IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AUBREY KELLER, *et al., on behalf of themselves and all those similarly situated* Plaintiffs, v. TD BANK, N.A., Defendant.	CASE NO. 12-5054

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF COLLECTIVE AND CLASS SETTLEMENT, AND APPROVAL OF ATTORNEYS' FEES, REIMBURSEMENT OF COSTS, AND SERVICE PAYMENTS

Plaintiffs, by and through Class Counsel, hereby move this Court to grant final approval to the class settlement which was preliminarily approved on April 15, 2014. Plaintiffs further request that this Court grant Class Counsel's application for attorney's fees and costs, and further request that this Court grant Named Plaintiffs' applications for service payments. The reasons for this motion are fully briefed in the attached memorandum of law.

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF COLLECTIVE AND CLASS SETTLEMENT, AND APPROVAL OF ATTORNEYS' FEES, REIMBURSEMENT OF COSTS, AND SERVICE PAYMENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

On April 15, 2014, following 1.5 years of litigation and substantial settlement discussions which continued even following the original motion to preliminarily approve the settlement was filed, and after a full briefing on the matter and oral argument regarding same, this Court gave preliminary approval to the pending class and collective action settlement. (April 15, 2014 Order, Doc. No. 49). Pursuant to the agreement, TD Bank, N.A. ("TD Bank") will pay six million dollars ($6,000,000), in addition to certain claims administration costs, to settle the wage and hour claims brought in this action. The settlement resolves all claims brought in this action, including allegations that TD Bank failed to pay overtime in violation of the Fair Labor Standards Act ("FLSA") and allegations that TD Bank failed to pay for compensable time and overtime in violation of various state laws. In exchange for the payment of six million dollars, class members will release wage and hour claims incurred during the class period which are based upon a class member's claim that he or she engaged in off-the-clock pre-shift and post-shift security procedures. Additionally, since the filing of this action, TD Bank has changed its timekeeping policies and practices to enable class members to input their pre-shift time into TD's time-keeping system.[1]

At the time this Court gave preliminary approval, the Court expressed some reservations regarding the settlement amount due to the claims-made nature of the settlement. As Plaintiffs discussed in their brief filed in support of the motion for preliminary approval, TD Bank did not possess accurate records reflecting which specific class members performed pre and post-shift security procedures each day, and, as a result, a claim form was a necessary procedure to

[1] TD Bank changed its policies shortly after the filing of this action (the change occurred in October of 2012) to enable employees to enter time spent engaging in security procedures into TD Bank's time-keeping system; TD Bank *denies* that the change was caused by the instant litigation.

determine the amount each class member was owed in this settlement. The Court expressed some concern that the claims-made nature of the settlement procedure could result in a substantial amount of the six-million dollar gross settlement reverting back to TD Bank while TD Bank would still receive a class-wide release and Class Counsel would still be seeking a percentage of the gross settlement (even if the ultimate payout was less than the maximum payout per the settlement agreement). Because no one could predict with reasonable accuracy the amount of claims which would ultimately be filed, Plaintiffs were unable to fully respond to such a concern prior to the class-wide notice being distributed and prior to the claims-process concluding.

Ultimately, as will be discussed below, no money under the preliminary approved settlement will revert back to TD Bank. Instead, due to the notice procedures which were negotiated, including a calling campaign and two mailings, the participation rate in this settlement is several times the typical participation rate for a claims-made settlement, and ultimately, the total amounts to be paid out per the settlement agreement will be equal to the gross settlement amount (*i.e.*, the total payments to be paid by TD Bank will equal six million dollars). Hence, the settlement before the Court will result in payment of the entire six million dollars.

The settlement should be given final approval because it meets all the *Girsh* factors (as discussed below) and because it is a fair and reasonable compromise of the claims asserted herein. The class members' reaction to the settlement has been extremely positive, and there is *not* a single objector as to any aspect of the settlement. Additionally, under the settlement agreement, every class member who completed a claim form will net *more* than their unpaid wages, and in fact will receive close to 20% more than their asserted losses. While it is correct

that if Plaintiffs prevailed at trial it is *possible* the recovery would be higher for class members (because liquidated damages could result in a recovery of double damages), such a result is far from certain, and in any event, would likely take many more years of hard fought litigation and an appeals process to come to fruition.

The extremely positive reaction of the class demonstrates that class members want to be paid now and are accepting and pleased with the compromise reached in this settlement. Additionally, all of the relevant factors this Court is to examine when determining the reasonableness and fairness of the settlement heavily weigh in favor of approving the settlement.

Plaintiffs further seek this Court to approve the requested attorneys' fees and costs and the service payments to the Named Plaintiffs. As briefed below, Class Counsel has litigated this matter for over 2 years, and has spent nearly 800 hours of attorney time litigating this claim. The requested fee, which after taking into account the costs incurred is less than 19% of the gross settlement fund, is at the *low end* of amounts routinely awarded to class counsel in wage and hour class action settlements. Likewise, the service payments to the Named Plaintiffs are also at the low end of what is typically awarded. And as indicated above, not a single class member objected to the attorneys' fees, costs, or service payments requested.

Hence, for the reasons stated above and fully briefed below, the Court should approve the settlement reached.

LEGAL ARGUMENT

I. Final Approval is Appropriate.

The law favors compromise and settlement of collective and class action suits. *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594-595 (3d Cir. 2010); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("there is an overriding public interest in settling class

action litigation, and it should therefore be encouraged"); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (noting the "strong judicial policy in favor of settlements, particularly in the class action context") (internal quotations omitted); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) ("[V]oluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation."); *Speed Shore Corp. v. Denda*, 605 F.2d 469, 473 (9th Cir. 1979) ("It is well recognized that settlement agreements are judicially favored as a matter of sound public policy. Settlement agreements conserve judicial time and limit expensive litigation."); *see also* NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy.").

The approval of a proposed class action settlement is a matter of discretion for the trial court. *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *Churchill Village, LLC v. Gen. Elec. Co.*, 361 F.3d 566, 575 (9th Cir. 2004); *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1998). In exercising this discretion, courts should give "proper deference to the private consensual decision of the parties." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1988).

II. The Court should give final approval to the class settlement.

The Third Circuit reviews nine factors when determining the fairness of a class settlement, the so-called "*Girsh* factors":

(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; and

(9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975); *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 179 (3d Cir. 2012); *see also Lenahan v. Sears, Roebuck and Co.*, 266 Fed. Appx. 114, 120 (3d Cir. 2008) (applying *Girsh* factors to determine if settlement of hybrid Rule 23/FLSA claims was reasonable); *Deitz v. Budget Renovations & Roofing, Inc.* 2013 U.S. Dist. LEXIS 75005 (M.D. Pa. 2013) (applying *Girsh* factors to determine reasonableness of FLSA settlement); *Brumley v. Camin Cargo Control, Inc.* 2012 U.S. Dist. LEXIS 40599 (D. NJ. 2012) (applying *Girsh* factors to determine reasonableness of FLSA settlement and noting that other courts in this circuit have done the same).

A. The complexity, expense, and likely duration of the litigation favors final approval of the settlement (Girsh Factor 1).

Here, the first *Girsh* factor weighs in favor of the settlement. The litigation involves allegations that TD Bank employees, working at more than 1,300 retail locations throughout the eastern United States, performed off-the-clock security work for TD Bank. Inherent in the number of facilities and class members at issue and the fact that all the work at issue was performed off-the-clock, are factual complexities which would be difficult to resolve in an adversarial trial.

Similarly, due to the size of the class (involving approximately 25,000 individuals), substantial additional discovery would be necessary to obtain reliable representative testimony regarding the hours worked by class members and the work performed. Such complexity would nearly guarantee a long and arduous discovery and litigation track which could easily last several more years, not including appeals.

Additionally, the legal claims are themselves complex. There is an inherent complexity to an off-the-clock class action which seeks wages for such a large number of employees who worked at a large number of locations over a lengthy class period. The eighteen-count, Third Amended Complaint further evidences the complexity of the claims at issue and asserts that TD Bank violated the federal FLSA as well as 29 wage and hours laws in 15 states and the District of Columbia by failing to pay for pre-shift and post-shift mandatory security procedures. In the instant settlement, four separate subgroups were necessary to provide the proper statute of limitations based upon the state where each class member worked.

Accordingly, the factual and legal complexities of the instant action weigh in favor of settlement.

B. The reaction of the class has been extraordinary and entirely positive. (*Girsh* factor 2)

In determining the reaction of the class "courts looks to the number and vociferousness of the objectors." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995). Here, of more than 25,000 class members, not a single class member objected to the settlement. (Declaration of Brian Radetich at ¶18, to be filed upon receipt, expected imminently). Moreover, only 130 requested to opt out of the class. (*Id.* at ¶17). Such a reaction strongly supports approval here. *See, e.g. Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990) (noting that second factor "strongly favor[ed]" settlement where "only twenty-nine" "of

281 class members" objected to the settlement's terms); *Ripley v. Sunoco, Inc.*, 287 F.R.D. 300 (E.D. Pa. 2012) (finding second *Girsh* factor weighed in favor of approving settlement when one objection was filed and 3 opt-outs received in a class of 441 members); *Inmates of the Northumberland County Prison v. Reish*, 2011 U.S. Dist. LEXIS 46600 (M.D. Pa. 2011) (finding second *Girsh* factor weighed in favor of settlement where court received 4 objections in a class of 200 members).

Notice was sent to all 25,838 class members by Heffler Claims Group ("Heffler"), the neutral third party class administrator in this matter. (Radetich Declaration at ¶¶7, 9, 10, 11, 12, 13). Notice included 2 mailings and a telephone communication. (*Id.*) Each notice made very clear the terms of the settlement and that the amount each class member would receive would be based upon the number of openings and closings each worked during the class period. The notice also made clear that if no claim form was filed, no compensation would be provided to the class member. Accordingly, each class member who received the notice was cognizant of the amount he or she would receive if this Court gives final approval.

Additionally, the participation rate in this settlement is unusually high, demonstrating the positive reaction of class members. *See Sylvester v. Cigna Corp.*, 369 F. Supp. 2d 34, 52 (D. Me. 2005) (stating that "claims made' settlements regularly yield response rates of 10 percent or less"); *see also Chambery v. Tuxedo Junction Inc.*, 2014 U.S. Dist. LEXIS 101939 (W.D.N.Y. July 25, 2014) (finding 37% to be "an unusually high participation rate" and granting final approval to the class settlement). Here, more than 9,000 individuals filed claim forms, resulting in a participation rate of 35%. (Radetich Declaration at ¶16). Additionally, all six million dollars of the gross settlement amount will be paid with no money reverting back to TD Bank under the settlement agreement, as the claims filed slightly exceed the $4,800,000 of the

settlement which was allocated to class members. (*Id.* at ¶21). Hence, the settlement easily satisfies the second of the *Girsh* factors.

C. The Stage of the Proceedings (*Girsh* Factor 3)

The third factor is "the stage of the proceedings and the amount of discovery completed." *Girsh*, 521 F.2d at 157. This factor "captures the degree of case development that class counsel have accomplished prior to settlement." *In re Cendant*, 2001 U.S. App. LEXIS 19214, at *16. "Through this inquiry, it can be determined whether counsel had an adequate appreciation of the merits of the case before negotiation." *In re Safety Components Int'l*, 166 F. Supp. 2d 72, 86 (D.N.J. 2001), *quoting in Re Prudential Ins*, 148 F.3d 283, 319 (3d Cir. 1998). "The stage of the proceedings are measured by reference to the commencement of proceedings either in the class action at issue or some related proceeding." *Id.*

The proper question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004). "The pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . [but] an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000) (internal quotations omitted).

Here, although preparing this case through trial would require more discovery for both sides, the Parties have completed enough discovery to understand the strengths and weaknesses of the case and accordingly were in a position to appropriately negotiate and recommend a settlement. First, the case was filed more than two years ago, on September 4, 2012. While the Parties filed for preliminary settlement approval on December 20, 2013, the mediation which resulted in a settlement in principle occurred on October 17, 2013, thirteen and one-half months

following the initiation of the lawsuit. By that time, the Parties had engaged in substantial and adversarial discovery to enable them to reach an amicable and informed settlement.

Specifically, the Parties engaged in on-site time studies to determine a fair average of the amount of time an employee would typically spend on pre-shift and post-shift security procedures. The Parties also exchanged substantial written discovery, which included the production of time records from 19 random TD Bank branches to review records prior to and following October of 2012, when TD Bank implemented a rule change allowing employees to log their pre-shift time when they clocked-in in the morning (the instant lawsuit asserted damages prior to the rule change, and the instant settlement release only releases claims prior to the rule change going into effect). These records allowed Plaintiffs and TD Bank to understand the potential value and exposure regarding the claims and the strengths and weaknesses of the case.

Additionally, TD Bank produced documents relating to the time keeping system which TD Bank employed, allowing the Parties to appreciate that there simply were insufficient records which would definitively determine – on a class wide basis - which employees opened and closed each branch each day. Understanding that such records were lacking allowed Plaintiffs to understand the challenges they could face in maintaining class certification through trial and in proving liability and damages class wide.

Finally, the time studies allowed the Parties to have a candid discussion regarding the amount of damages each employee who opened and closed each day incurred. This knowledge was utilized and relied upon in creating a class-wide damage formula which attributed 6 unpaid minutes for each opening and 1 unpaid minute for each closing.

Hence, this factor weighs in favor of approving the settlement.

D. The Risk of Establishing Liability (*Girsh* Factor 4)

While Plaintiffs remain confident that they could establish damages and liability on a class-wide basis and prevail at trial, it is clear that such an endeavor poses inherent and substantial risks of non-recovery to class members.

With respect to liability, TD Bank asserted at all times that to the extent any work was performed pre and/or post-shift, the work was legally *de minimis* and accordingly not compensable pursuant to the FLSA. "The FLSA does not require employers to compensate non-exempt employees for *de minimis* quantities of time spent working before and after shifts." *Williams v. Securitas Sec. Servs. USA, Inc.*, No. 10-7181, 2011 U.S. Dist. LEXIS 92337, at *8 (E.D. Pa. Aug. 17, 2011). Thus, if this case were litigated to trial, Plaintiffs would need to prove that the time they worked was not *de minimis*. *Albanese v. Bergen Cnty.*, 991 F. Supp. 410, 422 (D.N.J. 1997). To determine if a particular task is *de minimis*, courts consider "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Williams*, 2011 U.S. Dist. LEXIS 92337, at *9; *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984). While Plaintiffs believe the regularity and the aggregate amount of time class-wide would sufficiently defeat such a defense, Plaintiffs and Class Counsel recognize that there are no guarantees in litigation, and it would be presumptuous to believe that either Party knows how this Court would rule on such a defense.

Additionally, TD Bank asserted that per its written policies, Plaintiffs were required to notify TD Bank of any work they performed off-the-clock. TD Bank asserted that due to such policies, TD Bank was not liable for any damages to Plaintiffs, and further asserted that to the extent it was liable, its conduct was not willful (and hence, no liquidated damages should be

awarded and only a 2-year statute of limitations should apply). While Plaintiffs asserted that TD Bank required employees to engage in pre-shift and post-shift security procedures while at the same time employing a time-keeping system that prevented the employee from recording his or her pre-shift and post-shift time, TD Bank asserted that it was the employee's obligation to report such time to management. While Plaintiffs believe they have the stronger argument here, there is case law to support TD Bank's legal position that an employer who has no knowledge of overtime worked is not liable for damages under the FLSA where the employee deliberately hides the fact that he is performing such work from his employer. *See Guenzel v. Mount Olive Bd. of Educ. motion for reconsideration granted by*, 2012 U.S. Dist. LEXIS 21583 (D.N.J. Feb. 16, 2012).

Here, while Plaintiffs remain confident that they would ultimately prevail on this issue, the Parties' settlement takes into account the risk the class would take if no settlement was reached on account of such defenses.

E. The Risk of Establishing Damages (*Girsh* Factor 5)

The fifth factor for the Court to consider under *Girsh* is the risk of establishing damages at trial should the Court deny final approval of the settlement.

There is always difficulty in establishing damages in an off-the-clock case where the time at issue was not recorded by any means. This is especially the case in a class action asserted on behalf of more than 25,000 class members employed at over 1,300 TD Bank locations nationwide.

Where an employer fails to keep accurate time records, FLSA jurisprudence establishes a lower bar for plaintiffs who seek to establish damages. *See Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 686-689 (1946); *see also Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1300 (3d

Cir. 1991) (where an employee establishes that he has in fact performed work for which he was improperly compensated and shows sufficient evidence to show the amount and extent of that work as a matter of "just and reasonable inference," the court may award damages even though award "may be only approximate"). However, the employee still must establish through admissible evidence that he is entitled to some damages for improperly compensated work prior to being entitled to the relaxed burden under *Anderson.* *See Gwynn v. City of Phila.*, 719 F.3d 295, 304 (3d Cir. 2013) (affirming summary judgment for employer where employees failed to establish that they actually worked at least some overtime even where employer failed to keep proper records pursuant to the FLSA); *see also Lugo v. Farmers Pride Inc.*,737 F.Supp.2d 291, 315 (E.D. Pa. 2010) (decertifying wage and hour class because while the record indicated that some class members performed uncompensated work, others did not, and the plaintiffs presented no reliable manner to calculate damages class-wide for all class members); *but see Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986) (overturning district court's dismissal of class-wide damages claim where imprecise time records resulted in "speculative and unspecific" damage calculation because *Anderson* "leaves no doubt that an award of back wages will not be barred for imprecision where it arises from the employer's failure to keep records as required by the FLSA"); *Brock v. Tony & Susan Alamo Foundation*, 842 F.2d 1018 (8th Cir. 1988) (remanding to district court to "estimate and fashion a reasonable remedy that restores as fully as possible all employees covered by FLSA who were improperly denied compensation, regardless of the lack of records" where records did not indicate who was employed by the defendant or how many hours each worked).

To establish damages on a class-wide basis, Plaintiffs would need to present a reasonable basis for determining the amount of time opening and closing security procedures took, and the

number of times each class member performed opening and closing procedures. Pursuant to *Anderson* and its progeny, Plaintiffs intended to establish the amount of unpaid compensation owed to each class member through time studies and representative testimony. Plaintiffs would have been required to hire a statistician and possibly a vocational expert to aid in such a process. TD Bank likely would have employed their own counter-experts to argue that Plaintiffs' damage models were incorrect and unreliable. Such a reality poses inherent uncertainty and risk and weighs in favor of settlement. *See, e.g. In re Safety Components Int'l*, 166 F. Supp. 2d at 90 (granting final approval to settlement where "to establish damages, plaintiffs' counsel [would have had to employ] expert witnesses . . . [and] [t]he defendants likely would have employed their own experts to attack the accuracy and reliability of the models and formulae utilized . . . [thus] many risks would have faced lead plaintiffs in establishing damages").

Accordingly, this factor as well weighs in favor of granting final approval to the settlement.

F. The Risk of Maintaining the Class Action through trial (*Girsh* Factor 6)

The sixth *Girsh* factor for the Court to consider in determining whether to grant final approval to the settlement is the risk of maintaining the class action through trial. Here again, this factor weighs in favor of granting final approval of the settlement.[2]

[2] It is not clear that this factor remains a relevant factor for the Court to consider in approving a class action settlement. In *In re Prudential Ins*., our Appeals Court stated that "because the district court always possesses the authority to decertify or modify a class that proves unmanageable, examination of this factor in the standard class action would appear to be perfunctory." *In re Prudential Ins*., 148 F.3d at 321. The Circuit Court explained that "there will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." *Id.* The *Prudential Ins.* Court determined that this factor "becomes even more 'toothless' after [*Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, (1997)]." *Id.* The Circuit Court explained that *Amchem* held that, when "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." *Id.* (*citing Amchem Prods*., 521 U.S. at 620). The manageability inquiry in settlement-only class actions, the Circuit Court posited, may not be significant. *Id.*

While Plaintiffs remain confident that they could establish liability and damages on a class-wide basis, they remain humble to the risks and uncertainty inherent in obtaining and maintaining class certification through trial. As discussed *supra*, the assertions in this case seek compensation for off-the-clock work at every location of TD Bank in the United States. While the security procedures performed were largely uniform throughout all locations (and the time keeping system was also uniform), difficulties regarding proving which class members performed such procedures each day and how long each spent engaging in same would arise if this case proceeded through trial. While Plaintiffs intended to prove same through representative testimony and expert statisticians, Plaintiffs understand that TD Bank would have hired counter-experts, and it is not clear what ultimate findings or holdings this Court would make in respect to same.

For purposes of the instant settlement, the proofs as to which employees performed security procedures were simplified by permitting each class member to send a signed claim form attesting to the average number of openings and closings performed each workweek. Class members were not required to answer formal discovery or attend a trial to be paid. Additionally, time studies were utilized in creating a fair average amount of time for each opening and closing performed. The use of such procedures allows for a fair and expeditious resolution for class members without requiring Plaintiffs to prove that they could maintain a class-wide trial on damages and liability.

Hence, this factor also weighs in favor of approving the instant settlement.

G. The ability of TD Bank to withstand a greater judgment (*Girsh* Factor 7)

The seventh factor for consideration, the defendant's ability to withstand a greater judgment, can be a relevant factor in some cases (*i.e.*, where a defendant receives a significant

discount in settling claims and that discount is not related to the strengths and weaknesses of the claim). The Third Circuit has made clear that this factor is not relevant in every matter, and affirmed the decision of a district court where the district court found this factor was irrelevant when there was no evidence in the record of that same was "a consideration [which] factored into settlement negotiations." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 540 (3d Cir. 2004). In other words, if the settlement represents a fair compromise based on the value of the claims, *it is not relevant* if the defendant could withstand a greater judgment. *Id.*

Here, TD Bank's ability to pay was not a factor in settlement negotiations. Accordingly, this factor is irrelevant and neither weighs for or against settlement in this matter.

H. The settlement is well within a fair and reasonable range based upon the attendant risks of litigation and the best possible recovery (*Girsh* Factors 8 and 9)

In Plaintiffs' motion for preliminary approval of the settlement, Plaintiffs already addressed the range of reasonableness of the ultimately obtained settlement, and this Court already found that "the proposed settlement falls within the range of possible approval." (DE 49 at p. 7).

As discussed in Plaintiffs' motion for preliminary approval, the settlement amount is fair in light of Plaintiffs' best possible recovery. The settlement contemplates that the Settling Class will recover $4.8 million in unpaid wages, overtime and other damages, plus an additional $1.2 million allocated to plaintiffs' attorneys' fees and costs, and class representative service payments. As discussed in Plaintiffs' original brief in support of their motion for preliminary approval, this represents approximately 66% of the total possible recovery of the class, which considering the attendant risks of litigation (as discussed above) is well within a reasonable

range. (Plaintiffs' Brief in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement and Class Certification at p. 20, DE 40-14).

Additionally, it is worth noting that all class members who completed claim forms will obtain *more* from the settlement than in actual lost wages (although they will not obtain 100% of their total possible recovery). Still, a settlement which provides more than 100% of the alleged injury is certainly well within the range of fair and reasonable. While it is true that class members who chose not to complete a claim form, despite receiving 2 mailed notices *and* a phone call, will not be paid pursuant to the settlement, it is reasonable to believe that such individuals would also be unwilling to provide discovery and testimony regarding the amount of times they opened or closed the bank during their employment (and that they would not have filed an independent action against TD Bank in the absence of this settlement). Because TD Bank does not have adequate records showing same, their decision not to provide such information means that they could not have recovered any compensation from TD Bank. *See Gwynn v. City of Phila.*, 719 F.3d 295, 304 (3d Cir. 2013) (where time records are not kept in compliance with the FLSA record-keeping requirements, the plaintiff still must establish through some evidence that he or she is entitled to unpaid wages; where no evidence was provided, summary judgment for the employer was appropriate).

Specifically, per the settlement agreement, a class member who completed a claim form will receive compensation for each opening and closing they performed during the class period. Class members, through their submissions of claim forms, indicated the number of openings and closings they averaged each workweek during the class period. Per the settlement agreement,

class members will be paid for six minutes for each opening and one minute for each closing.[3] Class members who were full-time employees will receive such compensation at 1.5 times their regular rate, and class members who were part-time employees (who were not working overtime) will be paid for such time at their straight time rate. The settlement also contemplated providing up to a 25% additional amount to each class member as liquidated damages.

Due to the large number of claims filed and the acceptance of all late and deficient claims, the entire settlement fund will be distributed, and as a result, the settlement agreement requires that the claims be pro-rated. However, recognizing that the maximum settlement claim contemplated paying 100% of lost wages plus an additional 25% as liquidated damages (totaling 125% of their actual lost wages to each class member), even with the pro-rated deduction, class members will still more than 100% of their lost wages in the settlement. (Radetich Declaration). Hence, the settlement provides relief which will more than compensate each class member for unpaid wages incurred during the class period.

Accordingly, this factor also weighs heavily in favor of settlement.

In short, of the nine *Girsh* factors, 8 weigh in favor of settlement, and the remaining factor (ability of defendant to withstand a larger judgment) is irrelevant in the context of the instant class settlement.

III. Payments to Class Members who submitted Late Claims and/or Deficient Claim Forms.

Recognizing that this is a claims-made settlement where class members are waiving claims and are paid by submitting a claim form, the Parties have worked together and have

[3] Class members were informed in the notice that the settlement payment would be calculated by attributing 6 minutes of work time for each opening and 1 minute for each closing; that not a single person objected to this formula supports the belief of Plaintiffs that this was a fair average to use to determine class-wide damages.

agreed that all claim forms submitted shall be paid, even in cases where the claim form was received late or was otherwise deficient.

Per the settlement agreement, claim forms were validated by the Claims Administrator, who was given significant access to TD Bank's payroll and timekeeping records. (*See* Settlement Agreement at pp. 9-10). In the event that the Claim Administrator believed any claim to be invalid based on such records, a dispute resolution procedure was to be agreed upon by Class Counsel and TD Bank Counsel. (*Id.*). Here, the Claims Administrator had concerns regarding several hundred claim forms, and reached out to each class member by phone and in writing to receive corrected information. (Radetich Declaration at ¶18). The Claims Administrator was unable to communicate with 121 of the individuals who had deficient claims. (*Id.*). In these cases, Class Counsel and TD Bank Counsel agreed to the following resolution for such claims[4]; importantly, in all instances, class members who provided deficient forms will receive some compensation:

1. For most of these individuals, it is reasonable to infer that these individuals misinterpreted the question on the claim form (which asked for the claimant to provide the average number of openings/closings *per week*) and provided an answer regarding the *total* number of openings and closings they performed. Hence, for these members, the compromise reached will result in them being paid 6 minutes for each opening and 1 minute for each closing for the number each indicated on their claim form, without further multiplying the amount of openings/closings by number of weeks worked.

2. Of the remaining individuals, there a few instances where it appears that the claimant did not understand the question and/or gave an answer that included work performed outside of the class period. This inference is fair because even if the Parties assumed that the person was indicating the total number of openings and closings performed during the class period, the average amount of openings/closings per workweek would still exceed 7. For these individuals, a compromise was made where the *average* number of weekly openings/closing for their subclass will be utilized to determine their payment.

[4] Deficient claims were categorized based upon a methodology agreed by Counsel for the Parties. (Radetich Declaration).

3. A few class members indicated that they performed 10 openings and/or closings each workweek. Recognizing that TD Bank's pay period is 2 weeks, it is reasonable to infer that these individuals believed they were being asked how many times they opened/closed during a single pay period of 2 weeks. Accordingly, the Parties have agreed that such class members will receive compensation pursuant to the settlement for 5 openings and/or closings per workweek.

4. Finally, a few class members whose claims were deficient and who did not respond to further inquiries from the Claims Administrator indicated that they performed opening and/or closing procedures but did not provide the average number of openings/closings per workweek. For these individuals, the average number of openings and closings performed each workweek by their subclass will be utilized to determine their compensation.

These inferences are fair and result in a reasonable payment and compromise to the affected class members. Additionally, the total payment for all of these individuals cited above is only approximately $30,000, meaning that these payments do not in any real manner affect the payments of other class members. (Radetich Declaration).

Accordingly, the compromises reached are consistent with the settlement agreement and should be approved by the Court.

IV. The Court should award the requested attorneys' fees and costs.

Class counsel here seeks an award of fees and costs of 20% of the gross settlement, or $1.2 million (including the $10,000 requested for service payments, which per the agreement, are to be paid out of the attorney fee award).[5] Class Counsel in this case took this matter on a pure

[5] During the Preliminary Settlement Approval Hearing and in the Court's order preliminarily approving the proposed settlement in this matter (*See* Doc. No. 49 at p.7, FN3), the Court expressed reservations regarding approving a fee based upon a settlement fund where the settlement agreement contemplated that some of the fund could revert back to TD Bank in the event that the participation rate was low. While this Court has discretion to award an appropriate fee and reduce the award if the Court deems necessary, Plaintiffs note that other Courts within this Circuit have opined that it is appropriate to base the fee award off the available fund, even if some of the fund reverts back to the defendant. *See, e.g., Doherty v. Hertz Corp*., 2014 U.S. Dist. LEXIS 86792 (D.N.J. June 25, 2014) (after stating that the court had initially "expressed concerns" regarding the amount of attorney's fees when compared to the amount of total recovery "realized by Class Members through the claims process . . **the law supports an award of reasonable attorney's fees to Class Counsel based on the gross settlement - the monies potentially available to be claimed - without regard to the amount actually claimed by Class Members**"), *citing Boeing Co. v. Van Gemert,* 444 U.S. 472 (1980); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 177 (3d Cir.

contingency and agreed to receive nothing in this matter – including waiving recoupment of all costs – if the class did not obtain a recovery in this matter.

For the last 2 years, Class Counsel has litigated this matter without any compensation. During that time, Class Counsel has incurred $70,459.35 in costs relating to the prosecution and settlement of this matter. Additionally, the $10,000 of requested service awards for the Named Plaintiffs will be paid out of the fee and cost award.

To date, Class Counsel has dedicated 719.8 hours of attorney time and 74.9 hours of paralegal time litigating this matter. (Swidler Declaration at ¶5, *attached as* Exhibit B). Class Counsel requested and responded to substantial written discovery in this matter, reviewed thousands of documents, and interviewed dozens of class members prior to mediating this matter. Class Counsel has also now spoken to hundreds of class members following the distribution of the settlement notice. Class Counsel performed on-site time studies at various locations of TD Bank to understand the timing of the security procedures. Additionally, Class Counsel hired an investigator to perform investigations at other branches to ensure the results of the time study were accurate. Class Counsel prepared an in-depth and lengthy brief in support of Plaintiffs' anticipated motion conditional class certification (although it was ultimately not filed due to the fact that a settlement was reached) to enable Plaintiffs to have substantially more leverage during the settlement negotiations and to have an immediately viable "Plan B" should the mediation have failed.[6] Class Counsel also prepared a lengthy and detailed settlement memorandum for submission to Judge Rosen (mediator), which was shared with TD Bank prior to mediation, to maximize Plaintiffs' settlement position during the mediation. Class Counsel

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2013) (emphasis added). Regardless however, the issue is moot because due to the high participation rate, the entire $6,000,000 will be paid and no money will revert to TD Bank.

[6] The Parties agreed to toll the claims of class members pending the mediation; had the mediation failed, the tolling would have ended, and Plaintiffs would have needed to be able to file for conditional certification immediately to protect the rights of class members.

also attended a full day mediation with Judge Rosen and had numerous telephone conference Judge Rosen both prior to and following the mediation. As provided in the attached time logs, a substantial number of meetings occurred regarding the case, including conferences between Class Counsel, conferences with clients, and conferences which involved TD Bank's counsel. (Attorney Time Sheets, *attached as* Exhibit B(1)). Additional motions and briefs relating to the settlement were also filed, and this Court held numerous conferences and hearings regarding to the case and settlement.

The attorneys' fees and costs in this matter are requested as a percentage of the class recovery, which is the favored method for calculating attorneys' fees in such cases. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980); *In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006); *In re Prudential Ins. Co. America Sales Practice Litig. Agent*, 148 F.3d 283, 333 (3d Cir. 1998); *Court Awarded Attorney Fees, Report of Third Circuit Task Force*, 108 F.R.D. 237 (1985); *Bredbenner v. Liberty Travel, Inc.* 2011 U.S. Dist. LEXIS 38663 at *52-53 (D. NJ. 2011) (common fund distribution for attorney's fees in hybrid FLSA/Rule 23 wage and hour case). The percentage-of-recovery method "is the prevailing methodology used by courts in this Circuit for wage-and-hour cases." *Bredbenner*, 2011 U.S. Dist. LEXIS at *53, *citing, In re Janney*, 2009 U.S. Dist. LEXIS 60790 (E.D. Pa. 2009); *Chemi v. Champion Mortg.*, 2009 U.S. Dist. LEXIS 44860, (D.N.J. 2009); *Lenahan v. Sears, Roebuck & Co.*, 2006 U.S. Dist. LEXIS 60307 (D. NJ. 2006).

Even in cases where statutory attorney's fees attach, such as the FLSA, the percentage-of-recovery doctrine is still the preferred manner to calculate attorney's fees. The lodestar method, whereby the attorney's time is multiplied by the reasonable hourly rate, remains *disfavored* because "regardless [of] how a total settlement structure is formally structured . . .

every dollar given to class counsel means one less dollar for the class." *In re Cendant Corp. Litig.*, 264 F.3d 201, 256 (3d Cir. 2001); *see also In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d at 821-822 (rejecting lodestar fee and directing that percentage-of-recovery should have been utilized even though the agreement for fees was ostensibly distinct from the agreement to pay class members because of "economic reality" of such arrangement); *Dewey v. Volkswagen Aktiengesellschaft*, 558 Fed. Appx. 191, 199 (3d Cir. 2014) (affirming settlement, overruling objectors, and holding that the district court properly used a percentage-of-the-fund calculation in computing fees despite the fact that the underlying statute provided for attorney's fees to the prevailing party).

The Third Circuit Court of Appeals has set forth the standards by which to measure and evaluate the reasonableness of proposed counsel fees. *See Gunter v. Ridgewood Energy Corp*., 223 F.3d 190 (3d Cir. 2000). Those factors include: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases. *See Gunter*, 223 F.3d 190, 195 n.1; *see also In re AT&T Corp.*, 455 F.3d 160, 166 (3d Cir. 2006) (noting that courts should also consider any other factors that are "useful and relevant" under the facts of each case) (citations omitted). "Each case is different, however, and in some circumstances one single factor may outweigh the rest." *Bredbenner*, 2011 U.S. Dist. LEXIS 38663 at *54. In addition to the *Gunter* factors, the Third Circuit has suggested that courts "cross-check" its fee calculation against the lodestar award method. *Gunter*. *Id.*

A. Size of the Fund and Number of Persons Benefitted

The settlement in the instant matter provides payment to 9,004 class members who filed claim forms. The total settlement provides for a settlement payment of $6,000,000 to be distributed per the settlement agreement. This is a substantial recovery for class members, and as stated above, will result in each being paid *more* than their actual lost wages. *See Bredbenner*, 2011 U.S. Dist. LEXIS 38663 at *54-56; In *re Janney*, 2009 U.S. Dist. LEXIS 60790 (E.D. Pa. 2009). In addition, following Plaintiffs' initiation of this matter, while TD Bank denies that same was related to the filling of this action, TD Bank changed its timekeeping system so that employees who clock in can now enter into the timekeeping system the actual start time.

Accordingly, this factor supports the requested fee because of the large number of individuals and the substantial benefit – both monetary and equitable – provided to class members and employees of TD Bank in general.

B. No objections to class counsel's fee request.

The notice sent to class members informed them that Class Counsel would seek a fee award of 20% of the gross settlement. Not a single objection was raised with respect to Class Counsel's fee request. Hence, this factor weighs in favor of approving the fee application. *Bredbenner*, 2011 U.S. Dist. LEXIS 38663 at *56.

C. Skill and Efficiency of Class Counsel

The skill and efficiency of Class Counsel is "measured by 'the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.'" *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D.Pa.2000) *quoting In re Computron Software, Inc.*, 6 F. Supp. 2d 313, 323 (D.N.J. 1998).

Here, as discussed *supra* and as discussed in the original briefing for preliminary approval, the difficulties faced in this case were large. The case involves unpaid overtime and straight time claims of tens of thousands of individuals who work or worked for TD Bank in over one thousand separate locations stretching across the entire eastern United States. All the sought-after hours were worked off-the-clock, and accordingly, there were numerous evidentiary hurdles in proving both liability and damages in a class-wide proceeding. Moreover, because the amount of damages per class member was relatively low, it simply was and is not feasible that individual class members would bring their own individual federal and/or state lawsuit seeking recovery for such time.

Class Counsel handled these difficulties in the most effective and efficient manner possible. In just over two years, Class Counsel managed to take an individual claim arising out of Philadelphia and transform same into a multi-million dollar settlement wherein more than 9,000 workers throughout the eastern United States will receive compensation throughout the United States.

Further, Class Counsel has substantial experience in litigating class action wage and hour cases. As discussed in the accompanying affidavits, Justin Swidler and Richard Swartz have litigated more than 60 putative federal wage and hour class actions in the last 4 years, and are currently certified class counsel in thirteen wage and hour class actions throughout the United States, collectively representing well more than 100,000 workers. (Swidler Declaration at ¶¶12-13). Class Counsel has been previously recognized by this Court as being particularly skilled in this area of the law. *See, e.g. McGee v. Anne's Choice, Inc.,* 2014 U.S. Dist. LEXIS 75840 (E.D. Pa., June 4, 2014) (Schiller, J.) (finding Mr. Swartz and Mr. Swidler to be "well-versed in FLSA cases and skilled in litigating and settling wage-and-hour litigation"); *Stoneback v. ArtsQuest,*

2013 U.S. Dist. LEXIS 86457 (E.D. Pa. June 19, 2013) (Gardner, J.) (finding that Mr. Swidler and Mr. Swartz have "handled numerous class action lawsuits" and that their firm "is qualified to represent the class as class counsel"). TD Bank Counsel is Fisher & Phillips, LLP, one of the most respected employment law firms in the nation who also has substantial experience in class action wage and hour litigation.

Hence, this factor weighs in favor of the proposed fee award.

D. Hours Worked and Risk of Non-Payment

In determining the risk of non-payment, courts consider the risk of establishing liability. *In re Cendant Corp.*, 232 F. Supp. 2d at 339. Additionally, while Class Counsel could not find case law providing same, it seems evident from the test employed by the Third Circuit that this Court should further consider the risk that the class becomes decertified, as such would result in a far lesser recovery and accordingly, far less attorney's fees.

Here, as discussed above, this case poses a number of factual and legal issues which could have created risks as to liability and as to class certification. Accordingly, Class Counsel took substantial risk in litigating this matter.

Despite these risks, and as provided by the attached declarations and attorney time log, as of the date of this filing, Swartz Swidler, LLC dedicated 719.8 hours of attorney time litigating the instant matter, and 74.9 hours of paralegal time. Additionally, it is reasonable to presume that counsel will spend an additional 12 hours preparing for and attending the Final Fairness Approval Hearing and an additional 67.5 hours will be worked by attorneys in returning calls from class member following the Final Approval Hearing. Undersigned suspects that approximately 7.5% of the 9,004 claimants (about 675 class members) will call with questions or concerns regarding their payment, and that answering those calls and investigating their concerns

will average .1 hours per caller, totaling 67.5 hours. Moreover, the calls will be received by paralegals who will take initial information. Undersigned suspects that this will average, in total, 35 hours.

E. Awards in Similar Cases

Percentage awards vary between 19%-45% of the fund, and the court should reduce the percentage as the total settlement amount increases when the reason for the increase is not because of efforts taken by counsel, but instead simply because the size of the class has increased. *In re Cendant Corp.*, 243 F.3d at 736; *Bredbenner*, 2011 U.S. Dist. LEXIS at *54-56; *In re Gen. Motors*, 55 F.3d at 822, *citing In re SmithKline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 533 (E.D. Pa. 1990). Smaller percentages are reserved for large settlements, typically $100 million or higher, which may involve hundreds of thousands, if not millions of class members, and where class counsel did not incur substantial additional efforts by the inclusion of such persons. *See In re Cendant Corp.*, 243 F.3d at 736.

Accordingly, the requested award is consistent and is in fact *lower* than awards provided in similar cases. Here, Class Counsel has requested a fee of $1,130,068.65 (18.8% of the $6,000,000 fund), plus an additional $69,931.35 in costs, for a total of $1,200,000. This is lower than what is routinely provided in such cases. *See, e.g. Bredbenner*, 2011 U.S. Dist. LEXIS at *60-61. *In re Safety Components, Inc. Sec. Litig.*, 166 F Supp. 2d 72, 102 (D.N.J. 2001) (granting award of 33 1/3 % in common fund case and citing to ten cases from this Circuit holding the same).

Accordingly, the requested fee is well in line with other fee awards in this Circuit, and accordingly, this factor also weighs in favor of providing the requested fee award.

F. Lodestar Cross-check

Finally, the requested fee is also supported by the lodestar cross-check. The cross-check is performed by calculating the "lodestar multiplier." *In re AT&T Corp.*, 455 F.3d at 164. The lodestar multiplier is determined by dividing the requested fee award, determined from the percentage-of-recovery method, by the lodestar. *Id.* The lodestar multiplier accounts for "the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *See In re Rite Aid*, 396 F.3d 294, 306 (3d. Cir. 2005) (*citing Task Force Report*, 108 F.R.D. at 243) (approving a lodestar multiplier of ***4.07***). The Third Circuit has recognized that multipliers "ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." *In Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 238, 341 (3d Cir. 1998). The Court may consider reducing the percentage-of-recovery award when the multiplier is too high (*i.e.* much greater than 4x). *See In re Rite Aid*, 396 F.3d at 306. In determining the lodestar for cross-check purposes, the Court need not engage in a "full-blown lodestar inquiry," *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 169 n.6 (3d Cir. 2006), or "mathematical precision," *In re Rite Aid Corp.*, 396 F.3d at 306-07. A court need not involve itself with "a review of actual [attorney] time sheets." *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546, 592-93 (D. NJ. 2010). Indeed, where, there have been no objections to the requested fee, "a full-blown lodestar analysis is an unnecessary and inefficient use of judicial resources." *Id.*; *see also Kirsch v. Delta Dental*, 534 Fed. Appx. 113, 117 (3d Cir. 2013). Additional while lodestar multipliers are a relevant consideration in determining if the fee request is reasonable, "the lodestar cross-check does not trump the primary reliance on the percentage of common fund method." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005).

"In performing the lodestar cross-check, the district courts should apply blended billing rates that approximate the fee structure of all the attorneys who worked on the matter." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 306. Here, Richard Swartz, Justin Swidler, Joshua Boyette, Mathew Miller, and Daniel Horowitz performed work on this matter, though the vast majority of the work was performed by Justin Swidler and Richard Swartz. (*See* Swidler Declaration at ¶3, Time Sheets attached to Swidler Declaration at Exhibit B(1)).

Richard Swartz was admitted to the bar in 1997. Justin Swidler was admitted to the bar in 2007. Both have litigated more than 60 putative wage and hour cases, and as discussed above and in their supporting affidavits, both are currently class counsel in nine certified wage and hour cases, cumulatively representing more than 100,000 workers.[7] The associates who worked on this matter have, on average, 3.5 years of experience practicing law, and all have been practicing federal employment law for at least 3 years each. (Swidler Declaration at ¶14). As the attached time records provide, approximately 2/3 of the attorney work performed in this case was performed by either Mr. Swidler or Mr. Swartz, with the remaining third being split amongst the associate attorneys.

This Court found earlier this year found that $500 per hour was a reasonable hourly rate for Mr. Swartz and Mr. Swidler, who are experienced wage and hour class action attorneys. *See McGee*, 2014 U.S. Dist. LEXIS 75840. This Court also found that a reasonable rate for Mr. Horowitz, an associate of Swartz Swidler, was $350 per hour. These rates are further supported by the 2012 National Law Journal Annual Billing Survey, which courts within this Circuit have relied in determining a reasonable hourly rate for class counsel. *See, e.g. In re Schering-Plough*

[7] "In utilizing the blended billing rates to calculate the lodestar, the courts allow the use of current billing rates at the time the calculation is made rather than the billing rates actually in effect at the time the hours were recorded. Although counterintuitive, this is intended to compensate for delay in receiving fees." *In re Schering-Plough Corp.*, 2013 U.S. Dist. LEXIS 147981 (D.N.J. Aug. 27, 2013).

Corp., 2013 U.S. Dist. LEXIS 147981 (D. N.J. Aug. 27, 2013) (*sua sponte* determining fee request was reasonable because rates were in line with the rates found in the 2012 National Law Journal Annual Billing Survey); *see also* 2012 National Law Journal Annual Billing Survey, available online at https://ecf.nyed.uscourts.gov/dropbox/324457/1.11.cv.5632.8287512.3.pdf (September 22, 2014).

Three Philadelphia firms were included in the 2012 Billing Survey, Cozen O'Connor, Fox Rothschild, and Saul Ewing. The reported high-end of the hourly rates charged by partners at these Philadelphia firms were: $970, $795, and $800, respectfully (averaging $855/hour). The reported low-end of the hourly rates charge by partners at these Philadelphia firms were $320, $340, and $335 (averaging $331/hour). Undersigned respectfully submits that a reasonable rate for a partner in who is a successful and experienced class action attorney is in line with the higher end of these rates cited above. Nevertheless, for purposes of calculating the lodestar, Plaintiffs have used a blended rate for partners of $500/hour, consistent with the rate this Court found reasonable several months ago. *See McGee*, 2014 U.S. Dist. LEXIS 75840.

Additionally, for purposes of calculating the lodestar, Plaintiffs have used a blended rate of $350/hour for associates, which is consistent with the rate provided for associate counsel of Swartz Swidler in *McGee* and is consistent with their level of experience. *See id.; see also* Swidler Declaration at ¶14. As the partners performed 2/3 of the work in this case, a reasonable blended rate for all attorneys who worked on the case is $450/hour ($500 *2/3 + $350 * 1/3). Finally, Plaintiffs have used a blended rate of $85/hour for paralegal work.

In calculating the lodestar, Plaintiffs performed the following calculations:

1. Multiplying the number of attorney hours currently expended (719.8) by the blended hourly rate ($450) to arrive at: $323,910;

2. Multiplying the number of anticipated hours to be worked following the submission of this motion by attorneys of Swartz Swidler (79.5 hours) by the blended hourly rate ($450) to arrive at: $35,775;
3. Multiplying the number of paralegal hours currently expended (74.9) by the blended paralegal rate ($85/hour) to arrive at: $6,366.50;
4. Multiplying the number of anticipated paralegal hours to be worked following the submission of this motion (30 hours) by the blended paralegal rate ($85/hour) to arrive at: $2,550;
5. Adding the above together results in a lodestar of: $368,601.50.

Accordingly, the fee requested is well within the lodestar cross-check multiplier, as the cross-check produces a multiplier of 3.06, ($1,130,068.65/$368,601.50) well below the permissible multiplier of 4, which is "frequently" awarded. Hence, this cross-check verifies that the fee requested is reasonable for the work performed.

For these reasons, it is respectfully requested that this Court grant Class Counsel's fee application.

V. The Court should reward Class Counsel with Reimbursement for their Out-of-Pocket Costs.

"There is no reason to reject the request for reimbursement of [expenses] that counsel have spent out of their own pockets in litigating [a class action] case." *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 U.S. Dist. LEXIS 29162, at *35-36 (E.D. Pa. Oct. 13, 2004). Moreover, "attorneys who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses from the fund." *In re Aetna Inc. Sec. Litig.*, MDL No. 1219, 2001 U.S. Dist. LEXIS 68, at *40 (E.D. Pa. Jan. 4, 2001); *see also In re Fasteners Antitrust Litig.*, 2014 U.S. Dist. LEXIS 9990 (E.D. Pa. Jan. 27, 2014).

Here, Class Counsel incurred $69,931.35 in out-of-pocket costs in litigating this matter. The costs consist of: the filing fee ($350), Selective Subpoena invoices related to serving the complaint and delivering documents (totaling $154.83); mileage and parking ($212.52); Innovative Investigations, Inc.'s invoice for performing surveillance of opening security procedures ($742); Mediation Costs ($2,500), an out-going call notice campaign ($65,000), and a deficiency call campaign ($972). (Swidler Declaration at ¶15). No class member objected to Class Counsel recouping their costs from the settlement fund. Accordingly, Class Counsel respectfully requests to be awarded such costs.

VI. This Court should award the requested service payments for Named Plaintiffs.

"The purpose of [service] payments are to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation, and to reward the public service of contributing to the enforcement of mandatory laws." *Bredbenner v. Liberty Travel, Inc.*, 2011 U.S. Dist. LEXIS 38663, 63-64 (D.N.J. Apr. 8, 2011). By bringing suit against a large company and having documents publicly filed with their names on them, named plaintiffs who assist in class action litigation "[take] on certain risks. By bringing suit against a major company[,]… they risk their good will and job security in the industry for the benefit of the class as a whole." *Id.*

The notice in this matter informed all class members that Named Plaintiffs were seeking service awards totaling $10,000 ($7,500 to Ms. Keller, and $2,500 to Ms. Garcia). Not a single objection was made to the service award applications.

Named Plaintiffs all assisted greatly in the litigation and resolution of this matter. Ms. Keller, the original plaintiff in this action, seeks a service award of $7,500. Ms. Keller's efforts cannot be overstated. Ms. Keller was the sole plaintiff in this matter from September 2, 2012

through February of 2013. During this time, she could have chosen to engage in settlement discussions which could have resulted in her personally receiving more total compensation than she will ultimately get in the class settlement (and receiving same sooner), even with the inclusion of the service award. Of course, had she chosen to take such efforts, none of the other class members would have received compensation. In addition, she provided the ground work which led to the ultimate result, including providing witnesses, detailed information regarding TD Bank's pay practices, security procedures, job duties, locations, and other information which was necessary to ultimately obtain the result provided. She was instrumental during settlement discussions, and participated in the mediation and settlement discussions by phone and by meeting with Class Counsel. She further reviewed TD Bank's discovery responses and provided insight into weaknesses and alleged inconsistencies of same. The efforts she spent and the sacrifices she made were not shared by any other class member in this case. (Swidler Declaration at ¶ 7).

The other named plaintiff, Ms. Garcia, seeks a service payment of $2,500. While not as instrumental to the class as Ms. Keller, her efforts were still important to obtaining the ultimate recovery. She provided a further expansive view of TD Bank's policies, including providing further insight early in this case regarding TD Bank's pay practices, and security procedures. Additionally, she assisted with discovery, and reviewed TD Bank' responses to discovery. (Swidler Declaration at ¶ 8).

The service payments requested are in line with the amounts regularly provided in similar cases. *See, e.g.*, *Bredbenner*, 2011 U.S. Dist. LEXIS 38663 at *68 ($10,000 each for 8 named plaintiffs); *Dewey*, 728 F. Supp.2d at 610 ($10,000); *In re Am. Inv. Life Ins. Co. Annuity Mktg. & Sales Practice Litig.*, 263 F.R.D. 226, 245 (E.D. Pa. 2009) (between $5,000 and $10,000); *In re*

Elec. Carbon, 447 F. Supp. 2d 389, 412 (D. NJ. 2006) ($12,000); *In re Remeron End-Payor Antitrust Litig.*, 2005 U.S. Dist. LEXIS 27011 at *32-*33 (D.N.J. Sept. 13, 2005) ($30,000); *see also 4 Newberg on Class Actions* § 11.38, at 11-80 (citing empirical study from 2006 that found average award per class representative to be $16,000). Additionally, the service payments in this matter are to be paid out of the attorney's fees and costs award, and accordingly, rewarding these service payments will not decrease any class member's share of the settlement.

For these reasons, the class has greatly benefited by the efforts of these individuals, and it is accordingly requested that the service payments as requested be awarded.

CONCLUSION

For the reasons as stated above, Plaintiffs request that the Court give final approval to the settlement, and award the attorney's fees and service payments as requested.

Respectfully Submitted,

/s/ Justin L. Swidler

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