The Honorable Kathryn Nelson
Noted for Hearing:
June 22, 2018 at 9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

TODD WODJA, individually, and on behalf of all others similarly situated Plaintiff, vs. WASHINGTON STATE EMPLOYEES CREDIT UNION, and DOES 1-10, Defendants	Case No.: 16-2-12148-4 **PLAINTIFF TODD WODJA'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, AWARD OF ATTORNEY FEES AND COSTS, AND APPROVAL OF CLASS REPRESENTATIVE SERVICE AWARD; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

TO THE COURT AND ALL INTERESTED PARTIES:

On June 22, 2018, at 9:00 a.m. Plaintiff Todd Wodja will and hereby does move the Court for an order granting final approval of the class action settlement in this matter. This motion is based on the Memorandum of Points and Authorities attached hereto, the Declaration of Taras Kick, the Declaration of Richard McCune, the Declaration of the Claims Administrator Garden City Group, the Declaration of Arthur Olsen, the Declaration of Robert Weissman, the Declaration of Todd Wodja filed in support of the Motion for Preliminary Approval, and all matters which this Court may allow or as to which this Court may take judicial notice.

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Respectfully submitted,

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Dated: May 11, 2018

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MEMORANDUM

I. Introduction: This Settlement Meets All Criteria For Approval.

This is a class action in which Plaintiff alleges that Defendant Washington State Employees Credit Union ("WSECU") assessed overdraft fees against its customers when they had enough money in their accounts to pay for the transaction at issue, in breach of their contracts, and in violation of the implied covenant of good faith and fair dealing. Plaintiff alleges that Defendant charged fees based on the so-called "available balance"—a subset of the full account balance from which funds earmarked for pending transactions and recently deposited funds have been subtracted—rather than on the actual amount of money in the account (sometimes referred to as the "ledger balance"), in alleged violation of the terms of the governing contracts. WSECU contends that the overdraft privilege fees it charged were proper and in accordance with the terms of its member account agreements with the Class Members and applicable law, which allow WSECU to determine overdrafts based on the available balance in a member's account. WSECU maintains that this practice was properly disclosed to and agreed on by its members and denies that the fees give rise to claims for damages by Mr. Wodja or any class member.

After mediation with the Hon. Edward A. Infante (Ret.), the parties entered into a proposed settlement in this matter, to which this Honorable Court granted preliminary approval. This Court found, preliminarily, that the classes as defined in the Settlement Agreement meet all of the requirements for certification of a settlement class found in Washington CR 23 and applicable case law (Preliminary Approval Order, ¶¶ 2, 7), that the proposed settlement falls within the range of reasonableness for potential final approval, and that the proposed settlement is the product of arm's length negotiations by experienced counsel after extensive litigation and discovery. (*Id.*, ¶ 8.) This Court also found that the proposed notice plan to class members satisfied due process, and ordered that notice of the proposed settlement be served pursuant to it. (*Id.*, ¶ 9.)

The parties have complied with this Court's Order regarding notice, and Plaintiff therefore now presents the matter for final approval. As evidenced by the contemporaneously

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filed declaration of Shandarese Garr of the claims administrator Garden City Group ("GCG"), the direct notice program approved by this Court has been very successful. Specifically, it was initiated on March 23, 2018, 34,029 of the 34,811 class members successfully received the notice ordered by this Court, meaning a **97.75%** of class members successfully received the notice ordered by this Court. (Declaration of Shandarese Garr [hereafter "GCG Decl."] ¶¶ 6, 7, 8, 9, 11, 16.) The deadline for class members to opt out of the settlement expired on May 6, 2018, and only 6 members of the class elected to opt out of the proposed settlement being presented for approval to this Court. (GCG Decl. ¶ 20.) This means that of the class members who successfully received notice, **99.98**% have elected to remain in the proposed settlement. Finally, although the time to object does not expire until May 26, 2018, as of the date of this filing, there has been only one objection to the proposed settlement, meaning **99.99**% of the class members who received notice of the proposed settlement have elected not to object to it.[1] (GCG Decl. ¶ 21.)

In sum, the proposed settlement of this class action is a very good result for class members, and class members' reaction to it to date has been very favorable. Further, WSECU supports the entry of an order granting final approval of the settlement.[2]

II. BACKGROUND

A. The Settlement is a Very Good Result for the Class Members

The settlement fund totals $2,990,000. (SA ¶ 1(s).) As the settlement does not require any claims to be made by the class members, class members need not take any action whatsoever to receive payment. (SA ¶ 7(d)(vi).) The settlement fund will also be used to pay claims and notice administration costs, litigation costs, attorney fees as approved by this Court, and a proposed service award to the class representative. (SA ¶ 7(d).)

Under the settlement, no money will revert to the Defendant once the Effective Date

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[1] See a more detailed explanation of this in Section III.A.8., *infra*.

[2] WSECU denies plaintiff's claims and does not concede any of plaintiff's contentions. Settlement Agreement at 3 (Recital I).

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occurs. (Settlement Agreement, ¶ 7(d)(v).) Class members shall be sent a check by the claims administrator to the address to which the class notice was sent, or at such other address as designated by the Class Member. (SA ¶ 7(d)(vi).) The Class Member shall have one-hundred eighty days (180) to negotiate the check, after which the payment will re-collect in the residue to be distributed to a *cy pres* recipient and to the Legal Foundation of Washington, discussed *infra*. (*Id*.)

The amount paid to each class member shall be calculated as follows: (Net Settlement Fund / Total Improper Overdraft Charges) x Total Improper Overdraft Charge per Class Member = Individual Payment. (SA ¶ 7(d)(vi).) This means each class member will be treated fairly by receiving a proportionate share of his or her "sufficient fund" overdraft fees refunded as a result of this settlement.

The $2,990,000 settlement fund represents approximately 47% of the most likely non-interest restitutionary amount that could have been obtained at trial had the case been successful under Plaintiff's damage theory, while avoiding for the class members all of the risks and further litigation costs appurtenant with continuing. (Declaration of Arthur Olsen [hereafter "Olsen Decl."] ¶¶ 8, 10; Declaration of Taras Kick [hereafter "Kick Decl."] ¶ 23.) This is discussed in more detail in Section III, *infra*.

B. Pertinent Procedural History

Plaintiff originally filed this action in federal court, on September 25, 2015. (Kick Decl. ¶ 12.) On January 8, 2016, Defendant filed a motion to dismiss, which Plaintiff opposed on April 18, 2016, and in support of which Defendant filed a reply on April 29, 2016. (Kick Decl. ¶ 12.) The court granted in part and denied in part the motion to dismiss on June 9, 2016. (Kick Decl. ¶ 12.) On August 17, 2016, Defendant filed a second motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1332(d)(4)(B), which Plaintiff opposed on September 6, 2016, and in support of which Defendant filed a reply on September 9, 2016. (Kick Decl. ¶ 12.) On September 26, 2016, the Hon. Benjamin Settle issued an order granting Defendant's motion to dismiss for lack of subject matter jurisdiction, finding no

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question of federal law existing. (Kick Decl. ¶ 12.) Thereafter, Plaintiff filed this action on October 21, 2016. (Kick Decl. ¶ 12.) On or about November 29, 2016, WSECU filed a motion to dismiss this action in its entirety. (Kick Decl. ¶ 12.)

C. Investigation and Discovery

On May 18, 2016, Plaintiff propounded on Defendant his First Set of Requests for Production, comprised of 11 Requests for Production, to which Defendant served responses on June 20, 2016. (Kick Decl. ¶ 13.) On June 29, 2016, Plaintiff propounded on Defendant his Second Set of Requests for Production, bringing the total to 86 requests, his first set of Requests for Admission, comprised of 12 requests, and his first set of Special Interrogatories, comprised of 23 interrogatories, to which Defendant served responses on August 8, 2016. (Kick Decl. ¶13.)

The parties' settlement negotiations were at all times arm's length and adversarial, and devoid of any collusion. (Kick Decl. ¶ 14.) Pursuant to these negotiations, on February 28, 2017, the parties participated in mediation with the Hon. Edward Infante. Judge Infante has developed an expertise in overdraft fee litigation, having mediated a significant number of such cases. (*Id*.) The case did not settle on that date at the mediation. However, Judge Infante made a mediator's recommendation which did result in a settlement in the amount of $2,990,000. (Kick Decl. ¶ 14.) As part of the due diligence, Plaintiff's database expert, Arthur Olsen, was granted access to detailed transaction specific anonymous information from WSECU's customer database, from which he was able to perform an analysis. (*See* Olsen Decl. ¶¶ 6-7.) Mr. Olsen is considered to be one of the leading experts on overdraft fee database analysis, and has worked on overdraft litigation database analysis in such matters as the multidistrict litigation which took place in Florida (In re Checking Account Overdraft Litigation MDL No. 2036 (S.D. Fla.)), and in such matters as *Gutierrez v. Wells Fargo*, 730 F.Supp.2d 1080 (N.D. Cal. 2010). (Olsen Decl. ¶¶ 3-5.). Specifically, Mr. Olsen analyzed class data covering the class period of October 1, 2009 through December 31, 2016. (Olsen Decl. ¶ 6.) That data contained detailed information regarding all overdraft fees assessed by WSECU on debit card, check, and ACH transactions between October 1, 2009, and December 31, 2016, including the date of each overdraft fee, the amount of each overdraft fee, the type of transaction which caused each overdraft fee, (either

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debit card, check, or ACH), and the balance of the account at the time when each transaction posted to the account. (Olsen Decl. ¶ 7.) Mr. Olsen determined that after refunds WSECU charged approximately $6,387,766 in overdraft fees when there was enough money in the account to cover the transaction in question if "holds" on deposits or pending transactions were not taken into account, which is what the Plaintiff's "sufficient funds" theory of the case is. (Olsen Decl. ¶ 10.) The total settlement value in this case of $2,990,000 therefore represents approximately 47% of the total "sufficient funds" damages in this case.

D. Class Definition.

The Washington Supreme Court has held that a class definition must be framed so that disposition of the named plaintiff's claims can fairly bind a cohesive class. *Mader v. Health Care Authority*, 149 Wash. 2d 458, 468-69, 70 P.3d 931, 936 (2003). Here, the class definition does just that. Specifically, the class is defined as any member of WSECU who, between October 1, 2009 and December 31, 2016, had opted in for overdraft privilege on non-recurring debit card or ATM transactions and was charged an overdraft privilege fee when the member had sufficient ledger balance in his or her checking account, but insufficient available balance to cover the transaction in question. (SA ¶ 1(f).) This is a very cohesive specific class definition.

III. LEGAL ANALYSIS.

A. The Settlement Should Be Finally Approved.

Washington law "strongly encourages settlement." *City of Seattle v. Blume*, 134 Wash. 2d 243, 258 947 P.2d 223, 230 (1997) (quoting *Kirk v. Moe*, 114 Wn.2d 550, 554-55, 789 P.2d 84 (1990) ("The settlement of a claimant's entire claim should be strongly encouraged"). "CR 23 is identical to its federal counterpart, Fed. R. Civ. P. 23, and thus, federal cases interpreting the analogous federal provision are highly persuasive." *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wash. 2d 178, 188, 35 P.3d 351, 356 (2001). "[I]t must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution," and this is "especially true in complex class action litigation." *Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 625 (9th Cir. 1982). "Although Rule 23(e) is silent respecting the standard by which a proposed settlement is to be evaluated, the universally applied standard is whether the

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settlement is fundamentally fair, adequate and reasonable." *Id.*; *see also Hanlon v. Chrysler*, 150 F.3d 1011, 1026 (9th Cir. 1997). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Hanlon*, 150 F.3d at 1026.

In *Officers for Justice*, the Ninth Circuit delineated the parameters of the district court's inquiry as follows:

> [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. Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators.
>
> 688 F.2d at 625.

In *Officers for Justice*, the Ninth Circuit also first stated the factors the court may consider, among others, in making its determination. Those factors are: (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. *Id.*; *see also Hanlon*, 150 F.3d at 1026; *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998). "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claims advanced, the types of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice*, 688 F.2d at 625.

Plaintiff now reviews each of these eight factors in the order presented in *Officers*.

1. The Strengths of Plaintiff's Case.

"An important consideration in judging the reasonableness of a settlement is the strength of the plaintiffs' case on the merits balanced against the amount offered in the settlement." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (quoting 5

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Moore Federal Practice, § 23.85[2][b] (Matthew Bender 3d. ed.)). "However, in balancing, 'a proposed settlement is not to be judged against a speculative measure of what might have been awarded in a judgment in favor of the class.'" *Id*. "The likelihood of success by Plaintiffs must be evaluated as it existed at the time of settlement." *Pickett*, 145 Wash. 2d at 192. In considering the strength of Plaintiff's case, "[t]he Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, [i]t has been held proper to take the bird in hand instead of a prospective flock in the bush." *Id*. (internal quotation omitted). While Plaintiff was able to withstand a motion to dismiss on the merits of this case, there are considerable risks to a continued litigation, as discussed in Class Counsel's declaration. (Kick Dec. ¶¶ 22, 23.) For example, if the settlement is not approved, Defendant's most recent motion to dismiss will come back on calendar. If Plaintiff successfully defends against that motion, Plaintiff next will likely face a motion for summary judgment, as well as an contested motion for certification battle, both of which would have uncertain outcomes. (Kick Dec. ¶ 22.) If the case survived and went to trial, at trial Defendant would argue that the contractual language does not require all that Plaintiff believes it to require. (Kick Dec. ¶ 22.)

Accordingly, this factor favors approval of the settlement.

2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation.

"In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." 4 A Conte & H. Newberg, Newberg on Class Actions, § 11:50 at 155 (4th ed. 2002). Here, continued litigation would be risky, complex, lengthy, and expensive. The risks of further litigation have been outlined above. (Kick Dec. ¶¶ 22, 23.) With regard to expected duration, as noted, an otherwise strong case could last for a very substantial time if the proposed settlement were not approved, and be extremely expensive to both sides. (*Id*.) Plaintiff's Counsel believes the likelihood for certification is strong, but there is always some risk in getting consumer class actions certified, even the ones which have the strongest merits for certification. If the settlement is not approved,

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Defendant's motion to dismiss would come back on calendar, after which, if successful, Plaintiff would likely next face a motion for summary judgment. (Kick Dec. ¶ 22.) After an expensive trial, regardless of which party prevailed, there likely would be appellate practice, further delaying the receipt of actual funds by the class members.

Accordingly, this factor favors approval of the settlement.

3. The Risk of Maintaining Class Action Status Throughout the Trial.

Although the Court, in granting preliminary approval, provisionally certified the class in this case, the class has not been finally certified, nor has it been certified in an adverse situation. Defendant expressly stated it was agreeing to the provisional certification only for purposes of settlement, and therefore if this proposed settlement is not approved, a contested motion for certification would be necessary. (SA § 2.) Although Plaintiff believes this case to be a strong one for certification, the outcome of an adverse motion for class certification would be uncertain, as would the outcome of a motion to decertify the class later down the road, should Defendant file one. (Kick Dec. ¶ 22.) Additionally, of course, the Court could exercise its discretion at any time to reevaluate the appropriateness of class certification.

Accordingly, this factor favors approval of the settlement.

4. The Amount Offered in Settlement.

Although Plaintiff believes the proposed settlement amount in this matter is substantial, "It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *Officers for Justice*, 688 F.2d at 628. "Undoubtedly, the amount of the individual shares will be less than what some class members feel they deserve but, conversely, more than the defendants feel those individuals are entitled to. This is precisely the stuff from which negotiated settlements are made." *Id*. The settlement fund of $2,990,000 represents approximately 47% of the most likely expected recovery, should the class have prevailed at trial, which is a good result for class members considering the risks and expense of further litigation. (Kick Dec. ¶ 23.) Further, each class member is treated equally under this settlement, receiving a *pro rata* distribution in accordance with the number of wrongful overdraft fees he or she has incurred. (Settlement Agreement, ¶

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8(d)(iii).)

As stated, courts have determined that settlements are, of course, reasonable where plaintiffs recover only part of their actual losses. *Pickett*, 145 Wash. 2d at 199 ("[T]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.") (quotation omitted); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 256 (N.D. Cal. 2015) ("[I]t 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.") (quoting *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004)); *see also City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1386 (S.D.N.Y. 1972) (a recovery of 3.2 % to 3.7 % of the amount sought is "well within the ball park"), *aff'd in part, rev'd on other grounds*, 495 F.2d 448 (2d Cir. 1974); *Martel v. Valderamma*, 2015 U.S. Dist. LEXIS 49830 * 17 (C.D. Cal. 2015) (approving a settlement of $75,000 when potential damages were $1.2 million, or about 6%); *In re Toys R US FACTA Litig.*, 295 F.R.D. 438, 453 (C.D. Cal. 2014) (approving settlement with *vouchers* (not cash) potentially worth a maximum of three percent (3%) *if all possible claims were actually made*, or $391.5 million aggregate voucher potential where the class could have recovered $13.05 billion).

In this case, as stated, there will not even be any claims process necessary for class members to receive their money, and none of the settlement funds will revert to Defendant. The proposed settlement is therefore well within the range of suitable.

5. The Extent of Discovery Completed, and the Stage of the Proceedings.

"[A] settlement following sufficient discovery and genuine arm's-length negotiation is presumed fair." *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528. Even though "in the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement" (*Linney*, 151 F.3d at 1239 (citing *In re Chicken Antitrust Litig.*, 669 F.2d 228, 241 (5th Cir. 1982)), in this case substantial discovery was accomplished which has enabled the parties to explore the merits of the case and come to an understanding of its likelihood of success.

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Specifically, Plaintiff has propounded on WSECU, and obtained responses to 86 document requests, 23 special interrogatories, and 12 requests for admission. (Kick Decl. ¶ 13.) Further, WSECU has provided Plaintiff's database expert, Arthur Olsen, with the class data, which Mr. Olsen has been able to verify in determining the class and class damages. (Olsen Decl. ¶¶ 6-10.) The facts of this case have been fully explored and uncovered.

As to the stage of the proceedings, Plaintiff has faced two major challenges to the merits of her case which gave him the opportunity to examine WSECU's arguments, craft his own, and weigh the strengths and weaknesses of his case, and ultimately reach an informed judgment of the likelihood of success on the merits. (Kick Decl. ¶ 12.)

6. The Experience and Views of Counsel

Courts have "long deferred to the private consensual decision of the parties." *Rodriguez v. W. Publ'g Corp*., 563 F.3d 948, 965 (9th Cir. 2009). Therefore, "'[g]reat weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.'" *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528 (quoting *In re Paine Webber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997)); *see also Pickett*, 145 Wash. 2d 178, 200, 35 P.3d 351, 362 (2001) ("When experienced and skilled class counsel support a settlement, their views are given great weight."). Thus, "'the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.'" *Id*. (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)).

Class counsel is extremely experienced in consumer class actions, and specifically in overdraft fee class actions, and wholly support the settlement. (McCune Decl. ¶¶ 2-5, 20; Kick Decl. ¶¶ 2-3, 23.) The experience of Class Counsel is set forth in the Declarations of Richard McCune and Taras Kick, filed herewith. Together, Richard McCune and Taras Kick have over fifty years of litigation and trial experience. (*Id*.) Each has been appointed class counsel in numerous state and federal class actions, representing classes of consumers. (*Id*.) Together, they also have been appointed class counsel in numerous cases like this one representing consumers against financial institutions for wrongfully assessing overdraft fees, including: *Fry v. MidFlorida Credit Union*, Case No. 8:15-CV-2743 (M.D. Fla. 2018); *Ketner v. State Employees*

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Credit Union of Maryland, *Inc.*, Case No. 1:15-CV-03594 (D. Md. 2018); *Hernandez v. Point Loma Credit Union*, San Diego County Superior Court, Case No. 37-2013-00053519 (appointed co-lead counsel in California state consumer class action regarding alleged improper overdraft fees by a credit union, final approval granted of $1.5 million settlement in September 2017); *Lane v. Campus Federal Credit Union*, Case No. 3:16-cv-00037 (appointed co-lead counsel in consumer class action in the Middle District of Louisiana regarding alleged improper overdraft fees by a credit union, final approval granted in August 2017); *Gray v. Los Angeles Federal Credit Union*, Los Angeles County Superior Court, Case No. BC625500 (appointed co-lead counsel in California state consumer class action regarding alleged improper overdraft fees by a credit union, final approval granted in June 2017); *Moralez v. Kern Schools Federal Credit Union*, Kern County Superior Court, Case No. BCV-15-100538 (appointed co-lead counsel in California state consumer class action regarding alleged improper overdraft fees by a credit union, final approval granted in June 2017); *Manwaring v. Golden 1 Credit Union*, Sacramento County Superior Court, Case No. 34-2013-00142667 (appointed co-lead counsel in California state consumer class action regarding alleged improper overdraft fees by a credit union, final approval granted of $5 million settlement by the court in December 2015); and *Casey v. Orange County Credit Union*, Orange County Superior Court No. 30-2013-00658493-CJBT-CXC (appointed co-lead counsel in California state consumer class action regarding alleged improper overdraft fees by credit union, final approval granted by the court in May 2015). (*Id*.)

Class Counsel are in favor of the settlement, and believe it is a very good result for class members. (McCune Decl. ¶ 20; Kick Decl. ¶ 23.)

Accordingly, this factor also weighs in favor of approval of the settlement.

7. The Presence of a Government Participant.

No government entity is involved in this case. Accordingly, this factor is likely neutral.

8. The Reaction of the Class Members to the Proposed Settlement.

"The reactions of the members of a class to a proposed settlement is a proper consideration for the trial court." *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528 (quoting 5 Moore's Federal Practice, § 23.85[2][d] (Matthew Bender 3d ed.)); *Pickett*, 145 Wash. 2d at 200

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(the reaction of the class members "is one factor" to be considered). "In this regard, 'the representatives' views may be important in shaping the agreement and will usually be presented at the fairness hearing; they may be entitled to special weight because the representatives may have a better understanding of the case than most members of the class.'" *Id*. (quoting Manual for Complex Litigation, Third, § 30.44 (1995)).

The reaction of the class members to the settlement to date has been overwhelmingly positive. As noted above, 34,029 of the 34,811 class members successfully received the notice ordered by this Court, meaning a **97.75%** of class members successfully received the notice ordered by this Court. (GCG Decl. ¶¶ 6, 7, 8, 9, 11, 16.) Only 6 members of the class elected to opt out of the proposed settlement being presented for approval to this Court. (GCG Decl. ¶ 20.) This means that of the class members who successfully received notice, **99.98**% have elected to remain in the proposed settlement. Finally, although the time to object does not expire until May 26, 2018, as of the date of this filing, there has been only one possible objection to the proposed settlement, meaning **99.99**% of the class members who received notice of the proposed settlement have elected not to object to it.[3]

Accordingly, the very positive response to the proposed settlement by class members to date also supports approval.

B. The Requested Fee Award and Litigation Costs Should Be Approved.

Class Counsel apply to this Court for attorneys' fees of one-third (33-1/3%) of the settlement

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[3] As explained in the concurrently filed GCG Declaration, and attached to it, GCG received six signed copies of the sample objection sent out with the notice as part of FAQ 23. Because they were completely blank, GCG called each of the six class members who submitted the blank forms. (GCG Decl. ¶ 21.) Every one of these six class members informed GCG they did not intend to object, but rather thought that they needed to submit the form to make a claim. (*Id*.) There was also a single objection form which did contain a statement, and is attached as Exhibit D to the GCG Declaration. To Class Counsel it sounds as if it might be more that the class member is complaining about the defendant than about the settlement, but Class Counsel will address this further at the Court-ordered time for response to any objections. Further, GCG also attempted to reach this class member to inquire whether he actually meant to object to the proposed settlement, but did not hear back from the class member. (*Id*.)

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fund, or $966,666.67, plus reimbursement of reasonable litigation costs. (SA ¶ 7(d)(ii).) Under both the percentage of the benefit methodology and the lodestar methodology, the requested fee is very much well within the range for approval. (*see, e.g*., *Vizcaino v. Microsoft* (9th Cir. 2002) 290 F.3d 1043, 1050 (3.6x multiplier); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.* (2nd Cir. 2005) 396 F.3d 96, 123 ("`multipliers of between 3 and 4.5 have become common'".) Based on Class Counsel's lodestar to date, the multiplier to be requested in the Motion for Final Approval would be only 1.98, well within the range for approval in a case as such. (Kick Decl. ¶ 9.)[4]

1. The Award Is Appropriate Under a Percentage of the Benefit Analysis.

In common fund cases, Washington courts often "apply the percentage of recovery approach." *Bowles v. Wash. Dep't of Ret. Sys.*, 121 Wash. 2d 52, 73, 847 P.2d 440, 451 (1993). The Ninth Circuit has also allowed the use of the percentage-of-the-recovery method to calculate attorneys' fees in common fund cases, where, as here "(1) the class of beneficiaries is sufficiently identifiable, (2) the benefits can be accurately traced, and (3) the fee can be shifted with some exactitude to those benefiting." *Petition of Hill*, 775 F.2d 1037, 1041 (9th Cir. 1985). Here Plaintiff has identified with precision the exact beneficiaries to the settlement and the benefit that they will receive, and the fee is properly shifted to those beneficiaries. There is no argument that here "each member of [the] certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum recovered on his [or her] behalf." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

Under this analysis, the $966,666.67 being sought equals one-third of the overall value settlement. Although some say that 25% is a "starting point" under Washington and federal law for a percentage-of-benefit award, in reality, consumer class actions in this dollar range often award a higher percentage than that, often one-third (33-1/3%) of the settlement amount or higher. (see, *e.g*., *Chavez, at* 66: "[e]mpirical studies show that, regardless whether the

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[4] Class Counsel will make available for this Court's *in camera* review, should this Court request to see it, a detailed declaration specifying on what work the time was spent, and will also make available, should the Court wish to inspect them, timesheets documenting this.

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percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.")[1]

In fact, in all of the following very similar overdraft fee class actions prosecuted by the same Class Counsel, the following honorable courts and jurists have determined a one-third fee award (or more) to Class Counsel was appropriate: *Lane v. Campus Federal Credit Union*, Case No. 3:16-cv-00037 (final approval granted in August 2017, with fees awarded of one-third); *Hernandez v. Point Loma Credit Union*, San Diego County Superior Court, Case No. 37-2013-00053519 (49.7% fee award, final approval granted 2017); *Gray v. Los Angeles Federal Credit Union*, Los Angeles County Superior Court, Case No. BC625500 (final approval granted in June 2017, with fees awarded of one-third); *Moralez v. Kern Schools Federal Credit Union*, Kern County Superior Court, Case No. BCV-15-100538 (final approval granted in June 2017, with fees awarded of one-third); *Manwaring v. Golden 1 Credit Union*, Sacramento County Superior Court, Case No. 34-2013-00142667 (final approval granted in December 2015, with fees awarded of one-third); *Casey v. Orange County Credit Union*, Orange County Superior Court No. 30-2013-00658493-CJ-BT-CXC (final approval granted by the court in May 2015, with fees awarded of one-third). (Kick Decl. ¶ 3.)

Courts have applied the following factors when determining whether a higher percentage should be awarded: (1) the result obtained for the class; (2) the effort expended by counsel; (3) counsel's experience; (4) counsel's skill; (5) the complexity of the issues; (6) the risks of non-payment assumed by counsel; (7) the reaction of the class; and (8) comparison with counsel's

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[1] A non-exhaustive list of other cases awarding a percentage of benefit based on the common fund of one-third or more include *Fry v. MidFlorida Credit Union*, Case No. 8:15-CV-2743 (M.D. Fla. 2018) (award of one-third); *Ketner v. State Employees Credit Union of Maryland, Inc.*, Case No. 1:15-CV-03594 (D. Md. 2018) (award of one-third); *Castaneda v. Burger King Corp.* (N.D. Cal. Jul. 12, 2010)2010 U.S.Dist.LEXIS 78299 [awarding 33%].); *In re California Indirect Purchases* (Cal. Super. Ct. Oct. 22, 1998) No. 960886, 1998 WL 1031494, at *9 [setting forth a survey of awards approved by trial courts in common fund cases, including *In re Milk Antitrust Litigation* (L.A.Sup.Ct.1998) Civ. Case No. BC070061 (33⅓% award); ; *Carlson v. C.H. Robinson Worldwide* (D. Minn. 2006) 2006 U.S.Dist.LEXIS 67108, *21-22 [35%]; *Worthington v. CDW* (S.D. Ohio 2006) 2006 U.S.Dist.LEXIS 32100, *22 ["Counsel's requested percentage of 38 and one-third of the total gross settlement"].)

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lodestar. *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 U.S. Dist. LEXIS 13555 at *18 (C.D. Cal. June 10, 2005) (citing *In re Quintus Sec. Litig*, 148 F.Supp.2d 967, 973-74 (N.D. Cal. 2001)).

Here, the factors all weigh in favor of a higher percentage. The result obtained for the class is excellent: a $2,990,000 fund from which class members will be paid directly without having to make a claim, and none of which will revert to Defendant. This fund represents approximately 47% of the amount that the class might have achieved at trial without all of the risks and costs attendant with litigation. Counsel expended great effort in this case, battling very sophisticated skilled counsel for defendant in two jurisdictions, overcoming a motion to dismiss under Federal Rule 12(b)(6) and fighting tooth and nail a motion to dismiss for lack of subject matter jurisdiction. Counsel expended over 744.7 hours in litigating this case, all without any guarantee of payment. (Kick Decl. ¶ 9.) Counsel's skill has been previously noted. Both Richard McCune and Taras Kick are experienced class action litigators, having served as lead class counsel in numerous state and federal cases, each serving as co-lead counsel in well over ten successfully settled overdraft fee class actions alone. The issues here were complex, involving the analysis of two complex consumer contracts. Class Counsel accepted a considerable degree of risk that it would not receive any payment for its services, as they worked entirely on a contingent basis. The reaction of the class, as noted, has been overwhelmingly favorable, with over 99.98% participating in the settlement. Finally, Class Counsel's lodestar is over $489,445.00, which requires only a modest multiplier of less than 1.98 to arrive at the same result.

2. The Award Is Appropriate Under a Lodestar Analysis.

"Under the lodestar/multiplier method, the district court first calculates the 'lodestar' by multiplying the reasonable hours expended by a reasonable hourly rate." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 n.2 (9th Cir. 1994); *see also Staton*, 327 F.3d at 965. Additionally, in certain cases, the court may adjust the lodestar upwards where circumstances warrant the adjustment. *Staton*, 327 F.3d at 965 & n.17. The Ninth Circuit, and other circuits have awarded multipliers in the range of 2 to 4, and even higher. (*Vizcaino v.*

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Microsoft (9th Cir. 2002) 290 F.3d 1043, 1050 (3.6x multiplier); *In re Veritas Software Corp. Secs. Litig.* (N.D. Cal. 2005) 2005 U.S.Dist.LEXIS 30880, *43 (4x multiplier); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.* (2nd Cir. 2005) 396 F.3d 96, 123 ("`multipliers of between 3 and 4.5 have become common'"); *In re Linerboard Antitrust Litig.* (E.D. Pa. 2004) 2004 U.S.Dist.LEXIS 10532, *50 (noting that "during 2001-2003, the average multiplier approved in common fund class actions was 4.35"); *In re Superior Beverage/Glass Container Consol. Pretrial* (N.D. Ill. 1990) 133 F.R.D. 119, 131 (courts have characterized multipliers of 3 or higher as average in many class actions).

Here, as counsel is seeking a modest multiplier at the lower end of the range, at 1.98, a review of the factors set out by the Ninth Circuit in *Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67, 70 (9th Cir. 1976), is in order. Those factor are: (1) the time and labor required; (2) the novelty and difficulty of the issues litigated; (3) the skill needed to perform properly the legal service; (4) the preclusion of other employment due to the acceptance of work; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount at issue and the results obtained; (9) the experience, reputation, and ability of the attorney or attorneys; (10) the "undesirability" of the case; (11) the length and nature of the professional relationship between the attorney and the client; and (12) awards in similar cases.

Here, as to the first factor, the Declarations of Richard McCune and Taras Kick set forth the work performed by class counsel on all aspects of this case. Class Counsel performed considerable work, overcoming a motion to dismiss, and propounding written discovery. (Kick Decl. ¶ ¶ 12, 13.) As to the second factor, the case involved several difficult legal issues, including construction of the contractual language at issue. Accordingly, as to the third factor, this case required a high level of skill. As to the fourth factor, both The Kick Law Firm, APC and McCune Wright Arevalo, LLP, turned down work they could have taken in order to pursue this case. (Kick Decl. ¶ 15.) As to the fifth factor, the customary fee in Washington in a successful case would apply a positive multiplier to the lodestar of anywhere from 2 to 4 *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 98 P.3d 1264 (2004). Counsel is seeking the lower

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end of that range. As to the sixth factor, the fee was contingent, and accordingly Class Counsel took considerable risk in litigating this case. (Kick Decl. ¶ 15.) As to the seventh factor, no time limitations were imposed by the client or other circumstances. As to the eighth factor, the total amount of sufficient funds overdraft fees, minus refunds, and the amount that Plaintiff's counsel believes it most likely would have received had it prevailed at trial, is $6,387,766. The result obtained—$2,990,000—represents about 47% of the amount at issue. As to the ninth factor, the experience, reputation, and ability of the attorneys which have represented the class in this case are set forth in the Declarations of Richard McCune and Taras Kick. Both firms and both lead attorneys have considerable experience in consumer class action litigation, and specifically in overdraft fee class action cases. As to the tenth factor, this was not an undesirable case; however, it did present the real risk of total loss for Class Counsel. As to the eleventh factor, Mr. Wodja and Class Counsel have enjoyed a very productive working relationship, involving substantial communication, with positive results. (Kick Decl. ¶ 20.) As to the twelfth factor, as stated above with factor five, in a successful case as such a positive multiplier of anywhere from 2 to 4 would be expected, and here Class Counsel is seeking a multiplier which is actually slightly below the lower end of that range.

Finally, with regard to reimbursable costs, as set forth in the accompanying declarations of Richard McCune and Taras Kick, although the Notice disseminated to class members stated that litigation costs may be reimbursed up to $80,000, Class Counsel seek a total of only $54,622.72 for reimbursable litigation costs, and the costs constituting this amount are detailed in the declarations. (McCune Decl. ¶ 17; Kick Decl. ¶ 18.) These amounts were spent in furtherance of the litigation. For claims administrator's costs, as approved in this Court's March 20, 2018 Order, GCG seeks a cap of $71,850. (GCG Decl. ¶ 22.)

C. The Class Representative Service Award Is Reasonable.

The proposed class representative, Mr. Todd Wodja, respectfully requests this Court award a service award for his service in this case of $5,000. Mr. Wodja was very helpful to the case's success, including not only putting his name out in the public domain on behalf of helping all of the other absent class members, but also taking time to find and to provide documents,

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engaging in numerous discussions with counsel, both on the phone and by email, and meeting with counsel in Washington in person, as well as other service. (Kick Decl. ¶ 20.) A service award is of course appropriate under the law. *Probst v. Dep't of Ret. Sys.*, No. 38094-3-II, 2009 Wash. App. LEXIS 1613, at *17 (Ct. App. June 30, 2009)

D. The Proposed Cy Pres Recipients Are Appropriate.

Effective January 3, 2006, Washington adopted CR 23(f), which details how to disburse residual funds, *i.e.,* funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements. *See* CR 23(f)(1). The rule requires that 25% of any residual funds be disbursed to the Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents of Washington State. CR 23(f)(2). The remaining 75% may be disbursed to "any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class." *Id*.

The terms of the proposed Settlement Agreement before this Court comply with this requirement. Specifically, once the Effective Date occurs, none of the Settlement Fund will revert to WSECU. (SA ¶ 7(d)(viii.) Rather, if there is any residue which remains in the Net Settlement Fund after all class members have been paid the amount to which they are entitled, the settlement provides for a *cy pres* distribution of such residue, if approved by this Court, to Public Citizen, a non-profit organization devoted to protecting consumer rights. (SA ¶ 10.) The Declaration of Robert Weissman, the President of Public Citizen, is filed concurrently with this motion for the Court's review. As demonstrated in the declaration of Mr. Weissman, a substantial portion of Public Citizen's work is in the Ninth Circuit, positively affecting consumers of the State of Washington.

E. The Proposed Settlement Class Should Be Certified.

A court should certify a proposed class if it satisfies all four requirements of CR 23(a) and one of the subsections of CR 23(b). *Washington Educ. Ass'n v. Shelton Sch. Dist.*, 93 Wash. 2d 783, 789, 613 P.2d 769, 773 (1980).

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Class certification is proper if the proposed class, the proposed class representative, and the proposed class counsel satisfy the numerosity, commonality, typicality, and adequacy of representation requirements of CR 23(a). In addition to meeting those requirements, as stated, a plaintiff seeking class certification must also meet at least one of the three provisions of CR 23(b). "As there are few Washington cases on point, and because the federal rule is identical, much of [the Washington courts'] analysis [is] based upon federal cases." *Brown v. Brown*, 6 Wash. App. 249, 252, 492 P.2d 581, 583 (1971). Washington courts "favor a liberal interpretation of CR 23, rather than a restrictive one." *Id*. at 586. "A trial court is entitled to 'noticeably more deference' on a grant of class certification as opposed to a denial." *Chavez v. Our Lady of Lourdes Hospital at Pasco*, No. 94592-6 at p. 8 (Wash. Apr. 19, 2018) (quoting *Wolin v. Jaguary Land Rover No. Am., LLC*, 617 F.3d 1168, 1171 (9th Cir. 2010)).

When a plaintiff seeks class certification under CR 23(b)(3), the representative must demonstrate that common questions of law or fact predominate over individual issues and that a class action is superior to other methods of adjudicating the claims. *Amchem*, 521 U.S. at 615-16. Because Plaintiff meets all of the CR 23(a) and 23(b)(3) prerequisites, certification of the proposed Class is proper.

1. The Requirement of Numerosity is Satisfied.

The first prerequisite of class certification is numerosity, which requires "the class [be] so numerous that joinder of all members is impractical." CR 23(a)(1).

As a general rule, classes of 40 or more suffice. 5-23 Moore's Federal Practice - Civil § 23.22[1][b]. In this case, as 34,811 members have been identified who were assessed at least one overdraft fee when the ledger balance was sufficient to cover the transaction at issue, it is beyond question that the numerosity requirement is met. (Olsen Decl. ¶ 9.) *See, e.g., Wilson v. Fenture Fin. Group, Inc.*, 2011 U.S. Dist. LEXIS 9691 at *5 (W.D. Wash. 2011) ("with over 200 proposed class members, the class is so numerous that joinder of each member is impracticable").

2. The Requirement of Commonality is Satisfied.

The second requirement for certification requires that "questions of law or fact common

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to the class" exist. CR 23(a)(2). The commonality requirement does not demand that each class member have precisely the same claim. "CR 23 does not require 'that the shared questions of law or fact be identical' as to each individual class member." *Pellino v. Brink's Inc.*, 164 Wash. App. 668, 683, 267 P.3d 383, 392 (2011) (citing *Miller v. Farmer Bros. Co.*, 115 Wash. App. 815, 824, 64 P.3d 49, 55 (2003)); *see also*, *Brown v. Brown*, 6 Wash. App. 249, 255, 492 P.2d 581, 585 (1971).

Commonality is demonstrated when the claims of all class members "depend upon a common contention . . . that is capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). This requires that the determination of the common question "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. "Even a single common question will do." *Dukes*, 131 S. Ct. at 2556. Commonality has been found to exist where "all plaintiffs and potential class members suffer under the same allegedly arbitrary and discriminatory conduct." *Brown*, 6 Wash. App. at 255, 492 P.2d at 585.

> The commonality preconditions of Rule 23(a)(2) are less rigorous than the companion requirements of Rule 23(b)(3). Indeed, Rule 23(a)(2) has been construed permissively. All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.
>
> *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1997).

In other words, commonality exists where a question of law linking class members is substantially related to resolution of the litigation even where the individuals may not be identically situated. *Davis v. Astrue*, 250 F.R.D. 476, 486 (N.D. Cal. 2008) ("Rule 23(a)(2) does not mandate that each member of the class be identically situated, only that there be substantial questions of law or fact common to all.") (citing *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 915 (9th Cir. 1964)). The Ninth Circuit has found that commonality is a "limited burden" in that only one common question is required. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012). Courts look to whether the class members' claims "stem from the same source." *Hanlon*, 150 F.3d at 1019-1020.

Here, not only do there exist common questions of law or fact, the common questions predominate over any individual ones. The theories underlying the class claims involve a

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uniform overdraft fee practice. It is undisputed that Defendant uniformly and systematically used the "available balance" to determine whether to assess an overdraft fee on a transaction, as opposed to utilizing the actual money in the account, i.e., the "ledger balance" or "actual balance". Therefore, answering whether Defendant breached its contract terms in doing that will by definition predominate for all class members. Additionally, it is also undisputed that the operative terms regarding the overdraft fee program, and specifically the balance calculation to be used to determine the assessment of overdraft fees, as set forth in the Opt-In Contract (e.g. enough money in the account to cover a transaction) were provided to all class members. (First Amended Complaint "FAC" at ¶¶ 23, 24.)

As such, the commonality requirement is satisfied.

3. The Requirement of Typicality is Satisfied.

CR 23 next requires that the class representative's claims be typical of those of the class members. CR 23(a)(3). To Class Counsel's knowledge, no reported Washington decision has denied class certification based solely on a lack of typicality. *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wash. App. 401, 54 P.3d 687 (2002). "The requirements of commonality and typicality tend to merge, and are often addressed as a single issue." *Oda v. State*, 111 Wash. App. 79, 89, 44 P.3d 8, 13 (2002).

Like the commonality requirement, the typicality requirement is "permissive" and requires only that the representative's claims be "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. The typicality requirement looks to whether "the claims of the class representative [are] typical of those of the class, and [is] 'satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). The Supreme Court of the United States agrees with Washington's state courts that commonality and typicality "tend to merge," such that the factors supporting a finding of commonality also support a finding of typicality. *See General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982); *In re United Energy Corp. Solar Power Modules*

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Tax Shelter Investments Sec. Litig., 122 F.R.D. 251, 256 (C.D. Cal. 1988).

Plaintiff's claims are not only typical of those of the other putative class members, they are virtually indistinguishable. There is no dispute that Plaintiff entered into the uniform and standardized Opt-In Contract and that he was assessed overdraft fees when there was enough money in the account (i.e., the ledger balance) to complete the requested transaction. At a minimum, this occurred on June 18, 2015, when he was assessed a $27 overdraft fee on a transaction, despite the fact that his account contained sufficient funds to complete the transaction. (Complaint ¶ 30.) Plaintiff also alleges the same legal theories as the rest of the class of breach of contract/breach of the covenant of good faith. Therefore, typicality is satisfied.

4. The Requirement of Adequate Representation is Satisfied.

The final CR 23(a) prerequisite requires that the proposed class representative has and will continue to "fairly and adequately protect the interests of the class." This means at least that the class representative and the members of the class must have claims against the same defendants. *Doe v. Spokane and Inland Empire Blood Bank*, 55 Wash. App. 106, 118, 780 P.2d 853, 861. Courts apply a two-factor test to determine whether a plaintiff and his counsel will adequately represent the interests of the class: "(1) do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003); *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1995). As to the first factor, "Conflicting or antagonistic interests among members of the alleged class in the subject matter of the litigation, necessitating a determination of priorities between class members, may render a class action an improper vehicle for seeking vindication of a given right." *De Funis v. Odegaard*, 84 Wash. 2d 617, 622 529 P.2d 438, 441 (1974). Here, there are no competing interests: each of the class members were charged improper overdraft fees under the same conditions—when their accounts contained enough money to pay for the transaction at issue—and are therefore subject to refunds under the same rubric. As to the second factor, as with the typicality requirement, adequacy requires that the interests of the named plaintiffs are aligned with the unnamed class members to ensure that the class representative has an incentive

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to pursue and protect the claims of the absent class members. *See Amchem*, 521 U.S. at 626 n. 20, 117 S.Ct. 2231 ("The adequacy-of-representation requirement 'tends to merge' with the commonality and typicality criteria of Rule 23(a), which 'serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'")

Proposed Class Counsel, Richard McCune of McCune Wright Arevalo, LLP, and Taras Kick of The Kick Law Firm, APC, both have significant class action, litigation, and trial experience, are competent, and have been competent in representing the Classes. Both law firms representing the putative class have extensive experience in consumer class actions, and in particular, expertise in overdraft fee litigation. (McCune Decl. at ¶¶ 2-5; Kick Decl. at ¶¶ 2-3.) The interests of Plaintiff Todd Wodja are not antagonistic to those of the other Class members; his interests are wholly aligned because he was charged overdraft fees when his account had a positive ledger balance. Further, he understands that he is pursuing this case on behalf of all class members similarly situated and understands he has a duty to protect the absent Class members. (Kick Decl. ¶ 20.) He has actively participated in the litigation by frequently conferring with class counsel about the case and its status, assisting class counsel by gathering documents and other information, and being prepared and willing to testify at deposition and trial on behalf of the class if necessary. (Kick Decl. ¶ 20.)

5. The (Former) Implied Requirement of Ascertainability is Satisfied.

In *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121---, 2017 WL 24618 (9th Cir. 2017), the Ninth Circuit rejected the notion of a separate ascertainability requirement for certification in a class action. As such, none probably exists in Washington. Regardless, that recent holding would not really affect this case, since the actual class members were actually already identified by Defendant's own records. (Olsen Decl. ¶ 9.)

6. The Proposed Settlement Class Also Meets the Requirements of Rule 23(b)(3).

Once the prerequisites of CR 23(a) have been met, a plaintiff must also demonstrate

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that he satisfies the requirements of CR 23(b), which requires that "the questions of law or fact common to class member 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." Mr. Wodja clearly satisfies both of these requirements.

a. Common Questions of Law and Fact Predominate.

"To determine whether common issues predominate over individual ones, a trial court pragmatically examines whether there is a common nucleus of operative facts in each class member's claim." *Chavez v. Our Lady of Lourdes Hospital at Pasco*, No. 94592-6 at p. 8 (Wash. Apr. 19, 2018) (citing *Moeller v. Farmers Ins. Co. of Wash.*, 155 Wn. App. 133, 148, 229 P.3d 857 (2010), *aff'd* 173 Wn.2d 264, 267 P.3d 998 (2011)). "[C]omplete unanimity of position and purpose is not required among members of a class." *King v. Riveland*, 125 Wash. 2d 500, 519, 886 P.2d 160, 171 (1994). "The relevant inquiry is whether the issue shared by class members is the dominant, central, or overriding issue in the litigation." *Chavez*, No. 94592-6 at p. 8) (citing *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 825, 64 P.3d 49 (2003)).

"[T]he predominance requirement is not defeated merely because individual factual or legal issues exist; . . . '[a] single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions." *Id*. at p. 12 (quoting *Miller*, 115 Wn. App. at 825). The predominance requirement questions whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "If common questions 'present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication,' then 'there is clear justification for handling the dispute on a representative rather than on an individual basis,' and the predominance test is satisfied." *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 526 (C.D. Cal. 2012) (quoting *Hanlon*, 150 F.3d at 1022). But "common issues need only predominate, not outnumber individual issues." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013), cert. denied, 134 S. Ct. 1277 (2014).

As the Supreme Court most recently confirmed:

When one or more of the central issues in the action are common to the class and can be

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> said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

Tyson Foods, Inc. v. Bouaphakeo, 136 S.Ct. 1036, 1045 (2016). The claims here are subject to common proof, and would be subject to the same common proof if additional plaintiffs were added, and thus it would be more efficient to decide those common issues via the class action mechanism.

As WSECU does not dispute its practice of charging fees based on the available balance while the ledger balance contains enough money to pay for the transaction, Plaintiff contends that the only issue is whether the contract permitted it to do so. The common question of whether WSECU's contract language allowed it to charge overdraft fees when there was enough money in the account predominates over any potential individualized question.

b. This Class Action is the Superior Method of Adjudication.

CR 23(b)(3) also requires that a certifying court find that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." "The superiority inquiry under Rule 23(b)(3) requires determination of whether the objectives of the particular class action procedure will be achieved in the particular case." *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582, 594 (C.D. Cal. Aug. 24, 2011) (quoting *Hanlon*, 150 F.3d at 1023.) "This determination necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution." *Id*. (quoting *Hanlon*, 150 F.3d at 1023.); *see also Chavez*, No. 94592-6 at p. 12 ("The superiority requirement focuses on a comparison of available alternatives and a determination that a class action is superior to, not just as good as, other available methods."). Where each class member, pursuing an individual case, would burden the judiciary, this factor weighs in favor of certification. *See Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009) ("The overarching focus remains whether trial by class representation would further the goals of efficiency and judicial economy."). This factor also weighs in favor of certification where litigation costs would likely "dwarf potential recovery" if each class member litigated individually. *Hanlon*, 150 F.3d at 1023; *see also Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 652 (C.D. Cal. 1996)) ("[W]here the damages each plaintiff suffered are not that great, this

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factor weighs in favor of certifying a class action.").

As the Supreme Court stressed in *Amchem*, 521 U.S. at 617:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

As Judge Posner has stated, "[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). The Ninth Circuit has held similarly that the proposed class action is "paradigmatic" where "litigation costs would dwarf potential recovery." *Hanlon*, 150 F.3d 1011 at 1023; *see also Chavez*, No. 94592-6 at p. 13 ("Because this lawsuit involves well over 40 plaintiffs, we hold that a class action is superior to joinder for the resolution of these claims.").

The desirability of concentrating the litigation in the present forum is illustrated by the fact that the amount of an individual damage instance is at most a $27 overdraft fee. There is no question that a large number of class members have suffered damages in an amount that could not justify or sustain individual lawsuits, and the only choice is between a class action and no action. Plaintiff is not aware of any additional suits instituted by or against the class members concerning the subject matter of the settlement. Superiority is met.

Accordingly, all factors weigh in favor of class certification.

IV. CONCLUSION

Plaintiff respectfully requests that the Court grant final approval of the settlement, the request for attorney's fees and costs, the request for approval of class administrator expenses, and the request for a service award to the class representative, in the entirety.

Respectfully submitted,

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DATED: May 11, 2018

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