

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

DENISE GALGANO DBA SHEAR
ENVY HAIR STUDIO and TASHINA
DRAKEFORD, individually and on behalf
of all others similarly situated,

Plaintiffs,

v.

TD BANK, N.A.,

Defendant.

CASE NO.: 1:20-cv-5623-KMW-SAK

**PLAINTIFFS' BRIEF IN SUPPORT OF AWARD OF ATTORNEYS' FEES, COSTS
AND EXPENSES AND CLASS REPRESENTATIVES' INCENTIVE AWARDS
(CORRECTED)**

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The Class Representatives and Wilentz Goldman & Spitzer, P.A., The Kick Law Firm, APC and KalielGold PLLC (hereinafter collectively referred to as “Class Counsel”) submit this Brief in support of their Motion for Attorneys’ Fees, Costs, Expenses and Class Representatives’ Incentive Awards (the “Motion”). The Motion seeks a percent of recovery award of fees, costs, and expenses equal to one-third (33-1/3%) of the \$11,900,000 Cash Settlement Amount, which equates to a total Fee and Expense Award of \$3,966,666.00. In addition, the Motion seeks approval of awards to the two Class Representatives of \$7,500 each.

PRELIMINARY STATEMENT

This is a putative class action challenging Defendant TD Bank’s (“TD Bank” or “Defendant”) assessment of an “Out of Network ATM Balance Inquiry Fee” or “OON ATM Balance Inquiry Fee” when its customers check their account balance at an out of network ATM. Plaintiff Denise Galgano d/b/a Shear Envy Hair Studio filed the initial Complaint in this Action on May 6, 2020, before filing an Amended Complaint on September 15, 2020, adding Tashina Drakeford as a named plaintiff as well as a new cause of action.

As detailed in Plaintiffs’ filed Motion for Preliminary Approval (Dkt. 82), after conducting significant discovery, after Plaintiffs prevailed against a motion to dismiss filed by Defendant, after a mediation and an extensive arm’s-length negotiation process, the Parties reached a proposed settlement of these novel claims

regarding the assessment of small ATM fees on consumer checking accounts. The Parties agreed to settle the Action for a \$11,900,000 cash common fund, which represents between 30.5%-145% of best-day damages had the Court certified a nationwide class and had Plaintiffs prevailed at trial. The Settlement fund will automatically be distributed to Settlement Class Members without the requirement for a claims process or reversion to TD Bank.

Class Counsel obtained these benefits for the Settlement Class with hard work and creativity, investing hundreds and hundreds of hours of time in this matter without guarantee of recompense. Before this Action was filed, no enforcement agency, no consumer protection group, and no other court had addressed the assessment of multiple OON Fees by TD Bank during a single ATM use, a practice that Plaintiffs alleged slowly and almost imperceptibly skims from consumers' accounts. With unique contractual provisions at issue, Class Counsel faced significant risk in filing this Action. Without their hard work, and that of the Class Representatives, TD's alleged practices would have remained in the dark, without comment or notice.

Class Counsel collectively has litigated this case for three years, since May 2020. Class Counsel took this case on a pure contingency basis, with no guarantee that they would ever be reimbursed or paid for their time. The parties engaged in a fully-briefed Motion to Dismiss battle that culminated in the Court's grant in part

and denial in part of Defendant's Motion to Dismiss the Amended Complaint. Dkt. 36. The parties then conducted written discovery while simultaneously pursuing lengthy, arm's-length settlement negotiations. Declaration of Taras Kick In Support of Motion for Attorneys' Fees, Costs, Expenses and Class Representatives' Incentive Awards ("Kick Decl." ¶ 2). Formal discovery was extensive, and included the exchange of initial disclosures, responses by both parties to Requests for Production and Interrogatories, negotiation of an ESI protocol, and numerous meet-and-confer efforts. *Id.* To precisely determine class damages and identify class members, Class Counsel requested that Defendant retrieve and analyze voluminous account-level transactional data from its records. *Id.* This analysis took several months to complete and was followed by confirmatory discovery to test its accuracy. *Id.*

Mediation proceeded before the Hon. Elizabeth Laporte (Ret.) of JAMS San Francisco with the benefit of formal discovery and the expert analysis of the class transaction data. Kick Decl. ¶ 3. Class Counsel's efforts at this mediation brought about Defendant's agreement to settle the matter for \$11,900,000.00, which, as stated, represents between 30.5% and 145% of the most likely recoverable damages. *Id.*

Months of further work followed, including confirmatory discovery and an intensive effort to use existing TD Bank data and analysis to minimize notice and administration expenses for this large Settlement Class to the greatest extent

possible. *Id.*

After the parties reached their agreement-in-principle on the material terms of the proposed Settlement, Class Counsel and TD Bank negotiated attorneys' fees and the Class Representatives' proposed incentive awards. Kick Decl. ¶ 4. The proposed Fee and Expense Award is a result of this negotiation and represents reasonable compensation for Class Counsel's efforts in resolving this litigation, and as explained in detail below, complies with all of the factors enumerated in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190 (3d Cir. 2000) and *In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006).

Finally, the Court should also approve the proposed Class Representatives' Service Awards. The Service Awards are a modest recognition of the time and sacrifice made by the Class Representatives in following this litigation through to this successful conclusion.

For these reasons, the Class Representatives and Class Counsel respectfully request that the Court grant the Motion.

FACTUAL AND PROCEDURAL BACKGROUND

On May 6, 2020, Denise Galgano d/b/a Shear Envy Hair Studio, on behalf of herself and others similarly situated, filed a class action complaint in the United States District Court for the District of New Jersey (the "Court"), alleging that TD breached Plaintiff's contract with TD, as well as the duty of good faith and fair

dealing, and violated New Jersey's Consumer Fraud Act, N.J.S.A. § 56:8-1 *et seq.* Dkt. 1. Later, on September 15, 2020, Ms. Galgano and Tashina Drakeford ("Plaintiffs") filed an amended class action complaint, alleging that TD also violated New York General Business Law § 349, *et seq.* Dkt. 27.

Defendant filed a Motion to Dismiss on October 13, 2020. Dkt. 29. Plaintiffs filed their opposition to the Motion to Dismiss on November 2, 2020. Dkt. 30. Defendant replied on November 9, 2020. On June 17, 2021, the Court granted in part and denied in part TD's motion to dismiss the amended class action complaint. Dkt. 36.

Discovery then began. The parties proposed a discovery plan, and the Court adopted the proposed deadlines on July 29, 2021. Dkt. 46. On July 13, 2021, Plaintiffs served their First Set of Requests for Production and First Set of Interrogatories. Kick Decl. ¶ 5. The parties subsequently exchanged initial disclosures. *Id.* On September 13, 2021, TD responded to Plaintiffs' First Set of Requests for Production and First Set of Interrogatories. *Id.* The Parties thereafter negotiated and agreed on an ESI protocol. *Id.* The Parties met and conferred numerous times regarding Defendant's discovery responses. *Id.* Similarly, Defendant issued discovery requests to Plaintiffs, to which Plaintiffs responded. *Id.*

The parties also met and conferred about settlement. Kick Decl. ¶ 6. Plaintiffs requested, prior to settlement discussions, that TD retrieve and analyze voluminous

account-level transactional data in order to determine class-wide damages for the class period—a process that took months. *Id.* Only after that analysis was complete and had been verified by Plaintiffs, the Parties agreed to a mediation before the Hon. Elizabeth Laporte (Ret.) of JAMS San Francisco. The mediation was scheduled for February 15, 2022. *Id.* The Parties submitted detailed mediation statements in connection with that mediation. *Id.* The parties agreed in principle on a settlement that day, subject to both confirmatory discovery and the resolution of a handful of additional issues through negotiation of a written class settlement agreement. *Id.*

On February 28, 2022, the Parties filed a Joint Status Report, informing the Court that the Parties had reached a settlement. Dkt. 68. On May 26, 2022, the Parties informed the Court of the need to perform confirmatory discovery in order to finalize the Settlement Agreement. Dkt. 71.

The confirmatory discovery process was laborious and lengthy, and occupied the parties between February, 2022 and October, 2022. Kick Decl. ¶ 7. Simultaneously, the Parties continued to negotiate the terms of the written settlement agreement, including the plan for providing notice to class members. *Id.*

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LEGAL ARGUMENT

I. CLASS COUNSEL ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES FROM THE COMMON FUND CREATED BY THE SETTLEMENT THROUGH THE PERCENTAGE OF RECOVERY METHOD

Attorneys who represent a class and achieve a benefit for the class members are entitled to be compensated for their services. The common fund method “prevent[s] . . . inequity by assessing attorney’s fees against the entire fund, thus spreading fees proportionately among those benefitted by the suit.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 192 (E.D. Pa. 2000) (“[T]here is no doubt that attorneys may properly be given a portion of the settlement fund in recognition of the benefit they have bestowed on class members.”); *Fickinger v. C.I. Planing Corp.*, 646 F. Supp. 622, 632 (E.D. Pa. 1986) (awarding attorney fees from a common fund avoids “the unjust enrichment of those who otherwise would be benefitted by the fund without sharing in the expenses incurred by the successful litigant”).

In awarding fees in this type of case, a court may consider two different methods: the lodestar method and the percentage of recovery method. In common fund class action cases, like the present Action, the percentage of recovery method is the favored approach. *See Sullivan v. DB Investments*, 667 F.3d 273, 330 (3d Cir. 2011) (stating that percentage of recovery method “is generally favored in common

fund cases because it allows courts to award fees from the fund ‘in a manner that rewards counsel for success and penalizes it for failure.’”); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3rd Cir. 2005) (same); *In re Prudential Ins. Co. of Am. Sales Practices Litig. Actions*, 148 F.3d 283, 333 (3rd Cir. 1998) (same), *cert. denied*, 525 U.S. 1114 (1999); *In re AT&T Corp.*, 455 F.3d 160, 164 (3d. Cir. 2006) (indicating that the percentage-of-recovery method has long been used by Third Circuit in common-fund cases).¹

The proposed Settlement creates a common fund of direct monetary benefits to the Class. Thus, pursuant to Third Circuit precedent, Class Counsel applies for a Fee and Expense Award pursuant to a percentage of recovery method. Under the terms of the Settlement Agreement, Class Counsel may apply for attorneys’ fees and costs of up to one-third of the “Cash Settlement Amount.” Dkt. 82-3 at ¶¶ 4, 92. The Cash Settlement Amount is defined in the Settlement Agreement as \$11,900,000.00, which includes the amount that TD Bank will pay to Class Members to settle the

¹ In fact, two different task forces were convened by the U.S. Court of Appeals for the Third Circuit to consider fees in class action cases, first in 1985, and again in 2002. *See* Task Force Report, 108 F.R.D. at 238; Third Circuit Task Force Report, *Selection of Class Counsel*, 208 F.R.D. 340 (Jan. 15, 2002). Since the issuance of the Task Force Report in 1985, virtually every other circuit court has joined this Circuit and the Supreme Court in approving use of the percentage-of-the-fund method in common fund cases. *See* MANUAL FOR COMPLEX LITIGATION §14.121 (4th ed.) (“After a period of experimentation with the Lodestar method, . . . the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases.”)

Action, the Fee and Expense Award, the Service Awards, and all Administrative Costs. Dkt. 82-3 at ¶ 4. As such, Class Counsel request a total Fee and Expense Award in the amount of \$3,966,666.00. In reality, this fee request is actually a little less than one-third of the Cash Settlement Amount since it also includes reimbursement of litigation costs incurred by the attorneys, meaning these costs are coming from the attorneys' fees rather than separately from the class members. Dkt. 82-3 at ¶ 92.

II. EVALUATION OF THE *GUNTER* FACTORS SUPPORTS THE REQUESTED ATTORNEYS' FEE AND EXPENSE AWARD

In *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190 (3rd Cir. 2000), the Third Circuit set forth several factors that a court should consider in granting a fee award under the percentage of recovery method. The *Gunter* factors include: (1) the size of the fund created and number of persons benefitting from the settlement; (2) the presence/absence of substantial objections to the fee; (3) the skill of plaintiffs' counsel; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the litigation; and (7) awards in similar cases. *Id.* at 195 n.1. The Third Circuit has also suggested three other factors that may be relevant to a court's inquiry: (1) "the value of benefits accruing to class members attributable to the efforts of counsel as opposed to the efforts of other groups, such as government agencies conducting investigations;" (2) "the percentage fee that

would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained;” and (3) any “innovative terms of settlement.” *In re AT&T*, *supra*, 455 F.3d at 165 (citation omitted).

These factors “need not be applied in a formulaic way” because each case is different, and in certain cases, one factor may outweigh the rest. *In re AT&T Corp.*, *supra*, 455 F.3d at 166; *In re Datatec Systems, Inc. Sec. Litig.*, 2007 WL 4225828, at *6 (D.N.J. Nov. 28, 2007). “[W]hat is important is that the district court evaluate what class counsel actually did and how it benefitted the class.” *In re AT&T*, 455 F.3d at 165-66. *See also Hensley v Eckerhart*, 461 U.S. 424, 436 (1983) (the “most critical factor is the degree of success obtained”); *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) (“[t]he most significant factor in this case is the quality of representation, as measured by ‘the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel’”). As discussed *infra*, these factors clearly support the requested Fee and Expense Award.

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A. The Complexity and Duration of the Litigation, Size of the Fund Created, Skill of Plaintiffs' Counsel, and the Number of Persons Benefitting from the Settlement Favor Approval of the Requested Attorneys' Fee and Expense Award

The settlement fund is an all-cash amount of \$11,900,000. It represents a substantial portion of the potential damages in this case, a range of approximately 30% to 145%, depending on whether Plaintiffs' or Defendant's theory was accepted. Kick Decl. ¶ 8. Throughout this Action's nearly three-year history, the parties engaged in significant and highly-contested litigation. The successful prosecution of the many complex and unique issues in this litigation required the participation of highly skilled and dedicated attorneys, with extensive experience in banking fee litigation. Declaration of Jeffrey Kaliel ("Kaliel Decl.") ¶¶ 2-4; Kick Decl. ¶¶ 13-14.

Before the Action was filed, Class Counsel dedicated significant time and effort to an investigation of the facts and legal theories that would later support the Action. This investigation included interviewing potential class representatives and analyzing their monthly account statements; obtaining various historical account agreements for TD Bank, as well as current account documents; researching potential causes of action; and researching potentially applicable laws and regulations. Kick Decl. ¶ 8. Only after this investigation was completed did Class Counsel draft and file the initial Complaint. *Id.*

Subsequently, Class Counsel conducted further investigation including

interviews with other potential class representatives, as well as legal research, which allowed for the drafting of the Amended Complaint to add Tashina Drakeford and allege that TD also violated New York General Business Law § 349. Kick Decl. ¶ 9. When TD Bank attempted to terminate the Action via a Motion to Dismiss, Class Counsel conducted legal and factual research in support of its Opposition papers and drafted those documents. *Id.* These efforts resulted in the Court's denial of the Motion to Dismiss as to Plaintiffs' critical breach of contract cause of action, allowing the core of the case to proceed. *Id.*; Dkt. 36.

Plaintiffs promulgated discovery requests targeted at understanding TD's fee practices throughout the class period; the motivations behind those fee practices; TD's understanding of key contractual terms; customers' understanding of key contractual terms; and classwide damages.

At the same time, Class Counsel's collective wisdom was to make every reasonable effort to achieve a settlement taking into account the risks that they faced ahead, while winning as much value for the class as possible. *Id.* With the risks of a motion for summary judgment, denial of class certification, or Third Circuit reversal from any favorable rulings, Class Counsel took the opportunity to engaged in arm's-length settlement negotiations. *Id.*

Toward that end, and apart from conducting formal discovery as described above, including numerous meet-and-confer efforts, Class Counsel obtained the key

evidence in this Action that enabled a class-wide settlement, namely the transactional data sufficient to identify the over 2.5 million TD Bank customers impacted by the at-issue fees. Declaration of Robert Coomes of Notice Administrator Epiq Class Action & Claims Solutions, Inc. (“Epiq Decl.”) ¶ 5. Class Counsel negotiated with Defendant for an analysis of the class data, which consisted of millions of transactions and data points, and Class Counsel analyzed these materials in order to accurately assess class damages. Kick Decl. ¶ 10. These efforts enabled a successful mediation in which both parties were able to evaluate their positions based on objective criteria. *Id.* Even after the mediation, however, Class Counsel was required to confer with Defendant extensively during the process of confirmatory discovery, which was necessary to accurately identify members of the Class and their individual damages. *Id.*

By prevailing on the breach of contract theory at the Motion to Dismiss stage, mediating with Defendant, and obtaining the class transaction data, Class Counsel secured the Settlement that this Court preliminary approved in its December 22, 2022 Order. Dkt. 86. As a direct result of Class Counsel’s efforts, a common fund of \$11,900,000.00 has been created for the Class, which represents between 30.5% and 145% of the most likely recoverable damages. Kick Decl. ¶ 8. These funds will be distributed to the Class directly, without the need of a claim form, either via direct deposit or a credit to the account, or by check. Dkt. 82-3 at ¶ 103. This method of

delivery of the settlement funds would not have been possible absent the extraction and analysis of voluminous class transaction data described above. Kick Decl. ¶ 10. Moreover, TD Bank's disclosures on the relevant OON ATM Fees were improved after this litigation, another benefit to accountholders. *See* Ex. A to Kick Decl. (TD Bank's current fee schedule reflecting updated disclosures). The settlement is an excellent result, especially considering the legal hurdles Plaintiffs faced.

This excellent result for the Class was obtained on account of the skill and dedication of the attorneys involved, as well as the efforts of the Class Representatives, discussed *infra*. As set forth at length in the declarations that accompany this Motion, Class Counsel are highly experienced in banking fee class actions, having been appointed lead or co-lead counsel in dozens of such matters nationwide. Kick Decl. ¶ 14; Kaliel Decl. ¶ 4.

In addition, "[t]he quality of opposing counsel is important in evaluating the quality of counsel's work." *Hall v. AT&T Mobility LLC*, 2010 WL 4053547, *19 (D.N.J. Oct. 13, 2010). Class Counsel was opposed in this litigation by highly experienced class action defense counsel, including highly sophisticated local counsel Brown & Conner, and one of the nation's most elite national practice law firms, WilmerHale. The Defendant, TD Bank, is one of the largest banks in the United States with assets of approximately \$386 billion. Despite the skill of opposing counsel and the vast financial resources of the Defendant, Class Counsel's

efforts resulted in a fair and reasonable, if not exceptional, Settlement for the Class.

Accordingly, these factors further favor approval of the requested Attorney Fee and Expense Award.

B. The Current Absence of Objections to the Attorneys' Fee and Expense Award Favors Its Approval

The absence or minimal number of objections to a fee request is significant evidence that the request is fair and reasonable. *See, e.g., In re Rite Aid, supra*, 396 F.3d at 305; *In re AT&T Corp., supra*, 455 F.3d at 170 (awarding fee despite eight objections); *In re Genta Sec. Litig.*, 2008 WL 2229843, *9 (D.N.J. May 28, 2008) (awarding fees despite one objection).

To date, there have been no objections to the Settlement or Fee and Expense Request and only four Class Members have filed requests to be excluded. Epiq Decl. ¶¶ 25, 26. The lack of objections to the Settlement to date, including the proposed Fees and Costs Awards, further weighs in favor of approval.²

C. The Risk of Non-Payment Favors Approval of the Requested Fee and Expense Award

Class Counsel undertook this Action on an entirely contingent fee basis and assumed a substantial risk that the litigation might yield little or no recovery, leaving

² The deadline to object or opt-out is May 26, 2023.

them uncompensated for their substantial time. Kick Decl. ¶ 11. “Courts routinely recognize that the risk created by undertaking an action on a contingency fee basis militates in favor of approval.” *In re Schering-Plough Corp. Enhance ERISA Litig.*, 2012 WL 1964451, at *7 (D.N.J. May 31, 2012) Courts further recognize that the risk of receiving little or no recovery is a major factor in considering an attorneys’ fee award. *See, e.g., Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 219 (E.D. Pa. 2011) (“Courts consider the risk of non-payment in light of the Defendant’s ability to satisfy an adverse judgment, or the risk of establishing liability at trial.”)

During this Action, Class Counsel faced substantial risks of non-payment. Defendant filed a Motion to Dismiss and secured dismissal of *all* of Plaintiffs’ causes of action, with the exception of breach of contract. Dkt. 36. Plaintiffs’ breach of contract claim might have failed on a later Motion for Summary Judgment or at trial, if the Court or factfinder had agreed with Defendant’s interpretation of the applicable contracts. For example, in another case involving the alleged improper charging of “Out of Network” ATM fees, *Schertzer v. Bank of America, N.A.* USDC Southern District California, Case No.: 19cv264 JM (MSB), the Plaintiffs survived a Motion to Dismiss, but ultimately lost the case on summary judgment, meaning the class members and attorneys in that case received nothing. Kick Decl. ¶ 11. In contrast, the class members in this case will participate in an \$11.9 million settlement.

Class Counsel also faced the risk that Class Certification would be denied in this case, or that any result favorable to the Class would have been reversed on appeal. *Id.* Defendant would have pursued all of these options in the absence of a settlement, and possesses the financial resources to do so. *Id.* Despite the risks and difficulties presented throughout this litigation, Class Counsel forged a significant resolution that provides substantial relief to the Class. Based upon the issues faced during the Action, Class Counsel undertook a significant risk of non-payment, which now favors approval of the requested Fee and Expense Award. “Courts recognize the risk of non-payment as a major factor in considering an award of attorney fees.” *Saini v. BMW of North America, LLC*, No. 12-cv-6105 (CCC), 2015 U.S. Dist. LEXIS 66242, at *41 (D.N.J. May 21, 2015).

Further, many courts have recognized, “[s]uccess is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable.” *Martin v. Foster Wheeler Energy Corp.*, No. 06-cv-0878, 2008 U.S. Dist. LEXIS 25712, at *12 (E.D. Pa. Mar. 31, 2008). “[C]ourts have recognized that the risk of non-payment is heightened in a case of this nature where counsel accepts a case on a contingent basis.” *Reinhart v. Lucent Techs., Inc.*, 327 F. Supp. 2d 426, 438 (D.N.J. 2004).

Here, Plaintiffs’ Counsel “accepted the responsibility of prosecuting this class action on a contingent fee basis and without any guarantee of success or award.” *In*

re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 281 (3d Cir. 2009) (“Class Counsel invested a substantial amount of time and effort to reach this point and obtain the favorable Settlement.”).

D. The Requested Attorneys’ Fees and Costs Award is Reasonable When Compared to Awards in The Third Circuit, Awards In Similar Bank Fee Cases, and What Would Have Been Contracted in a Private Contingency Matter

There is no general rule as to what percentage of the common fund should be awarded as attorneys’ fees. *See In re Ikon Solutions, supra*, 194 F.R.D. at 194 (“Percentages awarded have varied considerably, but most fees appear to fall in the range of nineteen to forty-five percent.”). However, “[a] one third fee from a common fund has been found to be typical by several courts within this Circuit which have undertaken surveys of awards within the Third Circuit and others.” *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, at *15 (D.N.J. Nov. 9, 2005) (citing review of 289 settlements with a median value attorneys’ fee award of one-third).

Courts within the Third Circuit frequently award fees of one-third of the common fund in a class action settlements. *In re Tricor Direct Purchaser Antitrust Litig.*, Civ. A. No. 05-340, slip op. at 9-10 (ECF No. 543) (D. Del. Apr. 23, 2009) (awarding one-third fee on settlement of \$250 million); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 751 (E.D. Pa. 2013) (awarding one-third fee on settlement of

\$150 million); *Remeron Direct Purchaser Antitrust Litig.*, No. Civ. 03-0085 FSH, 2005 WL 3008808, at *17 (D.N.J. Nov. 9, 2005) (awarding one-third fee on settlement of \$75 million); *Johnson v. Cmty. Bank, N.A.*, No. 3:12-CV-01405, 2013 WL 6185607, at *8 (M.D. Pa. Nov. 25, 2013), a case regarding overdraft fees, the court held that “[a]n award of one-third of the settlement is consistent with this Court’s prior decisions and with cases decided throughout the Third Circuit.” (citing *Martin v. Foster Wheeler Energy Corp.*, No. 3:06-CV-0878, 2008 WL 906472, at *5 (M.D. Pa. 2008) (collecting cases).

Accordingly, Class Counsel’s request for one-third of the Settlement Fund is consistent with similar awards in the Third Circuit.

With regard specifically to attorneys’ fees awards in bank fee class actions, since 2010, numerous courts have awarded percentage of the fund-based attorneys’ fees in such cases (based on different—but arguably less difficult—theories of liability). The following list depicts some such settlements, all of which resulted in fee awards either roughly at or significantly above the 33-1/3% request here:

<u>Bank Fee Case Name</u>	<u>Percentage of the Fund Awarded</u>
<i>Wolfgeher v. Commerce Bank, N.A.</i> , No. 1:09-MD-02036-JLK (S.D. Fla.) (Dkt. 3574),	38% of \$18.3 million common fund

<i>In re Checking Account Overdraft Litig.</i> , No. 1:09-MD-02036-JLK, 2020 WL 4586398 (S.D. Fla. Aug. 10, 2020)	35% of \$7.5 million
<i>Hawkins et al v. First Tenn. Bank, N.A.</i> (Cir. Ct. Tenn.)	35% of \$16.75 million
<i>Swift v BancorpSouth</i> , No. 1:10-cv-00090-GRJ (N.D. Fla.)	35% of \$24 million
<i>Schulte v. Fifth Third Bank</i> , No. 09-cv-6655 (N.D. Ill.)	33.33% of \$9.5 million
<i>Johnson v. Community Bank, N.A.</i> , No. 12-cv-01405-RDM (M.D. Pa.)	33.33% of \$2.5 million
<i>Bodnar v. Bank of America</i> , No. 5:14-cv-03224-EGS (E.D. Pa.)	33.33% of \$27 million
<i>Holt v. Community America Credit Union</i> , No. 4:19-CV-00629-FJG (W.D. Mo.)	33.33% of 3.078 million
<i>White v. Members 1st Federal Credit Union</i> , Case No. 1:19-cv-00556-JEJ (W.D. Pa.)	33.33% of \$910,000
<i>Figueroa v. Capital One</i> , Case No. 3:18-cv-00692-JM-BGS (S.D. Cal.)	33.33% of \$13 million
<i>Liggio v. Apple Federal Credit Union</i> , No. 1:18-cv-01059-LO-MSN (E.D. Va.)	33.33% of 2.7 million

Similarly, other bank fee class action cases with fee awards of one-third include: *Campagna v. TD Bank*, Case No. 1:20-cv-18533-KMW-SAK (D.N.J.) (33.33% of \$2,250,000); *Bodnar v. Bank of America*, No. 5:14-cv-03224-EGS (E.D. Pa.) (33-1/3% of \$27 million); *Lambert v. Navy Fed. Credit Union*, No. 1:19-cv-103-LO-MSN, 2019 U.S. Dist. LEXIS138592, at *3 (E.D. Va.) (33-1/3% of \$16

million); *Lopez v. JPMorgan Chase Bank, N.A.*, No. 1:09-MD-02036-JLK (S.D. Fla.), DE 3134, fees of \$48.6 million on \$110 million cash settlement plus change in practices; *In re Checking Account Overdraft Litig.*, No. 1:09- MD-02036-JLK, 2020 U.S. Dist. LEXIS142012 (S.D. Fla. Aug. 10, 2020) (35% of \$7.5 million); *Swift v BancorpSouth*, No. 1:10-cv-00090-GRJ(N.D. Fla.) (35% of \$24 million); *Wolfgeher v. Commerce Bank, N.A.*, No. 1:09- MD-02036-JLK (S.D. Fla.) (Dkt. No. 3574) (38% of \$18.3 million); *Schulte v. Fifth Third Bank*, No. 09-cv-6655 (N.D. Ill.) (33-1/3% of \$9.5 million); *Richard v. Glens Falls National Bank et al*, 1:20CV00734, Dkt. No. 72 ¶ 14 (N.D.N.Y. July 22, 2022).

As demonstrated above, the requested fee award in this case is on par with the fee awards approved in other bank fee class action cases.

Finally, the requested Attorneys' Fee Award is entirely consistent with the private marketplace where attorneys negotiate contingency fee agreements. Declaration of Stephen Sullivan of Wilentz, Goldman & Spitzer ("Sullivan Decl.") ¶ 8. If this Action was not a class action litigation, the customary contingency fee would range from 30% to 40% of the recovery. *See In re Ikon Solutions, supra*, 194 F.R.D. at 194 ("[I]n private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery."); *In re Orthopedic Bone Screws Products Liability Litig.*, 2000 WL 1622741, *7 (E.D. Pa. Oct. 23, 2000) ("court notes that plaintiffs'

counsel in private contingency fee cases regularly negotiate agreements providing for thirty to forty percent of any recovery”); *Phemister v. Harcourt Brace Jovanovich, Inc.*, 1984 WL 21981, *15 (N.D. Ill., Sept. 14, 1984) (“[t]he percentages agreed on [in contingent fee arrangements in non-class action damage lawsuits] vary, with one-third being particularly common”).

Accordingly, the requested Fee and Expense Award is fair and reasonable.

E. The Requested Percentage of Recovery Award Also is Fair and Reasonable When Checked Against the Amount of Time Devoted to This Case and Favors Approval of the Request

The requested Fee and Expense Award of one-third of the Settlement Fund is also reasonable when checked against the time spent by Class Counsel in litigating this matter. When a court utilizes the percentage of recovery method, the Third Circuit has recommended that a lodestar cross-check can be performed to ensure the reasonableness of the requested attorneys’ fees. *In re AT&T, supra*, 455 F.3d at 164 (lodestar cross-check, while useful, should not displace a district court’s primary reliance on the percentage of recovery method); *In re Rite Aid Corp., supra*, 396 F.3d at 305; *In re Suprema Specialties, Inc. Sec. Litig.*, 2008 WL 906254, at *8 (D.N.J. March 31, 2008). To perform the cross-check, “the number of hours reasonably expended by counsel is multiplied by an hourly rate appropriate for the region and the lawyer’s experience.” *In re AT&T, supra*, 455 F.3d at 164. In performing this cross-check, the court may rely on summaries of fees and costs

submitted by the attorneys and need not review actual billing records. *See e.g., In re Rite Aid Corp Sec. Litig., supra*, 396 F.3d at 306-07 (“cross-check calculation need entail neither mathematical precision nor bean-counting. . . . [C]ourts may rely on summaries submitted by the attorneys and need not review actual billing records”); *In re Ins. Brokerage Antitrust Litig.*, 2007 WL 1652303, at *9 (D.N.J. June 5, 2007) (“court may rely on summaries submitted by the attorneys, and is not required to scrutinize every billing record), *aff’d*, 579 F.3d 241 (3d Cir. 2009).

After determining the lodestar, a court may adjust the fee using a multiplier. The lodestar multiplier attempts to account for the contingent nature or risk involved in a particular case and the quality of an attorneys’ work. *In re Rite Aid Corp., supra*, 396 F.3d at 305. In the Third Circuit, courts typically have awarded multipliers in the range of one to eight in common fund cases. *See, e.g., In re Mercedes-Benz Emissions Litig.*, No. 16-881, 2021 WL 7833193, *16 (D.N.J. Aug. 2, 2021) (approving requested multiplier of 5.67, which was “within the range of multipliers typically awarded in the Third Circuit” and noting that “[c]ourts in this Circuit and elsewhere have approved large multipliers, when appropriate, in a range exceeding 10”); *In re Valeant Pharmaceuticals Int., Inc. Sec. Litig.*, No. 15-7658, 2021 WL 358611, *8 (D.N.J. Jan. 31, 2021) (awarding multiplier of 4.4 and finding that it fell “within common range” for multipliers); *Stevens v. SEI Inv. Co.*, No. 18-4205, 2020 WL 996418 (E.D. Pa. Feb. 28, 2020) (approving multiplier of 6.16 and observing

that “multiples ranging from 1 to 8 are often used in common fund cases”); *In re Rite Aid Sec. Litig.*, 362 F.Supp.2d 587, 590 (E.D. Pa. 2005) (awarding 6.96 multiplier). Nevertheless, the “multiplier need not fall within any pre-defined range, provided that the District Court’s analysis justifies the award.” *In re Rite Aid Corp.*, *supra*, 396 F.3d at 307.

Here, Class Counsel have certified their hours and rates in prosecuting this Action. Combined, Class Counsel’s lodestar at current rates is approximately \$1,023,209.50, resulting from 1,293.6 hours expended and to be expended on this Action by Class Counsel. Kick Decl. ¶ 26; Kaliel Decl. ¶¶ 7-8; Sullivan Decl. ¶¶ 6-7.³ The requested attorneys’ fee would result in a multiplier of approximately 3.87, well within the Third Circuit’s accepted range. In addition, it is reasonable considering the risk that Class Counsel faced of non-payment, as discussed *supra*.

In sum, Class Counsel’s significant commitment of time, personnel, and out-of-pocket expenses weighs heavily in favor of granting the requested Attorneys’ Fee Award and Costs Award.

III. CLASS COUNSEL SHOULD BE REIMBURSED FOR THEIR REASONABLY INCURRED LITIGATION EXPENSES

The costs incurred by Class Counsel will be paid out of the fee award, and

³ If the Court wants more detail about the lodestars, Counsel can provide such.

will not be in addition to the fee award. Nonetheless, it is well settled that “[c]ounsel in common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case.” *Oh v. AT&T Corp.*, 225 F.R.D. 142, 154 (D.N.J. 2004) (citations omitted). Indeed, reimbursement for costs expended by counsel in prosecuting the action is “routinely permitted.” *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, *17 (D.N.J., Nov. 9, 2005). These costs may include, among others, experts’ fees, costs of court reporters and deposition transcripts, travel and lodging expenses, electronic legal research, copying costs, telephone and fax, and messenger/mail services. *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 479 (D.N.J. 2008) (citations omitted); *Ricoh Corp. v. Pitney Bowes, Inc.*, 2007 WL 1852553, at *4 (D.N.J. June 26, 2007) (allowing computer research expenses to be reimbursed).

As certified by Class Counsel, the firms presently have incurred \$5,936.18 in expenses litigating this matter on behalf of the Class. Kick Decl. ¶ 19; Kaliel Decl. ¶ 10. These expenses are directly related to the prosecution of this complex action.⁴

⁴ The costs of the notice administrator Epiq will be presented in the Motion for Final Approval, and requested at that time, as this Motion pertains only to Class Counsel’s Fees and Expenses.

Kick Decl. ¶ 19. Accordingly, Class Counsel respectfully request reimbursement for these reasonable expenses as part of the omnibus Fees and Costs Award.

IV. THE COURT SHOULD AWARD THE SERVICE AWARDS TO THE CLASS REPRESENTATIVES FOR THEIR DILIGENT WORK DURING THIS LITIGATION

Service awards for Class Representatives promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits. The efforts of the Class Representatives in this case were important to achieving the Settlement on behalf of the Class and justify the awards requested here.

The proposed Service Awards of \$7,500 for each of the two Class Representatives in recognition of their services to the Class is modest under the circumstances of this \$11,900,000 settlement, and well in line with awards approved by federal courts in New Jersey and elsewhere. *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 145 (E.D.Pa. 2000) (“[C]ourts routinely approve incentive awards to compensate named plaintiffs for services they provided and the risks they incurred during the course of the class action litigation.”); *McGee v. Continental Tire North America, Inc.*, Civ. No. 06-6234 (GEB), 2009 WL 539893, at *18 (D.N.J. Mar. 4, 2009) (“Incentive awards are ‘not uncommon in class action litigation and particularly where ... a common fund has been created for the benefit of the entire class.’”); *In re American Investors Life Insurance Co. Annuity Marketing and Sales*

Practices Litig., 263 F.R.D. 226, 245 (E.D. Pa. 2009) (awarding 10 representative plaintiffs incentive payments in the amounts of \$10,500 each and 2 representative plaintiffs \$5,000 each, for a total of \$115,000, finding those amounts to be “reasonable compensation considering the extent of the named plaintiffs’ involvement and the sacrifice of their anonymity”); *Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 220 (E.D. Pa. 2011) (finding that a service award of \$15,000 “is within the range of incentive awards recently accepted by other courts.”).

Here, the Class Representatives have sacrificed their anonymity over the course of several years to bring about a benefit to millions of people, not only in the form of the settlement distribution but also in deterring improper fee assessment practices in the financial services industry. Further, from the perspective of Class Counsel, the Class Representatives provided a valuable service to the Class by: (a) providing information and input in connection with the drafting of the original Complaint, or the Amended Complaint as to Plaintiff Drakeford; (b) overseeing the prosecution of the litigation; (c) consulting with counsel; (d) providing documents and information that were produced in discovery, (e) offering input at critical junctures, including the Settlement of the litigation, and (f) generally making themselves available to Class Counsel for interviews when needed. Kick Decl. ¶ 12;

see also Declaration of Denise Galgano; Declaration of Tashina Drakeford.

Accordingly, Class Counsel respectfully request that the Court award Plaintiffs Denise Galgano and Tashina Drakeford awards of \$7,500.00 each for their involvement in this Action in their names.

CONCLUSION

For the reasons stated above, the Class Representatives and Class Counsel respectfully request that the Court award the requested attorneys' fees, costs and expenses and Class Representatives' Incentive Award.⁵

Dated: April 24, 2023

Respectfully submitted,

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⁵ Plaintiffs intend to file a Proposed Order at the time of the filing of the Motion for Final Approval, so as to submit only one Proposed Order.

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