

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA**

ASHLEY TOTH, Personally, and on behalf of  
all Pennsylvanians similarly situated,

Plaintiff,

v.

NORTHWEST SAVINGS BANK,

Defendant.

**CIVIL DIVISION**

**NO. GD-12-008014**

**PLAINTIFF'S MEMORANDUM OF LAW IN  
SUPPORT OF MOTION FOR AN AWARD  
OF ATTORNEYS' FEES AND EXPENSES  
AND FOR A SERVICE AWARD**

## TABLE OF CONTENTS

	<b>Page</b>
I. Introduction.....	1
II. Statement of Facts.....	2
III. Summary of the Settlement Terms.....	4
A. The Settlement Class.....	4
B. Monetary Relief for the Benefit of the Class.....	4
IV. Class Counsel’s Fee Request Should be Approved.....	6
A. The Attorneys’ Fees Request is Proper Under Rule 1717.....	6
1. The Time and Effort Expended By Class Counsel.....	6
2. Quality of Services Rendered.....	7
3. Results Achieved and Benefits to the Class.....	8
4. Magnitude, Uniqueness and Complexity of the Litigation.....	9
5. The Contingent Nature of the Fee.....	9
B. Similar Awards Have Been Made in Other Cases.....	10
V. Class Counsel is Entitled to Reimbursement of the Their Costs.....	11
VI. The Court Should Award a Service Award to Plaintiff.....	11
VII. Conclusion.....	12

## TABLE OF AUTHORITIES

	<b>Page</b>
<b>CASES</b>	
<i>In re Bridgeport Fire Litig.</i> , 5 A.3d 1250 (Pa. Super. Ct. 2010).....	11
<i>In re Chambers Development Securities Litigation</i> , 912 F. Supp. 852 (W.D. Pa. 1995).....	10, 11
<i>In re Marsh Erisa Litig.</i> , 265 F.R.D. 128 (S.D.N.Y. 2010).....	8
<i>In re Sterling Fin. Corp. Sec. Class Action</i> , MDL No. 1879, 2009 U.S. Dist. LEXIS 83224 (E.D. Pa. Sept. 10, 2009).....	11
<i>Lazy Oil Co. v. Witco Corp.</i> , 95 F. Supp. 2d 290 (W.D. Pa. 1997).....	12
<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294 (N.D. Cal. 1995).....	11
<b>STATUTES</b>	
Pennsylvania Rules of Civil Procedure, Rule 1716.....	5
Pennsylvania Rules of Civil Procedure, Rule 1717.....	6, 10

## I. INTRODUCTION

Class Counsel obtained a non-reversionary Settlement Fund of \$2,350,000 for the benefit of the Settlement Class, a recovery that is well in line with the settlements reached in similar overdraft fee cases.<sup>1</sup> Settlement Class Members will automatically receive—without having to take any action—their *pro rata* share of the Net Settlement Fund, with their individual payment amounts calculated using the bank’s data and based on how much each individual was allegedly harmed by Northwest’s posting practice at issue. There are no claims forms to fill out, and Settlement Class Members will not be asked to put forth proof that they were damaged.

Class Counsel now moves this Court for an award from the Settlement Fund of attorneys’ fees in the amount of \$705,000.00, which represents thirty percent (30%) of the Settlement Fund and is reasonable and appropriate under applicable law and the circumstances of this case. This case involved complex issues of law and substantial risk to Class Counsel, who agreed to litigate the cases on a pure contingency basis with no guarantee of ever being paid for their time or reimbursed for costs advanced on behalf of the Class. Class Counsel expended significant time and effort conducting investigation and discovery, responding to Northwest’s preliminary objections and request for appellate review from the Court’s ruling on the objections, analyzing the potential damages, and negotiating this Settlement. The Settlement, which included this attorneys’ fees request, was obtained through arms-length negotiations with the assistance of a respected mediator, Hon. Kenneth J. Benson.

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<sup>1</sup>Similar overdraft fee cases have typically settled for between forty percent (40%) and sixty percent (60%) of the total amount of additional overdraft fees consumers were charged. Joint Declaration of Class Counsel Submitted in Support of Motion for Preliminary Approval (“Joint Decl.”) ¶ 18. The Payment Advisor has confirmed that the result here is in that range as well. *Id.*

Class Counsel also seeks reimbursement from the Settlement Fund of their out-of-pocket expenses incurred in this case, in the amount of \$11,230.25. These expenses were reasonably incurred and necessary to the prosecution and settlement of the case, and should be reimbursed.

Class Counsel also asks the Court to award Plaintiff an service award, in the amount of three thousand dollars (\$3,000.00) to compensate her for her contributions to the litigation and her commitment and work on behalf of the Class.

The amounts requested here are reasonable and appropriate and should be awarded.

## **II. STATEMENT OF FACTS**

Plaintiff brought this action seeking monetary damages and/or restitution in the amount of the alleged excessive Overdraft Fees charged to Northwest's customers as a result of Northwest's Debit Card Transaction Posting Order Practices.<sup>2</sup> Plaintiff alleged that as a result of Northwest's practices, customers' funds were depleted more rapidly than they should have been, and Plaintiff and Class Members paid more Overdraft Fees than they should have paid. Northwest denies all of Plaintiff's allegations and asserts that the language in its account agreements expressly advises customers of and permits the Debit Card Transaction Posting Order Practices. Northwest has advanced several other defenses, including that various statutes and/or regulations endorse its practices.

On September 6, 2012, Plaintiff filed her First Amended Complaint ("FAC") against Northwest.<sup>3</sup> Northwest filed its preliminary objections to the FAC on November 5, 2012, which initiated a full round of briefing followed by a hearing on January 22, 2013. At the hearing, the Court directed the parties to submit supplemental briefing regarding whether justifiable reliance

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<sup>2</sup> Joint Decl. ¶ 4.

<sup>3</sup> Joint Decl. ¶ 7.

must be pleaded to state a claim under the UTPCPL.<sup>4</sup> The parties complied, and on June 25, 2013, the Court issued its opinion and order (“Order”) stating that Plaintiff could pursue claims against Northwest for breach of contract, breach of the covenant of good faith and fair dealing, and violations of the UTPCPL (concluding that justifiable reliance does not need to be pleaded where, as here, the ascertainable losses necessarily flow from the fraud or deceit), but Plaintiff’s claims for unconscionability, unjust enrichment, and relief under the Declaratory Judgment Act were dismissed.<sup>5</sup>

On July 16, 2013, Northwest filed its Answer and New Matter to the Amended Complaint. Plaintiff initiated discovery, consulted with their expert and drafted a comprehensive electronic discovery protocol. Pursuant to the parties’ agreement, Northwest responded to these requests on August 26, 2013. Shortly thereafter, the parties began to discuss the possibility of resolving the case, and agreed to participate in a formal mediation.<sup>6</sup>

On November 18, 2013, the parties participated in a formal mediation session with retired U.S. Magistrate Judge Kenneth J. Benson that lasted twelve hours.<sup>7</sup> In advance of the mediation, Northwest provided Plaintiff with aggregate information regarding its overdraft fee revenues and detailed information regarding its posting order and categorization of debit transactions.<sup>8</sup> In advance of the mediation, Class Counsel, with the help of their expert, thoroughly analyzed the information provided by Northwest, and calculated Northwest’s potential exposure in the case.

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Joint Decl. ¶ 9; Agreement ¶ 16

<sup>7</sup> Joint Decl. ¶ 11; Agreement ¶¶ 19, 21

<sup>8</sup> Joint Decl. ¶ 11; Agreement ¶¶ 20, 69

At the mediation, the parties reached an agreement in principle as to the key terms of the Settlement.<sup>9</sup> Subsequently, the parties worked hard on finalizing the settlement papers.<sup>10</sup>

The parties notified the Court of their agreement in principle on November 20, 2013, and executed a formal Settlement Agreement on March 10, 2014.<sup>11</sup> The Payment Advisor subsequently completed his computation of each individual Class Member's alleged damages.<sup>12</sup>

### **III. SUMMARY OF THE SETTLEMENT TERMS**

The Settlement's terms are detailed in the Agreement, attached as Exhibit A to Plaintiff's Motion for Preliminary Approval. The following is a summary of the material terms of the Settlement.

#### **A. The Settlement Class**

The Settlement Class is defined as:

[A]ll Northwest Savings Bank customers who had one or more Accounts maintained in Pennsylvania and who, during the Class Period [the period from May 7, 2006 through, and including, June 30, 2011], incurred one or more Overdraft Fees as a result of Northwest Savings Bank's High to Low posting.<sup>13</sup>

#### **B. Monetary Relief for the Benefit of the Class**

The Settlement requires Northwest to pay a total sum of \$2.35 million to establish a Settlement Fund that will be used to: (1) compensate the Settlement Class Members; (2) pay any Court-ordered attorneys' fees and costs awarded to Class Counsel; and (3) pay any Court-ordered Service Award to the Plaintiff; and (4) pay the Payment Advisor for costs and fees in calculating the Settlement Class Member payments.<sup>14</sup> In addition to the \$2.35 million Settlement

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<sup>9</sup> Joint Decl. ¶ 12; Agreement ¶ 21

<sup>10</sup> Joint Decl. ¶ 12

<sup>11</sup> Joint Decl. ¶ 12; Agreement ¶ 22

<sup>12</sup> Joint Decl. ¶ 14

<sup>13</sup> Agreement ¶¶ 25, 54.

<sup>14</sup> Agreement ¶¶ 60, 63.

Fund, Northwest agreed to separately pay: (1) the costs of Notice to the Settlement Class; and (2) the other costs and fees of the Settlement Administrator<sup>15</sup> Settlement Class Members do not have to submit claims or take any other affirmative step to receive relief under the Settlement. Instead, within thirty days of the Effective Date of the Settlement, Northwest will make payments in the form of an account credit (for Class Members who are Current Account Holders) or mailed check (for Settlement Class Members who are Past Account Holders).<sup>16</sup> Thus, all identifiable Settlement Class Members who do not opt out of the Settlement will receive a *pro rata* distribution of the Net Settlement Fund.

As detailed in the Settlement, each Settlement Class Member's individual payment amount will be calculated by the Payment Advisor, using the Northwest's transactional data the relevant accounts, and will be based on the additional overdraft fees they were charged based on the bank's posting debit card transactions in high-to-low order.<sup>17</sup> Eligible Settlement Class Members will receive *pro rata* distributions of the Net Settlement Fund according to the dollar amounts tallied based on this calculation.<sup>18</sup>

With respect to any uncashed or undeliverable checks, within 210 days after the date the Settlement Administrator mails the first payment check, any funds remaining in the Settlement Fund will be distributed in accordance with Rule 1716 of the Pennsylvania Rules of Civil Procedure.<sup>19</sup> Any costs associated with such residual distribution will be paid out of the Settlement Fund.<sup>20</sup>

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<sup>15</sup> *Id.* ¶ 64.

<sup>16</sup> Agreement ¶¶ 88, 92-93, 95.

<sup>17</sup> Agreement ¶ 87.

<sup>18</sup> *Id.*

<sup>19</sup> Agreement ¶ 98.

<sup>20</sup> *Id.*



#### **IV. CLASS COUNSEL'S FEE REQUEST SHOULD BE APPROVED**

##### **A. The Attorneys' Fees Request Is Proper Under Rule 1717**

Pennsylvania Rule of Civil Procedure 1717 sets forth five factors that the Court should consider in determining the reasonableness of an attorneys' fees award: (1) the time and effort reasonably expended by the attorney in the litigation; (2) the quality of the services rendered; (3) the results achieved and benefits conferred upon the class or upon the public; (4) the magnitude, complexity and uniqueness of the litigation; and (5) whether the receipt of a fee was contingent on success. Pa.R.C.P. No. 1717.

##### **1. The Time and Effort Expended by Class Counsel**

Counsel for the Class conducted thorough research into factual circumstances of the case. A significant amount of analysis was necessary to reverse engineer the Defendant's posting sequence practices prior to the initiation of the lawsuit. Additionally, Class Counsel were required to research unique issues of first impression, including the propriety of sustaining consumer claims brought under the catch-all provision of the Pennsylvania Unfair Trade Practices and Consumer Protection Law.

Moreover, this litigation has been hard-fought. The parties engaged in motion practice, including briefing and a hearing on Northwest's preliminary objections, supplemental briefing on the objections, and additional briefing regarding Northwest's request for immediate appellate review of the Court's order on the objections.<sup>22</sup> Class Counsel worked hard on researching and briefing the significant issues raised by the objections and related filings. The parties also engaged in significant formal and informal discovery, including Northwest's responses and

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<sup>22</sup> Joint Decl. ¶¶ 7-8; Agreement ¶¶ 6-14.

objections to and production of documents regarding Plaintiff's request for production of documents and first set of interrogatories.<sup>23</sup> Settlement discussions began in approximately September 2013, and during these negotiations, Northwest provided Plaintiff with information regarding its overdraft fee revenues and its posting order and transaction categorizations for the Class Period.<sup>24</sup> Class Counsel, with the help of their expert, analyzed the data and information produced by Northwest and calculated the potential damages exposure in the case. On November 18, 2013, the parties participated in a twelve-hour-long formal mediation with retired U.S. Magistrate Judge Kenneth J. Benson and reached an agreement in principle on key deal terms.<sup>25</sup> After the parties reached an agreement in principle on the merits, they reached agreement, with the help of Judge Benson, on attorneys' fees and costs. After the mediation, the parties continued to diligently negotiate a formal settlement agreement, and Northwest provided the Payment Advisor with the data necessary to calculate each Settlement Class Member's monetary award from the Settlement.<sup>26</sup> Given the substantial time and effort that Class Counsel expended in this case, the requested attorneys' fee award is absolutely reasonable.

Class Counsel expended 595.4 hours in the prosecution of this case and incurred a total aggregate lodestar of \$306,582.55<sup>27</sup>. The fee award represents a reasonable 2.3 multiplier over the actual time incurred. The multiplier is reasonable to account for the substantial risk incurred by Class Counsel in litigating this matter and achieving an excellent result on behalf of the Class.

## **2. Quality of Services Rendered**

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<sup>23</sup> Joint Decl. ¶9; Agreement ¶¶ 4, 15, 69.

<sup>24</sup> Joint Decl. ¶¶ 11-12; Agreement ¶¶ 20, 69.

<sup>25</sup> Joint Decl. ¶11 ; Agreement ¶ 19.

<sup>26</sup> Joint Decl. ¶¶ 12-14, 17.

<sup>27</sup> Carpenter Decl. ¶14; *See also*, Carpenter Decl. ¶10; Heller Decl. ¶16; Exhibit "A"; *See also* Carpenter Decl. ¶12; Exhibit 2.

Based on their years of experience in litigating similar overdraft fee cases, including participation in a full bench trial of similar claims in California federal court, Class Counsel had a substantial understanding of the issues presented in this case and were able to obtain a settlement that provides an outstanding result for the Class Members. The Settlement here is the direct product of the skill and hard work brought to bear by Class Counsel at every stage of the proceedings. Class Counsels' exemplary prosecution of this class action weighs strongly in favor of the proposed fee award.

Class Counsel's task was made all the more difficult by the fact that Northwest was represented throughout by very skilled opposing counsel and the fact that the bank had significant resources to enable them to litigate the case vigorously. Courts have repeatedly recognized that the caliber of the opposition faced by the plaintiff's counsel should be taken into consideration in assessing the quality of the performance of the plaintiff's counsel; and in this case, it supports approval of the requested fee<sup>29</sup>. *See, e.g., In re Marsh Erisa Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) (reasonableness of fee was supported by fact that defendants "were represented by first-rate attorneys who vigorously contested Lead Plaintiffs' claims and allegations.").

### **3. Results Achieved and Benefits to the Class**

Class Counsel achieved an exceptional result in this case. Northwest strongly denied liability, and challenged Plaintiff's ability to certify the class. Continued litigation of this lawsuit presented Plaintiffs with substantial legal risks of certifying the class, proving liability and defeating any appeals relating to liability, damages or class certification.

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<sup>29</sup> Carpenter Decl. ¶7.

The \$2.35 million Settlement Fund is an excellent recovery for the Settlement Class Members and is in line, proportionately, with settlements obtained in similar overdraft fee cases.

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Further, Settlement Class Members do not have to do anything at all to receive the Settlement benefits. Settlement Class Members will automatically receive their *pro rata* share of the Net Settlement Fund based on a thorough calculation of how much each individual Settlement Class Member was allegedly harmed by Northwest's posting practice at issue.

#### **4. Magnitude, Complexity and Uniqueness of the Litigation**

This case involved complex issues, further supporting fee requested. Even more than in a typical class action, which always involve complex issues and challenges, this case presented additional complexities. Class Counsel was required to overcome numerous substantive arguments raised by Northwest's Objection and subsequent effort to appeal the Court's ruling on same. Defendant's Preliminary Objections raised unique issues of first impression, including: determinations as to (1) whether the economic loss doctrine applies to private actions based on the catch-all provision of the Pennsylvania Unfair Trade Practices and Consumer Protection Law and (2) whether a consumer can pursue a private cause of action based on the catch-all provision of the Pennsylvania Unfair Trade Practices and Consumer Protection Law without offering testimony regarding reliance. The substantive findings on these in favor of the Class increased Defendant's potential exposure by expanding the class period consistent with the broader statute of limitations afforded actions under the Pennsylvania Unfair Trade Practices and Consumer Protection Law<sup>35</sup>.

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<sup>30</sup> Joint Decl.

<sup>35</sup> Carpenter Decl. ¶11.

Moreover, achieving the excellent result here required Class Counsel, with the help of their expert, to analyze damages, and to bring to bear their experience and skill in negotiating a strong settlement for the Settlement Class Members. Indeed, to be in a position to resolve this case, Class Counsel were required to conduct a thorough legal analysis of the various complex issues raised. The result achieved here would not have been possible but for the research and hard work of Class Counsel on these issues.

### **5. The Contingent Nature of the Fee**

From the outset of the case to the present, prosecution of this action has involved significant financial risk for Class Counsel. Class Counsel undertook this matter solely on a contingent basis, with no guarantee of recovery. The risks of a class action should not be viewed in retrospect, from the standpoint of a settlement, but as they existed at the outset of the litigation. In bringing this action, Class Counsel faced several risks: the risk of not obtaining class certification (or having the class subsequently decertified); the risk of not prevailing on the merits; and the risk of not establishing damages on behalf of the Class. Class Counsel incurred substantial risk that they would never be paid for their time or reimbursed for the costs they advanced for the Class.

Application of the Rule 1717 factors demonstrate that Class Counsel is entitled to the reasonable requested attorney fees' award of \$705,000.

#### **B. Similar Awards Have Been Made in Other Cases**

Finally, the fee requested here, which represents thirty percent (30%) of the non-reversionary Settlement Fund, is well within the range typically approved in similar class actions. *See, e.g., In re Chambers Development Securities Litigation*, 912 F. Supp. 852 (W.D. Pa. 1995) (noting common fee awards normally fall in the 20 to 30 percent range); *In re Sterling*

*Fin. Corp. Sec. Class Action*, MDL No. 1879, 2009 U.S. Dist. LEXIS 83224, at \*8, \*15 (E.D. Pa. Sept. 10, 2009) (awarding 30% in fees in a \$10.25 million settlement fund).

**V. CLASS COUNSEL IS ENTITLED TO REIMBURSEMENT OF THEIR COSTS**

In prosecuting and resolving this case on behalf of the Class, Class Counsel has incurred out-of-pocket costs of \$11,230.25 to date.<sup>36</sup> This includes costs for mediation, filing fees, computer research, postage, and travel<sup>37</sup>. These costs are reasonable and were advanced by Class Counsel for the benefit of the Class, and they should be reimbursed. Moreover, it should be noted that Class Counsel is not seeking reimbursement for internal costs such as in-house copies, fax, or phone charges, which are generally charged by counsel to paying clients.

**VI. THE COURT SHOULD AWARD A SERVICE AWARD TO PLAINTIFF**

Class representative service awards, also called incentive awards, are common in class actions. *See In re Bridgeport Fire Litig.*, 5 A.3d 1250, 1257-58 (Pa. Super. Ct. 2010). The purpose of such awards is to compensate class representatives “for the additional risk and inconvenience [class representatives] take in joining the lawsuit as named parties.” *In re Chambers Dev. Secs. Litig.*, 912 F. Supp. 852, 868 (W.D. Pa. 1995). In determining whether to grant service awards, courts have commonly relied on five factors:

- 1) the risk to the class representative in commencing suit, both financial and otherwise;
- 2) the notoriety and personal difficulties encountered by the class representative;
- 3) the amount of time and effort spent by the class representative;
- 4) the duration of the litigation and;
- 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

*In re Bridgeport Fire Litig.*, 5 A.3d at 1258 (citing *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995)).

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<sup>36</sup> Carpenter Decl. ¶13.

<sup>37</sup> Carpenter Decl. ¶13.

Application of these factors here demonstrates that the requested \$3,000 service award is appropriate under the circumstances here. Plaintiff risked her reputation and was exposed to liability for counterclaims. Plaintiff assisted Class Counsel in prosecuting this case, including providing factual background, reviewing pleadings and discovery, reviewing the settlement and discussing the settlement terms with Class Counsel, and communicating with Class Counsel to remain informed of the progress of the case. Plaintiff's efforts and involvement have benefitted the class as a whole. A service award of \$3,000 is well within, if not below, the amount of awards in similar cases. *See Lazy Oil Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 345 (W.D. Pa. 1997) (citing cases awarding service awards in the range of \$1,000 to \$5,000). The Court should award Plaintiff a service award in the amount of \$3,000.

## **VII. CONCLUSION**

Based on the foregoing, Plaintiffs respectfully request that the Court (1) award Class Counsel \$705,000 in attorneys' fees and \$11,230.25 as reimbursement of Class Counsel's litigation costs; and (2) award a service award to Plaintiff in the amount of \$3,000.

Dated: February 17, 2015



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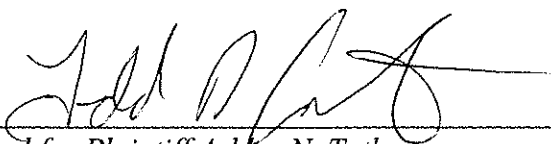


**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing First Amended Class Action Complaint has been served as follows upon Defendant's counsel of record:

**Via First Class U.S. Mail Delivery:**

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