UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

STACY MOCK, on behalf of
herself and all others similarly situated,

Plaintiff,

v.

TOMPKINS COMMUNITY BANK,

Defendant.

Civil Action No. 3:22-cv-00995-BKS-ML

Chief Judge Brenda K. Sannes

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARD

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Regulations

INTRODUCTION

After analyzing complex transactional banking data with the assistance of an expert, and participating in a mediation with Judge Richard A. Stone (ret.), the parties reached the proposed class action Settlement Agreement and Release (the "Settlement"), ECF No. 44-2, which the Court preliminarily approved on October 13, 2023, ECF No. 50. The settlement provides class members considerable relief with a Settlement Amount of $450,000.00, paid by Defendant Tompkins Community Bank, which constitutes approximately 64% of the total damages that potentially could have been recovered through trial. *See* ECF No. 46. Importantly, the settlement will be directly distributed to class members, without a claims process. Plaintiff now respectfully requests that the Court approve an award of one-third of the Settlement Amount in attorneys' fees for Class Counsel, $13,030.25 for reimbursement of litigation costs, and a $5,000 service award for the Class Representative. Defendant does not oppose these requests.

Class Counsel is entitled to reasonable compensation for the work performed and the costs incurred in prosecuting this case. The Settlement—which is the result of the hard work of experienced Class Counsel—is an excellent result. The claims involve intricacies of banking practices and transactional data, and the case faced risks at each litigation stage. The Court could have dismissed the case at summary judgment or declined to certify the class. No similar case has ever been tried at trial. Against these significant risks and hurdles, it was through the skill and hard work of Class Counsel and the Class Representatives that the Settlement was achieved—a Settlement that represents a strong recovery of the estimated damages and effectuates recovery now instead of years later after trial and appeal—an important point because the Class consists of individuals who did not have enough money in their bank account to pay for transactions.

Based on the work that Class Counsel did in order to obtain these benefits for the Class, the requested attorney fee represents one-third of the common fund. This award is reasonable when

considered under both the percentage of the fund or lodestar analysis. Moreover, the Class Representative seeks a service award to compensate her for her work in bringing the case and facing the attendant risks associated with serving as a class representative, as well as for the results achieved for the Class Members. In prosecuting this action, she expended her time and effort and took significant financial and reputational risks for the benefit of the Class.

These requests are all contemplated by the Settlement, are in line with payments made in comparable cases, and are fair and reasonable given the work involved, the risks overcome, and the outstanding results achieved for the Class.

BACKGROUND OF THE LITIGATION

On September 20, 2022, Plaintiff Stacy Mock filed her Complaint against Tompkins Community Bank alleging that it wrongfully assessed insufficient funds fees ("NSF Fees") and overdraft fees ("OD Fees") on transactions presented multiple times for payment. Plaintiff asserted claims against Tompkins Community Bank for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and violation of New York's General Business Law § 349 ("GBL § 349").

On January 20, 2023, Tompkins Community Bank filed its Answer. ECF No. 17. The parties negotiated a Civil Case Management Plan. ECF No. 23. Class Counsel conducted an extensive investigation relating to the claims and the underlying events and transactions alleged in the Complaint, including through substantial informal exchanges of information. Additionally, Class Counsel retained an expert, Arthur Olsen, to identify, measure, and quantify the alleged damages to Class Members.

On February 27, 2023, the Court referred this case to Mandatory Mediation. ECF No. 28. On March 12, 2023, the Parties submitted the Stipulation Selecting Mediator, naming Hon.

Richard A. Stone (Ret.) as the mediator selected to resolve the case. In an effort to resolve this dispute, the Settling Parties engaged in a mediation session before JAMS mediator Hon. Richard A. Stone (Ret.) on April 21, 2023. After extended arms' length negotiations with the assistance of Judge Stone, the Parties reached an agreement in principle to compromise and settle the claims raised in the Action.

On July 24, 2023, Plaintiff filed a Motion to Certify Class and Preliminarily Approve Class Action Settlement, ECF No. 44, an accompanying Memorandum of Law, ECF No. 44-1, the Settlement Agreement, ECF No. 44-2, the Declaration of Tyler B. Ewigleben, ECF No. 44-3, the Johnson Firm resume, ECF No. 44-4, the KalielGold resume, ECF No. 44-5, and a Proposed Order, ECF No. 44-5. Thereafter, on July 27, 2023, the Court Ordered Plaintiff to file a letter brief containing information regarding potential class size and estimate of the best possible recovery. ECF No. 45. Plaintiff submitted the Letter Brief on August 7, 2023, indicating that based on Plaintiff's expert's analysis of Defendant's data, for the class period of September 2016 – April 2023, identified class damages were $707,142.54. Therefore, the class settlement represents approximately 64% of classwide damages. *Id.* On October 2, 2023, the Court held a hearing on Plaintiff's Motion to Certify Class and Preliminary Approval of Class Action Settlement. On October 13, 2023, the Court entered a preliminary approval order, finding that "the proposed Settlement is fair, reasonable, and adequate." ECF. No. 50. The Court also approved the Parties proposed methods of provide Notice to the class. *Id.* The Court appointed Plaintiff as Class Representative and the undersigned as Class Counsel, as well as appointing KCC as the Settlement Administrator. *Id.* The Court also approved the proposed Notice Plan and established a schedule of deadlines for the Settlement. *Id.*

Since preliminary approval, Class Counsel has worked with defense counsel and the Administrator to finalize Notices to Class Members; to review, edit, and approve the Settlement website; to establish an escrow account for the Settlement Fund; to ensure the appropriate data is transferred to the Administrator; and to provide clear and detailed instructions to the Administrator regarding the requirements of the Notice plan. *See* Joint Decl. ¶ 21.

Notice was provided in accordance with the approved Notice Plan by November 27, 2023. The Notice informed the Class Members that Class Counsel requests a fee of up to one-third (1/3) of the $450,000.00 Settlement Amount, or $149,999.99. The Notice also informs the Class Members that the fees would be paid from the $450,000.00 Settlement Fund, that a service award of up to $5,000.00 would be sought for Stacy Mock, the Class Representative, and that litigation expenses and settlement administration costs would be deducted from the Settlement Fund before determining payments to Class Members. The Notice was posted to the settlement website (as will this motion) so that Class Members can review them and make objections if they wish. *Id.* While the Opt-Out/Objection Deadline is not until January 11, 2024, at the time of filing this document, zero opt-outs or objections have been received.

BENEFITS OF THE PRELIMINARILY APPROVED SETTLEMENT

The settlement achieved in this Action is excellent. The Settlement Fund of $450,000.00 represents approximately 64% of classwide damages in this case. Importantly, the settlement does not require any claims process. Instead, all class members will automatically receive a *pro rata* share of the Settlement Fund. Settlement. Moreover, none of the $450,000.00 will revert to the Bank.

The Settlement Administrator will send each Settlement Class Member a check or the Bank will provide account credit to Settlement Class Members who are current account holders. ECF

No. 44-2, § 75. Payments will be distributed pro rata based on the Retry NSF Fees charged to each Class Member. *Id.*, § 4.16. Specifically, Class Members shall be paid pro rata distributions of the Settlement Fund using the following formula:

$$\text{Class Member's Pro Rata \%} = \frac{\text{Retry Overdraft Fees Paid by That Class Member}}{\text{Total of Retry Overdraft Fees Paid by All Class Members}}$$

$$\text{Class Member's Distribution} = \text{Class Member's Pro Rata \%} \times \text{Net Settlement Fund}$$

Id.

Finally, any remaining amounts resulting from uncashed checks shall either be distributed: (a) in a second round of distribution to those Class Members who are current accountholders or who cashed their initial settlement check, if a second distribution is economically reasonable; or (b) to an appropriate cy pres recipient agreed to by the parties and approved by the Court. *Id.*, § 83. If a second distribution is made, any amounts remaining unclaimed shall be distributed to an appropriate cy pres recipient agreed to by the parties and approved by the Court. *Id.* § 87.

ARGUMENT

I. The Court should approve reasonable attorneys' fees in the amount of one-third (1/3) of the Settlement Amount.

Class Counsel requests an award of attorneys' fees of $149,999.99, which is one-third (1/3) of the Settlement Amount. *See* ECF No. 44. As discussed below, this requested fee is consistent with percentages awarded in the Second Circuit and in bank fee litigation across the country and should be approved as reasonable.

A. The Court should follow the Second Circuit "trend" and evaluate attorneys' fees under the percentage-of-recovery method.

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). It is well-established that "a litigant or a lawyer who recovers a common fund for the benefit of persons

other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S 472, 478 (1980).

In the Second Circuit, courts have discretion to use the lodestar or percentage-of-the-fund method, but "[t]he trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 416 (S.D.N.Y. 2018), *aff'd sub nom. In re Facebook, Inc.*, 822 F. App'x 40 (2d Cir. 2020) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005)); *see also Fleisher v. Phoenix Life Ins. Co.*, Nos. 11-cv-8405, 14-cv-8714, 2014 WL 10847814, at *14 (S.D.N.Y. Sept. 9, 2015) ("the percentage method continues to be the trend of district courts in this Circuit"). "This is consistent with the line of cases in which the Supreme Court held that in the case of a common fund, the fee awarded should be determined on a percentage-of-recovery basis." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 CIV 10240 CM, 2007 WL 2230177, at *15 (S.D.N.Y. July 27, 2007).

By contrast, the lodestar method "create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits." *Visa*, 396 F.3d at 121. The percentage approach remedies this central flaw because counsel's recovery is linked to the benefit recovered for the class. It "provides class counsel with the incentive to maximize the settlement payout for the class because a larger settlement yields a proportionally larger fee." *Fresno Cnty. Employees' Ret. Ass'n v. Isaacson/Weaver Fam. Tr.*, 925 F.3d 63, 71 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 385, 205 L. Ed. 2d 218 (2019). Thus, the percentage method is the better method for determining appropriate attorneys' fees.

As Judge D'Agostino in the Northern District of New York noted in a bank fee class action: "Courts in this Circuit routinely use the percentage method to compensate attorneys in common fund cases such as this Action. The 'percentage method,' is the far simpler method by which the fee award is some percentage of the fund created for the benefit of the class." *Thompson v. Cmty. Bank, N.A.*, No. 8:19-CV-919, 2021 WL 4084148, at *10 (N.D.N.Y. Sept. 8, 2021) (citations and quotations omitted) (finding a fee award at 33% of the value of the settlement, including cash and debt forgiveness, to be "reasonable"). The percentage method "eschew[s] the needless complications and dubious merits of the lodestar approach," including "convoluted judicial efforts to evaluate the lodestar, . . . efforts [that] produce much judicial papershuffling, in many cases with no real assurance that an accurate or fair result has been achieved." *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) (quoting *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 165 (S.D.N.Y. 1989)). And in cases like this one, "[w]here relatively small claims can only be prosecuted through aggregate litigation," the percentage approach ensures that "[a]ttorneys who fill the private attorney general role [are] adequately compensated for their efforts." *Willix v. Healthfirst, Inc.*, No. 07 Civ. 1143, 2011 WL 754862, at *6 (E.D.N.Y. Feb. 18, 2011) (citing *Goldberger v. Integrated Res. Inc.*, 209 F.3d 43, 51 (2d Cir. 2000), for the "'sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest'").

Multiple courts in this Circuit have reviewed attorneys' fees under the percentage method, without performing a lodestar multiplier crosscheck. *See, e.g., Hayes v. Harmony Gold Min. Co.*, No. 08 CIV. 03653 BSJ, 2011 WL 6019219, at *1 (S.D.N.Y. Dec. 2, 2011), *aff'd*, 509 F. App'x 21 (2d Cir. 2013) (awarding one-third of the common fund); *Willix*, 2011 WL 754862, at *7 (same); *Dorn v. Eddington Sec., Inc.*, No. 08 Civ. 10271, 2011 WL 9380874, at *6 (S.D.N.Y. Sept.

21, 2011) (33.33% "reasonable and consistent with the norms of class litigation in this circuit" (citation omitted)); *Macedonia Church v. Lancaster Hotel, LP*, No. 05-0153 TLM, 2011 WL 2360138, at *14 (D. Conn. June 9, 2011) (same).

Similarly, courts across the country have exercised their discretion to review attorneys' fees specifically in bank fee litigation under the percentage method, without performing a lodestar crosscheck. *See, e.g., Hash v. First Fin. Bancorp*, No. 1:20-cv-01321-RLM-MJD, slip op. at 4–10 (S.D. Ind. Nov. 22, 2021), ECF No. 91; *Chambers v. Together Credit Union*, No. 19-CV-00842-SPM, 2021 WL 1948452, at*1-2 (S.D. Ill. May 14, 2021); *Holt v. CommunityAmerica Credit Union*, No. 4:19-cv-00629- FJG, slip op. at 2–3 (W.D. Mo. Dec. 8, 2020), ECF No. 51; *Liggio v. Apple Fed. Credit Union*, No. 1:18-cv-01059-LO-MSN, slip op. at 1 (E.D. Va. Dec. 6, 2019), ECF No. 39.

B. One-third (1/3) is a reasonable percentage that is equal to, or less than, fee percentages awarded in similar litigation in this Circuit and across the country.

The percentage requested here is equal to or less than many of the percentages awarded by courts. *See Guevoura Fund Ltd. v. Sillerman*, No. 1:15-CV-07192-CM, 2019 WL 6889901, at *15 (S.D.N.Y. Dec. 18, 2019) (compiling cases awarding 33% for settlements between $6,750,000 and $21,000,000, and noting reasonable paying clients typically pay one-third pursuant to contingent fee agreements); *see also Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06 CIV.4270 (PAC), 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) ("Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit."); *Hayes*, 2011 WL 6019219, at *1 (awarding one-third); *Strougo*, 258 F. Supp. 2d at 262 (33.33%); *In re J.P. Morgan Stable Value Fund ERISA Litig.*, No. 12-CV-2548 (VSB), 2019 WL 4734396, at *2-*4 (S.D.N.Y. Sept. 23, 2019) (same); *Sierra v. Spring Scaffolding LLC*, No. 12-CV-05160

(JMA), 2015 WL 10912856, at *7 (E.D.N.Y. Sept. 30, 2015) (same); *Khait v. Whirlpool Corp.*, No. 06-6381 (ALC), 2010 WL 2025106, at *8 (E.D.N.Y. Jan. 20, 2010) (same); *Melito v. Am. Eagle Outfitters, Inc.*, No. 14-CV-2440 (VEC), 2017 WL 3995619, at *20 (S.D.N.Y. Sept. 11, 2017) (Caproni, J.), *judgment entered*, No. 1:14-CV-02440- VEC, 2017 WL 6403883 (S.D.N.Y. Sept. 8, 2017), *aff'd in part and appeal dismissed in part sub nom. Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85 (2d Cir. 2019) (30%); *In re Priceline.com, Inc. Sec. Litig.*, No. 3:00CV1884AVC, 2007 WL 2115592, at *4–5 (D. Conn. July 20, 2007) (same); *Hicks v. Morgan Stanley*, No. 01 CIV. 10071 (RJH), 2005 WL 2757792, at *9–10 (S.D.N.Y. Oct. 24, 2005) (same); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695CM, 2007 WL 4115808, at *1-*2 (S.D.N.Y. Nov. 7, 2007) (same).

Here, the requested fee, 33.33% of the Settlement, is clearly within the range of acceptable attorneys' fees in Second Circuit cases and is common in overdraft fee litigation. Courts regularly award one-third when awarding attorneys' fees in similar financial services class action settlements. The following depicts these settlements nationwide, all of which resulted in fee awards at or above the 33.33% that Class Counsel requests here:

Bank Fee Case Name	**Percentage of the Fund Awarded**
Jacobs v. Huntington Bancshares Inc. No. 11-cv-000090 (Lake County Ohio)	**40%** of value of settlement, which includes 40% of $8.975 million and 40% of $7 Million in debt forgiveness
Farrell v. Bank of Am., N.A., 327 F.R.D. 422 (S.D. Cal. 2018), *aff'd sub nom. Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628 (9th Cir. 2020)	**40%** of 37.5 million common fund
Wolfgeher v. Commerce Bank, N.A., No. 1:09-MD-02036-JLK (S.D. Fla.) (Dkt. 3574),	**38%** of $18.3 million common fund

Nelson v. Rabobank, N.A., No. RIC 1101391 (Cal. Supr.)	**35.2%** ($750k fee includes % of practice changes)
In re Checking Account Overdraft Litig., No. 1:09-MD-02036-JLK, 2020 U.S. Dist. LEXIS 142012 (S.D. Fla. Aug. 10, 2020)	**35%** of $7.5 million
Molina v. Intrust Bank, N.A., No. 10-CV-3686 (Dist. Ct. Ks.)	**33%** of $2.7 million
Hawkins et al v. First Tenn. Bank, N.A. (Cir. Ct. Tenn.)	**35%** of $16.75 million
Swift v BancorpSouth, No. 1:10-cv-00090-GRJ (N.D. Fla.)	**35%** of $24 million
Casto v. City National Bank, N.A., No. 10-C-1089 (Cir. Ct. W.Va.)	**33.33%** of $3 million
Schulte v. Fifth Third Bank, No. 09-cv-6655 (N.D. Ill.)	**33.33%** of $9.5 million
Johnson v. Defendant, N.A., No. 12-cv-01405-RDM (M.D. Pa.)	**33.33%** of $2.5 million
Bodnar v. Bank of America, No. 5:14-cv-03224-EGS (E.D. Pa.)	**33.33%** of $27 million
Holt v. Community America Credit Union, No. 4:19-CV-00629-FJG (W.D. Mo.)	**33.33%** of 3.078 million
White v. Members 1st Federal Credit Union, Case No. 1:19-cv-00556-JEJ (W.D. Pa.)	**33.33%** of $910,000
Figueroa v. Capital One, Case No. 3:18-cv-00692-JM-BGS (S.D. Cal.)	**33.33%** of $13 million
Liggio v. Apple Federal Credit Union, No. 1:18-cv-01059-LO-MSN (E.D. Va.)	**33.33%** of $2.7 million
Lambert v. Navy Fed. Credit Union, No. 1:19-cv-103-LO-MSN, 2019 U.S. Dist. LEXIS 138592, at *3 (E.D. Va.)	**33.33%** of $16 million

As the requested fee is clearly in line with other similar overdraft litigation around the nation that settled for a similar amount, the fee requested is reasonable.

C. The *Goldberger* factors support the requested attorneys' fee award.

The requested fee is also appropriate under the relevant factors courts in the Second Circuit consider, including: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at 50 (citation and quotations omitted).

1. Class Counsel's time and labor.

Class Counsel have devoted significant time and resources to this litigation, as outlined in the Joint Declaration. But hours alone do not tell the whole story. In addition to time, it was Class Counsel's significant experience and skill in bank fee litigation that provided a knowledge base and efficiency in prosecuting this case that benefited the Class and that would not have occurred had the case been prosecuted by lawyers less experienced in bank fee litigation. *See* Firm Resumes, ECF No. 44-4 (Johnson Firm); ECF No. 44-5 (KalielGold PLLC).

Nevertheless, the Class Counsel still spent significant time prosecuting this case. Although the Court is not required to do a lodestar crosscheck, exhibits to Class Counsel's Joint Declaration includes itemized hours to date and hourly rates. If the Court performs a crosscheck, it need not scrutinize the hours. *Goldberger*, 209 F.3d at 50. To date, Class Counsel have will have expended at least 191.3 hours by the conclusion of this litigation and completion of the settlement, with the end amount likely being more.[1] *See* Joint Decl. ¶¶ 9, 14 (67.5 Johnson Firm time); (103.8 KalielGold time). Class Counsel also expects to continue to expend significant time to administer this Settlement. *See, e.g.*, Joint Decl. ¶ 20 (estimating an additional twenty hours of additional time in connection with the final approval briefing, hearing and post-final approval work). Class

[1] Daily time submissions supporting the hours summarized in the accompanying Joint and Declaration have been submitted concurrently. *See* Joint Decl. Exhibits A and B.

Counsel will oversee the Administrator, respond to class member inquiries, oversee one to two distributions, and effectuate a *cy pres* payment, if necessary. *Id.*

The hourly rates the Court should use are "the 'market rate.'" *In re EVCI*, 2007 WL 2230177, at *17 n. 6. The hourly rate for co-lead counsel from Kaliel Gold is $878 for Partner Jeff Kaliel, $777 for Partner Sophia Gold, $239 for certified paralegal Neva Garcia, and $239 for certified legal assistant Jane Yu. *See* Joint Decl. ¶¶ 5-8. The hourly rate for co-lead counsel from Johnson Firm from $385 for newer attorney Winston Hudson to $625 for attorney Tyler Ewigleben to $750 for Partner Christopher Jennings. *See* Joint Decl. ¶¶ 11-13. The rates charged by Class Counsel therefore fall within the range of prevailing rates in this District. *See Woburn Ret. Sys. v. Salix Pharm., Ltd.*, No. 14-cv-8925 (KMW), 2017 WL 3579892, at *5 (S.D.N.Y. Aug. 18, 2017) (approving rates up to $995 for partners); *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-Civ-8557 (CM), 2014 WL 7323417, at *14 (S.D.N.Y. Dec. 19, 2014) (approving rates ranging from $425 to $825 for attorneys); *Rudman v. CHC Grp. Ltd.*, No. 15-cv3773 (LAK), 2018 WL 3594828, at *3 (S.D.N.Y. July 24, 2018) (finding rates up to $985 to be appropriate).[2]

Examination of the time and rates indicates that the current lodestar is $117,541.50. Using the current lodestar incurred by Class Counsel, the current multiplier is 1.28 which is notably *well* below many approved multipliers and well within the range of what courts in this circuit award. *See, e.g., In re Doral Fin. Corp. Sec. Litig.*, No. 05-cv-04014-RO, slip op. at 5 (S.D.N.Y. Jul. 17,

[2] The use of current rates has been approved by the Supreme Court and courts in this Circuit to calculate the base lodestar figure to compensate for the delay in receiving payment, inflation, and the loss of interest. *See Missouri v. Jenkins by Agyei*, 491 U.S. 274, 284-85 (1989); *Veeco*, 2007 WL 4115808, at *9 (using current rates to calculate to "account[ ] for the delay in payment inherent in class actions and for inflation"); *In re Hi-Crush Partners*, 2014 WL 7323417, at *15 (S.D.N.Y. Dec. 19, 2014) (noting, "use of current rates . . . has been endorsed repeatedly by the Supreme Court, the Second Circuit and district courts within the Second Circuit as a means of accounting for the delay in payment inherent in class actions and for inflation").

2007), ECF No. 65 (10.26 multiplier); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers.") (collecting cases); *Yuzary v. HSBC Bank USA, N.A.*, No. 12 Civ. 3693 (PGG), 2013 WL 5492998, at *11 (S.D.N.Y. Oct. 2, 2013) (7.6 multiplier); *In re RJR Nabisco, Inc. Sec. Litig.*, No. 88 Civ. 7905 (MBM), 1992 WL 210138, at *5 (S.D.N.Y. Aug. 24, 1992) (6 multiplier); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 & App. (9th Cir. 2002) (noting multipliers of up to 19.6); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, No. Civ.A. 03–4578, 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005) (15.6 multiplier). The modest multiplier cited today will be even less once Class counsel incurs all additional time through the completion of the fee motion and its accompanying documents, the final approval motion, hearing, and the Settlement administration.

2. The risks of the litigation.

In determining an appropriate attorneys' fee award, the Second Circuit has historically characterized the risk of success as "perhaps the foremost factor" for a court to consider. *Goldberger*, 209 F.3d at 54. Accordingly, Plaintiff shall discuss it next.

Three considerations cause this factor to support Plaintiff's motion.

First, this was risky litigation. The case is complicated and involves bank processing and electronic payment practices. The Bank adamantly denied liability and expressed an intention to defend itself through trial. This matters because courts recognize that regardless of the perceived strength of a plaintiff's case, liability is no sure thing. *Wal-Mart Stores*, 396 F.3d at 118. Despite a sound theory, the prospects of class certification and victory were speculative.

Second, the Bank is a sophisticated and well-funded opponent with the resources to delay prosecution of the claims at every potential opportunity, through trial and potentially multiple

appeals. The Bank's counsel are likewise formidable opponents well-versed in the defense of bank fee litigation. There is little doubt that continued litigation would have spanned years and would have been costly. There was no guarantee that the Class would succeed in a contested class certification battle, a battle of the experts, a potential Rule 23(f) appeal of class certification, summary judgment, trial, or appeal of any verdict. *Id.* ¶ 12.

Third, given the challenging subject matter and the level of sophisticated resistance encountered, it is significant that Class Counsel assumed the risk that class certification would not be granted, which would have meant the end of the litigation with no recovery for class members and no fee or even expense reimbursement for Class Counsel. The Second Circuit has noted that "'the attorneys' willingness to ensure for many years the risk that their extraordinary effort would go uncompensated,' should be rewarded now that a substantial settlement has been reached on behalf of the [ ] Class." *Wal-Mart Stores*, 396 F.3d at 118 (quoting *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 441 (E.D.N.Y. 2014)). Class Counsel invested time and expense with no guarantee of success.

The second *Goldberger* factor therefore favors the requested fee.

3. The magnitude and complexity of the litigation.

For some of the same reasons the litigation was risky, it was also complex. Although "class action suits in general have a well-deserved reputation as being most complex," *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999), this suit involved a technical theory challenging practices so difficult to discover that very few class members are likely even to be able to identify how they were harmed without Class Counsel. But for their ingenuity in uncovering the practice and stating a claim for recovery there would be nearly a half million more in the Bank's

possession and Class Members would have no recovery whatsoever. This third *Goldberger* factor therefore also favors the requested fee.

4. The quality of the representation.

The Second Circuit has held that "the quality of representation is best measured by results . . . ." *Goldberger*, 209 F.3d at 55. As noted, the $450,000.00 Settlement Amount represents approximately 64% of the total damages that potentially would be available if Plaintiff were to succeed at all phases of litigation, including trial." ECF No. 46. Achieving such an excellent result in this case in an efficient, economical, and professional manner demonstrates the quality of Class Counsel's representation and supports the requested fee. *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004) ("[An] indication of the quality of the result achieved is the fact that the Settlement will provide compensation to the [class members] expeditiously.").

In determining the quality of representation, courts may also rely on their own observations and review the backgrounds of the lawyers. *Cohan v. Columbia Sussex Mgmt., LLC*, No. CV 12-3203 (AKT), 2018 WL 4861391, at *4 (E.D.N.Y. Sept. 28, 2018). Class Counsel possesses extensive knowledge of and experience in prosecuting class actions in courts throughout the United States. *See* Firm Resumes, ECF No. 44-4 (Johnson Firm); ECF No. 44-5 (KalielGold PLLC). Class Counsel has successfully litigated and resolved many other consumer class actions against major corporations, including those against hundreds of financial institutions related to improper fee assessments, recovering hundreds of millions of dollars for those classes. *Id.* Class Counsels' experience, resources, and knowledge—especially in the area of banking litigation—is extensive and formidable. *Id.* Indeed, there are few firms in the nation with this combined experience and expertise. *See id.*

Here, Class Counsel's combined expertise allowed them to build this case. Just to identify the alleged inappropriate fees requires specialized knowledge and skill, as do the theories surrounding the alleged fees, not to mention the specialized knowledge of class action procedure required to achieve certification and settlement.

Finally, "[t]he quality of opposing counsel is also important in evaluating the quality of class counsel's work." *In re Nigeria Charter Flights Litig.*, No. MD 2004-1613, 2011 WL 7945548, at *8 (E.D.N.Y. Aug. 25, 2011). The Bank is represented by notably capable counsel who have professionally and zealously represented their clients in this litigation and who proved savvy negotiators in mediation. Such quality in the opposition suggests Class Counsel provided high-quality representation.

The fourth *Goldberger* factor supports granting the motion.

5. The requested fee in relation to the settlement.

As set forth above, the requested fee of one-third (1/3) of the Settlement Amount is significantly generally equal to or less than the fees awarded in other similar settlements. See Argument §§ I.B, I.C, *supra*. This factor favors the requested fee.

6. Public policy considerations.

Public policy favors compensating lawyers such that they have an incentive to bring cases that serve the public interest. *Goldberger*, 209 F.3d at 51. This policy is particularly important to ensure that claimants who lack the financial incentive or means to seek a recovery on their own behalf can obtain skilled counsel who can pursue their claims in an economically viable fashion. *See Fleisher*, 2014 WL 10847814, at *22; *Hicks*, 2005 WL 2757792, at *9 ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding."). Public policy favors incentivizing lawyers to take on risky litigation

against some of the largest and most powerful financial institutions that are alleged to have abused hundreds of thousands of unsophisticated consumers. Cases such as these have the power to change public policy—since Class Counsel filed this lawsuit and many others like it, public and regulatory scrutiny of bank fees has increased and some of the largest banks in the country have stopped or reduced their fee assessment practices.

This factor, like the others articulated in Goldberger, supports Plaintiff's requested attorneys' fee award.

II. The Court should approve reimbursement of the requested litigation expenses.

In addition to attorneys' fees, "[i]t is well established that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class." *Guevoura Fund Ltd. v. Sillerman*, Nos. 1:15-cv-07192-CM, 1:18-cv-09784-CM, 2019 WL 6889901, at *22 (S.D.N.Y. Dec. 18, 2019) (citations omitted). Class Counsel are entitled to reimbursement of litigation expenses incurred "that are incidental and necessary to the representation." *Reichman v. Bonsignore, Brignati & Mazzotta P.C.*, 818 F.2d 278, 283 (2d Cir. 1987). Expenses are reimbursable if they are of the type normally billed by attorneys to paying clients. *LeBlanc & Sternberg v. Fletcher*, 143 F.3d 748, 763 (2d Cir. 1998). Standard reimbursable expenses include "computer research fees, copying costs, postage, court fees, travel expenses, and professional fees paid to counsel's damage expert and accountant." *In re Merril Lynch Tyco Res. Sec. Litig.*, 249 F.R.D. 124, 144 (S.D.N.Y. 2008); *Guevoura Fund Ltd.*, 2019 WL 6889901, at *22 (awarding counsel reimbursement for expenses spent on, inter alia, investigation, experts, photocopying of documents, messenger services, postage express mail, discovery, and other incidental expenses directly related to the case). Second Circuit courts grant such requests as a matter of course.

Class Counsel requests reimbursement of $13,030.25 for actual costs necessarily incurred in connection with the prosecution and settlement of the Action. Specifically, those costs and expenses consist of filing fees and service of process costs, expert witness fees, litigation support vendors, and the services of a well-qualified JAMS mediator. *See* Joint Decl. ¶17 ($9,867.25 in expenses for KalielGold); ($3,163 in expenses for Johnson Firm).

Note that Class Counsel is not seeking costs related to legal research, copying, and other overhead expenses, which were advanced and are commonly reimbursed.

III. The Court should approve a service award of $5,000 to the Class Representative.

In the Second Circuit, Plaintiff incentive awards "are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by plaintiffs." *Hernandez v. Immortal Rise, Inc.*, 306 F.R.D. 91, 101 (E.D.N.Y. 2015); *see also Bellifemine v. Sanofi-Aventis U.S. LLC*, No. 07 Civ. 2207 (JGK), 2010 WL 3119374, at *7 (S.D.N.Y. Aug. 6, 2010) (courts within this Circuit "have, with some frequency, held that a successful Class action plaintiff, may, in addition to his or her allocable share of the ultimate recovery, apply for and, in the discretion of the Court, receive an additional award, termed an incentive award"); *Beebe v. V&J Nat'l Enters., LLC*, 6:17-CV-06075 EAW, 2020 WL 2833009 (W.D.N.Y. June 1, 2020).

Here, a $5,000.00 Service Award is sought for Plaintiff Stacy Mock, the Class Representative. Even larger awards have been granted in bank fee litigation. *See Story v. SEFCU*, No. 1:18-CV-764, 2021 WL 736962, at *10-*11 (N.D.N.Y. Feb. 25, 2021) (awarding $15,000 service awards to each of three named plaintiffs); *Holt v. CommunityAmerica Credit Union*, No. 4:19-CV-00629-FJG, 202 WL 12604384, at *1 (W.D.Mo. Dec. 8, 2020) ($10,000 service award);

Hash v. First Fin. Bancorp, slip op. at 12–13 (S.D. Ind. Nov. 22, 2021) (same); *Chambers*, 2021 WL 1948452, at *3 ($7,500 service award granted to named plaintiff Leon Chambers).

Here, Plaintiff Stacy Mock was integral to the case. Plaintiff spent considerable time discussing the case with Class Counsel and reviewing the relevant facts, and searching for relevant and responsive documents. These efforts have created significant financial benefits for the Class. Moreover, Plaintiff has risked her reputation in doing so, by publicly disclosing her personal financial difficulties, creating notoriety regardless of her success on the claims. She should be commended for taking action to protect the interests the Bank's many accountholders. The $5,000.00 award sought is well within the range awarded in this District and should be awarded here.

CONCLUSION

The Settlement achieves an outstanding result in novel litigation that advanced the law and directly and promptly puts real money in Settlement Class Members' pockets. In conjunction with final approval of the Settlement, the Court should approve the requested attorneys' fees of $149,999.99, litigation expenses of $13,030.25, and a service award of $5,000.00 as reasonable.

Respectfully submitted,

Dated: December 27, 2023

Respectfully submitted,

By: */s/ Tyler B. Ewigleben*

JOHNSON FIRM
Tyler B. Ewigleben (Bar Roll No. 704117)
610 President Clinton Avenue, Suite 300
Little Rock, Arkansas 72201
Telephone: (501) 372-1300
tyler@yourattorney.com

Jeffrey D. Kaliel (Bar Roll No. 518372)
KalielGold PLLC
1100 15th Street NW, 4th Floor
Washington, D.C. 20005

Tel: (202) 350-4783
jkaliel@kalielpllc.com

Sophia G. Gold (Bar Roll No. 701241)
KalielGold PLLC
950 Gilman Street, Suite 200
Berkeley, CA 94710
Tel: (202) 350-4783
sgold@kalielgold.com

Attorneys for Plaintiff and the Putative Class

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 27, 2023, the foregoing was served by CM/ECF to all counsel of record.

Respectfully submitted,

By: */s/Tyler B. Ewigleben*
Tyler B. Ewigleben (Bar Roll No. 518372)
JOHNSON FIRM