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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERICO GALAVIS and ZAK KIRIAKOS, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

BANK OF AMERICA, N.A. and VISA, INC.,

Defendants.

Case No.: 2:18-cv-09490-SVW-PJWx

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Hon. Stephen V. Wilson

Hearing
Date: December 9, 2019
Time: 1:30 p.m.
Place: 350 West 1st Street, Los Angeles, CA 90012, Courtroom 10A

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I. INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 23(c)(2) and 23(e), Plaintiffs and proposed Class Representatives Federico Galavis and Zak Kiriakos ("Plaintiffs") move for an order granting preliminary approval of a class action settlement ("Settlement") between Plaintiffs and Defendants Bank of America, N.A. ("BANA") and Visa, Inc. ("Visa") (together with BANA, "Defendants"), the terms of which are set forth in the Settlement Agreement attached as Exhibit A to the Declaration of David J. Harris, Jr. ("Harris Decl.").[1]

Plaintiffs filed this Action to challenge certain "Cash Advance" charges imposed upon credit cardholders who used their BANA-issued credit cards to purchase cryptocurrencies (or "cryptos"). Plaintiffs allege that Defendants improperly coded and categorized their crypto purchases to be Cash Advance transactions in violation of BANA's form credit card agreements, and that BANA's treatment of cryptos as Cash Advance transactions was an undisclosed change in credit terms under the federal Truth in Lending Act ("TILA"). Plaintiffs allege that this caused them to incur improper transaction fees and interest charges on their relevant credit card purchases. Defendants contend, *inter alia*, that Plaintiffs' crypto purchases were properly coded as transactions involving "Cash Equivalents," and properly treated as Cash Advance transactions by BANA within the meaning of BANA's cardholder agreements, and that there was no "significant change" in the Plaintiffs' contractual terms under TILA.

After the pleading stage, during the discovery period set by the Court, the Parties agreed to an in-person mediation session before the Honorable Jay C. Gandhi (Ret.) of JAMS on May 6, 2019, in Los Angeles. The Parties' negotiations were informed not only by the Court's hearing and subsequent order on Defendants' motions to dismiss, but also by their extensive investigations and informal exchanges

[1] Unless otherwise defined herein, capitalized terms in this brief have the same meaning as those defined terms set forth in the Settlement Agreement.

of information early in the discovery process. The Settlement resulting from these efforts is well calibrated to the facts and uncertainties of the case.

Specifically, the Settlement provides cash compensation to Class Members that is fair, reasonable and adequate, and does *not* require Class Members to submit claims to receive their payments. Defendants agree to provide Settlement Class members with a total of $415,000 in cash, plus a non-reversionary, lodestar-driven award of attorneys' fees and expenses to be paid separately by the Defendants, plus the costs of Settlement Administration. Class Members' individual awards will be calculated on a proportionate basis, where each Class member will receive approximately 50% of the Cash Advance fees they incurred from their crypto transactions.

Although Plaintiffs believe in the strength of their claims, Plaintiffs and the Settlement Class face numerous risks to obtaining a favorable judgment. These include without limitation: (1) the risk of an unfavorable summary judgment order on Plaintiffs' claims; (2) the risk that Defendants could successfully oppose class certification if the case survives summary judgment; and (3) the risks of ultimately losing at trial or on appeal. Thus, the Parties' Settlement reasonably reflects the risks and realities of extensive, future litigation.

The proposed Settlement notice plan satisfies all applicable requirements of law, including Fed. R. Civ. P. 23 and constitutional due process. The Settlement provides for direct notice to the Class via email or mail, with such notice to be supplemented by a Settlement Website maintained by the proposed Settlement Administrator, Epiq Class Action & Claims Solutions, Inc. ("Epiq"), an experienced and reliable provider of settlement administration services. The notices explain in plain language the Settlement, the amount of attorneys' fees and expenses Class Counsel intends to seek, the amount of incentive awards each Plaintiff intends to seek, and Class Members' rights to opt-out or object to the Settlement. The notices explain that Class Members who do not opt-out of the Settlement will be bound by it when and if the Court finally approves the Settlement. The Settlement notice campaign proposed by the Parties

affords Class Members the best notice practicable under the circumstances and complies with due process.

For all of these reasons, and as explained in detail below, the Court should grant Plaintiffs' motion for preliminary approval of the Settlement and certify the proposed Class for settlement purposes.

II. FACTUAL AND PROCEDURAL HISTORY

A. Class Claims and Allegations

Plaintiffs' allegations are detailed in the initial Class Action Complaint (Dkt. 1) ("Complaint"). Defendant BANA is a national bank and consumer credit card issuer. Dkt. 1, ¶15. Plaintiffs are consumers and BANA credit cardholders. *Id.*, ¶¶13-14. When BANA opened Plaintiffs' credit card accounts in or about 2017, it sent each Plaintiff and Class member a form credit card agreement. *Id.*, ¶¶36-39.

The agreements provided that "Purchase" charges would apply to "buy[ing] or leas[ing] goods or services," or to "mak[ing] a transaction that is not otherwise a Cash Advance." *Id.*, ¶39. They also provided that "Cash Advance" charges would apply to buying "Cash Equivalents" with a credit card. *Id.* BANA defined the term "Cash Equivalents" to mean "the purchase of foreign currency, money orders, travelers checks, or to obtain cash, each from a non-financial institution, or person-to-person money transfers, bets, lottery tickets purchased outside the United States, casino gaming chips, or bail bonds, with your card or account number . . . ." ¶37. Plaintiffs allege that BANA improperly assessed Cash Advance charges against them for their credit card purchases of cryptocurrencies, because cryptos do not satisfy this contractual definition of a Cash Equivalent. Plaintiffs assert claims for breach of contract and violations of TILA's subsequent notice requirements, in addition to seeking a declaratory judgment that cryptos are not "Cash Equivalents" within the meaning of the Parties' cardholder agreements.

With respect to Defendant Visa, Plaintiffs allege that in January 2018, Visa improperly altered the codes that its merchants must use to identify crypto-buying

transactions on the Visa credit card network ("VisaNet"). Plaintiffs allege that Visa required Coinbase, Inc. and other crypto merchants to self-identify on VisaNet using Merchant Category Code ("MCC") number 6051, when in fact there were other MCCs available on VisaNet that would more accurately describe cardholders' crypto purchases. Plaintiffs allege that Visa made this MCC-related change with the intent to facilitate BANA's and other banks' desires to impose Cash Advance charges on cardholders. Plaintiffs allege that Visa's actions tortiously interfered in their contractual relationships with BANA, and caused them and other Class members to incur wrongful Cash Advance charges on their credit card accounts.

Both BANA and Visa deny all of Plaintiffs' allegations against them, respectively, and deny all of Plaintiffs' allegations of wrongdoing.

B. Defendants' Defenses

BANA asserts that cryptos are used as cash equivalents in myriad contexts, and are even accepted as currency by major companies such as Microsoft, Overstock, and Expedia. Thus, BANA maintains that cryptos are a well-known form of digital money, which plainly satisfies the contractual definition of "Cash Equivalents" under its cardholder agreements. Accordingly, BANA asserts that its treatment of cryptos did not constitute a breach of contract. BANA further contends that it always deemed cryptos to be "Cash Equivalents," but previously, certain merchants processed crypto transactions with codes associated with "Purchases"; this resulted in BANA treating such transactions as "Purchases." BANA also contends that any prior coding of cryptos as "Purchase" transactions before January 23, 2018 did *not* result in a change in its actual contractual terms, and therefore did not trigger a change-in-terms disclosure obligation under TILA. *Accord Eckhardt v. State Farm Bank FSB*, 2019 WL 1177954, at *5–6 (C.D. Ill. Mar. 13, 2019).

Additionally, Visa asserts that its own actions were proper with respect to which MCC code merchants should use to identify sales of cryptocurrencies. Visa asserts this is so because several cryptocurrency merchants had been using the correct code all

along, *i.e.*, MCC 6051. Visa further contends that even if its conduct was somehow wrongful, any wrongfulness was unintentional, not tortious. Visa also claims that its conduct, whether tortious or not, did not proximately cause Plaintiffs to incur Cash Advance charges because such charges are imposed at BANA's sole discretion, and there is no requirement that any fees be charged simply because a particular MCC code is attached to a transaction.

C. Procedural History

Plaintiffs filed their Class Action Complaint on November 8, 2018. Dkt. 1. Defendants BANA and Visa each filed motions to dismiss on February 4, 2019. Dkt. 21; Dkt. 24. Plaintiffs filed two briefs in opposition to Defendants' motions to dismiss on February 25, 2019, and Defendants filed their respective reply briefs on March 11, 2019. Dkt. 32; Dkt. 33; Dkt. 35; Dkt. 36.

On March 25, 2019, the Court held a hearing on Defendants' motions to dismiss. Shortly after that hearing, the Court indicated its desire to address the merits of Plaintiffs' claims at summary judgment, before proceeding to a later class certification stage (if necessary). Dkt. 42. The Court ordered that discovery be completed by June 19, 2019, with cross-motions for summary judgment to be filed by July 8, 2019. *Id.*

Notably, the specter of early summary judgment only heightened the already-present litigation risks for Defendants as well as Class members. On the one hand, without the notice and opt-out requirements that accompany Class certification under Rule 23(c), absent Class members would not and could not be bound (for *res judicata* purposes) by the Court's early summary judgment decision. At the same time, however, given the unprecedented facts and novel issues inherent in this litigation, the Court's early summary judgment decision would be likely to have highly persuasive if not binding precedential effect on any future actions brought by Class members. A loss for these Plaintiffs, even before certification, would mean a loss for the entire Class as a practical matter.

Similar considerations faced the Defendants as summary judgment rapidly approached. Given that the case involves the interpretation of certain contractual language that appears across the cardholder agreements to which the Class Members are parties, a win for these Plaintiffs at an early summary judgment stage would likely serve as at least persuasive authority for other Class Members to cite. Thus, even if Defendants could later defeat a motion for class certification by these Plaintiffs, an early loss at summary judgment could subject Defendants to a sizable number of future cases brought by individual Class Members who would leverage Defendants' summary judgment loss in Class Members' individual litigations.

Consequently, after the Court's motion to dismiss hearing and order, the Parties initiated the discovery process in earnest, but also agreed to mediate the case during the discovery period to explore alternative resolutions. Harris Decl., ¶¶11-19. As further discussed herein, in May 2019, the Parties reached a settlement in principle following their full-day mediation before former Magistrate Judge Jay Gandhi. *Id.* On May 13, 2019, the Parties filed a notice of settlement in principle, asking this Court to stay all proceedings and deadlines pending Plaintiffs' forthcoming motion for preliminary approval. Dkt. 49.

On July 24, 2019, the Court entered an Order granting the Parties' request, ordering Plaintiffs to submit their motion for preliminary approval within 90 days. Dkt. 50. Plaintiffs' filed their instant Motion on October 22, 2019.

D. The Parties' Early Discovery and Mediation Efforts

Shortly after the Court's hearing on Defendants' motions to dismiss, the Parties began fact discovery in earnest. Harris Decl., ¶¶11-19. Plaintiffs served Fed. R. Civ. P. 30(b)(6) deposition notices on BANA and Visa, plus three individual deposition notices of key employees. *Id.* Plaintiffs also propounded five interrogatories and seventeen requests for admissions on Visa, ten interrogatories and twenty-one requests for admissions on BANA, and eight detailed requests for productions of documents and ESI. *Id.* Additionally, Plaintiffs served non-party Coinbase, Inc. with a Fed. R.

Civ. P. 30(b)(6) deposition subpoena, which detailed six requests for certain documents and ESI to be produced in advance of that deposition. *Id.*

Defendants likewise propounded extensive written discovery and deposition notices on Plaintiffs, including a deposition notice that BANA served on each Plaintiff, thirty-four requests for production of documents that BANA served on both Plaintiffs, and fourteen interrogatories that BANA served on each Plaintiff. *Id.* All Parties, as well as Coinbase, engaged in substantial discovery negotiations concerning the proper scope of fact discovery and the specific searching, culling and production methodologies that would be employed for various categories of ESI. *Id.*

In parallel with these discovery efforts, and in light of the litigation risks discussed herein, the Parties evaluated their ADR options, eventually agreeing to a full-day mediation session on May 6, 2019, about two months before the Court's summary judgment deadline. *Id.* Former Magistrate Judge Jay Gandhi conducted the Parties' mediation session, at the Los Angeles offices of JAMS. *Id.*

Prior to mediation, the Parties exchanged mediation briefs detailing their respective case theories and damages analyses. *Id.*[2] Plaintiffs and BANA also submitted numerous exhibits in support of their briefs to provide a more fulsome preview of potential evidentiary support at summary judgment and trial, if needed. *Id.*

[2] Plaintiffs advanced their theory that crypto transactions were not "Cash Advances" under the cardholder agreements, that BANA failed to disclose the change in crypto transactions from "Purchases" to "Cash Advances" in alleged violation of TILA, and that Visa intentionally interfered with Plaintiffs' contractual relations with BANA by recoding crypto transactions on the Visa credit card network. BANA argued, *inter alia*: that cryptos are cash equivalents and properly treated as such under the cardholder agreements; that BANA's treatment of crypto transactions as cash equivalents never changed; that the only change was in some *merchants'* coding of crypto transactions (which BANA's payment processing systems used to identify the transactions as "Cash Equivalents" under the cardholder agreements); and that there was no "significant change" in contract terms triggering a disclosure obligation under TILA. Visa maintained that it does not belong in this lawsuit because it did not impose or collect the fees at issue, and that Visa did not even know the terms at issue, much less "interfere" with the way BANA treated cryptos under those agreements.

The Parties' mediation briefs also fleshed out some of the key issues pertaining to class certification. *Id.*

During their full-day mediation session, the Parties conducted arms-length debates regarding their respective positions in the case. *Id.* Judge Gandhi aided the Parties in understanding the strengths and weaknesses of their positions, as well as the risks to both sides of insisting on litigation. *Id.* The Parties were thus able to assess their cases from a more neutral, third-party perspective, and through that lens, were encouraged to, and did, agree upon material Settlement terms in lieu of litigation. *Id.*

Over the ensuing weeks and months, the Parties carefully negotiated all remaining Settlement terms. *Id.* The Parties executed their finalized Settlement Agreement on September 26, 2019. *See* Harris Decl., Ex. A ("Settlement Agreement").

III. SUMMARY OF THE PROPOSED SETTLEMENT

A. Proposed Class

Solely for purposes of Settlement, the Parties agree to the preliminary certification of the following Class: "All persons and entities in the United States who, upon acquiring a Cryptocurrency during the Class Period, incurred Cash Advance Fees and/or Cash Advance Interest charges on credit cards issued by BANA." Settlement Agreement, ¶2.1(a). The Class Period is defined as the time period between June 1, 2016 and September 26, 2019, inclusive. *Id.*, ¶1.10. Based upon a search of BANA's transaction records, the Parties estimate that there are approximately 21,325 Class Members in total. Harris Decl., ¶20. The Parties have concluded that the actual Cash Advance fees charged to putative Class Members for their Class Period purchases of cryptocurrency total approximately $811,000. *Id.*; *see generally* Declaration of Cabot Williams in Support of the Parties' Settlement Agreement ("Williams Decl.").

B. Automatic Cash Settlement Benefits to Class Members

Defendants have agreed to provide an aggregate Cash Settlement Amount of $415,000 to Class Members. Settlement Agreement, ¶2.2(a). The Settlement will

provide these cash benefits to individual Class members on an automated (not claims-made) basis, in proportion to the actual Cash Advance fees they incurred during the Class Period. *Id.*, ¶¶2.2(c), 2.6(a)-(b). Class Member awards will be determined using a simple formula, which calculates each individual's award as the same percentage (approximately 50%) of the Cash Advance fees each actually incurred. *Id.*, ¶¶2.2(c).

Class Members need not submit claim forms to receive their funds. In the event of Final Approval, the Settlement Administrator will automatically send checks to all Class Members who incurred (unreversed) Cash Advance fees, and who did not opt out of the Settlement. *Id.*, ¶¶2.6(a)-(b). Prior to sending checks, the Settlement Administrator will attempt to update each Class Member's last known address through the National Change of Address Database or similar databases. *Id.*, ¶2.4(c). If certain Class Members were or are found to be *joint* accountholders with BANA, such Class Members' Award checks will be made payable to both accountholders. *Id.*, ¶2.6(b).

Unclaimed funds (*i.e.*, Award checks that are *not* cashed within 90 days of mailing) will, rather than reverting back to Defendants, be sent to all check-cashing Class Members through a secondary, *pro rata* distribution. *Id.*, ¶3.5. Only a residual amount that is less than $5,000 will be deemed too small to warrant a secondary *pro rata* distribution, but, subject to Court approval, would be distributed to a residual *cy pres* program chosen by and mutually agreed to by all parties. *Id.*

C. Release of Claims by the Class

In exchange for these cash Settlement benefits, upon the Settlement Effective Date, each Settlement Class Member will fully release Defendants and certain related "Releasees" from all "Released Claims," as those terms are defined in Settlement Agreement, ¶2.3. The Released Claims encompass all claims asserted in the Action, including claims that Defendants unlawfully or improperly categorized cardholders' cryptocurrency transactions as Cash Advances, as well as such claims that could have been asserted by Class Members in this Action. *Id.*, ¶2.3. "Settlements of this breadth are common and unobjectionable." *Rangel v. PLS Check Cashers of California, Inc.*,

899 F.3d 1106, 1110–11 (9th Cir. 2018) (noting approval where settlement covered "all claims" that "could have been pled based on the factual allegations in the Complaint").

D. Proposed Notice and Class Members' Rights to Opt Out or Object

Within 10 days of the Court's preliminary approval of the Settlement, BANA will provide the Settlement Administrator with the following information for each Class Member: (1) name; (2) last known email address; (3) last known mailing address; (4) the dollar amount each Class Member incurred in Cash Advance Fees for Cryptocurrency transactions (net of fully reversed transactions); and (5) whether the Class Member's corresponding credit card account(s) with BANA remain open. Settlement Agreement, ¶2.4(b). The Administrator will use the Class data to make the individual award calculations required by the Settlement. *Id.*

The Administrator will also use the Class data to provide direct, individual notice of the Settlement to Class Members via email and/or mail to each Class Member's last known email or mailing address. *Id.*, ¶2.4(c). The Administrator will send the "Email Notice" to all Class Members for whom BANA provides an email address, and a "Postcard Notice" to all Class Members for whom BANA provides no email address, and also to all Class Members who have their Email Notices returned to the Administrator as undeliverable. *Id.* These two "short forms" of notice will further direct Class Members to a comprehensive and dedicated website (the "Settlement Website") maintained by the Administrator until at least 90 days after the Court's Final Approval of the Settlement. *Id.*; *see also* Harris Decl., Ex. B (Postcard Notice); Ex. C (E-mail Notice); Ex. D (Long Form Notice).

The Notices and the Settlement Website shall provide the Court-approved Long Form Notice, advise Class Members of the pendency of the Action, including the nature of the Action and a summary of Plaintiffs' claims; the Settlement's essential terms; the automatic (not claims-made) nature of Class Members' individual awards in the event of Final Approval; the Class Member's right to object to the Settlement or to

request exclusion from the Class within 75 days after Preliminary Approval; and the Class Members' right to appear before the Court at the Final Approval Hearing. *Id*. The Notices will also contain information regarding Class Counsel's request for an award of attorneys' fees and expenses, Plaintiffs' requests for incentive awards, and the estimated average award to be distributed proportionally among Settlement Class Members. *Id*. Thus, all forms of notice to the Class Members shall provide the information necessary for Class Members to make informed decisions regarding the proposed Settlement.

In addition, the Administrator will (1) create and maintain a toll-free number that Class Members can contact for any other information concerning the Settlement; (2) process and record timely requests to be excluded from the Settlement; and (3) serve notice of the Settlement upon the appropriate state and federal officials pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715 ("CAFA"). *Id; see also* Settlement Agreement, ¶¶2.5, 5.13. Defendants agree to pay all Settlement Administration costs, estimated at $70,000, separate from and above the Cash Settlement Amount of $415,000. *Id*., ¶2.4(a).

E. Plaintiffs' Requested Incentive Awards and Class Counsel's Attorneys' Fees and Expenses

Each named Plaintiff may request an Incentive Award of up to $5,000 for his respective contributions to prosecuting the Class's claims in this Action. *Id.*, ¶3.1. Any Incentive Awards awarded by the Court will be paid out of the Cash Settlement Amount. *Id.*

Class Counsel may request an award of attorneys' fees and expenses of up to $285,000 to be paid by Defendants separate and apart from the Cash Settlement Amount, and subject to Court approval. *Id.*, ¶3.2. Defendants have agreed not to object to Class Counsel's request for attorneys' fees and expenses so long as it does not surpass this amount. *Id.* In the event that the Court approves an award of attorneys' fees and expenses that is less than $285,000, the difference between the two

amounts will not revert back to Defendants. *Id.* Instead, any difference will be added to the Cash Settlement Amount and paid by Defendants to Class Members, on a proportional basis, as an additional monetary benefit to Settlement Class Members. *Id.*

IV. THE PROPOSED SETTLEMENT CLASS SATISFIES RULE 23

Plaintiffs move for Class certification for Settlement purposes only.[3] At the preliminary approval stage, the Court's threshold task is to ascertain whether the proposed class is maintainable under Federal Rule of Civil Procedure 23(a) and (b)(3). *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998); *Vikram v. First Student Mgmt., LLC*, 2019 WL 1084169, at *3 (N.D. Cal. Mar. 7, 2019). To qualify for certification of a "settlement-only class," the class must be so numerous that joinder of all members is impracticable; there must be questions of law or fact common to the class; the claims or defenses of the representative parties are typical of the claims or defenses of the class; and the representative parties must fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a). Additionally, common questions must "predominate over any questions affecting only individual members," and class resolution must be "superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3) .

Courts, however, should apply less scrutiny when reviewing certification of settlement classes than when determining the propriety of class certification for litigation purposes. *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 633 (9th Cir. 1982); *Heffelinger v. Elec. Data Sys. Corp.*, 2013 WL 12201050, at *7 (C.D. Cal. Feb. 26, 2013). Such reduced scrutiny reflects the fact that a class settlement eliminates further litigation, and therefore does not require that a class-wide trial be practicable. *Id.*

[3] If the Settlement is not finally approved, the Parties will return to the respective litigation positions they occupied prior to settling.

A. Rule 23(a) is Satisfied

1. The Class is Sufficiently Numerous

A class may be certified only if it is "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). Here, where the Parties estimate there are approximately 21,325 Class Members, the Class is sufficiently numerous that joinder of all Members would be clearly "impracticable." *Id.*; Harris Decl., ¶20; *see also* Williams Decl.

2. This Action Presents Common Questions of Law or Fact

Rule 23(a)(2) requires that there be one or more questions common to the Class. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550-51 (2011). Here, Class Members' claims arise from the same contention: namely, that Defendants improperly categorized their credit card purchases of cryptos as "Cash Advances" instead of "Purchases" under BANA's form credit card agreements, causing Class Members to incur additional charges on their accounts. Hence, the following questions of law or fact are common among Class Members: (1) whether cryptos constituted "Cash Equivalents" within the meaning of BANA's form cardholder agreements, (2) whether BANA changed the terms of its cardholder agreements without notice to Class Members; (3) whether Visa tortiously interfered with cardholders' contractual relations with BANA; and (4) whether Defendants are liable to Class Members for the Cash Advance charges they incurred upon buying cryptos. The commonality requirement has a low hurdle and is satisfied based on the foregoing common questions. *See Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 594 (C.D. Cal. 2008) ("The threshold for establishing commonality under Rule 23(a) is relatively low.").

3. Plaintiffs' Claims are Typical of Those of the Class

Rule 23(a)(3) requires that "the claims and defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). Typicality does not require a total identity of claims among Plaintiffs and the Class. *Armstrong*

v. Davis, 275 F.3d 849, 869 (9th Cir. 2001). Rather, typicality is satisfied if Plaintiffs' claims stem "from the same event, practice, or course of conduct that forms the basis of the class claims, and [are] based upon the same legal theory." *Jordan v. Los Angeles Cty.*, 669 F.2d 1311, 1321 (9th Cir. 1982); *In re Juniper Networks Sec. Litig.*, 264 F.R.D. 584, 589 (N.D. Cal. 2009) ("representative claims are 'typical' if they are reasonably co-extensive with those of absent class members") (citation omitted).

Plaintiffs' claims are typical of the Class. Like the Class Members, Plaintiffs allege that they bought cryptos using BANA credit cards and incurred impermissible cash advance and interest charges for at least some of those transactions when BANA deemed cryptos to be Cash Equivalents within the meaning of its cardholder agreements. While Plaintiffs' individual claims may not be exactly the same as other Class Members, Plaintiffs and each Class Member assert the same legal claims against BANA for breach of contract and violations of TILA's notice requirements, as well as tortious interference on the part of Visa for the way in which it coded all cryptocurrency purchases on VisaNet. Plaintiffs' claims are thus typical of Class Members' claims, because they must satisfy the same legal elements that Class Members must satisfy, share similar theories of liability, and have similar alleged injuries. Hence, Rule 23(a)(3)'s typicality requirement is satisfied.

4. Plaintiffs and Their Counsel Will Fairly and Adequately Protect the Interests of the Class Members

Rule 23(a)(4) requires that the Plaintiffs will "fairly and adequately" protect the interests of the Class. The two-prong test for determining adequacy is: "(1) Do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Both prongs are satisfied here.

First, the Plaintiffs' interests are aligned with, and not antagonistic to, Class Members' interests. As explained above, Plaintiffs share the same claims and legal

theories as the proposed Class, and the proposed Settlement affords Plaintiffs and Class Members the same benefits. Moreover, Plaintiffs have diligently represented the Class Members' interests through a year's worth of litigation and settlement negotiations, including investigations, dispositive motion practice, discovery, and extensive settlement negotiations. Harris Decl., ¶¶2-19, 27-37.

Second, Class Counsel has extensive experience litigating and settling class actions, including consumer class actions, and is well qualified to represent the Class. *Id.* Class Counsel, along with Plaintiffs, have vigorously protected Class Members' interests and negotiated extensively to realize a favorable, automatic cash recovery for all Class Members in proportion to their actual losses. *Id.*

B. Rule 23(b)'s prongs are satisfied

1. Common Questions of Law or Fact Predominate.

The Supreme Court has defined the predominance factor as establishing "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997). "The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (internal quotation omitted). Here, Plaintiffs' and the Class's claims all turn on the following common questions, among others: (i) whether cryptocurrencies constitute "Cash Equivalents," and thus Cash Advance transactions, within the meaning of BANA's form cardholder agreements; (ii) whether BANA changed the terms of its cardholder agreements, within the meaning of TILA, without sending prior written notice to cardholders; and (iii) whether Visa intentionally miscoded cryptocurrency transactions on its credit card network. Such common questions predominate over any individual issues that might exist in this case.

Therefore, Rule 23(b)(3)'s predominance requirement is satisfied.

2. A Class Action is the Superior Method of Adjudication

To determine the issue of "superiority," Rule 23(b)(3) enumerates the following factors for courts to consider:

> (A) [T]he class members' interests in individually controlling the prosecution . . . of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by . . . class members; (C) the desirability . . . of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Here, each of these factors supports certifying this Class for settlement purposes.

This case involves over 20,000 Class Members, who have been injured in relatively small dollar amounts. Thus, there is little or no incentive for Class Members to individually pursue separate actions. *See Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30"). But, even if Class Members were inclined to sue individually, such repetitious litigation would be neither beneficial nor efficient. *McCrary v. Elations Co., LLC*, No. EDCV 13-00242 JGB, 2014 WL 1779243, at *16 (C.D. Cal. Jan. 13, 2014) ("It is more efficient to resolve the common questions . . . in a [single] proceeding rather than to have individual courts separately hear these cases."). Additionally, Class certification is superior here because concentrating Class Members' claims in a single forum reduces the risks of inconsistent outcomes and unnecessarily high litigation costs. *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 493 (C.D. Cal. 2006).

Finally, there are no manageability difficulties presented by preliminarily certifying the Class for settlement purposes, because there will be no Class trial if the Settlement is finally approved. *See Amchem Prods.*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems.") Accordingly, the proposed Settlement satisfies Rule 23(b)(3)'s second prong.

For all of the above reasons, Plaintiffs request that the Court preliminarily certify the following Class pursuant to Fed. R. Civ. P. 23(b)(3): All persons and entities in the United States who, upon acquiring a Cryptocurrency between and including June 1, 2016 and September 26, 2019, incurred Cash Advance Fees and/or Cash Advance Interest charges on credit cards issued by Bank of America, N.A.

V. PRELIMINARILY APPROVAL OF THE SETTLEMENT IS PROPER

Federal Rule of Civil Procedure 23(e) provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." The purpose of requiring court approval "is to protect the unnamed members of the class from unjust or unfair settlements affecting their rights." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008). When considering whether to preliminarily approve a class action settlement, courts determine whether it is "fundamentally fair, adequate, and reasonable." *In re Hyundai & Kia Fuel Economy Litig.*, 926 F.3d 539, 569 (9th Cir. 2019).

The law favors settlement, particularly in class actions and complex cases where substantial resources can be conserved by avoiding the time, costs, and rigors of prolonged litigation. *Pilkington v. Cardinal Health (In re Syncor ERISA Litig.)*, 516 F.3d 1095, 1101 (9th Cir. 2008); *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class Plaintiffs v. City of Seattle* ("*City of Seattle*"), 955 F.2d 1268, 1276 (9th Cir. 1992). Additionally, the Ninth Circuit "has long deferred to the private consensual decision of the parties" to settle. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). "[T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Glover v. City of Laguna Beach*, 2018 WL 6131601, at *5 (C.D. Cal. July 18, 2018) (quoting *Hanlon*, 150 F.3d at 2017); *see also Chavez v. WIS*

Holding Corp., No. 07cv1932, 2010 WL 11508280, at *1 (S.D. Cal. June 7, 2010) ("The Court gives weight to the parties' judgment that the settlement is fair and reasonable.") (citing *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)).

Preliminary approval is appropriate where the proposed Settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of likely approval. *McDonald v. Bass Pro Outdoor World, LLC*, No. 13-cv-889-BAS, 2014 WL 3867522, *6 (S.D. Cal. Aug. 5, 2014). The Settlement proposed in this case warrants preliminary approval under these legal standards.

A. The Settlement Benefits The Class By Providing Automatic Cash Relief In Reasonable Proportion To Class Members' Alleged Injuries

To evaluate the fairness of the settlement benefits, the Court should "compare the terms of the compromise with the likely rewards of litigation." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968). A settlement, however, is not judged solely against what plaintiffs would have recovered at trial had they prevailed, nor must a settlement provide a full recovery in order to be reasonable. *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998); *see In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair."). Settlement is a compromise: "in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation." *Officers for Justice*, 688 F.2d at 624.

This Settlement provides *automatic* cash benefits to Class members in reasonable proportion to the charges they incurred. The Parties have estimated that the Cash Advance fees charged to Class Members for their cryptocurrencies purchases total approximately $811,000. Williams Decl., ¶¶2-7. The Cash Settlement Amount

of $415,000 constitutes roughly 50% of the fees actually imposed, reflecting the real-world risks that Plaintiffs and the Class could ultimately lose their cases on the merits (and recover nothing) if they proceed with litigation. Courts have routinely approved of cash settlements totaling *far* less than 50% of class members' alleged damages. *See, e.g., In re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 454 (C.D. Cal. 2014) (finding a $5 or $30 benefit that represents 5% to 30% of the recovery that might have been obtained post-trial was fair and adequate in a consumer class action); *See City of Omaha Police & Fire Ret. Sys. v. LHC Grp.*, No. 6:12–1609, 2015 WL 965696, at *7-8 (W.D. La. Mar. 3, 2015) (finding that a "7.4%–10.3% [recovery] of estimated provable damages" amounts to "a high degree of success" because "[t]he typical recovery in most class actions generally is three-to-six cents on the dollar").[4]

This Settlement also imposes all Settlement Administration costs upon the Defendants, estimated at an additional $70,000 that will *not* come out of the Cash Settlement Amount. Settlement Agreement, ¶2.4(a). Furthermore, the Settlement imposes upon the Defendants the (non-reversionary) costs of Class Counsel's reasonable attorneys' fees and expenses, up to an additional $285,000 that will *not* reduce the Cash Settlement Amount. *Id.*; ¶3.2. For all of these reasons, experience dictates that the Class's interests are better served by the proposed Settlement than by the costs and uncertainties of continuing litigation. *See In re Linkedin User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015) ("Immediate receipt of money through settlement, even if lower than what could potentially be achieved through ultimate

[4] While Class Members also incurred Cash Advance interest charges on their crypto transactions, the interest rates charged from treating crypto transactions as Cash Advances instead of Purchases are likely to be outweighed by the Cash Advance fees in many cases. Purchase rates are sometimes almost as high as Cash Advance rates, and accrue far more slowly than the instant, lump sum fees attached to these transactions. For example, Plaintiff Kiriakos incurred only $62.29 in marginal crypto-related Cash Advance interest between January and March 2018, when he paid off his Cash Advance balance, but incurred *$691.32* in crypto-related Cash Advance fees in January 2018 alone.

success on the merits, has value to a class, especially when compared to risky and costly continued litigation.").

Indeed, in contrast to the tangible, immediate cash benefits of the Settlement, the outcomes of any continuing litigation or trial on the merits (plus adversarial class certification proceedings) are uncertain and could add years to this dispute. Absent settlement, Defendants would aggressively defend this Action before, during and after trial, including through motions for summary judgment and subsequent oppositions to class certification and on appeal.

In particular, Defendant BANA would vigorously argue that it never breached or changed the terms of its longstanding cardholder agreements, because cryptocurrencies are inherently a form of "money" or "cash" that the agreements define as "Cash Advances." Visa, for its part, would argue that Plaintiffs cannot show it had the requisite intent to interfere with their contracts, and that nothing Visa did proximately caused Plaintiffs to incur any improper finance charges. Defendants would also point to third party merchants and their acquiring financial institutions for using incorrect merchant category codes to identify crypto transactions on VisaNet. Defendants would present evidence purporting to show that it was third parties' conduct — not theirs — that caused the confusion resulting in Plaintiffs' claims. Defendants would seek to bolster their contentions with evidence that *other* cryptocurrency merchants (such as "Bitstamp") had been using MCCs associated with cash advance transactions throughout the relevant period.

Defendants have also indicated that they would vigorously oppose class certification outside the settlement context, and likely appeal any judgment if they lost at summary judgment or trial.

In sum, absent the Settlement, Plaintiffs and the Class could ultimately recover *nothing*. Even a potential recovery they might achieve could well take *years* to materialize. By reaching a reasonable settlement now, Plaintiffs and other Class Members have secured favorable cash recoveries and avoided many significant

expenses, delays, and uncertain results for Class Members. *See, e.g.*, *In re Toys R Us*, 295 F.R.D. at 454 (granting final approval of class action settlement).

B. The Settlement Is A Product Of Arms-Length Negotiations

"Before approving a class action settlement, the district court must reach a reasoned judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion among, the negotiating parties." *City of Seattle*, 955 F.2d at 1290. The involvement of a neutral mediator is "a factor weighing in favor of a finding of non-collusiveness." *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 948 (9th Cir. 2011).

Here, while the Parties were prepared to litigate this case indefinitely — propounding extensive discovery shortly after the Court's order denying Defendants' motions to dismiss — the Parties subsequently agreed to mediation. Harris Decl., ¶¶27-37. The Parties agreed to mediate in part due to the uncertainties of a case in which the outcomes would be largely unpredictable due to the emergent nature of cryptocurrencies, and the relative dearth of case law dealing with cryptos to date. *Id.* Indeed, the Parties are unaware of *any* case in which a court considered evidence of the monetary or non-monetary nature of cryptos in the context of private contracts or consumer credit laws. *Id.* In sum, this Action's ultimate outcome, which turns on essentially unprecedented questions of fact and law, would be quite difficult to predict. The Parties thus agreed to attempt alternative dispute resolution during fact discovery, just weeks before the Court's deadline for filing their cross-motions for summary judgment. *Id.*

After informal exchanges of relevant information, as well as detailed mediation briefing on all merits disputes, counsel for the Parties attended an in-person, arms-length mediation session before a neutral third party, Hon. Jay C. Gandhi (Ret.), a former Magistrate Judge in this District. *Id.* By the time the Parties appeared before Judge Gandhi in May 2019, they were well versed in the factual and legal disputes of this case, and well prepared to discuss the strengths and weaknesses of their respective

cases. *Id.* At mediation, the Parties thoroughly debated such strengths and weaknesses, and only after a full day of mediation before Judge Gandhi were the Parties able to reach an agreement-in-principle to resolve this case. *Id.* Far from circumstances suggesting fraud or collusion, the parties' arms-length negotiations before a skilled, neutral third party mediator resulted in a fair and reasonable result for all interested parties. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (affirming approval of settlement and noting, "[w]e put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution").

C. The Recommendation Of Experienced Counsel Favors Approval

In considering a proposed class settlement, "[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Knight v. Red Door Salons, Inc.*, No. 08-01520 SC, 2009 WL 248367, at *4 (N.D. Cal. Feb. 2, 2009). Here, Class Counsel has extensive experience litigating and settling consumer class actions and other complex matters and has conducted a very extensive investigation into the factual and legal issues raised by this case. *See generally* Harris Decl., Ex. E. Class Counsel has weighed the benefits of this Settlement against the risks and expenses of continued litigation, and strongly believes that the proposed Settlement is fair, reasonable, and adequate. Harris Decl., ¶¶27-37.

D. Plaintiffs Will Request A Reasonable Incentive Award And A Reasonable, Non-Reversionary Award of Fees And Costs

Class Counsel intends to request a non-reversionary, lodestar-driven award of up to $285,000 in attorneys' fees and expenses, separate and apart from the $415,000 Cash Settlement Amount and the Settlement Administration costs of approximately $70,000. Settlement Agreement, ¶¶2.4(a), 3.2. Class Counsel has expended hundreds of attorney and staff hours and thousands of dollars thoroughly investigating, litigating, mediating, and ultimately settling this unprecedented case on favorable terms for Class Members. In the event of Preliminary Approval, Class Counsel will

detail the support for their fee and expense request in their forthcoming application for attorneys' fees and expenses.

Importantly, however, for Preliminary Approval purposes: in no event would any judicial reduction of Class Counsel's requested fees and expenses revert back to benefit the Defendants in this case. *Id.*, ¶3.2. Instead, any judicially imposed reduction in Class Counsel's attorneys' fees will be *added* to the Cash Settlement Amount and be distributed as an additional, cash benefit to the Class. *Id.* This only further shows the reasonableness of the cash Settlement in this case. *See, e.g.*, *In re Hyundai & Kia Fuel Economy Litig.*, 926 F.3d at 569 (affirming preliminary approval where, among other things, the settlement was non-reversionary).

In addition, the Court has discretion to approve incentive awards to Plaintiffs for expending their own time and effort to benefit others, and for undertaking the risks inherent in serving as named plaintiffs. *See, e.g., Staton*, 327 F.3d at 977; *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 463. The Incentive Awards that Plaintiffs will request here ($5,000 each) are well within the customary range of plaintiff incentive awards and are by no means extraordinary. *Chu v. Wells Fargo Invs., LLC*, Nos. C 05–4526 MHP, C 06–7924 MHP, 2011 WL 672645, at *5 (N.D. Cal. Feb. 16, 2011) (awarding a $10,000 incentive award to two named plaintiffs) (collecting cases). Nevertheless, at Final Approval, Plaintiffs will move the Court and establish that the requested attorneys' fees, expenses and incentive awards are reasonable.

At bottom, the Settlement bears no clear deficiencies at this stage, and the Court should thus grant Preliminary Approval of the Settlement and facilitate notice to the Class Members so that they can accept or decline the cash benefits presented.

VI. THE PROPOSED NOTICE PLAN COMPORTS WITH DUE PROCESS

Rule 23(c)(2)(B) provides that for Rule 23(b)(3) classes, the Court "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Due process requires the best notice practicable, reasonably calculated under the

circumstances, to apprise the class member of the pendency of the class action and to give that class member a chance to be heard, object to, or opt out of the proposed settlement. *See Silber v. Mabon*, 18 F.3d 1449, 1453-54 (9th Cir. 1994). The notice to the Class also must include a general description of the proposed Settlement. *See Churchill Village*, 361 F.3d at 575; *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

Here, the Settlement Administrator will direct individualized Notice to each Class Member based upon personally identifying information ("PII") provided from BANA's credit card account records. Settlement Agreement, ¶¶2.4, 2.5; *see also* Harris Decl., Ex. B (Postcard Notice); Ex. C (E-mail Notice); Ex. D (Long Form Notice). Class Notice will be delivered via mail or email as appropriate based upon the best available addresses for each Class Member. *Id.* In addition, Class Notice will be published through a dedicated Settlement Website, which the Settlement Administrator will create and maintain throughout the Settlement approval process. *Id.* Such a Class Notice program comports with due process and constitutes the best notice practicable under the circumstances. *See Minter v. Wells Fargo Bank., N.A.*, 283 F.R.D. 268, 276 (D. Md. May 22, 2012) (where "all class members have been identified by name from Defendant records" and administrator used reasonable methods to update addresses, supplemental notice by publication was not necessary to satisfy due process).

The proposed Class Notice program, combined with Class Members' rights to opt out, satisfies Rule 23's requirements and fulfills the Class's procedural due process rights. *Phillips Petrol. Co. v. Shutts*, 472 U.S 797, 812 (1985).

VII. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court preliminarily approve the Settlement, and direct the proposed Notice to Class Members as set forth in the Settlement Agreement.

Dated: October 22, 2019

Respectfully submitted,

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