STATE OF MAINE CUMBERLAND, SS.		BUSINESS AND CONSUMER DOCKET CIVIL ACTION Docket No. BCD-CIV-2021-00027
ETHAN A. CHURCHILL and RHONDA YORK, on behalf of themselves and all others similarly situated, Plaintiffs, v. BANGOR SAVINGS BANK, Defendant.	* * * * * * * * * * * * * * *	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiffs Ethan A. Churchill and Rhonda York, ("Plaintiffs"), pursuant to Maine Rule of Civil Procedure 23, seek final approval of the Settlement Agreement and Release (the "Agreement") that this Court preliminarily approved on June 2, 2022.

After engaging in several arms' length negotiations made in good faith with the assistance of a third-party neutral mediator, Defendant Bangor Savings Bank ("Defendant" or "Bangor") has agreed to provide $2,000,000.00 in monetary relief, that will be directly distributed on a pro rata basis—without the need for Class Members to complete a claim form or submit any accompanying proof—to the Settlement Classes in the form of either a direct deposit into Active Accounts, cash settlement check to Settlement Class Members with Closed Accounts that are not Charged-Off Accounts, or Overdraft Forgiveness for Charged-Off Accounts. Gold Decl., ¶ 2. These substantial benefits constitute an exceptional result for the Settlement Classes and represent a fair, adequate, and reasonable resolution of the action. *Id.* ¶ 3.

The Settlement has been well received by the Classes. The culmination of the Notice period resulted in 20,875 Settlement Class Members receiving notice, which represents 99% of the class.

Azari Decl. ¶ 18. Zero Settlement Class Members have objected to the Settlement[1] and the settlement administrator has received only one request for exclusion from the Settlement from two Settlement Class Members (who are joint accountholders).[2] Azari Decl. ¶ 22. In sum, the reaction of the Classes represents an overwhelmingly positive response to the Settlement and only further justifies a grant of final approval.

In light of the excellent results achieved for the Classes, Plaintiff now respectfully requests that the Court grant final approval of the Settlement, finding it to be fair, adequate, and reasonable; and enter the Final Approval Order approving the Settlement.

I. Factual and Procedural Background

A. Overview of the Litigation and Settlement Process

On January 29, 2021, Plaintiff Churchill filed his putative class action complaint[3] on behalf of himself and all other similarly situated against Bangor arising out of Defendant's practice of improperly charging overdraft fees and non-sufficient funds fees in connection with ACH transactions (the "Retry Claims"). Gold Decl., ¶ 4. On March 1, 2021, Plaintiff Churchill amended his complaint to add plaintiff Elissa K. Tracey, who asserted APPSN Claims against Defendant arising from Bangor's charging of overdraft fees in connection with debit card transactions that were authorized with a positive account balance but settled with a negative account balance. The Action was transferred to this Court on April 2, 2021. Gold Decl., ¶ 5.

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[1] Because the deadline to opt out or object has not yet run as of the date of this filing, Plaintiff will supplement this filing if additional opt outs or objections are received.

[2] The request for exclusion did not fully comply with the requirements set forth in the Settlement Agreement. The Parties disagree as to whether to treat this request for exclusion as a valid opt-out. The redacted request is attached to the declaration of the settlement administrator for the Court's review.

[3] Churchill's complaint was filed in the Superior Court, State of Maine, County of Penobscot (Dkt. No. PENSC-CV-2021-00014).

On August 12, 2021, the Court denied Bangor's motion to dismiss the Complaint. Gold Decl., ¶ 6. Over the several months that followed, the Parties engaged in written discovery. Bangor produced account information for each plaintiff, as well as data regarding the amount of Fees charged during the Class Period. Gold Decl., ¶ 7.

The Parties thereafter began participating in settlement negotiations and agreed to attend mediation before mediator, Professor Eric Green of Resolutions LLC on January 27, 2022. Gold Decl., ¶ 8. In advance of mediation, Bangor provided Plaintiffs' counsel with transactional data to assist the Parties in assessing potential class-wide damages under Plaintiffs' theories of liability. After participating in a full-day mediation, the Parties agreed to the material terms of the Settlement. Gold Decl., ¶ 9. The Parties spent over eight weeks drafting, revising, and negotiating the Agreement, and on April 19, 2022, the Parties executed the Agreement. Gold Decl., ¶ 1.

On June 2, 2022, after the Court thoroughly examined the Settlement in its entirety to ensure the Settlement was provisionally fair, adequate, and reasonable, this Court granted its Preliminary Approval Order, conditionally approving the Settlement. Gold Decl., ¶ 12.

B. The Outcome of Notice Dissemination and Anticipated Distribution of Benefits

Beginning on September 23, 2022, the Settlement Administrator disseminated Notice of the Settlement to 20,937 Settlement Class Members in total. Azari Decl., ¶ 14. As of November 16, 2022, a Long Form Notice was delivered to 20,874 of the 20,937 unique, identified Settlement Class Members to whom Epiq sent notice. This means the individual notice efforts reached approximately 99% of the identified Settlement Class Members to whom Epiq sent notice. Azari Decl., ¶ 18.

To date, there have been no objections to the Settlement. Azari Decl., ¶ 22. Additionally, there has been only 1 opt out. Azari Decl., ¶ 2.

II. The Key Settlement Terms of the Preliminarily-Approved Settlement

The key terms of the preliminarily-approved Settlement are briefly summarized below:

- Agreed certification of the Settlement Classes (Agreement, II.A.);
- Notice of the Settlement sent directly to the Settlement Class Members by the Settlement Administrator, advising them of the terms of the Settlement and their right to object to or exclude themselves from the Settlement (*Id.,* III.C.; Exhibit A attached thereto);
- Payment by Defendant of a total Settlement Amount of $2,000,000.00 to be used for (i) direct payments to Settlement Class Members; (ii) Class Counsel's attorneys' fees and expenses; (iii) any service awards to the Settlement Class Representatives; (iv) the cost of Class Notice; (v) Settlement Administration Expenses; (vi) Overdraft Forgiveness; and (vii) Taxes (*id.,* IV.1.).[4]

III. Final Approval of the Settlement is Warranted

A. The Settlement is Fair, Adequate, and Reasonable

Under Maine Rule of Civil Procedure 23, "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." M.R. Civ. P. 23(e). [5] "In general, courts will presume that a settlement is reasonable if the parties

[4] Plaintiffs' Motion for Award of Attorneys' Fees, Costs, and Expenses, Settlement Administrator's Costs, and Class Representative Service Awards was filed on November 1, 2022.

[5] When a Maine Rule of Civil Procedure is identical to the comparable federal rule, Maine courts "value constructions and comments on the federal rule as aids in construing our parallel provisions." *Maine Cent. R. Co. v. Bangor & Aroostook R. Co.*, 395 A.2d 1107, 1114 (Me. 1978). Maine Rule of Civil Procedure 23, which governs class actions, was amended in 1981 to copy the text of Federal Rule of Civil Procedure 23 verbatim. *See* Advisory Committee's Notes 1981 to M.R. Civ. P. 23. The Rule has been amended twice since 1981, but only with respect to distributions of residual funds and to acknowledge class actions may be brought in both district and superior courts. *See* Advisory Committee's Notes 2001 and 2013 to M.R. Civ. P. 23. Therefore, it is appropriate to look to federal opinions construing the 1981 version of Federal Rule of Civil Procedure 23 in construing Maine Rule of Civil Procedure 23. Moreover, the 1981 version of Federal Rule of Civil Procedure 23 was not materially changed between 1966 and 2003 with respect to class certification or settlement, and the basic requirement of a class settlement being "fair, reasonable, and adequate" has remained to this day. *See* Advisory Committee Notes 1966, 1987, and 1998 to Fed. R. Civ. P. 23.

negotiated at arm's length and conducted sufficient discovery." *Sparks v. Mills,* 2022 WL 3645704, at *2 (D. Me. Aug. 24, 2022). "A district court enjoys considerable discretion in approving a class action settlement, given the generality of the standard and the need to balance a settlement's benefits and costs." *Noll v. Flowers Foods Inc.,* 2022 WL 1438606, at *5 (D. Me. May 3, 2022), citing *In re Pharm. Indus. Avg. Wholesale Price Litig.,* 588 F.3d 24, 33 (1st Cir. 2009). "The court's role in reviewing a proposed settlement agreement is effectively that of a fiduciary for the class members, a duty which obtains whether or not there are objectors or opponents to the proposed settlement." *Id.* (cleaned up).

In evaluating whether a class action settlement is fair and reasonable to justify granting final approval, courts consider various factors set forth under the Fed. R. Civ. P. 23(e):

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> i. the costs, risks, and delay of trial and appeal;
> ii. the effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims;
> iii. the terms of any proposed award of attorney's fees, including timing of payment; and
> iv. any agreement required to be identified under Rule 23(e); and
> (D) the proposal treats class members equitably relative to each other.

Id., citing Fed. R. Civ. P. 23(e).

Each relevant factor weighs in favor of granting final approval of the Settlement. Since the Court granted preliminary approval of the Settlement on June 2, 2022, finding it to be preliminarily fair, adequate, and reasonable, the Settlement Administrator has disseminated notice to 20,874 Class Members and not a single objection was received. And although one opt-out was received, this negligible number of opt-outs (1 out of the 20,874 Class Members set to receive a Settlement benefit) nevertheless demonstrates a positive consumer reaction to the Settlement and favors final approval. Azari Decl., ¶ 22. *See Veilleux v. Electricity Maine, LLC,* 2020 WL 6565260, at *2 (D.

Me. Nov. 9, 2020) (finding opt-outs "fewer than 50 in a class proceeding that produced roughly 44,000 claims, and no objections…does not disfavor the proposed settlement."); *see also Bezdek v. Vibram USA Inc.,* 79 F. Supp. 3d 324, 347 (D. Mass. 2016) (finding "overwhelmingly positive" reaction to the settlement where there were "23 opt-outs and 3 objections" out of 154,927 claims).

First, Class Representatives Ethan A. Churchill and Rhonda York and their Counsel have adequately represented the Settlement Classes. As addressed in Plaintiffs' Motion for Attorneys' Fees, each of the Class Representatives have dedicated significant time and effort in securing the Settlement benefits for absent Class Members. Further, the Class Representatives have fully participated in the case since its inception by providing Class Counsel with their knowledge of the facts and key documents, and by assisting Class Counsel in the settlement process. Additionally, Class Counsel has demonstrated their adequacy during the pendency of the litigation and the settlement process. In conjunction with Plaintiffs' Motion for Attorneys' Fees, Class Counsel submitted their respective firm resumes demonstrating their expertise in prosecuting complex class action litigation, including consumer disputes involving banking fee claims. This factor weighs in favor of granting final approval.

Second, the Parties conducted vigorous and lengthy settlement negotiations in crafting the Settlement before the Court. Gold Decl., ¶ 13. Indeed, the Settlement was reached only after several months of arm's-length negotiations conducted in good faith by experienced counsel and facilitated by a third-party neutral mediator, Professor Eric D. Green. Gold Decl., ¶ 14. Moreover, the terms of the Settlement were informed by a substantial amount of formal and informal discovery, including Bangor's transaction data that the Parties used to assist in formulating viable damages methodologies for each theory of liability. Gold Decl., ¶ 15. *See Bezdek,* 79 F. Supp. 3d at 348 (granting final approval of consumer class action settlement where "the parties had a

sufficient understanding of the merits of the case in order to engage in informed negotiations, particularly where plaintiffs' counsel are skilled and experienced in consumer class action litigation"). This factor also supports final approval.

Third, the relief provided for the Settlement Classes is more than adequate. Gold Decl., ¶ 16. Indeed, despite the complexities, obstacles, and risks inherent in protracted litigation—including losing at the pleading stage; losing class certification; losing summary judgment; losing at trial; or losing on appeal at either class certification or after a successful trial—the guaranteed monetary benefits to be directly distributed to the Settlement Classes in the total amount of $2.0 million (which includes the payments made via cash settlement check or direct deposit into Active Accounts plus overdraft forgiveness of outstanding Retry Fees and/or APPSN Fees) is an extraordinary result. Gold Decl., ¶ 17. Moreover, the plan for distributing Settlement payments to Class Members will be effective and streamlined. No later than 60 days after the Effective Date, the Settlement Administrator will deposit Settlement Class Member Payments directly into Active Accounts, mail checks to those members with Closed Accounts that are not Charged-Off Accounts, and implement the Overdraft Forgiveness. (Agreement, IV.B.2-4.) Thus, this factor similarly supports granting final approval.

Fourth, the Settlement treats Class Members fairly relative to each other because each Member will receive a pro rata payment distribution from the Settlement Fund in an amount that "is directly linked and tailored to his or her claims in the litigation" and each "share is calculated individually from the transactional data" maintained by Defendant that reflects the amount of APPSN Fees and Retry Fees that each Class Member paid. *Noll,* 2022 WL 1438606 at *7. To illustrate, the Distribution Plan provides that each Class Members' distribution will be derived from the Net Settlement Fund and divided on a pro rata basis pursuant to the following formula:

Class Member's Pro Rata % =

Amount of APPSN Fees and Retry Fees Paid by That Class Member
Total Amount of APPSN Fees and Retry Fees Paid by All Class Members

Class Member's Distribution = Class Member's Pro Rata % x Net Settlement Fund

(Agreement, IV.B.1.) Thus, no Class Member will receive an amount that is disproportionate to the amount of damages they each incurred. Accordingly, this final factor also weighs in favor of granting final approval.

IV. Conclusion

In light of the foregoing, Plaintiffs respectfully request that the Court grant final approval of class action settlement and enter the proposed Final Approval Order submitted herewith. Defendant does not oppose the relief requested in this Motion.

Dated: November 21, 2022

Respectfully submitted,

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