EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CUSTOM HAIR DESIGNS BY SANDY, LLC, and SKIP'S PRECISION WELDING, LLC, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CENTRAL PAYMENT CO., LLC,

Defendant.

CASE NO. 8:17-cv-00310-JFB-CPZ

JOINT DECLARATION OF
TYLER W. HUDSON AND MATTHEW C. KLASE

1. We are lead counsel for Plaintiffs in the above-referenced matter and submit this joint declaration in support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement and for Direction of Class Notice.

2. This declaration is based upon our collective personal knowledge. Although we both do not have personal knowledge of every fact set forth herein, at least one of us has personal knowledge of each such fact. Collectively, we attest that all facts in this declaration are true and correct and that we would competently testify thereto if called upon to do so.

3. Attached hereto as **Exhibit A** is a true and correct copy of the executed Settlement Agreement and Release ("Settlement") entered into by the parties in this action, including the exhibits thereto.

A. Qualifications and Introduction.

4. The Court previously appointed Mr. Hudson as lead counsel for the Class in early 2020. Dkt. 142. Mr. Hudson, with the assistance of his law partners Eric Barton and Melody

Dickson, as well as several associates and paralegals at their firm Wagstaff & Cartmell, LLC, has prosecuted this case since its inception.

5. Although Mr. Klase did not formally appear in this case until early 2021 (Dkt. 178), he and his firm Webb, Klase & Lemond, LLC were first retained by Plaintiffs in mid-2017 and have worked on this case continuously since that time. Mr. Klase was assisted by partners E. Adam Webb and G. Franklin Lemond and associates and staff at Webb, Klase & Lemond.

6. Mr. Hudson, Mr. Klase, and their firms have worked collaboratively to prosecute this case for the last four-and-a-half years. While more detailed information concerning the qualifications of the attorneys and staff members who worked on the case will be submitted at the final approval stage, we briefly summarize our individual qualifications for purposes of enabling the Court to evaluate whether to issue preliminary approval to the Settlement.

7. Mr. Hudson is a partner at Wagstaff & Cartmell, LLP, a Kansas City based law firm with more than 30 attorneys. The firm has a national practice handling complex litigation, including multi-district litigation ("MDL") and nationwide class actions. Mr. Hudson is licensed in Missouri, Kansas, and Washington D.C., and has been admitted to practice in multiple jurisdictions around the country in both state and federal courts. For more than twenty years, he has been involved in complex commercial and business litigation, including antitrust litigation, contract and partnership disputes, financial fraud and corporate malfeasance matters, and class actions. He has served as lead trial counsel, as lead and co-lead class counsel, and in other leadership positions in high-stakes commercial cases, class actions, and MDL proceedings. He previously served as Senior Counsel in the Enforcement Division of the United States Securities and Exchange Commission, worked as an Associate in the trial practice group at Jones Day in the Washington D.C. office, and was a law clerk to United States District Court Judge John W.

Lungstrum.

8. Mr. Klase has practiced law for nearly 20 years, is admitted to the state bars of California and Georgia, and is a partner at Webb, Klase & Lemond, LLC, in Atlanta, Georgia. After earning his law degree from The Ohio State University, Mr. Klase associated at what is currently Gordon Rees Scully Mansukhani, LLP in San Francisco, before joining Webb, Klase & Lemond in 2005. For more than a decade, Mr. Klase's practice has focused on representing plaintiffs in complex class actions and MDLs, with an emphasis on rectifying abuses by banks and payment card processing companies. Mr. Klase has been appointed to serve as class counsel in many certified class actions by both state and federal courts.

9. Mr. Klase and his firm have previously represented merchants in prior class actions seeking reimbursement for overbillings levied by their payment card processors/merchant acquirers. *See, e.g.*, *Patti's Pitas, LLC v. Wells Fargo Merchant Servs., LLC*, No. 1:17-cv-4583 (AKT), 2021 WL 5879167 (E.D.N.Y. July 22, 2021) (final approval of settlement with fund up to $40 million); *Teh Shou Kao v. CardConnect Corp.*, No. 16-cv-5707, 2021 WL 698173 (E.D. Pa. Feb. 23, 2021) (final approval of settlement with fund up to $7.65 million); *Alghadeer Bakery & Market, LLC v. Worldpay US, Inc.*, N.D. Ga. Case No. 16-cv-3627-MLB (June 3, 2020) (final approval of settlement with fund up to $15 million); *Al's Pals Pet Care v. Woodforest Nat'l Bank*, No. 4:17-CV-3852, 2019 WL 387409 (S.D. Tex. Jan. 30, 2019) (final approval of settlement with fund up to $15 million); *Expert Auto Repair, LLC v. Payment Systems*, Los Angeles County Superior Court Case No. BC623856 (Jan. 23, 2019) (final approval of settlement with fund up to $995,000); *Champs Sports Bar & Grill Co. v. Mercury Payment Sys., LLC*, 275 F. Supp. 3d 1350 (N.D. Ga. 2017) (final approval of settlement with fund up to $52 million).

10. Many of these cases were successfully resolved on a class-wide basis, while a few were lost on legal grounds. Mr. Klase and his firm's unique experience and expertise in this specific field of class litigation was crucial in identifying and grappling with the numerous complex issues raised in this case and to achieving a strong result for the Class.

11. Based on our collective investigation over the last four-and-a-half years (including our discussions with Plaintiffs and other customers of Defendant Central Payment Co., LLC ("CPAY"), our review and evaluation of the more than 450,000 pages of documents that were produced in this action and the substantial written discovery that was exchanged, and our preparation for and examination or defense of 21 depositions); our analysis of the many substantive rulings of this Court and the Eighth Circuit; our research of governing precedent; our knowledge of the payment processing industry; our interactions with the mediator; our detailed trial preparation; and our experience serving as lead counsel and in other leadership positions in major class action litigation, it is our opinion that the Settlement is fair, adequate, and reasonable so as to satisfy the requirements for preliminary – and ultimately final – approval.

12. We believe the Settlement – which recovers a fund of up to $84 million for the 185,883 member Class – is the largest class settlement ever achieved in a case seeking redress for payment processor overbilling. We believe the previous high was the settlement in the *Mercury Payment Systems* litigation, which recovered a fund of up to $52 million for a settlement class of over 200,000 members. We enthusiastically endorse the Settlement to this Court and to the Class.

B. <u>Our Initial Investigation of CPAY.</u>

13. In 2017, Plaintiffs Skip's Precision Welding, LLC ("Skip's") and Custom Hair Designs by Sandy, LLC ("Sandy") became embroiled in billing disputes with CPAY. Seeking

legal representation, their principals (Skip Payne and Sandy Carrano) proceeded to research potential claims with Webb, Klase & Lemond in mid-2017. Webb, Klase & Lemond had successfully prosecuted similar claims against CPAY competitor Mercury Payment Systems.

14. In addition to interviewing Mr. Payne and Ms. Carrano, Webb, Klase & Lemond obtained and reviewed these merchants' contracts and statements. This investigation revealed that CPAY was charging fees that were not identified in the merchants' contracts (e.g., the TSSNF fee) and were charging rates that exceeded the rates set forth in the contracts (e.g., the discount rates). Statement notices from CPAY explained these discrepancies were due to actions taken by the card brands (i.e., Visa and Mastercard), but based on what Webb, Klase & Lemond had learned researching card brand actions in the *Mercury Payment Systems* litigation and other actions against payment processors that were pending, this appeared to be inaccurate.

15. Webb, Klase & Lemond researched CPAY online and found a myriad of complaints from other merchants alleging similar overbilling, thus making it appear these overcharges were not isolated, but the result of standardized and automated billing practices.

16. After it was determined that the contracts contained a potentially enforceable choice-of-law (Nebraska) provision, Nebraska and Eighth Circuit law were evaluated.

17. A draft class action complaint asserting breach of contract and breach of the duty of good faith and fair dealing was prepared.

18. Webb, Klase & Lemond is a small, boutique firm with only three partners. Given their case load at the time (which included ongoing actions against multiple other payment processing defendants), it became clear it would behoove Plaintiffs and the putative class to retain experienced, well-respected co-counsel to assist in the prosecution of the case.

19. Mr. Klase reached out to Mr. Hudson, who had garnered an excellent reputation for class action work and was a partner at Wagstaff & Cartmell, a respected firm with the manpower and financial resources needed to diligently prosecute the case against a well-funded defendant, as well as being located within driving distance of Omaha, the necessary venue.

20. Mr. Hudson and others at Wagstaff & Cartmell proceeded to extensively research the facts and the law and agreed to serve as co-counsel.

21. Mr. Klase, Mr. Hudson, and their firms began collaborating in August 2017.

22. Wagstaff & Cartmell committed to file the complaint and act as lead counsel in the litigation. Webb, Klase & Lemond committed to assist Wagstaff & Cartmell with all aspects of the litigation.

C. <u>The Initial Class Action Complaint.</u>

23. The initial putative class action complaint was filed on August 21, 2017. Dkt. 1. Plaintiffs Skip's and Sandy brought claims against CPAY for breach of contract and breach of the duty of good faith and fair dealing based on a series of overcharges shown on their monthly statements.

24. CPAY's answer and affirmative defenses were filed on October 16, 2017. Dkt. 13. CPAY denied all aspects of Plaintiffs' claims and asserted multiple defenses, including the statute of limitations, waiver, and failure to mitigate damages. CPAY also asserted that Plaintiffs had failed to comply with various condition precedents necessary to bring contract-based claims and Plaintiffs were contractually barred from asserting class claims.

D. <u>Preliminary Discovery and Document Productions.</u>

25. Shortly after the complaint was filed, the parties exchanged initial disclosures and discovery began. We knew that it would be important to craft document requests that were

broad enough to capture CPAY's internal communications and documentation concerning the design and imposition of the challenged fees.

26. We drafted and issued 60 targeted document requests related to the claims and defenses, serving CPAY on December 22, 2017. Dkt. 28.

27. We also knew that CPAY was likely to resist discovery. On January 22, 2018, CPAY served its initial responses and objections to Plaintiffs' first request for production. Dkt. 33. CPAY objected to the majority of Plaintiffs' requests, prompting the first of many exchanges between counsel related to the proper scope and breadth of discovery prior to class certification.

28. We issued a Golden Rule letter to CPAY and set forth a list of proposed search terms and related criteria for identifying responsive documents in CPAY's files. Thereafter, the parties engaged in multiple telephone conferences and email exchanges reflecting their respective positions related to the breadth and scope of discovery necessary to brief the class certification issues.

29. CPAY issued its first request for production to Plaintiffs on February 16, 2018. We diligently worked with the Plaintiffs to answer these requests and submit comprehensive responses and related document productions to CPAY on March 19, 2018. Dkts. 35-36.

30. CPAY produced its first set of documents in April 2018, consisting of a mere 212 pages.

31. Understanding that ongoing discovery disputes existed and there was potential for additional claims to be asserted by the parties, we requested an expansion of the then-existing schedule to allow for a thorough and complete investigation. Dkts. 37-38, 40-41.

32. Over the course of the next several months, the parties engaged in substantial and meaningful discovery. After exchanging multiple emails and negotiating and refining search terms, document custodians, and document collection protocols, CPAY's second set of documents was produced on June 25, 2018, containing approximately 32,000 pages. Three additional productions were made during July, August, and September 2018, totaling an additional 2,000 pages.

33. We carefully analyzed and coded the internal documents and data produced by CPAY. Although this effort was a massive task and took many hundreds of hours of attorney time, it was critical to positioning Plaintiffs to not only understanding the nature of CPAY's fee practices, but ensuring that all proper class claims were being alleged.

34. As a result of such investigation and review, we determined that there was sufficient evidence to support a claim that CPAY had been perpetrating a fraudulent scheme to overbill merchant customers like Skip's and Sandy since it was formed.

E. The First Amended Complaint and Additional Discovery.

35. Based on this new evidence and substantial legal research into potential fraud claims and governing law, we drafted a 70-page First Amended Complaint adding two new claims against CPAY for violations of civil RICO, 18 U.S.C. §§ 1962(a), (c) and (d), and fraudulent concealment under Nebraska law. We filed this First Amended Complaint on November 15, 2018. Dkt. 46.

36. At the same time, we realized that we needed to engage sophisticated experts to help us prove the certification requirements of Federal Rule of Civil Procedure 23(b)(3), as well as prove that CPAY had engaged in a centralized, fraudulent overbilling scheme so that we could succeed at trial.

37. We investigated multiple candidates to serve as expert witnesses in support of class certification. By this time, CPAY had produced data containing over 16 million records of the putative class's transactions and fees. A data processing expert was essential to compile this enormous data and organize and isolate it for counsel's review and analysis. We also pursued an industry expert knowledgeable about the intricacies of the credit card processing industry to explain how CPAY took advantage of the complexities of the system to defraud its merchant customers.

38. Mr. Klase had previously worked with database expert Arthur Olsen of Cassis Technology on several prior overbilling cases. Mr. Olsen specializes in analyzing large financial data sets, extracting desired information from such data sets, and using the data to perform damage calculations.

39. We retained Mr. Olsen to assist us in organizing and understanding CPAY's fee and transaction data, isolating the various charges at issue, and performing damage calculations for the Plaintiffs, other individual putative class members, and the putative class as a whole. Given his qualifications and experience, Mr. Olsen was well-suited to manage CPAY's fee data and serve the putative class.

40. We also considered multiple potential industry experts to address the liability and causation issues. Research and interviews led us to retain Dr. Karl Borden, a Professor of Financial Economics at the University of Nebraska. Dr. Borden's specialty is corporate finance, including value transfer mechanisms such as credit/debit card systems and other electronic means of transferring value between individuals and institutions. In this role, Dr. Borden has authored several publications related to the credit card industry. Dr. Borden has also worked as an independent sales agent for one of CPAY's competitors and has processed credit cards as a

business merchant, just like the putative class members.

41. We also understood that it would be critical to depose CPAY's corporate representative early in the case to commit CPAY to specific positions on key topics. In November 2018, we issued a detailed notice pursuant to Fed. R. Civ. P. 30(b)(6) that sought the deposition of CPAY's corporate representative on 24 topics. Dkts. 53, 53-1. CPAY objected to most of the topics. However, after extensive negotiations and multiple meet-and-confer conferences, an amended notice was issued. Dkts. 65, 65-1.

42. We also served interrogatories on CPAY on January 29, 2019. Dkt. 66.

F. CPAY's Motion to Dismiss the First Amended Complaint.

43. On December 17, 2018, CPAY moved to dismiss the newly added RICO and fraudulent concealment claims. Dkt. 54. This would be the first of several dispositive motions CPAY would file in an attempt to defeat or substantially narrow the case.

44. On January 14, 2019, we filed a 30-page opposition brief. Dkt. 61. CPAY filed its reply brief on January 30, 2019. Dkt. 67.

45. The motion to dismiss centered on a key issue: the existence of a RICO enterprise. CPAY argued Plaintiffs had not effectively pled a distinct RICO enterprise because CPAY was not distinct from its founders or independent sale agents.

46. Mr. Klase had previously researched CPAY's litigation history and discovered a deposition by CPAY founder Matthew Hyman. In that deposition, Mr. Hyman admitted that CPAY's independent sales agents were not employees or agents of CPAY, thus supporting the allegation that a distinct enterprise existed.

47. Although the Court did not consider such evidence in ruling on the motion to dismiss, the Court nonetheless denied CPAY's motion on July 25, 2019, finding that Plaintiffs

had "sufficiently pled an enterprise with multiple, independent players who benefit from the alleged scheme." Dkt. 87. The Court also rejected CPAY's claim that Plaintiffs had not adequately pled a fraudulent concealment claim. *Id.*

48. On August 15, 2019, CPAY filed its answer and affirmative defenses to the First Amended Complaint, denying all claims and asserting numerous affirmative defenses, including that the claims were inconsistent with the parties' contracts and barred by the statute of limitations, waiver, and Plaintiffs' failure to mitigate. Dkt. 96.

G. <u>Class Certification Discovery.</u>

49. Meanwhile, discovery efforts continued in full force. Throughout the discovery process the parties continued to dispute the breadth and scope of the internal documentation CPAY was bound to produce prior to class certification. For example, CPAY refused to produce any of its pre-2012 merchant fee and transaction data, arguing it pre-dated the longest possible statute of limitations. However, we believed this data was necessary to establish the proper scope of the putative class and central to Plaintiffs' ability to establish that CPAY had been systemically and deceptively imposing unauthorized fees since its inception.

50. In early February 2019, the parties submitted this discovery dispute to Magistrate Judge Zwart, who denied Plaintiffs' efforts to compel the discovery of CPAY's pre-2012 fee data for its merchant accounts. Dkt. 76.

51. Plaintiffs filed a statement of objections to Magistrate Judge Zwart's decision on March 11, 2019. Dkt. 77. CPAY's response was filed on March 25, 2019, followed by Plaintiffs filing a reply on April 1, 2019. Dkts. 79, 80.

52. On July 25, 2019, Judge Bataillon overruled Magistrate Judge Zwart's decision and granted Plaintiffs' request to obtain the pre-2012 data.

53. Negotiations amongst counsel resulted in 10 additional productions from CPAY in 2019, spanning an additional 1,400 pages. Dkt. 87. We reviewed and coded all of this information, which turned out to be critical to confirming our view of the proper scope of the case and the alleged wrongdoing.

54. With a fuller set of CPAY's billing records, fee data, and internal communications, our team spent substantial time performing a detailed analysis of the fees charged by CPAY over more than a decade. Those fees included but were not limited to the following:

- TSSNF Fees
- PCI Annual Compliance Fee
- PCI Non-Compliance Fee
- Early Termination Fee
- Increased Discount Rates
- Increased Transaction Fees
- Mastercard Location Fee
- Card Compromised Assist Plan Fee
- Other Fee Adjustment
- Pass Thru Fees
- Tier Shifting
- Statement Fee
- Batch Fee
- Opt Blue
- Inbound Fee
- International Proc Fee
- International SVC Fee
- KB Trans Fee
- Digital Enablement Fee
- Cross Border Fee Non-US\US
- MC Acquirer License Fee
- MC Additional ASS $1000 Fee
- Visa Base II Trans Fee
- Visa Misuse Fee
- Visa Zero Floor Limit Fee
- Visa ISA-Cash Advance Fee
- Visa Partial Off Non-P Fee
- Visa International Acquirer Fee

55. Our team, working with database expert Arthur Olsen, examined hundreds of class member files containing millions of records, drafted and ran various data scripts, and conducted cell-by-cell analysis to decipher CPAY's systematic billing and fee/rate increase practices.

56. Through that process, for example, we discovered more than 70 widespread discount rate increases imposed on the putative class. We and our team then compared the discount rate increases to hundreds of billing statement notices. Through this process, we unearthed important data that suggested that CPAY had made false, misleading, or incomplete representations in its merchant billing statements concerning the reasons discount rate increases were being imposed.

57. We also identified a practice we termed "tier shifting." This practice is only discernible in the non-customer facing data and CPAY's internal communications. It has the effect of increasing the amount of fees charged for certain debit card transactions. We believed that we could show at trial that CPAY's disclosures related to this practice were incomplete, misleading, or false.

58. We also found evidence in CPAY's internal correspondence supporting the view that CPAY's customers were not receiving full disclosures related to the TSSNF fee or the PCI non-compliance fee. Additionally, the fee increase notices associated with these fees included representations that we believed to be incomplete, misleading, or false.

59. We also evaluated the various forms of merchant contracts used by CPAY during the class period. CPAY produced roughly two hundred merchant contracts in an attempt to establish that the terms were not uniform or even substantially similar during the class period. We evaluated and compared these agreements to identify material common terms. Despite the

existence of many versions of CPAY contracts over a ten-year timeframe, our analysis identified several material terms that existed in all versions. We also identified uniform fee practices that we believed we could prove impacted huge segments of CPAY's customers.

60. We took the deposition of CPAY's corporate representative Tommy Chang on March 12, 2019. This deposition covered a wide range of topics relating to CPAY's fees and practices. We were able to confirm through Mr. Chang's testimony that Matthew and Zach Hyman were the central decision-makers at CPAY during most of the relevant time period. We also confirmed that they acted alone in designing increases and new fees. Moreover, with respect to the contract claim, Mr. Chang admitted that CPAY often increased fees, but did not consult with its member bank (FNBO) or processor (TSYS) before doing so. Mr. Chang also admitted that the discount rate increases and tier shifts were not the product of modifications by the card brands to interchange rates, despite CPAY's statement messages suggesting that they were. Mr. Chang also explained the three PCI-related fees that CPAY charged its customers, and admitted that its PCI non-compliance fee was "all mark-up" and "no cost." This was a fact we believed that we could prove was never disclosed to CPAY's customers.

61. We also defended the depositions of both Plaintiffs prior to class certification. Mr. Payne was deposed on May 15, 2019, in Atlanta, Georgia. Ms. Carrano was deposed on May 20, 2019, in Palm Beach Gardens, Florida. Both depositions lasted several hours. We also convened several pre-deposition meetings and telephone calls with the Plaintiffs, who had little prior experience with litigation, to ensure they were prepared.

62. The Court's progression order also set class certification expert deadlines. On May 15, 2019, Plaintiffs' expert Karl Borden submitted a 100-page expert report detailing the intricacies of the credit card payment processing industry, payment processing logistics, and the

manner in which CPAY had effectively deceived its merchant customers while violating underlying contractual terms. Dkt. 91-2.

63. Plaintiffs' expert Arthur Olsen also submitted a report in support of class certification. Dkt. 91-23. Therein, Mr. Olsen outlined the four fee practices being challenged by Plaintiffs (increased discount rates, tier shifting, imposition of PCI non-compliance fees, and imposition and increasing of TSSNF fees), explained how the fees resulting from such practices are reflected in the underlying data, explained how he could programmatically use such fee data to determine which merchants were subjected to the challenged fee practices and the amount of their alleged overcharges, and performed this analysis on the accounts of the named Plaintiffs.

64. We defended Mr. Olsen's deposition on June 7, 2019, in Seattle, Washington. We defended Dr. Borden's deposition on June 10, 2019, in Kearney, Nebraska. Both of these depositions were extensive and involved substantial preparation.

65. On June 14, 2019, CPAY named an expert witness in opposition to class certification, Ian Ratner, principal and co-founder of Glass Ratner Advisory & Capital Group, LLC. Mr. Ratner is a certified public accountant with experience in the payment card industry. Mr. Ratner issued a 38-page report explaining why, in his opinion, "[t]he challenged fees were proper, and that the range of fee structures, contractual terms and merchant communications allegedly differed across the proposed merchant class." Dkt. 101-2.

66. We took a full-day deposition of Mr. Ratner on July 12, 2019, in Atlanta, Georgia. One of many key admissions obtained during the deposition was Mr. Ratner's acknowledgment that he did not disagree with the methodology suggested by Mr. Olsen to isolate the harm resulting from the challenged fee practices. Likewise, Mr. Ratner could not identify any unique contractual terms that were material to the challenged fees.

67. This voluminous, time consuming discovery was absolutely essential to enabling us to define and seek certification of the appropriate class and evaluate the merits of the case for trial and settlement purposes.

H. Class Certification and CPAY's First Motion for Summary Judgment.

68. On July 30, 2019, Plaintiffs moved for class certification (Dkts. 88-91), seeking certification of the following Class:

> All of CPAY's customers that, from January 1, 2010 to the present: (a) were assessed the TSSNF fee (a/k/a TSYS network fee); (b) were assessed the PCI Non-Compliance Fee; (c) had their contractual credit card discount rates increased above their contractual rate by CPAY; and/or (d) had credit card transactions shifted by CPAY from lower cost rate tiers to higher cost rate tiers.

69. Our 60-page brief in support of class certification explained how at trial all members of the Class would use the same common evidence from CPAY's files and expert reports to prove their claims and showed how the Plaintiffs and Class satisfied all of the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3). Dkt. 90.

70. CPAY filed a 72-page brief in opposition to class certification on August 30, 2019. Dkt. 109. CPAY vigorously argued that the requirements of Rule 23 had not been established. More specifically, CPAY contended that variations in the merchant contracts required an individualized factfinding process that rendered Plaintiffs' claims inappropriate for class treatment. Likewise, CPAY maintained that the contractual terms were individually negotiated such that common evidence could not be used to facilitate a class-wide trial. CPAY also contained that Plaintiffs were not adequate class representatives and their claims were not typical of the Class claims.

71. On August 30, 2019, CPAY also filed a motion to strike the expert report and opinions of Dr. Karl Borden. Dkt. 99. CPAY argued that Dr. Borden's analysis embraced the

ultimate issues in the case, invaded the province of the jury, and (despite not being a scientific expert) did not articulate scientific knowledge sufficient to assist the Court.

72. We researched, drafted, and filed a detailed brief in opposition to CPAY's motion to strike Dr. Karl J. Borden. Dkt. 113. We explained the validity and reliability of Dr. Borden's proffered opinions and the "fit" of those opinions to the underlying issues attendant to class certification. We showed how Dr. Borden's specialized knowledge and his opinions would assist the Court in evaluating the evidence relating to class certification.

73. Around the same time, we also filed a 64-page reply brief in support of class certification. Dkt. 121. We explained why both commonality and predominance existed because the centralized fraud scheme involved common legal and factual questions for all class members. The claims did not depend on the individual contract negotiations or independent agents' representations. We also showed that the material contractual terms were uniform across the Class, defended the adequacy of the class representatives, and confirmed that the economic injury suffered by the Plaintiffs was typical of that suffered by all other members of the Class.

74. In the middle of class certification briefing, CPAY filed its second dispositive motion – a motion for summary judgment on Plaintiffs' claims, which it supported with a 48-page brief. Dkt. 117. CPAY alleged that Plaintiffs' contract claims were barred by a 90-day notice provision and that all of the fees charged to Plaintiffs were consistent with the terms of the merchants' agreements. CPAY also alleged that Plaintiffs' RICO claim failed because the challenged fees were set forth in the contract and thus could not form the basis of a fraud scheme. CPAY finally claimed Plaintiffs' fraudulent concealment claim failed because CPAY had no duty to disclose the reason for the fee increases it imposed on its merchant customers and that merchants could have identified the true bases of the increases if they had paid reasonably

diligent attention.

75. On October 7, 2019, we filed a 79-page brief opposing CPAY's summary judgment motion. Dkt. 134. We responded to – and disputed with contrary evidence – most of CPAY's 121 statements of fact and extensively detailed the factual support for Plaintiffs' claims with 196 additional statements of fact from the evidentiary record. We also detailed why the 90-day notice-of-dispute provision relied upon by CPAY was inapplicable. As to the RICO claim, we detailed the wealth of evidence supporting the alleged scheme to defraud, namely that CPAY's disclosures were misleading and/or omitted material information and no merchant in the proposed Class agreed to pay CPAY's increased rates or new fees with full knowledge of the facts. Finally, we showed that Nebraska law does not make the existence of a fiduciary relationship a condition precedent to a duty to disclose material information.

76. On February 11, 2020, this Court issued an order certifying the Class, denying summary judgment, and denying the motion to strike Dr. Borden's report and testimony. The Court also appointed Mr. Hudson as lead counsel for the Class. Dkt. 142.

I. <u>Merits Discovery, Initial Mediation, and Class Certification Appeal.</u>

77. We immediately met and conferred with CPAY on a schedule for the remainder of the case and Magistrate Judge Zwart entered an amended progression order. Dkt. 145.

78. On February 26, 2020, CPAY filed a petition for permission to appeal the Court's class certification ruling pursuant to Fed. R. Civ. P. 23(f). Eighth Circuit Docket. No. 20-8003; Dkt. 146-1.

79. We promptly filed a detailed response to this petition – explaining why this Court's decision was correct and the petition should be denied. CPAY filed an unauthorized reply brief, and we moved to strike this filing as procedurally improper. The Eighth Circuit

granted the motion to strike, but also granted CPAY's motion to review the class certification decision, assigning the case Appeal No. 20-1677. Dkt. 148.

80. Meanwhile, the parties continued to take discovery to ensure compliance with the governing progression order. We issued a second request for production consisting of 44 additional requests to ensure we sought the evidence we needed for the Class to prevail on the merits at trial. Dkt. 147.

81. CPAY, meanwhile, issued supplemental initial disclosures identifying multiple additional witnesses on the underlying merits issues. In response, we requested multiple depositions, including the depositions of CPAY's co-founders Matthew and Zach Hyman.

82. Shortly after the Class was certified, the parties agreed to mediate the case with experienced class action neutral Hunter Hughes of Atlanta, Georgia. Mr. Hughes has substantial experience mediating class cases involving payment processor overbilling, having mediated (and resolved) the *Mercury Payment Systems*, *Worldpay*, and *Merchants' Choice* matters.

83. The parties each submitted lengthy mediation statements with supporting documents, some of which were exchanged amongst the parties and others which were submitted solely to Mr. Hughes. We also prepared and produced a detailed powerpoint cataloguing the key evidence that we had uncovered in CPAY's vast document productions and the deposition of CPAY's Rule 30(b)(6) representative Tommy Chang.

84. The parties participated in a full-day mediation via Zoom on April 9, 2020. By this time, the Eighth Circuit had granted CPAY's petition to appeal the class certification ruling and CPAY was bullish on its prospect of prevailing on appeal. As a result, only limited progress was made and the mediation was unsuccessful.

85. After mediation failed, Plaintiffs issued a third request for production to CPAY on April 30, 2020. Dkt. 157. CPAY's responses and objections were subsequently filed and the parties engaged in multiple meet-and-confer conferences to work through the relative scope of additional document productions that were to be made.

86. On July 6, 2020, after the parties reached impasse on the scope of additional discovery, CPAY moved to stay all proceedings in this Court pending a decision on the class certification appeal. Dkt. 159.

87. Plaintiffs' brief opposing CPAY's motion to stay was filed on July 13, 2020. Dkt. 162. We urged the Court to continue merits discovery because CPAY had not made a strong showing that it was likely to succeed in the Eighth Circuit, CPAY would not suffer irreparable harm if discovery proceeded, and the Class would be prejudiced by the delay.

88. This Court sided with CPAY, finding that the stay factors weighed in favor of staying the proceedings in this Court until a ruling by the Eighth Circuit. Dkt. 169.

89. CPAY's Rule 23(f) appeal brief was filed in the Eighth Circuit on May 11, 2020, and relied primarily on the Eighth Circuit's case of *Harris v. Union Pacific Railroad Co.*, 953 F.3d 1030 (8th Cir. 2020). CPAY argued that this case was not suitable for class-wide litigation because the merchant contracts were not sufficiently uniform and were individually negotiated by thousands of sales agents. CPAY challenged both the form and substance of the Court's Order granting class certification. CPAY also claimed that the Court had not undertaken the rigorous analysis required by United States Supreme Court precedent and the underlying facts of the case were not amenable to class-wide resolution.

90. Given the importance of the appeal to the Class, we retained experienced appellate litigation firm Gupta Wessler PLLC to assist us with drafting our appellate brief and

preparing for oral argument. We worked closely with Gupta Wessler attorneys Matt Wessler and Jon Taylor in this regard.

91. Our appellate brief went through multiple rounds of edits, with no less than eight attorneys providing input and edits.

92. Plaintiffs eventually filed their 52-page appellate brief on July 2, 2020. No. 20-1677, No. 4942263. We explained why this Court's certification decision was firmly rooted in the evidentiary record and binding Supreme Court precedent. We maintained that the RICO, fraud and implied contract claims were all supported by common evidence of a centralized fraud scheme. We also explained why the express breach of contract claim was capable of class-wide treatment given CPAY's systematic practice of raising rates in violation of uniform contractual provisions.

93. During the Eighth Circuit briefing process, the parties disputed the extent and nature of the documents that should be maintained under seal and whether specific confidentiality provisions should apply to the parties' briefing. Accordingly, a distinct line of briefing was submitted on these issues for resolution at the Eighth Circuit.

94. On August 5, 2020, an amicus brief was filed in support of the Court's certification of the Class by Main Street Alliance.

95. Given our practice of keeping abreast of new RICO decisions, we submitted supplemental authority pursuant to Fed. R. App. P. 28(j) on September 24, 2020, highlighting the Tenth Circuit's recent opinion in *CGC Holding Co. v. Hutchens*, 2020 WL 5509695 (10th Cir. Sept. 14, 2020). CPAY filed a response to Plaintiffs' 28(j) citation on October 1, 2020.

96. The Rule 23(f) appeal was argued on November 18, 2020, with Mr. Hudson presenting argument for Plaintiffs. We and our team spent significant time preparing for this

argument by anticipating potential questions from the panel and conducing mock arguments. The importance of this appeal could not have been overstated. Indeed, if this appeal was lost and the Class was decertified by the Eighth Circuit, then the two named Plaintiffs' claims (totaling less than $500) would be all that remained of the case. Our team did all we could do to ensure this Court's decision was affirmed.

97. These efforts paid off as on December 30, 2020, the Eighth Circuit issued its opinion unanimously affirming this Court's certification of the Class in all respects. CPAY quickly filed for *en banc* review on January 13, 2021, but the request was denied on February 11, 2021.

J. Continued Merits Discovery and CPAY's New Arbitration Defense.

98. After the stay was lifted in this Court, a new progression order was entered on January 14, 2021, that established a schedule for completing merits discovery. Dkt. 173.

99. Over the next several months, 20 additional document productions were delivered by CPAY totaling over 400,000 pages. Our team carefully reviewed all of these productions and coded and catalogued the evidence to prepare for depositions and trial.

100. In addition to continuing to seek discovery from CPAY, we also sought third-party discovery. CPAY was adamant that its member bank, First National Bank of Omaha, had "pre-authorized" its pricing increases, and thus CPAY had not violated any of the merchants' contracts. CPAY also initially contended that the processor had approved its actions.

101. We issued subpoenas to First National Bank of Omaha, Total System Services, Inc., and TSYS Merchant Solutions, LLC on March 23, 2021. Dkt. 181. We sought the deposition of each entity's corporate representative as well as documents applicable to the underlying communications between these entities and CPAY. CPAY filed objections to the

subpoenas on March 30, 2021. Dkt. 183.

102. These subpoenas resulted in 7,000 pages of documents being produced. We dutifully reviewed and coded all of this information so that it could be used during depositions and trial.

103. While the Rule 23(f) appeal was pending (and unbeknownst to us or Plaintiffs), CPAY sent revised terms and conditions to its current customers that it contended bound them to pursue any claims in arbitration.

104. On April 29, 2021, CPAY filed a motion to stay the claims of all class members that received these communications pending the arbitration of such claims. Dkt. 187. CPAY also sought leave to file an amended answer that added arbitration as a new defense. Dkt. 191.

105. Also, on April 29, 2021, the parties submitted several discovery disputes to the Court that they had been unable to resolve amongst themselves. After oral argument from all parties, Judge Zwart encouraged counsel to continue negotiating within the parameters she established. Dkt. 197. Thereafter, CPAY agreed to produce additional documents requested by the Plaintiffs and we agreed to narrow the scope of the requests.

106. After multiple requests for the depositions of CPAY co-founders Matthew and Zachary Hyman, we issued subpoenas to both individuals on May 21, 2021. Dkt. 200.

107. We also prepared and submitted a 39-page brief in opposition to CPAY's arbitration motion on May 20, 2021. Dkt. 201. Therein, we argued that CPAY waived any right to arbitrate by contesting class certification, filing a motion for summary judgment, and otherwise litigating in both this Court and the Eighth Circuit. Key to this argument was our unearthing of the fact CPAY previously inserted an arbitration clause in prior versions of its form terms and conditions but never sought to enforce its arbitration rights until after its class

certification and summary judgment arguments were rejected. Plaintiffs also argued that the arbitration provisions which CPAY unilaterally imposed on merchants were procedurally and substantively unconscionable.

108. The same day we also opposed CPAY's motion seeking leave to amend its answer, arguing that CPAY "was not diligent in bringing its motion for leave to amend, and Plaintiffs would be prejudiced if the Court grants CPAY's motion." We further noted the futility of CPAY's proposed arbitration defense due to its waiver of its arbitration rights and other arguments highlighted in our opposition to CPAY's arbitration motion. Dkt. 203.

109. On June 10, 2021, CPAY filed a reply brief in support its motion to stay, and we filed a motion for leave to file a sur-reply to respond to new evidence submitted with such reply. Dkt. 213. The motion for leave was granted on June 15, 2021. Dkt. 214. On June 16, 2021, we filed the authorized sur-reply. Dkt. 215.

K. Class Notice, Writ of Certiorari, and Additional Discovery.

110. In the meantime, after we obtained all of the fee and transaction data for the entire Class period, our expert Arthur Olsen used such data to isolate the Class members (i.e., those customers meeting one or more of the Class criteria) and calculate the harm each sustained as a result of the practices at issue.

111. We obtained the contact information for these merchants from CPAY and requested bids from three of the nation's leading class notice administrators so notice could be provided to the Class in accordance with Rule 23.

112. After carefully examining these bids, we chose Epiq Systems, Inc. ("Epiq") to administer the class notice plan.

113. On June 7, 2021, we submitted an unopposed motion to approve the class notice plan. Dkt. 209. The proposed plan called for email and/or postcard notice to each Class member, a website where Class members could learn additional facts about the case, and a reasonable period for exclusions.

114. On July 21, 2021, this Court approved the class notice plan. Dkt. 219. Notice to the Class proceeded immediately thereafter consistent with the Court's Order and instructions. Dkt. 268.

115. Wagstaff & Cartmell received and answered several calls from Class members with questions concerning the case. We also communicated regularly with Epiq to ensure the notice plan was timely and correctly implemented and kept abreast of statistics concerning undeliverable emails and postcards and address trace and re-mailing efforts. In the end, the deliverable rate to Class members was approximately 94.6%, which Epiq Project Manager Peter Sperry opined was "quite high" for a Class of this size. Dkt. 268, ¶ 10. Only 49 of the 185,932 Class members timely excluded themselves from the action. *Id.* at ¶ 14.

116. On July 12, 2021, CPAY filed a petition for writ of certiorari asking the Supreme Court to review the class certification decisions of this Court and the Eighth Circuit. We waived the right to file a response, but then the Supreme Court requested that we file a response. We prepared and filed a detailed brief in opposition to the petition on September 17, 2021. CPAY's petition was eventually denied on November 1, 2021.

117. In the meantime, we proceeded to prepare for and take multiple depositions. The deposition of FNBO's corporate representative (Virginia Wageman) occurred over a two-day period on June 23-24, 2021.

118. On July 8, 2021, we took a six-hour deposition of former CPAY's Sales Director Chris Lombardi.

119. The same day, we took a full-day deposition of CPAY's co-founder, Matthew Hyman.

120. On July 13, 2021, we took the full-day deposition of CPAY's co-founder, Zachary Hyman.

121. On July 15, 2021, we took a 4.5-hour deposition of former CPAY Chief Technical Officer Brian O'Reilly. Through that deposition, we gained additional knowledge of CPAY's internal merchant fee data and identified deficiencies in CPAY's previous productions. This deposition led to further discussions between the parties about CPAY's fee data productions and resulted in supplemental productions being made by CPAY.

122. On July 16, 2021, we took the full-day individual deposition of former CPAY Director of Operations Tommy Chang.

123. On July 22, 2021, we took a five-hour deposition of former CPAY Chief Operating Officer Eric Barth.

124. On July 26, 2021, we took a five-hour deposition of Julie Ortman, a corporate representative of TSYS and Total Merchant Solutions.

125. Throughout the course of merits discovery, we were collaborating with our retained expert witnesses on what we had learned so as to ensure they were aware of all relevant information in forming their opinions.

126. We eventually decided the Class needed to retain another expert witness, Steve Browne of Meara Welch Browne, P.C. Mr. Browne is a certified public accountant, and a certified fraud examiner qualified by the Association of Certified Fraud Examiners. He is

accredited in business valuation, financial forensics, and information technology by the American Institute of Certified Public Accountants and is a certified information systems auditor by the Information Systems Audit and Control Association. He has been engaged and testified as an expert in matters involving allegations of economic damages and fraud by the United States government, the Attorney Generals of Kansas and Missouri, the Insurance Guaranty Associations of fifteen States of the United States, as well as several publicly traded and privately held organizations. Additionally, Mr. Browne has served as a federal court appointed monitor to oversee and monitor the activities of entities and individuals that have been accused of fraud and collusion. Moreover, Mr. Browne has served as an auditor, business valuator, and consultant on over 40 corporate mergers and acquisitions. Mr. Browne is supported by a small team of economists and analysts that assist him in his duties as an expert witness.

127. We also continued to work with data expert Arthur Olsen. His trial expert report was submitted on July 28, 2021. The 68-paragraph report outlined the specific amounts of harm caused by CPAY's misconduct and the methodologies and codes supporting his conclusions. Mr. Olsen's damages model calculated aggregate out-of-pocket harm (i.e., damages) to the certified class of just over $200 million.

128. On the same day, Steve Browne submitted a 92-page trial expert report outlining the evidence of CPAY's fraudulent scheme and rendering multiple opinions in support of liability, causation, and damages. He also prepared many exhibits, including charts of CPAY's misleading merchant statements and representations, as well as charts analyzing CPAY's internal correspondence detailing its plan to deceive merchant customers.

129. CPAY retained two experts in response. First, CPAY re-retained Mr. Ratner to assert challenges against Plaintiffs' alleged damages model. Next, CPAY retained Patrick

Moran, a credit card processing industry expert and economist, to challenge Plaintiffs' liability and causation theories.

130. Steve Browne's deposition was taken by CPAY's counsel on August 11, 2021. Plaintiffs' expert Art Olsen was deposed (for the second time) on August 19, 2021.

131. On August 25, 2021, CPAY submitted detailed reports from Mr. Ratner and Mr. Moran. Mr. Ratner's report was 66 pages and Mr. Morgan's report was 39 pages.

132. We quickly digested these voluminous reports with assistance from our experts. In addition to preparing to depose CPAY's experts, we also began working with our experts on the issues that needed to be addressed in their rebuttal reports.

133. On September 9, 2021, we took a seven-hour deposition of Mr. Moran. On September 17, 2021, we took a full-day deposition of Mr. Ratner.

134. Plaintiffs' experts served their rebuttal reports on September 24, 2021. In addition to a 43-page rebuttal report from Mr. Olsen and a 26-page rebuttal report from Mr. Browne, we also submitted a rebuttal report from newly retained payment processing industry expert Steve Beene.

135. Mr. Beene has multiple decades of experience in the electronic payment processing industry. For nearly two decades, he was a principal in a consulting company that assisted clients in obtaining quality payment processing services with favorable pricing. He issued a 69-paragraph report responding to Mr. Moran's industry-related conclusions, including rebutting CPAY's claims that its pricing manipulations comported with "industry standards."

136. Mr. Olsen and Mr. Browne's rebuttal reports focused on addressing Mr. Ratner's criticisms of their calculations and methodologies.

137. We were heavily involved in helping the experts obtain the right evidence and evaluate the arguments and evidence relied on by CPAY's experts. This was a time-intensive process that, given the deadlines set by the Court, required the full-time attention of our entire team.

138. Following the submission of rebuttal reports, CPAY elected to take additional depositions of Plaintiffs' experts Steve Browne and Art Olsen. Those depositions (the second for Mr. Browne and the third for Mr. Olsen) occurred on October 1, 2021, and October 4, 2021, respectively. CPAY also took the deposition of Plaintiffs' new rebuttal expert, Steve Beene, on September 30, 2021.

139. All of these expert depositions were time intensive, and it took many hours of preparation to confirm the experts had mastered the record evidence and were ready to withstand CPAY's counsel's challenges to their reports, their opinions, and their methodologies.

L. Post-Discovery Motion Practice.

140. On September 14, 2021, following the close of general discovery, we participated in a telephone conference with CPAY's counsel and Magistrate Judge Zwart. At that time, a trial date was set on January 31, 2022. Dkt. 225.

141. With trial a mere four months away, CPAY ramped up its efforts to defeat and/or narrow the scope of the case, filing two new dispositive motions and a new *Daubert* motion.

142. Indeed, on October 12, 2021, CPAY moved to exclude Steve Browne (Dkt. 227), moved to decertify the Class (Dkt. 242), and moved for partial summary judgment in order to dramatically narrow the scope of the case before trial (Dkt. 238). Collectively, these motions contained 117 pages of briefing.

143. We also submitted a motion for partial summary judgment on October 12, 2021. Dkt. 232. We asked the Court to find in the Class's favor on all elements of the express breach of contract claim other than damages, which would be proven at trial. Dkt. 233. More specifically, we claimed that the undisputed evidence established that CPAY breached its merchant contracts as a matter of law by failing to obtain needed approval and authorization from FNBO prior to increasing merchant fees. *Id.* We also filed a motion to exclude all testimony of Patrick Moran on the grounds it was irrelevant to the issues at stake and limited testimony of Ian Ratner on the ground that it did not fit the facts. Dkt. 234.

144. We thereafter worked to research, draft, and file opposition briefs to CPAY's three pretrial motions. These important tasks required the time and attention of our entire team.

145. We ultimately prepared and filed a 78-page response in opposition to CPAY's motion for partial summary judgment that detailed more than 240 disputed facts relating to the material issues on Plaintiffs' claims. Dkt. 257.

146. We also prepared and filed a response in opposition to CPAY's motion to exclude the proposed testimony of Mr. Browne. Dkt. 259. Plaintiffs highlighted the importance of Mr. Browne's testimony and his ability to catalog the necessary evidence to assist the trier of fact in assessing Plaintiffs' fraud claims. Plaintiffs also highlighted Mr. Browne's expertise as a CPA, economist, and financial fraud examiner, all of which qualified him to opine about CPAY's billing practices.

147. On November 2, 2021, we filed a lengthy brief in opposition to CPAY's motion to decertify the Class. Dkt. 260. Therein, we explained how CPAY was regurgitating certification arguments that had already been rejected by this Court and the Eighth Circuit and the "individualized" issues CPAY claims were present simply did not exist or did not matter.

We also prepared and submitted a concise trial plan explaining exactly how common evidence would be used by the Class to prove its claims at trial. *Id.*

148. On November 2, 2021, CPAY responded to Plaintiffs' (a) motion for partial summary judgment on the express breach of contract claim and (b) motion to exclude the testimony of Mr. Moran and limited testimony of Mr. Ratner. Dkts. 254, 263.

149. On November 16, 2021, we filed a reply brief in support of the motion to exclude testimony of Mr. Moran and Mr. Ratner. Dkt. 270.

150. On November 23, 2021, we submitted a reply brief in support of the motion for partial summary judgment on CPAY's liability for express breach of contract. Dkt. 282.

151. Following the completion of briefing on the *Daubert* and dispositive motions, CPAY pressed both this Court and the Eighth Circuit to take measures to delay the pending trial date. We, on the other hand, vigorously opposed CPAY's efforts and sought to keep the trial date of January 31, 2022, given the Class had already waited far too long for its day in Court.

152. CPAY first filed a motion to continue the trial date in this Court, arguing that the trial should be continued to give the Court more time to rule on the pending motions, which included Defendant's long pending arbitration motions. Dkt. 287.

153. On December 9, 2021, the day after the motion to continue was filed, this Court issued a 22-page order denying CPAY's arbitration motions. Dkt. 288.

154. On December 10, 2021, we filed a brief in response to CPAY's motion to continue the trial and requested that the Court maintain the January 31, 2022 trial date. Dkt. 289.

155. On December 13, 2021, CPAY appealed this Court's arbitration ruling to the Eighth Circuit. Dkt. 290.

156. On December 17, 2021, CPAY filed a motion to stay proceedings in this Court pending resolution of its arbitration appeal. Dkt. 296.

157. On December 20, 2021, the Court issued an opinion denying the following motions: CPAY's motion for partial summary judgment, Plaintiffs' motion for partial summary judgment, CPAY's motion to decertify, CPAY's motion to exclude the testimony of Mr. Browne, Plaintiffs' motion to exclude the testimony of Mr. Moran and Mr. Ratner, and CPAY's motion to continue the trial date. Dkt. 297.

158. On December 30, 2021, we prepared and filed a brief opposing CPAY's motion to stay in this Court. Dkt. 299. CPAY filed its reply brief on January 6, 2022. Dkt. 301. On January 10, 2022, the Court denied the motion to stay. Dkt. 303.

159. On January 4, 2022, CPAY filed a motion for stay pending appeal in the Eighth Circuit. Per the Eighth Circuit's request, we filed an expedited response in opposition to the motion to stay on January 11, 2022. CPAY's reply was filed on January 14, 2022. This motion remained pending at the time the parties reached the Settlement.

M. <u>Trial Preparation and Second Mediation</u>.

160. By December 2021, our preparation for trial was in full swing. While we awaited the Court's rulings on the pending motions, our team was busy formulating witness and exhibits lists, working with Plaintiffs and our experts on their direct examinations, and formulating strategy for examining CPAY's witnesses.

161. A complicating factor was that we did not know which of CPAY's witnesses (all former employees) would be present for trial. All were beyond the subpoena power of the Court and none had confirmed under oath that they planned to attend. As a result, we prepared for the possibility that their testimony would be admitted via deposition and focused on reviewing and

re-reviewing their transcripts to select the appropriate testimony. We had several conferences with counsel for CPAY on these issues.

162. On December 30, 2021, the parties' final witness and exhibit lists were submitted. As outlined in Plaintiffs' earlier proffered trial plan, we intended to proceed to trial with as many 13 witnesses in our case-in-chief, including expert witnesses Steve Browne and Arthur Olsen. We identified the following potential witnesses in Plaintiffs' disclosures:

- Thomas (Skip) Payne
- Sandra Carrano
- Arthur Olsen
- Steve Browne
- Matthew Hyman
- Zach Hyman
- Tommy Chang – CPAY 30(b)(6)
- Julie Ortman – FNBO 30(b)(6)
- Chris Lombardi
- Shirley Yan
- San Chang
- Steve Beene
- Virginia Wageman – TMS 30(b)(6)

163. In conjunction with this witness list, on December 30, 2021, we submitted deposition designations for each of the following entities and/or witnesses, who at this point we were not certain would appear at trial:

- CPAY 30(b)(6)
- FNBO 30(b)(6)
- Chris Lombardi
- Matthew Hyman
- Zach Hyman
- Brian O'Reilly
- Tommy Chang
- Eric Barth
- TMS 30(b)(6)

164. In late December 2021, the parties recommenced settlement discussions with Mr. Hughes and agreed to hold a new mediation session.

165. On January 7, 2022, the parties participated in a mediation with Mr. Hughes via Zoom. The parties made substantial progress toward a resolution but ultimately remained too far apart and Mr. Hughes declared an impasse.

166. Pursuant to an earlier stipulation made with CPAY concerning trial depositions that was approved by the Court (Dkt. 221), we issued deposition subpoenas to former CPAY employees Shirley Yan and San Chang on January 5, 2022. Dkt. 300. CPAY contested whether these depositions complied with the stipulation, resulting in oral argument before Magistrate Judge Zwart on January 11, 2022. Dkt. 309.

167. Following this argument, Magistrate Judge Zwart ordered CPAY to move for a protective order and for Plaintiffs to respond. Dkts. 309-10. CPAY filed its motion (Dkts. 316-19) and we responded (Dkt. 320). Magistrate Judge Zwart ultimately ruled that the depositions of Ms. Chang and Ms. Yan could go forward with certain restrictions. Dkt. 322. Accordingly, the depositions were scheduled for January 17, 2022, and January 19, 2022, respectively.

168. On January 11, 2022, we filed Plaintiffs' omnibus motions in limine, briefing 19 categories of evidence that should be excluded at trial. Dkts. 314-15. This brief was the culmination of years of reviewing and cataloging potential trial evidence and the result of careful deliberation amongst our team.

169. On the same day, CPAY submitted its omnibus motions in limine which designated 13 categories of evidence CPAY contended should be excluded at trial. Dkts. 311-13.

170. On January 13, 2022, the parties exchanged their deposition designation objections, rebuttal deposition designations, and exhibit list objections.

171. The week of January 10, 2022, the parties worked collectively to draft and submit a proposed pretrial order to the Court. This combined submission, which was the result of many discussions and much back-and-forth between the parties, was made to Magistrate Judge Zwart via email on January 14, 2022.

172. Also on January 14, 2022, we filed a lengthy brief in opposition to CPAY's omnibus motions in limine. Dkt. 323.

173. In further preparation for trial, we engaged and collaborated with Sound Jury Consulting, a team of jury consultants based in Seattle, Washington, to identify the best evidence and evaluate how best to present the case at trial. This included an in-depth exploration of potential jurors' reactions to our arguments, evaluation of the jury's understanding of the complexities of the card processing industry, as well as the preparation of necessary demonstrative aids and exhibits. Our work with Sound Jury Consulting was extensive and time-consuming and ultimately very helpful to positioning us to better evaluate the case.

174. We also retained a well-respected and experienced local trial attorney, David Domina, to assist us with navigating local procedures and trying the case. Dkt. 307. Mr. Domina has decades of experience trying cases to Nebraskans and this Court and we felt his knowledge and experience in this regard would provide great value to the Class.

N. <u>The Settlement.</u>

175. Following the failure of the January 7th mediation, we believed that the case would be tried and our team continued with its trial preparations in earnest.

176. However, during the following week while counsel was in contact concerning their pre-trial deadlines and obligations, resolution talks resurfaced and the gap that existed at the conclusion of the mediation began to rapidly close.

177. Over the weekend of January 15th-16th, we continued to negotiate with CPAY's counsel and after substantial back-and-forth negotiations ultimately reached agreement on the key settlement terms on January 17, 2022, the day before the pretrial conference. A memorandum of understanding was executed on January 17, 2022.

178. These negotiations were entirely at arms' length and were fiercely contested, just as every other aspect of this litigation has been.

179. On January 18, 2022, the parties notified the Court of the Settlement, and indicated that the pretrial conference and trial date could be removed from the Court's calendar. The Court ordered the parties to finalize the Settlement within 45 days. Dkt. 324.

180. Over the next several weeks, the parties worked diligently to finalize the Settlement. The parties exchanged drafts of (a) a detailed written agreement, (b) the notices that will be made available to the Class informing them of the Settlement, and (c) the claim form for former customers.

181. We insisted on an allocation formula that ensures payments are fairly divided between Class members in relationship to their actual out-of-pocket damages as calculated by Mr. Olsen.

182. We also focused on guaranteeing an effective and efficient notice process that contemplates the logistical reality that some Class members are no longer in business and/or current addresses may be untraceable.

183. The parties also exchanged multiple drafts of class notices to ensure that the Settlement was accurately and appropriately described to Class members and telephone and internet resources were made available to Class members who needed additional information. Likewise, we exercised care to ensure that each Class member has a fair opportunity to collect its

portion of the Settlement.

184. The parties did not negotiate the amount of fees and expenses or service awards to the Class Representatives until after the substantive provisions of the Settlement, including the amount of the direct relief to the Class was agreed upon.

185. Consensus was reached on final drafts of the agreement, notices, and allocation formula on March 4, 2022.

186. The Settlement has averted multiple additional years of complex, highly contentious litigation. Had the parties not reached agreement on the Settlement, they would have immediately proceeded to take two trial depositions, try the case (assuming the Eighth Circuit denied CPAY's requested stay), litigate the resulting appeals, litigate the arbitration appeal, and litigate the resulting certiorari petitions. The Settlement provides much needed, immediate relief to small businesses, many of which have struggled through the pandemic.

O. Facts Supporting the Settlement.

187. The Settlement provides strong relief to the Class. CPAY is required to pay up to $84 million (and not less than $58.8 million) to create a settlement fund that will be used to make payments to Class members and also cover the costs of notice and administration, attorneys' fees and expenses, and service awards to the two named Plaintiff class representatives.

188. Under the Settlement, Class members that are current CPAY customers will automatically receive payments, while Class members that are former customers will receive a payment if they complete a simple claim form, which they can do electronically via the settlement website, or by mail using a postage-prepaid claim form attached to their notice.

189. There is good reason to pay current customers automatically while requiring former customers to file a claim. Current customers are active merchants (i.e., active business

entities) for which CPAY maintains current email and physical address information. Thus, a high percentage of the payments sent to such customers are likely to be received and negotiated. Former customers, however, may not be active entities (e.g., the merchant may have gone out of business sometime during the past 11-plus years) and the address information possessed by CPAY may be outdated. Thus, if payments were automatically sent to former customers, the cash rate would likely be very low. The proposed claim process gives former customers an opportunity to provide updated address and payee information so as to ensure payments are routed to the correct location and recipients.

190. The cash payment amounts for Class members will be calculated as described in the allocation formula attached as Exhibit 1 to the Settlement. The settlement administrator will use the damage calculations of Plaintiffs' expert Arthur Olsen to ensure that each Class member is allocated its actual pro rata share of the "net settlement amount" (i.e., the amount remaining from the $84 million settlement amount after deducting notice and administration costs, attorneys' fees and expenses, and incentive awards).

191. By way of example, if a Class member's individual damage was calculated by Mr. Olsen to be 0.00052 percent of the Class's total "out-of-pocket" loss, that Class member will receive an allocation of 0.00052 percent of the net settlement amount. This allocation method was chosen to ensure that Class members are fairly compensated relative to each other.

192. All current customers and former customers that timely submit a claim form will receive a notification via email when the settlement payments are ready for distribution and will be given the option to receive their payments electronically via PayPal or Venmo, in lieu of having a check mailed to their physical address. If the Class member does not timely make a election to receive the payment via PayPal or Venmo, the settlement administrator will

automatically mail a check to the Class member's physical address on file.

193. This method of distribution puts the Class member in control of how it will receive its payment. Selecting payment via PayPal or Venmo will enable the Class member to get paid electronically and avoid the hassle of taking a check to a bank for deposit/negotiation. It will also allow the Class member to get paid quickly, as opposed to waiting for a check to be printed, mailed, and delivered.

194. The parties agreed that, subject to the Court's approval, the two Class Representatives should receive service awards of up to $15,000 each. Service awards of that amount are justified based on the significant time and effort expended by the owners of Plaintiffs, which included making themselves available for conferences with our team, gathering and producing all of their written documentation, responding to written discovery, sitting for lengthy depositions and deposition preparation, keeping themselves abreast of the proceedings for more than four-and-a-half years, preparing for trial and travel to Nebraska for up to two weeks, and subjecting themselves to the time, expense, and risk of complex class action litigation.

195. This was a difficult case that involves voluminous account data, billions of transactions, hundreds-of-thousands of pages of evidence, dozens of knowledgeable witnesses, and complicated issues of law. Without the Settlement, the Class would face substantial hurdles litigating their claims through trial and on appeal. Indeed, CPAY demonstrated that it would appeal every dispositive ruling by this Court, and that it would even pursue certiorari to the Supreme Court if such appeals were denied.

196. As a result, even if the Class did ultimately overcome all procedural and substantive hurdles and risks, it would likely have to wait for multiple years of additional

complex, contentious, and costly litigation before receiving relief, if any.

197. While we believe that the Class could and would have succeeded on their claims at trial, the plentiful inherent risks could not be disregarded.

198. For instance, at trial CPAY intended to present the testimony of its founders Matthew and Zach Hyman. These men are practiced salesmen and it is plausible that the jury could have believed their story that they had FNBO's preapproval to raise rates and did not intend to mislead their merchants by implementing the disputed fee practices (especially if their industry expert Mr. Moran was permitted to testify that such fee practices are industry standard). Additionally, the jury may have decided that CPAY did receive sufficient preapproval from FNBO prior to increasing its fees and thus the disputed fee practices complied in full with the contract (especially since FNBO's corporate representative was set to testify live at trial and had suggested in her deposition that FNBO did provide preapproval). Obviously, if the jury accepted the Hymans' testimony and believed their side of the story, then the Class was likely to be defeated at trial.

199. In addition to the prospect of losing at trial, Plaintiffs also faced the prospect of losing on appeal on any number of legal grounds. For instance, CPAY argued that Plaintiffs failed to plead a valid RICO enterprise and the RICO enterprise it intended to pursue at trial was different than that reflected in the First Amended Complaint. Although this Court disagreed, an adverse ruling on appeal would have effectively ended the RICO claim.

200. CPAY also contended that it had no liability for fees disclosed in the contract or rate increases disclosed in notices that did not have alleged misrepresentations (e.g., PCI non-compliance fees and TSSNF fees explicitly referenced in the contract and rate increases without stated reasons). *Id.* at ¶ 200. CPAY was also adamant that Plaintiffs could not establish a viable

RICO enterprise. Although this Court denied summary judgment on these issues, a panel of the Eighth Circuit may have decided the issues differently, which could have wiped out any recovery for these charges that comprised more than $125 million of the alleged $201.1 million Class-wide damages and the entire RICO claim.

201. CPAY also alleged that its contractual class waiver and notice-of-dispute provisions were applicable and enforceable. This Court disagreed when it denied CPAY's first motion for summary judgment, but an appellate panel may have seen things differently. For instance, Mr. Klase's firm was counsel in two cases where courts dismissed claims against payment processors based on the plaintiff-merchants' failure to comply with similar contractual notice provisions. *E.g.*, *Zam & Zam Super Market, LLC v. Ignite Payments, LLC*, 736 Fed. Appx. 274, 277-78 (2d Cir. 2018) (affirming dismissal because merchants failed to provide timely notice of fee disputes); *Cobra Tactical, Inc. v. Payment Alliance Int'l, Inc.*, 315 F. Supp. 3d 1342, 1350-51 (N.D. Ga. 2018) (dismissing for similar reason). Although we believe the Court got this issue right in this case, the risk that the Eighth Circuit could see things differently could not be ignored.

202. Additionally, CPAY was already pursuing an appeal of the Court's denial of its arbitration motion. If this appeal was successful and all Class members that received the contract amendment were deemed bound to arbitrate their claims, roughly 20% of the Class (which made up approximately 40% of the Class damages) would have been eliminated.

203. CPAY, via its expert Mr. Ratner, also argued that the true Class damages were only a fraction of the $201.1 million calculated by Mr. Olsen. If the jury believed Mr. Ratner over Mr. Olsen in this "battle of the experts," the Class would have surely recovered much less at trial then the proposed Settlement provides.

204. Finally, CPAY maintained that the evidence adduced after the Class was certified proved that the trial would be consumed by individualized issues such that the Class should be decertified. Again, although this Court disagreed, CPAY would have pressed this issue throughout trial and on appeal in response to an adverse verdict. If a panel of the Eighth Circuit sided with CPAY, then the entire Class verdict necessarily would have been reversed and the Class would be left with nothing.

205. The Settlement avoids all of these uncertainties and provides the Class with immediate, meaningful, and certain monetary relief.

206. Under these circumstances, we appropriately determined that the benefits of the Settlement and the risks of continued litigation warranted a resolution at this stage.

207. We were uniquely positioned to gauge the relative strengths and weaknesses of the parties' positions, as well as to negotiate a fair, reasonable, and adequate settlement. In addition to being in the trenches of this contentious, ferociously-contested litigation for over four years (where we reviewed over 450,000 pages of documents, took or defended 21 depositions, reviewed the reports of six experts, and briefed more than a dozen contested motions and a full blown appeal), we received advice and input from numerous experienced, knowledgeable consultants including Mr. Wessler and Mr. Taylor of Gupta Wessler, Dr. Tom O'Toole of Sound Jury Consultants, and Mr. Domina. Additionally, Mr. Klase has been intimately involved with the settlement of numerous class cases alleging payment processor overbilling as well as two additional such cases that were lost on legal grounds and is thus extremely familiar with the relevant factual and legal issues.

208. Based on Mr. Olsen's careful, deliberate calculations, we estimate that the $84 million monetary settlement amount represents approximately 42% of the Class's $201.1 million "out-of-pocket" losses under the reasonable best case, proverbial "home run" scenario—i.e., if

the Class were to prevail at trial and hold on to that result through appeals.

209. We believe that the percentage of out-of-pocket loss recovered in this Settlement represents the highest percentage of out-of-pocket losses recovered in any case seeking redress for payment processor overbilling.

210. By any reasonable measure, this recovery of up to $84 million is a significant achievement given the extraordinary obstacles that the Class faced in the litigation and the likelihood of a protracted appeals process.

211. We have discussed the Settlement terms at length with the named Plaintiffs and they both agree that the Settlement is a fair, adequate, and reasonable compromise.

212. While notice has not yet gone out, we have not been made aware of any opposition to the Settlement.

213. Subject to the Court's approval, the parties have selected Epiq, which previously served as the notice administrator, to serve as the settlement administrator. This selection was made after obtaining proposals from two additional qualified administration firms. Epiq is a well-known administration firm that has successfully administrated many class action settlements, including multiple class settlements handled by the undersigned. Dkt. 209-1.

214. There are no agreements between the parties other than the Settlement Agreement presented to the Court and outlined herein.

We declare under penalty of perjury that the foregoing is true and correct to the best of our knowledge, information, and belief.

Executed this 4th day of March, 2022, in Kansas City, Missouri.

/s/ Tyler W. Hudson
Tyler W. Hudson

Executed this 4th day of March, 2022, in Atlanta, Georgia.

/s/ Matthew C. Klase
Matthew C. Klase