

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

CARNELL SMITH, on behalf of himself
and others similarly situated,

Plaintiffs,

vs.

FIFTH THIRD BANK,

Defendant.

Case No.: 1:18-cv-00464
Judge Douglas R. Cole
Magistrate Judge Stephanie K. Bowman

LENOX MAGEE, on behalf of himself and
others similarly situated,

Plaintiffs,

vs.

FIFTH THIRD BANK,

Defendant.

Case No.: 1:18-cv-00464

**PLAINTIFFS' MOTION AND
MEMORANDUM IN SUPPORT FOR
ATTORNEYS' FEES, EXPENSE
REIMBURSEMENT AND SERVICE
AWARD**

Pursuant to the Settlement Agreement [Dkt. 127, Ex. 1] in this action, Class Counsel respectfully moves the Court for an order approving payment of (1) \$1,733,333.00 for attorney fees (one-third of common fund); (2) \$47,329.39 for reimbursement of costs and expenses; and (3) \$5,000 service award for each Plaintiff in this matter. The legal and factual basis supporting this Motion are fully set forth in the Memorandum below, as well as the Joint Declaration [Dkt. 127, Ex. 2] filed in support of the Motion for Final Approval. A Proposed Order granting this Motion was filed as Exhibit 4 to the Motion for Final Approval.

Respectfully submitted,

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MEMORANDUM

I. INTRODUCTION

After Plaintiffs prevailed against a motion to dismiss filed by Fifth Third, after conducting significant discovery, and after two failed mediations with a well-respected Ohio neutral, the Parties reached a settlement of these novel claims regarding the assessment of ATM fees on consumer checking accounts. The Parties agreed to settle the Action for a \$5,200,000 cash common fund, which represents approximately 33% of best-day damages had the Court certified a nationwide class and had Plaintiffs prevailed at trial. The Settlement Fund will automatically be distributed to Settlement Class Members without the requirement for a claims process or reversion to Fifth Third. As another important Settlement benefit, Fifth Third agreed to significantly reduce notice and administration costs associated with the Settlement by conducting a review of its banking data in order to identify Settlement Class members and relevant fees—difficult data analysis work that is commonly performed by experts for plaintiffs, at great expense to the settlement class. Further, as a result of the Action, Fifth Third modified its Account disclosures to better inform its customers that they could be charged a fee for a balance inquiry at an ATM outside of Fifth Third’s network of ATMs (“Non-Fifth Third ATM Fees”). These modifications will also likely result in significant prospective financial savings to Settlement Class Members.

Class Counsel obtained these benefits for the Settlement Class with hard work and creativity, investing hundreds and hundreds of hours of time in this matter. Before this Action was filed, no enforcement agency, no consumer protection group, and no other court had addressed the assessment of one or more Non-Fifth Third ATM Fee for making a balance inquire at an ATM outside of Fifth Third’s network of ATMs, or more than one Non-Fifth Third ATM Fee for undertaking a balance inquiry during the same ATM visit as a cash withdrawal or other funds transfer,, a practice that Plaintiffs alleged slowly and almost imperceptibly skims from consumers’ accounts. With no

precedent to rely on, Class Counsel faced significant risk in filing this Action. Without their hard work, and that of the Class Representatives, Fifth Third's alleged practices would have remained in the dark, without comment or notice.

Here, Class Counsel has litigated this case since March 2018. Class Counsel took this case on a pure contingency basis and paid all the costs, with no guarantee that they would ever be reimbursed or paid for their time. Nor did this Action have a clear path to success. This case was based on a novel theory of liability. Indeed, this Action is the first of its kind in a case challenging OON Fees. Given the novel and complex nature of this case, the Settlement benefits described above are an outstanding result for the Settlement Class.

Pursuant to the Settlement Agreement in this action that was preliminarily approved by the Court on February 9, 2021 [Dkt. No. 125], Class Counsel now respectfully moves for an order approving the payment of (1) \$1,733,333 for attorney fees (one-third of the \$5,200,000 cash common fund); (2) \$47,329.39 for reimbursement of costs and expenses; and (3) a \$5,000 Service Award for each of the Class Representatives. As demonstrated herein, the fee requested by Class Counsel is appropriate under the "percentage of the fund" method, which is the preferred approach for determining a reasonable fee in a common fund case such as this one. The requested fee percentage is one-third, which is well within the range typically approved in the Sixth Circuit.¹ Further, the requested fee is supported by a lodestar cross-check analysis, as the actual lodestar amount yields only

¹ "The preferred method [for calculating attorney fees] in common fund cases has been to award a reasonable percentage of the fund, with the percentage awarded typically ranging from 20 to 50 percent of the common fund." *Chesher v. Neyer*, No. 1:01-CV-00566, 2007 WL 4553908, at *2 (S.D. Ohio Dec. 19, 2007), citing *Bowling v. Pfizer*, 922 F.Supp. 1261, 1278-79 (S.D. Ohio 1996), *aff'd*, 102 F.3d 777 (6th Cir.1996) (citations omitted). See also *Brent v. Midland Funding, LLC*, No. 3:11 CV 1332, 2011 WL 3862363 (N.D. Ohio Sept. 1, 2011) (awarding attorney fee equal to 29% of the settlement amount); *Dillworth v. Case Farms Processing, Inc.*, No. 5:08-CV-1694, 2010 WL 776933 (N.D. Ohio Mar. 8, 2010) (fee equal to 33% of settlement amount); *Clevenger v. Dillard's, Inc.*, No. C-1-02-558, 2007 WL 764291 (S.D. Ohio Mar. 9, 2007) (fee equal to 29% of settlement fund).

an exceedingly modest 1.366 multiplier.

II. BACKGROUND

A. History of Class Counsel's Work in the Litigation

Before this case was filed, Class Counsel researched and investigated the practice at issue in this case: the assessment of multiple, small bank fees on a single ATM use. Joint Decl. ¶ 18. With virtually no literature on the topic, much less prior cases on it, the research effort required intensive legal research, discussions with the Class Representatives, and expert consultation to understand the operation of ATM networks and the bank's fee practices. *Id.* After review of hundreds of pages of documents, including bank statements provided by the Class Representatives, and after further research into publicly available information regarding Fifth Third's practices, disclosures, and statements, Class Counsel began drafting the Complaints in this matter. *Id.*

On March 29, 2018, Plaintiff Carnell Smith filed his Complaint against Fifth Third in the United States District Court for the Middle District of Florida ("*Smith*") Dkt. 1. On June 8, 2018, Fifth Third moved to dismiss Plaintiff Smith's Complaint. Dkt. 22. Concurrently with the motion to dismiss, Fifth Third filed a Motion to Transfer the *Smith* action to the Southern District of Ohio, which was unopposed. Dkt. 23.

On July 9, 2018, *Smith* was transferred to the Southern District of Ohio. Dkt. 30, 31. On August 10, 2018, the presiding district judge, Judge Black, referred *Smith* to Magistrate Judge Bowman for disposition of all pretrial and post-judgment motions, including through a report and recommendation on any dispositive matters. Dkt. 45.

On September 10, 2018, Mr. Smith filed his First Amended Complaint alleging putative class claims against Fifth Third for breach of contract and breach of the covenant of good faith and fair dealing arising from Fifth Third's practice of charging a Non-Fifth Third ATM Fee for balance inquiries made at ATMs outside Fifth Third's network of ATMs and for charging two Non-Fifth

Third ATM Fees if a balance inquiry was undertaken during the same ATM visit as a cash withdrawal or other funds transfer, assessing an international transaction fee on foreign transactions made in U.S. Dollars, and Fifth Third's method of calculating the international transaction fee. The First Amended Complaint in *Smith* sought, *inter alia*, monetary damages, interest, attorneys' fees, and costs. Dkt. 52.

On October 8, 2018, Fifth Third moved to dismiss *Smith*. Dkt. 55. A few days later, on October 15, 2018, Plaintiff Lenox Magee filed a similar putative class action against Fifth Third also arising from Fifth Third's practice of assessing Non-Fifth Third ATM Fees for balance inquiries made at ATMs outside of Fifth Third's network of ATMs and for assessing multiple Non-Fifth Third ATM Fees if a balance inquiry was undertaken during the same ATM visit as a cash withdrawal or other funds transfer. The *Magee* Complaint alleges claims for breach of contract, violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), and for unjust enrichment, seeking, *inter alia*, entitlement to monetary damages, interest, attorneys' fees, and costs. As it pertains to the Non-Fifth Third ATM Fee, Plaintiffs both asserted that a balance inquiry is not a transaction subject to the Non-Fifth Third ATM Fee. S.D. Ohio No. 1:18cv722, Dkt. 1. The *Magee* Complaint alleged breach of contract, ICFA, and unjust enrichment claims, seeking, *inter alia*, entitlement to monetary damages, interest, attorneys' fees, and costs. *Id.*

On October 8, 2018, Fifth Third moved to dismiss *Smith*, Dkt. 55, and on October 29, 2018, Plaintiff Smith filed his Opposition to Fifth Third's Motion to Dismiss. Dkt. 62. On November 29, 2018, Fifth Third replied in support of its Motion to Dismiss in *Smith*. Dkt. 67. Effective November 1, 2018, Fifth Third revised its Account disclosures to expressly provide that a balance inquiry is subject to a Non-Fifth Third ATM Fee if undertaken at an ATM outside of Fifth Third's Network of ATMs. Joint Declaration of Class Counsel Jeffrey Kaliei, Robb S. Stokar, Jeff Ostrow, Andrea Gold, and Stuart Scott, attached to the concurrently-filed Motion to Final Approval [Dkt. 127] as *Exhibit 2* ("Decl."), ¶ 21.

On November 15, 2018, *Magee* was consolidated with *Smith*. Dkt. 64.

On December 31, 2018, Fifth Third moved to dismiss *Magee*; on January 22, 2019, Plaintiff Magee filed his Opposition; and on February 5, 2019, Fifth Third replied. Dkt. 70, 72, 73.

After briefing was completed, the Parties orally argued the two motions to dismiss to Judge Bowman on March 26, 2019. Dkt. 81. On April 18, 2019, Judge Bowman issued a Report and Recommendation granting in part and denying in part the motions to dismiss. Dkt. 83. More specifically, Judge Bowman recommended dismissal with respect to Plaintiff Smith's international transaction fee claims and Plaintiff Magee's ICFA and unjust enrichment claims. *Id.* Judge Bowman recommended denying both motions as to Plaintiffs' claims that Fifth Third improperly charged fees for balance inquiries made using out-of-network ATMs. *Id.* Fifth Third objected to that portion of the Report, and Plaintiffs Smith and Magee jointly responded, as well as filed a notice of supplemental authority. Dkt. 87, 97, 98. On August 28, 2019, Judge Black issued a Decision and Order adopting Judge Bowman's Report and Recommendation in its entirety. Dkt. 103.

On June 19, 2019, the Parties participated in a telephone conference with Judge Bowman regarding a discovery schedule. On June 24, 2019, Plaintiffs served their first set of Requests for Production and first set of Interrogatories. Decl. ¶ 23. On August 7, 2019, the Parties exchanged initial disclosures. *Id.* On August 23, 2019, Fifth Third responded to Plaintiffs' first set of Requests for Production and first set of Interrogatories. *Id.* at ¶ 25.

In September, 2019, the Parties conferred at length regarding discovery. *Id.* ¶ 26. During that same time period, the Parties also met and conferred about settlement. *Id.*, at ¶ 27.

Fifth Third produced substantial discovery in this Action, including account-level transactional data from which Plaintiffs' expert estimated class-wide damages. *Id.*, ¶ 28. The Parties appeared for numerous telephonic status conferences with Judge Bowman to aid the discovery process and advise her of the status of settlement negotiations during 2019 and 2020. *Id.*, ¶ 29.

In October, 2019, the Parties agreed to a mediation before Michael Ungar, Esq. The initial mediation was scheduled for November 11, 2019. *Id.*, ¶ 30. The Parties submitted detailed mediation statements in connection with that mediation. *Id.*, at ¶ 31. At the mediator's request on November 10, 2019, mediation was rescheduled and occurred on December 3, 2019. *Id.*, at ¶ 32. The Action did not settle that day. *Id.* The Parties continued good faith settlement discussions for several weeks but were unable to resolve the matter. *Id.*, ¶ 33.

The Parties continued to meet and confer regarding discovery, including but not limited to Fifth Third's ESI and non-ESI discovery productions and depositions, in February, March, and April of 2020. *Id.* ¶ 34. The Parties' counsel participated in numerous meet and confer telephone conferences and exchanged several meet and confer letters and emails. *Id.*, ¶ 35.

In mid-March of 2020, the Parties also began discussing the possibility of a second mediation session with Mr. Ungar, and ultimately scheduled one with him for July 23, 2020. *Id.* ¶ 36. The Parties also continued their meet and confer efforts regarding discovery throughout the summer of 2020. *Id.*, ¶ 37. The second mediation occurred on July 23, 2020, with Mr. Ungar and some of the participants attending in person and others virtually. *Id.*, ¶ 38. Again, the Parties engaged in good faith, hard-fought negotiations, but the Action did not settle that day. *Id.*, ¶ 32.

The Parties continued to meet and confer regarding discovery over the following weeks, including about completing document production and depositions. *Id.*, ¶ 39. Further, they continued to engage in settlement negotiations via telephone and email. *Id.*, ¶ 40. On October 5, 2020, the Parties reached an agreement in principle to resolve the Action on a class-wide basis. *Id.*, ¶ 41.

On October 6, 2020, the Parties filed a Joint Notice of Settlement and Motion to Stay All Deadlines, which the Court granted on October 15, 2020. Dkt. 118. On November 20, 2020, January 4, 2021, and January 19, 2021, the Parties filed Notices as to Timing of Filing Motion for Preliminary Approval to advise the Court that the Parties were still negotiating and preparing the Settlement

Agreement. Dkt. 120, 122, 123.

The Parties continued to negotiate the terms of the Settlement from October 5, 2020 through February 1, 2021, when they signed the Agreement. Decl. ¶ 42. The Parties did not discuss attorneys' fees or any Service Awards for the Class Representatives until after agreeing on the material terms of the Settlement. *Id.*

III. ATTORNEYS' FEES

A. Class Counsel's Attorneys' Fee Request is Fair and Reasonable

Rule 23(h) of the Federal Rules of Civil Procedure expressly authorizes a court to award “reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.” Negotiated and agreed-upon attorneys’ fees as part of a class action settlement are encouraged as an “ideal” toward which parties should strive.²

Importantly, negotiations as to the attorneys’ fees, expense reimbursement, and Class Representative Service Awards in this Action did not commence until after the Parties reached agreement on all of the substantive terms of the Settlement. Those negotiations were also conducted by experienced and knowledgeable counsel, with the assistance of a respected mediator, which resulted in the Parties’ agreement that Class Counsel may seek an order from this Court for their reasonable attorneys’ fees, in an amount not to exceed one-third of the Settlement Fund, and their costs and expenses. The fact that negotiations took place at arms-length, between sophisticated counsel on both sides, weighs strongly in favor of approval of Class Counsel’s request.³

B. Class Counsel's Attorneys' Fee Request is Fair and Reasonable Under a Common Fund Analysis

Courts have “the historic power of equity” to permit a party recovering a fund for the benefit

² *Bailey v. AK Steel Corp.*, No. 1:06-CV-468, 2008 WL 553764, at *1 (S.D. Ohio Feb. 28, 2008).

³ *Bailey*, 2008 WL 553764, *1 (citations omitted).

of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund itself or from the other parties enjoying the benefit.⁴ “[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.”⁵ This is known as the “common fund doctrine” and is premised upon the principal “that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant’s expense.”⁶ Accordingly, the attorneys who created the common fund are entitled to a reasonable fee therefrom.⁷

Where, as here, “counsel’s efforts create a substantial common fund for the benefit of the class, they are, therefore, entitled to payment from the fund based on a percentage of that fund.”⁸ Pursuant to the proposed Settlement, Fifth Third shall create a \$5,200,000 cash common fund for the benefit of the Settlement Class. Accordingly, “the percentage of the fund approach is the preferred method in cases where the attorneys’ fees are to be paid directly from the common fund.”⁹ This preference for the percentage approach is consistent with decisions of the United States Supreme

⁴ *Alyeska Pipeline SVC Co. v. Wilderness Soc’y*, 421 U.S. 240, 257 (1975).

⁵ *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

⁶ *Bowling*, 922 F. Supp. at 1277 (citing *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 164 (1939); *Boeing*, 444 U.S. at 478).

⁷ *Id.*

⁸ *Connectivity Sys. Inc. v. Nat’l City Bank*, No. 2:08-CV-1119, 2011 WL 292008, at *12 (S.D. Ohio Jan. 26, 2011) (citing *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 900 (S.D. Ohio 2001); *Basile v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 640 F. Supp. 697 (S.D. Ohio 1986)).

⁹ *Physicians of Winter Haven LLC v. Steris Corp.*, No. 1:10 CV 264, 2012 WL 406966, at *3 (N.D. Ohio Feb. 6, 2012); accord *Chesher*, 2007 WL 4553908, at *2 (“The preferred method in common fund cases has been to award a reasonable percentage of the fund ...”); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 532 (E.D. Mich. 2003) (“courts in the Sixth Circuit have indicated their preference for the percentage-of-the-fund method in common fund cases”).

Court.¹⁰ This preference is also consistent with the law in other Circuits.¹¹

“[T]he percentage approach encourages efficiency, judicial economy, and aligns the interests of the lawyers with the class... While the lodestar approach incentivizes attorneys to work more hours, without regard to the quality of the output or the class’s needs, the percentage approach instead ‘rewards counsel for success and penalizes it for failure’. Not only is the Court spared from the costly task of scrutinizing counsel’s billable hours, but attorneys are discouraged from padding hours and encouraged to work more efficiently. Furthermore, because the attorneys receive a higher fee if they obtain a higher settlement, the interests of the class and the attorneys are aligned.” *In re Cardinal Health Inc. Sec. Litigations*, 528 F. Supp. 2d 752, 762 (S.D. Ohio 2007) (citing *In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir.2001)). *See also Arp v. Hobla & Wyss Enterprises, LLC*, No. 3:18-CV-119, 2020 WL 6498956, at *8 (S.D. Ohio Nov. 5, 2020) (the “percentage approach encourages efficiency, judicial economy, and aligns the interests of the lawyers with the class”); *Swigart v. Fifth Third Bank*, No. 1:11-CV-88, 2014 WL 3447947, at *5 (S.D. Ohio July 11, 2014) (“In this district, ‘the preferred method is to award a reasonable percentage of the fund, with reference to the lodestar and the resulting multiplier.’”) (citing *Connectivity Sys. Inc. v. Nat’l City Bank*, No. 2:08–CV–1119, 2011 WL 292008, at *13 (S.D. Ohio Jan.26, 2011)).

And in this District, attorneys’ fees awarded pursuant to the percentage of the fund method “typically range from 20 to 50 percent of the common fund.”¹²

¹⁰ *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (noting that fees in common fund cases are based on a percentage of the benefit as opposed to fee-shifting cases where fees are intended to reflect the attorneys’ time); *Camden I Condo. Ass’n v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991) (“every Supreme Court case addressing the computation of a common fund fee award has determined such fees on a percentage of the fund basis”).

¹¹ *See, e.g., In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 973 (7th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993).

¹² *Connectivity Sys. Inc.*, 2011 WL 292008, at *12, citing *Brotherton*, 141 F. Supp. 2d at 902; *In re Telectronics*, 137 F. Supp. 2d at 1029 (“the range of reasonableness has been designated as between

The Sixth Circuit “require[s] only that awards of attorney’s fees in common fund cases be reasonable under the circumstances.”¹³ The Court must provide a concise and clear explanation of the reasoning for adopting a particular method and the factors considered to arrive at the fee.¹⁴ The Sixth Circuit has adopted the following *Ramey* factors to consider when determining what constitutes a reasonable fee in a common fund case:

- 1) the value of the benefit rendered to the plaintiff class (i.e. the results achieved);
- 2) society’s stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others;
- 3) whether the services were undertaken on a contingent fee basis;
- 4) the value of the services on an hourly basis [the lodestar cross-check];
- 5) the complexity of the litigation; and
- 6) the professional skill and standing of counsel involved on both sides.¹⁵

Each factor supports Class Counsel’s fee request in this case.

1. The Results Achieved in this Litigation Support the Requested Fee

The first *Ramey* factor requires the Court to evaluate the benefit of the Settlement to the Settlement Class and is often cited as the most important factor.¹⁶ The benefits achieved in this common fund Settlement are significant. Fifth Third has agreed to a Settlement that has a value of \$5,200,000.00 to Settlement Class Members, which represents approximately 33% of best-day

twenty to fifty percent of the common fund”); *In re S. Ohio Corr. Facility*, 173 F.R.D. 205, 217 (S.D. Ohio 1997), *rev’d on other grounds*, 24 Fed. App’x 520 (6th Cir. 2001) (“[t]ypically, the percentage awarded ranges from 20 to 50 percent of the common fund”).

¹³ *Rawlings*, 9 F.3d at 516.

¹⁴ *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *Rawlings*, 9 F.3d at 516.

¹⁵ *Snigart v. Fifth Third Bank*, No. 1:11-CV-88, 2014 WL 3447947, at *6 (S.D. Ohio July 11, 2014) (citing *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974), *cert. denied*, 422 U.S. 1048 (1975)).

¹⁶ *Bowling*, 922 F.Supp. at 1280.

damages had the Court certified a nationwide class and had Plaintiffs succeeded at trial. Class Counsel obtained these benefits for the Settlement Class with hard work and creativity. Before this Action was filed, no other cases, no government agencies, and no consumer rights groups had addressed the assessment of multiple OON Fees during a single ATM use. Joint Decl. ¶ 19. Without the hard work of Class Counsel, that \$5,200,000.00 would have remained lost forever.

In addition, as another important Settlement benefit, Fifth Third agreed to significantly reduce notice and administration costs associated with the Settlement by conducting a laborious review of its banking data in order to identify Settlement Class members and relevant Non-Fifth Third ATM Fees—difficult data analysis work that is commonly performed by experts for plaintiffs, at a cost of hundreds of thousands of dollars.

Moreover, as a result of the Action, Fifth Third modified its Account disclosures to better inform its customers that they could be charged a fee for Non-Fifth Third ATM Fees, likely resulting in significant prospective financial savings to Settlement Class Members.

The benefits—which together far exceed a value of \$5.2 million when including the disclosure improvement and in-kind contributions to settlement notice and administration—are excellent, especially considering the legal hurdles Plaintiffs faced. Settlement Class Members will receive their monetary distributions without the need to submit a claim. The amount each Settlement Class Member will recover will be paid by check or by direct deposit to Settlement Class Members' bank accounts. In short, the Settlement provides substantial benefits to Settlement Class Members.

The risks and uncertainty attendant in this litigation were significant. Though the Court had previously denied, in part, motions to dismiss, Plaintiffs faced the risk that this Court may have ultimately granted summary judgment to Fifth Third or deny the eventual motion for class certification, or they may have lost at trial or on appeal. As discussed above, this case was the first of its kind and there was no road map for taking it to trial. Thus, recovery was far from certain, and there

was a real risk that there would be no recovery had Plaintiffs continued to litigate the case.

2. The Requested Fee Provides Adequate Incentive to Undertake this Representation for the Benefit of Others

Here, Class Counsel’s “expenditure of time and money benefitted small claimants who lack the resources to prosecute a case of this nature.”¹⁷ Without the benefit of counsel willing to take on the risk of challenging Fifth Third’s conduct, the Class Members would have been unlikely to pursue their own remedies. The per litigant damages would likely have been a fraction of the costs of retaining counsel and prosecuting an individual action, thereby dissuading individual litigants from participating in the legal process. Thus, the second *Ramey* factor is satisfied.

3. Class Counsel Undertook this Representation on a Contingent Basis

The third *Ramey* factor “stands as a proxy for the risk that attorneys will not recover compensation for the work they put into a case.”¹⁸ Some courts consider the risk of non-recovery to be the most important factor in the fee determination.¹⁹

When Class Counsel agreed to undertake this litigation, they did so on a purely contingent basis.²⁰ Class Counsel assumed a real risk in taking on this complex case. Indeed, just determining what the alleged misconduct was took a great deal of investigation—even before the legal theories could be developed. Class Counsel took the case on a contingency basis, and invested substantial time, effort, and money with no guarantee of any recovery. The case involved novel, complicated issues and unsettled law, and no case directly on point to serve as a guidepost. Class Counsel faced significant risk in filing this Action and faced an even larger risk at class certification and trial.

¹⁷ *Hainey v. Parrott*, No. 1:02-CV-733, 2007 WL 3308027, at *3 (S.D. Ohio Nov. 6, 2007).

¹⁸ *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 765 (S.D. Ohio 2007) (citing *Bowling*, 922 F.Supp. at 1282).

¹⁹ *Id.* (citing cases).

²⁰ Joint Decl., 43.

At the time of Settlement, significant questions remained in the litigation. Plaintiffs had yet to file a motion for class certification. There was a significant risk the Court would deny certification of the nationwide class sought. Had Settlement not been reached by the Parties, there is a very real possibility that the entire case could have been wiped out by an adverse ruling on a motion for summary judgment, class certification, at trial, or from the Sixth Circuit even if this Court ruled in Plaintiffs' favor. Class Counsel's success in the face of all this uncertainty should be a significant and primary factor when evaluating the reasonableness of the fee requested.

4. The Value of the Services on an Hourly Basis Supports the Fee Requested

The fourth *Ramey* factor considers the value of the attorney's services on an hourly basis. Class Counsel spent over 1700 hours prosecuting this litigation, and will spend further time from this point to conclusion.²¹ Class Counsels' cumulative lodestar totals \$1,268,771.39, which is not substantially higher than the fee requested.²² The value of Class Counsel's time is outlined above in the description of the results achieved and in Section C below relating to the lodestar cross-check analysis.

5. The Complexity of the Litigation Supports the Requested Fee

The fifth *Ramey* factor requires the Court to consider the complexity of the case in awarding attorneys' fees. This case involved significant legal argument at its early stages as to whether Plaintiffs could pursue this cause of action. Chiefly, did the contract support the claims? This litigation was not supported by a long line of similar cases or prior legal authority, so Class Counsel faced significant risk in filing this Action and faced an even larger risk at class certification and trial. Further, Fifth Third raised significant legal defenses regarding the meaning of key contractual terms. Thus, the complexity of this case from both a legal and factual perspective supports the requested fee.

6. The Professional Skill of Counsel on both sides Supports the Requested Fee

²¹ Joint Decl., ¶ 48, detailing the time spent by each law firm.

²² *Id.*, at ¶ 51.

The last *Ramey* factor addresses the professional skill of counsel. This case has been pending for more than three years, and the Parties completed sufficient work and legal and factual analysis to allow Class Counsel to determine the benefits of resolving the case and give the Settlement Class immediate relief. Class Counsel succeeded on motions to dismiss and were in the midst of aggressively conducting discovery when the case settled.

Plaintiffs served discovery requests targeted at understanding Fifth Third's fee practices throughout the Class Period; the motivations behind those fee practices; Fifth Third's understanding of key contractual terms; customers' understanding of key contractual terms; and class-wide damages. Prior to Settlement, Class Counsel spent a significant amount of time analyzing class-wide data produced by Fifth Third, in consultation with an expert, in order to ascertain class-wide damages.

The length of this litigation therefore further supports the requested fee award. Class Counsel litigated this case for three years and conducted significant motion practice and discovery. No further litigation was needed to uncover information sufficient to understand the value of the case and weigh the risk of continued litigation.

Armed with extensive experience litigating similar bank fee and other class action cases, *see generally* **Exhibits A-F** to the Joint Declaration, Class Counsel's collective wisdom was to make every reasonable effort to achieve a settlement taking into account the prospective risks while extracting as much value out of the settlement. Prior to and during the litigation, Class Counsel engaged in an extensive factual investigation of the class claims, actively and diligently analyzing the strengths and weaknesses of the case. With the risks of a motion for summary judgment, denial of class certification, a loss at trial, or a Sixth Circuit reversal from a favorable ruling, Class Counsel took the opportunity to settle the case and extract the maximum settlement value. Class Counsel should be rewarded for this effort and result.

7. The Fee Request is Supported by the Clients

The utilization of the common fund doctrine as a basis for the payment of attorneys' fees and expenses is employed in addition to, and independent of, the contingent fee contract between lawyer and client. In addition to the foregoing common fund considerations, the clients and the fee agreements in this case support Class Counsel's fee request. As explained above, Plaintiffs understood this method of the payment of fees from the inception of the case, when the attorneys and clients discussed and agreed to these terms in the context of establishing a contingent fee contract.²³ In addition, Plaintiffs agreed to and support the payment of fees and expenses as requested in the instant motion.²⁴

The requested one-third fee has routinely been awarded in similar bank fee litigation and in class action litigation in general in courts across the country. (Joint Decl. ¶ 46.) This factor supports granting the requested fee. Indeed, the requested fee of 33.33% is the standard share that has been routinely approved by judges who have ruled on the fairness of settlements in other cases concerning disputed bank fee practices.

Since 2010, numerous courts have awarded percentage of the fund-based attorneys' fees in bank fee class actions (based on different—but arguably less difficult—theories of liability). The following list depicts such settlements nationwide, all of which resulted in fee awards either roughly at or significantly above the 33.33% request here:

| <u>Overdraft Fee Case Name</u> | <u>Percentage of the Fund Awarded</u> |
|--|---|
| <i>Lopez v. JPMorgan Chase Bank, N.A.</i> , 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 |

²³ Joint Decl., ¶ 45.

²⁴ *Id.* at ¶ 45.

| | |
|--|---|
| <i>Jacobs v. Huntington Bancshares Inc.</i> 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 |
| <i>Farrell v. Bank of Am., N.A.</i> , 327 F.R.D. 422 (S.D. Cal. 2018), <i>aff'd sub nom. Farrell v. Bank of Am. Corp., N.A.</i> , 827 F. App'x 628 (9th Cir. 2020) | 40% of 37.5 million common fund |
| <i>Wolfgeber v. Commerce Bank, N.A.</i> , No. 1:09-MD-02036-JLK (S.D. Fla.) (Dkt. 3574), | 38% of \$18.3 million common fund |
| <i>Nelson v. Rabobank, N.A.</i> , No. RIC 1101391 (Cal. Supr.) | 35.2% (\$750k fee includes % of practice changes) |
| <i>In re Checking Account Overdraft Litig.</i> , No. 1:09-MD-02036-JLK, 2020 WL 4586398 (S.D. Fla. Aug. 10, 2020) | 35% of \$7.5 million |
| <i>Molina v. Intrust Bank, N.A.</i> , No. 10-CV-3686 (Dist. Ct. Ks.) | 33% of \$2.7 million |
| <i>Hawkins et al v. First Tenn. Bank, N.A.</i> (Cir. Ct. Tenn.) | 35% of \$16.75 million |
| <i>Swift v BancorpSouth</i> , No. 1:10-cv-00090-GRJ (N.D. Fla.) | 35% of \$24 million |
| <i>Casto v. City National Bank, N.A.</i> , No. 10-C-1089 (Cir. Ct. W.Va.) | 33.33% of \$3 million |
| <i>Schulte v. Fifth Third Bank</i> , No. 09-cv-6655 (N.D. Ill.) | 33.33% of \$9.5 million |
| <i>Johnson v. Community Bank, N.A.</i> , No. 12-cv-01405-RDM (M.D. Pa.) | 33.33% of \$2.5 million |
| <i>Bodnar v. Bank of America</i> , No. 5:14-cv-03224-EGS (E.D. Pa.) | 33.33% of \$27 million |
| <i>Holt v. Community America Credit Union</i> , No. 4:19-CV-00629-FJG (W.D. Mo.) | 33.33% of 3.078 million |
| <i>White v. Members 1st Federal Credit Union</i> , Case No. 1:19-cv-00556-JEJ (W.D. Pa.) | 33.33% of \$910,000 |
| <i>Figueroa v. Capital One</i> , Case No. 3:18-cv-00692-JM-BGS (S.D. Cal.) | 33.33% of \$13 million |
| <i>Liggio v. Apple Federal Credit Union</i> , No. 1:18-cv-01059-LO-MSN (E.D. Va.) (J. O'Grady) | 33.33% of 2.7 million |

As demonstrated above, the requested fee award in this case is on par with the fee awards approved in other bank fee class action cases.

Based upon the foregoing, a \$1,733,333.00 attorneys' fee award, representing 33.33% of \$5,200,000 common fund is fair and reasonable, as it is supported by Plaintiffs, is within the range

established in the Sixth and other Circuits, is within the range established by the District Courts in Ohio, and is consistent with the awards in other bank fee litigation.

C. Class Counsel’s Fee Request is Fair and Reasonable Under a Lodestar Cross-Check

Although performing a cross-check on the percentage method using Class Counsel’s lodestar is optional,²⁵ and Class Counsel submit the Court should simply find that a percentage of the fund award be granted, should the Court decide to perform a lodestar cross-check, it will support the award requested. In this matter, a very modest lodestar multiplier would apply. The purpose of the cross-check is “not to supplant the court’s detailed inquiry into the attorney’s skill and efficiency in recovering the settlement” using the percentage of the fund and *Ramey* factors, but instead merely to ensure that the fee award is still “roughly aligned with the amount of work the attorneys contributed.”

Id.

“The Court performs a lodestar cross-check by comparing the lodestar multiplier used in this case to lodestar multipliers used in similar cases.”²⁶ “In contrast to employing the lodestar method in full, when using a lodestar cross-check, ‘the hours documented by counsel need not be exhaustively scrutinized by the district court.’”²⁷ In fact, “the lodestar cross-check is ‘not a full-blown lodestar inquiry’ and a court ‘should be satisfied with a summary of the hours expended by all counsel at various stages with less detailed breakdown than would be required in a lodestar jurisdiction.’”²⁸

²⁵ *Swigart*, 2014 WL 3447947 at *6.

²⁶ *Id.* at 767.

²⁷ *Id.*, citing *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005).

²⁸ *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-307 (3d Cir. 2005) (quoting Report of the Third Circuit Task Force, Circuit Task Force, Selection of Class Counsel, 208 F.R.D. at 243). *Accord* The Manual For Complex Litigation (Fourth) § 14.122 (2004) (“the lodestar is at least useful as a cross-check . . . using affidavits and other information provided by the fee applicant.”); *Milliron v. T-Mobile United States*, 423 Fed. Appx. 131, 136 (3d Cir. N.J. 2011) (“the crosscheck is not the primary analysis in this type of case and does not entail ‘mathematical precision []or bean-counting,’” citing *Rite Aide*, 396 F.3d at 306); *In re Cincinnati Gas & Electric Co. Sec. Litigation*, 643 F. Supp. 148, 150 (S.D. Ohio

Class Counsel spent 1,783 hours prosecuting this litigation. Using standard billing rates, their corresponding lodestar totals \$1,268,771.39. Moreover, Class Counsel will necessarily spend substantial additional time from this point to conclusion of the case, time that will not be reflected in this fee application. Thus, when cross-checked, the requested fee is equivalent to the application of a 1.366 multiplier to the lodestar—and this is before performing the additional work that will be needed to finalize the settlement and distributions to class members. The *Bowling* court explained that the lodestar calculation can be adjusted upward through application of a multiplier to account for additional factors such as the contingent nature of the case and the quality of an attorney’s work.²⁹ As discussed above, the particular legal issues involved in this case created the very real risk at the outset that Class Counsel would not be paid.³⁰ In addition, this litigation was complex and unique. The multiplier requested here is well within the range of those approved in the Sixth Circuit. *See In re Cardinal Health Inc. Sec. Litig.*, 528 F.Supp.2d 752, 767 (S.D. Ohio 2007) (lodestar multiplier of six); *Dillow v. Home Care Network, Inc.*, No. 2:16-cv-612, 2018 WL 4776977, at *7 (S.D. Ohio Oct. 3, 2018) (approving fee award that was “approximately 2.9 times the lodestar”); *Feiertag v. DDP Holdings, LLC*, No. 2:14-cv-2643, 2016 WL 4721208, at *7 (S.D. Ohio Sept. 9, 2016) (“Awards of common-fund attorney fees in amounts two to three-times greater than the lodestar have been found reasonable.”); *Louther v. AK Steel Corp.*, 1:11-cv-877, 2012 WL 6676131, at *5 (S.D. Ohio Dec. 21, 2012) (approving a “very acceptable” 3.06 multiplier and citing cases from other districts finding multipliers ranging from 4.3 to 8.74 to be reasonable).

1986) (“Counsel have provided the Court with helpful charts summarizing the hours logged and the rate requested by each of the attorneys involved in this case.”)

²⁹ *Bowling*, 922 F. Supp. at 1278 (citing the Report of the Third Circuit Task Force, 108 F.R.D. 237, 242 (1986)).

³⁰ *See Connectivity Sys. Inc.*, 2011 WL 292008, at *14 (“As stated in *City of Detroit v. Grinnell*, 495 F.2d 448, 471 (2d Cir. 1974): “[P]erhaps the foremost of these factors [justifying a multiplier] is...the fact that, despite the most vigorous and competent efforts, success is never guaranteed.”)

In sum, Class Counsel's fee request is reasonable based on a percentage of the common fund, after applying a lodestar cross-check.

C. The Sole Objection to the Fee Award

As noted in the concurrently filed Motion for Final Approval, only a single Settlement Class Member has objected to the proposed Settlement. Ms. Wint-Monroe states that she "find[s] that the legal fees provided to the representing legal counsel to be very much beyond legally provided standard of 33 1/3 portion of any settlement." However, that 33 1/3 "portion" is exactly what Class Counsel is requesting here. Ms. Wint-Monroe also seems to complain that the 33.33% fee request does not include expenses for providing notice and administration of the Settlement. It is true that the costs of notice and administration of the proposed Settlement will be paid from the Settlement Fund in addition to Class Counsel's request for attorneys' fees. However, it is well understood in class action jurisprudence that the costs of notice and administration of a settlement accrue to the benefit of class members, not to the attorneys representing them.³¹ Accordingly, it is entirely appropriate for the costs of notice and administration to be paid from the Settlement Fund here.

III. EXPENSES

"Under the common fund doctrine, class counsel is entitled to reimbursement of all reasonable out-of-pocket expenses and costs in the prosecution of claims, and in obtaining settlement, including but not limited to expenses incurred in connection with document productions, consulting with and

³¹ *Karpik v. Huntington Bancshares Inc.*, No. 2:17-CV-1153, 2021 WL 757123, at *9 (S.D. Ohio Feb. 18, 2021) (court approved notice and administration costs paid from settlement fund, noting "[t]he Settlement Notice, claims review, and payment distribution services provided by the Settlement Administrator are essential to carry out the Settlement"); *Thorn v. Bob Evans Farms, Inc.*, No. 2:12-CV-00768, 2016 WL 8140448, at *2 (S.D. Ohio Feb. 26, 2016) (finding settlement administration paid out of settlement fund "fair, adequate, and reasonable"); *Ganci v. MBF Inspection Servs., Inc.*, No. 2:15-CV-2959, 2019 WL 6485159, at *7 (S.D. Ohio Dec. 3, 2019) (settlement administration and other costs paid out of settlement fund were "reasonable and necessary to litigate and settle this case").

deposing experts, travel and other litigation-related expenses.”³² “[T]he categories of expenses for which Plaintiffs’ counsel seek reimbursement are the type routinely charged to hourly fee-paying clients and thus should be reimbursed out of the settlement fund ... [including] the cost of experts and consultants ... computerized research; travel and lodging expenses;; filing and witness fees; postage and overnight delivery; and the cost of court reporters and depositions.”³³

Class Counsel have incurred, to date, \$47,329.39 in costs and expenses.³⁴ Each expense for which Class Counsel seeks reimbursement was necessary and directly related to this litigation, and the largest expenses were for the essential services of an expert and the mediator.³⁵ Accordingly, Class Counsel is entitled to this expense reimbursement.

IV. SERVICE AWARDS

The Settlement Agreement also provides that Class Counsel will apply to the Court for Service Awards for Plaintiffs as Class Representatives in an amount not to exceed \$5,000 each. The Class Representatives each took risks by offering their services when the viability of their claims was uncertain. Their claims, which publicly disclosed personal financial matters, created notoriety regardless of their success on the claims. Had they failed, they created risk to their reputations. They should be commended for taking action to protect the interests of over a million Fifth Third customers who were affected by Fifth Third’s policy, on top of their own individual claims. It cannot be disputed that the Plaintiffs’ efforts have created substantial financial benefits for the Settlement Class, compensating them for past harm and prompting Fifth Third to be transparent about its Non-Fifth Third ATM Fee policy. Plaintiffs expended hours in advancing this litigation against a large and

³² *In re: Cardizem*, 218 F.R.D. at 534-535.

³³ *New Eng. Health Care Emples. Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 635 (W.D. Ky. 2006) (approving expenses submitted pursuant to these categories).

³⁴ Joint Decl., ¶ 58.

³⁵ *Id.*, ¶ 59.

powerful adversary. Each conferred with Class Counsel on a number of occasions. Joint Decl., ¶ 61. Specifically, Plaintiffs provided assistance that enabled Class Counsel to successfully prosecute the Action and reach the Settlement, including: (1) submitting to interviews with Class Counsel; (2) locating and forwarding responsive documents and information; (3) providing discovery documents; and (4) participating in conferences with Class Counsel. *Id.*, ¶ 62.

Class Counsel moves for the approval of the Service Awards under principles of equity and the prior practice and case law in the Ohio District Courts.³⁶ Compared to a class-wide recovery valued at \$5,200,000, the \$5,000 Service Awards are certainly reasonable. Accordingly, Plaintiffs respectfully request that the Court grant the Service Awards for their work on this case on behalf of themselves and all Settlement Class Members.

V. CONCLUSION

Based upon the foregoing, Class Counsel respectfully request this Court approve the following payments from the \$5,200,000 Settlement Fund: (1) \$1,733,333 as fair and reasonable for attorneys' fees; (2) \$47,329.39 for reimbursement of the costs and expenses necessarily incurred in prosecution of this action on behalf of the Settlement Class; and (3) \$5,000 each for Service Awards to the two Class Representatives.

³⁶ *Bert v. AK Steel Corp.*, No. 1:02-CV-467, 2008 WL 4693747, at *1 (S.D. Ohio Oct. 23, 2008) (Court approves \$10,000 incentive award to each class representative); *See also Birr v. Amica Mut. Ins. Co.*, No. 1:08CV124, 2011 WL 1429171, at *1 (S.D. Ohio Apr. 14, 2011) (adopting magistrate's Report and Recommendation approving incentive payment to the Class Representative of \$5,000).

Dated: May 24, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2021, I electronically filed the foregoing using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Robb Stokar
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