

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TAWANNA ROBERTS, on behalf of herself
and all others similarly situated,

Plaintiff,

- against -

CAPITAL ONE, N.A.,

Defendant.

CASE No. 1:16-cv-04841-LGS

**JOINT DECLARATION OF JEFF OSTROW, JEFFREY KALIEL
AND HASSAN ZAVAREEI IN SUPPORT OF UNOPPOSED MOTION
FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND
APPLICATION FOR ATTORNEYS' FEES AND COSTS AND SERVICE AWARD**

Jeff Ostrow, Jeffrey Kaliel, and Hassan Zavareei, declare and state as follows:

1. We are Class Counsel under the Settlement¹ with Capital One, N.A. being presented to the court for Final Approval. We submit this declaration in support of Plaintiffs' Unopposed Motion for Final Approval of Class Settlement and Application for Attorneys' Fees and Costs and Service Award. We have personal knowledge of the facts set forth in this declaration and could testify competently as to them if called upon to do so.

Case and Settlement History

2. After several rounds of arms-length negotiations and two rounds of formal mediation, Plaintiff, Class Counsel, and Capital One entered into a Settlement in this Action.

3. The legal theories at issue were relatively untested at the time the Action commenced. Consequently, Class Counsel spent a significant amount of time researching and investigating Capital One's practice of assessing overdraft fees on APPSN Transactions and researching applicable legal theories and interviewing prospective plaintiffs.

¹ The capitalized used herein shall have the same meanings as those defined in the Settlement Agreement, attached as *Exhibit A* to the Motion for Final Approval.

4. During the Action, the Parties engaged in extensive fact, class, and expert discovery. Class Counsel formulated targeted discovery requests and the Parties met and conferred numerous times to address Capital One's objections to those discovery requests. The Parties had significant disagreements as to the proper scope of discovery, but ultimately worked through those issues so as to avoid judicial intervention.

5. Class Counsel negotiated a protective order and order to govern the production of electronically stored information. Class Counsel also spent significant time negotiating ESI search terms and the proper custodians for those search terms.

6. Ultimately, Class Counsel's efforts resulted in Capital One producing approximately 49,285 pages of documents in this case, which Class Counsel reviewed. In addition to those documents, Capital One produced hours of call recordings between Ms. Roberts and Capital One customer service representatives.

7. Capital One produced transaction data, which allowed Class Counsel, in conjunction with Plaintiff's expert, to determine a methodology for determining which overdraft fees were assessed under Plaintiff's theory of liability in support of class certification and which would ultimately be used to determine class membership and damages. Class Counsel worked extensively with their expert, Art Olsen, to enable him to issue his expert report in this case.

8. Class Counsel also took and defended eight fact and expert witness depositions. Class Counsel took two 30(b)(6) depositions in this case—one pertaining to data issues and the other pertaining to class certification and overlapping merits issues. Leading up to those 30(b)(6) depositions, the Parties negotiated the scope of the 30(b)(6) topics. Class Counsel met and conferred with Capital One to address numerous objections to the scope of the depositions.

9. Class Counsel also took three fact witness depositions and deposed Capital One's expert. Class Counsel also defended Mr. Olsen's deposition and defended Ms. Robert's full-day deposition.

10. On October 18, 2018, the Parties participated in a full day mediation in New York with mediator Simeon Baum, Esq. In advance of the mediation, Capital One provided additional

transactional data for Class Counsel's and Mr. Olsen's review and analysis to estimate class damages. Class Counsel also prepared a detailed mediation statement analyzing the risks each side faced in the litigation. The mediation was unsuccessful.

11. Capital One moved for summary judgment. Responding to the motion required an extensive review of both the factual record in this case and the legal landscape. This Action was the first asserting Plaintiff's specific theory of liability to be evaluated at the summary judgment stage. Opposing Capital One's motion required Class Counsel to devise responses to novel legal arguments and a detailed review and understanding of the factual record developed from the extensive written and deposition discovery described above.

12. After fact discovery closed with respect to the Plaintiff, and with the class certification motion filed, on October 10, 2019, the Parties attended a second, full-day mediation with Mr. Baum. The Action did not settle that day, but the Parties continued to negotiate and ultimately agreed to the material settlement terms on October 25, 2019. Thereafter, the Parties negotiated a formal settlement agreement. After several weeks of negotiations, the Parties were able to reach agreement on the Settlement terms. On December 16, 2019, the Parties executed the Settlement Agreement.

13. Determining Settlement Class membership and apportioning the Settlement Fund required obtaining complex transactional data from Capital One, a process which took several months of work between the Parties and Class Counsel and Plaintiff's expert. Class Counsel then worked with the Settlement Administrator to develop an efficient Notice Program.

The Settlement Its Terms, and Certification of a Settlement Class

14. The Settlement consists of Capital One's agreement to a Settlement Fund of \$17,000,000.00 and to separately pay up to \$750,000.00 toward Settlement Administration Costs. Capital One funded the Escrow Account with the \$17,000,000.00 on January 22, 2020, and the Settlement Administration Costs are currently projected to be no more than \$675,000.00.

15. The Settlement Fund will be used to: (a) pay Settlement Class Members their respective Settlement Class Member Payments; (b) Class Counsel for any Court awarded attorneys' fees and costs; (c) any Court awarded Service Award for the Class Representative; (d) Settlement

Administration Costs, if any, above the Capital One Settlement Administration Costs Cap of \$750,000; and (e) in the event funds remain after the initial distribution to Settlement Class Members, as a result of uncashed checks, reimburse Capital One for up to what it paid toward Settlement Administration Costs up to the Settlement Administration Costs Cap, and make a second distribution, if feasible.

16. On November 7, 2018, after this Action had been initiated, Capital One voluntarily modified its disclosures to better inform its members that they may incur an Overdraft Fee on Debit Card Transactions that were authorized against a positive available balance, if at the time of settlement, the account balance is negative. This practice change inured to the Settlement Class's benefit and to other Capital One customers and has resulted and will continue to result in millions of dollars in savings. Class Counsel is not seeking attorneys' fees in connection with the substantial savings related to this practice change.

17. The Settlement was reached in the absence of collusion, and is the product of good faith, informed and arm's length negotiations by competent counsel, who are experienced in class action litigation and the legal and factual issues in the Action, making it procedurally fair.

18. The Parties concluded that the benefits of settlement outweigh the risks and uncertainties of continued litigation, as well as the attendant time and expenses associated with contested class certification proceedings and possible interlocutory appellate review, completing class discovery, pretrial motion practice, trial, and finally appellate review. Class Counsel was able to accurately evaluate the strengths and weakness of Plaintiff's claims.

19. Class Counsel is particularly experienced in the litigation, certification, trial, and settlement of nationwide class action cases in the financial services industry. In negotiating this Settlement in particular, Class Counsel had the benefit of years of experience and familiarity with the facts of this case as well as with other cases involving overdraft fees across the country. Class Counsel conducted a thorough investigation and analysis of Plaintiff's claims and engaged in extensive motion practice throughout this Action and an appeal.

20. Thus, although Plaintiff believes she has a strong chance on the merits, it is possible that Plaintiff may lose at trial.

21. Based on Plaintiff's expert analysis concluding that the Settlement Class's most likely recoverable damages at trial would have been \$ 50,517,226. The Settlement affords Plaintiff and the Settlement Class a 34% recovery of their most likely recoverable damages, without further attendant litigation risks. Including the \$675,000.00 in Settlement Administration Costs, the recovery is actually 35% of the total likely recoverable damages. Here the Settlement representing a 34% or 35% recovery of the most likely recoverable damages is an excellent result.

22. Under the circumstances, Plaintiff and Class Counsel appropriately determined that the Settlement outweighs the gamble of continued litigation. This Settlement provides substantial relief to Settlement Class Members without delay.

23. These negotiations led the Parties to a Settlement that Class Counsel believes to be fair, reasonable, and in the best interest of the Settlement Class. Given Class Counsel's experience in these cases, Class Counsel's assessment in this regard is entitled to considerable deference. The benefits are fair and reasonable in light of Capital One's defenses, and the challenging and unpredictable litigation path in the absence of settlement.

24. Recovery by any means other than settlement would require additional years of litigation in this Court and the Second Circuit. Delay, both at the trial stage, and through post-trial motions and appeals, could force the Class to wait even longer, further reducing its value. Further, this litigation activity would have required the expenditure of significant resources.

25. This Action is complex presenting novel factual and legal issues, which have yet to be tried in this Court or others.

26. Legally, the case involved complex issues which already required guidance from the Second Circuit once and may have involved an additional appeal to the Second Circuit in the future.

27. Factually, the Action was also difficult. Indeed, the fundamental contract construction issue remained unresolved when the Parties agreed to settle. That issue, along with other merits issues and the yet to be decided motion for class certification, would have been litigated aggressively. Thus, if Capital One was successful in opposing class certification or at trial, that would have prevented the Settlement Class from recovering anything at all.

28. Based on the record, there is no doubt the Settlement is fair. Plaintiff has litigated this Action for nearly four years, and Class Counsel have been involved in similar litigation in the past.

29. The Settlement meets all elements of Rule 23. The Settlement Class of holders of 339,048 Capital One Accounts is so numerous that joinder of all members is impracticable.

30. There are questions of law or fact common to the Settlement Class including whether Capital One's alleged systematic practice of assessing Overdraft Fees breached its contract.

31. Plaintiff is typical of absent members of the Settlement Class as she was subjected to the same Capital One practices leading to the assessment of fees and suffered from the same injuries, and she will benefit equally from the Settlement relief.

32. Plaintiff's interests are coextensive with, not antagonistic to, the interests of the Settlement Class because Plaintiff and the absent Settlement Class members have the same interest in the Settlement's relief, and the absent Settlement Class members have no diverging interests. Plaintiff is represented by qualified and competent counsel who devoted a substantial time to the litigation and who has extensive experience and expertise prosecuting complex class actions, including consumer actions like the instant case. Class Counsel are experienced in class action litigation, serving as Lead or Co-Lead Counsel in dozens of consumer class actions in federal and state courts throughout the country.

33. Plaintiff's Counsel took on considerable risk in filing and prosecuting this case as demonstrated by this Court's initial dismissal of the Complaint with prejudice. After winning the appeal, the Court denied Plaintiff's motion for partial summary judgment on the contract construction issue, leaving open the risk that the trier of fact would determine that Capital One was permitted to assess the challenged overdraft fees.

The Notice Program

34. The Notice Program was completed in accordance with this Court's instructions in the Preliminary Approval Order and the subsequent orders modifying it.

35. The Court approved BrownGreer PLC as the Settlement Administrator. Pursuant to the Court's Preliminary Approval Order, the Settlement Administrator oversaw the Notice Program,

which consisted of Email Notice, Postcard Notice, Long Form Notice, the establishment of a Settlement Website (www.capitaloneoverdraftlitigation.com), and a toll free telephone number that was available 7 days a week, 24 hours a day, for Settlement Class members to obtain information or to request Long Form Notices. Each facet of the Notice Plan was timely and properly accomplished.

36. The Notice Plan was reasonably calculated to and did apprise Settlement Class members of the following; a description of the material Settlement terms; a date by which Settlement Class members may exclude themselves from the Settlement Class; a date by which Settlement Class Members may object to the Settlement; the Final Approval Hearing date; and the Settlement Website address where the Settlement Class may access the Agreement and other related documents.

37. The Notice Program was designed to and did provide the best notice practicable and was tailored to take advantage of the information Capital One had available about the Settlement Class.

Class Representative's Service Award

38. Class Counsel seeks a Service Award of \$15,000.00 for the Plaintiff for serving as the Class Representative. The Service Award is in addition to the Settlement Class Member Payment the Plaintiff will be entitled to receive as a Settlement Class Member.

39. The Plaintiff took considerable risk by offering her services when the viability of her claims was uncertain. Her claim necessarily put her finances at issue and publicly disclosed her personal financial difficulties, creating notoriety regardless of the success of her claim.

40. She should be commended for taking action to protect the interest of hundreds of thousands of Capital One customers who were affected by Capital One's policies. It cannot be disputed that it is because of the Plaintiff's efforts, and her willingness to stand up to a powerful adversary, that the class is receiving extraordinary financial benefits. The fact that the Plaintiff was willing to do so is the only reason a settlement was possible here.

41. The award will also compensate the Plaintiff for her considerable time and effort she spent in prosecuting the Action. Specifically, she assisted Class Counsel to successfully prosecute the Action and reach the Settlement, including: (1) participating in interviews, telephone calls, and in-

person meetings with Class Counsel; (2) pursuing an appeal when the Court initially dismissed the Action; (3) taking time off of work to prepare for and sit for a full-day deposition during which she was interrogated about her finances and her financial decisions; (4) reviewing documents with Class Counsel, including numerous telephone recordings of her calls with Capital One's customer service; (5) assisting Class Counsel in reviewing and responding to numerous discovery requests including by locating and forwarding potentially responsive documents and information to Class Counsel; and (6) keeping apprised of the case and conferring with Class Counsel; (7) reviewing Settlement documents; and (8) staying informed throughout the Settlement process. In so doing, the Plaintiff was integral to the case.

Attorneys' Fees and Costs

42. Class Counsel has not been paid for their extensive efforts or reimbursed for litigation costs and expenses incurred. Pursuant to the Settlement and the Notices, Class Counsel are entitled to request, and Capital One will not oppose, attorneys' fees of up to 35% of the Settlement Fund, as well as reimbursement of litigation costs incurred in connection with the Action. Notwithstanding, Class Counsel is only seeking 30% of the Settlement Fund as fair and reasonable fee for its efforts.

43. The Notice Program, including all forms of Notice provided thereunder, informed the Settlement Class that Class Counsel was entitled to request fees of that percentage, as well as reimbursement of costs.

44. As of the filing this Motion, there have been zero objections to the 35% fee amount, let alone the reduced 30% fee Class Counsel actually requests in the Motion for Final Approval. Likewise, there have been no objections to the request for reimbursement of costs.

45. The Parties negotiated and reached agreement regarding fees and costs only after agreeing on all material terms of the Settlement. Such award is subject to this Court's approval and will serve to compensate Class Counsel for the time, risk and expense they incurred pursuing claims on Settlement Class Members' behalf.

46. The 30% requested fee is within the range of reason when considering the foregoing and when analyzing the following guidelines set forth by the Second Circuit in *Goldberger*. In fact, when

considering the Settlement Administration Costs, the requested fee is actually only 28.85% of the overall value of the Settlement.

47. The attorneys' fee requested is lower than what would be requested in individual contingent fee litigation, which generally starts at 33.33% and frequently is 40% or more.

48. While discretionary, to the extent that the Court wishes to perform a lodestar cross-check, it should be noted that there is a 2.2 lodestar multiplier as a result of the hard work Class Counsel performed.

49. To date, Class Counsel have expended a total of 3,777.45 hours in the prosecution of this case. It is anticipated that from the date of the filing of this Motion forward, Class Counsel will spend an additional 35 hours preparing for the Final Approval Hearing, which includes the filing of supplemental declarations, responding to any objections, if any, and preparing for and attending the Final Approval Hearing. Furthermore, there will be significant post-Final Approval work ensuring that the Settlement proceeds are properly distributed to Settlement Class Members, responding to Settlement Class Members' inquiries, and effectuating a secondary or *cypres* distribution, as needed.

50. The hourly rates of the attorneys and paralegals that worked on behalf of the Plaintiff and the Settlement Class are commensurate with the rates charged by class action practitioners in this district with similar experience.

51. Class Counsel requests reimbursement of \$185,647.65 for actual costs advanced and necessarily incurred in connection with the prosecution and settlement of the Action.

52. Specifically, those costs and expenses consist of filing fees and service of process costs, *pro hac vice* admission fees, court reporter expenses, deposition transcripts, expert witness fees, litigation support vendors and 50% of travel costs incurred. Class Counsel is not seeking costs related to legal research, copying, and other overhead expenses, which were advanced and are commonly reimbursed. All of these out of these pockets were reasonably and necessarily incurred to pursue this Action.

53. The individual declarations of Class Counsel and appellate counsel, attached as Exhibits E-H to the Memorandum, detail the time and costs; however, for the convenience of the

Court, Class Counsel provides the below summary of the total hours billed, lodestar and costs for each firm that work on behalf of the Plaintiff and the Settlement Class in this Action.

COUNSEL	HOURS	LODESTAR	COSTS
Kopelowitz Ostrow			
Ferguson Weiselberg Gilbert	1,504.25	\$820,132.50	\$160,172.75
Kaliel PLLC	1,273.50	\$773,251.60	\$14,665.28
Tycko & Zavareei LLP	476.20	\$336,432.40	\$10,554.62
Gupta Wessler PLLC	517.50	\$360,793.75	\$255.00
Shepherd, Finkelman, Miller & Shah LLP	6.00	\$4,350.00	\$0.00
Totals	3,777.45	\$2,294,960.25	\$185,647.65

We declare under penalty of perjury that the foregoing is true and correct.

Executed on September 8, 2020.

/s/ Jeff Ostrow

Jeff Ostrow

**KOPELOWITZ OSTROW
FERGUSON WEISELBERG GILBERT**

/s/ Jeffrey Kaliel

Jeffrey Kaliel

KALIEL PLLC

/s/ Hassan A. Zavareei

Hassan A. Zavareei

TYCKO & ZAVAREEI LLP