IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

JENNIFER COLLIER, on behalf of herself and all others similarly situated, Plaintiff, v. NATIONAL PENN BANK, NATIONAL PENN BANCSHARES, INC., and KNBT BANCORP, INC., Defendants.	JUNE TERM, 2012 NO: 01036

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF THE CLASS ACTION SETTLEMENT AND CERTIFICATION OF THE SETTLEMENT CLASS

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Pursuant to Rules 1702, 1708, 1709, 1710, 1712, and 1714 of the Pennsylvania Rules of Civil Procedure, Plaintiff Jennifer Collier respectfully submits this Memorandum of Law in support of the unopposed motion for Preliminary Approval of the Class Action Settlement and for Certification of the Settlement Class.

I. INTRODUCTION

Plaintiff respectfully moves for Preliminary Approval of the Settlement Agreement and Release ("Settlement" or "Agreement," attached as Exhibit A), which will resolve Plaintiff's and the Class's claims against National Penn Bank, National Penn Bancshares, Inc., and KNBT Bancorp, Inc. ("National Penn") in the above-captioned action.[1] The Court should grant Preliminary Approval because the $975,000 Settlement provides substantial monetary relief to the Settlement Class[2] and because the terms of the Settlement are well within the range of reasonableness, consistent with applicable statutes and case law.

In addition to approving the Settlement, Plaintiff respectfully requests that the Court approve the Settlement's Notice Program and the form and content of the Notices (attached to the Agreement as Exhibits 1-2) under Rules 1712 and 1714 of the Pennsylvania Rules of Civil Procedure; certify a Settlement Class under Pennsylvania Rules 1702, 1708, 1709, and 1710; and schedule a Final Approval Hearing.

Plaintiff sued on behalf of herself and all others similarly situated who incurred Overdraft Fees as a result of National Penn's practice of assessing overdraft fees even when a customer has

[1] Branch Banking and Trust Company ("BB&T") acquired National Penn Bank effective April 1, 2016.

[2] All capitalized terms used herein have the meaning assigned in the Settlement Agreement attached hereto as Exhibit A.

sufficient funds in their account to cover all merchant requests for payment. Plaintiff alleges that National Penn engaged in this practice to maximize its overdraft fee revenue. According to Plaintiff, National Penn's practices constituted a breach of contract, a breach of the contractual covenant of good faith and fair dealing, conversion, unjust enrichment, and a violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). National Penn denied any wrongdoing and maintains that its practices were permitted by applicable law and adequately disclosed to consumers.

The Settlement satisfies the criteria for preliminary approval under Pennsylvania law. One of the keystones of this Settlement is that eligible Settlement Class Members will automatically receive – without having to do anything at all – their *pro rata* share of the Net Settlement Fund based on a complete calculation of how much each individual Settlement Class Member was allegedly harmed by National Penn's practices. There are no claims forms to fill out, and Settlement Class Members will not be requested to provide evidentiary proof that they were damaged. Instead, the Parties will use available National Penn data to determine which National Penn Account Holders were affected by National Penn's practices, and will apply a formula (described below and detailed in Paragraph 94 of the Agreement) to calculate each identifiable Settlement Class Member's *pro rata* share of the Net Settlement Fund. Eligible Settlement Class Members will thereafter automatically receive Settlement payments.

Another testament to the reasonableness and fairness of the Settlement is the magnitude of the Settlement Fund. Class Counsel believes the $975,000 Settlement Fund represents an excellent

result for Class Members, particularly when compared with the settlements obtained in similar overdraft fee cases.[3]

This litigation has been hard-fought. The Parties engaged in motion practice, including a round of briefing on National Penn's preliminary objections, supplemental briefing on the objections, a round of briefing on National Penn's appeal to the Superior Court of Pennsylvania from the Court's order overruling National Penn's preliminary objections, and a round of briefing on National Penn's Petition for Allowance of Appeal to the Pennsylvania Supreme Court.[4] Settlement discussions began in approximately November 2016, and during these negotiations National Penn provided Plaintiff with certain requested information.[5] On April 5, 2017, the Parties participated in an eight hour formal mediation with retired United States Magistrate Judge Diane M. Welsh and reached an agreement in principle.[6] Since that time, the Parties have diligently negotiated a formal settlement agreement, and the Settlement Administrator will calculate each eligible Settlement Class Member's monetary award from the Settlement.[7]

With this motion, Plaintiff respectfully requests that the Court take the following initial steps in the settlement approval process: (1) preliminarily approve the Settlement; (2) certify for settlement purposes the proposed Settlement Class pursuant to Rules 1702, 1708, 1709, and 1710 of the Pennsylvania Rules of Civil Procedure, (3) appoint Plaintiff Jennifer Collier as a Class Representative and her counsel as Class Counsel; (4) pursuant to Rules 1712 and 1714, approve

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[3] Joint Affidavit of Class Counsel ("Joint Aff.") ¶¶ 4, 31, 44-5, 51-3, attached hereto as Exhibit B.

[4] Joint Aff. ¶¶ 16-25.

[5] Joint Aff. ¶¶ 27-9.

[6] Joint Aff. ¶ 30.

[7] Joint Aff. ¶¶ 33.

the Notice Program set forth in the Agreement and approve the form and content of the Notices, attached to the Agreement as Exhibits 1 and 2; (5) approve and order the opt-out and objection procedures set forth in the Agreement; and (6) schedule a Final Approval Hearing to occur no sooner than one hundred and ten (110) days after the preliminary approval order.[8]

II. STATEMENT OF FACTS

Plaintiff brought this Action seeking monetary damages and/or restitution in the amount of the alleged additional Overdraft Fees charged to National Penn's customers as a result of National Penn's practice of assessing overdraft fees even when a customer allegedly has sufficient funds in their account to cover all merchant requests for payment. Plaintiff alleges that as a result of National Penn's practices, customers were assessed overdraft fees when their accounts had positive ledger balances.[9] National Penn denied all of Plaintiff's allegations and asserts that the language in its account agreements expressly advises customers of its posting practices. National Penn has advanced several other defenses, including that various statutes and/or regulations endorse its practices.

On June 8, 2012, Ms. Collier filed this action in the Court of Common Pleas of Philadelphia County. Joint Aff. ¶ 14. Plaintiff's operative Complaint alleged common law claims of breach of contract and breach of the covenant of good faith and fair dealing, conversion, unjust enrichment, and violations of the Pennsylvania Unfair Trade Practice Law regarding National Penn's overdraft practices. *Id.*

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[8] A lawsuit involving wrongful overdraft fee practices was settled recently in the Court of Common Pleas of Allegheny County, Pennsylvania against Northwest Saving Bank. *See Toth v. Northwest Saving Bank*, No. GD-12-8014 (Allegheny C.C.P. 2014). The pleadings in that case are instructive here.

[9] Joint Aff. ¶ 7.

National Penn removed the case from the Court of Common Pleas on July 11, 2012, alleging that removal was warranted because that Ms. Collier's claims implicated significant federal issues. *Id.* at ¶ 15. On August 10, 2012, Plaintiff filed a motion to remand. *Id.* On March 28, 2013, the District Court granted Ms. Collier's motion for remand. *Id.* On May 21, 2013, National Penn filed a motion to transfer venue and its preliminary objections. *Id.* at ¶ 16. On June 7, 2013, Ms. Collier filed her opposition to National Penn's motion to transfer venue, and on June 10, 2013, Ms. Collier filed her opposition to National Penn's preliminary objections. *Id.* On July 12, 2013, the trial court denied National Penn's motion to transfer venue. *Id.* at ¶ 17.

On February 5, 2014, the trial court issued a scheduling order that, inter alia, opened discovery on March 3, 2014 and established that National Penn's answer would be due within 30 days of an order denying the Bank's preliminary objections. *Id.* at ¶ 18. On February 18, 2014, the trial court denied the preliminary objections in their entirety. *Id.* at ¶ 19. On March 17, 2014, National Penn filed a Notice of Appeal. *Id.* at ¶ 20.

On April 21, 2014, National Penn filed a concise statement of errors complained of on appeal. *Id.* at ¶ 21. On April 28, 2014, Plaintiff moved to strike paragraphs 2 and 3 of National Penn's concise statement of errors on the grounds that National Penn was attempting to appeal an interlocutory decision on preemption. *Id.* While the trial court denied Plaintiff's motion on August 11, 2014, in its October 27, 2014 Memorandum Opinion, the trial court held that National Penn's appeal was limited solely to the arbitration issue. *Id.* at ¶ 22.

On January 21, 2015, National Penn filed its opening brief with the Superior Court of Pennsylvania. *Id.* at ¶ 23. On March 6, 2015, Plaintiff filed her response brief with the Superior Court of Pennsylvania. *Id.* On March 27, 2015, National Penn filed its reply brief with the Superior Court of Pennsylvania. *Id.* On November 24, 2015, the Superior Court of Pennsylvania

issued a published opinion affirming the trial court's denial of National Penn's motion to compel arbitration and quashed the appeal of the denial of National Penn's demurrer to Ms. Collier's Complaint based on preemption under the National Bank Act. *Id.* at ¶ 24; *also* 2015 PA Super 246.

On December 23, 2015, National Penn filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. *Id.* at ¶ 25. National Penn's Petition was denied by the Supreme Court on April 27, 2016. *Id.* On November 9, 2016, the trial court entered its Class Action Initiation Order, which set a Case Management Conference for January 13, 2017. *Id.* at ¶ 26. At that conference, the trial court approved the Parties' Joint Scheduling Order, which stayed the start of discovery pending mediation. *Id.*

On April 5, 2017, the Parties participated in a formal mediation before retired U.S. Magistrate Judge Diane M. Welsh. *Id.* at ¶ 30. In advance of the mediation, BB&T provided Plaintiff aggregate information regarding its overdraft fee revenues, as well as detailed information regarding its posting order and categorization of transactions for the period after May of 2006. *Id.* at ¶ 29. Class Counsel and Plaintiff's expert reviewed and evaluated the information and documents provided by BB&T. *Id.*

After an eight-hour mediation session on April 5, 2017, the Parties reached an agreement in principle, subject to the preparation and execution of this Agreement and subject to Preliminary Approval and Final Approval (as defined below) by the Court as required by Rules 1702, 1708, 1709, 1710 and 1714 of the Pennsylvania Rules of Civil Procedure, and subject to dismissal of the Action, with prejudice, by the Court. *Id.* at ¶ 30. Pursuant to the agreement in principle and as set forth below, Plaintiff and the Settlement Class Members agree to fully, finally and forever resolve, discharge and release all rights and claims against the BB&T and Defendants in exchange for the

Bank's agreement to pay the sum of Nine Hundred Seventy-Five Thousand Dollars ($975,000.00) to create a common fund for the benefit of the Settlement Class and to fund class administration. *Id.* at ¶ 31. On April 7, 2017, the Parties notified the Court of the Parties' agreement in principle. *Id.* at ¶ 32.

III. SUMMARY OF THE SETTLEMENT TERMS

The Settlement's terms are detailed in the Agreement attached hereto as Exhibit A. The following is a summary of the material terms of the Settlement.

A. The Settlement Class

The Settlement Class is defined as:

> all National Penn customers in the United States who, between June 8, 2008 through December 31, 2011, incurred an overdraft fee as a result of National Penn's practice of assessing overdraft fees even when a customer allegedly has sufficient funds in their account to cover all merchant requests for payment.

Agreement ¶ 65.

B. Monetary Relief for the Benefit of the Class

The Settlement requires BB&T to pay a total sum of $975,000 which will be used to: (1) compensate Plaintiff and Class Members; (2) pay any Court-ordered attorneys' fees and costs awarded to Class Counsel; (3) pay any Court-ordered Service Award to the Plaintiff; and (4) pay the costs of Notice to the Settlement Class, and the Settlement Administrator's costs and fees. Agreement ¶ 73. Settlement Class Members do not have to submit claims or take any other affirmative step to receive the benefits for which they are eligible under the Settlement. Instead, within twenty (20) days of the Effective Date of the Settlement, the Settlement Administrator will make payments to Current Account Holders and Past Account Holders by mailing checks to them. Agreement ¶¶ 95-99. Thus, all identifiable Settlement Class members who do not opt out of the

Settlement and are eligible for a settlement payment will automatically receive a *pro rata* distribution of the Net Settlement Fund.

Individual payment amounts will be calculated by examining the transactional data for all accounts where National Penn charged an Overdraft Fee based on available balance when the Fee would not have been charged based on ledger balance during the Class Period, and determining whether an Account was overdrawn based on the "available balance" – meaning the actual money in the Account ***minus*** the money that, although still in the consumer's account, has been authorized to possibly be used to honor debit card transactions which have been approved, but not yet paid out – rather than "ledger balance" – meaning the actual money in the Account. Joint Aff. ¶¶ 8-12. If a transaction presented for payment caused the available balance to fall below zero, triggering an Overdraft Fee, when the same transaction would not have caused an Overdraft Fee based on the ledger balance, that fee will be included in the Settlement. Agreement ¶ 94. This methodology is explained in detail in the Agreement. *Id.* Eligible Settlement Class Members will receive *pro rata* distributions of the Net Settlement Fund according to the dollar amounts tallied based on this comparison. *Id.*

Within two hundred and ten (210) days after the date the Settlement Administrator mails the first check, any funds remaining in the Settlement Fund will be distributed in accordance with Paragraph 102 of the Agreement. The Settlement Fund will bear any costs associated with this process. *Id.*

C. Class Release

In exchange for the benefits conferred by the Settlement, all Settlement Class Members who do not opt out will be deemed to have released BB&T from claims relating to the subject

matter of the Action. The detailed release language can be found at Paragraphs 108 through 110 of the Agreement, with the definitions in Paragraphs 34-69 relating thereto.

D. The Notice Program

The Notice Program is designed to provide the best notice practicable based on the information BB&T has available about the Settlement Class Members, and it is reasonably calculated to apprise the Settlement Class Members of the terms of the Settlement and their rights to opt out of or object to the Settlement, Class Counsel's anticipated fee application, and the anticipated request for a Service Award for the Plaintiff. *See* Agreement ¶¶ 81-90.

The Notice Program is comprised of two parts: (1) Mailed Notice to all identifiable Settlement Class Members; and (2) and a Long-Form Notice with more detail than the Mailed Notice, that will be available on the Settlement Website, www.NationalPennOverdraftSettlement.com. *Id.* ¶¶ 85-90, Exs. 1-2.

All forms of Notice to the Settlement Class will include, among other information: a description of the material terms of the Settlement; a procedure and date by which Settlement Class members may exclude themselves from or "opt out" of the Settlement Class; a procedure and date by which Settlement Class members may object to the Settlement; the date of the Final Approval Hearing; and the address of the Settlement Website at which Settlement Class Members may access the Agreement and other related documents and information. *Id.* ¶ 82, Exs. 1-2.

1. The Mailed Notice Program

The Settlement Administrator will administer the Mailed Notice Program. Within twenty (20) days from the date the preliminary approval order is entered, Class Counsel and/or BB&T's Counsel will provide the names and last known addresses of persons within the Settlement Class to the Settlement Administrator. Agreement ¶ 87. Within fifty (50) days from the date of the

preliminary approval order, the Settlement Administrator will, if necessary, run such addresses through the National Change of Address Database and mail to all such Settlement Class Members a postcard containing the Mailed Notice. *Id.* Within seventy (70) days from the date of the preliminary approval order, if any notices are returned as undeliverable, the Settlement Administrator will perform reasonable address traces and re-mail the notice to the updated addresses. *Id.* ¶ 88. The Settlement Administrator will prepare an affidavit confirming that the Mailed Notice was completed, and Class Counsel will file the affidavit with the Court in conjunction with Plaintiffs Motion for Final Approval of the Settlement. *Id.* ¶ 89.

2. The Settlement Website and Long Form Notice

The Settlement Administrator will establish a Settlement Website, www.NationalPennOverdraftSettlement.com, as a means for Settlement Class Members to obtain notice of, and information about, the Settlement. Agreement ¶¶ 68, 82. The Settlement Website will be established as soon as practicable following the entry of the Preliminary Approval Order, but prior to commencement of the Notice Program. *Id.* ¶ 68. The Settlement Website will include hyperlinks to the Operative Complaint, the Settlement Agreement, the Long-Form Notice, the Preliminary Approval Order, Class Counsel's anticipated motion for attorneys' fees and costs, and such other documents as Class Counsel and counsel for National Penn agree to post or that the Court orders posted on the Settlement Website. *Id.* These documents will remain on the Settlement Website at least until Final Approval is entered. *Id.*

E. Settlement Administration

The proposed Settlement Administrator is Epiq Class Action & Claims Solutions, Inc. ("Epiq"), one of the leading class action settlement administrators in the United States. Epiq's responsibilities include, among other things, the following: (1) assisting in the creation of the

Mailed and Long Form Notices; (2) sending the Mailed Notice; (3) establishing and maintaining the Settlement Website and the automated, toll-free telephone line for Settlement Class Member inquiries; (4) receiving and processing inquiries and requests for exclusion from Settlement Class Members; and (5) mailing settlement payment checks. A more fulsome and detailed list of Epiq's duties is located at Paragraphs 80 and 81 of the Settlement Agreement. All fees and expenses related to Settlement Administration will be paid from the Settlement Fund. Agreement ¶ 74.

F. Settlement Termination

Either Party may terminate the Settlement if the Settlement is rejected or materially modified by the Court or an appellate court. Agreement ¶ 118. National Penn also has the right to terminate the Settlement if the number of persons in the Settlement Class who timely opt out equals or exceeds five percent (5%) of total number of persons in the Settlement Class. *Id.* ¶ 119.

G. Class Representative Service Award

Class Counsel will seek, in conjunction with their anticipated motion for attorneys' fees and costs, and National Penn has agreed not to oppose, a Service Award of $2,500 for Jennifer Collier, the named Plaintiff. *Id.* ¶ 116. If the Court approves the Service Award, it will be paid from the Settlement Fund and will be in addition to the relief Ms. Collier will be entitled to under the terms of the Settlement. *Id.* Such an award is meant to compensate her for her time and effort in this Action. The Settlement Agreement is not contingent upon the Court awarding the Service Award, and the Parties negotiated the Service Award agreement only after reaching agreement on all other material terms of the Settlement. *Id*. ¶ 117.

H. Attorneys' Fees and Costs

Class Counsel will seek, and BB&T will not oppose, attorneys' fees of up one-third of the amount of the Settlement Fund, plus reimbursement of litigation costs and expenses. *Id.* ¶ 112.

Any award of attorneys' fees and costs will be paid from the Settlement Fund. *Id.* The Settlement Agreement is not contingent upon the Court awarding the full amount of attorneys' fees and costs requested, and the parties negotiated the agreement regarding Class Counsel's fees and costs only after reaching agreement on all other material terms of the Settlement. *Id.* ¶¶ 112-13. All costs relating to administration shall also be paid from the Settlement Fund. BB&T is not obligated to make any additional payments to any Party or the administrator after establishing the Settlement Fund.

IV. ARGUMENT

A. Preliminary Approval Should Be Granted

1. The Legal Standard for Preliminary Approval

Rule 1714 of the Pennsylvania Rules of Civil Procedure requires judicial approval after a hearing for the compromise of claims brought on a class basis.[10] The Court's decision to approve or disapprove a class settlement is discretionary. *Buchanan v. Century Fed. Sav. & Loan Ass'n,* 393 A.2d 704, 709 (Pa. Super. Ct. 1978) (*citing Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3d Cir. 1974)). In exercising their discretion, courts are mindful of the public policy principle that "settlements are favored in class action lawsuits." *Dauphin Deposit Bank & Trust Co. v. Hess*, 727 A.2d 1076, 1078 (Pa. 1999). Class settlements conserve "substantial judicial resources . . . by avoiding formal litigation." *Krangel v. Golden Rule Res., Inc.*, 194 F.R.D. 501, 504 (E.D. Pa. 2000) *(quoting In re Gen. Motors Corp. Pick-up Truck Fuel Tank Litig.*, 55 F.3d 768, 784 (3d Cir. 1995)). And "because of the uncertainties of outcome, difficulties of proof, and length of litigation,

[10] Pennsylvania courts regularly cite to federal case law in determining whether to approve a class action settlement. *See, e.g., Buchanan v. Century Fed. Sav. & Loan Ass'n,* 393 A.2d 704, 709 n.13 (Pa. Super. Ct. 1978). Plaintiff likewise cites federal precedent in this motion.

class action suits lend themselves readily to compromise." *Milkman v. Am. Travellers Life Ins. Co.*, 61 Pa. D. & C. 4th 502, 514 (Pa. County Ct. 2002) *(quoting* Herbert B. Newberg and Alba Conte, *Newberg on Class Actions* § 11.41 (3d ed. 1992)).

Before the Court grants preliminary approval of a proposed class action settlement, it must determine whether the settlement is "within the range of possible approval." *Brophy v. Phila. Gas Works*, 921 A.2d 80, 88 (Pa. Commw. Ct. 2007). Settlement negotiations that involve arm's length, informed bargaining with the aid of experienced counsel support a preliminary finding of fairness. *See* MANUAL FOR COMPLEX LITIGATION (Third) § 30.42 at 240 (1995) ("[A] presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms' length negotiations between experienced, capable counsel after meaningful discovery") (citation omitted).

The Pennsylvania Supreme Court has held that the following seven factors should be considered when evaluating whether to grant *final* approval of a proposed class action settlement:

> (1) the risks of establishing liability and damages, (2) the range of reasonableness of the settlement in light of the best possible recovery, (3) the range of reasonableness of the settlement in light of all the attendant risks of litigation, (4) the complexity, expense and likely duration of the litigation, (5) the stage of the proceedings and the amount of discovery completed, (6) the recommendations of competent counsel, and (7) the reaction of the class to the settlement.[11]

Buchanan, 393 A.2d at 709, *accord Shaev v. Sidhu*, Nov. Term 2005, No. 0983, 2009 Phila. Ct. Com. Pl. LEXIS 63, at *22-23 (Pa. C.P. 2009). "In considering these factors, there is no exact

[11] Since Notice has not yet been approved or provided to the Class, it is premature to discuss the seventh factor regarding the reaction of the Class to the Settlement. This factor will be addressed in the Final Approval Motion.

calculus or formula for the court to use: '[i]n effect the court should conclude that the settlement secures an adequate advantage for the class in return for the surrender of litigation rights.'" *Milkman*, 61 Pa. D. & C. 4th at 532 *(quoting Buchanan*, 393 A.2d at 709). A preliminary evaluation of these factors shows that the Settlement falls within the range of reasonableness and should be preliminarily approved.

2. The Settlement Satisfies the Criteria for Preliminary Approval

The Settlement meets all of the criteria relevant to approval, and thus the Settlement should be preliminarily approved.

i. The Settlement is the product of informed negotiations conducted in good faith and at arm's length.

In negotiating this Settlement, Class Counsel had the benefit of years of experience in negotiating settlements in several similar overdraft fee cases.[12] As detailed above, Class Counsel conducted a thorough investigation and analysis of Plaintiff's claims and engaged in informal discovery with National Penn.[13] Counsel's review of this discovery enabled them to conduct well-informed settlement negotiations. *See Klingensmith v. Max & Erma's Rests., Inc.*, No. 07-0318, 2007 WL 3118505, at *4 (W.D. Pa. Oct. 23, 2007) (agreeing with plaintiff's statement "that time after sufficient discovery to put parties on firm notice of strengths and weaknesses of case, but before bulk of litigation discovery has been taken, is particularly appropriate to settlement"). Class Counsel here were also well positioned to evaluate the strengths and weaknesses of Plaintiff's claims, and the appropriate basis upon which to settle them, as a result of their role on the Executive

[12] Joint Aff. ¶¶ 44-5, 51-3.

[13] Joint Aff. ¶¶ 29, 33, 46.

Committee in a multi-district litigation involving similar overdraft fee cases against banks throughout the nation.[14]

Additionally, the Parties agreed to participate in formal mediation, and prior to that mediation, National Penn provided Plaintiff with aggregate information regarding its overdraft fee revenues and detailed information regarding its order of posting practices and its categorization of debit transactions.[15] On April 5, 2017, the Parties participated in an eight-hour-long mediation before an experienced and a respected mediator, retired U.S. Magistrate Judge Diane M. Welsh, and the parties reached an agreement in principle.[16] After the mediation, the Parties continued negotiating a formal settlement agreement, which was signed on May 31, 2017.[17]

These facts demonstrate that the Settlement is the result of intensive, arm's length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual issues of this Action. Courts properly consider the "tangible benefits derived from reaching a settlement through mediation" in determining whether to approve a settlement. *Treasurer of State v. Ballard Spahr Andrews & Ingersoll LLP*, 866 A.2d 479, 487 (Pa. Commw. Ct. 2005) (finding lower court's disapproval of a settlement to be an abuse of discretion because "the parties' submissions and the history of the pre-mediation investigations and of the protracted mediation process serve to demonstrate that relevant considerations as to various litigation options had been fully investigated and evaluated by competent counsel"). Because "the settlement was

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[14] Joint Aff. ¶¶ 44-5.

[15] Joint Aff. ¶¶ 29-30.

[16] *Id.*

[17] Joint Aff. ¶ 33.

arrived at by experienced, competent counsel after arm's length negotiations" and is not the product of collusion, it should be preliminarily approved. *Id.* at 486.

ii. The risks of establishing liability and damages favor settlement, and the Settlement is within the range of reasonableness in light of all the attendant risks of litigation.

Plaintiff and Class Counsel are confident in the strength of their case. Nonetheless, National Penn has asserted defenses that it believes could preclude recovery entirely. Plaintiff and Class Counsel are therefore mindful of the risks inherent in continued litigation and in their ability to establish class wide damages and liability. As noted above, Plaintiff faced the risk that a jury would determine that National Penn adequately disclosed its practices to its customers, did not breach the covenant of good faith and fair dealing, and/or did not violate the UTPCPL. Moreover, protracted litigation carries inherent risks that would necessarily have delayed and endangered Class Members' monetary recovery. Even if Plaintiffs did prevail at trial, recovery could be delayed for years by appeals. Under the circumstances, Plaintiff and Class Counsel appropriately determined that the Settlement reached with BB&T outweighs the gamble of continued litigation.[18]

The Settlement should accordingly be approved because it provides substantial relief to Settlement Class Members without further delay and without exposing Plaintiff and absent Settlement Class Members to the risks associated with continued litigation. The Settlement is well within the range of reasonableness in light of all the attendant risks of litigation.

> Weighing the risks of litigation [i.e., establishing breach of fiduciary duties and that the representative plaintiffs were adequate and typical class representatives] and benefits of the settlement [i.e., updates and improvements to the defendant's written policies and procedures and an award of monetary damages to the class], the

[18] Joint Aff. ¶ 46-8.

> Court believes that the settlement falls within the range of reasonableness.

Shaev, 2009 Phila. Ct. Com. Pl. LEXIS 63, at *24-28;4 William B. Rubenstein, Alba Conte, and Herbert B. Newberg, *Newberg on Class Actions* § 11:50 at 155 (4th ed. 2002) ("In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results"); *Ashley v. Atl. Richfield Co.*, 794 F.2d 128, 134 n.9 (3d Cir. Pa. 1986) ("Physical, psychological and monetary benefits inure to both sides of a settlement agreement. Indeed, the avoidance of litigation expense and delay is precisely what settlement contemplates").

iii. The Settlement is within the range of reasonableness in light of the best possible recovery.

As stated above, the $975,000 Settlement Fund is an excellent recovery for the Settlement Class Members and is consistent with the settlement obtained in similar overdraft fee cases. Class Counsel has extensive experience in similar overdraft fee cases. Class Counsel E. Adam Webb serves on the Executive Committee and Kenneth Grunfeld has held various leadership roles in *In re Checking Account Overdraft Litigation*, MDL 2036, a Multi-district Litigation in the Southern District of Florida coordinating actions against at least 35 banks (the "MDL Litigation") regarding their overdraft fee posting order practices.[19] And, Class Counsel have resolved numerous state court actions against banks for their overdraft fee practices outside of the MDL Litigation.[20] The

[19] Joint Aff. ¶¶ 44-5.

[20] *Id.*

calculation of damages here confirms that the Settlement falls squarely within this range of recovery.[21] As a result, the Settlement is within a range of reasonableness.

iv. The complexity, expense, and likely duration of the litigation favor settlement.

Where, as here, Class Counsel and National Penn have reached a settlement regarding "a vigorously disputed matter, the Court need not inquire as to whether the best possible recovery has been achieved but whether, in view of the stage of the proceedings, complexity, expense and likely duration of further litigation, as well as the risks of litigation, the settlement is reasonable." *Wilson v. State Farm Mut. Auto. Ins. Co.*, 517 A.2d 944, 948 (Pa. 1986) (internal quotation omitted); *see also Gregg v. Independence Blue Cross*, Dec. Term 200, No. 3482, 2004 WL 869063, at *40 (Pa. C.P. April 22, 2004) (holding that "[t]he complex nature, the high expense and the likelihood of years' passing without final resolution weigh in favor of settlement").

This case presents complexities not at issue in other cases. Establishing liability and damages at trial would require expert testimony. In addition, National Penn and BB&T have presented, and would continue to present, defenses it believes could bar recovery, thereby increasing Plaintiff's expenses. Further, the traditional means for handling claims like those at issue here would tax the court system, require a massive expenditure of public and private resources, and, given the relatively small value of the claims of the individual class members, would be impracticable. The five years the Parties have already spent litigating this case would likely expand to several more years before there is a final resolution. Thus, the proposed Settlement is the best vehicle for Settlement Class Members to receive relief in a prompt and efficient manner.

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[21] Joint Aff. ¶¶ 51-3.

v. The stage of the proceedings and the amount of discovery completed favor settlement.

Class Counsel's extensive experience in similar overdraft fee cases allowed them to quickly and efficiently seek the essential information needed to evaluate the strengths and weaknesses of the claims through informal discovery.[22] BB&T provided to Class Counsel the two most essential pieces of information – aggregate information regarding its overdraft fee revenues and detailed information regarding its posting practices – prior to the parties' engagement of settlement negotiations.[23] This information ensured that Plaintiff and her counsel had the information necessary to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation. Therefore, it is "particularly appropriate to settle[]" because there has been "sufficient discovery to put parties on firm notice of strengths and weaknesses of case," even though the "bulk of litigation discovery has [not yet] been taken." *See Klingensmith,* 2007 WL 3118505, at *4.

vi. The recommendations of competent counsel favor settlement.

"The court must [] consider the recommendations of competent counsel in evaluating the reasonableness of the settlement, and those recommendations are given substantial weight." *Gregg,* 2004 WL 869063, at *41 (*citing Milkman,* 61 Pa. D. & C. 4th at 545). The particular weight attributed to the counsel's recommendation depends on factors such as competence, the length of involvement in the case, experience in the particular type of litigation, and amount of discovery completed. *Austin* v. *Pa. Dep't of Corrs.,* 876 F. Supp. 1437, 1472 (E.D. Pa. 1995). "Usually, however, an evaluation of all the criteria leads courts to conclude that the

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[22] Joint Aff. ¶¶ 44-6.

[23] Joint Aff. ¶ 29.

recommendation of counsel is entitled to great weight following 'arm's length negotiations' by counsel who have 'the experience and ability . . . necessary [for] effective representation of the class's interests.'" *Id.* (*quoting Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982)).

Class Counsel and Plaintiff strongly endorse this Settlement.[24] The Parties have been litigating this case for five years, and as stated above, Class Counsel are competent and experienced in class action litigation (particularly in similar overdraft fee cases), the Parties have completed adequate discovery, albeit informally, and the Settlement is a result of arm's length negotiations. Therefore, Class Counsel's recommendations in favor of the Settlement should be afforded great weight.

vii. The public interest favors settlement.

While the public interest is not one of the factors listed as a necessary consideration for Pennsylvania courts, it must be noted that the Settlement will further the public interest of providing a substantial recovery for a significant number of persons through the efficiency afforded by a class action settlement. Class Counsel and Plaintiff believe the $975,000 Settlement provides an extremely fair and reasonable recovery to the Settlement Class, especially in view of National Penn's defenses and the challenging, unpredictable path of litigation that Plaintiff otherwise would have faced in the trial and appellate courts. Moreover, eligible Settlement Class Members will receive their cash benefits automatically, without needing to fill out any form or do anything at all.

[24] *See* Joint Aff.

B. Certification of the Settlement Class is Appropriate

For settlement purposes, Plaintiff respectfully requests that the Court certify the Settlement Class defined in Paragraph 65 of the Agreement. Certification of the proposed Settlement Class will allow notice of the proposed Settlement to Settlement Class Members. For purposes of this Settlement only, National Penn does not oppose class certification. Agreement ¶ 75. For the reasons set forth below, certification is appropriate under Rules 1702, 1708, 1709, and 1710 of the Pennsylvania Rules of Civil Procedure.

1. The Requirements of Rule 1702 are Met

The prerequisites for class certification under Rule 1702 are 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; (4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and (5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

i. Numerosity

"To satisfy this criterion, the class must be both numerous and identifiable, and 'whether the class is sufficiently numerous is not dependent upon any arbitrary limit, but upon the facts of each case.'" *Dunn v. Allegheny Cnty. Prop. Assessment Appeals & Review*, 794 A.2d 416, 423 (Pa. Commw. Ct. 2002) *(quoting Cook v. Highland Water & Sewer Auth.*, 530 A.2d 499, 503 (Pa. Commw. Ct. 1987)). And while there is no "arbitrary limit," "[i]t has been suggested that forty or fifty is normally the number of class members required to satisfy the numerosity requirement." *Freeport Area Sch. Dist. v. Commonwealth, Human Relations Comm'n*, 335 A.2d 873, 879 n.6

(Pa. Commw. Ct. 1975) (*citing* Delle Donne and VanHom, *Pennsylvania Class Actions: The Future in Light of Recent Restrictions on Federal Access?*, 78 Dick. L. Rev. 460, 501 (1974)).

Here, the numerosity requirement is satisfied because the Settlement Class consists of approximately 17,000 to 20,000 National Penn customers (Joint Aff. **¶ 12**), and joinder of all such persons is impracticable. *See Roethlein v. Schmidt*, 2006 Phila. Ct. Com. PL LEXIS 530, at * 1 (Aug. 21, 2006) ("the numerosity requirement . . . is satisfied because the number of members of the Class is in the thousands, and thus, the Class members are so numerous that their joinder before the Court would be impracticable"). Moreover, the Settlement Class Members will be identified through information provided by National Penn, and the Settlement Administrator will mail them Notice of the Settlement. Agreement ¶¶ 80-81. Thereafter, the eligible Settlement Class Member's *pro rata* allocation will be distributed from the Settlement Fund. *Id.* ¶¶ 94-102.

ii. Commonality

The commonality requirement compels the plaintiff to demonstrate that the class members "have suffered the same injury" and their claims "depend upon a common contention . . . of such a nature that it is capable of class-wide 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 Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (citation omitted). Under Pennsylvania law, "questions of law or fact common to the class generally exist if the members' grievances arise out of the 'same practice or course of conduct on the part of the class opponent.'" *Schall v. Windermere Court Apts.*, 27 Pa. D. & C. 5th 471, 480 (Pa. C.P. 2013) (*quoting Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652, 664 (Pa. 2009)). Essentially, commonality will be found if "proof on these issues as to one is proof as to all." *Id.* at 482 *(citing Liss*, 983 A.2d at 663).

This requirement is readily satisfied here. There are multiple questions of law and fact, all arising from National Penn's common, class-wide practices. These practices allegedly injured Settlement Class Members in the exact same way – the imposition of additional Overdraft Fees. Furthermore, the factual and legal issues are capable of class-wide resolution because "proof on these issues as to one is proof as to all" – if Plaintiff proves that she was injured by National Penn's allegedly unlawful practices, that proof will be adequate for the entire Class. *See id.*

iii. Typicality

For similar reasons, Plaintiff's claims are reasonably coextensive with those of the absent Class Members, such that the typicality requirement is satisfied. *In re Sheriff's Excess Proceeds Litig.*, 98 A.3d 706, 733 (Pa. Commw. Ct. 2014) ("Typicality exists if the class representative's claims arise out of the same course of conduct and involve the same legal theories as those of other members of the putative class.") (*quoting Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1, 31 (Pa. 2011)). This requirement "ensures that the legal theories of the representative and the class do not conflict, and that the interests of the absentee class members will be fairly represented." *In re Sheriff's Excess Proceeds Litig.*, 98 A.3d at 733 *(quoting Samuel-Bassett*, 34 A.3d at 31). But "typicality does not require that the claims of the representative and the class be identical, and the requirement may be met despite the existence of factual distinctions between the claims of the named plaintiff and the claims of the proposed class." *Id.*

Here, Plaintiff is typical of absent Settlement Class Members because she was assessed an overdraft fee when she had sufficient funds in her account to cover all merchant requests for payment. Moreover, the benefits available to Plaintiff and Settlement Class Members will be calculated using the same formula under the Settlement. Therefore, Plaintiff's legal theories do

not conflict with those of absentee Settlement Class Members, and Plaintiff will represent the interests of absentee Settlement Class Members fairly, because such interests parallel her own.

2. The Requirements Of Rule 1709 Are Met

Plaintiff has satisfied her obligation to fairly and adequately assert and protect the interests of the class under Rules 1702(4) and 1709. For this determination, the court considers:

> (1) whether the attorney for the representative parties will adequately represent the interests of the class,
>
> (2) whether the representative parties have a conflict of interest in the maintenance of the class action, and
>
> (3) whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.

Pa R. Civ. Pro. 1709.

"With regard to the first factor, generally, 'until the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession.'" *Dunn,* 794 A.2d at 425 *(quoting Janicik v. Prudential Ins. Co.,* 451 A.2d 451, 458 (Pa. Super. Ct. 1982)). Plaintiff is represented by qualified and competent counsel who have extensive experience and expertise prosecuting complex class actions, including actions substantially similar to the instant case. Joint Aff. ¶¶ 44-5. Therefore, the first factor is satisfied.

"Under Rule 1709(2), conflicts are interests antagonistic to other class members." *Grajales v. Safe Haven Quality Care, LLC*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 8, at *4 (Pa. County Ct. 2012) (*citing Samuels v. Smock,* 422 A.2d 902, 903 (Pa. Commw. Ct. 1980)). And just as with Rule 1709(1), "courts have generally presumed that here is no conflict of interest on the part of the representative parties unless the contrary is established and 'have relied upon the adversary system and the court's supervisory powers to expose and mitigate any conflict.'" *Dunn,* 794 A.2d at 425-26 (*quoting Janicik,* 451 A.2d at 459). Plaintiffs interests are coextensive with and not antagonistic

to the interests of the Settlement Class because the Settlement provides for the calculation of each individual's number and amount of allegedly additional Overdraft Fees using the same formula and provides eligible Settlement Class Members with a *pro rata* distribution from the Settlement Fund. Therefore, the second factor is satisfied.

Finally, "if the attorney for the class representatives is ethically advancing costs to representatives of a generally impecunious class, the adequate financing requirement will ordinarily be met." *Grajales*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 8, at *7 (*quoting Haft v. United States Steel Corp.*, 451 A.2d 445, 448 (Pa. Super. Ct. 1982)). Here, Class Counsel have advanced all costs in this case to date, and Ms. Collier has not paid anything for her representation. As such, the third factor is met.

Since all of the requirements of Rule 1709 are met, it is clear that Plaintiff will fairly and adequately assert and protect the interests of the Class.

3. The Requirements of Rule 1708 are Met

Under Pennsylvania Rules 1702(5) and 1708 (which is similar to Rule 23(b) of the Federal Rules of Civil Procedure),[25] certification is appropriate if a class action is a fair and efficient method of adjudicating the controversy. In making this determination where monetary recovery alone is sought, the court considers:

> (1) whether common questions of law or fact predominate over any question affecting only individual members;
>
> (2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;
>
> (3) whether the prosecution of separate actions by or against individual members of the class would create a risk of

[25] "Unlike in federal class action litigation, class actions brought under the Pennsylvania rules need not be 'superior' to alternative methods." *Janicik*, 451 A.2d at 461.

> (i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;
>
> (ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;
>
> (5) whether the particular forum is appropriate for the litigation of the claims of the entire class;
>
> (6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

Pa Civ. R. Pro. 1708.

Under Rule 1708(a)(l), "[t]he analysis of predominance . . . is closely related to that of commonality under Rule 1702(2)." *Lewis v. Bayer AG*, 66 Pa. D. & C. 4th 470, 515 (Pa. County Ct. 2004) (*citing Janicik*, 451 A.2d at 461). Thus, the court may adopt and incorporate its analysis of commonality and conclude that the requirement of predominance has been satisfied. *See id.* Here, each Settlement Class Member's relationship with National Penn arises from common legal and factual issues arising out of an account agreement that is the same or substantially similar in all relevant respects to the Plaintiff's account agreement and all other Settlement Class Members' account agreements. Additionally, each Class Member was subjected to the same posting practices, and each was allegedly harmed by being charged Overdraft Fees when their account had sufficient funds. Plaintiff therefore readily satisfies the predominance requirement because liability questions common to all Settlement Class Members substantially outweigh any possible issues that are individual to each Settlement Class Member.

The factor regarding the size of the class and the difficulties in managing the class action is also met. In *Schall*, this Court found that "[t]he class is not burdensomely large" because "its members are easily identifiable and to the extent that their damages claims are distinct, the court has at its disposal a variety of means to manage them." 27 Pa. D. & C. 5th 471 at ¶ 49. Similarly, the Settlement Class Members here are easily identifiable through National Penn's records, and any difference in their damages claims will be accounted for by the calculation method outlined herein. Also, review of this factor is limited because when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (internal citation omitted). Thus, the size-and-manageability requirement is met.

The prosecution of separate actions by individual Settlement Class Members would create a risk of inconsistent adjudications which would impair the protection of other Members' interests. Also, the separate claims of individual Settlement Class Members are insufficient in amount to support such separate actions. *See Board v. SEPTA*, 14 Pa. D. & C. 5th 301, 316 (Pa. C.P. 2010) ("In considering the separate effect of actions, the precedential effect of a decision is to be considered as well as the parties' circumstances and respective ability to pursue separate actions"). Here, it would be nearly impossible for the Settlement Class Members to file their own actions– the time and expense required to initiate and pursue such litigation would be enormous in comparison with the relatively small benefit to which each Settlement Class Member is entitled. And even if these thousands of suits were to be brought, there would be a "significant risk of inconsistent adjudications if tried separately," (*see id.*) i.e. one claim might be dismissed in one court while a substantially similar claim might be upheld in another court. This would severely

impair the rights of the non-litigating Settlement Class Members. Therefore, "because of the straightforward nature of the issues and facts involved, as a single certified class one case will determine liability and one verdict will establish all obligations." *Id.*

The Parties are not aware of any litigation already commenced by Settlement Class Members involving any of the same issues. Moreover, venue in the Philadelphia County Court of Common Pleas is proper under the Pennsylvania Rules of Civil Procedure for litigation of the claims of the entire Settlement Class. Therefore, these two factors are met. *See Basile v. H & R Block, Inc.*, 34 Phila. 1, 62 (Pa. C.P. 1997), *aff'd in part and rev'd in part on other grounds*, 729 A.2d 574 (Pa. Super. Ct., 1999) ("In their brief, plaintiffs state that they are unaware of any similar litigation currently pending in Pennsylvania. Neither defendant disputes this statement. There is thus nothing on the record to suggest that this court would not be an appropriate forum for this class action").

Finally, the Settlement Fund is $975,000. The Settlement Class Members are present and former customers who should be easily identified and notified of their *pro rata* share of the Settlement Fund, if eligible, based on the calculation method. Such amounts will not be dwarfed by the expense and effort of administering the action. *See* Pa. R. Civ. P. 1708(a)(7); *see also Haft*, 451 A.2d at 450 (holding that "the amounts which may be recovered by the individual class members will be large enough in relation to the expenses and effort of administering the action as to justify a class action" where "potential individual recoveries will be more than de minimis" and "[a]ll class members are present or former employees of appellee, and thus the costs of identifying and notifying them is unlikely to be unduly burdensome"). Therefore, a class action is justified.

Since all of the requirements of Rule 1708 are met, it is clear that a class action is a fair and efficient method of adjudicating this controversy. For these reasons and the reasons listed above, the Court should certify the Settlement Class.

C. The Court Should Approve the Proposed Notice Program

Rule 1714(c) of the Pennsylvania Rules of Civil Procedure requires that "[i]f an action has been certified as a class action, notice of the proposed . . . settlement . . . shall be given to all members of the class in such manner as the court may direct." For class members who can be identified with reasonable effort, "[t]he court may require individual notice to be given by personal service or by mail." Pa. R. Civ. P. 1712(b).

For notice in a class action to be considered adequate, it "must present a fair recital of the subject matter and proposed terms and inform the class members of an opportunity to be heard," but it "need not provide a complete source of settlement information." *Fischer v. Madway,* 485 A.2d 809, 811 (Pa. Super. Ct. 1984) (internal citations and quotations omitted). The description of the proposed settlement may be "very general[,] . . . including a summary of the monetary or other benefits that the class would receive and an estimation of attorneys' fees and other expenses," and "[i]t is enough that the notice contain facts sufficient to alert interested persons to the terms of the proposed settlement and also the means by which further inquiry can be made and objection recorded." *Id.* at 811 (internal citations and quotations omitted).

The proposed Notice Program satisfies these criteria. The Notice will (1) describe the substantive terms of the Settlement; (2) advise Settlement Class Members of their option and deadline to opt-out or object to the Settlement; and (3) indicate how Settlement Class Members may obtain additional information about the Settlement. Agreement ¶¶ 83-91, Exs. 1-2. The Notice Program is designed to reach Settlement Class Members mainly through direct mail notice

(Agreement ¶¶ 86-88), and the Long Form Notice will be available on the Settlement Website (*Id.* ¶ 68), which constitute the best practicable forms of notice. *See Bradburn Parent Teacher Store, Inc. v. 3M (Minnesota Mining & Mfg. Co.)*, 513 F. Supp. 2d 322, 329 (E.D. Pa. 2007) (finding that direct notice via first class mail satisfies the notice requirements of both Fed. R. Civ. P. 23 and the due process clause); *In re American Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 263 F.R.D. 226, 237 (E.D. Pa. 2009) (finding that direct notice via first class mail and the creation of a settlement website satisfy the notice requirements of both Fed. R. Civ. P. 23 and the due process clause). Therefore, the Court should approve the Notice Program and the form and content of the Notices attached to the Agreement as Exhibits 1-2.

D. The Court Should Schedule A Final Approval Hearing

The last step in the Settlement approval process is a Final Approval Hearing, at which the Court will hear all evidence and argument necessary to make its final evaluation of the Settlement. The Court will determine, at or after the Final Approval Hearing, whether the Settlement should be approved and whether to approve Class Counsel's application for attorneys' fees and reimbursement of costs and expenses. Plaintiff requests that the Court schedule the Final Approval Hearing to occur no sooner than one hundred and ten (110) days after the Preliminary Approval Order, at a date, time and location convenient to the Court. Plaintiff will file a motion for Final Approval of the Settlement, and Class Counsel will file a motion requesting attorneys' fees, expenses and a Service Award for the Plaintiff, no later than twenty (20) days prior to the Final Approval Hearing.

V. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court (1) preliminarily approve the Settlement; (2) certify for settlement purposes the proposed Settlement Class, (3) appoint Plaintiff Jennifer Collier as the Class Representative and the attorneys listed on the signature page as Settlement Class Counsel; (4) approve the Notice Program set forth in the Agreement and approve the form and content of the Notices, attached to the Agreement as Exhibits 1 and 2; (5) approve and order the opt-out and objection procedures set forth in the Agreement; and (6) schedule a fairness hearing on Final Approval to occur no sooner than one hundred and ten (110) days after the date of the Preliminary Approval is entered.

A proposed Preliminary Approval Order has been filed herewith.

Respectfully submitted,

BY: **GOLOMB & HONIK, P.C.**

s/ Kenneth Grunfeld

Kenneth Grunfeld, Esquire (Pa Bar No. 84121)
1515 Market Street, Suite 1100
Philadelphia, PA 19102
Phone: (215) 985-9177
Email: kgrunfeld@golombhonik.com

WEBB, KLASE & LEMOND, LLC
E. Adam Webb, Esquire
Georgia State Bar No. 743910
1900 The Exchange, SE, Suite 480
Atlanta, Georgia 30339
Phone: (770) 444-0773
Email: Adam@WebbLLC.com

Attorneys for Plaintiff

Dated: **June 12, 2017**