IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

TERRIANN WALKER, individually, and on behalf of others similarly situated, Plaintiff, v. PEOPLE'S UNITED BANK and DOES 1 through 100, Defendants.	CIVIL ACTION **No. 3:17-CV-00304 (AVC)** April 7, 2020 11:00 a.m. March 3, 2020

PLAINTIFF TERRIANN WALKER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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MEMORANDUM

I. SUMMARY

This is a class action alleging that People's United Bank ("PUB" or "Defendant" or "People's") charged overdraft fees based on what it called the "available balance" in customer accounts, which People's contends meant a subset of the actual account balance from which money has been deducted by placing holds on deposits and pending transactions which have not yet posted. Plaintiff contends the contracts at issue required People's to use the balance when determining and assessing overdraft fees, meaning the money actually in the account (sometimes also called "actual balance" or "ledger balance"). Plaintiff contends that People's failure to do so resulted in overdraft fees which should not have been charged, allegedly in violation of the terms of its contracts governing the overdraft programs. Plaintiff also alleges that Defendant violated Regulation E, 12 C.F.R. § 1005.17 ("Reg. E"), by enrolling bank customers in its overdraft program for subject transactions without obtaining their affirmative consent to do so based on a complete and valid disclosure of the terms of the program.

After substantial law and motion practice, as well as significant formal discovery, the Parties attended a mediation on August 28, 2019, with the Honorable Gerald E. Rosen (Ret., U.S. District Judge) of JAMS, and accepted a mediator's proposal made by Judge Rosen. Specifically, under the proposed settlement PUB will pay $6,500,000 in new money, with no reversion of any residue to PUB, and also will waive more than $963,933 in uncollected eligible overdraft fees, for a total settlement value of in excess of $7,400,000. (*See* Settlement Agreement, attached to the Declaration of Taras Kick ("Kick Decl.") as Exhibit 1, at ¶ 1(t) and 1(w), (hereafter "Settlement Agreement").)

This Court granted preliminary approval of the proposed settlement in an Order dated January 8, 2020, 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 (Preliminary Approval Order ["Order"], Docket No. 101, ¶ 2), that the proposed settlement falls within the range of reasonableness for potential final approval (Docket No. 101, ¶8), and that the proposed settlement is the product of arm's length negotiations by experienced counsel. (*Id.*)

This Court appointed Epiq Claims Solutions, Inc. ("Epiq") as the Claims Administrator under the terms of the Settlement Agreement (*Id.* ¶4); 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.* ¶ 9.)

Plaintiff can now report that the notice program ordered by this Court has been very successful, and Plaintiff therefore now presents the matter for final approval. Specifically, as evidenced by the contemporaneously filed declaration of Brian Young of the court-appointed claims administrator Epiq, Epiq mailed or emailed notice of this proposed class action settlement to the 137,664 unique class members, and had a successful deliverable rate of 95.1%. (Declaration of Brian Young of Epiq Dated March 3, 2020 ("Epiq Decl.") ¶¶ 8 - 14.)

As of February 21, 2020, only eight class members had elected to opt out of the proposed settlement being presented to this Court for final approval, meaning more than 99.99% of the class members have elected to remain in the proposed settlement. (*Id.* ¶19.) Further, also as of February 21, 2020, there have been no objections to the settlement whatsoever. (*Id.* ¶20.)[1]

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[1] The deadline to opt out expired on February 27, 2020, and the deadline to object expires on March 18, 2020. Class Counsel will provide a final tally of opt-out requests and objections to this Court in advance of the final approval

In sum, the proposed settlement of this class action is an excellent result for class members, and class members' reaction to it to date has been very favorable.

II. THE HISTORY OF THIS CASE

A. The Law and Motion Performed in this Case

Named plaintiff Terriann Walker filed this putative class action complaint entitled *Walker v. People's United Bank,* on February 21, 2017, in the United States District Court for the District of Connecticut, Case No. 3:17-CV-00304-AVC, alleging claims for Breach of Opt-In Contract, Breach of Account Agreement, Breach of the Implied Covenant of Good Faith and Fair Dealing, Unjust Enrichment/Restitution, Money Had and Received, Violation of the Electronic Fund Transfer Act (Regulation E) 12 C.F.R. §§ 1005, *et seq*., and Violation of the Connecticut Unfair Trade Practices Act, Connecticut Code§ 42-ll0(a), *et seq.* (the "Complaint"). (Kick Decl., at ¶ 7.) On June 8, 2017, Defendant filed a Motion to Dismiss, and related documents. (*Id.*) On June 29, 2017, Plaintiff filed a Memorandum in Opposition to the Motion to Dismiss, and related documents. (*Id.*) On July 13, 2017, Defendant filed a Reply to Plaintiff's Opposition to Motion to Dismiss. (*Id.*) On August 8, 2017, Defendant filed a Notice of New Authority in Support of Defendant's Motion to Dismiss Plaintiff's Class Action Complaint. (*Id.*) On August 10, 2017, Plaintiff filed a Response to Defendant's Notice of New Authority. (*Id.*) On September 29, 2017, Plaintiff filed a First Notice of New Authority In Support of Opposition to Defendant's Motion to Dismiss. (*Id.*) On October 5, 2017, Defendant filed a Second Notice of Additional Authority re Motion to Dismiss. On November 8, 2017, Defendant filed a Third Notice of New Authority in Support of Motion to Dismiss. (*Id.*) On March 20, 2018, Plaintiff filed a Fourth Notice of New Authority In Support of Opposition to Motion to Dismiss. (*Id.*) On March 30,

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hearing.

2018, the Court issued its ruling granting in part and denying in part the Motion to Dismiss. (*Id.*)

On October 31, 2018, Plaintiff filed a Motion for Class Certification, and related documents. (*Id.*) On January 22, 2019, Defendant filed a Motion for Summary Judgment, and related documents, and an Opposition to Motion for Class Certification, and related documents. (*Id.*) On February 13, 2019, Plaintiff filed a Memorandum in Opposition to Motion for Summary Judgment, and related documents. (*Id.*) On February 20, 2019, Plaintiff filed a Reply to Defendant's Opposition to Plaintiff's Motion for Class Certification. (*Id.*) On March 4, 2019, Defendant filed a Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment.

On May 17, 2019, Plaintiff filed a Motion to Compel Defendant to Produce Percipient Witness For Deposition and to Produce Documents Responsive to Discovery Requests. (*Id.*) On June 21, 2019, Defendant filed a Memorandum in Opposition to Plaintiff's Motion to Compel Defendant to Produce Percipient Witness and Documents. (*Id.*) On July 3, 2019, Plaintiff filed a Reply to Defendant's Opposition to Motion to Compel Defendant to Produce Percipient Witness and Documents. (*Id.*)

On July 11, 2019, the Parties filed a Joint Motion to Stay pending the Parties engaging in mediation, and on July 12, 2019, the Court entered an Order granting in part and denying in part the Joint Motion to Stay.

B. The Formal Discovery Performed in this Case

On May 3, 2018, Plaintiff served her First Set of Requests for Production, Interrogatories, and Requests for Admission on Defendant. (*Id.*, at ¶ 8.) Defendant provided its objections and responses to Plaintiff's First Set of Discovery on July 12, 2018, and produced its first set of 2,176 pages of responsive documents. (*Id.*) On May 9, 2018, Defendant served its First Set of Interrogatories and Requests for Production on Plaintiff. (*Id.*) Plaintiff provided her objections and responses to Defendant's First Set of Discovery on July 11, 2018. On May 31, 2018,

Plaintiff served Defendant with her Initial Disclosures. Plaintiff included 62 pages of documents with her disclosures. (*Id.*) On June 1, 2018, Defendant served Plaintiff with its Initial Disclosures.

On July 19, 2018 , Plaintiff served a Notice of Deposition on Defendant. (*Id.*) On August 9, 2018, Defendant produced its second set of approximately 21 pages of responsive documents to Plaintiff. On September 11, 2018, Plaintiff's deposition was taken by Defendant. (*Id.*) Plaintiff took the FRCP Rule 30(b)(6) depositions of Defendant's designated witnesses Sara Wilbur and Sherri Furce on September 13, 2018. (*Id.*) Between September 7 and September 18, 2018, Defendant produced additional sets of responsive documents, totaling approximately 2,711 pages. (*Id.*) Defendant continued to produce documents into early 2019 in response to the Parties' meet and confer efforts. (*Id.*)

C. The Mediation

On August 28, 2019, the Parties engaged in a mediation before the Honorable Gerald E. Rosen (Ret., U.S. District Judge) of JAMS. The negotiations were at all times arm's length and adversarial. (Kick Decl., at ¶ 12.) Towards the conclusion of the mediation, because the Parties had not reached a settlement, Judge Rosen made a mediator's proposal. (*Id.*) Both sides accepted the mediator's proposal, and the proposed settlement being brought to this Court for approval at this time is the result of that accepted mediator's proposal. (*Id.*) On September 3, 2019, the Court was informed of this settlement.

The proposed settlement which is now being presented to this Honorable Court for approval is documented by the Settlement Agreement which is attached as Exhibit 1 to the concurrently filed Declaration of Taras Kick.

III. ANALYSIS OF THE DATA

Plaintiff's database expert, Arthur Olsen, has performed a thorough analysis of Defendant's

actual data pertaining to overdraft fees assessed on class members. (Olsen Decl., at ¶¶ 6- 10.) The class data contained detailed information regarding all overdraft fees assessed by PUB on debit card, check, and ACH transactions between February 21, 2011 and October 31, 2016. (*Id*., at ¶ 6.) Among other things, the class data included account numbers, the date of each overdraft fee, the amount of each overdraft fee, information allowing the determination of the type of transaction which caused each overdraft fee, (either debit card, check, or ACH), and the ledger balance at the time when each transaction posted to the account. (*Id*.)

For the Sufficient Funds Class, Mr. Olsen identified 134,148 PUB accounts that were assessed at least one overdraft fee when the account holder had a positive ledger balance in his or her account that was sufficient to cover the transaction at issue between February 21, 2011 and October 31, 2016, after the application of any refunds already credited by PUB. (*Id*., at ¶ 7.) There were 454,094 such fees totaling $16,581,941, and after elimination of overlap for fees which were also Regulation E overdraft fees, the total amounts to $16,150,262. (*Id*., at ¶¶ 7, 9.)

Regarding the Regulation E Class, Mr. Olsen identified 14,575 PUB accounts that were assessed at least one overdraft fee for an ATM or non-recurring debit card transaction between February 21, 2016 and October 31, 2016, after the application of any refunds already credited by PUB. (*Id*., at ¶ 8.) There were 52,958 such fees totaling $1,959,446 before accounting for overlap with Sufficient Funds Fee Overdrafts, and $1,527,767 after accounting for such overlap. (*Id*., at ¶¶ 8, 9.)

IV. TERMS OF THE SETTLEMENT

A. The Class Definition

The class includes any customer of PUB who is in either of two classes, the "Sufficient Funds Class" or the "Regulation E Class." (Settlement Agreement, at ¶ 1(r) and (u).) The "Sufficient Funds Class" is defined as, "those customers of Defendant who were assessed and

who paid an overdraft fee between February 21, 2011 and October 31, 2016, on any type of payment transaction and at the time such fee was assessed the customer had sufficient money in his or her ledger balance to cover the transaction that resulted in the fee." (Settlement Agreement, at ¶ 1(r).) The "Regulation E Class" is defined as, "those customers of Defendant who were assessed and who paid an overdraft fee for a non-recurring debit card payment transaction between February 21, 2016 and October 31, 2016." (Settlement Agreement, at ¶ 1(u).)

B. The Settlement Amount

The value of the proposed settlement is in excess of $7,463,933. Specifically, under the proposed settlement, PUB will pay $6,500,000 of new money, with no reversion of any residue to PUB. (*See* Settlement Agreement, at ¶ 1(t).) Further, PUB has agreed to waive Sufficient Funds and Regulation E overdraft fees in the class period which it assessed but which had not yet been collected as of August 29, 2019. (Settlement Agreement, ¶ 1(w), ¶ 9. Expert Arthur Olsen has calculated the value of these uncollected overdraft fees which are being forgiven at $963,933 as of September 30, 2018. (Olsen Decl., at ¶ 10.) Therefore, the value of this settlement is in excess of $7,463,933.

C. Payments to Claimants

As stated, the Net Settlement Fund shall be divided with 7.7% of the Net Settlement Fund distributed to customers of the "Regulation E Class" on a *pro rata* basis, and 92.3% distributed to customers of the "Sufficient Funds Class" on a *pro rata* basis. (Settlement Agreement, at ¶ 8(d)(iv)(a) and (b).) The allocation between the two classes was arrived at as follows.

Defendant's position in this case is that pursuant 15 U.S.C. §1693m(a), the maximum liability exposure of Defendant to the Regulation E Class was the lesser of 1% of the Defendant's net worth, or $500,000. Defendant bases its argument on the following from 15

U.S.C. §1693m(a):

> . . . in the case of a class action, such amount as the court may allow, except that (i) as to each customer of the class no minimum recovery shall be applicable, and (ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same person shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the defendant.

As $500,000 is 7.7% of the total new money component of $6,500,000, that is the manner in which the allocation between the two classes was in part arrived at.

With regard to how the money will be distributed to class members, this also is a very consumer friendly process. Class members who remain PUB account-holders at the time of the distribution will receive a credit to their account in the amount of their payments. (Settlement Agreement ¶ 8(d)(iv)(d).) Class Members who do not have a checking or savings account with Defendant at the time of the distribution of the Net Settlement Fund shall be sent a check by the claims administrator to the address to which the class notice was sent, or at such other address as designated by the Class Member. (Settlement Agreement ¶ 8(d)(iv)(d).) The Class Member shall have one-hundred eighty days (180) to negotiate the check, after which the payment will re-collect in the residue to be distributed to a *cy pres* recipient.

D. Cy Pres Distribution

Under no circumstances will any of the money from this settlement revert to PUB. (Settlement Agreement Paragraph 8(d)(v).) Rather, if there is any residue which remains in the Net Settlement Fund, the Settlement provides for a proposed *cy pres* distribution to a 501(c) non-profit to be approved by this Court. (Settlement Agreement ¶ 12.) Plaintiff proposes Public Citizen. Public Citizen has been found by multiple federal courts across the country to be an appropriate *cy pres* recipient for a consumer class action such as this one involving overdraft fees imposed by a financial institution which are alleged to have been improper. (Kick Decl. ¶ 19.)

The Declaration of Public Citizen's President Robert Weissman is filed concurrently and further sets forth Public Citizen's appropriateness as the *cy pres* recipient in this matter.

E. Attorneys' Fees, Litigation Costs, Service Award, and Administrator Costs

"[A]…lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). 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 Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 122 (2d Cir. 2005). The Second Circuit has expressly approved the percentage method. *Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999) ("percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used"). "[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 Second Circuit also has stated that the "trend in this Circuit is toward the percentage method." *Wal-Mart*, 396 F.3d at 122.

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" of $7,400,000, meaning $2,466,666. (Settlement Agreement, at ¶ 8(d)(i).) Although expert Arthur Olsen has quantified the value of the waived uncollected fees as of September 30, 2018, at $963,933 (Olsen Decl. ¶ 10), the parties nonetheless agreed to use a lesser number for purposes of this quantification for fees, that being

$900,000. (Settlement Agreement, at ¶ 1(w).)[2] Therefore, Class Counsel applies for one-third of $7,400,000 rather than the higher number calculated by Mr. Olsen.

A one-third fee is a common award in the Second Circuit. *See, e.g., 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."); *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"); *Collins v. Olin Corp.*, 2010 WL 1677764, at *6 (D. Conn. Apr. 21, 2010) (approving award of 33-1/3%);

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[2] Although the waiver of the more than $963,933 in uncollected overdraft fees is a monetary component of the settlement, courts routinely include even non-monetary value in 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 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;" *Fleisher 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); *Pinto v. Princess Cruise Lines*, 513 F. Supp. 2d 1334, 1342-43 (S.D. Fla. 2007) ("Moreover, when 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.")

Macedonia Church v. Lancaster Hotel, LP, 2011 WL 2360138, at *14 (D. Conn. Jun. 9, 2011) (awarding 33-1/3%). 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).

Further, with regard to cases such as this one, meaning class actions challenging the propriety of overdraft fees, one-third or more is very commonly awarded. (See Declaration of Taras Kick In Support of Motion For Final Approval ["Kick Decl."], ¶ 6, listing such cases.) (*See also, Jacobs v. Huntington Bancshares Inc.*, Dkt. No. 11-00090, Lake County Court of Common Pleas (OH), Final Approval Granted June 2, 2017, settlement of $15,975,000.00, and fees awarded of 40%; *Kelly v. Old National Bank*, Dkt. No. 82C01-1012, Vanderburgh Circuit Court (IN), Final Approval Granted June 13, 2016, Settlement of $4,750,000.00, and fees awarded of 40%; *Gunter v. United Federal Credit Union*, Case No. 3:15-cv-00483-MMD-WGC (D. Nev.), in which the district court, by order dated June 4, 2019, a class action settlement with a settlement fund of $1,750,000, out of which the Court awarded attorney's fees of $833,000, or 47.6%, plus reimbursement of $86,500 in litigation costs; *Hernandez v. Point Loma Credit Union*, Case No. 37-2013-00053519-CU-BT-CTL (Cal. Super. Ct. for the County of San Diego), in which the superior court, by order dated September 7, 2017, approved a class action settlement with a settlement a settlement fund of $1,500,000, out of which the Court awarded attorney's fees of $745,000, or 49.6%, plus reimbursement of $83,012.33 in litigation costs.)

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, 50 (2d Cir. 2000). As demonstrated below, these factors all support approval of the requested fee.

Regarding the first *Goldberger* factor, the time and labor expended, the work done in this case is set forth in Section II, *supra*. Further, as documented by Class Counsel's declarations, lead counsels' law firms have spent approximately 1,900 hours on this matter. (Kick Decl. ¶ 7; McCune Decl. ¶ 18.) Regarding the second *Goldberger* factor magnitude and complexity of the litigation, "Most 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, and is particularly complex as it involves not only consumer class action issues, but also banking issues and 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 a strong challenge by Defendant on the Motion to Dismiss, a Motion for Summary Judgment, and if the case continued, a trier of fact that might disagree with the interpretation of the contracts being advocated by Plaintiff in this case. The Second Circuit has recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate 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.

Grinnell, 495 F.2d at 470. When considering the reasonableness of attorneys' fees in a contingency action, the Court should consider the risks of the litigation at the time the suit was

brought. The 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. (Kick Decl ¶¶ 11, 20; McCune Decl. ¶¶ 14, 15.)

Regarding the fourth *Goldberger* factor, the quality of representation, the experience of Class Counsel are presented in the McCune Declaration and Kick Declaration. They both have substantial experience in the specialized field of class actions pertaining to bank 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 two very highly sophisticated law firms of top caliber, 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 ("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 already discussed, it is one-third, which is a common fee in the Second Circuit, 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, speaks for itself in terms of promoting public policy.

In sum, all of the *Goldberger* factors support the requested fee in this matter.

Finally, although not required to be performed by this Court as Plaintiff is applying

pursuant to the percentage-of-benefit for attorneys' fees, a lodestar analysis also strongly supports the requested fee. If performing such a lodestar "cross-check" when using the percentage-of-benefit, the hours documented "need not be exhaustively scrutinized." *Goldberger*, 209 F.3d at 50. Nonetheless, the hours are detailed in Class Counsel's declarations, and should the Court want, timesheets can also be brought to the hearing.

Fees representing multiples of lodestar are regularly awarded in a case like this to reflect the contingency-fee risk and other relevant factors. *See, e.g.*, *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *26 (S.D.N.Y. Nov. 8, 2010) ("'Under the lodestar method, a positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors.'"). In in complex contingent litigation, lodestar multipliers of between 2 and 5 are commonly awarded. *See Wal-Mart*, 396 F.3d at 123 (upholding multiplier of 3.5); *Woburn Ret. Sys. v. Salix Pharm., Ltd.*, No. 14-CV-8925 (KMW), 2017 WL 3579892, at *6 (S.D.N.Y. Aug. 18, 2017) (3.14 multiplier was "within the range of reasonable . . . multipliers approved in this Circuit"); *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); *In re Intercept Pharm., Inc. Sec. Litig.*, No. 1:14-cv-01123-NRB, 2016 U.S. Dist. LEXIS 138413, at *5 (S.D.N.Y. Sept. 8, 2016) (2.72 multiplier); *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.")

In this case, the combined lodestar of Class Counsel and local counsel is $1,187,320, and

therefore the positive multiplier sought is 2.07x, far less than in any of these cases.[3] (Kick Decl. ¶ 7.) Further, if the unbilled time which was not included as a result of professional billing judgment were to be included, this would bring the lodestar to in excess of $1,237,320, meaning a multiplier of only approximately 1.9x. (Kick Decl. ¶ 8.)

Regarding costs, Plaintiff's attorneys costs equal to date $141,084.88 in costs in necessary litigation expenses. (McCune Decl. ¶21; Kick Decl. ¶17). Under the common fund doctrine, counsel is entitled to reimbursement from the common fund for reasonable litigation expenses such as these. *See Reichman v. Bonsignore, Brignati & Mazzotta P.C.*, 818 F.2d 278, 283 (2d Cir. 1987); *Hubbard v. Total Commun., Inc.*, 2010 WL 1981560, at *6 (D. Conn. May 18, 2010). Class Counsel provided notice to class members that they will cap costs at $150,000 in the class notice to class members, and this amount comes in below that.

Plaintiff also moves the Court to approve a service award to the class representative, Ms. Terriann Walker, of $15,000. "In a class action, plaintiffs can request an incentive award to compensate them for efforts expended for the benefit of the lawsuit." *In re Sinus Buster Products Consumer Litig.*, 2014 WL 5819921, at *19 (E.D.N.Y. Nov. 10, 2014) *Beckman*, 293 F.R.D. at 483 ("Service awards are common in class action cases and serve 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 plaintiffs").

Ms. Walker's very substantial and meaningful work on behalf of the class is partially detailed in her declaration filed in support of the Motion for Preliminary Approval ("Walker Decl."). Among other work, Ms. Walker, reviewed and gathered documents for the attorneys;

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[3] The firms of McCune Wright Arevalo and The Kick Law Firm, APC, the two lead counsel, have agreed to share equally in the attorneys' fees, and this was disclosed to and approved by the proposed class representative Ms. Walker. (Walker Decl. ¶ 3.)

reviewed the Complaint before it was filed; responded to substantial formal written discovery, including requests for production of documents and special interrogatories; sat for deposition in this matter, and prepared for the deposition in person with her attorneys. (Walker Decl. ¶ 3.) Ms. Walker also personally flew from her home in Connecticut to Chicago, Illinois to be present for and participate in the mediation in this matter which took place before the Honorable Gerald E. Rosen (Ret., U.S. District Judge) of JAMS on August 28, 2019. (Walker Decl. ¶ 3.) Requests such as these for Ms. Walker are routinely approved. *Westcott v. FedEx Ground Package Sys. (In re FedEx Ground Package Sys.)*, No. 3:05-MD-527 RLM (MDL 1700), 2017 U.S. Dist. LEXIS 64936 at *24 (N.D. Ind. Apr. 28, 2017) ("The request for $15,000 service awards for the class representative is just, fair and reasonable."); *Am. Int'l Grp., Inc. v. Ace Ina Holdings, Inc.*, No. 07 CV 2898, 2012 U.S. Dist. LEXIS 25265 at *59 (N.D. Ill. Feb. 28, 2012) (holding "the $25,000 figure is a reasonable one.").

Finally, as already stated in the Motion for Preliminary Approval, the Claims Administrator Epiq has estimated its total costs at $129,928, and agreed to cap its costs for the administration at $142,089.

V. ARGUMENT

A. The Legal Standards for Final Approval of a Class Action Are All Met

Federal Rule of Civil Procedure Rule 23(e)(2), as amended effective December 2018, provides that the 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 arms' 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). Plaintiff has satisfied all these elements of Rule 23(e)(2).

The Settlement also satisfies the requirements of *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (reversed on other grounds), which sets forth nine factors for courts to consider in assessing final approval of class action settlements. Courts in the Second Circuit, including in this District, have continued to apply the *Grinnell* factors after the recent amendment to Rule 23(e)(2). *See McArthur v. Edge Fitness, LLC*, No. 3:17-CV-1554 (RMS), 2019 WL 718540 (D. Conn. Feb. 20, 2019) (applying *Grinnell* factors in considering final approval of a proposed Class Action settlement). In *Grinnell*, 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.

495 F.2d at 463; *see also Edwards v. N. Am. Power & Gas, LLC*, No. 3:14-cv-01714(VAB), 2018 WL 3715273, at *10 (D. Conn. Aug. 3, 2018) (citing *Grinnell* factors); *Kemp-Delisser v. Saint Francis Hosp. & Med. Ctr,* No. 3:15-CV-1113 (VAB), 2016 WL 10033380 (D. Conn. July 12, 2016).

Here, the Class Counsel and the Class Representative zealously represented the Class throughout the litigation, the Settlement was negotiated by experienced and informed attorneys at arm's length, the Settlement provides significant benefit to the Class, and all members of the Class are treated equitably in relation to one another. Thus, the Settlement should be approved as fair, reasonable and adequate.

"[A] presumption of fairness, adequacy, and reasonableness may attach if the Court finds

that arm's length negotiations took place between experienced counsel after a period of meaningful discovery." *Collins v. Olin Corp.*, No. 03-CV-945 (CFD), 2010 WL 1677764, at *2 (D. Conn. Apr. 21, 2010) (*citing Wal-Mart Stores, Inc.*, 396 F. 3d at 116; *Manual for Complex Litigation*, Third, § 30.42 (1995)).

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 legal issues as they intersect federal banking law. In the absence of the Settlement, Plaintiffs would be required to pursue numerous additional motions, and a trial, and the party losing the trial undoubtedly would appeal. (Kick Decl. ¶¶ 20, 21.) All of this would add further years of delay before the Settlement Class could enjoy the benefit of a verdict, if any, obtained in its 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*, 396 F.3d at 118. Here, to date, there literally have been no objections whatsoever, and only eight class members have elected to opt out of the

proposed settlement being presented to this Court for final approval, meaning more than 99.99% of the class members have elected to remain in the proposed settlement. (Epiq Decl. ¶¶ 19, 20.)[4] It has been observed that 18 objections from a class of 27,883 weighed in favor of settlement. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86-87 (2d Cir. 2001). Here, this second *Grinnell* factor therefore strongly favors final approval of the Settlement.

3. The Stage of the Proceedings and Discovery Completed

A court will also consider "'whether the [plaintiffs] had adequate information about their claims such that their counsel can intelligently evaluate the merits of [their] claims, the strengths of the defenses asserted by defendants, 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). Here, as already set forth in Sections II and III, *supra*., not only has adequate discovery been performed, but exhaustive very thorough discovery has been performed. Furthermore, multiple motions have been briefed. As such, it is inarguable 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 of their case' and of the range of possible outcomes at trial." *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 WL 1883494, at *7. This third *Grinnell* factor is therefore satisfied.

4. The Risks of Establishing Liability and Damages

The fourth and fifth *Grinnell* factors are often considered together. *See*, *e.g.*, *Edwards v. N. Am. Power & Gas, LLC*, No. 3:14-cv-01714(VAB), 2018 WL 3715273 at *11 (D. Conn. Aug. 3, 2018) (considering risks of establishing liability and damages together). "In determining the

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[4] The deadline to opt out expired on February 27, 2020, and the deadline to object expires on March 18, 2020. Class Counsel will provide a final tally of opt-out requests and objections to this Court in advance of the final approval hearing.

risks of establishing liability and damages, courts need not 'adjudicate the disputed issues or decide unsettled questions; rather, [courts] need only assess the risks of litigation against the certainty of recovery under the proposed settlement.'" *Simerlein v. Toyota Motor Corp.*,No. 3:17-cv-1091 (VAB), 2019 U.S. Dist. LEXIS 96742 at *61 (D. Ct. June 10, 2019). The Motion for Class Certification, although fully briefed, had not yet been ruled on. Further, the Motion For Summary Judgment, despite also being fully briefed, also still had not been ruled on. If Plaintiff prevailed on both, after that, Plaintiff still would need to prevail at trial, and likely after that, on appeal. All of this presents risk. (Kick Decl. ¶¶ 20, 21.)

5. The Risks of Maintaining the Class Action through Trial Support

Plaintiff believes this is a strong case for certification. However, in reality, certification had not yet even been granted. Therefore, as discussed, this is an additional risk. (Kick Decl. ¶¶ 20, 21.) Further, once granted, it can theoretically also be revisited. *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."). The Settlement therefore also eliminates any uncertainty regarding certification.

6. Defendants' Ability to Withstand Greater Judgment

Under *Grinnell*, courts also consider the ability of the defendants to withstand a greater judgment, but, "[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)*IMAX*, 283 F.R.D. Therefore, although PUB might be able to withstand a greater judgment, this factor in this particular case, should not weigh in either direction.

7. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and in Light of All of the Attendant Risks of Litigation

The final two *Grinnell* factors – "(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" – "are typically considered together." *In re Virtus Inv. Partners, Inc.*, 2018 WL 6333657, at *2. *See also Edwards*, 2018 WL 3715273, at *12-13 (considering these factors together). 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).

As stated, PUB will pay $6,500,000 of new money, with no reversion of any residue to PUB, and also will waive at least $963,933 in uncollected eligible overdraft fees. (Settlement Agreement, at ¶¶ 1(t) and 1(w); Olsen Decl., at ¶ 10.) The total damages of the two classes are calculated by expert Arthur Olsen at $16,581,941 for the Sufficient Funds Class and at $1,959,446 for the Regulation E Class, before reducing either of the two classes for overlap. (Olsen Decl., at ¶¶ 7, 8, 9.) Class Counsel believe the most likely amount that would have been awarded had the matter gone all the way to trial and had Plaintiff prevailed at the trial is $16,581,941. (Kick Decl., at ¶ 15.) This means that as a percentage, the proposed value of the settlement of $7,463,933 equals more than 45% of the most likely recovery, or more than 41% of all damages combined, including the Regulation E overdraft fee damages with no statutory cap applied against that Regulation E damages number whatsoever. (Olsen Decl., at ¶ 9.)

Courts have determined that settlements are, of course, reasonable where plaintiffs

recover only part of their actual losses. *See 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." *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; *In re Toys R US FACTA Litig.*, 295 F.R.D. 438, 453 (C.D. Cal. 2014) (approving settlement with *vouchers* (not cash) potentially worth a maximum of three percent (3%) *if all possible claims were actually made*; *Martel v. Valderamma*, 2015 U.S. Dist. LEXIS 49830 * 17 (C.D. Cal. 2015) (approving a settlement of $75,000 when potential damages were $1.2 million, or about 6%); *See also In re Currency Conversion Fee*, 263 F.R.D. at 124 (finding settlement amount that was approximately less than one percent of the potential damages was within the range of reasonableness even though defendant "of substantial means"); *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. Morgan Stanley & Co*., 2005 U.S. Dist. LEXIS 24890, at *19 (S.D.N.Y. Oct. 19, 2005) (finding a settlement representing 3.8% of estimated damages to be within range of reasonableness); *Custom LED, LLC v. eBay, Inc.*, No. 12-cv-00350-JST, 2014 U.S. Dist. LEXIS 87180, at *13-14 (N.D. Cal. June 24, 2014) (noting courts have held that recovery of only 3% of the maximum potential recovery is fair and reasonable in face of real possibility of recovering nothing absent settlement).

Although Plaintiff does believe the liability in this case is strong, it is possible that a trier

of fact might agree that the language in the contracts at issue actually did allow the Defendant to assess overdraft fees in the manner it did. (Kick Decl. ¶¶ 20, 21.) Further, to continue with the case would be expensive for both sides. (*Id*.) With regard to expected duration, the case still would have substantial legal work, all of which would also contain some risk for Plaintiff. For example, although Class Counsel believes the likelihood for certification is strong, there is always some risk in getting consumer class actions certified, even the ones which have the strongest merits for certification. (*Id*.) In this case, although the class certification motion was fully briefed, it had not yet been ruled upon. Further, Defendant had pending a motion for summary judgment. (*Id*.) Although it is fully briefed, and although Plaintiff believes the Opposition is strong, certainly Defendant disagrees, and the Motion has not yet been ruled upon. If Plaintiff did prevail on these two submitted motions, and if the case still did not resolve at that time, 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 cost of attorneys' fees to both sides from all of this activity would be substantial. (*Id.*)

Finally, this settlement in substance and structure is more favorable than the vast majority of class action settlements. There is no requirement to make a claim to receive money; for current bank customers the money will be direct deposited into their account and for former bank customers a check directly sent to them; the relief is in cash, not coupons; and, none of the money will revert to the Defendant. (Settlement Agreement, at ¶ 8(d).)

8. Notice to The Settlement Class Satisfied FRCP Rule 23

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."

Rule 23(c)(2)(B) further requires certified classes to receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Here, as demonstrated by the contemporaneously filed declaration of the claims administrator Epiq, both the content of the Court-approved Notice and its distribution to Settlement Class Members satisfy all applicable notice requirements.

9. 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 PUB members at the time of the distribution will receive a credit to their accounts, and those Class Members who are not members of Defendant shall be sent a check. (Settlement Agreement ¶ 8(d)(iv)(d).) With regard to the second prong, attorneys' fees, as already discussed, the amount being sought is reasonable. With regard to the third prong, other agreements, there are none. (Kick Decl. ¶ 13.)

Finally, with regard to the last prong, equitable treatment of the class members, the Sufficient Funds Class was the most likely to prevail, and defendant may argue there is a statutory cap on Regulation E Damages of $500,000. (Kick Decl. ¶ 21; 15 U.S.C. §1693m(a)) Furthermore, the Class Members will received awards *pro rata* to their damages, and, "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); *See also*, *In re Lloyds' Am. Trust Fund Litig*., 2002 WL 31663577, at *19 (S.D.N.Y. Nov. 26, 2002) ("[P]ro rata allocations provided in the Stipulation are not only reasonable and rational, but appear to the fairest method of allocating the settlement benefits."). Because the plan of distribution will both "take appropriate account of differences" among claims, while also maximizing efficiency, the plan supports final approval. Fed. R. Civ. P. 23(e), Adv. Comm. Notes to 2018 Amendments.

B. The Settlement Is also Procedurally Fair

"In addition to ensuring the substantive fairness of the settlement through full consideration of the *Grinnell* factors, the Court must also 'ensure that the settlement is not the product of collusion.'" *In re NASDAQ Market-Makers Antitrust Litig*., 187 F.R.D. 465, 474 (S.D.N.Y. 1998)). "Courts presume that a proposed class action settlement is fair when certain factors are present, particularly evidence that the settlement is the product of arms'-length negotiation, untainted by collusion." *Kemp-DeLisser*, 2016 WL 6542707, at *6. Here, not only is all this true, but the settlement arises from a mediator's proposal made by a highly regarded retired federal judge, the Honorable Gerald Rosen. (Kick Decl. ¶ 12.) Courts have recognized that the "participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion." *See Arledge v. Domino's Pizza, Inc.*, 2018 WL 5023950, at *2 (S.D. Ohio Oct. 17, 2018). In fact, the drafters of the 2018 amendments to Rule 23 made clear that "the involvement of a neutral or court-affiliated mediator or facilitator…may bear on whether [negotiations] were conducted in a manner that would protect and further the class interests." Fed. R. Civ. P. 23(e), Adv. Comm. Notes to 2018 Amendments.

Further, 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 in this case counsel are experienced in litigating consumer class actions and other complex matters, and have a particular expertise in overdraft fee class actions. (McCune Decl. ¶¶ 2-5; Kick Decl. ¶¶ 2-4.) They have investigated the factual and legal issues raised in this action, and are in favor of the settlement. (McCune Decl. ¶24; Kick Decl. ¶12, 21.) A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery." *In re Aggrenox Antitrust Litig.*, No. 3:14-MD-02516 (SRU), 2018 WL 1183734, at *3 (D. Conn. Mar. 6, 2018).

C. The Proposed Settlement Class Should Be Finally Certified

In granting preliminary approval, this Court already determined that the proposed settlement class is appropriate for certification. (Docket No. 101.) It is appropriate for this Court to now grant final certification of the Settlement Class. Class certification is proper if the proposed class, the proposed class representative, and the proposed class counsel satisfy the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). Fed. R. Civ. P. 23(a)(1-4). In addition to meeting the requirements of Rule 23(a), a plaintiff seeking class certification must also meet at least one of the three provisions of Rule 23(b). Fed. R. Civ. P. 23(b). When a plaintiff seeks class certification under Rule 23(b)(3), the representative must demonstrate that common questions of law or fact predominate over individual issues and that a class action is superior to other methods of adjudicating the claims. Fed. R. Civ. P. 23(b)(3); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615-16 (1997). Because Plaintiff meets all of the Rule 23(a) and 23(b)(3) prerequisites, certification of the proposed Class is proper.

1. The Requirement of Numerosity Is Satisfied

The first Rule 23 prerequisite of class certification is numerosity, which requires "the class [be] so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). "Numerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). In this case, the class members number 137,664 (Epiq Decl. ¶ 14.) Therefore, numerosity is met.

2. The Requirement of Commonality Is Satisfied

The second requirement for certification requires that "questions of law or fact common to the class" exist. Fed. R. Civ. P. 23(a)(2). Commonality is demonstrated when the claims of all class members "depend upon a common contention . . . that is capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Commonality demands only the existence of a "single common question." *U.S. v. City of New York,* 276 F.R.D. 22, 28 (E.D.N.Y. 2011) (quoting *Dukes*, 131 S. Ct. at 2556).

Here, not only do there exist common questions of law or fact, the common questions predominate over any individual ones. The theories underlying the class claims involve a uniform overdraft fee practice and uniform contractual terms. Defendant itself admits it uniformly and systematically used what it calls "available balance" to determine whether to assess an overdraft fee on a transaction, as opposed to utilizing the actual money in the account, or "actual balance." This is true of all class members. The operative terms regarding the overdraft fee program, and specifically the balance calculation to be used to determine the assessment of overdraft fees, as set forth in the Opt-In Contract and Account Agreement were provided to all class members. (Docket No. 1, ¶¶ 24, 25, 26, 27.) Determination of the meaning of the language in these two contracts will resolve the allegations for the Classes.

The commonality requirement is therefore satisfied.

3. The Requirement of Typicality Is Satisfied

Rule 23 next requires that the class representative's claims be typical of those of the class members. Fed. R. Civ. P. 23(a)(3). The test for typicality is not demanding; it requires only that the class representative's "claim arises from the same course of events, and each class member makes similar legal arguments to prove defendants' liability." *In re Drexel Burnham Lambert Group, Inc.,* 960 F.2d 285, 291 (2d Cir. 1992); *see also* 1 Newberg on Class Actions § 3.13, at 3-76 (3d ed. 1992) ("A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.") Further, representative claims need not be identical to class members' claims in order to be typical. *Aude v. Kobe Steel, Ltd.,* No. 17-CV-10085 (VSB), 2018 WL 1634872, at *3 (S.D.N.Y Apr. 4, 2018).

Plaintiff's Terriann Walker's claims are not only typical of those of the other putative class members, they are essentially identical: she was assessed overdraft fees when there was enough money in her account to pay for the transaction in question. (Walker Decl., at ¶ 2.) Moreover, Plaintiff entered into the same uniform agreements as did other class members, was opted into the same overdraft program as the other class members, and was assessed an overdraft fee by PUB's automated software system for improper overdraft fees just as it did for other Class members. Further, Plaintiff and the Classes seek redress via common legal claims. Therefore, typicality is satisfied.

4. The Requirement of Adequate Representation Is Satisfied

The final Rule 23(a) prerequisite requires that the proposed class representative has and will continue to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Resolution of two questions determines adequacy of representation: (1) does the named plaintiff have any conflicts of interest with prospective class members and (2) is class counsel qualified, experienced, and able to vigorously prosecute the interests of the class?

Duprey v. Connecticut Dept. of Motor Vehicles, 191 F.R.D. 329, 337 (D. Conn. 2000). As with the typicality requirement, this element requires that the interests of the named plaintiff be aligned with the unnamed class members to ensure that the class representative has an incentive to pursue and protect the claims of the absent class members. *See Amchem*, 521 U.S. at 626 n. 20, 117 S.Ct. 2231 ("The adequacy-of-representation requirement 'tends to merge' with the commonality and typicality criteria of Rule 23(a), which 'serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'") Ms. Walker fulfills this.

The interests of Plaintiff Terriann Walker are not antagonistic to those of the other class members; in fact, her interests are wholly aligned because she was charged overdraft fees when her checking account had a positive balance. Further, she understands that she is pursuing this case on behalf of all class members similarly situated and understands she has a duty to protect the absent Class members. (Walker Decl., at ¶ 2.) She has actively participated in the litigation, assisted Class Counsel by gathering documents and other information, by preparing for and sitting for her deposition, by personally attending the mediation which took place more than 800 miles from her Connecticut home, and, *inter alia*, also being prepared and willing to testify at deposition and at trial on behalf of the class, if necessary. (Walker Decl., at ¶ 3.)

Further, Class Counsel, Richard McCune of McCune Wright Arevalo, LLP, and Taras Kick of The Kick Law Firm, APC, both have significant class action, litigation, and trial experience, are competent, and have been competent in representing the classes. Both law firms representing the putative class have extensive experience in consumer class actions, and in particular, expertise in overdraft fee litigation. (McCune Decl., at ¶¶ 3-6; Kick Decl., at ¶¶ 2-3.)

D. The Proposed Settlement Class Meets the Requirements of Rule 23(b)(3)

Once the prerequisites of Rule 23(a) have been met, a plaintiff must also demonstrate that she satisfies the requirements of Rule 23(b). To certify a class under Rule 23(b)(3), the plaintiff must show that (1) the common questions of law and fact predominate over questions affecting only individuals and (2) the class action mechanism is superior to other available methods for adjudicating the controversy. Fed. R. Civ. P. 23(b)(3).

As the Supreme Court most recently confirmed:

> When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

Tyson Foods, Inc. v. Bouaphakeo, 136 S.Ct. 1036, 1045 (2016).

The predominance requirement questions whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "The predominance requirement is met when the defendant's wrongful acts involve common practices and/or standardized documents, or when defendants put forth a common defense." *Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153, 159 (E.D.N.Y. 2009). "Or, to put it another way, common questions can predominate if a 'common nucleus of operative facts and issues' underlies the claims brought by the proposed class." *In re Nassau County Strip Search Cases*, 461 F.3d 219, 228 (2d Cir. 2006). "Judicial economy factors and advantages over other methods for handling the litigation as a practical matter underlie the predominance and superiority requirements for class actions certified under Rule 23(b)(3)." Rubinstein, et al., 2 Newberg on Class Actions § 4:24.

It is not disputed that the language used in the Account Agreement and Opt-In Contract is the same for all class members, and thus it would be far more efficient to decide those common

issues via the class action mechanism. (Docket No. 1, ¶¶ 24, 25, 26, 27.) PUB does not dispute its practice of charging fees based on what it contends it called the available balance while the actual balance contains enough money to pay for a transaction. The predominating issue is whether the contracts permitted this. In short, the only task the trier of fact needs to perform in adjudicating the breach of contract claim is to determine the meaning of the contractual language. The determination of this predominating question would likely be dispositive of the case. Predominance is met.

1. This Class Action Is the Superior Method of Adjudication

Rule 23(b)(3) also requires that a certifying court find that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Menkes v. Stolt-Nielsen S.A*., 270 F.R.D. 80, 100 (D. Conn. 2010) (quoting *Amchem*, 521 U.S. at 617). "Accordingly, class treatment is often deemed superior in 'negative value' cases, *i.e.* where each individual class member's interest in the litigation is less than the anticipated cost of litigating individually." *Id.* Here, it is undisputed that each class member's claim is relatively small, making it uneconomic for individuals to pursue these claims on their own.

The desirability of concentrating the litigation in the present forum is illustrated by the fact that the amount of an individual overdraft fee in this case would be far less than the cost of even filing the complaint. A large number of class members therefore have suffered damages in an amount that could not justify or sustain individual lawsuits, and the only real choice is thus between a class action and no action.

VI. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court grant final approval of the settlement, the 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 representative, in their entirety.

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Respectfully submitted,

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