

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.

Civil Action No. 6:21-cv-1173 (LEK-ML)

JUDGE LAWRENCE E. KAHN

Class Action

**PLAINTIFFS' NOTICE OF UNOPPOSED MOTION
FOR PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT**

PLEASE TAKE NOTICE that pursuant to Fed. R. Civ. P. 23, Plaintiffs Malinda Fairchild-Cathey, Richard Mumford, and Aaron Forjone, by and through counsel, move the Court for preliminary approval of a proposed class action settlement with Defendant AmeriCU Credit Union.

Based upon the accompanying (1) motion and memorandum of law and (2) declaration of Jeffrey D. Kaliel, Plaintiffs filed in support of the motion, Plaintiffs respectfully request that the Court: (i) grant preliminary approval of the proposed settlement; (ii) provisionally certify the three Classes for settlement purposes; (iii) approve the proposed forms of notice; (iv) direct notice to class members, as well as establish a schedule for objecting to or opting out of the settlement, as set forth in the Settlement Agreement; and (v) schedule a final approval hearing at the Court's opportunity no earlier than 105 days from the entry of the preliminary approval order to address the proposed settlement and the application of Class Counsel for an award of fees and costs and for class representative incentive awards.

WHEREFORE, Plaintiffs respectfully request that the Court grant the motion and enter the proposed Order Granting Preliminary Approval of Proposed Class Action Settlement filed herewith.

Dated: December 14, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 14th, 2023, a copy of the above document has this day been served on all counsel of record via the court's ECF system:

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UNITED STATES DISTRICT COURT
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**PLAINTIFFS' UNOPPOSED MOTION AND MEMORANDUM OF LAW
FOR PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT**

Now comes Plaintiffs Malinda Fairchild-Cathey, Richard Mumford, and Aaron Forjone, by and through counsel, who move under Fed. R. Civ. P. 23 for preliminary approval of a proposed class action settlement with Defendant AmeriCU Credit Union. Plaintiffs respectfully request that the Court: (i) grant preliminary approval of the proposed settlement by entering a proposed Order Granting Preliminary Approval of Proposed Class Action Settlement filed herewith; (ii) provisionally certify the three Classes for settlement purposes; (iii) approve the proposed forms of notice; (iv) direct notice to class members, as well as establish a schedule for objecting to or opting out of the settlement, as set forth in the Settlement Agreement; and (v) schedule a final approval hearing at the Court's opportunity no earlier than 105 days from the entry of the preliminary approval order to address the proposed settlement and the application of Class Counsel for an award of fees and costs and for class representative incentive awards.

A Memorandum in Support has been filed in conjunction with this motion and is incorporated by reference.

Dated: December 14, 2023

Respectfully submitted,

/s/ Jeffrey D. Kaliel

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Plaintiffs Malinda Fairchild-Cathey, Richard Mumford, and Aaron Forjone move for preliminary approval of a proposed **\$1,500,000.00** class action settlement with Defendant AmeriCU Credit Union (“Defendant” or “the credit union”). The terms and conditions of the settlement are set forth in the Settlement Agreement and Release¹ (the “Agreement”), which is attached to the accompanying Declaration of Jeffrey D. Kaliel (“Kaliel Decl.”) as Exhibit 1.

Plaintiffs allege that Defendant improperly assessed and collected certain Overdraft Fees² and NSF Fees³ not authorized by Defendant’s account agreement. Defendant denies the allegations in the operative complaint, but given the risks, uncertainties, and burdens of litigation, has agreed to settle according to the terms of the Agreement. The settlement achieved by the parties—which after significant damages-related discovery and an arms-length negotiation process—guarantees a substantial monetary and non-monetary benefits for Class Members.

Subject to the Court’s approval, in addition to providing monetary relief to the Class Members, the \$1,500,000.00 Settlement Fund will also be used to pay: court-approved service awards to Plaintiffs to compensate them for the time they spent, the risks they incurred, and the benefits they obtained for the Classes by serving as class representatives; Class Counsel’s attorneys’ fees of no more than 33-1/3% of the Value of the Settlement; Class Counsel’s costs

¹ The capitalized terms used herein are defined and have the same meaning as used in the Agreement unless otherwise stated.

² “Overdraft Fees” means fees assessed against a member’s checking account when that account does not have sufficient funds at the time a transaction is presented for payment that was not reversed. (Agreement § 1(u).)

³ “NSF Fee” means a fee assessed against a member’s checking account when Defendant declines a payment or the cashing of a check that would result in a negative balance. (Agreement § 1(v).)

incurred in prosecuting this action; and the costs of notice and settlement administration. The Parties have agreed to a robust notice plan designed to afford all members of the Classes due process and advise them of their rights under the Agreement.

For the reasons set forth below, the Agreement meets all requirements for preliminary approval under applicable law. Therefore, Plaintiffs respectfully request that the Court grant their unopposed motion and preliminarily approve this settlement, provisionally certify the three Classes for settlement purposes, appoint Plaintiffs the class representatives for the Classes and the undersigned counsel as Class Counsel, order that the proposed notices be disseminated, and schedule the Final Approval Hearing Date.⁴

II. HISTORY OF THE LITIGATION

On October 27, 2021, Plaintiff Malinda Fairchild-Cathey filed the captioned putative class action case against Defendant AmeriCU Credit Union. 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.

After Defendant filed a motion to dismiss, Plaintiff filed a January 2022 Amended Complaint that added two additional plaintiffs, Richard Mumford and Aaron Forjone, and 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. Am. Compl. at 1.

⁴ Plaintiffs certify to the Court that Defendant has been consulted and does not oppose the relief sought in Plaintiffs’ motion.

Plaintiffs asserted the following claims for relief against Defendant: (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. Am. Compl. at 30-33. 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 described herein is the result of the accepted Mediator’s Proposal. Since that time, the Parties have worked to draft and finalize a full Settlement Agreement and Class Notices. The Parties now seek preliminary approval of the Agreement.

III. SUMMARY OF THE SETTLEMENT

The Parties have entered into the Agreement, which completely resolves this Action. The Agreement includes the key terms discussed below.

A. Class Certification

For settlement purposes only, the Parties have agreed to certify the following three Settlement Classes:

Those members of Defendant who, during the Class Period, were assessed an APPSN Fee (“APPSN Fee Settlement Class”).

Those members of Defendant who, during the Class Period, were assessed an OON Fee (“OON Fee Settlement Class”).

Those members of Defendant who, during the Class Period, were assessed a Retry NSF Fee (“Retry Fee Settlement Class”).

(Agreement, § 1(y), (z), (aa).) Excluded from the Settlement Classes are Defendant, all officers and directors of Defendant, and the judge(s) presiding over this Action. The Class Period for the

APPSN Fee Settlement Class means the dates from October 27, 2015 through July 5, 2019.⁵ The Class Period for the OON Fee Settlement Class means the dates from October 27, 2015 through January 31, 2023.⁶ The Class Period for the Retry Fee Settlement Class means the dates from October 27, 2015 through July 5, 2019.⁷

B. Class Benefits

Class Counsel believes that the contemplated benefits addressed below adequately compensate Class Members for the harm they suffered and, in light of the risks of litigation, represent an excellent result for Class Members. (Kaliel Decl., ¶ 7.) According to Defendant's records, there are approximately 35,000 persons are in the Settlement Classes. (*Id.* ¶ 8.)

1. Settlement Fund

Within 10 days after entry of a Final Approval Order, Defendant shall transfer the Settlement Fund of \$1,500,000.00 to the Claims Administrator. (Agreement, § 7(a).) The Settlement Fund shall be used to pay (a) distributions to Class Members; (b) court-ordered Class Counsels' fees and costs; (c) any court-ordered service award payments to the Class

⁵ "APPSN Fee" means an Overdraft Fee charged by Defendant on a debit card transaction when the account had a positive available balance at time it was authorized. (Agreement § 1(d).) "APPSN Class Member" means any member of Defendant who had a checking account with Defendant and was assessed an APPSN Fee during the Class Period. (*Id.* § 1(hi).)

⁶ "OON Fee" means a fee assessed against a member's checking account for a balance inquiry undertaken at an out-of-network ATM, where a cash withdrawal was also performed at the same time. (Agreement § 1(t).) The Agreement does not expressly define "OON Fee Class Member." The Parties agree that "OON Fee Class Member" means any member of Defendant who had a checking account with Defendant and was assessed an OON Fee during the Class Period.

⁷ "Retry Fee" means the second and any subsequent NSF of OD Fees charged by Defendant on a single ACH or check. (Agreement § 1(e).) "Retry Fee Class Member" shall mean any member of Defendant who had a checking account with Defendant and was assessed a Retry Fee during the Class Period. (*Id.* § 1(i).)

Representatives (requested amount of \$5,000 to each Class Representative); and (d) costs associated with settlement administration and notice. (*Id.*)

No later than 10 days after the Effective Date of the Agreement, the Settlement Administrator will distribute the Net Settlement Fund to Class Members in accordance with the plan set forth in § 7 of the Agreement. The Net Settlement Fund shall be distributed to members of the Classes on a *pro rata* basis based as follows: (1) 83% of the Net Settlement Fund shall be allocated to the APPSN Fee Settlement Class, with each APPSN Class Member paid based on the following formula of $(0.83 \text{ of the Net Settlement Fund} / \text{Total APPSN Fees}) \times \text{Total number of APPSN Fees}$; (2) 14% of the Net Settlement Fund shall be allocated to the Retry Fee Settlement Class, with each Retry NSF Class Member paid based on the following formula of $(0.14 \text{ of the Net Settlement Fund} / \text{Total Retry NSF Fees}) \times \text{Total number of Retry NSF Fees}$; (3) 3% of the Net Settlement Fund shall be allocated to the OON Fee Settlement Class, with each OON Class Members paid based on the following formula of $(0.03 \text{ of the Nest Settlement} / \text{Total OON Fees}) \times \text{Total number of OON Fees charged}$. (Agreement § 7(d)(iv)(a) and (b)(3).)⁸

Class Members who are members of Defendant at the time of distribution will receive a checking account credit. (*Id.* § 7(d)(iv)(b)(1).) Class Members who are not members of Defendant at the time of distribution will be sent a check at the address used to provide notice or to such other address as designated by the Class Member. (*Id.* § 7(d)(iv)(b)(2).) Any checks uncashed after one-hundred eighty (180) days shall be distributed to Class Members on a *pro rata* basis if practical; otherwise, the residual amount will be distributed under Agreement § 10.⁹ (*Id.*

⁸ The Agreement has a typographical error: it has two § 7(d)(iv)(b)(3) sections.

⁹ The Agreement has a typographical error: Section 7(d)(iv)(b)(2) references residual distribution under § 12, but the Parties agree that the correct section to be referenced should be § 10.

§ 7(d)(iv)(b)(2).) Residual amounts held by the Claims Administrator at the time of the Final Report will be paid to one or more *cy pres* recipients nominated to by the Parties and approved by the Court. (*Id.* § 10.) No portion of the Settlement Fund reverts to Defendant. (*Id.* § 7(d)(iv)(c).)

2. Prospective Relief

The Agreement also provides that, no later than January 1, 2024, Defendant will cease charging APPSN Fees and will cease charging more than one NSF Fee on the same CH transaction or check.¹⁰ (*Id.* § 8(a).) As of January 31, 2023, Defendant has already amended its account disclosures to expressly state that more than one OON Fee may be assessed when a member uses an out of network ATM to perform both a balance inquiry and a withdrawal.

C. Settlement Release

The Agreement includes a release from Plaintiffs and the Class Members of claims that arise out of and/or relate to the facts and claims alleged in the Complaints, and any other claims relating to APPSN Fees, OON Fees, or Retry NSF Fees. (Agreement, § 13.) The Agreement also includes a waiver of unknown claims with respect to all the matters described in or subsumed by the Agreement on behalf of the Class Representatives and Class Members. (*Id.*)

D. Class Notice

Notice will be provided by mail and email, as applicable, to all Class Members. (*Id.* § 4.) Defendant's business records will be analyzed to identify Class Members, the type of fee(s) they incurred, and their contact information. (*Id.*)

The Claims Administrator will send the Email Notice to Defendant's current members who have agreed to receive notices regarding their Accounts from Defendant electronically, using the

¹⁰ The Agreement has a typographical error and states that "Defendant shall cease *changing* APPSN Fees" (emphasis added.) (Agreement § 8(a).) The Parties agree that the Agreement should read that "Defendant shall cease *charging* APPSN Fees" (emphasis added).

most recent email addresses provided by Defendant, in a manner that is calculated to avoid being caught and excluded by spam filters or other devices intended to block mass email. (*Id.* § 4(c).) For any emails returned undeliverable, the Claims Administrator will mail the Notice to the Settlement Class Member by first-class United States mail to the best available mailing address. (*Id.*)

For those Class Members who are former customers of Defendant or who are members but who have not agreed to receive electronic notices regarding their Accounts from Defendant, the Claims Administrator will mail the Notice by first-class United States mail to the best available mailing addresses. (*Id.* § 4(d).) Defendant will provide last known mailing addresses for these members. (*Id.*) Mailed Notices returned with forwarding address information will be re-mailed to the forwarding address. (*Id.*) For mailed Notices returned as undeliverable, the Claims Administrator will use standard skip tracing devices to obtain forwarding address information and, if the skip tracing yields a different forwarding address, the Administrator will remail the mailed Notice to the forwarding address. (*Id.*)

The Email Notice and mailed Notice both inform members of the Classes how they may obtain a copy of the Long Form Notice, which shall also be posted on a limited access settlement website created by the Claims Administrator. (*Id.* at § 4(c), (e), and (g).) The Settlement Administrator will provide the parties with a summary report regarding the results of the Notice program at least five days prior to the deadline to file the Motion for Final Approval. (*Id.* at § 4(f).)

The mailed Notice and Email Notice each provide notice of Class Members' rights, including the right to exclude oneself from the settlement or to object to the fairness, adequacy, or reasonableness of the settlement. (*Id.* at Exhibit 1.) The Notice advises Class Members of Class

Counsel's intent to seek attorney's fees of up to 33-1/3% of the Value of the Settlement, and the Plaintiffs' requested service awards (\$5,000.00 per Named Plaintiff). (*Id.*) The Notice also provides instructions for obtaining a copy of the Long Form Notice and the date and location of the Final Approval Hearing. (*Id.*)

The Long Form Notice includes a summary of the case; a summary of Class Members' legal rights and options; answers to frequently asked questions; a description of the Agreement and the settlement benefits; contact information for Counsel for Plaintiffs and Counsel for Defendant; instructions on how to opt out of the Agreement; information about how to object to the settlement; a description of the attorney's fees that Class Counsel intend to apply for and the service award to be sought for the Class Representative; information about the Final Approval Hearing; and instructions on how to obtain a copy of the Agreement. (*Id.* at Exhibit 2.)

Because all notices will include this vital information, and because the information provided to the class members in the notice is structured in a manner that enables class members rationally to decide whether they should intervene in the settlement proceedings or otherwise make their views known, the notices are more than sufficient. Further, the notices clearly explain that any member of the Settlement Classes who wishes to opt out of the Settlement Classes must individually sign and timely submit written notice of his or her intent to be excluded from the Settlement Class.

The notices also clearly explain that any member of the Settlement Classes who wishes to object to or opt-out of the settlement must timely file a written statement of objection with the Court. *Id.* Such objections must be submitted by a date no later than thirty (30) days (subject to Court approval) after the date the Notice must be delivered to the Class Members. Class Members are provided with sufficient time to submit any objections. Similarly, any opt-outs must submit

an Exclusion Letter no later than thirty (30) days after the date the Notice must be delivered to Class Members. (*Id.*)

E. Service Award for Named Plaintiffs and Attorneys' Fees and Costs

Subject to Court approval, Plaintiffs will request Service Awards of \$5,000 each; attorneys' fees of up to 33-1/3% of the Value of the Settlement; and reimbursement of reasonable costs and expenses in this litigation. (*Id.* at § 7(d)(i) and (ii).) Defendant does not oppose these requests.

F. Settlement Administration, Opt-Outs, Objections, and Termination

Plaintiffs and Class Counsel, in conjunction with Defendant, request the Court's approval of Kroll as the Claims Administrator, which will provide notice and other administrative handling of the Agreement. (*Id.* § 9.) The Claims Administrator will be bound by the obligations imposed on it under the terms of the Agreement and subject to the Court's jurisdiction. (*Id.* § 9(a) and (b).)

The Agreement provides a procedure for Class Members to exclude themselves from the Settlement by sending a letter by mail to the Claims Administrator postmarked on or before the Exclusion Deadline. (*Id.* § 11(a).) The Claims Administrator will maintain a list of members who opt-out. (*Id.* § 11(b).) The Agreement also provides the procedures for Class Members to object to the Agreement by the Objection Deadline. (*Id.* § 12.) Should any timely filed objection(s) meeting the required procedures be submitted, Class Counsel must file the objection(s) and any response(s) before the Final Approval Hearing date. (*Id.* § 12(c).)

The Agreement is conditioned on the occurrence of the Effective Date and entry of Preliminary Approval and Final Approval Orders, with all objections being overruled and any appeals taken from the Final Approval Order resolved in favor of final approval. (*Id.* § § 14.)

IV. ARGUMENT

Settlement of a class action requires judicial approval, which usually consists of two stages: (1) preliminary approval of the settlement, typically at an informal hearing or conference, where “prior to notice to the class a court makes a preliminary evaluation of fairness”; and (2) final approval, comprised of a formal fairness hearing “class members and settling parties are provided the opportunity to be heard on the question of final court approval.” *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 691 (S.D.N.Y. 2019) (quoting *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y. 2019)). See also Herbert Conte, *Newberg on Class Actions*, §§ 11.25 and 13:64; Manual for Complex Litigation, Fourth, § 21.632 (2004).

Plaintiffs are taking the first step in this process by seeking preliminary settlement approval. At this stage, the Court is asked to review the proposed settlement for obvious deficiencies, provisionally certify the proposed classes and appoint class representatives and Class Counsel, approve a method for providing the class with notice of the proposed settlement and a fairness hearing, and schedule the formal fairness hearing.

A. Preliminary Approval is Appropriate

It is well settled that, “[t]o be likely to approve a proposed settlement under Rule 23(e)(2), the Court must find ‘that it is fair, reasonable, and adequate.’” *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 692. In addressing these findings, courts consider four factors: “(1) adequacy of representation, (2) existence of arm's-length negotiations, (3) adequacy of relief, and (4) equitableness of treatment of class members.” *Id.*

1. Adequacy of Representation

Before the Court can preliminarily approve a settlement, “Rule 23(e)(2)(A) requires a Court to find that ‘the class representatives and class counsel have adequately represented the class.’” *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 692.

The adequacy inquiry in regard to the Named Plaintiffs is whether their interests are antagonistic to the interests of the other members of the classes. *Id.* (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000)). Here, Plaintiffs are all Defendant members holding checking accounts. They have assisted Class Counsel throughout the litigation, including by: (1) allowing Class Counsel to review their bank statements before filing suit; (2) participating in interviews with Class Counsel; (3) conducting an extensive search for relevant documents and evidence; (4) assisting with written discovery responses; (5) keeping apprised of the case and conferring with Class Counsel throughout the litigation; and (6) agreeing to a class settlement that is in the best interests of the Class Members. In doing so, Plaintiffs were integral to the case and have demonstrated their adequacy as class representatives. Moreover, Plaintiffs have no known interests antagonistic to the interests of the Classes.

The adequacy inquiry in regard to counsel asks whether they “are qualified, experienced and able to conduct the litigation.” *Id.* (quoting *Cordes & Co. Fin. Servs. V. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007) (internal quotation marks omitted)). Here, Class Counsel have extensive experience litigating and settling nationwide class actions, including litigating literally *dozens* of cases involving similar facts and identical legal theories to those alleged in the complaints. They have served as class counsel in multiple cases, including federal and state overdraft cases. (Kaliel Decl., ¶¶ 2, 3.) Class Counsel thoroughly investigated and analyzed Plaintiffs’ claims, Defendant’s liability, class-wide damages theories, and Defendant’s potential

defenses. Class Counsel also reviewed extensive data files and only reached a settlement after satisfactorily confirmatory discovery. They were thus able to knowledgably evaluate the strengths and weaknesses of their claims, the suitability of the claims for class treatment, and the value of the Settlement to the Class Members. Thus, as in *GSE Bonds*, “Rule 23(e)(2)(A)’s adequacy of representation prong thus weighs in favor of approval.” *Id.*

2. Existence of Arm’s Length Negotiations

The Agreement is the result of arm’s length negotiations between experienced counsel after extensive litigation. This matters because “[i]f a class settlement is reached through arm’s-length negotiations between experienced, capable counsel knowledgeable in complex class litigation, ‘the Settlement will enjoy a presumption of fairness.’” *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 693 (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000)). *See also Newberg on Class Actions* § 11.41, at 11-88. In addition, “a mediator’s involvement in settlement negotiations can help demonstrate their fairness.” *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 693.

Here, there is no debate over whether arm’s-length negotiations were involved. The Parties aggressively negotiated the Agreement and engaged in discovery to inform the Parties’ discussions. (Kaliel Decl., ¶ 5.) They mediated before the Honorable Edward Carni (Ret.), and the actual settlement reached was the result of an accepted Mediator’s Proposal. The proposed Settlement presently before this Court is the product of intensive, arm’s-length negotiations. (*Id.* ¶ 10.) Importantly, the Parties did not discuss attorneys’ fees and costs, or any potential service award, until they first agreed on the material terms of the settlement, including the Class definitions, form and manner of Notice, class benefits, and scope of the Release. (*Id.* ¶ 6.)

Moreover, experienced, capable counsel knowledgeable in complex class litigation were involved here. The negotiations on both sides were conducted by attorneys who are highly experienced in prosecuting, defending, and settling consumer class actions. (Kaliel Decl., ¶ 11.) As noted above, Class Counsel specifically have extensive experience litigating and settling nationwide class actions, including litigating literally *dozens* of cases involving similar facts and identical legal theories to those alleged in the complaints. Accordingly, the proposed Settlement in this case is entitled to a preliminary presumption of fairness, adequacy, and reasonableness.

3. Adequacy of Relief

The adequacy of relief factor takes into account

(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3).

In re GSE Bonds Antitrust Litig., 414 F. Supp. 3d at 693 (quoting Rule 23(e)(2)(C)).

When compared with the risks of continued litigation, the amount recovered and the related modification of Defendant's practices (that will afford plaintiffs ongoing benefits) constitute an astounding recovery. Legitimate disputes exist as to many legal issues, including, for example, damages and certification of a class for trial. *See id.* at 694 ("Although the 'risk of maintaining a class through trial is present in [every] class action, . . . this factor [nevertheless] weighs in favor of settlement where it is likely that defendants would oppose class certification if the case were to be litigated." (internal quotation marks and citations omitted)). The Parties naturally dispute the strength of Plaintiffs' case, and the Agreement reflects the Parties' compromise of their assessments of the worst-case and best-case scenarios, weighing the likelihood of various potential

outcomes. This case is complex, carries significant risks for all parties as to both legal and factual issues, and would consume a great deal of time and expense if the Parties litigated it to the end.

The settlement of this action assures that Class Members will receive compensation for a significant portion of their alleged losses relatively soon, rather than years from now or not at all. The Agreement provides prompt relief, and the proposed method of distribution is efficient and cost-effective. It is fair and adequate, serving to weed out unjustified claims while not being unduly demanding. *See id.* (“A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding.” (quoting Fed. R. Civ. P. 23, 2018 Advisory Note)).

Two other points support preliminary approval. First, the requested attorney’s fee is within the applicable range of reasonable percentage fund awards. *See id.* at 695-96 (“Courts in this District have approved fees as high as 33.5% from comparable class settlement funds”). *See also In re DDAPV Direct Purchaser Antitrust Litig.*, No. 05-2237, 2011 WL 12627961 (S.D.N.Y. Nov. 28, 2011) (approving 33.5% from a class settlement fund of \$20.25 million); *see In re Oxycontin Antitrust Litig.*, No. 04-md-1603-SHS, ECF No. 360 (S.D.N.Y. Jan. 25, 2011) (awarding 33.5% from a class settlement fund of \$16 million).

Second, it is notable that the proposed settlement fund comprises approximately 50% of the Classes alleged damages. (Kaliel Decl., ¶ 9.) This percentage either meets or exceeds many court-approved recoveries in federal overdraft fee class actions nationwide. *See, e.g., Bodnar v. Bank of Am., N.A.*, No. 14-3224, 2016 WL 4582084, at *4 (E.D. Pa. Aug. 4, 2016) (praising as “outstanding” and “a significant achievement,” a cash fund providing between 13 and 48 percent of the maximum damages); *In re Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2015 WL 12641970, at *1 (S.D. Fla. May 22, 2015) (approving settlement providing 35% of the

most probable aggregate damages); *Hawthorne v. Umpqua Bank*, No. 11-cv-06700-JST, 2015 WL 1927342, at *3 (N.D. Cal. Apr. 28, 2015) (approving settlement of approximately 38% of damages); *Torres v. Bank of Am.*, 830 F. Supp. 2d 1330, 1346 (S.D. Fla. 2011) (approving settlement of between 9 and 45 percent of the total potential damages); *Trombley v. Nat'l City Bank*, 826 F. Supp. 2d 179, 198 (D.D.C. 2011) (approving overdraft settlement with recovery range of 12 to 30 percent as “within the realm of reasonableness”); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 583 (N.D. Ill. 2011) (approving settlement representing 10% of potential recovery). In comparison, the recovery obtained here falls well within the range of recoveries, despite the substantial litigation risks specific to this case.

Finally, the Court has before it the Agreement. There is no other agreement to be identified under Rule 23(e)(3) here.

4. Equitableness of Treatment of Class Members

Rule 23(e)(2)(d) requires consideration of whether the proposed settlement “treats class members equitably relative to one another.” Here, similar to the plan approved in *GSE Bonds*, the proposed plan of distribution treats claimants equitably by providing them with a pro rata share of the recovery allocated within their respective class and all Class Members will provide the same release of claims. 414 F. Supp. 3d at 699. There is no preferred category of Class Members, but an equitable approach employed.

B. The Court Should Certify the Settlement Classes

Preliminary approval also tasks the Court with finding that it will likely be able to certify the class for purposes of judgment. This requires a proposed settlement to meet the four requirements under Rule 23(a) for class certification, as well as at least one of the three requirements under Rule 23(b). *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 699-700.

1. Numerosity

Rule 23(a)(1) requires that the proposed Settlement Classes be “so numerous that joinder of all members is impracticable.” Notably, “[t]he federal courts have repeatedly stated that there is no ‘magic number’ of class members that is required before certification is granted.” *Prive v. New Hampshire-Vermont Health Servs.*, No. 98-E-20, 1998 WL 375294, at *3 (N.H. Super. July 1, 1998) (citing *CV Reit, Inc. v. Levy*, 144 F.R.D. 690, 696 (S.D.Fla.1992); *Johns v. Rozet*, 141 F.R.D. 211, 216 (D.D.C.1992)). Thus, “[c]lass sizes may be as small as ninety members, see *Smith v. MCI Telecommunications Corp.*, 124 F.R.D. 665, 675 (D.Kan.1989), or number in the tens of thousands. See *Coleman v. Cannon Oil Corp.*, 141 F.R.D. 516, 521 (M.D.Ala.1992).” *Id.* “In making its determination, the court is encouraged ‘to accept common sense assumptions in order to support a finding of numerosity.’” *Id.* (quoting *Wolgin v. Magic Marker Corp.*, 82 F.R.D. 168, 171 (E.D.Pa. 1979)). See also Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 3:3, at 225 (4th ed.2002) (“a common sense approach is contemplated by Rule 23”). In this Circuit specifically, there is a presumption of numerosity for classes of 40 or more. *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 700.

Here, there are thousands of members of the Settlement Classes, which satisfies the numerosity requirement.

2. Commonality

Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” A judicial officer in Southern District has explained this requirement as follows:

A question is common to the class if it is “capable of classwide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). Commonality requires a plaintiff “to demonstrate that the class members have suffered the same

injury.” *Id.* at 349-50, 131 S.Ct. 2541 (internal quotations and citation omitted). “Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question.” *Johnson v. Nextel Commc’ns, Inc.*, 780 F.3d 128, 137 (2d Cir. 2015).

In re GSE Bonds Antitrust Litig., 414 F. Supp. 3d at 700.

Here, each of the members of the three Settlement Classes shares an issue with the other members of those Classes, namely whether Defendant was permitted to charge APSN Fees, OON Fees, and Retry NSF Fees, respectively for each Class. Courts have held that the commonality requirements are likely met where plaintiffs allege the same economic injury stemming from the same violation exists. *Id.* Thus, the commonality factor also weighs in favor of preliminary approval.

3. Typicality

Rule 23(a)(3) requires that “[t]he claims or defenses of the representative parties are typical of the claims or defenses of the class.” This requirement is satisfied “when “each class member’s claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant’s liability.” *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 700 (quoting *Brown v. Kelly*, 609 F.3d 467, 475 (2d Cir. 2010)).

Here, the claims of Plaintiffs and the Class Members arise from the same respective practices and course of conduct by Defendant, namely Defendant’s practice of charging APSN Fees, OON Fees, and Retry NSF Fees, respectively for each Class. The same course of events and same arguments within the Classes would be necessary to prove Defendant’s liability. The typicality requirement therefore weighs in favor of preliminary approval.

4. Adequacy of Representation

Rule 23(a)(4) requires that “[t]he representative parties will fairly and adequately protect the interests of the class.” This requirement is two-pronged and looks at the adequacy of the

Named Plaintiffs to be class representatives and the adequacy of counsel to serve as class counsel. *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 701. Both components of the adequacy inquiry were already discussed above in regard to Rule 23(e)(2)(A). Consequently, the Court can apply that discussion here and should find that this component of the adequacy requirement is met for the reasons outlined above. *See In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 701 (applying Rule 23(e)(2)(A) findings and reasoning to Rule 23(b) requirement).

5. **Predominance and Superiority**

Rule 23(b)(3) provides that “[a] class action may be maintained . . . if . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Findings pertinent to this multi-pronged requirement include “the class members interests in individually controlling the prosecution or defense of separate actions”; “the extent and nature of any litigation concerning the controversy already begun by or against class members”; “the desirability or undesirability of concentrating the litigation of the claims in the particular forum”; and “the likely difficulties in managing a class action.” Fed. R. Civ. P. 23(b)(3).

Here, the predominate issue in the litigation is shared among each of the members of the respective Settlement Classes, namely whether Defendant was permitted to charge APPSN Fees, OON Fees, and Retry NSF Fees, against each member of each Class. The predominance requirement also weighs in favor of preliminary approval.

The class mechanism is also superior to other means of adjudicating the Class Members’ claims. As in *In re GSE Bonds Antitrust Litig.*, “the large size of the class and potentially small recovery of many individual plaintiffs suggests that class members’ interests are likely served by

a class action.” 414 F. Supp. 3d at 702. Individual litigation could result in inconsistent or varying adjudications with respect to individual Class Members and could establish incompatible standards of conduct for Defendant. Further, a class action would allow both the Parties and the Court to benefit from economies of scale and the final and consistent resolution of relatively small claims in one forum. It is impracticable to bring Class Members’ individual claims before the Court. Class treatment permits a large number of similarly situated persons or entities to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, or expense. *See id.* (“concentrating the case in one forum will help improve fairness and efficiency in adjudication of the claims of plaintiffs”). Litigating the claims of thousands of Class Members would be infeasible because it would require presentation of the same evidence and expert opinions many times over. Finally, there is no suggestion that the case will not be manageable as a class action. *See id.*

C. The Proposed Notices Meet the Requirements of Due Process

Basic due process concerns entitle class members to notice of the proposed settlement and an opportunity to be heard if they so choose. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). The mechanics of the notice process “are left to the discretion of the court subject only to the broad ‘reasonableness’ standards imposed by due process.” *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975).

Here, the proposed Notices are written in plain English and are of reasonable length. Notably, they include: (i) a description of the case; (ii) a description of the three Classes; (iii) a description of the proposed settlement; (iv) a statement of the amount of attorneys’ fees that may be sought by class counsel; (v) the fairness hearing date and a description of the hearing; (vi) a statement regarding eligibility to appear at the hearing; (vii) a statement of the deadlines for filing

objections to the settlement and for submitting a claim; (viii) a statement of options, including the option to be excluded from the class; and (ix) how to obtain further information. Such content meets the substantively reasonable component of Rule 23(c)(2)(B). *See In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 703.

The proposed form of notice and the manner of dissemination are also reasonably calculated to reach all class members and constitute the best forms of notice available under the circumstances, thereby satisfying due process. For example, the Claims Administrator shall post the Long-Form Notice on the Settlement Website. The use of such a website has been approved as part of a multi-faceted notice plan. *See In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 702-03.

Notice will also be provided where possible by email. Numerous courts have allowed notice to be sent to Class Members through e-mail. *Sanders v. Glendale Rest. Concepts, LP.*, No. 19-cv-01850-NYW, 2019 WL 6799459, at *4 (D. Colo. Dec 13, 2019) (“as to the method of delivery of the Proposed Notice, the court finds that the use of mail, email, and text message, as stipulated by the Parties, is more than sufficient”); *Fairnella v. Paypal, Inc.*, 611 F. Supp. 2d 250 (E.D.N.Y. 2009); *Keirsev v. eBay, Inc.*, No. 12-cv-01200, 2014 WL 644697, at *1 (N.D. Cal. 2014); *Anwar v. Fairfield Greenfield Ltd.*, No. 1:11-cv-00813, 2012 WL 2273332, at *1 (S.D.N.Y. 2012).

If an email is returned as undeliverable, or for Settlement Class Members who are not current customers of Defendant or who have not agreed to receive electronic notices regarding their Accounts from Defendant, first-class United States mail to the best available mailing addresses shall be used. Such mail notice is sufficient where, as here, the Class Members are known. *See* 7B Wright & Miller, Federal Practice and Procedure § 1797.6 at 200 (3d ed.2005).

For all mailed Notices that are returned as undeliverable, the Claims Administrator shall use standard skip tracing devices to obtain forwarding address information and, if the skip tracing yields a different forwarding address, the Claims Administrator shall re-mail the Notice to the address identified in the skip trace.

These provisions are meaningful and meet or exceed notice protocols approved in other federal class action cases. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 496 (D.N.J. 1997); *In re VMS Sec. Litig.*, No. 89 C 9448, 1992 U.S. Dist. LEXIS 12141, at *7 (N.D. Ill. Aug. 11, 1992). Approval of the proposed form and manner of dissemination of notice is, therefore, appropriate. Therefore, class counsel respectfully request that the Court approve these methods of notice as the best available under the circumstances.

V. CONCLUSION

Plaintiffs respectfully ask the Court to enter the proposed order filed herewith, which would accomplish the following:

- (1) grant preliminary approval of the proposed class action settlement;
- (2) conditionally certify three settlement classes;
- (3) appoint the Named Plaintiffs as the class representatives, Plaintiffs' attorneys as Class Counsel; and Kroll as the Claims Administrator;
- (4) approve the proposed notice plan;
- (5) adopt the deadlines and procedures for persons who fall within the class definitions to exclude themselves and for Class Members to comment on the proposed settlement; and
- (6) schedule a Final Approval Hearing no earlier than 105 days from the entry of the preliminary approval order to address the proposed settlement and the application of Class Counsel for an award of fees and costs and for class representative incentive awards.

Dated: December 14, 2022

Respectfully submitted,

/s/ Jeffrey D. Kaliel

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 14, 2023, a copy of the above document has this day been served on all counsel of record via the court's ECF system:

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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.

Civil Action No. 6:21-cv-1173 (LEK-ML)

JUDGE LAWRENCE E. KAHN

Class Action

**DECLARATION OF JEFFREY D. KALIEL IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION AND MEMORANDUM OF LAW FOR
PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT**

I, Jeffrey D. Kaliel, declare as follows:

1. I am counsel of record for Plaintiffs and the proposed Classes in the above captioned matter. I submit this affidavit in support of Plaintiff's Unopposed Motion and Memorandum of Law for Preliminary Approval of Proposed Class Action Settlement. Unless otherwise noted, I have personal knowledge of the facts set forth in this declaration and could and would testify competently to them if called upon to do so.

Class Counsel's Experience

KalielGold PLLC

2. My firm has extensive class action experience. My firm has been appointed as class counsel in numerous class actions, including, but not limited to *Robinson v. First Hawaiian Bank*, No.17-1-0167-01 GWBC (1st Cir. Haw.); *Liggio v. Apple Federal Credit Union*, No. 18-cv-01059

(E.D. Va.); *Brooks et al. v. Canvas Credit Union*, No. 2019CV30516 (Dist. Ct. for Denver Cnty., Colo.); *Roberts v. Capital One*, No. 1:16-cv-04841 (S.D.N.Y.); and *Walters v. Target Corporation*, No. 3:16-CV-01678-L-MDD (S.D. Cal.); *Lambert v Navy Federal Credit Union*, No. 1:19-cv-00103 (E.D. Va.); *Perks v Activehouse d/b/a Earnin*, No. 5:19-cv-05543 (N.D. Cal.); *White v Members 1st Credit Union*, No. 1:19-cv-00556 (M.D. Pa.), and numerous actions in state courts across the country.

Gibbs Law Group LLP

3. Gibbs Law Group LLP (“GLG”) is a 35-attorney law firm that represents plaintiffs and injured parties in class actions, mass torts, and mass arbitrations. Over the past ten years, GLG has recovered over \$2.5 billion for its clients. GLG attorneys have been appointed to leadership positions in hundreds of class actions in state and federal courts throughout the United States and its territories. David Berger, who leads GLG’s bank fee litigation practice, has litigated dozens of cases asserting claims similar to those in this matter. In addition, Mr. Berger is currently serving as court-appointed lead counsel in *In re US Fertility LLC Data Security Litigation*, No. 8-21-CV-00299-PJM (D. Md.); *In re MGM Resorts International Data Breach Litigation*, No. 2:20-cv-00376-GMN-NJK (D. Nev.); and *In re Equifax Fair Credit Reporting Act Litigation*, No. 1:22-cv-03072-LMM (N.D. Ga.), among other matters. Mr. Berger previously was a key member of the litigation teams in cases including *In re Equifax Data Breach*, No. 17-md-2800-TWT (N.D. Ga.) (the largest data breach settlement in history) and *In re Anthem, Inc. Data Breach Litigation*, No. 15-md-2617-LHK (N.D. Cal.) (the largest data breach settlement in history at the time).

4. As described below in detail, I have been personally involved in all aspects of my firm’s work in this litigation that resulted in the Settlement. KalieGold PLLC has vigorously

represented the interests of the Settlement Class Members throughout the course of the litigation and settlement process.

5. The Parties, both of which are represented by capable and experienced class action counsel, aggressively negotiated the Settlement Agreement and Release (attached hereto as Exhibit 1) and engaged in discovery to inform the Parties' discussions.

6. Importantly, the Parties did not discuss attorneys' fees and costs, or any potential service award, until they first agreed on the material terms of the settlement, including the Class definitions, form and manner of Notice, class benefits, and scope of the Release.

7. Class Counsel believes that the contemplated benefits addressed below adequately compensate Class Members for the harm they suffered and, in light of the risks of litigation, represent an excellent result for Class Members.

8. According to Defendant's records, there are approximately 35,000 persons in the Settlement Classes.

9. The proposed settlement fund comprises approximately 50% of the Classes' alleged damages.

10. The proposed Settlement presently before this Court is the product of intensive, arm's-length negotiations.

11. Further, the negotiations were conducted by attorneys who are highly experienced in prosecuting, defending, and settling consumer class actions.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 14, 2023, at Washington, D.C.

/s/ Jeffrey D. Kaliel
JEFFREY D. KALIEL

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 14, 2023, a copy of the above document has this day been served on all counsel of record via the court's ECF system:

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/s/ Jeffrey D. Kaliel
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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.

Civil Action No. 6:21-cv-1173 (LEK-ML)

JUDGE LAWRENCE E. KAHN

Class Action

**[PROPOSED] ORDER GRANTING MOTION
FOR PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT**

THIS MATTER came before the Court for consideration of a motion for preliminarily certification of the Settlement Classes and preliminarily approval of a settlement between Plaintiffs Malinda Fairchild-Cathey, Richard Mumford, and Aaron Forjone (“Named Plaintiffs”), individually and on behalf of the proposed Settlement Classes, and Defendant AmeriCU Credit Union (“Defendant”). The Court has reviewed the Settlement Agreement and Release and attachments thereto (“Settlement Agreement”) executed by the Parties and submitted to the Court with Plaintiff’s Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement.

IT IS HEREBY ORDERED as follows:

1. Terms capitalized herein and not otherwise defined shall have the meanings ascribed to them in the Settlement Agreement.
2. This Court has jurisdiction over the subject matter and Parties to the above-captioned lawsuit (the “Action”).

Preliminary Approval of Settlement and Conditional Certification of Settlement Classes

1. Subject to the Final Approval Hearing and further review, the Court preliminarily approves the Settlement as being fair, reasonable, and adequate. The terms of the parties' Settlement are hereby conditionally approved, subject to further consideration thereof at the Final Approval Hearing provided for below. The Court finds that the Settlement is likely to obtain final approval and that notice of the proposed settlement should be given as provided in this Order and the Settlement Agreement.

2. The Court finds, for settlement purposes only, that the prerequisites for a class action under Fed. R. Civ. P. 23(a) and (b)(3) have been satisfied in that: (a) the Settlement Classes are comprised of so numerous members that joinder of all members is impracticable; (b) there are common questions of law and fact common to the Settlement Classes that predominate over questions affecting only individual members; (c) the claims of Named Plaintiffs are typical of the claims of the Settlement Class; (d) Named Plaintiffs will fairly and adequately protect the interests of the Settlement Class; (e) a class action is superior to other available methods for the fair and efficient adjudication of the controversy; and (f) Class Counsel will adequately represent the interests of the Settlement Class. Accordingly, the Court conditionally certifies, for settlement purposes only, the following Settlement Classes:

Those members of Defendant who, during the Class Period, were assessed an APPSN Fee ("APPSN Fee Settlement Class").

Those members of Defendant who, during the Class Period, were assessed an OON Fee ("OON Fee Settlement Class").

Those members of Defendant who, during the Class Period, were assessed a Retry NSF Fee ("Retry Fee Settlement Class").

Excluded from the Settlement Classes are Defendant, all officers and directors of Defendant, and the judge(s) presiding over this Action. The Class Period for the APPSN Fee Settlement Class means the dates from October 27, 2015 through July 5, 2019. The Class Period for the OON Fee Settlement Class means the dates from October 27, 2015 through January 31, 2023. The Class Period for the Retry Fee Settlement Class means the dates from October 27, 2015 through July 5, 2019.

3. A Final Approval Hearing shall be scheduled to take place before this Court for the purpose of, among other things: (a) determining whether the proposed Settlement Agreement should be finally approved by the Court as fair, reasonable, and adequate; (b) considering Class Counsel's Motion for Final Approval (including an award of fees, costs, and service awards; (c) ordering entry of Judgment on the Released Claims, which constitutes a release and bar of the Released Claims; (d) determining compliance with all matters pertaining to Rule 23, and (e) consideration of such other matters as the Court may deem necessary or appropriate. The Court may adjourn, continue, and reconvene the Final Approval Hearing pursuant to oral announcement without further notice to the Settlement Class, and the Court may consider and grant final approval of the Settlement, with or without minor modification and without further notice to the Settlement Class.

4. The Court appoints Plaintiffs Malinda Fairchild-Cathey, Richard Mumford, and Aaron Forjone as Class Representatives, appoints Jeffrey Kalief of Kalief Gold PLLC and David Berger of Gibbs Law Group LLP as Class Counsel, and appoints Kroll as Claims Administrator.

Class Notice and Objections

5. The Court hereby approves, as to form and content, the proposed Notice to the Settlement Class attached as Exhibits 1 and 2 to the Settlement Agreement. The long-form Notice shall be posted to the Settlement Website and the short-form notice shall be emailed and/or sent by U.S. Mail to Settlement Class Members. The manner of distribution of the Notices set forth in Section 4 of the Settlement Agreement satisfies due process and is the best notice practicable under the circumstances.

6. Class Counsel and the Claims Administrator shall cause Notice to be sent to each Settlement Class Member in accordance with the Settlement Agreement and this Order. The Parties may by mutual written consent make non-substantive changes to the Notices without Court approval.

7. Any person in the Settlement Classes may be excluded (opt out) from the Settlement Agreement upon request. To be valid and considered by the Court, the exclusion must be in writing and mailed to the Claims Administrator at the address specified in the Notice. The objection must be postmarked on or before the Bar Date to Opt Out, which shall be thirty (30) days after the date the Notice is sent to Settlement Class Members pursuant to the Settlement Agreement, and must include the Class Member's name, the last four digits of their account number(s) or former account numbers(s), address, telephone number, and email address. The Exclusion Letter must state that the Class Member wishes to exclude themselves from the Agreement and be signed and dated. An Exclusion Letter electing to opt out by any joint owner of an account shall be deemed to apply to all owners. The Claims Administrator shall provide all requests for exclusion to Class Counsel, who shall file any such requests with the Court. Any person who submits a timely and valid

request for exclusion will be excluded from the Settlement Agreement and will not be subject to the terms of the Settlement Agreement or the releases contained within it.

8. Settlement Class Members shall be afforded an opportunity to object to the terms of the Settlement. To be valid and considered by the Court, the objection must be in writing and mailed by first class mail, postage pre-paid, to the Claims Administrator at the addresses specified in the Notice. The objection must be postmarked on or before the Bar Date to Object, which shall be thirty (30) days after the date the Notice is delivered to the Class Members. The objection must include the following information:

- i. The name of the Action;
- ii. The objector's name, address, telephone number, and the last four digits of the Account(s) at issue;
- iii. The contact information for any attorney retained by the objector in connection with the objection or otherwise in connection with this case;
- iv. A statement of the factual and legal basis for each objection and any exhibits the objector wishes the Court to consider in connection with the objection;
- v. A statement as to whether the objector intends to appear at the Final Approval Hearing, either in person or through counsel, and, if through counsel, identifying the counsel by name, address, and telephone number; and
- vi. The objector's signature (an attorney signature is not sufficient).

9. Any Settlement Class Member who does not make his or her objection known in the manner provided in the Settlement Agreement and Notice shall be deemed

to have waived such objection and shall forever be foreclosed from making any objection to the fairness, reasonableness, or adequacy of the proposed Settlement.

10. Any request for intervention in this Action for purposes of commenting on or objecting to the Settlement must meet the requirements set forth above, including the deadline for filing objections, must be accompanied by any evidence, briefs, motions, or other materials the proposed intervenor intends to offer in support of the request for intervention, and must meet the requirements of applicable law and Court rules.

11. Any lawyer intending to appear at the Final Approval Hearing must be authorized to represent a Settlement Class Member, must be duly admitted to practice law before the Court, and must file a written appearance. Copies of the appearance must be served on Class Counsel and Defendant's Counsel.

Final Judgment & Release

12. Upon entry of Judgment by the Court in accordance with the Settlement, all Settlement Class Members shall be barred from asserting any Released Claims against the Released Parties and any such Settlement Class Member shall be conclusively deemed to have released any and all such Released Claims against the Released Parties.

Other Provisions

13. Notice will be sent to Class Members within thirty (30) days of the Order.

14. Class Counsel's Motion for Attorneys' Fees and Class Representative Service Awards shall be filed no later than thirty (30) days after Notice is sent to Class Members.

15. Class Counsel's Motion for Final Approval shall be filed no later than thirty (30) days after the Objection Deadline. If any objection is filed, Class Counsel shall file such objection at least seven (7) days before the Final Approval Hearing.

16. The Final Approval hearing is scheduled for _____, 2024, at _____.

17. Pending final determination as to whether the Settlement should be approved, the Court hereby asserts jurisdiction over the Settlement Class Members for the purposes of effectuating this Settlement and releasing and dismissing with prejudice their Released Claims.

18. All proceedings are hereby stayed until further order of the Court, except as may be necessary to implement the terms of the Settlement. Pending final determination as to whether the Settlement should be approved, Plaintiffs, all members of the Settlement Classes, and persons purporting to act on their behalf, are enjoined from commencing or prosecuting (either directly, representatively, or in any other capacity) against any of the Released Parties any action or proceeding in any court or other tribunal asserting any of the Released Claims.

19. The Settlement does not constitute an admission, concession, or indication by Defendant of the validity of any claims in this Action or of any wrongdoing, liability, or violation of law by Defendant, nor of the appropriateness of certification of litigation classes. To the contrary, Defendant has advised the Court that it believes it is without any liability whatsoever for any of the claims included in the Settlement and is participating in the Settlement to put an end to all such claims and the risks and the expense of protracted litigation.

20. In the event the Settlement is not approved by the Court, or for any reason the Parties fail to obtain a Final Approval Order and Judgment as contemplated in the Settlement, or any such order is reversed on appeal, or the Settlement is terminated pursuant to its terms for any reason, then the following shall apply:

- (i) All orders and findings entered in connection with the Settlement shall become null and void and have no further force and effect, shall not be used or referred to for any purposes whatsoever, and shall not be admissible or discoverable in any other proceeding;
- (ii) All of the Parties' respective pre-Settlement claims and defenses will be preserved;
- (iii) Nothing contained in this Order is, or may be construed as, any admission or concession by or against Plaintiff or Defendant on any point of fact or law;
- (iv) Neither the Settlement terms nor any publicly disseminated information regarding the Settlement, including, without limitation, the Settlement Agreement, the Notice, court filings, orders, and public statements, may be used as evidence in this or any other proceeding. In addition, neither the fact of, nor any documents relating to, any Party's withdrawal from the Settlement, any failure of the Court to approve the Settlement, and/or any objections or interventions may be used as evidence; and
- (v) Neither the fact of this Order nor any of its contents, nor the Parties' Settlement Agreement and submissions nor any of their contents, nor the fact of Defendant's willingness to enter into a class action settlement, may

be used to support certification of a litigation class in this or any other proceeding.

21. Each and every time period and provision of the Settlement Agreement shall be deemed incorporated herein as if expressly set forth and shall have the full force and effect of an Order of this Court.

22. All costs incurred in notifying members of the Settlement Classes, as well as administering the Settlement, shall be paid as set forth in the Settlement Agreement.

23. Certification of the Settlement Classes are conditional certifications for settlement purposes only. If the Settlement Agreement is terminated or not consummated for any reason whatsoever, the conditional certifications of the Settlement Classes shall be void and Defendant, pursuant to the terms of the Settlement Agreement, shall have reserved all of its rights to oppose any and all class certification motions in this Action, or in any other class action under Court Rules or any other applicable rule, statute, law or provision, on any grounds.

IT IS SO ORDERED.

Dated: _____

LAWRENCE E. KAHN
United States District Judge

Approved as to form:

/s/ Jeffrey D. Kalief
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Attorneys for Defendant AmeriCU Credit Union

EXHIBIT 1

PREAMBLE

This Settlement Agreement and Release (the “Agreement”) is entered into by and among plaintiffs Fairchild-Cathey, Mumford and Forjone (“Named Plaintiffs”) and all those on whose behalf they are prosecuting this action (each of them a “Plaintiff” and all of them “Plaintiffs”), on the one hand, and defendant Americu Credit Union (“Defendant”), on the other hand, as of the date executed below. All references in this Agreement to a “party” or the “parties” shall refer to a party or the parties to this Agreement.

RECITALS

On October 27, 2021, plaintiff Fairchild-Cathey filed a putative class action complaint entitled *Fairchild-Cathey et al. v. Americu Credit Union*, in the United States District Court for the Northern District of New York, Case No. 6:21-CV-01173, alleging claims for breach of contract and violation of NY GBL Section 349 with regard to Defendant’s practice of charging overdraft fees (“OD Fees”) on debit card transactions that allegedly did not overdraw an account at the time they were authorized (“APPSN transactions”); Defendant’s allegedly routine practice assessing more than one insufficient funds fee (“NSF Fee”) on the same transaction; and

A. In January, 2022, Plaintiffs filed an Amended Complaint adding Defendant’s allegedly routine practice of assessing two out-of-network ATM Fees (“OON Fees”) on ATM withdrawals undertaken in conjunction with balance inquiries

B. On March 10, 2022, Defendant filed a motion to dismiss the Amended Complaint, which the Parties fully briefed. Docs. 22-52.

C. Via written order, the Court denied the motion to dismiss on January 17, 2023. Doc. 53.

D. The Parties stipulated to a discovery schedule and commenced discovery. Plaintiffs issued discovery requests on April 7, 2023. Defendant also issued discovery requests, which the Plaintiffs responded to. The Parties engaged in extensive discovery.

E. On October 18, 2023, the parties participated in a mediation before the Honorable Edward Carni (Ret.). The mediation resulted in a settlement in principle. The settlement described below is the result of the accepted Mediator’s Proposal.

F. Defendant has entered into this Agreement to resolve any and all controversies and disputes arising out of or relating to the allegations made in the Action, and to avoid the burden, risk, uncertainty, expense, and disruption to its business operations associated with further litigation. Defendant does not in any way acknowledge, admit to, or concede any of the allegations made in the Action, and expressly disclaims and denies any fault or liability, or any charges of wrongdoing that have been or could have been asserted in Action. Defendant nevertheless believes that this settlement is in its best interest and in the best interests of all of its members. Nothing contained in this Agreement shall be used or construed as an admission of liability and this Agreement shall not be offered or received in evidence in any action or proceeding in any court or other forum as an admission or concession of liability or wrongdoing of any nature or for any other

purpose other than to enforce the terms of this Agreement.

G. Plaintiffs have entered into this Agreement to liquidate and recover on the remaining claims asserted in the Action, and to avoid the risk, delay, and uncertainty of continued litigation. Plaintiffs do not in any way concede the claims alleged in the Action lack merit or are subject to any defenses.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing recitals, which are incorporated into and are an integral part of this Agreement, and in consideration of the mutual promises below, the parties agree as follows:

1. DEFINITIONS. In addition to the definitions contained elsewhere in this Agreement, the following definitions shall apply:

(a) “Class Period” shall mean the dates from:

October 27, 2015 through July 5, 2019 for the APPSN Fee Settlement Class;

October 27, 2015 through July 5, 2019 for the Retry Fee Settlement Class; and

October 27, 2015 through January 31, 2023 for the OON Fee Settlement Class.

(b) “Bar Date To Object” will be the date set by the Court as the deadline for Class Members to file an Objection, and shall be approximately thirty (30) days after the date the Notice (defined below) must be delivered to the Class Members.

(c) “Bar Date To Opt Out” shall be the date set by the Court as the deadline for Class Members to opt out. The Bar Date shall be thirty (30) days after the date the Notice (defined below) must be delivered to the Class Members.

(d) “APPSN Fee” shall be an Overdraft Fee charged by Defendant on a debit card transaction when the account had a positive available balance at time it was authorized.

(e) “Retry Fee” shall be the second and any subsequent NSF or OD Fees charged by Defendant on a single ACH or check.

(f) “Claims Administrator” shall mean the entity that will provide the notice and other administrative handling in this Settlement Agreement. Class Counsel shall request bids of at least two separate claims administrators and the one providing the lowest bid shall be selected.

(g) “Class Counsel” shall mean the Gibbs Law Group and Jeffrey Kaliel of Kaliel Gold PLLC.

(h) “APPSN Class Member” shall mean any member of Defendant who had a checking account with Defendant and was assessed an APPSN Fee during the Class Period.

(i) “Retry Fee Class Member” shall mean any member of Defendant who had

a checking account with Defendant and was assessed a Retry Fee during the Class Period.

(j) “Court” shall mean the United States District Court for the Northern District of New York.

(k) “Defendant’s Counsel” shall mean Litchfield Cavo LLP.

(l) “Effective Date” shall be thirty (30) days after the entry of the Final Approval Order (defined below) provided no objections are made to this Agreement. If there are objections to the Agreement, then the Effective Date shall be the later of: (1) Ninety (90) days after entry of the Final Approval Order, if no appeals are taken from the Final Approval Order; or (2) if appeals are taken from the Final Approval Order, then thirty (30) days after an Appellate Court ruling affirming the Final Approval Order; or (3) Thirty (30) days after entry of a dismissal of the appeal.

(m) “Exclusion Letter” shall mean a letter by a Class Member who elects to opt out of this Agreement.

(n) “Final Approval Hearing Date” shall be the date set by the Court for the hearing on any and all motions for final approval of this Agreement.

(o) “Final Approval Order” shall mean the Order and Judgment approving this Agreement issued by the Court at or after the Final Approval Hearing Date.

(p) “Final Report” shall mean the report prepared by the Claims Administrator of all receipts and disbursements from the Settlement Fund, as described in Section 9, below.

(q) “Motion For Final Approval” shall mean the motion or motions filed by Class Counsel, as referenced in Section 5 below.

(r) “Net Settlement Fund” shall mean the net amount of the Settlement Fund after payment of court approved attorneys’ fees and costs, any court approved service award and the costs of Notice, and any fees paid to the Claims Administrator.

(s) “Notice” shall mean the notice to Class Members of the settlement provided for under the terms of this Agreement, as ordered by the Court in its Preliminary Approval/Notice Order (defined below), and shall refer to the form of Notice attached hereto as **Exhibit 1** and **Exhibit 2**.

(t) “OON Fee” shall mean a fee assessed against a member’s checking account for a balance inquiry undertaken at an out-of-network ATM, where a cash withdrawal was also performed at the same time.

(u) “Overdraft Fee” shall mean a fee assessed against a member’s checking account when that account does not have sufficient funds at the time a transaction is presented for payment that was not reversed.

(v) “NSF Fee” shall mean a fee assessed against a member’s checking account

when Defendant declines a payment or the cashing of a check that would result in a negative balance.

(w) “Preliminary Approval/Notice Order” shall mean the Order issued by the Court preliminarily approving this Agreement and authorizing the sending of the Notice to Class Members, as provided in Sections 3 and 4 below.

(x) “Settlement Fund” shall mean the one million, five hundred thousand dollars and zero cents (\$1,500,000.00) to be paid by Defendant under the terms of this Agreement.

(y) “APPSN Fee Settlement Class” shall mean those members of Defendant who, during the Class Period, were assessed an APPSN Fee.

(z) “OON Fee Settlement Class” shall mean those members of Defendant who, during the Class Period, were assessed an OON Fee.

(aa) “Retry Fee Settlement Class” shall mean those members of Defendant who, during the Class Period, were assessed a Retry NSF Fee.

2. CLASS ACTION SETTLEMENT. Plaintiffs shall propose and recommend to the Court that the three settlement classes defined above (the “APPSN Fee Settlement Class,” the “Retry Fee Settlement Class,” and the “OON Fee Settlement Class”)¹ be certified. Defendant agrees solely for purposes of the settlement provided for in this Agreement, and the implementation of such settlement, that this case shall proceed as a class action; provided, however, that if a Final Approval Order is not issued, then Defendant shall retain all rights to object to maintaining this case as a class action. Plaintiffs and Class Counsel shall not reference this Agreement in support of any subsequent motion relating to certification of a liability class.

3. PRELIMINARY SETTLEMENT APPROVAL. Class Counsel shall use reasonable efforts promptly to file a motion seeking a Preliminary Approval/Notice Order by **January 30, 2024**. The Preliminary Approval/Notice Order shall provide for: preliminary approval of this Agreement, provisional certification of the classes for settlement purposes, appointment of Class Counsel as counsel to the provisionally certified class, and the requirement that the Notice be given to the Class Members as provided in Section 4, below (or as otherwise determined by the Court).

4. NOTICE TO THE CLASS.

(a) Defendant shall prepare a list that identifies each Settlement Class Member and the number of each type of fee that the Class Member incurred during the Class Period.

(b) The Claims Administrator shall send the Notice to all Class Members as specified by the Court in the Preliminary Approval/Notice Order.

(c) For those Class Members who are current members of Defendant and have agreed to receive notices regarding their accounts from Defendant by email, Defendant shall

¹ Together, the “Classes.”

provide the Claims Administrator with the most recent email addresses it has for the Class Members. The Claims Administrator shall email an Email Notice (see Exhibit 1) to each such Class Member's last known email address, in a manner that is calculated to avoid being caught and excluded by spam filters or other devices intended to block mass email. For any emails that are returned undeliverable, the Claims Administrator shall use the best available databases to obtain current email address information, update its database with these emails, and resend the Notice by email. The Email Notice shall inform Class Members how they may request a copy of the Long Form Notice (see Exhibits 1-2).

(d) For those Class Members who are not current members of Defendant or who have not agreed to receive notices regarding their accounts from Defendant by email, the Notice shall be mailed to these Class Members by first class United States mail to the best available mailing addresses. Defendant shall provide the Claims Administrator with last known mailing addresses for these Class Members. The Claims Administrator will run the names and addresses through the National Change of Address Registry and update as appropriate. If a mailed Notice is returned with forwarding address information, the Claims Administrator shall re-mail the Notice to the forwarding address. For all mailed Notices that are returned as undeliverable, the Claims Administrator shall use standard skip tracing devices to obtain forwarding address information and, if the skip tracing yields a different forwarding address, the Claims Administrator shall re-mail the Notice to the address identified in the skip trace, as soon as reasonably practicable after the receipt of the returned mail.

(e) The Notice shall also be posted on a limited access settlement website created by the Claims Administrator, subject to designation by Defendant.

(f) The Claims Administrator shall maintain a database showing mail and email addresses to which each Notice was sent and any Notices that were not delivered by mail and/or email. A summary report of the Notice shall be provided to the Parties at least five (5) days prior to the deadline to file the Motion for Final Approval. The database maintained by the Claims Administrator regarding the Notice shall be available to the parties and the Court upon request. It shall otherwise be confidential and shall not be disclosed to any third party.

(g) The Notice shall be in a form approved by the Court and, substantially similar to the notice form attached hereto as Exhibit 1 and Exhibit 2. The parties may by mutual written consent make non-substantive changes to the Notice without Court approval.

(h) All costs associated with publishing, mailing and administering the Notice as provided for in this Section, and all costs of administration, including but not limited to the Claims Administrator's fees and costs shall be paid out of the Settlement Fund.

5. MOTION FOR FINAL APPROVAL. Within a reasonable time after the Bar Date to Opt Out, and provided the conditions in Section 14, below, are satisfied, Class Counsel shall file a Motion for Final Approval of this Agreement so that same can be heard on the Final Approval Hearing Date.

6. ENTRY OF JUDGMENT. The Final Approval Order shall constitute the Court's final judgment in this action. The Court shall retain jurisdiction to enforce the terms of the Final

Approval Order.

7. THE SETTLEMENT FUND AND DISTRIBUTION.

(a) Payments to Class Members. Within ten (10) days after the entry of the Final Approval Order, Defendant shall transfer the Settlement Fund to the Claims Administrator, less the total amount that will be credited to Class Members by Defendant, as provided in subsection 7(d)(iv)b(1), below. The Settlement Fund shall be the total amount Defendant is obligated to pay under the terms of this Agreement and includes (a) Class Counsels' fees and costs; (b) any service award payment to the Named Plaintiffs; (c) costs associated with administering the Notice in accordance with Section 4, above; however, AmeriCU shall prepare the list that identifies each Class Member and the number and type of each fee that that Class member incurred during each Class Period for utilization by the Claims Administrator in calculating any disbursements; and (d) any fees paid to the Claims Administrator for services rendered in connection with the administration process. Defendant shall not make any additional or further contributions to the Settlement Fund, even if the total amount of all alleged improper fees charged to the Class Members exceeds the value of the Net Settlement Fund. No later than 10 days following Final Approval by the Court, by agreement of the Parties, all of Named Plaintiffs' accounts with Americu will be closed and all of their individual or joint memberships with Americu shall be terminated. Named Plaintiffs shall bring all accounts to a zero or positive balance before they close. The Parties further agree that Named Plaintiffs shall only thereafter be able to reestablish or reopen any accounts and/or membership with Americu, whether jointly or individually, at the sole discretion of Americu, which may be withheld for any reason. In the event a Final Approval Order is not issued, or this Agreement is terminated by either party for any reason, including pursuant to Section 14, below, the portion of the Settlement Fund paid to the Claims Administrator (including accrued interest, if any) less expenses actually incurred by the Claims Administrator or due and owing to the Claims Administrator in connection with the settlement provided for herein, shall be refunded to Defendant within two (2) business days.

(b) All funds held by the Claims Administrator shall be deemed and considered to be in *custodia legis* of the Court, and shall remain subject to the jurisdiction of the Court, until distributed pursuant to this Agreement.

(c) All funds held by the Claims Administrator at any time shall be deemed to be a Qualified Settlement Fund as described in Treasury Regulation §1.468B-1, 26 C.F.R. §1.468B-1.

(d) Payments shall be made from the Settlement Fund as follows:

(i) Plaintiffs' Fees and Costs. Plaintiffs' reasonable attorneys' fees and costs, as determined and approved by the Court, shall be paid from the Settlement Fund within ten (10) business days after entry of the Final Approval Order, notwithstanding any appeals of the final approval order. Class Counsel shall apply for an award of attorneys' fees of up to one-third (33-1/3%) of the Settlement Fund to the Class Members plus reimbursement of reasonable litigation costs, to be approved by the court. Defendant agrees not to oppose an application up to one-third (33-1/3%) of the Settlement Fund but reserves the right to oppose an

application for fees in excess of that amount. Should the judgment approving the settlement be reversed on appeal, Class Counsel shall immediately repay all fees and costs to Defendant; should the award of fees and costs be reduced on appeal, Class Counsel shall immediately repay into the Settlement Fund an amount equal to the reduction ordered by the appellate court.

(ii) Service Award. Named Plaintiffs may apply to the Court for a service award of up to \$5,000.00 each. Subject to the Court's approval, the service award shall be paid from the Settlement Fund ten (10) days after the Effective Date.

(iii) Claims Administrator's Fees. The Claims Administrator's fees and costs, including estimated fees and costs to fully implement the terms of this Agreement, as approved by the Court, shall be paid within ten (10) days after the Effective Date.

(iv) Payments to Class Members. The amount paid to each Class Member shall be calculated as follows:

a. The Net Settlement Fund shall be allocated to members of the Classes on a *pro rata* basis, as follows: (1) 83% of the Net Settlement Fund shall be allocated to the APPSN Fee Settlement Class; (2) 14% of the Net Settlement Fund shall be allocated to the Retry Fee Settlement Class; (3) 3% of the Net Settlement Fund shall be allocated to the OON Fee Settlement Class.

b. Payments to those members of the Classes ("Individual Payments") shall be made no later than ten (10) days after the Effective Date, as follows:

(1) For those Class Members who are members of Defendant at the time of the distribution of the Net Settlement Fund, their checking accounts shall be credited in the amount of the Individual Payment they are entitled to receive. If they do not have a checking account, but maintain another account at Defendant, then that account shall be credited.

(2) For those Class Members who are not members of Defendant at the time of the distribution of the Net Settlement Fund, they shall be sent a check by the Claims Administrator at the address used to provide the Notice, or at such other address as designated by the Class Member. The Class Member shall have one-hundred eighty (180) days to negotiate the check. Any checks uncashed after one-hundred eighty (180) days shall be distributed to Class Members on a pro-rata basis if practical. Otherwise, any residual shall be distributed pursuant to Section 12.

(3) Settlement Class Members of the APPSN Fee Class shall be paid per incurred APPSN Fee calculated as follows: $(0.83 \text{ of the Net Settlement Fund} / \text{Total APPSN Fees}) \times \text{Total number of APPSN Fees charged to and paid by each APPSN Fee Class member}$;

Settlement Class Members of the Retry NSF Fee Class shall be paid per Retry NSF Fee calculated as follows: (0.14 of the Net Settlement Fund/Total Retry NSF Fees) x Total number of Retry NSF Fees charged to and paid by each Retry NSF Fee Class member; and

(3) Settlement Class Members of the OON Fee Class shall be paid per OON Fee calculated as follows: (0.03 of the Net Settlement Fund/Total OON Fees) x Total number of OON Fees charged to and paid by each OON Fee Class member.

(4) Settlement Class Member Payments shall be made no later than 90 days after the Effective Date

c. In no event shall any portion of the Settlement Fund revert to Defendant.

8. PROSPECTIVE RELIEF

(a) **Cessation of Challenged Practices.** No later than January 1, 2024, Defendant shall cease changing APPSN Fees and shall cease charging more than one NSF Fee on the same ACH transaction or check.

(b) **Disclosure Improvements.** As of January 31, 2023, and as result of this litigation, Defendant has amended its account disclosures to expressly state that more than one OON Fee may be assessed when a member uses an out of network ATM to perform both a balance inquiry and a withdrawal.

9. THE CLAIMS ADMINISTRATOR.

(a) The Claims Administrator shall execute a retainer agreement that shall provide, among other things, that the Claims Administrator shall be bound by and shall perform the obligations imposed on it under the terms of this Agreement.

(b) The Claims Administrator shall be subject to the jurisdiction of the Court with respect to the administration of this Agreement.

(c) The Claims Administrator shall keep all information regarding Class Members confidential except as otherwise provided herein. All data created and/or obtained and maintained by the Claims Administrator pursuant to this Agreement shall be destroyed twelve (12) months after the Final Report is submitted to the Court, provided that Class Counsel and Defendants Counsel, or either of them, at their own cost, shall receive a complete digital copy of the Claims Administrator's records, together with a declaration establishing completeness and authenticity, which they may maintain consistent with their own document retention policies.

(d) The Claims Administrator also shall be responsible for timely and properly filing all tax returns necessary or advisable, if any, with respect to the Settlement Fund. Except as provided herein, Class Members shall be responsible for their own tax reporting of payments received under the terms of this Agreement.

(e) The Claims Administrator shall provide the data in its claims administration database to Defendant's Counsel and/or Class Counsel in response to any written request, including an email request. The written request shall be copied to the other party when made.

(f) Within one hundred-ninety (190) days after the Effective Date, the Claims Administrator shall prepare a declaration setting forth the total payments issued to Class Members by the Claims Administrator, the total amount of any checks uncashed and/or returned, and the total amount of money being held by the Claims Administrator.

10. CY PRES PAYMENT. Subject to Court approval, thirty (30) days after the Final Report the total amount of uncashed checks, and amounts held by the Claims Administrator at the time of the Final Report, shall be paid by the Claims Administrator to one or more public interest organizations nominated by the parties and subject to Court approval.

11. OPT-OUTS.

(a) A Class Member who wishes to exclude himself or herself from this Agreement, and from the release of claims and defenses provided for under the terms of this Agreement, shall submit an Exclusion Letter by mail to the Claims Administrator. For an Exclusion Letter to be valid, it must be postmarked on or before the Bar Date to Opt Out. Any Exclusion Letter shall identify the Class Member, state that the Class Member wishes to exclude himself or herself from the Agreement, and shall be signed and dated.

(b) The Claims Administrator shall maintain a list of persons who have excluded themselves and shall provide such list to Defendant's Counsel and Class Counsel at least five (5) days prior to the date Class Counsel is required to file the Motion for Final Approval. The Claims Administrator shall retain the originals of all Exclusion Letters (including the envelopes with the postmarks). The Claims Administrator shall make the original Exclusion Letters available to Class Counsel, Defendant's Counsel and/or the Court upon two (2) court days' written notice.

12. OBJECTIONS.

(a) Any Class Member, other than a Class Member who timely submits an Exclusion Letter, may object to this Agreement.

(b) To be valid and considered by the Court, the objection must be in writing and sent by first class mail, postage pre-paid, to the Claims Administrator. The objection must be postmarked on or before the Bar Date to Object, and must include the following information:

(i) The objector's name, address, telephone number, and the contact information for any attorney retained by the objector in connection with the objection or otherwise in connection with this case;

(ii) A statement of the factual and legal basis for each objection and any exhibits the objector wishes the Court to consider in connection with the objection; and

(iii) A statement as to whether the objector intends to appear at the Final

Approval Hearing, either in person or through counsel, and, if through counsel, identifying the counsel by name, address and telephone number.

(c) Class Counsel shall file any objections and responsive pleadings at least seven (7) days prior to the Final Approval Hearing Date.

13. RELEASE. Except as to the rights and obligations provided for under the terms of this Agreement, Named Plaintiffs, on behalf of themselves and each of the Class Members, hereby release and forever discharge Defendant, and all of its past, present and future predecessors, successors, subsidiaries, divisions, employees, affiliates, assigns, officers, directors, shareholders, representatives, attorneys and agents and insurers including CUMIS Insurance Society, Inc. (collectively, the “Defendant Releasees”) from any and all claims, charges, complaints, debts, liabilities, demands, obligations, costs, expenses, actions, and causes of action of every nature, character, and description, whether known or unknown, asserted or unasserted, suspected or unsuspected, which Named Plaintiffs and Class Members, who do not opt out, now have, own or hold against any of the Defendant Releasees that arise out of and/or relate to the facts and claims alleged in the Complaints, including claims or allegations regarding APPSN Fees, OON Fees and Retry Fees as defined in Section 1 and/or described in the operative Complaint.

14. CONDITIONS TO SETTLEMENT.

(a) This Agreement shall be subject to and is expressly conditioned on the occurrence of all of the following events:

(i) The Court has entered the Preliminary Approval/Notice Order, as required by Section 3 above;

(ii) The Court has entered the Final Approval Order as required by Sections 5 and 6 above, and all objections, if any, to such Order are overruled, and all appeals taken from such Order are resolved in favor of approval; and

(iii) The Effective Date has occurred.

(b) If all of the conditions specified in Section 14(a) are not met, then this Agreement shall be cancelled and terminated.

(c) Defendant shall have the option to terminate this Agreement if five (5%) percent or more of the Class Members opt out. Defendant shall notify Class Counsel and the Court of its intent to terminate this Agreement pursuant to this Section 14 within fifteen (15) business days after the Bar Date To Opt Out, or the option to terminate shall be considered waived.

(d) Defendant shall provide reasonable confirmatory discovery to confirm its overdraft and NSF fee practices and the amount of the APPSN and Retry Fees at issue. If the confirmatory discovery reveals either that the APPSN and Retry fees at issue are materially different than as provided in the Parties’ pre-mediation and mediation information exchange, then Plaintiffs may withdraw from the settlement.

(e) In the event this Agreement is terminated, pursuant to Section 14(c)

immediately above, or fails to become effective in accordance with Sections 14(a) and/or (b) immediately above, then the parties shall be restored to their respective positions in this case as they existed as of the date of the execution of this Agreement. In such event, the terms and provisions of this Agreement shall have no further force and effect with respect to the parties and shall not be used in this case or in any other action or proceeding for any other purpose, and any order entered by this Court in accordance with the terms of this Agreement shall be treated as vacated, *nunc pro tunc*.

(f) Any dispute over the terms of this agreement, including but not limited to any claim of “material difference” discovered during confirmatory discovery as set forth in Section 14 (d) shall first be mediated by the Hon. Edward Carni (Ret.). If the parties cannot resolve their differences by mediation, the parties shall arbitrate any such dispute with Judge Carni.

15. REPRESENTATIONS.

(a) The parties to this Agreement represent that they have each read this Agreement and are fully aware of and understand all of its terms and the legal consequences thereof. The parties represent that they have consulted or have had the opportunity to consult with and have received or have had the opportunity to receive advice from legal counsel in connection with their review and execution of this Agreement.

(b) The parties have not relied on any representations, promises or agreements other than those expressly set forth in this Agreement.

(c) The Named Plaintiffs, on behalf of the Class Members, represent that they have made such inquiry into the terms and conditions of this Agreement as they deem appropriate, and that by executing this Agreement, they believe the Agreement and all the terms and conditions set forth herein, are fair and reasonable to all Class Members.

(d) The Named Plaintiffs represent that they have no conflicts or other personal interests that would in any way impact their representation of the class in connection with the execution of this Agreement.

(e) Defendant represents and warrants that it has obtained all corporate authority necessary to execute this Agreement.

16. FURTHER ASSURANCES. Each of the parties hereto agrees to execute and deliver all such further documents consistent with this Agreement, and to take all such further actions consistent with this Agreement, as may be required in order to carry the provisions of this Agreement into effect, subject to Class Counsel’s obligation to protect the interests of the Class Members.

17. APPLICABLE LAW. This Agreement shall be governed by and interpreted, construed, and enforced pursuant to the laws of the State of New York.

18. NO ORAL WAIVER OR MODIFICATION. No waiver or modification of any provision of this Agreement or of any breach thereof shall constitute a waiver or modification of any other provision or breach, whether or not similar. Nor shall any actual waiver or modification

constitute a continuing waiver. No waiver or modification shall be binding unless executed in writing by the party making the waiver or modification.

19. ENTIRE AGREEMENT. This Agreement, including the exhibits attached hereto, constitutes the entire agreement made by and between the parties pertaining to the subject matter hereof, and fully supersedes any and all prior or contemporaneous understandings, representations, warranties, and agreements made by the parties hereto or their representatives pertaining to the subject matter hereof. No extrinsic evidence whatsoever may be introduced in any judicial proceeding involving the construction or interpretation of this Agreement.

20. BINDING ON SUCCESSORS. This Agreement shall inure to the benefit of, and shall bind, each of the parties hereto and their successors.

21. SEVERABILITY. In the event any one or more of the provisions of this Agreement is determined to be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained in this Agreement will not in any way be affected or impaired thereby.

22. COUNTERPARTS AND FACSIMILE SIGNATURES. This Agreement may be executed and delivered in separate counterparts, each of which, when so executed and delivered, shall be an original, but such counterparts together shall constitute but one and the same instrument and agreement. Facsimile and pdf signature pages shall have the same force and effect as original signatures.

23. NOTIFICATION. Any notice to be given to Class Counsel and/or Named Plaintiffs shall be sent by email as follows:

Jeffrey Kaliel
KalielGold PLLC
1100 15th St NW, 4th Floor
Washington, D.C. 20005
(202) 350-4783
jkaliel@kalielpllc.com

-and-

David Berger
Gibbs Law Group
[]

Any notice to be given to Defendant under the terms of this Agreement shall be sent by email as follows:

[Jason E. Hunter; hunter@litchfieldcavo.com]

Any notice to the Claims Administrator shall be sent by email to the address of the claims administrator, which will be determined by the lowest bid for services.

IN WITNESS WHEREOF, the parties have entered this Agreement as of the dates set forth below.

Dated: 11/21/2023

AMERICU CREDIT UNION, a state chartered credit union

DocuSigned by:
Daniel Belfield
4D80E5A8CEC7451...

By: _____

Its: VP, Legal & Compliance

Dated: _____

MALINDA FAIRCHILD-CATHEY,

By: _____

Malinda Fairchild-Cathey

Dated: _____

RICHARD MUMFORD, an individual on behalf of herself and those she represents

By: _____

Richard Mumford

Dated: _____

AARON FORJONE, an individual on behalf of herself and those she represents

By: _____

Aaron Forjone

APPROVED AS TO FORM:

Dated: Nov 21, 2023

LITCHFIELD CAVO
Jason Hunter

By:  _____

Jason Hunter

Attorneys for Defendant Americu Credit Union

Dated: _____

GIBBS LAW GROUP
David Berger

By: _____
David Berger
Attorney for Plaintiffs

Dated: _____

KALIELGOLD PLLC
Jeffrey Kaliel

By: _____
Jeffrey Kaliel
Attorneys for Plaintiffs

Exhibit 1 – Email and Postcard Notice

Fairchild-Cathey v. Americu Credit Union

**NOTICE OF PENDING CLASS ACTION AND PROPOSED SETTLEMENT
READ THIS NOTICE FULLY AND CAREFULLY; THE PROPOSED SETTLEMENT
MAY AFFECT YOUR RIGHTS!**

**IF YOU HAVE OR HAD A CHECKING ACCOUNT WITH AMERICU
CREDIT UNION AND YOU WERE CHARGED CERTAIN OVERDRAFT,
NSF OR ATM FEES BETWEEN OCTOBER 27, 2015 AND JANUARY 31,
2023, THEN YOU MAY BE ENTITLED TO A PAYMENT FROM A CLASS
ACTION SETTLEMENT**

The United States District Court for the Northern District of New York has authorized this Notice; it is not a solicitation from a lawyer.

You may be a member of the settlement Class in *Fairchild-Cathey v. Americu Credit Union*, in which the plaintiffs allege that defendant Americu Credit Union. (“Defendant”) unlawfully assessed certain Overdraft, NSF and ATM fees (the “Relevant Fees”) between October 27, 2015 and January 31, 2023. If you are a member of the Settlement Class and if the Settlement is approved, you may be entitled to receive a cash payment from the \$1,500,000.00 Settlement Fund, benefits established by the Settlement. If you are a member of one of both of the Settlement Classes, you will receive a payment from the Settlement Fund so long as you do not opt out of or exclude yourself from the Settlement. **You do not have to do anything to be entitled to a payment from the Settlement Fund.**

The Court has preliminarily approved this Settlement. It will hold a Final Approval Hearing in this case on [INSERT DATE]. At that hearing, the Court will consider whether to grant Final Approval to the Settlement, and whether to approve payment from the Settlement Fund of up to \$5,000.00 in a Service Award to each Class Representative, up to 33.33% of the Settlement Fund as attorneys’ fees, and reimbursement of costs to the attorneys and the Settlement Administrator. If the Court grants Final Approval of the Settlement and you do not request to be excluded from the Settlement, you will release your right to bring any claim covered by the Settlement. In exchange, Defendant has agreed to issue a credit to your Account, a cash payment to you if you are no longer a customer, and/or to forgive certain Relevant Fees.

To obtain a Long Form Notice and other important documents please visit [INSERT WEBSITE ADDRESS]. Alternatively, you may call [INSERT PHONE #].

If you do not want to participate in this Settlement—you do not want to receive a cash payment and you do not want to be bound by any judgment entered in this case—you may exclude yourself by submitting an opt-out request postmarked no later than [PARTIES TO INSERT DATE]. If you want to object to this Settlement because you think it is not fair, adequate, or reasonable, you may object by submitting an objection postmarked no later than [PARTIES TO INSERT DATE]. You may learn more about the opt-out and objection procedures by visiting [PARTIES TO PROVIDE WEBSITE ADDRESS] or by calling [Insert Phone #].

Exhibit 2 – Long Form Notice

Fairchild-Cathey
v.
Americu Credit Union

NOTICE OF PENDING CLASS ACTION AND PROPOSED SETTLEMENT

READ THIS NOTICE FULLY AND CAREFULLY; THE PROPOSED SETTLEMENT MAY AFFECT YOUR RIGHTS!

IF YOU HAVE OR HAD A CHECKING ACCOUNT WITH AMERICU CREDIT UNION (“DEFENDANT”) AND YOU WERE CHARGED CERTAIN OVERDRAFT, NSF OR ATM FEES BETWEEN OCTOBER 27, 2015 AND JANUARY 31, 2023, THEN YOU MAY BE ENTITLED TO A PAYMENT FROM A CLASS ACTION SETTLEMENT

The United States District Court for the Northern District of New York has authorized this Notice; it is not a solicitation from a lawyer.

SUMMARY OF YOUR OPTIONS AND THE LEGAL EFFECT OF EACH OPTION	
DO NOTHING	If you don’t do anything, you will receive a payment from the Settlement Fund so long as you do not opt out of or exclude yourself from the settlement (described in the next box).
EXCLUDE YOURSELF FROM THE SETTLEMENT; RECEIVE NO PAYMENT BUT RELEASE NO CLAIMS	You can choose to exclude yourself from the settlement or “opt out.” This means you choose not to participate in the settlement. You will keep your individual claims against Defendant but you will not receive a payment for Relevant Fees. If you exclude yourself from the settlement but want to recover against Defendant, you will have to file a separate lawsuit or claim.
OBJECT TO THE SETTLEMENT	You can file an objection with the Court explaining why you believe the Court should reject the settlement. If your objection is overruled by the Court, then you may receive a payment and you will not be able to sue Defendant for the claims asserted in this litigation. If the Court agrees with your objection, then the settlement may not be approved.

These rights and options – *and the deadlines to exercise them* – along with the material terms of the settlement are explained in this Notice.

BASIC INFORMATION

1. What is this lawsuit about?

The lawsuit that is being settled is entitled *Fairchild-Cathey v. Americu Credit Union*. It is pending in the United States District Court for the Northern District of New York, Case No. 6:21-CV-01173. The case is a “class action.” That means that the “Class Representatives” are individuals who are acting on behalf of current and former customers who were assessed certain assessed certain Overdraft, NSF and ATM fees (the “Relevant Fees”) between October 27, 2015 and January 31, 2023. The Class Representatives have asserted a claim for breach of the Account agreement and violation of consumer protection laws.

Defendant does not deny it charged the fees the Class Representatives are complaining about, but contends it did so properly and in accordance with the terms of its agreements and applicable law. Defendant therefore denies that its practices give rise to claims for damages by the Class Representatives or any Settlement Class members.

2. Why did I receive this Notice of this lawsuit?

You received this Notice because Defendant’s records indicate that you were charged one or more Relevant Fees that are the subject of this action. The Court directed that this Notice be sent to all Settlement Class members because each such member has a right to know about the proposed settlement and the options available to him or her before the Court decides whether to approve the settlement.

3. Why did the parties settle?

In any lawsuit, there are risks and potential benefits that come with a trial versus settling at an earlier stage. It is the Class Representative’ and their lawyers’ job to identify when a proposed settlement offer is good enough that it justifies recommending settling the case instead of continuing to trial. In a class action, the Class Representative’ lawyers, known as Class Counsel, make this recommendation to the Class Representative. The Class Representative have the duty to act in the best interests of the class as a whole and, in this case, it is their belief, as well as Class Counsels’ opinion, that this settlement is in the best interest of all Settlement Class members.

There is legal uncertainty about whether a judge or a jury will find that Defendant was contractually and otherwise legally obligated not to assess the fees at issue. And even if it was contractually wrong to assess these fees, there is uncertainty about whether the Class Representative’ claims are subject to other defenses that might result in no or less recovery to Settlement Class members. Even if the Class Representative were to win at trial, there is no assurance that the Settlement Class Members would be awarded more than the current settlement amount and it may take years of litigation before any payments would be made. By settling, the Settlement Class members will avoid these and other risks and the delays associated with continued litigation.

While Defendant disputes the allegations in the lawsuit and denies any liability or wrongdoing, it enters into the Settlement solely to avoid the expense, inconvenience, and distraction of further proceedings in the litigation.

WHO IS IN THE SETTLEMENT

4. How do I know if I am part of the Settlement?

If you received this notice, then Defendant’s records indicate that you are a member of one or both of the Settlement Classes who is entitled to receive a payment or credit to your Account.

YOUR OPTIONS

5. What options do I have with respect to the Settlement?

You have three options: (1) do nothing and you will receive a payment according to the terms of this Settlement; (2) exclude yourself from the settlement (“opt-out” of it); or (3) participate in the Settlement but object to it. Each of these options is described in a separate section below.

6. What are the critical deadlines?

There is no deadline to receive a payment. If you do nothing, then you will get a payment or.

The deadline for sending a letter to exclude yourself from or opt-out of the settlement is [REDACTED].

The deadline to file an objection with the Court is also [REDACTED].

7. How do I decide which option to choose?

If you do not like the Settlement and you believe that you could receive more money by pursuing your claims on your own (with or without an attorney that you could hire) and you are comfortable with the risk that you might lose your case or get less than you would in this Settlement, then you may want to consider opting out.

If you believe the Settlement is unreasonable, unfair, or inadequate and the Court should reject the Settlement, you can object to the Settlement terms. The Court will decide if your objection is valid. If the Court agrees, then the Settlement may not be approved and no payments will be made to you or any other member of the Classes. If your objection (and any other objection) is overruled, and the Settlement is approved, then you may still get a payment, and will be bound by the Settlement.

If you want to participate in the Settlement, then you don’t have to do anything; you will receive a payment if the Settlement is approved by the Court.

8. What has to happen for the Settlement to be approved?

The Court has to decide that the Settlement is fair, reasonable, and adequate before it will approve it. The Court already has decided to provide Preliminary Approval of the Settlement, which is why you received a Notice. The Court will make a final decision regarding the Settlement at a “Fairness Hearing” or “Final Approval Hearing,” which is currently scheduled for [REDACTED].

THE SETTLEMENT PAYMENT

9. How much is the Settlement?

Defendant has agreed to create a Settlement Fund of \$1,500,000.00, and change its practices regarding the Relevant Fees going forward.

As discussed separately below, attorneys' fees, litigation costs, and the costs paid to a third-party Settlement Administrator to administer the Settlement (including mailing and emailing notice) will be paid out of the Settlement Fund. The Net Settlement Fund will be divided among all Settlement Class Members entitled to Settlement Class Member Payments based on formulas described in the Settlement Agreement.

10. How much of the Settlement Fund will be used to pay for attorney fees and costs?

Class Counsel will request the Court to approve attorneys' fees of not more than 33.33% of the Settlement Fund, and will request that it be reimbursed for litigation costs incurred in prosecuting the case. The Court will decide the amount of the attorneys' fees and costs based on a number of factors, including the risk associated with bringing the case on a contingency basis, the amount of time spent on the case, the amount of costs incurred to prosecute the case, the quality of the work, and the outcome of the case.

11. How much of the Settlement Fund will be used to pay the Class Representative a Service Award?

Class Counsel will request that the Class Representative be paid a service award in the amount of \$5,000.00 each for their work in connection with this case. The Service Awards must be approved by the Court.

12. How much will my payment be?

The balance of the Settlement Fund after attorneys' fees and costs, the service award and the Settlement Administrator's fees, also known as the Net Settlement Fund, will be divided among all Settlement Class Members entitled to Settlement Class Member Payments in accordance with the formulas outlined in the Settlement Agreement. Current customers of Defendant will receive a credit to their Accounts for the amount they are entitled to receive. Former customers of Defendant shall receive a check from the Settlement Administrator.

13. Do I have to do anything if I want to participate in the Settlement?

No. If you received this Notice, then you may be entitled to receive a payment for a Relevant Fee without having to make a claim, unless you choose to exclude yourself from the settlement, or "opt out."

14. When will I receive my payment?

The Court will hold a Final Approval Hearing on [REDACTED], at [REDACTED] to consider whether the Settlement should be approved. If the Court approves the Settlement, then payments should be made or credits should be issued approximately 90 days later. However, if someone objects to the Settlement, and the objection is sustained, then there is no Settlement. Even if all objections are overruled and the Court approves the Settlement, an objector could appeal, and it might take months or even years to have the appeal resolved, which would delay any payment.

EXCLUDING YOURSELF FROM THE SETTLEMENT

15. How do I exclude myself from the settlement?

If you do not want to receive a payment or if you want to keep any right you may have to sue Defendant for the claims alleged in this lawsuit, then you must exclude yourself, or “opt-out.”

To opt-out, you **must** send a letter to the Settlement Administrator that you want to be excluded. Your letter can simply say “I hereby elect to be excluded from the settlement in the *Fairchild-Cathey v. Americu Credit Union* class action. Be sure to include your name, the last four digits of your account number(s) or former account number(s), address, telephone number, and email address. Your exclusion or opt-out request must be postmarked by [REDACTED], and sent to:

Fairchild-Cathey v. Americu Credit Union

Attn:

ADDRESS OF THE SETTLEMENT ADMINISTRATOR

16. What happens if I opt-out of the Settlement?

If you opt-out of the Settlement, you will preserve and not give up any of your rights to sue Defendant for the claims alleged in this case. However, you will not be entitled to receive a payment from the settlement.

OBJECTING TO THE SETTLEMENT

17. How do I notify the Court that I do not like the Settlement?

You can object to the settlement or any part of it that you do not like **IF** you do not exclude yourself, or opt-out, from the Settlement. (Settlement Class members who exclude themselves from the Settlement have no right to object to how other Settlement Class members are treated.) To object, you **must** send a written document by mail or private courier (e.g., Federal Express) to the Settlement Administrator at the address below. Your objection must include the following information:

- a. the name of the Action;
- b. the objector’s full name, address and telephone number;
- c. all grounds for the objection, accompanied by any legal support for the objection known to the objector or objector’s counsel;
- d. the number of times the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which the objector has made such objection, and a copy of any orders related to or ruling upon the objector’s prior objections that were issued by the trial and appellate courts in each listed case;
- e. the identity of all counsel who represent the objector, including any former or current counsel who may be entitled to compensation for any reason related to the objection to the

Settlement or fee application;

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

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

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

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

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

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

All objections must be post-marked no later than [redacted], and must be mailed to the Settlement Administrator as follows:

ADDRESS OF THE SETTLEMENT ADMINISTRATOR

18. What is the difference between objecting and requesting exclusion from the settlement?

Objecting is telling the Court that you do not believe the Settlement is fair, reasonable, and adequate for the Settlement Class, and asking the Court to reject it. You can object only if you do not opt-out of the settlement. If you object to the Settlement and do not opt-out, then you are entitled to a payment for a Relevant Fee if the Settlement is approved, but you will release claims you might have against Defendant. Excluding yourself or opting-out is telling the Court that you do not want to be part of the Settlement, and do not want to receive a payment for a Relevant Fee, or release claims you might have against Defendant for the claims alleged in this lawsuit.

19. What happens if I object to the Settlement?

If the Court sustains your objection, or the objection of any other member of the Settlement Classes, then there is no Settlement. If you object, but the Court overrules your objection and any other objection(s), then you will be part of the Settlement.

THE COURT'S FINAL APPROVAL HEARING

20. When and where will the Court decide whether to approve the Settlement?

The Court will hold a Final Approval or Fairness Hearing at [REDACTED] on [REDACTED], 2024 at the United States District Court for the Northern District of New York, Federal Building and U.S. Courthouse, which is located at [REDACTED]. At this hearing, the Court will consider whether the Settlement is fair, reasonable and adequate. If there are objections, the Court will consider them. The Court may also decide how much to award Class Counsel for attorneys' fees and litigation costs and the amount of the Service Awards to the Class Representatives. The hearing may be virtual, in which case the instructions to participate shall be posted on the website at [www.\[REDACTED\]](http://www.[REDACTED]).

21. Do I have to come to the hearing?

No. Class Counsel will answer any questions the Court may have. You may attend if you desire to do so. If you have submitted an objection, then you may want to attend.

22. May I speak at the hearing?

If you have objected, you may ask the Court for permission to speak at the Final Approval Hearing. To do so, you must include with your objection, described in Question 18, above, the statement, "I hereby give notice that I intend to appear at the Final Approval Hearing."

THE LAWYERS REPRESENTING YOU

23. Do I have a lawyer in this case?

The Court ordered that the lawyers and their law firms referred to in this notice as "Class Counsel" will represent you and the other Settlement Class members.

24. Do I have to pay the lawyer for accomplishing this result?

No. Class Counsel will be paid directly from the Settlement Fund.

25. Who determines what the attorneys' fees will be?

The Court will be asked to approve the amount of attorneys' fees at the Fairness Hearing. Class Counsel will file an application for attorneys' fees and costs and will specify the amount being sought as discussed above. You may review a physical copy of the fee application at the website established by the Settlement Administrator, or by requesting the court record online from the United States District Court for the Northern District of New York at <https://eservices.archives.gov/orderonline>.

GETTING MORE INFORMATION

This Notice only summarizes the proposed Settlement. More details are contained in the Settlement Agreement, which can be viewed/obtained online at [WEBSITE] or at the Office of the Clerk of the United States District Court for the Northern District of New York, which is located at [REDACTED], by asking for the Court file containing the Motion For Preliminary Approval of Class Settlement (the settlement agreement is attached to the motion) or obtaining a copy online at <https://eservices.archives.gov/orderonline>.

For additional information about the settlement and/or to obtain copies of the Settlement Agreement, or to change your address for purposes of receiving a payment, you should contact the Settlement Administrator as follows:

Fairchild-Cathey v. Americu Credit Union
Settlement Administrator
Attn:

For more information, you also can contact the Class Counsel as follows:

David Berger
Gibbs Law Group
[]

Jeffrey Kaliel
KalielGold PLLC
1100 15th St. NW
4th Floor
Washington, DC 20005
202-350-4783
jkaliel@kalielpllc.com

PLEASE DO NOT CONTACT THE COURT OR ANY REPRESENTATIVE OF DEFENDANT CONCERNING THIS NOTICE OR THE SETTLEMENT.

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.

Civil Action No. 6:21-cv-1173 (LEK-ML)

JUDGE LAWRENCE E. KAHN

Class Action

**PLAINTIFFS' UNOPPOSED MOTION AND MEMORANDUM OF LAW
FOR PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT**

Now comes Plaintiffs Malinda Fairchild-Cathey, Richard Mumford, and Aaron Forjone, by and through counsel, who move under Fed. R. Civ. P. 23 for preliminary approval of a proposed class action settlement with Defendant AmeriCU Credit Union. Plaintiffs respectfully request that the Court: (i) grant preliminary approval of the proposed settlement by entering a proposed Order Granting Preliminary Approval of Proposed Class Action Settlement filed herewith; (ii) provisionally certify the three Classes for settlement purposes; (iii) approve the proposed forms of notice; (iv) direct notice to class members, as well as establish a schedule for objecting to or opting out of the settlement, as set forth in the Settlement Agreement; and (v) schedule a final approval hearing at the Court's opportunity no earlier than 105 days from the entry of the preliminary approval order to address the proposed settlement and the application of Class Counsel for an award of fees and costs and for class representative incentive awards.

A Memorandum in Support has been filed in conjunction with this motion and is incorporated by reference.

Dated: December 14, 2023

Respectfully submitted,

/s/ Jeffrey D. Kaliel

Jeffrey D. Kaliel (Bar Roll No. 518372)
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David M. Berger (admitted *pro hac vice*)
Tayler L. Walters (admitted *pro hac vice*)
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1111 Broadway, Suite 2100
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Attorneys for Plaintiffs and the Putative Class

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Plaintiffs Malinda Fairchild-Cathey, Richard Mumford, and Aaron Forjone move for preliminary approval of a proposed **\$1,500,000.00** class action settlement with Defendant AmeriCU Credit Union (“Defendant” or “the credit union”). The terms and conditions of the settlement are set forth in the Settlement Agreement and Release¹ (the “Agreement”), which is attached to the accompanying Declaration of Jeffrey D. Kaliel (“Kaliel Decl.”) as Exhibit 1.

Plaintiffs allege that Defendant improperly assessed and collected certain Overdraft Fees² and NSF Fees³ not authorized by Defendant’s account agreement. Defendant denies the allegations in the operative complaint, but given the risks, uncertainties, and burdens of litigation, has agreed to settle according to the terms of the Agreement. The settlement achieved by the parties—which after significant damages-related discovery and an arms-length negotiation process—guarantees a substantial monetary and non-monetary benefits for Class Members.

Subject to the Court’s approval, in addition to providing monetary relief to the Class Members, the \$1,500,000.00 Settlement Fund will also be used to pay: court-approved service awards to Plaintiffs to compensate them for the time they spent, the risks they incurred, and the benefits they obtained for the Classes by serving as class representatives; Class Counsel’s attorneys’ fees of no more than 33-1/3% of the Value of the Settlement; Class Counsel’s costs

¹ The capitalized terms used herein are defined and have the same meaning as used in the Agreement unless otherwise stated.

² “Overdraft Fees” means fees assessed against a member’s checking account when that account does not have sufficient funds at the time a transaction is presented for payment that was not reversed. (Agreement § 1(u).)

³ “NSF Fee” means a fee assessed against a member’s checking account when Defendant declines a payment or the cashing of a check that would result in a negative balance. (Agreement § 1(v).)

incurred in prosecuting this action; and the costs of notice and settlement administration. The Parties have agreed to a robust notice plan designed to afford all members of the Classes due process and advise them of their rights under the Agreement.

For the reasons set forth below, the Agreement meets all requirements for preliminary approval under applicable law. Therefore, Plaintiffs respectfully request that the Court grant their unopposed motion and preliminarily approve this settlement, provisionally certify the three Classes for settlement purposes, appoint Plaintiffs the class representatives for the Classes and the undersigned counsel as Class Counsel, order that the proposed notices be disseminated, and schedule the Final Approval Hearing Date.⁴

II. HISTORY OF THE LITIGATION

On October 27, 2021, Plaintiff Malinda Fairchild-Cathey filed the captioned putative class action case against Defendant AmeriCU Credit Union. 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.

After Defendant filed a motion to dismiss, Plaintiff filed a January 2022 Amended Complaint that added two additional plaintiffs, Richard Mumford and Aaron Forjone, and 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. Am. Compl. at 1.

⁴ Plaintiffs certify to the Court that Defendant has been consulted and does not oppose the relief sought in Plaintiffs’ motion.

Plaintiffs asserted the following claims for relief against Defendant: (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. Am. Compl. at 30-33. 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 described herein is the result of the accepted Mediator’s Proposal. Since that time, the Parties have worked to draft and finalize a full Settlement Agreement and Class Notices. The Parties now seek preliminary approval of the Agreement.

III. SUMMARY OF THE SETTLEMENT

The Parties have entered into the Agreement, which completely resolves this Action. The Agreement includes the key terms discussed below.

A. Class Certification

For settlement purposes only, the Parties have agreed to certify the following three Settlement Classes:

Those members of Defendant who, during the Class Period, were assessed an APPSN Fee (“APPSN Fee Settlement Class”).

Those members of Defendant who, during the Class Period, were assessed an OON Fee (“OON Fee Settlement Class”).

Those members of Defendant who, during the Class Period, were assessed a Retry NSF Fee (“Retry Fee Settlement Class”).

(Agreement, § 1(y), (z), (aa).) Excluded from the Settlement Classes are Defendant, all officers and directors of Defendant, and the judge(s) presiding over this Action. The Class Period for the

APPSN Fee Settlement Class means the dates from October 27, 2015 through July 5, 2019.⁵ The Class Period for the OON Fee Settlement Class means the dates from October 27, 2015 through January 31, 2023.⁶ The Class Period for the Retry Fee Settlement Class means the dates from October 27, 2015 through July 5, 2019.⁷

B. Class Benefits

Class Counsel believes that the contemplated benefits addressed below adequately compensate Class Members for the harm they suffered and, in light of the risks of litigation, represent an excellent result for Class Members. (Kaliel Decl., ¶ 7.) According to Defendant’s records, there are approximately 35,000 persons are in the Settlement Classes. (*Id.* ¶ 8.)

1. Settlement Fund

Within 10 days after entry of a Final Approval Order, Defendant shall transfer the Settlement Fund of \$1,500,000.00 to the Claims Administrator. (Agreement, § 7(a).) The Settlement Fund shall be used to pay (a) distributions to Class Members; (b) court-ordered Class Counsels’ fees and costs; (c) any court-ordered service award payments to the Class

⁵ “APPSN Fee” means an Overdraft Fee charged by Defendant on a debit card transaction when the account had a positive available balance at time it was authorized. (Agreement § 1(d).) “APPSN Class Member” means any member of Defendant who had a checking account with Defendant and was assessed an APPSN Fee during the Class Period. (*Id.* § 1(hi).)

⁶ “OON Fee” means a fee assessed against a member’s checking account for a balance inquiry undertaken at an out-of-network ATM, where a cash withdrawal was also performed at the same time. (Agreement § 1(t).) The Agreement does not expressly define “OON Fee Class Member.” The Parties agree that “OON Fee Class Member” means any member of Defendant who had a checking account with Defendant and was assessed an OON Fee during the Class Period.

⁷ “Retry Fee” means the second and any subsequent NSF of OD Fees charged by Defendant on a single ACH or check. (Agreement § 1(e).) “Retry Fee Class Member” shall mean any member of Defendant who had a checking account with Defendant and was assessed a Retry Fee during the Class Period. (*Id.* § 1(i).)

Representatives (requested amount of \$5,000 to each Class Representative); and (d) costs associated with settlement administration and notice. (*Id.*)

No later than 10 days after the Effective Date of the Agreement, the Settlement Administrator will distribute the Net Settlement Fund to Class Members in accordance with the plan set forth in § 7 of the Agreement. The Net Settlement Fund shall be distributed to members of the Classes on a *pro rata* basis based as follows: (1) 83% of the Net Settlement Fund shall be allocated to the APPSN Fee Settlement Class, with each APPSN Class Member paid based on the following formula of $(0.83 \text{ of the Net Settlement Fund} / \text{Total APPSN Fees}) \times \text{Total number of APPSN Fees}$; (2) 14% of the Net Settlement Fund shall be allocated to the Retry Fee Settlement Class, with each Retry NSF Class Member paid based on the following formula of $(0.14 \text{ of the Net Settlement Fund} / \text{Total Retry NSF Fees}) \times \text{Total number of Retry NSF Fees}$; (3) 3% of the Net Settlement Fund shall be allocated to the OON Fee Settlement Class, with each OON Class Members paid based on the following formula of $(0.03 \text{ of the Nest Settlement} / \text{Total OON Fees}) \times \text{Total number of OON Fees charged}$. (Agreement § 7(d)(iv)(a) and (b)(3).)⁸

Class Members who are members of Defendant at the time of distribution will receive a checking account credit. (*Id.* § 7(d)(iv)(b)(1).) Class Members who are not members of Defendant at the time of distribution will be sent a check at the address used to provide notice or to such other address as designated by the Class Member. (*Id.* § 7(d)(iv)(b)(2).) Any checks uncashed after one-hundred eighty (180) days shall be distributed to Class Members on a *pro rata* basis if practical; otherwise, the residual amount will be distributed under Agreement § 10.⁹ (*Id.*

⁸ The Agreement has a typographical error: it has two § 7(d)(iv)(b)(3) sections.

⁹ The Agreement has a typographical error: Section 7(d)(iv)(b)(2) references residual distribution under § 12, but the Parties agree that the correct section to be referenced should be § 10.

§ 7(d)(iv)(b)(2).) Residual amounts held by the Claims Administrator at the time of the Final Report will be paid to one or more *cy pres* recipients nominated to by the Parties and approved by the Court. (*Id.* § 10.) No portion of the Settlement Fund reverts to Defendant. (*Id.* § 7(d)(iv)(c).)

2. Prospective Relief

The Agreement also provides that, no later than January 1, 2024, Defendant will cease charging APPSN Fees and will cease charging more than one NSF Fee on the same CH transaction or check.¹⁰ (*Id.* § 8(a).) As of January 31, 2023, Defendant has already amended its account disclosures to expressly state that more than one OON Fee may be assessed when a member uses an out of network ATM to perform both a balance inquiry and a withdrawal.

C. Settlement Release

The Agreement includes a release from Plaintiffs and the Class Members of claims that arise out of and/or relate to the facts and claims alleged in the Complaints, and any other claims relating to APPSN Fees, OON Fees, or Retry NSF Fees. (Agreement, § 13.) The Agreement also includes a waiver of unknown claims with respect to all the matters described in or subsumed by the Agreement on behalf of the Class Representatives and Class Members. (*Id.*)

D. Class Notice

Notice will be provided by mail and email, as applicable, to all Class Members. (*Id.* § 4.) Defendant's business records will be analyzed to identify Class Members, the type of fee(s) they incurred, and their contact information. (*Id.*)

The Claims Administrator will send the Email Notice to Defendant's current members who have agreed to receive notices regarding their Accounts from Defendant electronically, using the

¹⁰ The Agreement has a typographical error and states that "Defendant shall cease *changing* APPSN Fees" (emphasis added.) (Agreement § 8(a).) The Parties agree that the Agreement should read that "Defendant shall cease *charging* APPSN Fees" (emphasis added).

most recent email addresses provided by Defendant, in a manner that is calculated to avoid being caught and excluded by spam filters or other devices intended to block mass email. (*Id.* § 4(c).) For any emails returned undeliverable, the Claims Administrator will mail the Notice to the Settlement Class Member by first-class United States mail to the best available mailing address. (*Id.*)

For those Class Members who are former customers of Defendant or who are members but who have not agreed to receive electronic notices regarding their Accounts from Defendant, the Claims Administrator will mail the Notice by first-class United States mail to the best available mailing addresses. (*Id.* § 4(d).) Defendant will provide last known mailing addresses for these members. (*Id.*) Mailed Notices returned with forwarding address information will be re-mailed to the forwarding address. (*Id.*) For mailed Notices returned as undeliverable, the Claims Administrator will use standard skip tracing devices to obtain forwarding address information and, if the skip tracing yields a different forwarding address, the Administrator will remail the mailed Notice to the forwarding address. (*Id.*)

The Email Notice and mailed Notice both inform members of the Classes how they may obtain a copy of the Long Form Notice, which shall also be posted on a limited access settlement website created by the Claims Administrator. (*Id.* at § 4(c), (e), and (g).) The Settlement Administrator will provide the parties with a summary report regarding the results of the Notice program at least five days prior to the deadline to file the Motion for Final Approval. (*Id.* at § 4(f).)

The mailed Notice and Email Notice each provide notice of Class Members' rights, including the right to exclude oneself from the settlement or to object to the fairness, adequacy, or reasonableness of the settlement. (*Id.* at Exhibit 1.) The Notice advises Class Members of Class

Counsel's intent to seek attorney's fees of up to 33-1/3% of the Value of the Settlement, and the Plaintiffs' requested service awards (\$5,000.00 per Named Plaintiff). (*Id.*) The Notice also provides instructions for obtaining a copy of the Long Form Notice and the date and location of the Final Approval Hearing. (*Id.*)

The Long Form Notice includes a summary of the case; a summary of Class Members' legal rights and options; answers to frequently asked questions; a description of the Agreement and the settlement benefits; contact information for Counsel for Plaintiffs and Counsel for Defendant; instructions on how to opt out of the Agreement; information about how to object to the settlement; a description of the attorney's fees that Class Counsel intend to apply for and the service award to be sought for the Class Representative; information about the Final Approval Hearing; and instructions on how to obtain a copy of the Agreement. (*Id.* at Exhibit 2.)

Because all notices will include this vital information, and because the information provided to the class members in the notice is structured in a manner that enables class members rationally to decide whether they should intervene in the settlement proceedings or otherwise make their views known, the notices are more than sufficient. Further, the notices clearly explain that any member of the Settlement Classes who wishes to opt out of the Settlement Classes must individually sign and timely submit written notice of his or her intent to be excluded from the Settlement Class.

The notices also clearly explain that any member of the Settlement Classes who wishes to object to or opt-out of the settlement must timely file a written statement of objection with the Court. *Id.* Such objections must be submitted by a date no later than thirty (30) days (subject to Court approval) after the date the Notice must be delivered to the Class Members. Class Members are provided with sufficient time to submit any objections. Similarly, any opt-outs must submit

an Exclusion Letter no later than thirty (30) days after the date the Notice must be delivered to Class Members. (*Id.*)

E. Service Award for Named Plaintiffs and Attorneys' Fees and Costs

Subject to Court approval, Plaintiffs will request Service Awards of \$5,000 each; attorneys' fees of up to 33-1/3% of the Value of the Settlement; and reimbursement of reasonable costs and expenses in this litigation. (*Id.* at § 7(d)(i) and (ii).) Defendant does not oppose these requests.

F. Settlement Administration, Opt-Outs, Objections, and Termination

Plaintiffs and Class Counsel, in conjunction with Defendant, request the Court's approval of Kroll as the Claims Administrator, which will provide notice and other administrative handling of the Agreement. (*Id.* § 9.) The Claims Administrator will be bound by the obligations imposed on it under the terms of the Agreement and subject to the Court's jurisdiction. (*Id.* § 9(a) and (b).)

The Agreement provides a procedure for Class Members to exclude themselves from the Settlement by sending a letter by mail to the Claims Administrator postmarked on or before the Exclusion Deadline. (*Id.* § 11(a).) The Claims Administrator will maintain a list of members who opt-out. (*Id.* § 11(b).) The Agreement also provides the procedures for Class Members to object to the Agreement by the Objection Deadline. (*Id.* § 12.) Should any timely filed objection(s) meeting the required procedures be submitted, Class Counsel must file the objection(s) and any response(s) before the Final Approval Hearing date. (*Id.* § 12(c).)

The Agreement is conditioned on the occurrence of the Effective Date and entry of Preliminary Approval and Final Approval Orders, with all objections being overruled and any appeals taken from the Final Approval Order resolved in favor of final approval. (*Id.* § § 14.)

IV. ARGUMENT

Settlement of a class action requires judicial approval, which usually consists of two stages: (1) preliminary approval of the settlement, typically at an informal hearing or conference, where “prior to notice to the class a court makes a preliminary evaluation of fairness”; and (2) final approval, comprised of a formal fairness hearing “class members and settling parties are provided the opportunity to be heard on the question of final court approval.” *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 691 (S.D.N.Y. 2019) (quoting *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y. 2019)). See also Herbert Conte, *Newberg on Class Actions*, §§ 11.25 and 13:64; Manual for Complex Litigation, Fourth, § 21.632 (2004).

Plaintiffs are taking the first step in this process by seeking preliminary settlement approval. At this stage, the Court is asked to review the proposed settlement for obvious deficiencies, provisionally certify the proposed classes and appoint class representatives and Class Counsel, approve a method for providing the class with notice of the proposed settlement and a fairness hearing, and schedule the formal fairness hearing.

A. Preliminary Approval is Appropriate

It is well settled that, “[t]o be likely to approve a proposed settlement under Rule 23(e)(2), the Court must find ‘that it is fair, reasonable, and adequate.’” *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 692. In addressing these findings, courts consider four factors: “(1) adequacy of representation, (2) existence of arm's-length negotiations, (3) adequacy of relief, and (4) equitableness of treatment of class members.” *Id.*

1. Adequacy of Representation

Before the Court can preliminarily approve a settlement, “Rule 23(e)(2)(A) requires a Court to find that ‘the class representatives and class counsel have adequately represented the class.’” *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 692.

The adequacy inquiry in regard to the Named Plaintiffs is whether their interests are antagonistic to the interests of the other members of the classes. *Id.* (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000)). Here, Plaintiffs are all Defendant members holding checking accounts. They have assisted Class Counsel throughout the litigation, including by: (1) allowing Class Counsel to review their bank statements before filing suit; (2) participating in interviews with Class Counsel; (3) conducting an extensive search for relevant documents and evidence; (4) assisting with written discovery responses; (5) keeping apprised of the case and conferring with Class Counsel throughout the litigation; and (6) agreeing to a class settlement that is in the best interests of the Class Members. In doing so, Plaintiffs were integral to the case and have demonstrated their adequacy as class representatives. Moreover, Plaintiffs have no known interests antagonistic to the interests of the Classes.

The adequacy inquiry in regard to counsel asks whether they “are qualified, experienced and able to conduct the litigation.” *Id.* (quoting *Cordes & Co. Fin. Servs. V. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007) (internal quotation marks omitted)). Here, Class Counsel have extensive experience litigating and settling nationwide class actions, including litigating literally *dozens* of cases involving similar facts and identical legal theories to those alleged in the complaints. They have served as class counsel in multiple cases, including federal and state overdraft cases. (Kaliel Decl., ¶¶ 2, 3.) Class Counsel thoroughly investigated and analyzed Plaintiffs’ claims, Defendant’s liability, class-wide damages theories, and Defendant’s potential

defenses. Class Counsel also reviewed extensive data files and only reached a settlement after satisfactorily confirmatory discovery. They were thus able to knowledgably evaluate the strengths and weaknesses of their claims, the suitability of the claims for class treatment, and the value of the Settlement to the Class Members. Thus, as in *GSE Bonds*, “Rule 23(e)(2)(A)’s adequacy of representation prong thus weighs in favor of approval.” *Id.*

2. Existence of Arm’s Length Negotiations

The Agreement is the result of arm’s length negotiations between experienced counsel after extensive litigation. This matters because “[i]f a class settlement is reached through arm’s-length negotiations between experienced, capable counsel knowledgeable in complex class litigation, ‘the Settlement will enjoy a presumption of fairness.’” *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 693 (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000)). *See also Newberg on Class Actions* § 11.41, at 11-88. In addition, “a mediator’s involvement in settlement negotiations can help demonstrate their fairness.” *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 693.

Here, there is no debate over whether arm’s-length negotiations were involved. The Parties aggressively negotiated the Agreement and engaged in discovery to inform the Parties’ discussions. (Kaliel Decl., ¶ 5.) They mediated before the Honorable Edward Carni (Ret.), and the actual settlement reached was the result of an accepted Mediator’s Proposal. The proposed Settlement presently before this Court is the product of intensive, arm’s-length negotiations. (*Id.* ¶ 10.) Importantly, the Parties did not discuss attorneys’ fees and costs, or any potential service award, until they first agreed on the material terms of the settlement, including the Class definitions, form and manner of Notice, class benefits, and scope of the Release. (*Id.* ¶ 6.)

Moreover, experienced, capable counsel knowledgeable in complex class litigation were involved here. The negotiations on both sides were conducted by attorneys who are highly experienced in prosecuting, defending, and settling consumer class actions. (Kaliel Decl., ¶ 11.) As noted above, Class Counsel specifically have extensive experience litigating and settling nationwide class actions, including litigating literally *dozens* of cases involving similar facts and identical legal theories to those alleged in the complaints. Accordingly, the proposed Settlement in this case is entitled to a preliminary presumption of fairness, adequacy, and reasonableness.

3. Adequacy of Relief

The adequacy of relief factor takes into account

(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3).

In re GSE Bonds Antitrust Litig., 414 F. Supp. 3d at 693 (quoting Rule 23(e)(2)(C)).

When compared with the risks of continued litigation, the amount recovered and the related modification of Defendant's practices (that will afford plaintiffs ongoing benefits) constitute an astounding recovery. Legitimate disputes exist as to many legal issues, including, for example, damages and certification of a class for trial. *See id.* at 694 ("Although the 'risk of maintaining a class through trial is present in [every] class action, . . . this factor [nevertheless] weighs in favor of settlement where it is likely that defendants would oppose class certification if the case were to be litigated.'" (internal quotation marks and citations omitted)). The Parties naturally dispute the strength of Plaintiffs' case, and the Agreement reflects the Parties' compromise of their assessments of the worst-case and best-case scenarios, weighing the likelihood of various potential

outcomes. This case is complex, carries significant risks for all parties as to both legal and factual issues, and would consume a great deal of time and expense if the Parties litigated it to the end.

The settlement of this action assures that Class Members will receive compensation for a significant portion of their alleged losses relatively soon, rather than years from now or not at all. The Agreement provides prompt relief, and the proposed method of distribution is efficient and cost-effective. It is fair and adequate, serving to weed out unjustified claims while not being unduly demanding. *See id.* (“A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding.” (quoting Fed. R. Civ. P. 23, 2018 Advisory Note)).

Two other points support preliminary approval. First, the requested attorney’s fee is within the applicable range of reasonable percentage fund awards. *See id.* at 695-96 (“Courts in this District have approved fees as high as 33.5% from comparable class settlement funds”). *See also In re DDAPV Direct Purchaser Antitrust Litig.*, No. 05-2237, 2011 WL 12627961 (S.D.N.Y. Nov. 28, 2011) (approving 33.5% from a class settlement fund of \$20.25 million); *see In re Oxycontin Antitrust Litig.*, No. 04-md-1603-SHS, ECF No. 360 (S.D.N.Y. Jan. 25, 2011) (awarding 33.5% from a class settlement fund of \$16 million).

Second, it is notable that the proposed settlement fund comprises approximately 50% of the Classes alleged damages. (Kaliel Decl., ¶ 9.) This percentage either meets or exceeds many court-approved recoveries in federal overdraft fee class actions nationwide. *See, e.g., Bodnar v. Bank of Am., N.A.*, No. 14-3224, 2016 WL 4582084, at *4 (E.D. Pa. Aug. 4, 2016) (praising as “outstanding” and “a significant achievement,” a cash fund providing between 13 and 48 percent of the maximum damages); *In re Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2015 WL 12641970, at *1 (S.D. Fla. May 22, 2015) (approving settlement providing 35% of the

most probable aggregate damages); *Hawthorne v. Umpqua Bank*, No. 11-cv-06700-JST, 2015 WL 1927342, at *3 (N.D. Cal. Apr. 28, 2015) (approving settlement of approximately 38% of damages); *Torres v. Bank of Am.*, 830 F. Supp. 2d 1330, 1346 (S.D. Fla. 2011) (approving settlement of between 9 and 45 percent of the total potential damages); *Trombley v. Nat'l City Bank*, 826 F. Supp. 2d 179, 198 (D.D.C. 2011) (approving overdraft settlement with recovery range of 12 to 30 percent as “within the realm of reasonableness”); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 583 (N.D. Ill. 2011) (approving settlement representing 10% of potential recovery). In comparison, the recovery obtained here falls well within the range of recoveries, despite the substantial litigation risks specific to this case.

Finally, the Court has before it the Agreement. There is no other agreement to be identified under Rule 23(e)(3) here.

4. Equitableness of Treatment of Class Members

Rule 23(e)(2)(d) requires consideration of whether the proposed settlement “treats class members equitably relative to one another.” Here, similar to the plan approved in *GSE Bonds*, the proposed plan of distribution treats claimants equitably by providing them with a pro rata share of the recovery allocated within their respective class and all Class Members will provide the same release of claims. 414 F. Supp. 3d at 699. There is no preferred category of Class Members, but an equitable approach employed.

B. The Court Should Certify the Settlement Classes

Preliminary approval also tasks the Court with finding that it will likely be able to certify the class for purposes of judgment. This requires a proposed settlement to meet the four requirements under Rule 23(a) for class certification, as well as at least one of the three requirements under Rule 23(b). *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 699-700.

1. Numerosity

Rule 23(a)(1) requires that the proposed Settlement Classes be “so numerous that joinder of all members is impracticable.” Notably, “[t]he federal courts have repeatedly stated that there is no ‘magic number’ of class members that is required before certification is granted.” *Prive v. New Hampshire-Vermont Health Servs.*, No. 98-E-20, 1998 WL 375294, at *3 (N.H. Super. July 1, 1998) (citing *CV Reit, Inc. v. Levy*, 144 F.R.D. 690, 696 (S.D.Fla.1992); *Johns v. Rozet*, 141 F.R.D. 211, 216 (D.D.C.1992)). Thus, “[c]lass sizes may be as small as ninety members, see *Smith v. MCI Telecommunications Corp.*, 124 F.R.D. 665, 675 (D.Kan.1989), or number in the tens of thousands. See *Coleman v. Cannon Oil Corp.*, 141 F.R.D. 516, 521 (M.D.Ala.1992).” *Id.* “In making its determination, the court is encouraged ‘to accept common sense assumptions in order to support a finding of numerosity.’” *Id.* (quoting *Wolgin v. Magic Marker Corp.*, 82 F.R.D. 168, 171 (E.D.Pa. 1979)). See also Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 3:3, at 225 (4th ed.2002) (“a common sense approach is contemplated by Rule 23”). In this Circuit specifically, there is a presumption of numerosity for classes of 40 or more. *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 700.

Here, there are thousands of members of the Settlement Classes, which satisfies the numerosity requirement.

2. Commonality

Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” A judicial officer in Southern District has explained this requirement as follows:

A question is common to the class if it is “capable of classwide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). Commonality requires a plaintiff “to demonstrate that the class members have suffered the same

injury.” *Id.* at 349-50, 131 S.Ct. 2541 (internal quotations and citation omitted). “Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question.” *Johnson v. Nextel Commc’ns, Inc.*, 780 F.3d 128, 137 (2d Cir. 2015).

In re GSE Bonds Antitrust Litig., 414 F. Supp. 3d at 700.

Here, each of the members of the three Settlement Classes shares an issue with the other members of those Classes, namely whether Defendant was permitted to charge APSN Fees, OON Fees, and Retry NSF Fees, respectively for each Class. Courts have held that the commonality requirements are likely met where plaintiffs allege the same economic injury stemming from the same violation exists. *Id.* Thus, the commonality factor also weighs in favor of preliminary approval.

3. Typicality

Rule 23(a)(3) requires that “[t]he claims or defenses of the representative parties are typical of the claims or defenses of the class.” This requirement is satisfied “when “each class member’s claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant’s liability.” *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 700 (quoting *Brown v. Kelly*, 609 F.3d 467, 475 (2d Cir. 2010)).

Here, the claims of Plaintiffs and the Class Members arise from the same respective practices and course of conduct by Defendant, namely Defendant’s practice of charging APSN Fees, OON Fees, and Retry NSF Fees, respectively for each Class. The same course of events and same arguments within the Classes would be necessary to prove Defendant’s liability. The typicality requirement therefore weighs in favor of preliminary approval.

4. Adequacy of Representation

Rule 23(a)(4) requires that “[t]he representative parties will fairly and adequately protect the interests of the class.” This requirement is two-pronged and looks at the adequacy of the

Named Plaintiffs to be class representatives and the adequacy of counsel to serve as class counsel. *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 701. Both components of the adequacy inquiry were already discussed above in regard to Rule 23(e)(2)(A). Consequently, the Court can apply that discussion here and should find that this component of the adequacy requirement is met for the reasons outlined above. *See In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 701 (applying Rule 23(e)(2)(A) findings and reasoning to Rule 23(b) requirement).

5. **Predominance and Superiority**

Rule 23(b)(3) provides that “[a] class action may be maintained . . . if . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Findings pertinent to this multi-pronged requirement include “the class members interests in individually controlling the prosecution or defense of separate actions”; “the extent and nature of any litigation concerning the controversy already begun by or against class members”; “the desirability or undesirability of concentrating the litigation of the claims in the particular forum”; and “the likely difficulties in managing a class action.” Fed. R. Civ. P. 23(b)(3).

Here, the predominate issue in the litigation is shared among each of the members of the respective Settlement Classes, namely whether Defendant was permitted to charge APPSN Fees, OON Fees, and Retry NSF Fees, against each member of each Class. The predominance requirement also weighs in favor of preliminary approval.

The class mechanism is also superior to other means of adjudicating the Class Members’ claims. As in *In re GSE Bonds Antitrust Litig.*, “the large size of the class and potentially small recovery of many individual plaintiffs suggests that class members’ interests are likely served by

a class action.” 414 F. Supp. 3d at 702. Individual litigation could result in inconsistent or varying adjudications with respect to individual Class Members and could establish incompatible standards of conduct for Defendant. Further, a class action would allow both the Parties and the Court to benefit from economies of scale and the final and consistent resolution of relatively small claims in one forum. It is impracticable to bring Class Members’ individual claims before the Court. Class treatment permits a large number of similarly situated persons or entities to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, or expense. *See id.* (“concentrating the case in one forum will help improve fairness and efficiency in adjudication of the claims of plaintiffs”). Litigating the claims of thousands of Class Members would be infeasible because it would require presentation of the same evidence and expert opinions many times over. Finally, there is no suggestion that the case will not be manageable as a class action. *See id.*

C. The Proposed Notices Meet the Requirements of Due Process

Basic due process concerns entitle class members to notice of the proposed settlement and an opportunity to be heard if they so choose. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). The mechanics of the notice process “are left to the discretion of the court subject only to the broad ‘reasonableness’ standards imposed by due process.” *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975).

Here, the proposed Notices are written in plain English and are of reasonable length. Notably, they include: (i) a description of the case; (ii) a description of the three Classes; (iii) a description of the proposed settlement; (iv) a statement of the amount of attorneys’ fees that may be sought by class counsel; (v) the fairness hearing date and a description of the hearing; (vi) a statement regarding eligibility to appear at the hearing; (vii) a statement of the deadlines for filing

objections to the settlement and for submitting a claim; (viii) a statement of options, including the option to be excluded from the class; and (ix) how to obtain further information. Such content meets the substantively reasonable component of Rule 23(c)(2)(B). *See In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 703.

The proposed form of notice and the manner of dissemination are also reasonably calculated to reach all class members and constitute the best forms of notice available under the circumstances, thereby satisfying due process. For example, the Claims Administrator shall post the Long-Form Notice on the Settlement Website. The use of such a website has been approved as part of a multi-faceted notice plan. *See In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 702-03.

Notice will also be provided where possible by email. Numerous courts have allowed notice to be sent to Class Members through e-mail. *Sanders v. Glendale Rest. Concepts, LP.*, No. 19-cv-01850-NYW, 2019 WL 6799459, at *4 (D. Colo. Dec 13, 2019) (“as to the method of delivery of the Proposed Notice, the court finds that the use of mail, email, and text message, as stipulated by the Parties, is more than sufficient”); *Fairnella v. Paypal, Inc.*, 611 F. Supp. 2d 250 (E.D.N.Y. 2009); *Keirsev v. eBay, Inc.*, No. 12-cv-01200, 2014 WL 644697, at *1 (N.D. Cal. 2014); *Anwar v. Fairfield Greenfield Ltd.*, No. 1:11-cv-00813, 2012 WL 2273332, at *1 (S.D.N.Y. 2012).

If an email is returned as undeliverable, or for Settlement Class Members who are not current customers of Defendant or who have not agreed to receive electronic notices regarding their Accounts from Defendant, first-class United States mail to the best available mailing addresses shall be used. Such mail notice is sufficient where, as here, the Class Members are known. *See* 7B Wright & Miller, Federal Practice and Procedure § 1797.6 at 200 (3d ed.2005).

For all mailed Notices that are returned as undeliverable, the Claims Administrator shall use standard skip tracing devices to obtain forwarding address information and, if the skip tracing yields a different forwarding address, the Claims Administrator shall re-mail the Notice to the address identified in the skip trace.

These provisions are meaningful and meet or exceed notice protocols approved in other federal class action cases. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 496 (D.N.J. 1997); *In re VMS Sec. Litig.*, No. 89 C 9448, 1992 U.S. Dist. LEXIS 12141, at *7 (N.D. Ill. Aug. 11, 1992). Approval of the proposed form and manner of dissemination of notice is, therefore, appropriate. Therefore, class counsel respectfully request that the Court approve these methods of notice as the best available under the circumstances.

V. CONCLUSION

Plaintiffs respectfully ask the Court to enter the proposed order filed herewith, which would accomplish the following:

- (1) grant preliminary approval of the proposed class action settlement;
- (2) conditionally certify three settlement classes;
- (3) appoint the Named Plaintiffs as the class representatives, Plaintiffs' attorneys as Class Counsel; and Kroll as the Claims Administrator;
- (4) approve the proposed notice plan;
- (5) adopt the deadlines and procedures for persons who fall within the class definitions to exclude themselves and for Class Members to comment on the proposed settlement; and
- (6) schedule a Final Approval Hearing no earlier than 105 days from the entry of the preliminary approval order to address the proposed settlement and the application of Class Counsel for an award of fees and costs and for class representative incentive awards.

Dated: December 14, 2022

Respectfully submitted,

/s/ Jeffrey D. Kaliel

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 14, 2023, a copy of the above document has this day been served on all counsel of record via the court's ECF system:

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Attorneys for Defendant AmeriCU Credit Union

/s/ Jeffrey D. Kaliel
Jeffrey D. Kaliel

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.

Civil Action No. 6:21-cv-1173 (LEK-ML)

JUDGE LAWRENCE E. KAHN

Class Action

**DECLARATION OF JEFFREY D. KALIEL IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION AND MEMORANDUM OF LAW FOR
PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT**

I, Jeffrey D. Kaliel, declare as follows:

1. I am counsel of record for Plaintiffs and the proposed Classes in the above captioned matter. I submit this affidavit in support of Plaintiff's Unopposed Motion and Memorandum of Law for Preliminary Approval of Proposed Class Action Settlement. Unless otherwise noted, I have personal knowledge of the facts set forth in this declaration and could and would testify competently to them if called upon to do so.

Class Counsel's Experience

KalielGold PLLC

2. My firm has extensive class action experience. My firm has been appointed as class counsel in numerous class actions, including, but not limited to *Robinson v. First Hawaiian Bank*, No.17-1-0167-01 GWBC (1st Cir. Haw.); *Liggio v. Apple Federal Credit Union*, No. 18-cv-01059

(E.D. Va.); *Brooks et al. v. Canvas Credit Union*, No. 2019CV30516 (Dist. Ct. for Denver Cnty., Colo.); *Roberts v. Capital One*, No. 1:16-cv-04841 (S.D.N.Y.); and *Walters v. Target Corporation*, No. 3:16-CV-01678-L-MDD (S.D. Cal.); *Lambert v Navy Federal Credit Union*, No. 1:19-cv-00103 (E.D. Va.); *Perks v Activehouse d/b/a Earnin*, No. 5:19-cv-05543 (N.D. Cal.); *White v Members 1st Credit Union*, No. 1:19-cv-00556 (M.D. Pa.), and numerous actions in state courts across the country.

Gibbs Law Group LLP

3. Gibbs Law Group LLP (“GLG”) is a 35-attorney law firm that represents plaintiffs and injured parties in class actions, mass torts, and mass arbitrations. Over the past ten years, GLG has recovered over \$2.5 billion for its clients. GLG attorneys have been appointed to leadership positions in hundreds of class actions in state and federal courts throughout the United States and its territories. David Berger, who leads GLG’s bank fee litigation practice, has litigated dozens of cases asserting claims similar to those in this matter. In addition, Mr. Berger is currently serving as court-appointed lead counsel in *In re US Fertility LLC Data Security Litigation*, No. 8-21-CV-00299-PJM (D. Md.); *In re MGM Resorts International Data Breach Litigation*, No. 2:20-cv-00376-GMN-NJK (D. Nev.); and *In re Equifax Fair Credit Reporting Act Litigation*, No. 1:22-cv-03072-LMM (N.D. Ga.), among other matters. Mr. Berger previously was a key member of the litigation teams in cases including *In re Equifax Data Breach*, No. 17-md-2800-TWT (N.D. Ga.) (the largest data breach settlement in history) and *In re Anthem, Inc. Data Breach Litigation*, No. 15-md-2617-LHK (N.D. Cal.) (the largest data breach settlement in history at the time).

4. As described below in detail, I have been personally involved in all aspects of my firm’s work in this litigation that resulted in the Settlement. KalieGold PLLC has vigorously

represented the interests of the Settlement Class Members throughout the course of the litigation and settlement process.

5. The Parties, both of which are represented by capable and experienced class action counsel, aggressively negotiated the Settlement Agreement and Release (attached hereto as Exhibit 1) and engaged in discovery to inform the Parties' discussions.

6. Importantly, the Parties did not discuss attorneys' fees and costs, or any potential service award, until they first agreed on the material terms of the settlement, including the Class definitions, form and manner of Notice, class benefits, and scope of the Release.

7. Class Counsel believes that the contemplated benefits addressed below adequately compensate Class Members for the harm they suffered and, in light of the risks of litigation, represent an excellent result for Class Members.

8. According to Defendant's records, there are approximately 35,000 persons in the Settlement Classes.

9. The proposed settlement fund comprises approximately 50% of the Classes' alleged damages.

10. The proposed Settlement presently before this Court is the product of intensive, arm's-length negotiations.

11. Further, the negotiations were conducted by attorneys who are highly experienced in prosecuting, defending, and settling consumer class actions.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 14, 2023, at Washington, D.C.

/s/ Jeffrey D. Kaliel
JEFFREY D. KALIEL

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 14, 2023, a copy of the above document has this day been served on all counsel of record via the court's ECF system:

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/s/ Jeffrey D. Kaliel
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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.

Civil Action No. 6:21-cv-1173 (LEK-ML)

JUDGE LAWRENCE E. KAHN

Class Action

**[PROPOSED] ORDER GRANTING MOTION
FOR PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT**

THIS MATTER came before the Court for consideration of a motion for preliminarily certification of the Settlement Classes and preliminarily approval of a settlement between Plaintiffs Malinda Fairchild-Cathey, Richard Mumford, and Aaron Forjone (“Named Plaintiffs”), individually and on behalf of the proposed Settlement Classes, and Defendant AmeriCU Credit Union (“Defendant”). The Court has reviewed the Settlement Agreement and Release and attachments thereto (“Settlement Agreement”) executed by the Parties and submitted to the Court with Plaintiff’s Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement.

IT IS HEREBY ORDERED as follows:

1. Terms capitalized herein and not otherwise defined shall have the meanings ascribed to them in the Settlement Agreement.
2. This Court has jurisdiction over the subject matter and Parties to the above-captioned lawsuit (the “Action”).

Preliminary Approval of Settlement and Conditional Certification of Settlement Classes

1. Subject to the Final Approval Hearing and further review, the Court preliminarily approves the Settlement as being fair, reasonable, and adequate. The terms of the parties' Settlement are hereby conditionally approved, subject to further consideration thereof at the Final Approval Hearing provided for below. The Court finds that the Settlement is likely to obtain final approval and that notice of the proposed settlement should be given as provided in this Order and the Settlement Agreement.

2. The Court finds, for settlement purposes only, that the prerequisites for a class action under Fed. R. Civ. P. 23(a) and (b)(3) have been satisfied in that: (a) the Settlement Classes are comprised of so numerous members that joinder of all members is impracticable; (b) there are common questions of law and fact common to the Settlement Classes that predominate over questions affecting only individual members; (c) the claims of Named Plaintiffs are typical of the claims of the Settlement Class; (d) Named Plaintiffs will fairly and adequately protect the interests of the Settlement Class; (e) a class action is superior to other available methods for the fair and efficient adjudication of the controversy; and (f) Class Counsel will adequately represent the interests of the Settlement Class. Accordingly, the Court conditionally certifies, for settlement purposes only, the following Settlement Classes:

Those members of Defendant who, during the Class Period, were assessed an APPSN Fee ("APPSN Fee Settlement Class").

Those members of Defendant who, during the Class Period, were assessed an OON Fee ("OON Fee Settlement Class").

Those members of Defendant who, during the Class Period, were assessed a Retry NSF Fee ("Retry Fee Settlement Class").

Excluded from the Settlement Classes are Defendant, all officers and directors of Defendant, and the judge(s) presiding over this Action. The Class Period for the APPSN Fee Settlement Class means the dates from October 27, 2015 through July 5, 2019. The Class Period for the OON Fee Settlement Class means the dates from October 27, 2015 through January 31, 2023. The Class Period for the Retry Fee Settlement Class means the dates from October 27, 2015 through July 5, 2019.

3. A Final Approval Hearing shall be scheduled to take place before this Court for the purpose of, among other things: (a) determining whether the proposed Settlement Agreement should be finally approved by the Court as fair, reasonable, and adequate; (b) considering Class Counsel's Motion for Final Approval (including an award of fees, costs, and service awards; (c) ordering entry of Judgment on the Released Claims, which constitutes a release and bar of the Released Claims; (d) determining compliance with all matters pertaining to Rule 23, and (e) consideration of such other matters as the Court may deem necessary or appropriate. The Court may adjourn, continue, and reconvene the Final Approval Hearing pursuant to oral announcement without further notice to the Settlement Class, and the Court may consider and grant final approval of the Settlement, with or without minor modification and without further notice to the Settlement Class.

4. The Court appoints Plaintiffs Malinda Fairchild-Cathey, Richard Mumford, and Aaron Forjone as Class Representatives, appoints Jeffrey Kalief of Kalief Gold PLLC and David Berger of Gibbs Law Group LLP as Class Counsel, and appoints Kroll as Claims Administrator.

Class Notice and Objections

5. The Court hereby approves, as to form and content, the proposed Notice to the Settlement Class attached as Exhibits 1 and 2 to the Settlement Agreement. The long-form Notice shall be posted to the Settlement Website and the short-form notice shall be emailed and/or sent by U.S. Mail to Settlement Class Members. The manner of distribution of the Notices set forth in Section 4 of the Settlement Agreement satisfies due process and is the best notice practicable under the circumstances.

6. Class Counsel and the Claims Administrator shall cause Notice to be sent to each Settlement Class Member in accordance with the Settlement Agreement and this Order. The Parties may by mutual written consent make non-substantive changes to the Notices without Court approval.

7. Any person in the Settlement Classes may be excluded (opt out) from the Settlement Agreement upon request. To be valid and considered by the Court, the exclusion must be in writing and mailed to the Claims Administrator at the address specified in the Notice. The objection must be postmarked on or before the Bar Date to Opt Out, which shall be thirty (30) days after the date the Notice is sent to Settlement Class Members pursuant to the Settlement Agreement, and must include the Class Member's name, the last four digits of their account number(s) or former account numbers(s), address, telephone number, and email address. The Exclusion Letter must state that the Class Member wishes to exclude themselves from the Agreement and be signed and dated. An Exclusion Letter electing to opt out by any joint owner of an account shall be deemed to apply to all owners. The Claims Administrator shall provide all requests for exclusion to Class Counsel, who shall file any such requests with the Court. Any person who submits a timely and valid

request for exclusion will be excluded from the Settlement Agreement and will not be subject to the terms of the Settlement Agreement or the releases contained within it.

8. Settlement Class Members shall be afforded an opportunity to object to the terms of the Settlement. To be valid and considered by the Court, the objection must be in writing and mailed by first class mail, postage pre-paid, to the Claims Administrator at the addresses specified in the Notice. The objection must be postmarked on or before the Bar Date to Object, which shall be thirty (30) days after the date the Notice is delivered to the Class Members. The objection must include the following information:

- i. The name of the Action;
- ii. The objector's name, address, telephone number, and the last four digits of the Account(s) at issue;
- iii. The contact information for any attorney retained by the objector in connection with the objection or otherwise in connection with this case;
- iv. A statement of the factual and legal basis for each objection and any exhibits the objector wishes the Court to consider in connection with the objection;
- v. A statement as to whether the objector intends to appear at the Final Approval Hearing, either in person or through counsel, and, if through counsel, identifying the counsel by name, address, and telephone number; and
- vi. The objector's signature (an attorney signature is not sufficient).

9. Any Settlement Class Member who does not make his or her objection known in the manner provided in the Settlement Agreement and Notice shall be deemed

to have waived such objection and shall forever be foreclosed from making any objection to the fairness, reasonableness, or adequacy of the proposed Settlement.

10. Any request for intervention in this Action for purposes of commenting on or objecting to the Settlement must meet the requirements set forth above, including the deadline for filing objections, must be accompanied by any evidence, briefs, motions, or other materials the proposed intervenor intends to offer in support of the request for intervention, and must meet the requirements of applicable law and Court rules.

11. Any lawyer intending to appear at the Final Approval Hearing must be authorized to represent a Settlement Class Member, must be duly admitted to practice law before the Court, and must file a written appearance. Copies of the appearance must be served on Class Counsel and Defendant's Counsel.

Final Judgment & Release

12. Upon entry of Judgment by the Court in accordance with the Settlement, all Settlement Class Members shall be barred from asserting any Released Claims against the Released Parties and any such Settlement Class Member shall be conclusively deemed to have released any and all such Released Claims against the Released Parties.

Other Provisions

13. Notice will be sent to Class Members within thirty (30) days of the Order.

14. Class Counsel's Motion for Attorneys' Fees and Class Representative Service Awards shall be filed no later than thirty (30) days after Notice is sent to Class Members.

15. Class Counsel's Motion for Final Approval shall be filed no later than thirty (30) days after the Objection Deadline. If any objection is filed, Class Counsel shall file such objection at least seven (7) days before the Final Approval Hearing.

16. The Final Approval hearing is scheduled for _____, 2024, at _____.

17. Pending final determination as to whether the Settlement should be approved, the Court hereby asserts jurisdiction over the Settlement Class Members for the purposes of effectuating this Settlement and releasing and dismissing with prejudice their Released Claims.

18. All proceedings are hereby stayed until further order of the Court, except as may be necessary to implement the terms of the Settlement. Pending final determination as to whether the Settlement should be approved, Plaintiffs, all members of the Settlement Classes, and persons purporting to act on their behalf, are enjoined from commencing or prosecuting (either directly, representatively, or in any other capacity) against any of the Released Parties any action or proceeding in any court or other tribunal asserting any of the Released Claims.

19. The Settlement does not constitute an admission, concession, or indication by Defendant of the validity of any claims in this Action or of any wrongdoing, liability, or violation of law by Defendant, nor of the appropriateness of certification of litigation classes. To the contrary, Defendant has advised the Court that it believes it is without any liability whatsoever for any of the claims included in the Settlement and is participating in the Settlement to put an end to all such claims and the risks and the expense of protracted litigation.

20. In the event the Settlement is not approved by the Court, or for any reason the Parties fail to obtain a Final Approval Order and Judgment as contemplated in the Settlement, or any such order is reversed on appeal, or the Settlement is terminated pursuant to its terms for any reason, then the following shall apply:

- (i) All orders and findings entered in connection with the Settlement shall become null and void and have no further force and effect, shall not be used or referred to for any purposes whatsoever, and shall not be admissible or discoverable in any other proceeding;
- (ii) All of the Parties' respective pre-Settlement claims and defenses will be preserved;
- (iii) Nothing contained in this Order is, or may be construed as, any admission or concession by or against Plaintiff or Defendant on any point of fact or law;
- (iv) Neither the Settlement terms nor any publicly disseminated information regarding the Settlement, including, without limitation, the Settlement Agreement, the Notice, court filings, orders, and public statements, may be used as evidence in this or any other proceeding. In addition, neither the fact of, nor any documents relating to, any Party's withdrawal from the Settlement, any failure of the Court to approve the Settlement, and/or any objections or interventions may be used as evidence; and
- (v) Neither the fact of this Order nor any of its contents, nor the Parties' Settlement Agreement and submissions nor any of their contents, nor the fact of Defendant's willingness to enter into a class action settlement, may

be used to support certification of a litigation class in this or any other proceeding.

21. Each and every time period and provision of the Settlement Agreement shall be deemed incorporated herein as if expressly set forth and shall have the full force and effect of an Order of this Court.

22. All costs incurred in notifying members of the Settlement Classes, as well as administering the Settlement, shall be paid as set forth in the Settlement Agreement.

23. Certification of the Settlement Classes are conditional certifications for settlement purposes only. If the Settlement Agreement is terminated or not consummated for any reason whatsoever, the conditional certifications of the Settlement Classes shall be void and Defendant, pursuant to the terms of the Settlement Agreement, shall have reserved all of its rights to oppose any and all class certification motions in this Action, or in any other class action under Court Rules or any other applicable rule, statute, law or provision, on any grounds.

IT IS SO ORDERED.

Dated: _____

LAWRENCE E. KAHN
United States District Judge

Approved as to form:

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