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STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

LINDSEY GARCIA, LARRY BENNER, and MICHAEL LUNGO, on behalf of themselves and all others similarly situated, Plaintiffs, v. MIDLAND STATES BANK, Defendant.	Case No. 2022-LA-0000104

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPLICATION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

Plaintiffs[1], submit this Memorandum in Support of Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement and Application for Attorneys' Fees, Costs, and Service Awards, and state as follows:

I. INTRODUCTION

On March 20, 2025, this Court preliminarily approved the Settlement Agreement and Release entered into between Plaintiffs and Defendant, finding it to be sufficiently fair, adequate, and reasonable, and conditionally certified the Settlement Classes for settlement purposes only.

After engaging in a full-day mediation and several arm's-length negotiations made in good faith with the assistance of a third-party neutral mediator, Defendant has agreed to provide the

[1]All capitalized terms used herein are defined and have the same meaning as used in the Agreement unless otherwise stated. The Agreement is attached to Joint Declaration of Lynn Toops of Cohen & Malad, LLP, Sophia Gold of KalielGold PLLC; Jonathan Streisfeld of Kopelowitz Ostrow P.A.; and Marty Schubert of Stranch, Jennings & Garvey PLLC ("Joint Decl.") as ***Exhibit 1*** and was filed in conjunction with Plaintiff's Motion for Preliminary Approval.

Settlement Classes with monetary benefits in the total amount of **$3,125,000.00**, which exceeds half of the estimated damages Settlement Class Members incurred during the Class Periods. The Net Settlement Fund will be directly distributed to the Settlement Classes—without the need for Settlement Class Members to submit a claim or submit any accompanying proof—in the form of either a direct deposit into Settlement Class Members' active checking Accounts or a check mailed to Settlement Class Members who are Past Accountholders at the time of distribution. These significant monetary benefits constitute an exceptional result for the Settlement Classes and represents a fair, adequate, and reasonable resolution of the Actions.

The reaction of the Settlement Classes represents an overwhelmingly positive reaction to the Settlement and only further justifies a grant of Final Approval. To date, zero Settlement Class Members have objected to the Settlement and zero Settlement Class members have opted out. In sum, the reaction of the Settlement Classes represents an overwhelmingly positive reaction to the Settlement and only further justifies a grant of final approval.

Additionally, Plaintiffs respectfully request that this Court approve an award of $1,041,666.66 in attorneys' fees for Class Counsel (33.33% of the Settlement Fund), $26,893.96 in litigation costs, and $10,000.00 Service Awards for each Plaintiff for serving as Class Representatives, all of which are to be paid from the Settlement Fund. Class Counsel is entitled to reasonable compensation for the work performed and the costs incurred in prosecuting this Action and achieving the excellent result for the Settlement Classes. In prosecuting these Actions, Plaintiffs expended their time and effort and took significant financial and reputational risks for the benefit of the Settlement Classes, thus, imposing a financial burden on Plaintiffs out of proportion to their individual stakes in the Action. As such, Plaintiffs should be awarded Service Awards to compensate them for bringing the case and facing the attendant risks associated with serving as Class Representatives. The amounts of these awards are justified in light of the factors considered by Illinois courts in determining a reasonable attorneys' fee award, litigation costs, and service awards.

In light of the excellent result achieved for the Settlement Classes, Plaintiffs respectfully request that the Court grant Final Approval of the Settlement, finding it to be fair, adequate, and reasonable, and finally certify the Settlement Classes; enter the Final Approval Order approving the Settlement; and grant Plaintiffs' request for attorneys' fees, costs, including Settlement Administration Costs, and Service Awards.

II. OVERVIEW OF THE LITIGATION

A. Pre-Suit Investigation

Prior to commencing litigation, Class Counsel spent many hours investigating the claims of several potential plaintiffs against Defendant, including interviewing a number of Defendant's customers to gather information about Defendant's conduct and its impact on consumers, which was essential to Class Counsel's ability to understand the nature of Defendant's conduct, the language of the relevant account agreements and other documents at issue, and potential remedies. Joint Decl., ¶ 3. Through that independent investigation, Class Counsel expended significant resources researching and developing the legal claims at issue. *Id.*, ¶ 4. Indeed, Class Counsel is particularly familiar with the instant claims through their extensive history of litigating and resolving other banking fee claims with similar factual and legal issues to the case at bar. *Id*. Class Counsel has experience in understanding the damages at issue, what information is critical in determining class membership, and what data is necessary to calculate each Class Member's respective damages. *Id.*, ¶ 5. Class Counsel, along with its expert, spent a significant amount of time analyzing transactional data regarding Defendant's fee revenue related to the assessment of APSN Fees, Retry Fees, and Fees-On-Fees at issue. *Id.*, ¶ 6. Defendant similarly retained its own expert who conducted a review and analyzed data accordingly. This data and analysis evaluating potential damages at issue was used in preparation for the Parties' mediation and to further drive the viability of resolution. *Id*.

B. Plaintiff Garcia Sues Defendant Regarding its Overdraft Fee Practices and Survives a Motion to Dismiss

On April 8, 2022, Plaintiff Garcia commenced the first state court action against Defendant on behalf of herself and a putative class of Illinois Accountholders of Midland States Bank and Alpine Bank & Trust Co. (which Midland State Bank acquired). *Id*., ¶ 7. After Plaintiffs Benner and Lungo initiated a separate action, Plaintiffs' counsel agreed to work together and ultimately filed a Third Consolidated Amended Complaint in the *Garcia* case on October 27, 2022, alleging Defendant improperly assessed certain overdraft fees and non-sufficient funds fees, specifically what are known as APSN Fees and Retry Fees. *Id*., ¶ 8.

On December 8, 2022, Defendant moved to dismiss the Third Consolidated Amended Complaint, which the Parties fully briefed. *Id*., ¶ 9. Following a hearing on that motion, on April 21, 2023, the Court denied in part and granted in part that motion. *Id*.

Thereafter, the Parties to the *Garcia* case agreed to stay the litigation in an effort to focus on a potential settlement of the class claims. *Id*. ¶ 10. The Court stayed the case in an order on June 27, 2023, and extended the stay in an order dated March 14, 2024. *Id*.

C. Plaintiff Enerson Sues Defendant Regarding its Overdraft Fee Practices and Survives a Motion to Dismiss

On September 23, 2022, Plaintiff Enerson commenced an action against Defendant on behalf of herself and a putative class of Illinois Accountholders challenging Midland States Bank and Centrue Bank's (which Midland State Bank acquired) assessment of certain overdraft fees and non-sufficient funds fees, specifically APSN Fees and Fees-On-Fees. *Id*., ¶ 11.

On December 9, 2022, Defendant moved to dismiss the Class Action Complaint, which the

Parties fully briefed. *Id.*, ¶ 12. Following a May 30, 2023 hearing on that motion, the Court denied that motion. *Id.*, ¶ 13. Thereafter, the Parties to the *Enerson* case agreed to stay the litigation in an effort to focus on a potential settlement of the class claims. The Court stayed the case in an order on July 19, 2023. *Id.*

The Parties to the *Enerson* matter subsequently stipulated to allow Plaintiff Enerson to amend her pleading, which the Court approved on December 12, 2023. *Id.*, ¶ 14. On December 18, 2023, the Court also approved a stay to extend Defendant's deadline to respond to the Amended Class Action Complaint. *Id.*, ¶ 15.

D. The Parties Engage in Informal Discovery and Mediation

Once the stays were entered in both *Garcia* and *Enerson*, the parties engaged in cooperative and coordinated informal discovery and pre-mediation negotiations. *Id.*, ¶ 16.

To facilitate settlement negotiations, Defendant retained an expert to analyze Account-level transaction data Defendant possessed for Midland States Bank, Alpine Bank & Trust Co., and Centrue Bank Accountholders to identify which of those Accountholders had been assessed APSN Fees, Retry Fees, and/or Fees-On-Fees (collectively, the Relevant Fees) and to determine the amount of such Relevant Fees that had been assessed to those Accountholders during the relevant time period. *Id.*, ¶ 17. Plaintiffs' expert reviewed Defendant's expert's methodologies and the Account-level transaction data available. *Id.*, ¶ 18.

On August 20, 2024, the Parties participated in a full-day mediation with the Honorable Morton Denlow (Ret.). *Id.*, ¶ 19. At this mediation, the Parties reached an agreement in principle to settle the Actions and signed a binding Term Sheet, subject to negotiating a final detailed settlement. *Id.*, ¶ 20.

III. <u>KEY TERMS OF THE PRELIMINARILY APPROVED SETTLEMENT</u>

On March 20, 2025, after the Court thoroughly examined the Settlement in its entirety to ensure the Settlement was provisionally fair, adequate, and reasonable, this Court entered its Preliminary Approval Order, preliminarily approving the Settlement, and conditionally certifying the Settlement Classes for settlement only.

The key terms of the preliminarily approved Settlement are briefly reiterated and summarized below:

- Defendant will pay $3,125,000 to Settlement Class Members through a non-reversionary cash Settlement Fund (Agreement, ¶ 77);

- The Net Settlement Fund will be paid out to Settlement Class Members on a *pro rata* basis based on the number of Relevant Fees each Class Member paid (*id.* at ¶¶ 95-96);

- Payments to Settlement Class Members will be automatic—by account credit to current customers and by check to former customers—without the need to submit a claim (*id.* at ¶ 99);

- Any undistributed Residual Funds, after a possible second distribution, will not revert to Defendant but will instead be paid on a *cy pres* basis to a Court-approved recipient, with the Parties agreeing to propose Land of Lincoln Legal Aid (*id.* at ¶¶ 100, 104-105);

- Agreed certification of the Settlement Classes, defined as:

  <u>"Midland APSN Fee Class"</u>
  All Accountholders who, from April 8, 2012, through April 30, 2022, were Midland States Bank personal checking Accountholders in Illinois and were assessed an OD Fee on a Debit Card Transaction that was authorized on a sufficient available balance and settled on negative funds in the same amount for which the Debit Card Transaction was authorized.

  <u>"Midland Fees-On-Fees Class"</u>
  All Accountholders who, from April 8, 2012, through April 30, 2022, were Midland States Bank personal checking Accountholders in Illinois and were assessed an OD Fee or an NSF Fee on a third-party merchant's attempt to collect its own fee.

  <u>"Centrue APSN Fee Class"</u>
  All Accountholders who, from April 8, 2012, through June 12, 2017, were Centrue Bank personal checking Accountholders in Illinois and were assessed an OD Fee on a Debit Card Transaction that was authorized on a sufficient available balance and settled on negative funds in the same amount for which the Debit Card Transaction was authorized.

"Alpine APSN Fee Class"
All Accountholders who, from April 8, 2012, through February 28, 2018, were Alpine Bank & Trust Co. personal checking Accountholders in Illinois and were assessed an OD Fee on a Debit Card Transaction that was authorized on a sufficient available balance and settled on negative funds in the same amount for which the Debit Card Transaction was authorized.

"Alpine Retry Fee Class"
All Accountholders who, from April 8, 2012, through February 28, 2018, were Alpine Bank & Trust Co. personal checking Accountholders in Illinois and were assessed multiple NSF Fees, or one or more NSF Fees followed by an OD Fee related to a single check, ACH, wire transfer, or other item (*id.* at ¶¶ 69, 76);

- In exchange for the benefits to the Settlement Class Members, Defendant will receive a release for the Released Claims (*id.* at ¶¶ 106-110);

- Class Counsel will request, and Defendant will not oppose, Service Awards to Plaintiffs in the amount of $10,000.00 each to compensate them for their time, effort, and risks assumed in prosecuting the Actions and serving as Class Representatives (*id.* at ¶ 116);

- Class Counsel will also request, and Defendant will not oppose, an attorneys' fees award of up to 33.33% of the Settlement Fund, plus reimbursement of reasonable litigation costs incurred in the Actions, to compensate them for the time, risk, and expenses incurred in pursuing claims for the Settlement Classes' benefits (*id.* at ¶ 111); and

- The *Enerson* action will be dismissed without prejudice and those claims combined with the *Garcia* action for purposes of proceeding in the Fifth Consolidated Amended Complaint already filed in *Garcia* (*id.* at ¶ 12).[2]

IV. CLASS NOTICE WAS PROVIDED AS ORDERED BY THE COURT

The Notice Program consisted of Email Notice, Postcard Notice, Long Form Notice, the Settlement Website, and toll-free Settlement telephone line. As the Court held when granting Preliminary Approval, the direct Email Notice and Postcard Notice provided to the Settlement Class Members is the best notice practicable under the circumstances.[3] The Email Notices and

[2] On February 20, 2025, this Court granted the motion to amend the complaint to include Ms. Enerson's claims. On March 4, 2025, Judge Sobol entered the order dismissing *Enerson* case as an independent action in Grundy County.
[3] At the Parties' request, the Court extended the Notice period to ensure the Notice Program could be completed consistent with the Agreement and ordered by the Court.

Postcard Notices clearly and concisely summarized the Settlement and the legal rights of members of the Settlement Class, and directed the Settlement Class to visit the Settlement Website for additional information, including the Long Form Notice. The Notice Program satisfies due process.

After the Court granted Preliminary Approval, the Settlement Administrator disseminated Notice of the Settlement to 29,153 Settlement Class Members, 9,503 Email Notices and 19,650 Postcard Notices. Declaration of Settlement Administrator ("Admin Decl."), ¶¶ 4, 7. Potential Settlement Class Members whose valid email addresses Defendants provided were sent Email Notices, and potential Settlement Class Members whose email addresses were not provided or whose Email Notice bounced back were sent Postcard Notices by mail. *Id.* Postcard Notices returned as undeliverable were re-mailed to any new address available through USPS information or to better addresses that were found using a third-party address lookup service. *Id.*, ¶ 6.

On May 9, 2025, the Settlement Administrator established a dedicated Settlement Website (www.garciabankfeessettlement.com) for the Settlement Class to obtain detailed information about the Action and the Settlement and review important documents, including the Long Form Notice, Settlement Agreement, and Preliminary Approval Order. *Id.,* ¶ 10. This Motion for Final Approval will be posted upon filing. The Settlement Website also includes relevant dates, answers to frequently asked questions, opt-out and objection instructions, contact information for the Settlement Administrator, and how to obtain other case-related information. *Id.* As of August 26, 2025, there have been 5,182 unique visitor sessions to the Settlement Website, and 9,757 page views of the website. *Id.,* ¶ 10.

Also on May 9, 2025, the Settlement Administrator established a toll-free telephone number for Potential Settlement Class Members to call for Settlement information and/or to request a Long Form Notice. *Id.,* ¶ 11. As of August 26, 2025, there have been 246 calls. *Id.*

The Settlement email address, admin@GarciaBankFeeSettlement.com, was established for Class Members requesting additional information. This email address is posted on the Settlement website on the Contact Information page. *Id.,* ¶ 12. To date, Verita has received 50 emails from Class Members with questions about the Settlement. *Id.*

To date, there have been no objections to and no opt-outs of the Settlement. *Id.,* ¶¶ 13-14. If an objection is submitted, Class Counsel will respond to it before the Final Approval Hearing.

V. **<u>THE SETTLEMENT WARRANTS FINAL APPROVAL</u>**

The Court should finally approve the proposed Settlement because it is fair, reasonable, and in the best interest of the Settlement Classes. The class claims may be settled only with Court approval. 735 ILCS 5/2-806. Requiring approval ensures the proposed Settlement agreement is "fair, reasonable, and in the best interest of the class." *Steinberg v. Sys. Software Assocs., Inc*., 306 Ill.App.3d 157, 169 (1999). The approval of a proposed class action settlement is exercised in the "two-step" process of preliminary and final approval. *Koerner v. Copenhaver*, No. 12-1091, 2014 WL 5544051, at *4 (C.D. Ill. Nov. 3, 2014). The Court already found the Settlement to be "within the range of possible approval" at the preliminary approval stage, the Final Approval Hearing is scheduled, and Notice was provided to the Settlement Classes. *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig*., No. 13 C 9116, 2016 WL 3854603, at *3 (N.D. Ill. July 15, 2016); 4 Newberg and Rubenstein on Class Actions § 13:39 (6th ed.).

"The standard used by the courts in evaluating a compromise [of a class action] is that the proposal must be fair and reasonable and in the best interest of all those who will be affected by it." *GMAC Mortg. Corp, of Pa, v. Stapleton*, 236 Ill.App.3d 486, 493 (1992). In determining whether a class settlement is "fair, reasonable and adequate," courts typically look at the following:

> (1) the strength of the case for plaintiffs on the merits, balanced against the money or other relief offered in settlement; (2) the defendant's ability to pay; (3) the

> complexity, length and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of members of the class to the settlement; (7) the opinion of competent counsel; and (8) the stage of proceedings and the amount of discovery completed.

Id. All of these factors weigh in favor of Final Approval of the Settlement.

Further, courts favor settlement, particularly in class actions and other complex cases where it conserves substantial resources of the parties and the judicial system. Newberg § 13:44. In reviewing a proposed settlement, the court should consider the judgment of counsel and the presence of good faith bargaining. *See, e.g.*, *City of Chicago v. Korshak,* 206 Ill.App.3d 968, 974 (1990); *People ex rel. Wilcox v. Equity Funding Life Ins. Co*., 61 Ill.2d 303, 316-18 (1975); *GMAC*, 236 Ill.App.3d at 493. Courts usually refuse to substitute their business judgment for that of counsel, absent fraud or overreaching, which does not exist here. *Id*. Settlements obtained as a result of arm's length negotiation between experienced and well-informed counsel are entitled to a presumption of fairness. *Manual for Complex Litigation* § 30.42 (3d ed.). "Since the result is a compromise the court in approving it should not judge the legal and factual questions by the same criteria applied in a trial on the merits." *Wilcox*, 61 Ill.2d at 316. "To do so would defeat the purposes of a compromise such as avoiding a determination of sharply contested issues and dispensing with expensive and wasteful litigation." *GMAC*, 236 Ill.App.3d at 493. Considering the issues, evidence and nature of the settlement negotiations, Final Approval should be granted.

A. **<u>The Settlement Amount is Substantial Given the Strengths of the Claims and Attendant Risks.</u>**

The first factor, which weighs the strength of Plaintiffs' case balanced against the substantial relief afforded under the Settlement, supports granting final approval. The proposed Settlement, which provides Settlement Class Members with a substantial, guaranteed, and automatic recovery of their *pro rata* share of the $3,125,000 cash Settlement Fund, and which represents *over half* of their maximum potential damages in Relevant Fees that they were allegedly charged by Defendant during the Class Periods, is a recovery that would typically take several years of continued litigation and significant expense to achieve. The Settlement is the best vehicle to efficiently resolve the Actions and provide Settlement Class Members the relief to which they believe they are entitled. "It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982). Nevertheless, this range is higher or comparable to results achieved in other bank fee cases, including overdraft fee class actions nationwide. *See, e.g., Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 583, 586 (N.D. Ill. 2011) (approving settlement fund representing 10% of class members' maximum potential recovery in overdraft fee class action"). Thus, this factor strongly weighs in favor of Final Approval.

B. <u>Defendant's Ability to Pay.</u>

The second factor, which examines Defendant's ability to pay, remains a neutral factor because Defendant's financial standing has not been placed at issue here. Defendant has paid the Settlement Fund into the Escrow Account and has the financial means to make that payment.

C. <u>Litigation Through Trial Would Be Complex, Costly, and Long.</u>

The third factor, which examines the risks inherent in litigation, similarly supports granting final approval. By achieving Settlement, the Parties ensured a valuable, immediate monetary benefit for the Settlement Classes without the need for lengthy, costly, and protracted litigation. "[A]n integral part of the strength of a case on the merits is a consideration of the various risks and costs that accompany continuation of the litigation." *Donovan v. Est. of Fitzsimmons*, 778 F.2d 298, 309 (7th Cir. 1985); *see also Korshak*, 206 Ill.App.3d at 972-73. Indeed, the risks involved in prosecuting a class action through trial cannot be disregarded. Although Plaintiffs largely prevailed on Defendant's motions to dismiss, their Relevant Fee claims would still need to survive forthcoming motions practice (e.g., a motion for summary judgment, motions advancing challenges to experts, etc.) and would need to succeed at class certification, as well as prevail on any resulting appeals challenging the Court's class certification and summary judgment decisions. Joint Decl., ¶ 21. Assuming the Parties went to trial and verdict, there would remain the possibility that the verdict could be reversed by this Court or on appeal. *Id.* Indeed, to Class Counsel's knowledge, no similar APSN Fee, Retry Fee, or Fees-On-Fees claims have proceeded to trial. *Id.,* ¶ 22. This means that there is no trial model for Plaintiffs' case and that unforeseen pitfalls could derail the Class's claims should they be forced to proceed through the rigors of litigation. *Id.*

At bottom, recovery by any means other than settlement would require additional years of litigation, and the delay would inevitably force the Settlement Classes to wait longer for recovery and would ultimately reduce the value of the recovery overall. *Id.,* ¶ 23. By contrast, the Settlement Fund provides a significant and guaranteed recovery now. *See Schulte*, 805 F. Supp. 2d at 586 (finding the "[s]ettlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation" by permitting the class to "realize both immediate and future benefits" now in lieu of "hotly-contested" motion practice and "inevitable" appeals).

D. <u>The Reaction of the Settlement Classes Is Overwhelmingly Positive.</u>

The fourth and sixth factors, which collectively examine the reaction of the Settlement Classes, support final approval. Since the Court granted preliminary approval of the Settlement, the Settlement Administrator has disseminated notice to 29,153 Potential Settlement Class Members. Admin Decl., ¶ 4, 7. The robust Notice Program—which included direct Email Notice and Postcard Notice, the Long Form Notice, Settlement Website, and toll-free number—provided adequate information regarding the nature of the Actions and the claims, the structure of the Settlement and class benefits, and apprised each Potential Settlement Class Member of his or her rights and obligation. After being sufficiently informed of their choices, not a single Potential Settlement Class Member decided to opt-out from the Settlement or to object to it. *See id.,* ¶ 10-14. As such, this overwhelmingly positive reaction to the Settlement strongly favors Final Approval.

E. The Settlement is the Result of Arm's Length Negotiations, Without Any Collusion.

The fifth factor, which focuses on the quality of the Parties' arm's-length negotiations in reaching settlement, also supports Final Approval. Plaintiffs and Class Counsel have adequately and vigorously represented the Settlement Classes through over three years of litigation, which involved significant informal discovery with expert analysis, contentious motion practice, and settlement negotiations with the assistance of an experienced third-party neutral mediator over a full-day mediation. Joint Decl., ¶ 24. The mediator's presence to guide extensive negotiations suggests an absence of collusion. *See Shaun Fauley,* 2016 Il App (2d) 150236, ¶ 21. Further, Plaintiffs, through their counsel, engaged in a lengthy, independent investigation of their claims, as well as the potential claims of other Settlement Class Members, in order to properly weigh the pros and cons of continued litigation versus the proposed settlement of all claims. Joint Decl., ¶ 25. The entire settlement was negotiated in good faith and arm's-length by highly knowledgeable counsel experienced in complex, consumer class action disputes. *Id.,* ¶ 26. Thus, the process leading up to the Settlement was procedurally fair and supports granting Final Approval.

F. Competent Counsel for All Parties Endorse This Agreement.

Under the seventh factor, weight is also given to Class Counsel's experience and their view of the proposed Settlement. *Korshak*, 206 Ill. App. 3d at 801. Class Counsel, having extensive experience in complex litigation and in particular, prosecuting bank fee cases like this one, is of the opinion that the Settlement in this case is fair, reasonable, and adequate. Joint Decl., ¶¶ 27-34, Exs. 2-5 (firm resumes). *See Schulte*, 805 F. Supp. 2d at 586 (finding that the opinion of class counsel supported settlement approval where "Class Counsel has extensive experience in consumer class actions and complex litigation and there is no indication that the Settlement Agreement is the victim of collusion"). Additionally, Defendant is represented by very experienced class action litigators from an well-respected law firm, a formidable adversary.

G. Discovery Had Advanced Enough to Allow Responsible Resolution.

Lastly, the eighth factor does not require the Court to find that the Parties have engaged in extensive discovery, but rather asks whether Class Counsel had enough information "to evaluate the merits of the case and assess the reasonableness of the settlement." *Stapleton,* 236 Ill. App. 3d at 497. Prior to mediation, the Parties exchanged significant information in conjunction with settlement negotiations including the class size and demographics, information regarding Defendants' various Fee practices and contracts, and Account-level transaction data for Midland States Bank's, Centrue Bank's, and Alpine Bank & Trust Co's Accountholders, which allowed Defendant's expert to determine the amount of such Relevant Fees that had been assessed during the Class Periods to calculate Defendant's damages exposure, and for Plaintiffs' expert to evaluate that the methodologies used were consistent with Plaintiffs' various theories of liability. Joint Decl., ¶¶ 17-18. Thus, discovery was sufficient to permit Class Counsel to adequately weigh the benefits of settlement against further litigation. *See Schulte,* 805 F. Supp. 2d at 587-88 (finding factor supported approval where the parties engaged in "month of arms-length negotiations" prior to settlement and "engaged in substantial informal discovery," which "confirmed the fairness of the settlement").

Accordingly, all factors weigh in favor of finding that the proposed Settlement is fair, reasonable, and adequate. Therefore, Plaintiffs respectfully request the Court grant Final Approval.

VI. <u>FINAL CERTIFICATION OF THE SETTLEMENT CLASSES IS PROPER</u>

For the reasons explained in Plaintiffs' Unopposed Motion for Preliminary Approval, and for the reasons stated in the Court's Preliminary Approval Order, the Settlement Classes should be finally certified for settlement purposes under 735 ILCS 5/2-801. Nothing has changed since the Court granted Preliminary Approval to disturb its finding that the Settlement Classes should be certified for settlement purposes. The appointments of the Class Representatives, Class Counsel, and the Settlement Administrator should be confirmed.

VII. <u>THE REQUESTS FOR REASONABLE ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS SHOULD BE GRANTED</u>

In conjunction with Final Approval, Plaintiffs also request the Court: (1) award \$1,041,666.66 for attorneys' fees (33.33% of the Settlement Fund); (2) award reimbursement of \$26,893.96 for reasonable litigation costs; (3) award Plaintiffs Service Awards in the amount of \$10,000.00 each; and (4) approve payment of Settlement Administration Costs.

A. The Court Should Award Class Counsel 33.33% of the Settlement Fund Under The Percentage-of-the-Recovery Method

The Illinois Supreme Court grants the circuit court with the discretion to award attorneys' fees in common fund class actions based on a "percentage of the recovery." *Brundidge v. Glendale Fed. Bank FSB,* 168 Ill.2d 235, 243-44 (1995). The U.S. Supreme Court has long recognized that under the "common fund doctrine," a lawyer who achieves a settlement for the benefit of a class is entitled to be compensated for his or her efforts from the common fund created by the settlement. *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980). Illinois has similarly adopted the "common fund doctrine" as a source of awarding attorneys' fees in class action cases. *See Wendling v. S. Ill. Hosp. Servs.,* 242 Ill. 2d 261, 265 (2011); *see also Brundidge,* 168 Ill. 2d at 238 (noting the common fund doctrine "finds its source in the court's inherent equitable powers and is founded on the rationale that successful litigants would be unjustly enriched if their attorneys were not compensated from the common fund created for the litigants' benefit").

Under the percentage-of-the-recovery method, attorneys' fees are awarded "based upon a percentage of the amount recovered on behalf of the plaintiff class," whereas, the lodestar method calculates attorneys' fees by multiplying the hourly rates by the reasonable hours expended on the litigation, with the potential enhancement of a "multiplier" based on "the contingency nature of the proceeding, the complexity of the litigation, and the benefits that were conferred upon the class members." *Brundidge,* 168 Ill.2d at 238-240.

Although the court has the discretion in which method it applies, "numerous criticisms have been lodged against the lodestar method" since its origination. *McCormick v. Adtalem Global Educ., Inc.,* No. 1-20-1197, 2022 IL App (1st) 201197-U, ¶ 26; *Ryan v. City of Chicago,* 274 Ill. App. 3d 913, 923 (1995) ("the lodestar approach has been subjected to increased scrutiny as its deficiencies began to offset or exceed its benefits"). Illinois courts have recognized the many disadvantages of using the lodestar method to award attorneys' fees:

> (1) it increases the workload of an already overtaxed judicial system, (2) it is insufficiently objective and produces results that are far from homogenous, (3) it creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law, (4) it is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or an overall dollar amount, (5) it has led to abuses such as lawyers billing excessive hours, (6) it creates a disincentive for the early settlement of cases, (7) it does not provide the trial court with enough flexibility to reward or deter lawyers so that desirable objectives will be fostered, . . . [and] (9) it is confusing and unpredictable in its administration.

Ryan, 274 Ill. App. 3d at 923 (citing *Court Awarded Attorney Fees, Report of the Third Circuit,* 108 F.R.D. 237, 246-47 (1985)); *see also Brundidge,* 168 Ill.2d at 242-43 (noting the lodestar method is concerning because "[e]valuating the hours actually expended is a laborious, burdensome, and time-consuming task that may be biased by hindsight[,]" "may generate protracted satellite litigation involving the attorney fees award[,]" and "[t]he risk multiplier is little short of a wild card in the already uncertain game of assessing fees under the lodestar calculation").

Conversely, the percentage-of-the recovery method is "a fair and expeditious method that reflects the economics of legal practice and equitably compensates counsel for the time, effort, and risks associated with represented the plaintiff class." *Brundidge,* 168 Ill.2d at 244. "Furthermore, in addition to being efficient and fair, the percentage approach is likely what the class members and counsel would have negotiated when counsel agreed to take on the case." *McCormick,* 2022 IL App (1st) 201197-U at ¶ 26 (citing *In re Capital One Telephone Consumer Protection Act Litig.,* 80 F. Supp. 3d 781, 793 (N.D. Ill. 2015) (indicating that the "normal practice" in consumer class actions is to negotiate compensation based upon a percentage of the recovery)).

According, the Court should apply the percentage-of-the-recovery method here.

B. Class Counsel's Requested 33.33% is Reasonable and Commonly Awarded by Illinois Courts in Common Fund Class Actions

Illinois courts applying the percentage-of-the-recovery method to calculate reasonable attorney fee awards in common fund cases commonly award percentages of 33.33% or higher. *See e.g., McCormick*, 2022 IL App (1st) 201197-U, at ¶¶ 27-29 (affirming fee award representing 35% of settlement fund in consumer fraud settlement and noting "[t]he supporting memo included Illinois state and federal court cases in which attorney fees were awarded in the 30-to-39% or higher range"); *Chambers v. Together Credit Union*, No. 19-cv-842-SPM, 2021 WL 1948452, at *2 (S.D. Ill. May 14, 2021) (awarding one-third of the common fund in overdraft fee class action as "appropriate and reasonable" as an "amount being commonly awarded as the market rate"); *Charvat v. Valente*, No. 12-cv-05746, 2019 WL 5576932, at *11-12 (N.D. Ill. Oct. 28, 2019) (awarding 33.99% of net settlement fund in TCPA class action as it "reflects the market rate and takes into account the risk of nonpayment"); *Shaun Fauley,* 2016 IL App (2nd) 150236, ¶ 24 (affirming one-third attorney fee award in TCPA class action); *Sekura v. L.A. Tan Enterprises*, *Inc.,* No. 2015-CH-16694 (Ill. Cir. Ct. Cook Cnty. Dec. 1, 2016) (awarding 40% of $1.5 million common fund in Illinois Biometric Information Privacy Act class action); *Coleman v. Sentry Insurance a Mutual Company*, No. 15-CV-1411-SMY-SCW, 2016 WL 6277593, at *3 (S.D. Ill. Oct. 27, 2016) (awarding 33.33% of common fund in breach of insurance contract settlement where "Class Counsel have provided the Court with numerous decisions in this District and this Circuit in which a contingent 33 1/3% fee was awarded to class counsel") *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 502-03 (N.D. Ill. 2015) (awarding 36% of $11 million settlement fund in TCPA class action and recognizing that "courts in this circuit regularly allow attorneys to recoup one-third of the first $10 million of the class action settlement fund); *Schulte*, 805 F. Supp. 2d at 597-98 (approving one-third fee of $9.5 million settlement fund in overdraft fee class action settlement as being "within the reasonable range"); *Ryan*, 274 Ill. App. 3d at 925 (upholding circuit court's attorney fee award of 33.33% of common fund and noting the "[p]ercentage analysis eliminates the need for additional major litigation and further taxing of scarce judicial resources").[4]

As such, the Court should award Class Counsel's requested attorneys' fees of 33.33% of the Settlement Fund because it is well-within the range of reasonable attorney fees awarded in Illinois in common fund class action settlements. Not only is this amount customary, but it is also supported by additional considerations, such as the risks Class Counsel undertook in pursuing these complex actions on a contingency basis, the significant results achieved for the Settlement

[4] The Court is not required to perform a lodestar cross-check on the requested attorneys' fees. *See Shaun Fauley*, 2016 IL App (2nd) 150236 at ¶ 59 (citing *Brundidge,* 168 Ill.2d at 246) (rejecting objectors' argument that trial court abused discretion by failing to use a lodestar cross-check on class counsel's fees as "unpersuasive" in $7.6 million fee award representing one-third of the common fund).

Classes, the time and effort expended by Class Counsel, and the standard 33.33% amount that is routinely awarded in this type of banking fee litigation across the country, including by Class Counsel. *See* Joint Decl., ¶ 35; *see Ryan*, 274 Ill. App. 3d at 924 (affirming attorney fee award "due to the extreme contingency risk" and the "hard cash benefit [secured] from a tenacious adversary"); *see also McNiff v. Mazda Motor of America, Inc.*, 384 Ill. App. 3d 401, 407 (4th Dist. 2008) (listing "a variety of factors" that courts may consider when assessing the reasonableness of requested attorneys' fees, such as "the case's novelty and difficulty level, the skill and standing of the attorney" and "the usual and customary charges for similar work").

1. <u>**The Risks of Continued Litigation and the Novelty and Complexity Level of the Actions**</u>

First, the risk of continued litigation was high. This case faced potential obstacles at all junctures that could have resulted in no recovery at all for the Settlement Classes, including losing the motions to dismiss, class certification, summary judgment, at trial, or on appeal at either class certification or after a successful trial. Joint Decl., ¶ 3. Additionally, the risk of 7 litigation would likely reduce the amount of the benefit ultimately obtained due to years of delay and increased cost of litigation. *Id.*, ¶ 38. Notwithstanding these hurdles, Class Counsel endeavored to take these cases on a pure contingency fee basis, devoted significant time and resources, and chose to forego pursuing other cases as sources of income in the face of assuming the significant risk of nonpayment. *Id.*, ¶ 39. Class Counsel's commitment to prosecute the action notwithstanding the real financial risk presented warrants reasonable compensation. *Id.*, ¶ 40.

Further, this case involved complexities of bank processing law that are novel, difficult, and ever evolving. *Id.*, ¶ 41. To illustrate, to Class Counsel's knowledge, no similar Relevant Fee claims have proceeded to trial. *Id.*, ¶ 42. This means that there is no model for Plaintiffs' case and therefore, unforeseen pitfalls could easily derail the Settlement Class's claims should they proceed through the rigors of litigation. *Id*. To even be able to identify the alleged challenged fees requires specialized knowledge by both experts and experienced complex litigation attorneys, as do the theories surrounding the alleged fees, not to mention the specialized knowledge of the class action procedure required to achieve certification, let alone settlement. *Id*., ¶ 43.These considerations support granting the requested attorneys' fees.

2. <u>The Significant Benefit Conferred by the Settlement</u>

Second, the benefit conferred by the Settlement—amounting to $3,125,000.00 in guaranteed monetary relief—is substantial. Defendant has agreed to establish a $3,125,000.00 Settlement Fund. From this Fund, Settlement Class Members will receive a direct and automatic Settlement benefit in the form of either an Account credit to Current Accountholders or a check to Past Accountholders, without submitting a claim or proof of their damages. The Settlement Fund represents over half of the Settlement Classes' potential damages. Additionally, after receiving Notice, no Settlement Class Member has objected to the Settlement. Thus, the results achieved weigh in favor of granting the requested attorneys' fee award.

3. <u>The Settlement Was the Result of Arms'-Length Negotiations Made in Good Faith by Experienced Class Counsel and After Exchanging Key Information</u>

Third, Class Counsel expended significant time and effort in achieving the Settlement for the Settlement Classes. The Settlement was reached only after several arm's-length negotiations conducted in good faith by experienced counsel and facilitated by a third-party neutral mediator. The Parties participated in a sufficient amount of informal discovery to drive the Parties' settlement discussions and consulted experts to analyze Defendant's account level transaction data.

Class Counsel has expended significant time thus far in the prosecution of the Actions, from investigating Defendant's fee practices and gathering evidence in support of the claims resolved by the Settlement; interviewing potential clients; drafting the Complaints; litigating contentious motion to dismiss practice; drafting written discovery requests; informal discovery; preparing for and attending mediation, including researching and drafting a mediation statement; engaging an expert to review Defendant's account-level transaction data and expert's analysis of potential damages; negotiating and drafting the Agreement with Defendant's counsel; moving for and obtaining Preliminary Approval; consulting and overseeing the Settlement Administrator's efforts to provide Notice to the Settlement Classes; and preparing this Motion. Joint Decl., ¶ 44. It is anticipated that Class Counsel will expend an additional 30 hours in securing Final Approval, final judgment, and ensuring the successful administration of the Settlement by working with the Settlement Administrator after Final Approval. *See id*., ¶ 45.

Further, Class Counsel have national reputations for their acquired skill in complex class action litigation, and particularly, in the context of banking fee litigation. Joint Decl., ¶¶ 28-34, 46 and Ex. 2-5 (firm resumes). Thus, the time and effort expended in the litigation along with the professional skill of Class Counsel similarly supports granting the requested fee.

4. <u>The Requested 33.33% Fee is Routinely Awarded in Similar Bank Fee Litigation Across the Country</u>

Fourth, the requested 33.33% fee is routinely awarded in similar bank fee litigation and class action litigation across the country. *See e.g., Chambers*, 2021 WL 1948452, at *2 (one-third fee award); *Edwards v. Mid-Hudson Valley Fed. Credit Union*, No. 1:22-cv-562-TJM-CFH, 2023 WL 5806409 (N.D.N.Y. Sept. 7, 2023) (same); *Lowe v. NBT Bank, N.A.*, No. 3:19-CV-1400 (MAD/ML), 2022 WL 4621433 (N.D.N.Y. Sept. 30, 2022) (same); *Richard v. Glen Falls Nat. Bank*, No. 1:20-cv-734 (BKS/DJS), 2022 WL 3286551 (N.D.N.Y. July 22, 2022) (same); *Thompson v. Community Bank, N.A.*, No. 8:19-CV-919 (MAD/CFH), 2021 WL 4084148 (N.D.N.Y. Sept. 8, 2021) (same); *Holt v. Community America Credit Union*, No. 4:19-cv-00629-

FJG, 2020 WL 12604384 (W.D. Mo. Dec. 8, 2020) (same); *Norwood v. The Camden Nat'l Bank*, No. BCD-CV-2020-13 (Me. Bus. Ct. Dec. 11, 2020) (same); *Fort Knox Fed. Credit Union*, No. 19-CI-01281 (Hardin Cnty., Ky.) (same); *L&N Fed. Credit Union*, No. 19-CI-002873 (Jefferson Cnty., Ky.) (same); *Old Hickory Credit Union*, No. 19-475-II (Davidson Cnty., Tenn.) (same); *Wilson Bank & Trust*, No. 19-400-BC (Tenn. Bus. Ct.) (same); *Ind. Members Credit Union*, No. 49D02-1804-PL-016174 (Marion Cnty., Ind.) (same); *ORNL Fed. Credit Union*, No. B9LA0107 (Anderson Cnty., Tenn.) (same); *Centra Credit Union*, No. 03D01-1804-PL-001903 (Bartholomew Cnty., Ind.) (same); *Johnson v. Elements Fin. Credit Union*, No. 49D01-2001-PL-004706 (Marion Cnty. Ind. Super. Ct. Oct. 29, 2020) (same); *Plummer v. Centra Credit Union*, No. 03D01-1804-PL-001903 (Bartholomew Cnty. Ind. Super. Ct. Oct. 2, 2020) (same); *Simpson v. Citizens Bank*, 2014 WL 12738263 (E.D. Mich. Jan. 31, 2014) (same); *Jenkins v. Trustmark Nat. Bank*, 300 F.R.D. 291 (S.D. Miss. 2014) (same).

Additionally, Class Counsel regularly receives a 33.33% or higher fee from common fund settlements involving similar banking fee claims in state and federal courts throughout the nation. *See* Joint Decl. ¶ 47. This factor further weighs in favor of granting the requested fee.

In sum, this Court should grant Class Counsel's requested 33.33% of the Settlement Fund in the total amount of $1,041,666.66.

C. The Court Should Also Award Class Counsel's Reimbursement of Litigation Costs

Next, it's "well established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses, which includes such things as expert witness costs; computerized research; court reports; travel expense; copy, phone and facsimile expenses and mediation." *Beesley v. Int'l Paper Co.*, No. 3:06-cv-703-DRH-CJP, 2014 WL 375432, at *3 (S.D. Ill. Jan. 31, 2014); *see e.g., Chambers*, 2021 WL 1948452, at *2 (reimbursing $2,322.37 in "ordinary litigation expenses, such as filing fees and deposition transcripts" as "reasonable").

In this case, Class Counsel advanced a total of $26,893.96 for litigation costs, contingent on the outcome of litigation, including: filing fees/service, pro hac vice fees, postage/courtier , mediation fees, consulting expert fees, and document related fees. Joint Decl., ¶ 48. Each of these costs were reasonable and necessary in prosecuting the Actions and should therefore be approved.

In addition, the Court should approve the payment of the Settlement Administration Costs to the Settlement Administrator for the reasonable costs of the Notice Program and the administration of the Settlement, including ultimately distributing the Settlement Class Member Payments by Account credit or cash check.

D. The Court Should Approve $10,000.00 Service Awards to Each Plaintiff

Finally, Service Awards are warranted for Plaintiffs in recognition of their contributions in this case. "Incentive awards are justified when necessary to induce individuals to become named representatives." *In re Synthroid Marketing Litig.*, 264 F.3d 712, 722 (7th Cir. 2001). Service awards are routinely awarded and encourage individual plaintiffs to undertake the responsibility of representative lawsuits. Illinois courts routinely award such "incentive payments" to persons who assume the special litigation burden of class representative and thereby benefit the entire class. *See, e.g.*, *GMAC,* 236 Ill.App.3d at 497 (service awards "are not atypical in class action cases […] and serve to encourage the filing of class action suits").

For this reason, Illinois courts routinely approve $10,000.00 class representative service awards, or higher, in recognition that the class representative brought a lawsuit that provided significant benefits to absent class members. *See e.g., Roberts v. Graphic Packaging Int'l, LLC*, No. 3:21-cv-00750-DWD, 2024 WL 3373780, at *6 (S.D. Ill. July 11, 2024) (awarding $10,000 service award in common fund consumer class action settlement where plaintiff "participat[ed] in the initial investigation of his claims, provided information to class counsel to aid in preparing initial pleadings and reviewing those pleadings before filing, participating in discovery request responses, consulting with class counsel regularly and analyzing and approving the Settlement that resolved in this case"); *Koszyk v. Country Fin. a/k/a CC Services, Inc.*, No. 16 Civ. 3571, 2016 WL 5109196, at *3 (N.D. Ill. Sept. 16, 2016) (approving $10,000 service awards where named plaintiffs "participated in an extensive pre-suit investigation, provided documents crucial to establishing Plaintiff's claims, and assisted Plaintiffs' counsel in analyzing documents during the informal discovery process"); *see also* William B. Rubenstein, 5 Newberg on Class Actions § 17:1 (5th ed. 2018) ("Empirical evidence shows that incentive awards are now paid in most class suits and average between $10,000 to $15,000 per class representative.").

The Court should similarly grant the Class Representatives Service Awards of $10,000 each in recognition of their time and effort they spent and the exceptional results they obtained on behalf of the absent Settlement Class Members who will receive compensation without even having to submit a claim. Plaintiffs' efforts and involvement have benefitted the Settlement Classes as a whole, as they have regularly consulted with Class Counsel, provided documents and information, reviewed pleadings, and participated in the settlement process. Joint Decl., ¶ 49. Without Plaintiffs' efforts, the total $3,125,000.00 in monetary relief for the Settlement Classes would never have been achieved. *Id*. These factors support granting the requested Service Awards.

VIII. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant Final Approval of the Settlement; finally certify the Settlement Classes for settlement purposes only; grant the requested for attorneys' fees, costs (including the Settlement Administration Costs,, and Service Awards; and enter the accompanying Final Approval Order submitted herewith.

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Respectfully submitted,

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