COMMONWEALTH OF KENTUCKY
HENDERSON CIRCUIT COURT
CIVIL ACTION NO. 22-CI-00553

AMY JO ARMSTEAD,
on behalf of herself and all others similarly situated, PLAINTIFF,

v.

(Electronically Filed)

VGW MALTA LTD, and
VGW LUCKYLAND INC., DEFENDANTS.

CLASS COUNSEL'S APPLICATION FOR ATTORNEYS' FEES AND COSTS RELATED TO THE CLASS ACTION SETTLEMENT AGREEMENT AND REQUEST FOR FEE AWARD TO CLASS REPRESENTATIVE

Class Counsel respectfully submit this Application for Attorneys' Fees and Costs Related to the Class Action Settlement Agreement and Request for Fee Award to Class Representative ("Class Counsel Application"), and in support thereof state as follows:

I. INTRODUCTION AND PROCEDURAL HISTORY

1. This is a proposed statewide Kentucky class action settlement. Plaintiff Amy Jo Armstead ("Plaintiff") has been appointed as class representative on behalf of all similarly situated persons. Plaintiff alleges that Defendants own and operate the Chumba Casino and Luckyland Slots (the "Games") that constitute illegal gambling under Kentucky state law. The details of procedural history and the claims asserted are set forth in the Memorandum of Law in Support of Joint Motion for Preliminary Approval of Class Settlement, Class Certification for Settlement Purposes, Appointment of Class Representatives, and Appointment of Class Counsel (the "Preliminary Approval Memo.") filed on September 28, 2022.[1]

2. After several months of arm's-length negotiations—including a full-day, in-person

[1] Both the Preliminary Approval Memo and forthcoming Final Approval Memorandum (to be filed on or before December 26, 2022) are incorporated by reference herein.

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mediation session facilitated by the Honorable Layn R. Phillips (Ret.) of Phillips ADR ("Phillips ADR") and his staff—Plaintiff and Defendants have reached a class-wide settlement, which was executed on September 12, 2022.

3. On September 28, 2022, the parties filed the Joint Motion for Preliminary Approval of Class Action Settlement, Class Certification for Settlement Purposes, Appointment of Class Representatives, and Appointment of Class Counsel (the "Preliminary Approval Motion"). After hearing the Preliminary Approval Motion, this Court granted preliminary approval on October 3, 2022. The Court's Order appointed Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A. as Class Counsel and Plaintiff Amy Jo Armstead as Class Representative.

4. Plaintiff and Class Counsel have achieved an outstanding result in this case: an $11.75 million non-reversionary, common fund settlement, a value irrespective of additional meaningful injunctive relief. *See* Preliminary Approval Memo. at 5.

5. The settlement payment checks Class Members will receive are significant, impactful, and immediate. Indeed, under the Settlement allocation structure, Class Members stand to recover substantial portions of the amounts spent on Defendants' Games, ranging from approximately 10% (at the low end) to 60% (at the high end). Furthermore, the Settlement requires Defendants to implement meaningful prospective relief, including providing addiction-related resources within their social casino games and creating and honoring a comprehensive self-exclusion policy.

6. Notably, the proposed Settlement here is directly in line with, and proportionate to, other recent settlements challenging similar virtual casino games that have been finally approved involving nearly identical allegations under Washington law: *Kater v. Churchill Downs*, Case No. 15-cv-00612, ECF No. 222 (W.D. Wash. Feb. 11, 2021), *Wilson v. Huuuge, Inc.*, Case No. 18-cv-

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05276, ECF No. 140 (W.D. Wash. Feb. 11, 2021), *Wilson v. Playtika, Ltd.*, Case No. 18-cv-05277, ECF No. 164 (W.D. Wash. Feb. 11, 2021), *and Reed v. Light & Wonder, Inc.*, Case No. 18-cv-000565-RSL, ECF No. 197 (W.D. Wash. Aug. 12, 2022) (collectively, the "Washington Cases").

7. Class Counsel seek an award of attorneys' fees, costs, and expenses in the amount of $3,525,000 (which is equal to 30 percent of the $11.75 million Settlement Fund). *See* Preliminary Approval Memo. at 10. In addition, this application seeks a service award of $7,000.00 to the Class Representative. *Id*. Defendant does not oppose either request.

8. As explained further below, the requested awards would fairly compensate Class Counsel and the Class Representative for the result they achieved, and this motion should be granted.

II. EVIDENCE IN SUPPORT OF CLASS COUNSEL'S APPLICATION

9. Class Counsel incorporate by reference herein the Preliminary Approval Motion, the Preliminary Approval Memo., and all exhibits attached thereto. In addition, Class Counsel ask the Court to take judicial notice of the entirety of the case file for the activities that have occurred during the course of this proceeding as an additional basis for the award of fees in this case.

10. Class Counsel additionally submits the Affidavit of Philip L. Fraietta ("Fraietta Affidavit") and the Affidavit of Amy Jo Armstead ("Armstead Affidavit"), attached hereto as **Exhibits 1** and **2**, respectively.

III. CLASS COUNSEL'S FEE REQUEST IS REASONABLE UNDER THE PERCENTAGE OF THE BENEFIT METHOD

A. Legal Standards

11. Under CR 23.08, the trial court in a certified class action is to approve or award "reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." *Coll. Ret. Equities Fund, Corp. v. Rink*, No. 2012-CA-002050-MR, 2015 WL 226112,

at *4 (Ky. Ct. App. Jan. 16, 2015) (pursuant to CR 76.28(4), attached hereto as **Exhibit 3**). "It is well-settled that the circuit court has discretion to determine the 'appropriate method for calculating attorneys' fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them.'" *Id*. (quoting *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). CR 23.08(3) provides that when a trial court awards fees in a class action, it must find the facts and state its legal conclusion under CR 52.01. *Id*. at *7. "Furthermore, when awarding fees in class actions, the trial court must also explain its 'reasons for adopting a particular methodology.'" *Id*. (quoting *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009)).

12. Courts "awarding fees in class actions use two methods, lodestar and percentage-of-fund. The lodestar method sets a fee by multiplying the reasonable hours expended by the reasonable hourly rate. In the percentage-of-fund method, the fee is expressed as a percentage of a set or fixed 'common fund,' whether the fund is obtained by judgment or settlement." *Id*. at *10–11.

13. "Federal Courts within Kentucky and the Sixth Circuit universally recognize that 'the percentages awarded in common fund cases typically range from 20 to 50 percent of the common fund awarded.' *Id.* at *6 (quoting *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 633 (W.D. Ky. 2006)).

14. "Courts in the Sixth Circuit evaluate the reasonableness of a requested fee percentage award using six factors: (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill

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and standing of counsel involved on both sides." *New England Health Care Emps. Pension Fund*, 234 F.R.D. at 634.

15. Performing a lodestar cross-check is optional when using the percentage of the fund method in Kentucky. *See Coll. Ret. Equities Fund, Corp*, 2015 WL 226112, at *8 (Upholding 33 percent percentage of the fund award where circuit court did not perform a lodestar cross-check).

16. "KRS 412.070 provides that attorneys' fees are to be paid 'out of the funds recovered *before distribution*.'" *Id*. at *19. (quoting KRS 412.070 (emphasis in original)). "[T]he statute recognizes the practical reality that a common fund attorney fee under KRS 412.070 should be measured before determining payment to individual claimants. Indeed, this interpretation of KRS 412.070 is entirely consistent with United States Supreme Court precedent." *Id*.

17. Absentee class members are of no consequence in calculating attorney's fees.

> In *Boeing*, the United States Supreme Court held that attorneys fees were appropriately determined as a percentage of the entire amount obtained for the class even though some class members failed to make claims for their individual damages. '[Absentee class members'] right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel.' *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480-81, (1980). Because all class members receive a benefit with this type of settlement (including class members who choose not to take advantage of it) a majority of courts have awarded attorneys' fees based upon the amount that would be recovered if every class member makes a claim, regardless of whether the claims are filed.

Id. at *19-20.

B. The Court Should Apply the "Percentage of the Fund" Method to Calculate Fees

18. Here, the "percentage of the fund" method is the superior method for evaluating the fee request. In *Rawlings*, the Sixth Circuit observed that the recent trend has been towards application of a percentage-of-the-fund method in common fund cases. *Rawlings*, 9 F.3d at 516–

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517; *See also In re Cardizem DC Antitrust Litigation*, 218 F.R.D. 508, 532 (E.D. Mich. 2003) ("[T]he Sixth Circuit have indicated their preference for the percentage-of-the-fund method in common fund cases.") (collecting cases). Similarly, in *In re Cardizem DC Antitrust Litigation*, the district court observed that:

> The lodestar method should arguably be avoided in situations where such a common fund exists because it does not adequately acknowledge (1) the result achieved or (2) the special skill of the attorney(s) in obtaining that result. Courts and commentators have been skeptical of applying the formula in common fund cases.... [M]any courts have strayed from using lodestar in common fund cases and moved towards the percentage of the fund method which allows for a more accurate approximation of a reasonable award for fees.

218 F.R.D. at 532 (quoting *Fournier v. PFS Investments, Inc.*, 997 F. Supp. 828, 832–33 (E.D.Mich.1998)).

19. Similarly, the loadstar method was criticized by the Eastern District of Michigan in *In re F&M Distribs. Inc. Sec. Litig.*, where the court stated both that (1) "the lodestar method is too cumbersome and time-consuming of the resources of the Court"; and (2) "more importantly, the 'percentage of the fund' approach more accurately reflects the result achieved." No. 95-CV-71778-DT, 1999 U.S. Dist. LEXIS 11090, at *8 (E.D. Mich. Jun. 29, 1999) (internal quotes and citations omitted)[2]; *see also In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 532 (E.D. Mich. 2003) (agreeing with *F M Distribs. Inc.* and noting "[t]his Court's decision to apply the percentage-of-the-fund method is consistent with the majority trend, and, more importantly, is reasonable under the circumstances presented here.")

20. For these reasons, the Court should apply the percentage-of-the-fund method which is consistent with the majority trend. *See New England Health Care Emps. Pension Fund*, 234

[2] Attached hereto as **Exhibit 4.**

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F.R.D. at 633. Because the fee requested is reasonable under the standards articulated, no lodestar cross-check is necessary, and the court need not devote its recourses to such a "cumbersome and time-consuming" evaluation. *See F&M Distribs. Inc. Sec. Litig.* 1999 U.S. Dist. LEXIS 11090, *8; *see also Coll. Ret. Equities Fund, Corp*, 2015 WL 226112, at *8 (Upholding 33 percent percentage of the fund award where circuit court did not perform a lodestar cross-check). This is consistent with the Washington Cases, each of which utilized the percentage of the fund method to assess attorney's fees. *See generally* Washington Cases.

C. The Attorneys' Fees Sought by Class Counsel are Reasonable Under the "Percentage of the Fund" Method

21. Here, Class Counsel seek attorneys' fees in the amount of 30 percent of the common fund. "Federal Courts within Kentucky and the Sixth Circuit universally recognize that 'the percentages awarded in common fund cases typically range from 20 to 50 percent of the common fund awarded.'" *Id*. at *18 (quoting *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 633 (W.D. Ky. 2006)).[3] Thus, the amount sought is well within the range typically awarded and is thus presumptively reasonable.

22. The reasonableness of the attorney's fees sought is further supported by the fact the common fund is based on a 23% recovery of the monies spent in Defendants' Games that are the subject of this litigation—a number in line with recoveries in numerous similar cases brought

[3] Kentucky courts often look to Federal Rule of Civil Procedure 23 and the federal case law interpreting it as guidance for interpreting Kentucky's counterpart, Kentucky Rule of Civil Procedure 23. *See* 6 Kurt A. Phillips, Jr., David V. Kramer and David W. Burleigh, *Kentucky Practice – Rules of Civil Procedure Annotated*, CR 23.02 (6th ed. 2005) ("Kentucky courts customarily rely on federal case law when interpreting a Kentucky rule of procedure that is similar to its federal counterpart. Such is the case with CR 23.01 and FRCP 23(a)."); *see also Bellarmine College v. Hornung*, 662 S.W.2d 847 (Ky. Ct. App. 1983) (relying on federal case law on FRCP 23 to interpret Kentucky Rule of Civil Procedure 23); *Lamar v. Office of Sheriff*, 669 S.W.2d 27 (Ky. Ct. App. 1984) (relying on federal case law on FRCP 23 to interpret Kentucky Rule of Civil Procedure 23).

under Washington law. *See* Preliminary Approval Memo. at 2. In addition, Class Counsel worked diligently on this action against a sophisticated corporate defendant represented by talented and well-respected counsel, with no guarantee at any point of any recovery. The reasonableness is thus further supported by "the complexity of the case and the effectiveness of class counsel." *Id*. at *24.

23. In terms of the specific amount requested here, the private market would easily support a fee higher than the 30% that Class Counsel request. In non-class litigation, 33.33% contingency fees (higher than those requested here) are typical. Although no such market truly exists for class actions, there are meaningful comparisons to be had in other areas of law. For example, sophisticated business clients who serve as named plaintiffs in class actions commonly agree to pay fees of 33 percent or greater to their counsel. *See, e.g., San Allen, Inc. v. Buehrer*, Case No. CV07-644950, Motion for Attorneys' Fees at 24 (Ohio Com. Pl. Nov. 7, 2014) (business plaintiffs signed retainers agreeing to pay 33.3% of recovery); *In re U.S. Foodservice, Inc. Pricing Litigation*, Case No. 3:07-md-1894 (AWT), ECF No. 510-1 at 20–21 (D. Conn. Aug. 29, 2014) (business plaintiffs agreed to fee award as high as 40%). Similar rates prevail in antitrust class actions where businesses participate as plaintiffs. *See, e.g., King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG, ECF No. 870 at 1–2; (E.D. Pa. Oct. 15, 2015) (noting that courts "have routinely granted a fee award of 33%" in Hatch-Waxman antitrust cases). The same is true for pharmaceutical cases, where a 33% fee "heavily dominate[s]" the market and "the average [is] 32.85 percent." Brian T. Fitzpatrick, A Fiduciary Judge's Guide to Awarding Fees in Class Actions, 89 FORDHAM L. REV 1151, 1161 (2021). And in patent cases, where plaintiffs agreed to pay their lawyers using a flat contingent fee, "the mean rate [is] 38.6% of the recovery." David L. Schwartz, The Rise of Contingent Fee Representation in Patent Litigation, 64 ALA. L.

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REV. 335, 360 (2012).

24. As Justices Brennan and Marshall observed in their concurring opinion in *Blum v. Stenson*, 465 U.S. 886 (1984): "In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." 465 U.S. at 902 n.19; *see also In re Prudential-Bache Energy Income Partnerships Sec. Litig.*, 1994 U.S. Dist. LEXIS 6621, at *4 (E.D. La. May 18, 1994) ("Were this not a class action, attorney's fees would range between 30% and 40%, the percentages commonly contracted for in contingency cases."). The Court of Appeals of Kentucky has upheld a trial court's finding that a fee awarding one-third of the common fund value was reasonable. *See Coll. Ret. Equities Fund, Corp.*, 2015 WL 226112, at *7 ("Given the varying amounts of attorneys' fees awarded in similar types of class action litigation, we cannot say that an award of one-third of the constructive common fund was erroneous.").

25. Comparison to judicially approved fees can also be useful, and that comparison supports Class Counsel's request here as well. Class Counsel's request for 30% of the Settlement Fund falls below the relevant market rate, meaning a market analysis supports the requested award.

i. Class Counsel Achieved Extraordinary Results for the Class

26. The number one factor Kentucky and Sixth Circuit courts consider in evaluating the reasonableness of a requested fee percentage award is the "the value of the benefit rendered to the plaintiff class[.]" *See New England Health Care Emps. Pension Fund*, 234 F.R.D. 627, 634; *See also Dick v. Sprint Commc'ns Co. L.P.*, 297 F.R.D. 283, 299 (W.D. Ky. 2014) ("The first *Ramey* factor requires the Court to assess the benefit of the settlement to the class. Courts in this circuit regard this element as the most important of the *Ramey* factors.) Here, the result achieved by Class Counsel is nothing short of extraordinary.

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27. In this action, Plaintiff alleged that Defendants own and operate the Games, and that the Games constitute illegal gambling under Kentucky state law. The Settlement establishes an $11.75 million non-reversionary common fund from which Class Members may make claims to receive substantial reimbursement for monies spent on Defendants' Games. The plan of allocation is structured in tiers so that Class Members who spent more money on the applications are entitled to commensurately recoup more money. Further, all claims will likely be subject to *pro rata* upward adjustment. Thus, by way of example, Settlement Class Members in the highest category of Lifetime Spending Amounts slated to recover the majority, *i.e.*, more than half, of their losses.

28. Based on information provided by Defendants prior to executing the settlement, the cash common fund represents approximately 23% of the Settlement Class's potential actual damages. This percentage recovery is in line with that achieved in the Washington Cases, despite that those cases were often settled after *years* of litigation. *See generally* Washington Cases. Even more remarkably, none of the Washington Cases were settled until after the Ninth Circuit issued a binding opinion holding that virtual casino games like the Games at issue here constitute illegal gambling under Washington law. *See Kater v. Churchill Downs Inc.,* 886 F.3d 784, 785 (9th Cir. 2018). No such analogous holding can be found in either Kentucky or the Sixth Circuit, yet Class Counsel achieved an analogous recovery to the Washington Cases all the same.

29. The monetary component of this Settlement is the primary relief provided to the Settlement Class, and it is the only component of the Settlement that Class Counsel ask to be compensated for directly. That said, the non-monetary benefits that Class Counsel achieved for the Class in this litigation are significant and meaningful, and they further justify the appropriateness of the requested fee award here.

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30. Specifically, the Settlement requires Defendants to maintain resources relating to video game behavior disorders that are accessible within the Games. Defendants will maintain a webpage on the Games sites that (1) encourages responsible gameplay; (2) describes what video game behavior disorders are; (3) provides or links to resources relating to video game behavior disorders; and (4) includes a link to Defendants' self-exclusion policy. Settlement Agreement § 2.2 (a). Defendants will maintain a policy, and will make commercially reasonable efforts to enforce that policy, such that customer service representatives will provide the same information to any player who contacts them and references or exhibits video game behavior disorders, and will face no adverse employment consequences for providing players with this information. *Id.*

31. In addition, under the Settlement, Defendants will publish on their websites a voluntary self-exclusion policy which players may terminate their ability to purchase virtual coins in the Games or close their Game accounts entirely. That policy will provide that, when a player self-excludes by specifying the relevant User ID, Defendants will use commercially reasonable efforts to implement the player's request with respect to all account(s) associated with those User ID(s). Defendants will retain discretion as to the particular method by which players may self-exclude; for example, Defendants may permit players to self-exclude by contacting Defendants' customer support, completing a form on Defendants' website, or any other reasonably accessible means. Defendants shall use commercially reasonable efforts to prevent any circumvention of the player's request, including by creation of a new account in either Game, from any account-related identifiers that are commercially and technically feasible, using commercially reasonable efforts, to be associated with the excluded account. After a self-exclusion request is addressed in full by Defendants, Defendants will not remove these restrictions for the period identified in the self-exclusion policy at the time the self-exclusion is requested. *Id*. § 2.2(b).

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32. Finally, under the Settlement, Defendants will maintain their recent changes (implemented after receipt of Plaintiff's initiation of dispute resolution proceedings) to game mechanics for the Games to ensure that players who run out of sufficient virtual coins are able to continue to play games within the Game suites without needing to purchase additional virtual coins or to wait until they would have otherwise received free additional virtual coins in the ordinary course. Specifically, players who run out of coins will be able to continue to play at least one game within the Game suites. *Id.* § 2.2(c). These injunctive components provide meaningful and valuable relief to the class beyond the monetary relief provided to class members, and further warrant the requested fee.

ii. Class Counsel Provided Quality Work in a Complex Case

33. Federal Courts, including in the Sixth Circuit, consider the "complexity of the litigation in evaluating the reasonableness of a requested fee percentage award. *See, e.g. New England Health Care Emps. Pension Fund*, 234 F.R.D. at 634 (W.D. Ky. 2006). Here, Class Counsel provided quality work in a case with complex and novel legal issues.

34. This action was originally filed on September 7, 2022, in Henderson Circuit Court. However, the case actually began months earlier. Prior to initiating the action, Class Counsel undertook extensive efforts investigating and evaluating the claims against Defendant. Eventually, in March 2022, Plaintiff initiated dispute resolution proceedings pursuant to the Chumba Casino Terms & Conditions. *See* Prelim. Approval Memo. at 3.

35. Class Counsel was contacted by defense counsel soon thereafter. Given the extensive roadmap laid out in prior similar cases in the Western District of Washington (*see* Prelim Approval Memo at 2), the Parties discussed the possibility of an early mediation through which the Parties could share their respective positions. *Id.*

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36. During the period leading up to the mediation, Defendants provided Class Counsel with transactional data for virtual coin purchases made by the Settlement Class; the Parties exchanged multiple rounds of voluminous briefing on the core facts, legal issues, litigation risks, and potential settlement structures; and the Parties supplemented that briefing with extensive telephonic correspondence, mediated and shuttled by the Phillips ADR team, clarifying each other's positions in advance of the mediation. *Id.* at 4. On August 31, 2022, following a full-day mediation session, Judge Phillips made a mediator's proposal to settle the case in principle, which both Parties accepted. *Id.*

37. Throughout these negotiations, Defendant was represented by prominent and well-respected counsel, another factor weighing in favor of the requested fee award. *See, e.g. New England Health Care Emps. Pension Fund*, 234 F.R.D. at 634 (W.D. Ky. 2006).

38. During the settlement negotiations, the parties detailed their positions on the novel and challenging issues raised in this case. Settlement negotiations ultimately culminated in the terms memorialized in the Settlement Agreement.

39. In sum, this case required a significant amount of skilled legal work. The Settlement Agreement was not arrived at until after Class Counsel had (1) conducted an extensive and comprehensive pre-suit investigation relating to the events and transactions underlying Plaintiff's claims prior to filing the Complaint; (2) thoroughly researched the law and facts pertinent to Plaintiff's claims and the defenses raised by Defendant, and assessed the risks of prevailing on each of the respective claims on pre-trial motions and at trial; (3) conducted discovery; (4) exchanged voluminous briefing in advance of the Parties' mediation; (5) thoroughly evaluated the risks of ongoing litigation; and (6) participated in a full-day mediation session.

40. Further yet, Class Counsel relied on their previous experience and innumerable

man-hours in other class action litigation involving similar "illegal gambling" allegations. *See, e.g., In Re: Apple Inc. App Store Simulated Casino-Style Games Litig.*, Case No. 5:21-cv-02777-EJD, ECF No. 77, at 5 (N.D. Cal. Sept. 23, 2021) (Order Granting Appointment of Interim Lead Counsel); *Croft v. SpinX Games Limited*, *et al.*, Case No. 20-cv-01310-RSM, ECF No. 60, at ¶ 4 (W.D. Wash. Mar. 24, 2022) (appointing Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A. as Class Counsel); Fraietta Affidavit ¶ 5; *see also In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *13 (approving attorneys' fees where class counsel "performed significant factual investigation prior to bringing th[is] action[] . . . participated in protracted negotiations[,] and filed several pleadings"). The work performed by Class Counsel in this case represents the highest caliber of legal work and strongly supports their requested fee award. Fraietta Affidavit ¶ 6.

iii. Plaintiff's Claims Carried Substantial Risk

41. The primary goal of Class Counsel and the named Plaintiff was to obtain, by settlement or judgment, the best overall common benefit for the Class at the earliest reasonable time. The reality of complex litigation against defendants represented by formidable counsel was an anticipated obstacle that Class Counsel considered and sought to overcome from the beginning. The results obtained by Class Counsel through the Settlement Agreement owe more to the strategy employed and quality of the work product than sheer time and labor. The mere expenditure of time and labor does not necessarily move a complex action such as this towards certification, judgment or settlement. The Court is in the superior position to assess whether the strategy undertaken by Class Counsel was reasonable and necessary under the circumstances of the case.

42. This action involved complex, novel and difficult legal issues related to various underlying causes of action and class certification. Throughout the case, Defendant maintained that Plaintiff's substantive and class allegations were wholly without merit. In short, the facts of

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the case, the legal issues involved and Defendant's aggressive posture in asserting its defenses presented a risk that Plaintiff would fail to establish liability and/or legal damages.

43. While there is a large body of Washington and Ninth Circuit caselaw on point (*see generally*, Washington Cases), to Class Counsel's knowledge this is the first case *ever* to challenge the legality of virtual casino games such as the Games in Kentucky. *See* Fraietta Affidavit ¶ 12. Further, Courts interpreting the gambling laws of Maryland, Illinois, Michigan, and California have held that such games *are* legal and do not constitute gambling. *See, e.g., Mason v. Machine Zone, Inc.*, 140 F. Supp. 3d 457 (D. Md. 2015), *aff'd* 851 F.3d 315 (4th Cir. 2017) (interpreting California and Maryland law); *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016) (interpreting Illinois law); *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871 (N.D. Ill. 2016) (interpreting California, Illinois and Michigan law); *Ristic v. Machine Zone, Inc.*, No. 15-cv-8996, 2016 WL 4987943 (N.D. Ill. Sept. 19, 2016) (interpreting Illinois law). While Class Counsel was confident in the claims alleged and believe that Kentucky law much more closely tracks Washington law than Maryland, Illinois, and California, it is entirely possible that a Kentucky court could have sided with Defendant and the majority of courts to consider this issue, leaving Plaintiff, Class Members and Class Counsel empty-handed. Fraietta Affidavit ¶ 12.

44. Even if Plaintiff had prevailed on the gambling issue, Defendant had numerous additional defenses available, any one of which could have been fatal to Plaintiff's claims. *See* Fraietta Affidavit ¶ 13. Specifically, Defendant's Terms and Conditions for the Games contained an agreement to resolve any Disputes through final and binding arbitration, a limitation of liability clause, a waiver of Plaintiff's right to participate in a class and/or representative action, and a forum selection clause requiring application of New York, rather than Kentucky, law. *Id*. Had a Court found any one of these terms applicable to Plaintiff, it would have barred recovery for the

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class entirely. *Id.*

45. It has been the experience of Class Counsel that plaintiffs in complex class actions have to prevail on essentially all substantive and procedural issues in order to succeed. *See* Fraietta Affidavit ¶ 14. A defendant, on the other hand, only has to prevail on any one, be it stopping class certification, reversing class certification, or undermining substantive claims on legal or factual grounds. *Id.* Class Counsel expended the necessary time and labor required to prosecute this action to a favorable conclusion. *Id.*

46. Defendant is a large and extremely lucrative gaming company. Class Counsel anticipated the case would be vigorously defended. In fact, Defendant retained very competent, aggressive, and well-respected counsel. *See New England Health Care Emps. Pension Fund*, 234 F.R.D. at 634 (listing "the professional skill and standing of counsel involved on both sides" as factor in determining class counsel fee award).

47. Class Counsel worked entirely on contingency, advancing both their time and required costs and expenses. Fraietta Affidavit ¶ 19. If Defendants had won this case, through any number of avenues, Class Counsel would not have been compensated at all.

48. When Class Counsel undertakes major litigation, such as this litigation, it necessarily limits Class Counsel's ability to undertake other complex litigation. During the course of this action, Class Counsel devoted significant manpower and resources. Class Counsel had to make this commitment at the outset without knowing how long the case would take or if it would ever resolve. Therefore, Class Counsel's willingness to prosecute this action on a contingent fee basis necessitated advancing and diverting the costs, manpower and resources expended on this action from other cases. Although Plaintiff ultimately believed she would prevail on the novel and difficult questions at issue in this case, at the outset Class Counsel undertook the case knowing

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that these novel and difficult questions would be an obstacle at every step of the litigation.

49. Under the circumstances, there were substantial risks that Plaintiff would be unable to certify the Class, unable to establish liability and would recover nothing. And even if Plaintiff and Class Counsel had been able to prevail at trial, they still faced the daunting prospect of affirming any verdict on post-trial motions in this Court and later on appeal. Fraietta Affidavit ¶ 15. That process would potentially have taken years and involved tremendous risk that a hard-fought victory could be lost. *Id.* There can be no doubt that Class Counsel faced daunting risks in this case that more than justify the fee award sought by Class Counsel. *See, e.g. F&M Distribs. Inc. Sec. Litig.* 1999 U.S. Dist. LEXIS 11090, at *16 ("As the preceding discussion has explained, the attorneys have achieved an excellent result in a case that was factually, legally, and logistically difficult. Society's stake in rewarding attorneys who can produce such benefits in complex litigation such as in the case at bar counsels in favor of a generous fee, as does the realization that they undertook this case on a contingent fee basis, which required them to fund all of the significant litigation costs while facing the risk of a rejection their clients' claims on the merits.")

iv. Class Counsel Handled This Case on a Contingent Basis and Bore the Financial Burden

50. "[C]ontingency fee arrangements indicate that there is a certain degree of risk in obtaining a recovery." *In re Telectronics Pacing Systems, Inc.*, 137 F.Supp.2d 1029, 1043 (S.D. Ohio 2001). Where, as here, "Class counsel spent considerable time on [a] case at the risk of receiving no compensation… this factor supports the reasonableness of the requested attorneys' fees." *Dick v. Sprint Commc'ns Co. L.P.*, 297 F.R.D. 283, 300 (W.D. Ky. 2014). To date, Class Counsel has worked for over two years with no payment, and no guarantee of payment.

51. Courts have long recognized that attorneys' contingent risk is an important factor in determining the fee award and may justify awarding a premium over an attorneys' normal hourly

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rates. *See, e.g. id.*, *see also In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299–1300 (9th Cir. 1994) ("It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases . . . [I]f this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing."); *McKeen-Chaplin v. Provident Savings Bank*, FSB, 2018 WL 3474472, at *2 (E.D. Cal. July 19, 2018) ("Counsel has not received payment for the vast majority of its time spent on this case . . . and took on significant financial risk by taking on this action on a contingency fee basis."); *In re Sumitomo Copper Litig.*, 74 F.Supp.2d 393, 396–98 (S.D.N.Y.1999) ("No one expects a lawyer whose compensation is contingent on the success of his services to charge, when successful, as little as he would charge a client who in advance of the litigation has agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee dependent solely on the reasonable amount of time expended.").

52. Further, if the case had advanced through class certification, Class Counsel's expenses would have increased many-fold, and Class Counsel would have been required to advance these expenses potentially for several years to litigate this action through judgment and appeals.

53. In sum, in the face of the obstacles referred to above, with a case asserting claims predicated on complex legal and factual issues that were opposed by highly skilled and experienced defense counsel, Class Counsel succeeded in securing a remarkable recovery for the Class. Plaintiff submits that the requested attorney's fees and costs are fair and reasonable when considered under applicable legal standards.

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D. The Reaction of the Class to Date Confirms that the Requested Fee is Reasonable

54. The Settlement Agreement provided for an exceedingly robust notice program. As of November 29, 2022, 8,657 unique Class Members have been emailed notice, 18,589,323 ad impressions have been delivered to potential Class Members advising them of the settlement, and the settlement website has received 35,284 unique visitors. Fraietta Affidavit ¶ 22. The Notice (which is also available on the settlement website) advised Class Members that Class Counsel would apply for a fee, cost, and expense award up to of $3,525,000.00. To date, no objections have been submitted, and not a single Class Member has requested exclusion from the settlement. *Id.* The lack of any objections is itself important evidence that the requested fees are fair. *See Ressler v. Jacobson*, 149 F.R.D. 651, 656 (M.D. Fla. 1992) (noting that the lack of objections is "strong evidence of the propriety and acceptability" of fee request); *see also In re SmithKline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 533 (E.D. Pa. 1990).

IV. THE REQUESTED INCENTIVE AWARD FOR PLAINTIFF IS REASONABLE

55. It is well settled that a class representative may be awarded an incentive award. As the Sixth Circuit has noted, "when [as here] a class-action litigation has created a communal pool of funds to be distributed to the class members, courts have approved incentive awards to be drawn out of that common pool." *Hadix v. Johnson*, 322 F.3d 895, 898 (6th Cir. 2003); *see also, e.g.*, Pelzer v. Vassalle, 655 F. App'x 352, 361 (6th Cir. 2016) (approving incentive award payments that were 53 times what claiming class members would receive).

56. In general, courts look to the following factors to determine if an incentive award is appropriate: "(1) the action taken by the Class Representatives to protect the interests of the Class Members and others and whether these actions resulted in a substantial benefit to Class Members; (2) whether the Class Representatives assumed substantial direct and indirect financial

risk; and (3) the amount of time and effort spent by the Class Representatives in pursuing the litigation." *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 3:08-MD-01998, 2010 WL 3341200, at *12 (W.D. Ky. Aug. 23, 2010) (quoting *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 250 (S.D. Ohio 1991)). Courts of the Sixth Circuit also recognize that service awards "encourage members of a class to become class representatives and reward their efforts taken on behalf of the class." *In re Automotive Parts Antitrust Litig.*, 2020 WL 5653257, at *5 (E.D. Mich. Sept. 23, 2020).

57. Here, the $7,000.00 incentive award for the proposed Class Representative is appropriate. *See, e.g.*, *F&M Distribs. Inc. Sec. Litig.* 1999 U.S. Dist. LEXIS 11090, at *20 (approving $7,500.00 incentive award). The incentive award is relatively small (considering the total size of the settlement) and corresponds directly to the effort put forth by the Class Representative in securing the terms of the Settlement Agreement. Moreover, the Settlement Agreement provides for a fair allocation of relief to all the members of the Settlement Class consistent with the allocation method described in the Settlement Agreement. *See* Settlement Agreement Ex. E. There are no sub-classes of Class Members that are treated any differently. Thus, aside from the incentive award, the Class Representative is treated in the exact same manner as any other Class Members.

58. Defendant does not object to $7,000.00 being awarded to the Class Representative. And importantly, 8,657 unique Class Members have been emailed notice, 18,589,323 ad impressions have been delivered to potential Class Members advising them of the settlement, and the settlement website has received 35,284 unique visitors. Fraietta Affidavit ¶ 22. The Notice (which is also available on the settlement website) advised Class Members that Class Counsel would apply for an incentive award of up to $7,000.00 for the Class Representative. To date, no

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objections have been submitted, and not a single Class Member has asked to be excluded from the class. *Id.*

59. Moreover, the requested amount of $7,000.00 for Plaintiff reflects her significant involvement and dedication to the case. Indeed, Ms. Armstead consulted with Class Counsel throughout the investigation, filing, prosecution and settlement of this litigation. Fraietta Affidavit ¶ 23; *see also generally* Armstead Affidavit. As such, Amy Jo Armstead was actively involved in the litigation and devoted substantial time and effort to the case. *Id.* Ms. Armstead was prepared to "go the distance" in this litigation to continue to represent the Class and fight to obtain significant relief on their behalf. *Id.; see also* Armstead Affidavit ¶ 10. Her actions and dedication played a significant role in this case and helped achieve the exceptional settlement that will benefit thousands of class members. Fraietta Affidavit ¶ 23-24. Accordingly, a $7,000.00 incentive award for Plaintiff Amy Jo Armstead is fair and reasonable.

V. CONCLUSION

60. Based upon the foregoing, it is apparent that the attorneys' fees and expenses requested by Class Counsel is fair, reasonable and fully supported by law applied to a percentage of the common fund benefit available to the Class. Additionally, the incentive award requested for the Class Representatives is fair, reasonable and well supported.

WHEREFORE, Class Counsel requests that this Application be granted; that Class Counsel be awarded $3,525,000.00 in attorneys' fees, expenses, and costs; and the Class Representative, Amy Jo Armstead, be awarded $7,000.00 as an incentive award.

Respectfully submitted,

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Counsel for Plaintiff and the Putative Class

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served upon the following parties or counsel via regular mail and the Court's electronic filing system on December 1, 2022:

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/s/ Joseph H. Langerak
Joseph H. Langerak

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EXHIBIT 1

COMMONWEALTH OF KENTUCKY
HENDERSON CIRCUIT COURT
CIVIL ACTION NO. 22-CI-00553

AMY JO ARMSTEAD,
on behalf of herself and all others similarly situated, PLAINTIFF,

v.

VGW MALTA LTD, and
VGW LUCKYLAND INC., DEFENDANTS.

AFFIDAVIT OF PHILIP L. FRAIETTA IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND EXPENSES AND ISSUANCE OF INCENTIVE AWARD

Affiant, Philip L. Fraietta, being first duly sworn, hereby declares as follows:

1. I am an attorney at law licensed to practice in the States of New York, New Jersey, Michigan, and Illinois, and I have been admitted to practice pro hac vice in this action. I am a Partner with Bursor & Fisher, P.A., Class Counsel in this action. I have personal knowledge of the facts set forth in this declaration, and, if called as a witness, could and would competently testify thereto under oath.

2. I submit this Declaration in support of Class Counsel's Application for Attorneys' Fees and Costs Related to the Class Action Settlement Agreement and Request for Fee Award to Class Representative.

3. Attached hereto as **Exhibit A** is a true and correct copy of the Parties' Class Action Settlement Agreement, and the exhibits attached thereto.

4. This case required a significant amount of skilled legal work. The Settlement Agreement was not arrived at until after Class Counsel had (1) conducted an extensive and comprehensive pre-suit investigation relating to the events and transactions underlying Plaintiff's claims prior to filing the Complaint; (2) thoroughly researched the law and facts pertinent to Plaintiff's claims and the defenses raised by Defendant, and assessed the risks of prevailing on

each of the respective claims on pre-trial motions and at trial; (3) conducted discovery; (4) exchanged voluminous briefing in advance of the Parties' mediation; (5) thoroughly evaluated the risks of ongoing litigation; and (6) participated in a full-day mediation session.

5. In working on this case, my colleagues and I relied on our previous experience and innumerable man-hours in other class action litigation involving similar "illegal gambling" allegations. *See, e.g., In Re: Apple Inc. App Store Simulated Casino-Style Games Litig.*, Case No. 5:21-cv-02777-EJD, ECF No. 77, at 5 (N.D. Cal. Sept. 23, 2021) (Order Granting Appointment of Interim Lead Counsel); *Croft v. SpinX Games Limited*, *et al.*, Case No. 20-cv-01310-RSM, ECF No. 60, at ¶ 4 (W.D. Wash. Mar. 24, 2022) (appointing Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A. as Class Counsel).

6. I believe the work performed by Class Counsel in this case represents the highest caliber of legal work and strongly supports their requested fee award.

7. After Defendants received Plaintiff's initial demand pursuant to Defendants' terms and conditions, the parties discussed the prospect of resolution at an early practicable juncture.

8. Those discussions eventually led to an agreement between the Parties to engage in mediation, which the Parties agreed would take place before the Honorable Layn Phillips (Ret.), who is a neutral affiliated with Phillips ADR Enterprises ("Phillips ADR"). In the weeks leading up to the mediation, the Parties were in regular communication with each other and with the Phillips ADR team, as the Parties sought to crystallize the disputed issues, produce focal information and data, and narrow down potential frameworks for resolution.

9. During this period, Defendants provided Class Counsel with transactional data for virtual chip purchases made by the Settlement Class; the Parties exchanged multiple rounds of voluminous briefing on the core facts, legal issues, litigation risks, and potential settlement structures; and the Parties supplemented that briefing with extensive telephonic correspondence, mediated and shuttled by the Phillips ADR team, clarifying each other's positions in advance of the mediation.

10. On August 31, 2022, following a full-day mediation session, Judge Phillips made a mediator's proposal to settle the case in principle, which both Parties accepted.

11. Working within the guideposts of prior analogous settlements under Washington law, the Parties were able to negotiate and execute a term sheet memorializing their agreement at the conclusion of the mediation. Every step leading up to and throughout the mediation session was hard-fought and adversarial.

12. While there is a large body of Washington and Ninth Circuit caselaw on point, to Class Counsel's knowledge this is the first case *ever* to challenge the legality of virtual casino games such as the Games in Kentucky. While Class Counsel was confident in the claims alleged and believe that Kentucky law much more closely tracks Washington law than Maryland, Illinois, and California, it is entirely possible that a Kentucky court could have sided with Defendants and the majority of courts to consider this issue, leaving Plaintiff, Class Members and Class Counsel empty-handed.

13. Even if Plaintiff had prevailed on her challenge of the legality of virtual casino games, Defendants had numerous additional defenses available, any one of which could have been fatal to Plaintiff's claims. Specifically, Defendants' Terms and Conditions for the Games contained an agreement to resolve any Disputes through final and binding arbitration, a limitation of liability clause, a waiver of Plaintiff's right to participate in a class and/or representative action, and a forum selection clause requiring application of New York, rather than Kentucky, law. Had a Court found any one of these terms applicable to Plaintiff, it would have barred recovery for the class entirely.

14. It has been my experience that plaintiffs in complex class actions have to prevail on essentially all substantive and procedural issues in order to succeed. A defendant, on the other hand, only has to prevail on any one, be it stopping class certification, reversing class certification, or undermining substantive claims on legal or factual grounds. In my opinion, Class Counsel expended the necessary time and labor required to prosecute this action to a favorable conclusion.

15. Even if Plaintiff and Class Counsel had been able to prevail at trial, they still faced the daunting prospect of affirming any verdict on post-trial motions in this Court and later on appeal. That process would potentially have taken years and involved tremendous risk that a hard-fought victory could be lost.

16. On October 3, 2022, the Court granted preliminary approval of the settlement, and issued the order attached as **Exhibit B.**

17. Since the Court granted preliminary approval, my firm has worked closely with the Settlement Administrator JND Legal Administration ("JND"), to carry out the Court-ordered notice plan.

18. My firm has also fielded calls from Settlement Class Members and assisted them with their inquiries and with filing claims.

19. My firm worked on this case entirely on contingency, advancing both my firm's time and required litigation costs and expenses.

20. To date, my firm has also expended $33,242.79 in out-of-pocket costs and expenses in connection with the prosecution of this case. Attached as **Exhibit C** is an itemized list of those costs and expenses. These costs and expenses are reflected in the records of my firm, and were necessary to prosecute this litigation. These expenses include mediation fees and other related litigation expenses. These expenses were necessarily and reasonably incurred to bring this case to a successful conclusion, and they reflect market rates for various categories of expenses incurred. The fee award sought by Class Counsel is inclusive of these costs.

21. I estimate that my firm will incur an additional 50-75 hours of future work in connection with the preparation of Plaintiff's Motion for Final Approval, the fairness hearing, coordinating with JND, monitoring settlement administration, and responding to Settlement Class Member inquiries.

22. I have received, and will continue to receive, weekly reports from JND regarding the status of notice and claims in this action. As of November 29, 2022, 8,657 unique Class Members have been emailed notice, 18,589,323 ad impressions have been delivered to potential

Class Members advising them of the settlement, and the settlement website has received 35,284 unique visitors. To date, no objections to the settlement have been submitted, and not a single Class Member has requested exclusion from the settlement.

23. Plaintiff Amy Jo Armstead was significantly involved and dedicated to this case. Plaintiff Armstead consulted with Class Counsel throughout the investigation, filing, prosecution and settlement of this litigation. As such, Ms. Armstead was actively involved in the litigation and devoted substantial time and effort to the case. Ms. Armstead was prepared to "go the distance" in this litigation to continue to represent the Class and fight to obtain significant relief on their behalf. Her actions and dedication played a significant role in this case and helped achieve the exceptional settlement that will benefit thousands upon thousands of class members.

24. I am therefore of the opinion that Ms. Armstead's active involvement in this case was critical to its ultimate resolution. She took her roles as class representatives seriously, devoting significant amounts of time and effort to protecting the interests of the class. Without her willingness to assume the risks and responsibilities of serving as class representatives, I do not believe such a strong result could have been achieved.

I declare under penalty of perjury under the laws of the United States and the Commonwealth of Kentucky that the foregoing is true and correct. Executed on November 30, 2022 at New York, New York.

Further, Affiant sayeth naught.

[REMAINDER OF THE PAGE INTENTIONALLY LEFT BLANK, SIGNATURE PAGE TO FOLLOW]

Philip L. Fraietta

State of New York }
}
County of New York }

Subscribed and sworn before me by Philip L. Fraietta on this 30th day of November, 2022.

My Commission expires: October 25, 2025

JULIAN COLE DIAMOND
Notary Public - State of New York
NO. 02DI6423918
Qualified in Kings County
My Commission Expires Oct 18, 2025

Julian Diamond

Notary Public, State of New York

EXHIBIT A

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COMMONWEALTH OF KENTUCKY
HENDERSON COUNTY CIRCUIT COURT

AMY JO ARMSTEAD, individually and on behalf of all others similarly situated, Plaintiff, v. VGW MALTA LTD. and VGW LUCKYLAND, INC., Defendant.	Case No. 2022-CI-00553

CLASS ACTION SETTLEMENT AGREEMENT

This Agreement ("Agreement" or "Settlement Agreement") is entered into by and among (i) Plaintiff, Amy Jo Armstead ("Plaintiff"); (ii) the Settlement Class (as defined herein); and (iii) Defendants, VGW Malta Ltd. and VGW Luckyland, Inc. (collectively, "VGW"). The Settlement Class and Plaintiff are collectively referred to as the "Plaintiffs" unless otherwise noted. The Plaintiff and VGW are collectively referred to herein as the "Parties." This Agreement is intended by the Parties to fully, finally and forever resolve, discharge, and settle the Released Claims (as defined herein), upon and subject to the terms and conditions of this Agreement, and subject to the final approval of the Court.

RECITALS

A. On May 16, 2022, Plaintiff, through her counsel, sent a demand letter to VGW alleging that its Games (defined below) fall within the definition of an illegal gambling game and that players can recover their losses under Kentucky law, setting forth claims for violations of Ky. Rev. Stat. § 372.020, based on Plaintiff's use of and purchases of virtual items in VGW's Games.

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B. Over the next several months, counsel for the Parties had numerous telephone calls and discussed the prospect of resolution.

C. Those discussions eventually led to an agreement between the Parties to engage in mediation, which the Parties agreed would take place before the Honorable Layn Phillips (Ret.), a neutral affiliated with Phillips ADR Enterprises ("Phillips ADR").

D. In the weeks leading up to the mediation, the Parties were in regular communication with each other and with Phillips ADR, as the Parties sought to crystallize the disputed issues, produce focal information and data, and narrow potential frameworks for resolution.

E. During this period and in connection with the mediation proceedings, VGW provided Class Counsel with transaction data for virtual coin purchases made by the Settlement Class; the Parties exchanged briefing on the key facts, legal issues, litigation risks, and potential settlement structures; and the Parties supplemented that briefing with extensive telephonic correspondence, mediated by Phillips ADR, in order to clarify the Parties' positions in advance of the mediation.

F. On August 31, 2022, the Parties participated in a full-day, in-person mediation before Judge Phillips at the New York City offices of Paul Hastings LLP. At the conclusion of the mediation, Judge Phillips made a mediator's proposal to settle the case, which all Parties accepted. The Parties then executed a binding term sheet to settle the case on a class action basis.

G. On September 7, 2022, Plaintiff filed a putative class action complaint against VGW in the Henderson County Circuit Court, Case No. 2022-CI-00553.

H. Plaintiff and Class Counsel have conducted a comprehensive examination of the law and facts regarding the claims against VGW, and the potential defenses available. Plaintiff

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believes that the claims asserted in the Action against VGW have merit and that Plaintiff would have prevailed at summary judgment and/or trial. Nonetheless, Plaintiff and Class Counsel recognize that VGW has raised factual and legal defenses that present a risk that Plaintiff may not prevail. Plaintiff and Class Counsel also recognize the expense and delay associated with continued prosecution of the Action against VGW through class certification, summary judgment, trial, and any subsequent appeals. Plaintiff and Class Counsel also have taken into account the uncertain outcome and risks of litigation, especially in complex class actions, as well as the difficulties inherent in such litigation. Therefore, Plaintiff believes it is desirable that the Released Claims be fully and finally compromised, settled, and resolved with prejudice. Based on its evaluation, Class Counsel has concluded that the terms and conditions of this Agreement are fair, reasonable, and adequate to the Settlement Class, and that it is in the best interests of the Settlement Class to settle the claims raised in the Action pursuant to the terms and provisions of this Agreement.

I. At all times, VGW has denied and continues to deny any wrongdoing and liability and denies all material allegations in the Action. Specifically, VGW denies that the Games constitute or constituted illegal gambling, and it opposes certification of a litigation class. VGW is prepared to continue its vigorous defense. Nonetheless, taking into account the uncertainty and risks inherent in a motion to dismiss, class certification, summary judgment, and trial, VGW has concluded that continuing to defend the Action would be burdensome and expensive. VGW has further concluded that it is desirable and beneficial that the Action be fully and finally settled and terminated in the manner and upon the terms and conditions set forth in this Agreement. This Agreement is a compromise, and the Agreement, any related documents, and any negotiations resulting in it shall not be construed as or deemed to be evidence of or an admission or concession of liability or wrongdoing on the part of VGW, or any of the Released Parties

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(defined below), with respect to any claim of any fault or liability or wrongdoing or damage whatsoever or with respect to the certifiability of a litigation class.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among Plaintiff, the Settlement Class, and each of them, and VGW, by and through its undersigned counsel that, subject to final approval of the Court after a hearing or hearings as provided for in this Settlement Agreement, in consideration of the benefits flowing to the Parties from the Agreement set forth herein, that the Action and the Released Claims shall be finally and fully compromised, settled, and released, and the Action shall be dismissed with prejudice, upon and subject to the terms and conditions of this Agreement.

AGREEMENT

1. DEFINITIONS.

As used in this Settlement Agreement, the following terms have the meanings specified below:

1.1 "Action" means the case captioned *Armstead v. VGW Malta Ltd. and VGW Luckyland, Inc.*, Case No. 2022-CI-00553, pending in the Henderson County Circuit Court.

1.2 "Approved Claim" means a Claim Form submitted by a Settlement Class Member that: (a) is submitted timely and in accordance with the directions on the Claim Form and the provisions of the Settlement Agreement; (b) is fully and truthfully completed by a Settlement Class Member with all of the information requested in the Claim Form; (c) is signed by the Settlement Class Member, physically or electronically; and (d) is approved by the Settlement Administrator pursuant to the provisions of this Agreement.

1.3 "Claim Form" means the document substantially in the form attached hereto as Exhibit A, as approved by the Court. The Claim Form, to be completed by Settlement Class

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Members who wish to file a Claim for a payment, shall be available in electronic and paper format in the manner described below.

1.4 "Claims Deadline" means the date by which all Claim Forms must be postmarked or received to be considered timely and shall be set as a date no later than fifty-six (56) days after the Final Approval Hearing. The Claims Deadline shall be clearly set forth in the Preliminary Approval Order as well as in the Notice and the Claim Form.

1.5 "Class Counsel" means Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A.

1.6 "Class Representative" means the named Plaintiff in this Action, Amy Jo Armstead.

1.7 "Court" means the Henderson County Circuit Court, the Honorable Karen L. Wilson presiding, or any judge who shall succeed her as the Judge in this Action.

1.8 "Defendants" means VGW Malta Ltd. and VGW Luckyland, Inc.

1.9 "Defendants' Counsel" means Paul Hastings LLP.

1.10 "Effective Date" means the date ten (10) days after which all of the events and conditions specified in Paragraph 9.1 have been met and have occurred.

1.11 "Escrow Account" means the separate, interest-bearing escrow account to be established by the Settlement Administrator under terms acceptable to all Parties at a depository institution insured by the Federal Deposit Insurance Corporation. The Settlement Fund shall be deposited by VGW into the Escrow Account in accordance with the terms of this Agreement and the money in the Escrow Account shall be invested in the following types of accounts and/or instruments and no other: (i) demand deposit accounts and/or (ii) time deposit accounts and certificates of deposit, in either case with maturities of forty-five (45) days or less. The costs of establishing and maintaining the Escrow Account shall be paid from the Settlement Fund.

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1.12 "**Fee Award**" means the amount of attorneys' fees, costs, and expenses awarded by the Court to Class Counsel, which will be paid out of the Settlement Fund.

1.13 **"Final"** means one business day following the latest of the following events: (i) the date upon which the time expires for filing or noticing any appeal of the Court's Final Judgment approving the Settlement Agreement; (ii) if there is an appeal or appeals, other than an appeal or appeals solely with respect to the Fee Award, the date of completion, in a manner that finally affirms and leaves in place the Final Judgment without any material modification, of all proceedings arising out of the appeal or appeals (including, but not limited to, the expiration of all deadlines for motions for reconsideration or petitions for review and/or *certiorari*, all proceedings ordered on remand, and all proceedings arising out of any subsequent appeal or appeals following decisions on remand); or (iii) the date of final dismissal of any appeal or the final dismissal of any proceeding on *certiorari,* leaving the Final Judgment intact in all material respects.

1.14 **"Final Approval Hearing"** means the hearing before the Court where the Parties will request the Final Judgment to be entered by the Court approving the Settlement Agreement, the Fee Award, and the incentive award to the Class Representative.

1.15 **"Final Judgment"** means the Final Judgment and Order to be entered by the Court approving the Agreement after the Final Approval Hearing.

1.16 **"Games"** means Chumba Casino and Luckyland Slots.

1.17 **"Net Settlement Fund"** means the Settlement Fund, plus any interest or investment income earned on the Settlement Fund, less any Fee Award, incentive award of the Class Representative, taxes, and Settlement Administration Expenses.

1.18 **"Notice"** means the notice of this proposed Class Action Settlement Agreement and Final Approval Hearing, which is to be sent to the Settlement Class substantially in the

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manner set forth in this Agreement, is consistent with the requirements of Due Process, Rule 23, and is substantially in the form of Exhibits B, C, and D hereto.

1.19 "Notice Date" means the date by which the Notice set forth in Paragraph 4.1 is complete, which shall be no later than twenty-eight (28) days after Preliminary Approval.

1.20 "Objection/Exclusion Deadline" means the date by which a written objection to this Settlement Agreement or a request for exclusion submitted by a Person within the Settlement Class must be made, which shall be designated as a date no later than forty-five (45) days after the Notice Date and no sooner than fourteen (14) days after papers supporting the Fee Award are filed with the Court and posted to the settlement website listed in Paragraph 4.1(d), or such other date as ordered by the Court.

1.21 "Person" shall mean, without limitation, any individual, corporation, partnership, limited partnership, limited liability company, association, joint stock company, estate, legal representative, trust, unincorporated association, and any business or legal entity and their spouses, heirs, predecessors, successors, representatives, or assigns.

1.22 "Plaintiffs" means Amy Jo Armstead and the Settlement Class Members.

1.23 "Preliminary Approval" means the Court's certification of the Settlement Class for settlement purposes, preliminary approval of this Settlement Agreement, and approval of the form and manner of the Notice.

1.24 "Preliminary Approval Order" means the order preliminarily approving the Settlement Agreement, certifying the Settlement Class for settlement purposes, and directing notice thereof to the Settlement Class, which will be agreed upon by the Parties and submitted to the Court in conjunction with Plaintiff's motion for preliminary approval of the Agreement.

1.25 "Released Claims" means any and all actual, potential, filed, known or unknown, fixed or contingent, claimed or unclaimed, suspected or unsuspected, claims, demands,

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liabilities, rights, causes of action, contracts or agreements, extra contractual claims, damages, punitive, exemplary or multiplied damages, expenses, costs, attorneys' fees and or obligations (including "Unknown Claims," as defined below), whether in law or in equity, accrued or unaccrued, direct, individual or representative, of every nature and description whatsoever, whether based on the Kentucky or other state, federal, local, statutory or common law or any other law, rule or regulation, including the law of any jurisdiction outside the United States against the Released Parties, or any of them, arising out of any facts, transactions, events, matters, occurrences, acts, disclosures, statements, representations, omissions, or failures to act relating to the operation of the Games and/or the sale of virtual coins in the Games, such as claims that the Games are illegal gambling games, that virtual coins in the Games are "something of value," that aspects of the Games are deceptive or unfair, or that VGW has been unjustly enriched by the operation of the Games, including but not limited to all claims that were brought or could have been brought in the Action relating to any and all Releasing Parties. For the avoidance of doubt, this release: (i) includes claims potentially subject to arbitration agreements; and (ii) does not extend to other games owned and/or operated by VGW and/or the Released Parties.

1.26 "Released Parties" means VGW Malta Ltd. and VGW Luckyland, Inc., as well as any and all of each of their parents, subsidiaries, divisions, corporate affiliates, predecessors, successors, and any of their respective present and former officers, directors, owners, shareholders, insurers, agents, affiliates, representatives, employees, and assigns.

1.27 "Releasing Parties" means Plaintiffs, those Settlement Class Members who do not timely opt out of the Settlement Class, and all of their and their respective past, present, and future heirs; children; spouses; beneficiaries; conservators; executors; estates; administrators; assigns; agents; consultants; independent contractors; insurers; attorneys; accountants; financial

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and other advisors; investment bankers; underwriters; lenders; and any other representatives of any of these persons and entities.

1.28 "Relevant Spending Amount" means the total amount of money a Settlement Class Member spent within the Games from March 17, 2017, through the date of Preliminary Approval, in amounts of $5.00 or more within a 24-hour period, while located in the Commonwealth of Kentucky.

1.29 "Settlement Administration Expenses" means the expenses incurred by the Settlement Administrator in providing Notice, processing claims, responding to inquiries from members of the Settlement Class, distributing funds for Approved Claims, and related services, paying taxes and tax expenses related to the Settlement Fund (including all federal, state or local taxes of any kind and interest or penalties thereon, as well as expenses incurred in connection with determining the amount of and paying any taxes owed and expenses related to any tax attorneys and accountants), as well as all expenses related to the resolution of any disputed claims (as described below in paragraph 5.4), and all expenses, excluding the fees and expenses of Class Counsel and Defendants' Counsel, related to any work required by the Court to confirm that Notice is consistent with Due Process and Rule 23.

1.30 "Settlement Administrator" means JND Legal Administration, or such other reputable administration company that has been selected jointly by the Parties and approved by the Court to perform the duties set forth in this Agreement, including but not limited to serving as Escrow Agent for the Settlement Fund, overseeing the distribution of Notice, as well as the processing and payment of Approved Claims to the Settlement Class as set forth in this Agreement, handing all approved payments out of the Settlement Fund, and handling the determination, payment and filing of forms related to all federal, state and/or local taxes of any

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kind (including any interest or penalties thereon) that may be owed on any income earned by the Settlement Fund.

1.31 "Settlement Class" means all individuals who, in Kentucky (as reasonably determined by billing address information, IP address information, or other information furnished by VGW), spent $5.00 or more within a 24-hour period on Chumba Casino or Luckyland Slots, from March 17, 2017, through March 17, 2022. Excluded from the Settlement Class are (1) any Judge or Magistrate presiding over this Action and members of their families; (2) VGW, VGW's subsidiaries, parent companies, successors, predecessors, and any entity in which the VGW or its parents have a controlling interest and their current or former officers, directors, agents, attorneys, and employees; (3) persons who properly execute and file a timely request for exclusion from the class; and (4) the legal representatives, successors or assigns of any such excluded persons.

1.32 "Settlement Class Member" means a Person who falls within the definition of the Settlement Class as set forth above and who has not submitted a valid request for exclusion.

1.33 "Settlement Fund" means the non-reversionary cash fund that shall be established by VGW in the total amount of eleven million seven hundred and fifty thousand dollars ($11,750,000.00 USD) to be deposited into the Escrow Account, according to the schedule set forth herein, plus all interest earned thereon. From the Settlement Fund, the Settlement Administrator shall pay all Approved Claims made by Settlement Class Members, Settlement Administration Expenses, any incentive award to the Class Representative, any Fee Award to Class Counsel, taxes, and any other costs, fees, or expenses approved by the Court. The Settlement Fund shall be kept in the Escrow Account with permissions granted to the Settlement Administrator to access said funds until such time as the listed payments are made. The Settlement Fund includes all interest that shall accrue on the sums deposited in the Escrow

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Account. The Settlement Administrator shall be responsible for all tax filings with respect to any earnings on the Settlement Fund and the payment of all taxes that may be due on such earnings. The Settlement Fund represents the total extent of VGW's monetary obligations under this Agreement. The payment of the amount of the Settlement Fund by VGW fully discharges VGW and the other Released Parties' financial obligations (if any) in connection with the Settlement, meaning that no Released Party shall have any other obligation to make any payment into the Escrow Account or to any Settlement Class Member, or any other Person, under this Agreement. In no event shall VGW's total monetary obligation with respect to this Agreement exceed eleven million seven hundred and fifty thousand dollars ($11,750,000.00 USD).

1.34 "Settlement Payment(s)" means the payments from the Net Settlement Fund to be made to Settlement Class Members with Approved Claims according to the plan of allocation attached as Exhibit E (the "Plan of Allocation").

1.35 "Settlement Website" means the website to be created, launched, and maintained by the Settlement Administrator which shall allow for the electronic submission of Claim Forms and shall provide access to relevant case documents including the Notice, information about the submission of Claim Forms, and other relevant documents. The Settlement Website shall also advise the Settlement Class of the total value of the Settlement Fund and give Settlement Class Members the ability to estimate their Settlement Payment. The Settlement Website shall remain accessible at least thirty (30) days after the Effective Date.

1.36 "Unknown Claims" means claims that could have been raised in the Action and that any or all of the Releasing Parties do not know or suspect to exist, which, if known by him or her, might affect his or her agreement to release the Released Parties or the Released Claims or might affect his or her decision to agree, object or not to object to the Settlement or to seek exclusion from the Settlement Class. Upon the Effective Date, the Releasing Parties shall be

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deemed to have, and shall have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights and benefits of § 1542 of the California Civil Code (if applicable), which provides as follows:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Upon the Effective Date, the Releasing Parties also shall be deemed to have, and shall have, waived any and all provisions, rights and benefits conferred by any law of any state or territory of the United States, or principle of common law, or the law of any jurisdiction outside of the United States, which is similar, comparable or equivalent to § 1542 of the California Civil Code. The Releasing Parties acknowledge that they may discover facts in addition to or different from those that they now know or believe to be true with respect to the subject matter of this release, but that it is their intention to finally and forever settle and release the Released Claims, notwithstanding any Unknown Claims they may have, as that term is defined in this Paragraph.

1.37 "User ID" means the unique identifier assigned by VGW to a person who has an account or log-in with either Game.

2. SETTLEMENT RELIEF.

2.1 Payments to Settlement Class Members.

(a) VGW shall pay or cause to be paid into the Escrow Account the amount of the Settlement Fund ($11,750,000.00), specified in Section 1.33 of this Agreement, within ten (10) days after entry of the Final Judgment.

(b) Settlement Class Members shall have until the Claims Deadline to submit a Claim Form. Each Settlement Class Member with an Approved Claim shall be entitled to a

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Settlement Payment from the Net Settlement Fund, calculated by the Settlement Administrator, by check or electronic payment.

(c) The Settlement Payment will be determined according to the Plan of Allocation attached as Exhibit E.

(d) If the total Approved Claims do not exhaust the Net Settlement Fund under the baseline marginal recovery percentages in the Plan of Allocation, the marginal recovery percentages will be increased pro rata so that the Settlement Payments will exhaust or leave only *de minimis* funds in the Net Settlement Fund.

(e) Within thirty (30) days after the Claims Deadline, the Settlement Administrator shall determine proration of amounts due to Settlement Class Members from the Settlement Fund.

(f) Within the later of sixty (60) days after the Claims Deadline or the date on which the Final Judgment becomes Final, the Settlement Administrator shall pay from the Settlement Fund all Approved Claims by check or electronic payment, provided, however, that the default payment method will be check, unless a Settlement Class Member elects for an electronic payment.

(g) All cash payments issued to Settlement Class Members via check will state on the face of the check that it will expire and become null and void unless cashed within one hundred eighty (180) days after the date of issuance.

(h) In the event that an electronic deposit to a Settlement Class Member is unable to be processed, the Settlement Administrator shall attempt to contact the Settlement Class Member within thirty (30) days to correct the problem.

(i) To the extent that a check issued to a Settlement Class Member is not cashed within one hundred eighty (180) days after the date of issuance, or an electronic deposit is

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unable to be processed one hundred eighty (180) days after the first attempt, such funds shall remain in the Net Settlement Fund and shall be apportioned *pro rata* to participating Settlement Class Members in a second distribution, if practicable. To the extent that any second distribution is impracticable, or that any second-distribution funds remain in the Net Settlement Fund after an additional one hundred and eighty (180) calendar days, such funds shall, subject to Court approval, revert to the Civil Rule 23 Account maintained by the Kentucky IOLTA Fund Board of Trustees pursuant to Supreme Court Rule 3.830(20).

(j) No amount paid by Defendants into the Escrow Account shall revert to Defendants unless the Settlement is terminated in accordance with Section 6.

2.2 Prospective Measures. In connection with this Settlement and within fifty-six (56) days after the Preliminary Approval Order, VGW shall take the following steps:

(a) VGW will maintain a webpage on the Games sites that (1) encourages responsible gameplay; (2) describes what video game behavior disorders are; (3) provides or links to resources relating to video game behavior disorders; and (4) includes a link to VGW's self-exclusion policy. VGW will maintain a policy, and will make commercially reasonable efforts to enforce that policy, such that customer service representatives will provide the same information to any player who contacts them and references or exhibits video game behavior disorders, and will face no adverse employment consequences for providing players with this information.

(b) VGW shall publish on its website a voluntary self-exclusion policy in which players may terminate their ability to purchase virtual coins in the Games or close their Game accounts entirely. That policy shall provide that, when a player self-excludes by specifying the relevant User ID, VGW shall use commercially reasonable efforts to implement the player's request with respect to all account(s) associated with those User ID(s). VGW shall

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retain discretion as to the particular method by which players may self-exclude; for example, VGW may permit players to self-exclude by contacting VGW customer support, completing a form on VGW's website, or any other reasonably accessible means. VGW shall use commercially reasonable efforts to prevent any circumvention of the player's request, including by creation of a new account in either Game, from any account-related identifiers that are commercially and technically feasible, using commercially reasonable efforts, to be associated with the excluded account. After a self-exclusion request is addressed in full by VGW, VGW shall not remove these restrictions for the period identified in the self-exclusion policy at the time the self-exclusion is requested.

(c) VGW will maintain its recent changes to the game mechanics for the Games to ensure that players who run out of sufficient virtual coins are able to continue to play games within the Game suites without needing to purchase additional virtual coins or wait until they would have otherwise received free additional virtual coins in the ordinary course. Specifically, players who run out of coins will be able to continue to play at least one game within the Game suites.

3. RELEASES.

3.1 The obligations incurred pursuant to this Settlement Agreement shall be a full and final disposition of the Action and any and all Released Claims, as against all Released Parties.

3.2 Upon the Effective Date, the Releasing Parties, and each of them, shall be deemed to have, and by operation of the Final Judgment shall have, finally, fully, and forever released, relinquished, and discharged all Released Claims against the Released Parties and each of them.

3.3 Upon the Effective Date, the Released Parties, and each of them, further shall by operation of the Final Judgment have, fully, finally, and forever released, relinquished, and discharged all claims against Plaintiff, the Settlement Class, and Class Counsel that arise out of

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or relate in any way to the commencement, prosecution, settlement, or resolution of the Action, except for claims to enforce the terms of the Settlement.

3.4 Plaintiffs and all Settlement Class Members stipulate that, with the changes delineated in Section 2.2 above, virtual coins in the Games are gameplay enhancements, not "something of value" as defined by Ky. Rev. Stat. Ann. § 528.010(11). As long as those prospective measures remain implemented in the Games as described, Settlement Class Members are estopped from contending that virtual coins in the Games are "something of value" under current Kentucky law, or that aspects of the Games are deceptive or unfair and, for the avoidance of doubt, the release will include but will not be limited to (1) claims potentially subject to arbitration agreements; and (2) claims for amounts spent on in-game purchases within the Games that are attributable to payment processing fees.

4. NOTICE TO THE CLASS.

4.1 The Notice Plan shall consist of the following:

(a) *Settlement Class List*. To effectuate the Notice Plan, VGW shall provide Class Counsel and the Settlement Administrator with a "Class List" which shall include all Settlement Class Member contact information reasonably available to VGW, including names, email addresses, and mailing addresses, as well as Relevant Spending Amount, for each Settlement Class Member.

(b) The Settlement Administrator shall keep the Class List and all personal information obtained therefrom, including the identity, mailing, and email addresses of all persons, strictly confidential. To prepare the Class List for potential Settlement Payments, the Settlement Administrator shall (1) first, attach to each unique and identifiable person all of his/her associated Games accounts (*e.g.*, by User ID); (2) second, use Claim Forms to supplement, amend, verify, adjust, and audit the foregoing data, as necessary; (3) third, calculate

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the total Relevant Spending Amount for each unique and identifiable person; and (4) fourth, categorize each unique and identifiable person according to the appropriate Relevant Spending Amount levels identified in the Plan of Allocation. The Class List may not be used by the Settlement Administrator for any purpose other than advising specific individual Settlement Class Members of their rights, distributing Settlement Payments, and otherwise effectuating the terms of the Settlement Agreement or the duties arising thereunder, including the provision of Notice of the Settlement.

4.2 Notice Plan. The Notice Plan shall consist of the following:

(a) *Direct Notice.* No later than the Notice Date, the Settlement Administrator shall send Notice via email substantially in the form attached as Exhibit B, along with an electronic link to the Claim Form, to all Settlement Class Members for whom a valid email address is available in the Class List. In the event transmission of email notice results in any "bounce-backs," the Settlement Administrator shall, where reasonable: (i) correct any issues that may have caused the "bounce-back" to occur and make a second attempt to re-send the email notice, and (ii) send Notice substantially in the form attached as Exhibit C via First Class U.S. Mail. The Settlement Administrator shall also, where practicable, send Notice substantially in the form attached as Exhibit C via First Class U.S. Mail to all Settlement Class Members with a Relevant Spending Amount greater than $100.00, provided an associated U.S. Mail address is contained in the Class List.

(b) *Update Addresses*. Prior to mailing any Notice, the Settlement Administrator will update the U.S. mail addresses of persons on the Class List using the National Change of Address database and other available resources deemed suitable by the Settlement Administrator. The Settlement Administrator shall take all reasonable steps to obtain the correct address of any

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Settlement Class members for whom Notice is returned by the U.S. Postal Service as undeliverable and shall attempt re-mailings.

(c) *Reminder Notice.* Both thirty (30) days prior to the Claims Deadline and seven (7) days prior to the Claims Deadline, the Settlement Administrator shall again send Notice via email substantially in the form attached as Exhibit B (with minor, non-material modifications to indicate that it is a reminder email rather than an initial notice), along with an electronic link to the Claim Form, to all Settlement Class Members for whom a valid email address is available in the Class List.

(d) *Settlement Website.* Within seven (7) days from entry of the Preliminary Approval Order, Notice shall be provided on a website at www.vgwgamessettlement.com, which shall be obtained, administered and maintained by the Settlement Administrator and shall include the ability to file Claim Forms on-line, provided that such Claim Forms, if signed electronically, will be binding for purposes of applicable law and contain a statement to that effect. The Notice provided on the Settlement Website shall be substantially in the form of Exhibit D hereto. The Settlement Website will also advise the Settlement Class of the total value of the Settlement Fund and provide Settlement Class Members the ability to approximate their Settlement Payments.

(e) *Digital Publication Notice*. The Settlement Administrator will supplement the direct notice program with a digital publication notice program that will deliver more than ten million (10,000,000) impressions to likely Settlement Class Members. The digital publication notice campaign will be targeted, to the extent reasonably possible, to the Commonwealth of Kentucky, will run for at least one month, and will contain active hyperlinks to the Settlement Website. The final digital notice advertisements, and the overall digital

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publication notice program to be used, shall be subject to the final approval of VGW, which approval shall not be unreasonably withheld.

(f) *Contact from Class Counsel.* Class Counsel, in their capacity as counsel to Settlement Class Members, may from time to time contact Settlement Class Members to provide information about the Settlement Agreement and to answer any questions Settlement Class Members may have about the Settlement Agreement.

4.3 The Notice shall advise the Settlement Class of their rights, including the right to be excluded from, comment upon, and/or object to the Settlement Agreement or any of its terms. The Notice shall specify that any objection to the Settlement Agreement, and any papers submitted in support of said objection, shall be considered by the Court at the Final Approval Hearing only if, on or before the Objection/Exclusion Deadline approved by the Court and specified in the Notice, the Person making the objection files notice of an intention to do so and at the same time (a) files copies of such papers he or she proposes to be submitted at the Final Approval Hearing, and (b) sends copies of such papers by mail, hand, or overnight delivery service to Class Counsel and Defendants' Counsel. A Class Member represented by counsel *must* timely file any objection through the Court's electronic filing system.

4.4 Any Settlement Class Member who intends to object to this Agreement must present on a timely basis the objection in writing, which must be personally signed by the objector, and must include: (1) the objector's name and address; (2) any User ID(s); (3) an explanation of the basis upon which the objector claims to be a Settlement Class Member, including any email address(es) associated with the Games; (4) all grounds for the objection, stated with specificity, including all citations to legal authority and evidence supporting the objection; (5) all documents or writings that the Settlement Class Member desires the Court to consider; (6) the name and contact information of any and all attorneys representing, advising, or

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in any way assisting the objector in connection with the preparation or submission of the objection or who may profit from the pursuit of the objection (the "Objecting Attorneys"); and (7) a statement indicating whether the objector intends to appear at the Final Approval Hearing (either personally or through counsel who must file an appearance with the Court in accordance with the Local Rules). All written objections must be filed with, or otherwise received by the Court, and emailed or delivered to Class Counsel and Defendants' Counsel, no later than the Objection/Exclusion Deadline. Any Settlement Class Member who fails to timely file or submit a written objection with the Court and notice of his or her intent to appear at the Final Approval Hearing in accordance with the terms of this Section and as detailed in the Notice, and at the same time provide copies to designated counsel for the Parties, shall not be permitted to object to this Settlement Agreement or appear at the Final Approval Hearing, and shall be foreclosed from seeking any review of this Settlement by appeal or other means and shall be deemed to have waived his or her objections and be forever barred from making any such objections in the Action or any other action or proceeding.

4.5 If a Settlement Class Member or any of the Objecting Attorneys has objected to any class action settlement where the objector or the Objecting Attorneys asked for or received any payment in exchange for dismissal of the objection, or any related appeal, without any modification to the settlement, then the objection must include a statement identifying each such case by full case caption and amount of payment received.

4.6 A Class Member may request to be excluded from the Settlement Class by sending a timely written request postmarked on or before the Objection/Exclusion Deadline approved by the Court and specified in the Notice. To exercise the right to be excluded, a Person in the Settlement Class must timely send a written request for exclusion, physically signed by the individual seeking exclusion, to the Settlement Administrator providing his/her name and

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address, any User ID(s) and any email address(es) associated with the Games, the name and number of the case, "*Amy Jo Armstead v. VGW Malta Ltd., et al.*, No. 2022-CI-00553 (Cir. Ct. Henderson Cnty.)" and a statement that he or she wishes to be excluded from the Settlement Class for purposes of this Settlement. A request to be excluded that does not include all of this information, or that is sent to an address other than that designated in the Notice, or that is not postmarked within the time specified, shall be invalid, and the Person(s) serving such a request shall be a member(s) of the Settlement Class and shall be bound as a Settlement Class Member by this Agreement, if approved. Any member of the Settlement Class who validly elects to be excluded from this Agreement shall not: (i) be bound by any orders or the Final Judgment; (ii) be entitled to relief under this Settlement Agreement; (iii) gain any rights by virtue of this Agreement; or (iv) be entitled to object to any aspect of this Agreement. The request for exclusion must be personally signed by each Person requesting exclusion. So-called "mass" or "class" opt-outs shall not be allowed. To be valid, a request for exclusion must be postmarked or received by the date specified in the Notice.

4.7 The Final Approval Hearing shall be no earlier than ninety (90) days after the Notice described in Paragraph 4.2(a) is provided.

4.8 Any Settlement Class Member who does not, in accordance with the terms and conditions of this Agreement, seek exclusion from the Settlement Class or timely file a valid Claim Form shall not be entitled to receive any payment or benefits pursuant to this Agreement, but will otherwise be bound by all of the terms of this Agreement, including the terms of the Final Judgment to be entered in the Action and the Releases provided for in the Agreement, and will be barred from bringing any action against any of the Released Parties concerning the Released Claims.

5. SETTLEMENT ADMINISTRATION.

5.1 The Settlement Administrator shall, under the supervision of the Court, administer the relief provided by this Settlement Agreement by processing Claim Forms in a rational, responsive, cost effective, and timely manner. The Settlement Administrator shall maintain reasonably detailed records of its activities under this Agreement. The Settlement Administrator shall maintain all such records as are required by applicable law in accordance with its normal business practices and such records will be made available to Class Counsel and Defendants' Counsel upon request. The Settlement Administrator shall also provide reports and other information to the Court as the Court may require. The Settlement Administrator shall provide Class Counsel and Defendants' Counsel with information concerning Notice, administration, and implementation of the Settlement Agreement. Should the Court request, the Parties shall submit a timely report to the Court summarizing the work performed by the Settlement Administrator, including a post-distribution accounting of all amounts from the Settlement Fund paid to Settlement Class Members, the number and value of checks not cashed, the number and value of electronic payments unprocessed, and the amount distributed to any *cy pres* recipient. Without limiting the foregoing, the Settlement Administrator shall:

(a) Receive requests to be excluded from the Settlement Class and promptly provide Class Counsel and Defendants' Counsel copies thereof. If the Settlement Administrator receives any exclusion forms after the deadline for the submission of such forms, the Settlement Administrator shall promptly provide copies thereof to Class Counsel and Defendants' Counsel;

(b) Provide Class Counsel and Defendants' Counsel with drafts of all administration related documents, including but not limited to follow-up class notices or communications with Settlement Class Members, telephone scripts, website postings or language or other communications with the Settlement Class, at least five (5) business days before the Settlement Administrator is required to or intends to publish or use such communications, unless

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Class Counsel and Defendants' Counsel agree to waive this requirement in writing on a document-by-document basis;

(c) Provide weekly reports to Class Counsel and Defendants' Counsel regarding the number of Claim Forms received, the amount of the Settlement Payments associated with those Claim Forms, and the categorization and description of Claims Form rejected, in whole or in part, by the Settlement Administrator; and

(d) Make available for inspection by Class Counsel or Defendants' Counsel the Claim Forms received by the Settlement Administrator at any time upon reasonable notice.

5.2 The Settlement Administrator shall distribute the Settlement Payments according to the provisions enumerated in Section 2.1.

5.3 The Settlement Administrator shall be obliged to employ reasonable procedures to screen claims for abuse or fraud and deny Claim Forms where there is evidence of abuse or fraud, including by cross-referencing Approved Claims with the Class List. The Settlement Administrator shall determine whether a Claim Form submitted by a Settlement Class Member is an Approved Claim and shall reject Claim Forms that fail to (a) comply with the instructions on the Claim Form or the terms of this Agreement, or (b) provide full and complete information as requested on the Claim Form. In the event a person submits a timely Claim Form by the Claims Deadline but the Claim Form is not otherwise complete, then the Settlement Administrator shall give such person reasonable opportunity to provide any requested missing information, which information must be received by the Settlement Administrator no later than twenty-eight (28) calendar days after the Claims Deadline. In the event the Settlement Administrator receives such information more than twenty-eight (28) calendar days after the Claims Deadline, then any such claim shall be denied. The Settlement Administrator may contact any person who has submitted a Claim Form to obtain additional information necessary to verify the Claim Form.

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5.4 Class Counsel and Defendants' Counsel shall both have the right to challenge the Settlement Administrator's acceptance or rejection of any particular Claim Form or the amount proposed to be paid on account of any particular Settlement Class Member's claim. The Settlement Administrator shall follow any joint decisions of Class Counsel and Defendants' Counsel as to the validity or amount of any disputed claim. Where Class Counsel and Defendants' Counsel disagree, the Settlement Administrator will finally resolve the dispute and the claim will be treated in the manner designated by the Settlement Administrator.

5.5 In the exercise of its duties outlined in this Agreement, the Settlement Administrator shall have the right to reasonably request additional information from the Parties or any Settlement Class Member.

5.6 All taxes and tax expenses shall be paid out of the Settlement Fund, and shall be timely paid by the Settlement Administrator pursuant to this Agreement and without further order of the Court. Any tax returns prepared for the Settlement Fund (as well as the election set forth therein) shall be consistent with this Agreement and in all events shall reflect that all taxes on the income earned by the Settlement Fund shall be paid out of the Settlement Fund as provided herein. The Released Parties shall have no responsibility or liability for the acts or omissions of the Settlement Administrator or its agents with respect to the payment of taxes or tax expenses.

6. TERMINATION OF SETTLEMENT.

6.1 Each Party additionally shall have the right, but not the obligation, to terminate the Settlement Agreement if 3.5% or more of the members of the Settlement Class exclude themselves from the Settlement. Notification of intent to terminate the Settlement Agreement must be provided with ten (10) calendar days after the *earlier* of: (1) the date the Parties agree in good faith that they have received a final tabulation from the Settlement Administrator of the

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objections and requests for exclusion timely received by the Objection/Exclusion Deadline, or (2) the date the Parties receive sufficient evidence from the Settlement Administrator to establish beyond a reasonable doubt that the threshold for a Section 6.1 Termination Notice has been or will be met. For example, if the Settlement Administrator – after the Objection/Exclusion Deadline – notifies the Parties that there were no objections and just a single opt-out, that evidence would be sufficient to establish beyond a reasonable doubt that no threshold for a Section 6.1 Termination Notice has been or will be met. If this Settlement Agreement is terminated, it will be deemed null and void *ab initio*.

6.2 Subject to Paragraphs 9.1-9.3 below, Defendants or the Class Representative on behalf of the Settlement Class, shall have the right to terminate this Agreement by providing written notice of the election to do so ("Termination Notice") to all other Parties hereto within twenty-one (21) days of any of the following events: (i) the Court's refusal to grant Preliminary Approval of this Agreement in any material respect; (ii) the Court's refusal to grant final approval of this Agreement in any material respect; (iii) the Court's refusal to enter the Final Judgment in this Action in any material respect; (iv) the date upon which the Final Judgment is modified or reversed in any material respect by the Kentucky Court of Appeals, Kentucky Supreme Court or any federal court.

6.3 In the event of termination pursuant to Section 6, Class Counsel shall cause the prompt return of the Settlement Fund in full to VGW, including any interest accrued while in the Escrow Account, minus one-half (50%) of any amounts reasonably incurred by the Settlement Administrator until the date of termination.

6.4 Confirmatory Discovery. VGW has represented that in-Game Gold Coin Purchases from Kentucky-based players who spent $5.00 or more within 24 hours from March 17, 2017, through March 17, 2022, are less than or equal to $51,112,161.00. Simultaneous with

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the execution of this Agreement, VGW has provided a declaration, from a person with sufficient knowledge, of VGW's best estimate attesting to the amount of in-Game Gold Coin Purchases from Kentucky-based players who spent $5.00 or more within 24 hours from March 17, 2017, through March 17, 2022. In the event that the declaration shows that amount exceeds $51,112,161.00 by more than two percent (2%), the Parties further agree that they shall execute an amended settlement agreement that adjusts the amount of the Settlement Fund proportionally to the increase in amount to account for this error.

7. PRELIMINARY APPROVAL ORDER AND FINAL APPROVAL ORDER.

7.1 Promptly after the execution of this Settlement Agreement, Class Counsel shall submit this Agreement together with its Exhibits to the Court and shall move the Court for Preliminary Approval of the settlement set forth in this Agreement; preliminary certification of the Settlement Class for settlement purposes only; preliminary appointment of Class Counsel to represent the class; preliminary appointment of Amy Jo Armstead as the Class Representative of the Settlement Class; and entry of a Preliminary Approval Order, which order shall set a Final Approval Hearing date and approve the form and contents of the Notice and Claim Forms for dissemination substantially in the form of Exhibits A, B, C, and D hereto. The Preliminary Approval Order shall also authorize the Parties, without further approval from the Court, to agree to and adopt such amendments, modifications and expansions of the Settlement Agreement and its implementing documents (including all exhibits to this Agreement) so long as they are consistent in all material respects with the terms of the Settlement Agreement and do not limit or impair the rights of the Settlement Class or materially expand the obligations of VGW.

7.2 At the time of the submission of this Agreement to the Court as described above, Class Counsel shall request that, after Notice is given, the Court hold a Final Approval Hearing

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where the Court will review comments and/or objections regarding the Settlement, consider its fairness, reasonableness and adequacy, consider the application for any Fee Award and incentive awards to the Class Representative, and consider whether the Court shall issue a Final Judgment approving this Agreement and dismissing the Action with prejudice.

7.3 After Notice is given, the Parties shall request and seek to obtain from the Court a Final Judgment, which will:

(a) find that the Court has personal jurisdiction over all Settlement Class Members and that the Court has subject matter jurisdiction to approve the Agreement, including all exhibits thereto;

(b) approve the Settlement Agreement and the proposed settlement as fair, reasonable, and adequate as to, and in the best interests of, the Settlement Class Members; direct the Parties and their counsel to implement and consummate the Agreement according to its terms and provisions; and declare the Agreement to be binding on, and have *res judicata* and preclusive effect in all pending and future lawsuits or other proceedings maintained by or on behalf of Plaintiffs and Releasing Parties with respect to the Released Claims;

(c) find that the Notice implemented pursuant to the Agreement (1) constitutes the best practicable notice under the circumstances; (2) constitutes notice that is reasonably calculated, under the circumstances, to apprise the Settlement Class of the pendency of the Action, their right to object to or exclude themselves from the proposed Agreement, and to appear at the Final Approval Hearing; (3) is reasonable and constitutes due, adequate, and sufficient notice to all persons entitled to receive notice; and (4) meets all applicable requirements of the Kentucky Rules of Civil Procedure, the Due Process Clause of the United States and Kentucky Constitutions, and the rules of the Court;

(d) find that the Class Representative and Class Counsel adequately represent the Settlement Class for purposes of entering into and implementing the Agreement;

(e) dismiss the Action (including all individual claims and Settlement Class Claims presented thereby) on the merits and with prejudice, without fees or costs to any party except as provided in the Settlement Agreement;

(f) incorporate the Release set forth above, make the Release effective as of the date of the Effective Date, and forever discharge the Released Parties as set forth herein;

(g) permanently bar and enjoin all Settlement Class Members who have not been properly excluded from the Settlement Class from filing, commencing, prosecuting, intervening in, or participating (as class members or otherwise) in, any lawsuit or other action in any jurisdiction based on the Released Claims;

(h) without affecting the finality of the Final Judgment for purposes of appeal, retain jurisdiction as to all matters relating to administration, consummation, enforcement, and interpretation of the Settlement Agreement and the Final Judgment, and for any other necessary purpose; and

(i) incorporate any other provisions as necessary or appropriate to effectuate the terms and conditions of the Settlement Agreement.

7.4 The Parties shall, in good faith, cooperate, assist, and undertake all reasonable actions and steps in order to accomplish these required events on the schedule set by the Court, subject to the terms of this Settlement Agreement.

8. CLASS COUNSEL'S ATTORNEYS' FEES, COSTS, AND EXPENSES; INCENTIVE AWARD.

8.1 Pursuant to Ky. R. Civ. P. 23.08, VGW agrees that Class Counsel shall be entitled to an award of reasonable attorneys' fees and costs out of the Settlement Fund in an amount

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determined by the Court as the Fee Award. With no consideration given or received, Class Counsel will limit its petition for attorneys' fees, costs, and expenses to no more than thirty percent (30%) of the Settlement Fund (i.e., $3,525,000.00). Payment of any Fee Award shall be made from the Settlement Fund and should the Court award less than the amount sought by Class Counsel, the difference in the amount sought and the amount ultimately awarded pursuant to this Paragraph shall remain in the Settlement Fund for distribution to eligible Settlement Class Members.

8.2 The Fee Award shall be payable by the Settlement Administrator within fifteen (15) days after entry of the Court's Final Judgment, subject to Class Counsel executing the Undertaking Regarding Attorneys' Fees and Costs (the "Undertaking") attached hereto as Exhibit F, and providing all payment routing information and tax I.D. numbers for Class Counsel. Payment of the Fee Award shall be made from the Settlement Fund by wire transfer pursuant to instructions provided by Bursor & Fisher, P.A., and completion of necessary forms, including but not limited to W-9 forms. Notwithstanding the foregoing, if for any reason the Final Judgment is reversed or rendered void as a result of an appeal(s) or otherwise does not become Final, then Class Counsel shall return such funds to VGW. Additionally, should any parties to the Undertaking dissolve, merge, declare bankruptcy, become insolvent, or cease to exist prior to the final payment to Class Members, those parties shall execute a new undertaking guaranteeing repayment of funds within fourteen (14) days of such an occurrence.

8.3 Class Counsel intends to file a motion for Court approval of an incentive award to the Class Representative, to be paid from the Settlement Fund, in addition to any funds the Class Representative stands to otherwise receive from the Settlement. With no consideration having been given or received for this limitation, Amy Jo Armstead will seek no more than $7,000 as an incentive award. Should the Court award less than this amount, the difference in the amount

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sought and the amount ultimately awarded pursuant to this Paragraph shall remain in the Settlement Fund for distribution to eligible Settlement Class Members. Such award shall be paid from the Settlement Fund (in the form of a check to the Class Representative that is sent care of Class Counsel), within thirty (30) business days after entry of the Final Judgment if there have been no objections to the Settlement Agreement, and, if there have been such objections, within thirty (30) business days after the Effective Date

9. CONDITIONS OF SETTLEMENT, EFFECT OF DISAPPROVAL, CANCELLATION OR TERMINATION.

9.1 The Effective Date of this Settlement Agreement shall not occur unless and until each of the following events occurs and shall be the date upon which the last (in time) of the following events occurs:

(a) The Parties and their counsel have executed this Agreement;

(b) The Court has entered the Preliminary Approval Order;

(c) The Court has entered an order finally approving the Agreement, following Notice to the Settlement Class and a Final Approval Hearing, as provided in the Kentucky Rules of Civil Procedure, and has entered the Final Judgment, or a judgment consistent with this Agreement in all material respects;

(d) VGW has funded the Settlement Fund; and

(e) The Final Judgment has become Final, as defined above.

9.2 If some or all of the conditions specified in Section 9.1 are not met, or in the event that this Agreement is not approved by the Court, or the settlement set forth in this Agreement is terminated or fails to become effective in accordance with its terms, then this Settlement Agreement shall be canceled and terminated subject to Section 6 unless Class Counsel and Defendants' Counsel mutually agree in writing to proceed with this Agreement. If any Party is

in material breach of the terms hereof, any other Party, provided that it is in substantial compliance with the terms of this Agreement, may terminate this Agreement on notice to all of the Settling Parties. Notwithstanding anything herein, the Parties agree that the Court's failure to approve, in whole or in part, the attorneys' fees payment to Class Counsel and/or the incentive award set forth in Section 8 above shall not prevent the Agreement from becoming effective, nor shall it be grounds for termination.

9.3 If this Agreement is terminated or fails to become effective for the reasons set forth above, and unless Class Counsel and Defendants' Counsel mutually agree in writing to proceed with this Agreement, the Parties shall be restored to their respective positions in the Action as of the date of the signing of this Agreement. In such event, any Final Judgment or other order entered by the Court in accordance with the terms of this Agreement shall be treated as vacated, *nunc pro tunc*, and the Parties shall be returned to the *status quo ante* with respect to the Action as if this Agreement had never been entered into. Within five (5) business days after written notification of termination as provided in this Agreement is sent to the other Parties, the Settlement Fund (including accrued interest thereon), less one-half (50%) of any amounts reasonably incurred by the Settlement Administrator until the date of termination (including costs and any taxes and tax expenses paid, due or owing), shall be refunded by the Settlement Administrator to VGW, based upon written instructions provided by Defendants' Counsel. In the event that the Final Judgment or any part of it is vacated, overturned, reversed, or rendered void as a result of an appeal, or the Settlement Agreement is voided, rescinded, or otherwise terminated for any other reason, Class Counsel shall, within thirty (30) days repay to VGW, based upon written instructions provided by Defendants' Counsel, the full amount of the Fee Award paid to Class Counsel from the Settlement Fund, including any accrued interest. In the event the Fee Award awarded by the Court or any part of them are vacated, modified, reversed,

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or rendered void as a result of an appeal, Class Counsel shall within thirty (30) days repay to VGW, based upon written instructions provided by Defendants' Counsel, the attorneys' fees and costs paid to Class Counsel and/or Class Representative from the Settlement Fund, in the amount vacated or modified, including any accrued interest.

10. CONFIDENTIALITY AND PUBLIC STATEMENTS

10.1 Except as otherwise agreed by Class Counsel and Defendants' Counsel in writing and/or as required by legal disclosure obligations, all terms of this Agreement will remain confidential and subject to Rule 408 of the Kentucky Rules of Evidence until presented to the Court along with Plaintiff's motion for preliminary approval.

11. MISCELLANEOUS PROVISIONS.

11.1 The Parties (a) acknowledge that it is their intent to consummate this Settlement Agreement; and (b) agree, subject to their fiduciary and other legal obligations, to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of this Agreement, to exercise their reasonable best efforts to accomplish the foregoing terms and conditions of this Agreement, to secure final approval, and to defend the Final Judgment through any and all appeals. Class Counsel and Defendants' Counsel agree to cooperate with one another in seeking Court approval of the Settlement Agreement, entry of the Preliminary Approval Order, and the Final Judgment, and promptly to agree upon and execute all such other documentation as may be reasonably required to obtain final approval of the Agreement.

11.2 The Parties intend this Settlement Agreement to be a final and complete resolution of all disputes between them with respect to the Released Claims by Plaintiff, the Settlement Class and each or any of them, on the one hand, against the Released Parties, and each or any of the Released Parties, on the other hand. Accordingly, the Parties agree not to

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assert in any forum that the Action was brought by Plaintiff or defended by VGW, or each or any of them, in bad faith or without a reasonable basis.

11.3 The Parties have relied upon the advice and representation of counsel, selected by them, concerning the claims hereby released. The Parties have read and fully understand the Settlement Agreement and have been fully advised as to the legal effect hereof by counsel of their own selection and intend to be legally bound by the same.

11.4 Whether or not the Effective Date occurs or the Settlement Agreement is terminated, neither this Agreement nor the settlement contained herein or any term, provision or definition therein, nor any act or communication performed or document executed in the course of negotiating, implementing or seeking approval pursuant to or in furtherance of this Agreement or the settlement:

(a) is, may be deemed, or shall be used, offered or received in any civil, criminal or administrative proceeding in any court, administrative agency, arbitral proceeding or other tribunal against the Released Parties, or each or any of them, as an admission, concession or evidence of, the validity of any Released Claims, the truth of any fact alleged by the Plaintiffs, the deficiency of any defense that has been or could have been asserted in the Action, the violation of any law or statute, the definition or scope of any term or provision, the reasonableness of the settlement amount or the Fee Award, or of any alleged wrongdoing, liability, negligence, or fault of the Released Parties, or any of them;

(b) is, may be deemed, or shall be used, offered or received against any Released Party, as an admission, concession or evidence of any fault, misrepresentation or omission with respect to any statement or written document approved or made by the Released Parties, or any of them;

(c) is, may be deemed, or shall be used, offered or received against the Released Parties, or each or any of them, as an admission or concession with respect to any liability, negligence, fault or wrongdoing or statutory meaning as against any Released Parties, or supporting the certification of a litigation class, in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal. However, the settlement, this Agreement, and any acts performed and/or documents executed in furtherance of or pursuant to this Agreement and/or Settlement may be used in any proceedings as may be necessary to effectuate the provisions of this Agreement. Further, if this Settlement Agreement is approved by the Court, any Party or any of the Released Parties may file this Agreement and/or the Final Judgment in any action that may be brought against such Party or Parties in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim;

(d) is, may be deemed, or shall be construed against Plaintiff, the Settlement Class, the Releasing Parties, or each or any of them, or against the Released Parties, or each or any of them, as an admission or concession that the consideration to be given hereunder represents an amount equal to, less than or greater than that amount that could have or would have been recovered after trial; and

(e) is, may be deemed, or shall be construed as or received in evidence as an admission or concession against Plaintiff, the Settlement Class, the Releasing Parties, or each and any of them, or against the Released Parties, or each or any of them, that any of Plaintiff's claims are with or without merit or that damages recoverable in the Action would have exceeded or would have been less than any particular amount.

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(f) The Parties acknowledge and agree that any Party may request that the Court appoint a Settlement Special Master. Each Party explicitly reserves the right to oppose any such request. Any fees earned or costs incurred by any such Settlement Special Master shall be paid exclusively from the Settlement Fund.

11.5 The Parties acknowledge that (a) any certification of the Settlement Class as set forth in this Agreement, including certification of the Settlement Class for settlement purposes in the context of Preliminary Approval, shall not be deemed a concession that certification of a litigation class is appropriate, nor that the Settlement Class definition would be appropriate for a litigation class, nor would VGW be precluded from challenging class certification in further proceedings in the Action or in any other action if the Settlement Agreement is not finalized or finally approved; (b) if the Settlement Agreement is not finally approved by the Court for any reason whatsoever, then any certification of the Settlement Class will be void, the Parties and the Action shall be restored to the status quo ante, and no doctrine of waiver, estoppel or preclusion will be asserted in any litigated certification proceedings in the Action or in any other action; and (c) no agreements made by or entered into by VGW in connection with the Settlement may be used by Plaintiff, any person in the Settlement Class, or any other person to establish any of the elements of class certification in any litigated certification proceedings, whether in the Action or any other judicial proceeding.

11.6. No person or entity shall have any claim against the Class Representative, Class Counsel, the Settlement Administrator or any other agent designated by Class Counsel, or the Released Parties and/or their counsel, arising from distributions made substantially in accordance with this Agreement. The Parties and their respective counsel, and all other Released Parties shall have no liability whatsoever for the investment or distribution of the Settlement Fund or the determination, administration, calculation, or payment of any claim or nonperformance of the

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Settlement Administrator, the payment or withholding of taxes (including interest and penalties) owed by the Settlement Fund, or any losses incurred in connection therewith. The Parties acknowledge and agree that no opinion concerning the tax consequences of the proposed Settlement to Settlement Class Members is given or will be given by the Parties, nor are any representations or warranties in this regard made by virtue of this Settlement Agreement. Each Settlement Class Member's tax obligations, and the determination thereof, are the sole responsibility of the Settlement Class Member, and it is understood that the tax consequences may vary depending on the particular circumstances of each individual Settlement Class Member.

11.7. All proceedings with respect to the administration, processing and determination of Claims and the determination of all controversies relating thereto, including disputed questions of law and fact with respect to the validity of Claims, shall be subject to the jurisdiction of the Court.

11.8 The headings used herein are used for the purpose of convenience only and are not meant to have legal effect.

11.9 The waiver by one Party of any breach of this Agreement by any other Party shall not be deemed as a waiver of any other prior or subsequent breaches of this Agreement.

11.10 All of the Exhibits to this Agreement are material and integral parts thereof and are fully incorporated herein by this reference.

11.11 This Agreement and its Exhibits set forth the entire agreement and understanding of the Parties with respect to the matters set forth herein, and supersede all prior negotiations, agreements, arrangements and undertakings with respect to the matters set forth herein. No representations, warranties or inducements have been made to any Party concerning this Settlement Agreement or its Exhibits other than the representations, warranties and covenants

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contained and memorialized in such documents. This Agreement may be amended or modified only by a written instrument signed by or on behalf of all Parties or their respective successors-in-interest.

11.12 Except as otherwise provided herein, each Party shall bear its own costs and attorneys' fees incurred in any way related to the Action.

11.13 Plaintiff represents and warrants that she has not assigned any claim or right or interest therein as against the Released Parties to any other Person or Party and that she is fully entitled to release the same.

11.14 Each counsel or other Person executing this Settlement Agreement, any of its Exhibits, or any related settlement documents on behalf of any Party hereto, hereby warrants and represents that such Person has the full authority to do so and has the authority to take appropriate action required or permitted to be taken pursuant to the Agreement to effectuate its terms.

11.15 This Agreement may be executed in one or more counterparts. Signature by digital means, facsimile, or in PDF format will constitute sufficient execution of this Agreement. All executed counterparts and each of them shall be deemed to be one and the same instrument. A complete set of original executed counterparts shall be filed with the Court if the Court so requests.

11.16 This Settlement Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the Parties hereto and the Released Parties.

11.17 The Court shall retain jurisdiction with respect to implementation and enforcement of the terms of this Agreement, and all Parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in this Agreement.

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11.18 This Settlement Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Kentucky.

11.19 This Agreement is deemed to have been prepared by counsel for all Parties, as a result of arm's-length negotiations among the Parties. Because all Parties have contributed substantially and materially to the preparation of this Agreement, it shall not be construed more strictly against one Party than another.

11.20 Where this Agreement requires notice to the Parties, such notice shall be sent to the undersigned counsel: For Plaintiff: Philip L. Fraietta, Bursor & Fisher, P.A., 888 Seventh Avenue, New York, NY 10019. For Defendant: Behnam Dayanim, Paul Hastings LLP, 2050 M Street NW, Washington, DC 20036.

11.21 All time periods and dates described in this Agreement are subject to the Court's approval. These time periods and dates may be changed by the Court or by the Parties' written agreement without notice to the Settlement Class. The Parties reserve the right, subject to the Court's approval, to make any reasonable extensions of time that might be necessary to carry out any provision of this Agreement.

11.22 VGW shall be given an opportunity to review and provide comments to Plaintiff's preliminary approval and final approval briefs, and Plaintiff shall consider in good faith all such comments.

[SIGNATURES BEGIN ON FOLLOWING PAGE]

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IT IS SO AGREED TO BY THE PARTIES:

Dated: Sep 12, 2022

AMY JO ARMSTEAD

By: Amy Jo Short Armstead
Amy Jo Short Armstead (Sep 12, 2022 11:20 CDT)
Amy Jo Armstead, individually and as representative of the Class

Dated: Sep 10, 2022

VGW MALTA LTD.

By: Laurence Escalante
Laurence Escalante (Sep 10, 2022 11:29 GMT+8)

Name: Laurence Escalante
Title: Director

Dated: Sep 10, 2022

VGW LUCKYLAND INC.

By: Laurence Escalante
Laurence Escalante (Sep 10, 2022 11:29 GMT+8)

Name: Laurence Escalante
Title: Director

IT IS SO STIPULATED BY COUNSEL:

Dated: Sep 12, 2022

BURSOR & FISHER, P.A.

By: _____
Philip L. Fraietta
pfraietta@bursor.com
Alec M. Leslie
aleslie@bursor.com
BURSOR & FISHER, P.A.
888 Seventh Avenue
New York, New York 10019
Tel: (646) 837-7150
Fax: (212) 989-9163

Attorneys for Class Representative and the Settlement Class

Dated: Sep 11, 2022

PAUL HASTINGS LLP

By: Behnam Dayanim
Behnam Dayanim (Sep 11, 2022 11:48 EDT)
Behnam Dayanim

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bdayanim@paulhastings.com
PAUL HASTINGS LLP
250 M Street NW
Washington, DC 20036
Tel: (202) 551-1700
Fax: (202) 551-0468

Attorneys for Defendants VGW Malta Ltd. and VGW Luckyland, Inc.

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EXHIBIT A

VGW GAMES SETTLEMENT CLAIM FORM

THIS CLAIM FORM MUST BE SUBMITTED ONLINE OR POSTMARKED BY [CLAIMS DEADLINE]. THE CLAIM FORM MUST BE SIGNED AND MEET ALL CONDITIONS OF THE SETTLEMENT AGREEMENT.

The Settlement Administrator will review your Claim Form. If accepted, you will receive a share of the Settlement Fund. This process takes time, please be patient. If you have any questions, or would like to estimate your share of the Settlement Fund, visit: [claims website].

Instructions: Fill out each section of this form and sign where indicated.

First Name	**Last Name**	
Street Address		
City	**State**	**ZIP Code**
Email Address		**Phone Number**
Chumba Casino and/or Luckyland Slots User ID(s) (if known)		
All email addresses associated with Chumba Casino and/or Luckyland Slots accounts.		

Settlement Class Member Affirmation: By submitting this Claim Form you affirm under penalty of perjury that, to the best of your knowledge, the User ID(s) and the email address(es) listed above are yours.

Signature: _____ Date: _____/ _____/ _____

Select Payment Method: Select **ONE** box for how you would like to receive payment and provide the requested information.

Check **Mailing Address:**	Venmo® **Email Address:**	PayPal® **Email Address:**

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EXHIBIT B

From: Notice@classactionadmin.com
To: JonQClassMember@domain.com
Re: Legal Notice of Class Action Settlement

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT
Armstead v. VGW Malta Ltd. and VGW Luckyland, Inc., Case No. 2022-CI-00553
(Commonwealth of Kentucky, Henderson County Circuit Court)

If you played Chumba Casino or Luckyland Slots you may be part of a class action settlement

A court authorized this notice. You are not being sued. This is not a solicitation from a lawyer.

This notice is to inform you of the settlement of a class action lawsuit against VGW Malta Ltd. and VGW Luckyland, Inc. (collectively, "VGW"), alleging claims based on the sale of virtual coins in Chumba Casino and Luckyland Slots. VGW denies all claims and that it violated any law, but has agreed to the settlement to avoid the uncertainties and expenses associated with continuing the case.

Am I a Class Member? Our records indicate you may be a Settlement Class Member. Settlement Class Members are persons who spent $5.00 or more within a 24-hour period on Chumba Casino or Luckyland Slots, from March 17, 2017, through March 17, 2022, while located in the Commonwealth of Kentucky.

What Can I Get? If approved by the Court, VGW will establish a Settlement Fund of $11,750,000 to pay all valid claims submitted by the Settlement Class, together with notice and administration expenses as well as any attorneys' fees, costs, and incentive award to the Class Representative awarded by the Court. If you are entitled to relief, you may submit a claim to receive a share of the Settlement Fund. Your share will depend on, among other things, (1) the total dollar amount of in-game purchases you made while playing Chumba Casino and/or Luckyland Slots, with those who spent more money receiving a higher percentage back, and (2) how many Settlement Class Members submit claims. You can find more information, and estimate your share of the Settlement Fund, at [**website**].

How Do I Get a Payment? To receive a payment, you must submit a timely and complete Claim Form by mail or online, submitted or postmarked **no later than [claims deadline]**. You can submit the claim form online at www.URL, or by clicking [here.] You may also request a paper claim form and mail it to [address].

What are My Other Options? You may exclude yourself from the Class by sending a letter to the settlement administrator no later than [**objection/exclusion deadline**]. If you exclude yourself, you cannot get a settlement payment, but you keep any rights you may have to sue VGW over the legal issues in the lawsuit. You and/or your lawyer have the right to appear before the Court and/or object to the proposed settlement. Your written objection must be filed no later than [**objection/exclusion deadline**]. Specific instructions about how to object to, or exclude yourself from, the Settlement are available at [website]. If you file a claim or do nothing, and the Court

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approves the Settlement, you will be bound by all of the Court's orders and judgments. In addition, your claims relating to the allegations in this case against VGW and any other Released Parties will be released.

Who Represents Me? The Court has appointed Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A. to represent the class. These attorneys are called "Class Counsel." You will not be charged for these lawyers. If you want to be represented by your own lawyer in this case, you may hire one at your expense. Plaintiff Amy Jo Armstead is a Settlement Class Member and the Court appointed her as "Class Representative."

When Will the Court Consider the Proposed Settlement? The Court will hold the Final Approval Hearing at _____ **.m.** on [date] in [TBD]. At that hearing, the Court will: hear any objections concerning the fairness of the settlement; determine the fairness of the settlement; decide whether to approve Class Counsel's request for attorneys' fees and costs; and decide whether to award the Class Representative $7,000 from the Settlement Fund for her services in helping to bring and settle this case. Class Counsel will be paid from the Settlement Fund in an amount to be determined and awarded by the Court. Class Counsel will seek no more than 30% of the Settlement Fund in attorneys' fees, costs, and expenses, but the Court may award less than this amount.

How Do I Get More Information? For more information, including a more detailed Notice, Claim Form, a copy of the Settlement Agreement and other documents, go to [website], contact the settlement administrator at 1-___-___-____ or VGW Settlement Administrator, [address], or call Class Counsel at 1-646-837-7150.

EXHIBIT C

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COURT AUTHORIZED NOTICE OF CLASS ACTION AND PROPOSED SETTLEMENT

If you played Chumba Casino, and/or Luckyland Slots, you may be part of a class action settlement.

VGW Games Settlement
Settlement Administrator
P.O. Box 0000
City, ST 00000-0000

||||||||||||||||||||||
Postal Service: Please do not mark barcode

XXX—«ClaimID» «MailRec»

«First1» «Last1»
«C/O»
«Addr1» «Addr2»
«City», «St» «Zip» «Country»

By Order of the Court Dated: [date]

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A settlement has been reached in a class action lawsuit against VGW Malta Ltd. and VGW Luckyland, Inc. (collectively, "VGW"), alleging claims under Kentucky state law based on the sale of virtual coins in Chumba Casino and Luckyland Slots. VGW denies all claims and that it violated the law, but has agreed to the settlement to avoid the uncertainties and expenses associated with continuing the case**.**

Am I a Class Member? Our records indicate you may be a Settlement Class Member. Settlement Class Members are persons who spent $5.00 or more within a 24-hour period on Chumba Casino or Luckyland Slots, from March 17, 2017, through March 17, 2022, while located in the Commonwealth of Kentucky.

What Can I Get? If approved by the Court, VGW will establish a Settlement Fund of $11,750,000 to pay all valid claims submitted by the Settlement Class, together with notice and administration expenses as well as any attorneys' fees, costs, and incentive award to the Class Representative awarded by the Court. If you are entitled to relief, you may submit a claim to receive a share of the Settlement Fund. Your share will depend on, among other things, (1) the total dollar amount of in-game purchases you made while playing Chumba Casino and/or Luckyland Slots, with those who spent more money receiving a higher percentage back, and (2) how many Settlement Class Members submit claims. You can find more information, and estimate your share of the Settlement Fund, at [**website**].

How Do I Get a Payment? To receive a payment, you must submit a timely and complete Claim Form by mail or online, submitted or postmarked **no later than [claims deadline]**. You can submit the claim form online at www.URL, or by clicking [here.] You may also request a paper claim form and mail it to [address].

What are My Other Options? You may exclude yourself from the Class by sending a letter to the settlement administrator no later than [**objection/exclusion deadline**]. If you exclude yourself, you cannot get a settlement payment, but you keep any rights you may have to sue the VGW over the legal issues in the lawsuit. You and/or your lawyer have the right to appear before the Court and/or object to the proposed settlement. Your written objection must be filed no later than [**objection/exclusion deadline**]. Specific instructions about how to object to, or exclude yourself from, the Settlement are available at [website]. If you file a claim or do nothing, and the Court approves the Settlement, you will be bound by all of the Court's orders and judgments. In addition, your claims relating to the allegations in this case against VGW and any other Released Parties will be released.

Who Represents Me? The Court has appointed Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A. to represent the class. These attorneys are called "Class Counsel." You will not be charged for these lawyers. If you want to be represented by your own lawyer in this case, you may hire one at your expense. Plaintiff Amy Jo Armstead is a Settlement Class Member and the Court appointed her as "Class Representative."

When Will the Court Consider the Proposed Settlement? The Court will hold the Final Approval Hearing at _____ **.m.** on [date] in [TBD]. At that hearing, the Court will: hear any objections concerning the fairness of the settlement; determine the fairness of the settlement; decide whether to approve Class Counsel's request for attorneys' fees and costs; and decide whether to award the Class Representative $7,000 from the Settlement Fund for her services in helping to bring and settle this case. Class Counsel will be paid from the Settlement Fund in an amount to be determined and awarded by the Court. Class Counsel will seek no more than 30% of the Settlement Fund in attorneys' fees, costs, and expenses, but the Court may award less than this amount.

How Do I Get More Information? For more information, including a more detailed Notice, Claim Form, a copy of the Settlement Agreement and other documents, go to [website], contact the settlement administrator at 1-___-___-____ or VGW Settlement Administrator, [address], or call Class Counsel at 1-646-837-7150.

_____
_____
_____

VGW Games Settlement Administrator
c/o [Settlement Administrator]
PO Box 0000
City, ST 00000-0000

XXX

Filed 22-CI-00553 12/01/2022 Clyde Gregory Sutton, Henderson Circuit Clerk

EXHIBIT D

Filed 22-CI-00553 12/01/2022 Clyde Gregory Sutton, Henderson Circuit Clerk

HENDERSON COUNTY CIRCUIT COURT

Armstead v. VGW Malta Ltd. and VGW Luckyland, Inc., Case No. 2022-CI-00553

If you played Chumba Casino and/or Luckyland Slots you may be part of a class action settlement.

A court authorized this notice. You are not being sued. This is not a solicitation from a lawyer.

- A Settlement has been reached in a class action lawsuit against VGW Malta Ltd. and VGW Luckyland, Inc. (collectively, "VGW"), alleging claims based on the sale of virtual coins in Chumba Casino and Luckyland Slots. VGW denies all claims and that it violated any law, but has agreed to the settlement to avoid the uncertainties and expenses associated with continuing the case.

- You are a Settlement Class Member if you spent $5.00 or more within a 24-hour period on Chumba Casino or Luckyland Slots, from March 17, 2017, through March 17, 2022, while located in the Commonwealth of Kentucky.

- Those who file timely and properly completed claims will be eligible to receive a share of the Settlement Fund. Your share will be depend on, among other things, (1) the total dollar amount of in-game purchases you made while playing Chumba Casino and/or Luckyland Slots, with those who spent more money receiving a higher percentage back, and (2) how many Settlement Class Members submit claims.

- Read this notice carefully. Your legal rights are affected whether you act, or don't act.

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT	
SUBMIT A CLAIM FORM	This is the only way to receive a payment.
EXCLUDE YOURSELF	You will receive no benefits, but you will retain any rights you currently have to sue VGW about the claims in this case.
OBJECT	Write to the Court explaining why you don't like the Settlement.
GO TO THE HEARING	Ask to speak in Court about your opinion of the Settlement.
DO NOTHING	You won't get a share of the Settlement benefits and will give up your rights to sue VGW about the claims in this case.

These rights and options—**and the deadlines to exercise them**—are explained in this Notice.

BASIC INFORMATION

1. Why was this Notice issued?

A Court authorized this notice because you have a right to know about a proposed Settlement of this class action lawsuit and about all of your options, before the Court decides whether to give final approval to the Settlement. This Notice explains the lawsuit, the Settlement, and your legal rights.

The Honorable _____, of the Henderson County Circuit Court, Commonwealth of Kentucky, is overseeing this case. The case is called *Armstead v. VGW Malta Ltd.*, Case No. XXXXXXXX. The person who sued is called the Plaintiff. The Defendants are VGW Malta Ltd and VGW Luckyland, Inc.

2. What is a class action?

In a class action, one or more people called class representatives (in this case, Amy Jo Armstead) sue on behalf of a group or a "class" of people who have similar claims. In a class action, the court resolves the issues for all class members, except for those who exclude themselves from the Class.

3. What is this lawsuit about?

The lawsuit claims that Defendant violated Kentucky's gambling laws through the sale of virtual coins in Chumba Casino and Luckyland Slots. VGW denies all claims and that it violated any law.

4. Why is there a Settlement?

The Court has not decided whether the Plaintiff or VGW should win this case. Instead, both sides agreed to a Settlement. That way, they avoid the uncertainties and expenses associated with ongoing litigation, and Class Members will get compensation sooner rather than, if at all, after the completion of a trial.

More information about the Settlement and the lawsuit are available in the "Court Documents" section of the settlement website, or by accessing the Court docket in this case, for a fee, through the Court's Public Access to Court Electronic Records (PACER) system at https://ecf.wawd.uscourts.gov, or by visiting the office of the Henderson County Circuit Court Clerk, 5 N. Main Street, Henderson, KY 42420, between 8:00 a.m. and 4:30 p.m., Monday through Friday, excluding Court holidays.

WHO'S INCLUDED IN THE SETTLEMENT?

5. How do I know if I am in the Settlement Class?

The Court decided that everyone who fits the following description is a member of the **Settlement Class**:

All individuals who, in Kentucky (as reasonably determined by billing address information, IP address information, or other information furnished by VGW), spent

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$5.00 or more within a 24-hour period on Chumba Casino or Luckyland Slots, from March 17, 2017, through March 17, 2022.

THE SETTLEMENT BENEFITS

6. What does the Settlement provide?

Monetary Relief: If approved by the Court, VGW will establish a Settlement Fund totaling $11,750,000. Settlement Class Member payments, as well as the cost to administer the Settlement, the cost to inform people about the Settlement, any attorneys' fees and costs awarded by the Court, and any incentive award to the Class Representative approved by the Court will also come out of this fund (*see* Question 13).

***Prospective Relief*:** VGW has also agreed to take or maintain measures designed to address video game behavior disorders, including providing self-service resources to players, providing for voluntary self-exclusion, and implementing in-game mechanics to ensure that players who run out of sufficient virtual coins will be able to continue to play the games without waiting an unreasonable amount of time.

A detailed description of the settlement benefits can be found in the Settlement Agreement. [insert hyperlink]

7. How much will my payment be?

If you are member of the Settlement Class you may submit a Claim Form to receive a portion of the Settlement Fund. The exact amount of your payment can't be determined at this time, but you can get an estimate by visiting the settlement website. The amount of your payment will depend on, among other things, (1) the total dollar amount of in-game purchases you made while playing Chumba Casino and/or Luckyland Slots, with those who spent more money receiving a higher percentage back, and (2) how many Settlement Class Members submit claims. If you would like more information about how Settlement Payments are determined, visit [**website**].

8. When will I get my payment?

You should receive a check or electronic payment from the Settlement Administrator within 90 days after the Settlement has been finally approved and/or any appeals process is complete. The hearing to consider the final approval of the Settlement is scheduled for [Fairness Hearing Date]. If you elect to receive your payment via check, please keep in mind that checks will expire and become void 180 days after they are issued. If appropriate, funds remaining from the initial round of uncashed checks, or electronic payments that cannot be processed, may be used for a second distribution to Settlement Class Members and/or may be donated to the Civil Rule 23 Account maintained by the Kentucky IOLTA Fund Board of Trustees.

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HOW TO GET BENEFITS

9. How do I get a payment?

If you are a Class Member and you want to get a payment, you must complete and submit a Claim Form by **[Claims Deadline]**. Claim Forms can be found and submitted online or you may have received a Claim Form in the mail (and which you can then submit by mail). To submit a Claim Form on-line or to request a paper copy, go to [WEBSITE] or call toll free, 1-800-000-0000.

We encourage you to submit your claim electronically. Not only is it easy and secure, but it is completely free and takes only minutes.

REMAINING IN THE SETTLEMENT

10. What am I giving up if I stay in the Class?

If the Settlement becomes final, you will give up your right to sue VGW and other Released Parties for the claims being resolved by this Settlement. The specific claims you are giving up against VGW are described in the Settlement Agreement. You will be "releasing" VGW and certain of its affiliates, employees and representatives as described in Section 1.28 of the Settlement Agreement. Unless you exclude yourself (*see* Question 14), you are "releasing" the claims, regardless of whether you submit a claim or not. The Settlement Agreement is available through the "court documents" link on the website.

The Settlement Agreement describes the released claims with specific descriptions, so read it carefully. If you have any questions you can talk to the lawyers listed in Question 12 for free or you can, of course, talk to your own lawyer if you have questions about what this means.

11. What happens if I do nothing at all?

If you do nothing, you won't get any benefits from this Settlement. But, unless you exclude yourself, you won't be able to start a lawsuit or be part of any other lawsuit against VGW for the claims being resolved by this Settlement.

THE LAWYERS REPRESENTING YOU

12. Do I have a lawyer in the case?

The Court has appointed two lawyers at the firm Bursor & Fisher, P.A. to be the attorneys representing the Settlement Class. Those lawyers – Philip L. Fraietta and Alec M. Leslie – are called "Class Counsel." They are experienced in handling similar

class action cases. More information about these lawyers, their law firm, and their experience is available at www.bursor.com. They believe, after conducting an extensive investigation, that the Settlement Agreement is fair, reasonable, and in the best interests of the Settlement Class. You will not be charged for these lawyers. If you want to be represented by your own lawyer in this case, you may hire one at your expense.

13. How will the lawyers be paid?

Class Counsel attorneys' fees, costs, and expenses will be paid from the Settlement Fund in an amount to be determined and awarded by the Court. The fee petition will seek no more than 30% of the Settlement Fund in attorneys' fees, costs, and expenses. The Court may award less than this amount.

Subject to approval by the Court, the Class Representative may be paid an Incentive Award from the Settlement Fund for helping to bring and settle the case. The Class Representative will ask for $7,000 as an incentive award.

EXCLUDING YOURSELF FROM THE SETTLEMENT

14. How do I get out of the Settlement?

To exclude yourself from the Settlement, you must mail or otherwise deliver a letter (or request for exclusion) stating that you want to be excluded from the "*Armstead v. VGW Malta Ltd.*, Case No. XXXXXX settlement." Your letter or request for exclusion must also include your name, all User ID(s), your address, and any email address(es) associated with your Chumba Casino or Luckyland Slots account, your signature, the name and number of this case, and a statement that you wish to be excluded. You must mail or deliver your exclusion request no later than **[objection/exclusion deadline]** to:

VGW Games Settlement
0000 Street
City, ST 00000

15. If I don't exclude myself, can I sue the Defendant for the same thing later?

No. Unless you exclude yourself, you give up any right to sue VGW for the claims being resolved by this Settlement.

16. If I exclude myself, can I get anything from this Settlement?

No. If you exclude yourself, you should not submit a Claim Form to ask for benefits because you won't receive any.

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OBJECTING TO THE SETTLEMENT

17. How do I object to the Settlement?

If you are a Class Member, you can object to the Settlement if you don't like any part of it. You can give reasons why you think the Court should not approve it. The Court will consider your views. To object, you must file with the Court a letter or brief stating that you object to the Settlement in *Armstead v. VGW Malta Ltd.*, Case No. XXXXXXXX and identify all your reasons for your objections (including citations and supporting evidence) and attach any materials you rely on for your objections. Your letter or brief must also include your name, all User ID(s), your address, the basis upon which the objector claims to be a Settlement Class Member, including any email address(es) associated with your Chumba Casino or Luckyland Slots account, the name and contact information of any and all attorneys representing, advising, or in any way assisting you in connection with your objection, and your signature. If you, or an attorney assisting you with your objection, have ever objected to any class action settlement where you or the objecting attorney has asked for or received payment in exchange for dismissal of the objection (or any related appeal) without modification to the settlement, you must include a statement in your objection identifying each such case by full case caption. You must also mail or deliver a copy of your letter or brief to Class Counsel and Defendant's Counsel listed below.

Class Counsel will file with the Court and post on this website its request for attorneys' fees, costs, and expenses by [two weeks prior to objection deadline].

If you want to appear and speak at the Final Approval Hearing to object to the Settlement, with or without a lawyer (explained below in answer to Question Number 21), you must say so in your letter or brief. File the objection with the Court and mail a copy to these two different places postmarked no later than **[objection deadline].**

Court	Class Counsel	Defendant's Counsel
INSERT	Philip L. Fraietta Alec M. Leslie Bursor & Fisher PA 888 Seventh Avenue New York, NY 10019	Behnam Dayanim Paul Hastings LLP 250 M Street NW Washington, DC 20036

18. What's the difference between objecting and excluding myself from the Settlement?

Objecting simply means telling the Court that you don't like something about the Settlement. You can object only if you stay in the Class. Excluding yourself from the Class is telling the Court that you don't want to be part of the Class. If you exclude yourself, you have no basis to object because the case no longer affects you.

THE COURT'S FINAL APPROVAL HEARING

19. When and where will the Court decide whether to approve the Settlement?

The Court will hold the Final Approval Hearing at [time] on **Month 00, 2023** in [TBD]. The purpose of the hearing will be for the Court to determine whether to approve the Settlement as fair, reasonable, adequate, and in the best interests of the Class; to consider the Class Counsel's request for attorneys' fees and expenses; and to consider the request for an incentive award to the Class Representative. At that hearing, the Court will be available to hear any objections and arguments concerning the fairness of the Settlement.

The hearing may be postponed to a different date or time without notice, so it is a good idea to check [website] or call 1-800-000-0000. If, however, you timely objected to the Settlement and advised the Court that you intend to appear and speak at the Final Approval Hearing, you will receive notice of any change in the date of such Final Approval Hearing.

20. Do I have to come to the hearing?

No. Class Counsel will answer any questions the Court may have. But, you are welcome to come at your own expense. If you send an objection or comment, you don't have to come to Court to talk about it. As long as you filed and mailed your written objection on time, the Court will consider it. You may also pay another lawyer to attend, but it's not required.

21. May I speak at the hearing?

Yes. You may ask the Court for permission to speak at the Fairness Hearing. To do so, you must include in your letter or brief objecting to the settlement a statement saying that it is your "Notice of Intent to Appear in *Armstead v. VGW Malta Ltd.*, Case No. XXXXXXX." It must include your name, address, telephone number and signature as well as the name and address of your lawyer, if one is appearing for you. Your objection and notice of intent to appear must be filed with the Court and postmarked no later than **[objection deadline]**, and be sent to the addresses listed in Question 17.

GETTING MORE INFORMATION

22. Where do I get more information?

This Notice summarizes the Settlement. More details are in the Settlement Agreement. You can get a copy of the Settlement Agreement at [website]. You may also write with questions to VGW Games Settlement, P.O. Box 0000, City, ST 00000. You can call the Settlement Administrator at 1-800-000-0000 or Class Counsel at 1-646-837-7150, if you have any

questions. Before doing so, however, please read this full Notice carefully. You may also find additional information elsewhere on the case website.

QUESTIONS? CALL 1-800-000-0000 TOLL FREE, OR VISIT [WEBSITE]

EXHIBIT E

Filed 22-CI-00553 12/01/2022 Clyde Gregory Sutton, Henderson Circuit Clerk

PLAN OF ALLOCATION

Each Settlement Payment will be comprised of (1) a Base Payment Amount, (2) *plus* a Supplemental Payment Amount, (3) *minus* the Settlement Class Member's share of any Fee Award, incentive awards to the Class Representatives, and Settlement Administration Expenses.

1. Base Payment Amounts.

Base Payment Amounts will be calculated by applying an escalating marginal recovery formula to the Settlement Class Member's Relevant Spending Amount. No Settlement Class Member will receive more than his or her Relevant Spending Amount.

Settlement Class Members who submit a valid claim will be subject to an escalating marginal recovery formula based on the percentages described in Figure 1 below.

Figure 1

Spend ($)	Marginal Rate (%)
5.00-1,000	10
1,000.01-10,000	17.5
10,000.01-100,000	30
100,000.01+	60

By way of example, an individual with a Relevant Spending Amount of $40,000 will be entitled to a Base Payment Amount of $8,273.12, calculated as: ((10% of their first $1,000 in spending [$100]) + (17.5% of their next $9,000 in spending ([$1,575)]) + (30% of their next $30,000 in spending [$9,000])) * (1 – (75% * 30%)). Settlement Class Members will have the ability to opt to receive an electronic payment via Venmo or PayPal, provided, however, that the default payment method will be check.

2. Proration.

In the event the sum of all Base Payment Amounts for Settlement Class members who submit a valid claim exceed the total amounts available for distribution in the Settlement Fund,

each individual's Base Payment Amount will be reduced proportionately. Proration of amounts due to Settlement Class Members from the Settlement Fund will be determined 30 days after the deadline for Settlement Class Members to file claims. *Pro rata* payments to Settlement Class Members shall be made within 60 days of the deadline for Settlement Class Members to file claims.

3. Supplemental Payment Amounts.

In the event there are available amounts remaining in the Settlement Fund after calculation of all Base Payment Amounts for Settlement Class members who have submitted a valid claim, Supplemental Payment Amounts will be calculated on a *pro rata* basis. Upon the close of the claims period, the sum of all unallocated amounts in the Settlement Fund (minus any amounts necessary to cover costs and fees) will be considered the Supplemental Payment Fund. The Supplemental Payment Fund will be apportioned *pro rata* to each Settlement Class Member who submitted a valid claim, based on the participating Settlement Class Member's Base Payment Amount. All payment amounts are subject to the deductions described in Section (3).

Regardless of Settlement Class Member participation rates, the sum of Base Payment Amounts and Supplemental Payment Amounts will equal the amounts available for distribution from the Settlement Fund.

3. Fee Award, Incentive Awards, and Settlement Administration Expenses.

Settlement Payment Amounts will be a Settlement Class Member's Base Payment Amount plus any Supplemental Payment Amount, minus that Settlement Class Member's share of any Fee Award, Incentive Awards and Settlement Administration Expenses, anticipated not to exceed 30% (cumulatively) of the Settlement Fund.

EXHIBIT F

COMMONWEALTH OF KENTUCKY
HENDERSON COUNTY CIRCUIT COURT

AMY JO ARMSTEAD, individually and on behalf of all others similarly situated, Plaintiff, v. VGW MALTA LTD. and VGW LUCKYLAND, INC., Defendant.	Case No. 2022-CI-00553

STIPULATION REGARDING UNDERTAKING RE: ATTORNEYS' FEES AND COSTS

Plaintiff Amy Jo Armstead and Defendants VGW Malta Ltd. and VGW Luckyland, Inc. ("Defendants") (collectively, "the Parties"), by and through and including their undersigned counsel, stipulate and agree as follows:

WHEREAS, Class Counsel's law firm Bursor & Fisher P.A. (the "Firm") desires to give an undertaking (the "Undertaking") for repayment of their award of attorney fees and costs, approved by the Court, and

WHEREAS, the Parties agree that this Undertaking is in the interests of all Parties and in service of judicial economy and efficiency.

NOW, THEREFORE, the undersigned, as agent for the Firm, hereby submits the Firm to the jurisdiction of the Court for the purpose of enforcing the provisions of this Undertaking.

Capitalized terms used herein without definition have the meanings given to them in the Settlement Agreement.

By receiving any payments pursuant to the Settlement Agreement, the Firm and its shareholders, members, and/or partners submit to the jurisdiction of the Henderson County Circuit Court, Commonwealth of Kentucky, for the enforcement of and any and all disputes

relating to or arising out of the reimbursement obligation set forth herein and the Settlement Agreement.

In the event that the Final Judgment or any part of it is vacated, overturned, reversed, or rendered void as a result of an appeal, or the Settlement Agreement is voided, rescinded, or otherwise terminated for any other reason, the Firm shall, within thirty (30) days repay to Defendant, based upon written instructions provided by Defendant's Counsel, the full amount of the attorneys' fees and costs paid to the Firm from the Settlement Fund, including any accrued interest.

In the event the attorney fees and costs awarded by the Court or any part of them are vacated, modified, reversed, or rendered void as a result of an appeal, the Firm shall within thirty (30) days repay to Defendant, based upon written instructions provided by Defendant's Counsel, the attorneys' fees and costs paid to the Firm and/or Representative Plaintiff from the Settlement Fund in the amount vacated or modified, including any accrued interest.

This Undertaking and all obligations set forth herein shall expire upon finality of all direct appeals of the Final Settlement Order and Judgment.

In the event the Firm fails to repay to Defendants any of attorneys' fees and costs that are owed to it pursuant to this Undertaking, the Court shall, upon application of Defendants, and notice to the Firm, summarily issue orders, including but not limited to judgments and attachment orders against the Firm, and may make appropriate findings for sanctions for contempt of court.

The undersigned stipulates, warrants, and represents that he has both actual and apparent authority to enter into this stipulation, agreement, and undertaking on behalf of the Firm.

This Undertaking may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. Signatures by facsimile shall be as effective as original signatures.

The undersigned declare under penalty of perjury under the laws of the United States that they have read and understand the foregoing and that it is true and correct.

IT IS SO STIPULATED THROUGH COUNSEL OF RECORD:

DATED: Sep 12, 2022

BURSOR & FISHER, P.A.

By: Philip L. Fraietta on behalf of Bursor & Fisher, P.A.
Attorneys for Plaintiff Amy Jo Armstead

DATED: Sep 11, 2022

PAUL HASTINGS LLP

Behnam Dayanim
Behnam Dayanim (Sep 11, 2022 11:48 EDT)

By: Behnam Dayanim
Attorneys for Defendants VGW Malta Ltd. and VGW Luckyland, Inc.

EXHIBIT B

9-28-2022

COMMONWEALTH OF KENTUCKY
HENDERSON CIRCUIT COURT
CIVIL ACTION NO. 22-CI-00553

AMY JO ARMSTEAD,
on behalf of herself and all others similarly situated, PLAINTIFF,

v.

VGW MALTA LTD, and
VGW LUCKYLAND INC., DEFENDANTS

PRELIMINARY ORDER APPROVING CLASS ACTION SETTLEMENT, CERTIFYING THE CLASS FOR SETTLEMENT PURPOSES, APPROVING NOTICE PLAN, APPOINTING CLASS REPRESENTATIVE, AND APPOINTING CLASS COUNSEL

WHEREAS, the above-captioned matter came before this Court upon the Parties' Joint Motion for Preliminary Approval of Class Action Settlement. Based upon the memoranda, exhibits, and all the files and proceedings herein, the Court finds as follows:

1. The Court grants preliminary approval of the Settlement based upon the terms set forth in the Settlement Agreement.

2. The settlement terms set forth in the Settlement Agreement appear to be fair, adequate and reasonable to the Settlement Class, and the Court preliminarily approves the terms of the Settlement Agreement, including:

a. The creation of a Settlement Fund of $11,750,000 should the Court ultimately grant final approval;

b. An Incentive Award, which shall not exceed $7,000 for Plaintiff Amy Jo Armstead;

c. Attorneys' fees, costs, and expenses to Class Counsel, which shall not exceed 30% of the Settlement Fund; and

d. Reasonable settlement administration expenses to be drawn from the Settlement Fund.

3. The Court grants the Parties' request for certification of the following KY CR 23 Settlement Class for the sole and limited purpose of implementing the terms of the Settlement Agreement, subject to this Court's final approval:

> All individuals who, in Kentucky (as reasonably determined by billing address information, IP address information, or other information furnished by VGW), spent $5.00 or more within a 24-hour period on Chumba Casino or Luckyland Slots, from March 17, 2017, through March 17, 2022.[1]

4. The Court preliminarily appoints Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A. as Class Counsel, and Plaintiff Amy Jo Armstead as Settlement Class Representative.

5. This Court approves, as to form and content, the notice of proposed class action settlement (the "Notice"), in substantially the form attached to the Settlement Agreement as Exhibits B, C and D. The Court approves the procedure for Settlement Class Members to opt out of, or object to, the Settlement as set forth in the Settlement Agreement Notice.

6. The Court directs the mailing of the Settlement Class Notice by email and/or First-Class U.S. mail to the Settlement Class Members in accordance with the schedule set forth below. The Court finds the dates selected for the mailing and distribution of the Notice, as set forth below, meet the requirements of due process and provide the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons entitled thereto.

[1] Excluded from the Settlement Class (1) any Judge or Magistrate presiding over this Action and members of their families; (2) Defendants, Defendants' subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendants or their parents have a controlling interest and their current or former officers, directors, agents, attorneys, and employees; (3) persons who properly execute and file a timely request for exclusion from the class; and (4) the legal representatives, successors or assigns of any such excluded persons.

Event	Proposed Deadline
Settlement Administrator to disseminate class notice pursuant to Settlement Agreement § 4.2 (a)	No later than twenty-eight (28) days after entry of Preliminary Approval Order
Settlement Administrator to send Reminder Notice via email	Both thirty (30) days prior to the Claims Deadline and seven (7) days prior to the Claims Deadline
Settlement Administrator to provide Notice on the settlement website	No later than seven (7) days after entry of Preliminary Approval

7. The Court appoints JND Legal Administration as the Settlement Administrator.

8. The Court adopts the following additional dates and deadlines:

   a. The deadline for Settlement Class Members to submit claims shall be March 6, 2023, which is no fewer than fifty-six (56) days following the Final Approval Hearing.

   b. Any Settlement Class Member wishing to be excluded from the Settlement Class shall have until December 15, 2022 to do so, which is no more than 45 days after the dissemination of the class notice and claims forms but no sooner than 14 days after Class Counsel submits papers supporting a Fee Award.

   c. Any Settlement Class Member wishing to object to the terms of the Settlement Agreement shall have until December 15, 2022 to do so, which is no more than 45 days after the dissemination of the class notice and claims forms but no sooner than 14 days after Class Counsel submits papers supporting a Fee Award.

d. Class Counsel shall file a memorandum of points and authorities in support of their motion for approval of attorneys' fees, costs, and expenses no later than December 1, 2022 (*suggested date 14 days prior to the Objection/Exclusion Deadline*).

e. Settlement Class Counsel shall file a memorandum of points and authorities in support of the final approval of the Settlement Agreement no later than December 26, 2022, fourteen (14) prior to the Final Approval Hearing.

f. A final settlement approval fairness hearing on the question of whether the proposed Settlement Agreement, attorneys' fees to Class Counsel, and the Settlement Class Representative's Incentive Award should be finally approved as fair, reasonable and adequate as to the members of the Settlement Class is scheduled for January 9, 2023 at 1:00 p.m. local time.

SO ORDERED this 3rd 22nd day of October, 2022

HON. KAREN L. WILSON
Henderson County Chief Circuit Judge

ENTERED 10-4-2022
C. GREGORY SUTTON, CLERK
BY D.C.

EXHIBIT C

Filed 22-CI-00553 12/01/2022 Clyde Gregory Sutton, Henderson Circuit Clerk

Bursor & Fisher, P.A. - Chumba Kentucky Gambling Expenses

$32,500.00	Mediation Expenses
$635.50	KY Bar Fees
$107.29	Travel & Lodging Expenses
$33,242.79	**Total Expenses**

Mediation Expenses

DATE	MATTER	AMOUNT	DESCRIPTION
2022.06.21	Chumba Kentucky Gambling	$32,500.00	Phillips ADR Enterprises, P.C.
		$32,500.00	**Total Mediation Expenses**

KY Bar Fees

DATE	MATTER	AMOUNT	DESCRIPTION
2022.09.14	Chumba Kentucky Gambling	$317.75	Kentucky Bar
2022.09.27	Chumba Kentucky Gambling	$317.75	Kentucky Bar
		$635.50	**Total KY Bar Fees**

Travel & Lodging Expenses

DATE	MATTER	AMOUNT	DESCRIPTION
2022.08.31	Chumba Kentucky Gambling	$55.00	888 Seventh Garage LLC
2022.08.31	Chumba Kentucky Gambling	$1.31	CitiBike
2022.08.31	Chumba Kentucky Gambling	$32.00	Grand Central Garage
2022.08.31	Chumba Kentucky Gambling	$18.98	Uber Trip
		$107.29	**Total Travel & Lodging Expenses**

EXHIBIT 2

Filed 22-CI-00553 12/01/2022 Clyde Gregory Sutton, Henderson Circuit Clerk

COMMONWEALTH OF KENTUCKY
HENDERSON CIRCUIT COURT
CIVIL ACTION NO. 22-CI-00553

AMY JO ARMSTEAD,
on behalf of herself and all others similarly situated, PLAINTIFF,

v.

VGW MALTA LTD, and
VGW LUCKYLAND INC., DEFENDANTS.

AFFIDAVIT OF AMY JO ARMSTEAD IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND EXPENSES AND ISSUANCE OF INCENTIVE AWARD

Affiant, Amy Jo Armstead, being first duly sworn, hereby declares as follows:

1. I have personal knowledge of the facts set forth in this declaration, and, if called as a witness, could and would competently testify thereto under oath.

2. I submit this Declaration in support of Plaintiff's Motion for Attorneys' Fees and Expenses and Issuance of Incentive Award.

3. I retained Bursor & Fisher P.A. ("Class Counsel") to prosecute my claims in this action on March 4, 2022. Class Counsel first served a demand on my behalf to Defendants on March 17, 2022.

4. I am a resident of the Commonwealth of Kentucky.

5. I played Defendants' "Chumba Casino" ("Chumba") and "Luckyland Slots" ("Luckyland") (together, the "Casino Games") within the Commonwealth of Kentucky, and lost approximately $7,000 in total.

6. From when my attorneys first served my demand on Defendants to present, I have actively represented the Class.

7. I was intricately involved in Class Counsel's investigation and prosecution of the claims at issue, and provided Class Counsel with documents and personal insight which enabled them to gain insight into the intricacies of Defendants' Casino Games.

8. I was actively involved in the settlement negotiation process, and discussed numerous offers from Defendants with Class Counsel.

9. I closely reviewed the terms of the Settlement, discussed it with my attorneys, and signed it. I approved the Settlement because I believe it is fair and in the best interests of the Class.

10. I have remained in regular communication with my attorneys, including exchanging emails, phone calls, responding to requests for information, and reviewing and signing papers when necessary. In addition, I was prepared to testify at deposition and trial, if necessary.

11. I have made substantial personal sacrifices for the benefit of the Class, and have spent hours in fulfilling my duties as Class Representative.

12. All of the time I contributed toward the successful prosecution of this case came at the expense of time I could have spent with friends or family.

13. At all times I understood that I would receive the same result as all of the other class members and that I was not entitled to or promised anything other than what all class members would receive; that my share of any settlement or judgment would be calculated on the same bases as all other class members.

14. I have never been promised nor have I ever expected anything in addition to what the class would receive. I was not promised an incentive award, and I did not make any decision in this case, including to accept the terms of the settlement, in exchange for anything other than what the class would receive through the settlement.

15. I have done my best to pursue this litigation and act in the best interests of the Settlement Class, which I agreed to represent. I believe the proposed settlement is in the best interests of the class, represents a fair and reasonable compromise, and should be approved.

I declare under penalty of perjury under the laws of the United States and the Commonwealth of Kentucky that the foregoing is true and correct. Executed on November 30 2022 at Henderson, Kentucky.

Further, Affiant sayeth naught.

Amy Jo Armstead

Amy Jo Armstead

State of Kentucky }
}
County of Henderson }

Subscribed and sworn before me by Amy Jo. Armstead on this 30th day of November, 2022.

My Commission expires: 1/24/26

Theresa M. Hawes ID# KYNP43426

Notary Public, Commonwealth of Kentucky

THERESA M. HAWES
NOTARY PUBLIC
ID# KYNP43426
COMMISSION EXPIRES
01-24-26
STATE AT LARGE, KENTUCKY

EXHIBIT 3

2015 WL 226112
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

COLLEGE RETIREMENT EQUITIES FUND, CORP., Appellant

v.

Richard Donald RINK, individually and on behalf of all others similarly situated; Stites & Harbison, PLLC; Joseph L. Hamilton; Marjorie A. Farris; Clark C. Johnson; Amy K. Jay; Cassandra Wiemken; Michael K. Kim; Vonda Kirby; Chadwick A. McTighe; Foley, Bryant, Holloway & Raluy, PLLC; Irvin D. Foley; Anthony Raluy; Stewart & Irwin, P.C.; Donn H. Wray; Bradley Skolnick; Nick Gahl; Mark Menkveld; Ray Biederman; M. Scott Barrett; and Barrett & Associates, Appellees

NO. 2012–CA–002050–MR
|
JANUARY 16, 2015; 10:00 A.M.

Synopsis
Background: After settlement of investors' class action against investment company arising out of company's delays in distributing investor funds, the Jefferson Circuit Court, Olu A. Stevens, J., awarded class counsel $7.5 million in attorney fees, calculated as approximately one-third of the total $22.4 million available to be claimed by class members. Company appealed.

Holdings: The Court of Appeals, Lambert, J., held that:

fee order adequately stated trial court's findings of fact and conclusions of law;

trial court did not abuse its discretion by awarding attorney fees calculated as a percentage of a common fund, rather than by the lodestar method;

fee award was reasonable under the circumstances; and

trial court's alleged failure to compare the attorney fee it awarded to an award calculated using the lodestar method did not render the award arbitrary.

Affirmed.

Procedural Posture(s): On Appeal.

APPEAL FROM JEFFERSON CIRCUIT COURT, HONORABLE OLU A. STEVENS, JUDGE, ACTION NO. 07–CI–010761

Attorneys and Law Firms

BRIEF FOR APPELLANT: Richard M. Sullivan, Kenneth A. Bohnert, Edward F. Busch, M. Tyler Reynolds, Louisville, Kentucky

BRIEF FOR APPELLEES, RICHARD DONALD RINK AND ALL OTHERS SIMILARLY SITUATED: Irvin D. Foley, Anthony Raluy, Louisville, Kentucky, Joseph L. Hamilton, Marjorie A. Farris, Clark C. Johnson, Louisville, Kentucky, Donn H. Wray, Indianapolis, Indiana

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

OPINION

LAMBERT, JUDGE:

***1** College Retirement Equities Fund appeals from the Jefferson Circuit Court's award of $7.5 million in attorneys' fees to class counsel in the underlying class action litigation. After careful review, we affirm.

College Retirement Equities Fund (CREF) is a New York corporation organized in 1952 as an investment company to allow its participants (largely school teachers) to purchase retirement annuities through investments in common stock. Dr. Richard Rink is a professor who, during his employment with the University of Louisville, maintained a retirement account administered through CREF at the University.

On October 30, 2006, Rink requested CREF to liquidate his account and transfer the proceeds to a broker. On that date, the value of the securities in Rink's account was $688,951.15. While certain CREF investment documents state that funds will be distributed within seven days of a liquidation request, the funds in Rink's account were

not distributed until December 15, 2006, at which time CREF transferred $690,052.13 to his broker. This amount represented $688,951.15, the account value on October 30, 2006, plus $1,100.98 in interest. However, Rink contended that during the delay in receiving his funds, his account appreciated by $19,082.28, and he should have received $709,134.00, which he claims was the account value on December 15, 2006.

The delay in transfer of Rink's funds was due to problems that started in 2005 when CREF began to replace its obsolete computerized record-keeping system with a new system. Due to these problems, the transfer requests of other CREF investors were similarly delayed from 2005 to 2008. When CREF became aware of the issue, it implemented a program to compensate all participants who experienced such delays, which included interest payments and other compensation.

Instead of accepting CREF's compensation, Rink filed a class action complaint against CREF, alleging that it breached its fiduciary duties and contractual obligations by retaining the amount his and other class members' accounts appreciated during distribution delays exceeding the seven day limit set forth in CREF's form contract. Discovery eventually revealed that CREF used gains from appreciated accounts to offset losses from other participants' accounts that depreciated during the delays, which during the three-year duration of CREF's computer glitch was substantial.

After five years of contentious litigation, the parties executed a settlement agreement on May 10, 2012. The circuit court entered an order giving final approval to the settlement agreement on September 6, 2012. The agreement did not create a specified or fixed sum of money to distribute to class members. Instead, the agreement provided that each settlement class member who submitted a valid claim form during a ninety-day claim period would receive the difference between the amount actually received and that which would have been received if the securities had been priced as of the date of actual distribution (plus 4% interest per annum). The settlement provided that CREF would pay the costs of class notice and claims administration, as well as any reasonable attorneys' fees and expenses the circuit court might award. Any fees that CREF paid would be in addition to the payment of claims and did not reduce the amount any class member received for his or her claim.

***2** During the claims period, it was estimated that approximately 28,000 class members were eligible to file a claim and that if 100% did so, CREF would pay about $22.4 million in claims. These numbers were estimates; however, under the settlement, there was no limit on what CREF was required to pay any individual class member or the settlement class as a group. During the claim period, the settlement class members submitted $16.15 million in claims, which CREF has paid.

On July 2, 2012, class counsel filed a motion requesting that the circuit court award them $8.5 million in attorneys' fees and up to $150,000 in expenses. During briefing on the issue, class counsel reduced their fee request to $7.5 million. Counsel based their motion on a "percentage of fund" method, arguing that $7.5 million in fees was a reasonable percentage (one-third) of what counsel contended was a $22.4 million "common fund" that the settlement allegedly created for the class. CREF opposed the motion on the ground that the fee sought was excessive.

On September 6, 2012, the circuit court held a fairness hearing to address the motion for attorneys' fees. The circuit court entered an order on September 25, 2012, awarding class counsel $7.5 million in attorneys' fees and up to $150,000.00 in costs and expenses. The court stated that the fee award was warranted under the "common fund doctrine" as codified in Kentucky Revised Statutes (KRS) 412.070 and was determined based on a percentage of the fund, plus reasonable expenses. The court found that "[a] fee award of approximately one-third of the total fund available for a payment to the settlement class is well-within the range of appropriate percentage fees in an action of this nature."

In October 2012, CREF moved the circuit court to make additional findings with respect to its September 25, 2012, order. The circuit court denied that motion on November 1, and on November 16, 2012, CREF filed a notice of appeal seeking review of the September 25, 2012, and November 1, 2012, orders.

On appeal, CREF argues that the circuit court's award of attorneys' fees is erroneous and excessive for several reasons. First, CREF argues that the settlement in the underlying class action did not create a common fund but instead created a "claims-made" settlement with no cap, under which CREF paid the aggregate amount of all individual valid claims. Since the ultimate amount payable was not known at the time of the fee motion and fairness hearing and was not in a set/fixed amount against which claims were made and paid, CREF argues the circuit court should have used the lodestar method

(multiply attorney hours by a reasonable hourly rate) to set the fees, under which a reasonable fee would be, at most, $5.06 million.

Next, CREF alleges that the circuit court failed to conduct a lodestar crosscheck to ensure that its percentage award did not produce an excessive effective hourly rate. CREF contends that this crosscheck shows that the $7.5 million in fees, when divided by class counsel's 5,074 hours in the case, produces an exorbitant hourly rate of almost $1,500 for each hour of time recorded by each partner, associate, and paralegal of class counsel's three separate law firms.

CREF argues that the circuit court misapplied the percentage-of-fund method and KRS 412.070, since the rule is that the fee should have been based on a percentage of the $16.1 million in claims actually paid to class members, and not, as the court's fee was, on a theoretical $22.4 million "phantom fund" that only would have been paid if 100% of the members had filed claims.

***3** Finally, CREF argues that even if the percentage-of-fund method had been the proper method to apply, the circuit court's one-third (33%) percentage is excessive, because it is significantly higher than recently awarded percentages.

Kentucky Rules of Civil Procedure (CR) 23.08 governs the award of attorneys' fees in a certified class action. CR 23.08(3) states that when a trial court awards fees in a class action, it must find the facts and state its legal conclusion under CR 52.01. Furthermore, when awarding fees in class actions, the trial court must also explain its "reasons for adopting a particular methodology." *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir.2009) (internal citation omitted).

CREF initially argues that the circuit court's September 25, 2012, fee order does not specifically find facts and does not state separately any conclusions of law. Further, CREF argues that the circuit court did not explain its reasons for adopting the percentage method to award a fee, and that it instead simply stated in a conclusory fashion that "a proper award would be one based on a percentage of the fund." CREF argues that the circuit court then summarily denied its motion to make additional fact findings as to what factors the court used to determine the fee awarded and whether a lodestar crosscheck was used to award fees. CREF urges this Court to conclude that the circuit court's ruling was arbitrary and vacate it.

A review of the record indicates that the circuit court did adequately state its findings of fact and conclusions of law supporting the attorneys' fees awarded to class counsel in its September 25, 2012, order. In fact, in its order, the circuit court indicated that it found the results obtained for the settlement class by class counsel to be exceptional. The court noted that any attorneys' fees awarded would be on top of the payments to the settlement class and thus that any award of fees would not reduce the recovery to the settlement class.

The circuit court also explained that class counsel was competent and experienced in class action litigation and that they were diligent and competent in prosecuting the action. The court described the underlying class action as "hard-fought litigation in which CREF raised numerous challenges to the claims presented and to the class certification efforts and in which CREF's objections and actions additionally necessitated a number of discovery disputes."

The circuit court held that this was a case in which an award of attorneys' fees and expenses was warranted under the common fund doctrine, as codified in KRS 412.070, and a proper award would be one based on a percentage of the fund, plus reasonable expenses. The circuit court then held that an award of $7.5 million plus actual costs incurred up to a limit of $150,000.00 was reasonable. The court noted that a fee award of approximately one-third of the total fund available for payment to the settlement class was well within the range of appropriate percentage fees in an action of this nature.

A review of the court's order awarding attorneys' fees indicates that the circuit court did support its award with written findings of fact and conclusions of law supporting its award of fees to class counsel. Additionally, the court did explain its reasons for adopting a particular methodology. Therefore, we find CREF's argument that the order awarding attorneys' fees was arbitrary or was clear error to be without merit. We find no error in this regard.

***4** CREF next argues that the circuit court's use of the percentage method to award fees was arbitrary since the settlement in this case was a claims-made settlement that did not create a common fund.

In order to address this argument and CREF's remaining arguments on appeal, a brief background about attorneys' fees in class action cases is helpful. Under CR 23.08, the trial court in a certified class action is to approve or award

"reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." When doing so, the court's primary concern should be to attract competent counsel but not produce windfalls to attorneys. *See Reed v. Rhodes,* 179 F.3d 453, 471 (6th Cir.1999). Even when fees are authorized by the parties' agreement, courts have an independent obligation to ensure that the award is reasonable. *In re Bluetooth Headset Products Liability Litig.,* 654 F.3d 935, 941 (9th Cir.2011).

While no Kentucky appellate court has addressed how a trial court is to determine a reasonable fee under CR 23.08, federal courts awarding fees in class actions use two methods, lodestar and percentage-of-fund. The lodestar method sets a fee by multiplying the reasonable hours expended by the reasonable hourly rate. In the percentage-of-fund method, the fee is expressed as a percentage of a set or fixed "common fund," whether the fund is obtained by judgment or settlement.

CREF contends that some courts express preference for the percentage method in class actions with a true common fund, while other courts hold that lodestar must be used. *See Longden v. Sunderman,* 979 F.2d 1095, 1099 (5th Cir.1992). CREF argues that a majority of courts hold that either method is acceptable in any case, even when a settlement creates a common fund. *See Rawlings v. Prudential–Bache Properties, Inc.,* 9 F.3d 513, 516 (6th Cir.1993); *Johnston v. Comerica Mort. Corp,* 83 F.3d 241, 246 (8th Cir.1996) (either method proper). CREF contends that the more appropriate method should be used in light of the unique circumstances of each case. CREF argues that even if the percentage-of-fund method is used, a trial court should use the lodestar method as a cross-check to ensure a percentage-of-fund award is not excessive and does not produce an effective hourly rate that is unreasonably high, citing *Goldberger v. Integrated Resources, Inc.* 209 F.3d 43, 50 (2nd Cir.2000).

In support of its argument that the settlement award in this case did not create a common fund, CREF contends that the circuit court referred to a "total fund available for payment to the settlement class," referring to the $22.4 million CREF would have paid if 100% of the class members filed a claim, and awarded a fee of 1/3 of that amount ($7.5 million). CREF posits that the circuit court's order was based on a finding that this hypothetical $22.4 million "phantom fund," which was never paid because only $16.1 million in claims were filed during the claim period, was a common fund out of which a percentage-of-fund fee award could be made. CREF contends that this is clearly erroneous because a common fund exists only when a settlement specifies a specific or defined sum of money, which it argues is not the case here because the settlement is a claims-made agreement in which CREF's total money obligation was not specified and in fact was unlimited since every class member was to be paid the amount of their filed claim.

***5** CREF explains that the only "fund" ever created and explicitly named as such under the agreement was the money it deposited into an escrow account for distribution to class members. The amount to be deposited was not specified and not known until after the ninety-day claim period, at which time claims administrator BMC Group informed CREF of the total amount of the individually-approved claims. On the "funding date," (seven days after the final order approving the settlement became final), CREF deposited the total amount of the individually-approved claims ($16.1 million) into the escrow account of the claims administrator, which then issued a check to each claimant.

CREF contends that the $22.4 million "phantom fund" referred to by the circuit court was not a common fund, as it never actually existed. However, CREF argues the $16.1 million in escrow money also was not a common fund since the amount deposited was an aggregation of many previously-approved and individually-earmarked monies, which the claims administrator paid to each class member. Claims were not distributed from a set fund; rather, the escrow account was the accumulation of many individually-approved claims. CREF argues that such claims-based settlement funds are not considered by courts to be common funds.

The Appellees counter that the circuit court properly applied the percentage-of-fund method in determining the fee award. In support of this, the Appellees argue that in awarding attorneys' fees in class action litigation, courts have long recognized that a "lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee from the fund as a whole." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). The Appellees posit that this common fund doctrine is codified under KRS 412.070(1). That statute states:

> (1) In actions for the settlement of estates, or for the recovery of money or property held in joint

> tenancy, coparcenary, or as tenants in common, or for the recovery of money or property which has been illegally or improperly collected, withheld or converted, if one (1) or more of the legatees, devisees, distributees or parties in interest has prosecuted for the benefit of others interested with him, and has been to trouble and expense in that connection, the court shall allow him his necessary expenses, and his attorney reasonable compensation for his services, in addition to the costs. This allowance shall be paid out of the funds recovered before distribution. The persons interested shall be given notice of the application for the allowance, provided, however, that if the court before whom the action is pending should determine that it is impracticable and too expensive to notify all of the parties individually, then by order of said court, personal notice may be dispensed with and in lieu thereof, notice of the application shall be given by an advertisement pursuant to KRS Chapter 424.

The Appellees contend that courts that have considered class settlements like the one at issue in this case have referred to them as "constructive common fund" cases and analyze fee entitlement as a percentage-of-fund created by the labors of counsel, citing *Guschausky v. Am. Family Life Assur. Co. of Columbus,* 851 F.Supp.2d 1252, 1257 (D.Mont.2012). [1]

The Appellees note that even though the exact amount available to settlement class members can be quantified to the penny and was fully known to the circuit court at the time it entered the fee award, CREF contends that it was a "hypothetical phantom fund." The Appellees argue that there was no hypothetical phantom fund, as the fund was easily ascertainable. In support of this, the Appellees note that prior to the hearing in this case, the court was presented with the affidavit of CREF's own employee, Sandra Kong, who verified that the total amount available for settlement class members was $22,406.753.27, which they contend is hardly "hypothetical" or "phantom." The court expressly stated in the fee award, "[t]he total value of the settlement for the approximately 26,188 settlement class members currently identified is approximately $18 million, before accounting for at least four years of interest which would increase that total to $22.4 million." The Appellees argue that although CREF's own witness verified the creation of this $22.4 million fund, CREF mistakenly asserts that a common fund only exists when a settlement specifies a specified or defined sum of money.

***6** The Appellees contend that CREF ignores the fact that the full amount available to settlement class members was readily ascertainable and known to the circuit court at the time it entered the fee award and misstates the law in its brief. They argue that courts *do* recognize the use of the percentage-of-fund methodology in awarding attorneys' fees in a class action *even if no formal fund is created,* so long as the court can reasonably determine the settlement value, citing *Shaffer v. Continental Cas. Co.,* 362 Fed.Appx. 627, 631 (9th Cir.2010). The Appellees argue that the fact that the settlement is uncapped or the fact that every class member will be paid upon filing a claim does not change the character of a settlement. What is important is that the value of the settlement can be ascertained. If so, the Appellees argue, it is appropriate to base a fee award upon a percentage of the benefits available to settlement class members.

The Appellees further argue that the constructive common fund doctrine was created to address the economic benefit conferred on settlement class members when attorneys' fees are paid separately. "The award to the class and the agreement on attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class recovery." *Johnston v. Comerica Mortgage Corp.,* 83 F.3d 241, 246 (8th Cir.1996). The Appellees contend that since each settlement class member receives a higher net recovery than if assessed a portion of the attorneys' fee from a "traditional" common fund, each settlement class member receives a quantifiable benefit. Accordingly, the attorneys' fees and class settlement proceeds are aggregated for determining the value of the constructive common fund. *Guschausky,* 851 F.Supp.2d at 1257 ("When attorneys' fees are paid independently, the aggregate amount of attorneys' fees and class settlement payments may be viewed as a 'constructive common fund' ").

We agree with the Appellees that CREF attempts to exalt form over substance in asking this Court to find that the circuit court abused its discretion in awarding the attorneys' fees as a percentage-of-fund. The reality is that in the underlying settlement, the class members received a benefit that was far better than it would have been had a cap been established. The settlement in this case insured that the class members did not have their recovery reduced in any way to pay for the services provided by class counsel. Therefore, we find no error in the circuit court treating the settlement in this case as a constructive common fund.

A review of the record indicates that the constructive common fund in this settlement included the total amount available to settlement class members ($22,406,753.27), plus the $7,500,000.00 fee, plus expenses in the amount of $114,922.09, for a total constructive common fund of $30,021,675.36. The $7.5 million fee represents 25% of the constructive common fund. Federal Courts within Kentucky and the Sixth Circuit universally recognize that "the percentages awarded in common fund cases typically range from 20 to 50 percent of the common fund awarded." *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.,* 234 F.R.D. 627, 633 (W.D.Ky.2006). *See also Enterprise Energy Corp. v. Columbia Gas Transmission Corp.,* 137 F.R.D. 240, 249 (S.D.Ohio 1991).

CREF also argues that the fee award in the instant case is not compatible with KRS 412.070, because it is based on the amount available to settlement class members, instead of the amounts actually claimed by settlement class members. It is not disputed that the labors of class counsel created the $22,406.753.23 pool available for distribution to settlement class members. KRS 412.070 provides that attorneys' fees are to be paid "out of the funds recovered *before distribution.*" (Emphasis added). "The words of [a] statute are to be given their usual, ordinary, and everyday meaning." *Gateway Construction Co. v. Wallbaum,* 356 S.W.2d 247, 249 (Ky.1962) (internal citation omitted). We agree with the Appellees that the statute recognizes the practical reality that a common fund attorney fee under KRS 412.070 should be measured *before* determining payment to individual claimants. Indeed, this interpretation of KRS 412.070 is entirely consistent with United States Supreme Court precedent.

***7** In *Boeing, supra,* the United Supreme Court held that attorneys' fees were appropriately determined as a percentage of the entire amount obtained for the class even though some class members failed to make claims for their individual damages. "[Absentee class members'] right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel." *Boeing,* 444 U.S. at 480–81. Because all class members receive a benefit with this type of settlement (including class members who choose not to take advantage of it) a majority of courts have awarded attorneys' fees based upon the amount that would be recovered if every class member makes a claim, regardless of whether the claims are filed. *See, e.g., Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423 (2nd Cir.2007); *Williams v. MGM–Pathe Commun. Co.,* 129 F.3d 1026 (9th Cir.1997).

Based on the above, we cannot say that the circuit court's decision to utilize a percentage-of-fund method based upon a constructive common fund was arbitrary or an abuse of discretion. A review of the applicable case law from the various jurisdictions indicates that either method was appropriate, as long as the circuit court based its decision on the facts presented by the underlying settlement and the benefits the class members received as a result of the efforts of class counsel, which was clearly the case here.

Next, CREF argues that the percentage awarded by the circuit court was too high. CREF argues that regardless of what the proper size of the fund was, the circuit court's use of one-third (33%) as the proper percentage was erroneous. In support of this, CREF argues that in securities class actions that awarded fees based off the percentage-of-fund method, the recent trend is for courts to award less than 20% of a common fund. CREF contends that even courts that award slightly more than 20% consider 25% as the benchmark percentage in securities cases, citing *City of Pontiac General Employees Retirement Systems,* 2013 WL 3796658 (S.D.N.Y.). There, the court reduced a fee request of 33% of $19.5 million to a "fee award at the increasingly used benchmark of 25%." CREF contends that the $7.5 million awarded as fees in this case is 46% of the $16.1 million that class members received under the settlement, which is excessive.

Again we agree with the Appellees that the attorneys' fees awarded by the circuit court were reasonable under the circumstances and were supported by the record in this case. Given the varying amounts of attorneys' fees awarded in similar types of class action litigation, we cannot say that an award of one-third of the constructive common fund was erroneous. Had the circuit court determined that the

circumstances of this litigation warranted fees of only 25% of the settlement amount, it would have been in its discretion to do so. Awarding 25–30% of the settlement amount was not arbitrary and was supported by the evidence in this case.

Finally, CREF argues that the circuit court should have checked the award of attorneys' fees by comparing it to an award of fees calculated using the lodestar method. CREF alleges that its failure to compare the two methods in its written order renders the circuit court's order arbitrary and therefore an abuse of discretion.

In support of this argument, CREF contends that a lodestar fee is determined by multiplying the reasonable attorney hours expended by a reasonable hourly rate. CREF notes that the base lodestar for the three law firms comprising class counsel is $1.685 million for 5,073.9 hours time, giving a blended hourly rate of $332.00. In this case, the circuit court awarded a percentage fee of $7.5 million, which is 4.45 times the base lodestar fee ($7.5 million divided by 1.685 million). The 4.45 figure is known as a "multiplier" because the lodestar of $1.65 million is "multiplied" by 4.45 to reach the $7.5 million fee awarded by the circuit court. In effect, this means the circuit court awarded a fee that is 4.45 times what class counsel's legal services are worth in the legal market. CREF contends that even if a modest lodestar multiplier was appropriate, the 4.45 multiplier that the circuit court's $7.5 million fee produces results in an effective hourly rate of $1,500.00.

***8** CREF urges this Court to consider the court's analysis in *Hall v. Children's Place Retail Stores,* 669 F.Supp.2d 399 (S.D.N.Y.2009), where the court awarded a fee of 15% (instead of the requested 27% herein) of a $12 million settlement fund. The awarded fee produced a lodestar multiplier of 2.08, while the requested fee would have produced a 3.75 multiplier. The court noted that "more recent cases reveal[ ] a trend toward awarding more modest fees" and that "an award of one-third of the settlement fund is not always justified where that percentage amounts to a lodestar multiplier of substantially more than 2.0." *Id.* at 403–404. CREF contends that this action was a typical securities and breach of contract case and did not present any difficult or complex issues. Therefore, any multiplier of more than 2.0 over lodestar is difficult to justify since it would still produce a base lodestar fee of $3.3 million (2.0 × $1.685 million) and an effective hourly rate of $650 ($3.3 million divided by 5,074 hours).

CREF argues that because the $7.5 million fee awarded produces an unreasonable $1,500.00 hourly rate, the circuit court's refusal to use the lodestar method, at least as a cross-check to avoid that outcome, is arbitrary and should be reversed.

The record in this case indicates that CREF presented the lodestar method to the circuit court in its arguments below. Furthermore, CREF presented its argument that the circuit court should utilize the lodestar at least as a cross-check to the court below. Accordingly, the circuit court considered CREF's arguments regarding the reasonableness of the attorneys' fees and awarded the fee it thought reasonable, given the complexity of the case and the effectiveness of class counsel. The circuit court specifically detailed this reasoning in its written order, which it was required to do. Because the circuit court supported its conclusions of law with substantial findings of fact, we cannot say that its reasoning was arbitrary.

It is well-settled that the circuit court has discretion to determine the "appropriate method for calculating attorneys' fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *Rawlings,* 9 F.3d at 516. This Court reviews an award of attorneys' fees for an abuse of discretion. *Id.* This highly deferential standard of review recognizes the trial court's superior understanding of the litigation. *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Absent a clear abuse of discretion that is not supported by the record and the facts of the underlying litigation, we will not disturb a circuit court's award of attorneys' fees in a complex class action.

Finding no abuse of discretion, we affirm the circuit court's September 25, 2012, order.

STUMBO, JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

All Citations

Not Reported in S.W. Rptr., 2015 WL 226112

Footnotes

1 *Guschausky* was later vacated based on AFLAC's motion for relief under Federal Rule of Civil Procedure (FRCP) 60.02(b)(6), which showed that the common fund amount was erroneous. However, the court did not retract its analysis on the constructive common fund.

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EXHIBIT 4

Positive
As of: November 21, 2022 4:21 PM Z

In re F&M Distribs., Inc. Sec. Litig.

United States District Court for the Eastern District of Michigan, Southern Division

June 29, 1999, Decided ; June 29, 1999, Filed

Case number 95-CV-71778-DT

Reporter
1999 U.S. Dist. LEXIS 11090 *; Fed. Sec. L. Rep. (CCH) P90,621

IN RE F&M DISTRIBUTORS, INC. SECURITIES LITIGATION,

Disposition: [*1] Attorneys' motion for final approval of settlement granted. Attorneys' request for award of attorneys fees and expenses granted in part and denied in part. Request for reimbursement of $ 584,951.20 in expenses granted.

Core Terms

settlement, attorney's fees, settlement fund, mediator, awards, skill, thirty percent, class action, percent, factors, parties, expenses, offering, Merits, courts, final approval, excellent, damages, hourly

Case Summary

Procedural Posture

Attorneys for the plaintiff class filed for final approval of the proposed settlement, attorney fees or a lodestar award, reimbursements, and an incentive award for the class representatives in an action for violations of the state's Uniform Securities Act, *Mich. Comp. Laws § 451.810(b)*, the Securities Act of 1933, *15 U.S.C.S. §§ 77K*, *771(2)*, and *77o*, the Securities Exchange Act of 1934, *15 U.S.C.S. §§ 78j(b)* and *78t*, and SEC Rule 10b.

Overview
The attorneys for plaintiff class sought approval of the proposed settlement, as well as attorney fees, reimbursements, and an incentive award for the class representatives. The court determined that the proposed resolution was fair, reasonable, adequate, and in the public interest as well as in the best interests of the class members. Therefore, the settlement was approved. As to fees, it concluded that the percentage of the fund method should be applied because the lodestar method was too cumbersome, and consumed too many of the court's resources. Further, the percentage approach more accurately reflected the result achieved. After evaluating all factors, the court awarded thirty percent of the settlement fund as reasonable fees based on the results obtained. They also awarded thirty percent of the interest earned on the settlement fund. Additionally, the attorneys' request for reimbursement was granted, and the class representatives were granted an incentive award.

Outcome
The court found the settlement to be suitable, and awarded thirty percent of the fund and interest earned as attorney fees, granted the reimbursement request, and awarded the class representatives an incentive award.

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN1[] **Class Actions, Compromise & Settlement**

Pursuant to the mandate in *Fed. R. Civ. P. 23(e)*, the court is required to determine if a class action settlement is fair, reasonable, adequate, and in the public interest before giving it final approval.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > American Rule

Civil Procedure > ... > Class Actions > Derivative Actions > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN2[] Basis of Recovery, American Rule

A lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. This approach has been used extensively in derivative shareholder litigation.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN3[] Attorney Fees & Expenses, Reasonable Fees

An award of attorneys' fees lies within the discretion of the court, and it must not rubber stamp applications for attorneys' fees. Rather, courts that are called upon to review fee requests carry the responsibility of ensuring that such awards are reasonable. As a consequence, trial courts use a percentage of the fund calculation, or a lodestar/multiplier approach. Either method must be applied with care. The interest of class counsel in obtaining fees is adverse to the interest of the class because the fees come out of the common fund set up for the benefit of the class. In addition, there is often no one to argue for the interests of the class. Finally, when awarding attorneys fees, district courts must provide a clear statement of the reasoning used in adopting a particular methodology, as well as the factors that were considered in arriving at the fee.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN4[] Remedies, Costs & Attorney Fees

When using a percentage of the fund approach to calculate attorneys' fees, twenty five percent has traditionally been the benchmark standard, with the ordinary range for attorney's fees between twenty and thirty percent.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN5[] Attorney Fees & Expenses, Reasonable Fees

When determining the reasonableness of an attorney fee request, trial courts are instructed to consider the value of the benefit rendered to the corporation or its stockholders, society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others, whether the services were undertaken on a contingent fee basis, the value of the services on an hourly basis, the complexity of the litigation, and the professional skill and standing of counsel involved on both sides.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN6[] Costs & Attorney Fees, Costs

Expense awards are customary when litigants have created a common settlement fund for the benefit of a class.

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN7[] Class Actions, Class Attorneys

Incentive awards for the class representatives are common in class actions where common funds have been created.

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For MARGARET ACREE, plaintiff: Bruce E. Gerstein, Barry S. Taus, PENDING APP., Noah J. Silverman, PENDING APP., Garwin, Bronzaft, New York, NY.

For MARGARET ACREE, plaintiff: Elwood S. Simon, John P. Zuccarini, Elwood S. Simon Assoc., Birmingham, MI.

For MARGARET ACREE, plaintiff: Lionel Z. Glancy, Los Angeles, CA.

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For RANDOLPH J. AGLEY, MICHAEL T. TIMMIS, EARL T. WEISSERT, LAURA C. KENDALL, FRANK M. JERNEYCIC, WAYNE C. INMAN, TALON,

INCORPORATED, defendants: Jerold S. Solovy, J. Kevin McCall, Jenner & Block, Chicago, IL.

For RANDOLPH J. AGLEY, MICHAEL T. TIMMIS, EARL T. WEISSERT, LAURA C. KENDALL, FRANK M. JERNEYCIC, WAYNE C. INMAN, TALON, INCORPORATED, defendants: K. Scott Hamilton, Dickinson, **[*2]** Wright, Detroit, MI.

For EUGENE DRIKER, ARCHIE A. VAN ELSLANDER, B. JOSEPH WHITE, defendants: Leonard B. Shulman, Keywell & Rosenfeld, Troy, MI.

For EUGENE DRIKER, ARCHIE A. VAN ELSLANDER, B. JOSEPH WHITE, defendants: David L. Schiavone, Christopher Q. King, Sonnenschein, Nath, Chicago, IL.

For PAINEWEBBER, INCORPORATED, MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, defendants: E. Michael Bradley, Jones, Day, New York, NY.

For PAINEWEBBER, INCORPORATED, MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, defendants: Dennis K. Egan, Egan & Mazarra, Troy, MI.

For TIMMIS AND INMAN L. L. P., defendant: Brian D. Einhorn, Morton H. Collins, Gerald A. Pawlak, Collins, Einhorn, Southfield, MI.

Judges: Honorable Julian Abele Cook, Jr., United States District Court.

Opinion by: Julian Abele Cook, Jr.

Opinion

CLASS ACTION

OPINION AND ORDER

I.

On April 21, 1999, the attorneys for the plaintiff class (the attorneys) filed a motion, in which they ask the Court to give its final approval of the parties' proposed global settlement of the issues in controversy.

This case involves a claim by the Plaintiffs, Margaret Acree and Daniel Dismondy, who, acting on behalf **[*3]** their class members, filed a complaint, in which they accused the Defendants of having falsely portrayed the vitality of F&M's business in the Prospectus and Registration Statement for the offering ("Offering") of certain notes ("Notes"), and in their public disclosures regarding the Offering, in violation of Sections 11, 12(2) and 15 of the Securities Act of 1933, *15 U.S.C. §§ 77K*, *771(2)*, and *77o*; Sections 10(b)and 20(a) of the Securities Exchange Act of 1934, *15 U.S.C. §§ 78j(b)* and *78t*; and Rule 10b of the Securities and Exchange Commission. The Plaintiffs also charged the Defendants with failing to disclose material facts that substantially impaired the ability of F&M to repay the purchasers of its Notes. In addition, they contend that some of the Defendants directly or indirectly controlled the activities of F&M in its sale of the Notes, in violation of Michigan's Uniform Securities Act, *Mich. Comp. Laws § 451.810(b)* (MUSA).

The proposed resolution of the dispute, which the parties seek to have approved by the Court, contains a Settlement Fund in the amount of $ 20.25 million. [1] ***HN1***[↑] Pursuant to the mandate in *Fed. R. Civ. P. 23(e)*, this **[*4]** Court is required to determine if a class action settlement is fair, reasonable, adequate, and in the public interest before giving it final approval. *Bailey v. Great Lakes Canning, Inc., 908 F.2d 38, 42 (6th Cir. 1990)*. Having conducted a hearing on the Plaintiffs' motion for final approval of the settlement, [2] the Court determines that their proposed resolution is fair, reasonable, adequate, and in the public interest as well as in the best interests of the class members. Therefore, the motion is granted and the Court will approve the settlement pursuant to the terms of a Final Judgment Order that has been entered this same day.

[*5] II.

On April 30, 1999, the attorneys filed an application for an award of attorneys fees and expenses. Specifically, they

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[1] According to the attorneys, the Settlement Fund contained approximately $ 20.6 million, as of the date on which this motion was filed. Their estimate was based, in part, upon the accumulation of interest and the payment of nearly $ 200,000 in taxes.

[2] All of the parties in interest were advised that the hearing on the instant motion would take place in the Eastern District of Michigan. Due to other scheduling obligations of the Court, the hearing took place in the District of South Carolina, at the United States Courthouse in Beaufort, South Carolina. However, the courtroom in the Eastern District of Michigan was open, staffed, and equipped with a telephone connection to the United States Courthouse in Beaufort, South Carolina for the purpose of accommodating and responding to the concerns of any person who expressed a desire to participate in the hearing, such as to place objections to the settlement in the record. Other than a representative who served as a counsel for the Plaintiffs' class, no person visited the courtroom in the Eastern District of Michigan in conjunction with this hearing.

request a fee in the amount of one-third of the Settlement Fund. Alternatively, the attorneys ask for a lodestar award on the basis of their customary hourly fees along with a 1.35 multiplier. Under the percentage-of-the-fund and lodestar approaches, the attorneys have also petitioned this Court for a pro rata share of the interest that has accumulated on the Settlement Fund. In addition, they ask to obtain a reimbursement for $ 584,951.20 in expenses and an incentive award of $ 7,500 for each of the class representatives.

For the reasons that have been set forth below, this motion is granted in part and denied in part. As specified in the Final Judgement Order, the Court grants an award of fees to the attorneys in the amount of thirty percent of the Settlement Fund, in addition to their requests for reimbursement and incentive awards.

A.

As part of their application for final approval of the proposed settlement, the attorneys have asked for an award of attorney fees in the amount of one-third of the Settlement Fund under the theory that "HN2[] a lawyer who recovers **[*6]** a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." [3] *Boeing Co. v. Van Gemert, 444 U.S. 472, 478, 62 L. Ed. 2d 676, 100 S. Ct. 745 (1980)*; see *Mills v. Electric Auto-Lite Co., 396 U.S. 375, 393-97, 24 L. Ed. 2d 593, 90 S. Ct. 616 (1970)*. This approach has been used extensively in derivative shareholder litigation. *Mills, 396 U.S. at 394*.

HN3[] An award of attorneys' fees lies within the discretion of the court. *Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188, 1196 (6th Cir. 1974)*, **[*7]** cert. denied, *422 U.S. 1048, 45 L. Ed. 2d 700, 95 S. Ct. 2666 (1975)*. Courts are admonished not to "rubber stamp" applications for attorneys' fees. *Wise v. Popoff, 835 F. Supp. 977, 979 (E.D. Mich. 1993)*. Rather, those courts that are called upon to review fee requests carry the responsibility of ensuring that such awards are "reasonable under the circumstances." See *Rawlings v. Prudential-Bache Properties, Inc., 9 F.3d 513, 516 (6th Cir. 1993)*; *Wise, 835 F. Supp. at 979*. As a consequence, trial courts within the Sixth Circuit are allowed to use (1) a percentage of the fund calculation, or (2) a lodestar/multiplier approach. *Rawlings, 9 F.3d at 516*. Either method must be applied with care because attorney fee awards in securities litigation raise some concerns that are different from those which exist in other fee shifting cases:

> the interest of class counsel in obtaining fees is adverse to the interest of the class in obtaining recovery because the fees come out of the common fund set up for the benefit of the class. In addition, there is often no one to argue for the interests of the class **[*8]** (that their recovery should not be unfairly reduced) . . . .

Rawlings, 9 F.3d at 516. Finally, when awarding attorneys fees, district courts must provide a clear statement of the reasoning that is used in adopting a particular methodology, as well as the factors that were considered in arriving at the fee. *Rawlings, 9 F.3d at 516*; see *Hensley v. Eckerhart, 461 U.S. 424, 437, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)* ("It remains important . . . for the district court to provide a concise but clear explanation of its reasons for the fee award.").

In deciding how to calculate a reasonable attorney fee in the case at bar, the Court concludes that the percentage-of-the-fund method should be applied for two reasons. First, the lodestar method is too cumbersome and time-consuming of the resources of the Court. See *Rawlings, 9 F.3d at 516-17*. Second, and more importantly, the "percentage of the fund" approach "more accurately reflects the result achieved." *Id. at 516*.

HN4[] When using a percentage-of-the-fund approach to calculate attorneys' fees, twenty-five percent has traditionally been the benchmark **[*9]** standard, "with the ordinary range for attorney's fees between 20-30%." *Fournier v. PFS Inv., Inc., 997 F. Supp. 828, 832 (E.D. Mich. 1998)* (citing *Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989)*); *In re Crazy Eddie Sec. Litig., 824 F. Supp. 320, 326 (E.D.N.Y. 1993)*; Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, *43 Stan. L. Rev. 497, 536* & n.155, 541 (1991) [hereinafter Do the Merits Matter?]. Awards in this Circuit appear to be consistent with this trend. Compare In re Michigan Nat'l Corp. Sec. and ERISA Litig., No. 95-CV-70647 (E.D. Mich. Dec. 7, 1998) (awarding thirty percent of settlement fund) and Rebenstock v. Deloitte, No. 94-CV-71331 (E.D. Mich. Nov. 13, 1996) (awarding attorney fee of one-third of settlement amount) and *Rebenstock v. Fruehauf, 1995 U.S. Dist. LEXIS 22089*, No. 92-CV-77050 (E.D. Mich. Aug. 18, 1995) (same) with *Rawlings, 9 F.3d at 517* (rejecting request for twenty-five percent of $ 3.9 million settlement in favor of approximately fifteen percent award) and *Fournier, 997 F. Supp. at 830* (awarding **[*10]** twenty percent of $ 7.5 million settlement fund) and *In re Cincinnati Gas & Elec. Co. Sec.*

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[3] The common-fund is an equitable doctrine which represents an exception to the general principle that every litigant is obliged to bear his own attorney's fees. *Boeing Co., 444 U.S. at 478*. This doctrine rests on the perception that those persons, who obtain the benefit of a lawsuit without contributing to its cost, are unjustly enriched at the successful litigant's expense. Id.

Litig., 643 F. Supp. 148, 152 (S.D. Ohio 1986) (awarding fifteen percent of $ 13,990,000 settlement fund). [4]

Reviewing the specific facts of this case, the Court is persuaded that the excellent performance of the attorneys merits an award of thirty percent of the settlement fund. Prior to the initiation of this litigation, F&M filed a voluntary Chapter 11 bankruptcy petition. This decision by the Company seriously complicated matters for the attorneys in two ways. First, it meant that the issuer of the relevant securities was no longer available to contribute to a settlement. Thus, the attorneys' probability of achieving a highly successful outcome was dramatically **[*11]** reduced because issuers are generally the largest contributors towards settlement funds. Do the Merits Matter?, 43 Stan. L. Rev. at 572 (in typical initial public offering cases, issuers generally contribute fifty to eighty percent or more of settlement amount). Second, it contributed to the attorneys having to litigate in three different forums; to wit, the state, federal, and bankruptcy courts. [5] Indeed, F&M, in seeking to obtain a stay of all non-bankruptcy matters, initiated a bankruptcy adversary proceeding against the Plaintiffs, which resulted in a trial.

[*12] Further, the attorneys were obliged to manage complex discovery which involved the necessary undertaking of a thorough examination of substantial quantities of documents in order to protect the interests of their clients. Additionally, they developed the record in this case without any governmental assistance, such as information and/or documentary evidence from the investigatory efforts of the Securities and Exchange Commission.

The attorneys' ability to achieve a successful outcome in this litigation was impeded by many factors. The case was hotly contested between very skilled counsel. For instance, the Plaintiffs' attorneys were able to (1) survive numerous motions to dismiss, and (2) prevail in the face of vigorous opposition to their efforts to obtain class certification. They were also hampered by the inescapable fact that the securities at issue were high yield notes, pejoratively known as "junk bonds," which are universally recognized as constituting a high-risk investment. Also detrimental to their efforts to obtain a successful outcome to this litigation was an awareness that a large proportion of the buyers of the securities were institutional investors with a high degree **[*13]** of knowledge and skill in the investment field.

The attorneys were also threatened by the prospect of an intervening change in the law. Two months prior to the commencement of this action, the Supreme Court decided Gustafson v. Alloyd Co., 513 U.S. 561, 131 L. Ed. 2d 1, 115 S. Ct. 1061 (1995), in which it held that only initial purchasers to a public offering have standing to sue for claims arising under Section 12(2). If this Court had extended the Gustafson ruling to the facts in this case, it could have dramatically limited the Plaintiffs' available damages under Sections 11 and 12(2). In turn, this would have forced them, in order to recover substantial damages, to prove their case under Section 10(b) and Rule 10b-5, which require a showing of scienter. Such a showing would have been very difficult to make because of an absence of any known evidence of insider trading.

Finally, the attorneys for both sides displayed a high degree of professional skill, competency, and innovation through the method by which they reached the settlement. This was done by way of an intensive mediation session that was comprised of (1) initial meetings between the respective parties **[*14]** and the mediator, (2) two briefing rounds between the parties, as well as a review of initial and rebuttal expert reports, wherein the parties provided a factual and legal analysis of their respective positions to each other and the mediator, (3) a mini-trial before the mediator and key decision-makers among the Defendants, in which each side gave a presentation of the arguments relating to the facts and the key legal issues, complemented by the provision of trial/exhibit books to the participants so that they could easily follow the evidentiary trail, and (4) several days of intense settlement mediation. The Court is strongly persuaded by the representations of the neutral mediator, who has (1) twenty years of experience, and (2) no vested interest in this litigation or the present request for fees. In his mediation report, he notes:

> during my many years as a Mediator, I have participated in the resolution of numerous complex litigations, including many securities, consumer, and mass tort class actions. *Based on my experience, I can report that the mediation of this case was one of the most difficult, strenuous, and contested mediations in which I have ever participated.* **[*15]**
> . . . .

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[4] In In re Kmart Corp. Sec. Litig., Consolidated Master File No. 95-CV-75584 (E.D. Mich. Oct. 30, 1998), this Court granted an attorney fee in the amount of twenty percent of the settlement fund to the same counsel as in the case at bar.

[5] Based upon information that was gleaned by the attorneys during discovery, they initiated a state court action against the Defendants, Talon, Inc. (Talon), and Timmis & Inman, L.L.P. (T&I), under the MUSA. In their complaint, the attorneys allege that T&I was F&M's general counsel, while Talon was the holding and management company for F&M. The state court action was subsequently stayed and these attorneys were successful in obtaining leave from this Court which authorized them to amend their federal complaint to incorporate these claims against Talon and T&I.

> . . . I believe that all parties in the litigation were ably served by their respective counsel, who participated throughout the mediation in a highly competent and professional manner.
>
> *In sum, of the thousands of [mediations] in which I have participated, this was one of the most successful from a procedural and substantive point of view*. . . . Counsel's effort and skill enabled me, as mediator, to quickly pinpoint and focus the negotiations on the salient issues, which ultimately led to the settlement. I am pleased to have been able to work with counsel and the party representatives in this case, and I commend them for their efforts. [6]

Based on all of these factors, the Court believes that the attorneys **[*16]** should receive an award of fees which will adequately compensate them for their outstanding work in this case. *HN5*[↑] When determining the reasonableness of an attorney fee request, trial courts are instructed to consider:

> (1) the value of the benefit rendered to the corporation or its stockholders,
>
> (2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others,
>
> (3) whether the services were undertaken on a contingent fee basis,
>
> (4) the value of the services on an hourly basis,
>
> (5) the complexity of the litigation, and
>
> (6) the professional skill and standing of counsel involved on both sides.

Smillie v. Park Chem. Co., 710 F.2d 271, 274 (6th Cir. 1983).

As for the first factor, the parties, through their collective efforts to reach a settlement of the issues, have rendered an invaluable benefit to F&M's stockholders. In the opinion of one expert, sixty one million dollars was the maximum amount of damages that the Plaintiffs could reasonably expect to obtain from the Defendants in this litigation. On the other hand, another expert viewed the issue of the Defendants' potential liability differently, in **[*17]** that he opined that five million six hundred thousand dollars was their maximum exposure in damages to the Plaintiffs in this case. Even if the Court adopted the estimate of the expert with the higher figure as being the more accurate of the two opinions, the result which was achieved by the Plaintiffs' attorneys was excellent in view of the evidentiary hurdles that they had to surmount. See Janet Cooper Alexander, Rethinking Damages in Securities Class Actions, *48 Stan. L. Rev. 1487, 1500* & n.50 (1996) (settlements average twelve percent of claimed losses); Richard M. Philips & Gilbert C. Miller, The Private Securities Litigation Reform Act of 1995: Rebalancing Litigation Risks and Rewards for Class Action Plaintiffs, Defendants and Lawyers, *51 Bus. Law 1009, 1029* & n.131 (1996) (typical recoveries are within range of seven to eleven percent of claimed losses); Do the Merits Matter?, 43 Stan. L. Rev. at 499-500, 514-19 ("securities class actions involving [initial public offering] claims . . . settled at an apparent 'going rate' of approximately one quarter of the potential damages").

The second and third factors also support **[*18]** a higher than usual attorney fee. Those factors consider (a) society's stake in rewarding attorneys who produce benefits in order to maintain an incentive to others, and (b) whether the services were undertaken on a contingent fee basis. As the preceding discussion has explained, the attorneys have achieved an excellent result in a case that was factually, legally, and logistically difficult. Society's stake in rewarding attorneys who can produce such benefits in complex litigation such as in the case at bar counsels in favor of a generous fee, as does the realization that they undertook this case on a contingent fee basis, which required them to fund all of the significant litigation costs while facing the risk of a rejection their clients' claims on the merits.

The fourth factor, which considers the value of the services rendered if computed on an hourly basis, also supports a healthy attorney fee. Although the Court continues to have some concerns about some of the extremely high hourly rates that the attorneys for the Plaintiffs claim, [7] the total amount of fees, if based on a reasonable hourly rate for counsel of comparable skill and expertise, would run into the millions of **[*19]** dollars.

The fifth and sixth factors, which are, respectively, the complexity of the litigation and the professional skill and competence of counsel on both sides, likewise argue for a very generous fee. As has already been explained, this was a complex and demanding case. The skill and competence of the attorneys for the Plaintiffs was evident, especially when viewed on the basis of the results that they obtained in this case, while the excellent advocacy skills of the defense counsel in this case were equally evident to the Court as well

[6] Affidavit of Bruce E. Gerstein in Support of Plaintiffs' Motion for Approval of the Proposed Settlement and Plaintiffs' Counsel's Application for an Award of Attorneys' Fees and Reimbursement of Expenses, Ex. K at 1, 7-8 (Mediation Report by Professor Eric D. Green) (emphasis added).

[7] The Court discussed this concern in detail in the Kmart case. See supra note 4.

as to the mediator.

After evaluating all of these factors and the specific nature of services performed and outcome achieved in this litigation, the Court believes that an award of thirty percent of the settlement fund, which represents fees at the highest end of the normal range of awards that is granted under the percentage-of-the-fund approach, is warranted because it recognizes the **[*20]** excellent results obtained by the attorneys. This thirty percent award amounts to a $ 6,075,000 attorney fee based on the $ 20.25 million settlement reached between the parties. The attorneys are also granted a thirty percent share of the interest that has been earned on the Settlement Fund.

B.

In addition to their request for attorney fees, the attorneys seek reimbursement for $ 584,951.20 in expenses. *HN6*[↑] Expense awards are customary when litigants have created a common settlement fund for the benefit of a class. See, e.g., *In re Southern Ohio Correctional Facility, 175 F.R.D. 270, 274-75 (S.D. Ohio 1997)*. The Court has reviewed the invoices provided in support of this request. Considering the needs of this litigation, the Court is persuaded that these expenses are reasonable.

C.

The attorneys have also motioned for an incentive award in the amount of $ 7,500 for each of the class representatives, Acree and Dismondy. *HN7*[↑] Such awards are common in class actions where common funds have been created. *In re Southern Ohio Correctional Facility, 175 F.R.D. at 272-75*. The Court finds these awards to be reasonable and justified due to the discovery and other **[*21]** burdens to which Acree and Dismondy were subjected, including having to give depositions and produce their records of securities transactions.

III.

Accordingly, for the reasons that have been explained above, the motion for final approval of the settlement is granted pursuant to the terms of a Final Judgment Order which is entered this same day.

The request for an award of attorneys fees and expenses is granted in part and denied in part. The attorneys are granted a fee in the amount of thirty percent of the Settlement Fund, amounting to $ 6,075,000, rather than the 33.33% that they have requested. They are also awarded thirty percent of the interest that has been earned on the Settlement Fund. Additionally, their request for reimbursement of $ 584,951.20 in expenses is granted. Further, the class representatives, Acree and Dismondy, are granted an incentive award in the amount of $ 7,500 each.

IT IS SO ORDERED.

Dated: JUN 29 1999

Detroit, Michigan

Honorable Julian Abele Cook, Jr.

United States District Court

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