

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

RUBY LAMBERT, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

NAVY FEDERAL CREDIT UNION,

Defendant.

Case No. 1:19-cv-00103-LO-MSN

Hon. Liam O'Grady

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF UNOPPOSED
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

Date: October 21, 2020

/s/ Kristi C. Kelly

Kristi C. Kelly
Andrew J. Guzzo
Casey S. Nash
KELLY GUZZO, PLC
3925 Chain Bridge Road, Suite 202
Fairfax, VA 22030
Telephone: (703) 424-7572
Facsimile: (703) 591-0167
kkelly@kellyguzzo.com
aguzzo@kellyguzzo.com
casey@kellyguzzo.com

Jeff Ostrow (pro hac vice)
Jonathan M. Streisfeld (pro hac vice)
KOPELOWITZ OSTROW
FERGUSION
WEISELBERG GILBERT
One W. Las Olas Blvd.
Suite 500
Fort Lauderdale, FL 33301
Telephone: (954) 525-4100
Facsimile: (954) 525-4300
ostrow@kolawyers.com
streisfeld@kolawyers.com

Jeffrey D. Kaliel (pro hac vice)
Sophia G. Gold (pro hac vice)
KALIEL PLLC
1875 Connecticut Ave., NW
10th Floor
Washington, DC 20009
(202) 350-7483
jkaliel@kaliellpc.com
sgold@kaliellpc.com

Hassan A. Zavareei (pro hac vice)
Andrea R. Gold (pro hac vice)
Katherine M. Aizpuru (pro hac vice)
TYCKO & ZAVAREEI LLP
1828 L Street NW, Suite 1000
Washington DC, 20036
Telephone: (202) 973-0900
Facsimile: (202) 973-0950
hzavareei@tzlegal.com
agold@tzlegal.com
kaizpuru@tzlegal.com

*Attorneys for Plaintiff and the Settlement
Class*

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	2
A.	Facts Alleged in the Complaint.....	2
B.	Procedural Background and Settlement Negotiations	2
III.	SETTLEMENT TERMS	4
A.	Settlement Class.....	4
B.	Settlement Benefits	4
1.	Cash Benefits	4
2.	Injunctive Relief.....	6
C.	Settlement Administrator and Settlement Administration Costs	7
D.	Proposed Notice Program	7
E.	Release	8
F.	Opt-Outs and Objections.....	9
G.	Attorneys’ Fees, Costs and Service Award.....	10
IV.	LEGAL STANDARD FOR PRELIMINARY APPROVAL	11
V.	ARGUMENT.....	13
A.	The Court should preliminarily approve the Settlement.....	13
1.	The Settlement is fair.....	14
2.	The Settlement is adequate and reasonable.	18
3.	The Settlement is an outstanding recovery for the Settlement Class.....	20
B.	The Court should grant conditional certification of the Settlement Class.	22
1.	The Settlement Class satisfies the requirements of Rule 23(a).....	22
a.	Numerosity is satisfied.....	22
b.	Commonality is satisfied.....	22
c.	Typicality is satisfied.	23
d.	Adequacy is satisfied.	23
2.	The Settlement Class also satisfies the requirements of Rule 23(b)(3). ...	24
a.	Common issues of law and fact predominate.	24
b.	A class action is a superior method of adjudication.	25
C.	The Court Should Appoint Plaintiff’s Counsel as Class Counsel Under Rule 23(g)	26

D.	The Court should approve the Notice Program.	27
VI.	CONCLUSION.....	28

TABLE OF AUTHORITIES

Cases

<i>Amchem Products, Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	22, 24, 25
<i>Bicking v. Mitchell Rubenstein & Assocs., P.C.</i> , No. 3:11CV78-HEH, 2011 WL 5325674 (E.D. Va. 2011).....	16, 17
<i>Brady v. Thurston Motor Lines</i> , 726 F.2d 136 (4th Cir. 1984)	22
<i>City of Detroit v. Grinnell Corporation</i> , 495 F.2d 448 (2d Cir. 1974).....	21
<i>Deem v. Ames True Temper, Inc.</i> , No. 6:10-cv-01339, 2013 WL 2285972 (S.D.W.Va. May 23, 2013)	17
<i>Droste v. Vert Capital Corp.</i> , No. 3:14-cv-467, 2015 WL 1526432 (E.D. Va. April 2, 2015).....	25
<i>Eisen v. Carlisle & Jacquelin</i> , 417 U.S. 156 (1974).....	27
<i>Fisher v. Va. Elec. & Power Co.</i> , 217 F.R.D. 201 (E.D. Va. 2003)	23
<i>Flinn v. FMC Corp.</i> , 528 F.2d 1169 (4th Cir. 1975)	20
<i>Gariety v. Grant Thornton, LLP</i> , 368 F.3d 356 (4th Cir. 2004)	12
<i>Gunnells v. Healthplan Servs.</i> , 348 F.3d 417 (4th Cir. 2003)	12, 24
<i>Henley v. FMC Corp.</i> , 207 F. Supp. 2d 489 (S.D.W.Va. 2002).....	20
<i>Herrera v. Charlotte School of Law, LLC</i> , 818 Fed. App'x 165, 2020 WL 3118494 (4th Cir. 2020)	12
<i>Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 855 F. Supp. 825 (E.D.N.C. 1994)	20
<i>In re Am. Capital S'holder Derivative Litig.</i> , No. 11-2424-PJM, 2013 WL 3322294 (D. Md. June 28, 2013).....	18
<i>In re Genworth Fin. Sec. Litig.</i> , 210 F. Supp. 3d 837 (E.D. Va. 2016)	11, 20
<i>In re Jiffy Lube Sec. Litig.</i> , 927 F.2d 155 (4th Cir. 1991)	passim

<i>In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig.</i> , 952 F.3d 471 (4th Cir. 2020)	12
<i>In re MicroStrategy, Inc. Sec. Litig.</i> , 148 F. Supp. 2d 654 (E.D. Va. 2001)	20
<i>In re NeuStar, Inc. Sec. Litig.</i> , No. 1:14CV885 JCC/TRJ, 2015 WL 5674798 (E.D. Va. Sept. 23, 2015)	passim
<i>In re The Mills Corp. Sec. Litig.</i> , 265 F.R.D. 246 (E.D. Va. 2009)	18, 22
<i>In re Titanium Dioxide Antitrust Litig.</i> , No. RDB-10-0318, 2013 WL 5182093 (D. Md. Sept. 12, 2013)	17
<i>Jeffreys v. Comm'ns Workers of Am., AFL-CIO</i> , 212 F.R.D. 320 (E.D. Va. 2003)	24, 25
<i>Lienhart v. Dryvit Sys., Inc.</i> , 255 F.3d 138 (4th Cir. 2001)	23
<i>McGlothlin v. Connors</i> , 142 F.R.D. 626 (W.D. Va. 1992)	23
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985)	27
<i>Sanchez v. Lasership, Inc.</i> , No. 1:12-cv-246 (GBL-TRJ), 2014 WL 12780145 (E.D. Va. Aug. 8, 2014)	17
<i>Solomon v. Am. Web Loan, Inc.</i> , No. 4:17cv145, 2020 WL 3490606 (E.D. Va. June 26, 2020)	passim
<i>Talbott v. GC Servs. Ltd. P'Ship</i> , 191 F.R.D. 99 (W.D. Va. 2000)	25
<i>Temporary Servs., Inc. v. Am. Int'l Grp., Inc.</i> , No. 3:08-cv-00271-JFA, 2012 WL 1300138 (D.S.C. July 31, 2012)	15
<i>Thomas v. FTS USA, LLC</i> , No. 3:13cv825 (REP), 2017 WL 1148283 (E.D. Va. Jan. 9, 2017), <i>report and recommendation approved in</i> 2017 WL 1147460 (E.D. Va. Mar. 27, 2017)	17

Other Authorities

Fed. R. Civ. P. 23(e), Committee Notes	12
--	----

Rules

Fed. R. Civ. P. 23(a)	12
Fed. R. Civ. P. 23(a)(2)	23

Fed. R. Civ. P. 23(a)(4).....	23
Fed. R. Civ. P. 23(b)(3).....	13, 24, 25
Fed. R. Civ. P. 23(c)(2)(B)	27
Fed. R. Civ. P. 23(e)	11
Fed. R. Civ. P. 23(e)(1).....	22, 27
Fed. R. Civ. P. 23(e)(2)(A)	17
Fed. R. Civ. P. 23(e)(2)(B)	16
Fed. R. Civ. P. 23(e)(2)(C)-(D).....	20
Fed. R. Civ. P. 23(e)(2)(C)(i).....	14, 19
Fed. R. Civ. P. 23(e)(2)(c)(iii)	16
Fed. R. Civ. P. 23(g)(1)(A).....	26
Fed. R. Civ. P. 23(g)(1)(B)	26

Treatises

Newberg on Class Actions § 15:73 (5th ed.)	17
--	----

I. INTRODUCTION

Plaintiff Ruby Lambert, on behalf of herself and a proposed class of current and former members of Defendant Navy Federal Credit Union, respectfully submits this memorandum in support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement. The Settlement¹—which was the result of hard-fought, arms' length negotiations between experienced counsel and facilitated by United States Magistrate Judge John F. Anderson—provides substantial monetary and non-monetary relief for the benefit of the Settlement Class. The Settlement includes Navy Federal's agreement to pay \$16,000,000.00 into a common fund and to separately pay all Settlement Administration Costs. Further, Navy Federal has agreed to modify its account agreement to further inform its members, resulting in significant potential prospective financial savings. One of the hallmark components of the Settlement is that Settlement Class Members will not have to file claim forms to receive the Settlement's benefits. Consequently, the Settlement is an excellent recovery, particularly in light of the Court's Order granting Navy Federal's Motion to Dismiss with prejudice. As explained below, the Settlement terms are well within the range of reasonableness and are consistent with applicable law. The Settlement satisfies all Fourth Circuit criteria for Preliminary Approval.

Accordingly, Plaintiff respectfully requests that this Court enter an order that will: (1) grant Preliminary Approval to the Settlement; (2) certify for settlement purposes the proposed Settlement Class, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3); (3) appoint Plaintiff Lambert as Class Representative; (4) approve the Notice Program set forth in the Agreement and approve the form and content of the Notices; (5) approve and order the opt-out and

¹ The capitalized terms in this Memorandum have the same meaning as the capitalized terms in the Settlement Agreement ("SA"), attached as *Exhibit A*.

objection procedures set forth in the Agreement; (6) stay all deadlines in the Action against Navy Federal pending Final Approval of the Settlement; (7) appoint as Class Counsel the law firms and attorneys identified herein; and (8) schedule a Final Approval Hearing.

II. BACKGROUND

A. Facts Alleged in the Complaint

On January 28, 2019, Plaintiff filed her Complaint against Navy Federal alleging that it assesses multiple \$29 insufficient funds fees (“NSF Fees”) on the same returned debit item or check when it is re-presented for payment and the account lacks sufficient funds. After Navy Federal returns the debit item or check for insufficient funds, the merchant may re-present that same debit item or check for payment up to three times. If Navy Federal returns the re-submitted debit item or check for insufficient funds, Navy Federal contends it is allowed to charge a new NSF Fee each time. Plaintiff alleges that under the terms of her contract with Navy Federal, Navy Federal was permitted to charge only one NSF Fee per debit item or check, regardless of how many times the merchant re-presents the debit item or check for payment. The Complaint alleged claims for breach of contract and breach of the covenant of good faith and fair dealing and violation of the North Carolina Unfair and Deceptive Trade Practices Act. The Complaint also alleged, *inter alia*, entitlement to monetary damages, interest, attorneys’ fees, and costs.

Navy Federal denies that its NSF Fee assessment practices breach its agreement with its members or violate the law.

B. Procedural Background and Settlement Negotiations

Plaintiff filed her Complaint on January 28, 2019. Dkt. 1. Navy Federal filed a motion to dismiss on April 1, 2019, which Plaintiff opposed. *See* Dkts. 19-21, 28, 34. The Court held a hearing on May 24, 2019. Dkt. 35. On August 14, 2019, the Court issued an order granting the

motion to dismiss with prejudice. Dkt. 37. Plaintiff timely noticed her appeal. Dkt. 38. The appeal is fully briefed, but the Fourth Circuit has stayed appellate proceedings pending approval of the Settlement. Dkt. 44.

Pursuant to Fourth Circuit Local Rule 33, a mediation was scheduled for October 16, 2019. App. Dkt. 10. The Parties conferred with the Fourth Circuit mediator, but that mediation did not result in settlement. Joint Declaration of Class Counsel Jeffrey Kaliei, Andrea Gold, and Jeff Ostrow, attached as **Exhibit B** (“Joint Decl.”) at ¶ 12.

After completing briefing in the appeal, the Parties’ counsel again met and conferred about settlement. The Parties agreed to a mediation on July 1, 2020, before Judge Anderson, a United States Magistrate Judge of this Court. *Id.* ¶ 13. Before mediation, the Parties exchanged mediation briefs and provided confidential mediation statements to Judge Anderson. *Id.* ¶ 14. Also, Navy Federal provided proposed Class Counsel with sample account-level transactional data for the proposed Settlement Class, from which Plaintiff’s expert extrapolated estimated class-wide damages for the proposed Class Period. *Id.* ¶ 10-11.

On July 1, 2020, the Parties met for a full-day settlement conference before Judge Anderson. *Id.* ¶ 15. Class Counsel entered the mediation fully informed of the merits of Settlement Class members’ claims and negotiated the proposed Settlement while zealously advancing the position of Plaintiff and Settlement Class members and being fully prepared to continue to litigate rather than accept a settlement that was not in Plaintiff’s and the Settlement Class’s best interests. *Id.* at ¶¶ 10-15. U.S. Magistrate Judge Anderson actively supervised and participated in the settlement discussions. The Parties made some progress but were unable to reach a settlement that day. *Id.* ¶ 16. However, the Parties continued to negotiate with the assistance of Judge Anderson. *Id.* ¶ 17. On July 10, 2020, the Parties agreed on the material terms of the Settlement, which were

memorialized in a term sheet executed July 24, 2020. *Id.* ¶ 18. The Parties did not discuss attorneys’ fees or any Service Award until after agreeing on the material terms of the Settlement.

Id. ¶ 19.

III. SETTLEMENT TERMS

A. Settlement Class

The Settlement will resolve the claims of the Settlement Class, defined as:

All current and former Navy Federal members in the United States who were charged Representment NSF Fees during the Class Period. Excluded from the Settlement Class is Navy Federal, its parents, subsidiaries, affiliates, officers and directors, all Settlement Class members who make a timely election to be excluded, and all judges assigned to this litigation and their immediate family members.

See Agreement (“SA”) § 44.

The Class Period is defined as the period of January 28, 2014, through the date of Preliminary Approval. *Id.* § 16. “Representment NSF Fees” means the second or third NSF Fee charged to an Account Holder when a Settlement Class member’s merchant has re-presented a debit item or check to Navy Federal for payment (after an initial return by Navy Federal for insufficient funds), and where the debit item or check is again returned by Navy Federal due to insufficient funds, resulting in an additional NSF Fee or NSF Fees. *Id.* § 26.

B. Settlement Benefits

The Settlement provides meaningful immediate relief to Settlement Class Members in the form of direct cash payments and future injunctive relief.

1. Cash Benefits

Navy Federal has agreed to establish a \$16,000,000.00 cash Settlement Fund for the benefit of the Settlement Class and to separately pay all Settlement Administration Costs—a substantial expense. *Id.* §§ 51, 66. The Settlement Fund will be used to pay Settlement Class Member

Payments, any attorneys' fees and costs that the Court may award to Class Counsel, and any Service Award. *Id.* § 51.

Settlement Class Members do not need to submit a claim form in order to receive a Settlement Class Member Payment. The Settlement Fund will be distributed to Settlement Class Members according to the distribution plan set out in the Agreement. *Id.* §§ 74-83. The precise calculation and implementation of allocations of the Settlement Fund will be done by Class Counsel and Plaintiff's expert using data provided by Navy Federal. *Id.* § 74. Accounts held by Settlement Class Members will be identified for which Navy Federal assessed Representment NSF Fees during the Class Period. *Id.* § 75(a). The Representment NSF Fees will be totaled for each Account, resulting in each Settlement Class Member's Relevant NSF Fees. *Id.* § 75(b). The Net Settlement Fund will then be allocated *pro rata* to the Settlement Class Members based on the number of incurred Relevant NSF Fees. *Id.* §§ 75(c), 76-77. The only exception is that if any Settlement Class Member's *pro rata* share is less than \$5.00, that Settlement Class Member's Payment amount shall be adjusted upward to \$5.00. *Id.* § 78.

Settlement Class Member Payments to Current Account Holders will be made first by crediting their accounts or, if not feasible or reasonable to make a payment by a credit, by check. *Id.* § 80. Navy Federal will bear any costs associated with implementing the account credits and notifying Settlement Class Members who are Current Account Holders of any credit on the account statement. *Id.* Former Account Holders will receive their Settlement Class Member Payments by check. *Id.* § 81. If any amounts remain in the Net Settlement Fund due to uncashed or returned checks, the Settlement Administrator will hold that amount for one year and make a reasonable effort to locate the recipient of the funds (such as by running the address of the returned check through the Lexis/Nexis database). *Id.* § 82. The Settlement Administrator shall make one

additional attempt to identify updated addresses and re-mail or re-issue a distribution check to an updated address. *Id.*

Within one year after the date the Settlement Administrator mails the first Settlement Class Member Payment, remaining amounts resulting from uncashed checks (“Residual Funds”) will be distributed as follows. First, any Residual Funds will be distributed on a *pro rata* basis to Settlement Class Members who received their payments, to the extent feasible and practicable. *Id.* § 83(a). If preparing, transmitting, and administering such subsequent payments would not be feasible and practical, the Residual Funds will be distributed to a *cy pres* recipient(s) that works to promote financial literacy, including for members of the military or veterans, whom Class Counsel and Navy Federal shall jointly propose. *Id.* § 83(b). The costs of any second distribution will come from the Residual Funds. *Id.* § 83(c). There will be no reversion to Navy Federal.

2. Injunctive Relief

In addition to direct cash payments, Settlement Class Members will receive significant benefits in the form of injunctive relief. Specifically, Navy Federal has agreed to revise its account agreement and related documents to further explain when Representment NSF Fees may be assessed. Navy Federal agrees to adopt the following, or substantially similar, language:

Navy Federal may return debits (e.g., ACH payments) submitted for payment against the checking account if the amount of the debit exceeds the funds available in the checking account. Each time we return a debit for insufficient funds, we will assess an NSF fee in the amount shown on Navy Federal’s current Schedule of Fees and Charges for each returned debit item. The entity that submitted the debit may submit another debit to Navy Federal even if we have already returned the prior debit for insufficient funds in the checking account. If the resubmitted debit again exceeds the funds available in the checking account, Navy Federal again will return the debit, resulting in an additional NSF fee. Thus, you may be charged multiple NSF fees in connection with a single debit that has been returned for insufficient funds multiple times.

SA § 52. Plaintiff and her counsel expect that this revised disclosure will result in significant financial savings and will inure to the benefit of the Settlement Class, other Navy Federal

members, and future Navy Federal members who will be better able to understand when fees will be assessed to their accounts. Joint Decl. ¶ 29-30.

C. Settlement Administrator and Settlement Administration Costs

The proposed Settlement Administrator is JND Legal Administration, a nationally recognized and experienced class action administrator. Joint Decl. ¶ 44. Navy Federal has agreed to separately pay the costs of the Notice Program and administration, providing an additional benefit to the Settlement Class apart from the Settlement Fund. SA § 66.

D. Proposed Notice Program

The Parties' proposed Notice Program is designed to reach as many Settlement Class members as possible and is the best notice practicable under the circumstances. Joint Decl. ¶ 44. Navy Federal will provide to Class Counsel and its expert data for the entirety of the Class Period sufficient for Plaintiff's expert to determine Settlement Class membership and ultimately each Settlement Class Member Payment. SA § 55. Because Plaintiff's expert will not have access to Settlement Class member names or complete account numbers, Plaintiff's expert will provide results to Navy Federal, who will then create a list of Settlement Class members and their electronic mail or postal addresses and provide that list to the Settlement Administrator to provide Notice to the Settlement Class of the terms of the Settlement. *Id.* Navy Federal will bear the expense of extracting the necessary data to make available to Class Counsel's expert for analysis, while Class Counsel shall be responsible for paying Class Counsel's expert, who will analyze the data provided to determine Settlement Class membership as well as the amount of each Settlement Class Member's damages. *Id.* Thus, within 30 days after the Court enters the Preliminary Approval Order, the Settlement Administrator shall implement the Notice Program. *Id.* § 58. Notice shall be provided through the following means: (1) Email Notice to Account Holders for whom Navy

Federal maintains email addresses; (2) Postcard Notice to Account Holders for whom Navy Federal does not have a valid email address; and (3) Long Form Notice, which will be available on the Settlement Website and which the Settlement Administrator will mail to Settlement Class members who request it. *Id.* § 62. The Email Notice, Postcard Notice and Long Form Notice shall be substantially in the forms attached as ***Exhibits C, D and E***, hereto.

In addition, the Settlement Administrator will create and maintain a Settlement Website containing important information about the Settlement and case-related documents. *Id.* § 49. The Settlement Administrator will also establish a toll-free telephone line for Settlement Class members to call with Settlement-related inquiries and answer frequently asked questions of Settlement Class members who call with or otherwise communicate such inquiries.

All of the Notices will include, among other information, a description of the Settlement's material terms; a date by which Settlement Class members may exclude themselves from, or "opt-out" of, the Settlement Class; a date by which Settlement Class Members may object to the Settlement; the scheduled Final Approval Hearing date; and the Settlement Website address at which Settlement Class members may access the Settlement Agreement and other related documents and information. *Id.* § 58.

The Settlement Administrator will perform reasonable address traces for the initial Postcard Notice and Email Notice. *Id.* § 64. The Settlement Administrator will re-mail Postcard Notices to Settlement Class members whose new addresses were identified by no later than 60 days before the Final Approval Hearing. *Id.* The Settlement Administrator will also send the Postcard Notice to all Settlement Class members whose emails were returned as undeliverable. *Id.*

E. Release

The Settlement Class Member Release is narrowly tailored. As of the Effective Date of the

Settlement, Plaintiff and each Settlement Class Member will be deemed to have fully and irrevocably released and forever discharged Navy Federal and each of its present and former parents, subsidiaries, divisions, affiliates, predecessors, successors and assigns, and the present and former directors, officers, employees, agents, insurers, members, attorneys, advisors, consultants, representatives, partners, joint venturers, independent contractors, wholesalers, resellers, distributors, retailers, predecessors, successors and assigns of each of them (“Released Parties”), of and from any and all liabilities, rights, claims, actions, causes of action, demands, damages, costs, attorneys’ fees, losses and remedies, whether known or unknown, existing or potential, suspected or unsuspected, liquidated or unliquidated, legal, statutory, or equitable, based on contract, tort or any other theory, that result from, arise out of, are based upon, or relate to the conduct, omissions, duties or matters during the Class Period that were or could have been alleged in the Action (“Released Claims”) relating to the assessment of Representment NSF Fees. SA § 84. Each Settlement Class Member is enjoined from bringing Released Claims against Navy Federal. *Id.* § 85. The Release includes both known and unknown claims, and Plaintiff and the Settlement Class Members also waive any rights they may have under Section 1542 of the California Code. *Id.* §§ 86-87.

F. Opt-Outs and Objections

The Notices will all inform Settlement Class members of their right to opt-out and deadline to do so. SA § 59. Settlement Class members may opt-out of the Settlement Class at any time during the Opt-Out Period. *Id.* The Opt-Out Period will begin the day after the earliest date on which the Notice is first mailed and end no later than 30 days before the Final Approval Hearing.

The Notices will also inform Settlement Class members of their right to object to the Settlement and/or to Class Counsel’s application for attorneys’ fees, costs and/or Service Award.

Id. § 60. Objections must be mailed to the Clerk of the Court, Class Counsel, Navy Federal's counsel, and the Settlement Administrator. *Id.* Objections must be submitted no later than the last day of the Opt-Out Period. *Id.* Objections must include: (a) the name of the Action; (b) the objector's full name, address, and telephone number; (c) an explanation of the basis upon which the objector claims to be a Settlement Class member; (d) all grounds for the objection, accompanied by legal support for the objection known to the objector or the objector's counsel; (e) the number of times in which the objector has objected to a class action settlement within the preceding five years, along with copies of any orders related to or ruling upon those prior objections; (f) the identity of all counsel representing the objector, including current or former counsel who may be entitled to compensation for any reason related to the objection; (g) copies of any orders related to or ruling upon counsel's or the counsel's law firm's prior objections that were issued by the trial and appellate courts in each listed case in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the preceding 5 years; (h) any and all agreements relating to the objection or the process of objecting (whether written or oral) between the objector and the objector's counsel; (i) the identity of all counsel (if any) representing the objector who will appear at the Final Approval Hearing; (j) a list of all persons who will be called to testify at the Final Approval Hearing in support of the objection; (k) a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing; and (l) the objector's signature (an attorney's signature is not sufficient). *Id.* § 61.

G. Attorneys' Fees, Costs and Service Award

Class Counsel have not been paid for their extensive efforts or reimbursed for litigation costs and expenses incurred. Joint Decl. ¶ 31. The Settlement Agreement provides that Class Counsel will apply for an award of attorneys' fees, costs, and expenses. *See* SA § 89. Navy Federal

has agreed not to oppose a request for fees up to 33.33% of the Settlement Fund (up to \$5,332,800.00) and a request for reimbursement of reasonable litigation costs. *Id.* Such award will serve to compensate for the time, risk and expense Plaintiff's counsel incurred pursuing claims on behalf of the Settlement Class. However, if the Court does not approve an award of fees or costs, in whole or in part, that will not prevent the Settlement from becoming effective nor shall it be grounds for termination. *Id.*

Class Counsel will also ask the Court to approve a Service Award of \$5,000.00 for the Plaintiff in recognition of her service as Class Representative. *Id.* § 93. Navy Federal does not oppose the request. *Id.* However, if the Court does not approve the Service Award, that will not prevent the Settlement from becoming effective nor shall it be grounds for termination. *Id.*

IV. LEGAL STANDARD FOR PRELIMINARY APPROVAL

Federal Rule of Civil Procedure 23 requires court approval of class action settlements. Fed. R. Civ. P. 23(e). "The primary concern addressed by Rule 23(e) is the protection of class members whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991). Accordingly, the Court may approve a settlement only upon a finding that the settlement is fair and adequate. *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 839 (E.D. Va. 2016). The relevant factors in determining "fairness" are "that the settlement was reached as a result of good-faith bargaining at arm's length, without collusion, on the basis of (1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel." *In re Jiffy Lube*, 927 F.2d at 159; *see also Solomon v. Am. Web Loan, Inc.*, No. 4:17cv145, 2020 WL 3490606, at *4 (E.D. Va. June 26, 2020). Adequacy is assessed through "(1) the relative strength of the plaintiffs' case on the merits, (2) the existence of

any difficulties of proof or strong defenses the plaintiffs are likely to encounter of the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement.” *In re Jiffy Lube*, 927 F.2d at 159.²

Where, as here, a class settlement is reached before the Court certified a class, the plaintiff may also seek certification of a settlement-only class. *Solomon*, 2020 WL 3490606, at *1 (citing *In re NeuStar, Inc. Sec. Litig.*, No. 1:14CV885 JCC/TRJ, 2015 WL 5674798, at *2 (E.D. Va. Sept. 23, 2015)). The certification of a settlement-only class requires a showing that the Rule 23 factors are satisfied. *See Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 367 (4th Cir. 2004). Thus, the plaintiff must show that the Rule 23(a) factors are met: numerosity, commonality; typicality; and adequacy of representation. *See Fed. R. Civ. P. 23(a)*; *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 423 (4th Cir. 2003). And where, as here, the plaintiff seeks preliminary certification of a settlement class under Rule 23(b)(3), the plaintiff must show that the questions of law or fact common to class members predominate over questions affecting only individual class members, and that a class action is superior to other available methods of adjudication. *See Fed. R. Civ. P.*

² The 2018 amendments to Rule 23 also provide specific guidance to federal courts considering whether to approve a class settlement. *See Fed. R. Civ. P. 23(e)*, Committee Notes. The factors that the Rules contemplate a court to consider include whether: (A) the class representative 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. *See Fed. R. Civ. P. 23(e)(2)*. The Fourth Circuit has held that the *Jiffy Lube* standards “almost completely overlap with the new Rule 23(e)(2) factors, rendering the analysis the same.” *See Herrera v. Charlotte School of Law, LLC*, 818 Fed. App’x 165, 176 n.4, 2020 WL 3118494, at *8 n.4 (4th Cir. 2020) (citing *In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, 952 F.3d 471, 474 n.8 (4th Cir. 2020)).

23(b)(3); *In re Neustar*, 2015 WL 567498, at *3. The Court resolves these issues using the preponderance of the evidence standard. *In re Neustar*, 2015 WL 567498, at *3.

V. ARGUMENT

A. The Court should preliminarily approve the Settlement.

A preliminary review of the fairness and adequacy factors demonstrate the Settlement warrants Preliminary Approval under Rule 23(e)(2). The Settlement was negotiated in the absence of collusion and is the result of good-faith, informed, arms'-length negotiation between experienced and sophisticated counsel, in conjunction with a Magistrate Judge of this Court. Joint Decl. ¶¶ 22-23.

Any settlement requires the parties to balance the merits of the claims and defenses asserted and the attendant risks of continued litigation and delay. Plaintiff believes her claims are meritorious and that she will prevail on appeal and eventually at trial. *Id.* ¶ 35. Navy Federal, which obtained dismissal of Plaintiff's claims once and is opposing the appeal, argues that her claims are unfounded, denies liability, and has demonstrated its willingness to litigate vigorously. If the Settlement does not occur, Plaintiff will need to persuade the Fourth Circuit to reverse the Court's order dismissing her claims; conduct discovery; brief and prevail at class certification; likely defeat at least one motion for summary judgment; and prevail at trial. *Id.* ¶¶ 35-38. Any potential recovery could be significantly delayed by appellate proceedings at multiple stages of the case. *Id.* Plaintiff faces significant risk at each stage of the litigation. All that is certain is that if the case continues in litigation, class members will need to wait much longer before receiving any potential recovery at all. Thus, in Class Counsel's experience and informed judgment, the Settlement represents an excellent recovery for the Settlement Class, and the benefits of settling under the proposed terms outweigh the risks and uncertainties of continued litigation. *Id.* ¶¶ 35-41.

1. The Settlement is fair.

As noted above, when evaluating the fairness of a settlement, the Court must evaluate the settlement against the following criteria: (1) the posture of the case at the time the settlement was proposed; (2) the extent of discovery conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel. *In re Jiffy Lube*, 927 F.2d at 159.

Posture of the case. The Settlement was reached only after significant work was conducted. *See In re Jiffy Lube*, 927 F.2d at 159; *accord* Fed. R. Civ. P. 23(e)(2)(C)(i). Class Counsel performed significant research on Navy Federal, its NSF Fee assessment practices, and consumer complaints. Additionally, numerous consumers were interviewed and documents collected to gather information about Navy Federal's practices. Class Counsel thoroughly investigated Plaintiff's claims; prepared and filed the Complaint; briefed and argued Navy Federal's Motion to Dismiss; and, after the Court granted the motion, fully briefed an appeal of the Court's Order. Joint Decl. ¶¶ 2, 8-9. Class Counsel has also reviewed data regarding the Representment NSF Fees charged to the Settlement Class and provided informally by Navy Federal. *Id.* ¶ 10. Class Counsel worked closely with a well-qualified data expert who spent hours analyzing the account-level transactional data provided by Navy Federal.

Class Counsel expended significant resources researching and developing the legal claims at issue. *Id.* at ¶¶ 9. Class Counsel is familiar with the claims as they have litigated and resolved cases with similar factual and legal issues. *Id.* Class Counsel has experience in understanding the remedies and damages at issue, as well as what information is critical in determining class membership. *Id.* Class Counsel spent a significant amount of time analyzing information regarding the alleged NSF Fee assessment practice and working with their expert to understand Navy Federal's data and quantify damages suffered by the Settlement Class. *Id.*

The Parties also engaged in extensive, good-faith, arms'-length negotiations via mediation,

including the mediation efforts that eventually led to the Settlement. *Id.* ¶¶ 22-23. Judge Anderson, a well-respected Magistrate Judge of this Court, oversaw the July 2020 mediation and subsequent negotiations. These “adversarial encounters dispel any apprehension of collusion between the parties.” *In re Neustar, Inc.*, 2015 WL 5674798, at *10 (finding that where plaintiff “filed an amended complaint, argued at the motion to dismiss stage, noticed an appeal, and engaged Defendants in settlement mediation,” the posture of the case supported preliminary approval). This action has been appropriately litigated by the Parties, and both sides have obtained sufficient information to assess the relative strength of their respective claims and defenses.

Extent of discovery. Second, and relatedly, while the Parties have not engaged in formal discovery (because the Complaint was initially dismissed and the Fourth Circuit has not yet resolved Plaintiff’s appeal), prior to finalizing the Settlement, Navy Federal provided substantial data regarding the Representment NSF Fees at the heart of the case. Working with Class Counsel, Class Counsel’s expert analyzed this data in order to approximate class-wide damages. Courts in this Circuit have recognized that informal damages discovery satisfies the fairness factor, particularly where experts are involved. *In re Jiffy Lube*, 927 F.2d at 159 (recognizing that informal discovery can provide satisfactory information prior to preliminary approval); *In re Neustar, Inc.*, 2015 WL 5674798, at *10 (finding second factor satisfied where counsel reviewed publicly available information, conducted economic analysis, and received damages analysis from an expert); *Temporary Servs., Inc. v. Am. Int’l Grp., Inc.*, No. 3:08-cv-00271-JFA, 2012 WL 1300138, at *10 (D.S.C. July 31, 2012) (“District Courts within the Fourth Circuit have found that even when cases settle early in the litigation after only informal discovery has been conducted, the settlement may nonetheless be deemed fair.”). This is especially true here given that merits discovery likely would have shed very little light on Plaintiff’s claims. In this breach of contract

action, Plaintiff likely would have argued that extrinsic evidence is irrelevant and instead the ambiguous contract ought to have been construed against the drafter. Because the critical question in this case is a legal one, *i.e.*, whether Navy Federal's contract was ambiguous, merits discovery likely would not have moved the needle. The contract was materially the same for all Settlement Class members. Thus, the Parties' informal damages discovery and Class Counsel's subsequent expert analysis satisfies the second factor.

Circumstances surrounding negotiations. The circumstances surrounding the Parties' negotiations demonstrate that the Settlement was reached through arms'-length negotiations. *See In re Jiffy Lube*, 927 F.2d at 159; *accord* Fed. R. Civ. P. 23(e)(2)(B). The Parties participated in multiple settlement conferences, including a full-day in-person conference before Magistrate Judge Anderson, and, following the July 2020 mediation, continued to negotiate with Judge Anderson as facilitator. These arms'-length negotiations led to a fair Settlement. *See, e.g., Bicking v. Mitchell Rubenstein & Assocs., P.C.*, No. 3:11CV78-HEH, 2011 WL 5325674, at *5 (E.D. Va. 2011) (finding settlement fair where it was reached "under the supervision and direction" of a Magistrate Judge).

The terms of the proposed award of attorneys' fees and Service Award are also fair and demonstrate that the Settlement is the product of arms'-length negotiations. *See* Fed. R. Civ. P. 23(e)(2)(c)(iii). The Parties did not discuss attorneys' fees or a Service Award until after agreeing upon the Settlement's material terms. The amounts sought for attorneys' fees, costs, and expenses and a Service Award for Plaintiff are also reasonable and fair. The Settlement Agreement authorizes Class Counsel to seek an award of up to 33.33% of the Settlement Fund (up to \$5,332,800.00) and a request for reimbursement of reasonable costs, an amount that is well within the range of approval. The Agreement also authorizes Plaintiff to seek a Service Award of

\$5,000.00. These amounts are well within the range of approval for class action settlements. *See, e.g., Bicking*, 2011 WL 5325674, at *2, *5 & n.6 (preliminarily approving class settlement providing for service award of \$5,000); *Thomas v. FTS USA, LLC*, No. 3:13cv825 (REP), 2017 WL 1148283, at *5 (E.D. Va. Jan. 9, 2017), *report and recommendation approved in* 2017 WL 1147460 (E.D. Va. Mar. 27, 2017) (awarding fees of 33.33% and noting that “any discussion of percentage awards should acknowledge the age-old assumption that a lawyer receives a third of his client’s recovery under most contingency agreements. Newberg on Class Actions § 15:73 (5th ed.). Consequently, a fee award of one-third of the settlement fund would be consistent with that awarded in other cases”); *Sanchez v. Lasership, Inc.*, No. 1:12-cv-246 (GBL-TRJ), 2014 WL 12780145, at *1 (E.D. Va. Aug. 8, 2014) (approving fee award “representing one-third of the common settlement fund”); *Deem v. Ames True Temper, Inc.*, No. 6:10-cv-01339, 2013 WL 2285972, at *5 (S.D.W.Va. May 23, 2013) (recognizing the “presumptive reasonableness” of a fee award of one-third of the common fund); *In re Titanium Dioxide Antitrust Litig.*, No. RDB-10-0318, 2013 WL 5182093, at *5 n.9 (D. Md. Sept. 12, 2013) (“[A] one-third contingent fee arrangement is a standard practice in this country, and Class Counsel’s intention to request that portion of the settlement fund as attorneys’ fees does not shock the Court.”).

Experience of counsel. Class Counsel is highly experienced in consumer class action litigation, as demonstrated by their firm resumes, and have brought that significant experience to bear in litigating and settling this case. *See* Joint Decl. ¶¶ 42-43, Exs. 1-3. *See also* Fed. R. Civ. P. 23(e)(2)(A). Class Counsel collectively have decades of experience litigating consumer class actions against financial institutions and have litigated and settled dozens of class actions involving overdraft fees, non-sufficient fund fees, and other bank fees. Joint Decl. ¶¶ 6-7, 42. Counsel “may be evaluated by their affiliation with well-regarded law firms with strong experience in the relative

field,” and by any measure, Class Counsel satisfies this prong. *See In re Neustar, Inc.*, 2015 WL 5674798, at *11 (quoting *In re Am. Capital S’holder Derivative Litig.*, No. 11-2424-PJM, 2013 WL 3322294, at *4 (D. Md. June 28, 2013)). Based on their experience, Class Counsel endorse the Settlement as fair and adequate. Joint Decl. ¶ 26. Courts afford substantial consideration to the view of Class Counsel in considering whether a class settlement is fair. *See In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 255 (E.D. Va. 2009) (stating that it is “entirely warranted” for the court to “pay heed to” the judgment of experienced class counsel).

2. The Settlement is adequate and reasonable.

In assessing the adequacy of the Settlement, the Court looks to (1) the relative strength of the merits of the plaintiff’s claims; (2) the existence of any difficulties of proof or strong defenses the plaintiff will encounter at trial; (3) the anticipated duration and expense of additional litigation; (4) the solvency of the defendant and likelihood of recovery; and (5) the degree of opposition to the Settlement. *In re Jiffy Lube*, 927 F.2d at 159. Each of the relevant factors is satisfied.³

Relative strength of the claims / Difficulties of proof. The first and second factors, which are generally considered together, evaluate “how much the class sacrifices in settling a potentially strong case in light of how much the class gains in avoiding the uncertainty of a potentially difficult one.” *In re The Mills*, 265 F.R.D. at 256. Plaintiff is confident in her claims, but Navy Federal has raised numerous defenses—and the Court granted its Motion to Dismiss with prejudice. Plaintiff and the Settlement Class are “not likely to recover if this case does not settle.” *In re Neustar, Inc.*, 2015 WL 5674798, at *11 (preliminarily approving settlement where the court had dismissed the case, “indicating the weakness of Lead Plaintiff’s claims and the obstacles of proof it faces moving

³ The fifth factor cannot be evaluated until after the Court authorizes Notice to be disseminated to the Settlement Class.

forward”). Even if the Fourth Circuit were to rule in Plaintiff’s favor, Navy Federal will continue to dispute the factual and legal bases for the suit. The existence of these numerous disputed factual and legal issues creates uncertainty and risk for all parties, warranting approval. *Solomon*, 2020 WL 3490606, at *5 (finding that the first and second factors were satisfied where “it is possible that the Fourth Circuit could render a decision adverse to the Plaintiffs”).

Duration and expense of continued litigation. The likely duration and expense of continued litigation are substantial. Joint Decl. ¶¶ 34, 38. While the appeal of the Court’s Order has been fully briefed, the Fourth Circuit has not yet heard argument or ruled. If the Court rules in Plaintiff’s favor, this case will still be in its early stages when this Court receives the mandate. The Parties will need to conduct discovery, including written discovery, document review, and depositions. Plaintiff will need to brief class certification, which Navy Federal would oppose, Navy Federal may file at least one motion for summary judgment, and parties expect to rely on significant expert testimony. And of course, the expense and burden of trial will be substantial. This case will potentially continue for several more years should it not settle now, at continued expense to the class—without any guarantee of additional benefit. Thus, “a settlement avoids returning the case to this Court for class and merits discovery, class certification, summary judgment, trial, and further appeals,” a factor that weighs in favor of approval. *Solomon*, 2020 WL 3490606, at *5; *see also In re Neustar, Inc.*, 2015 WL 5674798, at *12 (granting preliminary approval where “if plaintiffs succeed on appeal, the case must proceed to the costly procedures of class certification, discovery, summary judgment, and trial before any putative class members may recover”). *Accord* Fed. R. Civ. P. 23(e)(2)(C)(i). This factor, thus, favors approval.

Solvency of the Defendant. There is no indication that Navy Federal will be unable to satisfy a judgment, but the fourth factor is “largely considered beside the point given the other

factors weighing in favor of preliminary approval.” *Solomon*, 2020 WL 3490606, at *5 (quoting *Henley v. FMC Corp.*, 207 F. Supp. 2d 489, 494 (S.D.W.Va. 2002)). Continued litigation would be expensive and consume significant resources of the parties and the Court. Thus, on balance, the risks, delays, and costs associated with further litigation weigh in favor of Preliminary Approval.

3. The Settlement is an outstanding recovery for the Settlement Class.

The Settlement provides an excellent result for the Settlement Class and treats the Class Members equitably relative to each other. *See* Fed. R. Civ. P. 23(e)(2)(C)-(D). Despite the Court’s order granting Navy Federal’s Motion to Dismiss, Class Counsel successfully negotiated (1) a \$16,000,000.00 common fund that will provide cash payments directly to Settlement Class Members, without any claims process, (2) changes to Navy Federal’s account agreement, and (3) the costs of Settlement Administration to be borne separately. The common fund and Settlement Administration Costs represent approximately 10.8% of most likely damages for Settlement Class Members. In light of the fact that this Court had previously dismissed Plaintiff’s case—a result which, if upheld on appeal, would mean Settlement Class Members would get nothing, this is an outstanding result.

Indeed, courts in this Circuit routinely grants final approval to settlements providing between 5-15% of maximum potential damages. *See In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 660 (E.D. Va. 2001) (order approving settlement amounting to approximately 13.9% of the maximum recovery at the time of judicial approval in securities fraud class action); *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d at 842 n.3 (order approving settlement amounting to approximately 15% of the possible recovery in securities fraud class action); *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 833 (E.D.N.C. 1994) (order approving settlement amounting to 5% of plaintiffs’ estimated loss in securities class action); *see also Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975) (“And because the cash settlement ‘may only

amount to a fraction of the potential recovery’ will not per se render the settlement inadequate or unfair.” (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n. 2 (2d Cir. 1974) (“In fact, there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.”)). Where, as here, Plaintiff faced significant litigation risk enlarged by the Court’s dismissal of the Complaint, the Settlement will provide meaningful tangible benefits to Settlement Class Members.

The allocation of the Settlement is also fair and reasonable, and the manner of administering relief will be effective. Settlement Class Members will receive payments directly either via direct deposit or a check, in a *pro rata* amount that is adjusted to reflect the number of Representment NSF Fees paid. No Settlement Class Member will receive a payment of less than \$5.00. The amount that each Settlement Class Member receives is based on objective criteria that apply to each Settlement Class Member equally. No Settlement Class Member will be treated more favorably than any other.

Similarly, the injunctive relief will equally apply to all Settlement Class Members (and all current and former Navy Federal members). The injunctive relief is a significant benefit and will allow Navy Federal members and future members to better understand Representment NSF Fees. This change will result in additional savings for Navy Federal members. Even if Plaintiff prevailed at trial, as a private litigant Plaintiff would have been unable to demand that Navy Federal stop charging Representment NSF Fees. By agreeing to provide additional disclosures, Navy Federal has agreed to the only injunctive relief Plaintiff would have been able to obtain had she prevailed at trial.

In addition, as another important Settlement benefit, Navy Federal agrees to bear the cost of notice and administration separate and apart from the \$16 million common fund. This, too, is

valuable, saving the class likely hundreds of thousands of dollars in notice costs.

In sum, the Settlement benefits are excellent, especially considering the procedural posture of this case and the hurdles the class faced.

B. The Court should grant conditional certification of the Settlement Class.

Certification for settlement purposes “has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants.” *In re The Mills*, 265 F.R.D. at 266. “Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Here, the proposed Settlement Class satisfies all Rule 23(a) and Rule 23(b)(3) requirements. For purposes of this Settlement only, Navy Federal does not oppose class certification. The Court should conclude that it is likely to certify the Settlement Class and approve the Settlement as fair, adequate, and reasonable. *See* Fed. R. Civ. P. 23(e)(1). Accordingly, Plaintiff requests that the Court conditionally certify the Settlement Class.

1. The Settlement Class satisfies the requirements of Rule 23(a).

a. Numerosity is satisfied.

Rule 23(a)(1) requires the class to be so numerous that joinder of all parties is impracticable. Here, based on the data provided by Navy Federal to Class Counsel, there are approximately 700,000 Settlement Class members. *See* Joint Decl. ¶ 47. While “no specified number is needed to maintain a class action,” the size of the Settlement Class here unquestionably satisfies numerosity. *See, e.g., Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984).

b. Commonality is satisfied.

The “commonality” factor of Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). All that is needed is one common issue. *See*

McGlothlin v. Connors, 142 F.R.D. 626 (W.D. Va. 1992). Here, Plaintiff alleges that Navy Federal’s uniform policy of assessing Representment NSF Fees affected all Settlement Class members. Common issues of fact and law therefore include the nature of the policy and whether the policy violates Navy Federal’s account agreement. Resolution of those issues as to Plaintiff will resolve them for the Settlement Class as well and would rely on largely the same evidence as would be necessary to prove any other Settlement Class Member’s claims. *See Solomon*, 2020 WL 3490606 (finding commonality and predominance satisfied based on “a uniform scheme . . . which would rely on broadly applicable evidence”).

c. Typicality is satisfied.

To satisfy the typicality analysis, the proposed class representative must show that he or she is “part of the class and possess[es] the same interest and suffer[ed] the same injury as the class members.” *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001). Typicality is satisfied if the proposed class representative’s claims “fairly encompass those of the entire class, even if not identical.” *Fisher v. Va. Elec. & Power Co.*, 217 F.R.D. 201, 212 (E.D. Va. 2003). Here, Plaintiff’s claims arise from Navy Federal’s assessment of the same type of Representment NSF Fees that Navy Federal allegedly collected from other Settlement Class members. Her interests and those of the Settlement Class are aligned because the Settlement will benefit her in the same way it benefits the rest of the Settlement Class.

d. Adequacy is satisfied.

The final prong of Rule 23(a) requires the Court to find that the class representative and Class Counsel will “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). Here, Plaintiff does not have any known conflicts with the Class, or any “interests antagonistic to the class.” *Solomon*, 2020 WL 3490606, at *2. She understands and has accepted the obligations of being a class representative, and has adequately represented the Settlement Class

by reviewing the Complaint, providing documents to Class Counsel, making herself available to discuss the facts of the litigation with Class Counsel, pursuing the appeal, and reviewing the Agreement. Joint Decl. ¶ 33.

Class Counsel has also satisfied the adequacy requirement. Class Counsel has effectively handled numerous consumer protection and complex class actions, including in the area of financial services, credit unions and banks, bank fees, and overdraft and non-sufficient funds fees specifically. *See* Joint Decl. ¶¶ 42-43, Exs. 1-3. Moreover, Class Counsel was able to secure a significant recovery for the Settlement Class, along with important injunctive relief and the costs of Settlement Administration, despite the Court's order dismissing the case—a testament to both their skill and reputation in the legal field. Class Counsel is qualified, experienced, and able to conduct this litigation to fully and adequately represent the Settlement Class.

2. The Settlement Class also satisfies the requirements of Rule 23(b)(3).

a. Common issues of law and fact predominate.

The first requirement under Rule 23(b)(3) is that questions of law or fact common to class members predominate over questions affecting only individual members. Fed. R. Civ. P. 23(b)(3). This inquiry tests whether the proposed class is “sufficiently cohesive to warrant adjudication by representation.” *Amchem Products, Inc.*, 521 U.S. at 623 (1997); *see also Gunnells*, 348 F.3d at 428.

Here, Plaintiff and the Settlement Class seek to remedy common legal grievances based on Navy Federal's assessment of Representment NSF Fees. The common questions of the legality of this practice and Navy Federal's policies associated with the practice predominate over questions—if any—affecting only individual Settlement Class members, providing a common link between all the Settlement Class members and Navy Federal. *See Jeffreys v. Comm'ns Workers of Am., AFL-CIO*, 212 F.R.D. 320, 323 (E.D. Va. 2003) (finding predominance satisfied where [t]he

question in each individual controversy” would be resolved according to the same legal inquiry); *Talbott v. GC Servs. Ltd. P’Ship*, 191 F.R.D. 99, 105-06 (W.D. Va. 2000) (finding predominance satisfied based on the “standardized nature” of the defendant’s conduct). “The fact that damages will differ from class member to class member does not defeat the finding of predominance because liability is common to the class.” *Jeffreys*, 212 F.R.D. at 323.

b. A class action is a superior method of adjudication.

Finally, the Court must determine whether a class action is superior to other methods of adjudication for the fair and efficient adjudication of the controversy. *See* Fed. R. Civ. P. 23(b)(3). The factors to be considered are (1) individual class members’ interest in controlling individual cases; (2) the existence of related litigation; (3) the desirability of concentrating the litigation in one forum; and (4) manageability. *Droste v. Vert Capital Corp.*, No. 3:14-cv-467, 2015 WL 1526432, at *8 (E.D. Va. April 2, 2015). With class settlements, courts need not consider the last factor—whether the case, if tried, would present intractable management problems—for the proposal is that there will be no trial. *Amchem Products, Inc.*, 521 U.S. at 593. Here, a class action is superior to individual class member suits.

First, individual suits are unlikely here, because the probable recovery (even of full damages) is relatively small per Settlement Class Member, particularly compared to the expense of litigation. *See In re NeuStar, Inc.*, 2015 WL 5674798, at *8 (finding superiority satisfied where individual actions were “unlikely due to the size of probable recovery and expense of individual litigation). Where the “policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights,” *Amchem Products, Inc.*, 521 U.S. at 617, a suit like this is well-suited for class action litigation. Second, Class Counsel is not aware of other pending individual litigation against Navy Federal involving Representment NSF Fees. Joint Decl. ¶ 4. And third, it

would promote judicial economy to resolve this case as a class before this Court rather than requiring individual plaintiffs to file separate lawsuits. *In re NeuStar, Inc.*, 2015 WL 5674798, at *9. Accordingly, a class action is a superior method of adjudication.

C. The Court Should Appoint Plaintiff’s Counsel as Class Counsel Under Rule 23(g)

Fed. R. Civ. P. 23(g) requires a Court to appoint class counsel. In appointing class counsel, the Court “must” consider:

- the work counsel has done in identifying or investigating potential claims in the action;
- counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
- counsel’s knowledge of the applicable law; and
- the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). *See also In re Neustar*, 2015 WL 5674798, at *13. The court “may” also consider “any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class.” Fed. R. Civ. P. 23(g)(1)(B).

Proposed Class Counsel from the law firms of Kalier PLLC, Tycko & Zavareei LLP and Kopelowitz Ostrow Ferguson Weiselberg Gilbert, have expended a great deal of time, effort, and expense investigating Navy Federal’s NSF Fee assessment practice, and contract documents, and transactional data prior to and since filing this action. It is clear from their track-record of success, as outlined in their resumes, that Class Counsel are highly skilled and knowledgeable concerning class-action practice. Kelly Guzzo, PLC, a firm that regularly prosecutes class actions in this District, also serves as co-counsel in the Action.

As can be seen by their commitment to prosecuting this Action thus far, Class Counsel have made the investment and have the experience to represent the Settlement Class vigorously.

Accordingly, Plaintiff requests that the Court appoint Jeff Ostrow and Jonathan Streisfeld of Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Hassan Zavareei and Andrea Gold of Tycko & Zavareei LLP, and Jeffrey Kaliei and Sophia Gold of Kaliei PLLC, as Class Counsel

D. The Court should approve the Notice Program.

“Under Federal Rule of Civil Procedure 23(e)(1), “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties’ showing that the court will likely be able to . . .” certify the settlement class and approve the settlement.” *Solomon*, 2020 WL 3490606 at *6 (citing Fed. R. Civ. P. 23(e)(1)). The Parties’ proposed Notice Program is formulated to conform with the procedural and substantive requirements of Rule 23. Due process and Rule 23 require that class members receive notice of the settlement and an opportunity to be heard and participate in the litigation. *See* Fed. R. Civ. P. 23(c)(2)(B); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-76 (1974) (“[I]ndividual notice must be provided to those class members who are identifiable through reasonable effort.”). The mechanics of the notice process are left to the Court’s discretion, subject only to the broad reasonableness standards imposed by due process.

Here, the Notice Program contemplates notice via email, and where necessary, direct mail. A Long Form Notice is also available for Settlement Class members who request it, and it will be posted on the Settlement Website. To ensure that notice reaches as many Settlement Class members as possible, the Settlement Administrator will perform reasonable address traces for the Initial Mailed Notice and Postcard Notice following any undeliverable Email Notices.

All of the Notices will include important information about the Settlement, including how to opt-out or object, and where to find more information about the case or contact Class Counsel.

The substance of the notice will fully apprise Settlement Class members of their rights. Additionally, the Notices are designed to be “noticed,” reviewed, and—by presenting the information in plain language—understood by Settlement Class members. The design of the Notices follows principles embodied in the Federal Judicial Center’s illustrative “model” notices posted at www.fjc.gov. The Notices contain plain-language summaries of key information about Settlement Class members’ rights and options. Under Rule 23(e), the notice must generally describe the settlement in sufficient detail to alert those with adverse viewpoints to investigate and come forward to be heard. The proposed Notices contain all of the critical information required to apprise Settlement Class members of their rights. This approach to notice is adequate and provides sufficient detail to allow class members with adverse viewpoints to come forward and be heard.

Consistent with normal practice, prior to being delivered and published, all Notices will undergo a final edit for accuracy. All of the Notices are noticeable, clear, and concise, and are written in plain, easily understood language. The Notices effectively communicate key information about the Settlement and are designed to alert the reader that the Notices are important documents and that the content may affect them.

This robust Notice Program is informative, practical, and reasonably designed to reach the vast majority of Settlement Class members. Joint Decl. ¶¶ 44-46. *See also, e.g., Solomon*, 2020 WL 3490606, at *6 (approving notice plan providing for email address or, if no email address is available, a postcard notice, along with a settlement website). There is no claim form, and the Notice Program will be overseen, with the Court’s approval, by JND Legal Administration, a reputable settlement administrator with deep experience in the field.

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court: (1) conditionally

certify the Settlement Class, (2) appoint Plaintiff Lambert as Class Representative, (3) appoint Class Counsel, (4) preliminarily approve the Settlement, (5) approve the Notice Program and direct that Notice be provided to the Settlement Class Members, (6) approve and order the opt-out and objection procedures set forth in the Agreement, (7) stay all deadlines in the Action against Navy Federal pending Final Approval of the Settlement, and (8) set a date for a Final Approval Hearing.

The Parties propose that the Court enter a proposed schedule according to the dates provided in the Settlement Agreement:

Event	Calendar Days Before Final Approval Hearing
Notice Program Complete	60 days before Final Approval Hearing
Motion for Final Approval, Attorneys' Fees, Expenses, and Costs, and Service Award	45 days before Final Approval Hearing
Opt-Out Deadline	30 days before Final Approval Hearing
Deadline to Submit Objections	30 days before Final Approval Hearing
Deadline to Respond to Objections	15 days before Final Approval Hearing
Final Approval Hearing	March __, 2021 at ____ a.m./p.m.

A proposed Preliminary Approval Order is attached as ***Exhibit F*** for the Court's convenience.

Date: October 21, 2020

Kristi C. Kelly
Andrew J. Guzzo
Casey S. Nash
KELLY GUZZO, PLC
3925 Chain Bridge Road, Suite 202
Fairfax, VA 22030
Telephone: (703) 424-7572
Facsimile: (703) 591-0167
kkelly@kellyguzzo.com
aguzzo@kellyguzzo.com
casey@kellyguzzo.com

Jeff Ostrow (pro hac vice)
Jonathan M. Streisfeld (pro hac vice)
KOPELOWITZ OSTROW
FERGUSION
WEISELBERG GILBERT
One W. Las Olas Blvd.
Suite 500
Fort Lauderdale, FL 33301
Telephone: (954) 525-4100
Facsimile: (954) 525-4300
ostrow@kolawyers.com
streisfeld@kolawyers.com

/s/ Kristi C. Kelly

Jeffrey D. Kaliel (pro hac vice)
Sophia G. Gold (pro hac vice)
KALIEL PLLC
1875 Connecticut Ave., NW
10th Floor
Washington, DC 20009
(202) 350-7483
jkaliel@kalielllc.com
sgold@kalielllc.com

Hassan A. Zavareei (pro hac vice)
Andrea R. Gold (pro hac vice)
Katherine M. Aizpuru (pro hac vice)
TYCKO & ZAVAREEI LLP
1828 L Street NW, Suite 1000
Washington DC, 20036
Telephone: (202) 973-0900
Facsimile: (202) 973-0950
hzavareei@tzlegal.com
agold@tzlegal.com
kaizpuru@tzlegal.com

*Attorneys for Plaintiff and the
Settlement Class*

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2020, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all counsel of record.

/s/ Kristi C. Kelly

Kristi C. Kelly, VSB No. 72791
KELLY GUZZO, PLC
3925 Chain Bridge Road, Suite 202
Fairfax, Virginia 22030
Telephone: 703-424-7572
Facsimile: 703-591-0167
E-mail: kkelly@kellyguzzo.com
Counsel for Plaintiff