UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOE ALMON, JON CARNLEY, CYNTHIA CLARK, JACKIE DENSMORE, JENNIFER KREEGAR, HAROLD MCPHAIL, JB SIMMS, and KENNETH TILLMAN, on behalf of themselves and all others similarly situated, Plaintiffs, v. CONDUENT BUSINESS SERVICES, LLC d/b/a DIRECT EXPRESS, COMERICA, INC., and COMERICA BANK, Defendants.	§	Case No. 5:19-cv-01075-XR

PLAINTIFFS' MOTION AND MEMORANDUM OF LAW FOR PRELIMINARY APPROVAL OF SETTLEMENT, CONDITIONAL CERTIFICATION OF THE SETTLEMENT CLASSES, APPROVAL OF NOTICE PLAN AND RELATED MATTERS

Plaintiffs Joe Almon, Jon Carnley, Cynthia Clark, Jackie Densmore, Jennifer Kreegar, JB Simms, and Kenneth Tillman (collectively, "Plaintiffs")[1] respectfully submit this memorandum of law in support of their motion for: (1) preliminary approval of the settlement between Plaintiffs and Defendants Conduent Business Services, LLC[2], Comerica, Inc., and Comerica Bank ("Defendants"); (2) certification of classes for purposes of the settlement; (3) appointment

[1] During the pendency of this case, Plaintiff Harold McPhail passed away. The Parties anticipate filing a motion to substitute party pursuant to Fed. R. Civ. P. 25(a)(1) as soon as some estate-related issues are resolved in probate court. Once these estate issues are resolved, the Parties also anticipate Mr. McPhail's estate joining the settlement prior to final approval. At this time, however, this motion is brought on behalf of all of the other named Plaintiffs.

[2] Defendants assert that the proper party is Conduent State & Local Solutions, Inc., and not Conduent Business Services, LLC.

of Class Counsel for the Settlement Classes; (4) appointment of Plaintiffs as Class Representatives; (5) approval of the notice plan; and (6) leave to file a motion for attorneys' fees, reimbursement of expenses, and Service Awards for the named Plaintiffs.[3]

INTRODUCTION

Plaintiffs brought this action over three years ago alleging that Defendants failed to properly respond to disputes submitted by Direct Express cardholders alleging fraudulent or unauthorized transactions, in violation of the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693, *et seq*., its implementing regulations ("Regulation E"), 12 C.F.R. § 1005.1, *et seq*. After years of litigation, and arm's-length negotiations towards a settlement, Plaintiffs have reached a Settlement with the Defendants. *See* Settlement Agreement and Release (the "Settlement Agreement") (Exhibit 2 to Joint Declaration of E. Adam Webb and G. Franklin Lemond, Jr.). As described in more detail below, the Settlement Agreement provides for immediate economic relief to the proposed Settlement Classes and represents an excellent outcome for members of the proposed Settlement Classes.

In considering whether to grant preliminary approval of this settlement, the Court must determine whether the settlement was reached as a result of informed, arm's-length negotiations and is sufficiently fair, reasonable, and adequate that the Court will likely be able to finally approve the settlement after notice and an opportunity to opt out is provided to the Settlement Classes. As explained in further detail below, the Settlement Agreement exceeds these standards governing preliminary approval. There are no obvious deficiencies, and the Settlement Agreement falls well within the range of reasonableness. Its terms reflect a fair and reasonable result that is beneficial to all Settlement Class Members. The Settlement Agreement was

[3] All capitalized terms used herein have the same meanings ascribed in the Settlement Agreement.

reached after arm's-length negotiations (including a neutral third-party mediator) and following strongly contested litigation over the course of over three years. In light of the work invested in this case since its filing in 2019, the Parties and all counsel are well informed and positioned to assess the risks and merit of the case.

Accordingly, Plaintiffs respectfully request that the Court grant their motion.

BACKGROUND

I. LITIGATION HISTORY

On February 12, 2019, Plaintiffs initiated this action in the United States District Court for the Northern District of Georgia. *See Almon v. Conduent Business Services, LLC*, No. 19-cv-00746 (N.D. Ga. Feb. 12, 2019). In that case, the district court granted Defendants' motion to dismiss the non-Georgia plaintiffs' individual claims due to lack of personal jurisdiction. *See* Doc. 29 in Case No. 19-cv-00746 (N.D. Ga.). The plaintiffs whose claims were dismissed in Georgia re-filed their claims in this Court. *See* Doc. 1. In response, Defendants filed a motion to dismiss, which was denied by this Court. *See* Doc. 30. Thereafter, Plaintiffs filed an amended complaint (Doc. 31) which consolidated what remained in the Georgia case with the Texas case.

Thereafter, the Parties began discovery in earnest, including the negotiation of a protective order and an ESI protocol. *See* Docs. 35-36. Following an extensive discovery period, during which tens of thousands of pages of documents were produced and reviewed, numerous depositions were taken, and experts disclosed and deposed, Plaintiffs moved for class certification and Defendants filed a motion for summary judgment. *See* Docs. 56, 62. On March 25, 2022, this Court issued a 57-page order on both motions. *See* Doc. 70; *also Almon v. Conduent Bus. Servs., LLC*, 2022 WL 902992 (W.D. Tex. Mar. 25, 2022).

This Court denied in part and granted in part Defendants' request for summary judgment. Doc. 70 at 21-45. On the issue of class certification, this Court found that Plaintiffs had satisfied

the prerequisites that the classes be adequately defined and clearly ascertainable by reference to objective criteria, rejecting Defendants' objection that identifying class members would require a manual review of its business records because "a defendant may not avoid certification of a class by arguing their business records are not efficiently organized and maintained." Doc. 70 at 46-48. This Court found that Plaintiffs satisfied the numerosity element of Rule 23(a)(1) and, based on its summary judgment analysis, identified a number of common questions the resolution of which would affect a significant number of putative class members' claims. Doc. 70 at 50-56.

However, this Court concluded that it could not certify the proposed classes because they were defined too broadly to identify common issues based on the class definitions alone. *Id.* The Court, however granted Plaintiffs leave to file a renewed motion for class certification amending the proposed class definitions to cure the deficiencies identified in the order. *Id.* at 57. On April 15, 2022, Plaintiffs renewed their motion for class certification, seeking certification of four classes:

> (1) **The Breach of Contract Class:** All Direct Express customers who, within the applicable statute of limitations period preceding the filing of this action and through the date of class certification, were denied a refund for allegedly unauthorized transactions that exceed the contractual limits on liability in Section VIII of Defendants' Terms of Use.
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> (2) **The 13-day Deadline Class:** All Direct Express customers who were not sent the results of an investigation within 13 business days of submitting a notice of error in accordance with 15 U.S.C. § 1693f(a)(3) and 12 C.F.R. § 1005.11.
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> (3) **The Provisional Credit Class:** All Direct Express customers who were not given a provisional credit in the amount of the alleged error in accordance with 15 U.S.C. § 1693f(c) and 12 C.F.R. § 1005.11.
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> (4) **The Investigative Documents Class:** All Direct Express customers who were not timely provided a copy of the investigative documents upon request in accordance with 15 U.S.C. § 1693f(d) and its implementing regulations.

Doc. 82 at 16-7. On September 28, 2022, this Court denied Plaintiffs' motion as to the Breach of

Contract Class but certified the three EFTA classes. *Id.* at 17-39.

Both Parties filed petitions for permission to appeal under Fed. R. Civ. P. 23(f) with the Fifth Circuit, which were denied. After the Rule 23(f) petitions were denied, Plaintiffs filed their notice plan with the Court. *See* Doc. 85. Defendants opposed certain aspects of the notice plan (*see* Doc. 87) and Plaintiffs filed a reply. *See* Doc. 89.

II. SETTLEMENT NEGOTIATIONS

In accordance with the Court's Phase One Scheduling Order, the Parties explored the possibility of settlement in Spring 2020. *See* Doc. 37. These efforts, however, were unsuccessful. *Id.* Following the Court's orders on Defendants' request for summary judgment (Doc. 70), and Plaintiffs' renewed request for class certification (Doc. 82), the Parties participated in mediation with Circuit Court Judge Allyson K. Duncan (ret.) of JAMS. *See* Plaintiffs' Counsel Decl., ¶ 23. While that mediation was unsuccessful, the Parties continued their discussions in hopes of reaching a resolution of this matter on a class-wide basis. *See* Plaintiffs' Counsel Decl., ¶ 24.

On or about November 28, 2023, the Parties reached an agreement in principle to resolve this matter and exchanged a term sheet memorializing the general terms of their agreement in principle to resolve this matter on a class-wide basis. *See* Plaintiffs' Counsel Decl., ¶ 25. Over the next several weeks, the Parties worked to finalize the specific terms of the agreement. The Parties exchanged multiple redlined drafts, which included fine tuning the allocation formula to ensure payments are fairly divided among Settlement Class Members in accordance with Plaintiffs' theories in a logistically feasible manner. *Id.* at ¶ 26. The Parties also focused on how notice and eventually payments could most efficiently and fairly be disseminated to the Settlement Class Members. *Id.* The Parties also exchanged multiple drafts of the notices and

claim form to ensure that the settlement was accurately and appropriately described to the Settlement Class. *Id.*

Consensus was reached on final drafts of the agreement, notices, and allocation formula in January 2024. *Id.* at ¶ 29. Through the Agreement, the Parties now agree to settle the Action in its entirety, without any admission of liability. This includes settlement of all Released Claims of the Settlement Classes, as well as individual settlements of the Plaintiffs' non-class claims. The Parties intend this Agreement to bind Plaintiffs, Defendants, and all Settlement Class Members who do not timely request to be excluded from the Settlement Agreement.

III. PROVISIONS OF THE SETTLEMENT AGREEMENT

A. The Settlement Classes

Plaintiffs seek approval of the following nationwide classes, for settlement purposes only:

> **The 13-day Deadline Class:** All Direct Express customers who, between February 12, 2018 and September 28, 2022, were not sent the results of an investigation within 13 business days of submitting a notice of error in accordance with 15 U.S.C. § 1693f(a)(3) and 12 C.F.R. § 1005.11.
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> **The Provisional Credit Class:** All Direct Express customers who, between February 12, 2018 and September 28, 2022, were not given a provisional credit in the amount of the alleged error in accordance with 15 U.S.C. § 1693f(c) and 12 C.F.R. § 1005.11.
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> **The Investigative Documents Class:** All Direct Express customers who, between February 12, 2018 and September 28, 2022, were not timely provided a copy of the investigative documents upon request in accordance with 15 U.S.C. § 1693f(d) and its implementing regulations.

Settlement Agreement, ¶ 42.

B. The Compensatory Provisions

Defendants agreed to create a fund in the amount of One Million Two Hundred Thousand and 00/100 Dollars ($1,200,000.00). This Settlement Amount will be used to make (a) all monetary payments to the Settlement Class; and (b) all Service Awards to be paid to Plaintiffs.

See Settlement Agreement, ¶ 64. Any attorneys' fees and expenses awarded to Class Counsel and the costs of Notice and administering the settlement, up to Two Hundred Fifty Thousand Dollars ($250,000.00), shall be borne by Defendants and paid separately from, and in addition to, the Settlement Amount. *Id.* Defendants have also agreed to enter into separate, individual agreements with Plaintiffs in exchange for Plaintiffs assuming additional obligations beyond those described in the Settlement Agreement. *See* Plaintiffs' Counsel Decl., ¶ 34. Those individual agreements are confidential, but they are being submitted to the Court for its confidential review.

Under the settlement, an estimated 400,000 potential Settlement Class Members can receive a payment if they submit a simple claim form, which they can do electronically via the Settlement Website, or by mail using a form available on the same website. Participating Settlement Class Members will receive their *pro rata* share of the Settlement Amount based on the number of claims of allegedly fraudulent transactions that were submitted and denied by Defendants and where Defendants either (i) failed to send the results of the claim investigation within 13 business days; (ii) failed to give a provisional credit in the amount of the alleged error; or (iii) did not provide a requested copy of the documents that were relied upon to deny the claim. This payment formula is set forth in an explanatory attachment to the Agreement. *See* Exhibit 1 to Settlement Agreement.

C. The Release Provisions

In exchange for the consideration described above, Plaintiffs and Participating Settlement Class Members agree to release Defendants and their present and former parents, subsidiaries, divisions, affiliates and other specified related parties from any and all liabilities, rights, claims, actions, causes of action, and other specified remedies, that constitute, result from, arise out of,

are based upon, or relate to any of the claims that were or could have been asserted in the Action. The full text of the proposed release is set forth in the Settlement Agreement. *See* Settlement Agreement, ¶¶ 77-79.

D. Attorneys' Fees, Expenses, and Service Awards.

The Parties and their counsel did not discuss the provisions regarding attorneys' fees until after the Parties had already agreed upon the terms of the Settlement Agreement in principle, and substantive elements of the Settlement Agreement had been negotiated. Under the terms of the Settlement Agreement, Class Counsel intends to submit a Fee and Expense Application to the Court prior to Final Approval, requesting Eight Hundred Seventy-Two Thousand Four Hundred Twenty-Five Dollars and Fifty Cents ($872,425.50), and the reimbursement of reasonable costs and expenses of up to the agreed upon amount of Twenty Nine Thousand One Hundred Fifty-Seven Dollars and Seventy-Eight Cents ($29,157.78). *See* Plaintiffs' Counsel Decl., ¶ 31. Any award of attorneys' fees, costs, and expenses to Class Counsel shall be paid by Defendants separate, apart, and in addition to the Settlement Fund and the Costs of Notice and Administration. *See* Settlement Agreement, ¶ 83.

On behalf of the eight Plaintiffs, Class Counsel intends to seek Service Awards not to exceed Two Thousand and 00/100 Dollars ($2,000.00), for a total amount of Sixteen Thousand and 00/100 Dollars ($18,000.00). *Id.* at ¶ 33. Defendants have agreed not to oppose such a request for Service Awards, which shall be paid by the Settlement Administrator to Plaintiffs out of the Settlement Amount. *Id.*

The Parties agree that the Court's failure to approve, in whole or in part, any award for attorneys' fees or Service Awards shall not prevent the Settlement Agreement from becoming Effective, nor shall it be grounds for termination. *Id.*

LEGAL ARGUMENT

I. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE.

Rule 23(e) requires judicial approval of a class action settlement. Fed. R. Civ. P. 23(e). Rule 23(e)(1)(B), as amended December 1, 2018, directs a court to grant preliminary settlement approval and direct notice to the proposed class if the court "will likely be able to" grant final approval under Rule 23(e)(2) and "will likely be able to" certify a settlement class for purposes of entering judgment. Fed. R. Civ. P. 23(e)(1)(B). "A proposed settlement 'will be preliminarily approved unless there are obvious defects in the notice or other technical flaws, or the settlement is outside the range of reasonableness or appears to be the product of collusion, rather than arms-length negotiation.'" *ODonnell v. Harris County*, 2019 WL 4224040, at *7 (S.D. Tex. Sept. 5, 2019) (quoting 2 McLaughlin on Class Actions § 6:7 (15th ed. 2018)). "A lower degree of scrutiny" applies where, as here, the Court certified a class "before any settlement was reached or negotiated." *ODonnell*, 2019 WL 4224040, at *7 (quoting *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 122 (S.D.N.Y. 1997) (citing Manual for Complex Litigation § 30.44 (3d ed. 1995))).

In considering approval of a proposed settlement, courts are mindful of the strong judicial policy in favor of voluntary settlements particularly in the class action context. *E.g.*, *In re Deepwater Horizon*, 739 F.3d 790, 807 (5th Cir. 2014); *Smith v. Crystian*, 91 F. App'x. 952, 955 (5th Cir. 2004) (acknowledging "strong judicial policy favoring the resolution of disputes through settlement"). "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Erica P. John Fund, Inc. v. Halliburton Co.*, 2018 WL 1942227, at *4 (N.D. Tex. Apr. 25, 2018) (quoting *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1063 (S.D. Tex. 2012)). "This presumption reflects the

strong public interest in settling class actions." *ODonnell*, 2019 WL 4224040, at *8 (citing *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981) ("Particularly in class action suits, there is an overriding public interest in favor of settlement") (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)); *Hays v. Eaton Group Attorneys, LLC*, 2019 WL 427331, at *8 (M.D. La. Feb. 4, 2019) ("Because the public interest strongly favors the voluntary settlement of class actions, there is a strong presumption in favor of finding the settlement fair, reasonable[,] and adequate") (quoting *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex.*, 910 F. Supp. 2d 891, 930-31 (E.D. La. 2012)).

Here, the Court should grant preliminary approval because it "will likely be able to" both grant final approval to the Settlement Agreement as "fair, reasonable, and adequate" and certify the Settlement Classes for purposes of entering judgment after notice and a final approval hearing.

A. The Standard for Granting Preliminary Approval of the Settlement.

Rule 23(e)(2) sets out the factors a court must consider in determining whether a proposed class action settlement is "fair, reasonable, and adequate." Those factors are, whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2); *also ODonnell*, 2019 WL 4224040, at *8.

As the Advisory Committee's note to the 2018 Rule 23 Amendment explains, subsections (A) and (B) focus on the "procedural" fairness of a settlement and subsections (C) and (D) focus on the "substantive" fairness of the settlement. *See* Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment. Prior to the codification of the settlement approval factors in Rule 23, the Fifth Circuit identified six factors for courts to consider in determining the fairness, reasonableness, and adequacy of a proposed class settlement in *Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983):

> (1) evidence that the settlement was obtained by fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the litigation and available discovery; (4) the probability of plaintiffs' prevailing on the merits; (5) the range of possible recovery and certainty of damages; and (6) the opinions of class counsel, class representatives, and absent class members.

All Plaintiffs v. All Defendants, 645 F.3d 329, 334 (5th Cir. 2011) (quoting *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 194-95 (5th Cir. 2010)). "Because the Rule 23 and case-law factors overlap, courts in this circuit often combine them in analyzing class settlements." *ODonnell*, 2019 WL 4224040, at *8 (citing *Hays*, 2019 WL 427331, at *9; *Al's Pals Pet Care v. Woodforest Nat'l Bank, N.A.*, 2019 WL 387409, at *3 (S.D. Tex. Jan. 30, 2019)); *see also* Fed. R. Civ. P. 23(e)(2) Committee Notes to 2018 amendments ("The goal of this amendment [to Rule 23(e)(2)] is not to displace any [circuit case-law] factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.")

Under Rule 23(e), courts must undertake two steps in approving class action settlements: "(1) preliminary approval of the settlement, such that notice should be provided to the proposed settlement class; and (2) final fairness review, including a hearing at which all interested parties

are afforded the opportunity to be heard on the proposed settlement." *Blackmon v. Zachary Holdings, Inc.*, 2022 WL 3142362, at *3 (W.D. Tex. Aug. 5, 2022).

B. The Proposed Settlement Agreement Qualifies for Preliminary Approval.

As shown below, the settlement in this Case is fair, reasonable, and adequate under the factors identified in Rule 23(e) and the Fifth Circuit's *Reed* opinion such that the Court should conclude issuing notice to the Settlement Classes is justified.

1. The Class Representatives and Class Counsel Have Provided Excellent Representation to the Class.

The adequacy of representation factor supports finding that the settlement will ultimately be approved and thus that notice to the Settlement Classes should issue. First, Plaintiffs have shown their dedication to representing the Settlement Classes by providing information, documents, and deposition testimony in connection with the lawsuit, and working with counsel to advance the litigation on behalf of themselves and all members of the proposed Settlement Classes. *See* Plaintiffs' Counsel Decl., ¶ 37; Doc. 83 at 26 (finding "Plaintiffs satisfy the 'adequacy of representation' requirement").

Second, Class Counsel are competent, experienced, and qualified with expertise in consumer class actions and have vigorously prosecuted the claims asserted in this case. As demonstrated in connection with Plaintiffs' class certification motion, Webb, Klase & Lemond, LLC and The Vaught Firm, LLC have extensive experience handling class actions in state and federal court. *See* Plaintiffs' Counsel Decl., ¶¶ 51-52. In granting class certification, the Court recognized that "Plaintiffs' counsel has satisfied the adequacy requirement." *See* Doc. 83 at 25. Thus, this factor supports finding the settlement will likely be approved, and therefore, that notice should issue to the Settlement Classes.

2. The Settlement Is the Product of Arm's Length Negotiations.

As explained above, the proposed settlement is the product of significant negotiation by experienced counsel on both sides with the assistance of a neutral mediator, culminating in the execution of the Agreement. *See* Plaintiffs' Counsel Decl., ¶¶ 23-29. The arm's length nature of the negotiations amongst experienced counsel supports a finding that the settlement is fair, reasonable, and adequate and will likely be approved such that issuing notice to the Settlement Classes is justified. *See* Comment to December 2018 Amendment to Fed. R. Civ. P. 23(e) ("the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests."); *see also Welsh v. Navy Fed. Credit Union*, No. 16-CV-1062-DAE, 2018 WL 7283639, at *12 (W.D. Tex. Aug. 20, 2018) ("the Court may . . . presume that no fraud or collusion occurred between opposing counsel in the absence of any evidence to the contrary."). Accordingly, this factor supports issuing notice of the settlement to the Settlement Classes.

3. The Relief Provided by the Settlement Is Excellent.

The $1,200,000 cash settlement is an excellent result for the Settlement Classes in light of the duration, costs, risks, and delay of trial and appeal, supporting a finding that the settlement will likely be approved, and thus, that notice should issue. "When the prospect of ongoing litigation threatens to impose high costs of time and money on the parties, the reasonableness of approving a mutually-agreeable settlement is strengthened." *Heartland*, 851 F. Supp. 2d at 1064 (quoting *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 651 (N.D. Tex. 2010)); *see also Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004) ("[S]ettling ... avoids the risks and burdens of potentially protracted litigation.").

While Plaintiffs were successful in obtaining certification of three classes for trial and believe their interpretation of EFTA and Regulation E is correct and that damages can be established on a class-wide basis, there are many issues on which Plaintiffs and the classes would have to prevail to obtain a class-wide judgment for the full damages allegedly suffered. If this Court or an appellate court were to rule in Defendants' favor, the classes would be entitled to nothing. In addition, if the settlement is not approved, the Parties will ultimately have to undertake expensive trial preparations. Even if Plaintiffs were to prevail at trial, Defendants would likely appeal, resulting in significant delay to the class in obtaining any relief.

By reaching a favorable settlement prior to the resolution of dispositive motions or trial, Plaintiffs are avoiding expense and delay and ensuring recovery for the Settlement Classes. *See Hays*, 2019 WL 427331, at *10 ("approval of settlement is favored where settling 'avoids the risks and burdens of potentially protracted litigation.'") (quoting *In re Educ. Testing Serv. Praxis Principles of Learning & Teaching, Grades 7-12 Litig.*, 447 F. Supp. 2d 612, 620 (E.D. La. 2006)). In light of these serious risks, the proposed settlement, which affords class members a significant percentage of the total potential recovery, is an outstanding result and easily satisfies the requirements for issuing notice to the Settlement Classes.

Subject to Court approval, the Net Settlement Fund will be distributed pursuant to a proposed *pro rata* distribution formula that will provide each Settlement Class Member who completes a very simple claims form payment in the form of a check that will be delivered by U.S. mail, first-class postage prepaid, or by electronic payment. Given the simplified process for paying each Settlement Class Member and the fact that no funds will revert to Defendants, the relief provided is excellent.

The relief provided by the settlement is also excellent because Defendants have agreed to pay any attorneys' fees that are awarded by the Court separate, apart, and in addition to the Settlement Fund of One Million Two Hundred Thousand Dollars ($1,200,000.00) and the costs of notice and administration up to Two Hundred Fifty Thousand Dollars ($250,000.00).[4] Accordingly, the Agreement's provision for a separate fee award paid directly by Defendants is within the range generally deemed reasonable. Class Counsel will provide a thorough analysis of the reasonableness of their forthcoming attorneys' fee and expense award request in their fee motion. But importantly, the Parties' Agreement is not conditioned upon the Court's approval of the fee award. *See* Settlement Agreement, ¶ 84. Accordingly, at this stage, the Court can and should conclude that it is likely to approve the settlement for purposes of sending notice to the Settlement Classes, without regard to the issue of attorneys' fees and expenses.[5]

Under Rule 23(e)(3), "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal." In addition to the Settlement Agreement as to the class claims being resolved, the Parties have also agreed to provide Defendants with additional rights and protections as contemplated in individual agreements. These additional

[4] Since Defendants have agreed to pay any attorneys' fees awarded to Class Counsel in addition to the amount paid into the Settlement Fund, the Court need not apply the percentage of the common fund method. However, even if the Court were to do so, Class Counsel's requested fee constitutes 37% of the total amount of money set aside by Defendants to resolve the claims of the Settlement Class Members. Such a percentage is well within the range approved by Texas district courts. *E.g.*, *Wolfe v. Anchor Drilling Fluids USA Inc.*, 2015 WL 12778393, at *3 (S.D. Tex. Dec. 7, 2015) (awarding forty percent); *Frost v. Oil States Energy Servs.*, 2015 WL 12780763, *2 (S.D. Tex. Nov. 19, 2015) (one-third).

[5] Class Counsel will request Service Awards of up to $2,000 for the Class Representatives in their forthcoming motion. *See* Settlement Agreement, ¶ 85. Service awards of this size have been found reasonable. *See, e.g.*, *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 340 (W.D. Tex. 2007) (approving $5,000 service award); *Blackmon*, 2022 WL 3142362, at *5 (approving service award of $12,500). In addition, the Parties' Agreement is not conditioned on the Court's approval of this request.

agreements were negotiated following agreements on the principal terms of the class-wide settlement. *See* Plaintiffs' Counsel Decl., ¶ 34. The relief provided by the Settlement Agreement is excellent.

4. The Stage of the Proceedings and the Amount of Discovery Completed Support Approval of the Settlement.

This factor requires the court to look to whether "the parties and the district court possess ample information with which to evaluate the merits of the competing positions." *Ayers*, 358 F.3d at 369. As explained in Part II.A., *supra*, substantial discovery took place prior to the consummation of the Agreement, including the production and review of thousands of documents and depositions of numerous witnesses, including Plaintiffs and Plaintiffs' expert Mr. Olsen, and multiple fact and Rule 30(b)(6) deponents from Defendants. Much of the discovery material was presented with or relied on in the class certification-related briefing, upon which this Court ruled. *See* Doc. 83. Likewise, the merits of Plaintiffs' theories of liability and Defendants' defenses thereto are fully briefed in Defendants' motion for summary judgment. *See* Docs. 60, 70, 83. Thus, the Parties were well-informed of the facts and legal issues in this case. In addition, Class Counsel's significant experience litigating consumer class actions provided useful benchmarks to evaluate the merits of this case and to thus allow Class Counsel to evaluate the reasonableness of the settlement here. *See* Plaintiffs' Counsel Decl., ¶ 51.

The Court should thus conclude that "[t]he parties, and the court, have ample factual and legal information with which to evaluate the merits of their competing positions and to 'make a reasoned judgment about the desirability of settling the case on the terms proposed.'" *ODonnell*, 2019 WL 4224040, at *10 (quoting *In re Educ. Testing Serv.*, 447 F. Supp. 2d at 620). Thus, this factor supports the conclusion that the settlement will ultimately be approved as fair, reasonable, and adequate, and therefore, that issuing notice to the Settlement Classes is justified.

5. Plaintiffs' Probability of Success on the Merits Supports Approval of the Settlement.

"The probability of the plaintiffs' success on the merits is the most important *Reed* factor, 'absent fraud and collusion.'" *ODonnell*, 2019 WL 4224040, at *11 (quoting *Santinac v. Worldwide Labor Support of Ill., Inc.*, 2017 WL 1098828, at *3 (S.D. Miss. Mar. 23, 2017) (citing *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. Unit A 1982))). "In evaluating the likelihood of success, the Court must compare the terms of the settlement with the rewards the class would have been likely to receive following a successful trial." *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 287 (W.D. Tex. 2007) (citing *Reed*, 703 F.2d at 172). "This factor favors approving a settlement even when the likelihood of success on the merits is not certain." *Id.* (citing *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1322, 1326-27 (5th Cir. Unit A Oct. 1981) ("A district court need not establish the plaintiffs' likelihood of prevailing to a certainty.")).

While Plaintiffs are confident in the merits of their theory of liability and ability to prove the claims of the absent class members, there remain significant obstacles to a classwide judgment in favor of the class on liability and damages. Even though this Court certified three classes of Direct Express cardholders, Plaintiffs still have to establish that liability on behalf of these classes and convince a jury that damages are appropriate. And even if Plaintiffs prevail at trial on behalf of the classes, there is the significant risk that, after years-long litigation, the Fifth Circuit could reverse either on class certification or on the merits. Given these significant risks that could result in cardholders receiving nothing, the settlement, which returns to Settlement Class Members a substantial percentage of their potential damages, is a fair, reasonable, and adequate result. *See* Plaintiffs' Counsel Decl., ¶¶ 36, 38. Thus, this factor supports issuing notice to the Settlement Class.

6. The Range and Certainty of Recovery Supports Approval of the Settlement.

This factor requires the district court to "establish the range of possible damages that could be recovered at trial, and, then, by evaluating the likelihood of prevailing at trial and other relevant factors, determine whether the settlement is pegged at a point in the range that is fair to the plaintiff settlors." *Maher v. Zapata Corp.*, 714 F.2d 436, 460 (5th Cir. 1983) (quoting *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 213 (5th Cir. 1981)). "The court's consideration of this factor 'can take into account the challenges to recovery at trial that could preclude the class from collecting altogether, or from only obtaining a small amount.'" *ODonnell*, 2019 WL 4224040, at *12 (quoting *Klein*, 705 F. Supp. 2d at 656). "The question is not whether the parties have reached 'exactly the remedy they would have asked the Court to enter absent the settlement,' but instead 'whether the settlement's terms fall within *a reasonable range of recovery*, given the likelihood of the plaintiffs' success on the merits." *Id.* (quoting *Klein*, 705 F. Supp. 2d at 656; *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 849-50 (E.D. La. 2007)) (emphasis in original).

In this case, Plaintiffs seek to recover damages on behalf of the certified classes for Defendants' alleged violations of EFTA and Regulation E. *See* Doc. 83 at 1. In the class action context, damages for violations of EFTA and Regulation E are subject to the statutory cap imposed by Congress in 15 U.S.C. § 1693m(a)(2)(B). This statute provides that in the class action context the total recovery allowed per statutory violation "shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the defendant." 15 U.S.C. § 1693m(a)(2)(B). Because Plaintiffs have identified three potential statutory violations by Defendants, the maximum damages recoverable in this case on behalf of the certified classes is $1,500,000 (3 x $500,000). Therefore, the Settlement Amount that Defendants have agreed to pay as part of the

settlement ($1,200,000) represents eighty percent (80%) of the possible damages that could be recovered at trial in this case. Such a percentage of recovery of potential damages is more than reasonable.

"Parties give and take to achieve settlements. Typically neither Plaintiffs nor Defendants end up with exactly the remedy they would have asked the Court to enter absent the settlement." *Frew v. Hawkins*, 2007 WL 2667985, at *6 (E.D. Tex. Sept. 5, 2007) (internal citations omitted) (citing *United States v. Armour*, 402 U.S. 673, 681 (1971)). The settlement here is an excellent result given the range and certainty of recovery. Thus, this factor supports issuing notice of the settlement to the Settlement Classes.

7. The Respective Opinions of Class Counsel, the Class Representatives, and the Absent Class Members, Support Approval of the Settlement.

As explained above, Class Counsel believes the settlement is an excellent result for the Settlement Class, especially given the risks and delay of continued litigation, as detailed above. *See* Plaintiffs' Counsel Decl., ¶ 81. "The endorsement of class counsel is entitled to deference, especially in light of class counsels' significant experience in complex civil litigation and their lengthy opportunity to evaluate the merits of the claims." *DeHoyos*, 240 F.R.D. at 292; *see also Stott v. Capital Fin. Servs., Inc.*, 277 F.R.D. 316, 346 (N.D. Tex. 2011) ("As class counsel tends to be the most familiar with the intricacies of a class action lawsuit and settlement, 'the trial court is entitled to rely upon the judgment of experienced counsel for the parties'") (quoting *Cotton*, 559 F.2d at 1330). Thus, while the "[C]ourt may not simply defer to class counsels' opinion," because the other factors also support a finding that the proposed settlement is fair, adequate, and reasonable, Class Counsel's recommendation that the settlement satisfies the requirements for approval is entitled to substantial weight. *See Turner*, 472 F. Supp. 2d at 852.

Here, Class Counsel not only has the benefit of a complete understanding of the risks and potential ranges of recovery in this case, but has litigated other similar cases that allow Class Counsel to fairly consider the merits of the claims here and the value of the settlement to the Settlement Class. In addition, the Class Representatives also support and approve the Settlement, believing it to be in the best interests of the Settlement Class. *See* Plaintiffs' Counsel Decl., ¶¶ 37-38. While the Settlement Class Members have not yet had the opportunity to provide their views on the proposed Settlement, Class Counsel believe it will be well received, and any objections thereto will be provided to the Court and addressed in advance of the Fairness Hearing. Accordingly, this factor supports issuing notice of the settlement to the Settlement Class.

8. The Settlement Treats Class Members Equitably Relative to Each Other, Supporting Approval of the Settlement.

The settlement's proposed distribution formula determines each Settlement Class Member's recovery under the settlement according to the claims of fraud that were denied by Defendants. Accordingly, the Settlement treats the Settlement Class Members equitably relative to each other, supporting a finding that the settlement will likely be approved, and thus, justifying issuing notice of the Settlement to the Settlement Classes.

In sum, the Rule 23(e) and Fifth Circuit *Reed* factors support a finding that the settlement will likely be approved, and that therefore, notice of the settlement should issue to the Settlement Classes.

II. THE SETTLEMENT CLASSES SATISFY THE REQUIREMENTS FOR CLASS CERTIFICATION.

Plaintiffs' unopposed motion satisfies all the requirements of certification of the Settlement Class. Courts in the Fifth Circuit have approved class certification in light of

settlement where the class satisfies the requirements of Federal Rules of Civil Procedure 23(a) (*i.e.*, numerosity, commonality, typicality, and adequacy) and 23(b). *E.g.*, *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 279 (W.D. Tex. 2007); *Stott v. Cap. Fin. Servs., Inc.*, 277 F.R.D. 316, 324 (N.D. Tex. 2011); *also Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 296 (3d Cir. 2011). However, in the settlement context, the Court need not consider whether the case would present intractable management problems since, as a result of settlement, there will be no trial. *Sullivan*, 667 F.3d at 322, n.56. Because the proposed Settlement Classes meet all applicable requirements of Rule 23, it should be certified.

A. The Settlement Classes Meet the Requirements of Rule 23(a).

To be certified, a class must meet four criteria: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy). *See* Fed. R. Civ. P. 23. This Court has already determined that each of these requirements were met in this case and should do so again for the purposes of settlement.

1. The Numerosity Requirement Has Been Satisfied.

Numerosity requires the members of a class to demonstrate the class is so numerous that "joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Numerosity is generally satisfied where a proposed class exceeds forty (40) class members. *Neese v. Becerra*, 342 F.R.D. 399, 407 (N.D. Tex. 2022). As the proposed Settlement Classes contains more than 400,000 potential members, the numerosity requirement is easily satisfied.

2. The Commonality Requirement Has Been Satisfied.

The Rule 23(a)(2) "commonality" requirement is satisfied if there is *at least one* common question of fact or law between the Plaintiffs claims and those of the Settlement Classes. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011) (agreeing that "[f]or purposes of Rule 23(a)(2), even a single common question will do"). The element aims to determine "whether there is a need for combined treatment and a benefit to be derived therefrom." *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986); *Hackler v. Tolteca Enters., Inc.*, 2019 WL 7759523, at *3 (W.D. Tex. Sept. 9, 2019) (Rodriguez, J.). The threshold of commonality is not high. *Jenkins*, 782 F.2d at 472. Rather, the commonality test is met when there is "at least one issue whose resolution will affect all or a significant number of the putative class members." *Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir. 1982); *Hackler*, 2019 WL 7759523, at *3.

This Court has already determined that commonality has been satisfied as to Plaintiffs' EFTA claims. *See* Doc. 83 at 22-23. There is no reason to revisit this determination. Rule 23(a)(2)'s commonality requirement has been satisfied.

3. The Typicality Requirement Has Been Satisfied.

Plaintiffs' claims are also typical of the claims of the Settlement Classes as a whole, thus satisfying Rule 23(a)(3). Rule 23(a)(3) "'focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent.'" *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1990) (quoting *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997)). When determining whether typicality is satisfied, "the critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class." *Id.*

Here, this Court has already held that "within each class, Plaintiffs' theories of liability and relief are identical for all putative class members." *See* Doc. 83 at 24-25. Plaintiffs' claims

arose from the same course of events that each Settlement Class Member was subjected to, and that this same conduct caused the same injury to all of the Settlement Class Members. The typicality prong is satisfied here.

4. Plaintiffs Will Adequately Protect the Interests of the Class.

Rule 23(a)(4) is also met because Plaintiffs will fairly and adequately protect the interests of the Settlement Class. To certify a class, the court must find that class counsel is "qualified, experienced, and generally able to conduct the proposed litigation." *N. Am. Acceptance Corp. v. Arnall, Golden & Gregory*, 593 F.2d 642, 644 (5th Cir. 1979). Additionally, "the class representatives [must] possess a sufficient level of knowledge and understanding to be capable of 'controlling' or 'prosecuting' the litigation." *Feder v. Elec. Data Sys. Corp*., 429 F.3d 125, 129-30 (5th Cir. 2005) (quoting *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 482–83 (5th Cir. 2001)). Differences between named plaintiffs and class members do not necessarily make the plaintiffs inadequate representatives. *Mullen*, 186 F.2d at 625-26.

Here, as this Court has previously found, Plaintiffs and their counsel have adequately represented the classes. *See* Doc. 83 at 25-26. Therefore, the proposed settlement satisfies the adequacy requirement.

B. The Requirements of Rule 23(b)(3) Are Satisfied Because Questions Common to the Classes Predominate and a Class Action Is Superior to Other Available Methods of Adjudication.

In addition to the four requirements of Rule 23(a), the proposed class must also satisfy at least one provision of Rule 23(b). Rule 23(b)(3) is satisfied when: (1) the questions of law or fact common to the class predominate over any questions affecting only individual class members ("predominance"); and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy ("superiority"). Fed. R. Civ. P. 23(b)(3);

Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 615 (1997). Both of these requirements are met here.

1. Predominance Exists Here.

The predominance inquiry requires courts "to consider how a trial on the merits would be conducted if a class were certified." *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) (citation and internal quotation marks omitted). The inquiry "entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class, a process that ultimately prevents the class from degenerating into a series of individual trials." *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 326 (5th Cir. 2008). Rule 23(b)(3)'s predominance requirement is "far more demanding" than the commonality requirement of 23(a) because the predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.*

This Court has already determined that Plaintiffs "satisfied their burden of showing that questions of law or fact common to the putative members of the EFTA Classes predominate over any questions affecting only individual members. *See* Doc. 83 at 32. As a result, the predominance element is satisfied.

2. Superiority Exists Here.

The superiority prong asks whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The rule expressly sets forth a list of relevant factors: putative class members' interest in bringing individual actions; the extent of existing litigation by class members; the desirability of concentrating the litigation in one forum; and potential issues with managing a class action. Fed. R. Civ. P. 23(b)(3)(A-D). Here, the superiority requirement is satisfied.

First, no members of the putative classes expressed interest in bringing individual actions other than Plaintiffs here. Second, it is well settled that a class action is the superior method of adjudication where, as here, "the proposed class members are sufficiently numerous and seem to possess relatively small claims unworthy of individual adjudication due to the amount at issue . . . [and] there is reason to believe that class members may lack familiarity with the legal system, discouraging them from pursuing individual claims." *Jankowski v. Castaldi*, 2006 WL 118973, at *4 (E.D.N.Y. Jan. 13, 2006). As this Court held previously, "each of the EFTA Classes are far too large, and the claims too small, for each member of the EFTA Classes to prosecute as a separate individual action." *See* Doc. 83 at 34-35. Certification of the Settlement Classes will allow for efficient resolution of claims that would likely not be brought owing to prohibitive legal expenses, while at the same time preserving scarce judicial resources. Without the class action vehicle, the putative classes would have no reasonable remedy, and Defendants would be permitted to retain the proceeds of their violations of law. Accordingly, a class action is the best available method for the efficient adjudication of this litigation.

C. Plaintiffs' Counsel Should Be Appointed Class Counsel.

Rule 23(c)(1)(B) provides that "[a]n order that certifies a class action . . . must appoint class counsel under Rule 23(g)." The factors listed under Rule 23(g) all favor appointment of Webb, Klase & Lemond, LLC and The Vaught Firm, LLC as Class Counsel.

Class Counsel worked extensively to identify and investigate the claims, defended substantive and discovery matters before this Court, reviewed thousands of pages of documents, and responded to written discovery, among other things. Collectively, Class Counsel has substantial knowledge of this case in particular and experience in litigating complex consumer class actions in general. *See* Plaintiffs' Counsel Decl., ¶ 51. Class Counsel has expended and

will continue to expend the necessary resources to represent the Settlement Classes. For these reasons Class Counsel should once again be appointed class counsel at this juncture of the case.

III. THE COURT SHOULD APPROVE THE NOTICE PLAN.

Once a settlement has been reached on a class-wide basis, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). "For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable efforts." Fed. R. Civ. P. 23(c)(2)(B). "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements." *ODonnell*, 2019 WL 4224040, at *26 (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005)). "Instead, 'a settlement notice need only satisfy the 'broad reasonableness standards imposed by due process.'" *Id.* (quoting *In re Katrina*, 628 F.3d at 197 (quoting *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999))). "Due process is satisfied if the notice provides class members with the 'information reasonably necessary for them to make a decision whether to object to the settlement.'" *Id.* (quoting *In re Katrina*, 628 F.3d at 197); *see also* American Law Institute, Principles of the Law of Aggregate Litigation § 3.04(a) (2010) ("The purpose of a notice of a proposed class settlement is to set forth the major contours of the proposal and to inform class members of their right to attend the fairness hearing and to lodge written objections by a prescribed date should they so desire").

As for content of the notice, Rule 23 requires that the notice use clear, concise, and plain language to inform members of:

(i) the nature of the action;
(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;
(iv) that a class member may enter an appearance through an attorney if the member so desires;
(v) that the court will exclude from the class any member who requests exclusion;
(vi) the time and manner for requesting exclusion; and
(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). In the settlement context, notice must "inform class members of the nature of the pending litigation; of the settlement's general terms; that complete information is available from court files; and that any class member may appear and be heard at a fairness hearing." *DeHoyos*, 240 F.R.D. at 300.

A. The Plan and Form of Notice.

In total, there are three different forms of Notice contemplated that will be sent to potential Settlement Class Members: (1) direct E-Mail Notice and/or Mail Notice that will be sent to all potential Settlement Class Members' last known e-mail or mailing address; (2) Long-Form Notice posted on the Settlement Website; and (3) indirect notice via a Banner Ad being disseminated via a targeted social media campaign. *See* Settlement Agreement, ¶ 25. The costs of providing Notice will be paid out from the Settlement Fund.

The primary method of notice for potential Members of the Settlement Classes is individual E-Mail Notice to the last known e-mail address shown on Defendants' records and, for those class members for whom Defendants do not have an e-mail address, individual Mail Notice to the last known mail address shown on Defendants' records, or at a more current address, if that information can reasonably be obtained by the Settlement Administrator. *See* Settlement Agreement, ¶ 52. Within 30 days from the date that the Settlement Administrator receives the Notice Recipient List, the Settlement Administrator shall (1) send E-Mail Notice to potential Members of the Settlement Classes for whom the Settlement Administrator was

provided an e-mail address; and (2) Mail Notice to potential Members of the Settlement Classes for whom there are no e-mail addresses on file. *Id.* at ¶¶ 24-25.

The Settlement Administrator shall run the mailing addresses through the National Change of Address Database before mailing. *Id.* If an e-mail is returned as undeliverable, the Settlement Administrator shall mail the Mail Notice to the potential Settlement Class Member. *Id.* For all potential Members of the Settlement Classes, if the mailed postcard is returned as undeliverable, the Settlement Administrator shall use reasonable efforts to locate a current mailing address for the Settlement Class Member and re-mail the notice to the current address. *Id.*

The E-Mail and Mail Notice will direct potential Members of the Settlement Classes to the Long-Form Notice, which will be posted on the Settlement Website. The E-Mail Notice will include a hyperlink to the Settlement Website and Claim Form. As soon as practicable following Preliminary Approval, but prior to the sending of Notice, the Settlement Administrator shall establish the Settlement Website and a toll-free telephone line for potential Members of the Settlement Classes to call with questions. *See* Settlement Agreement, ¶ 47. The Internet address (URL) of the Settlement Website and the toll-free number shall be included in all forms of Notice sent to potential Members of the Settlement Class. *Id.* The Settlement Website shall include the Agreement, the Long-Form Notice, the Preliminary Approval Order, the Claim Form, and such other documents as Class Counsel and Defendants agree to post or that the Court orders posted on the website.

B. The Plan Satisfies Rule 23 and Constitutional Due Process.

The form and content of the Notice plan comply with Rule 23 and constitutional due process. The Notice plan is reasonably calculated to reach potential Settlement Class Members.

First, the Notice plan contemplates sending direct notice to all potential Settlement Class Members at their last known e-mail address, or if no e-mail address is known, to their last known mailing address. If there exists a forwarding address for these potential Settlement Class Members, Notice will be sent there, and the Settlement Administrator will take all reasonable and efficient efforts to locate potential Settlement Class Members whose E-Mail and/or Postcard Notices are returned as undeliverable.

As to the content of Notice, all forms of Notice use easily understood language to concisely and clearly inform potential Settlement Class Members of the nature of the Action, the definition of the proposed Settlement Class, the claims and issues, the ability to appear through counsel, the ability and process for requesting exclusion, and the binding effects of the Settlement. The Notices also explain the terms of the Settlement, the scope of the releases, the Claims process, and how Settlement Class Members may opt-out or object.

C. The Proposed Notice Timeline.

As outlined in the Proposed Order attached hereto, Plaintiffs propose the following settlement administration timeline, with deadlines measured from the date of the Court's Order granting Preliminary Approval of the settlement:

Deadline	**Proposed Dates**
Entry of Court Order granting Preliminary Approval	TBD
Creation of Settlement Website by Settlement Administrator	30 days after Preliminary Approval
Defendants to provide Notice Recipient List to Settlement Administrator	30 days after Preliminary Approval
Notice is e-mailed and/or mailed	60 days after Preliminary Approval

Filing Deadline for Plaintiffs' Motion for attorneys' fees and expenses, and for Service Awards	30 days after Notice Deadline
Deadline for objections and requests for exclusion	60 days after Notice Deadline
Submission deadline for Claims	90 days after Notice Deadline
Filing Deadline for Plaintiffs' Motion for Final Approval	14 days before Final Approval Hearing
Final Approval Hearing	_____ (no earlier than 120 days after Preliminary Approval to be set by the Court)

IV. PLAINTIFFS' MOTION FOR LEAVE TO FILE A MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS FOR THE PLAINTIFFS.

Pursuant to the above proposed schedule, Plaintiffs seek leave to file a motion for attorneys' fees, reimbursement of expenses, and for Service Awards for the Plaintiffs in accordance with the Settlement Agreement. As specified in the Proposed Preliminary Approval Order filed herewith, Settlement Class Counsel's motion for fees, expenses, and Service Awards shall be filed thirty (30) days in advance of the Settlement objection and exclusion deadlines. The timing and form of the Notice plan, discussed above, will provide Settlement Class Members with both sufficient notice of the motion for fees and expenses, and a reasonable opportunity to review it prior to determining whether to object to the motion, object to the Settlement Agreement, or opt out of the Settlement Class. Additionally, the Long Form Notice includes the date on which the motion for fees and costs shall be filed, and informs the Settlement Classes that the motion will be made available on the Settlement Website.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant their Motion for Preliminary Approval of settlement and enter the proposed Preliminary Approval Order.

DATED this 22nd day of March, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2024, I caused the foregoing document to be electronically filed with the Clerk of Court using the CM/ECF system which automatically sends e-mail notification of such filing to all attorneys of record. Additionally, I served the foregoing upon counsel of record for Defendants via electronic mail.

/s/ G. Franklin Lemond, Jr
G. Franklin Lemond, Jr.