UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

TAMI BRUIN, on behalf of herself and all others similarly situated, Plaintiff, v. BANK OF AMERICA, N.A., Defendant.	Case No. 3:22-cv-140-MOC-WCM

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE SERVICE AWARDS

I. INTRODUCTION

After years of hard-fought litigation in two different federal courts, Plaintiffs Tami Bruin and Eline Barokas, and Class Counsel,[1] successfully negotiated a resolution of this action with a proposed Settlement that creates an $8,000,000 Settlement Fund for the benefit of the Settlement Class Members, and additionally achieves business practice changes by Defendant Bank of America, N.A. ("BANA" or "Defendant") valued at an estimated $21,000,000 in savings to the Settlement Class and future BANA account holders—representing a ***total Settlement value of $29,000,000*** that directly addresses and resolves the claims at issue in this case. Plaintiffs now respectfully move for an award of attorneys' fees in the amount of one-third of the Settlement Fund ($2,666,667.00), an award of costs in the amount of $47,747.85, and a Service Award of $5,000 to each Class Representative.

The Settlement resolves Plaintiffs' novel claims arising from BANA's assessment of certain fees on outbound ACH transfers (or "push" transfers) to an Accountholder's external account held at other financial institutions. The Parties reached the Settlement only after (1) Plaintiffs briefed and largely prevailed against two motions to dismiss that BANA filed in two different courts; (2) the Parties conducted significant documentary and deposition discovery, including discovery necessary to determine classwide damages; and (3) the Parties participated in a private mediation session with a well-respected neutral.

Notably, unlike many other consumer settlements, the $8,000,000 cash fund achieved through the Settlement here will be ***automatically distributed*** to Settlement Class Members ***without any need for them to file a claim***, and ***without any reversion of funds to BANA***. And a

[1] Unless otherwise defined herein, all capitalized terms are defined in the Settlement Agreement. *See* Dkt. No. 42-3.

key term of the Settlement requires BANA to ***end its practice of assessing the fees*** that are at the heart of this litigation ***for a period of five years***. This practice change will result in estimated cost savings to the Class and future account holders of at least $21,000,000 over the next five years according to the Bank's projections, which is a value to Settlement Class Members that is ***in addition*** to the $8,000,000 common fund. Joint Decl., ¶ 11.

Class Counsel obtained these benefits for the Settlement Class with hard work and persistence, investing hundreds of hours of time in this matter. Prior to filing, Class Counsel spent many hours investigating the factual and legal bases for Plaintiffs' novel claims by interviewing BANA accountholders to gather information about BANA's conduct and its impact on consumers; and reviewing BANA accountholders bank statements and Plaintiffs' Account documents. This information was essential to Class Counsel's ability to understand the nature of the conduct at issue, the language of the Account agreements and other documents at issue, and potential remedies. Class Counsel also expended significant resources researching and developing the legal claims before the Complaint was filed and throughout the litigation. When this case was filed, ***no other case in the country*** had ever challenged the assessment of certain fees on ACH transfers for outbound or "push" transfers to an accountholder's own external accounts, the central practice at issue in this case. Without Class Counsel's hard work, and that of the Class Representatives, BANA's alleged practices would have likely gone without recompense. But because of Class Counsel's efforts, the Settlement Class will enjoy the benefit of meaningful retrospective relief and all Accountholders, including Settlement Class Members, will enjoy the benefits of the prospective relief secured by the Settlement.

The requested fee award will compensate Class Counsel for their diligence, investment of resources, and most importantly for the excellent results they achieved for the Class despite the

risks and uncertainty of their claims. The requested attorneys' fee award represents approximately 9% of the total value of the common fund and the prospective relief combined (not including other intangible benefits), however, consistent with Fourth Circuit law, Class Counsel seeks only one-third of the common fund in their fee request and do ***not*** base any portion of their fee request on the additional value they created by securing Defendant's agreement to cease assessing the fees at the heart of this litigation.

Plaintiffs respectfully request that this Court grant the Motion and award the requested attorneys' fees and costs to Class Counsel, and the requested Service Awards to the Class Representatives. BANA does not oppose the requested relief.

II. BACKGROUND

A. The Litigation

This litigation has been pending since March 17, 2021. Plaintiffs originally filed this class action in United States District Court for the Southern District of New York claims for violations of state consumer protection laws in North Carolina, New York, and New Jersey, and for unjust enrichment, arising out of BANA's alleged imposition of improper fees on ACH transfer fees for outbound or "push" transfers to accountholders' own external bank accounts. *See Bruin v. Bank of America, N.A.*, S.D.N.Y. Case No. 1:21-cv-02272 (the "*Barokas* Action"), Dkt. No. 5. On June 23, 2021, BANA moved to dismiss, and on March 31, 2022, United States District Court Judge Andrew L. Carter, Jr. issued an Opinion and Order dismissing Plaintiff Bruin's claims for lack of personal jurisdiction, but otherwise denied the motion as to Plaintiff Barokas' claims under New York General Business Law, N.Y. Gen. Bus. Law § 349, *et seq*. (the "NYDPA") and the New Jersey Consumer Fraud Act, N.J.C.F.A § 56:8-1, *et seq*. (the "NJCFA"). *See Barokas* Action, Dkt. No. 28. On April 18, 2022, BANA moved to reconsider the Opinion and Order, but on February

7, 2023, Judge Carter denied the motion for reconsideration. *See Barokas* Action, Dkt. No. 35. After her dismissal from the *Barokas* Action, Plaintiff Bruin filed this class action on April 4, 2022, in this Court, asserting almost identical claims for unjust enrichment and violation of the North Carolina Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75.1-1, *et seq*. (the "NCUDTPA"), as those alleged (and previously dismissed) in the *Barokas* Action regarding ACH Transfer Fees. *See* Dkt. No. 1. On June 13, 2022, BANA moved to dismiss the class action complaint, and on September 1, 2022, the Court denied BANA's motion, finding that it was premature to assess the viability of the class without affording Bruin the opportunity for discovery. *See* Dkt. No. 21.

Following the Court's Order on the Motion to Dismiss, and after the Court issued a Scheduling Order, the Parties began an extensive discovery effort. Plaintiff Bruin served Interrogatories and Requests for Production of Documents, and engaged in extensive negotiations with BANA over a confidentiality order and protocol to govern the exchange of electronically stored information. Joint Decl., ¶ 2. BANA propounded discovery requests on Plaintiffs, as well, including interrogatories and Requests for Production. *Id.* The Parties immediately began meeting and conferring on various discovery related issues, such as the Parties' respective discovery responses, custodial ESI searches, and the production of transactional data. *Id*., ¶ 3. BANA produced, and Plaintiffs' Counsel reviewed, critical internal documents related to BANA's ACH fee practices, such as bank contractual agreements and transactional database excerpts showing revenues from the disputed fees at issue, among others. *Id*., ¶ 4. Plaintiffs also took the deposition of a BANA corporate representative. *Id*., ¶ 5. BANA took, and Plaintiffs defended, the in-person deposition of Plaintiff Bruin, as well. *Id*.

Further, in preparation for their motion for class certification, Plaintiffs began researching, interviewing, and ultimately retained an expert to opine on the issues of consumer perception of the challenged disclosures and were in the process of preparing various survey evidence when the settlement was finalized. *Id*., ¶ 6. Additionally, Plaintiffs retained an expert to opine on issues relating to the ascertainability of the class, and to analyze potential classwide damages. *Id*., ¶ 7.

While discovery was ongoing, the Parties participated in a private mediation session with Judge Diane Welsh (Ret.) on June 30, 2023, which ultimately resulted in the Parties reaching a settlement in principle. *Id*., ¶ 8. Following the mediation and an agreement in principle, the Parties proceeded with limited confirmatory discovery related to damages, and worked on finalizing the Settlement Agreement involving several more months of negotiations. *Id*., ¶ 9. The Court granted preliminary approval of the settlement on November 17, 2023. *See* Dkt. No. 45.

Following preliminary approval, Class Counsel worked extensively with the notice administrator to make sure notice was disseminated properly. Indeed, since preliminary approval, Kroll has mailed and/or emailed Notice to 828,000 Class Members, with Notice to 3,985 unique Class Members currently known to be undeliverable, which is a 99.6% deliverable rate to the Class, and the Settlement website and phone line have launched. Declaration of Scott M. Fenwick, ("Fenwick Decl."), at ¶¶ 3-8.

B. The Settlement

Under the Settlement Agreement, BANA has agreed to do the following: (1) make a cash payment into a Settlement Fund of ***$8,000,000***; and (2) cease assessing ACH First Party Fees for five years, which can be valued at ***$21,000,000***. Settlement ¶¶ 1.46, 1.35, 2.1, 2.2, 6.

The $8 million Settlement Fund will be used to pay Settlement Class members, the costs of notice and administration, and any attorneys' fees and expenses and Service Award that the Court may award. *Id.*, ¶ 6.3.

As a result of this litigation, BANA also agreed to not assess ACH First Party Fees for a period of at least five (5) years from the Preliminary Approval of the Settlement. *Id*., ¶ 1.35. This element alone is conservatively valued at $21 million. Joint Decl., ¶ 11.

Moreover, since Kroll has identified the class members who are current BANA account holders (Fenwick Decl., ¶ 3) and Defendant has agreed to make direct deposits of Settlement proceeds to those Settlement Class Members, approximately 772,065 Settlement Class Members will receive settlement proceeds in this manner. This too saves hundreds of thousands of dollars in costs that would otherwise have been borne by the Settlement Class to print and mail checks.

The overwhelming response of Settlement class members has been positive. Though the deadline has not yet lapsed, as of the date of this filing, there have been only six opt outs and zero objections.

III. ARGUMENT

It is well established that, where counsel's work results in substantial benefit to a class of individuals, counsel is entitled to an award of their attorney's fees under the common fund doctrine. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (citing a line of decisions dating back to *Trustees v. Greenough*, 105 U.S. 527 (1882)). Rule 23(h) allows for the award of "reasonable attorneys' fees and nontaxable costs that are authorized by law or the parties' agreement." In determining a reasonable fee in a class action, courts generally use two different methods, the "lodestar" method and the "percentage of the fund" method. *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 260 (E.D. Va. 2009). The percentage of the fund method awards fees as a

percentage of the benefit secured for the Class; the lodestar method awards fees based on the value of Counsel's time spent litigating the claims. *Id*.

Within the Fourth Circuit, district courts prefer the percentage method in common-fund cases. *Kelly v. Johns Hopkins Univ.*, No. 1:16-CV-2835-GLR, 2020 WL 434473, at *2 (D. Md. Jan. 28, 2020) (collecting cases, finding that the percentage-of-the-fund method is "overwhelmingly preferred"); *see also Savani v. URS Prof'l Solutions LLC*, 121 F. Supp. 3d 564, 568-69 (D.S.C. 2015) ("the percentage-of-recovery approach is the *preferred* approach to determine attorney's fees.") (citations omitted) (emphasis added); *Jones v. Dominion Res. Servs.*, 601 F. Supp. 2d 756, 758-59 (S.D.W. Va. 2009) ("The percentage method has overwhelmingly become the preferred method for calculating attorneys' fees in common fund cases."). The underlying preference for the percentage approach rather than the loadstar method appears to be the proper alignment of the interests of attorney and client through the percentage method. *See, e.g.*, *Archbold v. Wells Fargo Bank, N.A.*, No. 3:13-cv-24599, 2015 WL 4276295, at *4 (S.D.W. Va. July 14, 2015) (stating a "clear consensus among the federal and state courts ... that the award of attorneys' fees in common fund cases should be based on a percentage of the recovery" because "the percentage of fund approach is the better-reasoned and more equitable method of determining attorneys' fees in such cases."); *DeWitt v. Darlington Cty.*, No. 4:11-cv-00740-RBH, 2013 WL 6408371, at *6 (D.S.C. Dec. 6, 2013) ("The percentage-of-the-fund approach rewards, counsel for efficiently and effectively bringing a class action case to a resolution, rather than prolonging the case in the hopes of artificially increasing the number of hours worked on the case to inflate the amount of attorney's fees on an hourly basis."); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (stating the lodestar method "create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district

courts to engage in a gimlet-eyed review of line-item fee audits") (alterations in original) (citations and internal quotations omitted)).

Ultimately, "[w]ith either method, the goal is to make sure that counsel is fairly compensated." *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 575 (E.D. Va. 2016). Importantly to the case at bar, the "most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 629 (4th Cir. 1995) (citations and quotations omitted).

Here, the Court should use the percentage of the fund method. Because the lodestar method does not necessarily align the interests of Class Counsel with those of the Settlement Class, the percentage of the fund method is the superior method for awarding attorneys' fees to Class Counsel. *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014) (finding that the percentage method "better aligns the incentives of plaintiffs' counsel with those of the class members because it bases the attorneys' fees on the results they achieve for their clients . . ."); *see also DeWitt*, 2013 WL 6408371, at *6. Under the lodestar method, Class Counsel's fee does not depend on how much the Settlement Class recovers, but, rather, on how many hours Class Counsel spent. In contrast, applying the percentage of the fund method not only rewards efficiency, but also aligns Class Counsel's interests with the Settlement Class's interests because the ***more*** the Settlement Class recovers, the ***more*** Class Counsel recovers. *In re Allura Fiber Cement Siding Litig.*, No. 2:19-MN-02886-DCN, 2021 WL 2043531, at *3–4 (D.S.C. May 21, 2021) ("The vast majority of courts use the percentage of recovery method, which is advantageous because it ties the attorneys' award to the overall result achieved rather than the number of hours worked.") (collecting cases). The percentage of the fund is "result oriented rather than process-oriented, [and therefore] better approximates the workings

of the marketplace" than the lodestar approach. *In re Thirteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995).

While Plaintiffs believe the Court should use the percentage of the fund method, Plaintiffs also demonstrate below that the requested fee award is reasonable under both approaches.

A. The Fee Request is Reasonable Under the Percentage of the Fund Method

District courts in the Fourth Circuit have acknowledged that "[f]ees awarded under 'the percentage-of-recovery method in settlements under $100 million have ranged from 15% to 40%.'" *Boyd v. Coventry Health Care Inc*., 299 F.R.D. 451, 465 (D. Md. 2014). "Within the Fourth Circuit, ***contingent fees of roughly 33% are common***." *Earls v. Forga Contracting, Inc*., No. 1:19-CV-00190-MR-WCM, 2020 WL 3063921, at *4 (W.D.N.C. June 9, 2020) (emphasis added); *Seaman v. Duke Univ.,* No. 1:15-CV-462, 2019 WL 4674758, at *3 (M.D.N.C. Sept. 25, 2019) ("***Contingent fees of one-third are common*** in this circuit in cases of similar complexity.") (emphasis added); *Kelly*, 2020 WL 434473, at *3 ("***Contingent fees of up to one-third are common*** in [the Fourth] circuit.") (emphasis added). As such, district courts in this Circuit routinely award 33% from a common fund as attorneys' fees. *See, e.g.*, *Morris v. Bank of Am., N.A.*, No. 3:18-CV-157-RJC-DSC, 2022 WL 214130, at *3 (W.D.N.C. Jan. 24, 2022) (approving 33.33% of $75 million settlement in class case against Bank of America); *Myers v. Loomis Armored US, LLC*, 3:18-cv- 00532-FDW-DSC, 2020 WL 1815902, at *6-7 (W.D.N.C. Apr. 8, 2020) ("Class Counsel's request for one-third of the Gross Maximum Settlement Amount is reasonable."); *Lambert v. Navy Federal Credit Union*, Case No. 1:19-cv-00103-LO-MSN, Dkt. No. 61 (E.D. Va. Apr. 8, 2021) (granting 33.33% of $16 million settlement fund because "Class Counsel's [which included many of same firms representing the Class here] expertise, perseverance, and skill allowed them to obtain an excellent result for the Settlement Class."); *In*

re Celebrex (Celecoxib) Antitrust Litig., No. 2:14-CV-00361, 2018 WL 2382091, at *5 (E.D. Va. Apr. 18, 2018) ("Fee awards of one-third of the settlement amount are commonly awarded in cases analogous to this one . . . ." and awarding 33% of $94 million settlement in class action case); *In re Titanium Dioxide Antitrust Litig*., No. 10-CV-00318 RDB, 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (awarding attorneys' fees of 33% of $163 million settlement). In fact, a comprehensive study of attorneys' fees in class action cases notes "a remarkable uniformity in awards between roughly 30% to 33% of the settlement amount." Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. of Empirical Legal Studies 27, 31, 33 (2004).

When using the "percentage of the fund method," district courts in this Circuit determine the reasonableness of the fee by analyzing the following seven factors: (1) the results obtained for the class; (2) the quality, skill, and efficiency of the attorneys involved; (3) the risk of nonpayment; (4) objections by members of the class to the settlement terms and/or fees requested by counsel; (5) awards in similar cases; (6) the complexity and duration of the case; and (7) public policy. *Kelly*, 2020 WL 434473, at *6. Here, these factors all support award of the requested fee.

1. Results Obtained for the Settlement Class

In the Fourth Circuit, "the most critical factor in calculating a reasonable fee award is the degree of success obtained." *McDonnell v. Miller Oil Co*., 134 F.3d 638, 641 (4th Cir. 1998) (citation and internal quotation omitted). Here, the Settlement provides an excellent result for the Settlement Class. Class Counsel successfully negotiated: (1) a $8,000,000.00 common fund that will provide cash payments directly to Settlement Class Members automatically, without any claims process; and (2) BANA's agreement to stop charging fees on ACH First Party Transfers for at least five years—a practice change valued at $21,000,000. The common fund ***alone*** (not

including the value of the injunctive relief) represents ***37% of the total recoverable damages***. Joint Decl., ¶ 10.

In addition to the common fund cash payment, BANA has agreed to not assess fees on push transfers of Accountholder funds via the National Automated Clearing House Association network to the Accountholder's external account (i.e. ACH First Party Fees), and that agreement will save current accountholder Settlement Class Members an estimated $21,000,000 over the next five years in fees that otherwise would have been assessed. Joint Dec., ¶ 11. When the value of the prospective relief is considered, the Settlement amounts to ***133% of the most probable amount of classwide damages***. *Id.*, ¶ 12.

The significance of BANA's practice change cannot be overstated. This Settlement is one of the few that contains an agreement by the defendant to cease the practice at the heart of the litigation, which is a substantial benefit to the class. *See Feinberg v. T. Rowe Price Grp., Inc.*, 610 F. Supp. 3d 758, 771–72 (D. Md. 2022) (finding "a significant benefit to the class" where the settlement terms provided injunctive relief on a "core issue" for the class). When the practice change is considered, the fee request of $2,666,667 represents ***only*** 9% of the overall $29,000,000 value of the settlement[2] – far below fee awards in similar cases. But even when not included in the total value of the settlement, the benefit of the practice change to the Settlement Class is certainly a factor that the Court should consider in determining a reasonable percentage of the common fund to award. *See Kruger v. Novant Health, Inc.*, Civ. No. 14-208, 2016 WL 6769066, at *3 (M.D.N.C.

[2] The Federal Judicial Center provides an example of when it is appropriate to base a percentage fee on the value of injunctive relief through objective criteria: "an injunction against an overcharge may be valued at the amount of the overcharge multiplied by the number of people likely to be exposed to the overcharge in the near future." *Fleisher v. Phoenix Life Ins. Co*., No. 11-CV-8405 (CM), 2015 WL 10847814, at *15 (S.D.N.Y. Sept. 9, 2015) (quoting A Pocket Guide for Judges, 3d. Ed., 34–35 (2010)).

Sept. 29, 2016) ("Considering the non-monetary benefits and relief created by counsel's efforts is important because it encourages attorneys to obtain meaningful affirmative relief."); *Kelly*, 2020 WL 434473, at *6 (noting that although the monetary component alone could justify a fee award, "the Court must also consider the value of the non-monetary relief when evaluating the overall benefit to the class.") (citing *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 481 (D. Md. 2014)). In order to incentivize class counsel to pursue meaningful practice changes, they must be rewarded when they do so. Perhaps for that reason, courts have consistently recognized as much when evaluating the fairness of fee requests. *See Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628, 631 (9th Cir. 2020) (overruling objector in part because the settlement included a practice change which generated benefits far "beyond the cash settlement fund."); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049 (9th Cir. 2002) (discussing non-monetary benefits as partial justification for a larger fee award); *Savani*, 121 F. Supp. 3d at 572 (approving class counsel's request for 39.57% of the cash paid, where the "cash paid represents approximately 16.88% of the potential $2.24 million current and future value of the recovery").

In sum, the Settlement is excellent by any measure and is in line with or better than the results achieved in similar class action settlements. As a result of the Settlement, Settlement Class Members will automatically receive cash payments without the need to submit a claim or do anything. In addition, the entire amount of the Settlement Fund will be distributed to Settlement Class Members through first and/or second rounds of distributions, or, if additional distributions are not cost effective, contributed to a *cy pres* recipient. Settlement ¶¶ 6.6, 6.7. Under the Agreement, there will be no reversion of unclaimed funds to BANA. *Id.*, ¶ 6.7. In short, the Settlement provides significant, direct benefits to Settlement Class Members and will continue to do so for at least five years. Given the significant benefits of the Settlement, Class Counsel's fee

request for one-third of the Settlement Fund is reasonable.

2. Quality, Skill, and Efficiency of Attorneys

Class Counsel possesses extensive experience in prosecuting consumer class actions throughout the United States, and particularly in litigation involving the financial-services industry. Joint Decl., ¶¶ 13-18. Class Counsel has successfully litigated and resolved many other consumer class actions against major corporations, including those against over a hundred financial institutions related to various types of improper fee assessments, recovering hundreds of millions of dollars for those classes. *Id*. Class Counsels' experience, resources, and knowledge—especially in the specialized area of banking litigation—is extensive and formidable. *Id*. Indeed, there are few if any firms in the nation with this expertise.

Here, Class Counsel leveraged that expertise to litigate this case and negotiate a favorable settlement for the Settlement Class. *Id*., ¶¶ 1-12. Because Class Counsel has litigated many complex consumer cases involving financial services, including working extensively with experts to uncover the methodologies behind the assessment of fees, they were able to successfully litigate and settle this matter. *Id*. Moreover, Class Counsel litigated this action efficiently. Based in no small part on their skill and expertise, Class Counsel was able to negotiate a Settlement prior to a ruling on (and potential appeals related to) class certification, allowing Settlement Class Members to receive their settlement benefits now—without the risks, uncertainties, and delays associated with continued litigation of this case through judgment and potential appeals. The swift resolution of the case benefits the Settlement Class and emphasizes the skill and efficiency of Class Counsel. This factor also weighs in favor of approval.

3. Risk of Nonpayment

In this case, Class Counsel bore a significant risk of nonpayment as "eviden[ced] in the fact that they undertook this action on an entirely contingent fee basis." *In re Mills Corp. Sec. Litig.*, 265 F.R.D. at 263. By doing so, Class Counsel assumed the significant risks involved with surviving dispositive motions, obtaining class certification, proving liability, causation, and damages, prevailing with experts, and litigating through trial and possible appeals, without any assurance of recompense for their labor or even reimbursement for their out-of-pocket expenses. Indeed, the risk was particularly acute here given that Plaintiffs' claims were entirely novel. With no roadmap to follow, Class Counsel undertook significant risk in litigating this case. *See Reynolds v. Fid. Invs. Institutional Operations Co., Inc.*, No. 1:18-CV-423, 2020 WL 92092, at *3 (M.D.N.C. Jan. 8, 2020) (finding that class counsel who litigated "novel questions of law" weighed in favor of granting fees of one-third of settlement fund) (citing *Kirkpatrick v. Cardinal Innovations Healthcare Sols.*, 352 F. Supp. 3d 499, 505 (M.D.N.C. 2018)).

Transferring the risk to Class Counsel afford access to the courts for some plaintiffs who might otherwise face difficulties, and it justifies awarding a "greater return than an hourly fee offers to induce lawyers to take on representation for which they might never be paid, and it makes sense to arrange these fees as a percentage of any recovery." *Pellegrin v. Nat'l Union Fire Ins. (In re Abrams & Abrams, P.A.)*, 605 F.3d 238, 245-46 (4th Cir. 2010). Absent this Settlement, the Settlement Class and Class Counsel risked obtaining no recovery at all. The contingent nature of the case and risk borne by Class Counsel therefore favors the award of fees. *See Decohen*, 299 F.R.D. at 482 (finding that "public policy favors the requested award" where risk of non-payment exists "because the relevant public policy considerations involve the balancing of the policy goals of encouraging counsel to pursue meritorious … litigation.") (citation and internal quotations omitted). The risk borne by Class Counsel in this complex case supports their fee request.

4. Objections

As of the date of this filing, no objections to the Settlement or attorneys' fee request have been filed. Should any timely objections be received after the filing of this Motion, Class Counsel will address them in their Motion for Final Approval.

5. Awards in Similar Cases

Courts approving fee requests in other bank fee settlements have approved fee awards similar to the one requested here. Indeed, the requested fee of 33.33% is in line with what has been routinely approved by judges who have ruled on the fairness of settlements in other cases concerning disputed bank fee practices. Courts regularly award fees in excess of 30% when awarding attorneys' fees in similar financial services class action settlements. This is true even though many of the settlements either did not include highly valuable injunctive relief like that obtained here, or, if they did, the court included the value of the injunctive relief in calculating the fee award. The following depicts such settlements nationwide, all of which resulted in fee awards either roughly at or significantly above the 33.33% that Class Counsel requests here:

Bank Fee Case Name	**Percentage of the Fund Awarded**
Lopez v. JPMorgan Chase Bank, N.A., No. 1:09-MD-02036-JLK (S.D. Fla.)	**44%** of value of settlement, which includes 30% of $110 million cash fund and 30% of value of practice changes
Jacobs v. Huntington Bancshares Inc., No. 11-cv-000090 (Lake County Ohio)	**40%** of value of settlement, which includes 40% of $8.975 million and 40% of $7 Million in debt forgiveness
Farrell v. Bank of Am., N.A., 327 F.R.D. 422 (S.D. Cal. 2018), *aff'd sub nom. Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628 (9th Cir. 2020)	**40%** of 37.5 million common fund
Wolfgeher v. Commerce Bank, N.A., No. 1:09-MD-02036-JLK (S.D. Fla.) (Dkt. 3574)	**38%** of $18.3 million common fund
Nelson v. Rabobank, N.A.,	**35.2%** ($750k fee includes % of practice

No. RIC 1101391 (Cal. Supr.)	changes)
In re Checking Account Overdraft Litig., No. 1:09-MD-02036-JLK, 2020 WL 4586398 (S.D. Fla. Aug. 10, 2020)	**35%** of $7.5 million
Hawkins et al v. First Tenn. Bank, N.A. (Cir. Ct. Tenn.)	**35%** of $16.75 million
Swift v BancorpSouth, No. 1:10-cv-00090-GRJ (N.D. Fla.)	**35%** of $24 million
Molina v. Intrust Bank, N.A., No. 10-CV-3686 (D. Kan.)	**33%** of $2.7 million
Morris v. Bank of Am., N.A., No. 3:18-CV-157-RJC-DSC, 2022 WL 214130 (W.D.N.C. Jan. 24, 2022)	**33.33%** of $75 million
Casto v. City National Bank, N.A., No. 10-C-1089 (Cir. Ct. W. Va.)	**33.33%** of $3 million
Schulte v. Fifth Third Bank, No. 09-cv-6655 (N.D. Ill.)	**33.33%** of $9.5 million
Johnson v. Community Bank, N.A., No. 12-cv-01405-RDM (M.D. Pa.)	**33.33%** of $2.5 million
Bodnar v. Bank of America, No. 5:14-cv03224-EGS (E.D. Pa.)	**33.33%** of $27 million
Holt v. Community America Credit Union, No. 4:19-CV-00629-FJG (W.D. Mo.)	**33.33%** of $3 million
White v. Members 1st Federal Credit Union, Case No. 1:19-cv-00556-JEJ (W.D. Pa.)	**33.33%** of $910,000
Figueroa v. Capital One, Case No. 3:18-cv00692-JM-BGS (S.D. Cal.)	**33.33%** of $13 million
Liggio v. Apple Federal Credit Union, No. 1:18-cv-01059-LO-MSN (E.D. Va.)	**33.33%** of $2.7 million
Lambert v. Navy Federal Credit Union, No. 1:19-cv-00103-LO-MSN, (E.D. Va.)	**33.33%** of $16 million
Soto Melendez v. Banco Popular de Puerto Rico, No. 3:20-cv-01057, (D.P.R.)	**33.33%** of $5.5 million

As demonstrated above, the requested fee award is consistent with the fee awards approved in other bank fee class action cases.

6. Duration and Complexity of the Case

This case involved difficult and novel issues that presented myriad risks and required a

highly technical understanding of the innerworkings of the complex ACH network. Because of the specialized knowledge required to prosecute Plaintiffs' theory of liability and the uncertainty that existed throughout the litigation, Class Counsel needed a high degree of skill, both to settle the matter and to be prepared to litigate the merits through any potential appeal. Class Counsel's experience handling the most prominent bank fee cases and their understanding of the related legal issues from those cases helped them to successfully and efficiently prosecute this case and obtain an excellent result for the Class. To even be able to identify the alleged inappropriate fees requires specialized knowledge and skill, as do the theories surrounding the alleged fees, not to mention the specialized knowledge of class action procedure required to evaluate certification and achieve settlement. The complex nature of this case warrants approval of the requested fee award.

7. Public Policy

When assessing the reasonableness of a fee award in a class action settlement, the "court must strike the appropriate balance between promoting the important public policy that attorneys continue litigating class action cases that 'vindicate rights that might otherwise go unprotected,' and perpetuating the public perception that 'class action plaintiffs' lawyers are overcompensated for the work that they do.'" *Fangman v. Genuine Title, LLC*, No. CV RDB-14-0081, 2017 WL 86010, at *6 (D. Md. Jan. 10, 2017) (internal citations omitted). The settlement of this case and the attorneys' fees requested do not raise serious public policy concerns, and no Settlement Class Members have presently objected to the requested fee. On balance, public policy also supports approval of the requested award.

In sum, the seven factors applied in the Fourth Circuit to assess the reasonableness of a fee award all weigh in favor of approving the requested award.

B. The Fee Award Is Reasonable Based on the Lodestar Method

Although the Court is not required to review counsel's lodestar to cross-check a requested fee amount, should the Court exercise its discretion to perform a lodestar cross-check here, the requested fee award is reasonable under that metric, as well. *See Boyd*, 299 F.R.D. at 467 ("The purpose of a lodestar cross-check is to determine whether a proposed fee award is excessive relative to the hours reportedly worked by counsel, or whether the fee is within some reasonable multiplier of the lodestar") (citation omitted). After examining the time and labor required, the Court may apply a multiplier to the lodestar. *Berry v. Schulman,* 807 F.3d 600, 617 n.9 (4th Cir. 2015) (noting that using the lodestar method, "the district court multiplies the number of hours worked by a reasonable hourly rate. And it can then 'adjust the lodestar figure using a "multiplier" derived from a number of factors, such as the benefit achieved for the class and the complexity of the case.'").

Under the lodestar method, the Court's analysis begins by calculating counsel's lodestar—reasonable hourly rates multiplied by hours reasonably expended in the litigation. *Grissom v. The Mills Corp.*, 549 F.3d 313, 320 (4th Cir. 2008). In the Fourth Circuit, twelve factors guide the Court's "reasonableness" analysis when evaluating fee awards on a lodestar basis:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 n.28 (4th Cir. 1978).

The Court does not need to address all twelve factors independently "because such considerations are usually subsumed within the initial calculation of hours reasonably expended at

a reasonable hourly rate." *MTU Am. Inc. v. Swiftships Shipbuilders LLC*, No. 1:14-CV-773 LMB/TCB, 2015 WL 4139176, at *3 (E.D. Va. July 8, 2015) (internal quotation omitted). Of the factors, "the results obtained" is typically considered the most important. *Nigh v. Koons Buick Pontiac GMC, Inc.*, 478 F.3d 183, 190 (4th Cir. 2007). Here, all of the factors counsel towards approval of the requested fee award.

1. Class Counsel's Lodestar Reflects the Time, Labor, and Skill Reasonably Required to Prosecute this Complex Action

Here, Class Counsel reasonably expended 1,703.9 total hours litigating this Action, including a reasonable amount of estimated time that will be spent from the date of this Motion forward, including to respond to a class member inquiries, draft and prepare a final approval motion, prepare for and attend the final approval hearing, and supervise the calculation and distribution of settlement proceeds to millions of class members. Joint Decl., ¶¶ 28, 36, 42, 48. Cognizant of the need to work efficiently, Class Counsel coordinated their work to avoid duplication of effort and assigned work to associates and paralegal personnel whenever possible and prudent to keep costs low. These hours were reasonably expended over the course of this litigation, which has been going on for almost three years. Prior to filing, Class Counsel spent many hours researching and investigating the nature of any potential claims, complicated NACHA Rules, banking regulations, the existence of consumer and regulatory complaints on the same issue, interviewing potential class members, reviewing bank statements and BANA's disclosures, and researching legal precedent that could influence the result.

After filing, Class Counsel then spent many more hours engaged in heavily contested motion practice. This included briefing two Motion to Dismiss in different federal courts as well as a Motion for Reconsideration and Motion to Stay discovery in the *Barokas* Action. Because no other major bank assessed ACH fees on transfers to accountholders' external accounts, Class

Counsel did not have any template to work from. Class Counsel put substantial effort into presenting the most cogent, persuasive opposition briefing that they could, and were rewarded with two opinions largely denying BANA's Motions to Dismiss – twice.

Following this Court's decision on the Motion to Dismiss, discovery began in earnest. Plaintiff Bruin served Interrogatories and Requests for Production of Documents and engaged in extensive negotiations with BANA over a confidentiality order and protocol to govern the exchange of electronically stored information. Joint Decl., ¶ 2. BANA proposed discovery requests on Plaintiffs, as well, including interrogatories and Requests for Production. *Id.* The Parties immediately began meeting and conferring on various discovery related issues, such as the Parties' respective discovery responses, custodial ESI searches, and the production of transactional data. *Id*., ¶ 3. BANA produced, and Plaintiffs' Counsel reviewed, critical internal documents related to BANA's ACH fee practices, such as bank contractual agreements and transactional database excerpts showing how much money it made from the disputed fees at issue, among others. *Id*., ¶ 4. To prepare for class certification, Class Counsel also began researching, interviewing, and ultimately retained experts to opine on issues of consumer perception of the challenged disclosures and issues relating to the ascertainability of the class, and to analyze potential class damages. *Id.*, ¶¶ 6-7. Plaintiffs also took the deposition of a BANA corporate representative. BANA took, and Plaintiffs defended, the in-person deposition of Plaintiff Bruin, as well. *Id*., ¶ 5.

In addition to formal discovery, Class Counsel put substantial effort into gathering all necessary information to negotiate a settlement. Class Counsel met face-to-face for a settlement conference with Judge Welsh (Ret.) on June 30, 2023, which ultimately resulted in the Parties reaching a settlement in principle. *Id*., ¶ 8. Following the mediation and an agreement in principle, the Parties proceeded with limited confirmatory discovery related to class damages, and worked

on finalizing the Settlement Agreement involving several more months of negotiations. *Id.*, ¶ 9. Class Counsel then worked diligently with the Settlement Administrator to prepare notice for the Settlement Class. *Id.*

In short, the hours Class Counsel spent litigating this Action reflect the efforts required to achieve such an excellent result.

2. Class Counsel's Hourly Rates are Reasonable

In the attached Joint Declaration, Class Counsel provide their lodestar calculations. Class Counsel's lodestar results in a multiplier of 2.11. Joint Decl., ¶ 21. An "attorney's actual billing rate provides a starting point for purposes of establishing a prevailing market rate." *Rum Creek Coal Sales, Inc v. Caperton*, 31 F.3d 169, 175 (4th Cir. 1994) (internal quotation omitted). Here, Class Counsel include leading class action attorneys, especially in financial services litigation. *See* Joint Decl., ¶¶ 13-18.

Each firm's billing rate is explained in detail in the declaration attached hereto. Joint Decl., ¶¶ 19-50. The rates used here are in line with the rates commonly awarded in this district. *See, e.g.*, *In re Neustar*, 2015 WL 8484438, at *10 (approving rates of $260 - $310 for paralegal services, $420 - $700 for associates, and $800 - $975 for partners); *Phillips v. Triad Guar. Inc.*, No. 1:09CV71, 2016 WL 2636289, at *8 (M.D.N.C. May 9, 2016) (finding that partner billing rates of $640 - $880 per hour and associate billing rates of $375 - $550 per hour were "within the range of reasonableness" especially given that "the market for class action attorneys is nationwide and populated by very experienced attorneys with excellent credentials"); *Seaman v. Duke Univ.*, 2019 WL 4674758, at *5 (hourly rate of between $590 - $900 for partner, $395 - $510 for the associates, and $280 - $390 for paralegals was reasonable).

3. The Requested Fee is Reasonable in Light of Class Counsel's Lodestar

Multiplying the hours reasonably expended by Class Counsel by their hourly rates, Class Counsel's lodestar is $1,265,687.20. Joint Decl., ¶ 20. The requested fee represents a multiplier of 2.11. *Id.*, ¶ 21. This multiplier is in line with multipliers approved in other class action settlements, both in the Fourth Circuit and nationally. For instance, in *Health Republic Insurance Co. v. U.S.*, 1:16-cv-00259, Dkt. No. 138 (Fed. Cir. Sept. 16, 2021), the Court of Federal Claims criticized the lodestar approach and the use of a lodestar cross-check for recreating the "same undesirable activities that the percentage method was designed to discourage, namely incentiviz[ing] [class counsel] to multiply filings and drag along proceedings to increase their lodestar." *Id*. at 11 (internal citations omitted). In awarding class counsel $185 million in fees, which ***represented a multiplier of 18-19***, the court held that the fee was justified both as a percentage of the fund, and even if the court used a lodestar multiplier because "a multiplier of 18–19 would, at least, not be outside the realm of reasonableness." *Id*. at 25.

Many other courts, including in this Circuit, have approved similar multipliers. *See, e.g.*, *Skochin v. Genworth Financial, Inc.,* No. 3:19-cv-49, 2020 WL 6708388 (E.D. Va. Nov. 13, 2020) (finding 9.05 multiplier not unreasonable in lodestar cross-check analysis); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp*., No. 03-cv- 04578, 2005 WL 1213926 (E.D. Pa. May 19, 2005) (approving 15.6 multiplier); *In re Merry-Go-Round Enters., Inc*., 244 B.R. 327, 335, 345 (D. Md. 2000) (approving multiplier of 19.6); *New Eng. Carpenters Health Benefits Fund v. First Databank*, No. 05-cv-11148, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (approving 8.3 multiplier); *In re Doral Financial Corp. Securities Litigation*, No. 05-cv-04014-RO (S.D.N.Y. Jul. 17, 2007) (approving 10.26 multiplier); *Beckman v. KeyBank, N.A*., 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers.").

Recently, in a similar bank-fee case where, unlike here, the defendant did not agree to cease the practice challenged in the lawsuit, the court approved an award of $6,125,000 in attorneys' fees, with a lodestar cross-check multiplier of 10.96. *Lloyd v. Navy Fed. Credit Union*, No. 17-CV-1280, 2019 WL 2269958, at *13 (S.D. Cal. May 28, 2019), *reconsideration denied in part*, No. 17-CV-1280, 2019 WL 2602516 (S.D. Cal. June 25, 2019).

Where, as here, Class Counsel, despite long odds, obtained an excellent result for the Settlement Class, which included a meaningful and valuable practice change, it is appropriate to apply the requested reasonable multiplier.

Giving due consideration to all of the foregoing, should the Court decide to conduct a lodestar cross-check, such a cross-check supports the requested fee award.

4. The *Barber* Factors Support the Fee Award

The reasonableness determination is further informed by the following factors: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases. *Barber*, 577 F.2d at 226 n.28. Class Counsel here expended large amounts of time and labor, demonstrated skill commensurate with their preeminent reputations, and achieved an excellent result in this large and complex action. Because the *Barber* factors are largely discussed *supra*, Class Counsel will not repeat them here. Suffice it to say, each factor

supports the requested fee award here.[3] Particularly salient here is the 8th factor—the amount in controversy and the results obtained. *See Decohen*, 299 F.R.D. at 481 ("In the Fourth Circuit, the most critical factor in calculating a reasonable fee award is the degree of success obtained."). Class Counsel have achieved relief that provides substantial benefits for hundreds of thousands of accountholders, making the requested fee more than reasonable.

C. Class Counsel's Costs and Expenses Incurred are Reasonable and Should Be Reimbursed from the Common Fund

The requested fee award also includes Class Counsel's reasonably incurred costs and expenses. As discussed above and in the accompanying declarations, Counsel has incurred $47,747.85 in costs litigating this case. Courts regularly award litigation expenses in addition to attorneys' fees in class action cases. *See, e.g.*, *Kabore v. Anchor Staffing, Inc.*, No. L-10-3204, 2012 WL 5077636, at *10 (D. Md. Oct.17, 2012). The Fourth Circuit has explained that such costs and expenses may include "those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." *Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988) (internal quotations omitted). Fourth Circuit courts have awarded costs such as "necessary travel, depositions and transcripts, computer research, postage, court costs, and photocopying." *Singleton*, 976 F. Supp. 2d at 681; *see also In re Neustar*, 2015 WL 8484438, at *10 (reasonable expenses included mediation fees). Class Counsel's costs

---

[3] The only factors not previously discussed are the 4th, 10th, and 11th factor. Each factor supports the requested fee award. With respect to the 4th factor, Class Counsel lost the opportunity to pursue other matters while pursuing this case. *Reynolds*, 2020 WL 92092, at *3 (M.D.N.C. Jan. 8, 2020) ("Class Counsel's law firms are small enough that the choice to take one case over another affects the firm's ability to accept other paying work, and the work involved in this case was extensive.") (internal citation omitted). Moreover, there are few attorneys with the level of expertise as Class Counsel in similar litigation challenging the fee assessment practices of sophisticated financial institutions. *Id*. at *4. Finally, Class Counsel has pursued this case on behalf of Plaintiffs for almost three years, further supporting the requested fee. *C.f. id*. ("Factor 11…is inconsequential given the one-time relationship present here").

here all fall into these categories and were all reasonably incurred in pursuing this litigation. Joint Decl., ¶¶ 30, 38, 44, 50. Class Counsel's expenses were reasonable and necessary to litigate this case, and the Court should therefore include them in any fee award. *Decohen*, 299 F.R.D. at 483 (awarding expenses that the court deemed were "reasonable and typical").

D. The Requested Service Award is Reasonable and Should Be Paid from the Common Fund

Courts generally recognize that "[i]ncentive or service awards reward representative plaintiffs' work in support of the class, as well as their promotion of the public interest." *Deem v. Ames True Temper, Inc.*, No. 6:10-CV-01339, 2013 WL 2285972, at *6 (S.D.W. Va. May 23, 2013) (citing *Jones*, 601 F. Supp. 2d at 767). Plaintiffs request a service award of $5,000 for each Class Representative. In total, this amounts to a "Service Award" for both Class Representatives of $10,000. Settlement, ¶ 10.1.

Service awards have been regularly approved by judges in this Circuit in cases such as this where the class representative took a role in prosecuting the claims on behalf of the class. *See, e.g., In re Cotton*, No. 14-30287, 2019 WL 1233740, at *4 (W.D.N.C. Mar. 15, 2019) (J. Conrad) (approving a service award to each class representative in the amount of $10,000); *see also Ryals v. HireRight Sols., Inc.*, No. 3:09cv625, Dkt. No. 127 at 10 (E.D. Va. Dec. 22, 2011) (same); *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 3:14CV238, 2016 WL 1070819, at *6 (E.D. Va. Mar. 15, 2016) (same). Each of the Class Representatives took a risk, and provided a valuable public service, by putting themselves forward as the class representatives in this case. They each kept abreast of the case's status, reviewed documents provided by their counsel, and discussed with counsel various aspects of the case, including the Settlement. Joint Decl., ¶ 51-52. One of them also prepared and sat for deposition. *Id.* Additionally, the nature of Plaintiffs' claims against BANA necessarily put their finances at issue, creating notoriety regardless of the success of their

claims.

IV. CONCLUSION

Plaintiffs respectfully request that the Court award attorneys' fees to Class Counsel in the amount of $2,666,667.00, award costs and expenses to Class Counsel in the amount of $47,747.85, and award Service Awards in the amount of $5,000.00 to each Class Representative, as agreed to by the Parties in the Settlement Agreement.

Dated: February 15, 2024

Respectfully submitted,

s/ David M. Wilkerson
David M. Wilkerson
NC State Bar No. 35742
THE VAN WINKLE LAW FIRM
11 North Market Street
Asheville, NC 28801
(828) 258-2991
dwilkerson@vwlawfirm.com

Jeffrey D. Kaliel (pro hac vice)
Sophia Gold (pro hac vice)
KALIELGOLD PLLC
1875 Connecticut Ave., NW, 10th Floor
Washington, D.C. 20009
(202) 350-4783
jkaliel@kalielpllc.com
sgold@kalielpllc.com

Andrew J. Shamis (pro hac vice)
Edwin E. Elliott (pro hac vice)
SHAMIS & GENTILE, P.A.
14 N.E. 1st Avenue, Suite 1205
Miami, FL 33132
(305) 479-2299
ashamis@shamisgentile.com
edwine@shamisgentile.com

Scott Edelsberg (pro hac vice)
Christopher Gold (pro hac vice)
EDELSBERG LAW, P.A.
20900 NE 30th Avenue, Suite 417
Aventura, FL 33180
(786) 289-9471
scott@edelsberglaw.com
chris@edelsberglaw.com

Counsel for Plaintiffs and the Class