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

MARCHBANKS TRUCK SERVICE, INC., *et al*., on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **COMDATA NETWORK, INC., *et al*.,** **Defendants.**	**Civil Action No. 07-1078-JKG** **Consolidated Case**

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR CLASS CERTIFICATION IN LIGHT OF SETTLEMENT, APPOINTMENT OF CLASS COUNSEL, APPROVAL OF THE FORM AND MANNER OF NOTICE TO THE SETTLEMENT CLASS AND SETTING THE FINAL SETTLEMENT SCHEDULE AND DATE FOR A FAIRNESS HEARING

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Plaintiffs Marchbanks Truck Service, Inc., d/b/a Bear Mountain Travel Stop; Gerald F. Krachey d/b/a Krachey's BP South; Walt Whitman Truck Stop, Inc.; and Mahwah Fuel Stop ("Plaintiffs" or "Class Representatives") respectfully submit this memorandum of law in support of their Motion for Class Certification in Light of Settlement, Appointment of Class Counsel, Approval of the Form and Manner of Notice to the Class and Setting the Final Settlement Schedule and Date for a Fairness Hearing (the "Motion"), seeking, among other things, certification of a proposed settlement class (defined below) and preliminary approval of their global settlement with Defendants Comdata Network, Inc. d/b/a Comdata Corporation ("Comdata") n/k/a Comdata Inc., its parent Ceridian Corporation n/k/a Ceridian LLC ("Ceridian") and certain major chain truck stops, namely: (1) Pilot Travel Centers LLC and Pilot Corporation (collectively "Pilot Defendants"); (2) TravelCenters of America LLC and its wholly owned subsidiaries TA Operating LLC f/k/a TA Operating Corporation d/b/a TravelCenters of America, TravelCenters of America Holding Company LLC f/k/a TravelCenters of America, Inc., and Petro Stopping Centers, L.P. (collectively, "TA Defendants"); and (3) Love's Travel Stops & Country Stores, Inc. ("Love's") (collectively the "Major Chains").

Plaintiffs' motion, including the request for certification of the class in light of settlement, is unopposed. The parties' Definitive Master Settlement Agreement ("Settlement Agreement" or "Settlement Agmt.") is attached as Exhibit A.[1]

I. INTRODUCTION

After extensive litigation and multiple mediation sessions over the course of several years, with private mediators as well as with the Court's able assistance, Plaintiffs and all Defendants have entered into a Settlement Agreement that provides for: (a) immediate payment

[1] Certain capitalized terms used in this brief are defined in Section I of the Settlement Agreement.

of $130 million to Plaintiffs and a proposed Settlement Class of over 5,000 independent Truck Stops and other Retail Fueling Facilities;[2] plus (b) valuable prospective relief in the form of, among other things, meaningful and enforceable commitments by Comdata not to enforce or to modify those portions of Comdata's merchant services agreements with members of the Settlement Class and the Major Chains that Plaintiffs had challenged in this case as being anticompetitive; and (c) an agreement by Comdata to engage in a good faith negotiation relating to, *inter alia*, merchant transaction fees with certain Buying Groups that are, collectively, composed of many members of the Settlement Class (collectively, the "Settlement").

Federal Rule of Civil Procedure 23 requires courts to undertake three steps with respect to class action settlements. First, a court must determine whether a class should be certified ***for settlement purposes.*** *See, e.g.*, *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 296 (3d Cir. 2011) (en banc). Second, a court must consider whether to approve the settlement ***preliminarily*** and order that notice be sent to the class. *See, e.g.*, *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liability Litig.* ("*In re GMC*"), 55 F.3d 768, 787 (3d Cir. 1995). "The preliminary approval decision is not a commitment to approve the final settlement; rather, it is a determination that there are no obvious deficiencies and the settlement falls within the range of reason." *Gates v. Rohm & Haas*, 248 F.R.D. 434, 438 (E.D. Pa. 2008).

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[2] The Settlement Class is defined as:

> All owners and operators of truck stops or other retail fueling facilities with at least one physical location in the United States that paid Merchant Transaction Fees directly to Comdata on Comdata Proprietary Transactions and that were calculated based on a percentage of the face amount of the transaction during the Settlement Class Period with the exception of Mobile Fuelers, Wilco-Hess locations, the Pilot Defendants, the TA Defendants, and Love's and any of the parents, subsidiaries, affiliates, franchisees or employees of any of the Defendants. *See* Settlement Agreement, ¶ 2.

Third, only after the class has been notified and has had the opportunity to consider the settlement, a court must decide whether to give final approval of the settlement as "fair, reasonable, and adequate." *Id.*; Fed. R. Civ. P. 23(e); *see also, e.g., In Re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085 (FSH), 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005). But the decision regarding *final* approval is reserved until after notice has been disseminated and a fairness hearing is held. At the preliminary approval stage, the Court need only determine that there are no obvious deficiencies and that the case falls within the range of reasonableness—both of which criteria are easily satisfied here.

Certification of the Settlement Class—***which is unopposed***—is appropriate given that all of the applicable provisions of Rule 23 are satisfied. As explained below in Part III, the Settlement Class meets all of the prerequisites of Rule 23(a): the Settlement Class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the Settlement Class; the claims of the Class Representatives are typical of the claims of the Settlement Class; and the Class Representatives have, and will continue to, fairly and adequately protect the interests of the Settlement Class. The Settlement Class also meets the requirements of Rule 23(b)(3) because common questions of law and fact predominate over questions affecting only individual members, and a Settlement Class is superior to other available methods for fairly and efficiently adjudicating this controversy.

In evaluating these factors, it is relevant that this is an unopposed motion to certify a Settlement Class rather than an opposed motion to certify a litigation class: "settlement is relevant to a class certification." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 619 (1997). *See also Sullivan*, 667 F.3d at 305-306 (affirming certification of two nationwide antitrust settlement classes, and explaining that the court need not "consider the available evidence and the method

or methods by which plaintiffs would use the evidence to prove the disputed element at trial") (quotation omitted). In addition, there is a "strong presumption in favor of voluntary settlement agreements" that is "especially strong in class actions and other complex cases because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts." *Sullivan*, 667 F.3d at 311 (quotation and internal edit omitted).

Further, preliminary approval of this Settlement is appropriate as there are no obvious deficiencies and the Settlement falls well within the range of reasonableness. It has all of the key indicia of a fair and reasonable result. The Parties agreed to the Settlement only after (a) intense, fully-developed litigation that spanned close to seven years, and (b) detailed arm's-length negotiations, moderated in part most recently by nationally-recognized mediator Professor Eric D. Green (the "Mediator"), and overseen in part by the Court itself. All counsel on both sides of the case are experienced in class actions generally and in antitrust litigation particularly. Further, given the work they have put into the case since its inception in 2007, the Parties and all counsel are well-informed and well-positioned to assess the risks and merits of the case.[3] The Settlement assures that the Settlement Class will receive an immediate substantial cash payment, as well as valuable Prospective Relief in the form of meaningful and enforceable commitments not to enforce or to modify certain allegedly anticompetitive contractual provisions in Comdata's merchant agreements, while avoiding the risks, uncertainties and delays of continued litigation and potential appeals. *See* Part IV, *infra*.

[3] In its April 26, 2007 Order [Dkt. 12], as amended by a February 1, 2008 Order [Dkt. 50], the Court appointed Berger & Montague, P.C.; Lieff Cabraser Heimann & Bernstein, LLP; and Quinn Emanuel Urquhart & Sullivan, LLP as interim Co-Lead Counsel, and established an Executive Committee comprised of the Co-Lead Counsel and the Law Offices of David Balto, Law Offices of Joshua P. Davis, and McCulley McCluer PLLC.

Accordingly, Plaintiffs respectfully request that the Court enter the unopposed proposed Preliminary Approval Order substantially in the form attached to the Settlement Agreement as Exhibit F, which:

1. Certifies the Settlement Class in light of settlement as proposed in the Settlement Agreement pursuant to Fed. R. Civ. P. 23(a) and (b)(3);

2. Preliminarily approves the Settlement Agreement and the documents necessary to effectuate the Settlement, including:

   - the proposed Plan of Administration and Distribution (Settlement Agmt., Ex. E);

   - the proposed plan for and forms of notice to the Settlement Class (both a "Long Form Notice" to be mailed and a "Publication Notice" to be included in one or more industry publications), which inform Settlement Class members of the Settlement and the procedures for opting-out of the Settlement Class and objecting to the Settlement (Settlement Agmt., Exs. D and G);

   - the proposed Claim Form to be mailed to each Settlement Class member (Settlement Agmt., Ex. A);

3. Appoints current interim Co-Lead Counsel Berger & Montague, P.C.; Lieff Cabraser Heimann & Bernstein, LLP; and Quinn Emanuel Urquhart & Sullivan, LLP., as Counsel for the Class ("Plaintiffs' Class Counsel") pursuant to Federal Rule of Civil Procedure 23(g);

4. Appoints Rust Consulting, Inc. ("Rust") as settlement administrator, *see* Decl. of Robin Niemiec (Settlement Agmt., Ex. J), and economic consulting firm, Econ One, Inc., to assist Rust in the Settlement Administration process;

5. Appoints Huntington National Bank ("HNB") as escrow agent for the settlement funds (*see* Settlement Agmt., Ex. H (Escrow Agreement)); and

6. Adopts the proposed settlement schedule set forth in the proposed preliminary approval order (*see* Settlement Agmt., Ex. F), including scheduling a fairness hearing during which the Court will consider:

   - Plaintiffs' request for final approval of the Settlement and entry of a proposed Final Approval Order and Final Judgment;

- Plaintiffs' Class Counsel's application for an Attorneys' Fees Award, Reimbursement for Cost and Expenses, payment of Settlement Administration Costs, and service awards to the named Plaintiffs; and

- Plaintiffs' request for dismissal of this action with prejudice against the Defendants and Releasees as defined in the Settlement Agreement.

II. BACKGROUND

A. Plaintiffs' Claims and Procedural Background

This case is an antitrust class action brought on behalf of independent Truck Stops and other Retail Fueling Facilities that accept Comdata's specialized payment cards (known as "Fleet Cards" or "OTR Fleet Cards").[4] Fleet Cards are used by OTR, long-haul fleets ("Fleets") to purchase diesel fuel and other items at Truck Stops and other Retail Fueling Facilities. Comdata has been the leading OTR Fleet Card issuer for the period relevant to this case. Ceridian is Comdata's parent. Plaintiffs allege that the challenged conduct allowed Comdata and Ceridian to restructure, and thereby artificially inflate, Comdata's Merchant Transaction Fees to members of the Settlement Class beginning in or about 2000-2001 (the "Fee Restructuring"). Plaintiffs allege that, as a result of the claimed anticompetitive conduct, Settlement Class members paid supracompetitive transaction fees to Comdata when processing Comdata Proprietary Transactions.

Defendants have consistently denied these allegations and raised multiple defenses to the merits of the claims. Defendants challenged Plaintiffs' pleadings, with all of them moving to dismiss both Plaintiffs' Second Consolidated Amended Complaint and most of them moving to dismiss the Third Consolidated Amended Complaint.[5] The Court denied both sets of motions.

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[4] "OTR" stands for "Over-the Road." Pls.' June 7, 2013 Mem. of Law in Support of Mot. for Class Cert. at 2, n.5 ("Class Cert. Mot.") [Dkt. 553].

[5] On May 7, 2010, Defendants each separately moved to dismiss the Second Consolidated Amended Complaint [Dkts. 233, 234, 235, 237, 238]. On May 6, 2011, Defendants TA, Pilot,

[Dkts. 388, 487]. *See generally Marchbanks Truck Serv. v. Comdata Network, Inc.*, No. 07-cv-1078, 2012 U.S. Dist. LEXIS 189789 (E.D. Pa. Mar. 29, 2012); *Marchbanks Truck Serv. v. Comdata Network, Inc.*, No. 07-cv-1078, 2011 U.S. Dist. LEXIS 158011 (E.D. Pa. Mar. 24, 2011). Thereafter, Plaintiffs and Defendants filed several other motions, including motions to strike and or exclude expert testimony.[6] As a result of the Settlement, the Court has now dismissed all of the motions that had not yet been decided without prejudice, pursuant to stipulations entered January 19, 2014, and January 30, 2014, respectively.

This case has had intensive discovery over a long period of time. The Parties took over 70 depositions of Parties, non-parties, and expert witnesses, and reviewed millions of pages of documents produced by Plaintiffs, Defendants, and third parties.[7] Further, Plaintiffs retained three experts, while Defendants retained four, all of whom issued reports and were deposed. *Id.* Plaintiffs and Defendants filed and argued motions to exclude or strike all or portions of the opposing experts' opinions. *Id.* ¶ 4. The Parties settled shortly before the Court's scheduled hearing on Plaintiffs' Class Certification Motion, which entailed extensive briefing detailing Plaintiffs' theories of the case and Defendants' defenses. *Id.* ¶ 4. A trial had been scheduled for August 2014.

Love's and Ceridian each separately moved to dismiss the Third Consolidated Amended Complaint [Dkts. 410, 413, 414, 419].

[6] *See, e.g.*, Ceridian's Motion for Summary Judgment [Dkt. 602], multiple motions to strike or exclude the opposing experts' witness testimony [Dkts. 584, 585, 588, 590, 594, 595], Plaintiffs' Motion for Class Certification [Dkt. 552], and several discovery motions.

[7] *See* Decl. of Eric L. Cramer, Esq. in Support of Plaintiffs' Unopposed Motion for Class Certification in Light of Settlement, Appointment of Class Counsel, Approval of the Form and Manner of Notice to the Settlement Class and Setting the Final Settlement Schedule and Date for a Fairness Hearing ("Cramer Decl."), ¶ 3, a copy of which is attached hereto as Exhibit B.

B. Settlement Negotiations and the Proposed Settlement

The protracted settlement negotiations between Plaintiffs' Class Counsel and attorneys for Defendants were hard fought, at arm's length, and guided by both the Court and two separate experienced, independent mediators.

The case resolved only after several failed efforts at settlement over several years, including a Court-ordered in-person settlement conference with Magistrate Judge Perkin in 2011, and a July 2012 mediation between Plaintiffs and defendants Comdata and Ceridian with a private mediator. More recently, in late 2013, after the close of fact and expert discovery, with the Court's two-day hearing on the Parties' *Daubert* motions having been held, and with a class certification hearing looming, the Parties agreed to private mediation with Professor Eric Green, a nationally-recognized mediator experienced in settling large antitrust class actions. Cramer Decl. ¶ 5. The Parties held a full-day mediation with Professor Green on December 5, 2013 in New York, which initially proved unsuccessful.

Following the mediation session, certain of the Parties continued to negotiate throughout December, culminating in an agreement under which Comdata and Ceridian would make a combined cash payment of $100 million to Plaintiffs along with Comdata providing prospective relief that these parties had been separately negotiating, in exchange for releases and dismissal of Plaintiffs' claims with prejudice. On December 31, 2013, Plaintiffs, Comdata, and Ceridian entered into a memorandum of understanding ("MOU"), resolving Plaintiffs' claims consistent with that agreement. *See* Cramer Decl. ¶ 5. Contemporaneous with these negotiations, and with Professor Green's assistance, Plaintiffs and Love's negotiated an MOU, signed January 3, 2014, whereby Love's would pay the Class $10 million in exchange for releases and dismissal of Plaintiffs' claims. *Id.*

On January 9, 2014, the Court held a settlement conference with Plaintiffs and the then-non-settling TA and Pilot Defendants. Cramer Decl. ¶ 5. During that conference, the Court and counsel for TA and for Pilot engaged in further discussions about settlement terms. Following that conference, the TA and Pilot Defendants and Plaintiffs agreed that each of these defendant groups would pay $10 million to the Class (i.e., $20 million combined) in exchange for releases and dismissal of Plaintiffs' claims. *Id.*

Throughout January and February of this year, Plaintiffs and all Defendants exchanged several drafts of the Settlement Agreement, vigorously negotiating its terms. Cramer Decl. ¶ 5. On March 3, 2014, all parties entered into a Definitive Master Settlement Agreement that provides a $130 million cash payment to the Settlement Class in addition to meaningful prospective relief from Comdata.

In order to attempt to put a dollar value on the portion of the prospective relief pertaining to Comdata's contractual changes, Plaintiffs asked Dr. Hal Singer, one of Plaintiffs' economists (who was thus fully familiar with the record), to conduct an economic valuation exercise in connection with the settlement process. Relying upon the extensive record, and his own economic analysis, Dr. Singer has estimated the value to the Settlement Class of contractual changes portion of the prospective relief to be between $260 million and $491 million over the next five years. *See* Expert Declaration of Dr. Hal J. Singer, dated March 4, 2014, ¶ 3 (the "Singer Decl."), a copy of which is attached hereto as Exhibit C. The prospective relief, described in detail below, relates largely to clauses in Comdata's contracts with both Settlement Class Members and the Major Chains that Plaintiffs had alleged thwarted competition and injured the Settlement Class by suppressing competition and ultimate enabling Comdata's artificial inflation of fees to the Settlement Class.

Although the value placed on the prospective relief by Dr. Singer is not guaranteed, and the Settlement Agreement, which sets forth in full the obligations of the parties under the Settlement, does not require Comdata to change its fee structure, Plaintiffs believe based on Dr. Singer's analysis that the combined value of the Settlement to the Settlement Class (*i.e.*, the cash portion plus the prospective relief) is between $390 to $621 million. Cramer Decl., ¶ 8.

III. THE SETTLEMENT CLASS SATISFIES THE REQUIREMENTS FOR CLASS CERTIFICATION

This case satisfies all of the requirements of certification of the Settlement Class, particularly in light of the Settlement. The motion is unopposed. The Third Circuit has approved class certification in light of settlement, as long as the proposed class satisfies the four requirements of Rule 23(a) and the requirements of Rule 23(b). *See Sullivan*, 667 F. 3d at 296; *see also In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 349 (3d Cir. 2010). Importantly, for certification in light of settlement, as here, the Court need not consider "whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." *See Sullivan*, 667 F.3d at 322 n.56 (quoting *In re Cmty. Bank of N. Va. & Guaranty Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 622 F.3d 275 (3d Cir. 2010)).

This case is suitable for class action treatment in light of settlement.[8] In Pls.' Class Cert. Mem., Plaintiffs cited multiple analogous direct purchaser antitrust cases in which courts certified classes where Plaintiffs had alleged overcharges resulting from suppressed competition.[9] The proposed Settlement Class here satisfies the requirements of Rule 23(a)

[8] For further detail regarding the standard for class certification of a litigation class, Plaintiffs respectfully refer the Court to their Motion for Class Certification [Dkt. 552], their Memorandum of Law In Support of Their Motion for Class Certification [Dkt. 553] ("Pls.' Class Cert. Mem.") and their Reply In Support of Class Certification [Dkt. 670] ("Pls.' Class Cert. Reply").

[9] Pls.' Class Cert. Mem. at 18, 25-27.

(numerosity, commonality, typicality, and adequacy of representation) and Rule 23(b)(3) (predominance and superiority).

A. The Class Satisfies the Prerequisites of Rule 23(a)

1. Numerosity, Ascertainability, and the Impracticability of Joinder[10]

Rule 23(a)(1) provides for class certification where, as here, the class is so numerous that joinder of all class members is impracticable. Fed. R. Civ. P. 23(a)(1). "No magic number exists satisfying the numerosity requirement." *Jackson v. SEPTA*, 260 F.R.D. 168, 185-86 (E.D. Pa. 2009) (citation omitted); *see also id*. at 186 ("[T]he Third Circuit has declined to set forth any hard and fast number required to satisfy this element."). Generally, if the "potential number of plaintiffs exceeds 40," the numerosity requirement is met. *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001); *see also In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 273-74 (3d Cir. 2009); *Stoneback v. ArtsQuest*, No. 12-cv-03287, 2013 U.S. Dist. LEXIS 86457, at *27 (E.D. Pa. June 20, 2013) (generally, "more than forty adequate") (quotation and citation omitted); *Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd. Co.*, No. 12-cv-3824, 2014 U.S. Dist. LEXIS 21504, at *11-12 (E.D. Pa. Feb. 18, 2014).

The evidence from Comdata's records demonstrates that the Settlement Class includes at least 3,000 truck stops and retail fueling facilities. Pls.' Class Cert. Mem. at 15 (citing Expert Report of Dr. Jeffrey Leitzinger, Ph.D. (6//17/13) (Exhibit A to Pls.' Class Cert. Mem.), ¶ 21 ("Leitz. Rpt.") (one of Plaintiffs' economists)). Furthermore, members of the Settlement Class are geographically dispersed along interstate highways "across the nation" and during the Settlement Class Period. *Id*., ¶ 6, 19, n. 29. Geographical dispersion, in addition to the size of the Settlement Class, makes joinder of members of the Settlement Class impracticable. *See Meijer, Inc. v. Warner Chilcott Holdings Co.* III, 246 F.R.D. 293, 306-07 (D.D.C. 2007);

[10] Pls.' Class Cert. Mem. at 14-15.

Vinson v. Seven Seventeen HB Phila. Corp., No. 00-6334, 2001 U.S. Dist. LEXIS 25295, *56-57 (E.D. Pa. Oct. 31, 2001).

The Settlement Class is also easily ascertainable from Comdata's electronic transactional sales data. *See In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 260 (E.D. Pa. 2012) ("*Processed Egg Prods*.") ("[T]he Court determines that the Class Members are ascertainable from objective criteria, such as various electronic data files that contained names and addresses of customers."). Here, Comdata's electronic transactional sales data identifies members of the Settlement Class by name and address, thereby enabling ready identification and individual first class mail notification. Given the number of entities in the Settlement Class, their straightforward ascertainability, their geographic dispersion, and the complexity of this action, judicial economy is served by class certification. *See, e.g.*, *Meijer*, 246 F.R.D. at 306.

2. Commonality[11]

Rule 23(a)(2)'s requirement of common questions is also satisfied here. Antitrust cases generally present common evidence of law and fact. *See In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 479 (W.D. Pa. 1999). Common questions of law and fact are routinely found in antitrust cases like this one because class members in such cases nearly always use the same evidence to prove their allegations. "In an antitrust action on behalf of purchasers who have bought defendants' products at prices . . . above competitive levels by unlawful conduct, the courts have held that the existence of an alleged conspiracy or monopoly is a common issue that will satisfy the Rule 23(a)(2) prerequisite." 1 Wm. B. Rubinstein, NEWBERG ON CLASS ACTIONS § 3:10 (4th ed. 2011); *see also In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 205-06 (E.D. Pa. 2001), *aff'd*, 305 F.3d 145 (3d Cir. 2002); *Mylan*, 2014 U.S. Dist. LEXIS 21504, at *12-13

[11] Pls.' Class Cert. Mem. at 15.

(commonality requirement satisfied when plaintiffs alleged that defendants committed anticompetitive behavior in violation of the Sherman Act); *Stoneback,* 2013 U.S. Dist. LEXIS 86457, at *29 ("Generally, where defendants have engaged in standardized conduct towards members of the proposed class, common questions of law and fact exist."). Commonality is met so long as plaintiffs' claims depend upon a "common contention . . . [that] must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

In Plaintiffs' Class Cert. Mem., Plaintiffs identified multiple common issues in this case including:

(a) whether the OTR Fleet Card market is a relevant market;

(b) whether Comdata possesses monopoly power in the OTR Fleet Card market;

(c) whether Comdata willfully acquired, maintained, or enhanced its monopoly power;

(d) whether Ceridian and the Major Chains conspired with Comdata to bolster Comdata's monopoly power;

(e) whether Comdata engaged in unlawful anticompetitive conduct to impair the opportunities of rivals in the OTR Fleet Card market;

(f) whether Comdata, with Ceridian's support and involvement, entered into agreements with the Major Chains that unreasonably restrained trade;

(g) whether the challenged conduct caused the Class to pay supracompetitive transaction fees; and,

(h) the appropriate measure of damages.[12]

These issues are more than sufficient to satisfy Rule 23(a)(2)'s commonality requirement.

[12] Pls.' Class Cert. Mem. at 15.

3. Typicality[13]

"Typicality" under Rule 23(a)(3) requires "the interests of the class and the class representatives [align] so that the latter will work to benefit the entire class." *Pichler v. UNITE*, 228 F.R.D. 230, 249-50 (E.D. Pa. 2005). A court must decide "whether 'the named plaintiff[s'] individual circumstances are markedly different or the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.'" *Id.* at 250 (citing *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985)); *see also Stoneback*, 2013 U.S. Dist. LEXIS 86457, at *30-31 (finding typicality requirement satisfied when plaintiffs suffered same basic injury). Rule 23(a)(3) does not require identical claims. *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 311 (3d Cir. 1998); *Eisenberg*, 766 F.2d at 786; *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1036 (N.D. Miss. 1993).

Here, each of the proposed Class Representatives accepted the Comdata OTR Fleet Card and paid percentage fees to Comdata during the Settlement Class Period. All claims arise from the same challenged conduct and involve the "same elements the other class members would have to prove if they brought individual actions." *In re Plastic Cutlery Antitrust Litig.*, No. 96-cv-728, 1998 U.S. Dist. LEXIS 3628, at *11 (E.D. Pa. Mar. 20, 1998); *see Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183-84 (3d Cir. 2001) ("If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences.") (citation omitted). Each Plaintiff alleges that it, like all members of the Settlement Class, paid inflated transaction fees to Comdata due to the challenged conduct. Each seeks to recover the resulting overcharges. *Mylan*, 2014

[13] Pls.' Class Cert. Mem. at 15-16.

U.S. Dist. LEXIS 21504, at *13-14 (typicality requirement satisfied when plaintiffs assert injury from same course of anticompetitive conduct and probable factual differences relate only damages rather than liability). Thus, Plaintiffs' claims are typical of those of the Settlement Class.

4. Adequacy of Representation[14]

The requirements of both prongs of Rule 23(a)(4) are also satisfied here: (1) the Class Representatives' interests do not conflict with the Settlement Class members' interests; and (2) the Class Representatives and their attorneys (Plaintiffs' Class Counsel) are able to prosecute the action vigorously. *See New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007). "Essentially, the inquiry into the adequacy of the representative parties examines whether the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously, that he or she has obtained adequate counsel, and that there is no conflict between the individual's claims and those asserted on behalf of the class." *Processed Egg Prods.*, 284 F.R.D at 261 (internal quotations and citations omitted).

a. Absence of Conflict

No conflict exists between Plaintiffs and other members of the Settlement Class. All seek overcharge damages, and thus all have the same financial incentive to prove they were overcharged and recover damages on the basis of that overcharge. *In re K-Dur Antitrust Litig.*, 686 F.3d 197, 223 (3d Cir. 2012), *vacated on other grounds*, 133 S. Ct. 2849 (2013), *reinstating class certification opinion*, *In re K-Dur Antitrust Litig.*, 2013 WL 5180857 (3d Cir. Sept. 9, 2013) ("[B]ecause *Hanover Shoe* sets the amount of overcharge as plaintiffs' damages, all of the class members have the same financial incentive for purposes of the litigation –*i.e.*, proving that

[14] Pls.' Class Cert. Mem. at 16-18.

they were overcharged and recovering damages based on that overcharge.").[15] In addition, Plaintiffs and their experts believe that the prospective relief, which entails significant commitments by Comdata to modify or not to enforce certain provisions in its merchant agreements, will help level the economic playing field between Settlement Class Members and the Major Chains, thereby benefitting Plaintiffs and Settlement Class Members alike. *See, e.g.*, Singer Decl. ¶¶ 19-21.

b. Qualifications of Counsel

This Court previously designated interim Class Counsel. *See supra* n.3. Plaintiffs move pursuant to Fed. R. Civ. P. 23(g) to have the same attorneys designated Class Counsel, *i.e.*, to remove the "interim" label. These firms have devoted substantial time and resources to the case, including developing the factual basis of the claims, working with experts, filing numerous pleadings, and engaging in extensive motion practice. *See* Cramer Decl. at ¶¶ 3-4, 9. They also have experience and expertise in antitrust class actions, having litigated them in courts throughout the United States.[16]

B. Plaintiffs Satisfy Rule 23(b)(3)

Plaintiffs satisfy the requirements of Rule 23(b)(3), which provides that a class should be certified if the requirements of Rule 23(a) are met and the "court finds that the questions of law

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[15] *See also In re Wellbutrin SR Direct Purchaser Antitrust Litig.*, No. 04-5525, 2008 U.S. Dist. LEXIS 36719, at *27 (E.D. Pa. May 2, 2008) ("Because all class members have the right to pursue overcharge damages, they have the same incentive to do so, and there is no conflict among class members allegedly harmed by the same antitrust violation."); *Processed Egg Prods.*, 284 F.R.D. at 261 ("Essentially, the inquiry into the adequacy of the representative parties examines whether the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously, that he or she has obtained adequate counsel, and that there is no conflict between the individual's claims and those asserted on behalf of the class.") (internal quotations and citations omitted).

[16] *See* Pls.' Mem. of Law Supporting the Unopposed Mot. for Entry of Proposed Pretrial Order No. 1 at 8-13 [Dkt. No. 10]; Pls.' Mem. of Law Supporting Their Unopposed 2d Mot. to Amend Pretrial Order No. 1 at 3 [Dkt. No. 44].

or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." For the reasons set forth below, common issues predominate in the context of settlement in this case, and a class action is the superior means of adjudicating this case.

1. Common Questions of Law and Fact Predominate Over Individual Questions.

Rule 23(b)(3) requires that: (1) common questions of law or fact predominate over individual questions; and (2) a class action is superior to other available methods of adjudication. The predominance requirement "does not demand unanimity of common questions, it requires that the common questions outweigh individual questions." *McCall v. Drive Fin. Servs., L.P.*, 236 F.R.D. 246, 254 (E.D. Pa. 2006) (citing *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 185 (3d Cir. 2001)). As the Supreme Court has recognized, the predominance requirement is "readily met" in cases alleging violations of the antitrust laws. *Amchem*, 521 U.S. at 625; *see also Sullivan*, 667 F.3d at 300 (noting that "predominance test is readily met in certain cases alleging . . . violations of the antitrust laws") (quoting *In re: Ins. Brokerage Litig.*, 579 F.3d at 266).[17]

Importantly, in *Amchem*, the Supreme Court recognized that the fact of a "settlement is relevant to a class certification[,]" 521 U.S. at 619, and specifically instructed that the portion of the predominance analysis that typically focuses on the management of the trial becomes unnecessary and irrelevant when a class is being certified in light of settlement. *Id*. at 620. *See also Sullivan*, 667 F.3d at 305-306 (court need not "consider the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove the disputed element

[17] Pls.' Class Cert. Mem. at 19-35.

at trial") (quotation omitted). Here, as is often true in cases involving monopolization and antitrust conspiracy claims, the focus is on Defendants' conduct and its overall effect on the market as a whole, *not* on matters pertaining to individual Settlement Class members. *In re Pressure Sensitive Labelstock Antitrust Litig.*, No. 3:03-MDL-1556, 2007 U.S. Dist. LEXIS 85466, at *41 (M.D. Pa. Nov. 19, 2007) ("Common issues predominate when the focus is on the defendants' conduct and not on the conduct of the individual class members") (citation and quotation marks omitted).

The challenged conduct had two main facets. First, Plaintiffs alleged that Comdata (with Ceridian's involvement) entered into illegal agreements that restricted the Major Chains—Comdata's customers *and* competitors—from competing with Comdata or supporting rival OTR Fleet Cards. Second, Plaintiffs alleged that Comdata imposed anticompetitive restrictions on members of the Settlement Class. Plaintiffs claimed that these agreements and restrictions blocked competitive forces and enabled Comdata to artificially inflate transaction fees. *See* Pls.' Class Cert. Mem. at 20 (citing Leitz. Rpt. ¶¶ 140-160); Expert Report of Dr. Hal J. Singer (6/17/13) ("Singer Rpt.") (Exhibit B to Pls.' Class Cert. Mem.), ¶ 1.

The central elements of these claims naturally lend themselves to class treatment, especially where the case has settled and there are no trial manageability issues to consider. Plaintiffs allege violations of Sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1, 2. Evidence of the alleged antitrust violations here, as with many conspiracy cases, does not vary by class member.[18] For example, in *McDonough v. Toys "R" Us*, the court certified nationwide classes of tens of thousands of consumers *for litigation purposes*, holding that proving anticompetitive

[18] *See, e.g.*, 6 NEWBERG ON CLASS ACTIONS, § 18.25 ("Common liability issues such as conspiracy or monopolization have, almost invariably, been held to predominate over individual issues.").

effects of a series of agreements between an alleged dominant retailer and its suppliers would not require individual evidence. 638 F. Supp. 2d 461, 480-82 (E.D. Pa. 2009). Similarly, the evidence here of the alleged antitrust violation includes Comdata's Major Chain Agreements, its standard contract with the Settlement Class members, and Ceridian's alleged active involvement. Such evidence applies classwide. Of course, given the Settlement, any purported or possible individual differences in proof become far less salient given that there will be no trial. *Sullivan*, 667 F.3d at 315.

Plaintiffs also present classwide evidence that the challenged conduct caused all or nearly all members of the Settlement Class to suffer antitrust injury ("impact" or "fact of damage"). *Allen v. Dairy Farmers of Am., Inc.*, No. 5:09-cv-230, 2012 U.S. Dist. LEXIS 164718, at *31-32 (D. Vt. Nov. 19, 2012) (defining "antitrust impact"). Plaintiffs must propose a predominantly common method for showing the violation caused Settlement Class members to suffer *some* loss in their business or property—here payment of an overcharge on at least one transaction. *See Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 114 n.9 (1969); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 151 (3d Cir. 2002); *see also Panache Board. of Pa., Inc. v. Richardson Elecs., Ltd.*, No. 90-C-6400, 1999 U.S. Dist. LEXIS 7941, at *20 (N.D. Ill. May 14, 1999) ("the issue in the common impact analysis is the fact, not the amount of injury").

Here, the common evidence is capable of showing that: (a) the challenged conduct involved a fee increase to the Settlement Class as a group; (b) the challenged conduct enabled Comdata to implement and sustain the fee increase; and (c) as a result, all or virtually all Settlement Class members paid at least some fees at artificially inflated levels. *See* Pls.' Class Cert. Mem. at 25-30 (citing Leitz. Rpt. ¶¶ 82-89, 140-60, 174-78); Expert Report of Dr. Hal J. Singer (6/7/13) ("Singer Rpt.") (Exhibit B to Pls.' Class Cert. Mem.), ¶¶ 47-150. This classwide

proof satisfies the common impact element. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 325-26 (3d Cir. 2008) ("'an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price.'") (quoting *Bogosian v. Gulf Oil Co.*, 561 F.2d 434, 455 (3d Cir. 1977)).

Finally, Plaintiffs have proffered a reliable means of proving damages on a classwide basis. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (holding that damages models "need not be exact" so long as they are "consistent with [plaintiffs'] liability case") (internal citation and quotation marks omitted). Plaintiffs' aggregate damages model here is both reliable and flows directly from Plaintiffs' theory of harm. Dr. Leitzinger, who has extensive relevant experience, Leitz. Rpt., ¶¶ 1-3, has concluded that there are several workable and formulaic approaches to computing classwide damages that measure the alleged overcharges flowing from the challenged conduct. *Id*. at ¶¶ 126-139, 179-183. Further, in certifying a settlement class, the Court need not "consider the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove the disputed element at trial[.]" *Sullivan*, 667 F.3d at 306.

2. A Class Action is Superior to Other Methods of Adjudication.

Rule 23(b)(3) provides that the Court may assess the superiority of the class action mechanism by weighing class members' interest in pursuing separate actions, the extent of any independent litigation already commenced by class members, the desirability of concentrating the litigation in this forum, and the difficulties likely to be encountered in the management of the class action. Fed. R. Civ. 23(b)(3); s*ee also Amchem*, 521 U.S. at 615 (observing that the superiority requirement ensures that resolution by class action will "achieve economies of time, effort, and expense, and promote . . . uniformity of decisions as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."); *In re*

Carbon Black Antitrust Litig., No. 03-cv-10191, 2005 U.S. Dist. LEXIS 660, at *44 (D. Mass. Jan. 18, 2005) ("Courts have noted that class actions are a particularly appropriate mechanism for achieving such enforcement[.]").

Notably, manageability concerns are irrelevant in a settlement certification context given that the case will never go to trial. *See Sullivan*, 667 F.3d at 302-03; *see also Smith v. First Union Mortg. Corp.*, No. 98-5360, 1999 U.S. Dist. LEXIS 10747, at *6-7 (E.D. Pa. July 19, 1999); *In re Prudential*, 148 F.3d at 316. In *Amchem*, the Supreme Court recognized that the fact of a "settlement is relevant to a class certification[,]" 521 U.S. at 619, and stated that the portion of the predominance analysis that typically focuses on the management of the trial becomes unnecessary and irrelevant when a class is being certified in light of settlement. *Id*. at 620.

Here, class certification is more efficient than separate settlement of thousands of separate claims. *See In re Prudential*, 148 F.3d at 315-16; *Wellbutrin SR*, 2008 U.S. Dist. LEXIS 36719, at *38 ("In the instant case, denying certification would require each direct purchaser to file suit individually at the expense of judicial economy and litigation costs for each party."); *see also Processed Egg Prods.*, 284 F.R.D. at 264-65 ("a class action device enables individual direct purchasers to pursue their claims in an economically feasible manner, with greater efficacy in achieving enforcement and deterrence goals, and with greater bargaining power for settlement purposes").

Furthermore, the fact that this case does not implicate management issues also supports a finding of superiority. Class certification in this context also limits the likelihood of inconsistent rulings. *See In re Relafen Antitrust Litig.*, 218 F.R.D. 337, 347 (D. Mass. 2003) ("Resolution by class action would instead promote uniform treatment of class members similarly situated direct

purchasers who allege similar injuries resulting from the same conduct."). Certification of the Settlement Class is plainly the superior method to adjudicate this Settlement.

C. Proposed Class Counsel Meet the Requirements for Appointment Under Rule 23(g)

Under Rule 23(g), a court that certifies a class must appoint class counsel. Class counsel is charged with fairly and adequately representing the interests of the class. *See* Fed. R. Civ. P. 23(g)(1)(B). In appointing class counsel, the Court must consider: (1) the work counsel has done in identifying or investigating potential claims; (2) counsel's experience in handling class actions, other complex litigation, and similar claims; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. *See* Fed. R. Civ. P. 23(g)(1)(A); *see also In re Imprelis Herbicide Mktg. Sales Prac. & Prods. Liability Litig.*, MDL No. 2284, 2013 U.S. Dist. LEXIS 149323, at *15-16 (E.D. Pa. Oct. 17, 2013).

Harnessing the collective experience garnered by litigating antitrust class action cases for more than 60 years, Plaintiffs' Class Counsel have vigorously pursued this litigation on behalf of the proposed Settlement Class. Cramer Decl. ¶¶ 3-4, 8-9. Class Counsel have investigated the claims prior to filing, filed and opposed multiple discovery and dispositive motions, spearheaded discovery of both parties and non-parties, taken or defended over 70 depositions, overseen multiple experts' preparation of their reports, conducted settlement negotiations, and otherwise managed and prosecuted all aspects of this litigation. Cramer Decl., ¶¶ 3-4. In addition, over the seven years this case has been litigated, Class Counsel have expended well over $6.5 million dollars in out of pocket costs and devoted more than $44 million in time at their current rates—all of it at risk and all uncompensated to date—in litigating this case. Cramer Decl., ¶ 9.

IV. THE PROPOSED SETTLEMENT MEETS THE STANDARD FOR PRELIMINARY APPROVAL

This Settlement easily satisfies the relatively low bar for preliminary approval. "The preliminary approval decision is not a commitment to approve the final settlement; rather, it is a determination that there are no obvious deficiencies and the settlement falls within the range of reason." *Gates*, 248 F.R.D. at 438 (internal quotations and citation omitted). At the preliminary approval stage, a settlement is presumed to be fair when, as here, the negotiations occurred at arm's length, there was sufficient discovery, and the proponents of the settlement are experienced in similar litigation. *See In re GMC*, 55 F.3d 768, 785 (3d Cir. 1995); *Gates*, 248 F.R.D. at 444; *Mylan*, 2014 U.S. Dist. LEXIS 21504, at *11.

A. The Proposed Settlement is the Product of Serious, Informed, Arm's-Length Negotiations

The preliminary approval analysis "often focuses on whether the settlement is the product of arm's-length negotiations." *Curiale v. Lenox Grp., Inc.*, No. 07-1432, 2008 U.S. Dist. LEXIS 92851, at *11 (E.D. Pa. Nov. 14, 2008) (citations and internal quotation marks omitted); *see also In re Auto Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 U.S. Dist. LEXIS 29163, at *6 (E.D. Pa. May 10, 2004) (preliminarily approving settlement reached "after extensive arms-length negotiation between very experienced and competent counsel"). If a court finds that a settlement is the result of good-faith, serious, arm's-length negotiations, the settlement is entitled to a presumption of fairness because such negotiations guard against any obvious deficiencies. *Hughes v. InMotion Entm't*, No. 07-CV-1299, 2008 WL 3889725, at *3 (W.D. Pa. Aug. 18, 2008); *see also Gates*, 248 F.R.D. at 444 (granting preliminary approval where there was "nothing to indicate that the proposed settlement . . . [was] not the result of good faith, arm's-length negotiations between adversaries").

As explained above, the Parties' protracted arm's-length negotiations spanned several years and included one settlement conference with Magistrate Judge Perkin; a private mediation among Plaintiffs, Comdata, and Ceridian; a second private mediation with all Parties; and a settlement conference before this Court. The Parties' multi-year arm's-length negotiations, which the Court observed in part, unambiguously support the presumption that the proposed Settlement is fair.

B. The Advanced Stage of this Case Supports Preliminary Approval

The stage of a case demonstrates "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re GMC*, 55 F.3d at 813. "Where [the] negotiation process follows meaningful discovery, the maturity and correctness of the settlement become all the more apparent." *In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 400 (D.N.J. 2006) (citing *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003)).

Here, active litigation and comprehensive discovery informed the Parties' settlement. As noted above, the parties took or defended more than 70 depositions and reviewed hundreds of thousands of pages of documents from parties and non-parties. Cramer Decl. ¶ 3. Plaintiffs retained three experts, while Defendants retained four, all of whom issued reports and were deposed. *Id.* The Parties settled shortly before the Court's scheduled hearing on Plaintiffs' Class Certification Motion, which entailed extensive briefing detailing Plaintiffs' theories of the case and Defendants' defenses. A trial was scheduled in the case for August 2014. That this case settled at a late stage further supports preliminary approval.

C. The Proponents of the Settlement Are Highly Experienced in Antitrust Litigation

In a court's evaluation of a proposed settlement, the "professional judgment of counsel involved in the litigation is entitled to significant weight." *Fisher Bros. v. Phelps Dodge Indus.*,

Inc., 604 F. Supp. 446, 452 (E.D. Pa. 1985); *see also Varacallo v. Mass Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005) ("Class Counsel's approval of the Settlement also weighs in favor of the Settlement's fairness."). Courts "give due regard to the advice of the experienced counsel . . . [who] negotiated this settlement at arm's-length and in good faith." *Collier v. Montgomery Cnty. Housing Auth.*, 192 F.R.D. 176, 186 (E.D. Pa. 2000); *see also Austin v. Pa. Dep't of Corr.*, 876 F. Supp. 1437, 1472 (E.D. Pa. 1995) (stating that significant weight should be attributed "to the belief of experienced counsel that settlement is in the best interest of the class").

The attorneys representing the Settlement Class are experienced litigators in antitrust class actions who have negotiated numerous antitrust class action settlements. Cramer Decl. ¶ 8.[19] Based on their experience, Plaintiffs' Class Counsel believe that the monetary and prospective relief that this Settlement provides is extraordinary, avoids the risks and delays associated with continued litigation, and is thus in Settlement Class members' best interests.

D. Members of the Settlement Class Have Reacted Positively to the Settlement

Although the Court has not yet issued notice, Plaintiffs' Class Counsel has spoken to several members of the Settlement Class through trade organizations in which members of the Settlement Class participate. Cramer Decl. ¶ 10. These entities with whom Plaintiffs' Class Counsel has interacted have overwhelmingly supported the Settlement. *Id.*

E. The Relief Available under the Proposed Settlement is Within the Range of Possible Approval

The Settlement falls within the range of settlements that could possibly be worthy of final approval as fair, reasonable, and adequate. *See, e.g.*, *Samuel v. Equicredit Corp.*, No. 00-6196, 2002 WL 970396, at *1 n.1 (E.D. Pa. May 6, 2002). The court in *In re Remeron End-Payor*

[19] *See also* http://www.bergermontague.com/practice-areas/antitrust; http://www.lieffcabraser.com/Practice-Areas/Antitrust-Intellectual-Property/; and http://www.quinnemanuel.com/practice-areas/antitrust-and-trade-regulation.aspx.

Antitrust Litig. stated that "an antitrust class action settlement may be approved even if the settlement amounts to a small percentage of the single damages sought, if the settlement is reasonable relative to other factors, such as the risk of no recovery. 'In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.'" Nos. 02-2007 (FSH), 04-5126 (FSH), 2005 U.S. Dist. LEXIS 27011, at *70 (D.N.J. Sept. 13, 2005) (quotation marks and citation omitted); *Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974)), abrogated on other grounds by *Goldberger v. Integrated Resources*, 209 F.3d 43 (2d Cir. 2000).

The Settlement involves an immediate cash payment of $130 million. In addition, Comdata has agreed to prospective relief in the form of commitments not to enforce or to modify certain contractual provisions in its merchant agreements that Plaintiffs had challenged as anticompetitive in the case. *See* Settlement Agreement, ¶¶ 17-29. Plaintiffs and their economist believe, under the very economic theory upon which this case was litigated, that these changes will promote competition among OTR Fleet Cards and lead to lower Comdata Merchant Transaction Fees for Settlement Class Members. Dr. Singer's analysis finds that the additional value of the prospective relief alone is between $260 million to $491 million, bringing Plaintiffs' estimate of the total value of the Settlement Agreement, including the cash component, to between $390 million to $621 million. Singer Decl. ¶¶ 3, 30.[20]

In his expert reports submitted in the case, Dr. Leitzinger computed overcharge damages to the Class as a whole as ranging from approximately $350 to $390 million. *See* Leitz. Rep., ECF No. 558 (June 18, 2013), ¶ 12. Even before noting that Defendants and their experts vigorously disputed these estimates, and putting the valuable prospective relief to the side, the

[20] The prospective relief also includes a commitment that Comdata will enter into good faith negotiations with certain independent Truck Stop Buying Groups. Settlement Agmt., ¶¶ 26-29.

Settlement is an extraordinary result. *The cash value alone constitutes approximately one-third of the total damages suffered by the Settlement Class*, which members of the Settlement Class will get without delay, further risk, and additional costs. Further, as discussed above, Plaintiffs estimate that the combined value of the Settlement is between $390 and $621 million—substantially more than the total overcharges suffered by the Settlement Class. In sum, the relief available under the Settlement clearly falls within the range of reasonableness.

F. The Plan of Administration and Distribution is Fair, Reasonable, and Adequate

The Court need not finally approve the Plan of Administration and Distribution now. It need merely find that it is sufficient for Plaintiffs to include a summary of that plan in the Class Notice. Approval of a plan of distribution of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable, and adequate. *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000). Generally, an allocation plan is reasonable if it reimburses class members based on the type and extent of their injuries. *Id.*

Plaintiffs' proposed Plan of Allocation and Distribution was developed in conjunction and consultation with Dr. Leitzinger and his staff at Econ One, Inc.—a nationally recognized economic consulting firm. Plaintiffs have retained Dr. Leitzinger and Econ One to assist the proposed Settlement Administrator, Rust Consulting, Inc. ("Rust"), with the Settlement and claims administration process. Dr. Leitzinger is a highly regarded antitrust economist, who has submitted four expert reports in this litigation, relating, *inter alia*, to class certification, computation of damages, and the underlying merits of the case. Dr. Leitzinger has worked on the case since 2007. Plaintiffs' proposed plan is fair, reasonable, and adequate in that it proposes

an accurate and efficient means to distribute the Net Settlement Fund to Settlement Class Members who submit timely and valid Claim Forms ("Claimants").

As set forth in the Plan of Administration and Distribution (Settlement Agmt., Ex. E), Plaintiffs propose to distribute the proceeds of the Settlement, inclusive of any interest and net of Court-approved attorneys' fees, representative Plaintiff incentive awards, and costs of litigation and administration ("Net Settlement Fund"), by paying out claims to Claimants based on each Claimant's share of the overcharge damages incurred. Dr. Leitzinger will assist Rust with the computation of Claimants' *pro rata* allocation shares. In his reports, Dr. Leitzinger assessed impact and damages flowing from the conduct Plaintiffs challenged in the case, and proposed a model to compute damages to the Class as a whole as well as to Class members individually. Here, Plaintiffs propose to use a modified version of the latter methodology, *i.e.*, the model Dr. Leitzinger specifically designed to compute damages to individual Class members.[21] Because Dr. Leitzinger has already run a version of this very model as part of his work in the case, there are considerable efficiencies in re-purposing it for allocation purposes.

The Plan of Administration and Distribution rewards Claimants based on the amount each was allegedly overcharged due to the conduct challenged in the case, using transactional data provided by Comdata during the course of the litigation. Using Comdata's data has at least two advantages. First, because all of the data will come from the same source rather than hundreds or thousands of different sources all sorted and presented differently, the opportunities for error will be substantially reduced. Second, the burdens on the Claimants will be substantially ameliorated as none must search old computers or paper files in order to submit a valid claim.

[21] *See* Leitz. Rpt. at 81, n.344; Leitz. Supp. Expert Rpt. ¶¶ 49-50, Exhibit 2.

The proposed Plan of Administration and Distribution should be preliminarily approved so that it can be included in the Settlement Notice. To identify and ensure that Claimants satisfy the Settlement Class definition, economists at Econ One will use Comdata's FMLog transaction database produced in this litigation to identity all Truck Stops and Retail Fueling Facilities with at least one physical location in the United States that paid percentage Merchant Transaction Fees for processing Comdata Proprietary Card Transactions during the Settlement Class Period.

Once Settlement Class membership has been established, to determine each Claimant's *pro rata* share of the Net Settlement Fund, Dr. Leitzinger will use a benchmark approach to estimate the amount each Claimant was overcharged. A benchmark serves as a proxy for the fees that Class members would have paid absent the challenged conduct. Here, Dr. Leitzinger will apply the TCH Benchmark he developed in his expert reports.[22] Based on record evidence, Dr. Leitzinger opined that TCH, a rival OTR Fleet Card provider, was a formidable threat to Comdata during a large portion of the relevant period.[23] The overcharge damage on each transaction, then, is the difference between the fees paid by each Claimant on each transaction processed at a percentage fee and the $1 benchmark fee (that TCH charged). To compute the total overcharges of any one Claimant, therefore, Dr. Leitzinger will, for all fees Claimants paid to Comdata that were above $1, take the sum of these per transaction overcharges by each Claimant over the course of the Settlement Class Period.

The amount of money each Claimant will receive also depends on the number of Claimants, the total overcharges incurred by the entire population of Claimants, and the amount

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[22] *See* Leitz. Rpt., ¶¶ 126-128, 133-135; Leitz. Supp. Rpt., ¶¶ 56-58.

[23] He concluded that in a world absent the challenged conduct—where, in his view, OTR Fleet Card issuers would have used lower merchant fees to encourage truck stops to steer business to their networks—adopting a pricing strategy similar to TCH (which had charged a flat $1 fee for most of the relevant period) would have been competitively advantageous.

of the Net Settlement Fund. If less than 100% of the Settlement Class submits Claim Forms, each Claimant's relative share will be larger. To compute each Claimant's *pro rata* share, Dr. Leitzinger will take the total overcharge computation for each Claimant using the above method and divide that by the sum of all overcharges computed for all Claimants. The result of that computation will be each Claimant's *pro rata* share of the Net Settlement Fund. The result of that computation for each Claimant will then be multiplied by the Net Settlement Fund amount to determine each Claimant's total dollar recovery.

For all timely and valid claims, the Settlement Administrator, with the assistance of Dr. Leitzinger, will: (a) identify the Comdata Proprietary Transactions in which the Claimant paid a percentage-based Merchant Transaction Fee of greater than $1 during the Settlement Class Period; (b) determine the Comdata Merchant Transaction Fees in dollars paid by the Claimant on each of those transactions; (c) subtract $1 (the TCH benchmark fee) from the Claimant's Merchant Transaction Fee for each of the Claimant's Comdata Proprietary Transactions during the Settlement Class Period to calculate an overcharge for each of the Claimant's qualifying Comdata Proprietary Transactions; (d) sum the total overcharges on all qualifying Comdata Proprietary Transactions made by each Claimant during the Settlement Class Period; (e) calculate each Claimant's percentage share of the total overcharges by dividing each Claimant's overcharges by the total combined overcharges paid by all Claimants; and then (f) multiply each Claimant's percentage share of the total overcharges by the total dollars in the Net Settlement Fund.

For illustrative purposes, take a Claimant for whom Comdata's transaction database shows that it processed 10,100 Comdata Proprietary Transactions as a percentage of the dollar amount of the transaction during the Settlement Class Period. Assume, for this example, that

10,000 of these transactions incurred transaction fees of $10 per transaction—*e.g.*, purchases of 100 gallons of diesel priced at $4 per gallon, for a total purchase amount of $400, with a 2.5% transaction fee on each transaction (0.25 x $400 = $10.00). These 10,000 transactions would thus be identified as transactions with percentage-based transaction fees of greater than $1, and included in the computation (*i.e.*, (a) above).

Assume that 100 of the transactions, however, incurred transaction fees of just $0.50 per transaction—*e.g.*, purchases of 5 gallons of fuel at $4 per gallon, for a total purchase amount of $20, with a 2.5% transaction fee on each transaction. These 100 transactions would thus fall below the $1 threshold, and, as a result, would be disregarded because they incurred no overcharge.

Next, Dr. Leitzinger will determine the dollar value of the percentage fees paid on each of the Claimant's Comdata Proprietary Transactions, which in this example is $10 (*i.e.*, (b) above). Dr. Leitzinger will then subtract the TCH Benchmark fee ($1) from the transaction fee paid by the Claimant on each Proprietary Transaction, here a $9 ($10-$1) overcharge per transaction (*i.e.*, (c) above). The Claimant's total overcharges would then be calculated by adding up all of the Claimant's per-transaction overcharges across all of the Claimant's Proprietary Transactions (*i.e.*, (d) above). In this example, the Claimant's total overcharges would be $90,000 ($9 x 100,000 transactions).

To get this exemplar Claimant's *pro rata* share of the Net Settlement Fund, the Claimant's overcharge ($90,000) would then be divided by the total overcharges computed for all valid Claimants using this same method: assume $200 million for these purposes. That would yield a *pro rata* distribution percentage share of the Net Settlement Fund for this exemplar Claimant of 0.045% (*i.e.*, (e) above, where 0.045% = $90,000/$200,000,000.00).

Finally, to arrive at the total distribution amount in dollars for this exemplar Claimant, the Claimant's share would be multiplied by the total dollar amount of the Net Settlement Fund. If the Net Settlement Fund was $80 million, then this Claimant would receive 0.045% (its pro-rata share) of $80 million or $36,000.00. This Plan of Administration and Distribution is fair and efficient and should be preliminarily approved.

G. The Proposed Form and Manner of Notice Are Appropriate

1. Form of Notice

Under Rule 23(e), class members are entitled to reasonable notice of a proposed settlement before it is finally approved by the Court, and notice of the final fairness hearing. *See* Manual for Complex Litig. 4th ("Manual") §§ 21.312, 21.633 (Fed. Judicial Ctr. 2011). "[T]o satisfy due process, notice to class members must be reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Ikon Office Solutions*, 194 F.R.D. at 174 (internal quotation marks and citation omitted). Notice sufficient to satisfy Rule 23(c)(2)(B) "must inform class members of: (1) the nature of the action; (2) the definition of the class certified; (3) the class claims, issues, or defenses; (4) the class members right to retain an attorney; (5) the class members' right to exclusion; (6) the time and manner for requesting exclusion; and (7) the binding effect of a class judgment on class members under Rule 23(c)(3)." *In re PhilipsMagnavox Television Litig.*, No.: 09-3072 (CCC), 2012 U.S. Dist. LEXIS 67287, at *39 (D.N.J. May 14, 2012). In addition, under Rule 23(e), the notice "must contain a summary of the litigation sufficient 'to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." *Id.* (quoting *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions*, 177 F.R.D. 216, 231 (D.N.J. 1997)).

There are two components of "notice": the form of the notice and the manner in which notice is sent to class members. Here, the proposed forms of notice (a mailed Long Form Notice and Publication Notice) are appropriate. The proposed notices (Settlement Agmt., Exs. D and G) are designed to alert Settlement Class members to the proposed Settlement by using bold headlines. These headlines will enable prospective Settlement Class members to quickly determine if they are potentially affected by the proposed Settlement. Plain language text provides important information regarding the terms of the Settlement, the schedule for future events, the class definition, and the legal rights available to members of the Settlement Class, including instructions on how a member of the Settlement Class may exclude itself from, or object to, the Settlement. In addition, the proposed notices prominently feature Plaintiffs' Class Counsel's contact information, directions to the website where the Settlement documents and supplemental information will be provided, as well as Rust's contact information so that members of the Settlement Class can obtain other information, exclude themselves from the Settlement or submit objections, if desired.

The Long Form Notice fairly, clearly, and concisely describe in plain, easily understood language the following:

- the nature of the action (*see* Settlement Agmt., Ex. D at §§ 2-4);
- the definition of the certified Settlement Class (*see* Settlement Agmt., Ex. D at p.1, § 6);
- a summary of the Settlement Class claims, issues and defenses (*see* Settlement Agmt., Ex. D at § 2;
- that a Settlement Class member may exclude themselves from the Settlement Class and the process for doing so (*see* Settlement Agmt., Ex. D at § 13);

- that a Settlement Class member may object to the Settlement Agreement and enter an appearance through an attorney if the member so desires (*see* Settlement Agmt., Ex. D at §§ 16, 19);
- the binding effect of a class judgment on members of the Settlement Class (*see* Settlement Agmt., Ex. D at §§ 7, 12, 15);
- the significant terms of the Settlement, including the total amount Defendants have agreed to pay and the prospective relief (*see* Settlement Agmt., Ex. D at § 7);
- the Plan of Administration and Distribution and claims process for the Net Settlement Fund (*see* Settlement Agmt., Ex. D at § 9);
- the Court approval process for the proposed Settlement and Plaintiffs' Class Counsel's anticipated request for attorneys' fees of one-third of the cash value of the Settlement, service awards, and reimbursement of all litigation expenses (*see* Settlement Agmt., Ex. D at §§ 20-23); and
- the schedule for completing the settlement approval process, including deadlines for objecting to the Settlement, and the submission of motions for final approval of the settlement, and for attorneys' fees, expenses, and service awards to the Class Representatives (*see* Settlement Agmt., Ex. D at §§ 13, 16, 20-25).

2. Manner of Notice

Rule 23(c)(2)(B) requires that notice be disseminated by "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Larson v. AT&T Mobility LLC*, 687 F.3d 109, 117 n.10 (3d Cir. 2012) (quoting Rule 23(c)(2)(B)). Where "the names and addresses of [] class members [were] easily ascertainable, and there [was] nothing to show that individual notice [could not] be

mailed to each," it is required. *Id.* at 123 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 166 (1974)). Individual notice by first class mail has been recognized by the courts as an appropriate manner of delivery of notice. *See, e.g., In re Janney Montgomery Scott LLC Fin. Consultant Litig.*, No. 06-3202, 2009 WL 2137224, at *7 (E.D. Pa. July 16, 2009) (notice by first-class mail); *see also Smith v. Prof'l Billing & Mgmt. Servs., Inc.*, No. 06-4453, 2007 WL 4191749, at *5 (D.N.J. Nov. 21, 2007) ("[F]irst-class mail . . . is unquestionably the best notice practicable under the circumstances.").

Here, Plaintiffs propose a notice procedure that is intended to reach all prospective Settlement Class members. First, Plaintiffs will send individual notices to prospective Settlement Class members—mainly sophisticated businesses—by first class mail. To ensure that all Settlement Class members receive notice, Plaintiffs and Rust will rely on Comdata's FMLog database, which has all Settlement Class members' names and addresses. Second, to supplement the mailed notice, Plaintiffs will publish notice in at least one industry publication agreed to by the Parties. "[T]his combination of individual and publication notice provides the best notice practicable." *Hall v. Best Buy Co.*, 274 F.R.D. 154, 168 (E.D. Pa. 2011) (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 527-28 (D.N.J. 1997) (combination of mailed and publication was "ideal"), *aff'd*, 148 F.3d 283 (3d Cir. 1998)).

H. The Court Should Appoint Rust Consulting as the Settlement Administrator and Econ One to Assist Rust in the Claims Process

Plaintiffs also ask that Rust be appointed as the Settlement Administrator to oversee the administration of the Settlement, including disseminating notice to the Settlement Class, calculating each Settlement Class Member's *pro rata* share of the Net Settlement Fund, and distributing the Net Settlement Fund. *See generally* Niemiec Decl. ¶¶ 6-8 (Settlement Agmt., Ex. J).

Rust is in the business of carrying out large public notice of payment projects on behalf of businesses and governmental agencies. Rust has been in operation for over 35 years. Rust has been appointed as settlement administrator in many antitrust class actions, including antitrust cases filed in this District. *See, e.g., In re OSB Antitrust Litig.*, No. 06-cv-00826 (PD) (E.D. Pa.); *see also, In re: TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827 (N.D. Cal.); and *Sullivan v. DB Investments, Inc.*, No. 04-2819-SRC (D.N.J.). Through these and other matters, Rust has developed and demonstrated the expertise to effectively administer settlements in pharmaceutical products antitrust class actions. Niemiec Decl. ¶¶ 4-5. Plaintiffs have also retained Econ One to assist in the administration and distribution process. Econ One has substantial knowledge of the facts of this case in connection with their expert work to date, and has significant expertise in economic analysis and claims distribution.

I. The Court Should Appoint Huntington National Bank as Escrow Agent

Plaintiffs propose Huntington National Bank ("HNB") as escrow agent. Defendants have approved this selection and the Escrow Agreement. *See* Settlement Agmt., Ex. H. HNB is qualified to serve as escrow agent. HNB, established in 1866, is among the largest 1% of banks in the United States based on size. It holds over $57 billion in assets and includes 700 offices nationwide. HNB's National Settlement Team has handled more than 1000 settlements for law firms, claims administrators, and regulatory agencies. Plaintiffs' Class Counsel have utilized the services of HNB as escrow agent in many class action settlements previously to great success. HNB has been appointed as escrow agent in antitrust class actions. *See, e.g., Mylan*, 2014 U.S. Dist. LEXIS 21504, at *18.

J. The Proposed Schedule is Fair and Should Be Approved

As set forth in the proposed preliminary approval order, the Parties are proposing the following schedule for completing the Settlement approval process:

- Within 10 days from the date of filing for preliminary approval, the Settlement Administrator shall serve notices pursuant to the Class Action Fairness Act of 2005 ("CAFA");

- Within 28 days from the date of preliminary approval,[24] the Long Form Notice and Claim Forms are mailed to each member of the Settlement Class and the Publication Notice is published in NACS (National Association for Convenience and Fuel Retailing) Magazine and NATSO's weekly e-newsletter (or one or more reasonably comparable industry publications agreed to by the Parties if the submission deadlines for the aforementioned publications do not allow for timely issuance of the Publication Notice);

- Within 49 days from the date of preliminary approval, Plaintiffs' Class Counsel will file its motion for attorneys' fees, expenses, and service awards for the Class Representatives;

- The deadline for requesting exclusion from the Settlement Class or objecting to the Settlement is 70 days from the date of preliminary approval;

- The deadline for Settlement Class Members to submit properly completed and signed Claim Forms is 80 days from the date of preliminary approval;

- Within 90 days from the date notice is mailed (Notice Date), Plaintiffs' Class Counsel will submit a motion and memorandum in support of final approval of the Settlement; and

- On a date to be set by the Court, no fewer than 105 days following the Preliminary Approval Date, the Court will hold a final fairness hearing.

This schedule is fair to all members of the Settlement Class. It gives ample time to review the preliminary approval papers, Settlement Agreement, and fee petition before the opt-out deadline or any objections are due. Settlement Class members will have the notice for more than 40 days before the deadline to request exclusion from the Settlement Class or object to the Settlement.[25] In addition, the schedule allows the full statutory period of 90 days for the Settlement Administrator, on behalf of Defendants, to serve its CAFA notice, pursuant to

[24] "Preliminary approval" refers to the date the Court enters an order substantially in the form of the attached (Settlement Agmt., Ex. F), which, *inter alia*, certifies the Settlement Class in light of settlement and preliminarily approves the Settlement.

[25] Notice will include a section notifying Class members of the projected amount of costs, fees, and incentive awards Plaintiffs' Class Counsel will be seeking.

28 U.S.C. § 1715, and for regulators to review the Settlement and, if any so choose, advise the Court of their view of the Settlement. On the other hand, the schedule is not so drawn out that it unreasonably delays the provision of awards from the Net Settlement Fund to Settlement Class Members.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order: (1) certifying the Settlement Class for purposes of Settlement; (2) appointing Class Counsel; (3) granting preliminary approval of the proposed Settlement; (4) approving the proposed form and manner of notice to the Settlement Class; (5) directing that the notice to the Settlement Class be disseminated in the manner described herein; (6) establishing a deadline for Settlement Class members to request exclusion from the Settlement Class or file objections to the Settlement; (7) appointing Rust Consulting as Settlement Administrator and Econ One to assist in the administration and distribution process; (8) appointing Huntington National Bank as the Escrow Agent for the Settlement funds and approving the Escrow Agreement; and (9) setting the proposed schedule for completion of further Settlement proceedings, including scheduling a final fairness hearing.

Respectfully Submitted,

Dated: March 4, 2014

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