UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

TAMI BRUIN, on behalf of herself and all others similarly situated, Plaintiff, v. BANK OF AMERICA, N.A., Defendant.	Case No. 3:22-cv-140-MOC-WCM

MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT

INTRODUCTION

Plaintiffs Tami Bruin and Eline Barokas ("Plaintiffs"), on behalf of themselves and proposed a class of current and former Bank of America, N.A. ("BANA") accountholders, reached a Settlement in this matter providing for a common fund of $8,000,000, as well as practice changes valued at $21,000,000. Notably, unlike many other consumer settlements, the $8,000,000 cash fund will be automatically distributed to Settlement Class Members without the need for them to file a claim, and without any reversion of funds to BANA. The settlement is excellent by any standard, but even more so here as it was achieved in an entirely novel and complex case. Indeed, when this case was filed, no other case in the country had ever challenged the assessment of fees on ACH transfers for outbound or "push" transfers to an accountholder's own external accounts ("ACH First Party Fees"), the central practice at issue in this case.

Pursuant to the Court's order granting preliminary approval, the Parties sent out notice to members of the Class to gauge their reaction to the proposed Settlement, as well as every state Attorney General in the Country. The results were overwhelmingly positive. Not a single member of the nearly 1-million-person class objected to the Settlement in this case or to Counsel's fee request. Moreover, no state Attorney General raised concerns with the Settlement proposal.

The preliminarily approved Settlement provides an outstanding recovery for Class Members and, as discussed herein, also satisfies all Fourth Circuit criteria for final settlement approval. Accordingly, Plaintiffs respectfully request that this Court enter an Order as follows: (1) granting Final Approval to the Settlement; (2) certifying the proposed Settlement Class for settlement purposes, pursuant to Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure; (3) granting Plaintiffs' pending Motion for Attorneys' Fees, Costs, and Class Representative

Service Awards (Dkt. No. 47); and (4) entering Final Judgment. A proposed order is attached hereto.

FACTUAL BACKGROUND

I. The Litigation

The history of this litigation is fully set forth in Plaintiffs' Unopposed Motion for Attorneys' Fees. *See* Memo. in Supp. of Mot. for Attorneys' Fees, Dkt No. 47-1. For purposes of efficiency, Plaintiffs incorporate the Factual Background section contained in that Brief. The Court granted Plaintiffs' Motion for Preliminary Approval of the Settlement on November 17, 2023. *See* Order Granting Preliminary Approval of Settlement, Dkt. No. 46 ("Prelim. Approval Order"). The Court, *inter alia*, (1) preliminarily approved the Settlement as fair, reasonable, and adequate, (2) conditionally certified the Settlement Class, (3) appointed Class Counsel, (4) approved the Settlement Class Notice, and (5) scheduled a Final Approval Hearing. *Id*.

II. The Settlement

A. Overview

Under the Settlement Agreement, BANA has agreed to do the following: (1) make a cash payment into a Settlement Fund of **$8,000,000**; and (2) cease assessing ACH First Party Fees for five years, which is reasonably valued at **$21,000,000**. Settlement[1] ¶¶ 1.46, 1.35, 2.1, 2.2, 6.

The $8 million Settlement Fund will be used to pay Settlement Class Members, the costs of notice and administration, and any attorneys' fees and expenses and Service Award that the Court may award. *Id.* ¶6.3.

[1] The Settlement Agreement was filed in connection with Plaintiffs' Motion for Preliminary Approval. *See* Dkt. No. 42-3

As a result of this litigation, BANA also agreed to not assess ACH First Party Fees for a period of at least five (5) years from the Preliminary Approval of the Settlement. *Id.* ¶ 1.35. This practice change is conservatively valued at $21 million. Declaration of Wilkerson, et. al. ("Joint Decl."), ¶ 7.

The Settlement Fund will be distributed to Settlement Class Members according to the distribution plan set out in the Settlement Agreement. Settlement ¶¶ 6.6, 6.7. Importantly, Settlement Class Members *do not* need to submit a claim form in order to receive payment. Current accountholders will receive automatic *pro rata* distributions straight to their accounts. *Id*. ¶ 6.6.3.2. Former accountholders will receive a check in the mail. *Id*. Payments from the Net Settlement Amount to each Settlement Class Member shall be distributed *pro rata* based on the unrefunded ACH First Party Fees paid from each Settlement Class Member Account, with all Settlement Class Members receiving a minimum payment of $2.00. *Id*. ¶ 6.6.2.1.

Additionally, no settlement funds will revert to BANA. After two hundred and forty (240) days from the Effective Date, any excess funds remaining from the Settlement Amount that have not been distributed in accordance with other provisions of this Settlement Agreement shall, if economically feasible, be distributed to the Settlement Class Members who successfully cashed checks or received their Settlement Class Member Payment as a credit. *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*.

B. The Settlement Class

The proposed Settlement Class is defined as the following:

> **ACH First Party Class**: All Accountholders in the United States who, during the Class Period, paid and were not refunded an ACH First Party Fee.

Id. ¶ 3.1. The class period is April 4, 2018 through November 17, 2023. *Id.* ¶ 1.13. In exchange for the consideration described above, the Settlement Class shall release BANA from any claims that were or could have been alleged in this action. *Id.* ¶¶ 1.39, 11.1.

D. Release

The Release is narrowly tailored. As of the Effective Date of the Settlement, Plaintiffs and each Settlement Class Member who does not opt out agrees to release any claims "arising out of or relating in any way to the allegations made in the Action . . . ." *Id.* ¶ 1.38.

C. The Notice Program

Following the Court's preliminary approval of the Settlement and appointment of Kroll Settlement Administration LLC ("Kroll") as the Settlement Administrator *(see* Prelim. Approval Order ¶ 6), Kroll sent 628,642 Email Notices to current accountholders who have agreed to receive account statements electronically. Supplemental Declaration of Scott Fenwick in Support of Final Approval of Settlement ("Fenwick Decl."), ¶ 9. Kroll received notice that 78,484 emails were undeliverable. *Id*. Kroll also sent initial Postcard Notices to 199,358 Settlement Class Members who were former accountholders or current accountholders who had not agreed to receive statements electronically. *Id*. ¶ 8. Kroll received 2,118 returned notices from USPS with forwarding information and promptly re-mailed Notice to the forwarding address provided by USPS. *Id*. ¶ 10. Kroll made a reasonable effort to locate correct addresses for the 11,741 Postcard Notices returned without forwarding information by performing an advanced address search. *Id*. ¶ 11. Following these efforts to obtain updated addresses, a second mailing of Postcard Notices was sent to 7,257 updated addresses. *Id*. Of those 7,257 Postcard Notices re-mailed, 736 have been returned as undeliverable a second time. *Id*. To locate correct addresses, Kroll is continuing to

skip-trace the remaining 736 undeliverable Postcard Notices. *Id*. As of March 28, 2024, Kroll has mailed and/or emailed Notice to 822,592 Settlement Class Members, with Notice to 5,408 unique Settlement Class Members currently known to be undeliverable, which is a 99.35% deliverable rate to the Class. *Id*. ¶ 12. In addition to the Postcard and Email Notices sent directly to Settlement Class Members, Kroll maintained a Settlement Website with information about the Settlement, important deadlines, and case-related documents. *Id*. ¶ 5. Kroll also established a toll-free Interactive Voice Response system to provide information and accommodate inquiries from Settlement Class Members. *Id*. ¶ 6. Class Counsel also actively responded to inquiries from potential Class Members, responding to numerous inquiries received via email and telephone. Joint Decl., ¶.1

The Notices included, among other information, a description of the material terms of the Settlement; a date by which Settlement Class Members may exclude themselves from, or "opt-out" of, the Settlement Class; a date by which Settlement Class Members may object to the Settlement; the date on which the Final Approval Hearing is scheduled to occur; and the address of the Settlement Website at which Settlement Class Members may access the Settlement Agreement and other related documents and information. Fenwick Decl., Exs. C-E.

E. Opt-Outs and Objections

The Notices informed Settlement Class Members of their right to opt out or object. *Id.* Settlement Class Members may opt out of the Settlement Class at any time during the Opt-Out Period. Settlement ¶ 1.51. The Opt-Out Period ended on March 18, 2024. Prelim. Approval Order ¶¶ 10, 26. The deadline for the Opt-Out Period was specified in each of the Notices. Fenwick Decl., Exs. C-E. The Notices also informed Settlement Class Members of their right to object to the Settlement and/or to Class Counsel's application for attorneys' fees, costs, and expenses, and/or

Service Award. *Id.* The postmark deadline for Objections was March 18, 2024. Prelim. Approval Order ¶¶ 10, 26. Following Notice to the Class, the Settlement Administrator received ten (10) timely requests for exclusion and zero (0) objections. Fenwick Decl., ¶ 14.

F. Attorneys' Fees, Costs, and Expenses, and Service Award

On February 15, 2024, Class Counsel filed a Motion requesting approval of attorneys' fees costs, and Class Representative service awards. *See* Memo. in Supp. of Mot. for Attorneys' Fees, Dkt. No. 47-1. Class Counsel have moved for an approval of attorneys' fees of one-third of the common fund (in the amount of $2,666,667), costs of $47,747.85, and Class Representative service awards totaling $10,000. *Id*. at 1. BANA has not opposed this Motion in any respect, and no Class Member or state Attorney General has filed an Objection or challenge to this aspect of the settlement. Fenwick Decl., ¶ 14.

LEGAL STANDARD

Under Rule 23, a settlement must be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Fourth Circuit has enumerated several factors that may bear on the fairness of the settlement and the adequacy of the consideration to the Class. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991). The factors for assessing fairness include "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of securities class action litigation." *Id*. at 159. The factors for assessing adequacy include "(1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement." *Id*. The

2018 amendments to Rule 23(e) also formalize a list of core considerations for settlement approval such as: (1) whether class representatives and class counsel have adequately represented the class, (2) whether the proposal was negotiated at arm's length, (3) whether the relief provided for the class is adequate, and (4) whether the proposal treats Settlement Class Members equitably relative to each other. Fed. R. Civ. P. 23(e)(2). The 2018 amendments to Rule 23(e) also formalize a list of core considerations for settlement approval such as: (1) whether class representatives and class counsel have adequately represented the class, (2) whether the proposal was negotiated at arm's length, (3) whether the relief provided for the class is adequate, and (4) whether the proposal treats Settlement Class Members equitably relative to each other. Fed. R. Civ. P. 23(e)(2). The Fourth Circuit has held that the *Jiffy Lube* standards "almost completely overlap with the new Rule 23(e)(2) factors, rendering the analysis the same." *See Herrera v. Charlotte School of Law, LLC*, 818 F. App'x 165, 176 n.4 (4th Cir. 2020) (citing *In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, 952 F.3d 471, 474 n.8 (4th Cir. 2020)).

ARGUMENT

I. The Court Should Grant Final Approval to the Settlement.

The Settlement preliminary approved by this Court provides substantial cash compensation to Settlement Class Members along with significant business practice changes to protect Settlement Class Members and future BANA accountholders from incurring ACH First Party Fees for at least five years. In total, the Parties estimate the value of the Settlement be the combined value of a $8,000,000 Settlement Fund, as well as business practice changes that will result in approximately $21,000,000 in savings to Settlement Class Members who are current accountholders and future BANA accountholders over the next five years. This Settlement was the

result of lengthy, intense, arm's length negotiations by experienced counsel for both the Plaintiffs and BANA and represents an outstanding result for the Class. The Settlement was also reached after years of hard-fought litigation in two different federal courts by knowledgeable counsel during which time the Parties litigated Motions to Dismiss and engaged in substantive discovery, including numerous depositions. As such, the settlement is reasonable and fits comfortably within the range warranting approval.

A. The Settlement Is Fair.

Each of the Fourth Circuit's relevant fairness factors weighs in favor of preliminarily approving the Settlement here. *See In re Jiffy Lube Secs. Litig*., 927 F.2d at 158–59.

First, the proposed settlement was reached after nearly three years of active, hard-fought litigation of an entirely novel case. Plaintiffs' claims were tested by BANA's Motions to Dismiss, which was thoroughly briefed and litigated by both sides and duly considered by this Court and the *Barokas* court, where Judge Carter also denied BANA's Motion for Reconsideration of the Opinion and Order denying its Motion to Dismiss as to Plaintiff Barokas' claims. *See Bruin v. Bank of America, N.A.*, S.D.N.Y. Case No. 1:21-cv-02272 (the "*Barokas* Action"), Dkt. No. 35.

Second, the Settlement follows active and extensive discovery by both sides. The Parties exchanged critical internal documents and data from BANA and documents from Plaintiffs. Plaintiffs have deposed a BANA representative, and BANA took, and Plaintiffs defended, the in-person deposition of Plaintiff Bruin, as well. The Parties have also exchanged formal written discovery in the form of interrogatories and requests for production of documents. Importantly, no mediation or settlement discussions took place until after Plaintiffs' counsel had obtained and analyzed classwide damages numbers in order to determine a reasonable settlement value. Plaintiffs' counsel retained an expert to opine on issues relating to ascertainability, and to analyze

potential classwide damages This extensive discovery has given both sides "additional insight to evaluate the merits" of the case and has "laid the groundwork for the arm's-length negotiations that resulted in the settlement." *Gaston v. LexisNexis Risk Sols. Inc.*, No. 516CV00009KDBDCK, 2021 WL 244807, at *6 (W.D.N.C. Jan. 25, 2021).

Third, the circumstances of the settlement negotiations demonstrate that the Settlement was the result of a fair, arm's length process that was often contentious. While discovery was ongoing, the Parties participated in a private mediation session with Judge Diane Welsh (Ret.) on June 30, 2023, which ultimately resulted in the Parties reaching a settlement in principle. Following the mediation and an agreement in principle, the Parties proceeded with limited confirmatory discovery related to damages, and worked on finalizing the Settlement Agreement involving several more months of negotiations.

Finally, counsel for both sides have significant experience in consumer class-action litigation involving bank-fee practices. Class Counsel is highly experienced in consumer class action litigation, as demonstrated by their firm resumes, and they have brought that significant experience to bear in litigating and settling this case. *See* Joint Decl., ¶ 10 , Exs. A-D; *see also* Fed. R. Civ. P. 23(e)(2)(A). Class Counsel collectively have decades of experience litigating consumer class actions against financial institutions and have litigated and settled dozens of class actions involving various types of improper fees, recovering hundreds of millions of dollars for those classes. *Id*. Counsel "may be evaluated by their affiliation with well-regarded law firms with strong experience in the relative field," and by any measure, Class Counsel satisfies this prong. *See In re Neustar, Inc. Securities Litig.*, No. 1:14cv885, 2015 WL 5674798, at *11 (E.D. Va. Sept. 23, 2015) (quoting *In re Am. Capital S'holder Derivative Litig.*, No. 11-2424-PJM, 2013 WL 3322294, at *4 (D. Md. June 28, 2013)). Based on their experience, Class Counsel endorse the

Settlement as fair and adequate. Joint Decl. ¶ 11. Counsel's "endorse[ment of] the settlement as fair and adequate under the circumstances . . . should be afforded due consideration in determining whether a class settlement is fair and adequate." *Gaston*, 2021 WL 244807, at *6 (collecting cases).

B. The Relief Provided to the Class Under the Settlement is Adequate.

The substantial relief provided by the Settlement also favors approval. Under the Settlement, BANA will provide a settlement fund of $8 million, which alone represents a significant portion of the estimated classwide damages should Plaintiffs have prevailed on every issue at class certification and trial. Joint Decl., ¶ 6. Assuming Plaintiffs prevailed at trial on liability (which BANA would have vigorously contested), Plaintiffs would have argued for a refund of every improperly assessed fee incurred by Class members, and the $8 million recovery represents approximately 37% of that damages figure. *Id*. In addition to this cash payment, however, BANA has also agreed to not charge fees on otherwise free push transfers of Accountholder funds via the National Automated Clearing House Association network to the Accountholders' own external account, which will save Current and future Accountholder Settlement Class Members over $21,000,000 over the next five years in fees. *Id*. ¶ 7. In short, the settlement benefits are tremendous.

Courts assess the adequacy of relief provided under a settlement based on four factors: (1) the costs, risks, and delay of trial and appeal, (2) the effectiveness of the proposed method of distributing relief to the class, (3) the terms of the proposed award of attorney's fees, and (4) the existence of other agreements reached by the Parties outside the settlement. Fed. R. Civ. P. 23(e)(2)(C); *see also Jiffy Lube*, 927 F.2d at 159. Each factor is met here.

1. The reaction of the Class to the Settlement

The reaction of the class to the settlement "is perhaps the most significant factor to be weighed in considering its adequacy." *Sala v. Nat'l R.R. Passenger Corp.*, 721 F. Supp. 80, 83 (E.D. Pa. 1989). Here, the Class Members' clear embrace of the Settlement "weighs significantly in favor of the settlement's adequacy." *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 257 (E.D. Va. 2009). Following notice to the Class, the Settlement Administrator and Class Counsel received ten (10) timely requests for exclusion and zero timely (or untimely) objections. Fenwick Decl., ¶ 14.

The complete lack of objections to the Settlement and the small number of opt-outs relative to the size of the Class "testifies to the value of the settlement in the eyes of the class[es]," and supports final approval. *Deloach v. Philip Morris Companies*, No. 00-CV-01235, 2003 WL 23094907, at *10 (M.D.N.C. Dec. 19, 2003). The lack of objections, in particular, "raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Myers v. Loomis Armored US, LLC*, No. 18-CV-00532, 2020 WL 1815902, at *3 (W.D.N.C. Apr. 9, 2020) (quoting *West v. Cont'l Auto., Inc.*, No. 16-CV-00502, 2018 WL 1146642, at *6 (W.D.N.C. Feb. 5, 2018)). As such, the "utter absence of objections from the class . . . militates strongly in favor of approval of the settlement." *Sala*, 721 F. Supp. at 83.

2. Costs, risks, and delay of trial and appeal

Plaintiffs' remaining claims for violation of the NCUDTPA, violation of the NY GBL § 349 , and violation of the NJCFA are strong, but maintaining these claims through trial and appeal would entail significant risk, uncertainty, and costs for both sides. Throughout this case, BANA has zealously disputed all of the Plaintiffs' claims. And BANA would have undoubtedly challenged class certification and moved for summary judgment. Both of these motions could have

required appellate resolution. Where, as here, both sides have notched significant litigation victories and defeats over the course of several years of litigation, the resolution of potential appeals by both sides "would require protracted adversarial litigation and appeals at substantial risk and expense to both Parties." *Gaston*, 2021 WL 244807, at *6. This strong likelihood of "substantial future costs favors approving the proposed settlement." *Id.*

3. Effectiveness of the proposed method of distributing relief to the class

The Settlement Fund will be *automatically* distributed to Settlement Class Members, without any need for a claim form, either by check or direct deposit. Under the terms of the Settlement, 45 days after the Settlement Effective Date, BANA will directly deposit payments under the settlement into the accounts of Settlement Class Members who are current accountholders as of the date of final approval of the Settlement. Settlement ¶ 6.6.3.3. For those Settlement Class Members that are not Current Accountholders at the time of final approval, BANA will mail them a check. *Id.* ¶ 6.6.3.4. Any remaining funds after the initial disbursement will be distributed to the Settlement Class Members that successfully cashed check or received direct deposits, to the extent economically feasible. *Id.* ¶ 6.7. If there are funds remaining after this second distribution or the distribution is not economically feasible, Class Counsel will petition the Court to distribute the remaining funds to an appropriate *cy pres* recipient, either a consumer protection or financial services charity. *Id.*

4. Terms of the proposed award of attorneys' fees

Under the terms of the Settlement, Class Counsel may move for an award of attorneys' fees. Settlement ¶ 9.1. As discussed more fully in Plaintiffs' Motion for Attorneys' Fees,[2]

[2] Class Counsel's arguments in favor of approving the requested fee award are fully set forth in Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Attorneys' Fees. *See* Dtk. No. 47-1. This Memorandum is incorporated by reference.

"[w]ithin the Fourth Circuit, contingent fees of roughly 33% are common." *Earls v. Forga Contracting, Inc.*, No. 1:19- CV-00190-MR-WCM, 2020 WL 3063921, at *4 (W.D.N.C. June 9, 2020); *see also Kelly v. The Johns Hopkins Univ.*, No. 1:16-cv-2835-GLR, 2020 WL 434473, at *3 (D. Md. January 28, 2020) ("Contingent fees of up to one-third are common in [the Fourth] [C]ircuit.").

5. Existence of other agreements reached by the Parties outside the settlement

Courts also consider whether there are additional agreements between the Parties outside of the settlement agreement that could cast doubt on the fairness or adequacy of the settlement. *See* Fed. R. Civ. P. 23(e)(2)(C)(iv). The Settlement here "contains the Parties' entire agreement on and understanding of the subject-matter at issue in the Action," and "supersedes all prior negotiations and proposals, whether written or oral." Settlement ¶ 13.9.2.

C. The Settlement Treats Settlement Class Members Equitably.

The Settlement provides relief to Settlement Class Members on a *pro rata* basis depending on the total amount of unrefunded ACH First Party Fees that the Settlement Class Member paid during the Class Period. Settlement ¶ 6.6.2. This method for calculating each class member's recovery treats each class member equitably based on the extent to which they were impacted by BANA's conduct. All Current and future BANA Accountholder Settlement Class Members likewise benefit from the agreement not to assess ACH First Party Fees required by the Settlement.

II. The Court Should Certify the Settlement Class.

A. The Proposed Class Is Ascertainable.

Under Rule 23, a class definition must be sufficiently definite, so that "a court can readily identify the class members in reference to objective criteria." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). This ascertainability requirement is easily satisfied in this case, as the

members of the Class are identifiable based on objective criteria applied to BANA's well-maintained records covering every potential transaction and Class member during the Class Period.

B. The Proposed Class Satisfies the Requirements of Rule 23(a).

Under Federal Rule of Civil Procedure 23(a), a class may be certified when "(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." Fed. R. Civ. P. 23(a). The class here satisfies each of these requirements.

1. Numerosity

Class certification is appropriate when class members are "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). While "[n]o specified number is needed to maintain a class action," *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984), courts within the Fourth Circuit generally "find classes of at least 40 members sufficiently large to satisfy the impracticability requirement," *In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. 328, 337 (D. Md. 2012), *amended*, 962 F. Supp. 2d 840 (D. Md. 2013) (citation omitted). Here, the Class contains hundreds of thousands of Settlement Class Members. Numerosity is therefore satisfied.

2. Commonality

Rule 23's requirement that there are "questions of law or fact common to the class," is also satisfied here. A common question is "one that can be resolved for each class member in a single hearing," and does not turn on the "'individual circumstances of each class member.'" *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (quotation omitted). A common question must be "capable of classwide resolution" such that "determination of its truth or falsity will resolve an issue that is central" to each class member's claims "in one stroke." *Wal-Mart*

Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). Rule 23(a) does not require commonality of all issues; rather, "even a single common question will do." *Id.* at 359 (quotation omitted),

Here, there are several common legal and factual questions that are common to all members of the class. Common questions include: (1) whether BANA violated the consumer protection laws of North Carolina, New York, and New Jersey through its fee policies and practices; (2) the proper method or methods by which to measure damages; and (3) whether BANA was unjustly enriched. These common questions are sufficient to satisfy the requirements of Rule 23(a)(2).

3. Typicality

Under Rule 23's typicality requirement, class representatives are "typical" if they are "part of the class and possess the same interest and suffer the same injury as the class members." *Broussard v. Meineke Discount Muffler Shops, Inc*., 155 F.3d 331, 338 (4th Cir. 1998). "The essence of the typicality requirement is captured by the notion that 'as goes the claim of the named plaintiff, so goes the claims of the class.'" *Deiter v. Microsoft Corp*., 436 F.3d 461, 466 (4th Cir. 2006) (citing *Broussard*, 155 F.3d at 340).

The proposed Class Representatives assert the same claims stemming from the same conduct by BANA as the absent Settlement Class Members. The proposed Class Representatives' claims arise from the same factual circumstances, are based on the same legal theories, are subject to the same defenses, and rise or fall with the claims of the absent Settlement Class Members. Typicality is satisfied here.

4. Adequacy of Representation

The adequacy inquiry "serves to uncover conflicts of interest between named Parties and the class they seek to represent." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). For a conflict of interest to defeat class certification, that conflict "must be fundamental," "must go to

the heart of the litigation," and "must be more than merely speculative or hypothetical." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430-31 (4th Cir. 2003) (quoting 6 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 18:14 (4th ed. 2002)).

There is no such conflict here. As discussed above, the proposed Class Representatives assert the same claims based on the same alleged conduct as the absent Settlement Class Members. There is likewise no conflict between the Settlement Class Members, as they are all compensated under the settlement on a *pro rata* basis based on the total amount of unrefunded ACH First Party Fees that the Settlement Class Member paid during the Class Period. Moreover, the proposed Class Representatives and absent Class Members who are Current or future Accountholders benefit from the agreement not to assess ACH First Party Fees.

Class Counsel also satisfies the adequacy requirement. Class Counsel has effectively handled numerous consumer protection and complex class actions, including in the area of financial services, and bank fees specifically. *See* Joint Decl., ¶ 10, Exs. A-D. Class Counsel are qualified, experienced, and able to conduct this litigation and will fully and adequately represent the Class.

C. The Proposed Class Satisfies the Requirements of Rule 23(b).

1. Predominance

The first requirement under Rule 23(b)(3) is that questions of law or fact common to Settlement Class Members predominate over questions affecting only individual members. Fed. R. Civ. P. 23(b)(3). This inquiry tests whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623; *see also Gunnells*, 348 F.3d at 428.

Here, Plaintiffs seek to remedy common legal grievances based on BANA's assessment of certain fees, allegedly in violation of BANA's account agreements. The common questions of the legality of this practice and BANA's policies associated with the practice predominate over questions—if any—affecting only individual Settlement Class Members, providing a common link between all the Settlement Class Members and BANA. *See Jeffreys v. Comm'ns Workers of Am., AFL-CIO*, 212 F.R.D. 320, 323 (E.D. Va. 2003) (finding predominance satisfied where "[t]he question in each individual controversy" would be resolved according to the same legal inquiry); *Talbott v. GC Servs. Ltd. P'Ship*, 191 F.R.D. 99, 105-06 (W.D. Va. 2000) (finding predominance satisfied based on the "standardized nature" of the defendant's conduct). "The fact that damages will differ from class member to class member does not defeat the finding of predominance because liability is common to the class." *Jeffreys*, 212 F.R.D. at 323.

2. *Superiority*

Finally, the Court must determine whether a class action is superior to other methods of adjudication for the fair and efficient adjudication of the controversy. *See* Fed. R. Civ. P. 23(b)(3). The factors to be considered are: (1) individual class members' interest in controlling individual cases; (2) the existence of related litigation; (3) the desirability of concentrating the litigation in one forum; and (4) manageability. *Droste v. Vert Capital Corp.*, No. 3:14-cv-467, 2015 WL 1526432, at *8 (E.D. Va. April 2, 2015). In settlement cases, courts need not consider the last factor. *Amchem*, 521 U.S. at 593. Here, a class action is superior to individual suits.

First, individual suits are unlikely here because the probable recovery (even of full damages) is relatively small per Settlement Class Member, particularly compared to the expense of litigation. *See In re NeuStar, Inc.*, 2015 WL 5674798, at *8 (finding superiority satisfied where individual actions were "unlikely due to the size of probable recovery and expense of individual

litigation."). Where the "policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights," *Amchem*, 521 U.S. at 617, a suit like this is well-suited for class action litigation. Second, Class Counsel is not aware of other pending individual litigation against BANA regarding the practices at issue in this Action. Joint Decl., ¶ 12. And third, it would promote judicial economy to resolve this case as a class before this Court rather than requiring individual plaintiffs to file separate lawsuits. *In re NeuStar, Inc.*, 2015 WL 5674798, at *9. Accordingly, a class action is a superior method of adjudication.

III. The Court Should Appoint Settlement Class Counsel.

Fed. R. Civ. P. 23(g) requires a Court to appoint class counsel. In appointing class counsel, the Court "must" consider: (a) the work counsel has done in identifying or investigating potential claims in the action; (b) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (c) counsel's knowledge of the applicable law; and (d) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A); *see also In re Neustar, Inc.*, 2015 WL 5674798, at *13. The court "may" also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

Proposed Class Counsel from the law firms of KalielGold PLLC ("KalielGold"), Edelsberg Law, P.A. ("Edelsberg Law"), Shamis & Gentile, P.A. ("Shamis & Gentile"), and The Van Winkle Law Firm ("Van Winkle") have expended a great deal of time, effort, and expense investigating, litigating, and resolving this Action. Further, as set forth in the firm resumes, each attorney from each firm is highly experienced in complex consumer class action litigation. *See* Joint Decl., Exs. A-D (Firm resumes of Class Counsel). It is clear from their track-record of success that Class

Counsel are highly skilled and knowledgeable concerning class-action practice. Class Counsel have the experience to represent the Settlement Class vigorously. Accordingly, Plaintiffs request that the Court appoint Sophia Gold of KalielGold; Christopher Gold of Edelsberg Law; and Andrew Shamis of Shamis & Gentile as co-lead counsel, and David M. Wilkerson of The Van Winkle Law Firm as liaison counsel.

IV. Notice to Class Members Was Adequate and Satisfies the Requirements of Rule 23 and Due Process.

The Notice Plan approved by this Court and carried out by the Settlement Administrator conforms with the procedural and substantive requirements of due process and Rule 23. Due process and Rule 23 require that Settlement Class members receive notice of the settlement and an opportunity to be heard and participate in the litigation. *See* Fed. R. Civ. P. 23(c)(2)(B). The mechanics of the notice process are left to the discretion of the Court, subject only to the broad reasonableness standards imposed by due process.

Here, the Settlement Administrator, Kroll, directed Notice to the Settlement Class Members via direct mail and email. Fenwick Decl., ¶¶ 8-12. A Long Form Notice was also available for Settlement Class Members who requested it, and it was posted on the Settlement Website. *Id*. ¶ 5. To ensure that notice reaches as many Settlement Class Members as possible, Kroll performed reasonable address traces for the initial Postcard Notice and Email Notice. *Id*. ¶ 11.

All of the Notices included important information about the Settlement, including how to opt out or object, and where to find more information about the case or contact Class Counsel. *Id*., Exs. C-E. The substance of the notice fully apprised Settlement Class Members of their rights. Additionally, the Notices were designed to be "noticed," reviewed, and—by presenting the information in plain language—understood by Settlement Class Members. The design of the

Notices followed principles embodied in the Federal Judicial Center's illustrative "model" notices posted at www.fjc.gov. The Notices contained plain-language summaries of key information about Settlement Class Members' rights and options. Under Rule 23(e), the notice must generally describe the settlement in sufficient detail to alert those with adverse viewpoints to investigate and come forward to be heard. The Notices contained all of the critical information required to apprise Settlement Class Members of their rights. This approach to notice is adequate and provided sufficient detail to allow Settlement Class Members with adverse viewpoints to come forward and be heard.

The Federal Judicial Center states that a notice plan that reaches 70% of class members is one that reaches a "high percentage" and is within the "norm." Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, "Managing Class Action Litigation: A Pocket Guide or Judges," at 27 (3d ed. 2010).[3] Here, notice reached approximately 99.35% of class members. Fenwick Decl., ¶ 12. The Notice to the Class here was the best notice that is practicable and is equivalent or superior to notice campaigns approved in similar class action settlements.[4]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court: (1) grant Final Approval to the Settlement; (2) finally certify the proposed Settlement Class for settlement purposes, pursuant to Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure; (3) grant

[3] This document is available at https://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf.

[4] Kroll also gave notice of the proposed Settlement to appropriate state and federal officials in compliance with the Class Action Fairness Act, 28 U.S.C. § 1715(b). Kroll sent CAFA Notice to government officials on September 21, 2023. Fenwick Decl., ¶ 4. CAFA Notice was mailed by first-class certified mail to the Attorney General of the United States and the appropriate government officials for all fifty (50) states, the District of Columbia, and the United States' Territories. *Id*. Kroll also sent the CAFA notice via United Parcel Service to two offices of the Office of the Comptroller of the Currency, the Consumer Financial Protection Bureau, and the Attorney General of the United States. *Id*.

Plaintiffs' pending Motion for Attorneys' Fees, Costs, and Class Representative Service Awards (Dkt. No. 47); and (4) enter Final Judgment.

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Respectfully submitted,

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