IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY FALONEY, **JAMES M. WHITT AND ANITRA WHITT**, on behalf of themselves and all others similarly situated, Plaintiffs v. **WACHOVIA BANK, N.A.** Defendant	CIVIL ACTION No. 07-1455
CATHERINE D. HARRISON, by and through her sister and attorney in fact, **JOANNE WELLER,** on behalf of herself and all others similarly situated, Plaintiff v. **WACHOVIA BANK, N.A**. Defendant	CIVIL ACTION No. 08-755

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL CLASS CERTIFICATION AND FOR FINAL APPROVAL OF THE PROPOSED SETTLEMENT

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Haroco v. Am. Nat'l Bank & Trust Co., 473 U.S. 606 (1985)..22

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Orloff v. Syndicated Office Sys., No. 00-5355, 2004 WL 870691 (E.D. Pa. Apr. 22, 2004) 23

Petersen v. H. & R. Block Tax Servs., Inc., 174 F.R.D. 78 (N.D. Ill. 1997) 34

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Smith v. MCI Telecomms. Corp., 124 F.R.D. 665 (D. Kan. 1989)..........22

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Other Authorities

Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 Santa Clara L. Rev. 747 (1988) 12

Tiffany Allen, *Anticipating Claims Filing Rates in Class Action Settlements*, Class Action Perspectives (Rust Consulting, Nov. 2008) 12

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FACTS AND PROCEDURAL HISTORY

Plaintiffs move for final certification of a settlement class and final approval of the proposed Class Action Settlement.[1] Final certification and approval is part of the global resolution of *Faloney v. Wachovia Bank, N.A.*, No. 07-1455, and *Harrison v. Wachovia Bank, N.A.*, No. 08-755. The Court granted preliminarily certification of the class and preliminary approval of the settlement on October 24, 2008. Defendant Wachovia joins in seeking the relief requested.

Plaintiffs are victims of what they contend were unlawful telemarketing practices. The telemarketers at issue obtained bank account information from class members, which was provided to payment processors that created unsigned checks written on the victims' accounts and deposited those checks in accounts at Defendant Wachovia Bank. Plaintiffs allege that Wachovia's participation in this scheme violated the Racketeering Influenced and Corrupt Organizations Act ("RICO"). The Class Action Settlement was entered into in conjunction with, and incorporates, a settlement of a related regulatory action by the Office of the Comptroller of the Currency addressing Wachovia's involvement in the processing of these payments.[2]

The settlement is a remarkable example of cooperation between the government and private litigants. The result is extraordinary. Despite the complexity of this case, every class member is entitled to full recovery of damages—a result that appears to be unprecedented. Class members' primary damages—the amounts taken from their

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[1] The settlement agreement is attached as exhibit A hereto.

[2] The Amended Agreement by and between Wachovia Bank, National Association, Charlotte, North Carolina, and The Office of the Comptroller of the Currency, *In re Wachovia Bank, N.A.*, No. 2008-159, AA-EC-08-80 (OCC Dec. 8, 2008) ("Amended OCC Agreement"), is available at http://www.occ.gov/FTP/EAs/ea2008-159.pdf. No. 2008-028

accounts by telemarketers through payment processors—can be determined from existing records. Checks for those damages have already been sent to every locatable class member without the need for any claim to be filed. Additional damages in the form of bank fees incurred as a result of the telemarketers raiding their accounts cannot be determined from existing records, so a claims procedure is necessary. But the claims procedure is designed to maximize returns—permitting recovery of $35 without requiring submission of bank records—while retaining every class member's ability to obtain full recovery, without limit, of all bank fee damages by providing appropriate documentation.

The total amount of damages to be paid is not limited, so each class member can obtain full recovery regardless of how much the settlement ultimately costs. Nor is any class member's recovery reduced by administration costs or counsel fees; they are accounted for separately. Plaintiffs have been unable to find any case in which all class members received one hundred percent of damages without a deduction for attorneys' fees and costs.

Checks totaling over $150 million have already been sent to class members, and the total value of the combined settlement is fairly valued at approximately $200 million.

I. BACKGROUND

A. OVERVIEW

The factual allegations in this case have been discussed at length in prior memoranda and opinions. A short sketch will suffice here.

Wachovia is alleged to have conspired with and/or participated in and/or operated a scheme or schemes to defraud more than one million people[3] through unlawful

[3] The class consists of 795,316 members. But it does not include those who were charged by the telemarketers, but had the money returned through the banking system.

telemarketing practices. A central aspect of the scheme or schemes is the manner in which funds were taken from the victims. The telemarketers fraudulently obtained bank account information, which was transmitted to a third-party payment processor ("TPP" or "payment processor"), which used the information to create paper checks written on the victim's account, and made payable to the telemarketer.

In lieu of a signature, these checks stated that they were authorized by the account holder—ostensibly, through verbal assent during the telemarketing call. These unsigned checks, known as "demand drafts" or "remotely created checks" ("RCCs"), were then deposited into bank accounts at Wachovia in the name of the payment processors. Wachovia accepted the representation of the payment processors that the checks were legitimate, notwithstanding the lack of a signature, and permitted the checks to be placed in the payment processors' accounts, even thought they were made payable to the telemarketers.

The payment processors, according to Plaintiffs, were at the center of one or more unified schemes to defraud, together with the various telemarketers, with Wachovia as an essential participant in those schemes.

In February 2006, the United States Attorney's office in Philadelphia brought a civil action against one of the payment processors—Payment Processing Center, LLC ("PPC"). After obtaining a temporary restraining order from the Court shutting down PPC's operations, the United States Attorney ultimately entered into a consent agreement under which $6 million of PPC's seized assets would be used to compensate victims. *See United States v. Payment Processing Ctr.*, No. 06-725 (E.D. Pa. Feb. 12, 2007) (Perm.

Approximately half of all checks were returned in this manner. Thus, it is fair to assume that the total number of people initially charged is well over one million.

Inj. by Consent of All Defs.). The result achieved by the United States Attorney in that case sowed the seeds of the omnibus settlement at issue today. At that stage, however, the focus was limited to PPC, and the available $6 million[4] fund covered only a small fraction of the $62 million worth of payments PPC had processed on behalf of the telemarketers.

The *Faloney* plaintiffs brought an action in April 2007 seeking the remaining primary damages, as well as bank charges that victims commonly paid as a result of their bank accounts having been depleted by the telemarketers' RCCs. *See* Complaint, Faloney v. Wachovia Bank, N.A. (E.D. Pa. 2007) (No. 07-1455). In February 2008, Plaintiff Catherine Harrison filed a related case covering other payment processors. *See* Complaint, Harrison ex rel. Weller v. Wachovia Bank, N.A. (E.D. Pa. 2008) (No. 08-755).

Beginning in late 2006, the Office of the Comptroller of the Currency ("OCC"), which regulates Wachovia's banking activities, conducted its own investigation of PPC.

In late 2007, plaintiffs' counsel informed both the United States Attorney's Office and the OCC that its investigations had revealed that Wachovia's relationship with the other payment processors raised similar concerns as its relationship with PPC.

On April 25, 2008, the OCC announced that it had reached an agreement with Wachovia, under which Wachovia was to pay $18.9 million in fines and to provide restitution to the victims of the telemarketers. *In re Wachovia Bank, N.A.*, No. 2008-028, AA-EC-08-12 (OCC Apr. 24, 2008) (Agreement by and between Wachovia Bank, N.A.

[4] Administrative costs related to the PPC fund have come out of the fund, reducing the amount available to consumers.

and the Office of the Comptroller of the Currency) ("OCC Agreement")[5]; *In re Wachovia Bank, N.A.*, No. 2008-037, AA-EC-08-13, 3 (OCC Apr. 24, 2008) (Consent Order for a Civil Money Penalty).[6] By this time, the OCC had expanded its investigation to cover all of the payment processors named in the *Harrison* complaint, as well as PPC.

The restitution program contemplated by the OCC's April agreement, however, required that eligible recipients file a claim for restitution. The class representatives—who represent the beneficiaries of this restitution program—immediately questioned this provision, posting a position paper on class counsel's website the day the agreement was announced arguing that requiring a claim form would result in victims obtaining only a fraction of the restitution to which they were entitled.[7] Plaintiffs had obtained through discovery detailed databases that established that a claims procedure would be unnecessary.

Plaintiffs were also concerned that the structure of the OCC's program would result in a fragmentary distribution that would be confusing and inefficient, further interfering with recovery. For example, part of the settlement was to be administered by the receiver appointed by the Court in the PPC action, while other parts were to be administered by others.

On May 9, 2008, the *Faloney* plaintiffs moved, as intervenors, in the *PPC* action for the Court to assert control over the entire OCC distribution under the All Writs Act,

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[5] Available at http://www.occ.gov/ftp/release/2008-48b.pdf.

[6] Available at http://www.occ.gov/FTP/EAs/ea2008-027.pdf.

[7] By this point, Langer, Grogan & Diver, P.C. had been appointed interim class counsel to represent the *Faloney* class. *Faloney v. Wachovia Bank, N.A.*, No. 07-1455 (E.D. Pa. Nov. 28, 2007) (order). It was appointed interim class counsel for the *Harrison* class thereafter. *Harrison ex rel Weller v. Wachovia Bank, N.A.*, No. 08-755 (E.D. Pa. June 3, 2008) (order).

28 U.S.C. § 1651. In addition to seeking to eliminate the fragmentary character of the multiple distributions to the same alleged victims, the *Faloney* plaintiffs urged that the OCC Agreement's claims procedure be abandoned entirely. A few weeks later, three members of Congress—Barney Frank, Edward Markey, and Joseph Sestak—moved for leave to file an amicus brief in support the All Writs motion, citing their concern that the claims procedure would unnecessarily deny recovery to the majority of victims. Mot. for Leave to File Amicus Curiae Brief in Supp. of the Intervenor Faloney Pls.' Mot. for an Inj. under the All Writs Act, United States v. Payment Processing Ctr. (E.D. Pa. May 29, 2008) (No. 06-725).

On June 5, 2008, the United States Attorney moved to change the distribution procedure in *PPC* in a manner consistent with the class's position that the money should be mailed directly to class members without a claim form. The proposed modification to the distribution of the limited fund obtained from PPC assumed that the much larger OCC distribution could be similarly modified to institute a direct-mailing program, which would create a combined fund for full restitution of primary damages to all victims of PPC. *See* Gov't's Proposed Restitution Plan Pursuant to Perm. Inj., at 15 n.12, United States v. Payment Processing Ctr. (E.D. Pa. June 5, 2008) (No. 06-725).

Following the United States Attorney's motion, discussions were initiated to attempt to settle the four separate actions—the *PPC* case, the two class actions, and the OCC enforcement action—in a coordinated manner. The four actions all shared the common goal of compensating the victims of the telemarketing schemes, so a unified solution eliminating the confusion of multiple distributions and allocating responsibility among the defendants in a rational way made sense.

These efforts led to an omnibus settlement agreement with three distinct, but interrelated, parts. The class-action settlement now before the court incorporates the revised terms of the OCC's agreement with Wachovia, which has been modified to adopt the class's position and to eliminate the claims procedure. Consequently, every class member has been automatically mailed a check for the entire amount debited by the payment processors (less any known refunds already received).[8] The class-action settlement allows class members to obtain full recovery of any bank fees that they paid as a result of the telemarketing debits. Wachovia has agreed to make all of these payments without any cap, as well as to pay for all costs and fees associated with the settlement. Wachovia is entitled to an offset, however, of any money recovered from the *PPC* fund, the bulk of which was released by the defendants in that case pursuant to a revision to the permanent injunction in that case, which constitutes the third element of the coordinated settlement.

The settlement is an extraordinary result for the class members. Not only are they able to recover their full damages without limits, they will automatically receive their primary damages without the need for a claims procedure. In short, all class members are entitled to complete relief, and the procedures have been streamlined to ensure that class members actually receive as much of that relief as is realistically possible.

B. THE CLASS-ACTION LITIGATION

The *Faloney* action was filed on April 11, 2007, after several months of work investigating and developing the case. From that time, plaintiffs' counsel engaged in

[8] Some class members—representing less than 7% of the class—have received a notice but no check, because records indicate that they have already received refunds of the full amount of the covered RCCs debited to their accounts.

extensive litigation of the class actions. This settlement was reached near the end of discovery, after several major motions were fully briefed, hundreds of thousands of pages of documents had been reviewed, and the records in various cases brought by the Federal Trade Commission and the Department of Justice had been carefully reviewed.

As noted, the United States Attorney's Office developed the case against one of the payment processors. It quickly obtained an impressive outcome against PPC, shutting down its operations and seizing its assets. *See United States v. Payment Processing Ctr.*, No. 06-725 (E.D. Pa. Feb. 21, 2006) (order granting T.R.O.); No. 06-725 (Apr. 7, 2006) (Stipulated Prelim. Inj. Order); No. 06-725 (Feb. 12, 2007) (Perm. Inj. by Consent of All Defs.).

Wachovia's relationship with PPC was not a central aspect of that litigation. Its role arose in a dispute over the ownership of certain funds in PPC's Wachovia accounts. In litigating that subordinate issue, Wachovia produced about 5,500 documents, more than half of which were transactional documents. The government took some ten depositions of Wachovia employees, and a two-day hearing was held on the issue of ownership of those funds, which was described in an opinion of the Court resolving the dispute over the Wachovia accounts. *United States v. Payment Processing Ctr., LLC*, 461 F. Supp. 2d 319 (E.D. Pa. Nov. 8, 2006). These materials provided the first picture of Wachovia's relationship with a payment processor.

The initial round of discovery in the *Faloney* matter involved the production of these items. The number of documents ultimately involved in the case expanded exponentially, with over 250,000 pages of documents produced by Wachovia. Over a million pages in total were reviewed or assessed in one form or another.

Plaintiffs' counsel's investigation of these documents led to the filing of a second class action, which expanded the case significantly. The new case, *Harrison v. Wachovia Bank, N.A.*, addressed Wachovia's relationship with the payment processors other than PPC and its predecessor, Netchex, that are part of the combined settlement: YMA and Guardian. The scope of the primary damages—the money taken from their accounts by the telemarketers and not returned—was thereby expanded from approximately $62 million to $150 million. The secondary bank-fee damages, which are in addition to these figures, are believed to have increased proportionately—to between about $15 and $50 million.

The class actions involve a number of significant complexities. First, the issue of proving Wachovia's involvement in the scheme presented an enormous evidentiary task, because it raised important questions regarding the knowledge and intent of both the individuals involved and of the bank itself, which was the only named defendant. These issues were extensively briefed in late 2007 and early 2008 as part of plaintiffs' motion for class certification.

Second, the alleged RICO scheme involved complex banking mechanisms, and required an understanding of standard banking practices and standard expectations with respect to check-return ratios and the like. Plaintiffs' counsel retained four experts who were focused on these banking issues.

The alleged scheme also involved a variety of telemarketers, who used a number of corporate aliases and an illusory multitude of products. At least nine separate actions by the FTC were initiated against these telemarketers; nearly all resulted in the schemes being shut down entirely. Plaintiffs' counsel reviewed tens of thousands of documents in

relation to these cases. These issues were also addressed in detail in plaintiffs' motion for class certification.

In addition to the banking experts, plaintiffs' counsel retained other experts, including Barbara Blake, an expert in fraudulent telemarketing and former investigator for the Iowa Attorney General; a marketing expert, Robert Myer, the chair of the Marketing Department at Wharton; as well as statisticians and forensic computing experts.

By the time the settlement was reached, plaintiffs had taken twelve depositions, including principals of PPC, Netchex, and YMA, the receiver for PPC, receivers for certain telemarketers, and Wachovia employees. Seventeen more were scheduled for the weeks immediately following the date of the initial agreement. In addition, plaintiffs reviewed scores of deposition transcripts from the PPC action, from the OCC's investigation, and from various FTC actions.

As of the date of the settlement, two crucial motions were fully briefed and awaiting resolution by the court. In *Faloney*, the class-certification brief, which addressed many of the most significant issues in this case in great detail, was pending. And in *Harrison*, Wachovia's motion to dismiss certain claims was fully briefed and pending.[9]

In addition to the documents reviewed, plaintiffs became aware of, and gained access to, large databases containing precise transactional data—including consumers' addresses and account numbers as well as refund information—for a large majority of the putative class members in both the *Faloney* and *Harrison* matters. These databases made the settlement now before the court possible.

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[9] Wachovia filed a motion to dismiss in *Faloney*, but withdrew it when plaintiffs filed their amended complaint.

C. THE OCC INVESTIGATION AND INITIAL AGREEMENT

The OCC initiated an investigation of Wachovia's conduct in connection with PPC in the latter part of 2006. The OCC conducted its investigation confidentially. At the time the *Faloney* case was filed, the OCC investigation was not public, and plaintiffs were unaware of it.

On April 25, 2008, the OCC announced the conclusion of its investigation and issued both a Consent Order for a Civil Money Penalty and a Formal Agreement with Wachovia. In the Consent Order, the OCC stated its findings concerning Wachovia's conduct, and ordered that Wachovia pay a civil money penalty of $10 million. Consent Order, at 3.

The Agreement contemplated: (1) a restitution program for the victims of the telemarketing scheme, OCC Agreement, art. IV; (2) a payment of $8.9 million for "consumer education, *id.*, art. IV; and (3) a series of changes to Wachovia's policies on RCCs, due diligence, risk management, and consumer protection, *id.*, arts. V-IX.

The Agreement contemplated "full restitution" and required that Wachovia "fully reimburse" each eligible consumer. But consumer recovery—and Wachovia's exposure—were limited by two important factors. First, the restitution was directed only at the primary damages—the money taken from consumers' accounts by the RCCs created by the payment processors. Other damages, including bank fees, would not be reimbursed. And second, in order to obtain restitution under the program, each consumer would be required to file a claim form. Thus, consumers who did not file claim forms would receive nothing. Because Wachovia had a full reversionary interest in the unclaimed restitution funds, to the extent claims forms were not filed, Wachovia stood to recoup those funds.

The Agreement required that Wachovia set aside $125 million for the restitution program, which was described as "an estimate of the maximum potential restitution that may be required by this Article; actual claims filed may result in restitution in a lesser amount." OCC Agreement, at 4.

Based on experience of similar consumer claims procedures, any realistic estimate of a likely claims rate would mean total payments of substantially less than $125 million. In fact, it is likely to be as low as ten percent or less. In a recent publication unrelated to this action, Rust Consulting, Inc., the administrator of the benefits in this case, reported that in consumer class actions, the filing rates are between two and twenty percent. Tiffany Allen, *Anticipating Claims Filing Rates in Class Action Settlements*, Class Action Perspectives, 2 (Rust Consulting, Nov. 2008). This is consistent with the run of cases, which have generally found response rates around or below ten percent.[10] Thus, the actual value of the restitution program to the class would likely be around $15 million (or even less).[11]

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[10] *See, e.g.*, *Sylvester v. CIGNA Corp.*, 369 F. Supp. 2d. 34, 44 (D. Me. 2005) (Signal, C.J.) ("'Claims made' settlements regularly yield response rates of 10 percent or less."); *Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 92-93 (3d Cir. 1985) (Adams, J.) ("[T]he defendants have cited studies by Herbert Newberg, author of a treatise on class actions, to demonstrate that a 12% rate is in line with response rates in similar settlements."); *Greenhaw v. Lubbock County Beverage Ass'n*, 721 F.2d 1019, 1032 (5th Cir. 1983); Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 Santa Clara L. Rev. 747 (1988).

[11] Wachovia's own exposure would be further reduced by the fact that it was entitled to offset the $5 to $6 million recovered from PPC by the United States Attorney. Thus, it might have paid less than $10 million in restitution. In fact, Wachovia's payments to PPC customers may have been close to zero. The losses in the PPC case were approximately $62 million. A ten-percent response rate (by dollars) would require about $6.2 million in payments. The PPC settlement fund could cover nearly all of that.

D. FORMAL SETTLEMENT TALKS

On February 11, 2008, District Judge John R. Padova[12] referred the class cases for settlement discussions to Magistrate Judge Timothy Rice. The initial session, in March 2008, resulted in little progress. Thereafter, the parties agreed to mediation before former Chief Judge Edward N. Cahn. Arms'-length negotiations were held over the course of a full day on April 11, 2008. That session did not result in a resolution of the matter; nor did it provide sufficient common ground to continue the negotiations.

Before the parties resumed discussions, there were a number of material changes. On April 25, 2008, the OCC announced its agreement with Wachovia, which had been confidential during the earlier settlement discussions. Thereafter, the *Faloney* plaintiffs filed their motion under the All Writs Act to bring the OCC restitution program under the jurisdiction of this Court. That motion was later supported by Representatives Frank, Markey, and Sestak, who sought permission to file an amicus brief in support of plaintiffs' motion. And on June 5, the United States Attorney filed his motion to modify the PPC distribution scheme in a manner that would require that the initial OCC Agreement be modified to dispense with the claims procedure, consistent with the relief requested in plaintiffs' All Writs Act motion.

On June 24, 2008, the parties again held settlement negotiations mediated by Judge Cahn over the course of a full day. Despite the parties' serious efforts to reach a resolution, that session did not result in resolution, and the negotiations were discontinued.

[12] The *Faloney* and *Harrison* actions, along with the government's case against *PPC*, were transferred from Judge Padova to Judge R. Barclay Surrick on March 11, 2008.

Throughout, plaintiffs were focused on maximizing the overall recovery to the class, whether it came from the OCC's fund or a separate fund created solely for the class actions. As Judge Cahn states in his declaration, "I can state without any reservation that throughout the negotiations class counsel placed the interest of the class foremost …." (Cahn Decl. ¶ 7.) Concern for the class led plaintiffs to challenge the initial OCC Agreement. It also created challenges to separate settlement of the class actions, because plaintiffs were forced to predict the path the government would ultimately take with respect to restitution to the class members in order to assess the overall benefit to the class of any proposed settlement.

These challenges were overcome after the parties decided to engage in global settlement discussions in August 2008. The impetus was the need to resolve the United States Attorney's motion to alter the distribution in the *PPC* case. Because the government's proposal implicated the OCC's Agreement with Wachovia, and that agreement directly affected the class members' ability to recover their damages, a joint resolution was needed. The settlement now before the Court was reached, in principal, after three days of mediation. The formal agreement ultimately reached is consistent with the agreement reached in those sessions. The *PPC* case and the OCC action against Wachovia were also resolved through these sessions. The class-action settlement expressly incorporates the Amended OCC Agreement's revised restitution requirements (ex. A, ¶ 24), which now requires the direct mailing of checks. Amended OCC Agreement, at 4. And the Amended OCC Agreement, in turn, incorporates the funds recovered in the *PPC* action into its restitution program. *Id.* at 6.

E. THE TERMS OF THE SETTLEMENT

The combined settlement represents an exceptional result for the class. Every class member has the opportunity to be made whole—receiving one hundred percent of both primary and bank-fee damages. And all of the fees and costs associated with the settlement will be paid on top of this recovery. Moreover, each class member will receive direct payment of his or her direct damages, and can file a simplified form for bank fee damages. Thus, the program will actually deliver as much restitution to each class member as could reasonably be accomplished. This result is apparently unprecedented, as there are no known class actions in which all class members are eligible to receive one hundred percent of damages, without a reduction for fees and costs, much less ones in which there is direct reimbursement of primary damages without filing a claim.

The Settlement Agreement defines the settlement class as follows:

> All individuals as to whom RCCs[13] on their bank accounts were deposited by the Payment Processors[14] into one or more accounts in any of the Payment Processors or Telemarketers'[15] names at defendant Wachovia and finally charged to individuals' bank accounts, and which was not returned in full by the drawee bank, between June 1, 2003, and the date of this Agreement.

(Ex. A, ¶ 10.)

1. **<u>Restitution by Direct Check</u>**

Using existing transactional data, the settlement administrator has already mailed checks to each class member for the full amount of the unreturned RCCs charged to their

[13] RCCs are defined in the agreement as a "remotely created draft" or "demand draft" (Ex. A, ¶ 8.)

[14] Working from the class definitions in both the *Faloney* and *Harrison* cases, the agreement defines Payment Processors as "PPC, Netchex, YMA and Guardian." (Ex. A, ¶ 6.)

[15] The agreement defines Telemarketers as "any and all entities that conducted outbound telemarketing activities and processed payments through the Payment Processors." (Ex. A, ¶ 7.)

accounts, less any refunds they have already received. There are no strings attached to these checks. The recipient simply needs to cash or deposit the check to gain the full benefits of this portion of the settlement.

Over 740,000 checks have now been issued, with a total value of over $150 million. The data for this mailing were painstakingly compiled, verified, and updated, to ensure that the sums are accurate, and that the addresses are current.[16] And any checks over $200 that are returned as undeliverable will be subject to further processing to ensure that as many of these checks reach the appropriate class members as is possible. Amended OCC Agreement, at 5-6.

2. Recovery for Bank Charges Incurred by Class Members

In addition to the direct restitution by check, all class members will also be able to recover bank fees incurred because of telemarketing charges. This portion of the settlement necessarily involves a claims procedure, because unlike the direct damages, the parties do not have access to the information that would make direct payment of these damages possible. This information is located in the consumers' own bank records, which are, except for the subset of consumers who happened to have their accounts at Wachovia, from other banks.

When telemarketers took funds from class members' accounts, that loss of funds often caused the account to be overdrawn when the next check or debit was posted to the account. Many victims may not have even known that their accounts were being debited

[16] The data concerning the initial RCCs are of very good quality. To the extent there are errors—and everyone accepts that there will be some, given the magnitude of the class—it is more likely to be in the data showing the returns of those checks, which may not be counted, or subsequent refunds, the records for which are incomplete. Thus, errors have been reduced to the level possible, and are more likely to be in the nature of "false positives"—i.e., class members receiving money for which they have already received a refund, then a "false negative."

by the telemarketers, making them especially likely to bounce later checks. But even for those who did understand that the telemarketers would take money from their accounts, many kept balances at a low level, so that they had insufficient funds to cover payments they made or attempted to make after the telemarketing charge, but which they would have been able to cover had the telemarketing charge not been incurred. (Blake Decl. ¶¶ 16-18.) Under the settlement, any fee that is proximately caused by a covered telemarketing charge is eligible for full compensation.

For certain class members, these secondary damages are likely to be significant. People who engaged in multiple transactions after the telemarketing charges hit their accounts—such as those who regularly use debit cards for small transactions—may have incurred large numbers of fees for insufficient funds.[17] Indeed, it is likely that many people suffered more in fee damages than they suffered in direct debits by the telemarketers. On the other hand, some class members did not incur any such banking fees.

Because of the range these damages, and the inability to determine who suffered what damages without access to the class members' bank records, the only way for class members to be made whole is to use a claim procedure that involves the submission of bank records. The agreement thus creates a system whereby a Master will review the individual bank records submitted by class members to determine the extent of fee

[17] For example, one of the class members who was retained as a client by class counsel suffered three returned-check fees and four overdraft charges in the two weeks following a demand draft, after which his social security payment brought his account back into balance. The total cost of the fees was $222. (Ex. B hereto). On another occasion, the same consumer was hit with twenty-two overdraft fees—totaling $726—in the three days following telemarketing charges to his account. (Ex. C) While the telemarketing charges there were not ones covered by this lawsuit, and most of the fees were ultimately reversed, this episode vividly illustrates the potential extent of fee damages.

damages in individual cases. The agreement creates certain procedures and presumptions to assist the Master. But none of these provisions changes the ultimate standard, which is whether a given fee that has not already been reversed was proximately caused by a covered RCC. Again, each class member is entitled to one hundred percent of such fees with no reduction for fees or costs. Thus, no class member's ability to recover either primary or bank-fee damages has been compromised to reduce those damages below full compensation for their losses.

The class notices were designed to facilitate the class members' ability to produce relevant bank records by listing the date and amount of each individual's covered RCCs. Nevertheless, there is no question that many people will be disinclined to follow through the claims procedure, especially if they have not suffered large fee damages, or if they do not know that they did.

To help class members obtain as much relief as possible, the settlement contemplates a second, simplified claims procedure that does not require the submission of bank records. Class members may elect instead simply to certify that, to the best of their knowledge and understanding, they incurred bank fees as a result of the RCCs that were written on their accounts. This can be done either by returning a signed claim form or by so certifying at the settlement website. Any class member who chooses this option is entitled to $35. Thirty-five dollars is the amount of one typical bank fee,[18] and is also within the range of the estimates of the average class member's bank-fee damages.

The settlement thus makes every reasonable effort to ease the obstacles that claims procedures present when they are unavoidable. And of course, where a claims

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[18] It may actually be higher than the average bank charge during the class period. Wachovia's own fees were generally between $25 and $30 during the class period.

procedure is not necessary—for the return of the money taken from consumers' accounts with covered RCCs—there is no such procedure required. Overall, the settlement is designed to permit recovery of full damages by every class member and to facilitate actual compensation for every individual class member's damages to the extent reasonably practicable.

3. **Award to the Representative Plaintiffs**

Under the agreement, each of the four representative plaintiffs is entitled to a payment of $10,000, in addition to his or her damages, to compensate them for the efforts and burdens of representing the class in this matter. These payments are in addition to the money paid to the class members for damages, and do not reduce either the overall fund available to compensate class members or any individual's ability to recover full damages. This award is subject to Court approval in its capacity as fiduciary to the absent class members.

4. **Fees and Costs**

The ultimate extent of the damages that will actually be paid to class members is uncapped. The settlement is structured so that every class member has the opportunity to obtain full compensation of all damages, with no cap on the total to be paid.

In order to permit full damage recovery, all of the fees and costs of the settlement are to be paid separately. Wachovia has accepted full responsibility for funding the costs of administering the settlement. Wachovia has incurred approximately $2 million in charges related to the administration of the restitution programs. Wachovia has also agreed to pay attorneys' fees of $15 million. Neither the fees nor the costs will reduce any class member's ability to recovery one hundred percent of damages.

5. <u>Release</u>

In exchange for the above consideration, the class members who remain in the class agree to release Wachovia (and its agents, assigns, et cetera) from all claims "concerning Wachovia's processing of RCCs by the Payment Processors that were or could have been asserted based on the facts alleged in the complaints filed in either the *Faloney* Action or *Harrison* Action." (Ex. A, ¶ 64.)

F. VALUE OF THE SETTLEMENT

Because the extent of bank fee damages is not known, the overall extent of the damages suffered by the class cannot be precisely determined. In addition, because the settlement is structured so that Wachovia is to pay one hundred percent of the ascertainable damages of each class member, rather than establishing a fund of a fixed size from which payments are to be made, the ultimate amount to be paid to the class will not be known until the completion of the claims period. Because all ascertainable damages will be paid in full, regardless of the total cost of these payments, knowing the precise total of damages, or of the payments ultimately made to compensate those damages, is not necessary to assess the adequacy of the settlement for individual class members. In any event, the general scope of the settlement can be ascertained.

First, the direct payment checks have already been mailed. On December 11, 2008, the claims administrator mailed 742,872 checks,[19] with a total value of $150,143,361.20.

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[19] The number of checks represents the number of class members who are eligible for this portion of the settlement. Those checks represent over two million transactions. Approximately 52,000 class members have already received refunds for the amounts taken from their accounts, and consequently did not receive a check, but are eligible to claim bank fee damages.

Second, the total bank fee damages incurred by the class members is conservatively estimated to be $32 million. Barbara Blake, who worked as an investigator in the Consumer Protection Division of the Office of the Iowa attorney General for sixteen years has provided a declaration in which she concludes that the likely range is between $14 million and $50 million, which results in a median of $32 million. (Blake Decl. ¶ 18).

The class also receives a fee for its lawyers that is in addition to its own recovery, and gets the benefit of all administrative costs being paid separately. All told, the estimated value to the class is approximately $200 million.

Moreover, unlike most consumer class actions, the substantial majority of this money will actually reach the class members. Checks for direct damages have already been sent and, recognizing the challenges that arise from claims programs, the "Easy Refund" program is designed to maximize response rates.

In any event, each person is entitled to full recovery of all determinable damages, and is provided with a simplified procedure for determining the full extent of the damages. From any particular class member's point of view, this is an exceptional result, and issues related to the aggregate class recovery do not alter that assessment.

DISCUSSION

II. THE CLASS SHOULD BE CERTIFIED

The proposed class fully satisfies the requirements of Federal Rule of Civil Procedure 23. This is a paradigmatic case for class certification. The proposed class includes approximately 800,000 individuals, all alleging injury as a result of a common conspiracy between telemarketers, payment processors, and Wachovia. Each class member was victimized in the same fashion—unauthorized demand drafts created using

fraudulently obtained personal bank account information were presented to their banks for payment with the result that substantial sums were taken directly from their bank accounts. Large numbers of class members also incurred bank overdraft fees because of the unauthorized demand drafts.[20]

Numerous courts in this Circuit have found class treatment, including certification of settlement classes, appropriate in similar cases, i.e., RICO cases involving schemes to defraud. *See In re Prudential Ins. Co of Am. Sales Practices Litig.*, 148 F.3d 283 (3d Cir. 1998) (settlement class); *Hoxworth v. Blinder Robinson & Co.*, 980 F.2d 912 (3d Cir. 1992); *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985); *Grider v. Keystone Health Plan Cent.*, No. 01-05641, 2006 WL 3825178 (E.D. Pa. Dec. 20, 2006); *Ralston v. Zats*, No. 94-3723, 2000 WL 1781590 (E.D. Pa. Nov. 7, 2000) (settlement class); *Cullen v. Whitman Med. Corp.*, 188 F.R.D. 226 (E.D. Pa. 1999); *Hanrahan v. Britt*, 174 F.R.D. 356 (E.D. Pa. 1997) (settlement class); *Robinson v. Countrywide Credit Indus.*, No. 97-2747, 1997 WL 634502 (E.D. Pa. Oct. 8, 1997); *Rodriguez v. McKinney*, 156 F.R.D. 112 (E.D. Pa. 1994); *McMahon Books, Inc. v. Willow Grove Assocs.*, 108 F.R.D. 32 (E.D. Pa. 1985).[21]

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[20] Class Plaintiffs' Memorandum of Law in Support of Class Certification, filed on December 27, 2007, and its Reply Memorandum, filed on March 12, 2008, include a detailed description of the scheme that victimized the class. Those filings are incorporated herein by reference.

[21] These decisions are joined by a host of other similar decisions from other Circuits. *See Carnegie v. Household Int'l, Inc.* 376 F.3d 656 (7th Cir. 2004); *Negrete v. Allianz Life Ins. Co.*, 238 F.R.D. 482 (C.D. Cal. 2006); *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75 (D. Mass. 2005) (settlement class); *Heastie v. Cmty. Bank of Greater Peoria*, 125 F.R.D. 669 (N.D. Ill 1999); *Spark v. MBNA Corp.*, 178 F.R.D. 431 (D. Del. 1998); *Smith v. MCI Telecomms. Corp.*, 124 F.R.D. 665 (D. Kan. 1989); *Haroco v. Am. Nat'l. Bank & Trust Co.*, 121 F.R.D. 664 (N.D. Ill 1988), *on remand from* 473 U.S. 606 (1985).

The grounds for class certification of this class are especially compelling. First, the class is to be certified as part of the global resolution of all litigation bearing on the class's claims. Thus the class certification analysis takes cognizance of the terms of that settlement. *Amchem v. Windsor*, 521 U.S. 591, 619 (1997). Those terms provide all class members, without distinction, the opportunity to be made whole for all of the damages caused by the conspiracy to which they fell victim. This eliminates any concern regarding intra-class conflict based on factual variations in the underlying schemes that formed part of the conspiracy. Second, in *Bridge v. Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131 (2008), the Supreme Court recently determined that no reliance requirement was to be read into the RICO predicate acts of mail and wire fraud. This eliminates the concern that a class member may have to prove individualized reliance as an element of a RICO violation.

In all significant respects, the settlement class proposed for certification here contains the essential cohesion necessary for class adjudication.

A. THE PROPOSED CLASS SATISFIES RULE 23

A class proposed for settlement purposes must fully satisfy the requirements of Federal Rule of Civil Procedure 23. *Amchem*, 521 U.S. at 621-22; *Orloff v. Syndicated Office Sys.*, No. 00-5355, 2004 WL 870691, *3 (E.D. Pa. Apr. 22, 2004); *Hanrahan*, 174 F.R.D. at 361. In reviewing a settlement class for certification, the Court acts as a fiduciary for absent class members and protects the interests of the federal judicial system. *Hanrahan*, 174 F.R.D. at 361 (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("*G.M. Trucks*")). This

cautionary approach notwithstanding, the law clearly favors class action settlements. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d. Cir. 2004).

When analyzing a settlement class for certification, courts take the terms of the proposed settlement into consideration to the extent they bear on the requirements of Rule 23. *Amchem*, 521 U.S. at 619; *Prudential*, 148 F.3d at 308. Also, for settlement purposes, the Court need not inquire whether the proposed class would present intractable management problems at trial. *Amchem*, 521 U.S. at 620.

In making its class certification decision, the court is not concerned with the probability of success on the merits of the litigation. *Eisen v. Carlise & Jacquelin*, 417 U.S. 156, 178 (1974). The substantive allegations of the complaints are taken as true. *In re OSB Antitrust Litig*, No. 06-826, 2007 WL 2253418, *5 (E.D. Pa. Aug. 3, 2007). In addition to the pleadings, the court may also refer to other materials submitted for class certification purposes. *Hanrahan*, 174 F.R.D. at 362.

B. THE REQUIREMENTS OF RULE 23(A)

1. Numerosity.

Notices of the proposed settlement were mailed to approximately 800,000 class members. That number more than satisfies the numerosity requirement of Rule 23, which demands that the class be sufficiently numerous such that "joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). *See Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) (noting that a class in excess of 40 members will generally satisfy numerosity).

2. Commonality

The commonality requirement of Rule 23(a)(2) requires that the named plaintiffs

and the class have at least one question of law or fact in common. *Baby Neal ex rel. Kantor v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). Because there need be only one issue of fact or law in common, the commonality requirement is easily met. *Id.* Class members' claims need not be identical and "the fact that there is some factual variation among class grievances will not defeat a class action." *Hanrahan*, 174 F.R.D. at 362.

In a RICO action, the burden of proving the various elements of a RICO conspiracy establishes the commonality necessary to satisfy Rule 23(a)(2). As Chief Judge Bartle has explained:

> [C]ommon questions in a RICO action will be whether the defendants were involved in any racketeering activity, whether there was a scheme to defraud in violation of the mail fraud statute which constituted racketeering activity, whether the racketeering acts were conducted as part of a pattern , and whether the racketeering enterprise affected interstate commerce.

Robinson, 1997 WL 634502, at *3. (internal quotations omitted). *See also In re Ins. Brokerage Antitrust Litig.,* MDL No. 1663, 2007 WL 2589950, *10 (D.N.J. Sept. 4, 2007) ("Due to the conspiratorial nature of allegations in antitrust and RICO actions, such cases often present common questions of law and fact and are frequently certified as class actions.); *Hanrahan*, 174 F.R.D. at 363; *Grider*, 2006 WL 3825178, at *16; *McCoy v. HealthNet*, 569 F. Supp. 2d 448, 456 (D.N.J. 2008); *Lupron*, 228 F.R.D. at 88-89. The significant aspects of this case involve common issues of fact or law, all of which would be proven using evidence common to the class gleaned largely from Wachovia's files, testimony of its employees, and records amassed in other enforcement actions brought by government agencies.

For example, common issues include: (1) the use of phones in interstate commerce to fraudulently obtain account information; (2) the transmission of account

information by phone or wire; (3) the preparation of demand drafts using the information by the payment processors; (4) the transmission of proceeds from the demand drafts to the telemarketers; (5) the participation of the payment processors in the operation of the telemarketers; (6) the identification of the RICO enterprises alleged; (6) whether the payment processors participated in the enterprises; (7) whether the telemarketers and the payment processors engaged in mail and wire fraud; (8) whether the telemarketers and the payment processors dealt in unauthorized access devices; (9) whether the activities of the telemarketers and the payment processors constituted a pattern of racketeering activity; and (10) whether Wachovia conspired with the telemarketers and payment processors. All of those issues would be proven using common evidence largely gathered from the files of Wachovia or the payment processors.

Moreover, where, as here, the focus of the litigation is on the conduct of the defendant or third-parties, courts conclude that there are common questions under Rule 23(a)(2). *See Prudential*, 148 F.3d at 309-10; *Behrend v. Comcast Corp.*, No. 03-6604, 2007 WL 2972601, *5-*6 (E.D. Pa. Oct. 10, 2007).[22]

3. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The concepts of commonality and typicality are broadly defined and closely linked. *Prudential*, 148 F.3d at 311, (quoting *Baby Neal*, 43 F.3d at 56.) "Typicality asks whether the named plaintiffs' claims are typical, in common-sense terms, of the class, thus suggesting that the incentives of the

[22] To the extent that Defendant contested commonality during the parties' briefing on class certification, its arguments cut to the question of predominance under Rule 23(b)(3) as there could be no argument that the plaintiffs raised at least some common issues and the standard for commonality under Rule 23(a)(2) is low. Accordingly, plaintiff will not address those issues here.

plaintiffs are aligned with those of the class." *Baby Neal*, 43 F.3d at 55. The threshold for a finding of typicality is easily met. *In re Wellbutrin Antitrust Litig.*, No. 04-5525, 2008 WL 1946848, *3 (E.D. Pa. May 2, 2008); *see also Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (noting that typicality is not a demanding test.).

The Court looks to whether the individual circumstances of the named plaintiffs are markedly different in fact from the class or whether the legal theory upon which their claims are based differs substantially from those of the class. *Eisenberg*, 766 F.2d at 786. "The named plaintiff's claims need only be sufficiently similar to those of the class to allow the court to conclude that (1) the representative will protect the interests of the class and (2) there are no antagonistic interests between the representative and the proposed class." *Nat'l Org. on Disability v. Tartaglione*, No. 01-1923, 2001 WL 1258089, *3 (E.D. Pa. Oct. 22, 2001) (quotation omitted).

Typicality does not require that the factual circumstances of the class and the named plaintiffs be identical. *See, e.g.*, *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 207 (E.D. Pa. 2001), *aff'd*, 305 F.3d 145 (3d Cir. 2002) ("A finding of typicality will generally not be precluded even if there are pronounced factual differences where there is a strong similarity of legal theories."); *Baby Neal*, 43 F.3d at 58 ("Commentators have noted that cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims."). *See also In re Glassine & Greaseproof Paper Antitrust Litig.*, 88 F.R.D. 302, 304 (E.D. Pa. 1980); *Hedges Enters., Inc. v. Cont'l Group, Inc.*, 81 F.R.D. 461, 466 (E.D. Pa. 1979).

Here, named plaintiffs and the class proceed on exactly the same legal theory. Their claims are fundamentally the same: all had their accounts debited through accounts maintained at Wachovia by payment processors who were acting on behalf of telemarketers whom plaintiffs alleged fraudulently obtained their bank account information. Any minor variations in the underlying telemarketing schemes do not alter the similarly fraudulent nature of their schemes or the common banking modus used to raid the accounts of named plaintiffs and class members. *See Prudential*, 148 F.3d at 312.

Courts find typicality in such cases, even when the factual details of the application of the scheme vary. Thus, in an antitrust action, a purchaser need not have purchased from all of the alleged conspirators. *Linerboard*, 203 F.R.D. at 208; *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 448 (3d Cir. 1977). Nor must a named plaintiff have purchased every product or security alleged to have been affected by a conspiracy. *See Eisenberg*, 766 F.2d at 786; *Hoxworth*, 980. F.2d at 923. Nor must a named plaintiff have purchased throughout the entire period of the alleged violation. *Linerboard*, 203 F.R.D. at 209; *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 208 (S.D.N.Y. 1995) ("The typicality requirement … does not require that named plaintiffs invest in all related partnerships that are the subject of the action.").

Moreover, there are no individual defenses applicable to named plaintiffs that would distinguish them from the class or create a conflict. The terms of the proposed settlement treat all plaintiffs, both the named plaintiffs and the class, identically. All plaintiffs stand to be made whole. Each class member is entitled to full-recovery of the unrefunded amounts taken from his or her account. Each class member has the same opportunity to be made whole for any bank fees incurred as a result of the having sums

deducted from his or her account. Given the settlement terms, there is not even a theoretical conflict among the class or the named plaintiffs. The claims of the named plaintiffs are typical of the class.

4. Adequacy of Representation.

The Third Circuit explained Rule 23(a)(3)'s adequacy requirement as follows:

> The final Rule 23(a) prerequisite encompasses two distinct inquiries designed to protect the interests of absent class members. First, the adequacy of representation inquiry tests the qualification of counsel to represent the class. Second, it serves to uncover conflicts of interest between named parties and the class they seek to represent.

Prudential, 148 F.3d at 312 (internal quotations and citations omitted). Those two inquiries are of heightened importance in certification of a proposed settlement class, where the court acts as a fiduciary for absent class members to ensure that their interests have been fairly accommodated in the litigation and zealously pursued by class counsel. On both counts, this class is more than adequately represented.

a. Adequacy of Class Counsel

Because the Court serves as a fiduciary for absent class members, the court must have as its paramount concern any indication of "collusion, inadequate prosecution and attorney inexperience." *G.M. Trucks*, 55 F.3d at 795. There is nothing about the conduct of this litigation, the settlement negotiations, nor most importantly, the structure and scope of the settlement itself that would warrant concern. Indeed, the record includes the Declaration of Edward N. Cahn, former Chief Judge of this Court, who mediated two full-day settlement discussions among the parties. Judge Cahn leaves no doubt that the settlement discussions were conducted vigorously and at arms'-length, and that class counsel was singularly focused on achieving the best result for the class.

Class counsel, Langer, Grogan & Diver, P.C., has a wealth of experience in class litigation. Judge Surrick recognized them as "highly skilled" in appointing them interim counsel for the class in his Order of June 3, 2008. Courts have frequently remarked on the skill and dedication of the firm's attorneys, including the lead plaintiffs' counsel in this matter, Howard Langer. *In re Linerboard Antitrust Litig.*, MDL 1261, 2004 WL 1221350, *6 (E.D. Pa. June 2, 2004) ("The court has repeatedly stated that the lawyering in the case at every stage was superb, and does so again."); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 149 (E.D. Pa. 2000) ("The highly skilled class counsel provided excellent representation both for named plaintiffs and absent class members.")

The other lawyers from Langer, Grogan and Diver offered the class additional experience directly related to this litigation, which allowed the plaintiffs' legal team to vigorously pursue this litigation. Judah Labovitz was co-lead counsel in one of the largest national class actions. *See In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677 (N.D. Ga. 1991). Irv Ackelsberg is a nationally recognized consumer rights litigator who was awarded the Vern Countryman Award by the National Consumer Law Center in 2005 and the Andrew Hamilton Award by the Philadelphia Bar Association in 2001 for his work on behalf of consumers. John Grogan and Edward Diver have also been singled out for praise for their public interest litigation efforts. Both have been awarded the Equal Justice Award from Community Legal Services and both have been honored by the Hebrew Immigrant Aid Society for their litigation efforts *pro bono publico*.

Class counsel's conduct of this litigation amply demonstrates the adequacy of legal representation afforded to the class. Class counsel initiated this litigation and pursued it vigorously through class certification briefing and extensive discovery. More

than one million documents were exchanged between the parties. Class Counsels' work in scrutinizing other litigation conducted by the Federal Trade Commission led to the discovery that Wachovia also served as the banker for other large payment processors besides PPC, including Guardian Marketing, YMA, and Netchex. This discovery greatly expanded the size of the class and the scope of the recovery. Class counsel developed the database resources that allowed this matter to settle on the premise that each class member would have the opportunity to be made whole. Class counsel conducted extensive settlement negotiations—negotiations that broke off on three occasions because of the disparities in the parties' positions. They filed the All Writs Motion, which set the stage for the modification of the OCC Agreement that eliminated the claims procedure. Class counsel, along with the Unites States Department of Justice and the Office of the Comptroller of the Currency, fashioned a global resolution of the litigation that greatly enhanced the outcomes of the litigation for the class as a whole.

In sum, the course of conduct of the litigation and the manner in which the settlement negotiations proceeded all bespeak zealous, hard-nosed litigation.

b. Adequacy of Class Representatives:

The typicality and adequacy of representation inquiries overlap. *Hanrahan*, 174 F.R.D at 363 n.10. Both look to the potential for conflicts among the class. As noted in the discussion of typicality, there are no conflicts between the claims of the named plaintiffs and the class. *See Prudential,* 148 F.3d at 313; *Hanrahan*, 174 F.R.D. at 364 (finding adequacy satisfied where defendants engaged in a "systematic course of conduct" directed at the entire class.).

Nor are there any intra-class conflicts. When analyzing the potential for conflicts, the Court may take into account the terms of the settlement. *Amchem*, 521 U.S. at 620. Here, all class members stand in the same position; all are afforded the opportunity to be made whole. There are no circumstances in which one group of class members could gain advantage over another. Since all are made whole, there is no possibility of trading off of interests.

Finally, adequacy does not require that the named plaintiffs have expert knowledge about the litigation or the intricacies of the legal claims which support it. *Linerboard*, 203 F.R.D. at 213; *Glassine Paper,* 88 F.R.D. at 305 n.3 ("[C]lass representatives in complex cases of this nature are not usually required to have first-hand knowledge of the facts needed to establish their claims.").

All that is required is that the named plaintiff shows an active and sincere interest in the litigation. *Linerboard,* 203 F.R.D. at 213. The named plaintiffs here have more than demonstrated their commitment to the litigation and their willingness to make personal sacrifice to support it. All of the named plaintiffs in the *Faloney* matter reviewed pleadings, searched their own personal records to ensure full compliance with discovery requests and traveled great distances to attend depositions. In the course of those depositions, all the named plaintiffs demonstrated their knowledge about the action and the damages suffered by them and the class. In the *Harrison* matter, the guardian of Ms. Harrison, who is incapacitated, thoroughly searched through Ms. Harrison's papers and records to provide counsel with the basis for filing the law suit. The suit settled before she was deposed.

C. REQUIREMENTS OF RULE 23(B)(3).

In addition to satisfying the requirements of Rule 23(a), the proposed class also amply satisfies the requirements of Rule 23(b)(3). Rule 23(b)(3) requires that the common issues raised in the litigation predominate over any individual issues and that the class action device is superior to other forms of adjudication. The "predominance" and "superiority" inquiries focus on whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623.

1. Predominance

A predominance analysis in this case begins with the Supreme Court's guidance that "predominance" is often readily met in consumer fraud, securities and antitrust cases. *Amchem*, 521 U.S. at 625. "To evaluate predominance, the court must determine whether the efficiencies gained by class resolution of the common issues are outweighed by individual issues presented for adjudication." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp 450, 511 (D.N.J. 1997), *aff'd*, 148 F.3d 283 (3d Cir. 1998). A court looks to determine whether plaintiffs are likely to be able to prove a "significant portion of their case through factual evidence and legal arguments common to all class members." *In re Hydrogen Peroxide Antitrust Litig.*, 240 F.R.D. 163, 170 (E.D. Pa. 2007).

Predominance does not require that there be no significant individual issues. It merely requires that the common issues predominate over any individual issues. Fed. R. Civ. Pro. 23(b)(3); 2 *Newberg on Class Actions* § 4:23 (4th ed.) ("[T]he predominance test expressly directs the court to make a comparison between the common and individual questions involved in order to reach a determination of such predominance ….").

Courts find predominance in cases involving consumer fraud and/or RICO conspiracies where, as here, the violation can be proven by common evidence. *See Prudential*, 148 F.3d at 314; *Eisenberg*, F.2d at 786; *Grider,* 2006 WL 3825178, at * 28; *Cullen*, 188 F.R.D. at 234-35; *Hanrahan*, 174 F.R.D. at 365; *Matthews*, 1996 WL 665729, at *4.

As discussed above, there are extensive common issues in this case. During class action briefing, Wachovia argued that common issues would not predominate because proof of the RICO conspiracy would require an individualized finding of reliance by each individual consumer on the predicate acts of mail and wire fraud. (*See* Def.'s Mem. of Law in Opp. to Class Cert., *passim*.)[23] It has withdrawn the objection and now joins in seeking class certification.

The argument rested on the premise that a reliance requirement should be read into the RICO predicate offenses of mail and wire fraud. *See Def.'s Mem.* at 42. That argument was undercut, however, after briefing on class certification closed, when the United States Supreme Court held, in *Bridge v. Phoenix Bond & Indemnity Co.*, that reliance was not an element of the RICO predicate acts of mail and wire fraud, resolving a split among lower courts. 128 S. Ct. at 2134. The Supreme Court's decision in *Bridge*

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[23] That "individual reliance" argument conflicts with the consistent theme of Third Circuit case law that holds that if the underlying fraud could be proven, reliance was an secondary issue that implicated the plaintiff's right of recovery, not the defendant's liability and that the evidence establishing fraud was also powerful circumstantial evidence of such reliance. *See Prudential*, 148 F.3d at 314 ("reliance is an issue secondary to establishing the fact of defendant's liability."); *Cullen*, 188 F.R.D. at 235 (holding where evidence establishes that service offered pursuant to he scam was a "complete sham" reliance on inducement can be inferred."); *Klay v. Humana*, 382 F.3d 1241, 1259 (11th Cir. 2004) ("The circumstantial evidence that can be used to show reliance is common to the whole class."). *See also Grider*, 2006 WL 3825178, at *23; *Spark*, 178 F.R.D. at 436; *Petersen v. H. & R. Block Tax Servs., Inc.*, 174 F.R.D. 78, 85 (N.D. Ill. 1997);

essentially endorsed the reasoning of the courts relied upon by class plaintiffs in their briefing. *See Anza v. Ideal Supply Corp.*, 547 U.S. 451, 463 (2006) (Thomas, J., concurring in part and dissenting in part); *Grider*, 2006 WL 3825178, at * 22; *Sys. Mgmt., Inc. v. Loiselle*, 303 F.3d 100, 103 (1st Cir. 2002).

Even if the Supreme Court had held that reliance is an element of mail or wire fraud, the Third Circuit had consistently recognized that where the underlying schemes can be established by common proof, reliance does not defeat predominance. *See Prudential*, 148 F.3d at 314; *Gagnon*, 766 F.2d at 786; *see also Cullen*, 188 F.R.D. at 234-35. Here, the class adduced extensive evidence—through documents, telemarketing scripts, findings by other courts and expert opinion—that the schemes employed a common modus of deceit.

2. <u>Superiority</u>

The superiority requirement under Rule 23(b)(3) calls for a court to " balance in terms of fairness and efficiency the merits of a class action against other alternative methods of adjudicating plaintiffs' claim." *See Grider*, 2006 WL 3825178, at *29 (*citing Prudential*, 148 F.3d at 316). Rule 23 sets forth four non-exhaustive factors pertinent to a determination of superiority: (A) the interest of class members in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) any likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3). When a class is proposed for certification as part of a settlement, the terms of the settlement itself are highly relevant to the issue of superiority and the prospect of

settlement allows the court to dispense with an inquiry into manageability issues at trial, because with the settlement, there will be no trial. *Amchem*, 521 U.S. at 620.

The effect of the settlement on the manageability issue also addresses another argument posited by defendant on class certification—that a trial would be unmanageable—because plaintiffs would have to establish the fraudulent nature of each of the telemarketing schemes at issue. (*See* Def.'s Mem. at 27.)

Defendant's manageability concerns were exaggerated even when trial of this matter was contemplated. Defendant submitted an expert affidavit purporting to identify over a hundred different products and schemes, the fraudulent nature of each of which would have to be proven at trial. (*See* Van Liere Decl., Ex.1 to Def's. Mem. in Opp. To Class. Cert.) That argument ignored the fact that plaintiffs adduced extensive documentary evidence—often in the form of findings by other courts, the FTC and the receivers appointed to manage the affairs of the telemarketing scams once they had been shut down through governmental enforcement actions—and authoritative expert opinions from Robert Meyer, the Chair of the Marketing Department at the Wharton School, and Barbara Blake, a veteran telemarketing fraud investigator, that the schemes at issue offered only a small set of core products and services under constantly changing names so that what looked like a wide-variety of schemes were really only an essential core of scams that followed the same pattern of deceptive operations.

Moreover, all of the scams were pervasively fraudulent. In most cases, the scammers actually sold nothing at all to consumers—the "sale" was just a pretext to raid the consumer's bank account, or sold products of such little value as to make the fraud

transparent once a consumer understood what he or she was receiving for the money taken from them.

In short, plaintiffs believed they would establish the fraudulent nature of the core underlying schemes at trial through common proof, which would have justified the advantages of class treatment. On settlement, all of those concerns are now irrelevant to manageability. *See Warfarin Sodium*, 391 F.3d at 529 (citing *Amchem,* 521 U.S. at 620.)

With respect to factors B and C, which concern the effect of class certification on other related litigation, the settlement proposed here involves coordination and integration of related enforcement actions brought by the United States Attorney for the Eastern District of Pennsylvania, the Federal Trade Commission and the Office of the Comptroller of the Currency. Moreover, the settlement itself was specifically structured to avoid confusing and wasteful duplication of efforts among various governmental entities and class counsel. Because of the coordination among the governmental entities, class counsel, and Wachovia itself, the certification of the class and effectuation of the proposed settlement will greatly enhance the efficiency of the process and the convenience of the consumer class members.

With respect to element A—class members' interest in individually controlling the litigation—there is no evidence of any such interest. No other action was filed in the two years these actions have been pending despite the extensive publicity they received. All class members were given the opportunity to opt-out of the class action if they had any desire to pursue their claims individually. Any class member who had a strong interest in pursuing individual litigation, has the opportunity to do so through the opt-out process. The return deadline for all opt-outs has not yet passed. Class counsel will

supplement this briefing once the deadline passes to alert to the court to the number of opt-outs, if any.

Once again, the structure of the settlement ensures that few, if any, class members would have any rational reason to pursue claims individually. The settlement affords all class members the opportunity to be made whole for their losses. Here, in a class made up of victims of telemarketing scams, where there is good reason to anticipate that the majority of class members are senior citizens of limited means, the efficiencies to be gained by class treatment are overwhelming. Any interest a class member would have in pursuing claims individually is substantially outweighed by the immense efficiencies provided by the settlement.

Finally, the average class member suffered damages of little more than $200. Individual litigation of claims of this size is not feasible. Thus, class treatment is not only superior, it is the only realistic way of litigating these matters. Plaintiffs respectfully request that the class be certified.

III. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

The Court is charged with determining whether the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court makes this determination in its role as "a fiduciary who must serve as a guardian of the rights of absent class members." *Warfarin Sodium*, 391 F.3d at 534 (3d Cir. 2004) (quoting *G.M. Trucks*, 55 F.3d at 783). The assessment of whether the class members' interests are fairly respected must also take into account the "overriding public interest in settling class action

litigation"; such settlements "should therefore be encouraged." *Warfarin Sodium*, 391 F.3d at 535.

A. PRESUMPTION OF FAIRNESS

Class-action settlements are entitled to a presumption of fairness when four conditions are met: (1) the negotiations were conducted at arms' length, (2) there was substantial discovery, (3) proposing counsel are experienced in similar litigation, and (4) a small percentage of class members have objected. *Id. See also G.M. Trucks*, 55 F.3d at 785.

As of the date of this filing, class members still have an opportunity to object and opt out, so it cannot be said with certainty that only a small percentage of the class will object, although there is every reason to believe that that will be the case. The parties will apprise the Court of the number of objectors and opt outs when the period for doing so ends on January 12, 2009.

It is clear that the first three conditions are met. The parties engaged in repeated, extended arms' length negotiations over the course of several months. As Judge Cahn, who mediated a number of these sessions, states in his declaration, "[t]he negotiations, while conducted professionally by both sides, were arduous and at arm's length." (Cahn Decl. ¶ 6). In the course of this negotiation, class counsel "placed the interest of the class foremost." (*Id.* ¶ 7). Only after talks had broken off on three separate occasions, and a unified settlement that permitted each class member to be made whole became a possibility, did class counsel agree to settle the case. Judge Cahn further notes, in reference to the two sessions he mediated, "That no settlement was achieved at either session, despite many hours of effort by all concerned, is indicative of the adversarial

nature of the negotiations." (*Id.* ¶ 6.) By negotiating aggressively, plaintiffs ultimately achieved a settlement that was similar to their initial demand. (*Id.* ¶ 9.)

There was substantial discovery, which provided the parties a clear picture of the risks and rewards of continued litigation. The settlement was reached very close to the deadline the Court had set for the completion of document discovery. Plaintiffs had taken numerous depositions, and were actively preparing for a number of others. Moreover, substantial discovery had been taken by the OCC, the United States Attorney, and the FTC, most of which had been reviewed by class counsel. Class counsel worked on the case for two years, and was well-prepared to assess the strengths and weaknesses of the litigation.

As discussed above, class counsel are also highly experienced in cases of this type. Langer, Grogan and Diver, P.C., specializes in complex class litigation and has a wealth of experience in successfully litigating consumer cases.

Thus, assuming that the class members respond to the proposed settlement as expected, the settlement is entitled to a presumption of fairness.

B. *GIRSH* FACTORS

The final determination of the fairness and adequacy of a class-action settlement is made by analyzing the factors set forth by the Third Circuit in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). The nine "*Girsh* factors are:

(1) the complexity, expense and likely duration of the litigation;
(2) the reaction of the class to the settlement;
(3) the stage of the proceedings and the amount of discovery completed;
(4) the risks of establishing liability;
(5) the risks of establishing damages;
(6) the risks of maintaining the class action through the trial;
(7) the ability of the defendants to withstand a greater judgment;

(8) the range of reasonableness of the settlement fund in light of the best possible recovery;
(9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id.; *In re AT&T Corp., Sec. Litig.*, 455 F.3d 160, 164-65 (3d Cir. 2006); *Warfarin Sodium*, 391 F.3d at 534-35.

1. <u>Complexity, Expense, and Duration</u>

"The first factor captures the probable costs, in both time and money, of continued litigation." *Warfarin Sodium*, 391 F.3d at 516 (quotation omitted).

This factor plainly supports settlement at this time. Litigating this case through a full trial would be a highly complex, time consuming, and costly affair. The central question of Wachovia's culpability alone requires not only a vast evidentiary record laying out the facts of Wachovia's involvement, but also establishing the standard of care in the banking industry. In preparing the case for eventual trial, plaintiffs retained a total of ten experts, including four experts in banking and payment systems.

That would be only one aspect of the case. Plaintiffs would also have to establish all of the elements related to RICO—the existence of an enterprise, persons operating the enterprise, as well as the existence of a conspiracy. They would also have to show that the class members were injured by RICO predicate acts on a class-wide basis, a task complicated by the number of different telemarketers and superficial variations of their programs to defraud. While the evidence relevant to these factors had largely been gathered, sorting through it all and bringing it all together in a way that would permit a

full hearing before a jury would require sufficient "costs, in both time and money" to easily support settlement under the first *Girsh* factor.[24]

2. The Reaction of the Class to the Settlement.

Girsh calls for assessing the reaction of the class in order to "gauge whether members of the class support the settlement." *Warfarin Sodium*, 391 F.3d at 536; *Prudential*, 148 F.3d at 318. As noted, the period for either opting out or objecting to the class runs until January 12, 2009; consequently, the final assessment of the reaction of the class to the settlement cannot be made as of the date of this filing. The parties will update the Court after that date as to the class's response.

3. Stage of Proceedings and Amount of Discovery Completed

Courts look at the stage of the litigation and the discovery completed in order to determine the degree to which the Court and the litigants are in a position to assess the merits of the case, and consequently, the merits of settlement. *Warfarin Sodium*, 391 F.3d at 537; *G.M. Trucks*, 55 F.3d at 813.

The litigation has progressed to the point that the parties—and the Court—are in a very good position to assess the litigation. Document discovery in the *Faloney* case was nearly completed. A substantial number of experts had been retained, and most of the central issues of the case had been fully briefed, especially in the briefing concerning class certification. (*See* Mem. in Supp. of Pls.' Mot. for Cert of this Case as a Class Action, Dec. 27, 2007; Mem. of Def. Wachovia, N.A., in Opp. to Pls.' Mot. for Cert. of Action as a Class Action; Pls.' Reply Mem. in Support of their Mot. for Cert. of the Action as a Class Action, March 12, 2008). Moreover, the related action by the United

[24] As discussed below, the amount of time it would take to bring this case to judgment would carry additional costs in this case, including non-monetary costs, because a substantial portion of the class is elderly.

States Attorney had clarified the role of at least one of the payment processors, and the various actions by the FTC and other government entities against the telemarketers and payment processors had described their activities.

The record was sufficiently developed that, back in April 2008, the OCC was able to reach a determination that Wachovia's "handing of the account activities of the payment processors and direct telemarketers was part of a pattern of misconduct that resulted in financial gain to the Bank in the form of fee income …, and a pattern or practice of disregard of the interests of consumers involved in transactions with the payment processors and direct telemarketers." Consent Order, at 2. The United States Attorney had shut down the operations of Payment Processing Center, and the FTC had shut down Guardian Marketing and many of the telemarketers at issue. With minor exceptions, the parties to the class actions had access to the same discovery on which the government entities made their determinations, and much more. There is no question that the record was sufficiently developed to permit a full assessment of the merits of the case for purposes of settlement.

4. <u>Risk of Establishing Liability</u>

While there is no question that there is substantial evidence in support of plaintiffs' position in this case, the substantial risk of establishing Wachovia's liability cannot be dismissed.

First, any case of this complexity presents substantial risk. While Wachovia was the only defendant, its liability was tied to a complex RICO scheme involving multiple payment processors and numerous telemarketers. Thus, plaintiffs not only had to show Wachovia was complicit in the telemarketers' misdeeds, but that the payment processors played a specific, organizing role in the schemes, and that each of the telemarketers was

engaged in fraudulent activity. Any one of these parts could have been a substantial case in its own right. Indeed, the various government actions were all directed at discrete parts of the scheme. Plaintiffs would be required to establish all of them here.

Moreover, because these cases could not realistically be litigated on an individual basis, the only practical way to establish the fraud committed against hundreds of thousands of individuals was to present class-wide evidence. This meant that plaintiffs had no choice but to show that the telemarketers were systematically fraudulent, and that the unlawfulness of any particular transaction could be established on the basis of common evidence.

And while there can be little question that certain Wachovia employees acted in a blameworthy way, that is a long way from establishing that the corporation as a whole can be charged with the kind of knowing participation in a conspiracy to commit unlawful acts such as wire and mail fraud that is required for establishing liability for RICO conspiracy. 18 U.S.C. § 1962(d). The extensive discussion of this issue in plaintiffs' motion for class certification, as well as the 417 pages of exhibits attached in support thereof, evidences the complexity of the issue.

While plaintiffs are confident that, on any given issue, they have the ability to prevail, because of the complexity of the case, the number of discrete issues on which they were required to prevail meant that the overall risk of establishing liability was substantial. Settlement at this stage is thus favored by this factor.

5. **Risk of Establishing Damages**

There was also risk in establishing damages. To be sure, assuming liability had been decided, it could be assumed that many or most class members were entitled to

damages. But in order for any individual class member to recover, plaintiffs would have to establish that that class member suffered damages.

Again, the only way to establish individual damages is on the basis of common evidence. Using the same databases and documents used to distribute the funds in the settlement, plaintiffs would be able to establish the amount of money that each person was potentially eligible for. But Defendant has argued that it cannot be presumed that every person was injured at all—a particular individual may have wanted the product offered, even if he was intentionally misled by a telemarketer. And that determination, Defendants has argued, must be made only after looking at all of the individualized evidence.

Plaintiffs believe that damages could be shown on a class-wide basis, because of the extent and uniformity of the fraud at issue in this case. As the United States Attorney stated in the *PPC* case, "The evidence is overwhelming that *all* of the people who had a PPC-created RCC charged against their bank account arising out a communication from an outbound telemarketer either did not authorize the transaction, or authorized a transaction based upon misrepresentations by telemarketers, or never received the product as offered." Govt.'s Proposed Restitution Plan Pursuant to Perm. Inj., at 13, United States v. Payment Processing Ctr., No. 06-725 (E.D. Pa.) (emphasis added). Nevertheless, there is unquestionably risk on this issue, a point made clear by the fact that the court in one of the major FTC actions against a payment processor and telemarketer—Suntasia and Guardian Marketing—concluded that "it is appropriate to assume that many, if not most" of those customers who were enrolled in programs for five months or more "were satisfied with their memberships." *FTC v. FTN Promotions,*

Inc., 2008 WL 151888, *10-*11 (M.D. Fla. Jan. 15, 2008). Later evidence revealed how erroneous this assumption was.[25] It nevertheless highlights the risk attendant to this aspect of the litigation.

Finally, there would be a real risk that a fact finder would be extremely conservative in finding damages. This is not a case in which the damages represent the amount of money unlawfully taken by the defendant itself. Most of the money taken from the class members was kept not by Wachovia, but by the telemarketers and, to a lesser extent, the payment processors. The present action seeks to hold Wachovia liable for all of the damages of the schemes because of its participation, despite the fact that its profits from the schemes were only a small fraction of the overall damages. In fact, the OCC determined that Wachovia had made only $3.9 million through these activities, OCC Agreement, at 8; Amended OCC Agreement, at 7, which is a substantial figure, but one that is dwarfed by the $200 million in damages suffered by the class. A RICO judgment would also be subject to trebling, which would mean that Wachovia could be on the hook for upwards of $600 million for a scheme in which it earned less than $4 million. While the law could support such a conclusion, it may be difficult for a jury to enter such an award.

6. <u>Risk of Maintaining Class Action Status Through Trial</u>

Plaintiffs believe that their class action position is strong, especially since the Supreme Court ruled in June 2008 that reliance is not an element of mail and wire fraud in RICO cases. *Bridge*, 128 S. Ct. at 2133.

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[25] After a notice was mailed in that case, the Receiver, who had supported this view, changed his position in response to the vehement response from these consumers. The FTN estate was depleted before the court revisited the issue.

Bridge, however, left open the question of individual proof of "causation." And the Third Circuit has made clear that the suitability of fraud actions for class treatment depends on the facts of the case. *Compare Prudential*, 148 F.3d at 315 ("While individual questions may arise during the course of this litigation, we agree with the district court that the presence of individual questions does not *per se* rule out a finding of predominance."), *with In re LifeUSA Holding Inc.*, 242 F.3d 136, 144-47 (3rd Cir. 2001) (distinguishing *Prudential* and finding that common questions did not predominate in putative fraud class action). While, at this point, there appears to be ample common evidence to adjudicate these issues, there is always the possibility that evidence would have come to light that undermined that conclusion.

7. Ability to Withstand Greater Judgment

"The seventh *Girsh* factor considers whether the defendants could withstand a judgment for an amount significantly greater than the settlement." *Warfarin Sodium*, 391 F.3d at 537-38 (quotation omitted).

Normally, one would expect that this factor would have no bearing on the propriety of settling a case with one of the largest banks in the country where the value of the case is measured in hundreds of millions of dollars. But this is not an ordinary time. On September 29, 2008—while details of the settlement agreement before the court were being finalized—following the failure of Washington Mutual Bank, Wachovia came within a hair's breadth of failing itself. The FDIC invoked emergency powers to intervene and support a sale of the bank to Citi Group. Some days later, that deal was replaced by a purchase of the bank by Wells Fargo & Company. It is no hyperbole to say that Wachovia was in a precarious financial position at the time of the settlement. The

value of the security the class members have in having already received checks for their primary damages is significant.

A settlement of approximately two hundred million dollars is certainly significant, but at the time of the settlement, there were real questions about the bank's ability to withstand a judgment that may have been close to three-quarters of a billion dollars. While perhaps not one of the most important factors in assessing the propriety of the settlement, this factor supports the settlement the parties agreed to preliminarily in August, and ultimately signed on October 2, 2008.

8. The Range of Reasonableness in Light of the Best Possible Recovery

9. The Range of Reasonableness in Light of All the Attendant Risks of Litigation.

The final *Girsh* factors represent the ultimate question of whether the settlement represents "a good value" for the class in light of the discount being given from the best possible recovery, on the one hand, and the risks avoided by settlement, on the other. It incorporates the other *Girsh* considerations to reach a determination whether the settlement is reasonable and adequate for the class. "In order to assess the reasonableness of a proposed settlement seeking monetary relief, 'the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement.'" *Prudential*, 148 F.3d at 322 (quoting *G.M. Trucks*, 55 F.3d at 806; Manual for Complex Litigation 2d § 30.44, at 252).

This settlement is not merely reasonable—it is extraordinary. The value of this settlement is remarkable in two respects. It gives every class member the opportunity to recover one-hundred percent of his or her damages. Thus, it represents no discount at all

relative to full damages. Second, it goes to great lengths to facilitate distribution of the money into the hands of class members, the success of which could not be expected to be improved upon following trial.

Plaintiffs are aware of *no* other case that was settled on the basis of full recovery for every class member. Stephen A. Saltzburg, the Wallace and Beverly Woodbury University Professor of Law at George Washington University Law School, is an expert in issues concerning class-action counsel and fees. Indeed, he was appointed by Chief Judge Becker to serve as Co-Chair of the Third Circuit Task Force on Selection of Class Counsel in 2000. He has been unable to identify a class action settlement as favorable to the class, stating, "There are few class actions, if any, that have provided a total and complete recovery like that recovered here." (Saltzburg Decl. ¶ 22). He further notes that the average recovery in class actions is approximately ten percent of claimed damages (10.97% in the Third Circuit). (*Id.*)

This case, of course, goes even further, by eliminating the claims procedure for the majority of the damages. Eliminating claim requirements is rare, and there are almost certainly no prior cases in which there was not only an opportunity for full recovery, but also the direct mailing of checks representing all damages calculable without a claims procedure. (*See id.*)

The only cases of which plaintiffs are aware that even come close to the complete recovery available here are *In re Buspirone Antitrust Litig.*, MDL No. 1410 (S.D.N.Y. Apr. 11, 2003) (transcript attached as Exhibit III to Saltzburg Decl.), and *In re Cardizem*

CD Antitrust Litig., 218 F.R.D. 508 (E.D. Mich. 2003).[26] In *Cardizem*, the overall scope of the damages was disputed. The fund may have represented 100% of the damages depending on the resolution of those "hotly contested" issues. *Id.* at 523 n.12. The court concluded that the fund represented "more than eighty-five percent of the total amount which the Litigating States' expert economist has estimated" to be the total damages. *Id.* at 522. Regardless, the amount ultimately recovered by the class was reduced by about twenty percent[27] for attorneys' fees. *Buspirone* involved a fund that was arguably at or close to full damages, including attorneys' fees, when the calculation was based on time period of the most significant damages, but class in that case was certified for significantly greater period,[28] meaning that the fund would not cover every class members' full damages. In neither case is there any indication that consumers received compensation without the need to file a claim form. Full recovery *plus* costs and fees, as here, appears to be entirely unprecedented. And the direct mailing of checks only makes this case more exceptional.

Because the costs of administration and counsel are typically the responsibility of the plaintiffs, the fair value of the settlement is significantly greater than full damages. And the availability of full recovery of each claimant is guaranteed, because the aggregate benefits to the class are uncapped, a fact that the Third Circuit has found "weighs strongly in favor of the settlement." *Prudential*, 148 F.3d at 328.

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[26] Both *Cardizem* and *Buspirone* were actions brought under the antitrust laws, which provide for the possibility of treble damages. *See* 15 U.S.C. § 15.

[27] The plaintiffs' lawyers obtained 17% of the common fund plus 17% of the accrued interest. 218 F.R.D. at 532. State attorneys general were awarded another 2.2% of the fund. *Id.* at 537.

[28] In the transcript, the attorney notes that the fund would cover the "core damages period" of November 1997 through March 2001. (Saltzer Decl. Ex. II, at 28.) Yet the order entered certifies a class from November 9, 1997, through January 28, 2003.

To be sure, plaintiffs sought treble damages. But even in cases where treble damages are possible, settlements of more than single damages are unheard of. Indeed, settlement for one hundred percent of single damages is virtually unheard of, even in treble-damages cases. There is good reason for this. Because plaintiffs' basic interest is to be made whole, recovery of actual damages is far more important than recovering anything on top of that. Thus, it nearly always makes sense to forego the possibility of treble damages—and the attendant risk of no recovery—to guarantee recovery of actual damages, or a significant portion thereof.[29] This is especially true when the delay attendant to full litigation is considered.

The value of prompt payment can scarcely be overstated in this case. While discovery was scheduled to close in December 2008, no date for trial was set, and the parties did not realistically expect a trial to be held for several months after that, at the earliest. Plaintiffs' motion for class certification was still pending, and the Court's determination of that motion would almost certainly be subject to interlocutory appeal, which could delay trial for a year or more. And even if it were not, the complexity and extent of the evidence needed for a full trial would suggest that trial would likely not be held expeditiously. Following the resolution of a trial, there would almost certainly be another appeal by one or both sides, which could result in further proceedings in the district court. In short, there was no basis for confidence that plaintiffs would see any recovery for many years to come.

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[29] Moreover, if plaintiffs were to obtain a successful judgment, the costs of administration would come from the fund, and counsel would likely look to a percentage of the fund for their fee. Thus, the greatest possible recovery for class members, at the end of the day, would likely be significantly less than three times the amount recovered under this settlement.

That delay would be especially problematic here, given the fact that a substantial portion of the class is elderly. But even without considering that factor, delay will substantially affect the ability to get restitution into the hands of injured parties. The more time passes, the more difficulty there is in locating people, as their addresses become stale. A central focus of the settlement is the effort to find class members and put money in their hands as efficiently as possible. A delay of several years would almost certainly result in a significantly higher non-redemption rate.

Moreover, the delay would also have introduced real risk with respect to the ability to recover. At the time of the settlement, in light of the ongoing credit crisis, Wachovia's longevity could not be taken for granted.

As discussed, the risks of establishing liability and damages for each of the class members is very real. It would be an exaggeration to state that plaintiffs' case is weak. But it is the nature of their claims that they must successfully establish a number of uncertain points of fact and law, the failure of any one of which could cause them to fail to recover anything at all. These risks would only be magnified if the litigation were to involve multiple appeals, as would be expected in this case. Thus, even without considering the effects of delay as such, the very significant litigation risks alone overwhelmingly support opting for the assurance of full damages, rather than the possibility of recovering somewhere between two and three times as much.

Judge Cahn suggests in his declaration that plaintiffs would have been justified in accepting the much less favorable settlements available in earlier mediation sessions, stating that "[c]lass counsel rejected these settlements despite what I perceived to be great risk to themselves, both in terms of the litigations risks, and in terms of actions that might

be taken by the Government ….” (Cahn Decl. ¶ 8.) Plainly, the same risks justify settlement of a case on the extraordinary terms reached in conjunction with the government entities.

Thus, for any class member, there is no question that full damages, plus attorneys' fees and costs, is more than fair, reasonable and adequate when compared to the best possible recovery of treble damages several years down the road, together with the significant risk of no recovery at all.

The limited claims procedure does not alter this settlement calculus. The settlement is designed to maximize the recovery of any class member's actual damages, rather than simply make it possible for class members to recover. Even if plaintiffs were to be fully successful at trial, they would still need to find a fair system for determining the extent of individual damages and distributing the money obtained. It is unlikely that a system that substantially improved on the settlement procedures could be devised. And as noted, the success rate of a similar system several years from now would actually be substantially lower, as class members' addresses become stale. Thus, the distribution system in the settlement is almost certain to be *more* successful at putting restitution in class members' hands than any system employed following the completion of the litigation would be.

The separation of fees and costs of administration from the restitution funds means that the benefits to the class are actually substantially greater than value of full recovery of damages by each class member. The administration of the class action settlement is expected to cost at least $2 million, and Wachovia has agreed to pay $15 million to class counsel in addition to the funds for recovery. If the settlement had been

structured as is typically done, these sums would have come from the overall fund set aside for the plaintiffs. Thus, the total benefit to the class is greater than their damages recovery by the full value of the $15 million plus the final cost of administering the settlement. *Cf. Prudential*, 148 F.3d at 329.

The appropriateness of the $15 million agreed to by the parties is the subject of a separate filing. Yet the reasonableness of the fee is tied to the adequacy of the settlement to the class. The reason for disapproving the fee would be that it unreasonably diminished the recovery by the class—the Court's jurisdiction to review such awards arises from its duty to protect the interest of absent class members.[30] *See AT&T*, 455 F.3d at 175. In this case, the fee could not fairly be said to reduce the class members' recovery at all, since they are entitled to one hundred percent of recovery without any reduction for fees, and without any limit on the overall fund available to the class.[31] Thus, the fee does not alter the conclusion that the settlement is fair, reasonable, and adequate for the class because it makes complete relief available to all class members without reduction. In any event, as discussed in the fee brief, the total fee is only 7.5% of the recovery, which is inarguably a modest sum in light of the extraordinary result achieved by the class through the settlement.

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[30] It goes without saying that the Court does not review the settlement and fee agreement to protect the interests of the named parties, who are represented directly by their own counsel.

[31] Plaintiffs recognize that the mere fact that the fee is accounted for separately does not mean that the adequacy of the settlement is not affected by the fee. In many cases, it could be that the class could have obtained more had the parties not negotiated a potentially unreasonable fee. *See G.M Trucks*, 55 F.3d at 819-20. But that concern is not present where the class members are being made whole, in addition to the fee. Under those circumstances, present here, it is simply not plausible that the class would have received more in exchange for a lower fee, at least where the negotiated fee is not plainly excessive. As the *Prudential* court emphasized, in such cases, the outcome is "exceptional," 148 F.3d at 322 , and "weighs in favor of the settlement," *id.* at 329.

The exceptional result achieved for the class here is brought into focus by looking at the alternatives. In April 2008, the federal government concluded that an agreement with Wachovia that involved only primary damages and required a claim procedure was reasonable. The cost to Wachovia of the restitution portion of that settlement would almost certainly have been less than $25 million, and would more likely have been less than $10 million.[32] By aggressively seeking to benefit the class, plaintiffs have achieved a settlement that has already resulted in the mailing of $150 million worth of checks, of which the substantial majority is expected to be deposited or cashed by class members.[33] While plaintiffs did not believe that the OCC's initial agreement was in the best interests of the class, all things considered, that agreement was thought at the time by highly competent and knowledgeable parties acting in good faith to be reasonable, and may well have been adjudicated as such. The enormous difference between the expected recovery of the class under that arguably fair, reasonable, and adequate settlement, and the recovery under the settlement now before the Court ought to lay to rest any question about the appropriateness of the latter.

Further supporting the conclusion that the settlement is fair and adequate is the fact that numerous independent federal government entities involved in the enforcement and regulation of the conduct at issue were involved in the negotiations that led to the settlement. Thus, there is universal support among those seeking to protect the interests

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[32] At the highest plausible estimate of claims rates, twenty percent, the class would receive approximately $30 million, of which approximately $5 million would have been paid from the PPC fund. At a more plausible, but still optimistic, rate of ten percent, the class would get around $15 million, including about $10 million from Wachovia.

[33] As noted, the benefits to the class are also well beyond those that would have resulted from settlement proposals plaintiffs rejected earlier in the litigation. (*See* Cahn Decl. ¶¶ 6-9.)

of the targets of the telemarketing schemes that this settlement is in their best interest. In an analogous situation in an insurance fraud case, the Third Circuit found that "the involvement of the various state insurance regulators, with their vast experience and expertise, provides great support in favor of the fairness of the settlement." *Prudential*, 148 F.3d at 329.

C. ALLOCATION

Courts also typically assess settlements to ensure that they allocate the proceeds of the settlement fairly to all class members, and in particular, to groups with different interests in the class. *E.g.*, *Warfarin Sodium*, 391 F.3d at 539. The present settlement treats all members of the class the same: each is entitled to direct mailing of primary damages, the ability to recover $35 of fee damages with little effort, and the ability to recover all fee damages that can be documented. There are no intra-class conflicts in this case. Consequently, there is no question that the allocation of the funds is fair.

It is worth highlighting, however, the value of the two claims-procedure options to the fair distribution of the benefits of the settlement. The low response rates in typical consumer class actions is of great concern, and that concern led to the creation of the "Easy Refund" procedure, which allows a person to obtain $35 dollars, which is the amount of a typical bounced-check fee and is within the estimated range of the extent of the average class member's bank-fee damages. If that were the only path to recovering fee damages, however, it would prejudice the rights of those who have very substantial bank-fee damages. With the "Documented Refund" procedure, their ability to recover all damages is retained.

Thus, the documented-claim procedure's availability is important for fairness. A critical element of this settlement is that no one participating in the settlement has had the value of his or claim compromised to a level below full compensation of all direct and bank-fee damages. Anyone who releases claims against Wachovia has the ability to obtain full relief within the settlement procedures. No one is giving away his or her legal rights for pennies—or even quarters—on the dollar.

D. THE NAMED PLAINTIFFS ARE ENTITLED TO INCENTIVE AWARDS

As Judge Brody explained in *Cullen*, 197 F.R.D. at 145, "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." (quotation omitted).

Mrs. Faloney and Mr. and Mrs. Whitt were each separately deposed in the *Faloney* action. They provided documents and interrogatory answers. They flew to Philadelphia from Pittsburgh and Virginia, respectively, for the depositions. In Mrs. Faloney's case, it was the first time she had flown on an airplane. Mrs. Harrison suffers from dementia. Her sister, who brought the case on her sister's behalf, spent a substantial amount of time sifting through cartons of bank records and other records to find the records that allowed the case to be brought.

The incentive awards sought here are modest compared to awards in other cases. Judge DuBois provided numerous examples of higher payments in *Linerboard*, 2004 WL 1221350, at *18-*19 ("Lastly, the Court notes that the amount requested, $25,000, is comparable to incentive awards granted by courts in this district and in other circuits") (citing *In re Graphite Electrodes Antitrust Litig.*, MDL No. 1244 (E.D. Pa. Sept. 8, 2003)

($80,000); *Bogosian v. Gulf Oil Corp.*, 621 F. Supp. 27 (E.D. Pa. 1985) ($20,000); *In re First Jersey Sec., Inc.*, MDL No. 681 (E.D. Pa. 1989) ($24,000); *In re Revco Sec. Litig.*, No.89-0593, 1992 WL 118800 (N.D. Ohio May 6, 1992) ($90,000); *In re Buspirone Antitrust Litig.*, MDL No. 1413 (S.D.N.Y. Apr. 7, 2003) ($25,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907 (S.D. Ohio 2001) ($50,000); *In re Cardizem CD Antitrust Litig.*, MDL No. 1278 (S.D. Mich., Nov. 26, 2002) ($20,000)).

And perhaps most importantly, the $40,000 in total compensation awards does not reduce the ability of any absent class member to recover full damages, as Wachovia has agreed to these awards separately, as it has with fees and costs.

CONCLUSION

For the foregoing reasons, plaintiffs Mary Faloney, Anitra Whitt, James Whitt, and Catherine Harrison respectfully request that the For all of the foregoing reasons, class plaintiffs respectfully request that the Court order final certification of the proposed class pursuant to Federal Rule of Civil Procedure 23, and approve the proposed settlement as fair, reasonable, and adequate pursuant to Federal Rule of Civil Procedure 23(e)(2).

Respectfully submitted,

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Dated: December 18, 2008

Attorneys for Plaintiffs and the Class

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY FALONEY, JAMES M. WHITT AND ANITRA WHITT, on behalf of themselves and all others similarly situated, Plaintiffs v. **WACHOVIA BANK, N.A.** Defendant	CIVIL ACTION No. 07-1455
CATHERINE D. HARRISON, by and through her sister and attorney in fact, **JOANNE WELLER,** on behalf of herself and all others similarly situated, Plaintiff v. **WACHOVIA BANK, N.A.** Defendant	CIVIL ACTION No. 08-755

SETTLEMENT AGREEMENT

This Settlement Agreement and Stipulation to Class Certification ("Agreement") is made and entered into this second day of October, 2008 (the "Execution Date"), by and between defendant Wachovia Bank, N.A., and Plaintiff Class Representatives, both individually and on behalf of all others similarly situated.

WHEREAS, Plaintiffs have asserted certain allegations against Wachovia in the Complaints filed in the above-captioned cases, which allegations are incorporated herein by reference;

WHEREAS, Wachovia denies that it is liable for the claims alleged;

WHEREAS, Plaintiffs have conducted an investigation into the facts and the law regarding the Class Actions and have concluded that a settlement with Wachovia according to the terms set forth below is in the best interest of Plaintiffs and the Class;

WHEREAS, Wachovia, despite its denial of liability, has nevertheless agreed to enter into this Agreement to avoid further expense, inconvenience, and the distraction of burdensome and protracted litigation;

WHEREAS, Wachovia acknowledges that the activities of Class Counsel have contributed materially and significantly to the scope and amounts obtained in the related regulatory enforcement actions against Wachovia, as well as to the methods of distribution of the consideration obtained;

NOW, THEREFORE, in consideration of the covenants, agreements, and releases set forth herein, and for other good and valuable consideration, it is agreed by and among the undersigned that the Class Actions against Wachovia be settled, compromised, and dismissed on the merits with prejudice, without costs as to Plaintiffs, the Class, or Wachovia, subject to the approval of the Court, on the following terms and conditions:

A. <u>Definitions</u>

The following terms, as used in this Agreement, shall have the following meanings:

1. "Wachovia" shall mean Wachovia Bank, N.A.

2. "PPC" shall mean Payment Processing Center, LLC.

3. "Netchex" shall refer to the payment processor known as Netchex that was located at 6 Penns Trail, Suite 201, Newtown, PA 18940. Unless otherwise stated, "Netchex" shall be used only when referring to the period before it was sold to YMA.

4. "YMA" shall refer to YMA Company, LLC, also known as "Your Money Access," and to Netchex during the period in which it was owned by YMA.

5. "Guardian" shall refer to Guardian Marketing Services Corp.

6. "Payment Processors" shall refer to PPC, Netchex, YMA, and Guardian.

7. "Telemarketers" shall refer to any and all entities that conducted outbound telemarketing activities and processed payments through the Payment Processors.

8. "RCC" and "Demand Draft" both mean a remotely created check.

9. "Covered RCC" means an RCC that was deposited by a Payment Processor into an account at Wachovia pursuant to information obtained from a Telemarketer, and which was not returned in full by the drawee bank.

10. "Class" shall refer to all individuals as to whom RCCs on their bank accounts were deposited by the Payment Processors into one or more accounts in any of the Payment Processors' or Telemarketers' names at defendant Wachovia and finally charged to the individuals' bank accounts, and which was not returned in full by the drawee bank, between June 1, 2003, and the date of this agreement.

11. "Class Member" means each member of the Class who does not timely elect to be excluded from the Class.

12. "Claimant" shall mean a member of the Class who files a claim under this Agreement.

13. "Class Counsel" shall refer to the law firm of Langer, Grogan & Diver, P.C.

14. "Claims Administrator" means the entity administering claims under this Agreement, and shall be Rust Consulting, LLC, unless another administrator is selected pursuant to paragraph 35.

15. "Releasees" shall refer to Wachovia and its past, present, and future officers, directors, employees, agents, stockholders, attorneys, servants, representatives, parents, subsidiaries, affiliates, partners, insurers, and to the predecessors, successors, heirs, executors, administrators, and assigns of each of the foregoing.

16. "OCC" refers to the Office of the Comptroller of the Currency of the United States.

17. "Revised OCC Agreement" refers to an agreement Wachovia has indicated has been reached in principle and will be finalized with the OCC that Wachovia represents will include a restitution plan that requires the direct mailing of checks to individuals without requiring a claim procedure to establish eligibility.

18. "Court" means the United States District Court for the Eastern District of Pennsylvania.

19. "US Attorney" shall mean the United States Attorney for the Eastern District of Pennsylvania.

20. "The *Faloney* Action" shall mean *Faloney et al. v. Wachovia Bank, N.A.*, Civil Action No. 07-1455, filed in the United States District Court for the Eastern District of Pennsylvania.

21. "The *Harrison* Action" shall mean *Harrison v. Wachovia Bank, N.A.*, Civil Action No. 08-755, filed in the United States District Court for the Eastern District of Pennsylvania.

22. "The Class Actions" refers to the *Faloney* Action and the *Harrison* Action, whether those actions remain separate or are consolidated by the Court.

B. Wachovia's Agreement with the Office of the Comptroller of the Currency

23. Wachovia represents that it has reached an accord with the OCC that will modify their agreement of April 24, 2008 (the Revised OCC Agreement), to require Wachovia to mail checks directly to members of the Class, without establishing eligibility through a claim procedure, in the estimated aggregate amount of $163 million. Class Members will not be required to make any affirmation or special endorsement to establish their right to the checks to be so distributed.

24. The remedial program under the Revised OCC Agreement is part of the consideration for a final settlement of the Class Actions.

25. Class Counsel shall be provided full access to the administrator of the checks to be distributed under the Revised OCC Agreement.

26. To the extent practicable, Wachovia will apprise Class Counsel on a current basis of the status of any plan or protocol for distribution of checks under the Revised OCC Agreement sufficiently in advance of adoption of the plan or protocol to allow for comment by Class Counsel.

27. The money represented by any checks that are returned or not presented, cashed and/or deposited shall remain in an account or reserve created pursuant to the Revised OCC Agreement until approval by the Court of a final report of the administrator

covering the checks distributed under the Revised OCC Agreement and of a final report of the administrator covering the funds distributed pursuant to section E of this Agreement. Any party may petition the Court to direct that any funds remaining in such account or reserve that will not be necessary to pay checks distributed under the Revised OCC Agreement, which would be subject to reversion to Wachovia, be used to satisfy any and all obligations under this Agreement. After final Court approval of the administrator reports in this paragraph, any funds remaining in any such account or reserve and not subject to an order of Court under this paragraph shall be unconditionally and indefeasibly released to Wachovia.

28. To the extent consistent with the Revised OCC Agreement, all checks distributed under the Revised OCC Agreement shall become void on the 180th day following the date of mailing if not presented and/or deposited on or prior to such day, and each such check shall so provide.

C. **Identification of Class Members**

29. Wachovia has apprised, and shall continue to apprise, Class Counsel of the efforts being made to prepare a Class list and to complete a database of Class Members and shall continue to fully inform Class Counsel how such list is being compiled. These efforts shall be undertaken at Wachovia's expense.

30. Class Counsel shall cooperate with Wachovia in providing and obtaining such information as it practicably can to complete the Class list and database. Class Counsel shall have access to the current Class list and database at all times.

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31. The lists of eligible restitution recipients used for purposes of mailing checks under the Revised OCC Agreement shall be unified with the lists used to compensate claims made under this Agreement.

D. <u>Notice and Right to Opt-Out</u>

32. In connection with the Motion for Preliminary Approval described herein, Class Counsel shall submit to the Court for its approval under Rule 23 of the Federal Rules of Civil Procedure a Notice of Pendency and Settlement of Class Action, a Publication Notice, and a Claim Form, which in their opinion fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process. Wachovia has a right to participate in the drafting of any claim forms and notices to the Class. The Court retains the final authority to determine the form of notice and claim forms, and will consider separate submissions from the parties if they are unable to agree on a proposed set of notices and claim forms to be submitted to the Court for approval..

33. Any member of the Class shall have the right to opt out of the Class by sending a written request for exclusion from the Class to the address listed in the Notices, postmarked no later than a deadline to be set by the Court, which deadline shall be set forth in the Notices. Any opt out under this Agreement shall have no effect on eligibility for restitution under the Revised OCC Agreement.

34. Opt-out requests must be signed by the Class Member requesting exclusion, include the requestor's full name and current address, and include an affirmation, under penalty of perjury, that that individual has advised any and all joint account holders on any account from which funds were taken through the use of a

Covered RCC that that requestor is seeking to exclude the account(s) from the Class and that the joint account holder(s) do not object to the opt-out request.

E. **Claims Administration**

35. All claims under this agreement shall be administered by the "Claims Administrator," which shall be Rust Consulting, LLC, unless the parties mutually agree to specify a different entity as Claims Administrator, and unless a different administrator is employed under the Revised OCC Agreement. The Claims Administrator has been retained by Wachovia and the Receiver for Payment Processing Center, Wayne Geisser, and shall hereafter be retained jointly by the Class and Wachovia for the purposes of carrying out this Agreement.

36. Together with the notice of this settlement, each Class Member shall be sent a form for claiming recovery of bank fees incurred as a result of a Covered RCC. The claim form shall identify two separate claims procedures that any claimant may follow: a "Simplified Claim Procedure" to seek an "Easy Refund" that requires no documentation, and a "Documented Claim Procedure" to seek a "Documented Refund" that permits full recovery of bank fees incurred as a result of a Covered RCC.

37. A Class Member may make a claim under the Simplified Procedure by submitting a claim form that includes an affirmation by the Class Member that he or she incurred bank fees as a result of a Covered RCC. The claim can be submitted either by paper form or through a website to be maintained by the Claims Administrator.

38. All claims must be submitted to the Claims Administrator for payment. The Claims Administrator will verify that the claimant is a bona fide Class Member and that the claim form indicates that the claimant has made the affirmation required under

paragraph 37 . No further determination shall be made. Any Class Member who files a verified claim under paragraph 37 shall be entitled to receive a payment of thirty-five dollars.

39. A Class Member may alternatively make a claim under the Documented Claims Procedure, which will require that the claimant document, with bank account statements or other records provided by the Claimant's bank listing all credits and debits posted to the account for a given period of time, both the Covered RCCs in question and the bank charges the claimant believes were caused by those RCCs. In seeking any such fees charged, a claimant must provide such records listing all transactions on that account for sixty days following the fee for which recovery is sought. There shall be no limit on the amount of money a Class Member may claim under the documented claims procedure, subject to adequate proof of causation of the fees by a Covered RCC, and a claimant shall be entitled to a payment equal to the entire sum of the fees that have been determined to have been caused by a Covered RCC.

40. All Documented Claims must be submitted to the Claims Administrator within 90 days of the date the claim form was mailed, which will verify that the claim has been properly filed by an eligible Class Member. The Claims Administrator shall refer all verified claims to Wayne Geisser or such other person appointed by the Court ("the Master"), for determination of the extent of bank fees that were proximately caused by Covered RCCs. The Master shall be retained jointly by Wachovia and Class Counsel, and shall be paid by Wachovia.

41. In making the determination of proximate causation, the Master shall follow the following rules and guidelines, together with any such other rules and

guidelines to which the parties agree, and such other rules and guidelines, if any, the Master may adopt:

A. A bank fee applied to a given transaction shall be presumed to have been caused by an RCC if:

   i. at the time of the transaction and in the order of posted transactions, if the full amount of the RCC and any previously applied fees determined to have been caused by the RCC had been added back to the balance, the balance of the claimant's bank account would have been sufficient to post that transaction, resulting in a non-negative balance, or if it is otherwise shown that the fee would not have been charged; and

   ii. the bank fee in question was charged not more than sixty days after the date of the RCC.

B. For clarity, to illustrate subparagraph A.i, if a person had a balance of $100 from which $50 was taken pursuant to a Covered RCC, a bank fee charged on a subsequent check for $60 based on insufficient balance would be caused by the RCC, because the balance would have been $100 but for the RCC, which would have been sufficient for a $60 check. A fee charged on a $200 check would not be presumed caused by the RCC, because it would have resulted in a negative balance even if the RCC had not been charged. Any fees deemed caused by the RCC must also be included in the calculation of what the account balance would have been but for the RCC.

C. A bank fee shall be presumed not to have been proximately caused by an RCC if it was charged more than sixty days from the date of the RCC.

D. Unless otherwise indicated, any waiver or reversal of a fee shall be presumed to relate to the earliest non-refunded fee of an identical amount within sixty days prior to the waiver or reversal. Any subsequent waivers or reversals shall be applied in the same manner to fees in the order charged within the 60-day period preceding each such waiver or reversal.

E. The Master shall make an initial determination on the basis of the claim submitted by the claimant together with accompanying documentation and may seek further documentation or explanation from the Claimant. The Master shall inform the claimant, with copies to Wachovia and Class Counsel, of the initial determination.

F. Either Wachovia or the Claimant may request a telephone hearing within thirty days of receiving notice of the Master's initial determination, during which each will have the opportunity to contest the determination of the Master, including seeking to overcome the presumptions in subparagraphs A and C of this paragraph. The Master shall determine on the basis of the evidence and arguments presented whether the fees in question were proximately caused by Covered RCCs. The presumptions in subparagraphs A and C of this paragraph shall continue to apply but may be rebutted by the claimant or Wachovia.

G. For claims in which $1000 or more has been awarded by the Master, Wachovia may seek review of the Master's determination by the Court within thirty days of the Master's determination. For claims in which $1000 or more was claimed, a claimant may seek review of the Master's determination by the Court within thirty days of the Master's determination. Such appeals will be considered, unless circumstances do not permit or by mutual agreement, by Magistrate Judge Timothy Rice of the United States District Court for the Eastern District of Pennsylvania. There shall be no further right of appeal.

H. For claims in which less than $1000 is in controversy, a party can obtain review only if the Master certifies that the claim raises issues of sufficient importance, or sufficient uncertainty, that an appeal is warranted. A request for certification shall be made within thirty days of the Master's determination. The Master may issue a certification without a party having made such a request.

42. There shall be no limit on the aggregate sum paid under either the Simplified Claims Procedure or the Documented Claims procedure, which shall be determined solely by the number and determined value of the verified claims made.

43. Beginning 45 days after Final Approval of this Settlement, and every 45 days thereafter, the Claims Administrator shall provide a report to Wachovia and Class Counsel listing all Simplified Claims that have been verified as of the end of that 45-day period and their total value, together with a list of all Documented Claims verified within that 45-day period and their total value, and a list of all Documented Claims that have become final within that 45-day period and their total value.

44. The Claims Administrator shall make reports copied to Class Counsel and Wachovia as described in paragraph 43 every 45 days thereafter, on a rolling basis, until it is satisfied that all claims have been finally processed and, in any event, for not less than 180 days after the end of the claims period.

45. Within ten days of receipt of a report of the total value of verified claims described in paragraphs 43 and 44, Wachovia shall place a sum of money equal to the value of (i) all Simplified Claims and (ii) all Documented Claims that have become final during the preceeding 45-day period into a separate account at Wachovia, and shall provide notice to Class Counsel and the Settlement Administrator that the deposit has been made. Upon receipt of such notice, the Settlement Administrator shall promptly make distribution by check to each Claimant, and shall file with the Court and serve on Wachovia and Class Counsel a certification that distribution has been made.

46. The Claims Administrator shall take such steps to ensure that Claimants receive and deposit and/or cash the checks distributed under this section as are employed in distributing the checks under the Revised OCC Agreement.

47. The Claims Administrator shall inform the Court in a final report on the distribution of funds described in paragraph 45 of the extent of such funds distributed. To the extent practicable, the Claims Administrator and Master shall complete the claims procedure under Section E within 365 days following the last date for submission of claims set forth in the notice. This date may be extended by the Court upon request by the Claims Administrator or Master.

F. Award to the Representative Plaintiffs

48. Subject to Court Approval, Wachovia agrees to pay each Representative Plaintiff an Award of $10,000 in addition to the value of the claims submitted by each Representative Plaintiff as consideration for the efforts and burdens of representing the Class Members in this litigation.

49. The awards described in paragraph 48 shall have no effect on the size of the fund available to pay Class Members' claims, which shall be determined solely by the number and value of claims submitted.

G. Fees and Costs

50. Wachovia shall pay all costs associated with notice and administration of the claims process in this Agreement. The Claims Administrator and Master shall submit invoices directly to Wachovia, which shall pay them according to their terms.

51. Wachovia shall pay to Class Counsel a sum of $15,000,000 as their attorneys fees and costs in this matter.

52. The sum set forth in paragraph 51 is subject to approval by the Court. Upon approval by the District Court following notice to the class, Wachovia shall deposit the sum approved by the Court into an interest-bearing escrow account at a national bank mutually agreed upon by the parties with Wayne Geisser, or such other person appointed by the Court, as escrow agent.

53. The escrow agent shall disburse to Class Counsel the sum awarded by the Court when the 30-day period for appeal from the Court's approval, as provided by Federal Rule of Appellate Procedure 4(a)(1)(A), has expired. In the event of an appeal of the Court's determination of Class Counsel's award for fees and costs, or an appeal of the approval of the settlement solely on the basis of the counsel fees and costs awarded by

the Court, the escrow agent shall disburse to Class Counsel the amounts that are not subject to appeal the day following the end of the appeal period. The escrow agent shall pay any further fees approved when the appeal and any subsequent proceedings become final, together with any interest that has accrued on the approved portion of the disputed funds.

54. The payment of notice and administration costs and attorneys' fees and costs under this section shall not reduce or affect the amount of money paid to the Class, nor affect any Class Member's right to recover the full value of the money taken from the Class Member's account by a Covered RCC, nor limit the recovery of bank fees incurred as a result of a Covered RCC. Nor shall the payment of any fees and costs under this section affect the size of the fund available to pay Class Members' claims, which shall be determined solely by the number and value of claims submitted.

55. Wachovia will not oppose or object to the payment for fees and costs that it has agreed to pay pursuant to paragraph 51, nor shall it suggest, encourage, or otherwise facilitate any objection thereto.

H. Approval of This Agreement and Dismissal of Claims

56. Plaintiffs and Wachovia shall use their best efforts to effectuate this Agreement, including cooperating in promptly seeking the Court's approval of procedures (including the giving of class notice under Federal Rule of Civil Procedure 23(c) and (e)) to secure the prompt, complete, and final dismissal with prejudice of the Action .

57. Not later than October 10, 2008, unless the parties to this agreement otherwise agree, or if the Court otherwise orders, Plaintiffs shall submit to the Court a

motion, to be joined in or stipulated to by Wachovia, seeking preliminary approval of a settlement class and of the settlement, authorization to disseminate Notice of such settlement and final judgment contemplated by this Agreement to all potential Class Members, subject to approval by the Court (the "Motion"). The Motion shall include: (i) a proposed form of, method for, and date of dissemination of notice (which notice shall be part of the notice that is disseminated to the Class); and (ii) a proposed form of final judgment order. Plaintiffs and Wachovia shall endeavor to agree upon the text of the items referred to in clauses (i) and (ii) above before submission of the Motion and the Court shall finally determine the text and content of those items. In addition to individual notice to Class Members to the extent practicable, notice of the settlement shall be published at least once in one or more national publications reasonably targeted to reach the Class. The Settlement Class shall be defined as:

> "All individuals as to whom RCCs on their bank accounts were deposited by the Payment Processors into one or more accounts in any of the Payment Processors' or Telemarketers' names at defendant Wachovia and finally charged to the individuals' bank accounts, and which was not returned in full by the drawee bank."

58. The parties shall make every effort to ensure that notice is mailed as soon as is practicable, seeking to complete mailing not later than October 31, 2008, subject to Court approval, unless the parties mutually agree to modify this date.

59. The parties will jointly request that the Court hold a hearing on final approval in December 2008, but not before thirty days have elapsed from the completion of the mailing of notice under paragraph 58.

60. If the Court approves this Agreement, Plaintiffs and Wachovia shall jointly seek entry of an order of final judgment, the text of which the parties shall agree upon:

A. approving finally this Agreement and its terms as being a fair, reasonable, and adequate settlement as to the Class Members within the meaning of Federal Rule of Civil Procedure 23 and directing its consummation according to its terms;

B. directing that the Action be dismissed with prejudice and, except as provided for in this Agreement, without costs;

C. reserving exclusive jurisdiction over the settlement, this Agreement, and the award of attorneys fees and costs including the administration and consummation of this settlement;

D. releasing Wachovia to the extent described in Section I below; and

E. requiring the Claims Administrator to file with the Clerk of the Court a record of potential class members who timely excluded themselves from the Class, to provide a copy of the record to counsel for Wachovia, and to maintain the record for a period of five years.

61. This Agreement shall become final when (i) the Court has entered a final order approving this Agreement under Federal Rule of Civil Procedure 23(e) and a final judgment dismissing the Action against Wachovia on the merits with prejudice as to all Class Members, and (ii) the time for appeal or to seek permission to appeal from the Court's approval of this Agreement and entry of a final judgment as described in clause (i) above has expired, or, if appealed, approval of this Agreement and the final judgment have been affirmed in their entirety by the Court of last resort to which such appeal has been taken and such affirmance is no longer subject to further appeal or review ("Finally Approved"). It is agreed that, for purposes of finality under this paragraph, the time for

appeal or to seek permission to appeal shall be 30 days, as provided by Federal Rule of Appellate Procedure 4(a)(1)(A).

62. If the Court refuses to approve this Agreement or any part hereof, or if such approval is modified or set aside on appeal, or if the Court does not enter the final judgment provided for in paragraph 60 of this Agreement, or if the Court enters such final judgment and appellate review is sought, and on such review, such final judgment is not affirmed, then the parties agree to seek, in good faith, a resolution of their differences that they believe will be granted final approval by the Court and upheld on any appeal. In the event resolution cannot be attained, the Agreement shall be abandoned.

63. Wachovia and the Plaintiffs expressly reserve all of their rights if the Agreement is not Finally Approved and is abandoned under paragraph 62.

I. Release and Discharge

64. In addition to the effect of any final judgment entered in accordance with this Agreement, when this Agreement is Finally Approved, and in consideration of the payments specified in this Agreement, and for other valuable consideration, the Releasees shall be completely released, acquitted, and forever discharged from any and all claims, demands, actions, suits, and causes of action, whether class, individual, or otherwise in nature, that Class Members, or each of them, ever had or may have concerning Wachovia's processing of RCCs by the Payment Processors that were or could have been asserted based on the facts alleged in the complaints filed in either the *Faloney* Action or *Harrison* Action, which arise under any federal or state law from the beginning of time to the date of this Agreement (the "Released Claims"). The parties shall request that this Release be included in the Final Order and Judgment entered in these cases.

J. Miscellaneous

65. This Agreement, whether or not Finally Approved, or whether or not a final judgment is entered, and any and all negotiations, documents, and discussions associated with it, shall not be deemed or construed to be an admission or evidence of any violation of any statute or law, or of any liability or wrongdoing by Wachovia, or of the truth of any of the claims or allegations contained in the complaints or any other pleading filed in the actions, and evidence thereof shall not be discoverable or used directly or indirectly, in any way, whether in the action or in any other action or proceeding.

66. The United States District Court for the Eastern District of Pennsylvania shall retain jurisdiction over the implementation, enforcement, and performance of this Agreement, and shall have exclusive jurisdiction over any suit, action, proceeding, or dispute arising out of or relating to this Agreement or the applicability of this Agreement that cannot be resolved by negotiation and agreement by Representative Plaintiffs, Class Counsel and Wachovia. This Agreement shall be governed by and interpreted according to the substantive laws of the Commonwealth of Pennsylvania without regard to its choice of law or conflict of laws principles, except to the extent to which the laws of the United States of America preempt Pennsylvania substantive law.

67. This Agreement constitutes the entire agreement among Representative Plaintiffs on behalf of themselves and Class Members and Wachovia pertaining to the settlement of the action and supersedes any and all prior and contemporaneous undertakings in connection therewith. This Agreement may be modified or amended only

by a writing executed by Plaintiffs and Wachovia, and approved by the Court. This Agreement may be executed in counterparts.

68. Neither Wachovia nor Named Plaintiffs, or any of them, shall be considered to be the drafter of this Agreement or any of its provisions for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Agreement.

69. Where this Agreement requires any party to provide notice or any other communication or document to any other party, such notice, communication, or document shall be provided by facsimile or letter by overnight delivery to the following persons:

If to Wachovia:

C. Vance Beck
Senior Vice President and Assistant General Counsel
Wachovia Bank
One Wachovia Center
301 South College Street
Charlotte, NC 28288
Tel.: (704) 374-4240
Fax.: (704) 383-0649

If to Plaintiffs:

Howard I. Langer
Langer, Grogan & Diver, P.C.
1717 Arch Street
Suite 4130
Philadelphia, PA 19103
Tel.: (215) 320-5660
Fax: (215) 320-5703

70. The persons signing the agreement represent that they are authorized to sign the agreement on behalf of the respective parties.

By: ______________________ Date 10.2.08

C. Vance Beck
Senior Vice President and Assistant General Counsel
Wachovia Bank
One Wachovia Center
301 South College Street
Charlotte, NC 28288
Tel.: (704) 374-4240
Fax.:(704) 383-0649
On behalf of Defendant Wachovia Bank, N.A.

By: ______________________ Date Oct. 2, 2008

Howard Langer
Langer, Grogan & Diver, P.C.
1717 Arch Street
Suite 4130
Philadelphia, PA 19103
Tel.: (215) 320-5660
Fax: (215) 320-5703
On behalf of Plaintiffs and the Plaintiff Classes

EXHIBIT B

Thank you for banking with Wells Fargo. For assistance, call: 800-869-3557 (1-800-TO-WELLS), TDD number (for the hearing impaired only) 1-800-877-4833. Or write: WELLS FARGO BANK, N.A.,

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Wells Fargo Free Checking

Account Numbe_

Activity summary

Balance on 05/16	$71.60
Deposits	2,949.78
Withdrawals	- 3,348.78
Balance on 06/15	- $327.40

Activity detail

Deposits

Date	Description	Amount
05/19	Tele-Transfer Fr XXXXXX Reference # TFEQD747Sy	$100.00
05/25	Check Reversal	299.00
05/27	Preauthorized Debit Reversal	87.85
06/03	Us Treasury 310 Soc Sec	898.00
06/07	Preauthorized Debit Reversal	87.85
06/07	Preauthorized Debit Reversal	59.90
06/07	Direct Deposit Advance On 06/07 ($50.00 *Finance Charge* Also Applies)	500.00
06/09	Preauthorized Debit Reversal	249.95

Deposits -continued

Date	Description	Amount
06/13	Check Reversal	26.61
06/14	Check Reversal	327.94
06/14	Check Reversal	61.33
06/15	Check Reversal	50.00
06/15	Check Reversal	28.50
06/15	Preauthorized Debit Reversal	87.85
06/15	Preauthorized Debit Reversal	85.00
Total deposits		$2,949.78

Withdrawals

Checks

Number	Date	$ Amount	Number	Date	$ Amount
1069	05/20	25.00	1082	06/07	50.00
1070	05/23	13.83	1075	06/07	188.79
9604	05/24	299.00	1083	06/10	26.61
1071	05/24	15.59	1079	06/13	327.94
1076	06/01	6.08	1081	06/13	61.33
1072	06/06	29.00	1077	06/14	50.00
1078	06/06	7.89	1080	06/14	28.50
Total checks					$1,129.56

Other withdrawals

Date	Description	$ Amount
05/23	Wells Fargo Bank Loan Pmt 050520	25.00
05/24	Christian Outrea Telephone 050520 0001	100.00
05/25	NSF Return Check Fee	30.00
05/25	Overdraft Fee	33.00
05/26	Opc 88 4 050523	87.85
05/27	NSF Return Check Fee	30.00
05/31	Qwest Auto Pay 050513 D9992451 456	28.42
06/01	Overdraft Fee	33.00
06/01	Opc NSF Ck Fee 05 03	30.00
06/02	Overdraft Fee	33.00
06/02	Overdraft Fee	33.00
06/03	*Finance Charge*Payment For DD Adv On 05/06	50.00
06/03	Payment For Direct Deposit Advance On 05/06	500.00
06/06	Wells Fargo Bank Loan Pmt 050603 616 1	96.40
06/06	Opc 8884421584 059600415003	87.85
06/06	Protel 8006342979 000000016853687	59.90
06/07	Overdraft Fee	33.00
06/07	Chaseusa Pymt Coll Jun 05	233.00
06/08	Overdraft Fee	33.00
06/08	Financial Debits 877-773-3416 Grant For You	249.95
06/09	NSF Return Check Fee	30.00
06/13	NSF Return Check Fee	30.00

Other withdrawals-continued

Date	Description	$ Amount
06/14	NSF Return Check Fee	30.00
06/14	NSF Return Check Fee	30.00
06/14	Opc 888	87.85
06/14	Aquila Util Bill 050614 7722306272	85.00
06/15	NSF Return Check Fee	30.00
06/15	NSF Return Check Fee	30.00
06/15	NSF Return Check Fee	30.00
06/15	NSF Return Check Fee	30.00
Total other withdrawals		$2,219.22
Total withdrawals		**$3,348.78**

Returned items

Date	Description	Amount
05/25	Check #9604 Reference #00330022029160161562	$299.00
05/27	Non-Monetary Notation Transaction Reference # 063112240870723	$87.85
06/07	Non-Monetary Notation Transaction Reference # 063112240878166	$87.85
06/07	Non-Monetary Notation Transaction Reference # 031101115000526	$59.90
06/09	Non-Monetary Notation Transaction Reference # 021000084477275	$249.95
06/13	Check #1083 Reference #00330022002253515615	$26.61
06/14	Check #1079 Reference #00330022002253986753	$327.94
06/14	Check #1081 Reference #00330022002253952556	$61.33
06/15	Non-Monetary Notation Transaction Reference # 063112240886028	$87.85
06/15	Non-Monetary Notation Transaction Reference # 071000150859725	$85.00
06/15	Check #1077 Reference #00330022002254442875	$50.00
06/15	Check #1080 Reference #00330022005450739126	$28.50

Save money by enrolling in the Checking Add-on Package. With the Checking Add-on Package you get free Wells Fargo Exclusive Checks or $5 discounts on other check designs, and no fee cashier's checks, official checks and personal money orders. You'll also receive savings on prescription medications, hotels, car rentals, theme parks, and more. All for just $5 per month. See your banker for more details.

Fees include sales tax, where applicable.

Daily balance summary

Date	$ Balance	Date	$ Balance
05/16	71.60	06/02	- 264.32
05/19	171.60	06/03	83.68
05/20	146.60	06/06	- 197.36
05/23	107.77	06/07	- 54.40
05/24	- 306.82	06/08	- 337.35
05/25	- 70.82	06/09	- 117.40
05/26	- 158.67	06/10	- 144.01
05/27	- 100.82	06/13	- 536.67
05/31	- 129.24	06/14	- 458.75
06/01	- 198.32	06/15	- 327.40

Direct Deposit Advance (Lender - Wells Fargo Bank, N.A.)

Outstanding balance as of last statement	$550.00
Outstanding balance as of this statement	$550.00
Annual percentage rate	120.0%
Current advance credit limit (reduction may apply, see below)	$500.00
Consecutive statements with at least 1 advance transaction	03

YOUR ADVANCE LIMIT HAS BEEN REDUCED TO $60 BASED ON HOW YOUR ACCOUNT HAS BEEN MAINTAINED. PLEASE CALL THE PHONE BANK TO REQUEST AN ADVANCE.

PLEASE NOTE: YOU HAVE THE RIGHT TO RECEIVE A WRITTEN EXPLANATION OF THE SPECIFIC REASONS FOR YOUR $60 ADVANCE LIMIT IF YOU NOTIFY US WITHIN 60 DAYS OF RECEIVING?THIS NOTICE. WE WILL RESPOND TO YOUR INQUIRY WITHIN 30 DAYS. YOU MAY CALL THE WELLS FARGO PHONE BANK NUMBER ON YOUR STATEMENT OR WRITE US AT: WELLS FARGO BANK, 455 MARKET STREET, 3RD FLOOR, MAC #A0104-039, SAN FRANCISCO, CA 94105.

THE FEDERAL EQUAL CREDIT OPPORTUNITY ACT PROHIBITS CREDITORS FROM DISCRIMINATING AGAINST CREDIT APPLICANTS ON THE BASIS OF RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, MARITAL STATUS, AGE (PROVIDED THAT THE APPLICANT HAS THE ABILITY TO ENTER INTO A BINDING CONTRACT), BECAUSE ALL OR PART OF THE APPLICANT'S INCOME DERIVES FROM ANY PUBLIC ASSISTANCE PROGRAM, OR BECAUSE THE APPLICANT HAS IN GOOD FAITH EXERCISED ANY RIGHT UNDER THE CONSUMER CREDIT PROTECTION ACT. THE FEDERAL AGENCY WHICH ADMINISTERS COMPLIANCE WITH THE LAW CONCERNING WELLS FARGO BANK IS THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, CUSTOMER ASSISTANCE GROUP, 1301 MCKINNEY STREET, SUITE 3450, HOUSTON, TX 77010-9050.

THE FINANCE CHARGE FOR THE DIRECT DEPOSIT ADVANCE SERVICE IS REFLECTED AS AN ANNUAL PERCENTAGE RATE (APR) WHICH IS A MEASURE OF THE COST OF CREDIT.

Thank you for banking with Wells Fargo.

EXHIBIT C

Account Statement
January 23 through February 20, 2004

Account Number:

Thank you for banking with Wells Fargo. For assistance, call: 800-869-3557 (1-800-TO-WELLS), TDD number (for the hearing impaired only) 1-800-877-4833. Or write: WELLS FARGO BANK, N.A.,

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Wells Fargo Free Checking

Account Number:

Activity summary

Balance on 01/22	$951.99
Deposits	888.55
Withdrawals	- 3,114.96
Balance on 02/20	- $1,274.42

Activity detail

Deposits

Date	Description	Amount
02/02	Overdraft Protection From 66	$60.55
02/03	Us Treasury 310	808.00
02/17	Overdraft Protection From 66	20.00
Total deposits		$888.55

Withdrawals
Checks

Number	Date	$ Amount	Number	Date	$ Amount
1102	01/23	31.39	1124	02/06	10.00
1098	01/23	3.00	1103	02/09	33.00
1099	01/26	34.80	1119	02/10	120.80
1096	01/26	5.00	1126	02/10	25.00
1110	01/28	43.19	1127	02/10	10.00
1107	01/30	89.90	1112	02/11	35.97
1106	01/30	25.00	1130	02/11	25.00
1120	02/02	206.00	1132	02/12	22.95
1113	02/02	37.47	1125	02/12	19.97
1122	02/02	29.15	1121	02/12	5.00
1111	02/02	27.79	1140	02/17	40.00
1109	02/02	20.77	1104	02/17	5.00
1128	02/03	50.00	1142	02/18	28.55
1108	02/04	36.00	1114	02/18	23.06
1115	02/04	13.47	1131	02/18	19.95
1129	02/05	29.65	1141	02/18	16.54
1123	02/05	18.45	1134	02/19	19.89
1117	02/05	5.00	1116	02/19	5.00
1118	02/06	69.14	1138	02/20	5.00
1105	02/06	10.00	1137	02/20	5.00
Total checks					$1,260.85

Other withdrawals

Date	Description	$ Amount
01/30	American Benefit 8663966638 012904 N039993612468	398.00
02/02	Qwest Auto Pay 040113	34.73
02/05	Wells Fargo Bank Loan Pmt	96.40
02/17	First Card Benef 8882656254 021304 N041483737603	299.98
02/17	Speed Link Medpenefit 021304 8346959 800 923 8651	299.00
02/18	Overdraft Fee	33.00
02/18	Overdraft Fee	33.00
02/18	Overdraft Fee	33.00
02/18	Overdraft Fee	33.00
02/19	Overdraft Fee	33.00
02/19	Overdraft Fee	33.00
02/19	Overdraft Fee	33.00
02/19	Overdraft Fee	33.00
02/19	Overdraft Fee	33.00
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02/20	Overdraft Fee	33.00
02/20	Overdraft Fee	33.00
02/20	Overdraft Fee	33.00
02/20	Overdraft Fee	33.00

Other withdrawals-continued

Date	Description	$ Amount
02/20	Overdraft Fee	33.00
02/20	Overdraft Fee	33.00
02/20	Overdraft Fee	33.00
Total other withdrawals		$1,854.11
Total withdrawals		**$3,114.96**

Fees include sales tax, where applicable.

Daily balance summary

Date	$ Balance	Date	$ Balance
01/22	951.99	02/06	496.24
01/23	917.60	02/09	463.24
01/26	877.80	02/10	307.44
01/28	834.61	02/11	246.47
01/30	321.71	02/12	198.55
02/02	26.35	02/17	- 425.43
02/03	784.35	02/18	- 645.53
02/04	734.88	02/19	- 934.42
02/05	585.38	02/20	- 1,274.42

Direct Deposit Advance (Lender - Wells Fargo Bank, N.A.)

Outstanding balance as of last statement	$0.00
Outstanding balance as of this statement	$0.00

DO SOMETHING FAST TO AVOID OVERDRAFTS AND RELATED FEES! CHOOSE THE DIRECT DEPOSIT ADVANCE SERVICE TO ACCESS UP TO $500 PRIOR TO RECEIVING YOUR RECURRING DIRECT DEPOSIT INCOME. JUST USE THE ATM, ONLINE OR CALL THE PHONE BANK. SEE YOUR CONSUMER ACCOUNT FEE AND INFORMATION SCHEDULE FOR COMPLETE DETAILS.

Thank you for banking with Wells Fargo.