

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE**

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**LINDA R. GLASKE, on behalf of herself  
and all others similarly situated,**

**Plaintiff,**

**v.**

**INDEPENDENT BANK CORPORATION,**

**Defendant.**

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**Hon. Muriel D. Hughes  
Case No. 13-009983-CZ**

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**JOINT AFFIDAVIT OF E. ADAM WEBB AND DAVID H. FINK IN SUPPORT OF  
UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT**

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Personally appeared before me, the undersigned officer authorized to administer oaths, E.  
Adam Webb and David H. Fink, who after first being duly sworn, state under oath as follows:

1. We are counsel for Plaintiff and the Settlement Class in the above-referenced matter.<sup>1</sup>

2. We submit this affidavit in support of Plaintiff's and Class Counsel's Unopposed Motion for Preliminary Approval of Class Settlement.

3. Unless otherwise noted, we have personal knowledge of the facts set forth in this affidavit, and could testify competently to them if called upon to do so.

4. After approximately three-and-a-half years of litigation and extensive settlement negotiations, Plaintiff, Class Counsel, and Defendant Independent Bank Corporation ("Independent") entered into a Settlement Agreement and Release ("Settlement" or "Agreement") under which Independent will (i) pay \$2.215 million in cash to create a common fund for the benefit of the Settlement Class and (ii) pay all costs and fees associated with Class Notice and Settlement administration. Under the Settlement, all Settlement Class Members will automatically receive distributions from the Net Settlement Fund in proportion to the actual harm that each of them sustained.

5. The litigation was hard-fought and the Parties engaged in significant motion practice on the issues of venue and summary disposition, an appeal before the Michigan Court of Appeals, as well as extensive document and data discovery.

6. The Action involved sharply opposed positions on several fundamental legal questions, including: (i) whether venue was appropriate in this Court; (ii) whether Independent breached its account agreement; (iii) whether Michigan law recognizes a cause of action for good faith and fair dealing; (iv) whether Michigan law allows an affirmative action for unconscionability; (v) whether Michigan law allows a claim for unjust enrichment when there is

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<sup>1</sup> All capitalized defined terms used herein have the same meanings from the Settlement Agreement.

a written contract; and (vi) the appropriate methodology for establishing damages on a class-wide basis and the amount of damages to be recovered.

7. Class Counsel continue to believe that the claims asserted in the Action are meritorious; that a class would be certified; that Plaintiff would establish liability and recover substantial damages if the Action proceeded to trial; and that the final judgment would be affirmed on appeal. Plaintiff's ultimate success in the litigation, however, requires her to prevail, in whole or in part, at all of these junctures. Conversely, Independent's success at any one of these junctures could or would have defeated Plaintiff's claims. Thus, continued litigation posed significant risks and countless uncertainties, as well as the time, expense, and delays associated with trial and appellate proceedings, particularly in the context of complex litigation. In light of the foregoing, the Settlement is fair and reasonable, providing guaranteed benefits to the Class in the form of direct cash compensation without further delay.

### **Background**

8. On July 31, 2013, Plaintiff Linda Glaske filed a class action complaint in this Court seeking monetary damages, restitution, and declaratory relief from Independent, arising from the alleged improper assessment, collection, and disclosure of Overdraft Fees, including those fees that were assessed due to Independent's High-to-low Debit Card Transaction Sequencing practice ("the Practice"). Plaintiff alleged that Independent systemically engaged in the Practice to maximize the Bank's Overdraft Fee revenues. Plaintiff asserted claims for breach of contract, unconscionability, unjust enrichment, and violation of the Michigan Consumer Protection Act.

9. The case was assigned to the Honorable Amy Hathaway.

10. Independent filed its answer and affirmative defenses on September 13, 2013.

11. On the same day, Independent moved to transfer venue to the Ionia County Circuit Court.

12. On September 23, 2013, Plaintiff filed her first amended class action complaint, which dropped the Michigan Consumer Protection Act claim.

13. On October 1, 2013, Plaintiff opposed Independent's motion to transfer venue.

14. On October 4, 2013, the Court heard oral argument on the motion to transfer venue and denied the motion.

15. The Parties thereafter engaged in discovery. Independent produced all versions of its customer agreement that were in effect during the relevant period.

16. On November 25, 2013, after reviewing such discovery, Plaintiff filed her second amended class action complaint.

17. On December 16, 2013, Independent filed its answer and affirmative defenses to the second amended class action complaint.

18. On the same day, Independent moved for summary disposition, arguing that Plaintiff failed to state lawful claims upon which relief may be granted. Plaintiff opposed this motion and Independent submitted a reply brief.

19. On December 24, 2013, Plaintiff served its first interrogatories, requests for production, and requests for admissions on Independent.

20. In late January 2014, Plaintiff agreed to extend Independent's time to respond to the outstanding written discovery requests until after the motion for summary disposition was resolved.

21. On February 14, 2014, the Court heard oral argument on the motion for summary disposition and granted it in part and denied it in part. Specifically, the Court granted summary

disposition on Plaintiff's claim that Independent breached the contract via the covenant of good faith and fair dealing, but denied it in all other respects, finding that Plaintiff's direct breach of contract, unconscionability, and unjust enrichment claims were validly pled.

22. Judge Hathaway retired before a written order on Independent's motion for summary disposition could be entered. The case was reassigned to the Honorable Muriel D. Hughes.

23. The Parties each submitted and objected to the other's proposed written orders on Independent's motion for summary disposition.

24. On July 24, 2014, the Court held a hearing on the Parties' competing written orders and entered an order granting in part and denying in part Independent's motion for summary disposition.

25. On August 14, 2014, Independent applied to the Michigan Court of Appeals for leave to appeal the order on its motion for summary disposition. The appeal was assigned docket number 323167.

26. The same day, Independent moved the Circuit Court to stay all proceedings pending the outcome of the application for leave to appeal. Plaintiff opposed the motion to stay.

27. On September 12, 2014, the Circuit Court heard oral argument on the motion to stay and granted it, ordering that the case be stayed pending a ruling from the Court of Appeals on the application for leave to appeal.

28. On September 17, 2014, the Circuit Court entered a written order staying the case.

29. Plaintiff opposed Independent's motion for leave to appeal and Independent submitted a reply brief.

30. On February 10, 2015, the Court of Appeals granted the application for leave to appeal.

31. On April 7, 2015, Independent submitted its Brief of Appellant.

32. On May 6, 2015, Plaintiff submitted her Brief of Appellee.

33. On May 27, 2015, Independent submitted its Reply Brief of Appellant.

34. On January 12, 2016, the Court of Appeals heard oral argument on the appeal.

35. On January 21, 2016, the Court of Appeals entered its decision affirming the order of this Court to deny Independent's motion for summary disposition as to Plaintiff's claims for direct breach of contract, unconscionability, and unjust enrichment.

36. On March 17, 2016, the Court held a conference to discuss scheduling.

37. On April 6, 2016, the Court entered two orders, one lifting the stay and one setting a schedule for the remainder of the litigation.

38. During this time period, the Parties informally agreed to focus efforts on settlement, including Independent's production of sample data and Plaintiff's expert's analysis of such data for the purpose of estimating class wide alleged damages.

39. Over the next several months, Independent provided sample data regarding millions of overdraft transactions during the Class Period – including data about individual transactions over several months and aggregate data – and Plaintiff's data expert, Arthur Olsen, analyzed such data and calculated probable class-wide damages.

40. On July 20, 2016, the Parties participated in a mediation with William Jack, Esq. serving as mediator. Although the mediation was unsuccessful, the Parties laid the groundwork for future negotiations.

41. Over the next several months, Independent provided additional sample data which Mr. Olsen analyzed and incorporated into his analysis. On multiple occasions, Mr. Olsen participated in conference calls with counsel for Independent wherein he explained his analysis and results.

42. Although the Parties were in active negotiations, Plaintiff served additional written discovery requests on Independent seeking information she would need to support a motion for class certification if settlement was unsuccessful.

43. Plaintiff also circulated her proposals for an electronically stored information (“ESI”) protocol and a confidentiality stipulation pertaining to documents and information. These agreements were negotiated and subsequently entered by the Court.

44. On September 7, 2016, the Parties held a settlement conference with the Court. Although no settlement was reached, the Parties continued to negotiate. The Court revised the case schedule to account for the continued negotiations.

45. On October 17, 2016, Plaintiff served a Rule 2.306(B)(5) deposition notice on Independent.

46. On October 17, 2016, the Parties agreed to stay formal discovery while they continued to negotiate. Independent agreed that it would not oppose class certification if settlement talks were unsuccessful.

47. On November 29, 2016, the Parties held another settlement conference with the Court, with client representatives present. Although no settlement was reached, progress was made.

48. On December 21, 2016, after several back and forth offers, the Parties agreed to a settlement framework that, subject to a mutually agreeable written Settlement Agreement and

subject to preliminary approval and final approval by the Court as required by Michigan Court Rule 3.501, reflected the Parties' good faith intention to fully, finally, and forever resolve, discharge, and release all rights and claims of the Settlement Class.

49. On January 5, 2017, the Parties filed a joint notice of settlement with the Court. Thereafter, the Parties met and conferred and worked to finalize the Settlement Agreement, proposed class notices, and preliminary approval papers. The Parties also have made arrangements for the full class data to be transmitted to Mr. Olsen so he may analyze it and ascertain who is in the Settlement Class and each member's damages (according to the allocation methodology set forth in the Agreement).

50. The Settlement Agreement was formally executed on February 28, 2017.

#### **The Settlement Terms**

51. The Settlement requires Independent to deposit \$2.215 million into an Escrow Account within 14 days of this Court's Final Approval of the Settlement. That deposit will create the Settlement Fund that will be used to pay: (i) all distributions of money to the Settlement Class, including cash account credits for current customers and checks to all former customers; (ii) any Court-ordered award of legal fees and expenses of Class Counsel; and (iii) any Court-ordered Service Awards to Plaintiff.

52. In addition to the \$2.215 million Settlement Fund, Independent is responsible for paying all costs and fees associated with Class Notice and Settlement Administration.

53. Based on our prior experience overseeing the administration of similar settlements, these amounts are likely to exceed \$100,000.

54. All identifiable Settlement Class Members who experienced an Additional Overdraft Amount will receive *pro rata* distributions from the Net Settlement Fund, provided

they do not opt-out of the Settlement. Agreement Section XIII.

55. Importantly, Settlement Class Members do *not* have to submit claim forms or take any other affirmative step to receive relief under the Settlement. The amount of their *pro rata* distributions will be determined by Plaintiff's expert through analysis of Independent's electronic data. This is the gold standard of class action settlements.

56. The Additional Overdraft Amount analysis determines which Independent Account holders were assessed Additional Overdrafts that would not have been assessed if the Bank had used an alternative posting sequence or method for posting Debit Card Transactions other than High-to-low Debit Card Transaction Sequencing, and how much in Additional Overdrafts those Account holders were assessed. The calculation involves a multi-step process that is described in detail in the Agreement. Agreement ¶ 100.

57. The Net Settlement Fund – which will be distributed *pro rata* among all Settlement Class Members who experienced an Additional Overdraft Amount – is equal to the Settlement Fund, plus interest earned (if any), less Court-awarded attorneys' fees and costs and Service Awards for the Plaintiff.

58. Within 30 days after the Effective Date, Independent and the Settlement Administrator will distribute the Net Settlement Fund to all eligible Settlement Class Members who do not timely opt-out of the Settlement and who are entitled to a distribution.

59. Payments to eligible Settlement Class Members who are Current Account Holders will be made by the Bank crediting such Settlement Class Members' Accounts, and notifying them of the credit. Independent will then be entitled to a reimbursement for such credits from the Net Settlement Fund.

60. Past Account Holders will receive payments from the Net Settlement Fund by checks mailed by the Settlement Administrator.

61. Any uncashed or returned checks will remain in the Settlement Fund for one year from the date the first distribution check is mailed by the Settlement Administrator, during which time the Settlement Administrator will make reasonable efforts to effectuate delivery of the Settlement Fund Payments.

62. The Settlement Administrator selected by the Parties (Epiq Systems) is expert at these processes and has handled other settlements in cases pertaining to overdraft fees, with an admirable record of making sure funds are paid to class members.

63. In exchange for the benefits conferred by the Settlement, all Settlement Class Members who do not opt-out will be deemed to have released Independent from claims related to the subject matter of the Action. The detailed release language can be found in Section XIV of the Agreement.

64. Either Party may terminate the Settlement if the Settlement is rejected or materially modified by the Court or an appellate court, as provided in the Settlement Agreement. Independent also has the right to terminate the Settlement if the number of Class Members who timely opt-out of the Class constitutes a significant percentage of the Class or the Settlement amount, as agreed on by the Parties in writing.

#### **The Notice Program**

65. Epiq Systems will serve as the Settlement Administrator for the Settlement. The Notice Program (Agreement Section VIII) is designed to provide the best notice practicable, and is tailored to take advantage of the information Independent has available about the Settlement Class Members.

66. Because of the address records in the possession of the Bank for all current and former customers, the Notice Program is reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the Action, the terms of the Settlement, Class Counsel's Fee Application and request for a Service Award for Plaintiff, and their rights to opt-out of the Settlement Class or object to the Settlement.

67. The Notices and Notice Program constitute sufficient notice to all persons entitled to notice and satisfy all applicable requirements of law, including, but not limited to, Michigan law, and the constitutional requirement of due process.

68. The Notice Program is comprised of two parts: (1) direct email notice ("Emailed Notice") or postcard mail notice ("Mailed Notice") to all identifiable Class Members; and (2) a "Long Form Notice" with more detail than the direct mail or publication notices, that will be available on the Settlement Website ([www.IndependentOverdraftSettlement.com](http://www.IndependentOverdraftSettlement.com)) and via mail upon request.

69. All forms of Notice to the Settlement Class will include, among other information: a description of the Settlement; a date by which Settlement Class Members may exclude themselves from or "opt-out" of the Settlement Class; a date by which Settlement Class Members may object to the Settlement; the date on which the Final Approval Hearing will occur; the address of the Settlement Website at which Settlement Class Members may access the Agreement and other related documents and information.

70. In addition to the information described above, the Long Form Notice will also describe the procedure Settlement Class Members must use to opt-out of the Settlement, object to the Settlement, object to Class Counsel's application for attorneys' fees and expenses, or object to the Service Award proposed for Plaintiff. All opt-outs and objections must be

postmarked before the Opt-out Deadline. For an objection to be valid, it must include the information specified in paragraph 90 of the Agreement.

71. All costs associated with notifying the Class and administering the Settlement will be paid by Independent.

#### **Service Awards and Attorneys' Fees and Costs**

72. Class Counsel will seek and Independent will not oppose a Service Award of \$10,000 for named Plaintiff Linda Glaske. This award will compensate the named Plaintiff for her time and effort in the Action, and for the risk she undertook in prosecuting the Action against Independent. Such an award is commonplace in successful class action settlements.

73. Independent will not oppose Class Counsel's request for attorneys' fees of up to one-third of the Settlement Fund, plus reimbursement of litigation costs and expenses. The Parties negotiated and reached agreement regarding attorneys' fees and costs only after reaching agreement on all other material terms of this Settlement. Thus, the amount of compensation to be sought by Class Counsel at Final Approval will not exceed the percentage range regularly sought for contingency work in Michigan.

#### **Considerations Supporting Settlement**

74. Settlement negotiations were informed by our experience in numerous similar class action cases. In particular, we had the benefit of years of experience and a familiarity with the facts of this case as well as with other cases involving improper overdraft fees. For instance, Mr. Webb serves on the Plaintiffs' Executive Committee of MDL No. 2036, styled *In re: Checking Account Overdraft Litigation*, Case No. 1:09-md-02036-JLK (S.D. Fla.), which involved litigation against numerous banks regarding their overdraft practices. Mr. Webb has also litigated several overdraft-related cases outside of the MDL, including notable settlements in

*Jenkins v. Trustmark Bank*, No. 12-cv-380 (S.D. Miss.), and *Lundsford v. Woodforest Bank*, No. 12-cv-103 (N.D. Ga.).

75. We were both also class counsel in *Faris v. Flagstar Bank*, No. 15-145287-CZ (Oakland County Circuit Court), which recently settled on terms very attractive to the class.

76. As detailed above, we conducted a thorough investigation and analysis of Plaintiff's claims and Independent's defenses, and engaged in substantial document and data discovery, motion practice, and a full blown appeal. This investigation and our research of Michigan substantive law enabled us to gain an understanding of the evidence related to central legal and factual issues in the case as they related to class certification and the merits of Plaintiff's and the Settlement Class' claims, and prepared us for well-informed settlement negotiations.

77. We have a thorough understanding of the practical and legal issues Plaintiff and the Settlement Class would continue to face litigating these claims against Independent based, in large part, on similar claims challenging other banks' overdraft fee practices prosecuted in MDL No. 2036 and elsewhere.

78. We were well-positioned to evaluate the strengths and weaknesses of Plaintiff's and the Settlement Class' claims, as well as the appropriate basis upon which to settle them.

79. While we are confident in the strength of our case, we are also pragmatic in our awareness of the various defenses available to Independent and the risks inherent to litigation. Throughout the litigation, Independent vigorously denied that it was liable to Plaintiff and it asserted various defenses which, if Independent prevailed, would have precluded, or seriously limited, any recovery for Plaintiff and the Settlement Class.

80. For example, if the action continued, Independent would have continued to assert that its account agreement authorized its practices. If the Court (or an appellate court) agreed with this argument, Plaintiff and the Settlement Class would have lost their claims and would have been precluded from recovering anything.

81. Even if Plaintiff prevailed on the Bank's contract argument, Plaintiff still faced a real risk that she would not succeed because Independent would have continued to assert that the Bank was not liable for Plaintiff and the Settlement Class members overdrawing their accounts.

82. Specifically, Independent would continue to argue that it properly disclosed its processing practices and that Plaintiff and the Settlement Class were themselves at fault for any overdrafts.

83. Without the Settlement, Plaintiff would have to succeed on class certification, summary disposition, and at trial and on any post-trial appeals. Even if Plaintiff managed to navigate this minefield and prevailed at trial and on appeal, any recovery could be delayed for several years.

84. The Settlement, by contrast, provides relief to Settlement Class Members without further delay.

85. Moreover, the Settlement was the result of intensive, arm's-length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual issues of this case following a mediation and several settlement conferences.

86. Here, based on Independent's transactional data, the \$2.215 million Settlement Fund and costs of Notice and Settlement Administration represent in excess of fifty percent (50%) of the amount of damages Plaintiff and the Settlement Class Members were likely to seek from a jury at trial, *if* they were successful in all respects through trial and any appeals.

87. There can be no doubt that this Settlement is a fair and reasonable recovery for the Settlement Class in light of the Bank's defenses, and the challenging and unpredictable path of litigation Plaintiff and all Settlement Class Members would have faced absent the Settlement.

88. We do not hesitate to enthusiastically support the Settlement as an outstanding result for Plaintiff and the Settlement Class.

### **Class Certification Requirements**

89. Certification under Michigan Court Rule 3.501(A) requires that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

90. Here, the numerosity requirement of Rule 3.501(A)(1)(a) is satisfied because the Settlement Class consists of tens of thousands of people and joinder of all such persons is impracticable.

91. Rule 3.501(A)(1)(b)'s commonality requirement is satisfied because there are many questions of law and fact common to the Settlement Class regarding Independent's High-to-low Debit Card Transaction Sequencing practice. Moreover, liability questions common to all Settlement Class Members substantially outweigh any possible issues that are individual to each such Class Members. For example, each Settlement Class Member's relationship with Independent arises from a form account agreement that is the same or substantially similar in all relevant respects to other Class Members' agreements.

92. Plaintiff's claims are reasonably coextensive with those of the absent Settlement Class Members, such that Rule 3.501(A)(1)(c)'s typicality requirement is satisfied. Indeed, Plaintiff is typical of absent Settlement Class Members because she was subjected to the same Independent practices, claims to have suffered from the same injuries, and because she will equally benefit from the relief provided by the Settlement.

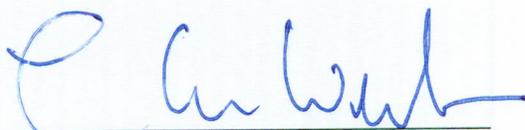
93. Plaintiff also satisfies the adequacy of representation requirement under Rule 3.501(A)(1)(d) because Plaintiff's interests are coextensive with, not antagonistic to, the interests of the Settlement Class, Plaintiff and absent Class Members have an equally great interest in the relief offered by the Settlement, and absent Class Members have no diverging interests.

94. Furthermore, Plaintiff is represented by qualified and competent Class Counsel with extensive experience and expertise prosecuting complex class actions, including consumer actions similar to the instant case. We have devoted substantial time and resources to vigorous litigation of the Action from inception through the date of the Settlement.

95. Finally, Rule 3.501(A)(1)(e) is satisfied because resolution of hundreds of thousands of claims in one action is far superior to individual lawsuits, as it promotes consistency and efficiency of adjudication.

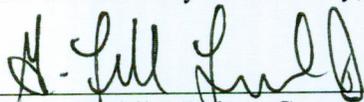
96. For these reasons, we enthusiastically urge the Court to preliminarily approve the Settlement and schedule the various deadlines through Final Approval. The sooner this process begins, the sooner funds will be in the hands of thousands of Settlement Class Members.

FURTHER AFFIANT SAYETH NOT.



E. Adam Webb

Sworn to and subscribed before me  
this the 28th day of February, 2017.



Notary Public, Fulton County, Georgia

My commission expires: 10/27/20

