UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

JUDITH J. JIMENEZ, KATHY FOGEL, and STEPHANIE VIL, on behalf of themselves and all others similarly situated, Plaintiffs, v. TD BANK, N.A., Defendant.	Civil Case No. 1:20-cv-07699-NLH

MOTION FOR FEES, EXPENSES, AND SERVICE AWARDS

Class Representative Judith J. Jimenez ("Class Representative"), and Plaintiffs Kathy Fogel and Stephanie Vil (collectively, "Plaintiffs") hereby submit this request for fees, expenses, and service awards pursuant to the Court's Order Granting Preliminary Approval (ECF No. 96) ("PA Order") and Federal Rule of Civil Procedure 23(b)(3) and (e).

INTRODUCTION

Court-appointed Class Counsel Webb, Klase & Lemond, LLC and Golomb Spirt Grunfeld, PC (collectively, "Class Counsel"), on behalf of the Class and the Class Representatives, respectfully move this Court for an award of attorneys' fees of $1,633,333, reimbursement of the $15,455.64 in out-of-pocket litigation costs and expenses that Plaintiffs' counsel incurred in prosecuting this action, and Service Awards for the Class Representative and Plaintiffs in the total amount of $18,000.

The attorneys' fees sought amount to one-third of the Settlement Fund. *See* Declaration of E. Adam Webb, ¶ 5 ("Webb Decl.") (Exhibit 1 hereto). Since even before the Complaint was filed, Class Counsel has been working diligently on this case, devoting extensive resources to

this action. *See* ECF No. 95, ¶¶ 6-10. In light of the results achieved, the requested fee is fair and reasonable.

Class Counsel have spent a total of $15,455.64 in reimbursable litigation-related costs and expenses. *See* Webb Decl., ¶ 5. This amount includes Class Counsel's total out-of-pocket expenses, including, *inter alia*, case fees, legal research expenses, expert fees, and travel expenses. *Id.* at ¶ 23. Class Counsel request the Court order reimbursement of this amount.

Finally, Class Counsel seeks Service Awards on behalf of the Class Representative Judith Jimenez in the amount of $8,000 and $5,000 for Kathy Fogel and Stephanie Vil, for a total of $18,000 to be paid in accordance with the Settlement Agreement. *Id.* at ¶ 28.

Class Counsel's efforts to date have been without compensation of any kind, and the fee has been wholly contingent upon the result achieved. *Id.* at ¶ 13. For the reasons set forth below, Class Counsel respectfully submit that the requested fees and Service Awards, and the cost and expense reimbursements, are fair and reasonable under the applicable legal standards, and, in light of the contingency risk undertaken and the result achieved, should be awarded by the Court.

CASE HISTORY

A full recitation of the history of the case is set forth in the briefing for preliminary approval and the declaration in support. *See* Plaintiffs' Motion and Memorandum of Law for Preliminary Approval, pp. 2-4 ("Litigation History"), pp. 4-5 ("Settlement Negotiations") (ECF No. 94); *see also* Joint Declaration in Support (ECF No. 95). Details of the case as it relates to the request set forth in this motion, including the efforts of Class Counsel, Plaintiffs, and the Class Representative, and the costs and expenses incurred as a result of the litigation, are set forth herein and within the attached declaration at paragraphs 6-31.

ARGUMENT

I. Class Counsel's Unopposed Request for Attorneys' Fees Is Reasonable and Authorized by the Settlement Agreement.

At the conclusion of a successful class action, class counsel may apply to a court for an award of attorneys' fees. *See* Fed. R. Civ. P. 23(h). The amount of a fee award "is within the district court's discretion so long as it employs correct standards and procedures and makes finding of fact not clearly erroneous." *Sullivan v. DB Inv., Inc.*, 667 F.3d 273, 329 (3d Cir. 2011) (*en banc*) (internal quotations and citation omitted); *see also Ursic v. Bethlehem Mines*, 719 F.2d 670, 675 (3d Cir. 1983) ("the district court has discretion in determining the amount of a fee award . . . in view of [its] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters").

As indicated in the Court-approved notice disseminated to the Settlement Class, and consistent with standard class action practice and procedure, Class Counsel requests attorneys' fees in the amount of $1,633,333 to be paid from the $4.9 million Class Settlement Fund. *See* Settlement Agreement ¶ 122. Not only has the Defendant agreed not to oppose this amount, but Class Counsel's requested fees fall within the acceptable range of fees routinely approved by this Court and within this Circuit.

A. Application of the Percentage-of-Recovery Method Is Proper When Awarding Fees in a Common Fund Case.

"Attorneys' fees requests are generally assessed under one of two methods: the percentage-of-recovery ('POR') approach or the lodestar scheme." *Sullivan*, 667 F.3d at 330. The POR approach is appropriate in cases involving a common settlement fund, i.e., when a settlement contemplates one fund from which class member payments and attorneys' fees will be paid. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768,

821 (3d Cir. 1995).

In consumer class cases with settlement funds like this one, courts in this Circuit prefer to award fees as a percentage-of-recovery. *See Sullivan,* 667 F.3d at 330 (stating that percentage-of-recovery method "is generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure'"); *In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294, 300 (3rd Cir. 2005) (same); *In re Prudential Ins. Co. of Am. Sales Practices Litig.,* 148 F.3d 283, 333 (3rd Cir. 1998) (same); *In re AT&T Corp.,* 455 F.3d 160, 164 (3d. Cir. 2006) (indicating that the percentage-of-recovery method has long been used by Third Circuit in common fund cases).[1]

The percentage-of-recovery method, rather than the lodestar method, is favored because lodestar looks only at the value of the time counsel spent working on the case. The percentage method provides "appropriate financial incentives" necessary to "attract well-qualified plaintiffs' counsel who are able to take a case to trial," and "directly aligns the interests of the class and its counsel." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355, 359 (S.D.N.Y. 2005). Further, the POR method "prevent[s] . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefitted by the suit." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980); *see also In re Ikon Office Solutions, Inc. Sec. Litig.,* 194 F.R.D. 166, 192 (E.D. Pa. 2000) ("there is no doubt that attorneys may properly be given a portion of the settlement fund in recognition of the benefit they have bestowed on

[1] Other circuits have approved and favor the percentage method in common fund cases as well. *See*, *e.g.*, *Maley v. Del Global Technologies Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002), ("there is a strong consensus – both in this Circuit and across the country – in favor of awarding attorneys' fees in common fund cases as a percentage of the recovery"); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("we join the Third Circuit Task Force and the Eleventh Circuit, among others, in concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases").

class members"); *Fickinger v. C.I. Planing Corp.,* 646 F. Supp. 622, 632 (E.D. Pa. 1986) (awarding attorney fees from a common fund avoids "the unjust enrichment of those who otherwise would be benefitted by the fund without sharing in the expenses incurred by the successful litigant").

Additional reasons exist to apply the percentage-of-recovery method. First, it incentivizes attorneys to create the largest common fund out of which payments to the class can be made, so counsel's interests are aligned with the interests of the class. *Lachance v. Harrington*, 965 F. Supp. 630, 647 (E.D. Pa. 1997) ("under the POR method, the more the attorney succeeds in recovering money for the client, and the fewer legal hours expended to reach that result, the higher dollar amount of fees the lawyer earns"). Second, it is consistent with market practices, because it mimics the compensation system used by clients to compensate their attorneys. *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000). Third, the percentage method promotes early case resolution, which is favored. *See In re First Fid. Bancorporation Sec. Litig.*, 750 F. Supp. 160, 162 (D.N.J. 1990) (compared to the percentage-of-recovery method, the lodestar method "penalizes rather than rewards counsel for an early resolution and distribution to class members"). Fourth, the percentage method preserves judicial resources because courts do not need to spend time scrutinizing counsel's billing entries. *Id*. ("Requiring the court to calculate the number of hours devoted by counsel and evaluate the services rendered is unrealistically burdensome and time-consuming"); *see also infra* Section II(B)(1).

B. Class Counsel Are Entitled to a Fee of One-Third of the Settlement Fund.

The United States Supreme Court has recognized the principle that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled

to a reasonable attorneys' fee from the fund as a whole." *Boeing*, 444 U.S. at 478; *see also Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393 (1970). Thus, an award of attorneys' fees is appropriate where a plaintiff's successful litigation confers substantial benefit on members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread costs proportionately among them. *Hall v. Cole,* 412 U.S. 1, 5 (1973).

Here, Class Counsel are entitled to reasonable attorneys' fees to compensate them for their work in recovering real dollars for the Class. The Settlement Agreement preliminarily approved by the Court provides that:

> TD Bank agrees not to oppose Class Counsel's request for attorneys' fees in an amount not to exceed one third of the Cash Settlement Amount. Class Counsel agree not to make a request for attorneys' fees that exceeds one-third of the Cash Settlement Amount. Any award of attorneys' fees, costs, and expenses to Class Counsel shall be payable solely out of the Cash Settlement Amount.

Settlement Agreement ¶ 122. In addition, the Court-approved Notice of Proposed Settlement of Class Action Lawsuit and Fairness Hearing ("Long-Form Notice") that was provided to Class Members stated the following:

> **16. How will the lawyers be paid?**
>
> Class Counsel intend to request up to one third of the Cash Settlement Amount for their attorneys' fees, plus their reasonable expenses in connection with this case. The attorneys' fees, costs, and expenses awarded by the Court will be paid out of the Settlement Fund Account. Class Counsel will file their motion seeking attorneys' fees, costs, and expenses by August 23, 2023. That motion will be available at www.TDAccountReopeningSettlement.com. The Court will review Class Counsel's request and determine the amount of fees, costs, and expenses to award.

Long-Form Notice, ¶ 16.

The parties and their counsel did not discuss the provisions regarding attorneys' fees until after they had already agreed upon the terms of the Settlement in principle, further minimizing

the risk of a conflict between the interests of the attorneys and those of the Class. *See* ECF No. 95, ¶ 25; *see also In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 542-43 (D.N.J. 1997) (finding the attorney fees negotiations to be proper where parties "did not negotiate attorneys' fees until after they had agreed on the appropriate relief"); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 803 (3d Cir. 1995) ("recogniz[ing] the potential for attorney-class conflicts" where terms of settlement and fees are negotiated simultaneously).

1. One-Third of the Settlement Fund Is Reasonable.

In terms of the percentage sought, there is no standardized rule regarding what percentage of the common fund should be awarded as attorneys' fees. *See In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("Percentages awarded have varied considerably, but most fees appear to fall in the range of nineteen to forty-five percent"). However, courts in New Jersey and within the Third Circuit routinely award one-third of the fund for attorneys' fees in class action settlements similar to this one. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538 (3d Cir. 2004) (finding an approximately 33% fee award of a $44.5 million settlement fund to be reasonable when compared with recovery percentages in other class actions); *Hall v. AT&T Mobility LLC*, 2010 WL 4053547, at *22 (D.N.J. Oct. 13, 2010) (multiple factors, including "the fact that several courts in similar matters have awarded fees in this amount" warranted approval of one-third fee).

In *Chaudhri v. Osram Sylvania Inc.* this Court granted the fee request of the plaintiff's counsel of one-third of a $30 million settlement fund in a consumer class action case involving falsely marketed automobile headlights. *See* Final Approval Order and Judgment, ECF No. 100, in Case No. 2:11-cv-05504 (D.N.J. Jan. 9, 2015). In that matter, the plaintiff's counsel retained

Professor Brian T. Fitzpatrick, an expert on attorney fee applications in class action litigations, who opined that "the most common percentages awarded by all federal courts . . . were 25%, 30% and 33%, with nearly two-thirds of awards between 25% and 35%." *See* ECF No. 88-4 (Fitzpatrick Declaration) at ¶¶ 14, 16 ("where the percentage-of-the-fund method was used, nearly fifty percent of awards [are] between 30% and 35%"). Accordingly and as set forth herein, Class Counsel's request is reasonable and well within the range approved by courts in similar litigations.

2. No Lodestar Analysis Is Required.

In cases involving settlement funds utilizing a percentage-of-recovery method to compute requested attorney fees, no court within the Third Circuit mandates the use of a detailed lodestar analysis to cross check the amount. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) *(*citing *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998)); *Bodnar v. Bank of Am., N.A.*, 2016 WL 4582084, at *5 (E.D. Pa. Aug. 4, 2016); *In re AT&T,* 455 F.3d at 164 (lodestar analysis does not displace a district court's primary reliance on the POR method); *In re Rite Aid Corp.*, 396 F.3d at 305; *In re Suprema Specialties, Inc. Sec. Litig.,* 2008 WL 906254, at *8 (D.N.J. Mar. 31, 2008).[2]

In fact, not mandating a lodestar cross check preserves judicial resources because it relieves the court of the "cumbersome, enervating, and often surrealistic process" of evaluating fee petitions. *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 736 n.44 (E.D. Pa. 2001) (noting that opting against performing a cross check "conserves scarce judicial time"); *see also*

[2] Other circuits also do not require a lodestar cross check. *See In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1363 (S.D. Fla. 2011) ("courts in this Circuit regularly award fees based on a percentage of the recovery, without discussing lodestar at all"); *Feiertag v. DDP Holdings, LLC*, 2016 WL 4721208, at *7 (S.D. Ohio Sept. 9, 2016) ("Performing a cross-check of the attorney-fee request using Class Counsel's lodestar is optional").

Savoie v. Merchants Bank, 166 F.3d 456, 461 n.4 (2d Cir. 1999); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 48-49 (2d Cir. 2000) (the "primary source of dissatisfaction [with the lodestar method] was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits").

It would be a burdensome task to review the billing records of two law firms over more than two years of litigation. This would not be a good use of judicial resources.[3] As set forth in the attached declaration, the lawyers representing the Class Representative and Plaintiffs here have logged almost 1,000 attorney hours on this case. This includes only time from June 2020 through mid-August 2023. Non-attorney staffs have also performed work at both firms. *See* Webb Decl., ¶ 16. If a lodestar analysis were to be performed for all of the lawyers that have spent time representing the Class Representative and Plaintiffs in this case, the lodestar will easily exceed $1,000,000 by the time the settlement administration is finally concluded. *Id.* at ¶ 17. Thus the fee request is less than 2.0 times the lodestar, which is well within the accepted rage in the Third Circuit. *E.g.*, *Lan v. Ludrof*, 2008 WL 763763, at *26 (W.D. Pa. Mar. 21, 2008) ("It has repeatedly been observed by courts in this circuit that '[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied'"); *also In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998); *First State Orthopaedics v. Concentra, Inc.,* 534 F. Supp. 2d 500, 524 (E.D. Pa. 2007) (approving multiplier of 1.9); *In re Vicuron Pharms., Inc. Sec. Litig.*, 512 F. Supp. 2d 279,

[3] If the Court disagrees and requires that such an analysis be undertaken, Plaintiffs' counsel will provide their lodestar before the Final Approval hearing set for February 23, 2023. *See, e.g., In re Rite Aid Corp Sec. Litig.,* 396 F.3d at 306-07 ("cross-check calculation need entail neither mathematical precision nor bean-counting. . . . courts may rely on summaries submitted by the attorneys and need not review actual billing records"); *In re Ins. Brokerage Antitrust Litig.,* 2007 WL 1652303, at *9 (D.N.J. June 5, 2007) ("court may rely on summaries submitted by the attorneys, and is not required to scrutinize every billing record"), *aff'd,* 579 F.3d 241 (3d Cir. 2009).

287 (E.D. Pa. 2007) (approving lodestar multiplier of 2.23).

Creating a detailed lodestar analysis here, and performing a review of such an analysis, would be a very time-consuming and extensive process, especially given the fact that it would likely result in confirmation of the requested fee. *Id.* Accordingly, Class Counsel do not include a detailed lodestar analysis herewith given the obvious and extensive amount of work performed.

C. Other Factors Used to Determine the Reasonableness of Fees Support the Requested Fee Award.

Other factors established to determine the reasonableness of fee awards under the percentage-of-recovery method similarly support Plaintiffs' requested fee award. These factors include: (1) the size of the fund created and number of persons benefiting from the settlement; (2) the presence/absence of substantial objections to the fee; (3) the skill of plaintiffs' counsel; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the litigation; and (7) awards in similar cases. *Gunter v. Ridgewood Energy Corp.,* 223 F.3d 190, 195, n.1 (3rd Cir. 2000). The Third Circuit has also suggested three other factors that may be relevant to a court's inquiry: (1) "the value of benefits accruing to class members attributable to the efforts of counsel as opposed to the efforts of other groups, such as government agencies conducting investigations;" (2) "the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained;" and (3) "any 'innovative' terms of settlement." *In re AT&T*, 455 F.3d at 165 (citation omitted); *Public Interest Research Group v. Windall*, 51 F.3d 1179, 1185 n.8 (3d Cir. 1995) (discussing the "*Johnson* factors" set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-18 (5th Cir. 1974), and cited in *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 (1983)).

These factors "need not be applied in a formulaic way, and their weight may vary on a

case-by-case basis." *In re Janney Montgomery Scott LLC Fin. Consultant Litig.*, 2009 WL 2137224, at *14 (E.D. Pa. July 16, 2009) (quoting *Oh v. AT&T Corp.*, 225 F.R.D. 142, 146 (D.N.J. 2004)); *In re AT&T Corp.,* 455 F.3d at 165-6 ("What is important is that the district court evaluate what class counsel actually did and how it benefitted the class"); *In re Datatec Sys., Inc. Sec. Litig.*, 2007 WL 4225828, at *6 (D.N.J. Nov. 28, 2007); *also Hensley,* 461 U.S. at 436 (the "most critical factor is the degree of success obtained").

> The most significant factor in this case is the quality of representation, as measured by 'the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel'.

In re Ikon Office Solutions, Inc., Sec. Litig., 194 F.R.D. 166, 194 (E.D. Pa. 2000) (internal citations omitted); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998) ("the *Gunter/Prudential* factors are not exhaustive. 'In reviewing an attorneys' fee award in a class action settlement, a district court should consider [those] factors . . . and any other factors that are useful and relevant with respect to the particular facts of the case.'") (quoting *In re AT&T Corp.*, 455 F.3d at 166).

As discussed *infra*, if this Court elects to consider these factors here, they also clearly support the reasonableness of Class Counsel's fee request.

1. Whether the Fee Was Fixed or Contingent.

Class Counsel undertook this action on an entirely contingent fee basis, and in doing so assumed a substantial risk that counsel would have to devote a significant amount of time and incur expenses in prosecuting this action without any assurance of being compensated for their efforts. *See* Webb Decl., ¶ 13. In effect, Class Counsel has advanced their legal services to the Settlement Class since that time. *See Lindy Bros. Builders of Philadelphia v. Am. Radiator &*

Standard Sanitary Corp., 540 F.2d 102, 116-17 (3d Cir. 1976).

Further, taking on this large and complex case served to preclude counsel from other employment due to time and budget restrictions based on the acceptance of this matter. *See* Webb Decl., ¶ 13. Class Counsel are two small law firms with busy practices. *Id.* at ¶ 18. Class Counsel were required to forego other opportunities to properly prosecute this case. *Id.* at ¶¶ 13-15. Briefing and discovery in this case was significant, which meant that the firms involved on behalf of the Plaintiffs expended a great deal of time and effort on this matter at the expense of other potentially lucrative matters. *Id.* at ¶¶ 13-16.

Courts have consistently recognized that the risk of receiving no recovery is a factor in considering an award of attorneys' fees. *See Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 219 (E.D. Pa. 2011) (risk at trial and contingency basis "indicates that substantial attorney's fees should be awarded").

> Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review is unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

In re Prudential-Bache Income Partnerships Sec. Litig., 1994 WL 202394, at *6 (E.D. La. May 18, 1994).

Here, Class Counsel expended significant time and costs to prosecute this case. *See* Webb Decl., ¶¶ 14, 16-17. Meanwhile, Class Counsel aggressively advanced this case despite substantial risk of non-payment. *Id.* at ¶ 13. Despite the risks and difficulties presented throughout this litigation, Class Counsel forged a significant resolution that provides substantial relief to the Class. Accordingly, Class Counsel undertook a significant risk of non-payment, which now favors approval of the requested fee.

2. The Time and Labor Required, the Size of the Fund Created, the Number of Persons Benefiting from the Settlement, the Novelty and Difficulty of the Questions Involved, and the Skill, Experience, Reputation, and Ability of Counsel Required to Perform the Service Properly.

Throughout this the two plus year history of this case, the parties engaged in significant and highly-contested adversarial litigation. The prosecution of the many complex and unique issues in this litigation required the participation of highly skilled and dedicated attorneys.

Class Counsel undertook a number of important tasks associated with this litigation, requiring a significant amount of Class Counsel's time and labor to develop the legal theories and arguments presented in the pleadings and crafted through discovery. *See* ECF No. 95, ¶¶ 6-28. These tasks include: initial investigation of the case; researching complex issues of law, client vetting and meetings; drafting numerous class action complaints; conducting substantial written discovery; opposing various motions filed by Defendant; preparing for and participating in hearings; and negotiating the settlement and drafting the settlement papers. *Id.*[4] In light of this case's robust litigation, discovery, and motions practice history, this factor supports Class Counsel's fee request. *E.g.*, *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 197 (3d Cir. 2000) ("The complexity and duration of the litigation is the first factor a district court can and should consider in awarding fees").

The skill required of Class Counsel to accomplish this excellent Settlement warrants the requested fee. The "single clearest factor reflecting the quality of Class Counsels' services to the Class are the results obtained." *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 96 (D.N.J. 2001). Related factors include "the difficulties faced, the speed and efficiency of the

[4] Moreover, Class Counsel's work is not yet done. Class Counsel will be required to, among other things, continue to monitor the claims administration process and communicate with the administrator, prepare for and attend the Final Approval Hearing, monitor distribution of benefits to the Class, and potentially handle any post-judgment appeals. Webb Decl., ¶ 17.

recovery, the standing, experience, and expertise of counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *Mehling v. N.Y. Life Ins. Co.*, 248 F.R.D. 455, 465 (E.D. Pa. 2008). *Gunter* factors are considered to ensure "that competent counsel continue to undertake risky, complex and novel litigation" for the benefit of large numbers of Class Members who might otherwise lack reasonable access to justice. *Gunter*, 223 F.3d at 198. Here, Class Counsel obtained monetary relief for over 90,000 TD Bank account holders.

Class Counsel have unique legal skills and abilities, as well as experience litigating consumer class actions and actions against this Defendant. *See* Webb Decl., ¶ 19. Those unique skills are called upon in order to litigate and successfully settle a complex class action. *Sullivan*, 667 F.3d at 303. Without Class Counsel's skill, the Class would have received no benefits at all. Webb Decl., ¶ 11. In addition, "[t]he quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsel's work." *Hall v. AT&T Mobility LLC,* 2010 WL 4053547, at *19 (D.N.J. Oct. 13, 2010); *In re OSB Antitrust Litig.*, 2008 U.S. Dist. LEXIS 125173, at *13-14 (E.D. Pa. Dec. 9, 2008) (in assessing quality of representation, courts also look to "the performance and quality of opposing counsel") (internal quotations and citation omitted). Class Counsel was opposed in this litigation by highly experienced class action defense counsel at two elite law firms. *See* Webb Decl., ¶ 20. There is little doubt that Defendant's law firms possess the resources, reputation, and experience to vigorously and effectively advocate for the Defendant's interests were this matter to be litigated further. *Id.* Despite Defendant's staunch resistance, Class Counsel's efforts resulted in a fair, adequate, and reasonable Settlement for the Class.

3. The Current Absence of Objections to the Attorneys' Fees Favors Approval.

The absence or minimal number of objections to a fee request is significant evidence that the request is fair and reasonable. *See, e.g., In re Rite Aid*, 396 F.3d at 305; *In re AT&T Corp.*, 455 F.3d at 170 (awarding fee despite eight objections); *In re Datatec Sys., Inc. Sec. Litig.,* 2007 WL 4225828 at *7 (no objections weighs "strongly in favor" of approval); *In re Genta Sec. Litig.,* 2008 WL 2229843, at *9 (D.N.J. May 28, 2008) (awarding fees despite one objection).

To date, there have been no objections to the Settlement and no Class Member has filed a valid request to be excluded. By comparison, over 90,000 Class Members were notified of the Settlement and are eligible to receive a payment from the Settlement Amount. *See* Declaration of Elizabeth Enlund, ¶¶ 5-19 (Exhibit 2 hereto). The lack of objections to the Settlement, including the proposed fees and Service Awards, weighs strongly in favor of approval.

4. The Requested Attorneys' Fees Are Reasonable When Compared to Awards in Similar Cases and What Would Have Been Contracted in a Private Contingency Matter.

Attorney fee awards in similar consumer class action cases have resulted in similar awards. *See infra* section II(B).

Additionally, the requested fee here is entirely consistent with the private marketplace where attorneys negotiate contingency fee agreements. Courts in this circuit have reasoned that the percentage-of-recovery method of awarding attorneys' fees in class actions should approximate the fee which would be negotiated if the lawyer were offering his or her services in the private marketplace. *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005) ("attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation"); *see also Fanning v. Acromed Corp.*, 2000 WL 1622741, at *7 (E.D. Pa. Oct. 23, 2000) (noting that plaintiffs' counsel in private

contingency fee cases regularly negotiate agreements providing for thirty to forty percent of any recovery); *Phemister v. Harcourt Brace Jovanovich, Inc.*, 1984 WL 21981, at *15 (N.D. Ill. Sept. 14, 1984) ("the percentages agreed on [in contingent fee arrangements in non-class action damage lawsuits] vary, with one-third being particularly common"). If this case was not class action litigation, the customary contingency fee would range from 30% to 40% of the recovery. *See In re Ikon Solutions*, 194 F.R.D. at 194 ("In private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery"). Certainly a one-third fee for contingency litigation is not high for New Jersey or the Third Circuit.

II. Plaintiffs' Counsel Should Be Awarded Reimbursement of Litigation Costs and Expenses.

Class Counsel requests reimbursement for a total of $15,455.64 in litigation costs and expenses, which has essentially been advanced to the Class. *See* Webb Decl., ¶¶ 22-24; *see Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970); *Oh v. AT&T Corp.,* 225 F.R.D. 142, 154 (D.N.J. 2004) ("counsel in common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case"). Indeed, reimbursement for costs expended by counsel in prosecuting the action is "routinely permitted." *In re Remeron Direct Purchaser Antitrust Litig.,* 2005 WL 3008808 at *17.

The costs and expenses are sought directly out of the Settlement Amount. *See* Settlement Agreement, ¶ 122. Further, the amount sought corresponds to certain actual out-of-pocket costs and expenses that Plaintiffs' law firms necessarily incurred and paid in connection with the prosecution of this litigation and the Settlement. *See* Webb Decl., ¶¶ 23-24. These costs have been carefully reviewed and audited by Class Counsel. *Id*.

The costs and expenses sought are compensable in a class action. *See* Fed. R. Civ. P. 23(h) (permitting award of "nontaxable costs that are authorized by law or by the parties' agreement"). In addition to being compensable under Rule 23, these costs are also compensable under the federal and consumer protection statutes alleged in the operative Complaint. *See* Second Amended Complaint, ¶¶ 155, 165 (ECF No. 50); *Sema v. Automall 46, Inc.*, 894 A.2d 77, 81 (N.J. Sup. Ct. App. Div. 2005).

The categories of expenses for which Class Counsel seek reimbursement here are the type of expenses routinely charged to paying clients in the marketplace and, therefore, the full requested amount should be reimbursed. *See* Webb Decl., ¶ 24. These expenses are reasonable and justified. *See, e.g., In re Certainteed Fiber Cement Siding Litig.*, 303 F.R.D. 199 (E.D. Pa. 2014) (approving $304,996.65 in costs that included similar categories as those requested here); *Oh v. AT&T Corp.*, 225 F.R.D. 142, 154 (D.N.J. 2004).

III. The Proposed Service Awards to the Class Representative and Plaintiffs Are Reasonable.

The purpose of service awards to the named plaintiffs in a class action is "to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *In re Philips/Magnavox*, 2012 WL 1677244, at *20; *McLennan*, 2012 WL 686020, at *11 ("Courts have ample authority to award incentive or 'service' payments to particular class members where the individual provided a benefit to the class or incurred risks during the course of litigation"); *see also Huguley v. General Motors Corp.,* 128 F.R.D. 81, 85 (E.D. Mich. 1989), *aff'd* 925 F.2d 1464 (6th Cir. 1989) ("Named plaintiffs and witnesses are entitled to more consideration than class members generally because of the onerous burden of litigation they have borne").

Indeed, numerous courts have approved service awards to class representatives that are

similar to the service awards sought here. *See, e.g., Bredbenner v. Liberty Travel, Inc.*, 2011 WL 1344745, at *24 (D.N.J. Apr. 8, 2011) ($10,000 per class representative); *In re Remeron End-Payor Antitrust Litig.*, 2005 WL 2230314, at *32-33 (D.N.J. Sept.13, 2005) (awards of $30,000 for two class representatives and $5,000 for three others); *Hanrahan v. Britt,* 174 F.R.D. 356, 369 (E.D. Pa. 1997) (awarding a total of $25,000 to two named plaintiffs); *see also* 5 *Newberg on Class Actions* § 17.8 (citing empirical studies on award size and noting in part "[t]he two studies show that the average award per plaintiff ranged from $9,355 (in 2002 dollars) in one study to $15,992 (in 2002 dollars) in the other"). Class Counsel request that the Court grant a Service Award to Class Representative, Judith Jimenez, in the amount of $8,000 and Service Awards to each of the two remaining Plaintiffs in the amount of $5,000 each. The proposed Service Awards are appropriate given the circumstances. Without the Class Representative and Plaintiffs there would have been no litigation and no recovery for the Settlement Class. The Class Representative and Plaintiffs assisted counsel with the investigation of this matter, the preparation of the Complaint, Amended Complaint, and Second Amended Complaint, provided information to support their claims, responded to discovery requests, stayed abreast of – and to varying degrees, actively participated in – the settlement negotiations, and reviewed and approved the settlement terms. *See* Webb Decl., ¶¶ 27-31.

The requested award will help compensate the Class Representative and Plaintiffs for expending such time and effort, as well as recognize that each helped to obtain a benefit for thousands of their fellow Settlement Class members. Class Counsel request a slightly higher Service Award for Ms. Jimenez because she was the original named Plaintiff, who performed services for a longer time than the others. It is likely this case would not have been filed without her initiative. Accordingly, the requested service awards of $8,000 to Ms. Jimenez and $5,000

each for Kathy Fogel and Stephanie Vil are reasonable and should be approved.

IV. Reasonable Notice of the Requested Fees, Litigation Expenses, and Service Awards Has Been Given to the Class and the Absence of Objections to Date Supports Approval.

Rule 23(h)(1) provides "[n]otice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." F.R.C.P. 23(h)(1). In preliminarily approving the Settlement, the Court ordered that "[a]ny Participating Settlement Class Member who does not timely and validly request exclusion from the Settlement may object to the Settlement by filing an objection with the Court with copy to Class Counsel and TD Bank's counsel" and that such objection must be must be "postmarked no later than sixty (60) days after the Notice Deadline." *See* ECF No. 96, at ¶ 22. The Notice Deadline was July 24, 2023, and set the final deadline for objections as September 22, 2023.

Notice of the Settlement was sent via email and regular mail, as necessary, to all potential members of the Settlement Class. *See* Enlund Decl., ¶ 4. This notice included a disclosure of the amount of the requested award of attorneys' fees, expenses, and Service Awards. *Id.* at Exhs. 1-2. Although the deadline for objections has not yet passed, as of this filing it has been 30 days since the Notice Deadline passed, and no objections have been filed. The absence of any objections to the requested amounts suggests they are reasonable.

CONCLUSION

For the foregoing reasons, Plaintiffs and Class Counsel respectfully request that the Court grant this application for fees, expenses, and Service Awards.

DATED this 23rd day August, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to all counsel of record.

/s/ Kenneth J. Grunfeld
Kenneth J. Grunfeld