IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

ARNOLD GOLDEN Plaintiff, vs. BANCO POPULAR DE PUERTO RICO, Defendant.	Civil Action No. 3:20-cv-00095

MEMORANDUM OF LAW IN SUPPORT OF MOTON FOR: (1) CERTIFICATION OF SETTLEMENT CLASS; (2) FINAL APPROVAL OF CLASS ACTION SETTLEMENT; (3) PAYMENT OF CLASS COUNSEL'S FEES AND EXPENSES; AND, (4) PAYMENT OF A SERVICE AWARD TO THE CLASS REPRESENTATIVE

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NOW APPEARS plaintiff Arnold Golden ("Plaintiff" or "Class Representative")[1] who hereby respectfully requests the relief as set forth below:[2]

I. INTRODUCTION

Class Representative Arnold Golden, on his own behalf and on behalf of the Settlement Class he represents in the above-captioned action, submit this brief in support of his motion for an order that grants: (i) certification of the Settlement Class; (ii) final approval of the Settlement on the terms set forth in the Settlement Agreement and Releases previously filed with the Court on January 19, 2023 (ECF No. 109)(the "Settlement Agreement" or "Settlement"); (iii) payment of Class Counsel and Liaison Counsel's fees and expenses; and, (iv) payment of a service award to the Class Representative.

This Court has already reviewed the terms of the Settlement and granted preliminary approval of the Settlement, while also finding that all requirements for class certification were met. *See* March 31, 2023 Preliminary Approval Order (ECF No. 119). The Court now should certify the class and grant Final Approval because the Settlement provides substantial relief for the Settlement Class and the terms of the Settlement are well within the range of reasonableness and consistent with applicable case law. Indeed, given the significant risks inherent in this litigation, the $1,653,000 Settlement Fund alone is an excellent result for the Settlement Class. But that is not all. Banco Popular de Puerto Rico ("BPPR" or the "Bank") has agreed to cease—for a period of at least five years—the fee assessment practice at the heart of this case. This package of benefits is a terrific recovery for the Settlement Class.

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[1] All capitalize terms have the same meaning as capitalize terms in the Definitions section of the Settlement Agreement. *See* ECF No. 109, pp. 3-11.

[2] Plaintiff shall submit to the Court a proposed order granting final approval and the other relief sought by this memorandum of law shortly before the hearing scheduled for September 8, 2023.

The Settlement satisfies all Third Circuit Court of Appeals criteria for settlement approval. One keystone of this Settlement is that all Settlement Class Members will receive their pro rata share of the Net Settlement Fund without having to complete any claims forms, and Settlement Class Members will not be asked to prove they were damaged by practices alleged in the Action. Instead, available information of the relevant fees assessed to each Settlement Class Member during the Class Period will be used to calculate each Settlement Class Member's distribution. Thus, the plan of allocation fairly and adequately accounts for the value of each Settlement Class Member's individual claim. In the face of certain risks discussed below, this Settlement is fair and reasonable and merits Final Approval.

With respect to the fees and expenses sought by Class Counsel and Liaison Counsel for their hard work on this matter, the requested amount of one-third of the settlement fund is in-line with Third Circuit precedent and should therefore be granted. The reimbursement of expenses incurred also should be granted as the expenses incurred were reasonable and instrumental to the prosecution and ultimate resolution of this matter. Finally, the service award of $10,000 to the Class Representative should also be granted as Mr. Golden was instrumental to the successful prosecution and resolution of this matter.

II. BACKGROUND

A. Procedural History

Plaintiff Golden filed a putative class action complaint on October 1, 2020, alleging claims for breach of contract; breach of the covenant of good faith and fair dealing; unjust enrichment; and, violation of the Consumer Protection Law of 1973 of the Virgin Islands on his behalf and on behalf of persons similarly situated. The claims are based on BPPR's standardized checking account agreement drafted by BPPR. Plaintiff Golden alleged that in breach of certain contractual

promises in BPPR's checking account agreement, BPPR assessed overdraft ("OD") fees on what he calls Authorize Positive, Purportedly Settle Negative Transactions" ("APPSN Transaction" or "APPSN Transactions"), where a bank assesses OD Fees on a transaction that overdraws the account when it settles although the transaction had previously been the subject of an authorization to the merchant that was issued against sufficient funds.

BPPR moved to dismiss the complaint on January 4, 2021, and the parties fully briefed the motion. The motion to dismiss was outstanding when the settlement was reached.

Plaintiff Golden served extensive written discovery while the motion to dismiss was pending. Discovery was ongoing at the time the Parties agreed to a mediation in this case.

Defendant produced, on a confidential basis and subject to the Stipulated Confidentiality Order issued by the Court, documents and a large quantity of transactional data regarding OD fees on APPSN Transactions, which Plaintiff's counsel analyzed.

On October 14, 2022, the Parties participated in a full-day mediation session with an esteemed former federal judge - the Hon. José Fusté (Ret.) - in San Juan, Puerto Rico. The Parties reached an agreement in principle and signed a term sheet that day.

On October 19, 2022, the Parties filed a Notice of Settlement, confirming their agreement in principle and requesting that the Court stay all deadlines in the action.

On January 19, 2023, Plaintiff filed the signed Settlement Agreement and a Motion for Preliminary Approval of the Settlement Agreement. *See* ECF Nos. 109 (Settlement Agreement; 110 (Motion for Preliminary Approval).

On March 31, 2023, this Court granted Preliminary Approval of the Settlement, ordered that notice be disseminated pursuant to the notice plan, and set September 8, 2023 as the date for the final approval hearing. *See* ECF No. 119 (Preliminary Approval Order).

B. Class Counsel's Investigation and Litigation of the Action

Class Counsel spent many hours investigating the claims of the Plaintiff against BPPR. See Declaration of Michael R. Reese in Support of Final Approval ("Reese Decl."), at ¶¶ 5-7. Class Counsel interviewed Plaintiff to gather information about BPPR's disclosures and practices and their potential impact upon consumers, which was essential to counsel's ability to understand the nature of the potential claims and issues, the language of the account agreement and other documents at issue, and potential remedies. *Id*. at ¶ 6. Class Counsel expended significant resources researching and developing the legal claims at issue. *Id*. at ¶7. Class Counsel are familiar with the claims as they have litigated and resolved other bank fee claims with similar factual and legal issues in courts across the country. *Id*. at ¶¶ 2-3. Class Counsel have experience in understanding the damages at issue, the information critical to determine class membership, and the necessary data to calculate each Settlement Class Member's damages. *Id*. at ¶¶ 2-3, 8.

The issues were heavily contested throughout the litigation, Defendant filed a motion to dismiss, which Class Counsel researched and to which Class Counsel filed an opposition. *Id*. at ¶ 7. Each side also served each other with extensive discovery requests and produced discovery in this litigation. *Id.*

Class Counsel spent a significant amount of time analyzing data related to the assessment of the Class Fees at issue. *Id*. at ¶ 9. The Parties conferred regarding the calculations' accuracy. *Id*. at ¶ 10. Prior to the mediation, Class Counsel used this data to analyze the alleged damages at issue. *Id*., ¶ at 11.

Consequently, Class Counsel mediated with the Honorable José A. Fusté (Ret.) (a former chief federal judge) fully informed of the merits of Settlement Class Members' claims and negotiated the proposed Settlement while zealously advancing the position of Plaintiff and other Settlement Class Members and being fully prepared to continue to litigate rather than accept a

settlement that was not in the best interest of Plaintiff and the other members of the Settlement Class. *Id*. at ¶ 12. In sum, Class Counsel spent significant time conferring with Plaintiff; investigating facts; researching the law; preparing a well-pleaded complaint; opposing a motion to dismiss; engaging in discovery and reviewing important documents and data; preparing the Settlement Agreement; drafting the motion for preliminary approval; and, drafting the motion for final approval now pending before Your Honor. *Id*. at ¶ 13.

III. SETTLEMENT TERMS

A. The Settlement Class.

The Settlement Class is a Federal Rule of Civil Procedure 23(b)(3) opt-out class defined as:

> All holders of BPPR consumer checking Accounts (including Multicuenta accounts) at branches in the United States and its territories, who, during the Class Period, paid and were not refunded an overdraft ("OD") fee in connection with a transaction on their account where the transaction had been authorized against available funds.
>
> Excluded from the Settlement Class are Defendant, its parents, subsidiaries, affiliates, officers and directors; all Settlement Class members who make a timely election to opt out; and all judges assigned to this litigation and their immediate family members.

Settlement Agreement at ¶ 3.1.

B. Relief for the Benefit of the Settlement Class.

1. Settlement Fund

The Settlement Fund is $1,653,000 and will be used to pay: (a) Settlement Class Members their respective Settlement Class Member Payments out of the Net Settlement Fund; (b) Class Counsel and Liaison Counsel for their attorneys' fees and costs; (c) the Service Award for the Class Representative; (d) Settlement Administration Costs; and (e) if funds remain after the second

distribution of the Net Settlement Fund to Settlement Class Members, to distribute to the *cy pres* recipient. Settlement Agreement at ¶ 6.

Settlement Class Members do not have to submit claims or take any other affirmative step to receive relief under the Settlement. Instead, as soon as practicable, but no later than 60 days following the Effective Date of the Settlement, BPPR and/or the Settlement Administrator will distribute the Net Settlement Fund to all Settlement Class Members. Settlement Agreement at ¶¶ 6.7.2.3-6.7.2.4.

2. Allocation of the Settlement Class Member Payments

Payments from the Net Settlement Fund to the Settlement Class Members shall be calculated as follows:

> (Net Settlement Amount divided by the total number of Class Fees the Settlement Class Members collectively were assessed in connection with the transactions at issue);
>
> Multiplied by;
>
> Total number of Class Fees the Settlement Class Member was charged and paid in connection with the transactions at issue.

Settlement Agreement. at ¶ 7.1.

3. Distribution of Settlement Class Member Payments

Settlement Class Members who are Current Accountholders with BPPR when the Net Settlement Fund is distributed will receive a credit in the amount of their Settlement Class Member Payments applied to any account they are maintaining at the time of the credit. *Id.* at ¶ 6.7.2.3. If by the deadline to apply credits of Settlement Class Member Payments to accounts BPPR is unable to complete certain credit(s), BPPR shall deliver the total amount of such unsuccessful Settlement

Class Member Payment credits to the Settlement Administrator to be paid by check in accordance with the procedure for Past Accountholders to receive payment. *Id.* at ¶ 6.7.2.4.

For Settlement Class Members who are Past Accountholders when the Net Settlement Fund is distributed or at that time do not have an account, they shall be sent a check by the Settlement Administrator at the address used to provide the Notice, or at such other address as designated by the Settlement Class Member. *Id.* For a jointly held Account of one or more Current Accountholders, payment will be made as described in Section 6.7.2.3 of the Settlement and may be deposited into an account of the primary Accountholder, whether or not such account is jointly held. *Id.* at ¶ 6.7.2.6. For a jointly held Account of a Past Accountholder, payment will be made by means of a check that will be payable to the primary Accountholder named on the Account, and mailed to the last known address for that primary Accountholder. *Id.* The Settlement Administrator will make reasonable efforts to locate the proper address for any check returned by the Postal Service as undeliverable and will re-mail it once to the updated address or, in the case of a jointly held account, and in the Settlement Administrator's discretion, to an accountholder other than the one listed first. *Id.* at ¶ 6.7.2.7. The Settlement Class Member shall have one-hundred eighty (180) days to cash the check. *Id.* at ¶ 6.7.2.5. After 240 calendar days from the Effective Date, any excess funds remaining from the Settlement Amount that have not been distributed in accordance with other provisions of the Settlement shall, if economically feasible, be distributed to the Settlement Class Members who successfully cashed checks or received their Settlement Class Member Payment as a credit. The payment notices accompanying the Settlement checks for a second distribution shall notify the recipients that the checks must be cashed within 90 days from the date on the payment notice and that the enclosed check shall not be valid after that date. *Id.* at ¶ 6.8.

4. Disposition of Residual Funds

If a second distribution of remaining funds costs more than the amount to be distributed or is otherwise economically unfeasible, or if additional funds remain after a second distribution, Class Counsel shall petition the Court to distribute any remaining funds to a *cy pres* recipient agreed upon by the Parties and approved by the Court. Settlement Agreement at ¶ 6.8. In no event shall any portion of the Settlement Fund revert to BPPR.

C. Releases.

In exchange for the benefits conferred by the Settlement, upon the Effective Date, the Releasing Parties, the Class Representative and each Settlement Class Member, and each of their respective heirs, executors, administrators, trustees, guardians, agents, successors, and assigns, and all those acting or purporting to act on their behalf, fully and finally release and discharge the Released Parties of and from the Released Claims. This Release shall be included as part of any judgment, so that all released claims and rights shall be barred by principles of res judicata, collateral estoppel, and claim and issue preclusion and shall bind all Settlement Class Members and all the Releasing Parties, and all Released Claims shall be dismissed with prejudice and released as against the Released Parties. The Released Claims are released regardless of whether these claims are known or Unknown Claims, actual or contingent, liquidated, or unliquidated. Settlement Agreement at ¶¶ 1.38-1.40, 13.1.

D. The Notice Program.

Based upon the Parties' recommendation, the Court appointed Kroll Settlement Administration LLC as the Settlement Administrator, one of the leading notice administration firms in the United States. Preliminary Approval Order (ECF No. 119) at p. 3, ¶ 7. The Settlement Administrator oversaw the Notice Plan, which was designed to provide the best notice practicable

and was tailored to take advantage of the information BPPR has available about the Settlement Class. *See* Declaration of Scott M. Fenwick of Kroll Settlement Administration LLC in Connection with Final Approval ("Fenwick Decl.") at ¶ 4. The Notice Plan was reasonably calculated to apprise Settlement Class members of the following through the Notice: a description of the material terms of the Settlement; a deadline to exclude themselves from the Settlement Class; a deadline to object to the Settlement; the Final Approval Hearing date; and the Settlement Website address to access the Settlement Agreement and other related documents. Fenwick Decl. at ¶ 5. The Notice and Notice Plan constituted sufficient notice to all persons entitled to notice, satisfying all applicable requirements of law, including Rule 23 and constitutional due process. Fenwick Decl. at ¶¶ 4-5, 16.

The Notice Plan was comprised of three parts: (1) direct Email Notice to those Settlement Class Members who agreed to receive communications from BPPR by email; (2) direct Postcard Notice to all Settlement Class Members who did not agree to receive communications from BPPR by email, or for whom the Settlement Administrator is unable to send Email Notice using the email address provided by BPPR; and (3) Long Form Notice (containing more detail than the Email or Postcard Notice) posted on the Settlement Website and available by U.S. mail on request to the Settlement Administrator. Fenwick Decl. at ¶¶ 8, 11-16. A Spanish version of the Long Form Notice is also available for review on the Settlement Website and upon request to be sent by mail. Fenwick Decl. at ¶ 8.

The Long Form Notice described the procedure that Settlement Class Members must follow to opt-out of the Settlement or object to the Settlement. Specifically, opt-outs must be postmarked no later than the last day of the Opt-Out Deadline, and objections must be postmarked no later than Objection Deadline (which for both is August 9, 2023). Fenwick Decl. at ¶ 17.

The Notice Program (Postcard Notice and Email Notice, including the Notice Re-Mailing Process) was completed before the filing of this Motion for Final Approval. Fenwick Decl. at ¶¶ 11-15.

The Settlement Website, which includes hyperlinks to the Agreement, the Long Form Notice, the Preliminary Approval Order and such other documents as the Parties agree to post or that the Court orders posted, went live on May 10, 2023 in coordination with commencement of the Notice Plan. Fenwick Decl. at ¶¶ 8, 11-13.

E. Settlement Administration

The Settlement Administrator is one of the leading class action settlement administrators in the United States. Its Settlement Administration responsibilities are delineated in the Settlement Agreement. Fenwick Decl. at ¶ 2.

F. Settlement Termination.

Either Party may terminate the Settlement if the Court fails to grant Final Approval of the Settlement in any material respect. Agreement at ¶ 8.

IV. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS

The first step towards final approval is that the Court must certify the class. *See e.g. O'Hern v. Vida Longevity Fund,* 2023 WL 3204044, at *2 (May 2, 2023). Notably, "when confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Indeed, this Court has already held in its Preliminary Approval Order that it will likely certify the class at final approval and that all the requirements of class certification under Federal Civil Procedure Rule 23

are met. See Preliminary Approval Order (ECF No. 119) at p. 2, ¶ 4 ("the Court finds that this Settlement Class meets the relevant requirements of Federal Rule of Civil Procedure 23(a) and (b)(3)").

District courts enjoy broad discretion to certify the class, so long as the following criteria are met: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

Lastly, class certification brought pursuant to Rule 23(b)(3) requires a determination that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other methods for the fair and efficient adjudication of the controversy."

As discussed before in Plaintiff's Motion for Preliminary Approval (*see* ECF No. 110 at pp. 17-21) and below, all of these factors are present here, and therefore, final certification of the Settlement Class is appropriate.

Numerosity. Numerosity is satisfied because the Settlement Class consists of tens of thousands of BPPR customers, and joinder of all such persons is impracticable. Reese Decl., at ¶ 25. See Fed. R. Civ. P. 23(a)(1).

Commonality. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" and the plaintiff's contention "must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 389-390 (2011). Here, commonality for settlement approval purposes

is satisfied. There are multiple questions of law and fact – centering on the alleged systematic practice of assessing fees – that are common to the Settlement Class Members, alleged to have injured all Settlement Class members in the same way, and would generate common answers central to the claims' viability were the action to be tried. Reese Decl., at ¶ 26.

Typicality. The third prong of the Rule 23(a) analysis, typicality, requires that "the claims of the class representatives must be typical of the class as a whole." *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 184 (3d Cir. 2001). Typicality ensures "that the class representatives are sufficiently similar to the rest of the class - in terms of their legal claims, factual circumstances, and stake in the litigation" and that their representation is fair to the rest of the class. *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 597 (3d Cir. 2009).

For similar reasons as discussed above for commonality, Plaintiff's claims are reasonably coextensive with those of the absent Settlement Class members, satisfying Rule 23(a)(3)'s typicality requirement.

Adequacy. Plaintiff and Class Counsel satisfy Rule 23(a)(4)'s adequacy of representation requirement. The court "primarily examines two matters: the interests and incentives of the class representatives, and the experience and performance of class counsel." *In re Cmty. Bank of Northern Virginia Mortg. Lending Practices Litig.*, 795 F.3d 38, 39 (3d Cir. 2015). Here, Plaintiff's interests are coextensive with, not antagonistic to, the Settlement Class' interests because Plaintiff and the absent Settlement Class Members have the same interests in the relief afforded by the Settlement, and absent Settlement Class Members have no diverging interests. Reese Decl., at ¶ 28. Further, Plaintiff is represented by qualified and competent counsel with extensive experience and expertise prosecuting complex class actions, including actions similar to

this one. Reese Decl., at ¶ 29. Class Counsel has devoted substantial time and resources to this action. Reese Decl., at ¶ 30.

Predominance. Certification of the Settlement Class is further appropriate because the questions of law or fact common to Settlement Class members predominate over any questions affecting only individual members. See Fed. R. Civ. P. 23(b)(3). For purposes of satisfying Rule 23(b)(3), "[i]f issues common to the class overwhelm individual issues, predominance should be satisfied." *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 371 (3d Cir. 2015).

Certification of the Settlement Class for settlement purposes is further appropriate because the questions of law or fact common to all members of the Settlement Class substantially outweigh any possible issues that are individual to each member of the Settlement Class. Reese Decl., at ¶ 31. For example, each Settlement Class Members' relationship with BPPR arises from an Account agreement that is the same or substantially similar in all relevant respects to the other Settlement Class members' agreements, and the fees at issue were based on the same type of transaction. Reese Decl., at ¶ 32.

Superiority. Further, resolution of thousands of claims in one action is far superior to individual lawsuits because it promotes consistency and efficiency of adjudication. See Fed. R. Civ. P. 23(b)(3).

For all these reasons, the Court should certify the Settlement Class.

V. THE COURT SHOULD GRANT FINAL APPROVAL TO THE PROPOSED SETTLEMENT

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of any class action settlement. The Court must evaluate the fairness of the class action settlement under Rule 23(e), which provides that approval of a class settlement should occur if the settlement is "fair, reasonable, and adequate" after consideration of four factors: (A) whether the class representative

and class counsel have adequately represented the class; (B) whether the proposal was negotiated at arm's length; (C) whether the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreements between the settling parties; and (D) whether the proposal treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2). The Advisory Committee's Note to the 2018 Amendment identifies these four factors as the "core concerns" that should guide the court's decision regarding whether to approve the proposed settlement.

Courts in the Third Circuit also continue to apply the factors set forth in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), which include procedural and substantive considerations similar to those in the 2018 amendments to Federal Civil Procedure Rule 23(e). See *O'Hern*, 2023 WL 3204044, at *5. The nine Girsh factors include: (1) the complexity, expense, and likely duration of litigation; (2) the reaction of the class to the settlement; (3) the stage of proceedings and amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class through trial; (7) the ability of the defendant 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 the risks of litigation.

As discussed below, the factors set forth by Federal Civil Procedure Rule 23 and the Third Circuit in *Girsh* weigh heavily in favor of granting final approval.

A. Class Counsel and Plaintiff Adequately Represented the Class

As stated above in section II.B, Class Counsel has dedicated significant time and effort in

litigating this matter. Furthermore, Class Counsel has extensive experience in litigating actions similar to this one, and the filings confirm that Class Counsel thoroughly investigated the claims, defenses and events underlying the action. Class Counsel also engaged in extensive settlement negotiations and a private mediation, culminating in the Settlement. Furthermore, Plaintiff's representation of the interests of the Class also satisfies Rule 23(e)(2)(A). The proposed settlement establishes that Plaintiff's claims are typical of the claims of the Settlement Class. Finally, there is no indication that Plaintiff's interests conflict with the interest of other class members. Accordingly, this prong is met. *See O'Hern*, 2023 WL 3204044 at *5.

B. The Settlement Was Negotiated At Arm's Length

The Settlement only was reached through the use of a neutral mediator – the esteemed Hon. José Fusté (Ret.), a former chief federal judge. "This factor further supports final approval." *O'Hern*, 2023 WL 3204044, at *6.

C. The Settlement Provides Substantial Relief to the Class Given the Risks Involved

The third factor under Rule 23(e)(2) regarding the adequacy of the relief provided for the class is related to many of the *Girsh* factors, specifically the first, fourth, fifth, eighth, and ninth *Girsh* factors. *O'Hern*, 2023 WL 3204044, at *6.

Here, the Settlement provides for a Settlement Fund that is 45% of the contested fees. Reese Decl., at ¶ 21. This Settlement either meets or exceeds the vast majority of court-approved recoveries in overdraft fee class actions nationwide. *See, e.g., Roberts v. Capital One*, 16 Civ. 4841 (LGS), Dkt. 198 (S.D.N.Y. Dec. 1, 2020) (approving cash fund of approximately 34% of the most likely recoverable damages for class members); *Bodnar v. Bank of Am., N.A.*, 2016 WL 4582084, at *4 (E.D. Pa. Aug. 4, 2016) (approving a cash fund of between 13%-48% of the maximum

amount of damages they may have been able to secure at trial, and describing such a result as a "significant achievement" and outstanding"); *In re Checking Account Overdraft Litig.*, 2015 WL 12641970, at *7 (S.D. Fla. May 22, 2015) (approving $31,767,200 settlement representing approximately 35% of the most probable aggregate damages); *Hawthorne v. Umpqua Bank*, 2015 WL 1927342, at *1 (N.D. Cal. Apr. 28, 2015) (approving $2,900,000 settlement for approximately 38% of what could have been obtained at trial); *In re Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2013 WL 11319242 at *1 (S.D. Fla. Aug. 2, 2013) (approving $4,000,000 settlement for 25% of the most probable recoverable damages). Accordingly, this factor weighs in favor of final approval.

Furthermore, in addition to the $1,653,000 Settlement Fund, Defendant has agreed to cease—for a period of at least five years—the fee assessment practice at the heart of this case. Settlement Agreement at ¶ 2.2. This prospective relief will, Class Counsel estimates, save the Settlement Class and BPPR accountholders approximately $3 million over the next five years. Reese Decl., ¶ at 23.

Rule 23(e)(2)(C)(ii) also requires the court to analyze "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-members claims." Rule 23(e)(2)(C)(ii). Here, the vast majority of notice was achieved via direct notice. Moreover, class members did not have to make a claim to receive the benefit of the settlement. Rather, the settlement money will be deposited directly into the account of current customers, and mailed to former customers. Accordingly, class participation is over 90%. Fenwick Decl. at ¶16. This greatly exceeds the standard. *See O'Hern*, 2023 WL 3204044 at *6 (granting final approval to settlement that had a claim filing rate of 24%).

Finally, Rule 23(e)(2)(C)(iv) and Rule 23(e)(3) require the parties seeking approval of the

settlement to file a statement identifying any agreement made in connection with the proposal. Class Counsel represent that other than the Settlement Agreement, there is no other agreement between the parties. Reese Decl., at ¶ 35. Class Counsel and Liaison Counsel do have a joint prosecution agreement, whereby Burns Charest LLP will receive 15% of the fees for its role as liaison counsel, with Class Counsel Reese LLP and KalielGold PLLC splitting the remaining amount 50/50, such that Reese LLP will receive 42.5% of the total fees and KalielGold PLLC will receive 42.5% of the total fees. Reese Decl., at ¶ 35

Finally, the Notice sent to class members stated that Class Counsel will seek one-third of the Settlement Fund for attorney fees for their work on the matter, and also seek reimbursement of their expenses. The Notice also told class members that a service award of $10,000 would be sought for Mr. Golden for his instrumental role as the Class Representative in this matter. As of the filing of this brief, no objection has been made to the attorney fee request, reimbursement of expenses, or the service award payment to the Class Representative.

D. The Proposed Plan of Allocation Treats Class Members Equally

Because the Settlement intends to distribute the Net Settlement Fund on a pro rata basis, there is no doubt Settlement Class Members will be treated equitably. This process is the most rational and reasonable means for distributing the Net Settlement Fund to the Settlement Class Members. The Proposed Settlement achieves a fundamentally fair, adequate, and reasonable resolution of all relevant claims.

E. The Remaining Girsh Factors

1. Reaction of the Class to the Settlement

As of the filing of this motion, no class member has objected to the settlement. And only one person has opted out of the settlement. Fenwick Decl. at ¶18. "This factor therefore weighs

in favor of final approval." *O'Hern*, 2023 WL 3204044 at *7.

2. Amount of Discovery

Under the third *Girsh* factor, the court must consider whether the parties' attorneys had an "adequate appreciation of the merits of the case before negotiating" the settlement. *O'Hern*, 2023 WL 3204044 at *7.

Here, Class Counsel had undertaken significant discovery by the time settlement negotiations began, and had sufficient information in order to assess the proposed terms of the Settlement. Reese Decl., at ""¶ 9. *See e.g. In re National Football League Players Concussion Injury Litig*, 821 F.3d 410, at 436-37 (3d Cir. 2016) ("In some cases, informal discovery will be enough for class counsel to asses the value of the class' claims and negotiate a settlement that provides fair compensation."); *Schuler v. Meds. Co.*, 2016 WL 3457218, at *7 (D.N.J. June 24, 2016) (finding class counsel had ample information to evaluate the prospects for the litigation and assess the fairness of the settlement despite the fact that no formal discovery was taken). Here, given that Class Counsel had engaged in discovery prior to settlement negotiation, this factor weighs in favor of final approval.

3. Risk of Maintaining a Class Action Through Trial

This sixth *Girsh* factor is neutral as Class Counsel does not present argument here that a certified class could not be achieved or maintained throughout this litigation.

4. Ability of Defendant to Withstand a Greater Judgment

This seventh *Girsh* factor is neutral, as there is no evidence that Defendant could not withstand a greater judgment. "But the neutrality of this [and the sixth *Girsh*] factor does not weigh against final approval of the settlement where, as here, the other *Girsh* factors support a conclusion

that the settlement is fair, reasonable, and adequate." *O'Hern*, 2023 WL 3204044 at *7 citing *In re Warfarin Sodium Antitrust Litig,* 391, F.3d, 516 at 538 (3d Cir. 2004).

Accordingly, the Court should grant final approval of the Settlement.

VI. THE COURT SHOULD GRANT THE REQUEST OF CLASS COUNSEL AND LIAISON COUNSEL FOR PAYMENT OF THEIR ATTORNEY FEES AND COSTS

A. Class Counsel and Liaison Counsel Should be Paid Their Attorney Fees Based on the Percentage-of-Recovery" Methodology

"The 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." *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005).

Here, Class Counsel seek payment of $551,000 (with payment of $234,175 to Class Counsel Reese LLP; $234,175 to Class Counsel KalielGold PLLC; and $82,650 to Liaison Counsel Burns Charest LLP) for their time and effort in this matter, which equate to 1/3 of the $1,653,000 common fund. This is in-line with fees paid to attorneys representing plaintiffs in other class action litigation within courts in the Third Circuit. *See e.g. Martin v. Altisource Residential Corp.*, 2020 WL 9763240 (D.V.I. Feb, 14, 2020) ("Lead Counsel are hereby awarded attorneys' fees in the amount of one-third of the Settlement Fund"); *In re K-Dur Antitrust Litig*., 2017 WL 11636125, at *2 (D.N.J. 2017) (awarding one-third of fund for payment of attorney fees).

To evaluate the fairness of the requested fees under this method, the court weighs the following factors:

> (1) the size of the fund created and the number of persons benefited; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000). Application of these factors is flexible, and "one factor may outweigh the rest." *In re Rite Aid*, 396 F.3d at 301.

Regarding the first and second factors, the $1,653,000 settlement represents approximately 45% of the estimated damages that benefits tens of thousands of the Bank's clients who are class members. Fenwick Decl. at ¶ 16; Reese Decl. at ¶ 21. This is well above the average recovery for courts within the Third Circuit and will benefit a significant number of class members. *See O'Hern*, 2023 WL 3204044 at *9 (approving fee request for settlement that represented approximately 5.4% of damages and citing cases with settlements representing between 4.0% and 5.2% of damages).

Moreover, as of the filing of this brief, there have been no objections to the request for payment of one-third of the Settlement Amount for attorney fees and a separate payment for costs that was included in the notice to class members.

With respect to the third *Gunter* factor, this too supports the requested payment of fees because Class Counsel and Liaison Counsel are skilled in litigating consumer class actions and expended significant time on a contingency basis. Reese Decl., at ¶¶ 2-3, 5-13 and Exhibit A attached thereto; Declaration of Jeffrey Kaliel in Support of Final Approval ("Kaliel Decl.") at ¶¶ 2-5 and Exhibit A attached thereto; Declaration of Korey A. Nelson in Support of Final Approval ("Nelson Decl.") at ¶¶ 3-4 and Exhibit 1 attached thereto.

The fourth factor supports an award of fees because "without a settlement, a significant amount of time and resources would be necessary to bring the case to a close." *O'Hern*, 2023 WL 3204044 at *9. Indeed, at the time a settlement was reached, Defendant had a motion to dismiss pending, which, if successful, would have resulted in dismissal of the action in its entirety.

The fifth *Gunter* factor weighs in favor of payment of the attorney fees because Class Counsel took this case on a contingency basis, risking non-payment if their efforts on behalf of the Class were not successful. *See In re Valeant Pharms. Int'l, Inc. Sec. Litig,*, 2020 WL 3166456, at *13 (D.N.J. June 15, 2020).

The time and effort expended by Class Counsel in this action further supports an award of fees under the sixth *Gunter* factor. Class Counsel has devoted over 490 hours to the prosecution and resolution of this case. Reese Decl., ¶ 36.

With respect to the seventh *Gunter* factor, the Third Circuit has stated that fee awards in common fund cases can range up to 45% of a settlement fund. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995). And in one of the most recent class action settlements in the District of the Virgin Islands, the Court awarded one-third (33.33%) of the settlement fund for fees, in addition to costs. *See Martin v. Altisource Residential Corp.*, 2020 WL 9763240, at *1 (D.V.I. Feb, 14, 2020)("Lead Counsel are hereby awarded attorneys' fees in the amount of one-third of the Settlement Fund"). Accordingly, this factor weighs in support of the requested fee payment.

Finally, a lodestar crosscheck confirms the reasonableness of the percentage-of-recovery amount sought here. Here, Class Counsel's lodestar is $526,169 based on 495.9 hours of work. Reese Decl. at ¶ 14; Kaliel Decl. at ¶ 5; Nelson Decl at ¶ 4. When calculated against the requested fee of $551,000, the lodestar multiplier is 1.05. This is well within the range of multipliers generally awarded in the Third Circuit. *See O'Hern*, 2023 WL 3204044 at *9; *In re Prudential Ins. Co. America Sales Practices Litig.*, 148 F.3d 283, 341 (3d Cir. 1998) (observing that multipliers "ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.")

B. Class Counsel Should Be Reimbursed for Their Expenses

"Counsel is common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case." *In re Cendant Corp. Deriv. Litig*., 232 F. Supp. 2d 327, 343 (D.N.J. 2002). Here, Class Counsel have paid $10,951.77 in expenses incurred in connection with the litigation and settlement of this action. *See* Reese Decl., ¶ 36. Accordingly, Class Counsel now respectfully request reimbursement for their expenses.

C. Service Award for the Class Representative

Class Counsel seeks an award of $10,000 for the court-appointed Class Representative, Arnold Golden. Mr. Golden was instrumental to the success of this case. Mr. Golden devoted substantial time and effort to prosecuting the case, including frequent communication with Class Counsel about the status of the case; discovery; reviewing pleadings and motions; participating directly in the mediation; and, reviewing and approving the Settlement Agreement and accompanying exhibits. *See* Declaration of Arnold Golden in Support of Motion for Final Approval. In similar situations, courts within the Third Circuit routinely grant requests for payment of $10,000 (or higher) to the class representative. *See e.g. O'Hern*, 2023 WL 3204044 at *10 (granting request of $10,000 for each of the three named plaintiffs, for a total of $30,000).

VII. CONCLUSION

For the reasons set forth above, Class Counsel respectfully request an order that: (1) certifies the class; (2) grants final approval of the Settlement Agreement; (3) grant approval for payment of $551,000 to Class Counsel and Liaison Counsel for their fees and $10,951.77 in expenses; and (4) grant the request for payment of $10,000 to the Class Representative for his work on the matter.

Dated: July 25, 2023

Respectfully submitted,

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