

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MARY JENNIFER PERKS, MARIA
NAVARRO-REYES on behalf of themselves and
all others similarly situated,

CASE NO. 1:18-CV-11176-DAB

Plaintiffs,

v.

TD BANK, N.A.,

Defendant.

SETTLEMENT AGREEMENT AND RELEASES

This Settlement Agreement and Releases (“Settlement” or “Agreement”),¹ dated as of May __, 2021, is entered into by Plaintiffs Mary Jennifer Perks and Maria Navarro-Reyes, 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 New York.

I. Procedural History and Recitals

1. On November 30, 2018, Plaintiff Mary Jennifer Perks filed a putative class action Complaint in the United States District Court for the Southern District of New York, entitled *Perks et al v. TD Bank, N.A.*, No. 1:18-cv-11176. 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 as well as unjust enrichment. On behalf of a New York subclass, the Complaint also asserted claims under the New York General Business Law.

2. On February 5, 2019, Defendant filed a Motion to Dismiss the Complaint pursuant

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

to Federal Rule of Civil Procedure 12(b)(6).

3. On February 19, 2019, Plaintiff Mary Jennifer Perks filed her Amended Class Action Complaint, which added Maria Navarro-Reyes as a named Plaintiff and added a Florida Multiple NSF Subclass. The Amended Complaint also included many additional allegations addressing arguments made by Defendant in its motion to dismiss and to address industry usage of certain important contractual terms.

4. On March 22, 2019, Defendant filed a Motion to Dismiss Plaintiffs' Amended Class Action Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

5. Plaintiffs opposed the Motion on April 19, 2019.

6. Defendant filed its reply on May 10, 2019.

7. On March 17, 2020, the Court entered a Memorandum Opinion and Order in which the Court granted in part and denied in part Defendant's Motion to Dismiss. The Court denied the Motion to Dismiss Plaintiffs' breach of contract claim and granted the Motion to Dismiss Plaintiffs' breach of implied covenant of good faith, New York General Business Law § 349, and unjust enrichment claims.

8. On April 14, 2020, Defendant filed its Answer and Defenses to the Amended Class Action Complaint.

9. Between April and October of 2020, the Parties engaged in significant discovery efforts, involving several sets of written discovery served by and on each party, multiple rounds of data and document production, numerous conferences of counsel to resolve potential discovery disputes, various reports to the Court regarding the status of discovery, and multiple depositions.

10. Subsequent to the initiation of this Action, TD Bank revised its disclosures concerning the assessment of Retry NSF Fees.

11. On October 2, 2020, the Parties requested that the Court stay the litigation pending a November 20, 2020, mediation before Professor Eric Green of Resolutions, LLC. The Court vacated the discovery deadlines that same day.

12. The Parties participated in a full-day mediation session on November 20, 2020, with respected neutral Professor Eric Green, in anticipation of which both parties performed and exchanged extensive analysis. The Parties did not settle at the mediation, but the mediation was productive in that it highlighted the need for further data analysis and review.

13. The Parties made progress toward a consensual resolution and identified additional class-related data analyses that would further facilitate the Parties' settlement discussions. The Parties agreed to perform the additional analyses, share the respective analyses with the opposing party, and then to reconvene before Professor Green on January 26, 2021.

14. The Parties and their respective experts completed these complex analyses and information exchange before the second mediation session on January 26, 2021.

15. The Parties notified the Court on February 1, 2021 that they had reached an agreement in principle to settle the case on a class action basis.

16. The tentative agreement allowed Plaintiffs to perform confirmatory discovery regarding certain aspects of the data and analysis performed by TD Bank's expert. Accordingly, on February 19, 2021, the Plaintiffs and their expert extensively interviewed TD Bank's expert as part of the confirmatory discovery process.

17. The Parties then worked for several weeks to draft a full settlement agreement and to seek bids from settlement administrators.

18. 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 Amended Class Action 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 Amended Class Action 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 Amended Class Action 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. Plaintiffs have entered into this Agreement to liquidate and recover on the claims asserted in the Amended Class Action Complaint, and to avoid the risk, delay, and uncertainty of continued litigation. Plaintiffs do not in any way concede the claims alleged in the Amended Class Action Complaint lack merit or are subject to any defenses. The Parties intend this Agreement to bind Plaintiffs, 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:

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

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

21. “Action” means *Perks et al. v. TD Bank, N.A.*, No. 1:18-cv-11176 (S.D.N.Y.)

22. “Complaint” means the Amended Class Action Complaint filed in this Action on February 19, 2019.

23. “Class Counsel” means:

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

KALIEL PLLC
Jeffrey Kaliel, Esq.
Sophia Gold, 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

WEITZ & LUXENBERG, P.C.
James J. Bilborrow, Esq.
700 Broadway
New York, NY 10003

24. “Class Period” means the following for each Account, based on the state where each Account was opened.

Alabama - November 30, 2012 to the date of Preliminary Approval
Alaska - November 30, 2015 to the date of Preliminary Approval
Arizona - November 30, 2014 to the date of Preliminary Approval

Arkansas - November 30, 2013 to the date of Preliminary Approval
California - November 30, 2014 to the date of Preliminary Approval
Colorado - November 30, 2015 to the date of Preliminary Approval
Connecticut - November 30, 2012 to the date of Preliminary Approval
Delaware - November 30, 2015 to the date of Preliminary Approval
District of Columbia - November 30, 2015 to the date of Preliminary Approval
Florida - November 30, 2013 to the date of Preliminary Approval
Georgia - November 30, 2012 to the date of Preliminary Approval
Hawaii - November 30, 2012 to the date of Preliminary Approval
Idaho - November 30, 2013 to the date of Preliminary Approval
Illinois - November 30, 2008 to the date of Preliminary Approval
Indiana - November 30, 2008 to the date of Preliminary Approval
Iowa - November 30, 2008 to the date of Preliminary Approval
Kansas - November 30, 2013 to the date of Preliminary Approval
Kentucky - November 30, 2008 to the date of Preliminary Approval
Louisiana - November 30, 2008 to the date of Preliminary Approval
Maine - November 30, 1998 to the date of Preliminary Approval
Maryland - November 30, 2015 to the date of Preliminary Approval
Massachusetts - November 30, 2012 to the date of Preliminary Approval
Michigan - November 30, 2012 to the date of Preliminary Approval
Minnesota - November 30, 2012 to the date of Preliminary Approval
Mississippi - November 30, 2015 to the date of Preliminary Approval
Missouri - November 30, 2008 to the date of Preliminary Approval
Montana - November 30, 2010 to the date of Preliminary Approval
Nebraska - November 30, 2013 to the date of Preliminary Approval
Nevada - November 30, 2012 to the date of Preliminary Approval
New Hampshire - November 30, 2015 to the date of Preliminary Approval
New Jersey - November 30, 2012 to the date of Preliminary Approval
New Mexico - November 30, 2012 to the date of Preliminary Approval
New York - November 30, 2012 to the date of Preliminary Approval
North Carolina - November 30, 2015 to the date of Preliminary Approval
North Dakota - November 30, 2012 to the date of Preliminary Approval
Ohio - November 30, 2010 to the date of Preliminary Approval
Oklahoma - November 30, 2013 to the date of Preliminary Approval
Oregon - November 30, 2012 to the date of Preliminary Approval
Pennsylvania - November 30, 2014 to the date of Preliminary Approval
Rhode Island - November 30, 2008 to the date of Preliminary Approval
South Carolina - November 30, 2015 to the date of Preliminary Approval
South Dakota - November 30, 2012 to the date of Preliminary Approval
Tennessee - November 30, 2012 to the date of Preliminary Approval
Texas - November 30, 2014 to the date of Preliminary Approval
Utah - November 30, 2012 to the date of Preliminary Approval
Vermont - November 30, 2012 to the date of Preliminary Approval
Virginia - November 30, 2013 to the date of Preliminary Approval
Washington - November 30, 2012 to the date of Preliminary Approval
West Virginia - November 30, 2008 to the date of Preliminary Approval

Wisconsin - November 30, 2012 to the date of Preliminary Approval
Wyoming - November 30, 2008 to the date of Preliminary Approval

25. “Class Representatives” mean Mary Jennifer Perks and Maria Navarro-Reyes.
26. “Court” means the United States District Court for the Southern District of New York.
27. “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.
28. “Defendant” means TD Bank, N.A.
29. “Effective Date” shall mean when the last of the following has occurred: (1) the day following the expiration of the deadline for appealing Final Approval if no timely appeal is filed, or (2) if an appeal of Final Approval is taken, the date upon which all appeals (including any requests for rehearing or other appellate review), as well as all further appeals therefrom (including all petitions for certiorari) have been finally resolved without material change to the Final Approval Order and the deadline for taking any further appeals has expired such that no future appeal is possible; or (3) such date as the Parties otherwise agree in writing.
30. “Email Notice” means a short form of notice that shall be sent by email to Settlement Class members who agreed to receive account communications by email in the form attached as *Exhibit 1*.
31. “Escrow Account” shall mean the account established and administered by the Escrow Agent into which the \$20,750.000 payment by Defendant will be deposited.
32. “Escrow Agent” shall mean RG2. Settlement Class Counsel and Defendant may, by agreement, substitute a different organization as Escrow Agent, subject to approval by the Court. The Escrow Agent shall administer the Escrow Account.

33. “Final Approval” means the date that the Court enters the Final Approval Order.

34. “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, any Settlement Administration Costs, and the amount of any Service Award to the Class Representatives.

35. “Final Approval Order” means the document attached as *Exhibit 4* hereto.

36. “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.

37. “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*.

38. “Net Settlement Fund” means the Settlement Fund, minus Court approved attorneys’ fees and costs awarded to Class Counsel, any Settlement Administration costs paid out of the Settlement Fund, if any, and any Court approved Service Award to the Class Representatives.

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

40. “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.

41. “NSF Forgiveness Amount” shall mean the \$20,750,000 that Defendant agrees to provide, as consideration for this Settlement, in the form of reductions to the outstanding balances of Settlement Class Members whose Accounts were closed with amounts owed to Defendant.

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

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

44. “Party” means Plaintiffs or Defendant and “Parties” means Plaintiffs and Defendant collectively.

45. “Plaintiffs” mean Mary Jennifer Perks and Maria Navarro-Reyes.

46. “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 the Settlement Administrator is unable to send Email Notice using the email address provided by Defendant,

47. “Preliminary Approval” means the date that the Court enters the Preliminary Approval Order.

48. “Preliminary Approval Order” means the document attached as *Exhibit 3* hereto.

49. “Releasing Parties” means Plaintiffs 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.

50. “Retry NSF Fee” means an insufficient funds fee that was charged during the Class Period, for an Automated Clearing House (ACH) or check transaction that was (1) submitted by a merchant, (2) returned unpaid by Defendant due to insufficient funds and (3) re-submitted by a

merchant and returned unpaid, as identified by the Parties based on review and analysis of Defendant's reasonably accessible data and information.

51. "Retry NSF Fee Refund" shall mean any Retry NSF Fee that was refunded to a Settlement Class Member during the Class Period, as identified by the Parties based on review and analysis of Defendant's reasonably accessible data and information.

52. "Service Award" means any Court ordered payment to Plaintiffs for serving as the Class Representatives, which is in addition to any Settlement Consideration due to them pursuant to Section IV of this Agreement as a Settlement Class Member.

53. "Settlement Administrator" means RG2. Settlement 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.

54. "Settlement Administration Costs" means all costs and fees of the Settlement Administrator regarding Notice and Settlement administration.

55. "Settlement Class" means all current and former holders of TD Bank, N.A. consumer checking Accounts who, during the Class Period, were assessed at least one Retry NSF 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.

56. "Settlement Class Member" means any member of the Settlement Class who has not opted-out of the Settlement and who is entitled to the benefits of the Settlement.

57. “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.

58. “Settlement Fund” means the \$20,750,000 common fund of cash Defendant is obligated to pay under the terms of this Settlement.

59. “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 Final Approval.

60. “Uncollected Retry NSF Fees” means the amount, as of the Effective Date, that a Settlement Class Member owes to Defendant on an Account that has been closed up to the amount that is equal to or less than the total Retry NSF Fees assessed to the Account, as identified by the Parties based on review and analysis of Defendant’s reasonably accessible data and information.

61. “Value of Settlement” means the Settlement Fund, the NSF Forgiveness Amount, and up to \$500,000 in Settlement Administrative Costs.

III. Certification of the Settlement Class

62. Solely for purposes of this Settlement, the Parties agree to certification of the following Settlement Class under Fed. R. Civ. P. 23(b)(2) and (b)(3):

All holders of TD Bank, N.A. consumer checking accounts who, during the Class Period, were assessed at least one Retry NSF 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.

63. 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 Plaintiffs to serve as class representatives.

IV. Settlement Consideration

64. Within 14 days of Preliminary Approval by the Court, Defendant shall pay \$20,750,000 in cash into the Escrow Account to create the Settlement Fund for the benefit of the Settlement Class. The Settlement Fund shall be used to pay Settlement Class Members their respective Settlement Class Member Payments; any and all attorneys' fees and costs awarded to Class Counsel; any Service Award to the Class Representative; and any Settlement Administration Costs in excess of \$500,000.00. Defendant shall pay Settlement Administration Costs of up to \$500,000.00 directly to the Settlement Administrator as invoiced by the Settlement Administrator. Defendant shall not be obligated to make any other payment under the Settlement. 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.

65. All funds held by the Settlement Administrator shall be deemed and considered to be in custodian 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.

66. Defendant shall forgive, waive, and agree not to collect from Settlement Class Members the NSF Forgiveness Amount. Such forgiveness shall be applied on an account-by-account basis.

V. Settlement Approval

67. 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 a form attached hereto as *Exhibit 3*. In the event the Court does not enter the 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. The Motion 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 Federal Rule of Civil Procedure 23, for settlement purposes only, appoint the Class Representatives as representatives of the Settlement Class and Class Counsel as counsel for the Settlement Class; (3) approve the Notice Program set forth herein and approve the form and content of the Notices of the Settlement; (4) approve the procedures set forth herein for Settlement Class members to exclude themselves from the Settlement Class or for Settlement Class Members to object to the Settlement; (5) stay the Action pending Final Approval of the Settlement; and (6) 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, determine whether it was made in good faith, 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 Representatives. The Motion for Preliminary Approval shall comply with the United States District Judge Valerie Caproni's Individual Rule 7.B.

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

d. The Parties further agree that in Plaintiffs' motion seeking Preliminary Approval, Plaintiffs will request that the Court enter the following schedule governing the Settlement: (i) deadline for sending the Class Notices: sixty (60) calendar days from Preliminary Approval; (ii) deadline for opting out or serving objections: one-hundred twenty (120) calendar days from Preliminary Approval; (iii) deadline for filing motions for Class Representative Service Award and Fee & Expense Award: one-hundred fifty (150) calendar days from Preliminary Approval; and (iv) Final Approval Hearing: one-hundred eighty (180) calendar days from Preliminary Approval.

68. **Final Approval.** Plaintiffs 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.

69. **Effect of Disapproval.** If the Settlement does not receive Final Approval or the Effective Date does not come to pass, 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 Plaintiffs and the Class Members shall not use anything in this Agreement, in any terms 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

70. The Settlement Administrator shall administer various aspects of the Settlement as described in paragraph 72 and perform such other functions as are specified for the Settlement Administrator elsewhere in this Agreement, including, but not limited to, effectuating the Notice Program and distributing the Settlement Fund as provided herein.

71. Defendant shall pay the Settlement Administrator directly for the Settlement Administration Costs up to a total of \$500,000.00. Settlement Administration Costs in excess of

\$500,000.00 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.

72. 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 Postcard Notice and Email 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 Settlement Class Members' 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 from the Settlement Class;
 - g. Provide weekly reports to Class Counsel and Defendant that summarizes 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 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; and
 - 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.

- n. Perform all tax-related services for the Escrow Account as provided in the Agreement.

73. The Settlement Administrator shall execute a confidentiality or non-disclosure 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.

74. The Settlement Administrator shall ensure that the information that it receives from Defendant, Class Counsel, and/or 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 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 Updated 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, Updated Class Member List, or other information to any other person, including Class Counsel, without Defendant's prior written consent.

VII. Notice to Settlement Class Members

75. **Provision of Information to Settlement Administrator.** Within thirty (30) calendar days 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 Class Member: (i) name; (ii) number of Retry NSF Fees per account through the date of Preliminary Approval; (iii) relevant refund and charge-off information through the date

of Preliminary Approval; (iv) last known e-mail address; and (v) last known mailing address (“Class Member List”). Within thirty (30) calendar days of the Effective Date, Defendant will provide the Settlement Administrator with an “Updated Class Member List” consisting of the following information, which will be kept strictly confidential between the Administrator and Defendant, for each Class Member: (i) name; (ii) number of Retry NSF Fees per account; (iii) relevant refund and charge-off information; (iv) last known e-mail address; (v) last known mailing address; (vi) whether the Account remains open; and (vii) if the Account no longer remains open, the balance remaining due and owing. The Settlement Administrator shall use this information solely for the purpose of administering the Settlement.

76. **Class Notices.** Within sixty (60) calendar days of Preliminary Approval, or by the time specified by the Court, the Settlement Administrator shall send the Class Notices in the forms attached hereto as *Exhibits 1 - 2*, or in such form as is approved by the Court, to the Class Members. The Settlement Administrator shall send the “Email Notice,” attached hereto as *Exhibit 1*, to all 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 Class Members for whom Defendant does not provided an email address to the Claims Administrator and to all 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*, Plaintiffs’ motion seeking Preliminary Approval, the Preliminary Approval Order, Plaintiffs’ motion seeking Final

Approval, and the Final Approval Order until at least ninety (90) calendar days after Final Approval. The Settlement Administrator shall send the long-form notice by mail to any Class Member who requests a copy. It will be conclusively presumed that the intended recipients received the Class Notices if the Administrator did not receive a bounce-back message and if mailed Class Notices have not been returned to the Administrator as undeliverable within fifteen (15) calendar days of mailing.

77. 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.

78. 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

79. **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. 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.

80. **Objections.** Objections to the Settlement, to the application for attorneys' fees and costs, and/or to the Service Award must be mailed 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 confirming 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.

81. **Waiver of Objections.** Except for Class Members who opt out of the Settlement Class in compliance with the foregoing, all 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 its fairness, reasonableness, and adequacy.

82. **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.

83. 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 Final Approval Order is entered. Class Counsel shall apply for an award of attorneys' fees of up to 25% of the Value of the Settlement, and reimbursement of reasonable litigation costs, to be approved by the Court. Plaintiffs' 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 25% of the Value of the Settlement, but reserves the right to oppose an application for attorneys' fees in excess of that amount. 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.

b. Service Award. Subject to Court approval, the Class Representatives shall be entitled to receive a Service Award of up to \$7,500.00 each for their role as the Class Representatives. The Service Award shall be paid from the Settlement Fund no later than 10 days

after the Effective Date.

c. Settlement Administrator's Fees and Costs. The Settlement Administrator's fees and costs, to the extent they exceed \$500,000.00, shall be paid from the Settlement Fund within 10 days after invoicing to and approval by Plaintiffs. In the event the Final Approval Order is not entered or this Agreement is terminated pursuant to Section XIII below, Defendant agrees to cover any costs incurred and fees charged by the Settlement Administrator up to \$500,000 pursuant to the Settlement 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 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 allocations of the Net Settlement

Fund and NSF Forgiveness Amount as provided in Section IX and X. The calculation of the allocations shall be performed by Settlement Class Counsel and their experts and/or the Settlement Administrator, as described below, and the implementation of the allocations contemplated by Sections IX and X 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 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: $(\text{Net Settlement Fund} / \text{Total dollar value of Retry NSF Fees}) \times (\text{Total dollar amount of Retry NSF Fees charged to that Settlement Class Member, less the dollar amount of any Retry NSF Fee Refunds and reduced by any Uncollected Retry NSF Fees})$.

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 XI.

iv. In no event shall any portion of the Settlement Fund revert to Defendant.

X. Forgiveness of Uncollected Retry NSF Fees

84. The Settlement Administrator, supervised by the Parties, shall calculate the forgiveness of the NSF Forgiveness Amount of \$20,750,000 in Uncollected Retry NSF Fees among Class Members whose Accounts are closed and who have amounts that remain due and owing to Defendant as of the Effective Date, using the following formula: (NSF Forgiveness Amount/Total Uncollected Retry NSF Fees) x (the dollar amount of the Settlement Class Members' Uncollected Retry NSF Fees, less any Retry NSF Fee Refunds).

85. The methodology provided for above 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 forgiveness that each Settlement Class Member should receive from the NSF Forgiveness Amount. The fact that this allocation formula will be used is not intended (and shall not be used) for any other purpose or objective whatsoever.

86. If any Settlement Class Member's outstanding balance on his or her Account is less than the amount of the pro rata forgiveness of Uncollected Retry NSF Fees to which he or she is entitled under the Settlement, the account balance will be adjusted to zero dollars. Under no circumstances will Defendant be required to make any cash payments as a result of the forgiveness of Uncollected Retry NSF Fees. Defendant is to apply the debt forgiveness described in this paragraph within 90 days after the Effective Date. Within 90 days of the

Effective Date, Defendant shall update any negative reporting to Chexsystems or credit reporting agencies with respect to Settlement Class Members who receive forgiveness of Uncollected Retry NSF Fees. Defendant shall notify Class Counsel once the debt forgiveness has been applied. A Settlement Class Member whose Uncollected Retry NSF Fees are less than the total Retry NSF Fees on his or her Account may receive both Forgiveness of Uncollected NSF Fees under this section and a distribution of Settlement Class Payments under Section IX.

XI. Disposition of Residual Funds

87. 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 Accountholders 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.

XII. Releases

88. 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 during the Class Period that were or could have been alleged in the Action by Plaintiffs or Settlement Class Members relating in any way to the assessment of Retry NSF Fees (“Released Claims”) 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 NSF fee practices.

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

90. With respect to the Released Claims, Plaintiffs and the 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 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME

OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

91. Thus, subject to and in accordance with this Agreement, even if the Plaintiffs and/or Class Members 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, Plaintiffs and each 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.

92. 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 Plaintiffs 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, with the exception of the forgiveness of certain Uncollected Retry NSF Fees under this Agreement. Likewise, nothing in this Agreement shall operate or be construed to release any defenses or rights of set-off or recoupment that Plaintiffs 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 Plaintiffs 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.

XIII. Termination of Settlement

93. 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 VIII, 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.

94. If all of the conditions specified in the immediately preceding paragraph are not met, then this Agreement shall be cancelled and terminated.

95. Defendant shall have the option to terminate this Agreement if 5% or more of the total Settlement Class members opt-out. Defendant shall notify Class Counsel and the Court of its intent to terminate this Agreement pursuant to this Section XIII within 10 business days after the end of the Opt-Out Period, or the option to terminate shall be considered waived.

96. 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*.

XIV. Effect of a Termination

97. 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.

98. 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.

XV. No Admission of Liability

99. 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.

100. 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.

101. 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.

102. Neither the Settlement, nor any act performed or document 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 Plaintiffs or Settlement Class Members, or of any wrongdoing or liability of the Released Parties; or (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.

103. In addition to any other defenses Class Counsel 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.

XIX. Confidentiality and Non-Disparagement

104. 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.

XX. Miscellaneous Provisions

105. 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.

106. Binding Effect. This Agreement shall be binding upon, and inure to for the benefit of, the successors and assigns of the Releasing Parties and the Released Parties.

107. 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.

108. 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.

109. 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.

110. 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.

111. 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 New York, without regard to the principles thereof regarding choice of law.

112. Counterparts. 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 wet-ink or electronic signature submitted by facsimile or through email of an Adobe PDF shall be deemed an original.

113. 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 the Court's 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.

114. Notices. All notices to Class 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.
Vess A. Miller, Esq.
1 Indiana Square, Suite 1400
Indianapolis, IN 46204
Email: ltoops@cohenandmalad.com

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

O'MELVENY & MYERS LLP
Danielle Oakley, Esq.
610 Newport Center Drive, 17th Floor
Newport Beach, CA 92660
Email: doakley@omm.com
Daniel L. Cantor, Esq.
7 Times Square
New York, NY 10036
Email dcantor@omm.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.

115. 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.

116. 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.

117. Authority. Class Counsel (for the Plaintiffs 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 Plaintiffs 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.


118. Agreement Mutually Prepared. Neither Defendant nor Plaintiffs, 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.

119. 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. Both Parties recognize and acknowledge that they and their experts reviewed and analyzed data for a subset of the time at issue and that they and their experts used extrapolation to make certain determinations, arguments, and settlement positions. The Parties agree that this Settlement is reasonable and will not attempt to renegotiate or otherwise void or invalidate or terminate the Settlement irrespective of what any unexamined data later shows. 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.

120. 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: 5/14/2021


DocuSigned by:

1A533F6DC4634ED...

Mary Jennifer Perks
Plaintiff

Dated: _____

Maria Navarro-Reyes
Plaintiff

Dated: May 14, 2021

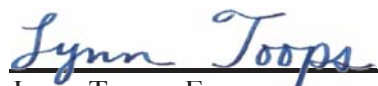


Jeffrey Kaliel, Esq.
KALIEL PLLC
Class Counsel

Dated: _____

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

Dated: May 13, 2021



Lynn Toops, Esq.
COHEN & MALAD
Class Counsel

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.

120. 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: _____

Mary Jennifer Perks
Plaintiff

Dated: May 13, 2021



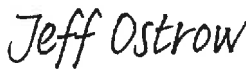
Maria Reyes (May 13, 2021 17:48 EDT)

Maria Navarro-Reyes
Plaintiff

Dated: _____

Jeffrey Kaliel, Esq.
KALIEL PLLC
Class Counsel

Dated: May 13, 2021



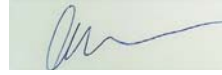
Jeff Ostrow, Esq.
KOPELOWITZ OSTROW P.A.
Class Counsel

Dated: _____

Lynn Toops, Esq.
COHEN & MALAD
Class Counsel

Dated: May 12, 2021

TD Bank, N.A.



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

Dated: May 13, 2021



Danielle Oakley, Esq.
Counsel for TD Bank