UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KELWIN INKWEL, LLC, ANITA'S SKIN & BODY CARE, and D.B. KOSIE & ASSOCIATES, on behalf of themselves and all others similarly situated,	:	
Plaintiffs,	:	CIVIL ACTION NO.
v.	:	1:17-cv-06255-FB-CLP
PNC MERCHANT SERVICES COMPANY, L.P.,	:	
Defendant.	:	
CHOI'S BEER SHOP, LLC, on behalf of itself and all others similarly situated,	:	
Plaintiff,	:	CIVIL ACTION NO.
v.	:	1:19-cv-5768-FB-CLP
PNC MERCHANT SERVICES COMPANY, L.P.,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND FOR DIRECTION OF CLASS NOTICE

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INTRODUCTION

After four years of hard-fought litigation, the parties have agreed to settle these cases on a class-wide basis. If approved, the settlement will provide critical monetary and non-monetary benefits to customers of Defendant PNC Merchant Services Company, LLP ("PNCMS" or "Defendant") that were allegedly overcharged for payment processing services.[1]

First, pursuant to the settlement, PNCMS has agreed to pay up to **$10 million** in cash benefits to the settlement class members as well as to cover notice and administration costs, attorneys' fees and expenses, and service awards. Second, PNCMS has also agreed to important practice changes, including: (a) allowing customers to switch, penalty-free, from a pricing plan that requires an annual fee (currently $109.95) to one that does not; (b) providing customers additional notice prior to imposing an annual fee; (c) continuing to refrain from charging early termination fees (up to $900); and (d) obtaining written consent from customers prior to imposing monthly paper statement fees on customers that request paper statements. These are significant benefits for class members that remain customers of PNCMS. Indeed, it is estimated that, if all class members take advantage of these benefits, a further benefit of more than **$14.5 million** will be conferred on the class.

By any objective measure, the settlement presented to this Court is fair, reasonable, and adequate, and merits preliminary approval. Moreover, the settlement class should be certified because the requirements of Rule 23(a) and (b)(3) are met. Finally, the notice program provided for in the settlement—which includes direct individual notice to settlement class members via email/mail and a settlement website—comports with Rule 23, due process, and best practices. Respectfully, the Court should preliminarily approve the settlement, certify the settlement class

[1] The Settlement is being filed herewith as Exhibit A to the accompanying Joint Declaration of E. Adam Webb and Matthew C. Klase ("Joint Decl.").

for settlement purposes, direct notice to the settlement class pursuant to the proposed notice program, schedule a final approval hearing, and grant the related relief requested herein. A proposed order approved by the parties is filed herewith.[2]

BACKGROUND

I. Factual Background

Plaintiffs/Class Representatives Anita's Body & Skin Care, D.B. Kosie & Associates, and Choi's Beer Shop, LLC are three small business merchants that retained PNCMS to process credit and debit card payments made by their customers.[3] Plaintiffs allege that PNCMS imposed (1) excessive annual fees without providing contractually required notice, (2) early termination fees that constituted unlawful penalties; and (3) monthly paper statement fees without providing contractually required notice. *See generally* Dkt. 36; Dkt. 1 in *Choi's*.[4] Plaintiffs filed this case on behalf of themselves and nationwide classes of merchants that are current and former PNCMS customers. PNCMS vehemently denies Plaintiffs' allegations.

II. Procedural History[5]

A. Initial Investigation and Litigation.

Following an extensive investigation by counsel that included a thorough review of PNCMS contracts and customer billing statements, the *Inkwel* case was originally filed on October 26, 2017, alleging that Defendant fraudulently induced its customers to contract and then overbilled them. Joint Decl., ¶¶ 8-12. The case received attention in the media and many

[2] Plaintiffs are authorized to state that PNCMS does not oppose the relief requested in this motion. The arguments and contentions contained herein, however, are attributable solely to Plaintiffs.

[3] Plaintiff Kelwin Inkwel, LLC is not a proposed class representative since it does not qualify for inclusion in the settlement class. Joint Decl., ¶ 105. Inkwel's claims will soon be dismissed without prejudice.

[4] All "Dkt." references are to *Inkwel*, unless otherwise noted.

[5] An extremely detailed summary of the pleadings, motion practice, discovery, and settlement negotiations is set forth in the accompanying Joint Declaration.

additional PNCMS merchants claiming to have been overcharged contacted counsel. After substantial further investigation by counsel, which included discussions with a PNCMS former employee and an industry expert, a series of new pleadings were filed, culminating in the filing of the Amended Consolidated Class Action Complaint. Joint Decl., ¶¶ 13-29.

On December 21, 2018, PNCMS moved to dismiss this operative complaint, and included with its motion a declaration and hundreds of pages of supporting exhibits. Dkt. 27. PNCMS argued that Plaintiffs' claims should be dismissed because, *inter alia*: Plaintiffs' failed to allege proper and timely notice of disputes in accordance with the parties' contract; the express terms of the contract permitted PNCMS's conduct; New York law barred implied covenant claims that are duplicative of contract claims; PNCMS's early termination fees comported with New York law; Plaintiffs failed to meet the heightened pleading standard for fraudulent inducement claims; and New York law barred unjust enrichment claims in the presence of a contract. *See id.* Plaintiffs opposed PNCMS's motion with thorough briefing, and PNCMS replied. Dkts. 28-29. Extensive legal research and investigation were required for this briefing, given the number and complexity of the issues raised. Joint Decl., ¶¶ 30-32.

On September 30, 2019, the Court entered an order that dismissed several of Plaintiffs' claims. Dkt. 37. As a result of this order (corrected at Dkt. 38), and following the resolution of a subsequent motion for reconsideration (Dkt. 47), two claims remained: (1) that Defendant's imposition of annual fees and paper statement fees on Plaintiff Anita's were express breaches of contract and (2) that Defendant's early termination fees on Plaintiffs Inkwel and Kosie constituted unlawful penalties that resulted in unjust enrichment for PNCMS. Dkt. 38.

On October 8, 2019, Plaintiff Choi's filed a new action challenging PNCMS's imposition of a 2019 annual fee. Dkt. 1 in *Choi's*. PNCMS moved to dismiss this claim on mootness and

standing grounds and such motion was granted by the Court over Plaintiff's opposition. Dkts. 20-22, 40-41. Plaintiff appealed (Dkt. 42 in *Choi's*) and the dismissal was vacated by the Second Circuit (Dkt. 43 in *Choi's*).

Aside from its initial motions to dismiss, PNCMS made two other overtures to derail the litigation. In *Inkwel*, PNCMS moved to deny certification of Plaintiffs' proposed annual fee class on the ground that the putative class members lacked standing. Dkt. 76. Moreover, after the Second Circuit remanded *Choi's* following Plaintiff's successful appeal, PNCMS sought permission from the Court to file a *second* motion to dismiss, this time alleging that subject matter jurisdiction under the Class Action Fairness Act was lacking. Dkt. 46 in *Choi's*. Plaintiffs dutifully opposed these requests, which were both pending at the time the settlement was reached. Joint Decl. ¶¶ 66-67, 74.

B. Extensive Discovery Process.

Discovery commenced in November of 2019. *Id.* at ¶ 44. PNCMS made multiple requests to stay discovery pending resolution of its various motions, but Plaintiffs successfully defeated them. *Id.* at ¶¶ 48-49, 56. Plaintiffs propounded 49 requests for production of documents as well as 30 written interrogatories on PNCMS. PNCMS, in turn, propounded many requests for production, interrogatories, and requests for admissions on Plaintiffs. The parties thereafter served responses to the discovery and counsel met and conferred on many occasions about the requests and the objections and responses thereto. Through those efforts, the parties were successfully able to resolve some disputes without the need for Court intervention. These efforts resulted in multiple sets of supplemental responses and additional productions. Joint Decl., ¶¶ 45-46, 50-52, 58, 70. Some disputes could not be resolved and Court intervention was sought, with a total of three motions to compel being filed. *Id.* at ¶¶ 53, 61, 69.

Counsel for the parties also negotiated a detailed protocol for the collection and production of electronically stored information ("ESI"), a confidentiality order, and negotiated extensively regarding the scope and nature of the customer data that PNCMS would produce, including substantial back-and-forth concerning the ESI terms Defendant would run and the custodians and databases on which such terms would be run. Joint Decl., ¶¶ 47, 60.

The ESI and document productions in this litigation have been substantial. In all, PNCMS has produced more than 6,000 pages of internal emails, spreadsheets, and other documents, as well as voluminous customer data. Class counsel spent many hours reviewing and analyzing the dense productions. *Id.* at ¶ 62. The parties were in the process of scheduling six depositions (three per party) when they agreed to focus their efforts on mediation. *Id.* at ¶ 73.

C. Settlement Negotiations.

The parties engaged in a formal mediation session with widely-respected and experienced mediator Terrence White of Upchurch Watson White & Max on August 17, 2021. Joint Decl., ¶¶ 78, 82. In preparation for this session, PNCMS produced the data and documentation necessary for Plaintiffs to accurately estimate class damages for each of the subject fees (i.e., annual fees, early termination fees, and paper statement fees). *Id.* at ¶¶ 75, 79-80. The parties also exchanged detailed mediation statements that addressed the most significant merits and class certification issues at issue in the litigation. *Id.* at ¶¶ 80-81.

The mediation was entirely arms-length, adversarial, and extremely hard-fought. *Id.* at ¶ 82. After a full day's worth of contentious negotiations, the parties reached agreement on the material terms of a class-wide settlement. *Id.* Thereafter, the parties worked diligently to finalize the settlement, including preparing (a) a detailed written agreement, (b) an allocation formula to ensure the monetary relief being provided in the settlement is equitably and efficiently distributed to the settlement class, (c) the notices that will be made available to the settlement

class informing them of the settlement and reminding former customers to file claims, and (d) the claim form for former customers. *Id.* at ¶¶ 84-85. The parties negotiated and reached agreement regarding attorneys' fees and expenses and service awards only after reaching agreement on all other material terms of the Settlement. Settlement ¶ 90; Joint Decl., ¶ 86.

The settlement averted several additional years of complex, contentious litigation. Had the parties not reached a settlement, they would have immediately proceeded to take at least six depositions, engaged in expert discovery, and briefed the second dismissal motion in *Choi's*, class certification, and summary judgment. Joint Decl., ¶ 88. The settlement provides much needed, immediate relief to small businesses that struggled with the pandemic.

III. The Settlement Terms

A. The Settlement Class.

Plaintiffs seek provisional certification under Rule 23(b)(3), for settlement purposes only, of a "Settlement Class," defined as:

> All merchants that entered into a payment card processing service contract with Defendant that paid one or more of the subject fees between October 26, 2011, and the date of Preliminary Approval.[6]

Entities or persons affiliated with the Defendant or the Court are excluded. Settlement ¶ 41.

B. The Relief.

Both monetary relief and non-monetary relief (i.e., practice changes) will be provided to settlement class members if the Court approves the settlement.

1. Settlement Fund.

Pursuant to the settlement, PNCMS will pay up to $10 million to establish a settlement fund which will provide cash benefits to the settlement class members via account credits and

[6] "Subject Fees" refers to: annual fees, early termination fees, and paper statement fees first assessed after October 26, 2011 and at least three months after the merchant first became a customer. Settlement ¶ 40.

checks and also cover attorneys' fees and expenses, service awards, and notice and administration costs. Settlement ¶¶ 37, 72. All of the 207,000 estimated settlement class members are eligible to receive a cash payment under the Settlement. The estimated 57,000 settlement class members that are current customers will automatically be issued payments without the need to submit a claim. The estimated 150,000 settlement class members that are former customers are eligible to receive cash payments by submitting a simple claim form. Settlement ¶ 73; Exh. 1, Exh. 2B (claim form). The precise amount of the settlement fund that is actually paid out will depend on the number of valid claims submitted by former customers but, no matter how many claims are submitted, under no circumstances will the total amount paid out be less than $7.5 million. Settlement ¶¶ 67, 76.

There is good reason to pay current customers automatically while requiring former customers to file a claim. Current customers are active merchants (i.e., active business entities) for which PNCMS can provide an account credit. Former customers, meanwhile, may not be active entities (e.g., the merchant may have gone out of business sometime during the past several years) and the address information from PNCMS may be outdated. Thus, if checks were automatically sent to all of the former customers, the cash rate would likely be very low. Joint Decl., ¶ 94. The claim process thus allows former customers to provide updated address and payee information so as to ensure checks are routed to the correct location and recipients. *Id.*

The cash payments will be calculated as described in the allocation formula attached as Exhibit 1 to the settlement. Settlement ¶ 74, Exh. 1. To summarize: 73% of the "net settlement amount" (i.e., the settlement amount, minus the total of (a) class counsel's fees and expenses; (b) service awards; (c) costs of notice and administration; and (d) taxes paid from the settlement fund) will be paid *pro rata* to settlement class members that paid annual fees, 25% will be paid

pro rata to settlement class members that paid early termination fees, and 2% will be paid *pro rata* to settlement class members that first paid paper statement fees after October 26, 2011 and at least three months after they became customers. Exh. 1 to Settlement.

This allocation formula was chosen by the parties to ensure that settlement class members are fairly compensated relative to each other. The applicable percentages were reached after considering (1) approximate percentage shares of the total potential class damages associated with each subject fee, and (2) the strength of the claim associated with each fee vis-a-vis the other fees. Joint Decl., ¶ 95.

2. Practice Changes.

The settlement also provides significant non-monetary relief to the settlement class. Settlement ¶¶ 43-46. With respect to annual fees, PNCMS has agreed to allow, for a period of 18 months, all customers that are currently on a pricing plan that includes an annual fee the option to switch, penalty free, to an alternative (swipe/non-swipe) pricing plan that does not include an annual fee. For those customers that do not wish to switch plans to avoid the fee, PNCMS has agreed to provide, for the next five years, an additional 30-days' advance notice prior to assessing the $109.95 annual fee (thereby affording customers more opportunity to terminate their service prior to the annual fee being assessed). Settlement ¶ 44. The value of these annual fee practice changes represents a value of at least $10 million to the settlement class. Joint Decl., ¶ 91.

Additionally, PNCMS has agreed to maintain for the next five years its current practice of waiving its contractual right to assess early termination fees on customers that terminate service prior to the end of their three-year initial contract term. Settlement ¶ 45. This fee equates to $25 per month remaining on the initial term, and can thus be up to $900 ($25 x 36). Based on the amount of early termination fees PNCMS was assessing annually at the time this

practice was instituted, this relief confers a value of at least $900,000 per year, or $4.5 million over the five-year term. Joint Decl., ¶ 92.

Finally, PNCMS has agreed that for a period of five years, prior to assessing a paper statement fee on any customer that did not elect to receive paper statements in exchange for a fee at the time of contracting, Defendant will have the customer execute a supplemental merchant processing agreement fee page acknowledging that a paper statement fee will be charged in exchange for Defendant providing paper statements to the customer. Settlement ¶ 46. This practice change ensures customers will be aware they will pay a charge in exchange for receiving monthly paper statements. Based on the amount of paper statement fees assessed annually to customers that did not have such a fee disclosed in their contract, this relief has the potential to provide value of at least $15,000 per year, or $75,000 over the five-year term. Joint Decl., ¶ 93. These practice changes give PNC merchants ample opportunity to avoid the three fees at issue in this litigation.

3. Administration, Notice, and Claim Program.

Following a competitive bid process, the parties are proposing that Rust Consulting be appointed as settlement administrator. Rust is a well-known administration firm that has successfully administrated numerous class action settlements and claims processes. Joint Decl., ¶¶ 85, 107, Exh. C (Rust Experience Brochure).

The parties' proposed notice program, which is set forth at ¶¶ 54-64 of the settlement, includes direct individual notice to the settlement class members. Specifically, all settlement class members for which an email address is reasonably available in PNCMS's records will be sent direct email notice to their last known email address. For settlement class members for which an email address is not reasonably available in PNCMS's records, or for which email notice is attempted but is not successful, notice will be sent via a postcard notice mailed to their

last known mailing address in PNCMS's records or, as applicable, a more current address available through the United States Postal Service National Change of Address database. The settlement administrator will attempt to locate updated address information for mailed postcard notices that are returned as undeliverable. *Id.*

Notice will also be provided via a settlement website, which will include a detailed long-form notice, key case documents, and additional information. Former customers will be able to electronically submit claims for payments via the settlement website. Settlement ¶¶ 58-59. The email, postcard, and long form notices will be substantially in the forms attached as Exhibits 2A, 2B, and 3 to the Settlement. The settlement administrator will also establish and maintain a toll-free telephone line that settlement class members can call with questions. Settlement ¶ 51.

The email and postcard notices sent to current customers will inform them that they will automatically receive a payment if the settlement is approved and becomes final. Settlement Ex. 2A. The email and postcard notices sent to former customers will inform them that they need to submit a claim to receive a payment, and will direct them to the settlement website to submit a claim online (via hyperlink in the email notice) or, if they prefer, to download a hard copy claim form. Settlement, Exh. 2B. The postcard notices sent to former customers will also include a hard copy claim form that former customers may tear off, fill out, and return by mail, postage prepaid. *Id.*

In addition to the initial mailed and email notices, former customers for whom PNCMS has a valid email address in its records will also be sent two *additional* reminder notices in advance of the claim deadline, reminding them that they are eligible to submit a claim and of the deadline for doing so. Settlement ¶ 63, Exh. 4 (reminder email form). Class counsel proposed

these additional notices be sent to ensure former customers that wish to claim their part of the settlement are reminded to do so on a timely basis.

C. Attorneys' Fees and Expenses and Service Awards.

Pursuant to the settlement, class counsel may seek, and PNCMS will not oppose, an award of attorneys' fees and reimbursement of litigation expenses in a total amount of up to one-third of the $10 million settlement amount. Settlement ¶¶ 86-87. Class counsel will also apply for service awards of up to $10,000 for each of the three class representatives to compensate them for the substantial efforts and commitment on behalf of the settlement class. Settlement ¶ 89. The parties negotiated and reached agreement regarding fees and service awards only after reaching agreement on all other material terms of the settlement. Settlement ¶ 90; Joint Decl., ¶ 86.

D. Release.

In exchange for the benefits afforded by the settlement, settlement class members will release PNCMS from claims relating to the issues that were or could have been asserted in the Action. The release is set forth in more detail in paragraphs 81-85 of the settlement.

ARGUMENT

I. Overview of the Class Settlement Approval Process

Pursuant to Rule 23(e), a class action settlement must be approved by the Court before it can become effective. The process for court approval is comprised of two principal steps:

(1) Preliminary approval of the proposed settlement and direction of notice to the class; and

(2) A final approval hearing, at which argument concerning the fairness, adequacy, and reasonableness of the settlement is presented.

By this motion, Plaintiffs respectfully ask the Court to take the first step and enter an order preliminarily approving the settlement and directing class notice, pursuant to the parties' proposed notice program, under Rule 23(e)(1).

II. The Proposed Settlement Meets the Standards for Preliminary Approval

The approval of a proposed class settlement is within the sound discretion of the Court. *See Victoria Perez v. Allstate Ins. Co.*, No. CV 11-1812 (AKT), 2019 WL 1568398, at *1 (E.D.N.Y. Mar. 29, 2019) (citing *Maywalt v. Parker & Parsley Peroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1998)). At the preliminary approval stage, there is no need to conduct a trial on the merits. *Newberg on Class Actions*, § 13:10 (4th ed. 2002). Rather, "[p]reliminary approval of a settlement agreement requires only an 'initial evaluation' of the fairness of the proposed settlement . . . To grant preliminary approval, the court need only find that there is 'probable cause to submit the [settlement] proposal to class members and hold a full-scale hearing as to its fairness.'" *Victoria Perez*, 2019 WL 1568398, at *1 (quoting *Lizondro-Garcia v. Kefi LLC*, 300 F.R.D.169, 179 (S.D.N.Y. 2014); *In re Traffic Exec. Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980)).

In evaluating a motion for preliminary approval, courts conduct a preliminary assessment of the factors that will be evaluated at the final settlement approval stage. Fed. R. Civ. P. 23(e)(1). The ultimate touchstone for that analysis is whether the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Courts in this Circuit apply the so-called "*Grinnell* factors" in evaluating the *substantive* fairness of class settlements:

> (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; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

In re Namenda Direct Purchaser Antitrust Litig., 462 F. Supp. 3d 307, 311 (S.D.N.Y. 2020) (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)). Courts in this Circuit also look at *procedural* fairness of the settlement to ensure that the settlement is not the product of collusion. *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012). "Courts examine [both] procedural and substantive fairness in light of the 'strong judicial policy favoring settlements' of class action suits." *Id*. (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)).

Additionally, Rule 23(e)(2) establishes factors for the Court's consideration which overlap considerably with the *Grinnell* factors. *See* Fed. R. Civ. P. 23(e)(2) (court must consider 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 the costs, risks, and delay of trial and appeal, the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, the terms of any proposed award of attorney's fees, including timing of payment, and any agreement required to be identified under Rule 23(e)(3); and (d) the proposal treats class members equitably relative to each other); *In re Namenda*, 462 F. Supp. 3d at 311 ("The factors set forth in Rule 23(e)(2) have been applied in tandem with the Second Circuit's *Grinnell* factors and focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.") (citation omitted).

As discussed below, the proposed settlement here is absolutely fair, reasonable, and adequate and readily satisifes all applicable standards for preliminary settlement approval.

A. The Settlement Is the Product of Arm's-Length Negotiations by Experienced Counsel and Is Informed by Extensive Discovery and Litigation (Fed. R. Civ. P. 23(e)(2)(B); *Grinnell* Factor 3).

"A strong initial presumption of fairness attaches to a proposed settlement if it is reached by experienced counsel after arm's-length negotiations, and great weight is accorded to counsel's recommendation." *In re Namenda*, 462 F. Supp. 3d. at 311 (citing *Guevoura Fund Ltd. v. Sillerman*, 2019 WL 6889901, at *6 (S.D.N.Y. Dec. 18, 2019)); *see also Victoria Perez*, 2019 WL 1568398, at * 1 (granting preliminary approval; finding settlement was "the result of extensive, arms'-length negotiations by counsel, well-versed in the prosecution of [pertinent] class and collective actions," and was reached with the assistance of an "experienced class-action…mediator," which "reinforces the non-collusive nature of the settlement").

The settlement here is the product of extensive arms-length negotiations through a respected mediator, Terrence White. The parties thereafter worked diligently to draft the written settlement agreement and exhibits and select the proposed settlement administrator. Joint Decl., ¶¶ 75-84.

Throughout the negotiations, the parties were represented by experienced and well-qualified counsel on both sides. Proposed class counsel here have extensive experience prosecuting and resolving class actions and other complex cases, including cases against payment processing companies and other financial institutions. Joint Decl., ¶¶ 3-5, 103, Exh. B.[7] Indeed, proposed class counsel were uniquely situated to analyze the strengths and weaknesses of this case, given their particular experience pursuing class action litigation against payment processing companies for alleged overbilling and improper charges. *Id*.

[7] The qualifications detailed in this memorandum and in the accompanying Joint Declaration also support appointment of Plaintiffs' counsel as class counsel pursuant to Rule 23(g).

Moreover, in negotiating the settlement, class counsel were well informed about the facts and law specific to this case, as a result of their substantial pre-filing investigation, their ongoing legal research and investigation, and their extensive discovery efforts—which included, *inter alia*, consultation with an industry expert, reviewing and analyzing more than 6,000 pages of documents and ESI and voluminous raw data produced by PNCMS, and analyzing written discovery responses. *See generally* Joint Decl.; *see also supra* Background II. Class counsel were thus well-situated to evaluate the relative strengths and weaknesses of the parties' positions, and to negotiate a fair, reasonable, and adequate settlement. *See In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011) (presumption of fairness where parties were represented by experienced counsel and the case "proceeded well into . . . discovery before settlement was reached").

B. Plaintiffs and Class Counsel Have Zealously Represented the Class (Fed. R. Civ. P. 23(e)(2)(A)).

Plaintiffs and class counsel have prosecuted this action on behalf of the settlement class with vigor and dedication for four years. As detailed above, class counsel have thoroughly investigated the factual and legal issues involved, conducted extensive discovery, and engaged in substantial litigation of the legal issues in furtherance of prosecuting the claims here. Likewise, Plaintiffs were actively engaged—each produced pertinent documents, responded to written discovery requests, and have communicated with class counsel up to and including evaluating and approving the proposed settlement.

C. The Settlement Represents a Strong Result for the Settlement Class, Particularly Given the Substantial Risk and Challenges They Face (Fed. R. Civ. P. 23(e)(2)(C); *Grinnell* Factors 1 & 4-9).

The settlement provides substantial monetary and non-monetary relief for the settlement class. Pursuant to the settlement, PNCMS will pay up to $10 million to create a settlement fund

(and in no event will less than $7.5 million of this fund be paid out to the class). Settlement ¶ 42. All settlement class members that are current customers of PNCMS will automatically receive settlement payments, and all settlement class members that are former customers and that file a simple claim form will receive settlement payments. Settlement ¶ 73. In addition to the monetary relief, PNCMS has also agreed to important, valuable practice changes. Settlement ¶¶ 43-47; *also* pp. 8-9, *supra*.

Plaintiffs estimate that the up to $10 million monetary settlement amount, plus the potential value from the non-monetary relief, represents approximately 34% of the class damages under the reasonable best case, proverbial "home run" scenario—i.e., if Plaintiffs and the settlement class were to overcome every affirmative defense, successfully obtain certification of a litigation class, prevail at trial on every claim, and hold on to that result through appeals. Joint Decl., ¶ 102.

The result achieved for the settlement class here is particularly strong given the significant risks, challenges, and substantial complexities of continued litigation. For example, PNCMS's motion to deny class certification of the annual fee class (which had, by far, the highest damages) was pending in *Inkwel*, as was Defendant's request to file a second motion to dismiss the *Choi's* case. Even if they are able to overcome these motions, Plaintiffs would face significant additional risks in establishing liability and damages. Among the other arguments PNCMS has advanced and/or indicated it would advance if the case proceeded are: (a) PNCMS discloses the fees in question in materials presented to customers at sign up; (b) PNCMS discloses the fees in question in its monthly billing statements; (c) PNCMS's annual fees are reasonably tied to its processing costs and other charges from third parties; and (d) customers can

avoid the charges through their own choices. PNCMS also has made clear that it would vigorously oppose certification of a litigation class.

While Plaintiffs absolutely believe that these obstacles are not insurmountable, they are indicative of the substantial risks that Plaintiffs and the settlement class would face if the litigation were to continue. The proposed settlement provides considerable, appropriately-tailored relief while allowing settlement class members to avoid the risks of unfavorable, and in some cases dispositive, rulings on these and other issues. The settlement also provides another significant benefit that would not be available if the litigation were to continue—prompt relief. Proceeding to trial could add years to the resolution of this litigation, given the legal and factual issues raised and likelihood of appeals. *See Velez v. Majik Cleaning Serv., Inc.*, 2007 WL 7232783, at *6 (S.D.N.Y. June 25, 2007) (proposed settlement "benefits each plaintiff in that he or she will recover a monetary award immediately, without having to risk that an outcome unfavorable to the plaintiffs will emerge from a trial").

D. The Settlement Treats Settlement Class Members Equitably (Fed. R. Civ. P. 23(e)(2)(D)).

Pursuant to the settlement, all settlement class members have the opportunity to receive a payment from the settlement fund pursuant to an allocation formula that is well-designed to ensure they will be fairly compensated relative to one another. Settlement Exh. 1; Joint Decl., ¶ 95; *see also supra* Background III.B.1. Moreover, the merchant-friendly practice changes that PNCMS has agreed to will also provide significant benefits to current customers, enabling them to completely avoid the fees at issue if they so choose. Settlement ¶¶ 43-46. And while settlement class members that are former customers are required to submit claims to receive payments, the claim process and claim form are simple and user-friendly (including the ability to submit claims online via the settlement website), and having a claim process for former

customers is reasonable and appropriate under the circumstances here given that many of them may no longer be in business and given the related practical unavailability of reliable contact and payee information.

E. The Additional Rule 23(e) Factors Support Granting Preliminary Approval.

The proposed method of distributing relief is simple and straightforward. Fed. R. Civ. P. 23(e)(2)(C)(ii) (court must consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims"). Settlement class members that are current customers will be automatically given account credits or mailed checks, while settlement class members that are former customers need only submit a short, simple claim form with an updated address to get their checks. Claim forms can be returned via mail or filled out electronically via the settlement website, and there will be a hyperlink in the email notice to the appropriate page on the settlement website for submitting claims. Settlement ¶ 59, Exhs. 2A-B. Moreover, former customers with valid email addresses will receive emails reminding them to file their claims. Settlement ¶ 63, Exh. 4.

Rule 23(e)(2)(C)(iii) requires the Court to consider "the terms of any proposed award of attorney's fees, including timing of payment." Here, the agreement provides that class counsel will seek attorneys' fees and expenses in a total amount not to exceed one-third (1/3) of the $10 million settlement amount, subject to Court approval. Settlement ¶ 87. A one-third percentage is consistent with the normal range awarded in this Circuit.[8] Class counsel will file their fee application, which will provide the supporting basis for their request, at least 30 days in advance

[8] *See, e.g., Springer v. Code Rebel Corp.*, 2018 WL 1773137, at *5 (S.D.N.Y. Apr. 10, 2018) ("33.3% is within the range of fee awards typically awarded.") (citing *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 587-88 (S.D.N.Y. 2008)); *Gaspar v. Personal Touch Moving, Inc.*, 2015 WL 7871036, at *2 (S.D.N.Y. Dec. 3, 2015) (same); *Becher v. Long Island Lighting Co.*, 64 F. Supp. 2d 174, 182 (E.D.N.Y. 1999) (one-third fee "well within the range accepted by courts in this circuit") (citing cases)).

of the deadline for settlement class members to opt-out or object, and it will be available on the settlement website after it is filed. Settlement class members will thus have the opportunity to comment on or object under Fed. R. Civ. P. 23(h) prior to the final approval hearing. As with the payments to settlement class members, any attorneys' fees and expenses awarded by the Court will be paid from the settlement fund following the effective date of the Settlement.

Finally, there are no agreements between the parties other than the settlement. Fed. R. Civ. P. 23(e)(3) ("the parties seeking approval must file a statement identifying any agreement made in connection with the proposal"); Joint Decl., ¶ 108.[9]

III. The Court Should Provisionally Certify the Settlement Class

When a settlement is reached before certification, a court must determine whether to certify the settlement class. *See, e.g.*, *Manual for Compl. Litig.,* § 21.632 (4th ed. 2014); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-14 (1997). Certification of a settlement class is warranted when the requirements of Rule 23(a) and at least one subsection of Rule 23(b) are satisfied. *Reid v. SuperShuttle Int'l, Inc.*, 2012 WL 3288816, at *4 (E.D.N.Y. Aug. 10, 2012). Certification of the settlement class is warranted here.

A. The Requirements of Rule 23(a) Are Satisfied.

1. Numerosity (Rule 23(a)(1))

Rule 23(a)(1) requires that a proposed settlement class be "so numerous that joinder of all members is impracticable." The settlement class here includes approximately 207,000 merchants, making joinder impracticable. *See Ft. Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 131 (S.D.N.Y. 2014) (numerosity satisfied if 40 or more members).

[9] One of the *Grinnell* factors is the reaction of the class to the settlement. Notice has not yet been disseminated to the settlement class, and so it is premature to evaluate this factor. Class counsel are not aware of any opposition to the settlement at this stage. Joint Decl., ¶ 106.

2. Commonality (Rule 23(a)(2))

Commonality under Rule 23(a)(2) is satisfied if there is at least one question of law or fact that is common to the class. *J.P. Morgan*, 301 F.R.D. at 131; *Passafiume v. NRA Grp., LLC*, 274 F.R.D. 424, 429 (E.D.N.Y. 2010) (commonality inquiry is "qualitative rather than quantitative") (citation omitted). Even if there are some variations in the individual circumstances of the class members, commonality will generally be satisfied where, as here, the class' injuries "derive from a unitary course of conduct." *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997). In this case, Plaintiffs and the settlement class members' claims all stem from alleged programmatic billing practices by PNCMS that are common to the class. These claims involve several common questions, including whether the charges in question are permitted by PNCMS's contracts and whether PNCMS adequately disclosed the charges in question in form materials and billing statements. Commonality is satisfied.

3. Typicality (Rule 23(a)(3))

Typicality under Rule 23(a)(3) requires that "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009). Typicality is satisfied here. Plaintiffs' claims and those of the settlement class arise from the same alleged programmatic billing charges and are based on the same legal theories.

4. Adequacy of Representation (Rule 23(a)(4))

Adequacy under Rule 23(a)(4) turns on "whether (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Flag Telecom*, 574 F.3d at 35. The adequacy inquiry serves to uncover any "conflicts of interest between named parties and the class they

seek to represent." *Id*. There are no such conflicts here. Moreover, Plaintiffs do not have any interests antagonistic to other settlement class members.

Further, Plaintiffs have retained counsel who are well-qualified and have extensive experience prosecuting and successfully resolving class action cases, including cases against payment processing companies and other financial institutions. Joint Decl., ¶¶ 3-5, 103, Exh. B. Proposed class counsel have vigorously litigated this action on behalf of the settlement class, conducted extensive investigation and discovery, negotiated the proposed Settlement, and have and will continue to fairly and adequately protect the interests of the settlement class. Likewise, Plaintiffs have demonstrated their commitment to the settlement class, including by participating in discovery, communicating with class counsel about the case, and reviewing and approving the proposed settlement.

B. The Requirements of Rule 23(b)(3) Are Satisfied.

In addition to the requirements of Rule 23(a), at least one of the prongs of Rule 23(b) must be satisfied. Here, Plaintiffs seek certification of the settlement class, for settlement purposes, under Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

1. Predominance.

"The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted). Predominance "is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized

proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 118 (2d Cir. 2013) (citation omitted). At its core, "[p]redominance is a question of efficiency." *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012).

Predominance is satisfied. The common issues—including whether the programmatic charges at issue are authorized by PNCMS's contracts, and whether PNCMS's billing statements adequately disclose the charges in question—predominate over any individualized questions. The only individual issues relate to damages, which can be programmatically calculated. *See Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 409 (2d Cir. 2015) (individualized damages determinations "alone cannot preclude certification under Rule 23(b)(3)").

2. Superiority.

Moreover, class treatment is superior to other methods for the resolution of this case. Given the size of each settlement class member's damages—which would be dwarfed by the expense of prosecuting a separate individual case—pursuit of individual claims is unlikely. In all events, settlement class members remain free to exclude themselves from the settlement class if they wish to do so. It would be far more efficient for the Court and the parties to have a single resolution (as with the proposed settlement here), rather than multiple separate cases about the same issues. Moreover, under the proposed settlement, there will not need to be a class trial, meaning there are no potential concerns about any individual issues, if any, creating trial inefficiencies. *See Amchem Prods.,* 521 U.S. at 620 ("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 will be no trial."); *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 335 (S.D.N.Y. 2005), *aff'd in relevant part sub nom. Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006).

IV. The Proposed Notice Program Complies with Rule 23 and Due Process

Before a proposed class settlement may be finally approved, the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). Where certification of a Rule 23(b)(3) settlement class is sought, the notice must also comply with Rule 23(c)(2)(B), which requires:

> the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974).

The proposed notice program here (Settlement ¶¶ 55-64, Exhs. 2-4) meets all applicable standards. The notice program includes direct notice to settlement class members sent via first class U.S. Mail and email, the establishment of a settlement website—where settlement class members can view the full settlement agreement, the detailed long-form notice, and other key case documents—and the establishment of a toll-free telephone number where settlement class members can get additional information. Moreover, the proposed forms of notice (Settlement Exhs. 2A and 2B) inform settlement class members, in clear and concise terms, about the nature of this case, the settlement, and their rights, including all of the information required by Rule 23(c)(2)(B). The Court should approve the proposed notice program.

V. The Court Should Schedule a Final Approval Hearing and Related Dates

The next steps in the settlement approval process are to notify settlement class members of the proposed settlement, allow members an opportunity to opt out or file objections, and hold a final approval hearing. To those ends, the parties propose the following schedule:

Last day for PNCMS to provide the settlement administrator with the class list	**30 days after entry of Preliminary Approval Order**
Notice Deadline	**60 days after entry of the Preliminary Approval Order**
Last day for Plaintiffs and class counsel to file motion for final approval of the settlement and motion for attorneys' fees, expenses, and service awards	**90 days after entry of the Preliminary Approval Order**
First reminder email to former customers	**105 days after entry of the Preliminary Approval Order**
Opt-Out/Objection Deadline	**120 days after entry of the Preliminary Approval Order**
Last day for the parties to file any responses to objections and any replies in support of final settlement approval and/or application for fees, expenses, and service awards	**14 days before Final Approval Hearing**
Final Approval Hearing	**[TBD]**
Second reminder email to former customers	**145 days after entry of the Preliminary Approval Order**
Claims Deadline	**165 days after entry of the Preliminary Approval Order**

CONCLUSION

For the reasons set forth above and in the accompanying materials, Plaintiffs respectfully request that the Court enter an order: (1) granting preliminary approval of the proposed settlement; (2) certifying, for settlement purposes, the settlement class; (3) appointing Plaintiffs Anita's, Kosie, and Choi's as class representatives representing the settlement class; (4) appointing class counsel for the settlement class; (5) approving the proposed notice program, including the proposed forms of notice, and directing that notice be disseminated pursuant to such notice program and Federal Rule 23(e)(1); (6) appointing Rust as settlement administrator and directing Rust to carry out the duties and responsibilities of the settlement administrator

specified in the settlement; (7) setting deadlines for settlement class members to request exclusion from the settlement class and to object to the settlement, and for settlement class members that are former customers to submit claims for settlement payments; (8) staying all non-settlement-related proceedings in this lawsuit pending final approval of the settlement; and (9) scheduling a final approval hearing and related dates in connection with the final approval of the settlement pursuant to Federal Rule 23(e)(2). The sooner that the order is entered, the sooner notice (and eventually, much needed relief) can be distributed to the small business settlement class members, many of which are struggling to stay afloat as a result of the COVID-19 pandemic.

Dated: November 8, 2021

Respectfully submitted,

/s/ E. Adam Webb

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2021, a copy of the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel who have registered with the Court.

/s/ E. Adam Webb
E. Adam Webb