UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANKIE LIPSETT, individually and on behalf of all others similarly situated, Plaintiff, -against- BANCO POPULAR NORTH AMERICA, Defendant.	Case No.: 1:22-cv-03901-MMG

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; FINAL CERTIFICATION OF SETTLEMENT CLASS; PAYMENT OF ATTORNEY FEES AND REIMBURSEMENT OF COSTS TO CLASS COUNSEL; AND, PAYMENT OF SERVICE AWARD TO THE CLASS REPRESENTATIVE

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On July 26, 2024, this Court granted the motion of Plaintiff Frankie Lipsett ("Lipsett" or "Plaintiff" or "Class Representative") for preliminary approval of the Settlement Agreement[1] and certification of the Settlement Class. *See* ECF No. 53 ("Preliminary Approval Order"). Plaintiff and Class Counsel now move this Court for final approval of the Settlement Agreement; final certification of the Settlement Class; payment of attorney fees and reimbursement of costs to Class Counsel; and payment of a service award to the Class Representative.

INTRODUCTION

The Settlement is an excellent result for the Settlement Class and should now receive final approval so that members of the Settlement Class can recover from the Settlement Amount of $1,500,000. The Settlement would finally resolve the claims of consumers who challenged Defendant's practice of charging overdraft fees on debit card transactions that did not overdraw an account at the time they were authorized ("OD fees"). The Settlement Agreement gives members of the Settlement Class a common fund of $1.5 million, which amounts to no less than 46% of the total fees at issue. This Settlement meets or exceeds the vast majority of court-approved recoveries in overdraft fee class actions nationwide. Additionally, as part of the Settlement, Defendant has agreed it will not reinstate the challenged OD fees for five years (which it had previously stopped charging), representing an additional savings of $3 million for bank customers.

Epiq Class Action & Claims Solutions, Inc. ("Epiq") implemented a robust notice program that delivered a reach of approximately 97.5%. The notice plan included: (1) direct notice to the Settlement Class Members and (2) a dedicated Settlement Website and toll-free helpline through which Settlement Class Members can obtain more detailed information about the Settlement. *See*

[1] Unless otherwise indicated, capitalized terms shall have the meaning that the Settlement Agreement ascribes to them. *See* ECF No. 49 ("Settlement" or "Settlement Agreement").

Declaration of Cameron R. Azari of Epiq Class Action & Claims Solutions, Inc. Regarding Implementation and Adequacy of Notice Plan dated November 25, 2024 ("Epiq") ("Azari Nov. 25th Decl."), filed simultaneously with this memorandum, at ¶¶ 7, 9-22.

Importantly, the response from the Settlement Class has been overwhelmingly positive. To date, no one has objected, and no one has opted out of the settlement class. *See* Azari Nov. 25th Decl. at ¶ 23.

The Settlement easily meets the factors for procedural and substantive fairness enumerated by Federal Rule of Civil Procedure 23(e)(2), as amended in 2018, as well as the standards set forth by the Second Circuit in *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ("*Grinnell*"). Accordingly, the Settlement should be finally approved.

This class action settlement also readily satisfies the requirements of Federal Rule of Civil Procedure 23, supporting final certification of the Settlement Class.

Finally, because these results were only achieved through the hard-work and perseverance of Class Counsel and the Class Representative, they now respectfully request the Court grant their motion for payment to Class Counsel of attorneys' fees of one-third of the settlement amount (in the amount of $500,000); reimbursement to Class Counsel of $7,505.39 for their out-of-pocket expenses; and payment of $10,000 to the named Plaintiff for his service as the Class Representative in this matter.

For the reasons stated below, Class Counsel and the Class Representative respectfully request that their motion for final approval now be granted.

BACKGROUND

I. History of the Litigation and Settlement Negotiations

Plaintiff Lipsett filed his class action complaint on May 13, 2022. ECF No. 1. On September 20, 2022, Defendant filed a motion to compel the claims to individual arbitration. ECF No. 20. Plaintiff, through his undersigned counsel, opposed the motion to compel arbitration. ECF No. 22. On December 9, 2022, the Court denied the Defendant's motion to compel arbitration. ECF No. 26. Defendant then appealed to the Second Circuit. After full briefing by the Parties and oral argument before the Court of Appeals for the Second Circuit, the Second Circuit upheld on January 10, 2024 this Court's finding that Defendant was not entitled to compel the claims to arbitration. ECF No. 38.

Shortly after the Second Circuit issued its decision denying Defendant's appeal, the Parties agreed to mediate. On May 2, 2024, counsel for the Parties met in San Juan, Puerto Rico before the Hon. Jose A. Fusté (Ret.), who was the former chief judge for the District of Puerto Rico and is now a highly respected mediator. *See* Declaration of Class Counsel in Support of Plaintiff's Unopposed Motion for Final Approval, filed simultaneously with this memorandum ("Class Counsel Final Approval Decl.") at ¶ 6. Prior to mediating with Judge Fusté (Ret.), Defendant provided Plaintiff's counsel with a large amount of data regarding the OD fees at issue. *Id.* Based upon this information, the Parties were able to evaluate the strengths and weaknesses of the case, including, but not limited to, the overall dollar amount of the OD fees at issue. *Id.*

After a full day of mediation, Judge Fusté (Ret.) made a mediator's proposal of a common fund of $1.5 million, which both parties accepted. Class Counsel Final Approval Decl. at ¶ 6.

II. The Terms of the Proposed Settlement

The Settlement Agreement defines the Settlement Class, describes the Parties' agreed-upon Settlement relief, and proposes a plan for disseminating notice to the Settlement Class Members.

A. Certification of the Settlement Class

Under the Settlement, the Parties seek certification of the following Settlement Class:

> All holders of Popular Bank consumer checking accounts who during the Class Period were assessed and not refunded an overdraft ("OD") fee in connection with: 1) a debit card or other ATM transaction on their account that was the subject of an authorization made on or before April 15, 2020; and/or 2) a debit card or other ATM transaction that was authorized against positive funds on or after April 16, 2020. Provided, however, that OD Fees assessed on or before August 6, 2018, against members of the settlement class in *Valle v. Popular Community Bank*, Index No. 653936/2012 (N.Y. Sup. Ct.), are not included in these two categories of OD Fees.
>
> Excluded from the Settlement Class are Defendant, its parents, subsidiaries, affiliates, officers, and directors; all Settlement Class members who make a timely election to opt out; and all judges assigned to this litigation and their immediate family members.

See Settlement at § 3.1.

B. Relief for the Members of the Settlement Class

The Settlement Agreement provides for significant substantial monetary relief. Defendant will pay $1,500,000.00 into a Settlement Fund. Settlement at §§ 1.45, 2.1, 6.1. Defendant also agreed not to reinstate the contested OD fees (which it had previously stopped charging) for a period of five years. Settlement at § 2.2.

The Settlement Fund will first be used to pay for Class Notice and administration costs or other fees and costs, including all Attorneys' Fees and Costs and Service Award, prior to any distribution from the payments to Settlement Class Members. *Id.* §§6.4, 7.1. Payments to each Settlement Class Member will then be distributed on a *pro rata* basis from the remaining amount. *Id.* at § 7.1. A cash payment will be made automatically to Settlement Class Members, unless they request exclusion from the Settlement Class. Current accountholders with Defendant at the time cash payments are made will be automatically credited the cash payment with a deposit to their account. Past accountholders will be sent a check for their cash payment. *Id.* at § 6.7.2. In other words, Settlement Class Members do not need to file a claim to receive a cash payment.

C. Service Award and Attorney Fees and Expenses

Defendant has agreed not to oppose an application for payment of a Service Award of $10,000 to the named Plaintiff to compensate him for the actions and risk that he took in his capacity as the class representative. Settlement at § 11.1. Defendant also has agreed not to oppose an application for payment of $500,000 (which is one-third of the Settlement Fund) for attorneys' fees to Class Counsel and payment of $7,505.39 for their reimbursement of costs and expenses. *Id.* at § 10.1.

D. Settlement Notice

The Settlement proposed that the Court appoint Epiq to administer the notice process and outlined the forms and methods by which notice of the Settlement would be given to the Class Members, including notice of the deadline to opt out of, or object to, the Settlement. Settlement at §§ 5, 1.42. In its Preliminary Approval Order, the Court appointed Epiq. ECF No. 53 at ¶ 7.

Epiq developed a robust notice program that included: (1) direct notice to the Settlement Class Members and (2) a dedicated Settlement Website and toll-free helpline through which Settlement Class Members can obtain more detailed information about the Settlement. *See* Azari Nov. 25th Decl. at ¶¶ 9-22. The notice plan delivered a reach of 97.5%. *Id*. at ¶ 7, 27.

Pursuant to the Settlement Agreement, the Settlement Website contains the Long Form Notice; answers to frequently asked questions; a contact information page; the Settlement Agreement; the signed order of Preliminary Approval; and the motion and this memorandum of law for Final Approval and payment of Attorneys' Fees and Costs to Class Counsel and payment of a Service Award to the Class Representative. *See* *https://lipsettoverdraftsettlement.com*. It will also contain any Order on Final Approval once issued. *Id.* The Settlement Website also includes procedural information regarding the status of the Court approval process, such as announcements of the Fairness Hearing date. *Id.*

ARGUMENT

I. The Court Should Grant Final Approval of the Settlement Agreement.

The Second 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) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("*Visa*")). "The compromise of complex litigation is encouraged by the courts and favored by public policy." *Visa*, 396 F.3d at 117 (citation omitted).

Under Federal Civil Procedure Rule 23(e)(2), a court may approve a class action settlement ". . . on finding that [the settlement agreement] is fair, reasonable, and adequate." *Moses v. The New York Times Co.*, 79 F.4th 235, 242 (2d Cir. 2023) (citing Fed. R. Civ. P. 23(e)(2)). The "fair, reasonable, and adequate" standard effectively requires parties to show that a settlement agreement is both procedurally and substantively fair. *Moses*, 79 F.4th 235 at 242-246. "To evaluate the fairness, reasonableness, and adequacy of a class settlement, [the Second Circuit has] historically applied the nine factors set out in *Grinnell*[.]" *Id.* at 242. Those factors are:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Moses, 79 F.4th 235 at 242, n. 3 (citing *Grinnell*).

In 2018, Federal Civil Procedure Rule 23 (hereafter, "Rule") was amended to list specific factors relating to the court's approval of the class settlement:

> (A) The class representative 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);

(D) The proposal treats Class Members equitably relative to each other.

Moses, 79 F.4th at 242 (citing Fed. R. Civ. P. 23(e)). "The first two factors are procedural in nature and the latter two guide the substantive review of a proposed settlement." *Moses*, 79 F.4th at 242. As the Second Circuit explained, "the revised Rule 23(e)(2) does not displace our traditional *Grinnell* factors, which remain a useful framework for considering the substantive fairness of a settlement." *Moses*, 79 F.4th at 243. However, revised Rule 23(e)(2) "now mandates courts to evaluate factors that may not have been highlighted in our prior case law, and its terms prevail over any prior analysis that are inconsistent with its requirements." *Id.* at 243. Thus, district courts in this Circuit consider the factors set forth in Rule 23(e)(2) along with the *Grinnell* factors.

Here, the Rule 23(e)(2) factors and the *Grinnell* factors overwhelmingly favor final approval of the Settlement Agreement.

A. The Class Representative and Class Counsel Have Adequately Represented the Class.

"Determination of adequacy typically entails inquiry as to 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. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007) (internal quotation marks omitted).

First, Plaintiff's interests are not antagonistic to the interest of the other class members. By virtue of the class definition, Plaintiff and the unnamed class members suffered the same harms—OD fees on transactions that did not overdraw an account at the time they were authorized. Plaintiff and the unnamed class members seek the same relief from these harms, namely monetary damages.

Thus, Plaintiff's interests are aligned with the interests of the unnamed class members' interests. *See Grissom v. Sterling Infosystems, Inc.*, 2024 WL 4627567, at *4 (S.D.N.Y. Oct. 30, 2024) (named plaintiff's interests were not antagonistic to interests of unnamed class members when all suffered the same harms and seek the same relief).

Second, Class Counsel have demonstrated the necessary qualifications and skill in this matter. *See* Class Counsel Final Approval Decl. at ¶¶ 2-4; Ex. 1 (Reese LLP's firm résumé); Ex. 2 (KalielGold PLLC's firm résumé). Class Counsel engaged in meaningful discovery and achieved a successfully mediated settlement. *Id.* at ¶¶ 5-7. Therefore, Rule 23(e)(2)(A)'s adequacy of representation prong weighs in favor of approval.

B. The Settlement Was Negotiated at Arm's Length.

Rule 23(e)(2)(b) requires a court to consider whether a proposed settlement "was negotiated at arm's length." Here, the Parties participated in serious and informed arms-length negotiations before a highly qualified mediator, the Hon. Jose A. Fusté (Ret.). This ultimately led to a mediator's proposal, which the Parties accepted then finalized over the course of months in the Settlement Agreement. Class Counsel Final Approval Decl. at ¶¶ 6-7. All of this suggests that the Settlement is the result of good faith arm's-length negotiations. *See Grissom*, 2024 WL 4627567, at *4 (finding existence of arm's-length negotiations where parties reached a final agreement with assistance of a mediator); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("[A] court-appointed mediator's involvement in precertification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure."); *Tiro v. Pub. House Investments, LLC*, 2013 WL 2254551, at *2 (S.D.N.Y. May 22, 2013) ("The assistance of an experienced…mediator . . . reinforces that the Settlement Agreement is non-collusive.").

C. The Relief Provided for the Class Is Adequate.

1. The costs, risks, and delay of trial and appeal

"In assessing the adequacy of a settlement under Rule 23(e)(2)(C)(i), courts may need to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such results. This inquiry overlaps with the *Grinnell* factors of complexity, expense, and likely duration of the litigation along with the risks of establishing liability, the risks of establishing damages and the risks of maintaining the class action through the trial." *Grissom*, 2024 WL 4627567, at *4 (internal quotation and citations omitted).

The $1.5 million common fund is approximately 46% of the total amount of OD fees contested here, representing an excellent result for class members. Class Counsel Final Approval Decl. at ¶ 9. Furthermore, as a result of the Settlement, Defendant will not reinstate the OD fees at issue (which it had previously stopped charging) for five years. *Id*. Accordingly, the Settlement goes a significant way toward compensating Settlement Class Members for the damages they incurred and protecting them from these type of OD fees for no less than 5 years going forward. Accordingly, this Settlement either meets or exceeds the vast majority of court-approved recoveries in overdraft fee class actions nationwide. *See, e.g., Roberts v. Capital One*, 16 Civ. 4841 (LGS), Dkt. 198 (S.D.N.Y. Dec. 1, 2020) (approving cash fund of approximately 34% of the most likely recoverable damages for class members); *In re Checking Account Overdraft Litig.*, 2015 WL 12641970, at *7 (S.D. Fla. May 22, 2015) (approving settlement representing approximately 35% of the most probable aggregate damages); *Hawthorne v. Umpqua Bank*, 2015 WL 1927342, at *1 (N.D. Cal. Apr. 28, 2015) (approving settlement for approximately 38% of what could have been obtained at trial).

"If settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *Banyai v. Mazur*, 2007 WL 927583, at *9 (S.D.N.Y. Mar. 27, 2007). "In considering this factor, the Court need not adjudicate the disputed issues or decide unsettled questions; rather, 'the Court need only assess the risks of litigation against the uncertainty of recovery under the proposed settlement.'" *In re N. Dynasty Minerals Ltd. Sec. Litig.*, 2024 WL 308242, at *11 (E.D.N.Y. Jan. 26, 2024).

Consumer class action lawsuits, like this action, are complex, expensive, and lengthy. *Manley v. Midan Rest. Inc.*, 2016 WL 1274577, at *9 (S.D.N.Y. Mar. 30, 2016) ("Most class actions are inherently complex[.]"). Should the Court decline to approve the Settlement Agreement, further litigation would resume. Such litigation could include contested class certification, proceedings, and appeals, including competing expert testimony and contested *Daubert* motions; further costly discovery; costly merits and class expert reports and discovery; and trial. Each step towards trial would be subject to Defendant's vigorous opposition. Even if the case were to proceed to judgment on the merits, any final judgment would likely be appealed. In short, "litigation of this matter . . . through trial would be complex, costly and long." *Manley*, 2016 WL 1274577, at *9. "The settlement eliminates [the] costs and risks" associated with further litigation. "It also obtains for the class prompt [] compensation for prior [] injuries." *Id.*

Class Counsel recognize that, as with any litigation, the action involves uncertainties as to their outcome. Class Counsel Final Approval Decl. at ¶¶ 20-21. Further litigation presents no guarantee for recovery, let alone a recovery greater than the recovery for which the Settlement provides.

Accordingly, this factor weighs in favor of final approval under both Rule 23(e)(2)(C)(i) and *Grinnell*.

2. The effectiveness of the proposed method of distributing relief to the class

Under Rule 23(e)(2)(c)(ii), a court must evaluate the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." "A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." *Lea v. Tal Educ. Grp.*, 2021 WL 5578665, at *11 (S.D.N.Y. Nov. 30, 2021) (internal quotation marks omitted). "When formulated by competent and experienced class counsel, a plan for allocation of net settlement proceeds need have only a reasonable, rational basis." *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 180 (S.D.N.Y. 2014) (internal quotation marks omitted).

Here, the distribution plan was formulated by experienced counsel and provides for automatic cash payment without Settlement Class Members needing to file a claim. Using Defendant's own records, cash payments to each Settlement Class Member will be distributed on a pro rata basis by either being automatically credited into their existing account with Defendant or being automatically sent a check if no longer an account holder with Defendant. *Id.* at § 6.7.2. Thus, there is little risk that this process will be unable to filter out unjustified claims or is unduly demanding on Class Members.

3. The terms of the proposed award of attorneys' fees

In assessing the adequacy of the relief, Rule 23 also requires the court to examine the proposed attorneys' fees. Fed. R. Civ. P. 23(e)(2)(C)(iii). Here, Class Counsel seek a fee award of one-third of the Settlement Fund plus reasonable out-of-pocket costs. This approach is consistent with what other courts within the Second Circuit have approved. *See, e.g.*, *Mendez v. MCSS Rest. Corp.*, 2022 WL 3704591, at *9 (E.D.N.Y. Aug. 26, 2022) ("Class Counsel's fee request of one-third (33.33%) of the Settlement Fund is reasonable and consistent with the norms of class litigation in this circuit and should be awarded on the basis of the total funds made available");

Sarit v. Westside Tomato, Inc., 2022 WL 2000328, at *1 (S.D.N.Y. May 19, 2021) ("District courts in the Second Circuit…routinely approve fees to counsel totaling one third of the recovery amount."); *In re Akazoo S.A. Securities Litig.*, 2022 WL 14915812, at *2 (E.D.N.Y. Oct. 7, 2022) (awarding 33-1/3% of class action settlement); *Suarez v. Rosa Mexicano Brands Inc.*, 2018 WL 1801319, at *1 (S.D.N.Y. Apr. 13, 2018) (same); *Zorrilla v. Carlson Rests., Inc.*, 2018 WL 1737139, at *2 (S.D.N.Y. Apr. 9, 2018) (same); *Raniere v. Citigroup Inc.*, 310 F.R.D. 211, 216, 220–22 (S.D.N.Y. 2015) (same); *In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *12 (S.D.N.Y. Dec. 19, 2014) (same); *Zeltser v. Merrill Lynch & Co.*, 2014 WL 4816134, at *8 (S.D.N.Y. Sept. 23, 2014) (same).

4. Any agreement required to be identified under Rule 23(e)(3)

Finally, a court must consider "any agreement required to be identified under Rule 23(e)(3)," which includes "any agreement made in connection with the proposal." Fed. R. Civ. P. 23(e)(2)–(3). There is no such agreement here other than a fee-split agreement among Class Counsel - whereby Class Counsel are splitting the fee 50% to Reese LLP and 50% to KalielGold PLLC - which does not affect the relief to the Class Members. *See* Class Counsel Final Approval Decl. at ¶ 14. Accordingly, this consideration does not weigh against final approval.

D. The Settlement Treats Class Members Equitably Relative to Each Other.

Rule 23(e)(2)(D) requires the Court to consider whether "the proposal treats class members equitably relative to each other." Here, each Class Member is eligible to receive the same relief, that is, their pro rata share of the Settlement Agreement, based upon the amount of OD fees that the Settlement Class Member paid. Settlement at § 7.1. Pro rata distribution is sufficient evidence of equitable treatment. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 47 (E.D.N.Y. 2019) (finding that a "pro rata distribution scheme is sufficiently equitable").

As part of this factor, the Court must consider the incentive payment to the Class Representative proposed in the Settlement. *Moses*, 79 F.4th at 244-45. As recognized by the Second Circuit, "Rule 23(e)(2)(D) does not forbid incentive awards." *Moses*, 79 F.4th at 245. Rather, "[i]ncentive awards encourage class representatives to participate in class action lawsuits, which are designed to provide a mechanism by which persons, whose injuries are not large enough to make pursuing their individual claims in the court system cost efficient, are able to bind together with persons suffering the same harm and redress." *Id.* at 243. Here, the Settlement provides for a $10,000 service award to Plaintiff Lipsett as the class representative. Settlement at § 11.1. This award is within the range of service awards approved by courts in this District. *Grissom*, 2024 WL 4627567, at *6 (finding a $10,000 service award reasonable); *Santos v. Nuve Miguel Corp.*, 2023 WL 2263207, at *3 (S.D.N.Y. Feb. 28, 2023) (approving a $10,000 service award).

E. The Remaining *Grinnell* Factors Support Final Approval.

The *Grinnell* factors not expressly assessed under Rule 23(e)(2)(C)(i) include "[ ] the reaction of the class to the settlement; [ ] the stage of the proceedings and the amount of discovery completed; ... [ ] the ability of the defendants to withstand a greater judgment; [ ] the range of reasonableness of the settlement fund in light of the best possible recovery; and [ ] the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Grinnell*, 495 F.2d at 463. Here, all of these factors favor final approval.

1. The reaction of the class to the settlement

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002). The Settlement Class overwhelmingly approves of the Settlement – there are no opt-outs or objectors. *See* Azari Nov. 25th Decl. at ¶ 23.

2. The stage of the proceedings and the amount of discovery completed

This *Grinnell* factor considers whether "the parties have conducted a factual investigation sufficient for the court to evaluate the proposed settlement and confirm that pretrial negotiations were adequately adversarial." *In re N. Dynasty*, 2024 WL 308242, at *11. Here, discovery has advanced sufficiently to allow the parties to resolve the case responsibly. Class Counsel have conducted discovery related to claims sufficient to evaluate the terms of the proposed Settlement. *See* Class Counsel Final Approval Decl. at ¶¶ 5-6. Accordingly, this factor supports final approval. *See Zeltser*, 2014 WL 4816134, at *6 (granting approval because "through both formal discovery and an informal exchange of information prior to mediation, Plaintiffs obtained sufficient discovery to weigh the strengths and weaknesses of their claims and to accurately estimate the damages at issue").

3. The ability of Defendant to withstand a greater judgment

It is more important that the Settlement Class receive some relief than possibly "yet more" relief. *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F.Supp.2d 179, 201 (S.D.N.Y. 2012); *see also Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 83 (1st Cir. 2015) ("The fact that a better deal for Class Members is imaginable does not mean that such a deal would have been attainable in these negotiations, or that the deal that was actually obtained is not within the range of reasonable outcomes."). Further, "[c]ourts have recognized that a [defendant's] ability to pay is much less important than the other *Grinnell* factors, especially where the other factors weigh in favor of approving the settlement." *In re Sinus Buster Products Consumer Litig.*, 2014 WL 5819921, at *11 (E.D.N.Y. Nov. 10, 2014). A "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Viafara v. MCIZ Corp.*, 2014 WL 1777438, at *7 (S.D.N.Y. May 1, 2014). For these reasons, this factor is neutral.

4. The range of reasonableness of the settlement in light of the best possible recovery and all the attendant risks of litigation

"The final two *Grinnell* factors [, *i.e.*, the range of reasonableness of the settlement in light of the best possible recovery and all attendant risks,] are typically considered together." *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 432 (S.D.N.Y. 2016). "There is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion[.]" *Visa*, 396 F.3d at 119. "In other words, the question for the Court is not whether the settlement represents the highest recovery possible . . . but whether it represents a reasonable one in light of the many uncertainties the class faces[.]" *Bodon v. Domino's Pizza, LLC*, 2015 WL 588656, at *6 (E.D.N.Y. Jan. 16, 2015).

Here, the relief for which the Settlement Agreement provides is well within the range of reasonableness, especially in light of the best possible recovery and in light of all the attendant risks of litigation.

Although Class Counsel believe Plaintiff's claims are strong, they recognize that continuation of this litigation poses significant risks. More litigation might not result in an increased benefit to the Settlement Class but will lead to substantial expenditure by both Parties. Class Counsel Final Approval Decl. at ¶ 21. Taking into account the risks and benefits of continued litigation, the Settlement falls within the range of reasonableness. *Id.* Class Counsel believe they have achieved the best possible recovery considering the merits of the Settlement weighed against the cost and risks of further litigation. *Id.*

Thus, collectively and independently, the *Grinnell* factors warrant the conclusion that the Settlement Agreement is fair, adequate, and reasonable. As such, Plaintiff respectfully requests that the Court grant final approval of the Settlement.

II. The Court Should Certify the Settlement Class.

A court may certify a settlement class upon finding that the action underlying the settlement satisfies all Rule 23(a) prerequisites and at least one prong of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 619–22 (1997). As set forth below, the proposed Settlement Class satisfies all of the requirements of Rule 23(a) and Rule 23(b)(3), and, consequently, Plaintiff respectfully asks the Court to certify the Settlement Class for settlement purposes.

A. The Settlement Class Meets All Prerequisites of Rule 23(a).

Rule 23(a) has four prerequisites for certification of a class: (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequate representation. The Settlement Class meets each prerequisite and, as a result, satisfies Rule 23(a).

1. Numerosity

Under Rule 23(a)(1), Plaintiff must show that the proposed class is "so numerous that joinder of all [its] members is impracticable." The Second Circuit has found numerosity met where a proposed class is "obviously numerous." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). Here, there is no dispute that thousands of people are in the Settlement Class. *See* Azari Nov. 25th Decl. at ¶ 19 (stating notice sent to over 13,000 class members). Numerosity is satisfied.

2. Commonality

Under Rule 23(a)(2), Plaintiff must show that "questions of law or fact common to the [proposed] class" exist. Commonality requires that the proposed Class Members' claims all centrally "depend upon a common contention," which "must be of such a nature that it is capable of classwide 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." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "[F]or purposes of Rule 23(a)(2) even a single common question will do[.]" *Id.* (citation, quotation marks, and brackets omitted). The Second Circuit has construed

this instruction liberally, holding that plaintiffs need only show that their injuries "derive[d] from defendants' . . . unitary course of conduct." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 84 (2d Cir. 2015).

Here, commonality for settlement approval purposes is satisfied. There are multiple questions of law and fact – centering on the alleged systematic practice of assessing OD fees – that are common to the Settlement Class Members, alleged to have injured all Settlement Class members in the same way, and would generate common answers central to their claims' viability were the action to be tried. Thus, commonality is satisfied.

3. Typicality

Under Rule 23(a)(3), Plaintiff must show that his claims "are typical of the [class'] claims." Plaintiff must show that "the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented." *Robidoux v. Celani*, 987 F.2d 931, 936–37 (2d Cir. 1993) (citations omitted). "[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.*, 2013 WL 4080946, at *19 (S.D.N.Y. May 30, 2013).

District courts within the Second Circuit have repeatedly found typicality easily satisfied in the context of approving a settlement class. *See e.g.*, *Manley*, 2016 WL 1274577, at *4; *Hadel v. Gaucho, LLC*, 2016 WL 1060324, at *2 (S.D.N.Y. Mar. 14, 2016); *Tart v. Lions Gate Entm't Corp.*, 2015 WL 5945846, at *3 (S.D.N.Y. Oct. 13, 2015); *Fogarazzao v. Lehman Bros.*, 232 F.R.D. 176, 180 (S.D.N.Y. 2005) ("The typicality requirement is not demanding.") (internal quotation omitted).

Here, typicality is met because the same allegedly unlawful conduct by Defendant—its assessment of the OD fees—was directed at, or affected, both Plaintiff and the other members of the proposed Settlement Class. *Robidoux*, 987 F.2d at 936–37. Accordingly, typicality is met.

4. Adequacy of representation

Under Rule 23(a)(4), Plaintiff must show that the proposed class representatives will "fairly and adequately protect the interests of the class." Plaintiff must demonstrate that: (1) the class representatives do not have conflicting interests with other Class Members; and (2) class counsel is "qualified, experienced and generally able to conduct the litigation." *Marisol A.*, 126 F.3d at 378.

To satisfy the first requirement, Plaintiff must show that "the members of the class possess the same interests" and that "no fundamental conflicts exist" between a class representative(s) and its members. *Charron*, 731 F.3d at 249. Here, Plaintiff possesses the same interests as the proposed Settlement Class Members because Plaintiff and the other Settlement Class Members were all allegedly injured in the same manner in that they were charged the OD fees at issue.

With respect to the second requirement, Class Counsel are qualified, experienced, and able to conduct the litigation. Class Counsel are not representing clients with interests at odds with the interests of the Settlement Class Members and are not acting as class representatives. Class Counsel Final Approval Decl. at ¶ 13. Further, they have invested considerable time and resources into the prosecution of the action. *Id*. ¶¶ 15-19. They have qualified as lead counsel in other class actions and have a proven track record of successful prosecution of significant class actions. *Id.* at ¶¶ 2-3; Exs. 1-2. "In the absence of proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to prosecute vigorously the action on behalf of the class." *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 241 F.R.D. 185, 199 n.99 (S.D.N.Y. 2007) (citation omitted).

For the foregoing reasons, Plaintiff has satisfied the adequacy prerequisite.

B. The Settlement Class Meets All Rule 23(b)(3) Requirements.

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem Prods., Inc.*, 521 U.S. at 614. Plaintiff seeks certification under Rule 23(b)(3). Under that rule, the court must find that "questions of law or fact common to Class Members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

1. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc.*, 521 U.S. at 623 (citation omitted). The Second Circuit has held that "to meet the predominance requirement . . . a plaintiff must establish that the 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." *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) (citation omitted). In the context of a request for settlement-only class certification, concerns about whether individual issues "would present intractable management problems" at trial drop out because "the proposal is that there be no trial." *Id.* at 620 (citation omitted). As a result, "the predominance inquiry will sometimes be easier to satisfy in the settlement context." *Tart*, 2015 WL 5945846, at *4 (citation omitted). Furthermore, consumer protection cases readily satisfy the predominance inquiry. *Amchem Prods.*, 521 U.S. at 625.

Here the central common question includes whether the OD fees charged by Defendant were proper or not. These issues are subject to "generalized proof" and "outweigh those issues that are subject to individualized proof." *In re Nassau Cty. Strip Search Cases*, 461 F.3d at 227–28. The Settlement Class meets the predominance requirement for settlement purposes.

2. Superior means of adjudication

Rule 23(b)(3) also requires that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Here, the class action mechanism is superior to individual actions for numerous reasons. First, "[t]he potential Class Members are both significant in number and geographically dispersed" and "[t]he interest of the class as a whole in litigating the many common questions substantially outweighs any interest by individual members in bringing and prosecuting separate actions." *Meredith Corp. v. SESAC, LLC*, 87 F.Supp.3d 650, 661 (S.D.N.Y. 2015) (citation omitted).

Additionally, a class action is superior here because "it will conserve judicial resources" and "is more efficient for Class Members, particularly those who lack the resources to bring their claims individually." *Zeltser*, 2014 WL 4816134, at *3 (citation omitted). The average amount of the OD fees charged was $34, a nominal amount where compared to the costs of litigation. Class Counsel Final Approval Decl. at ¶ 8. As a result, the expense and burden of litigation make it virtually impossible for the Settlement Class Members to seek redress on an individual basis. By contrast, in a class action, the cost of litigation is spread across the entire class, thereby making litigation viable. *See, e.g.*, *Tart*, 2015 WL 5945846, at *5. For all of the foregoing reasons, a class action is superior to individual suits.

In sum, because the requirements of Rule 23(a) and Rule 23(b)(3) are satisfied, the Court should certify the Settlement Class.

III. The Court Should Grant the Request for Payment of Attorney Fees and Reimbursement of Litigation Costs to Class Counsel.

Under Rule 23(h), "the court may award reasonable attorney's fees ... that are authorized by law or by the parties' agreement." Courts commonly employ either the "percentage of the fund method" or the "lodestar method" to evaluate the reasonableness of attorneys' fees awards. *Visa*, 396 F.3d 96 at 121 (internal quotation marks omitted). This action involves a common fund settlement and not a claims-made settlement. Therefore, the percentage-of-fund method, which Class Counsel request to apply in awarding attorneys' fees, is proper. "The 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," with the lodestar serving only as a "cross-check" on the resulting fee. *Id.* at 121, 123 (citations omitted).

Here, the Settlement is $1.5 million. The request payment of $500,000 in attorneys' fees is reasonable under the percentage-of-the-fund method, as it constitutes 1/3 of the Settlement Amount. An award of one-third, or 33.33%, of the Settlement Fund is well within the range that courts in this Circuit have awarded. *See Mendez*, 2022 WL 3704591, at *9 ("Class Counsel's fee request of one-third (33.33%) of the Settlement Fund is reasonable and consistent with the norms of class litigation in this circuit"); *Sarit*, 2022 WL 2000328, at *1 ("District courts in the Second Circuit…routinely approve fees to counsel totaling one third of the recovery amount."). *See also supra*, *Argument*, I.C.3 (citing additional cases where fees of one-third were approved).

Furthermore, the requested fee is also reasonable under the lodestar methodology. *See* Class Counsel Final Approval Decl. at ¶¶ 15-18. Indeed, Class Counsel's lodestar to date is $583,520, which is more than the requested fee. *Id.*

The attorneys' fee requested here is reasonable and worthy of the Court's approval.

IV. The Court Should Approve the Reimbursement of Class Counsel's Expenses.

"It is well-settled that attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients." *Raniere*, 310 F.R.D. at 222; *see also In re Hi-Crush Partners*, 2014 WL 7323417, at *19 ("Because the expenses here were incurred with no guarantee of recovery, Lead Counsel had a strong incentive to keep them at a reasonable level, and did so."). Class Counsel seek their costs of $7,505.39, consisting primarily of filing fees and costs of mediation. Class Counsel Final Approval Decl. at ¶ 19. These costs, which are detailed in the Class Counsel Final Approval Declaration, are reasonable. *Yang v. Focus Media Holding Ltd.*, 2014 WL 4401280, at *19 (S.D.N.Y. Sept. 4, 2014) (approving mediator fees, expert fees, postage, meals, and court filing fees and finding that these are the type of expenses that law firms typically bill to their clients).

V. The Court Should Approve the Service Award for the Class Representative.

"Incentive awards encourage class representatives to participate in class action lawsuits, which are designed to provide a mechanism by which persons, whose injuries are not large enough to make pursuing their individual claims in the court system cost efficient, are able to bind together with persons suffering the same harm and redress." *Moses*, 79 F.4th at 243. Here, the Class Representative performed important and valuable services for the benefit of the Settlement Class, including meeting, conferring, and corresponding with Class Counsel throughout the case as needed for the efficient process of this litigation. *See* Class Counsel Final Approval Decl. at ¶ 12. Accordingly, it is respectfully requested the Court approve the Service Award to the Class Representative in the amount of $10,000, which is within the range of service awards approved in this District. *See Grissom*, 2024 WL 4627567, at *6 (finding a $10,000 service award reasonable); *Santos*, 2023 WL 2263207, at *3 (approving a $10,000 service award).

CONCLUSION

For the foregoing reasons, the Class Representative and Class Counsel respectfully request that the Court grant their motion for Final Approval.

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Respectfully submitted,

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