X10-UWY-CV-12-6015956-S	:	SUPERIOR COURT
	:	
ALFONSE FORGIONE	:	JUDICIAL DISTRICT OF
	:	WATERBURY
VS.	:	COMPLEX LITIGATION DOCKET
	:	
WEBSTER BANK, N.A.	:	MARCH 1, 2016

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiff Alfonse Forgione, on behalf of himself and the proposed Class defined below, respectfully submits this Memorandum in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Settlement. For the reasons set forth below, the proposed settlement (the "Settlement") is fair, reasonable and adequate. The Settlement is the product of arm's-length negotiations between Proposed Settlement Class Counsel ("Class Counsel") and Defendant, Webster Bank ("Webster"). The Court should grant preliminary approval because the $1.8 million Settlement provides substantial monetary relief to the Class and represents a substantial recovery. As explained below, the terms of the Settlement are well within the range of reasonableness and are consistent with applicable case law. Indeed, the Settlement is an excellent result for the class of Webster account holders defined in the Settlement Agreement (the "Class") and easily satisfies all criteria for preliminary settlement approval. Accordingly, Plaintiffs request entry of a Preliminary Approval Order that will begin providing the Class with notice on the following schedule:

Event	Days From Preliminary Approval Order
Webster Transfers $1,800,000 to Settlement Fund	30 Business Days
Email Notice	21 Days
Mailed Notice	45 Days
Motion for Final Approval Due	75 Days
Opt-Out Deadline	90 Days
Deadline to Submit Objections	90 Days
Reply Brief Due	110 Days
Final Fairness Hearing	120 Days

In this litigation, Plaintiff challenges Defendant's assessment of Overdraft Fees for debit card transactions that were authorized in real time by Webster when there were sufficient available funds in his account to pay the full amount of the authorized transaction, but later presented to Webster for payment at a time when there were insufficient available funds in his account to pay the full amount of the transaction as a result of other items having been presented and paid. Under the proposed Settlement, Webster will deposit $1,800,000 in a common fund for the benefit of the Class. After payment of the costs of notice and settlement administration, litigation expenses and attorneys' fees, the net proceeds of the Settlement will be distributed automatically, without the need for Class Members to submit a claim form, with class members receiving a proportionate share of the Settlement Fund based on the total amount of unrefunded overdraft fees each actually paid that match the description of the overdraft fees Plaintiff has alleged were improper in the Complaint. The Parties have devised an extensive notice plan that will provide direct notice to virtually all Class Members. In the face of certain risks discussed below, this recovery merits approval.

For these reasons, and those detailed herein, Plaintiffs respectfully request that the Court: (1) preliminarily approve the Settlement; (2) preliminarily approve the proposed Plan of Allocation; (3) preliminarily certify for settlement purposes the proposed Class, pursuant to Sections 9.7 and 9-8 of the Practice Book; (4) appoint Alfonse Forgione as class representative; (5) appoint Robert Izard and Mark Kindall, Izard Nobel, LLP, and Hassan A. Zavareei and Jeffrey Kaliel, Tycko & Zavareei LLP, as Settlement Class Counsel; (6) approve the Notice program set forth in the Settlement Agreement (attached hereto as Exhibit A), and approve the form and content of the Notices (collectively attached hereto as Ex. C); (7) appoint Hilsoft Notifications as the Notice Administrator; (8) approve and order the opt-out and objection

procedures set forth in the Settlement Agreement; (9) stay the Litigation against Defendant pending Final Approval of the Settlement; and (10) schedule a Final Fairness Hearing to consider final approval of the settlement.

II. BACKGROUND RELEVANT TO PRELIMINARY APPROVAL

The complaint, which was filed by the Plaintiff and on July 2, 2012, alleges that he was a Webster account holder and had used a debit card in connection with his account at Webster. Plaintiff further alleges that Webster improperly assessed him (and other Webster customers) Overdraft Fees for one or more debit card transactions that were authorized in real time by Webster when there were sufficient available funds in the customer's account to pay the full amount of the authorized transaction, but later presented to Webster for payment at a time when there were insufficient available funds in customer accounts to pay the full amount of the transaction as a result of other items having been presented and paid. The Complaint challenges Webster's compliance with the terms of its Deposit Account Agreement and asserts certain other claims relating to Overdraft Fees. Plaintiff alleges that Webster's practices were unlawful and caused him and others similarly situated to incur overdraft fees in excess of those authorized by the Account Agreement. Webster denies the allegations of the Complaint.

From the outset of the case, the primary factual issues affecting liability have not been in dispute. The parties agreed about the content of Webster's customer agreements and – at least in general terms – agreed about Webster's actual policies for assessing overdraft fees. Declaration of Mark P. Kindall in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement ("Kindall Decl."), at ¶ 5. Plaintiff served, and Defendant responded to, Requests for Production of Documents and provided discovery fleshing out the exact mechanisms by which Webster's policies were implemented. *Id.* at ¶¶ 4-6. The real issue,

which has taken a considerable amount of discovery and assistance from the parties' experts, was determining the aggregate financial impact of Webster's policies. *Id.* at ¶¶ 5-6. Plaintiff's counsel retained an expert to review samples of Webster's transactional data to determine the frequency with which the challenged overdraft fees occurred. *Id.* at ¶ 6. The information provided Class Counsel both with important knowledge as to the universe of damages at issue and with additional information regarding the probabilities of class certification and, ultimately, prevailing on the merits. *Id.*

Subsequently, the Parties agreed to attempt to negotiate a settlement with the assistance of retired Judge Beverly Hodgson acting as a mediator. *Id.* at ¶ 7. The parties submitted detailed written mediation statements and conducted an in-person mediation session in Hartford on October 14, 2014. *Id.* at ¶¶ 7-8. The mediation was contentious and hard-fought, and ultimately resulted in the parties reaching an agreement in principle on the principal material terms of a settlement, including the amount that Webster would pay to a Settlement Fund. *Id.* at ¶ 8.

The key issue left unresolved by the mediation was the mechanism for identifying each of the transactions that had caused an overdraft fee in excess of what class members would have paid under Plaintiff's theory of the case during the entirety of the Class Period. *Id.* at ¶ 9. This was critical for purposes of crafting a Plan of Allocation that ensured that the net Settlement Fund would be distributed, as closely as possible, fairly and in accordance with Plaintiff's theory of the case. This proved to be technically difficult, because Webster did not keep its records in such a way that it was possible to readily isolate each time a customer (a) used a debit card to authorize a transaction; (b) at a time when the *available balance* of that customer's account – that is, the actual balance less any outstanding "holds" – was positive; and (c) that transaction was subsequently posted to the account at a time when the available balance was negative; and

(d) the account was charged an overdraft fee on that transaction; and (e) the charging of that overdraft fee caused the account to incur more overdraft fees than it otherwise would have done; and (f) the overdraft fee was not refunded or otherwise not paid (by virtue of the account being charged off with a negative balance). *Id.* at ¶ 10. To address these issues, Plaintiff's counsel retained another expert, Mr. Art Olsen, who had substantial experience in similar bank cases including the *Wells Fargo* litigation in California. *Id.* at ¶ 9. Through extensive work with Webster's employees and reviews of Webster's systems, Mr. Olsen was able to devise an automated program that was able to isolate these "profile" transactions, forming the basis for an equitable Plan of Allocation. *Id.* at ¶¶ 11.

While the Plan of Allocation issues were being worked on, the parties engaged in further negotiations over the terms of a final Settlement Agreement. *Id.* ¶ 12. The Parties were subsequently able to reach final agreement on the Settlement Agreement – including the Notice plan, claims process, and Plan of Allocation – now before the Court. *Id.* ¶ 12.

As is evident from the foregoing, the Settlement Agreement involved extensive and protracted negotiations, between counsel, between counsel and experts, and with former Judge Hodgson. The Settlement Agreement was reached only after the provision of key data that allowed Class Counsel to adequately evaluate the possibility of settlement, and the appropriate range of damages. Thus, the Settlement was reached after considerable investigation and careful consideration and discussions. The Parties were thus fully aware of the issues and risks associated with their respective claims and defenses.

III. <u>THE SETTLEMENT PROVISIONS</u>

The full terms of the Settlement are embodied in the Settlement Agreement, attached to the Kindall Declaration as Exhibit 1. The Agreement is fair and reasonable and provides

significant and meaningful benefits to the Class. Moreover, the terms of the Settlement have been carefully crafted and relate directly to the conduct that Plaintiff challenged in this case.

The terms of the Settlement are detailed in the Agreement. The following is a summary of the material terms.

A. <u>The Class</u>

The Settlement agreement provides that Plaintiffs will request certification of an opt-out class under Sections 9-8(3) and 9-9(a)(2)(B) of the Practice Book. The Class is defined as:

> All persons who were holders of debit cards issued by Webster Bank and who were charged an overdraft fee during the period from August 16, 2010 to March 15, 2014, for any debit card transaction authorized in real time by Webster when there were sufficient available funds in the customer's account to pay the full amount of the authorized transaction, but later presented to Webster for payment at a time when there were insufficient available funds in customer accounts to pay the full amount of the transaction as a result of other items having been presented and paid.

Settlement Agreement, ¶ 6.

Excluded from the defined Settlement Class are Webster, any parent, subsidiary, affiliate or controlled person of Webster, Webster's officers or directors, the judicial officers assigned to this litigation, and members of their staffs, and the heirs, successors and assigns of any of the foregoing. The Settlement also excludes from the proposed Settlement Class any person who timely submits a valid request to be excluded. *Id*.

B. <u>Monetary Relief for the Class</u>

Subject to approval by the Court, the total monetary consideration to be provided by Webster pursuant to the Settlement shall be $1,800,000, inclusive of all attorneys' fees, costs, and expenses, incentive payments and Third Party Notice and Claims Administration Costs. Settlement Agreement, ¶ 8.

The Settlement Agreement provides that Defendant will deposit the Settlement Fund into an escrow account established at Webster within thirty (30) business days of the entry of the Preliminary Approval Order, and will invest the funds in instruments backed by the full faith and credit of the United States Government or fully insured by the United States Government or an agency thereof (the "Instruments"), reinvesting the proceeds of these Instruments as they mature in similar Instruments at their current market rates. *Id.* ¶ 10. Further, Webster agreed to waive all standard account fees for the Escrow Account and fees for service as Escrow Agent. Any fees to be paid by Webster or the Claims Administrator to third parties in connection with the investment of the Settlement Fund are to be paid from the Settlement Fund. *Id*. The funds in the Escrow Account remain subject to the Court's jurisdiction until distributed pursuant to the Settlement or further order of the Court. *Id.* Furthermore, the Settlement provides that the Settlement Fund will be treated as a "qualified settlement fund" within the meaning of United States Treasury Reg. § 1.468B-1, and all taxes (including any estimated taxes, interest or penalties) arising with respect to the income earned by the Settlement Fund are to be paid out of the Settlement Fund.

C. Class Release

In consideration of the benefits conferred by the Settlement, all Class Members who do not submit a valid and timely opt-out request will be deemed to have released Defendants from claims related to the subject matter of the Action. The detailed release language can be found in Paragraphs 22-24 of the Agreement.

D. The Notice Program

To the extent possible, notice to Settlement Class Members shall be by first class mail or by electronic mail for Settlement Class Members who have authorized Webster to send them

monthly statements and other notices by this method. Settlement Agreement, ¶ 14. Plaintiff has chosen one of the leading class action notice and administration firms in the country to serve as the Notice Administrator for this Settlement. Hilsoft Notifications ("Hilsoft") is a firm that specializes in designing, developing, analyzing and implementing large-scale, un-biased, legal notification plans. Hilsoft is a business unit of Epiq Systems Class Action and Claims Solutions ("ECA"). Kindall Decl., ¶ 18.

E. Settlement Administration

The Parties have agreed that the cost of notice and the costs of claims administration shall be borne by the Settlement Fund, and that Webster will cooperate to facilitate notice and claims administration to reduce the costs associated with providing notice and distributing settlement funds to Settlement Class Members. Settlement Agreement, ¶ 13.

Plaintiff has engaged Hilsoft as Settlement Administrator. Kindall Decl., ¶ 18. Hilsoft will administer various aspects of the Settlement, including, but not limited to, providing notice by first class mail and by electronic mail.

F. Distribution of the Settlement Fund

The Third Party Notice and Claims Administration Costs, any taxes on the Settlement Fund, Court-approved attorneys' fees, costs and expenses, and Plaintiff's Incentive Award shall be deducted prior to the distribution of the remainder of the Settlement Fund in the Escrow Account. The distribution of the remainder of the Escrow Account will proceed in accordance with the Plan of Allocation agreed to by the Parties. Specifically, the Settlement Fund will be divided proportionately, based on the total amount of relevant overdraft fees incurred by each Settlement Class Member. *See* Plan of Allocation, attached to the Kindall Declaration as Exhibit 2.

The Parties agree to establish and maintain for no less than six (6) months after the Effective Date a mechanism to resolve claims, if any, submitted by Settlement Class Members in response to the Notice Program. Settlement Agreement, at ¶ 16. Any funds remaining in the Escrow Account after the distributions are completed pursuant to Paragraph 15 of the Settlement Agreement will be distributed through the *cy pres* process. *Id.* at ¶ 17. The Settlement provides that all funds resulting from returned or un-cashed checks shall remain in an account maintained by the Notice Administrator for six (6) months, at which time the money will be distributed through the *cy pres* distribution to a nonprofit financial literacy educational organization or organizations agreed upon by Webster and Settlement Class Counsel, and approved by the Court. *Id.* at ¶ 18. Should the parties be unable to agree on the recipient(s) they shall present their respective prospective recipients to the Court, with any supporting materials and argument, and the Court shall decide the recipient(s). *Id.* In the event that all funds remitted from Escrow Account to the Notice Administrator are paid to Settlement Class Members, Webster has no obligation to distribute a *cy pre*s under this Paragraph or as part of the Settlement. *Id.*

G. Class Representative Service Award

Class Counsel will ask the Court to approve an Incentive Award of $5,000 to Plaintiff. *Id.* at ¶ 11. Mr. Forgione has devoted substantial time and effort to the litigation and has kept in regular communications with Plaintiff's Counsel throughout more than three and a half years of litigation to remain fully apprised of all developments in this case and the progress of all Settlement discussions. Kindall Decl., at ¶ 20. Webster does not oppose Class Counsel's request for payment of the Incentive Award. Settlement Agreement, ¶ 11.

H. <u>Attorneys' Fees and Costs</u>

The Settlement Agreement provides that Plaintiff will apply to the Court for an award of attorneys' fees and expenses from the common fund established by the settlement. *Id.,* ¶ 9. Plaintiff proposes to submit an application for fees, not to exceed thirty-three percent (33%) of the Settlement, and for expenses incurred in the prosecution of the case, prior to the date for Class Members to either opt out of the Settlement or object to it. The Settlement Agreement is in no way predicated upon the Court's approval of Plaintiff's request for attorneys' fees and expenses, in whole or in part. *Id.*

IV. <u>ARGUMENT</u>

A. <u>The Settlement Agreement Merits Preliminary Approval</u>

Plaintiff requests that the Court give preliminary approval to the proposed settlement, so that members of the proposed Class may receive notice of the settlement terms and evaluate it for themselves. Approval of a class action settlement requires judicial approval. Conn. Prac. Bk. § 9-9(c)(1)(A). Courts in this state generally look to cases decided under Federal Law when interpreting Connecticut's class action rules and procedures, since the Practice Book requirements are substantially the same as the parallel provisions of the Federal Rules of Civil Procedure. *See, e.g., Artie's Auto Body, Inc. v. Hartford Fire Ins. Co.,* 287 Conn. 208, 215, 947 A.2d 320, 328 (2008); *Collins v. Anthem Health Plans,* 266 Conn. 12, 32 (2003)*; see also Gray v. Found. Health Sys., Inc.,* No. X06CV990158549S, 2004 WL 945137, at *1 (Conn. Super. Ct. Apr. 21, 2004) ("Reference to federal court decisions regarding approval of class action settlements is especially appropriate in light of the dearth of Connecticut appellate authority on the issue."). Public policy strongly favors the pretrial settlement of class action lawsuits. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 257 (S.D.N.Y. 2003); *see also In re Warner Chilcott*

Ltd. Sec. Litig., No. 06 Civ. 11515 (WHP), 2008 WL 5110904, at *1 (S.D.N.Y. Nov. 20, 2008) ("The settlement of complex class action litigation is favored by the Courts.") (citations omitted).

The standard for final approval of a class action settlement, under the Practice Book as under the Federal Rules, is whether it is "fair, reasonable and adequate." Conn. Prac. Bk. § 9-9(c)(1)(C). The issue now before the Court is whether the Settlement is within the range of what might later be found to be fair, reasonable and adequate, so that notice of the proposed Settlement should be given to Class Members and a hearing scheduled to consider final approval of the Parties' Settlement Agreement.

Once a proposed settlement is reached, "a court must determine whether the terms of the proposed settlement warrant preliminary approval. In other words, the court must make a 'preliminary evaluation' as to whether the settlement is fair, reasonable and adequate." *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409, 2006 WL 3247396, at *5 (S.D.N.Y. Nov. 8, 2006) (citations omitted); *see also In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("Preliminary approval of a proposed settlement is the first in a two-step process required before a class action may be settled."). "Once preliminary approval is bestowed, the second step of the process ensues: notice is given to the class members of a hearing, at which time class members and the settling parties may be heard with respect to final court approval." *See NASDAQ*, 176 F.R.D. at 102. At the preliminary approval stage, the Court is not required to make a final determination of the merits of the proposed settlement. *Prudential*, 163 F.R.D. at 210 ("At this stage of the proceeding, the Court need only find that the proposed settlement fits 'within the range of possible approval.'") (citation omitted). To grant preliminary approval, the court need only find that there is "'probable cause' to submit the

[settlement] to class members and hold a full-scale hearing as to its fairness." *In re Traffic Executive Ass'n,* 627 F.2d 631, 634 (2d Cir. 1980).

Preliminary approval of a proposed settlement is warranted "[w]here 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 reasonable range of possible approval." *NASDAQ*, 176 F.R.D. at 102 (*citing* Manual for Complex Litigation § 30.41 (3d ed.) (1995)); *see also In re Gilat Satellite Networks, Ltd.*, No. 02 Civ. 1510, 2007 WL 1191048, at *9 (E.D.N.Y. Apr. 19, 2007).

Because preliminary approval is simply the first step in the process of approving a settlement, courts have typically screened proposed settlements to determine if they have "obvious deficiencies, such as unduly preferential treatment of class representatives . . . or excessive compensation for attorneys." *Chin v. RCN Corp.,* No. 08-7349, 2010 WL 1257586, at *2 (S.D.N.Y. Mar. 12, 2010) (quoting Manual for Complex Litigation § 30.41 (3d ed.) (1995)).

The Settlement here has none of the "obvious defects" mentioned by courts. The Settlement itself is not contingent upon approval of attorneys' fees or any incentive award to the Class representative. Settlement Agreement, ¶¶ 9, 11. The Court will separately and independently determine the appropriate amount of fees, costs, and expenses to award to Class Counsel and the appropriate amount of any award to the Class representatives. Moreover, allocation and distribution of the Settlement Fund will treat Class Members fairly. Accordingly, the Proposed Settlement treats all members of the Proposed Class equally and fairly, and there are no "obvious deficiencies" which would prevent preliminary approval.

Considering the issues, evidence and nature of the settlement negotiations in this case, preliminary approval clearly is proper in this instance.

1. **The Settlement Agreement Is The Result Of Informed, Non-Collusive Negotiations**

Where a settlement is reached only after extensive arm's-length negotiations by competent counsel who had more than adequate information regarding the circumstances of the Litigation and the strengths and weaknesses of their respective positions, it is entitled to a "strong initial presumption of fairness." *In re PaineWebber Ltd.*, *P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). The opinion of experienced counsel supporting the settlement is entitled to considerable weight in a court's evaluation of a proposed settlement. *In re Michael Milken & Assoc. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993); *see also Reed v. General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983) ("[T]he value of the assessment of able counsel negotiating at arm's length cannot be gainsaid. Lawyers know their strengths and they know where the bones are buried."). Courts generally presume that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion, absent evidence to the contrary. Alba Conte & Herbert Newberg, NEWBERG ON CLASS ACTIONS § 11.28, at 11-59 (3d ed. 1992) (counsel are "not expected to prove the negative proposition of a noncollusive agreement").

Settlement discussions took place over the course of a year before an agreement was reached by the Parties. Kindall Decl. ¶¶ 5-8. The settlement negotiations were extensive and adversarial in nature. Moreover, the Parties were able to reach the settlement in principle only after working with former Judge Hodgson. *Id.* ¶¶ 7-8. There plainly was no collusion with respect to this proposed Settlement Agreement.

Class Counsel conducted a thorough investigation and analysis of Plaintiffs' claims. *Id.* ¶¶ 4-7. Class Counsel's review of sample transactional information provided early on by Webster enabled them to gain an understanding of the evidence related to central questions in the case, and prepared them for well-informed settlement negotiations. *Id.*, ¶ 7. Finally, Class Counsel are experienced in class action litigation. *See* Kindall Decl. Exhs. 3 & 4 (Firm Resumes). Accordingly, the Proposed Settlement is entitled to a "strong initial presumption of fairness." *In re PaineWebber Pshps. Litig.*, 171 F.R.D. at 125.

2. **<u>The Settlement Easily Falls Within the Range of Possible Approval</u>**

Even considering the more exacting standard for determining the fairness of the settlement at final approval, the Settlement is fair and reasonable. In making this determination, courts have looked to the nine-part test articulated by the Second Circuit:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Gray, 2004 WL 945137, at *1 (quoting *Robertson v. National Basketball Ass'n,* 556 F.2d 682, 684 n. 1 (2d Cir.1977) and *Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)) (internal citations omitted). While not the subject of the preliminary approval analysis, as discussed below, a review of the key factors for final approval support the Court's preliminary approval of the Settlement.

a. <u>The Stage of the Proceedings and the Amount of Discovery Completed</u>

In evaluating a settlement, "[t]here is no precise formula for what constitutes sufficient evidence to enable the court to analyze intelligently the contested questions of fact. It is clear

that the court need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation." Alba Conte & Herbert Newberg, NEWBERG ON CLASS ACTIONS § 11.45 (4th ed. 2002). By the time the Settlement was reached, Class Counsel had sufficient knowledge of the merits of the claims alleged in the Litigation and the defenses that would be asserted. Having litigated and currently litigating other cases regarding overdraft fees on checking accounts, Class Counsel are intimately familiar with the factual and legal issues and the ever-changing legal landscape surrounding the claims at issue in this litigation involving overdraft fees assessed by a national banking association.

Plaintiffs settled this litigation with the benefit of an analysis of a significant sample of fee data and Webster transactional information, as well as detailed information regarding business practices and written disclosures. As noted, review of this information positioned Class Counsel to evaluate with confidence the strengths and weaknesses of Plaintiffs' claims and prospects for success at class certification, summary judgment and trial.

Class Counsel were well informed of the strengths and weaknesses of Plaintiffs' claims and Defendants' defenses, which permitted them to fully consider and evaluate the fairness of the Settlement to the Class. *See Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (citation omitted) (finding action had advanced to stage where parties "'have a clear view of the strengths and weaknesses of their cases.'"). "[A] prompt and efficient attorney who achieves a fair settlement without litigation serves both his client and the interests of justice." *McKenzie Construction Inc. v. Maynard,* 758 F.2d 97, 101-2 (3d Cir. 1985). In the context of a complex class action, early settlement has far reaching benefits in the judicial system. *Maley v. Del Global Technologies Corp*., 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002).

b. The Risks of Establishing Liability and Damages

In assessing a proposed settlement, the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. While Class Counsel believe that Plaintiffs' claims are meritorious, there are substantial risks to achieving a better result for the Class through continued litigation. Specifically, Plaintiffs would face legal risk that, *inter alia*, their claims could be found preempted in whole or in part; or that a factfinder could determine Webster's disclosures were adequate and not misleading. Although Defendant's practices are far from unique, Plaintiff's case is fairly novel and there are few, if any, precedents concerning the proper interpretation of the disclosures at issue. This is not like a securities fraud class action, or even a bank overdraft fee case involving insufficient disclosures of the practice of reordering transactions from the highest to lowest dollar amount, where there has been considerable litigation and a number of important court decisions. This case involved novel issues and the risk of failure was high.

In addition to the general risks inherent in any Litigation, Webster argued that its methodology for assessing overdraft fees had the overall effect of diminishing the number of overdraft fees that it might have collected. Kindall Decl., ¶ 15. While overdraft fees were assessed on transactions that posted at a time when the customer's available account balance was negative, even though they were initially authorized when the available balance was positive and a hold was placed on the funds, the inverse was also true. That is, customers were authorized a transaction at a time when their available balance was negative were *not* assessed an overdraft fee so long as their available balance was positive when the transaction posted to the account. *Id.* This permitted customers who charged a transaction with insufficient funds a "grace period" for covering the purchase. While Plaintiff argued that the account agreement did not permit

Webster to assess an overdraft fee on a debit card transaction so long as the customer had sufficient available funds at *either* the time of authorization *or* the time of posting, this is an issue that might have been decided in Defendant's favor. This would have caused the entire action to fail, since Webster's overall fee collections probably would have been higher if it had inverted its practice. At very least, it would have made the path to success on the claims of both implied covenant of good faith and fair dealing and unjust enrichment much more difficult.

As an additional risk factor, even if Plaintiff *did* prevail on the merits, Defendant might successfully reduce the amount of damages by arguing that even if the disclosures were *initially* inadequate, Class Members should have eventually been on notice of the overdraft fees after a reasonable amount of time, and after bank statements and other notices made the reality of the fees clear. Kindall Decl. ¶ 14. If a factfinder agreed, best possible damages would be reduced accordingly.

Moreover, while Class Counsel believes that a class would be certified even over Defendant's objections, there is always a risk that Defendant would successfully block class certification. In attempting to block class certification, Webster would point to variations both in consumer understanding of the challenged practice and disclosures, and well as variations in consumer impact of the challenged practice such as the "grace period" discussed above.

In short, it is Class Counsel's considered opinion that the recovery from Defendant under this Settlement is fair and reasonable. *Id.* at ¶ 16. Although Plaintiffs and Class Counsel would have obviously sought more in any trial, the value of the Settlement constitutes a substantial recovery under all of the circumstances. Moreover, notwithstanding the confidence of Class Counsel in the merits of the Plaintiff's claims against Defendant, Class Counsel are cognizant that significant obstacles existed to both class certification and a victory at trial. Defendant had

arguments and potential defenses available to it at both stages. If class certification was denied and that denial was affirmed on appeal, the value of Plaintiffs' claims would have virtually extinguished. Under all of these circumstances, the proposed Settlement Agreement is fair, reasonable, and adequate.

c. <u>The Complexity, Expense and Likely Duration of the Litigation</u>

"The expense and possible duration of the litigation are major factors to be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984). This Litigation involves many complex legal issues relating to state consumer protection law and federal banking law and regulation. The costs and risks associated with litigating this Litigation to a verdict, not to mention through the inevitable appeals, would have been high, and the process would require many hours of the Court's time and resources. Further, even in the event that the Class could recover a larger judgment after a trial, the additional delay through trial, post-trial motions, and the appellate process could deny the Class any recovery for years, further reducing its value. *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action."); *Strougo*, 258 F. Supp. 2d at 261 ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation … the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery").

Because this complex Litigation would have placed significant burdens on both Parties and the Court, this factor militates in favor of the Settlement.

d. <u>The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and in Light of All the Attendant Risks of Litigation</u>

The adequacy of the amount offered in settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. Apr. 1987). Moreover, the Court need only determine whether the Settlement falls within a "'range of reasonableness.'" *PaineWebber*, 171 F.R.D. at 130 (citation omitted). When evaluating "the terms of the compromise in relation to the likely benefits of a successful trial . . . the trial court is entitled to rely upon the judgment of experienced counsel for the parties." *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). "Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Id.*

Here, the relief the Settlement Agreement provides for Class Members is outstanding. Webster has agreed to create a Settlement Fund of $1.8 million to reimburse Class Members for overdraft fees incurred during the Class Period on transactions that had a positive account balance when authorized. Based on the analysis of Plaintiff's experts, the proposed settlement represents approximately twenty-one percent of the total damages to the Class resulting from the challenged practice Kindall Decl. ¶ 14. In light of the risks discussed above that Plaintiff would not prevail in whole or in part, this is an extremely fair settlement.

This recovery is well within the range of recovery routinely approved by courts. *See Cagan v. Anchor Sav. Bank FSB*, No. CV–88–3024, 1990 WL 73423 at *12-13 (E.D.N.Y. May 22, 1990) (approving $2.3 million settlement over objections that "best possible recovery would be approximately $121 million."); *In Re AmBase Corp.,* No. 90 Civ. 2011 (CSH), 1995 WL 619856, at * 2 (S.D.N.Y. Oct. 20, 1995) (approving a settlement where class members received

from 3% to 20% of their losses, calculated as if all damage issues were resolved in the class members' favor); *see also Weinberger v. Kendrick,* 698 F.2d 61, 65 (2d Cir. 1982) (class action settlement approved as fair, reasonable, and adequate even where "it is not disputed that the recovery will be only a negligible percentage of the losses suffered by the class."); *Grinnell,* 495 F.2d at 455 ("The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved."); *In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895 (DAB), 2011 WL 1899715, at *5 (S.D.N.Y. May 13, 2011) (finding settlement reasonable "In light of the legal and factually complexity, the unpredictability of a lengthy trial and the appellate process" and noting that courts have approved settlement ranging from 3% to 7% of the class members' estimated losses in securities fraud cases); *In re Union Carbide*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989) (acknowledging that "a settlement can be approved even though the benefits amount to a small percentage of the recovery sought" and that the "essence of settlement is compromise.").

Here, in light of the novel issues present in this case, as well as the factual and legal complexity entailed in the prosecution and defense of this case and the unpredictability associated with class certification proceedings, a lengthy trial and any appellate proceedings, Plaintiff respectfully submits that the result achieved is excellent under all of the circumstances. The monetary benefit conferred upon the Class represents a significant recovery, under all of the circumstances and in light of the substantial risks of litigation on both the merits and in connection with what surely would have been a contested class certification proceeding. Kindall Decl. at ¶ 16. As the Proposed Settlement meets the requirements for final approval, it clearly is "within the range" of *possible* approval, and thus the Class should be notified and given the opportunity to evaluate the terms of the Proposed Settlement.

B. <u>The Plan of Allocation is Fair and Reasonable</u>

The proposed Plan of Allocation (the "Plan"), attached to the Kindall Declaration as Exhibit 2, is fair and reasonable. Importantly, the entirety of the Settlement Fund will be allocated among Settlement Class Members, ensuring complete exhaustion of the Fund. The Plan divides settlement funds proportionately among Class Members based on the total amount of relevant overdraft fees each paid that were not refunded. Settlement Class Members who paid more in overdraft fees as a result of the challenged practice will receive a proportionally greater share of the Settlement Fund. Kindall Decl., ¶ 17.

Courts grant preliminary approval of plans of allocation when they are "rationally related to the relative strengths and weaknesses of the respective claims asserted." *Torres v. Gristede's Operating Corp.*, No. 04-3316, 2010 WL 2572937, at *2 (S.D.N.Y. Jun. 1, 2010) (quoting *Danieli v. IBM*, No. 08 Civ. 3688, 2009 WL 6583144 (S.D.N.Y. Nov.16, 2009)). The proposed plan of allocation easily meets this standard.

The Plan treats Class Members fairly and relies upon accurate data maintained in Webster's records regarding the number, type and amount of overdraft fees charged to each Class Member. Moreover, the extensive analysis done by Plaintiff's expert, Mr. Olsen, has allowed Plaintiff to identify, with reasonable certainty, overdraft fees that fit the "profile" described in the complaint: (1) all debit card transactions that incurred an overdraft fee; (2) that were authorized in real time when the customer had a positive available balance in his or her account; where (3) Webster placed a "hold" on the account at the time that the debit card transaction was authorized; and (4) where the transaction was later presented to Webster for payment at a time when there were insufficient available funds to pay the full amount of the

transaction as a result of other items having been presented and paid; and where (5) "an overdraft fee was assessed on the transaction.[1] Plan of Allocation, ¶¶ 2-3.

Because Mr. Olsen's analysis of Defendant's records has permitted identification of the accounts that were adversely impacted by the challenged practice, and the number of times each account was adversely impacted, there will be no need for Class Members to submit proofs of claims. Instead, upon approval of the Settlement, the net proceeds will be divided according to the Plan of Allocation described above. For Webster Bank customers who have not closed the affected accounts, their share of the Settlement will simply be credited to their account. Former customers will receive a check in the mail. Thus, the benefits of the Settlement will flow directly to the injured members of the Class. Kindall Decl., ¶ 17.

The plan ensures fair compensation is given for all relevant overdraft fees to each Class Member. Plaintiff believes that this plan of allocation is fair and reasonable, and merits preliminary approval. *Id.*

C. <u>The Proposed Settlement Class Should be Certified</u>

One of this Court's functions in reviewing a proposed settlement of a class action is to determine whether the action may be maintained as a class action. Certification is clearly appropriate here.

1. <u>Numerosity, Commonality and Typicality</u>

The Class meets the numerosity, commonality, and typicality standards Practice Book Section 9-7. First, the number and location of putative Class Members is such that it is

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[1] Some of these transactions, however, did not result in any additional fees to class members, either because they did not increase the total number of fees that would have been charged for all of the day's transactions, or because the bank subsequently issued a refund. Accordingly, these transactions are not compensated through the Plan of Allocation.

impractical to join all of the Class Members in one lawsuit. *See Cross v. 21st Century Holding Co.*, No. 00 Civ. 4333 (MBM), 2004 WL 307306, at *1 (S.D.N.Y. Feb. 18, 2004) (certifying where the number of persons in the class logically exceeded 100). Here, there are over thirty thousand accountholders in the Class.

Second, there are substantial questions of law and fact common to all Class Members, including, *inter alia* whether Defendant:

a. Breached the contract;

b. Charged overdraft fees in circumstances not allowed under the contract;

c. Converted money belonging to Plaintiff and other members of the Class through its policies and practices;

d. Was unjustly enriched through its policies and practices; and

e. Violated the consumer protection acts of Connecticut.

Finally, Plaintiff's claims are "typical" of other Class Members' claims because they were subjected to a uniform set of policies and practices that Webster used for all account holders. Plaintiff's claims arise from the same course of conduct as the other Class Members' claims. Additionally, Plaintiff's and all other Class Members' claims are premised on the same legal theories. Accordingly, the typicality requirement is satisfied. *See In re Host Am. Corp. Sec. Litig.,* Master File No. 05-CV-1250 (VLB), 2007 WL 3048865, at *5 (D. Conn. Oct. 18, 2007) finding typicality where plaintiffs alleged defendants committed same acts, in same manner against all class members).

2. **<u>Adequacy of Representation</u>**

The adequacy requirement of Section 9-7 requires Plaintiffs to demonstrate that: (1) there is no conflict of interest between Plaintiffs and the other Class Members; and (2) Class Counsel are qualified, experienced and capable of conducting the Litigation. *See In re AOL Time Warner*

ERISA Litigation, No. 02-8853, 2006 WL 2789862, at *3 (S.D.N.Y. Sept. 27, 2006). Here, Plaintiff does not have any claims antagonistic to or in conflict with those of the other Class Members, as Plaintiff is pursuing the same legal theories as the rest of the Class relating to the same course of Defendant's conduct.

Additionally, Class Counsel have an extensive background in litigating complex litigation and consumer class actions, have been appointed class counsel in numerous cases, and have the resources necessary to prosecute this action to its conclusion. *See* Kindall Decl., Exhs. 3 and 4.

3. **<u>Predominance of Common Issues and Superiority</u>**

Practice Book Section 9-8(3) authorizes class on grounds very similar to Fed. R. Civ. P. 23(b)(3). Certification is appropriate when the Court finds that:

> questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of class action.

Conn. Prac. Bk. 9-8(3).

As Federal Courts have long held, "predominance" "does not require that *all* questions of law or fact be common; it only requires that the common questions *predominate* over individual questions." *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 93 (S.D.N.Y. 1981) (emphasis added); s*ee generally* Alba Conte & Herbert Newberg, NEWBERG ON CLASS ACTIONS §§ 4.21, 4.25 (1992). As demonstrated *supra* when addressing commonality, several issues of law and fact common to all Class Members are present in this matter. These common

issues of law and fact predominate over any potential individual issues which may arise, as they could be resolved through the presentment of proof common to all Class Members.

Additionally, the superiority requirement of Section 9-8(3) is satisfied. A class action is not only the most desirable, efficient, and convenient mechanism to resolve the claims of the Class, but it is almost certainly the only fair and efficient means available to adjudicate such claims. *See, e.g., Phillips Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("[c]lass actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually . . . [in such a case,] most of the plaintiffs would have no realistic day in court if a class action were not available"). Class Members likely would be unable or unwilling to shoulder the great expense of litigating the claims at issue against Defendant given the comparatively small size of each individual Class Members' claims. The parties are not aware of any litigation currently pending, or even contemplated, in which potential class members in this case have endeavored to litigate the same claims against Defendant on in individual basis, as discussed in Section 9-8(3)(A) and (B). Concentrating the litigation in this forum permits the claims to be dealt with in a fair and uniform way, and does not present any particularly difficult management challenges.

In light of the foregoing, all of the requirements of Practice Book Sections 9-7 and 9-8(3) are satisfied, and thus, the Court should certify this Class for settlement purposes in connection with the present Settlement.

D. The Notice Plan Meets the Requirements of Section 9-9(a)(2)(B)

Section 9-9(a)(2)(B) of the Practice Book requires that any class certified under Section 9-8(3) must be given "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Moreover, the Court is also required to "direct notice in a reasonable manner to all class members who would be bound by a proposed settlement." Conn. Prac. Bk. § Section 9-9(c)(1)(B). As Federal Courts have

stated, interpreting analogous requirements under constitutional due process and the Federal Rules, "notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members." *In re Merrill Lynch Tyco Research Sec. Litig*., 249 F.R.D. 124, 133 (S.D.N.Y. 2008) (*citing Weigner v. City of New York,* 852 F.2d 646, 649 (2d Cir.1988), *cert. denied,* 488 U.S. 1005 (1989)).

1. **The Proposed Notice Plan is Based on Individual Notice**

The proposed Notice program satisfies all of these criteria and is in fact the best notice practicable. As recited in the proposed Settlement and above, the Notice will inform Class members of all of the elements set forth in Section 9-9(a)(3) of the Practice Book, as well as of the substantive terms of the Settlement, will advise Class Members of their options for opting-out or objecting to the Settlement, and how to obtain additional information about the Settlement. Moreover, the Notice program was designed and is being implemented by a leading notice firm, Hilsoft.

Here, the Parties have agreed that virtually all Class Members, whether current or former customers of Webster, will receive individual notice within 45 days of this Court's preliminary approval of the Settlement Agreement. The Parties will employ either first class mail or email notice for those Class Members for whom Webster maintains valid email addresses. Settlement Agreement, ¶ 14. In addition, the Notice Administrator will create a Settlement Website with important information, including a Long-Form Notice and electronic copies of the Settlement Agreement and the Court's Preliminary Approval Order. The Notice Administrator will also maintain a toll-free hotline for class members to obtain additional information. Kindall Decl. at

¶ 19. These actions will ensure the vast majority all Class Members will receive individualized notice.

Courts regularly approve just such a process. *See, e.g., In re Sony SXRD Rear Projection Television Class Action Litig.*, 2008 WL 1956267 (S.D.N.Y. May 1, 2008) (email notice to all known addresses, and a hard copy mailing to persons who did not have an email address on file or where the email was returned as undeliverable); *Browning v. Yahoo! Inc.*, 2006 WL 3826714 (N.D. Cal. Dec. 27, 2006) (email notice sent to all available addresses, with a hard copy mailing sent to anyone who did not have an email address on file or where the email was returned as undeliverable).

2. **Contents of Notice**

The proposed Email Notice, Mailed Notice, and Long-Form Notice are attached as Exhibit A to the Settlement Agreement. The notices include of all of the elements set forth in Section 9-9(a)(3) of the Practice Book, as well as a summary of settling Parties' respective litigation positions; the general terms of the settlement as set forth in the Settlement Agreement; instructions for how to opt-out of or object to the settlement; requested attorneys' fee and representative Plaintiff Service Award; and the date, time, and place of the Final Fairness Hearing.

The content of the proposed notice is more than sufficient because it "fairly apprise[s] the . . . members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings." *See Maywalt v. Parker and Parsley Petroleum Co.,* 67 F.3d 1072, 1079 (2d Cir. 1995) (internal quotations omitted). The notice will provide class members with information on the class, the purpose and timing of the fairness hearing, opt-out procedures and deadlines, and the deadline and process for filing claims. In addition, as

discussed above, it will provide a telephone number and website that proposed Class Members may use to the extent they have any questions.

a. Opting Out

The Notices clearly explain that any member of the Class who wishes to opt out of the Class must timely submit written notice clearly manifesting his or her intent to be excluded from the Class to the designated Post Office box established for such purpose. *See* Long-form Notice. Class Members will be provided with at least forty-five (45) days to submit requests to opt-out.

b. Objecting

The Notices also clearly explain that any member of the Class who wishes to object to the settlement must timely file a written statement of objection with the Clerk of the Court and the Parties' counsel. Such objections must be postmarked no later than forty-five (45) days following the date of the notice program is completed. Class Members will be provided with at least forty-five (45) days to submit any objections. Courts have found similar periods to be reasonable. *See Maywalt v. Parker and Parsley Petroleum Co.,* 67 F.3d at 1079; *Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1374-75 (9th Cir. 1993), *cert. denied sub nom. Reilly v. Tucson Elec. Power Co.,* 512 U.S. 1220 (1994).

VIII. CONCLUSION

WHEREFORE, based on foregoing, Plaintiffs respectfully requests that the Court enter an Order:

(1) Preliminarily approving the settlement as set forth in the Settlement Agreement;

(2) Preliminarily approving the Plan of Allocation;

(3) Approving the Notice plan;

(4) Appointing Hilsoft as Notice Administrator;

(5) Certifying the Class for settlement purposes;

(6) Appointing Alfonse Forgione as Class Representative;

(7) Appointing Izard Nobel LLP and Tycko & Zavareei, LLP as Class Counsel; and

(8) Scheduling a Final Fairness Hearing in this matter.

Plaintiffs respectfully submit the accompanying, proposed Preliminary Approval Order for the Court's review and consideration. Plaintiffs stand ready to provide any additional materials that the Court may require to consider and preliminarily approve this Settlement.

Dated: March 1, 2014

Respectfully submitted:

/s/ Mark P. Kindall

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Plaintiff's Counsel

CERTIFICATE OF SERVICE

Pursuant to Practice Book Section 10-14, I certify that a copy of the foregoing was mailed or electronic delivered on March 1, 2016, to all counsel or *pro se* parties of record.

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