UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SARAH VALELLY, Individually and on Behalf of All Other Persons Similarly Situated, Plaintiff, v. MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, Defendant.	Case No. 19-CV-07998-VEC

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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PRELIMINARY STATEMENT

Plaintiff Sarah Valelly ("Valelly") seeks certification of two separate classes and one subclass, defined as

> 1. A "Reasonable Rate Class" of all persons who had one or more Merrill Edge retirement accounts with cash balances that were swept pursuant to the Retirement Account Sweep Program ("RASP") at any time during the period December 15, 2016 through March 15, 2020; and
>
> 2. A "Statement-Link Class" of all persons who had one or more Merrill Edge retirement accounts with cash balances that were swept pursuant to the Retirement Account Sweep Program ("RASP") at any time from July 13, 2014 through the present, who had multiple linked accounts on the Merrill Edge website but whose accounts were not "statement linked"; and
>
> 3. A "MCPL Subclass" of all Statement-Link Class members who entered into the governing retirement agreement at any time from July 13, 2016 through the present in Massachusetts or who resided in Massachusetts at any time from July 13, 2016 through the present when they were eligible for, but did not receive the benefits of, statement-linking.

Valelly's claim on behalf of the "Reasonable Rate Class" relies on uniform agreements that state that investors will be paid "reasonable" interest rates on sweep accounts. Defendant Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill")'s methodology in paying interest rates based on "Tiers" and assets under management is uniform among all class members. A reasonable rate can be determined based on Merrill's historical Model (which it failed to follow) of paying interest rates based on a "pass-through" percentage [redacted] Damages for class members will be calculated based on an arithmetic formula taking the difference between the rate that a finder of fact determines is "reasonable" and the lower rate paid by Merrill, multiplied by the uninvested cash in the class member's account. Accordingly, the Reasonable Rate Class should be certified.

Valelly's claims on behalf of the Statement-Link Class should also be certified. Merrill has a financial motive to discourage statement-linking (which would require Merrill to pay a higher

rate of interest) that is uniform among all class members. The great number of class members who "link" their accounts on Merrill's website but do not "statement-link" their accounts, coupled with the ineffective disclosure of investors' rights to statement-link, and the "hoops" class members need go through to statement-link, satisfies this Court's standards for certifying classes for breach of the covenant of good faith and fair dealing. For the same reasons, the Court should certify the MCPL Subclass, which asserts an identical statement-linking claim under Massachusetts law. Accordingly, Valelly's class certification motion should be granted.

STATEMENT OF FACTS

A. The Parties

Merrill is a registered broker-dealer, and a wholly owned subsidiary of Bank of America Corp. ("BAC").[1] Merrill operates the Merrill Edge online investing platform. BAC is a publicly owned bank holding company. BAC operates through wholly owned subsidiaries, including Bank of America, N.A. ("BANA"). BANA is in the business generally, *inter alia*, of lending money to third parties. BANA funds its lending activities "primarily with globally sourced deposits in our bank entities," including sweep accounts, "as well as secured and unsecured liabilities transacted in the capital markets." 2018 Form 10-K at 6; *see also* Luo Tr. (Ex. A)[2] 15:7-14.

Valelly is an individual investor who opened three Merrill Edge online investment accounts in August 2017 – a fully taxable Cash Management Account ("CMA"), a Traditional Individual Retirement Account ("IRA") and a Roth Individual Retirement Account ("Roth IRA"), and a separate BANA savings account in May 2018. Valelly Tr. (Ex. B) 33:5-8.

[1] *See* BAC 2018 Form 10-K at 47 (https://investor.bankofamerica.com/regulatory-and-other-filings/annual-reports/content/0000070858-19-000012/0000070858-19-000012.pdf) (last viewed February 28, 2022).

[2] All Exhibits referenced herein are enclosed with the accompanying Declaration of Robert C. Finkel, dated March 4, 2022.

During the period December 15, 2016 through March 15, 2020 (the "Relevant Period")[3] over [redacted] in cash was swept on a daily basis from Merrill brokerage accounts to BANA. *See, e.g.*, Ex. C (BANA_00003830, 33) at 2 ([redacted] in deposits). The spread between the interest received from third parties by BANA and the interest paid to Merrill investors on uninvested cash is a significant source of profit to BANA. Luo Tr. 18:10-17.

B. Valelly Opens Her Merrill Edge Accounts

Valelly met with a Merrill financial advisor ("FA") in August 2017, in Boston, MA. Valelly Tr. 30:22-25. Valelly opened her Merrill accounts using a Merrill iPad. *Id.* at. 30:7-15. Valelly was directed by the online instructions to scroll through the account opening procedures and enter her personal information. After doing so, Valelly was brought through a series of screens identified as "Terms & Conditions." By clicking "I agree," Valelly became bound to those disclosures. *See* ECF No. 31 (Opinion and Order) at 11-12.

Among the agreements Valelly "clicked" her consent to were the On-Line Client Relationship Agreement ("CRA"; ECF 18-1), the On-Line CMA agreement (ECF 18-2), the Traditional IRA Disclosure Statement (ECF 18-3), and the Roth IRA Agreement (ECF 18-4). Valelly Tr. 32:24-33:12. Section 13 of the CRA (applicable to all three of Valelly's online accounts) stated (on page 4) that interest was paid on retirement accounts pursuant to the Retirement Asset Savings Program ("RASP"). Section 13 also stated that "[t]he interest paid on retirement account assets will be at no less than a reasonable rate." ECF 18-1.

[3] Prior to December 15, 2016 and subsequent to March 15, 2020, market interest rates were low and sweep rates, generally, were nominal. [redacted]

The Traditional and Roth IRA agreements also provided that Valelly's uninvested cash would be swept to BANA pursuant to the RASP. The Traditional IRA agreement stated that BANA "will bear a reasonable rate of interest as required under the exemption provided by ERISA Section 408(b)(4) or Tax Code Section 4975(d)(4)," and "will set interest rates based on economic and business conditions." ECF 18-3 at p. 2, ¶7 and p.38, ¶18. The Roth IRA agreement stated that BANA would pay a "reasonable rate of interest" "based on economic and business conditions." ECF 18-4 at p. 25, ¶61 and p. 34, ¶18.

Ms. Valelly repeated the account opening procedure for her CMA, IRA and Roth IRA accounts under the same username and password. At all times when plaintiff accessed her Merrill account, all three of her Merrill accounts were visibly linked on the screen.

According to the July 11, 2017 "Cash Management Solutions" document available as a pdf at the bottom of the Merrill Edge website (Ex. D), the Annual Percentage Yield ("APY") for the Merrill Lynch RASP is tiered based on assets under management ("AUM") with the following rates as of July 11, 2017: Tier 1 (<$250,000), 0.14%, Tier 2 ($250,000 to $1M), 0.33%, Tier 3 ($1M to $10M), 0.38%, and Tier 4 (greater than $10M), 0.47%.

C. Valelly Opens a BANA Savings Account

From October 2017 until March 2019, Valelly continued to deposit cash into her taxable and IRA accounts and established a separate BANA savings account. Valelly Tr. 48:21-50:11. All four accounts, and Valelly's other BANA accounts, were listed on Merrill's website under the heading "Linked Accounts." *See* ECF 50-4. Annexed as Exhibit E is a chart reflecting the aggregate monthly AUM on Valelly's four ML/BANA accounts (exceeding, at times, $1 million). *See also* Amended Complaint ("AC"), ECF 55, ¶120 (listing Valelly's quarterly cash balances).

D. Valelly Was Not Paid the Appropriate Rate of Interest Available Through Statement-Linking

The IRA and Roth IRA agreements stated that Valelly could "statement-link" her accounts to earn a higher rate of interest at a higher tier.[4] ECF 18-3 (IRA agreement, pp. 43-44) and 18-4 (Roth IRA agreement, pp. 39-40). This requires the customer to enroll in Merrill's Statement Link Service by speaking to a FA or by calling Merrill's toll-free number; there is no ability to enroll online, nor are customers prompted to enroll in statement linking when they view their accounts on Merrill Edge. Ex. F (Hill Tr. 30:23-34:20). Valelly was not aware of those terms and did not seek to statement-link her accounts. *See* Valelly Tr. 98:18-101:5. Nowhere on the account opening iPad, or in the years she maintained her Merrill Edge accounts, was Valelly advised by any Merrill (or BANA) employee that she could "statement-link" her accounts, and that by statement-linking, she could earn a higher rate of interest on a higher tier. *Id.* 101:6-10. Plaintiff became aware that she was entitled to statement-link her accounts only after retaining counsel for this lawsuit.

At all times when Ms. Valelly maintained multiple accounts (including her BANA accounts), they were visibly linked on the Merrill website. *See* ECF 50, 50-1, 50-2, 50-3, and 50-4. The website neither informs clients that their accounts are not "statement linked," nor does it prompt them to statement link their accounts. *Id.*; Hill Tr. 103:20-104:11.

E. Merrill Breached Its Agreement to Pay a Reasonable Rate on Retirement Accounts

1. *Merrill Developed an Internal Model* [redacted]

From 2008 to 2015, the U.S. economy experienced an extended period of low interest rates during which the rates paid by Merrill to investors on sweep accounts were nominal, at or about

[4] Valelly's AC (ECF 55) focused on statement-linking her two IRA accounts (*e.g.*, ¶363). Among the common issues for determination is whether statement-linking applies to other Merrill or BANA accounts, as well. *See, e.g.*, ECF 18-3 at 43 ("Your Asset Tier will be based on ... deposit balances with the Merrill Lynch Affiliated Banks.").

0.01%. However, beginning in 2015-16, Merrill began to anticipate that the Federal Reserve would increase [redacted], which caused BANA's finance team to evaluate when and in what magnitude it would increase the interest rates paid on sweep accounts, including RASP. *See* Ex. G (BANA_00005505, 08) and H (BANA_00006313, 15) (October 2015 and October 2016 email streams with attachments evaluating pricing strategies in a rising rate environment). [redacted] Luo Tr. 224:16-225:14; 230:3-231:24. [redacted] Gleason Tr. (Ex. I) 35:7-22; Luo Tr. 21:12-21; 25:16-24. [redacted] *See* Luo Tr. 15:23-16:18.

By June 2017, Merrill had fine-tooled the Model so that the rates paid on RASP, Tiers 1 through 4, [redacted] Ex. J (BANA_00035654-55) at p. 8. [redacted] *See* Ex. H (BANA_00006313-15) at page 4 ("[redacted]

[5] [redacted] *Id.* [redacted] *Compare* Ex. J (BANA-00035654), pp. 7 and 8.

[redacted]

[redacted]").[6]

BANA had a pricing group, of which Aileen Gleason was a Managing Director. Gleason Tr. 7:23-8:5. Gleason's "team ... set[] the deposit strategy for" Global Wealth & Investment Management ("GWIM"). *Id.* 8:15-25, 9:13-19. Luo and Stephen Mondello reported to Gleason. Id. 43:2-44:2. From 2017 to the fall of 2018, Gleason reported to Jeffrey Busconi, who was the COO for Terence Laughlin,[7] who in turn was the head of GWIM and reported directly to Brian Moynihan, BAC's Chairman and CEO. *Id.* 13:7-16, 22-23, 14:11-16.

2. *Merrill Deviated from Its Own Model in Order to Maximize Revenue*

Contrary to its contractual obligations to continue to pay a "reasonable rate" based on "economic and business conditions," [redacted]

[redacted] Exs. G at BANA 5508, p. 2; Gleason Tr. 52:24-53:5. [redacted] *Id.* 37:19-38:5.

"Reasonable" and "adequate" have different meanings in the English language. According to the Oxford Dictionary, "reasonable" means "as much as is appropriate or fair."[8] "Adequate"

[6] SEC reforms had resulted in "gov't/treasury" MMFs, consisting primarily of government securities, being more conservative than prime funds. [redacted] *See also* Luo Tr. 75:13-76:2; 77:13-17.

[7] Laughlin passed away unexpectedly in October 2018. Tr. 15:19-25.

[8] "Reasonable," Oxford English Dictionary (last accessed via Google on March 3, 2022).

means "satisfactory or acceptable in quality or quantity."[9] According to Merriam-Webster, "Some common synonyms of adequate are competent, enough, and sufficient. While all these words mean 'being what is necessary or desirable,' adequate may imply barely meeting a requirement."[10] BANA's sweep rates, accordingly, may have been adequate to maximize BANA's profits, but not reasonable, in light of the value those deposits provided to BANA's profitability, and the alternative uses of that cash available to Merrill investors.

BANA classified investors as rate-sensitive or rate-insensitive. [redacted] *See* Ex. K (Luo December 7, 2018 email at BANA 00008818).[11] Thus, BANA determined to keep the tiered rates low and to mitigate the loss of deposits from investors migrating to money market funds ("MMFs") by offering an FDIC-insured Preferred Deposit account that tracked interest rates of MMFs. *See, e.g.*, Ex. L (BANA00002699, 70) ("[redacted]").[12]

3. *Timeline of [redacted] and Merrill Sweep Rate Changes*

On June 15, 2017, the Federal Reserve raised [redacted]

[9] "Adequate," Oxford English Dictionary (last accessed via Google on March 3, 2022)

[10] https://www.merriam-webster.com/thesaurus/adequate (last accessed March 3, 2022).

[11] In the same email stream, Kristin Huonker, of the finance group, was proposing an "[a]djustment of tiers 1-4 and preferred rate for 2019 (~ 95mm save)."

[12] Valley is aware of the Court's comment in the January 25, 2021 Order (ECF 54 at 4) that a MMF is an "entirely distinct investment option." However, at the conference on January 28, 2022, the Court walked back that comment in part. Tr. 17 (Ex. M) ("The fact that there may be some similarities that they have a lot in common, doesn't make them the same product…. At least my initial reaction is that the two are different products. Whether they have similarities, I would agree they have similarities.").

[redacted] Ex. N (BANA_00047779). On June 26, 2017, BANA raised the Tier rates to 14, 33, 38, and 47 bps, respectively. Ex. S.

Effective October 20, 2017, Merrill increased the interest rate on Preferred Deposit from 65 bps to 94 bps, while maintaining the interest rates on the four tiers at 14, 33, 38 and 47 bps. Ex. O (MLPFS_3651-53). Then, on October 23, 2017, [redacted] Ex. P (BANA_00007926, 27). [redacted][13] [redacted] Ex. Q (BANA_00048172).

On December 14, 2017, as had been anticipated, the Federal Reserve raised [redacted] Ex.

[13] All emphasis herein is added unless otherwise noted.

R (BANA_00002748, 49) [redacted].[14] [redacted] *Id.* at 2750. [redacted] *Id.* Laughlin, in turn, forwarded Busconi's email to Moynihan (BANA's CEO). *Id.* at 2749 ("[redacted]"). [redacted] Luo Tr. 165:2-4. [redacted] Ex. R at 2749. [redacted] T (BANA_00002769) at 70. But again, in February 2018, the rates were not increased. [redacted] (Ex. U,

[14] Busconi's recommendations were significantly below the rates determined by the Model as reflected in the October 23, 2017 10+2 Forecast (Ex. P).

BANA_00048452), [redacted]

[redacted] Other non-sweep rates kept pace with the increase in the FFs rate. [redacted] *See* Ex. V, BANA_00003947 at 48.

On March 22, 2018, the Federal Reserve raised the FF effective rate by 25 bps to 1.68%. On April 6, 2018, Merrill increased Tier 3 from .38% to .50%, and Tier 4 from .47% to .65% (Ex. W, BANA_00002819 at 20) -- the first increase in tiered rates from July 2017. No increase was made on Tier 1 or 2. Then, on June 13, 2018, contemporaneous with a further 25 bps increase in the FF effective rate to 1.90, Busconi approved an increase in Tier 3 from 50 to 60 bps, and an increase in Tier 4 from 65 to 75 bps. Ex. X (BANA_00044932). Preferred Deposit increased the full 25 bps from 155 to 180 bps.

[redacted] Ex. Y (BANA_00008663).

On September 28, 2018 and December 20, 2018, the Federal Reserve raised [redacted] causing BANA to keep pace by raising Preferred Deposit to 2.07%. AC, ¶99. Although [redacted], and Preferred Deposit increased five-fold from 0.40% to 2.07%, Tiers 3 and 4 had only increased by 22 and 28 bps, respectively, significantly below the Model (which projected, conservatively, a 55% and 100% pass-through) – and ***Tiers 1 and 2 increased not at all***. Even conservatively, based on a 20% pass-through model, Tier 1 should have increased to 37 bps ((2.40%-0.55%) * .2) rather than the 14 bps paid. Tier 2, based on a 45% pass-through model, should have increased to 83.25 bps ((2.40%-0.55%) *.45), rather than the 33 bps paid.

4. *The Pricing Group Improperly Did Not Consider Rates Offered by Online Competitors and Other Benchmark Products*

Internally, Merrill Edge employees considered online businesses (such as Fidelity,[15] Schwab, Marcus, Ally, etc.) to be typical competitors for online Merrill Edge accounts, and was aware that these online banks paid higher deposit rates than brick-and-mortar peers. Ex. DD (MLPFS_11762); Foskett Tr. (Ex. EE) 68:1-17; 114:13-115:2; 124:23-127:19, 152:15-153:18. Nevertheless, the pricing group only looked at [redacted] Luo Tr. 253:5-254:15,

[15] On August 7, 2019, Fidelity Investments issued a press release announcing that "it has challenged conventional industry practices by automatically directing investors' cash into higher yielding options available for brokerage and retirement accounts … all without any minimum requirements." Ex. Z (Px 39). Fidelity's approach is contrary to typical industry practices (including Merrill's) of defaulting customers' cash into a low-yielding product – often at an affiliated bank – with no other option in what the industry calls a "cash sweep." The press release stated that the 7-day yield of Fidelity's Government MMF (symbol SPAXX), with no account minimum, was 1.91% -- 13.6 times the yield on Merrill's Tier 1 sweep account. Fidelity also at that time provided investors with a 1.07 percent yield on an FDIC-insured sweep account. Ex. AA. The press release described Fidelity as the "largest retirement and brokerage firm with nearly $8 trillion in total client assets." Fidelity is a peer to the Merrill Edge account, as Merrill admits.

255:8-256:21, 258:24-259:7; 259:23-260:17; Gleason Tr. 77:13-24. Nor did the pricing group consider the additional language in the CRA, and IRA and Roth agreements, that BANA would pay a "reasonable" rate based on "economic and business conditions," which was not in the CMA or other fully taxable agreements, in setting rates on retirement accounts. Luo Tr. 265:15-25; Gleason Tr. 40:23-41:23; 213:22-214:15. BANA based its knowledge of competitors' FDIC-insured rates on "published rate sheet[s]." Gleason Tr. 108:15-20. But the fact that similarly situated brick-and-mortar banks chose not to compete on FDIC insured sweep accounts – but rather to compete on promotional rates (Gleason Tr. 201:17-202:23) -- does not make the sweep rates objectively reasonable. As Luo testified, [redacted] Luo Tr. 122:11.

Furthermore, the pricing group did not consider that Merrill's brick-and-mortar and online peers allowed investors to sweep cash at higher FDIC-insured or MMF rates, or the transparency at which those peers disclosed rates. A July 3, 2018 analysis done by personnel within Merrill Edge, separate from the pricing group, establishes that Merrill's online peers (Schwab, Fidelity, and Vanguard) each allowed investors to sweep cash at higher rates. *See, e.g.*, Ex. FF (MLPFS_00033900) at 6. *See also* Ex. AA (Fidelity paying 1.07% on FDIC-insured sweep rate).

F. Plaintiff Learns that She Was Not Paid a Reasonable Rate on Her Cash

Valelly maintained her accounts at Merrill Lynch and BANA until March 8, 2019, when she was alerted by a Merrill Assistant Vice President in Philadelphia that her accounts were earning substantially below market interest rates. Valelly Tr. 52:15-24. Even then, Valelly was not alerted to statement-link her accounts.

ARGUMENT

Under Rule 23, this Court may certify a class if all of the requirements of Rule 23(a) are satisfied, and at least one subsection of Rule 23(b) is satisfied. *See Roach v. T.L. Cannon Corp.*,

778 F.3d 401, 405 (2d Cir. 2015) (vacating denial of class certification). While the Rule 23 analysis sometimes "entail[s] some overlap with the merits of the plaintiff's underlying claim ... merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465-66 (2013) (citations omitted).

In her Amended Complaint (ECF No. 55), Valelly levels two substantive claims: (i) Merrill breached its contract with retirement investors by failing to pay a reasonable rate of interest on each RASP Tier, and (ii) Merrill violated the covenant of good faith and fair dealing and the MCPL by frustrating investors' ability to avail themselves of the higher, statement-linked rates. Valelly now seeks certification of two classes and one subclass, defined as:

> 1. A "Reasonable Rate Class" of all persons who had one or more Merrill Edge retirement accounts with cash balances that were swept pursuant to the Retirement Account Sweep Program ("RASP") at any time during the period December 15, 2016 through March 15, 2020; and
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> 2. A "Statement-Link Class" of all persons who had one or more Merrill Edge retirement accounts with cash balances that were swept pursuant to the Retirement Account Sweep Program ("RASP") at any time from July 13, 2014 through the present, who had multiple linked accounts on the Merrill Edge website but whose accounts were not "statement linked"; and
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> 3. A "MCPL Subclass" of all Statement-Link Class members who entered into the governing retirement agreement at any time from July 13, 2016 through the present in Massachusetts or who resided in Massachusetts at any time from July 13, 2016 through the present when they were eligible for, but did not receive the benefits of, statement-linking.

A. The Proposed Classes Meet the Requirements of Rule 23(a)

1. *The Classes Are Sufficiently Numerous*

Under Rule 23(a)(1), a class must be "so numerous that joinder of all members is impracticable." "[N]umerosity may be presumed when a class consists of forty or more plaintiffs." *In re Bank of Am. Corp. Sec., Derivative, & Employee Ret. Income Sec. Act (ERISA) Litig.*, 281

F.R.D. 134, 138 (S.D.N.Y. 2012). "The Court does not require evidence of the exact class size or the identity of its members." *Hernandez v. Autozone, Inc.*, 323 F.R.D. 496, 501-02 (E.D.N.Y. 2018) (citing *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993)). Rather, "Plaintiff must present either evidence of the number or a reasonable estimate." *Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 529 (E.D.N.Y. 2017) (citation omitted).

Here, both Classes satisfy numerosity. There are thousands of members of the Reasonable Rate Class. For March 2018, for example, Merrill maintained 45,839 IRA accounts that paid interest under RASP.[16] Likewise, there are also thousands of members of the Statement-Link Class. For example, in August 2017 there were merely 306 account holders electing to use Merrill's Statement Link Service. Comparably, there were 11,980 account holders maintaining online-linked accounts that month alone.[17] The difference between 11,980 and 306 is obviously well in excess of the 40-person numerosity benchmark. *Cf. Martinek v. AmTrust Fin. Servs., Inc.*, 19 Civ. 8030 (KPF), 2022 WL 326320, at *5 (S.D.N.Y. Feb. 3, 2022) ("Although Plaintiff does not estimate the proposed class's size, the Court is satisfied that the class is sufficiently numerous to clear the numerosity requirement's low bar"); *Id.* ("a court may make common sense assumptions to support a finding of numerosity") (citations omitted).

2. *There Is At Least One Common Question of Law or Fact*

"Rule 23(a)(2) requires a party seeking class certification to prove that the class has common 'questions of law or fact.' Their claims must depend upon a common contention of such

[16] *See* Def.'s Response to Pl.'s First Set of Interrogatories (Ex. GG) Nos. 1-4. "IRA Accounts" includes Traditional IRAs, Inherited IRAs, Rollover IRAs, and Roth IRAs.

[17] *See* Def's Response to Pl's First Set of Interrogatories Nos. 5-6 (Ex. GG). Per Merrill, online linking is the service that allows customers to view all of their accounts in a combined view on Merrill Edge's website. *Id.* at 41 n.1. To be sure, the fact that there are so many online-linked accounts, yet so few of them are statement-linked, does not only show numerosity but also demonstrates how successful Merrill has been in keeping customers in the dark.

a nature that it is capable of class wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). The commonality requirement is not demanding "so long as there is at least one issue common to the class." *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 418 (S.D.N.Y. 2012) (citations omitted). Here, there are several questions of law or fact common among the claims of members of the respective Classes including: (i) whether Merrill fails to pay retirement account-holders their contractually-entitled "reasonable rate" of interest; (ii) whether Merrill breached the covenant of good faith and fair dealing with respect to advising investors of statement-linking; and (iii) whether Merrill's conduct violated a common-law, regulatory, or other established concept of fairness in violation of the MCPL. As discussed further below, the class questions raised above are at the core of Valelly's claims, are common to all class members, and also predominate over any questions solely affecting individual Class member.

3. *Valelly's Claims Are Typical of the Class Claims*

"The requirement of typicality is 'not demanding,'" *Tsereteli v. Residential Asset Securitization Trust 2006-A8*, 283 F.R.D. 199, 208 (S.D.N.Y. 2012) (citation omitted), and will be satisfied where each class member's claim arises from the same course of events and each member makes similar legal arguments to prove the defendant's liability. *Id.* Typicality "ensures that maintenance of a class action is economical and [that] the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Surdu v. Madison Glob., LLC*, 15 Civ. 6567 (HBP), 2017 WL 3842859, at *4 (S.D.N.Y. Sept. 1, 2017) (internal quotation marks omitted).

Like all other Reasonable Rate Class members, Valelly maintained a retirement account with Merrill, was contractually entitled to a reasonable rate of interest on uninvested cash, and was

deprived of reasonable interest rates. Her contract-based claims are thus typical of other Class members. *See N.J. Carpenters Health Fund v. Royal Bank of Scot. Grp., PLC*, 08-CV-5310 (DAB), 2016 WL 7409840, at *4 (S.D.N.Y. Nov. 4, 2016) ("When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims") (quoting *Robidoux*, 987 F.2d at 936-37). Similarly, like other Statement-Link Class and/or MCPL Subclass members, Merrill's conduct caused Valelly to be under the impression that online-linked accounts are also statement-linked, and failed to take reasonable measures to advise class members of their right to statement-link either at account opening or thereafter, thereby frustrating Valelly's and Class members' ability to obtain a higher interest rate. *See* AC ¶371; *see also* January 25, 2021 Order and Opinion. Because Valelly's claims and these class members "arise from the same course of events and will be resolved based on similar legal arguments," *In re Signet Jewelers Ltd. Sec. Litig.*, No. 16 Civ. 6728 (CM) (RWL), 2019 WL 3001084, at *9 (S.D.N.Y. July 10, 2019), typicality is satisfied.

4. *Valelly and Class Counsel Are Adequate Representatives*

Rule "23(a)(4) requires that in a class action, 'the interests of the class' must be 'fairly and adequately protected.'" *Charron v. Wiener*, 731 F.3d 241, 249 (2d Cir. 2013) (quoting Fed. R. Civ. P. 23(a)(4)) (alteration omitted). Adequacy analyzes "whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class; and [whether] 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000) (citation omitted). "[A]dequacy is satisfied unless 'plaintiff's interests are antagonistic to the interest of other members of the class.'" *Claridge v. N. Am. Power & Gas, LLC*, 15-cv-1261 (PKC), 2016 WL 7009062, at *5 (S.D.N.Y. Nov. 30, 2016) (citations omitted).

Valelly's interests are fully aligned with the Class's. Among other things, Valelly has prepared for and sat for a deposition, responded to Defendant's interrogatories and document requests, and searched for and collected thousands of pages of documents in connection with responding to these requests. Valelly has also regularly conferred with counsel to discuss case matters and strategy. Moreover, the large amount of cash in Valelly's accounts that Merrill swept to low-interest bearing products incentivizes her to obtain the best possible recovery for the Class: she is not fighting over pennies. *See* AC ¶120.

Regarding counsel's adequacy, Valelly has retained qualified and experienced counsel who have and will continue to vigorously prosecute this Action on behalf of the Class. Wolf Popper, which is consistently appointed as lead counsel and class counsel,[18] possesses extensive experience successfully litigating complex class actions, both in federal and state court, including through trial, and has a track record of obtaining substantial recoveries in litigation, including against Merrill Lynch.[19] *See* Ex. HH (firm and attorney CVs).

Moreover, Wolf Popper has prosecuted the Class's claims with the attention and resources this case deserves by, among other things, (i) thoroughly investigating potential claims against Merrill, culminating in the filing of the complaint and subsequently, the AC; (ii) briefing Defendant's motion to dismiss the complaint and the motion for leave to file the amended complaint: (iii) serving discovery requests on Merrill and a subpoena on BANA, repeatedly meeting and conferring with defense counsel on the scope of production, and reviewing thousands

[18] *See, e.g.*, *Martinek*, 2022 WL 326320, at *7, 20 (granting class certification and noting that Wolf Popper "is an experienced law firm" and has "worked diligently" in initiating and prosecuting the action); *Tsereteli*, 283 F.R.D. at 209 (finding that Wolf Popper was "qualified and capable of prosecuting" the class action).

[19] Wolf Popper recovered $45 million for the State of New Jersey Division of Investment in an individual contract action against Merrill, prosecuted in Hudson County, New Jersey. https://www.law360.com/newjersey/articles/434496/merrill-lynch-pays-45m-to-settle-nj-stock-purchases-suit (last viewed February 16, 2022).

of produced documents[20]; (iv) responding to discovery requests from Merrill and collecting and reviewing Valelly's documents for responsiveness and privilege; (v) conducting depositions of Merrill and BANA witnesses; (vi) retaining and working with economics experts; and (vii) filing this Motion. Considering these facts, adequacy of Valelly and her counsel have been satisfied, and the Court should appoint Wolf Popper LLP as Class Counsel for the Class under Rule 23(g).[21]

B. The Proposed Classes Meet the Requirements of Rule 23(b)(3)

1. *Predominance Is Satisfied*

Rule 23(b)(3) requires a showing that common issues predominate over individual issues. This requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Predominance is satisfied if: "(1) resolution of any [common] material legal or factual questions ... can be achieved through generalized proof, and (2) these [common] issues are more substantial than the issues subject only to individualized proof." *In re Petrobras Sec. Litig.*, 862 F.3d 250, 270 (2d Cir. 2017); *accord Waggoner v. Barclays PLC*, 875 F.3d 79, 93 (2017). The predominance inquiry mitigates risk "by 'ask[ing] whether the common, aggregation-enabling, issues in the case are ***more prevalent or important*** than the non-common, aggregation-defeating, individual issues.'" *In re Petrobras Sec*., 862 F.3d at 270 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016)) (emphasis in original).

[20] Plaintiff also received documents pursuant to subpoena she served on Fidelity Brokerage Services LLC.

[21] The Classes also clearly meet any imputed threshold "ascertainability" standard as they are "defined using objective criteria that establish a membership with definite boundaries." *Petrobras*, 862 F.3d at 264. Specifically, the Class definitions rely on criteria—namely, "purchases identified by subject matter [and] timing" —that "are clearly objective" and can be readily identified through Merrill's own records or claim forms. *Id.* at 269.

Whether common questions predominate over individual questions "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). In this case, the claims on behalf of the Reasonable Rate Class assert that Merrill breached its contract by failing to pay a "reasonable rate" of interest. "Contract claims satisfy Rule 23(b)(3) when the claims of the proposed class 'focus predominantly on common evidence.'" *Claridge*, 2016 WL 7009062, at *6 (granting class certification and quoting *In re US Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 125 (2d Cir. 2013)). Here, the class claims were undoubtedly focus on common evidence: Class members have all contracted with Merrill Lynch to open investment accounts and are commonly bound by the same agreements. The retirement agreements are uniform with respect to the provisions at issue and provide that interest rates will be at "reasonable rates" and "based on economic and business conditions," and that investors may earn a higher rate of interest if they "statement-link" their accounts. The contract language at issue does not vary by individual class members, raising the presumption that there are no individualized issues with respect to Merrill's conduct toward members of the class. *See Hanks v. Lincoln Life & Annuity Co. of New York*, 330 F.R.D. 374 (S.D.N.Y. 2019) (certifying breach of contract claim given predominance finding).

Similarly, members of this Class who allege a breach of the covenant of good faith and fair dealing, based on Merrill's failure to pay at least the tiered rates promised on statement linked accounts, have a cohesive claim where common issues are more prevalent than individual issues. The covenant of good faith and fair dealing is implicit in all contracts; it encompasses "any promises which a reasonable person in the position of the promise would be justified in understanding were included," and it prohibits either party from acting in a manner "which will have the effect of destroying or injuring the right of the other party to receive the fruits of the

contract." *Granite Partners, L.P. v. Bear, Stearns & Co. Inc.*, 17 F. Supp. 2d 275, 305 (S.D.N.Y. 1998) (internal citation omitted). As discussed already, the delta between the number of investors who have online-linked accounts and those who have statement-linked accounts is vast. Merrill has offered no legitimate reason why investors, who already maintain online-linked accounts, would not also statement-link their accounts to receive the higher rate of interest.[22] Insofar as there are any Class members who deliberately chose not to avail themselves of a higher interest rate, this does not defeat class certification. *Cf. In re VALE S.A. Sec. Litig.*, 19-CV-526-RJD-SJB, 2022 WL 122593, at *20 (E.D.N.Y. Jan. 11, 2022) ("courts in this Circuit have rejected the argument that investors who are ineligible for damages should be excluded from the class at certification"); *Haw. Structural Ironworkers Pension Trust Fund, Inc. v. AMC Entm't Holdings, Inc.*, 338 F.R.D. 205, 218 (S.D.N.Y. 2021) ("requiring the class definition expressly exclude those who are ineligible for damages is superfluous"). Any such issues can be addressed in the claims process.[23]

Predominance is satisfied as to damages. Under *Comcast Corp. v. Behrend*, a plaintiff's proposed method for calculating damages must be consistent with her theory of liability—that is, it must "measure only those damages attributable to that theory." 569 U.S. 27, 35 (2013). "*Comcast* did not rewrite the standards governing individualized damage considerations." *Sykes v. Mel S. Harris and Assocs. LLC, et al*., 780 F.3d 70, 88 (2d Cir. 2015). Rather, "[a]ll that is required at

[22] *See* Greenberg Tr. (Ex. II) at 137:6-13 ("Q. Ms. Greenberg, why would a consumer want their account linked online but not statement-linked? A. I don't know. Q. Can you think of any reason? A. I can't really think of a reason. Maybe they just don't care about how the statements come to them."). As reference, Debra Greenberg is a retirement product management executive for Merrill (and now BANA).

[23] For example, at the claims stage, class members would need to aver that they did not consciously decline statement linking, and/or Class members, as a condition of participating in the recovery, would agree going forward to have their accounts statement-linked. Alternatively, this Court could certify the Statement-Link Class under Rule 23(b)(2) and direct transparent notice to class members of their right to statement link. *Cf. Hernandez*, 323 F.R.D. at 504.

class certification is that the plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Id.* (citations omitted).

Valelly's proposed damages model fits squarely with her theory of liability. Subsequent to opening her accounts at Merrill Lynch, Valelly made substantial deposits and, like all Reasonable Rate Class members, was entitled to a reasonable rate of interest on her uninvested cash. Merrill breached its contract with Valelly by failing to fulfill this contractual provision, and Valelly suffered economic damages as a direct result of this breach. Likewise, each member of the Class is bound by identical terms and has suffered similar economic loss as a result of the breach. Valelly contends that a "reasonable rate" should be at least the market rate based on the economic model that BANA developed to pass through increases in [redacted] to depositors, or the prevailing interest rate that was offered by the online institutions that Merrill considered to be its Merrill Edge competitors.[24] The exact sum of the losses suffered by each class member will be calculated based on a formula (taking the reasonable rate and deducting the rate actually paid to depositors) and thus can be adjudicated through the use of common proof, and not individualized proof. *See Hanks*, 330 F.R.D. at 380.

[24] The Court previously held that "Plaintiff will ultimately need to point to more than just the average rates across the country to prevail on her claim that the rate paid was not reasonable." ECF No. 54 at 3 n.1 (citing *Brock v. Walton*, 794 F.2d 586, 588 (11th Cir. 1986)). Plaintiff's proposed methodology does just that by pointing alternatively to Merrill's own modeling [redacted], and the failure of the pricing group to consider the higher sweep rates paid by Merrill Edge's online competitors (including Fidelity and Vanguard). However, it bears noting that this case is unlike *Brock*. In *Brock*, a pension fund was seeking to facilitate home ownership of its members by offering mortgage loans below rates set by for-profit lenders. The court's finding "that a reasonable rate of interest may be below the prevailing market rate" means, in that context, that a reasonable rate may be *more* favorable to the plan's members than the market rate, not less. Moreover, the pension fund had no financial interest in conflict with its members. Here, Merrill is paying the lowest rates possible consistent with its primary objective of maximizing profits for its parent company, at the expense of Class members. It is akin to the NFL. If the owners make more money, should they keep it all for themselves, or should they share it with the players?

Here, as Dr. Officer[25] explains, damages are subject to the standard methodology of calculating the difference in actual value of a Class member's cash holdings in the sweep account and the but-for cash value had the class member been paid at a reasonable rate. Ex. JJ, Officer Report ¶ 22, 37-40. A "reasonable rate," in turn, can be determined by Merrill's own pass-through model [redacted], or by other alternative competitive market and/or benchmark rates. *Id.* ¶¶ 26-36. This methodology is consistent with Valelly's theory of liability, namely that Class members were shortchanged when they were deprived a reasonable interest rate, which is an objective inquiry. *See, e.g.*, *In re AXA Equitable Life Ins. Co. COI Litig.*, 2020 WL 4694172, at *13 (S.D.N.Y. Aug. 13, 2020). To be sure, the existence of potential "individualized damages determinations" can never be considered a sufficient basis, by itself, to "preclude certification." *Roach*, 778 F.3d at 409. The methodology for determining damages for the Statement-Linking Class is even simpler, and would not require expert testimony, as damages are simply based on the delta between the advertised rate of the higher tier (potentially adjusted based on resolution of the breach of contract claim) and the lower-tier rate actually received.

2. *Superiority Is Satisfied*

Rule 23(b)(3) also requires a finding that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." "The superiority requirement asks courts to balance, in terms of fairness and efficiency, the advantages of a class action against those of alternative available methods of adjudication." *City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, 12 Civ. 0256 (LAK) (AJP), 2017 WL 3608298, at *15 (S.D.N.Y. Aug. 22, 2017)

[25] Dr. Officer, a professor of finance at Loyola Marymount University, has a special expertise in corporate finance matters. His opinions related to predominance were recently accepted in a much more complicated antitrust action. *See B & R Supermarket, Inc. v. Mastercard Int'l Inc.*, 17-CV-02738 (MKB) (JO), 2021 WL 234550 (E.D.N.Y. Jan. 19, 2021) (granting class certification).

(citations omitted). In analyzing superiority, courts consider: (i) the interests of class members in "individually controlling the prosecution or defense of separate actions"; (ii) "the extent and nature of any litigation concerning the controversy already begun by or against class members"; (iii) "the desirability or undesirability of concentrating the litigation of the claims in the particular forum"; and (iv) "the likely difficulties in managing a class action." Each factor supports superiority.

First, Valelly seeks to represent a Class that includes a large number of geographically dispersed investors and "the amount of potential recovery per plaintiff is not so high as to ensure that each plaintiff could or would bring an action individually," and thus individual litigation would be prohibitively expensive. *See Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168 (S.D.N.Y. 2008). Class treatment is superior "in 'negative value' cases, in which 'each individual class member's interest in the litigation is less than the anticipated cost of litigating individually.'" *In re Advanced Battery Technologies, Inc. Sec. Litig.*, 298 F.R.D. 171, 182 (S.D.N.Y. 2014) (citations omitted). ***Second***, concentrating this litigation in a single forum has numerous benefits, including eliminating the risk of inconsistent adjudication and promoting the fair and efficient use of the judicial system. *Lapin*, 254 F.R.D. at 187. ***Third***, Valelly is unaware of any other pending action asserting claims like those asserted here. ***Finally***, there are no management difficulties that would preclude this Action from being maintained as a class action. To the contrary: "litigating each case separately would be wasteful, and result in delay and an inefficient expenditure of judicial resources." *In re SCOR Holding (Switz.) AG Litig.*, 537 F. Supp. 2d 556, 579 (S.D.N.Y. 2008).

C. The Court Should Certify the MCPL Subclass

The Court should also certify the MCPL Subclass, which consists of all Class members who entered into the governing retirement agreements in Massachusetts, for the same reasons discussed above. Plaintiff's MCPL claim arises from the same facts as Plaintiff's contract claims, but seeks broader remedies available under the statute. *See* Mass. Ann. Laws ch. 93A, § 9(4)

(mandating "reasonable attorney's fees" upon proven MCPL violation on multiple, similarly situated persons); § 9(3A) (allowing treble damages); *Kelley v. CVS Pharmacy, Inc.*, No. 98-0897-BLS2, 2007 WL 2781163 (Mass. Sup. Ct. Aug. 24, 2007) (equitable disgorgement available under MCPL). The grounds for granting class certification for the MCPL Subclass are the same as the grounds for certifying the larger classes. With respect to numerosity, given the exceedingly high number of online customers whose accounts were not statement-linked (as discussed earlier), and considering that there are at least 14 Merrill branch offices within Massachusetts (reflecting hundreds of financial advisors), it is reasonable to assume that there are at least 40 Class members who contracted in Massachusetts.[26] *Cf. Martinek*, 2022 WL 326320, at *5 ("a court may make common sense assumptions to support a finding of numerosity") (citations omitted). Accordingly, the Court should certify the MCPL Subclass. *See In re Namenda Indirect Purchaser Antitrust Litig.*, 338 F.R.D. 527, 574 (S.D.N.Y. 2021) (certifying claims under, *inter alia*, MCPL); *Adikhanov v. Action Emergency Mgmt. Servs.*, 1984CV02355BLS1, 2021 WL 3292613 (Mass. Sup. Ct. Apr. 16, 2021) (certifying consumer claim under Section 9 of MCPL).[27]

CONCLUSION

For the reasons set forth above, Plaintiff's motion for class certification should be granted. The Court should certify the Classes and appoint Wolf Popper LLP as Class Counsel.

Dated: March 4, 2022

Respectfully submitted,

By: /s/ Robert C. Finkel

Robert C. Finkel

[26] *See* https://fa.ml.com/Massachusetts (listing all Massachusetts branches).

[27] As described in paragraph 393 of the AC, Plaintiff made a pre-suit demand in compliance with Mass. Gen. Laws ch. 93A, § 9(3). *See Hermida v. Archstone*, 950 F. Supp. 2d 298, 304 (D. Mass. 2013) (once demand letter requirement is met, "a putative class action takes on a life of its own.").

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2022, the foregoing was served on defendant in the above-referenced matter, pursuant to Rule 5 of the Federal Rules of Civil Procedure, by sending a copy to counsel of record for defendant via email, pursuant to prior written agreement between counsel.

/s/ Robert C. Finkel
Robert C. Finkel