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Sylvia Varga and the Putative Class

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SYLVIA VARGA, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

AMERICAN AIRLINES FEDERAL CREDIT UNION, and DOES 1-100,

Defendants.

CASE NO.: 2:20-CV-04380-DSF-KS

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT

Hearing
Date: August 2, 2021
Time: 1:30 p.m.
Place: Courtroom 7D
Hon. Dale S. Fischer

TO DEFENDANT AMERICAN AIRLINES FEDERAL CREDIT UNION AND ITS COUNSEL OF RECORD AND ALL OTHER INTERESTED PARTIES:

PLEASE TAKE NOTICE THAT on August 2, 2021, at 1:30 P.M., in Courtroom 7D of this Court located at First Street Courthouse, 350 West 1st Street, Los Angeles, California, Plaintiff SYLVIA VARGA will move and hereby moves the Court for entry of and Order to:

(1) preliminarily approve the Settlement Agreement reached between Plaintiff and Defendant attached as Exhibit A to the Declaration of Taras Kick in Support of the Unopposed Motion for Preliminary Approval;

(2) approve the proposed plan of notice to the Class;

(3) appoint an administrator to provide the notice and administration program outlined in the Settlement Agreement, motion and accompanying memorandum; and

(4) set a schedule of dates as set forth in the motion and accompanying memorandum for further action on this Settlement Agreement, including a hearing pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.

This motion is made on the grounds that the settlement is the product of arm's-length negotiations by informed counsel and is fair, reasonable, and adequate and should be finally approved. Class Counsel met and conferred with Counsel for Defendant about the motion, and Defendant does not oppose the motion.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities in Support Thereof, the accompanying Declaration of Taras Kick, the accompanying Declaration of Jeffrey Kaliel, other documents and papers on file in this action, and such other materials as may be presented before or at the hearing on this motion, or as this Honorable Court may allow.

Dated: July 14, 2021 Respectfully submitted,

By: /s/ *Taras Kick*

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I. SUMMARY

This is a putative class action in which Plaintiff alleges that Defendant American Airlines Federal Credit Union ("AAFCU" or "Defendant") imposed certain overdraft fees and Non-Sufficient Funds ("NSF") fees which its contracts did not allow it to charge. AAFCU disputes this.

After law and motion practice, formal discovery, and two separate mediations with The Hon. Edward A. Infante (Ret.), the parties have reached a proposed settlement, subject to this Honorable Court's review and approval. The Value of the Settlement is $1,765,807, comprised of AAFCU paying $1,590,000 in cash and waiving uncollected at-issue fees in the amount $175,807. A true and correct copy of the fully executed Settlement Agreement ("SA") is attached as Exhibit A to the Declaration of Taras Kick ("Kick Decl.").

The aggregate possible class damages at issue in this case are $2,652,075. (Declaration of Arthur Olsen ["Olsen Decl."] ¶¶ 7 and 9.) This means that the proposed settlement represents approximately 66.5% of the possible damages, an excellent result.

As the proposed settlement meets all criteria for preliminary approval, Plaintiffs' counsel respectfully requests that the Court preliminarily approve the settlement so that notice of a final approval hearing may be disseminated.

II. THE HISTORY OF THIS CASE.

A. The Law and Motion Practice Which Occurred in This Case

Plaintiff filed this putative class action complaint entitled *Varga v. American Airlines Federal Credit Union*, in the United States District Court for the Central District of California, Case No. CASE NO.: 2:20-cv-04380-DSF-KS, on May 14, 2020. Docket No. 1. The Complaint alleged claims for breach of contract including the covenant of good faith and fair dealing, money had and received, and violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §17200, *et seq.* On August 4, 2020, Defendant filed its Notice of Motion and Motion to

Dismiss Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) ("Motion to Dismiss"). Docket No. 12. Plaintiff filed her First Amended Complaint on August 25, 2020. Docket No. 17. On September 8, 2020, Defendant filed a Notice of Motion and Motion to Dismiss First Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Second Motion to Dismiss"). Docket No. 23. Plaintiff filed her Response In Opposition to Motion to Dismiss on October 19, 2020. Docket No. 24. Defendant filed its Reply in Support of Motion to Dismiss on October 28, 2020. Docket No. 25. On November 6, 2020, Plaintiff filed a Request for Judicial Notice of Supplemental Authority in Support of Plaintiff's Response to Motion to Dismiss. Docket No. 26. On November 13, 2020, Defendant filed a Notice of Supplemental Authority in Support of its Second Motion to Dismiss. Docket No. 29. On November 19, 2020, Plaintiff filed a Request For Judicial Notice In Support of Plaintiff's Response to Defendant's Motion to Dismiss. Docket No. 31.

On December 1, 2020, this Court granted in part and denied in part Defendant's Second Motion to Dismiss, denying the motion as to Plaintiff's First Cause of Action, ruling that Plaintiff's contract claim is not preempted as it is a state law contract claim and does not interfere with banking-related functions, and that Plaintiff plausibly alleged a breach of contract claim with regard to the APPSN transactions and Retry Fees. Docket No. 34. Defendant filed its Answer to the Amended Complaint on January 22, 2021. Docket No. 38.

B. <u>The Formal Discovery Performed in this Case.</u>

On September 3, 2020, Plaintiff served her First Set of Requests for Production on Defendant. (Kick Decl. ¶ 7.) On September 8, 2020, Defendant served its First Set of Interrogatories to Plaintiff. On September 21, 2020, Plaintiff served her First Set of Interrogatories to Defendant. (Kick Decl. ¶ 7.) On October 5, 2020, Defendant provided Plaintiff with its Rule 26 Initial Disclosures. Also on October 5, 2020, Defendant served its Response to Requests for Production on Plaintiff. Plaintiff provided Defendant with her Rule 26 Initial Disclosures on October 7, 2020. (Kick

Decl. ¶ 7.) On October 8, 2020, Plaintiff served her Responses and Objections to Defendant's First Set of Interrogatories and her Responses and Objections to Defendant American Airlines Federal Credit Union's First Set of Requests for Production of Documents. (Kick Decl. ¶ 7.) On October 21, 2020, Defendant served its Response to Plaintiff's First Set of Interrogatories.

C. The Two Mediations

The parties participated in two mediations in this matter, both with Retired Federal Magistrate Judge Edward Infante of JAMS. (Kick Decl. ¶ 8.) Settlement negotiations at all times were at arm's length, adversarial and devoid of any collusion. (*Id.*) The first of the two mediations took place on March 8, and did not result in a settlement. The second of the two mediations occurred on March 18, 2021, and also did not result in a settlement. However, at the conclusion of that second mediation, the mediator made a mediator's proposal. The parties accepted the mediator's proposal on or about March 26, 2021, and the Settlement Agreement being brought to this Court for approval arises from the mediator's proposal.

III. TERMS OF THE SETTLEMENT

A. Class Definitions

This case challenges two fee practices which Plaintiff alleges were improper under the contracts in effect during the class period. First, Plaintiff challenges the assessment of overdraft fees on "Authorized Positive, Posted Supposedly Negative" ("APPSN") debit card transactions, which are those that AAFCU authorized against a positive balance, but purportedly settled against a negative one. (*See generally*, Dkt. No. 17 (First Amended Complaint ("FAC")).) The second challenged practice is the assessment of more than one insufficient funds fee ("NSF Fees") on the same transaction when reprocessed again after initially being returned for insufficient funds. (*Id.*) Until it changed its disclosure on this issue effective on or about March 1, 2020, Plaintiff contends AAFCU's contracts did not permit it to charge more than one fee for the same item. *Id.* ¶ 76

The "APPSN Fee Class" is defined as those members of Defendant who were charged APPSN Fees between May 14, 2016 and October 8, 2020. (Settlement Agreement ["SA"], ¶ 1.b.) The "Retry NSF Fee Class" is defined as those members of Defendant who were charged Retry NSF Fees between May 14, 2016 and February 29, 2020. (SA, ¶ 1.x.).

B. The Settlement Amount

As stated, the value of the proposed settlement is $1,765,807. This is comprised of AAFCU paying $1,590,000 in cash (SA ¶ 1(y)) and waiving uncollected at-issue fees in the amount $175,807. (SA ¶ 1(y).) The proposed settlement does not require any claims to be made by the class members; they need not take any action to receive payment. (SA ¶ 8(d)(v).)

C. Payments to Class Members.

Of the $1,590,000 Settlement Fund, $715,500 (45%) is allocated to the APPSN Fee Class, and $874,500 (55%) is allocated to the Retry NSF Fee Class. (SA ¶ 8.d. iv.) Each class member will receive a *pro rata* share of the settlement proportionate to the eligible fees assessed against the class member. (*Id.*)

All class members will be paid by direct deposit into their accounts if they are current AAFCU customers, or will be mailed a check if they no longer have an account with AAFCU, with no need to make any claim whatsoever. (SA ¶ 8.d. iv.3.-4.) For those class members who are paid by check, the class member shall have one-hundred eighty days (180) to negotiate the check. (SA ¶ 8.d. iv.4.) No class member will be required to make a claim to receive the money.

D. *Cy Pres* Distribution

Under no circumstances will any of the money from this settlement revert to Defendant. (SA ¶ 8.d. v.) Rather, "Subject to Court approval, within thirty (30) days after the Final Report, the total amount of uncashed checks, and residual amounts held by the Claims Administrator at the time of the Final Report, shall be paid by the Claims Administrator to a Cy Pres fund or funds that is/are appropriate for the case

and agreed to by the parties." (SA ¶ 11.) The parties will propose a *cy pres* recipient for review by this Court with the Motion for Final Approval.

E. Class Notice

The Settlement Agreement provides that, for class members who are current customers of Defendant and who have agreed to receive notices regarding their accounts from Defendant by email, Defendant will provide the Claims Administrator with the most recent email addresses it has for those class members, to which the Claims Administrator will email the notice in a manner that is calculated to avoid being excluded by spam filters or other devices intended to block mass email. (SA ¶ 5(b).) For any emails that are returned undeliverable, the Claims Administrator will use the best available databases to obtain current email address information for those customers, update its database with those addresses, and resend the notice to them. (*Id.*)

For those class members who are not currently members of AAFCU, or who did not agree to receive notices regarding their accounts by email, the Claims Administrator will mail those members a notice by first class United States mail. (SA ¶ 5(c).) The Claims Administrator will run the names and addresses provided by Defendant through the National Change of Address Registry and update them as appropriate. (*Id.*) For all mailed notices that are returned as undeliverable, the Claims Administrator shall use standard skip tracing devices to obtain forwarding address information and, if the skip tracing yields a different forwarding address, the Claims Administrator shall re-mail the notice to the address identified in the skip trace, as soon as reasonably practicable after the receipt of the returned mail. (*Id.*) Finally, the notice shall also be posted on a settlement website created by the Claims Administrator. (SA ¶ 5(d).)

The Notice is proposed to be substantially as shown in Exhibit 1 to the Settlement Agreement. (Kick Decl., Ex. 1.) Plaintiff obtained bids for administration services from two very well-regarded claims administrators, and the lower bidder

was KCC, which Plaintiff proposes therefore be the claims administrator in this matter. (Kick Decl. ¶ 10.) The manner of notice when used in other overdraft fee class action cases prosecuted by Class Counsel with this administrator consistently has resulted in a notice reach of 90% or greater. (*Id*.)

F. Opt Out Procedure

A class member who wishes to opt out can do so by the Bar Date. (SA ¶ 12.)

G. Opportunity to Object

Any class member who wishes to object to the settlement terms can do so by mailing an objection to the Court and the settlement administrator. (SA ¶ 13.)

H. Attorneys' Fees and Costs

Attorneys' fees and costs are to be paid out of the settlement fund. Under the terms of the Settlement Agreement, Class Counsel may apply to this Court for attorneys' fees of twenty-five percent of the Value of the Settlement, plus reimbursement of reasonable litigation costs, and Defendant has agreed not to oppose an application for up to that amount. [1] (SA ¶ 8(d)(i).)

Class counsel will apply for their fees pursuant to the percentage-of-the-recovery. The Ninth Circuit has affirmed the use of the percentage-of-the-recovery method to calculate attorneys' fees in common fund cases, where, as here "(1) the class of beneficiaries is sufficiently identifiable, (2) the benefits can be accurately traced, and (3) the fee can be shifted with some exactitude to those benefiting." *Petition of Hill*, 775 F.2d 1037, 1041 (9th Cir. 1985). Here Plaintiff has identified

[1] Although the waiver of $175,807 in uncollected at-issue fees is a "monetary" component of this settlement, even when actions resulting from a lawsuit are *not* "monetary" in nature, courts nonetheless include them in calculating the value of a proposed settlement for purposes of an attorney fee award. For example, according to the Federal Judicial Center, "Courts use two methods to calculate fees for cases in which the settlement is susceptible to an objective evaluation. The primary method is based on a percentage of the actual value to the class of any settlement fund ***plus the actual value of any nonmonetary relief***." Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges, 3d. Ed., 35 (2010) (emphasis added). And according to the American Law Institute, "a percentage-of-the-fund approach should be the method utilized in most common-fund cases, ***with the percentage being based on both the monetary and nonmonetary value of the judgment or settlement.***" Principles of the Law of Aggregate Litigation, The American Law Institute, Mar 1, 2010 § 3.13 (emphasis added).

with precision the exact beneficiaries to the settlement and the benefit that they will receive, and the fee is properly shifted to those beneficiaries. The percentage-of-the-recovery approach is especially appropriate here because "each member of [the] certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum recovered on his [or her] behalf." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Counsel will also present a lodestar analysis at the time of the Motion for Final Approval, should this Court wish to perform a lodestar cross-check on the fee request, pursuant to *Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67, 70 (9th Cir. 1976).

Regarding costs, Class Counsel to date have incurred litigation costs of $26,325, and have committed to the litigation costs in this matter, exclusive of the claims administrator, not to exceed $35,000. (Kick Decl. ¶ 12.) Class Counsel will provide a detailed itemization of the costs expended with the Motion for Final Approval and, of course, if they come in less than $35,000, the difference will go to the Net Settlement Fund.

The cost of administration will also be paid from the settlement. Settlement administration services were put out to bid to two very well-regarded class action administrators, and the lower bid was presented by KCC. (Kick Decl. ¶ 10.) KCC has agreed to cap its administration costs at $53,500. (Kick Decl. ¶ 10.)

I. Service Award for the Class Representative

Plaintiff is also moving for the Court to approve a service award to the class representative in the amount of $15,000. Ms. Varga contributed substantial and meaningful work on behalf of the class. (Kick Decl. ¶ 9.) This will be detailed more fully with the Motion for Final Approval but included: communicating with Class Counsel before the case was filed; locating documents before the case was filed; communicating with Class Counsel during the pendency of the case; reviewing and gathering documents in response to discovery requests; and responding to formal

written discovery. (Kick Decl. ¶ 9.) Defendant has reserved its right to object to a class representative service award request of more than $10,000.

IV. ARGUMENT

A. The Settlement Should Be Preliminarily Approved

1. Class Action Settlement Procedure

Class action settlements are subject to a two-step approval process. First, the Court makes a preliminary evaluation of the fairness of the settlement. If the Court determines that the settlement appears to be fair, adequate and reasonable, then it should order that notice be given to the class members of a formal final settlement hearing. At that formal hearing, evidence may be presented in support of and in opposition to the settlement. The federal Manual for Complex Litigation, Second ("MCL 2d"), summarizes the preliminary approval criteria as follows:

> If the proposed settlement appears to be the product of serious, informed, noncollusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement.

MCL 2d § 30.44.

2. The Rule 23(e) Criteria for Granting Preliminary Approval

Federal Rules of Civil Procedure, Rule 23(e) describes a three-step process for approval of a class action settlement: 1. Preliminary approval of the proposed settlement; 2. Dissemination of notice of the settlement to all affected class members; and, 3. A formal fairness hearing, *i.e.,* the final approval hearing, at which class members may be heard regarding the settlement, and at which counsel may introduce evidence and present argument concerning the fairness, adequacy, and reasonableness of the settlement.

Rule 23(e) was amended effective December 1, 2018, to, among other things, specify that the focus of a court's preliminary approval evaluation is whether "giving notice [to the class] is justified by the parties' showing that the court will likely be

able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2) now establishes that where a settlement would bind class members, the court may approve it after finding that it is fair, reasonable, and adequate after considering 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; and, (D) the proposal treats class members equitably relative to each other. "The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate." Advisory Committee Notes to 2018 Amendments to Fed. R. Civ. P. 23.

"The goal of this amendment is not to displace any 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." *Id.* However, "[a]t the preliminary approval stage, the court is simply determining whether it is 'likely' these . . . requirements for settlement approval will be met at the final approval stage. Newberg on Class Actions §§ 13:14-15 (5th ed.) (June 2019 Update).

Here, this proposed settlement meets all these criteria, and existing Ninth Circuit law.

3. The Settlement Is Reasonable, Fair, and Adequate Given the Strength of the Case and the Risks of Litigation

As already detailed in Section I, *supra*, the value of the proposed settlement is $1,765,807. The aggregate possible class damages at issue in this case is $2,652,075. (Olsen Decl. ¶ 7, 9.) This means that the proposed settlement being brought to this Court for approval represents approximately 66.5% of the possible damages.

Courts in this Circuit have determined that settlements are, of course, reasonable where plaintiffs recover only part of their actual losses. *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 256 (N.D. Cal. 2015) ("[I]t is well-settled law that a proposed settlement may be acceptable even though it amounts to only a

fraction of the potential recovery that might be available to the class members at trial.") (quoting *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004)); *See also City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1386 (S.D.N.Y. 1972) (a recovery of 3.2 % to 3.7 % of the amount sought is "well within the ball park"), aff'd in part, rev'd on other grounds, 495 F.2d 448 (2d Cir. 1974); *see also Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988), aff'd 899 F.2d 21 (11th Cir. 1990), "[T]he fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate…a settlement can be satisfying even if it amounts to a hundredth or even - a thousandth of a single percent of the potential recovery;" *Martel v. Valderamma*, 2015 U.S. Dist. LEXIS 49830 * 17 (C.D. Cal. 2015) (approving a settlement of $75,000 when potential damages were $1.2 million, or about 6%); *In re Toys R US FACTA Litig.*, 295 F.R.D. 438, 453 (C.D. Cal. 2014) (approving settlement with *vouchers* (not cash) potentially worth a maximum of three percent (3%) *if all possible claims were actually made*, or $391.5 million aggregate voucher potential where the class could have recovered $13.05 billion).

In terms of risks, the risks in the case include that a trier of fact might agree with Defendant that the language at issue actually did allow Defendant to assess fees in the manner it did. (Kick Decl. ¶ 13.) Further, although Plaintiff successfully opposed the Motion to Dismiss, Defendant has not yet filed a Motion for Summary Judgment, and this raises risk. Also, the Motion for Class Certification has not yet been filed, and although Plaintiff believes it would be a strong motion, Defendant would argue against it and this presents another risk. (*Id.*)

If Plaintiff prevailed on class certification and summary judgment, and if the case still did not resolve at that time, there would have been an expensive trial, and regardless of which party prevailed, there likely would be appellate practice, further delaying any possible actual receipt of money by the class members. (*Id.*) The costs and attorneys' fees to both sides would be substantial. (*Id.*)

4. The Settlement Treats Class Members Equally

All class members will receive a *pro rata* distribution based on the amount of eligible fees they incurred. (SA ¶ 8.d.iv.)

5. The Settlement Was Negotiated at Arm's Length

Rule 23(e)(2)(B) instructs the Court to consider whether the proposed settlement was negotiated at arm's length. In this case, all settlement negotiations between the parties not only were conducted at arm's-length, and through experienced counsel, but also were conducted by highly experienced mediator Honorable Edward A. Infante (Ret.), in two separate mediation sessions, and the settlement being presented to the Court for approval arises from an accepted mediator's proposal made by Judge Infante. (Kick Decl. ¶ 8.) Courts have held that there is typically an initial presumption that a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations. *Harris*, 2011 U.S. Dist. LEXIS 48878 at *24 ("An initial presumption of fairness is usually involved if the settlement is recommended by class counsel after arm's-length bargaining."). This is even more so when a mediator was involved. *Satchell v. Fed. Express Corp.*, No. C03-2659 SI, 2007 U.S. Dist. LEXIS 99066, at *17 (N.D. Cal. Apr. 13, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive."); *In re Viropharma Inc. Sec. Litig.*, No. CV 12-2714, 2016 WL 312108, at *8 (E.D. Pa. Jan. 25, 2016) (the "participation of an independent mediator in settlement negotiations virtually insures [sic] that the negotiations were conducted at arm's length and without collusion between the parties").

Finally, the judgment of competent counsel regarding the proposed settlement is given significant weight. *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("'Great weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation."); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979) ("The recommendations of plaintiffs' counsel should be given a presumption

of reasonableness."). Plaintiff's counsel are experienced in litigating consumer class actions such as this, have investigated the factual and legal issues, and are in favor of the settlement. (Kaliel Decl. ¶ 5; Kick Decl. ¶ 13.)

6. The Proposed Forms of Notice and Notice Programs Are Appropriate

The Settlement Agreement is attached as Exhibit A to the Declaration of Taras Kick. The proposed Email and Postcard Notice is attached as Exhibit 1 to the Settlement Agreement, and the proposed Long Form Notice is attached to it as Exhibit 2. The proposed forms of notice and notice program here comply with due process and Federal Rules of Civil Procedure, Rule 23. Rule 23(e) of the Federal Rules of Civil Procedure, mandates that "notice of the proposed compromise shall be given to all customers of the class in such manner as the court directs." Fed. R. Civ. P. 23(e). Here, the class members are receiving direct notice. Under Rule 23(c)(3), the notice must clearly and concisely state in plain, easily understood language: (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. The notice here does that. The content of the notice to class members "is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009).

In sum, notice should be disseminated here, as it is "likely that the court will be able to approve the proposal after notice to the class and a final approval hearing." *See* Fed. R. Civ. P. 23 (e)(1) Advisory Committee's note to 2018 amendments.

B. The Proposed Settlement Class Should Be Certified

In granting preliminary approval of a proposed settlement, the Court also must determine that the proposed settlement class is appropriate for certification. Manual for Complex Litigation § 21.632 (4th ed. 2004); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Class certification is proper if the proposed class, the proposed class representative, and the proposed class counsel satisfy the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). Fed. R. Civ. P. 23(a)(1-4). In addition to meeting the requirements of Rule 23(a), a plaintiff seeking class certification must also meet at least one of the three provisions of Rule 23(b). Fed. R. Civ. P. 23(b). When a plaintiff seeks certification under Rule 23(b)(3), the representative must demonstrate that common questions of law or fact predominate over individual issues, and that a class action is superior to other methods of adjudicating the claims. Fed. R. Civ. P. 23(b)(3); *Amchem*, 521 U.S. at 615-16.

1. The Requirement of Numerosity Is Satisfied

Rule 23(a)(1) requires "the class [be] so numerous that joinder of all customers is impractical." Fed. R. Civ. P. 23(a)(1). Although no strict numerical test defines numerosity, courts in this Circuit find the requirement typically met with at least 40 class members. *See*, *e.g.*, *Celano v. Marriott Int'l, Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007). Plaintiff's expert has determined there are 26,787 class members. (Olsen Decl., at ¶¶ 8, 10.) Thus, numerosity is met.

2. The Requirement of Commonality Is Satisfied

The second requirement for certification requires that "questions of law or fact common to the class" exist. Fed. R. Civ. P. 23(a)(2). Commonality is demonstrated when the claims of all class members "depend upon a common contention . . . that is capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Commonality requires only one common question such that "a classwide proceeding [can] generate common *answers* apt to drive the resolution of

the litigation." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1133 (9th Cir. 2016) (quoting *Wal-Mart*, at 350 (2011)). A common question need not be one that "will be answered on the merits, in favor of the class." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013). It only "must be of such a nature that it is *capable* of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350 (emphasis added). Commonality looks to "the existence of shared legal issues" or "a common core of salient facts." *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1019 (9th Cir. 1998). Either suffices, even in the presence of "divergent factual predicates" and "disparate legal remedies within the class." *Id*. As *Wal-Mart* established, the commonalty analysis "does not turn on the number of common questions, but on their relevance to the factual and legal issues at the core" of the class claims. *Jimenez v. Allstate Ins. Co*., 765 F.3d. 1161, 1165 (9th Cir. 2014).

It is not disputed that the liability theories underlying the class claims here involve a uniform overdraft fee and NSF fee practice, and uniform contractual terms. Common questions include, did the contracts allow fees on APPSN transactions, and did the contracts allow more than one NSF Fee on the same item. In large part, the meaning of the language in the contracts at issue will resolve the allegations for the Classes. Commonality is satisfied.

3. The Requirement of Typicality Is Satisfied

Rule 23 next requires that the class representative's claims be typical of those of the class members. Fed. R. Civ. P. 23(a)(3). Rule 23(a)(3)'s typicality standard is met when the class representative's claims rest on the same legal or remedial theory as those of absent class members. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011). The claims of named plaintiff and class members need not be identical and can have "different factual circumstances." *Wolin v. Jagua*

Land Rover N. Am., LLC, 617 F.3d 1168, 1175 (9th Cir. 2010). *See also* 1 Newberg on Class Actions § 3.13, at 3-76 (3d ed. 1992) ("A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.") Plaintiff's claims here are not only typical of those of the other putative class members, they are essentially identical: Plaintiff was assessed the same sort of overdraft and NSF fees as the class members, and entered into the same uniform agreements as did other class members, and were assessed these fees by the same automated software system in the same alleged improper manner as were other Class members. (Kick Decl. ¶ 9.) Typicality is satisfied.

4. The Requirement of Adequate Representation Is Satisfied

The final Rule 23(a) prerequisite requires that the proposed class counsel and representative has and will continue to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Ninth Circuit has adopted a two-factor test to determine whether a plaintiff and her counsel will adequately represent the interests of the class: "(1) do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003); *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1995). As with typicality, adequacy requires the interests of the named plaintiff be aligned with the unnamed class members to ensure that the class representative has an incentive to pursue and protect the claims of the absent class members. *See Amchem*, 521 U.S. at 626 n. 20, 117 S.Ct. 2231 ("The adequacy-of-representation requirement 'tends to merge' with the commonality and typicality criteria of Rule 23(a), which 'serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'")

Proposed Class Counsel have significant class action, litigation, and trial experience, are competent, and have been competent in representing the Classes. The law firms representing the putative class have extensive experience in consumer class actions, and particular expertise in overdraft fee litigation. (Kaliel Decl. ¶¶ 2-7; Kick Decl. ¶¶ 2-3.) The interests of the named Plaintiff are not antagonistic to those of the other class members; in fact, her interests are aligned because she was charged the same fees as other class members. (Kick Decl. at ¶ 9.) Further, she has actively participated in the litigation. (*Id.*)

5. The Proposed Settlement Class also Satisfies Rule 23(b)(3)

Once the prerequisites of Rule 23(a) have been met, a plaintiff must also demonstrate that he or she satisfies the requirements of Rule 23(b). To certify a class under Rule 23(b)(3), the plaintiff must show that (1) the common questions of law and fact predominate over questions affecting only individuals and (2) the class action mechanism is superior to other available methods for adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). As the Supreme Court recently confirmed, when one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1045 (2016). The predominance requirement questions whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "If common questions 'present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication,' then 'there is clear justification for handling the dispute on a representative rather than on an individual basis,' and the predominance test is satisfied." *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 526 (C.D. Cal. 2012) (quoting *Hanlon*, 150 F.3d at 1022).

Here, it is not disputed that the language used in the relevant member account agreements is the same for all class members, and thus it would be far more efficient to decide those common issues via the class action mechanism. AAFCU does not dispute its practice of charging fees of all class members in the same manner as Plaintiff alleges it did. Rather, it argues that it was allowed to do this under the terms of its contracts. The predominating issue is therefore whether the contracts permitted this. The determination of this predominating question would likely be dispositive of the case. Predominance is met.

Rule 23(b)(3) also requires that a certifying court find that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Here, it is undisputed that each class member's claim is small, making it uneconomic to pursue the claims individually. This factor weighs in favor of certification where litigation costs would likely "dwarf potential recovery" if each class member litigated individually. *Hanlon*, 150 F.3d at 1023; *see also Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 652 (C.D. Cal. 1996)) ("[W]here the damages each plaintiff suffered are not that great, this factor weighs in favor of certifying a class action."). As the Supreme Court stressed in *Amchem*, 521 U.S. at 617:

> 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. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

And as Judge Posner has stated, "[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

There is no question that a large number of class members have suffered damages in an amount that could not justify or sustain individual lawsuits, and the only choice is between a class action and no action. Plaintiff is not aware of any

additional suits instituted by or against the class members concerning the subject matter of the settlement. Superiority is met.

C. Proposed Schedule of Future Dates

The next steps in the settlement approval process are to notify the Class of the proposed Settlement, allow an opportunity for opt-outs and objections, and to hold a fairness hearing. The parties propose the following dates, assuming such dates are acceptable to this Honorable Court:

Claims Administrator Sends Notice and Website Goes Live	Within Twenty Days After Preliminary Approval Is granted
Last day to Opt Out	Thirty Days After Claims Administrator Sends Notice
Motion for Final Approval and Attorneys' Fees Filed with Court	Thirty-Five Days After Claims Administrator Sends Notice
Last day to Object	Fifteen Days After Motion For Final Approval and Attorneys' Fees is Filed With the Court
Last day to file responses to objections and Class Counsel's and Defendants' Replies in Support of Motion for Final Approval and Attorneys' Fees	Ten Days After Last Day to Object
Final Approval Hearing	If Convenient to this Court's Calendar, Twenty Days After Last Day to Object, or Whatever Date Is Convenient to this Court's Calendar
Filing by Claims Administrator of Final Report	Thirty Days After Time to Cash Checks has Expired

V. CONCLUSION

Plaintiffs respectfully request that the Court: (1) preliminarily approve the Settlement; (2) approve the proposed plan of notice to the Class; (3) appoint KCC to administrate the program outlined in the Settlement Agreement; (4) set a schedule of dates as set forth above for further action on this Settlement Agreement, including a hearing pursuant to Rule 23(e) of the Federal Rules of Civil Procedure to determine whether the proposed Settlement is fair, reasonable, and adequate and should be finally approved.

Dated: July 14, 2021

Respectfully submitted,

By: */s/ Taras Kick*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14th day of July 2021, the foregoing document was filed electronically on the CM/ECF system, which caused all CM/ECF participants to be served by electronic means.

/s/ *Jeffrey Bils*
Jeffrey Bils