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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF NOTICE PLAN

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INTRODUCTION

The proposed $41.5 million settlement of this class action ($20.75 million in cash and an equivalent amount in debt forgiveness) represents an excellent recovery for the Settlement Class in this groundbreaking case—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 NSF Fee assessed) but was later resubmitted by the merchant for payment again and charged an additional NSF Fee ("Retry NSF Fees"). When filed two and a half years ago, Plaintiffs' Complaint sought recovery under a novel theory of liability that had never before been endorsed by a court or challenged by a governmental entity or consumer watchdog. After extensive discovery, expert analysis, several months of settlement negotiations, and two mediations, the proposed Settlement before the Court—which includes $41.5 million in direct monetary benefits to Settlement Class Members, plus an agreement by Defendant to pay $500,000 in notice and administration expenses—represents a recovery of between 42-70% of the estimated damages at trial. *See generally* Ex. 1, Settlement Agreement and Releases. In addition, after Plaintiffs filed this lawsuit, Defendant improved its account agreements to disclose the Retry NSF Fee practice to its customers for the first time. Given the risks and uncertainties of continued litigation, including risks on a contested class certification motion, a Rule 23(f) appeal of class certification, summary judgment, trial, and appeal of any verdict, the proposed Settlement easily meets the Second Circuit's standards for preliminary and, ultimately final, approval.

In addition to the monetary recovery, the Settlement is an exemplar of class action settlement best practices. Substantial benefits will be placed directly in the hands of Settlement Class Members without the requirement of a claim form or any action on their part whatsoever. Settlement Class Members will receive cash or forgiveness of debt owed to the Bank without lifting a finger. And not one penny will revert under any circumstance to Defendant. For all these

reasons, the Court should grant preliminary approval so that notice of the proposed Settlement can be provided to the Settlement Class, the case can proceed to final approval, and Settlement Class Members can receive the benefits of the Settlement.

Plaintiffs, therefore, respectfully request that the Court enter the proposed Preliminary Approval Order attached as Exhibit 3 to the Settlement Agreement and Exhibit 1 to the Motion for Preliminary Approval and (1) find that it is likely to approve the terms of the Settlement under Rule 23(e)(2); (2) find that it will likely be able to certify the Settlement Class for settlement purposes only under Rule 23(e)(1)(B); (3) approve the notice program set forth in the Settlement and approve the form and content of the notices; (4) approve the procedures for Settlement Class Members to exclude themselves from the Settlement or to object to the Settlement; (5) appoint Plaintiffs' counsel as Class Counsel; (6) appoint the named Plaintiffs as representatives of the Settlement Class; and (7) schedule a Final Approval Hearing to be held approximately 180 days after the entry of the Preliminary Approval Order to determine whether to finally approve the Settlement and Class Counsel's application for attorneys' fees, costs, and expenses and for Service Awards to Plaintiffs.

BACKGROUND OF THE LITIGATION

On November 30, 2018, Plaintiff Mary Jennifer Perks filed a putative class action Complaint in this Court on behalf of a nationwide class of customers who were charged Retry NSF Fees by TD Bank, N.A. ("TD Bank" or "Defendant"). Dkt. 4. The Complaint asserted claims for breach of contract and breach of the covenant of good faith and fair dealing, as well as unjust enrichment. *Id.* at ¶ 12. On behalf of a New York subclass, the Complaint asserted claims under the New York General Business Law. *Id.* at ¶¶ 65-104. On February 5, 2019, Defendant filed a Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. 25.

On February 19, 2019, Plaintiff Perks filed her Amended Class Action Complaint, which added Maria Navarro-Reyes as a named Plaintiff, added a Florida subclass, and included many additional allegations addressing arguments made in TD Bank's motion to dismiss as well as industry usage of certain important contractual terms. *See generally* Dkt. 28. On March 22, 2019, Defendant filed a Rule 12(b)(6) Motion to Dismiss Plaintiffs' Amended Class Action Complaint. Dkt. 31. Plaintiffs opposed the Motion on April 19, and Defendant filed its reply on May 10. Dkts. 41, 42. While the motion was pending, the parties filed multiple notices of supplemental authority. Dkts. 43, 45, 47-49.

On March 17, 2020, the Court entered a Memorandum Opinion and Order, granting in part and denying in part Defendant's Motion to Dismiss. Dkt. 54. The Court denied the Motion to Dismiss Plaintiffs' breach of contract claim and granted dismissal of Plaintiffs' breach of implied covenant of good faith, New York General Business Law § 349, and unjust enrichment claims. *Id.* at 4, 7-8. On April 14, 2020, Defendant filed its Answer and Defenses to the Amended Class Action Complaint. Dkt. 58.

After the Court's Memorandum and Order on the Motion to Dismiss, the Parties engaged in significant discovery efforts. Ex. 2, Joint Decl. of Toops & Kaliel ("Joint Decl.") at ¶¶ 7-17. The parties negotiated and submitted to the Court a Protective Order and a Stipulated Document Production Protocol. *See* Dkts. 66, 67. The parties exchanged written discovery requests and responses. Joint Decl. at ¶¶ 10, 13.

On June 18, 2020, Defendant began its document production. *Id*. at ¶ 10. The parties immediately identified disputes on the scope of discovery and began meeting and conferring on various discovery issues, such as custodial ESI searches and the production of data on resubmitted

transactions. *Id.* As a product of the parties' meet and confer efforts, on July 1, 2020, Plaintiffs served revised written discovery on Defendant. *Id.*

Beginning on May 15, 2020, the parties submitted monthly discovery status reports to the Court. Dkts. 62, 68, 69, 74, 77. Shortly thereafter, the parties presented to the Court a dispute regarding Defendant's data production. Dkt. 69 at 1. On July 29, 2020, the parties appeared before the Court, and the Court ordered Defendant to produce all discovery data on resubmitted transactions no later than August 12, 2020. Dkt. 71.

Based on the Court's order as well as the parties' frequent and ongoing meet and confer efforts, Defendant made supplemental document productions on July 15, 2020, August 5, 2020, August 21, 2020, August 28, 2020, September 15, 2020, September 16, 2020, September 22, 2020, September 26, 2020, and October 31, 2020. Joint Decl. at ¶ 12. In total, Defendant's productions comprised tens of thousands of pages of documents and an extensive data production of years of Defendant's banking transaction data. *Id.*

In addition to written discovery, Plaintiffs took the deposition of Defendant's 30(b)(6) corporate representative on September 17, 2020. *Id.* at ¶ 16. Plaintiffs were also preparing for further 30(b)(6) corporate representative depositions and depositions of other key executives of Defendant prior to the case being stayed for mediation. *Id.*

Plaintiffs also made productions of documents and responded to written discovery. *Id.* at ¶¶ 13-14. Plaintiff Perks sat for a full day deposition on September 28, 2020. *Id.* at ¶ 16. Plaintiffs also served non-party subpoenas on numerous non-party banks as well as the National Automated Clearing House Association (NACHA). Dkts. 63, 75, 84. Plaintiffs' counsel received and reviewed numerous documents in response to these subpoenas and met and conferred with the financial

institutions regarding the scope of the production of documents in response to the subpoenas. Joint Decl. at ¶ 17.

On September 15, 2020, Plaintiffs reported to the Court that they had been continuing to attempt to address deficiencies in the production by Defendant. Dkt. 77 at 2. Unable to resolve the dispute, on September 23, 2020, Plaintiffs asked the Court to order Defendant to produce within two weeks (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. Dkt. 78 at 3. On September 28, 2020, Defendant responded to Plaintiffs' September 23, 2020 request, and on October 1, 2020, the Court ordered the parties to meet and confer and propose to the Court a new discovery deadline by October 9, 2020. Dkts. 80, 81.

On October 2, 2020, the parties requested a stay of all pretrial deadlines pending private mediation. Dkt. 82. That same day, the Court granted the parties' request and adjourned all upcoming deadlines. Dkt. 83.

MEDIATION AND SETTLEMENT NEGOTIATIONS

In October 2020, Professor Eric Green agreed to conduct a private mediation in this case. Ex. 3, Green Decl. at ¶ 7. The parties and Professor Green agreed to a mediation schedule that included extensive pre-mediation briefing by the parties and a mediation to be held in November. *See id*.

Following the submission of the parties' briefs on November 9, 2020 and multiple pre-mediation calls with the respective parties, Professor Green supervised a day-long mediation session on November 20, 2021 via videoconference. *Id.* at ¶ 8. The matter did not settle during the first mediation session. *Id. at* ¶ 9.

Subsequently, the parties and their experts performed additional data analysis and legal research. *Id.* at ¶ 9. The data analyses included matters relating to: ACH items coded as Retry payments prior to the NACHA's requirement that such items bear a "RETRY PYMT" code; ACH items not coded as "RETRY PYMT"; refunded fees; and accounts closed with a negative balance. Joint Decl. at ¶ 20. The parties submitted additional mediation briefs to Professor Green prior to a second mediation session on January 26, 2021, which took place via videoconference. Green Decl. at ¶ 9. After the conclusion of the mediation, the parties reached a settlement in principle. *Id.* at ¶11.

The Parties notified the Court of the agreement in principle on February 1, 2021. Dkt. 87. The tentative agreement allowed Plaintiffs to perform confirmatory discovery regarding certain aspects of the data and analysis performed by TD Bank's experts regarding damages. Joint Decl. at ¶ 22. On February 19, 2021, Plaintiffs' counsel and their expert extensively interviewed TD Bank's experts as part of this confirmatory discovery process. *Id.*

The parties worked together for over three months to negotiate the terms of a full settlement agreement and seek bids from settlement administrators. *Id*. at ¶¶ 23, 29.

SUMMARY OF THE PROPOSED SETTLEMENT TERMS

The proposed Settlement provides for agreed certification of a Settlement Class, notice, the cash and debt forgiveness benefits to the Settlement Class Members, and a release relating to Retry NSF Fees.

I. The Settlement Class Definition

The Settlement Class is defined as:

> All current and former holders of TD Bank, N.A. consumer checking Accounts who, during the Class Period, were assessed at least one Retry NSF Fee. Excluded from the Settlement Class are Defendant, its parents, subsidiaries, affiliates, officers and directors; all Settlement Class members who make a timely election to be

> excluded; and all judges assigned to this litigation and their immediate family members.

Settlement at ¶ 55. The parties agree, solely for the purposes of settlement, that the Settlement Class meets the requirements for class certification under Federal Rules of Civil Procedure 23(a) and 23(b)(3).

II. Benefits of the Settlement

A. The $41.5 million Settlement.

The first monetary benefit of the Settlement is TD Bank's payment of $20,750,000 in cash into the Settlement Fund. Settlement at ¶ 64. This payment will be made within 14 days of preliminary approval and will earn interest that accrues to the benefit of the Settlement Class. *Id.* In no event does any of the Settlement Fund revert to TD Bank. *Id.* at ¶ 83(d)(iv).

In addition, TD Bank will issue monetary forgiveness of $20,750,000 in Uncollected Retry NSF Fees of Settlement Class Members whose accounts are closed at TD Bank and had amounts owing. *Id.* at ¶ 84. Forgiveness will be automatic 90 days after the Effective Date of the Settlement. *Id.* at ¶ 86. Within 90 days of the Effective Date, Defendant will update any negative reporting to ChexSystems or credit reporting agencies with respect to Settlement Class Members who receive forgiveness of Uncollected Retry NSF Fees. *Id*. Defendant shall notify Class Counsel once the debt forgiveness has been applied. *Id*.

A Settlement Class Member whose Uncollected Retry NSF Fees are less than the total Retry NSF Fees on his or her Account may receive *both* Forgiveness of Uncollected NSF Fees under this section and a distribution of Settlement Class Payments. *Id*.

In addition to the monetary benefits, TD Bank is responsible for paying notice and settlement administration costs up to $500,000 on top of the total $20.75 million in payments from the Settlement Fund and $20.75 million in forgiveness of Uncollected Retry NSF Fees. *Id.* at ¶ 71.

B. Class Member Payments

The Net Settlement Fund will be distributed to Settlement Class Members by direct deposit to the accounts of existing customers and by check mailed directly to former customers. *Id.* at ¶ 83(d)(iii).

For those Settlement Class Members who are Current Account Holders at the time of distribution of the Settlement Fund, a credit for the Settlement Class Member Payment shall be deposited directly into the Settlement Class Member's TD Bank account. *Id.* at ¶ 83(d)(iii)(1). If Defendant is unable to complete certain credit(s), Defendant shall return the total amount of unsuccessful Settlement Class Member Payments back to the Settlement Administrator to be paid by check. *Id*.

For those Settlement Class Members who are Former Account Holders at the time of the distribution of the Net Settlement Fund or who at that time do not have an Account, they shall be sent a check by the Settlement Administrator at the address used to provide the notice, or at such other address as designated by the Settlement Class Member. *Id.* at ¶ 83(d)(iii)(2). For jointly held accounts, checks will be payable to all members, and will be mailed to the first member listed on the account. *Id.*; *see also* Ex. 4, Tucci Decl. at ¶ 9. The Settlement Administrator will make reasonable efforts to locate the proper address for any check returned by the Postal Service as undeliverable and will re-mail it once to the updated address or, in the case of a jointly held account, and in the Settlement Administrator's discretion, to an accountholder other than the one listed first. Settlement at ¶ 83(d)(iii)(2). Specifically, the Settlement Administrator will use Accurint (a division of Lexis-Nexis) to perform a "skip trace" search to obtain the Class Member's most accurate and current information, at which point the notice will either be re-mailed to the updated address or sent by email. Tucci Decl. at ¶ 10. The Settlement Class Member shall have 180 days to negotiate the check. Settlement at ¶ 83(d)(iii)(2).

Class Member Payments will be distributed *pro rata* based on the Retry NSF Fees charged to each Settlement Class Member. *Id.* at ¶ 83(d)(ii). Specifically, Settlement Class Members shall be paid *pro rata* distributions of the Net 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 Settlement Class Member, less the dollar amount of any Retry NSF Fee Refunds and reduced by any Uncollected Retry NSF Fees). *Id.*

C. Disposition of Residual Funds

Within one year after the date the Settlement Administrator mails the first Settlement Class Member Payment, any remaining amounts resulting from uncashed checks shall either be distributed: (a) in a second round of distribution to those Settlement Class Members who are Current Accountholders or who cashed their initial settlement check, if Class Counsel determines that a second distribution is economically reasonable, given the costs of a second distribution (which must be paid out of the Settlement Fund) and the relative amount of such a second distribution; or (b) to an appropriate cy pres recipient agreed to by the Parties and approved by the Court. *Id.* at ¶ 87. If a second distribution is made, any amounts remaining unclaimed six months after the second distribution shall be distributed to an appropriate cy pres recipient agreed to by the parties and approved by the Court. *Id.* In no event does any of the Settlement Fund revert to TD Bank. *Id.* at ¶ 83(d)(iv).

D. Settlement Administrator

The Settlement provides that its Administrator will be RG/2 Claims Administration LLC ("RG/2"). Settlement at ¶ 53. Before selecting RG/2, Class Counsel issued a request for proposals to two leading class action settlement notice and administration firms, Epiq and RG/2. Joint Decl. at ¶ 29. Class Counsel then compared bids for any inconsistency in services delivered, then negotiated price with both firms, ultimately choosing the low-cost provider, RG/2. *Id.* RG/2 is a

leading class action notice and claims administrator comprised of seasoned class action practitioners and highly credentialed CPAs and forensic accountants. Tucci Decl., Ex. A at 4. RG/2 has administered and distributed more than $1.2 billion in class action settlement proceeds, is well-versed in the legal requirements governing notice and claims administration in class action settlements, and employs best practices to ensure that class members obtain efficient and meaningful notice. Tucci Decl. at ¶¶ 2, 6. RG/2 also agreed to cap notice costs at a specified level. Joint Decl. at ¶ 29.

III. Class Notice

Within 30 calendar days of Preliminary Approval, Defendant will provide the Settlement Administrator with the following information, which will be kept strictly confidential between the Administrator and Defendant, for each Class Member: (i) name; (ii) number of Retry NSF Fees per account through the date of Preliminary Approval; (iii) relevant refund and charge-off information through the date of Preliminary Approval; (iv) last known e-mail address; and (v) last known mailing address ("Class Member List"). Settlement at ¶ 75.

Within 60 calendar days of Preliminary Approval, or by the time specified by the Court, the Settlement Administrator shall send the Class notices in the forms attached as Exhibits 1 and 2 to the Settlement, or in such form as is approved by the Court, to the Class Members. *Id.* at ¶ 76. The Settlement Administrator shall send the "email notice," attached to the Settlement as Exhibit 1, to all Class Members for whom the Defendant has provided the Settlement Administrator with an e-mail address. *Id*. The Settlement Administrator shall send the "postcard notice," attached as Exhibit 1 to the Settlement, to all Class Members for whom Defendant does not provide an email address to the Settlement Administrator and to all Class Members to whom the Settlement Administrator sent Exhibit 1 via email but for whom the Settlement Administrator receives notice of an undeliverable email. *Id*. Postcard notice shall be mailed after the Settlement Administrator

updates mailing addresses provided by Defendant with the National Change of Address database and other commercially feasible means. *Id*. The Settlement Administrator shall also maintain a website containing the Complaint, the "long-form notice," attached as Exhibit 2 to the Settlement, Plaintiffs' motion seeking Preliminary Approval, the Preliminary Approval Order, Plaintiffs' motion seeking Final Approval, and the Final Approval Order until at least 90 calendar days after Final Approval. *Id*. The Settlement Administrator shall send the long-form notice by mail to any Class Member who requests a copy. *Id*. A Spanish language translation of the long-form notice shall be available on the Settlement Website and be provided to Settlement Class Members who request it from the Settlement Administrator. *Id.* at ¶ 78.

IV. Opt Out Procedures

A Settlement Class Member may opt-out of the Settlement Class at any time prior to the Opt-Out Deadline, which is 120 calendar days after Preliminary Approval (or other date as ordered by the Court), provided the opt-out notice that must be sent to the Settlement Administrator is postmarked no later than the Opt-Out Deadline. *Id*. at ¶¶ 43, 79. If an Account has more than one Account Holder, and if one Account Holder excludes himself or herself from the Settlement Class, then all Account Holders on that Account shall be deemed to have opted out of the Settlement with respect to that Account. *Id*. at ¶ 79.

V. Objection Procedures

The Settlement also provides a procedure for Settlement Class Member to object to the Settlement, to the application for attorneys' fees and costs, and/or to the Service Award. *Id*. at ¶ 80. Objections must be submitted no later than the Objection Deadline, as specified in the notice, which is 120 calendar days after Preliminary Approval (or other date as ordered by the Court). *Id*. at ¶¶ 42, 80. If submitted by mail, an objection shall be deemed to have been submitted when posted if received with a postmark date indicated on the envelope if mailed first-class postage

prepaid and addressed in accordance with the Settlement's instructions. *Id*. at ¶ 80. If submitted by private courier (*e.g.*, Federal Express), an objection shall be deemed to have been submitted on the shipping date reflected on the shipping label. *Id*.

VI. Attorneys' Fees, Costs, and Service Awards

Attorneys' fees and costs, as determined and approved by the Court, are to be paid out of the Settlement Fund. *Id*. at ¶ 83(a). Class Counsel shall apply for an award of attorneys' fees of up to 25% of the $41.5 million Value of the Settlement, and reimbursement of reasonable litigation costs, to be approved by the Court. *Id*. Defendant agrees not to oppose an application for attorneys' fees of up to 25% of the Value of the Settlement, but reserves the right to oppose an application for attorneys' fees in excess of that amount. *Id*.

Subject to Court approval, the Class Representatives shall be entitled to receive a Service Award of up to $7,500.00 each for their role as the Class Representatives. *Id.* at ¶ 83(b). The Service Award shall be paid from the Settlement Fund. *Id*.

VII. Releases

In consideration for the Settlement, Class Members are releasing claims relating to Retry NSF Fees. *Id*. at ¶ 88.

VIII. Change in Disclosures

After Plaintiffs filed this action, Defendant changed its account agreement with customers to disclose Retry NSF Fees for the first time:

> Please be aware that third parties sometimes re-submit items that we return unpaid. Each re-submission constitutes a separate item. You agree that if any transaction is submitted for payment again after having previously been returned unpaid by us, an Overdraft Fee or Return Item Fee may be assessed each time the transaction is submitted for payment and your available balance is insufficient to pay the item.

Joint Decl., Ex. A at 10. Although this change in disclosures is not a negotiated part of this Settlement, it is almost certainly a result of this litigation. Joint Decl. at ¶ 30.

ARGUMENT

Rule 23(e) requires judicial approval of a class action settlement. Fed. R. Civ. P. 23(e). Rule 23(e)(1)(B), as amended December 1, 2018, directs a court to grant preliminary settlement approval and direct notice to the proposed class if the court "will likely be able to" grant final approval under Rule 23(e)(2) and "will likely be able to" certify a settlement class for purposes of entering judgment. Fed. R. Civ. P. 23(e)(1)(B).

In considering approval of a proposed settlement, courts are mindful of the "strong judicial policy in favor of settlements particularly in the class action context." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 804 (2d Cir. 2009). Given this policy, "[a]bsent fraud or collusion," courts "should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007). Moreover, "[c]ourts encourage early settlement of class actions, when warranted, because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere." *Hadel v. Gaucho, LLC*, No. 15 Civ. 3706, 2016 WL 1060324, at *2 (S.D.N.Y. Mar. 14, 2016) (collecting cases).

Here, the Court should grant preliminary approval because it "will likely be able to" both grant final approval to the Settlement as "fair, reasonable, and adequate" and certify the Settlement Class for purposes of entering judgment after notice and a final approval hearing.

I. The Court "will likely be able to" approve the Settlement as "fair, reasonable, and adequate" under Rule 23(e)(2).

A. The legal standard for preliminary approval.

Rule 23(e)(2) sets out the factors a court must consider in determining whether a proposed class action settlement is "fair, reasonable, and adequate." Those factors are, whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

As the Advisory Committee's note to the 2018 Rule 23 Amendment explains, subsections (A) and (B) focus on the "procedural" fairness of a settlement and subsections (C) and (D) focus on the "substantive" fairness of the settlement. Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment. These factors are similar to the "procedural" and "substantive" factors the Second Circuit developed prior to the amendment. *See Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013) (explaining that courts evaluate procedural and substantive fairness of a class settlement). The 2018 amendment, however, recognizes that "[t]he sheer number of factors" considered in various Circuits "can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2)." Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment. The 2018 Amendment "therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal." *Id.*

This Court's Individual Practices in Civil Cases further provides factors to consider on preliminary approval:

> Any motion for preliminary approval of a class action settlement must provide sufficient information regarding: (i) the complexity, expense, and likely duration of the litigation; (ii) the litigation risk, including the risks of establishing liability and damages; (iii) the damages class members allegedly suffered; (iv) the range of reasonableness of the settlement in light of the best possible recovery and the attendant risks of litigation; and (v) the rationale for any discount from the "best case" damages calculation, so that the Court can make a preliminary finding as to whether the proposed settlement is procedurally and substantively fair pursuant to Federal Rule of Civil Procedure 23(e). *See Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).

Rule 7(B)(ii), *Individual Practices in Civil Cases* (Jan. 30, 2020), https://bit.ly/3y9Vh3Z.

II. The proposed Settlement meets the requirements for preliminary approval.

The proposed Settlement is plainly "fair, reasonable, and adequate" considering the relevant factors, and the Court should grant preliminary approval and direct notice because the Court "will likely be able to" grant final approval after considering those factors.

A. The Class Representatives and Class Counsel have adequately represented the Class.

First, the Class Representatives and Class Counsel have adequately represented the Settlement Class. *See* Fed. R. Civ. P. 23(e)(2)(A). Class Counsel has extensive experience in class action litigation in general and in cases involving the fee practices of financial institutions in particular. Joint Decl. at ¶¶ 32-51. There are few, if any, firms in the nation with the expertise of Class Counsel in class action litigation in the consumer financial services industry. *See id.* at ¶ 32. Here, Class Counsel's combined expertise allowed them to build a novel case that had not been attempted before. *See id.* at ¶ 53. To even be able to identify the alleged inappropriate fees—much less the legal theories that would make them actionable—required unique knowledge and skill. *Id.* Class Counsel leveraged that knowledge and skill to litigate this case and negotiate a favorable settlement for the Settlement Class. *Id.* at ¶ 57. Without their persistence, expertise, and willingness

to invest time and money in this matter, the Settlement Class would have been left entirely without recompense. *Id.* at ¶ 55. Class Counsel engaged in extensive written advocacy on the claims, resulting in this Court's denial of TD Bank's motion to dismiss Plaintiffs' novel breach of contract claim. *See id.* at ¶¶ 5-6, 54-56.

At the time the Complaint was filed in 2018, no other state or federal court, anywhere, had denied a motion to dismiss these claims. *Id.* at ¶ 53. 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.* at ¶ 54. This Court was among the first to do so. *See id.* at ¶¶ 53-54, 56. Since then, at least eight courts across the country have relied on this Court's ruling in denying motions to dismiss these claims. *Id.* at ¶ 56.

Class Counsel aggressively pursued discovery of relevant evidence, obtaining tens of thousands of pages of discovery and access to years of Defendant's banking transaction data for Plaintiffs' expert to analyze damages. *See* Dkts. 62, 68, 69, 74, 77. Class Counsel brought several discovery disputes to the Court's attention, obtained a ruling in Plaintiffs' favor, and was close to obtaining another. Dkts. 62, 69, 71, 77. The results of Class Counsel's efforts, along with their significant experience in account fee class action litigation, culminated in the Settlement for 42-70% of estimated best-case damages at trial after extensive discovery on a novel claim. Joint Decl. at ¶ 57.

Similarly, the Class Representatives timely responded to written discovery requests and produced hundreds of pages of documents. *Id.* at ¶¶ 13-14. Class Representative Perks sat for a full day deposition. *Id.* at ¶ 16. The Class Representatives also timely responded to alleged discovery deficiencies sent by Defendant, which required the Class Representatives to undertake additional time and effort to ensure discovery compliance, including completing additional

document searches and participating in multiple phone calls with Class Counsel. *Id.* at ¶ 14. These efforts culminated in the sending of a detailed discovery letter to Defendant on September 25, 2020, providing further responses and details regarding Class Representatives' responses to Defendant's discovery requests. *Id.* The Class Representatives also reviewed and approved the terms of the Settlement. *Id.* at ¶ 23.

The Class Representatives and Class Counsel "have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc.*, No. 02 CIV. 5575 (SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (approving settlement where "[d]iscovery is fairly advanced and the parties certainly have a clear view of the strengths and weaknesses of their cases"); *Millien v. Madison Square Garden Co.*, No. 17-CV-4000 (AJN), 2020 WL 4572678, at *5 (S.D.N.Y. Aug. 7, 2020) (same). Thus, Class Counsel and the Class Representatives have adequately represented the Class. Fed. R. Civ. P. 23(e)(2)(A).

B. The Settlement was negotiated at arm's length.

Second, the Settlement is the product of hard-fought, arm's-length negotiations under a very experienced and well-respected mediator. *See* Fed. R. Civ. P. 23(e)(2)(B). "To determine procedural fairness, courts examine the negotiating process leading to the settlement." *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012). "A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.* ("*Visa*"), 396 F.3d 96, 116 (2d Cir. 2005) (quoting Manual for Complex Litig. (Third) § 30.42 (1995)). Moreover, in such circumstances, "great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying

litigation." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. Mar. 20, 1997); *see also Clark v. Ecolab Inc.*, Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672, 2010 WL 1948198, at *4 (S.D.N.Y. May 11, 2010) ("In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation"). Class Counsel, who have extensive experience litigating and settling account fee litigation across the country, are of the opinion that the Settlement is an outstanding result for the Settlement Class. Joint Decl. at ¶ 25, 57.

Further, the Settlement was reached only after multiple mediation sessions with Professor Eric Green. This Court has recognized that Professor Eric Green is "a highly experienced and very well-regarded mediator," *Fleisher v. Phoenix Life Ins. Co.*, Nos. 11-CV-8405 (CM), 14-cv-8714 (CM), 2015 WL 10847814, at *1 (S.D.N.Y. Sept. 9, 2015), as have other courts. *See, e.g.*, *In re Checking Acct. Overdraft Litig.*, 275 F.R.D. 654, 658 (S.D. Fla. 2011) (noting Professor Green is "an experienced and well-respected mediator"); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 JG VVP, 2015 WL 5918273, at *2 n.3 (E.D.N.Y. Oct. 9, 2015) (same); *Gulbankian v. MW Mfrs., Inc.*, No. CIV.A. 10-10392-RWZ, 2014 WL 7384075, at *1 (D. Mass. Dec. 29, 2014) (same). As the Central District of Illinois observed, Professor Green's "guidance and participation in mediating this matter between the parties, and reviewing their settlement agreement, demonstrates that this matter was negotiated at arm's length and absent any collusion between the parties' counsel to the detriment of the class." *Clapp v. Accordia Life & Annuity Co.*, No. 2:17-cv-02097-CSB-EIL at 26–27 (C.D. Ill. June 23, 2020) (ECF 66). *See also Visa*, 396 F.3d at 117 (agreeing with Professor Green's assessment that the settlement was negotiated at arm's length and was procedurally fair); *Rubio-Delgado v. Aerotek, Inc.*, No. 13-CV-03105-SC, 2015 WL 3623627, at *4 (N.D. Cal. June 10, 2015) (same). *See also* Fed. R. Civ. P. 23(e)(2)(A) & (B)

advisory committee's note to 2018 amendments ("[T]he involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests.").

Although the details of the mediation sessions are confidential, it is Professor Green's opinion that counsel for both sides skillfully and vigorously represented the interests of their clients. Green Decl. at ¶ 11. According to Professor Green, "the level of advocacy for both parties was informed, vigorous, engaged, ethical, and effective"; "[t]he parties' positions on both liability and damages in this and the related cases were extensively briefed prior to the mediation session"; and the parties' "positions on liability and damages, as well as the risks involved in continuing to litigate the cases, were probed and discussed at length during the mediation in both joint and separate sessions." *Id*. Professor Green also acknowledged that "[t]hroughout the process, the parties engaged in extensive adversarial negotiations over virtually every issue in the cases." *Id*. According to Professor Green, "[t]he negotiations were principled, exhaustive, informed, and sometimes difficult and contentious." *Id*.

Therefore, in the opinion of Professor Green, "the outcome of the mediated negotiations is the result of a fair, thorough, and fully-informed arms-length process between highly capable, experienced, and informed parties and counsel." *Id*. at ¶ 12. The Settlement, therefore, was negotiated at arm's length. *See* Fed. R. Civ. P. 23(e)(2)(B).

C. The relief provided for the Settlement Class is adequate, taking into account the relevant factors.

1. The relief provided by the Settlement is significant.

Third, perhaps the best indicator of the fairness of the Settlement is the significance of the relief it provides—$41.5 million in total value, which represents a recovery of approximately 42-70% of the estimated best-case damages at trial. Joint Decl. at ¶ 57. Assuming Plaintiffs prevailed

at trial on liability (which TD Bank would have vigorously contested), Plaintiffs would have argued for a refund or forgiveness of every improperly assessed fee incurred by the Class, and the $41.5 million recovery represents approximately 42% of that damages figure. *Id.* at ¶ 26. The cash recovery of $20.75 million represents 41% of all Retry NSF Fees assessed and paid by Settlement Class Members; the debt forgiveness of $20.75 million represents 42% of all Retry NSF Fees assessed but not yet paid (still owing) to TD Bank. *Id.* at ¶ 27.

However, TD Bank would have undoubtedly argued that the transactions giving rise to each NSF fee were distinct and separate items and that Settlement Class Members were (or should have been) on notice of the challenged fee practices after incurring their first Retry NSF Fee. Using Defendant's damages model, the $41.5 million recovery represents approximately 70% of the Retry NSF Fees at issue. *Id.* Thus, if the Settlement is approved, Settlement Class Members will recover approximately 42-70% (depending upon the opposing damage models) of their potential damages, without further risks attendant to litigation. *See id.* This significant recovery was obtained on a novel claim after significant discovery, and it is Class counsel's opinion that it is an outstanding result for the Class. *Id.* at ¶¶ 55, 57. The relief provided by the Settlement warrants preliminary approval. *See* Fed. R. Civ. P. 23(e)(2)(C).

The Second Circuit has recognized that "[t]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth of a single percent of the potential recovery." *Grinnell*, 495 F.2d at 455 n.2. Consistent with that principle, courts often approve class settlements even where the benefits represent "only a fraction of the potential recovery." *See, e.g.*, *In re Initial Public Offering Secs. Litig.* ("*In re IPO*"), 671 F. Supp. 2d 467, 483-85 (S.D.N.Y. 2009). In a recent decision, the Second Circuit upheld approval of a settlement that represented 6.1% of the class's maximum potential damages. *In re Patriot Nat'l, Inc. Sec.*

Litig., 828 F. App'x 760, 762 (2d Cir. 2020). And in *In re IPO*, the court approved a settlement that provided only 2% of defendants' maximum possible liability, observing that "the Second Circuit has held that . . . even a fraction of the potential recovery does not render a proposed settlement inadequate." 671 F. Supp. 2d at 484. *See, e.g.*, *In re Prudential Inc. Secs. Ltd. P'ships Litig.*, MDL No. 1005, M-21-67, 1995 WL 798907 (S.D.N.Y. Nov. 20, 1995) (approving settlement of between 1.6 and 5% of claimed damages); *In re Merrill Lynch Tyco Rsch. Sec. Litig.*, 249 F.R.D. 124, 135 (S.D.N.Y. 2008) (approving settlement at 3% of estimated damages); *Hall v. Children's Place Retail Stores, Inc.*, 669 F. Supp. 2d 399, 402 (S.D.N.Y. 2009) (same, 5 to 12% of maximum damages); *In re Interpublic Sec. Litig.*, No. 02 CIV.6527(DLC), 2004 WL 2397190, at *8 (S.D.N.Y. Oct. 26, 2004) (same, 10 to 20% of damages estimate); *Trinidad v. Pret a Manger (USA) Ltd.*, No. 12 CIV. 6094 PAE, 2014 WL 4670870, at *7 (S.D.N.Y. Sept. 19, 2014) (same, 20 to 25% of maximum recovery).

In this case, by contrast, the amount of the Settlement is a significant percentage of the potential damages, however measured. In fact, Professor Eric Green's opinion is that the "final settlement represents the parties' and counsels' best professional effort and judgment about a fair, reasonable, and adequate settlement after thoroughly investigating and litigating this and the related cases, taking into account the risks, strengths, and weaknesses of their respective positions on the substantive issues in the cases, the risks and costs of continued litigation, and the best interests of their clients." Green Decl. at ¶ 12.

Brian Fitzpatrick, a Professor specializing in the study of class action litigation at Vanderbilt University, has extensively studied and written about class action settlements and is of the opinion that the Settlement is "several times better than the typical recovery" in class actions for which there is data regarding the recovery rates of class action settlements. Ex. 5, Fitzpatrick

Decl. at ¶ 25. Further, Professor Fitzpatrick served as an expert in numerous class action cases challenging overdraft fee practices consolidated in MDL 2036. *Id*. at ¶ 5 (citing *In re: Checking Account Overdraft Litigation*, MDL No. 2036 (S.D. Fla.) (twenty-one different settlements)). According to Professor Fitzpatrick, "the recovery here is at the high end of recoveries in the overdraft cases in which [he] ha[s] served as an expert. . . . Rarely was the recovery greater as a percentage of damages than obtained here." *Id*. at ¶ 25 & Table 1.

The significant recovery strongly supports preliminary approval of the Settlement. *See* Fed. R. Civ. P. 23(e)(2)(C).

2. The costs, risks, and delay of trial and appeal make the relief provided by the Settlement even more valuable.

The amount of the Settlement is even more significant when considered against the substantial costs, risks, and delays of continued litigation. *See* Fed. R. Civ. P. 23(e)(2)(C)(i). The relief provided by the Settlement is concrete, guaranteed, and immediate, while the results from continued litigation would be delayed at best and lower in value at worst.

Make no mistake, this was risky litigation from the start. This is a complicated breach of contract case involving bank processing and electronic payment practices, including the dense NACHA rules. TD Bank adamantly denied liability and expressed an intention to defend itself through trial.

At the time the lawsuit was filed, no court in the country had ruled on this novel claim challenging the assessment of Retry NSF Fees. Joint Decl. at ¶ 51. Since this Court's decision, numerous other courts have agreed and relied on this Court's opinion in so ruling; however, others have come to the opposite conclusion and dismissed these claims. *See Page v. Alliant Credit Union*, No. 19-CV-5965, 2020 WL 5076690 (N.D. Ill. Aug. 26, 2020) (dismissing multiple fee claims); *Toth v. Scott Credit Union*, No. 20-CV-00306-SPM, 2021 WL 535549 (S.D. Ill. Feb. 12,

2021) (dismissing in part claims challenging multiple fee practice); *Saunders v. Y-12 Fed. Credit Union*, No. E2020-00046-COA-R3-CV, 2020 WL 6499558 (Tenn. Ct. App. Nov. 5, 2020) (upholding dismissal of multiple fee claims); *Foltz v. Matanuska Valley Valley Fed. Credit Union*, No. 3AN-20-06666CI (Alaska Super Ct. Jan. 12, 2021) (granting motion to dismiss multiple fee claims); *Winamaki v. Umpqua Bank*, No. 19CV52252 (Or. Cir. Ct. Oct. 20, 2020) (same); *Jones v. Washington State Employees' Credit Union*, No. 20-2-06596-5 (Wash. Super. Ct. Nov. 3, 2020) (same); *Marical v. Boeing Employees' Credit Union*, No. 19-2-20417-6 KNT (Wash. Super. Ct. Oct. 31, 2019) (same); *Choy v. Space Coast Credit Union*, No. 94920472 (Fla. Cir. Ct. May 7, 2020) (same); *Haines v. Washington Trust Bank*, No. 20-2-10459-1 SEA (Wash. Super. Ct. Nov. 10, 2020) (same); *see also Lambert v. Navy Fed. Credit Union*, No. 1:19-cv-103-LO-MSN, 2019 WL 3843064 (E.D. Va. Aug. 14, 2019) (same). Indeed, based on Professor Fitzpatrick's research and experience, it is his opinion that "not only is the recovery of nearly half of maximum potential damages better than most bank fee cases, but it is better than the expected value of this lawsuit" and, therefore, "a recovery this strong in light of the risks and circumstances of this litigation is unusual." Fitzpatrick Decl. at ¶ 26.

TD 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. There is little doubt that continued litigation would have spanned years and would have been costly to the parties and a tax on judicial resources. There was no guarantee that the Settlement 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. The Settlement on the other hand, provides meaningful expedited relief to Settlement Class

Members who are likely unable to bring their own claims against TD Bank, as the claims stem from having bank accounts that did not have sufficient funds to cover an attempted transaction.

Surviving class certification, defeating summary judgment, achieving a litigated verdict at trial, and then sustaining any such verdict in appeals is a prolonged, complex, and risky proposition that would require substantial additional time and expense. *See In re IPO*, 671 F. Supp. 2d at 481 (finding that the complexity, expense, and duration of continued litigation supports approval where, among other things "motions would be filed raising every possible kind of pre-trial, trial and post-trial issue conceivable"). The substantial risk of continued litigation weighs in favor of approving the Settlement because "plaintiffs would have faced significant legal and factual obstacles to proving their case." *In re Global Crossing Securities and ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004).

Apart from substantial risk and expenses, courts overwhelmingly recognize that the delay of litigation by itself is a significant consideration in approving a settlement. As the Court explained in *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003), "even if a [plaintiff] or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would in light of the time value of money, make future recoveries less valuable than this current recovery." Inevitable litigation delays "not just at the trial stage, but through post-trial motions and the appellate process, would cause Settlement Class Members to wait years for any recovery, further reducing its value." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) (citing *Grinnell*, 495 F.2d at 467). *See In re Marsh & McLennan, Cos. Sec. Litig.*, No. 04 Civ. 8144(CM), 2009 WL 5178546, at *5 (S.D.N.Y. Dec. 23, 2009) (noting the additional expense and uncertainty of "inevitable appeals" and the benefit of Settlement, which "provides

certain and substantial recompense to the Class members now"); *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1322 (S.D. Fla. 2005) (likelihood that appellate proceedings could delay class recovery "strongly favor[s]" approval of a settlement); *Cardiology Assocs., P.C. v. Nat'l Intergroup, Inc.*, No. 85 CIV. 3048 (JMW), 1987 WL 7030, at *3 (S.D.N.Y. Feb. 13, 1987) ("[E]ven assuming a favorable jury verdict, if the matter is fully litigated and appealed, any recovery would be years away.").

In contrast to ongoing litigation, "[s]ettlement at this juncture results in a substantial and tangible present recovery, without the attendant risk and delay." *In re EVCI Career Coll.*, No. 05 Civ. 10240, 2007 WL 2230177, at *6 (S.D.N.Y. July 27, 2007) (internal citations omitted). The prompt and significant recovery obtained here is especially important because Settlement Class Members are, by definition, bank account holders who did not have enough money in their account to pay for checks or electronic payment items, such as their insurance payment. Money in their pockets now will be meaningful.

Further, those Settlement Class Members entitled to debt forgiveness will be provided a greater opportunity to re-enter the banking system. *See* Fitzpatrick Decl. at ¶ 17. When financial institutions like TD Bank charge off an account due to delinquency, they report the consumer to a screening database such as ChexSystems. *Id*. Because financial institutions throughout the country routinely check ChexSystems before determining whether to enter into a banking relationship with consumers, consumers who have been reported to ChexSystems are effectively blacklisted and ejected from the banking system. *Id*. Such unbanked consumers face numerous harms, including significant fees associated with basic financial services such as cashing checks or paying bills, and are often required to resort to payday lenders and other predatory alternatives. *Id*. The Settlement's requirement that TD Bank both forgive Settlement Class Members' uncollected debt and update

any negative reporting to ChexSystems or credit reporting agencies with respect to Settlement Class Members thus provides a meaningful benefit. *Id.* at ¶¶ 17-18.

The $41.5 million recovery readily falls within the range of reasonable results given the complexity of the case and the significant barriers that stand between now and a final, collected judgment. *Nobles v. MBNA Corp.*, No. C 06-3723 CRB, 2009 WL 1854965, at *2 (N.D. Cal. June 29, 2009) ("The risks and certainty of recovery in continued litigation are factors for the Court to balance in determining whether the Settlement is fair."); Fed. R. Civ. P. 23(e)(2)(C)(i).

3. The method of distributing the relief to the Settlement Class is highly effective.

In addition to being substantial in amount, the Settlement also effectively distributes the relief to the Settlement Class Members without the need for them to do anything at all, a factor the Court must review under Fed. R. Civ. P. 23(e)(2)(C)(ii). A plan for allocating settlement proceeds, like the Settlement itself, should be approved if it is fair, reasonable, and adequate. *See, e.g.*, *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012). "Measuring the proposed relief may require evaluation of any proposed claims process." Fed. R. Civ. P. 23(e)(C) advisory committee's note to 2018 amendments.

Here, the Settlement is highly effective in distributing the relief to the Settlement Class Members because the distribution is automatic and does not involve any claims process. Debt forgiveness will be automatically applied by Defendant, current customers will receive money directly deposited to their accounts, and former customers will receive a check mailed directly to their last known address. Thus, unlike other settlements where the ascribed value may be dubious because it depends on a complicated or burdensome claims process, the relief is automatic and it will no doubt reach the Settlement Class Members who deserve it. Indeed, the Settlement even provides for a second round of distribution of any residual funds remaining from uncashed checks.

The Settlement's distribution method is ideal and supports approval. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii).

4. Attorneys' fees will be paid only after Court approval and in an amount justified by the Settlement.

Rule 23(e)(2)(C)(iii) requires evaluation of the terms of any proposed attorneys' fees, including timing of payment. This Court's Individual Practices in Civil Case requires that Class Counsel "identify all attorneys with whom counsel intends to share the fees, regardless of whether those attorneys have filed Notices of Appearance" and to "provide a fair approximation of the number of hours each attorney has devoted to the case and his or her regular billing rate." Rule 7(B)(i), *Individual Practices in Civil Cases* (Jan. 30, 2020), https://bit.ly/3y9Vh3Z. All law firms with whom counsel intends to share fees are identified in Class Counsel's declaration and all have entered appearances. *See* Dkts. 9-10, 22-24, 39-40. Class Counsel's fair approximation of hours and rates is also in Class Counsel's declaration. Joint Decl. at ¶¶ 37, 42, 47, 52.

The Settlement provides that attorneys' fees will be paid from the Settlement Fund only after a separate application is made, Settlement Class Members have a chance to object, and the Court determines the appropriate amount. Under the Settlement, TD Bank will not object to a fee request of up to 25% of the Value of the Settlement. While an application for fees has yet to be made, the notices will explain that a maximum 25% fee request may be lodged. A 25% fee request would fall squarely within the accepted range of fees awarded in similar account fee cases, Fitzpatrick Decl. at ¶¶ 19, 24, and in cases in the Second Circuit, *id.* at ¶ 23.

A percentage-of the fund fee is appropriate here. As stated by the Second Circuit: "[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[.]" *Visa*, 396 F.3d at 121 (internal citations omitted). *See* Fitzpatrick Decl. at ¶ 13

(same). Indeed, "[t]his 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 Colleges Holding Corp. Sec. Litig.*, No. 05 CIV 10240 CM, 2007 WL 2230177, at *15 (S.D.N.Y. July 27, 2007) (citing, *e.g.*, *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984)).

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. Thus, the percentage approach remedies this central flaw in lodestar because class counsel's recovery is linked to the benefit recovered for the class. Fitzpatrick Decl. at ¶ 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 Cty. Employees' Ret. Ass'n v. Isaacson/Weaver Fam. Tr.*, 925 F.3d 63, 71 (2d Cir.), *cert. denied*, 140 S. Ct. 385, 205 L. Ed. 2d 218 (2019) (emphasis added). Thus, the percentage method is the better method for determining appropriate attorneys' fees. Fitzpatrick Decl. at ¶¶ 12-13.

Moreover, the requested percentage is reasonable. "[F]ederal courts have established that a standard fee in complex class action cases like this one, where plaintiffs' counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit," and "[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); *see also Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 235–36 (2d Cir. 2007) (affirming 30% fee award of $42.5 million to counsel); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695CM, 2007

WL 4115808, at *1 (S.D.N.Y. Nov. 7, 2007) (awarding 30%); *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).

Furthermore, in the calculation of the "overall settlement value for purposes of the 'percentage of the recovery' approach, Courts include the value of both the monetary and non-monetary benefits conferred on the Class." *Fleischer v. Phoenix Life Ins. Co.*, Nos. 11-cv-8405 (CM), 14-cv-8714 (CM), 2015 WL 10847814, at *15 (S.D.N.Y. Sept. 9, 2015). Here, the $41.5 million Settlement plus $500,000 in notice and administration costs provides is all properly considered part of the fund. *See, e.g., Moukengeshcaie v. Eltman, Eltman & Cooper, P.C.*, No. 14CV7539MKBCLP, 2020 WL 5995978, at *2 (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 fund that included debt forgiveness); *Velez*, 2010 WL 4877852, at *4, *18 (awarding fees on total value of fund, including monetary and nonmonetary relief). Indeed, this is how courts routinely approach the total value of the fund in account fee litigation. *See, e.g.*, *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, No. 6:15MN02613 (D.S.C. Jan. 9, 2020) (ECF 233) (including in total value of $70 million settlement $43 million in cash and $27 million in debt forgiveness); *In re: Checking Account Overdraft Litig. (Commerce Bank)*, No. 1:09-MD-02036-JLK, 2013 WL 11319243 (S.D. Fla. Aug. 2, 2013) (including in total value of $23.2 million settlement $18.3 million in cash and a change in posting practice with value of $4.9 million); *In re: Checking Account Overdraft Litig. (JP Morgan Chase Bank)*, No. 09-MD-02036-JLK (S.D. Fla. Dec. 19, 2012) (ECF 3134) (including in $162 million settlement value $110 million in cash and change in overdraft fee policy with an estimated value of $52 million over a two-year period).

Simply put, any request for fees will be supported by law and evidence, and such a request supports preliminary approval. *See* Fed. R. Civ. P. 23(e)(2)(C)(iii).

5. There are no side agreements.

Rule 23(e)(2)(C)(iv) requires the Court to consider any side agreements that must be disclosed under Rule 23(e)(3). This is because side agreements can result in inequitable treatment of class members. Fed. R. Civ. P. 23(C) advisory committee's note to 2018 amendments. Here, there are no side agreements to consider, as every term of the Settlement is found in the agreement itself, so there is no cause to doubt the adequacy and fairness of the Settlement.

6. The Settlement treats Class Members equitably relative to each other.

The Court must also consider whether the Settlement treats Settlement Class Members equitably relative to one another. *See* Fed. R. Civ. P. 23(e)(2)(D). Here, the Settlement treats Settlement Class Members equitably relative to one other because the amount a Settlement Class Member receives is based on the amount of Retry NSF Fees that Settlement Class Members was charged. As to individual members, more allegedly unlawful fees equate to more relief and, therefore, an allocation that compensates each Settlement Class Members in proportion to the harm each suffered is equitable. *See Maley*, 186 F. Supp. 2d at 367 ("An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel."); *In re Telik Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 580 (S.D.N.Y. 2008) ("A reasonable plan may consider the relative strengths and values of different categories of claims.").

III. The Court will "likely be able to" certify the Settlement Class for purposes of entering judgment on the Settlement.

To determine whether the Court will "likely be able to" certify the Settlement Class for purposes of entering judgment on the Settlement, the Court looks to the requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy) and the requirements of any subsection of

Rule 23(b), here subsection 23(b)(3) (predominance and superiority). Fed. R. Civ. P. 23. The Second Circuit has emphasized that Rule 23 should be "given liberal rather than restrictive construction." *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997). Indeed, it is "beyond peradventure that the Second Circuit's general preference is for granting rather than denying class certification." *Gortat v. Capala Bros.*, 257 F.R.D. 353, 361–62 (E.D.N.Y. 2009) (quotation omitted). Numerous courts have found class certification appropriate in the tougher litigation context in account fee cases. *See, e.g.*, *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 325 F.R.D. 136, 141, 142 (D.S.C. 2018); *Smith v. Bank of Hawaii*, No. 16-00513-JMS-WRP, 2019 WL 3297301, at *6 (D. Haw. Jan. 30, 2019), *report and recommendation adopted in part, rejected in part*, 2019 WL 2712262 (D. Haw. June 28, 2019); *Gunter v. United Fed. Credit Union*, No. 3:15–cv–00483–MMD–WGC, 2017 WL 4274196, at *5 (D. Nev. Sept. 24, 2017); *In re Checking Account Overdraft Litig*., 275 F.R.D. 666, 676 (S.D. Fla. 2011).

The proposed Settlement Class meets all of the requirements for certification.

A. The Settlement Class meets the requirements of Rule 23(a).

1. The Settlement Class is so numerous that joinder of all members is impracticable.

Rule 23(a)(1) requires that "the class be so numerous that joinder of all members is impracticable." Numerosity does not require a fixed number of class members but "is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). The Second Circuit has found this requirement met where a class is "obviously numerous." *Marisol A.*, 126 F.3d at 376.

Here, it is undisputed that there are tens of thousands of members across numerous states. Joint Decl. at ¶ 24. The class is "obviously numerous," and numerosity is satisfied. *See Marisol A.*, 126 F.3d at 376.

2. There are questions of law and fact common to the Settlement Class.

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Rule 23(a)(2) is a "low hurdle," *Fort Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 131 (S.D.N.Y. 2014), and "for purposes of Rule 23(a)(2) even a single common question will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). Commonality requires only that the proposed class members' claims "depend upon a common contention," which "must be of such a nature that it is capable of class wide resolution," meaning that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. Damages resulting from a "unitary course of conduct" are sufficient to show commonality. *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 85 (2d Cir. 2015). "The claims for relief need not be identical for them to be common." *Zivkovic v. Laura Christy LLC*, 329 F.R.D. 61, 69 (S.D.N.Y. 2018).

Here, the common question of whether TD Bank's standard agreement permitted it to charge Retry NSF Fees is common to all members of the Settlement Class and is "central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. As in other bank fee class actions in the tougher litigation context, the "low hurdle" of commonality is satisfied. *See In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 325 F.R.D. at 152–53 (finding that, "the answer to the overarching question of whether [the fees were] permissible" would "resolve large swathes [of] the class members' available-balance-based claims in one fell swoop").

3. The Class Representatives' claims are typical of the claims of the Settlement Class.

Rule 23(a)(3) requires that the class representatives' claims be "typical" of the claims of the class. The commonality and typicality requirements tend to merge, and demonstrating typicality under Rule 23(a)(3) requires only that "each class member's claim arises from the same

course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A.*, 126 F.3d at 376. The typicality requirement "is not demanding." *Fogarazzo v. Lehman Bros.*, 232 F.R.D. 176, 180 (S.D.N.Y. 2005). "[D]ifferences in the degree of harm suffered, or even in the ability to prove damages, do not vitiate the typicality of a representative's claims." *In re Nissan Radiator/Transmission Cooler Litig.*, No. 10 CV 7493 VB, 2013 WL 4080946, at *19 (S.D.N.Y. May 30, 2013). Rather, "the typicality requirement requires that the disputed issue of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *Id.* Typicality is therefore satisfied "irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir. 1993).

Here, the Class Representatives' claims arise from the same course of conduct as the claims of the Settlement Class, namely TD Bank's practice of charging Retry NSF Fees. Like the members of the Settlement Class, the Class Representatives' claims depend on whether TD Bank's standard contract documents permitted assessment of Retry NSF Fees. As in other account fee class actions, typicality is satisfied. *See Gunter*, 2017 WL 4274196, at *6 ("[The plaintiff] need only show that her breach of contract claim is typical of the breach of contract claims that could be brought by members of the proposed class as she defines it, which she has done.").

4. The Class Representatives will fairly and adequately protect the interests of the Settlement Class.

Rule 23(a)(4) requires that the class representatives will "fairly and adequately protect the interests of the class." This inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Adequacy turns on "whether (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct

the litigation." *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007) (internal quotations omitted).

The first requirement is satisfied by showing that "the members of the class possess the same interests" and that "no fundamental conflicts exist" between the class members. *Charron*, 731 F.3d at 249. Here, the Class Representatives share the same interests as the Settlement Class in seeking a recovery for Retry NSF Fees charged by TD Bank, because they were all damaged by the same conduct of TD Bank, and the Class Representatives have no interests antagonistic to the Settlement Class. With respect to the second requirement, proposed Class Counsel are highly qualified and experienced in consumer class actions generally and account fee litigation specifically and have worked diligently to prosecute this case to a settlement. *See* Joint Decl. at ¶¶ 31-55, 58.

B. The Settlement Class meets the requirements of Rule 23(b)(3).

Rule 23(b)(3) requires that common questions of law or fact "predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). This inquiry examines "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Here, like in several other account fee cases in the litigation context, these requirements are met because the predominant issue in the litigation is whether Defendant's standard fee practice violated its standard form agreement. *See, e.g., In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 325 F.R.D. 136 at 155 (because liability turned "legal and factual issues that are the same for all Plaintiffs and class members" predominance was met); *In re Checking Acct. Overdraft Litig.*, 275 F.R.D. at 676 (finding predominance met where, "[a]ny analysis of [the bank's alleged overdraft fee] scheme will depend on evidence relating to

the standardized form account agreement and bank practices affecting all class members in a uniform manner").

1. Common questions of law and fact predominate over any questions affecting only individual members of the Settlement Class.

"Class-wide issues predominate if resolution of some of the legal or factual questions . . . can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002). Where plaintiffs are "unified by a common legal theory" and by common facts, the predominance requirement is satisfied. *McBean v. City of New York*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005).

Here, like in other account fee litigation where courts have found predominance, the common issue of whether TD Bank's Retry NSF Fee assessment practices violate its Agreement or are otherwise unlawful will "depend on evidence relating to the standardized form account agreement and bank practices affecting all class members in a uniform manner." *In re Checking Acct. Overdraft Litig.*, 275 F.R.D. at 676. And the answer to that question drives the resolution of the matter for the Settlement Class as well as for TD Bank, and any other issues are ancillary.

2. The Settlement Class is superior to other methods for the fair and efficient adjudication of the controversy.

Resolving this litigation through the Settlement Class is plainly superior to litigation by individual Settlement Class Members. Most Settlement Class Members lack the financial resources to prosecute individual actions, and the value of any individual claim is simply too low to justify individual cases. *Sykes v. Mel Harris & Assocs. LLC*, 285 F.R.D. 279, 294 (S.D.N.Y. 2012) ("[T]he class members' interests in litigating separate actions is likely minimal given their potentially limited means with which to do so and the prospect of relatively small recovery in individual actions"). This is especially true here against a well-funded defendant like TD Bank.

"Employing the class device here will not only achieve economies of scale for Class Members, but will also conserve judicial resources and preserve public confidence in the integrity of the system by avoiding the waste and delay repetitive proceedings and preventing inconsistent adjudications." *Zeltser v. Merrill Lynch & Co., Inc.*, No. 13 Civ. 1531(FM), 2014 WL 4816134, at *3 (S.D.N.Y. Sept. 23, 2014). Thus, the Settlement Class is the superior method of adjudicating this action.

For all the reasons discussed *supra*, the Settlement Class meets all of the requirements for certification and the Court "will likely be able to" certify it for purposes of entering judgment on the Settlement.

IV. The Court should approve the forms of notice and direct notice to be sent to the Settlement Class.

Once the Court has determined that preliminary approval is appropriate, it must direct notice to the proposed class that would be bound by the settlement. Fed. R. Civ. P. 23(e)(1). "The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Visa*, 396 F.3d at 113 (citations omitted). The Court is given broad power over which procedures to use for providing notice so long as the procedures are consistent with the standards of reasonableness that the Constitution's due process guarantees impose. *See Handschu v. Special Services Div.*, 787 F.2d 828, 833 (2d Cir. 1986) ("[T]he district court has virtually complete discretion as to the manner of giving notice to class members."). "When a class settlement is proposed, the court 'must direct to class members the best notice that is practicable under the circumstances.'" *Vargas v. Capital One Fin. Advisors*, 559 F. App'x 22, 26 (2d Cir. 2014) (summary order) (quoting Fed. R. Civ. P. 23(c)(2)(B), (e)(1)). The notice must include: "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an

attorney if the member so desires; (v) that the court will exclude from the class any member who request exclusions; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).” Fed. R. Civ. P. 23(c)(2)(B).

Here, the proposed forms of notice, attached as Exhibits 1-2 to the Settlement Agreement, and plans for disseminating the notice by direct email and direct mail, and establishing a settlement website with a long-form notice constitute the best notice practicable. The forms of notice are written in plain language in a format prescribed by the Federal Judicial Center, and they provide the required information. And notice is being directly emailed or mailed to Settlement Class Members.

V. The Court should schedule a final approval hearing.

The last step in the Settlement approval process is a final approval hearing at which the Court will make its final evaluation of the Settlement. Plaintiffs and Class Counsel request that the Court schedule the final approval hearing 180 days after entry of the Preliminary Approval Order.

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’s ruling on the motion to dismiss, significant discovery and depositions, and two hard-fought mediations that were presided over by a preeminent mediator. This Court should grant preliminary approval to the Settlement.

Dated: May 17, 2021

Respectfully submitted,

/s/ Lynn Toops

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CERTIFICATE OF SERVICE

I certify that on May 17, 2021, a true and accurate copy of the foregoing memorandum 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/ Lynn A. Toops

EXHIBIT 1

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

SETTLEMENT AGREEMENT AND RELEASES

This Settlement Agreement and Releases ("Settlement" or "Agreement"),[1] dated as of May __, 2021, is entered into by Plaintiffs Mary Jennifer Perks and Maria Navarro-Reyes, individually and on behalf of the Settlement Class, and Defendant TD Bank, N.A. The Parties hereby agree to the following terms in full settlement of the above action, subject to Final Approval, as defined below, by the United States District Court for the Southern District of New York.

I. Procedural History and Recitals

1. On November 30, 2018, Plaintiff Mary Jennifer Perks filed a putative class action Complaint in the United States District Court for the Southern District of New York, entitled *Perks et al v. TD Bank, N.A.*, No. 1:18-cv-11176. On behalf of a putative nationwide class, the Complaint asserted claims for breach of contract and breach of the covenant of good faith and fair dealing as well as unjust enrichment. On behalf of a New York subclass, the Complaint also asserted claims under the New York General Business Law.

2. On February 5, 2019, Defendant filed a Motion to Dismiss the Complaint pursuant

[1] All capitalized terms herein have the meanings ascribed to them in Section II below or various other places in the Agreement.

to Federal Rule of Civil Procedure 12(b)(6).

3. On February 19, 2019, Plaintiff Mary Jennifer Perks filed her Amended Class Action Complaint, which added Maria Navarro-Reyes as a named Plaintiff and added a Florida Multiple NSF Subclass. The Amended Complaint also included many additional allegations addressing arguments made by Defendant in its motion to dismiss and to address industry usage of certain important contractual terms.

4. On March 22, 2019, Defendant filed a Motion to Dismiss Plaintiffs' Amended Class Action Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

5. Plaintiffs opposed the Motion on April 19, 2019.

6. Defendant filed its reply on May 10, 2019.

7. On March 17, 2020, the Court entered a Memorandum Opinion and Order in which the Court granted in part and denied in part Defendant's Motion to Dismiss. The Court denied the Motion to Dismiss Plaintiffs' breach of contract claim and granted the Motion to Dismiss Plaintiffs' breach of implied covenant of good faith, New York General Business Law § 349, and unjust enrichment claims.

8. On April 14, 2020, Defendant filed its Answer and Defenses to the Amended Class Action Complaint.

9. Between April and October of 2020, the Parties engaged in significant discovery efforts, involving several sets of written discovery served by and on each party, multiple rounds of data and document production, numerous conferences of counsel to resolve potential discovery disputes, various reports to the Court regarding the status of discovery, and multiple depositions.

10. Subsequent to the initiation of this Action, TD Bank revised its disclosures concerning the assessment of Retry NSF Fees.

11. On October 2, 2020, the Parties requested that the Court stay the litigation pending a November 20, 2020, mediation before Professor Eric Green of Resolutions, LLC. The Court vacated the discovery deadlines that same day.

12. The Parties participated in a full-day mediation session on November 20, 2020, with respected neutral Professor Eric Green, in anticipation of which both parties performed and exchanged extensive analysis. The Parties did not settle at the mediation, but the mediation was productive in that it highlighted the need for further data analysis and review.

13. The Parties made progress toward a consensual resolution and identified additional class-related data analyses that would further facilitate the Parties' settlement discussions. The Parties agreed to perform the additional analyses, share the respective analyses with the opposing party, and then to reconvene before Professor Green on January 26, 2021.

14. The Parties and their respective experts completed these complex analyses and information exchange before the second mediation session on January 26, 2021.

15. The Parties notified the Court on February 1, 2021 that they had reached an agreement in principle to settle the case on a class action basis.

16. The tentative agreement allowed Plaintiffs to perform confirmatory discovery regarding certain aspects of the data and analysis performed by TD Bank's expert. Accordingly, on February 19, 2021, the Plaintiffs and their expert extensively interviewed TD Bank's expert as part of the confirmatory discovery process.

17. The Parties then worked for several weeks to draft a full settlement agreement and to seek bids from settlement administrators.

18. The Parties now agree to settle the Action in its entirety, without any admission of liability, with respect to all Released Claims, Releasees, and Releasing Parties. Defendant has

entered into this Agreement to resolve any and all controversies and disputes (directly or indirectly) arising out of or relating to the allegations made in the Amended Class Action Complaint, and to avoid the burden, risk, uncertainty, expense, and disruption to its business operations associated with further litigation. Defendant does not in any way acknowledge, admit to or concede any of the allegations made in the Amended Class Action Complaint, and expressly disclaims and denies any fault or liability, or any charges of wrongdoing that have been or could have been asserted in the Amended Class Action Complaint. Nothing contained in this Agreement shall be used or construed as an admission of liability, and this Agreement shall not be offered or received in evidence in any action or proceeding in any court or other forum as an admission or concession of liability or wrongdoing of any nature or for any other purpose other than to enforce the terms of this Agreement. Plaintiffs have entered into this Agreement to liquidate and recover on the claims asserted in the Amended Class Action Complaint, and to avoid the risk, delay, and uncertainty of continued litigation. Plaintiffs do not in any way concede the claims alleged in the Amended Class Action Complaint lack merit or are subject to any defenses. The Parties intend this Agreement to bind Plaintiffs, Defendant, and all Settlement Class Members.

NOW, THEREFORE, in light of the foregoing, for good and valuable consideration, the receipt and sufficiency of which is hereby mutually acknowledged, the Parties agree, subject to approval by the Court, as follows.

II. Definitions

In addition to the terms defined at various points within this Agreement, the following Defined Terms apply throughout this Agreement:

19. "Account" means a consumer checking account maintained by Defendant that was assessed a Retry NSF Fee during the Class Period.

20. "Account Holder" means any person who has or had any interest, whether legal or equitable, in an Account during the Class Period.

21. "Action" means *Perks et al. v. TD Bank, N.A.*, No. 1:18-cv-11176 (S.D.N.Y.)

22. "Complaint" means the Amended Class Action Complaint filed in this Action on February 19, 2019.

23. "Class Counsel" means:

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24. "Class Period" means the following for each Account, based on the state where each Account was opened.

Alabama - November 30, 2012 to the date of Preliminary Approval
Alaska - November 30, 2015 to the date of Preliminary Approval
Arizona - November 30, 2014 to the date of Preliminary Approval

Arkansas - November 30, 2013 to the date of Preliminary Approval
California - November 30, 2014 to the date of Preliminary Approval
Colorado - November 30, 2015 to the date of Preliminary Approval
Connecticut - November 30, 2012 to the date of Preliminary Approval
Delaware - November 30, 2015 to the date of Preliminary Approval
District of Columbia - November 30, 2015 to the date of Preliminary Approval
Florida - November 30, 2013 to the date of Preliminary Approval
Georgia - November 30, 2012 to the date of Preliminary Approval
Hawaii - November 30, 2012 to the date of Preliminary Approval
Idaho - November 30, 2013 to the date of Preliminary Approval
Illinois - November 30, 2008 to the date of Preliminary Approval
Indiana - November 30, 2008 to the date of Preliminary Approval
Iowa - November 30, 2008 to the date of Preliminary Approval
Kansas - November 30, 2013 to the date of Preliminary Approval
Kentucky - November 30, 2008 to the date of Preliminary Approval
Louisiana - November 30, 2008 to the date of Preliminary Approval
Maine - November 30, 1998 to the date of Preliminary Approval
Maryland - November 30, 2015 to the date of Preliminary Approval
Massachusetts - November 30, 2012 to the date of Preliminary Approval
Michigan - November 30, 2012 to the date of Preliminary Approval
Minnesota - November 30, 2012 to the date of Preliminary Approval
Mississippi - November 30, 2015 to the date of Preliminary Approval
Missouri - November 30, 2008 to the date of Preliminary Approval
Montana - November 30, 2010 to the date of Preliminary Approval
Nebraska - November 30, 2013 to the date of Preliminary Approval
Nevada - November 30, 2012 to the date of Preliminary Approval
New Hampshire - November 30, 2015 to the date of Preliminary Approval
New Jersey - November 30, 2012 to the date of Preliminary Approval
New Mexico - November 30, 2012 to the date of Preliminary Approval
New York - November 30, 2012 to the date of Preliminary Approval
North Carolina - November 30, 2015 to the date of Preliminary Approval
North Dakota - November 30, 2012 to the date of Preliminary Approval
Ohio - November 30, 2010 to the date of Preliminary Approval
Oklahoma - November 30, 2013 to the date of Preliminary Approval
Oregon - November 30, 2012 to the date of Preliminary Approval
Pennsylvania - November 30, 2014 to the date of Preliminary Approval
Rhode Island - November 30, 2008 to the date of Preliminary Approval
South Carolina - November 30, 2015 to the date of Preliminary Approval
South Dakota - November 30, 2012 to the date of Preliminary Approval
Tennessee - November 30, 2012 to the date of Preliminary Approval
Texas - November 30, 2014 to the date of Preliminary Approval
Utah - November 30, 2012 to the date of Preliminary Approval
Vermont - November 30, 2012 to the date of Preliminary Approval
Virginia - November 30, 2013 to the date of Preliminary Approval
Washington - November 30, 2012 to the date of Preliminary Approval
West Virginia - November 30, 2008 to the date of Preliminary Approval

Wisconsin - November 30, 2012 to the date of Preliminary Approval
Wyoming - November 30, 2008 to the date of Preliminary Approval

25. "Class Representatives" mean Mary Jennifer Perks and Maria Navarro-Reyes.

26. "Court" means the United States District Court for the Southern District of New York.

27. "Current Account Holder" means a Settlement Class Member who continues to have his or her Account as of the date that the Net Settlement Fund is distributed to Settlement Class Members pursuant to this Agreement.

28. "Defendant" means TD Bank, N.A.

29. "Effective Date" shall mean when the last of the following has occurred: (1) the day following the expiration of the deadline for appealing Final Approval if no timely appeal is filed, or (2) if an appeal of Final Approval is taken, the date upon which all appeals (including any requests for rehearing or other appellate review), as well as all further appeals therefrom (including all petitions for certiorari) have been finally resolved without material change to the Final Approval Order and the deadline for taking any further appeals has expired such that no future appeal is possible; or (3) such date as the Parties otherwise agree in writing.

30. "Email Notice" means a short form of notice that shall be sent by email to Settlement Class members who agreed to receive account communications by email in the form attached as ***Exhibit 1***.

31. "Escrow Account" shall mean the account established and administered by the Escrow Agent into which the $20,750.000 payment by Defendant will be deposited.

32. "Escrow Agent" shall mean RG2. Settlement Class Counsel and Defendant may, by agreement, substitute a different organization as Escrow Agent, subject to approval by the Court. The Escrow Agent shall administer the Escrow Account.

33. "Final Approval" means the date that the Court enters the Final Approval Order.

34. "Final Approval Hearing" is the hearing held before the Court wherein the Court will consider granting Final Approval to the Settlement and further determine the amount of attorneys' fees and costs awarded to Class Counsel, any Settlement Administration Costs, and the amount of any Service Award to the Class Representatives.

35. "Final Approval Order" means the document attached as ***Exhibit 4*** hereto.

36. "Former Account Holder" means a Settlement Class Member who no longer holds his or her Account as of the date that the Net Settlement Fund is distributed to Settlement Class Members pursuant to this Agreement.

37. "Long Form Notice" means the form of notice that shall be posted on the Settlement website created by the Settlement Administrator and shall be available to Settlement Class members by mail on request made to the Settlement Administrator in the form attached as ***Exhibit 2***.

38. "Net Settlement Fund" means the Settlement Fund, minus Court approved attorneys' fees and costs awarded to Class Counsel, any Settlement Administration costs paid out of the Settlement Fund, if any, and any Court approved Service Award to the Class Representatives.

39. "Notice" means the Email Notice, Long Form Notice, and Postcard Notice that the Parties will ask the Court to approve in connection with the Motion for Preliminary Approval of the Settlement.

40. "Notice Program" means the methods provided for in this Agreement for giving the Notice and consists of Email Notice, Postcard Notice, and Long Form Notice, which shall be substantially in the forms as ***Exhibits 1 and 2*** attached to this Agreement.

41. "NSF Forgiveness Amount" shall mean the $20,750,000 that Defendant agrees to provide, as consideration for this Settlement, in the form of reductions to the outstanding balances of Settlement Class Members whose Accounts were closed with amounts owed to Defendant.

42. "Objection Deadline" means one-hundred twenty (120) calendar days after Preliminary Approval (or other date as ordered by the Court).

43. "Opt-Out Deadline" means one-hundred twenty (120) calendar days after Preliminary Approval (or other date as ordered by the Court).

44. "Party" means Plaintiffs or Defendant and "Parties" means Plaintiffs and Defendant collectively.

45. "Plaintiffs" mean Mary Jennifer Perks and Maria Navarro-Reyes.

46. "Postcard Notice" shall mean the short form of notice, in the form attached as ***Exhibit 1***, which shall be sent by mail to Settlement Class members for whom the Settlement Administrator is unable to send Email Notice using the email address provided by Defendant,

47. "Preliminary Approval" means the date that the Court enters the Preliminary Approval Order.

48. "Preliminary Approval Order" means the document attached as ***Exhibit 3*** hereto.

49. "Releasing Parties" means Plaintiffs and all Settlement Class Members, and each of their respective executors, representatives, heirs, predecessors, assigns, beneficiaries, successors, bankruptcy trustees, guardians, joint tenants, tenants in common, tenants by entireties, agents, attorneys, and all those who claim through them or on their behalf.

50. "Retry NSF Fee" means an insufficient funds fee that was charged during the Class Period, for an Automated Clearing House (ACH) or check transaction that was (1) submitted by a merchant, (2) returned unpaid by Defendant due to insufficient funds and (3) re-submitted by a

merchant and returned unpaid, as identified by the Parties based on review and analysis of Defendant's reasonably accessible data and information.

51. "Retry NSF Fee Refund" shall mean any Retry NSF Fee that was refunded to a Settlement Class Member during the Class Period, as identified by the Parties based on review and analysis of Defendant's reasonably accessible data and information.

52. "Service Award" means any Court ordered payment to Plaintiffs for serving as the Class Representatives, which is in addition to any Settlement Consideration due to them pursuant to Section IV of this Agreement as a Settlement Class Member.

53. "Settlement Administrator" means RG2. Settlement Class Counsel and Defendant may, by agreement, substitute a different organization as Settlement Administrator, subject to approval by the Court if the Court has previously approved the Settlement preliminarily or finally. In the absence of agreement, either Class Counsel or Defendant may move the Court to substitute a different organization as Settlement Administrator, upon a showing that the responsibilities of Settlement Administrator have not been adequately executed by the incumbent.

54. "Settlement Administration Costs" means all costs and fees of the Settlement Administrator regarding Notice and Settlement administration.

55. "Settlement Class" means all current and former holders of TD Bank, N.A. consumer checking Accounts who, during the Class Period, were assessed at least one Retry NSF Fee. Excluded from the Settlement Class are Defendant, its parents, subsidiaries, affiliates, officers and directors; all Settlement Class members who make a timely election to be excluded; and all judges assigned to this litigation and their immediate family members.

56. "Settlement Class Member" means any member of the Settlement Class who has not opted-out of the Settlement and who is entitled to the benefits of the Settlement.

57. "Settlement Class Member Payment" means the cash distribution that will be made from the Net Settlement Fund to each Settlement Class Member, pursuant to the allocation terms of the Settlement.

58. "Settlement Fund" means the $20,750,000 common fund of cash Defendant is obligated to pay under the terms of this Settlement.

59. "Settlement Website" means the website that the Settlement Administrator will establish as a means for Settlement Class Members to obtain notice of and information about the Settlement, through and including hyperlinked access to this Agreement, the Long Form Notice, Preliminary Approval Order, and such other documents as the Parties agree to post or that the Court orders posted on the website. These documents shall remain on the Settlement Website for at least six months after Final Approval.

60. "Uncollected Retry NSF Fees" means the amount, as of the Effective Date, that a Settlement Class Member owes to Defendant on an Account that has been closed up to the amount that is equal to or less than the total Retry NSF Fees assessed to the Account, as identified by the Parties based on review and analysis of Defendant's reasonably accessible data and information.

61. "Value of Settlement" means the Settlement Fund, the NSF Forgiveness Amount, and up to $500,000 in Settlement Administrative Costs.

III. Certification of the Settlement Class

62. Solely for purposes of this Settlement, the Parties agree to certification of the following Settlement Class under Fed. R. Civ. P. 23(b)(2) and (b)(3):

> ***All holders of TD Bank, N.A. consumer checking accounts who, during the Class Period, were assessed at least one Retry NSF Fee. Excluded from the Settlement Class are Defendant, its parents, subsidiaries, affiliates, officers and directors; all Settlement Class members who make a timely election to be excluded; and all judges assigned to this litigation and their immediate family members.***

63. In the event that the Settlement does not receive Final Approval, or in the event the

Effective Date does not occur, the Parties shall not be bound by this definition of the Settlement Class, shall not be permitted to use it as evidence or otherwise in support of any argument or position in any motion, brief, hearing, appeal, or otherwise, and Defendant shall retain its right to object to the maintenance of this Action as a class action and the suitability of the Plaintiffs to serve as class representatives.

IV. Settlement Consideration

64. Within 14 days of Preliminary Approval by the Court, Defendant shall pay $20,750,000 in cash into the Escrow Account to create the Settlement Fund for the benefit of the Settlement Class. The Settlement Fund shall be used to pay Settlement Class Members their respective Settlement Class Member Payments; any and all attorneys' fees and costs awarded to Class Counsel; any Service Award to the Class Representative; and any Settlement Administration Costs in excess of $500,000.00. Defendant shall pay Settlement Administration Costs of up to $500,000.00 directly to the Settlement Administrator as invoiced by the Settlement Administrator. Defendant shall not be obligated to make any other payment under the Settlement. For avoidance of doubt, Defendant shall not be required to pay any additional monetary sums in settlement of the Action, nor shall it be required to bear any other fees, costs, charges, or expenses in connection with the Settlement. Defendant also shall not be required to take any action or refrain from taking any action as a result of this Settlement except to fulfill its obligations to implement the terms ofthis Agreement as specifically provided herein.

65. All funds held by the Settlement Administrator shall be deemed and considered to be in custodian legis of the Court, and shall remain subject to the jurisdiction of the Court, until distributed pursuant to this Agreement. All funds held by the Settlement Administrator at any time shall be deemed to be a Qualified Settlement Fund as described in Treasury Regulation §1.468B-

1, 26 C.F.R. §1.468B-1.

66. Defendant shall forgive, waive, and agree not to collect from Settlement Class Members the NSF Forgiveness Amount. Such forgiveness shall be applied on an account-by-account basis.

V. Settlement Approval

67. **Preliminary Approval.**

a. Upon execution of this Agreement by all Parties, Class Counsel shall promptly move the Court for a Preliminary Approval Order. The proposed Preliminary Approval Order shall be attached to the motion, or otherwise filed with the Court, and shall be in a form attached hereto as ***Exhibit 3***. In the event the Court does not enter the Preliminary Approval Order without material change, Defendant has the right to terminate this Agreement and the Settlement and will have no further obligations under the Agreement unless Defendant waives in writing its right to terminate the Agreement due to anymaterial changes to the Preliminary Approval Order.

b. The Motion for Preliminary Approval shall, among other things, request that the Court: (1) preliminarily approve the terms of the Settlement as being within the range of fair, adequate, and reasonable; (2) find that it will be likely to certify the Settlement Class pursuant to Federal Rule of Civil Procedure 23, for settlement purposes only, appoint the Class Representatives as representatives of the Settlement Class and Class Counsel as counsel for the Settlement Class; (3) approve the Notice Program set forth herein and approve the form and content of the Notices of the Settlement; (4) approve the procedures set forth herein for Settlement Class members to exclude themselves from the Settlement Class or for Settlement Class Members to object to the Settlement; (5) stay the Action pending Final Approval of the Settlement; and (6) schedule a Final Approval Hearing for a time and date mutually convenient for the Court, Class

Counsel, and counsel for Defendant, at which the Court will conduct an inquiry into the fairness of the Settlement, determine whether it was made in good faith, and determine whether to approve the Settlement and Class Counsel's application for attorneys' fees and costs and for a Service Award to the Class Representatives. The Motion for Preliminary Approval shall comply with the United States District Judge Valerie Caproni's Individual Rule 7.B.

c. In Plaintiffs' motion seeking Preliminary Approval, Plaintiffs shall request that the Court approve the Class Notices attached at ***Exhibits 1 - 2***. The Court will ultimately determine and approve the content and form of the Class Notices to be distributed to Class Members.

d. The Parties further agree that in Plaintiffs' motion seeking Preliminary Approval, Plaintiffs will request that the Court enter the following schedule governing the Settlement: (i) deadline for sending the Class Notices: sixty (60) calendar days from Preliminary Approval; (ii) deadline for opting out or serving objections: one-hundred twenty (120) calendar days from Preliminary Approval; (iii) deadline for filing motions for Class Representative Service Award and Fee & Expense Award: one-hundred fifty (150) calendar days from Preliminary Approval; and (iv) Final Approval Hearing: one-hundred eighty (180) calendar days from Preliminary Approval.

68. **Final Approval.** Plaintiffs will submit for the Court's consideration, by the deadline set by the Court, the Final Approval Order attached as ***Exhibit 4***. The motion for Final Approval of this Settlement shall include a request that the Court enter the Final Approval Order and, if the Court grants Final Approval of the Settlement and incorporates the Agreement into the final judgment, that the Court dismiss this Action with prejudice, subject to the Court's continuing jurisdiction to enforce the Agreement. In the event that the Court does not enter the Final Approval

Order in materially the same form as ***Exhibit 4***, Defendant has the right to terminate this Agreement and the Settlement and will have no further obligations under the Agreement unless Defendant waives in writing its right to terminate the Agreement due to any material changes or deviations from the form of the Final Approval Order.

69. **Effect of Disapproval.** If the Settlement does not receive Final Approval or the Effective Date does not come to pass, Defendant shall have the right to terminate this Agreement and the Settlement and will have no further obligations under the Agreement unless Defendant waives in writing its right to terminate the Agreement under this section. In addition, the Parties agree that if this Agreement becomes null and void, Defendant shall not be prejudiced in any way from opposing class certification in the Action, and Plaintiffs and the Class Members shall not use anything in this Agreement, in any terms sheet, or in the Preliminary Approval Order or Final Approval Order to support a motion for class certification or as evidence of any wrongdoing by Defendant. No Party shall be deemed to have waived any claims, objections, rights or defenses, or legal arguments or positions, including but not limited to, claims or objections to class certification, or claims or defenses on the merits. Each Party reserves the right to prosecute or defend this Action in the event that this Agreement does not become final and binding.

VI. Settlement Administrator

70. The Settlement Administrator shall administer various aspects of the Settlement as described in paragraph 72 and perform such other functions as are specified for the Settlement Administrator elsewhere in this Agreement, including, but not limited to, effectuating the Notice Program and distributing the Settlement Fund as provided herein.

71. Defendant shall pay the Settlement Administrator directly for the Settlement Administration Costs up to a total of $500,000.00. Settlement Administration Costs in excess of

$500,000.00 shall be paid from the Settlement Fund. In the event the Settlement is terminated subsequent to the incurrence of Settlement Administration Costs, TD Bank shall not be entitled to recoup those costs.

72. The duties of the Settlement Administrator are as follows:

a. Use the name and address information for Settlement Class members provided by Defendant in connection with the Notice Program approved by the Court, for the purpose of distributing the Postcard Notice and Email Notice, and later mailing Settlement Class Member Payments to Former Account Holder Settlement Class Members, and to Current Account Holder Settlement Class Members where it is not feasible or reasonable for Defendant to make the Settlement Class Member Payments by a credit to the Current Settlement Class Members' Accounts;

b. Establish and maintain a post office box for requests for exclusion from the Settlement Class;

c. Establish and maintain the Settlement Website;

d. Establish and maintain an automated toll-free telephone line for Settlement Class members to call with Settlement-related inquiries, and answer the questions of Settlement Class members who call with or otherwise communicate such inquiries;

e. Respond to any mailed Settlement Class Member inquiries;

f. Process all requests for exclusion from the Settlement Class;

g. Provide weekly reports to Class Counsel and Defendant that summarizes the number of requests for exclusion received that week, the total number of

exclusion requests received to date, and other pertinent information;

h. In advance of the Final Approval Hearing, prepare a declaration or affidavit to submit to the Court confirming that the Notice Program was completed, describing how the Notice Program was completed, providing the names of each Settlement Class Member who timely and properly requested exclusion from the Settlement Class, and other information as may be necessary to allow the Parties to seek and obtain Final Approval.

i. Distribute Settlement Class Member Payments by check to Former Account Holder Settlement Class Members and Current Account Holder Settlement Class Members who are unable to receive credits;

j. Provide to Defendant the amount of the Settlement Class Member Payments that each Current Account Holder Settlement Class Member should receive, transfer to Defendant the total amount of payments due to those Current Account Holders Settlement Class Members and instruct Defendant to initiate the direct deposit or credit of Settlement Class Member Payments to Current Account Holder Settlement Class Members.

k. Pay invoices, expenses, and costs upon approval by Class Counsel and Defendant, as provided in this Agreement;

l. Provide notice of this Settlement as required under the Class Action Fairness Act, 28 U.S.C. § 1715; and

m. Any other Settlement Administration function at the instruction of Class Counsel and Defendant, including, but not limited to, verifying that the Settlement Funds have been distributed.

n. Perform all tax-related services for the Escrow Account as provided in the Agreement.

73. The Settlement Administrator shall execute a confidentiality or non-disclosure agreement in a form acceptable to Defendant that shall provide, among other things, that the Settlement Administrator shall be bound by and shall perform the obligations imposed on it under the terms of this Agreement.

74. The Settlement Administrator shall ensure that the information that it receives from Defendant, Class Counsel, and/or Class Members is secured and managed in such a way as to protect the security and confidentiality of the information, consistent with industry best practices and applicable law. Except as specifically provided in this Agreement, the Settlement Administrator shall not disclose or disseminate any information that it receives from Defendant, Class Counsel and/or Class Members without prior written consent of the Parties or by order of the Court. The Parties and Class Counsel agree that the Settlement Administrator shall maintain the Class Member List and Updated Class Member List and other information provided to it by or on behalf of Defendant, including mail and email addresses, in a confidential manner, and that it will not provide such Class Member List, Updated Class Member List, or other information to any other person, including Class Counsel, without Defendant's prior written consent.

VII. Notice to Settlement Class Members

75. **Provision of Information to Settlement Administrator.** Within thirty (30) calendar days of Preliminary Approval, Defendant will provide the Settlement Administrator with the following information, which will be kept strictly confidential between the Administrator and Defendant, for each Class Member: (i) name; (ii) number of Retry NSF Fees per account through the date of Preliminary Approval; (iii) relevant refund and charge-off information through the date

of Preliminary Approval; (iv) last known e-mail address; and (v) last known mailing address ("Class Member List"). Within thirty (30) calendar days of the Effective Date, Defendant will provide the Settlement Administrator with an "Updated Class Member List" consisting of the following information, which will be kept strictly confidential between the Administrator and Defendant, for each Class Member: (i) name; (ii) number of Retry NSF Fees per account; (iii) relevant refund and charge-off information; (iv) last known e-mail address; (v) last known mailing address; (vi) whether the Account remains open; and (vii) if the Account no longer remains open, the balance remaining due and owing. The Settlement Administrator shall use this information solely for the purpose of administering the Settlement.

76. **Class Notices.** Within sixty (60) calendar days of Preliminary Approval, or by the time specified by the Court, the Settlement Administrator shall send the Class Notices in the forms attached hereto as ***Exhibits 1 - 2***, or in such form as is approved by the Court, to the Class Members. The Settlement Administrator shall send the "Email Notice," attached hereto as ***Exhibit 1***, to all Class Members for whom the Defendant has provided the Settlement Administrator with an e-mail address. The Settlement Administrator shall send the "Postcard Notice," attached hereto as ***Exhibit 1***, to all Class Members for whom Defendant does not provided an email address to the Claims Administrator and to all Class Members to whom the Settlement Administrator sent ***Exhibit 1*** via email but for whom the Settlement Administrator receives notice of an undeliverable email. Postcard notice shall be mailed after the Settlement Administrator updates mailing addresses provided by Defendant with the National Change of Address database and other commercially feasible means. The Settlement Administrator shall also maintain a website containing the Complaint, the "long-form notice," attached hereto as ***Exhibit 2***, Plaintiffs' motion seeking Preliminary Approval, the Preliminary Approval Order, Plaintiffs' motion seeking Final

Approval, and the Final Approval Order until at least ninety (90) calendar days after Final Approval. The Settlement Administrator shall send the long-form notice by mail to any Class Member who requests a copy. It will be conclusively presumed that the intended recipients received the Class Notices if the Administrator did not receive a bounce-back message and if mailed Class Notices have not been returned to the Administrator as undeliverable within fifteen (15) calendar days of mailing.

77. Notices provided under or as part of the Notice Program shall not bear or include Defendant's logo or trademarks or the return address of Defendant, or otherwise be styled to appear to originate from Defendant.

78. The Email Notice, Postcard Notice, and Long Form Notice shall be in forms approved by the Court, and substantially similar to the notice forms attached hereto as ***Exhibits 1 and 2***. The Parties may by mutual written consent make non-substantive changes to the Notices without Court approval. A Spanish language translation of the Long Form Notice shall be available on the Settlement Website and be provided to Settlement Class members who request it from the Settlement Administrator.

VIII. Procedure for Opting Out and Objecting

79. **Opt Outs.** A Settlement Class Member may opt-out of the Settlement Class at any time prior to the Opt-Out Deadline, provided the opt-out notice that must be sent to the Settlement Administrator is postmarked no later than the Opt-Out Deadline. Any Settlement Class Member who does not timely and validly request to opt out shall be bound by the terms of this Agreement. If an Account has more than one Account Holder, and if one Account Holder excludes himself or herself from the Settlement Class, then all Account Holders on that Account shall be deemed to have opted out of the Settlement with respect to that Account, and no Account Holder shall be

entitled to a payment under the Settlement.

80. **Objections.** Objections to the Settlement, to the application for attorneys' fees and costs, and/or to the Service Award must be mailed to the Clerk of the Court, Class Counsel, Defendant's counsel, and the Settlement Administrator. For an objection to be considered by the Court, the objection must be submitted no later than the Objection Deadline, as specified in the Notice. If submitted by mail, an objection shall be deemed to have been submitted when posted if received with a postmark date indicated on the envelope if mailed first-class postage prepaid and addressed in accordance with the instructions. If submitted by private courier (*e.g.*, Federal Express), an objection shall be deemed to have been submitted on the shipping date reflected on the shipping label. For an objection to be considered by the Court, the objection must also set forth:

a. the name of the Action;

b. the objector's full name, address and telephone number;

c. all grounds for the objection, accompanied by any legal support for the objection known to the objector or objector's counsel;

d. the number of times the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which the objector has made such objection, and a copy of any orders related to or ruling upon the objector's prior objections that were issued by the trial and appellate courts in each listed case;

e. the identity of all counsel who represent the objector, including any former or current counsel who may be entitled to compensation for any reason related to the objection to the Settlement or fee application;

f. the number of times in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the five years preceding the date that of the filed objection, the caption of each case in which counsel or the firm has made such objection and a copy of any orders related to or ruling upon counsel's or the counsel's law firm's prior objections that were issued by the trial and appellate courts in each listed case in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the preceding five years;

g. any and all agreements that relate to the objection or the process of objecting—whether written or oral—between objector or objector's counsel and any other person or entity;

h. the identity of all counsel (if any) representing the objector who will appear at the Final Approval Hearing;

i. a list of all persons who will be called to testify at the Final Approval Hearing in support of the objection;

j. a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing; and

k. the objector's signature (an attorney's signature is not sufficient).

Class Counsel and/or Defendant may conduct limited discovery on any objector or objector's counsel consistent with the Federal Rules of Civil Procedure.

81. **Waiver of Objections.** Except for Class Members who opt out of the Settlement Class in compliance with the foregoing, all Class Members will be deemed to be members of the Settlement Class for all purposes under this Agreement, the Final Approval Order, and the releases set forth in this Agreement and, unless they have timely asserted an objection to the Settlement,

shall be deemed to have waived all objections and opposition to its fairness, reasonableness, and adequacy.

82. **No Encouragement of Objections.** Neither the Parties nor any person acting on their behalf shall seek to solicit or otherwise encourage anyone to object to the Settlement or appeal from any order of the Court that is consistent with the terms of this Settlement.

IX. Disbursement from the Settlement Fund.

83. Payments shall be made from the Settlement Fund as follows:

a. Class Counsels' Fees and Costs. Class Counsels' reasonable attorneys' fees and costs, as determined and approved by the Court, shall be paid from the Settlement Fund within 30 days after the Final Approval Order is entered. Class Counsel shall apply for an award of attorneys' fees of up to 25% of the Value of the Settlement, and reimbursement of reasonable litigation costs, to be approved by the Court. Plaintiffs' attorneys' fee application shall be separate from the motion for Final Approval, and the Proposed Order on the attorneys' fee application shall be separate from the Proposed Order on the motion for Final Approval. Defendant agrees not to oppose an application for attorneys' fees of up to 25% of the Value of the Settlement, but reserves the right to oppose an application for attorneys' fees in excess of that amount. In the event the Effective Date does not occur or any award of attorneys' fees or expenses is reduced following an appeal, Class Counsel shall repay to the Settlement Fund within 30 days the full amount of any such award or the amount of the reduction, for which all Class Counsel shall be jointly and severally liable.

b. Service Award. Subject to Court approval, the Class Representatives shall be entitled to receive a Service Award of up to $7,500.00 each for their role as the Class Representatives. The Service Award shall be paid from the Settlement Fund no later than 10 days

after the Effective Date.

c. Settlement Administrator's Fees and Costs. The Settlement Administrator's fees and costs, to the extent they exceed $500,000.00, shall be paid from the Settlement Fund within 10 days after invoicing to and approval by Plaintiffs. In the event the Final Approval Order is not entered or this Agreement is terminated pursuant to Section XIII below, Defendant agrees to cover any costs incurred and fees charged by the Settlement Administrator up to $500,000 pursuant to the Settlement prior to the denial of Final Approval or the termination of this Agreement.

d. Calculation and Distribution of Settlement Class Member Payments. The Settlement Administrator, supervised by the Parties, shall calculate and implement the allocation of the Settlement Fund for the purpose of compensating Settlement Class Members using the methodology provided below. Defendant shall have the right but not the obligation to review and challenge the accuracy of this calculation. The methodology provided for below will be applied to the data as consistently, sensibly, and conscientiously as reasonably possible, recognizing and taking into consideration the nature and completeness of the data and the purpose of the computations. The Parties agree the allocation formula below is exclusively for purposes of computing, in a reasonable and efficient fashion, the amount of any Settlement Class Member Payment each Settlement Class Member should receive from the Net Settlement Fund. The fact that this allocation formula will be used is not intended (and shall not be used) for any other purpose or objective whatsoever.

i. Defendant, in consultation with Class Counsel and their experts, shall identify data—to the extent it exists in reasonably accessible electronic form—sufficient to calculate and implement the allocations of the Net Settlement

Fund and NSF Forgiveness Amount as provided in Section IX and X. The calculation of the allocations shall be performed by Settlement Class Counsel and their experts and/or the Settlement Administrator, as described below, and the implementation of the allocations contemplated by Sections IX and X shall be jointly undertaken by the Settlement Administrator and Defendant. Subject to its statutory and regulatory obligations to protect its customers' private financial information, and pursuant to any confidentiality, data protection, or other agreements restricting the dissemination of data or information, Defendant shall make available data and information sufficient to allow Class Counsel and their experts and the Settlement Administrator to determine and confirm the calculations and allocations contemplated by this Agreement.

ii. Settlement Class Members shall be paid pro rata distributions of the Net 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 Settlement Class Member, less the dollar amount of any Retry NSF Fee Refunds and reduced by any Uncollected Retry NSF Fees).

iii. Settlement Class Member Payments shall be made no later than 90 days after the Effective Date, as follows:

1. For those Settlement Class Members who are Current Account Holders at the time of distribution of the Settlement Fund, a credit for the Settlement Class Member Payment shall be applied to the account the Settlement Class Member is maintaining at the time of the credit. Within sixty (60)

days of the Effective Date, the Settlement Administrator shall transfer to Defendant funds equal to the total amount of payments due to Settlement Class Members who are Current Account Holders. If, at that time, Defendant is unable to complete certain credit(s), Defendant shall deliver the total amount of unsuccessful Settlement Class Member Payments back to the Settlement Administrator to be paid by check in accordance with subsection 2 below.

2. For those Settlement Class Members who are Former Account Holders at the time of the distribution of the Net Settlement Fund, they shall be sent a check by the Settlement Administrator at the address used to provide the Notice, or at such other address as designated by the Settlement Class Member. For jointly held accounts, checks will be payable to all members, and will be mailed to the first member listed on the account. The Settlement Administrator will make reasonable efforts to locate the proper address for any check returned by the Postal Service as undeliverable and will re-mail it once to the updated address or, in the case of a jointly held account, and in the Settlement Administrator's discretion, to an accountholder other than the one listed first. The Settlement Class Member shall have 180 days to negotiate the check. Any checks uncashed after 180 days

shall be distributed pursuant to Section XI.

iv. In no event shall any portion of the Settlement Fund revert to Defendant.

X. Forgiveness of Uncollected Retry NSF Fees

84. The Settlement Administrator, supervised by the Parties, shall calculate the forgiveness of the NSF Forgiveness Amount of $20,750,000 in Uncollected Retry NSF Fees among Class Members whose Accounts are closed and who have amounts that remain due and owing to Defendant as of the Effective Date, using the following formula: (NSF Forgiveness Amount/Total Uncollected Retry NSF Fees) x (the dollar amount of the Settlement Class Members' Uncollected Retry NSF Fees, less any Retry NSF Fee Refunds).

85. The methodology provided for above will be applied to the data as consistently, sensibly, and conscientiously as reasonably possible, recognizing and taking into consideration the nature and completeness of the data and the purpose of the computations. The Parties agree the allocation formula below is exclusively for purposes of computing, in a reasonable and efficient fashion, the amount of any forgiveness that each Settlement Class Member should receive from the NSF Forgiveness Amount. The fact that this allocation formula will be used is not intended (and shall not be used) for any other purpose or objective whatsoever.

86. If any Settlement Class Member's outstanding balance on his or her Account is less than the amount of the pro rata forgiveness of Uncollected Retry NSF Fees to which he or she is entitled under the Settlement, the account balance will be adjusted to zero dollars. Under no circumstances will Defendant be required to make any cash payments as a result of the forgiveness of Uncollected Retry NSF Fees. Defendant is to apply the debt forgiveness described in this paragraph within 90 days after the Effective Date. Within 90 days of the

Effective Date, Defendant shall update any negative reporting to Chexsystems or credit reporting agencies with respect to Settlement Class Members who receive forgiveness of Uncollected Retry NSF Fees. Defendant shall notify Class Counsel once the debt forgiveness has been applied. A Settlement Class Member whose Uncollected Retry NSF Fees are less than the total Retry NSF Fees on his or her Account may receive both Forgiveness of Uncollected NSF Fees under this section and a distribution of Settlement Class Payments under Section IX.

XI. Disposition of Residual Funds

87. Within one year after the date the Settlement Administrator mails the first Settlement Class Member Payment, any remaining amounts resulting from uncashed checks shall either be distributed: (a) in a second round of distribution to those Settlement Class Members who are Current Accountholders or who cashed their initial settlement check, if Class Counsel determines that a second distribution is economically reasonable, given the costs of a second distribution (which must be paid out of the Settlement Fund) and the relative amount of such a second distribution; or (b) to an appropriate cy pres recipient agreed to by the Parties and approved by the Court. If a second distribution is made, any amounts remaining unclaimed six months after the second distribution shall be distributed to an appropriate cy pres recipient agreed to by the parties and approved by the Court.

XII. Releases

88. As of the Effective Date, Releasing Parties shall automatically be deemed to have fully and irrevocably released and forever discharged Defendant and each of its present and former parents, subsidiaries, divisions, affiliates, predecessors, successors and assigns, and the present and former directors, officers, employees, agents, insurers, members, attorneys, advisors, consultants, representatives, partners, joint venturers, independent contractors, wholesalers,

resellers, distributors, retailers, predecessors, successors and assigns of each of them ("Released Parties"), of and from any and all liabilities, rights, claims, actions, causes of action, demands, damages, costs, attorneys' fees, losses and remedies, whether known or unknown, existing or potential, suspected or unsuspected, liquidated or unliquidated, legal, statutory, or equitable, based on contract, tort or any other theory, that result from, arise out of, are based upon, or relate (directly or indirectly) to the conduct, omissions, duties or matters during the Class Period that were or could have been alleged in the Action by Plaintiffs or Settlement Class Members relating in any way to the assessment of Retry NSF Fees ("Released Claims") without limitation, any claims, actions, causes of action, demands, damages, losses, or remedies relating to, based upon, resulting from, or arising out of Defendant's practices, policies and procedures related to the authorization, processing, payment, return and/or rejection of an item or any failure to adequately or clearly disclose, in one or more contracts, agreements, disclosures, or other written materials, through oral communications, or in any other manner NSF fee practices.

89. Each Settlement Class Member is barred and permanently enjoined from bringing on behalf of themselves, or through any person purporting to act on their behalf or purporting to assert a claim under or through them, any of the Released Claims against Defendant and Released Parties in any forum, action, or proceeding of any kind.

90. With respect to the Released Claims, Plaintiffs and the Class Members shall be deemed to have, and by operation of the Settlement shall have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights and benefits of Section 1542 of the California Civil Code (to the extent it is applicable, or any other similar provision under federal, state or local law to the extent any such provision is applicable), which reads:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME

OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

91. Thus, subject to and in accordance with this Agreement, even if the Plaintiffs and/or Class Members may discover facts in addition to or different from those which they now know or believe to be true with respect to the subject matter of the Released Claims, Plaintiffs and each Class Member, upon entry of Final Approval of the Settlement, shall be deemed to have and by operation of the Final Approval Order, shall have, fully, finally, and forever settled and released all of the Released Claims. This is true whether such claims are known or unknown, suspected, or unsuspected, contingent or non-contingent, whether or not concealed or hidden, which now exist, or heretofore have existed upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct which is negligent, intentional, with or without malice, or a breach of any duty, law, or rule, without regard to the subsequent discovery or existence of such different or additional facts.

92. Nothing in this Agreement shall operate or be construed to release any claims or rights that Defendant has to recover any past, present, or future amounts that may be owed by Plaintiffs or by any Settlement Class Member on his/her accounts, loans or any other debts with Defendant, pursuant to the terms and conditions of such accounts, loans, or any other debts, with the exception of the forgiveness of certain Uncollected Retry NSF Fees under this Agreement. Likewise, nothing in this Agreement shall operate or be construed to release any defenses or rights of set-off or recoupment that Plaintiffs or any Settlement Class Member has, other than with respect to the claims expressly released by this Agreement, in the event Defendant and/or its assigns seeks to recover any past, present, or future amounts that may be owed by Plaintiffs or by any Settlement Class Member on his/her accounts, loans, or any other debts with Defendant, pursuant to the terms and conditions of such accounts, loans, or any other debts.

XIII. Termination of Settlement

93. This Agreement shall be subject to and is expressly conditioned on the occurrence of all of the following events:

a. The Court has entered the Preliminary Approval Order, as required by Section V above;

b. The Court has entered the Final Approval Order as required by Section VIII, above, and all objections, if any, to such Order are overruled, and all appeals taken from such Order are resolved in favor of approval; and

c. The Effective Date has occurred.

94. If all of the conditions specified in the immediately preceding paragraph are not met, then this Agreement shall be cancelled and terminated.

95. Defendant shall have the option to terminate this Agreement if 5% or more of the total Settlement Class members opt-out. Defendant shall notify Class Counsel and the Court of its intent to terminate this Agreement pursuant to this Section XIII within 10 business days after the end of the Opt-Out Period, or the option to terminate shall be considered waived.

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

XIV. Effect of a Termination

97. In the event of a termination, (i) this Agreement shall be considered null and void;

(ii) all of Plaintiff's, Class Counsel's, and Defendant's obligations under the Settlement shall cease to be of any force and effect; (iii) the Settlement Fund shall be returned to Defendant; and (iv) the Parties shall return to the status *quo ante* in the Action as if the Parties had not entered into this Agreement. In addition, in the event of such a termination, all of the Parties' respective pre-Settlement rights, claims and defenses will be retained and preserved.

98. In the event the Settlement is terminated in accordance with the provisions of this Agreement, any discussions, offers, or negotiations associated with this Settlement shall not be discoverable or offered into evidence or used in the Action or any other action or proceeding for any purpose. In such event, all Parties to the Action shall stand in the same position as if this Agreement had not been negotiated, made or filed with the Court.

XV. No Admission of Liability

99. Defendant continues to dispute its liability for the claims alleged in the Action and maintains that its overdraft and overdraft-return (NSF) practices and representations concerning those practices complied, at all times, with applicable laws and regulations and the terms of the account agreements with its customers. Defendant does not admit any liability or wrongdoing of any kind, by this Agreement or otherwise. Defendant has agreed to enter into this Agreement to avoid the further expense, inconvenience, and distraction of burdensome and protracted litigation, and to be completely free of any further claims that were asserted or could possibly have been asserted in the Action.

100. Class Counsel believe that the claims asserted in the Action have merit, and they have examined and considered the benefits to be obtained under the proposed Settlement set forth in this Agreement, the risks associated with the continued prosecution of this complex, costly, and time-consuming litigation, and the likelihood of success on the merits of the Action. Class Counsel

fully investigated the facts and law relevant to the merits of the claims, conducted significant informal discovery, and conducted independent investigation of the challenged practices. Class Counsel concluded that the proposed Settlement set forth in this Agreement is fair, adequate, reasonable, and in the best interests of the Settlement Class Members.

101. The Parties understand and acknowledge that this Agreement constitutes a compromise and settlement of disputed claims. No action taken by the Parties either previously or in connection with the negotiations or proceedings connected with this Agreement shall be deemed or construed to be an admission of the truth or falsity of any claims or defenses heretofore made, or an acknowledgment or admission by any party of any fault, liability, or wrongdoing of any kind whatsoever.

102. Neither the Settlement, nor any act performed or document executed pursuant to or in furtherance of the Settlement: (a) is or may be deemed to be, or may be used as, an admission of, or evidence of, the validity of any claim made by the Plaintiffs or Settlement Class Members, or of any wrongdoing or liability of the Released Parties; or (b) is or may be deemed to be, or may be used as, an admission of, or evidence of, any fault or omission of any of the Released Parties, in the Action or in any proceeding in any court, administrative agency, or other tribunal.

103. In addition to any other defenses Class Counsel may have at law, in equity, or otherwise, to the extent permitted by law, this Agreement may be pleaded as a full and complete defense to, and may be used as the basis for an injunction against, any action, suit or other proceeding that may be instituted, prosecuted, or attempted in breach of this Agreement or the Releases contained herein.

XIX. Confidentiality and Non-Disparagement

104. Neither Party shall issue any press release or shall otherwise initiate press coverage of the Settlement. If contacted, the Party may respond generally, either online or in person, by

stating that the Settlement was reached and that it was a fair and reasonable result. The Parties agree that they shall not make any disparaging remarks, or any remarks that could reasonably be construed as disparaging, whether orally or in writing, regarding one another or their officers, directors, trustees, employees, consultants, attorneys, partners, owners, affiliates, or agents. Nothing in this paragraph is intended to prohibit the Parties from testifying or responding truthfully in response to any court order, arbitral order, subpoena or government investigation.

XX. Miscellaneous Provisions

105. Gender and Plurals. As used in this Agreement, the masculine, feminine or neuter gender, and the singular or plural number, shall each be deemed to include the others whenever the context so indicates.

106. Binding Effect. This Agreement shall be binding upon, and inure to for the benefit of, the successors and assigns of the Releasing Parties and the Released Parties.

107. Cooperation of Parties. The Parties to this Agreement agree to cooperate in good faith to prepare and execute all documents, to seek Court approval, uphold Court approval, and do all things reasonably necessary to complete and effectuate the Settlement described in this Agreement.

108. Obligation to Meet and Confer. Before filing any motion in the Court raising a dispute arising out of or related to this Agreement, the Parties shall consult with each other and certify to the Court that they have consulted.

109. Integration. This Agreement constitutes a single, integrated written contract expressing the entire agreement of the Parties relative to the subject matter hereof. No covenants, agreements, representations, or warranties of any kind whatsoever have been made by any Party hereto, except as provided for herein.

110. No Conflict Intended. Any inconsistency between the headings used in this

Agreement and the text of the paragraphs of this Agreement shall be resolved in favor of the text.

111. Governing Law. Except as otherwise provided herein, the Agreement and all disputes arising out of or relating to (directly or indirectly) the Agreement shall be construed in accordance with, and be governed by, the laws of the State of New York, without regard to the principles thereof regarding choice of law.

112. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument, even though all Parties do not sign the same counterparts. Original signatures are not required. Any wet-ink or electronic signature submitted by facsimile or through email of an Adobe PDF shall be deemed an original.

113. Jurisdiction. The Court shall retain jurisdiction over the implementation, enforcement, and performance of this Agreement, and shall have exclusive jurisdiction over any suit, action, proceeding, or dispute arising out of or relating to (directly or indirectly) this Agreement that cannot be resolved by negotiation and agreement by counsel for the Parties. The Court shall retain jurisdiction with respect to the administration, consummation, and enforcement of the Agreement and shall retain jurisdiction for the purpose of enforcing all terms of the Agreement. The Court shall also retain jurisdiction over all questions and/or disputes related to the Notice Program and the Settlement Administrator. As part of their agreement to render services in connection with this Settlement, the Settlement Administrator shall consent to the jurisdiction of the Court for this purpose. The Court shall retain jurisdiction over the enforcement of the Court's injunction barring and enjoining all Releasing Parties from asserting any of the Released Claims and from pursuing any Released Claims against Defendant or its affiliates at any time, including during any appeal from the Final Approval Order.

114. Notices. All notices to Class Counsel provided for herein, shall be sent by email with a hard copy sent by overnight mail to:

COHEN & MALAD, LLP
Lynn A. Toops, Esq.
Vess A. Miller, Esq.
1 Indiana Square, Suite 1400
Indianapolis, IN 46204
Email: ltoops@cohenandmalad.com

KALIEL PLLC
Jeffrey Kaliel, Esq.
Sophia Goren Gold, Esq.
1875 Connecticut Avenue NW, 10th Floor
Washington, DC 20009
Email: jkaliel@kalielpllc.com
Class Counsel

O'MELVENY & MYERS LLP
Danielle Oakley, Esq.
610 Newport Center Drive, 17th Floor
Newport Beach, CA 92660
Email: doakley@omm.com
Daniel L. Cantor, Esq.
7 Times Square
New York, NY 10036
Email dcantor@omm.com
Counsel for TD Bank, N.A.

The notice recipients and addresses designated above may be changed by written notice. Upon the request of any of the Parties, the Parties agree to promptly provide each other with copies of objections, requests for exclusion, or other filings received as a result of the Notice program.

115. Modification and Amendment. This Agreement may not be amended or modified, except by a written instrument signed by Class Counsel and counsel for Defendant and, if the Settlement has been approved preliminarily by the Court, approved by the Court.

116. No Waiver. The waiver by any Party of any breach of this Agreement by another Party shall not be deemed or construed as a waiver of any other breach, whether prior, subsequent,

or contemporaneous, of this Agreement.

117. Authority. Class Counsel (for the Plaintiffs and the Settlement Class Members), and counsel for Defendant, represent and warrant that the persons signing this Agreement on their behalf have full power and authority to bind every person, partnership, corporation or entity included within the definitions of Plaintiffs and Defendant to all terms of this Agreement. Any person executing this Agreement in a representative capacity represents and warrants that he or she is fully authorized to do so and to bind the Party on whose behalf he or she signs this Agreement to all of the terms and provisions of this Agreement.

118. Agreement Mutually Prepared. Neither Defendant nor Plaintiffs, nor any of them, shall be considered to be the drafter of this Agreement or any of its provisions for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Agreement.

119. Independent Investigation and Decision to Settle. The Parties understand and acknowledge that they: (a) have performed an independent investigation of the allegations of fact and law made in connection with this Action; and (b) that even if they may hereafter discover facts in addition to, or different from, those that they now know or believe to be true with respect to the subject matter of the Action as reflected in this Agreement, that will not affect or in any respect limit the binding nature of this Agreement. Both Parties recognize and acknowledge that they and their experts reviewed and analyzed data for a subset of the time at issue and that they and their experts used extrapolation to make certain determinations, arguments, and settlement positions. The Parties agree that this Settlement is reasonable and will not attempt to renegotiate or otherwise void or invalidate or terminate the Settlement irrespective of what any unexamined data later shows. It is the Parties' intention to resolve their disputes in connection with this Action pursuant

to the terms of this Agreement now and thus, in furtherance of their intentions, the Agreement shall remain in full force and effect notwithstanding the discovery of any additional facts or law, or changes in law, and this Agreement shall not be subject to rescission or modification by reason of any changes or differences in facts or law, subsequently occurring or otherwise.

120. Receipt of Advice of Counsel. Each Party acknowledges, agrees, and specifically warrants that he, she, or it has fully read this Agreement and the Releases contained herein, received independent legal advice with respect to the advisability of entering into this Agreement and the Releases, and the legal effects of this Agreement and the Releases, and fully understands the effect of this Agreement and the Releases.

Dated: 5/14/2021

DocuSigned by:
1A53F6DC4684ED...
Mary Jennifer Perks
Plaintiff

Dated: _____

Maria Navarro-Reyes
Plaintiff

Dated: May 14, 2021

Jeffrey Kaliel, Esq.
KALIEL PLLC
Class Counsel

Dated: _____

Jeff Ostrow, Esq.
KOPELOWITZ OSTROW P.A.
Class Counsel

Dated: May 13, 2021

Lynn Toops
Lynn Toops, Esq.
COHEN & MALAD
Class Counsel

to the terms of this Agreement now and thus, in furtherance of their intentions, the Agreement shall remain in full force and effect notwithstanding the discovery of any additional facts or law, or changes in law, and this Agreement shall not be subject to rescission or modification by reason of any changes or differences in facts or law, subsequently occurring or otherwise.

120. Receipt of Advice of Counsel. Each Party acknowledges, agrees, and specifically warrants that he, she, or it has fully read this Agreement and the Releases contained herein, received independent legal advice with respect to the advisability of entering into this Agreement and the Releases, and the legal effects of this Agreement and the Releases, and fully understands the effect of this Agreement and the Releases.

Dated: _____

Mary Jennifer Perks
Plaintiff

Dated: May 13, 2021

Maria Reyes (May 13, 2021 17:48 EDT)

Maria Navarro-Reyes
Plaintiff

Dated: _____

Jeffrey Kaliel, Esq.
KALIEL PLLC
Class Counsel

Dated: May 13, 2021

Jeff Ostrow

Jeff Ostrow, Esq.
KOPELOWITZ OSTROW P.A.
Class Counsel

Dated: _____

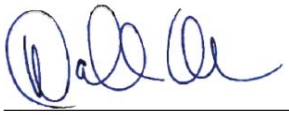
Lynn Toops, Esq.
COHEN & MALAD
Class Counsel

Dated: May 12, 2021

TD Bank, N.A.

By: Alissa Van Volkom
ITS Head of U.S. Consumer Deposits, Products and Payments

Dated: May 13, 2021



Danielle Oakley, Esq.
Counsel for TD Bank

Exhibit 1 – Email and Postcard Notice

Perks et al v. TD Bank, N.A.

NOTICE OF PENDING CLASS ACTION AND PROPOSED SETTLEMENT
READ THIS NOTICE FULLY AND CAREFULLY; THE PROPOSED SETTLEMENT MAY AFFECT YOUR RIGHTS!

IF YOU HAVE OR HAD A CHECKING ACCOUNT WITH TD BANK AND YOU WERE CHARGED CERTAIN RETRY NSF FEES BETWEEN [_____] TO [DATE OF PRELIMINARY APPROVAL], THEN YOU MAY BE ENTITLED TO A PAYMENT FROM A CLASS ACTION SETTLEMENT

Para una notificacion en Espanol, visitar www.XXXXXXXXXXXXXXXXXXX.com.

The United States District Court for the Southern District of New York has authorized this Notice; it is not a solicitation from a lawyer.

You may be a member of the Settlement Class in *Perks et al v. TD Bank, N.A.*, in which the plaintiffs allege that defendant TD Bank, N.A. ("Defendant") unlawfully assessed Retry NSF Fees between _____. If you are a member of the Settlement Class and if the Settlement is approved, you may be entitled to receive a cash payment from the $20,750,000.00 Settlement Fund and/or the forgiveness of $20,750,000 in Uncollected Retry NSF Fees.

The Court has preliminarily approved this Settlement. It will hold a Final Approval Hearing in this case on [INSERT DATE]. At that hearing, the Court will consider whether to grant Final Approval to the Settlement, and whether to approve payment from the Settlement Fund of up to $7,500.00 in service awards to each of the two class representatives, up to 25% of the Value of the Settlement as attorneys' fees, and reimbursement of costs to the attorneys and the Settlement Administrator. If the Court grants Final Approval of the Settlement and you do not request to be excluded from the Settlement, you will release your right to bring any claim covered by the Settlement. In exchange, Defendant has agreed to issue a credit to your Account, a cash payment to you if you are no longer an accountholder, and/or to forgive certain certain amounts.

To obtain a long form class notice and other important documents please visit [INSERT WEBSITE ADDRESS]. Alternatively, you may call [INSERT PHONE #].
If you do not want to participate in this settlement—you do not want to receive a credit or cash payment and/or the forgiveness of certain Uncollected Retry NSF Fees and you do not want to be bound by any judgment entered in this case—you may exclude yourself by submitting an opt-out request postmarked no later than [PARTIES TO INSERT DATE]. If you want to object to this settlement because you think it is not fair, adequate, or reasonable, you may object by submitting an objection postmarked no later than [PARTIES TO INSERT DATE]. You may learn more about the opt-out and objection procedures by visiting [PARTIES TO PROVIDE WEBSITE ADDRESS] or by calling [Insert Phone #].

Exhibit 2 – Long Form Notice

Perks et al v. TD Bank, N.A.

NOTICE OF PENDING CLASS ACTION AND PROPOSED SETTLEMENT

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

IF YOU HAVE OR HAD A CHECKING ACCOUNT WITH TD BANK ("DEFENDANT") AND YOU WERE CHARGED CERTAIN RETRY NSF FEES BETWEEN [redacted], THEN YOU MAY BE ENTITLED TO A PAYMENT FROM A CLASS ACTION SETTLEMENT

The United States District Court for the Southern District of New York has authorized this Notice; it is not a solicitation from a lawyer.

SUMMARY OF YOUR OPTIONS AND THE LEGAL EFFECT OF EACH OPTION	
DO NOTHING	If you don't do anything, you will receive a payment from the Settlement Fund and/or forgiveness of certain Uncollected Retry NSF Fees so long as you do not opt out of or exclude yourself from the settlement (described in the next box).
EXCLUDE YOURSELF FROM THE SETTLEMENT; RECEIVE NO PAYMENT BUT RELEASE NO CLAIMS	You can choose to exclude yourself from the settlement or "opt out." This means you choose not to participate in the settlement. You will keep your individual claims against Defendant but you will not receive a payment for Retry NSF Fees and/or forgiveness of Uncollected Retry NSF Fees. If you exclude yourself from the settlement but want to recover against Defendant, you will have to file a separate lawsuit or claim.
OBJECT TO THE SETTLEMENT	You can file an objection with the Court explaining why you believe the Court should reject the settlement. If your objection is overruled by the Court, then you may receive a payment and/or forgiveness of Uncollected Retry NSF Fees and you will not be able to sue Defendant for the claims asserted in this litigation. If the Court agrees with your objection, then the settlement may not be approved.

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

BASIC INFORMATION

1. What is this lawsuit about?

The lawsuit that is being settled is entitled *Perks et al v. TD Bank, N.A.* It is pending in the United States District Court for the Southern District of New York, Case No. 1:18-cv-11176-DAB. The case is a "class action." That means that the "Class Representatives," Mary Jennifer Perks and Maria Navarro-Reyes, are individuals who are acting on behalf of current and former

accountholders who were assessed certain Retry NSF Fees between _____. The Class Representatives have asserted claims for breach of the account agreement.

Defendant does not deny it charged the fees the Class Representatives are complaining about, but contends it did so properly and in accordance with the terms of its agreements. Defendant therefore denies that its practices give rise to claims for damages by the Class Representatives or any Settlement Class Members.

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

You received this Notice because Defendant's records indicate that you were charged one or more Retry NSF Fees that are the subject of this action. The Court directed that this Notice be sent to all Settlement Class members because each such member has a right to know about the proposed settlement and the options available to him or her before the Court decides whether to approve the settlement.

3. Why did the parties settle?

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

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

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

WHO IS IN THE SETTLEMENT

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

If you received this notice, then Defendant's records indicate that you are a member of the Settlement Class who is entitled to receive a payment or credit to your Account and/or forgiveness of Uncollected Retry NSF Fees.

YOUR OPTIONS

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

You have three options: (1) do nothing and you will receive a payment or forgiveness of Uncollected Retry NSF Fees according to the terms of this Settlement; (2) exclude yourself from the Settlement ("opt out" of it); or (3) participate in the Settlement but object to it. Each of these options is described in a separate section below.

6. What are the critical deadlines?

There is no deadline to receive a payment. If you do nothing, then you will get a payment and/or receive forgiveness of Uncollected Retry NSF Fees.

The deadline for sending a letter to exclude yourself from or opt out of the settlement is _____. The deadline to file an objection with the Court is also _____.

7. How do I decide which option to choose?

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

If you believe the Settlement is unreasonable, unfair, or inadequate and the Court should reject the Settlement, you can object to the Settlement terms. The Court will decide if your objection is valid. If the Court agrees, then the Settlement may not be approved and no payments will be made to you or any other member of the Settlement Class. If your objection (and any other objection) is overruled, and the Settlement is approved, then you may still get a payment and/or forgiveness of Uncollected Retry NSF Fees, and will be bound by the Settlement.

If you want to participate in the Settlement, then you don't have to do anything; you will receive a payment and/or forgiveness of Uncollected Retry NSF Fees if the Settlement is approved by the Court.

8. What has to happen for the Settlement to be approved?

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

THE SETTLEMENT PAYMENT

9. How much is the Settlement?

Defendant has agreed to create a Settlement Fund of $20,750,000.00. It will also forgive Uncollected Retry NSF Fees totaling $20,750,000, as defined in the Settlement Agreement.

As discussed separately below, attorneys' fees, litigation costs, and the costs paid to a third-party Settlement Administrator to administer the Settlement (including mailing and emailing notice) will be paid out of the Settlement Fund. The Net Settlement Fund will be divided among all Settlement Class Members entitled to Settlement Class Member Payments based on a formula described in the Settlement Agreement.

10. How much of the Settlement Fund will be used to pay for attorney fees and costs?

Class Counsel will request the Court to approve attorneys' fees of not more than 25% of the Value of the Settlement, and will request that it be reimbursed for litigation costs incurred in prosecuting the case. The Court will decide the amount of the attorneys' fees and costs based on a number of factors.

11. How much of the Settlement Fund will be used to pay the Class Representatives a Service Award?

Class Counsel will request that the Class Representatives each be paid a service award in the amount of $7,500.00 for their work in connection with this case. The Service Award must be approved by the Court.

12. How much will my payment be?

The balance of the Settlement Fund after attorneys' fees and costs, the service award and the Settlement Administrator's fees, also known as the Net Settlement Fund, will be divided among all Settlement Class Members entitled to Settlement Class Member Payments in accordance with the formula outlined in the Settlement Agreement. Current accountholders of Defendant will receive a credit to their Accounts for the amount they are entitled to receive. Former acocuntholders of Defendant shall receive a check from the Settlement Administrator. Settlement Class Members entitled to forgiveness of Uncollected Retry NSF Fees shall receive this benefit automatically.

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

No. If you received this Notice, then you may be entitled to receive a payment for a Retry NSF Fee and/or forgiveness of Uncollected Retry NSF Fees without having to make a claim, unless you choose to exclude yourself from the settlement, or "opt out."

14. When will I receive my payment?

The Court will hold a Final Approval Hearing on _____, at _____ to consider whether the Settlement should be approved. If the Court approves the Settlement, then payments should be made or credits should be issued within 90 days of the Effective Date. However, if someone objects to the Settlement, and the objection is sustained, then there is no Settlement. Even if all objections are overruled and the Court approves the Settlement, an objector could appeal, and it might take months or even years to have the appeal resolved, which would delay any payment.

EXCLUDING YOURSELF FROM THE SETTLEMENT

15. How do I exclude myself from the Settlement?

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

To opt out, you **must** send a letter to the Settlement Administrator that you want to be excluded. Your letter can simply say "I hereby elect to be excluded from the settlement in the *Perks et al v. TD Bank, N.A.* class action." Be sure to include your name, the last four digits of your account number(s) or former account number(s), address, telephone number, and email address. Your exclusion or opt out request must be postmarked by _____, and sent to:

Perks et al v. TD Bank, N.A.
Attn:
ADDRESS OF THE SETTLEMENT ADMINISTRATOR

16. What happens if I opt out of the Settlement?

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

OBJECTING TO THE SETTLEMENT

17. How do I notify the Court that I do not like the Settlement?

You can object to the settlement or any part of it that you do not like **IF** you do not exclude yourself, or opt-out, from the Settlement. (Settlement Class members who exclude themselves from the Settlement have no right to object to how other Settlement Class members are treated.) To object, you **must** send a written document by mail or private courier (e.g., Federal Express) to

the Clerk of Court, Settlement Administrator, Class Counsel, and Defendant's Counsel at the addresses below. Your objection must include the following information:

a. the name of the Action;

b. the objector's full name, address and telephone number;

c. all grounds for the objection, accompanied by any legal support for the objection known to the objector or objector's counsel;

d. the number of times the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which the objector has made such objection, and a copy of any orders related to or ruling upon the objector's prior objections that were issued by the trial and appellate courts in each listed case;

e. the identity of all counsel who represent the objector, including any former or current counsel who may be entitled to compensation for any reason related to the objection to the Settlement or fee application;

f. the number of times in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the five years preceding the date that of the filed objection, the caption of each case in which counsel or the firm has made such objection and a copy of any orders related to or ruling upon counsel's or the counsel's law firm's prior objections that were issued by the trial and appellate courts in each listed case in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the preceding five years;

g. any and all agreements that relate to the objection or the process of objecting—whether written or oral—between objector or objector's counsel and any other person or entity;

h. the identity of all counsel (if any) representing the objector who will appear at the Final Approval Hearing;

i. a list of all persons who will be called to testify at the Final Approval Hearing in support of the objection;

j. a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing; and

k. the objector's signature (an attorney's signature is not sufficient).

All objections must be post-marked no later than _____, and must be mailed to the Settlement Administrator as follows:

CLERK OF COURT	SETTLEMENT ADMINISTRATOR	CLASS COUNSEL	DEFENDANT'S COUNSEL

Clerk of the United States District Court for the Southern District of New York, which is located at 100 State Street, Rochester, NY 14614	Perks et al v. TD Bank, N.A. Settlement Administrator Attn: ADDRESS OF THE SETTLEMENT ADMINISTRATOR	Lynn A. Toops Vess A. Miller Cohen & Malad, LLP 1 Indiana Square Suite 1400 Indianapolis, IN 46204 *and* Jeffrey D. Kaliel Sophia Goren Gold Kaliel PLLC 1875 Connecticut Ave NW 10th Floor Washington, DC 20009	Danielle N. Oakley O'Melveny & Myers LLP 610 Newport Center Drive Ste 1700 Newport Beach, CA 92660 *and* Daniel L. Cantor O'Melveny & Myers LLP Times Square Tower 7 Times Square New York, NY 10036

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

Objecting is telling the Court that you do not believe the Settlement is fair, reasonable, and adequate for the Settlement Class, and asking the Court to reject it. You can object only if you do not opt out of the Settlement. If you object to the Settlement and do not opt out, then you are entitled to a payment for a Retry NSF Fee and/or forgiveness of Uncollected Retry NSF Fees if the Settlement is approved, but you will release claims you might have against Defendant. Excluding yourself or opting-out is telling the Court that you do not want to be part of the Settlement, and do not want to receive a payment for a Retry NSF Fee or forgiveness of Uncollected Retry NSF Fees, or release claims you might have against Defendant for the claims alleged in this lawsuit.

19. What happens if I object to the Settlement?

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

THE COURT'S FINAL APPROVAL HEARING

20. When and where will the Court decide whether to approve the Settlement?

The Court will hold a Final Approval or Fairness Hearing at ___ on _____, 2021 at the United States District Court for the Southern District of New York, which is located at _____. At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. If there are objections, the Court will consider them. The Court may also decide how much to award Class Counsel for attorneys' fees and litigation costs and the amount of the Service Award to the Class Representatives. The hearing may be virtual, in which case the instructions to participate shall be posted on the website at www._____.

21. Do I have to come to the hearing?

No. Class Counsel will answer any questions the Court may have. You may attend if you desire to do so. If you have submitted a timely and valid objection, the Court will consider it whether or not you attend.

22. May I speak at the hearing?

If you have objected, you may ask the Court for permission to speak at the Final Approval Hearing. To do so, you must include with your objection, described in Question 17, above, the statement, "I hereby give notice that I intend to appear at the Final Approval Hearing."

THE LAWYERS REPRESENTING YOU

23. Do I have a lawyer in this case?

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

24. Do I have to pay the lawyer for accomplishing this result?

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

25. Who determines what the attorneys' fees will be?

The Court will be asked to approve the amount of attorneys' fees at the Fairness Hearing. Class Counsel will file an application for attorneys' fees and costs and will specify the amount being sought as discussed above. You may review a physical copy of the fee application at the website established by the Settlement Administrator, or by requesting the court record online from the United States District Court for the Southern District of New York at https://www.nysd.uscourts.gov/document-requests.

GETTING MORE INFORMATION

This Notice only summarizes the proposed Settlement. More details are contained in the Settlement Agreement, which can be viewed/obtained online at [WEBSITE] or at the Office of the Clerk of the United States District Court for the Southern District of New York, which is located at _____, by asking for the Court file containing the Motion For Preliminary Approval of Class Settlement (the settlement agreement is attached to the motion) or obtaining a copy online at https://www.nysd.uscourts.gov/document-requests.

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

Perks et al v. TD Bank, N.A.
Settlement Administrator
Attn:

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

COHEN & MALAD, LLP
Lynn A. Toops, Esq.
Vess A. Miller, Esq.
Richard E. Shevitz, Esq.
1 Indiana Square
Suite 1400
Indianapolis, IN 46204
317-636-6481

Jeffrey D. Kaliel
Sophia Goren Gold
KALIEL PLLC

1875 Connecticut Ave NW
10th Floor
Washington, DC 20009
202-350-4783
jkaliel@kalielpllc.com
sgold@kalielpllc.com

Jeffrey Ostrow
Jonathan M. Streisfeld
KOPELOWITZ OSTROW P.A.
One West Las Olas Boulevard
Suite 500
Fort Lauderdale, Florida 33301
954-525-4100
954-525-4300
ostrow@kolawyers.com
streisfeld@kolawyers.com

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

Exhibit 3 – Preliminary Approval Order

Perks et al v. TD Bank, N.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-DAB

PRELIMINARY APPROVAL ORDER

Plaintiffs Mary Jennifer Perks and Maria Navarro-Reyes and Defendant TD Bank, N.A., by their respective counsel, have submitted a Settlement Agreement and Releases (the "Settlement") to this Court, and Plaintiffs have moved under Federal Rule of Civil Procedure 23(e) for an order: (1) certifying the Settlement Class for purposes of settlement only and appointing Plaintiffs as the Class Representatives and their counsel as Class Counsel; (2) preliminarily approving the Settlement; (3) approving the Notice Plan; (4) appointing RG/2 Claims Administration LLC as Settlement Administrator and directing it to commence the Notice Plan; and (5) scheduling a final approval hearing to consider final approval of the settlement and any application for attorneys' fees, expenses, and Class Representative service awards. The Court has considered the terms of the Settlement, the exhibits to the Settlement, the record of proceedings, and all papers and arguments submitted in support, and now finds that the motion should be, and hereby is, **GRANTED**.

ACCORDINGLY, THE COURT FINDS AND ORDERS:

1. This Court has jurisdiction over the subject matter of this lawsuit and jurisdiction over the Plaintiffs and Defendant (the "Parties").

2. Capitalized terms not otherwise defined in this Order have the definitions set forth in the Settlement.

SUMMARY OF THE LITIGATION AND SETTLEMENT

3. On February 19, 2019, Plaintiffs filed their Amended Class Action Complaint alleging claims relating to Defendant's practice of charging non-sufficient funds fees on checks and Automated Clearing House ("ACH") transactions that were returned unpaid after having been re-submitted by a merchant after having been previously returned unpaid by Defendant for insufficient funds. Plaintiffs claimed this practice breached their contract with Defendant and violated various other laws.

4. On March 22, 2019, Defendant filed a Motion to Dismiss Plaintiffs' Amended Class Action Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), which the Parties fully briefed. On March 17, 2020, the Court entered a Memorandum Opinion and Order in which the Court granted in part and denied in part Defendant's Motion to Dismiss. The Court denied the Motion to Dismiss Plaintiffs' breach of contract claim and granted the Motion to Dismiss Plaintiffs' breach of implied covenant of good faith, New York General Business Law § 349, and unjust enrichment claims. On April 14, 2020, Defendant filed its Answer and Defenses to the Amended Class Action Complaint.

5. Following the Court's Memorandum and Order on the Motion to Dismiss, the Parties engaged in significant discovery efforts, involving several sets of written discovery served by and on each party, multiple rounds of data and document production, numerous conferences of counsel to resolve potential discovery disputes, various reports to the Court regarding the status of discovery, and multiple depositions. On October 2, 2020, the Parties

requested that the Court stay the litigation pending a November 20, 2020, mediation before Professor Eric Green of Resolutions, LLC. The Court vacated the remaining discovery deadlines that same day.

6. The Parties participated in a full-day mediation session on November 20, 2020 with Professor Green. The Parties did not settle at the mediation, but they agreed to reconvene the mediation after additional analysis of transactional data.

7. The Parties participated in a second mediation session on January 26, 2021. The Parties did not reach agreement that day, but shortly thereafter reached an agreement in principle. They then negotiated the detailed Settlement and exhibits that are now before the Court.

8. The Settlement provides, among other things, that as consideration for the release from Settlement Class Members, Defendant will pay $20,750,000 in cash into a Settlement Fund, pay Settlement Administrative Costs up to $500,000, and forgive $20,750,000 in amounts owed by the Settlement Class Members to the Defendant for accounts that were closed with a negative balance ("Forgiveness"). The Settlement Fund (after deducting Court-approved costs) will be distributed pro rata to Settlement Class Members in accordance with the procedures in the Settlement. Settlement Class Members who have a current account with Defendant will receive their payment by a credit to their account, while Settlement Class Members whose account is closed will be mailed a check. Forgiveness will be applied to accounts by Defendant. Settlement Class Members are not required to submit a claim in order to receive any of this relief.

9. The Settlement also provides for emailed and mailed Notice to the Settlement Class and the proposed Notices are included as exhibits to the Settlement.

PRELIMINARY APPROVAL

10. Federal Rule of Civil Procedure 23(e) requires court approval of class action settlements. In general, the approval process involves three stages: (1) notice of the settlement to

the class after "preliminary approval" by the Court; (2) an opportunity for class members to opt out of, or object to, the proposed settlement; and (3) a subsequent hearing at which the Court grants "final approval" upon finding that the settlement is "fair, reasonable, and adequate," after which judgment is entered, class members receive the benefits of the settlement, and the defendant obtains a release from liability. Fed. R. Civ. P. 23(e)(1)–(2), (4)–(5).

11. In deciding whether to grant "preliminary approval" to a proposed settlement, the Court evaluates two issues: (1) whether "the court will likely be able to" grant final approval to the settlement as a "fair, reasonable, and adequate" compromise, so that it makes sense to give notice to the proposed class members; and (2) whether "the court will likely be able to" certify the class for purposes of entering judgment on the settlement. Fed. R. Civ. P. 23(e)(1)(B).

I. The Court will "likely be able to" grant final approval to the Settlement as "fair, reasonable, and adequate."

12. This Circuit has recognized a "strong judicial policy in favor of settlements, particularly in the class action context." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009). "The compromise of complex litigation is encouraged by the courts and favored by public policy." *Springer v. Code Rebel Corp.*, No. 16-CV-3492 (AJN), 2018 WL 1773137, at *2 (S.D.N.Y. Apr. 10, 2018) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.* ("*Visa*"), 396 F.3d 96, 117 (2d Cir. 2005) (citation omitted)). "Courts encourage early settlement of class actions, when warranted, because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere." *Hadel v. Gaucho, LLC*, No. 15 CIV. 3706 (RLE), 2016 WL 1060324, at *2 (S.D.N.Y. Mar. 14, 2016) (citations omitted). A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Visa*, 396 F.3d at 116 (quoting *Manual for Complex Litigation (Third)* § 30.42 (1995)).

13. Under Federal Rule of Civil Procedure 23(e)(2), as amended in December 2018, in considering whether a proposed settlement is "fair, reasonable, and adequate," the Court considers whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

14. Under this standard, the Court finds that it will "likely be able to" grant final approval to the Settlement as "fair, reasonable, and adequate," such that the Settlement warrants preliminary approval and dissemination of notice to the Settlement Class so that Settlement Class Members may express any objections to the Settlement or decide whether to opt-out of the Settlement or participate in it. The Settlement appears at this preliminary approval stage to be procedurally fair, reasonable, and adequate in that the Class Representatives and Class Counsel have adequately represented the Settlement Class in litigating the merits of the dispute and in obtaining a Settlement of significant value through arm's-length negotiations by sophisticated counsel and under the auspices of a sophisticated mediator. Fed. R. Civ. P. 23(e)(2)(A)–(B).

Likewise, the Settlement appears at this preliminary approval stage to be substantively fair, reasonable, and adequate in that the relief provided is substantial particularly when taking into account the costs, risks, and delays of trial. Fed. R. Civ. P. 23(e)(2)(C). The proposed method of distributing relief to the Settlement Class Members is through direct deposits or direct mailed check and/or forgiveness of amounts owed to Defendant, meaning Settlement Class Members do not need to make a claim and will receive payments and/or Forgiveness. *Id.* Attorneys' fees will be paid only after final approval and only by approval of the Court, which will consider any request for fees in conjunction with final approval. *Id.* The Parties have represented that there are no agreements to be identified under Fed. R. Civ. P. 23(e)(3). *Id.* Finally, the proposal treats Settlement Class Members equitably relative to one another because the amount of recovery is based on the amount of alleged NSF Retry Fees, and cash payment and Forgiveness will be distributed pro rata based on the number of NSF Retry Fees charged to a Settlement Class Member, meaning Settlement Class Members who allegedly incurred more damages will receive more under the Settlement. Fed. R. Civ. P. 23(e)(2)(D).

II. The Court will "likely be able to" certify the Settlement Class for purposes of entering judgment on the Settlement.

15. In considering whether the Court will "likely be able to" certify the Settlement Class for purposes of entering judgment on the Settlement, the Court must determine whether the Settlement Class likely meets the requirements for class certification under Federal Rule of Civil Procedure 23(a) (numerosity, commonality, typicality, and adequacy) and any one of the subsections of Federal Rule of Civil Procedure 23(b), here subsection 23(b)(3) (predominance and superiority).

16. The Court finds, for settlement purposes only, that it will likely be able to certify the proposed Settlement Class, defined as:

> All current and former holders of TD Bank, N.A. consumer checking Accounts who, during the Class Period, were assessed at least one Retry NSF Fee. Excluded from the Settlement Class are Defendant, its parents, subsidiaries, affiliates, officers and directors; all Settlement Class members who make a timely election to be excluded; and all judges assigned to this litigation and their immediate family members.

17. Specifically, the Court finds for settlement purposes that the Settlement Class likely satisfies the following requirements of Federal Rule of Civil Procedure 23:

(a)(1) Numerosity: There are tens of thousands of members of the Settlement Class spread across numerous states. Joinder is therefore impracticable. *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (holding that "[n]umerosity is presumed for classes larger than forty members. numerosity is presumed at a level of 40 members").

(a)(2) Commonality: There are questions of law and fact common to the members of the Settlement Class, specifically the class-wide question of whether Defendant's uniform practice of processing NSF fees violated its standard form contract. Because of this, there exists "the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

(a)(3) Typicality: The Class Representatives' claims are typical of the claims of the Settlement Class. The Class Representatives' claim is that they were allegedly charged multiple NSF fees on a single item, which they allege violated Defendant's standard form contract. These are the same claims as the claims of the Settlement Class. *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993) (typicality is satisfied where "the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented.").

(a)(4) Adequacy: The Class Representatives will fairly and adequately protect the interests of the Settlement Class because they share the same claims as the Settlement Class, have no interests in conflict with the Settlement Class, and Class Counsel is qualified to conduct the litigation. *Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997) (holding that adequacy is satisfied where "there is no conflict of interest between the named plaintiffs and other members of the plaintiff class" and "class counsel is qualified, experienced, and generally able to conduct the litigation").

(b)(3) Predominance: Questions of law and fact common to the Settlement Class predominate over any questions affecting only individual members, specifically the predominate question of whether Defendant's uniform practice of processing NSF fees violated its standard form contract is common to all members of the Settlement Class and overwhelms any potentially individual issues that may arise. *See In re Nassau County Strip Search Cases*, 461 F.3d 219, 227-28 (2d Cir. 2006) (holding that predominance is satisfied where "issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof").

(b)(3) Superiority: A class action is superior to other available methods for fairly and efficiently adjudicating the controversy, particularly because the individual claims are numerous and small-value and therefore the class action device provides a superior method for their resolution in a single proceeding. *See Sykes v. Mel Harris & Assocs. LLC*, 285 F.R.D. 279, 294 (S.D.N.Y. 2012) (noting that "the class members' interests in litigating separate actions is likely minimal given their potentially limited means with which to do so and the prospect of relatively small recovery in individual actions").

18. Additionally, the Court finds that the Settlement Class is ascertainable because it is defined by reference to objective criteria, *In re Petrobras Securities Litigation*, 862 F.3d 250, 257 (2d Cir. 2017), and the Court finds that it will likely be able to appoint Plaintiffs' Counsel as Class Counsel under Federal Rule of Civil Procedure 23(g).

19. Having found that (1) "the court will likely be able to" grant final approval to the settlement as a "fair, reasonable, and adequate" compromise, so that it makes sense to give notice to the proposed class members; and (2) "the court will likely be able to" certify the class for purposes of entering judgment on the settlement. The Court hereby **GRANTS** preliminary approval to the Settlement.

NOTICE TO THE SETTLEMENT CLASS

20. Upon granting preliminary approval under Federal Rule of Civil Procedure 23(e)(1), the Court "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means." Fed. R. Civ. P. 23(c)(2)(B).

21. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B).

22. "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Visa*, 396 F.3d at 114 (quotation omitted).

23. The Court finds that the Notice Plan, including the forms of Notice attached to the Settlement and the plan for distribution of the Notice by email and mail, satisfy these requirements and Due Process and constitute "the best notice that is practicable under the circumstances." The Court appoints RG/2 Claims Administration LLC as Settlement Administrator and directs that the Notice Plan be implemented as set forth in the Settlement.

24. Within thirty (30) calendar days of Preliminary Approval, Defendant will provide the Settlement Administrator with the following information, which will be kept strictly confidential between the Administrator and Defendant, for each Class Member: (i) name; (ii) number of Retry NSF Fees per account; (iii) relevant refund and charge-off information; (iv) last known e-mail address; (v) last known mailing address; (vi) whether the Account remains open; and (vii) if the Account no longer remains open, the balance remaining due and owing. The Settlement Administrator shall use this information solely for the purpose of administering the Settlement and shall keep the information strictly confidential.

25. Within sixty (60) calendar days of Preliminary Approval, the Settlement Administrator shall send the Class Notices in the forms attached to the Settlement to the Class Members. The Settlement Administrator shall send the Email Notice to all Class Members for whom Defendant has provided the Settlement Administrator with an e-mail address. The Settlement Administrator shall send the Postcard Notice to all Class Members for whom

Defendant does not provided an email address to the Settlement Administrator and to all Class Members to whom the Settlement Administrator sent Email Notice but for whom the Settlement Administrator receives notice of an undeliverable email. The Postcard Notice shall be mailed after the Settlement Administrator updates mailing addresses provided by Defendant with the National Change of Address database and other commercially feasible means. The Settlement Administrator shall also maintain a website containing the Complaint, the "long-form notice" attached to the Settlement, Plaintiffs' motion seeking Preliminary Approval, this Preliminary Approval Order, Plaintiffs' motion seeking Final Approval, and the Final Approval Order until at least ninety (90) calendar days after Final Approval. The Settlement Administrator shall send the "long-form notice" by mail to any Class Member who requests a copy.

PROCEDURES FOR OPTING OUT OF OR OBJECTING TO THE SETTLEMENT

26. A member of the Settlement Class may opt-out of the Settlement Class at any time prior to the Opt-Out Deadline, provided the opt-out notice that must be sent to the Settlement Administrator is postmarked no later than the Opt-Out Deadline. Any Settlement Class Member who does not timely and validly request to opt out shall be bound by the terms of this Agreement. If an Account has more than one Account Holder, and if one Account Holder excludes himself or herself from the Settlement Class, then all Account Holders on that Account shall be deemed to have opted out of the Settlement with respect to that Account, and no Account Holder shall be entitled to a payment under the Settlement.

27. Except for Class Members who opt out of the Settlement Class in compliance with the foregoing, all Class Members will be deemed to be Settlement Class Members for all purposes, the Final Approval Order, and the releases set forth in the Settlement.

28. Objections to the Settlement, to the application for attorneys' fees and costs, and/or to the Service Award must be mailed to the Clerk of the Court, Class Counsel,

Defendant's counsel, and the Settlement Administrator. For an objection to be considered by the Court, the objection must be submitted no later than the Objection Deadline, as specified in the Notice. If submitted by mail, an objection shall be deemed to have been submitted when posted if received with a postmark date indicated on the envelope if mailed first-class postage prepaid and addressed in accordance with the instructions. If submitted by private courier (e.g., Federal Express), an objection shall be deemed to have been submitted on the shipping date reflected on the shipping label. For an objection to be considered by the Court, the objection must also set forth: the name of the Action; the objector's full name, address and telephone number; all grounds for the objection, accompanied by any legal support for the objection known to the objector or objector's counsel; the number of times the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which the objector has made such objection, and a copy of any orders related to or ruling upon the objector's prior objections that were issued by the trial and appellate courts in each listed case; the identity of all counsel who represent the objector, including any former or current counsel who may be entitled to compensation for any reason related to the objection to the Settlement or fee application; the number of times in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the five years preceding the date that of the filed objection, the caption of each case in which counsel or the firm has made such objection and a copy of any orders related to or ruling upon counsel's or the counsel's law firm's prior objections that were issued by the trial and appellate courts in each listed case in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the preceding five years; any and all agreements that relate to the objection or the process of objecting—whether written or oral—between objector or objector's

counsel and any other person or entity; the identity of all counsel (if any) representing the objector who will appear at the Final Approval Hearing; a list of all persons who will be called to testify at the Final Approval Hearing in support of the objection; a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing; and the objector's signature (an attorney's signature is not sufficient). Class Counsel and/or Defendant may conduct limited discovery on any objector or objector's counsel consistent with the Federal Rules of Civil Procedure.

29. Except for Settlement Class Members who have timely asserted an objection to the Settlement, all Settlement Class Members shall be deemed to have waived all objections and opposition to its fairness, reasonableness, and adequacy.

MOTIONS FOR FINAL APPROVAL, FEES, EXPENSES, AND SERVICE AWARD

30. Plaintiffs shall file their Motion for Final Approval of the Settlement, inclusive of Class Counsel's application for attorneys' fees and costs, for a Service Award for the Class Representatives, and for all Settlement Administration Costs, no later than 60 days after this Order is entered. At the Final Approval Hearing, the Court will hear argument on Plaintiff's Motion for Final Approval of the Settlement, and on Class Counsel's application for attorneys' fees and expenses, for the Service Award for the Class Representatives, and for all Settlement Administration Costs.

FINAL APPROVAL HEARING

31. The Court will hold a Final Approval Hearing on _____, 2021, at __ a.m./p.m., in Courtroom 443 of the Thurgood Marshall United States Courthouse, 40 Foley Square, New York, NY 10007, or by videoconference or teleconference if determined by separate order, to assist the Court in determining whether to grant Final Approval to the

Settlement, enter the Final Approval Order and Judgment, and grant any motions for fees, expenses, and service awards.

SCHEDULE OF DEADLINES

32. The Court sets the following deadlines:

Event	**Date**
Deadline for the Settlement Administrator to serve on the appropriate government officials the notice required by 28 U.S.C.§ 1715	May 27, 2021
Deadline for Defendant to pay $20,750,000 in cash into the Escrow Account	No later than 14 days from the date of this Order
Deadline for Defendant to provide the Settlement Administrator with the information required by paragraph 75 of the Settlement Agreement	No later than 30 days from the date of this Order
Deadline for Settlement Administrator to Mail and E-mail Notice to Class Members	No later than 60 days from the date of this Order
Deadline for any petition for an award of attorneys' fees, costs, and service awards	No later than 60 days from the date of this Order
Opt-Out Deadline	120 days from the date of this Order
Objection Deadline	120 days from the date of this Order
Deadline for Motion for Final Approval	130 days from the date of this Order
Final Approval Hearing	_____ (approximately 180 days from the date of this Order)

SO ORDERED.

Date:

HON. VALERIE CAPRONI
United States District Judge

Exhibit 4 – Final Approval Order

Perks et al v. TD Bank, N.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-DAB

FINAL APPROVAL ORDER

Plaintiffs Mary Jennifer Perks and Maria Navarro-Reyes and Defendant TD Bank, N.A., by their respective counsel, have submitted a Settlement Agreement and Releases (the "Settlement") to this Court, and Plaintiffs have moved under Federal Rule of Civil Procedure 23(e) for an order: (1) certifying the Settlement Class for purposes of settlement only and appointing Plaintiffs as the Class Representatives and their counsel as Class Counsel; and (2) granting final approval to the Settlement. The Court has considered the terms of the Settlement, the exhibits to the Settlement, the record of proceedings, and all papers and arguments submitted in support, and any objections, and now finds that the motion should be, and hereby is, **GRANTED**.

ACCORDINGLY, THE COURT FINDS AND ORDERS:

1. This Court has jurisdiction over the subject matter of this lawsuit and jurisdiction over the Plaintiffs and Defendant (the "Parties").

2. Capitalized terms not otherwise defined in this Order have the definitions set forth in the Settlement.

SUMMARY OF THE LITIGATION AND SETTLEMENT

3. On February 19, 2019, Plaintiffs filed their Amended Class Action Complaint alleging claims relating to Defendant's practice of charging multiple non-sufficient funds fees on checks and Automated Clearing House ("ACH") transactions that were returned unpaid after having been re-submitted by a merchant after having been previously returned unpaid by Defendant for insufficient funds. Plaintiffs claimed this practice breached their contract with Defendant and violated various other laws.

4. On March 22, 2019, Defendant filed a Motion to Dismiss Plaintiffs' Amended Class Action Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), which the Parties fully briefed. On March 17, 2020, the Court entered a Memorandum Opinion and Order in which the Court granted in part and denied in part Defendant's Motion to Dismiss. The Court denied the Motion to Dismiss Plaintiffs' breach of contract claim and granted the Motion to Dismiss Plaintiffs' breach of implied covenant of good faith, New York General Business Law § 349, and unjust enrichment claims. On April 14, 2020, Defendant filed its Answer and Defenses to the Amended Class Action Complaint.

5. Following the Court's Memorandum and Order on the Motion to Dismiss, the Parties engaged in significant discovery efforts, involving several sets of written discovery served by and on each party, multiple rounds of data and document production, numerous conferences of counsel to resolve potential discovery disputes, various reports to the Court regarding the status of discovery, and multiple depositions.

6. On October 2, 2020, the Parties requested that the Court stay the litigation pending a November 20, 2020 mediation before Professor Eric Green of Resolutions, LLC. The Court vacated the remaining discovery deadlines the same day.

7. The Parties participated in a full-day mediation session on November 20, 2020, with Professor Green. The Parties did not settle at the mediation, but they agreed to reconvene the mediation after additional analysis of transactional data.

8. The Parties participated in a second mediation session on January 26, 2021. The Parties did not reach agreement that day, but shortly thereafter reached an agreement in principle. They then negotiated the detailed Settlement and exhibits that are now before the Court.

9. The Settlement provides, among other things, that as consideration for the release from Settlement Class Members, Defendant will pay $20,750,000 in cash into a Settlement Fund; pay Settlement Administrative Costs up to $500,000; and forgive $20,750,000 in amounts owed by the Settlement Class Members to the Defendant for accounts that were closed with a negative balance ("Forgiveness"). The Settlement Fund (after deducting the Court-approved costs) will be distributed pro rata to Settlement Class Members in accordance with the procedures in the Settlement. Settlement Class Members who have a current account with Defendant will receive their payment by a credit to their account, while Settlement Class Members whose Account with Defendant is closed will be mailed a check. Forgiveness will be applied to accounts by Defendant. Settlement Class Members are not required to submit a claim in order to receive any of this relief.

NOTICE OF THE SETTLEMENT

10. The Settlement Administrator has provided a declaration showing that the Notice Plan was administered in accordance with the Settlement and the Preliminary Approval Order. The Court therefore finds that the Notice Plan constituted the best notice practicable under the circumstances and fulfills the requirements of Federal Rule of Civil Procedure 23 and Due Process.

FINAL APPROVAL

11. Federal Rule of Civil Procedure 23(e) requires court approval of class action settlements. The final stage in the process requires the Court to find that the settlement is "fair, reasonable, and adequate" and that the Settlement Class meets the requirements for class certification under Federal Rule of Civil Procedure 23(a) and one subsection of 23(b), here subsection 23(b)(3). Fed. R. Civ. P. 23(e). The Court finds that each of these requirements is met.

I. The Settlement is "fair, reasonable, and adequate."

12. This Circuit has recognized a "strong judicial policy in favor of settlements, particularly in the class action context." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009). "The compromise of complex litigation is encouraged by the courts and favored by public policy." *Springer v. Code Rebel Corp.*, No. 16-CV-3492 (AJN), 2018 WL 1773137, at *2 (S.D.N.Y. Apr. 10, 2018) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.* ("*Visa*"), 396 F.3d 96, 117 (2d Cir. 2005) (citation omitted)). "Courts encourage early settlement of class actions, when warranted, because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere." *Hadel v. Gaucho, LLC*, No. 15 CIV. 3706 (RLE), 2016 WL 1060324, at *2 (S.D.N.Y. Mar. 14, 2016) (citations omitted). A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Visa*, 396 F.3d at 116 (quoting *Manual for Complex Litigation (Third)* § 30.42 (1995)).

13. Under Federal Rule of Civil Procedure 23(e)(2), as amended in December 2018, in considering whether a proposed settlement is "fair, reasonable, and adequate," the Court considers whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

14. Under this standard, the Court finds that the Settlement is "fair, reasonable, and adequate." The Settlement is procedurally fair, reasonable, and adequate in that the Class Representatives and Class Counsel have adequately represented the Settlement Class in litigating the merits of the dispute and in obtaining a Settlement of significant value through arm's-length negotiations by sophisticated counsel and under the auspices of a sophisticated mediator. Fed. R. Civ. P. 23(e)(2)(A)–(B). Likewise, the Settlement is substantively fair, reasonable, and adequate in that the relief provided is substantial particularly when taking into account the costs, risks, and delays of trial. Fed. R. Civ. P. 23(e)(2)(C). The proposed method of distributing relief to the Settlement Class Members is through direct deposits or direct mailed check and/or Forgiveness, meaning Settlement Class Members do not need to make a claim and will receive payments and/or Forgiveness. *Id.* Attorneys' fees will be separately determined by the Court. *Id.* The Parties have represented that there are no agreements to be identified under Fed. R. Civ. P. 23(e)(3). *Id.* Finally, the proposal treats Settlement Class Members equitably relative to one

another because the amount of recovery is based on the amount of alleged NSF Retry Fees, and cash payment and Forgiveness will be pro rata based on the number of NSF Retry Fees charged to a Settlement Class Member, meaning Settlement Class Members who allegedly incurred more damages will receive more under the Settlement. Fed. R. Civ. P. 23(e)(2)(D).

II. The Settlement Class meets the requirements for class certification for purposes of entering judgment on the Settlement.

15. The Court further finds that the Settlement Class meets the requirements for class certification under Federal Rule of Civil Procedure 23(a) (numerosity, commonality, typicality, and adequacy) and Federal Rule of Civil Procedure 23(b)(3) (predominance and superiority).

16. The Court therefore certifies, for settlement purposes only, the Settlement Class, defined as:

> All current and former holders of TD Bank, N.A. consumer checking Accounts who, during the Class Period, were assessed at least one Retry NSF Fee. Excluded from the Settlement Class are Defendant, its parents, subsidiaries, affiliates, officers and directors; all Settlement Class members who make a timely election to be excluded; and all judges assigned to this litigation and their immediate family members.

17. All members of the Settlement Class who validly excluded themselves pursuant to the Preliminary Approval Order are excluded from the Settlement Class and are not bound by this Final Approval Order, the Settlement, or the releases in the Settlement.

18. Pursuant to Federal Rule of Civil Procedure 23(g), the Court appoints the law firms of Cohen & Malad, LLP, Kaliel, PLLC, and Kopelowitz Ostrow, P.A., as Class Counsel and appoints Plaintiffs Mary Jennifer Perks and Maria Navarro-Reyes as the Class Representatives.

19. Specifically, the Court finds for settlement purposes that the Settlement Class satisfies the following requirements of Federal Rule of Civil Procedure 23:

(a)(1) Numerosity: There are tens of thousands of members of the Settlement Class spread across numerous states. Joinder is therefore impracticable. *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (holding that "[n]umerosity is presumed for classes larger than forty members. numerosity is presumed at a level of 40 members").

(a)(2) Commonality: There are questions of law and fact common to the members of the Settlement Class, specifically the class-wide question of whether Defendant's uniform NSF fee practices violated its standard form contract. Because of this, there exists "the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

(a)(3) Typicality: The Class Representatives' claims are typical of the claims of the Settlement Class. The Class Representatives' claim is that they were allegedly charged multiple NSF fees on a single item, which they allege violated Defendant's standard form contract. These are the same claims as the claims of the Settlement Class. *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993) (typicality is satisfied where "the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented.").

(a)(4) Adequacy: The Class Representatives will fairly and adequately protect the interests of the Settlement Class because they share the same claims as the Settlement Class, have no interests in conflict with the Settlement Class, and Class Counsel is qualified to conduct the litigation. *Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997) (holding that adequacy is satisfied where "there is no conflict of interest between

the named plaintiffs and other members of the plaintiff class" and "class counsel is qualified, experienced, and generally able to conduct the litigation").

(b)(3) Predominance: Questions of law and fact common to the Settlement Class predominate over any questions affecting only individual members, specifically the predominate question of whether Defendant's uniform practice of processing NSF fees violated its standard form contract is common to all members of the Settlement Class and overwhelms any potentially individual issues that may arise. *See In re Nassau County Strip Search Cases*, 461 F.3d 219, 227-28 (2d Cir. 2006) (holding that predominance is satisfied where "issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof").

(b)(3) Superiority: A class action is superior to other available methods for fairly and efficiently adjudicating the controversy, particularly because the individual claims are numerous and small-value and therefore the class action device provides a superior method for their resolution in a single proceeding. *See Sykes v. Mel Harris & Assocs. LLC*, 285 F.R.D. 279, 294 (S.D.N.Y. 2012) (noting that "the class members' interests in litigating separate actions is likely minimal given their potentially limited means with which to do so and the prospect of relatively small recovery in individual actions").

20. Additionally, the Court finds that the Settlement Class is ascertainable because it is defined by reference to objective criteria. *In re Petrobras Securities Litigation*, 862 F.3d 250, 257 (2d Cir. 2017).

21. The Court therefore grants final approval and directs the parties to implement all aspects of the Settlement triggered by such final approval.

DISTRIBUTION OF NET SETTLEMENT FUND AND FORGIVENESS

22. The Court hereby approves the distribution of the Net Settlement Fund and the plan for implementing Forgiveness as set forth in the Settlement. The Court orders the Parties and the Settlement Administrator to implement all payments and Forgiveness as set forth in the Settlement.

RELEASE

23. The Releasing Parties have fully and irrevocably released and forever discharged Defendant and each of its present and former parents, subsidiaries, divisions, affiliates, predecessors, successors and assigns, and the present and former directors, officers, employees, agents, insurers, members, attorneys, advisors, consultants, representatives, partners, joint venturers, independent contractors, wholesalers, resellers, distributors, retailers, predecessors, successors and assigns of each of them ("Released Parties"), of and from any and all liabilities, rights, claims, actions, causes of action, demands, damages, costs, attorneys' fees, losses and remedies, whether known or unknown, existing or potential, suspected or unsuspected, liquidated or unliquidated, legal, statutory, or equitable, based on contract, tort or any other theory, that result from, arise out of, are based upon, or relate (directly or indirectly) to the conduct, omissions, duties or matters during the Class Period that were or could have been alleged in the Action by Plaintiffs or Settlement Class Members relating in any way to the assessment of Retry NSF Fees ("Released Claims") without limitation, any claims, actions, causes of action, demands, damages, losses, or remedies relating to, based upon, resulting from, or arising out of Defendant's practices, policies and procedures related to the authorization, processing, payment, return and/or rejection of an item or any failure to adequately or clearly disclose, in one or more contracts, agreements, disclosures, or other written materials, through oral communications, or in any other manner NSF fee practices.

JUDGMENT

24. This Order resolves all issues in this lawsuit as between all parties and therefore constitutes a final judgment. The Clerk shall enter the judgment separately as provided by Federal Rule of Civil Procedure 58. The Court retains jurisdiction over the construction, interpretation, implementation, and enforcement of the Settlement and to supervise and adjudicate any disputes arising from the Settlement.

SO ORDERED.

Date:

HON. VALERIE CAPRONI
United States District Judge

EXHIBIT 2

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

JOINT DECLARATION OF LYNN A. TOOPS AND JEFFREY D. KALIEL IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF NOTICE PLAN

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. Ms. Toops submits this declaration in support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan.

2. Jeffrey D. Kaliel is the founder and partner at Kaliel Gold PLLC and is one of the attorneys of record for Plaintiffs. Mr. Kaliel submits this declaration in support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan.

I. THE LITIGATION

3. This is a nationwide consumer class action against TD Bank, N.A. ("TD Bank") concerning the improper assessment of an insufficient funds fee ("NSF Fee") on an item that had previously been returned for insufficient funds (and had an NSF Fee assessed) but was later

resubmitted by the merchant for payment again and charged an additional NSF Fee ("Retry NSF Fee").

4. On November 30, 2018, Plaintiff Mary Jennifer Perks filed a putative class action Complaint asserting claims for breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment on behalf of a nationwide class. Plaintiff Perks also brought a claim for violations of the New York General Business Law on behalf of a New York subclass. On February 5, 2019, TD Bank moved to dismiss the complaint.

5. On February 19, 2019, Plaintiff Perks filed an Amended Class Action Complaint, which added Plaintiff Maria Navarro-Reyes, added a Florida subclass, and included new allegations regarding industry usage of key contract terms as well as allegations responsive to the arguments raised in TD Bank's motion to dismiss. On March 22, 2019, TD Bank moved to dismiss the Amended Complaint. On April 19, 2019, Plaintiffs filed their response in opposition to TD Bank's motion, and, on May 10, 2019, TD Bank filed its reply in further support of the motion. While the motion was pending, both parties filed notices of supplemental authority to notify the Court of newly decided relevant authority.

6. On March 17, 2020, the Court entered a Memorandum Opinion and Order, granting in part and denying in part TD Bank's motion to dismiss. Specifically, the Court upheld Plaintiffs' claim for breach of contract but dismissed Plaintiffs' claims for breach of the implied covenant of good faith, violations of New York General Business Law § 349, and unjust enrichment. On April 14, 2020, Defendant filed its Answer and Defenses to the Amended Class Action Complaint.

A. Discovery

7. Throughout the course of this litigation, the Parties have engaged in substantial discovery, including the exchange of more than 23,400 pages of documents and years of banking data, written discovery responses, and depositions.

8. Plaintiffs served their first set of interrogatories and requests for production on TD Bank on April 15, 2020.

9. Pursuant to the Court's instruction, beginning on May 15, 2020, the parties submitted monthly discovery status reports to the Court.

10. On June 17, 2020, TD Bank served its written responses to Plaintiffs' discovery requests and, on June 18, 2020, TD Bank made a small document production. Plaintiffs quickly notified TD Bank of numerous deficiencies in its discovery responses and the parties immediately identified disputes over the scope of discovery. The parties began meeting and conferring on discovery issues such as custodial ESI searches and the production of key transactional data. As a result of the parties' meet and confer efforts, on July 1, 2020, Plaintiffs served revised written discovery to TD Bank.

11. In the July 15, 2020 joint letter reporting on the status of discovery, Plaintiffs notified the Court of their concern that they had not yet received transactional data on damages, which Plaintiffs had duly requested in their April 2020 discovery requests. On July 29, 2020, the parties appeared before the Court, and the Court ordered TD Bank to produce all transactional data regarding resubmitted transactions by August 12, 2020.

12. The parties continued to engage in frequent meet and confer efforts. Pursuant to these efforts and consistent with the Court's discovery order and instructions, TD Bank made supplemental document productions on July 15, 2020, August 5, 2020, August 21, 2020, August

28, 2020, September 15, 2020, September 16, 2020, September 22, 2020, September 26, 2020, and October 31, 2020. In total, TD Bank produced to Plaintiffs more than 23,000 pages of documents and an extensive data production that was required for Plaintiffs' expert to calculate damages in this action.

13. On July 31, 2020, TD Bank served its first set of interrogatories and requests for production on Plaintiffs. On August 31, 2020, Plaintiff Perks served her written responses to TD Bank's discovery requests and made a production of documents. On September 8, 2020, Plaintiff Navarro-Reyes served her written responses to TD Bank's discovery requests and made a production of documents.

14. Despite Plaintiffs' production of hundreds of pages of documents, TD Bank contacted Plaintiffs regarding alleged deficiencies in their discovery responses. In response to TD Bank's letter, Plaintiffs again worked with Class Counsel to ensure discovery compliance, including completing additional document searches and participating in multiple phone calls with Class Counsel. As a result of these efforts, on September 25, 2020, Plaintiffs served TD Bank with a letter providing additional details in response to TD Bank's discovery requests.

15. On September 15, 2020, the parties reported to the Court that they were continuing to attempt to address ongoing deficiencies in TD Bank's production. Despite numerous meet and confer discussions, the parties were unable to resolve the dispute and so, on September 23, 2020, Plaintiffs asked the Court to order TD Bank to produce certain discovery within two weeks. On October 1, 2020, the Court ordered the parties to meet and confer and propose to the Court a new discovery deadline by October 9, 2020. The parties scheduled a mediation and requested a stay of this action before the October 9, 2020 deadline passed.

16. In addition to written discovery, the parties also participated in depositions. On September 17, 2020, Plaintiffs took the deposition of TD Bank's Rule 30(b)(6) corporate representative and, on September 28, 2020, Plaintiff Perks sat for a full day deposition. Plaintiffs were preparing for further Rule 30(b)(6) corporate representative depositions as well as depositions of other key executives of TD Bank when the parties agreed to stay the case pending mediation.

17. In addition to the parties' extensive discovery efforts, Plaintiffs also served non-party subpoenas on twenty non-party financial institutions as well as a non-party subpoena on the National Automated Clearing House Association in order to collect evidence demonstrating standard industry usage of key contract terms. Plaintiffs' counsel received and reviewed numerous documents in response to these subpoenas and met and conferred with the financial institutions regarding the scope of the production of documents in response to the subpoenas.

II. MEDIATION AND SETTLEMENT NEGOTIATIONS

18. In an effort to reach a resolution of this matter, the parties selected Professor Eric Green to conduct a private mediation in this case and, on October 2, 2020, requested a stay of all pretrial deadlines the mediation, which the Court granted.

19. The parties submitted mediation briefs in support of their positions to Professor Green and attended multiple pre-mediation calls to prepare for the mediation. On November 20, 2020, the parties participated in a day-long mediation via videoconference. The parties were not able to reach an agreement at this first mediation.

20. Following the November 20 mediation, the parties and their experts performed additional data analysis and legal research. Specifically, the experts' analysis of the transactional data focused on automated clearinghouse items coded as "Retry" payments prior to NACHA's

adoption of such labeling requirement; ACH items not coded as "Retry" payments; refunded fees; and accounts that TD Bank closed due to a negative balance.

21. Following these additional analyses, the parties submitted additional mediation briefs to Professor Green in preparation for a second mediation on January 26, 2021, which occurred via videoconference. Again, the parties were unable to resolve the matter at this second mediation. However, Professor Green subsequently made a mediator's proposal for settlement, which the parties accepted.

22. On February 1, 2021, the parties notified the Court of their agreement in principle, which allowed Plaintiffs to perform confirmatory discovery regarding certain aspects of the data and analysis performed by TD Bank's experts. As part of this confirmatory discovery, on February 19, 2021, Class Counsel extensively interviewed TD Bank's experts.

23. The parties worked together for over three months to negotiate the terms of a full settlement agreement, which Plaintiffs reviewed and approved.

III. THE PROPOSED SETTLEMENT

24. The Settlement Class is defined to include tens of thousands of members across numerous states who were charged the fees challenged in this action.

25. The Settlement provides two key monetary benefits to Settlement Class Members. First, TD Bank agrees to make a cash payment of $20,750,000 into a Settlement Fund. Second, TD Bank will forgive $20,750,000 in uncollected fees owed by Settlement Class Members whose accounts were closed at TD Bank. These monetary benefits provide meaningful relief to Settlement Class Members and represent a superb result.

26. TD Bank made clear to Plaintiffs that it intended to vigorously defend against Plaintiffs' claims up through trial. While Plaintiffs would have sought a refund or forgiveness of

every improperly assessed fee incurred by Settlement Class Members, according to Plaintiffs' expert's calculation, the $41.5 million recovery represents approximately 42% of that damages figure.

27. Specifically, Plaintiffs' expert determined that the cash recovery of $20.75 million represents 41% of all Retry NSF Fees assessed and paid by Settlement Class Members, and the debt forgiveness of $20.75 million represents 42% of all Retry NSF Fees assessed but not yet paid and still owing to TD Bank. And under Defendant's damages model, the $41.5 million recovery represents approximately 70% of the damages.

28. TD Bank is also responsible for paying notice and settlement administration costs up to $500,000 on top of the total $41.5 million recovery.

29. In selecting a settlement administrator to provide notice and distribute the Settlement benefits, Class Counsel issued a request for proposal to two leading class action settlement notice and administration firms: Epiq and RG/2 Claims Administration LLC ("RG/2"). Class Counsel compared the bids for any inconsistency in services delivered and then negotiated price with both firms. Because RG/2 was lower-cost, Class Counsel selected RG/2 to serve as Settlement Administrator. RG/2 also agreed to cap notice costs at a specified level.

IV. DISCLOSURE CHANGE

30. Moreover, beginning in April 2021, TD Bank has amended its standardized account agreement with customers to, for the first time ever, disclose that they may be charged multiple NSF fees on an item:

> Please be aware that third parties sometimes re-submit items that we return unpaid. Each re-submission constitutes a separate item. You agree that if any transaction is submitted for payment again after having previously been returned unpaid by us, an Overdraft Fee or Return Item Fee may be assessed each time the transaction is submitted for payment and your available balance is insufficient to pay the item.

Exhibit A at 10. Although this amendment is not part of the Settlement, it is almost certainly a result of this litigation.

V. CLASS COUNSEL

31. The Settlement in this action provides meaningful relief to Settlement Class Members and was made possible only by Class Counsel's extensive experience in class action litigation in general and in litigation against financial institutions in particular.

32. Class Counsel have emerged as leaders in nationwide litigation against financial institutions over the assessment of improper fees. As detailed in Class Counsel's firm resumes, attached hereto as **Exhibits B-E**, Class Counsel also have extensive experience in a wide range of consumer protection litigation.

A. Cohen & Malad, LLP

33. For the last 50 years, Cohen & Malad, LLP ("C&M") has served as class counsel in numerous local, statewide, multi-state, nationwide, and even international class actions. *See, e.g.*, *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (settlement of $1.25 billion for claims relating to conversion of bank accounts and property of victims of the Holocaust); *Raab v. R. Scott Waddell, in his official capacity as Commissioner of the Indiana Bureau of Motor Vehicles et al.*, Nos. 49D12-1303-PL-008769, 49D11-1310-PL-038001 (Ind. Super. Ct.) (settlements, including after trial and judgment, of approximately $100 million in overcharges for motor vehicle and license fees). C&M has also served in leadership positions in numerous multidistrict litigation matters and state court consolidations of multiple matters. *See Pain Pump Device Litig.* (C&M served as National Coordinated Counsel); *Excellus Data Breach Litig.*, No. 6:15-CV-06569 (W.D.N.Y.) (Ms. Toops appointed to executive steering committee in data breach litigation); *In re: Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices,*

and Prods. Liability Litig., No. 16-md-2738 (FLW) (LHG) (D.N.J. Dec. 6, 2016) (ECF) (appointing C&M to plaintiffs' steering committee).

34. Ms. Toops and her team are currently litigating hundreds of class actions against financial institutions across the country for the improper assessment of various account fees. In these cases, Ms. Toops and her team have engaged in extensive written and oral advocacy to achieve dozens on rulings in the consumers' favor. Ms. Toops and her team have also worked with voluminous discovery, including ESI and transactional data, to prosecute these claims and to work with experts in analyzing data for damages. In dozens of these cases, Ms. Toops and her team have recovered tens of millions of improperly collected fees on behalf of consumers. *See, e.g., Terrell et al. v. Fort Knox Credit Union*, No. 19-CI-01281 (Ky. Cir. Ct.) (C&M appointed class counsel and achieving settlement representing nearly 70% of damages); *Hill v. Ind. Members Credit Union*, No. 49D02-1804-PL-016174 (Ind. Super. Ct.) (C&M appointed class counsel and achieving settlement representing nearly 80% of damages).

35. Ms. Toops and her team have also achieved leading settlements in data breach litigation, and she and her team are currently litigating and settling dozens of these cases on behalf of consumers. Ms. Toops also represents cities and counties across Indiana that are battling the opioid prescription epidemic via litigation against manufacturers and distributors of prescription opioids. Ms. Toops also has served a leading role in litigation against the State of Indiana for failure to pay promised adoption subsidy payments to families who adopted special needs children out of the state's foster care program.

36. A listing of Cohen & Malad's leadership roles and notable cases can be found in the firm's resume, attached hereto as **Exhibit B**.

37. The current number of hours worked and the hourly rates for the attorneys and staff members from C&M who worked on this case are as follows:

a. Lynn Toops – $780 per hour, 551.8 hours

b. Vess Miller – $730 per hour, 164.3 hours

c. Natalie Lyons – $625 per hour, 48.7 hours

d. Arend Abel – $550 per hour, 33.2 hours

e. Lisa La Fornara – $490 per hour, 192.1 hours

f. Tyler Ewigleben – $450 per hour, 294.2 hours

g. Elizabeth Hyde – $375 per hour, 23.7 hours

h. Paralegal – $325, 15.1 hours

i. Law Clerk – $300 per hour, 55.4 hours

B. Kaliel Gold PLLC

38. Kaliel Gold PLLC ("KG") similarly has extensive experience in consumer protection class actions in both state and federal court and has represented accountholders in hundreds of class actions against financial institutions.

39. Mr. Kaliel has been appointed lead Class Counsel in numerous nationwide and state-specific class actions. In that capacity, Mr. Kaliel has won contested class certification motions, defended dispositive motions, engaged in data-intensive discovery, and worked extensively with economics and information technology experts to build damages models. Mr. Kaliel has also successfully resolved numerous class actions by settlement, resulting in hundreds of millions of dollars in relief for millions of class members.

40. Mr. Kaliel and his colleague Sophia Gold are currently class counsel in numerous ongoing putative class action lawsuits. Additionally, KG has been named class counsel or

settlement class counsel in numerous class actions including, *inter alia*, *Figueroa v. Capital One, N.A. et al.*, No. 3:18-cv-00692 (S.D. Cal.); *Roberts v. Capital One*, No. 1:16-cv-04841 (S.D.N.Y.); *Liggio v. Apple Federal Credit Union*, No. 18-cv-01059 (E.D. Va.); *Walters v. Target Corporation*, No. 3:16-CV-01678-L-MDD (S.D. Cal.); *Robinson v. First Hawaiian Bank*, Civil No.17-1-0167-01-GWBC (1st Cir. Haw.); *Brooks v. Canvas Credit Union*, 2019CV30516 (Denver Cnty., Colo. Dist. Ct); *Martin v. L&N Federal Credit Union*, No. 19-CI-002873 (Jefferson Cir. Ct., Tenn.); *Lambert v Navy Federal Credit Union*, No. 1:19-cv-00103 (E.D. Va.); *Perks v Activehouse d/b/a Earnin*, No. 5:19-cv-05543 (N.D. Cal.); and *White v Members 1st Credit Union*, No. 1:19-cv-00556 (M.D. Pa.).

41. Mr. Kaliel and Ms. Gold's biographies and experience are further detailed in the firm's resume, attached hereto as **Exhibit C**.

42. The current number of hours worked and the hourly rates for the attorneys from KG who worked on this case are as follows:

a. Jeffrey Kaliel – $759 per hour, 675.5 hours

b. Sophia Gold – $465 per hour, 270.5 hours

C. Kopelowitz Ostrow, P.A.

43. Kopelowitz Ostrow, P.A. ("KO") likewise has significant experience litigating nationwide and state consumer class actions. Although KO has successfully litigated a diverse range of consumer class actions, the firm focuses on helping consumers recover account fees that were unlawfully charged by their financial institution.

44. KO has been appointed class counsel in dozens of account fee cases throughout the country, has accumulated meaningful skills related to all stages of class action litigation, and has tried several class actions to verdict.

45. Based on its experience as one of the leading account fee litigation firms for over a decade, KO is able to anticipate, respond to, and overcome the unique challenges that may arise in account fee litigation.

46. KO's qualifications and experience are further detailed in the firm's resume, attached hereto as **Exhibit D**.

47. The current number of hours worked and the hourly rates for the attorneys from KO who worked on this case are as follows:

a. Jeffrey Ostrow – $725 per hour, 19.75 hours

b. Jonathan Streisfeld – $725 per hour, 25.5 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, 26.25 hours

D. Seeger Weiss, LLP

48. Seeger Weiss, LLP ("Seeger Weiss") has served a leading role in some of the most complex and high-profile litigation in the United States and is well recognized and respected for its strong track record of landmark verdicts and settlement.

49. Seeger Weiss focuses on complex and class action litigation, with a particular emphasis in the areas of products liability, pharmaceutical injury, consumer protection, environmental and toxic tort, securities fraud, antitrust, insurance, ERISA, employment, and qui tam litigation.

50. Seeger Weiss has earned a reputation for leadership and innovation that has resulted in its appointment to numerous plaintiffs' steering and executive committees in a variety of multidistrict litigations throughout the United States. The vast knowledge and skill that Seeger

Weiss brings to a case are evident from the meaningful relief that the firm has obtained on behalf of millions of consumers.

51. Some of Seeger Weiss's notable cases and settlements are summarized in the firm's resume, attached hereto as **Exhibit E**.

52. The current number of hours worked and the hourly rates for the attorney from Seeger Weiss who worked on this case are as follows:

a. James Bilsborrow – $695 per hour, 26.1 hours

VI. CLASS COUNSEL'S EFFORTS IN THIS ACTION

53. Class Counsel's combined expertise allowed them to build a case on a novel theory that had not been attempted before. Indeed, at the time this action was filed, no court had ruled on the theory asserted in this action. As such, the mere identification of the challenged fees in this action required innovation, unique knowledge, and skill.

54. Similarly, at the time this Court entered its Order on the motion to dismiss, only two federal courts had ruled in favor of similar claims and one had ruled against them. *See Morris v. Bank of America, N.A.*, No. 3:18-CV-157-RJC-DSC, 2019 WL 1274928 (W.D.N.C. Jan. 8, 2019), *report and recommendation adopted in part, rejected in part*, No. 318CV00157RJCDSC, 2019 WL 1421166 (W.D.N.C. Mar. 29, 2019) (denying motion to dismiss multiple NSF claims); *Noe v. City National Bank of West Virginia*, No. 3:19-0690, 2020 WL 836871 (S.D. W. Va. Feb. 19, 2020), *vacated and remanded on other grounds*, 828 F. App'x. 163 (4th Cir. 2020) (same); *Lambert v. Navy Fed. Credit Union*, No. 19-cv-103-LO-MSN, 2019 WL 3843064 (E.D. Va. Aug. 14, 2019) (granting motion to dismiss multiple NSF claims). No court in the Second Circuit had ruled on Plaintiffs' theory.

55. Despite the originality of Plaintiffs' claims, Class Counsel leveraged their extensive knowledge and skill to overcome TD Bank's challenge to the merits of Plaintiffs' claims, identify and collect the necessary discovery, and negotiate a favorable settlement for the Settlement Class. Without Class Counsel's persistence, expertise, and willingness to invest time and money in this matter, the Settlement Class would have been left entirely without recompense and TD Bank would have continued charging the challenged fees without providing proper disclosures to consumers.

56. Because this Court was among the first courts in the country to rule on the multiple NSF theory, numerous courts throughout the country, including four federal courts in New York, have cited this Court's Order when analyzing and upholding similar claims. *See Chambers v. HSBC Bank USA, N.A.*, No. 19-cv-10436 (ER), 2020 WL 7261155 (S.D.N.Y. Dec. 10, 2020); *Richard v. Glens Falls National Bank*, No. 1:20-cv-00734 (BKS/DJS), 2021 WL 810218 (N.D.N.Y. Mar. 3, 2021); *Roy v. ESL Federal Credit Union*, No. 19-CV-6122-FPG, 2020 WL 5849297 (W.D.N.Y. Sept. 30, 2020); *Lussoro v. Ocean Fin. Fed. Credit Union*, 456 F. Supp. 3d 474 (E.D.N.Y. 2020); *Wilkins v. Simmons Bank*, No. 3:20-cv-116-DPM, 2020 WL 7249030 (N.D. Ark. Dec. 9, 2020); *Darty v. Scott Credit Union*, No. 19L0793 (Ill. Cir. Ct. June 24, 2020); *Glass v. Delta Community Credit Union*, No. 2019CV318302 (Ga. Super. Ct. Dec. 8, 2020); *Romohr v. The Tennessee Credit Union*, No. 19-1542-BC (Tenn. Chancery Ct. May 19, 2020).

57. In addition to helping shape litigation throughout the country on similar claims, Class Counsel's work in this novel account fee class action also culminated in a Settlement for 42-70% of estimated best-case damages at trial, which provides meaningful relief for tens of thousands of consumers who otherwise would recover nothing. This is a remarkable result for the Settlement Class.

58. Over the past two and a half years, Class Counsel have devoted substantial attorney and staff time and out-of-pocket expenses to develop and prosecute this litigation to a successful conclusion against a financial institution with considerable resources. Class Counsel have at all times represented Plaintiffs and the Settlement Class on a contingent basis and thus took a huge risk in investing substantial resources in a novel theory where the outcome was uncertain.

59. The litigation tasks that Class Counsel performed include:

a. Researching and preparing the complaints and other pleadings;

b. Briefing a motion to dismiss and notices of supplemental authority;

c. Developing discovery plans, a protective order, and a protocol for the identification and production of highly relevant ESI;

d. Substantial offensive and defensive party and nonparty discovery, including frequent meet and confer discussions;

e. Working with experts to identify challenged fees, interpret TD Bank's transactional data, and calculate damages;

f. Preparing for and defending depositions;

g. Preparing for and attending two full-day mediations; and

h. Negotiating and preparing documentation for the settlement.

60. In addition to the time already referenced herein, Class Counsel estimate that collectively they will spend at least an additional 200 hours on this case administering the Settlement and seeking final approval of the Settlement.

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

Dated: May 17, 2021

Lynn A. Toops

Dated: May 17, 2021

Jeffrey D. Kaliel

EXHIBIT A

Personal Deposit Account Agreement

America's Most Convenient Bank®

This is an important document. It contains the contract governing your deposit relationship with the Bank and required legal disclosures. Please have it translated.

Este es un documento importante. Contiene el contrato que rige su relación de depósitos con el Banco y declaraciones de información exigidas por ley. Por favor, mande a hacer la traducción de este documento.

Ce document est important. Il contient le contrat régissant vos rapports avec la Banque en votre qualité de déposant ainsi que les informations exigées par la loi. Veuillez le faire traduire.

Este documento é importante. Contém o contrato que governa a sua relação para depósitos com o banco e as declarações requeridas por lei. Por favor mande traduzir.

هذه وثيقة مهمة تحتوي على عقد يحكم علاقتكم الإيداعية مع البنك والمعلومات المطلوب الإفصاح عنها بموجب القانون. الرجاء ترجمتها.

這是一份重要文件。其中包含有關您與銀行之間存款關係的合約，以及所需的法律披露事宜。請翻譯此文件。

"នេះជាឯកសារមួយសំខាន់ណាស់ ។ ឯកសារនេះមានពត៌មានស្តីពីកិច្ចសន្យាគ្រប់គ្រងលើទំនាក់ទំនងនៃការកក់ប្រាក់របស់អ្នកជាមួយធនាគារ ហើយតំរូវឲ្យមានការបញ្ចេញពត៌មានស្របច្បាប់ ។ សូមឲ្យគេបកប្រែឯកសារនេះ "

Ini adalah dokumen penting. Dokumen ini berisi kontrak yang mengatur hubungan simpanan Anda dengan Bank serta pengungkapan legal yang dibutuhkan. Harap diterjemahkan.

본 문서는 중요합니다. 여기에는 은행과의 예금관계 계약과 법적으로 요구되는 공시가 실려있습니다. 본 문서를 번역 하시기 바랍니다.

Это важный документ. В нем содержится договор, который регулирует ваши взаимоотношения с Банком по вопросу депозита, а также необходимые юридические оговорки. Пожалуйста, попросите, чтобы этот документ перевели для вас.

"Đây là tài liệu quan trọng. Tài liệu này bao gồm hợp đồng chi phối tương quan giữa việc ký thác tiền bạc của quý vị với Ngân Hàng và việc tiết lộ nội dung hoạt động theo đòi hỏi của pháp luật. Vui lòng nhờ dịch tài liệu này sang tiếng Việt để hiểu rõ."

Welcome to TD Bank, America's Most Convenient Bank®

We are pleased to offer you this Personal Deposit Account Agreement ("Agreement") that governs the terms and conditions of your personal deposit Account(s) with us. This Agreement consists of Parts I-VI below, as well as the Deposit Rate Sheet(s), Personal Fee Schedule(s) and Account Maintenance Information grid(s) published by the Bank from time to time. This Agreement provides you with information you will want to know about your personal deposit Account(s). If you have any questions, or would like to learn more about our personal deposit Account products and services, please contact any of our Stores or call us at **1-888-751-9000**. We will be happy to assist you.

Definitions

Throughout this Agreement, unless otherwise indicated, the following words have the meanings given to them below:

a) **"Account"** means your Checking Account, Money Market Account, personal CD Account and/or Savings Account with us, including Individual Retirement Accounts (IRAs), as applicable, unless limited by the heading under which it appears.

b) **"Business Day"** means every day, except Saturdays, Sundays, and federal holidays.

c) **"Calendar Day"** means every day, including Saturdays, Sundays, and federal holidays.

d) **"Bank," "we," "us," "our"** and **"TD Bank"** refer to TD Bank, N.A.

e) **"You"** and **"your"** mean each depositor who opens an Account, and any joint owner of each Account.

f) **"Store"** means a branch office.

Part I: Personal Deposit Account Terms and Conditions

By opening and maintaining an Account with the Bank, you agree to the provisions of this Agreement, so you should read this Agreement thoroughly and keep it with other important records. From time to time, we may offer new types of Accounts and may cease offering some types of Accounts. This Agreement governs all of these new types of Accounts, and continues to govern any Accounts you may have that we no longer offer. If and to the extent the provisions of this Agreement vary from the provisions of the Uniform Commercial Code as adopted in the jurisdiction where your Account was opened, the terms and conditions of this Agreement shall control.

This Agreement includes your promise to pay the charges listed on the Personal Fee Schedule and Account Maintenance Information grid and your permission for us to deduct these charges, as earned, directly from your Account. You also agree to pay any additional reasonable charges we may impose for services you request which are not contemplated by this Agreement but are disclosed in our Personal Fee Schedule which may be amended from time to time. Each of you agrees to be jointly and severally liable for any Account deficit resulting from charges or overdrafts, whether caused by you or another authorized to withdraw from your Account, together with the costs we incur to collect the deficit, including, to the extent permitted by law, our reasonable attorneys' fees.

You agree to use the Account only for lawful purposes, and you acknowledge and agree that "restricted transactions" as defined in the Unlawful Internet Gambling Enforcement Act of 2006 and Regulation GG issued thereunder are prohibited from being processed through your Account or any relationship between you and the Bank. In the event we identify a suspected restricted transaction, we may block or otherwise prevent or prohibit such transaction; and further, we may deny services to you, close the Account, or end the relationship. However, in the event that a charge or transaction described in this disclosure is approved and processed, you will still be liable for the charge. In order to protect you, we may ask for identification or may ask identifying questions to authenticate you prior to processing a request or transaction.

Deposit Policy

We may refuse to accept an item for deposit or to return all or a part of it to you. Any item that we accept for deposit is subject to later verification. We will usually give you provisional credit for items deposited into your Account. However, we may delay or refuse to give you provisional credit if we believe in our discretion that your item will not be paid. We will reverse any provisional credit we have given for an item deposited into your Account if we do not receive final credit for that item and charge you a fee (see Personal Fee Schedule). If the reversal of a provisional credit creates an overdraft in your Account, you will owe us the amount of the overdraft, plus any overdraft fees (see Personal Fee Schedule). We will determine when final credit is received for any item. Please read the Funds Availability Policy for a detailed discussion of how and when we make funds available to you.

We will accept certain items like foreign checks and bond coupons for collection only. You may also ask us to accept certain other items for collection only. You will not receive credit for (provisional or otherwise), and may not withdraw funds against, any of these items until we receive final credit from the person responsible for paying them. Items sent for collection will be credited to your Account in U.S. dollars, with the amount of U.S. dollars credited calculated using our applicable exchange rate that is in effect on the date when we credit the funds to your Account and not when the deposit is made. We may earn revenue on this exchange.The Funds Availability Policy does not apply to items we have accepted for collection only. If and when we receive final credit for an item we have accepted for collection only, you agree that we may subtract our collection fee (see Personal Fee Schedule) from the amount finally credited to us, before we credit your Account for the remaining amount.

Checks

All negotiable paper (called "checks") presented for payment must be in a form supplied by or previously approved by the Bank. The Bank may refuse to accept any check that does not meet this requirement or which is incompletely or defectively drawn. Once an outstanding check is six (6) months old, we may elect not to pay it. But if there is no stop payment order on file when we receive the check for payment, we may elect to pay it in good faith without consulting you. You agree that you will use care in safeguarding your unsigned checks against loss or theft. You will tell us immediately if any checks are missing. You agree

to assume all losses that could have been prevented if you had safeguarded unsigned (or otherwise incomplete) checks, or had told us they were missing.

Returned Checks/Waiver of Rights

If you deposit a check or item in your Account that the drawee bank returns unpaid for any reason (called "dishonor"), we may put the check or item through for collection again. This means that you are waiving your right to receive immediate notice of dishonor. If the check or item is dishonored for any reason, the amount of the dishonored check or item will be deducted from your Account. You agree to pay the Bank a fee for any such check or item that is dishonored (see Personal Fee Schedule). The Bank may also collect any amounts due to the Bank because of returned checks, through the right of set-off, from any other of your Accounts at the Bank, or collect the funds directly from you.

Cashing of Checks

Typically, the Bank will cash checks drawn on other banks for its Customers who have adequate available funds in their Account(s). If any such check should be returned by the paying bank for any reason, the Bank will charge you a fee (see Personal Fee Schedule). In addition, the Bank will debit the amount of the returned check from your Account(s). If the debit creates an overdraft in your Account, you will owe us the amount of the overdraft plus any overdraft fees (see Personal Fee Schedule).

Withdrawal Policy

Passbook Account (if available in your jurisdiction) withdrawals can be made by an authorized signer only upon presentation of the passbook, either in person or accompanied by a written order of withdrawal. If you lose the passbook, we require that a Lost Passbook Affidavit be signed by ALL persons named on the Account before a notary public.

Statement Savings Account withdrawals can be made per written order of withdrawal in accordance with the information contained on the signature card and may also be made with an ATM or Visa® Debit Card, as applicable. The Bank may refuse a request if any document or identification required by the Bank or law in connection with the withdrawal has not been presented.

The Bank reserves the right to require seven (7) Calendar Days written notice prior to withdrawal or transfer of funds from all Savings or Money Market Accounts offered by the Bank.

For any non-transactional savings account(s) and money market account(s) you may make as many in-person withdrawals at a teller window or any ATM as you wish. However, our bank policy allows no more than a combined total of six (6) pre-authorized, automatic, electronic (including computer or mobile initiated), telephone withdrawals or transfers, or payments by check, draft, debit card, or similar order payable to third parties or made payable to yourself in any monthly period (based on your statement date). We may impose a fee, as disclosed on the Personal Fee Schedule, for the seventh (7th) and each additional withdrawal that you make in any monthly period (based on your statement date). These fees will be reflected in your monthly statement.

For Holiday Club and Club Saver Accounts, we may impose a fee, as disclosed on the Personal Fee Schedule, for the fourth (4th) and each additional withdrawal that you make in any calendar month.

Processing Order for Payment of Checks, Debit Card Transactions, and Other Items

The following describes how we pay or charge to your Account checks, debit card transactions, and other items presented for payment or deposit. An "item" includes any instruction or order for the payment, transfer, deposit, or withdrawal of funds, including but not limited to any check, substitute check, purported substitute check, remotely created check or draft, electronic transaction, draft, demand draft, image replacement document, indemnified copy, ATM withdrawal or transfer, debit card point-of-sale transaction, pre-authorized debit card payment, automatic transfer, telephone-initiated transfer, ACH transaction, online banking transfer to or from Accounts at TD Bank or external transfers to other institutions, online bill payment instruction, payment to or from other people (Send Money with Zelle® transaction), withdrawal or deposit slip, in-person transfer or withdrawal, cash ticket, deposit adjustment, or wire transfer. In the event that there are insufficient funds in your account to pay an item and the transaction is resubmitted, each resubmission constitutes a separate item.

For purposes of determining your available Account balance and processing items to your Account, including returning items due to insufficient funds or paying items that overdraw your Account, all items are processed overnight at the end of each Business Day (which excludes Saturdays, Sundays and federal holidays). Each Business Day, your starting available Account balance is determined in accordance with our Funds Availability Policy. Please read the Funds Availability Policy for a detailed discussion of how and when we make funds available to you.

For (i) Checking Accounts and (ii) Money Market Accounts with check access, items are processed as follows:

a) First, items, including both deposits and withdrawals, are added to and deducted from your available Account balance in chronological date and time order based on the information that we receive for each item. The following transaction fees also will be deducted in date and time order based on when they are assessed: wire transfer fees, deposit return fees, returned item fees, and overdraft fees. For some items, we do not receive date and time information. We assign these items a date and time, which may vary from when the transactions

were conducted. All checks drawn upon your account that are not cashed at a TD Bank Store are assigned a time of 11pm on the date we receive them. If multiple items have the same date and time information, they will be processed in the following order: (i) deposits first; (ii) checks drawn upon your account next, from lowest to highest check number, and then (iii) other withdrawals, from lowest to highest dollar amount. For purposes of this section (a), withdrawals include transactions that have been presented for payment as well as pending debit card, ATM or electronic transactions that have been authorized but not yet presented to us for payment. Please see the additional details below for more information regarding pending transactions. Deposits are made available to you in accordance with our Funds Availability Policy.

b) Second, we add to or deduct from your available Account balance any interest credits or fees not described in (a) above. Examples of these fees include non-TD ATM fees, monthly maintenance fees, and overdraft protection transfer fees.

For (i) Savings Accounts, (ii) Money Market Accounts with no check access, and (iii) CD Accounts, items are processed as follows:

a) First, deposits that have become available to you that Business Day in accordance with our Funds Availability Policy are added to your available Account balance.

b) Next, the total amount of any "pending" debit card, ATM and other electronic transactions that have been authorized but not yet presented to us for payment is deducted from your available Account balance. Please see the additional details below for more information regarding pending transactions.

c) We then deduct items from your available Account balance by category, in the following order:

   i. Outgoing wire transfers, return deposit items, and debit adjustments to your available Account balance;

   ii. Overdraft fees, other returned item fees, and deposit return fees;

   iii. All other Account fees (except as described in (iv) below), and all other items including checks, ATM transactions, and debit card transactions; and

   iv. Fees assessed at the end of the statement cycle including, for example but not limited to, monthly maintenance fees.

   Within categories i, ii, and iii, we post items in order from lowest to highest dollar amount.

Additional details regarding pending transactions for all Accounts:

When you use a debit card, ATM card, or other electronic means to make withdrawals, we may receive notice of the transaction before it is actually presented to us for payment. That notice may be in the form of a merchant authorization request or other electronic inquiry. Upon receipt of such notice, we treat the transaction as "pending" at the time we receive notice, and subject to certain exceptions, we deduct the amount of the pending transactions from your available Account balance to determine the amount available to pay other items presented against your Account. The amount of a pending transaction may not be equal to the amount of the actual transaction that is subsequently presented for payment and posted to your Account. If a pending transaction is not presented for payment within three (3) Business Days after we receive notice of the transaction, we will release the amount of the pending transaction. We do not deduct the amount of pending debit card transactions from your available Account balance for certain categories of merchants that frequently request authorization for amounts in excess of the likely transaction amount, including hotels and resorts, airlines and cruise lines, car rental companies, and automated gas pumps (pay at the pump).

Additional details regarding our processing order of items for all Accounts:

The order in which items are processed may affect the total amount of overdraft fees incurred. See "Overdrafts" below, as well as the Personal Fee Schedule, for more information.

We may from time to time change the order in which we accept, pay or charge items to your Account even if (a) paying a particular item results in an insufficient available balance in your Account to pay one or more other items that otherwise could have been paid out of your Account; or (b) using a particular order results in the payment of fewer items or the imposition of additional overdraft fees. If we do change our processing order for checks and other items presented for payment from your Account, we will provide advance notice of the change. Please call **1-888-751-9000** for additional information about our processing order.

Reasons Why We May Refuse to Pay an Item:

a) is illegible;

b) is drawn in an amount greater than the amount of funds then available for withdrawal in your Account (see the Funds Availability Policy) or which would, if paid, create an overdraft;

c) bears a duplicate check number;

d) we believe has been altered;

e) we believe is otherwise not properly payable; or

f) we believe does not bear an authorized signature.

We are not required to honor any restrictive legend on checks you write unless we have agreed in writing to the restriction. Examples of restrictive legends are "Not Valid For More Than $1000", "Void If Not Negotiated Within 30 Days of Issuance", and the like.

Postdated Items

You agree that when you write a check you will not date the check in the future. If you do and the check is presented for payment before the date of the check, we may either pay it or return it unpaid. You agree that if we pay the check, the check will be

posted to your Account on the day we pay the check. You further agree that we are not responsible for any loss to you in doing so.

Pre-authorized Drafts

If you voluntarily give information about your Account (such as our routing number and your Account number) to a party who is seeking to sell you goods or services, and you do not physically deliver a check to the party, any debit to your Account initiated by the party to whom you gave the information is deemed authorized by you.

Overdrafts

An overdraft is an advance of funds that exceeds your available Account balance, made by us to you, at our sole discretion. Overdrafts may include, but are not limited to, advances to cover a check, in-person withdrawal, ATM withdrawal, debit card point-of-sale transaction, or a withdrawal by other electronic means from your Account. We may demand immediate repayment of any overdraft and charge you an overdraft fee (see Personal Fee Schedule).

For (i) Checking Accounts and (ii) Money Market Accounts with check access, you will not be charged an overdraft fee on items presented for payment that result in your available Account balance being overdrawn by $5 or less. Overdraft fees may be charged on items presented for payment regardless of your available Account balance at the end of the day.

Overdraft fees are not charged on "pending" transactions, although pending transactions reduce your available Account balance to pay other transactions and may result in the assessment of overdraft fees for those transactions. Overdraft fees may be charged on any item, including checks and debit card transactions (see "Important Information for Consumers about your TD Bank Checking Account" brochure for more information).

You agree to pay us, when we ask you, all of our costs of collecting an overdraft, to the fullest extent permitted by applicable law. These costs include, but are not limited to, our legal fees and expenses. If more than one of you owns an Account, each of you will be responsible for paying us the entire amount of all overdrafts and obligations resulting from the overdrafts.

We do not have to allow you to make an overdraft. It may be a crime to intentionally withdraw funds from an Account when there are not enough funds in the Account to cover the withdrawal or when the funds are not yet available for withdrawal.

Please be aware that third parties sometimes re-submit items that we return unpaid. Each re-submission constitutes a separate item. You agree that if any transaction is submitted for payment again after having previously been returned unpaid by us, an Overdraft Fee or Return Item Fee may be assessed each time the transaction is submitted for payment and your available balance is insufficient to pay the item.

Stop Payments

At your request and risk, the Bank will accept a stop payment request for a check on your Account for a fee (see Personal Fee Schedule). To be effective, a stop payment request must be received in such timely manner so as to give the Bank a reasonable opportunity to act on it, and must precisely identify the Account number, check number, date and amount of the item, and the payee.

Your stop payment request will be effective after the request has been received by the Bank and the Bank has had a reasonable opportunity to act on it. Regardless of whether your stop payment request has been made orally or in writing, it will remain in effect for one (1) year from the date it was given. If your stop payment request has been made orally, the Bank will send you a written confirmation. If your stop payment request is made in writing, you must use a form that is supplied by the Bank; this form will constitute written confirmation of your request. In either case, it is your responsibility to ensure that all of the information supplied on your written confirmation is correct and to promptly inform the Bank of any inaccuracies.

To maintain the validity of the stop payment request for more than one (1) year, you must furnish a new stop payment request that is confirmed in writing as described in the preceding paragraph before the expiration of the one (1) year period. If a new stop payment request is not received, the check may be paid.

We are not liable for failing to stop payment if you have not given us sufficient information or if your stop payment request comes too late for us to act on it. We are entitled to a reasonable period of time after we receive your stop payment request to notify our employees and take other action needed to stop payment. You agree that "reasonable time" depends on the circumstances but that we will have acted within a reasonable time if we make your stop payment request effective by the end of the next Business Day following the Business Day on which we receive your stop payment request. If we stop payment, you agree to defend and pay any claims raised against us as a result of our refusal to pay the check or other item on which you stopped payment.

If we recredit your Account after we have paid a check or other item over a valid and timely stop order, you agree to sign a statement describing the dispute you have with the person to whom the check or item was made payable. You also agree to transfer to us all of your rights against the payee and any other holder, endorser or prior transferee of the check or item and to cooperate with us in any legal action taken to collect against the other person(s).

If we are liable for inadvertently paying your check over a stop payment order, you must establish the amount of your loss caused by our payment of the check. We will pay you only the amount of the loss, up to the face amount of the check. You agree that we shall not be liable for any punitive, exemplary or consequential damages.

The Bank has no duty to stop payment on a cashier's check,

teller's check or other similar item because items of this type are not drawn on your Account. The Bank may, in its sole discretion, attempt to stop payment on a cashier's check, teller's check or other similar item if you certify to our satisfaction that the item has been lost, stolen or destroyed. You must also furnish any other documents or information we may require, which may include your affidavit attesting to the facts and your indemnification of the Bank. Even if the Bank agrees to attempt to stop payment on a cashier's check, teller's check or other similar item, if the item is presented for payment, the Bank may pay it and you will be liable to us for that item, unless otherwise required by applicable law.

For information on Stop Payments as they pertain to pre-authorized funds transfers, please reference the Pre-authorized (Recurring) Transfers and Stop Payments section within Part IV: Electronic Funds Transfers Disclosure.

International, ACH, The Clearing House Real-Time Payments ("TCH RTP") and Wire Transactions

If your Account receives incoming ACH transactions (either credits or debits), RTP transfers, or wire transfers initiated from within or outside of the United States, both you and we are subject to the Operating Rules and Guidelines of the National Automated Clearing House Association ("NACHA"), the The Clearing House Real-Time Payments (TCH RTP) Operating Rules," or the rules of any wire transfer system involved, and the laws enforced by the Office of Foreign Assets Control ("OFAC"). You must not send or receive RTP transfers on behalf of a person who is not a resident of, or otherwise domiciled in, the United States. Under such rules and laws, we may temporarily suspend processing of a transaction for greater scrutiny or verification against the OFAC list of blocked parties, which may result in delayed settlement, posting and/or availability of funds. If we determine there is a violation, or if we cannot satisfactorily resolve a suspected or potential violation, the subject funds will be blocked as required by law. If you believe you have adequate grounds to seek the return of any blocked funds, it is your sole responsibility to pursue the matter with the appropriate governmental authorities. Please see the OFAC website for procedures and form required to seek a release of blocked funds.

We may impose a fee, as disclosed on the Personal Fee Schedule, for any domestic or international incoming wire transactions. Wire transfers in a foreign currency will be converted at our rate of exchange on the day the transaction completed and we may earn revenue on this exchange.

Periodic Statements; Time Limit to Report Errors

If your Account is not a Holiday Club, Club Saver, IRA, Passbook or CD Account, the Bank will provide you with a periodic statement. Unless you tell us of a change of address, we will continue to mail or deliver electronically statements or any other notices to your address as it appears on our records and you will be considered to have received those statements and any other notices sent to you at that address. We do not have to send you a statement or notice if (i) you do not claim your statement, (ii) we cannot deliver your statement or notice because of your instructions or your failure to tell us that you have changed your address, or (iii) we determine that your Checking Account has been inactive for more than 6 months or your Savings Account has been inactive for more than 9 months.

You should review your statements and balance your Account promptly after you receive them or, if we are holding them for you, promptly after we make them available to you. If you don't receive an Account statement by the date when you usually receive it, call us at once. You must review your statements to make sure that there are no errors in the Account information.

On Accounts with check-writing privileges, you must review your statement and imaged copies of paid checks, if any, we send you and report forgeries, alterations, missing signatures, amounts differing from your records, or other information that might lead you to conclude that the check was forged or that, when we paid the check, the proper amount was not paid to the proper person. You have this duty even if we do not return checks to you or we return only an image of the check. You should notify us as soon as possible if you think there is a problem.

Applicable law and this Agreement require you to discover and report any error in payment of a check within specified time periods. You agree that statements and any images of paid checks accompanying the statement shall be deemed to be "available" to you as of the statement mailing date, or the date on which electronic statements are available for viewing. If we are holding your Account statements for you at your request, the statements become "available" on the day they are available for you to pick up. This means, for example, that the period in which you must report any problem with an Account begins on the day we make the statement available, even if you do not pick up the statement until later.

If you assert against us a claim that an item was not properly payable because, for example, the item was forged or an endorsement was forged, you must cooperate with us and assist us in seeking criminal and civil penalties against the person responsible. You agree to assist TD Bank, N.A. and law enforcement authorities as needed in any investigation and if needed, to serve as a witness at any hearing, proceeding or action brought against the person(s) responsible for the forgery. If we ask, you also must give us a statement, under oath, about the facts and circumstances relating to your claim. If you fail or refuse to do these things, we will consider that you have ratified the defect in the item and agree that we may charge the full amount of the item to your Account.

You must notify us as soon as possible if you believe there is an error, forgery or other problem with the information shown on your Account statement. You agree that thirty (30) Calendar Days after we mailed a statement (or otherwise made it available to you) is a reasonable amount of time for you to review your Account statement and report any errors, forgeries or other problems. In addition,

you agree not to assert a claim against us concerning any error, forgery or other problem relating to a matter shown on an Account statement unless you notified us of the error, forgery or other problem within thirty (30) Calendar Days after we mailed you the statement (or otherwise made it available to you). This means, for example, that you cannot bring a lawsuit against us, even if we are at fault, for paying checks bearing a forgery of your signature unless you reported the forgery within thirty (30) Calendar Days after we mailed you the statement (or otherwise made it available to you) listing the check we paid.

There are exceptions to this 30 day notice requirement. For claims asserting forged, missing or unauthorized endorsement or alteration, you must notify us within the period specified by the state law applicable to your account. We may destroy original checks not less than thirty (30) Calendar Days after the statement mailing date or electronic delivery date. We will retain copies of the front and back of the checks on microfilm or other media for a period of seven (7) years. During that period, we will provide you an imaged copy of any paid check on request, but we need not do so thereafter. You agree not to make any claim against us arising out of the authorized destruction of your original checks or the clarity or legibility of any copy we provide.

Combined Statements with Checking

If more than one Checking type Account is combined together on a monthly statement, then only one Checking Account can be designated as the primary Account. This primary Account may receive imaged copies of the paid checks back with the statement, and we may impose a fee as disclosed on the Personal Fee Schedule, for providing these imaged copies. Checks for all other Accounts will be retained by the Bank. To request a copy of a paid check, please call **1-888-751-9000**.

Please note that a Health Savings Account cannot be included on a combined statement.

Important Information for Opening a New Account

To help the government fight the funding of terrorism and money laundering activities, Federal law requires all financial institutions to obtain, verify and record information that identifies each person who opens an Account. When you open an Account, we will ask for your name, legal address, date of birth, Social Security or Tax Identification Number, and other information that will allow us to identify you. We may also ask to see your driver's license or any other identifying documents.

Telephone Numbers

If you give a cell phone number directly to us, you consent to and agree to accept calls related to the servicing of your Account to your cell phone from us and our agents. For any service related telephone or cell phone calls placed to you by us or our agents, you consent and agree that those calls may be automatically dialed and/or may consist of pre-recorded messages.

Account Ownership

The following provisions explain the rules applicable to your Account depending on the form of ownership specified on the signature card. Only the portion corresponding to the form of ownership specified will apply.

Individual Accounts

An individual Account is issued to one person who does not intend (merely by opening the Account) to create any survivorship rights for any other person.

Joint Accounts – With Right of Survivorship

A joint Account is issued in the name of two or more persons. If more than one of you opens an Account and signs a signature card as a co-owner of the Account, the Account is a joint Account with right of survivorship. Each of you intends that, upon your death, the balance in the Account (subject to any previous pledge to which we have consented) will belong to the survivor(s), and we may continue to honor checks or orders drawn by, or withdrawal requests from, the survivor(s) after the death of any owner(s). If two or more of you survive, you will own the balance in the Account as joint tenants with right of survivorship.

The following rules apply to all joint Accounts:

a) **Deposits:** All deposits are the property of all of the owners of the Account. Each owner of a joint Account agrees that we may credit to the joint Account any check or other item which is payable to the order of any one or more of you, even if the check or other item is endorsed by less than all or none of you. We may supply endorsements as allowed by law on checks or other items that you deposit to the Account. For certain checks, such as those payable by the government, we may require all payees to endorse the check for deposit.

b) **Orders:** The Bank may release all or any part of the balance of the Account to honor checks, withdrawals, orders, or requests signed by any owner of the Account. Any one of you may close the Account. We may be required by service of legal process to hold or remit funds held in a joint Account to satisfy an attachment or judgment entered against, or other valid debt incurred by, any owner of the Account. None of you may instruct us to take away any of the rights of another. If there is a dispute among you, you must resolve it yourselves and the Bank does not have to recognize that dispute in the absence of any valid court order. Unless we receive written notice signed by any owner not to pay any joint deposit, we shall not be liable to any owner for continuing to honor checks or other orders drawn by, or withdrawal requests from, any owner; after receipt of any such written notice, we shall not be liable to any owner for refusing to pay any checks or honor any orders and we may require the written authorization of any or all owners for any further payments.

c) **Liability:** Co-owners of a joint Account are jointly and

severally liable for activity on this Account. In the event of any overdrafts on a joint Account, the joint owners agree that each owner shall be jointly and severally liable for the overdrafts in the joint Account, whether or not any particular owner: (a) created the overdraft, (b) had knowledge of the overdraft, (c) was involved in or participated in activity in the Account, or (d) derived any benefit from the overdraft.

No Two-Signer Accounts

We do not offer Accounts on which two or more signatures are required for a check or other withdrawal. Notwithstanding any provisions to the contrary on any signature card or other agreement you have with us, you agree that if any Account purports to require two or more signers on items drawn on or withdrawals from the Account, such provision is solely for your internal control purposes and is not binding on us. If more than one person is authorized to write checks or draw items on your Account, you agree that we can honor checks signed by any Authorized Signer, even if there are two or more lines on the items for your signature and two signatures are required.

Specialty Accounts

TD Bank offers accounts providing benefits to specific demographics. The following provisions explain the rules to these specialty accounts.

a) **TD Convenience Checking:** TD Convenience Checking for students and young adults: TD Convenience Checking accounts provide a monthly maintenance fee waiver for primary account owners age 17 through 23. If you are under the age of 18, you must open a joint account with a parent or legal guardian as the secondary owner. The monthly maintenance fee waiver benefits expire upon the primary account owner's 24th birthday at which time the account will be subject to the monthly maintenance fee unless the $100 minimum daily balance is maintained.

b) **TD 60+ Checking:** TD 60+ Checking accounts eligible for Customers who are 60 years of age or older.

Trust Accounts

a) **Unwritten:** If your Account is designated as a trust Account, in the absence of any written trust agreement provided to us at Account opening, this Account is deemed a Revocable Unwritten Trust, and you as trustee may withdraw all of the funds during your lifetime. In the event of your death, the Account will belong to the person you named as Account beneficiary, if that person is still living. That Account beneficiary would have the sole right to withdraw the funds in the Account at anytime after your death (although the Bank may be entitled under applicable law to place a hold on the funds before payment to the beneficiary), but not before.

b) **Written:** If you have opened the Account as trustee of a written trust or as trustee pursuant to court order, only the trustee will be allowed to withdraw funds or otherwise transact business on the Account as designated by the trust instrument or court order. We can request a certified copy of any trust instrument or court order, but whether or not a copy is filed with us, we will not be held responsible or liable to any of the written trust's beneficiaries for the trustee's actions. Beneficiaries acquire the right to withdraw only as provided in the trust instrument or court order.

The person(s) creating either of these Trust Account types may make changes to the Account, including changes to the beneficiaries or the Account type, and may withdraw funds on deposit in the Account, only as permitted by the trust instrument or court order.

Some jurisdictions have specific laws governing other specific types of fiduciary Accounts. If you establish one of these types of Accounts, you agree to comply with all of the laws applicable to such types of Accounts.

With all fiduciary and custody Accounts, regardless of whether a written trust instrument has been provided to us, the owners and beneficiaries of the Account agree that we will not be liable if the trustee or custodian commits a breach of trust or breach of fiduciary duty, or fails to comply with the terms of a written trust agreement or comply with applicable law. We are not responsible for enforcing the terms of any written trust agreement or applicable law against the trustee or custodian, and can rely on the genuineness of any document delivered to us, and the truthfulness of any statement made to us, by a trustee or custodian.

Uniform Gifts/Transfers To Minors Act Account

If your Account is opened under the Uniform Transfers to Minors Act or Uniform Gifts to Minors Act, the funds in the Account belong to the minor [depending on the jurisdiction in which you have opened such an Account and the circumstances, a minor may be a child under the age of eighteen (18) or under the age of twenty-one (21)] you have named. You must provide to us the minor's Social Security Number. You, as custodian, or the custodian you have named, may withdraw all of the funds in the Account at any time for the benefit of the minor you have named. Our contractual obligation to honor checks, orders, withdrawals or other requests related to the Account is with the custodian only. In the event of the custodian's death, the person named as successor custodian (as provided by law) will succeed to these rights. When the minor reaches the age of majority applicable in his or her jurisdiction, or at another time determined by applicable law, the custodian shall transfer any funds remaining in the Account to the minor or to the minor's estate.

Power of Attorney

We may, in our sole discretion (unless we are required by law to recognize a statutory form of power of attorney), recognize the authority of a person to whom you have given a power of attorney

to enter into transactions relating to your Account, until and unless we receive written notice or we have actual notice of the revocation of such power of attorney. However, you must show us an original copy or certified copy of the power of attorney, properly notarized, and any other documentation we may ask for from time to time. The power of attorney and all other documents must be in a form satisfactory to the Bank. We will not be liable for damages or penalty by reason of any payment made to, or at the direction of, a person holding a power of attorney.

Certified Taxpayer Identification Number ("TIN") or Social Security Number ("SSN")

Federal law requires you to provide to the Bank a valid and certified Taxpayer Identification Number ("TIN") or Social Security Number ("SSN"). We may be required by federal or state law to withhold a portion of the interest credited to your Account in the following circumstances:

a) you do not give us a correct TIN or SSN;
b) the IRS tells us that you gave us an incorrect TIN or SSN;
c) the IRS tells you that you are subject to backup withholding because you have under-reported your interest or other income;
d) you fail to certify to us that you are not subject to backup withholding;
e) you do not certify your TIN or SSN to us; or
f) there may be other reasons why we may be required to do so under applicable law.

If we do this, the amount we withhold will be reported to you and the IRS and applied by the IRS to the payment of any Federal income tax you may owe for that year.

Credit Verification and Obtaining Financial Information

You agree that we may verify credit and employment history through third parties, including but not limited to consumer reporting agencies, or verify any previous banking relationships of yours for any Accounts you have with the Bank now or in the future. If an Account is declined based on adverse information, you may request from the consumer reporting agency a copy of the information supplied to us. Additionally, if your Account is closed for insufficient funds activity or other negative reason, a report may be made by us to one or more consumer reporting agencies or other third parties if permitted by applicable law. Please notify us if you have a dispute or if you have questions regarding the information we provide. Write to us at: TD Bank Overdraft Collections, Mailstop ME02-002-036, P.O. Box 9547, Portland, ME 04112. Please provide your name, Account number, and why you believe there is an inaccuracy or describe the item you are not sure about. We will complete any investigation and notify you of our findings and, if necessary, corrections. Please note that calling us will not preserve your rights.

If you are a licensed attorney, you agree that we may report information about overdrafts on and/or returned checks drawn on Accounts which you maintain as trustee for the benefit of another person or in any fiduciary capacity, to the extent and in the manner required by applicable laws, rules, or regulations. You agree that we have no liability to you for reporting any information to applicable authorities regarding any Account which we believe in good faith is subject to such laws, rules, or regulations.

If you're having trouble with payments, lenders want to explore options with you. Visit td.com or reach out to the National Foundation for Credit Counseling online or by phone at 1-877-357-6322 for help.

Conflicting Demands/Disputes

If there is any uncertainty or conflicting demand regarding the ownership of an account or its funds; or we are unable to determine any person's authority to give us instructions; or we are requested by law enforcement or a state or local agency to freeze the account or reject a transaction due to the suspected financial abuse of an elder or dependent adult; or we believe a transaction may be fraudulent or may violate any law, we may, in our sole discretion:

1) freeze the account and refuse transactions until we receive written proof (in form and substance satisfactory to us) of each person's right and authority over the account and its funds;
2) close the account and distribute the account balance, subject to any debts or obligations owed to the Bank, equally to each accountholder;
3) refuse transactions and return checks, marked "Refer to Maker" (or similar language);
4) require the signatures of all authorized signers for the withdrawal of funds, the closing of an account, or any change in the account regardless of the number of authorized signers on the account;
5) request instructions from a court of competent jurisdiction at your expense regarding the account or transaction; and/or
6) continue to honor checks and other instructions given to us by persons who appear as authorized signers according to our records. The existence of the rights set forth above shall not impose an obligation on us to assert such rights or to deny a transaction.

If any person notifies us of a dispute, we do not have to decide if the dispute has merit before we take further action. We may take these actions without any liability and without advance notice, unless the law says otherwise

Changing Your Account

If we agree to let you make any change to your Account type in the middle of the Account's interest and/or service charge cycle, without requiring you to open a new Account and without changing your Account number, you agree that the following rules will apply to the period in which we allow you to make this change:

a) **Interest:** The rules for the payment of interest (if any) on the new Account will take effect on the day the type of Account is changed (the "Change Date"). For the days before the Change Date, the rules for the payment of interest (if any) and for any minimum balance that must be maintained in order to qualify for interest (if any) that applied to the old Account will apply.

b) **Fees and Charges:** The rules for all fees and charges that we may charge in connection with the new Account, and for any minimum balance that must be maintained in order to avoid certain fees and charges, will take effect after the Change Date.

c) **Account Statement:** If you receive statements, the Account statement you will receive for the statement period that includes the Change Date will show: (1) the total interest earned or accrued during the entire statement period; (2) the corresponding "annual percentage yield earned" for the entire statement period; and (3) the fees and charges subtracted from your Account during the entire statement period.

Adverse Claims; Interpleader; Legal Process

We need not honor any claim against or involving an Account unless we are required to do so by order of a court or government agency that has jurisdiction over us, or pursuant to applicable law. This rule applies to any person asserting any rights or interest regarding an Account, including you and other persons who are authorized to make withdrawals or write checks or who present a power of attorney signed by you.

If we receive notice of any claim or dispute or of any legal proceeding we reasonably believe involves you or any of your Accounts, in our discretion we may suspend transactions on any Account which we believe to be affected until final determination of the claim or proceeding. We may place a hold on any funds in the Account and suspend transactions whether the affected Account is in your name alone or is a joint Account. An Account may be suspended even though the suspension may have been due to inadvertence, error because of similarity of the names of depositors, or other mistake.

You agree that we may comply with any state or federal legal process, including, without limitation, any writ of attachment, adverse claim, execution, garnishment, tax levy, restraining order, subpoena or warrant relating to you or your Account which we believe to be valid, without any liability from us to you. You agree

that if we are served with legal process at any of our Stores or offices, we may comply with it, even if it is served at a location other than where your Account was opened. Further, you agree that we may comply with such process as we deem appropriate under the circumstances even if the legal process or document appears to affect the interest of only one owner of a joint Account. In such case, we may refuse to permit withdrawals or transfers from your Account until such legal process is satisfied or dismissed even if such action results in insufficient funds to pay a check you have written or otherwise satisfy an obligation you may have incurred.

You agree that we are entitled to a processing fee, for which you are liable to us, upon receipt of any legal process. We may deduct such fee, as well as any expenses, including without limitation attorneys' fees, in connection with any such document or legal process, from your Account or any other Account you may have with us without prior notice to you, or we may bill you directly for such expenses and fees. Any garnishment, attachment or other levy against your Account shall be subject to our right of set-off and security interest.

You agree that we will not pay and you shall not be entitled to receive interest on any funds we hold or set aside in connection with or in response to legal process. Finally, you agree that we may accept and comply with legal process, irrespective of how and/or where it was received even if the law requires any particular method of service.

You agree to indemnify us against all losses, costs, attorneys' fees, and any other liabilities that we incur by reason of responding to or initiating any legal action, including any interpleader action we commence involving you or your Account. As part of that indemnity, in the event we incur liability to a creditor of yours as a result of our response or failure to respond to a legal action, you agree to pay us on demand the amount of our liability to your creditor and to reimburse us for any expense, attorneys' fees, or other costs we may incur in collecting the amount from you.

We may, in our sole discretion and without any liability to you, initiate an action in interpleader to determine the rights of the persons making adverse claims to your Account. We may exercise the right regardless of whether the persons making the adverse claims have complied with all statutory requirements pertaining to adverse claims, such as posting a bond or giving other surety. Upon initiation of an interpleader action, we will be relieved and discharged of all further duties and obligations.

If You Owe Us Money

If you withdraw funds from your Account that you do not have a right to withdraw, including the amount of a check or other item which we later charge back to your Account or any amounts that may be credited to your Account in error, you will have to pay us back. If you do not, the Bank may apply the funds in or

deposits to your Account (or any other related account) against the debt or obligation owed to us, without providing notice to you, except that this provision does not apply to any consumer credit covered by the federal Truth in Lending law. In the event that your Account is a joint account, the Bank may access the funds in your Account to satisfy a debt or obligation owed by any of the accountholders to the Bank.

If there are not enough funds in your Account to cover the debts or obligations owed to the Bank, we may overdraw your Account, without being liable to you. Some government payments (such as Social Security, Supplemental Security Income, Veterans and other federal or state benefit) may be protected from attachment, levy, garnishment, or other legal process under federal or state law. If such protections would otherwise apply to the funds in or deposits to your Account, you waive these protections and agree that we may use these funds or deposits to satisfy debts owed to the Bank. The Bank also may bring a lawsuit against you to get the money back. We can also do this if you owe us any fees or charges in connection with your Account and you do not pay us. If we bring a lawsuit against you, you agree to pay our court costs and reasonable attorneys' fees as awarded by the court and as permitted by law.

Right of Set-Off

Unless we are prohibited by applicable law, the Bank can take any funds in any of your Account(s) to pay any debt you owe us or liability. This is called the right of set-off and applies to all funds of yours in our possession now or in the future. We can use this right of set-off without giving you any notice (unless notice is required by applicable law) and without going through any legal processes or court proceedings. If this is a joint Account, the right of set-off applies to deposits of each co-owner to pay the debts owed to us by any or all of you. Likewise, we could withdraw money from an Account owned by only one person and apply it to reduce the joint debt of that person and another person. This right of set-off does not apply to your Account if: (a) it is an IRA or a tax-deferred retirement Account, Health Savings Account, or Coverdell Education Savings Account; or (b) the debt is created by a consumer credit transaction under a credit card plan; or (c) the debtor's right of withdrawal arises only in a representative capacity.

We also have a right to place a hold on funds in your Account(s) if we have a claim against you or pending exercise of our right of set-off. If we place a hold on your Account, you may not withdraw funds from the Account and we can refuse to pay checks or other items drawn on the Account.

In addition to any right of set-off, you hereby grant to the Bank a security interest in your deposit Accounts to secure all loans or other extensions of credit, now or in the future.

Death/Incompetence

Your death, or a declaration that you are legally incompetent to handle your affairs, does not end our authority to pay checks signed or other items authorized by you, to accept deposits or to collect items deposited until we receive written notice of your death or declared incompetence. Even after we receive notice, we can pay checks or other items authorized by you before your death or declared incompetence for such period of time permitted under applicable law.

On joint Accounts, your death or declared incompetence does not affect the rights of any other owner of the Account to make deposits, make withdrawals or, if applicable, write checks. We may require the surviving owners and any in-trust-for Account beneficiary to provide reasonable proof of your death or incompetence and, in some jurisdictions, provide any tax releases or other documents or consents needed from government authorities before we pay any checks or other items authorized on your joint Account or allow the surviving owners or your beneficiary to withdraw any funds from the Account. Each of you is responsible for notifying us when any other joint owner of an Account dies.

Certain checks or other items made payable to a deceased joint Account holder (e.g. Social Security checks or electronic deposits) must be returned to the issuer and may not be used, cashed or disposed of in any other way by the surviving Account holders. If such items are used, cashed or disposed of by any one or all of the surviving Account holders, each Account holder remains liable for the amount of the item and any charges incurred as a result of the improper use of the item. In our discretion, we can charge your Account for the amount of these items and remit payment to the issuer of the item.

Limited Liability

UNLESS EXPRESSLY PROHIBITED OR OTHERWISE RESTRICTED BY APPLICABLE LAW, THIS AGREEMENT, OR THE ELECTRONIC FUNDS TRANSFERS DISCLOSURE, THE BANK'S LIABILITY IS LIMITED AS FOLLOWS: THE BANK WILL NOT BE LIABLE TO YOU FOR PERFORMING OR FAILING TO PERFORM OUR SERVICES UNDER OR IN CONNECTION WITH THIS AGREEMENT UNLESS WE HAVE ACTED IN BAD FAITH. WITHOUT LIMITING THE ABOVE, THE BANK WILL NOT BE LIABLE FOR DELAYS OR MISTAKES WHICH HAPPEN BECAUSE OF REASONS BEYOND OUR CONTROL, INCLUDING, BUT NOT LIMITED TO, ACTS OF BANKING AUTHORITIES, NATIONAL EMERGENCIES, ACTS OF GOD, FAILURE OF TRANSPORTATION, COMMUNICATION OR POWER SUPPLY, MALFUNCTION OF OR UNAVOIDABLE DIFFICULTIES WITH THE BANK'S EQUIPMENT. SHOULD A COURT ESTABLISH THE BANK'S LIABILITY TO YOU PURSUANT TO WHAT WAS DONE OR NOT DONE UNDER THIS AGREEMENT, YOU MAY RECOVER FROM THE BANK ONLY YOUR ACTUAL DAMAGES, IN AN AMOUNT NOT TO

EXCEED THE TOTAL FEES AND CHARGES PAID BY YOU TO THE BANK PURSUANT TO THIS AGREEMENT DURING THE THREE (3) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO THE LIABILITY. IN NO EVENT WILL YOU BE ABLE TO RECOVER FROM THE BANK INDIRECT, SPECIAL, CONSEQUENTIAL, EXEMPLARY DAMAGES OR LOST PROFITS, WHETHER OR NOT IT HAS NOTICE THEREOF.

This Agreement and the deposit relationship do not create a fiduciary, quasi-fiduciary, or special relationship between you and us. Our deposit relationship with you is that of debtor and creditor. For IRA Accounts, you acknowledge that the Bank does not provide fiduciary advice with respect to your IRA Account, including, but not limited to advice regarding a contribution into a specific IRA account, a distribution from a retirement account, or a rollover from a retirement plan into an IRA deposit account. You agree that you will neither solicit nor rely upon the Bank or any of its employees for any such advice.

The Bank's internal policies and procedures are solely for our own purposes and do not impose on us a higher standard of care than otherwise would apply by law without such policies or procedures.

Default

Your Account may be in default if: (a) you have repeatedly overdrawn your Account; (b) you do not repay immediately any overdraft; (c) you do not comply fully with any term or condition of this Agreement or of any other agreement you may have with us; (d) you give us false or misleading information about yourself or any of your deposit or credit relationships with us or with others; (e) you file or someone else files against you a petition in bankruptcy; (f) any of your loans with us is past due or otherwise in default; (g) we, in our sole discretion, are not satisfied with your condition or affairs, financial or otherwise; or (h) we, in our sole discretion, believe that your financial condition has suffered an adverse change.

If you are in default, we may close any or all of your Accounts, with or without notice (unless notice is required under applicable law), or we may exercise all available rights and remedies provided elsewhere in this Agreement or other agreements and all rights and remedies available at law or equity.

Indemnity

a) **In General.** You agree to indemnify, and hold TD Bank harmless from and against any and all losses, liabilities, penalties, damages, costs, expenses (including, but not limited to, attorneys' fees and court costs) or other harm or injury that we may incur as a result of any claim asserted against us by any third party arising out of any action at any time taken or omitted to be taken by (i) you under or in connection with this Agreement, including, but not limited to, your failure to observe and perform properly each and every obligation in accordance with this Agreement and any other agreement which you enter into with us; or (ii) us in reliance upon any certification, evidence of authority, or other document or notice given or purporting to have been given by you to us, or any information or order which you provide to us. This indemnification does not apply to claims that you may assert against us, or to any amounts we are obligated to pay you under the terms of this Agreement or applicable law.

b) **Your Instructions to Us.** Without limiting the above, if you give us instructions which we believe may expose us to potential liability, we may refuse to follow your instructions. If we decide to follow your instructions, you agree to indemnify us against all losses, costs, attorneys' fees and any other liabilities we incur. In addition, we may ask you for certain protections, such as a surety bond or your indemnity in a form satisfactory to us.

Jury Trial Waiver

YOU AND WE EACH AGREE THAT NEITHER YOU NOR WE SHALL (A) SEEK A JURY TRIAL IN ANY LAWSUIT, PROCEEDING, COUNTERCLAIM, OR ANY OTHER ACTION BASED UPON, OR ARISING OUT OF, THIS AGREEMENT OR ANY ACCOUNT OR THE DEALINGS OF THE RELATIONSHIP BETWEEN YOU OR US, OR (B) SEEK TO CONSOLIDATE ANY SUCH ACTION IN WHICH A JURY TRIAL CANNOT BE OR HAS NOT BEEN WAIVED. THE PROVISIONS OF THIS SECTION SHALL BE SUBJECT TO NO EXCEPTIONS. NEITHER YOU NOR WE HAVE AGREED WITH OR REPRESENTED TO THE OTHER THAT THE PROVISIONS OF THIS SECTION WILL NOT BE FULLY ENFORCED IN ALL INSTANCES. YOU AND WE EACH ACKNOWLEDGE THAT THIS WAIVER HAS BEEN KNOWINGLY AND VOLUNTARILY MADE.

Demand Deposit Accounts and Sub-Accounts

All Checking Accounts consist of two separate sub-Accounts: a transaction sub-Account, and a non-transaction sub-Account. Whenever your transaction sub-Account balance exceeds a certain level (which we may set and change at our discretion without notice to you), funds above that level may be transferred from the transaction sub-Account to the non-transaction sub-Account at the Bank's discretion, as often as once each day. All of your Checking Account transactions are posted to the transaction sub-Account. Balances transferred to the non-transaction sub-Account are transferred back to the transaction sub-Account to meet these transactional needs, so there is no adverse impact on the availability of the balances held in your Checking Account. In addition, we do not allow more than six (6) transfers from the non-transaction sub-Account during any statement cycle. Therefore, if a sixth (6th) transfer occurs, we will return all balances to the transaction sub-Account for the remainder of the statement cycle.

These sub-Accounts are treated as a single Checking Account for

purposes of deposits and withdrawals, access and information, statement reporting, and any fees or charges. There are no separate or additional balance requirements, fees, or charges associated with the creation of these sub-Accounts. If your Checking Account is a non-interest bearing Account, neither the transaction sub-Account nor the non-transaction sub-Account receives any interest. If your Checking Account is an interest-bearing Checking Account, both the transaction sub-Account and the non-transaction sub-Account receive the same interest rate at all times, and your periodic statement will reflect a single blended Annual Percentage Yield ("APY") and APY Earned.

In accordance with federal regulations, we reserve the right to require seven (7) Calendar Days advance notice of withdrawals from interest-bearing transaction sub-Accounts and all non-transaction sub-Accounts. While the Bank is required to reserve this right, the Bank does not presently exercise this right.

Miscellaneous

a) **Our Right to Refuse/Close Accounts:** The Bank reserves the right to refuse to open any Account and to terminate any Account at any time, and for any reason, or no reason without notice to you (unless notice is required under applicable law). This Agreement survives the closing of your Account.

b) **Our Right to Delay Enforcement:** We can choose to not enforce or delay in enforcing any provisions of this Agreement without losing the right to enforce them in the future.

c) **Assignment:** Your Account may not be transferred, pledged or assigned without the Bank's prior written consent, to be given or refused at the Bank's sole discretion.

d) **Items in the Mail:** We are not responsible for any items you mail to us that are lost in transit. Therefore, you may not wish to place currency or coupons in the mail.

e) **Direct Deposit:** If you have direct deposit, you agree that if a direct deposit must be returned for any reason, you authorize us to deduct the amount from this Account or any other Account you may have with us, without prior notice and at any time.

f) **Accounts with Zero Balance:**

i) Your Account may not be considered closed if you transfer all of the funds out of your Account or reduce the Account balance to zero. We may continue to assess fees to your Account; please refer to the Personal Fee Schedule and Personal Account Maintenance Information grid for any applicable fees.

ii) Accounts can only be closed by you if the current balance is at zero. If you would like to close your Account, you must contact us directly by visiting one of our Stores, contacting Customer Service at 888-751-9000, or by written request. When submitting a written request, you must include the Account number(s) and mailing address (the address you would like the check mailed). The letter must be signed and notarized. Written requests must be sent to:
TD Bank, NA
PO Box 1377
Lewiston, ME 04243-1377

iii) You should not close your account until all the transactions you arranged for have been paid, and you should leave enough funds to pay them and any fees. You will owe us for any fees or transactions that are pending during the Account closure process or that post to your Account before we close the Account. Your account will not be closed until we process your request.

Please check your account following your request date to ensure the Account has been closed.

iv) We may consider any Account (excluding CDs) that has a zero balance for forty-five (45) Calendar Days to be closed.

v) This section does not change our ability to close Your Account(s) at any time within our discretion for any reason or no reason at all.

g) **Notice of Address Changes:** You must notify us in writing, by phone or at any of our banking offices, of any change of address. Any communication we send to you at the last address as shown on our records will be binding on you for all purposes. You agree we may change your address on our records based on information provided by the United States Postal Service without notice to you.

h) **Abandoned Accounts:** If your Account is considered to be abandoned under applicable law because you have not used or acknowledged your Account for a time period directed by law, we must turn over the funds in your Account to the appropriate governmental authority. We may give notices as required by law before we do this. You may try to reclaim funds turned over to the governmental authority to the extent permitted by applicable law.

i) **Account Mailings:** From time to time, the Bank may enclose advertising or promotional materials with any periodic statement that is mailed or otherwise made available to you with respect to your Account(s). These materials may include, without limitation, information regarding new, modified or discontinued products or services, as well as sweepstakes or other contests sponsored by the Bank. By opening and maintaining an Account with the Bank, you consent to the mailing and receipt of these advertising or promotional materials with your periodic statement.

j) **Banking Practices:** In the absence of a specific provision in this Agreement to the contrary, your Account will be subject to our usual banking practices and, to the extent not inconsistent therewith, the general commercial banking practices in the area we serve.

k) **Severability:** If any provision of this Agreement is invalid, changed by applicable law or declared invalid by order of a court, the remaining terms of this Agreement will not be affected, and the invalid provision shall be reformed in order to preserve the original intent of this Agreement to the fullest extent feasible. However, if such reformation is not feasible, this Agreement will be interpreted as if the invalid provision had not been placed in this Agreement.

l) **Governing Law:** This Agreement and any claim, controversy or dispute arising under or related to this Agreement shall be governed by and interpreted in accordance with federal law and, to the extent not preempted or inconsistent therewith if you opened your Account in person in a Store (or branch) by the laws of the jurisdiction in which the Store (or branch) where you opened your Account is located, or if you are a government or other public entity, by the laws of the jurisdiction pursuant to which you were incorporated or otherwise organized. If you opened your Account online or by telephone then this Agreement and any claim, controversy or dispute arising under or related to this Agreement shall be governed by and interpreted in accordance with federal law and, to the extent not preempted or inconsistent therewith then by the laws of the jurisdiction of your State of residence at the time you opened your Account online.

m) **Amendments:** We reserve the right to change the terms of this Agreement or change the terms of your Account at any time. We will give you such notice of the change as we determine is appropriate, such as by statement message or enclosure, letter, or as posted in the Store, and as required under applicable law. Where applicable law permits, we can notify you of the changes by posting a new version of this Agreement online, or by making the new version available in our Stores. Your continued use of the Account following the effective date of any such change indicates your consent to be bound by this Agreement, as amended. If you would like a copy of a current Agreement or have questions, please ask any Bank representative or call us at **1-888-751-9000.**

n) **Maine Disclosure of Complaint Resolution Procedures:** If you have a dispute with TD Bank regarding your deposit Account, you may contact us and attempt to resolve the problem directly. If we fail to resolve the problem, you may communicate the problem and the resolution you are seeking to:

Bureau of Financial Institutions
36 State House Station
Augusta, Maine 04333-0036

To file a complaint electronically, you may contact the Bureau of Financial Institutions at the following Internet address: maine.gov/pfr/financialinstitutions/complaint.htm.

The Bureau of Financial Institutions will acknowledge receipt of your complaint promptly and investigate your claim. You will be informed of the results of the investigation. When your complaint involves a federally-chartered financial institution or credit union, the Bureau of Financial Institutions will refer it to the appropriate federal supervisory agency and inform you to whom it has been referred.

o.) **Bonus and Promotions**: From time to time, we may offer cash, rate or TD Bank Gift Card bonuses for opening or maintaining a personal deposit account and meeting specific criteria. Once the offer criterion is met, the bonus will be credited into the new personal deposit product. Account must remain open, active and in good standing. If the deposit account is closed by the Customer or TD Bank within 6 months after account opening, TD Bank does reserve the right to deduct the bonus amount at account closing. TD Bank may issue you an IRS Form 1099-MISC or other appropriate forms reporting the value of the Bonus. Offer may be withdrawn at any time and is subject to change. One bonus per Customer and cannot be combined with any other offer. TD Bank Employees and Canadian cross-border banking Customers are not eligible.

Part II: Truth in Savings Disclosure

a) **Accounts Covered:** "Accounts" covered by this disclosure include ALL personal deposit Accounts including Checking, interest bearing Checking, Money Market Accounts, Savings, and Certificates of Deposit (called "CDs"). Your Account will be considered open when you sign a signature card and we receive credit for your initial deposit. You must also complete and sign any other Account documentation that we may require from time to time to maintain your Account. Where applicable, information also pertains to like Private Banking Accounts.

b) **Minimum Account Requirements:**

i) **To Open Accounts:** To open an Account, you must deposit the amount shown in the accompanying Personal Account Maintenance Information grid.

ii) **To Avoid Imposition of Monthly Maintenance Fees:** To avoid the imposition of monthly maintenance fees, you must maintain the minimum requirements for your specified type of Account for that particular monthly cycle as outlined in the Personal Account Maintenance Information grid.

c) **Fees & Charges:** Monthly maintenance fees are shown in the accompanying Personal Account Maintenance Information grid. You agree to pay all fees applicable to the Account including those detailed in the Personal Fee Schedule. You will be notified at least thirty (30) days in advance of any changes to these fees.

i) **Paper Statement Fee:** We may impose a fee, as disclosed on the Personal Fee Schedule, for certain Account types that choose to receive paper statements.

The Paper Statement Fee is charged per Account, not per statement; therefore a combined statement with more than one Account could receive multiple fees.

d) **Interest Rate and ANNUAL PERCENTAGE YIELD:** The current interest rate on your Account and the Annual Percentage Yield (or "APY") are as shown on the accompanying Deposit Rate Sheet, which is considered part of this disclosure.

Note: If this disclosure was given to you in connection with an inquiry, the Interest Rate(s) and APY(s) shown are accurate as of the date shown on our Deposit Rate Sheet. Current rates may be obtained by calling Customer Service at the toll-free number listed on the back of this disclosure or visiting our website.

TD Convenience Checking, TD Simple Checking and Savings Transaction Accounts: These are non-interest bearing Accounts and have no APY.

All interest bearing Checking, Savings, and Money Market Accounts: The interest rate and APY may change daily and are adjusted periodically by the Bank based on various economic factors. There is no limit on changes up or down and the rates are subject to change at any time without notice.

i) **TD Step Rate CDs:** Three (3) and five (5) year terms are available. The APY will increase every year on the anniversary of the Account open date. At maturity, the TD Step Rate CD will renew to a one (1) year term.

ii) **All other CDs:** The interest rate and APY are fixed for the term of the certificate and may only be changed at maturity.

iii) **To Obtain the Annual Percentage Yield ("APY") Disclosed:** For Checking, Savings, and Money Market Accounts, you must maintain the minimum tier balance in the Account each day in order to obtain the disclosed APY for that particular tier. For CDs, the initial Interest Rate is determined by the balance at account opening. Interest Rates for subsequent terms is determined by the CD balance at the end of the grace period. The APY disclosed assumes the Account remains on deposit for one year at the same interest rate.

iv) **Balance Computation Method:** We use the daily balance method to calculate interest on your Account. This method applies a periodic rate to the principal in the Account each day.

v) **Accrual of Interest:** For all deposit Accounts (except CDs), interest begins to accrue no later than the Business Day we receive credit for the deposit of non-cash items (for example, checks). For Savings and Money Market Accounts, interest is accrued each day on the full collected balance. The collected balance is the available balance in your Account as determined by our Funds Availability policy.

vi) **Frequency of Compounding and Crediting of Interest (Applicable to All Interest Bearing Accounts):** The Bank compounds interest monthly. Interest is credited on a monthly basis. If you or we close your interest bearing Account before the date of interest posting, accrued interest in the amount of $10 or more will be paid. Accrued interest in an amount under $10 will not be paid except at the discretion of the Bank.

e) **Checking Balance Tier Structures**

i) **TD Beyond Checking:** The chart which follows indicates the balance tier levels used to determine the variable interest rate and annual percentage yield (APY) being applied to your Account. The interest rate and APY for the appropriate tier will be paid on the full balance in the Account.

Balance Tier Structure:

$ 0.01 – $ 999.99	$ 50,000.00 – $ 99,999.99
$ 1,000.00 – $ 9,999.99	$100,000.00 – $249,999.99
$10,000.00 – $24,999.99	$250,000.00 – $499,999.99
$25,000.00 – $49,999.99	$500,000.00 – $999,999.99
	$1,000,000.00+

ii) **TD Private Tiered Checking Account:** The chart below indicates the balance tier levels used to determine the variable interest rate and APY being applied to your Account. The interest rate and annual percentage yield for the appropriate tier will be paid on the full balance in the Account.

Balance Tier Structure:

$ 0.01 – $ 9,999.99	$ 25,000.00 – $249,999.99
$10,000.00 – $24,999.99	$250,000.00 – $499,999.99
	$500,000.00+

f) **Checking Account Information**

i) **TD Beyond Checking**

1) **Account Information:** The monthly maintenance fee for TD Beyond Checking Accounts will be waived in each service charge cycle (a monthly period based on your statement date) that the Account meets at least one of the qualifications specified below.:

a) Your TD Beyond Checking account has direct deposits of at least $5,000 or more

b) You maintain a minimum daily balance of $2,500 in your TD Beyond Checking account

c) You maintain a $25,000 minimum daily combined balance of all deposit accounts, all outstanding home equity loan and home equity line of credit accounts, and/or mortgages in good standing (excluding credit card and personal loans) that you choose to link as specified in the Personal Account Maintenance Information Grid.

TD Beyond Checking Accounts are eligible for monthly maintenance fee waivers on one additional TD Simple Checking Account and all personal Savings Accounts (including Money Market and Health Savings Accounts) that you choose to link to your TD Beyond Checking Account. You must request these waivers; they are not automatically applied. Waivers expire when the TD Beyond Checking Account is closed.

Linked Accounts that are not eligible for monthly maintenance fee waivers will need to meet the balance requirements to avoid the monthly maintenance fee on those Accounts.

2) **Combined Balances:** You can designate your TD Beyond Checking Account as your primary Checking Account and then link certain other Accounts to it for Relationship Pricing. With Relationship Pricing, balances in those Accounts are included in your daily combined balance which is used to determine if the monthly maintenance fee on your TD Beyond Checking Account is waived.

You must tell us what other Accounts you want us to link to your TD Beyond Checking Account for relationship Pricing. We do not link your Accounts unless you tell us to do so. The Personal Account Maintenance Grid lists the required daily combined balance for a TD Beyond Checking Account and the types of Accounts that can be linked for relationship Pricing. Restrictions apply.

Once you have selected which Accounts to be included in the combined balance, we will look at the end-of-Business-Day-balance of each selected Account and add them together to get the total combined daily balance. If your end-of-Business-Day-balance in one of the selected Accounts is negative, it will have a negative effect on the total combined daily balance requirement.

When an existing Account is closed and a new Account is opened to replace the existing Account, we do not automatically link the new Account to your TD Beyond Checking Account, even if the existing Account was linked. You must tell us to link the new Account for Relationship Pricing.

ii) **TD Private Tiered Checking:** TD Private Tiered Checking Accounts are eligible for monthly maintenance fee waivers on one additional personal Checking Account and all personal Savings Accounts that you choose to include in a combined statement with your Private Tiered Checking Account. You may also request waivers for any TD Health Savings Account(s) you own. You must request these waivers; they are not automatically applied. Waivers expire when the Private Tiered Checking Account is closed.

g) **Savings Balance Tier Structures**

i) **TD Beyond Savings and TD Private Tiered Savings:** The chart which follows indicates the balance tier levels used to determine the variable interest rate and APY being applied to your Account. The interest rate and APY for the appropriate tier will be paid on the full collected balance in the Account.

Balance Tier Structure:

$ 0.01 – $19,999.99	$ 250,000.00 – $ 499,999.99
$20,000.00 – $49,999.99	$ 500,000.00 – $ 999,999.99
$50,000.00 – $99,999.99	$ 1,000,000.00 – $9,999,999.99
$100,000.00 – $249,999.99	$10,000,000.00+

ii) **TD Growth Money Market**: The chart below indicates the balance tier levels used to determine the variable interest rate and APY being applied to your Account. The interest rate and APY for the appropriate tier will be paid on the full collected balance in the Account.

Balance Tier Structure:

$ 0.01 – $ 999.99	$ 25,000 - $ 49,999.99
$ 1,000 - $1,999.99	$ 50,000 - $ 99,999.99
$ 2,000 - $4,999.99	$100,000 - $249,999.99
$ 5,000 - $9,999.99	$250,000 +
$10,000 - $24,999.99	

h) **Savings Account Information**

i) **TD Beyond Savings:** For personal and certain personal trust TD Beyond Savings Accounts, the interest rate and APY applied will also be determined by whether or not we have on record an eligible TD Bank Account linked to your TD Beyond Savings Account. Eligible Accounts include personal TD Bank Mortgage, Home Equity, Credit Card or active personal or small business Checking Accounts.

Definition of personal and certain personal Trust TD Beyond Savings Accounts:

Account Type	Eligibility Requirements	Ownership Requirements
TD Beyond Savings	Open	Individual, Primary or Secondary Owner, OR Trust set up with a Social Security Number or Tax Identification Number, or be a Trustee of such a Trust Account

Eligible Accounts you may link:

Account Type	Eligibility Requirements	Ownership Requirements
Mortgage*	In good standing (Active, and with a Mortgage Payment no more than 90 days past due)	Individual, Primary or Secondary Owner
Home Equity Line of Credit, Home Equity Loan	In good standing (Active)	Individual, Primary or Secondary Owner
Credit Card	Open	Individual or Primary Owner
Personal Checking	In good standing (not Closed or Abandoned) with at least three-Customer-initiated Deposit, Withdrawal, Payment or Transfer transactions posted each calendar month or with a direct deposit each calendar month to qualify for the rate bump during the following calendar month.	Individual, Primary or Secondary Owner
Small Business Checking	In good standing (not Closed or Abandoned) with at least three-Customer-initiated Deposit, Withdrawal, Payment or Transfer transactions posted each calendar month or with a direct deposit each calendar month to qualify for the rate bump during the following calendar month.	Primary, secondary, or DBA owner; or authorized signer or controller

*Mortgages that we no longer service are not eligible

In addition, certain Trust Accounts are eligible to be linked:

Account Type	Eligibility Requirements	Ownership Requirements
Personal Checking (small business checking not eligible)	In good standing (not Closed or Abandoned) with at least three-Customer-initiated Deposit, Withdrawal, Payment or Transfer transactions posted each calendar month or with a direct deposit each calendar month to qualify for the rate bump during the following calendar month.	Trust set up with a Social Security Number or Tax Identification Number, or be a Trustee of such a Trust Account

On the last Business Day of a calendar month, if you do not have a linked, eligible Account (personal Mortgage, Home Equity, Credit Card, or active personal or small business Checking), the interest rate and APY applied to your Account from the first Business Day of the next calendar month will be adjusted to reflect this change. For the current interest rate on your Account, please refer to the appropriate table on the accompanying Deposit Rate Sheet.

Type of TD Beyond Savings Account	Table on Rate Sheet
Qualifying TD Beyond Savings Accounts with an eligible TD Bank Account linked to it	TD Beyond Savings with Rate Bump
All other TD Beyond Savings Accounts	TD Beyond Savings with Standard Rate

Information regarding your linked Account may be made available to any other owner or signer on any of the Accounts you have linked.

If you choose to link your personal Account to an Account for which you serve as trustee, either of your Accounts may receive a financial benefit, which could be a violation of your fiduciary duties.

ii) **TD Growth Money Market:** For personal and certain personal Trust TD Growth Money Market Accounts, the interest rate and APY applied will also be determined by whether your Account meets all of the following criteria:

1) Whether or not your TD Growth Money Market Account qualifies, as defined below:

Account Type	Eligibility Requirements	Ownership Requirements
TD Growth Money Market℠	Open	Individual, Primary or Secondary Owner, OR Trust set up with a Social Security Number, or be a Trustee of such a Trust Account

2) Whether or not we have on record an eligible, personal TD Bank Checking Account linked to your TD Growth Money Market Account. Eligible Accounts you may link include:

Account Type	Eligibility Requirements	Ownership Requirements
Personal Checking	In good standing (notClosed or Abandoned)	Individual, Primary or Secondary Owner
Personal Checking (Trust)	In good standing (notClosed or Abandoned)	Trust set up with a Social Security Number, or be a Trustee of such a Trust Account

3) Whether or not your TD Growth Money Market has grown by $50 or more during your current statement cycle. This is determined by comparing the closing balance on your current statement to the closing balance on your previous statement.

4) whether or not you made at least one qualifying transfer into your TD Growth Money Market Account during your current statement cycle.

- A qualifying transfer is a recurring transfer of any amount from a TD Bank Account. Eligible transfers include recurring transfers set up by phone or at a TD Bank Store, or through Online Banking. Transfers set up using ATMs, voice response units, overdraft protection transfers, and sweeps are not eligible.
- In addition, an immediate transfer completed through Online Banking will also qualify.
- To be eligible, your qualifying transfer must post during the period starting the first Business Day and ending the last Business Day of your current statement cycle. Please be aware of the available balance in your Accounts - transferring funds from an Account with an insufficient balance may result in an Overdraft and a fee may be charged. Please refer to the Overdraft section for details.

  On the last Business Day of your statement cycle, we will determine whether you meet the above requirements, and the interest rate and APY applied to your Account from the first Business Day of the next statement cycle will be adjusted, if necessary, to reflect your Account qualification status.

  For the current interest rate on your Account, please refer to the appropriate table on the accompanying Deposit Rate Sheet.

Type of TD Growth Money Market	Table on Rate Sheet
Qualifying TD Growth Money Market Accounts with a linked eligible Checking Account, net balance growth of at least $50, and a recurring transfer into the Account	TD Growth Money Market (with Qualifying Activity)
All other TD Growth Money Market Accounts	TD Growth Money Market (without Qualifying Activity)

Non-personal TD Growth Money Market Accounts will receive the interest rate and APY applicable to TD Growth Money Market Accounts without qualifying activity.

Information regarding your linked Account may be made available to any other owner or signer on any of the Accounts you have linked.

If you choose to link your personal Account to an Account for which you serve as trustee, either of your Accounts may receive a financial benefit, which could be a violation of your fiduciary duties.

iii) **TD Simple Savings:** The monthly maintenance fee for TD Simple Savings Accounts will be waived in each service charge cycle (a monthly period based on your statement date) that the Account meets all of the criteria specified below. This waiver is only available for 12 months from the date you open your Account, or 12 months from the date when you switch your Account to TD Simple Savings.

1) Your TD Simple Savings Account must qualify, as defined below:

Account Type	Eligibility Requirements	Ownership Requirements
TD Simple Savings℠	Open	Individual, Primary or Secondary Owner, OR Trust set up with a Social Security Number, or be a Trustee of such a Trust Account

2) We must have on record an eligible, personal TD Bank Checking Account linked to your TD Simple Savings Account. Eligible Accounts you may link include:

Account Type	Eligibility Requirements	Ownership Requirements
Personal Checking	In good standing (not Closed or Abandoned)	Individual, Primary or Secondary Owner
Personal Checking (Trust)	In good standing (not Closed or Abandoned)	Trust set up with a Social Security Number, or be a Trustee of such a Trust Account

3) There must have been at least one qualifying transfer into your TD Simple Savings Account.

- A qualifying transfer is a recurring transfer of at least $25 from a TD Bank Account. Eligible transfers include recurring transfers set up by phone or at a TD Bank Store, or through Online Banking. Transfers set up using ATMs, voice response units, overdraft protection transfers, and sweeps are not eligible.
- In addition, an immediate transfer completed through Online Banking will also qualify.
- To be eligible, your qualifying transfer must post during the period starting the last Business Day of your previous service charge cycle and ending the second-to-last Business Day of your current service charge cycle (See example in chart below). Please be aware of the available balance in your Accounts – transferring funds from an Account with an insufficient balance may result in an Overdraft and a fee may be charged. Please refer to the Overdraft section for details.

Example

Previous Service Charge Cycle	Monday, June 1st through Tuesday, June 30th
Current Service Charge Cycle	Wednesday, July 1st through Friday, July 31st
Dates you can make a qualifying transfer	Monday, June 29th through Thursday, July 30th

We will determine whether your Account qualifies for this monthly maintenance fee waiver on the second-to-last Business Day of your current service charge cycle.

i) **Special Information for Certificates of Deposit:**

i) **TD Choice and Private CDs:** The chart which follows indicates the balance tier levels used to determine the interest rate and APY being applied to your Certificate of Deposit. The balance tier level for your Certificate of Deposit is determined by the opening balance of your CD and will not vary throughout the term of your deposit. After maturity and if your CD auto-renews, the balance tier level for your Certificate of Deposit for subsequent renewed terms will be determined by the balance at the end of your Grace Period.

Balance Tier Structure:

$250.00 – $9,999.99 $50,000 – $99,999.99
$10,000 – $49,999.99 $100,000+

ii) **Certificates of Deposit Information**

TD Choice CDs For personal and certain personal trust TD Choice CDs, the interest rate and APY applied will also be determined by whether or not we have on record an eligible TD Bank Personal Checking Account at the time that the CD is opened or matures.

Definition of personal and certain personal Trust TD Choice CDs:

Account Type	Eligibility Requirements	Ownership Requirements
TD Choice CD	Open	Individual, Primary or Secondary Owner, OR Trust set up with a Social Security Number, or be a Trustee of such a Trust Account

Eligible Relationship Accounts:

Account Type	Eligibility Requirements	Ownership Requirements
Personal Checking	In good standing (not Closed or Abandoned)	Individual, Primary or Secondary Owner

In addition, certain personal trust Accounts qualify your TD Choice CD for the Relationship interest rate:

Account Type	Eligibility Requirements	Ownership Requirements
Personal Checking (small business checking not eligible)	In good standing (not Closed or Abandoned)	Trust set up with a Social Security Number or be a Trustee of such a Trust Account

If you have an eligible TD Bank Personal Checking Account on the date that you open your TD Choice CD, your TD Choice CD will earn the Relationship rate and APY. For the current interest rate on your Account, please refer to the appropriate column on the accompanying Deposit Rate Sheet for your initial term. For subsequent terms, Relationship status will be determined on the business day prior to the maturity of your TD Choice CD.

iii) **Early Withdrawal Penalties:** No part of the principal may be withdrawn prior to maturity without the Bank's consent. No withdrawals will be permitted during the first seven (7) days of the CD term. If the Bank does allow an early withdrawal, the following penalties will be calculated and charged based on your current balance and interest rate:

CD Term	Penalty
7 – 89 days	All interest
90 days < 1 year	3 months' interest
1 year < 2 years	6 months' interest
2 years < 3 years	9 months' interest
3 years < 4 years	12 months' interest
4 years < 5 years	18 months' interest
5 years +	24 months' interest

In certain circumstances, such as the death or incompetence of an owner of the CD, the penalty may be waived. In no circumstances can the amount withdrawn bring the balance to below the Minimum to Open, as disclosed in the accompanying Personal Account Maintenance Information grid.

TD Step Rate CD: Partial and full withdrawals may be made without penalty during a ten (10) day grace period that begins on each anniversary of the Account opening date.

TD No-Catch CD: At no cost to you, you will have the option to withdraw principal funds without penalty once during the term of the CD. Therefore, if you choose to withdraw principal funds, there will be no penalty for that

withdrawal. More than one withdrawal of principal during the term of this CD may result in a penalty. The interest rate and APY remain the same for the term. No withdrawals will be permitted during the first seven (7) days of the CD term.

iv) **Withdrawal of Interest Prior To Maturity:** The APY disclosed assumes interest and principal will remain on deposit until maturity. A withdrawal will reduce earnings. For CDs of less than one (1) year, the APY assumes the CD remains on deposit for one (1) year at the current rate.

v) **Renewal Policies:** Unless otherwise noted, CDs will automatically renew to the same term at maturity. At maturity, the TD Step Rate CD will renew to a one (1) year CD.At maturity you will have ten (10) Calendar Days beginning on the maturity date to withdraw the funds without penalty or make additional deposits. Interest not withdrawn will be converted to principal upon the renewal of the certificate.

For TD Choice CDs, you must have an eligible TD Bank Personal Checking account as of the business day prior to your maturity date in order to earn the Relationship interest rate on your next term. TD Choice CDs that do not have an eligible personal TD Checking Account as of the business day prior to your maturity date will earn the Standard interest rate.

vi) **Interest Computation:** Interest is accrued on all deposits as of the day the Account is opened on a 365/365-day basis (366/366-day basis during a leap year), and is compounded monthly on the cycle date. The APY for the Account assumes that interest will remain on deposit until maturity; a withdrawal will reduce earnings. The daily balance method is used to calculate the interest on the Account. This method applies a daily periodic rate to the principal in the Account each day. Interest is credited monthly for all CDs.

vii) **Additional Deposits:** We do not accept additional deposits on TD Choice, Private, TD No-Catch or TD Step Rate CDs. Additional deposits on discontinued CD Account types, if permitted, are governed by your original certificate. For TD IRA Add-Vantage CDs, you may make additional deposits of not less than $500 per deposit at any time during the term up to a maximum of $250,000 in additional deposits.

viii) **Promotional CD Interest Rates:** We may offer Promotional CD interest rates which may have different Account opening requirements than our non-promotional TD Choice CD terms. These requirements will be disclosed on the Deposit Rate Sheet. If we are offering such a promotion and you are opening a new Account, you must deposit the required initial minimum balance to open the Account in money not already on deposit at TD Bank to qualify. If we are offering such a promotion and you have a renewing CD, you may be eligible for the promotional rate by making a deposit of new to bank money to the renewing CD that is equal to or greater than the new Account minimum balance requirement. Maximum deposit limits may apply. Promotional CDs will automatically renew at maturity to the same term at the non-promotional TD Choice CD interest rate and APY in effect at the time of renewal unless we notify you otherwise. Promotional CD interest rates and/or Special Offers apply only until the promotional CD's first maturity date.

ix) **Grand Opening Bonus CD Rate:** In addition to the terms above, a TD Bank personal Checking Account is required. The offer is valid for new CD Accounts only and does not include IRA CDs.

Part III: Funds Availability Policy

Your ability to withdraw funds you have deposited at the Bank will be determined according to this policy.

This disclosure applies to all transaction Accounts such as Checking and Interest Bearing Checking Accounts, and to Money Market, Savings, and Time/Certificate of Deposit Accounts.

The Bank's general policy is to make funds from your deposits available to you no later than the first (1st) Business Day after the day we receive your deposit. Electronic direct deposits, TCH RTP transfers, and wire transfers will be available on the day we receive the deposit. Once they are available, you can withdraw the funds in cash and we will use the funds to pay checks that you have written.

Determining the Availability of a Deposit

a) **Timing:** To determine the availability of your deposits, every day is a Business Day, except Saturdays, Sundays and federal holidays. If you make a deposit on a Business Day we are not open, we will consider the deposit to be made on the next Business Day we are open.

b) **Deposits in TD Bank Stores:** If you make a deposit with a Store employee before 8:00 p.m. on a Business Day that we're open, we will consider that day to be the day of your deposit. However, if you make a deposit after 8:00 p.m. or on a day we are not open, we will consider that the deposit was made on the next Business Day we are open.

c) **Deposit by Mail:** If you mail funds to us, the funds are considered deposited on the Business Day we receive them.

d) **Deposits by ATM:** If you make a deposit at a Bank ATM before 8:00 p.m. on a Business Day that we are open, we will consider that day to be the day of your deposit. If you make a deposit at a Bank ATM after 8:00 p.m. or on a day

we are not open, we will consider the deposit made on the next Business Day we are open.

e) **Deposits by Mobile App:** If you make a deposit through TD Bank Mobile Deposit before 8:00 p.m. on a Business Day that we are open, we will consider that day to be the day of your deposit. However, if you make a deposit through TD Bank Mobile Deposit after 8:00 p.m. or on a day we are not open, we will consider the deposit made on the next Business Day we are open.

f) **Deposits by Night Depository or Store Lockbox:** Funds deposited in a night depository or Store lockbox are considered deposited on the next Business Day the Bank or Store lockbox is open.

Please note that the Funds Availability may vary depending on the type and method of deposit as explained on the following two pages:

Same Day Availability

Funds from the following deposits are available on the same day they are deposited:

a) Cash deposits;

b) Funds received for deposit by an electronic payment (including ACH credits and transfers, including TCH RTP) and wire transfers;

c) Wire transfers;

d) $100 for non-cash deposits made at the Bank's teller station;

e) $100 for non-cash deposits made at the Bank's ATM.

TD FastFunds

TD FastFunds is a service which will enable expedited funds availability in exchange for a fee. Please see the Personal Fee Schedule for applicable fees. Deposits eligible for and subject to Fast Funds may be available at the time of deposit and credited to your account first before any other items, such as deposits and withdrawals made the same day.

Longer Delays May Apply

In some cases, we will not make all the funds that you deposit by check available at the times shown in this Policy.

Depending on the type of check you deposit, funds may not be available until the second (2nd) Business Day after the day of your deposit. The first $225 of your deposit, however, will be available no later than the first (1st) Business Day after the day of your deposit. If we are not going to make all of the funds from your deposit available on the first (1st) Business Day, we will notify you at the time you make your deposit, except as otherwise provided in this Agreement. We will also tell you when the funds will be available. If your deposit is not made directly to one of our employees, or if we decide to take this action after you have left the premises, we will mail you the notice by the day after we receive your deposit. If you will need the funds from a deposit right away, you should ask us when the funds will be available.

In addition, funds deposited by check may be delayed for a longer period under the following circumstances:

a) You deposit checks totaling more than $5,525 on any one-day (Note: The first $225 will be made available no later than the first (1st) Business Day after the day of your deposit);

b) We believe a check you deposited will not be paid;

c) You re-deposit a check that has been returned unpaid;

d) You have overdrawn your Account repeatedly, or would have overdrawn your Account if checks had been honored in the last six (6) months;

e) There is an emergency, such as failure of communications or computer equipment. (Note: The first $225 will be made available no later than the first (1st) Business Day after the day of your deposit).

We will notify you if we delay your ability to withdraw funds for any of these reasons, and we will tell you when the funds will be available. They will generally be available no later than the seventh (7th) Business Day after the day of your deposit.

Special Rules For New Accounts

If you are a new Customer, the following special rules may apply during the first thirty (30) days your Account is open.

a) Funds from in-Store cash deposits, electronic direct deposits, TCH RTP transfers and wire transfers to your Account will be available on the day we receive the deposit. Please note for new Accounts, it may take up to three business days for us to be able to receive and credit a TCH RTP transfer to your Account. This may result in us rejecting TCH RTP transfers for new Accounts.

b) The first $100 of your daily in-Store non-cash deposits will be available to you on the day we receive the deposit.

c) Funds from the first $5,525 of a day's total deposits of cashier's, certified, teller's, traveler's, and federal, state, and local government checks will be available on the first (1st) Business Day after the day of your deposit.

d) The excess over $5,525 and funds from all other check deposits will be available no later than the seventh (7th) Business Day after the day of your deposit.

For new Customers using an ATM, the following additional special rule may apply during the first thirty (30) days your Account is open.

a) Cash deposits and first $100 of your daily ATM non - cash deposits will be available to you on the day we receive the deposit.

Holds on Other Funds

If we accept for deposit or we cash a check that is drawn on another bank, we may make funds from the deposit available for withdrawal immediately, but delay your availability to withdraw a corresponding amount of funds that you have on deposit in another Account with us. The funds in the other Account would then not be available for withdrawal in accordance with the time periods that are described in this policy.

Non-U.S. Financial Institutions

We reserve the right to send any checks drawn on a foreign financial institution (including Canadian financial institutions) for collection. For each item sent, we will assess a collection charge plus any collection fees charged to us by other financial institutions which process the item as listed in our most recent Personal Fee Schedule. While the funds represented by checks that are sent for collection are generally available within thirty (30) Calendar Days or subject to payment by the Drawee bank, items sent for collection will be credited to your Account in U.S. dollars, with the amount of U.S. dollars credited calculated using our applicable exchange rate that is in effect on the date when we credit the funds to your Account and not when the deposit is made. If we do not enter any item (Canadian only) for collection, the funds will be available no later than the third (3rd) Business Day after the day of deposit.

Returned Items Subsequent to Availability of Funds

If a check or other item you deposited to your Account is returned to us unpaid after the funds have been made available to you, the amount of the check or other item will be deducted from your Account. If there are insufficient funds in your Account, we reserve the right to demand payment directly from you and to charge you for the overdraft as posted in our most recent Personal Fee Schedule.

Endorsements

Endorsements on items deposited to your Account are restricted, under federal law, to the first 1.5 inches of the back of the check. The remaining portion of the check is reserved for endorsements by banks. Your endorsement should contain your signature, the words "For Deposit Only," and your Account number. Improper endorsements may delay the check collection process and the subsequent crediting and availability of funds. While we may accept non-conforming endorsements, you agree you will be responsible for any losses.

Part IV: Electronic Funds Transfers Disclosure

The Electronic Funds Transfers ("EFT") we are capable of handling are indicated below. Some of these may not apply to your Account. Please read this disclosure carefully because it tells you your rights and obligations for these transactions. You should keep this notice for future reference.

Use of your ATM or Visa® Debit Card may be restricted in certain countries due to security risks.

For security purposes, your card may be canceled at any time without notice to you.

Direct Deposits

You may make arrangements for certain direct deposits to be accepted into your Checking, Statement Savings or Statement Money Market Deposit Accounts.

Pre-authorized Withdrawals

You may make arrangements to pay certain recurring bills from your Checking, Statement Savings or Statement Money Market Deposit Accounts.

Telephone Transfers

You may make arrangements to have telephone transfers between eligible Checking, Statement Savings or Statement Money Market Deposit Accounts through our telephone banking system.

Electronic Check Conversions

Some Point-of-Purchase terminals may provide you the option of initiating a one-time automatic debit from your Account by authorizing the merchant to obtain the necessary information from a check drawn on your Deposit Account. A check used in this way is treated as an EFT and is not a negotiable instrument in its own right. The check cannot be subsequently used and should be voided.

You may authorize a merchant or other payee to make a one-time electronic payment from your Checking Account using information from your check to:

- Pay for purchases
- Pay bills

Bill Pay

You may use this service to pay your bills with a mobile device or online with a Checking Account or Money Market Account with check access.

a) Payments may be made in any amount from $1 to $75,000.

External Transfer (Account to Account Transfers) Service and Send Money with Zelle®

You may use the external transfer service to transfer funds to/from your Accounts and other Accounts you own at other financial institutions. You may also use this service to transfer money to or request money from other people.

External Transfers can be made from an "Eligible Transaction Account;" an Account from which payments and service fees, if any, will be automatically debited, and to which payments and credits will be deposited. Personal Checking, Money Market or Savings Accounts are typically eligible.

Send Money with Zelle®[1] Payments require an "Eligible Transaction Account at TD Bank," from which payments and service fees, if any, will be automatically debited, and to which payments and credits will be deposited. Personal Checking and Money Market Accounts are typically eligible for this service.

The standard limits are:

Delivery Option	Direction	Daily	Monthly
External Transfers (to/from other institutions)			
3 Business Days	Outbound	$3,000	$5,000
	Inbound	$10,000	$20,000
Next Business Day	Outbound	$2,500	$4,000
	Inbound	$7,500	$15,000
Send Money with Zelle® (to/from other people)			
3 Business Days	Outbound	$2,500	$10,000
	Inbound (request money)	$2,500	$10,000
Within Minutes	Outbound	$1,000	$5,000

Please note: In addition to the standard daily limits, additional limits on the frequency of transactions may apply. When you Send Money with Zelle® within minutes to other people, your daily Debit Card transaction limits may be impacted. For External Transfers, there is a $20,000 monthly maximum limit for inbound and outbound transfers combined. For Send Money with Zelle® payments, there is a $10,000 monthly maximum limit.

Personal Identification Number (PIN)

The PIN issued to you is for your security purposes. The numbers are confidential and should not be disclosed to third parties or recorded on the Card. You are responsible for safekeeping your PIN(s). You agree not to disclose or otherwise make your PIN available to anyone.

ATM Transaction Types

You may access your Account(s) by ATM using your ATM Card or Visa® Debit Card and Personal Identification Number (PIN) to:

a) Make deposits to Checking, Statement Savings, and Statement Money Market Accounts at TD Bank ATMs;
b) Get cash withdrawals and/or transfer funds from and between Checking, Statement Savings, and Statement Money Market Accounts linked to your Card;
c) Make envelope-free deposits at many TD Bank ATMs;
d) Get information about the Account balance(s) in the Checking, Statement Savings, and/or Statement Money Market Account(s) linked to your Card.

Note: Some of these services may not be available at all terminals.

Visa Debit Card Transaction Types

For Checking Accounts, in addition to the ATM transaction types listed above, with your Visa Debit Card, you may:

a) Purchase goods online, via phone or in person, or pay for services wherever Visa Debit Cards are accepted;
b) Get cash from a merchant, if the merchant permits, or from a participating financial institution;
c) Make deposits with a merchant, if the merchant permits.

Note: If a merchant receives authorization for a purchase, TD Bank cannot return that transaction unpaid even if your Account is not in good standing.

Standard Daily Limits (per Card)

	Visa Debit Card	Visa Private Client Debit Card	ATM Card
ATM Cash Withdrawals	$1,250	$1,500	$1,250
POS (PIN) Transactions	$2,000	$2,000	N/A
Visa Signature Transactions	$5,000	$10,000	N/A
Visa Cash Advances	$5,000	$5,000	N/A

Customer Safety Information – NY

Each time you use an Automated Teller Machine (ATM) keep the following safety tips in mind:

a) The activity of the ATM facility is being recorded by a surveillance camera or cameras;
b) Close the entry door completely upon entering and exiting;
c) Do not permit any unknown persons to enter after regular banking hours;
d) Place withdrawal cash securely upon your person before exiting the ATM facility.

Complaints concerning security in the ATM facility should be directed to your bank's security department at **1-888-751-9000** or NYS at 1-877-BANK-NYS, and the nearest available public telephone should be used to call the police if emergency assistance is needed.

Customer Safety Information – NJ

Please keep the following safety tips in mind while using an automated teller machine:

a) Be alert to your surroundings and to defer transactions if circumstances cause you to be apprehensive for your safety;
b) Close the entry door of any automated teller machine (ATM) facility equipped with a door;
c) Place withdrawn cash securely on your person before exiting any ATM facility.

You should direct any complaints concerning automated teller machine security to the Corporate Security and Investigations Department of TD Bank at **1-888-751-9000** or to the New Jersey Department of Banking at 1-609-292-7272.

Termination

You may terminate the Electronic Funds Transfers Agreement by calling us and subsequently providing written notice. The Bank may terminate the Electronic Funds Transfers Agreement by notifying you in writing.

Charges For Electronic Funds Transfers

We will impose a fee, as disclosed on the Personal Fee Schedule, for Account transactions you conduct at an ATM that we do not own or operate. Such transactions are referred to as "non-TD" ATM transactions. Fees imposed by TD Bank for non-TD ATM transactions will be reflected in your monthly statement and are charged per transaction. Each transfer, each withdrawal and each balance inquiry is a separate transaction. For example, if you make two withdrawals and you obtain a balance at a non-TD ATM, then you will be charged three transaction fees. Currently, the transaction fee is $3.00. In this example, you would be assessed total transaction fees of $9.00. These fees are in addition to any fees ("surcharge") that the owner and/or operator of the non-TD ATM may charge you.

Please note: For non-TD ATM transactions, the owner and/or operator of the ATM (or the network) may assess a surcharge at the time of your transaction, including for balance inquiries. In certain instances, we will reimburse this surcharge.

International ATM Surcharge Fee for Accounts that Qualify for Surcharge Refunds: When we process an international ATM transaction and the fee is presented separately, we will refund the ATM surcharge fee assessed. If we do not receive the fee separately, we will refund the surcharge fee assessed if you bring us your ATM receipt within ninety (90) Calendar Days of the transaction. Reimbursement is subject to the balance requirements as disclosed on the Personal Fee Schedule.

International ATM Card or Visa® Debit Card Transactions: The exchange rate between the transaction currency and the billing currency used for processing international ATM Card or Visa Debit Card transactions is a rate selected by Visa from the range of rates available in wholesale currency markets for the applicable central processing date, which may vary from the rate Visa itself receives, or the government-mandated rate in effect for the applicable central processing date.

Whenever you use your TD Bank Debit Card or TD ATM Card outside of the United States to get cash at any non-TD ATM, or to purchase goods or services, or for cash advances, we will charge an International transaction fee equal to 3% of the transaction amount. This fee will apply whether the TD Bank Debit Card holder or TD ATM Card holder is physically located inside or outside the United States and the merchant is located outside the United States or makes a purchase in a foreign currency or in US currency.

Certain types of accounts may receive a waiver of one of the fees outlined above. Please refer to the Personal Fee Schedule for more details on waivers for certain types of accounts.

Right To Documentation

Terminal Transactions

You can get a receipt at the time you conduct a transaction using ATM or point-of-sale terminals, unless your transaction totals $15.00 or less.

Direct Deposits

If you have arranged to have direct deposits made to your Account at least once every sixty (60) Calendar Days from the same person or company, you can call us at **1-888-751-9000** to find out whether the deposit has been made.

Periodic Statements

You will get a monthly Account statement from us for your Checking, Statement Savings, and/or Statement Money Market Accounts unless there are no checks written or no electronic transfers in a particular month. You will receive a statement at least quarterly for all Accounts except Club, IRA, Passbook, or CD Accounts, and Checking Accounts that have been inactive for more than 6 months or Savings Accounts that have been inactive for more than 9 months.

Passbook Accounts Where the Only Possible Electronic Funds Transfers Are Direct Deposits

If you bring your Passbook to us, we will record any electronic deposits that were made since the last time you brought in your Passbook. Passbook Accounts are not available in all states.

Notice of Varying Amounts

If these regular payments may vary in amount, the person (or organization) you are going to pay will tell you, at least ten (10) Calendar Days before each payment, when it will be made and how much it will be. You may choose instead to get this notice only when the payment would differ by more than a certain amount from the previous payment, or when the amount would fall outside certain limits that you set.

Pre-authorized (Recurring) Transfers and Stop Payments

If you have authorized a merchant to bill charges to your Visa Debit Card on a recurring basis, it is your responsibility to notify the merchant in the event your Visa Debit Card is replaced, your Visa Debit Card number or expiration date changes, or the applicable account from which payments are debited has been closed. However, if we issue you a replacement Visa Debit Card we may provide your new Visa Debit Card number and expiration date to a merchant with whom you have set up a recurring pre-authorized payment, and you authorize us to apply such

recurring charges to your Visa Debit Card until you notify the merchant or us that you have revoked authorization for charges to your Visa Debit Card.

If you have Recurring Pre-authorized Visa Debit Card Payments made from your Account(s) on a regular basis, you can request a stop payment by visiting one of our TD Bank Stores or calling us at **1-888-751-9000**.

Pre-authorized ACH transfers from your Account(s) can be discontinued, for a fee (see Personal Fee Schedule), by visiting one of our TD Bank Stores, calling us at **1-888-751-9000**, or using secure online banking at **td.com**. If your Stop Payment request has been made orally, the Bank will send you a written confirmation. If your Stop Payment request is made in writing, you must use a form that is supplied by the Bank; this form will constitute written confirmation of your request. In either case, it is your responsibility to ensure that all of the information supplied on your written confirmation is correct and to promptly inform the Bank of any inaccuracies.

To be effective, a Stop Payment request must be received at least three (3) Business Days prior to the regularly scheduled payment date. Your Stop Payment request will be effective after the request has been received by the Bank and the Bank has had a reasonable opportunity to act on it.

If you order us to stop one of these payments three (3) Business Days or more before the transfer is scheduled, and we do not do so, we will be liable for your losses or damages.

Additional Information Required By Massachusetts Law

a) Any documentation provided to you which indicates an electronic fund transfer was made shall be admissible as evidence of the transfer and shall constitute prima facie proof that the transfer was made.

b) Unless otherwise provided in the Agreement, you may not stop payment of electronic fund transfers, therefore you should not employ electronic access for purchases or services unless you are satisfied that you will not need to stop payment.

EFT: Our Liability

If we do not complete a transfer to or from your Account on time or in the correct amount according to our Agreement with you, we will be liable for losses or damages. However, there are some exceptions. We will NOT be liable for instance:

a) If, through no fault of ours, you do not have enough money in your Account to make the transfer.

b) If the transfer would go over the credit limit on your overdraft line.

c) If the ATM where you are conducting the transfer does not have enough cash.

d) If the terminal or system was not working properly and you knew about the breakdown when you started the transfer.

e) If circumstances beyond our control prevent the transfer, despite reasonable precautions we have taken. Such circumstances include telecommunications and power outages or interruptions, postal strikes, delays caused by payees, fires and floods.

f) If the funds are subject to legal process or other encumbrances restricting such transfer.

g) If the transfer would result in your daily withdrawal limit being exceeded.

h) If the Bank has reason to believe that you or someone else is using the ATM or other electronic banking service for fraudulent or illegal purposes.

i) If you do not give proper, complete or correct instructions for the transfer, or you do not follow the procedures in this Agreement or any other Agreement with us for requesting the transfer.

j) If your ATM or Visa® Debit Card and/or your PIN has been reported lost or stolen, or we have canceled your PIN, your Card, or otherwise terminated this Agreement.

There may be other exceptions stated in our Agreement with you.

Disclosures of Account Information to Third Parties

In order that your privacy may be protected, we will not disclose any information about you or your Account to any person, organization, or agency except:

a) For certain routine disclosures necessary for the completion of a transfer or to resolve errors; or

b) For verification of the existence and condition of your Account for a credit bureau or merchant; or

c) To persons authorized by law in the course of their official duties; or

d) To our employees, auditors, service providers, attorneys or collection agents in the course of their duties; or

e) Pursuant to a court order or lawful subpoena; or

f) To a consumer reporting agency; or

g) To update your Account or Card information with the card network; or

h) To certain third parties with whom we have joint marketing agreements; or

i) To our affiliates as permitted by law; or

j) By your written Authorization which, for Massachusetts Customers only, shall automatically expire forty-five (45) days after our receipt of your authorization.

For Massachusetts Customers only: If an unauthorized disclosure has been made, we must inform you within three (3) days after we have discovered that an unauthorized disclosure has occurred.

Unauthorized Transfers

Tell us AT ONCE if you believe your Card, your PIN, or both has been lost, stolen or used without your permission, or if you believe that an Electronic Funds Transfer has been made without your permission using information from your check. You could lose all the money in your Deposit Account, plus your available overdraft protection. Telephoning is the best way of keeping your possible losses down. If you notify us within two (2) Business Days after you learn of the loss or theft of your Card or PIN, you can lose no more than $50 if someone uses your Card or PIN without your permission. If you do not notify us within two (2) Business Days after you learn of the loss or theft of your Card or PIN, and we can prove we could have prevented someone from using your Card and/or PIN without your permission if you had told us, you could lose as much as $500 ($50 if you are a resident of Massachusetts and this Agreement is governed by Massachusetts law). You will not be liable for unauthorized purchases made with your Debit Card when used as if it were a Visa® Credit Card. However, you can be held liable for fraudulent use of your Card and/or PIN when PIN-based transactions are made with your ATM or Debit Card.

Also, if your statement shows transfers that you did not make, notify us at once. If you do not notify us within sixty (60) Calendar Days after the statement was mailed or electronically delivered to you, you may not get back any money you lost after the sixty (60) Calendar Days if we can prove that we could have stopped someone from taking the money if you had told us in time. (If you are a resident of Massachusetts and this Agreement is governed by Massachusetts law, the maximum amount of money you could lose is $50.) If a good reason (such as a long trip or hospital stay) kept you from notifying us, we will extend the time periods.

If you believe your Card and/or your PIN has been lost or stolen, someone has transferred or may transfer money from your Account without your permission, or a transfer has been made using the information from your check without your permission, call us at **1-888-751-9000**, or write:

Customer Service Department
Mail Stop NJ5-002-215
6000 Atrium Way
Mt. Laurel, NJ 08054

Business Days: Monday through Friday, excluding federal holidays.

Errors or Questions About Electronic Funds Transfers

If you need information about an Electronic Funds Transfer or if you believe there is an error on your bank statement or receipt relating to an Electronic Funds Transfer, telephone the Bank immediately at **1-888-751-9000** or write to:

Deposit Operations Department
P.O. Box 1377
Lewiston, ME 04243-1377

We must hear from you no later than sixty (60) Calendar Days after we sent you the FIRST statement on which the problem or error appeared. When contacting the Bank, please provide us with the following information:

a) Tell us your name and Account number.
b) A description of the error or transaction you are unsure about. Please explain as clearly as you can why you believe there is an error or why more information is needed.
c) The dollar amount of the suspected error.

When making a verbal inquiry, the Bank may ask that you send us your complaint in writing within ten (10) Business Days after the verbal inquiry. If we ask you to put your complaint or question in writing and we do not receive it within ten (10) Business Days, we may not provisionally credit your Account.

We will complete our investigation within ten (10) Business Days after we hear from you (or within twenty (20) Business Days after we hear from you if your notice relates to a transfer that occurred within thirty (30) Calendar Days after your first deposit to the Account). If we need more time, however, we may take up to forty-five (45) Calendar Days to investigate your complaint or question. We may take up to ninety (90) Calendar Days to investigate your complaint or question if it relates to a transaction you initiated through point-of-sale, from outside the United States, or a transaction which occurred within thirty (30) Calendar Days after your first deposit to the Account. If we decide to do this, we will credit your Account for the amount you think is in error within ten (10) Business Days (or, twenty (20) Business Days if your complaint or question relates to a transfer which occurred within thirty (30) Calendar Days after your first deposit to the Account), so that you will have use of the money during the time it takes us to complete our investigation.

We will correct any error promptly after we complete our investigation. We will send you a written explanation within three (3) Business Days after completing our investigation. You may ask for copies of the documents that we used in our investigation and we must make these available to you for inspection.

Part V: Substitute Checks and Your Rights

What is a Substitute Check?

To improve the way checks are processed, federal law permits banks to replace original checks with "substitute checks". These checks are similar in size to original checks with a slightly reduced image of the front and back of the original check. The front of a substitute check states: "This is a legal copy of your check. You can use it the same way you would use the original check." You may use a substitute check as proof of payment just like the original check. Some or all of the checks that you receive back from us may be substitute checks. This notice describes rights you have when you receive substitute checks from us. The rights in this notice do not apply to original checks or to electronic debits

to your Account. However, you have rights under other law with respect to those transactions.

What are my Rights Regarding Substitute Checks?

In certain cases, federal law provides a special procedure that allows you to request a refund for losses you suffer if a substitute check is posted to your Account (for example, if you think that we withdrew the wrong amount from your Account or that we withdrew money from your Account more than once for the same check). The losses you may attempt to recover under this procedure may include the amount that was withdrawn from your Account and fees that were charged as a result of the withdrawal (for example, bounced check fees). The amount of your refund under this procedure is limited to the amount of your loss or the amount of the substitute check, whichever is less. You are also entitled to interest on the amount of your refund if your Account is an interest-bearing Account. If your loss exceeds the amount of the substitute check, you may be able to recover additional amounts under other law. If you use this procedure, you may receive up to $2,500 of your refund (plus interest if your Account earns interest) within ten (10) Business Days after we received your claim and the remainder of your refund (plus interest if your Account earns interest) not later than forty five (45) Calendar Days after we received your claim. We may reverse the refund (including any interest on the refund) if we later are able to demonstrate that the substitute check was correctly posted to your Account.

How Do I Make a Claim for a Refund?

If you believe that you have suffered a loss relating to a substitute check that you received and that was posted to your Account, please contact us at **1-888-751-9000**. You must contact us within forty (40) Calendar Days of the date that we mailed (or otherwise delivered by a means to which you agreed) the substitute check in question or the Account statement showing that the substitute check was posted to your Account, whichever is later. We will extend this time period if you were not able to make a timely claim because of extraordinary circumstances. Your claim must include:

a) A description of why you have suffered a loss (for example, you think the amount withdrawn was incorrect);

b) An estimate of the amount of your loss;

c) An explanation of why the substitute check you received is insufficient to confirm that you suffered a loss; and

d) A copy of the substitute check and/or the following information to help us identify the substitute check: check number, the name of the person to whom you wrote the check, the amount of the check and the date posted on your statement.

Part VI: Night Depository Agreement

This Agreement governs the use of the night depository service of TD Bank, N.A. after September 1, 2011. By using this service after September 1, 2011, you agree to the terms of this Agreement. In this Agreement, the terms "you" and "your" refer to the Depositor and the terms "we", "us" and "our" refer to TD Bank, N.A.

Bags and Containers

a) Disposable Bags – Effective September 1, 2011, all new Depositors using the night depository service must make deposits using the two-part disposable bags supplied by us or by our vendor. The bags must only be used for the deposit of currency, coin and negotiable instruments owned by you.

b) Locking Bags, Zipper Bags, Envelopes and Other Containers – Existing Depositors using the night depository service may continue to use their existing locking bags, envelopes or other containers.

c) All Bags, Envelopes and Containers – You must record the contents of each bag, envelope or container on a deposit slip supplied or approved by us and place the deposit slip in the bag, envelope or container.

Method of Deposit

Deposits made pursuant to this Agreement are to be either (i) placed in a night depository facility ("night depository") at one of our offices, or (ii) given directly to our employee at one of our offices during regular business hours without waiting for our employee to verify the amount of the deposit ("subject to count deposit"), or (iii) delivered to us via an armored carrier or by a courier service (a "Carrier").

Receipt of Bags and Keys

You acknowledge receipt of any bank-supplied bags and any keys necessary to operate the exterior door of the night depository. Any lost keys must be reported to us immediately.

Third Party Carriers

We may arrange for and pay for a Carrier to collect deposits from you and deliver the deposits to us for processing. For any deposits made via a Carrier, you acknowledge and agree that (a) we do not own or control the Carrier, the Carrier's employees or the Carrier's facilities; (b) the Carrier retains discretion to determine what Customers and geographic areas it will serve and maintains the ultimate responsibility for scheduling, movement and routing; (c) the Carrier acts as your exclusive agent when items are in transit and is responsible for the bags and their contents during transit; and (d) the Carrier is responsible for maintaining adequate insurance covering theft, employee fidelity and other in-transit losses. The items transported by the Carrier are considered deposited only when actually received by us and verified and credited to your Account.

Liability of Bank

You expressly agree that the use of the night depository service is at your own risk. We will not be responsible for any loss or

damage sustained by you in the use of the night depository service resulting from any cause whatsoever, including mechanical defects or a malfunction of the night depository itself, unless such loss or damage is directly caused by our negligence or willful misconduct. In no event will we be liable for damages resulting from causes beyond our control or for consequential, special or punitive damages or for any lost profits.

Contents Not Insured

We do not insure the contents of any bag, envelope or container.

Processing Deposits

You give us authority to open the bags and process for deposit any coin, currency or negotiable instruments found in the bags. You acknowledge and agree that the deposit slip you provide is not conclusive as to the contents of the bags and the determination of our employee is conclusive as to the contents of the bags. Our Funds Availability Policy, as it may be amended from time to time, applies to all deposits. We may take up to two (2) Business Days following the day the bag is received to count the cash in the bag and to credit your Account based on our verified cash count. We will use ordinary care and adhere to the reasonable commercial standards of the banking business in connection with the receipt and processing of the contents of the bags.

Fees and Service Charges

You agree to pay all fees associated with this service as described in the Personal Fee Schedule. We may change those fees from time to time by giving you notice of such changes in the manner specified in the Personal Deposit Account Agreement or as may be required by applicable law.

Termination

This Agreement may be terminated by either you or by us immediately by giving oral or written notice to the other. Upon termination of this Agreement, you agree to return any key(s) to the night depository facility.

Entire Agreement; Conflict of Terms; Governing Law

This Agreement constitutes the entire agreement between you and us with respect to the use of the night depository service. In the event of any conflict between any provision of this Agreement and any provision of the Deposit Account Agreement relative to the night depository service, the provision of this Agreement shall control. This Agreement shall be governed by the state laws that apply to your primary deposit Account.

[1] Send Money with Zelle®, is available for most personal checking and money market accounts. To use Send Money with Zelle® you must have an Online Banking profile with a U.S. address, a unique U.S. mobile phone number, and an active unique e-mail address. Your eligible personal deposit account must be active and enabled for ACH transactions and Online Banking transfers. Message and data rates may apply, check with your wireless carrier.

Must have a bank account in the U.S. to use Send Money with Zelle®. Transactions typically occur in minutes when the recipient's email address or U.S. mobile number is already enrolled with Zelle®. Transaction limitations apply.

Zelle and the Zelle related marks are wholly owned by Early Warning Services, LLC and are used herein under license.

General Information

1-888-751-9000

td.com

America's Most Convenient Bank®

EXHIBIT B

COHEN & MALAD, LLP

Complex Litigation
Resume

One Indiana Square | Suite 1400 | Indianapolis, IN | 46204 |
www.cohenandmalad.com

Directory

Introduction

Cohen & Malad, LLP is a litigation firm founded in 1968 by a former Indiana Attorney General, a former United States Attorney and three other distinguished lawyers. With 25 experienced attorneys, we litigate cases across multiple practice areas including: class action, mass torts and individual personal injuries, business litigation, family law, as well as commercial litigation and appeals.

Cohen & Malad, LLP enjoys a reputation as one of Indiana's leading class action law firms. Over the last 50 years, the firm has served as class counsel in numerous local, statewide, multi-state, nationwide, and even international class actions. We have also served in leadership positions in numerous multidistrict litigation matters. Our personal injury and medical malpractice trial lawyers have handled high profile cases against medical providers who subjected hundreds of their patients to unnecessary procedures, sometimes leading to deaths.

Significant Class Actions

Lead Counsel, Co-lead Counsel, or Executive Committee

- *In re Holocaust Victim Assets Litigation;* Settlement of $1.25 billion for claims relating to conversion of bank accounts and property of victims of the Holocaust during the Nazi era.
- *Raab v. R. Scott Waddell, in his official capacity as Commissioner of The Indiana Bureau of Motor Vehicles et al.*, Settlements (including settlement after trial and judgment) of approximately $100 million in overcharges for motor vehicle and license fees.
- *In re Ready-Mixed Concrete Antitrust Litigation;* Settlements of over $60 million for price fixing claims.
- *In re Iowa Ready-Mix Concrete Antitrust Litigation;* Settlement of over $18 million for price fixing claims.
- *Moss v. Mary Beth Bonaventura, in her official capacity as Director of the Department of Child Services et al.* Settlement for underpayment of per diem subsidies owed to families who adopted special needs children out of foster care.
- *Bank Fee Litigation*. Litigation of hundreds of lawsuits against financial institutions in state and federal courts across the country for improper fee assessment practices and achieving dozens of settlements totaling in the tens of millions.

Significant Mass Tort Litigation

Leadership positions in federal multidistrict litigations and state court consolidations

- *Gilead Tenofovir Cases, JCCP No. 5043, Superior Court for the County of San Francisco, California. Cohen & Malad, LLP is currently representing patients against Gilead Sciences who were prescribed its TDF-based drugs to treat HIV,*

for pre-exposure prophylaxis (PrEP) to mitigate HIV risk, or to treat Hepatitis, and suffered serious kidney and bone injuries.

- *In Re: Zofran (Ondansetron) Products Liability Litigation. Litigation on behalf of women who took Zofran while pregnant and gave birth to a baby who suffered from a serious birth defect. Litigation is currently pending.*

- *In re: Fresenius Granuflo/Naturalyte Dialysate Products. Litigation on behalf of dialysis patients alleging Fresenius' dialysis products caused cardiac injuries and death. $250 million global settlement.*

- *Pain Pump Device Litigation. Cohen & Malad, LLP served in a National Coordinated Counsel role in litigation against pain pump manufacturers who marketed pain pumps to orthopedic surgeons for continuous intra-articular uses, despite the fact that intra-articular placement of the pain pump catheters was not approved by the FDA. The use of pain pumps in the joint space resulted in deterioration of cartilage, severe pain, loss of mobility or decreased range of motion and use of shoulder.*

- *In Re: Prempro Products Liability Litigation. Litigation on behalf of women who took the hormone replacement therapy drug Prempro manufactured by Wyeth and suffered strokes, heart attacks, endometrial tumors or breast cancers. Global settlement for more than $890 million to settle roughly 2,200 claims.*

Significant Mass Medical Malpractice Actions

Co-Lead counsel for mass litigation

- *Mass tort medical malpractice cases involving over 280 claimants against an ENT physician settled for more than $59 million*

- *Mass tort medical malpractice cases involving more than 260 claimants against a Northwest Indiana cardiology group settled for more than $67 million*

Our Attorneys

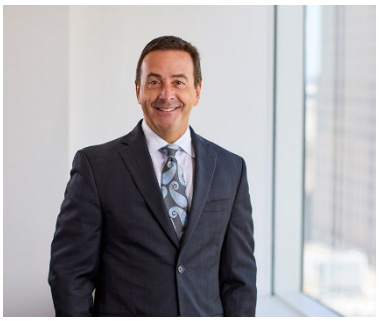
Irwin B. Levin, Managing Partner

Irwin joined Cohen & Malad, LLP in 1978 and concentrates his practice in the areas of class action, mass torts and commercial litigation. Irwin served on the Executive Committee in litigation against Swiss Banks on behalf of Holocaust victims around the world which culminated in an historic $1.25 billion settlement. He has also served as lead counsel in class action cases around the country since 1983 including two class action cases against the Indiana Bureau of Motor Vehicles, which settled for nearly $100 million, and was Co-Lead Counsel in two major antitrust cases against the concrete industry. Those cases settled for over $75 million. Irwin has also served in leadership in various MDL and mass tort cases such as Pain Pump and

Hormone Therapy litigation. Irwin currently is counsel for dozens of Indiana cities and counties in litigation against companies responsible for the opioid epidemic.

David J. Cutshaw

David's practice includes both class action and mass medical malpractice litigation. He served as co-lead counsel to successfully negotiate over $59 million in settlements for more than 280 plaintiffs against former ENT surgeon Mark Weinberger who performed unnecessary sinus surgeries, negligent surgeries, and abandoned his patients. Weinberger was sentenced to seven years in jail for health care fraud. David acted as co-lead counsel in 263 claims against a Northwest Indiana cardiology group alleged to have unnecessarily implanted pacemakers and defibrillators and performed unnecessary cardiac vessel stenting. Those claims were recently settled for over $67 million. He has also tried numerous medical malpractice jury trials as first chair.



Gregory L. Laker

Greg is the chair of the personal injury practice group and oversees the firm's dangerous drug and defective medical device litigation team. Greg and his team have held leadership positions in several multidistrict litigations including In re: Prem Pro Products Liability, Pain Pump Device Litigation, In re: Consolidated Fresenius Cases (Granuflo), In re: Testosterone Replacement Therapy Products Liability, and others. Greg also oversees the firm's sexual abuse litigation team and litigates cases involving molestation committed by perpetrators in institutional care facilities, sports and organizational groups, churches, schools, and doctor or medical offices.

Richard E. Shevitz

Richard is the chair of the class action practice group and handles a wide variety of class action lawsuits, including claims against insurance companies, manufacturers, and governmental entities. He led the trial court proceedings and handled the appeal of a class action on behalf of drivers who had been overcharged for fuel prices by a publicly held trucking company, which resulted in a judgment of approximately $5 million which was upheld on appeal. He also played a key role in the historic class action litigation bringing Holocaust-era claims against Swiss banks, which resolved for $1.25 billion, as well as the prosecution of Holocaust-related claims against leading German industrial enterprises, which were resolved through a $5 billion fund.

Lynn A. Toops

Lynn is a partner in the class action group and focuses her practice on high-stakes consumer protection litigation. Lynn and her team are currently litigating hundreds of class actions against financial institutions across the country for the improper assessment of various fees. In dozens of bank fee cases, Lynn and her team have obtained tens of millions in settlements on behalf of consumers. Lynn is also a nationwide leader in data breach litigation and is currently litigating and settling dozens of those cases on behalf of consumers. Lynn also represents cities and counties across Indiana that are battling the opioid prescription epidemic via litigation against manufacturers and distributors of prescription opioids. Lynn also served in a leading role in litigation against the state of Indiana for failure to pay promised adoption subsidy payments to families who adopted special needs children out of the state's foster care program.

Arend J. Abel

Arend's practice includes complex litigation and appeals. His clients range from governmental entities to businesses of all sizes, from Fortune 500 companies to sole proprietors. His legal career includes work for former Indiana attorney general Pamela Carter, for whom he served as special counsel. In that role, Arend briefed and argued two cases on the merits before the United States Supreme Court. He has also briefed and argued numerous cases before the Indiana State Supreme Court and State and Federal Trial and Appellate Courts. Arend supports the class action practice group via briefing on complex issues at the trial and appellate court level.

Scott D. Gilchrist

Scott is a class action attorney and concentrates his practice on antitrust, securities fraud, and consumer protection matters. Scott was a principal attorney in two antitrust cases against suppliers of ready-mixed concrete on behalf of small businesses, farmers and individuals. In re: Ready Mixed Concrete Antitrust Litigation, which settled for nearly $60 million and In re: Iowa Ready Mix Concrete Antitrust Litigation, which settled for more than $18 million.

Vess A. Miller

Vess is a class action attorney and focuses his practice on consumer protection matters. He played a critical role in uncovering hundreds of illegal charges made by the Indiana BMV and gave closing arguments at trial. After a ruling for drivers, that case settled for over $62 million in refunds. Vess has also successfully litigated predatory lending claims against payday lenders that charged interest rates exceeding 1,000% APR. He has defeated arbitration clauses that would have left consumers with no recovery, and successfully defended the wins at the Indiana Court of Appeals, the Indiana Supreme Court, and ultimately the United States Supreme Court.

Gabriel A. Hawkins

Gabriel is a class action and complex litigation attorney. He is an integral part of the firm's mass medical malpractice litigation team. He helped represent over 280 plaintiffs in lawsuits against former ENT surgeon Mark Weinberger who performed unnecessary sinus surgeries, negligent surgeries, and abandoned his patients. Weinberger was sentenced to seven years in jail for health care fraud. Gabriel's work contributed to the successful $59 million global settlement for these plaintiffs.

Lisa M. La Fornara

Lisa handles complex civil litigation, including class and representative actions, with a focus on consumer protection, financial services, and data security matters. Lisa has actively litigated hundreds of actions against financial institutions and has helped consumers recover tens of millions of dollars in improperly collected fee revenue. Lisa has helped achieve leading settlements in actions against companies that failed to protect their customers' most sensitive data, providing meaningful equitable and financial relief for victims who experienced or are likely to experience identity theft and fraud. Lisa has also uncovered and obtained refunds for consumers who were systematically underpaid by their insurers following the total loss of their vehicles and has represented whistleblowers in *qui tam* and False Claims Act cases involving fraud against the government.

Tyler B. Ewigleben

Tyler focuses his practice on consumer protection litigation on both a local and national scale. He is an advocate for consumers, businesses, and municipalities who have been harmed or victimized by an unfair practice, policy, or event that has also affected hundreds or sometimes thousands of other individuals. Tyler is currently litigating hundreds of class actions against financial institutions across the country for the improper assessment of various fees. He has played a critical role in obtaining tens of millions of dollars in settlements on behalf of consumers through his mastery of case initiation, managing complex discovery, and briefing complex legal issues. Tyler also represents consumers and businesses in data breach litigation across the country, with dozens of cases currently being litigated and settled.

Natalie A. Lyons

Natalie Lyons focuses on complex and class action matters. Over her career, she has represented consumer and civil rights plaintiffs in federal and state class actions around the country—including two federal civil rights trials that resulted in merits wins for plaintiffs. She has litigated against the federal Departments of Homeland Security and Education, state correctional agencies, and an array of commercial defendants. She is presently litigating complicated class actions in state and federal courts under consumer protection laws, the Telephone Consumer Protection Act and state contract and fraud laws.

Prior to joining Cohen & Malad, LLP, Natalie advocated on behalf of marginalized communities in litigation, direct representation and policy advocacy at the Southern Poverty Law Center (Montgomery, AL), Housing & Economic Rights Advocates (Oakland, CA) and Equal Rights Advocates (San Francisco, CA). In her role as an advocate for racial and social justice, she has appeared on panels; authored reports, op-eds and white papers; and testified on behalf of legislation. Here in Indiana, she served on the 2017 Spirit & Place Festival panel: Liberty & Justice for All?

April F. Williams Shaw

April handles complex litigation matters including class action and business litigation. She is part of the opioid litigation team representing Indiana cities and counties in lawsuits against manufacturers and distributors of prescription opioids to combat the opioid prescription epidemic.

Edward 'Ned' B. Mulligan V

Ned handles product liability matters in the firm's dangerous pharmaceutical drug and defective medical device practice group. He has served in mass tort leadership roles on several multidistrict litigations including, In re: Testosterone Replacement Therapy Products Liability Litigation, and In re: Consolidated Fresenius Cases (Granuflo). Ned is a named member of the Plaintiff Steering Committee for In re: Zofran (Ondansetron) Products Liability Litigation. Ned has also written articles regarding mass tort litigation for Trial Magazine.

Jonathon A. Knoll

Jon is a product liability attorney in the firm's dangerous pharmaceutical drug and defective medical device practice group. He has served in mass tort leadership roles for Biomet Metal on Metal Hip Replacement System Litigation in Indiana state court, *Gilead Tenofovir Cases*, JCCP No. 5043, as well as the multidistrict litigation *In re: Consolidated Fresenius Cases* (Granuflo). Jon speaks nationally on various topics related to mass tort litigation and has also written articles regarding mass tort litigation for Trial Magazine.

Laura C. Jeffs

Laura is a class action and product liability attorney. Her work includes class action privacy claims involving data breaches and consumer protection claims. Laura represents people who have been injured by dangerous pharmaceutical and defective medical devices in litigation involving pain pump devices, hormone replacement therapy, transvaginal mesh implants, tainted steroid injections, talcum powder ovarian cancer claims, and tenofovir drug litigation.

Antitrust Cases

- ***In re Bromine Antitrust Litigation*,** U.S. District Court, Southern District of Indiana.
  Liaison Counsel for the class in price-fixing issue. Settlement valued at $9.175 million.

- ***In re Ready-Mixed Concrete Antitrust Litigation*,** U.S. District Court, Southern District of Indiana.
  Co-Lead Counsel in a consolidated class action alleging a price-fixing conspiracy among all of the major Ready-Mixed Concrete suppliers in the Indianapolis area. The total settlements provided for a recovery of $60 million, which allowed for a net distribution to class members of approximately 100% of their actual damages.

- ***In re Iowa Ready-Mix Concrete Antitrust Litigation*,** U.S. District Court, District of Iowa.
  Co-lead counsel in class action alleging a price-fixing conspiracy among major suppliers of Ready-Mixed Concrete in northwest Iowa and the surrounding states. Settlements totaled $18.5 million, which allowed for a net distribution to class members of approximately 100% of their actual damages.

Consumer Protection Cases

- ***Raab v. R. Scott Waddell, in his official capacity as Commissioner of The Indiana Bureau of Motor Vehicles et al.*,** and ***Raab v. Kent W. Abernathy, in his official capacity as Commissioner of The Indiana Bureau of Motor Vehicles et al.,*** Marion County Indiana, Superior Court.
  Actions on behalf of Indiana drivers who had been systematically overcharged by the Indiana Bureau of Motor Vehicles for driver's licenses, registrations, and other fees. Achieved a combined total $100 million recovery providing either credits or refund checks to over 4 million drivers in amounts that equaled the agreed overcharge amounts.

- ***Moss v. Mary Beth Bonaventura, in her official capacity as Director of The Indiana Department of Child Services, et al.*,** LaPorte County Indiana, Superior Court.
  Action on behalf of Indiana families that adopted special needs children from out of DCS foster care and who were denied an adoption subsidy payment. Achieved settlement over $15 million providing checks to benefit over 1,880 special needs children, with the average settlement check near $5,000 and a substantial number exceeding $10,000.

- ***Coleman v. Sentry Insurance*,** United States District Court, Southern District of Illinois.
  Class action on behalf of insured for failure to honor premium discounted features of automobile insurance policy; Settled for $5.7 million cash fund, with direct payments to class members averaging over $550.

- ***Econo-Med Pharmacy v. Roche,*** United States District Court for the Southern District of Indiana.
  $17 million common fund recovery in TCPA class action.

- ***Plummer v. Nicor Energy Services Company,*** U.S. District Court, Southern District of Indiana.
  Class counsel in multistate class action on behalf of utility customers for deceptive charges on utility bills. Resolved for $12 million cash settlement.

- ***Price v. BP Products North America Inc.,*** U.S. District Court, Northern District of Illinois.
  Class counsel in multi-state class action on behalf of motorists that purchased contaminated gasoline recalled by BP. Achieved settlement of $7 million.

- ***Wilmoth et al. v. Celadon Trucking Services*****,** Marion County Indiana, Superior Court.
  Appointed Class Counsel and obtained judgment, which was upheld on appeal, for approximately $5 million in favor of nationwide class of long-distance drivers who had compensation improperly withheld by Celadon from fuel purchases.

- ***Means v. River Valley Financial Bank, et al.*****,** Marion County Indiana, Superior Court.
  Action involving prepaid burial goods and services in Madison, Indiana. Cemetery owners and banks who served as the trustees for the prepaid burial funds violated the Indiana Pre-Need Act and other legal duties, which resulted in insufficient funds to provide class members' burial goods and services at death. Settlements valued at $4 million were achieved to ensure that thousands of class members' final wishes will be honored.

- ***Meadows v. Sandpoint Capital, LLC,*** and ***Edwards v. Apex 1 Processing, Inc.,*** Marion County Indiana, Circuit Court.
  Class actions brought against internet-based payday lenders. Settlement provided reimbursement for fees and expenses that exceeded amounts permitted by the Indiana payday loan act.

- ***Edwards v. Geneva-Roth Capital, Inc.,*** Marion County Indiana, Circuit Court. Class action brought against internet-based payday lenders. Achieved settlement over $1 million providing checks for over 6,000 individuals.

- ***Colon v. Trinity Homes, LLC and Beazer Homes Investment Corp,*** Hamilton County Indiana, Superior Court.
  Class counsel in statewide settlement providing for remediation of mold and moisture problems in over 2,000 homes. Settlement valued at over $30 million.

- ***Whiteman v. Time Warner Entertainment Company, L.P.,*** Marion County, Indiana, Superior Court.
  Successfully appealed to the Indiana Supreme Court challenging the application of the voluntary payment doctrine for class of cable subscribers. Following this victory, Cohen & Malad, LLP negotiated a multi-million-dollar settlement for class members.

- ***Hecht v. Comcast of Indianapolis,*** Marion County Indiana, Circuit Court.
  Represented a class of Comcast cable subscribers challenging arbitrarily determined late fees as unlawful liquidated damages. Obtained a multi-million-dollar settlement on the eve of trial.

- ***Littell et al. v. Tele-Communications, Inc. (AT&T) et al.,*** Morgan County, Indiana, Superior Court. Lead counsel in nationwide class action challenging late fee charges imposed by cable television companies. The total value of the nationwide settlement exceeded $106 million.

- ***Bridgestone/Firestone, Inc., ATX, ATX II and Wilderness Tires Products Liability Litigation,*** U.S. District Court, Southern District of Indiana.
  Court-appointed Liaison Counsel and Executive Committee Member in consolidated litigation involving international distribution of defective tires.

- ***Tuck v. Whirlpool et al.,*** Marion County, Indiana, Circuit Court.
  Appointed Class Counsel in nationwide class action regarding defective microwave hoods. Settlement achieved in excess of $7 million.

- ***Hackbarth et al. v. Carnival Cruise Lines,*** Circuit Court of Dade County, Florida.
  Class Counsel in nationwide action challenging cruise lines' billing practices. Settlement valued at approximately $20 million.

- ***Kenro, Inc. v. APO Health, Inc.,*** Marion County Indiana, Superior Court.
  Appointed Class Counsel in case alleging violations of the Federal Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. Settlement negotiated to create a common fund of $4.5 million and provide benefits to class members of up to $500 for each unsolicited fax advertisement received.

- ***Shilesh Chaturvedi v. JTH Tax, Inc. d/b/a Liberty Tax Service,*** Court of Common Pleas, Allegheny County, Pennsylvania.
  Class Counsel in case involving Federal Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. Settlement valued at $45 million.

- ***Kenro, Inc. and Gold Seal Termite and Pest Control Company v. PrimeTV, LLC, and DirecTV, Inc.***, Marion County Indiana, Superior Court.
  Class Counsel in case involving the federal Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. Following certification, the parties entered into nationwide settlement providing class members with benefits worth in excess of $500 million.

- ***Econo-Med Pharmacy, Inc. v. Roche Diagnostics Corp. et al.,*** U.S. District Court, Southern District of Indiana.
  Class Counsel in Telephone Consumer Protection Act case alleging medical device company sent unsolicited junk faxes to 60,000 U.S. pharmacies. Settlement for $17 million.

- ***McKenzie et. al. v. Allconnect, Inc.,*** U.S. District Court, Eastern District of Kentucky.
  Class action on behalf of consumers whose highly sensitive personally identifiable information was compromised as a result of a data breach. Settlement for $500,000, five (5) years of credit monitoring services, and monetary payments of $100 to each settlement class member.

Bank Fee Cases

- ***Terrell et. al. v. Fort Knox Federal Credit Union,*** Hardin County Kentucky, Circuit Court.
  Class action on behalf of consumers who were improperly assessed (1) overdraft fees on transactions that were previously authorized on a sufficient available balance and (2) multiple insufficient funds fees on a single transaction. Final approval of $4.5 million settlement amounting to 70% of damages.

- ***Holt v. Community America Credit Union,*** U.S. District Court, Western District of Missouri.
  Class action on behalf of consumers who were improperly assessed overdraft fees on accounts that were never overdrawn and multiple fees on a single item or transaction returned for insufficient funds. Final approval of $3.1 million settlement amounting to 67% of damages.

- ***Hill v. Indiana Members Credit Union,*** Marion County Indiana, Superior Court.
  Class action on behalf of credit union members who were improperly assessed (1) non-sufficient funds fees on accounts that were never actually overdrawn; (2) multiple non-sufficient funds fees on a single transaction; (3) out of network ATM withdrawal fees; and (4) ATM balance inquiry fees. $3 million settlement amounting to recovery of 80% of damages.

- ***Martin v. L&N Federal Credit Union,*** Jefferson County Kentucky, Circuit Court.
  Class action on behalf of consumers who were improperly assessed overdraft fees on accounts that had sufficient funds to cover the transactions. Settlement for $2.575 million.

- ***Plummer v. Centra Credit Union,*** Bartholomew County Indiana, Superior Court.
  Class action on behalf of consumers who were improperly assessed overdraft fees on accounts that were never actually overdrawn. Settlement for $1.5 million.

- ***Norwood v. The Camden National Bank,*** Cumberland County Maine, Business and Consumer Court.
  Class action on behalf of consumers who were improperly assessed overdraft fees on accounts that were never actually overdrawn and also on phantom transactions—where an accountholder never made a withdrawal request and where an account balance was never reduced. Final approval of $1.2 million settlement amounting to recovery of 64% of damages.

- ***Yarski v. Knoxville TVA Employees Credit Union,*** Knox County Tennessee, Circuit Court.
  Class action on behalf of consumers who were improperly assessed more than one multiple non-sufficient funds fee on a single item. Preliminary approval of settlement for $1.1 million.

- ***Cauley v. Citizens National Bank,*** Sevier County Tennessee, Circuit Court.
  Class action on behalf of consumers who were improperly assessed overdraft fees on transactions that did not actually overdraw checking accounts. Final approval of settlement for 94% of damages.

- ***Almon v. Ind. Bank,*** McCracken County Kentucky, Circuit Court.
  Class action on behalf of consumers who were improperly assessed multiple Return Item Fees on the same item. Preliminary approval of settlement for nearly 80% of damages under multiple fee theory of liability.

- ***Tisdale v. Wilson Bank and Trust,*** Davidson County Tennessee, Chancery Court.
  Class action on behalf of consumers who were improperly assessed overdraft fees on transactions that were previously authorized on an account with sufficient funds. Final approval of settlement for nearly 70% of damages.

- ***MJ Evans Beauty v. Bremer Bank, National Association,*** Hennepin County Minnesota, District Court.
  Class action on behalf of consumers who were improperly assessed overdraft fees on (1) transactions that were previously authorized on an account with sufficient funds and (2) multiple non-sufficient funds fees on a single transaction. Final approval of settlement for 66% of damages.

- ***Graves v. Old Hickory Credit Union,*** Chancery Court of Tennessee.
  Class action on behalf of credit union members who were charged overdraft fees on debit card and ATM transactions when the member's Available Balance was negative, but the member's Ledger Balance was positive. Approval of pre-suit settlement for 63% of damages.

- ***Johnson et. al. v. Elements Financial Credit Union,*** Marion County Indiana, Commercial Court.
  Class action on behalf of consumers who were improperly assessed (1) overdraft fees on accounts that were never actually overdrawn; and (2) multiple insufficient funds fees on a single transaction. Final approval of settlement for nearly 60% of damages.

- ***Chambers v. Together Credit Union,*** U.S. District Court, Southern District of Illinois.
  Class action on behalf of consumers who were improperly assessed multiple NSF Fees on a single item. Final approval of settlement for nearly 60% of damages.

- ***Louden v. Arvest Bank,*** Pulaski County Arkansas, Circuit Court.
  Class action on behalf of consumers who were improperly assessed multiple insufficient funds fees on the same item. Preliminary approval of settlement for 54% of damages.

- ***Hawley et. al. v. ORNL Federal Credit Union,*** Anderson County Tennessee, Circuit Court.
  Class action on behalf of consumers who were improperly assessed (1) overdraft fees on transactions that did not actually overdraw checking accounts; (2) overdraft fees on transactions made on the same day that a direct deposit should have been made available to cover the transaction subject to an overdraft fees; and (3) multiple non-sufficient funds fees on a single transaction. Settlement for 45% of damages.

Human Rights Cases

- ***In re Holocaust Victims Assets Litigation*****,** U.S. District Court, Eastern District of New York.
  Selected as one of ten firms from the U.S. to serve on the Executive Committee in the prosecution of a world-wide class action against three major Swiss banks to recover assets from the Nazi era. This litigation

resulted in a $1.25 billion settlement in favor of Holocaust survivors.

- ***Kor v. Bayer AG,*** U.S. District Court, Southern District of Indiana.
  Action against an international pharmaceutical company for participating in medical experiments on concentration camp inmates during World War II. This action was resolved as part of a $5 billion settlement negotiated under the auspices of the governments of the U.S. and Germany and led to the creation of the *Foundation for Remembrance, Responsibility and the Future*.

- ***Vogel v. Degussa AG*****,** U.S. District Court, District of New Jersey.
  Action against a German industrial enterprise for enslaving concentration camp inmates during World War II for commercial benefit. This action also was resolved in connection with the settlement which created the *Foundation for Remembrance, Responsibility and the Future*.

Health Care / Insurance Cases

- ***In re Indiana Construction Industry Trust,*** Marion County, Indiana, Circuit Court.
  Lead Counsel in action against an insolvent health benefits provider from Indiana and surrounding states. Recovered approximately $24 million for enrollees, providing nearly 100% recovery to victims.

- ***Coleman v. Sentry Insurance a Mutual Company,*** United States District Court, Southern District of Illinois.
  Class Counsel on behalf of 6,847 policy holders in 11 states against insurer for breaching refund feature of auto insurance policies, which resulted in recovery of $5,718,825.

- ***Davis v. National Foundation Life Insurance Co.,*** Jay County, Indiana, Circuit Court.
  Class Counsel in action involving insureds who were denied health insurance benefits as a result of National Foundations' inclusion and enforcement of pre-existing condition exclusionary riders in violation of Indiana law. Settlement provided over 85% recovery of the wrongfully denied benefits.

Securities Fraud Cases

- ***Grant et al. v. Arthur Andersen et al.,*** Maricopa County Arizona, Superior Court.
  Lead counsel in class action arising from the collapse of the Baptist Foundation of Arizona, involving losses of approximately $560 million. Settlement achieved for $237 million.

- ***In re: Brightpoint Securities Litigation,*** U.S. District Court, Southern District of Indiana.

Class Counsel in securities fraud action that resulted in a $5.25 million settlement for shareholders.

- ***City of Austin Police Retirement System v. ITT Educational Services, Inc., et al*****,** U.S. District Court, Southern District of Indiana.
  Co-lead counsel in action alleging misrepresentations by defendant and certain principals concerning enrollment and graduate placement, and a failure to disclose multiple federal investigations into defendant's operations and records.

- ***Beeson and Gregory v. PBC et al.,*** U.S. District Court, Southern District of Indiana.
  Class Counsel in a nationwide class action with ancillary proceedings in the District of Connecticut, and the Southern District of Florida. Multi-million-dollar settlement that returned 100% of losses to investors.

- ***In re: Prudential Energy Income Securities Litigation,*** U.S. District Court, Eastern District of Louisiana.
  Counsel for objectors opposing a $37 million class action settlement. Objection successfully led to an improved $120 million settlement for 130,000 class members.

- ***In re: PSI Merger Shareholder Litigation,*** U.S. District Court, Southern District of Indiana.
  Obtained an injunction to require proper disclosure to shareholders in merger of Public Service Indiana Energy, Inc. and Cincinnati Gas & Electric.

- ***Dudley v. Ski World, Inc.,*** U.S. District Court, Southern District of Indiana.
  Class counsel for over 5,000 investors in Ski World stock. Multi-million-dollar settlement.

- ***Stein v. Marshall,*** U.S. District Court, District of Arizona.
  Class Counsel Committee member in action involving the initial public offering of Residential Resources, Inc. Nationwide settlement achieved on behalf of investors.

- ***Dominijanni v. Omni Capital Group, Ltd. et al.,*** U.S. District Court, Southern District of Florida.
  Co-lead counsel in securities fraud class action. Nationwide settlement on behalf of investors.

Mass Medical Malpractice

- **Weinberger Litigation,** $59 million in settlements.
  This litigation involved 282 plaintiffs who were patients of former ENT surgeon Mark Weinberger of Merrillville, Indiana. This mass medical malpractice included complaints ranging from unnecessary sinus

surgeries and negligently performed surgeries to patient abandonment. Weinberger fled the country after more than a dozen medical malpractice lawsuits were filed against him. He was also indicted on 22 counts of health care fraud and was later apprehended at the foot of the Italian Alps. Weinberger was ultimately sentenced to 7 years in prison for insurance fraud. Cohen & Malad, LLP attorneys served as Co-Counsel in these medical malpractice lawsuits and successfully negotiated $59 million in settlements for the people Weinberger harmed.

- **Northwest Indiana Cardiology Group Litigation,** $67 million settlement. This litigation involved over 260 claimants who were patients of a cardiology practice in northwest Indiana. This mass tort medical malpractice included complaints of unnecessary heart surgeries, coronary artery stenting, peripheral stenting, and pacemaker and defibrillator implantations, as well as negligent credentialing claims. Cohen & Malad, LLP attorneys are served as Co-Counsel in these medical malpractice lawsuits and successfully negotiated a settlement of over $67 million.

Mass Tort Pharmaceutical Drug and Medical Device Litigation

- ***Gilead Tenofovir Cases*****,** JCCP No. 5043 *(pending)*
  Cohen & Malad, LLP is currently representing patients against Gilead Sciences who were prescribed its TDF-based drugs to treat HIV, for pre-exposure prophylaxis (PrEP) to mitigate HIV risk, or to treat Hepatitis, and suffered serious kidney and bone injuries. Thousands of cases are pending in the Superior Court for the County of San Francisco, California.

- **Strattice Biologic Mesh** *(pending)*
  Cohen & Malad, LLP is representing patients against LifeCell Corporation and Allergen who suffered injuries, including revision or removal surgeries, after receiving a Strattice mesh product for hernia repairs. These cases are currently pending in New Jersey State Court.

- ***In Re: Zofran (Ondansetron) Products Liability Litigation*****,** MDL No. 2657 (D. Mass) (pending)
  Cohen & Malad, LLP serves on the Plaintiff's Steering Committee, Narrative Committee, and Discovery, Briefing, and Science Committees in an action on behalf of women who took Zofran while pregnant and gave birth to a baby who suffered from a serious birth defect.

- ***In re: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Liability Litigation*****,** MDL No. 2738 (D. N.J.) (pending)
  Cohen & Malad, LLP is currently representing women who used Johnson & Johnson's talcum powder products for feminine hygiene and were diagnosed with ovarian cancer. Thousands of cases are currently pending.

- ***In Re: National Prescription Opiate Litigation*****,** MDL No. 2804 (N.D. Ohio) (pending)

Cohen & Malad, LLP is currently representing dozens of Indiana cities and counties in litigation against the manufacturers and distributors of opioid pain medications. This litigation is focused on combating the prescription opioid epidemic and replenishing valuable resources for Indiana communities that have spent vital economic resources responding to public health and safety issues resulting from this epidemic.

- **Biomet Metal on Metal Hip Replacement System** (pending)
  Cohen & Malad, LLP is representing patients in Indiana state court who were implanted with a Biomet M2a metal on metal hip replacement system and suffered serious injuries such as significant pain, tissue destruction, bone destruction, and metallosis. In many cases, revision surgeries were necessary within just a few years of implantation.

- ***In Re: Zantac (Ranitidine) Products Liability Litigation*****,** MDL No. 2924, (S.D. FL.) *(pending)*
  Cohen & Malad, LLP is representing patients who were diagnosed with cancer following the use of Zantac (ranitidine). The U.S. Food and Drug Administration issued a recall for all Zantac (ranitidine) drugs including over the counter and prescription formulas on April 1, 2020.

- ***In Re: Cook Medical, Inc., IVC Filters Marketing, Sales Practices and Products Liability Litigation*****,** MDL No. 2570 (S.D. Ind.) *(pending)*
  Cohen & Malad, LLP is representing patients alleging serious injury related to the use of Cook Medical's inferior vena cava (IVC) filters.

- ***In Re: Prempro Products Liability Litigation*****,** MDL No. 1507
  Cohen & Malad, LLP litigated hundreds of claims against Wyeth, the manufacturer of Prempro, for women who took hormone replacement therapy drug Prempro and suffered stroke, heart attacks, endometrial tumors or breast cancers. Wyeth agreed to a global settlement for more than $890 million to settle roughly 2,200 claims.

- **Pain Pump Device Litigation**
  No MDL existed for this litigation. Cohen & Malad, LLP served in a National Coordinated Counsel role. This litigation was against pain pump manufacturers who marketed pain pumps to orthopedic surgeons for continuous intra-articular uses, despite the fact that intra-articular placement of the pain pump catheters was not approved by the FDA. The use of pain pumps in the joint space resulted in deterioration of cartilage, severe pain, loss of mobility or decreased range of motion and use of shoulder.

- **Yaz**
  Cohen & Malad, LLP represented hundreds of women in claims against Bayer over its Yaz and Yasmin birth control oral contraceptive. These drugs contained a synthetic version of estrogen called drospirenone that was linked to an increased risk for blood clots, stroke, and heart attack. As

of January 2016, Bayer agreed to pay $2.04 billion to settle over 10,000 claims for blood-clot injuries.

- **Transvaginal Mesh**
  Cohen & Malad, LLP represented hundreds of women in claims against transvaginal mesh manufacturers Ethicon, C.R. Bard, Boston Scientific, and American Medical Systems. Mesh implants are synthetic material used to support organs in women who suffer from pelvic organ prolapse and stress urinary incontinence. The FDA received thousands of complaints from women who suffered serious personal injury including perforated organs, infection, severe pain, and erosion of the mesh.

- ***In Re: Testosterone Replacement Therapy Products Liability Litigation*****,** MDL No. 2425 (N.D. III.)
  Cohen & Malad, LLP served on the discovery team in action on behalf of men who took drug manufacturers' testosterone replacement therapy products and suffered injuries such as blood clots, heart attacks, strokes and death.

- ***In Re: Consolidated Fresenius Cases (Granuflo)*****,** MICV2013-3400-O, Commonwealth of Massachusetts, Middlesex County,
  Cohen & Malad, LLP served on the Plaintiff's Steering Committee, bellwether discovery program committee, and privilege log committee in an action on behalf of dialysis patients alleging the defendant's dialysis products caused cardiac injuries and death. There was a $250 million global settlement.

EXHIBIT C

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KALIEL GOLD PLLC

Kaliel Gold PLLC was founded in 2017 and is a 100% contingency Plaintiff-side law firm. Our attorneys have decades of combined experience and have secured hundreds of millions of dollars for their clients. Our firm's practice focuses on representing consumers in class action litigation and specifically on cases in the consumer financial services sector. In the four years since our firm was founded, our firm has been appointed lead counsel or co-lead counsel in numerous class action and putative class action lawsuits in state and federal courts nationwide including most recently in *Roberts v. Capital One*, No. 1:16-cv-04841 (S.D.N.Y.); *Walters v. Target Corp.,* No. 3:16-cv-00492 (S.D. Cal.); *Robinson v. First Hawaiian Bank*, Civil No.17-1-0167-01 GWBC (1st Cir. Haw.); *Liggio v. Apple Federal Credit Union*, No. 18-cv-01059 (E.D. Va.); *Morris et al. v. Bank of America, N.A.,* No. 3:18-cv-00157-RJC-DSC (W.D.N.C.); *Brooks et al. v. Canvas Credit Union*, 2019CV30516 (Dist. Ct. for Denver Cnty., Colo.); *Figueroa v. Capital One, N.A.*, Case No. 3:18-cv-00692-JM-BGS (S.D. Cal.); *White v. Members 1st Credit Union*, Case No. 1:19-cv-00556-JEJ (M.D. Pa.); *Plummer v. Centra Credit Union*, Case No. 03D01-1804-PL-001903 (Cnty. Of Bartholomew, Ind.); *Holt v. Community America Credit Union*, Case No. 4:19-cv-00629-FJG (W.D. Mo.); *Trinity Management v. Charles Puckett*, Case No. GCG-17-558960 (Super. Ct., San Francisco Cnty, Cal.); *Martin v. L&N Federal Credit Union*. No. 19-CI-022873 (Jefferson Cir. Ct., Div. One); *Clark v. Hills Bank and Trust Company*, No. LACV080753 (Iowa Dist. Ct. Johnson Cnty.); *Morris v. Provident Credit Union*, Case No. CGC-19-581616 (Super. Ct., San Francisco Cnty., Cal.).

As shown in the biographies of our attorneys and the list of class counsel appointments, Kaliel Gold PLLC is well versed in class action litigation and zealously advocates for its clients. To learn more about Kaliel Gold PLLC, or any of the firm's attorneys, please visit www.kalielgold.com.

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JEFFREY D. KALIEL

Jeffrey Kaliel earned his law degree from Yale Law School in 2005. He graduated from Amherst College summa cum laude in 2000 with a degree in Political Science, and spent one year studying Philosophy at Cambridge University, England.

Over the last 10 years, Jeff has built substantial class action experience. He has received "Washington D.C. Rising Stars Super Lawyers 2015" recognition.

Jeff has been appointed lead Class Counsel in numerous nationwide and state-specific class actions. In those cases, Jeff has won contested class certification motions, defended dispositive motions, engaged in data-intensive discovery and worked extensively with economics and information technology experts to build damages models. Jeff has also successfully resolved numerous class actions by settlement, resulting in hundreds of millions of dollars in relief for millions of class members.

Currently Jeff is actively litigating several national class action cases, including actions against financial services entities and other entities involved in predatory lending and financial services targeting America's most vulnerable populations.

Jeff's class action successes extend beyond financial services litigation. He seeks to lead cases that serve the public interest. Jeff has worked with nonprofits such as the Humane Society, Compassion Over Killing, and the National Consumers League to fight for truth in the marketplace on food and animal products.

Jeff has over a decade of experience in high-stakes litigation. He was in the Honors Program at the Department of Homeland Security, where he worked on the Department's appellate litigation. Jeff also helped investigate the DHS response to Hurricane Katrina in preparation for a Congressional inquiry. Jeff also served as a Special Assistant US Attorney in the Southern District of California, prosecuting border-related crimes.

Jeff is a former Staff Sergeant in the Army, with Airborne and Mountain Warfare qualifications. He is a veteran of the second Iraq war, having served in Iraq in 2003.

Jeff is admitted to practice in California and Washington, DC, and in appellate and district courts across the country.

Jeff lives in Washington, D.C. with his wife, Debbie, and their three children.

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SOPHIA GOREN GOLD

Sophia Goren Gold is a third-generation Plaintiff's lawyer. A *summa cum laude* graduate of Wake Forest University and the University of California, Berkeley, School of Law, Sophia has spent her entire career fighting for justice.

A fierce advocate for those in need, Sophia's practice centers around taking on financial institutions, insurance companies, and other large corporate interests. Sophia has participated in hundreds of individual and class cases in both state and federal courts across the country. Collectively, she has helped secure tens of millions of dollars in relief on behalf of the classes she represents.

In addition to providing monetary relief, Sophia's extensive litigation experience has resulted in real-world positive change. For example, she brought litigation which resulted in the elimination of the Tampon Tax in the State of Florida, and she was influential in changing the state of Delaware's Medicaid policy, resulting in greater access to life-saving medication.

Sophia is currently representing consumers in numerous cases involving the assessment of improper fees by banks and credit unions, such as overdraft fees, insufficient funds fees, and out of network ATM fees. She is also currently representing consumers who have been the victims of unfair and deceptive business practices.

Sophia is admitted to practice in California and Washington, D.C. When not working, Sophia enjoys spending time with her husband, daughter, and their goldendoodle.

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BRITTANY CASOLA

Brittany Casola attended the University of Central Florida in Orlando and graduated in 2012 with a bachelor's degree in Political Science and a minor in Spanish. Brittany earned her Juris Doctorate from California Western School of Law in 2015 and graduated magna cum laude in the top 10% of her class.

Throughout the course of her law school career, she served as a judicial extern to the Honorable Anthony J. Battaglia for the United States District Court, Southern District of California and worked multiple semesters as a certified legal intern for the San Diego County District Attorney's Office. Brittany was awarded Academic Excellence Awards in law school for receiving the highest grade in Trial Practice, Health Law & Policy, and Community Property.

Before joining Kaliel Gold PLLC, Brittany worked as a judicial law clerk for the Honorable Anthony J. Battaglia and as an associate attorney for Carlson Lynch LLP, specializing in consumer complex litigation.

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AMANDA ROSENBERG

Amanda Rosenberg graduated *cum laude* from the University of California, Hastings College of the Law in 2011 and the University of California, San Diego in 2008, where she earned departmental Honors with Highest Distinction in history.

Before joining Kaliel Gold PLLC, Amanda represented and advised small businesses and financial institutions in litigation matters including employment disputes, merchant disputes, credit and charge card disputes, wrongful foreclosures, and securities. She has successfully litigated cases in California, Illinois, and Michigan.

Amanda is an active volunteer in her community and has helped numerous individuals understand and navigate their rights in the workplace.

In law school, Amanda worked as an extern for the Honorable Judge Vaughn Walker in the United States District Court, Northern District of California. Amanda was awarded academic excellence awards for receiving the highest grades in Trial Advocacy and Litigating Class Action Employment.

When not working, Amanda loves exploring Michigan's outdoors with her husband, kids, and rescue dog.

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CLASS COUNSEL APPOINTMENTS

- *Roberts v. Capital One*, No. 1:16-cv-04841 (S.D.N.Y.);
- *Walters v. Target Corp.,* No. 3:16-cv-00492 (S.D. Cal.);
- *Figueroa v. Capital One, N.A.*, Case No. 3:18-cv-00692-JM-BGS (S.D. Cal.).
- *Robinson v. First Hawaiian Bank*, Civil No.17-1-0167-01 GWBC (1st Cir. Haw.);
- *Brooks et al. v. Canvas Credit Union*, 2019CV30516 (Dist. Ct. for Denver Cnty., Colo.).
- *Liggio v. Apple Federal Credit Union*, Civil No. 18-cv-01059 (E.D. Va.);
- *Morris et al. v. Bank of America, N.A.,* Civil No. 3:18-cv-00157-RJC-DSC (W.D.N.C.);
- *White v. Members 1st Credit Union*, Case No. 1:19-cv-00556-JEJ (M.D. Pa.);
- *Plummer v. Centra Credit Union*, Case No. 03D01-1804-PL-001903 (Bartholomew Cnty., Ind.);
- *Holt v. Community America Credit Union*, Case No. 4:19-cv-00629-FJG (W.D. Mo.);
- *Trinity Management v. Charles Puckett*, Case No. GCG-17-558960 (Super. Ct., San Francisco, Cnty., Cal.);
- *Martin v. L&N Federal Credit Union*. No. 19-CI-022873 (Jefferson Cir. Ct., Division One);
- *Clark v. Hills Bank and Trust Company*, No. LACV080753 (Iowa Dist. Ct. Johnson Cnty.);
- *Morris v. Provident Credit Union*, Case No. CGC-19-581616 (Super. Ct. San Francisco Cnty., Cal.).
- *Bodnar v. Bank of America, N.A.*, 5:14-cv-03224 (E.D. Pa.);
- *In re Higher One OneAccount Marketing and Sales Practice Litigation.*, No. 12-md-02407-VLB (D. Conn.).
- *Shannon Schulte, et al. v. Fifth Third Bank.*, No. 1:09-cv-06655 (N.D. Ill.);
- *Kelly Mathena v. Webster Bank*, No. 3:10-cv-01448 (D. Conn.);
- *Nick Allen, et al. v. UMB Bank, N.A., et al.*, No. 1016 Civ. 34791 (Cir. Ct. Jackson Cnty., Mo.);
- *Thomas Casto, et al. v. City National Bank, N.A.*, 10 Civ. 01089 (Cir. Ct. Kanawha Cnty., W. Va.);
- *Eaton v. Bank of Oklahoma, N.A.*, and *BOK Financial Corporation, d/b/a Bank of Oklahoma, N.A.*, No. CJ-2010-5209 (Dist. Ct. for Tulsa Cnty., Okla.);
- *Lodley and Tehani Taulva, et al., v. Bank of Hawaii and Doe Defendants 1-50*, No. 11-1-0337-02 (Cir. Ct. of 1st Cir., Haw.);
- *Jessica Duval, et al. v. Citizens Financial Group, Inc., et al*, No. 1:10-cv-21080 (S.D. Fla.);
- *Mascaro, et al. v. TD Bank, Inc.*, No. 10-cv-21117 (S.D. Fla.);
- *Theresa Molina, et al., v. Intrust Bank, N.A.*, No. 10-cv-3686 (18th Judicial Dist., Dist. Ct. Sedgwick Cnty., Kan.);
- *Trombley v. National City Bank*, 1:10-cv-00232-JDB (D.D.C.); *Galdamez v. I.Q. Data Internatonal, Inc.*, No. l:15-cv-1605 (E.D. Va.);
- *Brown et al. v. Transurban USA, Inc. et al.*, No. 1:15-CV-00494 (E.D. Va.);
- *Grayson v. General Electric Co.*, No. 3:13-cv-01799 (D. Conn.);
- *Galdamez v. I.Q. Data Internatonal, Inc.*, No. l:15-cv-1605 (E.D. Va.).

EXHIBIT D

KO LAWYERS

KOPELOWITZ OSTROW
FERGUSON WEISELBERG GILBERT

FIRM **RESUME**

One West Las Olas Boulevard, Suite 500
Fort Lauderdale, Florida 33301

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Miami – Fort Lauderdale – Boca Raton

OUR FIRM

For over two decades, Kopelowitz Ostrow Ferguson Weiselberg Gilbert (KO) has provided comprehensive, results-oriented legal representation to individual, business, and government clients throughout Florida and the rest of the country. KO has the experience and capacity to represent its clients effectively and has the legal resources to address almost any legal need. The firm's 26-plus attorneys have practiced at several of the nation's largest and most prestigious firms and are skilled in almost all phases of law, including consumer class actions, multidistrict litigation involving mass tort actions, complex commercial litigation, and corporate transactions. In the class action arena, the firm has experience not only representing individual aggrieved consumers, but also defending large institutional clients, including multiple Fortune 100 companies.

WHO WE ARE

The firm has a roster of accomplished attorneys. Clients have an opportunity to work with some of the finest lawyers in Florida and the United States, each one committed to upholding KO's principles of professionalism, integrity, and personal service. Among our roster, you'll find attorneys whose accomplishments include: being listed among the "Legal Elite Attorneys" and as "Florida Super Lawyers"; achieving an AV® Preeminent™ rating by the Martindale-Hubbell peer review process; being Board Certified in their specialty; serving as in-house counsel for major corporations, as a city attorney handling government affairs, as a public defender, and as a prosecutor; achieving multi-millions of dollars through verdicts and settlements in trials, arbitrations, and alternative dispute resolution procedures; successfully winning appeals at every level in Florida state and federal courts; and serving government in various elected and appointed positions.

KO has the experience and resources necessary to represent large putative classes. The firm's attorneys are not simply litigators, but rather, experienced trial attorneys with the support staff and resources needed to coordinate complex cases.

Since its founding, KO has initiated and served as co-lead counsel and liaison counsel in many high-profile class actions. Currently, the firm serves as liaison counsel in a multidistrict class action antitrust case against four of the largest contact lens manufacturers pending before Judge Schlesinger in the Middle District of Florida. *See* In Re: Disposable Contact Lens Antitrust Litigation, MDL 2626 as well as co-lead counsel in *In re Zantac (Ranitidine) Prods. Liab. Litig.*, 9:20-md-02924-RLR (S.D. Fla.).

Further, the firm has served or is currently serving as lead or co-lead counsel in dozens of certified and/or proposed class actions against national and regional banks involving the unlawful re-sequencing of debit and ATM transactions resulting in manufactured overdraft fees, and other legal theories pertaining to overdraft fees and insufficient funds (NSF) fees. The cases are pending, or were pending, in various federal and state jurisdictions throughout the country, including some in multidistrict litigation pending in the Southern District of Florida and others in federal and state courts dispersed throughout the country. KO's substantial knowledge and experience litigating overdraft class actions and analyzing overdraft damage data has enabled the firm to obtain about a dozen multi-million dollar settlements (in excess of $400 million) for the classes KO represents.

Additionally, other current cases are being litigated against automobile insurers for failing to pay benefits owed to insureds with total loss vehicle claims; data breaches; false advertising; defective consumer products and vehicles; antitrust violations; and suits on behalf of students against colleges and universities arising out of the COVID-19 pandemic.

The firm has in the past litigated certified and proposed class actions against Blue Cross Blue Shield and United Healthcare related to their improper reimbursements of health insurance benefits. Other insurance cases include auto insurers failing to pay benefits owed to insureds with total loss vehicle claims. Other class action cases include cases against Microsoft Corporation related to its Xbox 360 gaming platform, ten of the largest oil companies in the world in connection with the destructive propensities of ethanol and its impact on boats, Nationwide Insurance for improper mortgage fee assessments, and several of the nation's largest retailers for deceptive advertising and marketing at their retail outlets and factory stores.

CLASS ACTION **DEFENSE**

The firm also brings experience in successfully defended many class actions on behalf of banking institutions, mortgage providers and servicers, an aircraft maker and U.S. Dept. of Defense contractor, a manufacturer of breast implants, and a national fitness chain.

MASS TORT **LITIGATION**

The firm also has extensive experience in mass tort litigation, including the handling of cases against Bausch & Lomb in connection with its Renu with MoistureLoc product, Wyeth Pharmaceuticals related to Prempro, Bayer Corporation related to its birth control pill YAZ, and Howmedica Osteonics Corporation related to the Stryker Rejuvenate and AGB II hip implants. In connection with the foregoing, some of which has been litigated within the multidistrict arena, the firm has obtained millions in recoveries for its clients.

OTHER AREAS **OF PRACTICE**

In addition to class action and mass tort litigation, the firm has extensive experience in the following practice areas: commercial and general civil litigation, corporate transactions, health law, insurance law, labor and employment law, marital and family law, real estate litigation and transaction, government affairs, receivership, construction law, appellate practice, estate planning, wealth preservation, healthcare provider reimbursement and contractual disputes, white collar and criminal defense, employment contracts, environmental, and alternative dispute resolution.

FIND US **ONLINE**

To learn more about KO, or any of the firm's other attorneys, please visit www.kolawyers.com.

FINANCIAL
INSTITUTIONS

Roberts v. Capital One, N.A., 16 Civ. 4841 (LGS) (S.D.N.Y 2020) - $17 million

Lloyd v. Navy Federal Credit Union, 17-cv-01280-BAS-RBB (S.D. Ca. 2019) - $24.5 million

Farrell v. Bank of America, N.A., 3:16-cv-00492-L-WVG (S.D. Ca. 2018) - $66.6 million

Bodnar v. Bank of America, N.A., 5:14-cv-03224-EGS (E.D. Pa. 2015) - $27.5 million

Morton v. Green Bank, 11-135-IV (20th Judicial District Tenn. 2018) - $1.5 million

Hawkins v. First Tennessee Bank, CT-004085-11 (13th Judicial District Tenn. 2017) - $16.75 million

Payne v. Old National Bank, 82C01-1012 (Cir. Ct. Vanderburgh 2016) - $4.75 million

Swift. v. Bancorpsouth, 1:10-CV-00090 (N.D. Fla. 2016) - $24.0 million

Mello v. Susquehanna Bank, 1:09-MD-02046 (S.D. Fla. 2014) – $3.68 million

Johnson v. Community Bank, 3:11-CV-01405 (M.D. Pa. 2013) - $1.5 million

McKinley v. Great Western Bank, 1:09-MD-02036 (S.D. Fla. 2013) - $2.2 million

Blahut v. Harris Bank, 1:09-MD-02036 (S.D. Fla. 2013) - $9.4 million

Wolfgeher Commerce Bank, 1:09-MD-02036 (S.D. Fla. 2013) - $18.3 million

Case v. Bank of Oklahoma, 09-MD-02036 (S.D. Fla. 2012) - $19.0 million Settlement

Hawthorne v. Umpqua Bank, 3:11-CV-06700 (N.D.Ca. 2012) - $2.9 million Settlement

Simpson v. Citizens Bank, 2:12-CV-10267 (E.D. Mi. 2012) - $2.0 million

Nelson v. Rabobank, RIC 1101391 (Riverside County, Ca. 2012) - $2.4 million

Harris v. Associated Bank, 1:09-MD-02036 (S.D. Fla. 2012) - $13.0 million

LaCour v. Whitney Bank, 8:11-CV-1896 (M.D. Fla. 2012) - $6.8 million

Orallo v. Bank of the West, 1:09-MD-202036 (S.D. Fla. 2012) - $18.0 million

Taulava v. Bank of Hawaii, 11-1-0337-02 (1st Cir. Hawaii 2011) - $9.0 million

Trevino v. Westamerica, CIV 1003690 (Marin County, CA 2010) - $2.0 million

FALSE PRICING

Gattinella v. Michael Kors (USA), 14-Civ-5731 (WHP) (S.D. NY 2015) - $4.875 million

Stathakos v. Columbia Sportswear, 4:15-cv-04543-YGR (N.D. Ca. 2018) - Injunctive relief prohibiting deceptive pricing practices

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CONSUMER PROTECTION

Walters v. Target Corp., 3:16-cv-1678-L-MDD (S.D. Cal. 2020) – $8.2 million

Papa v. Grieco Ford Fort Lauderdale, LLC, 18-cv-21897-JEM (S.D. Fla. 2019) - $4.9 million

Bloom v. Jenny Craig, Inc., 18-cv-21820-KMM (S.D. Fla. 2019) - $3 million

DiPuglia v. US Coachways, Inc., 1:17-cv-23006-MGC (S.D. Fla. 2018) - $2.6 million

Masson v. Tallahassee Dodge Chrysler Jeep, LLC, 1:17-cv-22967-FAM (S.D. Fla. 2018) - $850,000

MASS TORT

In re Zantac (Ranitidine) Prods. Liab. Litig., 9:20-md-02924-RLR (S.D. Fla.) - MDL No. 2924 – Co-Lead Counsel

In re: Stryker Rejuvenate and ABG II PRODUCTS LIABILITY LITIGATION, 13-MD-2411 (17th Jud. Cir. Fla. Complex Litigation Division)

In re: National Prescription Opiate Litigation, 1:17-md-02804-DAP (N.D. Ohio) - MDL 2804

In re: Smith and Nephew BHR Hip Implant Products Liability Litigation, MDL-17-md-2775

Yasmin and YAZ Marketing, Sales Practivces and Products Liability Litigation, 3:09-md-02100-DRH-PMF (S.D. Ill.) – MDL 2100

In re: Prempro Products Liability Litigation, MDL Docket No. 1507, No. 03-cv-1507 (E.D. Ark.)

JEFF OSTROW

Managing Partner

Bar Admissions

The Florida Bar

Court Admissions

Supreme Court of the United States
U.S. Court of Appeals for the Eleventh Circuit
U.S. District Court, Southern District of Florida
U.S. District Court, Middle District of Florida
U.S. District Court, Northern District of Florida
U.S. District Court, Northern District of Illinois
U.S. District Court, Eastern District of Michigan
U.S. District Court, Western District of Tennessee
U.S. District Court, Western District of Wisconsin

Education

Nova Southeastern University, J.D. - 1997
University of Florida, B.S. – 1994

Email: Ostrow@kolawyers.com

Jeff Ostrow is the Managing Partner of Kopelowitz Ostrow P.A. He established his own law practice immediately upon graduation from law school in 1997, co-founded the current firm in 2001, and has since grown it to nearly 50 attorneys in 3 offices throughout South Florida. In addition to overseeing the firm's day-to-day operations and strategic direction, Mr. Ostrow practices full time in the areas of consumer class actions, sports and business law. He is a Martindale-Hubbell AV® Preeminent™ rated attorney in both legal ability and ethics.

Mr. Ostrow is an accomplished trial attorney who represents both Plaintiffs and Defendants, successfully trying many cases to verdict involving multi-million dollar damage claims in state and federal courts. Currently, he serves as lead counsel in nationwide and statewide class action lawsuits against many of the world's largest financial institutions in connection with the unlawful assessment of fees. To date, his efforts have successfully resulted in the recovery of over $400,000,000 for tens of millions of bank customers, as well as monumental changes in the way banks assess fees. In addition, Mr. Ostrow has litigated consumer class actions against some of the world's largest clothing retailers, health insurance carriers, technology companies, and oil conglomerates, along with serving as class action defense counsel for some of the largest advertising and marketing agencies in the world, banking institutions, real estate developers, and mortgage companies.

Mr. Ostrow often serves as outside General Counsel to companies, advising them in connection with their legal and regulatory needs. He has represented many Fortune 500® Companies in connection with their Florida litigation. He has handled cases covered by media outlets throughout the country and has been quoted many times on various legal topics in almost every major news publication, including the Wall Street Journal, New York Times, Washington Post, Miami Herald, and Sun-Sentinel. He has also appeared on CNN, ABC, NBC, CBS, FoxNews, ESPN, and almost every other major national and international television network in connection with his cases, which often involve industry changing litigation or athletes in Olympic Swimming, the NFL, NBA and MLB.

In addition to the law practice, he is the President of ProPlayer Sports LLC, a full-service sports agency and marketing firm. He represents both Olympic swimmers and select NFL athletes and is licensed by both the NFL Players Association and the NBA Players Association as a certified Contract Advisor. Mr. Ostrow handles all player-team negotiations of contracts, represents his clients in legal proceedings, negotiates all marketing engagements, and oversees public relations and crisis management. He has extensive experience in negotiating, mediating and arbitrating a wide-range of issues on behalf of clients with the NFL Players Association, the International Olympic Committee, the United States Olympic Committee, USA Swimming and the United States Anti-Doping Agency.

He is the founder and President of Class Action Lawyers of American, a member of the Public Justice Foundation, and a lifetime member of the Million Dollar Advocates Forum. The Million Dollar Advocates Forum is the most prestigious group of trial lawyers in the United States. Membership is limited to attorneys who have won multi-million dollar verdicts. Additionally, he has been named as one of the top lawyers in Florida by Super Lawyers® for several years running, honored as one of Florida's Legal Elite Attorneys, recognized as a Leader in Law by the Lifestyle Media Group®, and nominated by the South Florida Business Journal® as a finalist for its Key Partners Award. Mr. Ostrow is a recipient of the Gator 100 award for the fastest growing University of Florida alumni-owned law firm in the world.'

When not practicing law, Mr. Ostrow serves on the Board of Governors of Nova Southeastern University's Wayne Huizenga School of Business and is a Member of the Broward County Courthouse Advisory Task Force. He is also the Managing Member of One West LOA LLC, a commercial real estate development company. Mr. Ostrow is a founding board member for the Jorge Nation Foundation, a 501(c)(3) non-profit organization that partners with the Joe DiMaggio Children's Hospital to send children diagnosed with cancer on all-inclusive Dream Trips to destinations of their choice. He has previously sat on the boards of a national banking institution and a national healthcare marketing company.

ROBERT C. GILBERT

Partner

Bar Admissions
The Florida Bar
District of Columbia Bar

Court Admissions
Supreme Court of the United States
U.S. Court of Appeals for the 11th Circuit
U.S. District Court, Southern District of Florida
U.S. District Court, Middle District of Florida

Education
University of Miami School of Law, J.D. - 1985
Florida International University, B.S. - 1982

Email: Gilbert@kolawyers.com

Robert C. "Bobby" Gilbert has over three decades of experience handling class actions, multidistrict litigation and complex business litigation throughout the United States. He has been appointed lead counsel, co-lead counsel, coordinating counsel or liaison counsel in many federal and state court class actions. Bobby has served as trial counsel in class actions and complex business litigation tried before judges, juries and arbitrators. He has also briefed and argued numerous appeals, including two precedent-setting cases before the Florida Supreme Court.

Bobby was appointed as Plaintiffs' Coordinating Counsel in *In re Checking Account Overdraft Litig.*, MDL 2036, class action litigation brought against many of the nation's largest banks that challenged the banks' internal practice of reordering debit card transactions in a manner designed to maximize the frequency of customer overdrafts. In that role, Bobby managed the large team of lawyers who prosecuted the class actions and served as the plaintiffs' liaison with the Court regarding management and administration of the multidistrict litigation. He also led or participated in settlement negotiations with the banks that resulted in settlements exceeding $1.1 billion, including Bank of America ($410 million), Citizens Financial ($137.5 million), JPMorgan Chase Bank ($110 million), PNC Bank ($90 million), TD Bank ($62 million), U.S. Bank ($55 million), Union Bank ($35 million) and Capital One ($31.7 million).

Bobby has been appointed to leadership positions is numerous other class actions and multidistrict litigation proceedings. He is currently serving as co-lead counsel in *In re Zantac (Ranitidine) Prods. Liab. Litig.*, 9:20-md-02924-RLR (S.D. Fla.), as well as liaison counsel in *In re Disposable Contact Lens Antitrust Litig.*, MDL 2626 (M.D. Fla.); liaison counsel in *In re 21st Century Oncology Customer Data Security Beach Litig.*, MDL 2737 (M.D. Fla.); and *In re Farm-Raised Salmon and Salmon Products Antitrust Litig.*, No. 19-21551 (S.D. Fla.). He previously served as liaison counsel for indirect purchasers in *In re Terazosin Hydrochloride Antitrust Litig.*, MDL 1317 (S.D. Fla.), an antitrust class action that settled for over $74 million.

For the past 18 years, Bobby has represented thousands of Florida homeowners in class actions to recover full compensation under the Florida Constitution based on the Florida Department of Agriculture's taking and destruction of the homeowners' private property. As lead counsel, Bobby argued before the Florida Supreme Court to establish the homeowners' right to pursue their claims; served as trial counsel in non-jury liability trials followed by jury trials that established the amount of full compensation owed to the homeowners for their private property; and handled all appellate proceedings. Bobby's tireless efforts on behalf of the homeowners resulted in judgments exceeding $93 million.

Bobby previously served as an Adjunct Professor at Vanderbilt University Law School, where he co-taught a course on complex litigation in federal courts that focused on multidistrict litigation and class actions. He continues to frequently lecture and make presentations on a variety of topics.

Bobby has served for many years as a trustee of the Greater Miami Jewish Federation and previously served as chairman of the board of the Alexander Muss High School in Israel, and as a trustee of The Miami Foundation.

JONATHAN M. STREISFELD

Partner

Bar Admissions

The Florida Bar

Court Admissions

Supreme Court of the United States
U.S. Court of Appeals for the First, Second, Fourth, Fifth Ninth, and Eleventh Circuits
U.S. District Court, Southern District of Florida
U.S. District Court, Middle District of Florida
U.S. District Court, Northern District of Florida
U.S. District Court, Northern District of Illinois
U.S. District Court, Western District of Michigan
U.S. District Court, Western District of New York
U.S. District Court, Western District of Tennessee

Education

Nova Southeastern University, J.D. - 1997
Syracuse University, B.S. - 1994

Email: streisfeld@kolawyers.com

Jonathan M. Streisfeld joined KO as a partner in 2008. Mr. Streisfeld concentrates his practice in the areas of consumer class actions, business litigation, and appeals nationwide. He is a Martindale-Hubbell AV® Preeminent™ rated attorney in both legal ability and ethics.

Mr. Streisfeld has vast and successful experience in class action litigation, serving as class counsel in nationwide and statewide consumer class action lawsuits against the nation's largest financial institutions in connection with the unlawful assessment of fees. To date, his efforts have successfully resulted in the recovery of over $400,000,000 for millions of bank and credit union customers, as well as profound changes in the way banks assess fees. Additionally, he has and continues to serve as lead and class counsel for consumers in many class actions involving false advertising and pricing, defective products, and data breach. In addition, Mr. Streisfeld has litigated class actions against some of the largest health and automobile insurance carriers and oil conglomerates, and defended class and collective actions in other contexts.

Mr. Streisfeld has represented a variety of businesses and individuals in a broad range of business litigation matters, including contract, fraud, breach of fiduciary duty, intellectual property, real estate, shareholder disputes, wage and hour, and deceptive trade practices claims. He also assists business owners and individuals with documenting contractual relationships. Mr. Streisfeld also provides legal representation in bid protest proceedings.

Mr. Streisfeld oversees the firm's appellate and litigation support practice, representing clients in the appeal of final and non-final orders, as well as writs of certiorari, mandamus, and prohibition. His appellate practice includes civil and marital and family law matters.

Previously, Mr. Streisfeld served as outside assistant city attorney for the City of Plantation and Village of Wellington in a broad range of litigation matters.

As a member of The Florida Bar, Mr. Streisfeld served for many years on the Executive Council of the Appellate Practice Section and is a past Chair of the Section's Communications Committee. Mr. Streisfeld currently serves as a member of the Board of Temple Kol Ami Emanu-El.

DANIEL TROPIN

Partner

Bar Admissions
The Florida Bar

Court Admissions
U.S. District Court, Southern District of Florida
U.S. District Court, Middle District of Florida

Education
University of Virginia, J.D. - 2012
Emory University, B.A. - 2008

Email: tropin@kolawyers.com

Daniel Tropin is a litigator who specializes in complex commercial cases and class action litigation. Mr. Tropin joined the law firm as a partner in 2018, and has a wealth of experience across the spectrum of litigation, including class actions, derivative actions, trade secrets, arbitrations, and product liability cases.

Mr. Tropin graduated from the University of Virginia law school in 2012, and prior to joining this firm, was an associate at a major Miami law firm and helped launch a new law firm in Wynwood. He was given the Daily Business Review's Most Effective Lawyers, Corporate Securities award in 2014. His previous representative matters include:

- Represented a major homebuilder in an action against a former business partner, who had engaged in a fraud and defamation scheme to extort money from the client. Following a jury trial, the homebuilder was awarded $1.02 billion in damages. The award was affirmed on appeal.

- Represented the former president and CEO of a cruise line in a lawsuit against a major international venture capital conglomerate, travel and entertainment company, based on allegations of misappropriation of trade secrets, breach of a non-disclosure agreement, and breach of a partnership agreement.

- Represented the CEO of a rapid finance company in an action seeking injunctive relief to protect his interest in the company.

- Represented a medical supply distribution company an action that involved allegations of misappropriation and breach of a non-circumvention agreement.

- Represented a mobile phone manufacturer and distributor in a multi-million-dollar dispute regarding membership interests in a Limited Liability Company, with claims alleging misappropriation of trade secrets and breach of fiduciary duty.

- Represented a major liquor manufacturer in a products liability lawsuit arising out of an incident involving flaming alcohol.

JOSH LEVINE

Partner

Bar Admissions

The Florida Bar

Court Admissions

U.S. Court of Appeals for the Fifth Circuit
U.S. Court of Appeals for the Sixth Circuit
U.S. Court of Appeals for the Eleventh Circuit
U.S. District Court, Southern District of Florida
U.S. District Court, Middle District of Florida
U.S. District Court, Northern District of Illinois

Education

University of Miami School of Law, J.D. - 2011
University of Central Florida, B.A. - 2006

Email: levine@kolawyers.com

Josh Levine is a litigation attorney, and his practice takes him all over the State of Florida and the United States. Mr. Levine focuses on civil litigation and appellate practice, primarily in the areas of class actions and commercial litigation.

Mr. Levine has handled over 175 appeals in all five of Florida's District Courts of Appeal and the Florida Supreme Court, as well as multiple federal appellate courts. Mr. Levine has represented both businesses and individuals in litigation matters, including contractual claims, fraud, breach of fiduciary duty, negligence, professional liability, enforcement of non-compete agreements, trade secret infringement, real estate and title claims, other business torts, insurance coverage disputes, as well as consumer protection statutes.

Mr. Levine is a member of the Florida Bar Appellate Court Rules Committee, currently serving as the vice-chair of the Civil Practice Subcommittee and is an active member of the Appellate Practice Section of the Florida Bar and the Broward County Bar Association. Mr. Levine recently completed a four-year term as a member of the Board of Directors of the Broward County Bar Association Young Lawyers Section.

Mr. Levine received a Juris Doctor degree, Magna Cum Laude, from the University of Miami School of Law. While attending law school, he served as an Articles and Comments Editor on the University of Miami Inter-American Law Review and was on the Dean's List, and a Merit Scholarship recipient. Mr. Levine also was awarded the Dean's Certificate of Achievement in Legal Research and Writing, Trusts & Estates, & Professional Responsibility classes.

Before joining KO, Mr. Levine worked at an Am Law 100 firm where he also focused on civil litigation and appellate practice, primarily representing banks, lenders, and loan servicers in consumer finance related litigation matters.

KRISTEN LAKE CARDOSO

Partner

Bar Admissions
The Florida Bar

Court Admissions
U.S. District Court, Southern District of Florida
U.S. District Court, Middle District of Florida

Education
Nova Southeastern University, J.D., 2007
University of Florida, B.A., 2004

Email: cardoso@kolawyers.com

Kristen Lake Cardoso is a litigation attorney focusing on complex commercial cases and consumer class actions. She has gained valuable experience representing individuals and businesses in state and federal courts at both the trial and appellate levels in a variety of litigation matters, including contractual claims, fraud, breach of fiduciary duty, negligence, professional liability, real estate claims, enforcement of non-compete agreements, trade secret infringement, shareholder disputes, deceptive trade practices, other business torts, as well as consumer protection statutes.

Mrs. Cardoso's class action cases have involved, amongst other things, data breaches, violations of state consumer protection statutes, and breaches of contract. Mrs. Cardoso has represented students seeking reimbursements of tuition, room and board, and other fees paid to their colleges and universities for in-person education, housing, meals, and other services not provided when campuses closed during the COVID-19 pandemic. Ms. Cardoso has also represented consumers seeking recovery of gambling losses from tech companies that profit from illegal gambling games offered, sold, and distributed on their platforms.

Mrs. Cardoso is admitted to practice law throughout the State of Florida, as well as in the United States District Courts for the Southern District of Florida and the Northern District of Florida. Mrs. Cardoso attended the University of Florida, where she received her Bachelor's degree in Political Science, cum laude. She received her law degree from Nova Southeastern University, magna cum laude. While in law school, Mrs. Cardoso served as an Articles Editor for the Nova Law Review, was on the Dean's List, and was the recipient of a scholarship granted by the Broward County Hispanic Bar Association for her academic achievements. When not practicing law, Mrs. Cardoso serves as a volunteer at Saint David Catholic School. She has also served on various committees with the Junior League of Greater Fort Lauderdale geared towards improving the local community through leadership and volunteering.

RACHEL GLASER

Associate

Bar Admissions
The Florida Bar

Education
Nova Southeastern University, J.D., 2020
Florida State University, B.S., 2017

Email: glaser@kolawyers.com

Rachel Feder Glaser is an attorney in KO's Fort Lauderdale office and is an active member of the Florida Bar. Her practice focuses primarily on class action litigation. Ms. Glaser litigates consumer class action lawsuits, including cases against some of the largest financial institutions in Florida and around the United States, challenging their unlawful assessment and collection of account fees. She has also assisted the firm in class actions targeting auto insurance companies across the country, in connection with the failure to provide proper coverage in the event of a total vehicular loss.

Ms. Glaser earned her Juris Doctor, summa cum laude, from Nova Southeastern University, Shepard Broad College of Law, where she served as an Executive Board Member of the Nova Trial Association, Senior Associate for the Nova Law Review, and as a teaching assistant for the Legal Research and Writing department. Ms. Glaser was consistently placed on the Dean's List and received the Book Awards in Legal research and Writing, Evidence, and Trial Advocacy.

While in law school, Ms. Glaser participated in national competitions for both the Nova Trial Association and the Moot Court Honor Society, winning a National Championship at the 2019 Buffalo-Niagara Mock Trial Competition. For her excellence in advocacy, Ms. Glaser was inducted into the Order of the Barristers.

Ms. Glaser received a Bachelor of Science in both Accounting and Finance from Florida State University. While attending Florida State, she interned for the University's Office of Inspector General Services where she assisted internal auditors in investigating allegations related to compliance, fraud, and abuse of university resources.

EXHIBIT E

55 Challenger Road
Ridgefield Park, NJ 07660
P: 973-639-9100
F: 973-679-8656
seegerweiss.com

SEEGER WEISS LLP

One of the preeminent trial law firms in the nation, Seeger Weiss is known for its landmark verdicts and settlements in multidistrict mass tort and class action litigation on behalf of consumers, athletes, farmers, municipalities, and other injured parties. Since its founding in 1999, the firm has led and tried some of the most complex and high-profile litigations in the nation, including multiple bellwether trials, in both state and federal courts.

Team

Managing partners:

- Christopher A. Seeger
- Stephen A. Weiss
- David R. Buchanan

Total partners: 11

Total lawyers: 39

Languages

- English
- German
- Hebrew
- Hindi
- Korean
- Russian
- Spanish
- Urdu

Offices

New Jersey
55 Challenger Road
Ridgefield Park, NJ 07660

New York
100 Church Street
New York, NY 10007

Pennsylvania
1515 Market Street
Suite 1380
Philadelphia, PA 19102

Massachusetts
1280 Centre Street
Suite 230
Newton, MA 02459

Representative Cases

Consumer Protection / Product Liability

3M Combat Arms Earplug Products Liability Litigation

NORTHERN DISTRICT OF FLORIDA – MDL No. 2885

Co-lead counsel in MDL prosecuting product liability claims arising from product.

Intel Corp. CPU Marketing, Sales Practices & Products Liability Litigation

DISTRICT OF OREGON – MDL No. 2828

Co-lead counsel in class action prosecuting consumer fraud, product defect and related claims.

American Medical Collection Agency, Inc. Customer Data Security Breach Litigation

DISTRICT OF NEW JERSEY – MDL No. 2904

Co-lead counsel (Quest Track) in class action prosecuting consumer data privacy claims.

Davol, Inc. / C.R. Bard Inc. Polypropylene Hernia Mesh Products Liability Litigation

SOUTHERN DISTRICT OF OHIO – MDL No. 2846

Executive Committee member in MDL prosecuting product liability claims arising from medical product.

Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation

NORTHERN DISTRICT OF CALIFORNIA – MDL No. 2672

Steering Committee in class action arising from consumer fraud. Over $20 billion settlement on behalf of over 500,000 class members.

Mercedes-Benz Emissions Litigation

DISTRICT OF NEW JERSEY

Co-counsel prosecuting class action alleging consumer fraud, RICO, and related claims. $700 million settlement on behalf of class members.

Fenner et al. v. General Motors LLC et al.

EASTERN DISTRICT OF MICHIGAN

Co-counsel prosecuting class action alleging consumer fraud, RICO, and related claims.

Counts et al. v. General Motors, LLC

EASTERN DISTRICT OF MICHIGAN

Co-counsel prosecuting class action alleging consumer fraud, RICO, and related claims.

Representative Cases, continued

Bledsoe et al. v. FCA US LLC et al.

EASTERN DISTRICT OF MICHIGAN

Co-counsel prosecuting class action alleging consumer fraud, RICO, and related claims.

Gamboa et al. v. Ford Motor Company et al.

EASTERN DISTRICT OF MICHIGAN

Co-counsel prosecuting class action alleging consumer fraud, RICO, and related claims.

Rickman v. BMW of North America

DISTRICT OF NEW JERSEY

Co-counsel prosecuting class action alleging consumer fraud, RICO, and related claims.

Syngenta AG MIR 162 Corn Litigation

DISTRICT OF KANSAS – MDL No. 2591

Member of Plaintiffs' Executive Committee. Certification of eight statewide and one nationwide class. Member of Plaintiffs' Settlement Negotiating Committee and principal negotiator. $1.51 billion nationwide settlement.

FieldTurf Artificial Turf Marketing & Sales Practices Litigation

DISTRICT OF NEW JERSEY – MDL No. 2779

Co-lead counsel prosecuting class action for fraud, product defect, and related claims.

Chinese-Manufactured Drywall Products Liability Litigation

EASTERN DISTRICT OF LOUISIANA – MDL No. 2047

Lead trial counsel and trial committee chair in MDL prosecuting fraud, product defect, and related claims. Over $1 billion settlement on behalf of nearly 5,000 plaintiffs.

Depuy Orthopaedics, Inc. ASR Hip Implant Products Multidistrict Litigation

NORTHERN DISTRICT OF OHIO – MDL No. 2197

Executive Committee in MDL prosecuting fraud, product defect, and related claims. $2.5 billion settlement.

Catastrophic Injury

NFL Players' Concussion Injury Litigation

EASTERN DISTRICT OF PENNSYLVANIA – MDL No. 2323

Co-lead counsel and chief negotiator for class of former NFL players. Over $1 billion uncapped settlement fund plus medical testing program on behalf of over 20,000 plaintiffs.

Representative Cases, continued

Wildcats Bus Crash Litigation

NEW YORK SUPREME COURT OF LIVINGSTON COUNTY

Lead counsel. $2.25 million verdict followed by $36 million settlement on behalf of 11 plaintiffs.

Drug Injury

National Prescription Opiate Litigation

NORTHERN DISTRICT OF OHIO – MDL No. 2804

Member of Plaintiffs' Executive Committee, Settlement Committee, Manufacturers' Committee, Law and Briefing Committee, as well as co-lead counsel for Negotiation Class in MDL prosecuting RICO, public nuisance, and related claims on behalf of local governments.

Proton-Pump Inhibitor Products Liability Litigation (No. II)

DISTRICT OF NEW JERSEY – MDL No. 2789

Co-lead counsel in ongoing MDL representing individuals injured by gastric acid reduction medication.

Testosterone Replacement Therapy Products Liability Litigation

NORTHERN DISTRICT OF ILLINOIS – MDL No. 2545

Co-lead counsel and lead trial counsel in MDL representing individuals injured by testosterone medication. $140 million verdict in bellwether case Konrad v. AbbVie Inc. and $150 million verdict in bellwether case Mitchell v. AbbVie Inc.

Invokana Products Liability Litigation

DISTRICT OF NEW JERSEY – MDL No. 2750

Co-lead counsel in MDL representing individuals injured by diabetes medication. Confidential settlement on behalf of plaintiffs.

Vioxx Products Liability Litigation

EASTERN DISTRICT OF LOUISIANA – MDL No. 1657

Co-lead counsel in MDL representing individuals injured by pain medication. $4.85 billion global settlement on behalf of more than 45,000 plaintiffs in approximately 27,000 claims.

Zyprexa Products Liability Litigation

EASTERN DISTRICT OF NEW YORK – MDL No. 1596

Liaison counsel. $700 million first-round settlement and $500 million second-round settlement.

Representative Cases, continued

Kendall v. Hoffman-La Roche, Inc.

SUPREME COURT OF NEW JERSEY

Co-trial counsel. $10.6 million verdict on behalf of plaintiff.

McCarrell v. Hoffman-La Roche, Inc.

SUPREME COURT OF NEW JERSEY

Liaison counsel. $25.16 million verdict on behalf of plaintiff.

Rossitto & Wilkinson v. Hoffmann La Roche, Inc.

NEW JERSEY SUPERIOR COURT

Lead trial counsel. $18 million verdict on behalf of two plaintiffs.

Accutane Litigation

NEW JERSEY SUPERIOR COURT – MDL No. 2523

Lead trial counsel. $25.5 million verdict on behalf of plaintiff.

Humeston v. Merck & Co.

NEW JERSEY SUPERIOR COURT

Co-trial counsel. $47.5 million verdict on behalf of plaintiff.

Vytorin/Zetia Marketing, Sales Practices, & Products Liability Litigation

DISTRICT OF NEW JERSEY – MDL No. 1938

Co-liaison counsel and principal negotiator. $41.5 million settlement.

Phenylpropanolamine (PPA) Products Liability Litigation

WESTERN DISTRICT OF WASHINGTON – MDL No. 1407

Co-lead counsel and principal negotiator. Over $40 million nationwide settlement.

Xarelto (Rivaroxaban) Products Liability Litigation

EASTERN DISTRICT OF LOUISIANA – MDL No. 2592

Plaintiffs' Steering Committee member in MDL. $775 million settlement on behalf of more than 25,000 plaintiffs.

Representative Cases, continued

Opioids Liability

National Prescription Opiate Litigation

NORTHERN DISTRICT OF OHIO – MDL No. 2804

Member of Plaintiffs' Executive Committee, Settlement Committee, Manufacturers' Committee, and Law & Briefing Committee in multidistrict litigation prosecuting RICO, public nuisance and related claims on behalf of local governments. Co-lead counsel for Negotiation Class.

Bergen County v. Purdue Pharma, L.P., et al.

NORTHERN DISTRICT OF OHIO

Co-counsel prosecuting nuisance, negligence, fraud, and related claims.

Camden County v. Purdue Pharma, L.P., et al.

NORTHERN DISTRICT OF OHIO

Co-counsel prosecuting nuisance, negligence, fraud, and related claims.

Essex County v. Purdue Pharma, L.P., et al.

NORTHERN DISTRICT OF OHIO

Co-counsel prosecuting nuisance, negligence, fraud, and related claims.

City of Jersey City v. Purdue Pharma, L.P., et al.

NORTHERN DISTRICT OF OHIO

Co-counsel prosecuting nuisance, negligence, fraud, and related claims.

Township of Bloomfield v. Purdue Pharma, L.P., et al.

NORTHERN DISTRICT OF OHIO

Co-counsel prosecuting nuisance, negligence, fraud, and related claims.

Township of Irvington v. Purdue Pharma, L.P., et al.

NORTHERN DISTRICT OF OHIO

Co-counsel prosecuting nuisance, negligence, fraud, and related claims.

Representative Cases, continued

Antitrust

Humira (Adalimumab) Antitrust Litigation

NORTHERN DISTRICT OF ILLINOIS

Executive Committee member in class action prosecuting antitrust claims for end-payors.

German Automotive Manufacturers Antitrust Litigation

NORTHERN DISTRICT OF CALIFORNIA – MDL No. 2796

Plaintiffs' Steering Committee member in class action prosecuting consumer antitrust claims.

Liquid Aluminum Sulfate Antitrust Litigation

DISTRICT OF NEW JERSEY – MDL No. 2687

Plaintiffs' Steering Committee member in class action prosecuting antitrust claims on behalf of water treatment chemical purchasers. $33 million settlement.

Polyurethane Foam Antitrust Litigation

NORTHERN DISTRICT OF OHIO – MDL No. 2196

Executive Committee member in class action prosecuting antitrust claims on behalf of direct purchasers. Approximately $428 million settlement.

Securities

Potter v. Valeant Pharmaceuticals International, Inc. et al.

DISTRICT OF NEW JERSEY

Liaison counsel in class action prosecuting securities fraud claims. $1.2 billion settlement.

Novo Nordisk Securities Litigation

DISTRICT OF NEW JERSEY

Co-liaison counsel and member of Executive Committee in securities fraud class action.

Pfizer Inc. Securities Litigation

SOUTHERN DISTRICT OF NEW YORK

Class and science counsel, lead counsel for class plaintiffs in Daubert hearing, and designated trial counsel. Case resolved with a $486 million cash settlement fund for the aggrieved investors.

Representative Cases, continued

Toxic Exposure

Bayer CropScience Rice Contamination Litigation

EASTERN DISTRICT OF MISSOURI – MDL No. 1811

Executive Committee in MDL. $750 million settlement.

"StarLink" Corn Products Litigation

NORTHERN DISTRICT OF ILLINOIS – MDL No. 1403

Co-lead counsel in class action MDL. $110 million settlement.

Owens v. ContiGroup Companies

WESTERN DISTRICT OF MISSOURI

Lead trial counsel. $11 million settlement for 15 plaintiffs.

EXHIBIT 3

DECLARATION OF MEDIATOR ERIC D. GREEN

1. I am a full-time mediator with Resolutions, LLC, an ADR firm located in Boston, Massachusetts. I retired as a Professor at the Boston University School of Law in 2007 after thirty years teaching negotiation, mediation, complex ADR processes, resolution of mass torts, constitutional law and evidence. I subsequently taught Evidence at Harvard Law School as a Lecturer in Law. I was a co-founder of JAMS/EnDispute, the largest private ADR provider in the United States, and I am a co-founder and principal of Resolutions, LLC.

2. I was a member of the Center for Public Resources International Institute of Dispute Resolution virtually since its inception, over 40 years ago, and have served on many of its panels and committees and spoken at numerous of its conferences and programs on mediation and ADR. I am now a member of its Board of Directors. I was a co-author with Professors Frank Sander and Stephen Goldberg of the first edition of *Dispute Resolution*, the first law school textbook on ADR, and have written numerous books and articles on dispute resolution and evidence. I maintain an active ADR/mediation practice for complex, legally-intensive disputes.

3. I have successfully mediated many high stakes cases, including the *United States v. Microsoft* antitrust case, various Mastercard/Visa merchants' class action antitrust cases, portions of the Enron Securities class action cases, the LCD, CRT, LIB, vitamin, and polyurethane antitrust cases, the childhood and adult cancer cases in Toms River, New Jersey, numerous large construction cases, including most of the disputes arising out of the design and construction of major league baseball and football stadiums, environmental cases, insurance coverage, intellectual property, international disputes, ERISA cases, and consumer cases. I have mediated many complex, multi-party class action cases involving horizontal and vertical price-fixing antitrust claims, mergers and acquisitions, contract disputes, patent disputes, securities fraud, shareholder

derivative claims, accounting problems, mass torts, employment, gas line explosion, contamination, and consumer claims. I have mediated dozens if not hundreds of antitrust class actions. In the past few years, I have also mediated many large cases arising out of the 2007-2008 financial crisis, including class actions involving all aspects of mortgage-based securities, CDO's, auction-rate securities, private equity, and various types of financial fraud. Many of the cases I have mediated have involved the federal government, state governments, or regulatory agencies.

4. I have also served as court-appointed Special Master, the Legal Representative for Future Claimants, Mediator and Guardian Ad Litem in class or mass claimant matters in the Northern District of Ohio, Southern District of New York, District of Massachusetts, Eastern District of Texas, and Eastern District of Michigan. Currently I am serving as the Special Master and Trustee for all Takata airbag personal injury and wrongful death claims.

5. I am a 1968 Honors graduate of Brown University and graduated in 1972 from Harvard Law School, magna cum laude, where I was Executive Editor of the Harvard Law Review. I am a member of the bars of the states of California (inactive) and Massachusetts, the United States District Courts for the Northern and Central Districts of California and the District of Massachusetts, several Courts of Appeals, and the Supreme Court of the United States. Prior to teaching at Boston University School of Law, I clerked for the Hon. Benjamin Kaplan, Supreme Court of Massachusetts and then was an associate and partner at Munger Tolles & Olson in Los Angeles.

6. I have delivered hundreds of lectures, panel discussions and training sessions on ADR and taught or supervised more than one thousand students in ADR while mediating more than one hundred cases a year for over 40 years. I continue to teach classes to judges and others about the innovative use of Special Masters, mediators and ADR in complex cases. I also continue

to provide Continuing Legal Education Training in ADR, particularly the mediation of class actions. In 2001, I was awarded a Lifetime Achievement Award from the American College of Civil Trial Mediators. I was voted Boston's Lawyer of the Year for Alternative Dispute Resolution for 2011 based on my "particularly high level of peer recognition." In 2011, I received the James F. Henry Award for Outstanding Contributions to the field of ADR from The International Institute for Conflict Prevention & Resolution.

7. I was jointly retained by the parties in October, 2020 to conduct a private mediation in this case. After preliminary discussions with counsel for the parties, the parties and I agreed to a mediation schedule that included extensive pre-mediation briefing by the parties and an in-person mediation.

8. Following the submission of the parties' briefs on November 9, 2020 and pre-mediation calls with the respective parties, I supervised a day-long mediation session on November 20, 2021 via videoconference. Plaintiffs were represented by Jeffrey Kaliel, Sophia Gold, Lynn Toops, Vess Miller, and Jeffrey Ostrow. TD Bank was represented by O'Melveny & Myers LLP. The matter did not settle during the first mediation session.

9. Subsequently, the Parties performed additional data analysis and legal research. The Parties submitted additional mediation briefs to me prior to a second mediation session on January 26, 2021, via videoconference. I supervised a day-long mediation session. Plaintiffs were represented by Jeffrey Kaliel, Sophia Gold, Lynn Toops, Vess Miller, and Jeffrey Ostrow. TD Bank was represented by O'Melveny & Myers LLP.

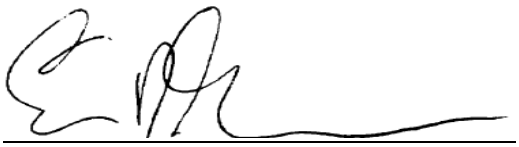
10. After the second mediation, the parties agreed to a settlement in principle.

11. Although the details of the mediation sessions are confidential, it is my opinion that counsel for both sides skillfully and vigorously represented the interests of their clients. The level

of advocacy for both parties was informed, vigorous, engaged, ethical, and effective. The parties' positions on both liability and damages in this and the related cases were extensively briefed prior to the mediation session. Their positions on liability and damages, as well as the risks involved in continuing to litigate the cases, were probed and discussed at length during the mediation in both joint and separate sessions. Throughout the process, the parties engaged in extensive adversarial negotiations over virtually every issue in the cases. The negotiations were principled, exhaustive, informed, and sometimes difficult and contentious.

12. In my opinion, the outcome of the mediated negotiations is the result of a fair, thorough, and fully-informed arms-length process between highly capable, experienced, and informed parties and counsel. The final settlement represents the parties' and counsels' best professional effort and judgment about a fair, reasonable, and adequate settlement after thoroughly investigating and litigating this and the related cases, taking into account the risks, strengths, and weaknesses of their respective positions on the substantive issues in the cases, the risks and costs of continued litigation, and the best interests of their clients.

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 May, at Boston, Massachusetts.



Eric D. Green

EXHIBIT 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Perks v. T.D. Bank

Case No. 18-CV-11176

DECLARATION OF BRIAN T. FITZPATRICK

I. BACKGROUND AND QUALIFICATIONS

1. I am a Professor of Law at Vanderbilt University in Nashville, Tennessee. I joined the Vanderbilt law faculty in 2007, after serving as the John M. Olin Fellow at New York University School of Law in 2005 and 2006. I graduated from the University of Notre Dame in 1997 and Harvard Law School in 2000. After law school, I served as a law clerk to The Honorable Diarmuid O'Scannlain on the United States Court of Appeals for the Ninth Circuit and to The Honorable Antonin Scalia on the United States Supreme Court. I also practiced law for several years in Washington, D.C., at Sidley Austin LLP. My C.V. is attached as Exhibit 1.

2. My teaching and research at Vanderbilt have focused on class action litigation. I teach the Civil Procedure, Federal Courts, and Complex Litigation courses. In addition, I have published a number of articles on class action litigation in such journals as the University of Pennsylvania Law Review, the Journal of Empirical Legal Studies, the Vanderbilt Law Review, the NYU Journal of Law & Business, the Fordham Law Review, and the University of Arizona Law Review. My work has been cited by numerous courts, scholars, and media outlets such as the New York Times, USA Today, and Wall Street Journal. I have also been invited to speak at symposia and other events about class action litigation, such as the ABA National Institutes on Class Actions in 2011, 2015, 2016, 2017, and 2019; the Annual Conference of the ABA's Litigation Section in 2021; and the ABA Annual Meeting in 2012. Since 2010, I have also served

on the Executive Committee of the Litigation Practice Group of the Federalist Society for Law & Public Policy Studies. In 2015, I was elected to the membership of the American Law Institute.

3. In December 2010, I published an article in the Journal of Empirical Legal Studies entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (hereinafter "*Empirical Study*"). This article is still what I believe to be the most comprehensive examination of federal class action settlements and attorneys' fees that has ever been published. Unlike other studies of class actions, which have been confined to one subject matter or have been based on samples of cases that were not intended to be representative of the whole (such as settlements approved in published opinions), my study attempted to examine *every* class action settlement approved by a federal court over a two-year period (2006-2007). *See id*. at 812-13. As such, not only is my study an unbiased sample of settlements, but the number of settlements included in my study is also several times the number of settlements per year that has been identified in any other empirical study of class action settlements: over this two-year period, I found 688 settlements, including 109 from the Second Circuit alone. *See id*. at 817. I presented the findings of my study at the Conference on Empirical Legal Studies at the University of Southern California School of Law in 2009, the Meeting of the Midwestern Law and Economics Association at the University of Notre Dame in 2009, and before the faculties of many law schools in 2009 and 2010. Since then, this study has been relied upon regularly by courts, scholars, and testifying experts.[1] I have attached this study as Exhibit 2 and will draw upon it in this declaration.

[1] *See, e.g.*, *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (relying on article to assess fees); *Kuhr v. Mayo Clinic Jacksonville*, No. 3:19-cv-453-MMH-MCR, 2021 WL 1207878, at *12-13 (M.D. Fla. Mar. 30, 2021) (same); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2020 WL 6891417, at *3 (S.D.N.Y. Nov. 24, 2020) (same); *Shah v. Zimmer Biomet Holdings, Inc.*, No. 3:16-cv-815-PPS-MGG, 2020 WL 5627171,

at *10 (N.D. Ind. Sept. 18, 2020) (same); *In re GSE Bonds Antitrust Litig.*, No. 19-cv-1704 (JSR), 2020 WL 3250593, at *5 (S.D.N.Y. June 16, 2020) (same); *In re Wells Fargo & Co. S'holder Derivative Litig.*, No. 16-cv-05541-JST, 2020 WL 1786159, at *11 (N.D. Cal. Apr. 7, 2020) (same); *Arkansas Teacher Ret. Sys. v. State St. Bank & Trust Co.*, No. CV 11-10230-MLW, 2020 WL 949885, 2020 WL 949885, at *52 (D. Mass. Feb. 27, 2020), appeal dismissed sub nom. Arkansas Tchr. Ret. Sys. v. State St. Corp., No. 20-1365, 2020 WL 5793216 (1st Cir. Sept. 3, 2020) (same); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *34 (N.D. Ga. Jan. 13, 2020) (same); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. 3:07-cv-05634-CRB, 2019 WL 6327363, at *4-5 (N.D. Cal. Nov. 26, 2019) (same); *Espinal v. Victor's Cafe 52nd St., Inc.*, No. 16-CV-8057 (VEC), 2019 WL 5425475, at *2 (S.D.N.Y. Oct. 23, 2019) (same); *James v. China Grill Mgmt., Inc.*, No. 18 Civ. 455 (LGS), 2019 WL 1915298, at *2 (S.D.N.Y. Apr. 30, 2019) (same); *Grice v. Pepsi Beverages Co.*, 363 F. Supp. 3d 401, 407 (S.D.N.Y. 2019) (same); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2018 WL 6250657, at *2 (S.D.N.Y. Nov. 29, 2018) (same); *Rodman v. Safeway Inc.*, No. 11-cv-03003-JST, 2018 WL 4030558, at *5 (N.D. Cal. Aug. 23, 2018) (same); *Little v. Washington Metro. Area Transit Auth.*, 313 F. Supp. 3d 27, 38 (D.D.C. 2018) (same); *Hillson v. Kelly Servs. Inc.*, No. 2:15-cv-10803, 2017 WL 3446596, at *4 (E.D. Mich. Aug. 11, 2017) (same); *Good v. W. Virginia-Am. Water Co.*, No. 14-1374, 2017 WL 2884535, at *23, *27 (S.D.W. Va. July 6, 2017) (same); *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 385 (S.D.N.Y. 2017) (same); *Brown v. Rita's Water Ice Franchise Co. LLC*, No. 15–3509, 2017 WL 1021025, at *9 (E.D. Pa. Mar. 16, 2017) (same); *In re Credit Default Swaps Antitrust Litig.*, No. 13MD2476 (DLC), 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) (same); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp 3d 1217, 1246 (D.N.M. 2016); *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, No. 3:07-cv-5944 JST, 2016 WL 721680, at *42 (N.D. Cal. Jan. 28, 2016) (same); *In re Pool Products Distribution Mkt. Antitrust Litig.*, No. MDL 2328, 2015 WL 4528880, at *19-20 (E.D. La. July 27, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11–cv–4462, 2015 WL 2147679, at *2-4 (N.D. Ill. May 6, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11–cv–4462, 2015 WL 1399367, at *3-5 (N.D. Ill. Mar. 23, 2015) (same); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 797 (N.D. Ill. 2015) (same); *In re Neurontin Marketing and Sales Practices Litig.*, 58 F.Supp.3d 167, 172 (D. Mass. 2014) (same); *Tennille v. W. Union Co.*, No. 09–cv–00938–JLK–KMT, 2014 WL 5394624, at *4 (D. Colo. Oct. 15, 2014) (same); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 349-51 (S.D.N.Y. 2014) (same); *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 444-46 & n.8 (E.D.N.Y. 2014) (same); *In re Fed. Nat'l Mortg. Association Sec., Derivative, and "ERISA" Litig.*, 4 F. Supp. 3d 94, 111-12 (D.D.C. 2013) (same); *In re Vioxx Prod. Liab. Litig.*, No. 11–1546, 2013 WL 5295707, at *3-4 (E.D. La. Sep. 18, 2013) (same); *In re Black*

4. In addition to my empirical works, I have also published many law-and-economics papers on the incentives of attorneys and others in class action litigation. *See, e.g.*, Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 Fordham L. Rev. 1151 (2021) (hereinafter "*A Fiduciary Judge*"); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043 (2010) (hereinafter "*Class Action Lawyers*"); Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009). Much of this work was discussed in a book published recently by the University of Chicago Press entitled THE CONSERVATIVE CASE FOR CLASS ACTIONS (2019). The thesis of the book is that the so-called "private attorney general" is superior to the public attorney general in the enforcement of the rules that free markets need in order to operate effectively and that courts should provide proper incentives to encourage such private attorney general behavior. I will also draw upon this work in this declaration.

5. From time to time, I serve as an expert witness on attorneys' fees in class action litigation. Most relevant here, since 2010, I have served as an expert in dozens of class action cases challenging overdraft fees consolidated in MDL 2036. *See, e.g.*, *In Re: Checking Account Overdraft Litigation* (MDL No. 2036) (S.D. Fla.) (twenty-one different settlements). In addition to my academic work, I will draw on this experience in this declaration.

Farmers Discrimination Litig., 953 F. Supp. 2d 82, 98-99 (D.D.C. 2013) (same); *In re Se. Milk Antitrust Litig.*, No. 2:07–CV 208, 2013 WL 2155387, at *2 (E.D. Tenn., May 17, 2013) (same); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1081 (S.D. Tex. 2012) (same); *Pavlik v. FDIC*, No. 10 C 816, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 40 (D.D.C. 2011) (same); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011) (same); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (same).

6. I have been asked by class counsel to opine on whether a fee award of 25% of the value of the settlement in this case would be reasonable in light of the empirical studies and research on economic incentives in class action litigation. In order to formulate my opinion, I reviewed a number of documents provided to me by class counsel, and I have attached a list of these documents in Exhibit 3. As I explain, based on the empirical studies and research on economic incentives, I believe a fee award of *at least* 25% of the value of the settlement would be reasonable.

II. CASE BACKGROUND

7. This settlement arises out of litigation against TD Bank, N.A., for breach of contract over its insufficient funds fee practices. The complaint was filed in May 2018. Since then, the parties have undertaken motions practice and significant discovery, including work with experts. The parties have reached a class-wide settlement and are now asking the court to certify a settlement class and preliminarily approve the settlement.

8. The proposed settlement class includes, with minor exceptions, "all current and former holders of TD Bank, N.A., consumer checking Accounts who . . . were assessed at least one Retry NSF Fee" from various dates depending on the state where the account was opened. *See* Settlement Agreement ¶¶ 24, 55. The class will release the defendant from any and all claims "that were or could have been alleged . . . relating in any way to the assessment of Retry NSF Fees . . . ." *See id*. at ¶ 88. In exchange, the class will receive $20,750,000 in cash, another $20,750,000 in debt forgiveness (for those class members whose accounts were closed with negative balances), and up to another $500,000 to administer the settlement. *See id*. at ¶¶ 28, 58, 61, 64. After attorneys' fees and other expenses are deducted, the cash will be distributed pro rata to all class members in proportion to the number of fees they incurred (minus any refunds of those fees and

any amounts owing to the defendant); the debt forgiveness will be distributed pro rata. *See id*. at ¶¶ 83.d.ii, 84. None of the cash or the debt relief can revert back to the defendant; if any payments are uncashed, they will be redistributed to other class members or awarded to a cy pres recipient. *See id*. at ¶ 87.

9. As I explain below, it is my opinion that a fee award of *at least* 25% of the value of the settlement would be reasonable.

III. ASSESSMENT OF THE REASONABLENESS OF THE REQUEST FOR ATTORNEYS' FEES

10. When a class action reaches settlement or judgment and no fee shifting statute is triggered and the defendant has not agreed to pay class counsel's fees, class counsel is paid by the class members themselves pursuant to the common law of unjust enrichment. This is sometimes called the "common fund" or "common benefit" doctrine. It requires the court to decide how much of their class action proceeds it is fair to ask class members to pay to class counsel.

11. At one time, courts that awarded fees in common fund class action cases did so using the familiar "lodestar" approach. *See* Fitzpatrick, *Class Action Lawyers*, 158 U. Pa. L. Rev. at 2051. Under this approach, courts awarded class counsel a fee equal to the number of hours they worked on the case (to the extent the hours were reasonable), multiplied by a reasonable hourly rate as well as by a discretionary multiplier that courts often based on the risk of non-recovery and other factors. *See id.* Over time, however, the lodestar approach fell out of favor in common fund class actions. It did so largely for two reasons. First, courts came to dislike the lodestar method because it was difficult to calculate the lodestar; courts had to review voluminous time records and the like. Second—and more importantly—courts came to dislike the lodestar method because it did not align the interests of class counsel with the interests of the class; class counsel's recovery did not depend on how much the class recovered, but, rather, on how many

hours could be spent on the case. *See id.* at 2051-52. According to my empirical study, the lodestar method is now used to award fees in only a small percentage of class action cases, usually those involving fee-shifting statutes or those where the relief is predominantly injunctive in nature (and the value of the injunction cannot be reliably calculated). *See* Fitzpatrick, *Empirical Study*, 7 J. Empirical L. Stud. at 832 (finding the lodestar method used in only 12% of settlements). The other large-scale academic studies of class action fees, authored over time by Geoff Miller and the late Ted Eisenberg, agree with my findings. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 248, 267 (2010) ("*Eisenberg-Miller 2010*") (finding lodestar method used only 13.6% of the time before 2002 and less than 10% of the time thereafter); Theodore Eisenberg et al., *Attorneys' Fees in Class Action Settlements: 2009-2013*, 92 N.Y.U. L. Rev. 937, 945 (2017) ("*Eisenberg-Miller 2017*") (finding lodestar method used less than 7% of the time since 2009).

12. The more common method of calculating attorneys' fees today is known as the "percentage" method. Under this approach, courts select a percentage of the settlement that they believe is fair to class counsel, multiply the settlement by that percentage, and then award class counsel the resulting product. The percentage approach has become the preferred method for awarding fees to class counsel in common fund cases precisely because it corrects the deficiencies of the lodestar method: it is less cumbersome to calculate, and, more importantly, it aligns the interests of class counsel with the interests of the class because the more the class recovers, the more class counsel recovers. *See* Fitzpatrick, *Class Action Lawyers,* 158 U. Pa. L. Rev. at 2052. This is why private parties—including sophisticated corporations—that hire lawyers on contingency almost always use the percentage method over the lodestar method. *See, e.g.*, David

L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 360 (2012); Herbert M. Kritzer, RISKS, REPUTATIONS, AND REWARDS 39-40 (1998).

13. In the Second Circuit, courts have discretion to use either the lodestar method or the percentage method in awarding attorneys' fees in common fund class actions. *See Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 45 (2d Cir. 2000) ("We hold that either the lodestar or percentage of the recovery methods may properly be used to calculate fees in common fund cases."). But "[t]he trend in this Circuit is toward the percentage method . . . ." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). In light of the well-recognized disadvantages of the lodestar method and the well-recognized advantages of the percentage method, courts most often use the percentage method in common fund cases whenever the value of the settlement or judgment can be reliably calculated; courts most often use the lodestar method only where the value cannot be reliably calculated and the percentage method is therefore not feasible. I agree with this approach, as do leading class action scholars. *See* Principles of the Law of Aggregate Litigation § 3.13 (2010) (cmt. b) ("Although many courts in common-fund cases permit use of either a percentage-of-the-fund approach or a lodestar . . . most courts and commentators now believe that the percentage method is superior."). Because this settlement consists of cash and debt relief that can be easily valued, it is my opinion that the percentage method can be used here, and both jurisprudence and expert opinion, including my opinion, support that view. I will therefore proceed under that method.

14. Under the percentage method, courts must 1) calculate the value of the benefits to the class in the settlement and then 2) select a percentage of that value to award to class counsel. When calculating the value of the benefits, in my opinion, courts should include any cash benefits to class members, cash the defendant must pay to third parties, non-cash benefits that can be

reliably valued, attorneys' fees and expenses, and administrative costs paid by the defendant. *See, e.g.*, *Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405 (CM), 2015 WL 10847814, at *15 (S.D.N.Y. Sept. 9, 2015); *Moukengeshcaie v. Eltman, Eltman & Cooper, P.C.*, No. 14CV7539MKBCLP, 2020 WL 5995978, at *2 (E.D.N.Y. Apr. 21, 2020), *report and recommendation adopted sub nom.*, 2020 WL 5995650 (E.D.N.Y. Oct. 8, 2020).

15. Although some of these things do not go directly to the class as compensation, they facilitate compensation to the class, savings to the class, or serve to deter defendants from future misconduct by making defendants pay more when they cause harm. As I explain in more detail below, class counsel should be rewarded for generating both compensation and deterrence. This is not only my opinion, but the opinion of the leading class action scholars. *See* Principles of the Law of Aggregate Litigation § 3.13(b) (2010) ("[A] percentage-of-the-fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and the nonmonetary value of the judgment or settlement."). When selecting the percentage, courts usually examine a number of factors. *See* Fitzpatrick, *Empirical Study*, 7 J. Empirical L. Stud. at 832. In the Second Circuit, courts consider the following factors: "(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 43, 50 (2d Cir. 2000). In my opinion, the fee requested here is reasonable because it is supported by all six of these factors.

16. Let me begin with the valuation of the settlement. The cash portion of the settlement is easily valued. The defendant has agreed to pay the class members $20.75 million in cash as well as to pay up to $500,000 in settlement administration costs, for a total of $21.25 million, and none of that will under any circumstance revert to the defendant. The defendant has

also agreed to forgive another $20.75 million in debt that class members owe. Debt forgiveness is economically equivalent to cash: every dollar you don't have to repay is another dollar you have to spend on other things. It is for this reason that I included debt relief in my calculations of the value of class action settlements in my empirical study. *See* Fitzpatrick, *Empirical Study*, 7 J. Empirical L. Stud. at 824 (note to tbl. 3).

17. Further, when bank accounts are closed with negative balances, banks like the defendant have the option to report the consumer to a screening database such as ChexSystems. This reporting can be devastating to consumers and effectively blacklists them from other financial institutions, thereby preventing them from opening accounts at new institutions and ejecting them from the banking system. *See, e.g.*, Rebecca Borne et al., *Broken Banking: How Overdraft Fees Harm Consumers and Discourage Responsible Bank Products*, Center for Responsible Lending 14 (May 2016), https://bit.ly/2QBr8JV ("These are essentially blacklists, where the consumer's name remains for five years . . . ."); *Empowering Low Income and Economically Vulnerable Consumers*, Consumer Financial Protection Bureau 26-27 (Nov. 2013), https://bit.ly/3noikDa ("A negative history with a specialized consumer reporting agency . . . may prevent some consumers from opening an account for an extended period of time, possibly as long as five years."); Dennis Campbell et al., *Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures* 1-2 (June 6, 2008), https://bit.ly/3nu6sjk ("evidence of prior financial mismanagement at another institution either leads banks to deny customers checking accounts, or only to offer them high cost or limited service accounts"). What happens to people who cannot open accounts at traditional financial institutions? Several of my colleagues at Vanderbilt have studied what happens and have found that these consumers are forced to rely on payday lenders and other predatory alternatives. *See, e.g.,* GANESH SITARAMAN & ANNE ALSTOTT, THE PUBLIC

OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY 169-80 (HARVARD UNIVERSITY PRESS 2019) (noting a "variety of reasons for not having accounts," including "banks often screen customers through a service called ChexSystems"). Some 7% of American adults are now "unbanked" like this, *see i.d.* at 169, and many of them end up irreparably harmed by the experience. *See, e.g.*, Tyler Desmond & Charles Sprenger, *Estimating the Cost of Being Unbanked*, Federal Reserve Bank of Boston 25 (Spring 2007), https://www.bostonfed.org/commdev/c&b/2007/spring/article9.pdf ("These expensive loans can easily balloon out of control, at times becoming more costly than their initial value"); Chris Moon, *The Problems of Being Unbanked*, LendingTree (Nov. 28, 2016), https://bit.ly/3xvEEiQ (explaining that unbanked consumers are also unable to receive direct deposits from an employer).

18. In this case, the settlement not only requires the defendant to forgive the debt, but to update any negative reporting to ChexSystems or credit reporting agencies with respect to class members who receive debt forgiveness. Thus, not only is the debt relief in this settlement economically equivalent to receiving new money, but it may also confer meaningful collateral benefits. It is therefore my opinion that it should be fully included in the total value of this settlement. *See, e.g.*, *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, No. 6:15MN02613 (D.S.C. Jan. 9, 2020) (ECF 233) (including $27 million debt relief in total value of settlement); Exhibit 4, tbl. 1 (listing six cases marked with note "1" doing the same). Thus, in my opinion, the total value of this settlement is $42 million.[2]

[2] It is theoretically possible that notice and administration of the settlement will not consume all of the $500,000 the defendant has agreed to pay towards those ends. If they do not, then the total value of the settlement will be slightly lower than $42 million, but any difference would be so slight that the effect on class counsel's fee percentage would be de minimis (at most—i.e., if notice and administration ends up costing nothing—class counsel's fee request could be 25.3%).

19. Let me turn now to the percentage. According to the empirical studies, a 25% fee request would be a merely average fee request compared to all other class action cases. But it would be a low-end fee request compared to other bank fee class action cases. For this and other reasons, it is my opinion that it would be reasonable under the Second Circuit's factors to award a percentage *at least* this high.

20. Consider first factor "(6) public policy considerations." As I explain in my book THE CONSERVATIVE CASE FOR CLASS ACTIONS, class action lawyers perform a critical law enforcement role in our country—which is why they are often referred to as "private" attorneys general. In Europe, countries rely much more on the government to police the marketplace. In America, by contrast, we believe more strongly in self-help and the private sector, including to police the marketplace. That is, we need private class action lawyers because it is not desirable for "public" attorneys general to police all wrongdoing. Even if it were desirable, it is simply not possible: "public" attorneys general have very limited resources. It is also impossible for individual litigants to police all wrongdoing: sometimes individual claims are too small to be viable on their own, and, even when they are viable, individuals do not have the incentive to invest in one claim the same way a defendant facing many similar claims does; as a result, the playing field between individual plaintiffs and defendants is often not level. *See* Fitzpatrick, *Class Action Lawyers*, 158 U. Pa. L. Rev. at 2059. Class action lawyers level the playing field and overcome the enforcement gap that would otherwise exist in our country by aggregating non-viable and underinvested claims into effective litigation vehicles. *See id*.

21. In this case, class counsel were among the very first to discover the misconduct alleged here and to take action against it. The government, by contrast, has done nothing. In addition, the costs and expenses of individual actions, when weighed against the individual

recoveries potentially obtainable, would have been prohibitive for virtually all of these class members. Thus, it is only because of class counsel that the defendant will be held accountable at all for any misdeeds it has committed. And it should be noted that there is a serious chance that misdeeds have been committed here: I examined the court's decision on the motion to dismiss and I agree with the court that the account agreement may well have been breached. In other words, this is not a frivolous case. To the contrary: the court's ruling in this matter has spawned a significant number of actions in state and federal courts against other financial institutions across the country. In other words, this is an example of our private enforcement system at its best: class counsel performed a vital public service by discovering misconduct and enabling the victims not just in this case but across the banking system to hold the wrongdoers accountable.

22. But lawyers are rational economic actors like anyone else. They will only bring lawsuits and optimally invest in them if they are compensated adequately. The fee decisions courts make at the end of successful class actions are, so to speak, the "fuel" in the engine of the private-attorney-general "automobile"; these decisions tell lawyers in future cases what they can expect to receive if they invest in a new case and ultimately win it. Accordingly, in my opinion, courts should set fee awards such that future lawyers will make the best decisions about what cases to file and how to resolve them. In my view, this means courts should set fees such that lawyers will have incentives 1) to bring as many meritorious cases as possible and 2) to litigate those cases in a way that maximizes the resulting compensation for the class and the deterrence of future wrongdoing. As I said above, this case has considerable merit. Moreover, there is no doubt the settlement will generate both considerable compensation and deterrence: every dollar in cash and debt relief will directly benefit class members and increase the defendant's cost of engaging in

misconduct. It is important to incentivize class counsel whenever they generate compensation or deterrence like this. This factor therefore supports a fee award of at least 25%.

23. Consider next factor "(5) the requested fee in relation to the settlement." A fee award of 25% would be merely average compared to all class actions. For example, according to my empirical study, the most common percentages awarded by federal courts nationwide using the percentage method were 25%, 30%, and 33%, with a mean award of 25.4% and a median award of 25%. *See* Fitzpatrick, *Empirical Study*, 7 J. Empirical L. Stud. at 833-34, 838. The Eisenberg-Miller studies are in agreement, if not trending even higher. *See Eisenberg-Miller 2010*, 7 J. Empirical L. Stud.at 260 (finding mean and median of 24% and 25%, respectively); *Eisenberg-Miller 2017*, 92 N.Y.U. L. Rev. at 951 (finding mean and median of 27% and 29%, respectively). The same is true when looking at fee awards in the Second Circuit alone. In the 72 settlements in my study from the Second Circuit where the percentage method was used, the mean and median were 23.8% and 24.5%, respectively. *See* Fitzpatrick, *Empirical Study*, 7 J. Empirical L. Stud. at 836. Again, the Eisenberg-Miller studies found much the same thing—again, if not trending higher. *See Eisenberg-Miller 2010*, 7 J. Empirical L. Stud.at 260 (finding mean and median in the Second Circuit of 23% and 24%, respectively); *Eisenberg-Miller 2017*, 92 N.Y.U. L. Rev. at 951 (finding mean and median in the Second Circuit of 28% and 30%, respectively). It is important to note that both my study and the Eisenberg-Miller studies include in the value of the settlement both cash and any non-cash relief that was valued by the court. *See, e.g.,* Fitzpatrick, *Empirical Study*, 7 J. Empirical L. Stud. at 825 (note to tbl. 4); *Eisenberg-Miller 2017*, 92 N.Y.U. L. Rev. at 941 n.14. Thus, this data is an apples-to-apples comparison to the settlement here.

24. But a fee request of 25% would be lower than average compared to other bank fee cases. As I noted above, I have served as an expert in many of these cases, and, in November

2019, I attempted to perform a systematic analysis of the fee awards in every such case I could find, whether in federal or state court and whether or not I had served as an expert. The effort resulted in an expert declaration I filed in a case against the defendant here but for a different fee practice; that declaration is attached as Exhibit 4. As the declaration explains, I found 64 percentage-method overdraft fee awards in state or federal court between August 2010 and November 2019. The median and mode percentage was 30%, and the average percentage was 30.5%. There were *only three out of 64* awards below 25%, and all of those were above 20%. A 25% fee request would therefore be *at the very low end* of overdraft fee cases.

25. Consider next the factors that speak to the results obtained by class counsel in light of the risks presented by the litigation: "(2) the magnitude and complexities of the litigation; (3) the risk of the litigation[, and] (4) the quality of representation." According to estimates by the parties' experts, the total value of the settlement is almost half of the total number of illegal fees that were charged class members if the class's view of the account agreement prevails. This is several times better than the typical recovery in the class actions for which we have empirical studies (i.e., antitrust and securities fraud). *See* John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries are Mostly Less Than Single Damages,* 100 Iowa L. Rev. 1997, 2010 (2015) (finding the weighted average of recoveries—the authors' preferred measure—to be 19% of single damages for cartel cases between 1990 to 2014); Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2020 Full-Year Review* 20 (Jan. 25, 2021), https://www.nera.com/content/dam/nera/publications/2021/PUB_2020_Full-Year_Trends_012221.pdf (finding recoveries in securities class actions to vary between 1.6% and 2.5% of investor losses between 2012 and 2020). Moreover, although I have not done a systematic study of recovery rates in bank fee cases like the one I did for fee percentages in Exhibit 4, the recovery

here is at the high end of recoveries in the overdraft cases in which I have served as an expert. For example, in Table 1, I list the recovery rates in all of the settlements in MDL 2036. Rarely was the recovery greater as a percentage of damages than obtained here.

Table 1: Settlements from Overdraft-Fee Litigation in MDL 2036

Defendant	Final Approval	Recovery as % of damages
BancorpSouth	07/15/16	57%
Capital One	5/22/15	35%
Synovus Bank	4/2/15	36%
M&T Bank	3/13/15	5%
Comerica	6/10/14	35%
Susquehanna	4/1/14	40%
U.S. Bank	1/6/14	13%
Compass	8/7/13	16%
PNC	8/5/13	45+%
Harris	8/5/13	65+%
M & I	8/2/13	25+%
Great Western	8/2/13	50+%
Commerce	8/2/13	57%
Associated	8/2/13	50+%
TD Bank	3/18/13	42%
Citizens	3/12/13	42%
Chase	12/19/12	21%
Bank of the West	12/18/12	52%
Union	10/4/12	63%
Bank of OK	9/13/12	46%
Bank of America	11/22/11	9-45%

26. Recovery rates alone do not tell the whole story because not every bank fee case faces the same risks. But, based on my research and experience, it is my opinion that a recovery this strong in light of the risks and circumstances of this litigation is unusual. This is one of the first cases in the entire country challenging the fee practice at issue here and no governmental entity or consumer protection group had ever brought the practice to light before class counsel did. This was risky, unproven litigation from the very beginning. And the risks have not abated: not only would there have been difficulty certifying a nationwide litigation class in this case given the

variety of state laws governing the causes of action, but the interpretation of the account agreement that would ultimately prevail here was probably close to a coin flip. In other words, not only is the recovery of nearly half of maximum potential damages better than most bank fee cases, but it is better than the expected value of this lawsuit. Thus, it is not difficult to conclude that the recovery here looks excellent in light of the attendant risks.

27. Consider finally the factor "(1) the time and labor expended by counsel." There are two ways that courts might consider this factor: qualitatively or quantitatively. The qualitative approach assesses what class counsel did during the years of litigation; i.e., whether class counsel have dug deeply enough into a case to know what it is worth as opposed to selling out the class for a quick fee award. *See, e.g.*, *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10th Cir. 1988) ("[I]n awarding attorneys' fees in a common fund case, the 'time and labor involved' factor need not be evaluated using the lodestar formulation . . . ."). The quantitative approach is to calculate class counsel's lodestar and to "crosscheck" the fee percentage requested against the lodestar to ensure that the ensuing multiplier is not in some sense "too much." *See, e.g.*, *In re Cendant Corp. Litig.*, 264 F.3d 201, 285 (3d Cir. 2001).

28. The better approach is to assess this factor qualitatively rather than quantitatively. I take this view because the lodestar crosscheck creates perverse incentives for class counsel thereby undermining the public policy considerations discussed above. In particular, the 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. Consider the following examples. Suppose a lawyer had worked on a case for one year and accrued a lodestar of $1 million. If the lawyer believed that a court would award a fee of 25%, or 2 times his lodestar, whichever was lesser, then he would be

completely indifferent as between accepting a settlement offer at this point of $8 million or $80 million. Either way he would get only $2 million. Needless to say, the incentive to be indifferent as to the size of the settlement is not good for compensation or deterrence. Or suppose the lawyer had been offered a settlement offer of $16 million after one year of work. If the lawyer again believed the court would not award a fee of 25% unless it was no more than 2 times his lodestar, the lawyer would have the incentive to delay accepting the settlement until he could generate another $1 million in lodestar and thereby reap the maximum fee. Dragging cases along for nothing is not good for class members or the court system.

29. For this reason, economic models of rational clients suggest that clients would not want to use the lodestar crosscheck when they hire lawyers on contingency. *See* Fitzpatrick, *A Fiduciary Judge*, 89 Fordham L. Rev. at 1156-59, 1167. In a recent article, I tried to discern whether there was any evidence that real clients in the marketplace ever use the lodestar crosscheck when they hire lawyers on contingency. I could find no such evidence, whether among unsophisticated clients who hire lawyers on contingency for things like personal injury cases or among sophisticated clients who lawyers on contingency for things like patent cases. *See id.* at 1159-63. Real clients follow the economic models: they do not want the lodestar crosscheck because it creates bad incentives for their lawyers. This is important because judges in class actions often say they act as fiduciaries for absent class members. *See* 4 William B. Rubenstein, Newberg on Class Actions § 13:40 (5th ed. 2020) ("[T]he law requires the judge to act as a fiduciary [of absent class members.]"). In my view, this means courts should not saddle absent class members with a fee method like the lodestar crosscheck that they would never choose for themselves. *See also Goldberger*, 209 F.3d at 53 ("[A] fee award should be assessed based on . . . 'a jealous regard to the rights of those who are interested in the fund.'"). Thankfully, most courts

across the country do not perform the crosscheck. *See* Fitzpatrick, *Empirical Study*, 7 J. Empirical L. Stud. at 833 (finding that only 49% of courts consider lodestar when awarding fees with the percentage method); *Eisenberg-Miller 2017*, 92 N.Y.U. L. Rev. at 945 (finding percent method with lodestar crosscheck used 38% of the time versus 54% for percent method without lodestar crosscheck). For example, in *none* of the overdraft fee settlements in MDL 2036 did the court perform the crosscheck. In my opinion, the court here should not do it either.

30. Instead, the court should assess this factor qualitatively. In my opinion, there is little doubt that class counsel dug into this case deeply enough to know what it is worth. This litigation has transpired almost as long as the typical class action does before it reaches settlement. *See* Fitzpatrick, *Empirical Study*, 7 J. Empirical L. Stud. at 820 (finding the average and median times for class actions to reach final settlement approval was around three years). The discovery conducted in this litigation has enabled class counsel's expert to calculate precisely what the class's damages would be if the class's view of the account agreement prevails. The probability of prevailing at this point is a legal question that will not benefit from further litigation. Given that the recovery here is better, as I noted, than the expected value of the litigation, it is in no one's interest to continue litigating. In my opinion, this should be the end of the matter.

31. It is true that the Second Circuit "encourage[s]" the lodestar crosscheck. *See, e.g.*, *Goldberger*, 209 F.3d at 50. "Encourage" does not mean require, however, and there are plenty of courts in this Circuit that do not do the crosscheck. *See, e.g.*, *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 71 (S.D.N.Y. 2003); *Teachers' Ret. Sys. of Louisiana v. A.C.L.N., Ltd.*, No. 01-CV-11814(MP), 2004 WL 1087261, at *7 (S.D.N.Y. May 14, 2004); *Dorn v. Eddington Sec., Inc.*, No. 08 CIV. 10271 LTS, 2011 WL 9380874, at *6-7 (S.D.N.Y. Sept. 21, 2011); *Palacio v. E*TRADE Fin. Corp.*, No. 10 CIV. 4030 LAP DCF, 2012 WL 2384419, at *6-7 (S.D.N.Y. June

22, 2012); *In re Am. Int'l Grp., Inc. Sec. Litig.*, 293 F.R.D. 459, 466 (S.D.N.Y. 2013); *Macedonia Church v. Lancaster Hotel, LP*, No. 05-0153 TLM, 2011 WL 2360138, at *13-14 (D. Conn. June 9, 2011).

32. But in any event, there is no indication that class counsel's lodestar would be outside the bounds of previous cases. *See, e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 n.6 (9th Cir. 2002) (noting multipliers of up to 19.6); *Steiner v. American Broadcasting Co.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007) (affirming fee award where the lodestar multiplier was 6.85); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, No. Civ.A. 03–4578, 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005) (awarding fee with 15.6 multiplier); *In re Doral Financial Corp. Securities Litigation*, No. 05-cv-04014-RO (S.D.N.Y. Jul. 17, 2007) (ECF 65) (same with 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."); *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. 05-11148-PBS, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (awarding fee with 8.3 multiplier); *Yuzary v. HSBC Bank USA, N.A.*, No. 12 CIV. 3693 PGG, 2013 WL 5492998, at *11 (S.D.N.Y. Oct. 2, 2013) (same with 7.6 multiplier); *Hainey v. Parrott*, No. 1:02-CV-733, 2007 WL 3308027, at *1 (S.D. Ohio Nov. 6, 2007) (same with 7.47 multiplier); *In re Rite Aid Corp. Secs. Litig.*, 362 F. Supp 2d 587, 589 (E.D. Pa. 2005) (same with 6.96 multiplier); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (same with 6 multiplier); *In re RJR Nabisco, Inc. Secs. Litig.*, 88 Civ. 7905 (MBM), 1992 WL 210138, at *5 (S.D.N.Y. Aug. 24, 1992) (same with 6 multiplier).

33. For all these reasons, it is my opinion that a fee percentage of at least 25% of the value of the settlement would be reasonable in this case.

34. My compensation for this declaration was $950 per hour and in no way dependent on the outcome of class counsel's fee petition.

Nashville, TN

May 17, 2021

Brian T. Fitzpatrick

EXHIBIT 1

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ACADEMIC APPOINTMENTS

VANDERBILT UNIVERSITY LAW SCHOOL, *Milton R. Underwood Chair in Free Enterprise*, 2020 to present
- *Professor of Law*, 2012 to present
- *FedEx Research Professor*, 2014-2015; *Associate Professor*, 2010-2012; *Assistant Professor*, 2007-2010
- Classes: Civil Procedure, Complex Litigation, Federal Courts, Comparative Class Actions
- Hall-Hartman Outstanding Professor Award, 2008-2009
- Vanderbilt's Association of American Law Schools Teacher of the Year, 2009

HARVARD LAW SCHOOL, *Visiting Professor*, Fall 2018
- Classes: Civil Procedure, Litigation Finance

FORDHAM LAW SCHOOL, *Visiting Professor*, Fall 2010
- Classes: Civil Procedure

EDUCATION

HARVARD LAW SCHOOL, J.D., *magna cum laude*, 2000
- Fay Diploma (for graduating first in the class)
- Sears Prize, 1999 (for highest grades in the second year)
- *Harvard Law Review*, Articles Committee, 1999-2000; Editor, 1998-1999
- *Harvard Journal of Law & Public Policy*, Senior Editor, 1999-2000; Editor, 1998-1999
- Research Assistant, David Shapiro, 1999; Steven Shavell, 1999

UNIVERSITY OF NOTRE DAME, B.S., Chemical Engineering, *summa cum laude*, 1997
- First runner-up to Valedictorian (GPA: 3.97/4.0)
- Steiner Prize, 1997 (for overall achievement in the College of Engineering)

CLERKSHIPS

HON. ANTONIN SCALIA, Supreme Court of the United States, 2001-2002

HON. DIARMUID O'SCANNLAIN, U.S. Court of Appeals for the Ninth Circuit, 2000-2001

EXPERIENCE

NEW YORK UNIVERSITY SCHOOL OF LAW, Feb. 2006 to June 2007
John M. Olin Fellow

HON. JOHN CORNYN, United States Senate, July 2005 to Jan. 2006
Special Counsel for Supreme Court Nominations

SIDLEY AUSTIN LLP, Washington, DC, 2002 to 2005
Litigation Associate

BOOKS

THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS: AN INTERNATIONAL SURVEY (Cambridge University Press, forthcoming 2021) (ed., with Randall Thomas)

THE CONSERVATIVE CASE FOR CLASS ACTIONS (University of Chicago Press 2019)

ACADEMIC ARTICLES

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The Politics of Merit Selection, 74 MISSOURI L. REV. 675 (2009)

Errors, Omissions, and the Tennessee Plan, 39 U. MEMPHIS L. REV. 85 (2008)

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Do Class Actions Deter Wrongdoing? in THE CLASS ACTION EFFECT (Catherine Piché, ed., Éditions Yvon Blais, Montreal, 2018)

Judicial Selection in Illinois in AN ILLINOIS CONSTITUTION FOR THE TWENTY-FIRST CENTURY (Joseph E. Tabor, ed., Illinois Policy Institute, 2017)

Civil Procedure in the Roberts Court in BUSINESS AND THE ROBERTS COURT (Jonathan Adler, ed., Oxford University Press, 2016)

Is the Future of Affirmative Action Race Neutral? in A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50 (Ellen Katz & Samuel Bagenstos, eds., Michigan University Press, 2016)

ACADEMIC PRESENTATIONS

A Fiduciary Judge's Guide to Awarding Fees in Class Actions, The Judicial Role in Professional Regulation, Stein Colloquium, Fordham Law School, New York, NY (Oct. 9, 2020)

Objector Blackmail Update: What Have the 2018 Amendments Done?, Institute for Law and Economic Policy, Fordham Law School, New York, NY (Feb. 28, 2020)

Keynote Debate: The Conservative Case for Class Actions, Miami Law Class Action & Complex Litigation Forum, University of Miami School of Law, Miami, FL (Jan. 24, 2020)

The Future of Class Actions, National Consumer Law Center Class Action Symposium, Boston, MA (Nov. 16, 2019) (panelist)

The Conservative Case for Class Actions, Center for Civil Justice, NYU Law School, New York, NY (Nov.11, 2019)

Deregulation and Private Enforcement, Class Actions, Mass Torts, and MDLs: The Next 50 Years, Pound Institute Academic Symposium, Lewis & Clark Law School, Portland, OR (Nov. 2, 2019)

Class Actions and Accountability in Finance, Investors and the Rule of Law Conference, Institute for Investor Protection, Loyola University Chicago Law School, Chicago, IL (Oct. 25, 2019) (panelist)

Incentivizing Lawyers as Teams, University of Texas at Austin Law School, Austin, TX (Oct. 22, 2019)

"Dueling Pianos": A Debate on the Continuing Need for Class Actions, Twenty Third Annual National Institute on Class Actions, American Bar Association, Nashville, TN (Oct. 18, 2019) (panelist)

A Debate on the Utility of Class Actions, Contemporary Issues in Complex Litigation Conference, Northwestern Law School, Chicago, IL (Oct.16, 2019) (panelist)

Litigation Funding, Forty Seventh Annual Meeting, Intellectual Property Owners Association, Washington, DC (Sep. 26, 2019) (panelist)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, International Class Actions Conference, Vanderbilt Law School, Nashville, TN (Aug. 24, 2019)

A New Source of Class Action Data, Corporate Accountability Conference, Institute for Law and Economic Policy, San Juan, Puerto Rico (April 12, 2019)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, Ninth Annual Emerging Markets Finance Conference, Mumbai, India (Dec. 14, 2018)

MDL: Uniform Rules v. Best Practices, Miami Law Class Action & Complex Litigation Forum, University of Miami Law School, Miami, FL (Dec. 7, 2018) (panelist)

Third Party Finance of Attorneys in Traditional and Complex Litigation, George Washington Law School, Washington, D.C. (Nov. 2, 2018) (panelist)

MDL at 50 - The 50th Anniversary of Multidistrict Litigation, New York University Law School, New York, New York (Oct. 10, 2018) (panelist)

The Discovery Tax, Law & Economics Seminar, Harvard Law School, Cambridge, Massachusetts (Sep. 11, 2018)

Empirical Research on Class Actions, Civil Justice Research Initiative, University of California at Berkeley, Berkeley, California (Apr. 9, 2018)

A Political Future for Class Actions in the United States?, The Future of Class Actions Symposium, University of Auckland Law School, Auckland, New Zealand (Mar. 15, 2018)

The Indian Class Actions: How Effective Will They Be?, Eighth Annual Emerging Markets Finance Conference, Mumbai, India (Dec. 19, 2017)

Hot Topics in Class Action and MDL Litigation, University of Miami School of Law, Miami, Florida (Dec. 8, 2017) (panelist)

Critical Issues in Complex Litigation, Contemporary Issues in Complex Litigation, Northwestern Law School (Nov. 29, 2017) (panelist)

The Conservative Case for Class Actions, Consumer Class Action Symposium, National Consumer Law Center, Washington, DC (Nov. 19, 2017)

The Conservative Case for Class Actions—A Monumental Debate, ABA National Institute on Class Actions, Washington, DC (Oct. 26, 2017) (panelist)

One-Way Fee Shifting after Summary Judgment, 2017 Meeting of the Midwestern Law and Economics Association, Marquette Law School, Milwaukee, WI (Oct. 20, 2017)

The Conservative Case for Class Actions, Pepperdine Law School Malibu, CA (Oct. 17, 2017)

One-Way Fee Shifting after Summary Judgment, Vanderbilt Law Review Symposium on The Future of Discovery, Vanderbilt Law School, Nashville, TN (Oct. 13, 2017)

The Constitution Revision Commission and Florida's Judiciary, 2017 Annual Florida Bar Convention, Boca Raton, FL (June 22, 2017)

Class Actions After Spokeo v. Robins*: Supreme Court Jurisprudence, Article III Standing, and Practical Implications for the Bench and Practitioners*, Northern District of California Judicial Conference, Napa, CA (Apr. 29, 2017) (panelist)

The Ironic History of Rule 23, Conference on Secrecy, Institute for Law & Economic Policy, Naples, FL (Apr. 21, 2017)

Justice Scalia and Class Actions: A Loving Critique, University of Notre Dame Law School, South Bend, Indiana (Feb. 3, 2017)

Should Third-Party Litigation Financing Be Permitted in Class Actions?, Fifty Years of Class Actions—A Global Perspective, Tel Aviv University, Tel Aviv, Israel (Jan. 4, 2017)

Hot Topics in Class Action and MDL Litigation, University of Miami School of Law, Miami, Florida (Dec. 2, 2016) (panelist)

The Ideological Consequences of Judicial Selection, William J. Brennan Lecture, Oklahoma City University School of Law, Oklahoma, City, Oklahoma (Nov. 10, 2016)

After Fifty Years, What's Class Action's Future, ABA National Institute on Class Actions, Las Vegas, Nevada (Oct. 20, 2016) (panelist)

Where Will Justice Scalia Rank Among the Most Influential Justices, State University of New York at Stony Brook, Long Island, New York (Sep. 17, 2016)

The Ironic History of Rule 23, University of Washington Law School, Seattle, WA (July 14, 2016)

A Respected Judiciary—Balancing Independence and Accountability, 2016 Annual Florida Bar Convention, Orlando, FL (June 16, 2016) (panelist)

What Will and Should Happen to Affirmative Action After Fisher v. Texas, American Association of Law Schools Annual Meeting, New York, NY (January 7, 2016) (panelist)

Litigation Funding: The Basics and Beyond, NYU Center on Civil Justice, NYU Law School, New York, NY (Nov. 20, 2015) (panelist)

Do Class Actions Offer Meaningful Compensation to Class Members, or Do They Simply Rip Off Consumers Twice?, ABA National Institute on Class Actions, New Orleans, LA (Oct. 22, 2015) (panelist)

Arbitration and the End of Class Actions?, Quinnipiac-Yale Dispute Resolution Workshop, Yale Law School, New Haven, CT (Sep. 8, 2015) (panelist)

The Next Steps for Discovery Reform: Requester Pays, Lawyers for Civil Justice Membership Meeting, Washington, DC (May 5, 2015)

Private Attorney General: Good or Bad?, 17th Annual Federalist Society Faculty Conference, Washington, DC (Jan. 3, 2015)

Liberty, Judicial Independence, and Judicial Power, Liberty Fund Conference, Santa Fe, NM (Nov. 13-16, 2014) (participant)

The Economics of Objecting for All the Right Reasons, 14th Annual Consumer Class Action Symposium, Tampa, FL (Nov. 9, 2014)

Compensation in Consumer Class Actions: Data and Reform, Conference on The Future of Class Action Litigation: A View from the Consumer Class, NYU Law School, New York, NY (Nov. 7, 2014)

The Future of Federal Class Actions: Can the Promise of Rule 23 Still Be Achieved?, Northern District of California Judicial Conference, Napa, CA (Apr. 13, 2014) (panelist)

The End of Class Actions?, Conference on Business Litigation and Regulatory Agency Review in the Era of Roberts Court, Institute for Law & Economic Policy, Boca Raton, FL (Apr. 4, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, University of Missouri School of Law, Columbia, MO (Mar. 7, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, George Mason Law School, Arlington, VA (Mar. 6, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, Roundtable for Third-Party Funding Scholars, Washington & Lee University School of Law, Lexington, VA (Nov. 7-8, 2013)

Is the Future of Affirmative Action Race Neutral?, Conference on A Nation of Widening Opportunities: The Civil Rights Act at 50, University of Michigan Law School, Ann Arbor, MI (Oct. 11, 2013)

The Mass Tort Bankruptcy: A Pre-History, The Public Life of the Private Law: A Conference in Honor of Richard A. Nagareda, Vanderbilt Law School, Nashville, TN (Sep. 28, 2013) (panelist)

Rights & Obligations in Alternative Litigation Financing and Fee Awards in Securities Class Actions, Conference on the Economics of Aggregate Litigation, Institute for Law & Economic Policy, Naples, FL (Apr. 12, 2013) (panelist)

The End of Class Actions?, Symposium on Class Action Reform, University of Michigan Law School, Ann Arbor, MI (Mar. 16, 2013)

Toward a More Lawyer-Centric Class Action?, Symposium on Lawyering for Groups, Stein Center for Law & Ethics, Fordham Law School, New York, NY (Nov. 30, 2012)

The Problem: AT & T as It Is Unfolding, Conference on *AT & T Mobility v. Concepcion*, Cardozo Law School, New York, NY (Apr. 26, 2012) (panelist)

Standing under the Statements and Accounts Clause, Conference on Representation without Accountability*,* Fordham Law School Corporate Law Center, New York, NY (Jan. 23, 2012)

The End of Class Actions?, Washington University Law School, St. Louis, MO (Dec. 9, 2011)

Book Preview Roundtable: Accelerating Democracy: Matching Social Governance to Technological Change, Searle Center on Law, Regulation, and Economic Growth, Northwestern University School of Law, Chicago, IL (Sep. 15-16, 2011) (participant)

Is Summary Judgment Unconstitutional? Some Thoughts About Originalism, Stanford Law School, Palo Alto, CA (Mar. 3, 2011)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Northwestern Law School, Chicago, IL (Feb. 25, 2011)

The New Politics of Iowa Judicial Retention Elections: Examining the 2010 Campaign and Vote, University of Iowa Law School, Iowa City, IA (Feb. 3, 2011) (panelist)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Washington University Law School, St. Louis, MO (Oct. 1, 2010)

Twombly *and* Iqbal *Reconsidered,* Symposium on Business Law and Regulation in the Roberts Court, Case Western Reserve Law School, Cleveland, OH (Sep. 17, 2010)

Do Class Action Lawyers Make Too Little?, Institute for Law & Economic Policy, Providenciales, Turks & Caicos (Apr. 23, 2010)

Originalism and Summary Judgment, Georgetown Law School, Washington, DC (Apr. 5, 2010)

Theorizing Fee Awards in Class Action Litigation, Washington University Law School, St. Louis, MO (Dec. 11, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Conference on Empirical Legal Studies, University of Southern California Law School, Los Angeles, CA (Nov. 20, 2009)

Originalism and Summary Judgment, Symposium on Originalism and the Jury, Ohio State Law School, Columbus, OH (Nov. 17, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Meeting of the Midwestern Law and Economics Association, University of Notre Dame Law School, South Bend, IN (Oct. 10, 2009)

The End of Objector Blackmail?, Stanford-Yale Junior Faculty Forum, Stanford Law School, Palo Alto, CA (May 29, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, University of Minnesota School of Law, Minneapolis, MN (Mar. 12, 2009)

The Politics of Merit Selection, Symposium on State Judicial Selection and Retention Systems, University of Missouri Law School, Columbia, MO (Feb. 27, 2009)

The End of Objector Blackmail?, Searle Center Research Symposium on the Empirical Studies of Civil Liability, Northwestern University School of Law, Chicago, IL (Oct. 9, 2008)

Alternatives To Affirmative Action After The Michigan Civil Rights Initiative, University of Michigan School of Law, Ann Arbor, MI (Apr. 3, 2007) (panelist)

OTHER PUBLICATIONS

Memo to Mitch: Repeal the Republican Tax Increase, THE HILL (July 17, 2020)

The Right Way to End Qualified Immunity, THE HILL (June 25, 2020)

I Still Remember, 133 HARV. L. REV. 2458 (2020)

Proposed Reforms to Texas Judicial Selection, 24 TEX. R. L. & POL. 307 (2020)

The Conservative Case for Class Actions?, NATIONAL REVIEW (Nov. 13, 2019)

9th Circuit Split: What's the math say?, DAILY JOURNAL (Mar. 21, 2017)

Former clerk on Justice Antonin Scalia and his impact on the Supreme Court, THE CONVERSATION (Feb. 24, 2016)

Lessons from Tennessee Supreme Court Retention Election, THE TENNESSEAN (Aug. 20, 2014)

Public Needs Voice in Judicial Process, THE TENNESSEAN (June 28, 2013)

Did the Supreme Court Just Kill the Class Action?, THE QUARTERLY JOURNAL (April 2012)

Let General Assembly Confirm Judicial Selections, CHATTANOOGA TIMES FREE PRESS (Feb. 19, 2012)

"Tennessee Plan" Needs Revisions, THE TENNESSEAN (Feb. 3, 2012)

How Does Your State Select Its Judges?, INSIDE ALEC 9 (March 2011) (with Stephen Ware)

On the Merits of Merit Selection, THE ADVOCATE 67 (Winter 2010)

Supreme Court Case Could End Class Action Suits, SAN FRANCISCO CHRONICLE (Nov. 7, 2010)

Kagan is an Intellect Capable of Serving Court, THE TENNESSEAN (Jun. 13, 2010)

Confirmation "Kabuki" Does No Justice, POLITICO (July 20, 2009)

Selection by Governor may be Best Judicial Option, THE TENNESSEAN (Apr. 27, 2009)

Verdict on Tennessee Plan May Require a Jury, THE MEMPHIS COMMERCIAL APPEAL (Apr. 16, 2008)

Tennessee's Plan to Appoint Judges Takes Power Away from the Public, THE TENNESSEAN (Mar. 14, 2008)

Process of Picking Judges Broken, CHATTANOOGA TIMES FREE PRESS (Feb. 27, 2008)

Disorder in the Court, LOS ANGELES TIMES (Jul. 11, 2007)

Scalia's Mistake, NATIONAL LAW JOURNAL (Apr. 24, 2006)

GM Backs Its Bottom Line, DETROIT FREE PRESS (Mar. 19, 2003)

Good for GM, Bad for Racial Fairness, LOS ANGELES TIMES (Mar. 18, 2003)

10 Percent Fraud, WASHINGTON TIMES (Nov. 15, 2002)

OTHER PRESENTATIONS

Does the Way We Choose our Judges Affect Case Outcomes?, American Legislative Exchange Council 2018 Annual Meeting, New Orleans, Louisiana (August 10, 2018) (panelist)

Oversight of the Structure of the Federal Courts, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, United States Senate, Washington, D.C. (July 31, 2018)

Where Will Justice Scalia Rank Among the Most Influential Justices, The Leo Bearman, Sr. American Inn of Court, Memphis, TN (Mar. 21, 2017)

Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit, Subcommittee on Courts, Intellectual Property, and the Internet, United States House of Representatives, Washington, D.C. (Mar. 16, 2017)

Supreme Court Review 2016: Current Issues and Cases Update, Nashville Bar Association, Nashville, TN (Sep. 15, 2016) (panelist)

A Respected Judiciary—Balancing Independence and Accountability, Florida Bar Annual Convention, Orlando, FL (June 16, 2016) (panelist)

Future Amendments in the Pipeline: Rule 23, Tennessee Bar Association, Nashville, TN (Dec. 2, 2015)

The New Business of Law: Attorney Outsourcing, Legal Service Companies, and Commercial Litigation Funding, Tennessee Bar Association, Nashville, TN (Nov. 12, 2014)

Hedge Funds + Lawsuits = A Good Idea?, Vanderbilt University Alumni Association, Washington, DC (Sep. 3, 2014)

Judicial Selection in Historical and National Perspective, Committee on the Judiciary, Kansas Senate (Jan. 16, 2013)

The Practice that Never Sleeps: What's Happened to, and What's Next for, Class Actions, ABA Annual Meeting, Chicago, IL (Aug. 3, 2012) (panelist)

Life as a Supreme Court Law Clerk and Views on the Health Care Debate, Exchange Club, Nashville, TN (Apr. 3, 2012)

The Tennessee Judicial Selection Process—Shaping Our Future, Tennessee Bar Association Leadership Law Retreat, Dickson, TN (Feb. 3, 2012) (panelist)

Reexamining the Class Action Practice, ABA National Institute on Class Actions, New York, NY (Oct. 14, 2011) (panelist)

Judicial Selection in Kansas, Committee on the Judiciary, Kansas House of Representatives (Feb. 16, 2011)

Judicial Selection and the Tennessee Constitution, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Mar. 24, 2009)

What Would Happen if the Judicial Selection and Evaluation Commissions Sunset?, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Feb. 24, 2009)

Judicial Selection in Tennessee, Chattanooga Bar Association, Chattanooga, TN (Feb. 27, 2008) (panelist)

Ethical Implications of Tennessee's Judicial Selection Process, Tennessee Bar Association, Nashville, TN (Dec. 12, 2007)

PROFESSIONAL ASSOCIATIONS

Member, American Law Institute
Referee, Journal of Law, Economics and Organization
Referee, Journal of Empirical Legal Studies
Reviewer, Oxford University Press
Reviewer, Supreme Court Economic Review
Member, American Bar Association
Member, Tennessee Advisory Committee to the U.S. Commission on Civil Rights
Board of Directors, Tennessee Stonewall Bar Association
American Swiss Foundation Young Leaders' Conference, 2012
Bar Admission, District of Columbia

COMMUNITY ACTIVITIES

Board of Directors, Nashville Ballet, 2011-2017 & 2019-present; Board of Directors, Beacon Center, 2018-present; Nashville Talking Library for the Blind, 2008-2009

EXHIBIT 2

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An Empirical Study of Class Action Settlements and Their Fee Awards

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This article is a comprehensive empirical study of class action settlements in federal court. Although there have been prior empirical studies of federal class action settlements, these studies have either been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as those settlements approved in published opinions). By contrast, in this article, I attempt to study every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first attempt to collect a complete set of federal class action settlements for any given year. I find that district court judges approved 688 class action settlements over this two-year period, involving nearly $33 billion. Of this $33 billion, roughly $5 billion was awarded to class action lawyers, or about 15 percent of the total. Most judges chose to award fees by using the highly discretionary percentage-of-the-settlement method, and the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Fee percentages were strongly and inversely associated with the size of the settlement. The age of the case at settlement was positively associated with fee percentages. There was some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located, with lower percentages in securities cases and in settlements from the Second and Ninth Circuits. There was no evidence that fee percentages were associated with whether the class action was certified as a settlement class or with the political affiliation of the judge who made the award.

I. Introduction

Class actions have been the source of great controversy in the United States. Corporations fear them.[1] Policymakers have tried to corral them.[2] Commentators and scholars have

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[1]See, e.g., Robert W. Wood, Defining Employees and Independent Contractors, Bus. L. Today 45, 48 (May–June 2008).

[2]See Private Securities Litigation Reform Act (PSLRA) of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); Class Action Fairness Act of 2005, 28 U.S.C. §§ 1453, 1711–1715 (2006).

suggested countless ways to reform them.[3] Despite all the attention showered on class actions, and despite the excellent empirical work on class actions to date, the data that currently exist on how the class action system operates in the United States are limited. We do not know, for example, how much money changes hands in class action litigation every year. We do not know how much of this money goes to class action lawyers rather than class members. Indeed, we do not even know how many class action cases are resolved on an annual basis. To intelligently assess our class action system as well as whether and how it should be reformed, answers to all these questions are important. Answers to these questions are equally important to policymakers in other countries who are currently thinking about adopting U.S.-style class action devices.[4]

This article tries to answer these and other questions by reporting the results of an empirical study that attempted to gather all class action settlements approved by federal judges over a recent two-year period, 2006 and 2007. I use class action settlements as the basis of the study because, even more so than individual litigation, virtually all cases certified as class actions and not dismissed before trial end in settlement.[5] I use federal settlements as the basis of the study for practical reasons: it was easier to identify and collect settlements approved by federal judges than those approved by state judges. Systematic study of class action settlements in state courts must await further study;[6] these future studies are important because there may be more class action settlements in state courts than there are in federal court.[7]

This article attempts to make three contributions to the existing empirical literature on class action settlements. First, virtually all the prior empirical studies of federal class action settlements have either been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as those settlements approved in published opinions). In this article, by contrast, I attempt to collect every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first to attempt to collect a complete set of federal class action settlements for

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[3]See, e.g., Robert G. Bone, Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness, 83 B.U.L. Rev. 485, 490–94 (2003); Allan Erbsen, From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions, 58 Vand. L. Rev. 995, 1080–81 (2005).

[4]See, e.g., Samuel Issacharoff & Geoffrey Miller, Will Aggregate Litigation Come to Europe?, 62 Vand. L. Rev. 179 (2009).

[5]See, e.g., Emery Lee & Thomas E. Willing, Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions 11 (Federal Judicial Center 2008); Tom Baker & Sean J. Griffith, How the Merits Matter: D&O Insurance and Securities Settlements, 157 U. Pa. L. Rev. 755 (2009).

[6]Empirical scholars have begun to study state court class actions in certain subject areas and in certain states. See, e.g., Robert B. Thompson & Randall S. Thomas, The Public and Private Faces of Derivative Suits, 57 Vand. L. Rev. 1747 (2004); Robert B. Thompson & Randall S. Thomas, The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions, 57 Vand. L. Rev. 133 (2004); Findings of the Study of California Class Action Litigation (Administrative Office of the Courts) (First Interim Report, 2009).

[7]See Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 56 (2000).

any given year.[8] As such, this article allows us to see for the first time a complete picture of the cases that are settled in federal court. This includes aggregate annual statistics, such as how many class actions are settled every year, how much money is approved every year in these settlements, and how much of that money class action lawyers reap every year. It also includes how these settlements are distributed geographically as well as by litigation area, what sort of relief was provided in the settlements, how long the class actions took to reach settlement, and an analysis of what factors were associated with the fees awarded to class counsel by district court judges.

Second, because this article analyzes settlements that were approved in both published and unpublished opinions, it allows us to assess how well the few prior studies that looked beyond securities cases but relied only on published opinions capture the complete picture of class action settlements. To the extent these prior studies adequately capture the complete picture, it may be less imperative for courts, policymakers, and empirical scholars to spend the considerable resources needed to collect unpublished opinions in order to make sound decisions about how to design our class action system.

Third, this article studies factors that may influence district court judges when they award fees to class counsel that have not been studied before. For example, in light of the discretion district court judges have been delegated over fees under Rule 23, as well as the salience the issue of class action litigation has assumed in national politics, realist theories of judicial behavior would predict that Republican judges would award smaller fee percentages than Democratic judges. I study whether the political beliefs of district court judges are associated with the fees they award and, in doing so, contribute to the literature that attempts to assess the extent to which these beliefs influence the decisions of not just appellate judges, but trial judges as well. Moreover, the article contributes to the small but growing literature examining whether the ideological influences found in published judicial decisions persist when unpublished decisions are examined as well.

In Section II of this article, I briefly survey the existing empirical studies of class action settlements. In Section III, I describe the methodology I used to collect the 2006–2007 federal class action settlements and I report my findings regarding these settlements. District court judges approved 688 class action settlements over this two-year period, involving over $33 billion. I report a number of descriptive statistics for these settlements, including the number of plaintiff versus defendant classes, the distribution of settlements by subject matter, the age of the case at settlement, the geographic distribution of settlements, the number of settlement classes, the distribution of relief across settlements, and various statistics on the amount of money involved in the settlements. It should be noted that despite the fact that the few prior studies that looked beyond securities settlements appeared to oversample larger settlements, much of the analysis set forth in this article is consistent with these prior studies. This suggests that scholars may not need to sample unpublished as well as published opinions in order to paint an adequate picture of class action settlements.

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[8]Of course, I cannot be certain that I found every one of the class actions that settled in federal court over this period. Nonetheless, I am confident that if I did not find some, the number I did not find is small and would not contribute meaningfully to the data reported in this article.

In Section IV, I perform an analysis of the fees judges awarded to class action lawyers in the 2006–2007 settlements. All told, judges awarded nearly $5 billion over this two-year period in fees and expenses to class action lawyers, or about 15 percent of the total amount of the settlements. Most federal judges chose to award fees by using the highly discretionary percentage-of-the-settlement method and, unsurprisingly, the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Using regression analysis, I confirm prior studies and find that fee percentages are strongly and inversely associated with the size of the settlement. Further, I find that the age of the case is positively associated with fee percentages but that the percentages were not associated with whether the class action was certified as a settlement class. There also appeared to be some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all other areas, and district courts in some circuits—the Ninth and the Second (in securities cases)—awarded lower fee percentages than courts in many other circuits. Finally, the regression analysis did not confirm the realist hypothesis: there was no association between fee percentage and the political beliefs of the judge in any regression.

II. Prior Empirical Studies of Class Action Settlements

There are many existing empirical studies of federal securities class action settlements.[9] Studies of securities settlements have been plentiful because for-profit organizations maintain lists of all federal securities class action settlements for the benefit of institutional investors that are entitled to file claims in these settlements.[10] Using these data, studies have shown that since 2005, for example, there have been roughly 100 securities class action settlements in federal court each year, and these settlements have involved between $7 billion and $17 billion per year.[11] Scholars have used these data to analyze many different aspects of these settlements, including the factors that are associated with the percentage of

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[9]See, e.g., James D. Cox & Randall S. Thomas, Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions, 106 Colum. L. Rev. 1587 (2006); James D. Cox, Randall S. Thomas & Lynn Bai, There are Plaintiffs and . . . there are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements, 61 Vand. L. Rev. 355 (2008); Theodore Eisenberg, Geoffrey Miller & Michael A. Perino, A New Look at Judicial Impact: Attorneys' Fees in Securities Class Actions after *Goldberger v. Integrated Resources, Inc.*, 29 Wash. U.J.L. & Pol'y 5 (2009); Michael A. Perino, Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions (St. John's Legal Studies, Research Paper No. 06-0034, 2006), available at <http://ssrn.com/abstract=870577> [hereinafter Perino, Markets and Monitors]; Michael A. Perino, The Milberg Weiss Prosecution: No Harm, No Foul? (St. John's Legal Studies, Research Paper No. 08-0135, 2008), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133995> [hereinafter Perino, Milberg Weiss].

[10]See, e.g., RiskMetrics Group, available at <http://www.riskmetrics.com/scas>.

[11]See Cornerstone Research, Securities Class Action Settlements: 2007 Review and Analysis 1 (2008), available at <http://securities.stanford.edu/Settlements/REVIEW_1995-2007/Settlements_Through_12_2007.pdf>.

the settlements that courts have awarded to class action lawyers.[12] These studies have found that the mean and median fees awarded by district court judges are between 20 percent and 30 percent of the settlement amount.[13] These studies have also found that a number of factors are associated with the percentage of the settlement awarded as fees, including (inversely) the size of the settlement, the age of the case, whether a public pension fund was the lead plaintiff, and whether certain law firms were class counsel.[14] None of these studies has examined whether the political affiliation of the federal district court judge awarding the fees was associated with the size of awards.

There are no comparable organizations that maintain lists of nonsecurities class action settlements. As such, studies of class action settlements beyond the securities area are much rarer and, when they have been done, rely on samples of settlements that were not intended to be representative of the whole. The two largest studies of class action settlements not limited to securities class actions are a 2004 study by Ted Eisenberg and Geoff Miller,[15] which was recently updated to include data through 2008,[16] and a 2003 study by Class Action Reports.[17] The Eisenberg-Miller studies collected data from class action settlements in both state and federal courts found from court opinions published in the Westlaw and Lexis databases and checked against lists maintained by the CCH Federal Securities and Trade Regulation Reporters. Through 2008, their studies have now identified 689 settlements over a 16-year period, or less than 45 settlements per year.[18] Over this 16-year period, their studies found that the mean and median settlement amounts were, respectively, $116 million and $12.5 million (in 2008 dollars), and that the mean and median fees awarded by district courts were 23 percent and 24 percent of the settlement, respectively.[19] Their studies also performed an analysis of fee percentages and fee awards. For the data through 2002, they found that the percentage of the settlement awarded as fees was associated with the size of the settlement (inversely), the age of the case, and whether the

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[12]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 17–24, 28–36; Perino, Markets and Monitors, supra note 9, at 12–28, 39–44; Perino, Milberg Weiss, supra note 9, at 32–33, 39–60.

[13]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 17–18, 22, 28, 33; Perino, Markets and Monitors, supra note 9, at 20–21, 40; Perino, Milberg Weiss, supra note 9, at 32–33, 51–53.

[14]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 14–24, 29–30, 33–34; Perino, Markets and Monitors, supra note 9, at 20–28, 41; Perino, Milberg Weiss, supra note 9, at 39–58.

[15]See Theodore Eisenberg & Geoffrey Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Stud. 27 (2004).

[16]See Theodore Eisenberg & Geoffrey Miller, Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008, 7 J. Empirical Legal Stud. 248 (2010) [hereinafter Eisenberg & Miller II].

[17]See Stuart J. Logan, Jack Moshman & Beverly C. Moore, Jr., Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep. 169 (Mar.–Apr. 2003).

[18]See Eisenberg & Miller II, supra note 16, at 251.

[19]Id. at 258–59.

district court went out of its way to comment on the level of risk that class counsel had assumed in pursuing the case.[20] For the data through 2008, they regressed only fee awards and found that the awards were inversely associated with the size of the settlement, that state courts gave lower awards than federal courts, and that the level of risk was still associated with larger awards.[21] Their studies have not examined whether the political affiliations of the federal district court judges awarding fees were associated with the size of the awards.

The Class Action Reports study collected data on 1,120 state and federal settlements over a 30-year period, or less than 40 settlements per year.[22] Over the same 10-year period analyzed by the Eisenberg-Miller study, the Class Action Reports data found mean and median settlements of $35.4 and $7.6 million (in 2002 dollars), as well as mean and median fee percentages between 25 percent and 30 percent.[23] Professors Eisenberg and Miller performed an analysis of the fee awards in the Class Action Reports study and found the percentage of the settlement awarded as fees was likewise associated with the size of the settlement (inversely) and the age of the case.[24]

III. Federal Class Action Settlements, 2006 and 2007

As far as I am aware, there has never been an empirical study of all federal class action settlements in a particular year. In this article, I attempt to make such a study for two recent years: 2006 and 2007. To compile a list of all federal class settlements in 2006 and 2007, I started with one of the aforementioned lists of securities settlements, the one maintained by RiskMetrics, and I supplemented this list with settlements that could be found through three other sources: (1) broad searches of district court opinions in the Westlaw and Lexis databases,[25] (2) four reporters of class action settlements—*BNA Class Action Litigation Report*, *Mealey's Jury Verdicts and Settlements*, *Mealey's Litigation Report*, and the *Class Action World* website[26]—and (3) a list from the Administrative Office of Courts of all district court cases

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[20]See Eisenberg & Miller, supra note 15, at 61–62.

[21]See Eisenberg & Miller II, supra note 16, at 278.

[22]See Eisenberg & Miller, supra note 15, at 34.

[23]Id. at 47, 51.

[24]Id. at 61–62.

[25]The searches consisted of the following terms: ("class action" & (settle! /s approv! /s (2006 2007))); (((counsel attorney) /s fee /s award!) & (settle! /s (2006 2007)) & "class action"); ("class action" /s settle! & da(aft 12/31/2005 & bef 1/1/2008)); ("class action" /s (fair reasonable adequate) & da(aft 12/31/2005 & bef 1/1/2008)).

[26]See <http://classactionworld.com/>.

coded as class actions that terminated by settlement between 2005 and 2008.[27] I then removed any duplicate cases and examined the docket sheets and court orders of each of the remaining cases to determine whether the cases were in fact certified as class actions under either Rule 23, Rule 23.1, or Rule 23.2.[28] For each of the cases verified as such, I gathered the district court's order approving the settlement, the district court's order awarding attorney fees, and, in many cases, the settlement agreements and class counsel's motions for fees, from electronic databases (such as Westlaw or PACER) and, when necessary, from the clerk's offices of the various federal district courts. In this section, I report the characteristics of the settlements themselves; in the next section, I report the characteristics of the attorney fees awarded to class counsel by the district courts that approved the settlements.

A. Number of Settlements

I found 688 settlements approved by federal district courts during 2006 and 2007 using the methodology described above. This is almost the exact same number the Eisenberg-Miller study found over a *16*-year period in both federal *and* state court. Indeed, the number of annual settlements identified in this study is *several times* the number of annual settlements that have been identified in any prior empirical study of class action settlements. Of the 688 settlements I found, 304 were approved in 2006 and 384 were approved in 2007.[29]

B. Defendant Versus Plaintiff Classes

Although Rule 23 permits federal judges to certify either a class of plaintiffs or a class of defendants, it is widely assumed that it is extremely rare for courts to certify defendant classes.[30] My findings confirm this widely held assumption. Of the 688 class action settlements approved in 2006 and 2007, 685 involved plaintiff classes and only three involved

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[27]I examined the AO lists in the year before and after the two-year period under investigation because the termination date recorded by the AO was not necessarily the same date the district court approved the settlement.

[28]See Fed. R. Civ. P. 23, 23.1, 23.2. I excluded from this analysis opt-in collective actions, such as those brought pursuant to the provisions of the Fair Labor Standards Act (see 29 U.S.C. § 216(b)), if such actions did not also include claims certified under the opt-out mechanism in Rule 23.

[29]A settlement was assigned to a particular year if the district court judge's order approving the settlement was dated between January 1 and December 31 of that year. Cases involving multiple defendants sometimes settled over time because defendants would settle separately with the plaintiff class. All such partial settlements approved by the district court on the same date were treated as one settlement. Partial settlements approved by the district court on different dates were treated as different settlements.

[30]See, e.g., Robert H. Klonoff, Edward K.M. Bilich & Suzette M. Malveaux, Class Actions and Other Multi-Party Litigation: Cases and Materials 1061 (2d ed. 2006).

defendant classes. All three of the defendant-class settlements were in employment benefits cases, where companies sued classes of current or former employees.[31]

C. Settlement Subject Areas

Although courts are free to certify Rule 23 classes in almost any subject area, it is widely assumed that securities settlements dominate the federal class action docket.[32] At least in terms of the number of settlements, my findings reject this conventional wisdom. As Table 1 shows, although securities settlements comprised a large percentage of the 2006 and 2007 settlements, they did not comprise a majority of those settlements. As one would have

Table 1: The Number of Class Action Settlements Approved by Federal Judges in 2006 and 2007 in Each Subject Area

	Number of Settlements	
Subject Matter	*2006*	*2007*
Securities	122 (40%)	135 (35%)
Labor and employment	41 (14%)	53 (14%)
Consumer	40 (13%)	47 (12%)
Employee benefits	23 (8%)	38 (10%)
Civil rights	24 (8%)	37 (10%)
Debt collection	19 (6%)	23 (6%)
Antitrust	13 (4%)	17 (4%)
Commercial	4 (1%)	9 (2%)
Other	18 (6%)	25 (6%)
Total	304	384

NOTE: Securities: cases brought under federal and state securities laws. Labor and employment: workplace claims brought under either federal or state law, with the exception of ERISA cases. Consumer: cases brought under the Fair Credit Reporting Act as well as cases for consumer fraud and the like. Employee benefits: ERISA cases. Civil rights: cases brought under 42 U.S.C. § 1983 or cases brought under the Americans with Disabilities Act seeking nonworkplace accommodations. Debt collection: cases brought under the Fair Debt Collection Practices Act. Antitrust: cases brought under federal or state antitrust laws. Commercial: cases between businesses, excluding antitrust cases. Other: includes, among other things, derivative actions against corporate managers and directors, environmental suits, insurance suits, Medicare and Medicaid suits, product liability suits, and mass tort suits.

SOURCES: Westlaw, PACER, district court clerks' offices.

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[31]See Halliburton Co. v. Graves, No. 04-00280 (S.D. Tex., Sept. 28, 2007); Rexam, Inc. v. United Steel Workers of Am., No. 03-2998 (D. Minn. Aug. 29, 2007); Rexam, Inc. v. United Steel Workers of Am., No. 03-2998 (D. Minn. Sept. 17, 2007).

[32]See, e.g., John C. Coffee, Jr., Reforming the Security Class Action: An Essay on Deterrence and its Implementation, 106 Colum. L. Rev. 1534, 1539–40 (2006) (describing securities class actions as "the 800-pound gorilla that dominates and overshadows other forms of class actions").

expected in light of Supreme Court precedent over the last two decades,[33] there were almost no mass tort class actions (included in the "Other" category) settled over the two-year period.

Although the Eisenberg-Miller study through 2008 is not directly comparable on the distribution of settlements across litigation subject areas—because its state and federal court data cannot be separated (more than 10 percent of the settlements were from state court[34]) and because it excludes settlements in fee-shifting cases—their study through 2008 is the best existing point of comparison. Interestingly, despite the fact that state courts were included in their data, their study through 2008 found about the same percentage of securities cases (39 percent) as my 2006–2007 data set shows.[35] However, their study found many more consumer (18 percent) and antitrust (10 percent) cases, while finding many fewer labor and employment (8 percent), employee benefits (6 percent), and civil rights (3 percent) cases.[36] This is not unexpected given their reliance on published opinions and their exclusion of fee-shifting cases.

D. Settlement Classes

The Federal Rules of Civil Procedure permit parties to seek certification of a suit as a class action for settlement purposes only.[37] When the district court certifies a class in such circumstances, the court need not consider whether it would be manageable to try the litigation as a class.[38] So-called settlement classes have always been more controversial than classes certified for litigation because they raise the prospect that, at least where there are competing class actions filed against the same defendant, the defendant could play class counsel off one another to find the one willing to settle the case for the least amount of money.[39] Prior to the Supreme Court's 1997 opinion in *Amchem Products, Inc. v. Windsor*,[40] it was uncertain whether the Federal Rules even permitted settlement classes. It may therefore be a bit surprising to learn that 68 percent of the federal settlements in 2006 and 2007 were settlement classes. This percentage is higher than the percentage found in the Eisenberg-Miller studies, which found that only 57 percent of class action settlements in

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[33]See, e.g., Samuel Issacharoff, Private Claims, Aggregate Rights, 2008 Sup. Ct. Rev. 183, 208.

[34]See Eisenberg & Miller II, supra note 16, at 257.

[35]Id. at 262.

[36]Id.

[37]See Martin H. Redish, Settlement Class Actions, The Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process, 73 U. Chi. L. Rev. 545, 553 (2006).

[38]See Amchem Prods., Inc v Windsor, 521 U.S. 591, 620 (1997).

[39]See Redish, supra note 368, at 557–59.

[40]521 U.S. 591 (1997).

state and federal court between 2003 and 2008 were settlement classes.[41] It should be noted that the distribution of litigation subject areas among the settlement classes in my 2006–2007 federal data set did not differ much from the distribution among nonsettlement classes, with two exceptions. One exception was consumer cases, which were nearly three times as prevalent among settlement classes (15.9 percent) as among nonsettlement classes (5.9 percent); the other was civil rights cases, which were four times as prevalent among nonsettlement classes (18.0 percent) as among settlements classes (4.5 percent). In light of the skepticism with which the courts had long treated settlement classes, one might have suspected that courts would award lower fee percentages in such settlements. Nonetheless, as I report in Section III, whether a case was certified as a settlement class was not associated with the fee percentages awarded by federal district court judges.

E. The Age at Settlement

One interesting question is how long class actions were litigated before they reached settlement. Unsurprisingly, cases reached settlement over a wide range of ages.[42] As shown in Table 2, the average time to settlement was a bit more than three years (1,196 days) and the median time was a bit under three years (1,068 days). The average and median ages here are similar to those found in the Eisenberg-Miller study through 2002, which found averages of 3.35 years in fee-shifting cases and 2.86 years in non-fee-shifting cases, and

Table 2: The Number of Days, 2006–2007, Federal Class Action Cases Took to Reach Settlement in Each Subject Area

Subject Matter	*Average*	*Median*	*Minimum*	*Maximum*
Securities	1,438	1,327	392	3,802
Labor and employment	928	786	105	2,497
Consumer	963	720	127	4,961
Employee benefits	1,162	1,161	164	3,157
Civil rights	1,373	1,360	181	3,354
Debt collection	738	673	223	1,973
Antitrust	1,140	1,167	237	2,480
Commercial	1,267	760	163	5,443
Other	1,065	962	185	3,620
All	1,196	1,068	105	5,443

SOURCE: PACER.

[41]See Eisenberg & Miller II, supra note 16, at 266.

[42]The age of the case was calculated by subtracting the date the relevant complaint was filed from the date the settlement was approved by the district court judge. The dates were taken from PACER. For consolidated cases, I used the date of the earliest complaint. If the case had been transferred, consolidated, or removed, the date the complaint was filed was not always available from PACER. In such cases, I used the date the case was transferred, consolidated, or removed as the start date.

medians of 4.01 years in fee-shifting cases and 3.0 years in non-fee-shifting cases.[43] Their study through 2008 did not report case ages.

The shortest time to settlement was 105 days in a labor and employment case.[44] The longest time to settlement was nearly 15 years (5,443 days) in a commercial case.[45] The average and median time to settlement varied significantly by litigation subject matter, with securities cases generally taking the longest time and debt collection cases taking the shortest time. Labor and employment cases and consumer cases also settled relatively early.

F. The Location of Settlements

The 2006–2007 federal class action settlements were not distributed across the country in the same way federal civil litigation is in general. As Figure 1 shows, some of the geographic circuits attracted much more class action attention than we would expect based on their docket size, and others attracted much less. In particular, district courts in the First, Second, Seventh, and Ninth Circuits approved a much larger share of class action settlements than the share of all civil litigation they resolved, with the First, Second, and Seventh Circuits approving nearly double the share and the Ninth Circuit approving one-and-one-half times the share. By contrast, the shares of class action settlements approved by district courts in the Fifth and Eighth Circuits were less than one-half of their share of all civil litigation, with the Third, Fourth, and Eleventh Circuits also exhibiting significant underrepresentation.

With respect to a comparison with the Eisenberg-Miller studies, their federal court data through 2008 can be separated from their state court data on the question of the geographic distribution of settlements, and there are some significant differences between their federal data and the numbers reflected in Figure 1. Their study reported considerably higher proportions of settlements than I found from the Second (23.8 percent), Third (19.7 percent), Eighth (4.8 percent), and D.C. (3.3 percent) Circuits, and considerably lower proportions from the Fourth (1.3 percent), Seventh (6.8 percent), and Ninth (16.6 percent) Circuits.[46]

Figure 2 separates the class action settlement data in Figure 1 into securities and nonsecurities cases. Figure 2 suggests that the overrepresentation of settlements in the First and Second Circuits is largely attributable to securities cases, whereas the overrepresentation in the Seventh Circuit is attributable to nonsecurities cases, and the overrepresentation in the Ninth is attributable to both securities and nonsecurities cases.

It is interesting to ask why some circuits received more class action attention than others. One hypothesis is that class actions are filed in circuits where class action lawyers

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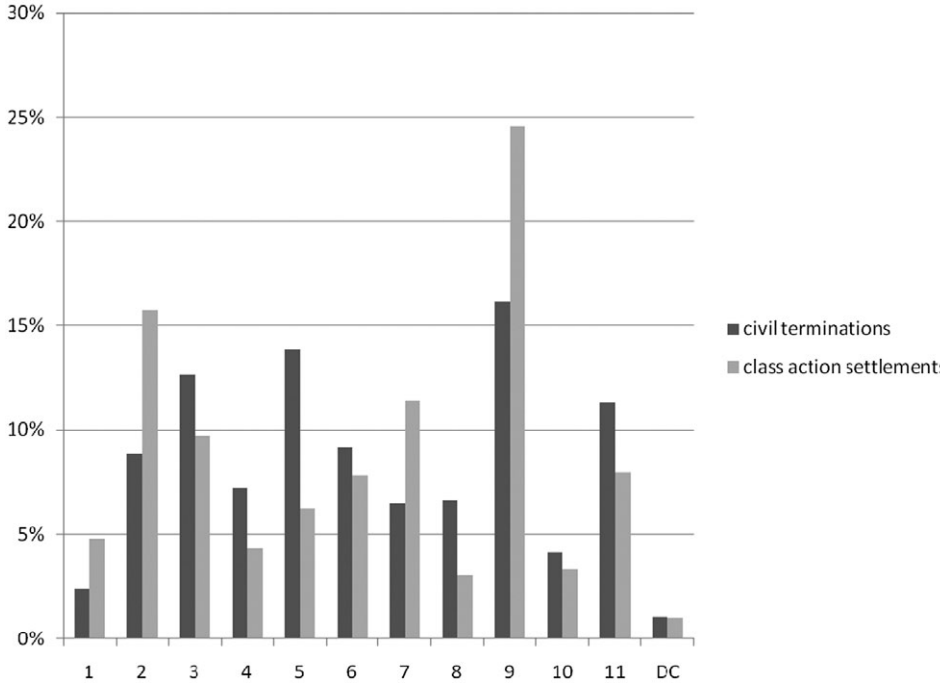
[43]See Eisenberg & Miller, supra note 15, at 59–60.

[44]See Clemmons v. Rent-a-Center W., Inc., No. 05-6307 (D. Or. Jan. 20, 2006).

[45]See Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006).

[46]See Eisenberg & Miller II, supra note 16, at 260.

Figure 1: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



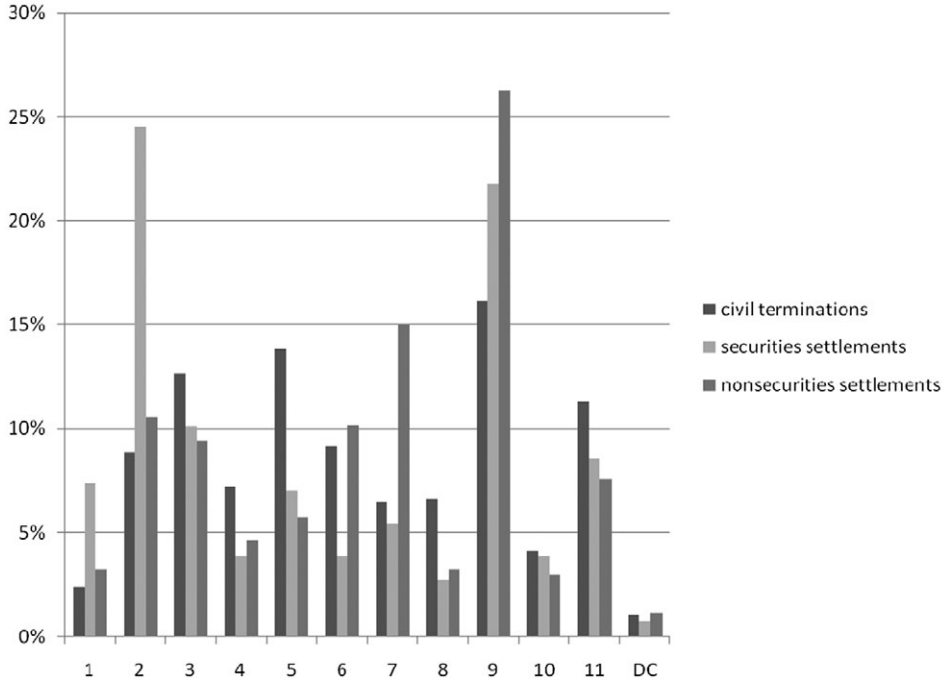
SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <http://www.uscourts.gov/stats/index.html>).

believe they can find favorable law or favorable judges. Federal class actions often involve class members spread across multiple states and, as such, class action lawyers may have a great deal of discretion over the district in which file suit.[47] One way law or judges may be favorable to class action attorneys is with regard to attorney fees. In Section III, I attempt to test whether district court judges in the circuits with the most over- and undersubscribed class action dockets award attorney fees that would attract or discourage filings there; I find no evidence that they do.

Another hypothesis is that class action suits are settled in jurisdictions where defendants are located. This might be the case because although class action lawyers may have discretion over where to file, venue restrictions might ultimately restrict cases to jurisdic-

[47]See Samuel Issacharoff & Richard Nagareda, Class Settlements Under Attack, 156 U. Pa. L. Rev. 1649, 1662 (2008).

Figure 2: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <http://www.uscourts.gov/stats/index.html>).

tions in which defendants have their corporate headquarters or other operations.[48] This might explain why the Second Circuit, with the financial industry in New York, sees so many securities suits, and why other circuits with cities with a large corporate presence, such as the First (Boston), Seventh (Chicago), and Ninth (Los Angeles and San Francisco), see more settlements than one would expect based on the size of their civil dockets.

Another hypothesis might be that class action lawyers file cases wherever it is most convenient for them to litigate the cases—that is, in the cities in which their offices are located. This, too, might explain the Second Circuit's overrepresentation in securities settlements, with prominent securities firms located in New York, as well as the

[48]See 28 U.S.C. §§ 1391, 1404, 1406, 1407. See also Foster v. Nationwide Mut. Ins. Co., No. 07-04928, 2007 U.S. Dist. LEXIS 95240 at *2–17 (N.D. Cal. Dec. 14, 2007) (transferring venue to jurisdiction where defendant's corporate headquarters were located). One prior empirical study of securities class action settlements found that 85 percent of such cases are filed in the home circuit of the defendant corporation. See James D. Cox, Randall S. Thomas & Lynn Bai, Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses, 2009 Wis. L. Rev. 421, 429, 440, 450–51 (2009).

overrepresentation of other settlements in some of the circuits in which major metropolitan areas with prominent plaintiffs' firms are found.

G. Type of Relief

Under Rule 23, district court judges can certify class actions for injunctive or declaratory relief, for money damages, or for a combination of the two.[49] In addition, settlements can provide money damages both in the form of cash as well as in the form of in-kind relief, such as coupons to purchase the defendant's products.[50]

As shown in Table 3, the vast majority of class actions settled in 2006 and 2007 provided cash relief to the class (89 percent), but a substantial number also provided in-kind relief (6 percent) or injunctive or declaratory relief (23 percent). As would be

Table 3: The Percentage of 2006 and 2007 Class Action Settlements Providing Each Type of Relief in Each Subject Area

Subject Matter	*Cash*	*In-Kind Relief*	*Injunctive or Declaratory Relief*
Securities ($n = 257$)	100%	0%	2%
Labor and employment ($n = 94$)	95%	6%	29%
Consumer ($n = 87$)	74%	30%	37%
Employee benefits ($n = 61$)	90%	0%	34%
Civil rights ($n = 61$)	49%	2%	75%
Debt collection ($n = 42$)	98%	0%	12%
Antitrust ($n = 30$)	97%	13%	7%
Commercial ($n = 13$)	92%	0%	62%
Other ($n = 43$)	77%	7%	33%
All ($n = 688$)	89%	6%	23%

NOTE: Cash: cash, securities, refunds, charitable contributions, contributions to employee benefit plans, forgiven debt, relinquishment of liens or claims, and liquidated repairs to property. In-kind relief: vouchers, coupons, gift cards, warranty extensions, merchandise, services, and extended insurance policies. Injunctive or declaratory relief: modification of terms of employee benefit plans, modification of compensation practices, changes in business practices, capital improvements, research, and unliquidated repairs to property.

SOURCES: Westlaw, PACER, district court clerks' offices.

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[49]See Fed. R. Civ. P. 23(b).

[50]These coupon settlements have become very controversial in recent years, and Congress discouraged them in the Class Action Fairness Act of 2005 by tying attorney fees to the value of coupons that were ultimately redeemed by class members as opposed to the value of coupons offered class members. See 28 U.S.C. § 1712.

expected in light of the focus on consumer cases in the debate over the anti-coupon provision in the Class Action Fairness Act of 2005,[51] consumer cases had the greatest percentage of settlements providing for in-kind relief (30 percent). Civil rights cases had the greatest percentage of settlements providing for injunctive or declaratory relief (75 percent), though almost half the civil rights cases also provided some cash relief (49 percent). The securities settlements were quite distinctive from the settlements in other areas in their singular focus on cash relief: every single securities settlement provided cash to the class and almost none provided in-kind, injunctive, or declaratory relief. This is but one example of how the focus on securities settlements in the prior empirical scholarship can lead to a distorted picture of class action litigation.

H. Settlement Money

Although securities settlements did not comprise the majority of federal class action settlements in 2006 and 2007, they did comprise the majority of the money—indeed, the *vast majority* of the money—involved in class action settlements. In Table 4, I report the total amount of ascertainable value involved in the 2006 and 2007 settlements. This amount

Table 4: The Total Amount of Money Involved in Federal Class Action Settlements in 2006 and 2007

	Total Ascertainable Monetary Value in Settlements (and Percentage of Overall Annual Total)			
Subject Matter	*2006* (n = *304*)		*2007* (n = *384*)	
Securities	$16,728	76%	$8,038	73%
Labor and employment	$266.5	1%	$547.7	5%
Consumer	$517.3	2%	$732.8	7%
Employee benefits	$443.8	2%	$280.8	3%
Civil rights	$265.4	1%	$81.7	1%
Debt collection	$8.9	<1%	$5.7	<1%
Antitrust	$1,079	5%	$660.5	6%
Commercial	$1,217	6%	$124.0	1%
Other	$1,568	7%	$592.5	5%
Total	$22,093	100%	$11,063	100%

NOTE: Dollar amounts are in millions. Includes all determinate payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.

SOURCES: Westlaw, PACER, district court clerks' offices.

[51]See, e.g., 151 Cong. Rec. H723 (2005) (statement of Rep. Sensenbrenner) (arguing that consumers are "seeing all of their gains go to attorneys and them just getting coupon settlements from the people who have allegedly done them wrong").

includes all determinate[52] payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.[53] I did not attempt to assign a value to any relief that was not valued by the district court (even if it may have been valued by class counsel). It should be noted that district courts did not often value in-kind or injunctive relief—they did so only 18 percent of the time—and very little of Table 4—only $1.3 billion, or 4 percent—is based on these valuations. It should also be noted that the amounts in Table 4 reflect only what defendants *agreed to pay*; they do not reflect the amounts that defendants *actually paid* after the claims administration process concluded. Prior empirical research has found that, depending on how settlements are structured (e.g., whether they awarded a fixed amount of money to each class member who eventually files a valid claim or a pro rata amount of a fixed settlement to each class member), defendants can end up paying much less than they agreed.[54]

Table 4 shows that in both years, around three-quarters of all the money involved in federal class action settlements came from securities cases. Thus, in this sense, the conventional wisdom about the dominance of securities cases in class action litigation is correct. Figure 3 is a graphical representation of the contribution each litigation area made to the total number and total amount of money involved in the 2006–2007 settlements.

Table 4 also shows that, in total, over $33 billion was approved in the 2006–2007 settlements. Over $22 billion was approved in 2006 and over $11 billion in 2007. It should be emphasized again that the totals in Table 4 understate the amount of money defendants agreed to pay in class action settlements in 2006 and 2007 because they exclude the unascertainable value of those settlements. This understatement disproportionately affects litigation areas, such as civil rights, where much of the relief is injunctive because, as I noted, very little of such relief was valued by district courts. Nonetheless, these numbers are, as far as I am aware, the first attempt to calculate how much money is involved in federal class action settlements in a given year.

The significant discrepancy between the two years is largely attributable to the 2006 securities settlement related to the collapse of Enron, which totaled $6.6 billion, as well as to the fact that seven of the eight 2006–2007 settlements for more than $1 billion were approved in 2006.[55] Indeed, it is worth noting that the eight settlements for more than $1

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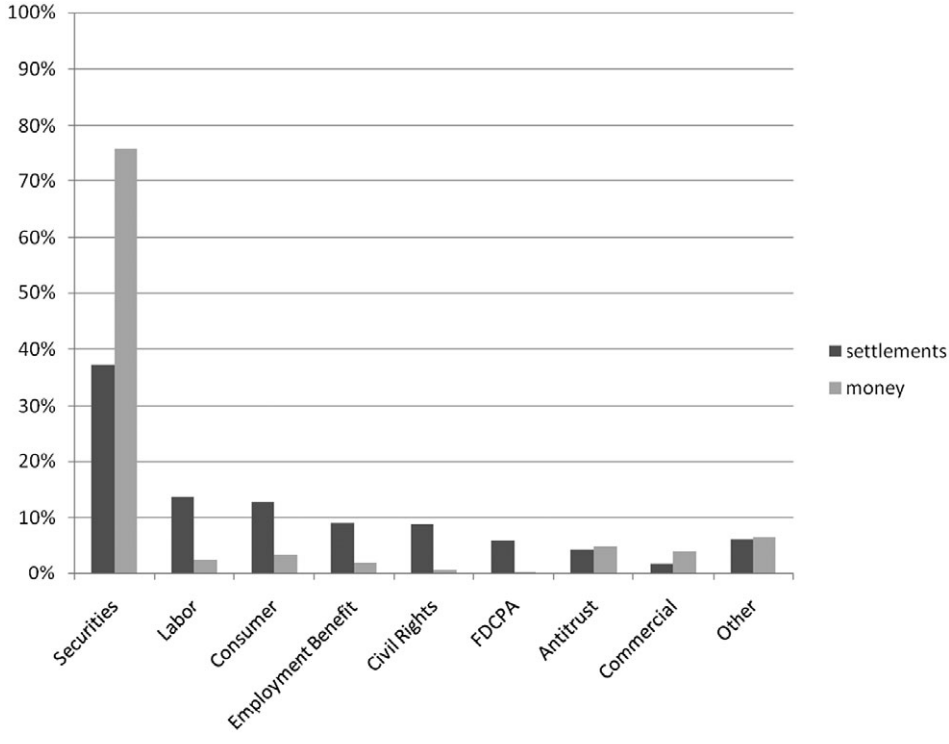
[52]For example, I excluded awards of a fixed amount of money to each class member who eventually filed a valid claim (as opposed to settlements that awarded a pro rata amount of a fixed settlement to each class member) if the total amount of money set aside to pay the claims was not set forth in the settlement documents.

[53]In some cases, the district court valued the relief in the settlement over a range. In these cases, I used the middle point in the range.

[54]See Hensler et al., supra note 7, at 427–30.

[55]See In re Enron Corp. Secs. Litig., MDL 1446 (S.D. Tex. May 24, 2006) ($6,600,000,000); In re Tyco Int'l Ltd. Multidistrict Litig., MDL 02-1335 (D.N.H. Dec. 19, 2007) ($3,200,000,000); In re AOL Time Warner, Inc. Secs. & "ERISA" Litig., MDL 1500 (S.D.N.Y. Apr. 6, 2006) ($2,500,000,000); In re: Diet Drugs Prods. Liab. Litig., MDL 1203 (E.D. Pa. May 24, 2006) ($1,275,000,000); In re Nortel Networks Corp. Secs. Litig. (Nortel I), No. 01-1855 (S.D.N.Y. Dec. 26, 2006) ($1,142,780,000); In re Royal Ahold N.V. Secs. & ERISA Litig., 03-1539 (D. Md. Jun. 16, 2006)

Figure 3: The percentage of 2006–2007 federal class action settlements and settlement money from each subject area.



SOURCES: Westlaw, PACER, district court clerks' offices.

billion accounted for almost $18 billion of the $33 billion that changed hands over the two-year period. That is, a mere 1 percent of the settlements comprised over 50 percent of the value involved in federal class action settlements in 2006 and 2007. To give some sense of the distribution of settlement size in the 2006–2007 data set, Table 5 sets forth the number of settlements with an ascertainable value beyond fee, expense, and class-representative incentive awards (605 out of the 688 settlements). Nearly two-thirds of all settlements fell below $10 million.

Given the disproportionate influence exerted by securities settlements on the total amount of money involved in class actions, it is unsurprising that the average securities settlement involved more money than the average settlement in most of the other subject areas. These numbers are provided in Table 6, which includes, again, only the settlements

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($1,100,000,000); Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006) ($1,075,000,000); In re Nortel Networks Corp. Secs. Litig. (Nortel II), No. 05-1659 (S.D.N.Y. Dec. 26, 2006) ($1,074,270,000).

Table 5: The Distribution by Size of 2006–2007 Federal Class Action Settlements with Ascertainable Value

Settlement Size (in Millions)	*Number of Settlements*
[$0 to $1]	131 (21.7%)
($1 to $10]	261 (43.1%)
($10 to $50]	139 (23.0%)
($50 to $100]	33 (5.45%)
($100 to $500]	31 (5.12%)
($500 to $6,600]	10 (1.65%)
Total	605

NOTE: Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.
SOURCES: Westlaw, PACER, district court clerks' offices.

Table 6: The Average and Median Settlement Amounts in the 2006–2007 Federal Class Action Settlements with Ascertainable Value to the Class

Subject Matter	*Average*	*Median*
Securities ($n = 257$)	$96.4	$8.0
Labor and employment ($n = 88$)	$9.2	$1.8
Consumer ($n = 65$)	$18.8	$2.9
Employee benefits ($n = 52$)	$13.9	$5.3
Civil rights ($n = 34$)	$9.7	$2.5
Debt collection ($n = 40$)	$0.37	$0.088
Antitrust ($n = 29$)	$60.0	$22.0
Commercial ($n = 12$)	$111.7	$7.1
Other ($n = 28$)	$76.6	$6.2
All ($N = 605$)	$54.7	$5.1

NOTE: Dollar amounts are in millions. Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.
SOURCES: Westlaw, PACER, district court clerks' offices.

with an ascertainable value beyond fee, expense, and class-representative incentive awards. The average settlement over the entire two-year period for all types of cases was almost $55 million, but the median was only $5.1 million. (With the $6.6 billion Enron settlement excluded, the average settlement for all ascertainable cases dropped to $43.8 million and, for securities cases, dropped to $71.0 million.) The average settlements varied widely by litigation area, with securities and commercial settlements at the high end of around $100

million, but the median settlements for nearly every area were bunched around a few million dollars. It should be noted that the high average for commercial cases is largely due to one settlement above $1 billion;[56] when that settlement is removed, the average for commercial cases was only $24.2 million.

Table 6 permits comparison with the two prior empirical studies of class action settlements that sought to include nonsecurities as well as securities cases in their purview. The Eisenberg-Miller study through 2002, which included both common-fund and fee-shifting cases, found that the mean class action settlement was $112 million and the median was $12.9 million, both in 2006 dollars,[57] more than double the average and median I found for all settlements in 2006 and 2007. The Eisenberg-Miller update through 2008 included only common-fund cases and found mean and median settlements in federal court of $115 million and $11.7 million (both again in 2006 dollars),[58] respectively; this is still more than double the average and median I found. This suggests that the methodology used by the Eisenberg-Miller studies—looking at district court opinions that were published in Westlaw or Lexis—oversampled larger class actions (because opinions approving larger class actions are, presumably, more likely to be published than opinions approving smaller ones). It is also possible that the exclusion of fee-shifting cases from their data through 2008 contributed to this skew, although, given that their data through 2002 included fee-shifting cases and found an almost identical mean and median as their data through 2008, the primary explanation for the much larger mean and median in their study through 2008 is probably their reliance on published opinions. Over the same years examined by Professors Eisenberg and Miller, the Class Action Reports study found a smaller average settlement than I did ($39.5 million in 2006 dollars), but a larger median ($8.48 million in 2006 dollars). It is possible that the Class Action Reports methodology also oversampled larger class actions, explaining its larger median, but that there are more "mega" class actions today than there were before 2003, explaining its smaller mean.[59]

It is interesting to ask how significant the $16 billion that was involved annually in these 350 or so federal class action settlements is in the grand scheme of U.S. litigation. Unfortunately, we do not know how much money is transferred every year in U.S. litigation. The only studies of which I am aware that attempt even a partial answer to this question are the estimates of how much money is transferred in the U.S. "tort" system every year by a financial services consulting firm, Tillinghast-Towers Perrin.[60] These studies are not directly

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[56]See Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006) (approving $1,075,000,000 settlement).

[57]See Eisenberg & Miller, supra note 15, at 47.

[58]See Eisenberg & Miller II, supra note 16, at 262.

[59]There were eight class action settlements during 2006 and 2007 of more than $1 billion. See note 55 supra.

[60]Some commentators have been critical of Tillinghast's reports, typically on the ground that the reports overestimate the cost of the tort system. See M. Martin Boyer, Three Insights from the Canadian D&O Insurance Market: Inertia, Information and Insiders, 14 Conn. Ins. L.J. 75, 84 (2007); John Fabian Witt, Form and Substance in the Law of

comparable to the class action settlement numbers because, again, the number of tort class action settlements in 2006 and 2007 was very small. Nonetheless, as the tort system no doubt constitutes a large percentage of the money transferred in all litigation, these studies provide something of a point of reference to assess the significance of class action settlements. In 2006 and 2007, Tillinghast-Towers Perrin estimated that the U.S. tort system transferred $160 billion and $164 billion, respectively, to claimants and their lawyers.[61] The total amount of money involved in the 2006 and 2007 federal class action settlements reported in Table 4 was, therefore, roughly 10 percent of the Tillinghast-Towers Perrin estimate. This suggests that in merely 350 cases every year, federal class action settlements involve the same amount of wealth as 10 percent of the entire U.S. tort system. It would seem that this is a significant amount of money for so few cases.

IV. Attorney Fees in Federal Class Action Settlements, 2006 and 2007

A. Total Amount of Fees and Expenses

As I demonstrated in Section III, federal class action settlements involved a great deal of money in 2006 and 2007, some $16 billion a year. A perennial concern with class action litigation is whether class action lawyers are reaping an outsized portion of this money.[62] The 2006–2007 federal class action data suggest that these concerns may be exaggerated. Although class counsel were awarded some $5 billion in fees and expenses over this period, as shown in Table 7, only 13 percent of the settlement amount in 2006 and 20 percent of the amount in 2007 went to fee and expense awards.[63] The 2006 percentage is lower than the 2007 percentage in large part because the class action lawyers in the Enron securities settlement received less than 10 percent of the $6.6 billion corpus. In any event, the percentages in both 2006 and 2007 are far lower than the portions of settlements that contingency-fee lawyers receive in individual litigation, which are usually at least 33 percent.[64] Lawyers received less than 33 percent of settlements in fees and expenses in virtually every subject area in both years.

Counterinsurgency Damages, 41 Loy. L.A.L. Rev. 1455, 1475 n.135 (2008). If these criticisms are valid, then class action settlements would appear even more significant as compared to the tort system.

[61]See Tillinghast-Towers Perrin, U.S. Tort Costs: 2008 Update 5 (2008). The report calculates $252 billion in total tort "costs" in 2007 and $246.9 billion in 2006, id., but only 65 percent of those costs represent payments made to claimants and their lawyers (the remainder represents insurance administration costs and legal costs to defendants). See Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update 17 (2003).

[62]See, e.g., Brian T. Fitzpatrick, Do Class Action Lawyers Make Too Little? 158 U. Pa. L. Rev. 2043, 2043–44 (2010).

[63]In some of the partial settlements, see note 29 supra, the district court awarded expenses for all the settlements at once and it was unclear what portion of the expenses was attributable to which settlement. In these instances, I assigned each settlement a pro rata portion of expenses. To the extent possible, all the fee and expense numbers in this article exclude any interest known to be awarded by the courts.

[64]See, e.g., Herbert M. Kritzer, The Wages of Risk: The Returns of Contingency Fee Legal Practice, 47 DePaul L. Rev. 267, 284–86 (1998) (reporting results of a survey of Wisconsin lawyers).

Table 7: The Total Amount of Fees and Expenses Awarded to Class Action Lawyers in Federal Class Action Settlements in 2006 and 2007

	Total Fees and Expenses Awarded in Settlements (and as Percentage of Total Settlement Amounts) in Each Subject Area	
Subject Matter	*2006 (n = 292)*	*2007 (n = 363)*
Securities	$1,899 (11%)	$1,467 (20%)
Labor and employment	$75.1 (28%)	$144.5 (26%)
Consumer	$126.4 (24%)	$65.3 (9%)
Employee benefits	$57.1 (13%)	$71.9 (26%)
Civil rights	$31.0 (12%)	$32.2 (39%)
Debt collection	$2.5 (28%)	$1.1 (19%)
Antitrust	$274.6 (26%)	$157.3 (24%)
Commercial	$347.3 (29%)	$18.2 (15%)
Other	$119.3 (8%)	$103.3 (17%)
Total	$2,932 (13%)	$2,063 (20%)

NOTE: Dollar amounts are in millions. Excludes settlements in which fees were not (or at least not yet) sought (22 settlements), settlements in which fees have not yet been awarded (two settlements), and settlements in which fees could not be ascertained due to indefinite award amounts, missing documents, or nonpublic side agreements (nine settlements).

SOURCES: Westlaw, PACER, district court clerks' offices.

It should be noted that, in some respects, the percentages in Table 7 overstate the portion of settlements that were awarded to class action attorneys because, again, many of these settlements involved indefinite cash relief or noncash relief that could not be valued.[65] If the value of all this relief could have been included, then the percentages in Table 7 would have been even lower. On the other hand, as noted above, not all the money defendants agree to pay in class action settlements is ultimately collected by the class.[66] To the extent leftover money is returned to the defendant, the percentages in Table 7 understate the portion class action lawyers received relative to their clients.

B. Method of Awarding Fees

District court judges have a great deal of discretion in how they set fee awards in class action cases. Under Rule 23, federal judges are told only that the fees they award to class counsel

[65]Indeed, the large year-to-year variation in the percentages in labor, consumer, and employee benefits cases arose because district courts made particularly large valuations of the equitable relief in a few settlements and used the lodestar method to calculate the fees in these settlements (and thereby did not consider their large valuations in calculating the fees).

[66]See Hensler et al., supra note 7, at 427–30.

must be "reasonable."[67] Courts often exercise this discretion by choosing between two approaches: the lodestar approach or the percentage-of-the-settlement approach.[68] The lodestar approach works much the way it does in individual litigation: the court calculates the fee based on the number of hours class counsel actually worked on the case multiplied by a reasonable hourly rate and a discretionary multiplier.[69] The percentage-of-the-settlement approach bases the fee on the size of the settlement rather than on the hours class counsel actually worked: the district court picks a percentage of the settlement it thinks is reasonable based on a number of factors, one of which is often the fee lodestar (sometimes referred to as a "lodestar cross-check").[70] My 2006–2007 data set shows that the percentage-of-the-settlement approach has become much more common than the lodestar approach. In 69 percent of the settlements reported in Table 7, district court judges employed the percentage-of-the-settlement method with or without the lodestar cross-check. They employed the lodestar method in only 12 percent of settlements. In the other 20 percent of settlements, the court did not state the method it used or it used another method altogether.[71] The pure lodestar method was used most often in consumer (29 percent) and debt collection (45 percent) cases. These numbers are fairly consistent with the Eisenberg-Miller data from 2003 to 2008. They found that the lodestar method was used in only 9.6 percent of settlements.[72] Their number is no doubt lower than the 12 percent number found in my 2006–2007 data set because they excluded fee-shifting cases from their study.

C. Variation in Fees Awarded

Not only do district courts often have discretion to choose between the lodestar method and the percentage-of-the-settlement method, but each of these methods leaves district courts with a great deal of discretion in how the method is ultimately applied. The courts

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[67]Fed. R. Civ. P. 23(h).

[68]The discretion to pick between these methods is most pronounced in settlements where the underlying claim was not found in a statute that would shift attorney fees to the defendant. See, e.g., In re Thirteen Appeals Arising out of San Juan DuPont Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995) (permitting either percentage or lodestar method in common-fund cases); Goldberger v. Integrated Res. Inc., 209 F.3d 43, 50 (2d Cir. 2000) (same); Rawlings v. Prudential-Bache Props., Inc., 9 F.3d 513, 516 (6th Cir. 1993) (same). By contrast, courts typically used the lodestar approach in settlements arising from fee-shifting cases.

[69]See Eisenberg & Miller, supra note 15, at 31.

[70]Id. at 31–32.

[71]These numbers are based on the fee method described in the district court's order awarding fees, unless the order was silent, in which case the method, if any, described in class counsel's motion for fees (if it could be obtained) was used. If the court explicitly justified the fee award by reference to its percentage of the settlement, I counted it as the percentage method. If the court explicitly justified the award by reference to a lodestar calculation, I counted it as the lodestar method. If the court explicitly justified the award by reference to both, I counted it as the percentage method with a lodestar cross-check. If the court calculated neither a percentage nor the fee lodestar in its order, then I counted it as an "other" method.

[72]See Eisenberg & Miller II, supra note 16, at 267.

that use the percentage-of-the-settlement method usually rely on a multifactor test[73] and, like most multifactor tests, it can plausibly yield many results. It is true that in many of these cases, judges examine the fee percentages that other courts have awarded to guide their discretion.[74] In addition, the Ninth Circuit has adopted a presumption that 25 percent is the proper fee award percentage in class action cases.[75] Moreover, in securities cases, some courts presume that the proper fee award percentage is the one class counsel agreed to when it was hired by the large shareholder that is now usually selected as the lead plaintiff in such cases.[76] Nonetheless, presumptions, of course, can be overcome and, as one court has put it, "[t]here is no hard and fast rule mandating a certain percentage . . . which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case."[77] The court added: "[i]ndividualization in the exercise of a discretionary power [for fee awards] will alone retain equity as a living system and save it from sterility."[78] It is therefore not surprising that district courts awarded fees over a broad range when they used the percentage-of-the-settlement method. Figure 4 is a graph of the distribution of fee awards as a percentage of the settlement in the 444 cases where district courts used the percentage method with or without a lodestar cross-check and the fee percentages were ascertainable. These fee awards are exclusive of awards for expenses whenever the awards could be separated by examining either the district court's order or counsel's motion for fees and expenses (which was 96 percent of the time). The awards ranged from 3 percent of the settlement to 47 percent of the settlement. The average award was 25.4 percent and the median was 25 percent. Most fee awards were between 25 percent and 35 percent, with almost no awards more than 35 percent. The Eisenberg-Miller study through 2008 found a slightly lower mean (24 percent) but the same median (25 percent) among its federal court settlements.[79]

It should be noted that in 218 of these 444 settlements (49 percent), district courts said they considered the lodestar calculation as a factor in assessing the reasonableness of the fee percentages awarded. In 204 of these settlements, the lodestar multiplier resulting

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[73]The Eleventh Circuit, for example, has identified a nonexclusive list of 15 factors that district courts might consider. See Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768, 772 n.3, 775 (11th Cir. 1991). See also In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 265 (D.N.H. 2007) (five factors); Goldberger v. Integrated Res. Inc., 209 F.3d 43, 50 (2d Cir. 2000) (six factors); Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000) (seven factors); In re Royal Ahold N.V. Sec. & ERISA Litig., 461 F. Supp. 2d 383, 385 (D. Md. 2006) (13 factors); Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir. 1988) (12 factors); In re Baan Co. Sec. Litig., 288 F. Supp. 2d 14, 17 (D.D.C. 2003) (seven factors).

[74]See Eisenberg & Miller, supra note 15, at 32.

[75]See Staton v. Boeing Co., 327 F.3d 938, 968 (9th Cir. 2003).

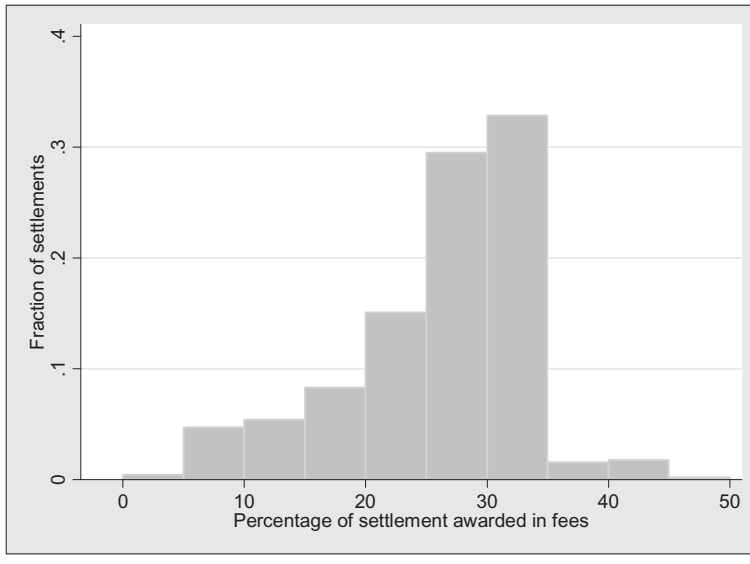
[76]See, e.g., In re Cendant Corp. Litig., 264 F.3d 201, 282 (3d Cir. 2001).

[77]*Camden I Condo. Ass'n*, 946 F.2d at 774.

[78]*Camden I Condo. Ass'n*, 946 F.2d at 774 (alterations in original and internal quotation marks omitted).

[79]See Eisenberg & Miller II, supra note 16, at 259.

Figure 4: The distribution of 2006–2007 federal class action fee awards using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

from the fee award could be ascertained. The lodestar multiplier in these cases ranged from 0.07 to 10.3, with a mean of 1.65 and a median of 1.34. Although there is always the possibility that class counsel are optimistic with their timesheets when they submit them for lodestar consideration, these lodestar numbers—only one multiplier above 6.0, with the bulk of the range not much above 1.0—strike me as fairly parsimonious for the risk that goes into any piece of litigation and cast doubt on the notion that the percentage-of-the-settlement method results in windfalls to class counsel.[80]

Table 8 shows the mean and median fee percentages awarded in each litigation subject area. The fee percentages did not appear to vary greatly across litigation subject areas, with most mean and median awards between 25 percent and 30 percent. As I report later in this section, however, after controlling for other variables, there were statistically significant differences in the fee percentages awarded in some subject areas compared to others. The mean and median percentages for securities cases were 24.7 percent and 25.0 percent, respectively; for all nonsecurities cases, the mean and median were 26.1 percent and 26.0 percent, respectively. The Eisenberg-Miller study through 2008 found mean awards ranging from 21–27 percent and medians from 19–25 percent,[81] a bit lower than the ranges in my

[80]It should be emphasized, of course, that these 204 settlements may not be representative of the settlements where the percentage-of-the-settlement method was used without the lodestar cross-check.

[81]See Eisenberg & Miller II, supra note 16, at 262.

Table 8: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Percentage of Settlement Awarded as Fees	
Subject Matter	*Mean*	*Median*
Securities ($n = 233$)	24.7	25.0
Labor and employment ($n = 61$)	28.0	29.0
Consumer ($n = 39$)	23.5	24.6
Employee benefits ($n = 37$)	26.0	28.0
Civil rights ($n = 20$)	29.0	30.3
Debt collection ($n = 5$)	24.2	25.0
Antitrust ($n = 23$)	25.4	25.0
Commercial ($n = 7$)	23.3	25.0
Other ($n = 19$)	24.9	26.0
All ($N = 444$)	25.7	25.0

SOURCES: Westlaw, PACER, district court clerks' offices.

2006–2007 data set, which again, may be because they oversampled larger settlements (as I show below, district courts awarded smaller fee percentages in larger cases).

In light of the fact that, as I noted above, the distribution of class action settlements among the geographic circuits does not track their civil litigation dockets generally, it is interesting to ask whether one reason for the pattern in class action cases is that circuits oversubscribed with class actions award higher fee percentages. Although this question will be taken up with more sophistication in the regression analysis below, it is worth describing here the mean and median fee percentages in each of the circuits. Those data are presented in Table 9. Contrary to the hypothesis set forth in Section III, two of the circuits most oversubscribed with class actions, the Second and the Ninth, were the only circuits in which the mean fee awards were *under* 25 percent. As I explain below, these differences are statistically significant and remain so after controlling for other variables.

The lodestar method likewise permits district courts to exercise a great deal of leeway through the application of the discretionary multiplier. Figure 5 shows the distribution of lodestar multipliers in the 71 settlements in which district courts used the lodestar method and the multiplier could be ascertained. The average multiplier was 0.98 and the median was 0.92, which suggest that courts were not terribly prone to exercise their discretion to deviate from the amount of money encompassed in the lodestar calculation. These 71

Table 9: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Percentage of Settlement Awarded as Fees	
Circuit	*Mean*	*Median*
First ($n = 27$)	27.0	25.0
Second ($n = 72$)	23.8	24.5
Third ($n = 50$)	25.4	29.3
Fourth ($n = 19$)	25.2	28.0
Fifth ($n = 27$)	26.4	29.0
Sixth ($n = 25$)	26.1	28.0
Seventh ($n = 39$)	27.4	29.0
Eighth ($n = 15$)	26.1	30.0
Ninth ($n = 111$)	23.9	25.0
Tenth ($n = 18$)	25.3	25.5
Eleventh ($n = 35$)	28.1	30.0
DC ($n = 6$)	26.9	26.0

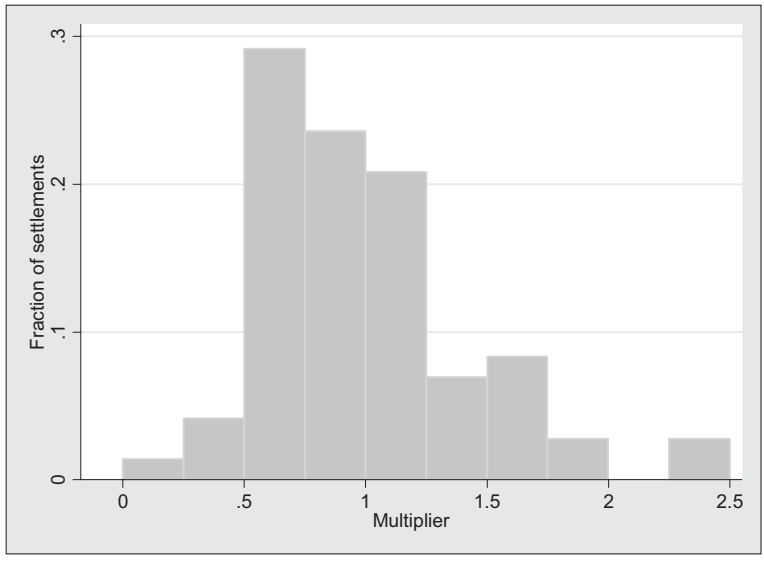
SOURCES: Westlaw, PACER, district court clerks' offices.

settlements were heavily concentrated within the consumer (median multiplier 1.13) and debt collection (0.66) subject areas. If cases in which district courts used the percentage-of-the-settlement method with a lodestar cross-check are combined with the lodestar cases, the average and median multipliers (in the 263 cases where the multipliers were ascertainable) were 1.45 and 1.19, respectively. Again—putting to one side the possibility that class counsel are optimistic with their timesheets—these multipliers appear fairly modest in light of the risk involved in any piece of litigation.

D. Factors Influencing Percentage Awards

Whether district courts are exercising their discretion over fee awards wisely is an important public policy question given the amount of money at stake in class action settlements. As shown above, district court judges awarded class action lawyers nearly $5 billion in fees and expenses in 2006–2007. Based on the comparison to the tort system set forth in Section III, it is not difficult to surmise that in the 350 or so settlements every year, district court judges

Figure 5: The distribution of lodestar multipliers in 2006–2007 federal class action fee awards using the lodestar method.



SOURCES: Westlaw, PACER, district court clerks' offices.

are awarding a significant portion of all the annual compensation received by contingency-fee lawyers in the United States. Moreover, contingency fees are arguably the engine that drives much of the noncriminal regulation in the United States; unlike many other nations, we regulate largely through the ex post, decentralized device of litigation.[82] To the extent district courts could have exercised their discretion to award billions more or billions less to class action lawyers, district courts have been delegated a great deal of leeway over a big chunk of our regulatory horsepower. It is therefore worth examining how district courts exercise their discretion over fees. This examination is particularly important in cases where district courts use the percentage-of-the-settlement method to award fees: not only do such cases comprise the vast majority of settlements, but they comprise the vast majority of the money awarded as fees. As such, the analysis that follows will be confined to the 444 settlements where the district courts used the percentage-of-the-settlement method.

As I noted, prior empirical studies have shown that fee percentages are strongly and inversely related to the size of the settlement both in securities fraud and other cases. As shown in Figure 6, the 2006–2007 data are consistent with prior studies. Regression analysis, set forth in more detail below, confirms that after controlling for other variables, fee percentage is strongly and inversely associated with settlement size among all cases, among securities cases, and among all nonsecurities cases.

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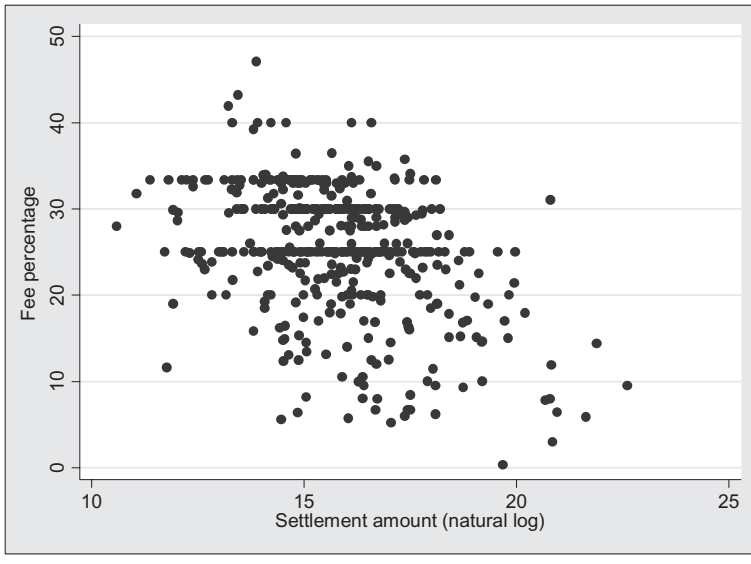
[82]See, e.g., Samuel Issacharoff, Regulating after the Fact, 56 DePaul L. Rev. 375, 377 (2007).

Figure 6: Fee awards as a function of settlement size in 2006–2007 class action cases using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

As noted above, courts often look to fee percentages in other cases as one factor they consider in deciding what percentage to award in a settlement at hand. In light of this practice, and in light of the fact that the size of the settlement has such a strong relationship to fee percentages, scholars have tried to help guide the practice by reporting the distribution of fee percentages across different settlement sizes.[83] In Table 10, I follow the Eisenberg-Miller studies and attempt to contribute to this guidance by setting forth the mean and median fee percentages, as well as the standard deviation, for each decile of the 2006–2007 settlements in which courts used the percentage-of-the-settlement method to award fees. The mean percentages ranged from over 28 percent in the first decile to less than 19 percent in the last decile.

It should be noted that the last decile in Table 10 covers an especially wide range of settlements, those from $72.5 million to the Enron settlement of $6.6 billion. To give more meaningful data to courts that must award fees in the largest settlements, Table 11 shows the last decile broken into additional cut points. When both Tables 10 and 11 are examined together, it appears that fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent, and by the time $500 million was reached, they plunged well below 15 percent, with most awards at that level under even 10 percent.

[83]See Eisenberg & Miller II, supra note 16, at 265.

Table 10: Mean, Median, and Standard Deviation of Fee Awards by Settlement Size in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

Settlement Size (in Millions)	*Mean*	*Median*	SD
[$0 to $0.75] ($n = 45$)	28.8%	29.6%	6.1%
($0.75 to $1.75] ($n = 44$)	28.7%	30.0%	6.2%
($1.75 to $2.85] ($n = 45$)	26.5%	29.3%	7.9%
($2.85 to $4.45] ($n = 45$)	26.0%	27.5%	6.3%
($4.45 to $7.0] ($n = 44$)	27.4%	29.7%	5.1%
($7.0 to $10.0] ($n = 43$)	26.4%	28.0%	6.6%
($10.0 to $15.2] ($n = 45$)	24.8%	25.0%	6.4%
($15.2 to $30.0] ($n = 46$)	24.4%	25.0%	7.5%
($30.0 to $72.5] ($n = 42$)	22.3%	24.9%	8.4%
($72.5 to $6,600] ($n = 45$)	18.4%	19.0%	7.9%

SOURCES: Westlaw, PACER, district court clerks' offices.

Table 11: Mean, Median, and Standard Deviation of Fee Awards of the Largest 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

Settlement Size (in Millions)	*Mean*	*Median*	SD
($72.5 to $100] ($n = 12$)	23.7%	24.3%	5.3%
($100 to $250] ($n = 14$)	17.9%	16.9%	5.2%
($250 to $500] ($n = 8$)	17.8%	19.5%	7.9%
($500 to $1,000] ($n = 2$)	12.9%	12.9%	7.2%
($1,000 to $6,600] ($n = 9$)	13.7%	9.5%	11%

SOURCES: Westlaw, PACER, district court clerks' offices.

Prior empirical studies have not examined whether fee awards are associated with the political affiliation of the district court judges making the awards. This is surprising because realist theories of judicial behavior would predict that political affiliation would influence fee decisions.[84] It is true that as a general matter, political affiliation may influence district court judges to a lesser degree than it does appellate judges (who have been the focus of most of the prior empirical studies of realist theories): district court judges decide more routine cases and are subject to greater oversight on appeal than appellate judges. On the other hand, class action settlements are a bit different in these regards than many other decisions made by district court judges. To begin with, class action settlements are almost never appealed, and when they are, the appeals are usually settled before the appellate court hears the case.[85] Thus, district courts have much less reason to worry about the constraint of appellate review in fashioning fee awards. Moreover, one would think the potential for political affiliation to influence judicial decision making is greatest when legal sources lead to indeterminate outcomes and when judicial decisions touch on matters that are salient in national politics. (The more salient a matter is, the more likely presidents will select judges with views on the matter and the more likely those views will diverge between Republicans and Democrats.) Fee award decisions would seem to satisfy both these criteria. The law of fee awards, as explained above, is highly discretionary, and fee award decisions are wrapped up in highly salient political issues such as tort reform and the relative power of plaintiffs' lawyers and corporations. I would expect to find that judges appointed by Democratic presidents awarded higher fees in the 2006–2007 settlements than did judges appointed by Republican presidents.

The data, however, do not appear to bear this out. Of the 444 fee awards using the percentage-of-the-settlement approach, 52 percent were approved by Republican appointees, 45 percent were approved by Democratic appointees, and 4 percent were approved by non-Article III judges (usually magistrate judges). The mean fee percentage approved by Republican appointees (25.6 percent) was slightly *greater* than the mean approved by Democratic appointees (24.9 percent). The medians (25 percent) were the same.

To examine whether the realist hypothesis fared better after controlling for other variables, I performed regression analysis of the fee percentage data for the 427 settlements approved by Article III judges. I used ordinary least squares regression with the dependent variable the percentage of the settlement that was awarded in fees.[86] The independent

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[84]See generally C.K. Rowland & Robert A. Carp, Politics and Judgment in Federal District Courts (1996). See also Max M. Schanzenbach & Emerson H. Tiller, Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform, 75 U. Chi. L. Rev. 715, 724–25 (2008).

[85]See Brian T. Fitzpatrick, The End of Objector Blackmail? 62 Vand. L. Rev. 1623, 1640, 1634–38 (2009) (finding that less than 10 percent of class action settlements approved by federal courts in 2006 were appealed by class members).

[86]Professors Eisenberg and Miller used a square root transformation of the fee percentages in some of their regressions. I ran all the regressions using this transformation as well and it did not appreciably change the results. I also ran the regressions using a natural log transformation of fee percentage and with the dependent variable natural log of the fee amount (as opposed to the fee percentage). None of these models changed the results

variables were the natural log of the amount of the settlement, the natural log of the age of the case (in days), indicator variables for whether the class was certified as a settlement class, for litigation subject areas, and for circuits, as well as indicator variables for whether the judge was appointed by a Republican or Democratic president and for the judge's race and gender.[87]

The results for five regressions are in Table 12. In the first regression (Column 1), only the settlement amount, case age, and judge's political affiliation, gender, and race were included as independent variables. In the second regression (Column 2), all the independent variables were included. In the third regression (Column 3), only securities cases were analyzed, and in the fourth regression (Column 4), only nonsecurities cases were analyzed.

In none of these regressions was the political affiliation of the district court judge associated with fee percentage in a statistically significant manner.[88] One possible explanation for the lack of evidence for the realist hypothesis is that district court judges elevate other preferences above their political and ideological ones. For example, district courts of both political stripes may succumb to docket-clearing pressures and largely rubber stamp whatever fee is requested by class counsel; after all, these requests are rarely challenged by defendants. Moreover, if judges award class counsel whatever they request, class counsel will not appeal and, given that, as noted above, class members rarely appeal settlements (and when they do, often settle them before the appeal is heard),[89] judges can thereby virtually guarantee there will be no appellate review of their settlement decisions. Indeed, scholars have found that in the vast majority of cases, the fees ultimately awarded by federal judges are little different than those sought by class counsel.[90]

Another explanation for the lack of evidence for the realist hypothesis is that my data set includes both unpublished as well as published decisions. It is thought that realist theories of judicial behavior lose force in unpublished judicial decisions. This is the case because the kinds of questions for which realist theories would predict that judges have the most room to let their ideologies run are questions for which the law is ambiguous; it is

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appreciably. The regressions were also run with and without the 2006 Enron settlement because it was such an outlier ($6.6 billion); the case did not change the regression results appreciably. For every regression, the data and residuals were inspected to confirm the standard assumptions of linearity, homoscedasticity, and the normal distribution of errors.

[87]Prior studies of judicial behavior have found that the race and sex of the judge can be associated with his or her decisions. See, e.g., Adam B. Cox & Thomas J. Miles, Judging the Voting Rights Act, 108 Colum. L. Rev. 1 (2008); Donald R. Songer et al., A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals, 56 J. Pol. 425 (1994).

[88]Although these coefficients are not reported in Table 8, the gender of the district court judge was never statistically significant. The race of the judge was only occasionally significant.

[89]See Fitzpatrick, supra note 85, at 1640.

[90]See Eisenberg & Miller II, supra note 16, at 270 (finding that state and federal judges awarded the fees requested by class counsel in 72.5 percent of settlements); Eisenberg, Miller & Perino, supra note 9, at 22 ("judges take a light touch when it comes to reviewing fee requests").

Table 12: Regression of Fee Percentages in 2006–2007 Settlements Using Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Regression Coefficients (and Robust t *Statistics)*				
Independent Variable	*1*	*2*	*3*	*4*	*5*
Settlement amount (natural log)	−1.77	−1.76	−1.76	−1.41	−1.78
	(−5.43)**	(−8.52)**	(−7.16)**	(−4.00)**	(−8.67)**
Age of case (natural log days)	1.66	1.99	1.13	1.72	2.00
	(2.31)**	(2.71)**	(1.21)	(1.47)	(2.69)**
Judge's political affiliation (1 = Democrat)	−0.630	−0.345	0.657	−1.43	−0.232
	(−0.83)	(−0.49)	(0.76)	(−1.20)	(−0.34)
Settlement class		0.150	0.873	−1.62	0.124
		(0.19)	(0.84)	(−1.00)	(0.15)
1st Circuit		3.30	4.41	0.031	0.579
		(2.74)**	(3.32)**	(0.01)	(0.51)
2d Circuit		0.513	−0.813	2.93	−2.23
		(0.44)	(−0.61)	(1.14)	(−1.98)**
3d Circuit		2.25	4.00	−1.11	—
		(1.99)**	(3.85)**	(−0.50)	
4th Circuit		2.34	0.544	3.81	—
		(1.22)	(0.19)	(1.35)	
5th Circuit		2.98	1.09	6.11	0.230
		(1.90)*	(0.65)	(1.97)**	(0.15)
6th Circuit		2.91	0.838	4.41	—
		(2.28)**	(0.57)	(2.15)**	
7th Circuit		2.55	3.22	2.90	−0.227
		(2.23)**	(2.36)**	(1.46)	(−0.20)
8th Circuit		2.12	−0.759	3.73	−0.586
		(0.97)	(−0.24)	(1.19)	(−0.28)
9th Circuit		—	—	—	−2.73
					(−3.44)**
10th Circuit		1.45	−0.254	3.16	—
		(0.94)	(−0.13)	(1.29)	
11th Circuit		4.05	3.85	4.14	—
		(3.44)**	(3.07)**	(1.88)*	
DC Circuit		2.76	2.60	2.41	—
		(1.10)	(0.80)	(0.64)	
Securities case		—			—
Labor and employment case		2.93		—	2.85
		(3.00)**			(2.94)**
Consumer case		−1.65		−4.39	−1.62
		(−0.88)		(−2.20)**	(−0.88)
Employee benefits case		−0.306		−4.23	−0.325
		(−0.23)		(−2.55)**	(−0.26)
Civil rights case		1.85		−2.05	1.76
		(0.99)		(−0.97)	(0.95)
Debt collection case		−4.93		−7.93	−5.04
		(−1.71)*		(−2.49)**	(−1.75)*
Antitrust case		3.06		0.937	2.78
		(2.11)**		(0.47)	(1.98)**

Table 12 *Continued*

	Regression Coefficients (and Robust t *Statistics)*				
Independent Variable	*1*	*2*	*3*	*4*	*5*
Commercial case		−0.028		−2.65	0.178
		(−0.01)		(−0.73)	(0.05)
Other case		−0.340		−3.73	−0.221
		(−0.17)		(−1.65)	(−0.11)
Constant	42.1	37.2	43.0	38.2	40.1
	(7.29)**	(6.08)**	(6.72)**	(4.14)**	(7.62)**
N	427	427	232	195	427
R^2	.20	.26	.37	.26	.26
Root MSE	6.59	6.50	5.63	7.24	6.48

NOTE: **significant at the 5 percent level; *significant at the 10 percent level. Standard errors in Column 1 were clustered by circuit. Indicator variables for race and gender were included in each regression but not reported.

SOURCES: Westlaw, PACER, district court clerks' offices, Federal Judicial Center.

thought that these kinds of questions are more often answered in published opinions.[91] Indeed, most of the studies finding an association between ideological beliefs and case outcomes were based on data sets that included only published opinions.[92] On the other hand, there is a small but growing number of studies that examine unpublished opinions as well, and some of these studies have shown that ideological effects persisted.[93] Nonetheless, in light of the discretion that judges exercise with respect to fee award decisions, it hard to characterize *any* decision in this area as "unambiguous." Thus, even when unpublished, I would have expected the fee award decisions to exhibit an association with ideological beliefs. Thus, I am more persuaded by the explanation suggesting that judges are more concerned with clearing their dockets or insulating their decisions from appeal in these cases than with furthering their ideological beliefs.

In all the regressions, the size of the settlement was strongly and inversely associated with fee percentages. Whether the case was certified as a settlement class was not associated

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[91]See, e.g., Ahmed E. Taha, Data and Selection Bias: A Case Study, 75 UMKC L. Rev. 171, 179 (2006).

[92]Id. at 178–79.

[93]See, e.g., David S. Law, Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit, 73 U. Cin. L. Rev. 817, 843 (2005); Deborah Jones Merritt & James J. Brudney, Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals, 54 Vand. L. Rev. 71, 109 (2001); Donald R. Songer, Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality, 73 Judicature 307, 312 (1990). At the trial court level, however, the studies of civil cases have found no ideological effects. See Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States, 7 J. Empirical Legal Stud. 175, 192–93 (2010); Denise M. Keele et al., An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions, 6 J. Empirical Legal Stud. 213, 230 (2009); Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. Legal Stud. 257, 276–77 (1995). With respect to criminal cases, there is at least one study at the trial court level that has found ideological effects. See Schanzenbach & Tiller, supra note 81, at 734.

with fee percentages in any of the regressions. The age of the case at settlement was associated with fee percentages in the first two regressions, and when the settlement class variable was removed in regressions 3 and 4, the age variable became positively associated with fee percentages in nonsecurities cases but remained insignificant in securities cases. Professors Eisenberg and Miller likewise found that the age of the case at settlement was positively associated with fee percentages in their 1993–2002 data set,[94] and that settlement classes were not associated with fee percentages in their 2003–2008 data set.[95]

Although the structure of these regressions did not permit extensive comparisons of fee awards across different litigation subject areas, fee percentages appeared to vary somewhat depending on the type of case that settled. Securities cases were used as the baseline litigation subject area in the second and fifth regressions, permitting a comparison of fee awards in each nonsecurities area with the awards in securities cases. These regressions show that awards in a few areas, including labor/employment and antitrust, were more lucrative than those in securities cases. In the fourth regression, which included only nonsecurities cases, labor and employment cases were used as the baseline litigation subject area, permitting comparison between fee percentages in that area and the other nonsecurities areas. This regression shows that fee percentages in several areas, including consumer and employee benefits cases, were lower than the percentages in labor and employment cases.

In the fifth regression (Column 5 of Table 12), I attempted to discern whether the circuits identified in Section III as those with the most overrepresented (the First, Second, Seventh, and Ninth) and underrepresented (the Fifth and Eighth) class action dockets awarded attorney fees differently than the other circuits. That is, perhaps district court judges in the First, Second, Seventh, and Ninth Circuits award greater percentages of class action settlements as fees than do the other circuits, whereas district court judges in the Fifth and Eighth Circuits award smaller percentages. To test this hypothesis, in the fifth regression, I included indicator variables only for the six circuits with unusual dockets to measure their fee awards against the other six circuits combined. The regression showed statistically significant association with fee percentages for only two of the six unusual circuits: the Second and Ninth Circuits. In both cases, however, the direction of the association (i.e., the Second and Ninth Circuits awarded *smaller* fees than the baseline circuits) was opposite the hypothesized direction.[96]

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[94]See Eisenberg & Miller, supra note 15, at 61.

[95]See Eisenberg & Miller II, supra note 16, at 266.

[96]This relationship persisted when the regressions were rerun among the securities and nonsecurities cases separately. I do not report these results, but, even though the First, Second, and Ninth Circuits were oversubscribed with securities class action settlements and the Fifth, Sixth, and Eighth were undersubscribed, there was no association between fee percentages and any of these unusual circuits except, again, the inverse association with the Second and Ninth Circuits. In nonsecurities cases, even though the Seventh and Ninth Circuits were oversubscribed and the Fifth and the Eighth undersubscribed, there was no association between fee percentages and any of these unusual circuits except again for the inverse association with the Ninth Circuit.

The lack of the expected association with the unusual circuits might be explained by the fact that class action lawyers forum shop along dimensions other than their potential fee awards; they might, for example, put more emphasis on favorable class-certification law because there can be no fee award if the class is not certified. As noted above, it might also be the case that class action lawyers are unable to engage in forum shopping at all because defendants are able to transfer venue to the district in which they are headquartered or another district with a significant connection to the litigation.

It is unclear why the Second and Ninth Circuits were associated with lower fee awards despite their heavy class action dockets. Indeed, it should be noted that the Ninth Circuit was the baseline circuit in the second, third, and fourth regressions and, in all these regressions, district courts in the Ninth Circuit awarded smaller fees than courts in many of the other circuits. The lower fees in the Ninth Circuit may be attributable to the fact that it has adopted a presumption that the proper fee to be awarded in a class action settlement is 25 percent of the settlement.[97] This presumption may make it more difficult for district court judges to award larger fee percentages. The lower awards in the Second Circuit are more difficult to explain, but it should be noted that the difference between the Second Circuit and the baseline circuits went away when the fifth regression was rerun with only nonsecurities cases.[98] This suggests that the awards in the Second Circuit may be lower *only* in securities cases. In any event, it should be noted that the lower fee awards from the Second and Ninth Circuits contrast with the findings in the Eisenberg-Miller studies, which found no intercircuit differences in fee awards in common-fund cases in their data through 2008.[99]

V. Conclusion

This article has attempted to fill some of the gaps in our knowledge about class action litigation by reporting the results of an empirical study that attempted to collect all class action settlements approved by federal judges in 2006 and 2007. District court judges approved 688 class action settlements over this two-year period, involving more than $33 billion. Of this $33 billion, nearly $5 billion was awarded to class action lawyers, or about 15 percent of the total. District courts typically awarded fees using the highly discretionary percentage-of-the-settlement method, and fee awards varied over a wide range under this method, with a mean and median around 25 percent. Fee awards using this method were strongly and inversely associated with the size of the settlement. Fee percentages were positively associated with the age of the case at settlement. Fee percentages were not associated with whether the class action was certified as a settlement class or with the

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[97]See note 75 supra. It should be noted that none of the results from the previous regressions were affected when the Ninth Circuit settlements were excluded from the data.

[98]The Ninth Circuit's differences persisted.

[99]See Eisenberg & Miller II, supra note 16, at 260.

political affiliation of the judge who made the award. Finally, there appeared to be some variation in fee percentages depending on subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all of the other litigation areas, and district courts in the Ninth Circuit and in the Second Circuit (in securities cases) awarded lower fee percentages than district courts in several other circuits. The lower awards in the Ninth Circuit may be attributable to the fact that it is the only circuit that has adopted a presumptive fee percentage of 25 percent.

EXHIBIT 3

Documents reviewed:

- Class Action Complaint (document 1, filed 11/30/18)
- Amended Class Action Complaint (document 28, filed 2/19/19)
- Memorandum Opinion and Order (document 54, filed 3/17/20)
- Answer and Defenses of Defendant TD Bank, N.A. to Amended Complaint (document 58, filed 4/14/20)
- Memorandum in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan (filed herewith)
- Settlement Agreement and Release (filed herewith) ("Settlement Agreement")

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

CASE NO. 6:15-MN-02613-BHH
ALL CASES

IN RE: TD BANK, N.A. DEBIT CARD OVERDRAFT FEE LITIGATION

MDL No. 2613

DECLARATION OF BRIAN T. FITZPATRICK IN SUPPORT OF PLAINTIFFS' AND CLASS COUNSEL'S REQUEST FOR SERVICE AWARDS, ATTORNEYS' FEES AND EXPENSES, AND CLASS ACTION ADMINISTRATION EXPENSES

1. I am a Professor of Law at Vanderbilt University in Nashville, Tennessee. I joined the Vanderbilt law faculty in 2007, after serving as the John M. Olin Fellow at New York University School of Law in 2005 and 2006. I graduated from the University of Notre Dame in 1997 and Harvard Law School in 2000. After law school, I served as a law clerk to The Honorable Diarmuid O'Scannlain on the United States Court of Appeals for the Ninth Circuit and to The Honorable Antonin Scalia on the United States Supreme Court. I also practiced law for several years in Washington, D.C., at Sidley Austin LLP. My C.V. is attached as Exhibit 1.

2. My teaching and research have focused on class action litigation. I teach the Civil Procedure, Federal Courts, and Complex Litigation courses at Vanderbilt. In addition, I have published a number of articles on class action litigation in such journals as the University of Pennsylvania Law Review, the Journal of Empirical Legal Studies, the Vanderbilt Law Review, the University of Arizona Law Review, and the NYU Journal of Law & Business. My work has been cited by numerous courts, scholars, and popular media outlets, such as the New York Times, USA Today, and the Wall Street Journal. I am also frequently invited to speak at

symposia and other events about class action litigation, such as the ABA National Institutes on Class Actions in 2011, 2015, 2016, 2017, and 2019, and the ABA Annual Meeting in 2012. Since 2010, I have also served on the Executive Committee of the Litigation Practice Group of the Federalist Society for Law & Public Policy Studies. In 2015, I was elected to the membership of the American Law Institute.

3. In December 2010, I published an article in the Journal of Empirical Legal Studies entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (hereinafter "Empirical Study"). This article is still the most comprehensive examination of federal class action settlements and attorneys' fees that has ever been published. Unlike other studies, which have been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as settlements approved in published opinions), my study attempted to examine *every* class action settlement approved by a federal court over a two-year period, 2006-2007. *See id*. at 812-13. As such, not only is my study an unbiased sample of settlements, but the number of settlements included in my study is several times the number of settlements per year that has been identified in any other empirical study: over this two-year period, I found 688 settlements. *See id*. at 817. I presented the findings of my study at the Conference on Empirical Legal Studies at the University of Southern California School of Law in 2009, the Meeting of the Midwestern Law and Economics Association at the University of Notre Dame in 2009, and before the faculties of many law schools in 2009 and 2010. This study has been relied upon by a number of courts, scholars, and testifying experts.[1]

[1] *See, e.g.*, *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (relying on article to assess fees); *James v. China Grill Mgmt., Inc.*, 2019 WL 1915298, at *2 (S.D.N.Y. Apr. 30, 2019) (same); *Grice v. Pepsi Beverages Co.*, 363 F. Supp. 3d 401, 407 (S.D.N.Y. 2019) (same); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2018 WL 6250657, at *2 (S.D.N.Y.

4. In order to assist the court with the fee award in this case, class counsel asked me to conduct a similar empirical study focused on class action cases against banks for illegal overdraft practices. To conduct this study, I followed a methodology like the one I used in my article described above. First, I started with a list of overdraft cases that I was already aware of from previous work as an expert in such cases. Second, I supplemented this list with overdraft cases known to class counsel. Third, my research assistant and I supplemented these lists with broad searches of 1) federal dockets on BloombergLaw (using the search "final approval" & ("overdraft fee" or "overdraft fees")); 2) trial court orders on Westlaw (((grant! /s final /s approval) ("overdraft fee" or "overdraft fees")) & TI(Bank "Credit Union")); 3) Google

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Nov. 29, 2018) (same); *Rodman v. Safeway Inc.*, 2018 WL 4030558, at *5 (N.D. Cal. Aug. 23, 2018) (same); *Little v. Washington Metro. Area Transit Auth.*, 313 F. Supp. 3d 27, 38 (D.D.C. 2018) (same); *Hillson v. Kelly Servs. Inc.*, 2017 WL 3446596, at *4 (E.D. Mich. Aug. 11, 2017) (same); *Good v. W. Virginia-Am. Water Co.*, 2017 WL 2884535, at *23, *27 (S.D.W. Va. July 6, 2017) (same); *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 385 (S.D.N.Y. 2017) (same); *Brown v. Rita's Water Ice Franchise Co. LLC*, 2017 WL 1021025, at *9 (E.D. Pa. Mar. 16, 2017) (same); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 1629349, at *17 (S.D.N.Y. Apr. 24, 2016) (same); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp. 3d 1217, 1246 (D.N.M. 2016); *In re: Cathode Ray Tube (Crt) Antitrust Litig*., 2016 WL 721680, at *42 (N.D. Cal. Jan. 28, 2016) (same); *In re Pool Products Distribution Mkt. Antitrust Litig.*, 2015 WL 4528880, at *19-20 (E.D. La. July 27, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 2147679, at *2-4 (N.D. Ill. May 6, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 1399367, at *3-5 (N.D. Ill. Mar. 23, 2015) (same); *In re Capital One Tel. Consumer Prot. Act Litig.*, 2015 WL 605203, at *12 (N.D. Ill. Feb. 12, 2015) (same); *In re Neurontin Marketing and Sales Practices Litigation*, 2014 WL 5810625, at *3 (D. Mass. Nov. 10, 2014) (same); *Tennille v. W. Union Co.*, 2014 WL 5394624, at *4 (D. Colo. Oct. 15, 2014) (same); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F.Supp.3d 344, 349-51 (S.D.N.Y. 2014) (same); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 991 F. Supp. 2d 437, 444-46 & n.8 (E.D.N.Y. 2014) (same); *In re Federal National Mortgage Association Securities, Derivative, and "ERISA" Litigation*, 4 F. Supp. 3d 94, 111-12 (D.D.C. 2013) (same); *In re Vioxx Products Liability Litigation*, 2013 WL 5295707, at *3-4 (E.D. La. Sep. 18, 2013) (same); *In re Black Farmers Discrimination Litigation*, 953 F. Supp. 2d 82, 98-99 (D.D.C. 2013) (same); *In re Southeastern Milk Antitrust Litigation*, 2013 WL 2155387, at *2 (E.D. Tenn. May 17, 2013) (same); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1081 (S.D. Tex. 2012) (same); *Pavlik v. FDIC*, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 40 (D.D.C. 2011) (same); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011) (same); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (same).

("overdraft" & "class action" & ("bank" or "credit union") and "approved"); and 4) topclassactions.com ("overdraft" "settlement" "final approval"). After examining all the "hits" from these searches, I generated a list of 69 fee awards in overdraft cases in both state and federal court since August 2010. I could not locate the court orders confirming the fee awards in two cases[2] and three of the awards were based on the "lodestar" method.[3] Because almost all the courts used the percentage method and the two methods are so different they are usually analyzed separately, *see* Fitzpatrick, *Empirical Study*, *supra*, at 832-39, my focus in this declaration will be on the 64 fee awards where I could locate the court orders and the court did not use the lodestar method.

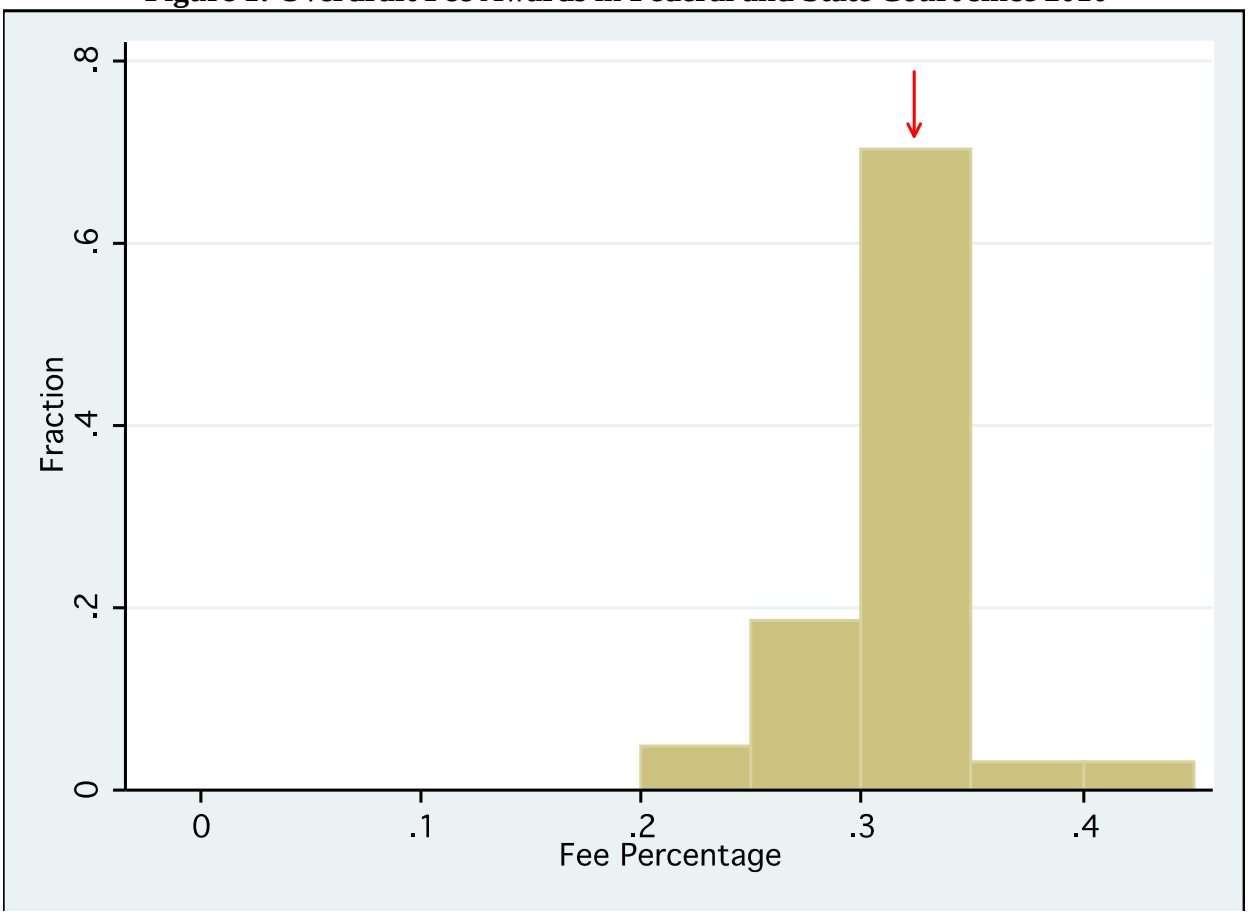
5. Table 1 appended to this declaration lists information about each of these 64 fee awards. The average fee was 30.5% with a standard deviation of 3.9%. The median was 30%, as was the mode (the most common fee percentage), with 19 awards equal to 30%.

6. In order to visualize this data, in Figure 1, below, I graph the distribution of fee awards in the 64 cases. The Figure shows what fraction of settlements (y-axis) fall into each five-point fee percentage range (x-axis). The bar that the 30% fee request in this case falls into—30% (inclusive) to 35%—is depicted with a red arrow. As the Figure shows, this is *by far* the most populous range, with *three fourths* of all settlements falling within this range.

[2] These two cases are *Casey v. Orange County Credit Union*, No. 30-2013-00658493 (Orange Cty Sup. Ct. (CA), May 5, 2015) and *Gregory v. Cent. Pacific Bank*, No. 11-1-0457-03 (Honolulu Cty Cir. Ct. (HI), Oct. 27, 2011).

[3] The three lodestar awards were in *Gunter v. United Federal Credit Union*, No. 15-00483 (D. Nev., June 4, 2019); *Hernandez v. Point Loma Credit Union*, No. 37-2013-00053519 (S.D. County Sup. Ct. (CA), Sep. 7, 2017); *Gutierrez v. Wells Fargo Bank*, No. 07-05923 (N.D. Cal., Aug. 1, 2010).

Figure 1: Overdraft Fee Awards in Federal and State Court since 2010



7. Another way to visualize the data is to plot each fee award as its own data point. In Figures 2 and 3, below, I do this, first plotting each fee award against the natural log of the size of the settlement in which the fee was awarded (I use the log transformation because the wide disparity in settlement amounts can otherwise obscure relationships between variables, *see* Fitzpatrick, *Empirical Study*, at 838), and second plotting each fee award against the date on which the award was entered. In each case, a red dot depicts the fee request here.

Figure 2: Overdraft Fee Awards in Federal and State Court since 2010 versus Settlement Size

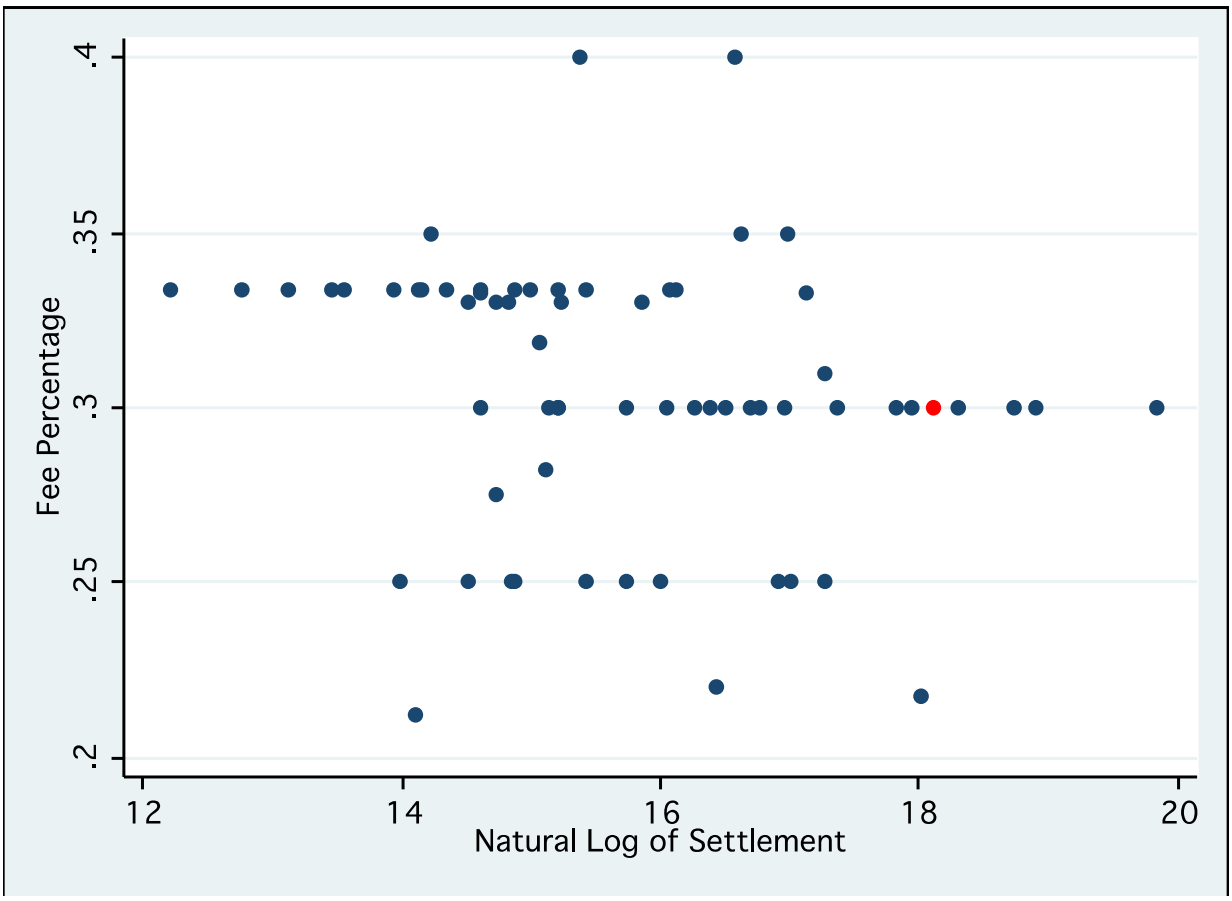
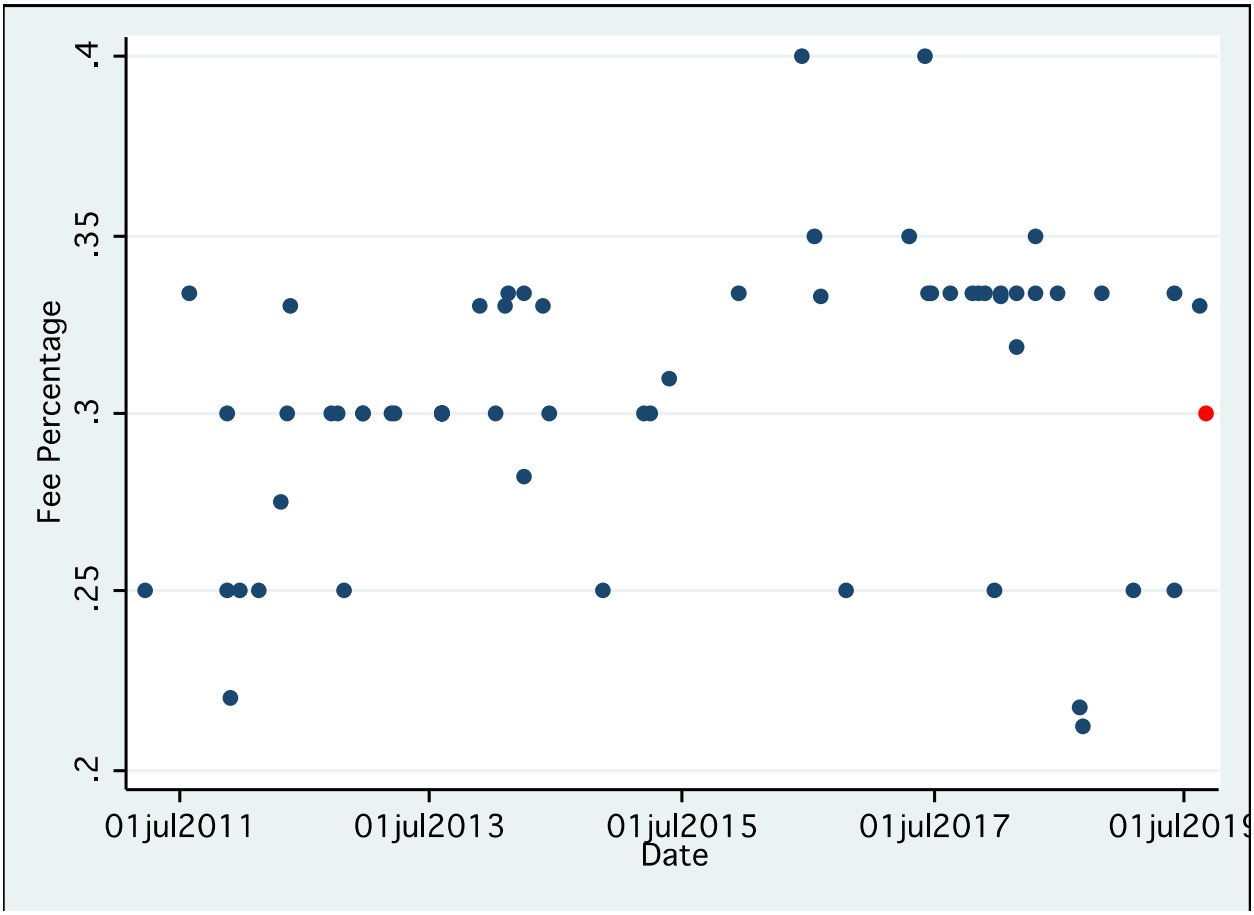


Figure 3: Overdraft Fee Awards in Federal and State Court since 2010 versus Date



8. Empirical scholars have often found that settlement size has a negative inverse effect on fee awards. *See* Fitzpatrick, *Empirical Study*, *supra*, at 837-38. In the 64 cases in the overdraft data, however, there is *no* statistically significant relationship between fee award and settlement size (p = .106). Figure 2 shows this graphically: fee awards do not appear to vary as settlement sizes increase.

9. Although, of course, every case has its own unique facts and circumstances, in my opinion, the data shows that a fee award equal to 30% in an overdraft case would be well within the mainstream of fee awards.

10. It should also be noted that a 30% fee award would be lower than the contingent fees usually agreed to in the market for individual litigation. It is well known that standard

contingency-fee percentages in individual litigation are *at least* 33%. *See, e.g.*, Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DePaul L. Rev. 267, 286 (1998) (reporting the results of a survey of Wisconsin lawyers, which found that "[o]f the cases with a [fee calculated as a] fixed percentage [of the recovery], a contingency fee of 33% was by far the most common, accounting for 92% of those cases"). Although the Kritzer study is based largely on unsophisticated clients, studies of sophisticated clients show much the same thing. The best of these studies comes from patent litigation. *See* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335 (2012). Professor Schwartz reports that, "[o]f the agreements using a flat fee reviewed for this Article, the mean rate was 38.6% of the recovery" and, "[o]f the agreements reviewed for this Article that used graduated rates, the average percentage upon filing was 28% and the average through appeal was 40.2%." *Id*. at 360.

11. My compensation for this declaration was a flat fee in no way contingent on the success of class counsel's fee petition.

Executed on this 13th day of November, 2019, at New York, NY.

By: */s/ Brian T. Fitzpatrick*
Brian T. Fitzpatrick

Table 1: Overdraft Fee Awards in Federal and State Court since 2010

Case Name	Docket Number	Court	Final approval	Settlement Amount	Fee %	Notes
Robinson v. First Hawaiian Bank	17-1-0167-01	Hawaii Circuit Court	8/8/19	$4,125,000.00	33.00%	
Sewell v. Wescom Credit Union	BC586014	Los Angeles County Superior Court (CA)	5/31/19	$3,243,365.00	33.33%	1
Lloyd v. Navy Federal Credit Union	17-01280	S.D.Cal.	5/28/19	$24,500,000.00	25.00%	
Pantelyat v. Bank of America, N.A.	16-08964	S.D.N.Y.	1/31/19	$22,000,000.00	25.00%	
Bowens v. Mazuma Federal Credit Union	15-00758	W.D. Mo.	11/5/18	$1,360,000.00	33.33%	
Behrens v. Landmark Credit Union	17-00101	W.D. Wisc.	9/11/18	$1,324,562.02	21.2%	1, 2, 3
Farrell v. Bank of America, N.A.	16-00492	S.D.Cal.	8/31/18	$66,600,000.00	21.77%	1
Wodja v. Washington State Employees Credit Union	16-2-12148-4	Pierce County Superior Court (WA)	6/22/18	$2,900,000.00	33.33%	
Fernandez v. Altura Credit Union	RIC1610873	Riverside County Superior Court (CA)	4/23/18	$1,390,000.00	33.33%	
Morton v. GreenBank	11-135-IV	Davidson County Chancery Court (TN)	4/18/18	$1,500,000.00	35.00%	
Fry v. Midflorida Credit Union	15-02743	M.D. Fl.	2/23/18	$3,525,000.00	31.90%	2
Santiago v. Meriwest Credit Union	34-2015-00183730	Sacramento County Superior Court (CA)	2/22/18	$697,000	33.33%	
Ketner v. State Employees Credit Union of Maryland	15-03594	D. Md.	1/11/18	$1,700,000.00	33.33%	

Glaske v. Independent Bank Corporation	9983	Wayne County Circuit Court (MI)	1/11/18	$2,215,000.00	33.33%	
Ramirez v. Baxter Credit Union	16-03765	N.D. Ca.	12/22/17	$1,175,069.00	25.00%	1
Lynch v. San Diego County Credit Union	37-2015-00008551	San Diego County Superior Court (CA)	11/22/17	$2,200,000.00	33.33%	
Towner v. 1st Midamerica Credit Union	15-01162	S.D. Ill.	11/9/17	$500,000.00	33.33%	
Hernandez v. Logix Federal Credit Union	BC628495	Los Angeles County Superior Court (CA)	10/20/17	$1,123,118.00	33.33%	1
Lane v. Campus Federal Credit Union	16-00037	M.D. La.	8/21/17	$200,000.00	33.33%	
Gray v. Los Angeles Federal Credit Union	BC625500	Los Angeles County Superior Court (CA)	6/26/17	$350,000.00	33.33%	
Moralez v. Kern Schools Federal Credit Union	15-100538	Kern County Superior Court (CA)	6/13/17	$775,000.00	33.33%	
Jacobs v. Huntington Bancshares Incorporated.	11-00090	Lake County Court of Common Pleas (OH)	6/2/17	$15,975,000.00	40.00%	1
Hawkins v. First Tennessee Bank, N.A.	CT-004085-11	Shelby County Circuit Court (TN)	4/20/17	$16,750,000.00	35.00%	
In re: HSBC Bank USA, N.A.	650562/11	New York Supreme Court	10/17/16	$32,000,000.00	25.00%	
Bodnar v. Bank of America	14-03224	E.D. Pa.	8/4/16	$27,500,000.00	33.33%	
Swift v. BancorpSouth Bank	10-00090	N.D.Fla.	7/15/16	$24,000,000.00	35.00%	
Kelly v. Old National Bank	82C01-1012	Vanderburgh Circuit Court (IN)	6/13/16	$4,750,000.00	40.00%	
Manwaring v. Golden 1 Credit Union	34-2013-00142667	Sacramento County Superior Court (CA)	12/9/15	$5,000,000.00	33.33%	
Steen v. Capital	09-02036	S.D.Fla.	5/22/15	$31,767,200.00	31.00%	

One						
Childs v. Synovus Bank	09-02036	S.D.Fla.	4/2/15	$3,750,000.00	30.00%	
Given v. Manufacturers and Traders Trust Company a/k/a M&T Bank	09-02036	S.D.Fla.	3/13/15	$4,000,000.00	30.00%	
Anrendas v. Citibank Inc.	11-06462	N.D. Ca.	11/14/14	$5,000,000.00	25.00%	
Simmons v. Comerica Bank	09-02036	S.D.Fla.	6/10/14	$14,580,000.00	30.00%	
Lunsford v. Woodforest National Bank	12-00103	N.D. Ga.	5/19/14	$7,750,000.00	33.00%	
Mello v. Susquehanna Bank	09-02036	S.D.Fla.	4/1/14	$3,680,000.00	28.26%	
Jenkins v. Trustmark National Bank	12-00380	S.D. Miss.	3/25/14	$4,000,000.00	33.33%	
Barlow v. Zions First National Bank	11-00929	D. Utah	2/14/14	$10,000,000.00	33.33%	
Simpson v. Citizens Bank	12-10267	E.D. Mi.	1/31/14	$2,000,000.00	33.00%	
Waters v. U.S. Bank, N.A.	09-02036	S.D.Fla.	1/6/14	$55,000,000.00	30.00%	
Johnson v. Community Bank, N.A.	12-01405	M.D. Pa.	11/25/13	$2,500,000.00	33.00%	
Anderson v. Compass Bank	09-02036	S.D.Fla.	8/7/13	$11,500,000.00	30.00%	
Blahut v. Harris Bank, N.A.	09-02036	S.D.Fla.	8/5/13	$9,400,000.00	30.00%	
Casayuran v. PNC Bank, N.A.	09-02036	S.D.Fla.	8/5/13	$90,000,000.00	30.00%	
Harris v. Associated Bank, N.A.	09-02036	S.D.Fla.	8/2/13	$13,000,000.00	30.00%	
Wolfgeher v. Commerce Bank, N.A.	09-02036	S.D.Fla.	8/2/13	$23,200,000.00	30.00%	2
McKinley v. Great Western Bank	09-02036	S.D.Fla.	8/2/13	$2,200,000.00	30.00%	
Eno v. M&I Marshall & Ilsley Bank	09-02036	S.D.Fla.	8/2/13	$4,000,000.00	30.00%	
Mosser v. TD	09-02036	S.D.Fla.	3/18/13	$62,000,000.00	30.00%	
Duval v. Citizens	09-02036	S.D.Fla.	3/12/13	$137,500,000.00	30.00%	

Lopez v. JPMorgan Chase Bank, N.A.	09-02036	S.D.Fla.	12/19/12	$162,000,000.00	30.00%	2
Orallo v. Bank of the West	09-02036	S.D.Fla.	12/18/12	$18,000,000.00	30.00%	
LaCour v. Whitney Bank	11-01896	M.D. Fl.	10/23/12	$6,800,000.00	25.00%	
Larsen v. Union	09-02036	S.D.Fla.	10/4/12	$35,000,000.00	30.00%	
Case v. Bank of OK	09-02036	S.D.Fla.	9/13/12	$19,000,000.00	30.00%	
Molina v. Intrust Bank	10-3686	Sedgewick County Dist. Ct. (KS)	5/21/12	$2,759,641.00	33.33%	
Casto v. City National Bank	10-1089	Cir. Ct. Kanawha County (WV)	5/10/12	$6,866,000.00	30.00%	4
Sachar v. IBERIABANK	09-02036	S.D.Fla.	4/26/12	$2,500,000.00	27.50%	
Tualava v. Bank of Hawaii	11-1-0337-02	Honolulu County Circuit Court (HI)	2/14/12	$9,000,000.00	25.00%	
Hawthorne v. Umpqua Bank	11-06700	N.D.Ca.	12/29/11	$2,900,000.00	25.00%	
Trombley v. National City Bank	10-00232	D. D.C.	12/1/11	$13,800,000.00	22.00%	
Tornes v. Bank of America, N.A.	09-02036	S.D.Fla.	11/22/11	$410,000,000.00	30.00%	
Trevino v. Westamerica	1003690	Marin County (CA)	11/16/11	$2,000,000.00	25.00%	
Schulte v. Fifth Third Bank	09-06655	N.D. Ill.	7/29/11	$9,500,000.00	33.33%	
Mathena v. Webster Bank NA	10-01448	D. Conn.	3/28/11	$2,800,000.00	25.00%	

Notes: some of the fee awards were inclusive of expenses and some were exclusive
1 = fee calculated from settlement amount that included debt forgiveness
2 = fee calculated from settlement amount that included future savings from changed practices
3 = fee calculated from settlement amount that excluded the fee award itself
4 = settlement amount included debt forgiveness but fee calculated from cash portion alone

EXHIBIT 4

IN THE 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

DECLARATION OF CHRISTOPHER J. TUCCI IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND INCORPORATED MEMORANDUM IN SUPPORT

1. I am the Vice President of Business Development and Client Relations at RG/2 Claims Administration LLC ("RG/2 Claims"). In that role, I oversee the intake and management of all ongoing class action settlements including the creation and implementation of legal notice plans.

2. RG/2 Claims was established in 2002 as a full-service class action notice and claims administrator, providing notice and administration services for a broad range of collective actions, including but not limited to antitrust, securities, consumer, and employment cases. RG/2 Claims specializes in the creation, development and implementation of legal notification plans. Accordingly, RG/2 Claims is familiar with, and guided by Constitutional due process provisions, rules of states and local jurisdictions, and the relevant case law relating to legal notification. Since 2002, RG/2 has administered and distributed in excess of $1.2 billion in class-action

settlement proceeds. A true and accurate copy of the firm's publication describing RG/2's background and capabilities is attached hereto as Exhibit A.

3. I submit this declaration at the request of Class Counsel for the Settlement Class in order to describe the proposed notice plan and notice services in the settlement of claims against Defendant, TD Bank, N.A. ("Defendant") in the above-captioned litigation.

4. I have personal knowledge of the matters set forth in this declaration and, if called as a witness, could and would testify competently thereto.

5. The objective of the suggested Notice program is to provide the best notice practicable—Rule 23-compliant notice—to those members of the Class.

6. Within 10 days of Class Counsel filing for Preliminary Approval, RG/2 Claims will provide notice to relevant state and federal attorneys general in compliance with the Class Action Fairness Act.

7. RG/2 Claims proposes a notice program with the following elements:

a. Direct notice via postcard and available emails to the class members identified from Defendants' records who are in the proposed Settlement Class.

b. The Notice and other important court documents relevant to the Class Notice and the litigation in general will be made available on a case specific website designated for this action. Additionally, RG/2 Claims will maintain a toll-free number to answer and address any class member inquiries.

8. The proposed notice plan provides the best practicable method to reach the potential class members and is consistent with other class action notice plans that have been approved by various federal courts for similarly situated matters.

9. Whenever practicable, direct USPS mail is the preferred form of notice for class members in a class action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-76 (1974).

10. All undeliverable mail will be sorted and scanned. For returned notices without a forwarding address, RG/2 Claims will use Accurint (a division of Lexis-Nexis) to perform a basic "skip trace" search in order to retrieve the most accurate and updated information. The database will be updated with any new address found and the Notice will be either be re-mailed to the updated addresses or sent by email.

11. RG/2 Claims believes the notice program described above is suitable for this case and is comparable to plans other federal courts have approved for similar cases. RG/2 Claims also believes that the Notice is drafted in the "plain language" format preferred by federal courts and provides the information required by Rule 23. RG/2 Claims believes that the Notice is understandable for members of the Class and complies with due process.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT TO THE BEST OF MY KNOWLEDGE THE FOREGOING IS TRUE AND CORRECT.

Executed on May 12TH, 2021 at Philadelphia, PA.

Christopher J. Tucci, Declarant