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Matter of HSBC Bank U.S.A. N.A. Checking Account Overdraft Litig.
2015 NY Slip Op 51582(U)
Decided on October 27, 2015
Supreme Court, New York County
Bransten, J.
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In the Matter of HSBC Bank U.S.A., N.A., Checking Account Overdraft Litigation.

650562/2011

The attorneys on the matter are:

Barry Himmelstein of Himmelstein Law Network and Adam Seth Turk of Turk & Davidoff PLLC for Plaintiffs
James Bernard and Julia Strickland of Stroock & Stroock & Lavan LLP for Defendants

Eileen Bransten, J.

This matter comes before the Court on Plaintiffs Ofra Levin ("Levin"), Michael Park ("Park"), 33 Seminary, LLC ("33 Seminary") and Binghousing, Inc.'s ("Binghousing") (collectively, "Levin Plaintiffs" or "Plaintiffs") motion for preliminary approval of the proposed class action settlement, as well as conditional certification of the settlement class as against Defendants HSBC Bank U.S.A., N.A. and HSBC U.S.A., Inc. (collectively, "HSBC" or "Defendants"). Defendants support the motion and proposed settlement.

For the reasons that follow, Plaintiffs' motion is granted.

I. *Background*

1. HSBC's Overdraft Program

Plaintiffs allege that HSBC engaged in "high-to-low" posting of customer debit transactions in order to maximize revenue obtained through overdraft fees. (Class Action Compl. ¶¶ 1-15) As a practice, HSBC allowed customers to use their debit cards to make purchases when their checking accounts contained insufficient funds in order to charge an overdraft fee of $35.00. *Id*. at ¶ 6. HSBC engaged in this practice even though it could have declined the transaction or, in the alternative, warned customers that the $35.00 fee would apply. *Id*. at ¶¶ 5-6.

In order to maximize overdraft fees, HSBC "manipulate[d] and reorder[ed] debits from highest to lowest during the course of a day." *Id*. at ¶ 12. Plaintiffs allege that HSBC used a computer program to re-order transactions

automatically, causing funds in a checking account to run out more rapidly, which led to more overdraft fees. *Id*. at ¶¶ 13-14. Plaintiffs provide an instructive example:

> [I]f a customer has an account with a $50 balance and makes four transactions of $10 and [*2]one later transaction of $100 the same day, HSBC debits the transaction from the account largest-to-smallest, thus subjecting the customer to four overdraft fees. Conversely, if the $100 transaction were debited last (in the order it was made), the customer would only be subject to one overdraft fee.

Id. at ¶ 14.

2. The State and Federal Class Actions

On March 1, 2010, Levin Plaintiffs filed the Class Action Complaint on behalf of the following class:

> All HSBC customers who are citizens of the State of New York having accounts at HSBC branches in the State of New York who, within the applicable statute of limitations preceding the filing of this action to the date of class certification, incurred an overdraft fee as a result of HSBC's illegal practice of re-sequencing debit card transactions from highest to lowest.

Id. at ¶ 26.

On June 26, 2012, this Court denied HSBC's motion to dismiss, first finding that Plaintiffs' claims were not preempted by federal legislation. (Dkt. No. 22 at 20) The Court determined that Plaintiffs sufficiently pleaded a breach of the implied covenant of good faith and fair dealing and a violation of New York General Business Law ("NY GBL") § 349. *Id*. at 25-32.

On August 27, 2012, Plaintiffs filed the Amended Class Action, adding Derek Jura ("Jura") as a named

plaintiff.[FN1] In November 2012, Plaintiffs' original counsel withdrew representation citing irreconcilable differences. (Dkt. No. 47) On November 19, 2012, through newly obtained class counsel, Turk & Davidoff PLLC and the Himmelstein Law Network,[FN2] Levin Plaintiffs filed a parallel putative class action in the Eastern District of New York. See Levin, et al. v. HSBC Bank U.S.A., N.A., et al., E.D.NY 12-cv-6224-ADS.

On December 19, 2012, Jura also filed a parallel putative class action in the Eastern District of New York. See Jura v. HSBC Bank U.S.A., N.A., et al., E.D.NY 12-cv-6224-ADS. A third putative class action was filed by California resident Leah Hanes ("Hanes") in the Eastern District of Virginia. See Hanes v. HSBC Bank U.S.A., N.A., E.D. Va. 13-cv-00229-ADS. On June 5, 2013, the Judicial Panel on Multidistrict Litigation ("MDL") centralized the three federal actions and assigned them to the Hon. Arthur D. Spatt in the Eastern District of New York. See In re HSBC Bank U.S.A., N.A., Debit Card Overdraft Fee Litig., 949 F. Supp. 2d 1358, 1359 (U.S. Jud. Pan. Mult. Lit. 2013).

On September 30, 2013, counsel for Jura and Hanes filed an amended consolidated class action complaint in the Eastern District of New York naming only Jura and Hanes as plaintiffs ("Federal Plaintiffs"). (Affirmation of James J. Bernard in Support of Preliminary Approval of the Proposed Settlement ("Bernard Affirm.") Ex. 1) On March 5, 2014, Judge Pratt granted in part and denied in part HSBC's motion to dismiss. See In re HSBC Bank U.S.A., N.A., Debit Card Overdraft Fee Litig., 1 F. Supp. 3d 34 (E.D.NY 2014).

3. Settlement Negotiations

In October 2014, HSBC approached Himmelstein and Levin Plaintiffs regarding settlement of the New York State action. *See* Himmelstein Affirm. ¶ 2. On December 18, 2014, the parties participated in a mediation session before the Hon. Layn R. Phillips, a retired federal district court judge. (Declaration of Layn R. Phillips in Support of Settlement ("Phillips Decl.") ¶¶ 4-6) At the time, HSBC had already provided Plaintiffs with substantial discovery,

including over 100,000 pages of documents. *See* Himmelstein Affirm. ¶ 2. Following the mediation, the parties signed a memorandum of understanding, subject to the negotiation of a definitive settlement agreement, to settle the Levin Plaintiffs' New York class claims for $30 million. Id. at ¶ 3.

a. The Second Amended Complaint

The Second Amended Complaint (the "Complaint"), filed by Levin Plaintiffs on March 3, 2015,[FN3] provides for the following national class:

> All HSBC account holders in the United States who, within the applicable statute of limitations, incurred an overdraft fee on a debit card transactions a result of HSBC's practice of posting transactions from highest to lowest dollar amount.

(Sec. Amend. Compl. ¶ 27) It also provides for the following, New York only, sub-class:

> All HSBC account holders in the United States who, within the applicable statute of limitations, incurred an overdraft fee on a debit card transaction conducted in the State of New York as a result of HSBC's practice of posting transactions from highest to lowest dollar amount.

Id. at ¶ 29. The first cause of action asserted in the Complaint is for a breach of the implied covenant of good faith and fair dealing.[FN4] *Id.* at ¶¶ 104-10. The second cause of action, asserted on behalf of the sub-class only, is for a violation of NY GBL § 349. Id. at ¶¶ 111-15. Plaintiffs [*3]also assert that HSBC breached the terms of the "Debit Card Agreement" by resequencing debit transactions.[FN5] *Id.* at ¶¶ 116-22. The final cause of action is for the violation of a consumer protection law of another state.[FN6] *Id.* at ¶¶ 123-25.

In addition, counsel also added Michael Park ("Park"), a California resident, as a named plaintiff. Id. at ¶ 22. Park opened his checking account with HSBC branch in 2007 and as a result of the bank's "high-to-low" posting, he was improperly charged multiple overdraft fees between May 2008 and August 2009. Id. at ¶¶ 74-85.

b. The Proposed Settlement

On March 2, 2015, Levin Plaintiffs and HSBC executed the Settlement and Release (the "Settlement Agreement" or "Agreement"). (Himmelstein Affirm. Ex. A (Settlement Agreement)) The Agreement was modeled after a series of settlement agreements that were granted final approval in a consolidated action against several other banks, including Wells Fargo and Bank of America, which also engaged in the practice of "high-to-low" posting of debit transactions. *Id*. at ¶ 4; s*ee In re: Checking Account Overdraft Litigation*, MDL No. 2036 (S.D. Fla.) (approving the terms of the agreements, including notice procedure, distribution method and fees).

i. *The Settlement Class and Notice Procedure*

The Settlement provides for the following national class (the "Settlement Class"):

> All HSBC customers in the United States who, between December 17, 2004 and June 30, 2010 for consumer accounts and between December 17, 2004 and November 30, 2011 for business accounts, incurred one or more overdraft fees on their HSBC account(s) as a result of posting transactions that included at least one debit card or point of sale transaction from highest to lowest dollar amount.

(Settlement Agreement Sec. B ¶ 39) The parties agree to a conditional certification of the Settlement Class for settlement purposes only. *Id*. at Sec. D ¶ 1.

The Settlement provides for distribution of notice to the Settlement Class through the [*4]following means: (1) a mailed notice to all identifiable class members; (2) a published notice;[FN7] (3) a long-form notice; and (4) a settlement website. Id. at Sec. H ¶ 2. Each notice, regardless of means, will include a description of the material terms of the settlement, including instructions on how to opt-out of the Settlement,[FN8] how to file an objection to

the Settlement and the date of final approval hearing. *Id.*

ii. *Settlement Consideration and Distribution*

Pursuant to the Agreement, HSBC will establish a settlement fund of $30 million (the "Settlement Fund"). *Id*. at Sec. C ¶ 1. The Settlement Fund will not only cover distributions to the Settlement Class, but will also cover the cost of providing notice, settlement administration, attorneys' fees and costs and awards, if any, to Levin and Park as class representatives (the "Class Representatives"). *Id*. at ¶ 4.

The Settlement Class will receive distributions in proportion to their actual damages, *i.e*., the difference between the overdraft fees they *were* charged and the number they *would* have been charged had HSBC processed debit card transactions from lowest to highest amount. *Id*. at Sec. J ¶ 3. For class members who incurred overdraft fees from July 1, 2007 through the end of the class period—June 30, 2010, for consumers and November 30, 2011, for businesses—they will receive automatic distributions, either by direct credit to their account or, where the account has been closed, by check. *Id*. at Sec. L ¶ 2.

However, for class members who incurred an overdraft fee between December 17, 2004 and July 1, 2007, they must submit a claim form to receive payment because HSBC does not have the data necessary to make the distributions automatically. *Id*. at Sec. K ¶¶ 1-11. These class members must provide the settlement administrator their account information and bank statements that show when an overdraft fee was charged, as well as the transaction that triggered the fee. *Id*. at ¶5. The settlement administrator will determine which overdraft fees were charged as a result of the bank's "high-to-low" posting and arrange for distributions accordingly. *Id*. at ¶¶ 6-7.

Finally, the Settlement Agreement provides for the *pro rata* distribution of any residual funds to the Settlement

Class. *Id*. at Sec. M ¶¶ 1-2. In the event such distribution is not feasible, the funds are to be distributed through a *cy pres* program. *Id*. at ¶ 2.b. The *cy pres* recipient will be an entity "mutually agreed to by Settlement Class Counsel and HSBC, subject to approval by the Court, before consummation of the Notice Program." *Id*.

iii. *Attorneys' Fees and Service Awards*

The Agreement provides for attorneys' fees to the Settlement Class counsel, Himmelstein, of up to 25% of the Settlement Fund, as well as reimbursement for expenses incurred in connection with the litigation. *Id*. at Sec. P ¶ 1. Pursuant to the Agreement, any award to counsel is subject to Court approval. *Id*.

The Agreement further provides for a service award of $5,000 to each of the Class Representatives, Ofra Levin and Michael Park. *Id*. at Sec. P ¶ 4. The Court's failure to approve the service awards "will not prevent the Agreement from becoming effective, nor will it be grounds for termination." *Id*.

4. Federal Plaintiffs' Motion to Enjoin

On March 2, 2015, the same day the Settlement Agreement was executed, Levin Plaintiffs filed a motion for preliminary approval of the settlement, provisional certification of the Settlement Class and approval of the Agreement's notice provisions. *See* Himmelstein Affirm. Ex. A. On March 5, 2015, Federal Plaintiffs filed a motion in the Eastern District of New York to enjoin the settlement proceedings before this Court. *See* Bernard Affirm. Ex. 3. On April 9, Judge Spatt denied the motion to enjoin and partially stayed the Federal Action "pending resolution of the class action settlement process in the State Court Action." (Dkt. No. 148) On April 27, 2015, Federal Plaintiffs filed an Order to Show Cause with the Court. (Dkt. No. 151) Federal Plaintiffs sought permission to intervene in the Levin Action and a stay of the Settlement Proceedings. *Id*.

On July 7, 2015, this Court held a hearing on both the motion for preliminary approval and the Order to Show Cause. (Dkt. No. 172) At the hearing, this Court instructed the parties to further brief the motion for preliminary approval and the Federal Plaintiffs' motion to intervene in advance of another hearing to be held on August 25, 2015. *Id*. At the August 25 hearing, this Court denied Federal Plaintiffs' motion to intervene. (Dkt. No. 369)

II. *Discussion*

Presently before the Court is Plaintiffs' motion for preliminary approval of the Settlement Agreement. Plaintiffs argue that the $30 million settlement is a favorable result for the class, representing 50% of the total damages sustained by the Settlement Class. Plaintiffs explain that, in comparing the proposed settlement to those obtained by other banks that engaged in "high-to-low" posting, only two settlement classes received a better result. In light of this fact, Plaintiffs argue that preliminary approval, which is not subjected to the heightened scrutiny of final approval, is easily warranted. Defendants agree that this settlement is highly favorable and support the motion.

To grant the motion, the Court must: (1) conditionally certify the Settlement Class; (2) find the settlement terms fair and reasonable; and (3) find the notice provisions adequate. *See* Settlement Agreement Sec. E ¶ 1. For the reasons that follow, the motion is granted.

a. Class Certification

In order to obtain class certification, the five prerequisites set forth in CPLR § 901(a) must be satisfied: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) questions of law or fact common to the class predominate over questions of [*5]law or fact affecting individual class members (commonality); (3) the claims or defenses of the class representatives are typical of those in the class (typicality); (4) the class

representatives will fairly and adequately protect the interests of the class (adequacy); and, (5) a class action represents the superior method of adjudicating the controversy (superiority). *See Rabouin v. Metropolitan Life Ins. Co.*, 25 AD3d 349, 350 (1st Dep't 2006). Where a class seeks certification for settlement purposes only, "these prerequisites—and particularly those designed to protect absentee class members—must still be met and, indeed, demand undiluted, even heightened, attention.'" *Klein v. Robert's American Gourmet Food, Inc.*, 28 AD3d 63, 70 (2d Dep't 2006) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)).

In addition to the CPRL § 901 prerequisites, the proposed class must also satisfy CPLR § 902, which asks the court to consider: (1) the interest of class members in individually controlling the prosecution; (2) the impracticability or inefficiency of prosecuting or defending separate actions; (3) the extent and nature of any litigation concerning the controversy commenced by or against members of the class; (4) the desirability or undesirability of concentrating the litigation of the claim in the particular forum; and (5) the difficulties likely to be encountered in the management of a class action. *See Pludeman v. Northern Leasing Sys., Inc.*, 74 AD3d 420, 421-22 (1st Dep't 2010).

As discussed below and for purposes of preliminary settlement approval, Plaintiffs' have met their burden and the Settlement Class is conditionally certified.

i. *Numerosity*

Under CPLR § 901(a)(1), the class must be so numerous that the joinder of all members as actual parties would be impracticable. There is no "bright-line test" governing the numerosity requirement. *See Weinstein v. Jenny Craig Operations, Inc.*, 41 Misc 3d 1220(A) at *3 (Sup. Ct. NY Cnty. 2013) (certifying a class of 751). "Each case depends upon the particular circumstances surrounding the proposed class and the Court should consider the reasonable

inferences and common sense assumptions from the facts before it." *Friar v. Vanguard Holding Corp.*, 78 AD2d 83, 96 (2d Dep't 1980). Plaintiffs herein propose a class numbering in the hundreds of thousands. *See* Sec. Amend. Compl. ¶ 31.a; *see also* Himmelstein Affirm. ¶ 12 (asserting that the national class numbers in the millions). Therefore, there is no doubt that Plaintiffs' have met the numerosity requirement. *See Pruitt v. Rockefeller Ctr. Prop., Inc.,* 167 AD2d 14, 21 (1st Dep't 1991) ("This action, involving thousands of class members, clearly meets the statute's numerosity requirement.").

ii. *Commonality*

CPLR § 901(a)(2) requires that questions of law or fact common to the class predominate over any such questions affecting individual class members. The determination "should be based on whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated.'" *Globe Surgical Supply v. GEICO Ins. Co.*, 59 AD3d 129, 140 (2d Dep't 2008) (quoting *Friar*, 78 AD2d at 97). Thus, when individual factual questions as to individual class members predominate, courts have found commonality to be lacking. *See DeFilippo v. Mutual Life Ins. Co. of NY*, 13 AD3d 178, 180 (1st Dep't 2004) (affirming denial of class certification where the only claim, for a violation [*6]of NY GBL§ 349, would require individualized inquiries); *but see Emilio v. Robison Oil Corp.*, 63 AD3d 667, 668-69 (2d Dep't 2009) (finding certification proper where the plaintiffs asserted multiple claims, including violations of GBL§ 349, because common issues still predominated). In New York, "courts have uniformly certified breach of contract class actions, notwithstanding differing individual damages, where there is uniformity in contractual agreements and/or statutorily obligations." *Globe,* 59 AD3d at 139-40.

Here, Class Members had identical contracts with HSBC and were subjected to improper overdraft fees through the bank's practice of "high-to-low" posting. *See* Sec. Amend. Compl. ¶ 27. Levin Plaintiffs allege that by engaging

in this practice, HSBC breached the Debit Card Agreement, breached the implied covenant of good faith and fair dealing as to the Rules for Deposit Accounts and violated various consumer protection laws, including NY GBL § 349. *See id*. at ¶ 31.b.

In determining whether common issues predominate, it is clear that the only individualized issue of fact is damages, which, as explained above, is not a bar to certification. *Globe*, 59 AD3d at 139-40. However, since the Settlement Class is a national class, it is important to note the differences that exist, state-by-state, with respect to the applicable contract and consumer protection laws.[FN9] *See Ackerman v. Price Waterhouse*, 252 AD2d 179, 193-95 (1st Dep't 1998) (holding that members of the global class did not meet their burden of "establishing that the relevant choice of law principles w[ould] not ultimately require application of widely divergent laws of multiple jurisdictions"); *but see In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 529-30 (3d Cir. 2004) ("When dealing with variations in state law, the same regards to case manageability that arise with litigation classes are not present with settlement classes and do not defeat commonality and predominance.") (internal citation omitted); accord *Sullivan v. DB Invest., Inc.*, 667 F.3d 273 302-02 (3d. Cir. 2011) ("The class settlement posture of this case largely marginalizes the objectors' concern that state law variations undermine a finding of predominance.").

Despite these variations in state law, common issues nonetheless predominate by virtue of HSBC's uniform contract with the Settlement Class and its uniform practice of "high-to-low" posting. See Klein v. Robert's American Gourmet Food, Inc., 28 AD3d 63, 72 (2d Dep't 2006) (explaining that commonality was lacking where issues of both fact and law were individualized).

iii. Typicality

CPLR § 901(a)(3) requires that the "claims and defenses of the representative parties are typical of the claims or

defenses of the class." If the claims arise "from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory [the typicality] requirement is satisfied." *See Pludeman v. Northern Leasing Sys., Inc.*, 74 AD3d 420, 423 (1st Dep't 2010) (citing *Friar v. Vanguard [*7]Holding Corp.*, 78 AD2d 83, 99 (2d Dep't 1980)). Since typicality "relates to the nature of the claims and the underlying transaction that plaintiff's damages may differ from those of other members of the class is not a proper basis to deny class certification." *Pruitt v. Rockefeller Ctr. Prop., Inc.,* 167 AD2d 14, 22 (1st Dep't 1991) (citing *Vickers v. Home Fed. Sav. & Loan Assn.*, 56 AD2d 62, 65 (4d Dep't 1977)).

Here, the proposed class representatives, Levin and Park, were subjected to the same $35.00 overdraft as the rest of the Settlement Class. *See* Sec. Amend. Compl. ¶¶ 21-22. The only differences between their claims and those of the Class are the *number* of overdraft fees that were improperly charged—*i.e.*, damages. Such a difference is not a relevant to the Court's decision whether to conditionally certify the class. *See Pruitt*, 167 AD2d at 22. Therefore, the typicality requirement is satisfied.

iv. *Adequacy*

Pursuant to CPLR § 901(a)(4), a class action can only be maintained if the representative parties, class representatives and class counsel, will fairly and adequately protect the interests of the class. In addressing adequacy, courts consider: (1) whether any conflicts exist between class representatives and class members; (2) representatives' familiarity with the lawsuit and their financial resources; and (3) the competence and experience of class counsel. *See Ackerman v. Price Waterhouse*, 252 AD2d 179, 202 (1st Dep't 1998) (citing *Pruitt*, 167 AD2d at 24).

First, there is nothing in the record that suggests a conflict between the Class Representatives, Levin and Park, and the other class members. *See Globe Surgical Supply v. GEICO Ins. Co.*, 59 AD3d 129, 145 (2d Dep't 2008)

(finding a class representative inadequate where he had a history of pursuing his own defenses). Aside from the $5,000 service award sought by both, which will be discussed below, Levin and Park are similarly situated to the Settlement Class, each of whom will be reimbursed for improper overdraft fees. *See* Settlement Agreement Sec. J ¶ 3. Particularly with respect to Levin, who initiated this action in 2011 and was the first to challenge HSBC's practices, there is no one more familiar with this case. *See* Class Action Complaint. Though Park was not added as a named plaintiff until March 2015, the Court has no reason to doubt he also has the necessary familiarity, or "general awareness," to adequately represent the class. *See Ackerman*, 252 AD2d at 202.

As for Settlement Class counsel, Mr. Himmelstein, the Court finds he has "amply demonstrated [his] experience and skill in class action litigation." *Id.*; *see* Himmelstein Affirm. ¶ 7. Furthermore, he was involved with the only overdraft fee litigation to go to trial. *See Gutierrez v. Wells Fargo Bank, N.A.*, 730 F. Supp. 2d 1080, 1082 (awarding the class over $200 million).

v. *Superiority*

The final requirement under CPLR § 901(a) is a showing that the class action is superior to other available methods for the "fair and efficient adjudication" of the controversy. CPLR § 901(a)(5). "Since the relatively insignificant amount of damages suffered by many [class] members' makes individual actions cost prohibitive a class action is not only superior but, indeed, the only practical method of adjudication." *Pruitt*, 167 AD2d at 24; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (noting that the "very core of the class-action [*8]mechanism is to overcome the problem that small recoveries do not provide incentive for any individual to bring a solo action prosecuting his or her rights"). Here, Class Members could receive a reimbursement for as little as $35.00.[FN10] *See Settlement Agreement Sec. J ¶ 3. Thus, a class action is clearly the superior method of adjudicating this matter.*

vi. CPRL § 902 Factors

The Settlement Class must also meet the requirements of CPRL § 902. With respect to the first two factors—§ 902(1), class members' interest in individually prosecuting their claims and § 902(2), the impracticability of prosecuting separate actions—these two factors are satisfied by the Court's finding that the class action is the superior method of adjudication. *See Globe*, 59 AD3d at 136 (noting that the two factors are "subsumed under the prerequisite of superiority" where individual recovery is minimal). Since each Class Member stands to recover a relatively small amount, the interest in pursuing an individual action is quite low.[FN11] Coupled with the fact that the Settlement Class numbers in the hundreds of thousands, it follows that the impracticability of pursuing separate actions is exceedingly high. See Sec. Amend. Compl. ¶ 31.a.

Under CPLR § 902(3), the Court must consider "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." As explained above, there is a Federal Action, which consists of three consolidated complaints, pending before Judge Spatt in the Eastern District of New York. See In re HSBC Bank U.S.A., N.A., Debit Card Overdraft Fee Litig., 949 F. Supp. 2d 1358, 1359 (U.S. Jud. Pan. Mult. Lit. 2013). Judge Spatt ordered a partial stay of the action on April 9, 2015, "pending resolution of the class action settlement process in the State Court Action." (Dkt. No. 148) Since this action is closer to resolution, § 902(3) weighs in favor of certification.

The Court must also consider "the desirability or undesirability of concentrating the litigation of the claim in the particular forum." CPLR § 902(4). HSBC is headquartered in New York and has the majority of its branches here. *See* Sec. Amend. Compl. ¶¶ 25-26. Therefore, New York County is the most desirable forum for this litigation.

The last factor, CPLR § 902(5), addresses the difficulties in managing the class action and has no bearing on the Court's decision here, since the class is being certified for settlement purposes only. *See Amchen*, 521 U.S. at 620

("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems ").

b. Reasonableness of the Settlement

Since this action may properly proceed as a class action for settlement purposes, the Court must now address whether the proposed settlement is "fair, adequate, reasonable, and in the best interest of class members." *Klein v. Robert's American Gourmet Food, Inc.*, 28 AD3d 63, 73 (2d Dep't 2006). In making this determination, courts balance "the value of [the] settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation."

Id. (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 806 (3d Cir. 1995)).

Courts may also consider, among other things, the following factors: the likelihood of success on the merits of the underlying case; the extent of support of the settlement by the parties, taking into account the number of class members who opt out of the class or file objections to the settlement's terms; counsel's judgment; and whether good-faith bargaining occurred at arm's length. *See Rosenfeld v. Bear Stearns & Co.*, 237 AD2d 199, 199 (1st Dep't 1997) (describing the scope of the inquiry); *see also Klurfeld v. Equity Enterprises, Inc*., 79 AD2d 124, 133 (2d Dep't 1981) (same).

Here, the $30 million settlement represents approximately 50% of the actual damages sustained, estimated by HSBC to be $58.8 million. *See* Himmelstein Affirm. ¶ 8. The damages were calculated by taking a sample of

consumer and business accounts and determining which overdraft fees would not have been charged *but for* the "high-to-low" posting. *Id*. The percentage of overdraft fees that were improper was multiplied by the total number of overdraft fees charged during the class period. *Id*. It should be noted, however, that since HSBC did not store chronological posting information, HSBC and Levin Plaintiffs agreed to the random sampling used to calculate actual damages.[FN12] *Id.*

First, as the parties here point out, the Settlement Fund is on the higher end of recovery in similar class actions against other banks that engaged in "high-to-low" posting. See Himmelstein Affirm. ¶ 9. For example, in Schulte v. Fifth Third Bank, the court approved a $9.5 million settlement, which accounted for 10% of the actual damages sustained by the class. 805 F. Supp. 2d 560, 583 (N.D. Ill. 2011) (noting that the majority of class action settlements fall below 10% of class members' estimated losses). Plaintiffs point out that, in general, the majority of the "high-to-low" settlements are clustered in the 40-50% range, with only two actions receiving a greater percentage of total damages than the proposed settlement here. See Himmelstein Affirm. Sec. C; see Larson v. Union Bank N.A., N.D. Cal., 4:09-cv-3250 (where the national class received 63% of its actual damages); Blahut v. Harris Bank, N.A., N.D. Ill. 1:10-cv-2543 (65%).

In addition, the record also supports a finding that the parties engaged in "good faith bargaining" at "arm's length." See Rosenfeld, 237 AD2d at 199. The Settlement Agreement is a product of four years of litigation between the parties. See Class Action Complaint. Not only is the settlement supported by experienced counsel, the settlement mediator, the Hon. Layn R. Phillips, fully endorsed the Settlement Agreement, as well. (Phillips Decl. ¶ 11) Judge Phillips explained that the Agreement is "the product of vigorous and independent advocacy and arm's-[*9]length negotiation conducted in good faith." (Phillips Decl. ¶¶ 10-11) Though Judge Phillips' observations as mediator are not binding on this Court, his respected opinion supports the conclusion that the Settlement Agreement is fair, adequate, reasonable and in the best interest of the Class. See Klein, 28 AD3d at 73.

Though Federal Plaintiffs maintain that the Settlement Agreement is not fair and reasonable, their objections are not relevant on a motion for preliminary approval since they are not parties to the Agreement and, in any event, may opt-out before final approval.[FN13] Furthermore, Federal Plaintiffs will have the opportunity to make their objections at the final approval hearing. See Casey v. Citibank, N.A., 2014 WL 3468188, at *1 (N.D.NY Mar. 21, 2014) (finding that an "attempt to object to the proposed settlement agreement is inappropriate and premature. The proper time is at the final approval hearing); see also Davis v. J.P. Morgan Chase & Co., 775 F. Supp. 2d 601, 608 (W.D.NY 2011) (same). As explained by a leading treatise on class action litigation:

> The goal of preliminary approval is for a court to determine whether notice of the proposed settlement should be sent to the class, not to make a final determination of the settlement's fairness. Accordingly, the standard that governs the preliminary approval inquiry is less demanding than the standard that applies at the final approval phase .
>
> More specifically, courts will grant preliminary approval where the proposed settlement is neither illegal nor collusive and is within the range of possible approval.

(Newburg on Class Actions §13:13 (5th ed.) (internal citations omitted)) Based on the record before this Court, there is no doubt that the proposed settlement is fair and "within the range of possible approval." *Id.* Even if the Court accepts the Federal Plaintiffs' calculation of total damages, at $76 million, the $30 million in recovery here still represents approximately 40% of the class members' total losses, again, a fair, adequate and reasonable settlement, and well-within the possible range. *See Klein v. Robert's American Gourmet Food, Inc.*, 28 AD3d 63, 73 (2d Dep't 2006).

c. Reasonableness of Fees

Generally speaking, attorneys' fees in New York may not be recovered unless provided for by statute, court rule or agreement between the parties. *Flemming v. Barnwell Nursing Home and Health Facilities, Inc.*, 15 NY3d 375,

379 (2010) (citing *Hooper Assoc. v. AGS Computers*, 74 NY2d 487, 491 (1989)). Under CPLR Article 9, which governs class actions,

> If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees to the representatives of the class and/or to any other person that the court finds has acted to benefit the class based on the reasonable value of legal services rendered and if justice requires, allow recovery of the [*10]amount awarded from the opponent of the class.

(CPLR § 909) In determining "reasonable value of legal services," the court computes the reasonable numbers of hours spent by counsel multiplied by the reasonable hourly rate for counsel's services. *See Matter of Rahmey v. Blum*, 95 AD2d 294 (2d Dep't 1983) (adopting the federal standard for attorney fee calculations)); *see also Matakov v. Kel-Tech Const., Inc.*, 84 AD3d 677, 678 (1st Dep't 2011) (adopting the same standard). Since the burden lies on the claimant to show reasonableness of the fees, the claimant must provide the court with "an objective and detailed breakdown by the attorney of the time and labor expended, together with other factors he or she feels supports the fee requested." *Klein*, 28 AD3d at 75 (citing *Matter of Karp*, 145 AD2d 208, 216 (1st Dep't 1989)).

Here, the Settlement Agreement provides for attorneys' fees of up to 25% and a $5,000 award for the class representatives. (Settlement Agreement. Sec. D ¶¶ 1-4) However, Plaintiffs' have not provided a breakdown, much less a detailed breakdown, of the services provided by counsel in support of the award. Given Plaintiffs' counsel stands to earn up to $7.5 million, far greater than any plaintiff—named or otherwise—stands to recover, counsel's request will not be considered without a showing as to the reasonable value of services provided. *See Matakov*, 84 AD3d at 678 (citing *Friar v. Vanguard Holding Corp.*, 125 AD2d 444, 447 (2d Dep't 1986)). Therefore, the Court concludes that a decision on the appropriateness of fees at this time is premature. *See id*.

As for the $5,000 service awards requested by the Class Representatives, Levin and Park, CPLR § 909 does not authorize such so-called "incentive awards." *Flemming*, 56 AD3d at 166-67 ("New York law does not authorize

incentive awards for named plaintiffs in class actions The legislature did not statutorily provide for incentive awards when enacting CPLR Article 9, and we decline to create new law, leaving that policy determination within the purview of the legislature."); *but see Fiala v. Metropolitan Life Ins. Co., Inc.*, 27 Misc 3d 599, 611-12 (NY Sup. 2010) (nonetheless awarding a "modest incentive fee"). Since the awards are not available as a matter of New York law, Plaintiffs' requests for awards are "deemed warranted to the extent that they seek reasonable compensation for time and effort expended on behalf of the class." *In re MetLife Demutualization Litigation*, 689 F. Supp. 2d 297, 372 (E.D.NY 2010) (awarding $1,500 for each named plaintiff based on value of work "actually contributed"); *see also Fiala*, 27 Misc 3d at 611-12 (explaining that a modest fee of $1,500 or $1,000 to the named plaintiffs "cannot be argued to be a temptation to settle" the 9 years-long litigation); *Cox v. Microsoft Corp.*, 26 Misc 3d 1220(A) (NY Sup. 2007) (explaining that $7,500 was warranted in light of participation in the years' of litigation and discovery, including depositions).

In the light of the above observations, incentive awards to Levin and Park are not foreclosed, but any award will be limited to the time and effort each expended in litigating the matter. See In re MetLife Demutualization Litigation, 689 F. Supp. 2d at 372. Since Park was not added as a named plaintiff until March of 2015, the Court doubts that the value of his services is equal to that of Levin. However, a decision on this issue is premature until Levin and Park make some showing of the time and effort each expended on behalf of the Settlement Class.

d. Adequacy of Notice

Pursuant to CPLR § 908, "notice of the proposed compromise shall be given to all members of the class in such a manner as the court directs." As explained by the First [*11]Department, a notice must, at minimum:

> [I]nform all class members of the pending class action, the composition of the class, the issues between the parties, the terms of the proposed settlement, how a class member may object, the time period within which such objection, if any, must be made, and the date on which the trial court will hold a hearing, at

which same will consider the fairness of the proposed settlement.

Matter of Colt Indus. Shareholder Litig., 155 AD2d 154, 160 (1st Dep't 1990). Moreover, CPLR § 904 provides that the "content of the notice shall be subject to court approval."

The Settlement Agreement provides for several forms of notice to the Settlement Class, each containing the above required information. (Settlement Agreement Sec. H ¶ 2) Each Class Member that can be identified from HSBC's records will receive a postcard notice, informing them of the settlement and its term, how to file claims, how to exclude themselves (opt-out") and how to object. Id. at ¶ 3, Ex. 1. The settlement notice will also be published in major newspapers, containing the same information as the postcard notice. See Himmelstein Affirm. Ex. D. Both forms of notice will direct class members to the settlement website where they can access the long-form notice and claim form. See Settlement Agreement Sec. H ¶6, Ex. 3, 6. In light of these facts, the Court finds the notice provisions of the Settlement Agreement to be not only adequate, but comprehensive. See Colt Indus., 155 AD2d at 161.

It is also important to note that the "opt-out" method provided for in the Settlement Agreement, though not the preferred method of the Commercial Division, does not operate as a bar to preliminary approval. *See Hibbs v. Marvel Enterprises, Inc.*, 19 AD3d 232, 233 (1st Dep't 2005) (holding that the trial court abused its discretion by failing to approve proposed settlement on the ground that it used the "opt-out" method).

Finally, since the notice to the Settlement Class must include the date of the final approval hearing, so that class members may attend and object, the Court will schedule the hearing on February 18th, 2016, at 10:00 a.m. Prior to the hearing and by no later than January 19, 2016, Plaintiffs are to submit affidavits and briefing as to the reasonableness of attorneys' fees and incentive awards to the class representatives.

(Orders follow on the next page)

III. *Conclusion*

For the foregoing reasons, it is

ORDERED that Plaintiffs' motion for preliminary approval of the proposed class action settlement is granted and the settlement class conditionally certified;

ORDERED that the fairness hearing for final approval of the class action settlement will be held on April 6, 2016, at 10:00 a.m.;

ORDERED that Plaintiffs' affidavits and briefs on the issue of attorneys' fees and awards to class representatives will be received by March 7, 2016; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

E N T E R
Dated: October_____, 2015
New York, New York

_____
Hon. Eileen Bransten, J.S.C.

Footnotes

Footnote 1: Jura's claims were voluntarily dismissed without prejudice on August 22, 2013. (Dkt. No. 121)

Footnote 2: Adam Seth Turk ("Turk"), of Turk and Davidoff, and Barry Himmelstein ("Himmelstein"), of the

Himmelstein Law Network, assumed representation as local counsel and settlement class counsel, respectively. (Affirmation of Barry Himmelstein ("Himmelstein Affirm.") ¶ 2)

Footnote 3: The Parties stipulated that Plaintiffs would file the Second Amended Complaint, alleging a nationwide class, on the same day they moved for preliminary approval of the settlement. *See* Himmelstein Affirm. ¶ 5.

Footnote 4: The breach is specifically with respect to the "Rules for Deposit Accounts," which provide that an overdraft fee may be charged on a debit transaction if a withdrawal is made against insufficient funds. *Id*. at ¶ 33.

Footnote 5: The Debit Card Agreement provides, in relevant part, "You acknowledge that all Point-of-Sale transactions will constitute a simultaneous withdrawal from your Checking Account, even though the transaction might not be paid from your Checking Account until a later date." *Id*. at ¶ 38. The Debit Card Agreement further provides that its provisions are controlling over any inconsistent provisions contained in the Rules for Deposit Accounts. *Id* at ¶ 42.

Footnote 6: The Complaint cites the consumer protection law of every state beside New York that is, essentially, equivalent to NY GBL § 349. *Id*. at ¶ 124.

Footnote 7: Notice will be published in quarter-page ads in the highest circulation daily newspapers in twelve designated market areas, which cover 88% of HSBC branch locations. (Himmelstein Affirm. Ex. D)

Footnote 8:A person who does not validly and timely opt-out will be bound by the terms of the Agreement. (Settlement Agreement at Sec. H ¶ 8)

Footnote 9: As a matter of New York law, GBL § 349 claims are limited to New York residents or individuals whose claims are based on transactions that occurred in New York. *Goshen v. Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 (2002) (dismissing the GBL § 349 claims of non-New York residents who did not transact in New York).

Footnote 10: For example, proposed class representative Ofra Levin stands to recover $35.00 for one improper overdraft fee. *See* Sec. Amend. Compl. ¶ 70.

Footnote 11: For example, proposed class representative Michael Park stands to recover $35.00 for five improperly charged overdraft fees for a total of $175.00. *See* Sec. Amend. Compl. ¶¶ 73-88.

Footnote 12: Federal Plaintiffs object to the method used to calculate damages and insist actual damages equal $76 million.

Footnote 13: As previously noted, Federal Plaintiffs filed leave to intervene, but the Court denied the motion on August 25, 2015. (Dkt. No. 369)

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