IN THE CIRCUIT COURT FOR THE FOURTEENTH JUDICIAL CIRCUIT
ROCK ISLAND COUNTY, ILLINOIS

DEANNA RIVERA, on behalf of herself and all others similarly situated, Plaintiff, v. IH MISSISSIPPI VALLEY CREDIT UNION, Defendant.	Case No.: 2019 CH 299

PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, ALLOCATION, AND FINAL CERTIFICATION OF THE CLASS FOR SETTLEMENT PURPOSES AND INCORPORATED MEMORANDUM OF LAW

Plaintiff Deanna Rivera (hereinafter, "Plaintiff" or, "Named Plaintiff"), individually and on behalf of all other persons similarly situated (the "Class") and Defendant IH Mississippi Valley Credit Union ("Defendant" or "IHMVCU") (collectively, the "Parties"), hereby jointly move this Court for an Order finally approving the proposed class action settlement as described herein, and in support state as follows:

I. INTRODUCTION

After having defeated IHMVCU's motion to dismiss, pursued discovery and undertaken arms-length settlement negotiations, Plaintiff and her Counsel achieved significant results for Class Members: Defendant IHMVCU has agreed to provide $1,689,676 of value to the proposed Class, including $1,425,000 in cash to all accountholders who were assessed either a Retry Fee and/or an APPSN Fee during the applicable statutory limitations periods, and to forgive $264,676 worth of Uncollected Fees. The Court previously granted preliminary approval to the proposed Settlement on September 13, 2022, and pursuant to that Order notice has now been provided to the

Class Members. Plaintiff now respectfully requests that the Court grant Final Approval[1] of the Settlement Agreement and Release.

This Court should grant Final Approval because the terms of the proposed Settlement are fair, adequate, and reasonable under the law and provide substantial relief for the Class. Indeed, given the significant risks inherent in this Action, the nearly $1.7 million Value of the Settlement is an excellent result for Class Members. Moreover, where the Settlement provides for a guaranteed, direct, and immediate award for Class Members, this benefit far outweighs the substantial risks and uncertainties of continued litigation and expense. Indeed, the Settlement Administrator will automatically distribute to Class Members their *pro rata* share of the Net Settlement Fund—there are no claim forms and Class Members will not be required to submit proof that they were harmed by IHMVCU's Retry Fee and APPSN Fee practices. Instead, the Parties will use IHMVCU's available data to determine which accountholders were harmed by the assessment of relevant fees and will apply an appropriate formula to calculate each Class Member's appropriate distribution. Thus, the plan of allocation fairly and adequately accounts for the value of each Class Member's individual claim.

Ultimately, this Court has a duty to ensure that any settlement entered into in a class action is fair, reasonable and adequate under 735 ILCS 5/2-801. This Settlement easily meets this requirement, and it is worthy of final approval. In addition, the Court should reaffirm its finding in the Preliminary Approval Order that the Class should be certified for settlement purposes only. *See* 735 ILCS 5/2-801.

[1] All capitalized terms used throughout this memorandum have the same meanings as those found in the Settlement Agreement.

Lastly, and for the reasons described below, the Court should award Plaintiff Rivera a service award for her work on behalf of the Class and should award Class Counsel the requested attorneys' fees and expenses.

II. BACKGROUND

A. Class Counsel's Investigation

Class Counsel spent many hours investigating the claims of several potential plaintiffs against IHMVCU, including interviewing a number of IHMVCU customers to gather information about IHMVCU's conduct and its impact upon consumers, which was essential to Class Counsel's ability to understand the nature of Defendant's conduct, the language of the account agreement and other documents at issue, and potential remedies.

Through its independent investigation, Class Counsel expended significant resources researching and developing the legal claims at issue. Indeed, Class Counsel is familiar with the instant claims through their extensive history of litigating and resolving other banking fee claims with similar factual and legal issues to the case at bar. Class Counsel has experience in understanding the damages at issue, what information is critical in determining class membership, and what data is necessary to calculate each Class Member's respective damages. Class Counsel, along with its fee expert, spent a significant amount of time analyzing preliminary data regarding IHMVCU's fee revenue related to the assessment of Retry Fees and APPSN Fees at issue. Defendant similarly retained its own expert who conducted a review and analyzed data accordingly. This data and analysis evaluating potential damages at issue was used in preparation for the Parties' settlement discussions and to further drive the viability of resolution.

B. Procedural History

On December 2, 2019, Named Plaintiff filed a putative class action complaint in the Circuit Court of the Fourteenth Judicial Circuit, Rock Island County, Illinois, entitled *Deanna Rivera v. IH Mississippi Valley Credit Union*, Case No. 2019-CH-299, alleging claims on behalf of one class for breach of contract, breach of the implied covenant of good faith and fair dealing, violation of Illinois Consumer Fraud and Deceptive Business Practices Act and unjust enrichment.

On May 15, 2020, Named Plaintiff filed an amended class action complaint in which she alleged claims on behalf of one class for breach of contract.

IHMVCU filed a motion to dismiss, which Plaintiff opposed. After oral argument, the Court denied Defendant's motion to dismiss on October 30, 2020.

On May 20, 2021, Named Plaintiff filed the operative second amended complaint in the Circuit Court of the Fourteenth Judicial Circuit, Rock Island County, Illinois, entitled *Deanna Rivera v. IH Mississippi Valley Credit Union*, Case No. 2019-CH-299, alleging claims on behalf of two classes for breach of contract ("Complaint"). The second amended complaint added a claim based on the "APPSN" theory of liability. Defendant denies Plaintiff's allegations or that it charged any fees that were contrary to the terms of its contract.

Throughout this time, the Parties engaged in formal and informal discovery. In sum, it is evident that Class Counsel spent significant time conferring with Plaintiff, investigating facts, researching the law, preparing well-pleaded complaints, engaging in discovery and ongoing meet and confer efforts, working with an expert witness, and reviewing important documents and data. Class Counsel's extensive efforts resulted in the proposed Settlement for which Preliminary Approval is respectfully requested.

C. Summary of the Settlement Terms

1. The Class

The Class is defined as "current or former members of Defendant who were assessed APPSN Fees or Retry Fees." Agreement at ¶ 1(e).

> APPSN Fees" means "overdraft fees that were charged and not refunded from January 1, 2018 to April 30, 2019, on signature Point of Sale debit card transactions where there was a sufficient available balance at the time the transaction was authorized, but an insufficient available balance at the time the transaction was presented to Defendant for payment and posted to a member's account, and "Retry Fees" means "overdraft and/or returned item fees that were charged and not refunded from December 1, 2012 to April 30, 2019, for Automated Clearing House (ACH) and check transactions that were re-submitted by a merchant after being returned by Defendant for insufficient funds.

Id. at ¶¶ 1(a), 1(s).

2. Relief for The Benefit of The Class

a. Settlement Fund & Uncollected Fees

Defendant has agreed to place $1,425,000 cash into a Settlement Fund, within 15 days of Final Approval of the Settlement by the Court. Agreement at ¶ 9(a). This cash amount will be used to pay: (a) Class Members their respective cash payment; (b): any Court-awarded reasonable attorneys' fees and costs for Class Counsel; (c) any Court-awarded Service Award for Plaintiff for her role as Class Representative; (d) Settlement administration costs; and (e) if any residual funds

remain after the distribution of Class Members' payments, then to be distributed to the *cy pres* recipient. *Id.* at ¶ 12.

Additionally, Defendant has agreed to forgive in full all Uncollected Fees, those Retry Fees and APPSN Fees that were assessed but were not paid when an Account was closed and the Uncollected Fees charged off, in the amount of $246,676. *Id.* at ¶ 3. Class Members may qualify for both a Individual Payment and forgiveness of Uncollected Fees.

Importantly, Class Members need not affirmatively do anything—via submitting a claim, or otherwise—in order to receive relief under the Settlement. Rather, the Settlement Administrator will issue Class Member Payments to former accountholders within 10 days after the Effective Date, and Defendant will do the same for amounts credited directly to current accountholders. *Id.* at ¶ 9(d).

b. Distribution of Class Member Payments

No later than 10 days after the Effective Date, Class Members who are Current Account Holders at the time of the distribution of the Net Settlement Fund will receive a credit in the amount of the Individual Payment they are entitled to receive directly to any account they are maintaining individually at the time of the credit. Agreement at ¶ 9(d)(iv). If by the deadline for IHMVCU to apply credits of the Class Member Payments to accounts Defendant is unable to complete certain credit(s), IHMVCU shall deliver the total amount of such unsuccessful Individual Payment credits to the Settlement Administrator to be paid by check in accordance with the procedure for Past Account Holders to receive payment, as explained below. *Id.*

For those Class Members who are Past Account Holders at the time of distribution of the Net Settlement Fund, the Settlement Administrator will send a check in the amount of the Class Member Payment to the address used to provide the Notice, or at such other address as designated

by the Class Member. *Id.* The Settlement Administrator will make reasonable efforts to locate the proper address for any check returned by the Postal Service as undeliverable and will re-mail it once to the updated address, or in the case of a jointly held account, and in the Settlement Administrator's discretion, to an accountholder other than the one listed first. *Id.* Class Members will have one hundred eighty (180) days to negotiate the checks, and after this time, the total value of uncashed checks, if any, will be distributed to the Court-approved *cy pres* recipient. *Id.*

c. Disposition of Residual Funds

Funds resulting from uncashed checks and any other residual funds shall be distributed to an appropriate *cy pres* recipient agreed to by the Parties and approved by the Court. Agreement at ¶ 12.

3. Releases

In exchange for the benefits conferred by the Settlement, all Class Members will be deemed to have released IHMVCU from claims relating to the subject matter of the Action. The Releases are set forth in Paragraph 15 of the Agreement.

D. Preliminary Approval and Certification of the Class for Settlement Purposes

The Parties filed (1) a Joint Motion for Preliminary Approval of Class Action Settlement and (2) brief in support of the Motion for Preliminary Approval. On September 13, 2022, after holding a hearing on the merits of the Motion for Preliminary Approval, the Court issued an Order Granting Motion for Preliminary Approval ("Preliminary Approval Order"). The order preliminarily approved the Settlement Agreement as fair, reasonable, and adequate and that a final hearing should be held, after notice has been given to the class, to determine whether the Court should grant final approval to the Settlement Agreement. Additionally, the Court found that the prerequisites of 735 ILCS 5/2-801, *et seq*. have been met by the Class and certified the Class, as defined above, subject to Final Approval of the Settlement Agreement.

E. Notice Has Been Successfully Delivered to the Class

Prior to distributing notice to the Class members, the Settlement Administrator established a website, www.riveraoverdraftsettlement.com, as well as a toll-free line that Class Members could access or call for any questions or additional information about the proposed Settlement. (Notice Decl. ¶¶ 21, 22.) On October 13, 2022, the Settlement Administrator then mailed the Court-approved notice of the Settlement to the 13,647 Class members, at their last known addresses after updating through the National Change of Address database. (Id. ¶ 16, 17.) For returned notices, the Settlement Administrator performed skip trace searches to attempt to locate an updated address and remail the notice. (*Id.* ¶ 18.) In total, notice has been delivered, without return, to over 95.9% of Settlement Class members. (*Id.* ¶ 20). In total, notice has been delivered, without return, to over 95.9% of Class members. (Id. ¶ 20).

In response to the notice, to date no Class member objected to the Settlement or the requested fees, expenses, and service award. (Id. ¶ 24.) To date, only one Class member elected to opt-out of the Settlement. (Id. ¶24.) The opt out and objection deadline is November 28, 2022, and these totals will be updated after that date.

III. ARGUMENT

A. Standards for Final Approval of Class Settlement

This Court has a duty to ensure that any settlement entered into in a class action is fair, reasonable and adequate under 735 ILCS 5/2-801. Section 2-806 of the Illinois Code of Civil Procedure provides that "[a]ny action brought as a class action under Section 2-801 of this Act [735 ILCS 5/2-801] shall not be compromised or dismissed except with the approval of the court and, unless excused for good cause shown, upon notice as the court may direct."

At the outset, it is important to note that settlements of class action controversies are favored. In particular, Illinois courts have held that a settlement compromising conflicting

positions in class action litigation serves the public interest. *Wilcox v. Equity Funding Life Ins. Co*., 61. Ill. 2d 303, 317 (Ill. 1975); *Langendorf v. Irving Trust Co.*, 244 Ill. App. 3d. 70, 78 (1992); *Alliance to End Repression v. City of Chicago*, 91 F.R.D. 182, 196 (N.D. Ill. 1981).[2] Since the settlement is a compromise, the trial court may not decide the merits of the case, attempt to resolve disputed issues of fact or law, or substitute its own judgment for that of the parties. *Wilcox*, 61 Ill. 2d at 316; *Langendorf,* 244 Ill. App. 3d at 78; *Armstrong v. Board of School Directors*, 616 F.2d 305, 314-15 (7th Cir. 1980). To do so would defeat the purposes of the settlement, which include avoiding a determination of sharply contested issues and dispensing with expensive and wasteful litigation. *Wilcox*, 61 Ill. 2d at 316-17; *Levin v. Miss. River Corp*., 59 F.R.D. 353 (S.D.N.Y. 1973). Instead, the trial court must view the settlement as a whole, considering all relevant factors in assessing the compromise. *Wilcox*, 61 Ill. 2d at 319; *Langendorf,* 244 Ill. App. 3d at 78. There is a strong presumption in favor of the settlement's fairness. *See, e.g., Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 146 (E.D.N.Y. 2000); *Collier v. Montgomery County Hous. Auth.*, 192 F.R.D. 176, 185 (F.D. Pa. 2000); *Bryant v. Universal Servs*., 2000 U.S. Dist. LEXIS 7619, at *6 (E.D. La. May 24, 2000). *See also 4 Newberg on Class Actions*, § 11:41 (4th Ed. 2002). *See also Leb. Chiropractic Clinic, P.C. v. Liberty Mut. Ins. Co.*, 2016 IL App (5th) 150111-U, ¶ 42 ("[T]here is a presumption that the settlement is fair, reasonable, and adequate" "[w]here the procedural factors support approval of a class settlement.").

[2] It is well settled that Illinois Courts "may consider federal case law for guidance on class action issues because the Illinois class action statute is patterned on Rule 23 of the Federal Rules of Civil Procedure." *Ballard RN Ctr., Inc. v. Kohll's Pharmacy & Homecare*, Inc., 2015 IL 118644, ¶ 40, 48 N.E.3d 1060, 1068.

The procedure for review of a proposed class action settlement is a well-established two-step process. Alba Conte and Herbert Newberg, *Newberg on Class Actions,* § 11.25, at 38-39 (4th ed. 2002). During the first step – a preliminary, pre-notification hearing – the court assesses whether the proposed settlement falls "within the range of possible approval." *Id.* (quoting *Manual for Complex Litig.* (Third) § 30.41 (1995)). The court determines whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing. *Id; Steinberg* v. *Sys. Software Assoc., Inc.,* 306 Ill. App. 3d 157, 169 (1st Dist. 1999). As discussed above, the Court has already granted preliminary approval of the Settlement Agreement.

Having already determined that the Settlement Agreement falls "within the range of possible approval," the case must now proceed to the second step in the review process: the final fairness hearing. *Newberg on Class Actions,* § 11.25 at 38-39. "Review of class action settlements necessarily proceeds on a case-by-case basis." *GMAC Mortg. Corp. of Pa. v. Stapleton,* 236 Ill. App. 3d 486, 493 (1st Dist. 1992). Nevertheless, certain factors have been consistently considered to be relevant to the determination of whether a settlement is fair, reasonable, and adequate: (1) the strength of the case, compared to the relief offered in settlement; (2) the defendant's ability to pay; (3) the complexity, length, and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of class members of the settlement; (7) the opinion of competent counsel; and (8) the stage of proceedings and the amount of discovery completed. *Id.* (citing *City of Chi. v. Korshak,* 206 Ill. App. 3d 968, 971-72 (1st Dist. 1991)). Here, the relevant *Korshak* factors support the Settlement, and as such, the Court should find it "well within the range of possible approval."

B. The Strength of Plaintiff's Case, Compared with the Relief Afforded Under the Settlement, Supports Granting Preliminary Approval

The first factor, the strength of Plaintiff's case compared to the relief provided for in the settlement, is the most important of the *Korshak* factors, *Steinberg,* 306 Ill. App. 3d at 170, and weighs most strongly in favor of the fairness, reasonableness, and adequacy of the settlement here. While Plaintiff and Class Counsel are undoubtedly confident in the strength of the claims, they also recognize that their ability to obtain class certification and ultimately prevail on the merits is anything but certain. This is because Defendant possesses several defenses to this lawsuit that could preclude recovery by Plaintiff and the class altogether. As explained in more detail below, in light of the strength of the legal claims and defenses remaining in this case, the settlement benefits available to Class members supports final approval here.

1. Plaintiff Still Faces Substantial Hurdles to Obtaining Recovery for Plaintiff Himself and the Class.

Plaintiff believes she has strong factual and legal arguments, but he recognizes the significant risks attendant with trying the case. Plaintiff recognizes that Defendant has several potential factual and legal defenses that, if successful, would defeat or substantially impair the value of Plaintiff's claims. Defendant has retained highly respected and skilled counsel to defend the case. Defendant has asserted several complete defenses to liability. These defenses might reduce or eliminate any potential recovery by Plaintiff.

Substantial hurdles remain before Plaintiff could obtain recovery for the Class. If Defendant defeated class certification, prevailed on any of its defenses, or obtained reversal of any orders in which Plaintiff were to have prevailed, Plaintiff and the Class would get nothing. The Settlement eliminates the risk of an adverse outcome and will provide the Class with immediate and substantial benefits, which favors approval of the Proposed Settlement. The Settlement relief, therefore, must be weighed in light of these risks.

2. The Settlement Benefits Provided to Class Members in this Settlement Are Reasonable in Light of the Risks Remaining in this Case.

In terms of relief offered, this Settlement is excellent. The instant dispute concerns IHMVCU's allegedly unfair and misleading assessment and collection of Retry Fees and APPSN Fees on deposit accounts. This Settlement achieves Plaintiff's desired goal of compensating class members charged such fees during the Class Period. While Plaintiff' best-case scenario is a 100% refund of the relevant Fees, there was a substantial risk that Plaintiff would not achieve such a result, or any recovery at all. Prior to Settlement, IHMVCU filed a motion to dismiss on Plaintiff's "Retry NSF Fee" theory of liability, arguing that the relevant language in its Account Agreements was not ambiguous, and thus, specifically permitted IHMVCU to assess fees accordingly. While the Court denied the motion to dismiss on that theory of liability, it did not yet rule on the later-added "Retry Fee" theory of liability. Further, Defendant intended to bring a summary judgment motion after discovery was complete, presenting Plaintiff with further litigation risk. Although Plaintiff believe she had a strong chance on the merits, Plaintiff could certainly fail to obtain class certification or lose at summary judgment on this issue of contract interpretation.

The proposed Settlement amounts to 58% of the combined APPSN and Retry Fees during the Class Period that were allegedly improperly charged to Class Members. Declaration of Jeff Kaliel ("Kaliel Decl.") at ¶ 2.

Indeed, the Settlement is comparable to results in other bank fee cases, and overdraft fee class actions nationwide. *See Roberts v. Capital One, N.A.,* Case No. 1:16-cv-04841 (S.D.N.Y. Dec. 1, 2020) (approving a cash fund representing approximately 35% of relevant overdraft fees alleged by plaintiff); *Bodnar v. Bank of Am., N.A.*, No. 14-3224, 2016 WL 4582084, at *4 (E.D. Pa. Aug. 4, 2016) (approving a cash fund of between 13%-48% of the maximum amount of damages they may have been able to secure at trial, and describing such a result as a "significant

achievement" and outstanding"); *In re Checking Account Overdraft Litig.*, No. l:09-MD-02036, 2015 WL 12641970, at *7 (S.D. Fla. May 22, 2015) (approving $31,767,200 settlement representing approximately 35% of the most probable aggregate damages); *Hawthorne v. Umpqua Bank*, No. 11-cv-06700, 2015 WL 1927342, at *3 (N.D. Cal. Apr. 28, 2015) (approving $2,900,000 settlement for approximately 38% of what could have been obtained at trial); *In re Checking Account Overdraft Litig.*, No. 1:09-MD-02036, 2013 WL 11319242, at *1 (S.D. Fla. Aug. 2, 2013) (approving $4,000,000 settlement for 25% of the most probable recoverable damages); *Mosser v. TD Bank, N.A.*, No. 1:09-MD-02036, 2013 U.S. Dist. LEXIS 187627, at *83-84 (S.D. Fla. Mar. 18, 2013) (approving $62,000,000 settlement for 42% of the most probable damages and praising it as an "outstanding result"); *Torres v. Bank of Am.*, 830 F. Supp. 2d 1330, 1346 (S.D. Fla. 2011) (approving $410 million settlement for between 9%-45% of the total potential damages); *Trombley v. Nat'l City Bank*, 826 F. Supp. 2d 179, 198 (D.D.C. 2011) (approving settlement with recovery range of 12%-30% as "within the realm of reasonableness").

The relief provided to Class Members here is especially impressive in light of the alternative—months, , and likely years, of complex, expensive litigation with no guarantee of recovery by Plaintiff and the Class. First, this case involves several complex factual and legal issues that are not yet resolved. Plaintiff's claims and Defendant's defenses involve complex legal issues, and continuing to litigate this action would require extensive resources and Court time. Given the breadth and complexity of the legal issues in this case, this case has already spanned over two years and is likely to proceed for several more and cost hundreds of thousands of dollars, if not more, to reach a resolution through litigation. The Proposed Settlement alleviates the uncertainty inherent in resolving these issues and avoids the expense and delay of continued litigation in the trial and appellate courts. *See* 2 McLaughlin, *supra*, § 6:9 ("The specter of a

complex trial militates in favor of settlement.").

But even the court's order resolving these complicated factual and legal issues is not the "final word" on the issue, as absent a settlement Defendant would undoubtedly appeal the ruling after any final judgment. Plaintiff also has no doubt that, absent settlement, Defendant would appeal Defendant's motion to dismiss for lack of standing resolved in Plaintiff's favor and any class certification order or judgment ultimately rendered in Plaintiff's favor, which would further delay recovery by the Class. And it goes without saying that additional litigation and any appeal would come at a great cost to Plaintiff and the class, with the possibility in the end that they would recover nothing.

Contrary to the expense and complexity associated with continued litigation, the Settlement provides relief now-as opposed to months or years from now (if at all). This also weights in favor of final approval of this Settlement.

C. The Settlement is Within the Amount Defendant is Able to Pay

The second *Korshak* factor, defendant's ability to pay, is not a pertinent factor in this case. As one of the largest drug store chains in the country, there is no doubt about Defendant's ability to provide the relief contemplated in the Settlement Agreement. *See Korshak,* 206 Ill.App.3d at 973. More importantly, no discount has been contemplated in the Settlement based on Defendant's finances. Defendant's ability to pay, therefore, is simply not pertinent in this case.

D. The Settlement is Reasonable in Light of the Complexity, Length and Expense of Further Litigation

The relief provided to Class Members here is especially impressive in light of the alternative – months, and likely years, of complex, expensive litigation with no guarantee of recovery by Plaintiff and the Class. First, this case involves several complex factual and legal issues that are not yet resolved. Plaintiff's claims and Defendant's defenses involve complex legal

issues, and continuing to litigate this action would require extensive resources and Court time. Given the breadth and complexity of the legal issues in this case, this case has already spanned three years and is likely to proceed for several more and cost hundreds of thousands of dollars, if not more, to reach a resolution through litigation. The proposed Settlement alleviates the uncertainty inherent in resolving these issues and avoids the expense and delay of continued litigation in the trial and appellate courts. *See* 2 McLaughlin, *supra*, § 6:9 ("The specter of a complex trial militates in favor of settlement.").

This case has settled at a time when significant additional resources would be necessary to continue the litigation. Contrary to the expense and complexity associated with continued litigation, the Settlement provides relief now – as opposed to months or years from now (if at all). This also weights in favor of preliminary approval of this Settlement. The strength of the relief and the added benefit of obtaining it now rather than years from now make approval of this Settlement in the best interest of Class Members.

In the end, the relief afforded by the proposed Settlement is significant, especially in light of the numerous risks of further litigation, and weighs in favor of preliminary approval.

E. The Amount of Opposition and the Reaction of Class Members Support Settlement

The fourth and sixth *Korshak* factors—the amount of opposition and the reaction of class members—typically are considered together. *See Korshak,* 206 Ill. App. 3d at 973; *GMAC*, 236 Ill. App. 3d at 496. Here, the Parties note that of over 20,000 Class Members who were sent notices, zero objections to the Settlement have been filed and only one Class Member has opted out of the Settlement. The negligible amount of opposition to the Settlement from the class supports approval by the Court.

F. The Proposed Settlement Was Reached Without Collusion and as a Result of Arm's-Length Negotiations Between the Parties

The Proposed Settlement is the product of a full adversarial process. The settlement negotiations in this case were conducted at arms'-length by experienced counsel with adverse interests. The absence of collusion is demonstrated by "hard fought" and "vigorously contested" litigation and "hard bargaining" between the Parties. *Korshak,* 206 Ill. App. 3d at 973. The proposed Settlement here was reached only after litigation, discovery, and briefing and a hearing on a motion to dismiss. *See* Statement of Facts *supra.* The Parties engaged in arms'-length negotiations until they finally reached an agreement on this Settlement. Kaliel Decl., ¶ 3.

Class Counsel is particularly experienced in litigation, certification, trial, and settlement of nationwide consumer class action cases. *Id*., ¶ 4. As detailed above, Class Counsel thoroughly investigated and analyzed Plaintiff' claims and vigorously litigated the Action, prevailing on Defendant's motion to dismiss in the instant action, and in evaluating the strengths and weakness of the claims and defenses in order to formulate an appropriate foundation upon which to negotiate and settle Plaintiff's claims. *Id*., ¶ 5.

The Settlement thus resulted from arm's-length negotiations between experienced counsel with an understanding of the strengths and weaknesses of their respective positions in this lawsuit. These circumstances weigh in favor of approval.

Additionally, the parties spent significant time negotiating the terms of the final written Settlement Agreement which is now presented to the Court for approval. At all times, these negotiations were at arm's length and, while courteous and professional, the negotiations were intense and hard-fought on all sides. *Id*., ¶ 6. In sum, the Court should have no doubt that the Proposed Settlement was reached fairly and without collusion.

G. Class Counsel Believes that this Settlement is in the Best Interests of the Class

This action has been litigated by experienced and competent counsel on both sides of the case. The fact that such qualified and well-informed counsel, acting at arm's-length, unanimously endorse the settlement as being fair, reasonable and adequate is entitled to significant weight. *See GMAC*, 236 Ill. App. 3d at 493, 497 (*citing Korshak*). In fact, some courts hold that the court "should defer to the judgment of experienced counsel who has competently evaluated the strengths of his proofs." *Levell v. Monsanto Research Corp.*, 191 F.R.D. 543,557; *Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983). In deciding to approve a settlement, the "judge should keep in mind the unique ability of class and defense counsel to assess potential risks and rewards of litigation, a presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *See Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *Lelsz v. Kavanagh,* 783 F. Supp. 286, 297 (N.D. Tex.1991). The court should not "substitute its own judgment for that of the parties." *Langendorf,* 244 Ill. App. 3d at 78-79.

Proposed Class Counsel, who are well versed in the facts of this litigation, *see infra,* and who have significant experience in litigating consumer protection class actions, believe that the instant Settlement is in the best interests of the Class for a number of reasons. Kaliel Decl., ¶ 7.

First, the relief provided for here, which amounts to 58% of best-case damages, is strong in light of the complexities of this litigation and the defenses at Defendant's disposal. Furthermore, the relief here compares favorably to similar already approved class action settlements against financial institutions for the allegedly improper assessment of bank fees, as discussed above. Second, a recovery for the Class now is preferable to years of litigation and inevitable appeals with no guarantee of recovery. Third, proposed Class Counsel's review of data have convinced them that this Settlement provides the Class with the best opportunity to obtain a meaningful recovery.

H. The Stage of Litigation and Amount of Discovery Completed Has Ensured that the Settlement is Fair, Reasonable and Adequate

The eighth and final *Korshak* factor, involving the stage of litigation and the amount of discovery, is important because it "indicates the extent to which the trial court and counsel were able to evaluate the merits of the case and assess the reasonableness of the settlement." *Korshak,* 206 Ill. App. 3d at 974. Here, the Parties reached the proposed Settlement in this case only after discovery was exchanged, Defendant answered, the Parties had fully briefed and argued a motion to dismiss, and the Parties engaged in significant data analysis regarding potential damages. That the proposed Settlement was reached at this stage of the litigation supports final approval, as both Parties had a clear view of the factual and legal issues in this case.

While the parties settled before Plaintiff's putative classes were certified, the Parties had sufficient information to adequately evaluate the merits of the case. The parties exchanged significant information in conjunction with settlement negotiations that included the class size and demographics, and information regarding the relevant practices and damages resulting therefrom.

Additionally, Class Counsel relied on their experience presenting expert evidence and litigating the key legal issues in other major bank fee cases to assist in evaluating the merits of this case. Kaliel Decl., ¶ 8.

For all of the foregoing reasons, the instant Proposed Settlement is fair, reasonable, and adequate, and as such, is well within the range of approval. Accordingly, the Court should grant preliminary approval.

IV. ATTORNEYS' FEES, LITIGATION EXPENSES AND INCENTIVE AWARDS.

A. The Court Should Award Class Counsel Attorneys' Fees of One-Third of the Settlement Fund

1. Courts Commonly Award Attorneys' Fees of One-Third of the Value of a Class Action Settlement

"[L]awyer[s] who recover[ ] a common fund . . . [are] entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Brundidge v. Glendale Fed. Bank, F.S.B.*, 168 Ill. 2d 235, 243–44, 659 N.E.2d 909, 914 (1995); *Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007). "[T]the circuit court is vested with the discretionary authority to choose the percentage-of-the-award method or the lodestar method to determine the amount of fees to be granted plaintiffs' counsel in common fund class action litigation." *Brundidge*, 168 Ill. 2d at 243–44, 659 N.E.2d at 914.

"Although courts . . . have the discretion to use either a percentage of the fund or lodestar methodology, . . . the percentage method is employed by the vast majority of courts" both federally and state-by-state throughout the country. *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *7 (S.D. Ill. Dec. 16, 2018) (citation omitted); *c.f. Beesley v. Int'l Paper Co.*, No. 3:06-CV-703-DRH-CJP, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) ("When determining a reasonable fee, the Seventh Circuit Court of Appeals uses the percentage basis rather than a lodestar or other basis."). Courts have expressed a preference for the "percentage of the recovery" method "because of its relative simplicity of administration." *Florin*, 34 F.3d at 566. The "percentage of the recovery" approach also has the advantage that it "award[s] counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692 (citing *In re Synthroid Mktg. Litig. ("Synthroid I")*, 264 F.3d 712, 718 (7th Cir. 2001)); *accord Williams v. Rohm & Haas*

Pension Plan, 658 F.3d 629, 635 (7th Cir. 2011) ("[T]he district court must try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys.").[3]

The percentage method makes sense because "it is essentially unheard of for sophisticated lawyers to take on a case of this magnitude and type on any basis other than a contingency fee, expressed as a percentage of the relief obtained." *Hale* 2018 WL 6606079, at *7 (quotation omitted). "Thus, where, as here, the prevailing method of compensating lawyers for similar services is the contingent fee, then the contingent fee *is* the market rate." *Id.* (internal quotations omitted) (quoting *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (emphasis in original)).

"The normal rate of compensation in the market [is] 33.33% of the common fund recovered because the class action market commands contingency fee agreements and the class counsel accepts a substantial risk of nonpayment." *George v. Kraft Foods Global, Inc.*, No. 1:08-cv-3799, 2012 WL 13089487, at *2 (N.D. Ill. Jun. 26, 2012) (citation, quotation marks omitted). And a one-third fee is common across the country. *See, e.g.*, *Hale*, 2018 WL 6606079, at *10 ("Courts within the Seventh Circuit, and elsewhere, regularly award percentages of 33.33% or higher to counsel in class action litigation."); *Gaskill v. Gordon*, 160 F.3d 361, 362–63 (7th Cir. 1998) (noting that typical contingency fees are between 33% and 40%) (citation omitted); *Kolinek v. Walgreen Co*.,

[3] In addition, "[t]he use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive." *Will v. Gen. Dynamics Corp.*, No. 06-698-GPM, 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010) (citing *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 979–980 (7th Cir. 2003) ("The client cares about the outcome alone" and class counsel's efficiency should not be used "to reduce class counsel's percentage of the fund that their work produced."); *In re Comdisco Sec. Litig.*, 150 F. Supp. 2d 943, 948 n. 10 (N.D.Ill.2001) ("To view the matter through the lens of free market principles, [lodestar analysis] (with or without a multiplier) is truly unjustified as a matter of logical analysis."); *Gehrich v. Chase Bank USA*., 2016 WL 806549 *13 (N.D. Ill. March 2, 2016) ("The central consideration is what class counsel achieved for the class rather than how much effort class counsel invested in the litigation"); *Silverman v. Motorola*, No. 07 C 4507, 2012 WL 1597388 *4 (N.D. Ill. 2012), *aff'd* 739 F.3d 956 (7th Cir. 2013) (declining to consider lodestar).

311 F.R.D. 483, 500 (N.D. Ill. 2015) (recognizing that "courts in this circuit regularly allow attorneys to recoup one-third of the first $10 million of the class action settlement fund" and rejecting request by objecting class members to utilize the lodestar approach); *Pavlik v. FDIC*, No. 10-816, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *Coleman v. Sentry Ins. A Mut. Co.*, No. 15-CV-1411-SMY-SCW, 2016 WL 6277593, at *3 (S.D. Ill. Oct. 27, 2016) (awarding one-third of the common fund and noting that "Class Counsel has shown the Court that they have routinely been awarded a contingent 33 1/3% (and in some cases more) of a Settlement Fund").[4]

The award of a reasonable fee also "is informed by a number of factors," including: (1) the actual agreements between the parties as well as fee agreements reached by sophisticated entities in the market for legal services; (2) the risk of non-payment at the outset of the case; (3) the caliber of Class Counsel's performance; and (4) information from other cases, including fees awarded in comparable cases. *Hale*, 2018 WL 6606079, at *8 (citing *Synthroid I*, 264 F.3d at 719).

[4] *See also Martin v. Caterpillar, Inc.*, No. 07-1009, 2010 WL 11614985 (C.D. Ill. Sept. 10, 2010) (one-third fee); *Burkholder v. City of Ft. Wayne*, 750 F. Supp. 2d 990, 997 (N.D. Ind. 2010) (one-third fee); *Heekin v. Anthem, Inc.*, No. 1:05-CV-01908-TWP, 2012 WL 5878032, at *3 (S.D. Ind. Nov. 20, 2012) (awarding 33.3% of the common fund of $90 million); *In re Guidant Corp. ERISA Litig.,* No. 05-cv-1009, slip op. at 2 (S.D. Ind. Sept. 10, 2010) (38% of the common fund); *Campbell v. Advantage Sales & Mktg. LLC,* No. 09–01430, 2012 WL 1424417, at *2 (S.D. Ind. Apr. 24, 2012) (awarding one-third of recovery as attorneys' fees); *Williams v. Rohm & Haas Pension Plan*, No. 4:04-cv-0078-SEB-WGH, 2010 WL 4723725 (S.D. Ind. Nov. 12, 2010) (awarding one-third of recovery ($43.5 million) as attorneys' fees); *Retsky Family Ltd. P'ship*, No. 97 C 7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) ("A customary contingency fee would range from 33 1/3% to 40% of the amount recovered."); *In re Lithotripsy Antitrust Litig.*, No. 98-8394, 2000 WL 765086, at *2 (N.D. Ill. June 12, 2000) (noting that "[m]any courts in this district have utilized" the percentage method to set fees in class actions; 33.3% of the fund plus expenses is well within the generally accepted range of the attorneys fee awards"); *Goldsmith v. Tech. Solutions Co.*, No. 92-4374, 1995 WL 17009594, at *8 (N.D. Ill. Oct. 10, 1995) (noting that courts in the Seventh Circuit award attorneys' fees "equal to approximately one-third or more of the recovery").

2. Attorneys' Fees of One-Third of the Settlement Fund are Appropriate Here

The Court should grant Class Counsel an award of attorneys' fee from the Settlement Fund in the amount of $563,224. This amount represents one-third of the Value of the Settlement. The requested fee is consistent with the one-third percentage routinely awarded by courts across the country. The relevant factors all support the requested fee. First, the fee agreement between the Class Representative and Class Counsel called for attorneys' fees of up to one-third for recoveries before trial. The terms of the Settlement also permit Class Counsel to seek attorneys' fees of up to one-third of the Settlement Fund, and so IHMVCU does not oppose the fee request. Second, the risk of non-payment at the outset of the case was substantial as the matter was entirely contingent-fee based and there were significant risks and uncertainties as to the outcome of this matter. Third, Class Counsel performed in a diligent and efficient manner to achieve a settlement that provides for an excellent recovery of past damages and prevents future harm. Finally, one-third of the Settlement is the amount of fees that have been awarded in comparable cases, including comparable Illinois cases involving many of the same claims at issue here. *See Darty v. Scott Credit Union*, No. 19L0793 (St. Clair Cnty., Ill. May 27, 2022) (awarding class counsel one-third of settlement value in case challenging identical fee practices). The Court should thus award Class Counsel the requested attorneys' fees.

3. The Court Should Award Reimbursement of Plaintiff's Reasonable Litigation Expenses

In addition to fees, "[i]t is well established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses." *Hale*, 2018 WL 6606079, at *17 (citing *Beesley*, 2014 WL 375432, at *3 (citing *Boeing*, 444 U.S. at 478)). These expenses "include[] such things as expert witness costs; computerized research; court reports; travel expense; copy, phone and facsimile expenses and mediation." *Id.* (citation omitted).

Here, the Court should grant Class Counsel reimbursement of $466.28 in litigation expenses. These expenses consist primarily of travel expenses, filing fees, legal research, etc. Kaliel Decl. ¶ 11, 12. These are routine litigation costs, and Class Counsel had every incentive to incur only reasonable expenses and to keep these costs low because repayment of them was contingent on the outcome of the lawsuit. *Hale*, 2018 WL 6606079, at *17. The Court should thus award Class Counsel the requested litigation expenses.

4. The Court Should Award Plaintiff Rivera a Service Award of $10,000

In recognition that a class representative has taken her own time and has achieved a settlement that benefits the many other absent class members, courts often approve payment of a class representative service award. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 2009). These awards serve to incentivize persons to seek vindication of rights through a class action and consider the actions the class representative has taken to protect the interests of the class, the degree to which the class has benefited from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation. *Id.* Class representative service awards of $5,000 to $25,000 or more are common. *See, e.g.*, *id.* (affirming $25,000 service award); *Hale*, 2018 WL 660679, at *15 ($25,000 service award); *Spano v. Boeing Co.*, No. 06-cv-743-NJR-DGW, 2016 WL 3791123, at *4 (Mar. 31, 2016) (awarding $25,000 to two representatives and $10,000 to a third representative); *Abbott v. Lockheed Martin Corp.*, No. 06-CV-701-MJR-DGW, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015) (awarding $25,000); *Beesley*, 2014 WL 375432, at* 4 (awarding $15,000 and $25,000); *Will v. Gen. Dynamics Corp.*, No. CIV. 06-698-GPM, 2010 WL 4818174, at *4 (S.D. Ill. Nov. 22, 2010) ("Awards of $25,000 for each Plaintiff are well within the ranges that are typically awarded in comparable cases."); *Lively v. Dynegy, Inc.*, No. 05-CV-0063-MJR, 2008 WL 4657792 (S.D. Ill. Sept. 30, 2008) (awarding $10,000 to each of three representatives); *Morlan v. Universal Guar. Life Ins.*, No. Civ. 99-274-GPM, 2003 WL 22764868

(S.D. Ill. Nov. 20, 2003) (awarding $25,000, $20,000, $20,000 and $5,000 respectively to class representatives); *Spicer v. Chicago Board Options Ex., Inc.*, 844 F. Supp. 1226 (N.D. Ill. 1993) (collecting cases awarding incentive fees ranging from $5,000 to $100,000; awarding $10,000 each to named plaintiffs).

Here, the Court should award Plaintiff Rivera a service award of $10,000. Before and during the litigation and settlement, Plaintiff Rivera regularly consulted with Class Counsel in prosecuting the lawsuits, worked with Class Counsel to provide responses to IHMVCU's discovery requests, and participated in the decision to accept the proposed Settlement, overall taking her own valuable time to represent the interests of the Class, which ultimately resulted in the Settlement that will benefit all Class Members. Kaliel Decl. ¶ 13. The result achieved by the lawsuit and Settlement has been substantial and would not have been actualized if not for Plaintiff Rivera's efforts and involvement. The requested service award is well within the range of awards often granted in similar cases, and IHMVCU has agreed in the Settlement Agreement that, subject to Court approval, Plaintiff Rivera is entitled to the requested service award. The Court should therefore award Plaintiff Rivera the requested service award.

V. CONCLUSION

As demonstrated above, all of the factors that this Court should consider in deciding whether to finally approve the Settlement indicate that final approval should be granted. The Parties believe that final approval is appropriate and respectfully request final approval and the Court's entry of a Final Approval Order in the form attached as Exhibit **1** to this Motion.

Dated: November 14, 2022

LYNCH CARPENTER, LLP

/s/ Katrina Carroll

Katrina Carroll
katrina@lcllp.com
Kyle A. Shamberg
kyle@lcllp.com
111 W. Washington Street, Suite 1240
Chicago, IL 60602
312.750.1265

Jeffrey D. Kaliel (*pro hac vice*)
Sophia G. Gold (*pro hac vice*)
KALIEL PLLC
1875 Connecticut Ave. NW 10th Floor
Washington, D.C. 20009
(202) 350-4783
jkaliel@kalielpllc.com
sgold@kalielpllc.com

Counsel for Plaintiff and the Proposed Class