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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

MAUREEN HARROLD, individually and on behalf of all others similarly situated,

Plaintiff,

v.

MUFG UNION BANK, N.A.,

Defendant.

Case No. BC680214

(Assigned for All Purposes to the Honorable Yvette M. Palazuelos, Dept. 9)

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED MOTION FOR ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARD

Date: July 25, 2024
Time: 10:00 A.M.

Complaint Filed: October 19, 2017

Amended Complaint Filed: July 29, 2020
Trial Date: None Set

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff[1] and Class Counsel[2] respectfully submit this Memorandum of Points and Authorities in support of their Motion for Attorneys' Fees, Costs, and Incentive Award (the "Motion") in this Action which has been pending for more than six years. The Motion seeks a percentage of recovery award of 33-1/3% of the Settlement Fund ($1,666,500.00); reimbursement of $60,458.10 for litigation costs; and a $10,000.00 Incentive Award to the Class Representative.

I. INTRODUCTION

As set forth in this Honorable Court's January 25, 2024, Order granting Plaintiff's Motion for Preliminary Approval, the Settlement presented to this Court will resolve claims by Plaintiff and Settlement Class Members to whom Defendant MUFG Union Bank, N.A. improperly assessed Overdraft Fees in a manner that breached its contracts with its Accountholders.

Plaintiff filed the initial Complaint in this Court on October 19, 2017. Declaration of Andrea Gold In Support of Unopposed Motion for Attorneys' Fees, Costs, and Incentive Award ("Gold Decl."), Settlement Agreement, Ex. 3, ¶ 1. As detailed in Plaintiff's January 30, 2023, Motion for Preliminary Approval, this Settlement was reached following arbitration-related discovery; Plaintiff's deposition of Defendant regarding the validity of the arbitration provision; Defendant's Motion to Compel Arbitration; an arbitration which Class Counsel successfully argued should be dismissed pursuant to California's *McGill* Rule; Defendant's unsuccessful Motion to Vacate the Arbitration Award; Defendant's Motion for Judgment on the Pleadings; substantial discovery in which Plaintiff's expert analyzed Defendant's transaction data to precisely assess class damages; and a full-day mediation with mediator Robert Meyer, Esq. of JAMS. *Id.* ¶¶ 2–28. The Parties agreed to settle for a $5,000,000.00 Settlement Fund, representing approximately 37% of Settlement Class

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[1] All capitalized defined terms used herein have the same meanings ascribed in the Amended Settlement Agreement, filed with the Court on December 29, 2023.

[2] The Settlement Agreement provides "Class Counsel" means Jonathan M. Streisfeld of Kopelowitz Ostrow P.A.; Andrea R. Gold of Tycko & Zavareei LLP; and "such other counsel as are identified in Class Counsel's request for attorneys' fees and costs," namely Taras Kick of The Kick Law Firm, APC; Richard D. McCune of McCune Law Group, APC; and Jeffrey D. Kaliel of KalielGold PLLC. Gold Decl., Ex. 3. These law firms are identified as Class Counsel in the Notice that was disseminated to Settlement Class Members. *Id.*, Ex. 3, ¶ 45, 51.

damages. *Id.* ¶ 6. This is an excellent result in light of the risk of no recovery for the Settlement Class and when compared to recoveries in similar overdraft fee class actions, as Plaintiff's Motion for Preliminary Approval details. The Net Settlement Fund will automatically be distributed to Settlement Class Members with no claims process. Gold Decl., Ex. 3, ¶¶ 101-106. Other than a potential reimbursement for Settlement Administration Costs (which, in the first instance, are being paid by Defendant outside of the Settlement Fund), none of the Settlement Fund will revert to the Defendant. *Id.,* ¶ 107.

Class Counsel obtained these benefits for the Settlement Class having invested around 1,344 hours of time in this matter without guarantee of recovery, and they will invest additional time leading up to Final Approval and thereafter to help with Settlement administration. Because the Settlement establishes a common fund, Plaintiff applies for the requested attorneys' fees under the percentage of the recovery method, which aligns interests most closely with the interests of the Settlement Class. *See Laffitte v. Robert Half Intern, Inc.* (2016) 1 Cal.5th 480, 503. Plaintiff's request for attorneys' fees is reasonable based on numerous factors, such as the common market rate of one-third in California state court, the common award for consumer class actions involving alleged improper bank fees, the excellent result for the Settlement Class, the skill required to achieve these results, the risk of non-payment, and the overwhelmingly favorable reaction to date by the Settlement Class. Although as explained by the California Supreme Court in *Laffitte*, a lodestar cross-check is not required when applying for fees under the percentage of recovery method, should this Court wish to perform such a lodestar cross-check, the requested fee award is nevertheless reasonable. Finally, the requested $10,000.00 Incentive Award to the Class Representative is justified as a modest recognition of her six years of persistent service on behalf of the Settlement Class. Accordingly, this Motion should be granted in its entirety.

II. ARGUMENT

A. The Requested Fee Award Is Reasonable.

Plaintiff respectfully requests a fee award of one-third of the Settlement Fund, which is reasonable under either the percentage method, pursuant to which Class Counsel apply, and is also

supported by an optional lodestar cross-check, as detailed below.

1. The Court Is Permitted to Award Attorneys' Fees Pursuant to the Percentage Method.

California law allows an attorneys' fee award to Class Counsel based on the percentage method. *Laffitte,* 1 Cal.5th at 486; *Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 255; *Consumer Cause v. Mrs. Gooch's Natural Food Markets* (2005) 127 Cal.App.4th 387, 397 (common fund doctrine "frequently applied in class actions when the efforts of the attorney for the named class representatives produce monetary benefits for the entire class").

The percentage method has numerous "recognized advantages" over the lodestar method:

> We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation . . . convince us the percentage method is a valuable tool that should not be denied our trial courts.

Laffitte, 1 Cal.5th at 503. In so holding, the Supreme Court cited a Third Circuit task force that "recommended courts generally use a percentage-of-the-fund method in common fund cases[.]" *Id.* at 492; *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989) (finding lodestar method is not preferred in common fund cases because it "does not achieve the stated purposes of proportionality, predictability and protection of the class. It encourages abuses such as unjustified work and protracting litigation"); *see also* 5 Newberg and Rubenstein on Class Actions § 15:65 (6th ed.) (noting percentage methodology aligns class counsel's interests with those of the class, is easily administered, and rewards efficiency, "thus decreasing the social costs of litigation").

Factors relevant to determining the reasonableness of the requested fee award include awards in similar cases; fees negotiated in comparable cases; the time and effort expended by counsel; the results obtained; the contingent nature of the litigation; the extent to which the litigation precluded other employment; the novelty and difficulty of the questions raised; and the class's approval of the fee. As detailed below, each of these factors weighs in favor of the requested fee award, and would

also support the requisite lodestar multiplier should the Court wish to perform a cross-check.

2. One-Third Fee Awards Are Common in California Consumer Class Actions Where, As Here, A Settlement Fund Has Been Created, and Are Also Most Commonly Approved in Banking Fee Class Actions Nationwide.

"[E]mpirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n. 11; *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 558. In *Laffitte* itself, the California Supreme Court affirmed a one-third fee award from a $19 million class settlement. *Laffitte*, 1 Cal.5th at 486. *See also Estrada v. Royalty Carpet Mills, Inc.,* No. G059681, 2022 WL 855977, at *1 (Cal. Ct. App. Mar. 23, 2022) (finding that in common fund cases, attorneys' fees are typically one-third of the common fund).

Further, the California Court of Appeal held "the amount of attorney fees typically negotiated in comparable litigation should be considered in the assessment of a reasonable fee in representative actions" because class action attorneys "must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior." *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 46–48. In overdraft fee class actions, one-third fee awards have been approved in dozens of similar settlements, thus establishing this fee rate as that which would likely be negotiated in the private market. *Carlin v. DairyAmerica, Inc.* (E.D. Cal. 2019) 380 F.Supp.3d 998, 1019 (considering "awards made in similar cases" as a factor in determining reasonableness of attorneys' fees), Kick Decl., ¶ 7.

Courts in other overdraft fee class actions similar to this one also have deemed that a one-third fee award is a "reasonable baseline" for establishing a reasonable fee pursuant to the percentage method. *Edwards v. Mid-Hudson Valley Federal Credit Union* (N.D.N.Y., Sept. 7, 2023, No. 122CV00562TJMCFH) 2023 WL 5806409, at *11 (awarding fees in the amount of "$754,851, which constitutes 33.33% of the total value of the settlement."); *see also Thompson v. Community Bank, N.A.*, No. 819CV919MADCFH, 2021 WL 4084148, at *10 (N.D.N.Y. Sept. 8, 2021)

(awarding $1,153,610.00 in attorneys' fees, which constituted "33.33% of the Value of the Settlement."); *Lowe v. NBT Bank, N.A.*, No. 319CV1400MADML, 2022 WL 4621433 (N.D.N.Y. Sept. 30, 2022), at *10; *see also* Declaration of Richard D. McCune ("McCune Decl."), ¶¶ 15-16, Ex. 1-2 (collecting cases).

3. Class Counsel's Time and Effort in This Matter Supports the Requested Fee Award.

In *Laffitte*, the Supreme Court of California, in a case involving an objection to a one-third percentage based recovery in a $19 million class action lawsuit, stated: "We hold further that the trial courts have discretion to conduct a lodestar cross-check on a percentage fee ... [and] *also retain the discretion to forego a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee*." *Laffitte,* 1 Cal.5th at 506 (emphasis added). However, if a lodestar cross-check is performed, it strongly supports the requested fee award, as set forth below.

Here, before this action was filed, Class Counsel dedicated significant time and effort to an investigation of the facts and legal theories that would later support the action. This investigation included interviewing potential class representatives and analyzing their monthly account statements; obtaining various historical account agreements for Union Bank, as well as current account documents; researching potential causes of action; and researching potentially applicable laws and regulations. Declaration of Jeffrey D. Kaliel ("Kaliel Decl."), ¶ 8; Declaration of Taras Kick ("Kick Decl."), ¶ 8; McCune Decl., ¶ 9. Only after this investigation was completed did Class Counsel draft and file the initial Complaints in each matter. Gold Decl., ¶ 34; Declaration of Jonathan M. Streisfeld ("Streisfeld Decl."), ¶ 8.

When Defendant attempted to terminate this action via a Motion to Compel Arbitration, Class Counsel conducted additional legal research in support of their Opposition papers and drafted those documents. Gold Decl*.,* ¶¶ 12-16. To further support Plaintiff's Opposition, Class Counsel engaged in arbitration-related discovery, including written discovery, document review, and a deposition of Defendant. *Id.* These efforts led the Court to enforce only the delegation clause of the arbitration agreement, rather than dismiss the case. *Id.,* ¶ 14.

In the arbitration proceedings before the Hon. Candace Cooper, Class Counsel conducted additional legal research and drafted Plaintiff's Amended Demand for Arbitration in the Arbitration and her Motion to Declare Arbitration Agreement Unenforceable under the *McGill* rule. *Id.,* ¶ 16. These motions also required supplemental briefing. *Id.,* ¶ 17. When the arbitrator initially denied Plaintiff's motion, Class Counsel persevered in arguing the arbitration agreement was unenforceable and filed another supplemental brief regarding the agreement's "poison pill" provision. *Id.,* ¶ 18. These efforts led the arbitrator to reverse her prior opinion and dismiss the arbitration. *Id.,* ¶ 19. Absent Class Counsel's skill and persistence in advocating on behalf of the class in this arbitration, the individual arbitration would have proceeded, and other Accountholders would have recovered nothing in this action.

Despite Class Counsel's success before the arbitrator, Defendant attempted to terminate the action once again by filing a Motion to Vacate the Arbitration Award, which required Class Counsel to conduct legal research and draft Opposition papers. *Id.*, ¶ 20. These efforts led to the Court's denial of the Motion to Vacate. *Id.* After failing to vacate the arbitration ruling, Defendant sought to enforce the account agreement's alternative judicial reference provision, which Class Counsel opposed, though the Court granted the Motion to Compel Judicial Reference on February 4, 2021. *Id.,* ¶ 22. On April 13, 2021, after researching suitable referees, the Joint Status Report reported the Parties' agreement to proceed in judicial reference before the Honorable Rita ("Sunny") Miller (Ret.), who was appointed on April 21, 2021. *Id.,* ¶ 23.

The possibility of settlement was raised but settlement talks did not progress. *Id.,* ¶ 24. Accordingly, on November 18, 2021, the Parties' Joint Status Report asked to move forward with the judicial reference proceedings. *Id.* After moving forward under the judicial referee, Plaintiff propounded discovery requests targeted at understanding Defendant's fee practices throughout the class period; the motivations behind those fee practices; Defendant's understanding of key contractual terms; customers' understanding of key contractual terms; and classwide damages. *Id.* When Defendant filed its Motion for Judgment on the Pleadings, seeking to have the contract construed to permit the challenged APSN Fees, Class Counsel evaluated the risks and costs

associated with continued litigation and took the opportunity to engage in arm's-length settlement negotiations with the Defendant. *Id.,* ¶¶ 25-28.

Toward that end, Class Counsel retained a database expert and analyzed Defendant's damages analysis and data regarding Defendant's fee revenue related to the assessment of APSN Fees with the assistance of that expert. *Id.,* ¶ 27, 38. These efforts enabled a successful mediation in which the Parties were able to evaluate their positions based on objective criteria. *Id.,* ¶ 40, 41. Following the mediation, Class Counsel continued negotiating, drafting, revising, and amending the Agreement on behalf of the Settlement Class. *Id.,* ¶ 28, 43. Class Counsel then coordinated the production of Defendant's class transaction data for analysis by Plaintiff's expert, which enabled Plaintiff's expert to identify APSN Fees assessed against Settlement Class members and allowed the Parties to deliver a class list to the Settlement Administrator. *Id.,* ¶ 39.

Finally, Class Counsel drafted the Motion for Preliminary Approval, drafted two supplemental memoranda in response to the Court's inquiries regarding the Settlement, and amended the Agreement at the Court's direction. Gold Decl., ¶ 48; Kick Decl., ¶ 8. These efforts led the Court to preliminarily approve the Agreement. *Id.*

The requested fee award is reasonable not only in light of the foregoing, but also when checked against the time spent by Class Counsel in litigating this matter. As stated, the Court is not required to conduct a lodestar cross-check when considering attorneys' fees requests under the percentage of the recovery method that is appropriate in this type of common fund settlement, as argued *supra*. *Lafitte*, 1 Cal.5th at 506. Nonetheless, a lodestar cross-check is permitted, and further confirms the reasonableness of the requested fee award. *Id.* at 505 (lodestar "does not override the trial court's primary determination of the fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum on the potential fee award."). "Under this approach, the lodestar is calculated by multiplying the reasonable hours expended by a reasonable hourly rate. The court may then enhance the lodestar with a multiplier, if appropriate." *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254–255.

The lodestar multiplier accounts for "a variety of other factors, including the quality of the

representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented." *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26. As detailed *infra*, all of those factors are abundant here. "Multipliers can range from 2 to 4 or even higher." *Wershba*, 91 Cal.App.4th at 255. Under California law, an attorney declaration suffices to support a request for attorneys' fees, and detailed billing or timekeeping records are not necessary. *See, e.g. Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1375; *see also Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1398 (approving attorneys' fees based on attorney affidavits because "it cannot be said in this particular case that the absence of time records and billing statements deprived the trial court of substantial evidence to support the [attorneys' fee] award"). In conducting a lodestar analysis, the court is not required to make "specific findings" regarding its calculations, nor is counsel required to submit "detailed time sheets." *Id.*

Here, Class Counsel has certified their hours and rates in prosecuting this action. Combined, Class Counsel's lodestar at current rates is approximately $1,175,582.70, resulting from over 1,300 hours expended and to be expended on this action by Class Counsel. *See* Gold Decl., ¶ 60-62, Ex. 2; Kick Decl., ¶ 9; McCune Decl., ¶ 20, Kaliel Decl., ¶12, 13, Ex. 1; Streisfeld Decl., ¶ 21.[3] The requested attorneys' fee would result in a multiplier of approximately 1.41, well within, and on the very low end, of California's accepted range. *See Glendora Community Redevelopment Agency v. Demeter* (1984) 155 Cal.App.3d 465 (affirming a fee award that included a 12.0 multiplier); *Craft v. County of San Bernardino* (C.D. Cal. 2008) 624 F.Supp.2d 1113, 1125 (awarding a common fund fee award that amounted to a 5.2 multiplier); *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051 (approving a 3.65 multiplier); *Van Vranken v. Atlantic Richfield Co.*, (N.D. Cal. 1995) 901 F.Supp. 294, 298-299 (approving multiplier of 3.6); *Chavez v. Netflix, Inc*. (2008) 162 Cal.App.4th 43, 66 (upholding 2.5 multiplier).[4] The multiplier is amply justified by the fee award factors analyzed herein, including the novelty and complexity of the issues, the results obtained, and the contingent risk presented. *See* Sections II.A.4., *infra*.

[3] The concurrently filed declarations summarize the time. Class Counsel will provide time sheets for *in camera* review by this Honorable Court if the Court so wishes.

[4] Each firm's respective lodestar and multiplier are set forth in their concurrently filed declarations.

Regarding hourly rates, the reasonable hourly rate is the prevailing rate in the community for similar work. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095. "[I]n assessing a reasonable hourly rate, the trial court is allowed to consider the attorneys' skill as reflected in the quality of work, as well as the attorneys' reputation and status." *MBNA American Bank, N.A. v. Gorman* (2006) 147 Cal.App.4th 1, 3. The trial court may also "find hourly rates reasonable based on evidence of other courts approving similar rates." *Parkinson v. Hyundai Motor America* (C.D. Cal. 2010) 796 F.Supp.2d 1160, 1172. Class Counsel have calculated their lodestar using the Adjusted Laffey Matrix, which has been approved by multiple courts in California and are consistent with the current prevailing billing or "market" rates in the California market. Gold Decl., ¶ 61; *see also Syers Properties III, Inc.* (2014), 226 Cal.App.4th 691,702 (finding hourly rates reasonable where rates were virtually identical to those calculated in the *Laffey* Matrix as adjusted for that region)[5]. The Adjusted Laffey Matrix provides the standard hourly rates for attorneys practicing in Washington, D.C., but the rates are reasonable and fall well within the rate that courts in California have approved. *See, e.g.*, *Wang v. StubHub*, *Inc.*, No. CGC-18-564120 (Cal. Super. Ct. S.F. Cty. Aug. 8, 2022); *Lash Boost Cases* No. CJC-18-004981 (Cal. Super. Ct. S.F. Cty. Sept. 28, 2022); *Stathakos v. Columbia Sportswear Co.* (N.D. Cal. Apr. 9, 2018) No. 15-CV-04543-YGR, 2018 WL 1710075, at *6 (approving these rates and stating that "[S]everal courts in this district have approved hourly rates equal to or greater than the rates at issue here in similar cases."); *Kumar v. Salov N. Am. Corp*. (N.D. Cal. July 7, 2017) No. 14-CV-2411-YGR, 2017 WL 2902898, at *7 (finding Class Counsel's rates were "reasonable and commensurate with those charged by attorneys with similar experience in the market").

[5] *See, e.g., In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prod. Liab. Litig.,* MDL No. 2672 CRB (JSC), 2017 WL 1047834, at *5 (N.D. Cal. Mar. 17, 2017) (approving rates ranging from $275 to $1,600 for partners, $150 to $790 for associates, and $80 to $490 for paralegals)*; Wit v. United Behavioral Health,* No. 14-cv-02346-JCS, 2022 WL 45057, at *7 (N.D. Cal. Jan. 5, 2022) (approving rates ranging from $625 to $1,145 for partners and counsel, $425 to $650 for associates, $300-$370 for paralegals); *Bickley v. CenturyLink, Inc.* (C.D. Cal. Nov. 29, 2016) No. CV 15-1014-JGB (ASX), 2016 WL 9046911, at *4 (a billing survey was submitted from 2013 listing the rates for partners and associates from large law firms, noting that those rates ranged from a low of $515/per hour for associates to $1,220/per hour for partners.) *see also Banas v. Volcano Corp.* (N.D. Cal. 2014) 47 F.Supp.3d, 965 (approving 2014 rate of $1,095).

Indeed, the Adjusted Laffey rates sought here have been approved by numerous courts across the country. *See*, *e.g.*, *Meta v. Target Corp*., No. 14-cv-0832 (N.D. Ohio Aug. 7, 2018), ECF No. 179; *In re Think Finance, LLC*, No. 17-bk-33964 (Bankr. N.D. Tex.); *Brown v. Transurban USA, Inc.*, No. 1:15CV494 (JCC/MSN), 2016 WL 6909683 (E.D. Va. Sept. 29, 2016) (approving of Adjusted Laffey rates for purposes of calculating the reasonable hourly rate for Tycko & Zavareei attorneys, as well as other Class Counsel); *Smith v. Fifth Third Bank*, No. 1:18-cv-00464-DRC-SKB (S.D. Ohio Aug. 31, 2021); *Small v. BOKF, N.A.*, No. 1:13-cv-01125-REB-MJW (D. Colo. Mar. 31, 2016) (approving fees in case against Bank of Oklahoma submitted with lodestar cross-check based on Adjusted Laffey Rates); *Soule v. Hilton Worldwide, Inc.*, No. CV 13-00652 ACK-RLP, 2015 WL 12827769 (D. Haw. Aug. 25, 2015); *Beck v. Test Masters Educ. Servs.*, Inc., 73 F. Supp. 3d 12 (D.D.C. 2014); *Roberts v. Capital One Financial Corp*. 1:16-cv-04841 (S.D. NY Dec. 2, 2020); *Hamm, et al. v. Sharp Electronics Corp.*, No. 5:19-cv-00488-JSM-PRK (M.D. Fla. Jan. 7, 2021); *Juan Quintanilla Vazquez et al. v. Libre by Nexus, Inc.*, No. 17-cv-00755 CW (N.D. Cal. Feb. 8, 2021); *Silveira v. M&T Bank*, No. 2:19-cv-06958-ODW-KS (C.D. Cal. Jan. 20, 2022); *Jette v. Bank of America, N.A.*, No. 20-cv-6791-LDW (D.N.J. Nov. 17, 2021); *Morris, et al., v. Bank of America*, *N.A*. No. 3:20-cv-00157-RJC-DSC (W.D.N.C. Jan., 24, 2022); *Gupta v. Aeries Software*, No. 8:20-cv-00995-FMO-ADS (C.D. Cal. Mar. 3, 2023).

4. The Factors Considered Regarding the Reasonableness of the Requested Fee Award Are All Fulfilled Here, including the Difficulty and Novelty of the Questions Presented, the Skill of Class Counsel, and the Results Achieved for the Class.

The "novelty and difficulty together with the skill shown by counsel" and "the results obtained" are relevant considerations in assessing the reasonableness of a fee award. *Laffitte*, 1 Cal.5th at 489, 504. This case presented novel questions of fact and law from the outset because the APSN liability theory had not been extensively litigated or tried before it was filed, and though in other cases plaintiffs have succeeded at the dismissal and summary judgment stages, no one has tried the APSN theory of liability to judgment. Gold Decl., ¶ 8. Indeed, this case was filed before

the Second Circuit's seminal opinion regarding the APSN theory in *Roberts v. Capital One, N.A.* (2d Cir. 2017) 719 Fed.Appx. 33. *Id.* The APSN liability theory also presented significant difficulties in assessing class damages. Kick Decl., ¶ 13. Because APSN Fees typically cannot be identified by reference to account statements alone, the class damages analysis required discovery of Defendant's internal data propounded by Class Counsel, which drew on Class Counsel's extensive experience in other bank fee class actions, and was analyzed by a preeminent expert. *Id.*

Further, Class Counsel's success in obtaining dismissal of the arbitration depended on the nuanced argument that *McGill v. Citibank, N.A.* (2017) 2 Cal. 5th 945 rendered the entire arbitration agreement unenforceable on account of the "poison pill" provision in the contract. Gold Decl., ¶ 8. Application of the *McGill* rule was undeveloped when Plaintiff successfully argued its application. *Id.* More broadly, Defendant's arbitration defense raised difficult questions of contractual interpretation and California law at several stages of the litigation. *Id.*

Further, this case is novel among all other class actions in that not only was the case challenged by Defendant on the basis of the binding arbitration clause which Plaintiff successfully overcame, but after that Defendant invoked another section of its account agreement, seeking judicial reference pursuant California Code of Civil Procedure section 638. Gold Decl., ¶ 22.

In addition, the "quality of opposing counsel is important in evaluating the quality of Class Counsel's work." *Barbosa v. Cargill Meat Solutions Corp.* (E.D. Cal. 2013) 297 F.R.D. 431, 449. Class Counsel was opposed in this litigation by highly experienced bank fee class action defense counsel, who at different times were with Morrison & Foerster LLP, a multinational law firm, and Buckley LLP. The Defendant had over $124.7 billion in assets as of 2022 and has since been acquired by U.S. Bank, one of the largest United States banks with assets of over $650.7 billion. Accordingly, Defendant possessed nearly limitless resources with which to oppose this class action.

Nevertheless, in spite of these difficulties, Class Counsel prevailed on the critical issue of the enforceability of Defendant's arbitration agreement, which allowed the case to proceed. By prevailing on this issue, mediating with Defendant, and obtaining the class transaction data, Class Counsel secured the Settlement that this Court preliminarily approved in its January 25, 2024, Order.

As a direct result of Class Counsel's efforts, a $5,000,000 common fund was created for the Settlement Class, representing approximately 37% of Settlement Class damages. Gold Decl., ¶ 6. These funds will be directly distributed to the Class, without a claims process, either via direct deposit or a credit to the account, or by check. *Id*., Ex. 3, ¶ 105. Direct payments would not have been possible absent Class Counsel's efforts in coordinating the production and analysis of voluminous class transaction data described above. The Settlement is a very good result considering, *inter alia*, the results in similar overdraft fee class actions, the possibility Defendant would prevail in arguing the contract authorized the assessment of APSN Fees, the potential defenses Defendant would raise as a bar to class certification, and the cost of continued litigation.[6]

The successful prosecution of this Action over its nearly seven-year duration required the participation of highly skilled and dedicated attorneys with extensive experience in bank fee litigation. As discussed above, this case involved numerous complex legal issues, including banking law, contract law, and class certification. Gold Decl., ¶ 8. *See Rebney v. Wells Fargo Bank,* 220 Cal. App. 3d 1117, 1140 (Ct. App. 1990) (recognizing the inherent complexity of overdraft fee litigation against large national banks). In addition, Class Counsel's challenge to the enforceability of the arbitration provision based on the *McGill* rule and "poison pill" provision addressed complex and newly evolving case law, with other courts deciding *McGill* was inapplicable. *See Clifford v. Quest Software Inc.* (2019) 38 Cal.App.5th 745, 750 (recognizing complexity of *McGill* challenge to arbitration because enforceability depends on type of relief sought); *see also Torrecillas v. Fitness International, LLC* (2020) 52 Cal.App.5th 485, 500. Class Counsel collectively has decades of experience in class action litigation and has successfully handled national, regional, and statewide class actions throughout the United States and in California, in both state and federal courts. Kick Decl., ¶ 14; McCune Decl., ¶¶ 2, 18; Gold Decl., ¶ 46, Ex. 1; Kaliel Decl., ¶ 2; Streisfeld Decl., ¶ 20, Ex. 1. For over a decade, each of the attorneys appointed Class Counsel have focused a substantial portion of their class action practices on cases challenging Overdraft Fees and other bank

[6]Plaintiff has briefed the issue of the fairness of the Settlement in her Motion for Preliminary Approval and supplemental briefs. *See* Motion for Preliminary Approval (Jan. 30, 2023), at 19–21. The issue will be further briefed in Plaintiff's forthcoming Motion for Final Approval.

fees assessed by financial institutions. *Id.* The declarations supporting this Motion identify prior cases in which each named Class Counsel has been approved by a court to act as lead, co-counsel, settlement class counsel, and/or class counsel. Kick Decl., ¶ 3; McCune Decl., ¶¶ 3-7; Gold Decl., ¶ 5; Streisfeld Decl., ¶ 5; Kaliel Decl., ¶ 2.

5. The Contingent Nature of The Fee and the Risk of Non-Payment Weigh In Favor of Granting Class Counsel's Attorneys' Fee Request.

Class Counsel undertook this Action on an entirely contingent fee basis and assumed a substantial risk the litigation might yield little or no recovery, leaving them uncompensated for their substantial time and effort. Gold Decl., ¶10. Courts recognize the risk of receiving little or no recovery is a major factor in considering an attorneys' fee award. *Laffitte*, 1 Cal.5th at 504 (approving trial court's consideration of "contingency" as a factor in determining reasonableness of fee award); *Bellinghausen v. Tractor Supply Company* (N.D. Cal. 2015) 306 F.R.D. 245, 261 ("With respect to the contingent nature of litigation, courts tend to find above-market-value fee awards more appropriate in this context given the need to encourage counsel to take on contingency-fee cases for plaintiffs who otherwise could not afford to pay hourly fees."). As the California Supreme Court explained in *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133:

> The economic rationale for fee enhancement in contingency cases has been explained as follows: "A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans." (Posner, Economic Analysis of Law (4th ed. 1992) pp. 534, 567.) "A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." (Leubsdorf, *The Contingency Factor in Attorney Fee Awards* (1981) 90 Yale L.J. 473, 480; *see also Rules Prof. Conduct, rule 4-200(B)(9)* [recognizing the contingent nature of attorney representation as an appropriate component in considering whether a fee is reasonable]; ABA Model Code Prof. Responsibility, DR 2-106(B)(8) [same]; ABA Model Rules Prof. Conduct, rule 1.5(a)(8).)

During this action, Class Counsel faced substantial risks of non-payment. As just one example, as discussed *supra*., Defendant argued it had a binding arbitration clause which would prohibit a class action. As noted above, Plaintiff successfully argued the *McGill* rule rendered the

entire arbitration agreement unenforceable. But in other recent decisions *McGill* rule challenges were unsuccessful. *See Magill v. Wells Fargo Bank, N.A.,* No. 4:21-CV-01877 YGR, 2021 WL 6199649, at *7 (N.D. Cal. June 25, 2021); *Marselian v. Wells Fargo & Co.,* 514 F. Supp. 3d 1166, 1176 (N.D. Cal. 2021).

Other examples of risk included that Plaintiff's claims might have failed on Defendant's Motion for Judgment on the Pleadings, at summary judgment, or at trial if the Court or factfinder had agreed with Defendant's interpretation of the applicable contracts. Kick Decl., ¶ 15. Defendant also indicated it intended to re-raise its arbitration clause as a defense at the class certification stage, raising the possibility that certification would be denied and the class would recover nothing. *Id.* Further, any result favorable to the Settlement Class might have been reversed on appeal. *Id.* Plaintiff believes Defendant would have pursued all of these options in the absence of a settlement, and possesses the financial resources to do so. *Id.* Despite these risks and difficulties presented throughout this litigation, Class Counsel forged a significant resolution that provides substantial relief to the Settlement Class, which favors the requested fee award.

The fee award is similarly justifiable because the time spent on this matter by Class Counsel has required considerable work that could have, and would have, been spent on other billable matters. Gold Decl., ¶ 10. As a result of having accepted and been devoted to this case, Class Counsel wound up not representing parties in cases they otherwise would have, and which likely would have compensated Class Counsel at their hourly rates requested in this matter. *Id.*

6. The Current Absence of Objections to the Attorneys' Fee Award Favors Its Approval.

The absence or minimal number of objections to a fee request is significant evidence that the request is fair and reasonable. *Bellinghausen v. Tractor Supply Company* (N.D. Cal. 2015) 306 F.R.D. 245, 261; *National Rural Telecommunications Cooperative v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 529 ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.").

Here, the requested one-third attorneys' award was clearly and conspicuously disclosed to Settlement Class Members in the Notice. Gold Decl., Ex. 3, ¶¶ 45, 51. To date, no Settlement Class Member has objected to the Settlement or attorneys' fee request, and there are no opt-outs. Gold Decl., ¶ 44. No objections to date, including to the proposed fee award, further weighs in favor of its approval.[7]

7. Should the Court Perform a Lodestar Cross-Check, the Multiplier Should Apply to Class Counsel as a Whole and Not Vary By Law Firm.

Although all of the law firms have put forth their lodestars and contributed to the case, the California Court of Appeal has held, although fee awards in class actions "must be tied to counsel's actual efforts to benefit the class", this "does not 'mean that class counsel need follow, line by line, the lodestar formula in arriving at an agreement as to fee distribution'" but rather, "the distribution of fees must bear *some relationship to the services rendered.*" *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1142–1143 (*quoting In re Agent Orange Product Liability Litigation* (2d Cir.1987) 818 F.2d 216, 223) (emphasis in original) (rejecting argument that agreement among class counsel to share a lump-sum fee was inappropriate because it provided for a division of fees on a basis other than a strict lodestar calculation).

Further, courts have recognized that class counsel are generally better suited than the court to decide the weight and merit of the attorneys' relative contributions to the success of a class action lawsuit. *In re Agent Orange Product Liability Litigation* (2d Cir. 1987) 818 F.2d 216, 223 (recognizing "the attorneys may be in a better position to judge the relative input of their brethren and the value of their services to the class."); *In re Ampicillin Antitrust Litigation* (D.D.C. 1978) 81 F.R.D. 395, 400 ("[I]t is recognized that the allocation among counsel must depend at least in part upon the more subjective factors of the relative contributions of the attorneys to the group effort. In the context of this litigation, which has extended over an eight-year period, it is virtually impossible for the Court to determine as accurately as can the attorneys themselves the internal distribution of

[7] The deadline to object or opt-out is June 25, 2024. Plaintiff will provide updated information regarding opt-outs and objections in her forthcoming Motion for Final Approval and at the Final Approval Hearing.

work, responsibility and risk."); *In re Copley Pharmaceutical, Inc., Albuterol Products Liability Litigation* (D. Wyo. 1999) 50 F.Supp.2d 1141, 1148, *aff'd and remanded sub nom. In re Copley Pharmaceutical, Inc.* (10th Cir. 2000) 232 F.3d 900 ("Class counsel are better able to decide the weight and merit of each other's contributions.").

Here, Class Counsel entered into a fully disclosed and a"propriately approved fee sharing arrangement that reflects each firm's relative contribution to the investigation, development, litigation, and settlement of this Action. Gold Decl., ¶ 9. Specifically, under the Joint Prosecution Agreement, which Plaintiff approved in writing, the McCune Law Group, APC and The Kick Law Firm, APC will collectively receive 25% of the total attorneys' fees or their relative lodestar, whichever is greater; Tycko and Zavareei LLP and Kopelowitz Ostrow P.A. will each receive 40% of the remainder of the attorneys' fees; and KalielGold PLLC will receive the final 20% of the attorneys' fees. *Id.* The total fee has not increased solely by reason of this agreement, as required by California Rule of Professional Conduct 1.5.1. *Id.* The fee arrangement was disclosed to the Settlement Class in the Notice. *Id*., Ex. 3.

This fee-sharing arrangement was intended to reasonably reflect each firm's relative contribution to the success of this Action, thereby exceeding the minimal standard that the fee distribution bear "some relationship to the services rendered." *Rebney*, 220 Cal.App.3d at 1143. First, as stated, *supra*., the multiplier sought in this case is only approximately 1.41, a multiplier which is well within California class action jurisprudence. Second, although the lodestar should be considered collectively, even if analyzed by firm, it is still reasonable. *Id*. *See* Gold Decl., ¶ 62; Kick Decl., ¶ 11; McCune Decl., ¶ 23, Kaliel Decl., ¶ 14; Streisfeld Decl., ¶ 23 (citing multipliers between 1 and 4). Further, the different firms had different primary roles. As demonstrated in the concurrently filed declarations of Class Counsel, the McCune Law Group, APC, The Kick Law Firm, APC, and KalielGold PLLC were responsible for the development of the case, pre-suit investigation, and the retention of the class representative, and also are the primary authors of this Motion, as well as the Motion for Final Approval. Kaliel Decl., ¶ 8; Kick Decl., ¶ 17; McCune Decl., ¶ 9. Tycko and Zavareei LLP and Kopelowitz Ostrow P.A. were generally responsible for litigating

the case and interacting with the Plaintiff after other law firms transitioned that responsibility. Gold Decl., ¶¶ 47-48. Finally, although some Departments in the Los Angeles County Complex Courthouse request only confirmation that the class representative has been made aware of and approved the fee-sharing agreement, here the attorneys not only received such client consent, but also have disclosed the details to this Court, which is more than what is required under the Rules of Professional Conduct and class action jurisprudence.

B. Class Counsel Should Be Reimbursed for Reasonably Incurred Litigation Costs

"There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund." *Ontiveros v. Zamora* (E.D. Cal. 2014) 303 F.R.D. 356, 375 (quotation omitted). As certified by Class Counsel, counsel for Plaintiff in this Action presently have incurred $53,299.09 in costs litigating this matter on behalf of the Settlement Class. Gold Decl., ¶ 63; McCune Decl., ¶ 24; Kick Decl., ¶ 18; Streisfeld Decl., ¶ 25; Kaliel Decl., ¶ 16. These costs are directly related to the prosecution of this complex class action. *Id.* Notably, this amount is lower than the $60,458.10 reflected in the Notice to Class Members as the costs that might be requested by Class Counsel. *Id.* In addition, other costs may be incurred by Class Counsel through the Motion for Final Approval. *Id.* Accordingly, Class Counsel respectfully requests reimbursement of $60,458.10 in reasonable litigation costs, and if any amount is unused, it will remain in the settlement fund.[8]

C. The Court Should Grant the Requested Incentive Award To The Class Representative For Her Diligent Work On Behalf of the Class

The Amended Settlement Agreement provides for an Incentive Award to the Class Representative of up to $10,000, subject to this Court's approval. Gold Decl., Ex. 3, ¶ 119. This award is intended to recognize the time, effort, and risk Plaintiff undertook in bringing this case and helping to secure the relief obtained for the Settlement Class. *See Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726 (upholding "service payment" to named plaintiff for his efforts in

[8] The Settlement Administration Costs will be presented in the Motion for Final Approval, and requested at that time, as this Motion pertains only to Class Counsel's fees and costs and the Incentive Award to the Class Representative.

bringing class case); *Rodriguez v. West Publishing* (9th Cir. 2009) 563 F.3d 948, 959 (stating that incentive awards are "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general."). To determine the propriety of a Incentive Award, courts consider the actions protecting class interests, the benefit provided to the class based on those actions, and the amount of time and effort expended by the plaintiff. *Staton v. Boeing Co.* (9th Cir. 1993) 327 F.3d 938, 976-7. In addition, an incentive award is appropriate "if it is necessary to induce an individual to participate in the suit[.]" *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804.

Here, as detailed in her concurrently filed declaration, Plaintiff made significant contributions to this Action's success, undertook reputational risks, and expended time and effort on behalf of the Settlement Class. Declaration of Maureen Harrold ("Harrold Decl."), ¶¶ 3-4. Among other things, Plaintiff provided essential information for the prosecution of this action and in connection with negotiations and settlement, gathered and provided pertinent documents, took time to participate in phone calls with counsel, and reviewed the Settlement documents. *Id.* At no time did Plaintiff ever have a guarantee of any personal benefit as a result of this Action. *Id.*

The proposed Incentive Award falls well within the range of reasonable incentive payments awarded to Class Representatives in similar class actions. *See, e.g., Richard v. Glens Falls National Bank* (N.D.N.Y. July 22, 2022) No. 1:20-cv-00734 (BKS/DJS), Dkt. No. 72 at ¶ 16 (granting $15,000 service award in overdraft fee class action); *Roberts v. Capital One* (S.D.N.Y. Dec. 2, 2020) No. 1:16-cv-04841-LGS, Dkt. No. 199 at 11 (granting $10,000 service award in overdraft fee class action); *see also Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393 (upholding service awards of $10,000 each to four named plaintiffs in wireless carrier early termination fees case); 5 Newberg and Rubenstein on Class Actions § 17:8 (6th ed.) (citing a 2011 study in which the average incentive award was found to be $11,697, or $14,371 in 2021 dollars). In addition, even if the success of the Action could have been assumed, Plaintiff stood to recover only the amounts of her improperly assessed Overdraft Fees, which are minimal when considered against the time and

effort Plaintiff devoted to the action on behalf of the class. Kick Decl., ¶ 12.

III. CONCLUSION

For the reasons stated above, the Class Representative and Class Counsel respectfully request the Court approve the award of the requested attorneys' fees, costs, and Incentive Award.

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