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15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

17 MAUREEN HARROLD, individually and on
behalf of all others similarly situated,

18 Plaintiff,

19 v.

20 MUFG UNION BANK, N.A.,

21 Defendant.

Case No. BC680214

(Assigned for All Purposes to the Honorable
Elaine Lu, Dept. 9)

**PLAINTIFF’S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF UNOPPOSED MOTION
FOR FINAL APPROVAL OF CLASS
ACTION SETTLEMENT**

Date: July 25, 2024
Time: 10:00 a.m.
Department 9

Complaint Filed: October 19, 2017

Amended Complaint Filed: July 29, 2020
Trial Date: None Set

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff¹ and Class Counsel² respectfully submit this Memorandum of Points and
3 Authorities in support of their Unopposed Motion for Final Approval of Class Action Settlement
4 (the “Motion”). Plaintiff filed an Unopposed Motion for Attorneys’ Fees, Costs, and Incentive
5 Award on May 10, 2024, for consideration at the Final Approval Hearing with this Motion.

6 **I. INTRODUCTION**

7 As set forth in this Honorable Court’s January 25, 2024, Preliminary Approval Order, the
8 Settlement being presented to this Court would resolve claims by Plaintiff and Settlement Class
9 members that Union Bank improperly charged overdraft (“OD”) fees in a manner that breached its
10 contracts with its accountholders. A true and correct copy of the Agreement, is attached as Exhibit
11 6 to the Joint Declaration of Andrea R. Gold and Jonathan M. Streisfeld in Support of Unopposed
12 Motion for Final Approval of Class Action Settlement. (“Joint Decl.”)

13 Plaintiff filed the initial Complaint in this Court almost seven years ago, on October 19,
14 2017. Joint Decl. ¶ 7. This Settlement was reached following discovery; Plaintiff’s deposition of
15 Union Bank; an attempted binding arbitration which Class Counsel successfully argued should be
16 dismissed; Union Bank’s Motion to Vacate the Arbitration Award, which Class Counsel
17 successfully opposed; a California Civil Code § 638 judicial reference; Union Bank’s Motion for
18 Judgment on the Pleadings; extensive discovery in which Plaintiff’s expert analyzed Union Bank’s
19 class transaction data to precisely assess class damages; and, a full-day mediation with a mediator
20 from JAMS. *Id.* ¶¶ 5-31. After all of this, on January 30, 2023, Plaintiff filed her Motion for
21 Unopposed Preliminary Approval. After that, on the Court’s instruction, Plaintiff also submitted
22 two supplemental memoranda in support of Preliminary Approval, one on August 15, 2023, and one
23

24 _____
25 ¹ All capitalized defined terms used herein have the same meanings ascribed in the Amended
Settlement Agreement (“Settlement” or “Agreement”) filed with the Court on December 29, 2023.

26 ² The Agreement provides that “Class Counsel” means Jonathan M. Streisfeld of Kopelowitz Ostrow
27 P.A.; Andrea R. Gold of Tycko & Zavareei, LLP; and “such other counsel as are identified in Class
28 Counsel’s request for attorneys’ fees and costs”, namely Taras Kick of The Kick Law Firm, APC;
Richard D. McCune of McCune Law Group; and Jeffrey Kaliel of KalielGold PLLC. Agreement,
Ex. 6 to Joint Decl., at ¶ 38. These law firms are identified as Class Counsel in the Notices
disseminated to Settlement Class members. *Id.* at 83.

1 on December 29, 2023, and modified the Settlement Agreement as instructed by the Court. *See*
2 Plaintiff’s Second Supplemental Memorandum of Points and Authorities In Support Of Unopposed
3 Motion For Preliminary Approval of Class Action Settlement. Joint Decl. ¶ 34.

4 On January 25, 2024, this Court preliminarily approved the Settlement, certified the
5 Settlement Class, and approved the Notice Program. Preliminary Approval Order at 1. Class
6 Counsel can now report that this Notice Program has been successful. Specifically, as evidenced by
7 the contemporaneously filed declaration of Scott M. Fenwick of the Court-appointed claims
8 administrator, Kroll Settlement Administration LLC (“Kroll”), Kroll sent the Email Notice to the
9 70,848 email addresses in the class list. Declaration of Scott M. Fenwick of Kroll Settlement
10 Administration in Connection with Final Approval (“Fenwick Decl.”) ¶¶ 4, 8, 9. An additional
11 31,366 Postcard Notices were sent to Class Members for whom an email address was unavailable.
12 *Id.* ¶ 11. There was a successful deliverable rate of approximately 99%. *Id.* ¶ 14. To date, only one
13 class member has requested to be excluded from the Settlement, and none has objected. *Id.* ¶ 16.

14 Because the proposed Settlement is an excellent result for the Class, and because the Class’s
15 reaction to the Settlement to date has been overwhelmingly positive, Plaintiff respectfully requests
16 that the Court finally approve the Settlement.

17 **II. SUMMARY OF THE LITIGATION**

18 **A. Plaintiff’s Claims and Union Bank’s Defenses**

19 The First Amended Class Action Complaint alleges Union Bank charged Plaintiff and other
20 similarly situated California Accountholders APSN Fees on Debit Card Transactions. An APSN Fee
21 is an Overdraft Fee that Union Bank charged and did not refund on Debit Card Transactions, during
22 the Class Period, where there was a positive available balance at the time the transaction was
23 authorized, but an insufficient balance at the time the transaction was presented to Union Bank for
24 payment and posted to an Accountholder’s Account. Agreement ¶ 35. As such, Plaintiff claims
25 Union Bank breached the Account Agreement and violated the California Unfair Competition Law
26 (“UCL”), Bus. & Prof. Code § 17200, *et seq.*, the California Consumer Legal Remedies Act
27 (“CLRA”), Civil Code § 1750 *et seq.*, and statutory fraud pursuant to Civil Code § 1281.2. Plaintiff
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1 sought relief including damages and/or restitution for all APSN Fees; an injunction against Union
2 Bank barring it from continuing to misrepresent its Overdraft Fee policies in its publicly available
3 account documents, continuing to charge Overdraft Fees on transactions that do not actually
4 overdraw accounts, and conducting business via the complained-of unlawful and unfair business
5 practices; pre-judgment interest; and attorney’s fees and costs. Union Bank denied all allegations
6 and claims including based on its view that the Account Agreement permitted the challenged APSN
7 Fees and that all Accountholders in the Settlement Class are subject to an arbitration provision
8 preventing suits in court or participation in a class action. Agreement ¶ 128.

9 **B. Procedural History; Summary of Investigation and Discovery Conducted**

10 A true and correct copy of the Docket Sheet from this matter is attached as Exhibit 5 to the
11 Joint Declaration. Plaintiff filed the Complaint on October 19, 2017. Joint Decl. ¶ 7. On March 2,
12 2018, Union Bank filed a Motion to Compel Arbitration claiming the Account Agreement mandated
13 individual arbitration of Plaintiff’s claims. *Id.* at ¶ 13. Arbitration-related discovery occurred with
14 the production of several Account Agreements, fee schedules, change of terms notices, and policy
15 documents. *Id.* Plaintiff took Union Bank’s deposition. *Id.* On May 30, 2018, following a hearing,
16 the Court ruled the Account Agreement delegated authority to determine the enforceability of the
17 arbitration provision to the arbitrator. *Id.* at ¶ 14.

18 On October 16, 2018, the Honorable Candace Cooper (Ret.) was appointed as the Arbitrator.
19 *Id.* at ¶ 15. On March 7, 2019, Plaintiff submitted her Amended Demand for Arbitration in the
20 Arbitration, attaching her First Amended Class Action Complaint, and her Motion to Declare
21 Arbitration Agreement Unenforceable. *Id.* at ¶ 16. After briefing, on May 21, 2019, Arbitrator
22 Cooper heard that motion, the parties submitted supplemental authority, and on August 19, 2019,
23 denied it. *Id.* at ¶ 17.

24 However, on September 4, 2019, during a status conference, Plaintiff sought permission to
25 file a supplemental brief on the “poison pill” issue raised in her motion. *Id.* at ¶ 18. With approval,
26 both Parties submitted supplemental briefing. *Id.* On December 15, 2019, Arbitrator Cooper issued
27 her Supplemental Order re Arbitrability, ruling that because the waiver of public injunctive relief in
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1 the arbitration provision was unenforceable, the “poison pill” provision rendered the entire
2 arbitration provision null and void. *Id.* at ¶ 19. Arbitrator Cooper thus rescinded portions of her prior
3 order and dismissed the arbitration. *Id.* The Action then moved back to this Court. *Id.*

4 On March 24, 2020, Union Bank filed a Motion to Vacate the Arbitration Award, which the
5 Court denied on July 27, 2020. *Id.* at ¶ 20. The Court lifted the stay of the proceedings and ordered
6 that Plaintiff’s First Amended Complaint be filed and served, which Plaintiff did on July 28, 2020.
7 *Id.* On September 14, 2020, Union Bank filed its Answer to the First Amended Complaint, which
8 included a general denial of the allegations and affirmative defenses. *Id.* at ¶ 21.

9 Union Bank notified Plaintiff of its intent to move to reassign the case to a judicial referee
10 under Civil Code § 638, which Plaintiff opposed. *Id.* at ¶ 22. The Parties submitted briefing on
11 Union Bank’s Motion to Compel Judicial Reference. *Id.* On February 4, 2021, the Court issued its
12 tentative ruling granting that motion, which became the Order of the Court on February 8, 2021. *Id.*
13 On April 13, 2021, the Joint Status Report indicated agreement to proceed in judicial reference
14 before the Honorable Rita “Sunny” Miller (Ret.), who was appointed on April 21, 2021. *Id.* at ¶ 23.

15 The possibility of settlement was raised but settlement talks did not progress. *Id.* at ¶ 24. On
16 November 18, 2021, the Parties submitted a Joint Status Report asking to move forward with the
17 judicial reference proceedings. *Id.* Plaintiff served interrogatories and document requests to which
18 Union Bank responded. *Id.* On January 25, 2022, Union Bank filed a Motion for Judgment on the
19 Pleadings, arguing the Account Agreement permitted the challenged APSN Fees. *Id.* at ¶ 25.

20 On February 14, 2022, the Parties filed a stipulation to stay the case pending mediation,
21 which Judicial Referee Miller granted on March 21, 2022. *Id.* ¶ 26. In addition to arbitration-related
22 discovery resulting in production of all relevant Account agreements that allowed them to evaluate
23 changes Union Bank made to its contractual provisions regarding its overdraft fee practices and/or
24 policies, the Parties engaged in informal discovery regarding an estimate of the aggregate relevant
25 APSN Fees assessed during the Class Period, as well as analyzed and estimated damages
26 recoverable by Plaintiff and the Settlement Class should they succeed on their claims. *Id.*, ¶ 27.

27 Following a full-day mediation on April 22, 2022, with JAMS mediator Robert Meyer, Esq.,
28

1 the Parties agreed in principle to settle, with the material terms memorialized in a May 4, 2022 Term
2 Sheet. *Id.* ¶ 28. The Parties’ May 5, 2022, Joint Status Report confirmed the agreement in principle
3 and requested the Court continue the stay of all deadlines. *Id.* ¶ 29. To gather full Account-level
4 transaction data sufficient for Plaintiff’s expert to determine membership in the Settlement Class,
5 the Court extended the deadline to seek preliminary approval. *Id.* ¶ 30. Plaintiff’s expert completed
6 the work necessary to identify Accountholders in the Settlement Class and their APSN Fees. *Id.*,
7 ¶31. The Parties signed the Agreement effective January 25, 2023. *Id.*, ¶ 32.

8 U.S. Bank National Association thereafter acquired Union Bank, so the Defendant in the
9 Action is now U.S. Bank National Association, as successor in interest to Union Bank. Following
10 Plaintiff’s preliminary approval briefing, including two supplemental memoranda in support of
11 preliminary approval, the Parties amended the Agreement at the Court’s direction, yielding the
12 Agreement the Court preliminarily approved on January 25, 2024. *Id.* ¶ 34-35.

13 **III. TERMS OF THE SETTLEMENT**

14 **A. Class Definition**

15 The Settlement Class in this matter is defined as “all MUFU Union Bank, National
16 Association consumer checking Accountholders in California who were assessed one or more APSN
17 Fees during the Class Period. Excluded from the Settlement Class is Defendant, its parents,
18 subsidiaries, affiliates, officers, and directors; all Accountholders in the Settlement Class who make
19 a timely election to be excluded by opting-out; and all judges and judicial referees assigned to these
20 proceedings and their immediate family members.” Agreement ¶ 69. “APSN Fees” are defined as
21 “Overdraft Fees that Union Bank charged and did not refund on Debit Card Transactions, during
22 the Class Period, where there was a positive available balance at the time the transaction was
23 authorized, but an insufficient balance at the time the transaction was presented to Union Bank for
24 payment and posted to an Accountholder’s Account.” *Id.* ¶ 35. The “Class Period” is “the period
25 from October 19, 2013 through February 28, 2019.” *Id.* ¶ 37.

26 **B. The Settlement Amount**

27 Defendant has paid \$5,000,000 cash to create the Settlement Fund that will be used to pay
28

1 (a) Settlement Class Member Payments; (b) any Incentive Award to the Class Representative, up to
2 a maximum of \$10,000; (c) attorneys' fees not to exceed one-third of the Settlement Fund, meaning
3 \$1,666,500; (d) costs to Class Counsel not to exceed \$60,458.10; and (e) any *cy pres* payment.
4 Agreement ¶¶72, 75. Joint Decl. ¶ 62. Defendant shall separately pay Settlement Administration
5 Costs, estimated to be \$93,816.00. Agreement ¶ 75. Joint Decl. ¶ 63.

6 The Net Settlement Fund available for class member payments, assuming the maximum
7 deductions to the Settlement Fund discussed above, is \$3,263,041.90. Agreement ¶ 52. The Net
8 Settlement Fund shall be disbursed *pro rata* using the equitable formula that divides the Net
9 Settlement Fund by the total number of APSN Fees for the Settlement Class to yield a per-fee
10 amount, following which the per-fee amount is multiplied by each Settlement Class Member's total
11 number of APSN Fees. *Id.* ¶ 101. Within 15 days after the Effective Date, applying the formula, the
12 Settlement Administrator shall identify to Defendant the full amount of Settlement Class Member
13 Payments, and the amount of each Settlement Class Member Payment to be credited to Current
14 Accountholders' Accounts. *Id.* ¶ 104. No later than 60 days from the Effective Date, Defendant and
15 the Settlement Administrator shall distribute the Net Settlement Fund. *Id.* ¶ 105. Current
16 Accountholders will receive Account credits, and Past Accountholders will be mailed a check. *Id.*
17 If by the deadline for Defendant to apply credits, it is unable to complete certain credits, Defendant
18 shall deliver the total amount of such unsuccessful Settlement Class Member Payments to the
19 Settlement Administrator to issue checks. *Id.* ¶ 105.a. The Agreement includes a process for
20 remailing checks returned undeliverable. *Id.* ¶ 105.b.

21 **C. Secondary Distribution and *Cy Pres* Payment**

22 The Agreement provides for a distribution of Residual Funds to the Settlement Class
23 Members who received payments from the first distribution, to the extent feasible and practical
24 in light of the costs of administering such subsequent payments. Agreement ¶ 107. First, any
25 Residual Funds shall reimburse Defendant for the amount it paid in Settlement Administration
26 Costs. *Id.* ¶ 107.a. As discussed in Plaintiff's August 15, 2023, Supplemental Memorandum, this
27 settlement structure benefits the class. Joint Decl. ¶ 63. In most overdraft fee class action settlements,
28

1 in Class Counsel’s observation, settlement administration costs are paid out of the settlement fund.
2 *Id.* Here, Defendant is paying the Settlement Administration Costs up front, thereby increasing the
3 amount of the settlement payments to Current Accountholders and to Past Accountholders who the
4 Settlement Administrator is able to locate and who cash their checks. *Id.*

5 Second, following the secondary distribution to class members who cashed their checks, or
6 if a secondary distribution is not feasible, the total amount of uncashed checks and residual amounts
7 held by the Settlement Administrator at the time of the Settlement Administrator’s Final Report is
8 to be distributed to a *cy pres* recipient approved by the Court. Agreement ¶ 107.b-c. California
9 JumpStart Coalition (<https://cajumpstart.org/about-us>) has been proposed as the *cy pres* recipient, a
10 nonprofit organization to support projects that will benefit the Settlement Class or similarly situated
11 persons and works to promote financial literacy in California. *Id.* ¶ 107.c. Of course, this *cy pres*
12 recipient is subject to the Court’s ultimate approval.

13 **D. Release**

14 As discussed in Plaintiff’s December 29, 2023, Second Supplemental Memorandum, the
15 Release has been revised from its original language such that it takes effect only upon payment to
16 class members. The full text of the Release section of the Agreement is as follows:

17 108. As of the date Defendant completes an Account credit for a Settlement
18 Class Member Payment or the date the Settlement Administrator sends a Settlement
19 Class Member Payment by check, the Releasing Party shall automatically be
20 deemed to have fully and irrevocably released and forever discharged the Released
21 Parties of and from any and all liabilities, rights, claims, actions, causes of action,
22 demands, damages, costs, attorneys’ fees, losses and remedies, whether known or
23 unknown, existing or potential, suspected or unsuspected, liquidated or
24 unliquidated, legal, statutory, or equitable, based on contract, tort or any other
25 theory, that result from, arise out of, are based upon, or relate to the conduct,
26 omissions, duties or matters during the Class Period that were or could have been
27 alleged in the Action relating to the assessment of APSN Fees by Defendant
28 (“Released Claims”).

109. Each Settlement Class Member is barred and permanently enjoined
from bringing on behalf of themselves, or through any person purporting to act on
their behalf or purporting to assert a claim under or through them, any of the
Released Claims against Defendant in any forum, action, or proceeding of any kind.

110. With respect to all Released Claims, Plaintiff agrees that she is
expressly waiving and relinquishing to the fullest extent permitted by law (a) the
provisions, rights and benefits conferred by Section 1542 of the California Civil
Code, which provides: A GENERAL RELEASE DOES NOT EXTEND TO
CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT
KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER,

1 WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT
2 WITH THE DEBTOR OR RELEASED PARTY. and (b) any law of any state or
3 territory of the United States, federal law or principle of common law, or of
4 international or foreign law, that is similar, comparable or equivalent to Section
5 1542 of the California Civil Code.

6 111. Plaintiff or any Settlement Class Member may hereafter discover facts
7 other than or different from those that he/she knows or believes to be true with
8 respect to the subject matter of the claims released herein, or the law applicable to
9 such claims may change. Nonetheless, each of those individuals expressly agrees
10 that, as of the Effective Date, he/she shall have automatically and irrevocably
11 waived and fully, finally, and forever settled and released any known or unknown,
12 suspected or unsuspected, asserted or unasserted, liquidated or unliquidated, and
13 contingent or non-contingent claims with respect to all of the matters described in
14 or subsumed by herein. Further, each of those individuals agrees and acknowledges
15 that he/she shall be bound by this Agreement, including by the release herein and
16 that all of their claims in the Action shall be released, whether or not such claims
17 are concealed or hidden; without regard to subsequent discovery of different or
18 additional facts and subsequent changes in the law; and even if he/she never
19 receives actual notice of the Settlement and/or never receives a distribution of funds
20 or credits from the Settlement.

21 112. In addition to the releases made by Plaintiff and Settlement Class
22 Members above, Plaintiff, including each and every one of her agents,
23 representatives, attorneys, heirs, assigns, or any other person acting on her behalf
24 or for her benefit, and any person claiming through her, makes the additional
25 following general release of all claims, known or unknown, in exchange and
26 consideration of the Settlement set forth in this Agreement. This named Plaintiff
27 agrees to a general release of the Released Parties from all claims, demands, rights,
28 liabilities, grievances, demands for arbitration, and causes of action of every nature
29 and description whatsoever, known or unknown, pending or threatened, asserted or
30 that might have been asserted, whether brought in tort or in contract, whether under
31 state or federal or local law.

32 113. Nothing in this Agreement shall operate or be construed to release any
33 claims or rights that Defendant has to recover any past, present, or future amounts
34 that may be owed by Plaintiff or by any Settlement Class Member on his/her
35 accounts, loans, or any other debts with Defendant, pursuant to the terms and
36 conditions of such accounts, loans, or any other debts. Likewise, nothing in this
37 Agreement shall operate or be construed to release any defenses or rights of set-off
38 that Plaintiff or any Settlement Class Member has, other than with respect to the
39 claims expressly released by this Agreement, in the event Defendant and/or its
40 assigns seeks to recover any past, present, or future amounts that may be owed by
41 Plaintiff or by any Settlement Class Member on his/her accounts, loans, or any other
42 debts with Defendant, pursuant to the terms and conditions of such accounts, loans,
43 or any other debts.

44 **IV. THE NOTICE PROGRAM**

45 Pursuant to the Court's Preliminary Approval Order, on January 25, 2024, to initiate the
46 Notice Program, Defendant's counsel provided Kroll with the class list in a data file containing
47 81,251 unique accounts of known Settlement Class Member names, mailing addresses, and email
48 addresses. Fenwick Decl. ¶ 4. After de-duplication and other appropriate preparation of the data, on

1 March 13, 2024, Kroll sent the Email Notice to 70,848 Settlement Class members who are
2 Accountholders in the Settlement Class who agreed to receive account statements by email, and for
3 whom a valid emailing address was available, successfully delivering the Email Notice to 66,994
4 class members. *Id.* ¶ 10. The Email Notice is attached as Exhibit A to the Fenwick Declaration and
5 is substantially identical to the Email Notice approved by this Court at the Preliminary Approval
6 stage. Fenwick Decl. ¶ 10; Agreement, Ex. 1. On April 19, 2024, 31,366 Postcard Notices were sent
7 to Settlement Class members who are Accountholders in the Settlement Class who did not agree to
8 receive notices by email, or for whom the Settlement Administrator was unable to send Email Notice
9 using the email address provided by Union Bank. *Id.* ¶¶ 9-13. To ensure the accuracy of mailing
10 addresses, Kroll checked the class list addresses against the National Change of Address database.
11 *Id.* Of these postcards, 2,834 were returned as not deliverable, but Kroll was able to find new
12 addresses for 2,249, and re-mailed them. *Id.* Of these, only 200 were returned, meaning 30,581 of
13 the 31,366 postcards ultimately were successfully delivered. *Id.*³ Thus, out of the 81,251 unique
14 accounts Kroll sent Notice to, 540 Postcard Notices were unable to be traced, 200 Postcard Notices
15 were returned undeliverable a second time, and thirty-four (34) Postcard Notices were returned
16 following the end of the Notice Program. Therefore, 80,477 of the 81,251 unique accounts for which
17 Notice was emailed or mailed received Notice successfully. *Id.*, ¶ 14. The Notice Campaign resulted
18 in direct notice of the Settlement to 99% of the Settlement Class. *Id.*

19 The Settlement Class also had access to the Long Form Notice (in Spanish and English),
20 Settlement Website, and IVR System toll-free number as part of the Notice Program. *Id.* ¶7. On
21 May 10, 2024, Kroll published downloadable copies of Class Counsel’s Motion for Attorneys’ Fees
22 and all declarations filed in support of that Motion to the Settlement Website. *Id.* ¶8. As of June 7,
23 2024, 3,026 unique users have visited the Settlement Website. *Id.* ¶9. Kroll has responded to eighty-
24 one (81) inquiries from visitors to the website. *Id.* As of June 7, 2024, no requests for the Long Form
25 Notice have been received. *Id.*

26
27 ³ The Postcard Notice is attached as Exhibit B to the Fenwick Declaration and is substantially
28 identical to the Postcard Notice previously presented with Plaintiffs’ Motion for Preliminary
Approval. Fenwick Decl. ¶ 11; Ex. 1 Agreement.

1 The opt-out and objection deadlines are June 25, 2024, except for those Settlement Class
2 members who received a Postcard Notice as part of the Notice re-mailing process, who have a July
3 10, 2024 deadline. Fenwick Decl. ¶15. As of the filing of this Motion, there is one opt-out request,
4 and no objection to any aspect of the proposed Settlement. Fenwick Decl. ¶ 16.

5 **V. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT**

6 “The well-recognized factors that the trial court should consider in evaluating the
7 reasonableness of a class action settlement agreement include ‘the strength of plaintiffs’ case, the
8 risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action
9 status through trial, the amount offered in settlement, the extent of discovery completed and stage
10 of the proceedings, the experience and views of counsel, the presence of a governmental participant,
11 and the reaction of the class members to the proposed settlement.’” *Kullar v. Foot Locker Retail,*
12 *Inc.* (2008) 168 Cal.App.4th 116, 128 (*quoting Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th
13 1794, 1801). There is “a presumption of fairness when the settlement is the result of arm’s-length
14 negotiation, investigation and discovery that are sufficient to permit counsel and the court to act
15 intelligently, counsel are experienced in similar litigation, and the percentage of objectors is small.”
16 *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723. The inquiry in evaluating a class action
17 settlement is “not whether the settlement agreement was the best one that class members could have
18 possibly obtained, but whether it is ‘fair, adequate, and reasonable.’” *Chavez v. Netflix, Inc.* (2008)
19 162 Cal.App.4th 43, 55 (*quoting Dunk*, 48 Cal.App.4th at 1801).

20 Applying these standards, this Court preliminarily found that the proposed Settlement is fair,
21 adequate, and reasonable in its January 25, 2024, Preliminary Approval Order. As discussed below,
22 each of the *Dunk/Kullar* factors weigh in favor of Final Approval.

23 **A. The Strength of Plaintiff’s Case and the Amount Offered In Settlement Favor**
24 **Final Approval In Light of the Risks of Litigation**

25 Based on Plaintiff’s expert data analysis, the Settlement Class’s most likely recoverable
26 damages at trial would have been approximately \$13.3 million. Joint Decl. ¶¶ 3-4. The Long Form
27 Notice estimated the average payment per Account at \$40.16 (which amount is subject to the Court’s
28 awards of amounts to be paid from the Settlement Fund). *Id.* However, Plaintiff and the Settlement

1 Class faced legal risks in the absence of the Settlement. Joint Decl. ¶¶ 3-4. Union Bank filed a
2 Motion for Judgment on the Pleadings, arguing its contracts permitted the assessment of APSN
3 Fees. *Id.* If Defendant were to prevail on this argument, the Settlement Class likely would recover
4 nothing in this action. *Id.* Defendant would also continue to argue all Accountholders were required
5 to arbitrate their claims, posing a risk the class would not achieve certification or only a more limited
6 class would be certified. *Id.* Even if Plaintiff prevailed on these pre-trial motions and at trial,
7 Defendant would likely appeal. *Id.* If Plaintiff prevailed, additional litigation activity would still
8 likely cause class members to wait years for any eventual recovery. *Id.* In light of these risks, the
9 \$5,000,000.00 Settlement amount, representing 37% of potential damages, is reasonable.

10 The fairness of this Settlement amount is further confirmed when compared to settlements
11 in other actions challenging the APSN Fee practice at issue here. *See, e.g., Roberts v. Capital One,*
12 *N.A.* (S.D.N.Y. Dec. 1, 2020) No. 1:16-cv-04841-LGS (35% of damages); *Fallis v. Gate City Bank*
13 *(N.D., Cass Cty. Dist Ct. Sept. 9, 2022) No. 09-2019-CV-04007* (approving settlement for 31% of
14 recoverable damages); *Bodnar v. Bank of Am., N.A.* (E.D. Pa. Aug. 4, 2016) 2016 WL 4582084, at
15 *4 (between 13% and 48% of damages, and describing such a result as a “significant achievement”
16 and “outstanding”). Thus, the Settlement will provide Settlement Class Members with substantial
17 relief, and is within the range of reasonable recovery in light of the litigation risks. *See Wershba v.*
18 *Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 250 (a settlement need not obtain 100% of
19 damages, as compromise is inherent and necessary, and settlement providing relief substantially
20 narrower than if case were successfully litigated can be in public interest).

21 **B. The Extent of Discovery Completed and the Stage of the Proceedings Favor**
22 **Approval**

23 As detailed above, this Settlement was reached only after a full-day mediation session with
24 a well-respected and highly experienced class action mediator, Robert Meyer, Esq. of JAMS. In
25 addition, Union Bank provided to Plaintiff, and Plaintiff and Class Counsel are providing to the
26 Court, information about the available damages in the Action, allowing the Court to “independently
27 and objectively analyze the evidence and circumstances before it in order to determine whether the
28 settlement is in the best interests of those whose claims will be extinguished.” *Kullar*, 168 Cal. App.

1 4th at 130. Specifically, Class Counsel retained Arthur Olsen of Cassis Technology, a preeminent
2 expert in evaluating and analyzing bank data necessary to identify APSN Fees. Joint Decl. ¶¶ 44-
3 46. Mr. Olsen spoke with Union Bank’s representatives to confirm availability of necessary data,
4 and then completed the necessary work to identify the APSN Fees assessed to Accountholders in
5 the Settlement Class, allowing the Parties to deliver a class list to the Settlement Administrator for
6 the Notice Program and ultimate distribution of the Net Settlement Fund. *Id.*

7 Further, the litigation had progressed to a point at which the Parties had a “clear view of the
8 strengths and weaknesses of their cases.” *Knapp v. Art.com, Inc.* (N.D. Cal. 2017) 283 F. Supp. 3d
9 823, 833 (quotation omitted). Both before and after initiating the action on behalf of the class, Class
10 Counsel diligently investigated the claims alleged and conducted legal research regarding Union
11 Bank’s potential liability and defenses. Joint Decl. ¶¶ 39-45. In addition analyzing damages, Class
12 Counsel engaged in arbitration-related discovery, including by taking Union Bank’s deposition. *Id.*,
13 ¶¶13, 59. Finally, the critical issue of the enforceability of Union Bank’s arbitration clause had been
14 extensively litigated by the time the Settlement was reached. *Id.*, ¶¶14-19.

15 **C. The Experience and Views of Counsel Favor Final Approval.**

16 Plaintiff is represented by experienced Class Counsel. Class Counsel collectively has
17 decades of experience in class action litigation and has successfully handled national, regional, and
18 statewide class actions throughout the United States, in both state and federal courts. Joint Decl.
19 ¶¶40, 82, 84. For over a decade, each of the attorneys applying to be appointed Class Counsel have
20 focused a substantial portion of their class action practices on cases challenging Overdraft Fees and
21 other bank fees assessed by financial institutions. *Id.* The declarations supporting Plaintiff’s
22 Unopposed Motion for Attorneys’ Fees, Costs, and Incentive Award identify prior cases in which
23 each named Class Counsel has been approved by a court to act as lead, co-counsel, settlement class
24 counsel, and/or class counsel, and Class Counsel’s firm resumes were filed concurrently with that
25 motion. *See also* Joint Decl. at ¶¶82-86 and Exhs. 1-4.

26 The view of the attorneys actively conducting the litigation is entitled to significant weight
27 in deciding whether to approve the Settlement. *Dunk*, 48 Cal.App.4th at 1801 (instructing trial courts
28

1 to consider the “views of counsel” in assessing the fairness of a proposed settlement); *see also Reed*
2 *v. General Motors Corp.* (5th Cir. 1983) 703 F.2d 170, 175 (“[T]he value of the assessment of able
3 counsel negotiating at arm’s length cannot be gainsaid. Lawyers know their strengths and they know
4 where the bones are buried.”). Class Counsel have evaluated the reasonableness of the proposed
5 Settlement in light of their extensive experience in similar Overdraft Fee class actions and believe
6 it to be fair and in the best interests of the Settlement Class. Joint Decl. ¶54. Accordingly, this factor
7 favors Final Approval.

8 **D. The Reaction of the Class to the Settlement Has Been Overwhelmingly Positive,**
9 **Thus Favoring Its Final Approval**

10 The absence of significant objections to a proposed settlement is strong evidence that the
11 settlement is fair, reasonable, and adequate. *National Rural Telecommunications Cooperative v.*
12 *DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 529 (“It is established that the absence of a large
13 number of objections to a proposed class action settlement raises a strong presumption that the terms
14 of a proposed class settlement action are favorable to the class members.”).

15 Here, the Email Notice and Postcard Notice directly notified Class Members of this litigation
16 and their rights to either to opt-out or object to the Settlement. Fenwick Decl. ¶¶ 10,11. There has
17 been one opt-out request and no objections. Fenwick Decl. ¶ 16. If any objections are submitted,
18 Class Counsel will respond to them. This is further strong evidence of the Settlement Class’s
19 satisfaction with the Settlement, thus favoring its Final Approval.

20 **VI. FINAL CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE**

21 In its January 25, 2024, Preliminary Approval Order, the Court found that “the class may be
22 conditionally certified because the prerequisites of class certification have been satisfied.”
23 Preliminary Approval Order, at 14. Nothing has changed since the issuance of that Order that should
24 prevent finally certifying the Settlement Class. Plaintiff therefore requests final certification for
25 Settlement purposes under Code Civ. Proc. § 382.

26 Certification requires an ascertainable and sufficiently numerous class, a “well-defined
27 community of interest,” and substantial benefits from certification that render proceeding as a class
28 superior to the alternatives. *Woods v. Am. Film Inst.* (2021) 72 Cal.App.5th 1022, 1029. As noted in

1 this Court’s Preliminary Approval Order, in weighing certification, the court employs “a lesser
2 standard of scrutiny for settlement cases” than would apply in the litigation context. *Dunk*, 48
3 Cal.App.4th at 1807 n. 19. Further, the court need not conduct an evidentiary hearing to determine
4 whether the prerequisites to class certification are satisfied. *Wershba*, 91 Cal.App.4th at 240.

5 **A. The Proposed Class Is Ascertainable and Numerous.**

6 To attain certification, class members must be sufficiently “numerous” that “it is
7 impracticable to bring them all before the court[.]” Code Civ. Proc. § 382. “No set number is
8 required as a matter of law for the maintenance of a class action . . . Thus, our Supreme Court has
9 upheld a class representing the ten beneficiaries of a trust in an action for removal of the trustees.”
10 *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934. Here, the Settlement Class consists of
11 81,251 members. Fenwick Decl. ¶4. This figure comports with the number of Settlement Class
12 members outlined in the Preliminary Approval Order. Certainly, it would be impracticable to bring
13 the small-dollar individual claims of a group of this size in separate lawsuits.

14 “A class [i]s ascertainable when it is defined in terms of objective characteristics and
15 common transactional facts that make the ultimate identification of class members possible when
16 that identification becomes necessary.” *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 967
17 (internal quotation marks omitted). Here, Settlement Class Members are ascertainable from Union
18 Bank’s account-level transaction records from which APSN Fees are identified, and already
19 received actual direct notice with a successful deliverable rate of 99%. Fenwick Decl. ¶ 14; *Bufile v.*
20 *Dollar Fin. Group, Inc.* (2008) 162 Cal.App.4th, 1193, 1208 (ascertaining class from defendant’s
21 records). The Settlement Class is therefore not only ascertainable, but successfully ascertained.

22 **B. The Community of Interest Requirements Are Met**

23 “To obtain certification, a party must establish the existence of . . . a well-defined community
24 of interest among the class members.” *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435. “The
25 community of interest requirement embodies three factors: (1) predominant common questions of
26 law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class
27 representatives who can adequately represent the class.” *Richmond v. Dart Industries, Inc.* (1981)

1 29 Cal.3d 462, 470. Each of these requirements is satisfied here.

2 1. Common Questions Predominate.

3 Common issues predominate when they would be “the principal issues in any individual
4 action, both in terms of time to be expended in their proof and of their importance.” *Vasquez v.*
5 *Superior Court*, (1971) 4 Cal.3d 800, 810. For predominance, the “trial court must determine
6 whether the issues which may be jointly tried, when compared with those requiring separate
7 adjudication, are so numerous or substantial that the maintenance of a class action would be
8 advantageous to the judicial process and to the litigants.” *Woods*, 72 Cal.App.5th at 1029 (internal
9 quotation marks omitted).

10 Either common legal questions *or* fact questions are sufficient to establish commonality. *See*
11 *Arce v. Kaiser Found. Health Plan, Inc.* (2010) 181 Cal.4th 471, 488-89. Here, both are present.
12 The class claims arise from a common nucleus of facts. Accountholders maintained Accounts that
13 were assessed APSN Fees based on uniform Account Agreements and promises. Joint Decl. ¶ 8, 10,
14 79. Common legal issues uniting the Settlement Class include (1) the elements of Plaintiff’s claims
15 and Union Bank’s defenses (including the arbitration defense), (2) whether Union Bank breached
16 its contracts and the covenant of good faith and fair dealing by assessing APSN Fees, (3) whether
17 Union Bank violated the UCL or CLRA, or committed statutory fraud when assessing APSN Fees,
18 (4) whether Plaintiff and the Settlement Class Members sustained damages, and (5) the measure of
19 damages or restitution. *Id.*, ¶9. No legal issues affect only individual Accountholders in the
20 Settlement Class. *Id.*

21 2. The Named Plaintiff’s Claims Are Typical.

22 Typicality requires Plaintiff’s interests be similar to those of other Settlement Class
23 Members. *See Fireside Bank v. Superior Court* (2007) 40 Cal.5th 1069, 1090. The class
24 representative need not have interests identical to those of the other class members. *B.W.I. Custom*
25 *Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1347. Rather, a class representative’s
26 claims are “typical” if they arise from the same fact pattern giving rise to the claims of other class
27 members and are based on the same legal theories. *See Classen v. Weller* (1983) 145 Cal.App.3d
28

1 27, 46. Here, Plaintiff's claims are typical. Joint Decl. ¶ 10, 81. They are based on the same facts
2 and underlying legal theories as other Accountholders in the Settlement Class. *Id.* Like them, she
3 was assessed APSN Fees, and all Settlement Class Members were assessed these fees pursuant to
4 the same uniform contracts. *Id.*

5 3. *The Settlement Class Is Adequately Represented.*

6 The Class Representative must adequately protect the class's interests. *Barboza v. West*
7 *Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540, 546. This adequacy analysis focuses on any
8 conflicts that would appear between the Plaintiff and putative class members. *See Richmond v. Dart*
9 *Industries, Inc.* (1981) 29 Cal.3d 462, 470. The Court must also consider the competency of
10 Plaintiff's counsel in determining whether to certify a class. *Cal Pak Delivery, Inc. v. United Parcel*
11 *Service, Inc.* (1997) 52 Cal.App.4th 1, 12. Here, Class Counsel and the Class Representative meet
12 the adequacy requirement.

13 Class Counsel have extensive background in litigating complex litigation and consumer
14 class actions, have been appointed class counsel in prior and similar cases, and have the resources
15 necessary to prosecute this Action to its conclusion. Joint Decl. ¶¶ 40, 82-86; Declaration of Taras
16 Kick In Support of Unopposed Motion for Final Approval of Class Action Settlement ¶¶ 2-3. They
17 and their law firms have recovered hundreds of millions of dollars for classes they represented. Joint
18 Decl. ¶ 84. Class Counsel are qualified to represent the Settlement Class and will, along with
19 Plaintiff, continue to vigorously protect the interests of the Settlement Class.

20 Further, since 2017, Plaintiff has agreed to act as Class Representative and understands her
21 responsibilities. Harrold Decl. in support of Unopposed Motion for Attorneys' Fees, at ¶¶ 2, 5. Her
22 claims are not antagonistic to or in conflict with other Accountholders' claims. Joint Decl. ¶¶ 10-
23 11, 81. She pursues the same legal theories challenging the same course of Union Bank's conduct
24 as the other class members. *Id.* Plaintiff's and the Settlement Class's claims turn on the same alleged
25 promises, misrepresentations, and omissions, and she seeks remedies equally applicable and
26 beneficial to her fellow Accountholders. *Id.*

1 4. Class Action Is the Superior Vehicle for Adjudication.

2 A class action is a superior method of adjudicating this action since Plaintiff and the
3 Settlement Class’s claims are based on Union Bank’s uniform account disclosures and involve
4 common evidence. *See Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385. It would be
5 inefficient to resolve these individual claims at separate trials. *Bufile, supra.*, at 1208. The alternative
6 is for each class member to file a separate case, but here, it would be impracticable and not
7 economically feasible or practice to bring each Settlement Class member’s small-dollar claims
8 individually. Thus, absent certification, most Accountholders in the Settlement Class might never
9 seek redress, which would be unjust. “The class action is a product of the court of equity. It . . .
10 [was] adopted to prevent a failure of justice.” *City of San Jose v. Superior Court* (1974) 12 Cal.3d
11 447, 458. Class certification best “achieve[s] economies of time, effort and expense, and promote
12 uniformity of decision as to persons similarly situated, without sacrificing procedural fairness.”
13 *Amchem Prod., Inc. v. Windsor* (1997) 521 U.S. 591, 615.

14 In sum, the proposed Settlement Class meets all certification criteria and should be finally
15 certified for purposes of approving the Settlement. *Dean Witter Reynolds, Inc. v. Superior Court*
16 (1989) 211 Cal.App.3d 758, 765 (if the necessary factors are found, “a trial court is under a duty to
17 certify the class and is vested with no discretion to deny certification based upon other
18 considerations”).

19 **VII. CONCLUSION**

20 Plaintiff respectfully requests the Court: (1) finally approve the proposed Settlement; (2)
21 finally certify the Settlement Class for Settlement purposes; (3) reaffirm its appointment of Kroll as
22 the Settlement Administrator; (4) finally appoint Jonathan M. Streisfeld of Kopelowitz Ostrow P.A.;
23 Andrea R. Gold of Tycko & Zavareei, LLP; Taras Kick of The Kick Law Firm, APC; Richard D.
24 McCune of McCune Law Group; and Jeffrey Kaliel of KalielGold PLLC as Class Counsel; (5)
25 finally appoint Plaintiff Maureen Harrold as the Class Representative; and (6) enter the proposed
26 Final Approval Order and proposed Final Judgment filed concurrently herewith.

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DATED: June 10, 2024

THE KICK LAW FIRM, APC

By: Taras Kick
Taras Kick
Tyler Dosaj

DATED: June 10, 2024

TYCKO & ZAVAREEI LLP

By: Andrea Gold
Andrea Gold (*Pro Hac Vice*)

DATED: June 10, 2024

KOPELOWITZ OSTROW P.A.

By: [Signature]
Jonathan M. Streisfeld (*Pro Hac Vice*)
Class Counsel