IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

ALEJANDRO CARRILLO, individually and on behalf of all others similarly situated, Plaintiff, v. WELLS FARGO BANK, N.A., Defendant.	NO. 2:18-cv-03095-SJF-SIL ECF Case Judge Sandra J. Feuerstein Magistrate Judge Steven I. Locke **JURY DEMANDED HEREON**

MEMORANDUM IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARD

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I. INTRODUCTION

This case involves allegations that Wells Fargo offers consumers the opportunity to buy down the interest rate for an initial period of their residential real estate loans, but then applies a higher rate. Plaintiff alleges specifically that Wells Fargo gives consumers a closing disclosure that prominently displays the lower interest rate. Wells Fargo offers the lower interest rate through a form buydown agreement that attaches a buydown payment schedule showing the same lower buydown interest rate. Plaintiff alleges that Wells Fargo does not use the represented lower interest rate in amortizing consumers' loans. It uses a higher interest rate. Wells Fargo then collects a lower monthly payment that "corresponds" to the lower interest rate during the initial loan period. In other words, Plaintiff alleges that consumers do not really "buy down" interest rates through this program. Instead, Wells Fargo's buydown program is nothing more than a reduced monthly payment program.

Wells Fargo denies these allegations and has steadfastly defended its buydown product—and the truth of its disclosures—throughout the course of the litigation and during settlement negotiations. In the face of this defense, Plaintiff and his counsel have achieved an excellent settlement that requires Wells Fargo to pay $6,945,095 into a non-reversionary common fund for the benefit of the Settlement Class. Unless they exclude themselves from the Settlement, all Settlement Class Members will receive a payment without having to submit a claim form. The mean payment is approximately $423 per loan and the median payment is approximately $364, which is an excellent result especially given this case involves a unique fact pattern that raises issues of first impression legally and almost certainly would require a risky trial to resolve.

The Settlement is a result of sustained efforts of experienced and knowledgeable Class Counsel over the course of three years. To compensate them for their efforts, Class Counsel seek

one-third of the common fund, equaling up to $2,314,800, and an award of costs estimated to be $17,087. The attorneys' fees sought are reasonable under the circumstances of the case, including the years of work Class Counsel devoted to the case, the risks they faced moving forward in the litigation in the face of an unfaltering defense, and the outstanding results they obtained for the Class. Class Counsel also seek approval of a service award in the amount of $12,500 to Plaintiff Carrillo, who was willing to step up on behalf of thousands of other consumers and who actively participated in the matter from start to finish. The requested fees, costs, and service award are reasonable and in line with the Second Circuit's requirements for approval. For these reasons, Class Counsel's motion should be granted.

II. STATEMENT OF FACTS

A. The Settlement represents an outstanding result for the Class.

The Settlement provides that Wells Fargo will pay $6,945,095 into a Settlement Fund from which all Settlement Class Members will receive a cash payment. Dkt. No. 92-1 (Settlement Agreement) § V.i, ¶ 61. The amount of each cash payment depends on the amount the Settlement Class Member allegedly overpaid and whether the Settlement Class Member is entitled to statutory damages under the federal Truth in Lending Act (TILA). *Id*. § VI.i, ¶¶ 70. Class Counsel estimate the payments will range from $50 to $14,109 after deductions for the requested attorneys' fees and costs, the requested service award to the named Plaintiff, and the cost of settlement administration. Dkt. No. 91 (Prelim. Approval Mtn) at 6. The average estimated award is $423.75 per loan and the median is $364.64 per loan. No Class Member will receive less than $50.

Class Members do not need to submit a claim form to receive a payment. Class Members have until June 7, 2021 to object to the Settlement or exclude themselves from the Class. *See*

Dkt. No. 95 (Preliminary Approval Order) ¶ 30. If any amounts remain in the Settlement Fund as a result of uncashed checks, those funds will be directed to the Center for Responsible Lending. Settlement Agreement ¶ 79. Not one penny of the Fund will revert to Wells Fargo. The Settlement achieved by Class Counsel thus provides exceptional monetary relief.

B. The action involved considerable risk.

In 2018, Class Counsel undertook representation of this matter on a pure contingency-fee basis. Declarations of Beth E. Terrell and Daniel A. Schlanger in Support of Plaintiff's Motion for Attorneys' Fees and Costs and for Service Award to the Class Representative (Terrell Decl.) ¶ 17 and (Schlanger Decl.) ¶¶ 26-27. As a result, they shouldered the risk of expending substantial costs and time in litigating the action without any monetary gain in the event of an adverse judgment, all while devoting time to this case that otherwise could have been spent on other matters. *Id*. This was not a case that was obviously attractive to other attorneys. In fact, before contacting Class Counsel, Mr. Carrillo presented the potential case to multiple other plaintiff's firms and was rejected. Declaration of Alejandro Carrillo (Carrillo Decl.) ¶¶ 5-6.

The primary risk Plaintiff faced was that he could lose on the merits. Terrell Decl. ¶ 11. The crux of the parties' dispute "stems from differing interpretations of Wells Fargo's obligations" under the loan documents that memorialize the terms of their residential mortgages with Wells Fargo. Dkt. No. 46 (Magis. Rpt. & Rec.) at 8. Plaintiff alleges that Wells Fargo's documents promise consumers a reduced interest rate for a certain period of time. Wells Fargo argues that it never promises a reduced interest rate, but rather only a reduced payment. The Court denied Wells Fargo's motion to dismiss because it concluded that the loan documents "present ambiguities such that the Court is unable to interpret the agreements on a motion to dismiss." *See id.*; *see also* Dkt. No. 53 (adopting magistrate's report and recommendation and

noting that "reasonably intelligent people" who reviewed the loan documents could have a difference of opinion as to their meaning). Although Plaintiff is confident in his interpretation of the loan documents, if Wells Fargo convinced a jury that its interpretation is correct, Plaintiff would have recovered nothing because his legal claims all turned on the allegation that Wells Fargo's loan documents were misleading. Dkt. No. 94 at 11-12 (alleging violation of New York State General Business Law § 394 due to Wells Fargo's practice of overstating consumers' balances), at 12 (alleging breach of contract due to same practice), at 13 (alleging violation of the federal Truth in Lending Act because Wells Fargo's practice of setting forth one interest rate for an initial period but effectively charging a different rate due to the method of amortization is not authorized by contracts).

Another risk Plaintiff faced going forward is that the Court would decline to certify the case as a class action. Terrell Decl. ¶ 12. Indeed, Wells Fargo felt so strongly that class certification is not appropriate it moved to strike Plaintiff's class allegations on the pleadings. *See* Dkt. No. 34 at 12-23 (arguing whether Wells Fargo breached contracts or made deceptive representations is an individualized question depending on its contracts and disclosures with each class member). The Court denied Wells Fargo's motion, but if, after discovery, Wells Fargo had shown that its loan documents varied substantially from borrower to borrower, the Court may have declined to certify the class. Terrell Decl. ¶ 12. Even if a class were eventually certified, and Plaintiff succeeded in bringing the case to verdict, Wells Fargo likely would have appealed.

C. Class Counsel thoroughly and efficiently investigated the Class claims.

Before filing this matter, Class Counsel not only conducted their own analysis of the relevant facts and law, but also hired Kevin Byers, CPA, as a consulting expert to analyze Mr. Carrillo's loan data and to inform and confirm Class Counsel's theory of the case. Schlanger

Decl. ¶ 48. Mr. Byers is a forensic accountant with deep expertise in loan analysis, and is currently employed as Senior Director, Consumer Protection & Non-Depository Supervision, at the Conference of State Bank Supervisors. *Id.*

After this initial investigation, the parties actively litigated this action for over two years. Terrell Decl. ¶ 13. Plaintiff propounded written discovery requests targeting Plaintiff and Class Members' loan documents; Wells Fargo's amortization, buydown agreement, and disclosure policies; and marketing materials relating to buydown agreements. *Id*. Wells Fargo objected to responding to Plaintiff's requests until its motion to dismiss had been decided, but ultimately—after numerous meet and confer telephone conferences and with the assistance of Magistrate Judge Locke—produced loan-level data pertaining to loan terms, interest rates buydown agreement terms, and payment-related information for each proposed class member (*see* Dkt. No. 79) as well as nearly half a million pages of documents reflecting the buydown agreements, loan disclosures, and loan documents that they used during the relevant time. *Id.* The parties also negotiated an agreement that required Wells Fargo to produce a sample of loan files relating to 122 proposed class members, as well as an agreed-upon procedure for identifying which class members' files would be sampled. *Id.* And Wells Fargo also produced communications that concerned policy changes and information concerning Wells Fargo's use of buydown agreements over time. *Id.* Wells Fargo's documents were instrumental to Plaintiff in deposing Wells Fargo's Rule 30(b)(6) designee, Julie Wolfe. Terrell Decl. ¶ 13. And its loan-level data production and loan-file production allowed Plaintiff to calculate the amount that each Class Member allegedly was overcharged. *See id.*

During the course of discovery, Wells Fargo disclosed that a third party—Wolters Kluwer Financial Services U.S.—created and had custody of many of the key form documents

relating to Wells Fargo's buydown programs, including loan disclosures, schedules, and other forms. Terrell Decl. ¶ 14. Plaintiff served Wolters Kluwer with a subpoena, seeking those documents. Although Wolters Kluwer initially objected to producing much of the requested information, it eventually produced 260 pages of redline form documents for Wells Fargo's buydown agreements. *Id.*

The parties also engaged in motions practice. Wells Fargo notified Plaintiff that it intended to move to dismiss (Dkt. No. 14) and, in response, Plaintiff filed an Amended Complaint (Dkt. No. 17). Wells Fargo then moved to dismiss the Amended Complaint. Dkt. No. 33. When briefing was complete, the motion was referred to Magistrate Judge Locke, who recommended that it be denied (Dkt. No. 46) and the Court adopted that recommendation over Wells Fargo's objections. Dkt. No. 53. The parties also briefed several other motions, including Wells Fargo's motion to stay discovery pending a decision on its motion to dismiss (Dkt. No. 38), Plaintiff's motion regarding the treatment of confidential information (Dkt. No. 61), and Plaintiff's motion to compel discovery (Dkt. No. 78). The outcome of these motions informed the parties about the strengths and weaknesses of their respective claims and defenses. Terrell Decl. ¶ 15.

As a result of the extensive discovery and motion practice, by the time the parties commenced settlement negotiations, Class Counsel understood the size of the class, and the extent of class wide damages. Terrell Decl. ¶ 16. The parties mediated with Hunter R. Hughes III of Hunter ADR on July 29, 2020. *Id*. Mr. Hughes is a well-respected mediator with a "nationwide practice that focuses on class, collective, and complex cases." https://www.nadn.org/hunter-hughes. During that full-day mediation session, the parties reached a settlement in principle. After months of follow-up meetings and negotiations, and work

analyzing loan-level data in order to propose a fair allocation of the Settlement Fund that is based on Class Members' actual damages, the parties reached agreement regarding the scope of the class, and on all other material terms. Terrell Decl. ¶ 16.

III. CLASS COUNSEL'S ATTORNEYS' FEES AND COSTS SHOULD BE APPROVED.

Plaintiff requests that the Court approve their request for attorneys' fees of 33.33% of the Settlement Fund ($2,314,800) and reimbursement of litigation costs of $17,087. Plaintiff's request is reasonable based on the factors courts considers when awarding fees as a percentage of a settlement fund. *See Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 50 (2d Cir. 2000). A lodestar crosscheck confirms its reasonableness.

A. The percentage of the fund method should be applied here.

"[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Goldberger,* 209 F.3d at 47. Although there are two ways to compensate attorneys for successful prosecution of statutory claims, the lodestar and percentage of the fund method, "[t]he trend in this Circuit is toward the percentage method." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 121 (2d Cir. 2005). There are several reasons why courts prefer the percentage method over the lodestar method to compensate attorneys for successful prosecution of statutory claims.

First, the percentage method "directly aligns the interests of the class and its counsel" because it provides an incentive to attorneys to resolve the case efficiently and to create the largest common fund out of which payments to the class can be made. *Wal-Mart Stores*, 396 F.3d at 121 (internal quotation marks omitted); *see also Vizcaino v. Microsoft Corp*., 290 F.3d

1043, 1050 n.5 (9th Cir. 2001) (finding "the lodestar method does not reward early settlement" and that "class counsel should [not] necessarily receive a lesser fee for settling a case quickly").

Second, the percentage method is closely aligned with market practices because it "mimics the compensation system actually used by individual clients to compensate their attorneys." *In re Sumitomo Copper Litig*., 74 F. Supp. 2d 393, 397 (S.D.N.Y. 1999); *see also Strougo ex rei. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) ("[T]he percentage method is consistent with and, indeed, is intended to mirror, practice in the private marketplace where contingent fee attorneys typically negotiate percentage fee arrangements with their clients.").

Third, the percentage of the fund method promotes early resolution, and removes the incentive for plaintiffs' lawyers to engage in wasteful litigation in order to increase their billable hours. It "provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores*, 396 F.3d at 121 (internal quotation marks and additional citation omitted). In that regard, the percentage method discourages plaintiffs' lawyers from running up their billable hours, one of the most significant downsides of the lodestar method. *Savoie v. Merchants Bank*, 166 F.3d 456, 460-61 (2d Cir. 1999) ("It has been noted that once the fee is set as a percentage of the fund, the plaintiffs' lawyers have no incentive to run up the number of billable hours for which they would be compensated under the lodestar method.").

Fourth, the percentage method preserves judicial resources because it "relieves the court of the cumbersome, enervating, and often surrealistic process of evaluating fee petitions." *Savoie*, 166 F.3d at 461 n.4. District courts in the Second Circuit consistently award one-third of the fund. *See Mouskengeshcaie v. Eltman, Eltman & Cooper, P.C.*, 14 CV 7539 (MKB) (CLP), 2020 WL 5995978, at *7-8 (E.D.N.Y. Apr. 21, 2020), *report and recommendation adopted in*

Mouskengeshcaie, 2020 WL 5995650 (E.D.N.Y. Oct. 8, 2020) (awarding 32% of the fund and observing that percentage was "reasonable in relationship to the settlement"); *Suarez v. Rosa Mexicano Brands Inc.*, No. 16 Civ. 5464 (GWG), 2018 WL 1801319, at *1 (S.D.N.Y. Apr. 13, 2018) (approving a fee award of 33.3% of $3.6 million settlement fund); *Zorrilla v. Carlson Rests., Inc.*, No. 14 Civ. 2740 (AT), 2018 WL 1737139, at *2 (S.D.N.Y. Apr. 9, 2018) (approving fee award equal to one-third of $19.1 million settlement fund); *In re Marsh ERISA Litig.,* 265 F.R.D. 128, 149 (S.D.N.Y. 2010) (awarding one-third of the recovery); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar,* No. 06 CIV.4270 (PAC), 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) (collecting cases awarding over 30% and noting that "Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit."); *Frank v. Eastman Kodak Co*., 228 F.R.D. 174, 188–89 (W.D.N.Y. 2005) (awarding 38.26%); *Strougo*, 258 F. Supp. 2d at 262 (33.33%); *In re Lloyd's Am. Trust Fund Litig*., No. 96 CIV.1262 RWS, 2002 WL 31663577, at *26 (S.D.N.Y. Nov. 26, 2002), *aff'd sub nom. Adams v. Rose*, No. 03-7011, 2003 WL 21982207 (2d Cir. Aug. 20, 2003) ("In this district alone, there are scores of . . . cases where fees . . . were awarded in the range of 33.3 percent of the settlement fund."); *Maley v. Del Global Tech. Corp*., 186 F. Supp. 2d 358, 370–71 (S.D.N.Y. 2002) (awarding 33.33%; noting "modest multiplier of 4.65 [was] fair and reasonable"); *Becher v. Long Island Lighting Co*., 64 F. Supp. 2d 174, 182 (E.D.N.Y. 1999) (33.33%); *In re Crazy Eddie Sec. Litig*., 824 F. Supp. 320, 326 (E.D.N.Y. 1993) (33.8%).

Plaintiff respectfully requests that the Court use the percentage of fund method here.

B. The *Goldberger* factors support an award of one-third of the common fund.

In determining the reasonableness of fee applications, courts consider the following six factors set forth by the Second Circuit in *Goldberger*: (1) the time and labor expended by

counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *Goldberger*, 209 F.3d at 50. All of the *Goldberger* factors weigh in favor of approving Class Counsel's request for 33.33% of the fund here.

1. Class Counsel's time and labor.

Class Counsel have litigated this case since 2018, and the time they dedicated to this case supports their requested fee. Class Counsel have submitted billing records showing that they dedicated over 1,927.1 hours to this case. *See* Terrell Decl. ¶¶ 19-22, Ex. 1; Schlanger Decl. ¶¶42, 47, 50. Much of this time was spent pursuing documents and data from Wells Fargo, reviewing thousands of pages of documents, and conducting an exhaustive analysis of Wells Fargo's loan-level data and corresponding loan files to establish the Class claims and calculate damages. Class Counsel defeated Wells Fargo's successive motions to dismiss. Class Counsel deposed Wells Fargo's 30(b)(6) witness. And Class Counsel obtained key documents through third-party discovery. This strategy permitted Class Counsel to obtain information about the strengths and weaknesses of Plaintiff's claims efficiently and effectively. Terrell Decl. ¶¶ 23-25.

The work on this case is far from complete. Still to be done, and not included in the count of hours listed above, are the final approval motion and hearing, responding to any Class Member objections or inquiries, and supervision of the administrator's distribution of the Settlement Fund. Terrell Decl. ¶ 27; Schlanger Decl. ¶ 46. All of this represents an extraordinary commitment to a case where recovery was far from certain. Because of these efforts, this factor supports the requested fee award.

2. The litigation's magnitude and complexity.

The second *Goldberger* factor, which addresses "the magnitude and complexities of the litigation," also supports approval of the requested fee. *Goldberger*, 209 F.3d at 50. This class action was unusually complex for several reasons.

First, the action involves an unusual fact pattern—a bank breaching its form contracts with mortgage borrowers and violating consumer protection laws by promising borrowers that they would be charged one interest rate for an initial period but then effectively charging a higher rate due to the bank's amortization method—is apparently not an everyday occurrence. Class Counsel could not locate a class action involving similar facts. When Wells Fargo moved to dismiss, asserting its disclosures were not misleading, there was no road map for Class Counsel to follow to challenge Defendant's assertions. Class Counsel instead used their experience in other individual and class matters, ingenuity, and careful scrutiny of their client's documents to respond to Wells Fargo's arguments.

Second, due to the uniqueness of the fact pattern, this is not a run-of-the-mill case where hundreds of decisions provide clear legal guidance. Many of the claims raise issues of first impression, creating risk for the parties and requiring Class Counsel to spend time crafting arguments without the benefit of authority that was directly on point.

Third, the data analysis was complicated. Before the litigation commenced, Class Counsel spent considerable time and effort investigating Wells Fargo's practices generally and Plaintiff's claim specifically. Schlanger Decl. ¶ 55. Class Counsel scrutinized Wells Fargo's amortization schedules and performed complicated mathematical calculations to conclude that Wells Fargo charged Plaintiff and Class Members more interest that Wells Fargo said it would charge. After the litigation commenced, Wells Fargo ultimately produced loan level data relating

to approximately 10,776 consumers nationwide. Class Counsel dedicated hundreds of hours conducting a detailed analysis of this data, which often was missing fields of key information. To fill in the gaps, Class Counsel reviewed pdfs of voluminous loan files. *See* Terrell Decl. ¶ 24.

If the litigation had not settled, Class Counsel would have faced additional obstacles as Wells Fargo continued to mount a vigorous defense both to the appropriateness of class certification and at trial, which would require substantial fact and expert testimony. *See Fleisher v. Phoenix Life Ins. Co*., No. 11-CV-8405 (CM), 2015 WL 10847814, at *20 (S.D.N.Y. Sept. 9, 2015) (awarding fees of one-third of cash component of settlement due, in part, to the complexity of issues that required expert analysis). Class Counsel were more than willing to take on these challenges, but are confident that the settlement they achieved was in the best interest of the Class because it provided substantial compensation without delay.

3. The risks of litigation.

"Courts of this Circuit have recognized the risk of litigation to be perhaps the foremost factor to be considered in determining the award of appropriate attorneys' fees." *Taft v. Ackermans*, No. 02 Civ. 7951 (PKL), 2007 WL 414493, at *10 (S.D.N.Y. Jan. 31, 2007). "A lawyer whose compensation is contingent on services can be expected to receive more than she would receive if she were charging an hourly rate." *Banyai v. Mazur*, No. 00 Civ. 9806, 2008 WL 5110912, at *4 (S.D.N.Y. Dec. 2, 2008) (citing *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981)). Class Counsel prosecuted this matter on a purely contingent basis, agreeing to advance all necessary expenses and to receive a fee only if there was a recovery. *See* Terrell Decl. ¶ 17; Schlanger Decl. ¶ 27. Class Counsel invested considerable time and money prosecuting this action; their out-of-pocket costs are approximately $17,087. *See* Terrell Decl. ¶ 26; Schlanger Decl. ¶ 47, 50, Ex. G. Class Counsel hired a consulting expert before filing the

lawsuit in order to properly and fully develop their liability and damages analysis; diligently reviewed Wells Fargo's records and records subpoenaed from third parties; analyzed loan-level data and loan files to identify class members and calculate their damages; deposed Wells Fargo's key witness; and engaged in motions practice. "Despite the most vigorous and competent of efforts," their success was "never guaranteed." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974). Three years have passed since this case was filed, and Class Counsel has, as yet, received no payment for their work.

This litigation presented specific risks to Plaintiff's recovery. From the outset, Wells Fargo has maintained that Plaintiff's claims are not suitable for class certification because they require "individualized, file-by-file determinations of each class member's loan, buydown agreement, disclosures, and the related course of conduct." Dkt. No. 36 at 23. Given Wells Fargo uses form loan documents for its residential mortgages and maintains electronically-stored loan level data, Plaintiff disagrees. That said, if Wells Fargo could show that individual loan files contain documents unique to specific class members, a court may decline to certify Plaintiff's claims. *See, e.g., Mata v. CitiMortgage, Inc.*, No. 10-cv-9167, 2012 WL 7985175, at *1 (C.D. Cal. July 20, 2012) (class certification not appropriate where merits determination required file-by-file review).

Even if their motion to certify the class was successful, Plaintiff faced a future motion for summary judgment on the issue of liability, since Wells Fargo insists that its buydown agreements are not ambiguous. If Plaintiff could overcome this hurdle and succeed in bringing the case to verdict, Wells Fargo would likely appeal, which "could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 748 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *see also West Virginia*

v. Chas. Pfizer & Co., 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970) ("It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced."), *aff'd,* 440 F.2d 1079 (2d Cir. 1971); *Berkey Photo, Inc. v. Eastman Kodak Co.,* 603 F.2d 263 (2d Cir. 1979) (reversing $87 million judgment after trial).

For these reasons, this factor also supports Class Counsel's attorneys' fee request.

4. Quality of the representation.

"The critical element in determining the appropriate fee to be awarded class counsel out of a common fund is the result obtained for the Class through the efforts of such counsel." *Maley*, 186 F. Supp. 2d at 373. Class Counsel are experienced class action litigators who have successfully prosecuted complex consumer cases, including cases involving financial institutions like Wells Fargo. *See* Terrell Decl. ¶¶ 3-10; Schlanger Decl. ¶¶ 5-25. Terrell Marshall has represented scores of classes and recovered hundreds of millions of dollars for consumers. Dkt. No. 92 ¶ 2. Ms. Terrell currently serves as Co-Chair of PLI's Consumer Financial Services Institute and frequently presents on the impact financial institution practices have on consumers.

Mr. Schlanger also focuses his practice on representing consumers who have been injured by financial institutions, including banks and debt collectors, and has dedicated his legal practice to ensuring that consumers have access to financial justice. Schlanger Decl. ¶¶ 5-25. Mr. Schlanger presents frequently on consumer issues, has served on a wide variety of consumer protection related bar committees, and currently serves on the National Association of Consumer Advocates Issues Committee. *Id.* ¶ 19.

Class Counsel efficiently applied their skills and experience to obtain excellent relief for the Class in a case that raises issues of first impression. Each Settlement Class Member will receive a share of approximately $4,548,936, which is the estimated amount of the Settlement

Fund that will be allocated to Settlement Class Member claims after any court-awarded attorneys' fees, litigation costs, administration costs, and service award are deducted. Settlement Class Members' individual shares will be calculated based on the amount that each Settlement Class Member was allegedly overcharged and whether that person is eligible for statutory damages under TILA. No Settlement Class Member will receive less than $50. *See* Mtn for Prelim Appr. (Dkt. No. 91) at 6 (including a chart describing the range of awards). The average estimated award is $423.75 per loan and the median is $364.64 per loan. *See id.*

Class Counsel attained this success "in the face of tenacious opposition by a highly capable adversary." *Hart v. RCI Hosp. Holdings, Inc.*, No. 09 CIV. 3043 PAE, 2015 WL 5577713, at *16 (S.D.N.Y. Sept. 22, 2015). Class Counsel opposed a large, international corporation represented by sophisticated attorneys. Defendant's counsel, Mayer Brown, is a highly reputable firm with significant experience defending class actions. The challenge of litigating against such formidable opposing counsel only serves to highlight the victory that Class Counsel has achieved by obtaining a groundbreaking settlement for the Class. This factor also favors granting the requested fees.

5. The fee is reasonable in relation to the Settlement.

Class Counsel's request for one-third of the fund is "fair and reasonable in relation to the recovery and compares favorably to fee awards in other risky common fund cases in this Circuit and elsewhere." *In re Marsh ERISA Litig.,* 265 F.R.D. at 149 (awarding $11,665,500 fee out of $35 million settlement fund); *see* additional cases cited in Section B.1, *supra*. Class Counsel's efforts resulted in a non-reversionary common fund of $6,945,095 that will put hundreds—and in some cases thousands—of dollars in the pockets of over 10,000 mortgage borrowers, without requiring them to file a claim. Despite the numerous risks that continued litigation would have

presented, the amount of the recovery is substantial, when considered on both a gross and per-Class-Member basis.

The average per-Class-Member Settlement represents approximately 41% of the maximum damages Class Members could have obtained had they prevailed at trial. As Plaintiff emphasized in his preliminary approval motion, this is an excellent recovery for the Class especially in light of the risks. *See* Mtn for Prelim. Approv. (Dkt. No. 91) at 13-14 (citing *Beebe v. V&J Nat'l Enter., LLC*, No. 6:17-CV-06075 EAW, 2020 WL 2833009, at *7 (W.D.N.Y. June 1, 2020) (approving settlement where total settlement amounted 31% of actual damages); *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 621 (S.D.N.Y. May 8, 2012) (approving settlement where plaintiff demonstrated individual settlement amount represents approximately 38% of the estimated value of the case).

This factor also weighs in favor of granting the requested fees.

6. Public policy considerations.

Public policy considerations also weigh in favor of granting Class Counsel's requested fees. In rendering awards of attorneys' fees, "the Second Circuit and courts in this district also have taken into account the social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation." *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399 (1999). When individuals' damages are small, "it [is] less likely that, without the benefit of class representation, they would be willing to incur the financial costs and hardships of separate litigations, which would certainly exceed their recoveries manifold." *Frank,* 228 F.R.D. at 181. Thus, "Counsel's fees should reflect the important public policy goal of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 352 (S.D.N.Y. July 8,

2014) (internal quotation marks and citations omitted); *see also Goldberger*, 209 F.3d at 51 (observing attorneys' fees provide a means of "providing lawyers with sufficient incentive to bring common fund cases that serve the public interest). This is especially true with a class action because "tightening class certification standards means more risk and less reward for plaintiffs' lawyers." Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1285-86 (2012).

Awarding Class Counsel their requested fee furthers the goals of the TILA, which are to promote the informed use of credit and protect borrowers from unethical lenders by requiring the meaningful disclosure of the terms and conditions of consumer loans offered. 15 U.S.C. § 1601(a). Awarding Class Counsel their requested fee also furthers the policies behind New York's General Business Law § 349, which "was intended to empower consumers; to even the playing field in their disputes with better funded and superiorly situated fraudulent businesses." *Teller v. Bill Hayes, Ltd.*, 630 N.Y.S.2d 769, 774 (N.Y. App. Div. 1995). Plaintiff filed his lawsuit, seeking relief on behalf of all other consumers impacted by Wells Fargo's deceptive conduct in marketing and implementing buydown agreements. Given the potential recovery for each consumer was relatively low—approximately $1,000 on average—it was likely not worth it for individual consumers to bring claims and a class action was the only feasible means to challenge the conduct and enforce the statutes. Put differently, the broad relief achieved here was only possible due to Plaintiff and Class Counsel's willingness to assume the risk and pursue the claims for the Class.

C. A lodestar cross check supports an award to Class Counsel of one-third of the fund.

The Second Circuit has encouraged courts to conduct a lodestar cross-check when assessing the reasonableness of a percentage fee award. *Goldberger*, 209 F.3d at 50. When the

lodestar method is used as a "cross-check," the district court need not exhaustively scrutinize counsel's hours. *Id*. In performing a lodestar cross-check, courts multiply hours reasonably expended against hourly rates prevailing in the community. *Id.* at 47; *see also Luciano v. Olsten Corp*., 109 F.3d 111, 115 (2d Cir.1997) ("[t]he lodestar figure should be in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation") (internal quotations omitted).

Here, a lodestar cross-check confirms the reasonableness of Class Counsel's requested fee. Class Counsel charge rates ranging from $375 for junior associates to $625 for senior partners, which fall within the range of prevailing rates in this District. *See, e.g., In re Hi-Crush Partners L.P. Sec. Litig*., No. 12-CIV-8557 CM, 2014 WL 7323417, at *14 (S.D.N.Y. Dec. 19, 2014) (approving billing rates ranging from $425 to $825 per hour for attorneys); *Williamsburg Fair Hous. Comm. v. N.Y. City Hous. Auth*., No. 76 CIV. 2125 (RWS), 2005 WL 736146, at *12 (S.D.N.Y. Mar. 31, 2005), *opinion amended on reconsideration*, No. 76 CIV.2125 RWS, 2005 WL 2175998 (S.D.N.Y. Sept. 9, 2005) (observing that "a recent billing survey made by the National Law Journal shows that senior partners in New York City charge as much as $750 per hour and junior partners charge as much as $ 490 per hour").

"Under the lodestar method of fee computation, a multiplier is typically applied to the lodestar." *In re Global Crossing Sec. & ERISA Litig*., 225 F.R.D. 436, 468 (S.D.N.Y. 2004). When deciding whether a multiplier is warranted courts consider factors such as: "(i) the contingent nature of the expected compensation for services rendered; (ii) the consequent risk of non-payment viewed as of the time of filing the suit; (iii) the quality of representation; and (iv) the results achieved." *Parker v. Jekyll & Hyde Entm't Holdings, LLC*, No. 08 Civ. 7670 (BSJ)(JCF), 2010 WL 532960, at *2 (S.D.N.Y. Feb. 9, 2010). These factors support approval of

Class Counsel's request for one-third of the Fund, which reflects a 2.65 multiplier on their $872,495 lodestar.

With respect to the first two factors, Class Counsel have submitted billing records showing they spent over 1,927 hours litigating and settling this matter. *See* Terrell Decl., Ex. 1; Schlanger Decl., Ex. F. The hours worked by counsel on this case, which were performed on a pure contingency basis, result in a lodestar of approximately $872,495. *Id*. The lodestar does not include time that was administrative in nature, and time that arguably could have been more efficiently spent. *Id.* It is likely that the multiplier will diminish as Class Counsel spends additional time working on this case, including preparing for and attending the final fairness hearing, answering Class Member questions, and working with the settlement administrator.

The multiplier Class Counsel seek is reasonable in light of the excellent result achieved for the Class and is well within the range awarded by courts in this Circuit. *See, e.g., See Spicer v. Pier Sixty LLC*, No. 08 CIV. 10240 PAE, 2012 WL 4364503, at *4 (S.D.N.Y. Sept. 14, 2012) (approving a fee that was "3.36 multiplier of the lodestar, which is well within the range of reasonableness") (citing *Agofonova v. Nobu Corp.*, 07–cv–6926, at 6 (S.D.N.Y. Feb. 6, 2009) (stating that "the award of one-third the gross fund value is a 4.34 lodestar multiplier and is perfectly within the range that is acceptable"); *In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d 570, 590 (S.D.N.Y.2008) ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts[.]"); *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05–cv–10240, 2007 U.S. Dist. LEXIS 57918, at *56 n. 7, 2007 WL 2230177 (S.D.N.Y. July 27, 2007) ("Lodestar multipliers of nearly 5 have been deemed "common" by courts in this District.")); *see also In re Colgate-Palmolive*, 36 F. Supp. 3d at 353 (approving fee with multiplier of 5.); *Monserrate v. Tequipment, Inc.*, No. 11 CV 6090 RML, 2012 WL 5830557, at *4 (E.D.N.Y. Nov. 16, 2012)

(approving 4.34 multiplier); *Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 371 (S.D.N.Y. 2002) (multiplier of 4.65); *In re NASDAQ MarketMakers Antitrust Litig.,* 187 F.R.D. 465, 489 (S.D.N.Y.1998) (multiplier of 3.97); *Roberts v. Texaco, Inc.,*979 F.Supp. 185, 197 (S.D.N.Y.1997) (multiplier of 5.5); *In re RJR Nabisco, Inc. Sec. Litig.,* No. 88 CV 7905, 1992 WL 210138, at *5 (S.D.N.Y. Aug.24, 1992) (multiplier of 6); *In re Credit Default Swaps Antitrust Litig.*, 2016 U.S. Dist. LEXIS 54587, at *54, 2016 WL 1629349 (S.D.N.Y. Apr. 25, 2016) (lodestar multiplier "of just over 6"); *Athale v. Sinotech Energy Ltd.*, 2013 U.S. Dist. LEXIS 199696, 2013 WL 11310685 (S.D.N.Y. Sept. 4, 2013) (20% fee award with 5.65 multiplier); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers"); *In re WorldCom, Inc. Sec. Litig.*, 388 F.Supp.2d 319 (S.D.N.Y. 2005) (4.0 multiplier); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 134-35 (D.N.J. 2002) (4.3 multiplier); *Maley v. Del Global Techs. Corp.*, 186 F.Supp.2d 358, 371 (S.D.N.Y. 2002) (33.3% fee, resulting in "modest multiplier of 4.65").

Judge Chin, while presiding before the Southern District of New York in 2016, observed that "[t]here is commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest." *Sykes v. Harris*, No. 09 Civ. 8486 (DC), 2016 WL 3030156, at *17 (S.D.N.Y. May 24, 2016). When considering a possible multiplier, Judge Chin stated:

> The multiplier here is 3.3, which is consistent with other cases in the Second Circuit. *See, e.g., Wal-Mart Stores*, 396 F.3d at 123 ("multipliers of between 3 and 4.5 have become common"); *Davis [v. J.P. Morgan Chase & Co.]*, 827 F. Supp. 2d [172,] 185 [(W.D.N.Y. 2011)] (awarding a multiplier of 5.3 times the lodestar); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) ("In contingent litigation, lodestar multipliers of over 4 are routinely awarded by courts, including this Court.").

Id. at *16. Class Counsel's requested multiplier of 2.65 is well within the range of reasonableness. With respect to the third and fourth factors, Class Counsel's performance was very good in a challenging case and resulted in excellent benefits for the Class.

For these reasons, Plaintiff requests that the Court award attorneys' fees in the amount of $2,314,800.

D. Class Counsel are entitled to reimbursement of their litigation expenses.

"It is well established that counsel who obtain a common settlement fund for a class are entitled to the reimbursement of expenses that they advance to a class." *Meredith Corp. v. SESAC*, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2015); *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 WL 2230177, at *18 (S.D.N.Y. July 27, 2007) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course.") (internal citation omitted).

Class Counsel seek reimbursement of out-of-pocket litigation expenses, totaling $17,087, attributable to general litigation expenses such as travel and transcript costs, mediation expenses, and postage. *See* Terrell Decl. ¶ 26; Schlanger Decl. ¶ 50; Ex. G. Counsel put forward these out-of-pocket costs without assurance that they would ever be repaid. These out-of-pocket costs were necessary and reasonable to secure the resolution of this litigation, and should be recouped. *In re March ERISA Litig.,* 265 F.R.D at 150 ("The expenses that may be reimbursed from the common fund encompass 'all reasonable' litigation-related expenses.").

IV. A SERVICE AWARD SHOULD BE APPROVED FOR PLAINTIFF.

Pursuant to the Settlement Agreement, and subject to Court approval, Class Counsel request approval of an incentive award of $12,500 to Plaintiff Carrillo, in recognition of the services he performed on behalf of the Class. Settlement Agreement § XVII, ¶ 118. This award is

reasonable given the significant contributions Plaintiff made to advance the prosecution and resolution of the lawsuit.

Service awards "are common in class action cases and serve to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risk incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs." *Flores v. Anjost*, No. 11 Civ. 1531, (AT), 2014 WL 321831, at *10 (S.D.N. Y. Jan. 29, 2014) (citing cases). Courts in this circuit and elsewhere have approved service awards ranging from $2,500 to $85,000. *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 125 (S.D.N.Y. 2001) (approving a top award of $10,000 for lead plaintiff); *see also Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2018 WL 6250657, at *4 (S.D.N.Y. Nov. 29, 2018) (awarding $50,000 and $100,000 incentive awards); *Ferrick v. Spotify USA Inc.*, No.16-CV-8412 (AJN), 2018 WL 2324076, at *11 (S.D.N.Y.) May 22, 2018), *appeal dismissed sub nom, Ferrick v. Diable*, No. 18-1702, 2018 WL 6431410 (2d Cir. Oct. 9, 2018) (awarding $25,000); *Mills v. Capital One, N.A.*, No. 14 CIV, 1937 HBP, 2015 WL 5730008, at *17 (S.D.N.Y. Sept. 30, 2015) (awarding eight named plaintiffs service awards of $6,000 each and three opt-in plaintiffs $3,000 each); *Matheson v. T-Bone Rest., LLC*, No. 09 Civ. 4214, 2011 WL 6268216, at *9 (S.D.N.Y. 2011) (approving service award of $45,000); *Dial Corp. v. News Corp*., 317 F.R.D. 426, 439 (S.D.N.Y. 2016) (approving service awards of $50,000); *Sheppard v. Consol. Edison Co. of New York*, No. 94-CV-0403(JG), 2002 WL 2003206, at *6 (E.D.N.Y. Aug. 1, 2002) (approving service awards ranging from $8,333 to $29,167). Also, this amount is approximately 0.1% of the total Fund, which is similar to other cases. *See, e.g., In re Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 131 (S.D.N.Y. 2009) (approving incentive awards ranging from $5,000 to $45,000

and noting the total service award amount was approximately 0.1% of the fund, which was "similar to other cases").

Plaintiff's services were instrumental to the initiation and prosecution of this action, and he expended considerable time and effort to assist Class Counsel with this case. Plaintiff was meaningfully involved in this litigation at every stage. Plaintiff first attempted to work through his dispute with Defendant without counsel and then diligently sought counsel for assistance with the case. After being turned down by several plaintiff's lawyers, Plaintiff presented the potential case to Class Counsel, including providing key facts and documents. Plaintiff not only informed counsel of the predicate facts and provided underlying loan documents, servicing records and dispute correspondence, but also provided his own detailed analysis of his loan data. Plaintiff provided meaningful feedback on draft complaints prior to filing. *See generally* Carrillo Decl. He also thoroughly answered written discovery, reviewed the Court's merits rulings; and provided input and feedback to Class Counsel at every stage of the proceedings. *Id*. Plaintiff was ready and willing to sit for a deposition and to testify at trial. *Id*. He has acted diligently with regard to his duties to the class. Schlanger Decl. ¶¶ 52-56. Accordingly, the Court should grant the requested service award. *Id.*

Plaintiff acknowledges that the Eleventh Circuit ruled that a service payment to the class representative violates Supreme Court decisions from the 1800s. *See Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020). That is not the law in this Circuit. *See Melito v. Experian Marketing Solutions*, 923 F.3d 85, 96 (2d Cir. 2019), *cert. denied sub nom. Bowes v. Melito*, --- U.S. ---, 140 S. Ct. 677 (2019) (affirming award of incentive bonuses and finding the Supreme Court cases cited in *NPAS Solutions* to be "inapposite"). Because the service award requested here is reasonable and in line with other service awards in this Circuit, it should be approved.

V. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court approve their motion for payment of service awards, attorneys' fees, and costs. Plaintiff specifically requests that the Court approve a fee award in the amount of $2,314,800, litigation costs in the amount of $17,087, and a service award in the amount of $12,500.

RESPECTFULLY SUBMITTED AND DATED this 7th day of May, 2021.

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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on May 7, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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