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THE HONORABLE KEN SCHUBERT
Department 40
Noted for Consideration: June 3, 2021
Without Oral Argument

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Department 40
Noted for Consideration: June 3, 2021
Without Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

STEVE R. MARICAL; EMILY J. ANDERSON, on
behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

BOEING EMPLOYEES' CREDIT UNION,

Defendant.

NO. 19-2-20417-6 KNT

**PLAINTIFFS' MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

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1 **I. INTRODUCTION**

2 The parties are pleased to present the class settlement of this matter, which
3 challenged several aspects of Boeing Employees' Credit Union's ("BECU") overdraft and
4 insufficient funds ("NSF") fee programs. Plaintiff¹ alleged that BECU uses several practices that
5 are unfair and deceptive under Washington's Consumer Protection Act (CPA). BECU denied
6 these claims and contends that it charges overdraft and NSF fees in accordance with its
7 agreements with its members and that the fees are properly disclosed.

8 The parties have reached a proposed settlement. If the settlement is approved, BECU
9 will pay a total of \$6,000,000 for the benefit of the Settlement Class, and institute a number of
10 important changes to its practices, including (1) an enhanced fee refund policy; (2) providing
11 detailed information in prominent places that describes the ways overdraft and NSF fees are
12 assessed based on "available balance" rather than "current balance" and describing the
13 difference between those types of balances; (3) reminders to members of their ability to opt
14 out of overdraft-fee programs, and directing members to the specific web page they can use
15 to opt out; (4) introducing and offering an overdraft and NSF-fee-free checking account
16 product; and (5) additional efforts to educate its membership regarding its fee practices and
17 ways for members to avoid having fees assessed against their accounts.

18 Plaintiff Steve Marical respectfully moves the Court for preliminary approval of the
19 proposed Settlement. BECU denies liability on Plaintiff's claims, but supports approval of the
20 proposed Settlement. The Settlement satisfies the requirements for preliminary approval
21 because it was negotiated at arm's length and is within the range of possible approval.
22 Plaintiff therefore asks that the Court grant preliminary approval of the Settlement and take
23 the initial steps in the settlement approval process listed below.

24
25

¹ Only Plaintiff Marical seeks appointment as a class representative. Plaintiff Anderson
26 supports the settlement but will recover only as a member of the Settlement Class. For
27 purposes of the settlement and this motion, the term Plaintiff is therefore referred to in the
singular.

1 **II. RELIEF REQUESTED**

2 Plaintiff requests that the Court take the following initial steps in the settlement
3 approval process: (1) grant preliminary approval of the Settlement; (2) certify the Settlement
4 Class for settlement purposes; (3) appoint Plaintiff Marical to serve as representative of the
5 Settlement Class; (4) appoint Terrell Marshall Law Group, Berger Montage PC and Smith &
6 Dietrich Law Offices to serve as Class Counsel; (5) approve the proposed Notice Program; (6)
7 appoint JND Legal Administration as the Settlement Administrator; and (7) schedule the Final
8 Approval Hearing.

9 **III. STATEMENT OF FACTS**

10 **A. Plaintiff's claims.**

11 Plaintiff, a BECU member, challenged two of BECU's practices. First, Plaintiff
12 challenged BECU's practice of assessing overdraft fees based on a member's "available
13 balance," as opposed to the "ledger balance," which Plaintiff alleged was not properly
14 disclosed and was unfair and deceptive in light of the ways BECU presented information. The
15 amount of money in a member's account at any given time is commonly called the "ledger
16 balance." For purposes of assessing overdraft and NSF fees, however, BECU uses a member's
17 "available balance," which cannot be higher than the ledger balance and may be lower. The
18 available balance subtracts pending transactions that have not yet posted as well as "holds"
19 BECU or members' merchants have imposed.

20 Plaintiff also challenged BECU's practice of charging multiple NSF fees for the same
21 transaction. Specifically, BECU may assess multiple \$25 NSF fees for the same member-
22 initiated transaction when a payee presents a previously declined transaction a second or
23 third time.

24 BECU contends that its Member Account Agreement and Account Disclosures
25 accurately explain its overdraft and NSF fee practices and that such fees are based on
26 available balance (and not ledger balance). BECU denies the claims Plaintiffs alleged.

1 **B. The parties engaged in substantial discovery and motion practice.**

2 The parties have been litigating this matter vigorously for nearly two years. Plaintiff
3 originally asserted a violation of the Washington Consumer Protection Act on behalf of the
4 Sufficient Funds Class and claims for breach of contract and violation of the CPA on behalf of
5 the Multiple NSF Class. The Court granted BECU's motion to dismiss the contract claims
6 asserted on behalf of the Multiple NSF Class, but found that the CPA claims survived on behalf
7 of both proposed classes. The parties began discovery, wherein both parties propounded
8 extensive interrogatories and requests for production. Declaration of Beth Terrell ("Terrell
9 Decl.") ¶ 8. Following numerous conferences as to the scope of discovery, BECU moved for a
10 protective order to resolve a dispute regarding the scope of the Court's order on the motion
11 to dismiss. Terrell Decl. ¶ 9. The Court granted in part and denied in part BECU's motion for
12 protective order, reiterating and clarifying the scope of discovery remaining after the Court's
13 prior ruling on the motion to dismiss. *Id.*

14 The parties negotiated a protocol to search for Electronically Stored Information
15 ("ESI") using specified search terms on the accounts of specified custodians. *Id.* ¶ 10. Using
16 negotiated search terms, Defendant produced over 51,000 pages of documents along with
17 nearly seven gigabytes of transaction data extracted from various computer databases. *Id.* The
18 parties' counsel conferred dozens of times regarding discovery. The data productions in
19 particular were the subject of numerous discussions as the parties determined what data
20 Plaintiff needed to prove his case, and what data Defendant could reasonably produce. *Id.*
21 Following document production, Plaintiff's counsel deposed four of Defendant's employees
22 and executives. *Id.* ¶ 11 Both Plaintiffs Marical and Anderson sat for their depositions. Plaintiff
23 Marical's deposition lasted nearly 7 ½ hours. *Id.*

24 Plaintiff moved for class certification, and BECU filed a response. Plaintiff asserted that
25 the Rule 23 prerequisites for certification were met, and BECU asserted four main arguments
26 in response: 1) that the challenged practices cannot be unfair or deceptive because they are
27

1 disclosed in its account agreement; 2) that Plaintiff cannot sustain a CPA claim because he
2 cannot show causation class-wide; 3) that Plaintiff's claim is time barred because he incurred
3 earlier overdraft fees; and 4) that overdraft programs provide a valuable benefit to its
4 customers.

5 Both the motion and the response were supported by extensive expert reports. On the
6 parties' request, the Court stayed the case prior to the filing of Plaintiff's reply in support of
7 class certification to allow the parties to engage in mediation.

8 **C. The settlement negotiations.**

9 The mediation was facilitated by an experienced mediator, Stewart Cogan, and took
10 place on February 9, 2021, via Zoom. Terrell Decl. ¶ 13. After extensive negotiations that went
11 well into the night, the parties agreed to the basic structure of the class action settlement
12 they now present to the Court. *Id.* Over the following months, the parties hammered out the
13 details, engaged in talks regarding confirmatory discovery, drafted the formal settlement
14 agreement and supporting documents, and sought bids for settlement administration. *Id.* All
15 of these efforts led to the Settlement Agreement the parties now present to the Court for
16 approval.

17 **D. The Settlement.**

18 The proposed settlement resolves all of Plaintiff's claims about both overdraft and NSF
19 fees. The full terms of the Settlement are set forth in the parties' Settlement Agreement.
20 Terrell Decl., Ex. 1. Capitalized terms used in this motion are defined in the Settlement
21 Agreement.

22 1. The Settlement Class.

23 The proposed Class for settlement purposes is defined as follows:

24 all current and former BECU consumer members who are residents of the
25 State of Washington and who, (a) between August 2, 2015, and July 1,
26 2020, were charged one or more (1) Available Balance Overdraft or
27 Available Balance NSF Fees, where the member's ledger balance would
have been sufficient to cover the transaction, (2) Available Balance

1 Overdraft or Available Balance NSF fees, where the member's ledger
2 balance would have been sufficient to cover the transaction but for
3 previously incurred fees described in (1) on the same day; or (b) between
4 August 2, 2013, and July 1, 2020, were charged one or more
5 Representment NSF Fees. The start of the Settlement Class period
6 regarding Representment NSF Fees may be adjusted to August 2, 2015
7 based on the results of confirmatory discovery. Excluded from the
8 Settlement Class is BECU, its parents, subsidiaries, affiliates, officers and
9 directors, all Settlement Class members who make a timely election to be
10 excluded, and all judges assigned to this litigation and their immediate
11 family members.

12 Settlement ¶ 42. This Class thus includes individuals who assert both the NSF and overdraft
13 claims. The Settlement Class will include all individuals who fall within the Settlement Class
14 definition who have not opted out of the Settlement. *Id.* ¶ 43. The proposed Class is made up
15 of approximately 137,000 individuals. Terrell Decl. ¶ 12.

16 2. Settlement relief.

17 BECU will pay \$6,000,000 into a Settlement Fund for the Settlement Class as a
18 common fund. Settlement ¶ 46. The Settlement Fund will be used to pay (1) Settlement
19 Awards to Settlement Class Members, (2) any Court-approved service award to Plaintiff
20 Marical, (3) Court-approved attorneys' fees and costs, and (4) Court-approved settlement
21 administration costs. *Id.* After deducting items (2)-(4) above, the Net Settlement Fund will be
22 distributed to Class Members in proportion to the amount of the Net Relevant Fees they paid.
23 *Id.* ¶¶ 77-79. All Class Members will receive a share of the settlement – there is no
24 requirement that Class Members submit a claim form or take affirmative action in order to
25 recover. Any remaining funds from uncashed settlement checks will be distributed 50% to the
26 Legal Foundation of Washington and 50% to Financial Beginnings, a 501(c)(3) non-profit
27 organization. *Id.* ¶ 85.

28 In addition, BECU has agreed to (1) publish prominently on its website a link to a
29 statement clearly describing BECU's overdraft and NSF policies in detail, including the fact that
30 overdraft and NSF fees are calculated based on Available Balance rather than Ledger Balance
31 and describing the differences between those two Balances; (2) create a formal policy

1 governing refunds of NSF and Overdraft fees, by which BECU will, upon request from a BECU
2 member in good standing, refund at least one NSF or Overdraft fee annually; (3) create a
3 notification to be sent to any member receiving a NSF or Overdraft refund, informing the
4 member of the basis for the fee, and offering money management resources; (4) remind class
5 members of the options for opting in or out of overdraft coverage and the Courtesy Pay for
6 Debit overdraft program; and (5) within three years of Settlement, implement a checking
7 account product featuring no NSF or overdraft fees. *Id.* ¶¶ 51-55.

8 a. *Settlement administration.*

9 Following a competitive bidding process, the parties agreed to hire JND Legal
10 Administration to serve as the Settlement Administrator. Terrell Decl. ¶ 15; Settlement ¶ 41.
11 Among other tasks, JND will send notice of the Settlement to Class Members by email and/or
12 U.S. mail, maintain the settlement website, update the addresses of Class Members whose
13 notices are returned as undeliverable, track responses including opt-outs and objections, and
14 mail Settlement Awards to Settlement Class Members who are no longer BECU members.
15 Settlement ¶ 60. JND will arrange for direct deposits of Settlement Awards for Settlement
16 Class Members who are currently BECU members; if it opts to distribute funds for current
17 members in an alternative method, it will pay for that distribution over and above the
18 Settlement Fund. *Id.* ¶ 74.

19 b. *Service award to Plaintiff Marical.*

20 Plaintiff's Counsel will request Court approval of a service award of \$7,500 for Plaintiff
21 Marical to compensate him for the time he dedicated to this litigation and the risk he
22 undertook in stepping forward as representatives of the Class. Settlement ¶ 93; Terrell Decl.
23 ¶ 16. The Settlement is not in any way contingent on the approval of this award. Settlement ¶
24 93.

1 c. *Attorneys' fees and litigation costs.*

2 Plaintiff's Counsel will file a motion for an award of attorneys' fees of no more than
3 30% of the Settlement Fund, plus out-of-pocket costs, to be paid from the Settlement Fund.
4 Settlement ¶ 90. Plaintiff's counsel will make that request based on their lodestar in a motion
5 that will be posted to the Settlement Website. The Settlement is not in any way contingent on
6 the approval of fees, or any particular amount of fees. *Id.*

7 3. Settlement Class Members' release.

8 In exchange for the Settlement benefits, Settlement Class Members will release all
9 claims "that were or could have been alleged in [this case] relating to the assessment of
10 Representment NSF Fees and Available Balance Overdraft or Available Balance NSF Fees" prior
11 to July 1, 2020. Settlement ¶ 86. Settlement Class Members are also enjoined from asserting
12 released claims. *Id.* ¶ 87.

13 **IV. STATEMENT OF ISSUES**

14 Whether the Court should grant preliminary approval of the proposed Settlement,
15 preliminarily certify the Settlement Class for settlement purposes, direct notice to the
16 Settlement Class Members, and schedule a Final Approval Hearing.

17 **V. EVIDENCE RELIED UPON**

18 Plaintiff relies on the Declarations of Beth Terrell, E. Michelle Drake, and Walter Smith
19 in support of this motion and the attached exhibits, and the pleadings and records on file with
20 the Court.

21 **VI. ARGUMENT AND AUTHORITY**

22 **A. Class action settlement approval process.**

23 As a matter of "express public policy," Washington courts strongly favor and
24 encourage settlements. *City of Seattle v. Blume*, 134 Wn.2d 243, 258, 947 P.2d 223 (1997); *see*
25 *also Pickett v. Holland Am. Line Westours, Inc.*, 145 Wn.2d 178, 190, 35 P.3d 351 (2001)
26 ("[V]oluntary conciliation and settlement are the preferred means of dispute resolution.").

1 This is particularly true in class actions and other complex matters where the costs, delays,
2 and risks of continued litigation might otherwise overwhelm any potential benefit the class
3 could hope to obtain. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

4 The Manual for Complex Litigation describes a three-step process to approve class
5 action settlements: (1) preliminary approval of the proposed settlement; (2) dissemination of
6 notice of the settlement to all affected class members; and (3) a “fairness hearing” at which
7 class members may be heard and evidence and argument concerning the fairness, adequacy,
8 and reasonableness of the settlement may be presented. Manual for Complex Litigation
9 (Fourth) §§ 21.632–21.634 (2004) (Ann. ed. May 2019 update). This procedure safeguards
10 class members’ due process rights and enables the court to fulfill its role as the guardian of
11 class interests. *See William B. Rubenstein, Newberg on Class Actions* § 13:1 (5th ed. Dec. 2019
12 update).

13 Plaintiff requests that the Court take the first step in the settlement approval process
14 by granting preliminary approval of the proposed Settlement. The approval of a class
15 settlement is within the Court’s sound discretion. *See Pickett*, 145 Wn.2d at 190. Because no
16 class has been certified, “the judge should make a preliminary determination that the
17 proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of
18 Rule 23(b).” Manual for Complex Litigation § 21.632.

19 **B. The Settlement satisfies the criteria for preliminary approval.**

20 Proposed class action settlements are not effective unless approved by the Court. CR
21 23(e). At the preliminary approval stage, courts typically consider whether “the proposed
22 settlement appears to be the product of serious, informed, non-collusive negotiations, has no
23 obvious deficiencies, does not improperly grant preferential treatment to class
24 representatives or segments of the class, and falls within the range of possible [judicial]
25 approval.” Newberg § 13.10 (citation omitted). The proposed Settlement satisfies these
26 requirements.

1 1. The Settlement is the product of serious, informed, and arm’s-length
2 negotiations.

3 This Settlement is the result of hard-fought litigation and arm’s-length negotiations
4 between attorneys experienced in this type of litigation. *Pickett*, 145 Wn.2d at 200 (“When
5 experienced and skilled class counsel support a settlement, their views are given great
6 weight.” (citation omitted)).

7 Plaintiff’s counsel negotiated the Settlement with the benefit of many years of prior
8 experience and a solid understanding of the facts and law of this case. Terrell Decl. ¶ 18.
9 Plaintiff’s counsel have extensive experience litigating and settling class actions, and
10 consumer class actions challenging banking practices in particular. *Id.* ¶¶ 2-6; Drake Decl.
11 ¶¶ 4-5, 10; Smith Decl. ¶¶ 3, 6, 8-9. They believe the settlement is fair, reasonable, adequate,
12 and in the best interest of the Class as a whole. Terrell Decl. ¶ 18. The parties also negotiated
13 the Settlement with the assistance of mediator Stewart Cogan, who has substantial
14 experience in settling complex cases. Terrell Decl. ¶ 13. Courts recognize that “the assistance
15 of an experienced mediator in the settlement process confirms that the settlement is non-
16 collusive.” *Betorina v. Randstad US, L.P.*, No. 15-cv-03646-EMC, 2017 WL 1278758, at *7 (N.D.
17 Cal. Apr. 6, 2017).

18 2. The Settlement has no obvious deficiencies and does not grant preferential
19 treatment to any Class Member.

20 The Settlement treats all Class Members fairly and equally. Each Settlement Class
21 Member who paid one or more of the challenged fees to Defendant during the Class Period is
22 entitled to a Settlement Payment. The Settlement Payments will be calculated *pro rata* based
23 on the amount of fees paid by each Settlement Class Member who is eligible to receive a
24 Settlement Payment. Settlement ¶¶ 77-79. In addition, all Settlement Class Members will
25 benefit from the substantial prospective relief described above, as Defendant will, among
26 other things, offer an overdraft and NSF fee-free checking account, better describe and more
27 prominently publicize its fee policy and the ability to opt out of certain fees, and offer refunds
of certain fees that it did not offer in the past. *Id.* ¶¶ 51-55.

1 The Settlement Fund is non-reversionary. The parties request that the Court approve,
2 as required by CR 23(f)(2), distributions in *cy pres* of 50% of any residual funds to the Legal
3 Foundation of Washington and 50% to Financial Beginnings, a 501(c)(3) non-profit
4 organization. *Id.* ¶ 85. The *cy pres* award to Financial Beginnings will benefit the interest of the
5 Class Members affected by the banking practices at issue in this case because Financial
6 Beginnings provides financial education to help low income individuals learn to manage funds
7 and better avoid the fees and other practices at issue in this case.

8 Plaintiff will request a service award for Plaintiff in recognition of his efforts on behalf
9 of the Class, which included assisting counsel with the investigation and ongoing litigation,
10 answering written discovery, and time spent over multiple days preparing for deposition and
11 being deposed. Settlement ¶ 93; Terrell Decl. ¶ 16. Service awards “are intended to
12 compensate class representatives for work undertaken on behalf of a class” and “are fairly
13 typical in class action cases.” *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th
14 Cir. 2015) (citation omitted); *see also Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1329-
15 30 & n.9 (W.D. Wash. 2009) (collecting cases approving service awards ranging from \$5,000 to
16 \$40,000); *Probst v. Wash. Dept. of Ret. Sys.*, 150 Wn. App. 1062, 2009 WL 1863993, at *5-6
17 (Wash. Ct. App. June 30, 2009) (unpublished opinion) (affirming service award of \$7,500 to
18 named plaintiff). Plaintiff’s support of the Settlement is not conditioned on the Court
19 awarding a certain amount or any service award at all.

20 The Settlement Fund will also be used to pay attorneys’ fees and costs in an amount
21 approved by the Court. Plaintiff’s counsel anticipate filing a motion for court approval of a
22 reasonable attorneys’ fee award of 30% of the Settlement Fund, and reimbursement of
23 litigation costs. Settlement ¶ 90. The requested award is within the range of awards the
24 Washington Supreme Court has approved. *Bowles v. Dep’t of Ret. Sys.*, 121 Wn.2d 52, 72, 847
25 P.2d 440 (1993) (noting fee awards for common fund cases are often in the range of 20 to 30
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1 percent). The Settlement Agreement is not contingent on the amount of attorneys' fees or
2 costs awarded.

3 3. The Settlement falls within the range of possible judicial approval.

4 This is an excellent settlement in light of the obstacles to continued litigation and
5 recovery after trial and appeal. The combination of Defendant's agreement to pay \$6,000,000
6 and provide substantial prospective relief makes this a highly favorable resolution for the
7 Settlement Class.

8 Plaintiff is confident in the strength of his case but also recognizes the significant risks
9 to class certification, which was partially briefed at the time of mediation. Defendant argued
10 that certification should be denied on numerous grounds including that 1) the challenged
11 practices cannot be unfair or deceptive because they are disclosed in its account agreement;
12 2) Plaintiff cannot prove a CPA claim because he cannot show causation class-wide; 3)
13 Plaintiff's claim is time barred because he incurred earlier overdraft fees; and 4) overdraft
14 programs provide a valuable benefit to its customers. If the Court accepted any of these
15 arguments and denied Plaintiff's motion for class certification, the other Settlement Class
16 Members would be left with no relief.

17 If Plaintiff prevailed on class certification, he would likely face a summary judgment
18 motion challenging his claims on the merits that would likely include arguments that the
19 challenged conduct was exempt from actions under the CPA, that CPA claims were preempted
20 by federal law, that BECU's conduct was not deceptive, and that even if it were, that any such
21 conduct did not cause the harm alleged. While Plaintiff believes his CPA claims should survive
22 such a motion, these arguments present challenges and risks. The parties are also cognizant of
23 the risks inherent in any trial. BECU would likely appeal if Plaintiff won at trial, which creates
24 additional risk.

25 The Settlement, by contrast, will provide a guaranteed recovery for all Settlement
26 Class Members. After Court-approved deductions, the net settlement fund will be distributed

1 *pro rata* to all class members in proportion to the fees paid. Depending on the information
2 shown in confirmatory discovery, each Settlement Class Member will likely recover between
3 29% and 40% of the fees they incurred during the Class Period. This relief is in addition to
4 Defendant’s substantial non-monetary practice changes, which will also provide a substantial
5 benefit to the Class.

6 The Settlement compares favorably with negotiated resolutions of other cases making
7 similar claims. *See* Motion for Final Approval of Class Action Settlement at 8, *Wodja v.*
8 *Washington State Employees Credit Union*, Pierce County Superior Court, Case No. 16-2-
9 12148-4 (May 11, 2018) (after payment of fees and costs, class members recovered 29.6% of
10 overdraft fees imposed at a time when the member’s ledger balance was sufficient to cover
11 the transaction); *see also* Order and Judgment Finally Approving Class Action Settlement
12 *Wodja v. Washington State Employees Credit Union*, Pierce County Superior Court, Case No.
13 16-2-12148-4 (June 22, 2018).

14 **C. Preliminary certification of the Settlement Class is appropriate.**

15 Preliminary certification of the Settlement Class for settlement purposes is appropriate
16 under CR 23(a) and (b)(3). Plaintiff will briefly address the Rule 23 requirements but also
17 incorporates his prior Motion for Class Certification and memorandum in support.

18 1. The Settlement Class satisfies the requirements of CR 23(a).

19 To be certified, a class must satisfy the requirements of CR 23(a): numerosity,
20 commonality, typicality, and adequacy of representation. Numerosity is satisfied because the
21 Settlement Class consists of approximately 137,000 individuals. *See* CR 23(a)(1); *Miller v.*
22 *Farmer Bros. Co.*, 115 Wn. App. 815, 821, 64 P.3d 49 (2003) (numerosity is generally satisfied
23 when a class has at least 40 members).

24 Commonality is satisfied when there is “a single issue common to all members of the
25 class.” *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 320, 54 P.3d 665 (2002). “[T]here is a
26 low threshold to satisfy this test.” *Id.* Whether BECU’s practices of imposing overdraft fees
27

1 based on a member’s “available balance” rather than the member’s “ledger balance” and
2 charging re-presentment NSF fees are unfair or deceptive under the CPA is a question
3 common to the Class. *See* CR 23(a)(2); *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 325
4 F.R.D. 136, 152–53 (D.S.C. 2018) (common questions existed regarding plaintiffs’ “available
5 balance theory” because “the answer to the overarching question of whether it was
6 permissible . . . to charge overdraft fees before it actually advanced any funds to the customer
7 will resolve large swathes the class members’ available-balance-based claims in one fell
8 swoop.”); *In re Checking Account Overdraft Litig.*, 307 F.R.D. 630, 641 (S.D. Fla. 2015)
9 (questions regarding uniform policies for imposing overdraft fees were common to the class)

10 The typicality requirement is satisfied because Plaintiff’s claims arise from the same
11 course of conduct that gives rise to the claims of other Class Members and is based on the
12 same legal theory. *See* CR 23(a)(3); *Pellino v. Brink’s Inc.*, 164 Wn. App. 668, 684, 267 P.3d 383
13 (2011). Plaintiff’s and Class Members’ claims all arise from BECU imposing the challenged fees
14 upon them. The same legal theories support Plaintiff’s claims and those of Class members:
15 that the imposition of these fees was unfair and deceptive under the CPA.

16 The adequacy of representation requirement is satisfied because Plaintiff’s interests
17 are not antagonistic to the interests of the Class and the Class is represented by qualified
18 counsel. *See Hansen v. Ticket Track, Inc.*, 213 F.R.D. 412, 415 (W.D. Wash. 2003); Terrell Decl.
19 ¶¶ 1-6; Drake Decl. ¶¶ 3-8, 10; Smith Decl. ¶¶ 3-6, 8-9. Plaintiff and his counsel vigorously
20 advocated on behalf of the Class throughout this litigation, including the arm’s-length
21 negotiations that resulted in this settlement.

22 2. The Class satisfies the requirements of CR 23(b)(3).

23 Civil Rule 23(b)(3) requires that common questions predominate over any questions
24 affecting only individual class members, and that a class action is superior to other available
25 methods for the fair and efficient adjudication of the controversy. *Chavez v. Our Lady of*
26 *Lourdes Hosp. at Pasco*, 190 Wn.2d 507, 514, 415 P.3d 224 (2018). Predominance is satisfied

1 when “there is a common nucleus of operative facts in each class member’s claim.” *Id.* at 516.
2 “The relevant inquiry is whether the issue shared by class members is the dominant, central,
3 or overriding issue in the litigation.” *Id.* The issues common to Plaintiff and Class Members are
4 dominant, central, and overriding in this litigation. The question of whether the imposition of
5 the challenged fees was a violation of the CPA is common to Plaintiff and Class Members and
6 is a dominant issue central to resolution of this case.

7 The superiority requirement is satisfied when a class action is superior to other
8 methods of adjudication for resolution of the claims at issue. *Chavez*, 190 Wn.2d at 511.
9 Factors relevant to superiority include: (A) the interest of members of the class in individually
10 controlling the prosecution or defense of separate actions; (B) the extent and nature of any
11 litigation concerning the controversy already commenced by or against members of the class;
12 (C) the desirability or undesirability of concentrating the litigation of the claims in the
13 particular forum; (D) the difficulties likely to be encountered in the management of a class
14 action. CR 23(b)(3).

15 Resolution of all of Settlement Class Members’ claims at once is far superior to
16 individual lawsuits and promotes consistency and efficiency of adjudication. *See* CR 23(b)(3);
17 *Chavez*, 190 Wn.2d at 518-23. This is especially true since Class Members have relatively small
18 claims for damages and are unlikely to be able to afford an attorney. *Chavez*, 190 Wn.2d at
19 523 (“[S]mall claims cases somewhat automatically meet the test that a class suit is superior
20 to other forms of adjudication.”).

21 Plaintiff is not aware of any individual litigation filed by any Class Members. *See*
22 *Chavez*, 190 Wn.2d at 524 (the fact that defendant is not involved in other litigation over the
23 same issue raised by plaintiffs supports superiority). And concentrating claims against
24 Defendant in this forum is likely the only way Class Members’ rights will be vindicated because
25 many Class Members may not be aware of their claims. *See id.*

1 Finally, the manageability of litigation is not relevant to certification for settlement
2 purposes. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (“Confronted with a
3 request for settlement-only class certification, a district court need not inquire whether the
4 case, if tried, would present intractable management problems.”). The Settlement will be
5 easily and fairly managed, as described above.

6 **D. The proposed Notice Program should be approved.**

7 Notice of a class action settlement must “be given to all members of the class in such
8 manner as the court directs.” CR 23(e). To protect class members’ rights, the Court should
9 ensure that they receive “the best notice practicable under the circumstances.” CR 23(c)(2).
10 The best practicable notice is that which is “reasonably calculated, under all the
11 circumstances, to apprise interested parties of the pendency of the action and afford them an
12 opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S.
13 306, 314 (1950).

14 The parties propose that Notice shall be provided to Settlement Class members in
15 three different ways: email notice to Account Holders for whom BECU has email addresses;
16 postcard notice sent by U.S. mail to Account Holders for whom BECU does not have valid
17 email addresses or from whose email addresses the Email Notice bounces back; and long form
18 notice, which will be written in both English and Spanish, and shall be available on the
19 Settlement Website and/or via mail upon a Settlement Class member’s request. Settlement ¶
20 65. This approach will ensure that notice reaches as many Class Members as possible.

21 The language of the proposed notice is straightforward and easily understood. Each
22 Class Member will receive a notice that provides all the information needed to evaluate and
23 respond to the Settlement. The notice will inform Class Members of: (1) the nature of this
24 litigation; (2) the general terms of the proposed Settlement; (3) a statement of each Class
25 Member’s rights under the Settlement, (4) an explanation of how Class Members can object
26 to or exclude themselves from the Settlement; (5) the identity of Class Counsel and that Class
27

1 Counsel will move for approval of payment of their attorneys' fees and costs and service
2 award for Plaintiff from the Settlement Fund; (6) the settlement website they can visit for
3 additional information; (7) a telephone number they can call with questions; and (8) the date
4 and time of the Final Approval Hearing. Terrell Decl., Exs. 2-5; *see also* Newberg § 8:17.

5 **E. Schedule for final approval.**

6 The last step in the settlement approval process is a fairness hearing at which the
7 Court will make its final evaluation. Plaintiff proposes the following schedule:

EVENT	DEADLINE
Settlement Administrator to implement Notice Program	Within 14 days of Preliminary Approval Order
Deadline for Class Counsel to move for final approval and award of attorneys' fees, costs, and service awards	45 days before Final Approval Hearing
Opt-Out and Objection Deadlines	45 days after the Initial Mailed Notice is sent
Deadline for Plaintiff to file supplemental brief regarding final approval, responding to any objections	10 days before Final Approval Hearing
Final Approval Hearing	To be set by the Court, but no earlier than 60 days after Initial Mailed Notice is sent

18
19
20 **VII. CONCLUSION**

21 For all the forgoing reasons, Plaintiff requests preliminary approval of the Settlement.

22 **VIII. LCR CERTIFICATION**

23 I certify that this memorandum contains 5,097 words in compliance with the Local Civil
24 Rules.

1 RESPECTFULLY SUBMITTED AND DATED this 21st day of May, 2021.

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