UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANKIE LIPSETT, individually and on behalf of all others similarly situated,

Plaintiff,

-against-

BANCO POPULAR NORTH AMERICA,

Defendant.

Case No.: 1:22-cv-03901-MMG

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF NOTICE PLAN

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Plaintiff[1] Frankie Lipsett ("Lipsett" or "Plaintiff"), on behalf of himself and all others similarly situated respectfully submit this memorandum of law in support of Plaintiff's unopposed motion for preliminary approval of the Parties' Settlement Agreement.

INTRODUCTION AND PROCEDURAL BACKGROUND

This case challenges Defendant's practice of charging overdraft fees ("OD fees") on debit card transactions that did not overdraw an account at the time they were authorized.

Plaintiff Lipsett filed his class action complaint on May 13, 2022. (ECF No. 1). On September 20, 2022, Defendant filed a motion to compel the claims to individual arbitration. (ECF No. 20). Plaintiff, through his undersigned counsel, opposed the motion to compel arbitration. (ECF No. 22). On December 9, 2022, the Court denied the Defendant's motion to compel arbitration. (ECF No. 26). Defendant then appealed to the Second Circuit. After full briefing by the Parties before the Second Circuit, and oral argument held before the Second Circuit, the Second Circuit on January 10, 2024 upheld this Court's finding that Defendant was not entitled to compel the claims to arbitration. (ECF No. 38).

Shortly after the Second Circuit issued its decision denying Defendant's appeal, the Parties agreed to mediate. On May 2, 2024, counsel for the Parties met in San Juan, Puerto Rico before the Hon. Jose A. Fusté (Ret.), who was the former chief judge for the District of Puerto Rico and now is a highly respected mediator. *See* Declaration of Michael R. Reese in Support of Plaintiff's Motion for Preliminary Approval of Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan filed simultaneously with this memorandum ("*Reese Decl.*" or "*Reese Declaration*") at ¶ 11. Prior to mediating with Judge Fusté (Ret.), Defendant provided Plaintiff's

[1] Unless otherwise indicated, capitalized terms shall have the meaning that the Settlement Agreement ascribes to them. *See generally* Class Settlement Agreement (ECF No. 49).

counsel with a large amount of data regarding the fees at issue. Based upon this information, the Parties were able to evaluate the strengths and weaknesses of the case, including, but not limited to, the overall dollar amount of fees at issue.

After a full day of mediation, Judge Fusté (Ret.) made a mediator's proposal of a common fund of $1.5 million, which both parties accepted.

The Settlement Agreement defines the Settlement Class, describes the Parties' agreed-upon Settlement relief, and proposes a plan for disseminating notice to the Settlement Class Members.

The settlement amount is an excellent result for the class members. Review of the discovery that Defendant provided prior to the mediation evidenced that the total fees at issue were approximately $3.25 million. *Reese Decl.* at ¶ 19. The settlement amount of $1.5 million is no less than 46% of that total amount. *Id*. Additionally, as part of the Settlement, Defendant has agreed it will not charge the challenged fees for five years, representing an additional savings of $3 million for bank customers. *Id.* at 4.

For all of the reasons given herein, Plaintiff respectfully asks the Court to grant preliminary approval of the Settlement, allow the Settlement Administrator to provide notice to the Settlement Class Members, and schedule a Fairness Hearing to consider final approval of the Settlement. *See* FED. R. CIV. P. 23(e). Plaintiff also respectfully requests to be appointed as the representative for the Settlement Class and for his counsel to be appointed as Class Counsel. *See* FED. R. CIV. P. 23(g). The Court should also approve the notice program to which the Parties agreed in the Settlement, as it meets the requirements of due process and is the best notice practicable under the circumstances. *See* FED. R. CIV. P. 23(c).

A. Certification of the Settlement Class

Under the Settlement Agreement, the Parties agree to seek certification of a nationwide Settlement Class defined as follows:

> All holders of Popular Bank consumer checking accounts who during the Class Period were assessed and not refunded an overdraft ("OD") fee in connection with: 1) a debit card or other ATM transaction on their account that was the subject of an authorization made on or before April 15, 2020; and/or 2) a debit card or other ATM transaction that was authorized against positive funds on or after April 16, 2020. Provided, however, that OD Fees assessed on or before August 6, 2018, against members of the settlement class in *Valle v. Popular Community Bank*, Index No. 653936/2012 (N.Y. Sup. Ct.), are not included in these two categories of OD Fees.
>
> Excluded from the Settlement Class are Defendant, its parents, subsidiaries, affiliates, officers, and directors; all Settlement Class members who make a timely election to opt out; and all judges assigned to this litigation and their immediate family members.

See Settlement at § 3.1.

B. Relief for the Members of the Settlement Class

The Settlement Agreement provides for significant substantial monetary relief. Defendant will pay $1,500,000.00 into a Settlement Fund. *Settlement* at §§ 1.45, 2.1, 6.1. Defendant also agrees not to assess the contested fees for a period of five years. *Settlemen*t at § 2.2.

The Settlement Fund will first be used to pay for Class Notice and administration costs or other costs pursuant to the terms of Section 6 of the Settlement Agreement, including all Attorneys' Fees and Costs and Service Award, prior to any distribution from the payments to Settlement Class Members. *Id.*

C. Service Awards and Attorneys' Fees and Expenses

Defendant has agreed not to oppose an application for payment of a Service Award of $10,000 to the named Plaintiff to compensate him for the actions and risk that he took in his capacity as the class representative. *Settlement* at § 11.1. Defendant has also agreed not to oppose

an application for payment of $500,000 (which is one-third of the Settlement Fund) for attorneys' fees to Class Counsel for Class Counsel's work on the Action. *Id.* at § 10.1. Class Counsel shall also separately apply for the reimbursement of costs and expenses. *Id.*

D. Settlement Notice

The Settlement proposes that the Court appoint Epiq Class Action & Claims Solutions, Inc. ("Epiq") to administer the notice process and outlines the forms and methods by which notice of the Settlement Agreement will be given to the Settlement Class Members, including notice of the deadlines to opt out of, or object to, the Settlement. *Settlement* at §§ 1.42, 5. Epiq has developed a robust notice program that includes: (1) direct notice to the Settlement Class Members and (2) a dedicated Settlement Website and toll-free helpline through which Settlement Class Members can obtain more detailed information about the Settlement. *See* Declaration of Cameron R. Azari of Epiq Regarding Notice Plan filed simultaneously with this memorandum of law ("*Azari Decl.*") at ¶¶ 20-28. The notice plan has been designed to deliver a reach of approximately 85%. *Azari Decl*. at ¶ 32.

Under the Settlement Agreement, the Settlement Website shall contain the Long Form Notice; answers to frequently asked questions; a contact information page; the Settlement Agreement; the signed order of Preliminary Approval; and (when they become available) the motion for Final Approval and Plaintiff's application(s) for payment of Attorneys' Fees and Costs to Class Counsel and payment of a Service Award to the Class Representative, and any Order on Final Approval. *Settlement* at § 5.3. The Settlement Website will also include procedural information regarding the status of the Court approval process, such as announcements of the Fairness Hearing date and when the Final Order and Judgment has been entered. *Id.*

ARGUMENT

A. The Court Should Preliminarily Approve the Settlement Agreement

Class Counsel have worked steadfastly to reach a fair, reasonable, and adequate Settlement. *See generally Reese Declaration*. Plaintiffs and their counsel believe claims asserted in the Actions are strong and have merit. *Reese Decl.* at ¶ 18. They recognize, however, that significant expense and risk are associated with continuing to prosecute the claims through trial and any appeals. *Id.* In negotiating and evaluating the Settlement, Plaintiff and Class Counsel have taken these costs and uncertainties into account, as well as the delays inherent in complex class action litigation. *Id.* Additionally, in the process of investigating and litigating the action, Class Counsel conducted significant research on the consumer protection statutes at issue, as well as the overall legal landscape, to determine the likelihood of success and reasonable parameters under which courts have approved settlements in comparable cases. *Id.* at ¶ 6. For the foregoing reasons, Class Counsel believe this Settlement provides significant relief to the Settlement Class Members and is fair, reasonable, adequate, and in the best interests of the Settlement Class. *Id*. at ¶ 20.

1. Legal Standard

Under Rule 23(e)(2) of the Federal Rules of Civil Procedure, a court may approve a class action settlement "on finding that [the settlement agreement] is fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). The "fair, reasonable, and adequate" standard effectively requires parties to show that a settlement agreement is both procedurally and substantively fair. *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013). Additionally, "[i]n 2018, Rule 23 was amended to list specific factors relating to the court's approval of the class settlement." *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation*, 2022 WL 3043103, at *4 (E.D.N.Y. Aug. 2, 2022). "Rule 23(e)(2) now provides that, in determining whether a settlement is 'fair, reasonable, and adequate,' the Court must consider whether:"

(A) The class representatives and class counsel have adequately represented the class;

(B) The proposal was negotiated at arm's length;

(C) The relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3);

(D) The proposal treats Class Members equitably relative to each other.

Id. (quoting Fed. R. Civ. P. 23(e)).

The Second Circuit has recognized a "strong judicial policy in favor of settlements, particularly in the class action context." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("*Visa*")). "The compromise of complex litigation is encouraged by the courts and favored by public policy." *Visa*, 396 F.3d at 117 (citation omitted); *see also Hadel v. Gaucho, LLC*, 2016 WL 1060324, at *2 (S.D.N.Y. Mar. 14, 2016) ("Courts encourage early settlement of class actions, when warranted, because early settlement allows Class Members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere.").

"Preliminary approval is the first step in the settlement of a class action whereby the court 'must preliminarily determine whether notice of the proposed settlement . . . should be given to Class Members in such a manner as the court directs, and an evidentiary hearing scheduled to determine the fairness and adequacy of settlement.'" *Manley v. Midan Rest. Inc.*, 2016 WL 1274577, at *8 (S.D.N.Y. Mar. 30, 2016) (citations omitted). "To grant preliminary approval, the

court need only find that there is 'probable cause' to submit the [settlement] to Class Members and hold a full-scale hearing as to its fairness." *Id.* (citations and internal quotation marks omitted); *accord Tart v. Lions Gate Entm't Corp.*, 2015 WL 5945846, at *5 (S.D.N.Y. Oct. 13, 2015). "If the proposed settlement appears to fall within the range of possible approval, the court should order that the Class Members receive notice of the settlement." *Manley*, 2016 WL 1274577, at *8 (citation omitted); *accord Hadel*, 2016 WL 1060324, at *2; *Tart*, 2015 WL 5945846, at *5.

Here, the Settlement Agreement is both procedurally and substantively fair and falls well within the range of possible approval.

2. The Settlement Is Procedurally Fair, as It Is the Result of Good Faith, Arm's-Length Negotiations by Well-Informed, Experienced Counsel

The first two factors under Rule 23(e)(2) concern the procedural fairness of the settlement, that is, "the conduct of the litigation and of the negotiations leading up to the proposed settlement[.]" *In re Restasis*, 2022 WL 3043103, at *5. To demonstrate a settlement's procedural fairness, a party must show "that the settlement resulted from 'arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests.'" *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001).

Furthermore, the participation of a highly qualified mediator in settlement negotiations strongly supports a finding that negotiations were conducted at arm's length and without collusion. *See D'Amato*, 236 F.3d at 85 ("[A] court-appointed mediator's involvement in precertification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure."); *Tiro v. Pub. House Investments, LLC*, 2013 WL 2254551, at *2 (S.D.N.Y. May 22, 2013) ("The assistance of an experienced JAMS employment mediator . . . reinforces that the Settlement Agreement is non-collusive.")

Here, Class Counsel conducted a thorough investigation and evaluation of the claims and defenses prior to filing the action and continued to analyze the claims throughout the pendency of the case. *See, e.g.*, *Reese Decl.* at ¶¶ 5-6. Prior to agreeing to the Settlement, Class Counsel conducted meaningful discovery. *Id.* at ¶ 12. Through this investigation, discovery, and ongoing analysis, Class Counsel obtained a thorough understanding of the strengths and weaknesses of the action. *Id.* at ¶ 5.

Class Counsel have substantial experience litigating class actions and negotiating class settlements. *Reese Decl.* at ¶ 25; Ex. 1 (Reese LLP's firm résumé); Ex. 2 (KalielGold PLLC's firm résumé). Moreover, the Parties participated in serious and informed arms-length negotiations before a highly qualified mediator -the Hon. Jose A. Fusté (Ret.) - which, ultimately, led to the finalized Settlement Agreement. *Id.* at ¶11.

For the foregoing reasons, the Settlement Agreement is procedurally fair.

3. The Settlement Is Substantively Fair, as Application of the Factors Set Out in *City of Detroit v. Grinnell Corp.* Demonstrates

Factors (C)-(D) of Rule 23(e) "are 'substantive,' addressing 'the terms of the proposed settlement." *In re Restasis*, 2022 WL 3043103, at *5. In this Circuit, to demonstrate the substantive fairness of a settlement agreement, a party must show that the factors the Second Circuit set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ("*Grinnell*"), weigh in favor of approving the agreement. *Charron*, 731 F.3d at 247. The *Grinnell* factors are:

> (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; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

McReynolds, 588 F.3d at 804 (quoting *Grinnell*, 495 F.2d at 463).

Critically, "[t]he goal of the [2018] amendment was 'not to displace any factors, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision...District courts in this Circuit, accordingly, have considered the *Grinnell* factors 'in tandem' with the factors set forth in Rule 23(e)(2), and the Second Circuit has continued to endorse the use of the *Grinnell* factors following the 2018 amendment." *In re Restasis*, 2022 WL 3043103, at *5 (citing *In re Patriot Nat'l, Inc. Sec. Litig.*, 828 F.App'x 760, 762-63 (2d Cir. 2020)).

Here, both the Rule 23(e)(2) factors and *Grinnell* factors overwhelmingly favor preliminary approval of the Settlement Agreement.

i. The complexity, expense, and likely duration of litigation

"The greater the 'complexity, expense and likely duration of the litigation,' the stronger the basis for approving a settlement." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 663 (S.D.N.Y. 2015). Consumer class action lawsuits, like this action, are complex, expensive, and lengthy. *Manley*, 2016 WL 1274577, at *9 ("Most class actions are inherently complex[.]"). Should the Court decline to approve the Settlement Agreement, further litigation would resume. Such litigation could include contested class certification, proceedings and appeals, including competing expert testimony and contested *Daubert* motions; further costly discovery; costly merits and class expert reports and discovery; and trial. Each step towards trial would be subject to Defendant's vigorous opposition. Even if the case were to proceed to judgment on the merits, any final judgment would likely be appealed. In short, "litigation of this matter . . . through trial would be complex, costly and long." *Manley*, 2016 WL 1274577, at *9. "The settlement eliminates [the] costs and risks" associated with further litigation. *Meredith Corp.*, 87 F. Supp. 3d at 663. "It also obtains for the class prompt [] compensation for prior [] injuries." *Id.*

For all of these reasons, this factor weighs strongly in favor of preliminary approval.

ii. The reaction of the class to the settlement

It is premature to address the reaction of the Settlement Class to the Settlement.

iii. The stage of the proceedings and the amount of discovery completed

The third *Grinnell* factor considers whether "the parties have conducted a factual investigation sufficient for the court to evaluate the proposed settlement and confirm that pretrial negotiations were adequately adversarial." *In re N. Dynasty Minerals Ltd. Sec. Litig.*, 2024 WL 308242, at *11 (E.D.N.Y. Jan. 26, 2024). Here, "discovery has advanced sufficiently to allow the parties to resolve the case responsibly." *Manley*, 2016 WL 1274577, at *9. Class Counsel have conducted discovery related to claims. *See Reese Decl.* at ¶¶ 12, 19, 26, *see also Zeltser v. Merrill Lynch & Co.*, 2014 WL 4816134, at *6 (S.D.N.Y. Sept. 23, 2014) ("Here, through both formal discovery and an informal exchange of information prior to mediation, Plaintiffs obtained sufficient discovery to weigh the strengths and weaknesses of their claims and to accurately estimate the damages at issue."). Consequently, Class Counsel had sufficient information to evaluate the terms of the proposed Settlement.

iv. The risks of establishing liability and damages

"If settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *Banyai v. Mazur*, 2007 WL 927583, at *9 (S.D.N.Y. Mar. 27, 2007). "In considering this factor, the Court need not adjudicate the disputed issues or decide unsettled questions; rather, 'the Court need only assess the risks of litigation against the uncertainty of recovery under the proposed settlement.'" *In re. N. Dynasty*, 2024 WL 2024 WL 308242, at *11.

Class Counsel recognize that, as with any litigation, the action involves uncertainties as to their outcome. *Reese Decl.* at ¶ 18. Defendant continues to deny all of Plaintiff's allegations, and should this matter proceed, it will vigorously defend itself on the merits. *Id*. Defendant would

likely appeal, if possible, decisions in Plaintiff's favor. *Id.* Defendant would challenge Plaintiff at every litigation step, presenting significant risks of ending the litigation while increasing costs to Plaintiff and the Settlement Class Members. *Id.* Further litigation presents no guarantee for recovery, let alone a recovery greater than the recovery for which the Settlement provides. *Id.*

For these reasons, the risks of establishing liability and damages strongly support preliminary approval under both *Grinnell* and Rule 23(e)(2)(C)(i).

v. The risk of maintaining class action status through trial

The Action settled before rulings on class certification, and the current certification is for settlement purposes only. *Settlement* at § 3.2. Defendant has stated that but for the Settlement, it would vigorously oppose class certification. *Reese Decl.* ¶ at 18. Furthermore, even if the Court were to certify a litigation class, the certification would not be set in stone. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."); *see also Price v. L'Oreal USA, Inc.*, 2021 WL 4459115 (S.D.N.Y. Sept. 29, 2021) (decertifying Rule 23(b)(3) class in consumer fraud case). Given the risks, this factor weighs in favor of final approval, under both *Grinnell* and Rule 23(e)(2)(C)(i).

vi. The ability of Defendant to withstand a greater judgment

It is more important that the Settlement Class receive some relief than possibly "yet more" relief. *See Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 201 (S.D.N.Y. 2012); *see also Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 83 (1st Cir. 2015) ("The fact that a better deal for Class Members is imaginable does not mean that such a deal would have been attainable in these negotiations, or that the deal that was actually obtained is not within the range of reasonable outcomes."). Further, "[c]ourts have recognized that a [defendant's] ability to pay is much less important than the other *Grinnell* factors, especially where the other factors weigh in favor of

approving the settlement." *In re Sinus Buster Products Consumer Litig.*, 2014 WL 5819921, at *11 (E.D.N.Y. Nov. 10, 2014). A "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Viafara v. MCIZ Corp.*, 2014 WL 1777438, at *7 (S.D.N.Y. May 1, 2014). For these reasons, this factor is neutral.

vii. The range of reasonableness of the settlement in light of the best possible recovery and all the attendant risks of litigation

"There is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion[.]" *Visa*, 396 F.3d at 119. "In other words, 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[.]" *Bodon v. Domino's Pizza, LLC*, 2015 WL 588656, at *6 (E.D.N.Y. Jan. 16, 2015).

Here, the relief for which the Settlement Agreement provides is within the range of reasonableness, especially in light of the best possible recovery and in light of all the attendant risks of litigation. The $1.5 million common fund is no less than 46% of the total amount of fees contested here, representing an excellent result for class members. Furthermore, as a result of the Settlement, Defendant will not charge the fees at issue for five years. Accordingly, the cash compensation to which eligible Settlement Class Members will be entitled goes a significant way toward compensating Settlement Class Members for the damages they incurred and protect them from these type of fees for no less than 5 years going forward.

This Settlement either meets or exceeds the vast majority of court-approved recoveries in overdraft fee class actions nationwide. *See, e.g., Roberts v. Capital One*, 16 Civ. 4841 (LGS), Dkt. 198 (S.D.N.Y. Dec. 1, 2020) (approving cash fund of approximately 34% of the most likely recoverable damages for class members); *In re Checking Account Overdraft Litig.*, 2015 WL

12641970, at *7 (S.D. Fla. May 22, 2015) (approving settlement representing approximately 35% of the most probable aggregate damages); *Hawthorne v. Umpqua Bank*, 2015 WL 1927342, at *1 (N.D. Cal. Apr. 28, 2015) (approving settlement for approximately 38% of what could have been obtained at trial). Accordingly, this factor weighs in favor of preliminary approval.

As discussed above, Plaintiffs believe their claims are strong but recognize that continuation of this litigation poses significant risks. *Reese Decl.* at ¶ 18. While continuation of the litigation might not result in an increased benefit to the Settlement Class, it would lead to substantial expenditure by both Parties. *Id.* Taking into account the risks and benefits outlined above, the Settlement falls within the "range of reasonableness." *Id.* at ¶¶ 18-20. Class Counsel have achieved the best possible recovery considering the merits of the Settlement weighed against the cost and risks of further litigation. *Id.*

Thus, collectively and independently, the *Grinnell* factors warrant the conclusion that the Settlement Agreement is fair, adequate, and reasonable. As such, Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement.

viii. The remaining Rule 23(e)(2)(C) & (D) factors weigh in favor of approval

As discussed in detail in the Azari Declaration, the notice plan meets the standards set by the Federal Judicial Center as the notice plan is designed with a 85% reach. *See Azari Decl.* at ¶ 32. Furthermore, Class Members do not have to make a claim to receive compensation, rather the will receive the funds directly either to their accounts, or via check if the Settlement Class Member is a Past Accountholder. *Settlement* at § 6.7.2.3. As such, Rule 23(e)(2)(C)(ii) factor weighs in favor of the settlement.

The total value of the settlement is $1,500,000. The present fee request of one-third (*i.e.* $500,000) is well within the range awarded in this Circuit. *See, e.g., Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) ("Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit."); *Maley v. Del Global Tech. Corp.*, 186 F. Supp. 2d 358, 370-71 (S.D.N.Y. 2002) (awarding 33.33% as fair and reasonable). Thus the Rule 23(e)(2)(C)(iii) factor weighs in favor of the settlement.

There are no other agreements amongst the parties, and thus the Rule 23(e)(2)(C)(iv) factor weighs in favor of the settlement.

Finally, each Class Member is eligible to receive the same relief, that is, their *pro rata* share of the Settlement Agreement, based upon the amount of Fees that the Settlement Class Member Paid. *Settlement* at § 7.1. All Class Members are treated equally, and thus, the Rule 23(e)(2)(D) factor weighs in favor of settlement.

B. The Court Should Preliminarily Certify the Settlement Class

A court may certify a settlement class upon finding that the action underlying the settlement satisfies all Rule 23(a) prerequisites and at least one prong of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 619–22 (1997). As set forth below, the proposed Settlement Class satisfies all of the requirements of Rule 23(a) and Rule 23(b)(3), and, consequently, Plaintiff respectfully asks the Court to certify the Settlement Class preliminarily for settlement purposes.

1. The Settlement Class Meets All Prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure

Rule 23(a) has four prerequisites for certification of a class: (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequate representation. FED. R. CIV. P. 23(a). The Settlement Class meets each prerequisite and, as a result, satisfies Rule 23(a).

i. Numerosity

Under Rule 23(a)(1), plaintiffs must show that the proposed class is "so numerous that joinder of all [its] members is impracticable." FED. R. CIV. P. 23(a)(1). The Second Circuit has found numerosity met where a proposed class is "obviously numerous." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). Here, there is no dispute that tens of thousands of people are in the Settlement Class. *Reese Decl*. at ¶ 21. Numerosity is easily satisfied. *Id.*

ii. Commonality

Under Rule 23(a)(2), plaintiff must show that "questions of law or fact common to the [proposed] class" exist. FED. R. CIV. P. 23(a)(2). Commonality requires that the proposed Class Members' claims all centrally "depend upon a common contention," which "must be of such a nature that it is capable of classwide resolution," meaning that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). "[F]or purposes of Rule 23(a)(2) even a single common question will do[.]" *Id.* (citation, quotation marks, and brackets omitted). The Second Circuit has construed this instruction liberally, holding that plaintiffs need only show that their injuries "derive[d] from defendants' . . . unitary course of conduct." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 84 (2d Cir. 2015).

Here, commonality for settlement approval purposes is satisfied. There are multiple questions of law and fact – centering on the alleged systematic practice of assessing fees – that are common to the Settlement Class Members, alleged to have injured all Settlement Class members in the same way, and would generate common answers central to the claims' viability were the action to be tried. Thus, commonality is satisfied.

iii. Typicality

Under Rule 23(a)(3), plaintiff must show that the proposed class representatives' claims "are typical of the [class'] claims." FED. R. CIV. P. 23(a)(3). Plaintiff must show that "the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented." *Robidoux v. Celani*, 987 F.2d 931, 936–37 (2d Cir. 1993) (citations omitted). "[D]ifferences in the degree of harm suffered, or even in the ability to prove damages, do not vitiate the typicality of a representative's claims." *In re Nissan Radiator/Transmission Cooler Litig.*, 2013 WL 4080946, at *19 (S.D.N.Y. May 30, 2013).

District courts within the Second Circuit have repeatedly found typicality easily satisfied in the context of preliminary approval of a settlement class. *E.g.*, *Manley*, 2016 WL 1274577, at *4; *Hadel*, 2016 WL 1060324, at *2; *Tart*, 2015 WL 5945846, at *3; *see Fogarazzao v. Lehman Bros.*, 232 F.R.D. 176, 180 (S.D.N.Y. 2005) ("The typicality requirement 'is not demanding.'").

Here, typicality is met because the same allegedly unlawful conduct by Defendant—its assessment of the Fees—was directed at, or affected, both Plaintiff and the other members of the proposed Settlement Class. *Robidoux*, 987 F.2d at 936–37. Accordingly, typicality is met.

iv. Adequacy of representation

Under Rule 23(a)(4), plaintiff must show that the proposed class representatives will "fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). Plaintiff must demonstrate that: (1) the class representatives do not have conflicting interests with other Class Members; and (2) class counsel is "qualified, experienced and generally able to conduct the litigation." *Marisol A.*, 126 F.3d at 378.

To satisfy the first requirement, Plaintiff must show that "the members of the class possess the same interests" and that "no fundamental conflicts exist" between a class representative(s) and its members. *Charron*, 731 F.3d at 249. Here, Plaintiff possesses the same interests as the proposed Settlement Class Members because Plaintiff and the other Settlement Class Members were all allegedly injured in the same manner in that they were charged the Fees at issue.

With respect to the second requirement, Class Counsel are qualified, experienced, and able to conduct the litigation. Class Counsel are not representing clients with interests at odds with the interests of the Settlement Class Members and are not acting as class representatives. *Reese Decl.* at ¶ 17. Further, they have invested considerable time and resources into the prosecution of the Action. *Id*. They have qualified as lead counsel in other class actions and have a proven track record of successful prosecution of significant class actions. *Reese Decl.* ¶ at 25; Exs. 1-2. "In the absence of proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to prosecute vigorously the action on behalf of the class." *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 241 F.R.D. 185, 199 n.99 (S.D.N.Y. 2007) (citation omitted).

For the foregoing reasons, Plaintiff has satisfied the adequacy prerequisite.

2. The Settlement Class Meets All Rule 23(b)(3) Requirements

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem Prods., Inc.*, 521 U.S. at 614. Plaintiff seeks certification under Rule 23(b)(3). Under that rule, the court must find that "questions of law or fact common to Class Members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

i. Common legal and factual questions predominate in this action

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc.*, 521 U.S. at 623 (citation omitted). The Second Circuit has held that "to meet the predominance requirement . . . a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof." *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) (citation omitted). In the context of a request for settlement-only class certification, concerns about whether individual issues "would present intractable management problems" at trial drop out because "the proposal is that there be no trial." *Id.* at 620 (citation omitted). As a result, "the predominance inquiry will sometimes be easier to satisfy in the settlement context." *Tart*, 2015 WL 5945846, at *4 (citation omitted). Furthermore, consumer fraud cases readily satisfy the predominance inquiry. *Amchem Prods., Inc.*, 521 U.S. at 625.

Here the central common question includes whether the fees charged by Defendant were proper or not. These issues are subject to "generalized proof" and "outweigh those issues that are subject to individualized proof." *In re Nassau Cty. Strip Search Cases*, 461 F.3d at 227–28 (citation omitted). The Settlement Class meets the predominance requirement for settlement purposes.

ii. A class action is the superior means of adjudication

Rule 23(b)(3) also requires that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). Here, the class action mechanism is superior to individual actions for numerous reasons. First, "[t]he potential Class Members are both significant in number and geographically dispersed" and "[t]he interest of the class as a whole in litigating the many common questions substantially outweighs any interest by individual members in bringing and prosecuting separate actions." *Meredith Corp.*, 87 F. Supp. 3d at 661 (citation omitted).

Additionally, a class action is superior here because "it will conserve judicial resources" and "is more efficient for Class Members, particularly those who lack the resources to bring their claims individually." *Zeltser*, 2014 WL 4816134, at *3 (citation omitted). The average amount of the Fees charged was $34, a nominal amount where compared to the costs of litigation. *Reese Decl.* at ¶ 19. As a result, the expense and burden of litigation make it virtually impossible for the Settlement Class Members to seek redress on an individual basis. By contrast, in a class action, the cost of litigation is spread across the entire class, thereby making litigation viable. *See, e.g.*, *Tart*, 2015 WL 5945846, at *5. "Employing the class device here will not only achieve economies of scale for Class Members, but will also conserve judicial resources and preserve public confidence in the integrity of the system by avoiding the waste and delay repetitive proceedings and preventing inconsistent adjudications." *Zeltser*, 2014 WL 4816134, at *3. For all of the foregoing reasons, a class action is superior to individual suits.

In sum, because the requirements of Rule 23(a) and Rule 23(b)(3) are satisfied, the Court should preliminarily certify the Settlement Class.

C. The Court Should Approve the Proposed Notice Plan

"Rule 23(e)(1)(B) requires the court to 'direct notice in a reasonable manner to all Class Members who would be bound by a proposed settlement, voluntary dismissal, or compromise' regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.312 (2004). "The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Visa*, 396 F.3d at 113 (citations omitted).

The Court is given broad power over the procedures to use in providing notice so long as they are consistent with the standards of reasonableness that the due process. *Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986) ("[T]he district court has virtually complete discretion as to the manner of giving notice to Class Members.").

"When a class settlement is proposed, the court 'must direct to Class Members the best notice that is practicable under the circumstances.'" *Vargas v. Capital One Fin. Advisors*, 559 F. App'x 22, 26 (2d Cir. 2014) (summary order) (citing FED. R. CIV. P. 23(c)(2)(B), (e)(1)). The notice must include: "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a Class Member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who request exclusions; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." FED. R. CIV. P. 23(c)(2)(B). "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Visa*, 396 F.3d at 114.

Here, the robust proposed notice program meets the requirements of due process and the Federal Rules of Civil Procedure. As discussed above, the proposed methods Plaintiffs identified above for providing notice to the Settlement Class Members is direct notice with an estimated 85% reach. *Azari Decl.* at ¶ 32. Notice to the Settlement Class will be achieved shortly after entry of the Preliminary Approval Order. The Notice will be provided to Class Members so they have sufficient time to decide whether to participate in the settlement, object, or opt out.

The proposed notice program also provides sufficiently detailed notice. The notice defines the Settlement Class; explains all Settlement Class Members' rights, the Parties' releases, and the applicable deadlines; and describes in detail the monetary terms of the Settlement, including the procedures for allocating and distributing Settlement funds among the Settlement Class Members. *See Settlement*, Exs. 1-2. It will plainly indicate the time and place of the Fairness Hearing, and it plainly explains the methods for objecting to, or opting out of, the Settlement. *Id*. Finally, it details the provisions for payment of Attorneys' Fees and Expenses and class representative Service Awards. *Id*.

For the foregoing reasons, Plaintiffs respectfully request the Court approve the notice plan.

PROPOSED SCHEDULE OF EVENTS

In connection with preliminary approval of the Settlement Agreement, the Court should set the Final Approval Fairness Hearing, as well as dates for publishing the notice and deadlines for objecting to, or opting out of, the Settlement and filing papers in support of the Settlement. Plaintiffs respectfully propose the following schedule:

Event	Proposed Date/Deadline
Deadline for dissemination of notice to the Settlement Class Members	30 days after the Court enters the Preliminary Approval Order
Deadline for Motion for Final Approval, Application for Attorneys' Fees, Expenses and Costs, and for a Service Award	45 days prior to the Final Approval Hearing
Deadline for receipt of any objections and opt-outs	30 days prior to the Final Approval Hearing
Fairness Hearing	At least 150 days from entry of the Preliminary Approval Order

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court: (1) certify the Settlement Class and appoint Plaintiff as the class representative and Michael R. Reese of Reese LLP and Jeff Kaliel of KalielGold PLLC as Class Counsel; (2) preliminarily approve the Settlement Agreement; (3) approve the form and manner of the class action settlement notice; (4) and set a date and time for the Fairness Hearing.

Dated: July 25, 2024

Respectfully submitted,

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