

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

MARVIN FIELDER, DEBORAH)
WILLIAMS, LUCY HENDERSON,)
JEROME HENDERSON, KIMBERLEY R.)
WILLIAMS, AND JERRY DAU,)
individually and on behalf of)
a class of similarly situated)
individuals,)

Plaintiffs,)

vs.)

CREDIT ACCEPTANCE CORPORATION, et al.,)

Defendants.)

Case No. CV96-24285
Division One



07 MAY 30 PM 3:43
CLERK OF COURT
JACKSON CO., MO-KC

**SUGGESTIONS IN SUPPORT OF THE PARTIES' JOINT MOTION FOR
ORDER CONDITIONALLY APPROVING CLASS SETTLEMENT AND
SETTING HEARING FOR FINAL APPROVAL OF CLASS SETTLEMENT**

I. INTRODUCTION

Pursuant to agreement of the plaintiff class representatives and the defendant Credit Acceptance Corporation ("CAC"), a proposed settlement of this matter has been reached.¹ The terms of the settlement are as set forth in the Memorandum of Understanding attached as Exhibit A-1 and incorporated by reference herein. Counsel for the parties believe the terms of the settlement are fair and reasonable.

Rule 52.08(e) provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Accordingly, the parties request that this Court: (1) enter an Order conditionally approving the proposed settlement; (2) set this matter for a hearing to consider whether the settlement should be given final approval; and (3) direct that a Notice of Proposed Class Action Settlement be sent to the class. The proposed Notice is attached in Exhibit A-2.

¹ The other defendant, Northeast Auto Credit, Inc., has long been in default and is no longer in business.

II. BACKGROUND

Plaintiffs' initial class action Petition against CAC was filed in Jackson County Circuit Court by plaintiffs Marvin Fielder and Deborah Williams on October 15, 1996, alleging, *inter alia*, certain improper practices engaged in by CAC in the course of its financing and collection of the class members' automobile installment purchase contract obligations. The initial petition alleged two classes, one made up of debtors who allegedly were overcharged post-maturity interest, and another of debtors who allegedly were overcharged for official fees.

CAC removed this action to the United States District Court on November 25, 1996, where it was litigated for some time before being remanded to the Jackson County Circuit Court pursuant to orders filed in the federal court on September 20, 1999, February 18, 2000, and May 25, 2000. While in the federal system, the plaintiffs made amendments to their pleadings that included the addition of a subclass of debtors to whom CAC allegedly sent defective presale notices following its repossession of their cars. The case generated several reported decisions at the district court level, including one certifying it as a class action, *Fielder v. Credit Acceptance Corporation*, 175 F.R.D. 313 (W.D.Mo. 1997), another denying CAC's motions to dismiss and for summary judgment, *Fielder v. Credit Acceptance Corporation*, 10 F.Supp.2d 1101 (W.D.Mo. 1998), and another granting partial summary judgment to the plaintiffs, *Fielder v. Credit Acceptance Corporation*, 19 F.Supp.2d 966 (W.D.Mo. 1998). The latter decision was reversed on jurisdictional grounds by *Fielder v. Credit Acceptance Corporation*, 188 F.3d 1021 (8th Cir. 1999), resulting in a remand to this Court after disposal of the remaining federal claim in *Fielder v. Credit Acceptance Corp.*, 98 F.Supp.2d 1104 (W.D.Mo. May 25, 2000).

Following remand the voluminous record of the federal court proceedings was filed in this Court pursuant to Rule 55.34. The Court granted plaintiffs leave to file their Fourth Amended Petition on October 25, 2002. CAC's motion to dismiss it was overruled on January 9, 2004.

At the Court's direction, plaintiffs filed a Memorandum Supporting Continuation of Class Certification, which the Court sustained on November 16, 2005, over CAC's opposition. The Court essentially adopted the federal court's class certification order, ruling in addition that the case continue forward as a class action under Missouri Supreme Court Rule 52.08(b)(3), with notice to the class.

Plaintiffs subsequently filed a motion to adjust the class definition, requesting that the repossession subclass of the interest overcharge class be treated as a stand-alone class of all debtors whose cars had been repossessed by CAC within the class period, whether or not they allegedly had also been overcharged interest. The Court granted this motion on May 23, 2006, after opposition from CAC. The Court also denied CAC's motion for reconsideration of the Court's class certification ruling.

On June 2, 2006, CAC sought permission from the Missouri Court of Appeals, Western District, to appeal the class certification rulings and, in conjunction, to stay further proceedings in this Court pending the appeal. The motion for a stay was denied on June 16, 2006, with this Court noting the lengthy history of the case in both the federal and state court courts and stressing the need to move forward with identification of the class members. In a companion Order of the same date, the Court directed the parties to meet, confer and report on procedures for class member identification.

Permission to appeal was denied on August 31, 2006. Shortly thereafter the parties began to explore the possibility of settlement, agreeing to mediation before former Clay County, Missouri, Circuit Judge David Russell.² Several sessions were held, including a pre-mediation conference with Judge Russell the afternoon of October 2, 2006, an initial mediation session on November 7 and another on December 4, with numerous teleconferences in between among Judge Russell and the parties. Although the parties failed to reach any agreement by the end of the December 4 mediation, much valuable information had been exchanged in the process and the parties continued to negotiate by telephone.

² This was the parties' second attempt at reaching a settlement through mediation. An unsuccessful mediation was had in January of 1998 before the Hon. Richard Ralston.

On December 12, 2006, the Court entered another Order setting briefing deadlines for certain matters still in dispute regarding class identification and ordering production of certain records by CAC pertaining to class identification. The parties continued to discuss settlement over the telephone and on February 9, 2007, the attached Memorandum of Understanding setting forth the terms of a proposed settlement was executed.

Before and throughout this litigation, class counsel have conducted an ongoing investigation and examination of the facts and law relating to the matters at issue in the action. Specifically, and in addition to informal discovery, class counsel have undertaken discovery of the actions and practices of CAC through written discovery and depositions, both in Michigan and in Missouri. This resulted in CAC's production of many bankers' boxes of documents pertaining to class member accounts and CAC's lawsuits against class members, plus electronic data containing many thousands of entries. Class Counsel carefully examined and evaluated all of these documents, both at CAC's headquarters in Southfield, Michigan, and at the offices of its attorneys in Kansas City. Moreover, the docket sheets alone, both from the federal court file and this Court's file, evidence the fact that this has been an extremely hard-fought and contentious class action.

As a result of class counsel's investigation, review, and analysis of the facts and law relating to the matters alleged in this action, and having carefully weighed the benefits to the plaintiff class of a settlement of the action for the consideration being offered by CAC against the significant cost, risk, and delay that continued prosecution of the action would involve, the class representatives and class counsel have concluded that settlement of the action on the terms set forth in their proposed agreement is fair, reasonable and adequate, and that the settlement is in the best interests of the class members.

CAC is in agreement, although it denies any fault, wrongdoing, or liability whatsoever, and firmly believes that the class members have not suffered compensable damages as a result of the events at issue in the action. CAC has concluded, however, that it is in its best interests to settle the action on the terms set forth in

the proposed agreement in order to avoid further expense, inconvenience, and interference with ongoing business operations.

Where the Court has not certified a class, it must evaluate in a preliminary hearing whether a class can be certified for settlement purposes. Here, however, both the federal court and this Court, after having carefully considered the requirements for certification, determined that the requirements for class certification had been met.

III. TERMS OF THE PROPOSED SETTLEMENT

The terms of the proposed settlement, details of which are set out in the attached Exhibit A-1, particularly include (but are not limited to) the following:

- Write-offs of Class Member Accounts: With respect to all repossession class members, CAC will close all accounts and write off any balances owed, including judgment balances. With respect to all other class members, CAC will write off all charges, including amounts due on judgments, that are other than the net cash price of the car and credit all cash payments received at any time against the net cash price of the car. Accounts with a resulting zero balance shall be closed.
- Class Settlement Common Fund: CAC will pay \$12,500,000.00 in full and final settlement of the class members' claims. Plaintiffs intend to use these funds to reimburse repossession class members for amounts paid on their accounts after repossession and sale of their vehicles, to reimburse interest overcharge and official fee class members for amounts they paid to CAC in excess of the cash price of their cars, to pay for costs of the administration of the settlement, potentially to pay additional amounts to class members representing some potential additional damages, to compensate the class representatives for time expended in prosecuting this lawsuit, and to pay class counsels' fees and litigation expenses.

- Correction of Class Members' Credit Reports: CAC will take reasonably necessary action to correct any credit reporting issues that may exist on class member accounts to remove any negative credit report entries relating to class members' CAC accounts that are inconsistent with this settlement.
- Agreement to Refrain From Certain Conduct: CAC will refrain for a period of three years from certain interest computation conduct, from sending repossession pre- or post-sale notices with faults alleged by plaintiffs to have occurred, and from providing affidavits or other documents to Missouri courts with incorrectly high statements about amounts due for post-maturity interest, and the plaintiffs' counsel may do certain spot-checks of CAC documents over those three years, and if they believe that there have been violations they can follow a good faith procedure of attempting to resolve the concerns with CAC and, if that fails, can file a motion with the Court for appropriate and necessary equitable relief to correct and enjoin such practices.
- Release: Class members will release all claims that were or could have been pled based on facts alleged in Plaintiffs' Fourth Amended Petition or in any of the other complaints or petitions filed in this case in either this Court or the federal court.

In addition, class counsel propose the following:

- Allocation of Payments to Entitled Class Members: After deductions from the Settlement Fund for expenses of class administration, costs and legal expenses, and attorneys' fees, payments to class members would be made from the fund as follows:
 - 1) restitution payments:
 - A) on each account in the repossession class, an amount equal to the total of all amounts paid in on the account after the repossession and sale of the vehicle;

B) on each account in either the interest or official fee class, an amount equal to the total of all amounts paid in on the account at any time that totaled above the "net cash price of the car" (cash price less any downpayment);

C) on each account that is in both the repossession class on the one hand, and in either the interest or official fee class on the other hand, the higher of the amount calculated under A) and B) above.

If the total of all restitution payments would exceed the amount in the fund available for class distribution, then payments would be made in reduced amounts, pro-rata, according to the calculations in A), B), and C), above.

2) If the total of all restitution payments would be less than the amount in the fund available for class distribution, then the remaining amount would be divided among all the class members, as follows:

Each class member account would be entitled to 1 pro-rata share for each class to which the class member belongs. For example, if an account is in the repossession class only, it would be entitled to one share; if in the repossession and interest class, two shares; if in all three classes, three shares. The amount in the fund remaining for distribution would be paid out to class members pro-rata, according to the number of "shares" each class member has.

3) Any unusual expenses incurred specifically for a class member, such as unusual expenses to locate the class member or unusual expenses incurred in distributing the funds to the class member, will be subtracted from any payment to the class member provided in 1) and 2), above.

- Notice to Entitled Class Members: Notices will provide information to the class members regarding the contents of the proposed settlement, the options available to the class members, the procedure for objections and opting out, and the date of the final settlement hearing; a copy of the proposed notice is attached as Exhibit A-2. Notices will be mailed to class members. The class members' addresses last

known by CAC are a starting point. Before mailing of any notices, all such addresses will be checked against the National Change of Address database (and the "Coding Accuracy Support System" and "Locatable Address Conversion System" databases). Further, rather than waiting for any mailed notices to be returned, before mailing any notices all class members' addresses will be checked using a "skip-tracing" database such as "accurint" or an equivalent. In addition, a website will be created that will carry information about the settlement.

- Class Administrator: Class counsel have selected Rust Consulting and UMKC Associate Professor Jerry P. Place, whom they propose to perform class administration services as described in the settlement, including review and verification of information and representations provided by CAC as described in the Memorandum of Understanding.
- Class Representatives' Compensation: Class counsel intend to recommend that the named plaintiffs each receive an incentive award of \$5,000.00 from the Settlement Payment, in addition to any monies payable to them as members of the class, as compensation for their efforts in prosecuting this case on behalf of the class.
- Payment of Class Representative Attorneys' Fees, Costs, Expenses, and Disbursements: Class Counsel intend to ask the Court for award of attorneys fees of up to \$6,000,000 of the class fund as well as reimbursement for costs, expenses and disbursements. Class counsel submit that this amounts to less than 10% of the total benefit provided to the class, as described in more detail, below. Class Counsel have requested preliminary approval of these fees by separate motion.
- Cy Pres Distribution: In the event there are funds deemed by the Class Administrator to be undeliverable and/or checks that are uncashed after the expiration of time to cash such checks, and reasonable efforts to locate the entitled class members associated with undeliverable and/or uncashed checks have been exhausted, class counsel intend to recommend a cy pres distribution of the remaining

funds to an appropriate recipient, such as an organization or organizations dedicated to furthering consumer protection.

IV. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE.

After well over ten years of litigation, the parties have been able to resolve this litigation and to provide a fair and reasonable settlement to the classes. The Court stands as the guardian of the rights of absent class members, and thus it is the burden of the proponents of the settlement to convince the Court that the settlement protects the interests of the absent members. *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). The approval of class action settlements lies within the Court's discretion, and will not be overturned except on a showing that the circuit court clearly abused its discretion. *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1176–78 (8th Cir. 1995).

In determining whether to approve a settlement the Court must consider a number of factors. These factors include: 1) opinions of the participants, including class counsel, class representatives, and class members; 2) the complexity, expense, and likely duration of further litigation; 3) the extent of discovery completed and the state of the proceedings; 4) the probability of the plaintiff's success on the merits; 5) the range of possible recovery, and 6) the evidence, if any, that the proposed settlement is the product of fraud and collusion. *Ring v. The Metropolitan St. Louis Sewer District*, 41 S.W.3d 487, 492 (Mo.App.E.D. 2000). When the proposed settlement now before the Court is measured against these standards, it is apparent that it is both reasonable and in the best interests of the classes, and should be preliminarily approved.

A. Class Counsel and the Class Representatives Believe that the Proposed Settlement is Fair and Reasonable.

In considering approval of a settlement, the Court must consider the views of class counsel and of the class representatives. The opinion of experienced counsel should be given significant weight, and the Court is

entitled to rely on these evaluations. *Ring*, 41 S.W.3d at 492. Class counsel and CAC's counsel are of the opinion that this is a favorable settlement.

In addition, the class representatives are of the opinion that the proposed settlement is in the best interests of the class. They have been involved with this case for more than ten years, and are very pleased with, and approving of, the proposed settlement. They have discussed the relative merits of the settlement with class counsel, and have also approved the settlement. See Affidavits attached in Exhibit B.

B. The Complexity and Expense of Future Litigation Support Preliminary Approval of the Proposed Settlement

This case has been in litigation for more than 10 years. CAC continues to deny any fault, wrongdoing, or liability whatsoever, and continues to insist that any overcharges it may have made were offset by other charges it was entitled to, but did not enter in the class members' accounts. Although plaintiffs have vigorously litigated on behalf of the classes, as attested to by the record, any liability for, as well as the amount of any damages allegedly flowing from, CAC's conduct remains in contention and would require further litigation, including additional motions to be decided by this Court and quite possibly a lengthy and complex trial followed by an appeal. Moreover, further litigation would further delay class members' receipt of benefit, and such lengthy future proceedings would be injurious to absent class members.

In addition, class counsel recognize the possibilities of difficulty in locating class members. By the time disbursements will be made to the classes, this litigation will have continued for almost eleven years. Some class members will have moved thus making them difficult to locate. The Settlement avoids increasing this risk by noticing class members of their claim without further delay and disbursing funds before more class members become unable to be located. Weighed against the delay and costs of further litigation, the proposed settlement is economically in the best interests of the class.

Class counsel have thoroughly investigated, reviewed, and analyzed the facts and law relating to the matters alleged in the action. They have also carefully weighed the benefits to the plaintiff classes of a prompt settlement of the action for the consideration being offered by CAC against the significant cost, risk, and delay that continued prosecution of the action would involve. The class representatives and class counsel have concluded that settlement of the action on the terms set forth in the proposed agreement is fair, reasonable and adequate, and that the settlement is in the best interests of the class members.

C. The Stage of the Proceedings and the Opinion of Judge Russell Support Preliminary Approval of the Proposed Settlement.

An additional factor to be considered is the stage of the proceedings reached when the settlement occurred. *Ring*, 41 S.W.3d at 492. The initial Petition was served over ten years ago, in October, 1996. The case has been to federal district court, to the federal court of appeals, and back to this Court. Since the onset of the case, class counsel have briefed numerous motions, before both the federal district court and the court of appeals as well as this Court, conducted written discovery, examined thousands of documents, conducted depositions, collected and analyzed data relating to the amount of any damages that may have been sustained by class members and participated in numerous mediations and discussions regarding the relative merits of the case, the damages incurred, and the parties' positions with respect to many other issues. As such, class counsel have conducted a thorough investigation and examination of the facts and law relating to the matters at issue in the action.

In addition, the proposed settlement was reached after class certification (by two different courts) and after unsuccessful attempts to settle the case had been made before two highly-respected and successful mediators. Because of the extensive work by the parties in motion practice and mediation efforts, the issues for the classes have been narrowed to reach the best settlement possible. Moreover, the late stage of the proceedings supports preliminary approval of the proposed settlement.

D. The Benefits That the Proposed Settlement Provides Demonstrate That the Settlement is Fair and Reasonable.

The most important element to consider in considering whether a settlement is fair and reasonable is the strength of the plaintiffs' case on the merits balanced against the offered settlement. *Ring*, 41 S.W.3d at 492. Class counsel believe that the proposed settlement offers the class members highly substantial cash and non-cash benefits in exchange for the dismissal of the class claims.

The relief to the repossession class members is based on their claim that CAC's pre-sale notices failed UCC Article 9 requirements. In exchange for dismissal of their claims, class members will receive the extensive relief described in Section III, above. Class counsel note also that they believe it is probable that these class members will receive full reimbursement of all or almost all of any amounts paid in on their accounts after the repossessions, and potentially some additional amounts.

The relief to the interest overcharge and official fee overcharge class members is based on their claim that CAC violated the Motor Vehicle Time Sales Act in making these alleged overcharges. In exchange for dismissal of their claims class members will receive the extensive relief described in Section III, above. Class counsel note also that they believe it is probable that these class members will receive full reimbursement of all or almost all of any amounts they paid to CAC over and above the net cash price of their cars, and potentially some additional amounts.

Moreover, as noted in the settlement agreement, "CAC represents that, as a result of this Settlement, the total amount that would have been carried on CAC's books as either paid by or due and owing from the class members after the Effective Date would have been approximately \$39,000,000 greater than the total that will be carried on CAC's books as due from the class members after the Effective Date. CAC represents that over the course of this litigation, it has posted credits, settled and filed partial satisfaction of judgments to some class member accounts and that no calculation has been made, in connection with this settlement, to measure the

positive financial impact these adjustments have had to the affected class members' accounts." Class counsel submit that even rough and conservative figuring of the additional amounts that were reduced from the class members' accounts by reason of the partial satisfactions filed in the late 1990s, and then by reason of the interest charges that would otherwise have run on such amounts, would easily have run into the tens of millions of dollars. Class counsel therefore submit that the total benefit to the classes, conservatively estimated, is in excess of \$75,000,000.

Finally, CAC has agreed to allow class counsel to examine, once a year for the next three years, documents from a random sampling of cases CAC files against its debtors, to confirm that the practices alleged in this case have not occurred.

Significantly, it is Judge Russell's considered opinion that the proposed settlement is fair and reasonable. *See*, Affidavit of Judge Russell, Exhibit C. Given his past tenure on the bench and his hands-on involvement in this case as a mediator, his opinion furnishes solid support for the proposed settlement. In his estimation the result obtained by class counsel for the classes constitutes an excellent result.

E. The Proposed Settlement is a Product of Arm's Length Negotiations.

Finally, this settlement is the product of arm's length negotiations. The parties have attended mediation and settlement conferences while this case was in federal district court, including a mediation session with the first mediator, Judge Ralston, and several mediation sessions before the second mediator, Judge Russell, followed by numerous teleconferences. All of these negotiations culminated in the execution of the Memorandum of Understanding setting forth the terms of the parties' proposed settlement. Counsel for each side have engaged in extensive information review and analysis of the legal and factual bases for the claims and defenses. These endeavors laid a solid foundation for each side to analyze their respective positions and settle the case based on the best interest of their clients. Where, as here, there is an affirmative showing of arms

length negotiation, and there has been no collusion or other unfairness, the proposed settlement should be preliminarily approved.

V. CLASS COUNSEL AND THE CLASS REPRESENTATIVES

HAVE ADEQUATELY REPRESENTED THE CLASS.

Both in the federal court's October 9, 1997 Order and this Court's May 1, 2002 Order Granting Plaintiffs' Motion for Class Certification, findings were made that the prerequisites to class certification had been met. The parties believe that membership for all classes totals 14,845 which includes individuals who are in more than one class.

In addition, throughout this litigation, the class representatives and class counsel have fairly and adequately represented the interests of the plaintiff classes. During the more than ten years of litigation, the class representatives have made themselves available for consultation with counsel, supplied documents, responded to discovery and attended depositions. They have reviewed the proposed settlement, discussed the terms with their counsel, and approved the settlement. See the named plaintiffs' Affidavits In Support of Class Settlement attached in Exhibit B.³ Likewise, class counsel have vigorously represented the class through discovery, taking an attending depositions and combing through records in both Kansas City and in Detroit, numerous court hearings and motions, including briefing and argument in the 8th Circuit, several mediations and in final settlement negotiations. In both the federal court's Order granting class certification and this Court's Order ruling that the case should go forward as a class action, the class representatives and class counsel were found to satisfy the adequacy requirement of the respective federal and state class action rules. Given the extensive litigation of the case, and its outcome, they continue to satisfy this requirement.


³ The named plaintiff Kimberly Williams has failed to keep class counsel advised of her whereabouts and they have been unable to locate her, despite a diligent search. The named plaintiff Jerry Dau, who co-signed for Ms. Williams on her contract with CAC, has lost contact with her.

CONCLUSION

This settlement meets all of the requirements for this Court to grant preliminary approval. Classes have been certified. The parties negotiated this settlement having had the benefit of both the federal courts' and this Court's rulings on the myriad issues that have come up in the course of the litigation. The negotiations between the parties were conducted in a fair and meaningful manner for the benefit of the classes, and the proposed settlement gives to the classes significant refunds, substantial debt relief and long-term prospective relief. This settlement is fair and reasonable. Counsel therefore request that the Court grant preliminary approval to this settlement, and order that notice of the Settlement attached to these Suggestions be sent to the class members, and that the parties otherwise perform as provided for in the Memorandum of Understanding, all as provided by the proposed order being submitted with these suggestions.


Respectfully submitted,

THE BROWN LAW FIRM

By 
Bernard E. Brown #31292
4350 Shawnee Mission Parkway, Suite 250
Fairway, Kansas 66205-2513
913 789-9400
913 789-9470 fax
brlawofc@swbell.net

and

**SLOUGH CONNEALY IRWIN
& MADDEN LLC**

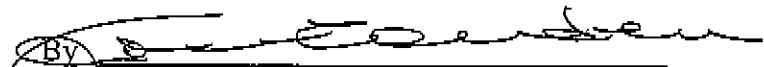
By 

Dale K. Irwin #24928
1627 Main Street
Kansas City, Missouri 64108
816 531-2224
816 531-2147 fax
dirwin@scimlaw.com

**Attorneys For Plaintiffs And
The Plaintiff Class**

and

BAKER STERCHI COWDEN & RICE LLC

By 

John W. Cowden
2400 Pershing Road, Suite 500
Kansas City, Missouri 64108-2504
816 471-2121
816 472-0288 fax
cowden@bscr-law.com

BELL BOYD & LLOYD LLP

By 

John P. Scotellaro
70 West Madison Street, Ste. 3300
Chicago, Illinois 60602
312 807-4206
312 827-8000 fax
jscotellaro@bellboyd.com

**Attorneys For Defendant
Credit Acceptance Corporation**