UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiff,

v.

CAPITAL ONE, N.A.,

Defendant.

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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPLICATION FOR ATTORNEYS' FEES AND COSTS AND SERVICE AWARD

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Rules and Statutes

Other

I. INTRODUCTION

Plaintiff, Tawana Roberts, submits this Memorandum of Law in Support of her Unopposed Motion for Final Approval of Class Settlement and Application for Attorneys' Fees and Costs and Service Award.[1] The Settlement Agreement, attached as ***Exhibit A***, if approved, will resolve all claims against Defendant Capital One, N.A., in the Action. The Settlement should be finally approved because it provides substantial relief for the Settlement Class and the Settlement terms are reasonable and consistent with Second Circuit precedent.

Given the material risks inherent in this Action, the Settlement is an excellent result for the Settlement Class. The Settlement provides for a cash Settlement Fund of $17,000,000.00 and Capital One's agreement to separately pay up to $750,000.00 in Settlement Administration Costs. One of the keystones of the Settlement is that the Settlement Fund will automatically be distributed or credited to Settlement Class Members without the requirement for a claims process or reversion to Capital One. The allocation plan fairly and adequately accounts for the value of each Settlement Class Member's individual damages. Class Counsel is seeking attorneys' fees of 30% of the Settlement Fund, reimbursement of reasonable litigation costs, and a $15,000.00 Service Award for Ms. Roberts.

Since Preliminary Approval of the Settlement on January 10, 2020, the Settlement Administrator properly completed the Court-approved Notice Program. To date, no Settlement Class Member has objected to the Settlement, Class Counsel's request for attorneys' fees and costs, or the Service Award, and only five Settlement Class members have opted-out of the Settlement. The absence of objections to date and the low number of opt-outs shows that the Settlement Class fully supports approval of the Settlement and that it warrants final approval.[2]

Based on the controlling legal standards and supporting facts, Final Approval is warranted. In support of the Motion, Plaintiff submits a Joint Declaration from Class Counsel Jeff Ostrow, Jeffrey Kaliel and Hassan Zavareei ("Joint Decl."), a Declaration from the Settlement Administrator ("Admin.

[1] All capitalized terms in this memorandum shall have the same meanings as those defined in the Settlement Agreement.

[2] Should a proper objection be asserted following the filing of this Motion, Plaintiff will file a response pursuant to this Court's Preliminary Approval Order.

Decl."), a Declaration from Plaintiff's expert, Arthur Olsen, and Declarations from Jeff Ostrow, Hassan Zavareei, Jeffrey Kaliel, and Matthew Wessler ("Individual Counsel Declarations"), respectively. Therefore, Plaintiff and Class Counsel respectfully request that the Court: (1) grant Final Approval of the Settlement; (2) certify for settlement purposes the Settlement Class pursuant to Federal Rules of Civil Procedure 23(b)(3); (3) appoint Plaintiff Tawanna Roberts as Class Representative; (4) appoint Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Kaliel PLLC, and Tycko & Zavareei LLP as Class Counsel; (5) grant Class Counsel's Application for Attorneys' Fees and Costs and Service Award; and (6) enter Final Judgment dismissing the Action with prejudice.

II. BACKGROUND

This Action seeks redress from Capital One's assessment of Overdraft Fees charged on Debit Card Transactions that authorized against a positive balance but settled against a negative balance ("APPSN Transactions"). Plaintiff alleges that Capital One breached its contract with Account Holders in assessing these fees. Capital One denies any wrongdoing or liability.

A. PROCEDURAL HISTORY

The legal theories at issue were relatively untested at the time this 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, identifying applicable legal theories, and interviewing prospective plaintiffs. Joint Decl. ¶ 3.

On June 22, 2016, Plaintiff filed the Action seeking damages and injunctive relief arising out of Capital One's purported breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, conversion, and a violation of New York General Business Law § 349 *et seq.* (ECF #1). Plaintiff brought claims on behalf of both a nationwide and New York class of similarly situated individuals who, like her, had been assessed Overdraft Fees on APPSN Transactions. *Id.* On September 2, 2016, Capital One filed a Motion to Dismiss, arguing that its contract permitted the challenged fees. (ECF #18-20). On October 11, 2016, Plaintiff filed an Opposition to the Motion to

Dismiss. (ECF #30). On May 4, 2017, the Court granted the Motion to Dismiss, dismissing Plaintiff's Complaint with prejudice and thereafter entering Final Judgment on May 5, 2017. (ECF #41, 42). On June 2, 2017, Plaintiff filed a Notice of Appeal of the Order dismissing the Action. (ECF #43).

On December 1, 2017, the Second Circuit Court of Appeals reversed the Court's order and remanded the Action for further proceedings. (ECF #45). Thereafter, the Parties commenced discovery and on May 31, 2018, Capital One filed its Answer and Affirmative Defenses. (ECF #66).

The Parties engaged in extensive fact, class, and expert discovery. Joint Decl. ¶ 4. Class Counsel formulated targeted discovery requests and the Parties met and conferred numerous times to address Capital One's objections to those discovery requests. *Id.* The Parties had significant disagreements as to the proper scope of discovery but ultimately worked through those issues so as to avoid judicial intervention. *Id.* Class Counsel negotiated a protective order and order to govern the production of electronically stored information. *Id.* ¶ 5. Class Counsel also spent significant time negotiating ESI search terms and the proper custodians for those search terms. *Id.* ¶. Ultimately, Class Counsel's efforts resulted in Capital One producing approximately 49,285 pages of documents in this case, which Class Counsel reviewed. *Id.* ¶ 6. In addition to those documents, Capital One produced hours of call recordings between Ms. Roberts and Capital One customer service representatives. *Id.* 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. *Id.* ¶ 7. Class Counsel worked extensively with their expert, Art Olsen, to enable him to issue his expert report in this case. *Id.*

Class Counsel also took and defended eight depositions in this case. *Id.* ¶ 8. 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. *Id.* Leading up to those 30(b)(6) depositions, the

Parties negotiated the scope of the 30(b)(6) topics. *Id.* Class Counsel met and conferred with Capital One to address numerous objections. *Id.* Class Counsel took three additional fact witness depositions and deposed Capital One's expert. *Id.* ¶ 9. Class Counsel also defended Mr. Olsen's deposition and defended Ms. Robert's full-day deposition. *Id.* ¶.

On October 18, 2018, the Parties participated in a full day mediation in New York with mediator Simeon Baum, Esq. *Id.* ¶ 10. In advance of the mediation, Capital One provided additional transactional data for Mr. Olsen's review and analysis to estimate class damages. *Id.* Class Counsel also prepared a detailed mediation statement analyzing the risks each side faced in the litigation. The mediation was unsuccessful. *Id.*

On January 25, 2019, Capital One moved for summary judgment. (ECF #96-100). Capital One argued, *inter alia*, that Plaintiff lacked standing because she was not harmed by Capital One's practices; that she could not prove damages for the same reason; and that extrinsic evidence required a contract interpretation in its favor. Responding to Capital One's motion required an extensive review of both the factual record in this case and the legal landscape. Joint Decl. ¶ 11. This Action was the first asserting Plaintiff's specific theory of liability to be evaluated at the summary judgment stage. *Id.* 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. *Id.* On March 15, 2019, Plaintiff filed her opposition and cross-motion for partial summary judgment on the issue of Capital One's liability for assessing the challenged Overdraft Fees. (ECF #105-07). On March 25, 2019, Capital One replied in support of its motion and opposed the cross-motion. (ECF #108-12). Capital One also filed objections to Plaintiff's evidence. (ECF #111). On April 1, 2019, Plaintiff replied in support of her cross-motion and responded to Capital One's objections. (ECF #115-16). On June 25, 2019, the Court held oral argument on those motions and denied them. (ECF #130-31). On July 30, 2019, moved for

reconsideration of its summary judgment motion, which Plaintiff opposed. The Motion for Reconsideration had not been decided at the time of Settlement. (ECF #136-37, 140).

On September 13, 2019, Plaintiff filed her Motion for Class Certification, supported by the extensive discovery taken and a proposed trial plan that analyzed applicable breach of contract law in each of the relevant states to demonstrate manageability. The Motion for Class Certification remained pending when the Parties agreed to settle. (ECF #145-47).

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. Joint Decl. ¶ 12. 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. *Id.* The Parties filed a Notice of Settlement confirming their agreement in principle and the Court stayed all deadlines. (ECF #154, 155).

Thereafter, the Parties began discussing a formal settlement agreement. *Id.* After several weeks of negotiations, the Parties were able to reach agreement on its terms. *Id.* On December 16, 2019, the Parties executed the Settlement Agreement. *See* Exhibit A.

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. *Id.* ¶ 13. Class Counsel then worked with the Settlement Administrator to develop an efficient Notice Program. *Id.*

Thereafter, on December 16, 2019, the Plaintiff filed her Unopposed Motion and Memorandum in Support of Preliminary Approval of the Settlement. (ECF #156-159).

On January 10, 2020, the Court entered an Order Granting Plaintiff's Unopposed Motion for Preliminary Approval (ECF #171).

On April 10, 2020, the Parties moved the Court for an order extending the deadlines in the

Preliminary Approval Order, which the Court granted on April 13, 2020. (ECF #173, 174). Class Counsel then worked with the Settlement Administrator to ensure Notice was timely completed by August 24, 2020. Joint Decl. ¶ 13; Admin. Decl. ¶17.

B. THE SETTLEMENT TERMS

1. The Settlement Class

The Settlement Class is an opt-out class under Fed. R. Civ. P. 23(b)(3), defined as:

> All current and former Capital One customers, other than those with Capital One 360 accounts, who were charged an Overdraft Fee on a debit card or ATM transaction that was authorized into a positive available balance, but settled against a negative available balance, during the Class Period. Excluded from the Settlement Class is Capital One, its parents, subsidiaries, affiliates, officers and directors, all Settlement Class members who make a timely election to be excluded, and all judges assigned to this litigation and their immediate family members.

Agreement ¶47.

Class Period means:

> a. for Settlement Class members who established Accounts in Connecticut, Louisiana, New Jersey, and New York, the period from August 16, 2010, through November 7, 2018;[3]
> b. for Settlement Class members who established Accounts in Virginia, the period from June 22, 2011, through November 7, 2018;
> c. for Settlement Class members who established Accounts in Texas, the period from June 22, 2012, through November 7, 2018; and
> d. for Settlement Class members who established Accounts in Delaware, Maryland, and Washington D.C., the period from June 22, 2013, through November 7, 2018.

Agreement ¶21.

[3] For Settlement Class members who established their Accounts in Connecticut, Louisiana, New Jersey, and New York, the Class Period begins on August 16, 2010, because August 15, 2010 is the end of the Class Period in *Steen v. Cap. One (In re Checking Account Overdraft Litig.)*, No. 1:09-MD-02036-JLK, Doc. # 4168 (S.D. Fla. May 22, 2014), which previously settled similar overdraft litigation against Capital One.

2. Relief for the Benefit of the Settlement Class.

a. Settlement Fund & Settlement Administration Costs

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. Agreement ¶¶50, 53. On January 22, 2020, Capital One fully funded the Escrow Account with the $17,000,000.00. Joint Decl. ¶ 14. The Settlement Fund will be used to pay: (a) 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; and (d) Settlement Administration Costs, if any, above the Capital One Settlement Administration Costs Cap of $750,000.00.[4] In the event funds remain after the initial distribution to Settlement Class Members, as a result of uncashed checks, the Settlement Fund will also be used to 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, as explained below. *Id.* ¶¶53, 81.

Settlement Class Members do not have to submit claims or take any other affirmative step to receive Settlement relief. Instead, as soon as practicable, but no later than 90 days after the Effective Date, Capital One and the Settlement Administrator will distribute the Net Settlement Fund. Agreement ¶75. Current Account Holders will automatically receive a credit to their Accounts and notification of the credit, or by checks mailed by the Settlement Administrator. *Id.* ¶76. Past Account Holders will exclusively receive check payments. *Id.* ¶79. Any uncashed or returned checks will remain in the Settlement Fund, during which time the Settlement Administrator will make reasonable efforts to deliver Settlement Class Member Payments. *Id.* ¶ 80.

[4] As of the dates of the filing of this Motion, the Settlement Administrator has confirmed that Settlement Administration Costs are expected to be less than the Settlement Administration Costs Cap.

All Settlement Class Members entitled to a Settlement Class Member Payment will receive a *pro rata* distribution from the Net Settlement Fund based on the number of Relevant Overdraft Fees during the Class Period. *Id.* ¶¶71.c., 74. Because each Settlement Class Member Payment depends on his or her specific Account activity and the number of Settlement Class Members, it is impossible to determine each Settlement Class Member's likely recovery until after this calculation is done.

If funds remain in the Settlement Fund after the initial distribution to Settlement Class Members, Capital One shall be reimbursed for the Settlement Administration Costs it paid. *Id.* ¶81.a. Thereafter, if funds remain, to the extent feasible, a second distribution will occur to those Settlement Class Members that were paid or credited with a Settlement Class Member Payment in the first distribution. *Id.* ¶81.b. All Settlement Administration Costs of a second distribution will be paid out of the Settlement Fund. *Id.* ¶81.d. If a second distribution is not feasible, or if funds remain after a second distribution, those funds shall be distributed to a *cy pres* recipient, proposed by the Parties and to be approved by the Court, that works to promote financial literacy. *Id.* ¶81.c.

b. Practice Change – Modified Disclosures

On November 7, 2018, after this Action had been initiated, Capital One voluntarily modified its disclosures to better inform its account holders 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. Joint Decl. ¶ 16. 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. *Id.* Class Counsel is not seeking attorneys' fees in connection with the substantial savings related to this practice change. *Id.*

3. Releases.

In exchange for the benefits conferred by the Settlement, all Settlement Class Members will be deemed to have released Capital One from claims relating to the subject matter of the Action. The

Releases are set forth in Section XII of the Agreement.

4. The Notice Program.

The Notice Program was completed in accordance with this Court's instructions in the Preliminary Approval Order. Joint Decl. ¶ 34. The Court approved BrownGreer PLC as the Settlement Administrator. *Id.* ¶ 35. 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. *Id.* Each facet of the Notice Program was timely and properly accomplished. Admin. Decl. ¶ 24.

Following Preliminary Approval, the Settlement Administrator received the data files identifying the Settlement Class members' names, last known addresses and email addresses. *Id.* ¶ 10. Thereafter, on July 13, 2020, 191,628 emails were sent to Settlement Class members for whom Capital One maintained addresses. *Id.* ¶ 14. On July 20, 2020, 142,660 postcards were sent to Settlement Class members with (1) no facially valid email address, or (2) an undeliverable email after multiple attempts. *Id.* ¶ 16-17. On August 24, 2020, the Settlement Administrator implemented multiple additional Postcard Notice mailings to: (1) Settlement Class members whose initial Postcard Notices returned as undeliverable but for whom the USPS provided a forwarding address; and (2) Settlement Class members whose initial Postcard Notices returned as undeliverable without a forwarding address but for whom it was able to obtain an alternative mailing address through research using LexisNexis's commercial compendium of domestic addresses; and (3) the Account Holders of the Unreachable-by-Email Accounts, completing the Mailed Notice. *Id.* ¶17. In addition, the Settlement Website, with a Long Form Notice and other important Settlement-related filings, was established on July 13, 2020.

Id. ¶ 7. The website allowed Settlement Class members to obtain detailed information about the Action and Settlement. *Id.* As of September 1, 2020, the Settlement Website has been visited 5,028 times and visitors have downloaded documents from the Settlement Website 3,279 total times. *Id.* The Notice Program was extremely effective as 98.6% of Settlement Class members received individual notice. *Id.* ¶ 18.

The Notice Program 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. Joint Decl. ¶ 36. 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. Joint Decl. ¶ 37. The Notice Program constituted sufficient notice to all persons entitled to notice, and satisfied all applicable requirements of law, including Rule 23 and constitutional due process. Admin. Decl. ¶23.

5. Class Representative's Service Award.

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 that she will be entitled to receive as a Settlement Class Member. Agreement ¶91. 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. Joint Decl. ¶ 39. 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. *Id.* ¶ 40. 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 she was willing to do so is the only reason a settlement was possible here. *Id.*

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. *Id.* ¶ 41. In so doing, the Plaintiff was integral to the case. *Id.*

6. Attorneys' Fees and Costs.

Class Counsel has not been paid for their extensive efforts or reimbursed for litigation costs incurred. 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. Agreement ¶87; Joint Decl. ¶ 42. The Notice Program informed the Settlement Class that Class Counsel was entitled to request fees of that percentage, as well as reimbursement of costs. *Id.* As of the date of the filing of this Motion, no Settlement Class Member has objected to the amount of fees Class Counsel is entitled to request. *Id.* ¶ 43. Notwithstanding, Class Counsel is only seeking 30% of the Settlement Fund as fair and reasonable fee for their efforts. *Id.* ¶ 42. The Parties negotiated and reached agreement regarding fees and costs only after agreeing on all material terms of the

Settlement. Agreement ¶ 92; Joint Decl. ¶ 45. 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 behalf of the Settlement Class.

III. ARGUMENT

A. THE LEGAL STANDARD FOR FINAL APPROVAL.

Courts, including the Second Circuit, have emphasized the "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores v. Visa U.S.A.*, 396 F.3d 96, 116 (2d Cir. 2005). Fed. R. Civ. P. 23(e) requires court approval before a class action can be dismissed via a settlement. "In order to grant final approval of a proposed settlement under Federal Rule of Civil Procedure 23(e)(2), the Court must find 'that it is fair, reasonable, and adequate.' The Court considers a number of factors laid out in Rule 23(e)(2), as well as in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), to determine whether this standard has been met." *In re GSE Bonds Antitrust Litig.*, No. 19-cv-1704 (JSR), 2020 U.S. Dist. LEXIS 104842, at *10 (S.D.N.Y. June 16, 2020).

At the final approval stage, Rule 23(e)(2) requires courts to consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3);[5] and
> (D) the proposal treats class members equitably relative to each other.

To evaluate the Settlement's fairness, the Court must examine its procedural fairness under Rule 23(e)(2)(A)-(B) and substantive fairness under 23(e)(2)(C)-(D). *Christine Asia Co. v. Jack Yun Ma*, No. 1:15-md-02631 (CM) (SDA), 2019 U.S. Dist. LEXIS 179836, at *38 (S.D.N.Y. Oct. 16, 2019).

[5] There is no such agreement to be identified. The only agreement is the Settlement Agreement.

Both are clearly satisfied here.

B. THIS SETTLEMENT SATISFIES THE CRITERIA FOR FINAL APPROVAL.

The relevant factors weigh in favor of Final Approval. First, 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, making it procedurally fair. Joint Decl. ¶ 17. Furthermore, a review of the substantive factors related to the Settlement's fairness, adequacy and reasonableness demonstrates that Final Approval is warranted. Any settlement requires the parties to balance the claims' merits and the defenses asserted against the attendant risks of continued litigation and delay. Plaintiff believes she asserted meritorious claims and would prevail if this matter proceeded to trial. Capital One argues the claims are unfounded, denies any potential liability, and up to the point of settlement indicated a willingness to litigate those claims vigorously. 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. *Id.* ¶ 18.

1. This Settlement Is the Product of Good Faith, Informed and Arm's-Length Negotiations.

The Settlement in this case is the result of intensive, arm's-length negotiations between experienced attorneys familiar with class action litigation and with the legal and factual issues of this Action. *Id.* ¶ 17. In assessing procedural fairness, courts examine the negotiating process leading to the settlement. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). A strong initial presumption of fairness attaches to the proposed settlement if, as here, the settlement is reached after discovery by experienced counsel and after arm's length negotiations. *Wal-Mart Stores, Inc.*, 396 F.3d at 116.

Furthermore, Class Counsel is particularly experienced in the litigation, certification, trial, and settlement of nationwide class action cases in the financial services industry. Joint Decl. ¶ 19. 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. *Id.* Class Counsel conducted a thorough investigation and analysis of Plaintiff's claims and engaged in extensive motion practice throughout this Action and an appeal. *Id.* Class Counsel reviewed 49,285 pages of Capital One's documents and data and took and defended eight depositions. *Id.* ¶¶ 6, 8. Class Counsel engaged a data expert to analyze Capital One's sample data to determine whether a class could be ascertained and to support Plaintiff's Motion for Class Certification. *Id.* ¶ 7. Class Counsel was able to accurately evaluate the strengths and weakness of Plaintiff's claims. *Id.* ¶ 18. Finally, Class Counsel used an experienced mediator to achieve this Settlement. This factor, too, supports Final Approval.

2. The Facts Support a Determination That the Settlement Is Fair, Adequate, and Reasonable.

A review of the relevant factors supports a determination that Settlement should be finally approved under Rule 23(e)(2). The Second Circuit has identified nine factors (the *Grinnell* factors) that should be considered in determining the substantive fairness of the Settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) *abrogated on other grounds by Goldberger v. Integrated Res., Inc.,* 209 F.3d 43 (2d Cir. 2000). In applying these factors, "not every factor must weigh in favor of [the] settlement, rather the court should consider the totality of these factors in light of the particular circumstances." *Christine Asia Co.*, 2019 U.S. Dist. LEXIS 179836, at *36 (alteration in original) (quotation omitted). As applied here, the *Grinnell* factors weigh heavily in favor of Final

Approval.[6] These factors remain applicable even after the 2018 amendment of Rule 23(e), which clarified the factors quoted above. *Christine Asia Co.*, 2019 U.S. Dist. LEXIS 179836, at *37 ("The Court understands the new Rule 23(e) factors to add to, rather than displace, the *Grinnell* factors.").

a. The Risks of Establishing Liability and Damages Demonstrate That This Settlement is Within the Range of Reasonableness in Light of All Attendant Risks of Litigation and Relative to the Best Possible Recovery

"Courts typically collapse into this inquiry the final two *Grinnell* factors: 'the range of reasonableness of the settlement fund in light of the best possible recovery' and 'the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.'" *Guevoura Fund Ltd.*, 2019 U.S. Dist. LEXIS 218116, at *28 n.1 (internal citations omitted). The Court need only decide if the Settlement falls within a "range of reasonableness" which "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

The $17,000,000.00 Settlement Fund and $750,000.00 in Settlement Administration Costs is an excellent result given the Action's complexity and the significant litigation barriers looming without settlement. The Settlement Fund represents approximately 34% of the most likely recoverable damages for class members. While Plaintiff's best-case scenario is a 100% refund of Relevant Overdraft Fees, there was a substantial risk that the Plaintiff would not achieve such a result. Early

[6] The sole *Grinnell* factor that does not favor settlement is the ability of the defendant to withstand a larger settlement; however, this standing alone is not reason to reject the Settlement. *In re Sinus Buster Prods. Consumer Litig.*, 2014 U.S. Dist. LEXIS 158415, at *26 (E.D.N.Y. Nov. 10, 2014) (collecting cases); *Guevoura Fund Ltd. v. Sillerman*, No. 1:15-cv-07192-CM, 2019 U.S. Dist. LEXIS 218116, at *26-27 (S.D.N.Y. Dec. 18, 2019) ("[T]he ability of defendants to pay more, on its own, does not render the settlement unfair. Rather, the reasonableness of the Settlement is better analyzed in light of the amount of the Settlement compared to the substantial risks Lead Plaintiff faced in proving liability and damages, and not on whether the Director Defendants could have paid more.") (quotations omitted); *accord D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001).

on, Capital One obtained dismissal of the Action. Although the dismissal was reversed on appeal, this Court's dismissal shows that reasonable minds can differ as to the merits of Plaintiff's claims. While Capital One's motion for summary judgment was denied, Plaintiff's cross-motion for summary judgment was also denied. Plaintiff's cross-motion sought a liability-judgment, emphasizing there was no admissible or relevant extrinsic evidence to support contract construction and thus the *contra proferentem* cannon should apply to construe the contract in her favor. The Court's denial meant extrinsic evidence may have been admissible at trial. When the summary judgment hearing concluded, the Court commented that Plaintiff faced an uphill battle at class certification. (ECF # 131 at 33). While Plaintiff, of course, disagreed and extensively briefed her class certification papers, the Court's comment shows the significant risk Plaintiff faced at class certification and beyond. Thus, although Plaintiff believes she has a strong chance on the merits, it is possible that Plaintiff may lose at trial. Joint Decl. ¶ 20.

Based on the data analysis, the Parties estimate that the Settlement Class's most likely recoverable damages at trial would have been $ 50,517,226. Olsen Decl. ¶14. As stated above, the Settlement provides the Settlement Class 34% of their most likely damages, without further attendant litigation risks.[7] Joint Decl. ¶ 21. That is a significant achievement and notably in-line with other overdraft fee class settlements. "The prompt, guaranteed payment of the settlement money increases the settlement's value in comparison to some speculative payment of a hypothetically larger amount years down the road." *Guevoura Fund Ltd.*, 2019 U.S. Dist. LEXIS 218116, at *30 (internal citation omitted).

Moreover, Plaintiff and Class Counsel are confident their case is strong, but they are also

[7]34% is based upon the $17,000,000.00 Settlement Fund. When considering the Settlement Administration Costs that Capital One has agreed to pay, the total recovery for the Settlement Class increases to 35%. Such costs are often borne by the Settlement Class.

pragmatic in their awareness of Capital One's various defenses, and the risks inherent to litigation despite defeating Capital One's motion for summary judgment, as well as establishing both liability and damages. This is a crucial factor favoring settlement, as Courts routinely approve settlements where Plaintiff would have faced significant legal and factual obstacles to establishing liability. *Thompson v. Metropolitan Life Ins. Co.,* 216 F.R.D. 55, 63 (S.D.N.Y. 2003). Indeed, "[l]itigation inherently involves risks." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997). "In analyzing these factors, the adequacy of the amount offered in settlement must be judged 'not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case.'" *Guevoura Fund Ltd*, 2019 U.S. Dist. LEXIS 218116, at *28.[8]

This Settlement either meets or exceeds the vast majority of court-approved recoveries in overdraft fee class actions nationwide. *See, e.g., Bodnar v. Bank of Am., N.A.*, No. 14-3224, 2016 U.S. Dist. LEXIS 121506, at *12 (E.D. Pa. Aug. 4, 2016) (cash fund of between 13 and 48 percent of the maximum amount of damages they may have been able to secure at trial, and describing such a result as a "significant achievement" and outstanding"); *In re Checking Account Overdraft Litig.*, No. l:09-MD-02036-JLK, 2015 U.S. Dist. LEXIS 193690, at *37 (S.D. Fla. May 22, 2015) ($31,767,200 settlement representing approximately 35% of the most probable aggregate damages); *Hawthorne v. Umpqua Bank*, No. 11-cv-06700-JST, 2015 U.S. Dist. LEXIS 56370, at *9 (N.D. Cal. Apr. 28, 2015) ($2.9 million settlement that was approximately 38% of damages); *In re Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2013 U.S. Dist. LEXIS 190562, at *3-4 (S.D. Fla. Aug. 2, 2013) ($4,000,000 settlement that was 25% of the most probable recoverable damages); *Mosser v. TD Bank, N.A.*, No. 1:09-MD-02036-JLK, 2013 U.S. Dist. LEXIS 187627, at *83-84 (S.D. Fla. Mar. 18, 2013) ($62,000,000

[8] *See also In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 461 (S.D.N.Y. November 23, 2004) (noting that "the certainty of [a] settlement amount has to be judged in [the] context of the legal and practical obstacles to obtaining a large recovery").

settlement that was 42% of the most probable damages, praised as an "outstanding result"); *Torres v. Bank of Am.*, 830 F. Supp. 2d 1330, 1346 (S.D. Fla. 2011) ($410 million settlement that was between 9 to 45 percent of the total potential damages); *Trombley v. Nat'l City Bank*, 826 F. Supp. 2d 179, 198 (D.D.C. 2011) (overdraft settlement with recovery range of 12 to 30 percent as "within the realm of reasonableness"); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 583 (N.D. Ill. 2011) (settlement representing 10% of potential recovery).

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

Finally, as discussed above, the Settlement is the product of arm's-length negotiations conducted by the Parties' experienced counsel with the assistance of a well-respected mediator through multiple in-person mediation sessions at different points in the litigation. *Id.* ¶¶ 2, 10, 12. 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. Joint Decl. ¶ 23. 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. *Id.*

b. The Reaction of Settlement Class Members to the Proposed Settlement

The Reaction of the Settlement Class has been overwhelmingly positive. Out of approximately 339,048 Settlement Class member Accounts, only five opted-out by the day this Motion was filed, and no objections have been filed. Admin. Decl. ¶ 19-20. Following the Opt-Out Period and objection deadline, Class Counsel will file an updated declaration from the Settlement Administrator advising the Court as to any additional opt-outs or objections.

c. The Expense, Complexity, and Likely Duration of Further Litigation Favor Settlement

The traditional means for handling claims like those at issue here would tax the court system, require a massive expenditure of public and private resources, and, given the relatively small value of the claims of the individual Settlement Class Members, is impracticable. Indeed, the complexity, expense, and likely duration of litigation is critical in evaluating the reasonableness of a class action settlement. *Charron v. Weiner,* 731 F.3d 241, 247 (2d Cir. 2013). Settlements are favored in class actions, which in general have a well-deserved reputation as being most complex. *Christine Asia Co.*, 2019 U.S. Dist. LEXIS 179836, at *34-35.

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.[9] Joint Decl. ¶ 24.

Here, approval of the Settlement will mean a present recovery for Settlement Class Members. While Plaintiff believes that the Action has merit and that the class ultimately would prevail at trial, continued litigation would last for an extended period before any judgment might be entered. Settling now with the benefit of Capital One's analysis of Settlement Class membership provides immediate and substantial benefits to holders of 339,048 Settlement Class member Accounts, avoiding the significant costs and risks of continuing litigation, including considerable fees incurred by experts. This factor militates heavily in favor of the Settlement. *Guippone v. BH S&B Holdings LLC*, 2016 U.S. Dist. LEXIS 134899, at *20-21 (S.D.N.Y. Sep. 23, 2016). Settling now on such favorable terms is, therefore, in the Settlement Class's best interests. *See In re Signet Jewelers Ltd. Sec. Litig.*, Civil Action No.

[9] *See United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 856 (2d Cir. 1998) (noting that "a principal function of a trial judge is to foster an atmosphere of open discussion among the parties' attorneys and representatives so that litigation may be settled promptly and fairly so as to avoid the uncertainty, expense and delay inherent in a trial").

1:16-cv-06728-CM-SDA, 2020 U.S. Dist. LEXIS 128998, at *10 (S.D.N.Y. July 21, 2020). Therefore, the proposed Settlement is the best vehicle for Settlement Class Members to receive the relief to which they believe they are entitled in a prompt and efficient manner.

d. The Risk of Maintaining Class Action Status Throughout Trial Favors Settlement

Whether the Action would be tried as a class action is also relevant in assessing the Settlement's fairness. *Guevoura Fund Ltd.*, 2019 U.S. Dist. LEXIS 218116, at *26. As the Court had not yet certified a class when the Agreement was executed, it is unclear whether certification would have been granted. This is especially true given the Court's comment that Plaintiff could face an uphill battle with class certification. (ECF No. 131 at 33). The difficulty of certifying a class favors approving the Settlement. *Guippone*, 2016 U.S. Dist. LEXIS 134899, at *19.[10] Although Capital One had not yet responded to Plaintiff's Motion for Class Certification, its pre-motion letter opposing class certification showed Capital One intended to vigorously oppose the motion and argue against numerosity, commonality, typicality, adequacy and predominance, as well as argue lack of jurisdiction over the claims of out-of-state putative class members. (ECF #138). Further, this litigation activity would have required the expenditure of significant resources. Joint Decl. ¶24. Accordingly, this factor weighs in favor of Final Approval.

Further, at the time of Settlement, Capital One's Motion for Reconsideration remained pending. Obviously, had the Court reconsidered its Order on Capital One's motion for summary judgment, the putative class claims would have been in jeopardy. And class certification was no sure thing in the Court's view.

[10] *See also Bellifemine v. Sanofi-Aventis U.S. LLC*, 2010 WL 3119374, at *4 (S.D.N.Y. Aug. 6, 2010) (there "is no assurance of obtaining class certification through trial, because a court can reevaluate the appropriateness of certification at any time during the proceedings.").

e. The Extent of Discovery Completed and the Stage of the Proceedings Favor Settlement

This *Grinnell* factor requires that the parties have engaged in sufficient investigation of the facts "such that counsel possessed a record sufficient to permit evaluation of the merits of Plaintiffs claims, the strengths of the defenses asserted by Defendants, and the value of Plaintiffs' causes of action for purposes of settlement." *Christine Asia Co.*, 2019 U.S. Dist. LEXIS 179836, at *43. Further, "a sufficient factual investigation must have been conducted to afford the Court the opportunity to 'intelligently make . . . an appraisal' of the Settlement." *Ferrick v. Spotify USA Inc.*, No. 16-cv-8412 (AJN), 2018 U.S. Dist. LEXIS 86083, at *31 (S.D.N.Y. May 22, 2018) (alteration in original) (quoting *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000)). Here, fact discovery had been completed with respect to the Plaintiff. Very little discovery (only that related to classwide membership and damages) remained pending. The Parties served written discovery, Class Counsel reviewed 49,285 pages of documents and bank data, and the Parties took eight depositions including Plaintiff's, multiple depositions of Capital One's corporate representatives, key bank employees, and the Parties' experts. Joint Decl. ¶¶ 6-9. Plaintiff therefore settled the Action with the benefit of extensive fact, expert and class discovery.

Given the stage of litigation when the Action settled, the Parties are well aware of the relative strengths and weaknesses of their respective positions, having dealt with the appeal, extensive discovery, unsuccessful summary judgment efforts, Plaintiff moving for class certification, and two mediations. The extensive factual and legal analysis along the way fully inform the Settlement negotiations.

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. *Id.* ¶28. Accordingly, this favor also weights in favor of Final Approval.

f. Effectiveness of Distributing Relief, the Release and Equitable Treatment of Class Members Favor Approval

Consideration under the Rule 23(e)(2) factor, which asks whether Class members are treated equally relative to each other, also favors approval. Consideration here "could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. By distributing Settlement proceeds on a pro rata basis, Settlement Class Members will be treated equitably. *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667 (S.D.N.Y. 2015) (finding that the pro rata distribution scheme is sufficiently equitable).

Further, the scope of the Releases applies uniformly to Settlement Class Members and does not affect the apportionment of the relief to Settlement Class Members. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. at 47. The Releases are not a general release of claims against Capital One and are instead tailored to the Released Claims as expressly defined in the Agreement. Agreement ¶ 82. Accordingly, this factor also weighs in favor of granting Final Approval.

g. The Terms of The Proposed Award of Attorneys' Fees Favor Approval

Class Counsel has not been paid for their extensive efforts or reimbursed for litigation costs incurred. Under the Agreement, Class Counsel are entitled to request, and Capital One does 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. Agreement ¶ 87. Notwithstanding, Class Counsel is seeking only 30% of the Settlement Fund as compensation for its services. The Parties negotiated and reached agreement regarding fees and costs only after agreeing on all material terms of the Settlement. Joint Decl. ¶ 45. Upon consideration of the detailed analysis of Class Counsel's application *infra*, this Court should find that this factor weighs in favor of Final Approval.

C. NOTICE TO THE SETTLEMENT CLASS WAS ADEQUATE AND SATISFIED RULE 23 AND DUE PROCESS

In addition to having personal jurisdiction over Plaintiff, the Court also has personal jurisdiction over all members of the Settlement Class because they received the requisite notice and due process. *Wal-Mart Stores, Inc.*, 396 F.3d at 114 (adequate notice must be fairly understood by the average class member, fairly apprise prospective class members of the proposed settlement terms and the options open to them, and will satisfy due process when it informs class members of the allocation of attorney's fees and provide the final approval hearing date, time and place.); *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118 (S.D.N.Y. 2001) ("Because adequate notice has been disseminated and all potential Class Members have been given the opportunity to opt out of this class action, the Court has personal jurisdiction over all Class Members.").

As described more fully above, the Notice Program was designed to provide the best notice practicable and was tailored to take advantage of the information Capital One has available about the Settlement Class. Joint Decl. ¶ 37. It was reasonably calculated under the circumstances to apprise Settlement Class members of: the material terms of the Settlement; the deadline for them to exclude themselves from the Settlement Class; the deadline to object to the Settlement; the Final Approval Hearing date; and the Settlement Website address to access the Agreement and other related documents and information. Joint Decl. ¶ 36. The Notice Program constituted sufficient notice to all persons entitled to notice and satisfied all applicable requirements of law, including Fed. R. Civ. P. 23 and constitutional due process. *Id.*; Admin. Decl. ¶ 23. Again, it effectively reached 98.6% of Settlement Class members. Admin. Decl. ¶ 18.

D. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE.

In its Preliminary Approval Order, the Court conditionally certified the Settlement Class for Settlement purposes. (ECF # 171). Now, for settlement purposes, Plaintiff respectfully requests that the Court finally certify the Settlement Class. As explained at Preliminary Approval certification for

settlement purposes is appropriate under Fed. R. Civ. P. 23(a) and (b)(3) because:

(1) the Settlement Class of holders of 339,048 Capital One Accounts is so numerous that joinder of all members is impracticable, Joint Decl. ¶29;

(2) 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, *Id.* ¶ 30;

(3) 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, *Id.* ¶ 31; and

(4) 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 and 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. *Id.* at *Id.* ¶ 32; *See* Individual Counsel Declarations.

Further, resolution of a few hundred thousand claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication. *See* Fed. R. Civ. P. 23(b)(3).[11] For these reasons, the Court should certify the Settlement Class.

E. NOTICE PURSUANT TO THE CLASS ACTION FAIRNESS ACT (CAFA)

CAFA requires a settling defendant to give notice of a proposed class settlement to appropriate

[11] "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

state and federal officials. 28 U.S.C. § 1715(b). The CAFA Notice of Proposed Settlement must supply the information and documents set forth in 28 U.S.C. § 1715(b)(1)-(8). Capital One served the CAFA Notice, along with a CD containing the documents described in Section 1715(b). *See* ECF # 172. The CAFA notice protects class members from a settlement that may be deemed unfair or inconsistent with regulatory policies and from class action abuse. No regulatory authorities have objected to date.

F. APPLICATION FOR ATTORNEYS' FEES

In this common fund Settlement, the Notice provides that Class Counsel will request an attorneys' fee of up to 35% of the Settlement Fund. Agreement ¶ 87. However, Class Counsel has chosen to seek attorneys' fees in the amount of 30% of the Settlement Fund. Joint Decl. ¶ 42. As of the filing this Motion, there are zero objections to the 35% fee amount, let alone the reduced 30% fee Class Counsel actually requests. *Id.* ¶ 44. The Parties negotiated and reached agreement regarding attorneys' fees only after reaching agreement on all other material terms of this Settlement. *Id.* ¶ 45. Class Counsel's application is subject to this Court's approval to compensate them for their time, risk, and expenses incurred pursuing claims for the Settlement Class. While discretionary, to the extent that the Court wishes to perform a lodestar cross-check, it should be noted that there is a 2.22- lodestar multiplier as a result of the hard work Class Counsel performed. *Id.* ¶ 48. For the reasons stated below, Class Counsel's application should be approved.

1. The Standard for Awarding Attorneys' Fees to Class Counsel

In settlements such as this one involving a common fund, courts in this Circuit typically look at the percentage-of-the-fund method, with a lodestar crosscheck. *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). The "'percentage of the fund' method, [ ] is the trend in this Circuit." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 348 (S.D.N.Y. 2014) (Schofield, J.) (citing *Wal-Mart Stores*, 396 F.3d at 121). Class Counsel is entitled to "a reasonable fee – set by the court – to be taken from the fund." *Goldberger*, 209 F.3d 50; *see also* Fed. R. Civ. P. 23(h). *See also Fresno Cty. Emps.'s*

Ret. Ass'n v. Isaacson/Weaver Family Tr., 925 F.3d 63, 68 (2d Cir. 2019) ("The common-fund doctrine is . . . rooted in the courts' 'historic power of equity to permit' a person who secures a fund for the benefit of others to collect a fee directly from the fund." (citation omitted)).

In addition to being far simpler, awarding a percentage of the fund is preferred and "'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.'" *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d at 348 (quoting *Wal-Mart Stores*, Inc., 396 F.3d at 121). This method further incentivizes class counsel to obtain the largest possible recovery in the most efficient manner possible. *Id.* "The lodestar method, on the other hand, disincentivizes early settlements, tempts lawyers to run up their hours, and 'compels district courts to engage in a gimlet-eyed review of line-item fee audits.'" *Raniere v. Citigroup Inc.*, 310 F.R.D. 211, 220 (S.D.N.Y. 2015) (citing *Wal-Mart Stores, Inc.*, 396 F.3d at 121). *See also Torres v. Gristede's Operating Corp.*, 519 F. App'x 1, 3 (2d Cir. 2013) (trial courts evaluating fee requests "need not, and indeed should not, become green-eyeshade accountants").

The percentage method is an appropriate method of fee recovery here because, among other things, it aligns Class Counsel's interest in being paid a fair fee with the Settlement Class's interests. It achieves the maximum recovery in the shortest amount of time required under the circumstances, is supported by public policy, has been recognized as appropriate by the Supreme Court for cases of this nature, and represents the current trend in the Second Circuit.

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*: (1) the time and labor expended by counsel, (2) the magnitude of the litigation, (3) the risk of the litigation, (4) the quality of the representation, (5) the requested fee in relation to the settlement, and (6) public policy considerations. 209 F.3d at 50. In fact, when considering the Settlement Administration Costs, the requested fee is actually only 28.85% of the overall value of the Settlement. Joint Decl. ¶ 46.

2. *Goldberger* Factors

a. The Magnitude and Complexities of Litigation

The magnitude and complexity of the litigation weighs in favor of approval. *Raniere*, 310 F.R.D. at 221 This Action is complex presenting novel factual and legal issues, which have yet to be tried in this Court or others. *Id.*; *see also* Joint Decl. ¶ 25. 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. Factually, as well, the case was difficult. The case involved the laborious review of back-end transactional data from Capital One, a review of 49,285 documents from Capital One, and extensive briefing from both Parties at summary judgment. 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. *Id.* 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. *Id.* ¶ 27.

b. Risks of Litigation

The Second Circuit has historically labeled the risk of success as "perhaps the foremost factor to be considered in determining whether to award an enhancement." *Goldberger*, 209 F.3d at 54. Courts recognize that regardless of the perceived strength of a plaintiff's case, liability is no sure thing. *Wal-Mart Stores, Inc.*, 396 F.3d at 118.

As stated above, 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. Joint Decl. ¶ 33. Nevertheless, Class Counsel proceeded with the appeal. As noted above, 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. *Id.* Thus, Class Counsel certainly invested extensive time and costs with

no guarantee of success.

c. Quality of Representation

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. *Id.* ¶ 32. Counsel used their experience to obtain a great result for the Settlement Class. "[T]he quality of representation is best measured by results, and such results may be calculated by comparing 'the extent of possible recovery with the amount of actual verdict or settlement.'" *Goldberger*, 209 F.3d at 55 (citation omitted). Here the Settlement representing 34% of the most likely recoverable damages is an excellent result. Thus, the Court should easily find counsel achieved success.

"The quality of opposing counsel is also important in evaluating the quality of class counsel's work." *See Anyoku v. World Airways (In re Nig. Charter Flights Litig.)*, No. MD 2004-1613 (RJD)(MDG), 2011 U.S. Dist. LEXIS 155180, *28 (E.D.N.Y. Aug. 25, 2011). Capital One is represented by James McGuire, Esq., currently with Buckley LLP and earlier with another prominent national firm, Morrison & Foerster LLP, when the Settlement was reached. *Id.* He has defended numerous financial institutions in class actions. *Id.* Counsel have professionally and zealously represented the Parties. *Id.*

d. Requested Fee in Relation to the Settlement

The $5,100,000.00 requested fee – which is 30% of the Settlement Fund - is reasonable in light of the work performed, the results obtained, and falls within the range of common fund awards in the Second Circuit. The attorneys' fee requested is lower than what would be requested in individual contingent fee litigation, which generally start at 33.33% of any recovery and frequently go up to 40% or more. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 830 (2010) (the attorneys' fees generally awarded to class action lawyers are lower than what "contingency-fee lawyers receive in individual litigation, which are usually at least 33 percent."); see also Joint Decl. at ¶ 47. As discussed above, courts in this circuit have found an award

of one-third of a class settlement as the benchmark to be fair, reasonable, and within the range of what is normally awarded for a class settlement. *See Guevoura Fund Ltd.*, 2019 U.S. Dist. LEXIS 218116, at *46 (compiling cases awarding 33% for settlements between $6,750,000 and $21,000,000, and noting reasonable paying clients typically pay one-third pursuant to contingent fee agreements). *See also Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, 2009 U.S. Dist. LEXIS 27899, at *16 (S.D.N.Y. Mar. 31, 2009) ("Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit."). The most common fee percentages awarded in common fund class actions are 25%, 30% and 33%. *See* Fitzpatrick, 7 J. Empirical Legal Stud. at 833 (Figure 6). Here, the requested fee, 30% of the Settlement Fund, is within the range of acceptable attorneys' fees in Second Circuit cases and is common in overdraft fee litigation. Courts regularly award fees in excess of 30% when awarding attorneys' fees in similar financial services class action settlements. The following table depicts these settlements nationwide, all of which resulted in fee awards at or above the 30% that Class Counsel requests here:

Overdraft Fee Case Name	**Percentage-of-the-Fund Awarded**
Lopez v. JPMorgan Chase Bank, N.A., 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
Jacobs v. Huntington Bancshares Inc. 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
Nelson v. Rabobank, N.A., No. RIC 1101391 (Cal. Supr.)	**35.2%** ($750k fee includes % of practice changes)
Molina v. Intrust Bank, N.A., No. 10-CV-3686 (Dist. Ct. Ks.)	**33%** of $2.7 million
Hawkins et al v. First Tenn. Bank, N.A. (Cir. Ct. Tenn.)	**35%** of $16.75 million
Swift v BancorpSouth, No. 1:10-cv-00090-GRJ (N.D. Fla.)	**35%** of $24 million
Casto v. City National Bank, N.A., No. 10-C-1089 (Cir. Ct. W.Va.)	**33%** of $3 million
Schulte v. Fifth Third Bank, No. 09-cv-6655 (N.D. Ill.)	**33%** of $9.5 million
Johnson v. Community Bank, N.A., No. 12-cv-01405-RDM (M.D. Pa.)	**33%** of $2.5 million
Bodnar v. Bank of America, No. 5:14-cv-03224-EGS (E.D. Pa.)	**33%** of $27 million

Harris v. Associated Bank, N.A., No. 1:09-MD-02036-JLK (S.D. Fla.)	**30%** of $13 million
Duval v. Citizens Bank Fin. Group, Inc., No. 1:09-MD-02036-JLK (S.D. Fla.)	**30%** of $137.5 million
Mosser v. TD Bank, N.A., No. 1:09-MD-02036-JLK (S.D. Fla.)	**30%** of $62 million
Anderson v. Compass Bank No. 1:09-MD-02036-JLK (S.D. Fla.)	**30%** of $11.5 million
Casayuran v. PNC Bank, N.A., No. 1:09-MD-02036-JLK (S.D. Fla.)	**30%** of $90 million
Orallo v. Bank of the West, No. 1:09-MD-02036 JLK (S.D. Fla.)	**30%** of $18 million
Wolfgeher v. Commerce Bank, N.A., No. 1:09-MD-02036-JLK (S.D. Fla.)	**30%** of value of settlement, which includes 30% of $18.3 million cash and 30% of value of practice changes
McKinley v. Great Western Bank, No. 1:09-MD-02036-JLK (S.D. Fla.)	**30%** of $2.2 million
Eno v. M & I Marshall & Ilsley Bank, No. 1:09-MD-02036-JLK (S.D. Fla.)	**30%** of $4 million
Larsen v. Union Bank, No. 1:09-MD-02036-JLK (S.D. Fla.)	**30%** of $35 million
Tornes v. Bank of America, N.A., No. 1:09-MD-02036-JLK (S.D. Fla.)	**30%** of $410 million
Case v. Bank of Oklahoma, N.A., No. 1:09-MD-02036-JLK (S.D. Fla.)	**30%** of $19 million
Allen v. UMB Bank, No. 1016-CV34791 (Cir. Ct. Mo.)	**30%** of $7.8 million
Jones v. United Bank, (Jackson, WV)	**30%** of $3.3 million
Higgins v. Pinnacle Bank, (Tenn. St. Ct.)	**30%** of $1.25 million
Beason v. Liberty Bank, (Ark. St. Ct.)	**30%** of $325k

As the requested fee is clearly in line with other similar overdraft litigation around the nation that settled for a similar amount, the fee requested is reasonable.

e. Public Policy Considerations

Where relatively small claims can only be prosecuted through aggregate litigation, "private attorneys general" play an important role. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980). Attorneys who fill the private attorney general role must be adequately compensated for their efforts. *Id. See also Wal-Mart Stores*, 396 F.3d 96 (policy issue in evaluating a fee request is that fees "must . . . serve as an inducement for lawyers to make similar efforts in the future"). This and the other *Goldberger* factors support approval of the attorneys' fees requested by Class Counsel.

f. The Time and Labor Expended by Counsel and Lodestar Cross-Check

"The last Goldberger factor to consider is the time and labor expended by counsel, which is essentially what the lodestar method does by assessing the value of attorney hours worked times a reasonable billing rate." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d at 353. Under the lodestar method, the court "scrutinizes the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate" to calculate the "lodestar." *Goldberger*, 209 F.3d at 47. "Of course, where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50. In considering the lodestar in common fund settlements, it is appropriate to enhance the lodestar by a multiplier accounting for "(1) the contingent nature of the expected compensation for services rendered; (2) the consequent risk of non-payment viewed as of the time of filing the suit; (3) the quality of representation; and (4) the results achieved." *Goodwin v. Boesky (In re Ivan F. Boesky Sec. Litig.)*, 888 F. Supp. 551, 562 (S.D.N.Y. 1995).

There was no unnecessary amount of time, labor, and resources expended by the Parties. *Id.* As is detailed above, this Action was hotly contested and heavily litigated, including one appeal to the Second Circuit, substantial discovery, the cross motions for summary judgement, Plaintiff's class certification motion, two mediations, negotiating and documenting the Settlement, and the Settlement approval process.

To date, Class Counsel have expended a total of 3,777.45 hours in the prosecution of this case. Joint Decl. ¶ 49. 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 *cy pres* distribution, as needed. *Id.*

To assist with the appeal to the Second Circuit, Plaintiff retained Matthew Wessler of Gupta Wessler PLLC, one of the nation's leading appellate law firms, which invested substantial resources, with Class Counsels' assistance, without any guarantee of success that the Second Circuit would revive Plaintiff's putative class claims. The success in that appeal permitted Class Counsel to pursue the merits of the putative class claims, culminating in the Settlement. Mr. Wessler and his colleagues aided preparations for the hearing on the Parties' competing summary judgment motions.

Summaries of the time expended by all counsel and paralegals on the Action appear in Class Counsel's declaration and Mr. Wessler's declaration in support of this Motion, organized by work performed in the various stages of the Action. *See* Individual Counsel Declarations. Should the Court require detailed billing, Class Counsel will promptly submit it. Hourly rates of attorneys and paralegals are commensurate with the rates charged by class action practitioners in this district with similar experience. Joint Decl. ¶ 50. *See, e.g.*, *United States ex rel. Fox Rx, Inc. v. Omnicare, Inc.*, No. 12cv275 (DLC), 2015 U.S. Dist. LEXIS 49477, at *5 (S.D.N.Y. Apr. 15, 2015) (approving as reasonable in this district $836/hour for a litigation partner; $631.75/hour for an eighth-year associate; and $541.50/hour for a fourth-year associate); *In re Platinum & Palladium Commodities Litig.*, No. 10cv3617, 2015 U.S. Dist. LEXIS 98691, at *13 (S.D.N.Y. July 7, 2015) (approving rates up to $950/hour and citing National Law Journal survey indicating that the average partner billing rate at the largest New York-based law firms is $982 per hour); *City of Providence v. Aéropostale, Inc.*, 2014 U.S. Dist. LEXIS 64517, at *38 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73, 73 (2d Cir. 2015) (approving rates ranging from $640 to $875 for partners, $550 to $725 for of counsels, and $335 to $665 for other attorneys).

Here, the aggregate lodestar is $2,294,960.25. Joint Decl. ¶ 53. Class Counsel seek fees of $5,100,000.00, representing 30% of the Settlement Fund. The lodestar multiplier of 2.22 is well within

the range of what Court's in this circuit typically award. *Johnson v. Brennan*, No. No. 10-cv- 4712, 2011 U.S. Dist. LEXIS 105775, at *58 (S.D.N.Y. Sep. 16, 2011) ("Courts regularly award lodestar multipliers from two to six times lodestar."). As detailed above, Class Counsel and appellate counsel assumed significant risks in representing Plaintiff on a contingent fee basis. Those risks should be rewarded. Given that this Court applies the percentage of the fund method with a lodestar crosscheck, the 2.22 multiplier is reasonable. *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d at 353 (finding that a multiplier of five "was large, but not unreasonable"); *James v. China Grill Mgmt.*, 2019 U.S. Dist. LEXIS 72759, at *8 (S.D.N.Y. Apr. 30, 2019) (Schofield, J.) (approving "a fee award equivalent to 30% of the settlement fund [that] represents a lodestar multiplier of approximately 3.53."). Class Counsel expended resources to achieve a prompt fair, adequate and reasonable settlement.

For the reasons set forth above, the requested fee is appropriate, fair and reasonable, and should therefore be approved.

G. APPLICATION FOR SERVICE AWARD

As noted above, a $15,000.00 Service Award is sought for Plaintiff as Class Representative. "[S]ervice awards are common in class action cases and are important 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 plaintiff." *Torres v. Gristede's Operating Corp.*, No. 04-CV-3316 (PAC), 2010 U.S. Dist. LEXIS 139144, at *22 (S.D.N.Y. Dec. 21, 2010) (approving as "reasonable service awards of $15,000 each" for fifteen named plaintiffs for a total of $225,000 from a settlement fund of $3,530,000); *see also Flores v. Mamma Lombardi's of Holbrook, Inc.*, 104 F. Supp. 3d 290, 316 (E.D.N.Y. 2015) ($10,000 service award); *Times v. Target Corp.*, No. 18 Civ 02993, 2019 U.S. Dist. LEXIS 189101, at *13 (S.D.N.Y. Oct. 29, 2019) (service award of $20,000). As discussed above, the Plaintiff invested significant time in this case and risked her reputation in doing so. *See supra* at § B.5. If approved, the Service Award is only .09% of the Settlement Fund. The

award sought is well within the range awarded in this District and should be awarded here.

H. REIMBURSEMENT OF COSTS

"It is well established that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class." *Guevoura Fund Ltd.*, 2019 U.S. Dist. LEXIS 218116, at *67 (citation omitted). Second Circuit courts grant such requests as a matter of course. *Id.* 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. Joint Decl. ¶ 51. Specifically, those costs and expenses consist of expert witness fees, filing fees and service of process costs, pro hac vice admission fees, court reporter expenses, deposition transcripts, litigation support vendors, and half of travel costs incurred. *Id.* ¶ 52. 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. *Id.*

IV. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court: (1) grant Final Approval to the Settlement; (2) certify for settlement purposes the proposed Settlement Class, pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(3); (3) appoint Plaintiff as Class Representative; (4) appoint as Class Counsel the attorneys previously appointed in the Preliminary Approval Order; (5) award a Class Representative Service Award in the amount of **$15,000.00**; (6) award attorneys' fees to Class Counsel in an amount of **$5,100,000.00** which is 30% of the Settlement Fund; (7) award Class Counsel reimbursement of litigation costs and expenses in the amount of **$185,647.65**; and (8) enter final judgment dismissing this Action, and reserving jurisdiction over settlement implementation. For the Court's convenience, a proposed Final Approval Order is submitted along with this Motion.

DATED: September 8, 2020.

By: /s/ Jeff Ostrow
Jeff Ostrow (pro hac vice)
Jonathan M. Streisfeld (pro hac vice)
Joshua R. Levine (pro hac vice)
KOPELOWITZ OSTROW FERGUSON WEISELBERG GILBERT
One West Las Olas Boulevard, Suite 500
Fort Lauderdale, Florida 33301
Telephone: 954-525-4100
Facsimile: 954-525-4300
streisfeld@kolawyers.com
ostrow@kolawyers.com
levine@kolawyers.com

Jeffrey D. Kaliel (pro hac vice)
Sophia G. Gold (pro hac vice)
KALIEL PLLC
1875 Connecticut Ave., NW, 10th Floor
Washington, D.C. 20009
Telephone: 202-350-4783
jkaliel@kalielpll.com
sgold@kalielpllc.com

Hassan A. Zavareei (pro hac vice)
Anna C. Haac (pro hac vice)
TYCKO & ZAVAREEI LLP
1828 L Street, N.W., Suite 1000
Washington, D.C. 20036
Telephone: 202-973-0900
hzavareei@tzlegal.com
ahaac@tzlegal.com

Laurie Rubinow
James E. Miller
SHEPHERD, FINKELMAN, MILLER & SHAH, LLP
65 Main Street
Chester, CT 06412
Telephone: 860-526-1100
lrubinow@sfmslaw.com
jmiller@sfmslaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 8, 2020, the foregoing was filed via CM/ECF, which caused a true and correct copy to be served to all counsel of record.

Respectfully submitted,

By: */s/ Jeff Ostrow*
Jeff Ostrow

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TAWANNA ROBERTS, on behalf of herself and all others similarly situated, Plaintiff, vs. CAPITAL ONE, N.A., Defendant.	CASE NO. 1:16-cv-04841-LGS

SETTLEMENT AGREEMENT AND RELEASES

This Settlement Agreement and Releases ("Settlement" or "Agreement")[1], dated as of December 16, 2019, is entered into by Plaintiff Tawanna Roberts, individually and on behalf of the Settlement Class, and Defendant Capital One, N.A. Plaintiff and Capital One are each individually a "Party" and are collectively the "Parties." The Parties hereby agree to the following terms in full settlement of the action entitled *Roberts v. Capital One, N.A.*, No. 1:16-cv-04841-LGS, subject to Final Approval, as defined below, by the United States District Court for the Southern District of New York.

I. Recitals

1. On June 22, 2016, Plaintiff filed the Action and alleged that Capital One charged Overdraft Fees on Debit Card Transactions that authorized against a positive balance but settled against a negative balance due to intervening charges. Plaintiff alleged that this practice is prohibited by the terms of Capital One's Rules Governing Deposit Accounts and Electronic Fund Transfer Agreement and Disclosure for Personal and Commercial Accounts.

[1] All capitalized terms herein have the meanings ascribed to them in Section II or various places in the Agreement.

2. On September 2, 2016, Capital One filed a Motion to Dismiss the Action on the basis that the Class Action Complaint failed to state a cause of action.

3. On October 11, 2016, Plaintiff filed a Response in Opposition to the Motion to Dismiss.

4. On May 4, 2017, the Court granted the Motion to Dismiss, thereafter entering judgment on May 5, 2017.

5. On June 2, 2017, Plaintiff filed a Notice of Appeal of the judgment.

6. On December 1, 2017, the Second Circuit Court of Appeals issued its opinion vacating the judgment of the Court with respect to Plaintiff's causes of action for breach of contract and violation of New York General Business Law § 349, and remanding the Action for further proceedings. The Court of Appeals issued the mandate on December 28, 2017, to return jurisdiction to the Court. Thereafter, on May 31, 2018, Capital One filed its Answer and Affirmative Defenses.

7. The Parties engaged in extensive fact and class discovery, retained experts, and exchanged expert reports. The Parties served written discovery, Class Counsel reviewed approximately 49,285 pages of documents, and the Parties took eight depositions.

8. 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 data for Plaintiff's expert to review and analyze to reasonably estimate the value of class damages. The mediation concluded that day without the Parties reaching an agreement.

9. On January 25, 2019, Capital One filed a Motion for Summary Judgment, Memorandum of Law in Support, and Local Civil Rule 56.1 statement and evidence in support of same.

10. On March 15, 2019, Plaintiff responded and filed her Cross-Motion for Summary Judgment, Memorandum of Law in Support, and Local Civil Rule 56.1 statement and evidence in support of same.

11. On June 25, 2019, the Court held a hearing on the Parties' cross-motions for summary judgment, and at the hearing the Court ruled that the Parties' cross-motions for summary judgment would both be denied.

12. On July 16, 2019, Capital One filed a Motion for Reconsideration of the order denying its motion for summary judgment and memorandum of law, which Plaintiff opposed. Capital One's motion remained pending when this Settlement was reached.

13. On September 13, 2019, Plaintiff filed her Motion for Class Certification, which remained pending when this Settlement was reached.

14. On October 10, 2019, the Parties once again met in New York with Simeon Baum, Esq. for a second full day of mediation. The case did not settle that day, but the Parties continued to negotiate and ultimately agreed to the material terms of a settlement on October 25, 2019. The Parties then filed a Notice of Settlement on October 30, 2019, confirming their agreement in principle and requesting that the Court stay all deadlines in the Action.

15. The Parties now agree to settle the Action in its entirety, without any admission of liability, with respect to all Released Claims of the Releasing Parties (definitions below). The Parties intend this Agreement to bind Plaintiff, Capital One, and all Settlement Class Members.

NOW, THEREFORE, in light of the foregoing, for good and valuable consideration, the receipt and sufficiency of which is hereby mutually acknowledged, the Parties agree, subject to approval by the Court, as follows.

II. Definitions

In addition to the terms defined at various points within this Agreement, the following Defined Terms apply throughout this Agreement:

16. "Account" means any consumer checking account maintained by Capital One, with the exception of Capital One 360 accounts.

17. "Account Holder" means any person who has or had any interest, whether legal or equitable, in an Account during the Class Period.

18. "Action" means *Tawanna Roberts v. Capital One, N.A.*, S.D.N.Y. Case No. 1:16-cv-04841-LGS.

19. "Capital One" means Capital One, N.A.

20. "Class Counsel" means:

KOPELOWITZ OSTROW P.A.
Jeff Ostrow, Esq.
Jonathan M. Streisfeld, Esq.
Joshua Levine, Esq.
1 West Las Olas Blvd.
Suite 500
Fort Lauderdale, FL 33301

TYCKO & ZAVAREEI, LLP
Hassan Zavareei, Esq.
1828 L Street NW
Suite 1000
Washington, DC 20036

KALIEL PLLC
Jeffrey Kaliel, Esq.
Sophia Gold, Esq.
1875 Connecticut Ave. NW
10th Floor
Washington, DC 20009

and such other counsel as are identified in Class Counsel's request for attorneys' fees and costs.

21. "Class Period" means:

a. for Settlement Class Members who established Accounts in Connecticut, the period from August 16, 2010, through November 7, 2018;

b. for Settlement Class Members who established Accounts in Delaware, the period

from June 22, 2013, through November 7, 2018;

c. for Settlement Class Members who established Accounts in Louisiana, the period from August 16, 2010, through November 7, 2018;

d. for Settlement Class Members who established Accounts in Maryland, the period from June 22, 2013, through November 7, 2018;

e. for Settlement Class Members who established Accounts in New Jersey, the period from August 16, 2010, through November 7, 2018;

f. for Settlement Class Members who established Accounts in New York, the period from August 16, 2010, through November 7, 2018;

g. for Settlement Class Members who established Accounts in Texas, the period from June 22, 2012, through November 7, 2018;

h. for Settlement Class Members who established Accounts in Virginia, the period from June 22, 2011, through November 7, 2018; and

i. for Settlement Class Members who established Accounts in Washington D.C., the period from June 22, 2013, through November 7, 2018.

22. "Class Representative" means Tawanna Roberts.

23. "Court" means the United States District Court for the Southern District of New York.

24. "Current Account Holder" means a Settlement Class Member who continues to have his or her Account as of the date that the Net Settlement Fund is distributed to Settlement Class Members pursuant to this Agreement.

25. "Debit Card" means a card or similar device issued or provided by Capital One, including a debit card, check card, or automated teller machine ("ATM") card that can or could be

used to debit funds from an Account by Point of Sale and/or ATM transactions.

26. "Debit Card Transaction" means a Point of Sale or ATM transaction using a Debit Card.

27. "Effective Date" means the fifth business day after which all of the following events have occurred:

a. The Court has entered without material change the Final Approval Order and judgment; and

b. The time for seeking rehearing or appellate or other review has expired, and no appeal or petition for rehearing or review has been timely filed; or the Settlement is affirmed on appeal or review without material change, no other appeal or petition for rehearing or review is pending, and the time period during which further petition for hearing, review, appeal, or certiorari could be taken has finally expired and relief from a failure to file same is not available.

28. "Final Approval" means the date that the Court enters the Final Approval Order.

29. "Final Approval Hearing" is the hearing held before the Court wherein the Court will consider granting final approval to the Settlement and further determine the amount of fees, costs, and expenses awarded to Class Counsel and the amount of any Service Award to the Class Representative.

30. "Final Approval Order" means the final order that the Court enters granting final approval to the Settlement. The proposed Final Approval Order shall be in a form agreed upon by the Parties and shall be substantially in the form attached as an exhibit to the Motion for Final Approval. Final Approval Order also includes the orders, which may be entered separately, determining the amount of fees, costs, and expenses awarded to Class Counsel and the amount of any Service Award to the Class Representative.

31. "Net Settlement Fund" means the Settlement Fund, minus Court approved attorneys' fees, costs and expenses, any notice and administration expenses incurred in excess of $750,000.00, and any Court approved Service Award to Plaintiff.

32. "Notice" means the notices that the Parties will ask the Court to approve in connection with the Motion for Preliminary Approval of the Settlement.

33. "Notice Program" means the methods provided for in this Agreement for giving the Notice and consists of Postcard Notice, Email Notice, and Long Form Notice (all defined herein below), which shall be substantially in the forms as the exhibits attached to the Motion for Preliminary Approval.

34. "Opt-Out Period" means the period that begins the day after the earliest date on which the Notice is first distributed, and that ends no later than 30 days before the Final Approval Hearing. The deadline for the Opt-Out Period will be specified in the Notice.

35. "Overdraft Fee" means any fee or fees assessed to a holder of an Account for items paid when the Account has insufficient funds.

36. "Past Account Holder" means a Settlement Class Member who no longer holds his or her Account as of the date that the Net Settlement Fund is distributed to Settlement Class Members pursuant to this Agreement.

37. "Plaintiff" means Tawanna Roberts.

38. "Preliminary Approval" means the date that the Court enters, without material change, an order preliminarily approving the Settlement, substantially in the form of the exhibit attached to the Motion for Preliminary Approval.

39. "Preliminary Approval Order" means the order granting Preliminary Approval of this Settlement.

40. "Releases" means all the releases contained in Section XIII hereof.

41. "Released Claims" means all claims to be released as specified in Section XIII hereof.

42. "Releasing Parties" means Plaintiff and all Settlement Class Members, and each of their respective executors, representatives, heirs, predecessors, assigns, beneficiaries, successors, bankruptcy trustees, guardians, joint tenants, tenants in common, tenants by entireties, agents, attorneys, and all those who claim through them or on their behalf.

43. "Service Award" means any Court ordered payment to Plaintiff for serving as Class Representative, which is in addition to any payment due Plaintiff as a Settlement Class Member.

44. "Settlement Administrator" means BrownGreer PLC. Settlement Class Counsel and Capital One may, by agreement, substitute a different organization as Settlement Administrator, subject to approval by the Court if the Court has previously approved the Settlement preliminarily or finally. In the absence of agreement, either Settlement Class Counsel or Capital One may move the Court to substitute a different organization as Settlement Administrator, upon a showing that the responsibilities of Settlement Administrator have not been adequately executed by the incumbent.

45. "Settlement Administration Costs" means all costs and fees of the Settlement Administrator regarding notice and settlement administration.

46. "Settlement Administration Costs Cap" means the $750,000.00 maximum that Capital One is obligated to pay toward Notice and Settlement Administration Costs.

47. "Settlement Class" means all current and former Capital One consumer checking account customers, other than those with Capital One 360 accounts, who were charged an Overdraft Fee on a Debit Card Transaction that was authorized into a positive available balance,

but settled against a negative balance, during the Class Period. Excluded from the Settlement Class is Capital One, its parents, subsidiaries, affiliates, officers and directors; all Settlement Class members who make a timely election to be excluded; and all judges assigned to this litigation and their immediate family members.

48. "Settlement Class Member" means any member of the Settlement Class who has not opted-out of the Settlement and who is entitled to the benefits of the Settlement, including a Settlement Class Member Payment.

49. "Settlement Class Member Payment" means the cash distribution that will be made from the Net Settlement Fund to each Settlement Class Member, pursuant to the allocation terms of the Settlement.

50. "Settlement Fund" means the $17,000,000.00 common cash fund Capital One is obligated to pay under the Settlement. The Settlement Fund will be funded into an escrow account established by the Settlement Administrator within 7 days of the Court's entry of the Preliminary Approval Order. The Settlement Fund will be used to pay the Settlement Class Member Payments, any attorneys' fees, expenses, costs, and Service Award ordered by the Court, any Settlement Administration Costs in excess of $750,000.00, and any *cy pres* payment required under this Agreement.

51. "Settlement Website" means the website that the Settlement Administrator will establish as a means for Settlement Class members to obtain notice of and information about the Settlement, through and including hyperlinked access to this Agreement, the Long Form Notice, Preliminary Approval Order, and such other documents as the Parties agree to post or that the Court orders posted on the website. These documents shall remain on the Settlement Website at least until Final Approval. The URL of the Settlement Website shall be

www.capitaloneoverdraftlitigation.com, or such other URL as Class Counsel and Capital One agree upon in writing. The Settlement Website shall not include any advertising, and shall not bear or include the Capital One logo or Capital One trademarks. Ownership of the Settlement Website URL shall be transferred to Capital One within 10 days of the date on which operation of the Settlement Website ceases.

III. Certification of the Settlement Class

52. For Settlement purposes only, Plaintiff and Capital One agree to ask the Court to certify the Settlement Class under the Federal Rules of Civil Procedure.

IV. Settlement Consideration

53. Subject to approval by the Court, Capital One shall establish a cash Settlement Fund of $17,000,000.00 and further pay up to $750,000.00 toward Settlement Administration Costs. The Settlement Fund shall be used to pay Settlement Class Members their respective Settlement Class Member Payments; any and all attorneys' fees; costs and expenses awarded to Class Counsel; any Service Award to the Class Representative; and all costs and expenses incurred by the Settlement Administrator in excess of the Settlement Administration Costs Cap. Capital One shall not be responsible for any other payments under this Agreement.

V. Settlement Approval

54. Upon execution of this Agreement by all Parties, Class Counsel shall promptly move the Court for an order granting Preliminary Approval of this Settlement. The proposed Preliminary Approval Order that will be attached to the motion shall be in a form agreed upon by Class Counsel and Capital One. The Motion for Preliminary Approval shall, among other things, request that the Court: (1) approve the terms of the Settlement as within the range of fair, adequate, and reasonable; (2) provisionally certify the Settlement Class pursuant to Federal Rule of Civil

Procedure 23 for settlement purposes only; (3) approve the Notice Program set forth herein and approve the form and content of the Notices of the Settlement; (4) approve the procedures set forth herein below for Settlement Class members to exclude themselves from the Settlement Class or to object to the Settlement; (5) stay the Action pending Final Approval of the Settlement; and (6) schedule a Final Approval Hearing for a time and date mutually convenient for the Court, Class Counsel, and counsel for Capital One, at which the Court will conduct an inquiry into the fairness of the Settlement, determine whether it was made in good faith, and determine whether to approve the Settlement and Class Counsel's application for attorneys' fees, costs and expenses and for a Service Award to the Class Representative.

VI. Discovery and Settlement Data

55. Class Counsel and Capital One already have engaged in significant discovery related to liability and damages. Additionally, for purposes of effectuating the Settlement, Capital One will make available to Class Counsel and its expert, data for the entirety of the Class Period, similar to that previously provided for mediation purposes, such that Plaintiff's expert may determine Settlement Class membership and ultimately the amount of Settlement Class Member damages. Because Plaintiff's expert will not have access to Settlement Class member names or Account numbers, Plaintiff's expert will provide his results to Capital One, which will then create a list of Settlement Class members and their electronic mail or postal addresses, which will be provided to the Settlement Administrator to provide Notice.

VII. Settlement Administrator

56. The Settlement Administrator shall administer various aspects of the Settlement as described in the next paragraph hereafter and perform such other functions as are specified for the Settlement Administrator elsewhere in this Agreement, including, but not limited to, effectuating

the Notice Program and distributing the Settlement Fund as provided herein.

57. The duties of the Settlement Administrator, in addition to other responsibilities that are described in the preceding paragraph and elsewhere in this Agreement, are as follows:

a. Use the name and address information for Settlement Class members provided by Capital One in connection with the Notice Program approved by the Court, for the purpose of distributing the Mailed Notice, Email Notice, and Long Form Notice, and later mailing distribution checks to Past Account Holder Settlement Class Members, and to Current Account Holder Settlement Class Members where it is not feasible or reasonable for Capital One to make the payment by a credit to the Settlement Class Members' Accounts;

b. Establish and maintain a post office box for requests for exclusion from the Settlement Class;

c. Establish and maintain the Settlement Website;

d. Establish and maintain an automated toll-free telephone line for Settlement Class members to call with Settlement-related inquiries, and answer the questions of Settlement Class members who call with or otherwise communicate such inquiries;

e. Respond to any mailed Settlement Class member inquiries;

f. Process all requests for exclusion from the Settlement Class;

g. Provide weekly reports to Class Counsel and Capital One that summarizes the number of requests for exclusion received that week, the total number of exclusion requests received to date, and other pertinent information;

h. In advance of the Final Approval Hearing, prepare an affidavit to submit to the Court confirming that the Notice Program was completed, describing how the Notice Program was completed, providing the names of each Settlement Class member who timely and properly

requested exclusion from the Settlement Class, and other information as may be necessary to allow the Parties to seek and obtain Final Approval.

i. Distribute Settlement Class Member Payments by check to Past Account Holder Settlement Class Members;

j. Provide to Capital One the amount of the Settlement Class Member Payments to Current Account Holder Settlement Class Members from the Settlement Fund and instruct Capital One to initiate the direct deposit of Settlement Class Member Payments to Current Account Holder Settlement Class Members.

k. If funds remain available, repay Capital One for the amount of Settlement Administration Costs it paid;

l. Pay invoices, expenses, and costs upon approval by Class Counsel and Capital One, as provided in this Agreement; and

m. Any other Settlement-administration-related function at the instruction of Class Counsel and Capital One, including, but not limited to, verifying that the Settlement Funds has been distributed.

n. Subject to the Settlement Administrator Costs Cap, costs related to Settlement Administration shall be paid by Capital One. Residual Funds, if any, shall be paid first to Capital One to reimburse it for these costs as indicated in Section XI.

VIII. Notice to Settlement Class members

58. As soon as practicable after Preliminary Approval of the Settlement, at the direction of Class Counsel and Capital One's Counsel, the Settlement Administrator shall implement the Notice Program provided herein, using the forms of Notice approved by the Court. The Notice shall include, among other information: a description of the material terms of the Settlement; a

date by which Settlement Class members may exclude themselves from or "opt-out" of the Settlement Class; a date by which Settlement Class Members may object to the Settlement; the date upon which the Final Approval Hearing is scheduled to occur; and the address of the Settlement Website at which Settlement Class members may access this Agreement and other related documents and information. Class Counsel and Capital One shall insert the correct dates and deadlines in the Notice before the Notice Program commences, based upon those dates and deadlines set by the Court in the Preliminary Approval Order. Notices provided under or as part of the Notice Program shall not bear or include the Capital One logo or trademarks or the return address of Capital One, or otherwise be styled to appear to originate from Capital One.

59. The Notice also shall include a procedure for members of the Settlement Class to opt-out of the Settlement Class. A Settlement Class member may opt-out of the Settlement Class at any time during the Opt-Out Period, provided the opt-out notice is postmarked no later than the last day of the Opt-Out Period. Any Settlement Class member who does not timely and validly request to opt-out shall be bound by the terms of this Agreement. If an Account has more than one Account Holder, and if one Account Holder excludes himself or herself from the Settlement Class, then all Account Holders on that account shall be deemed to have opted-out of the Settlement with respect to that Account, and no Account Holder shall be entitled to a payment under the Settlement.

60. The Notice also shall include a procedure for Settlement Class Members to object to the Settlement and/or to Class Counsel's application for attorneys' fees, costs and expenses and/or Service Award for the Class Representative. Objections to the Settlement, to the application for fees, costs, expenses, and/or to the Service Award must be mailed to the Clerk of the Court, Class Counsel, Capital One's counsel, and the Settlement Administrator. For an objection to be considered by the Court, the objection must be submitted no later than the last day of the Opt-Out

Period, as specified in the Notice. If submitted by mail, an objection shall be deemed to have been submitted when posted if received with a postmark date indicated on the envelope if mailed first-class postage prepaid and addressed in accordance with the instructions. If submitted by private courier (*e.g.*, Federal Express), an objection shall be deemed to have been submitted on the shipping date reflected on the shipping label.

61. For an objection to be considered by the Court, the objection must also set forth:

a. the name of the Action;

b. the objector's full name, address and telephone number;

c. all grounds for the objection, accompanied by any legal support for the objection known to the objector or objector's counsel;

d. the number of times the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which the objector has made such objection, and a copy of any orders related to or ruling upon the objector's prior objections that were issued by the trial and appellate courts in each listed case;

e. the identity of all counsel who represent the objector, including any former or current counsel who may be entitled to compensation for any reason related to the objection to the Settlement or fee application;

f. the number of times in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the five years preceding the date that of the filed objection, the caption of each case in which counsel or the firm has made such objection and a copy of any orders related to or ruling upon counsel's or the counsel's law firm's prior objections that were issued by the trial and appellate courts in each listed case in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the preceding 5 years;

g. any and all agreements that relate to the objection or the process of objecting—whether written or oral—between objector or objector's counsel and any other person or entity;

h. the identity of all counsel (if any) representing the objector who will appear at the Final Approval Hearing;

i. a list of all persons who will be called to testify at the Final Approval Hearing in support of the objection;

j. a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing; and

k. the objector's signature (an attorney's signature is not sufficient).

Class Counsel and/or Capital One may conduct limited discovery on any objector consistent with the Federal Rules of Civil Procedure.

62. Notice shall be provided to Settlement Class members in three different ways: (a) Email notice to Account Holders for whom Capital One has email addresses ("Email Notice"); (b) postcard notice to those Account Holders for whom Capital One does not have email addresses ("Postcard Notice"); and (c) long-form notice with greater detail than the Email Notice and Postcard Notice ("Long Form Notice"). Email Notice and Postcard Notice shall collectively be referred to as "Mailed Notice." Not all Settlement Class members will receive all forms of Notice, as detailed herein.

63. Capital One will cooperate with Class Counsel and its expert to make available the necessary data to Class Counsel's expert to determine Settlement Class membership. The data necessary for Class Counsel's expert to compile the Settlement Class membership list shall be provided as soon as practicable. Capital One will bear the expense of extracting the necessary data to make available to Class Counsel's expert for analysis, while Class Counsel shall be responsible

for paying Class Counsel's expert, who will analyze the data provided to determine Settlement Class membership as well as the amount of the Settlement Class' damages. The Settlement Administrator shall send out Email Notice to all Settlement Class members receiving Notice by that method. For those Settlement Class members for whom Capital One does not have email addresses, the Settlement Administrator shall run the physical addresses provided by Capital One through the National Change of Address Database and shall mail to all such Settlement Class members Postcard Notice. The initial Mailed Postcard and Email Notice shall be referred to as "Initial Mailed Notice."

64. The Settlement Administrator shall perform reasonable address traces for Mailed Notice postcards that are returned as undeliverable. By way of example, a "reasonable" tracing procedure would be to run addresses of returned postcards through the Lexis/Nexis database that can be utilized for such purpose. No later than 60 days before the Final Approval Hearing, the Settlement Administrator shall complete the re-mailing of Postcard Notice to those Settlement Class members whose new addresses were identified as of that time through address traces ("Notice Re-mailing Process"). The Settlement Administrator shall send Postcard Notice to all Settlement Class members whose emails were returned as undeliverable and complete such Notice pursuant to the deadlines described herein as they relate to the Notice Re-mailing Process.

65. The Notice Program (which is composed of both the Initial Mailed Notice and the Notice Re-mailing Process) shall be completed no later than 60 days before the Final Approval Hearing.

66. Subject to the Settlement Administration Costs Cap, costs related to the Notice Program shall be paid by Capital One. Residual Funds, if any, shall be paid first to Capital One to reimburse it for these costs, as indicated in Section XI.

67. Within the provisions set forth in this Section VIII, further specific details of the Notice Program shall be subject to the agreement of Class Counsel and Capital One.

IX. Final Approval Order and Judgment

68. Plaintiff's Motion for Preliminary Approval of the Settlement will include a request to the Court for a scheduled date on which the Final Approval Hearing will occur. Plaintiff shall file her Motion for Final Approval of the Settlement, inclusive of Class Counsel's application for attorneys' fees, costs and expenses and for a Service Award for the Class Representative, no later than 45 days before the Final Approval Hearing. At the Final Approval Hearing, the Court will hear argument on Plaintiff's Motion for Final Approval of the Settlement, and on Class Counsel's application for attorneys' fees, costs, and expenses and for the Service Award for the Class Representative. In the Court's discretion, the Court also will hear argument at the Final Approval Hearing from any Settlement Class Members (or their counsel) who object to the Settlement or to Class Counsel's application for attorneys' fees, costs, expenses or the Service Award application, provided the objectors submitted timely objections that meet all of the requirements listed in the Agreement.

69. At or following the Final Approval Hearing, the Court will determine whether to enter the Final Approval Order granting Final Approval of the Settlement and final judgment thereon, and whether to approve Class Counsel's request for attorneys' fees, costs, expenses and Service Award. Such proposed Final Approval Order shall, among other things:

a. Determine that the Settlement is fair, adequate and reasonable;

b. Finally certify the Settlement Class for settlement purposes only;

c. Determine that the Notice provided satisfies Due Process requirements;

d. Bar and enjoin all Releasing Parties from asserting any of the Released Claims; bar

and enjoin all Releasing Parties from pursuing any Released Claims against Capital One or its affiliates at any time, including during any appeal from the Final Approval Order; and retain jurisdiction over the enforcement of the Court's injunctions;

e. Release Capital One and the Released Parties from the Released Claims; and

f. Reserve the Court's continuing and exclusive jurisdiction over the Parties to this Agreement, including Capital One, all Settlement Class Members, and all objectors, to administer, supervise, construe, and enforce this Agreement in accordance with its terms.

X. Calculation and Disbursement of Settlement Class Member Payments

70. The calculation and implementation of allocations of the Settlement Fund contemplated by this section shall be done by Class Counsel and its expert for the purpose of compensating Settlement Class Members. The methodology provided for herein will be applied to the data as consistently, sensibly, and conscientiously as reasonably possible, recognizing and taking into consideration the nature and completeness of the data and the purpose of the computations. Consistent with its contractual, statutory, and regulatory obligations to maintain the security of and protect its customers' private financial information, Capital One shall make available such data and information as may reasonably be needed by Class Counsel and its expert to confirm and/or effectuate the calculations and allocations contemplated by this Agreement. Class Counsel shall confer with Capital One's counsel concerning any such data and information.

71. The amount of the Settlement Class Member Payment from the Net Settlement Fund to which each Settlement Class Member is entitled for the Class Period (subject to the availability of data) is to be determined using the following methodology or such other methodology as would have an equivalent result:

a. All accounts held by Settlement Class Members will be identified at which, on one

or more calendar days during the Class Period, Capital One assessed Overdraft Fees on Debit Card Transactions that were authorized into a positive available balance ("Relevant Overdraft Fees").

b. Relevant Overdraft Fees will be totaled for each Account.

c. The Net Settlement Fund will be allocated pro rata to the Settlement Class Members based on their number of Relevant Overdraft Fees.

72. The Parties agree the foregoing allocation formula is exclusively for purposes of computing, in a reasonable and efficient fashion, the amount of any Settlement Class Member Payment each Settlement Class Member should receive from the Net Settlement Fund. The fact that this allocation formula will be used is not intended and shall not be used for any other purpose or objective whatsoever.

73. The Settlement Administrator shall divide the total amount of the Net Settlement Fund by the total amount of all Settlement Class Members' Relevant Overdraft Fees. This calculation shall yield the "Pro Rata Percentage."

74. Each Settlement Class Member's Pro Rata Percentage will be multiplied by the amount of the Net Settlement Fund, which yields a "Pre-Adjustment Payment Amount" for each Settlement Class Member.

75. As soon as practicable but no later than 90 days from the Effective Date, Capital One and the Settlement Administrator shall distribute the Net Settlement Fund to Settlement Class Members.

76. Settlement Class Member Payments to Current Account Holders shall be made either by a credit to those Account Holders' Accounts, or by mailed check in those circumstances where it is not feasible or reasonable to make the payment by a credit. Capital One shall notify Current Account Holders of any such credit and provide a brief explanation that the credit has been

made as a payment in connection with the Settlement. Capital One shall provide the notice of account credit described in this paragraph in or with the account statement on which the credit is reflected. Capital One will bear any costs associated with implementing the account credits and notification discussed in this paragraph. Settlement Class Member Payments made to Current Account Holders by check will be cut and mailed by the Settlement Administrator with an appropriate legend, in a form approved by Class Counsel and Capital One, to indicate that it is from the Settlement, and will be sent to the addresses that the Settlement Administrator identifies as valid. Checks shall be valid for 180 days.

77. For jointly held Accounts, checks will be payable to all Account Holders, and will be mailed to the first Account Holder listed on the Account. The Settlement Administrator will make reasonable efforts to locate the proper address for any intended recipient of Settlement Funds whose check is returned by the Postal Service as undeliverable (such as by running addresses of returned checks through the Lexis/Nexis database that can be utilized for such purpose) and will re-mail it once to the updated address or, in the case of a jointly held Account, and in the Settlement Administrator's discretion, to an Account Holder other than the one listed first. In the event of any complications arising in connection with the issuance or cashing of a check, the Settlement Administrator shall provide written notice to Class Counsel and Capital One's Counsel. Absent specific instructions from Class Counsel and Capital One's Counsel, the Settlement Administrator shall proceed to resolve the dispute using its best practices and procedures to ensure that the funds are fairly and properly distributed to the person or persons who are entitled to receive them. All costs associated with the process of printing and mailing the checks and any accompanying communication to Current Account Holders shall be borne by Capital One.

78. Capital One shall be entitled to a payment from the Net Settlement Fund equal to

the amount of account credits to be paid. Prior to making the account credits, Capital One shall request in writing, and the Settlement Administrator shall provide within 2 business days, a payment equal to the aggregate amount of account credits that are to be given. No later than 45 days prior to the Final Approval Hearing, Capital One shall file a declaration with the Court attesting to the fact that such Settlement Funds were credited to the Accounts of those Settlement Class Members who are Current Account Holders.

79. Settlement Fund Payments to Past Account Holders will be made by check with an appropriate legend, in a form approved by Class Counsel and Capital One Counsel, to indicate that it is from the Settlement Fund. Checks will be cut and mailed by the Settlement Administrator and will be sent to the addresses that the Settlement Administrator identifies as valid. Checks shall be valid for 180 days. For jointly held Accounts, checks will be payable to all Account Holders, and will be mailed to the first Account Holder listed on the Account. The Settlement Administrator will make reasonable efforts to locate the proper address for any intended recipient of Settlement Funds whose check is returned by the Postal Service as undeliverable (such as by running addresses of returned checks through the Lexis/Nexis database that can be utilized for such purpose), and will re-mail it once to the updated address, or, in the case of a jointly held Account, and in the Settlement Administrator's discretion, to an Account Holder other than the one listed first. All costs associated with the process of printing and mailing the checks and any accompanying communication to Past Account Holders shall be borne by Capital One.

80. The amount of the Net Settlement Fund attributable to uncashed or returned checks sent by the Settlement Administrator shall be held by the Settlement Administrator for up to one year from the date that the first distribution check is mailed by the Settlement Administrator. During this time, the Settlement Administrator shall make a reasonable effort to locate intended

recipients of settlement funds whose checks were returned (such as by running addresses of returned checks through the Lexis/Nexis database that can be utilized for such purpose) to effectuate delivery of such checks. For any such recipients for whom updated addresses are found, the Settlement Administrator shall make only one additional attempt to re-mail or re-issue a distribution check to the updated address.

XI. Disposition of Residual Funds

81. Within one year after the date the Settlement Administrator mails the first Settlement Class Member Payment, any remaining amounts resulting from uncashed checks ("Residual Funds") shall be distributed as follows:

a. First, any Residual Funds shall be payable to Capital One for the amount that it paid in connection with Settlement Administration Costs up to the Settlement Administration Costs Cap.

b. Second, any Residual Funds remaining after distribution shall be distributed on a *pro rata* basis to participating Settlement Class Members who received Settlement Class Member Payments, to the extent feasible and practical in light of the costs of administering such subsequent payments, unless the amounts involved are too small to make individual distributions economically feasible or other specific reasons exist that would make such further distributions impossible or unfair.

c. Third, in the event the costs of preparing, transmitting and administering such subsequent payments pursuant to this Section are not feasible and practical to make individual distributions economically feasible or other specific reasons exist that would make such further distributions impossible or unfair, or if such a distribution is made and Residual Funds still remain, Class Counsel and Capital One shall seek the Court's approval to distribute the Residual Funds to

a *cy pres* recipient or recipients. The Parties shall propose as a *cy pres* recipient or recipients an entity or entities that work to promote financial literacy.

d. All costs of any second distribution, including Capital One's internal costs of crediting Settlement Class Member Accounts, will come from the Residual Funds, and Capital One is not required to pay these costs as Settlement Administration Costs.

XII. Releases

82. As of the Effective Date, Releasing Parties shall automatically be deemed to have fully and irrevocably released and forever discharged Capital One and each of its present and former parents, subsidiaries, divisions, affiliates, predecessors, successors and assigns, and the present and former directors, officers, employees, agents, insurers, members, attorneys, advisors, consultants, representatives, partners, joint venturers, independent contractors, wholesalers, resellers, distributors, retailers, predecessors, successors and assigns of each of them ("Released Parties"), of and from any and all liabilities, rights, claims, actions, causes of action, demands, damages, costs, attorneys' fees, losses and remedies, whether known or unknown, existing or potential, suspected or unsuspected, liquidated or unliquidated, legal, statutory, or equitable, based on contract, tort or any other theory, that result from, arise out of, are based upon, or relate to the conduct, omissions, duties or matters during the Class Period that were or could have been alleged in the Action ("Released Claims"), relating to the assessment of Overdraft Fees on Debit Card Transactions that authorized against a positive balance but settled against a negative balance due to intervening charges.

83. Each Settlement Class Member is barred and permanently enjoined from bringing on behalf of themselves, or through any person purporting to act on their behalf or purporting to assert a claim under or through them, any of the Released Claims against Capital One in any forum,

action, or proceeding of any kind.

84. With respect to all Released Claims, Plaintiff and each of the other Settlement Class Members agree that they are expressly waiving and relinquishing to the fullest extent permitted by law (a) the provisions, rights and benefits conferred by Section 1542 of the California Civil Code, which provides:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

and (b) any law of any state or territory of the United States, federal law or principle of common law, or of international or foreign law, that is similar, comparable or equivalent to Section 1542 of the California Civil Code.

85. Plaintiff or any Settlement Class Member may hereafter discover facts other than or different from those that he/she knows or believes to be true with respect to the subject matter of the claims released herein, or the law applicable to such claims may change. Nonetheless, each of those individuals expressly agrees that, as of the Effective Date, he/she shall have automatically and irrevocably waived and fully, finally, and forever settled and released any known or unknown, suspected or unsuspected, asserted or unasserted, liquidated or unliquidated, contingent or non-contingent claims with respect to all of the matters described in or subsumed by herein. Further, each of those individuals agrees and acknowledges that he/she shall be bound by this Agreement, including by the release herein and that all of their claims in the Action shall be dismissed with prejudice and released, whether or not such claims are concealed or hidden; without regard to subsequent discovery of different or additional facts and subsequent changes in the law; and even if he/she never receives actual notice of the Settlement and/or never receives a distribution of funds

or credits from the Settlement. In addition to the releases made by Plaintiff and Settlement Class Members above, Plaintiff, including each and every one of her agents, representatives, attorneys, heirs, assigns, or any other person acting on her behalf or for her benefit, and any person claiming through her, makes the additional following general release of all claims, known or unknown, in exchange and consideration of the Settlement set forth in this Agreement. This named Plaintiff agrees to a general release of the Released Parties from all claims, demands, rights, liabilities, grievances, demands for arbitration, and causes of action of every nature and description whatsoever, known or unknown, pending or threatened, asserted or that might have been asserted, whether brought in tort or in contract, whether under state or federal or local law.

86. Nothing in this Agreement shall operate or be construed to release any claims or rights that Capital One has to recover any past, present, or future amounts that may be owed by Plaintiff or by any Settlement Class Member on his/her accounts, loans or any other debts with Capital One, pursuant to the terms and conditions of such accounts, loans, or any other debts. Likewise, nothing in this Agreement shall operate or be construed to release any defenses or rights of set-off that Plaintiff or any Settlement Class Member has, other than with respect to the claims expressly released by this Agreement, in the event Capital One and/or its assigns seeks to recover any past, present, or future amounts that may be owed by Plaintiff or by any Settlement Class Member on his/her accounts, loans, or any other debts with Capital One, pursuant to the terms and conditions of such accounts, loans, or any other debts.

XIII. Payment of Attorneys' Fees, Costs, Expenses and Service Award

87. Capital One agrees not to oppose Class Counsel's request for attorneys' fees of up to 35% of the Settlement Fund, and not to oppose Class Counsel's request for reimbursement of reasonable costs and expenses. Any award of attorneys' fees and costs and expenses to Class

Counsel shall be payable solely out of the Settlement Fund. The Parties agree that the Court's failure to approve, in whole or in part, any award for attorneys' fees shall not prevent the Settlement Agreement from becoming Effective, nor shall it be grounds for termination.

88. Within seven days of the Court's entry of the Final Approval Order or within seven days of Class Counsel providing all information required to make the payment, whichever is later, the Settlement Administrator shall pay Class Counsel all Court-approved attorneys' fees, costs and expenses from the Settlement Fund. In the event the award of attorneys' fees is reduced on appeal, or if the Effective Date does not occur (either because approval of the Settlement is overturned or the Agreement is terminated for any reason), Class Counsel shall reimburse the Settlement Fund, within 10 business days of the entry of the order reducing the fees, overturning the approval of the Settlement on appeal, or the termination of the Agreement, the difference between the amount distributed and the reduced amount (in the event of a reduction) or the entirety of the amount (in the event approval is overturned or the Agreement is terminated).

89. After the fees, costs and expenses have been paid to Class Counsel by the Settlement Administrator, Class Counsel shall be solely responsible for distributing each Class Counsel firm's allocated share of such fees, costs and expenses to that firm. Capital One shall have no responsibility for any allocation, and no liability whatsoever to any person or entity claiming any share of the funds to be distributed for payment of attorneys' fees, costs, or expenses or any other payments from the Settlement Fund not specifically described herein.

90. In the event the Effective Date does not occur, or the attorneys' fees or expenses and cost award is reduced following an appeal, each counsel and their law firms who have received any payment of such fees or costs shall be jointly and severally liable for the entirety. Further, each counsel and their law firms consent to the jurisdiction of the Court for the enforcement of this

provision.

91. Class Counsel will ask the Court to approve a Service Award to the Plaintiff in the amount of $15,000.00. The Service Award is to be paid by the Settlement Administrator to the Class Representative within 10 days of the Effective Date. The Service Award shall be paid to the Class Representative in addition to Class Representative's Settlement Class Member Payment. Capital One agrees not to oppose Class Counsel's request for a Service Award. The Parties agree that the Court's failure to approve a Service Award, in whole or in part, shall not prevent the Settlement Agreement from becoming Effective, nor shall it be grounds for termination.

92. The Parties negotiated and reached agreement regarding attorneys' fees, expenses, and costs, and the Service Award, only after reaching agreement on all other material terms of this Settlement.

XIV. Termination of Settlement

93. This Settlement may be terminated by either Class Counsel or Capital One by serving on counsel for the opposing Party and filing with the Court a written notice of termination within 15 days (or such longer time as may be agreed in writing between Class Counsel and Capital One) after any of the following occurrences:

a. Class Counsel and Capital One agree to termination;

b. the Court rejects, materially modifies, materially amends or changes, or declines to preliminarily or finally approve the Settlement;

c. an appellate court vacates or reverses the Final Approval Order, and the Settlement is not reinstated and finally approved without material change by the Court on remand within 360 days after such reversal;

d. any court incorporates into, or deletes or strikes from, or modifies, amends, or

changes, the Preliminary Approval Order, Final Approval Order, or the Settlement in a way that Class Counsel or Capital One seeking to terminate the Settlement reasonably considers material;

e. the Effective Date does not occur; or

f. any other ground for termination provided for elsewhere in this Agreement.

94. Capital One also shall have the right to terminate the Settlement by serving on Class Counsel and filing with the Court a notice of termination within 14 days after its receipt from the Settlement Administrator of any report indicating that the number of Settlement Class members who timely request exclusion from the Settlement Class equals or exceeds the number or percentage specified in the separate letter executed concurrently with this Settlement by Class Counsel and Capital One. The number or percentage shall be confidential except to the Court, which shall upon request be provided with a copy of the letter for *in camera* review.

XV. Effect of a Termination

95. The grounds upon which this Agreement may be terminated are set forth herein above. In the event of a termination, this Agreement shall be considered null and void; all of Plaintiff's, Class Counsel's, and Capital One's obligations under the Settlement shall cease to be of any force and effect; and the Parties shall return to the status *quo ante* in the Action as if the Parties had not entered into this Agreement. In addition, in the event of such a termination, all of the Parties' respective pre-Settlement rights, claims and defenses will be retained and preserved.

96. In the event of termination, Capital One shall have no right to seek reimbursement from Plaintiff's Class Counsel, or the Settlement Administrator, for Settlement Administration Costs paid by Capital One. After payment of any invoices or other fees or expenses mentioned in this Agreement that have been incurred and are due to be paid from the Settlement Fund, to the extent any such fees or expenses have been incurred given Capital One's obligation in paragraph

53 to pay Settlement Administration Costs directly, the Settlement Administrator shall return the balance of the Settlement Fund to Capital One within seven calendar days of termination.

97. The Settlement shall become effective on the Effective Date unless earlier terminated in accordance with the provisions hereof.

98. In the event the Settlement is terminated in accordance with the provisions of this Agreement, any discussions, offers, or negotiations associated with this Settlement shall not be discoverable or offered into evidence or used in the Action or any other action or proceeding for any purpose. In such event, all Parties to the Action shall stand in the same position as if this Agreement had not been negotiated, made or filed with the Court.

XVI. No Admission of Liability

99. Capital One continues to dispute its liability for the claims alleged in the Action and maintains that its overdraft practices and representations concerning those practices complied, at all times, with applicable laws and regulations and the terms of the account agreements with its members. Capital One does not admit any liability or wrongdoing of any kind, by this Agreement or otherwise. Capital One has agreed to enter into this Agreement to avoid the further expense, inconvenience, and distraction of burdensome and protracted litigation, and to be completely free of any further claims that were asserted or could possibly have been asserted in the Action.

100. Class Counsel believe that the claims asserted in the Action have merit, and they have examined and considered the benefits to be obtained under the proposed Settlement set forth in this Agreement, the risks associated with the continued prosecution of this complex, costly, and time-consuming litigation, and the likelihood of success on the merits of the Action. Class Counsel fully investigated the facts and law relevant to the merits of the claims, conducted significant informal discovery, and conducted independent investigation of the challenged practices. Class

Counsel concluded that the proposed Settlement set forth in this Agreement is fair, adequate, reasonable, and in the best interests of the Settlement Class members.

101. The Parties understand and acknowledge that this Agreement constitutes a compromise and settlement of disputed claims. No action taken by the Parties either previously or in connection with the negotiations or proceedings connected with this Agreement shall be deemed or construed to be an admission of the truth or falsity of any claims or defenses heretofore made, or an acknowledgment or admission by any party of any fault, liability, or wrongdoing of any kind whatsoever.

102. Neither the Settlement, nor any act performed or document executed pursuant to or in furtherance of the Settlement: (a) is or may be deemed to be, or may be used as, an admission of, or evidence of, the validity of any claim made by the Plaintiff or Settlement Class members, or of any wrongdoing or liability of the Released Parties; or (b) is or may be deemed to be, or may be used as, an admission of, or evidence of, any fault or omission of any of the Released Parties, in the Action or in any proceeding in any court, administrative agency, or other tribunal.

103. In addition to any other defenses Class Counsel may have at law, in equity, or otherwise, to the extent permitted by law, this Agreement may be pleaded as a full and complete defense to, and may be used as the basis for an injunction against, any action, suit or other proceeding that may be instituted, prosecuted, or attempted in breach of this Agreement or the Releases contained herein.

XIX. No Press Release

104. Neither Party shall issue any press release or shall otherwise initiate press coverage of the Settlement. If contacted, the Party may respond generally by stating that they are happy that the Settlement was reached and that it was a fair and reasonable result.

XX. Miscellaneous Provisions

105. Gender and Plurals. As used in this Agreement, the masculine, feminine or neuter gender, and the singular or plural number, shall each be deemed to include the others whenever the context so indicates.

106. Binding Effect. This Agreement shall be binding upon, and inure to for the benefit of, the successors and assigns of the Releasing Parties and the Released Parties.

107. Cooperation of Parties. The Parties to this Agreement agree to cooperate in good faith to prepare and execute all documents, to seek Court approval, uphold Court approval, and do all things reasonably necessary to complete and effectuate the Settlement described in this Agreement.

108. Obligation to Meet and Confer. Before filing any motion in the Court raising a dispute arising out of or related to this Agreement, the Parties shall consult with each other and certify to the Court that they have consulted.

109. Integration. This Agreement constitutes a single, integrated written contract expressing the entire agreement of the Parties relative to the subject matter hereof. No covenants, agreements, representations, or warranties of any kind whatsoever have been made by any Party hereto, except as provided for herein.

110. No Conflict Intended. Any inconsistency between the headings used in this Agreement and the text of the paragraphs of this Agreement shall be resolved in favor of the text.

111. Governing Law. Except as otherwise provided herein, the Agreement shall be construed in accordance with, and be governed by, the laws of the State of New York, without regard to the principles thereof regarding choice of law.

112. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the

same instrument, even though all Parties do not sign the same counterparts. Original signatures are not required. Any signature submitted by facsimile or through email of an Adobe PDF shall be deemed an original.

113. Jurisdiction. The Court shall retain jurisdiction over the implementation, enforcement, and performance of this Agreement, and shall have exclusive jurisdiction over any suit, action, proceeding, or dispute arising out of or relating to this Agreement that cannot be resolved by negotiation and agreement by counsel for the Parties. The Court shall retain jurisdiction with respect to the administration, consummation, and enforcement of the Agreement and shall retain jurisdiction for the purpose of enforcing all terms of the Agreement. The Court shall also retain jurisdiction over all questions and/or disputes related to the Notice Program and the Settlement Administrator. As part of their agreement to render services in connection with this Settlement, the Settlement Administrator shall consent to the jurisdiction of the Court for this purpose. The Court shall retain jurisdiction over the enforcement of the Court's injunction barring and enjoining all Releasing Parties from asserting any of the Released Claims and from pursuing any Released Claims against Capital One or its affiliates at any time, including during any appeal from the Final Approval Order.

114. Notices. All notices to Class Counsel provided for herein, shall be sent by email with a hard copy sent by overnight mail to:

KOPELOWITZ OSTROW
FERGUSON WEISELBERG GILBERT
Jeff Ostrow, Esq.
1 West Las Olas Blvd., Suite 500
Fort Lauderdale, Florida 33301
Email: ostrow@kolawyers.com
Class Counsel

TYCKO & ZAVAREEI, LLP
Hassan Zavareei, Esq.

1828 L Street Northwest
Suite 1000
Washington, DC 20036
Email: hzavareei@tzlegal.com
Class Counsel

KALIEL PLLC
Jeffrey Kaliel, Esq.
1875 Connecticut Avenue NW, 10th Floor
Washington, DC 20009
Email: jkaliel@kalielpllc.com
Class Counsel

MORRISON & FOERSTER LLP
James McGuire, Esq.
425 Market Street
San Francisco, CA 94105
Email: jmcguire@mofo.com
Counsel for Capital One, N.A.

The notice recipients and addresses designated above may be changed by written notice. Upon the request of any of the Parties, the Parties agree to promptly provide each other with copies of objections, requests for exclusion, or other filings received as a result of the Notice program.

115. Modification and Amendment. This Agreement may not be amended or modified, except by a written instrument signed by Class Counsel and counsel for Capital One and, if the Settlement has been approved preliminarily by the Court, approved by the Court.

116. No Waiver. The waiver by any Party of any breach of this Agreement by another Party shall not be deemed or construed as a waiver of any other breach, whether prior, subsequent, or contemporaneous, of this Agreement.

117. Authority. Class Counsel (for the Plaintiff and the Settlement Class Members), and counsel for Capital One (for Capital One), represent and warrant that the persons signing this Agreement on their behalf have full power and authority to bind every person, partnership, corporation or entity included within the definitions of Plaintiff and Capital One to all terms of

this Agreement. Any person executing this Agreement in a representative capacity represents and warrants that he or she is fully authorized to do so and to bind the Party on whose behalf he or she signs this Agreement to all of the terms and provisions of this Agreement.

118. Agreement Mutually Prepared. Neither Capital One nor Plaintiff, nor any of them, shall be considered to be the drafter of this Agreement or any of its provisions for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Agreement.

119. Independent Investigation and Decision to Settle. The Parties understand and acknowledge that they: (a) have performed an independent investigation of the allegations of fact and law made in connection with this Action; and (b) that even if they may hereafter discover facts in addition to, or different from, those that they now know or believe to be true with respect to the subject matter of the Action as reflected in this Agreement, that will not affect or in any respect limit the binding nature of this Agreement. Capital One has provided and is providing information that Plaintiff reasonably requests to identify Settlement Class members and the alleged damages they incurred. Both Parties recognize and acknowledge that they and their experts reviewed and analyzed data for a subset of the time at issue and that they and their experts used extrapolation to make certain determinations, arguments, and settlement positions. The Parties agree that this Settlement is reasonable and will not attempt to renegotiate or otherwise void or invalidate or terminate the Settlement irrespective of what any unexamined data later shows. It is the Parties' intention to resolve their disputes in connection with this Action pursuant to the terms of this Agreement now and thus, in furtherance of their intentions, the Agreement shall remain in full force and effect notwithstanding the discovery of any additional facts or law, or changes in law, and this Agreement shall not be subject to rescission or modification by reason of any changes or

differences in facts or law, subsequently occurring or otherwise.

120. Receipt of Advice of Counsel. Each Party acknowledges, agrees, and specifically warrants that he, she, or it has fully read this Agreement and the Releases contained herein, received independent legal advice with respect to the advisability of entering into this Agreement and the Releases, and the legal effects of this Agreement and the Releases.

Dated: 12/16/2019

DocuSigned by:
7C13655A94CB4D2...
TAWANNA ROBERTS
Plaintiff

Dated: _____

_____
Jeff Ostrow, Esq.
KOPELOWITZ OSTROW
FERGUSON WEISELBERG GILBERT
Class Counsel

Dated: _____

_____
Hassan Zavareei, Esq.
TYCKO & ZAVAREEI LLP
Class Counsel

Dated: _____

_____
Jeffrey Kaliel, Esq.
KALIEL PLLC
Class Counsel

Dated: _____

CAPITAL ONE, N.A.

_____
By: _____
ITS _____

Dated: _____

_____
James McGuire, Esq.
MORRISON & FOERSTER LLP
Counsel for Capital One, N.A.

differences in facts or law, subsequently occurring or otherwise.

120. Receipt of Advice of Counsel. Each Party acknowledges, agrees, and specifically warrants that he, she, or it has fully read this Agreement and the Releases contained herein, received independent legal advice with respect to the advisability of entering into this Agreement and the Releases, and the legal effects of this Agreement and the Releases, and fully understands the effect of this Agreement and the Releases.

Dated: _____

TAWANNA ROBERTS
Plaintiff

Dated: _____

Jeff Ostrow, Esq.
KOPELOWITZ OSTROW
FERGUSON WEISELBERG GILBERT
Class Counsel

Dated: _____

Hassan Zavareei, Esq.
TYCKO & ZAVAREEI LLP
Class Counsel

Dated: _____

Jeffrey Kaliel, Esq.
KALIEL PLLC
Class Counsel

Dated: 12/16/19

CAPITAL ONE, N.A.

By: Matthew Cooper
ITS General Counsel

Dated: _____

James McGuire, Esq.
MORRISON & FOERSTER LLP
Counsel for Capital One, N.A.

differences in facts or law, subsequently occurring or otherwise.

120. Receipt of Advice of Counsel. Each Party acknowledges, agrees, and specifically warrants that he, she, or it has fully read this Agreement and the Releases contained herein, received independent legal advice with respect to the advisability of entering into this Agreement and the Releases, and the legal effects of this Agreement and the Releases, and fully understands the effect of this Agreement and the Releases.

Dated: _____

TAWANNA ROBERTS
Plaintiff

Dated: 12/16/19

Jeff Ostrow, Esq.
KOPELOWITZ OSTROW
FERGUSON WEISELBERG GILBERT
Class Counsel

Dated: 12/16/2019

Hassan Zavareei, Esq.
TYCKO & ZAVAREEI LLP
Class Counsel

Dated: 12/16/2019

DocuSigned by:
Jeff Kaliel
F817E108E0B1427...

Jeffrey Kaliel, Esq.
KALIEL PLLC
Class Counsel

Dated: _____

CAPITAL ONE, N.A.

By: _____
ITS _____

Dated: 12-16-19

James McGuire, Esq.
MORRISON & FOERSTER LLP
Counsel for Capital One, N.A.