UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Danielle Wellington, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. Empower Federal Credit Union, DOES 1 Through 5, Defendants.	Civil Action No: 5:20-cv-01367-DNH-ML

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICAITON OF SETTLEMENT CLASS;

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MEMORANDUM

Plaintiffs respectfully submit this memorandum of law in support of their motion for final approval of the class action settlement; an award of attorney fees and costs, including claims administrator costs; and service awards for the named class representatives.

SUMMARY

This is a class action in which Plaintiffs Danielle Wellington and Dianna Conley (collectively, "Plaintiffs") allege that Defendant Empower Federal Credit Union ("Empower" or "Defendant") charged overdraft fees and Non-Sufficient Funds ("NSF") fees which its contracts with its members and Regulation E did not allow it to charge. Empower disputes this.

After substantial law and motion practice, significant formal discovery, a mediation, and confirmatory discovery, the parties reached a proposed settlement, subject to this Honorable Court's review and approval. A true and correct copy of the fully executed Settlement Agreement ("SA") is attached as Exhibit A to the Declaration of Elaine S. Kusel ("Kusel Decl.").

On July 19, 2022, this Court granted preliminary approval to the proposed settlement, finding preliminarily that the class as defined in the proposed Settlement Agreement meets all of the requirements for certification of a settlement class under the Federal Rules of Civil Procedure and applicable case law, that the proposed settlement falls within the range of reasonableness for potential final approval, and that the proposed settlement is the product of arm's length negotiations by experienced counsel. Order Granting Preliminary Approval of Class Action Settlement and Certification of Settlement Class, ECF No. 67 ("PA Order") at ¶¶2, 3. The Court provisionally appointed Richard D. McCune and Elaine S. Kusel of McCune Law Group, McCune Wright Arevalo Vercoski Kusel Weck Brandt, APC f/k/a McCune Wright Arevalo, LLP ("MLG"), and Joseph Marchese of Bursor & Fisher, PA ("BF") as Class Counsel. *Id.*

This Court appointed the lowest bidder, KCC LCC ("KCC") the Claims Administrator

pursuant to the terms of the Settlement Agreement; found that the methods of giving notice prescribed in the Settlement Agreement meet the requirements of the Federal Rules of Civil Procedure and due process, are the best notice practicable under the circumstances, shall constitute due and sufficient notice to all persons entitled thereto, and comply with the requirements of the Constitution of the United States; and, ordered that notice of the proposed settlement be served on class members. *Id.* at ¶6, 9, 10. On March 8, 2023, the Court issued an order updating the scheduling of settlement. ECF No. 79.

Plaintiffs can now report that the notice program ordered by this Court has been very successful, and Plaintiffs therefore present the matter for final approval. Specifically, as evidenced by the contemporaneously filed declaration of Zachary Cooley of the court-appointed claims administrator KCC, KCC mailed or emailed notice of this proposed class action settlement to the 38,175 unique class members, and had a successful deliverable rate of 99%. (Declaration of Zachary Cooley of KCC Dated January 4, 2021 ["KCC Decl."] ¶¶ 7-10.)[1]

As of May 11, 2023, only one class member had elected to opt out of the proposed settlement being presented to this Court for final approval, meaning more than 99% of the class members have elected to remain in the proposed settlement. (*Id*. at ¶14.) Further, also as of May 11, 2023, there have been no objections to the settlement whatsoever. (*Id*. at ¶15.) Class involvement is also high: KCC has received 2,559 timely-received claims so far. (*Id.* at ¶13.) Additionally, approximately 10,239 Class Members will be paid automatically. (*Id.* at ¶16.)

In sum, the proposed settlement of this class action is an excellent result for class

[1] Of 38,175 class members, KCC printed and mailed notices to 29,540 mailing addresses, and with only 299 returned as undeliverable. (KCC Decl. ¶¶7, 10.) Of those undelivered notices, KCC found updated addresses for 69 of those members, and remailed notice. (*Id.*) As well, KCC emailed 8,132 email notices, with 445 bounced back—however, KCC then mailed those 445 individuals postcard notices. (*Id.* at ¶ 9) Last, 58 class members had no physical or email address. (*Id.* at ¶7.) In sum, out of 38,175 class members, only 288 members could not be reached, or less than 1% of total class members.

members, and class members' reaction to it to date has been very favorable.

THE HISTORY OF THIS CASE

A. The Law and Motion Practice Which Occurred in This Case

Plaintiff Danielle Wellington filed this putative class action complaint entitled *Wellington v. Empower*, in the United States District Court Northern District of New York, Case No. 5:20-cv-01367-DNH-ML, on November 4, 2020, alleging claims for violation of the Electronic Fund Transfer Act (Regulation E), and violation of New York General Business Law § 349. ECF No. 1. On February 3, 2021, Defendant filed a Motion to Dismiss, and related documents. ECF No. 15. On February 23, 2021, Plaintiff Wellington filed her opposition to the Motion to Dismiss, and related documents. ECF No. 19. On February 26, 2021, Defendant filed a letter motion seeking leave to file excess pages for Defendant's reply brief. ECF No. 20. Plaintiff Wellington opposed that motion the very same day. ECF No. 21. On March 2, 2021, Defendant filed its reply in support of its motion to dismiss. ECF No. 22. On April 13, 2021, the Court denied Defendant's motion to dismiss, and ordered Defendant to file its Answer. ECF No. 25.

On April 26, 2021, Defendant filed its Answer. ECF No. 26. On May 11, 2021, Plaintiff Wellington and Defendant filed a civil case management statement with differing positions on whether discovery should be phased—Plaintiff Wellington preferred keeping all discovery on the same track and Defendant favored staying class discovery until other discovery was completed—as well as the sequence and timing of motions. ECF No. 30. On May 18, 2021, after a telephonic hearing, the Court issued a pretrial scheduling order, and did not bifurcate discovery. ECF No. 33.

On April 27, 2021, Plaintiff Conley filed an action in New York State Court in Onondaga County also related to Empower's overdraft fees, asserting breach of contract claims and violation of New York General Business Law § 349. (Marchese Decl. ¶3) On May 17, 2021,

Plaintiff Conley's action was removed to this Court, No. 5:21-cv-00566 (N.D.N.Y.) ("*Conley*"). On June 28, 2021, the Court consolidated the *Wellington* and *Conley* actions, designating *Wellington* as the lead action. ECF No. 36.

On June 27, 2022, Plaintiffs filed their motion for preliminary approval of the settlement. ECF No. 66. The Court subsequently granted preliminary approval of the settlement on July 19, 2022, finding on a preliminary basis, *inter alia*, that the Class satisfied the requirements under the Federal Rules and case law, and certifying the preliminary Settlement Class. ECF No. 67. After resolving the issues raised in Plaintiffs' Motion to Enforce the Settlement with the assistance of the Hon. Dianne M. Welsh of JAMS, ECF No. 68, Plaintiffs proceeded with the notice program. ECF No. 79.

B. The Formal Discovery Performed in this Case

On May 11, 2021, Plaintiff Wellington served her Rule 26 Initial Disclosures on Defendant. (Kusel Decl. ¶ 6.) On May 14, 2021, Defendant served its Rule 26 Initial Disclosures on Plaintiff Wellington. (*Id*.) On May 19, 2021, Plaintiff Wellington served her Interrogatories and First Set of Requests for Production of Documents on Defendant. (*Id.*) On May 26, 2021, Plaintiff Wellington served a notice of deposition under Fed. R. Civ. P. 30(b)(6) on Defendant. On June 18, 2021, Defendant served its responses to Plaintiff Wellington's discovery requests and also annexed 961 pages of documents with its response. (*Id.*)

Several discovery letters were also exchanged between Plaintiff Wellington and Defendant. (*Id.*) On June 2, 2021, Plaintiff Wellington wrote Defendant regarding the filing of a protective order as well as electronically stored information issues. (*Id.*) On June 11, 2021, Plaintiff Wellington sent Defendant a follow-up letter regarding the protective order as well as inquiring about Defendant's response to Plaintiff Wellington's deposition notice. (*Id.*) On July 8,

2021, Plaintiff Wellington sent a meet and confer letter to Defendant regarding its responses to Plaintiff Wellington's discovery requests. (*Id.*)

On July 12, 2021, Plaintiffs and Defendant held a meet and confer and discussed numerous discovery topics, including class size, damages, and their upcoming mediation. (*Id.*)

C. The First Mediation and Subsequent Confirmatory Discovery

On August 9, 2021, the parties participated in a mediation in this matter, with private mediator the Hon. Diane Welsh (Ret.) of JAMS. (Kusel Decl. ¶7.) The parties drafted and submitted mediation briefs to the mediator in advance of the mediation. (*Id.*) Settlement negotiations at all times were at arm's length, adversarial and devoid of any collusion. (*Id.*) Notably, the mediation lasted all day. (*Id.*) The parties agreed to a term sheet, outlining certain change of practices by Empower, a $2,000,000 payment, and Defendant agreeing to provide confirmatory discovery. (*Id.*) On August 18, 2021, the parties informed the Court of the mediation's result. (*Id.*) After the mediation, on September 29, 2021, Plaintiffs conducted two confirmatory depositions regarding Empower's overdraft practices and Empower's data. (*Id.*) On January 21, 2022, Plaintiffs received data from Empower which allowed for the identification of the number of individuals who had incurred overdraft fees and the amount of fees during each individual incurred the period from October 2018 through November 2020, which Defendant obtained from FiServ DNA, its current account processing platform. (*Id.*) After exchanging letters about the data, and Plaintiffs retaining an expert to analyze the data, Plaintiffs and Defendant negotiated a settlement agreement. (*Id.*)

The Settlement Agreement which is now being brought to this Court for final approval is attached as Exhibit A to Ms. Kusel's Declaration.

D. The Second Mediation and Resolution of Class List Issues

Even after preliminary approval, Plaintiffs and Class Counsel continued to place the interests of the Class at the forefront by filing a Motion to Enforce the Settlement Agreement on September 9, 2022. ECF No. 68. Plaintiffs took this action because they objected to Defendant's plan to use an extrapolation formula to determine which account holders incurred damages during the first part of the class period, specifically between April 27, 2015 and November 2018. (Kusel Decl. ¶8.) Defendant's position was based on the fact that it would be difficult and expensive to obtain that data because it was archived, and had been created with a account processing platform that it no longer used—the XP2 system. (*Id.*) While recognizing the additional work which would be required of both parties related to the retrieval and analysis of the XP2 data, Plaintiffs insisted that the parties comply with the Settlement Agreement which required Defendant to identify which Empower members had incurred overdrafts and how many each such individual had incurred throughout the Class Period. (*Id.*) After several futile meet and confers, Plaintiffs moved the Court to Enforce the Settlement Agreement by having Defendant provide Plaintiffs with the data necessary to identify Class Members when the XP2 platform was in use. (*Id.*) Defendant opposed. (*Id.*) Subsequently, Plaintiffs again engaged the services of the Hon. Diane Welsh (Ret.) of JAMS to resolve this dispute. (*Id.*) This mediation was held on October 31, 2022. (*Id.*) As a result of the mediation, Defendants agreed to provide Plaintiffs with the data necessary to identify Class Members in the XP2 period and to allow for the calculation of the total amount of fees each such individual incurred. (*Id.*) Thereafter, Plaintiffs' expert once again analyzed voluminous class data so that the settlement could proceed in the manner set forth in the Settlement Agreement and the Court's Preliminary Approval Order. (*Id.*).

ANALYSIS OF THE DATA

Plaintiffs' database expert, Arthur Olsen, has performed a thorough analysis of Defendant's actual data pertaining to overdraft fees assessed on class members. (Olsen Decl. ¶¶ 6-8.)

Mr. Olsen identified Empower members who were assessed at least one overdraft fee when the member had a balance in the account that was sufficient to cover the transaction at issue, after the application of any refunds already credited by Empower in the data set. (*Id.* at ¶ 6.) Mr. Olsen identified 610,598 such fees totaling $15,198,567. (*Id.*)

Mr. Olsen also estimated the value of certain changes in practice. With respect to Empower's cessation of charging Regulation E overdraft fees and re-opting in of members on September 24, 2021, Mr. Olsen estimates this resulted in $885,583 in reduced fees (*Id.* at ¶8.) With respect to charged off fees Empower assessed, but did not collect, Mr. Olsen estimates this resulted in approximately $2,300,000 in fees that were assessed but not collected and subsequently charged off. (*Id.* at ¶7.)

TERMS OF THE SETTLEMENT

A. Class Definition And Class' Claims

The settlement class, *i.e.*, the "Sufficient Funds Settlement Class," is defined as those members of Defendant who, from April 27, 2015 through September 24, 2021, were assessed an overdraft fee when the account had a positive actual balance at the time of the posting of the transaction, *i.e.*, a "Sufficient Funds Overdraft Charge." (SA ¶ 1(v).) "Regulation E Overdraft Fees" are Sufficient Funds Overdraft Charges on recurring debit card or ATM transaction when the account had a positive actual balance at the time of the posting of the transaction that were assessed from November 4, 2019 through September 24, 2021. (SA ¶ 1(t).) The liability theory is that Empower's opt-in form did not inform members that these fees were charged under the

"available balance" metric, rather than the "actual" or "ledger" balance metric, which violated Regulation E.

"GBL Overdraft Fees" are Sufficient Fund Overdraft Charges from November 4, 2017 through September 24, 2021. (SA ¶ 1(n)) The liability theory is that Empower's opt-in form did not inform members that these fees were charged under the "available balance" metric, rather than the "actual" or "ledger" balance metric, and therefore, the practice of charging positive balance overdraft fees was deceptive practice under NY GBL § 349.

Last, "Breach of Contract Overdraft Fees" are Sufficient Fund Overdraft Charges from April 27, 2015 through November 3, 2017. (SA ¶ 1(c)) The liability theory is that Empower's contracts did not authorize charging overdraft fees when the ledger or actual balance was positive.

B. The Settlement Amount

The value of the proposed settlement is approximately $5,185,583, arrived at as follows. First, Empower will pay $2,000,000 of cash. (SA ¶¶ 1(u), 8.) Second, as a part of this settlement, Empower has agreed to change its disclosures, and on September 24, 2021, Empower stopped charging overdraft fees on Regulation E transactions until such time as the members were opted-in utilizing the current opt-in form that specifically discloses Empower's usage of the available balance. (SA ¶ 2.) Mr. Olsen estimates that this will result in approximately $885,583 in reduced overdraft fees for the credit union's members. (Olsen Decl. ¶8.). Third, Empower also has agreed to forgive and release any claims it may have to collect any at-issue fees which were assessed by Empower but not collected and subsequently charged-off, totaling approximately $2,300,000. (SA ¶ 9; Olsen Decl. ¶7.) Therefore, the total value of the settlement is approximately $5,185,583.

C. Payments to Class Members.

Of the $2,000,000 "new money" portion of the proposed settlement, 25% of the Net Settlement Fund shall be allocated to Class Members' Regulation E Overdraft Fees; (2) 62.5% of the Net Settlement Fund shall be allocated to Class Members' GBL Overdraft Fees; and (3) 12.5% of the Net Settlement Fund shall be allocated to Class Members' Breach of Contract Overdraft Fees. (SA ¶ 8(d)(iv).) Each class member will receive a pro rata share of the settlement proportionate to the eligible fees assessed against the class member. (SA ¶ 8(d)(iv)(a)-(d).)

Class members will be paid by direct deposit into their accounts if they are current Empower customers, or will be mailed a check if they no longer have an account with Empower. (SA ¶ 8(d)(iv)(a)-(d).) For those class members who are paid by check, the class member shall have one-hundred eighty days (180) to negotiate the check, after which the payment will collect in the residue to be distributed class members with NY GBL Overdraft Fees, and then to one or more public interest organizations nominated by the parties. (SA, at ¶ 8(d)(iv)(a)-(d)) Members with Breach of Contract Overdraft Fees or Regulation E Overdraft Fees (not to exceed the total fee amount if overlapping with NY GBL Overdraft fees) will be required to submit claim forms without submitting any additional documentation. *Id.* The residual of these fees will revert to Class Members with NY GBL Overdraft Fees, for which claims do not need to be filed. *Id.*

E. Cy Pres Distribution

Under no circumstances will any of the money from this settlement revert to Defendant. (SA ¶ 8(d)(iv)(e).) Rather, "[s]ubject to Court approval, within thirty (30) days after the Final Report, the total amount of uncashed checks, and residual amounts held by the Claims Administrator at the time of the Final Report, shall be paid by the Claims Administrator to one or more public interest organizations nominated by the parties[.]" (SA ¶ 12.)

The parties will meet and confer, and submit regarding a *cy pres* recipient nominee to the Court after entry of a final approval order.

ARGUMENT

The Settlement Satisfies The Standards Governing Final Approval

Federal Rule of Civil Procedure Rule 23(e)(2), as amended effective December 2018, provides that a court may finally approve a settlement only after "finding that it is fair, reasonable, and adequate." Fed. R Civ. P. 23(e)(2). To determine whether that requirement is met, the court must consider: (A) the adequacy of the representation by the class representatives and class counsel; (B) whether the proposal was negotiated at arm's length; (C) the adequacy of the relief that the proposed settlement provides for the class; and (D) whether all members of the are treated equitably relative to each other under terms of the proposed settlement. Fed. R. Civ. P. 23(e)(2)(A)-(D). Plaintiffs have satisfied all these elements of Rule 23(e)(2).

In *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir.1974), the Second Circuit held that the following should be considered in evaluating a class action settlement: (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; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Courts in the Second Circuit have continued to apply the *Grinnell* factors after the amendment to Rule 23(e)(2). *Christine Asia Co. v. Yun Ma*, No. 115MD02631CMSDA, 2019 WL 5257534, at *9 (S.D.N.Y. Oct. 16, 2019) ("The Court understands the new Rule 23(e)

factors to add to, rather than displace, the *Grinnell* factors."). Further, "not every factor must weigh in favor of [the] settlement, rather the court should consider the totality of these factors in light of the particular circumstances." *Id.* at *9.

1. The Complexity, Expense, and Duration of the Litigation

This first *Grinnell* factor is satisfied. "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them," and this class action is no different. *In re Austrian & German Bank Holocaust Litig*., 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000). This case involves complex consumer law issues as they intersect federal banking law. In the absence of the Settlement, Plaintiffs would be required to pursue numerous further motions, a trial, and the party losing the trial undoubtedly would appeal. (Kusel Decl. ¶9.) All of this would add further years of delay before the class members could enjoy the benefit of a verdict, if any, obtained in their favor. *In re Sony SXRD Rear Projection TV Class Action Litig.*, No. 06 Civ. 5173 (RPP), 2008 WL 1956267, at *6 (S.D.N.Y. May 1, 2008) ("Not only would Plaintiffs spend substantial sums in litigating this case through trial and appeals, it could be years before class members saw any recovery, if at all.").

2. The Reaction of the Class to the Settlement

The reaction of the class members to the Settlement is an important factor in assessing its fairness and adequacy, and the lack of objections "'evidenc[es] the fairness of a settlement.'" *In re PaineWebber Ltd. P'ships Litig*., 171 F.R.D. 104, 126 (S.D.N.Y.), *aff'd*, 117 F.3d 721 (2d Cir. 1997). "'If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.'" *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 118 (2d Cir. 2005). Here, to date, there have been no objections whatsoever, and only one class member has elected to opt out of the proposed settlement being presented to this Court for final

approval, meaning more than 99% of the class members have elected to remain in the proposed settlement. (KCC Decl. ¶¶14-15.) It has been noted that 18 objections in a class of 27,883- weighs in favor of settlement. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001). The second *Grinnell* factor favors approval.

3. The Stage of the Proceedings and Discovery Completed

A court will consider "whether [plaintiffs] had adequate information about their claims such that their counsel can intelligently evaluate the merits of claims, the strengths of defenses asserted…, and the value of plaintiffs' causes of action for purposes of settlement.'" *In re Bear Stearns Cos*., 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012). As already set forth in Section II, *supra*, substantial discovery has been performed, and multiple motions have been briefed. Class Counsel "developed a comprehensive understanding of the key legal and factual issues in the litigation and, at the time the Settlement was reached, had 'a clear view of the strengths and weaknesses…and…range of possible outcomes at trial." *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 WL 1883494, at *7 (S.D.N.Y. May 9, 2014). The third *Grinnell* factor is satisfied.

4. The Risks of Establishing Liability and Damages, Combined With The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and the Attendant Risks of Litigation

This pertains to *Grinnell* factors 4 (risks of establishing liability), 5 (risks of establishing damages), 8 (range of reasonableness of the settlement fund in light of the best possible recovery), and 9 (range of reasonableness in light of all attendant risks). "Courts typically collapse into this inquiry ['the risks of establishing liability and damages'] the final two Grinnell factors: '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.'" *Guevoura Fund Ltd. v. Sillerman*, No. 1:15-CV-07192-CM, 2019

WL 6889901, at *9 n.1 (S.D.N.Y. Dec. 18, 2019). In considering the reasonableness of a settlement, "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…." *In re Citigroup, Inc. Sec. Litig*., 965 F. Supp. 2d 369, 384 (S.D.N.Y. 2013). The adequacy of the amount offered in settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig*., 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir.1987).

The aggregate possible class damages at issue in this case are $15,198,567. (Olsen Decl. ¶ 6.) This means that the proposed settlement value of $5,185,583 represents an extraordinary 34% of the possible damages. Even if one were to look only at the $2,000,000 "new money" component of this proposed settlement, this still represents approximately 13.2% of the total damages at issue.[2]

Courts have determined that settlements are, of course, reasonable where plaintiffs recover only part of their actual losses. *See Grinnell*, 356 F. Supp. 1380, 1386 (a recovery of 3.2% to 3.7 % of the amount sought is "well within the ball park"); *see also Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988), *aff'd* 899 F.2d 21 (11th Cir. 1990) ("[T]he fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate"). As the Second Circuit has held, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved."

[2] Under *Grinnell*, courts also consider the ability of the defendants to withstand a greater judgment. "[A] defendant is not required to 'empty its coffers' before a settlement can be found adequate." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 191 (S.D.N.Y. 2012). Thus, although Empower might be able to withstand a greater judgment, this factor should not weigh in either direction.

Grinnell, 495 F.2d at 455. The Second Circuit further explained that, "[i]n fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id*. at 455 n.2. *See also In re Initial Pub. Offering Sec. Litig*., 671 F. Supp. 2d 467, 484 (S.D.N.Y. 2009) (approving settlement that represented two percent of plaintiffs' damages expert's calculation); *Hicks v. Stanley*, No. 01 CIV. 10071 (RJH), 2005 WL 2757792, at *7 (S.D.N.Y. Oct. 24, 2005) (finding a settlement representing 3.8% of estimated damages to be within range of reasonableness).

Although Plaintiffs do believe the case for liability in this action is strong, it is possible that a trier of fact might believe that the language in the agreements at issue actually did allow the Defendant to assess overdraft and NSF fees in the manner it did. (Kusel Decl. ¶9.) If the proposed settlement were not approved, the case still would require substantial legal work, all of which would carry some risk for Plaintiffs. (*Id*.) For example, although Class Counsel believes the likelihood for certification is strong, it is never certain, even in cases which have the strongest reasons for certification. (*Id*.) Moreover, even if certification was granted, it could have been challenged at a later stage. *Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) ("Even if certified, the class would face the risk of decertification."). This settlement thus eliminates any uncertainty regarding certification. Next, Defendant would file a motion for summary judgment, and although Plaintiffs believe they would defeat it, it is another risk. (*Id*.) If Plaintiffs prevailed on those motions, and if the case still did not resolve, next there would have been an expensive trial, and regardless of which party prevailed, there likely would be appellate practice, further delaying any possible actual receipt of money by the class members, and further substantially increasing the number of attorney hours spend and the dollar amount spent on

costs. (*Id*.) The risk and cost of attorneys' fees to both sides from all of this activity would be substantial. (*Id*.)

5. Notice to The Settlement Class Satisfied FRCP Rule 23

Adequate notice must be fairly understood by the average class member, fairly apprise prospective class members of the proposed settlement terms and the options open to them, and will satisfy due process when it informs class members of the allocation of attorney's fees and provide the final approval hearing date, time and place. *Wal-Mart Stores, Inc.*, 396 F.3d at 114. Rule 23(e)(1)(B) requires that notice of the proposed settlement be given "in a reasonable manner to all class members who would be bound by the proposal." Here, as demonstrated by the contemporaneously filed declaration of the claims administrator, KCC, both the content of the Court-approved Notice and its distribution to settlement class members satisfied all applicable notice requirements, including that it reached 99% of class members. (KCC Decl. ¶¶7-10.)

6. The Other Factors Set Forth in Rule 23(e)(2).

As stated, Rule 23(e)(2), as amended, also considers: (i) the effectiveness of the proposed method of distributing relief to the class, including the method of processing class- member claims; (ii) the terms of any proposed award of attorneys' fees, including timing of payment; (iii) any agreement made in connection with the proposed settlement; and (iv) the equitable treatment of class members. *See* Rule 23(e)(2)(C)(ii), (iii), and (iv); Rule 23(e)(2)(D). Each of these additional considerations also supports final approval of the settlement.

With regard to the first prong, the effectiveness of the method of distribution of the relief to the class members, as stated, class members who remain Empower members at the time of the distribution will receive a deposit to their accounts, and those class members who are not members of Defendant shall be sent a check. § IV, *supra*. With regard to the second prong, attorneys' fees, as set forth below, the amount being sought is reasonable. *See* §V.B, *infra*. With

regard to the third prong, other agreements, there are none. Finally, with regard to the last prong, equitable treatment, the class members will receive awards *pro rata* to their damages, with special consideration given to the strength of the categories of claims or fees. § IV, *supra*. "Settlement distributions, such as this one, that apportion funds according to the relative amount of damages suffered by class members, have repeatedly been deemed fair and reasonable." *In re Vitamins Antitrust Litig*., 2000 WL 1737867, at *6 (D.D.C. Mar. 31, 2000); *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004) ("A reasonable plan may consider the relative strength and values of different categories of claims.").

7. The Settlement Was Negotiated at Arm's Length

Rule 23(e)(2)(B) instructs the Court to consider whether the proposed settlement was negotiated at arm's length. The Court "must review the negotiating process leading up to the settlement for procedural fairness, to ensure that the settlement resulted from an arm's-length, good faith negotiation between experienced and skilled litigators." *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013) (citing *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803–04 (2d Cir. 2009). There is typically an initial presumption that a settlement is fair and reasonable when it was the result of arm's length negotiations between experienced, capable counsel after meaningful discovery. *McReynolds*, 588 F.3d at 804 ("We have recognized a presumption of fairness, reasonableness, and adequacy as to the settlement where "a class settlement [is] reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.").

Here, there is no doubt this occurred, as the settlement is the result of the acceptance of a mediator's proposal after mediation and follow-up confirmatory discovery, including depositions and data review. (Kusel Decl. ¶7.) As such, the presumption that the Settlement is fair is further strengthened. *Kemp-DeLisser v. St. Francis Hospital* and Medical Center Fin. Committee, 2016 WL 6542707, at *4 (D. Conn. Nov. 3, 2016) (finding that "the proposed Settlement resulted from

informed, extensive arm's-length negotiations, including participating in mediation with an experienced mediator"); *In re Viropharma Inc. Sec. Litig.*, No. CV 12-2714, 2016 WL 312108, at *8 (E.D. Pa. Jan. 25, 2016) (the "participation of an independent mediator in settlement negotiations virtually insures [sic] that the negotiations were conducted at arm's length and without collusion between the parties").

Finally, courts have consistently found that "[r]ecommendations of experienced counsel are entitled to great weight in evaluating a proposed settlement in a class action because such counsel are most closely acquainted with the facts of the underlying litigation." *Godson v. Eltman, Eltman, & Cooper, P.C.*, 328 F.R.D. 35, 53 (W.D.N.Y. Oct. 23, 2018). Class Counsel are very experienced in consumer class actions, and have particular experience in overdraft fee class actions. (Kusel Decl. ¶3; Marchese Decl. ¶18) They have investigated the issues raised in this action, and favor the settlement. (Kusel Decl. ¶¶31-32.)

Accordingly, in light of the foregoing factors, the settlement should be finally approved.

The Attorneys' Fees and Costs Request Is Appropriate

Federal courts recognize that a lawyer whose efforts create a common fund should recover a reasonable fee. *Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229 (2d Cir. 2007). Although either a lodestar analysis or percentage-of-the-fund is permitted in the Second Circuit, the percentage-of-the-fund method, under which counsel is awarded a percentage of the fund they created, is often the preferred means to determine a fee because it "'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.'" *Wal-Mart*, 396 F.3d at 122. "[T]he prospect of a percentage fee award from a common settlement fund, as here, aligns the interests of class counsel with those of the class."

Hayes v. Harmony Gold Mining Co., 509 F. App'x 21, 24 (2d Cir. 2013). The "trend in this Circuit is toward the percentage method." *Wal-Mart*, 396 F.3d at 122.

Class Counsel applies for a fee award pursuant to a percentage-of-fund method. Under the terms of the Settlement Agreement, Class Counsel may apply for attorneys' fees of up to one-third of the "Value of the Settlement." (SA ¶ 8(d)(i).) The "Value of the Settlement" as defined in the Settlement Agreement equals $5,185,583, (SA ¶1(x).; Olsen Decl. at ¶¶7-8) This means that per the Settlement Agreement, Class Counsel can apply for as much as $1,728,527 in fees without objection by Defendant. (SA¶ 8(d).) Nonetheless, despite the value of the changes in practices and written off fees which have significant value for the Class, Class Counsel will apply only for $948,812, which is just 18% of the Value of the Settlement, or just 22% of the Value of the Settlement without taking into consideration the saved fees from re-opting in Empower members ($4.3 million).

1. The Fee Request Is Appropriate Under Comparable Authority

A one-third fee is a common award in the Second Circuit. *See, e.g.*, *Capsolas v. Pasta Res. Inc.*, 2012 WL 4760910, at *8 (S.D.N.Y. Oct. 5, 2012) ("Class counsel's request for one-third of the Fund is reasonable and consistent with the norms of class litigation in this circuit"); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) (noting that "Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit."); *Gilliam v. Addicts Rehab. Ctr. Fund*, 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008) (fee equal to one-third of the settlement fund is reasonable and "consistent with the norms of class litigation in this circuit"); *Bozak v. FedEx Ground Package Sys., Inc.*, 2014 WL 3778211, at * 7 (D. Conn. July 31, 2014) ("The one-third amount that plaintiffs request is typical of awards in this Circuit."); *In re Med. X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL 661515, *7 (E.D.N.Y. Aug. 7, 1998) (holding that

class counsel's request for one-third of the $39.4 million settlement fund "is well within the range accepted by courts in this circuit; *Klein v. PDG Remediation, Inc.*, No. 95-cv-4954- DAB, 1999 WL 38179, at *4 (S.D.N.Y. Jan. 28, 1999) ("33% of the settlement fund . . . is within the range of reasonable attorney fees awarded in the Second Circuit").

With regard to consumer class actions challenging the propriety of overdraft fees imposed by a financial institution, a one-third or greater award is also common. *See Jacobs v. Huntington Bancshares Inc.*, Dkt. No. 11-00090, Lake County Court of Common Pleas (OH), Final Approval June 2, 2017 (settlement of $15,975,000, and fees awarded of 40%); *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); *Kelly v. Old National Bank*, Dkt. No. 82C01-1012, Vanderburgh Circuit Court (IN), Final Approval June 13, 2016 (Settlement of $4,750,000, fees awarded of 40%); *Gunter v. United Federal CU*, Case No. 3:15-cv-00483-MMD-WGC (D. Nev.) (fees of 47.6%). The one-third award is also common in the Second Circuit in much larger cases as well. *See, e.g.*, *Landmen Partners, Inc. v. Blackstone Grp., L.P.*, No. 08-cv-03601-HB-FM, 2013 WL 11330936, at *3 (S.D.N.Y. Dec. 18, 2013) (awarding 33.33% of $85 million recovery, plus expenses); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding 33.33% of $586 million recovery).[3]

[3] Even when actions resulting from a lawsuit are not "monetary" in nature like these are, courts nonetheless routinely include them in calculating the value of a proposed settlement for purposes of an attorney fee award. For example, according to the Federal Judicial Center, "Courts use two methods to calculate fees for cases in which the settlement is susceptible to an objective evaluation. The primary method is based on a percentage of the actual value to the class of any settlement fund plus the actual value of any nonmonetary relief." Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges, 3d. Ed., 35 (2010) (emphasis added). And according to the American Law Institute, "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 nonmonetary value of the judgment or settlement." Principles of the Law of Aggregate Litigation, The American Law Institute, Mar 1, 2010 § 3.13 (emphasis added). Under this rationale, "[i]n calculating the overall settlement value for purposes of the 'percentage of the recovery' approach, Courts include the value of both the monetary and nonmonetary benefits conferred on the Class." *Poertner v. Gillette Co.*, 618 Fed. Appx. 624 (11th Cir. 2015) (approving percentage of common fund award and finding that "settlement's allocation of benefits was fair" by including "the value of the nonmonetary relief and cy pres award" as "part of the settlement pie," rejecting objector's argument that analysis of a reasonable attorney

2. The *Goldberger* Factors Support The Fee Request

The Second Circuit has held that the appropriate criteria to consider when reviewing a request for attorneys' fees in a common-fund case include the *Goldberger* 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 v. Integrated Res., Inc*., 209 F.3d 43 (2d Cir. 2000). As demonstrated below, these factors support approval of the requested fee.

Under the first *Goldberger* factor, the time and labor expended, the work done in this case has been substantial, and is set forth in the declarations of Ms. Kusel and Mr. Marchese. Further, as documented by Class Counsel's declarations, the law firms have spent in excess of 1,300 hours on this matter. (Kusel Decl. ¶23; Marchese Decl. ¶9.) Regarding the second *Goldberger* factor, magnitude and complexity of the litigation, "[m]ost class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig*., 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000). This class action is no exception. It is particularly complex as it involves not only consumer class action issues, but also their intersection with federal banking regulations. Regarding the third *Goldberger* factor, the risk of the litigation, the case had many risks, not only that of class certification, but also challenges by Defendant via a potential Motion for Summary Judgment. Further, if the case continued, a trier of fact might disagree with the interpretation of

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fee should "exclud[e] the substantial nonmonetary benefit and the cy pres award"); *In re Nutella Mktg. & Sales Practices Litig.*, 589 Fed. Appx. 53, 57 (3d Cir. 2014) ("[f]or purposes of approving the settlement, an exact figure is not required to evaluate the settlement's nonmonetary benefits;" *Fleischer v. Phx. Life Ins. Co.*, Civil Action No. 11-cv-8405 (CM), 2015 U.S. Dist. LEXIS 121574, at *51-55 (S.D.N.Y. Sep. 9, 2015); *Velez v. Novartis Pharm. Corp*., No. 04 CIV 09194 CM, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010) (awarded fee based on "gross settlement benefit"); *Pinto v. Princess Cruise Lines*, 513 F. Supp. 2d 1334, 1342-43 (S.D. Fla. 2007) ("[W]hen determining the total value of a class action settlement for purposes of calculating the attorneys' fee award, courts usually consider not only the compensatory relief, but also the economic value of any prospective injunctive relief obtained for the class.").

the contracts and regulations as advocated by Plaintiffs.

With respect to risk, a court should consider "'the contingent nature of the expected compensation'" and the "'risk of non-payment viewed as of the time of the filing of the suit." *Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 276 (E.D.N.Y. 2009). Here, Class Counsel undertook the case on an entirely contingent basis, has not been paid a single penny to date, and has forsaken other available work instead to pursue the prosecution of this contingent matter, one with substantial risk. (Kusel Decl ¶22; Marchese Decl. ¶9.) The Second Circuit recognizes that risk associated with a case undertaken on a contingent basis is an important factor in determining a fee award:

> No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

City of Detroit v. Grinnell Corp., 495F.2d 448, 470 (2d Cir. 1974).

Regarding the fourth *Goldberger* factor, the quality of representation, the experience of Class Counsel are presented in the Class Counsel's declarations. They both have substantial experience in the specialized field of class actions pertaining to overdraft fees such as the ones in this litigation, and as a result of their expertise were able to obtain an excellent result for the class members. Further, Defendant in this matter was represented by a very sophisticated law firm of high quality, and courts recognize that the quality of opposing counsel should be taken into account in assessing the quality of plaintiffs' counsel's performance. *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2020) ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement.").

Regarding the fifth *Goldberger* factor, the requested fee in relation to the settlement, as discussed above, *supra* § V.B.1, is one-third, and this is common in the Second Circuit, and what has been most often awarded in overdraft fee class actions, and less than has been awarded in many other overdraft fee class actions. With regard to the final Goldberger factor, public policy considerations, recovery of millions of dollars in allegedly wrongful overdraft fees for the consumers who were charged these fees certainly promotes public policy. *See* United States Consumer Financial Protection Bureau, *CFPB Research Shows Banks' Deep Dependence on Overdraft Fees*, https://www.consumerfinance.gov/about-us/newsroom/cfpb-research-shows-banks-deep-dependence-on-overdraft-fees/ (Dec. 1, 2021) ("'Rather than competing on quality service and attractive interest rates, many banks have become hooked on overdraft fees to feed their profit model,' said CFPB Director Rohit Chopra. 'We will be taking action to restore meaningful competition to this market.'"). In sum, all of the *Goldberger* factors support the requested fee in this matter.

3. A Lodestar Crosscheck Also Supports The Fee Request

Furthermore, should this Court wish to perform a lodestar cross-check, Class Counsel together have a lodestar in this matter of approximately $746,077.59 based on current billing rates, meaning a multiplier of approximately 1.2 ($948,812÷$746,077.59). (Kusel Decl. ¶25; Marchese Decl. ¶9.) Multipliers of between 1 and 2 are common in the Second Circuit. *See In re Agent Orange Prod. Liab. Litig*., 818 F.2d 226, 234 (2d Cir. 1987) (upholding multipliers of 1.5, and in one case 1.75); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) (applying 1.6 multiplier); *In re BioScrip, Inc. Sec. Litig.*, 273 F. Supp. 3d 474, 497 (S.D.N.Y. 2017), *aff'd sub nom. Fresno Cnty. Employees' Ret. Ass'n v. Isaacson/Weaver Fam. Tr.*, 925 F.3d 63 (2d Cir. 2019) (upholding 1.39 multiplier). *Hall v. ProSource Techs., LLC*, No. 14-CV-2502 (SIL), 2016 WL 1555128, a *14 (E.D.N.Y. Apr. 11, 2016) (upholding 2.01 multiplier);

Gattinella v. Michael Kors (USA), Inc., No. 14–CV–5731, 2016 WL 690877, at *2 (S.D.N.Y. Feb. 9, 2016) (applying 1.94 multiplier).

Indeed, courts even approve multipliers of 3-4, establishing the reasonableness of Plaintiffs' request. *See Wal-Mart*, 396 F.3d at 123 (upholding multiplier of 3.5); NASDAQ Market–Makers, 187 F.R.D. at 489 ("multipliers of between 3 and 4.5 have become common"); *NECA-IBEW Health & Welfare Fund v. Goldman, Sachs & Co.*, No. 1:08- cv-10783-LAP, 2016 WL 3369534, at *1 (S.D.N.Y. May 2, 2016) (3.9 multiplier on $272 million settlement); *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 185 (W.D.N.Y. 2011) (multiplier of 5.3 was "not atypical" in similar cases); *Cornwell v. Credit Suisse Grp.*, No. 08-cv-03758 (VM), 2011 WL 13263367, at *2 (S.D.N.Y. July 20, 2011) (4.7 multiplier); *In re Telik, Inc. Sec. Litig*., 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts, including this Court.").

4. Class Counsel's Requests For Costs Should Be Granted

Regarding costs, they are $94,291.04, and are detailed in the declarations of Class Counsel. (Kusel Decl. at ¶28; Marchese Decl. at ¶12.) Under the common fund doctrine, counsel is entitled to reimbursement from the fund for reasonable litigation expenses such as these. *See Reichman v. Bonsignore, Brignati & Mazzotta P.C.*, 818 F.2d 278, 283 (2d Cir. 1987). Class Counsel expect to incur an additional $10,000 to finalize the settlement, mostly in the form of expert fees and travel expenses for the final approval hearing. (Kusel Decl. at ¶29.) Accordingly, Plaintiffs respectfully request that Class Counsel's costs be reimbursed.

Finally, the court appointed claims administrator, KCC, is also to be paid from the settlement, and has agreed to cap its billing at $88,150. (Kusel Decl. ¶30; KCC Decl. ¶18); *see also* ECF No. 67 at ¶12 (preliminary approval order stating that, "All costs incurred in connection with providing notice and settlement administration services to the Class Members

shall be paid from the Settlement Fund.").

A Class Representative Service Award Is Also Appropriate

Plaintiffs are also moving for the Court to approve a service award to two proposed class representatives, Ms. Danielle Wellington and Ms. Dianna Conley, of $10,000 each. "[S]ervice awards are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiff." *Torres v. Gristede's Operating Corp.*, No. 04-CV-3316 PAC, 2010 WL 5507892, at *7 (S.D.N.Y. Dec. 21, 2010), *aff'd*, 519 F. App'x 1 (2d Cir. 2013) (approving as "reasonable service awards of $15,000 each" for fifteen named plaintiffs for a total of $225,000 from a settlement fund of $3,530,000; *Story v. SEFCU*, No. 1:18-CV-764 (MAD/DJS), 2021 WL 736962, at *10-11 (N.D.N.Y. Feb. 25, 2021) (awarding each of the three named plaintiffs a $15,000 service award); *Times v. Target Corp*., No. 18 CIV. 02993, 2019 WL 5616867, at *5 (S.D.N.Y. Oct. 29, 2019) (service award of $20,000).

The substantial and meaningful work of Ms. Wellington and Ms. Conley on behalf of the class is detailed in their declarations filed concurrently with this Motion for Final Approval. Each of the class representatives communicated with Class Counsel extensively throughout the case; reviewed and gathered documents for Class Counsel; and, reviewed and approved of the proposed settlement in this matter.

THE PROPOSED SETTLEMENT CLASS SHOULD BE FINALLY CERTIFIED

In granting preliminary approval, this Court already determined that the proposed settlement class fulfills all the criteria of Rule 23, and is appropriate for certification. ECF No. 67. Specifically, the Court found the class was numerous as to make joinder impracticable; that there existed that common issues of law and fact; that these common issues predominated; that

the claims of the class representatives were typical of the class members; that the class representatives and Class Counsel had and would protect the interests of the class members; and, that a class action is superior to other methods for adjudicating the controversy. *Id.* None of these factors have changed, and it is appropriate now to grant final certification.

CONCLUSION

Plaintiffs respectfully request that the Court grant final approval of the settlement, Class Counsel's request for attorney's fees and costs, the request for approval of class administrator expenses, and the request for a service award to the class representatives, in their entirety.

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Respectfully Submitted,

By:/s/ Elaine S. Kusel

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