IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REYNALDO REYES,
on behalf of himself and all
others similarly situated,

Plaintiff,

v.

ZIONS FIRST NATIONAL BANK,
NETDEPOSIT, LLC,
MP TECHNOLOGIES d/b/a MODERN
PAYMENTS, TELEDRAFT, INC.,
NATIONAL PENN BANK, WELLS FARGO
BANK, N.A., and WACHOVIA BANK, N.A.,
Defendants.

CIVIL ACTION NO. 10-00345

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR CLASS CERTIFICATION
AND FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

Plaintiff moves for final certification of a settlement class and final approval of the proposed Class Action Settlement.[1] On July 8, 2016, the Court provisionally certified the case as a class action and preliminarily approved the settlement between Plaintiff and Zions First National Bank, NetDeposit, LLC, and MP Technologies d/b/a Modern Payments.[2]

II. BACKGROUND

This case involves what this Court previously described as "a national scourge of telemarketing fraud, which victimizes extremely vulnerable people, and does so in an inherently and intrinsically evil way." Transcript of Hearing at 77, *Faloney v. Wachovia Bank, N.A.*, No. 07-01455 (E.D. Pa., Jan. 22, 2009).

Plaintiff alleges that he and the class he seeks to represent were victims of unlawful telemarketing and internet schemes. The telemarketers and internet sales entities identified in the Second Amended Complaint (hereinafter referred to as "telemarketers") obtained class members' bank account information. MP Technologies, d/b/a Modern Payments, a subsidiary of Zions Bancorporation, provided software to the telemarketers that allowed them to enter transactions onto the Automated Clearing House, or "ACH," system through Modern Payments and Zions First National Bank. These transactions debited consumers' accounts at banks throughout the United States. Zions and Modern Payments then credited the amounts debited to the accounts of the telemarketers. Plaintiff alleges that the Zions Defendants' participation in this scheme violated the Racketeering Influenced and Corrupt Organizations Act ("RICO").

Certain of the fraudulent schemes were operated by the same persons who were the

[1] The settlement agreement is attached as exhibit A to the accompanying motion.
[2] Zions First National Bank, NetDeposit, and MP Technologies are collectively referred to as "Defendants" or "Zions."

subject of prior cases, including the *Wachovia* action, which resulted in a class settlement and action by the Office of the Comptroller of the Currency ("OCC") against Wachovia Bank for facilitating fraud in essentially the same manner alleged in this case. Some of those fraudulent telemarketers simply moved their banking relationship to Zions after their relationship with Wachovia was terminated as a result of those actions.

The named plaintiff, Reynaldo Reyes, approached class counsel after receiving a recovery as a class member in the *Wachovia* litigation. He described how he was victimized by a scheme not covered by the *Wachovia* settlement. Mr. Reyes had been contacted by an entity known as NHS, which ultimately led to debits to his account. "In Reyes' case, in an unsolicited phone call in November 2007, telemarketer NHS Systems told Reyes that he qualified for a free government grant. NHS Systems then requested Reyes' bank account information, which he provided." *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 475 (3d Cir. 2015). Class counsel's pre-complaint investigation discovered that NHS was operated by the same persons responsible for Mr. Reyes's previous victimization that had resulted in his recovery in the *Wachovia* suit. The telemarketers had simply changed names and moved their payment processing to Zions when Judge Padova ordered frozen the relevant accounts at Wachovia.

The Third Circuit summarized the manner in which the Mr. Reyes's account was debited:

> Telemarketers such as NHS Systems cannot readily obtain funds directly from consumers' bank accounts because most banks are extremely reluctant to allow them to debit accounts. Accordingly, telemarketers usually contract with payment processing entities that debit bank accounts on the telemarketer's behalf. In Reyes' case, NHS Systems did exactly that. It provided Reyes' bank account information to Modern Payments, a third-party payment processing agency and subsidiary of Zions Bank. Modern Payments then caused Zions Bank to initiate an Automated Clearing House ("ACH") debit of Reyes' bank account at Commerce Bank. Pursuant to Zions Bank's request, Reyes' funds on deposit with Commerce Bank were transferred to Modern Payments' account at Zions Bank, and ultimately transferred to NHS Systems, the Originator. Two debits were processed from Reyes' account using this ACH debit process, one for $29.95 and another for

$299.95.

Id. (footnote omitted).

Mr. Reyes brought suit on January 26, 2010, after extensive preliminary investigation. The case was brought against Zions as well as four banks that wired funds overseas on behalf of the telemarketers. Over two years of preliminary motion practice resulted in the Court's decision sustaining the claims against Zions while dismissing those against the other banks, *Reyes v. Zion First Nat. Bank*, No. 10-345, 2012 WL 947139 (E.D. Pa. Mar. 21, 2012).

Discovery then began. While discovery was proceeding, class counsel also collected and reviewed the public files from the government cases against the telemarketers. In addition, they retained and worked with four prominent experts, all of whom eventually prepared extensive reports.

At the close of discovery, the complaint was amended to better define the telemarketers participating in the RICO scheme. Each was chosen because there was both significant evidence of its fraud and because it, or its owner, had been in some way the subject of a prior government action resulting in the shutting down of its operations. Despite numerous government actions, no significant funds were recovered in any of those actions sufficient to allow for any restitution to the victims in the class in this case.

Plaintiff moved for class certification following the close of discovery. A two-day class certification hearing was held on January 17 and 18, 2013. Nine months later, the Court issued its opinion denying class certification. *Reyes v. Zions First Nat. Bank*, No. 10-345, 2013 WL 5332107 (E.D. Pa. Sept. 23, 2013). Plaintiff moved for interlocutory review of the class certification denial pursuant to Federal Rule of Civil Procedure 23(f). The Third Circuit granted the petition.

On appeal, the case raised significant issues of law and attracted significant amici. The

AARP, the Consumers Federation of America, the National Consumer Law Center, Public Interest Law Center of Philadelphia, Community Legal Services, United States Senators Richard Blumenthal, Robert Casey, and Edward Markey, United States Representative Allyson Schwartz, and Wayne Geisser, the receiver for NHS, filed amici briefs in support of Plaintiff and, on the other side, the American Bankers Association, Independent Community Bankers of America, and the Risk Management Association filed briefs in support of Zions. On September 2, 2015, almost two years after the denial of class certification, the Circuit issued its ruling vacating and remanding the order denying class certification, setting forth, for the first time, a modern standard for consideration of class certification in cases involving mass-marketing fraud. *Reyes v. Netdeposit, LLC*, 802 F.3d 469 (3d Cir. 2015).

Upon remand, the district court directed the parties to mediation before United States Magistrate Judge Rice. The mediation proved an arduous process. So difficult were the negotiations that at one point Defendants sought the services of a second mediator, Garrett Brown, former Chief Judge of the District of New Jersey, whose services proved futile.

After Plaintiff succeeded in obtaining modification of the Court's orders governing subsequent class proceedings, limiting the class certification consideration on remand to the existing record, the parties were again ordered to mediation. At that point, the parties began productive settlement discussions. Months of subsequent settlement negotiations resulted in the settlement now before the Court. These negotiations extended from November 2015 through June 2016.

Discovery was complete when the settlement was reached. Plaintiff had reviewed tens of thousands of documents, propounded numerous interrogatories, and taken 13 depositions, including from officers and key employees of Net Deposit, the key officials at Zions involved

with Modern Payments, the primary investigator at NACHA, and the receiver for NHS. In addition, Plaintiff's counsel reviewed transcripts and documents from the various, related government actions. As of the date of the settlement, the class-certification motion was fully briefed on remand. It addressed many of the most significant issues in this case in great detail.

At the time the case was settled, Plaintiff and the putative class faced significant risks and challenges. Proving Zions's involvement in the scheme presented a major evidentiary challenge. It raised questions of the knowledge and intent of the individuals involved and of the bank itself, which (together with its subsidiaries) was the only named defendant at the time of settlement. These issues were extensively briefed in opposition to the Defendants' motions to dismiss and then, following full discovery, as part of Plaintiff's motion for class certification. That the Court resolved the motion to dismiss in the Plaintiff's favor against the Zions Defendants and Teledraft, but dismissed the remaining bank defendants, highlights some of the complexity and risk involved.

RICO actions are inherently complex. And here, the RICO scheme involved complex banking mechanisms, and required an understanding of banking practices, protocols, and rules. Class counsel had to master and be prepared to explain to a jury the complex rules governing the ACH system and the common practices relating to those rules.

Moreover, the scheme involved a variety of telemarketers, who used different aliases and illusory products. The Third Circuit correctly held that the multiplicity of schemes and supposed products did not prevent class certification. As Chief Judge McKee explained, "an interpretation of Rule 23 that places class actions beyond the reach of consumers who have been victimized by fraudulent schemers who are wise enough to adopt schemes with subtle (but meaningless) variations would invite the kind of consumer fraud that Reyes is alleging here." *Reyes*, 802 F.3d

at 491. Nevertheless, it remained for Plaintiff to convince a jury that each of these schemes was fraudulent, and that the Zions Defendants were liable to members across the whole class.

III. TERMS OF THE SETTLEMENT

The settlement represents an exceptional result for the class. It creates a fund of $37.5 million to compensate class members for the amounts taken from their accounts and for certain bank charges they incurred, to pay their counsel fees and costs, and to provide an incentive award to Mr. Reyes, the class representative. The settlement amount is *more* than the total of the unreturned funds debited from the victims' accounts. As discussed below, there are different ways of measuring the total potential recovery. Depending on how it is calculated, the percentage of recovery varies between 58% and 129% of single damages. And because money that would go to class members who cannot be located will be redistributed to those class members who can, those who can be compensated will receive an even greater percentage.

Each class member who can practicably be located will receive direct payment in the form of an ACH transfer, requiring no action by the class member. There is no reversion to Defendants. All funds that cannot be distributed to class members will be redistributed to class members who can be located and paid.

The Settlement Agreement defines the settlement class as follows:

> All individuals in the United States as to whom ACH debit entries or remotely-created check drafts on their accounts were prepared by Defendants on behalf of the merchants identified as "Telemarketing Enterprises" in Plaintiff's Second Amended Complaint during the period of January 26, 2006, through the present, and all individuals who incurred bank charges as a consequence of such ACH debit entries or remotely-created check drafts.

Settlement Agreement, ¶ 3.

A. Restitution by ACH

When the settlement becomes final, funds will be distributed to class members by

electronic payments through the ACH system, *i.e.*, funds will be wired to class members' accounts without the need for any class member to do anything, except possibly to update their banking information in response to the notice. If any class member's direct deposit is unsuccessful, he or she will receive a check by mail, so long as the claims administrator has a valid address. Because of the length of time between the events giving rise to the case and the present, the settlement provides for special efforts to be made to locate and obtain accurate information regarding class members to ensure that as many class members as possible will receive compensation.

The settlement provides that any funds that cannot be successfully distributed will be redistributed to the class members to whom funds have been successfully distributed.

B. Restitution Amount

In addition to the restitution for funds taken from accounts, class members will be compensated for certain bank fees they incurred as a result of this conduct. When telemarketers attempted to take funds from class members' accounts, many banks denied the transaction on the basis that class members had insufficient funds in their accounts and then charged insufficient funds (NSF) fees. During discovery, class counsel obtained records that identify the amounts debited from each class member and that identify when transactions were returned as a result of insufficient funds. Each class member's pro-rata share of the net fund will be calculated by combining the debits they incurred plus $25 for each NSF return.[3]

C. Release

In exchange for the above consideration, the class members who remain in the class agree

[3] The settlement also provides that the class members for whom class counsel does not have address or account information can file a claim. Based on the amount of the claims, Zions will supplement the fund by up to $250,000.

to release the Zions defendants of any claims that could have been asserted based on the facts alleged in the Second Amended Class Action Complaint.

D. Notice Provisions

Extensive efforts have been made to provide notice to the class. Class counsel has obtained the addresses for 85 percent of the class, over 460,000 class members. These addresses were then updated by running them through both the United States Postal Service's National Change of Address database and through a more sophisticated skip-trace database offered by LexisNexis. See Declaration of Ronald A. Bertino ("Bertino Dec."), ¶5. This resulted in over 300,000 addresses being updated. *Id*. The 460,000 class members were all provided with direct notice via a postcard that the Court approved on August 18, 2016. Approximately 50,000 of the notices were returned as undeliverable. *Id*. ¶7. Those with forwarding addresses were re-mailed and for all class members with over $250 in losses, the Claims Administrator undertook extra efforts, including a manual trace, to try to find a valid address. *Id*. To date, over 5,400 notices have been re-mailed to class members. *Id*. ¶8.

In addition to direct notice, the Claims Administrator designed an advertisement to run in *People* magazine, which has a readership of 40 million people. *Id*. ¶4. The Court approved of this publication and the form of this notice in an August 1, 2016, order. The advertisement ran in the September 12, 2016, issue, which is attached as Exhibit B to the Bertino Declaration. In addition, the claims administrator issued a press release containing the Court-approved notice.

To further assist the class, the claims administrator created a website—www.telemarketingsettlement.com—that allows class members to find more information about the case, update their records if necessary, request paper checks instead of direct deposit, and—for the limited number of class members that will not be receiving payment automatically—an

ability to file a claim. *Id*. ¶8. To date, there have been over 22,000 visits to the website. *Id*.

The claims administrator also created an Interactive Voice Response telephone service that answers frequently asked questions and allows class members to speak with a customer service representative. *Id*. ¶9. Over 5,000 calls have been received, encompassing nearly 300 hours of talk time. *Id*.

IV. DISCUSSION

A. The Case Should be Certified as a Class Action

The proposed class fully satisfies the requirements of Federal Rule of Civil Procedure 23. The proposed class includes approximately 540,000 individuals, all alleging injury as a result of a common scheme involving the telemarketers and the Zions defendants. Each class member was victimized in the same fashion—unauthorized ACH debits or remotely-created checks were created as a result of fraudulently obtained personal bank account information resulting in either bank fees or sums being taken directly from their bank accounts.

In considering certification of the class, the Court has the benefit of the Third Circuit's review of the facts and law pertinent to class certification. In many ways, the Circuit considered the case a paradigm for certification under Rule 23. As Chief Judge McKee explained:

> Class actions are often the only practical check against the kind of widespread mass-marketing scheme alleged here. The individual claims arising from such conduct are usually too small to justify suit unless aggregated in a class action. This is particularly true when, as is often the case, the scheme targets unsophisticated consumers with little disposable income and without the means or wherewithal to seek assistance of legal counsel. As a practical matter, the average victim of such a scheme nearly always finds it far easier—and much cheaper—to reluctantly accept any loss and move on than to undertake the expense and inconvenience endemic in the protracted process of trying to recover a few dollars years later.
>
> …
>
> In such cases, the class action can "create[ ] greater access to judicial relief[.]" *Marcus*, 687 F.3d at 594. "[I]t is[, in fact,] possible to think of consumer class

> actions as providing an indispensable mechanism for aggregating claims when the individual stake is low and the similarity of the challenged conduct is high." Samuel Issacharoff, *Group Litig. of Consumer Claims: Lessons from the U.S. Experience*, 34 Tex. Int'l L.J. 135, 149 (1999).[17] Thus, class actions have the practical effect of allowing plaintiffs who have suffered relatively *de minimis* loss to nevertheless function as private attorneys general and thereby deter fraud in the marketplace.

Reyes, 802 F.3d at 491–92.

Numerous courts in this Circuit have found class treatment, including certification of settlement classes, appropriate in RICO cases and cases involving schemes to defraud. A very similar settlement class was certified by this Court in *Faloney v. Wachovia Bank.* There, the Court explained that the proposed class, "satisfies Rule 23 in all respects." Transcript of Hearing at 80; *see also In re Insurance Brokerage Antitrust Litig.*, 579 F.3d 241 (3d Cir. 2009) (settlement class); *In re Prudential Ins. Co of Am. Sales Practices Litig.*, 148 F.3d 283 (3d Cir. 1998) (settlement class); *Hoxworth v. Blinder Robinson & Co.*, 980 F.2d 912 (3d Cir. 1992); *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985); *Grider v. Keystone Health Plan Cent.*, No. 01-05641, 2006 WL 3825178 (E.D. Pa. Dec. 20, 2006); *Ralston v. Zats*, No. 94-3723, 2000 WL 1781590 (E.D. Pa. Nov. 7, 2000) (settlement class); *Cullen v. Whitman Med. Corp.*, 188 F.R.D. 226 (E.D. Pa. 1999); *Hanrahan v. Britt*, 174 F.R.D. 356 (E.D. Pa. 1997) (settlement class); *Robinson v. Countrywide Credit Indus.*, No. 97-2747, 1997 WL 634502 (E.D. Pa. Oct. 8, 1997); *Rodriguez v. McKinney*, 156 F.R.D. 112 (E.D. Pa. 1994); *McMahon Books, Inc. v. Willow Grove Assocs.*, 108 F.R.D. 32 (E.D. Pa. 1985).[4]

[4] These decisions are joined by a host of other similar decisions from other Circuits. *See, e.g.*, *Carnegie v. Household Int'l, Inc.* 376 F.3d 656 (7th Cir. 2004); *Negrete v. Allianz Life Ins. Co.*, 238 F.R.D. 482 (C.D. Cal. 2006); *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75 (D. Mass. 2005) (settlement class); *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538 (E.D. Va. 2000); *Heastie v. Cmty. Bank of Greater Peoria*, 125 F.R.D. 669 (N.D. Ill 1999); *Spark v. MBNA Corp.*, 178 F.R.D. 431 (D. Del. 1998); *Smith v. MCI Telecomms. Corp.*, 124 F.R.D. 665 (D. Kan. 1989); *Haroco v. Am. Nat'l Bank & Trust Co.*, 121 F.R.D. 664 (N.D. Ill 1988).

When analyzing a settlement class for certification, courts take the terms of the proposed settlement into consideration to the extent they bear on the requirements of Rule 23. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619 (1997); *Prudential*, 148 F.3d at 308. Also, for settlement purposes, the Court need not inquire whether the class would present intractable management problems at trial because, as a result of settlement, there is no trial. *Amchem*, 521 U.S. at 620.

1. The Requirements of Rule 23(a)

a. Numerosity.

Notices of the proposed settlement were mailed to over 460,000 class members. "[N]umerosity is generally satisfied if there are more than 40 class members." *In re Nat'l Football League Players Concussion Injury Litig.* (*NFL Players*), 821 F.3d 410, 426 (3d Cir. 2016).

b. Commonality

Rule 23(a)(2) requires "questions of law or fact common to the class." "Commonality does not require perfect identity of questions of law or fact among all class members. Rather, even a single common question will do." *Reyes*, 802 F.3d at 486. (internal quotation marks omitted); *see also Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) (noting that commonality under 23(a)(2) "is easily met")." "[A] properly supported RICO allegation will often contain common issues because, like 'commonality[, a RICO allegation,] is informed by the defendant's conduct as to all class members and any resulting injuries common to all class members[.]'" *Reyes*, 802 F.3d at 487 (alterations in original, quoting *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) (en banc)).

In addition to the common elements of RICO, the Circuit noted that the factual record

could support a finding of multiple common issues:

> Reyes has presented evidence which, if accepted, could establish by a preponderance of the evidence that (1) "Zions and Modern Payments were processing transactions for a number of entities—in addition to NHS Systems—that government agencies [later] determined were fraudulent[,]" Appellant Br. at 15; Appellee Br. at 48–49, (2) Zions Bank, Netdeposit, and Modern Payments sent e-mails communicating a sense of shock regarding the "staggering" return rates, JA 686, and concerns that they may be at risk for some of their business lines being used for "money laundering[,]" *id.* at 692, (3) Zions Bank was aware that its high return rates "alarm[ed]" NACHA," *id.* at 814–15, and (4) Modern Payments was "afraid of" a probe by the FTC regarding potential fraud, *id.* at 693, and Zions Bank received warnings from other banks that they "will disput[e] all charges" generated by NHS Systems. *Id.* at 1061–62.

Reyes, 802 F.3d at 487. Commonality is readily met.

c. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The concepts of commonality and typicality are broadly defined and closely linked. *See Prudential*, 148 F.3d at 311 (quoting *Baby Neal*, 43 F.3d at 56.) "Typicality asks whether the named plaintiffs' claims are typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class." *Baby Neal*, 43 F.3d at 55. "We also have set a low threshold for typicality. Even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories' or where the claim arises from the same practice or course of conduct." *NFL Players*, 821 F.3d at 428 (citations omitted) (internal quotation marks omitted).

"The named Plaintiff's claims need only be sufficiently similar to those of the class to allow the court to conclude that (1) the representative will protect the interests of the class and (2) there are no antagonistic interests between the representative and the proposed class." *Nat'l Org. on Disability v. Tartaglione*, No. 01-1923, 2001 WL 1258089, *3 (E.D. Pa. Oct. 22, 2001) (internal quotation marks omitted).

The claims of the named Plaintiff and those of the class are fundamentally the same: each was injured as a result of the debits the Zions Defendants entered on behalf of the telemarketers. There is no plausible conflict between Mr. Reyes and the class members, whose interests he has vigorously advocated throughout, regardless of which telemarketing scheme they were targeted by. Any minor variations in the underlying telemarketing schemes do not alter the similar nature of their schemes or the common banking modus operandi used to access the accounts of the named plaintiff and class members. Far from a conflict, all class members have an interest in establishing liability with respect to each telemarketer to support that individual's claim that the Zions Defendants was a systematic and knowing participant. "When a defendant engaged in a 'common scheme relative to all members of the class, there is a strong assumption that the claims of the representative parties will be typical of the absent class members.'" *Cohen v. Chicago Title Ins. Co.*, 242 F.R.D. 295, 299 (E.D. Pa. 2007) (Sánchez, J.) (quoting *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 207 (E.D. Pa. 2001)).

d. Adequacy of Representation.

The Third Circuit explained Rule 23(a)(3)'s adequacy requirement as follows:

> The final Rule 23(a) prerequisite encompasses two distinct inquiries designed to protect the interests of absent class members. First, the adequacy of representation inquiry tests the qualification of counsel to represent the class. Second, it serves to uncover conflicts of interest between named parties and the class they seek to represent.

Prudential, 148 F.3d at 312 (internal quotations and citations omitted). As noted above, those two inquiries are of heightened importance in certification of a proposed settlement class, where the court acts as a fiduciary for absent class members to ensure that their interests have been fairly accommodated in the litigation and zealously pursued by class counsel. On both counts, this class is more than adequately represented.

i. Adequacy of Class Counsel

Because the Court serves as a fiduciary for absent class members, in assessing the adequacy of representation for a proposed settlement class, the Court must have as its paramount concern any indication of "collusion, inadequate prosecution and attorney inexperience." *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 795 (3d Cir. 1995). There is nothing about the conduct of this litigation, the settlement negotiations, nor most importantly, the structure and scope of the settlement itself that would warrant concern.

Class counsel, Langer, Grogan & Diver, P.C., are recognized as a preeminent firm in the successful pursuit and resolution of class litigation, and particularly in RICO litigation similar to the present case. This Court in *Wachovia* "acknowledge[d] class counsel's tireless efforts, their dogged pursuit of fairness and justice in this case, their exemplary legal skill, and their scrupulous ethics throughout this proceeding." Transcript of Hearing at 81, *Faloney v. Wachovia Bank, N.A.*, No. 07-01455 (E.D. Pa. January 22, 2009). Other Courts within the district have recognized the expertise and skill of class counsel. *See, e.g.*, *In re Linerboard Antitrust Litig.*, MDL 1261, 2004 WL 1221350, *6 (E.D. Pa. June 2, 2004) ("The court has repeatedly stated that the lawyering in the case at every stage was superb, and does so again."); *Cullen*, 197 F.R.D. at 149 (concluding that, in a RICO class action, "the highly skilled class counsel provided excellent representation both for named plaintiffs and absent class members").

Class counsel's skill in successfully prosecuting the present action and the appeal confirm what these prior courts have recognized.

ii. Adequacy of Class Representatives

The typicality and adequacy of representation inquiries overlap. *Hanrahan v. Britt*, 174

F.R.D 356, 363 n.10 (E.D. Pa. 1997). Both look to the potential for conflicts among the class. As noted, under the typicality inquiry, there are no conflicts between the claims of the named Plaintiff and the class—they pursue the same legal theory and were victimized by the same basic scheme. *See Prudential*, 148 F.3d at 312–13 (finding adequacy established where case proceeded on theory of a common scheme to defraud); *Hanrahan*, 174 F.R.D. at 364 (finding adequacy satisfied where defendants engaged in a "systematic course of conduct" directed at the entire class).

Mr. Reyes has been an ideal representative for the class. He reviewed the pleadings, searched his personal records to ensure prompt compliance with discovery requests and subjected himself to a deposition. He has remained attentive to the case for almost eight years.

2. Requirements of 23(b)(3)

In addition to satisfying the requirements of Rule 23(a), the proposed class also amply satisfies the requirements of Rule 23(b)(3). Rule 23(b)(3) requires that the common issues raised in the litigation predominate over any individual issues and that the class action device is superior to other forms of adjudication. The "predominance" and "superiority" inquiries focus on whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "We are nonetheless 'more inclined to find the predominance test met in the settlement context.'" *NFL Players*, 821 F.3d at 434 (quoting *Sullivan*, 667 F.3d at 304 n.29).

a. Predominance

A predominance analysis in this case begins, as the Third Circuit recognized, with the nature of Mr. Reyes's claim: "It is important to note that Reyes is alleging a kind of consumer fraud. '[T]he Supreme Court has observed that predominance is a test readily met in certain cases

alleging consumer or securities fraud or violations of the antitrust laws." *Reyes*, 802 F.3d at 488–89 (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321–22 (3d Cir. 2008)). "To evaluate predominance, the court must determine whether the efficiencies gained by class resolution of the common issues are outweighed by individual issues presented for adjudication." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp 450, 511 (D.N.J. 1997), *aff'd*, 148 F.3d 283 (3d Cir. 1998).

Predominance does not require that there be no significant individual issues. It merely requires that the issues common to the class predominate over individual issues. Fed. R. Civ. Pro. 23(b)(3).

The Third Circuit considered the issue of predominance in this case at length, attending to both the law and the facts. It found that Plaintiff's theory of the case—that each of the telemarketers was a complete sham, so that no individual determinations of injury would be needed—would support of finding of predominance. *Reyes*, 802 F.3d at 492. Indeed, the Court emphasized the importance of class certification in such cases: "An interpretation of Rule 23 that places class actions beyond the reach of consumers who have been victimized by fraudulent schemers who are wise enough to adopt schemes with subtle (but meaningless) variations would invite the kind of consumer fraud that Reyes is alleging here." *Id.* at 491. The Court emphasized the extensive evidence that Plaintiff produced in support of his theory. It then noted, "[t]he District Court may consider that the defendants' experts offer little reason to conclude that predominance cannot be satisfied here." *Id.* at 492.

The Circuit's view of this case is consistent with many prior opinions in which courts have had little difficulty finding predominance in cases involving consumer fraud and/or RICO conspiracies where, as here, the underlying fraud can be proven by common evidence. *See*

Insurance Brokerage, 579 F.3d at 258–59; *Prudential*, 148 F.3d at 314; *Grider,* 2006 WL 3825178, at * 28; *Cullen*, 188 F.R.D. at 234–35; *Hanrahan*, 174 F.R.D. at 365; *Matthews v. Kidder Peabody & Co.*, No. 95-85, 1996 WL 665729, at *4 (W.D. Pa. 1996).

b. Superiority

The superiority requirement under Rule 23(b)(3) calls for a court to "balance in terms of fairness and efficiency the merits of a class action against other alternative methods of adjudicating plaintiffs' claim." *See Grider*, 2006 WL 3825178, at *29 (*citing Prudential*, 148 F.3d at 316).

The Third Circuit made it clear that not only was class certification the superior means of litigating this case, it is the only realistic means:

> Class actions are often the only practical check against the kind of widespread mass-marketing scheme alleged here. The individual claims arising from such conduct are usually too small to justify suit unless aggregated in a class action. This is particularly true when, as is often the case, the scheme targets unsophisticated consumers with little disposable income and without the means or wherewithal to seek assistance of legal counsel. As a practical matter, the average victim of such a scheme nearly always finds it far easier—and much cheaper—to reluctantly accept any loss and move on than to undertake the expense and inconvenience endemic in the protracted process of trying to recover a few dollars years later.

Reyes, 802 F.3d at 491.

For all of the above reasons, a settlement class is properly certified.

B. The Proposed Settlement is Fair, Reasonable, and Adequate

The Court is charged with determining whether the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court makes this determination in its role as "a fiduciary who must serve as a guardian of the rights of absent class members." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534 (3d Cir. 2004) (quoting *GM Trucks*, 55 F.3d at 785). The Court's task in simplified in the present case because, even taken at its lowest

valuation, the present settlement represents among the highest percentage recoveries of damages ever obtained. Stephen A. Saltzburg, the Wallace and Beverly Woodbury University Professor of Law at George Washington University Law School, is an expert in issues concerning class-action counsel and fees. He was appointed by Chief Judge Becker to serve as Co-Chair of the Third Circuit Task Force on Selection of Class Counsel in 2000. He explains that, "[e]ven assuming a mid-point between the low and high valuations of the settlement, it provides a recovery of over ninety percent of single damages. Such a recovery is extremely rare and, I believe, unprecedented in a case in which there was no government action." Declaration of Stephen A. Saltzburg ("Saltzburg Decl.") ¶36.

The recovery provided for under the settlement is significantly greater than the recoveries in other class settlements approved by courts within this district. *See, e.g.*, *In re Ikon Office Solutions, Inc., Securities Litigation*, 194 F.R.D. 166, 183 (E.D. Pa. 2000) ("the settlement provide[d] a recovery of approximately 5.2% of the best possible recovery for those who acquired common stock and approximately 8.7% for those who acquired convertible preferred stock."); *In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 490 (E.D. Pa. 2003) (settlement represented 15% of maximum provable damages).

The assessment of whether the class members' interests are fairly represented must also take into account the "overriding public interest in settling class action litigation"; such settlements "should therefore be encouraged." *Warfarin Sodium*, 391 F.3d at 535.

The Third Circuit recently explained:

> Class-action settlements are entitled to a presumption of fairness when four conditions are met: (1) the negotiations were conducted at arms' length, (2) there was substantial discovery, (3) proposing counsel are experienced in similar litigation, and (4) a small percentage of class members have objected.

NFL Players, 821 F.3d at 436.

It is clear that the first three conditions are met.[5] The parties engaged in repeated, extended arms' length negotiations over the course of many months. Mediation efforts terminated on several occasions without success.

The settlement was reached after the close of merits discovery and after expert reports had been exchanged. Plaintiff had taken numerous depositions and reviewed thousands of pages of documents. Substantial material had been adduced in the prior government cases against the telemarketers available to the parties to the class actions. Multiple rounds of substantive briefs were completed. Class counsel worked on the case for seven years, and was well-prepared to assess the strengths and weaknesses of the litigation during settlement negotiations.

Class counsel are highly experienced in cases of this type. Langer, Grogan & Diver, P.C., specializes in complex class litigation and has a wealth of experience in successfully litigating consumer cases. The settlement is entitled to a presumption of fairness.

1. The Settlement Meets All The Relevant *Girsh* Factors

The final determination of the fairness and adequacy of a class-action settlement is made by analyzing the factors set forth by the Third Circuit in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)). The nine *Girsh* factors are:

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

[5] It is nearly as clear that the fourth will be met. To date, no class members have objected. The deadline for objections is November 1, 2016. Plaintiff will supplement this memorandum to address any objections received by that date.

recovery; and
(9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. The Third Circuit has employed the *Girsh* factors on numerous occasions. *See, e.g.*, *In re AT&T Corp., Sec. Litig.*, 455 F.3d 160, 164–65 (3d Cir. 2006); *Warfarin Sodium*, 391 F.3d at 534–35.

Earlier this year, in *NFL Players*, the Circuit reaffirmed the *Girsh* factors and described other "prudential" considerations enunciated in *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 323 (3d Cir. 1998):

> [1] the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; [2] the existence and probable outcome of claims by other classes and subclasses; [3] the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; [4] whether class or subclass members are accorded the right to opt out of the settlement; [5] whether any provisions for attorneys' fees are reasonable; and [6] whether the procedure for processing individual claims under the settlement is fair and reasonable.

NFL Players, 821 F.3d at 437. The Circuit continued by explaining that, "[u]nlike the *Girsh* factors, each of which the district court must consider before approving a class settlement, the *Prudential* considerations are just that, prudential." *Id.* (quoting *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013)).

a. Complexity, Expense, and Duration of the Proceedings

"The first factor captures the probable costs, in both time and money, of continued litigation." *Warfarin Sodium*, 391 F.3d at 536 (quotation omitted).

Litigating this case through a full trial would have been a highly complex, time consuming, and costly affair. First, class certification would have to be argued again, with the

delay attendant to a decision by the Court and potential requests for interlocutory appeal. A period for notice and opt-out opportunity would follow, further delaying trial.

Trial itself would be a complex endeavor. As noted, the central question of Zions's culpability requires not only a significant evidentiary record laying out the facts of Zions's involvement, but also establishing the standard of care in the banking industry. In the course of preparing the case for eventual trial, Plaintiff retained four experts, including experts in banking, marketing, fraud analysis, and payment systems.

At trial, Plaintiff would also have to establish all of the elements related to RICO—the existence of an enterprise and persons operating the enterprise, as well as the existence of a conspiracy. Zions seemed set to contest Plaintiff's ability to show that the class members were injured by RICO predicate acts on a class-wide basis, arguing that the task was complicated by the number of different telemarketers and variations of their fraudulent regimes. While the evidence relevant to these factors had largely been gathered, sorting through it all and bringing it all together in a way that would permit a full hearing before a jury would require sufficient "costs, in both time and money" to easily support settlement under the first *Girsh* factor.[6]

Equally significant is the fact that the interlocutory appeal already added two years to the litigation and further delay—almost ten years had elapsed since the violations occurred—could lead to significant attrition of the class.

b. The Reaction of the Class to the Settlement.

Second, *Girsh* calls for assessing the reaction of the class in order to "gauge whether members of the class support the settlement." *Warfarin Sodium*, 391 F.3d at 536; *see also*

[6] As discussed below, the amount of time it would take to bring this case to judgment would be especially costly to class members in this case, because a substantial portion of the class is elderly.

Prudential, 148 F.3d at 318. Here, to date, no class member actually receiving notice has opted out or objected to the settlement. This is remarkable. As the Circuit recently explained, low numbers of opt-outs and objections weigh strongly in favor of settlement approval. *NFL Players*, 821 F.3d at 438 (agreeing with the district court that "only approximately 1% of class members objected and approximately 1% of class members opted out … weigh in favor of settlement approval").

c. Stage of Proceedings and Amount of Discovery Completed

"The third *Girsh* factor 'captures the degree of case development that class counsel [had] accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *NFL Players*, 821 F.3d at 438–39 (quoting *Warfarin Sodium*, 391 F.3d at 537).

The litigation had progressed to the point that the parties—and the Court—were in a very good position to assess the litigation. Merits discovery had been completed. Class certification had been briefed, and a lengthy hearing had been held. The case was then briefed and argued to the Third Circuit based on an extensive evidentiary record. On remand, it was briefed in this Court for a second time. Final expert reports had been exchanged and expert depositions had been taken.

There is no question that the record was sufficiently developed to permit a full assessment of the merits of the case for purposes of settlement.

d. Risk of Establishing Liability

While there is substantial evidence in support of Plaintiff's position in this case, the risk of establishing Zions's liability cannot be dismissed. In *Johnson v. U.S. Nat. Bank Ass'n*, 508 F. App'x 451, 452 (6th Cir. 2012), in which the plaintiff was represented by Langer, Grogan &

Diver, the Sixth Circuit looked at facts similar to those that both this Court and the Third Circuit had found provided ample grounds for asserting liability against Zions and concluded, "we have examined the additional citations forwarded by the plaintiffs under Federal Rule of Appellate Procedure 28(j) and find that they are either not persuasive, in the case of *Reyes v. Zions First National Bank*, 2012 WL 947139, No. 10-345 (E.D. Pa. Mar. 21, 2012), or distinguishable on the facts, in the case of *Ouwinga v. Benistar 419 Plan Servs., Inc.*, 694 F.3d 783 (6th Cir. 2012)." The Sixth Circuit's ruling, and particularly its rejection of the *Reyes* decision, underscores the risk present in the case.

Any case of this complexity presents substantial risk. While the Zions entities were the only defendants remaining, their liability was tied to complex RICO schemes involving multiple telemarketers. Plaintiff had to show not only that Zions was complicit in the telemarketers' misdeeds, but that its payment processor, Modern Payments, played a specific role in the schemes, and that each of the telemarketers was engaged in systematic fraudulent activity. Any one of these parts could have been a substantial case in its own right. That three bank defendants had successfully persuaded the Court that the evidence against them was too sparse even to survive a motion to dismiss raised the question of whether a third person looking at the evidence would assess the strength of Plaintiff's evidence more skeptically than Plaintiff and his counsel.

Moreover, because these cases could not realistically be litigated on an individual basis, the only practical way to establish the fraud committed against hundreds of thousands of individuals was to present class-wide evidence. This meant that Plaintiff had no choice but to show that the telemarketers were systematically fraudulent, and that the unlawfulness of any particular transaction could be established on the basis of common evidence.

And while there can be little question that certain Zions employees acted in a

blameworthy fashion, Plaintiff had to establish that the corporation as a whole could be charged with the kind of knowing participation in a RICO enterprise or in a conspiracy to commit unlawful acts such as wire and mail fraud that is required for establishing liability for RICO conspiracy under 18 U.S.C. § 1962(d). The extensive discussion of this issue in Plaintiff's motion for class certification, as well as the appendices of exhibits attached in support thereof and by Zions in opposition, evidence the complexity of the issue.

While Plaintiff was confident of success at trial, because of the complexity of the case, the number of discrete issues on which they were required to prevail meant that the overall risk of establishing liability was substantial. Settlement at this stage is thus favored by this factor.

e. Risk of Establishing Damages

There was also risk in establishing damages. To be sure, assuming liability had been decided, it could be assumed that many or most class members were entitled to damages. But in order for any individual class member to recover, Plaintiff would have had to establish that that class member suffered damages.

Again, the only way to establish individual damages is on the basis of common evidence. Using the same databases and documents used to distribute the funds in the settlement, Plaintiff was able to establish the amount of money that each person was potentially eligible to receive. Plaintiff believes this is the proper measure of damages, but Defendants have argued that it cannot be presumed that every person was injured at all—a particular individual may have wanted the product offered, even if he was intentionally mislead by a telemarketer. And that determination, Defendants have argued, must be made only after looking at all of the individualized evidence.

Plaintiff believes that damages could be shown on a class-wide basis because of the

extent and uniformity of the fraud at issue in this case. Nevertheless, there is unquestionably risk on this issue. The district court had denied class certification in part by citing testimony of David Giorgione, head of one of the telemarketers, who had testified that his family members had made use of his alleged "products." Perhaps a jury would have credited such testimony were Zions to have adduced it at trial.

Finally, there would be a risk that a factfinder would be extremely conservative in finding damages. This is not a case in which the damages represent the amount of money unlawfully taken by the Defendant itself. Most of the money taken from the class members was kept not by Zions, but by the telemarketers. The present action seeks to hold Zions liable for all of the damages of the schemes because of its participation, despite the fact that its profits from the schemes were only a small fraction of the overall damages. While the law supports such a conclusion, it may have been difficult for a jury to enter such an award.

f. Risk of Maintaining Class Action Status Through Trial

Plaintiff believes that his class action position is strong, especially in light of the Third Circuit's opinion in the case. That said, the Third Circuit remanded the issue and did not *sua sponte* certify the case as a class action. Class certification had been briefed a second time when the case was settled. Moreover, while there is ample common evidence to adjudicate the issues on a class basis, there is always the possibility that evidence would have come to light that undermined that conclusion. This factor weighs in favor of the settlement, albeit to more modest degree than some of the other factors.

g. Defendants' Ability to Withstand Greater Judgment

Zions could have withstood a greater judgment. This factor does not weigh in favor or against the settlement, as it did not have an effect on the negotiations. While "evidence that the

defendant will not be able to pay a larger award at trial tends to weigh in favor of approval of a settlement, … the converse is not necessarily true; i.e., the fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

h. The Range of Reasonableness in Light of the Best Possible Recovery

In the present case there are several ways of viewing total damages. According to the expert report of Alexander J. Hoinski, Plaintiff's damage expert, Zions had debited $35,507,631 from victims' accounts. However, Mr. Hoinski had expressed concerns regarding his inability to reconcile different data provided by Zions. Upon remand from the Third Circuit, Zions found that the information they had provided was erroneous and determined, based on an updated database, that the actual amount debited was $29,038,577. Using an average NSF charge of $25, Mr. Hoinski calculated that there were $20,655,550 in NSF charges that resulted from Zions's debits. In addition, Plaintiff had obtained a database giving partial transactional information for Teledraft debits. While the total amount debited was $4,240,929, Plaintiff was only able to obtain identifying information for the victims of the NHS entities. That totaled $1,178,639. There was no data on Teledraft victims' NSF charges. Based on projections, Mr. Hoinski estimated victims' NSF charges from Teledraft transactions at $11,082,925.

Based on these figures, maximum damages would be $65,017,981 and the settlement, which under this scenario would be augmented by $250,000 in payments by Defendants, represents 58 percent of total damages.

However, Plaintiff lacked any means of identifying the individuals representing $3,062,290 in debits processed by Teledraft and $11,082,925 in projected NSF charges related to

Teledraft. Plaintiff believed that despite efforts through publication notice, very few valid claims would be filed and those claims would be covered by the $250,000 augmentation by Defendants. Thus, from a practical standpoint, excluding such sums from the damages, the settlement represents a recovery of 74% of total damages.

From Defendants' perspective, all damages attendant to the NSF charges should also be excluded. They argued that using a national average of the charge for overdrafts by banks during the time period and multiplying it by the entries indicating NSF returns was improper. Their position was that each class member would have to prove a charge was actually imposed because, they argued, there were occasions when banks did not impose an NSF charge. They purported to have statistical evidence showing that there were a significant number of such instances. Plaintiff vigorously disputed, and continues to dispute the validity of this argument. If it were accepted, however, and NSF damages were excluded, then the settlement—based on the above assumptions regarding Teledraft—represents 129% of single damages.

Depending on which of the three scenarios chosen, the settlement represents between 58% and 129% of single damages. As Professor Saltzburg explains in his declaration, "[t]he lowest estimate of the percentage of recovery would itself be among the highest recoveries ever." Saltzburg Decl., ¶35.

The only case of which class counsel is aware that even comes close to the recovery available here is *Wachovia*, which was achieved with significant government involvement—the settlement was reached in conjunction with an action against Wachovia by the Office of the Comptroller of the Currency. Plaintiff is unaware of any cases achieving such a recovery in the absence of government action taken against the defendants. The only cases of which Plaintiff is aware that have come close to such a complete recovery by class members are *In re Buspirone*

Antitrust Litig., MDL No. 1410 (S.D.N.Y. Apr. 11, 2003), *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508 (E.D. Mich. 2003),[7] and, most recently, *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litig.*, MDL No. 2672 (N.D. Cal. July 29, 2016), all of which involved companion government actions.

In *Cardizem*, as in this case, the overall scope of the damages was disputed. The fund may have represented 100% of the damages depending on the resolution of certain "hotly contested" issues. *Id.* at 523 n.12. The court concluded that the fund represented "more than eighty-five percent of the total amount which the Litigating States' expert economist has estimated" to be the total damages. *Id.* at 522. *Buspirone* involved a fund that was arguably at or close to full damages, when the calculation was based on the time period of the most significant injury. But the class in that case was certified for a greater period of time than the period during which the most significant injury occurred, meaning that the fund would not have covered every class members' full damages. In neither case is there any indication that consumers received compensation without the need to file a claim form.

To be sure, Plaintiff sought treble damages. But within the Third Circuit, even in such actions, settlements are often evaluated on the basis of single damages. *See Sullivan*, 667 F.3d at 325 ("courts generally determine fairness of an antitrust class action settlement based on how it compensates the class for past injuries, without giving much, if any, consideration to treble damages.") (internal quotation omitted). In cases where treble damages are possible, settlements of full damages or more are virtually unheard of. Because a plaintiff's basic interest is to be made whole, recovery of actual damages is far more important than recovering anything on top of that. Thus, it nearly always makes sense to forego the possibility of treble damages—and the

[7] Both *Cardizem* and *Buspirone* were actions brought under the antitrust laws, which provide for the possibility of treble damages. *See* 15 U.S.C. § 15.

attendant risk of no recovery—to guarantee recovery of actual damages, or a significant portion thereof. This is especially true when the delay associated with full litigation is considered.

The value of prompt payment cannot be overstated in this case. The events began in 2007. A class certification hearing on remand had not yet been held. There would be a need for a certification opinion, potential motions for interlocutory appeal, notice to the class, a period for opting out, and then, ultimately trial. The complexity and extent of the evidence needed for a full trial would suggest that trial would likely not be held expeditiously. Following the resolution of a trial, there would almost certainly be another appeal by one or both sides, which could result in further proceedings in the district court. In short, there was no basis for confidence that Plaintiff would see any recovery for many years to come.

That delay would be especially problematic here, given the fact that a substantial portion of the class is elderly. Indeed, the AARP was among the more prominent amici before the Third Circuit, representing that the elderly are prime targets of the kind of fraud giving rise to the suit. But even without considering that factor, delay will substantially affect the ability to get restitution into the hands of injured parties. The more time passes, the more difficulty there is in locating people, as their addresses become stale. A central focus of the settlement is the effort to find class members and put money in their hands as efficiently as possible. A delay of several years would almost certainly result in a significantly greater difficulty in distributing funds.

All of this needs to be considered, moreover, in light of the fact that winning was far from a certainty, as the example of *Johnson* makes clear.

i. The Range of Reasonableness in Light of All the Attendant Risks of Litigation.

The final two *Girsh* factors represent the ultimate question of whether the settlement represents "a good value" for the class in light of the discount being given from the best possible

recovery, on the one hand, and the risks avoided by settlement, on the other. It incorporates the other *Girsh* considerations to reach a determination whether the settlement is reasonable and adequate for the class. "In order to assess the reasonableness of a proposed settlement seeking monetary relief, 'the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement.'" *Prudential*, 148 F.3d at 322 (quoting *G.M. Trucks*, 55 F.3d at 806; Manual for Complex Litigation 2d § 30.44, at 252). Here, the additional factor—the passage of time and its effect on the ability to distribute funds to the class—added a major additional element of risk that had to be considered.

This settlement is extraordinary. It gives every class member the opportunity to recover a significant portion of the amounts taken from their accounts as well as to recover consequent bank charges. It goes to great lengths to facilitate distribution of the money into the hands of class members, the success of which could not be expected to be improved upon following trial.

This case, of course, goes even further, by eliminating the claims procedure and directly depositing funds into victims' accounts. Eliminating claim requirements is rare.

For the above reasons, the settlement should be approved.

C. The Plan of Allocation Is Appropriate

Courts also typically assess settlements to ensure that they allocate the proceeds of the settlement fairly to all class members. *E.g.*, *Warfarin Sodium*, 391 F.3d at 539. The present settlement treats all members of the class the same: each is entitled to a pro rata distribution of the fund based on the amounts debited from their accounts and estimated NSF charges. There are no intra-class conflicts in this case. Consequently, there is no question that the allocation of the funds is fair.

The plan has used the notice procedure as an initial screen and experts have been employed to assure that the form of distribution—ACH transfers—is undertaken in the most accurate practicable form.

It is worth highlighting, however, the value of the claims procedure to the fair distribution of the benefits of the settlement. The low response rates in typical consumer class actions is of great concern. For that reason, ACH transfers without the need for the filing of a claim is being employed. There is an acknowledged risk that this form of distribution will have imperfections and risks that certain sums will be transferred to, among other places, dormant or closed accounts. However, the risk of a low response rate to a claims procedure or of failure to deposit checks makes ACH distribution, with such safeguards as are practicable, the form of distribution that will best place funds in the hands of the class.

V. CONCLUSION

For all of the foregoing reasons, class Plaintiff Reynaldo Reyes respectfully requests that the Court order final certification of the proposed class pursuant to Federal Rule of Civil Procedure 23, and approve the proposed settlement as fair, reasonable, and adequate pursuant to Federal Rule of Civil Procedure 23(e)(2).

Dated: October 17, 2016

Respectfully Submitted,

Howard Langer

Howard Langer
John Grogan
Edward Diver
Irv Ackelsberg
Peter Leckman
LANGER, GROGAN & DIVER, P.C.
1717 Arch Street, Suite 4130
Philadelphia, PA 19103
Telephone: (215) 320-5660
Facsimile: (215) 320-5703