

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

**CARNELL SMITH, on behalf of
himself and others similarly
situated,**

Plaintiff,

v.

**Case No. 1:18-cv-464 (Lead Case)
Judge Douglas R. Cole
Magistrate Judge Stephanie K. Bowman**

FIFTH THIRD BANK,

Defendant.

LENOX MAGEE,

Plaintiff,

v.

Case No. 1:18-cv-722 (Member Case)

FIFTH THIRD BANK,

Defendant.

**ORDER GRANTING PLAINTIFFS' UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

WHEREAS, Plaintiffs, Carnell Smith and Lenox Magee, in the above-captioned class Action have applied for an Order, pursuant to Federal Rule of Civil Procedure 23, preliminarily approving the Settlement Agreement and Releases entered into between Plaintiffs, Carnell Smith and Lenox Magee, individually and on behalf of the proposed Settlement Class, and Defendant, Fifth Third Bank, dated February 1, 2021, and this Court having reviewed the Agreement as submitted to the

Court with the Unopposed Motion for Preliminary Approval of Class Action Settlement (“Motion for Preliminary Approval”) (Doc. 124); and

WHEREAS, this Preliminary Approval Order incorporates the Agreement, and its exhibits, and the terms used herein shall have the meaning and/or definitions given to them in the Agreement, as submitted to the Court with the Motion for Preliminary Approval;

NOW, THEREFORE, pursuant to Federal Rule of Civil Procedure 23(e), upon the agreement of the Parties, and after consideration of the Agreement and its exhibits,

IT IS HEREBY ORDERED as follows:

1. The Court preliminarily finds that the Agreement proposed by the Parties is fair, reasonable, and adequate and likely to be approved at a final approval hearing such that giving notice is justified. The representations, agreements, terms, and conditions of the Settlement, as embodied in the Agreement and the exhibits attached thereto, are preliminarily approved pending a final hearing on the Settlement as provided herein. The Settlement meets the considerations set forth in the amended Rule 23(e).

2. The Court has preliminarily considered the following factors: “(1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.” *UAW v. Gen.*

Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007). The Court concludes that each of these factors favor preliminary approval of the proposed Settlement.

3. The Settlement was negotiated with the assistance of neutral Mediator, Michael Unger, Esq., and appears to be the result of extensive, arm's length negotiations between the Parties after Class Counsel and Fifth Third Bank's Counsel had investigated the claims, sufficiently litigated the claims, and become familiar with the strengths and weaknesses of the claims. The Settlement appears not to be collusive, has no obvious defects, and falls within the range of reasonableness.

4. The Court finds that it will likely certify at the final approval stage the Settlement Class, for purposes of the Settlement only, consisting of:

All Current Account Holders and Former Account Holders of Fifth Third Bank who were assessed one or more Non-Fifth Third ATM Fees for making a balance inquiry at an ATM outside of Fifth Third Bank's network of ATMs or were assessed more than one Non-Fifth Third ATM Fee for undertaking a balance inquiry during the same ATM visit as a cash withdrawal or other funds transfer during the Class Period.

Excluded from the Settlement Class is Fifth Third Bank, its parents, subsidiaries, affiliates, officers, and directors; all Settlement Class members who make a timely election to be excluded; and all judges assigned to this litigation and their immediate family members.

5. The Court finds that this Settlement Class meets the relevant requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) in that: (a) the number of Settlement Class members is so numerous that joinder is impracticable; (b) there are questions of law and fact common to the Settlement Class members; (c) the claims of the Class Representatives are typical of the claims of the Settlement

Class members; (d) the Class Representatives are adequate representatives for the Settlement Class, and has retained experienced counsel to represent them; (e) the questions of law and fact common to the Settlement Class members predominate over any questions affecting any individual Settlement Class member; and (f) a class action is superior to the other available methods for the fair and efficient adjudication of the controversy. The Court therefore preliminarily certifies the proposed Settlement Class.

6. For purposes of the Settlement only, the Court finds and determines that it will likely find at the final approval stage, pursuant to Federal Rule of Civil Procedure Rule 23(a)(1), that Plaintiffs will fairly and adequately represent the interests of the Settlement Class in enforcing their rights in the Action, and therefore appoints them as Class Representatives.

7. For purposes of the Settlement only, and pursuant to Federal Rule of Civil Procedure 23(a)(1), the Court appoints the following as Class Counsel to act on behalf of the Settlement Class and the Class Representatives with respect to the Settlement:

KOPELOWITZ OSTROW P.A.
Jeff Ostrow, Esq.
Jonathan M. Streisfeld, Esq.
1 West Las Olas Blvd, Suite 500
Fort Lauderdale, FL 33301

KALIEL PLLC
Jeffrey Kaliel, Esq.
Sophia Gold, Esq.
1875 Connecticut Avenue, NW
10th Floor
Washington, DC 20009

TYCKO & ZAVAREEI LLP
Andrea Gold, Esq.
Katherine Aizpuru, Esq.
1828 L Street Northwest
Suite 1000
Washington, DC 20036

MINNILLO LAW GROUP CO., LPA
Robb S. Stokar, Esq.
2712 Observatory Avenue
Cincinnati, OH 45208

SPANGENBERG SHIBLEY & LIBER LLP
Stuart E. Scott
1001 Lakeside Avenue East, Suite 1700
Cleveland, OH 44114

8. KCC Class Action Services, LLC is appointed as Settlement Administrator and shall administer the Notice Program and oversee settlement administration. The Settlement Administrator shall abide by the terms and conditions of the Agreement that pertain to the Settlement Administrator.

9. Pursuant to the 2018 amendment to Federal Rule Civil Procedure 23(e), the terms of the Agreement (and the Settlement provided for therein) are preliminarily approved based on the Court's preliminary determination that:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm's length;
- (C) the relief provided for the class is adequate, taking into account:
 - (i) the costs, risks, and delay of trial and appeal;
 - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required;
 - (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and
 - (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

10. Having reviewed the proposed Notice Program, including the proposed Email Notice, Postcard Notice, and Long Form Notice submitted by the Parties as *Exhibits C and D* to the Motion, respectively, the Court approves, as to form and content, such Notice for the purpose of notifying the Settlement Class as to the

proposed Settlement, the Final Approval Hearing, and the rights of the members of the Settlement Class. Those Notices contain all of the essential elements necessary to satisfy the requirements of federal law, including the Federal Rules of Civil Procedure and federal and state due process provisions, including the class definition, the identities of the Parties and their counsel, a summary of the terms of the proposed settlement, information regarding the manner in which objections may be submitted, information regarding opt-out procedures and deadlines, and the date and location of the Final Approval Hearing. Not all Settlement Class members will receive all forms of Notice, as detailed in the Agreement.

11. The Court directs the Settlement Administrator to cause the Email Notice and Postcard Notice to be sent to the Settlement Class in accordance with the Notice Program. The Notice Program shall be completed no later than 60 days before the Final Approval Hearing.

12. The Notices shall be updated by the Settlement Administrator to include the Final Approval Hearing date and time as set forth below. The Court finds and determines that the Email Notice and Postcard Notice pursuant to this Order constitutes the best notice practicable under the circumstances, constitutes due and sufficient notice of the matters set forth in the notices to all persons entitled to receive such notices, and fully satisfies the requirements of due process, the Federal Rules of Civil Procedure, and all other applicable law and rules.

13. Any person falling within the definition of the Settlement Class may, upon request, be excluded or “opt-out” from the Settlement Class. Notice shall include

a procedure for Settlement Class Members to opt-out of the Settlement Class. A Settlement Class Member may opt-out of the Settlement Class at any time during the Opt-Out Period, provided the opt-out notice is postmarked no later than the last day of the Opt-Out Period. Any Settlement Class Member who does not timely and validly request to opt-out shall be bound by the terms of this Agreement.

14. Any member of the Settlement Class who timely and properly requests exclusion in compliance with the procedures provided, will thereafter be excluded from the Settlement Class, will not become a Settlement Class Member, will not have any rights under the Settlement, will not be entitled to receive a Settlement Class Member Payment, and will not be bound by the Agreement or the Final Approval Order. Any members of the Settlement Class who fail to submit a valid and timely opt-out request shall be bound by all terms of the Agreement and the Final Approval Order, regardless of whether they have requested to be opted-out from the Settlement.

15. Any Settlement Class Member who wishes to object to the Settlement, Class Counsel's application for attorneys' fees and costs, or the Service Award for the Class Representatives, or to appear at the Final Approval Hearing and show cause, if any, why the Settlement should not be approved as fair, reasonable, and adequate to the Settlement Class, or why a final judgment should not be entered thereon, may do so, but must proceed as set forth in this paragraph and in Paragraphs 81 and 82 of the Agreement. Objections to the Settlement, to the application for attorneys' fees and costs, and/or to the Service Award must be mailed to the Clerk of the Court, Class

Counsel, Fifth Third Bank's counsel, and the Settlement Administrator. For an objection to be considered by the Court, the objection must be submitted no later than the last day of the Opt-Out Period, as specified in the Notice. If submitted by mail, an objection shall be deemed to have been submitted when posted if received with a postmark date indicated on the envelope if mailed first-class postage prepaid and addressed in accordance with the instructions. If submitted by private courier (e.g., Federal Express), an objection shall be deemed to have been submitted on the shipping date reflected on the shipping label.

16. For an objection to be considered by the Court, the objection must also set forth: the name of the Action; the objector's full name, address and telephone number; all grounds for the objection, accompanied by any legal support for the objection known to the objector or objector's counsel; the number of times the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which the objector has made such objection, and a copy of any orders related to or ruling upon the objector's prior objections that were issued by the trial and appellate courts in each listed case; the identity of all counsel who represent the objector, including any former or current counsel who may be entitled to compensation for any reason related to the objection to the Settlement or fee application; a copy of any orders related to or ruling upon counsel's or the counsel's law firm's prior objections that were issued by the trial and appellate courts in each listed case in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the preceding five years;

any and all agreements that relate to the objection or the process of objecting—whether written or oral—between objector or objector’s counsel and any other person or entity; the identity of all counsel (if any) representing the objector who will appear at the Final Approval Hearing; a list of all persons who will be called to testify at the Final Approval Hearing in support of the objection; a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing; and the objector’s signature. The Parties must file any briefs in response to any objection on or before 15 days prior to the date of the Final Approval Hearing. Class Counsel and/or Fifth Third Bank may conduct limited discovery on any objector consistent with the Federal Rules of Civil Procedure.

17. Any Settlement Class Member who does not make his or her objections in the manner and by the date set forth above of this Order shall be deemed to have waived any objections and shall be forever barred from raising such objections in this or any other action or proceeding, absent further order of the Court.

18. Prior to the Final Approval Hearing, (i) Class Counsel shall file with the Court and serve on all Parties an affidavit or declaration of the Settlement Administrator certifying that the Notice Program was completed and providing the name of each Settlement Class member who timely and properly requested exclusion from the Settlement Class; and (ii) Fifth Third Bank shall file with the Court and serve on all Parties a declaration certifying that notice was provided to the appropriate government entities in accordance with the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1715.

19. All pretrial proceedings in this action are stayed and suspended until further order of this Court, except such actions as may be necessary to implement the Agreement and this Preliminary Approval Order.

20. Upon the entry of this Order, the Class Representatives and all members of the Settlement Class shall be provisionally enjoined and barred from asserting any claims against Fifth Third Bank and the Released Parties arising out of, relating to, or in connection with the Released Claims prior to the Court's decision as to whether to grant Final Approval of the Settlement.

21. In the event that (a) this Court does not grant Final Approval of the Settlement as provided in the Agreement; (b) this Court does not enter the Final Approval Order in all material respects and substantial form as the Final Approval Order submitted by the Parties with the Motion for Final Approval; or (c) the Settlement does not become final for any other reason, the Agreement shall be null and void and any order or judgment entered by this Court in furtherance of the Settlement shall be vacated *nunc pro tunc*. In such a case, the Parties shall proceed in all respects as if the Agreement had not been executed and the Parties shall in no way be prejudiced in proceeding with or defending this Action, the provisional class certification effected herein will be null and void, and Fifth Third Bank shall have the right to oppose and object, on any and all grounds, to certification of the Settlement Class or any other class at any future time.

22. For the benefit of the Settlement Class and to protect this Court's jurisdiction, this Court retains continuing jurisdiction over the Settlement

proceedings to ensure the effectuation thereof in accordance with the Settlement preliminarily approved herein and the related orders of this Court.

23. Class Counsel and Fifth Third Bank's Counsel are hereby authorized to use all reasonable procedures in connection with approval and administration of the Settlement that are not materially inconsistent with this Order or the Agreement, including making, without the Court's further approval, minor form or content changes to the Notices they jointly agree are reasonable or necessary.

24. A Final Approval Hearing will be held in the Courtroom of The Honorable Douglas R. Cole, United States District Court for the Southern District of Ohio, Potter Stewart U.S. Courthouse, Room 822, 100 East Fifth Street Cincinnati, Ohio 45202 on **July 8, 2021 at 10:00 a.m.**, to determine: (a) whether the Settlement should be approved as fair, reasonable, and adequate to the Settlement Class; (b) whether the Final Approval Order should be entered in substance materially the same as the Final Approval Order submitted by the Parties with the Motion for Final Approval; (c) whether to approve Class Counsel's application for attorneys' fees and costs, and for Service Awards for the Class Representatives; and (d) any other matters that may properly be brought before the Court in connection with the Settlement. The Final Approval Hearing is subject to continuation or adjournment by the Court without further notice to the Settlement Class. The Court may approve the Settlement with such modifications as the Parties may agree to, if appropriate, without further notice to the Settlement Class. The Parties must file all moving papers and briefs in support of Final Approval, inclusive of Class Counsel's

application for attorneys' fees and costs, and for Service Awards for the Class Representatives, no later than 45 days before the date set forth herein for the Final Approval Hearing.

25. Any Settlement Class Member may enter an appearance in the Action, at their own expense, individually or through counsel of their own choice. If a Settlement Class Member does not enter an appearance, he or she will be represented by Settlement Class Counsel.

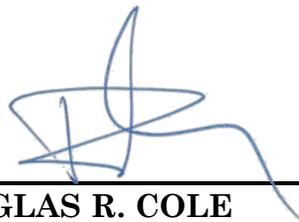
26. The Court hereby sets the following schedule of events:

Event	Calendar Days Before Final Approval Hearing
Notice Program Complete	May 10, 2021
Plaintiffs' Motion for Final Approval, including Application for Class Counsel Fees and Costs and Service Awards	May 24, 2021
Opt-Out Deadline	June 8, 2021
Deadline to Submit Objections	June 8, 2021
Deadline to Respond to Objections	June 23, 2021
Final Approval Hearing	July 8, 2021 at 10:00 a.m.

SO ORDERED.

February 9, 2021

DATE



DOUGLAS R. COLE
UNITED STATES DISTRICT JUDGE