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FIRST BANK OF DELAWARE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMBER KRISTI MARSH and STACIE EVANS, individually and on behalf of a class of similarly situated persons,

Plaintiffs,

v.

ZAAZOOM SOLUTIONS, LLC, a Delaware Limited Liability Company; **ZAZA PAY LLC**, a Delaware Limited Liability Company *dba* Discount Web Member Sites, LLC, Unlimited Local Savings, LLC, Web Discount Club, Web Credit Rpt. Co., MegaOnlineClub, LLC, and RaiseMoneyForAnything; **MULTIECOM, LLC**, a Colorado Limited Liability Company *dba* Online Discount Membership, Web Discount Company, and Liberty Discount Club; **ONLINE RESOURCE CENTER, LLC**, a Delaware Limited Liability Company *dba* Web Coupon Site, USave Coupon, and UClip; **FIRST BANK OF DELAWARE**, a Delaware Corporation; **FIRST NATIONAL BANK OF CENTRAL TEXAS**, a Texas Corporation; **JACK HENRY & ASSOCIATES, INC.**, a Delaware Corporation *dba* PROFITSTARS; **AUTOMATED ELECTRONIC CHECKING, INC.**, a Nevada Corporation; **DATA PROCESSING SYSTEMS, LLC**, a Delaware Limited Liability Company; and **DOES 1-10**, inclusive,

Defendants.

CASE NO. 3:11-cv-05226-WHO

NOTICE OF MOTION AND MOTION FOR GOOD FAITH SETTLEMENT DETERMINATION AND CONFIRMATION OF CONTRIBUTION PROTECTION TO FIRST BANK OF DELAWARE

Date: January 15, 2014
Time: 2:00 p.m.
Courtroom: 2

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on January 15, 2014 at 2:00 p.m., or as soon thereafter as this matter may be heard before the Honorable William H. Orrick in Courtroom 2 of the above-entitled Court located at 450 Golden Gate Avenue, San Francisco, California, 94102, Defendant First Bank of Delaware ("FBD") will and hereby does move the Court for an order determining that it has made a good faith settlement with Plaintiff Stacie Evans individually and on behalf of a putative Settlement Class of alleged similarly situated persons ("Plaintiffs"), and barring claims against FBD for contribution and/or equitable indemnity from non-settling defendants.

This motion is brought pursuant to California Code of Civil Procedure sections 877 and 877.6 (because the remaining negligence claim against FBD is a state law claim heard under this Court's supplemental jurisdiction), and is brought concurrently with Plaintiffs' Unopposed Motion For Preliminary Approval of Class Action Settlement, filed this same date.

The settlement between Plaintiffs and FBD seeks to resolve Plaintiffs' claim against FBD as alleged in Plaintiffs' Third Amended Complaint, filed on April 10, 2012. Currently, the sole remaining claim alleged against FBD is common law negligence. Through this Motion FBD seeks a determination that the settlement is made in good faith and that all potential claims of non-settling defendants for contribution and/or equitable indemnity against FBD based on the matters addressed in the settlement are barred. The non-settling defendants from which contribution protection is sought include ZaaZoom Solutions, LLC, ZaZa Pay LLC, MultiECom, LLC, Online Resource Center, LLC, Jack Henry & Associates, Inc., Data Processing Systems, LLC, Automated Electronic Checking, Inc., and First National Bank of Central Texas.

This Motion is based on this Notice of Motion, Memorandum of Points and Authorities in Support of Motion for Good Faith Settlement Determination and Confirmation of Contribution Protection to First Bank of Delaware, the declarations of Joseph J. Manion, Jr. and Paul J. Hall in support thereof, all pleadings and papers on file herein, and any other oral or documentary evidence presented to the Court at the time of the hearing.

Dated: December 11, 2013

Respectfully submitted,

DLA PIPER LLP (US)

By: /s/ Paul J. Hall
PAUL J. HALL

Attorney for Defendant
FIRST BANK OF DELAWARE

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Defendants.

CASE NO. 3:11-cv-05226-WHO

MOTION FOR GOOD FAITH SETTLEMENT DETERMINATION AND CONFIRMATION OF CONTRIBUTION PROTECTION TO FIRST BANK OF DELAWARE

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

First Bank of Delaware ("FBD") is a tertiary actor in this case, having no customer or contractual relationship with Plaintiffs or the putative class they seek to represent. Pending settlement, Plaintiffs assert only one remaining claim against FBD for common law negligence. That claim hangs by a thin thread, weathered by FBD's procedural, factual and legal defenses and the likelihood that FBD would prevail on summary judgment and in its opposition to certification of a class for purposes of discovery, litigation and trial on the merits. In this context and after protracted, adversarial, and mediator-assisted negotiations, culminating in acceptance of the mediator's proposal, Plaintiff Stacie Evans and FBD agreed to a non-reversionay, all-in payment to Plaintiff and the Settlement Class by FBD of $527,750, subject to the approval of this Court.

FBD now seeks an order pursuant to California Code of Civil Procedure sections 877 and 877.6 determining good faith settlement and confirming contribution protection against non-settling defendants. The settlement meets California's good faith requirement because it is within "the ballpark" of reasonableness in light of (i) FBD's proportional liability as a tertiary actor in the alleged misconduct, and robust procedural, factual and legal defenses, (ii) FBD's operational status and insurance coverage, and (iii) the nature of the settlement as an adversarial, mediator-facilitated process demonstrating lack of collusion, fraud or other bad faith conduct. *See Tech–Bilt, Inc. v. Woodward–Clyde Associates*, 38 Cal.3d 488, 499-500 (1985).

FBD's attenuated role, if any, in the alleged misconduct, along with robust factual, legal and procedural defenses, supports a finding of good faith settlement. In the Third Amended Complaint ("TAC"), Plaintiffs aver a scheme in which allegedly unscrupulous internet merchants obtain consumers' personal information from payday loan websites in order to enroll consumers in discount coupon services without their consent. Plaintiffs allege that these internet merchants collected payment for the coupon service memberships using the consumers' personal information to generate remotely created checks ("RCCs")[1], drawn on consumers' bank accounts

[1] A RCC is a financial transaction in which a person with a checking account authorizes a merchant or other company to create a RCC drawn on that person's bank account for the purpose of paying for a purchase of goods or services. RCCs are commonly used to pay for purchases

without their consent. These internet merchants, defendants ZaaZoom Solutions, LLC ("ZaaZoom"), ZaZa Pay LLC ("ZaZa Pay"), MultiECom, LLC ("MultiECom") and Online Resource Center, LLC ("ORC") (collectively, the "ZaaZoom Defendants"), are the primary actors, and indeed the architects, of the alleged misconduct.

Plaintiffs allege that check processing defendants Jack Henry & Associates, Inc. ("Jack Henry"), Data Processing Systems, LLC ("DPS"), and Automated Electronic Checking, Inc. ("AEC") (collectively "Payment Processor Defendants") contracted with ZaaZoom Defendants to generate, process and deposit the RCCs into Payment Processor Defendants' accounts for the benefit of the ZaaZoom Defendants. Payment Processor Defendants are in privity with the ZaaZoom Defendants and thus are "secondary" actors in the alleged misconduct.

FBD, along with Defendant First National Bank of Central Texas ("FNBOCT") (collectively, "Depository Banks"), are tertiary actors. The Depository Banks have no link of privity or other legal duty to Plaintiffs or even to the ZaaZoom Defendants. Rather, the Payment Processor Defendants maintained business accounts at the Depository Banks in which they deposited the RCCs for the benefit of the ZaaZoom Defendants.

Furthermore, FBD advances factual, legal and procedural defenses that confirm the reasonableness of the settlement in light of FBD's exceedingly attenuated potential liability exposure in this case. *First*, evidence demonstrates that consumers affirmatively consented to enrollment in coupon memberships and payment by RCC. *Second*, even if there was some misunderstanding about the terms of enrollment, consumers had a complete and efficacious statutory remedy to seek refund of unauthorized RCCs, without litigation. *Third*, Plaintiffs cannot prevail on their negligence claim, because FBD owes no duty of care to them as third-party non-depositors. *Finally*, Plaintiffs will not be able satisfy the requirements of Rule 23(a) and 23(b)(3) to certify a class for purposes of discovery, litigation and trial on the merits. The strength of these defenses, as demonstrated below, and the likelihood of FBD prevailing on summary judgment and/or in its opposition to class certification supports a finding that the settlement is reasonable in light of FBD's potential liability exposure.

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from internet merchants, or for recurring monthly bills such as club or magazine subscriptions.

FBD's operational and financial status also support a good faith settlement determination. On October 23, 2012, FBD's stockholders approved a plan whereby FBD was dissolved, it surrendered its bank charter, sold certain assets, and its remaining assets and liabilities were transferred to a liquidating trust. FBD has been funding its defense of this lawsuit from an insurance policy with a $3 million limit for Bankers' Professional Liability ("BPL") coverage, potentially applicable to this case. This is a "wasting limits" insurance policy, meaning that attorneys' fees and costs of defense, as well as loss or settlement payments, are charged against the Policy, thus reducing its available coverage as the defense of a case progresses. This action is not the only case covered under this policy. The BPL coverage limits of the Policy are now exhausted by virtue of the defense fees and settlement costs in this action and two other matters. Declaration of Joseph J. Manion, Jr. ("Manion Decl."), ¶¶ 1-9[2] (Dkt. 201). The availability of potential excess insurance coverage is disputed, uncertain, and even if confirmed would be exhausted by the same three claims and other claims already noticed to the insurer. (*Id*. at ¶¶ 10-13.)

Taking into account all of these factors, Plaintiff Evans and FBD reached a settlement after many months of arms-length negotiations facilitated by the Honorable James L. Warren (Ret.) of JAMS and culminating in the Parties' acceptance of his mediator's proposal. FBD respectfully requests this Court to enter an order determining that the settlement was in good faith and barring contribution and indemnification claims from non-settling defendants.

II. CALIFORNIA LAW GOVERNS DETERMINATION OF GOOD FAITH FOR SETTLEMENT OF PLAINTIFFS' NEGLIGENCE CLAIM.

California Code of Civil Procedure section 877, rather than federal common law, governs determination of good faith settlement of Plaintiffs' negligence claim. Where, as here, "a district court sits in diversity, or hears state law claims based on supplemental jurisdiction, the court applies state substantive law to the state law claims." *Mason & Dixon Intermodal, Inc. v. Lapmaster Int'l*, 632 F.3d 1056, 1060 (9th Cir. 2011); *Galam v. Carmel (In re Larry's*

[2] The Manion Declaration was previously filed by Plaintiff Evans in support of the Motion for Preliminary Approval. (Dkt. 201).

Apartment), 249 F.3d 832, 837 (9th Cir. 2001) ("It is well established that [u]nder the Erie doctrine, federal courts sitting in diversity apply state substantive law" (internal quotations and citations omitted)); *Bass v. First Pac. Networks, Inc.*, 219 F.3d 1052, 1055 n. 2 (9th Cir. 2000) (federal court exercising supplemental jurisdiction over state law claim is bound to apply state substantive law). "California Code of Civil Procedure section 877 constitutes state substantive law." *Mason & Dixon Intermodal, Inc.*, 632 F.3d at 1060 (holding the district court correctly applied Section 877 as state substantive law to resolve motion to dismiss pursuant to good faith settlement); *Fed. Savings & Loan Ins. Corp. v. Butler*, 904 F.2d 505, 511 (9th Cir. 1990) (holding Section 877 constitutes substantive law). Additionally, because the procedural provisions of section 877.6 are outcome-determinative, governing the determination of good faith, they also are applicable. *Holmes v. Home Depot USA, Inc.*, 1:06-CV-01527-SMS, 2009 WL 2030898 (E.D. Cal. July 9, 2009) ("in the absence of a conflict with federal procedures or other factors giving rise to federal concerns, state settlement procedures are to be applied by federal courts to state causes of action where they are outcome-determinative"). Here, the Court has diversity jurisdiction under Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), over Plaintiffs' California common law negligence claim. Therefore, Sections 877 and 877.6 govern the determination of good faith settlement.

III. STATEMENT OF FACTS

A. The Settling Parties

1. Plaintiff Stacie Evans

Plaintiff Stacie Evans is the only Named Plaintiff signatory to the class action settlement agreement. While Plaintiff Kristi Marsh supports the settlement, she does not claim FBD was the depository bank for any allegedly unauthorized RCC debit from her account, and thus does not personally make a claim against FBD, so only Ms. Evans is an appropriate class representative of the proposed Settlement Class.

2. The Putative Class As Alleged

Plaintiffs bring this action "on their own behalves and as representatives of all persons: "a) whose checking accounts were drawn on by way of remotely created checks created by the

ZaaZoom Defendants for the Liberty Website and/or U-Clip Website and/or other online coupon or discount service operated by the ZaaZoom Defendants after May 6, 2007, and b) who never consented to the creation of a remotely created check to pay for the ZaaZoom Defendants' services on the Liberty Website and/or U-Clip Website and/or other online coupon or discount service operated by the ZaaZoom Defendants (the "Class")." (TAC, filed on April 10, 2012 (Dkt. 100), ¶ 238.) Plaintiffs also bring this action on behalf of a subclass composed of all similarly affected California residents (the "California Subclass"). (*Id*. at ¶ 239.) Class certification has yet to be adjudicated, but Plaintiff Evans and FBD seek certification of a class for purposes of settlement only ("Settlement Class").[3]

3. First Bank of Delaware

FBD, now dissolved and winding up, was a Delaware state chartered bank with branch locations in Delaware. FBD offered traditional consumer and business banking services that are not the subject of this dispute. Additionally, FBD served as a depository bank for certain check processors (the "Processors"), which in turn processed RCCs for internet merchants (the "Merchants"). FBD accepted for deposit into Processors' accounts RCCs the Processors generated, at the request of Merchants, as payment for products or services purchased by consumers on Merchants' websites. FBD engaged in this line of business for a very limited time period during part of 2010-2011, and ultimately eliminated the line of business in mid-2011. (Manion Decl. ¶¶ 1-3.)

The claims at issue in this lawsuit, arise from FBD's RCC line of business. In this lawsuit, Plaintiffs contend that FBD negligently allowed RCCs that were drawn on consumer bank accounts without their consent to be deposited with the bank into the accounts of the Payment Processor Defendants for the benefit of the ZaaZoom Defendants. Only one claim for common law negligence remains against FBD. (*Id*., ¶ 4.)

[3] FBD notes that whether class certification for settlement is appropriate, where there is an agreed compromise remedy, no need to decide a case on the merits, and no need to evaluate the manageability and superiority of a class action for trial, is a completely different question than whether class certification would be appropriate in the context of discovery and trial. *See e.g*., *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, [citation] for the proposal is that there be no trial").

On October 23, 2012, FBD's stockholders approved a plan whereby FBD was dissolved, it surrendered its bank charter, sold certain assets to another bank (but not the assets or alleged liabilities involved in this case), and transferred its remaining assets and liabilities to a liquidating trust. (*Id*. at ¶ 2.) Pursuant to Delaware law, the liquidating trust retains the right to defend this action and effectuate the dissolution and winding up of FBD. (*Id*. at ¶ 2.)

FBD has a Continental Casualty insurance policy, policy no. 425362605 ("the Policy"). The Policy includes various types of coverage, including Bankers' Professional Liability (BPL) coverage potentially applicable here. It has a $3,000,000 limit, subject to a $100,000 self-insured retention. It is a "wasting limits" policy, with defense fees charged against the Policy limits. (*Id*. at ¶¶ 6-7.) This action is not the only case covered under FBD's Policy. Two other lawsuits are also covered under the same Policy, the same BPL coverage, and the same Policy coverage year, and thus the same $3,000,000 wasting limits Policy limit. The BPL coverage limits of the Policy are now exhausted by virtue of the defense fees and settlement costs in this action and two other matters. (*Id*. at ¶¶ 8-9.)

FBD has potential excess coverage for BPL liability, but the excess carrier has reserved rights, has not acknowledged coverage, and coverage is uncertain. Further, if there were excess coverage, it would also be exhausted by the same three claims that have exhausted the primary Policy, as well as several potential claims recently noticed to the insurer. (*Id*. at ¶¶ 10-12.)

Additionally, FBD faces potential contingent liability for other unfiled claims which would also be covered under this same Policy and excess insurance, if applicable. They include claims for RCCs originated and processed by non-party internet merchants and processors (which are not at issue in this case). FBD estimates that the present action involves only about 25% of its former RCC line of business. Therefore, this case involves only about 25% of the dollar volume of claims which potentially could be asserted as "copy-cat" claims. While FBD believes that it has meritorious statute of limitations, procedural, factual and legal defenses to the claims in this or similar potential actions, it is a fact that (subject to Court approval), the proposed settlement with Plaintiffs resolves only a small portion of potential claims arising from FBD's former RCC line of business. (*Id*. at ¶ 13.)

B. The Non-Settling Parties

1. The ZaaZoom Defendants

The ZaaZoom Defendants were in the business of providing online coupon services to consumers through various Internet websites. Each of these defendants now claims to be defunct. Plaintiffs contend that the ZaaZoom Defendants registered consumers for coupon services without their knowledge or consent, after obtaining their personal information from payday loan websites. Plaintiffs allege that the ZaaZoom Defendants, with the assistance of check processors, drafted RRCs from the applicants' checking accounts payable to the ZaaZoom Defendants, without the applicants' knowledge or consent.

2. Payment Processor Defendants and Non-Party CheckSite, Inc.

Check processors act as agents for internet merchants, creating the RCCs and submitting them for deposit to a bank on behalf of the merchants. Plaintiff Evans alleges that Payment Processor Defendants helped create and deposit the RCCs in the Payment Processors' bank accounts with Depository Banks for the benefit of the ZaaZoom Defendants. AEC and DPS claim to be defunct.

CheckSite, Inc. ("CSI") is the only check processor relevant to the Evans RCCs deposited at FBD. Landmark Clearing, Inc. ("Landmark") was a check processor responsible for processing Settlement Class Members' RCCs deposited at FBD. CSI and Landmark are not defendants, but operated in the same manner as the Payment Processor Defendants. ZaaZoom Defendants used AEC, CSI and Landmark to create and deposit Settlement Class Members RCCs (including the Evans' RCCs) with FBD.

3. First National Bank of Central Texas

Defendant FNBOCT is a Texas corporation and a national bank based in Waco, Texas. Plaintiffs allege that the Payment Processor Defendants deposited RCCs in their accounts at FNBOCT for the benefit of the ZaaZoom Defendants.

C. Procedural History and Settlement

Plaintiffs originally filed this case against the ZaaZoom Defendants, on May 9, 2011, in the San Francisco Superior Court, Case No. CGC-11-510815. Plaintiffs amended their complaint

twice, adding all of the current Defendants in their Second Amended Complaint on August 30, 2011. On October 28, 2011, the case was removed to this Court. The Court has subject matter jurisdiction under the Class Action Fairness Act of 2005, 28 U.S.C. Sections 1332(d). After several rounds of motions to dismiss, the sole remaining claim against the Depository Banks was for common law negligence. Defendants all answered Plaintiffs' Third Amended Complaint.

On March 8, 2013, Plaintiffs and all the Defendants attended private mediation before the Honorable James L. Warren (Ret.) of JAMS. After a full day of mediation, the parties did not settle. Facilitated by Judge Warren, Plaintiffs and FBD only continued settlement discussions. After many months and half-a-dozen rounds of lengthy conference calls with Judge Warren, on June 20, 2013 Plaintiff Evans and FBD accepted Judge Warren's Mediator's Proposal to settle the case for a non-reversionary, all-in payment to the proposed Settlement Class by FBD of $527,750, subject to the approval of this Court. (Hall Decl. ¶¶ 1-4; Manion Decl., ¶ 5.)

IV. THE COURT SHOULD APPROVE THE SETTLEMENT TO BE IN GOOD FAITH AND CONFIRM CONTRIBUTION PROTECTION TO FBD.

In the wake of its settlement with Plaintiff Evans for the putative Settlement Class, FBD now seeks contribution protection from non-settling defendants. California Code of Civil Procedure section 877 provides such protection in a partial settlement to settlors where, as here, the settlement is made in good faith. Section 877 is applicable here because state law, rather than federal common law, governs determination of good faith for settlement of Plaintiffs' state law claims. *See* Section II, *supra*. The settlement meets California's good faith requirement because it is within "the ballpark" of reasonableness in light of (i) FBD's proportional liability as a tertiary actor in the alleged misconduct, and robust procedural, factual and legal defenses; (ii) FBD's operational status and insurance coverage; and (iii) the nature of the settlement as an adversarial, mediator-facilitated process demonstrating lack of collusion, fraud or other bad faith conduct. *See* Section III(A), *infra*. Thus, this Court should confirm contribution protection to FBD.

A. The Court Should Confirm Contribution Protection Under Section 877.

FBD is entitled to a determination that its settlement with Plaintiff Evans was entered into in good faith, warranting protection from any contribution or indemnification claims brought by

non-settling defendants. Section 877 provides that, where partial settlements are entered into before trial and "in good faith," the settling defendants are discharged from "all liability for any contribution to any other parties." Cal. Code Civ. Proc. §§ 877, 877(b). Section 877.6 and the California Supreme Court's *Tech-Bilt* decision guide the determination of whether a settlement meets the "good faith" requirement stated in Section 877. Parties opposing a settlement "have the burden of proof" to establish any "lack of good faith." Cal. Code Civ. Proc. § 877.6(d). To meet that burden, a party opposing settlement must establish that the settlement is "so far out of the ballpark" of reasonableness as to be inequitable. *Tech–Bilt, Inc.*, 38 Cal.3d at 499-500.

In *Tech-Bilt*, the California Supreme Court explained that "the ballpark" of good faith is determined by assessing a range of values based on the information available at the time of settlement, encompassed by the following six factors: (1) a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability; (2) the amount paid in settlement; (3) the allocation of settlement proceeds among plaintiffs; (4) a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial; (5) the financial conditions and insurance policy limits of settling defendants; and, (6) the existence of collusion, fraud or tortious conduct aimed to injure the interests of non-settling defendants. *Id.* at 499. The California Supreme Court explained further that "bad faith is [not] established by a showing that a settling defendant paid less than his theoretical proportionate or fair share" because such a rule would unduly discourage settlements. *Id.*

As discussed below, under the *Tech-Bilt* factors, the settlement now before the Court is a good faith settlement that fully justifies contribution protection. *First*, with respect to factors 1 - 4, the settlement amount is not unreasonable in light of FBD's proportional liability, as a tertiary actor with strong procedural, factual and legal defenses to the one pending claim. *Second*, regarding factor 5, FBD is dissolved and winding up its business; drawing upon an exhausted insurance policy to fund its defense to this lawsuit. *Finally*, with respect to factor 6, there are no allegations of collusion or bad faith conduct and the settlement emerged from lengthy, arms-length, mediator-facilitated negotiations, in which all other defendants initially participated.

1. The Settlement Is Reasonable and Representative of FBD's Proportional Liability.

Plaintiff Evans and FBD settled the sole remaining claim of common law negligence for $527,750.[4] (Hall Decl., ¶ 4, Ex. 1.) This is a great result for the Settlement Class in light of the parties' reasonable assessment of FBD's potential liability during mediation. The ultimate yardstick of good faith is whether the settlement is ***grossly disproportionate*** to what a reasonable person at the time of settlement would estimate the settlor's liability to be:

> A settlement does not lack good faith solely because the settling tortfeasor pays less than his or her theoretical proportional or fair share. Discounting a settling tortfeasor's proportional share is appropriate because a plaintiff's damages are often speculative, and the probability of legal liability therefor is often uncertain or remote.... Practical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement.
>
> In the end, the ultimate determinant of good faith is whether the settlement is ***grossly disproportionate*** to what a reasonable person at the time of settlement would estimate the settler's liability to be. A 'good faith' settlement does not call for perfect or even nearly perfect apportionment of liability. In order to encourage settlement, it is quite proper for a settling defendant to pay less than his proportionate share of the anticipated damages. What is required is simply that the settlement not be ***grossly disproportionate*** to the settlor's fair share.

PacifiCare of Cal. v. Bright Med. Associates, Inc., 198 Cal. App. 4th 1451, 1464-65 (2011) (emphasis added and internal quotations and citations omitted); *Cahill v. San Diego Gas & Elec. Co.*, 194 Cal. App. 4th 939, 968 (2011), (settlement of 1/2 of 1% of potential damages was within ballpark based on facts known at time of settlement). The strength of FBD's defenses informs evaluation of liability. Not only is FBD a tertiary actor in the alleged misconduct, but it possesses complete procedural, factual and legal defenses and, in the absence of settlement, would likely prevail on summary judgment and in its opposition to class certification.

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[4] Regarding *Tech-Bilt* factor 1, at settlement, Plaintiff's total recovery was the same as its settlement with FBD, *e.g.*, $527,750. To date, Plaintiffs has not recovered from any other defendants. Regarding *Tech-Bilt* factor 3 (*e.g.*, the allocation of proceeds among plaintiffs), the settlement proceeds will be distributed among Settlement Class as follows: "The Settlement Administrator shall make a single Cash Payment from the Settlement Fund of the lesser of up to three monthly Membership Fees or sixty dollars ($60) to each Settlement Class Member who submits a completed Claim Form to the Settlement Administrator during the Claim Period. If Cash Payments exceed the Net Settlement Amount then Cash Payments, calculated using the above formula, will be reduced pro rata such that total Cash Payments equals the Net Settlement Amount. The precise Cash Payment shall depend on the claims rate." (Hall Decl., Ex. 1, ¶ 44.)

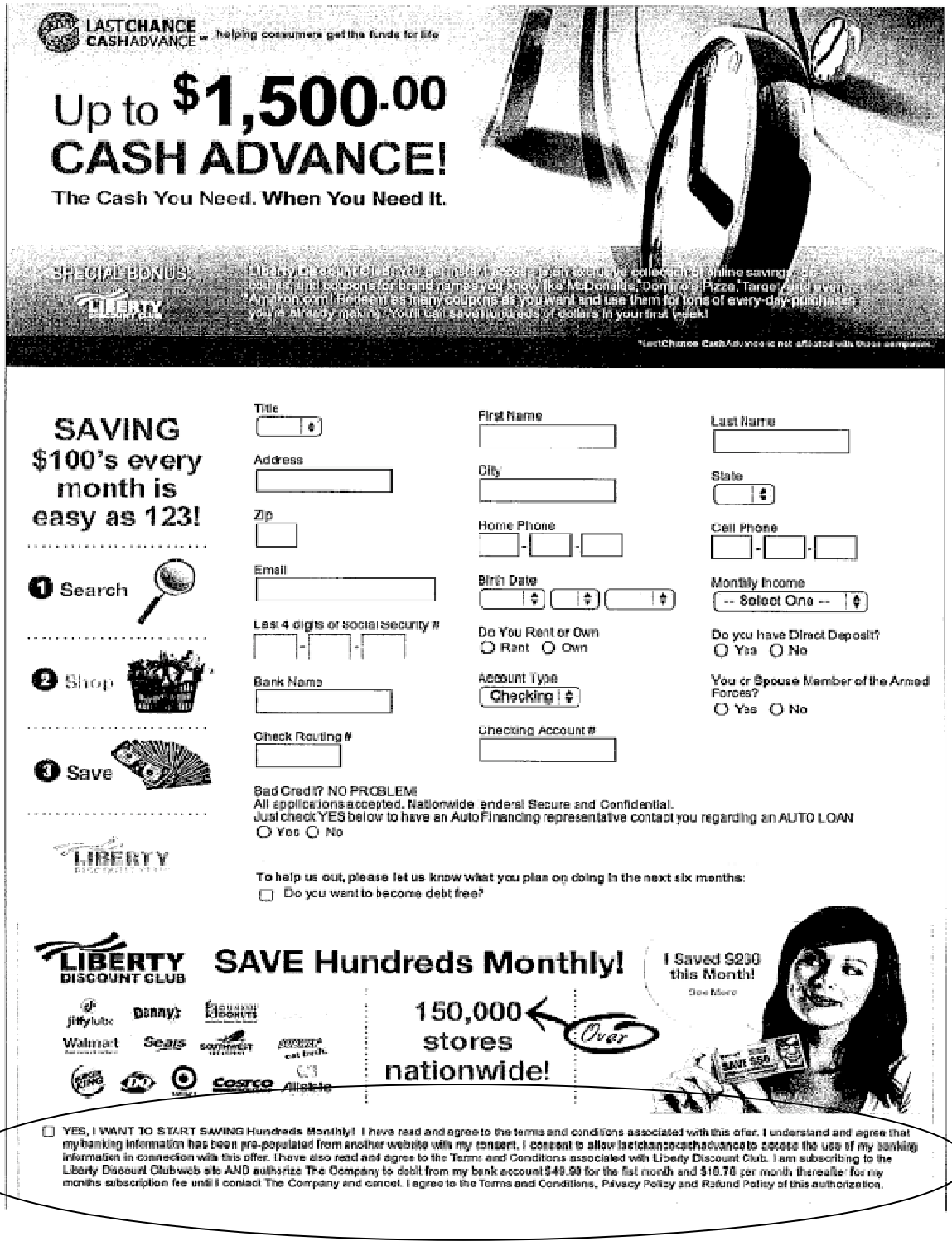
If approved by the Court, the putative Settlement Class will receive certification for settlement purposes only without adversary class certification procedures. Class Members will receive, upon submission of a proof of claim, payment of three months of Membership Fees paid to the ZaaZoom Defendants, or $60, whichever is less. Since most of the Membership Fees at issue were at the level of $19.99 per month or less, this would give Settlement Class Members reimbursement in most cases for up to three months of Membership Fees. The strength of FBD's defenses, discussed below, shows the reasonableness of the settlement in light of the risk-adjusted value of the case against FBD. *See* Sections III(B)(1)(a)-(d), *infra*.

a. **The Evans Internet Transactions Show Clear Contracts, Disclosed Charges, and Intentional Purchase.**

Plaintiffs claim that FBD was negligent in preventing unauthorized RCC withdrawals from Ms. Evans' account because FBD knew or should have known of suspicious circumstances surrounding the business activities of the ZaaZoom Defendants and CSI. However, the Evans transactions reveal that the terms of the offers were clearly disclosed, Ms. Evans intentionally selected the offers and agreed to payment. (See Hall Decl., Ex. 2 [Evans RCCs dated 10/22/10, 11/3/2010, and 12/3/10].) FBD cannot be negligent for failing to prevent legitimate transactions.

i. <u>The October 22, 2010 Last Chance Cash Advance Transaction</u>

On October 22, 2010, Ms. Evans visited the Last Chance Cash Advance website and accepted an offer from Liberty Discount Club ("Liberty") to subscribe to a coupon service. The Liberty offer ***required Ms. Evans to affirmatively check the box to accept.*** The offer expressly stated that Ms. Evans' banking information had been pre-populated from the payday lending website and that, by accepting the offer, she authorized debits from her account to pay Liberty. (Hall Decl., Ex. 3, p. 27 [ZaaZoom Solutions' Motion to Dismiss in *Marsh et al. v. Moe Tassoudji, et al.*, District of Arizona, Case No. 2:12-cv-00915-DKD ("ZaaZoom MTD")].) The offer authorized by the ZaaZoom Defendants to be posted on the Last Chance Cash Advance website in October 2010 stated as follows:



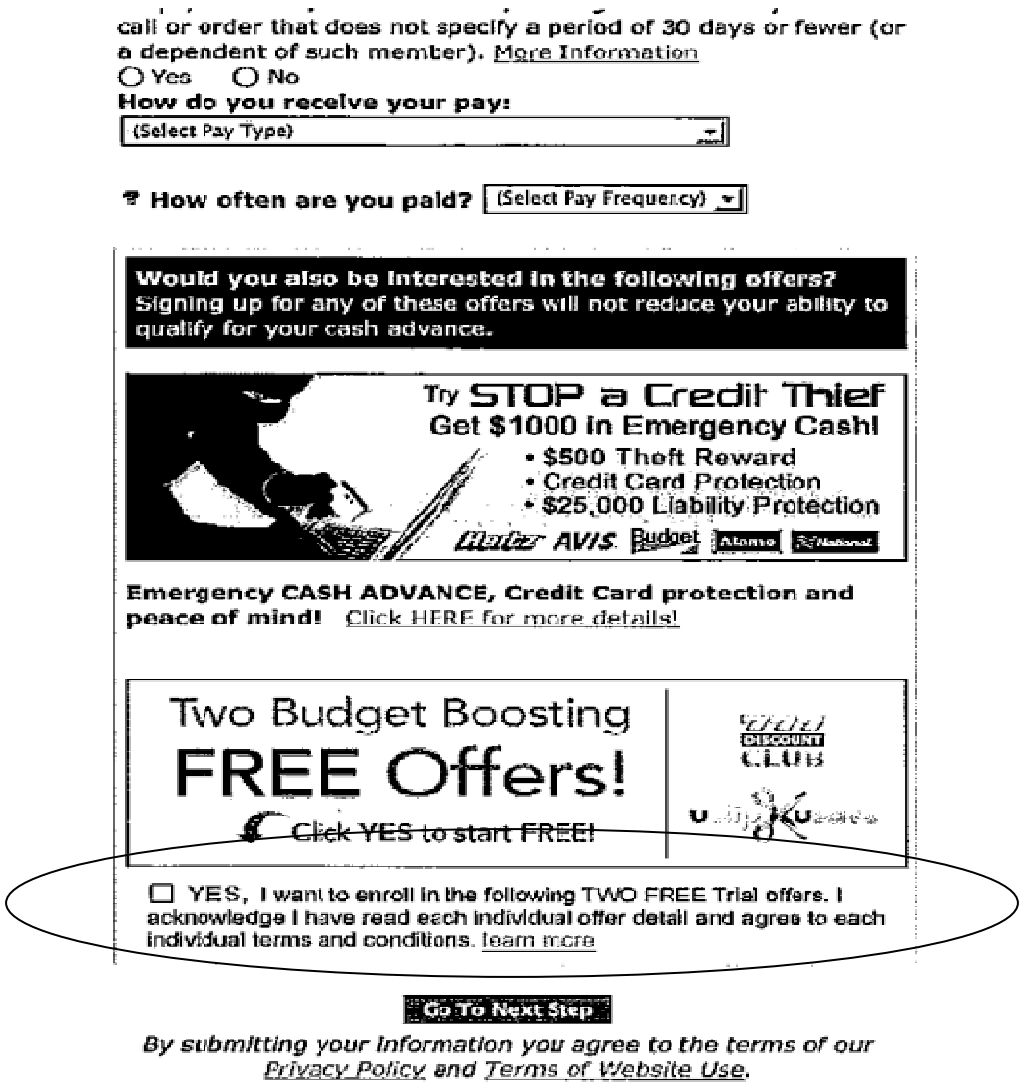
(*Id.*)

Ms. Evans then received two separate emails to the email address she provided confirming her Liberty Discount Club purchase and providing cancellation information for the purchase. (*Id.*, Ex. 3, p.8, lns. 20-21) According to the TAC, Liberty debited Ms. Evans' account by an RCC on

October 25, 2010. (See TAC, ¶ 227) This transaction did not involve FBD, but is relevant to Ms. Evans' overall claims that she did not consent to any of the disputed RCCs.

ii. The October 22, 2010 Payday.com Transaction

On October 22, 2010, Ms. Evans visited another payday lending site, Payday.com, where she received the following joint 777Discount/UClip offer as published on 300Payday.com:



(Hall Decl., Ex. 3, p. 30 [ZaaZoom MTD.)

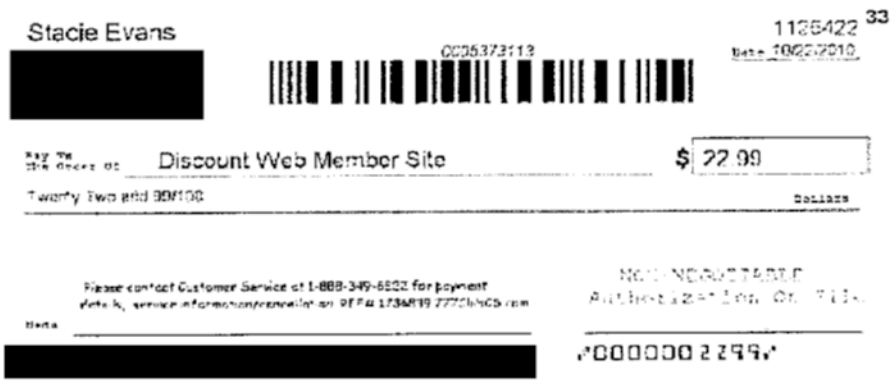
She affirmatively selected "YES, I want to enroll in the following TWO FREE Trial offers, I acknowledge I have read each individual offer detail and agree to each individual terms and conditions." The offer contains a "learn more" link that explains charges and terms. The offer also expressly states that, "By submitting your Information you agree to the terms of our

Privacy Policy and Terms of Website Use," which were links within the offer. The Terms confirm billing, cancellation and refund policies.

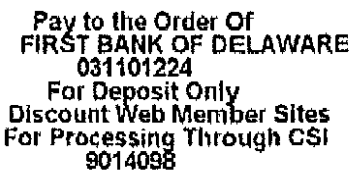
According to the ZaaZoom Defendants, Ms. Evans then received two separate emails from the 777Discount Club and two separate emails from UClip to the email address she provided confirming her purchases and providing cancellation information. Ms. Evans did not cancel. (*Id.*, Ex. 3, p.8, lns. 5-7 [ZaaZoom MTD].)

According to Ms. Evans RCC, the 777Discount Club (Discount Member Web Site) debited Ms. Evan's account by an RCC for $22.99, dated October 22, 2010. (*Id.*, Ex. 2, [Evans RCC].) The transaction was not finalized until after the four-day free trial period expired without cancellation, on or about October 28, 2010. The payee on the front of the October 22, 2010 RCC is "Discount Web Member Site."

Account	Check #	Post Date	Amount
Checking: XXXXXXX2136	1126422	10/28/2010	$ 22.99



(*Id.*) The endorser on the back of the October 22, 2010 RCC is "Discount Web Member Sites:"

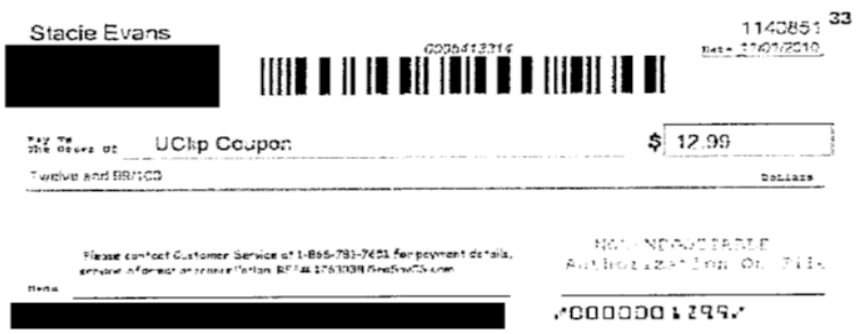


(*Id.*)

The payee, endorser, and intended beneficiary are consistent on the October 22, 2010 RCC (as well as the November 3, 2010 RCC and December 3, 2010 RCC). Evidence demonstrates that "CSI" is another check processor performing the same function as the Payment Processor Defendants.

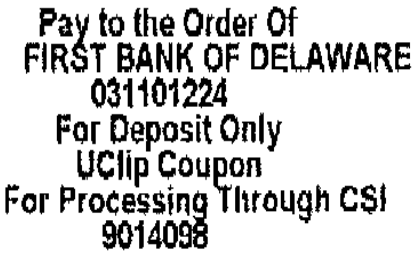
Ms. Evans' account was also debited by an RCC from UClip Coupon on November 3, 2010 after the 10-day free trial period expired without cancellation for the second coupon club in the joint offer. (*Id.*) On December 3, 2010, Ms. Evans' account was again charged $12.99 by RCC from UClip Coupon for the second month of subscription. (*Id.*) On the RCCs to UClip Coupon, the payee, endorser, and beneficiary of the account are also consistent:

Account	Check #	Post Date	Amount
Checking: XXXXXXX2136	1140851	11/03/2010	$ 12.99



(*Id.*)

The endorser on the back of the December 3, 2010 RCC is "UClip Coupon:"



(*Id.*)

In all, the evidence shows that Ms. Evans visited two different payday lending websites on October 22, 2010, and subscribed to three different coupon services, manually inputting banking information for her bank account multiple times. In each instance, the coupon offers were separate from other offers on the websites, and required Ms. Evans to affirmatively select the coupon offer and affirmatively agree that her banking information could be used to pay for the coupon services. In each instance, Ms. Evans received two separate confirming emails for each coupon service before her bank account was debited, but did not cancel the transactions. Moreover, Ms. Evans allowed a second monthly subscription charge to her account in December 2010 for the November 3, 2010 subscription to the UClip service.

All three transactions were paid by RCC and processed by FBD. Ms. Evans did not object to these transactions at the time the funds were withdrawn from her accounts or at any time during the one year "return period" allowed by statute to challenge an unauthorized RCC. Ms. Evans is bound by the internet contracts she accepted because "one who accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms." *Meyer v. Benko*, 55 Cal.App.3d 937, 943 (1976). Whether or not Evans read all the terms and conditions, failure to read contract language provides no defense to a contract. Instead, "when a person with the capacity for reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents." *Goldner v. Jaffe*, 171 Cal.App.2d 751, 755 (1959). Thus, Ms. Evans' claims that that she did not consent to any offers on the three pay day lending websites are without merit. FBD likely would prevail on these factual grounds at summary judgment.

b. **Statutory warranties governing RCCs create a no-fault remedy and displace the common law negligence claim.**

Notwithstanding the above evidence demonstrating Ms. Evan's affirmative consent to pay for enrollment with RCCs, in the event consumers did not understand the enrollment terms, they had access to a complete statutory remedy for refund of the RCCs. The California Commercial Code provides a process for the recovery of funds debited from an account by an unauthorized RCC. Commercial Code §3104(k) defines negotiable instruments, including RCCs, as demand drafts subject to Commercial Code §§4207 and 4208, which establish authentication and

presentment warranties by a depository bank presenting an RCC for payment to another bank. Under either Federal Reserve Board Regulation CC, 12 C.F.R. part 229, *et seq*., or California Commercial Code §§4207-08, when depository banks present RCCs for payment to an account holder's bank, the depository banks make statutory warranties to that bank that the RCCs are authorized. This statutory process reverses the usual rule placing responsibility for confirming a transaction is authorized on the account holder's bank (the payor bank) because all RCCs are electronically generated with no actual signatures to check and appear authorized on their faces. The statutes shift the risk of loss for an unauthorized RCC from the account holder's bank to the depository bank because the depository bank is receiving the RCC for deposit from its own customer (*i.e*., CSI) and therefore is in the best position to determine whether the RCC is authorized. Accordingly, Commercial Code §4207(a), and 12 C.F.R. 229.34(d), both provide for bank to bank warranties for RCCs. In the event an account holder's bank is notified that an RCC was not authorized, the bank may demand a statutory re-credit of the funds from the depository bank. The account holder therefore recovers any funds debited by an unauthorized RCC without creating any duty of care owed by the depository bank to the account holder and without any warranty by the depository bank to the non-customer account holder. *See Mills, et al. v. U.S. Bank*, 166 Cal.App.4th 871, 881 (2008) (finding court properly sustained demurrer to customer claim for breach of warranty of depository bank under Commercial Code sections 4207-4208, on grounds that the warranty is made to the payor bank, not to the payor customer).

Commercial Code sections 4207 and 4208 provide the exclusive statutory process for recovery of funds debited from accounts by allegedly unauthorized RCCs. *See Zengen, Inc. v. Comerica Bank*, *supra,* 41 Cal.4th 239, 251-256 (2007). Thus, under the statutory warranty structure, Plaintiffs' common law negligence claim is ***displaced***.

c. **FBD has no liability for negligence as it owes no duty to Plaintiffs.**

Plaintiffs were not banking customers of FBD and had no business or other relationship with FBD. Banks generally do not owe a duty of care to third party non-depositors. *See Software*

Design & Application LTD v. Hoefer & Arnett, Inc., 49 Cal.App.4th 472, 478 (1996);[5] *see also Chazen v. Centennial Bank*, 61 Cal.App.4th 532, 541 (1998); *Joffe v. United California Bank*, 141 Cal.App.3d 541, 556 (1983); *E.F. Hutton & Co. v. City National Bank*, 149 Cal.App.3d 60, 68 (1983). Under California law "it has long been regarded as axiomatic that the relationship between a bank and its depositor arising out of a general deposit is that of a debtor and creditor . . . [a] debt is not a trust and there is not a fiduciary relation between debtor and creditor." *Price v. Wells Fargo Bank*, 213 Cal.App.3d 465, 476 (Cal. App. 1989 (internal quotes omitted) (citing *Morse v. Croker National Bank*, 142 Cal.App.3d 228, 232 (1983), and *Downey v. Humphreys*, 102 Cal.App.2d 323, 332 (1954)) (*Price* overruled on other grounds in *Riverisland Cold Storage, Inc. v. Fresno–Madera Production Credit Association*, 55 Cal.4th 1169, 1182 (2013)).

Under California law, depository banks do not have a duty to their customer that gives rise to civil tort liability to investigate or police their own customers' accounts, let alone a civil tort duty of care to third party non-customers to monitor the banking transactions of bank depositors. *Casey v. U.S. Bank, N.A.*, 127 Cal.App.4th 1138, 1149 (2005) ("a bank owes no duty to non-depositors to investigate or disclose suspicious activities on the part of an account holder"). As a matter of law, it would make no sense if a bank owed a greater duty to a non-customer than the bank owes to its own customers. Thus, at common law, there is no link of privity or other legal duty between Plaintiffs and FBD that could establish a duty of care.

The only limited exception to the general rule that a depository bank owes no duty of care to non-customers is the *Sun 'n Sand* exception, which does not apply here. *Sun 'n Sand* provides a very narrow exception to the general rule that a bank owes no duty to a non-depositor, which applies "*only when checks, not insignificant in amount, are . . . presented to the payee* bank by a

[5] *See also Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220 (4th Cir. 2002). The *Eisenberg* decision is notable because, in addressing the issue of a bank's duty to a non-customer, an issue of first impression in North Carolina, it relied heavily on *Software Design*, and it was written by Judge Beezer of the Ninth Circuit, sitting by designation. Relying on *Software Design* among other cases, the court held there was no bank liability: "Eisenberg ... falls into the undefined and unlimited category of strangers who might interact with Wachovia's bank customers. In McCallum, the Massachusetts Superior Court noted that maintenance of a bank account was intended to benefit the person who opened the account. [citation]. The court resolved that to extend the duty of care to strangers like Eisenberg would be contrary to the normal understanding of the purpose of a bank account and would expose banks to unlimited liability for unforeseeable frauds." *Id.* at 226.

third party seeking to negotiate the checks for his own benefit," *Sun 'n Sand v. United California Bank,* 21 Cal.3d 671, 695-696 (1978) (emphasis added) "*and the payee's endorsement "was either forged, unauthorized or nonexistent*." *Chazen*, 61 Cal.App.4th at 544-545 (emphasis added). The core question is whether the method in which Plaintiffs' RCCs were deposited at FBD reveals a mis-match between payee and endorser with an unauthorized endorsement that established "suspicious circumstances" sufficient to create a duty of care under the restricted holding of *Sun 'n Sand*.

The RCCs are payable to the ZaaZoom Defendants, endorsed by the ZaaZoom Defendants' Processor, CSI, for the benefit of the ZaaZoom Defendants, and the endorsement is not forged, unauthorized or non-existent. FBD knew of the Merchant/Processor relationship between the ZaaZoom Defendants and CSI, and understood that the endorsements on the RCCs reflected this arrangement. Therefore, there was no mis-match, no unauthorized endorsement, and the RCCs lack any suspicious circumstances that are required under the *Sun'n Sand* exception.

Plaintiffs argue that the RCCs show "suspicious circumstances" because CSI, the Processor depositor, is different than the ZaaZoom Defendant payees. This argument fails because (a) the RCC payee, the endorser, and the intended beneficiary of the RCC are the same entity; (b) there are no allegations of alteration of the RCCs; and (c) the centerpiece of the Plaintiffs' allegations against the Processors—and why some of them are defendants here at all—is that the ZaaZoom Defendants authorized the Processors to deposit the RCCs. This is an entirely proper banking process that is evident from the face of and endorsements of the RCCs. On the basis of Plaintiffs' allegations regarding these purportedly "suspicious circumstances," the Court denied FBD's motion to dismiss Plaintiffs' remaining negligence claim. But, the Court acknowledged the ultimate futility of this claim if it is shown that "CSI," which was not identified as a Processor by Plaintiffs, is akin to the other Processor Defendants. On summary judgment, FBD would prove that CSI was a Processor (undisputed, see Declaration of Neil Godfrey filed by Plaintiffs (Dkt. 200)), warranting dismissal of the final claim of negligence against FBD.

d. **Plaintiffs face procedural obstacles to class certification for discovery, litigation and trial on the merits.**

Although a class can be certified for purposes of settlement, where the parties have agreed on settlement terms and methodology, Plaintiffs face insurmountable obstacles certifying a class for purposes of discovery, litigation and trial on the merits. *See, e.g.*, *Amchem Products, Inc.*, 521 U.S. at 620 (for certification of settlement class, "court need not inquire whether the case, if tried, would present intractable management problems," as there will be no trial).

First, a class action is not a superior vehicle for adjudication because California Commercial Code sections 4207-4208 provide a complete remedy for putative class members through the depository bank warranty for RCCs. *See* Section III(B)(1)(b), *supra*. This statutory banking process already provides banking customers with a fast, free and efficacious way to seek refunds for unauthorized RCCs, without litigation. The existence of an alternative means of providing class members with a full and complete remedy for their claims weighs heavily in favor of denying class certification. *Kamm v. California City Dev. Co.*, 509 F.2d 205, 211 (9th Cir. 1975).

Second, Plaintiffs' class definition and substantive claims turn on inherently individual and subjective fact questions, rendering the class unascertainable and defeating typicality and predominance. Individual and subjective fact questions render class treatment untenable for purposes of discovery and trial. Under Plaintiffs' class definition, class membership and liability turn on the subjective concept of "consent," *i.e.* whether consumers consented to pay for enrollment in an online coupon service with RCCs. Plaintiffs allege that they did not consent. Defendants contend that mere enrollment constitutes objective evidence of customer consent and contract formation because the websites required consumers to actively and intentionally check a box indicating acceptance of the coupon offer. *See Meyer v. Benko*, 55 Cal.App.3d 937, 943 (1976) ("one who accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms."). ZaaZoom's websites did ***not*** automatically enroll consumers without consent, through default settings, pre-checked boxes, or negative options contracts. *See* Section III (B)(1)(a), *supra*. ZaaZoom even sent two confirmation e-mails before billing a customer.

Thus, for Plaintiffs to prove lack of consent (if allowed), would necessarily require individual inquiries into consumers' subjective beliefs during contract formation and subsequent behavior, specifically whether they: (i) formed a contract; (ii) requested or used the coupons (which would confirm acceptance of benefits, waiver or estoppel of any legal claims); (iii) requested and received a refund for an unauthorized RCC (thus no damages); or (iv) returned to the websites a second or further time (which would manifest knowing assent). *See, e.g., Goldner*, 171 Cal.App.2d at 755 ("when a person with the capacity for reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents").

Such an individualized inquiry would not generate common "answers" that would facilitate resolution of this lawsuit through class treatment. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) ("What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.") (citation omitted); *see also Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433-1435 (2013) (class certification improper where theory of damages would not give rise to common answers). Due to the impossibility that such an inquiry would yield common answers as to class membership, liability and damages, Plaintiffs cannot certify a class for purposes of discovery and trial because (as further discussed in points three and four below) the class is unascertainable and individual issues do not predominate.

Third, since it is not possible to identify putative class members without an individual inquiry into, and adjudication of, the circumstances of each consumer's enrollment into the coupon service, the class is not ascertainable. Certification requires a proposed class to be "ascertainable," *i.e.* possible to objectively identify who is a class member. *Simer v. Rios*, 661 F.2d 655, 669-71 (7th Cir. 1981). Class membership may not turn on extensive fact-finding, a resolution of the merits of the claims, or the subjective beliefs of the class members. *Id.*; *Mazur v. eBay Inc.*, 257 F.R.D. 563, 567-68 (N.D. Cal. 2009); *In re Paxil Litig.*, 212 F.R.D. 539, 545 (C.D. Cal. 2003). Since class membership turns on the subjective concept of "consent" (TAC ¶ 238), extensive fact finding into the subjective beliefs of each consumer and resolution of the merits of each claim (did they consent, cancel, get refund or use coupons) would be required to identify

whether a consumer is a member of the putative class. The necessity of this individualized inquiry into each class member's claim to class membership renders the class unascertainable.

Fourth, common issues do not predominate. A plaintiff must establish that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole,… predominate over those issues that are subject only to individualized proof." *Rutstein v. Avis Rent-A-Car Sys*., Inc., 211 F.3d 1228, 1233 (11th Cir. 2000). Where a putative class member must introduce individualized proof or legal points to establish elements of his own claims, predominance is not present. *See, e.g*., *Zinser v. Accufix Research Instit. Inc*., 253 F.3d 1180, 1189 (9th Cir. 2001). The fundamental issue of whether Plaintiffs authorized RCCs, is not a common issue of fact subject to common proof, but requires an individualized inquiry into each proposed class member's (i) understanding of the specific website contract, which varied by each internet merchant and over time, and (ii) alleged lack of understanding or consent (*e.g*., whether she checked the box accepting the offer for coupons; and whether she knew of and consented to the charges, wanted or used the coupons, or canceled during the free trial period). The Court must also make individualized inquiries into each class member's (i) state of residency and location of internet use, (ii) date of transaction(s), (iii) acceptance of benefits, (iv) status of RCC payment, and (v) potentially, status of refund. Thus, common issues do not predominate.

Thus, *Tech-Bilt* factors 1-4 weigh in favor of finding that the settlement amount was in the "ballpark" of reasonableness given FBD's status as a tertiary actor in the alleged misconduct, with no relationship or duty owed to Plaintiffs, FBD's likelihood of prevailing on summary judgment and class certification on numerous independent grounds, and a recognition that a settlor should pay less in settlement than it would if found liable at trial.

2. The Settlement Is Reasonable In Light of FBD's Operational Status and Insurance Policy Coverage.

Under *Tech-Bilt*, the financial circumstances of the settlor are heavily weighed. This factor includes availability of insurance coverage. Where the settlor's resources are limited, the settlement is likely to be in "good faith," regardless of the amount and the defendant's share of fault. *Tech–Bilt, Inc*., 38 Cal.3d at 499; *Aero-Crete, Inc. v. Sup.Ct. (Dale Village Apartment*

Co.), 21 Cal. App. 4th 203, 208-09 (1993) (settlor "was the proverbial turnip from which little if any blood was forthcoming in the event of an adverse judgment. Under the *Tech–Bilt* standards, a settlement which recouped anything of value could be properly found to be in good faith.").

FBD is no longer operational. (Manion Decl., ¶ 2.) On October 23, 2012, FBD's stockholders approved a plan whereby FBD was dissolved, it surrendered its bank charter, sold certain assets to another bank (but not the assets or alleged liabilities involved in this case), and transferred its remaining assets and liabilities to a liquidating trust. FBD is in the process of winding up its business, with operations never to be revived. (*Id.*)

FBD was funding its defense to this lawsuit from a $3 million wasting limits insurance policy. (*Id.* at ¶ 6.) The insurer approved and agreed to fund the settlement. (*Id.* at ¶ 7.) But, this is not the only case covered under this policy. The BPL coverage limits of the Policy are now exhausted by virtue of the defense fees and settlement costs in this action and two other matters. (*Id.* ¶¶ 8-9.) Even if there is excess coverage, which is disputed, unconfirmed and uncertain, existing and recently tendered claims will exhaust the excess policy. (*Id.* ¶¶ 10-12.)

Additionally, FBD faces potential liability for other unfiled claims which would also be covered under the now exhausted primary policy and the soon to be exhausted (if applicable) excess policy. (*Id.* at ¶ 13.) Potential unfiled claims include those for RCCs originated and processed by other non-party internet merchants and processors, subject to merits, statutes of limitations and other procedural defenses. (*Id.*) Indeed, FBD estimates that this case represents only 25% of claims arising from FBD's former RCC line of business, and thus this settlement only resolves a portion of potential claims that could be asserted. (*Id.*)

Thus, FBD's operational status (dissolved and winding up) and the availability of insurance coverage (primary policy exhausted and excess policy, if accepted by the insurer, almost entirely exhausted already, with more potential claims) weighs in favor of finding that the settlement was in the "ball park" of reasonableness.

3. The Mediated Settlement Did Not Result from Collusion, Fraud or Tortious Conduct.

If collusion, fraud, or tortious conduct aimed at injuring the interests of non-settling

defendants drove the settlement, that fact would weigh against finding good faith. *Tech–Bilt, Inc.*, 38 Cal.3d at 499. Here there can be no allegations or evidence of such misconduct. Indeed, the settlement was the result of adversarial, arms-length, mediator-facilitated negotiations, with each party representing and protecting its own interests. (Hall Decl., ¶¶ 3-4.) In fact, the negotiations included all other defendants, until they voluntarily withdrew from the discussions, following their own interests and strategy. (*Id.* at ¶ 4.) All parties attended the March 8, 2013 private mediation, facilitated by the Honorable James L. Warren (Ret.) of JAMS, but no settlement was then reached. (*Id.*) However, Plaintiff Evans and FBD continued settlement discussions. Judge Warren led Plaintiffs and FBD in half-a-dozen rounds of lengthy conference calls that spanned the course many months before the parties ultimately accepted the Mediator's Proposal. (*Id.*) Thus, *Tech-Bilt* factor 6 weighs in favor of a good faith determination.

Taking into consideration all of the *Tech-Bilt* factors, this Court should confirm that the partial settlement as to FBD only was in good faith, thus warranting contribution protection.

V. CONCLUSION

In conclusion, FBD respectfully requests that the Court issue an order determining the settlement was in good faith and confirming indemnification and contribution protection under Section 877.

Dated: December 11, 2013

Respectfully submitted,

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