STATE OF MAINE CUMBERLAND, SS.		BUSINESS AND CONSUMER DOCKET CIVIL ACTION Docket No. BCD-CIV-2021-00027
ETHAN A. CHURCHILL and RHONDA YORK, on behalf of themselves and all others similarly situated, Plaintiffs, v. BANGOR SAVINGS BANK, Defendant.	* * * * * * * * * * * * * * * * * * *	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, COSTS, AND EXPENSES, SETTLEMENT ADMINISTRATOR'S COSTS, AND CLASS REPRESENTATIVES' SERVICE AWARDS

Plaintiffs Ethan A. Churchill and Rhonda York respectfully request that this Court approve an award of $666,666.67 in attorneys' fees for Class Counsel, $30,567.70 in costs and expenses, the Settlement Administrator's[1] costs currently estimated to be $79,347, and $5,000 service awards for the Class Representatives. These awards are to be paid from the Settlement Fund established by Defendant Bangor Savings Bank ("Bangor" or the "Bank") in connection with the class action settlement reached between to the Parties, which was previously preliminarily approved by the Court. The Bank does not oppose this award.

Class Counsel is entitled to reasonable compensation for the work performed and the costs incurred in prosecuting this case. After litigating this case for over a year, the Parties—with the assistance of a highly respected and experienced mediator—reached an agreement to settle the matter on a class-wide basis. Defendant agreed to automatically return to Class Members their pro

[1] The capitalized terms used herein are defined and have the same meaning as used in the Agreement unless otherwise stated.

rata share of the $2,000,000.00 Settlement that they incurred in improper Retry Fees and APPSN Fees. Plainly, this Settlement provides a significant financial benefit for the Settlement Classes.

This extraordinary result, however, could not have been achieved without Plaintiffs' efforts. In prosecuting this action, 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 matter. As such, both Class Representatives should be awarded service awards to compensate them for their work in bringing the case and facing the attendant risks associated with serving as class representatives.

Based on the work that Class Counsel did in order to obtain these significant benefits for the Settlement Classes, the requested attorney fee award represents just one-third of the Settlement Amount. The amount of this award is reasonable and routinely approved by Maine courts, courts in the First Circuit, and across the nation in complex class action settlements.

Respectfully, Plaintiffs' unopposed motion for attorneys' fees, costs, Settlement Administrator costs, and service awards should be granted.

I. The Court should award Class Counsel one-third of the Settlement Amount, to be paid from the Settlement Fund.

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) ("a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole"). The "prevailing" approach is for courts to award class counsel's attorneys' fees from the settlement fund in a percentage of the value of the settlement. *Bennett v. Roark Capital Grp., Inc.,* No. 2:09-CV-00421-GZS, 2011 WL 1703447, at *1 (D. Me. May 4, 2011); *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel*

Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995) (recognizing the percentage-of-funds method to be the "prevailing praxis" in complex litigation and common fund cases and advantageous over the lodestar method). "[U]nder the percentage approach, the class members and the class counsel have the same interest—maximizing the recovery of the class." Silber and Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel's Response,* 17 Rev. Litig. 525, 534 (Summer 1998). Courts determine the total value to the class based on both the monetary and the non-monetary value of the settlement. *See* Principles of the Law of Aggregate Litigation, A.L.I., § 3.13(b) (May 20, 2009) ("a percent-of-the-fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and the nonmonetary value of the settlement."). Thus, consideration of injunctive or declaratory relief, as well as savings to Class Members or elimination of their debts, is appropriately considered as part of the total value of a settlement. *See e.g., Tussey v. ABB, Inc.,* No. 06-CV-04305-NKL, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019) (including tax avoidance and injunctive relief in addition to monetary relief as being the basis for the total value of the settlement for determining an appropriate common-fund fee); *Barfield v. Sho-Me Power Elec. Co-op,* No. 2:11-CV-4321NKL, 2015 WL 3460346, at *4 (W.D. Mo. June 1, 2015) (including administrative costs paid separately by defendant as being part of the total value of the settlement).

In evaluating the reasonableness of the fee, courts consider such factors as whether the fee was fixed or contingent, the novelty and complexity of the case, the fees customarily awarded, and the results achieved. *Bennett*, 2011 WL 1703447, at *1. A request for an award of one-third of the value of the settlement "is customary." *Id.* at *2 (approving one-third fee). *Sylvester v. CIGNA Corp.*, 401 F. Supp. 2d 147, 151 (D. Me. 2005) (awarding one-third of a $2.3 million settlement and reimbursement of expenses of $256,516); *O'Connor v. Dairy*, No. 2:14-00192-NT, 2018 WL

3041388, at *4 (D. Me. June 19, 2018) (awarding one-third of a $5,000,000 settlement); *Applegate v. Formed Fiber Technologies, LLC,* No. 2:10-00473-GZS, 2013 WL 6162596 (D. Me. Nov. 21, 2013) (awarding one-third of the settlement fund); *Noll v. Flowers Foods Inc.,* 2022 WL 1438606, at *9 (D. Me. May 3, 2022) (awarding 32% of overall cash value of settlement in the amount of $7,500,000).

Here, the Court should award Class Counsel the standard fee of one-third of the Settlement Amount as contemplated by the Settlement Agreement. Not only is this amount customary, it is also supported by the contingency of the fee, the complexity of the case, the result achieved, and the standard one-third amount that Class Counsel has been awarded in this type of banking fee litigation. *See* Declaration of Sophia G. Gold in Support of Plaintiff's Motion for Award of Attorneys' Fees, Costs, and Expenses, attached as Exhibit 1 to the Motion ("Gold Decl."), ¶ 3.

First, the benefit conferred by the Settlement is substantial. Bangor will provide $2,000,000.00 in monetary relief, that will be directly distributed on a pro rata basis—without the need for Class Members to complete a claim form or submit any accompanying proof—to the Settlement Classes in the form of either a direct deposit into Active Accounts, cash settlement check to Settlement Class Members with Closed Accounts that are not Charged-Off Accounts, or Overdraft Forgiveness for Charged-Off Accounts. This benefit is automatic, as Settlement Class Members need not submit a claim, nor provide proof of damages or any supporting documentation. The benefit conferred represents approximately 65% of the Class's estimated potential damages. Gold Decl. ¶ 4 Thus, this factor weighs in favor of granting the requested fee award.

Second, 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 at the pleading stage; losing class certification; losing summary judgment; losing at trial; or losing

on appeal at either class certification or after a successful trial. Additionally, the risk of protracted litigation would likely reduce the amount of the benefit ultimately obtained due to years of delay and increased cost of litigation. Notwithstanding these hurdles, Class Counsel endeavored to take this case 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. Gold Decl., ¶ 5. Class Counsel's commitment to prosecute the action notwithstanding the real financial risk presented warrants reasonable compensation; thus, this factor also supports awarding the requested fee.

Third, this case involved complexities of bank processing and law that are novel, difficult, and ever evolving. To Class Counsel's knowledge, no similar APPSN Fee or Retry Fee claims have proceeded to trial. 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. To even be able to identify the alleged inappropriate fees requires specialized knowledge and skill by both experts and experienced complex litigation attorneys, as do the theories surrounding the alleged fees, not to mention the specialized knowledge of class action procedure required to achieve certification, let alone settlement. Indeed, as illustrated by the Gold Declaration, Class Counsel have national reputations for their acquired skill in complex class action litigation, and particularly, in the context of banking fee litigation. Gold Decl., ¶ 6; Ex. A. This factor supports granting the requested fee.

Fourth, the requested one-third fee is routinely awarded in similar bank fee litigation and class action litigation across the country. *See e.g., Norwood v. The Camden National Bank,* No. BCD-CV-2020-13 (Cumberland, Me.) (one-third fee award); *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); *Chambers v. Together Credit Union*, No. 19-CV-00842-SPM, 2021 WL 1948452, at *2 (S.D. Ill. May 14, 2021) (same); *see also* pp. 3-4, *supra, Bennett*, 2011 WL 1703447, at *2; *Sylvester,* F. Supp. 2d at 151; *O'Connor,* 2018 WL 3041388, at *4; *Applegate,* 2013 WL 6162596; *Noll,* 2022 WL 1438606, at *9. Courts regularly award a one-third or higher fee from common fund settlements involving similar banking fee claims in state and federal courts throughout the nation. Gold Decl., ¶ 7; Ex. B. This factor further weighs in favor of granting the requested fee.

In sum, this Court should similarly grant Class Counsel's requested one-third of the Settlement Fund in the total amount of $666,666.67.

II. The Court should approve reimbursement of litigation expenses of $30,567.70 to be paid from the Settlement Fund.

Next, "lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax." *In re Fidelity/Micron Sec. Litig.,* 167 F.3d 735, 737 (1st Cir. 1999). "Equity ordinarily contemplates that those responsible for bringing home the bacon will receive repayment of expenditures made in that endeavor." *Id.* at 738. *See also Hill v. State Street Corp.,* No. 09-12146-GAO, 2015 WL 127728, at *20 (D. Mass. Jan. 8, 2015) ("Lawyers who recover a common fund for a class are entitled to

reimbursement of litigation expenses that were reasonably and necessarily incurred in connection with the litigation."); *see id.* at *21 (awarding $995,297.89 in litigation expenses incurred for court fees, experts, court reports, out-of-town travel, copying, and legal research, and noting "[t]hese are the types of expenses that are necessarily incurred in litigation of this type and routinely charged to clients billed by the hour[.]").

In this case, Class Counsel advanced $30,567.70 in expenses, contingent on the outcome of litigation. Of these expenses, $21,150 consisted of expert fees, $7,750 were for mediation, and the remaining $1,667.70 were for filing, service of process, *pro hac*, and administrative fees. Gold Decl., ¶ 8. These fees are reasonable.

In addition, the Court should approve the payment of the costs of notice and administration to the Settlement Administrator, Epiq, for the reasonable costs of mailing notice and administering the Settlement and Settlement Fund. *Latorraca v. Centennial Technologies Inc.,* 834 F. Supp. 2d 25, 28 (D. Mass. 2011) ("Claim Administrators are also entitled to a reasonable fee for their services in a common fund case."). These costs are necessary because of the notice requirements needed to notify class members of the settlement, escrow settlement funds, and ultimately distribute the class recovery by direct deposit into active Accounts and by check to class members with closed Accounts. The Settlement Administrator has estimated that its costs will not exceed $79,347 to the date of completion, which is in line with Class Counsel's experience for this type of settlement. Gold Decl., ¶ 9.

III. The Court should approve a $5,000 Service Award to Each Class Representative, to be paid from the Settlement Fund.

Lastly, Class Representative Service Awards are warranted for both Plaintiff Churchill and York in recognition of their contributions in this case. Indeed, "[i]ncentive awards serve the important purpose of compensating plaintiffs for the time and effort expended in assisting the

prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, the public nature of a collective action filing, and any other burdens they sustain." *Lauture v. A.C. Moore Arts & Crafts, Inc.,* No. 17-cv-10219-JGD, 2017 WL 6460244, at *2 (D. Mass. June 8, 2017).

For this reason, courts routinely award class representative service awards in recognition that the class representative brought a lawsuit that provided a significant benefit to absent class members. *See e.g., Noll,* 2022 WL 1438606, at *9 (awarding $10,000 to the class representative where he "spent considerable time and effort communicating regularly with counsel, providing critical assistance, participating in discovery, sitting for deposition, contributing to negotiations, and advocating for the class."); *O'Connor,* 2018 WL 3041388, at *4 (awarding between $6,500 and $15,000 to five class representatives); *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017) (noting that courts "regularly grant service awards of $10,000 or greater"); *Lauture,* 2017 WL 6460244, at *2 (awarding $15,000 to each named plaintiff). The Court should similarly grant the Class Representatives service awards of $5,000 each in recognition of the time and effort they spent and the result they obtained on behalf of the absent Class Members who will receive compensation without even having to submit a claim. The Class Representatives' 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. Gold Decl., ¶ 10. Without the Class Representatives' efforts, the $2 million in benefits for the Classes would never have been achieved. These factors support granting service awards.

Respectfully submitted,

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/s/ Dov Sacks, Esq.
Dov Sacks, Esq.
Maine Bar No. 5500
Berman & Simmons, P.A.
P.O. Box 961
Lewiston, ME 04243-0961
(207) 784-3576
SacksService@bermansimmons.com

/s/ Sophia Gold, Esq.
Sophia Gold, Esq. (*pro hac vice*)
KALIELGOLD PLLC
1100 15th Street NW, 4th Floor
Washington, D.C. 20005
sgold@kalielgold.com

Counsel for Plaintiffs and Class Counsel