UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

JOY L. BOWENS, individually, and on behalf of all others similarly situated, Plaintiff, v. MAZUMA CREDIT UNION, and DOES 1-10, Defendant.	Case No.: 4:15-cv-00758-DW Judge Assigned: Dean Whipple

PLAINTIFF JOY L. BOWENS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND SUGGESTIONS IN SUPPORT THEREOF

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Plaintiff Joy L. Bowens hereby moves this Honorable Court for entry of an Order:

1. Preliminarily approving the Settlement Agreement reached between Plaintiff and Defendants attached as Exhibit 1 to the Declaration of Taras Kick in Support of the Unopposed Motion for Preliminary Approval;

2. Appointing Garden City Group, LLC, as the Settlement Administrator and approving the proposed notice plan; and

3. Scheduling a hearing for final approval of the settlement.

This motion is made on the grounds that the settlement is the product of arm's-length negotiations by informed counsel and is fair, reasonable and adequate. Class Counsel met and conferred with counsel for Defendant about the motion, and Defendant does not oppose the motion.

This motion is based on this Notice of Motion and Motion, the Suggestions in Support Thereof,

the accompanying Declaration of Taras Kick, the accompanying Declaration of Richard McCune, the accompanying Declaration of Arthur Olsen, the accompanying Declaration of Robert Weissman of the proposed *cy pres* recipient, Public Citizen, the accompanying Declaration of Joy L. Bowens, the accompanying Declaration of Shandarese Garr of the proposed settlement administrator Garden City Group, other documents and papers on file in this action, and such other materials as may be presented before or at the hearing on this motion, or as this Honorable Court may allow.

Dated: April 2, 2018

Respectfully submitted,

/s/ Taras Kick

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Attorneys for Plaintiff Joy L. Bowens and the Putative Class

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I. SUMMARY.

This is a putative class action alleging that Defendant Mazuma Credit Union ("MCU" 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 on the actual or current balance in the account (*i.e.*, the money actually in the account, sometimes called "ledger" balance). Plaintiff alleges this is in violation of the terms of MCU's 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. MCU disputes Plaintiff's contentions.

The parties have now reached a proposed settlement of this matter, subject to this Honorable Court's review and approval. Pursuant to the signed settlement contract, MCU was required as of January 1, 2018, to assess overdraft fees based on the "collected balance" in a member's account rather than on the "available balance" as it had been doing prior to this lawsuit. Assessing overdraft fees on members in this new manner rather than on the "available balance" challenged by Plaintiff in the lawsuit will decreased the total amount of overdraft fees charged by MCU over the next four years by approximately $3 million. Further, in addition to this change in practices, under the proposed settlement agreement, MCU also will make a monetary payment of $1,360,000, with no reversion of any residue to MCU. The settlement payment will be used to provide restitution to class members, pay the litigation costs, costs of notice and claims administration, attorney fees in the amount of one-third of the settlement payment (subject to this Court's approval), and a service award to the class representative for her work on behalf of the class. As described in more detail below, the total settlement value of $4,360,000 ($3 million in savings from future overdraft fees plus $1,360,000 in new money) represents approximately 126% of the most likely expected recovery at trial, and the $1,360,000 new money component alone represents approximately 39.37% of that most likely expected recovery at trial.

Further, the manner of distribution of this proposed settlement is especially consumer friendly. It

does not require any claims to be made by the class members at all. Specifically, payment will be credited to the class members according to a formula which 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. (See Exhibit 1 to the Declaration of Taras Kick ("Kick Decl."), "Settlement Agreement," ¶ 8(d)(iv).) This 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, without the need for any claim to be made by the class member. (Settlement Agreement, ¶ 8(d)(v).) Finally, any money that remains after this distribution process, rather than revert to Defendant, instead will be divided between two non-profits, Public Citizen, an organization actively involved in protecting consumer rights, and Truman Heritage Habitat for Humanity (if approved by this Court). (Settlement Agreement ¶ 11.)

In sum, the proposed settlement meets all criteria for preliminary approval, and Class Counsel respectfully requests that the Court preliminarily approve the settlement so that notice of a final approval hearing may be disseminated to the class at this time.

II. BACKGROUND.

The Complaint in this action was filed on September 30, 2015 (Docket No. 1 "Complaint"), alleging that MCU 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, ¶ 2, ¶¶ 16-19.) On December 21, 2015, Defendant filed an Answer to the Complaint, denying generally all material allegations therein, and raising several affirmative defenses. (Docket No. 3). On February 22, 2016, Plaintiff propounded on MCU its first request for production of documents, identifying 69 categories of documents, its first set of special interrogatories, including 24 interrogatories, and its first set of requests for admission, including 12 requests, to which Defendant responded on April 15, 2016. (Kick Decl. ¶ 5.) On May 18, 2016, Plaintiff propounded on MCU its second set of requests for production, identifying 10 additional categories of documents, to which Defendant responded on June 25, 2016. (Kick Decl. ¶ 5.) On May 25, 2016, Plaintiff took the deposition of three "person most knowledgeable" corporate designees regarding overdraft fees, John Brown, MCU's Vice President of Technology, Laura Kay Eblen, MCU's

Director of Payments, and Brandon Michaels, MCU's President and CEO. (Kick Decl. ¶ 5.)

The parties began settlement negotiations, which at all times were at arms' length and adversarial. (Kick Decl. ¶6.) The parties participated in two separate in-person mediation sessions with mediator John R. Phillips. (*Id.*)

Finally, Plaintiff's database expert, Arthur Olsen, reviewed the analysis performed by Defendant of the class data, and it included detailed information regarding overdraft fees assessed by MCU on debit card, check, and ACH transactions for each of the sample months, including the date of each overdraft fee, the amount of each overdraft fee, the type of transaction which caused each overdraft fee, (either debit card, check, or ACH), and the balance of the account at the time when each transaction posted to the account, and documents relating to the analysis that had been performed. (*See* Declaration of Arthur Olsen ("Olsen Decl.") ¶¶ 7, 8.) As a result of his review of that analysis, Mr. Olsen was able to confirm that MCU charged $3,454,308 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. ¶ 9.) Mr. Olsen also has confirmed the credit union's change in overdraft fee practices will result in savings to the credit union's members of $750,000 per year, or $3 million over four years. (Olsen Decl. ¶ 10.) The settlement fund of $1,360,000 therefore represents approximately 39.37% of the total "sufficient funds" damages in this case, while the total settlement value of $4,360,000 represents 126.22% of those damages.

III. TERMS OF THE SETTLEMENT.

1. Class Definition.

The class includes any member of MCU who, between the implementation of Defendant's automated overdraft program in April 2011 and September 30, 2015, was assessed an overdraft fee when the member had sufficient money in his or her ledger balance, but insufficient money in his or her available balance to complete the transaction that caused the fee. (Settlement Agreement ¶ 1(e).) The parties already have determined that there are 12,031 members in the class, and have identified who they are. (*See* Olsen Decl. ¶ 9.)

2. Change in Systems.

As a part of this proposed settlement, MCU contracted that as of January 1, 2018, it would no longer assess overdraft fees based on the "available balance" method, but instead will only assess overdraft fees based on the "collected balance" in a member's account.[1] (Settlement Agreement ¶ 2.) The parties have calculated that over a period of four years this change in the way MCU assesses overdraft means a savings of approximately $3 million based on the difference in overdraft fees which would have been assessed in the prior four years. (*Id*.; Olsen Decl. ¶ 9.)

3. Monetary Payment.

Pursuant to the terms of the Settlement, Defendant also will pay $1,360,000 into a settlement fund, which will be set up by the third-party administrator and used to pay class members directly. (Settlement Agreement ¶ 1(s).) Class members will not need to take any action to receive payment. (Settlement Agreement ¶ 8.) The settlement fund will also be used to pay claims and notice administration costs, and to pay for attorney fees and litigation costs as approved by this Court. (*Id*.)

4. Payments to Claimants.

No class member will need to make a claim. The amount paid to each class member shall be calculated as follows: (Net Settlement Fund / Total Improper Overdraft Charges) x Total Improper Overdraft Charge per Class Member = Individual Payment. (Settlement Agreement ¶ 8(d)(iv)). This means each class member will be treated fairly by receiving a proportionate share of his or her "sufficient fund" overdraft fees refunded as a result of this settlement. Class members who remain MCU members at the time of the distribution will receive a credit to their checking accounts in the amount of the Individual Payment. (Settlement Agreement ¶ 8(d)(v)(1)). If they do not have a checking account, but maintain another account at Defendant, then that account shall be credited. (*Id*.) Class Members who are not members of Defendant at the time of the distribution of the Net Settlement Fund shall be sent a check by the claims administrator to the address to which the class notice was sent,

[1] The Settlement Agreement originally signed stated the change in practices was going to be to "current balance" rather than "collected balance." This terminology was changed to "collected balance" at the request of the credit union. Database expert Arthur Olsen has confirmed the four year savings under this "collected balance" will be $3 million.

discussed *infra*, or at such other address as designated by the Class Member. (Settlement Agreement ¶ 8(d)(v)(2)). The Class Member shall have one-hundred eighty days (180) to negotiate the check, after which the payment will re-collect in the residue to be distributed to a *cy pres* recipients, also discussed *infra*. (*Id*.)

5. *Cy Pres* Distribution.

Under no circumstances will any of the money from this settlement revert to MCU. (Settlement Agreement ¶ 8(d)(vi).) Rather, if there is any residue which remains in the Net Settlement Fund, the Settlement provides for a *cy pres* distribution of one-half (50%) of such residue to Public Citizen, a non-profit organization devoted to protecting consumer rights, or to some other non-profit, public benefit corporation nominated by Class Counsel and approved by the Court that operates in the area of western Missouri, and one-half (50%) of the residue to Truman Heritage Habitat for Humanity, or if Truman Heritage Habitat for Humanity is not approved by this Court, some other non-profit, public benefit corporation nominated by Defendant's counsel and approved by the Court. (Settlement Agreement ¶ 11; Kick Decl. ¶ 8.)

6. Class Notice.

The Settlement Agreement provides that, for all class members who are current members of MCU and who have agreed to receive notices about their accounts from MCU by email, the claims administrator shall email the notice to all such class members in a manner that is calculated to avoid being caught and excluded by spam filters or other devices intended to block mass email, after receiving from MCU the most recent email addresses it has for those members. (Settlement Agreement ¶ 5(b).) For any emails that are returned undeliverable, the claims administrator shall use the best available databases to obtain current email address information for class members, update its database with these emails, and resend the notice. (*Id*.)

For all class members who are not current members of MCU or who have not agreed to receive notices about their accounts from MCU by email, the claims administrator shall mail those class members the notice by first class United States mail to their best mailing addresses. (Settlement Agreement ¶ 5(c).) To determine the best mailing addresses, MCU will first provide the claims administrator with the last known mailing addresses for the class members, and the claims administrator

will next run the names and addresses through the National Change of Address Registry and update the addresses as appropriate. (*Id*.) If a mailed notice is returned with forwarding address information, the claims administrator shall re-mail the notice to the forwarding address. (*Id*.) For all mailed notices that are returned as undeliverable, the claims administrator shall use standard skip tracing devices to obtain forwarding address information and, if the skip tracing yields a different forwarding address, the claims administrator shall re-mail the notice to the address identified in the skip trace, as soon as reasonably practicable after the receipt of the returned mail. (*Id*.) Finally, the notice shall also be posted on a settlement website created by the claims administrator. (Settlement Agreement ¶ 5(d).)

Plaintiff had requested bids from two well regarded claims administrators, and the lower bid came from Garden City Group LLC ("GCG"). The contemporaneously filed Declaration of Shandarese Garr of GCG sets forth the proposed notice and administration procedures to be used, and in Paragraph 13 declares to cap the costs at $41,250. Using similar notice procedures in other overdraft fee class actions against credit unions, these same Class Counsel have accomplished successful notice well in excess of 90%. (Kick Decl. ¶ 9.)

7. Opt Out Procedure.

Any class member who wishes to opt out can do so by mailing an exclusion letter by the Bar Date. (Settlement Agreement ¶ 12.)

8. Opportunity to Object.

Under the proposed schedule for approval of this settlement, class members will have the opportunity to object from the time notice is mailed to them until fifteen days after class counsel will file the Motion for Final Approval, including for attorneys' fees and reimbursement of costs, both with this Honorable Court and also on the website created by the claims administrator for this settlement. (Settlement Agreement ¶ 1(a).) This means that every class member who so wishes will have at least 45 days to object since the Motion for Class Certification will not be filed sooner than 30 days after notice of this settlement goes out. Any class member who wishes to object to the settlement terms can then do so by mailing an objection to the Court and the settlement administrator. (Settlement Agreement ¶¶ 1(a), 13.)

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9. Attorneys' Fees and Costs.

Attorneys' fees and costs are to be paid out of the settlement fund. Class Counsel will apply to this Court for attorneys' fees of one-third of the new money portion of the settlement, meaning $453,333.33, plus reimbursement of reasonable litigation costs as approved by this Court. (Settlement Agreement ¶ 8(d)(i).) This fee application is equal to about 11% of the total settlement value when considering the full value of the settlement resulting from the change in practices, and if evaluated from a lodestar perspective, a multiplier of only 1.4x based on Class Counsel's current lodestar. (Kick Decl. ¶ 10.) Defendant has agreed not to oppose a fee request of this amount. (*Id*.) Class Counsel's litigation costs in this matter to date equal $31,707.50, and Class Counsel have committed to the litigation costs in this matter, including the costs of database expert consultant Arthur Olsen, not exceeding $35,000 through conclusion of this matter, including through the Final Approval hearing. (Kick Decl. ¶ 10.) Additionally, the firms of McCune Wright Arevalo and The Kick Law Firm, APC, the two proposed lead counsel in this matter, have agreed to share equally in the attorneys' fees, and this was disclosed to and approved by the proposed class representative Ms. Bowens. (*Id*.)

10. The Class Representative Service Award.

The Settlement Agreement states that Defendant will not object to a service award to the class representative of $10,000, but has the right, if it wishes, to object to a request of more than $10,000. Ms. Bowens, the class representative, is requesting an award in excess of $10,000, that being a request of at least 5% of the proposed settlement. She has submitted a contemporaneously filed supplemental declaration which makes her case in support of this award, which specifies the reasons for the amount she is requesting, and Paragraphs 5 through 17 of that declaration are written without the assistance of Class Counsel. Class Counsel can state that Ms. Bowen was very helpful to the prosecution of the case. (Kick Decl. ¶ 7.). She always provided all documents requested, and answered all questions asked. (*Id*.) Furthermore, Ms. Bowen was very involved in the case, asking questions consistently, including about the status, and also personally attended both of the sessions of the mediation with the mediator John Phillips. (*Id*.)

11. Release.

In consideration for the settlement, as detailed in the Settlement Agreement, class members are

releasing all claims they made, could have made, or in any way arise out of any allegations that were or could have been made by any Class Member concerning alleged wrongdoing during the class period (consistent with the class definition) in the Action. (Settlement Agreement ¶ 14.)

IV. ARGUMENT

A. The Settlement Should Be Preliminarily Approved.

1. Class Action Settlement Procedure.

Class action settlements are subject to a two-step approval process. First, the Court makes a preliminary evaluation of the fairness of the settlement. If the Court determines that the settlement appears be fair, adequate and reasonable, then it should order that notice be given to the class members of a formal final settlement hearing. At that formal hearing, evidence may be presented in support of and in opposition to the settlement. The federal Manual for Complex Litigation, Second ("MCL 2d"), summarizes the preliminary approval criteria as follows:

> If the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement.

(MCL 2d § 30.44.)

In addition to provisional certification of the proposed settlement class (*see* Section IV.B., *infra*), the Rule 23(e) settlement approval procedure describes a three-step process for approval of a class action settlement:

1) Preliminary approval of the proposed settlement;
2) Dissemination of notice of the settlement to all affected class members; and
3) A formal fairness hearing, i.e. the final approval hearing, at which class members may be heard regarding the settlement, and at which counsel may introduce evidence and present argument concerning the fairness, adequacy, and reasonableness of the settlement.

The Eighth Circuit has held that, "[t]he law strongly favors settlements," and that "[c]ourts should hospitably receive them." *Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1*, 921 F.2d 1371, 1383 (8th Cir. 1990). As such, settlement agreements are "presumptively valid," *id.*, and "judges should

not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148-49 (8th Cir. 1999.

2. The Standard for Granting Preliminary Approval.

This motion asks that this Honorable Court take the first step in this three-step process by preliminarily approving the Settlement Agreement of the parties. Under Rule 23(e), courts are tasked with determining whether class action settlements are "fair, reasonable, and adequate." The court should consider "(1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement." *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932-33 (8th Cir. 2005) (internal citations omitted).

In this case, the proposed settlement easily falls within the range of possible approval, and is fair to the entire class. All settlement negotiations between the parties were conducted at arm's-length, and through experienced counsel. (Kick Decl. ¶ 6.) Courts have held that there is typically an initial presumption that a proposed settlement is fair and reasonable when it is the result of arms-length negotiations. *In re ADC Telecomms. ERISA Litig.*, No. 03-2989 ADM/FLN, 2006 U.S. Dist. LEXIS 98683, at *4 (D. Minn. July 14, 2006); *see also* Newberg on Class Actions §11.41 at 11-88 (3d ed. 1992). Moreover, if the terms of the settlement agreement seem to be fair, courts generally assume that negotiations were proper. *See In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981); *see also* 4 Newberg § 11.41.

The proposed settlement meets the standards for preliminary approval because: (1) it is the product of serious informed non-collusive negotiations arrived at after civil motion practice by counsel very experienced in this sort of litigation pertaining to overdraft fees and after Plaintiff's database expert was given the chance to review Defendant's database calculations pertaining to class members and damages; (2) it has no obvious deficiencies because it provides relief that is appropriately tailored to the alleged harm and that is fair, reasonable and adequate given the risks of litigation; (3) it treats all class members equally; and (4) it was negotiated by and recommended by experienced counsel.

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3. The Settlement is Reasonable, Fair and Adequate Given the Strength of the Case and the Risks of Litigation.

As stated, the settlement provides for a change in practices that will save approximately $3 million in overdraft fees over the next four years, and also a monetary fund payment of $1,360,000, from which all class members will be paid their *pro rata* share, based on the total amount of improper overdraft fees they paid. Defendants will not receive a reversion of any unclaimed funds. The total settlement value of the case, inclusive of the savings from Mazuma's change in practice, is $4,360,000. Plaintiff's counsel believes that the most likely restitutionary number the class would have received in aggregate, had it prevailed at trial, is $3,454,308. (Kick Decl. ¶ 12.) Accordingly, the new money portion of the settlement represents approximately 39.37% of the most likely result Class Counsel believes would have been obtained by class members had Plaintiff prevailed, and the total settlement value represents 126.22% of that figure. (*Id.*)

Courts have determined that settlements are, of course, reasonable where Plaintiffs recover only part of their actual losses. "A cash settlement amounting to only a fraction of the potential cash recovery… does not in itself render the settlement unfair or inadequate." *Holden v. Burlington N., Inc.*, 665 F. Supp. 1398, 1414 (D. Minn. 1987); *see also Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988), aff'd 899 F.2d 21 (11th Cir. 1990) ("[T]he fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate"). Indeed, "[a] settlement can be satisfying even if it amounts to a hundredth or even - a thousandth of a single percent of the potential recovery." *Id.*; *see also 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*, or $391.5 million aggregate voucher potential where the class could have recovered $13.05 billion). In this case, as stated, there will not even be any claims process necessary for class members to receive their money, and none of the new money portion of

$1,360,000 will revert to Defendant.

Although Plaintiff does believe the liability in this case is strong, to continue with the case also would nonetheless be very expensive for both sides. (Kick Decl. ¶¶ 11, 12.) With regard to expected duration, 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. (*Id*.) Class 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. (*Id*.) If the settlement is not approved, Plaintiff would likely next face a motion for summary judgment. (*Id*.) After an expensive trial, regardless of which party prevailed, there likely would be appellate practice, further delaying any possible actual receipt of money by the class members. (*Id*.) The cost of attorneys' fees to both sides from all of this activity would be substantial, at least hundreds of thousands of dollars and potentially millions of dollars in additional attorney time if the matter went all the way to verdict and appeal. (*Id*.)

Finally, this settlement in substance and structure is more favorable than the vast majority of class action settlements. The relief is in cash, not coupons. And, none of the money will revert to the Defendant.

4. The Settlement Treats Class Members Equally.

Under the settlement, all class members are treated equally. All class members for whom an improper overdraft fee has been identified will receive their *pro rata* share based on their "sufficient funds" overdraft fees from the settlement fund.

5. The Recommendation of Experienced Counsel Supports Approval.

The judgment of competent counsel regarding the Settlement should be given significant weight. *White v. Nfl*, 822 F. Supp. 1389, 1420 (D. Minn. 1993) ("The court therefore affords considerable weight to the opinion of experienced and competent counsel that is based on their informed understanding of the legal and factual issues involved."); *Turner v. Murphy Oil USA, Inc.*, 472 F.Supp.2d 830, 852 (E.D. La. 2007); *In re Global Crossing. Sec. & ERISA Litig.*, 225 F.R.D. 436, 461 (S.D.N.Y. 2005); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 493 (N.D. Ill. 2015) (considering, among other factors, "the opinion of experienced counsel"). Plaintiff's counsel are experienced in litigating and settling consumer class actions and other complex matters. (McCune Decl. ¶¶ 2-5; Kick Decl. ¶¶ 2-4.)

They have investigated the factual and legal issues raised in this action, and are in favor of the settlement. (McCune Decl. ¶ 7; Kick Decl. ¶12.)

6. The Proposed Forms of Notice and Notice Programs are Appropriate and Should Be Approved.

The Settlement Agreement is attached as Exhibit 1 to the Declaration of Taras Kick. The proposed notice is attached as Exhibit 1 to the Settlement Agreement. The proposed form of notice and notice program here fully comply with due process and Fed. R. Civ. P. 23. Rule 23(e) of the Federal Rules of Civil Procedure, which pertains to class action settlements, mandates that "notice of the proposed compromise shall be given to all members of the class in such manner as the court directs." Fed. R. Civ. P. 23(e). The Eighth Circuit has directed that the notice need only satisfy the "broad 'reasonableness' standards imposed by due process." *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999) (quoting *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 121 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975)). "The Supreme Court has found that the notice must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id*. (quoting *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950); *see also Ruiz v. McKaskle*, 724 F.2d 1149, 1153 (5th Cir. 1984) (approving district court's notice plan that "fairly recited the [settlement] agreement's terms and did not employ unnecessary legalisms."). There is, however, no requirement that the entire settlement agreement be sent to class members. *See Grunin*, 513 F.2d at 122.

The proposed notice more than meets this standard, as it fairly states the terms of the settlement without resort to legalisms and provides the class members a clear avenue to object to the settlement, absent themselves from it, or to participate in the settlement by undertaking no action whatsoever. (Settlement Agreement, Ex. 1). The Garden City Group ("GCG") declaration filed contemporaneously further supports this.

B. The Proposed Settlement Class Should Be Certified.

In granting preliminary approval of a proposed settlement, the Court must determine that the proposed settlement class is appropriate for certification. MANUAL FOR COMPLEX LITIGATION § 21.632 (4th ed. 2004); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). 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. 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). There is no specific number of class members required, though the numerosity requirement is typically satisfied when the class comprises at least forty members *See, e.g. Bradford v. AGCO Corp.*, 187 F.R.D. 600, 604 (W.D. Mo. 1999) (certifying class of between 20 and 65); *Ark. Educ. Asso. v. Bd. of Educ.*, 446 F.2d 763, 769 (8th Cir. 1971) (finding that 20 members is sufficient to meet the numerosity requirement); *Esler v. Northrop Corp.*, 86 F.R.D. 20, 33-34 (W.D. Mo. 1979) ("the difficulty inherent in joining as few as 25 or 30 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of 23(a)(1) on that fact alone") (quotation omitted); Newberg on Class Actions, at § 3:05 (4th ed. 2002) (joinder is impracticable where the class is composed of more than 40 persons). In this case, the number of class members is over 10,000, far exceeding that needed for numerosity. (Olsen Decl. ¶ 9.)

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. *See, e.g., In re Aquila ERISA Litigation*, 237 F.R.D. 202, 207 (W.D. Mo. 2006) ("This requirement imposes a light burden on the plaintiff seeking class certification and does not require commonality on every single question raised in a class action.") (citing *DeBoer v. Mellon Mort. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995); *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561 (8th Cir. 1982) ("The rule does not require that every question of law or fact be common to every member of the class . . . and may be satisfied, for example, where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated.") (internal citations and quotations omitted). 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. 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" as Plaintiff contends should have been done under the relevant contracts. Determination of this contention, regardless of the answer, will resolve the allegations for the whole Class in one stroke. As such, 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; typicality "means that there are 'other members of the class who have the same or similar grievances as the plaintiff.'" *Alpern v. UtiliCorp United*, 84 F.3d 1525, 1540 (8th Cir. 1996) (quoting *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir.), *cert. denied*, 434 U.S. 856, 54 L. Ed. 2d 128, 98 S. Ct. 177 (1977)); *see also* 1 Newberg on Class Actions § 3.13, at 3-76 (3d ed. 1992). "The burden is 'fairly easily met so long as other class members have claims similar to the named plaintiff.'" *Id*. (quoting *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995)). "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class

claims, and gives rise to the same legal or remedial theory." (*Id*.)

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 to complete the requested transaction. At a minimum, this occurred on January 12, 2015, when she was assessed two $28 overdraft fees on transactions for $20 and $7.99, despite the fact that her account contained $96.98 before she requested the transactions 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). "In order to satisfy this requirement, Plaintiffs must show that: 1) the representatives and their attorneys are able and willing to prosecute the action competently and vigorously; and 2) each representative's interests are sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge… Otherwise stated, adequate representation turns upon the qualifications and experience of plaintiffs' counsel to conduct the litigation and whether the plaintiffs have any interests antagonistic to the class." *Carpe v. Aquila, Inc.*, 224 F.R.D. 454, 458 (W.D. Mo. 2004) (quoting *Beckmann v. CBS, Inc.*, 192 F.R.D. 608, 614 (D. Minn. 2000). As with the typicality requirement, this second 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 have extensive experience in consumer class actions, and in particular, expertise in overdraft fee litigation. (McCune Decl. at ¶¶ 2-5; Kick Decl. at ¶¶ 2, 3.) The interests of Plaintiff Joy L. Bowens 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. (Bowens Decl. ¶ 2; Kick Decl. ¶ 7.) 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, personally attending two sessions of mediation, and being prepared and willing to testify at trial on behalf of the class if necessary. (Kick Decl. ¶7.)

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). *Carpe v. Aquila, Inc.*, 224 F.R.D. 454, 456 (W.D. Mo. 2004). 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); *Carpe*, 224 F.R.D. at 456.

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. "Common questions of law and fact need only predominate the claims of the proposed class; such claims need not be dispositive of the litigation." *Carpe v. Aquila, Inc.*, 224 F.R.D. 454, 458 (W.D. Mo. 2004) (citing 7A Wright, Miller & Kane Federal Practice and Procedure, § 1778 at 528-29 ("When one or more of the central issues in the action are common to the class and can be said to predominate, the action will be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately."). "The fact that some individual questions will be involved in the case does not preclude a finding that the common issues will predominate." *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 MCU 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 only 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. To the extent there is any ambiguity, the intent of the parties can be determined by examining the contract itself, construing any ambiguity against the drafter. *Triarch Indus. v. Crabtree*, 158 S.W.3d 772, 777 n.7 (Mo. 2005) ("ambiguities in contracts should be construed against the drafter"); *Transit Cas. Co. v. Certain Underwriters at Lloyd's*, 963 S.W.2d 392, 398 (Mo. Ct. App. 1998) ("ambiguity must be read against the draftsman of the provisions in question"). Further, under Missouri law, the determination of the parties' intent in entering a contract is a question of objective intent. *Newco Atlas, Inc. v. Park Range Constr., Inc.*, 272 S.W.3d 886, 891 (Mo. Ct. App. 2008) ("Where the language of the contract is unambiguous, the intent of the parties will be ascertained from the language of the contract alone and not from extrinsic or parol evidence of intent."). For this reason, among others, courts often grant class certification for classes alleging breach of a common contract. *Boswell v. Panera Bread Co.*, 311 F.R.D. 515, 527 (E.D. Mo. 2015) (noting that breach of contract claims for uniform contracts are "particularly well suited for class treatment"); *see also Dupler v. Costco Wholesale Corp.*, 249 F.R.D. 29, 37 (E.D.N.Y. 2008) (collecting cases from around country for proposition that "[a]n overwhelming number of courts have held that claims arising out of form contracts are particularly appropriate for class

action treatment."); *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 39 (1st Cir. 2003) (affirming certification of breach of contract and unfair trade practices claims where the claims were "based entirely on a standard form contract which the defendant used with every member of the class"); *Bird Hotel Corp. v. Super 8 Motels, Inc.*, 246 F.R.D. 603, 605 (D.S.D. 2007) (granting class certification when the "liability question" of whether the defendant "breach[ed] the [form] franchise agreement by imposing an additional mandatory five percent fee" was identical for all class members).

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). Courts in the Eighth Circuit have 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. *McCollins v. Bayer Corp. (In re Baycol Prods. Litig.)*, 265 F.R.D. 453, 458 (D. Minn. 2008) ("*Bayocol Prods. I*") ("[T]he most compelling rationale for finding superiority in a class action is whether the action is a negative value suit.") (quoting *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 210 (D. Minn. 2003) ("*Bayocol Prods. II*")). 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). 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 at most a $28 overdraft fee. There is no question that a large number of class members have suffered damages in an amount that could not justify or sustain individual lawsuits, and the only choice is between a class action and no action.

C. SCHEDULE OF SETTLEMENT DATES.

The next steps in the settlement approval process are to notify the Class of the proposed Settlement, allow an opportunity for opt-outs and objections, and to hold a fairness hearing. The parties

propose the following dates, assuming such dates are acceptable to the docket of this Honorable Court:

Claims Administrator Sends Notice and Website Goes Live	**Ten Days After Preliminary Approval**
Last day to Opt Out	**Thirty Days After Claims Administrator Sends Notice**
Motion for Final Approval and Attorneys' Fees Filed with Court	**Thirty-Five Days After Claims Administrator Sends Notice**
Last day to Object	**Fifteen Days After Motion For Final Approval and Attorneys' Fees is Filed With the Court**
Last day to file responses to objections and Class Counsel's and Defendants' Replies in Support of Motion for Final Approval and Attorneys' Fees	**Ten Days After Last Day to Object**
Final Approval Hearing	**Twenty Days After Last Day to Object**
Filing by Claims Administrator of Final Report	**Thirty Days After Time to Cash Checks has Expired**

V. Conclusion.

Based on the foregoing, Plaintiff respectfully requests that the Court: (1) preliminarily approve the Settlement; (2) approve the proposed plan of notice to the Class; (3) appoint Garden City Group as the Notice Administrator; (4) set a schedule of dates as set forth above for further action on this Settlement Agreement, including a hearing pursuant to Rule 23(e) of the Federal Rules of Civil Procedure to determine whether the proposed Settlement is fair, reasonable, and adequate and should be finally approved.

Dated: April 2, 2018

Respectfully submitted,

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Counsel for Plaintiff Joy L. Bowens and the Putative Class

*Pro Hac Vice applications to be submitted

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2018, a copy of the foregoing document 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