IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MATTHEW DOMANN, individually and on behalf of all those similarly situated,

Plaintiffs,

v.

SUMMIT CREDIT UNION, and DOES 1-100,

Defendants.

OPINION AND ORDER

18-cv-167-wmc

Plaintiff Matthew Domann brings this putative class action alleging, among other things, that defendant Summit Credit Union breached its contracts with customers and violated the Electronic Fund Transfer Act, Regulation E, 12 C.F.R. § 1005.17. (Compl. (dkt. #1).) Before the court is plaintiffs' unopposed motion for preliminary approval of a class action settlement agreement, including certification of two Rule 23 Classes, approval of a proposed notice plan, proposed notice to class members, and proposed appointment of Kurtzman Carson Consultants to provide notice and administer the program outlined in the settlement agreement. (Dkt. #52.) For the reasons below, the court will grant the motion. The court will further hold a fairness hearing on April 13, 2020, at 1:00 p.m.

BACKGROUND

A. History of the Case

Plaintiff filed this class action on March 9, 2018, alleging that defendant breached certain account agreements with its members by imposing overdraft fees based on the "available balance" -- a subset of the actual account balance from which money has been

deducted by placing holds on funds earmarked for pending transactions that have not yet posted -- as opposed to the "actual balance" -- the money actually in the account, sometimes also called the "ledger balance." Plaintiff also alleged that defendant violated Regulation E of the Electronic Funds Transfer Act, 12 C.F.R. § 1005.17, by enrolling credit union members in its overdraft program for subject transactions without first obtaining their affirmative consent following a complete and valid disclosure of the terms of the program. Finally, for business account class members, plaintiff alleged that defendant's contract terms did not allow such fees to be charged without affirmative opt-in by the business account holder, but defendant charged such fees anyway.

Based on this conduct, plaintiff asserted causes of action for: (1) Breach of the Opt-In Contract; (2) Breach of the Account Contract -- All Accounts; (3) Breach of the Account Contract – Business Accounts; (4) Breach of the Implied Covenant of Good Faith and Fair Dealing; (5) Unjust Enrichment/Restitution; (6) Money Had and Received; and (7) Violation of Electronic Fund Transfers Act (Regulation E).[1] (Compl. (dkt. #1).) On May 30, 2018, defendant filed a motion to dismiss the claims for Breach of the Opt-In Contract, Breach of the Account Contract, Unjust Enrichment, Money Had and Received, and Violation of the EFTA. Magistrate Judge Stephen Crocker, presiding at that time, granted the motion on September 13, 2018, agreeing with defendant that its contracts with customers made clear SCU would assess overdrafts based on the member's available balance rather than the ledger balance. (Op. and Ord. (dkt. #29).) As a result of Judge

[1] The complaint also stated a claim for violation of the Wisconsin Deceptive Trade Practices Act, but the parties do not mention this claim in their settlement papers.

Crocker's order, only Counts III (Breach of the Account Agreement -- Business Accounts) and IV (Breach of the Implied Covenant of Good Faith and Fair Dealing as to both consumer and business accounts) remained.

After defendant answered the complaint as to these claims, plaintiff deposed two of defendant's Rule 30(b)(6) witnesses and propounded interrogatories and requests for production of documents. On April 15, 2019, plaintiff also filed a motion for class certification with supporting documents. (Dkt. #42.) After protracted negotiations, the parties subsequently entered into a proposed settlement agreement, subject to the court's approval. (Settlement Agreement and Release, Exh. 1 to Decl. of Taras Kick (dkt. #62).) On September 30, 2019, the parties supplemented their submissions in response to certain questions posed by the court. (Dkts. ## 63-66.)

B. Proposed Settlement

The parties' proposed settlement agreement provides that defendant will establish a $1 million settlement fund to resolve participating class members' claims, while denying any liability or wrongdoing. Each plaintiff is then to receive pro-rated settlement funds based on the number of overdraft charges he or she incurred during the relevant time period.

The proposed settlement applies to any current or former member of Summit Credit Union who is in either of two classes: (1) the Consumer Account Sufficient Funds Class; or (2) the Business Account Class. The Consumer Account Sufficient Funds Class is defined as

> those members of Defendant who were assessed an Overdraft Fee on any type of payment transaction from January 2, 2013, through March 9, 2018, against their consumer accounts if, at the time such fee was assessed, the member had sufficient money in his or her ledger balance to cover the transaction that resulted in the fee.[2]

The Business Account Class is defined as

> those members of Defendant who had business accounts and did not opt-in to overdraft protection for ATM or non-recurring debit card transactions but were nevertheless assessed an Overdraft Fee for an ATM or non-recurring debit card payment transaction against their business accounts from January 2, 2013, through March 9, 2018.

Based on his review of class data provided by defendant, class counsel's expert has identified 22,048 members of the Consumer Account Sufficient Funds Class and 1,384 members of the Business Account Class. The Consumer Account Sufficient Funds Class collectively incurred 107,818 overdraft fees of $25 each for a total of $2,695,450. The Business Account Class collectively incurred 16,100 fees of $25 each for a total of $402,500. (Dec. of Arthur Olsen (dkt. # 65) ¶¶ 8, 9.)

The settlement provides for three benefits to class members. First, defendant will pay $1,000,000, with no reversion of any residue to SCU. Second, defendant has changed

[2] The parties had originally agreed that the class period for both classes would run from March 9, 2012, to March 9, 2018, but later agreed to shorten the class period to begin on January 2, 2013, after discovering that data from the preceding nine-month period had not been saved in defendant's account transaction databases, making retrieval and analysis of this data very time-consuming and costly. (*See* dkt. ## 64, 67.) At a hearing before the court on November 19, 2019, class representative Matthew Domann indicated that he objected to the shortening of the class period, as well as a number of other actions by class counsel. (*See* Text Only Order Nov. 19, 2019 (dkt. # 68).) The court adjourned the hearing and directed plaintiff and his counsel to confer privately and inform the court as to how best to proceed. On November 26, 2019, plaintiff Domann and his counsel filed a joint status report indicating that Domann (1) reaffirmed his approval of the class action settlement and (2) consented to the shortening of the class period to January 2, 2013, through March 8, 2018. (Dkt. # 69.)

how it assesses overdraft fees in a manner approximating that advocated by plaintiff in this lawsuit and has agreed to maintain this practice for a minimum of three years. The parties represent this change will result in additional savings to class members of $400,000 per year, for a total of $1,200,000. Third, defendant has improved its disclosures to describe better how it determines whether to assess an overdraft fee on a transaction.

Distribution of the settlement fund to class members will occur as follows: after deducting up to one-third for attorneys' fees, litigation costs not to exceed $45,000, administrative costs,[3] and a possible $10,000 service award to the named plaintiff, the amount remaining in the settlement fund for distribution to class members will be $563,166.67. This amount will be divided into two equal halves: one for the Consumer Account Sufficient Funds Class and one for the Business Account Class. After division, each half shall be distributed to members of the respective classes on a *pro rata* basis, based on the number of eligible overdraft fees they incurred. For each such overdraft fee, all of which were originally $25, Consumer Account Sufficient Funds Class members should expect to receive $2.61. For each alleged improper overdraft fee incurred by the Business Account Class, class members should expect to receive $17.49. (Supp. Dec. of Arthur Olsen (dkt. # 66) ¶¶ 7-9.)

Although there are fewer members and fees at issue in the Business Accounts class, resulting in a larger award per overdraft fee assessed, the parties represent that the difference in the size of the award reflects differences in the relative strength of the legal

[3]The claims administrator, Kurtzman Carson Consultants LLC, has estimated its costs will be $43,427, and provided there is no significant change to the scope of work, has agreed to cap its administration costs at $48,500. (Decl. of Taras Kick (dkt. #55) ¶ 11.)

claims pertaining to each class. Specifically, Judge Crocker rejected plaintiff's principal legal theory underlying the claims pertaining to the Consumer Account Sufficient Funds Class. Although the claim for Breach of the Implied Covenant of Good Faith and Fair Dealing survived with respect to this class, plaintiff notes that the claim rested essentially on the same contract language interpretation that Judge Crocker had rejected in dismissing the other claims, and thus was unlikely to succeed if litigation progressed. In contrast, the surviving claim with respect to the Business Account Class is based on different contract language than that at issue with respect to the Consumer Account Class and stood a better chance of succeeding on the merits.

All class members will receive a direct distribution without the need to make any claim whatsoever, although any class member who wishes to opt out may do so. The distribution to class members will be (1) deposited directly into their accounts if they are current members of defendant or (2) sent via check mailed to the class members' residence of record if they no longer have an account with defendant. Class members will have 180 days to negotiate the check, after which the payment will revert to the residue of the fund.

Under no circumstance will any portion of the settlement fund revert to defendant, including any funds from uncashed checks. Those remaining funds will be distributed to charitable organizations concerned with consumer protection issues consistent with the interests of the class, as agreed upon by counsel for the parties and approved by the court.

Finally, counsel may petition for fees in an amount up to one-third the value of the settlement. Class counsel has indicated that they intend to apply for attorney's fees of $333,333 or one-third of the "new money" component of the settlement. In addition,

Domann, as the class representative, will seek approval of an incentive award of $10,000. The settlement calls for the appointment of a claims administrator who will be responsible for sending notice of the proposed settlement to the class members, calculating each class member's portion of the settlement fund and distributing settlement payments.

OPINION

I. Class Certification

While the parties jointly stipulate to certifying the proposed classes, certification is only appropriate following a rigorous analysis concerning whether the proposed class satisfies Federal Rule of Civil Procedure 23. *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 373 (7th Cir. 2015). The plaintiffs have the burden to show that a class should be certified. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006). This analysis encompasses a two-part test: (1) whether the proposed class meets all four prerequisites of Rule 23(a) to establish the class; and (2) whether the class can be maintained under one of the subsections of Rule 23(b). *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). The court will address the Rule 23(a) prerequisites before considering Rule 23(b)(3).

A. Rule 23(a) Prerequisites

The prerequisites under Rule 23(a) -- numerosity, commonality, typicality and adequacy of representation -- determine whether a class may be established. Fed. R. Civ. P. 23(a). First, a class must be so numerous that it is reasonable to believe that joinder

would be impracticable. *Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities Inc.*, 747 F.3d 489, 492 (7th Cir. 2014). The Seventh Circuit has previously concluded that a forty-member class may be sufficient to satisfy the numerosity prerequisite. *Mulvania v. Sheriff of Rock Island Cty.*, 850 F.3d 849, 859 (7th Cir. 2017). Here, there are two putative classes: (1) the Consumer Account Sufficient Funds Class, consisting of 22,048 members; and (2) the Business Account Class, consisting of 1,384 members. Heeding the Seventh Circuit's guidance, the court agrees that individually joining members of classes this large would be impractical. Accordingly, this prerequisite is met with respect to both proposed classes.

Second, a class must have questions of law or fact in common. Fed. R. Civ. P. 23(a)(2). A class must not just suffer violation of the same provision of law, but instead have a common injury whose resolution is "central to the validity of each one of the claims in one stroke." *Lacy v. Cook Cty., Ill.*, 897 F.3d 847, 865 (7th Cir. 2018) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). Plaintiff points out that: (1) all members of the Consumer Account Sufficient Funds Class were provided with the Opt-In Contract, which set forth the operative terms by which defendant would determine whether the balance in a member's checking account was sufficient to cover a transaction; and (2) defendant admits that it applied its overdraft fee program to these members uniformly and systematically. Moreover, for the Fourth Cause of Action, all class members assert that defendant breached the convenant of good faith and fair dealing by assessing overdraft fees using a method not clearly explained in the Opt-In Contract. Commonality exists because these issues are central to the resolution of each plaintiff's claim and can be

answered "in one stroke" for all plaintiffs. With respect to the Business Account Class, questions common to all class members are (1) whether the Business Account Agreement required that overdraft fees not be charged unless the account holder affirmatively opted in; and (2) whether defendant nonetheless charged such fees. Again, these questions are central to each member of this class and can be answered in one stroke for all plaintiffs.

Third, typicality requires that the proposed class representative have claims that are typical of the claims of the proposed class, such that his claim arises from the same event or course of conduct that gives rise to the claims of other class members. Fed. R. Civ. P. 23(a)(3); *Lacy*, 897 F.3d at 866 (citing *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)). Typicality ensures that a plaintiff litigating his or her own self-interest will also advance the interests of the class. *Lacy*, 897 F.3d at 866 (citing *Oshana*, 472 F.3d at 514). The typicality requirement is satisfied here because each plaintiff's claim, including Domann's, arises from defendant's alleged improper charging of overdraft fees pursuant to its uniform, standardized and automated practices. Domann entered into the same uniform Membership Guide and Account Agreement as did other members of the Consumer Accounts Sufficient Funds class, and he was assessed an overdraft fee by defendant's automated software system despite having sufficient money in his ledger balance to cover the transaction that resulted in the fee, as were the other class members. Domann's claims with respect to his Business Account with defendant are also identical to those of the other members of the Business Account Class: he alleges that defendant breached its Membership Guide and Account Agreement by automatically enrolling his business into overdraft coverage for ATM and one-time debit transactions and then

charging his business account overdraft fees, both in violation of the Agreement's terms requiring affirmative opt-in to overdraft coverage of these transactions. Redress of Domann's claims will resolve not only his claims but those of the members in each class, and therefore typicality is satisfied.

Fourth, adequacy requires the putative class representative and class counsel to protect the interests of the proposed class fairly and adequately. Fed. R. Civ. P. 23(a)(4). In assessing the adequacy of the class' representation, the court must consider whether the named plaintiff "(1) has antagonistic or conflicting claims with other members of the class; (2) has sufficient interest in the outcome of the case to ensure vigorous advocacy; and (3) has counsel that is competent, qualified, experienced and able to vigorously conduct the litigation." *Wahl v. Midland Credit Mgmt., Inc.*, 243 F.R.D. 291, 298 (N.D. Ill. 2007). The burden of establishing this standard is "not difficult." *Murray v. New Cingular Wireless Serv., Inc.*, 232 F.R.D. 295, 300 (N.D. Ill. 2005).

Here, Matthew Domann is adequate to represent both of the proposed classes because he has the same interest as both the Consumer Sufficient Account Class and the Business Account Class members: he was allegedly injured and seeks compensation for the same alleged failures of defendant as the other class members. Domann understands that he is pursuing this case on behalf of all class members similarly situated, understands that he has a duty to protect the absent class members, and has been an active participant in the litigation.

That said, Domann *might* have a conflict because, as a member of both classes, he can expect a larger recovery per overdraft fee as a result of his membership in the Business

Account Class, which could potentially affect his ability to advocate vigorously for the interests of the Consumer Sufficient Account Class. As class counsel has explained, however, Judge Crocker's dismissal of the bulk of the claims asserted on behalf of the Consumer Sufficient Account Class presents a fair and logical reason to have agreed to a lower per-overdraft fee recovery than that inuring to the Business Account Class. Moreover, having had the opportunity to address Mr. Domann in person and hear him speak at a telephonic hearing, the court is persuaded that he has a full and complete understanding of the claims, defenses, and issues at stake in this case. For all these reasons, the court is satisfied that he is an adequate representative for both classes in this case.

As to counsel's adequacy, co-lead attorneys Richard McHune and Taras Kick have been appointed class counsel in numerous state and federal class actions litigating similar overdraft practices as those involved in this case, demonstrating their qualification and experience to represent the proposed class. (Dec. of Richard McCune (dkt. # 56) ¶ 6; Dec. of Taras Kick (dkt. # 55) ¶3.) Since all the Rule 23(a) prerequisites are met, the court turns to superiority and predominance, which are required under Rule 23(b)(3).

B. Rule 23(b)(3) Requirements

The Rule 23(b)(3) requirements determine whether an established class may be maintained. Fed. R. Civ. P. 23(b). Under Rule 23(b)(3), certification requires the class have "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id*. Relevant

considerations include: class members' interest in individually litigating their claims, the extent and nature of class members' preexisting litigation regarding the controversy, the desirability of concentrating the litigation in a particular forum, and the difficulties of managing a class action. *Id*.

Predominance exists where a class representative's general allegations and common evidence establishes a prima facie case for the class. *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1060 (7th Cir. 2016) (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005)). The presence of individual questions does not prevent a common issue from predominating unless those individual questions overwhelm the questions common to the class. *Bell*, 800 F.3d at 378–79; *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 468 (2013).

Here, common questions concerning how to interpret defendant's contracts predominate over any individual questions. There is no dispute over the method by which which defendant charged overdraft fees to members of either class. So far as it appears, there is also no dispute that defendant automatically enrolled Business Account Class members into its overdraft program. The predominating issues in this case are whether the contracts permitted defendant to take these actions. While the ultimate amount of damages to any plaintiff would depend on how many overdraft charges that individual incurred, the threshold question of whether defendant lawfully imposed such charges predominates and is common to all the plaintiffs.

The other requirement is that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). This requirement is intended to ensure that a class action is the preferred method to "achieve

economies of time, effort, and expense, and promote uniform decisions as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 759 (7th Cir. 2014) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997)).

Here, the two classes of plaintiffs all claim the same injury under the same contracts. Therefore, a single proceeding to determine whether defendant breached the covenant of good faith and fair dealing by charging overdraft fees to class members based on the member's "available balance" rather than the ledger balance is superior when compared to the possibility of duplicative, individual adjudication of each plaintiff's claim. Likewise, a single proceeding to determine whether defendant breached its contract with Business Account holders by charging overdraft fees when those account holders had not opted in to overdraft coverage is superior to adjudicating the claim of each Business Account holder separately.

Accordingly, since the Rule 23(a) and Rule 23(b)(3) requirements are satisfied, class certification is granted. Plaintiff Matthew Domann is appointed class representative and McCune Wright Arevalo, LLP, and The Kick Law Firm, APC, are appointed class counsel.

II. Preliminary Settlement Approval

Settlement approval begins with a preliminary determination whether the proposed settlement is "within the range of possible approval." *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982). Following preliminary approval, the second step is a fairness hearing to give class members an opportunity to be heard. *Id.*

A district court may approve a settlement that is fair, reasonable and adequate. Fed. R. Civ. P. 23(e)(2). Considerations for court approval include the strength of the plaintiffs' case compared to the settlement offer; the complexity, length, and expense of further litigation; any opposition to the settlement; the opinion of competent counsel; and the stage of the proceedings and the amount of discovery completed. *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (citing *Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996)).

The first and primary concern is the strength of the plaintiffs' case as compared to the proposed settlement. *Kaufman v. Am. Express Travel Related Servs.*, 877 F.3d 276, 284 (7th Cir. 2017). This factor does not instruct district courts to resolve the merits of the controversy, but instead to establish whether the settlement "reasonably reflects the relative merits of the case." *Id.* at 285. As described above, this case really presents two cases in one: (1) the case involving the Consumer Account Sufficient Funds class, which claims that defendant's method of assessing overdraft fees by using the "available" balance in a member's account as opposed to the ledger balance is in violation of defendant's contracts with its members; and (2) the case involving the Business Account class, which makes this same claim *as well as* a claim that defendant breached its Business Account Contract with its members by automatically enrolling them into the overdraft program without first obtaining their consent. At this stage of the litigation, the first case stands on shaky legal ground, Judge Crocker having dismissed all relevant causes of action except the fourth, which alleges a breach of the Covenant of Good Faith and Fair Dealing with respect to both the consumer and business accounts. Moreover, the likelihood of plaintiff

succeeding on this remaining claim is slim, given that, at least with respect to the consumer accounts, it rests on the same theory as the already-dismissed claims.

The case involving the Business Accounts class is stronger. Defendant did not move for dismissal of the Third Cause of Action, which asserts, in part, that defendant breached its contracts by automatically enrolling business account members in the overdraft protection program, even though its contracts promised that it would not do so. Nor did defendant move for dismissal of the Fourth Cause of Action alleging breach of the covenat of good faith and fair dealing. Defendant's litigation position suggests that Business Account class members stand a fair to good chance of succeeding on their claim regarding the automatic enrollment in the overdraft protection program.

Considering the relative merits of the different claims, the court is satisfied at this preliminary stage that the proposed settlement is fair, adequate and reasonable. Under the settlement, Business Account class members can expect to receive $17.49 for each $25 overdraft fee incurred during the relevant time period, or approximately 70 percent of their actual damages. This reflects a reasonable compromise in light of the remaining burden on plaintiffs to show that defendant's contracts with business account members did not permit it to impose overdraft fees based on ATM or non-recurring debit card transactions when these members did not opt-in to overdraft fees for these transactions, the costs of continued litigation, and the risk of no recovery at all.

Consumer Account Sufficient Funds class members can expect to receive $2.61 for each $25 fee incurred. In light of the fact that the court has already rejected the claims of these class members on the merits, a 10 percent recovery is fair and reasonable. Appealing

the court's ruling would be expensive, time-consuming, and not certain to yield a different result. Indeed, even without the Judge Crocker's adverse rulings, a 10 percent recovery would not necessarily be unreasonable. *See In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1014 (N.D. Ill. 2000) (quoting *Isby*, 75 F.3d at 1200 (in evaluating a proposed settlement, the court must recognize that the "'essence of settlement is compromise'" and will not represent a total win for either side)); *Van Lith v. iHeartMedia + Entm't, Inc.*, No. 1:16-CV-00066-SKO, 2017 WL 4340337, at *12 (E.D. Cal. Sept. 29, 2017) ("'It is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial.'") (citations omitted).

Under the settlement, funds will also be distributed automatically, with no need for a claim form, to the class members. For those class members currently holding accounts with defendant, the funds will be deposited directly into their accounts. Funds will be sent via check mailed to the class members' residence of record if they no longer have an account with defendant. This procedure is an efficient, claimant-friendly method of distributing the settlement funds.

In addition to agreeing to pay $1 million, defendant has also agreed as part of the settlement to: (1) change its method for assessing overdraft fees to almost the method that plaintiff contended in this lawsuit was the proper method; and (2) improve its disclosures to better explain how it determines whether to assess an overdraft fee on a transaction. Thus, in addition to providing compensation to class members who already incurred overdraft fees as a result of defendant's practices, the settlement protects those class

members who are still members of defendant from incurring fees in the future, thereby adding to its benefit for at least some class members.

The complexity, length, and expense of further litigation also weigh in favor of settling. Matters likely to be contested by the parties should this case proceed include: (1) the appropriateness of class certification; (2) whether the remaining causes of action could be dismissed in whole or in part on summary judgment; and (3) should any portion of plaintiff's claims survive summary judgment, a possible trial on the merits. Further litigation to resolve these issues involves expense to both parties, while the proposed settlement gives class members a reasonable proportion of their alleged damages without the hardships of continuing litigation. Therefore, this factor weighs in favor of the proposed settlement.

The court cannot yet consider opposition to this settlement because class members have not yet been notified of the proposed settlement. However, the proposed notice to class members clearly outlines how and why class members might want to object or be excluded from the settlement. (*See* Proposed Notice (dkt. #62-1) Ex. 1 at 5 ("You can object to the settlement or any part of it that you do not like . . . To object, you must send a written document to the Claims Administrator" and the Court.)) Because there is a process for class members to still oppose the settlement at this stage, this factor does not weigh against preliminarily approving the settlement.

Finally, the settlement was reached through arm's-length negotiations with experienced counsel after pretrial motions practice and rigorous discovery, entitling it to a strong presumption of fairness. *Great Neck Capital Appreciation Inv. P'ship, L.P. v.*

PricewaterhouseCoopers, L.L.P., 212 F.R.D. 400, 410 (E.D. Wis. 2002). Therefore, the competency of class counsel and stage of these proceedings also favor preliminarily approving the settlement here. Because the factors show that the parties' proposal is fair, reasonable and adequate, the court will approve the preliminary class action settlement and authorize the mailing of notice as detailed below.

III. Incentive Award and Attorneys' Fees

The court will next briefly address the validity of the named plaintiff's incentive award and counsel's request for attorneys' fees. The parties have agreed to allocate named plaintiff Matthew Domann an incentive award of $10,000. An incentive award can be explained as a form of compensation for the extra work a named plaintiff performs in class action lawsuits. *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 410 (7th Cir. 2000). The appropriate amount of an incentive award depends on "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 834 (7th Cir. 2018) (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)). Plaintiff's counsel indicates that Domann has provided key information and assistance in litigating this matter, gathering documents, attending depositions, and participating in settlement discussions. (Kick Decl. (dkt. # 55) ¶ 9.) This court agrees that based on Domann's assistance to counsel and participation in court proceedings, which benefited the entire two classes, the incentive award of $10,000 appears reasonable, though the court will withhold approval until the fairness hearing.

As to attorneys' fees, the parties have proposed that class counsel be awarded one-third of the class settlement fund or $333,000. Attorneys' fees should resemble an *ex ante* bargain between the attorneys and the class. *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011). In determining appropriate attorneys' fees, courts have discretion to use either the lodestar method or percentage method. *Americana Art China Co. v. Foxfire Printing & Packaging*, 743 F.3d 243, 247 (7th Cir. 2014).

The lodestar method roughly estimates "the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551 (2010). The percentage method instead sets the attorneys' fees at a percentage of the recovered settlement fund, plus expenses and interest. *Camp Drug Store*, 897 F.3d at 828. While class counsel is relying on the percentage method, the court will scrutinize plaintiff counsel's application for attorneys' fees, including reference to counsel's hourly billing records and rates as a factor in determining an appropriate fee award. The court, therefore, will reserve on this request until class counsel's additional submissions and discussion during the final fairness hearing.

IV. Proposed Notice

Finally, as noted above, the court will authorize the claims administrator to send notice to members of the classes. Notice to all members of a Rule 23(b)(3) certified class must include: (1) the nature of the action; (2) a definition of the certified class; (3) the class claims, issues, or defenses; (4) the option for class members to appear through counsel; (5) the option for class members to be excluded; (6) the time and manner to request

exclusion; and (7) the effect of a class judgment on the members. Fed. R. Civ. P. 23(b)(2)(B). The proposed notice provides class members with information regarding the nature and claims of the action, a definition of the classes, class members' option to appear through counsel and the availability and process for exclusion or objection. Furthermore, the option for class members to be excluded and the effect on members of a class judgment is set forth in appropriate detail.

Even so, the court notes a few, minor modifications to the notice that class counsel or the claims administrator should make before sending it out:

- Throughout the notice, make sure to amend the class period to reflect the parties' agreement that the period begins on January 2, 2013.
- In Section 1, modify the case caption to reflect that it is: 18-cv-00167-wmc.
- To the end of Section 13, add the following text:

  "If you had a consumer account, you can expect to receive $2.61 for each such overdraft fee you incurred during the relevant time period. If you had a business account, you can expect to receive $17.49 for each such overdraft fee you incurred during the relevant time period."

- In Section 19, omit the requirement that objectors must also send a copy of their objection to the claims administrator. Instead, the court will docket any objections it receives.
- In Sections 19, 22 and 28, change the court's zip code to 53703.
- In Section 28, the court's website is www.wiwd.uscourts.gov.

With these changes made, the court approves the proposed notice.

ORDER

IT IS ORDERED that:

1) Plaintiff's unopposed motion for preliminary approval of class action settlement, including class certification under Fed. R. Civ. P. 23 (dkt. # 52), is GRANTED.

2) The court certifies the following classes:

> The Consumer Account Sufficient Funds Class is defined as
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> those members of Defendant who were assessed an Overdraft Fee on any type of payment transaction from January 2, 2013, through March 9, 2018, against their consumer accounts if, at the time such fee was assessed, the member had sufficient money in his or her ledger balance to cover the transaction that resulted in the fee.
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> The Business Account Class is defined as
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> those members of Defendant who had business accounts and did not opt-in to overdraft protection for ATM or non-recurring debit card transactions but were nevertheless assessed an Overdraft Fee for an ATM or non-recurring debit card payment transaction against their business accounts from January 2, 2013, through March 9, 2018.

3) Plaintiff Matthew Domann is appointed class representative and the firms of McCune Wright Arevalo and The Kick Law Firm, APC, are appointed co-class counsel.

4) Kurtzman Carson Consultants is appointed as claims administrator.

5) Subject to the modifications described above, the proposed notice attached as Exhibit 1 (dkt. #62-1), is APPROVED and the claims administrator is AUTHORIZED to distribute it as provided in the parties' submissions.

6) The court approves the following settlement procedure and timeline:

   a. no later than January 21, 2020, class counsel will complete the notice program;

   b. class members shall have until 45 days after mailing of notice to submit a request to be excluded or any objections;

c. no later than March 23, 2020, class counsel shall file a petition for attorneys' fees and costs;

d. no later than March 30, 2020, class counsel shall provide the list of excluded class members to defendant's counsel;

e. a motion for final approval and any briefing in support, as well as any objection to class counsel's fee petition are due on or before April 6, 2020; and

f. the court will hold a fairness hearing on April 13, 2020, at 1:00 p.m.

Entered this 7th day of January, 2019.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge