

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MARY JENNIFER PERKS, MARIA
NAVARRO-REYES on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

TD BANK, N.A.,

Defendant.

CASE NO. 1:18-CV-11176-VEC

**NOTICE OF MOTION AND PLAINTIFFS' MOTION FOR APPROVAL OF ATTORNEYS'
FEES, EXPENSES, AND SERVICE AWARDS**

PLEASE TAKE NOTICE that on May 3, 2022, at 2:00 p.m., a hearing will be held before the Honorable Valerie Caproni, United States District Judge for the Southern District of New York, in Courtroom 443, 40 Foley Square, New York, NY 10007, or, subject to further order of the Court, by telephone or videoconference, at which Plaintiff Class Representatives Mary Jennifer Perks and Maria Navarro-Reyes will, and hereby do, move the Court, under Federal Rules of Civil Procedure 23(h) and 54(d)(2), for entry of an order approving the following payments from the Settlement Fund created by the Settlement Agreement and Releases, ECF No. 94-2:

- (a) \$10,375,000 (25% of the cash and debt forgiveness provided by the Settlement) as attorneys' fees to Class Counsel;
- (b) \$95,286.87 in reimbursement of litigation expenses that were advanced by Class Counsel; and
- (c) \$7,500 to each of the Class Representatives as service awards.

This Motion is based on this Notice of Motion and Motion, Plaintiffs' Memorandum in Support of this Motion and all its exhibits, the Settlement Agreement and Releases and all its exhibits, the argument of counsel, all papers and records on file in this matter, and such other matters as the Court may consider. This Notice of Motion and Motion, along with the accompanying papers, will be posted to the settlement website for review by any Class Member free of charge.

Dated: January 14, 2022

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CERTIFICATE OF SERVICE

I certify that on January 14, 2022, a true and accurate copy of the foregoing notice was filed electronically with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ James J. Bilborrow

**UNITED STATES DISTRICT COURT
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**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR APPROVAL OF
ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS**

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INTRODUCTION

After engaging in motion practice over the merits; gathering tens of thousands of pages of documents and years of transactional banking data; taking and defending key depositions; gathering third-party discovery from other financial institutions; engaging in numerous discovery battles and conferences; working extensively with an expert on damages; and participating in two full-day mediations followed by months of negotiations and confirmatory discovery, the parties reached the proposed class action Settlement Agreement and Release (the “Settlement”), ECF No. 94-2, which the Court preliminarily approved on September 7, 2021, ECF No. 103. Joint Declaration of Lynn A. Toops and Jeffrey D. Kaliel in Support of Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Action Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan (“Preliminary Approval Decl.”) ¶¶ 3–23, ECF No. 95-2. The Settlement was the result of arm’s-length negotiations overseen by well-respected mediator Professor Eric Green. ECF No. 95-3, Declaration of Mediator Eric D. Green (“Green Decl.”). It provides relief valued at \$42,000,000.00, comprised of a cash Settlement Fund of \$20,750,000.00, debt forgiveness of \$20,750,000.00, and \$500,000.00 in administration costs paid by Defendant. Preliminary Approval Decl. ¶¶ 24–29; Settlement § 4. The Settlement also contains “hidden” benefits that save the Settlement Fund and Class Members hundreds of thousands of dollars in expenses, such as Defendant and its expert taking steps to reduce administration costs. Ex. A, Joint Declaration of Lynn A. Toops and Jeffrey D. Kaliel in Support of Plaintiffs’ Motion for Approval of Attorneys’ Fees, Expenses, and Service Awards (“Joint Decl.”) ¶¶ 9–10.

The Settlement represents class action settlement best practices. The relief is automatic for Class Members, with no claims process—credits will be automatically deposited by Defendant to current customers’ bank accounts, a Settlement benefit that will save nearly \$200,000 in costs. *Id.* ¶ 10. Former customers will be mailed checks and debt forgiveness will be automatically applied.

Settlement ¶¶ 83(d)(iii), 86. Not one penny will revert to Defendant. *Id.* ¶ 83(d)(iv). The Settlement is a phenomenal and timely result for the Class Members and was obtained against a well-funded defense by TD Bank, N.A. (the “Bank”). Joint Decl. ¶ 11.

This result is even more remarkable because this is a groundbreaking case. *Id.* ¶ 12. When this case was filed over three years ago, it was one of the first cases in the country challenging the banking practice of charging an insufficient funds fee (“NSF Fee”) on an item that had previously been returned for insufficient funds (and had an initial NSF Fee assessed) and was later resubmitted by the merchant for payment again and charged an additional NSF Fee (“Retry NSF Fees”). *Id.* The Complaint sought recovery under a novel theory that had never been endorsed by a court or challenged by a governmental entity or consumer watchdog. *Id.* Novel consumer cases like these are important—since Class Counsel filed this lawsuit and many others like it, public and regulatory scrutiny of these fees has increased and resulted in some of the largest banks in the country eliminating, or drastically reducing, NSF or overdraft fees. *Id.*

This case was also risky and complex. The claims involve intricacies of banking practices and transactional data, and the case faced risks at each litigation stage. *Id.* The Court could have ruled for the Bank on summary judgment or a jury could have done so at trial. *Id.* Plaintiffs faced the hurdle of having the Court certify a class adversarially and having that ruling immediately appealed under Rule 23(f). *Id.* Without a certified class, no Class Member would receive any recovery. *Id.* Even with a certified class, trial and appeal present significant risks—and substantial delays and costs—in any complex case, particularly one asserting untested theories. *Id.*

Against these 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 recovery of between 42% to 70% of the estimated damages. *Id.* ¶ 13. A settlement in this range is

likely to be viewed favorably by the Class Members, who will appreciate receiving compensation without taking any action. *Id.* And the Class Members will receive recovery now instead of years later after trial and appeal, which is important because the Class consists of individuals who did not have enough money in their bank account to pay for transactions. *Id.*

Under Federal Rule of Civil Procedure 23(h) and the common fund doctrine, Courts recognize that Class Counsel and the Class Representatives are entitled to be compensated from the Settlement. Class Counsel and the Class Representatives respectfully request that the Court approve the requested payments from the Settlement Fund for attorneys' fees, expenses, and service awards. These requests are all contemplated by the Settlement, are in line with (or lower than) payments made in cases of comparable size, 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 November 30, 2018, Plaintiff Mary Jennifer Perks filed the Complaint on behalf of a nationwide class of customers who were charged Retry NSF Fees by the Bank. ECF No. 4. The Complaint asserted claims for breach of contract and the covenant of good faith and fair dealing, as well as unjust enrichment. *Id.* ¶¶ 56–64, 105–113. On behalf of a New York subclass, the Complaint asserted New York General Business Law § 349 (“GBL § 349”) claims. *Id.* ¶¶ 65–104. On February 5, 2019, the Bank filed a Rule 12(b)(6) motion to dismiss. ECF No. 25.

On February 19, 2019, Plaintiff Perks filed her Amended Complaint, which added Maria Navarro-Reyes as a Plaintiff and included allegations addressing arguments made in the Bank's motion to dismiss. *See* ECF Nos. 25–26. On March 22, 2019, the Bank filed another motion to dismiss. ECF No. 31. Plaintiffs opposed the motion, the Bank replied, and, while the motion was pending, the parties filed multiple notices of supplemental authority. ECF Nos. 41–43, 45, 47–49.

On March 17, 2020, the Court denied the motion to dismiss Plaintiffs' breach of contract claim but dismissed the covenant of good faith, GBL § 349, and unjust enrichment claims. ECF No. 54 at 4, 7–8. After the Court's Order, the parties engaged in significant discovery efforts. Preliminary Approval Decl. ¶¶ 7–17. The parties negotiated a Protective Order and a Stipulated Document Production Protocol. ECF Nos. 66, 67. The parties exchanged written discovery requests and responses. Preliminary Approval Decl. ¶¶ 7–15. On June 18, 2020, the Bank began its document production. *Id.* ¶ 10. The parties immediately identified disputes on the scope of discovery and began meeting and conferring. *Id.* As a product of the parties' meet and confer efforts, on July 1, 2020, Plaintiffs served revised discovery on the Bank. *Id.*

Beginning on May 15, 2020, the parties submitted monthly discovery status reports to the Court. ECF Nos. 62, 68, 69, 74, 77. On July 15, 2020, the parties presented to the Court a dispute regarding the Bank's data production. ECF No. 69 at 1. On July 29, the parties appeared before the Court, and the Court ordered the Bank to produce the requested discovery. ECF No. 71. Based on the Court's order as well as the parties' frequent and ongoing meet and confer efforts, the Bank made 9 supplemental document productions. Preliminary Approval Decl. ¶ 12. Ultimately, the Bank produced tens of thousands of pages of documents and years of transaction data. *Id.* ¶ 7.

Plaintiffs deposed a 30(b)(6) representative on September 17, 2020. *Id.* ¶ 16. Plaintiffs were preparing for more 30(b)(6) depositions and depositions of other key Bank executives prior to the case being stayed for mediation. *Id.* Plaintiffs also produced documents and responded to written discovery. *Id.* ¶¶ 13–14. Plaintiff Perks sat for a full-day deposition on September 28, 2020. *Id.* ¶ 16. Plaintiffs also served non-party subpoenas on other banks and the National Automated Clearing House Association (NACHA). ECF Nos. 63, 75, 84. Plaintiffs' counsel reviewed

documents in response to these subpoenas and met and conferred regarding the scope of the production of documents. Preliminary Approval Decl. ¶ 17.

On September 15, 2020, Plaintiffs reported to the Court deficiencies in the Bank's production. ECF No. 77 at 2. Plaintiffs asked the Court to order the Bank to produce (a) ESI responsive to Plaintiffs' discovery requests; (b) data reflecting returned checks (including check numbers); and (c) data reflecting overdraft fees on ACH and check items that have previously been returned. ECF No. 78 at 3. On October 1, the Court ordered the parties to meet and confer. ECF Nos. 80, 81. On October 2, 2020, the parties requested a stay of all pretrial deadlines pending mediation. ECF No. 82. The Court granted the parties' request. ECF No. 83.

MEDIATION AND SETTLEMENT NEGOTIATIONS

The parties and Professor Eric Green agreed to a mediation schedule that included extensive pre-mediation briefing and a November 2020 mediation date. Green Decl. ¶ 7. Following the submission of the parties' briefs and multiple pre-mediation calls, Professor Green supervised a day-long mediation on November 20, 2020. *Id.* ¶¶ 7-8. The matter did not settle.

Subsequently, the parties and their experts performed additional data analysis and legal research. *Id.* ¶ 9. The parties submitted additional mediation briefs to Professor Green before a second mediation session on January 26, 2021. *Id.* After the mediation concluded, the parties reached a settlement in principle. *Id.* ¶ 11.

The parties notified the Court of the agreement on February 1, 2021. ECF No. 87. The agreement allowed Plaintiffs to perform confirmatory discovery. Preliminary Approval Decl. ¶ 22, ECF No. 95-2. On February 19, Class Counsel and their expert interviewed the Bank's experts as part of this confirmatory discovery. *Id.* The parties worked together for months to negotiate the terms of a full settlement agreement and seek bids from settlement administrators. *Id.* ¶¶ 23, 29.

PRELIMINARY APPROVAL AND EFFORTS SINCE PRELIMINARY APPROVAL

On August 4, 2021, the Court held a conference to discuss questions the Court had regarding the Settlement and the notices to Class Members. ECF Nos. 96, 99. Thereafter, the parties submitted a joint letter with more detailed information regarding the debt forgiveness benefit of the Settlement. ECF No. 100. Class Counsel also worked with the Bank and the Administrator to revise the Notices as requested by the Court. ECF No. 100-1.

On September 7, the Court entered the Preliminary Approval Order, finding it would “likely be able” to grant final approval to the Settlement as “fair, reasonable, and adequate.” ECF No. 102, ¶ 14. The Court appointed RG/2 Claims Administration LLC as Settlement Administrator and established a schedule of deadlines for the Settlement. *Id.* ¶¶ 23-25, 30-31.

Since preliminary approval, Class Counsel has worked with defense counsel and the Administrator to finalize Notices to Class Members; review, edit, and approve the Settlement website and phone script; establish an escrow account for the Settlement Fund; 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. Joint Decl. ¶ 14.

As part of the Settlement oversight process, the parties determined that there was a limited subset of data—for a short period and particular geographic region—that had yet to be collected, processed, and analyzed. *Id.* ¶ 15. This data was necessary to ensure a complete Class Member list. *Id.* To ensure that all Class Members were sent notices at the same time, and to ensure all Class Members had sufficient time to determine whether to opt-out of or object to the proposed Settlement, the parties requested an extension of the notice deadline. *Id.* The Court revised the deadline to January 15, 2022. ECF No. 105. Class Counsel will provide the Court with full details of notice in the Motion for Final Approval of the Settlement, which is due March 29, 2022. The Final Approval Hearing is scheduled for May 3, 2022. *Id.*

Second, during their supervision of the notice process, Class Counsel determined that a lower proportion of Class Members maintain a valid email address for notice delivery than anticipated at preliminary approval. Joint Decl. ¶ 16. Therefore, estimated costs were higher than anticipated because more notices will be sent by mail with the attendant printing and postage costs. *Id.* The parties informed the Court that notice and administration costs are now estimated at \$795,000. ECF No. 104 at 2. Accordingly, the parties requested that the Court allow the Long Form Notice to be amended to inform Class Members that, after the Bank's \$500,000 contribution, \$295,000 was expected to be paid from the Settlement Fund for administration. *Id.* The Court approved that request. ECF No. 105.

CLASS NOTICE

Notice is being sent on January 15, 2022. Joint Decl. ¶ 17. The Notice informs the Class Members that Class Counsel requests a fee of \$10,375,000 or 25% of the cash and debt forgiveness (Class Counsel has not requested a fee on the notice and administration costs paid by the Bank or the "hidden" Settlement benefits). *Id.* The Notice also informs the Class Members that the fees would be paid from the \$20,750,000 Settlement Fund, that a \$7,500 service award is sought for each Class Representative, and that litigation expenses and costs of notice above the \$500,000 paid by the Bank would be deducted from the Settlement Fund before determining payments to Class Members. *Id.* The Notice specifies the amount—\$295,000—expected to be paid from the Settlement Fund for notice. *Id.* It also provides Class Members with an example of the amount they would receive if the Court approves the requested fees, expenses, and service awards, so that Class Members can evaluate how these payments affect what they will receive from the Settlement. *Id.* The Notice, and this motion, will be posted to the settlement website so that Class Members can review them and make objections if they wish. *Id.*

BENEFITS OF THE PRELIMINARILY APPROVED SETTLEMENT

The first monetary benefit of the Settlement is the Bank's payment of \$20,750,000.00 in cash into the Settlement Fund. Settlement ¶ 64. This payment was made on September 21, 2021, and will earn interest that accrues to the benefit of the Settlement Class. Joint Decl. ¶ 6. In no event does any of the Settlement Fund revert to the Bank. Settlement ¶ 83(d)(iv).

Class Members receiving a cash payment will receive an average of \$35.55, before deductions for attorneys' fees, expenses, service awards, and costs of notice and administration above the \$500,000.00 paid by the Bank. Joint Decl. ¶ 6. Before those same deductions, the highest amount a Class Member will receive is \$3,968.02; 206 Class Members will receive over \$1,000; and 40,715 Class Members will receive at least \$100. *Id.*

The Bank will also forgive \$20,750,000.00 in Uncollected Retry NSF Fees of Class Members whose bank accounts were closed owing money to the Bank. Settlement ¶ 84. Forgiveness will be automatic and the Bank will update any negative reporting to ChexSystems or credit reporting agencies. *Id.* ¶ 86. A Class Member whose Uncollected Retry NSF Fees are less than the total Retry NSF Fees may receive *both* debt forgiveness and a cash distribution. *Id.*

The debt forgiveness benefit is significant. Joint Decl. ¶ 7. The Administrator has refined the estimate initially provided by the parties at preliminary approval—there are approximately 456,697 accounts, down from 470,486 reported at preliminary approval, that will receive this benefit with an average forgiveness of \$45.43 per account, up from \$44.10 reported at preliminary approval. *Id.* Approximately 80,000 Class Members will have the negative balance on their accounts reduced by 25% or more, improving their chances of fully repaying their debt. *Id.*

The Bank is also responsible for paying notice and settlement administration costs up to \$500,000. Settlement ¶ 71. The estimated costs (\$795,000) exceed this amount, so the Bank will

pay the full \$500,000 amount. Joint Decl. ¶ 8. Total remaining costs are estimated to be \$295,000, as set forth in the Notices. *Id.*

The Bank also agreed to reduce Settlement administration costs by conducting a laborious review of its data to identify Class Members, their addresses and email addresses, and relevant Retry NSF Fees—difficult data analysis work that is commonly performed by plaintiffs’ experts at a cost of hundreds of thousands of dollars to the Settlement Fund. Joint Decl. ¶ 9. By the Bank incurring these expenses, funds that otherwise would have been consumed by expenses will instead be distributed to the Class. *Id.*

Moreover, the Bank agreed to make direct deposits of Settlement proceeds to current accountholders. Approximately 304,539 Class Members will receive their payments by direct deposit. Joint Decl. ¶ 10. Had the Bank not agreed to use its own systems to directly deposit funds, the cost to mail checks to these Class Members would have amounted to approximately \$193,961.21. *Id.* Instead, those funds will be distributed to the Class.

For Class Members who are former accountholders, the Administrator will send a check. Settlement ¶ 83(d)(iii)(2). Payments will be distributed *pro rata* based on the Retry NSF Fees charged to each Class Member. *Id.* ¶ 83(d)(ii). Specifically, Class Members shall be paid *pro rata* distributions of the Settlement Fund using the following formula: (Net Settlement Fund/Total dollar value of Retry NSF Fees) x (Total dollar amount of Retry NSF Fees charged to that Class Member, less the dollar amount of any Retry NSF Fee Refunds and reduced by any Uncollected Retry NSF Fees). *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.* ¶ 87. 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.*

ARGUMENT

I. The Court should approve reasonable attorneys' fees in the amount of 25% of the cash and debt forgiveness provided by the Settlement.

Class Counsel requests an award of attorneys' fees of \$10,375,000, which is 25% of the cash benefit and debt forgiveness provided by the Settlement, and which does not seek an award of a percentage of the \$500,000 in costs paid separately by the Bank, nor of the hundreds of thousands of dollars in additional "hidden" benefits. The request thus is 24.7% of the full \$42,000,000 Value of the Settlement (taking into consideration the \$500,000 in costs paid by the Bank) and an even lower percentage when considering the value of the "hidden" benefits. The requested fee is the same or less than 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”); Declaration of Brian T. Fitzpatrick (“Fitzpatrick Decl.”) ¶¶ 12–13, ECF No. 95-5 (same). “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. Fitzpatrick Decl. ¶ 12. 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. Fitzpatrick Decl. ¶¶ 12–13.

As Judge D’Agostino in the Northern District of New York recently 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”).

Numerous courts in this Circuit have reviewed attorneys’ fees under the percentage method, without performing a lodestar multiplier crosscheck. *See 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); *Hill v. County of Montgomery*, No. 9:14-cv-00933, 2021 WL 2227796, at *9 (N.D.N.Y. June 2, 2021) (awarding 30% of common fund); *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 415 (S.D.N.Y. 2018), *aff’d sub*

nom. In re Facebook, Inc., 822 F. App'x 40 (2d Cir. 2020) (awarding 25% of \$35 million common fund); *In re CIT Grp. Inc. Sec. Litig.*, No. 1:08-cv-06613, 2012 WL 12651002, at *1 (S.D.N.Y. June 13, 2012) (awarding 26.5% of common fund).

Courts across the country have exercised their discretion to review attorneys' fees in bank fee litigation under the percentage method, without performing a lodestar crosscheck. *See 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. Twenty-five percent of the cash payment and debt forgiveness is a reasonable fee that is equal to, or less than, fees awarded in similar litigation in this Circuit and across the country.

As for the appropriate percentage, “[d]istrict courts in the Second Circuit routinely award attorneys’ fees that are 30 percent or greater.” *Velez v. Novartis Pharm. Corp.*, No. 04 CIV 09194 CM, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010) (collecting cases); *see, e.g., Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 249-50 (2d Cir. 2007) (affirming 30%); *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, Plaintiffs request 25% of the cash and debt forgiveness provided by the Settlement. Class Counsel is not seeking a percentage of the \$500,000 in costs paid separately by the Bank, nor of the hundreds of thousands of dollars in additional “hidden” benefits—making the request less than 25% the settlement value. This request is less than the 30–33% that is “consistent with the norms of class litigation in this circuit.” *Dorn*, 2011 WL 9380874, at *6. And in bank fee litigation across the country, courts routinely award fees of 25% or more of the settlement value, including cash and debt forgiveness. *See generally* Fitzpatrick Decl.; Ex. B, Supplemental Declaration of Brian T. Fitzpatrick (“Fitzpatrick Supp. Decl.”) ¶ 3 & Table 1.

C. The Second Circuit and courts across the country include monetary benefits, like debt forgiveness, as part of the settlement value against which to apply the attorneys’ fee percentage.

As for the appropriate settlement value against which to apply the percentage, in “calculating the overall settlement value for purposes of the ‘percentage of the recovery’ approach,” courts in this Circuit “include the value of both the monetary and non-monetary benefits conferred on the Class.” *Fleisher*, 2015 WL 10847814, at *15 (citation omitted); *see also id.* at n. 7; *Coleman v. Alaska USA Fed. Credit Union*, No. 3:19-cv-00229-HRH, slip op. at 17–18 (D. Alaska Nov. 17, 2021), ECF No. 93 (“The Court considers both cash and cash equivalents, such as debt forgiveness of the Uncollected Retry Fees, when determining the denominator,” *i.e.*, the value of the settlement). Here, the monetary benefit is \$42,000,000, plus the hundreds of thousands in “hidden” settlement benefits. Class Counsel is seeking a percentage of part of the

monetary benefits (the cash and debt forgiveness)—both of which are routinely and equally considered part of a settlement’s value. See *Moukengeshcaie v. Eltman, Eltman & Cooper, P.C.*, No. 14CV7539MKBCLP, 2020 WL 5995978, at *2-*4 (E.D.N.Y. Apr. 21, 2020), *report and recommendation adopted sub nom.*, 2020 WL 5995650 (E.D.N.Y. Oct. 8, 2020) (awarding percentage of overall value of settlement that included debt forgiveness); *In re Lloyd’s Am. Tr. Fund Litig.*, No. 96CIV1262RWS, 2002 WL 31663577, at *7, *28 (S.D.N.Y. Nov. 26, 2002), *aff’d sub nom. Adams v. Rose*, No. 03-7011, 2003 WL 21982207 (2d Cir. Aug. 20, 2003) (awarding fees at 28% of the settlement value, which included cash and credit notes); *Velez*, 2010 WL 4877852, at *4, *18 (awarding fees on value of settlement, including monetary and nonmonetary relief); *Hash*, slip op. at 7 (“In bank fee litigation, forgiveness of debts owed is routinely included in the value of the settlement.”) (collecting cases).

As described in the Supplemental Fitzpatrick Declaration filed with this Motion, this is almost always done in bank fee cases. Fitzpatrick Supp. Decl. ¶ 3 (concluding that, when requested by counsel, no court rejected the inclusion of debt forgiveness) & Table 1 (citing, among others, *Thompson*, 2021 WL 4084148, at *2 (awarding 33.33% of value of bank fee settlement that included cash and debt forgiveness); *Holt*, slip op. at 2–3 (same); *In re TD Bank Debit Card Overdraft Fee Litig.*, No. 6:15-MN-02613, slip op. (D.S.C. Jan. 9, 2020), ECF No. 233 (30% of settlement value that included cash and debt forgiveness); *Hash*, slip op. at 8–10 (awarding 25% of settlement value that included cash and debt forgiveness); *Coleman*, slip op. at 17–18 (same); *In re: Checking Account Overdraft Litig. (Commerce Bank)*, No. 1:09-MD-02036-JLK, 2013 WL 11319243, *5-*6 (S.D. Fla. Aug. 2, 2013) (including settlement value \$18.3 million in cash and a change in practice with value of \$4.9 million); *In re: Checking Account Overdraft Litig. (JP Morgan Chase Bank)*, No. 09-MD-02036-JLK, slip op. at 12 (S.D. Fla. Dec. 19, 2012), ECF No.

3134 (including in settlement value \$110 million in cash and change in policy with value of \$52 million). *See also* Ex. C, Supplemental Declaration of Mediator Eric Green ¶ 1 (“In my experience, [bank fee] matters often involve a resolution that includes both a cash settlement payment and debt forgiveness. In my experience, defendants view debt forgiveness as a cost to them and plaintiffs view it as a value for class members.”).

That is because debt forgiveness provides a significant benefit. *Thompson*, 2021 WL 4084148, at *2, *8-*9; *CLRB Hanson Indus., LLC v. Weiss & Assocs., PC*, 465 F. App’x 617, 619 (9th Cir. 2012) (calling “forgiveness of indebtedness” a “cash-equivalent”); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 147 (E.D. Pa. 2000) (distinguishing between “debt forgiveness” and “non-monetary” relief); *Cosgrove v. Citizens Auto. Fin., Inc.*, No. 09-1095, 2011 WL 3740809, at *7 (E.D. Pa. Aug. 25, 2011) (“[D]ebt forgiveness provides a valuable award to class members[.]”). Debt forgiveness relieves class members of an obligation to repay money that the Bank can pursue in debt collection actions. The debt forgiven is “legally enforceable”:

[The bank] could initiate proceedings to collect. Alternatively, [the bank] could sell the debt at a discount to another entity that might be more willing to undertake collection efforts. The Debt Portion relief immunizes recipients from worrying about or suffering through any efforts to collect on this debt. The Debt Portion relief will also benefit recipients in the form of the improved credit scores some class members will realize once [the Bank] reports the debt relief to the credit bureaus.

Farrell v. Bank of Am., N.A., 327 F.R.D. 422, 431 (S.D. Cal. 2018), *aff’d sub nom. Farrell v. Bank of Am. Corp., N.A.*, 827 F. App’x 628 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 71 (Oct. 4, 2021). *See Gradie v. C.R. England, Inc.*, No. 2:16-CV-00768-DN, 2020 WL 6827783, at *11 (D. Utah Nov. 20, 2020) (“[D]ebt forgiveness [] eliminates [the defendant’s] legal right to pursue what it views to be an enforceable and collectable amount, whether in an independent action or . . . as a counterclaim or offset.”).

D. 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 devoted significant time and resources to this litigation. Joint Decl. ¶ 18. But hours alone do not tell the whole story. In addition to time, it was Class Counsel's skill and ingenuity in successfully building this case on a novel theory that Class Counsel developed and that, at the time, had not been accepted by any court or pursued by any governmental entity or consumer watchdog. *Id.* ¶ 12. Having done the legwork and investigation needed to get the case off the ground and past a motion to dismiss, Class Counsel then aggressively pursued discovery, obtaining tens of thousands of pages of documents and access to years of banking transaction data. *See* ECF Nos. 62, 68, 69, 74, 77. Class Counsel brought several discovery disputes to the Court's attention, obtaining a ruling in Plaintiffs' favor, and was close to obtaining another. ECF Nos. 62, 69, 71, 77. Further, Class Counsel's significant experience and skill in bank fee litigation 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, attached as Exhibits B–E to ECF No 95-2. Indeed, Class Counsel and their experience were well-known to the Bank's counsel. Class Counsel's efforts, along with their significant knowledge in this arena, culminated in the Settlement for 42% to 70% of estimated best-case damages. Joint Decl. ¶ 13.

Although the Court is not required to do a lodestar crosscheck, Class Counsel’s Declaration includes hours to date and hourly rates. If the Court performs a crosscheck, it need not scrutinize the hours. *Goldberger*, 209 F.3d at 50; Fitzpatrick Decl. ¶¶ 28–29 (“[T]he lodestar crosscheck reintroduces all the bad behaviors of the lodestar method that the percentage method was designed to correct in the first place: either to be indifferent to the size of the recovery or to drag cases out to increase the lodestar. . . . Real clients follow the economic models: they do not want the lodestar crosscheck because it creates bad incentives for their lawyers.”). And the hourly rates to use are “the ‘market rate.’” *In re EVCI*, 2007 WL 2230177, at *17 n. 6.

The rates charged by Class Counsel 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-cv-3773 (LAK), 2018 WL 3594828, at *3 (S.D.N.Y. July 24, 2018) (finding rates up to \$985 to be appropriate).¹

Class Counsel also expects to continue to expend significant time to administer this Settlement. Joint Decl. ¶ 19. Class Counsel will oversee the Administrator, respond to class

¹ 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); *Vecco*, 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”).

member inquiries, move for final approval, and oversee distributions and cy pres payments, efforts that will continue throughout 2022 and into 2023. *Id.*

To date, Class Counsel expended 2808.1 hours (excluding this motion). Joint Decl. ¶ 18 & Table 1. Class Counsel spent more time than anticipated from preliminary approval to the filing of this motion because of the additional information requested by the Court, the data issues, and Bank customer inquiries. *Id.* It is anticipated that Class Counsel will spend at least an additional 200 hours preparing for the final approval hearing, including filing supplemental declarations, responding to any objections, and preparing for and attending the final approval hearing. *Id.* ¶ 19. There will be post-final approval work ensuring that the Settlement proceeds are properly distributed to Class Members, responding to Class Members' inquiries, and effectuating a secondary or *cy pres* distribution, as needed. *Id.*

Using the current lodestar incurred by Class Counsel, the current multiplier is 5.66. That multiplier will likely be reduced to at least 5.36 once Class counsel incurs the additional time through the Settlement administration, which is below many approved multipliers and 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, 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).

2. The risks of the litigation.

This was risky litigation. Joint Decl. ¶ 12–13. This is a complicated case involving bank processing and electronic payment practices. *Id.* The Bank adamantly denied liability and expressed an intention to defend itself through trial. *Id.* At the time Class Counsel devised the theory of this case, no Court in the country had endorsed it and no governmental entity or consumer watchdog had pursued it. *Id.* And, even though this Court agreed with the theory in part, not all Courts have done so, and some courts have dismissed similar claims. *Id.* This case also presented significant hurdles because it implicated decades-old banking data that is difficult to access and use. *Id.* The prospects of class certification and victory were speculative.

And the Bank is one of the largest in America with nearly half a trillion dollars in assets. It 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. *See id.* ¶¶ 11-12. 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. This factor 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 and of great magnitude, as shown by the settlement value itself. While “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 novel theory that had not been tested and that was devised

by Class Counsel. Joint Decl. ¶ 12. But for their ingenuity in uncovering the practice and stating a claim for recovery there would be \$42 million more in the Bank's possession and Class Members would have no recovery whatsoever. *Id.* ¶ 13.

At the time the Complaint was filed, no other state or federal court, anywhere, had denied a motion to dismiss these claims. *Id.* ¶ 12. At the time of the Court's ruling on the motion to dismiss, no federal court in New York or the Second Circuit had ruled on these claims. *Id.* This factor favors the requested fee.

4. The requested fee in relation to the settlement.

As set forth above, the requested fee of 25% of the cash and debt forgiveness is significantly less than the fees awarded in other similar settlements. *See* Argument §§ I.B, I.C, *supra*. This factor favors the requested fee.

5. The quality of the representation.

In determining the quality of representation, courts may 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. Firm Resumes, attached as Exhibits B–E to ECF No 95-2. 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 if any firms in the nation with this expertise. *See id.*

Here, Class Counsel's combined expertise allowed them to build a novel case that has not been attempted before. Joint Decl. ¶ 12. 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. *Id.* This factor supports granting the requested fee. In addition, the quality of the legal representation “is best measured by results.” *Goldberger*, 209 F.3d at 55. In this case, the excellent result achieved in an efficient and professional manner demonstrates that 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.”).

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. Fitzpatrick Decl. ¶¶ 20-22. 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. Joint Decl. ¶ 12.

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 Merrill 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. *Id.*

Class Counsel requests reimbursement of \$95,286.87 for actual costs necessarily incurred in connection with the prosecution and settlement of the Action. Joint Decl. ¶ 20. Specifically, those costs and expenses consist of filing fees and service of process costs (\$975.07), pro hac vice admission fees (\$606.50), expert witness fees (\$70,350.00), litigation support vendors (\$9,381.55), and multiple sessions with the services of the well-qualified mediator Eric Green (\$13,973.75). *Id.* The largest expense is for Plaintiff’s expert, Arthur Olsen, who participated in both litigation and settlement efforts. Specifically, Mr. Olsen reviewed sample data produced by the Bank in litigation and helped Class Counsel formulate deposition questions needed to confirm that such data was suitable for class certification purposes. *Id.* During settlement discussions, Mr. Olsen repeatedly reviewed and questioned the Bank’s damages analyses to determine whether they accurately reflected the class damages. *Id.* Class Counsel was incentivized to only incur reasonable and

necessary expenses because recovery of expenses was not guaranteed and was dependent on the outcome of the case. *Id.*

Class Counsel is not seeking costs related to legal research, copying, and other overhead expenses, which were advanced and are commonly reimbursed. *Id.* Class Counsel is also not seeking costs related to expert witness fees utilized in seeking preliminary and final approval of the Settlement. *Id.*

III. The Court should approve service awards of \$7,500 to both Class Representatives.

As noted above, a \$7,500.00 Service Award is sought for each of the two Class Representatives. “[S]ervice 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 the plaintiff.” *Torres v. Gristede’s Operating Corp.*, Nos. 04–CV–3316 (PAC), 08–CV–8531 (PAC), 08–CV–9627 (PAC), 2010 WL 5507892, at *7 (S.D.N.Y. Dec. 21, 2010). Service awards of \$15,000 or more are not uncommon. *See id.* (approving service awards of \$15,000 each to fifteen plaintiffs). Similar awards have been granted in bank fee litigation. *See Story v. SEFCU*, No. 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*, slip op. at 3 (\$10,000 service award); *Hash*, slip op. at 12–13 (S.D. Ind. Nov. 22, 2021) (same); *Chambers*, 2021 WL 1948452, at *3 (\$7,500 service award).

Here, Plaintiffs invested significant time in this case and risked their reputations in doing so, by publicly disclosing their personal financial difficulties, creating notoriety regardless of their success on the claims. Joint Decl. ¶ 21. They risked their reputations to bring these claims against their bank who had access to sensitive personal financial information. *Id.* They should be commended for taking action to protect the interests of hundreds of thousands of the Bank’s

accountholders. *Id.* Plaintiffs' efforts have created extraordinary financial benefits for the Class, compensating them for past harm and protecting them from future harm. *Id.* Their efforts will also inure to the benefit of new accountholders, who will better be able to understand how the Bank assesses fees because after the filing of this lawsuit the Bank first disclosed its multiple fee practices. Plaintiffs expended hours in advancing this litigation against a large and powerful adversary. Each conferred with Class Counsel on a number of occasions. *Id.* Specifically, Plaintiffs provided assistance that enabled Class Counsel to successfully prosecute the Action and reach the Settlement, including: (1) submitting to interviews with Class Counsel; (2) locating and forwarding responsive documents and information; (3) providing discovery documents; (4) participating in conferences with Class Counsel; and (5) with respect to Plaintiff Perks, sitting for a rigorous deposition. *Id.* The \$7,500 awards sought are 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 and forgives debt without any claims process. It was achieved after the Court ruled on the motion to dismiss, significant discovery and depositions, and two hard-fought mediations that were presided over by a preeminent mediator. In conjunction with final approval of the Settlement, the Court should approve the requested attorneys' fees, litigation expenses, and service awards as reasonable.

Dated: January 14, 2022

Respectfully submitted,

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Attorneys for Plaintiff Class Representatives and the Settlement Class

CERTIFICATE OF SERVICE

I certify that on January 14, 2022, a true and accurate copy of the foregoing notice was filed electronically with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ James J. Bilsborrow

EXHIBIT A

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MARY JENNIFER PERKS, MARIA
NAVARRO-REYES on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

TD BANK, N.A.,

Defendant.

CASE NO. 1:18-CV-11176-VEC

**JOINT DECLARATION OF LYNN A. TOOPS AND JEFFREY D. KALIEL IN
SUPPORT OF PLAINTIFFS' MOTION FOR APPROVAL OF ATTORNEYS' FEES,
EXPENSES, AND SERVICE AWARDS**

We, Lynn A. Toops and Jeffrey D. Kaliel, declare as follows:

1. Lynn A. Toops is a partner at Cohen & Malad, LLP, and is one of the attorneys of record for Plaintiffs.
2. Jeffrey D. Kaliel is the founder and partner at Kaliel Gold PLLC and is one of the attorneys of record for Plaintiffs.
3. We submit this Declaration in support of Plaintiffs' Motion for Approval of Attorneys' Fees, Expenses, and Service Awards ("Fee Motion").

I. INCORPORATION OF PRIOR DECLARATION.

4. On May 17, 2021, we also submitted a Joint Declaration in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan ("Preliminary Approval Declaration"), ECF No. 95-2. Many of the facts stated in the Preliminary Approval Declaration also support granting the Fee Motion, and we expressly incorporate the Preliminary Approval Declaration into this Declaration.

II. ADDITIONAL DETAIL ON SETTLEMENT BENEFITS.

5. The benefits provided by the proposed Settlement Agreement and Releases (the “Settlement”) are substantial and multi-faceted. They include both stated monetary benefits as well as “hidden” benefits that are not readily apparent from the face of the Settlement itself.

6. The first monetary benefit of the Settlement is the payment by TD Bank, N.A (the “Bank”) of \$20,750,000.00 in cash into the Settlement Fund. This payment was made on September 21, 2021, and will earn interest that accrues to the benefit of the Settlement Class. As calculated by the Settlement Administrator, Class Members receiving a cash payment under the Settlement will receive an average of \$35.55, before deductions for attorneys’ fees, expenses, service awards, and costs of notice and administration above the \$500,000.00 paid by the Bank. Before those same deductions, the highest amount a Class Member will receive is \$3,968.02; 206 Class Members will receive over \$1,000; and 40,715 Class Members will receive at least \$100.

7. The second monetary benefit is that the Bank will forgive \$20,750,000.00 in Uncollected Retry NSF Fees of Class Members whose bank accounts were closed owing money to the Bank. The debt forgiveness benefit is significant. The Settlement Administrator has refined the estimate initially provided by the parties at preliminary approval. There are approximately 456,697 accounts, down from 470,486 reported at preliminary approval, that will receive this benefit with an average debt forgiveness of \$45.43 per account, up from \$44.10 reported at preliminary approval. Approximately 80,000 Class Members will have the negative balance on their accounts reduced by 25% or more, significantly improving their chances of fully repaying their debt.

8. The third monetary benefit is that the Bank will pay notice and settlement administration costs up to \$500,000. The estimated costs (\$795,000) exceed this amount, so the Bank will pay the full \$500,000 amount.

9. The fourth monetary benefit is not as apparent from the face of the Settlement itself but is nonetheless highly valuable. The Bank agreed to reduce Settlement administration costs by conducting a laborious review of its data to identify Class Members, their addresses and email addresses, and relevant Retry NSF Fees—difficult data analysis work that is commonly performed by plaintiffs’ experts at a cost of hundreds of thousands of dollars to the Settlement Fund. By the Bank incurring these expenses, funds that otherwise would have been consumed by expenses will instead be distributed to the Class.

10. The fifth monetary benefit is likewise not immediately obvious from the face of the Settlement but is again highly valuable. The Bank agreed to make direct deposits of Settlement proceeds to current accountholders at the Bank’s own cost. Approximately 304,539 Class Members will receive their payments by direct deposit. Had the Bank not agreed to use its own systems to directly deposit funds, the cost to mail checks to the approximately 304,539 current accountholder Class Members would have amounted to approximately \$193,961.21. Instead, those funds will be distributed to the Class.

11. The Settlement is a phenomenal and timely result for the Class Members and was obtained against a well-funded defense by TD Bank, N.A. (the “Bank”).

III. RISKS AND NOVELTY OF THE LITIGATION.

12. This result is even more remarkable because this is a groundbreaking case. When this case was filed over three years ago, it was one of the first cases in the country challenging the banking practice of charging an insufficient funds fee (“NSF Fee”) on an item that had previously been returned for insufficient funds (and had an initial NSF Fee assessed) and was later resubmitted by the merchant for payment again and charged an additional NSF Fee (“Retry NSF Fees”). The Complaint sought recovery under a novel theory that had never been endorsed by a court or challenged by a governmental entity or consumer watchdog. Novel consumer cases

like these are important—since Class Counsel filed this lawsuit and many others like it, public and regulatory scrutiny of these fees has increased and resulted in some of the largest banks in the country eliminating, or drastically reducing, NSF or overdraft fees. Chris Arnold, *People Hate Overdraft Fees. Banks Are Ditching or Reducing Them*, NPR (Jan. 11, 2022), <https://www.npr.org/2022/01/11/1071860136/people-hate-overdraft-fees-capital-one-is-ditching-them-and-other-banks-may-foll>. This case was also risky and complex. The Bank adamantly denied liability and expressed an intention to defend itself through trial. And, even though this Court agreed with the theory in part, not all Courts have done so, and some courts have dismissed similar claims. This case also presented significant hurdles because it implicated decades-old banking data that is difficult to access and use. The claims involve intricacies of banking practices and transactional data, and the case faced risks at each litigation stage. The Court could have ruled for the Bank on summary judgment or a jury could have done so at trial. Plaintiffs faced the hurdle of having the Court certify a class adversarially and having that ruling immediately appealed under Rule 23(f). Without a certified class, no Class Member would receive any recovery. Even with a certified class, trial and appeal present significant risks—and substantial delays and costs—in any complex case, particularly one asserting untested theories. At the time the Complaint was filed, no other state or federal court, anywhere, had denied a motion to dismiss these claims. At the time of the Court’s ruling on the motion to dismiss, no federal court in New York or the Second Circuit had ruled on these claims.

13. Against these 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 recovery of between 42% to 70% of the estimated damages. A settlement in this range is likely to be viewed favorably by the Class Members, who will appreciate receiving

compensation without taking any action. And the Class Members will receive that recovery now instead of years later after trial and appeal, which is important because the Class consists of individuals who did not have enough money in their bank account to pay for transactions.

IV. NOTICE AND SETTLEMENT ADMINISTRATION INFORMATION.

14. Since preliminary approval, Class Counsel has worked with defense counsel and the Administrator to finalize Notices to Class Members; review, edit, and approve the Settlement website and phone script; establish an escrow account for the Settlement Fund; 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.

15. As part of that process, the parties determined that there was a limited subset of data—for a short period and particular geographic region—that had yet to be collected, processed, and analyzed. This data was necessary to ensure a complete Class Member list. To ensure that all Class Members were sent notices at the same time, and to ensure all Class Members had sufficient time to determine whether to opt-out of or object to the proposed Settlement, the parties requested an extension of the notice deadline.

16. Second, during their supervision of the notice process, Class Counsel determined that a lower proportion of Class Members maintain a valid email address for notice delivery than anticipated by the parties at preliminary approval. Therefore, estimated notice costs were higher than anticipated because more notices will be sent by mail with the attendant printing and postage costs.

17. Notice is being sent on January 15, 2022. The Notice informs the Class Members that Class Counsel requests a fee of \$10,375,000 or 25% of the cash and debt forgiveness (Class Counsel has not requested a fee on the notice and administration costs paid by the Bank or the “hidden” Settlement benefits). The Notice also informs the Class Members that the fees would

be paid from the \$20,750,000 Settlement Fund, that a \$7,500 service award is sought for each Class Representative, and that litigation expenses and costs of notice above the \$500,000 paid by the Bank would be deducted from the Settlement Fund before determining payments to Class Members. The Notice specifies the amount—\$295,000—expected to be paid from the Settlement Fund for notice. It also provides Class Members with an example of the amount they would receive if the Court approves the requested fees, expenses, and service awards, so that Class Members can evaluate how these payments affect what they will receive from the Settlement. The Notice, and this motion, will be posted to the settlement website so that Class Members can review all materials supporting the requested fee, expenses, and service awards and make objections if they wish.

V. COUNSEL’S TIME AND EXPENSES.

18. Class Counsel devoted significant time and resources in this litigation. To date, Class Counsel expended 2808.1 hours (excluding this motion). Table 1 provides categorizations of the time spent by firm. Class Counsel spent more time than anticipated from preliminary approval to the filing of this motion because of the additional information requested by the Court, the data issues, and Bank customer inquiries.

The current number of hours worked and the hourly rates for the attorneys and staff members from Cohen & Malad, LLP who worked on this case are as follows:

- a. Lynn Toops – \$780 per hour, 712.9 hours
- b. Vess Miller – \$730 per hour, 186.9 hours
- c. Natalie Lyons – \$625 per hour, 65.2 hours
- d. Arend Abel – \$550 per hour, 33.2 hours
- e. Lisa La Fornara – \$490 per hour, 194.5 hours
- f. Tyler Ewigleben – \$450 per hour, 310.0 hours

- g. Elizabeth Hyde – \$375 per hour, 23.7 hours
- h. Paralegal – \$325 per hour, 16.1 hours
- i. Law Clerk – \$300 per hour, 55.4 hours

The current number of hours worked and the hourly rates for the attorneys from Kaliel Gold PLLC who worked on this case are as follows:

- a. Jeffrey Kaliel – \$759 per hour, 809.2 hours
- b. Sophia Gold – \$465 per hour, 270.5 hours

The current number of hours worked and the hourly rates for the attorneys from Kopelowitz Ostrow Ferguson Weiselberg Golbert who worked on this case are as follows:

- a. Jeffrey Ostrow – \$725 per hour, 19.75 hours
- b. Jonathan Streisfeld – \$725 per hour, 41.25 hours
- c. Josh Levine – \$600 per hour, 0.75 hours
- d. Daniel Tropin – \$550 per hour, 10.25 hours
- e. Todd Becker – \$200 per hour, 27.00 hours

The current number of hours worked and the hourly rates for the attorneys from Weitz & Luxenberg P.C. who worked on this case are:

- a. James J. Bilsborrow – \$695 per hour, 30.5 hours

19. It is anticipated that Class Counsel will spend at least an additional 200 hours preparing for the final approval hearing, including filing supplemental declarations, responding to any objections, and preparing for and attending the final approval hearing. There will be post-final approval work ensuring that the Settlement proceeds are properly distributed to Class Members, responding to Class Members' inquiries, and effectuating a secondary or *cy pres* distribution, as needed. These efforts will continue throughout 2022 and into 2023.

20. Class Counsel requests reimbursement of \$95,286.87 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 (\$975.07), pro hac vice admission fees (\$606.50), expert witness fees (\$70,350.00), litigation support vendors (\$9,381.55), and multiple sessions with the services of the well-qualified mediator Eric Green (\$13,973.75). The largest expense is for Plaintiff's expert, Arthur Olsen, who participated in both litigation and settlement efforts. Specifically, Mr. Olsen reviewed sample data produced by the Bank in litigation and helped Class Counsel formulate deposition questions needed to confirm that such data was suitable for class certification purposes. During settlement discussions, Mr. Olsen repeatedly reviewed and questioned the Bank's damages analyses to determine whether they accurately reflected the class damages. Class Counsel was incentivized to only incur reasonable and necessary expenses because recovery of expenses was not guaranteed and was dependent on the outcome of the case. Class Counsel is not seeking costs related to legal research, copying, and other overhead expenses, which were advanced and are commonly reimbursed. Class Counsel is also not seeking costs related to expert witness fees utilized in seeking preliminary and final approval of the Settlement.

VI. THE CLASS REPRESENTATIVES' TIME AND EFFORTS.

21. Plaintiffs invested significant time in this case and risked their reputations in doing so, by publicly disclosing their personal financial difficulties, creating notoriety regardless of their success on the claims. They risked their reputations to bring these claims against their bank who had access to sensitive personal financial information. They should be commended for taking action to protect the interests of hundreds of thousands of the Bank's accountholders. Plaintiffs' efforts have created extraordinary financial benefits for the Class, compensating them for past harm and protecting them from future harm. Their efforts will also inure to the benefit of

new accountholders, who will better be able to understand how the Bank assesses fees because after the filing of this lawsuit the Bank first disclosed its multiple fee practices. Plaintiffs expended hours in advancing this litigation against a large and powerful adversary. Each conferred with Class Counsel on a number of occasions. Specifically, Plaintiffs provided assistance that enabled Class Counsel to successfully prosecute the Action and reach the Settlement, including: (1) submitting to interviews with Class Counsel; (2) locating and forwarding responsive documents and information; (3) providing discovery documents; (4) participating in conferences with Class Counsel; and (5) with respect to Plaintiff Perks, sitting for a rigorous deposition.

We declare under the penalty of perjury that the foregoing is true and correct.

Dated: January 14, 2021



Lynn A. Toops

Dated: January 14, 2021



Jeffrey D. Kalief

Table 1 - Summary of All Firms' Lodestar by Category

Task	Cohen & Malad, LLP	Kaliel Gold PLLC	Kopelowitz Ostrow Ferguson Weiselberg Golbert	Weitz & Lixenberg	Totals
Presuit investigation, Factual Development, Client Meetings and Correspondence <i>Researched potential causes of actions; researched potentially applicable federal laws and regulations; researched TD's disclosures and compared to other Bank's disclosures; interviewed clients; reviewed many sets of monthly bank statements; prepared preservation letter; review NACHA Rules and guidance</i>	55.40	134.60	0.25	0.00	190.25
Strategy, Case Analysis, Class Counsel Conferences <i>Strategy meetings internally at the firm and with co-counsel throughout the case</i>	27.50	82.30	1.00	10.80	121.60
Pleadings <i>Researched, drafted, and edited complaint; researched the viability of New York state causes of action; researched choice of law issues; reviewed answer and researched viability of affirmative defenses.</i>	47.50	63.40	5.75	2.10	118.75
Motion Practice <i>Researched and drafted opposition to motion to dismiss and supplemental filings; prep for hearing on motion to dismiss (cancelled due to covid-19)</i>	154.80	57.70	16.00	2.50	231.00
Discovery <i>Prepared for and took 30(b)(6) deposition; defended depositions of Class Representative; responded to discovery requests; promulgated discovery requests; negotiated protective order; negotiated ESI Protocol and ESI search terms; reviewed documents; worked with an expert regarding class data; analyzed class data; drafted 30(b)(6) notice; drafted, met and conferred on, and reviewed third party discovery to numerous financial institutions</i>	788.20	461.30	38.25	4.90	1292.65
Case Management and Other Court Mandated Tasks <i>Conducted 26(f) conference; drafted 26(f) report; prepared joint letter requests to continue deadlines; prepared motion for briefing schedule on summary judgment; edited joint discovery plan; attended discovery conferences.</i>	15.80	38.20	1.25	2.50	57.75
Settlement, Approval Process, and Notice <i>Engaged in settlement discussions with opposing counsel; coordinated settlement strategy with co-counsel; prepared mediation brief and supplemental mediation brief; attended two full-day mediations; negotiated and finalized settlement agreement and all associated documentation over numerous drafts. Drafted motion for preliminary approval of class action settlement and accompanying declarations. Received and reviewed detailed bids from notice administrators; worked with notice administrator to develop notice plan and find cost-efficiencies; drafted notices; oversaw notice process; prepared for and participated in preliminary approval hearing; worked with defense counsel, administrator, and experts to answer court questions regarding details of settlement for preliminary approval; revised settlement notices; worked through complex data issues that delayed notice; review and revise settlement website and phone script.</i>	509.70	242.20	36.50	7.70	796.10
Total Hours	1598.90	1079.70	99	30.5	2808.10
Total Lodestar	\$ 1,017,054.00	\$ 739,965.30	\$ 55,712.50	\$ 21,197.50	\$ 1,833,929.30

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Perks v. T.D. Bank

Case No. 18-CV-11176

SUPPLEMENTAL DECLARATION OF BRIAN T. FITZPATRICK

1. I am the Milton R. Underwood Chair in Free Enterprise and Professor of Law at Vanderbilt University in Nashville, Tennessee. I submitted a declaration in support of class counsel’s motion for preliminary approval on May 17, 2021. In that declaration, I referenced an empirical study of fee awards in bank fee class actions that I did in a previous case against the defendant. Herein, I provide further details regarding my prior study and—based on new research—update and expand the findings of my original study. I believe the results further support my opinion that fees may be reasonably awarded as a portion of the total settlement value, including debt forgiveness, because state and federal courts across the country continue to do so regularly.

2. To update the study, I followed the same methodology I undertook in the previous case and outlined in my earlier declaration. Using that methodology, I found 37 new fee awards in bank fee cases in both state and federal court through November 2021, bringing the total over both studies to 106 such awards since 2010.¹ I could not locate the court orders confirming the fee awards in two of the new cases I identified.² After excluding these two cases and the five cases

¹ The focus of these studies has been “overdraft” fees, but bank fees go by a variety of names and the theories on why the fees might be unlawful are varied as well. In my opinion, the name of the fee or the theory of liability is immaterial to the question at hand: how have other courts treated settlements that include forgiving fees still owed as well as reimbursing fees already paid.

² These two cases are *Valle v. Popular Community Bank*, Case No. 653936/2012 (N.Y. Sup. Ct., Comm. Div., Aug. 6, 2018) and *Allen and Lande v. UMB Bank, N.A., et al.*, Case No. 1016-CV34791 (Jackson Cnty. Cir. Ct. (MO), Oct. 31, 2011).

I excluded in the prior study (two where I could not locate the orders and three that used the lodestar rather than percentage method), I am left with 99 fee awards in bank fee cases from 2010 to November 2021. Twenty-six of these cases involved settlements that included debt forgiveness by the defendant. I list these 26 cases in Table 1 in order to present a comprehensive picture of how courts across the country have treated debt forgiveness in class action fee awards.

3. Table 1 shows that in every instance in which counsel requested it, courts included debt forgiveness in the settlement fund from which the attorneys' fee percentage was taken. In particular, in the notes in the last column of the table, I reported whether the fund from which fees were calculated included debt forgiveness (cases with note 1), the fund was calculated both ways—i.e., with and without debt forgiveness (cases with note 2), or the lawyers did not even request that debt forgiveness be included in the fund (cases with note 3). As the table shows, debt forgiveness was not included in the fund from which fees were drawn only in the two cases where the lawyers did not request that it be included. In all of the other 24 cases, courts *included* debt forgiveness, usually as the only fee calculation but occasionally at least as the alternative fee calculation. *In no case did a court reject the inclusion of debt forgiveness.* In my opinion, this new data further supports the testimony in my earlier declaration.

4. My compensation for this declaration was \$950 per hour.

Executed on this 11th day of January, 2022, at Nashville, TN.

By:



Brian T. Fitzpatrick

**Table 1: Bank Fee Cases in Federal and State Court since 2010
where the Settlement included Debt Forgiveness**

Case Name	Docket Number	Court	Final approval	Settlement Amount	Fee %	Notes
Hash v. First Financial Bancorp	20-cv-1321	S.D. Ind.	11/21/21	\$6,678,681	24.24%	1
Coleman v. Alaska USA Federal Credit Union	19-cv-0229	D. Alaska	11/17/21	\$1,208,447	25.00%	1
Ingram v. Teachers Credit Union	49D01-1908-PL-035431	Ind. Comm. Ct.	9/20/21	\$9,552,305	16.00%	1
Thompson v. Community Bank	19-cv-919	N.D.N.Y.	9/8/21	\$3,460,833	33.33%	1
Almon v. Independence Bank	19-CI-00817	Ky. Cir. Ct.	6/18/21	\$751,928.75	33.33%	1
Skinner v. Glacier Bank	15-2020-105	Mont. 11 th Jud. Dist. Ct.	6/14/21	\$4,063,164	33.33%	1
Wright v. Veridian Credit Union	LACL144915	Iowa Dist.	5/3/21	\$6,228,970	33.33%	1
Perks v. Activehours	19-cv-05543	N.D.Cal.	3/25/21	\$3,000,000	30.00%	2
Story v. SEFCU	19-cv-00147	N.D.N.Y.	2/25/21	\$9,734,857	25.97%	1
Smith v. Bank of Hawaii	16-cv-00513	D.Haw.	12/22/20	\$12,397,519	30.00%	1
Norwood v. Camden National Bank	BCD-cv-2020-13	Me. Bus. Cons. Ct.	12/11/20	\$1,685,452	33.33%	1
Holt v. Community America Credit Union	19-cv-00629	W.D.Mo.	12/8/20	\$3,078,436	33.33%	1
Johnson v. Elements Financial Credit Union	49D01-2001-PL-004706	Ind. Comm. Ct.	10/29/20	\$827,470	33.33%	1
White v. Members 1 st Federal Credit Union	19-cv-00556	M.D.Pa.	10/28/20	\$1,080,000	33.33%	1
Walters v. Target Corp.	16-cv-01678	S.D.Cal.	10/26/20	\$8,222,830	25.00%	1
Walker v. People's United Bank	17-cv-00304	D. Conn.	6/29/20	\$7,400,000	33.33%	1

Hawley v. ORNL Federal Credit Union	B9LA0107	Tenn. Cir. Ct.	6/16/20	\$470,000	33.33%	3
Coleman-Weathersbee v. MSU Federal Credit Union	19-cv-11674	E.D.Mich.	6/12/20	\$10,488,600	19.10%	1
In re TD Bank Debit Card Overdraft Fee Litig.	15-MN-02613	D.S.C.	1/9/20	\$70,000,000	30.00%	1
Salls v. Digital Federal Credit Union	18-cv-11262	D.Mass.	12/19/19	\$1,800,000	33.33%	2
Sewell v. Wescom Credit Union	BC586014	Los Angeles County Superior Court (CA)	5/31/19	\$3,243,365.00	33.33%	1
Farrell v. Bank of America, N.A.	16-00492	S.D.Cal.	8/31/18	\$66,600,000.00	21.77%	1
Ramirez v. Baxter Credit Union	16-03765	N.D. Ca.	12/22/17	\$1,175,069.00	25.00%	1
Hernandez v. Logix Federal Credit Union	BC628495	Los Angeles County Superior Court (CA)	10/20/17	\$1,123,118.00	33.33%	1
Jacobs v. Huntington Bancshares Incorporated.	11-00090	Lake County Court of Common Pleas (OH)	6/2/17	\$15,975,000.00	40.00%	1
Casto v. City National Bank	10-1089	Cir. Ct. Kanawha County (WV)	5/10/12	\$3,366,000.00 ³	30.00%	3

Notes: some of the fee awards were inclusive of expenses and some were exclusive

1 = fee calculated from fund that included debt forgiveness

2 = fee calculated from fund alternatively with debt forgiveness and without debt forgiveness

3 = settlement amount included debt forgiveness but lawyers requested the fee be calculated from the cash portion alone

³ In Table 1 in my earlier declaration, I included debt forgiveness (\$3.5M) in this settlement value number (\$6.866M), but, since the court did not include debt forgiveness in the fund from which attorneys' fees were calculated, I removed debt forgiveness here in order to make the fee-percentage numbers consistent throughout the table in this declaration.

EXHIBIT C

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MARY JENNIFER PERKS, MARIA
NAVARRO-REYES on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

TD BANK, N.A.,

Defendant.

CASE NO. 1:18-CV-11176-DAB

SUPPLEMENTAL DECLARATION OF MEDIATOR ERIC GREEN

1. As discussed in my original Declaration dated May 13, 2021, I served as mediator in the resolution of this case. I have also served as mediator in various other consumer class actions brought against financial institutions. In my experience, these matters often involve a resolution that includes both a cash settlement payment and debt forgiveness. In my experience, defendants view debt forgiveness as a cost to them and plaintiffs view it as a value for class members.

2. In the mediated negotiations that led to the settlement of this case, both cash and debt forgiveness were the subject of good faith, vigorous, and adversarial negotiation over what the overall relief for the class would be. The settlement that was ultimately reached was based on both the cash and debt forgiveness provisions.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 13 day of January, at Concord, Massachusetts.



Eric D. Green