UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN CHECCHIA, on behalf of himself and all other similarly situated,

Plaintiff

CASE NO. 2:21-cv-3585

v.

BANK OF AMERICA, N.A.,

Defendant
_____/

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND FOR CERTIFICATION OF CLASS AND INCORPORATED MEMORANDUM OF LAW

TABLE OF CONTENTS

I. INTRODUCTION

Plaintiff, Steven Checchia, respectfully moves for Preliminary Approval[1] of the Settlement Agreement and Release, attached as ***Exhibit A***, which will resolve all claims against Defendant, Bank of America, N.A. Preliminary Approval should be granted because the Settlement provides substantial relief for the Settlement Class of current and former BANA checking and savings Accountholders who paid, but were not refunded, an NSF Fee and/or OD Fee on the same check when it was re-presented for payment after having been initially returned for non-sufficient funds and charged an NSF Fee. The Settlement terms are well within the range of reasonableness and granting Preliminary Approval will be consistent with applicable law.

The Settlement in this novel case—which follows and significantly adds to an earlier, similar case litigated by Class Counsel in *Morris et al. v. Bank of America, N.A.*, No. 3:18-CV-157-RJC-DSC (W.D.N.C.)—will provide substantial benefits to the Settlement Class. If approved, the Settlement will include BANA's cash payment of $8,000,000.00 into a common fund. Further, after the initiation of this Action, BANA ceased the practice at the heart of this Action – charging more than one fee on a check that is re-presented for payment – and, as a result of this Settlement, has committed to not re-establish the practice for at least five years. BANA is one of the first major U.S. banks to do so. BANA's agreement in this regard to that Practice Change will no doubt result in a significant intangible value for the Settlement Class and future BANA Accountholders. Thus, the total value of the Settlement is outstanding when considering the common fund and the intangible benefit of BANA's five-year cessation of the practice of charging the Class Fees. *See* Declaration of Jeff Ostrow ("Ostrow Decl."), attached as ***Exhibit B***, at ¶ 10.

One of the keystones of this Settlement is that Settlement Class Members will

[1] All capitalized terms used herein shall have those same meanings as those defined in the Settlement Agreement.

automatically receive their *pro rata* share of the Net Settlement Fund without having to complete and submit claim forms, and Settlement Class Members will not be asked to prove they were damaged. Instead, the Parties and the Settlement Administrator will use available BANA data that confirms which BANA checking and savings Accountholders were affected by the challenged practice, and thereafter, apply a simple formula to calculate each Settlement Class Member's *pro rata* share of the Net Settlement Fund.

As detailed in this Motion below, the Settlement easily satisfies all Third Circuit criteria for Preliminary Approval. Accordingly, Plaintiff respectfully requests that this Court enter an Order: (1) granting Preliminary Approval to the Settlement; (2) certifying the proposed Settlement Class for settlement purposes pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3); (3) appointing Plaintiff as the Class Representative; (4) approving the Notice Plan and approving the form and content of the notices attached to the Settlement Agreement as Exhibits 1-3; (5) approving and ordering the opt-out and objection procedures; (6) staying all deadlines in the Action pending Final Approval of the Settlement; (7) appointing as Class Counsel the law firms and attorneys identified herein; and (8) scheduling a Final Approval Hearing. A Proposed Preliminary Approval Order is attached to the Settlement Agreement as ***Exhibit C***.

II. STATEMENT OF FACTS

A. Factual Background and Procedural History

1. The Related *Morris* Litigation

This case concerns BANA's practice of charging NSF Fees and/or OD Fees on checks processed for payment more than one time after having been initially returned for insufficient funds and assessed an NSF Fee. The instant Action, which concerns re-presented paper checks and paper checks processed electronically, follows *Morris*, which exclusively concerned the assessment of NSF Fees and OD Fees on electronic payments undertaken over the automated

clearing house (ACH) network. Ostrow Decl. ¶ 11. One of the primary questions raised in this Action and in *Morris* is whether BANA was authorized under its Account agreements to assess more than one NSF Fee and/or OD Fee on the same item when that item is re-presented for payment multiple times after having initially been returned for insufficient funds resulting in an NSF Fee. *Id*. Both the Action and *Morris* have the same or similar contract provisions and theories of liability that would hinge on interpreting those provisions but address different transaction types (paper checks versus ACH transactions). *Id*.

Morris was heavily litigated by Class Counsel, who invested thousands of hours of time on motions practice and discovery in that matter. For example, on August 27, 2018, BANA moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6), arguing that none of its actions violated its relevant contractual provisions or state consumer protection laws. *See* W.D.N.C. ECF Nos. 22-23. On January 8, 2019, United States Magistrate Judge David S. Cayer issued a memorandum opinion and recommendation ("M&R") to grant in part and deny in part BANA's motion to dismiss. Judge Cayer recommended denying dismissal of the breach of contract and consumer protection claims but dismissing with prejudice the conversion, unjust enrichment, and breach of the implied covenant of good faith and fair dealing claims. *See* W.D.N.C. ECF No. 38. *See also* Ostrow Decl. ¶ 12.

On March 29, 2019, Judge Robert J. Conrad adopted the M&R in part. The breach of contract, California Unfair Competition Law, and North Carolina Unfair and Deceptive Trade Practices Act claims survived the motion to dismiss, but the conversion, unjust enrichment, breach of the implied covenant of good faith and fair dealing, Oklahoma Consumer Protection Act, and Georgia Fair Business Practices Act claims were dismissed. W.D.N.C. ECF No. 42. *See also* Ostrow Decl. ¶ 13.

After an additional North Carolina plaintiff was added, BANA answered the third amended

complaint on January 28, 2020. *See* ECF No. 66. The parties then began an extensive discovery effort that lasted nearly two years. Plaintiffs served three sets of interrogatories and document requests, as well as multiple Fed. R. Civ. P. 30(b)(6) deposition notices and third-party subpoenas on five non-party banks and the National Automated Clearing House Association. BANA served written discovery requests on the *Morris* plaintiffs and non-party subpoenas on various third-party merchants. Ostrow Decl. ¶ 14.

The Parties exchanged tens of thousands of pages of documents and relevant information. BANA produced and plaintiffs' counsel and their experts reviewed internal documents related to BANA's NSF Fee and OD Fee practices including Account agreements, marketing and internal studies on NSF/OD Fees, customer complaints about the challenged fees, and transactional database excerpts showing how much money BANA made from the challenged fees. *Id.* ¶ 15. Several BANA corporate representatives were deposed, as were several plaintiffs. *Id*. ¶ 16. Plaintiffs engaged the services of a well-regarded expert in bank fee cases to evaluate BANA's data for purposes of ascertaining class members and estimating damages in *Morris*. *Id*. The expert analyzed millions of account transactions that occurred during the class period. *Id*. Further, in preparation for their motion for class certification, the *Morris* plaintiffs engaged a consumer perception expert to address BANA's challenged disclosures. *Id*.

Ultimately, a class settlement was reached in *Morris* pertaining to the multiple fees charged on ACH debits. *Id.* ¶ 17. Class Counsel here then undertook to pursue the instant putative class action to challenge multiple fees charged on check transactions benefiting from the extremely well-developed facts learned in *Morris*. *Id*. The Parties here had the benefit of the expertise, knowledge, and factual background developed in *Morris*, but they still had to explore issues related to the check transactions at issue here. *Id*.

2. The Instant Litigation

Plaintiff, a Pennsylvania citizen, filed this Action in the Court of Common Pleas of Philadelphia County on May 19, 2021, alleging BANA breached its Account agreements, violated the North Carolina Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75.1-1, *et seq*., and violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq*., by charging NSF Fees and OD Fees on checks that were re-presented for payment after having initially been returned for non-sufficient funds and charged an NSF Fee. *See* ECF No. 1-1. *See also* Ostrow Decl. ¶ 18.

On August 11, 2021, BANA removed the Action to this Court. *See* ECF No. 1. With the benefit of the extensive litigation in *Morris*, which provided a unique and efficient insight to the legal risks and facts of this Action, the Parties extended the deadlines for BANA to respond to the Complaint and for Plaintiff to file a motion to remand the Action to participate in an early mediation. *See* ECF Nos. 2, 4-5, 7, 9. *See also* Ostrow Decl. ¶ 19.

To facilitate meaningful settlement discussions, the Parties engaged in an extensive informal discovery effort that included a data analysis that lasted months. Ostrow Decl. ¶ 20. The analysis was the subject of intensive discussion and negotiation between the Parties and numerous alterations and amendments to the analysis occurred during this process. *Id*. It was not until such analysis was completed that settlement discussions proceeded. *Id*.

Class Counsel prepared a detailed, confidential mediation statement. *Id*. ¶ 21. The Parties mediated the matter with Judge Diane M. Welsh (ret.) on February 18, 2022, which resulted in an agreement in principle to settle this Action. *Id*. The Parties filed a notice of settlement on March 11, 2022. *See* ECF No. 11. The Court then directed the Parties to file this Motion by June 9, 2022. *Id*. The Parties then proceeded with further confirmatory discovery related to damages, including scheduling a deposition of BANA's corporate representative. Ostrow Decl. ¶ 22. The Parties have

also worked extensively to draft the Settlement Agreement, identify and retain the Settlement Administrator, and build the Class List for the Notice Plan. *Id*.

B. Summary of the Settlement Terms.

1. Settlement Consideration

Under the Settlement Agreement, BANA has agreed to do the following: (1) make a cash payment into a Settlement Fund of $8,000,000.00; and (2) continue its cessation of assessing the Class Fees for a period of at least five years. Settlement ¶¶ 1.36, 1.47, 2.1, 6.1. The $8,000,000.00 Settlement Fund will be used to pay Settlement Class Member Payments, Settlement Administration Costs, any Attorneys' Fees and Costs the Court may award to Class Counsel, and any Service Award the Court may award to the Class Representative. *Id*. ¶ 6.3.

The Settlement Fund will be distributed to Settlement Class Members according to the distribution plan set out in the Settlement Agreement. *Id*. ¶ 6.6, 7. Importantly, Settlement Class Members do not need to submit a claim form to receive payment, as the Net Settlement Amount will be distributed *pro rata* using BANA's data to determine the Settlement Class Member Payment amount. Current Accountholders who are Settlement Class Members will receive credits to their Accounts. Past Accountholders will receive a check in the mail. The precise calculations to allocate the Net Settlement Amount will occur after Final Approval applying the distribution formula. *Id*.

After 240 calendar days from the Effective Date, any excess funds remaining from the Settlement Amount shall, if economically feasible, be distributed to the Settlement Class Members who successfully cashed checks or received a credit to their Accounts. *Id*. ¶ 6.7. If a second distribution of remaining funds costs more than the amount to be distributed or is otherwise economically unfeasible, or if additional funds remain after a second distribution, Class Counsel shall petition the Court to distribute any remaining funds to a consumer protection or financial

services organization as a *cy pres* recipient. *Id*. There will be no reversion to BANA. *Id*. ¶ 7.4.

2. The Settlement Class

The proposed Settlement Class is defined as the following:

> All Accountholders of BANA consumer checking and/or savings accounts ("Accounts") in the United States who, during the Class Period, paid and were not refunded a NSF Fee and/or OD Fee in connection with (a) an ACH entry on their Account that was submitted by the merchant or the merchant's bank with a "REDEP CHECK" indicator or (b) a physical check (not an ACH transaction) that was re-presented for payment after having initially been returned for non-sufficient funds and charged an NSF Fee within the preceding 28 calendar days.
>
> Excluded from the Settlement Class is BANA, its parents, subsidiaries, affiliates, officers and directors, all Settlement Class members who make a timely election to opt-out, and all judges assigned to this litigation and their immediate family members.

Id. ¶ 3.1. The Class Period is May 19, 2017, through the Preliminary Approval date. *Id*. ¶ 1.13.

3. Settlement Administrator and Proposed Notice Plan

The proposed Settlement Administrator is Epiq Class Action & Claims Solutions, Inc., a nationally recognized and experienced class action administrator. The Parties' proposed Notice Plan is designed to reach as many Settlement Class members as possible at the lowest cost to the Settlement Class. In Class Counsel's view, it is the best notice practicable under the circumstances. Notice shall be provided through the following means: (1) Email Notice to Current Accountholders who have agreed to receive notices from BANA by email; (2) Postcard Notice to Current Accountholders who have not agreed to receive notices from BANA by email, Past Accountholders, and Current Accountholders whom the Settlement Administrator is unable to send Email Notice using the email address provided by BANA; and (3) Long Form Notice, which will be available on the Settlement Website and mailed by the Settlement Administrator to Settlement Class Members who request it. *Id*. ¶¶ 5.2.1, 5.2.2. The Settlement Administrator will update addresses to improve the likelihood of the Class Notice being delivered. *Id*. ¶ 5.2.3.

Additionally, the Settlement Administrator will create and maintain a Settlement Website with important Settlement information and case-related documents. *Id*. ¶ 5.3.

The Class Notice will include the required description of the material Settlement terms; the Opt-Out Deadline for Settlement Class Members to opt-out of the Settlement Class; the Objection Deadline by which Settlement Class Members may object to the Settlement; the Final Approval Hearing date and time; and the Settlement Website address at which Settlement Class Members may access the Long Form Notice, Settlement Agreement, and other related documents and information. *Id*. ¶ 1.12 and Exhibits 1-3 thereto.

4. Release

The Release is narrowly tailored to claims regarding the Class Fees. As of the Effective Date of the Settlement, Plaintiff and each Settlement Class Member who does not opt-out agree to release the Released Claims. *Id*. ¶¶ 1.39, 13.

5. Opt-Outs and Objections

The Class Notice will inform the Settlement Class of the opt-out and objection rights and procedures, including the Opt-Out Deadline and Objection Deadline, both of which are 30 days before the Final Approval Hearing. *Id.*, ¶¶ 1.30, 9.1, 9.4. Settlement Class Members will be informed of their right to object to the Settlement, Class Counsel's application for Attorneys' Fees and Costs, and/or the Service Award to the Class Representative. *Id.*, ¶ 9.4. Objections must include information identified in the Settlement Agreement, including the grounds for the objection and information about the objector, any counsel for the objector, and previous objections made by the objector or the objector's counsel to ensure that any objections are made for a proper purpose. *Id*. ¶ 9.4.1. The additional requirements for objections and to notice the intent to appear at the Final Approval Hearing will also be included in the Class Notice. *Id.*, ¶ 9.4.2, 9.4.7.

6. Attorneys' Fees and Costs and Service Award

To date, Class Counsel has not been paid for their efforts or reimbursed for litigation costs incurred, having taken on this Action on a contingent fee basis. The Settlement Agreement provides that Class Counsel will apply for an award of Attorneys' Fees and Costs of up to $2,666,666.66, which represents 33.33% of the cash Settlement Amount. *Id.* ¶ 10.1; Ostrow Decl. ¶ 28. Moreover, this does not take into account the intangible value of BANA's agreement to continue for five years the cessation of the practice of charging Class Fees. BANA agrees Class Counsel are entitled to attorneys' fees to be determined by this Court. Settlement ¶ 10.1. The Fee and Cost Award will serve to compensate Class Counsel for the time, risk, and expenses incurred to pursue the class claims. If the Court does not award Attorneys' Fees and Costs, in whole or in part, however, that will not prevent the Settlement from becoming effective nor shall it be grounds for termination. *Id.* ¶ 8.1.

Class Counsel will also ask the Court to approve a Service Award for the Class Representative for serving in that capacity. *Id.*, 11.1. BANA will not oppose a request for a $5,000.00 award. *Id.* If the Court does not award the Service Award, in whole or in part, however, that will not prevent the Settlement from becoming effective nor shall it be grounds for termination. *Id.* ¶ 8.1.

III. ARGUMENT

A. The Legal Standard for Preliminary Approval.

Whether to approve a proposed class settlement is left to this Court's sound discretion. *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 299 (3d Cir. 1998).

> Review of a proposed class action settlement proceeds in two steps: preliminary approval and a subsequent fairness hearing. *In re Nat'l Football League Players Concussion Injury Litig.*, 775 F.3d 570, 581 (3d Cir. 2014). During preliminary review, counsel submit the proposed terms to the court, and the court makes a preliminary fairness finding. *Id.* A court's decision to preliminarily approve a

> proposed class action settlement "is a determination that there are no obvious deficiencies and the settlement falls within the range of reason." *Gates v. Rohm and Haas Co.*, 248 F.R.D. 434, 438 (E.D. Pa. 2008) (citation omitted). The court's approval should not be construed as a commitment to approve the final settlement. *Id*. Preliminary approval of a proposed class action settlement "establishes an initial presumption of fairness." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) (citation omitted).
>
> If a court grants preliminary approval, the court directs that notice be provided to all of the potential class members who would be bound by the settlement agreement. See Fed. R. Civ. P. 23(c). Class members may object or opt out of the settlement agreement. See Fed. R. Civ. P. 23(c), 23(e). After notice is given to class members, the district court holds a fairness hearing. *In re Nat'l Football League*, 775 F.3d at 581. If the district court concludes after the fairness hearing that the settlement is fair, reasonable, and adequate, then final settlement approval is given. Fed. R. Civ. P. 23(e). Preliminary approval is less demanding than final approval of class action settlement agreements. *Gates*, 248 F.R.D. at 444 n.7. "Final approval requires a more rigorous, multifactor assessment of the fairness, adequacy, and reasonableness of a proposed class action settlement." *Pfeifer v. WaWa, Inc.*, No. 16-497, 2018 WL 2057466, at *2 (E.D. Pa. May 1, 2018) (citation omitted).

Myers v. Jani-King of Philadelphia, Inc., No. 09-1738, 2019 WL 2077719, at *2 (E.D. Pa. May 10, 2019 (Surrick, J.).

Fed. R. Civ. P. 23(e), as amended in 2018, sets forth the standards for this Court's consideration of this Motion:

> **(e) Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
>
> **(1)** ***Notice to the Class***
>
> **(A)** *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.
>
> **(B)** *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:
>
> (i) approve the proposal under Rule 23(e)(2); and
>
> (ii) certify the class for purposes of judgment on the proposal.
>
> **(2)** ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair,

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

These factors overlap with the Third Circuit's traditional nine-factor standard for reviewing a class settlement's fairness and reasonableness originally articulated in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975):

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

See generally Hall v. Accolade, Inc., No. 17-3423, 2019 WL 2996621, at *2 n.1 (E.D. Pa. Aug. 23, 2019) (noting overlap between Rule 23(e) standards with *Girsh* factors).[2]

[2] The Third Circuit expounded on the *Girsh* factors in *In re Prudential*, 148 F.3d 283m 323 (3d Cir. 1998), with:

> the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

Granting Preliminary Approval will allow the Settlement Class to receive notice of the proposed Settlement's terms and the Final Approval Hearing date and time at which Settlement Class Members may be heard, and at which further evidence and argument concerning the fairness, adequacy, and reasonableness of the Settlement may be presented by the Parties following the filing of the Motion for Final Approval.

B. This Settlement Satisfies the Criteria for Preliminary Approval.

Each of the relevant factors quoted above weighs in favor of Preliminary Approval of this Settlement. Plaintiff structures the arguments below to track the elements specified in Rule 23(e)(2), and in doing so establishes that the overlapping considerations in *Girsh* and *Prudential* are also met. The Class Representative and Class Counsel adequately represent the Settlement Class. The Settlement was reached through well-informed, arm's length negotiations by competent and experienced counsel with an experienced mediator's assistance. Ostrow Decl. ¶ 38. A preliminary review of the factors related to the Settlement's fairness, adequacy, and reasonableness demonstrates the Settlement fits well within the range of reasonableness, such that Preliminary Approval is warranted. Finally, all Settlement Class Members are treated equitably relative to each other.

Any settlement requires the parties to balance the merits of the claims and defenses asserted against the attendant risks of continued litigation and delay. Plaintiff and Class Counsel believe that the claims asserted are meritorious and that Plaintiff would prevail if this Action proceeded to trial. BANA argues that Plaintiff's claims are unfounded, denies any potential liability, and up to the point of settlement has indicated a willingness to litigate those claims vigorously. The Parties concluded that the benefits of settlement in this case outweigh the risks and uncertainties of continued litigation, as well as the attendant time and expenses associated with contested class certification proceedings and possible interlocutory appellate review, completing merits discovery,

pretrial motion practice, trial, and final appellate review. *Id.* ¶ 37.

1. Rule 23(e)(2)(A): The Class Representative and Class Counsel Adequately Represent the Settlement Class.

Plaintiff's interests are coextensive with, and not antagonistic to, the interests of the Settlement Class Members, because Plaintiff and the absent members of the Settlement Class have the same interest in the relief afforded by the Settlement, and the absent members of the Settlement Class have no diverging interests. Further, Plaintiff is represented by qualified and competent counsel. Class Counsel have devoted substantial time and resources investigating and prosecuting this Action and will vigorously protect the interests of the Settlement Class.

Class Counsel possess extensive experience in prosecuting class actions, including cases involving bank NSF Fees and OD Fees, in courts throughout the United States, and have recovered hundreds of millions of dollars for the classes they have represented. *Id.* ¶ 57 and Exhibits 1-3 thereto. Class Counsel is qualified to represent the Settlement Class and will, along with the Class Representative, vigorously protect the interests of the Settlement Class Members. *Id*.

As a result of negotiations, the Parties have reached a Settlement that Class Counsel believe, based on extensive experience litigating class actions like this one, to be fair, reasonable, and in the Settlement Class Members' best interests. Class Counsel's assessment in this regard is entitled to considerable deference. *See Callahan v. Commonwealth Land Title Ins. Co.*, 1990 WL 168273, at *16 (E.D. Pa. Oct. 29, 1990) ("a court should refrain from merely substituting its own judgment of the merits of a settlement for that of counsel intimately associated with the litigation and consequently far more able to weigh its relative strengths and weaknesses"); *Daniel B. v. O'Bannon*, 633 F. Supp. 919, 926 (E.D. Pa. 1986) ("the professional judgment of counsel involved in the litigation is entitled to significant weight"). Recommendations of experienced counsel are entitled to great weight in evaluating a proposed settlement in a class action. *In re Prudential Ins.*

Co. of Am. Sales Practices Litig., 962 F. Supp. 450, 543 (D.N.J. 1997), *aff'd*, 148 F.3d 283, 311 (3d Cir. 1998). "Significant weight" should be given "to the belief of experienced counsel that settlement is in the best interest of the class, so long as the Court is satisfied that the settlement is the product of good faith, arms-length negotiations." *In re American Family Enterprises*, 256 B.R. 377, 421 (D.N.J. 2000); *see also Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 414 (E.D. Pa. 2010).

2. Rule 23(e)(2)(B): This Settlement Is the Product of Arm's Length Negotiations.

The Settlement in this case is the result of intensive, arm's length negotiations between experienced attorneys, aided by a well-respected mediator, who are familiar with class action litigation and with the legal and factual issues of this Action, including from litigation in the *Morris* matter. The existence of an independent neutral in a mediation negotiating a class action settlement is considered when evaluating arm's length negotiations. *In re National Football League Players' Concussion Injury Litigation*, No. 2:12-02323, 301 F.R.D. 191, 198-9 (E.D. Pa. 2014). The negotiations did not begin in earnest until an extensive data analysis was requested, completed, and evaluated by Class Counsel in this case. Ostrow Decl. ¶¶ 35, 38.

In negotiating this Settlement in particular, Class Counsel had the general benefit of years of experience in litigating bank fee class actions across the country involving similar claims, and a familiarity with BANA's practices at issue in *Morris* and other cases against BANA. *Id*. ¶ 36. As detailed above, Class Counsel conducted a thorough investigation and analysis of Plaintiff's claims and engaged in sufficient informal discovery. *Id.* Analysis of data provided concerning the challenged fees charged to members of the Settlement Class enabled an understanding of the evidence related to central questions in the Action, and prepared Class Counsel for well-informed settlement negotiations at mediation. *Id*. Class Counsel were also well-positioned to evaluate the

strengths and weaknesses of Plaintiff's claims and BANA's defenses because of their extensive experience in bank fee class action litigation, including *Morris*. *Id*. and Exhibits 1-3 thereto.

3. Rule 23(e)(2(C): The Relief Provided to the Class Is Adequate.

A preliminary review of the Rule 23(e)(2)(C) factors[3] (and in conjunction *Girsh* factors 4-6 and 8-9) supports a determination that this Settlement falls within the "range of reason" such that notice to the Settlement Class and a Final Approval Hearing as to the fairness, adequacy, and reasonableness of the Settlement are warranted. There can be no doubt that this Settlement is a fair and reasonable recovery for the Settlement Class in light of BANA's defenses, and the challenging and unpredictable path of litigation Plaintiff would have faced absent a settlement.

Plaintiff and Class Counsel are confident in the strength of their case, but they are also pragmatic in their awareness of the various defenses available to BANA, and the risks inherent to litigation. Ostrow Decl. ¶ 42. As another court examining an overdraft fee settlement noted: "The combined risks here were real and potentially catastrophic . . . . [B]ut for the Settlement, Plaintiffs and the class faced a multitude of potentially serious, substantive defenses, any one of which could have precluded or drastically reduced the prospects of recovery." *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1347-48 (S.D. Fla. 2011). The same is true here.

A major risk is that the Court or a jury might find that the language in BANA's Account agreements permits defenses that the contract permitted BANA to charge the challenged Class Fees, and that BANA sufficiently disclosed its multiple fee practice for checks that were re-presented such that those practices were not deceptive or misleading. Ostrow Decl. ¶ 43. Indeed, a number of courts across the country have dismissed similar claims at the pleadings stage. *See, e.g., Lambert v. Navy Fed. Credit Union*, No. 1:19-cv-103-LO-MSN, 2019 WL 3843064 (E.D.

[3] There is no agreement required to be disclosed by Rule 23(e)(2)(C)(iv) other than the Settlement Agreement.

Va. Aug. 14, 2019); *Page v. Alliant Credit Union*, No. 19-CV-5965, 2020 WL 5076690 (N.D. Ill. Aug. 26, 2020); *Toth v. Scott Credit Union*, No. 20-CV-00306-SPM, 2021 WL 535549 (S.D. Ill. Feb. 12, 2021), *reconsideration denied*, No. 19-CV-5965, 2021 WL 1546437 (N.D. Ill. Apr. 20, 2021); *Ross v. NavyArmy Cmty. Credit Union*, No. 2:21-cv-168, 2022 WL 100110 (S.D. Tex. Jan. 11, 2022) (same). Also, because BANA's practices regarding Class Fees had been in place for many years, the Settlement Class (and the Class Representative) faced potential statute of limitations, estoppel, and waiver defenses, among other affirmative defenses that would be pled. *Id.* In addition, BANA would have asserted numerous defenses to class certification that raise substantial litigation risks. *Id.* Each of these risks, by itself, could easily have impeded Plaintiff's and the Settlement Class's successful prosecution of these claims at trial and in an eventual appeal. Under the circumstances, Plaintiff and Class Counsel appropriately determined the Settlement reached with BANA outweighs the gamble of continued litigation. *Id.*

Moreover, even if Plaintiff prevailed at trial, any recovery could be delayed for years by an appeal. *See Rivera v. Lebanon School Dist.*, No. 1:11-00147, 2013 WL 4498817 (M.D. Pa. Aug. 20, 2013) (noting appeal "could have delayed reimbursement to class members, as well as jeopardized their eventual recovery"); *Lipuma v. American Express Company*, 406 F. Supp. 2d 1298, 1322 (S.D. Fla. 2005) (likelihood that appellate proceedings could delay class recovery "strongly favor[s]" settlement approval). This Settlement provides substantial relief to the Settlement Class without further delay.

The claims and defenses in this Action are complex, as is clear by Class Counsel's efforts in the sister *Morris* case, which was hard fought for years, with numerous depositions, third party discovery, and hundreds of thousands of pages of documents produced. Ostrow Decl. ¶ 45. There is no doubt that continued litigation here would be difficult, expensive, and time-consuming. *Id.* The risks and obstacles in this case are just as great as those in other bank fee cases and this case

would likely have taken years as well to successfully prosecute. *Id*. Recovery by any means other than settlement would require additional years of litigation in this Court and the Third Circuit. *See United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 856 (2d Cir. 1998) (noting that "a principal function of a trial judge is to foster an atmosphere of open discussion among the parties' attorneys and representatives so that litigation may be settled promptly and fairly so as to avoid the uncertainty, expense and delay inherent in a trial").

One of the most expensive aspects of ongoing litigation in this case involves the retention of experts to perform data analyses and to present those analyses in expert reports, at depositions, and at trial. Ostrow Decl. ¶ 45. As was the case in *Morris*, Plaintiff would likely have to rely on a damages expert and experts in the fields of marketing and banking had the case proceeded to trial. *Id*. These considerations, and the other considerations noted above, militate heavily in favor of the Settlement. *Id*. *See also Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988) (noting likely "battle of experts" at trial regarding damages, which would pose "great difficulty" for plaintiffs).

Courts have determined that settlements may be reasonable even where class members recover only part of their actual losses. *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 144 (E.D. Pa. 2000) ("Even if the proposed settlement only amounts to 'a fraction of the potential recovery,' it does not necessarily follow that the settlement 'is grossly inadequate and should be disapproved.'"). "The existence of strong defenses to the claims presented makes the possibility of a low recovery quite reasonable." *Lipuma*, 406 F. Supp. 2d at 1323.

Here, Plaintiff's $8,000,000.00 cash recovery, plus the intangible value of the Practice Change, is outstanding, given the complexity of the litigation and the significant barriers that would loom in the absence of settlement: motions to dismiss, for class certification, and for summary judgment; trial; and potential appeals after class certification and a Plaintiff's verdict.

Based on extensive analysis of BANA's data, Class Counsel estimate that the Settlement Class's most likely recoverable damages at trial would have been approximately $20 million. Ostrow Decl. ¶ 31. Thus, the Settlement will result in the recovery of approximately 40% percent of the most probable damages, without further risks attendant to litigation. *Id*. That percentage recovery is on par with other bank fee settlements.

The Settlement provides for a highly effective means of directly distributing the Net Settlement Fund *pro rata* to the Settlement Class Members. The amount to which each Settlement Class Member is entitled shall be determined by the number of Class Fees that each Settlement Class Member paid and was not refunded, based on an analysis of reliable data provided from BANA's business records.

The Attorneys' Fees and Costs that Class Counsel will seek from the Settlement Fund will be consistent with awards entered in similar bank fee cases and will be paid following the Effective Date of the Settlement, near the time that Settlement Class Members will receive their payments.

4. Rule 23(e)(2)(D): The Settlement Treats Settlement Class Members Equitably.

The very simple *pro rata* formula for distributing the Net Settlement Fund assures that all Settlement Class Members will be treated equitably. The distribution formula reflects that there are no subclasses, and no relevant differences between Settlement Class Members.

C. Certification of the Class Is Appropriate.

For settlement purposes, Plaintiff respectfully requests that the Court certify the Settlement Class defined in paragraphs 3.1 of the Settlement Agreement. "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). For purposes of this Settlement, BANA does not oppose class certification. For the reasons set forth below, certification is appropriate under

Rule 23(a) and (b)(3).

Certification under Federal Rule of Civil Procedure 23(a) requires 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. Under Rule 23(b)(3), certification is appropriate if questions of law or fact common to the members of the class predominate over individual issues, and if a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Rule 23(a)(1) numerosity is satisfied because the Settlement Class consists of hundreds of thousands of current and former BANA Accountholders, and joinder of all such persons is impracticable. Ostrow Decl. ¶ 53. *See Steward v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) ("No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceed 40, the first prong of Rule 23(a) has been met.").

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" and the plaintiff's common contention "must be 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). The Third Circuit has held that "commonality" may be satisfied by one common issue. *In re Warfarin Sodium Antitrust Litig*, 391 F.3d 516, 527 (3d Cir. 2004). Here, Rule 23(a)(2) commonality is readily satisfied. There are multiple questions of law and fact – centering on BANA's charging of Class Fees and whether such fees were authorized by binding contract documents – that are common to the Settlement Class, that are alleged to have injured all Settlement Class Members in the same way, and that

would generate common answers central to the viability of the claims were the Action to proceed to trial. Ostrow Decl. ¶ 54.

For similar reasons, Plaintiff's claims are reasonably coextensive with those of the absent members of the Settlement Class, such that Rule 23(a)(3) typicality is satisfied. Ostrow Decl. ¶ 55. The typicality inquiry, a low threshold, is "intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." *Baby Neal v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994). Typicality is satisfied where the class representative's claim arises from the same alleged wrongful conduct by the defendant. *In re Warfarin*, 391 F.3d at 532. Plaintiff and the Settlement Class Members were subjected to the same practices and claim to have suffered from the same injuries, and they will benefit equally from the Settlement relief. *Id.* at 531 ("The typicality requirement is 'designed to align the interests of the class and the class representatives so that the latter will work to the benefit of the entire class through the pursuit of their own goals.'").

Plaintiff and Class Counsel satisfy Rule 23(a)(4) adequacy of representation, which "serves to uncover conflicts of the interest between named parties and the class they seek to represent." *Amchem Products, Inc.*, 521 U.S. at 594. Adequacy is assessed by a two-prong test: (1) class counsel's qualifications and (2) whether there are conflicts of interest between the named plaintiff and the class. *In re Prudential*, 148 F.3d at 312. Both these components are satisfied, and Plaintiff should be appointed the Class Representative, and Jeff Ostrow and Jonathan M. Streisfeld of Kopelowitz Ostrow P.A., Jeffrey D. Kaliel of KalielGold PLLC, and Kenneth J. Grunfeld of Golomb Spirt Grunfeld, P.C. should be appointed Class Counsel. Class Counsel have worked to identify and investigate the claims, have the requisite experience in bank fee class actions, know the applicable law, and have the resources committed to represent the Settlement Class. Fed. R.

Civ. P. 23(g). *See also* Ostrow Decl. ¶¶ 35, 57.

Rule 23(b)(3) certification of the Settlement Class is further proper because the predominance and superiority elements are met. The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 266 (3d Cir. 2009) (quoting *Amchem*, 521 U.S. at 623-24). Further, it assesses whether a class action "would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." Fed. R. Civ. P. 23(b)(3), Advisory Committee's Note to 1966 Amendment. Rule 23(b)(3) predominance is readily satisfied because liability questions common to all Settlement Class Members substantially outweigh any possible individual issues affecting a Settlement Class Member. Ostrow Decl. ¶ 54. All of their relationships with BANA arise from materially identical Account agreements, and all Class Fees were for the same amount and were levied in the same circumstances. *See Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1171 (11th Cir. 2010) ("It is the form contract, executed under like conditions by all class members, that best facilitates class treatment.").

Superiority "asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *In re Warfarin*, 391 F.3d at 533-34 (internal quotation marks omitted). Rule 23(b)(3) identifies four superiority factors, the last of which is manageability, a matter of no concern with a settlement because there will be no trial. *Amchem Products, Inc.*, 51 U.S. at 620. There is no concern for superiority because Accountholders have not shown an interest in controlling the prosecution of their claims, this being the only case to address the challenged Class Fees, and it is desirable to concentrate the litigation of these relatively small value individual claims into a single proceeding. Ostrow Decl. ¶ 58.

Finally, the Third Circuit's ascertainability requirement, which requires a showing that the

class is defined based on objective criteria, and that there is a reliable and administratively feasible mechanism to confirm that class members fall within the class definition, is definitely met in this Action. *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015). The Settlement Class Members will be identified because they were assessed Class Fees during the Class Period. Readily available BANA business records allow for the identification of the Settlement Class Members and direct distribution of Settlement Class Member Payments. As noted above, Settlement Class Members need not prove their inclusion in the Settlement Class by submitting a claim form.

For these reasons, the Court should conditionally certify the Settlement Class for settlement purposes only. Further evaluation of certification can be completed at the Final Approval stage.

D. The Court Should Approve the Notice Plan Because It Is Constitutionally Sound.

"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 compromise . . . ." *Manual for Compl. Lit.* § 21.312. The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "To meet this standard, the notice must inform class members of (1) the nature of the litigation; (2) the settlement's general terms; (3) where complete information can be located; and (4) the time and place of the fairness hearing and that objectors may be heard." *Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467 (E.D. Pa. 2007) (citations omitted).

The proposed Notice Plan satisfies all of these criteria. As recited in the Settlement Agreement, the Class Notice will properly inform members of the Settlement Class of the Settlement's substantive terms; advise the Settlement Class of the options for opting-out of or

objecting to the Settlement; and advise how to obtain additional information about the Settlement. Ostrow Decl. ¶ 52. Since BANA has names and mailing and/or email address records of all Settlement Class members, the Notice Plan will reach a high percentage of the Settlement Class and exceeds the requirements of constitutional due process. *Id.* Therefore, the Court should approve the Notice Plan and the form and content of the Class Notice.

E. The Court Should Schedule a Final Approval Hearing.

The last step in the class settlement approval process is a Final Approval Hearing, at which the Court will 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 the Settlement Class finally certified; whether to enter a Final Approval Order and Final Judgment and Order of Dismissal under Rule 23(e); whether to approve Class Counsel's application for Attorneys' Fees and Costs; and whether to approve the request for a Service Award to the Plaintiff. Plaintiff requests that the Court schedule the Final Approval Hearing Date no sooner than 150 days following Preliminary Approval to allow adequate time for the Parties to retrieve all data necessary for implementing the Notice Plan. The Opt-Out Deadline and Objection Deadline shall both be 30 days before the Final Approval Hearing. Plaintiff and Class Counsel will file the Motion for Final Approval seeking Final Approval, the Fee and Cost Award, and the Service Award no later than 45 days prior to the Final Approval Hearing.

IV. CONCLUSION

Plaintiff respectfully requests that the Court: (1) grant Preliminary Approval of the Settlement; (2) certify for settlement purposes the Settlement Class; (3) appoint Plaintiff Steven Checchia as Class Representative; (4) appoint Epiq Class Action & Claims Solutions, Inc. as Settlement Administrator; (5) approve and order the disclosure of BANA data concerning the Settlement Class to the Settlement Administrator for purposes of implementing the Notice Plan;

(6) approve the Notice Plan and the form and content of the Class Notice; (7) approve and order the opt-out and objection procedures set forth in the Settlement Agreement; (8) stay the Action pending Final Approval of the Settlement; (9) appoint as Class Counsel Jeff Ostrow and Jonathan M. Streisfeld of Kopelowitz Ostrow P.A.; Jeffrey D. Kaliel of KalielGold PLLC; and Kenneth J. Grunfeld of Golomb Spirt Grunfeld, P.C.; and (10) schedule a Final Approval Hearing no sooner than 150 days after Preliminary Approval.

DATED: June 9, 2022

Respectfully submitted,

/s/ Jeff Ostrow

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 9, 2022, the foregoing document was filed electronically on the CM/ECF system, which caused all CM/ECF participants to be served by electronic means.

/s/ Jeff Ostrow
Jeff Ostrow