

# **SETTLEMENT AGREEMENT AND RELEASE**

*James Smiley, et al. v. First National Bank*

**In The Circuit Court of Lonoke County, Arkansas**

**Case No. 43CV-20-531**

## PREAMBLE

This Settlement Agreement and Release (the “Agreement”) is entered into by and among plaintiffs James Smiley and Toni Dawn Fouts (“Named Plaintiffs”) and all those on whose behalf they are prosecuting this action (each of them a “Plaintiff” and all of them “Plaintiffs”), on the one hand, and defendant First National Bank (“Defendant” or “FNB”), on the other hand, as of the date executed below. All references in this Agreement to a “party” or the “parties” shall refer to a party or the parties to this Agreement.

## RECITALS

A. On August 11, 2020, Plaintiff James Smiley filed his Class Action Complaint. On September 25, 2020, Plaintiffs Smiley and Toni Dawn Smiley (formerly Toni Dawn Fouts) filed an Amended Class Action Complaint, which remains the operative pleading. Plaintiffs allege claims for breach of contract, breach of the covenant of good faith and fair dealing, conversion, and violation of the Arkansas Deceptive Trade Practices Act (“ADTPA”), Ark. Code Ann. § 4-88-101 *et seq.* Plaintiffs challenge Defendant’s practice of assessing overdraft fees (“OD Fees”) on debit card transactions that were pre-authorized into a positive balance and settled into a negative balance (“APSN Fees”). On behalf of the putative classes, Plaintiffs seek actual and statutory damages, restitution in the form of the return of all improperly assessed fees within the applicable statute of limitations (dating back to August 11, 2015), plus attorneys’ fees, costs, treble damages under the ADTPA, pre- and post-judgment interest allowed by law, and other relief.

B. Defendant denies liability and has filed a motion to dismiss the Amended Complaint, to which Plaintiffs filed a Response, and FNB filed a Reply. The motion to dismiss remains pending.

C. The parties engaged in discovery. During the course of conferring about discovery, the parties agreed to mediate this matter.

D. On January 14, 2022, Defendant provided an expert report with a damages analysis to facilitate the mediation.

E. On February 1, 2022, the parties mediated their dispute before mediator John W. Perry, Jr.

F. Although the parties did not settle the day of the mediation, they continued to negotiate and ultimately agreed to a settlement in principle.

G. Defendant has entered into this Agreement to resolve any and all controversies and disputes arising out of or relating to the allegations made in the Complaint, and to avoid the burden, risk, uncertainty, expense, and disruption to its business operations associated with further litigation. Defendant does not in any way acknowledge, admit to, or concede any of the allegations made in the Complaint, and expressly disclaims and denies any fault or liability, or any charges of wrongdoing that have been or could have been asserted in the Complaint. This Agreement and any of its terms, any agreement or Order relating thereto, and any payment or consideration provided for herein, is not and shall not be construed as an admission by Defendant or any of the Defendant Releasees (defined below) of any fault, wrongdoing, or liability whatsoever. This Agreement and

any of its terms, any agreement, Order, or notice relating thereto, and any payment or consideration provided for herein shall not be offered or submitted by any party in any civil, criminal, administrative, or other proceeding, as a presumption, concession, or admission of any fault, wrongdoing, or liability on the part of Defendant or any of the Defendant Releasees (defined below). Notwithstanding the foregoing, nothing contained herein shall prevent this Agreement (or any agreement, Order, or notice relating thereto) from being used, offered, or received in evidence in any proceeding to approve, enforce, or otherwise effectuate the settlement provided for in this Agreement (or any agreement or Order relating thereto) or the Final Approval Order. This Agreement may be filed and used in other proceedings, as required by law, or to the extent necessary for the Parties to approve, enforce, or otherwise effectuate this settlement, including but not limited to the Defendant Releasees (defined below) filing the Agreement and/or the Final Approval Order in any other action that may be brought against them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, waiver, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

H. Named Plaintiffs have entered into this Agreement to liquidate and recover on the claims asserted in the Complaint, and to avoid the risk, delay, and uncertainty of continued litigation. Named Plaintiffs do not in any way concede the claims alleged in the Complaint lack merit or are subject to any defenses.

### **AGREEMENT**

**NOW, THEREFORE**, in consideration of the foregoing recitals, which are incorporated into and are an integral part of this Agreement, and in consideration of the mutual promises below, the parties agree as follows:

**1. DEFINITIONS.** In addition to the definitions contained elsewhere in this Agreement, the following definitions shall apply:

(a) “Motion for Award of Fees, Costs, and Service Awards” shall mean the motion or motions filed by Class Counsel seeking approval of Class Counsel’s attorneys’ fees and costs, as well as the service awards to be paid to Named Plaintiffs, as referenced in Section 6 below, which shall be filed fifty (50) days after the date the Notice (defined below) and must be sent to Class Members and shall be posted to the settlement website.

(b) “APSN Fees” shall mean overdraft fees (“OD Fees”) on debit card transactions that were authorized into a positive balance and settled into a negative balance (“APSN Fees”) that Defendant charged and did not refund from August 11, 2015 to February 4, 2022.

(c) “APSN Fees Class” shall mean:

All persons who, between August 11, 2015 and February 4, 2022 (the “Class Period”) were customers of Defendant First National Bank and were charged by Defendant during the Class Period an overdraft fee on a debit card transaction that was pre-authorized into a positive balance and settled into a negative balance or who were otherwise charged an OD Fee during the Class Period. Excluded from the class are Defendant’s current and former officers, directors, affiliates, legal representatives, employees, successors, subsidiaries, and assigns. Also excluded

are any judges who have presided over this matter and their immediate families and judicial staff, and any individuals who were not Arkansas citizens at the time this action was commenced.

For purposes of this Agreement and the settlement provided for in this Agreement, a person shall be deemed a citizen of Arkansas if the physical address of the primary owner of the account is located in Arkansas.

(d) “Bar Date to Object” shall be the date set by the Court as the deadline for Class Members to file an Objection. The parties agree to jointly request that the Court set the Bar Date to Object thirty (30) days after the date the Notice (defined below) must be sent to the Class Members.

(e) “Bar Date to Opt Out” shall be the date set by the Court as the deadline for Class Members to opt out. The parties agree to jointly request that the Court set the Bar Date to Opt Out thirty (30) days after the date the Notice (defined below) must be sent to the Class Members.

(f) “Charged Off Amounts” shall mean all amounts Class Members owe Defendant as of the date of the Final Approval Order from deposit accounts in which Class Members were charged APSN Fees (defined below) and which were closed and charged off from August 11, 2015 to February 4, 2022. The term “Charged Off Amounts” shall not include amounts Class Members currently owe Defendant from deposit accounts that were closed and charged off between August 11, 2015 to February 4, 2022, but which did not incur APSN Fees (defined below). Defendant shall forgive up to \$500 of the Charged Off Amounts for each APSN Class Member, which is roughly estimated to be approximately \$3 million.

(g) “Class Counsel” shall mean Lynn A. Toops of Cohen & Malad, LLP, J. Gerard Stranch, IV of Branstetter Stranch & Jennings, PLLC, and Christopher D. Jennings of the Johnson Firm.

(h) “Class Member(s)” shall mean any current or former accountholder of Defendant who is in the APSN Fee Class.

(i) “Class Member List” shall mean the list of eligible Class Members. The portion of the Class Member List identified by Defendant will be compiled by Defendant and shall include where available the amount of APSN Fees (defined below) each Class Member identified by Defendant was charged. The Class Member List shall be given to Class Counsel within 7 days of the date the Court signs the Preliminary Approval Order.

(j) “Complaint” shall mean the Amended Class Action Complaint filed in this case on September 25, 2020.

(k) “Court” shall mean the Circuit Court of Lonoke County, Arkansas, Third Division.

(l) “Defendant” shall mean First National Bank, a bank with its principal place of business in Paragould, Greene County, Arkansas.

(m) “Defendant’s Counsel” shall mean Anton L. Janik, Jr and Graham Talley of Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

(n) “Effective Date” shall be thirty (30) days after the entry of the Final Approval Order (defined below) provided no objections are made to this Agreement. If there are objections to the Agreement, then the Effective Date shall be the later of: (1) thirty (30) days after entry of the Final Approval Order if no appeals are taken from the Final Approval Order; or (2) if appeals are taken from the Final Approval Order, then thirty (30) days after the entry of any final, non-reviewable appellate order.

(o) “Exclusion Letter” shall mean a letter by a Class Member who elects to opt out of this Agreement.

(p) “Final Approver Order” means the proposed Final Approval Order, substantially in the form of **Exhibit 1** hereto.

(q) “Final Approval Hearing Date” shall be the date set by the Court for the hearing on the Motion for Final Approval (defined below) of this Agreement and the settlement provided for by this Agreement. The Final Approval Hearing Date shall be no earlier than ninety (90) days after the date the Notice (defined below) must be sent to Class Members.

(r) “Final Approval Order” shall mean the Order and Judgment approving this Agreement issued by the Court at or after the Final Approval Hearing Date.

(s) “Final Report” shall mean the report prepared by the Settlement Administrator of all receipts and disbursements from the Settlement Fund, as described in Section 10, below.

(t) “Long Form Notice” shall mean the long form notice to Class Members attached hereto as **Exhibit 2**. The Long Form Notice will be posted to the settlement website.

(u) “Motion for Final Approval” shall mean the motion or motions filed by Class Counsel seeking final approval of this Agreement and the settlement provided for by this Agreement, as referenced in Section 6, below, which shall be filed fifty (50) days after the date the Notice (defined below) must be sent to Class Members and shall be posted to the settlement website.

(v) “Net Settlement Fund” shall mean the net amount of the Settlement Fund after payment of Class Counsel’s court approved attorneys’ fees and costs, the costs of Notice, any service awards allowed by the Court, and any fees paid to the Settlement Administrator.

(w) “Notice” shall mean a short form of the Notice in the form attached as **Exhibit 3**, which shall be sent by email to Class Members who agreed to receive account statements by email and that shall be sent by mail to Class Members who did not agree to receive account statements by email.

(x) “Preliminary Approval/Notice Order” shall mean the Order issued by the Court preliminarily approving this Agreement and the settlement provided for by this Agreement and

authorizing the sending of the Notice to Class Members, as provided in Sections 4 and 5, below, and substantially in the form of **Exhibit 4** hereto.

(y) “Released Parties” shall mean Defendant First National Bank, as well as its parent company, affiliates, subsidiaries, insurers, and all current and former officers, directors, employees, attorneys, and agents.

(z) “Settlement Administrator” shall mean the entity that will provide the notice and other administrative handling of this Settlement Agreement.

(aa) “Settlement Fund” shall mean the amount of one million two hundred and fifty thousand dollars (\$1,250,000.00) to be paid or credited by Defendant under the terms of this Agreement.

**2. CLASS ACTION SETTLEMENT.** Plaintiffs shall propose and recommend to the Court that the APSN Fees Class shall be certified for purposes of implementing the terms of the settlement provided for in this Agreement. Defendant agrees solely for purposes of the settlement provided for in this Agreement, and the implementation of such settlement, that this case shall proceed as a class action, and that Class Counsel shall (subject to court approval) be appointed as counsel for the Settlement Class; provided, however, that if a Final Approval Order is not entered, then Defendant shall retain all rights to object to maintaining this case as a class action.

**3. FORGIVENESS OF CHARGED OFF AMOUNTS.** Subject to the conditions provided for in this Agreement, Defendant shall forgive up to \$500 of the Charged Off Amounts for all deposit accounts in which a Class Member was charged APSN Fees and which was closed and charged off between August 11, 2015 through February 4, 2022. In no event shall the aggregate amount of Charged Off Amounts forgiven exceed \$500 per Class Member. In the event that a Class Member has Charged Off Amounts in more than one deposit account that was charged APSN Fees and which was closed and charged off between August 11, 2015 through February 4, 2022, Defendant shall have the sole discretion to determine how to allocate the forgiveness provided for in this Section between or among the Class Member’s accounts.

**4. PRELIMINARY SETTLEMENT APPROVAL.** Class Counsel shall use reasonable efforts to promptly file a motion seeking a Preliminary Approval/Notice Order. The Preliminary Approval/Notice Order shall provide for: preliminary approval of this Agreement, provisional certification of the APSN Fees Class for settlement purposes, appointment of Class Counsel as counsel to the provisionally certified APSN Fee Class, and the requirement that the Notice be given to the Class Members as provided in Section 5 below (or as otherwise determined by the Court).

**5. NOTICE TO THE CLASS.**

(a) Within 35 days of entry of the Preliminary Approval Order, or within such other time as may be ordered by the Court, the Settlement Administrator shall send the Notice, as applicable, to all Class Members as specified by the Court in the Preliminary Approval/Notice Order.

(b) For those Class Members who are current accountholders of Defendant and have agreed to receive account statements from Defendant electronically, Defendant shall provide the Settlement Administrator with the most recent email address(es) it has for these Class Members. The Settlement Administrator shall email the Notice to each such Class Member's last known email address(es), in a manner that is designed to avoid being filtered and excluded by spam filters or other devices intended to block mass email. For any emails that are returned undeliverable, the Settlement Administrator shall use the best available databases to obtain current email address information for Class Members, update its database with these emails, and resend the Notice. If the Settlement Administrator is unable to identify a valid email address for a Class Member, it shall undertake the methods below to send Notice by mail. The Notice shall inform Class Members how they may request a copy of the Long Form Notice.

(c) For those Class Members who are not current accountholders of Defendant or who have not agreed to receive account statements from Defendant electronically, the Notice shall be mailed to these Class Members by first class United States mail to the best available mailing address(es). Defendant shall provide the Settlement Administrator with the last known mailing address for each Class Member. The Settlement Administrator will run the names and addresses through the National Change of Address Registry and update as appropriate. If a mailed Notice is returned with forwarding address information, the Settlement Administrator shall re-mail the Notice to the forwarding address. For all mailed Notices that are returned as undeliverable, the Settlement Administrator shall use standard skip tracing devices to obtain forwarding address information and, if the skip tracing yields a different forwarding address, the Settlement Administrator shall re-mail the Notice to the address identified in the skip trace, as soon as reasonably practicable after the receipt of the returned mail.

(d) The Long Form Notice shall be posted on the settlement website created by the Settlement Administrator.

(e) The Settlement Administrator shall maintain a database showing mail and email addresses to which each Notice was sent and any Notices that were not delivered by mail and/or email. A summary report of the Notice shall be provided to the Parties at least five (5) days prior to the deadline to file the Motion for Final Approval. The database maintained by the Settlement Administrator regarding the Notice shall be available to the parties and the Court upon request. It shall otherwise be confidential and shall not be disclosed to any third party. To the extent the database is provided to Class Counsel, it shall be used only for purposes of implementing the terms of this Agreement and shall not be used for any other purposes.

(f) The Notice shall be in a form approved by the Court and, substantially similar to the notice forms attached hereto as Exhibits 2 and 3. Unless prohibited by law or Court order, the parties may by mutual written consent make non-substantive changes to the notice forms attached hereto as Exhibits 2 and 3 without Court approval.

(g) All costs associated with publishing, mailing, and administering the Notice or Long Form Notice as provided for in this Section, setting up and maintaining the settlement website, and all other costs incurred by the Settlement Administrator in connection with the administration of the settlement provided for in this Agreement, including, but not limited to, the Settlement Administrator's fees and costs, shall be paid out of the Settlement Fund.

**6. MOTION FOR FINAL APPROVAL AND MOTION FOR AWARD OF FEES, COSTS, AND SERVICE AWARDS.** Fifty (50) days after the date the Notice must be sent to Class Members, Class Counsel shall file a Motion for Final Approval of this Agreement and the settlement provided for in this Agreement, along with a Motion for Award of Fees, Costs, and Service Awards so that same can be heard on the Final Approval Hearing Date. The Motions shall be posted to the settlement website.

**7. ENTRY OF JUDGMENT.** The Final Approval Order shall constitute the Court's final judgment in this action. The Court shall retain jurisdiction to enforce the terms of the Final Approval Order.

**8. THE SETTLEMENT FUND AND DISTRIBUTION.**

(a) Settlement Fund. The Settlement Fund shall be the total amount Defendant is obligated to pay under the terms of this Agreement and includes (a) Class Counsel's fees and costs; (b) any service award payments to the Named Plaintiffs; (c) costs associated with administering the Notice and the Long Form Notice in accordance with Section 5 above; and (d) any fees paid to the Settlement Administrator for services rendered in connection with the administration process. As provided above, the total amount to be paid into the Settlement Fund by Defendant is one million two hundred and fifty thousand dollars and zero cents (\$1,250,000.00), and Defendant shall not make any additional or further contributions to the Settlement Fund. In the event a Final Approval Order is not entered, or this Agreement is terminated by either party for any reason, including pursuant to Section 14, below, the portion of the Settlement Fund paid to the Settlement Administrator (including accrued interest, if any) less expenses actually incurred by the Settlement Administrator or due and owing to the Settlement Administrator in connection with the settlement provided for herein, shall be refunded to Defendant within 7 (7) business days.

(b) Payments to Class Members. Within ten (10) days after entry of the Preliminary Approval/Notice Order, Defendant shall transfer seventy-five thousand dollars and zero cents (\$75,000.00) of the Settlement Fund to the Settlement Administrator as pre-payment of the fees and costs to be incurred by the Settlement Administrator in connection with the administration of the settlement provided for in this Agreement. Contemporaneously with this transfer to the Settlement Administrator, Defendant shall also place the remaining one million one hundred seventy-five thousand dollars and zero cents (\$1,175,000.00) into a separate account within Defendant's institution pending the Effective Date. Not later than five (5) days after the Effective Date, Defendant shall then transfer the remainder of the Settlement Fund, less the total amount that will be credited to Class Members by Defendant, as provided in subsection 8(e)(iv)(a) below, to the Settlement Administrator.

(c) The Settlement Fund shall be deemed and considered to be in *custodia legis* of the Court and shall remain subject to the jurisdiction of the Court, until distributed pursuant to this Agreement.

(d) The Settlement Fund shall be deemed to be a Qualified Settlement Fund as described in Treasury Regulation §1.468B-1, 26 C.F.R. §1.468B-1.

(e) Payments shall be made from the Settlement Fund as follows:

(i) Plaintiffs' Fees and Costs. Plaintiffs' reasonable attorneys' fees and costs, as determined and approved by the Court, shall be paid from the Settlement Fund ten (10) days after the Effective Date. Class Counsel shall apply for an award of attorneys' fees, plus reimbursement of reasonable litigation costs, to be approved by the Court in accordance with Section 6 above. Defendant will take no positions on any attorney fee award or service awards, but all such payments must be approved by the Court and shall come out of the Settlement Fund.

(ii) Service Awards. Subject to Court approval, Named Plaintiffs shall be entitled to receive service awards of two thousand five hundred dollars and zero cents (\$2,500.00) each from the Settlement Fund for their role as the Named Plaintiffs.

(iii) Settlement Administrator's Fees. The Settlement Administrator's fees and costs, including estimated fees and costs to fully implement the terms of this Agreement, as approved by the Court, shall be paid from the Settlement Fund within ten (10) days after the Effective Date.

(iv) Payments to Class Members. To determine the payment amount to Class Members, Defendant will determine, as reasonably practicable, (1) the total number of current and former members assessed at least one OD Fee during the class period (the Class Members); (2) with respect to the time periods for which Defendant retains transactional data, all current and former members who were charged OD Fees on APSN transactions and in what amount; and (3) all current and former members who were charged at least one OD Fee at some point during the Class Period. As soon as practicable after the Effective Date, the Settlement Fund will then be distributed by the settlement administrator *pro rata* to each Class Member as follows:

- (a) For Class Members charged OD fees on APSN transactions during the periods for which Defendant retains transactional data, full refund of those fees from the Net Settlement Fund;
- (b) For Class Members who were assessed at least OD Fee during the Class Period, a *pro rata* share of the remainder of the Net Settlement Fund after payment under the preceding part (a).<sup>1</sup>

The Settlement Administrator will mail a check for the applicable amount to the last known address of each former accountholder of Defendant. Checks shall have a stale date of one hundred twenty (120) days after issuance. The Settlement administrator will make reasonable efforts to locate the proper address for any Settlement Class Member whose check is returned by the Postal Service as undeliverable, and will re-mail it once to the updated address. The Settlement Administrator will also process any requests by Settlement Class Members for reissuance of checks.

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<sup>1</sup> Some Class Members therefore could receive a payment both under part (a) and under part (b). Payments to any such members shall be aggregated into a single distribution payment.

(v) In no event shall any portion of the Settlement Fund revert to Defendant, unless this Agreement is terminated or not finally approved by all relevant courts.

**9. THE SETTLEMENT ADMINISTRATOR.**

(a) Kurtzman Carson Consultants, LLC (“KCC”) shall serve as the Settlement Administrator. In the event that KCC is unwilling or unable to serve as the Settlement Administrator, the parties agree to work together to select a mutually agreeable Settlement Administrator. In the event the parties are unable to select a mutually agreeable Settlement Administrator, the Court shall select a Settlement Administrator.

(b) The Settlement Administrator shall execute a retainer agreement that shall provide, among other things, that the Settlement Administrator shall be bound by and shall perform the obligations imposed on it under the terms of this Agreement. The retainer agreement shall include provisions requiring that all Class Member data shall be strictly confidential and secured by the Settlement Administrator by means of data security measures that meet the requirements of 12 CFR § 748, and appendices thereto, and shall not be disclosed other than as provided for under the terms of this Agreement or as ordered by the Court.

(c) The Settlement Administrator shall be subject to the jurisdiction of the Court with respect to the administration of this Agreement.

(d) The Settlement Administrator shall keep all information regarding Class Members confidential except as otherwise provided herein. All data created and/or obtained and maintained by the Settlement Administrator pursuant to this Agreement shall be destroyed twelve (12) months after the Final Report is submitted to the Court, provided that Class Counsel and Defendant’s Counsel, or either of them, at their own cost, shall receive a complete copy of the Settlement Administrator’s records (excluding specific account information and social security numbers), together with a declaration establishing completeness and authenticity, which they may maintain consistent with their own document retention policies. To the extent Class Counsel receives a copy of the class list, it shall be subject to the protective order issued in this case and shall not be used for any purposes other than the implementation of this Agreement.

(e) The Settlement Administrator also shall be responsible for timely and properly filing all applicable state and federal tax returns necessary or advisable, if any, with respect to the Settlement Fund. Except as provided herein, Class Members shall be responsible for their own tax reporting of payments or credits received under the terms of this Agreement.

(f) The Settlement Administrator shall provide the data in its administration database to Defendant’s Counsel and/or Class Counsel (excluding specific account information and social security numbers) in response to any written request, including an email request. The written request shall be copied to the other party when made. If transmitting such information by email, the Settlement Administrator shall use secured email only. Such information shall be used only for purposes of the implementation of this Agreement.

**10. DISPOSITION OF UNCLAIMED FUNDS.** For any funds remaining resulting from uncashed settlement checks one hundred eighty (180) days after distribution to Class

Members, Class Counsel will move the Court to distribute the funds to Legal Aid of Arkansas as the *Cy Pres* recipient.

## **11. OPT-OUTS.**

(a) A Class Member who wishes to exclude himself or herself from this Agreement, and from the release of claims and defenses provided for under the terms of this Agreement, shall submit an Exclusion Letter by first class mail to the Settlement Administrator. For an Exclusion Letter to be valid, it must be postmarked on or before the Bar Date to Opt Out. Any Exclusion Letter shall identify the Class Member by name, shall include the last four digits of the Class Member's account number(s) or former account number(s), address, telephone number, and email address (if applicable), shall state that the Class Member wishes to exclude himself or herself from the Agreement, and shall be dated and signed by the Class Member.

(b) The Settlement Administrator shall maintain a list of persons who have excluded themselves and shall provide such list to Defendant's Counsel and Class Counsel at least four (4) days prior to the date Class Counsel is required to file the Motion for Final Approval. The Settlement Administrator shall retain the originals of all Exclusion Letters (including the envelopes with the postmarks). The Settlement Administrator shall make the original Exclusion Letters available to Class Counsel, Defendant's Counsel and/or the Court upon two (2) court days' written notice.

## **12. OBJECTIONS.**

(a) Any Class Member, other than a Class Member who timely submits an Exclusion Letter, may object to this Agreement.

(b) To be valid and considered by the Court, the objection must be in writing and sent by first class mail, postage pre-paid, to the Settlement Administrator, and also be filed with the Court, with service upon Defendant's counsel and Class Counsel. The objection must be (1) mailed to the Settlement Administrator and received by or showing a postmark date on or before the Bar Date to Object and (2) filed with the Court and served upon Defendant's counsel and Class Counsel on or before the Bar Date to Object. The objection must include the following information and must be signed and dated by the Class Member:

(i) The objector's name, address, telephone number, email address (if applicable), the last four digits of his or her account number(s) or former account number(s), and the contact information for any attorney retained by the objector in connection with the objection or otherwise in connection with this case;

(ii) A statement of the factual and legal basis for each objection and any exhibits the objector wishes the Court to consider in connection with the objection; and

(iii) A statement as to whether the objector intends to appear at the Final Approval Hearing, either in person or through counsel, and, if through counsel, identifying the counsel by name, address, and telephone number.

(c) Class Counsel shall file responsive pleadings to any objections at least seven (7) days prior to the Final Approval Hearing Date.

**13. GENERAL RELEASE.** Upon the occurrence of the Effective Date of the Settlement, all Class Members release and forever discharge the “Released Parties” from all past and present and known and unknown claims, demands, damages, causes of action or suits seeking damages or other equitable relief arising out of or in any way related to the claims asserted or which could have been asserted relating to OD Fees charged on a debit card transaction that was authorized into a positive balance and settled into a negative balance. The release shall not extend to any claims by Class Members for bodily injury or the Servicemembers Civil Relief Act.

**14. CONDITIONS TO SETTLEMENT.**

(a) This Agreement shall be subject to and is expressly conditioned on the occurrence of all of the following events:

(i) The Court entering the Preliminary Approval/Notice Order, as required by Section 4 above;

(ii) The Court entering the Final Approval Order as required by Sections 6 and 7 above, all objections, if any, to such Order being overruled, and all appeals taken from such Order being resolved in favor of affirming the Final Approval Order or dismissing the appeal, as the case may be; and

(iii) The Effective Date being occurred.

(b) If all of the conditions specified in Section 14(a) are not met, then Defendant shall have the sole discretion to terminate this Agreement.

(c) Defendant shall have the option to terminate this Agreement if five percent (5%) or more of the Class Members opt out. Defendant shall notify Class Counsel and the Court of its intent to terminate this Agreement pursuant to this Section 14 within ten (10) business days after the Bar Date to Opt Out, or the option to terminate shall be considered waived.

(d) In the event this Agreement is terminated, pursuant to Section 14(c) immediately above, or fails to become effective in accordance with Sections 14(a) and/or (b) immediately above, then the parties shall be restored to their respective positions in this case as they existed as of the date of the execution of this Agreement. In such event, the terms and provisions of this Agreement shall have no further force and effect with respect to the parties and shall not be used in this case or in any other action or proceeding for any other purpose, and any order entered by this Court in accordance with the terms of this Agreement shall be treated as vacated, *nunc pro tunc*.

**15. REPRESENTATIONS.**

(a) The parties to this Agreement represent that they have each read this Agreement and are fully aware of and understand all of its terms and the legal consequences thereof. The parties represent that they have consulted or have had the opportunity to consult with and have

received or have had the opportunity to receive advice from legal counsel in connection with their review and execution of this Agreement.

(b) The parties have not relied on any representations, promises, or agreements other than those expressly set forth in this Agreement.

(c) The Named Plaintiffs, on behalf of the Class Members, represent that they have made such inquiry into the terms and conditions of this Agreement as they deem appropriate, and that by executing this Agreement, they, based on Class Counsel's advice, and their understanding of the case, believes the Agreement and all the terms and conditions set forth herein, are fair and reasonable to all Class Members.

(d) The Named Plaintiffs represent that they have no knowledge of conflicts or other personal interests that would in any way impact their representation of the class in connection with the execution of this Agreement.

(e) Defendant represents and warrants that it has obtained all corporate authority necessary to execute this Agreement.

**16. FURTHER ASSURANCES.** Each of the parties hereto agrees to execute and deliver all such further documents consistent with this Agreement, and to take all such further actions consistent with this Agreement, as may be required in order to carry the provisions of this Agreement into effect, subject to Class Counsel's obligation to protect the interests of the Class Members. Class Counsel (and any affiliate counsel) expressly acknowledge that they will not represent (directly or indirectly) any individual who (i) will be a Class Member who challenges in any way the settlement described in this Agreement; or (ii) who opts-out or who claims for any reason at some later date that they were not bound by the terms of the settlement described in this Agreement. The parties expressly acknowledge and agree that none of them will institute, participate in, or encourage any appeal from an order implementing the settlement described in this Agreement; provided, however, any party has the right to appeal an order regarding the settlement described in this Agreement that differs in any way from the material terms of this Agreement.

**17. APPLICABLE LAW.** This Agreement shall be governed by and interpreted, construed, and enforced pursuant to the laws of the State of Arkansas, without regard to any conflicts of laws principles that may otherwise apply.

**18. NO ORAL WAIVER OR MODIFICATION.** No waiver or modification of any provision of this Agreement or of any breach thereof shall constitute a waiver or modification of any other provision or breach, whether or not similar. Nor shall any actual waiver or modification constitute a continuing waiver. No waiver or modification shall be binding unless executed in writing by the party making the waiver or modification.

**19. ENTIRE AGREEMENT.** This Agreement, including the exhibits attached hereto, constitutes the entire agreement made by and between the parties pertaining to the subject matter hereof, and fully supersedes any and all prior or contemporaneous understandings, representations, warranties, and agreements made by the parties hereto or their representatives pertaining to the

subject matter hereof. No extrinsic evidence whatsoever may be introduced in any judicial proceeding involving the construction or interpretation of this Agreement.

**20. BINDING ON SUCCESSORS.** This Agreement shall inure to the benefit of, and shall bind, each of the parties hereto and their successors.

**21. SEVERABILITY.** In the event any one or more of the provisions of this Agreement is determined to be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained in this Agreement will not in any way be affected or impaired thereby.

**22. COUNTERPARTS AND FACSIMILE SIGNATURES.** This Agreement may be executed and delivered in separate counterparts, each of which, when so executed and delivered, shall be an original, but such counterparts together shall constitute but one and the same instrument and agreement. Facsimile and pdf signature pages shall have the same force and effect as original signatures.

**23. NOTIFICATION.** Any notice to be given to Class Counsel and/or Named Plaintiffs shall be sent by email as follows:

Lynn A. Toops  
Cohen & Malad, LLP  
One Indiana Square  
Suite 1400  
Indianapolis  
Indianapolis, IN 46204  
317-636-6481  
Fax: 317-636-2593  
ltoops@cohenandmalad.com

Any notice to be given to Defendant under the terms of this Agreement shall be sent by email as follows:

Anton L. Janik, Jr.  
Graham Talley  
**MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, P.L.L.C.**  
425 West Capitol Avenue, Suite 1800  
Little Rock, Arkansas 72201  
(501) 688-8800

ajanik@mvlaw.com  
gtalley@mvlaw.com

Any notice to the Settlement Administrator shall be sent by email to the address of the Settlement Administrator.



IN WITNESS WHEREOF, the parties have entered this Agreement as of the dates set forth below.

Dated: June \_\_, 2022

First National Bank

By: \_\_\_\_\_

Its: \_\_\_\_\_

Dated: June \_\_, 2022

James Smiley, an individual on behalf  
of himself and those he represents

By: \_\_\_\_\_  
James Smiley

Dated: June \_\_, 2022

Toni Dawn Smiley (formerly Fouts), an individual on  
behalf of herself and those she represents

By: \_\_\_\_\_  
Toni Dawn Smiley (formerly Fouts)

# **EXHIBIT 1: Final Approval Order**

IN THE CIRCUIT COURT OF LONOKE COUNTY, ARKANSAS  
THIRD DIVISION

JAMES SMILEY and TONI DAWN FOUTS,  
individually and on behalf of all others  
similarly situated,

Plaintiffs,

v.

FIRST NATIONAL BANK,

Defendant.

Cause No. 43CV-20-531

**CLASS ACTION COMPLAINT**

**FINAL APPROVAL ORDER**

WHEREAS, Plaintiffs/Class Representatives James Smiley and Toni Dawn Smiley (formerly Toni Dawn Fouts), by their respective counsel, entered into the Class Action Settlement Agreement (“Settlement”);

WHEREAS, Plaintiffs and Defendant applied pursuant to Rule 23 of the Arkansas Rules of Civil Procedure for an order preliminarily approving the proposed Settlement and preliminarily approving the form and plan of notice and distribution as set forth in the Settlement;

WHEREAS, this Court previously certified the Settlement Class.

WHEREAS, on \_\_\_\_\_, the Court entered an order preliminarily approving the Settlement, approving the forms of notice of the Settlement to Class Members, directing that appropriate notice of the Settlement be given to Class Members, and scheduling a hearing on final approval (the “Preliminary Approval Order”);

WHEREAS, in accordance with the Settlement Agreement and the Preliminary Approval Order: (1) Class Counsel caused the Notice of class action settlement to be emailed or mailed by United States First Class Mail to all known members of the Class; and (2) the declaration of notice

demonstrates compliance with the Preliminary Approval Order with respect to the emailed and mailed notice and, further, that the best notice practicable under the circumstances was, in fact, given;

WHEREAS, Class Counsel filed with the Court a listing of those persons who submitted valid requests for exclusion from the Class;

WHEREAS, on \_\_\_\_\_, this Court held a hearing on whether the Settlement is fair, reasonable, adequate, and in the best interests of the Class (the “Final Approval Hearing”); and

WHEREAS, based upon the foregoing, having heard the statements of Class Counsel and Counsel for Defendant, and of such persons as chose to appear at the Final Approval Hearing; having considered all of the files, records and proceedings in the Lawsuit, the benefits to the Class under the Settlement and the risks, complexity, expense, and probable duration of further litigation; and being fully advised in the premises;

**THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:**

1. Terms capitalized herein and not otherwise defined shall have the meanings ascribed to them in the Settlement Agreement.

2. This Court has jurisdiction over the subject matter of this lawsuit and jurisdiction over the Plaintiffs and Defendant in this case (the “Parties”).

3. The Court hereby adopts and reaffirms the findings and conclusions set forth in the Preliminary Approval Order.

4. For settlement purposes, the Court certifies the following Settlement Class:

All persons who, between August 11, 2015 and February 4, 2022 (the “Class Period”) were customers of Defendant First National Bank and were charged by Defendant during the Class Period an overdraft fee on a debit card transaction that was pre-authorized into a positive balance and settled into a negative balance. Excluded from the class are Defendant’s current and former officers, directors, affiliates, legal representatives, employees, successors, subsidiaries, and assigns. Also excluded are any judges who have

presided over this matter and their immediate families and judicial staff, and any individuals who were not Arkansas citizens at the time this action was commenced.

[IF APPLICABLE: Excluded from the Class are \_\_\_\_]. For the reasons set forth in the Preliminary Approval Order and in Plaintiffs' Motion for Final Approval, the Court finds that the requirements for certification under Arkansas Rules of Civil Procedure 23(a) and 23(b) are satisfied.

5. The Plaintiffs and Class Counsel fairly and adequately represent the interests of the Class in connection with the Settlement, and the Settlement is the product of good-faith, arm's-length negotiations.

6. The Settlement is the product of good faith, arm's-length negotiations by the Parties and their counsel, and the Class and Defendant were represented by capable and experienced counsel.

7. The form, content, and method of dissemination of the Notice given to members of the Class—individual emailed or mailed notice—were adequate and reasonable, constituted the best notice practicable under the circumstances, and satisfied the requirements of Rule 23 and Due Process.

8. For the reasons set forth in the Preliminary Approval Order and Plaintiffs' Motion for Final Approval, the Court finds that the Settlement Agreement is fair, reasonable, and adequate and in the best interests of the Class, and is approved in all respects. The Court hereby directs the Plaintiffs, the Class, Class Counsel, Defendant, and Defendant's counsel to effectuate the Settlement according to its terms.

9. The Settlement Agreement provides for certain benefits to Class Members. The Court approves those benefits and approves the distribution plan for the Settlement Fund set forth in the Settlement Agreement, and the parties are authorized to implement that distribution after deductions for fees, expenses, and service awards as approved by the Court.

10. The Court shall have continuing jurisdiction over the Settlement Fund.

11. Upon the Effective Date, the Class Representatives and the Settlement Class release and forever discharge Defendant and its insurers, and including but not limited to their successors, assigns, members, current and former officers, directors, employees, attorneys and agents, from all past and present known and unknown claims, demands, damages, causes of action or suits seeking damages or other legal or equitable relief arising out of or in any way related to the claims asserted, or which could have been asserted, in the Lawsuit.

12. This Order is a final judgment because it disposes of all claims against all parties to this lawsuit. The Court retains jurisdiction over the Settlement Agreement, the parties to the Settlement Agreement, and all matters relating to the administration and enforcement of the Settlement Agreement.

**THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: \_\_\_\_\_, 2022

\_\_\_\_\_  
Honorable Parker Sanders Huckabee  
Circuit Judge

# **Exhibit 2: Long-Form Notice**

James Smiley, et al.  
v.  
First National Bank

**NOTICE OF PENDING CLASS ACTION AND PROPOSED SETTLEMENT**

**READ THIS NOTICE FULLY AND CAREFULLY; THE PROPOSED SETTLEMENT  
MAY AFFECT YOUR RIGHTS!**

**IF YOU HAVE OR HAD A CHECKING ACCOUNT WITH FIRST  
NATIONAL BANK (“DEFENDANT”) AND YOU WERE CHARGED  
CERTAIN OVERDRAFT FEES BETWEEN AUGUST 11, 2015 AND  
FEBRUARY 4, 2022, THEN YOU MAY BE ENTITLED TO A PAYMENT  
FROM A CLASS ACTION SETTLEMENT**

The Circuit Court of Lonoke County, Arkansas, has authorized this Notice; it is not a solicitation from a lawyer.

**SUMMARY OF YOUR OPTIONS AND THE LEGAL EFFECT OF EACH OPTION:**

**DO NOTHING:**

If you are a Class Member (defined below) who no longer has an open account with Defendant and you don’t do anything, you will receive a payment from the Settlement Fund, so long as you do not opt out of or exclude yourself from the settlement (described in the next box). If you are a Class Member (defined below) who still has an open account with Defendant and you don’t do anything, you will receive a credit to your account from the Settlement Fund, so long as you do not opt out of or exclude yourself from the settlement (described in the next box). If you are a Class Member (defined below), regardless of whether you still have an open account with Defendant and you don’t do anything, you may also be eligible to have up to \$500 of all amounts you may owe Defendant from qualifying deposit accounts that were charged off by Defendant between August 11, 2015 and February 4, 2022 forgiven, so long as you do not opt out of or exclude yourself from the settlement (described in the next box). Under all of these scenarios, you will also release all claims you have against Defendant related to the assessment of fees on transactions previously authorized on a positive balance that later settled into a negative balance.

<p><b>EXCLUDE YOURSELF FROM THE SETTLEMENT; RECEIVE NO PAYMENT BUT RELEASE NO CLAIMS:</b></p>	<p>You can choose to exclude yourself from the settlement or “opt out.” This means you choose not to participate in the settlement. You will keep any individual claims you may have against Defendant but you will not receive a payment or a credit to your account. You will also be ineligible for the debt forgiveness described in this Notice and the settlement. If you exclude yourself from the settlement but want to recover against Defendant, you will have to file a separate lawsuit or claim.</p>
<p><b>OBJECT TO THE SETTLEMENT:</b></p>	<p>You can file an objection with the Court explaining why you believe the Court should reject the settlement. If your objection is overruled by the Court, then you will receive a payment and you will not be able to sue Defendant for the claims asserted in this litigation. If the Court agrees with your objection, then the settlement may not be approved.</p>

These rights and options – *and the deadlines to exercise them* – along with the material terms of the settlement are explained in this Notice.

**BASIC INFORMATION**

**1. What is this lawsuit about?**

The lawsuit that is being settled is entitled *James Smiley, et al. v. First National Bank* in the Circuit Court of Lonoke County, Arkansas, Case No. 43CV-20-531. The case is a “class action.” That means that the “Named Plaintiffs,” James Smiley and Toni Dawn Smiley, are individuals who are acting on behalf of a group. That group is all customers of Defendant who are Arkansas citizens and were assessed an overdraft fee on a transaction authorized on a positive balance and that settled into a negative balance between August 11, 2015 and February 4, 2022. The persons in this group are individually called a “Class Member” and are collectively called the “Class Members.”

The Named Plaintiffs filed a Complaint and an Amended Complaint challenging the assessment of these fees. The Named Plaintiffs sought a refund of these alleged improper fees charged to Class Member accounts. Defendant does not deny it charged these fees but contends it did so properly and in accordance with the terms of its agreements and applicable law. Defendant maintains that its practices were and now are proper and properly disclosed to its accountholders, and therefore denies that its practices give rise to claims for damages by the Named Plaintiffs or any Class Member.

**2. Why did I receive this Notice of this lawsuit?**

You received this Notice because Defendant’s records indicate that you were charged one or more of the fees that are the subject of this action. The Court directed that this Notice be sent to all Class Members because each Class Member has a right to know about the proposed settlement and the options available to him or her before the Court decides whether to approve the settlement.

**3. Why did the parties settle?**

In any lawsuit, there are risks and potential benefits that come with a trial versus settling at an earlier stage. It is the Named Plaintiffs' and her lawyers' job to identify when a proposed settlement offer is good enough that it justifies recommending settling the case instead of continuing to trial. In a class action, the Named Plaintiffs' lawyers, known as Class Counsel, make this recommendation to the Named Plaintiffs. The Named Plaintiffs have the duty to act in the best interests of the class as a whole and, in this case, it is her belief, as well as Class Counsel's opinion, that this settlement is in the best interest of all Class Members.

There is legal uncertainty about whether a judge or a jury will find that Defendant was contractually and otherwise legally obligated not to assess the fees that are being challenged in this case. And even if it was contractually wrong to assess these fees, there is uncertainty about whether the Named Plaintiffs' claims are subject to other defenses that might result in no or less recovery to Class Members. Even if the Named Plaintiffs were to win at trial, there is no assurance that the Class Members would be awarded more than the current settlement amount and it may take years of litigation before any payments would be made. By settling, the Class Members will avoid these and other risks and the delays associated with continued litigation.

While Defendant disputes the allegations in the lawsuit and denies any liability or wrongdoing, it enters into the settlement solely to avoid the expense, inconvenience, and distraction of further proceedings in the litigation.

**WHO IS IN THE SETTLEMENT?**

**4. How do I know if I am part of the settlement?**

If you received this Notice, then Defendant's records indicate that you are a Class Member who is entitled to receive a payment or credit to your account.

**YOUR OPTIONS**

**5. What options do I have with respect to the settlement?**

You have three options: (1) do nothing and you will receive a payment or credit to your account according to the terms of the settlement and you may be eligible for the debt forgiveness described in this Notice and the settlement; (2) exclude yourself from the settlement ("opt out" of it); or (3) participate in the settlement but object to it. Each of these options is described in a separate section below.

**6. What are the critical deadlines?**

There is no deadline to receive a payment or credit to your account, whichever the case may be, or to be eligible for the debt forgiveness described in this Notice and the settlement. If you do nothing, then you will get a payment or a credit to your account and up to \$500 of all amounts you may owe Defendant from qualifying deposit accounts that were charged off by Defendant between August 11, 2015 and February 4, 2022 will be forgiven (see Section 9 below).

The deadline for sending a letter to exclude yourself from or opt out of the settlement is \_\_\_\_\_.

The deadline to file an objection with the Court is also \_\_\_\_\_.

**7. How do I decide which option to choose?**

If you do not like the settlement and you believe that you could receive more money by pursuing your claims on your own (with or without an attorney that you could hire) and you are comfortable with the risk that you might lose your case or get less than you would in this settlement, then you may want to consider opting out.

If you believe the settlement is unreasonable, unfair, or inadequate and the Court should reject the settlement, you can object to the settlement terms. The Court will decide if your objection is valid. If the Court agrees, then the settlement will not be approved and no payments will be made to you or any other Class Member. If your objection (and any other objection) is overruled, and the settlement is approved, then you will still get a payment or a credit to your account and up to \$500 of all amounts you may owe Defendant from qualifying deposit accounts that were charged off by Defendant between August 11, 2015 and February 4, 2022 will be forgiven (see Section 9 below).

If you want to participate in the settlement, then you don't have to do anything; if the settlement is approved by the Court you will automatically receive a payment or a credit to your account and up to \$500 of all amounts you may owe Defendant from qualifying deposit accounts that were charged off by Defendant between August 11, 2015 and February 4, 2022 will be forgiven (see Section 9 below).

**8. What has to happen for the settlement to be approved?**

The Court has to decide that the settlement is fair, reasonable, and adequate before it will approve it. The Court already has decided to provide preliminary approval of the settlement, which is why you received this Notice. The Court will make a final decision regarding the settlement at a "Fairness Hearing" or "Final Approval Hearing," which is currently scheduled for \_\_\_\_\_.

**THE SETTLEMENT PAYMENT**

**9. How much is the settlement?**

Defendant has agreed to create a Settlement Fund of \$1,250,000.00. In addition, Defendant has agreed to forgive up to \$500 of all amounts any Class Member owes Defendant from deposit accounts that were charged off by Defendant between August 11, 2015 and February 4, 2022, provided that the account is one that was charged one or more insufficient funds or overdraft fees on an item that had previously been charged one or more insufficient funds fee between August 11, 2015 and February 4, 2022. In no event shall the aggregate amount to be forgiven exceed \$500 per Class Member. In the event that you have more than one account that is eligible for the forgiveness described in this Section, Defendant will have the sole discretion to determine how to allocate the forgiveness described in this Section between or among your accounts. The total amount Defendant has agreed to forgive is estimated to be approximately \$3 million.

As discussed separately below, attorneys' fees, litigation costs, and the costs and fees paid to a third-party Settlement Administrator to administer the settlement (including mailing and emailing this notice) will be paid out of the Settlement Fund. The balance of the Settlement Fund will be

divided among all Class Members based on a methodology described in the settlement agreement, which is available on the settlement website (identified below).

**10. How much of the settlement fund will be used to pay for attorney fees and costs?**

Class Counsel will request an attorney fee to be awarded by the Court. Class Counsel will also request reimbursed of litigation costs incurred in prosecuting the case. The Court will decide the amount of the attorneys' fees and costs based on a number of factors, including the risk associated with bringing the case on a contingency basis, the amount of time spent on the case, the amount of costs incurred to prosecute the case, the quality of the work, and the outcome of the case.

**11. How much of the settlement fund will be used to pay Service Awards to the Named Plaintiffs?**

Class Counsel will request that the Named Plaintiffs be paid Service Awards of \$2,500.00 each for their work in connection with this case. The Service Award must be approved by the Court.

**12. How much will my payment be?**

The balance of the Settlement Fund after attorneys' fees and costs, the Service Award, and the Settlement Administrator's fees and costs will be divided among all Class Members in accordance with the methodology outlined in the settlement agreement, which is available on the settlement website (identified below). Class Members who still have an open account with Defendant will receive a credit to their accounts for the amount they are entitled to receive. Class Members who no longer have an open account with Defendant will receive a check from the Settlement Administrator for the amount they are entitled to receive. Additionally, all Class Members, regardless of whether they still have an open account with Defendant, will have up to \$500.00 of all amounts they owe Defendant from qualifying deposit accounts that were charged off by Defendant between August 11, 2015 and February 4, 2022 forgiven (see Section 9 above).

**13. Do I have to do anything if I want to participate in the settlement?**

No. If you received this Notice, then you will be entitled to receive a payment or a credit to your account without having to make a claim, unless you choose to exclude yourself from the settlement, or "opt out."

**14. When will I receive my payment or account credit and my debt forgiveness?**

The Court will hold a Fairness Hearing on \_\_\_\_\_, at \_\_\_\_\_ to consider whether the settlement should be approved. If the Court approves the settlement, then payments should be made or credits should be issued within about 40 to 60 days after the settlement is approved. Defendant will also forgive up to \$500.00 of all amounts Class Members owe Defendant from qualifying deposit accounts that were charged off by Defendant between August 11, 2015 and February 4, 2022 (see Section 9 above) within about 40 to 60 days after the settlement is approved. However, if someone objects to the settlement, and the objection is sustained, then there is no settlement. Even if all objections are overruled and the Court approves the settlement, an objector could appeal, and it might take months or even years to have the appeal resolved, which would delay any payment and debt forgiveness.

**EXCLUDING YOURSELF FROM THE SETTLEMENT**

**15. How do I exclude myself from the settlement?**

If you do not want to receive a payment, or if you want to keep any right you may have to sue Defendant for the claims alleged in this lawsuit, then you must exclude yourself, or “opt out.”

To opt out, you **must** send a letter by first class mail to the Settlement Administrator that you want to be excluded. Your letter can simply say “I hereby elect to be excluded from the settlement in the *James Smiley v. First National Bank* class action.” Your letter must also include your name, the last four digits of your account number(s) or former account number(s), address, telephone number, and email address (if applicable). Your exclusion letter or opt out request must also be dated and signed by you. Your exclusion or opt out request must be postmarked on or before \_\_\_\_\_, and sent to:

James Smiley et al. v. First National Bank

Attn:

**ADDRESS OF THE SETTLEMENT ADMINISTRATOR**

**16. What happens if I opt out of the settlement?**

If you opt out of the settlement, you will preserve and not give up any of your rights to sue Defendant for the claims alleged in this case. However, you will not be entitled to receive a payment from this settlement.

**17. If I exclude myself, can I obtain a payment or account credit and debt forgiveness?**

No. If you exclude yourself, you will not be entitled to a payment or a credit to your account. You will also no longer be eligible for the debt forgiveness described in this Notice and the settlement.

**OBJECTING TO THE SETTLEMENT**

**18. How do I notify the Court that I do not like the settlement?**

You can object to the settlement or any part of it that you do not like **IF** you do not exclude yourself, or opt out, from the settlement. (Class Members who exclude themselves from the settlement have no right to object to how other Class Members are treated.) To be valid and considered by the Court, your objection **must** be in writing and (1) sent by first class mail to the Settlement Administrator at the address below, and (2) filed with the Court, with service upon Class Counsel and Defendant’s counsel. Your objection should say that you are a Class Member, that you object to the settlement, the factual and legal reasons why you object (including any exhibits you want the Court to consider in connection with your objection), and whether you intend to appear at the hearing. In your objection, you must include your name, address, telephone number, last four digits of your account number(s) or former account numbers(2), and email address (if applicable). You must also sign and date your objection. If you retain an attorney in connection with your objection, you must also provide the contact information for your attorney.

All objections must be (1) mailed to the Settlement Administrator and received by or showing a postmark date on or before \_\_\_\_\_ **and** (2) filed with the Court and served upon Class Counsel

and Defendant's counsel on or before \_\_\_\_\_. Objections should be mailed to the Settlement Administrator as follows:

<b>SETTLEMENT ADMINISTRATOR</b>
James Smiley, et al. v. First National Bank Settlement Administrator Attn: <b>ADDRESS OF THE SETTLEMENT ADMINISTRATOR</b>

After being filed with the Court, objections should also be served on Class Counsel and Defendant's counsel as follows:

<b>CLASS COUNSEL</b>
James Smiley et al. v. First National Bank Settlement Administrator Attn:  Lynn A. Toops Cohen & Malad, LLP One Indiana Square Suite 1400 Indianapolis Indianapolis, IN 46204 317-636-6481 Fax: 317-636-2593 ltoops@cohenandmalad.com  J. Gerard Stranch, IV Branstetter, Stranch and Jennings, PLLC 223 Rosa L Parks Blvd. Suite 200 Nashville, TN 37203 (615) 254-8801 gerards@bsjfirm.com  Christopher D. Jennings JOHNSON FIRM 610 President Clinton Avenue, Suite 300 Little Rock, Arkansas 72201 Telephone: (501) 372-1300

Facsimile: (888) 505-0909  
chris@yourattorney.com

**DEFENDANT'S COUNSEL**

James Smiley et al. v. First National Bank Settlement Administrator  
Attn:

Anton L. Janik, Jr.  
Graham Talley

**MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD,  
P.L.L.C.**

425 West Capitol Avenue, Suite 1800  
Little Rock, Arkansas 72201

(501) 688-8800

ajanik@mwlaw.com

gtalley@mwlaw.com

**19. What is the difference between objecting and requesting exclusion from the settlement?**

Objecting is telling the Court that you do not believe the settlement is fair, reasonable, and adequate for the class, and asking the Court to reject it. You can object only if you do not opt out of the settlement. If you object to the settlement and do not opt out, then you are entitled to a payment if the settlement is approved, but you will release claims you might have against Defendant. Excluding yourself or opting out is telling the Court that you do not want to be part of the settlement, and do not want to receive a payment or credit to your account, debt forgiveness, or release claims you might have against Defendant.

**20. What happens if I object to the settlement?**

If the Court sustains your objection, or the objection of any other Class Member, then there is no settlement. If you object, but the Court overrules your objection and any other Class Member's objection(s), then you will be part of the settlement.

## THE COURT'S FAIRNESS HEARING

### **21. When and where will the Court decide whether to approve the settlement?**

The Court will hold a Final Approval or Fairness Hearing at \_\_\_ on \_\_\_\_, 2022 at the Circuit Court of Lonoke County, Arkansas, which is located at 301 N. Center St, Lonoke, AR 72086. At this hearing, the Court will consider whether the settlement is fair, reasonable and adequate. If there are objections, the Court will consider them. The Court may also decide how much to award Class Counsel for attorneys' fees and expenses.

### **22. Do I have to come to the hearing?**

No. Class Counsel will answer any questions the Court may have. You may attend if you desire to do so. If you have submitted an objection, then you may want to attend.

### **23. May I speak at the hearing?**

If you have objected, you may ask the Court for permission to speak at the Final Approval Hearing. To do so, you must include with your objection, described in Question 18, above, the statement, "I hereby give notice that I intend to appear at the Final Approval Hearing." If you intend to appear at the Final Approval Hearing through counsel, you must also identify your counsel by name, address, and telephone number.

## THE LAWYERS REPRESENTING YOU

### **24. Do I have a lawyer in this case?**

The Court ordered that the lawyers and their law firms referred to in this notice as "Class Counsel" will represent you and the other Class Members.

### **25. Do I have to pay the lawyer for accomplishing this result?**

No. Class Counsel will be paid directly from the Settlement Fund.

### **26. Who determines what the attorneys' fees will be?**

The Court will be asked to approve the amount of attorneys' fees at the Final Approval or Fairness Hearing. Class Counsel will file an application for fees and costs and will specify the amount being sought as discussed above. You may review a copy of the fee application at the settlement website established by the Settlement Administrator (identified below), or by reviewing it at the Circuit Court of Lonoke County, Arkansas, which is located at 301 N. Center St., Lonoke, AR 72201.

## **GETTING MORE INFORMATION**

This Notice only summarizes the proposed settlement. More details are contained in the settlement agreement, which can be viewed/obtained online via the settlement website at [WEBSITE] or at the Circuit Court of Lonoke County, Arkansas, which is located at 301 N. Center St., Lonoke, AR 72201, by asking for the Court file containing the Motion For Preliminary Approval of Class Settlement (the settlement agreement is attached to the motion).

For additional information about the settlement and/or to obtain copies of the settlement agreement, or to change your address for purposes of receiving a payment, you should contact the Settlement Administrator as follows:

James Smiley v. First National Bank  
Settlement Administrator

Attn:

[INSERT SETTLEMENT ADMINISTRATOR INFORMATION]

For more information you also can contact the Class Counsel as follows:

Lynn A. Toops  
Cohen & Malad, LLP  
One Indiana Square  
Suite 1400  
Indianapolis  
Indianapolis, IN 46204  
317-636-6481  
Fax: 317-636-2593  
ltoops@cohenandmalad.com

J. Gerard Stranch, IV  
Branstetter, Stranch and Jennings, PLLC  
223 Rosa L Parks Blvd.  
Suite 200  
Nashville, TN 37203  
(615) 254-8801  
gerards@bsjfirm.com

Christopher D. Jennings  
JOHNSON FIRM  
610 President Clinton Avenue, Suite 300  
Little Rock, Arkansas 72201  
Telephone: (501) 372-1300  
Facsimile: (888) 505-0909  
chris@yourattorney.com

***PLEASE DO NOT CONTACT THE COURT OR ANY REPRESENTATIVE OF  
DEFENDANT CONCERNING THIS NOTICE OR THE SETTLEMENT.***

## Exhibit 3

### COURT ORDERED NOTICE OF CLASS ACTION SETTLEMENT

You may be a member of the settlement class in *Smiley et al. v. First National Bank*, in which the plaintiffs allege that Defendant First National Bank (“Defendant”) incorrectly assessed certain fees between August 11, 2015 and February 4, 2022. If you are a Class Member and if the settlement is approved, you may be entitled to receive a cash payment or account credit from the \$1,250,000.00 Settlement Fund and, if you had an account or accounts with Defendant that was closed and charged off between August 11, 2015 and February 4, 2022 with amounts owing, have up to \$500.00 of the amount you owe Defendant forgiven, which is estimated to be approximately \$3 million in the aggregate. All of these are benefits established by the settlement.

The Court has preliminarily approved this settlement. It will hold a Final Approval Hearing in this case on [PARTIES TO INSERT DATE]. At that hearing, the Court will consider whether to grant final approval to the settlement, and whether to approve payment from the Settlement Fund of up to \$2,500,00 in service awards to each of the named plaintiffs, attorneys’ fees, and reimbursement of costs to the attorneys and the Settlement Administrator. If the Court grants final approval of the settlement and you do not request to be excluded from the settlement, you will release your right to bring any claim against Defendant that is covered by the settlement. In exchange, Defendant has agreed to issue a credit to your account, a cash payment to you if you are no longer a customer, and/or to forgive certain amounts owed to Defendant.

**To obtain a long form class notice and other important documents please visit [PARTIES TO PROVIDE WEBSITE ADDRESS]. Alternatively, you may call [INSERT PHONE #].**

*If you do not want to participate in this settlement—you do not want to receive a credit or cash payment or the forgiveness of certain amounts owed to Defendant and you do not want to be bound by any judgment entered in this case—you may exclude yourself by mailing an opt-out request to the Settlement Administrator postmarked no later than [PARTIES TO INSERT DATE]. If you want to object to this settlement because you think it is not fair, adequate, or reasonable, you may object by (1) mailing an objection to the Settlement Administrator received or postmarked no later than [PARTIES TO INSERT DATE] and (2) filing your objection with the Circuit Court of Lonoke County, Arkansas, with service on all counsel of record, no later than [PARTIES TO INSERT DATE]. You may learn more about the opt-out and objection procedures by visiting [PARTIES TO PROVIDE WEBSITE ADDRESS] or by calling [Insert Phone #].*

**EXHIBIT 4: PRELIMINARY APPROVAL ORDER**

IN THE CIRCUIT COURT OF LONOKE COUNTY, ARKANSAS  
THIRD DIVISION

JAMES SMILEY and TONI DAWN FOUTS,  
individually and on behalf of all others  
similarly situated,

Plaintiffs,

v.

FIRST NATIONAL BANK,

Defendant.

Cause No. 43CV-20-531

**CLASS ACTION COMPLAINT**

**ORDER PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT,  
DIRECTING NOTICE, AND SETTING DATE FOR FAIRNESS HEARING**

Plaintiffs James Smiley and Toni Dawn Smiley (formerly Toni Dawn Fouts) (“Plaintiffs”), by counsel, having submitted a class action Settlement Agreement and Release (the “Settlement” or the “Settlement Agreement”) to the Court and having moved on an unopposed basis for preliminary approval of the Settlement under Arkansas Rule of Civil Procedure 23(e), and the Court, being duly advised, now finds that the motion should be, and hereby is, **GRANTED**.

**ACCORDINGLY, IT IS HEREBY ORDERED:**

1. Terms capitalized herein and not otherwise defined shall have the meanings ascribed to them in the Settlement.
2. This Court has jurisdiction over the subject matter of this lawsuit and jurisdiction over Plaintiffs and Defendant in the above-captioned case (the “Parties”).
3. The Court finds that, solely for the purposes of settlement and notice, the requirements of Rule 23(a) and 23(b) of the Arkansas Rules of Civil Procedure have been met, specifically:

- a. The Class Members are so numerous that joinder of all members is impracticable, as there are thousands of Class Members;
- b. There are questions of law or fact common to the Class based upon the claims raised in the lawsuit relating to the charging of the bank fees at issue;
- c. Plaintiffs' claims are typical of the claims of the Class because they are based on the assessment of those same fees;
- d. Plaintiffs and Class Counsel will fairly and adequately protect the interests of the Class as Plaintiffs have no interests antagonistic to the Class and Class Counsel is experienced in class action litigation and Plaintiffs have participated in the litigation;
- e. Questions of law and fact common to the class members predominate over any questions affecting only individual members, namely those relating to the bank fees at issue, and a class action is superior to other available methods for fairly and efficiently adjudicating this lawsuit, as it provides an efficient class-wide resolution.

4. The Court therefore **CERTIFIES** the following Class:

*All persons who, between August 11, 2015 and February 4, 2022 (the "Class Period") were customers of Defendant First National Bank and were charged by Defendant during the Class Period an overdraft fee on a debit card transaction that was pre-authorized into a positive balance and settled into a negative balance. Excluded from the class are Defendant's current and former officers, directors, affiliates, legal representatives, employees, successors, subsidiaries, and assigns. Also excluded are any judges who have presided over this matter and their immediate families and judicial staff, and any individuals who were not Arkansas citizens at the time this action was commenced. A person shall be deemed a citizen of Arkansas if the physical address of the primary owner of the account is located in Arkansas.*

5. The Court finds that the terms of the Settlement are within the range of a fair, reasonable, and adequate settlement between Plaintiffs and the Class, on one hand, and Defendant, on the other hand, under the circumstances of this case. The Court therefore preliminarily approves the Settlement and directs the parties to the Settlement to perform and satisfy the terms and conditions of the Settlement that are triggered by such preliminary approval.

6. Defendant is directed to make the payments to create the Settlement Fund as set forth in the Settlement Agreement for the benefit of the Class.

7. The proposed notices in the form attached to the Settlement, and the manner of distribution of such Notice by email and/or direct mail, are hereby approved by this Court as the best notice practicable to the Class. The form and manner of notice proposed in the Settlement comply with Rule 23 of the Arkansas Rules of Civil Procedure and the requirements of Due Process.

8. KCC Class Action Services, LLC (the “Settlement Administrator”) shall cause notice to be sent to each Class Member no later than thirty (30) days from the date of this Order. Notice shall be sent in the manner set forth in the Settlement.

9. Within 50 days of Notice being sent, Plaintiffs shall file a motion for approval of the attorneys’ fees, expenses and costs, the Settlement Administrator’s costs, and service awards to the Class Representatives, and shall file a motion for final approval of the Settlement.

10. Pursuant to Rule 23 of the Arkansas Rules of Civil Procedure, a final approval hearing (the “Final Approval Hearing”) shall be held before the undersigned at \_\_\_\_\_, 2022, at the Circuit Court of Lonoke County, Arkansas (or by remote appearance if circumstances permit and information relating to the hearing shall then be posted on the settlement website) for the purpose of: (a) determining whether the Settlement is fair, reasonable, and adequate and should be finally approved; (b) determining whether a Final Approval Order should be entered; and (c) considering Class Counsel’s application for an award of attorneys’ fees pursuant to Rule 23 of the Arkansas Rules of Civil Procedure. The Court may adjourn, continue, and reconvene the Final Approval Hearing pursuant to oral announcement without further notice to the Class, and the Court

may consider and grant final approval of the Settlement, with or without minor modification and without further notice to the Class.

11. Class Members shall be afforded an opportunity to request exclusion from the Class. For an Exclusion Letter to be valid, it must be postmarked on or before the Bar Date to Opt Out. Any Exclusion Letter shall identify the Class Member by name, shall include the last four digits of the Class Member's account number(s) or former account number(s), address, telephone number, and email address (if applicable), shall state that the Class Member wishes to exclude himself or herself from the Agreement, and shall be dated and signed by the Class Member. Class Members who submit a timely and valid request for exclusion from the Class shall not participate in and shall not be bound by the Settlement. Class Members who do not timely and validly opt out of the Class in accordance with the Notice shall be bound by all determinations and judgments in the action concerning the Settlement.

12. Class Members who have not excluded themselves shall be afforded an opportunity to object to the terms of the Settlement. To be valid and considered by the Court, the objection must be in writing and sent by first class mail, postage pre-paid, to the Settlement Administrator, and also be filed with the Court, with service upon Defendant's counsel and Class Counsel. The objection must be (1) mailed to the Settlement Administrator and received by or showing a postmark date on or before the Bar Date to Object (as defined in the Settlement Agreement) and (2) filed with the Court and served upon Defendant's counsel and Class Counsel on or before the Bar Date to Object. Class Counsel shall file responsive pleadings to any objections at least seven (7) days prior to the Final Approval Hearing Date. The content of the objection must include the following information and must be signed and dated by the Class Member:

- (i) The objector's name, address, telephone number, email address (if applicable), the last four digits of his or her account number(s) or former

account number(s), and the contact information for any attorney retained by the objector in connection with the objection or otherwise in connection with this case;

- (ii) A statement of the factual and legal basis for each objection and any exhibits the objector wishes the Court to consider in connection with the objection; and
- (iii) statement as to whether the objector intends to appear at the Final Approval Hearing, either in person or through counsel, and, if through counsel, identifying the counsel by name, address, and telephone number.

13. Any member of the Class who does not make his or her objection known in the manner provided in the Settlement and Notice shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness or adequacy of the proposed Settlement.

14. Any request for intervention in this action for purposes of commenting on or objecting to the Settlement must meet the requirements set forth above, including the deadline for filing objections, and also must be accompanied by any evidence, briefs, motions or other materials the proposed intervenor intends to offer in support of the request for intervention, and must meet the requirements of the Arkansas Rules of Civil Procedure.

15. Any lawyer intending to appear at the Final Approval Hearing must be authorized to represent a Class Member, must be duly admitted to practice law before the Circuit Court of Lonoke County, and must file a written appearance. Copies of the appearance must be served on Class Counsel and counsel for Defendant in accordance with the Arkansas Rules of Civil Procedure.

16. If the Settlement does not become effective or is rescinded pursuant to the Settlement Agreement, the Settlement and all proceedings had in connection therewith shall be

without prejudice to the status quo ante rights of the Parties, and all Orders issued pursuant to the Settlement shall be vacated.

17. The Court retains jurisdiction to consider all further applications arising out of or connected with the proposed Settlement.

**SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_ 2022.**

\_\_\_\_\_  
Hon. Honorable Parker Sanders Huckabee  
Circuit Judge