UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MARC BLOCK, on behalf of himself and all others similarly situated, Plaintiff, v. RBS CITIZENS, NATIONAL ASSOCIATION, INC., d/b/a "Charter One", Defendant.	1:15-CV-01524 (JHR) (JS)

BRIEF IN SUPPORT OF UNOPPOSED MOTION TO GRANT PRELIMINARY APPROVAL TO PROPOSED CLASS ACTION SETTLEMENT, TO APPROVE DISTRIBUTION OF PROPOSED SETTLEMENT NOTICE AND TO SET A HEARING DATE FOR A FORMAL FAIRNESS HEARING ON PROPOSED SETTLEMENT

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Plaintiff Mark Block ("Plaintiff") and Plaintiff's counsel (referred to herein as "Class Counsel") respectfully move for Preliminary Approval of the Amended Settlement Agreement ("Settlement" or "Agreement") attached as Exhibit A to the accompanying Declaration of Stephen P. DeNittis ("DeNittis Decl."), and entry of a Preliminary Approval Order, substantially in the form of DeNittis Decl. Ex. B, which will resolve all claims against Defendant Citizens Bank, N.A. ("Defendant" or "Citizens"), erroneously sued as "RBS Citizens, National Association, Inc.," in the Action. The Court should grant Preliminary Approval because the Settlement provides substantial relief for the Settlement Classes, and because the terms of the Settlement are well within range of the reasonableness and consistent with applicable case law. In fact, the Settlement Amount represents a full refund of the alleged overcharges and will be automatically distributed to Settlement Class Members without the need for a claim form. This is an extraordinary result for the proposed Settlement Classes and is worthy of Preliminary Approval.

Pursuant to Federal Rule of Civil Procedure 23, Plaintiff moves for an order to:

1) Certify for preliminary settlement purposes the two proposed Settlement Classes;

2) Grant preliminary, non-binding approval of the Agreement;

3) Approve the Notice Program set forth in Section VI of the Agreement, including the form and content of the proposed class settlement Long-Form Notice (Exhibit 2 to the Agreement) and Mailed Notice (Exhibit 3 to the Agreement);

4) Approve and order the opt-out and objection procedures set forth in Section VII of the Agreement;

5) Appoint as Class Representative plaintiff Marc Block;

6) Appoint as Class Counsel Stephen P. DeNittis, Joseph A. Osefchen, Shane T. Prince, and DeNittis Osefchen, P.C.;

7) Appoint Kurtzman Carson Consultants ("KCC") as Settlement Administrator;

8) Stay the Action pending Final Approval of the Settlement;

9) Enter the schedule set forth in the proposed Preliminary Approval Order (DeNittis Decl., Ex. B); and

10) Schedule a Final Approval Hearing at least 156 days from Preliminary Approval at which class members can appear and be heard on the issue of whether to grant final, binding approval to the proposed settlement.

I. INTRODUCTION

This is a proposed class action brought on behalf of persons who opened a Home Equity Line of Credit ("HELOC") in the United States with Defendant, who signed a pre-printed, uniformly-worded HELOC form contract document, and who were later charged an annual fee of $100 or $125 – denominated as a "USAGE FEE" – on their HELOC Accounts by the Defendant.

A. Litigation

On February 27, 2015, Plaintiff filed a complaint in the United States District Court for the District of New Jersey on behalf of himself and all others similarly situated (the "Complaint"). The Complaint brings claims for both breach of contract under Rhode Island[1] law and the Truth in Lending Act ("TILA"). Complaint ¶¶ 72-102. Plaintiff alleges that, during the relevant Class Period, Defendant used a pre-printed form contract for its HELOC Accounts that included language stating that Citizens could charge a Usage Fee, but would not do so if the Account had an average outstanding balance of more than a certain percentage (usually 20% or 40%) of the borrower's HELOC line of credit during the prior twelve month period (the "Credit Line Agreement"). Complaint ¶ 23; DeNittis Decl. ¶ 7, Ex. C. Plaintiff further alleges that

[1] Based on the uniform language of the "choice of law" clause contained in the HELOC form contract documents signed by the class members, Rhode Island state law applies to all claims for breach of contract brought in this action, regardless of the state in which the HELOC form contract was actually signed or where the class member resides.

certain of Citizens' form HELOC contracts included an Annual Fee Rider ("Rider"). Complaint ¶ 41; DeNittis Decl. ¶ 8, Ex. C. The Rider provided that no annual fee would be charged to an applicable account, regardless of the average outstanding balance on the line of credit. Complaint ¶ 42; DeNittis Decl. ¶ 8, Ex. C. Plaintiff alleges that Citizens employed a uniform policy during the Class Period of charging an annual fee to Account holders contrary to the terms of the Credit Line Agreement and/or the Rider. Complaint ¶¶ 37, 46; DeNittis Decl. ¶ 9.

After the filing of the Complaint, Plaintiff filed a Motion for Class Certification on March 17, 2015, which was later withdrawn without prejudice to refile. DeNittis Decl. ¶ 10. After the Parties began settlement discussions, as described below, they attended three conferences with Magistrate Judge Schneider in June, September, and October 2015. Id. ¶ 11. The Parties held a discovery conference and negotiated a Confidentiality Agreement in September 2015 before the October court conference. Id. ¶12. Citizens filed its Answer on October 8, 2015. Id. ¶ 13. Plaintiffs served written discovery requests on Citizens on October 30, 2015. Id. ¶ 14. Citizens also provided confirmatory discovery, which included the Declaration of Kevin J. Inkley and the Declaration of Dr. Robert B. Noah. Id. ¶ 38. The Parties informed Magistrate Judge Schneider that they reached a tentative settlement during the May 5, 2016 status conference. Id. ¶ 22.

B. Settlement Negotiations

The Parties first started discussing potential settlement on or around April 30, 2015 during a call regarding Plaintiff's Complaint and discovery. Id. ¶ 15. Class Counsel requested that Citizens compile and provide certain information, pursuant to Federal Rule of Evidence 408, that Counsel would need to effectively consider a potential settlement and make a demand on Citizens. Id. ¶ 16. The Parties entered into an Informal Discovery Confidentiality Agreement in

June 2015, and Citizens began to provide Class Counsel with the requested information from its consumer loan servicing system and backup tapes. Id. ¶ 17. Citizens provided informal discovery, on a masked-account basis to protect individual privacy, that included a variety of data regarding Accounts that existed on Citizens' consumer loan servicing system between December 1, 2008 and December 22, 2015 and were charged a Usage Fee (the "Preliminary Account Data"). Id. ¶ 18. All data provided to Class Counsel have been masked by Citizens to protect customer privacy. Class Counsel has no access to names of account holders, addresses, account numbers, or other data that could be used to identify the customers behind the data provided. Id. ¶ 19.

Prior to negotiating with Citizens, Class Counsel reviewed the data and determined that Citizens' data was sufficient to analyze on a class-wide basis the Accounts that were charged a Usage Fee when the Account's Usage Percentage was equal to, or greater than, the percentage required to avoid a Usage Fee and those Accounts that were charged a Usage Fee when the Account had a Rider or otherwise prohibited or waived Usage Fees for the life of the Account. Id. ¶ 20. The Parties engaged in intense settlement discussions in January 2016, February 2016, March 2016, and April 2016. Id. ¶ 21. A tentative settlement was reached in April 2016, and the Parties negotiated the terms of the Agreement thereafter. Id. ¶ 22. The Parties' settlement negotiations were at arms-length and were concluded prior to any discussions regarding attorneys' fees and costs and the service award to the Plaintiff. Id. ¶ 23.

Citizens provided confirmatory discovery establishing that the Preliminary Account Data was sufficient to form the basis of the proposed Settlement. This confirmatory discovery included:

a. Finalized Account Data which consisted of final updated versions of the

Preliminary Account Data previously produced;

b. A sworn declaration of Defendant's employee Senior Vice President, Operations Group Manager, Kevin J. Inkley; and

c. A sworn affidavit of expert economic and finance consultant Robert B. Noah.

Id. ¶ 24.

Plaintiff and Class Counsel now seek Preliminary Approval so that they can notify Settlement Class Members of the terms of the Settlement, and provide them with an opportunity to opt out of or object to the Settlement. While Citizens denies the merits of Plaintiff's claims, as well as all liability and wrongdoing, it has agreed to settle the Action under the terms set forth in the Agreement to avoid the expense and inconvenience of protracted litigation. Therefore, Plaintiff and Class Counsel submit that the proposed Settlement, as more fully explained below, is fair, reasonable and adequate to the Plaintiff and to the proposed Settlement Class, and should be approved.

II. MATERIAL TERMS OF THE SETTLEMENT

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

A. The Settlement Classes

The Settlement Classes consist of two opt-out classes under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The Settlement Classes are defined as:

> All persons in the United States who have or had an Account that (i) was on Citizens' systems between December 1, 2008 and December 22, 2015; (ii) was charged a Usage Fee when the Account's Usage Percentage was equal to, or greater than, the percentage required to avoid a Usage Fee, and (iii) the Usage Fee was assessed between (x) the time the Account was converted to Citizens' systems or the time the Account was originated at Citizens, and (y) December 22, 2015

("Usage Fee Class"); and

> All persons in the United States who have or had an Account that (i) included a rider or otherwise prohibited or waived Usage Fees for the life of the Account; (ii) was on Citizens' systems between December 1, 2008 and December 22, 2015; and (iii) was assessed a Usage Fee between (x) the time the Account was converted to Citizens' systems or the time the Account was originated at Citizens, and (y) December 22, 2015 ("Usage Fee Rider Class").

Agreement § 3.01.

B. Monetary Relief for the Class

The Agreement requires Citizens to deposit $612,294 into a non-interest bearing account. That deposit will create the Settlement Fund, which will be used to pay (i) all distributions of money to the Settlement Class; (ii) any Court-ordered award of Class Counsel's attorneys' fees, costs, and expenses; (iii) any Court-ordered Service Award to Plaintiff; and (iv) any additional fees, costs, and expenses not specifically enumerated in the Agreement, subject to approval of Settlement Class Counsel and Citizens. Id. § 3.07. In addition to the $612,294 Settlement Fund, Citizens is responsible for paying the fees, costs, charges, and expenses of the Settlement Administrator incurred in connection with administration of the Notice Program and the Settlement. Id. § 3.03.

Citizens, in consultation with Settlement Class Counsel, shall identify data – to the extent it exists in reasonably accessible electronic form – sufficient to calculate and implement the allocation of Settlement funds. Id. § 3.08. The amount to which each identifiable Settlement Class Member is entitled shall be calculated in accordance with Section 3.09 of the Agreement. Each Settlement Class Member will receive his or her Additional Usage Fee Amount minus any Usage Fees that Citizens previously waived, i.e., the Settlement Class Member's Net Additional Usage Fee Amount. Id. § 3.09. Settlement Class Members who do not opt out will receive Automatic Distributions, without any need to submit a claim form. Id. § 3.11. Automatic

Distributions to Current Account Holders shall be made either by a credit to the principal balance of those Current Account Holders' Accounts, or mailed by check in those circumstances where it is not feasible or reasonable to make the payment by a credit. Id. § 3.11(B)(i). Automatic Distributions to Past Account Holders will be made by check and mailed by the Settlement Administrator to an address it identifies as valid. Id. § 3.11(B)(iii). Settlement Class Members whose Accounts were closed and written off as uncollectable will have their Automatic Distribution first credited to the Uncollectable Balance and will receive the difference, if any, by check. Id. § 3.11(c)(i)-(ii). Citizens will be entitled to reimbursement from the Settlement Fund for the Account credits that it will provide to Current Account Holders and the Uncollectable Balance Credits it provides to Past Account Holders. Id. § 3.11(B)(ii). If a Settlement Class Member opts out of the Settlement, Citizens is entitled to a reimbursement of that Settlement Class Member's Automatic Distribution. Id. § 3.11(B)(ii).

If a check is returned, the Settlement Administrator will make reasonable efforts to locate the proper address for any intended recipient, and will re-mail the check once to the updated address. Any amounts in the Settlement Fund attributable to unclaimed checks shall be distributed by the Settlement Administrator in compliance with all applicable unclaimed property and escheat laws. Id. § 3.12.

Plaintiff and Class Counsel believe that the Settlement provides substantial financial benefit and convenience to the Settlement Class. DeNittis Decl. ¶ 25. In fact, the settlement represents a full refund to each Settlement Class Member of any alleged overcharges – an extraordinary result for the class. Id. If the Settlement is approved, more than 2,900 Settlement Class Members will receive Automatic Distributions – they do not need to fill out any claim forms – of their portion of the Settlement Fund. Id. ¶ 26. Furthermore, each Settlement Class

Member's reward will not be reduced by attorneys' fees or the service award to Plaintiff, which will be paid by Citizens under the Agreement. Id. ¶ 27.

C. Class Release

In exchange for the benefits conferred by the Settlement, all Settlement Class Members who do not opt out will be deemed to have released Citizens from all claims known or unknown related to the subject matter of the Action. The detailed release language can be found in Section IX of the Agreement.

D. The Notice Program

Citizens and Class Counsel have selected KCC to serve as the Settlement Administrator. Agreement § 2.37. The Notice Program, as described in Section VI of the Agreement, is designed to provide the best notice practicable, and is tailored to take advantage of the information Citizens has available about the Settlement Class Members. Id. § 6.02. Citizens has current address information for the Current Account Holders and a last known address for the Past Account Holders. DeNittis Dec. ¶ 28. The Notice Program is reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the Action, the terms of the Settlement, Class Counsel's Fee Application and request for Service Awards for Plaintiff, and their rights to opt-out of the Settlement Class and object to the Settlement. The Notices and Notice Program constitute sufficient notice to all persons entitled to notice. The Notices and Notice Program satisfy all applicable requirements of law, including, but not limited to, Federal Rule of Civil Procedure 23 and the constitutional requirement of due process. Id. ¶ 29.

The Notice Program is comprised of (1) direct mail postcard notice ("Mailed Notice") to all identifiable Settlement Class Members, which is attached to the Agreement as Ex. 3; and (2) a "Long-Form" notice with more detail than the Mailed Notice, which is attached to the

Agreement as Ex. 2, that will be available on the Settlement Web Site (www.CitizensUsageFeeSettlement.com). Agreement § 6.04. Additionally, the Settlement Administrator shall maintain an automated toll-free telephone line for Settlement Class Members to call with Settlement-related inquiries. Id. § 5.02(D). Settlement Class Members will be able to obtain the Mailed Notice and Long-Form Notice in Spanish upon request. Id. at Exs. 2-3.

Both forms of Notice will include, among other information: a description of the Settlement; the date by which Settlement Class Members may exclude themselves from or opt out of the Settlement Class; the date by which Settlement Class Members may object to the Settlement; the date on which the Final Approval Hearing is scheduled; the address of the Settlement Website at which Settlement Class Members may access the Agreement and other related documents and information; and the toll-free telephone line that Settlement Class Members may call for more information. See id. at Exs. 2, 3. In addition to the information described above, the Long-Form Notice will also describe the procedure Settlement Class Members must use to opt out of or object to the Settlement, and/or to Class Counsel's Fee Application, and/or the request for Service Awards. See id. at Ex. 2.

E. Service Award/Incentive Fee

The Parties negotiated the Service Award for Class Representative after reaching agreement on all other material terms of the Settlement. Agreement § 3.16; DeNittis Decl. ¶ 30. The Parties have agreed that Plaintiff, as Class Representative, will receive a Service Award of $5,000 for his service in this matter. Id. § 3.15. Courts often grant service awards to class representatives for their efforts in prosecuting the case on behalf of the class. See, e.g., In re Remeron End-Payor Antitrust Litig., Nos. Civ. 02-2007, Civ. 04-5126, 2005 WL 2230314, at **32, 33 (D.N.J. Sept. 13, 2005) ("In the instant action, the Class Representatives spent a

significant amount of their own time and expense litigating these cases for the benefit of the absent members of the settlement class, and as is recognized by a multitude of courts, their efforts should not go unrecognized."). Plaintiff in this matter provided substantial assistance to Class Counsel throughout the case on behalf of the class. He met and conferred with class counsel several times, provided documents and information needed to draft the Complaint, helped edit the Complaint to ensure accuracy, and reviewed the Agreement. He was prepared to go forward with the Litigation to trial and willing to participate in depositions and written discovery if needed. He has been very involved with the case and frequently contacted Class Counsel's office to inquire, what, if anything, he could do to assist. DeNittis Decl. ¶ 31. Finally, other than the Service Award, Plaintiff will not receive anything more from this Settlement than any other Class Member. Instead, he will be entitled to the same relief, subject to the same conditions, as any other Class Member. Id. ¶ 32.

F. Attorneys' Fees, Costs, and Expenses

The Parties negotiated attorneys' fees, costs, and expenses after reaching agreement on all other material terms of the Settlement. Agreement § 3.16. After several rounds of negotiation, Citizens has agreed not to oppose Class Counsel's request of up to 22% of the value of the Settlement Fund for attorneys' fees and reimbursements of the costs and expenses of prosecuting the class action, but which shall not exceed $130,173.00. Id. § 3.14. Any award of attorneys' fees, costs, and expenses is in addition to, and will not in any way affect, the relief available to Class Members under the Settlement, including any Service Award.

G. Effect of Failure to Approve the Settlement or Termination

In the event the Settlement is not approved by the Court, or for any reason the Parties fail to obtain a Final Approval Order and Judgment as contemplated in the Settlement, or the

Settlement is terminated pursuant to its terms for any reason, then the case will revert to the status quo. Id. § 10.01, 10.03. Specifically, this Agreement shall be considered null and void; all of Citizens' obligations under the Settlement shall cease to be of any force and effect; the amounts in the Settlement Fund shall be returned to Citizens in accordance with paragraph 10.4; the Parties' rights and defenses shall be restored, without prejudice, to their respective positions as if this Agreement had never been executed, and any orders entered by the Court in connection with this Agreement shall be vacated. In addition, the Parties' discussions, offers, or negotiations associated with this Settlement shall not be discoverable or offered into evidence or used in the Action or any other action or proceeding for any purpose.

III. INVESTIGATION AND DISCOVERY

Class Counsel conducted substantial investigation and discovery prior to suit, and during the litigation and settlement negotiations. Class Counsel gathered and reviewed all of Plaintiff's documents associated with the claim. Class Counsel conducted an online investigation and corporate searches to identify the relevant corporate entities, as well as conducted extensive legal research into the substantive claims. DeNittis Decl. ¶ 33. Class Counsel also conducted online searches and obtained copies of other Citizens' HELOC documents for review and comparison to the HELOC signed by Plaintiff. Id. In addition, Citizens provided, pursuant to Rule 408, and Class Counsel analyzed Preliminary Account Data over a series of productions that included a variety of masked data reflecting account-level information for each Account, including among other things: (1) Usage Fees assessed, (2) Usage Fees waived, (3) Contract/Anniversary Date; (4) dates Usages Fees were charged; and (5) outstanding account balance and available credit information. Id. ¶ 34. The data produced by Citizens was sufficient to analyze on a class-wide basis Accounts that were charged a Usage Fee when the Account's Usage Percentage was equal

to, or greater than, the percentage required to avoid a Usage Fee or were charged a Usage Fee when the Accounts had a rider or otherwise prohibited or waived Usage Fees for the life of the Account. Id. ¶ 35.

Once that data was reviewed, counsel for the Parties participated in extensive, arms-length settlement negotiations, including an intense period of negotiations between January and April 2016. Id. ¶ 36. Once a tentative settlement was reached, Plaintiff's counsel then received confirmatory discovery to further confirm that the data provided to Plaintiff was sufficient to form a basis for the proposed Settlement. Id. ¶ 37. This confirmatory discovery included: final updated versions of the account data previously produced, a sworn declaration of Citizens' Senior Vice President, Operations Group Manager, Kevin J. Inkley, and a sworn affidavit of expert economic and finance consultant Dr. Robert B. Noah. Id. ¶ 38. This information provided a firm basis for concluding that the tentative settlement was fair and reasonable. Id. In addition, the Inkley and Noah Declarations explained Citizens' process for obtaining and analyzing the data to establish that the Usage Fee class consists of 2,491 members and the Usage Fee Rider Class consists of 454 members. Id. ¶ 39.

IV. ARGUMENT AND AUTHORITY

A. The Standard for Preliminary Approval of a Proposed Class Settlement

The Third Circuit has recognized that there is a strong presumption in favor of the settlement of lawsuits and has specifically held that this presumption is especially strong with regard to the settlement of class actions. See Ehrheart v. Verizon Wireless, 609 F.3d 590, 594-95 (3rd Cir. 2010), holding that there is a **"strong presumption in favor of voluntary settlement agreements"** and noting that this presumption is especially strong with regard to class action settlements, stating:

> "This presumption is especially strong in 'class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.' The strong judicial policy in favor of class action settlement contemplates a circumscribed role for the district courts in settlement review and approval proceedings. This policy also ties into the strong policy favoring the finality of judgments and the termination of litigation. Settlement agreements are to be encouraged because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts." (citation omitted)

Approval of a proposed class action settlement takes place in two stages. See Jones v. Commerce Bancorp, Inc., 2007 WL 2085357 (D.N.J. 2007) (Judge Kugler) at *2:

> "Review of a proposed class action settlement is a two-step process: preliminary approval and a subsequent fairness hearing."

See also Manual for Complex Litigation, Third, § 30.41, at 236-37 (1995):

> "Approval of class action settlements involves a two-step process. First, counsel submit the proposed terms of settlement and the court makes a preliminary fairness evaluation.
>
> * * *
>
> If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment to class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement."

The primary purpose of the preliminary approval stage is not to determine whether the proposed settlement will ultimately be approved, but rather to determine whether notice of the proposed settlement should be sent to prospective class members, telling them about the proposed settlement and telling them how they can appear and be heard on that proposed settlement. See Lucas v. Kmart Corp., 234 F.R.D. 688, 693 (D. Colo. 2006):

> "The purpose of the preliminary approval process is to determine whether there is any reason not to notify the class members of the proposed settlement and to proceed with a fairness hearing."

See also 4 Herbert Newberg, Newberg on Class Actions, § 11:25 at 38 (4th ed. 2002).

At the preliminary approval stage, the court is not asked to make a binding determination as to whether the proposed class action settlement will ultimately be approved. See Jones v. Commerce Bancorp, Inc., 2007 WL 2085357 (D.N.J. 2007) (Judge Kugler) at *2:

> "Preliminary approval is not binding, and it is granted unless a proposed settlement is obviously deficient." (citation omitted)

See also In re Inter-Op Hip Prosthesis Liability Litig., 204 F.R.D. 330, 350 (N.D. Ohio 2001), stating on a preliminary approval application that:

> "the Court, at this juncture, is not obligated to, nor could it reasonably, undertake a full and complete fairness review."

Rather, during the preliminary approval process, the Court makes a cursory review of the proposed settlement to determine if there any "glaring deficiencies" in the proposal. See West v. Circle K Stores Inc., No. CIV. S-04-0438, 2006 WL 1652598, at *9 (E.D. Cal. June 13, 2006), stating that on an application for preliminary approval of a proposed class action settlement:

> "the court will simply conduct a cursory review of the terms of the Parties' settlement for the purpose of resolving any glaring deficiencies before ordering the Parties to send the proposal to class members."

Thus, at the preliminary approval stage, the court is not asked to determine whether the proposal will ultimately be approved, but rather whether it might possibly be approved in the future, after additional briefing, at a final hearing which is open to the public. In re Nasdaq Mkt. Makers Antitrust Litig., 176 F.R.D. 99, 102 (S.D.N.Y.1997) (quoting Manual for Complex Litigation, Third, § 30.41 (West, 1995)):

> "Where 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, preliminary approval is granted."

See also Gautreaux v. Pierce, 690 F.2d 616, 621 n.3 (7th Cir. 1982) (noting that on a preliminary approval application the court is merely asked to "determine whether the proposed settlement is within the range of possible approval."); In re Prudential Sec. Inc. Ltd. P'ships, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (describing the court's function on an application for preliminary approval as a limited search for "obvious deficiencies" and "unduly preferential treatment of class representatives or of segments of the class").

The manner in which preliminary approval of a proposed class settlement is obtained varies. In some cases, a formal motion for preliminary approval is brought by one or both of the Parties. E.g., West, 2006 WL 1652598. In other cases, the Parties simply present their proposed class action settlement to the court informally. See Manual for Complex Litigation, §§ 30.41 at 236 (3rd ed. 1995) ("[I]n some cases this initial evaluation can be made on the basis of . . . informal presentations by the settling Parties."). Either method may be used because preliminary approval is not binding and merely: (1) triggers the mechanism for sending notice to potential class members; (2) starts a process that will culminate in a full and final public fairness hearing (at which time the question of fairness is reviewed de novo); and (3) establishes a procedure for class members to "opt out" or register objections to the proposed settlement with the court. Id.

After notice of the proposed class action settlement is given to the prospective class members, the second stage of the class action approval process takes place: the formal fairness hearing. At the formal fairness hearing, the court, inter alia, entertains any objections or comments by putative class members to the treatment of this litigation as a class action and/or the terms of the settlement. See Diaz v. Trust Territory of Pac. Islands, 876 F.2d 1401, 1408 (9th Cir. 1989). Following that formal fairness hearing, the court makes a de novo determination as to whether the Parties should be allowed to settle a class action pursuant to the terms agreed

upon. West, 2006 WL 1652598, at *9.

B. The Proposed Class Action Settlement Meets the Standard for Preliminary Approval

At the current time, Plaintiff is moving **only** for a non-binding preliminary approval of the proposed class action settlement which is memorialized in the accompanying Agreement. See DeNittis Decl., Ex. A.[2] Basically, Plaintiff and Class Counsel seek permission from the Court to send notice to potential class members, telling them about the terms of the proposed settlement and telling them about their rights. Specifically, the Parties are seeking court permission to distribute the proposed class settlement notice, informing the class of the terms of the proposed settlement, and notifying them of their rights to 1) "opt out" of the proposed class, 2) to object to the proposed settlement, and/or 3) to appear and be heard at a public fairness hearing. The Parties are also asking the court to conditionally certify the class and to schedule a formal public fairness hearing on the proposed settlement at least 190 days from the date preliminary approval is granted, which class members may attend and at which the Parties will present full and detailed arguments as to why they believe the proposed settlement should be granted final approval.[3] It is submitted that the proposed class action settlement meets the standard for preliminary approval as set forth in the above cited authorities.

The proposed class settlement is an outstanding result for the class. Under this proposed settlement, each proposed class member will receive an automatic refund – without the need for

[2] Of course, while only preliminary approval is being sought here, the Parties will show through additional briefing – submitted in advance of the final hearing – that the Settlement is fair and reasonable, was arrived at by arms-length negotiations, and represents a fair value and valid compromise in light of the complexity, expense, and duration of the litigation and the risks involved in establishing liability and obtaining certification of the class.

[3] The Parties will submit more detailed briefs relating to the proposed class action settlement, class certification and the request for attorneys' fees in advance of the requested formal fairness hearing.

submission of a claim or claim form – equal to a full refund of an alleged overcharge. See e.g., Educ. Station Day Care Ctr., Inc. v. Yellow Book USA, Inc., No. A-1653-05T1, 2007 WL 1245971, at *2 (N.J. Super. Ct. App. Div. May 1, 2007) (where the New Jersey Appellate Division noted that the "average" recovery for class members in a "typical class action" settlement is "nine to twelve percent of maximum possible damages" and found a class settlement that resulted in class member recovering fifty percent to be "a tremendous result.") As such, the proposed settlement reached clearly represents a fair value and valid compromise in light of the complexity, expense, and duration of the litigation and the risks involved in establishing liability and obtaining certification of the class.

Accordingly, Plaintiff requests that the court grant preliminary approval to the proposed settlement, so that notice of the proposed settlement can be sent to class members and the class can learn of the proposed settlement and have an opportunity to be heard on the issue of its requested approval.

C. The Proposed Forms of Notice to the Settlement Class Should Be Approved

For the purposes of this motion, which seeks class certification under Rule 23(b)(3), the Notices must satisfy Rule 23(c)(2)(B) (notice to class members of certification of a Rule 23(b)(3) class) and Rule 23(e) (notice of a proposed class action settlement). "[W]here the Parties seek to simultaneously certify a settlement class and settle a class action, the elements of Rule 23(c) notice (for class certification) are combined with the elements of Rule 23(e) notice (for settlement)." Grunewald v. Kasperbauer, 235 F.R.D. 599, 609 (E.D. Pa. 2006) (citing Zemmer Paper Prods., Inc. v. Berger & Montague, P.C., 758 F.2d 86, 90-91 (3d Cir. 1985)).

The Class Notice meets the requirements of Rule 23(c)(2)(B) and the reasonableness requirement of Rule 23(e). First, both the Mailed Notice and the Long-Form Notice contain each

of the seven required elements under Rule 23(c)(2)(B)(i-vii), namely:

> (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

See Agreement at Exs. 2, 3. Further, the proposed Notices give Class Members a fair opportunity to consider the merits of the proposed Settlement, and whether to opt out of the Settlement and/or raise objections. Each proposed form of Notice includes appropriate information regarding: (1) the Action, the Class, the Class Representative, Class Counsel, and the essential terms of the Agreement; (2) Class Counsel's forthcoming application for attorneys' fees; (3) how to participate in, or opt out of, the Settlement; (4) this Court's Final Approval procedure, including information as to how Class Members can attend and be heard at the requested final fairness hearing; and (5) appropriate information about how to object to the proposed settlement. See Jones, 2007 WL 2085357, at *5.

The proposed Notice Program also satisfies the requirement under Rule 23(e)(1) that the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." The Parties have agreed that a Court-approved form of Mailed Notice will be sent by mail to each Class Member. Agreement § 6.02. Citizens has in its records the last known address of each Class Member. Prior to mailing the Notices, the Settlement Administrator shall run the addresses of all Class Members through the National Change of Address Database to update the last known address held by Defendant, and shall then mail notice to all such class members. Id. §§ 6.02, 6.04. The Mailed Notice will advise Class Members that they may obtain a copy of the Long-Form Notice online. The Long-Form Notice, and the Agreement itself, will be posted on a website specially created for the proposed Settlement.

D. The Proposed Settlement Classes Should Be Certified[4]

This case is ideally suited for class certification under both the Federal Rules of Civil Procedure and the relevant case law. All claims arise exclusively from the identical, pre-printed language of form contract documents and an alleged uniform policy by Defendant which violates that form contract language. Thus, even though the case law cited herein makes clear that class certification does not require every issue in a case to be identical, as to the respective members of each of the proposed classes, all issues will be substantially identical. Accordingly, the claims can and should be decided on a class-wide basis.

1. No Case Is Better Suited For Class Certification Than One Where the Claims Turn on Identical Language of Form Documents

Time and again, courts have made clear that cases involving a challenge to pre-printed language of mass-produced form documents are "natural" class actions. This is because such cases invariably involve issues that are common to every person who signed the form document in question. See, e.g., Sacred Heart Health Sys., Inc. v. Humana Military Healthcare, 601 F.3d 1159, 1171 (11th Cir. 2010) ("It is the form contract, executed under like conditions by all class members, that best facilitates class treatment."); Kleiner v. First Nat'l Bank of Atl., 97 F.R.D. 683, 692 (N.D. Ga.1983) ("[C]laims arising from interpretations of a form contract appear to present the classic case for treatment as a class action . . . .").

Here, each proposed Settlement Class is defined in terms of those who executed either the Credit Line Agreement or the Rider or otherwise had an Account that prohibited or waived Usage Fees for the life of the Account. Plaintiff's claims arise, not from any oral statements or

[4] The arguments with regard to class certification contained herein are the argument of Plaintiff's counsel only. While Defendant has agreed to the certification of the two proposed settlement classes in order to effectuate the proposed class settlement, that agreement is not an endorsement of these arguments. Defendant reserves the right to oppose class certification if the proposed Settlement is not approved.

handwritten language, but rather from the pre-printed language of the form documents themselves and a uniform policy that Plaintiff contends violates that form contract language. Regardless of who is right on the issue of the correct interpretation of these form contract documents, the resolution of the claims will be the same for the members of each respective class. As such, this case cries out for class certification.

2. The Rule 23(a) Prerequisites Are Met

Under Federal Rule of Civil Procedure 23(a), the party seeking class certification must satisfy four prerequisites: numerosity, commonality, typicality, and adequacy of representation. The case at bar amply satisfies the requirements of the rule.

a) The Class Is So Numerous that Joinder of All Members Is Impracticable

The numerosity requirement demands that the class be so large that joinder of all members would be "impracticable." Fed. R. Civ. P. 23(a)(1). In the context of class actions, "[i]mpracticability does not mean impossibility but only the difficulty or inconvenience of joining all members of the class." Zinberg v. Washington Bancorp, Inc., 138 F.R.D. 397, 406 (D.N.J. 1990) (internal quotation marks and citations omitted).

It is well settled that 40 or more potential class members will satisfy the "numerosity" requirement. See Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001) ("No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met."); see also Feret v. Corestates Fin. Corp., No. CIV. A. 97-6759, 1998 WL 512933, at *6 (E.D. Pa. Aug. 18, 1998) (quoting 1 Herbert B. Newberg et al., Newberg on Class Actions, § 3:05 at 247 (4th ed. 2002)) ("The difficulty in joining as few as 40 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 Rule 23(a)(1) on that fact alone.'").

Here, the proposed classes are defined in terms of customers who executed certain form documents and who were charged a Usage Fee. Based on the confirmatory discovery and documents provided to Class Counsel and his further analysis, there are 2,491 Usage Fee Class Members and 454 Usage Fee Rider Class Members. See DeNittis Decl. ¶ 39. Based upon the foregoing, the "numerosity" requirement under Rule 23(a)(1) is satisfied as to each Settlement Class.

b) There Are Questions of Law and Fact Common to the Class

As noted by the Third Circuit, the Rule 23(a)(2) "commonality" requirement "is not a high bar." In re Chiang, 385 F.3d 256, 265 (3d Cir. 2004); see also Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994) ("Because the requirement may be satisfied by a single common issue, it is easily met . . . ."). Rule 23(a)(2) does not require that all factual or legal issues be common to the entire class. See In re Prudential Ins. Co., 148 F.3d 283, 310 (3d Cir.1998) (internal quotation marks and citations omitted) ("A finding of commonality does not require that all class members share identical claims, and indeed factual differences among the claims of the putative class members do not defeat certification."); see also Thomas v. SmithKline Beecham Corp., 201 F.R.D. 386, 392 (E.D. Pa. 2001) (internal quotation marks and citations omitted) ("Because Rule 23(a)(2) requires only a single issue common to all members of the class, the requirement is easily met, and commonality is not defeated by a showing that individual facts and circumstances will have to be resolved.").

In this case, the class claims arise from the identical language of mass-produced form contract documents and an alleged uniform policy. Thus, there are obviously questions of law and/or fact that are common to all members of the proposed Usage Fee Rider Class, including:

- Whether the uniform language of the Rider barred Defendant from charging any annual fee to the class members who executed the document;

- Whether a "USAGE FEE" was an "annual fee" within the meaning of the Rider form contract;

- Whether Defendant's alleged act in charging a "USAGE FEE" to Class Members who executed the Rider was a breach of contract under Rhode Island law; and

- Whether Defendant's alleged act in charging a "USAGE FEE" to Class Members who executed the Rider violated the implied duty of good faith and fair dealing under Rhode Island law.

There are also clearly questions or law and/or fact common to all members of the proposed Usage Fee Class, including:

- Whether a "USAGE FEE" was an "annual fee" within the meaning of the Credit Line Agreement form contract;

- Whether the uniform language of the Credit Line Agreement form contract barred Defendant from charging any annual fee to customers whose average outstanding balance for the prior 12 months was greater than a certain percentage (e.g., 20% or 40%) of their HELOC credit line;

- Whether Defendant had a policy of charging HELOC customers who executed the "Credit Line Agreement" form contract a "USAGE FEE" even where their outstanding balance for the prior 12 months was greater than the percentage required to avoid an annual fee; and

- Whether Defendant's actions violated Rhode Island contract law, including the implied duty of good faith and fair dealing in contracts.

Each of these common issues will "generate common answers apt to drive the resolution of the litigation." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (internal quotation marks and citations omitted). Thus, the common nature of these factual and legal issues satisfies Rule 23(a)(2).

c) Plaintiff's Claims Are Typical of the Claims of the Class

The typicality prerequisite is intended to ensure that the representative plaintiff's claims

are similar to the claims brought on behalf of the absent class members. See Neal, 43 F.3d at 57. This requirement does not require that the personal characteristics of the class members be identical. Id. Nor does it require that the factual circumstances of each class member be mirror images of each other. Id. at 56-58.

Rather, the Third Circuit has made clear that factual differences among the purported class will not render a claim atypical if the same legal theories underpin the claims. See Stewart v. Abraham, 275 F.3d 220, 227-28 (3d Cir. 2001) (internal quotation marks and citations omitted) ("Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the [absent] class members, and if it is based on the same legal theory."); Neal, 43 F.3d at 58 ("Commentators have noted that cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirements irrespective of the varying fact patterns underlying the individual claims.").

In the case at bar, Plaintiff has asserted legal theories that apply across the board to all members of each proposed class. The Complaint presents, on a class-wide basis, causes of action that stem from the same course of alleged conduct by Defendant. Specifically, the claims arise from the language of written form contracts and Citizens' alleged violations of pre-printed language of those form documents in exactly the same manner, under exactly the same law (i.e., Rhode Island state contract law and TILA). Plaintiff does not seek anything different or more for himself than he seeks for every other class member. Based on the foregoing, the typicality requirement of Rule 23(a)(3) is satisfied.

d) Plaintiff, as Class Representative, Fairly and Adequately Protects the Interests of the Class

The final prerequisite under Rule 23(a) is adequacy of representation. In the words of the

Third Circuit, Rule 23(a)(4) ensures "[t]hat the representatives and their attorneys will competently, responsibly and vigorously prosecute the suit." Bogosian v. Gulf Oil Corp., 561 F.2d 434, 449 (3d Cir. 1977), cert. denied 434 U.S. 1086 (1978), and abrogated on other grounds by Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). Under the test articulated by the Third Circuit in Bogosian, two prongs must be satisfied: (1) the presence of competent counsel to represent the class; and (2) the absence of any actual conflict of interest between the representative plaintiff and other class members. Id.

Plaintiff has retained experienced and competent counsel to represent himself and the proposed classes. Plaintiff's co-counsel, Stephen P. DeNittis, has participated in over 150 certified class actions, serving as lead class counsel or co-lead class counsel in all of those cases. See DeNittis Decl. ¶ 42. Mr. DeNittis has also presented and/or lectured to attorneys on various topics relating to class action litigation. See id. ¶ 43. Mr. DeNittis is also co-author of A Plaintiff's Perspective of the New Ascertainability Requirement in Federal Class Actions, New Jersey Lawyer, April 2015 at 24. See id. ¶ 44. Plaintiff's co-counsel Joseph A. Osefchen has focused almost exclusively on class actions for the last 23 years, and he has participated in well over 170 certified class actions. See id. Mr. Osefchen has also co-authored three articles on topics relating to class action litigation. See id. ¶ 42

As to the second prong of Rule 23(a)(4), there are no conflicts of interest between the named Plaintiff and either of the proposed Settlement Classes. The named Plaintiff alleges that he, like the Class Members, executed form documents limiting or prohibiting the charge of a Usage Fee and that his contractual rights were breached in the exact same manner, namely, by the allegedly improper charge of a Usage Fee. Plaintiff seeks the same relief for himself as he seeks for every other Class Member, and he does not seek anything more or different for himself.

He has pursued this action vigorously and retained adequate class counsel to represent himself and the classes. As such, Plaintiff is an adequate class representative. DeNittis Decl. ¶ 31.

Based on the foregoing, each of the requirements under Rule 23(a) are satisfied.

3. Class Certification Under Rule 23(b)(3) Is Appropriate

To meet the requirements for certification under Rule 23(b)(3), two requirements must be satisfied. First, common questions of law or fact must predominate over individual issues. Fed. R. Civ. P. 23(b)(3). Second, the court must find that a class action is the superior method to decide the issues before it. Id.; see also Prudential, 148 F.3d at 313 ("In order to certify an opt-out class under Rule 23(b)(3) the district court must make two additional findings: predominance and superiority.").

a) Common Questions of Law and Fact Dominate Over Individual Issues

This requirement focuses on the defendant's alleged conduct. See Sullivan v. DB Invs., Inc., 667 F.3d 273, 298 (3d Cir. 2011) ("Our precedent provides that the focus of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members."). Common questions predominate over individual issues where there was a "common course of conduct" by the defendant that can be established through common proofs, which predominates over individual issues. Id. at 300.

Predominance does not demand the complete absence of individual issues or require that all issues in the case be common ones. See In re Mercedes-Benz Antitrust Litig., 213 F.R.D. 180, 186 (D.N.J. 2003) ("The mere existence of individual issues will not of itself defeat class certification."); Weisfeld v. Sun Chem. Corp., 210 F.R.D. 136, 141 (D.N.J. 2002) ("The requirement that common questions of law or fact predominate over individual issues does not mean that the existence of individual issues defeats certification; instead, questions affecting

only individual members of the class must have lesser overall significance than the issues common to the class, and they must be manageable in a single class action.").

Indeed, a class may be certified under (b)(3) even where the court has found that there are relatively few common issues, as long as the common issues will advance the litigation. See In re Metro. Life Ins. Co. Sales Practices Litig., No. 96-179, MDL 1091, 1999 WL 33957871, at *22 (W.D. Pa. Dec. 28, 1999) (internal quotation marks and citations omitted) ("Even a few common issues may satisfy the predominance requirement if resolution of those issues will so advance the litigation that they may fairly be said to predominate.").

The case at bar is a prime example of a case where an alleged common course of conduct by a defendant gives rise to common claims that can be established through common proofs. The Complaint alleges that Citizens violated uniformly worded form contract documents that promised that Citizens would refrain from charging class members a Usage Fee. Based on the foregoing, (b)(3) "predominance" requirement is satisfied.

b) A Class Action Is Superior to Other Available Methods for Fairly and Efficiently Adjudicating the Controversy

The second factor for Rule 23(b)(3) certification asks whether it would be better to resolve the claims as a class action or as a series of individual lawsuits. In making this assessment, courts consider whether failing to certify a class would make it economically infeasible to litigate claims with a small dollar value per person. See Hegab v. Family Dollar Stores, Inc., No. 11-1206, 2015 WL 1021130, at *4 (D.N.J. Mar. 9, 2015) (internal quotation marks and citation omitted) ("One consideration is the economic burden Class Members would bear in bringing suits on a case-by-case basis. Class actions have been held to be especially appropriate where it would be economically infeasible for individual Class Members to proceed individually."); see also Stephenson v. Bell Atl. Corp., 177 F.R.D. 279, 289 (D.N.J. 1997)

("Since most of the putative class members allegedly suffered damages in such small amounts, it would be economically infeasible for them to proceed individually.").

Great weight is also given to whether class certification would promote efficiency by allowing common proofs to be presented in a single proceeding, rather than in individual suits. See Hegab, 2015 WL 1021130, at *4 (internal quotation marks and citations omitted) ("Another consideration is judicial economy. In a situation where individual cases would each require weeks or months to litigate, would result in needless duplication of effort by all Parties and the Court, and would raise the very real possibility of conflicting outcomes, the balance may weigh heavily in favor of the class action."); see also In re Wellbutrin XL Antitrust Litig., 282 F.R.D. 126, 145 (E.D. Pa. 2011) ("Individual treatment of each class members' claims would require duplicative, expensive litigation, which would come at enormous expense to the Parties and judicial economy. Class resolution would also avoid problems of inconsistent resolution.").

A class action is the superior method of resolving the dispute in the case at bar. The alleged damages of at most $100 or $125 per Class Member per year is too low to make individual lawsuits feasible. Thus, a class action is the only practical way to litigate the claims at issue. Moreover, forcing each and every class member to individually hire a lawyer and litigate the meaning of the same form contract terms over and over would be a waste of time and resources. A class action is the superior and most efficient method of resolving these common issues and claims.

V. REQUEST FOR ENTRY OF PROPOSED SCHEDULE

Based on the Agreement, Plaintiff and Class Counsel requests that the Court set the following schedule:

(i) The Settlement Administrator shall establish the Settlement Website and toll-free telephone line as soon as practicable following Preliminary Approval, but no later than the commencement of the Mailed Notice Program;

(ii) Within 30 days of this Order, Citizens and its counsel will provide to the Settlement Administrator, in an electronically searchable and readable format, a Class List that includes the names, and last known mailing addresses, for all identifiable Settlement Class Members as such information is contained in the reasonably available account records, subject to the availability of information in reasonably accessible electronic form, maintained by Citizens;

(iii) Within 30 days after receiving the Class List, the Settlement Administrator shall run the addresses through the National Change of Address Database and shall send the Mailed Notice to Settlement Class Members;

(iv) The Settlement Administrator shall provide to counsel for all Parties a declaration stating that Notice was completed in accordance with the Agreement;

(v) No later than 30 days prior to the Final Approval Hearing, Plaintiff shall file his motion for Final Approval of the Settlement, and Settlement Class Counsel shall file their Fee Application and Request for a Service Award for Plaintiff;

(vi) Settlement Class Members must file any objections to the Settlement, the Motion for Final Approval of the Settlement, Settlement Class Counsel's Fee Application, and/or the Request for a Service Award no later than 45 days after the Notice Date;

(vii) Settlement Class Members must file requests for exclusion from the Settlement by no later than 45 days after the Notice Date;

(viii) Plaintiff and Class Counsel shall file their responses to timely filed objections to the Motion for Final Approval of the Settlement and Fee Application no later than 14 days before Final Approval Hearing;

(ix) If Citizens chooses to file a response to timely filed objections to the Motion for Final Approval of the Settlement, it shall do so no later than 14 days before Final Approval Hearing; and

(x) Set the Final Approval Hearing on a date not sooner than 156 days after Preliminary Approval.

VI. CONCLUSION

For the foregoing reasons, we respectfully request the Court to certify for preliminary settlement purposes the two proposed Settlement Classes; grant preliminary, non-binding approval of the Agreement; approve the Notice Program set forth in Section VI of the Agreement; approve and order the opt-out and objection procedures set forth in Section VII of the Agreement; appoint Plaintiff as Class Representative; appoint Stephen P. DeNittis, Joseph A. Osefchen, Shane T. Prince, and DeNittis Osefchen, P.C. as Class Counsel; appoint KCC as Settlement Administrator; stay the Action pending Final Approval of the Settlement; and schedule a Final Approval Hearing at least 156 days from Preliminary Approval at which class members can appear and be heard on the issue of whether to grant final, binding approval to the proposed settlement.

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