State of Montana
County of Yellowstone } ss CERTIFICATE

I hereby certify that this sheet and all attached sheets identified by impression of my Official Seal are each and all true and correct copies of originals filed in my Office in Case No DV-20-528

WITNESS my hand and Official Seal this 27 day of June 20 22

Terry Halpin
Clerk of the District Court

By _____ Deputy

CLERK OF THE DISTRICT COURT
TERRY HALPIN

2022 JUN 27 A 9:26

FILED

BY _____ DEPUTY

MONTANA ~~THIRTEENTH~~ JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY, MONTANA

BRANDY MORRIS and BRENDA GRAY, on behalf of themselves and all others similarly situated, Plaintiffs, vs. FIRST INTERSTATE BANK, Defendant.	Cause No. DV-20-528 Judge: Michael G. Moses **ORDER APPROVING CLASS ACTION SETTLEMENT AND AWARDING ATTORNEYS' FEES, EXPENSES AND CLASS REPRESENTATIVE SERVICE AWARDS**

On February 1, 2022 the Court entered an Order preliminarily approving the proposed Settlement in this case, including preliminarily certifying the proposed Settlement Classes, appointing the Class Representatives and Class Counsel for the Settlement Classes, and directing notice of the Settlement to the Settlement Classes. The Court also set a hearing to consider whether to grant final approval to the Settlement and to consider Class Counsel's application for attorneys' fees, expenses, and a service award, as well as distribution of the Net Settlement Fund to the Settlement Classes. Plaintiffs Brandy Morris, Brenda Gray, and Stacy Miller, by counsel, have now moved for final approval and for approval of the payment of attorneys' fees, expenses, and a service award from the Settlement Fund, along with approval for distribution of the Net Settlement Fund to the Settlement Class Members The Court has given due consideration to the terms of the Settlement, the exhibits to the Settlement, the motion and memorandum and declaration in support, and the record of proceedings, and now finds that the Motion For Final Approval Of Class Action

Settlement, For Service Award To Named Plaintiffs, And For Attorneys' Fees And Expenses should be and hereby is **GRANTED**.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Terms capitalized herein and not otherwise defined shall have the meanings ascribed to them in the Settlement.

2. This Court has jurisdiction over the subject matter of this lawsuit and jurisdiction over Plaintiffs and Defendant in the above-captioned case (the "Parties").

Final Approval

3. After a class action case is granted preliminary approval and notice of its terms and binding effect are given to the class members, the Court may grant final approval to the proposed settlement only after a final approval hearing and after finding that it is fair, reasonable, and adequate. Mont.R.Civ.P. 23(e)(2).

4. Montana Rule 23 is nearly identical to Federal Rule 23. Thus, the Montana Supreme Court has "looked to the federal courts for guidance" in interpretation of identical Montana rules. *In re Blue Cross & Blue Shield of Mont., Inc.*, 2016 MT 121, ¶12, 383 Mont. 404, 372 P.3d 457; *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶28, 371 Mont. 393, 310 P.3d 452.

5. Rule 23(e) "requires the district court to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corporation,* 150 F.3d 1011, 1026 (9th Cir. July 24, 1998) "Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion.'" *Id.* at 1027. The court balances the factors in *Hanlon* when deciding whether the Settlement is fair, adequate, and reasonable:

> (1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

Gutierrez-Rodriguez v. R.M. Galicia, Inc., No. 16-CV-0182 H BLM, 2017 U.S. Dist. LEXIS 170982, at *15 (S.D. Cal. Oct. 16, 2017).

6. Additionally, "[s]ubsection (e)(2) was added to Rule 23 as a part of the 2018 amendments. Fed. R. Civ. Proc. 23, *Advisory Comm. Notes*. The amended Rule 23(e)(2) factors that this Court must consider are:

> (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). "[T]he factors in amended Rule 23(e)(2) generally encompass the list of relevant factors previously identified by the Ninth Circuit." *Graves v. United Indus. Corp.*, No. 2:17-cv-06983-CAS-SKx, 2020 U.S. Dist. LEXIS 33781, at *13 (C.D. Cal. Feb. 24, 2020) (alteration in original) (internal citations omitted).

7. When a court exercises its discretion to approve a settlement, the Ninth Circuit has instructed:

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Officers for Just. v. Civ. Serv. Comm'n of City & Cty. of San Francisco, 688 F.2d 615, 625 (9th Cir. 1982)

Constitutionally Adequate Notice Was Provided

8. Under Rule 23(e)(1)(B), "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the [settlement] proposal." Likewise, for any class certified under Rule 23(b)(3)—including a settlement class—"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." Mont. R. Civ. P. 23(c)(2)(B).

9. The Court finds the Notice described in the Settlement Agreement and Preliminary Approval Order was provided, and such Notice met these content requirements and constituted the best practicable notice under the circumstances, as it reached a high percentage of the Settlement Class, who were identified through Defendant's reasonable efforts, by sending direct Email or Postcard Notice to Settlement Class Members. This Notice exceeded the requirements of constitutional due process. Thus, the notice satisfied the specific requirements of Montana Rule of Civil Procedure 23(c)(2)(B) and Federal Rule 23(e)(1)((B), sufficiently informed class members of the terms of the proposed settlement and their available options and was the best notice that is practicable under the circumstances.

The proposed Settlement is fair, reasonable, and adequate.

10. This Action alleged that Defendant assessed overdraft fees, and non-sufficient funds fees against its members in breach of Defendant's contract and in violation of Montana law. Defendant denies all of Plaintiff's allegations.

11. The Settlement Agreement is fair, reasonable, and adequate because it provides class-wide relief in the form of direct payments to Class Members, which is precisely the type of relief that Plaintiffs sought on behalf of themselves and the Classes in this lawsuit.

12. The Court finds the Settlement is the product of good-faith, informed, and arms-length negotiations between competent counsel, as the Settlement was reached in the absence of collusion in conjunction with using an experienced and highly regarded mediator, Judge Edward Infante (Ret.) of JAMS. A full day formal mediation served as the foundation for the eventual resolution of this action.

13. The Court finds that each of the relevant *Hanlon* factors evidences that the Settlement is fair, reasonable and adequate; consequently, the Settlement is deserving of Final Approval.

14. First, Plaintiffs continued to face significant risk that their claims would be dismissed in whole or in part, and faced risk on any future Motion for Summary Judgment and/or Motion for Class Certification, at trial, or on a subsequent appeal based on First Interstate's various theories and defenses. Each risk, by itself, could have impeded Plaintiffs' and the Settlement Class' successful prosecution of these claims at trial and in an eventual appeal—resulting in zero benefit to the Settlement Class. *Dennis v. Kellogg Co.*, 09-CV-1786-L (WMc), 2013 U.S. Dist. LEXIS 163118, at *9 (S.D. Cal. Nov. 14, 2013) ("[T]he settlement avoids the risks of extreme results on either end, i.e., complete or no recovery. Thus, it is plainly reasonable for the parties at this stage to agree that the actual recovery realized and risks avoided here outweigh the opportunity to pursue potentially more favorable results through full adjudication").

15. Second, continued litigation here would be difficult, expensive, and time consuming. Recovery by any means other than settlement would likely require additional years of

litigation in this Court and Montana appellate courts. The completion of merits and expert discovery, class certification briefing, dispositive motions, trial, post-trial motions, and possible appeals would entail substantial time and significant expense for all Parties. The Settlement provides immediate and substantial benefits to thousands of First Interstate customers.

16. Third, whether the Action would have been tried as a class action is also relevant in assessing the Settlement's fairness. As the Court had not yet certified a class when the Settlement was executed, it is unclear whether certification would have been granted.

17. Fourth, the Settlement is the product of arm's-length negotiations conducted by the Parties' experienced counsel and under the supervision of a reputable and skilled mediator. As a result of these negotiations, the Parties have reached a Settlement that Class Counsel believes to be fair, reasonable, and in the Settlement Class' best interest. Class Counsel's assessment in this regard is entitled to considerable deference. Further, in light of the risks inherent in continuing this class action litigation, the proposed Settlement—which Plaintiffs have represented to equate to a recovery of 53% of best-case damages in this litigation—constitutes an excellent recovery. Furthermore, the changes to the Bank's disclosures may help Settlement Class Members and other customers avoid future fees.

18. Fifth, the Court finds the extensive information provided prior to the mediation process not only allowed the Parties to sufficiently understand the nature of their positions, but also laid the groundwork for arm's length-negotiations before the mediator that ultimately resulted in the Settlement. Additionally, Class Counsel relied on their experience presenting expert evidence and litigating the key legal issues in other bank fee cases to assist in evaluating the merits of this case. The Court finds the Settlement was reached with knowledge of the legal risks and

merits of these claims. The Parties were fully aware of the issues and risks associated with the respective claims and defenses.

19. Sixth, a great deal of weight is accorded to the recommendation of counsel, who are the most closely acquainted with the facts of the underlying litigation. *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1174 (S.D. Cal. 2007); *Nat'l Rural Telecomm. Coop. v. DirectTV, Inc.*, 221 F.R.D. at 528 (C.D. Cal. Jan. 5, 2004). Through the lens of its significant experience litigating class claims and familiarity with this case, Class Counsel is of the opinion that the Settlement in this case is fair, reasonable and adequate.

20. Seventh, no governmental actor is relevant to this action, rendering this factor immaterial to the settlement approval process.

21. Eighth, there are no Settlement Class members who opted-out.

22. Further, no Settlement Class Member has objected.

23. This small number of opt-outs and objections evidences significant support for the Settlement from Settlement Class Members.

24. Lastly, for the reasons provided in the Court's preliminary approval Order, final certification of the Settlement Classes here is appropriate.

The requested attorneys' fees, expenses, and service award are reasonable and approved.

25. Class Counsel has requested that from the Settlement Fund they be paid $782,696 in attorneys' fees and $14,965.52 in expenses. In addition, Class Counsel has requested that the Class Representatives Brandy Morris and Brenda Gray, and Stacy Miller, be paid from the Settlement Fund service awards in the amount of $10,000 each. Finally, Class Counsel has requested that the Court approve the method for distributing the Net Settlement Fund to the

Settlement Class members. For the reasons set forth below, the Court approves each of Class Counsel's requests.

Attorneys' Fees

26. "In a class action an award of attorney fees is contingent upon success, and upon the existence of a fund from which the fees can be paid, and that the evaluation of settlement must be fair, reasonable, and in the best interests of all affected." *As'n of Unit Owners of Deer Lodge Condominium v. Big Sky*, 242 Mont. 358, 362-63, 790 P.2d 967, 970 (1990). The Montana Supreme Court recognizes "two primary methods of calculating reasonable fees: the 'lodestar method,' which involves multiplying the number of hours reasonably spent on the case by an appropriate hourly rate in the community for such work, and the 'percentage of the recovery method,' which authorizes fees to be paid from a percentage of a common fund or a contingency fee agreement. *Gendron v. Mont. Univ. Sys.*, 2020 MT 82, ¶ 12 (internal citations omitted.); *see also Wight v. Hughes Livestock Co.*, 204 Mont. 98, 110, 664 P.2d 303, 309-10 (1983) ("Ordinarily, when lawyers undertake a representation on a contingency basis, they bargain for a percentage of the recovery."); *Mt. W. Farm Bureau Mut. Ins. Co. v. Hall*, 2001 MT 314, ¶ 14 11 (providing that a party who creates or preserves a common fund benefiting ascertainable, nonparticipating beneficiaries of the litigation is generally entitled to reimbursement of his or her attorney fees from that common fund).

27. An attorneys' fees award as a percentage of a common fund established by a class action settlement is well-established in Ninth Circuit jurisprudence and is eminently appropriate here. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Paul, Johnson, Alston & Hunt v. Graulty, 886* F.2d 268, 272 (9th Cir. 1989); *In re Pacific Enterprises Sec. Litig.*, 47 F.3d

373, 379 (9th Cir. 1995). Here, the Court finds that the "percentage of the fund" method is preferable for determining an attorneys' fee award. The Settlement creates a common fund in a class action for which there is no applicable fee-shifting statute. Thus, Class Counsel may only be compensated from the fund created as a result of their work.

28. Class Counsel's request here for 1/3 of the Settlement Value is fair and reasonable, as has also been found in other common fund cases in Montana. *See, e.g., Sones v. Rimrock Engineering, Inc.*, DV 19-0575 (Thirteenth Jud. Dist. Ct. 2020) (Judge Todd awarding 1/3 of $3.45 million common fund as reasonable fees); *Hageman v. AT&T Mobility LLC*, No. CV 13-50-BLG-RWA, 2015 U.S. Dist. LEXIS 25595 (D. Mont. 2015) (Magistrate Judge Anderson awarding 1/3 of $45 million common fund as reasonable fees).

29. The Montana Supreme Court has articulated the following nonexclusive factors typically used to determine a reasonable fee award under the percentage of the recovery calculation: (1) The novelty and difficulty of the legal and factual issues involved; (2) The time and labor required to perform the legal service properly; (3) The character and importance of the litigation; (4) The result secured by the attorney; (5) The experience, skill, and reputation of the attorney; (6) The fees customarily charged for similar legal services at the time and place where the services were rendered; (7) The ability of the client to pay for the legal services rendered; and (8) The risk of no recovery. *Gendron v. Mont. Univ. Sys*, ¶ 14.

30. As discussed below, those factors support the 1/3 fee requested by Class Counsel. Moreover, to date no Class Members filed an objection specifically directed to the amount of attorneys' fees and expenses allowed under the Agreement, indicating the Class's lack of opposition to the requested fee award. The Court notes Justin Benn filed a purported objection to

the Settlement. However, that objection, which has been overruled by the Court, did not challenge the attorneys' fees and costs requested by Class Counsel.

31. First, this is a breach of contract case involving bank processing and electronic payment practices, including the rules of the National Automated Clearinghouse Association ("NACHA"). First Interstate adamantly denied liability and expressed an intention to defend itself through trial. This is a rapidly developing area of jurisprudence. Indeed, while many cases with similar theories of liability have been successful at the pleadings stage, other courts have reached the opposite conclusion. The Court finds that Class Counsel's experience handling similar bank fee cases and fulsome understanding of the related legal issues helped them successfully advance this case and procure a beneficial result for the Classes. The complex nature of this case warrants approval of the requested fee award.

32. Second, the Court finds that both of the firms comprising Class Counsel have expended a significant amount of their time and resources prosecuting this case. Specifically, Class Counsel has spent numerous hours reviewing data and documents, communicating with the five Class Representatives, communicating with opposing counsel, and briefing a complex legal case. They spent numerous additional hours negotiating and drafting settlement documents, and explaining the terms of the settlement to individual class members. Class Counsel took on this case with high risk concerning not only the result of the case, but also how much time and money would need to be invested to get a result.

33. Third, given the complex legal issues in this case and the expert costs, it would have been virtually impossible to prosecute the Plaintiffs' claims on individual bases. The cases would most likely not be brought because the net recovery to an individual plaintiff would not be worth the expense.

34. Fourth, the benefit conferred by the Settlement is substantial and valued at $2,348,090.00, not counting the improvements to First Interstate's disclosures in charging and disclosing its fees, which, while not attempted to be quantified, provides an important additional benefit to Class Members going forward. The recovery (monetary and forgiveness of charged off fees) represents approximately 53% of the total alleged damages in this case, and it will be distributed directly to Class members, with no need to submit a claim, and no reversion of any funds to Defendant. Even putting aside the significant litigation risk, the Settlement is a more than adequate recovery. The Settlement provides significant benefits to Class Members in a difficult case with many litigation obstacles ahead.

35. Fifth, the Court finds the combined experience, skill and reputation of Class Counsel Jeffrey Kaliel of Kaliel Gold, Taras Kick of The Kick Law Firm APC, and Triel Culver of Edwards & Culver, weighs in favor of the requested award. Together, Class Counsel possessed an expertise in both Montana law and extensive experience litigating similar overdraft fee and other class action cases, and used that expertise to attain the best possible result for the Settlement Classes.

36. Sixth, the Court finds that consistent with standard-contingent fee agreements in individual cases, were the case to settle on an individual basis, Class Counsel took on this case with no guarantee they would receive any compensation for their work, which occupied significant resources at Class Counsel firms. Public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that might be paid nothing at all for their work. This practice encourages attorneys to assume this risk and allows plaintiffs who would otherwise not be able to hire an attorney to obtain competent counsel. *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994).

Class Counsel's representation of Plaintiffs and the Settlement Class supports the standard 33% rate at which contingent fee attorneys regularly contract. Moreover, the requested one-third fee has generally been awarded in similar bank fee litigation class action across the country.

37. Seventh, it would be cost-prohibitive for any individual class member to pay, out-of-pocket, for the time and costs expended by Class Counsel in the prosecution of this case, as well as the significant expense of experts.

38. Eighth, Class Counsel devoted their time and energy to this matter, instead of pursuing other income, all at the risk of never getting paid and, at best, being paid at some point potentially many years down the road. If Defendant prevailed on the merits, on class certification, or on appeal, Class Counsel might have recovered nothing for the time and expense they invested in representing the Settlement Classes.

39. Thus, all of these factors support the Court's discretion in approving the requested attorneys' fee amount of one-third of the value of the settlement.

Litigation Expenses

40. An attorney is entitled to "recover as part of the award of attorneys' fees those out-of-pocket expenses that would normally be charged to a fee paying client." *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (citation omitted). Class Counsel's declarations detail each of the claimed and recoverable costs and expenses, separating each by category. Because the costs and expenses are small relative to the common fund amount, and are facially reasonable and necessary, the Court will award the requested $14,965.52 in expenses.

Service Awards

41. Service awards to the Class Representatives are typical in class action cases and are intended to compensate class representatives for work done on behalf of the class, to make up for

financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general. See Albert Conte and Herbert B. Newberg, 4 NEWBERG ON CLASS ACTIONS, §11.38 (4th ed.) Awards are generally sought after a settlement or verdict has been achieved.

42. Plaintiffs request a service award of $10,000 each to be paid from the Settlement Fund.

43. The Court finds that each of the Class Representatives diligently pursued their claims on behalf of the Classes. Had they failed to prevail in this case, there would be potential risk to their reputations. They should be commended for taking action to protect the interests of tens of thousands of First Interstate accountholders who were allegedly affected by the Bank's practices, on top of their own individual claims. Plaintiffs' efforts have created significant financial benefits for the Class.

THEREFORE, THE COURT FINDS AND ORDERS AS FOLLOWS:

1. The Court finds that the Settlement is fair, reasonable, and adequate and hereby GRANTS FINAL APPROVAL TO THE SETTLEMENT.

2. The Court approves and orders payment of attorneys' fees from the Settlement Fund in the amount of $782,696 to Class Counsel.

3. The Court approves and orders reimbursement of expenses from the Settlement Fund in the amount of $14,965.52 to Class Counsel.

4. The Court approves and orders payment from the Settlement Fund of a service award in the amount of $10,000 each to the Class Representatives Brandy Morris, Brenda Gray, and Stacy Miller.

5. The Court approves the plan of distribution of the Net Settlement Fund to the Settlement Classes and orders the parties to proceed with distribution as set forth in the Settlement. Any unclaimed funds following distribution as provided in the Settlement shall be paid in equal shares to the Montana Legal Services Association and United Way of Montana.

6. Upon the Effective Date, Defendants are released from all claims as set forth in the Settlement.

7. This Order is a final judgment as it disposes of all claims against all parties.

8. The Court shall retain jurisdiction for purposes of enforcing the terms of the Settlement and this Order.

ACCORDINGLY, THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED.

Dated: June 27, 2022

The Honorable Michael Moses
Judge of District Court

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