

EXHIBIT 1

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 0:21-cv-61376-JEM**

JILL ABERCROMBIE, on behalf of herself)
and all others similarly situated,)
)
Plaintiff,)
)
v.)
)
TD BANK, N.A.,)
)
Defendant.)

SETTLEMENT AGREEMENT AND RELEASES

This Settlement Agreement and Releases (“Settlement” or “Agreement”),¹ dated as of November 1, 2021, is entered into by Plaintiff Jill Abercrombie, individually and on behalf of the Settlement Class, and Defendant TD Bank, N.A. The Parties hereby agree to the following terms in full settlement of the above action, subject to Final Approval, as defined below, by the United States District Court for the Southern District of Florida.

I. Procedural History and Recitals

1. On June 3, 2021, Plaintiff Jill Abercrombie filed a putative class action Complaint in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, entitled *Abercrombie v. TD Bank, N.A.*, No. CACE-21-11047. On behalf of a putative nationwide class, the Complaint asserted claims for breach of contract and breach of the covenant of good faith and fair dealing.

2. On July 6, 2021, Defendant filed a Notice of Removal under 28 U.S.C. § 1446, removing this action to the United States District Court for the Southern District of Florida, where

¹ All capitalized terms herein have the meanings ascribed to them in Section II below or various other places in the Agreement.

it was assigned case number 0:21-cv-61376-Martinez/Snow.

3. On August 13, 2021, Defendant filed a Motion to Dismiss Class Action Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

4. Plaintiff opposed the Motion on September 10, 2021.

5. Between June and September, 2021, the Parties engaged in informal discovery and exchanged information, in the context of seeking to reach a resolution to the claims through direct negotiations.

6. On September 15, 2021, the parties reached agreement in principle and executed a settlement term sheet.

7. Thereafter, the parties negotiated the details of this final Settlement Agreement and Releases.

8. The Parties now agree to settle the Action in its entirety, without any admission of liability, with respect to all Released Claims, Releasees, and Releasing Parties. Defendant has entered into this Agreement to resolve any and all controversies and disputes (directly or indirectly) arising out of or relating to the allegations made in the Complaint, and to avoid the burden, risk, uncertainty, expense, and disruption to its business operations associated with further litigation. Defendant does not in any way acknowledge, admit to or concede any of the allegations made in the Complaint, and expressly disclaims and denies any fault or liability, or any charges of wrongdoing that have been or could have been asserted in the Complaint. Nothing contained in this Agreement shall be used or construed as an admission of liability, and this Agreement shall not be offered or received in evidence in any action or proceeding in any court or other forum as an admission or concession of liability or wrongdoing of any nature or for any other purpose other than to enforce the terms of this Agreement. Plaintiff has entered into this Agreement to liquidate

and recover on the claims asserted in the Complaint, and to avoid the risk, delay, and uncertainty of continued litigation. Plaintiff does not in any way concede the claims alleged in the Complaint lack merit or are subject to any defenses. The Parties intend this Agreement to bind Plaintiff, Defendant, and all Settlement Class Members.

NOW, THEREFORE, in light of the foregoing, for good and valuable consideration, the receipt and sufficiency of which is hereby mutually acknowledged, the Parties agree, subject to approval by the Court, as follows.

II. Definitions

In addition to the terms defined at various points within this Agreement, the following defined terms apply throughout this Agreement:

9. “Account” means a consumer checking account maintained by Defendant that was assessed a Retry OD Fee during the Class Period.

10. “Account Holder” means any person who has or had any interest, whether legal or equitable, in an Account during the Class Period.

11. “Action” means *Abercrombie v. TD Bank, N.A.*, No. 0:21-cv-61376-JEM (S.D. Fla.).

12. “Complaint” means the Class Action Complaint filed in this Action on June 3, 2021, and removed to this Court on July 6, 2021.

13. “Class Counsel” means:

COHEN & MALAD, LLP
Lynn A. Toops, Esq.
1 Indiana Square
Suite 1400
Indianapolis, IN 46204

KALIEL GOLD PLLC
Jeffrey Kaliel, Esq.

1875 Connecticut Ave. NW
10th Floor
Washington, DC 20009

KOPELOWITZ OSTROW P.A.
Jeff Ostrow, Esq.
Jonathan M. Streisfeld, Esq.
1 West Las Olas Blvd.
Suite 500
Fort Lauderdale, FL 33301

14. “Class Period” means the time period from June 1, 2015 through and including April 30, 2021.

15. “Class Representative” means Plaintiff Jill Abercrombie.

16. “Court” means the United States District Court for the Southern District of Florida.

17. “Current Account Holder” means a Settlement Class Member who continues to have his or her Account as of the date that the Net Settlement Fund is distributed to Settlement Class Members pursuant to this Agreement.

18. “Defendant” means TD Bank, N.A.

19. “Defendant’s Counsel” means Lucus Ritchie and Joshua Dunlap of Pierce Atwood, LLP.

20. “Effective Date” means the first business day after which all of the following events have occurred: (i) all Parties, Class Counsel, and Defendant’s Counsel have executed this Agreement; (ii) the Court has entered without material change the Final Approval Order; and (iii) the time for seeking rehearing or appellate or other review has expired, and no appeal or petition for rehearing or review has been timely filed; or the Settlement is affirmed on appeal or review without material change to the Final Approval Order, no other appeal or petition for rehearing or review is pending, and the time period during which further petition for rehearing, review, appeal, or certiorari could be taken has finally expired and relief from a failure to file the same is

not available.

21. “Email Notice” means a short form of notice that shall be sent by email to Settlement Class members for whom Defendant has an email address on file in the form attached as *Exhibit 1*.

22. “Final Approval” means the Court’s final approval of this Settlement pursuant to Fed. R. Civ. P. 23, and the Court’s determination of the amount of attorneys’ fees and costs awarded to Class Counsel and the amount of a Service Award to the Class Representative, if any. In the event the Court issues multiple orders addressing the foregoing matters, then the date of Final Approval shall be the date of the last of such orders.

23. “Final Approval Hearing” is the hearing held before the Court wherein the Court will consider granting Final Approval to the Settlement and further determine the amount of attorneys’ fees and costs awarded to Class Counsel and the amount of a Service Award to the Class Representative, if any.

24. “Final Approval Order” means the order and judgment that the Court enters upon Final Approval of the Settlement. The proposed Final Approval Order that will be attached to Plaintiff’s motion for final approval of the Settlement shall be in the form agreed upon by Class Counsel and Defendant and attached as *Exhibit 4* hereto. Plaintiff’s motion for attorneys’ fees and costs may attach additional proposed orders.

25. “Former Account Holder” means a Settlement Class Member who no longer holds his or her Account as of the date that the Net Settlement Fund is distributed to Settlement Class Members pursuant to this Agreement.

26. “Long Form Notice” means the form of notice that shall be posted on the Settlement Website created by the Settlement Administrator and shall be available to Settlement Class

members by mail on request made to the Settlement Administrator in the form attached as *Exhibit 2*.

27. “Net Settlement Fund” means the Settlement Fund, minus Court-approved attorneys’ fees and costs awarded to Class Counsel, Settlement Administration Costs, and Court-approved Service Award to the Class Representative, if any.

28. “Notice” means the Email Notice, Postcard Notice, and Long Form Notice that the Parties will ask the Court to approve in connection with the motion for Preliminary Approval of the Settlement.

29. “Notice Program” means the methods provided for in this Agreement for giving the Notice and consists of Email Notice, Postcard Notice, and Long Form Notice, which shall be substantially in the forms as *Exhibits 1 and 2* attached to this Agreement.

30. “Objection Deadline” means one-hundred twenty (120) calendar days after the date of Preliminary Approval (or other date as ordered by the Court).

31. “Opt-Out Deadline” means one-hundred twenty (120) calendar days after the date of Preliminary Approval (or other date as ordered by the Court).

32. “Overdraft Fee” means any fee assessed to an Account for an item paid when Defendant determined the Account had insufficient funds to cover the item.

33. “Party” means Plaintiff or Defendant and “Parties” means Plaintiff and Defendant collectively.

34. “Plaintiff” means Jill Abercrombie.

35. “Postcard Notice” shall mean the short form of notice, in the form attached as *Exhibit 1*, which shall be sent by mail to Settlement Class members for whom Defendant does not have an email address on file, or whose Email Notice was returned undeliverable.

36. Preliminary Approval” means the Court’s entry of an order preliminarily approving this Settlement and authorizing the sending of the Notice to Settlement Class members pursuant to Fed. R. Civ. P. 23, substantially in the form of the “Preliminary Approval Order” agreed to by Class Counsel and Defendant and attached as *Exhibit 3* hereto.

37. “Released Claims” means all claims to be released as specified in Section XI hereof.

38. “Releases” means all of the releases contained in Section XI hereof.

39. “Releasing Parties” means Plaintiff and all Settlement Class Members, and each of their respective executors, representatives, heirs, predecessors, assigns, beneficiaries, successors, bankruptcy trustees, guardians, joint tenants, tenants in common, tenants by entireties, agents, attorneys, and all those who claim through them or on their behalf.

40. “Retry OD Fee” means an Overdraft Fee that was charged during the Class Period, for an Automated Clearing House (ACH) or check transaction that was (1) submitted by a merchant or other third party, (2) returned unpaid by Defendant due to insufficient funds, and (3) re-submitted by a merchant or third party and paid by Defendant despite insufficient funds in the Account, as identified by the Parties based on review and analysis of Defendant’s reasonably accessible data and information.

41. “Service Award” means any Court ordered payment to Plaintiff for serving as the Class Representative, which is in addition to (i) any settlement consideration due to Plaintiff pursuant to Section IV of this Agreement as a Settlement Class Member; and (ii) the \$5,000.00 to be paid by Defendant to Plaintiff, subject to the Court’s approval, under the terms of a separate individual settlement agreement in exchange for Plaintiff’s general release of claims.

42. “Settlement Administrator” means Epiq Systems, Inc., or such other entity agreed

to in writing by Class Counsel and Defendant's Counsel. Class Counsel and Defendant may, by agreement, substitute a different organization as Settlement Administrator, subject to approval by the Court if the Court has previously approved the Settlement preliminarily or finally. In the absence of agreement, either Class Counsel or Defendant may move the Court to substitute a different organization as Settlement Administrator, upon a showing that the responsibilities of Settlement Administrator have not been adequately executed by the incumbent.

43. "Settlement Administration Costs" means all fees, costs, charges, and expenses of Notice and administration of the Settlement (including, but not limited to, all such amounts incurred by the Settlement Administrator). All Settlement Administration Costs shall be paid from the Settlement Fund.

44. "Settlement Class" means all Account Holders within the class defined in Section III hereof.

45. "Settlement Class Member" means any member of the Settlement Class who has not opted-out of the Settlement.

46. "Settlement Class Member Payment" means the cash distribution that will be made from the Net Settlement Fund to each Settlement Class Member, pursuant to the allocation terms of the Settlement.

47. "Settlement Fund" means the common fund established in Section IV hereof.

48. "Settlement Payment Amount" means the amount of four million two hundred and forty-five thousand dollars (\$4,245,000.00 (USD)) that Defendant agrees to pay, without admission of liability, under the terms of this Settlement, as more specifically described in Section IV hereof.

49. "Settlement Website" means the website that the Settlement Administrator will

establish as a means for Settlement Class members to obtain notice of and information about the Settlement, through and including hyperlinked access to this Agreement, the Long Form Notice, Preliminary Approval Order, and such other documents as the Parties agree to post or that the Court orders posted on the website. These documents shall remain on the Settlement Website for at least six months after the date of Final Approval.

III. Certification of the Settlement Class

50. Solely for purposes of this Settlement, Plaintiff shall ask the Court to certify the following Settlement Class under Fed. R. Civ. P. 23(b)(3):

All current and former holders of TD Bank, N.A. consumer checking accounts who, from June 1, 2015 through and including April 30, 2021, were assessed at least one Retry OD Fee. Excluded from the Settlement Class are Defendant, its parents, subsidiaries, affiliates, officers and directors; all Settlement Class members who make a timely election to be excluded; and all judges assigned to this litigation and their immediate family members.

51. Defendant agrees not to oppose Plaintiff's request for certification of the Settlement Class for settlement purposes only. In so doing, Defendant does not admit that any class may be certified for purposes of litigation. This Agreement is entered into without prejudice to Defendant's rights to oppose certification, or seek decertification, of any litigation class in this Action or any other litigation.

52. In the event that the Settlement does not receive Final Approval, or in the event the Effective Date does not occur, the Parties shall not be bound by this definition of the Settlement Class, shall not be permitted to use it as evidence or otherwise in support of any argument or position in any motion, brief, hearing, appeal, or otherwise, and Defendant shall retain its right to object to the maintenance of this Action as a class action and the suitability of the Plaintiff to serve as a class representative.

IV. Settlement Fund

53. In exchange for the mutual promises and covenants in this Agreement, including,

without limitation, the Releases as set forth in Section XI and dismissal of the Action with prejudice upon Final Approval, within 14 calendar days of the date of Preliminary Approval by the Court, Defendant shall deposit the Settlement Payment Amount with the Settlement Administrator to create the Settlement Fund for the benefit of the Settlement Class. Defendant's payment of the Settlement Payment Amount is subject to Court approval, without admission of liability, and subject to the refund provisions of Section XII below, in the event that this Agreement is terminated or the Effective Date otherwise does not occur. The Settlement Fund shall be used to pay Settlement Class Members their respective Settlement Class Member Payments; any and all Settlement Administration Costs; any and all attorneys' fees and costs awarded to Class Counsel; and any Service Award awarded to the Class Representative. Defendant shall not be obligated to make any other payment under the Settlement, other than Defendant shall separately pay to Plaintiff, subject to the Court's approval, the sum of \$5,000.00 in exchange for a general release from Plaintiff that is broader than the release given by the Settlement Class. For avoidance of doubt, Defendant shall not be required to pay any additional monetary sums in settlement of the Action, nor shall it be required to bear any other fees, costs, charges, or expenses in connection with the Settlement. Defendant also shall not be required to take any action or refrain from taking any action as a result of this Settlement except to fulfill its obligations to implement the terms of this Agreement as specifically provided herein.

54. Except in the event this Agreement is terminated pursuant to Section XII, or the Effective Date otherwise does not occur, in no event shall any portion of the Settlement Fund revert to Defendant.

55. All funds held by the Settlement Administrator shall be deemed and considered to be in custodia legis of the Court, and shall remain subject to the jurisdiction of the Court, until

distributed pursuant to this Agreement. All funds held by the Settlement Administrator at any time shall be deemed to be a Qualified Settlement Fund as described in Treasury Regulation §1.468B-1, 26 C.F.R. §1.468B-1.

V. Settlement Approval

56. Preliminary Approval.

a. Upon execution of this Agreement by all Parties, Class Counsel shall promptly move the Court for a Preliminary Approval Order. The proposed Preliminary Approval Order shall be attached to the motion, or otherwise filed with the Court, and shall be in the form attached hereto as *Exhibit 3*. In the event the Court does not enter the proposed Preliminary Approval Order without material change, Defendant has the right to terminate this Agreement and the Settlement and will have no further obligations under the Agreement unless Defendant waives in writing its right to terminate the Agreement due to any material changes to the Preliminary Approval Order.

b. Plaintiff's motion seeking for Preliminary Approval shall, among other things, request that the Court: (1) preliminarily approve the terms of the Settlement as being within the range of fair, adequate, and reasonable; (2) find that it will be likely to certify the Settlement Class pursuant to Fed. R. Civ. P. 23, for settlement purposes only; (3) appoint the Class Representative as representative of the Settlement Class and Class Counsel as counsel for the Settlement Class; (4) approve the Notice Program set forth herein and approve the form and content of the Notices of the Settlement; (5) approve the procedures set forth herein for Settlement Class members to exclude themselves from the Settlement Class and for Settlement Class Members to object to the Settlement; (6) stay the Action pending Final Approval of the Settlement; and (7) schedule a Final Approval Hearing for a time and date mutually convenient for the Court,

Class Counsel, and counsel for Defendant, at which the Court will conduct an inquiry into the fairness of the Settlement, and determine whether to approve the Settlement and Class Counsel's application for attorneys' fees and costs and for a Service Award to the Class Representative, if any.

c. In Plaintiff's motion seeking Preliminary Approval, Plaintiff shall request that the Court approve the Notices attached as *Exhibits 1 - 2*. The Court will ultimately determine and approve the content and form of the Notices to be distributed to Settlement Class members.

d. The Parties further agree that in Plaintiff's motion seeking Preliminary Approval, Plaintiff will request that the Court enter the following schedule governing the Settlement: (i) deadline for sending the Notices to Settlement Class members: sixty (60) calendar days from the date of Preliminary Approval; (ii) deadline for Settlement Class members to opt out of the Settlement or serve objections to the Settlement: one-hundred twenty (120) calendar days from the date of Preliminary Approval; (iii) deadline for filing motion for Class Counsel's fees and costs: sixty (60) calendar days from the date of Preliminary Approval; and (iv) deadline for Plaintiff to file motion for Final Approval: one-hundred thirty (130) calendar days from the date of Preliminary Approval.

57. **Final Approval.** Plaintiff will submit for the Court's consideration, by the deadline set by the Court, the Final Approval Order attached as *Exhibit 4*. The motion for Final Approval of this Settlement shall include a request that the Court enter the Final Approval Order and, if the Court grants Final Approval of the Settlement and incorporates the Agreement into the final judgment, that the Court dismiss this Action with prejudice, subject to the Court's continuing jurisdiction to enforce the Agreement. In the event that the Court does not enter the Final Approval Order in materially the same form as *Exhibit 4*, Defendant has the right to terminate this

Agreement and the Settlement and will have no further obligations under the Agreement unless Defendant waives in writing its right to terminate the Agreement due to any material changes or deviations from the form of the Final Approval Order.

58. **Effect of Disapproval.** If the Settlement does not receive Final Approval or the Effective Date does not otherwise occur, Defendant shall have the right to terminate this Agreement and the Settlement and will have no further obligations under the Agreement unless Defendant waives in writing its right to terminate the Agreement under this section. In addition, the Parties agree that if this Agreement becomes null and void, Defendant shall not be prejudiced in any way from opposing class certification in the Action, and Plaintiff and Settlement Class members shall not use anything in this Agreement, in any term sheet, or in the Preliminary Approval Order or Final Approval Order to support a motion for class certification or as evidence of any wrongdoing by Defendant. No Party shall be deemed to have waived any claims, objections, rights or defenses, or legal arguments or positions, including but not limited to, claims or objections to class certification, or claims or defenses on the merits. Each Party reserves the right to prosecute or defend this Action in the event that this Agreement does not become final and binding.

VI. Settlement Administrator

59. The Settlement Administrator shall administer various aspects of the Settlement as described in this Agreement, including, but not limited to, effectuating the Notice Program and distributing the Settlement Fund as provided herein.

60. Settlement Administration Costs shall be paid from the Settlement Fund. In the event the Settlement is terminated subsequent to the incurrence of Settlement Administration Costs, TD Bank shall not be entitled to recoup those costs.

61. The duties of the Settlement Administrator are as follows:
- a. Use the name and address information for Settlement Class members provided by Defendant in connection with the Notice Program approved by the Court, for the purpose of distributing the Email Notice and Postcard Notice, and later mailing Settlement Class Member Payments to Former Account Holder Settlement Class Members, and to Current Account Holder Settlement Class Members where it is not feasible or reasonable for Defendant to make the Settlement Class Member Payments by a credit to the Current Account Holders' Accounts;
 - b. Establish and maintain a post office box for requests for exclusion from the Settlement Class;
 - c. Establish and maintain the Settlement Website;
 - d. Establish and maintain an automated toll-free telephone line for Settlement Class members to call with Settlement-related inquiries, and answer the questions of Settlement Class members who call with or otherwise communicate such inquiries;
 - e. Respond to any mailed Settlement Class Member inquiries;
 - f. Process all requests for exclusion (opt outs) from the Settlement Class;
 - g. Provide weekly reports to Class Counsel and Defendant that summarize the number of requests for exclusion received that week, the total number of exclusion requests received to date, and other pertinent information;
 - h. In advance of the Final Approval Hearing, prepare a declaration or affidavit to submit to the Court confirming that the Notice Program was completed,

describing how the Notice Program was completed, providing the names of each Settlement Class member who timely and properly requested exclusion from the Settlement Class, and other information as may be necessary to allow the Parties to seek and obtain Final Approval.

- i. Distribute Settlement Class Member Payments by check to Former Account Holder Settlement Class Members and Current Account Holder Settlement Class Members who are unable to receive account credits;
- j. Provide to Defendant the amount of the Settlement Class Member Payments that each Current Account Holder Settlement Class Member should receive, transfer to Defendant the total amount of payments due to those Current Account Holders Settlement Class Members and instruct Defendant to initiate the direct deposit or credit of Settlement Class Member Payments to Current Account Holder Settlement Class Members.
- k. Pay invoices, expenses, and costs upon approval by Class Counsel and Defendant, as provided in this Agreement;
- l. Provide notice of this Settlement as required under the Class Action Fairness Act, 28 U.S.C. § 1715, if requested by Defendant;
- m. Any other Settlement Administration function at the instruction of Class Counsel and Defendant, including, but not limited to, verifying that the Settlement Funds have been distributed; and
- n. Perform all tax-related services for the Settlement Fund as provided in the Agreement.

62. The Settlement Administrator shall execute an agreement in a form acceptable to Defendant that shall provide, among other things, that the Settlement Administrator shall be bound by and shall perform the obligations imposed on it under the terms of this Agreement.

63. The Settlement Administrator shall ensure that the information that it receives from Defendant, Class Counsel, and/or Settlement Class members is secured and managed in such a way as to protect the security and confidentiality of the information, consistent with industry best practices and applicable law. Except as specifically provided in this Agreement, the Settlement Administrator shall not disclose or disseminate any information that it receives from Defendant, Class Counsel and/or Settlement Class members without prior written consent of the Parties or by order of the Court. The Parties and Class Counsel agree that the Settlement Administrator shall maintain the Class Member List and other information provided to it by or on behalf of Defendant, including mail and email addresses, in a confidential manner, and that it will not provide such Class Member List or other information to any other person, including Class Counsel, without Defendant's prior written consent.

64. The Settlement Administrator also shall be responsible for timely and properly filing all tax returns necessary or advisable, if any, with respect to the Settlement Fund. All taxes (including any estimated taxes, and any interest or penalties relating to them) arising with respect to the income earned by the Settlement Fund or otherwise, including any taxes or tax detriments that may be imposed upon Defendant or Defendant's Counsel, or Plaintiff and Class Counsel, with respect to income earned by the Settlement Fund for any period during which the Settlement Fund does not qualify as a "qualified settlement fund" for the purpose of federal or state income taxes or otherwise (collectively "Taxes"), shall be paid out of the Settlement Fund. Plaintiff and Class Counsel, and Defendant and Defendant's Counsel shall have no liability or responsibility for any

of the Taxes. The Settlement Fund shall indemnify and hold Plaintiff and Class Counsel, and Defendant and Defendant's Counsel harmless for all Taxes (including, without limitation, Taxes payable by reason of any such indemnification). Except as provided herein, Settlement Class Members shall be responsible for their own tax reporting of payments or credits received under the terms of this Agreement.

VII. Notice to Settlement Class Members

65. **Provision of Information to Settlement Administrator.** Within thirty (30) calendar days of the date of Preliminary Approval, Defendant will provide the Settlement Administrator with the following information, which will be kept strictly confidential between the Administrator and Defendant, for each Settlement Class member: (i) name; (ii) number of Retry OD Fees per account for the Class Period; (iii) relevant fee refund information for the Class Period; (iv) last known e-mail address; and (v) last known mailing address ("Class Member List"). The Settlement Administrator shall use this information solely for the purpose of administering the Settlement.

66. **Class Notices.** Within sixty (60) calendar days of the date of Preliminary Approval, or by the time specified by the Court, the Settlement Administrator shall send the Notices in the forms attached hereto as *Exhibits 1 - 2*, or in such form as is approved by the Court, to the Settlement Class members. The Settlement Administrator shall send the Email Notice, attached hereto as *Exhibit 1*, to all Settlement Class members for whom the Defendant has provided the Settlement Administrator with an e-mail address. The Settlement Administrator shall send the Postcard Notice, attached hereto as *Exhibit 1*, to all Settlement Class members for whom Defendant does not provide an email address to the Settlement Administrator and to all Settlement Class members to whom the Settlement Administrator sent *Exhibit 1* via email but for whom the

Settlement Administrator receives notice of an undeliverable email. Postcard Notice shall be mailed after the Settlement Administrator updates mailing addresses provided by Defendant with the National Change of Address database and other commercially feasible means. The Settlement Administrator shall also maintain a website containing the Complaint, the Long Form Notice attached hereto as *Exhibit 2*, Plaintiff's motion seeking Preliminary Approval, the Preliminary Approval Order, Plaintiff's motion seeking Final Approval, and the Final Approval Order until at least ninety (90) calendar days after the date of Final Approval. The Settlement Administrator shall send the Long Form Notice by mail to any Settlement Class member who requests a copy. It will be conclusively presumed that the intended recipients received the Notices if the Settlement Administrator did not receive a bounce-back message for Email Notices and if mailed Postcard Notices have not been returned to the Administrator as undeliverable within fifteen (15) calendar days of mailing.

67. Notices provided under or as part of the Notice Program shall not bear or include Defendant's logo or trademarks or the return address of Defendant, or otherwise be styled to appear to originate from Defendant.

68. The Email Notice, Postcard Notice, and Long Form Notice shall be in forms approved by the Court, and substantially similar to the notice forms attached hereto as *Exhibits 1 and 2*. The Parties may by mutual written consent make non-substantive changes to the Notices without Court approval. A Spanish language translation of the Long Form Notice shall be available on the Settlement Website and be provided to Settlement Class members who request it from the Settlement Administrator.

VIII. Procedure for Opting Out and Objecting

69. **Opt Outs.** A Settlement Class member may opt-out of the Settlement Class at any

time prior to the Opt-Out Deadline, provided the opt-out notice that must be sent to the Settlement Administrator is postmarked no later than the Opt-Out Deadline. Any Settlement Class Member who does not timely and validly request to opt out shall be bound by the terms of this Agreement, including the Releases. If an Account has more than one Account Holder, and if one Account Holder excludes himself or herself from the Settlement Class, then all Account Holders on that Account shall be deemed to have opted out of the Settlement with respect to that Account, and no Account Holder shall be entitled to a payment under the Settlement.

70. **Objections.** Objections to the Settlement, to the application for attorneys' fees and costs, and/or to the Service Award must be sent to the Clerk of the Court, Class Counsel, Defendant's Counsel, and the Settlement Administrator. For an objection to be considered by the Court, the objection must be submitted no later than the Objection Deadline, as specified in the Notice. If submitted by mail, an objection shall be deemed to have been submitted when posted if received with a postmark date indicated on the envelope if mailed first-class postage prepaid and addressed in accordance with the instructions. If submitted by private courier (*e.g.*, Federal Express), an objection shall be deemed to have been submitted on the shipping date reflected on the shipping label. For an objection to be considered by the Court, the objection must also set forth:

- a. the name of the Action;
- b. the objector's full name, address and telephone number;
- c. all grounds for the objection, accompanied by any legal support for the objection known to the objector or objector's counsel;
- d. the number of times the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of

each case in which the objector has made such objection, and a copy of any orders related to or ruling upon the objector's prior objections that were issued by the trial and appellate courts in each listed case;

- e. the identity of all counsel who represent the objector, including any former or current counsel who may be entitled to compensation for any reason related to the objection to the Settlement or fee application;
- f. the number of times in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the five years preceding the date that of the filed objection, the caption of each case in which counsel or the firm has made such objection and a copy of any orders related to or ruling upon counsel's or the counsel's law firm's prior objections that were issued by the trial and appellate courts in each listed case in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the preceding five years;
- g. any and all agreements that relate to the objection or the process of objecting—whether written or oral—between objector or objector's counsel and any other person or entity;
- h. the identity of all counsel (if any) representing the objector who will appear at the Final Approval Hearing;
- i. a list of all persons who will be called to testify at the Final Approval Hearing in support of the objection;
- j. a statement indicating whether the objector intends to personally appear and/or testify at the Final Approval Hearing; and
- k. the objector's signature (an attorney's signature is not sufficient).

Class Counsel and/or Defendant may conduct limited discovery on any objector or objector's counsel consistent with the Federal Rules of Civil Procedure.

71. **Waiver of Objections.** Except for Settlement Class members who opt out of the Settlement Class in compliance with the foregoing, all Settlement Class Members will be deemed to be members of the Settlement Class for all purposes under this Agreement, the Final Approval Order, and the Releases set forth in this Agreement and, unless they have timely asserted an objection to the Settlement, shall be deemed to have waived all objections and opposition to the fairness, reasonableness, and adequacy of the Settlement.

72. **No Encouragement of Objections.** Neither the Parties nor any person acting on their behalf shall seek to solicit or otherwise encourage anyone to object to the Settlement or appeal from any order of the Court that is consistent with the terms of this Settlement.

IX. Disbursement from the Settlement Fund.

73. Payments shall be made from the Settlement Fund as follows:

a. Class Counsels' Fees and Costs. Class Counsels' reasonable attorneys' fees and costs, as determined and approved by the Court, shall be paid from the Settlement Fund within 30 days after the date of Final Approval. Class Counsel shall apply for an award of attorneys' fees of up to one-third of the Settlement Fund, and reimbursement of reasonable litigation costs, to be approved by the Court. Plaintiff's attorneys' fee application shall be separate from the motion for Final Approval, and the Proposed Order on the attorneys' fee application shall be separate from the Proposed Order on the motion for Final Approval. Defendant agrees not to oppose an application for attorneys' fees of up to one-third of the Settlement Fund, but reserves the right to oppose an application for attorneys' fees in excess of that amount. Any award of attorney's fees, costs or expenses to Class Counsel shall be payable solely out of the Settlement Fund. In the

event the Effective Date does not occur or any award of attorneys' fees or expenses is reduced following an appeal, Class Counsel shall repay to the Settlement Fund within 30 days the full amount of any such award or the amount of the reduction, for which all Class Counsel shall be jointly and severally liable. The Parties agree that the Court's failure to approve, in whole or in part, any award for attorneys' fees, costs or expenses in the amount requested by Class Counsel shall not prevent the Settlement Agreement from becoming Effective, nor shall it be grounds for termination.

b. Service Award. Unless the Eleventh Circuit Court of Appeals panel decision in *Johnson v. NPAS Solutions, LLC*, No. 18-12344 ("*Johnson*"), prohibiting service awards in class actions, is reversed, vacated, or overruled by the date of the Final Approval Hearing, Plaintiff shall not seek a service or incentive award to be paid from the Settlement Fund. If *Johnson* is reversed, vacated, or overruled by the date of the Final Approval Hearing, then, subject to Court approval, Plaintiff shall be entitled to receive a Service Award in an amount approved by the Court not to exceed \$5,000.00 for her role as the Class Representative. Any such approved Service Award shall be payable solely out of the Settlement Fund, and shall be paid from the Settlement Fund no later than 10 days after the Effective Date. Any court-awarded Service Award to Plaintiff for her role as Class Representative shall be in addition to the \$5,000.00 to be paid from Defendant to Plaintiff, subject to the Court's approval, under the terms of a separate individual settlement agreement in exchange for Plaintiff's general release of claims. The Parties agree that the Court's failure to approve, in whole or in part, (i) any service or incentive award to Plaintiff, or (ii) the \$5,000.00 separate payment to Plaintiff for her general release of claims, shall not prevent this class-wide Settlement Agreement from becoming effective, nor shall it be grounds for termination.

c. Settlement Administrator's Fees and Costs. The Settlement Administrator's fees and costs shall be paid from the Settlement Fund within 10 days after invoicing to and approval by Class Counsel and Defendant's Counsel. In the event the Final Approval Order is not entered or this Agreement is terminated pursuant to Section XII below, the Settlement Fund will cover any costs incurred and fees charged by the Settlement Administrator prior to the denial of Final Approval or the termination of this Agreement.

d. Calculation and Distribution of Settlement Class Member Payments. The Settlement Administrator, supervised by the Parties, shall calculate and implement the allocation of the Net Settlement Fund for the purpose of compensating Settlement Class Members using the methodology provided below. Defendant shall have the right but not the obligation to review and challenge the accuracy of this calculation. The methodology provided for below will be applied to the data as consistently, sensibly, and conscientiously as reasonably possible, recognizing and taking into consideration the nature and completeness of the data and the purpose of the computations. The Parties agree the allocation formula below is exclusively for purposes of computing, in a reasonable and efficient fashion, the amount of any Settlement Class Member Payment each Settlement Class Member should receive from the Net Settlement Fund. The fact that this allocation formula will be used is not intended (and shall not be used) for any other purpose or objective whatsoever.

i. Defendant, in consultation with Class Counsel and their experts, shall identify data—to the extent it exists in reasonably accessible electronic form—sufficient to calculate and implement the allocation of the Net Settlement Fund as provided in Section IX. The calculation of the allocations shall be performed by the Parties and their experts and/or the Settlement Administrator, as

described below, and the implementation of the allocations contemplated by Section IX shall be jointly undertaken by the Settlement Administrator and Defendant. Subject to its statutory and regulatory obligations to protect its customers' private financial information, and pursuant to any confidentiality, data protection, or other agreements restricting the dissemination of data or information, Defendant shall make available data and information sufficient to allow Class Counsel and their experts and the Settlement Administrator to determine and/or confirm the calculations and allocations contemplated by this Agreement.

ii. Settlement Class Members shall be paid pro rata distributions of the Net Settlement Fund using the following formula: $(\text{Net Settlement Fund} / \text{Total dollar value of Retry OD Fees}) \times (\text{Total dollar amount of Retry OD Fees charged to that Settlement Class Member, less any adjustment for refunds made of Overdraft Fees to that particular Class Member as identified by the Parties and their experts based on review and analysis of Defendant's reasonably accessible data and information})$.

iii. Settlement Class Member Payments shall be made no later than 90 days after the Effective Date, as follows:

1. For those Settlement Class Members who are Current Account Holders at the time of distribution of the Settlement Fund, a credit for the Settlement Class Member Payment shall be applied to the account the Settlement Class Member is maintaining at the time of the credit. Within sixty (60) days of the Effective Date, the Settlement Administrator

shall transfer to Defendant funds equal to the total amount of payments due to Settlement Class Members who are Current Account Holders. If, at that time, Defendant is unable to complete certain credit(s), Defendant shall deliver the total amount of unsuccessful Settlement Class Member Payments back to the Settlement Administrator to be paid by check in accordance with subsection 2 below.

2. For those Settlement Class Members who are Former Account Holders at the time of the distribution of the Net Settlement Fund, they shall be sent a check by the Settlement Administrator at the address used to provide the Notice, or at such other address as designated by the Settlement Class Member. For jointly held accounts, checks will be payable to all members, and will be mailed to the first member listed on the account. The Settlement Administrator will make reasonable efforts to locate the proper address for any check returned by the Postal Service as undeliverable and will re-mail it once to the updated address or, in the case of a jointly held account, and in the Settlement Administrator's discretion, to an accountholder other than the one listed first. The Settlement Class Member shall have 180 days to negotiate the check. Any checks uncashed after 180 days shall be distributed pursuant to Section X.

X. Disposition of Residual Funds

74. Within one year after the date the Settlement Administrator mails the first Settlement Class Member Payment, any remaining amounts resulting from uncashed checks shall either be distributed: (a) in a second round of distribution to those Settlement Class Members who are Current Account Holders or who cashed their initial settlement check, if Class Counsel determines that a second distribution is economically reasonable, given the costs of a second distribution (which must be paid out of the Settlement Fund) and the relative amount of such a second distribution; or (b) to an appropriate *cy pres* recipient agreed to by the Parties and approved by the Court. If a second distribution is made, any amounts remaining unclaimed six months after the second distribution shall be distributed to an appropriate *cy pres* recipient agreed to by the Parties and approved by the Court.

XI. Releases

75. As of the Effective Date, Releasing Parties shall automatically be deemed to have fully and irrevocably released and forever discharged Defendant and each of its present and former parents, subsidiaries, divisions, affiliates, predecessors, successors and assigns, and the present and former directors, officers, employees, agents, insurers, members, attorneys, advisors, consultants, representatives, partners, joint venturers, independent contractors, wholesalers, resellers, distributors, retailers, predecessors, successors and assigns of each of them (“Released Parties”), of and from any and all liabilities, rights, claims, actions, causes of action, demands, damages, costs, attorneys’ fees, losses and remedies, whether known or unknown, existing or potential, suspected or unsuspected, liquidated or unliquidated, legal, statutory, or equitable, based on contract, tort or any other theory, that result from, arise out of, are based upon, or relate (directly or indirectly) to the conduct, omissions, duties or matters up to and including the date of

Preliminary Approval that were or could have been alleged in the Action by Plaintiff or by any other Members of the Settlement Class relating in any way to the assessment of Retry OD Fees (“Released Claims”), including, without limitation, any claims, actions, causes of action, demands, damages, losses, or remedies relating to, based upon, resulting from, or arising out of Defendant’s practices, policies and procedures related to the authorization, processing, payment, return and/or rejection of an item or any failure to adequately or clearly disclose, in one or more contracts, agreements, disclosures, or other written materials, through oral communications, or in any other manner overdraft fee practices.

76. With respect to the Released Claims, Plaintiff and the Settlement Class Members shall be deemed to have, and by operation of the Settlement shall have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights and benefits of Section 1542 of the California Civil Code (to the extent it is applicable, or any other similar provision under federal, state or local law to the extent any such provision is applicable), which reads:

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, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

77. Thus, subject to and in accordance with this Agreement, even if the Plaintiff and/or any Settlement Class Member may discover facts in addition to or different from those which they now know or believe to be true with respect to the subject matter of the Released Claims, Plaintiff and each Settlement Class Member, upon entry of Final Approval of the Settlement, shall be deemed to have and by operation of the Final Approval Order, shall have, fully, finally, and forever settled and released all of the Released Claims. This is true whether such claims are known or unknown, suspected, or unsuspected, contingent or non-contingent, whether or not concealed or

hidden, which now exist, or heretofore have existed upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct which is negligent, intentional, with or without malice, or a breach of any duty, law, or rule, without regard to the subsequent discovery or existence of such different or additional facts.

78. The Releases provided for herein are a result of membership in the Settlement Class, the Court's approval process, and occurrence of the Effective Date, and are not conditioned on receipt of payment or reduction of any outstanding obligation by any particular Settlement Class Member.

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

XII. Termination of Settlement

80. This Agreement shall be subject to and is expressly conditioned on the occurrence of all of the following events:

- a. The Court has entered the Preliminary Approval Order, as required by Section V above;

- b. The Court has entered the Final Approval Order as required by Section V above, and all objections, if any, to such Order are overruled, and all appeals taken from such Order are resolved in favor of approval; and
- c. The Effective Date has occurred.

81. The Settlement shall become effective on the Effective Date unless earlier terminated in accordance with the provisions of this Agreement.

82. In addition to other rights to termination set forth in this Agreement, Defendant, in its sole and absolute discretion, shall also have the option to terminate this Agreement if 5% or more of the total Settlement Class members opt-out of the Settlement. Defendant shall notify Class Counsel and the Court of its intent to terminate this Agreement pursuant to this paragraph within 10 business days after the end of the Opt-Out Period, or the option to terminate shall be considered waived.

83. In the event this Agreement is terminated or fails to become effective, then the Parties shall be restored to their respective positions in this case as they existed as of the date of the execution of this Agreement. In such event, the terms and provisions of this Agreement shall have no further force and effect with respect to the parties and shall not be used in this case or in any other action or proceeding for any other purpose, and any order entered by this Court in accordance with the terms of this Agreement shall be treated as vacated, *nunc pro tunc*.

84. In the event of a termination, (i) this Agreement shall be considered null and void; (ii) all of Plaintiff's, Class Counsel's, and Defendant's obligations under the Settlement shall cease to be of any force and effect; (iii) the Settlement Fund shall be returned to Defendant; and (iv) the Parties shall return to the status *quo ante* in the Action as if the Parties had not entered into this Agreement. In addition, in the event of such a termination, all of the Parties' respective pre-

Settlement rights, claims and defenses will be retained and preserved.

85. In the event the Settlement is terminated in accordance with the provisions of this Agreement, any discussions, offers, or negotiations associated with this Settlement shall not be discoverable or offered into evidence or used in the Action or any other action or proceeding for any purpose. In such event, all Parties to the Action shall stand in the same position as if this Agreement had not been negotiated, made or filed with the Court.

XIII. No Admission of Liability

86. Defendant continues to dispute its liability for the claims alleged in the Action and maintains that its overdraft and overdraft-return (NSF) practices and representations concerning those practices complied, at all times, with applicable laws and regulations and the terms of the account agreements with its customers. Defendant does not admit any liability or wrongdoing of any kind, by this Agreement or otherwise. Defendant has agreed to enter into this Agreement to avoid the further expense, inconvenience, and distraction of burdensome and protracted litigation, and to be completely free of any further claims that were asserted or could possibly have been asserted in the Action.

87. Class Counsel believe that the claims asserted in the Action have merit, and they have examined and considered the benefits to be obtained under the proposed Settlement set forth in this Agreement, the risks associated with the continued prosecution of this complex, costly, and time-consuming litigation, and the likelihood of success on the merits of the Action. Class Counsel fully investigated the facts and law relevant to the merits of the claims, conducted significant informal discovery, and conducted independent investigation of the challenged practices. Class Counsel concluded that the proposed Settlement set forth in this Agreement is fair, adequate, reasonable, and in the best interests of the Settlement Class Members.

88. The Parties understand and acknowledge that this Agreement constitutes a compromise and settlement of disputed claims. No action taken by the Parties either previously or in connection with the negotiations or proceedings connected with this Agreement shall be deemed or construed to be an admission of the truth or falsity of any claims or defenses heretofore made, or an acknowledgment or admission by any party of any fault, liability, or wrongdoing of any kind whatsoever, or an admission by Defendant of the appropriateness of certification of any litigation class.

89. Neither the Settlement, nor any act performed, statement made or document submitted or executed pursuant to or in furtherance of the Settlement: (a) is or may be deemed to be, or may be used as, an admission of, or evidence of, the validity of any claim made by the Plaintiff or Settlement Class Members, or of any wrongdoing or liability of the Released Parties; (b) is or may be deemed to be, or may be used as, an admission of, or evidence of, any fault or omission of any of the Released Parties, in the Action or in any proceeding in any court, administrative agency, or other tribunal; or (c) is or may be deemed to be, or may be used as, an admission by the Released Parties that any litigation class may be certified.

90. In addition to any other defenses Defendant may have at law, in equity, or otherwise, to the extent permitted by law, this Agreement may be pleaded as a full and complete defense to, and may be used as the basis for an injunction against, any action, suit or other proceeding that may be instituted, prosecuted, or attempted in breach of this Agreement or the Releases contained herein.

XIV. Confidentiality and Non-Disparagement

91. Neither Party shall issue any press release or shall otherwise initiate press coverage of the Settlement. If contacted, the Party may respond generally, either online or in person, by stating that the Settlement was reached and that it was a fair and reasonable result. The Parties

agree that they shall not make any disparaging remarks, or any remarks that could reasonably be construed as disparaging, whether orally or in writing, regarding one another or their officers, directors, trustees, employees, consultants, attorneys, partners, owners, affiliates, or agents. Nothing in this paragraph is intended to prohibit the Parties from testifying or responding truthfully in response to any court order, arbitral order, subpoena or government investigation. Notwithstanding this paragraph, Defendant may issue a statement concerning this Settlement in conjunction with any filings or reporting with or to any governmental agency.

XV. Miscellaneous Provisions

92. Gender and Plurals. As used in this Agreement, the masculine, feminine or neuter gender, and the singular or plural number, shall each be deemed to include the others whenever the context so indicates.

93. Binding Effect. This Agreement shall be binding upon, and inure to for the benefit of, the heirs, executors, administrators, successors, beneficiaries, and assigns of the Releasing Parties and the Released Parties.

94. Cooperation of Parties. The Parties to this Agreement agree to cooperate in good faith to prepare and execute all documents, to seek Court approval, uphold Court approval, and do all things reasonably necessary to complete and effectuate the Settlement described in this Agreement.

95. Obligation to Meet and Confer. Before filing any motion in the Court raising a dispute arising out of or related to this Agreement, the Parties shall consult with each other and certify to the Court that they have consulted.

96. Integration. This Agreement constitutes a single, integrated written contract expressing the entire agreement of the Parties relative to the subject matter hereof. No covenants, agreements, representations, or warranties of any kind whatsoever have been made by any Party

hereto, except as provided for herein.

97. No Conflict Intended. Any inconsistency between the headings used in this Agreement and the text of the paragraphs of this Agreement shall be resolved in favor of the text.

98. Governing Law. Except as otherwise provided herein, the Agreement and all disputes arising out of or relating to (directly or indirectly) the Agreement shall be construed in accordance with, and be governed by, the laws of the State of Florida, without regard to the principles thereof regarding choice of law.

99. Counterparts and Electronic Signatures. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument, even though all Parties do not sign the same counterparts. Original signatures are not required. Any handwritten signature submitted by facsimile or through email of an Adobe PDF shall be deemed an original. In addition, the Parties agree that any Electronic Signature by a Party to this Agreement is intended to authenticate this writing and has the same force and effect as a handwritten signature. Pursuant to the Florida Uniform Electronic Transaction Act, “Electronic Signature” means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. Such Electronic Signature includes, without limitation, a signature submitted through the DocuSign digital transaction system.

100. Jurisdiction. The Court shall retain jurisdiction over the implementation, enforcement, and performance of this Agreement, and shall have exclusive jurisdiction over any suit, action, proceeding, or dispute arising out of or relating to (directly or indirectly) this Agreement that cannot be resolved by negotiation and agreement by counsel for the Parties. The Court shall retain jurisdiction with respect to the administration, consummation, and enforcement

of the Agreement and shall retain jurisdiction for the purpose of enforcing all terms of the Agreement. The Court shall also retain jurisdiction over all questions and/or disputes related to the Notice Program and the Settlement Administrator. As part of their agreement to render services in connection with this Settlement, the Settlement Administrator shall consent to the jurisdiction of the Court for this purpose. The Court shall retain jurisdiction over the enforcement of any injunction barring and enjoining all Releasing Parties from asserting any of the Released Claims and from pursuing any Released Claims against Defendant or its affiliates at any time, including during any appeal from the Final Approval Order.

101. Notices. All notices to Class Counsel, Defendant or Defendant's Counsel provided for herein, shall be sent by email with a hard copy sent by overnight mail to:

COHEN & MALAD, LLP
Lynn A. Toops, Esq.
1 Indiana Square, Suite 1400
Indianapolis, IN 46204
Email: ltoops@cohenandmalad.com

KOPELOWITZ OSTROW P.A.
Jeff Ostrow, Esq.
Jonathan M. Streisfeld, Esq.
1 West Las Olas Blvd.
Suite 500
Fort Lauderdale, FL 33301
Email: ostrow@kolawyers.com
streisfeld@kolawyers.com
Class Counsel

KALIEL GOLD PLLC
Jeffrey Kaliel, Esq.
1875 Connecticut Avenue NW, 10th Floor
Washington, DC 20009
Email: jkaliel@kalielgold.com
Class Counsel

PIERCE ATWOOD LLP
Lucus A. Ritchie, Esq.
Merrill's Warf
254 Commercial Street
Portland, ME 04101
Email lritchie@pierceatwood.com
Counsel for TD Bank, N.A.

Deirdre McInerney
TD Bank, N.A.
Senior Counsel
1701 Route 70 East, 4th Fl.
Cherry Hill, NJ 08003
856.505.2293
deirdre.mcinerney@td.com
Counsel for TD Bank, N.A.

The notice recipients and addresses designated above may be changed by written notice. Upon the request of any of the Parties, the Parties agree to promptly provide each other with copies of objections, requests for exclusion, or other filings received as a result of the Notice program.

102. Modification and Amendment. This Agreement may not be amended or modified, except by a written instrument signed by Class Counsel and counsel for Defendant and, if the Settlement has been approved preliminarily by the Court, approved by the Court.

103. No Waiver. The waiver by any Party of any breach of this Agreement by another Party shall not be deemed or construed as a waiver of any other breach, whether prior, subsequent, or contemporaneous, of this Agreement.

104. Authority. Class Counsel (for the Plaintiff and the Settlement Class Members), and counsel for Defendant, represent and warrant that the persons signing this Agreement on their behalf have full power and authority to bind every person, partnership, corporation or entity included within the definitions of Plaintiff and Defendant to all terms of this Agreement. Any person executing this Agreement in a representative capacity represents and warrants that he or

she is fully authorized to do so and to bind the Party on whose behalf he or she signs this Agreement to all of the terms and provisions of this Agreement.

105. Agreement Mutually Prepared. Neither Defendant nor Plaintiff, nor any of them, shall be considered to be the drafter of this Agreement or any of its provisions for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Agreement.

106. Independent Investigation and Decision to Settle. The Parties understand and acknowledge that they: (a) have performed an independent investigation of the allegations of fact and law made in connection with this Action; and (b) that even if they may hereafter discover facts in addition to, or different from, those that they now know or believe to be true with respect to the subject matter of the Action as reflected in this Agreement, that will not affect or in any respect limit the binding nature of this Agreement. It is the Parties' intention to resolve their disputes in connection with this Action pursuant to the terms of this Agreement now and thus, in furtherance of their intentions, the Agreement shall remain in full force and effect notwithstanding the discovery of any additional facts or law, or changes in law, and this Agreement shall not be subject to rescission or modification by reason of any changes or differences in facts or law, subsequently occurring or otherwise.

107. Receipt of Advice of Counsel. Each Party acknowledges, agrees, and specifically warrants that he, she, or it has fully read this Agreement and the Releases contained herein, received independent legal advice with respect to the advisability of entering into this Agreement and the Releases, and the legal effects of this Agreement and the Releases, and fully understands the effect of this Agreement and the Releases.

Dated: 10/30/2021 _____

DocuSigned by:

Jill Abercrombie

Jill Abercrombie
Plaintiff

Dated: 11/1/2021 _____

DocuSigned by:

Jeffrey Kalief

Jeffrey D. Kalief, Esq.
KALIEL GOLD PLLC
Class Counsel

Dated: 11/1/2021 _____

DocuSigned by:

Jeff Ostrow

Jeff Ostrow, Esq.
KOPELOWITZ OSTROW P.A.
Class Counsel

Dated: 10/31/2021 _____

DocuSigned by:

Lynn Toops

Lynn Toops, Esq.
COHEN & MALAD
Class Counsel

Dated: _____

TD Bank, N.A.

By: _____
ITS _____

Dated: _____

Lucas A. Ritchie, Esq.
Counsel for TD Bank

Dated: _____

Jill Abercrombie
Plaintiff

Dated: _____

Jeffrey Kaniel, Esq.
KALIEL GOLD PLLC
Class Counsel

Dated: _____

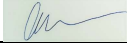
Jeff Ostrow, Esq.
KOPELOWITZ OSTROW P.A.
Class Counsel

Dated: _____

Lynn Toops, Esq.
COHEN & MALAD
Class Counsel

Dated: 11/1/2021

TD Bank, N.A.



By: Alissa Van Volkom
ITS Head of Consumer Deposits,
Products and Payments

Dated: 11/1/2021



Lucas A. Ritchie, Esq.
Counsel for TD Bank

Exhibit 1 – Email and Postcard Notice

Abercrombie v. TD Bank, N.A.

**NOTICE OF PENDING CLASS ACTION AND PROPOSED SETTLEMENT
READ THIS NOTICE FULLY AND CAREFULLY; THE PROPOSED SETTLEMENT
MAY AFFECT YOUR RIGHTS!**

**IF YOU HAVE OR HAD A CONSUMER CHECKING ACCOUNT WITH
TD BANK AND YOU WERE CHARGED CERTAIN OVERDRAFT FEES
BETWEEN JUNE 1, 2015 AND APRIL 30, 2021, THEN YOU MAY BE
ENTITLED TO A PAYMENT FROM A CLASS ACTION SETTLEMENT**

Para una notificación en Español, visitar www.XXXXXXXXXXXXXXXXXXXXXX.com.

The United States District Court for the Southern District of Florida has authorized this Notice; it is not a solicitation from a lawyer.

You may be a member of the Settlement Class in *Abercrombie v. TD Bank, N.A.*, in which the plaintiff alleges that defendant TD Bank, N.A. (“Defendant”) unlawfully assessed “Retry OD Fees” between June 1, 2015 and April 30, 2021. “Retry OD Fees” are overdraft fees charged for ACH or check transactions that were (1) submitted by a merchant or other third party, (2) returned unpaid by Defendant due to insufficient funds, and (3) re-submitted by a merchant or third party and paid by Defendant despite insufficient funds in the account. Defendant maintains that the fees were proper. The Court has not decided which side is right. If you are a member of the Settlement Class and if the Settlement is approved, you may be entitled to receive a cash payment from the **\$4,245,000.00** Settlement Fund.

The Court has preliminarily approved this Settlement. It will hold a Final Approval Hearing in this case on **[INSERT DATE]**. At that hearing, the Court will consider whether to grant Final Approval to the Settlement, and whether to approve payment from the Settlement Fund of any service award to the class representative, up to one-third of the Settlement Fund as attorneys’ fees, and reimbursement of costs to the attorneys and the Settlement Administrator. If the Court grants Final Approval of the Settlement and you do not request to be excluded from the Settlement, you will release your right to bring any claims covered by the Settlement. In exchange, Defendant has agreed to issue a credit to your Account or a cash payment to you if you are no longer an accountholder. If you previously received a notice from a separate class action settlement entitled *Perks v. T.D. Bank, N.A.*, No. 1:18-cv-11176-VEC (S.D.N.Y.), the benefits of this settlement are in addition to the benefits provided by *Perks*.

To obtain a long form class notice and other important documents please visit **[INSERT WEBSITE ADDRESS]. Alternatively, you may call **[INSERT PHONE #]**.**

*If you do not want to participate in this settlement—you do not want to receive a credit or cash payment and you do not want to be bound by any judgment entered in this case—you may exclude yourself by submitting an opt-out request postmarked no later than **[PARTIES TO INSERT DATE]**.*

*If you want to object to this settlement because you think it is not fair, adequate, or reasonable, you may object by submitting an objection postmarked no later than **[PARTIES TO INSERT DATE]**. You may learn more about the opt-out and objection procedures by visiting **[PARTIES TO PROVIDE WEBSITE ADDRESS]** or by calling **[Insert Phone #]**.*

Exhibit 2 – Long Form Notice

Abercrombie v. TD Bank, N.A.

NOTICE OF PENDING CLASS ACTION AND PROPOSED SETTLEMENT

READ THIS NOTICE FULLY AND CAREFULLY; THE PROPOSED SETTLEMENT MAY AFFECT YOUR RIGHTS!

IF YOU HAVE OR HAD A CONSUMER CHECKING ACCOUNT WITH TD BANK (“DEFENDANT”) AND YOU WERE CHARGED CERTAIN RETRY OD FEES¹ BETWEEN JUNE 1, 2015 AND APRIL 30, 2021, THEN YOU MAY BE ENTITLED TO A PAYMENT FROM A CLASS ACTION SETTLEMENT

The United States District Court for the Southern District of Florida has authorized this Notice; it is not a solicitation from a lawyer.

SUMMARY OF YOUR OPTIONS AND THE LEGAL EFFECT OF EACH OPTION	
DO NOTHING	If you don’t do anything, you will receive a payment from the Settlement Fund so long as you do not opt out of or exclude yourself from the settlement (described in the next box). You will give up your right to bring your own lawsuit about the claims covered by the settlement.
EXCLUDE YOURSELF FROM THE SETTLEMENT; RECEIVE NO PAYMENT BUT RELEASE NO CLAIMS	You can choose to exclude yourself from the settlement or “opt out.” This means you choose not to participate in the settlement. You will keep your individual claims against Defendant but you will not receive a settlement payment for Retry OD Fees. If you exclude yourself from the settlement but want to recover against Defendant, you will have to file a separate lawsuit or claim.
OBJECT TO THE SETTLEMENT	You can file an objection with the Court explaining why you believe the Court should reject the settlement. If your objection is overruled by the Court, then you may receive a settlement payment and you will not be able to sue Defendant for the claims asserted in this litigation. If the Court agrees with your objection, then the settlement may not be approved.

¹ “Retry OD Fee” means an overdraft fee that was charged during the Class Period, for an Automated Clearing House (ACH) or check transaction that was (1) submitted by a merchant or other third party, (2) returned unpaid by Defendant due to insufficient funds and (3) re-submitted by a merchant or other third party and paid by Defendant despite insufficient funds in the Account, as identified by the Parties based on review and analysis of Defendant’s reasonably accessible data and information.

These rights and options – *and the deadlines to exercise them* – along with the material terms of the settlement are explained in this Notice.

BASIC INFORMATION

1. What is this lawsuit about?

The lawsuit that is being settled is entitled *Abercrombie v. TD Bank, N.A.* It is pending in the United States District Court for the Southern District of Florida, Case No.0:21-cv-61376. The case is a “class action.” That means that the “Class Representative,” Jill Abercrombie, is an individual who is acting on behalf of current and former accountholders who were assessed certain Retry OD Fees between June 1, 2015 and April 30, 2021. The Class Representative has asserted claims for breach of the account agreement and breach of the implied covenant of good faith and fair dealing.

Defendant does not deny it charged the fees the Class Representative is complaining about, but contends it did so properly and in accordance with the terms of its agreements. Defendant therefore denies that its practices give rise to claims for damages by the Class Representative or any Settlement Class Members.

2. Why did I receive this Notice of this lawsuit?

You received this Notice because Defendant’s records indicate that you were charged one or more Retry OD Fees that are the subject of this action. The Court directed that this Notice be sent to all Settlement Class members because each such member has a right to know about the proposed settlement and the options available to him or her before the Court decides whether to approve the settlement. If you previously received a notice from a separate class action settlement entitled *Perks v. T.D. Bank, N.A.*, No. 1:18-cv-11176-VEC (S.D.N.Y.), the benefits of this settlement are in addition to the benefits provided by *Perks*.

3. Why did the parties settle?

In any lawsuit, there are risks and potential benefits that come with a trial versus settling at an earlier stage. It is the Class Representative and her lawyers’ job to identify when a proposed settlement offer is good enough that it justifies recommending settling the case instead of continuing to trial. In a class action, the Class Representative’s lawyers, known as Class Counsel, make this recommendation to the Class Representative. The Class Representative has the duty to act in the best interests of the class as a whole and, in this case, it is her belief, as well as Class Counsels’ opinion, that this settlement is in the best interest of all Settlement Class members.

There is legal uncertainty about whether a judge or a jury will find that Defendant was contractually and otherwise legally obligated not to assess the fees at issue. And even if it was contractually wrong to assess these fees, there is uncertainty about whether the Class Representative’s claims are subject to other defenses that might result in no or less recovery to Settlement Class Members. Even if the Class Representative were to win at trial, there is no assurance that the Settlement Class Members would be awarded more than the current settlement amount and it may take years of litigation before any payments would be made. By settling, the Settlement Class Members will avoid these and other risks and the delays associated with continued litigation.

While Defendant disputes the allegations in the lawsuit and denies any liability or wrongdoing, it enters into the Settlement solely to avoid the expense, inconvenience, and distraction of further proceedings in the litigation.

WHO IS IN THE SETTLEMENT

4. How do I know if I am part of the Settlement?

If you received this Notice, then Defendant’s records indicate that you are a member of the Settlement Class who is entitled to receive a payment or credit to your Account.

YOUR OPTIONS

5. What options do I have with respect to the Settlement?

You have three options: (1) do nothing and you will receive a payment or credit according to the terms of this Settlement; (2) exclude yourself from the Settlement (“opt out” of it); or (3) participate in the Settlement but object to it. Each of these options is described in a separate section below.

6. What are the critical deadlines?

There is no deadline to receive a payment or credit to your account. If you do nothing, then you will get a payment or credit.

The deadline for sending a letter to exclude yourself from or opt out of the settlement is _____. The deadline to file an objection with the Court is also _____.

7. How do I decide which option to choose?

If you do not like the Settlement and you believe that you would receive more money by pursuing your claims on your own (with or without an attorney that you could hire) and you are comfortable with the risk that you might lose your case or get less than you would in this Settlement, then you may want to consider opting out.

If you believe the Settlement is unreasonable, unfair, or inadequate and the Court should reject the Settlement, you can object to the Settlement terms. The Court will decide if your objection is valid. If the Court agrees, then the Settlement may not be approved and no payments will be made to you or any other member of the Settlement Class. If your objection (and any other objection) is overruled, and the Settlement is approved, then you may still get a payment or credit, and you will be bound by the Settlement.

If you want to participate in the Settlement, then you don’t have to do anything; you will receive a payment or credit if the Settlement is approved by the Court. If you participate in the Settlement, you will give up your right to bring your own lawsuit about the claims covered by the settlement.

8. What has to happen for the Settlement to be approved?

The Court has to decide that the Settlement is fair, reasonable, and adequate before it will approve it. The Court already has decided to provide Preliminary Approval of the Settlement, which is why you received a Notice. The Court will make a final decision regarding the Settlement at a “Fairness Hearing” or “Final Approval Hearing,” which is currently scheduled for _____.

THE SETTLEMENT PAYMENT

9. How much is the Settlement?

Defendant has agreed to create a Settlement Fund of \$4,245,000.00. As discussed separately below, attorneys’ fees, litigation costs, and the costs paid to a third-party Settlement Administrator to administer the Settlement (including mailing and emailing notice) will be paid out of the Settlement Fund. The Net Settlement Fund will be divided among all Settlement Class Members

entitled to Settlement Class Member Payments based on a formula described in the Settlement Agreement.

10. How much of the Settlement Fund will be used to pay for attorney fees and costs?

Class Counsel will request the Court to approve attorneys’ fees of not more than one-third of the Settlement Fund, and will request that it be reimbursed for litigation costs incurred in prosecuting the case. The Court will decide the amount of the attorneys’ fees and costs.

11. How much of the Settlement Fund will be used to pay the Class Representative a Service Award?

If applicable law permits, at the time of final approval, Class Counsel will request that the Class Representative be paid a service award not to exceed \$5,000.00 for their work in connection with this case. The Service Award must be approved by the Court.

12. How much will my payment be?

The balance of the Settlement Fund after attorneys’ fees and costs, the Settlement Administrator’s fees, and any service award, also known as the Net Settlement Fund, will be divided among all Settlement Class Members entitled to Settlement Class Member Payments in accordance with the formula outlined in the Settlement Agreement. Current accountholders of Defendant will receive a credit to their Accounts for the amount they are entitled to receive. Former accountholders of Defendant shall receive a check from the Settlement Administrator.

13. Do I have to do anything if I want to participate in the Settlement?

No. If you received this Notice, then you may be entitled to receive a credit or payment for a Retry OD Fee without having to make a claim.

14. When will I receive my payment?

The Court will hold a Final Approval Hearing on _____, at _____ to consider whether the Settlement should be approved. If the Court approves the Settlement, then payments should be made or credits should be issued within 90 days of the Effective Date. However, if someone objects to the Settlement, and the objection is sustained, then there is no Settlement. Even if all objections are overruled and the Court approves the Settlement, an objector could appeal, and it might take months or even years to have the appeal resolved, which would delay any payment.

EXCLUDING YOURSELF FROM THE SETTLEMENT

15. How do I exclude myself from the Settlement?

If you do not want to receive a payment or if you want to keep any right you may have to sue Defendant for the claims alleged in this lawsuit, then you must exclude yourself, or “opt out.”

To opt out, you **must** send a letter to the Settlement Administrator that you want to be excluded. Your letter can simply say “I hereby elect to be excluded from the settlement in the *Abercrombie v. TD Bank, N.A.* class action.” Be sure to include your name, the last four digits of your account number(s) or former account number(s), address, telephone number, and email address. Your exclusion or opt out request must be postmarked by _____, and sent to:

Abercrombie v. TD Bank, N.A.

Attn:

ADDRESS OF THE SETTLEMENT ADMINISTRATOR

16. What happens if I opt out of the Settlement?

If you opt out of the Settlement, you will preserve and not give up any of your rights to sue Defendant for the claims alleged in this case. However, you will not be entitled to receive a payment or credit from the settlement.

OBJECTING TO THE SETTLEMENT

17. How do I notify the Court that I do not like the Settlement?

You can object to the settlement or any part of it that you do not like **IF** you do not exclude yourself, or opt-out, from the Settlement. (Settlement Class members who exclude themselves from the Settlement have no right to object to how other Settlement Class members are treated.) To object, you **must** send a written document by mail or private courier (e.g., Federal Express) to the Clerk of Court, Settlement Administrator, Class Counsel, and Defendant's Counsel at the addresses below. Your objection must include the following information:

- a. the name of the Action;
- b. the objector's full name, address and telephone number;
- c. all grounds for the objection, accompanied by any legal support for the objection known to the objector or objector's counsel;
- d. the number of times the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which the objector has made such objection, and a copy of any orders related to or ruling upon the objector's prior objections that were issued by the trial and appellate courts in each listed case;
- e. the identity of all counsel who represent the objector, including any former or current counsel who may be entitled to compensation for any reason related to the objection to the Settlement or fee application;
- f. the number of times in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the five years preceding the date that of the filed objection, the caption of each case in which counsel or the firm has made such objection and a copy of any orders related to or ruling upon counsel's or the counsel's law firm's prior objections that were issued by the trial and appellate courts in each listed case in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the preceding five years;
- g. any and all agreements that relate to the objection or the process of objecting—whether written or oral—between objector or objector's counsel and any other person or entity;
- h. the identity of all counsel (if any) representing the objector who will appear at the Final Approval Hearing;
- i. a list of all persons who will be called to testify at the Final Approval Hearing in support of the objection;
- j. a statement indicating whether the objector intends to personally appear and/or testify at the Final Approval Hearing; and
- k. the objector's signature (an attorney's signature is not sufficient).

All objections must be post-marked no later than _____, and must be sent to all of the following addresses:

CLERK OF COURT	SETTLEMENT ADMINISTRATOR	CLASS COUNSEL	DEFENDANT'S COUNSEL
Clerk of the United States District Court for the Southern District of Florida, which is located at 400 North Miami Avenue, Room 8N09, Miami, FL 33128	Abercrombie v. TD Bank, N.A. Settlement Administrator Attn: ADDRESS OF THE SETTLEMENT ADMINISTRATOR	Lynn A. Toops Cohen & Malad, LLP 1 Indiana Square Suite 1400 Indianapolis, IN 46204	Lucus A. Ritchie, Esq. Pierce Atwood LLP Merrill's Warf 254 Commercial Street Portland, ME 04101

18. What is the difference between objecting and requesting exclusion from the settlement?

Objecting is telling the Court that you do not believe the Settlement is fair, reasonable, and adequate for the Settlement Class, and asking the Court to reject it. You can object only if you do not opt out of the Settlement. If you object to the Settlement and do not opt out, then you are entitled to a payment for a Retry OD Fee if the Settlement is approved, but you will release claims you might have against Defendant. Excluding yourself or opting-out is telling the Court that you do not want to be part of the Settlement, and do not want to receive a payment for a Retry OD Fee or release claims you might have against Defendant for the claims alleged in this lawsuit.

19. What happens if I object to the Settlement?

If the Court sustains your objection, or the objection of any other member of the Settlement Class, then there is no Settlement. If you object, but the Court overrules your objection and any other objection(s), then you will be part of the Settlement.

THE COURT'S FINAL APPROVAL HEARING

20. When and where will the Court decide whether to approve the Settlement?

The Court will hold a Final Approval or Fairness Hearing at ___ on ____, 2021 at the United States District Court for the Southern District of Florida, which is located at Wilkie D. Ferguson, Jr. United States Courthouse, 400 North Miami Avenue, Room 10-1, Miami, Florida 33128. At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. If there are objections, the Court will consider them. The Court may also decide how much to award Class Counsel for attorneys' fees and litigation costs and the amount of the Service Award, if any, to the Class Representative. The hearing may be virtual, in which case the instructions to participate shall be posted on the website at www.

21. Do I have to come to the hearing?

No. Class Counsel will answer any questions the Court may have. You may attend if you desire to do so. If you have submitted a timely and valid objection, the Court will consider it whether or not you attend.

22. May I speak at the hearing?

If you have objected, you may ask the Court for permission to speak at the Final Approval Hearing. To do so, you must include with your objection, described in Question 17, above, the statement, “I hereby give notice that I intend to appear at the Final Approval Hearing.”

THE LAWYERS REPRESENTING YOU

23. Do I have a lawyer in this case?

The Court ordered that the lawyers and their law firms referred to in this notice as “Class Counsel” will represent you and the other Settlement Class members.

24. Do I have to pay the lawyer for accomplishing this result?

No. Class Counsel will be paid directly from the Settlement Fund.

25. Who determines what the attorneys’ fees will be?

The Court will be asked to approve the amount of attorneys’ fees at the Fairness Hearing. Class Counsel will file an application for attorneys’ fees and costs and will specify the amount being sought as discussed above. You may review a copy of the fee application at the website established by the Settlement Administrator.

GETTING MORE INFORMATION

This Notice only summarizes the proposed Settlement. More details are contained in the Settlement Agreement, which can be viewed/obtained online at [[WEBSITE](#)] or at the Office of the Clerk of the United States District Court for the Southern District of Florida, which is located at 400 North Miami Avenue, Miami, FL 33128, by asking for the Court file containing the Motion For Preliminary Approval of Class Settlement (the settlement agreement is attached to the motion) or obtaining a copy online at [\[REDACTED\]](#).

For additional information about the settlement and/or to obtain copies of the Settlement Agreement, or to change your address for purposes of receiving a payment, you should contact the Settlement Administrator as follows:

Abercrombie v. TD Bank, N.A.
Settlement Administrator
Attn:

For more information, you also can contact the Class Counsel as follows:

COHEN & MALAD, LLP
Lynn A. Toops, Esq.
1 Indiana Square
Suite 1400
Indianapolis, IN 46204
317-636-6481

Jeffrey D. Kaliel
KALIEL GOLD PLLC
1875 Connecticut Ave NW
10th Floor
Washington, DC 20009
202-350-4783
jkaliel@kalielpllc.com

Jeff Ostrow
Jonathan M. Streisfeld
KOPELOWITZ OSTROW P.A.
One West Las Olas Boulevard
Suite 500
Fort Lauderdale, Florida 33301
954-525-4100
954-525-4300
ostrow@kolawyers.com
streisfeld@kolawyers.com

***PLEASE DO NOT CONTACT THE COURT OR ANY REPRESENTATIVE OF
DEFENDANT CONCERNING THIS NOTICE OR THE SETTLEMENT.***

Exhibit 3 – Preliminary Approval Order
Abercrombie v. TD Bank, N.A.

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 0:21-cv-61376-JEM**

JILL ABERCROMBIE, on behalf of herself)
and all others similarly situated,)
)
Plaintiff,)
)
v.)
)
TD BANK, N.A.,)
)
Defendant.)

PRELIMINARY APPROVAL ORDER

Plaintiff Jill Abercrombie and Defendant TD Bank, N.A., by their respective counsel, have submitted a Settlement Agreement and Releases (the “Settlement”) to this Court, and Plaintiffs have moved under Federal Rule of Civil Procedure 23(e) for an order: (1) finding that the Court will likely be able to approve terms the terms of the Settlement as fair, adequate and reasonable; (2) finding that the Court will likely be able to certify the Settlement Class for settlement purposes only; (3) approving the Notice Program set forth in the Settlement and directing Notice to the Settlement Class; (4) appointing Plaintiff as the Class Representative and her counsel as Class Counsel; and (5) scheduling a final approval hearing to consider final approval of the Settlement and any application for attorneys’ fees, expenses, and Class Representative service award, if any. The Court has considered the terms of the Settlement, the exhibits to the Settlement, the record of proceedings, and all papers and arguments submitted in support, and now finds that the motion should be, and hereby is, **GRANTED**.

ACCORDINGLY, THE COURT FINDS AND ORDERS:

1. This Court has jurisdiction over the subject matter of this lawsuit and jurisdiction over the Plaintiff and Defendant (the “Parties”) pursuant to 28 U.S.C. § 1332(d).

2. The Court appoints Plaintiff Jill Abercrombie as Class Representative and her counsel Cohen & Malad, LLP; Kaliel Gold, PLLC; and Kopelowitz Ostrow, P.A. as Class Counsel.

3. Capitalized terms not otherwise defined in this Order have the definitions set forth in the Settlement.

SUMMARY OF THE LITIGATION AND SETTLEMENT

4. On June 3, 2021, Plaintiff filed her Class Action Complaint alleging claims relating to Defendant’s practice of charging overdraft fees on checks and Automated Clearing House (“ACH”) transactions that were paid by Defendant despite insufficient funds in an Account after having been re-submitted by a merchant or other third party after having been previously returned unpaid by Defendant for insufficient funds. Plaintiff claimed this practice breached her contract with Defendant.

5. On July 6, 2021, Defendant filed a Notice of Removal under 28 U.S.C. § 1146, removing the action to this Court. On August 13, 2021, Defendant filed a Motion to Dismiss Class Action Complaint to which Plaintiff responded on September 10, 2021.

6. The Parties engaged in informal discovery and settlement discussions, and signed a term sheet on September 15, 2021. They then negotiated the detailed Settlement and exhibits that are now before the Court.

7. The Settlement provides, among other things, that as consideration for the release of claims from Settlement Class Members, Defendant will pay \$4,245,000.00 into a Settlement Fund. The Settlement Fund (after deducting Court-approved costs) will be distributed pro rata to Settlement Class Members in accordance with the procedures in the Settlement. Settlement Class

Members who have a current account with Defendant will receive their payments by a credit to their accounts, while Settlement Class Members whose accounts are closed will be mailed a check. Settlement Class Members are not required to submit a claim in order to receive any of this relief.

8. The Settlement also provides for emailed and mailed Notice to the Settlement Class and the proposed Notices are included as exhibits to the Settlement.

PRELIMINARY APPROVAL

9. Federal Rule of Civil Procedure 23(e) requires court approval of class action settlements. In general, the approval process involves three stages: (1) notice of the settlement to the class after “preliminary approval” by the Court; (2) an opportunity for class members to opt out of, or object to, the proposed settlement; and (3) a subsequent hearing at which the Court grants “final approval” upon finding that the settlement is “fair, reasonable, and adequate,” after which judgment is entered, class members receive the benefits of the settlement, and the defendant obtains a release from liability. Fed. R. Civ. P. 23(e)(1)–(2), (4)–(5).

10. In deciding whether to grant “preliminary approval” to a proposed settlement, the Court evaluates two issues: (1) whether “the court will likely be able to” grant final approval to the settlement as a “fair, reasonable, and adequate” compromise, so that it makes sense to give notice to the proposed class members; and (2) whether “the court will likely be able to” certify the class for purposes of entering judgment on the settlement. Fed. R. Civ. P. 23(e)(1)(B).

I. The Court will “likely be able to” grant final approval to the Settlement as “fair, reasonable, and adequate.”

11. Under Rule 23(e), approval should be given so long as the settlement is “fair, adequate and reasonable and is not the product of collusion between the parties.” *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) (internal quotation marks omitted). The Court

“should always review the proposed settlement in light of the strong judicial policy that favors settlements.” *Id.* (citations omitted). The Court may rely on the judgment of experienced class counsel and “absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.” *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) (citation omitted). Settlement “has special importance in class actions with their notable uncertainty, difficulties of proof, and length. Settlements of complex cases contribute greatly to the efficient use of judicial resources, and achieve the speedy resolution of justice[.]” *Turner v. Gen. Elec. Co.*, No. 2:05-CV-186-FTM-99DNF, 2006 WL 2620275, at *2 (M.D. Fla. Sept. 13, 2006). For these reasons, “[p]ublic policy strongly favors the pretrial settlement of class action lawsuits.” *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992).

12. Under Federal Rule of Civil Procedure 23(e)(2), as amended in December 2018, in considering whether a proposed settlement is “fair, reasonable, and adequate,” the Court considers whether:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm’s length;
- (C) the relief provided for the class is adequate, taking into account:
 - (i) the costs, risks, and delay of trial and appeal;
 - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and
 - (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

13. Under this standard, the Court finds that it will “likely be able to” grant final approval to the Settlement as “fair, reasonable, and adequate,” such that the Settlement warrants preliminary approval and dissemination of notice to the Settlement Class so that Settlement Class Members may express any objections to the Settlement or decide whether to opt-out of the Settlement or participate in it. The Settlement appears at this preliminary approval stage to be procedurally fair, reasonable, and adequate in that the Class Representative and Class Counsel have adequately represented the Settlement Class in litigating the merits of the dispute and in obtaining a Settlement of significant value through arm’s-length negotiations by sophisticated counsel. Fed. R. Civ. P. 23(e)(2)(A)–(B). Likewise, the Settlement appears at this preliminary approval stage to be substantively fair, reasonable, and adequate in that the relief provided is substantial particularly when taking into account the costs, risks, and delays of trial. Fed. R. Civ. P. 23(e)(2)(C). The proposed method of distributing relief to the Settlement Class Members is through direct deposits or direct mailed checks, meaning Settlement Class Members do not need to make a claim and will receive payments. *Id.* Attorneys’ fees will be paid only after final approval of the Settlement and only by approval of the Court, which will consider any request for fees in conjunction with final approval. *Id.* Finally, the proposal treats Settlement Class Members equitably relative to one another because the amount of recovery is based on the amount of alleged Retry OD Fees, meaning Settlement Class Members who allegedly incurred more damages will receive more under the Settlement. Fed. R. Civ. P. 23(e)(2)(D).

II. The Court will “likely be able to” certify the Settlement Class for purposes of entering judgment on the Settlement.

14. In considering whether the Court will “likely be able to” certify the Settlement Class for purposes of entering judgment on the Settlement, the Court must determine whether the

Settlement Class likely meets the requirements for class certification under Federal Rule of Civil Procedure 23(a) (numerosity, commonality, typicality, and adequacy) and any one of the subsections of Federal Rule of Civil Procedure 23(b), here subsection 23(b)(3) (predominance and superiority).

15. The Court finds, for settlement purposes only, that it will likely be able to certify the proposed Settlement Class, defined as:

All current and former holders of TD Bank, N.A. consumer checking Accounts who, from June 1, 2015 through and including April 30, 2021, were assessed at least one Retry OD Fee. Excluded from the Settlement Class are Defendant, its parents, subsidiaries, affiliates, officers and directors; all Settlement Class members who make a timely election to be excluded; and all judges assigned to this litigation and their immediate family members.

16. Specifically, the Court finds for settlement purposes that the Settlement Class likely satisfies the following requirements of Federal Rule of Civil Procedure 23:

(a)(1) Numerosity: There are thousands of members of the Settlement Class spread across numerous states. Joinder is therefore impracticable. *Cheney v. Cyberguard Corp.*, 213 F.R.D. 484, 490 (S.D. Fla. 2003) (“The Eleventh Circuit has held that “[g]enerally, less than twenty-one is inadequate, more than forty adequate.”) (quoting *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986)).

(a)(2) Commonality: Under Rule 23(a)(2), a party must show that the claims rest on a “common contention.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U. S. 338, 350 (2011). Here, the commonality requirement is satisfied for settlement purposes because there are multiple questions of law and fact that center on Defendant’s class-wide fee policies and practices and are common to the Settlement Class.

(a)(3) Typicality: The Class Representative’s claims are typical of the claims of the Settlement Class. The Class Representative’s claim is that she was allegedly charged

multiple Overdraft fees on a single item, which she alleges violated Defendant's standard form contract. These are the same claims as the claims of the Settlement Class. *Alhassid v. Bank of America, N.A.*, 307 F.R.D. 684, 697 (S.D. Fla. 2015) ("the typicality requirement is permissive: representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.").

(a)(4) Adequacy: The Class Representative will fairly and adequately protect the interests of the Settlement Class because she shares the same claims as the Settlement Class, has no interests in conflict with the Settlement Class, and Class Counsel is qualified to conduct the litigation. *Justice v. Rheem Mfg. Co.*, 318 F.R.D. 687, 695 (S.D. Fla. 2016) (finding adequacy where "Plaintiffs assert that there are no conflicts between the Plaintiffs and the proposed class" and "[t]he Court has no reason to believe that the Named Plaintiffs and their counsel would not adequately protect the interests of the class.").

(b)(3) Predominance and Superiority: Rule 23(b)(3) is satisfied for settlement purposes, as well, because the common legal and alleged factual issues here predominate over individualized issues, and resolution of the common issues for thousands of members of the Settlement Class in a single, coordinated proceeding is superior to thousands of individual lawsuits addressing the same legal and factual issues. With respect to predominance, Rule 23(b)(3) requires that the proposed class be sufficiently cohesive to warrant adjudication by representation. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). Rule 23(b)(3) also requires Plaintiffs to demonstrate that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See Fed. R. Civ. P. 23(b)(3)*. Here, the predominance requirement is

satisfied for settlement purposes because common questions present a significant aspect of the case and can be resolved for all members of the Settlement Class in a single common judgment. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1254 (11th Cir. 2004) (holding that for Rule 23(b)(3) predominance, “it is not necessary that all questions of law or fact be common, but only that some questions are common and that they predominate over the individual questions.”). Further, resolving the claims of the members of the Settlement Class in one proceeding is superior to multiple class actions clogging up the Court’s docket. *See Jackson v. Motel 6 Multipurpose Inc.*, 130 F.3d 999, 1006 (11th Cir. 1997) (superiority is satisfied where there will be “increased efficiency” through the class mechanism).

17. Having found that (1) “the court will likely be able to” grant final approval to the settlement as a “fair, reasonable, and adequate” compromise, so that it makes sense to give notice to the proposed Settlement Class members; and (2) “the court will likely be able to” certify the Settlement Class for purposes of entering judgment on the Settlement, the Court hereby **GRANTS** preliminary approval to the Settlement.

NOTICE TO THE SETTLEMENT CLASS

18. Upon granting preliminary approval under Federal Rule of Civil Procedure 23(e)(1), the Court “must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.” Fed. R. Civ. P. 23(c)(2)(B).

19. The notice must clearly and concisely state in plain, easily understood language:
(i) the nature of the action;

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

Fed. R. Civ. P. 23(c)(2)(B).

20. There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings. *United States v. Alabama*, 271 Fed. App'x 896, 901 (11th Cir. 2008).

21. The Court finds that the Notice Program, including the forms of Notice attached as Exhibit 1 and 2 to the Settlement and the plan for distribution of the Notice by email and mail, satisfies these requirements and Due Process and constitutes "the best notice that is practicable under the circumstances." The Court appoints Epiq Systems, Inc. as Settlement Administrator and directs that the Notice Program be implemented as set forth in the Settlement and this Order.

22. Within thirty (30) calendar days of the date of Preliminary Approval, Defendant will provide the Settlement Administrator with the following information, which will be kept strictly confidential between the Administrator and Defendant, for each Settlement Class Member: (i) name; (ii) number of Retry OD Fees per account for the Class Period; (iii) relevant refund information for the Class Period; (iv) last known e-mail address; and (v) last known

mailing address. The Settlement Administrator shall use this information solely for the purpose of administering the Settlement and shall keep the information strictly confidential.

23. Within sixty (60) calendar days of the date of Preliminary Approval, the Settlement Administrator shall send Notices in the forms attached to the Settlement to the Settlement Class members. The Settlement Administrator shall send the Email Notice to all Settlement Class members for whom Defendant has provided the Settlement Administrator with an e-mail address. The Settlement Administrator shall send the Postcard Notice to all Settlement Class members for whom Defendant has not provided an email address to the Settlement Administrator and to all Settlement Class members to whom the Settlement Administrator sent Email Notice but for whom the Settlement Administrator receives notice of an undeliverable email. The Postcard Notice shall be mailed after the Settlement Administrator updates mailing addresses provided by Defendant with the National Change of Address database and other commercially feasible means. The Settlement Administrator shall also maintain a website containing the Complaint, the Long Form Notice attached to the Settlement, Plaintiffs' motion seeking Preliminary Approval, this Preliminary Approval Order, Plaintiffs' motion seeking Final Approval, and the Final Approval Order, until at least ninety (90) calendar days after the date of Final Approval. The Settlement Administrator shall send the Long Form Notice by mail to any Settlement Class member who requests a copy.

PROCEDURES FOR OPTING OUT OF OR OBJECTING TO THE SETTLEMENT

24. A member of the Settlement Class may opt-out of the Settlement Class at any time prior to the Opt-Out Deadline, provided the opt-out notice that must be sent to the Settlement Administrator is postmarked no later than the Opt-Out Deadline. Any Settlement Class Member who does not timely and validly request to opt out shall be bound by the terms of the Settlement, including the Releases. If an Account has more than one Account Holder, and if

one Account Holder excludes himself or herself from the Settlement Class, then all Account Holders on that Account shall be deemed to have opted out of the Settlement with respect to that Account, and no Account Holder shall be entitled to a payment under the Settlement.

25. Except for Class Members who opt out of the Settlement Class in compliance with the foregoing, all Class Members will be deemed to be Settlement Class Members for all purposes under the Settlement, the Final Approval Order, and the releases set forth in the Settlement.

26. Objections to the Settlement, to the application for attorneys' fees and costs, and/or to the Service Award must be sent to the Clerk of the Court, Class Counsel, Defendant's Counsel, and the Settlement Administrator. For an objection to be considered by the Court, the objection must be submitted no later than the Objection Deadline, as specified in the Notice. If submitted by mail, an objection shall be deemed to have been submitted when posted if received with a postmark date indicated on the envelope if mailed first-class postage prepaid and addressed in accordance with the instructions. If submitted by private courier (e.g., Federal Express), an objection shall be deemed to have been submitted on the shipping date reflected on the shipping label. For an objection to be considered by the Court, the objection must also set forth: the name of the Action; the objector's full name, address and telephone number; all grounds for the objection, accompanied by any legal support for the objection known to the objector or objector's counsel; the number of times the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which the objector has made such objection, and a copy of any orders related to or ruling upon the objector's prior objections that were issued by the trial and appellate courts in each listed case; the identity of all counsel who represent the objector, including any

former or current counsel who may be entitled to compensation for any reason related to the objection to the Settlement or fee application; the number of times in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the five years preceding the date that of the filed objection, the caption of each case in which counsel or the firm has made such objection and a copy of any orders related to or ruling upon counsel's or the counsel's law firm's prior objections that were issued by the trial and appellate courts in each listed case in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the preceding five years; any and all agreements that relate to the objection or the process of objecting—whether written or oral—between objector or objector's counsel and any other person or entity; the identity of all counsel (if any) representing the objector who will appear at the Final Approval Hearing; a list of all persons who will be called to testify at the Final Approval Hearing in support of the objection; a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing; and the objector's signature (an attorney's signature is not sufficient). Class Counsel and/or Defendant may conduct limited discovery on any objector or objector's counsel consistent with the Federal Rules of Civil Procedure.

27. Except for Settlement Class members who have timely and validly asserted an objection to the Settlement, all Settlement Class Members shall be deemed to have waived all objections and opposition to the fairness, reasonableness, and adequacy of the Settlement.

MOTIONS FOR FINAL APPROVAL, FEES, EXPENSES, AND SERVICE AWARD

28. Class Counsel shall file their application for attorney's fees and expenses no later than 60 days from the date of this Order. Plaintiff shall file her Motion for Final Approval of the Settlement no later than 130 days from the date of this Order. At the Final Approval Hearing, the Court will hear argument on Plaintiff's Motion for Final Approval of the Settlement, and on

Class Counsel's application for attorneys' fees and expenses, for the Service Award for the Class Representatives, if any, and for all Settlement Administration Costs.

FINAL APPROVAL HEARING

29. The Court will hold a Final Approval Hearing on _____, 2022, at ___ a.m./p.m., in the Wilkie D. Ferguson, Jr. United States Courthouse, 400 North Miami Avenue, Room 10-1, Miami, Florida 33128, or by videoconference or teleconference if determined by separate order, to assist the Court in determining whether to grant Final Approval to the Settlement, enter the Final Approval Order and Judgment, and grant any motions for fees, expenses, and service award.

OTHER PROVISIONS

30. Upon entry of Judgment by the Court in accordance with the Settlement, all Settlement Class Members shall be barred from asserting any Released Claims against the Released Parties and any such Settlement Class Member shall be conclusively deemed to have released any and all such Released Claims against the Released Parties.

31. Pending final determination as to whether the Settlement should be approved, the Court hereby asserts jurisdiction over the Settlement Class Members for the purposes of effectuating this Settlement and releasing and dismissing with prejudice their Released Claims.

32. All proceedings are hereby stayed until further order of the Court, except as may be necessary to implement the terms of the Settlement. Pending final determination as to whether the Settlement should be approved, Plaintiff, all members of the Settlement Class, and persons purporting to act on their behalf, are enjoined from commencing or prosecuting (either directly, representatively, or in any other capacity) against any of the Released Parties any action or proceeding in any court or other tribunal asserting any of the Released Claims.

33. The Court may finally approve the Settlement at or after the Final Approval Hearing with modifications agreed to by the Parties, and without further notice to the Settlement Class Members.

34. The Settlement does not constitute an admission, concession, or indication by Defendant of the validity of any claims in this Action or of any wrongdoing, liability, or violation of law by Defendant, nor of the appropriateness of certification of a litigation class. To the contrary, Defendant has advised the Court that it believes it is without any liability whatsoever for any of the claims included in the Settlement and is participating in the Settlement to put an end to all such claims and the risks and expense of protracted litigation.

35. In the event the Settlement is not approved by the Court, or for any reason the Parties fail to obtain a Final Approval Order and Judgment as contemplated in the Settlement, or any such order is reversed on appeal, or the Settlement is terminated pursuant to its terms for any reason, then the following shall apply:

- a. All orders and findings entered in connection with the Settlement shall become null and void and have no further force and effect, shall not be used or referred to for any purposes whatsoever, and shall not be admissible or discoverable in any other proceeding;
- b. All of the Parties' respective pre-Settlement claims and defenses will be preserved;
- c. Nothing contained in this Order is, or may be construed as, any admission or concession by or against Plaintiff or Defendant on any point of fact or law;
- d. Neither the Settlement terms nor any publicly disseminated information regarding the Settlement, including, without limitation, the Settlement Agreement, the

Notice, court filings, orders, and public statements, may be used as evidence in this or any other proceeding. In addition, neither the fact of, nor any documents relating to, any Party’s withdrawal from the Settlement, any failure of the Court to approve the Settlement, and/or any objections or interventions may be used as evidence; and

- e. Neither the fact of this Order nor any of its contents, nor the Parties’ Settlement Agreement and submissions nor any of their contents, nor the fact of Defendant’s willingness to enter into a class action settlement, may be used to support certification of a litigation class in this or any other proceeding.

36. Each and every time period and provision of the Settlement Agreement shall be deemed incorporated herein as if expressly set forth and shall have the full force and effect of an Order of this Court.

37. All costs incurred in notifying members of the Settlement Class, as well as administering the Settlement, shall be paid as set forth in the Settlement Agreement.

SCHEDULE OF DEADLINES

38. The Court sets the following deadlines:

Event	Date
Deadline for Defendant or Settlement Administrator to serve on the appropriate government officials the notice required by 28 U.S.C. § 1715	10 days after Plaintiff’s filing of the motion for preliminary approval of the Settlement
Deadline for Defendant to deposit \$4,245,000.00 with the Settlement Administrator to create the Settlement Fund	No later than 14 days from the date of this Order
Deadline for Defendant to provide the Settlement Administrator with the Class Member List	No later than 30 days from the date of this Order

Deadline for Settlement Administrator to send E-Mail and Mail Notice to Settlement Class members	No later than 60 days from the date of this Order
Deadline for any petition for an award of attorneys' fees and costs	No later than 60 days from the date of this Order
Opt-Out Deadline	120 days from the date of this Order
Objection Deadline	120 days from the date of this Order
Deadline for Motion for Final Approval	130 days from the date of this Order
Final Approval Hearing	_____ (approximately 160 days from the date of this Order)

SO ORDERED.

Date:

HON. JOSE E. MARTINEZ
United States District Judge

Exhibit 4 – Final Approval Order
Abercrombie v. TD Bank, N.A.

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 0:21-cv-61376-JEM**

JILL ABERCROMBIE, on behalf of herself)
and all others similarly situated,)
)
Plaintiff,)
)
v.)
)
TD BANK, N.A.,)
)
Defendant.)

FINAL APPROVAL ORDER

Plaintiff Jill Abercrombie and Defendant TD Bank, N.A., by their respective counsel, have submitted a Settlement Agreement and Releases (the “Settlement”) to this Court, and Plaintiff has moved under Federal Rule of Civil Procedure 23(e) for an order: (1) certifying the Settlement Class for purposes of settlement only; and (2) granting final approval to the Settlement. The Court has considered the terms of the Settlement, the exhibits to the Settlement, the record of proceedings, and all papers and arguments submitted in support, and any objections, and now finds that the motion should be, and hereby is, **GRANTED**.

ACCORDINGLY, THE COURT FINDS AND ORDERS:

1. This Court has jurisdiction over the subject matter of this lawsuit and jurisdiction over the Plaintiff and Defendant (the “Parties”).
2. Capitalized terms not otherwise defined in this Order have the definitions set forth in the Settlement.

SUMMARY OF THE LITIGATION AND SETTLEMENT

3. On June 3, 2021, Plaintiff filed her Class Action Complaint alleging claims relating to Defendant's practice of charging overdraft fees on checks and Automated Clearing House ("ACH") transactions that were paid by Defendant despite insufficient funds in an Account after having been re-submitted by a merchant or other third party after having been previously returned unpaid by Defendant for insufficient funds. Plaintiff claimed this practice breached her contract with Defendant.

4. On July 6, 2021, Defendant filed a Notice of Removal under 28 U.S.C. § 1146, removing the action to this Court. On August 13, 2021, Defendant filed a Motion to Dismiss Class Action Complaint to which Plaintiff responded on September 10, 2021.

5. The Parties engaged in informal discovery and settlement discussions, and signed a term sheet on September 15, 2021. They then negotiated the detailed Settlement and exhibits that are now before the Court.

6. The Settlement provides, among other things, that as consideration for the release of claims from Settlement Class Members, Defendant will pay \$4,245,000.00 into a Settlement Fund. The Settlement Fund (after deducting Court-approved costs) will be distributed pro rata to Settlement Class Members in accordance with the procedures in the Settlement. Settlement Class Members who have a current account with Defendant will receive their payments by a credit to their accounts, while Settlement Class Members whose accounts are closed will be mailed a check. Settlement Class Members are not required to submit a claim in order to receive any of this relief.

NOTICE OF THE SETTLEMENT

7. The Settlement Administrator has provided a declaration showing that the Notice Program was administered in accordance with the Settlement and the Preliminary Approval

Order. The Court therefore finds that the Notice Program constituted the best notice practicable under the circumstances and fully satisfies the requirements of Federal Rule of Civil Procedure 23 and Due Process. The Court also finds that the requirements of 28 U.S.C. § 1715 have been satisfied.

FINAL APPROVAL

8. Federal Rule of Civil Procedure 23(e) requires court approval of class action settlements. The final stage in the process requires the Court to find that the settlement is “fair, reasonable, and adequate” and that the Settlement Class meets the requirements for class certification under Federal Rule of Civil Procedure 23(a) and one subsection of 23(b), here subsection 23(b)(3). Fed. R. Civ. P. 23(e). The Court finds that each of these requirements is met.

I. The Settlement is “fair, reasonable, and adequate.”

9. Under Rule 23(e), approval should be given so long as the settlement is “fair, adequate and reasonable and is not the product of collusion between the parties.” *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) (internal quotation marks omitted). The Court “should always review the proposed settlement in light of the strong judicial policy that favors settlements.” *Id.* (citations omitted). The Court may rely on the judgment of experienced class counsel and “absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.” *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) (citation omitted). Settlement “has special importance in class actions with their notable uncertainty, difficulties of proof, and length. Settlements of complex cases contribute greatly to the efficient use of judicial resources, and achieve the speedy resolution of justice[.]” *Turner v. Gen. Elec. Co.*, No. 2:05-CV-186-FTM-99DNF, 2006 WL 2620275, at *2 (M.D. Fla. Sept. 13, 2006). For

these reasons, “[p]ublic policy strongly favors the pretrial settlement of class action lawsuits.” *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992).

10. Under Federal Rule of Civil Procedure 23(e)(2), as amended in December 2018, in considering whether a proposed settlement is “fair, reasonable, and adequate,” the Court considers whether:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm’s length;
- (C) the relief provided for the class is adequate, taking into account:
 - (i) the costs, risks, and delay of trial and appeal;
 - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and
 - (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

11. Under this standard, the Court finds that the Settlement is “fair, reasonable, and adequate.” The Settlement is procedurally fair, reasonable, and adequate in that the Class Representative and Class Counsel have adequately represented the Settlement Class in litigating the merits of the dispute and in obtaining a Settlement of significant value through arm’s-length negotiations by sophisticated counsel. Fed. R. Civ. P. 23(e)(2)(A)–(B). Likewise, the Settlement is substantively fair, reasonable, and adequate in that the relief provided is substantial particularly when taking into account the costs, risks, and delays of trial. Fed. R. Civ. P.

23(e)(2)(C). The proposed method of distributing relief to the Settlement Class Members is through direct deposits or direct mailed check, meaning Settlement Class Members do not need to make a claim and will receive payments. *Id.* Finally, the proposal treats Settlement Class Members equitably relative to one another because the amount of recovery is based on the amount of alleged Retry OD Fees, and settlement payments will be pro rata based on the number of Retry OD Fees assessed to a Settlement Class Member's Account, meaning Settlement Class Members who allegedly incurred more damages will receive more under the Settlement. Fed. R. Civ. P. 23(e)(2)(D). Attorneys' fees will be separately determined by the Court.

II. The Settlement Class meets the requirements for class certification for purposes of entering judgment on the Settlement.

12. The Court further finds that the Settlement Class meets the requirements for class certification for settlement purposes under Federal Rule of Civil Procedure 23(a) (numerosity, commonality, typicality, and adequacy) and Federal Rule of Civil Procedure 23(b)(3) (predominance and superiority).

13. The Court certifies, for settlement purposes only, the following Settlement Class pursuant to Federal Rule of Civil Procedure 23:

All current and former holders of TD Bank, N.A. consumer checking Accounts who, from June 1, 2015 through April 30, 2021, were assessed at least one Retry OD Fee. Excluded from the Settlement Class are Defendant, its parents, subsidiaries, affiliates, officers and directors; all Settlement Class members who make a timely election to be excluded; and all judges assigned to this litigation and their immediate family members.

14. Specifically, the Court finds for settlement purposes that the Settlement Class satisfies the following requirements of Federal Rule of Civil Procedure 23:

(a)(1) Numerosity: There are thousands of members of the Settlement Class spread across numerous states. Joinder is therefore impracticable. *Cheney v. Cyberguard Corp.*, 213 F.R.D. 484, 490 (S.D. Fla. 2003) (“The Eleventh Circuit has held that “[g]enerally,

less than twenty-one is inadequate, more than forty adequate.”) (quoting *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986)).

(a)(2) Commonality: Under Rule 23(a)(2), a party must show that the claims rest on a “common contention.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U. S. 338, 350 (2011). Here, the commonality requirement is satisfied for settlement purposes because there are multiple questions of law and fact that center on Defendant’s class-wide fee policies and practices and are common to the Settlement Class.

(a)(3) Typicality: The Class Representative’s claims are typical of the claims of the Settlement Class. The Class Representative’s claim is that she was allegedly charged multiple OD fees on a single item, which she alleges violated Defendant’s standard form contract. These are the same claims as the claims of the Settlement Class. *Alhassid v. Bank of America, N.A.*, 307 F.R.D. 684, 697 (S.D. Fla. 2015) (“the typicality requirement is permissive: representative claims are ‘typical’ if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.”).

(a)(4) Adequacy: The Class Representative fairly and adequately protected the interests of the Settlement Class because she shares the same claims as the Settlement Class, has no interests in conflict with the Settlement Class, and Class Counsel is qualified to conduct the litigation. *Justice v. Rheem Mfg. Co.*, 318 F.R.D. 687, 695 (S.D. Fla. 2016) (finding adequacy where “Plaintiffs assert that there are no conflicts between the Plaintiffs and the proposed class” and “[t]he Court has no reason to believe that the Named Plaintiffs and their counsel would not adequately protect the interests of the class.”).

15. (b)(3) Predominance and Superiority: Rule 23(b)(3) is satisfied for settlement purposes, as well, because the common legal and alleged factual issues here predominate over individualized issues, and resolution of the common issues for thousands of members of the Settlement Class in a single, coordinated proceeding is superior to thousands of individual lawsuits addressing the same legal and factual issues. With respect to predominance, Rule 23(b)(3) requires that the proposed class be sufficiently cohesive to warrant adjudication by representation. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). Rule 23(b)(3) also requires Plaintiffs to demonstrate that “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” *See* Fed. R. Civ. P. 23(b)(3). Here, the predominance requirement is satisfied here for settlement purposes because common questions present a significant aspect of the case and can be resolved for all members of the Settlement Class in a single common judgment. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1254 (11th Cir. 2004) (holding that for Rule 23(b)(3) predominance, “it is not necessary that all questions of law or fact be common, but only that some questions are common and that they predominate over the individual questions.”). Further, resolving the claims of the members of the Settlement Class in one proceeding is superior to multiple class actions clogging up the Court’s docket. *See Jackson v. Motel 6 Multipurpose Inc.*, 130 F.3d 999, 1006 (11th Cir. 1997) (superiority is satisfied where there will be “increased efficiency” through the class mechanism).

16. Accordingly, pursuant to Fed. R. Civ. P. 23(e), the Court hereby finally approves, in all respects, the proposed settlement and finds that the Settlement Agreement (including the Releases) and the plan for distributing the settlement funds are in all respects fair, reasonable, and adequate, and are in the best interests of the Settlement Class. The Court therefore directs the parties to implement all aspects of the Settlement triggered by such final approval.

DISTRIBUTION OF NET SETTLEMENT FUND

17. The Court hereby approves the distribution of the Net Settlement Fund as set forth in the Settlement. The Court orders the Parties and the Settlement Administrator to implement all payments as set forth in the Settlement.

RELEASE

18. The Releasing Parties have fully and irrevocably released and forever discharged Defendant and each of its present and former parents, subsidiaries, divisions, affiliates, predecessors, successors and assigns, and the present and former directors, officers, employees, agents, insurers, members, attorneys, advisors, consultants, representatives, partners, joint venturers, independent contractors, wholesalers, resellers, distributors, retailers, predecessors, successors and assigns of each of them (“Released Parties”), of and from any and all liabilities, rights, claims, actions, causes of action, demands, damages, costs, attorneys’ fees, losses and remedies, whether known or unknown, existing or potential, suspected or unsuspected, liquidated or unliquidated, legal, statutory, or equitable, based on contract, tort or any other theory, that result from, arise out of, are based upon, or relate (directly or indirectly) to the conduct, omissions, duties or matters up to and including the date of Preliminary Approval that were or could have been alleged in the Action by Plaintiff or by any other Members of the Settlement Class relating in any way to the assessment of Retry OD Fees (“Released Claims”), including, without limitation, any claims, actions, causes of action, demands, damages, losses, or remedies relating to, based upon, resulting from, or arising out of Defendant’s practices, policies and procedures related to the authorization, processing, payment, return and/or rejection of an item or any failure to adequately or clearly disclose, in one or more contracts, agreements, disclosures, or other written materials, through oral communications, or in any other manner overdraft fee practices.

19. No Releasing Party (Plaintiff of any other Settlement Class Member), either directly, representatively, or in any other capacity, shall commence, continue, or prosecute any action or proceeding in any court or tribunal asserting any of the Released Claims, and they are hereby permanently enjoined from so proceeding.

OTHER PROVISIONS

20. Without affecting the finality of this Order or the separately issued Final Judgment, the Court retains continuing and exclusive jurisdiction over all matters relating to the administration, consummation, enforcement, and interpretation of the Settlement Agreement and of this Order, to protect and effectuate this Order and Final Judgment, and for any other necessary purpose. The Plaintiff, Defendant, and each Member of the Settlement Class are hereby deemed to have irrevocably submitted to the exclusive jurisdiction of this Court, for the purpose of any suit, action, proceeding, or dispute arising out of or relating to the Settlement, including the exhibits thereto, and only for such purposes. Without limiting the generality of the foregoing, and without affecting the finality of this Order or Final Judgment, the Court retains exclusive jurisdiction over any such suit, action, or proceeding. Solely for purposes of such suit, action, or proceeding, to the fullest extent they may effectively do so under applicable law, the parties hereto are deemed to have irrecoverably waived and agreed not to assert, by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of this Court, or that this Court is, in any way, an improper venue or an inconvenient forum.

21. The Settlement does not constitute an admission, concession, or indication by Defendant of the validity of any claims in this Action or of any wrongdoing, liability, or violation of law by Defendant. To the contrary, Defendant has advised the Court that it believes

it is without any liability whatsoever for any of the claims included in the Settlement and is participating in the Settlement to put an end to all such claims and the risks and expense of protracted litigation.

22. Each and every provision of the Settlement Agreement shall be deemed incorporated herein as if expressly set forth and shall have the full force and effect of an Order of this Court.

23. In reviewing the Settlement proposal, the Court finds reasonable and approves Defendant's \$5,000 payment to Plaintiff for a general release of claims that is broader than the release given by the Settlement Class ("General Release Payment"). The General Release Payment will be paid from funds outside the Settlement Fund, pursuant to the terms of the Individual Settlement Agreement and Release submitted to the Court.

JUDGMENT

24. This Order resolves all issues in this lawsuit as between all parties and therefore constitutes a final judgment. Pursuant to Federal Rule of Civil Procedure 58(a), the Court will enter Final Judgment dismissing the Action with prejudice in a separate document and direct the Clerk of this Court to close the case. The judgment shall dismiss this Action with prejudice as to all parties and all Settlement Class Members, each side to bear its own fees and costs except as otherwise provided in the Settlement Agreement and this Order.

SO ORDERED.

Date:

HON. JOSE E. MARTINEZ
United States District Judge