UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

MARTHA TOWNER, individually, and on behalf of all others similarly situated, Plaintiff, v. 1st MIDAMERICA CREDIT UNION, and DOES 1-10, Defendant.	**Civil No.: 3:15-cv-01162-NJR-SCW**

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

I. SUMMARY 1

II. BACKGROUND 2

A. The Settlement is a Very Good Result for the Class Members 2

B. Pertinent Procedural History 3

C. Investigation and Discovery 3

III. LEGAL ANALYSIS 5

A. The Settlement Should Be Finally Approved 5

1. The Strengths of Plaintiff's Case Compared Against the Terms of the Settlement 6

2. The Expected Complexity, Length, and Expense of the Litigations 7

3. The Amount of Opposition to the Settlement Among Affected Parties 8

4. The Presence of Collusion in Obtaining Settlement 8

5. The Stage of the Proceedings 9

6. The Amount of Discovery Completed 9

B. The Requested Fee Award and Litigation Costs Also Should Be Approved 9

C. The Proposed Cy Pres Recipient Should Be Approved 11

D. The Settlement Class Should Be Finally Certified 12

1. The Requirement of Numerosity is Satisfied 12

2. The Requirement of Commonality is Satisfied 13

3. The Requirement of Typicality is Satisfied 14

4. The Requirement of Adequate Representation is Satisfied 15

5. The Proposed Settlement Class Meets the Requirements of Rule 23(b)(3) 16

a. Common Questions of Law and Fact Predominate 16

b. This Class Action is the Superior Method of Adjudication.....18

V. Conclusion 18

TABLE OF AUTHORITIES

Cases

Abbott v. Lockheed Martin Corp.
No. 06-cv-701-MJR-DGW, 2015 U.S. Dist. LEXIS 93206 (S.D. Ill. July 17, 2015) 11

ACLU of Ill. v. United States GSA
235 F. Supp. 2d 816 (N.D. Ill. 2002) 8

Air Line Stewards and Stewardesses Ass'n, Local 550 v. Tans World Airlines, Inc.
630 F.2d 1164 (7th Cir. 1980) 5

Amchem Prods. v. Windsor
521 U.S. 591 (1997).....12

Am. Int'l Grp., Inc. v. Ace Ina Holdings, Inc.
No. 07 CV 2898, 2012 U.S. Dist. LEXIS 25265 (N.D. Ill. Feb. 28, 2012) 12

Armstrong v. Bd. of Sch. Dirs.
616 F.2d 305 (7th Cir. 1980) 5, 9

Brent v. Midland Funding, LLC
No. 3:11-CV-1332, 2011 WL 3862363 (N.D. Ohio Sept. 1, 2011).....7

Felzen v. Cal. Pub. Employees' Ret. Sys.
134 F.3d 873 (7th Cir. 1998) 5

Florin v. Nationsbank, N.A.
34 F.3d 560 (7th Cir. 1994) 10

GE Capital Corp. v. Lease Resolution Corp.
128 F.3d 1074 (7th Cir. 1997) 6

George v. Kraft Foods Glob., Inc.
No. 1:08-cv-3799, 2012 U.S. Dist. LEXIS 166816 (N.D. Ill. June 26, 2012).....10, 11

Gutierrez v. Wells Fargo
730 F.Supp.2d 1080 (N.D. Cal. 2010) 4

In re Austrian and German Bank Holocaust Litig.
80 F. Supp. 2d 164 (S.D.N.Y. 2000).....7

In re Checking Account Overdraft Litigation
MDL No. 2036 (S.D. Fla.) 4

In re General Motors Corp. Engine Interchange Litig.
594 F.2d 1106 (7th Cir. 1979) 6

In re Mexico Money Transfer Litig.
164 F. Supp. 2d 1002 (N.D. Ill. 2000) 9

In re Ready-Mixed Concrete Antitrust Litig.
No. 1:05:CV-00979, 2009 U.S. Dist. LEXIS 132343 (S.D. Ind. 2009) 11

In re Synthroid Mktg. Litig.
264 F.3d 712 (7th Cir. 2001) 10

Isby v. Bayh
75 F.3d 1191, 1196 (7th Cir. 1996) 5

Lazy Oil Co. v. Witco Corp.
95 F. Supp. 2d 290 (W.D. Pa. 1997).....7

Marcial v. Coronet Ins. Co.
880 F.2d 954 (7th Cir. 1989) 13

Martin v. Caterpillar, Inc.
No. 07-cv-1009, 2010 U.S. Dist. LEXIS 82350 (C.D. Ill. Aug. 12, 2010) 5, 6

Milstein v. Huck
600 F. Supp. 254 (E.D.N.Y. 1984) 7

Reynolds v. Ben. Nat'l Bank
288 F.3d 277 (7th Cir. 2002) 6

Schulte v. Fifth Third Bank
No. 09-cv-6655, 2010 U.S. Dist. LEXIS 144810 (N.D. Ill. Sep. 10, 2010) 8

Sutton v. Bernard
504 F.3d 688 (7th Cir. 2007) 10

Synfuel Techs., Inc. v. DHL Express (USA), Inc.
463 F.3d 646 (7th Cir. 2006) 6

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).....12

Statutes and Regulations

12 C.F.R. § 1005.17 1

Fed. R. Civ. P. 23..... passim

Other Authority

4 Newberg on Class Actions § 11.50-51 (4th ed. 2002).....7, 8

MEMORANDUM

I. SUMMARY.

This is a class action alleging that Defendant 1st MidAmerica Credit Union ("1st MidAmerica" or "Defendant") charged overdraft fees based on the "available balance" in customer accounts (*i.e.*, the actual account balance less a deduction for any holds on pending debit transactions which have not actually posted and debited from the account) rather than the actual balance (*i.e.*, the money actually in the account, sometimes called the "ledger balance"), in alleged violation of the terms of its customer agreement. Plaintiff also alleges in the complaint that Defendant violated 12 C.F.R. § 1005.17 by enrolling credit union members in its overdraft program without appropriately obtaining their affirmative consent, because the Opt-In Contract which Defendant was required to send to its customers did not accurately describe the overdraft program. 1st MidAmerica has disputed Plaintiff's contentions throughout the case.

After law and motion practice and discovery into the underlying facts, the parties have reached a proposed settlement of this matter, to which this Honorable Court granted preliminary approval in an Amended Order dated June 20, 2017, 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, ¶¶ 1, 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 counsel after extensive litigation and discovery. (*Id.*, ¶ 8.) This Court found that the proposed notice plan to class members satisfied due process, and ordered that notice of the proposed settlement be served pursuant to it. (*Id.*, ¶ 9.) 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 Andrew Perry of the claims administrator Kurtzman Carson Consultants ("KCC"), the direct notice program approved by this Court has been very successful. (Declaration of Andrew Perry of KCC [hereafter, "Perry Decl."]. As of the date of this filing, there have been no objections to the settlement whatsoever. (Perry Decl. ¶ 9.) On July 31, 2017, the claims administrator caused the Court approved Notice

Form to be mailed to 10,391 Class Members and, on the same date, to be emailed to 6,304 email addresses. (Perry Decl. ¶¶ 5, 6) Further, as of the date of the filing of this motion for Final Approval, the claims administrator has received only 2 requests for exclusion, meaning **99.9%** of the class members have elected not to opt out of the settlement. (Perry Decl. ¶ 8).

In sum, the proposed settlement to this class action is a fair one, and class members' reaction to it to date has been overwhelmingly favorable.

II. BACKGROUND

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

Under the settlement's terms, 1st MidAmerica will make an "all in" non-reversionary payment of $500,000 to the class. (Settlement Agreement, ¶¶ (1)(q), (8)(d)(iv).) In addition to providing significant monetary benefits to the class, this amount will also be used to reimburse the litigation costs, the costs of class notice and claims administration, and attorneys' fees in the amount of one-third of the common fund (subject to Court approval). (Settlement Agreement, ¶ 8.)

Under the settlement, no money will revert to the Defendant. (Settlement Agreement, ¶ 8(d)(v).) Payment will be credited to the class members according to an individualized formula which takes into account the total improper overdraft charge per class member. Specifically, the formula divides the net settlement fund by the total improper overdraft charges for the relevant period and multiplies the resulting figure by an individual class member's total improper overdraft charge. (Settlement Agreement, ¶ 8(d)(iii).) As a result, each member will receive an award in direct proportion to the size of his or her claim. The settlement compensation will be directly deposited into existing customers' accounts, and will be distributed by check to the last known address of all former members. (Settlement Agreement, ¶ (8)(d)(v).) This means the class member literally has to do nothing to receive this money. Finally, any money that remains after this distribution process, rather than revert to Defendant, instead will go to a 501(c)(3) non-profit, Public Citizen, an organization actively involved in protecting consumer rights (if approved by this Court). (Settlement Agreement, ¶ 11.)

The $500,000 settlement fund represents approximately 26.2% of the most likely non-

interest restitutionary amount that could have been obtained at trial had the case been successful under Plaintiff's damage theory, while avoiding for the class members all of the risks and further litigation costs appurtenant with continuing. (Supplemental Declaration of Arthur Olsen [hereafter "Olsen Decl."] ¶ 8; Declaration of Taras Kick [hereafter "Kick Decl."] ¶¶ 18-20.) This is discussed in Section III, *infra*.

B. Pertinent Procedural History

The Complaint in this action was filed on November 25, 2015 (Docket No. 1 "Complaint"), alleging that 1st MidAmerica 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, ¶¶ 14-19.) On May 26, 2016, Defendants filed a motion to dismiss the Complaint. (Docket No. 45.) Among other things, Defendants argued that 1st MidAmerica's contracts with its customers fully disclosed and permitted its practice of charging overdraft fees when there was enough money in the customer's account to complete the transaction at issue, and that the contract on which Plaintiff relied was not really a contract because it also served as a federally required disclosure of the terms of the overdraft program. (*Id.*) Plaintiff opposed the motion. (Docket No. 47.) On October 26, 2016, Defendant filed a motion to dismiss for lack of subject matter jurisdiction or, in the alternative, for partial summary judgment. (Docket No. 55.)

C. Investigation and Discovery

On January 15, 2016, Plaintiff propounded on 1st MidAmerica its first request for production of documents, and its first set of special interrogatories, to which Defendant responded on April 14, 2016. (Kick Decl. ¶ 12.) On May 18, 2016, Plaintiff propounded on 1st MidAmerica its second set of requests for production, to which Defendant responded on June 25, 2016. (Kick Decl. ¶ 12.) Defendant has produced 513 pages of documents. (Kick Decl. ¶ 12.) On January 14, 2016, Defendant propounded on Plaintiff its first requests for production of documents, and its first set of special interrogatories, to which Plaintiff responded on March 24, 2016, producing 168 pages of documents. (Kick Decl. ¶ 12.) On May 16, 2016, Defendant took Plaintiff's deposition in Kansas City, Missouri. (Kick Decl. ¶ 12.) On May 26, 2016, Plaintiff

took the Deposition of Defendant's Person Most Knowledgeable on overdraft issues, Terri Herbstreit, in Edwardsville, Illinois. (Kick Decl. ¶ 12.) On November 1, 2016, Plaintiff took the deposition of third-party FiServ's Person Most Knowledgeable on issues related to Defendant's database, Keith Alvin Isom, in Plano, Texas. (Kick Decl. ¶ 12.)

The parties' settlement negotiations at all times were arm's-length and adversarial. (Kick Decl. ¶¶ 13-18.) Magistrate Judge Stephen C. Williams was integral to these negotiations. Judge Williams held proceedings on December 18, 2015, March 1, 2016, June 29, 2016, September 1, 2016, October 5, 2016, November 7, 2016, November 21, 2016, December 14, 2016, January 5, 2016, January 20, 2017, March 10, 2017, and April 14, 2017, during which settlement issues were discussed. (Kick Decl. ¶¶ 13.) During the negotiations, 1st MidAmerica provided Plaintiff's expert Arthur Olsen access to the class data, which included transactional account data for 1st MidAmerica's customers during the class period. (Olsen Decl. ¶ 6.) 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 the multidistrict litigation which took place in Florida (*In re Checking Account Overdraft Litigation* MDL No. 2036 (S.D. Fla.)), and in such matters as *Gutierrez v. Wells Fargo* 730 F.Supp.2d 1080 (N.D. Cal. 2010). (Olsen Decl. ¶¶ 3-5.) As a result of his analysis, Mr. Olsen was able to calculate that 1st MidAmerica charged $1,908,459.00 in overdraft fees when there was enough money in the account to cover the transaction in question if "holds" on deposits or pending transactions were not taken into account, which is what the Plaintiff's "sufficient funds" theory of the case is. (Olsen Decl. ¶ 8.) The total settlement amount in this case of $500,000 represents approximately 26.2% of the total "sufficient funds" damages in this case. (Kick Dec. ¶ 15.)

III. LEGAL ANALYSIS.

A. The Settlement Should Be Finally Approved.

"Federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). "[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. Accordingly, "[i]n evaluating the fairness, reasonableness, and adequacy of a proposed settlement, the Court must 'refrain from resolving the merits of the controversy or making a precise determination of the parties' respective legal rights . . . .'" *Martin*, 2010 U.S. Dist. LEXIS 82350, at *5 (quoting *Isby v. Bayh*, 75 F.3d 1191, 1196-1197 (7th Cir. 1996)).

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.'") (quoting *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1132 (7th Cir. 1979)). "In conducting this analysis, the district court should begin by 'quantify[ing] the net expected value of continued litigation to the class.'" *Id*. (quoting *Reynolds v. Ben. Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002).

Here, Plaintiff's expert, Arthur Olsen, has determined that the total value of the overdraft fees assessed when 1st MidAmerica's customers had enough money in their accounts to pay for the transaction at issue—which Plaintiff's counsel believes is the most likely result had this case proceeded to trial—is $1,908,459.00. (Olsen Dec. ¶ 8; Kick Dec. ¶ 20.) The total settlement amount in this case of $500,000 represents 26.2% of this total value of the case. However, the Plaintiff class faced significant risks in this case which could have forestalled a $1,908,459.00, or any, recovery. If this settlement is not approved, Defendant's motion to dismiss for lack of personal jurisdiction, or in the alternative, motion for partial summary judgment, and Defendant's motion for judgment on the pleadings will be decided by the Court, with uncertain outcomes. (Kick Dec. ¶ 19.) Should Plaintiff prevail on both motions, she 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. Finally, the Plaintiff class would face the risk of loss at trial. Counsel for defendant has argued, and would continue to argue, that Ms. Towner lacks personal jurisdiction because she was not harmed by the conduct at issue here—under defendant's contentions, Ms. Towner would have incurred more overdraft fees under her own proposed accounting methods.

(Kick Dec. ¶ 18.) Counsel for Defendant has also argued that the contract language does not support Plaintiff's interpretation, and that Defendant may assess fees based on the available balance under that language. Further, in this case there will not even be any claims process necessary for class members to receive their money, and none of the $500,000 will revert to Defendant.

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. 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. 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 Dec. ¶ 19.) If the settlement is not approved, Defendant's motion to dismiss and motion for judgment on the pleadings will return to the calendar and, assuming a victory in those battles, 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.

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

As noted above, only two class members have requested exclusion from the settlement—meaning that 99.9% of the class members have not requested exclusion—and no objections have been filed to date. Accordingly, there is extremely little opposition to the settlement among affected parties. That there are no objectors to this settlement is a consideration that should not be understated. Courts in the Seventh Circuit have found that this fact overwhelms other factors that could militate against approval. *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.").

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. ¶¶ 13, 18.) "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)). Accordingly, as there is no evidence of collusion, 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, Plaintiff has faced two major adverse motions

going to the merits of her claims, the motion for judgment on the pleadings, and the motion to dismiss for lack of subject matter jurisdiction or, in the alternative, for partial summary judgment, the first of which she fully briefed in opposition, which gave her the opportunity to examine 1st MidAmerica's arguments, craft her own, and weigh the strengths and weaknesses of her case, ultimately reaching an informed judgment of the likelihood of success on the merits.

6. The Amount of Discovery Completed.

Also contributing to Plaintiff's judgment of the merits of her case is the significant amount of discovery which has taken place during the pendency of this action. As noted above, Plaintiff has propounded two sets of requests for production on Defendant, and one set of special interrogatories and requests for admission, and has received 513 pages of documents produced by Defendant, in addition to taking the deposition of 1st MidAmerica's Person Most Knowledgeable on overdraft issues. (Kick Decl. ¶ 12.) Meanwhile, Defendant has received responses to requests for production, interrogatories, and requests for admission, 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. ¶ 12.) Further, 1st MidAmerica has made its database available to Plaintiff's database expert, Arthur Olsen, who has analyzed it and ascertained the class and class damages. The facts of this case have been fully explored and uncovered. (Olsen Decl. ¶ 6.)

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

Class counsel requests that the Court approve its application for attorneys' fees in the amount of one-third (33-1/3%) of the settlement fund, which amounts to $166,666, and makes its application under both the percentage-of-the-recovery and lodestar approaches. 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). "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.") The Court should "determine whether a requested fee is within the range of fees that would have been agreed to at the outset of the litigation in an arm's length negotiation given the risk of nonpayment and the normal rate of compensation in the market at the time." *George v. Kraft Foods Glob., Inc.*, No. 1:08-cv-3799, 2012 U.S. Dist. LEXIS 166816, at *6-7 (N.D. Ill. June 26, 2012) (citing *In re Synthroid Marketing Litig.*, 264 F.3d 712, 718 (7th Cir. 2001). In performing this balancing, courts in the Seventh Circuit have consistently held that a percentage of one-third is appropriate in common fund cases. *George v. Kraft Foods Glob., Inc.*, No. 1:08-cv-3799, 2012 U.S. Dist. LEXIS 166816, at *8 (N.D. Ill. June 26, 2012) ("'[T]he normal rate of compensation in the market [is] 33.33% of the common fund recovered' because the class action market commands contingency fee agreements and the class counsel accepts a substantial risk of nonpayment.") (quoting *In re Ready-Mixed Concrete Antitrust Litig.*, No. 1:05:CV-00979, 2009 U.S. Dist. LEXIS 132343 at *34 (S.D. Ind. 2009). As the court held in *Kraft Foods*, "[a] one-third fee is consistent both with the market rate for settlements of this size and in settlements concerning this particularly complex area of law." *Id.*; *see also Will v. Gen. Dynamics Corp.*, No. 06-698-GPM, 2010 U.S. Dist. LEXIS 123349, at *9 (S.D. Ill. Nov. 22, 2010) ("The Court further agrees that a one-third fee is consistent with the market rate.").

A lodestar methodology also supports the requested fee. Class counsel's combined lodestar between the two firms is about $370,000. The requested fee award of $166,666 is accordingly a substantial reduction, amounting to only about 44% of the fee that would result

from application of the attorneys' hourly rates to the hours spent on this matter. Far from requesting a positive multiplier—which would arguably be appropriate in this case—class counsel will actually be incurring a substantial reduction with the requested fee.

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 Final Approval ("Weissman Decl.") ¶ 4), to be the *cy pres* recipient in this case. 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. ¶¶ 4, 9, 10.) 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, including consumers in Illinois. (Weissmann Decl. ¶ 3).[1]

Class counsel would additionally like to bring the Court's attention to Plaintiff Martha Towner's request that the Madison County, Illinois Department of Children and Family Services, based in Alton, Illinois 62002 be considered as an alternate *cy pres* recipient. Plaintiff's counsel leaves it to the Court's discretion as to which organization should be the *cy pres* recipient in this case.

D. The Settlement Class Should Be Finally 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

---

[1] Neither Plaintiff, nor Plaintiff's counsel, nor Defendant, 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. ¶ 17; McCune Decl. ¶ 23.)

the three provisions of Rule 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 Prods. v. Windsor*, 521 U.S. 591, 615-616 (1997). Because Plaintiff meets all of the Rule 23(a) and 23(b)(3) prerequisites, certification of the proposed Class is proper.

1. The Requirement of Numerosity is Satisfied.

The first 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). "Because there is no mystical number at which the numerosity requirement is established, courts have found this element satisfied when the putative class consists of as few as 20 to 40 members." *Lengle v. Attorneys' Title Guar. Fund, Inc.*, No. 01 C 7739, 2002 U.S. Dist. LEXIS 18398, at *8 (N.D. Ill. Sep. 26, 2002). The number of 10,405, as set forth in the declaration of database expert Arthur Olsen, clearly satisfies the numerosity requirement. (Olsen Decl. ¶ 8.)

2. 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.* "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, it is undisputed that 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. 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. Determination of these issues, regardless of the answers, will resolve the allegations for the whole Class in one stroke. The commonality requirement is satisfied.

3. 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 February 6, 2014, when she was assessed a $29 overdraft fee on a transaction for $23.52, despite the fact that her account contained $94.97 before she requested the transaction at issue. (Complaint ¶ 20.) 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. Therefore, typicality is satisfied.

4. 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). 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 ¶¶ 2-4.) The interests of Plaintiff Martha Towner 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. (Kick Decl. at ¶ 16.) 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 sitting for deposition.

5. 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 1st MidAmerica does not dispute its manner of charging overdraft fees, the predominating issue is whether the contract permitted it to charge them in tis manner. 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 Illinois law, the determination of the parties' intent in entering a contract is a question of objective intent. *Bunge Corp. v. N. Tr. Co.*, 252 Ill. App. 3d 485, 493, 191 Ill. Dec. 195, 201, 623 N.E.2d 785, 791 (1993) ("Absent ambiguity, the intention of the parties must be gathered from the language used in the contract, not from a party's construction of that language."). 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.").

The common questions for claims for violation of Regulation E also predominate over any individualized issues. The Opt-In contract states, "An overdraft occurs when you do not

have enough money in your checking account to cover a transaction, but we pay it anyway." (Complaint at ¶ 17.) The central liability question—whether the above language describes "in a clear and readily understandable way" 1st MidAmerica's overdraft service, where overdraft fees are based on the available balance method as opposed to the ledger balance method—predominates over individualized questions.

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 $29 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.

V. Conclusion.

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

Dated: September 5, 2017

Respectfully submitted,

MCCUNE • WRIGHT • AREVALO LLP
THE KICK LAW FIRM, APC
BRANDT LAW LLC

/s/ Taras Kick
Taras Kick, *Pro Hac Vice*
Taras@kicklawfirm.com
Robert Dart, CA State Bar #264060*
Robert@kicklawfirm.com
THE KICK LAW FIRM, APC
815 Moraga Drive
Los Angeles, California 90049
Telephone: (310) 395-2988
Facsimile: (310) 395-2088

Richard D. McCune, *Pro Hac Vice*
rdm@mccunewright.com
Jae (Eddie) K. Kim, CA State Bar #236805*
jkk@mccunewright.com
MCCUNE • WRIGHT • AREVALO LLP
3281 East Guasti Road, Suite 100
Ontario, California 91761
Telephone: (909) 557-1250
Facsimile: (909) 557-1275

Derek Y. Brandt, #6228895 (IL)
derek@brandtlawllc.com
Brandt Law LLC
P.O. Box 487
Edwardsville, IL 62025
Telephone: (618) 307-6116

Counsel for Plaintiff Martha Towner and the Conditionally Certified Class

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2017, a copy of the above Memorandum Of Points And Authorities In Support Of Plaintiff's Unopposed 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