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Date: 06/27/2024

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Return To:
Sue Lerkins
99 Exchange Blvd.
Rochester, NY 14614

Lee, Michael
Broyld, Marnetta

Canandaigua National Bank and Trust

Total Fees Paid: \$0.00

Employee: CW

State of New York

MONROE COUNTY CLERK'S OFFICE
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JAMIE ROMEO

MONROE COUNTY CLERK



STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

MICHAEL LEE and MARNETTA BROYLD, *on behalf of themselves and all others similarly situated,*

Plaintiffs

v.

Index No.: 2021005065

CANANDAIGUA NATIONAL BANK &
TRUST

Defendant

The above-entitled matter came before the Court on Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement, Service Award to Plaintiffs, and Class Counsel's Attorney's Fees and Costs ("Motion for Final Approval").

JUDGMENT AND ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT, SERVICE AWARDS, AND CLASS COUNSEL'S ATTORNEYS' FEES AND COSTS

Plaintiffs filed the present Class Action Complaint in New York State Supreme Court, Monroe County, on June 7, 2021. The Complaint alleged common law claims for breach of contract, breach of the implied covenant of good faith and fair dealing and violations of section 349 of the New York General Business Law ("GBL") based on Plaintiff Lee's theory that CNB improperly assesses overdraft fees ("Overdraft Fees") and insufficient funds fees ("NSF Fees"). A negotiated Settlement Agreement and Release ("Settlement Agreement") was executed by all parties to resolve this matter for \$1,200,000 and the forgiveness of Uncollected Funds, as described in the Settlement Agreement. On May 15, 2024, named Plaintiffs filed a Motion for Preliminary Approval Of The Settlement. On February 13, 2024, the Court granted preliminary approval of the Settlement Agreement And Release; certified the Class for settlement purposes; appointed

Plaintiffs as Class Representatives; appointed Patrick Lannon of Cherundolo Law Firm, PLLC, Jeffrey Kaliel and Sophia Gold of KalielGold PLLC, and Taras Kick of The Kick Law Firm as Class Counsel; and approved the Postcard Notice, Email Notice, and Longform Notice.

The Claims Administrator emailed and/or mailed the Settlement Class Notice to Class Members. Subsequently, Plaintiffs filed a Motion for Final Approval of Class Action Settlement, Service Awards to Named Plaintiffs, and Class Counsel's Attorney's Fees and Costs. Defendant did not oppose this Motion.

No Class Member has objected to the settlement.

Having considered the Motion for Final Approval of Class Action Settlement, Service Awards to Named Plaintiffs, and Class Counsel's Attorney's Fees and Costs, and the supporting Declaration of Sophia G. Gold, Esq., and the complete record in this matter, for the reasons set forth herein, and for good cause shown,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

Approval Of The Settlement Agreement

1. The Court hereby grants the Motion for Final Approval of Class Action Settlement, Service Awards to Plaintiffs, and Class Counsel's Attorney's Fees and Costs and finally approves the settlement as set forth in the Settlement Agreement of \$1,200,000.00.

2. The Court finds that this action satisfies all of the prerequisites of New York Civil Practice Law and Rules ("CPLR") § 901, and that consideration of the CPLR § 902 factors support certification for purposes of settlement.

3. The Court certifies the following classes under Article 9 of the CPLR, for settlement purposes only ("Settlement Classes"):

Sufficient Funds Fee Class: All current or former customers of Defendant who were assessed Overdraft Fees that Defendant charged and did not refund or credit during the Class Period when there was enough money in the Account Holder's Account to cover the transaction in question if holds placed on deposits and pending debit card transactions were

not deducted from the amount in the Account.

Retry Fees Class: All current or former customers of Defendant who were assessed an NSF Fee that was assessed (and not refunded or credited) for an ACH or check transaction that was re-submitted by a merchant after being returned by Defendant during the Class Period.

Excluded from the Settlement Classes are Defendant, its parents, subsidiaries, affiliates, officers and directors; all Sufficient Funds Fee Class members and Retry Fee Class members who made a timely election to be excluded; and all judges assigned to this litigation and their immediate family members. The Class Period is from May 21, 2014 through September 5, 2022.

4. CPLR § 908 requires judicial approval for any compromise of claims brought on a class basis. In determining whether to approve a class action settlement, courts examine “the fairness of the settlement, its adequacy, its reasonableness and the best interests of the class members.” *Fiala v Met Life Insurance Co., Inc.*, 899 N.Y.S.2d 531, 537 (NY Sup. Ct. 2010) (citation omitted). Relevant factors in determining whether a settlement is fair, reasonable, and adequate include “the likelihood of success, the extent of support from the parties, the judgment of counsel, the presence of bargaining in good faith, and the nature of the issues of law and fact.” *In re Colt Indus. Shareholder Litig.*, 155 A.d.2d 154, 160 (1st Dept. 1990)(citations omitted). A court should also “balance[e] the value of [a proposed] settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation.” *Fiala* at 538 (citation omitted). All of these factors weigh in favor of approving the settlement.

5. In reaching the settlement, Class Counsel took into account the risks of establishing liability, and also considered the time, delay, and financial repercussions in the event of trial and appeal by Defendant. The settlement negotiations were at all times hard fought and arms-length, between parties represented by counsel experienced in overdraft fee litigation, and they have produced a result that Class Counsel believes to be in the best interests of the Class in light of the costs and risks of continued litigation. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116

(2nd Cir. 2005) (internal quotation omitted). Additionally, Defendant has and will continue to vigorously contest Plaintiffs' claims if the action does not settle. In light of the strength and weaknesses of the case, the settlement easily falls within the range of reasonableness because it achieves a significant benefit for Plaintiffs and the Settlement Class members in the face of significant obstacles. While there is a possibility that the Class could recover more money, including interest, after trial, the Settlement provides the significant benefit of a guaranteed and substantial payout to Settlement Class members, rather than "speculative payment of hypothetically larger amount years down the road." *Gilliam v. Addicts Rehab. Ctr. Fund*, 2008 WL 782596, 5 (S.D.N.Y. 2008) (quoting *Teachers' Ret. Sys. Of Louisiana v. A.C.L.N Ltd*, 2004 WL 1087261, 5 (S.D.N.Y. 2004)).

Service Award to the Class Representatives

6. The Court finds reasonable the service award of \$5,000 for each of the two named Plaintiffs, Michael Lee and Marnetta Broyld, given the significant contributions they made to advance the prosecution and resolution of the lawsuit. This award shall be paid from the settlement fund.

7. A Court may grant service awards in a class action. Such awards "rewards the named plaintiffs for the effort and inconvenience of consulting with counsel over the many years [a] case was active and for participating in discovery..." *Cox v. Microsoft Corp.*, 26 Misc.3d 1220(A), 4 (N.Y. Sup. 2007). "Courts regularly grant requests for service awards in class actions to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs." *Story*, 2021 U.S. Dist. LEXIS 34909 at *28-29 (quoting *Hall v. ProSource Technologies, LLC*, No. 14-CV-2502, 2016U.S. Dist. LEXIS 53791, *9 (E.D.N.Y. Apr.

11, 2016). A Service Award of \$5,000.00 for each Class Representative is reasonable and within the range of awards granted in this Circuit. See *id.* (awarding the named plaintiffs service awards of \$15,000)). Therefore, the Court approves a \$5,000.00 Service Award for each of the Class Representatives.

Award of Fees and Costs to Class Counsel

8. On February 13, 2024, the Court appointed Patrick Lannon of Cherundolo Law Firm, PLLC, Jeffrey Kaliel and Sophia Gold of KalielGold PLLC, and Taras Kick of The Kick Law Firm as Class Counsel. The work that Class Counsel has performed in litigating and settling this case demonstrates their commitment to the classes and to representing the best interests of the classes. Class Counsel has committed substantial resources to prosecuting this case on a fully contingent basis.

9. The Court hereby grants Class Counsel's request for attorney's fees and awards Class Counsel \$400,000, which is 33% of the settlement fund.

10. Class Counsel's fee request of 33% is "consistent with the norms of class litigation ..." *Gilliam v. Addicts Rehab. Ctr. Fund*, 2008 WL 782596, 5 (S.D.N.Y. 2008) (granting one-third of the settlement fund). Thus, courts routinely grant requests of one-third of settlement funds for attorney's fees in bank fee actions such as this.

11. "Common fund recoveries are contingent on a successful litigation Outcome." *Guaman v. Anja-Bar NYC*, 2013 WL 445896, 7 (S.D.N.Y. 2013). Such "contingency fees provide access to counsel for individuals who would otherwise have difficulty obtaining representation ... and transfer a significant portion of the risk of loss to the attorneys taking a case. Access to the courts would be difficult to achieve without compensating attorneys for that risk. *deMunecas v. Bold Food LLC*, 2010 WL 3322580, 8 (S.D.N.Y. 2010) (internal quotation marks and citation omitted). Many individual

litigants, “cannot afford to retain counsel at fixed hourly rates. .. yet they are willing to pay a portion of any recovery they may receive in return for successful representation.” *Id.* (citation omitted).

12. In determining reasonable attorney’s fees, a court should consider the following factors:

[T]he risks of the litigation, whether counsel had the benefit of a prior judgment, standing at bar of counsel for the plaintiffs and defendants, the magnitude and complexity of the litigation, responsibility undertaken, the amount recovered, the knowledge the court has of the case’s history and the work done by counsel prior to trial, and what it would be reasonable for counsel to charge a victorious plaintiff.

Fiala v Met Life Insurance Co., Inc., 899 N.Y.S.2d 531,540 (N.Y. Sup. 2010). All of these factors weigh in favor of approving the requested fee.

13. The fact that Class Counsel’s fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward also supports their fee request.

14. The Court also awards Class Counsel reimbursement of their litigation expenses in the amount of \$104,363.29.

15. The attorney’s fees and the amount in reimbursement of litigation costs and expenses shall be paid from the settlement fund.

Settlement Procedure

16. The “Final Effective Date” of the settlement shall be thirty (30) days following this Order if no appeal is taken from the Order. If a party appeals this Order, the “Final Effective Date” of the settlement shall be the day after all appeals are finally resolved in favor of final approval.

17. Within thirty (30) days after the motion for final approval is granted, the Claims Administrator shall pay Class Counsel attorneys’ fees of \$400,000 from the settlement fund.

18. Within thirty (30) days after the motion for final approval is granted, the Claims Administrator shall reimburse Class Counsel for litigation costs and expenses totaling \$104,363.29 from the settlement fund.

19. Within thirty (30) days of the Final Effective Date, the Claims Administrator will pay the service awards of \$5,000 for each of the named Plaintiffs.

20. Within thirty (30) days of the Final Effective Date, the Claims Administrator shall pay the remainder of the settlement fund (after subtracting for the attorney's fees, and expenses, the named Plaintiff's service award, and the agreed upon Claims Administrator's fees which are also approved), to Settlement Class Members in accordance with the methodology set forth in the Settlement Agreement.

21. The Court retains jurisdiction over this action for the purposes of enforcing the Settlement Agreement and overseeing the distribution of settlement funds. The parties shall abide by all terms of the Settlement Agreement, which are incorporated herein, and this Order.

22. This litigation shall be dismissed with prejudice.

It is so ORDERED this 26th day of June, 2024



HONORABLE DANIEL J. DOYLE
Supreme Court Justice