UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

DANELL BEHRENS, individually, and on behalf of all others similarly situated,

Plaintiff,

vs.

LANDMARK CREDIT UNION, and DOES 1-100,

Defendants.

Case No.: 17-cv-101

Judge James Peterson

PLAINTIFF DANELL BEHRENS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

MEMORANDUM

I. SUMMARY

This is a class action alleging that Defendant Landmark Credit Union ("LCU" or "Defendant") charged overdraft fees based on the "available balance" in customer accounts (*i.e.*, a subset of the actual account balance from which money has been deducted by placing holds on funds earmarked for pending transactions which have not yet posted) rather than the actual balance (*i.e.*, the money actually in the account, sometimes called "ledger balance"), in alleged violation of the terms of its contract governing the overdraft program for certain types of transactions. Plaintiff also alleges that Defendant violated Regulation E, 12 C.F.R. § 1005.17 ("Reg. E"), by enrolling credit union members in its overdraft program for subject transactions without obtaining their affirmative consent to do so based on a complete and valid disclosure of the terms of the program. LCU disputes Plaintiff's contentions.

After law and motion practice and discovery into the underlying facts, the parties reached a proposed settlement of this matter through the acceptance of a mediator's proposal made by a retired federal judge after a mediation did not settle the matter. (Declaration of Taras Kick [hereafter "Kick Decl."] ¶ 12.) This Honorable Court granted preliminary approval to the proposed settlement in an Order dated June 26, 2018, finding preliminarily that the classes as defined in the Settlement Agreement meet all of the requirements for certification of a settlement class found in the Federal Rules of Civil Procedure and applicable case law (Preliminary Approval Order [hereafter "Order"], p. 3-7), that the proposed settlement falls within the range of reasonableness for potential final approval, and is the product of arm's length negotiations by experienced. (*Id.*, p. 7-11.) As such, this Court ordered that notice of the proposed settlement be served on class members. (*Id.*, p. 9-13.)

The parties have complied with this Court's Order regarding notice, and Plaintiff therefore now presents the matter for final approval. As evidenced by the contemporaneously filed declaration of Eric Kierkegaard of the court-appointed claims administrator Garden City Group (hereafter "GCG"), the direct notice program ordered by this Court has been very successful. Specifically, 17,672 of the class members, meaning 97.8%, successfully received the

notice ordered by this Court. (Declaration of Eric Kierkegaard of GCG [hereafter, "GCG Decl."], ¶ 16.) Further, to date, only one class member of the 17,672 who received the notice has elected to opt out of the proposed settlement being presented to this Court for final approval, meaning more than 99.99% of the class members have elected to remain in the proposed settlement. (GCG Decl. ¶ 21.) Further, as of the date of this filing, there have been no objections to the settlement whatsoever. (GCG Decl. ¶ 22).[1]

In sum, the proposed settlement of this class action is a very good result for class members, and class members' reaction to it to date has been overwhelmingly favorable.

II. BACKGROUND

A. The Settlement is a Very Good Result for the Class Members.

There are three different tangible benefits under the proposed settlement agreement. First, LCU will pay $950,000 of new money, with no reversion of any residue to LCU. (*See* Settlement Agreement, Declaration of Taras Kick filed in Support of the Motion for Preliminary Approval, Exh. 1, at ¶ 1(s), (hereafter "Settlement Agreement").) Second, LCU has agreed to change the manner by which it assesses overdraft fees to essentially the manner in which Plaintiff contended in this lawsuit was the proper manner. This means a very real concrete savings to class members of at least $385,000 per year, for a minimum of three years, meaning *at least* $1,155,000. (Declaration of Database Expert Arthur Olsen filed in Support of Motion for Preliminary Approval (hereafter "Olsen Decl.") ¶ 11.) LCU has contracted that this manner of processing overdraft fees will start after the approval of this proposed settlement, and last a minimum of three years. (Settlement Agreement ¶ 2.)

In its Order granting Preliminary Approval, this Court inquired as to the number of class members who remain members of the defendant. (Order, p. 10.)) The answer is that as of June 28, 2018, 13,704 of the 18, 062 class members, or 75.87%, remain members of Defendant. (GCG Decl. ¶ 5.) In case it was this Court's thinking to equate the value of the savings conferred by

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[1] The deadline to opt out expires on August 15 and to object on August 24. Class Counsel will provide a final tally to this Court by August 23 as per the Court's Order.

the change in practice to the percentage of current class members, this would mean a direct savings to class members only of $876,321 over the three year period. Finally, as a part of this proposed settlement, LCU also has agreed to waive $10,000 in overdraft fees which it assessed against class members but has not yet collected.[2] (Settlement Agreement ¶ 9.) This means a total value of this proposed settlement of at least $2,115,000 (at least $1,155,000 in savings from the change in practices plus $950,000 new money plus $10,000).[3]

The damages of the two classes, after accounting for overlap, are $2,101,565. (Olsen Decl. ¶¶ 8-10.) This means that as a percentage, if the full value of the settlement of $2,115,000 is taken, the recovery for class members presented in the proposed settlement actually exceeds 100%. If the savings of $1,155,000 is reduced by the percentage of class members who currently remain members of Defendant (75.87% remain members), this means a settlement value of $1,836,321, or 87.38%. Finally, if only the $950,000 in new money and $10,000 in forgiven overdraft fees were counted, the proposed settlement still represents approximately 45.5% of the total damages at issue.

The manner of claims in the claims process allowed the class members who believed they have been most aggrieved by the alleged wrongfulness of the practice to have maximum opportunity to address this. Specifically, there was a claims process for any Regulation E class member who was assessed an overdraft fee during the Regulation E class period which allowed each such class member to claim compensatory damages for up to ten eligible overdrafts to be refunded from one-half of the net settlement fund. (Settlement Agreement ¶ 8(d)(iv)(a).) To date, 460 timely claims have been made, claiming 1,136 Regulation E Overdraft charges worth a combined $34,080. (GCG Decl. ¶ 19.) Class members from the Sufficient Funds class, which means those who were charged an eligible overdraft fee during the class period when there was

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[2] The parties had originally calculated this amount at $88,000 but further investigation has determined it is $10,000 as some of this $88,000 was previously collected by Defendant prior to this Settlement Agreement being entered. Defendant has agreed it is not going to attempt to collect any portion of this $10,000 and waives it.

[3] There additionally is a fourth benefit from this settlement, that being an improvement in disclosures. (Settlement Agreement ¶ 2.)

enough money in the account to cover the transaction in question, will receive a direct distribution from the other one-half of the net settlement fund, plus the unclaimed moneys from the one-half of the net settlement fund from the claims portion. (Settlement Agreement ¶ 8(d)(iv)(b).)[4]

All class members will be paid by direct deposit into their accounts if they are current LCU credit union members, or will be mailed a check if they no longer have an account with LCU. (Settlement Agreement ¶ 8(d)(iv)(d).) Finally, any money that remains after this distribution process, rather than revert to Defendant, instead is proposed to go to two 501(c)(3) non-profits, 50% to Public Citizen, which is actively involved in protecting consumer rights such as the ones at issue in this case, and 50% to United Way of Greater Milwaukee & Waukesha County. (Settlement Agreement ¶ 12.)

B. The History of this Case.

The Complaint in this action was filed on February 9, 2017. (Docket No. 1 "Complaint"), alleging that LCU had breached its contracts with its customers and violated Reg. E by charging overdraft fees for transactions which, to be completed, required less money than was already in the customers' actual or ledger balances. (Complaint, ¶ 1, ¶¶ 22-32.) On April 3, 2017, Defendant filed a motion to partially dismiss the Complaint on the grounds that the Electronic Funds Transfers Act claim is allegedly barred by the statute of limitations. (Docket No. 14.) On April 11, 2017, along with its Notice of Deposition of Plaintiff, Defendant served on Plaintiff its First Set of Requests for Production of Documents, to which Plaintiff responded on April 17, 2017. (Kick Decl. ¶ 13.) Plaintiff produced thirty-six pages of documents. (Kick Decl. ¶ 13.) On April 18, 2017 Defendant took Plaintiff's deposition. (Kick Decl. ¶ 13.) On April 19, 2017 Plaintiff took the deposition of Defendant's two Persons Most Knowledgeable on overdraft issues, Doe Gregersen and Wendie Koconis. (Kick Decl. ¶ 13.)

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[4] To prevent a double recovery for individual fees that fall under both the Sufficient Funds and Reg. E damages categories, Class Members shall not be entitled to recover more for each allegedly improper charge than the actual amount charged. (Settlement Agreement ¶ 8(d)(iv)(c).)

On May 2, 2017, the parties engaged in mediation before the Honorable Edward A. Infante (Ret.), of JAMS. (Kick Decl. ¶ 14.) Although the matter did not settle at the mediation, Judge Infante made a written mediator's proposal about two weeks after the mediation and gave the two sides eight days to decide whether to accept or reject the mediator's proposal. (*Id.*) Both sides accepted. (*Id.*) The parties' settlement negotiations at all times were at arm's length and adversarial. (Kick Decl. ¶ 14.)

C. Analysis of the Data.

Plaintiff's database expert, Arthur Olsen, has performed a thorough analysis of Defendant's actual data pertaining to overdraft fees assessed on class members. (Olsen Decl. ¶¶ 6-10.) Mr. Olsen is considered to be one of the leading experts on overdraft fee database analysis, and has worked on overdraft litigation database analysis in such matters as *Gutierrez v. Wells Fargo*, 730 F.Supp.2d 1080 (N.D. Cal. 2010). (Olsen Decl. ¶ 5.)

Mr. Olsen analyzed data produced by LCU which covers the time period January 1, 2010 through February 28, 2017, and which encompasses the entire class period of February 9, 2011 through February 28, 2017. (Olsen Decl. ¶ 6.) The class data contained detailed information regarding all overdraft fees assessed by LCU between January 1, 2010 and February 28, 2017, and included account numbers, the date of each overdraft fee, the amount of each overdraft fee, the type of transaction which caused each overdraft fee, and the balance of the account at the time when each transaction posted to the account. (Olsen Decl. ¶ 7.) For the Sufficient Funds Class, he identified 14,286 LCU members that were assessed at least one overdraft fee between February 9, 2011 and February 28, 2017 when the member had a positive ledger balance in their account that was sufficient to cover the transaction at issue, after the application of any refunds already credited by LCU. (Olsen Decl. ¶ 8.) There were 52,595 such fees totaling $1,576,955. (*Id.*) For the Regulation E Class, Mr. Olsen identified 6,020 LCU members that were assessed at least on overdraft fee for an ATM or debit card transaction for the first time between February 9, 2016 and February 28, 2017, with 21,747 such fees totaling $652,410. (Olsen Decl. ¶ 9.) After accounting for overlap between the two classes, Mr. Olsen concluded that there were 70,082 fees totaling $2,101,565. (Olsen Decl. ¶ 10.) Therefore, damages have been very robustly analyzed.

III. LEGAL ANALYSIS

A. The Settlement Should Be Finally Approved.

Class Counsel believe this is a fair settlement for the class members (Kick Decl. ¶ 24), and Class Counsel have been involved in a substantial number of class actions against financial institutions pertaining to the issue in this case, that being alleged improper overdraft fees. (Kick Decl. ¶¶ 2-4.) Further, to Defendant Landmark's legitimate credit, it has agreed to a change its overdraft fee practice which is very meaningful to class members and really will benefit all class members and all of Landmark's members, a new practice which is a much more consumer friendly practice than the prior practice.

With regard to the law, it is uncontroversial that "Federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). It is "generally for the parties to decide how much litigation risk they wish to take, and courts should be hesitant to second-guess them." *Martin v. Reid*, 818 F.3d 302 (7th Cir. 2016). "[F]ederal courts look with great favor upon the voluntary resolution of litigation through settlement. This rule has particular force regarding class action lawsuits." *Martin v. Caterpillar, Inc.*, No. 07-cv-1009, 2010 U.S. Dist. LEXIS 82350, at *5-6 (C.D. Ill. Aug. 12, 2010) (quoting *Air Line Stewards and Stewardesses Ass'n, Local 550 v. Tans World Airlines, Inc.*, 630 F.2d 1164, 1166-1167 (7th Cir. 1980)). In determining whether to grant final approval over a class action settlement, the proper frame of analysis is whether the settlement is "lawful, fair, reasonable, and adequate." *Id.*; *see also Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 313 (7th Cir. 1980), *overruled on other grounds by Felzen v. Cal. Pub. Employees' Ret. Sys.*, 134 F.3d 873 (7th Cir. 1998). While judges must assess the settlement agreement in its entirety with respect to these factors; *see, e.g., id.* at 315 (citations omitted); *Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996) (citations omitted); the analysis is "limited" in one respect: "[j]udges should not substitute their judgment as to optimal settlement terms for the judgment of the litigants and their counsel" and need not undertake the full investigation of the claims that would be necessary if the case were being tried before them. *Armstrong*, 616 F.2d at 314-15. Instead, the Court's "inquiry is limited to the consideration of whether the proposed settlement is lawful, fair, reasonable, and

adequate." *Isby*, 75 F.3d at 1196.

In determining whether the settlement is "lawful, fair, reasonable, and adequate," the Seventh Circuit has directed courts to address the following factors: (1) the strengths of the plaintiff's case compared against the terms of the settlement; (2) the expected complexity, length, and expense of the litigation; (3) the amount of opposition to the settlement among affected parties; (4) the presence of collusion in obtaining settlement; (5) the stage of the proceedings; and (6) the amount of discovery completed. *GE Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082 (7th Cir. 1997); *see also Martin v. Caterpillar, Inc.*, 2010 U.S. Dist. LEXIS 82350, at *4-5.

1. The Strengths of Plaintiff's Case Compared Against the Terms of the Settlement.

"Generally, the first factor, the strength of Plaintiffs' case measured against the terms of the settlement, is the most important factor." *Martin v. Caterpillar, Inc.*, 2010 U.S. Dist. LEXIS 82350, at *5; *see also Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) ("The 'most important factor relevant to the fairness of a class action settlement' is the first one listed: 'the strength of plaintiff's case on the merits balanced against the amount offered in the settlement.'")

Here, Plaintiff's expert, Arthur Olsen, has determined that the damages of the two classes, after accounting for overlap, are a total of $2,101,565. (Olsen Decl. ¶¶ 8-10.) This means that if the full value of the settlement of $2,115,000 is taken, the recovery for class members presented in the proposed settlement actually exceeds 100%, an extraordinary result for class members. If the savings of $1,155,000 is reduced by the percentage of class members who remain members of Defendant (75.87% remain members), this means a settlement value of $1,836,321, or 87.38%. Finally, if only the $950,000 in new money and $10,000 in forgiven overdraft fees were counted, the proposed settlement still represents approximately 45.5% of the total damages at issue.

These are very strong settlement numbers because courts have determined that "[a] settlement can be satisfying even if it amounts to a hundredth or even - a thousandth of a single percent of the potential recovery." *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D.

Fla. 1988), aff'd 899 F.2d 21 (11th Cir. 1990); *City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1386 (S.D.N.Y. 1972) (a recovery of 3.2 % to 3.7 % of the amount sought is "well within the ball park"), aff'd in part, rev'd on other grounds, 495 F.2d 448 (2d Cir. 1974); *Martel v. Valderamma*, 2015 U.S. Dist. LEXIS 49830 * 17 (C.D. Cal. 2015) (approving a settlement of $75,000 when potential damages were $1.2 million, or about 6%); *In re Toys R US FACTA Litig.*, 295 F.R.D. 438, 453 (C.D. Cal. 2014) (approving settlement with *vouchers* (not cash) potentially worth a maximum of three percent (3%) *if all possible claims were actually made*.

Courts in the Seventh Circuit have held similarly. Specifically, in *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 583-84 (N.D. Ill. 2011), in a scholarly opinion surveying cases on this issue, the court explained as follows in approving the proposed settlement:

> "As an initial matter, without taking into account the $1.08 million that Defendant has paid to effectuate the settlement, and without taking into account the real value of the prospective change in Defendant's business practices, the $9.5 million settlement fund still represents approximately 10% of the $96.5 million that is the class's maximum potential recovery. Numerous courts have approved settlements with recoveries around (or below) this percentage. *See, e.g. Lazy Oil Co. v. Witco*, 95 F. Supp. 2d 290, 339 (W.D. Pa. 1997) (approving settlement amounting to 5.35% of damages for the entire class period, and 25.5% of damages within the limitations period); *Erie Forge and Steel, Inc. v. Cyprus Minerals Co.*, Civil No. 94-404 (W.D. Pa. Dec. 23, 1996) (approving settlement of $3.6 million where plaintiffs' expert estimated damages at $33 million); *In re Domestic Air Tranp. Antitrust Litig.*, 148 F.R.D. 297, 325 (N.D. Ga. 1993) (12.7% to 15.3%); *In re Newbridge Networks Sec. Litig.*, 1998 U.S. Dist. LEXIS 23238, 1998 WL 765724, at *2 (D.D.C. Oct. 23, 1998) (approving settlement and concluding that while "[c]ourts have not identified a precise numerical range within which a settlement [**59] must fall in order to be deemed reasonable; [] an agreement that secures roughly six to twelve percent of a potential trial recovery, while preventing further expenditures and delays and eliminating the risk that no recovery at all will be won, seems to be within the targeted range of reasonableness"); *In re Ravisent Techs., Inc. Sec. Litig.*, 2005 U.S. Dist. LEXIS 6680, 2005 WL 906361, at *9 (E.D. Pa. Apr. 18, 2005) (approving settlement, [*584] which amounted to 12.2% of damages, and citing study by Columbia University Law School, which determined that "since 1995, **class action settlements have typically recovered between 5.5% and 6.2% of the class members' estimated losses**.")" (internal citations omitted) (emphasis added.)

Another informative opinion from the Seventh Circuit is *In Re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, 733 F. Supp. 2d 997, 1008 (E.D. Wis. 2010), where, in approving the settlement, the court noted as follows:

> "Adding the $65 million in cash and the $45.7 million in warranties, the value of the

> settlement can be estimated as $110.7 million. As noted, class counsel believes that if the class prevailed at trial it could recover damages in the range of $816 million to $2.5 billion. Under class counsel's view of the case, then, the settlement is reasonable so long as the class's likelihood of success on the merits is no better than 4.4% to 13.6%."

Moreover, the Plaintiff class faced significant risks in this case which could have forestalled a $2,101,565 recovery, or any, recovery. If this settlement were not to be approved, Defendant's motion to partially dismiss would return to the Court's calendar, with an uncertain outcome. (Kick Decl. ¶ 24.) Plaintiff would next face the challenge of an adverse motion for class certification which, if successful, would present the subsequent challenge of opposing a motion for summary judgment, whose outcome would also be uncertain. (Kick Decl. ¶ 24.) Whichever party lost that motion would likely appeal, leading to further expense and delay, as well as a real risk of loss for the Plaintiff class. (Kick Decl. ¶ 24.) Finally, the Plaintiff class would face a risk of loss at trial. Counsel for defendant has argued, and would continue to argue, that the contract language does not support Plaintiff's interpretation, and that Defendant may assess fees based on the available balance under that language. (Kick Decl. ¶ 24.)

In sum, including based on comparison of percentages for which other class actions are settled, the settlement proposed in this matter is a very favorable one for the class members.

2. The Expected Complexity, Length, and Expense of the Litigation.

"Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *Brent v. Midland Funding, LLC*, No. 3:11-CV-1332, 2011 WL 3862363, at *16 (N.D. Ohio Sept. 1, 2011) (quoting *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000)). Thus, "[i]n most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Id*. (quoting 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11.50 (4th ed. 2002).

For this reason, courts have consistently found that "[t]he expense and possible duration of the litigation [should] be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984). *See also Lazy Oil Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 340 (W.D. Pa. 1997) ("[I]t has been held proper to take the bird in the hand

instead of a prospective flock in the bush.") (citations omitted).

Continued litigation would be complex, lengthy, and expensive. (Kick Decl. ¶¶ 22, 24.) With regard to expected duration, as noted, an otherwise strong case could last for a very substantial time if the proposed settlement were not approved, and be extremely expensive to both sides. (Kick Decl. ¶ 24.) Plaintiff's Counsel believes the likelihood for certification is strong, but there is always some risk in getting consumer class actions certified, even the ones which have the strongest merits for certification. (Kick Decl. ¶¶ 22, 24.) If the settlement is not approved, Defendant's motion to partially dismiss will return to the calendar and Plaintiff would likely next face a motion for summary judgment. After an expensive trial, regardless of which party prevailed, there likely would be appellate practice, further delaying the receipt of actual funds by the class members. (Kick Decl. ¶¶ 22, 24.)

3. The Amount of Opposition to the Settlement Among Affected Parties.

As noted above, only a single class member of the who successfully received notice has requested exclusion from the settlement—meaning that more than 99.99% of the class members have not requested exclusion. (GCG Decl. ¶ 21.) Further, to date, literally not a single objection to any aspect of the proposed settlement has been filed. (GCG Decl. ¶ 22.) *See ACLU of Ill. v. United States GSA*, 235 F. Supp. 2d 816, 819 (N.D. Ill. 2002) ("In light of the fact that no objectors came forward to challenge the settlement, and because we believe that the settlement is otherwise fair and reasonable, we hold that these factors present no bar to approval of the settlement.").

Accordingly, with only one opt out to date, and no objections to date, the class members' reaction to the proposed settlement has been overwhelmingly favorable.

4. The Presence of Collusion in Obtaining Settlement.

There was no collusion, and there is no hint of evidence of collusion, in negotiating the settlement. The settlement was reached through arm's length negotiations by experienced counsel. (Kick Decl. ¶¶ 12, 14.) "The decisions indicate that the courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered." *Schulte v. Fifth Third Bank*, No. 09-cv-6655, 2010 U.S.

Dist. LEXIS 144810, at *15-16 n.5 (N.D. Ill. Sep. 10, 2010) (quoting William B. Rubenstein, Alba Conte and Herbert B. Newberg, 4 Newberg on Class Actions § 11:51 (4th ed. 2002) (collecting cases)).

But in this case there is even more for this Court on this issue than "respecting" counsel: the settlement being presented for this Court's consideration is the result of a mediator's proposal made by The Honorable Edward Infante, Ret., after a JAMS mediation which did not resolve the matter, and which mediator's proposal was accepted by the two sides within the judge's deadline for acceptance. (Kick Decl. ¶ 12.)

Accordingly, not only is there no evidence of collusion, but the proposed settlement is the result of an accepted proposal by a highly regarded former federal judge. As such, this factor weighs in favor of approval.

5. The Stage of the Proceedings.

"The stage of the proceedings at which settlement is reached is important because it indicates how fully the district court and counsel are able to evaluate the merits of plaintiffs' claims." *Armstrong*, 616 F.2d at 325; *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1021–22 (N.D. Ill. 2000) (before settlement took place, Plaintiff was able to weigh the case's strengths and weaknesses and "had ample opportunity to reach an informed judgment concerning the merits of the proposed settlements"). Here, substantial discovery was performed, including depositions of 30(b)(6) witnesses as well as of the proposed class representative, and also Plaintiff's database expert was able to independently verify all of the data at issue. (Kick Decl. ¶ 13.) Plaintiff therefore has had ample opportunity to examine LCU's arguments, craft her own, and weigh the strengths and weaknesses of her case, ultimately reaching an informed judgment.

6. The Amount of Discovery Completed.

As stated, also contributing to Plaintiff's judgment of the merits of her case is the meaningful amount of discovery which has taken place during the pendency of this action. As noted above, Plaintiff has responded to written discovery and produced documents, in addition to taking the deposition of LCU's two Persons Most Knowledgeable on overdraft issues. (Kick Decl. ¶ 13.) Meanwhile, Defendant has received responses to written discovery, and has taken

Plaintiff's deposition, the preparation for which served to inform Plaintiff of the strengths and weaknesses of her own case as much as the deposition itself did so for Defendant. (Kick Decl. ¶ 13.) Further, Plaintiff's expert has personally analyzed LCU's database and fully ascertained the class and class damages. (Olsen Decl. ¶¶ 6-11.)

The facts of this case have been fully explored and uncovered.

B. The Requested Fee Award and Litigation Costs Should Be Approved.

Class Counsel stated in the Notice which went out to all class members, and to which no class member has objected and only one class member has opted out, that Class Counsel would seek up to one-third of the value of the settlement. Although the actual value of the settlement is $2,115,000 (the $1,155,000 from the change in practices plus $950,000 in new money plus $10,000 in forgiven debt), for purposes of the attorney fee request the definition of "value of settlement" was limited to one year from the change in practices, or $385,000, plus the $950,000 in new money, plus $10,000 in forgiven debt, for a total of $1,345,000. Although one-third of that equals $448,333, Class Counsel instead seek only $355,770.50 in fees for their work in this matter, rather than the $448,333 to which Defendant agreed not to object in the Settlement Agreement. (Settlement Agreement Defendant ¶ 8(d)(i).) If one were to use the real value of the settlement of $2,115,000, this request totals only approximately 16.8%.

This Court requested in its Order granting Preliminary Approval a presentation supporting the fee request both under the percentage of benefit analysis, as well as under the lodestar analysis. (Order, pp. 12-13.) The following now responds to that.

Regarding the percentage of benefit, the attorneys' fees sought here are well within the range of approval. *Gaskill v. Gordon,*,160 F.3d 361, at 362 (7th Cir. 1998) ("most suits for damages in this country are handled on the plaintiff's side on a contingent-fee basis…[t]he typical contingent fee is between 33 and 40 percent"); *Sjoblum v. Charter Communs*, No. 07-cv-451, dkt. #394 (W.D. Wis. Jan. 26, 2009, Crabb, J.). Further, the Seventh Circuit has repeatedly affirmed the use of the percentage-of-the-recovery method to calculate attorneys' fees in common fund cases, holding that "both the lodestar approach and the percentage approach may be appropriate in determining attorney's fee awards, depending on the circumstances" and that

"in common fund cases, the decision whether to use a percentage method or a lodestar method remains in the discretion of the district court." *Florin v. Nationsbank, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994). However, the Seventh Circuit has also recognized that "there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration." *Id*. "In deciding fee levels in common fund cases, [the Seventh Circuit] has consistently directed district courts to 'do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.'" *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007) (quoting *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001)).

In assessing the appropriateness of a requested fee, the court should bear in mind the risk faced by the attorneys of recovering nothing while also protecting the interests of the absent class members. *Florin v. Nationsbank, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994) ("The district court must balance the competing goals of fairly compensating attorneys for their services rendered on behalf of the class and of protecting the interests of the class members in the fund.") Although the Seventh Circuit stated in *Gaskill* that, "…[t]he typical contingent fee is between 33 and 40 percent"; in this case, as stated, if one uses the *actual* value of the settlement of $2,115,000 which includes the three years of savings, this request totals only approximately 16.8%. But even if one were to use the definitional value of the settlement as defined in the Settlement Agreement, which as explained is $1,345,000, the requested fees amount only to about 26.3%, well below the Seventh Circuit's stated range of "…between 33 and 40 percent."[5]

In preliminarily approving the fee request, this Honorable Court also inquired as to incorporating non-monetary relief into the amount of the recovery. (Order, p. 12.) In fact, this is

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[5] And even if for some reason only the $950,000 in new money were to be considered, this fee is still only 37.36%, well within the Seventh Circuit's stated common range. *See also Kaufman v. Am. Express Travel Related Servs., Co.*, 877 F.3d 276, 282 (7th Cir. 2017), in which the Seventh Circuit affirmed the approval of a settlement in which "[i]n the final tally, attorneys would be receiving $1,950,000 from the settlement, while class members would receive approximately $1,800,000."

commonly done, especially when the relief is actually monetarily quantifiable, as is clearly the case here. According to the Federal Judicial Center, "Courts use two methods to calculate fees for cases in which the settlement is susceptible to an objective evaluation. The primary method is based on a percentage of the actual value to the class of any settlement fund ***plus the actual value of any nonmonetary relief***." Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges, 3d. Ed., 35 (2010) (emphasis added). And according to the American Law Institute, "a percentage-of-the-fund approach should be the method utilized in most common-fund cases, ***with the percentage being based on both the monetary and nonmonetary value of the judgment or settlement.***" Principles of the Law of Aggregate Litigation, The American Law Institute, Mar 1, 2010 § 3.13 (emphasis added); *see also* Manual for Complex Litigation (4th ed.) § 21.71 ("In comparing the fees sought by the lawyers to the benefits conferred on the class, the court's task is easiest when class members are all provided cash benefits that are distributed. It is more complicated when class members receive non-monetary or delayed benefits. *In such cases, the judge must determine the value of those benefits*.") (emphasis added); *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 792 n.23 (N.D. Ohio 2010.)

Under this rationale, "[i]n calculating the overall settlement value for purposes of the 'percentage of the recovery' approach, Courts include the value of both the monetary and non-monetary benefits conferred on the Class." *Poertner v. Gillette Co.*, 618 Fed. Appx. 624 (11th Cir. 2015) (approving percentage of common fund award and finding that "settlement's allocation of benefits was fair" by including "the value of the nonmonetary relief and cy pres award" as "part of the settlement pie"; rejecting objector's argument that analysis of a reasonable attorney fee should "exclud[e] the substantial nonmonetary benefit and the cy pres award"); *In re Nutella Mktg. & Sales Practices Litig.*, 589 Fed. Appx. 53, 57 (3d Cir. 2014) ("[f]or purposes of approving the settlement, an exact figure is not required to evaluate the settlement's non-monetary benefits"; *Fleisher v. Phx. Life Ins. Co.*, Civil Action No. 11-cv-8405 (CM), 2015 U.S. Dist. LEXIS 121574, at *51-55 (S.D.N.Y. Sep. 9, 2015); *Pinto v. Princess Cruise Lines*, 513 F. Supp. 2d 1334, 1342-43 (S.D. Fla. 2007) ("Moreover, when determining the total value of a class

action settlement for purposes of calculating the attorneys' fee award, courts usually consider not only the compensatory relief, but also the economic value of any prospective injunctive relief obtained for the class."); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (estimating the non-monetary value of the settlement at $115 million and checking the percentage of the attorneys fee against it).

In a situation such as ours, where the injunctive relief can be readily quantified in dollars, the above cases demonstrate it should be counted along with the new money for purposes of the application of the one-third to forty percent award range of *Gaskill*, but even in situations unlike ours, where the injunctive relief can ***not*** be readily quantified, it is still given value for a fee award, "as a 'relevant circumstance' in determining what percentage of the common fund class counsel should receive as attorneys' fees, rather than as part of the fund itself." *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003); *see also Mahoney v. TT of Pine Ridge, Inc.*, No. 17-80029-CIV-MIDDLEBROOKS, 2017 U.S. Dist. LEXIS 217470, at *35 (S.D. Fla. Nov. 17, 2017); *Good Morning to You Prods. Corp. v. Warner/Chappell Music, Inc.*, No. CV 13-4460-GHK (MRWx), 2016 U.S. Dist. LEXIS 191665, at *8 (C.D. Cal. Aug. 16, 2016) ("Even assuming that we cannot ascertain the precise dollar amount that the settlement will save class members, we cannot ignore the settlement's prospective benefits when determining the reasonableness of the fee request."); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 775 (11th Cir. 1991) ("pertinent factors" include "any non-monetary benefits conferred upon the class by the settlement."). Accordingly, it is highly appropriate for the Court to assess the overall value of the settlement, inclusive of the non-monetary relief, before awarding class counsel a percentage of the overall recovery.

A lodestar methodology also supports the requested fee. Class Counsel's lodestar is $241,791. (Kick Decl. ¶ 8.) The requested fee award of $355,770.50 accordingly requires a multiplier of just 1.47x.[6] This is well below the Seventh Circuit's average multiplier: "Between

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[6] Class Counsel's hourly rate requested in this case has been approved by a multitude of courts across the country. (*See, e.g.*, Kick Decl. ¶¶ 6, 7.)

1993 and 2008, the mean multiplier in class actions in the Seventh Circuit was 1.85." *Abbott v. Lockheed Martin Corp.*, No. 06-cv-701-MJR-DGW, 2015 U.S. Dist. LEXIS 93206, at *12 (S.D. Ill. July 17, 2015). Further, this Court has stated that even a multiplier of five or more is "within the bounds of reason" in the Seventh Circuit. *See, e.g., Johnson v. Meriter Health Servs. Employee Ret. Plan*, No. 10-CV-426-WMC, 2015 WL 13546111, at *6 (W.D. Wis. Jan. 5, 2015) (citing *Williams v. Rohm & Haas Pension Plan*, No. 04-0078-SEB, 2010 WL 4723725 (S.D. Ind. Nov. 12, 2010), aff'd, 658 F.3d 629 (7th Cir. 2011)) (noting that the court in *Williams* awarded fees of $43.5 million, requiring a 5.85 multiplier). More generally, it has been held multipliers for lodestars in class actions tend to range between 4 and 5. *See In re Linerboard Antitrust Litig.*, No. 98-5055, 2004 WL 1221350, at *14 (E.D. Pa. Jun. 2, 2004) (from 2001 to 2003, the average multiplier approved in common fund cases was 4.35).

Here the multiplier could easily be justified to be much larger than requested, and is warranted, *inter alia*, due to "the complexity of the legal issues involved, the degree of success obtained, and the public interest advanced by the litigation." *Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010). As to the complexity of legal issues, this case involved the construction of a complex consumer banking contract as well as the application of a relatively novel federal regulation, Reg. E, along with the Wisconsin Deceptive Trade Practices Act, Wis. Stat. § 100.18 *et seq*. As to the degree of success obtained, this case was massively successful, resulting in a total settlement value which exceeds the total damages. And as far as the public interest is concerned, this case addressed an important issue, the assessment of excessive and improper overdraft fees, which has been the subject of the scrutiny of the Consumer Financial Protection Bureau, and several private consumer advocacy groups, and involves an important change in practice that will benefit thousands of Wisconsin residents in the future.

With regard to costs, as detailed in the accompanying declarations of Richard McCune and Taras Kick, for Class Counsel's litigation costs, although the Notice disseminated to class members stated that litigation costs to be reimbursed may be up to $75,000, Class Counsel seek a total of only $61,538.48, and the costs constituting this amount are detailed in the declarations. (McCune Decl. ¶ 17; Kick Decl. ¶¶ 18, 19.) These costs were expended in furtherance of the

litigation. For claims administrator's costs, GCG seeks the amount of $54,450 as set forth in the preliminary approval papers.

C. The Proposed *Cy Pres* Recipient Should Be Approved.

In the motion for preliminary approval of class action settlement, and in the settlement agreement, counsel for Plaintiff stated that they would apply for Public Citizen, a non-profit organization that represents the interests of consumers against businesses, including financial institutions (*see* Declaration of Robert Weissman in Support of Motion for Preliminary Approval ("Weissman Decl.") ¶ 4), to be the recipient of 50% of the *cy pres* funds in this case, with 50% of the funds going to a non-profit public benefit organization which works in the Milwaukee area and is approved by this Court. (Settlement Agreement ¶ 12.) Public Citizen has been involved in litigation in the Seventh Circuit, and consistently engages in advocating for consumer rights, including with regard to financial institutions. (Weissmann Decl. at ¶¶ 4, 8.) It intends to use the money from the *cy pres* in this matter, if approved by the Court, to support its research and advocacy supporting strong protections for consumers. (Weissmann Decl. ¶ 3).[7] Defendant has stated it proposes United Way of Greater Milwaukee & Waukesha County for the other 50%.

D. The Class Representative's Service Award Should Be Approved

The proposed class representative's service award, which is only $10,000, is well within the range of reasonableness and should be approved. *Westcott v. FedEx Ground Package Sys. (In re FedEx Ground Package Sys.)*, No. 3:05-MD-527 RLM (MDL 1700), 2017 U.S. Dist. LEXIS 64936, at *24 (N.D. Ind. Apr. 28, 2017) ("The request for $15,000 service awards for the class representative is just, fair and reasonable."); *Am. Int'l Grp., Inc. v. Ace Ina Holdings, Inc.*, No. 07 CV 2898, 2012 U.S. Dist. LEXIS 25265, at *59 (N.D. Ill. Feb. 28, 2012) (holding, as to seven class representatives, that "the $25,000 figure is a reasonable one."). The class representative, Ms. Behrens, was very proactive, enthusiastic and helpful for the case of the

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[7] Neither plaintiff, nor plaintiff's counsel, nor LCU, nor defense counsel will benefit financially in any way from the *cy pres* award. Plaintiff's counsel are members of Public Citizen, but have no control over how Public Citizen spends its money. Additionally neither class counsel is on a list of firms used by it for litigation. (Kick Decl. ¶ 15; McCune Decl. ¶ 23.)

absent class members. She responded to discovery, prepared for deposition, actually sat for deposition, and always inquired as to status and developments, and asked for clarifications of proposed settlement terms and negotiations. (Kick Decl. ¶ 20.)

B. The Proposed Settlement Class Should Be Certified.

Class certification is proper if the proposed class, the proposed class representative, and the proposed class counsel satisfy the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). Fed. R. Civ. P. 23(a)(1-4). In addition to meeting the requirements of Rule 23(a), a plaintiff seeking class certification must also meet at least one of the three provisions of Rule 23(b). Fed. R. Civ. P. 23(b). When a plaintiff seeks class certification under Rule 23(b)(3), the representative must demonstrate that common questions of law or fact predominate over individual issues and that a class action is superior to other methods of adjudicating the claims. Fed. R. Civ. P. 23(b)(3); *Amchem*, 521 U.S. at 615-16.

Because Plaintiff meets all of the Rule 23(a) and 23(b)(3) prerequisites, certification of the proposed Class is proper.

1. Class Definition.

The class includes any member of LCU who, is in either of two classes, the Regulation E Class or the Sufficient Funds Class. (Settlement Agreement ¶ 1(f).) The Regulation E Class is defined as "those members of Defendant who were assessed an Overdraft Fee for an ATM or non-recurring debit card payment transaction for the first time between February 9, 2016 and February 28, 2017." (Settlement Agreement ¶ 1(t).) The Sufficient Funds Class is defined as "those members of Defendant who were assessed an Overdraft Fee between February 9, 2011 and February 28, 2017 on any type of payment transaction and at the time such fee was assessed, the member had sufficient money in his or her ledger balance to cover the transaction that resulted in the fee.

2. Plaintiff Satisfies this Court's Prerequisites of Standing and Ascertainability.

In addition to the Rule 23 requirements set forth below, some courts in the Seventh Circuit have announced two additional implied prerequisites for class certification, both of which are met here. The first of which, standing, requires that "the named class representatives must

have standing, that is, they must be members of the class they propose to represent." *Blihovde v. St. Croix Cty.*, 219 F.R.D. 607, 614 (W.D. Wis. 2003) (citing *Rozema v. Marshfield Clinic*, 174 F.R.D. 425, 432 (W.D. Wis. 1997). Here, Plaintiff has standing; she was assessed overdraft fees during the class period when her account contained enough money to pay for the transaction at issue.

The second prerequisite is that "the definition of the proposed class must be 'precise, objective and presently ascertainable.'" *Blihovde v. St. Croix Cty.*, 219 F.R.D. at 614 (quoting *Loeb Indus. v. Sumitomo Corp.(In re Copper Antitrust Litig.)*, 196 F.R.D. 348, 353 (W.D. Wis. 2000)). Here, the class definition covers precisely those members of LCU who were assessed objectionable overdraft fees during the class period; accordingly, the class is ascertainable, and more than meets the standard in the Seventh Circuit. Moreover, the class members have actually been ascertained by Plaintiff's database expert, who has determined that there are 18,062 members in the class. (Olsen Decl. ¶ 10.)

3. The Requirement of Numerosity is Satisfied.

The first Rule 23 prerequisite of class certification is numerosity, which requires "the class [be] so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). The exact number of class members need not be known, so long as the class is readily ascertainable. *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989). "Meeting this requirement takes only a good faith non-speculative estimate of the size of the proposed class." *Anderson v. Capital One Bank*, 224 F.R.D. 444, 450 (W.D. Wis. 2004). In this case, however, the actual number is known, and is 18,062. (Olsen Decl. ¶ 10.) Numerosity is met.

4. The Requirement of Commonality is Satisfied.

The second requirement for certification requires that "questions of law or fact common to the class" exist. Fed. R. Civ. P. 23(a)(2). Commonality is demonstrated when the claims of all class members "depend upon a common contention . . . that is capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). This requires that the determination of the common question "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* "Some factual variation in the details of individual claims

does not defeat a finding of commonality." *Anderson v. Capital One Bank*, 224 F.R.D. at 450. "Even a single common question will do." *Dukes*, 131 S. Ct. at 2556. In other words, commonality exists where a question of law linking class members is substantially related to resolution of the litigation even where the individuals may not be identically situated. *Warnell v. Ford Motor Co.*, 189 F.R.D. 383, 390 (N.D. Ill. 1999); *see also Markham v. White*, 171 F.R.D. 217, 222 (N.D. Ill. 1997); *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 57 (N.D. Ill. 1996) ("[T]he commonality requirement has been characterized as a 'low hurdle' [that is] easily surmounted.").

Here, not only do there exist common questions of law or fact, the common questions predominate over any individual ones. The theories underlying the class claims involve a uniform overdraft fee practice and uniform contractual terms. First, it is undisputed that Defendant uniformly and systematically used the "available balance" to determine whether to assess an overdraft fee on a transaction, as opposed to utilizing the actual money in the account, i.e., the "ledger balance" or "actual balance". Second, the operative terms regarding the overdraft fee program, and specifically the balance calculation to be used to determine the assessment of overdraft fees, as set forth in the Opt-In Contract (e.g. "enough money in your checking account to cover a transaction") were provided to all class members. (Complaint at ¶¶ 22-27.) Third, all class members assert claims under breach of contract/breach of the covenant of good faith and fair dealing based on the fact that the terms of the Opt-In Contract mandate that the ledger balance would be used to determine the assessment of overdraft fees, without any mention of the use of the available balance or that pending debit transactions would deduct from that balance calculation. (Complaint at ¶¶ 59-73.) Determination of these issues, regardless of the answers, will resolve the allegations for the whole Class.

The commonality requirement is satisfied.

5. The Requirement of Typicality is Satisfied.

Rule 23 next requires that the class representative's claims be typical of those of the class members. Fed. R. Civ. P. 23(a)(3). The test for typicality is not demanding; it "focuses on the class representatives and whether their pursuit of their own claims will work for the benefit of the entire class." *Nelson v. IPALCO Enters.*, 2003 U.S. Dist. LEXIS 26392, at *11 (S.D. Ind.

2003); *see also* 1 Newberg on Class Actions § 3.13, at 3-76 (3d ed. 1992). "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) (quoting H. Newberg, Class Actions § 1115(b) at 185 (1977)). "The typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members. Thus, similarity of legal theory may control even in the face of differences of fact." *Id*. In other words, "[a] representative's claims are typical of the class if they 'have the same essential characteristics as the claims of the other class members.'" *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 57 (N.D. Ill. 1996) (quoting *Patrykus v. Gomilla*, 121 F.R.D. 357, 362 (N.D. Ill. 1988) ("The similarity of legal theory may control even where there are factual differences between the claims of the named representatives.")). "Typical does not mean identical, and the typicality requirement is liberally construed." *Id*. Further, issues of "[i]ndividual damages will not defeat a named Plaintiff's typicality." *Alexander v. Q.T.S. Corp.*, 1999 U.S. Dist. LEXIS 11842, at *21 (N.D. Ill. 1999).

Plaintiff's claims are not only typical of those of the other putative class members, they are virtually indistinguishable. There is no dispute that Plaintiff entered into the uniform and standardized Opt-In Contract and that she was assessed overdraft fees when there was enough money in the account (*i.e.*, the ledger balance) to complete the requested transaction. At a minimum, this occurred on December 21, 2015, when she was assessed two $30 overdraft fees on transactions for $32.50 and $10.49, despite the fact that her account contained $239.61 before she requested the first transaction, and $177.11 before she requested the second transaction. (Complaint ¶ 41.) Plaintiff also alleges the same legal theories as the rest of the class of breach of contract/breach of the covenant of good faith and fair dealing and violation of Regulation E.

Typicality is satisfied.

6. The Requirement of Adequate Representation is Satisfied.

The final Rule 23(a) prerequisite requires that the proposed class representative has and will continue to "fairly and adequately protect the interests of the class." Fed. R. Civ. P.

23(a)(4). "A finding of adequacy of representation involves a two-pronged inquiry. First, the named representatives must have a sufficient interest in the outcome to ensure vigorous advocacy while having no interest antagonistic to the interests of the class. Second, counsel for the named plaintiffs must be competent." *Riordan v. Smith Barney*, 113 F.R.D. 60, 64 (N.D. Ill. 1986); *see also Anderson v. Capital One Bank*, 224 F.R.D. at 451 (same). As with the typicality requirement, this element requires that the interests of the named plaintiffs are aligned with the unnamed class members to ensure that the class representative has an incentive to pursue and protect the claims of the absent class members. *See Amchem*, 521 U.S. at 626 n. 20, 117 S.Ct. 2231 ("The adequacy-of-representation requirement 'tends to merge' with the commonality and typicality criteria of Rule 23(a), which 'serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'")

Proposed Class Counsel, Richard McCune of McCune Wright Arevalo, LLP, and Taras Kick of The Kick Law Firm, APC, both have significant class action, litigation, and trial experience, are competent, and have been competent in representing the Classes. Both law firms representing the putative class have extensive experience in consumer class actions, and in particular, expertise in overdraft fee litigation. (McCune Decl. at ¶¶ 2-5; Kick Decl. at ¶ 3.) The interests of Plaintiff Danell Behrens are not antagonistic to those of the other Class members; her interests are wholly aligned because she was charged overdraft fees when her account had a positive ledger balance. Further, she understands that she is pursuing this case on behalf of all class members similarly situated and understands she has a duty to protect the absent Class members. (Declaration of Danell Behrens filed in Support of the Motion for Preliminary Approval ("Behrens Decl.") at ¶¶ 2-3; Kick Decl. at ¶ 20.) She has actively participated in the litigation by frequently conferring with class counsel about the case and its status, assisting class counsel by gathering documents and other information, and being prepared and willing to testify at trial on behalf of the class if necessary. (*Id.*) Furthermore, she sat for deposition in this matter on April 18, 2017, and has been very helpful to the prosecution of this case. (Kick Decl.

¶ 20.)

7. The Proposed Settlement Class Meets the Requirements of Rule 23(b)(3).

Once the prerequisites of Rule 23(a) have been met, a plaintiff must also demonstrate that she satisfies the requirements of Rule 23(b). *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). To certify a class under Rule 23(b)(3), the plaintiff must show that (1) the common questions of law and fact predominate over questions affecting only individuals and (2) the class action mechanism is superior to other available methods for adjudicating the controversy. Fed. R. Civ. P. 23(b)(3); *Messner*, 669 F.3d at 811.

a. Common Questions of Law and Fact Predominate.

The predominance requirement questions whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "There is no mathematical or mechanical test for evaluating predominance." *Messner*, 669 F.3d at 814 (7th Cir. 2012) (citing 7AA Wright & Miller, Federal Practice & Procedure § 1778 (3d ed. 2011). "Rule 23(b)(3)'s predominance requirement is satisfied when 'common questions represent a significant aspect of [a] case and . . . can be resolved for all members of [a] class in a single adjudication.'" *Id*. (quoting Wright & Miller, *supra*, § 1778). "Or, to put it another way, common questions can predominate if a 'common nucleus of operative facts and issues' underlies the claims brought by the proposed class." *Id*. (quoting *In re Nassau County Strip Search Cases*, 461 F.3d 219, 228 (2d Cir. 2006). "Individual questions need not be absent;" in fact, "the text of Rule 23(b)(3) itself contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole." *Id*. "Judicial economy factors and advantages over other methods for handling the litigation as a practical matter underlie the predominance and superiority requirements for class actions certified under Rule 23(b)(3)." Rubinstein, et al., 2 Newberg on Class Actions § 4:24. Analysis of the predominance requirement "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S.Ct. 2179, 2184. As the Supreme Court most recently confirmed:

When one or more of the central issues in the action are common to the class and can be

> said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

Tyson Foods, Inc. v. Bouaphakeo, 136 S.Ct. 1036, 1045 (2016). Both the contract claims and violation of Regulation E claims are subject to common proof, and thus it would be more efficient to decide those common issues via the class action mechanism.

As LCU does not dispute its practice of charging fees based on the available balance while the ledger balance contains enough money to pay for the transaction, the predominating issue is whether the contract permitted it to do so. In short, the only task the trier of fact needs to perform in adjudicating the breach of contract claim is to determine the meaning of the contractual language. Further, under Wisconsin law, the determination of the parties' intent in entering a contract is a question of objective intent. *Disc. Mega Mall Milwaukee Corp. v. Badger Auctioneers, Inc.*, 337 Wis. 2d 556, 806 N.W.2d 268 (Ct. App. 2011) ("[I]f the contract is unambiguous, the court's attempt to determine the parties' intent ends with the language of the contract, without resort to extrinsic evidence.") (quoting *Town Bank v. City Real Estate Dev., LLC*, 330 Wis. 2d 340, 360, 793 N.W.2d 476, 486 (2010)). For this reason, among others, courts in this circuit have granted class certification for classes alleging breach of a common contract. *Flanagan v. Allstate Ins. Co.*, 242 F.R.D. 421, 433 (N.D. Ill. 2007) ("[W]e find that plaintiffs have met all the requirements of Rule 23(a) and 23(b)(3) and we certify the . . . class for the breach of contract claim."); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 961 (W.D. Wis. 2008)).

The common questions for claims for violation of Regulation E also predominate over any individualized issues. The Opt-In contract states that an overdraft occurs when the customer does not have enough money in his or her checking account to cover a transaction, but LCU pays it anyway. (Complaint at ¶ 26.) The central liability question—whether the above language describes "in a clear and readily understandable way" LCU's overdraft service, where overdraft fees are based on the available balance method as opposed to the ledger balance method—predominates over any individualized questions.

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b. This Class Action is the Superior Method of Adjudication.

Rule 23(b)(3) also requires that a certifying court find that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The Seventh Circuit has noted that class actions are superior particularly for "negative value" suits, *i.e.*, suits where the possible recovery is less than the cost of bringing the suit. As Judge Posner has stated, "[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661. (7th Cir. 2004); *see also Hinman v. M and M Rental Center, Inc.*, 545 F. Supp. 2d 802, 807 (N.D. Ill. 2008) ("[R]esolution of the issues on a classwide basis, rather than in thousands of individual lawsuits (which in fact may never be brought because of their relatively small individual value), would be an efficient use of both judicial and party resources."). As the Supreme Court stressed in *Amchem*, 521 U.S. at 617:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."

The desirability of concentrating the litigation in the present forum is illustrated by the fact that the amount of an individual damage instance is a $30 overdraft fee. A large number of class members therefore have suffered damages in an amount that could not justify or sustain individual lawsuits, and the only real choice is thus between a class action and no action. Plaintiff is not aware of any additional suits instituted by or against the class members concerning the subject matter of the settlement. Superiority is met.

Accordingly, all factors weigh in favor of class certification.

IV. CONCLUSION

Plaintiff respectfully requests that the Court grant final approval of the settlement, the request for attorney's fees and costs, the request for approval of class administrator expenses,

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and the request for a service award to the class representative, in their entirety.

Dated: August 9, 2018

Respectfully submitted,

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*Pro Hac Vice applications to be submitted

Counsel for Plaintiff Danell Behrens and the Putative Class

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2018, a copy of the above Memorandum Of Points And Authorities In Support Of Plaintiff's Motion For Final Approval Of Class Action Settlement was electronically filed using the CM/ECF system which will send a notice of electronic filing to all CM/ECF participants.

Respectfully submitted,

/s/ Robert Dart