

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

MALINDA FAIRCHILD-CATHEY,  
RICHARD MUMFORD, and AARON  
FORJONE on behalf of themselves and all  
others similarly situated,

Plaintiffs,

v.

AMERICU CREDIT UNION,

Defendant.

Case No. 6:21-cv-01173-DNH-ML

**PLAINTIFFS' UNOPPOSED APPLICATION FOR ATTORNEYS' FEES AND COSTS  
AND SERVICE AWARDS**

Plaintiffs Malinda Fairchild-Cathey, Richard Mumford and Aaron Forjone, move this Court for an order final approval of class action settlement and applies for attorneys' fees and costs and service award for class representative for an order:

1. Awarding attorneys' fees in the amount of \$500,000;
2. Awarding costs in the amount of \$6,451.18; and
3. Awarding a service award of \$5,000 for each Class Representative.

This Unopposed Motion is based on this Notice of Motion; the Memorandum of Points and Authorities; the Declaration of Jeffrey D. Kaliel; the papers and pleadings on file with the Court; and on such other evidence, information, or material as may be presented to the Court.

DATED: February 20, 2024

Respectfully submitted,

By: /s/ Jeffrey D. Kaliel

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 20, 2024, the foregoing was served by CM/ECF to all counsel of record.

Respectfully submitted,

*Jeffrey D. Kalief*

\_\_\_\_\_  
Jeffrey D. Kalief

# Exhibit 1

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

MALINDA FAIRCHILD-CATHEY,  
RICHARD MUMFORD, and AARON  
FORJONE on behalf of themselves and all  
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Plaintiffs,

vs.

AMERICU CREDIT UNION,

Defendant.

Civil Action No. 6:21-cv-01173-DNH-ML

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED  
APPLICATION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS**

Plaintiffs respectfully submit the following Memorandum of Law in Support of their Unopposed Application for Attorneys' Fees, Costs, and Service Awards.

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**I. INTRODUCTION**

Pursuant to the terms of the Settlement Agreement between Named Plaintiffs and Defendant AmeriCU Credit Union (“Defendant” or “AmeriCU”), Class Counsel requests an award of attorneys’ fees of one-third (33-1/3%) of the \$1,500,000.00 Settlement Fund, reimbursement of \$6,451.18 in litigation costs, and service awards of \$5,000 to each of the three Named Plaintiffs. Defendant does not oppose these requests.<sup>1</sup>

On January 3, 2024, the Court issued an Order granting preliminary approval of the class action Settlement Agreement and Release<sup>2</sup> (the “Settlement”) reached in this litigation. *See* ECF No. 82. The Settlement provides substantial relief for the Settlement Classes and the terms of the Settlement exceeds the requirements of the Federal Rules of Civil Procedure and applicable case law. The Settlement establishes a \$1,500,000 cash Settlement Fund that will be used to pay Settlement Class Members and does not require Settlement Class Members to take any action to receive their *pro rata* shares. Settlement Agreement §§ 1(x), 7(d).

The Final Approval Hearing on the Settlement is set for May 8, 2024. *See* ECF No. 82 at 7. In preparation for that hearing, the Court has ordered that Plaintiffs file papers in support of Class Counsel’s application for attorneys’ fees, costs, and service awards to the Class Representatives. *Id.* at 6. Accordingly, by the instant filing, Plaintiffs respectfully request that the Court approve the requested payments from the Settlement Fund for attorneys’ fees, costs, and service awards. These requests are all contemplated by the Settlement, are in line with (or lower than) payments made in cases of comparable size, and are fair and reasonable given the work

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<sup>1</sup> Plaintiffs will separately file a Motion for Final Approval, on or before April 3, 2024.

<sup>2</sup> The Settlement Agreement is attached as Exhibit 1 to the Declaration of Jeffrey D. Kalieel in Support of Motion for Preliminary Approval (Dkt. 81-4).

involved, the risks overcome, and the outstanding results achieved for the Class.

## **II. BACKGROUND**

On October 27, 2021, Plaintiff Malinda Fairchild-Cathey filed the captioned putative class action case against Defendant. ECF No. 1. The complaint asserted claims for breach of contract and violation of New York General Business Law (“GBL”) § 349 related to Defendant’s alleged practice of charging overdraft fees (“OD Fees”) on debit card transactions that did not overdraw an account at the time they were authorized (“APPSN transactions”) and Defendant’s alleged practice of assessing more than one insufficient funds fee (“NSF Fee”) on the same transaction. Defendant filed a motion to dismiss on January 7, 2022. ECF No. 9. On January 28, 2022, Plaintiff Fairchild-Cathey filed an Amended Complaint that added two additional plaintiffs, Richard Mumford and Aaron Forjone, and added claims targeting Defendant’s alleged practice of assessing two out-of-network ATM Fees (“OON Fees”) on ATM withdrawals undertaken in conjunction with balance inquiries. ECF No. 12. The Amended Complaint asserted claims against Defendant for (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) violation of New York General Business Law (“GBL”) § 349. ECF No. 12. Defendant then filed a second motion to dismiss, which the Court granted in part and denied in part. See Order, ECF No. 53. The Court dismissed the claim for breach of the implied covenant of good faith and fair dealing and left Plaintiffs’ claims for breach of contract and § 349 claims pending. *Id.* at 32.

Thereafter, the Parties engaged in extensive discovery. On October 18, 2023, the Parties participated in a mediation before the Honorable Edward Carni (Ret.), which resulted in a

settlement in principle. The settlement is the result of the accepted Mediator's Proposal. Next, the parties worked to draft and finalize a full Settlement Agreement and Class Notices.<sup>3</sup>

Based on the Court's review of the Parties' Settlement Agreement, Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement Agreement, and the arguments of counsel, the Court granted preliminary approval of the Settlement Agreement on January 3, 2024. ECF No. 82. The Preliminary Approval Order found that the Agreement was "fair, reasonable and adequate" and that the proposed Notice "satisfies due process and is the best notice practicable under the circumstances." *Id.* at 3, 4. Consequently, the Court granted preliminary approval of the Settlement and conditionally certified three Settlement Classes. *Id.* at 2, 9.

The Court also appointed Plaintiffs Malinda Fairchild-Cathey, Richard Mumford, and Aaron Forjone as Class Representatives, appointed Jeffrey Kaliel of Kaliel Gold PLLC and David Berger of Gibbs Law Group LLP as Class Counsel, and appointed Kroll as Claims Administrator. *Id.* at 3.

Since preliminary approval, Class Counsel has worked with defense counsel and the Claims Administrator to meet all deadlines under the Settlement schedule, which has included finalization of the Notices to Class Members, ensuring that appropriate data is transferred to the Administrator, and providing clear and detailed instructions to the Administrator regarding the requirements of the Notice plan. That work is ongoing.

### **III. ARGUMENT**

#### **A. Application for Attorneys' Fees.**

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<sup>3</sup> For purposes of brevity, the terms of Settlement that are recited in great detail in Plaintiffs' Motion for Preliminary Approval (ECF Not. 81-1 at 3-9) and will be discussed in Plaintiff's forthcoming motion for final approval will not be reproduced here. The capitalized terms used herein are defined and have the same meaning as used in then Agreement unless otherwise stated.

In this common fund Settlement, the Notices to Settlement Class Members provide that Class Counsel would request an attorneys' fee of 33.33% of the Settlement Fund, an amount that equals to \$500,000. *See* ECF No. 81-4 at 16, 19. As of filing this Motion, there are zero objections to that fee amount, which has been prominently stated in each of the class notices. Class Counsel's application is subject to this Court's approval to compensate them for their time, risk, and costs incurred pursuing claims for the Settlement Class. Although discretionary, to the extent that the Court wishes to perform a lodestar cross-check, it should be noted that there is a very modest 1.36-lodestar multiplier as a result of the hard work Class Counsel performed. Kalief Decl. ¶ 2. For the reasons stated below, the Court should approve Class Counsel's application.

### **1. Standard for Awarding Attorneys' Fees to Class Counsel**

“[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). The Second Circuit recognizes that a lawyer whose efforts create a common fund should recover a reasonable fee. *Central States Southeast & Southwest Areas v. Merck-Medco Managed Care, LLC*, 504 F.3d 229 (2d Cir. 2007).

In common fund settlements, courts in this Circuit typically look at the percentage-of-the-fund method, with an optional lodestar crosscheck. *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). The “percentage of the fund’ method, [ ] is the trend in this Circuit.” *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 348 (S.D.N.Y. 2014) (citing *Wal-Mart Stores*, 396 F.3d at 121). Class Counsel is entitled to “a reasonable fee – set by the court – to be taken from the fund.” *Goldberger*, 209 F.3d 50. *See also* Fed. R. Civ. P. 23(h); *Fresno Cty. Emps.'s Ret. Ass'n v. Isaacson/Weaver Family Tr.*, 925 F.3d 63, 68 (2d Cir. 2019) (“The common-fund doctrine is . . . rooted in the courts’ ‘historic power of equity to permit’ a person who secures

a fund for the benefit of others to collect a fee directly from the fund.” (citation omitted)).

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

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

The 33.33% of the Settlement Fund requested fee is within the range of reasonableness when considering the foregoing and when analyzing the following guidelines set forth by the Second Circuit in *Goldberger*: (1) the time and labor expended by counsel, (2) the magnitude of the litigation, (3) the risk of the litigation, (4) the quality of the representation, (5) the requested

fee in relation to the settlement, and (6) public policy considerations. 209 F.3d at 50.<sup>4</sup> Kaliel Decl. ¶ 3.

## 2. *Goldberger Factors*

### a. Magnitude and Complexities of Litigation

The magnitude and complexity of the litigation weigh in favor of approval. *Raniere*, 310 F.R.D. at 221. This Action is complex presenting novel factual and legal issues, which have yet to be tried in this Court or others. *Id.*; *see also* Kaliel Decl. ¶ 4. Legally, the case involved complex issues which required guidance from the Second Circuit in a similar case, *Roberts v. Capital One, N.A.*, 719 F. App'x 33 (2d Cir. 2017). Factually, the case was difficult as it involved the detailed review of back-end transactional data from AmeriCU, as review of several different versions of binding account contracts during the relevant limitations period. Kaliel Decl., ¶ 5. The fundamental contract construction issue remained unresolved when the Parties agreed to settle. *Id.* That issue, along with other merits issues and the yet to be filed and decided motion for class certification, would have been litigated aggressively. *Id.* If AmeriCU was successful in opposing class certification or at trial, that would have prevented recovering anything at all. *Id.*

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<sup>4</sup> *See, e.g., Capsolas v. Pasta Res. Inc.*, No. 10-cv-5595 (RLE), 2012 WL 4760910, at \*8 (S.D.N.Y. Oct. 5, 2012) (“Class counsel’s request for onethird of the Fund is reasonable and consistent with the norms of class litigation in this circuit”); *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) (noting “request for 33% of the Settlement Fund is typical”); *Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05 Civ. 3452(RLE), 2008 WL 782596, at \*5 (S.D.N.Y. Mar. 24, 2008) (same); *In re Med. X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL 661515, \*7 (E.D.N.Y. Aug. 7, 1998) (same); *Klein v. PDG Remediation, Inc.*, No. 95-cv-4954- DAB, 1999 WL 38179, at \*4 (S.D.N.Y. Jan. 28, 1999) (same). The one-third award is also common in the Second Circuit in much larger cases as well. *See, e.g., Landmen Partners, Inc. v. Blackstone Grp., L.P.*, No. 08-cv-03601-HB-FM, 2013 WL 11330936, at \*3 (S.D.N.Y. Dec. 18, 2013) (awarding 33.33% of \$85 million recovery, plus expenses); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467 (S.D.N.Y. 2009) (awarding 33.33% of \$586 million).



**b. Risks of Litigation**

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

Plaintiffs’ Counsel took on considerable risk in filing and prosecuting this case. Nevertheless, Class Counsel proceeded with the litigation. Still, the risk remains that without settlement the trier of fact would determine that AmeriCU was permitted to assess the challenged bank fees. Kaliel Decl., at ¶ 6. Thus, Class Counsel certainly invested extensive time and costs with no guarantee of success.

**c. Quality of Representation**

Class Counsel are experienced in class action litigation, serving as Lead or Co-Lead Counsel in dozens of consumer class actions in federal and state courts throughout the country. Kaliel Decl. ¶ 7. Counsel used their experience to obtain a great result for the Settlement Class. *Id.* “[T]he quality of representation is best measured by results, and such results may be calculated by comparing ‘the extent of possible recovery with the amount of actual verdict or settlement.’” *Goldberger*, 209 F.3d at 55 (citation omitted). Here the Settlement Fund, representing a 50% recovery of the most probable damages, is an excellent result. Kaliel Decl. ¶ 8. Thus, the Court should easily find counsel achieved success.

**d. Requested Fee in Relation to the Settlement**

The \$500,000 requested fee – which is, again, one-third of the Settlement Fund—is reasonable in light of the work performed, the results obtained, and falls within the range of common fund awards in the Second Circuit. In considering the results, courts examine the value

of both monetary and injunctive relief. *See Story v. SEFCU*, No. 1:18-CV-764 (MAD/DJS), 2021 U.S. Dist. LEXIS 34909, at \*25 (N.D.N.Y. Feb. 25, 2021) (holding that the overall value of the settlement, from which attorneys' fees are calculated, comprises monetary as well as non-monetary relief.); *Baudin v. Res. Mktg. Corp., LLC*, No. 1:19-cv-386 (MAD/CFH), 2020 U.S. Dist. LEXIS 146280, at \*7 (N.D.N.Y. Aug. 13, 2020) (awarding class counsels a 33% of the Settlement Fund). The results achieved here, including recovery of 50% of the disputed amounts, demonstrates the excellent results achieved through the Settlement.

The fee request here is consistent with this Court's order granting a 33% fee in *Kelly v. Community Bank, N.A.*, No. 8:19-cv-919-MAD-CFH (N.D.N.Y. Feb. 18, 2020), a case in which the plaintiff recovered approximately 39% of damages, compared with the 50% of damages achieved here.

As discussed above, courts in this circuit (including this Court) have found an award of 33.33% of a class settlement as the benchmark to be fair, reasonable, and within the range of what is normally awarded for a class settlement. *See Guevoura Fund Ltd.*, 2019 U.S. Dist. LEXIS 218116, at \*46 (compiling cases awarding 33% for settlements between \$6,750,000 and \$21,000,000, and noting reasonable paying clients typically pay one-third pursuant to contingent fee agreements); *see also Mohny 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) ("Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit."). Here, the requested fee, 33.33% of the Value of the Settlement, is clearly within the range of acceptable attorneys' fees in Second Circuit cases and is common in overdraft fee litigation. Courts regularly award fees in excess of 30% when awarding attorneys' fees in similar financial services class action settlements. The following depicts these settlements nationwide, all of which resulted in fee

awards at or above the 33.33% that Class Counsel requests here:

<b><u>Bank Fee Case Name</u></b>	<b><u>Percentage of the Fund Awarded</u></b>
<i>Jacobs v. Huntington Bancshares Inc.</i> No. 11-cv-000090 (Lake County Ohio)	<b>40%</b> of value of settlement, which includes 40% of \$8.975 million and 40% of \$7 Million in debt forgiveness
<i>Farrell v. Bank of Am., N.A.</i> , 327 F.R.D. 422 (S.D. Cal. 2018), <i>aff'd sub nom. Farrell v. Bank of Am. Corp., N.A.</i> , 827 F. App'x 628 (9th Cir. 2020)	<b>40%</b> of 37.5 million common fund
<i>Wolfgeher v. Commerce Bank, N.A.</i> , No. 1:09-MD-02036-JLK (S.D. Fla.) (Dkt. 3574),	<b>38%</b> of \$18.3 million common fund
<i>Nelson v. Rabobank, N.A.</i> , No. RIC 1101391 (Cal. Supr.)	<b>35.2%</b> (\$750k fee includes % of practice changes)
<i>In re Checking Account Overdraft Litig.</i> , No. 1:09-MD-02036-JLK, 2020 U.S. Dist. LEXIS 142012 (S.D. Fla. Aug. 10, 2020)	<b>35%</b> of \$7.5 million
<i>Molina v. Intrust Bank, N.A.</i> , No. 10-CV-3686 (Dist. Ct. Ks.)	<b>33%</b> of \$2.7 million
<i>Hawkins et al v. First Tenn. Bank, N.A.</i> (Cir. Ct. Tenn.)	<b>35%</b> of \$16.75 million
<i>Swift v BancorpSouth</i> , No. 1:10-cv-00090-GRJ (N.D. Fla.)	<b>35%</b> of \$24 million
<i>Casto v. City National Bank, N.A.</i> , No. 10-C-1089 (Cir. Ct. W.Va.)	<b>33.33%</b> of \$3 million
<i>Schulte v. Fifth Third Bank</i> , No. 09-cv-6655 (N.D. Ill.)	<b>33.33%</b> of \$9.5 million
<i>Johnson v. AmeriCU, N.A.</i> , No. 12-cv-01405-RDM (M.D. Pa.)	<b>33.33%</b> of \$2.5 million
<i>Bodnar v. Bank of America</i> , No. 5:14-cv-03224-EGS (E.D. Pa.)	<b>33.33%</b> of \$27 million
<i>Holt v. Community America Credit Union</i> , No. 4:19-CV-00629-FJG (W.D. Mo.)	<b>33.33%</b> of 3.078 million
<i>White v. Members 1st Federal Credit Union</i> , Case No. 1:19-cv-00556-JEJ (W.D. Pa. Aug. 2, 2013)	<b>33.33%</b> of \$910,000
<i>Figueroa v. Capital One</i> , Case No. 3:18-cv-00692-JM-BGS (S.D. Cal.)	<b>33.33%</b> of \$13 million
<i>Liggio v. Apple Federal Credit Union</i> , No. 1:18-cv-01059-LO-MSN (E.D. Va.)	<b>33.33%</b> of \$2.7 million

<i>Lambert v. Navy Fed. Credit Union</i> , No. 1:19-cv-103-LO-MSN, 2019 U.S. Dist. LEXIS 138592, at *3 (E.D. Va.)	33.33% of \$16 million
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As the requested fee is clearly in line with other similar overdraft litigation around the nation that settled for a similar amount, the fee requested is reasonable.

**e. Public Policy Considerations**

Where relatively small claims can only be prosecuted through aggregate litigation, “private attorneys general” play an important role. *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 338-39 (1980). Attorneys who fill the private attorney general role must be adequately compensated for their efforts. *Id.*; see also *Wal-Mart Stores*, 396 F.3d 96 (policy issue in evaluating a fee request is that fees “must . . . serve as an inducement for lawyers to make similar efforts in the future”). 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.” *Goldberger*, 209 F.3d at 51. This and the other *Goldberger* factors support approval of the attorneys’ fees requested by Class Counsel.

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

“The last *Goldberger* factor to consider is the time and labor expended by counsel, which is essentially what the lodestar method does by assessing the value of attorney hours worked times a reasonable billing rate.” *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d at 353. Under the lodestar method, the court “scrutinizes the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate” to calculate the “lodestar.” *Goldberger*, 209 F.3d at 47. “Of course, where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court.” *Id.* at 50. In considering the lodestar in common fund settlements, it is appropriate to enhance the

lodestar by a multiplier accounting for “(1) the contingent nature of the expected compensation for services rendered; (2) the consequent risk of non-payment viewed as of the time of filing the suit; (3) the quality of representation; and (4) the results achieved.” *Goodwin v. Boesky (In re Ivan F. Boesky Sec. Litig.)*, 888 F. Supp. 551, 562 (S.D.N.Y. 1995).

There was no unnecessary amount of time, labor, and resources expended by the Parties. Kaniel Decl. ¶ 9. As is detailed above, this Action was contested and litigated efficiently and intelligently, including hotly contested discovery, amended pleading, a mediation, negotiating and documenting the Settlement, and the Settlement approval process. Kaniel Decl. ¶ 10.

To date, Class Counsel have expended a total of 513.6 hours in the prosecution of this case, including anticipated time preparing for the Final Approval Hearing, filing of supplemental declarations, responding to any objections, and preparing for and attending the Final Approval Hearing. Kaniel Decl., ¶ 11. Further, there will be significant post-Final Approval work ensuring that the Settlement proceeds are properly distributed to Settlement Class Members, responding to Settlement Class Members’ inquiries, and effectuating a secondary or *cy pres* distribution, as needed. *Id.* ¶ 12.

Summaries of the time expended by all counsel and paralegals on the Action appear in Class Counsel’s Kaniel Declaration in support of this Motion, organized by work performed in the various stages of the Action. *Id.*, ¶¶ 13-15. Hourly rates of attorneys and paralegals are commensurate with the rates charged by class action practitioners in this state with similar experience. *Id. See, e.g., United States ex rel. Fox Rx, Inc. v. Omnicare, Inc.*, No. 12cv275 (DLC), 2015 U.S. Dist. LEXIS 49477, at \*5 (S.D.N.Y. Apr. 15, 2015) (approving as reasonable in this district \$836/hour for a litigation partner; \$631.75/hour for an eighth-year associate; and \$541.50/hour for a fourth-year associate); *In re Platinum & Palladium Commodities Litig.*, No.

10cv3617, 2015 U.S. Dist. LEXIS 98691, at \*13 (S.D.N.Y. July 7, 2015) (approving rates up to \$950/hour and citing National Law Journal survey indicating that the average partner billing rate at the largest New York-based law firms is \$982 per hour); *City of Providence v. Aéropostale, Inc.*, 2014 U.S. Dist. LEXIS 64517, at \*38 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73, 73 (2d Cir. 2015) (approving rates ranging from \$640 to \$875 for partners, \$550 to \$725 for of counsels, and \$335 to \$665 for other attorneys).<sup>5</sup>

Finally, although not required to be performed by this Court because Plaintiffs are applying pursuant to the percentage-of-the-benefit for attorneys' fees, a lodestar analysis also supports the requested fee. The Court need not exhaustively scrutinize the hours documented. *Goldberger*, 209 F.3d at 50. Fees representing multiples of lodestar are regularly awarded in a case such as this to reflect the contingency-fee risk and other relevant factors. *See, e.g., In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at \*26 (S.D.N.Y. Nov. 8, 2010) (“Under the lodestar method, a positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors.”).

Here, the aggregate lodestar is \$367,330.5. Class Counsel seeks fees of \$500,000. Class Counsel seek a modest lodestar multiplier of 1.36, which is below the range of what courts in this circuit typically award. Kaliehl Decl., ¶ 16. *Hanifin*, 2014 U.S. Dist. LEXIS 115710 at \*19 (“Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers.”); *see also Wal-Mart Stores*, 396 F.3d at 123 (upholding multiplier of 3.5); *NECA-IBEW Health & Welfare Fund v. Goldman, Sachs & Co.*, No. 1:08-cv-10783-LAP, 2016

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<sup>5</sup> Timesheets supporting the hours set forth in Class Counsel's Kaliehl Declaration can also be brought to the hearing.

WL 3369534, at \*1 (S.D.N.Y. May 2, 2016) (3.9 multiplier on \$272 million settlement); *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 185 (W.D.N.Y. 2011) (multiplier of 5.3 was “not atypical” in similar cases); *Woburn Ret. Sys. v. Salix Pharm., Ltd.*, No. 14-CV-8925 (KMW), 2017 WL 3579892, at \*6 (S.D.N.Y. Aug. 18, 2017) (3.14 multiplier was “within the range of reasonable . . . multipliers approved in this Circuit”); *Cornwell v. Credit Suisse Grp.*, No. 08-cv-03758 (VM), 2011 WL 13263367, at \*2 (S.D.N.Y. July 20, 2011) (4.7 multiplier); *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, including this Court.”); *Johnson v. Brennan*, No. No. 10-cv-4712, 2011 U.S. Dist. LEXIS 105775, at \*58 (S.D.N.Y. Sep. 16, 2011) (“Courts regularly award lodestar multipliers from two to six times lodestar.”).

As detailed above, Class Counsel assumed significant risks in representing Plaintiffs on a contingent fee basis. Those risks should be rewarded. Given that this Court applies the percentage-of-the-fund method with a lodestar crosscheck, the 1.36 multiplier is reasonable. *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d at 353 (finding that a multiplier of five “was large, but not unreasonable”); *James v. China Grill Mgmt.*, 2019 U.S. Dist. LEXIS 72759, at \*8 (S.D.N.Y. Apr. 30, 2019) (approving “a fee award equivalent to 30% of the settlement fund [that] represents a lodestar multiplier of approximately 3.53.”). Class Counsel expended resources to achieve a prompt fair, adequate and reasonable settlement.

For the reasons set forth above, the requested fee is appropriate, fair, and reasonable. The Court should therefore approve the fee request.

**B. Application for Service Awards**

As noted above, a \$5,000.00 Service Award is sought for each Named Plaintiff. “Courts regularly grant requests for service awards in class actions ‘to compensate plaintiffs for the time

and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs.” *Story v. SEFCU*, No. 1:18-CV-764 (MAD/DJS), 2021 U.S. Dist. LEXIS 34909, at \*28-29 (N.D.N.Y. Feb. 25, 2021). Named Plaintiffs invested significant time in this case and risked their reputations in doing so, by publicly disclosing their personal financial difficulties, creating notoriety regardless of their success on the claims. Kalief Decl. ¶ 17. Had Named Plaintiffs failed, they created risk to their reputation. *Id.* Named Plaintiffs should be commended for taking action to protect the interests of thousands of AmeriCU accountholders who were affected by AmeriCU’s practices, on top of their individual claims. *Id.* It is undisputed that the Plaintiffs’ efforts have created extraordinary financial benefits for the Settlement Class, compensating them for past harm and protecting them from future harm. *Id.* Their efforts will also inure to the benefit of new accountholders, who will better be able to understand how AmeriCU assesses fees. *Id.* Plaintiffs expended hours in advancing this litigation against a large and powerful adversary. *Id.* Plaintiffs conferred with Class Counsel on a number of occasions. *Id.* Specifically, Named Plaintiffs provided assistance that enabled Class Counsel to successfully prosecute the Action and reach the Settlement, including: (1) submitting to interviews with Class Counsel; (2) locating and forwarding responsive documents and information; (3) providing discovery documents; and (4) participating in conferences with Class Counsel. *Id.*

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

**C. Reimbursement of Costs**

“It is well established that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class.” *Guevoura Fund Ltd.*, 2019 U.S. Dist.



LEXIS 218116, at \*67 (citation omitted). Second Circuit courts grant such requests as a matter of course. *Id.* Class Counsel requests reimbursement of \$6,451.18 for actual costs advanced and necessarily incurred in connection with the prosecution and settlement of the Action. Kaliel Decl. ¶ 18. Specifically, those costs and expenses consist of filing fees and service of process costs, pro hac vice admission fees, expert witness fees, litigation support vendors and, most substantially, the services of a well-qualified mediator. *Id.* Class Counsel is not seeking costs related to legal research, copying, and other overhead expenses, which were advanced and are commonly reimbursed. All of these out of these pockets were reasonably and necessarily incurred to pursue this Action. *Id.*

#### IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court: (1) award attorneys' fees to Class Counsel in an amount of \$500,000, which is 33.33% of the Settlement Fund; (2) award Class Representative Service Awards in the amount of \$5,000.00 to each Named Plaintiff; and (3) award Class Counsel reimbursement of litigation costs and expenses in the amount of \$6,451.18. For the Court's convenience, a proposed Final Approval Order seeking the relief requested herein will be filed along with Plaintiff's forthcoming Motion for Final Approval on or before April 3, 2024.

Dated: February 20, 2024

Respectfully submitted,

/s/ Jeffrey D. Kaliel  
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*Attorneys for Plaintiffs and the Putative Class*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 20, 2024, the foregoing was filed via CM/ECF, which caused a true and correct copy to be served to all counsel of record.

*/s/ Jeffrey D. Kalief* \_\_\_\_\_  
Jeffrey D. Kalief (Bar Roll No. 518372)

# Exhibit 2

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

MALINDA FAIRCHILD-CATHEY,  
RICHARD MUMFORD, and AARON  
FORJONE on behalf of themselves and all  
others similarly situated,

Plaintiff,

v.

AMERICU CREDIT UNION,

Defendant.

Case No. 6:21-cv-01173-DNH-ML

**DECLARATION OF JEFFREY D. KALIEL IN SUPPORT OF APPLICATION FOR  
ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS**

I, Jeffrey D. Kaliel, declare:

1. I am Class Counsel of record for Plaintiffs Malinda Fairchild-Cathey, Richard Mumford and Aaron Forjone (“Plaintiffs”) and the proposed Settlement Class in the above-captioned matters. I submit this Declaration in support of Plaintiffs’ Unopposed Application for Attorneys’ Fees, Costs and Class Representative Service Award.

2. As of filing this Motion, there are zero objections to that fee amount, which has been prominently stated in each of the class notices. Class Counsel’s application is subject to this Court’s approval to compensate them for their time, risk, and costs incurred pursuing claims for the Settlement Class. To the extent that the Court wishes to perform a lodestar cross-check, it should be noted that there is a very modest 1.36- lodestar multiplier as a result of the hard work Class Counsel performed.

3. The 33.33% of the Settlement Fund requested fee is within the range of reasonableness when considering the foregoing and when analyzing the following guidelines set

forth by the Second Circuit in *Goldberger*: (1) the time and labor expended by counsel, (2) the magnitude of the litigation, (3) the risk of the litigation, (4) the quality of the representation, (5) the requested fee in relation to the settlement, and (6) public policy considerations.

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

5. Factually, the case was difficult as it involved the detailed review of back-end transactional data from AmeriCU, as review of several different versions of binding account contracts during the relevant limitations period. The fundamental contract construction issue remained unresolved when the Parties agreed to settle. That issue, along with other merits issues and the yet to be filed and decided motion for class certification, would have been litigated aggressively. If AmeriCU was successful in opposing class certification or at trial, that would have prevented recovering anything at all.

6. Plaintiffs' Counsel took on considerable risk in filing and prosecuting this case. Nevertheless, Class Counsel proceeded with the litigation. Still, the risk remains that without settlement the trier of fact would determine that AmeriCU was permitted to assess the challenged bank fees.

7. Class Counsel are experienced in class action litigation, serving as Lead or Co-Lead Counsel in dozens of consumer class actions in federal and state courts throughout the country. Counsel used their experience to obtain a great result for the Settlement Class.

8. Here the Settlement Fund, representing a 50% recovery of the most probable damages, is an excellent result.

9. There was no unnecessary amount of time, labor, and resources expended by the Parties.

10. As is detailed above, this Action was contested and litigated efficiently and intelligently, including hotly contested discovery, amended pleading, a mediation, negotiating and documenting the Settlement, and the Settlement approval process.

11. To date, Class Counsel have expended a total of 513.6 hours in the prosecution of this case, including anticipated time preparing for the Final Approval Hearing, filing of supplemental declarations, responding to any objections, and preparing for and attending the Final Approval Hearing.

12. Further, there will be significant post-Final Approval work ensuring that the Settlement proceeds are properly distributed to Settlement Class Members, responding to Settlement Class Members' inquiries, and effectuating a secondary or *cy pres* distribution, as needed.

13. Summaries of the time expended by all counsel and paralegals on the Action are detailed below, organized by work performed in the various stages of the Action. Hourly rates of attorneys and paralegals are commensurate with the rates charged by class action practitioners in this state with similar experience.

<b>Task</b>	<b>KalielGold PLLC</b>	<b>Gibbs Law Group</b>
<p><b>Pre-suit investigation, Factual Development, Client Meetings, Correspondence</b>  <i>Researched potential causes of action; researched potentially applicable laws and regulations; researched NY state law; researched Americu disclosures and compared to other financial institution disclosures; interviewed potential clients; reviewed monthly bank statements; prepared preservation letter.</i></p>	22.5	26.4

<b>Strategy/Case Analysis/Class Counsel Conferences</b> <i>Strategy meetings internally at the firm and with co-counsel throughout the case.</i>	15	20.9
<b>Pleadings</b> <i>Researched, drafted, and edited complaint</i>	12.5	50.6
<b>Motion Practice</b> <i>Researched, drafted, and edited opposition to motion to dismiss.</i>	22.1	25.0
<b>Discovery</b> <i>Drafted discovery requests; reviewed document production; meet and conferred on responses; drafted and filed motion to compel; requested, checked and analyzed data and analysis regarding "retry" NSF/OD Fee damages and "APPSN" damages.</i>	37.8	98.7
<b>Settlement</b> <i>Engaged in settlement discussions with opposing counsel; participated in mediation; drafted mediation statement; coordinated settlement strategy with co-counsel; negotiated and finalized settlement agreement and all associated documentation.</i>	77.4	23.0
<b>Preliminary Approval</b> <i>Drafted motion for preliminary approval of class action settlement and accompanying declarations</i>	18	17.9
<b>Class Notice</b> <i>Worked with notice administrator to develop notice plan; drafted notices; oversaw notice process.</i>	16.5	8.5
<b>Final Approval, Settlement Execution, Distribution of Common Fund (Est.)</b> <i>Prepare motion for final approval and all supporting declarations, respond to objections, respond to class member inquiries, prepare for and attend final approval</i>	20	0.8



<i>hearing, work with settlement administrator to ensure proper distribution of funds to class members, prepare any post-final approval motions.</i>		
<b>Totals:</b>	<b>241.8</b>	<b>271.8</b>

14. The time and lodestar expended by the attorneys, paralegals, and law clerks at the two law firms is as follows:

- a. KanielGold PLLC – 241.8 hours, \$205,048.00
- b. Gibbs Law Group – 271.8 hours, \$162,282.50

15. The hourly rates for each law firm are broken down as follows:

**Kaniel Gold PLLC**

Jeffrey D. Kaniel - \$878.00  
Sophia G. Gold - \$777.00  
Amanda J. Rosenberg - \$777.00  
Neva R. Garcia - \$208.00

**Gibbs Law Group**

Shawn K. Judge - \$960.00  
David M. Berger - \$895.00  
Mark H. Troutman - \$850.00  
Erin Barlow - \$490.00  
Tayler Walters - \$490.00  
Catherine Conroy - \$275.00  
Honeyleen Bohol - \$240.00  
Gillian Norton - \$220.00

16. Here, the aggregate lodestar is \$367,330.5. Class Counsel seek fees of \$500,000. Class Counsel seek a modest lodestar multiplier of 1.36, which is below the range of what courts in this circuit typically award.

17. Named Plaintiffs invested significant time in this case and risked their reputations in doing so, by publicly disclosing their personal financial difficulties, creating notoriety regardless of their success on the claims. Had Named Plaintiffs failed, they created risk to their reputation. Named Plaintiffs should be commended for taking action to protect the interests of thousands of

AmeriCU accountholders who were affected by AmeriCU's practices, on top of their individual claims. It is undisputed that the Plaintiffs' efforts have created extraordinary financial benefits for the Settlement Class, compensating them for past harm and protecting them from future harm. Their efforts will also inure to the benefit of new accountholders, who will better be able to understand how AmeriCU assesses fees. Plaintiffs expended hours in advancing this litigation against a large and powerful adversary. Plaintiffs conferred with Class Counsel on a number of occasions. Specifically, Named Plaintiffs provided assistance that enabled Class Counsel to successfully prosecute the Action and reach the Settlement, including: (1) submitting to interviews with Class Counsel; (2) locating and forwarding responsive documents and information; (3) providing discovery documents; and (4) participating in conferences with Class Counsel. *Id.*

18. Class Counsel seek reimbursement of \$6,451.18 for the reasonable expenses incurred to advance this litigation. Specifically, those costs and expenses consist of filing fees and service of process costs, pro hac vice admission fees, expert witness fees, litigation support vendors and, most substantially, the services of a well-qualified mediator. Class Counsel is not seeking costs related to legal research, copying, and other overhead expenses, which were advanced and are commonly reimbursed. All of these out of these pockets were reasonably and necessarily incurred to pursue this Action.

<b>Category</b>	<b>Kaliel Gold PLLC</b>	<b>Gibbs Law Group</b>
Legal Research		\$827.63
Travel	\$550	
Filing	\$602	\$426.00
Process Service	\$186.25	
Mediation Fees	\$1,812.50	\$1,812.50
Copy Charges		\$26.80
Messenger		\$207.50
<b>Total</b>	<b>\$3,150.75</b>	<b>\$3,300.43</b>

I declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Executed this 20th day of February, 2024, at Washington, D.C.

*/s/ Jeffrey D. Kaliel*  
JEFFREY D. KALIEL

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on July 10, 2023, the foregoing was served by CM/ECF to all counsel of record.

Respectfully submitted,

By: Jeffrey D. Kaliel  
Jeffrey D. Kaliel