insured bank. The funds are safe, pending final approval and distribution to the Class. (Ex. 1, Settlement Agrmt, ¶ 2.06(a).)

Although Plaintiff expects the Class Members' claims would have been certified on contest, there was vigorous class motion practice in which PSECU opposed certification. While Plaintiff is confident in the strength of his case, and of the ability to secure statutory damages, cases such as this are fairly novel in the Pennsylvania jurisprudence, and there is not insignificant risk. *See Milkman*, 61 D. & C. 4th at 561–62. The risk of nonpayment in this case weighs in favor of approving the requested fee.

f. The Amount of Time and Resources Devoted to the Litigation was Substantial

Class Counsel has expended well over 1,000 hours in aggregate time thus far prosecuting this case on behalf of the Class. As noted above, additional time is sure to be spent on class member issues post-approval. (Ex. 9, Flitter Cert. ¶ 32). A large portion of the attorney time was devoted to the pleadings, the briefing of the preliminary objections, taking venue discovery and other discovery, reviewing copious discovery documents and data, reviewing and cataloging thousands of documents, deposing PSECU's corporate witnesses (twelve depositions total), and researching substantive legal issues in the case. The parties and counsel spent time preparing for and attending a full-day mediation at JAMS. Class Counsel has been communicating with the administrator regarding notice and administration. Additional time was spent drafting, negotiating, and redrafting settlement documents (the agreement, proposed orders, and class notice), the motion for preliminary approval, and the instant motion for final approval. (Ex. 9, Flitter Cert. ¶ 32).

C. The Fee Request is Supported by all of the Rule 1717 Factors

The fee request readily satisfies the factors set forth in Pa. R. Civ. P. 1717, which overlap substantially with the *Gunter* factors.[12] The above discussion of the history of this litigation amply demonstrates that the time and effort expended by Class Counsel was reasonable and necessary. Pa. R. Civ. P. 1717(1). Settlement was obtained efficiently through skillful litigating and negotiation. The quality of the services rendered is reflected by the excellent recovery for the Class and the $16M fund now on deposit at PNC Bank. Pa. R. Civ. P. 1717(2)-(3). This case for statutory damages under UCC Article 9 raised nuanced questions about consumer usage, auto finance law, deficiencies, and taxation of debt forgiveness. *Id.* at 1717(4). Finally, as discussed in the previous section, Class Counsel's receipt of a fee was entirely contingent on success. *Id.* at 1717(5). All these factors support approval here.

D. Reimbursement of Litigation Expenses is Warranted

Class Counsel seeks reimbursement of expenses incurred during prosecution of this case to a successful conclusion. In *Gregory v. Harleysville Mut. Ins. Co.*, 542 A.2d 133, 136 (Pa. Super. 1988), Superior Court held that under the "common fund doctrine," class counsel is entitled to reimbursement of expenses from the settlement fund created.

Here, the litigation expenses for which reimbursement is sought is $22,808—less than the $50,000.00 projected and disclosed to the Classes in the Notice. The expenses are referenced in the Flitter Certification at ¶ 32. These expenses reflect costs for court filing fees, service costs, court reporting charges, document copying, brief binding, bulk postage, legal research, mediation

[12] These factors include (1) the time and effort reasonably expended by the attorney in the litigation; (2) the quality of the services rendered; (3) the results achieved and benefits conferred upon the class or upon the public; (4) the magnitude, complexity and uniqueness of the litigation; and (5) whether the receipt of a fee was contingent on success. Pa. R. Civ. P. 1717; *see also Milkman*, 61 Pa. D. & C. 4th at 558.

fees, travel expenses, translation services, and other smaller miscellaneous expenses, as summarized in the below chart. (*Id.*)

Category	**Amount**
Filing Fees	$ 584.95
Service of Process	$ 65.00
Court Reporting Charges	$ 1,953.85
Investigative Services	$ 100.00
Expert Services and Reports (Marcum LLP & Tarter)	$10,381.81
Link Translations, Inc. (hiring of Korean translator for conference with Korean-speaking Class Member)	$ 516.92
Bulk photocopying @ 0.15	$ 511.68
Legal Research outside of Westlaw plan	$ 321.57
Mediation with JAMS	$ 4,650.00
Travel expenses (parking, lodging, transportation, etc.)	$ 3,330.87
Miscellaneous: binding, bulk postage, federal express	$ 391.35
TOTAL LITIGATION EXPENSES	**$22,808.00**

"Check by check" expenditures can be available if requested by the Court.

These expenses were reasonable and necessary to prosecute the case and to Class Counsel's success in achieving the settlement. (*Id.*). Reimbursement of these expenses should likewise be allowed.

VII. RELIEF

For the reasons detailed herein, Plaintiff Codey Farley respectfully requests that this Court find Notice to the class to have been due and proper, that the proposed settlement meets all criteria for approval, and grant his motion for final approval of this Class action settlement. Plaintiff also asks that the Court allow Class Counsel fees in the sum of $6,400,000, expense reimbursement in the sum of $22,458, and Representative Plaintiff's service award of $12,500.

Date: 4/14/2020

/s/ Cary L. Flitter

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CODEY FARLEY, individually and on behalf of all others similarly situated, Plaintiff vs. PENNSYLVANIA STATE EMPLOYEES CREDIT UNION Defendant.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY JUNE TERM, 2017 NO. 001889 CLASS ACTION

CERTIFICATE OF SERVICE

I hereby certify that on this day, my office filed the foregoing Motion for Final Approval of Class Settlement, along with a Memorandum of Law, Certifications and proposed Order, with the Clerk of Judicial Records and mailed a copy, via email, to the following:

Kimberly M. Colonna, Esquire
McNees Wallace & Nurick, LLC
100 Pine Street
Harrisburg, PA 17101
Attorney for Defendant, PSECU

Date: 4/14/2020

/s/ Cary L. Flitter
CARY L. FLITTER

CODEY FARLEY, individually and on behalf of all others similarly situated, Plaintiff vs. PENNSYLVANIA STATE EMPLOYEES CREDIT UNION Defendant.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY JUNE TERM, 2017 NO. 001889 CLASS ACTION

ORDER FOR FINAL JUDGMENT AND DISMISSAL

WHEREAS, Plaintiff Codey Farley (the "Class Representative" or "Plaintiff") on behalf of himself and the Class Members, and Pennsylvania State Employees Credit Union ("PSECU"), the Defendant in the above captioned action, (the "Action") have entered into and filed with the Court, a Class Action Settlement Agreement and Release (the "Settlement Agreement");

WHEREAS, the Court on January 21, 2020 entered an Order Preliminarily Approving the Settlement ("Preliminary Approval Order"), and scheduling the final hearing date for April 27, 2020;

WHEREAS, on _____, 2020, beginning at _____ o'clock a.m., the Court held a hearing to consider, among other things (i) whether the settlement reflected in the Settlement Agreement should be approved as fair, reasonable, adequate and in the best interests of the Class Members; (ii) whether final judgment should be entered dismissing the Class Members' claims with prejudice and on the merits, as required by the Settlement Agreement; and (iii) whether to approve Plaintiff's application for a Class Representative award, and Class Counsel's petition for an award of Class Counsel fees and expenses from the common fund.

WHEREAS, based on the foregoing, having heard the statements of counsel for the parties and of such persons who chose to appear at the final approval hearing, having considered all of the files, records and proceedings in the Action, including specifically the Settlement Agreement (and the exhibits appended thereto), the memoranda and other papers filed by the parties in support of final approval of the proposed settlement, Plaintiff's request for an award of a Class Representative incentive award, and Class Counsel's request for an award of Class Counsel fees and expenses;

WHEREAS, there have been no objections to the settlement and only two of the more than 8,500 Class Members have written to exclude themselves from the Class.

THE COURT HEREBY FINDS, ORDERS AND ADJUDGES THAT:

1. Notice to the Class: Notice to the Class has been provided by the Settlement Administrator pursuant to this Court's Order of Preliminary Approval, as attested to by the Affidavit of the Settlement Administrator dated April 3, 2020. The Notice given to Class Members by first class mail constituted due and sufficient Notice of the settlement and the matters set forth in said Notices to all persons entitled to receive Notice, and fully satisfies the requirements of due process and Pa. R. Civ. P. 1712, 1714(c).

2. Adequacy of Class Representatives: Plaintiff Codey Farley, as representative of the Classes, fairly and adequately represents the interest of the Classes, such that the requirements of due process, the requirements of Pennsylvania law, and the requirements of Pa. R. Civ. P. 1709 have been satisfied.

3. Adequacy of Class Counsel: Cary L. Flitter, Andrew M. Milz, and Jody Thomas López-Jacobs of the law firm of Flitter Milz, P.C. fairly and adequately represent the interests of

the Classes, such that the requirements of due process, the requirements of Pennsylvania law and the requirements of Pa. R. Civ. P. 1709 have been satisfied.

4. **Settlement Approved**: The proposed settlement set forth in the parties' Settlement Agreement, a copy of which was filed as Ex. "1" to the Motion for Final Approval, is fair, reasonable, adequate, and in the best interests of the Class. The terms in this Order shall be interpreted in accordance with the definitions in the Settlement Agreement. All aspects of the Settlement Agreement are approved. The Class Representative service award is approved in the amount of $12,500.00, to be paid by Defendant per the Agreement of Settlement.

5. **Class Counsel Fees and Expenses**: The Court has reviewed the application for Class Counsel fees and expenses, and the documentation submitted in support. Consistent with the criteria set forth in Pa. R. Civ. P. 1717, and established Pennsylvania law providing for payment of reasonable counsel fees and expenses to Class Counsel from a common fund created for the benefit of the Class, the Court finds the aggregate settlement, which includes a cash fund of $16 million and the complete waiver of approximately $36.48 million in auto finance agreement deficiency balances claimed due by PSECU, for an aggregate approximate monetary settlement of $52.48 million, together with equitable-type relief in the correction of consumer credit reports of Class Members as provided in the Class Action Settlement Agreement, provides a substantial and tangible benefit to the Class Members.

Class Counsel's fee request in the sum of $6,400,000 is approved as fair and reasonable considered in light of the results obtained and all the factors set forth in Pa. R. Civ. P. 1717, and in light of ongoing future services reasonably anticipated to be required to implement and oversee this settlement. Litigation expenses of Class Counsel have been adequately documented, and

appear reasonable and necessary for effective prosecution of the case. Expenses are approved in the requested sum of $22,808. Both fees and expenses shall be paid out of the Common Fund.

6. Dismissal and Related Matters:

a. The claims of all Class Members are hereby dismissed with prejudice, on the merits and without costs to any party. Pursuant to the affidavit of the Administrator, no class members have opted out.

b. Plaintiff, on his own behalf, and on behalf of each Class Member, by operation of this Release and the judgment, hereby shall be deemed to have fully, finally and forever released, settled, compromised, relinquished and discharged with prejudice any and all of the Released Persons of and from any and all Settled Claims, and shall be forever barred and enjoined from instituting or further prosecuting, in any forum, including but not limited to any state or federal court, any Settled Claim as defined in the Settlement Agreement.

c. On the Effective Date, Defendant shall be deemed to have released, settled, compromised, relinquished and discharged with prejudice any such Deficiency Balance of the Class Members arising from or related to the motor vehicle installment sale contracts or vehicle loans at issue. PSECU is hereby enjoined from any further attempts to collect monies from Class Members. Notwithstanding the foregoing, this Release shall not apply to any Class Member who reinstated his contract or reclaimed and/or obtained the return of his vehicle following repossession, does not have a Deficiency Balance, or who elected not to receive the Deficiency Balance waiver pursuant to the Class Notice.

d. In light of the Notice given to the Class Members, Plaintiff and all Class Members shall be bound by the Settlement Agreement and all of their Settled Claims shall be dismissed with prejudice and released.

7. ***Cy Pres***: The Court approves Pennsylvania Interest on Lawyers Trust Account ("IOLTA"), North Penn Legal Services ("NPLS"), and Pennsylvania Legal Aid Network ("PLAN"), as *cy pres* beneficiaries. All residual funds remaining after distribution of the Settlement Fund to Class Members, as called for in the Settlement Agreement, and payment of Class Counsel fees, litigation expenses and administration expenses, shall be distributed a *cy pres* remedy by the Settlement Administrator accordingly: (A) 50% to IOLTA pursuant to Pa. R. Civ. P. 1716; (B) 25% to NPLS; and (C) 25% to PLAN. The *cy pres* fund shall be used for consumer purposes as set forth in the Class Action Settlement Agreement ¶ 3.06.

8. **Continuing Jurisdiction**: Consummation of the settlement shall proceed as described in the Settlement Agreement and the Court hereby retains jurisdiction of this matter in order to resolve any disputes which may arise in the implementation of the Settlement Agreement or the implementation of this Final Judgment and Order. The Court retains continuing jurisdiction for purposes of supervising the implementation of the Settlement Agreement and supervising the distribution and allocation of the Settlement Fund. Final judgment shall be entered as provided herein.

BY THE COURT:

_____

J.