

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

| | |
|---|--------------------------------------|
| MICHELLE PETREY, on behalf of herself) | |
| and all others similarly situated,) | Civil Action No. 3:20-cv-1147-MAD-ML |
|) | |
| Plaintiff,) | District Judge Mae A. D’Agostino |
| v.) | |
|) | |
| VISIONS FEDERAL CREDIT UNION,) | |
|) | |
| Defendant.) | |

**DECLARATION OF JEFFREY D. KALIEL IN SUPPORT OF PLAINTIFF’S
UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT
AND APPLICATION FOR ATTORNEYS’ FEES AND COSTS AND SERVICE
AWARDS**

I, Jeffrey D. Kaliel, declare:

1. I, along with Taras Kick of The Kick Law Firm, APC (“TKLF”), am Class Counsel of record for Plaintiff Michelle Petrey and the proposed Settlement Class in the above-captioned matter. I submit this Declaration in support of Plaintiff’s Unopposed Motion for Final Approval of Class Action Settlement and Application for Attorneys’ Fees and Costs and Service Award.

2. The Court issued several scheduling orders throughout the litigation of the Case and the Parties vigorously pursued discovery pursuant to those Order. In particular, Plaintiff served document requests and interrogatories on January 18, 2022, to which Defendant served its written responses.

3. The Parties met and conferred several times on alleged discovery deficiencies.

4. On December 3, 2021, after further investigation and analysis of discovery materials produced by that time, Plaintiff moved to amend the Complaint, adding a new theory of liability based on alleged improper assessment of overdraft fees for APPSN transactions.

5. Discovery proceeded apace. Plaintiff noticed a Rule 30(b)(6) deposition of Visions for March 8, 2022

6. Defendant scheduled a deposition of Plaintiff Petrey for March 28, 2022.

7. The discovery process, although professional, was often contentious.

8. Counsel for the Parties met and conferred on various occasions regarding Visions' discovery responses. After the Parties were unable to reach agreement on the scope of additional document production, information and testimony, including complex electronic discovery, Plaintiff drafted a motion to compel additional discovery responses.

9. Just before that motion was filed, the Parties reached an interim compromise on the contested discovery issues.

10. On February 11, 2022, the Parties participated in a mediation before Hon. Thomas Mercure (Ret.). The Parties did not settle at the mediation.

11. The Parties undertook further data analysis, then reconvened for a second mediation on March 18, 2022.

12. Class Counsel spent many hours investigating the claims of several potential plaintiffs against Visions FCU.

13. Class Counsel interviewed a number of Visions FCU customers to gather information about Visions FCU's disclosures and practices and their potential impact upon consumers, which was essential to counsels' ability to understand the nature of the potential claims and issues, the language of the Account agreement and other documents at issue, and potential remedies.

14. Class Counsel expended significant resources researching and developing the legal claims at issue.

15. They are familiar with the claims as they have litigated and resolved other fee claims with similar factual and legal issues. Class Counsel has experience in understanding the damages at issue, the information critical to determine class membership, and the necessary data to calculate each Settlement Class Member's damages. The issues were heavily contested throughout the litigation.

16. Class Counsel, along with its data analysis expert, spent a significant amount of time analyzing data regarding Visions FCU's fee revenue related to the assessment of the APPSN Fees and the Retry NSF Fees at issue. The Parties conferred regarding the calculations' accuracy, with Visions FCU retaining its own expert. Prior to the first mediation, Class Counsel and Plaintiff's expert used this data to analyze the damages at issue. Additional data analysis was performed prior to the second mediation as well.

17. Consequently, Class Counsel mediated with Judge Mercure fully informed of the merits of Settlement Class members' claims and negotiated the proposed Settlement while zealously advancing the position of Plaintiff and Settlement Class members and being fully prepared to continue to litigate rather than accept a settlement that was not in the best interest of Plaintiff and the Settlement Class.

18. After the first and second mediation, Judge Mercure continued to actively participate in the settlement discussions and helped the Parties reach an acceptable compromise.

19. In sum, prior to negotiating the Settlement, Class Counsel spent significant time conferring with Plaintiff, investigating facts, researching the law, preparing a well-pleaded complaint, engaging in discovery, working with an expert witness, and reviewing important documents and data.

20. Plaintiff believes they asserted meritorious claims and would prevail if this matter

proceeded to trial. Visions FCU argues the claims are unfounded, denies any potential liability, and up to the point of settlement indicated a willingness to litigate those claims vigorously. The Parties concluded that the benefits of settlement outweigh the risks and uncertainties of continued litigation, as well as the attendant time and expenses associated with contested class certification proceedings and possible interlocutory appellate review, completing class discovery, pretrial motion practice, trial, and finally appellate review.

21. The Settlement in this case is the result of intensive, arm's-length negotiations between experienced attorneys familiar with class action litigation and with the legal and factual issues of this Action—all occurring before a well-respected neutral with an expertise in these kinds of financial services cases.

22. Class Counsel is particularly experienced in the litigation, certification, and settlement of nationwide class action cases in the financial services industry.

23. In negotiating this Settlement in particular, Class Counsel had the benefit of years of experience and familiarity with the facts of this case as well as with other cases involving overdraft fees across the country. The resumes of both Class Counsel, The Kick Law Firm, APC and Kaniel Gold PLLC, were previously submitted to this Court as exhibits with the Motion for Preliminary Approval.

24. Class Counsel conducted a thorough investigation and analysis of Plaintiff's claims and engaged in extensive discovery throughout this Action.

25. Class Counsel reviewed Visions FCU's document production, reviewed the arguments it made in its motion to dismiss and opposition to the Plaintiff's motion to amend the complaint, and reviewed a separate production of transactional data and engaged a data expert to analyze Visions FCU's sample data to determine whether a class could be ascertained and to

support Plaintiff' future motion for class certification.

26. Class Counsel was able to accurately evaluate the strengths and weakness of Plaintiff' claims.

27. Although Plaintiff believes she has a strong case, Plaintiff might not certify the classes or would lose at summary judgment or trial, or on appeal.

28. The cash Settlement Fund represents approximately 55% of the APPSN Fees and Retry Fees allegedly wrongly charged and paid by the Settlement Class, without the inherent litigation risks, is a very fair and reasonable recovery. This is an excellent result when compared to the results in other bank fee cases and considering the significant risks remaining for the Settlement Class. Further, based on my review of Plaintiff's database expert's analysis of the data produced by Defendant, the allocation in the Settlement Agreement of 66.2% to the APPSN class members and 33.8% to the Retry NSF class members reflects the ratio between the APPSN and Retry NSF damages.

29. Under the circumstances, Plaintiff and Class Counsel appropriately determined that the Settlement outweighs the gamble of continued litigation.

30. This Settlement provides substantial relief to Settlement Class Members without delay.

31. Finally, as discussed above, the Settlement is the product of arm's-length negotiations conducted by the Parties' experienced counsel with the assistance of a well-respected mediator through multiple mediation sessions at different points in the litigation.

32. These negotiations led the Parties to a Settlement that Class Counsel believes to be fair, reasonable, and in the best interest of the Settlement Class.

33. Given Class Counsel's experience in these cases, Class Counsel's assessment in

this regard is entitled to considerable deference. The benefits are fair and reasonable in light of Visions FCU's defenses, and the challenging and unpredictable litigation path in the absence of settlement.

34. Recovery by any means other than settlement would require additional years of litigation in this Court and the Second Circuit. Delay, both at the trial stage, and through post-trial motions and appeals, could force the Settlement Class to wait even longer, further reducing its value.

35. Further, this litigation activity would have required the expenditure of significant resources.

36. Class Counsel devoted substantial time and resources investigating, litigating, and resolving this case. Plaintiff settled the Action with the benefit of Class Counsel's years of experience litigating cases like this one, contentious discovery, and data and damage analysis.

37. The record provides sufficient information for this Court to determine that the Settlement is fair. Class Counsel have shown their willingness to litigate this action and their past experience shows that they will zealously represent their clients.

38. The Parties negotiated and reached agreement regarding fees and costs only after agreeing on all material terms of the Settlement.

39. The Settlement Class of 36,236 Settlement Class Members is so numerous that joinder of all members is impracticable.

40. There are questions of law or fact common to the Settlement Class including whether Visions FCU's alleged systematic practice of assessing Relevant Fees breached its contract.

41. Plaintiff is typical of absent members of the Settlement Class as they were subjected

to the same Visions FCU practices leading to the assessment of fees and suffered from the same injuries, and she will benefit equally from the Settlement relief.

42. Plaintiff's interests are coextensive with, not antagonistic to, the interests of the Settlement Class because Plaintiff and the absent Settlement Class Members have the same interest in the Settlement's relief, and the absent Settlement Class Members have no diverging interests.

43. Plaintiff is represented by qualified and competent counsel who devoted substantial time to the litigation and have extensive experience and expertise prosecuting complex class actions, including actions like the instant case.

44. While discretionary, to the extent that the Court wishes to perform a lodestar cross-check, it should be noted that there is a very modest 1.27- lodestar multiplier as a result of the hard work Class Counsel performed.

45. The 33.33% of the Settlement Fund requested fee is within the range of reason when considering the foregoing and when analyzing the following guidelines set forth by the Second Circuit in *Goldberger*: (1) the time and labor expended by counsel, (2) the magnitude of the litigation, (3) the risk of the litigation, (4) the quality of the representation, (5) the requested fee in relation to the settlement, and (6) public policy considerations.

46. This Action is complex presenting novel factual and legal issues, which have yet to be tried in this Court or others. That issue, along with other merits issues and the yet to be filed and decided motion for class certification, would have been litigated aggressively. Factually, the case was difficult as it involved the detailed review of back-end transactional data from Visions FCU, as review of several different versions of binding account contracts during the relevant limitations period. The fundamental contract construction issue remained unresolved when the Parties agreed to settle. That issue, along with other merits issues and the yet to be filed and

decided motion for class certification, would have been litigated aggressively.

47. If Visions FCU was successful in opposing class certification or at trial, that would have prevented recovering anything at all.

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

49. Class Counsel are experienced in class action litigation, serving as Lead or Co-Lead Counsel in dozens of consumer class actions in federal and state courts throughout the country.

50. The Settlement Fund, representing a 55% recovery of the most probable damages, is an excellent result—and that does not even include the additional \$1.5 million in waived Uncollected Fees still owing by Settlement Class Members. Thus, the Court should easily find counsel achieved success.

51. As is detailed above, this Action was contested and litigated efficiently and intelligently, including hotly contested discovery, complaint amendment, two mediations, negotiating and documenting the Settlement, and the Settlement approval process.

53. To date, Class Counsel have expended a total of 561.5 hours in the prosecution of this case, including anticipated time preparing for the Final Approval Hearing, filing of supplemental declarations, responding to objections, if any, and preparing for and attending the Final Approval Hearing.

54. Further, there will be significant post-Final Approval work ensuring that the Settlement proceeds are properly distributed to Settlement Class Members, responding to

Settlement Class Members' inquiries, and effectuating a secondary or *cy pres* distribution, as needed.

55. Summaries of the time expended by all counsel and paralegals on the Action are detailed below, organized by work performed in the various stages of the Action. Hourly rates of attorneys and paralegals are commensurate with the rates charged by class action practitioners in this state with similar experience. The time of co-counsel, as represented by each firm to me, is also included.

| Task | KalielGold PLLC | The Kick Law Firm, APC | Wilentz Goldman & Spitzer, PA |
|--|--------------------------|-----------------------------------|--|
| Pre-suit investigation, Factual Development, Client Meetings, Correspondence <i>Researched potential causes of action; researched potentially applicable laws and regulations; researched NY state law; researched Visions disclosures and compared to other financial institution disclosures; interviewed potential clients; reviewed monthly bank statements; prepared preservation letter.</i> | JDK – 11.2 SGG – 4.5 | TK – 3. | KR – 3.5 |
| Strategy/Case Analysis/Class Counsel Conferences <i>Strategy meetings internally at the firm and with co-counsel throughout the case.</i> | JDK – 9.5 SGG – 2.2 | TK – 6.9 TB – 0.3 JB – 3.2 | KR – 11.1 |
| Pleadings <i>Researched, drafted, and edited complaint and amended complaint</i> | JDK – 22.1 SGG – 4.3 | TK – 2.9 | KR – 15.2 |
| Motion Practice <i>Researched, drafted, and edited opposition to motion to dismiss; motion to amend complaint; and motion to compel discovery responses.</i> | JDK – 46.0 SGG – 13.0 | TK – 36.9 TB -0.4 JB – 23.5 | KR – 38.0 |
| Discovery | JDK – 31.2 | TK – 20.2 | KR – 36.1 |

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| <i>Drafted discovery requests; reviewed document production; meet and conferred on responses; drafted and filed motion to compel; drafted and served deposition notice; requested, checked and analyzed data and analysis regarding "retry" NSF/OD Fee damages and "APPSN" damages.</i> | SGG – 12.1 AJR – 2.6 | TB – 2.8 JB – 26.4 | |
| Settlement <i>Engaged in settlement discussions with opposing counsel; participated in mediation; drafted mediation statement; coordinated settlement strategy with co-counsel; negotiated and finalized settlement agreement and all associated documentation.</i> | JDK – 66.2 SGG – 23.2 | TK – 6.1 TB – 1.6 JB – 1.3 | KR – 7.0 |
| Preliminary Approval <i>Drafted motion for preliminary approval of class action settlement and accompanying declarations</i> | JDK - 14.6 SGG 0 3.5 | TK – 3.6 TB – 0.9 | |
| Class Notice <i>Worked with notice administrator to develop notice plan; drafted notices; oversaw notice process.</i> | JDK – 13.4 SGG – 4.2 | TK – 0.4 | |
| Final Approval, Settlement Execution, Distribution of Common Fund (Est.) <i>Prepare motion for final approval and all supporting declarations, respond to objections, respond to class member inquiries, prepare for and attend final approval hearing, work with settlement administrator to ensure proper distribution of funds to class members, prepare any post-final approval motions.</i> | JDK - 18.6 SGG – 5.5 | TK – 1.7 | |
| Totals: | 307.90 | 142.7 | 110.9 |

56. The time and lodestar expended by the attorneys, paralegals and law clerks at all four law firms is as follows:

- a. KanielGold PLLC – 307.90, **\$248,039.50**
- b. Wilentz Goldman & Spitzer, PA – 110.9, **\$99,810.00**
- c. The Kick Law Firm, APC – 142.7, **\$116,350.00**

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

Kaniel Gold PLLC

Jeffrey D. Kaniel (JDK) - \$829.00
Sophia G. Gold (SGG) - \$733.00
Amanda J. Rosenberg (AJR) - \$733.00
Neva R. Garcia (NRG) - \$208.00

Wilentz Goldman & Spitzer, PA

Kevin Roddy (KR) - \$900.00

The **Kick Law Firm, APC**

Taras Kick (TK) - \$900.00
Jeffrey Bills (JB) - \$700.00

58. Here, the aggregate lodestar is \$464,199.50. Class Counsel seek fees of \$589,999. Class Counsel seek a modest lodestar multiplier of 1.27, which is below the range of what courts in this circuit typically award.

59. Plaintiff expended hours in advancing this litigation against a large and powerful adversary. She conferred with Class Counsel on a number of occasions.

60. Specifically, Plaintiff provided assistance that enabled Class Counsel to successfully prosecute the Action and reach the Settlement, including: (1) submitting to interviews with Class Counsel; (2) locating and forwarding responsive documents and information; (3) providing discovery documents; and (4) participating in conferences with Class Counsel.

61. Class Counsel seek reimbursement of \$12,868.50 for the reasonable expenses incurred to advance this litigation. Specifically, those costs and expenses consist of filing fees and service of process costs, pro hac vice admission fees, expert witness fees, litigation support vendors and, most substantially, the services of a well-qualified mediator. Class Counsel is not seeking

costs related to legal research, copying, and other overhead expenses, which were advanced and are commonly reimbursed. All of these out of these pockets were reasonably and necessarily incurred to pursue this Action.

| EXPENSES | | | |
|-----------------|-------------------------|--|-------------------------------|
| Category | Kaliel Gold PLLC | Wilentz Goldman & Spitzer, PA | The Kick Law Firm, APC |
| Legal Research | | | |
| Travel | | | |
| Filing | | \$800.00 | \$171.00 |
| Transcripts | | | |
| Process Service | | \$150.00 | |
| Mediation Fees | \$2,347.50 | | |
| Expert Fees | \$10,350.00 | | |
| Copy Charges | | | |
| Messenger | | | |
| Total | \$12,697.50 | \$950.00 | \$171.00 |

62. Class Counsel requests reimbursement of \$12,868.50 for actual costs advanced and necessarily incurred in connection with the prosecution and settlement of the Action. Specifically, those costs and expenses consist of filing fees and service of process costs, pro hac vice admission fees, expert witness fees, litigation support vendors and, most substantially, the services of a well-qualified mediator. Class Counsel is not seeking costs related to legal research, copying, and other overhead expenses, which were advanced and are commonly reimbursed. All of these out of these pockets were reasonably and necessarily incurred to pursue this Action.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 6th day of February, 2023, at Washington, D.C.

/s/ Jeffrey D. Kaliel

 Jeffrey D. Kaliel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 6, 2023, the foregoing was filed via CM/ECF, which caused a true and correct copy to be served to all counsel of record.