UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

No. 5:15-cv-231

GARY and ANNE CHILDRESS, THOMAS and ADRIENNE BOLTON, STEVEN and MORGAN LUMBLEY, RAYMOND and JACKIE LOVE, HARRY and MARIANNE CHAMPAGNE, and RUSSELL and MARY BETH CHRISTE, *on behalf of themselves and others similarly situated*,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AND CERTIFICATION OF A SETTLEMENT CLASS

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I. INTRODUCTION

This case concerns loans held by military families and Bank of America, N.A.'s ("Bank of America") application of military reduced interest rate benefits to those loans. As pleaded previously, plaintiffs, and the proposed class they seek to represent, had interest-bearing obligations, primarily credit card and mortgage accounts, with Bank of America at some point during or after 2001.

Plaintiffs allege that Bank of America failed to provide the full benefits to military families that the law requires. This lawsuit stemmed from Bank of America's alleged overcharging of interest and fees to military families in violation of the Servicemembers Civil Relief Act (SCRA) and its own proprietary program and allegations that Bank of America then tried to conceal those violations.

Plaintiffs here look to settle all extant claims on behalf of a proposed nationwide class of military family account holders with Bank of America. This Court previously denied, in substantive part, Bank of America's motion to dismiss this case and the matter is now before the Court on fully-briefed motions for and against class certification. Bank of America denies any and all allegations of wrongdoing and liability in this case.

The parties have completed two separate in-person mediation sessions: the first this past January, in California, and a second in March, in New York. The parties have continued to negotiate this matter vigorously and in earnest and have reached a proposed settlement agreement that provides for meaningful, additional compensation to all members of the settlement class.[1] The proposed settlement provides an immediate and substantial gross benefit of $41,920,374.06 to the settlement class as compensation for these alleged violations.

[1] *See* Settlement Agreement, attached as Ex. A.

As plaintiffs demonstrate below, the proposed settlement is worthy of the Court's approval.

II. STATEMENT OF FACTS

A. Background

As alleged in their complaint, plaintiffs in this action are military family members who maintained either (or both) a credit card account or mortgage account with Bank of America during some period of active military service performed since 2001. Plaintiffs allege that these obligations were subject to the interest rate reduction protections of the SCRA and Bank of America's own SCRA-related proprietary interest reduction program for military families, but Bank of America failed to provide this relief to tens of thousands of military family class members.

In 2015, just prior to the filing of this suit, the United States Department of the Treasury, Comptroller of the Currency entered into a consent order with Bank of America regarding violations of the SCRA. The consent order required Bank of America to provide a remediation plan describing the remediation efforts it planned to take or had already taken with respect to eligible servicemembers.

B. Proceedings to date

In June of 2015, plaintiffs filed their complaint against Bank of America and affiliated entities for violations of the SCRA, Truth in Lending Act, and the North Carolina Unfair and Deceptive Trade Practices Act, along with claims for negligence, negligent misrepresentation, and equitable relief. An amended complaint was filed in September of 2015.

On May 18, 2016, this Court denied defendants' motion to dismiss plaintiffs' amended complaint. In September of 2016, plaintiffs' motion for class certification was fully briefed before the Court. Since that time, discovery has continued apace and the Court has stayed its

ruling on the pending motion for class certification to allow the parties to pursue mediation, which has resulted in the proposed settlement.

Just prior to filing this motion for preliminary approval, plaintiffs (including additional named plaintiffs) filed a Second Amended Complaint that is now the operative complaint.

C. The proposed settlement

1. Mediation

At the end of 2016, the parties agreed to mediate this matter before former United States District Court Judge Layn Phillips, who mediated two sessions with the parties. The first all-day mediation session occurred in Newport Beach, California, on January 12, 2017. Following that session, the parties continued to negotiate further and conduct discovery. A second all-day mediation session occurred in New York, New York, on March 13, 2017. During these months, the parties provided to the mediator and exchanged between themselves mediation briefs and additional legal and factual analyses of the many issues contested in the case.

The parties reached tentative agreement on terms at the end of the day during the March 13 mediation session and have continued to work on the details of settlement since that time.

2. Settlement class definition

The parties' agreement defines the settlement class as follows:

> All persons identified in Bank of America's records as obligors or guarantors on an obligation or account who, at any time on or after September 11, 2001, received and/or may have been eligible to receive additional compensation related to military reduced interest rate benefits from Defendant, but excluding persons who have executed a release of the rights claimed in this action.

Unlike other consumer class action cases, the persons in the class are known to Bank of America and readily identifiable from the Bank's records of accounts. Mailing addresses and other contact information for each class member will be provided by Bank of America to the

settlement administrator in this case and updated by the settlement administrator, as applicable, and proceeds of the net settlement fund will be directly distributed to them (as discussed further below).[2]

3. Relief to the settlement class

Based on discovery and analysis, plaintiffs estimate that the nationwide settlement class consists of 125,000–130,000 members. This proposed settlement provides for a gross settlement fund of $41,920,374.06 in monetary relief. Bank of America also agrees as part of the settlement to provide certain injunctive relief.[3]

The proposed settlement agreement provides, as discussed further below, that proceeds payable to the class are net of: (a) the cost of notice and administration; (b) incentive awards to the named plaintiffs (subject to approval); and (c) attorneys' fees, costs, and expenses as specified (subject to approval).

The plan for distribution of net proceeds to the nationwide class (*i.e.*, the "net settlement fund") provides for an iterative process set forth in the proposed distribution plan.[4] In sum, the class members are divided into four groups based on account type, when they had the account(s), and amount of refund payments that Bank of America previously paid to them (*e.g.*, whether they received any refund and, if so, whether they also received a payment in addition to the refund). Bank of America previously provided payments to most members of groups one through three, but not all members of those groups.

[2] *See* Distribution Plan, Ex. B.

[3] *See* Settlement Agreement, Ex. A at 18.

[4] *See* Distribution Plan, Ex. B.

Net settlement proceeds will first be used to make "Step One" payments to those members of groups one through three for whom the Bank had previous calculated a refund payment but who did not receive or successfully deposit the payment, for whatever reason.[5] These class members will be given both sufficient time to cash their checks and reminder mailings.

Any remaining money after distribution of these "Step One" payments will be combined with the balance of the net settlement proceeds to form an "award pool." The award pool will then be distributed to all class members.[6] After this classwide distribution, the class members will be provided reminder mailings and given approximately six months to cash their checks.

Finally, the value of any uncashed settlement payments after the classwide distribution will be redistributed to other members of the class, if economically feasible, or will be distributed as *cy pres* to organizations providing services to servicemembers and veterans. The distribution plan was carefully designed to help servicemembers receive their distributions and to maximize the amount of the net settlement proceeds ultimately received by servicemembers.

4. Notice and release

The parties' proposed settlement provides for direct notice to class members, the best practicable notice under the circumstances.[7] The parties' settlement proposes that well-known

[5] *See* Distribution Plan, Ex. B.

[6] *Id.*

[7] *See* Declaration of Alan Vasquez Regarding Dissemination of Class Notice ("Vasquez Decl."), Ex. D at 3. KCC LLP is a full-service settlement administrator with extensive experience and expertise in every aspect of class action administration.

class action administrators KCC LLP will supply complete administration services for the notice and distribution of funds.[8]

Further, the settlement administrator will establish a settlement website, where notice of the settlement and key documents will be available, including all notices.[9] Class counsel's websites will include links to the settlement website. Costs of notice and settlement administration will be paid from the $41,920,374.06 gross settlement fund.[10] Prior to the final approval hearing, the settlement administrator will file an affidavit confirming that notice has been provided as set forth in the settlement agreement and ordered by the Court.[11]

The proposed notice describes the material terms of the settlement and the procedures that class members must follow in order to receive settlement benefits.[12] The notice also describes the procedures for class members to exclude themselves from the settlement or to provide comments in support of or in objection to it.[13] Any class member who wishes to be excluded from the settlement need only opt out by making a timely request.[14] The procedures for opting out are those commonly used in class action settlements; they are straightforward and plainly described in the class notice. Additionally, the settlement agreement provides that if opt-outs exceed 5% of the class, then the defendant will have the option to terminate the settlement.[15]

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[8] *See* Declaration of Knoll Lowney Supporting Plaintiffs' Motion for Preliminary Approval ("Lowney Decl."), Ex. C at ¶ 21; Vasquez Decl., Ex. D

[9] Vasquez Decl., Ex. D at ¶ 13.

[10] Distribution Plan, Ex. B.

[11] Vasquez Decl., Ex. D.

[12] Vasquez Decl., Ex. D at Exs. 2 & 3 (long and short form notices).

[13] *Id.*

[14] *Id.*

[15] *See* Settlement Agreement, Ex. A at 42.

If the Court grants final approval of the settlement following notice, and after the period for opt-out requests and objections expires, then all class members who have not excluded themselves from the settlement class will be deemed to have released all covered claims, as defined in the settlement agreement, against the defendant.[16]

5. Service awards and attorneys' fees, costs, and expenses

Subject to Court approval, the parties have agreed that each named plaintiff family should receive an award of $10,000 or $15,000 for their service as class representatives in this matter. The Settlement provides the higher amount to the original plaintiffs who provided the greatest assistance in the litigation.

Named plaintiffs have assisted Counsel in providing detailed, often cumbersome records of their military service, their applications for SCRA benefits, as well as their interactions with the Bank related not only to securing SCRA benefits from the Bank, but also investigating the refund checks received and the sufficiency and tax implications thereof.[17] Named plaintiffs also assisted in communicating with other servicemembers in the class, drafting complaints, consulting with counsel during the course of this litigation, monitoring the course of this case, and consulting with counsel regarding proposed terms of settlement.[18]

Following negotiation of the substantive settlement terms, the parties came to agreement that proposed class counsel may request 30% of the gross settlement fund by way of a separate motion to be filed prior to the final approval hearing.[19]

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[16] *See* Settlement Agreement, Ex. A at § III.

[17] Lowney Decl., Ex. C.

[18] *Id.*

[19] *See* Settlement Agreement, Ex. A at 24.

III. ARGUMENT

A. The Court should grant preliminary approval of the proposed settlement.

Rule 23(e) of the Federal Rules of Civil Procedure governs settlement of class action lawsuits and provides that a "class may be settled, voluntarily dismissed, or compromised only with the court's approval."

Approval of a class action settlement generally proceeds through two steps, with notice to the class in-between. First, the Court determines whether to grant preliminary approval of the proposed settlement and preliminarily certify a class. If so conditionally approved and certified, the Court then directs that notice and an opportunity to object or opt out of the preliminarily approved settlement be provided to the class. Second, the Court determines whether final approval of the settlement is warranted.[20]

The "standard for conditional certification is fairly lenient and requires 'nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.'"[21] Unless the Court's initial examination "disclose[s] grounds to doubt its fairness or other obvious deficiencies," the Court should order that notice of a formal hearing be given to settlement class members under Rule 23(e).[22]

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[20] *See* MANUAL FOR COMPLEX LITIGATION ("MANUAL") § 13.14, at 173 (4th ed. 2004) ("This [approval of a settlement] usually involves a two-stage procedure. First, the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing."); *see also id*., § 21.632, at 320 ("Review of a proposed class action settlement generally involves two hearings. First, counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation ….") (footnote omitted); Alba Conte & Herbert Newberg, NEWBERG ON CLASS ACTIONS ("NEWBERG") § 11:25, at 38-39 (4th ed. 2002) (noting same two-step process is the norm).

[21] *McLaurin v. Prestage Foods, Inc.*, 271 F.R.D. 465, 469 (E.D.N.C. 2010), (quoting *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001) (further citation omitted)).

[22] MANUAL FOR COMPLEX LITIGATION § 30.41, at 237 (3d ed. 1995).

Because the settlement in this matter passes the standards for this first step in the approval process—consideration of preliminary approval—plaintiffs, with the agreement of Bank of America,[23] ask the Court to grant their request for preliminary approval of the proposed settlement.

1. This settlement meets the standards for preliminary approval.

There exists a "strong judicial policy in favor of settlements, particularly in the class action context."[24] And "the law permits a class to be certified solely for purposes of settlement."[25] Nonetheless, where parties to the action agree to settle as a class action, "the Court must still review the case to ensure that it meets the requirements for certification,"[26] under Fed. R. Civ. P. 23, and test the "fairness, reasonableness, and adequacy of the settlement terms."[27]

At the stage of preliminary approval, in addition to determining "that a precisely defined class exists"[28] (a condition satisfied by the class definition) and that the class representative families are "member[s] of the proposed class" (as made evident by the litigation to date and

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[23] Bank of America asserts that class certification is appropriate for settlement only and for no other purpose.

[24] *Hall v. Higher One Machines, Inc.*, 2016 WL 5416582, at *2 (E.D.N.C. Sept. 26, 2016) (quoting *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)).

[25] *Mateo-Evangelio v. Triple J Produce, Inc.*, 2016 WL 183485, at *3 (E.D.N.C. Jan. 14, 2016); *Covarrubias v. Capt. Charlie's Seafood, Inc.*, 2011 WL 2690531 (E.D.N.C. July 6, 2011).

[26] *U.S. Airline Pilots Ass'n v. Velez, et al.*, 2016 WL 1615408, at *1 (W.D.N.C. April 22, 2016).

[27] MANUAL § 21.632, at 321 (4th ed. 2004); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Where, as here, the proposed settlement was reached via "arm's-length negotiations," following "meaningful discovery," in which the parties were represented by "experienced, capable" counsel, the Court may afford to it a "presumption of fairness, adequacy, and reasonableness." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005); NEWBERG § 11:41, at 90 (4th ed. 2002) ("There is usually an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for approval.").

[28] *Haywood v. Barnes*, 109 F.R.D. 568, 576 (E.D.N.C. 1986).

explained further below),[29] the Court will generally assess (1) whether the proposed settlement is the product of genuine, informed, and non-collusive negotiation; (2) whether the proposed settlement is within the range of reasonableness; (3) whether there are no obvious deficiencies; and (4) whether the agreement reflects overall fairness and does not favor certain members of the class.[30]

a. The settlement is the product of well-informed, arm's-length negotiation.

The Court must ensure, as the Fourth Circuit has articulated, that the proposed settlement "was reached as a result of good-faith bargaining at arm's length, without collusion."[31]

In this case, the proposed settlement comes after nearly two years of litigation between experienced class action counsel, including one of the largest plaintiffs' class action firms in the country and a large, experienced defense firm.[32] This case has now been litigated through a motion to dismiss (which was denied by the Court last year), meaningful discovery, and briefing on plaintiffs' motion for class certification.[33] With the aid of a respected retired federal judge, the parties have spent several months negotiating this proposed resolution.[34]

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[29] *East Tex. Motor Freight Sys., Inc. v. Rodriquez*, 431 U.S. 395, 402-03 (1977).

[30] NEWBERG § 11:25 (4th ed. 2002); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991) (a court at this stage asks whether the proposed settlement was "the … result of good-faith bargaining at arm's length…").

[31] *Jiffy Lube Sec. Litig.*, 927 F.2d at 159.

[32] Lowney Decl., Ex. C; Declaration of Steve W. Berman in Support of Motion for Preliminary Approval of Proposed Settlement and Certification of the Settlement Class ("Berman Decl."), Ex. E (resume attached).

[33] Lowney Decl., Ex. C.

[34] Lowney Decl., Ex. C at ¶ 17. *See, e.g.*, *In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 352 (E.D.N.Y. 2000) ("Most significantly, the settlements were reached only after arduous settlement discussions conducted in a good faith, non-collusive manner, over a lengthy period of time, and with the assistance of a highly experienced neutral mediator ….").

Because of the foregoing, plaintiffs' counsel were well-situated to evaluate the strengths and challenges of plaintiffs' case. The settlement at issue is the result of long, hard-fought, adversarial work, such that it is worthy of preliminary approval by the Court.

b. The settlement is within the range of reasonable resolutions for this case.

At the stage of preliminary approval the Court asks whether there is a probability that the proposed settlement could be finally approved, and if so, then orders notification to the class.[35] Courts "have recognized that settlements, by definition, are compromises which need not satisfy every single concern of the plaintiff class, but may fall anywhere within a broad range of upper and lower limits."[36]

The proposed settlement in this case will result in a gross settlement fund of just under $42,000,000 in a compromise of hotly contested claims. This is a fair settlement given the arguments that Bank of America raised that, if accepted by a Court, could foreclose much or all of the recovery.

For example, Bank of America alleged that most if not all of the class members' claims are barred by the statute of limitations. Though plaintiffs maintain that the claims are subject to a discovery rule and that the statute of limitations did not begin to run until recently, this argument poses some risk to the class.

In addition, Bank of America has argued and continues to argue that this case is not amenable to class certification, as discussed in the Response to Motion for Class Certification.[37]

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[35] *See Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994).

[36] *South Carolina Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991) (internal quotations and citation omitted).

[37] Def's Br. in Opp'n to Class Certification, Dkt. No. 70, *passim*.

Though plaintiffs are confident that this case may be certified as a class under Fed. R. Civ. P. 23, if Bank of America were to prevail on this question it would, as a practical matter, preclude any recovery for the vast majority of the class.

Defendant has also argued that even if this case is certified as a class action, the plaintiffs will not recover damages because they and putative class members have already received full refunds for any interest rate benefits owed, and in many instances, payments in addition to those refunds. Plaintiffs disagree and view Bank of America's payments to servicemembers as voluntary payments for poor service, and argue that the payments cannot be used to "offset" damages sustained in this lawsuit. But this is a unique fact pattern and if the Court were to rule for Bank of America on this question, it would likely result in far less recovery for the class than provided for in the proposed settlement, if any.

These are just a few of the issues that the parties fully briefed and argued before the mediator, who in turn helped the parties to quantify their risks to reach the proposed settlement.

Ultimately, after taking into account the risk, expense, complexity, and likely duration of further litigation,[38] plaintiffs and their experienced counsel, with the aid of mediator Layn Philips, were able to reach a settlement that allows for substantial monetary, as well as injunctive relief, to the settlement class.

With respect to the monetary component of the settlement, the nearly $42,000,000 gross settlement amount is substantial in light of the above-stated risks, together with the risk that, ultimately, a jury could find no liability or award no damages, or less in damages, should the case have proceeded to trial. As for the non-monetary relief achieved, it includes an agreement by Bank of America to forgo the use of the interest subsidy method for interest benefits

[38] *Burden v. SelectQuote Ins. Servs.*, 2013 WL 1190634, at *3 (N.D. Cal. Mar. 21, 2013) (citation omitted).

calculations for a five-year period, which method, plaintiffs have pleaded, can result in higher costs for class members.[39]

Further, the ongoing federal oversight of Bank of America's SCRA compliance, and the United States Office of the Comptroller of the Currency's issuance of a consent order in May of 2015 requiring remediation to SCRA-eligible servicemembers, makes the proposed settlement all the more reasonable.[40]

In sum, the settlement at bar falls well within the range of possible approval. For this reason, too, the Court should grant preliminary approval.

c. There are no obvious deficiencies in this proposed settlement.

Furthermore, the proposed settlement bears no obvious deficiencies. There are no patent defects that would preclude its approval by the Court, such that notifying the class and proceeding to a formal fairness hearing would be a waste of time.[41] Respectfully, an examination of the settlement will reveal no apparent unfairness, and, as one district court put it, no "unduly preferential treatment of a class representative or segments of the Settlement Class, or excessive compensation for attorneys."[42]

As discussed below, the proposed settlement gives no preference to named plaintiff families or other particular members of the class. The proposed 30% fee for counsel, to be

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[39] *See* Settlement Agreement, Ex. A at 18.

[40] *See In re Bank of America, N.A., Charlotte, North Carolina*, Consent Order, AA-EC-2015-1, available at http://www.occ.gov/static/enforcement-actions/ea2015-046.pdf.

[41] *See* NEWBERG § 11:25 (4th ed. 2002) (referring to the Court's inquiry as to, *inter alia*, "obvious deficiencies").

[42] *See In re Zurn Pex Plumbing Prods. Liab. Litig.*, 2012 WL 5055810, at *6 (D. Minn. Oct. 18, 2012) ("There are no grounds to doubt the fairness of the Settlement, or any other obvious deficiencies, such as unduly preferential treatment of a class representative or segments of the Settlement Class, or excessive compensation for attorneys.").

addressed further by separate motion following preliminary approval (if so approved), is reasonable, common, and not excessive.[43]

d. The settlement favors no members of the class and gives no preferential treatment to anyone.

The proposed settlement provides a cash benefit to all class members commensurate with the strength of their individual claims in the case (*e.g.*, their type of loan; whether they previously received remediation from Bank of America and how much; and the period for which they may have been eligible for interest rate refunds, among other things).[44] There is no preferential treatment of class members or segments of the class. All class members, including class representatives, are treated fairly based upon objective criteria relating to their loans(s) and any previous remediation received from Bank of America.[45]

The proposed method of distribution begins by providing $15,420,374.06 to class members who did not previously receive or successfully deposit payments from Bank of America.[46] After a reminder mailing and one hundred fifteen (115) days, any remaining

[43] *See, e.g.*, NEWBERG § 15:73 (5th ed. 2016) (noting that a "33% figure provides some anchoring for the discussion of class action awards [to counsel]" and that "many courts have stated that … fee award in class actions average around one-third of the recovery."); Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. OF EMPIRICAL LEGAL STUDIES, 27, 31, 33 (2004) (finding that courts consistently award between 30-33% of the common fund); *In re Rite Aid Corp. Sec. Litig*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001) (reviewing 289 class action settlements and finding an "average [of] attorney's fee percentage [of] 31.71%" and a median value of roughly one-third).

[44] *See* Settlement Agreement, Ex. A, and Distribution Plan, Ex. B.

[45] As for incentive awards of $10,000 or $15,000 for each of the named plaintiff families, such awards are supported by precedent and also by the attention that these individuals have devoted to this matter, including, variously, by way of assisting with the drafting of complaints, consulting with counsel during the course of this litigation, monitoring the course of this case, and consulting with counsel regarding proposed terms of settlement. *See* Lowney Decl., Ex. C.

[46] Distribution Plan, Ex. B.

uncashed amounts from these first payments will be pooled together with the balance of the net settlement fund and distributed to all class members as described in the distribution plan.[47]

At each stage, after checks are distributed, the settlement administrator will send reminders and reissue checks as necessary to maximize the number of servicemembers and veterans who actually receive and cash their settlement checks.

After the class wide distribution, the value of any uncashed distribution checks will be redistributed further to the class, if the value is sufficient to make it economically feasible, or else such residual funds will be distributed as *cy pres* to a non-profit organization providing services to military servicemembers and veterans. Such organization(s) would be selected by the parties and would be required to provide a report to the parties and to the Court as to the use of the residual funds.[48]

2. The proposed class meets the *Amchem* requirements for certification of a settlement class.

In *Amchem Prods. v. Windsor*, the Supreme Court confirmed the propriety, and recognized the necessity, of settlement class certification in matters such as this one, where class members are readily identifiable, and where there are relatively small economic damages per class member.[49] As the court put it:

> 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.[50]

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[47] *Id.*

[48] *Id.*

[49] 521 U.S. at 617.

[50] *Id.* (internal quotes and citations omitted).

Here, there is one underlying commonality among the class of military family members at issue—each carried a loan or loans subject to interest reductions that plaintiffs allege were not provided by Bank of America, an alleged course of conduct common to all class members. This is the kind of class action settlement endorsed in *Amchem*. Without this class action and settlement, most class members would be "without effective strength to bring their opponents into court at all."[51] In a situation such as this, where the proposed class seeks to recover in settlement only economic damages (as distinct from a class or classes seeking individualized personal injury and future-injury damages), settlement class certification is eminently proper.

B. Because it satisfies the requirements of Rule 23, the proposed class should be certified for settlement purposes.

"Under Rule 23(a) of the Federal Rules of Civil Procedure, a party seeking class certification, whether for settlement or litigation purposes, first must demonstrate that: '(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.'"[52]

In addition, it must be established that the action is maintainable under one of the subparts of Rule 23(b)—here, the Rule 23(b)(3) requirements of predominance and superiority are also satisfied by this proposed settlement.[53]

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[51] *Id*.

[52] *Berry v. Schulman*, 807 F.3d 600, 608 (4th Cir. 2015) (quoting, in part, Fed. R. Civ. P. 23(a)), *cert. denied*, 137 S. Ct. 77 (2016).

[53] *Amchem*, 521 U.S. at 614. Though not an express requirement of Rule 23, the proposed settlement class is also readily ascertainable such that it is administratively straight-forward in this case to identify settlement class members with objectively verifiable account information from Bank of America.

1. The proposed settlement class satisfies each requirement of Rule 23(a).

a. Plaintiffs satisfy the numerosity requirement—there are tens of thousands of class members.

Discovery from Bank of America makes plain that plaintiffs can identify nearly every military family account that received or may have been eligible to receive additional compensation from Bank of America related to military reduced interest rate benefits—there are likely 125,000-130,000 class members. Given this fact, the requirement of numerosity is easily satisfied here.[54]

b. Plaintiffs satisfy the commonality and typicality requirements for purposes of settlement.

As this Court has noted, "[t]he requirements for typicality and commonality often merge."[55] Rule 23(a) "requires only that resolution of the common questions affect all or a substantial number of the class members."[56] A plaintiff's claim is typical "if it arises from the same event, practice, or course of conduct that gives rise to the claims of other class members, and if the plaintiff's claim is based on the same legal theory as those of the other members."[57]

Plaintiffs here allege that a common practice by Bank of America violated the SCRA and its own proprietary program by not providing reduced interest rate benefits to military family

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[54] *Romero v. Mountaire Farms, Inc.*, 796 F. Supp. 2d 700, 713 (E.D.N.C. 2011) (finding that a "class of approximately 2,000 members … easily satisfies the numerosity requirement of Rule 23(a)(1)."); NEWBERG § 3:5 (4th ed. 2002) ("In light of prevailing precedent, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone.").

[55] *Romero*, 796 F. Supp. 2d at 714 (citing *Kidwell v. Transp. Commc'ns Int'l Union*, 946 F.2d 283, 305 (4th Cir. 1991)).

[56] *Brown v. Nucor Corp.*, 576 F.3d 149, 153 (4th Cir. 2009) (further citation omitted).

[57] *McLaurin*, 271 F.R.D. at 476 (citing *Haywood*, 109 F.R.D. at 578).

borrowers.[58] While Bank of America has argued that there are legal and factual questions that, if litigated, would defeat commonality in this case, plaintiffs have identified no suggestion in the record or unearthed anything in discovery to suggest that Bank of America's alleged failure to provide interest reductions was based on individualized analysis that would preclude a class wide settlement.

Similarly, the named plaintiffs' claims are typical of the class because plaintiffs allege they are the product of the same course of conduct and that they suffered the same type of injury (interest overcharges).[59] Plaintiffs have the same legal claims as members of the class they seek to represent and must satisfy the same legal elements that other class members must satisfy.

Thus, the commonality and typicality requirements of Rule 23(a) are satisfied for purposes of this settlement.

c. Plaintiffs satisfy the requirement to adequately represent the interests of the settlement class.

Finally, Rule 23(a)(4) requires a determination that plaintiffs "will fairly and adequately represent the interests of the class." In making this determination, courts must confirm that: (1) plaintiffs' counsel are "qualified, experienced and generally able to conduct the proposed litigation,"[60] and (2) the named plaintiffs are "members of the class they purport to represent, and their interests [are] not in conflict with those of other class members."[61]

Taking the second factor first, plaintiffs' claims are co-extensive with members of the putative class. Indeed, they claim to "possess the same interest and suffer the same injury shared

[58] Second Amended Complaint ("SAC"), Dkt. No. 103, at 6-9.

[59] *Id*., at 6 and 9.

[60] *McLaurin*, 271 F.R.D. at 476 (quoting *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968), *vacated on other grounds*, 417 U.S. 156 (1974)).

[61] *Romero*, 796 F. Supp. 2d at 715 (citing *Amchem*, 521 U.S. at 625-26).

by all members of the class [they] represent."[62] Each named plaintiff family has the same interest in establishing Bank of America's liability, as each alleges to have been injured in the same manner as the rest of the class, by not receiving sufficient interest rate benefits on their account(s). There is no conflict among them.

Also, each named plaintiff has agreed to assume the responsibility of representing the class, and each has made him or herself available to do so, including by way of assisting with the drafting of complaints, helping to prepare initial disclosures, consulting with counsel during the course of this litigation, monitoring the course of this case, and consulting with counsel regarding proposed terms of settlement.[63]

Second, as to the qualification and experience of counsel, as discussed and referenced in the declarations of counsel and as illustrated in the resumes attached thereto, plaintiffs' lawyers have extensive experience and expertise in prosecuting complex class actions, including commercial, consumer, and banking cases.[64] And "courts generally hold that the employment of competent counsel assures vigorous prosecution."[65] Qualified counsel have pursued this litigation vigorously, and they remain committed to advancing and protecting the common interests of all members of the class.

Thus, the demands of Rule 23(a)(4) are satisfied here for purposes of this settlement.

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[62] *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974).

[63] *See* Lowney Decl., Ex. C.

[64] *See* Berman Decl., Ex. E (resume attached); s*ee* Lowney Decl., Ex. C.

[65] *South Carolina Nat'l Bank*, 139 F.R.D. at 331.

2. In addition, the requirements of Rule 23(b)(3) are satisfied for purposes of settlement because common questions plainly predominate plaintiffs' allegations and class treatment is the superior method for adjudicating a settlement of class member claims.

Once the prerequisites of Fed. R. Civ. P. 23(a) are satisfied, the Court must determine if one of the subparts of Rule 23(b) is also satisfied.[66] Here, Rule 23(b)(3) is satisfied because, with plaintiffs' substantial allegations, questions common to class members predominate over questions affecting only individual class members, and the class action device provides the best method for the fair and efficient resolution, via settlement, of class members' claims.

When addressing the propriety of class certification, the Court should consider the fact that, in light of the settlement, trial will now be unnecessary, such that the manageability of the class for trial purposes is no longer a relevant question, nor need the Court reach dispositive conclusions of unsettled legal questions.[67]

Furthermore, Bank of America supports this motion to certify the settlement class and approve the class settlement proposed here by the parties.

a. Common questions predominate in this case.

Rule 23(b)(3) requires an examination of whether "questions of law or facts common to the members of the class predominate over any questions affecting only individual members …." As the Supreme Court stated in *Amchem*, the "Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[68] It "does

[66] *Amchem*, 521 U.S. at 615.

[67] *Flinn v. EMC Corp.*, 528 F.2d 1169, 1172-73 (4th Cir. 1975) ("The trial court should not … turn the settlement hearing into a trial or a rehearsal of the trial nor need it reach any dispositive conclusions on the admittedly unsettled legal issues in the case."); *Carson v. Am. Brands Inc.*, 450 U.S. 79, 88 n.14 (1981) (the court "need not decide the merits of the case or resolve unsettled legal questions").

[68] 521 U.S. at 623.

not require a plaintiff seeking class certification to prove that each elemen[t] of [her] claim [is] susceptible to classwide proof."[69] Instead, the rule only requires "that common questions *predominate* over any questions affecting only individual [class] members."[70]

In a "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."[71] Also, to satisfy the predominance requirement the Court generally needs to determine only whether the common questions predominate over individual questions *as to liability*, such that any "need for individualized determination of the amount of compensatory damages suffered by the putative class members will *not* alone defeat certification."[72]

In light of the above, for purposes of this settlement, common questions plainly predominate. Among the predominant questions, which are released by the settlement, are: whether Bank of America unlawfully failed to provide to class members the benefits entitled to them under the SCRA; whether Bank of America failed to provide promised benefits to military families under its own proprietary interest reduction program; and whether, by way of the conduct alleged in the complaint, Bank of America violated, *inter alia*, the SCRA and the North Carolina Unfair and Deceptive Trade Practices Act.[73]

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[69] *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013) (further citation omitted) (emphasis and alteration in original).

[70] *Id*. (emphasis in original).

[71] *Id*.

[72] *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 429 (4th Cir. 2003) (emphasis in original); *see also* 5 MOORE'S FEDERAL PRACTICE § 23.23[2] (1997) ("[T]he necessity of making an individualized determination of damages for each class member generally does not defeat commonality.").

[73] *See* SAC, Dkt. No. 103, at, *e.g.*, 8.

Given that common questions here predominate over any individual questions in this settlement context, the predominance requirement is satisfied.

b. Class treatment is the superior method for adjudicating claims of members of the proposed settlement class.

As for the requirement in Fed. R. Civ. P. 23(b)(3) that the class action be "superior to other available methods for fair and efficient adjudication of the controversy," class treatment will facilitate the fair and efficient resolution, via settlement, of all putative class members' claims. Given that plaintiffs are aware of tens of thousands of class members falling under the defined class, the class device is the most efficient and fair means of adjudicating these many claims.

Here, "[t]he alternative to a class action litigation in this case would be, of course, individual lawsuits by each class member."[74] As this Court noted in a prior case, "[e]ven if the putative class members were inclined to pursue individual actions, there is no doubt this would be more burdensome on the class members, and it would likely be a less efficient use of judicial resources."[75] This is particularly true in this case in light of the arm's-length settlement that has already been negotiated and will provide immediate monetary benefit to the settlement class members. Class treatment is far superior to the alternative of thousands upon thousands of individual suits or piecemeal litigation; in this matter, the class action mechanism will function to conserve scarce judicial resources and promote the consistency of adjudication. Accordingly, the superiority aspect of Rule 23(b)(3) is readily met.

[74] *Romero*, 796 F. Supp. 2d at 716.

[75] *Id*.

C. The Court should appoint Hagens Berman Sobol Shapiro LLP, Smith & Lowney PLLC, and Shanahan Law Group, PLLC as class counsel in this action and appoint the named plaintiffs as class representatives.

Rule 23(g)(2)(4) directs the Court to appoint class counsel who will "fairly and adequately represent the interests of the class." Per the Rule, in appointing class counsel the Court must consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class."[76] The Court "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[77]

The proposed class counsel have vast experience with class action and other complex civil litigation.[78]

Founded in 1993, Hagens Berman is now one of the largest and most successful plaintiffs' class action firms in the country, having litigated and settled many of the largest class action cases in history.[79] It routinely litigates consumer class action cases in federal courts across the country against many of the largest corporations in the world, including many cases against the largest commercial and investment banks around the world.[80] Because of this success,

[76] Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

[77] Fed. R. Civ. P. 23(g)(1)(B).

[78] *See* Lowney Decl., Ex. C; Berman Decl., Ex. E; Affidavit of Kieran J. Shanahan in Support of Motion for Preliminary Approval of Class Settlement ("Shanahan Aff."), Ex. F.

[79] *See* Berman Decl., Ex. E.

[80] *Id.*

Hagens Berman is able to bring substantial financial resources to bear in complex, long-duration, class action litigation.[81]

Since its founding in 1996, Smith & Lowney has participated in numerous nationwide class actions on behalf of consumers, including litigation against First USA Bank that culminated in a nationwide settlement of claims for a class of over ten million consumers, and several other nationwide consumer class actions in state and federal courts across the United States.[82]

Shanahan Law Group is a boutique firm which frequently conducts high-stakes, complex litigation in North Carolina federal, business, and state courts, as well as before non-judicial tribunals such as FINRA and the American Arbitration Association. The firm has also participated in a number of class-action lawsuits, and has been crucial to their successful resolution.[83]

Plaintiffs' counsel have committed substantial time and resources to the litigation of this action.[84] Plaintiffs' counsel have advanced all of the costs of bringing the case, and to date, have received no reimbursement or other compensation.[85] Over the past three years, plaintiffs' counsel have analyzed and developed legal theories, conducted discovery, and engaged in motions practice.[86] Plaintiffs have overcome a motion to dismiss and resolved various discovery disputes, and have now reviewed a significant number of bank records, developed additional legal theories, and engaged affected class representatives.[87] Counsel have also engaged in productive

[81] *Id.*

[82] *See* Lowney Decl., Ex. C at ¶ 4.

[83] *See* Shanahan Aff., Ex. F at ¶ 5.

[84] *See* Lowney Decl., Ex. C.

[85] *Id.*

[86] *Id.*

[87] *Id.*

and now-successful settlement discussions, developed a complex settlement framework, and diligently worked to advance the interests of the class.[88]

As the case progressed, plaintiffs' counsel conducted months of additional research and analysis ultimately determining there was an additional cause of action that was not included in the Amended Complaint and productively brought those claims to the mediation, ultimately settling them as part of the anticipated global settlement. These additional claims, and three new plaintiff families (Jackie Love, Harry and Marianne Champagne, and Russell and Mary Beth Christe), were added in the Second Amended Complaint.[89]

Further, the named plaintiffs in this case should be appointed as class representatives in this action. As per their complaint, the named plaintiffs are military families who had either or both a mortgage account or credit card account with Bank of America and failed to receive interest rate benefits owed on the account under the SCRA and the Bank's own proprietary interest reduction program.[90] No plaintiff family has any conflict with any other class member and each will fairly and adequately protect the interests of the class.[91]

D. The Court should approve the settlement and proposed form and method of notice and administration of the settlement.

In addition, "Rule 23(e)(1)(B) requires the court to 'direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or

[88] *Id.*

[89] *Id*. at ¶ 15.

[90] SAC, Dkt. No. 103, at, *e.g.*, 10-26.

[91] *See* Lowney Decl., Ex. C at ¶16.

compromise ….'"[92] In order to protect the rights of absent class members, the Court must direct the best notice practicable to them.[93]

Also, "Rule 23 … requires that individual notice in [opt-out] actions be given to class members who can be identified through reasonable efforts. Those who cannot be readily identified must be given the 'best notice practicable under the circumstances.'"[94]

Here, given that class members are readily identifiable from the documents in the possession of Bank of America (*i.e.*, the bank records of qualified accounts held by members of the class), direct notice will be easily facilitated.[95] The parties have consulted with class action administration experts KCC LLP, whom the parties propose to administer the class settlement. KCC LLP will be prepared to facilitate notice to the class members and will provide the requisite mechanisms for those who desire to opt out.[96]

As for the settlement notice itself, it should (and does here):

- define the class;
- describe clearly the options open to class members and the deadlines for taking action;
- describe the essential terms of the proposed settlement;
- disclose any special benefits provided to the class representatives;
- provide information regarding attorneys' fees;
- indicate the time and the place of the hearing to consider approval of the settlement;

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[92] MANUAL § 21.312, at 293 (4th ed. 2004).

[93] *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974).

[94] MANUAL § 21.311, at 287 (4th ed. 2004).

[95] *See* Vasquez Decl., Ex. D.

[96] *Id.*

- describe the method for objecting to or opting out of the settlement;
- explain the procedures for allocating and distributing settlement funds and clearly set forth any variations among different categories of class members;
- explain the basis for valuation of non-monetary benefits;
- provide information that will enable class members to estimate their individual recoveries; and
- prominently display the address and phone number of class counsel and how to make inquiries.[97]

Here, the proposed notice satisfies these requirements.[98]

The notice program and related documents will ensure that notice to the class occurs in a comprehensive and reasonable manner. Plaintiffs respectfully ask the Court to approve the proposed form and method of notice.

E. The Court should adopt the parties' proposed schedule, which aims toward final approval of the proposed settlement.

If the Court grants preliminary approval and provisionally certifies the settlement class, respectfully, the Court then should set a schedule toward final approval of the parties' settlement. The plaintiffs, with the agreement of Bank of America, request the following schedule, which is incorporated in the proposed order submitted with this motion:

1. Within ten (10) days from filing this motion Bank of America shall send any required notices pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715;
2. The notice program shall commence no later than thirty (30) days after the entry of this Order ("Class Notice Date");
3. Class counsel's application for attorneys' fees, costs, and expenses shall be filed no later than forty-six (46) days after the Class Notice Date;

[97] MANUAL § 21.312, at 295 (4th ed. 2004) (citation omitted).

[98] *See* Vasquez Decl., Ex. D.

4. Class members shall have until sixty (60) days after the Class Notice Date to opt out, or exclude themselves, to object to the proposed settlement and release, or to respond to class counsel's application for attorneys' fees, costs, and expenses;

5. Plaintiffs shall file their Motion for Final Approval no later than thirty-five (35) days before the Final Approval Hearing;

6. Plaintiffs shall reply to any objection to the proposed settlement and release and/or class counsel's application for attorneys' fees, costs, and expenses no later than seven (7) days before the Final Approval Hearing; and

7. The Final Approval Hearing shall be held on a date no earlier than one hundred forty-five (145) days from the date of the order granting preliminary approval.

IV. CONCLUSION

For all of the foregoing reasons, plaintiffs, with the agreement of Bank of America, ask respectfully that the Court grant preliminary approval of the parties' proposed settlement and the further relief requested here.

Submitted this 20th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Memorandum of Law in Support of Motion for Preliminary Approval of Settlement and Certification of a Settlement Class** was filed this 20th day of July, 2017, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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