

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE No. 1:09-MD-02036-JLK

**IN RE: CHECKING ACCOUNT
OVERDRAFT LITIGATION**

MDL No. 2036

**THIS DOCUMENT RELATES TO:
FOURTH TRANCHE ACTION**

Simmons, et al. v. Comerica Bank
N.D. Tex. Case No. 3:10-cv-326-0
S.D. Fla. Case No. 1:10-cv-22958

**JOINT DECLARATION OF ROBERT C. GILBERT, RUSSELL W. BUDD AND
JOSEPH G. SAUDER IN SUPPORT OF PLAINTIFFS' AND CLASS COUNSEL'S
MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT, AND APPLICATION
FOR SERVICE AWARDS, ATTORNEYS' FEES AND EXPENSES**

Robert C. Gilbert, Russell W. Budd, and Joseph G. Sauder declare as follows:

1. We are Settlement Class Counsel and Class Counsel, respectively, for Plaintiffs and the Settlement Class under the Settlement Agreement and Release with Comerica Bank ("Settlement" or "Agreement") that was preliminarily approved by this Court on November 15, 2013.¹ (DE # 3704). We submit this declaration in support of Plaintiffs' and Class Counsel's Motion for Final Approval of Class Settlement, and Application for Service Awards, Attorneys' Fees and Expenses. Unless otherwise noted, we have personal knowledge of the facts set forth in this declaration, and could testify competently to them if called upon to do so.

¹ All capitalized defined terms have the same meaning as defined in the Agreement attached as Exhibit A to the Motion for Final Approval.

2. After more nearly three years of litigation and settlement negotiations, Plaintiffs, Settlement Class Counsel and Comerica Bank entered into the Settlement under which Comerica Bank will pay (i) \$14,580,000 in cash to create a common fund for the benefit of the Settlement Class, plus (ii) the fees and costs of providing Notice to Settlement Class Members and associated fees and costs incurred in connection with administration of the Settlement. Under the Settlement, all identifiable Settlement Class Members who sustained a Positive Differential Overdraft Fee will automatically receive *pro rata* distributions from the Net Settlement Fund in proportion to the actual harm that each of them sustained.

3. The Action involved sharply opposed positions on several fundamental legal and factual issues, including: (i) whether Comerica Bank's relevant Account agreements expressly authorized it to engage in High-to-Low Posting; (ii) whether state law claims for relief were preempted; (iii) whether claims brought against Comerica Bank were subject to a contractually-abbreviated limitations period; (iv) whether Comerica Bank breached its duty of good faith and fair dealing when it engaged in High-to-Low Posting of its customers' Debit Card Transactions; (v) whether Comerica Bank's policies and practices involving High-to-Low Posting were unconscionable, constituted conversion and/or resulted in unjust enrichment; and (vi) the appropriate methodology for establishing damages on a class-wide basis and the amount of damages to be recovered.

4. Plaintiffs and Class Counsel maintain that the claims asserted in the Action are meritorious; that Plaintiffs and the certified class would establish liability and recover substantial damages if the Action proceeded to trial; and that the final judgment would be affirmed on appeal. Conversely, Comerica Bank argued that Plaintiffs' claims are unfounded and could not be maintained as a class action, denied any liability, and demonstrated that it will litigate its

defenses vigorously. Plaintiffs' ultimate success required them to prevail, in whole or in part, at *all* of these junctures, while Comerica Bank's success at any one of these junctures could have spelled defeat for Plaintiffs and the Settlement Class. Thus, continued litigation posed significant risks and countless uncertainties, as well as the time, expense, and delays associated with trial and appellate proceedings, particularly in the context of complex multi-district litigation.

5. In light of the risks, uncertainties and delays associated with continued litigation, the Settlement represents an outstanding achievement by providing guaranteed benefits to the Settlement Class in the form of direct cash compensation without further risks, delays or costs.

A. Background of the Litigation.

6. Plaintiffs sought monetary damages, restitution and declaratory relief from Comerica Bank, on behalf of themselves and all others similarly situated, who incurred Overdraft Fees as a result of Comerica Bank's practice of High-to-Low Posting of Debit Card Transactions. Plaintiffs alleged that Comerica Bank systemically engaged in High-to-Low Posting of Debit Card Transactions to maximize the Bank's Overdraft Fee revenues. According to Plaintiffs, Comerica Bank's practices violated the Bank's contractual and good faith duties, were substantively and procedurally unconscionable, and resulted in conversion and unjust enrichment.

7. Comerica Bank denied all of Plaintiffs' allegations of wrongdoing. The Bank consistently defended its conduct by, *inter alia*, highlighting language in the relevant Account agreements that it contended expressly advised its customers of and permitted the very High-to-Low Posting practices at issue. The Bank advanced additional defenses, including preemption, and that the operative Account agreements contain a contractually-abbreviated limitations period for bringing the claims at issue in the Action.

B. Class Counsel's Investigation.

8. Class Counsel devoted substantial time to investigating the potential claims against Comerica Bank. Class Counsel interviewed customers and potential plaintiffs to gather information about the Bank's conduct and its impact upon customers. This information was essential to Class Counsel's ability to understand the nature of Comerica Bank's conduct, the language of the Account agreements, and potential remedies.

C. The Course of Proceedings.

9. On February 17, 2010, Plaintiff Delphia Simmons commenced the Action against Comerica Bank, Case No. 3:10-cv-00326-O ("*Simmons*") in the United States District Court for the Northern District of Texas, alleging improper assessment and collection of Overdraft Fees and seeking, *inter alia*, monetary damages, interest, attorney's fees, restitution, and equitable relief.

10. On August 9, 2010, *Simmons* was transferred to this Court, where it was made part of *In Re: Checking Account Overdraft Litigation*, Case No. 1:09-md-02036-JLK.

11. On December 6, 2010, Plaintiffs Delphia Simmons and Patricia Matlage filed an Amended Class Action Complaint against Comerica Bank (DE # 990), alleging unfair assessment and collection of Overdraft Fees and seeking monetary damages, restitution, interest, attorney's fees, and equitable relief.

12. On January 20, 2011, Comerica Bank filed a motion to dismiss the Amended Class Action Complaint (DE # 1084). On February 22, 2011, Plaintiffs filed their opposition to that motion (DE # 1195), and on March 14, 2011, Comerica Bank filed its reply (DE # 1289). On March 21, 2011, the Court denied in part and granted in part Comerica Bank's motion to dismiss, dismissing Plaintiff's claims based for breach of the implied covenant of good faith and fair dealing under Texas and Michigan law (DE # 1306).

13. On April 21, 2011, Comerica Bank filed an answer to the Amended Class Action Complaint (DE # 1359), denying any and all wrongdoing and liability and asserting various affirmative defenses, including that Comerica Bank's actions complied with all applicable laws and regulations.

14. On June 3, 2011, Comerica Bank filed a Joinder in JPMorgan Chase Bank, N.A.'s Motion, Based on Recently Decided Eleventh Circuit Authority, to Dismiss on Grounds of Preemption Pursuant to Fed. R. Civ. P. 12(c) and on Further Reconsideration of its Earlier Motion Pursuant to Fed. R. Civ. P. 12(b)(6), or, in the Alternative for Certification Pursuant to 28 U.S.C. § 1292(b) (DE # 1568).

15. On July 13, 2011, the Court issued an Omnibus Order Denying Defendants' Motions for Reconsideration and Alternative Request for Certification to the Eleventh Circuit (DE # 1725).

16. On July 27, 2011, the Parties entered into a Stipulated Protective Order relating to the production of documents and information (DE # 1774). During the extensive discovery that followed, Comerica Bank produced over 300,000 pages of documents (in addition to voluminous data files and spreadsheets). Class Counsel created a document review team whose task it was to review and analyze the documents. To make the review and litigation more efficient, Class Counsel established coding procedures for electronic review of the documents, and team members remained in constant contact with each other to ensure that all counsel became aware of significant emerging evidence in real time.

17. During the course of discovery, Class Counsel took the depositions of approximately nine Comerica Bank employees, and two of its expert witnesses. Comerica Bank

took the depositions of Plaintiffs, as well as of Plaintiffs' data expert. Class Counsel also served and responded to interrogatories and requests for admission.

18. On January 6, 2012, Plaintiffs moved for class certification (DE # 2384). On February 23, 2012, Comerica Bank filed its opposition to class certification (DE # 2490), and on March 22, 2012, Plaintiffs filed their reply (DE # 2583).

19. On February 21, 2012, Comerica Bank filed a motion for summary judgment (DE # 2488). On February 24, 2012, Comerica Bank moved to defer consideration of class certification pending resolution of its summary judgment motion (DE # 2506). On April 3, 2012, the Court denied Comerica Bank's motion for summary judgment, and denied the motion to defer (DE # 2614).

20. On March 2, 2012, Comerica Bank filed a motion to strike the declaration of Arthur Olsen submitted in support of Plaintiffs' motion for class certification (DE # 2523). Plaintiffs opposed this motion on March 21, 2012 (DE # 2586), and Comerica Bank replied on April 2, 2012 (DE # 2611). On June 29, 2012, the Court denied the motion to strike Mr. Olsen's declaration (DE # 2801).

21. On March 21, 2012, Plaintiffs moved to strike Comerica Bank's experts (DE # 2587). Defendant responded on June 5, 2012 (DE # 2742) and Plaintiffs replied on June 13, 2012 (DE # 2757). On July 2, 2012 the Court denied Plaintiffs' motion (DE # 2807).

22. The Court heard oral argument on class certification on July 18, 2012. On August 10, 2012, the Court issued an Order granting class certification (DE # 2875).

23. On August 24, 2012, Comerica Bank filed in the United States Court of Appeals for the Eleventh Circuit a Fed. R. Civ. P. 23(f) petition for leave to appeal the Order granting

class certification. Plaintiff's opposed the petition, and the Eleventh Circuit denied the petition on December 13, 2012.

24. On December 26, 2012, United States Court of Appeals for the Ninth Circuit issued its opinion in *Gutierrez v. Wells Fargo Bank*, 704, F.3d 712 (9th Cir. 2012). On January 3, 2013, Comerica Bank filed a motion in the Eleventh Circuit seeking reconsideration of the denial of its petition for leave to appeal based on the Ninth Circuit's decision in *Gutierrez*. That motion was denied on February 12, 2013.

25. On March 5, 2013, Comerica Bank filed a motion for judgment on the pleadings and alternative request for certification of an interlocutory appeal (DE # 3302). That motion was fully briefed on April 8, 2013 (DE # 3388, 3419) and was pending at the time the Parties reached the Settlement.

26. On May 23, 2013, Plaintiffs served Comerica Bank with their expert report regarding damages.

D. Settlement Negotiations.

27. In early 2012, Settlement Class Counsel and counsel for Comerica Bank initiated preliminary settlement discussions. The preliminary discussions resulted in the scheduling of formal mediation on May 23, 2012, with Professor Eric Green of Resolutions, LLC. When the formal mediation conference did not result in an agreement to settle, Settlement Class Counsel and Comerica Bank agreed to continue direct settlement discussions thereafter.

28. On July 12, 2013, Settlement Class Counsel and Comerica Bank participated in a settlement conference. Following further discussions, they executed a Summary Agreement memorializing the material terms of the Settlement on August 7, 2013. On August 8, 2013, Settlement Class Counsel and Comerica Bank filed a Joint Notice of Settlement (DE # 3592), and requested a suspension of deadlines pending the drafting and execution of the Agreement;

the Court granted the request on August 13, 2013 (DE # 3600). Following further negotiations and discussions, the Parties resolved all remaining issues, culminating in the execution of the Agreement in late October 2013.

E. Settlement Recovery.

29. The Settlement required Comerica Bank to deposit \$14,580,000 into the Escrow Account within fourteen (14) days following entry of the Preliminary Approval Order. Agreement ¶ 85. The Bank timely deposited that sum, creating the Settlement Fund. The Settlement Fund will be used to: (i) pay all Automatic Distributions of payments to eligible members of the Settlement Class; (ii) pay all Court-ordered awards of attorneys' fees, costs and expenses of Class Counsel; (iii) pay all Court-ordered service awards to the Class Representative Plaintiffs; (iv) distribute any residual funds as set forth in paragraph 102 of the Agreement; (v) pay all Taxes pursuant to paragraph 87 of the Agreement; (vi) pay any costs of Settlement Administration other than those to be paid by Comerica Bank pursuant to paragraph 65 of the Agreement; and (vii) pay any additional fees, costs and expenses not specifically enumerated in paragraph 88 of the Agreement, subject to approval of Settlement Class Counsel and Comerica Bank. *Id.* at ¶ 88. In addition to the \$14,580,000 Settlement Fund, Comerica Bank is responsible for paying all costs and fees of the Settlement Administrator and Notice Administrator incurred in connection with the administration of the Notice Program and Settlement administration. *Id.* at ¶¶ 65, 81.

30. All identifiable Settlement Class Members who experienced a Positive Differential Overdraft Fee will receive *pro rata* distributions from the Net Settlement Fund, provided they do not opt-out of the Settlement.² Agreement Section XII. The Positive

² The Net Settlement Fund is equal to the Settlement Fund, plus interest earned (if any), less the

Differential Overdraft Fee analysis determines, among other things, which Comerica Bank Account holders were assessed additional Overdraft Fees that would not have been assessed if the Bank had used an alternative posting sequence or method for posting Debit Card Transactions other than High-to-Low Posting, and how much in additional Overdraft Fees those Account holders paid. The calculation involves a multi-step process that is described in detail in the Agreement. *Id.* at ¶ 91.

31. Settlement Class Members do not have to submit claims or take any other affirmative step to receive relief under the Settlement. The amount of their damages has been determined by Settlement Class Counsel and their expert through analysis of Comerica Bank's electronic data. Agreement Section XI. As soon as practicable after Final Approval, but no later than 90 days from the Effective Date (Agreement ¶ 37), the Settlement Administrator will calculate and distribute the Net Settlement Fund, on a pro rata basis, to all Settlement Class Members who had a Positive Differential Overdraft Fee and did not timely opt out of the Settlement. Agreement Section XII.

32. Payments to Settlement Class Members who are Current Account Holders will be made by crediting such Settlement Class Members' Accounts, and notifying them of the credit. Agreement ¶ 98. Comerica Bank will then be entitled to a reimbursement for such credits from the Net Settlement Fund. *Id.* at ¶ 99. Past Account Holders (and any Current Account Holders

amount of Court-awarded attorneys' fees and costs to Class Counsel, the amount of Court-awarded service awards to the Plaintiffs, a reservation of a reasonable amount of funds for prospective costs of Settlement administration that are not Comerica Bank's responsibility pursuant to paragraph 88 of the Agreement, and any other costs and/or expenses incurred in connection with the Settlement that are not specifically enumerated in paragraph 94 that are provided for in the Agreement and have been approved by Settlement Class Counsel and Comerica Bank. Agreement ¶ 94.

whose Accounts cannot feasibly be automatically credited) will receive their payments by checks mailed by the Settlement Administrator. *Id.* at ¶ 100.

33. Any uncashed or returned checks will remain in the Settlement Fund for one year from the date the first distribution check is mailed, during which time the Settlement Administrator will make reasonable efforts to effectuate delivery of the Settlement Fund Payments. Agreement ¶ 101.

34. Any residual funds remaining in the Settlement Fund one year after the first Settlement Fund Payments are mailed will be distributed pursuant to Section XIII of the Agreement. Agreement ¶ 102.

F. Class Release.

35. In exchange for the benefits conferred by the Settlement, all Settlement Class Members who do not opt out will be deemed to have released Comerica Bank from claims related to the subject matter of the Action. The detailed release language is found in Section XIV of the Agreement. Agreement ¶¶ 103-106.

G. Settlement Notice.

36. The Notice Program (Agreement Section VIII) was designed to provide the best notice practicable, and was tailored to take advantage of the information Comerica Bank had available about Settlement Class Members. Agreement ¶¶ 71-82. Comerica Bank has and will pay the fees and costs associated with the Notice Program. *Id.* at ¶¶ 65, 81.

37. The Notice Program was reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the Action, the terms of the Settlement, Class Counsel's Fee Application and request for Service Awards, and their rights to opt-out of the Settlement Class or object to the Settlement. The Notices and Notice Program constituted sufficient notice to all persons entitled to notice. The Notices and Notice Program satisfied all applicable

requirements of law, including, but not limited to, Federal Rule of Civil Procedure 23 and the constitutional requirement of due process.

38. The Notice Program was comprised of three (3) parts: (1) direct mail postcard notice (“Mailed Notice”) to all identifiable Settlement Class Members; (2) publication notice (“Published Notice”) designed to reach those Settlement Class Members for whom direct mail notice was not possible; and (3) a “Long Form” notice with more detail than the direct mail or publication notices, that has been and remains available on the Settlement Web Site and via mail upon request. Agreement ¶ 75.

39. All forms of Notice to the Settlement Class included, among other information: a description of the Settlement; a date by which Settlement Class Members may exclude themselves from or “opt out” of the Settlement Class; a date by which Settlement Class Members may object to the Settlement; the date on which the Final Approval Hearing will occur; and the address of the Settlement Website at which Settlement Class Members may access the Agreement and other related documents and information. Agreement ¶¶ 71-73.

40. In addition to the information described above, the “Long-Form” notice also described the procedure Settlement Class Members must use to opt out of the Settlement or to object to the Settlement, and/or to Class Counsel’s Fee Application and/or request for Service Awards. All opt-outs and objections must be postmarked by the Opt-Out Deadline. Agreement ¶ 74.

a. The Mailed Notice Program

41. The Mailed Notice Program was administered and timely completed by the Notice Administrator in accord with paragraphs 76-78 of the Agreement.

b. The Published Notice Program

42. The Published Notice Program was administered and timely completed by the Notice Administrator in accord with paragraph 79 of the Agreement.

c. The Settlement Website and the Toll-Free Settlement Line

43. The Notice Administrator timely established and has maintained the Settlement Website as a means for Settlement Class Members to obtain notice of, and information about, the Settlement. Agreement ¶¶ 60, 71. The Settlement Website includes hyperlinks to the Settlement, the “Long-Form” notice, the Preliminary Approval Order, and such other documents as Settlement Class Counsel and counsel for Comerica Bank agreed to post on the Settlement Website. *Id.* These documents will remain on the Settlement Website at least until Final Approval. *Id.*

44. The Notice Administrator also timely established and has maintained an automated toll-free telephone line for Settlement Class Members to call with Settlement-related inquiries, and answer the questions of Settlement Class Members who call with or otherwise communicate such inquiries. Agreement ¶ 70(d).

H. Settlement Termination

45. Except as provided in paragraphs 102(b) of the Agreement, either Party may terminate the Settlement if it is rejected or materially modified by the Court or an appellate court. Agreement ¶ 112. Comerica Bank also has the right to terminate the Settlement if the number of Settlement Class Members who timely opt out of the Settlement Class equals or exceeds the number or percentage specified in the separate letter executed concurrently with the Agreement by the Bank’s counsel and Settlement Class Counsel. *Id.* at ¶ 113. The number or percentage will be confidential except to the Court, who upon request will be provided with a copy of the letter agreement for *in camera* review. *Id.*

I. Service Awards, Attorneys' Fees and Costs

46. Class Counsel are entitled to request, and Comerica Bank will not oppose, Service Awards of \$10,000 for each of the Class Representatives. Agreement ¶ 110. If the Court approves them, the Service Awards will be paid from the Settlement Fund, and will be in addition to any other relief to which the Plaintiffs are entitled under the terms of the Settlement. *Id.* The awards will compensate the Class Representatives for their time and effort in the Action, and for the risks they undertook in prosecuting the Action against Comerica Bank.

47. Class Counsel are entitled to request, and Comerica Bank will not oppose, an award of attorneys' fees equal to thirty percent (30%) of the \$14,580,000 Settlement Fund, plus reimbursement of certain litigation costs and expenses. Agreement ¶ 107. The Parties negotiated and reached this agreement regarding attorneys' fees and costs only after reaching agreement on all other material terms of the Settlement. *Id.* at ¶ 111.

J. Considerations Supporting Settlement.

1. The Settlement is the Product of Good Faith, Informed and Arm's Length Negotiations.

48. Settlement negotiations were informed by the experience of counsel in the litigation, certification, trial and settlement of nationwide class action cases. In particular, Class Counsel had the benefit of years of experience and a familiarity with the facts of this Action, as well as numerous other cases involving similar claims.

49. As detailed above, Class Counsel conducted substantial discovery and litigation relating to the Plaintiffs' claims and the Bank's anticipated defenses. Class Counsel's analysis enabled them to gain an understanding of the legal and factual issues in the Action, and prepared them for well-informed settlement negotiations.

50. Class Counsel were well-positioned to evaluate the strengths and weaknesses of Plaintiffs' claims, as well as the appropriate basis upon which to settle them, as a result of the litigation and settlement of similar cases reached within and outside of MDL 2036.

51. Class Counsel also gained a thorough understanding of the practical and legal issues they would continue to face litigating these claims based, in part, on similar claims challenging Wells Fargo's high-to-low posting practices prosecuted in *Gutierrez v. Wells Fargo Bank, N.A.*, 730 F. Supp. 2d 1080 (N.D. Cal. 2010). Wells Fargo appealed the final judgment in *Gutierrez* to the United States Court of Appeals for the Ninth Circuit, which affirmed in part and reversed in part and remanded for further proceedings. *See Gutierrez v Wells Fargo Bank, N.A.*, 704 F.3d 712 (9th Cir. 2012).

2. Risks Associated with Trial Favor Settlement.

52. While Class Counsel are confident in the strength of Plaintiffs' case, we are also pragmatic in our awareness of the various defenses available to Comerica Bank, and the risks inherent in continued litigation. While Plaintiffs avoided dismissal on various theories advanced at the motion to dismiss stage and obtained class certification, the ultimate success of Plaintiffs' claims would turn on these and other questions that were certain to arise in the context of summary judgment, trial, and post-judgment appellate review.

53. Protracted litigation carries inherent risks and inevitable delay. Under the circumstances, Class Counsel determined that the Settlement outweighs the risks of continued litigation.

3. The Settlement Amount is Reasonable Given the Range of Possible Recovery.

54. In reaching the Settlement, Settlement Class Counsel were forced to consider the potential impact of Comerica Bank's various defenses, in addition to all of the other litigation risks created in this complex multidistrict proceeding.

55. The \$14,580,000 cash recovery obtained through the Settlement represents approximately thirty-five percent (35%) of Plaintiffs' and Settlement Class Members' most probable damages recovery, *if* Plaintiffs and the certified class were successful in all respects through trial and on plenary appeal. On the other hand, if Comerica Bank succeeded in enforcing its contractually-abbreviated limitation period, the total damages recoverable by the certified class would have decreased to approximately \$11,000,000.

56. Given these risks, the \$14,580,000 cash recovery obtained through the Settlement is outstanding. Comerica Bank's agreement to pay the fees, costs and expenses associated with the Notice Program and administration of the Settlement – which are quite substantial – further enhances the recovery, as such amounts will not reduce the amount available for distribution to eligible Settlement Class Members.

57. The recovery achieved by this Settlement must be measured against the fact that any recovery by Plaintiffs' and Settlement Class Members through continued litigation could only have been achieved if: (i) Plaintiffs and the certified class succeeded in defeating the Bank's pending motion for judgment on the pleadings (DE # 3302); (ii) Plaintiffs and the certified class defeated summary judgment; (iii) Plaintiffs and the certified class established liability and recovered damages at trial; and (iv) the final judgment was affirmed on appeal. The Settlement is an extremely fair and reasonable recovery for the Settlement Class in light of Comerica Bank's

defenses, and the challenging and unpredictable path of litigation that Plaintiffs and the Settlement Class would have faced absent the Settlement.

4. The Complexity, Expense, and Duration of Ongoing Litigation Favors Settlement.

58. The Settlement is the best vehicle for approximately 190,000 Settlement Class Members to receive the relief to which they are entitled in a prompt and efficient manner. Ongoing litigation would involve substantial, expensive fact and expert discovery, lengthy additional pretrial proceedings in this Court and the appellate courts and, ultimately, a trial and appeal. Absent the Settlement, the Action would likely continue for two or three more years.

5. The Factual Record Is Sufficiently Developed to Enable Plaintiffs and Settlement Class Counsel to Make a Reasoned Judgment Concerning This Settlement.

59. The Action was settled with the benefit of extensive briefing and decisions from this Court and the Eleventh Circuit involving Comerica Bank and other banks involved in MDL 2036. Class Counsel also had the benefit of 300,000 pages produced by Comerica Bank, as well as deposition testimony from fourteen fact and expert witnesses. Review of those documents and deposition testimony positioned Settlement Class Counsel to evaluate with confidence the strengths and weaknesses of Plaintiffs' and the certified class' claims and the prospects for success at summary judgment, at trial, and on appeal. Settlement Class Counsel, with the benefit of their experience in MDL No. 2036, were well positioned to evaluate with confidence the strengths and weaknesses of Plaintiffs' claims and Comerica Bank's defenses.

6. Plaintiffs Faced Significant Obstacles to Prevailing.

60. Protracted litigation involves risks, delay and expenses; this case is no exception. While Class Counsel believe that Plaintiffs had a solid case against Comerica Bank, we are mindful that Comerica Bank advanced significant defenses that we would have been required to

overcome in the absence of the Settlement. This Action involved several major litigation risks, including preemption and the contractually-abbreviated limitations period for bringing claims set forth in Comerica Bank's Account agreements.

61. Apart from the risks, continued litigation would have involved substantial delay and expense, which further counsels in favor of Final Approval. Although the Court previously certified a class for litigation purposes in the Action (DE # 2875), Plaintiffs and the certified class would still have faced summary judgment, a trial on the merits, and a post-judgment appeal. The uncertainties and delays from this process would have been significant. Given the myriad risks attending these claims, as well as the certainty of substantial delay and expense from ongoing litigation, the Settlement cannot be seen as anything except a fair compromise.

7. **The Benefits Provided by the Settlement Are Fair, Adequate and Reasonable Compared to the Range of Possible Recovery.**

62. This Settlement provides reasonable benefits to the Settlement Class. Class Counsel's expert's analysis of Comerica Bank's transactional data showed that the most probable damages Plaintiffs and the Settlement Class could reasonably have anticipated recovering at a trial in the Action was \$41,324,779. Through Settlement, Plaintiffs and the Settlement Class Members have achieved a recovery of approximately thirty-five percent (35%) of those damages without further risks or delays. If Comerica Bank succeeded in enforcing its contractually-abbreviated limitation period, the total damages recoverable by the certified class would have decreased to approximately \$11,000,000.

63. The \$14,580,000 cash recovery obtained through this Settlement is an extremely fair and reasonable recovery to the Settlement Class in light of Comerica Bank's merits defenses, as well as the challenging, unpredictable path of litigation that Plaintiffs would otherwise have continued to face in the trial and appellate courts.

64. The Automatic Distribution process further supports Final Approval. All Settlement Class Members who experienced a Positive Differential Overdraft Fee will receive their cash benefits automatically, without needing to fill out any claim forms – or indeed to take any affirmative steps whatsoever.

8. The Opinions of Class Counsel, the Plaintiffs, and Absent Class Members Favor Approval of the Settlement.

65. Class Counsel believe this Settlement represents an excellent result in the face of extraordinary risks, and represents the best vehicle for Settlement Class Members to receive the relief to which they are entitled in a prompt and efficient manner.

66. The recovery achieved by this Settlement must be measured against the fact that any recovery by Plaintiffs and Settlement Class Members through continued litigation could only have been achieved if (i) Plaintiffs and the certified class succeeded in defeating the Bank's pending motion for judgment on the pleadings (DE # 3302); (ii) Plaintiffs and the certified class defeated summary judgment; (iii) Plaintiffs and the certified class established liability at trial; (iv) Plaintiffs and the certified class recovered damages at trial under our theory of the case; and (v) the final judgment was affirmed on appeal. Given the extraordinary obstacles that Plaintiffs faced in the litigation, this recovery is a significant achievement by any objective measure.

67. To date, there has been virtually no opposition to the Settlement. As of February 18, 2014, only three (3) Settlement Class Members had requested to be excluded from the Settlement Class. As of the same date, there were no objections to the Settlement.

68. Based on these and other reasons, we are of the opinion that the Settlement is deserving of Final Approval.

K. Service Awards.

69. Pursuant to the Settlement, Class Counsel request, and Comerica Bank does not oppose, Service Awards of \$10,000 for each of the two Class Representatives. Agreement ¶ 110. If the Court approves them, the Service Awards will be paid from the Settlement Fund, and will be in addition to any relief to which the Class Representatives are entitled under the terms of the Settlement. *Id.* These awards will compensate the Class Representatives for their time and effort and the risks they undertook in prosecuting the Action.

70. Service awards compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation. Courts, including this Court, have found service awards to be an efficient and productive way to encourage members of a class to become class representatives.

71. The factors for determining a service award include: (1) the actions the class representatives took to protect the interests of the class; (2) the degree to which the class benefited from those actions; and (3) the amount of time and effort the class representatives expended in pursuing the litigation.

72. The above factors, as applied to this Action, demonstrate the reasonableness of Service Awards to the two Class Representatives. The Class Representatives 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 (i.e., monthly account statements and account agreements), and (3) appearing for lengthy depositions taken by Comerica Bank's counsel. In so doing, the Class Representatives were integral to forming the theory of the case. The Class Representatives not only devoted time and effort to the litigation, but the end result of their efforts, and those of Class Counsel, conferred a substantial benefit on the Settlement Class.

73. If the Court approves them, the total Service Awards will be \$20,000. This amount represents less than 0.0014% of the Settlement Fund, a ratio that falls well below the range of reasonable service awards.

L. Attorneys' Fees and Expenses.

74. Pursuant to the Settlement, Class Counsel request that the Court award attorneys' fees of thirty percent (30%) of the \$14,580,000 Settlement Fund, plus reimbursement of \$361,026.13 representing certain litigation costs and expenses we incurred in the prosecution and settlement of the Action. Comerica Bank agreed not to oppose our request for such fees and expenses. We negotiated and reached this agreement regarding attorneys' fees and expenses only after reaching agreement on all other material terms of this Settlement.

75. The Court-approved Notice disseminated to the Settlement Class indicated that Class Counsel intended to request a fee equal to thirty percent (30%) of the \$14,580,000 common fund created through our efforts, plus reimbursement of litigation costs and expenses.

1. The Claims Against Comerica Bank Required Substantial Time and Labor.

76. Prosecuting and settling the claims in the Action demanded considerable time and labor, making this fee request reasonable. Throughout the pendency of the Action, the organization of Class Counsel ensured that we were engaged in coordinated, productive work to maximize efficiency and minimize duplication of effort.

77. Class Counsel devoted substantial time to investigating the claims of potential plaintiffs against Comerica Bank. We interviewed Comerica Bank customers and potential plaintiffs to gather information about Comerica Bank's conduct and its effect on consumers. This information was essential to our ability to understand the nature of Comerica Bank's conduct, the language of the account agreements at issue, and potential remedies.

78. Class Counsel also expended significant resources researching and developing the legal theories and arguments presented in our pleadings and motions, and in opposition to Comerica Bank's motions, before this Court and the Eleventh Circuit.

79. Substantial time and resources were also dedicated to conducting discovery. Class Counsel took the depositions of approximately nine Comerica Bank employees, and two of its expert witnesses. Comerica Bank took the depositions of Plaintiffs, as well as of Plaintiffs' data expert. Class Counsel also served and responded to interrogatories and requests for admission.

80. Settlement negotiations consumed further time and resources. A mediation session was held in Boston in 2012 that required substantial preparation. Direct settlement discussions and negotiations during 2013 required substantial additional time and effort. Even after we reached an agreement in principle, detailed negotiations and discussions ensued regarding specific terms of the Agreement. This work consumed a significant amount of time.

81. All told, our steadfast and coordinated work paid dividends for the Settlement Class. Each of the above-described efforts was essential to achieving the Settlement currently before the Court. Taken together, the time and resources we devoted to prosecuting and settling this Action support the fee we are now seeking.

2. The Issues Involved Were Novel and Difficult, and Required the Exceptional Skill of a Talented Group of Attorneys.

82. The Court has regularly witnessed and commented upon the high quality of our legal work, which conferred a significant benefit on the Settlement Class in the face of numerous litigation obstacles. It required the acquisition and analysis of substantial factual information and complex legal issues. Moreover, the management of this very large MDL, including the Action

against Comerica Bank, among others, presented challenges that many law firms are simply not able to meet.

83. Indeed, litigation of a case like this requires counsel highly trained in class action law and procedure as well as the specialized issues these cases present. Class Counsel possess these attributes, and their participation on the team added value to the representation of this Settlement Class of approximately 190,000 Account holders.

84. The record before the Court shows that the Action involved a wide array of complex and novel challenges. We met every challenge, at every juncture.

85. In assessing the quality of representation by Class Counsel, the Court also should consider the quality of Comerica Bank's counsel. Comerica Bank was represented by extremely able and diligent attorneys, led by Kenneth C. Johnston of Kane Russell Coleman & Logan, PC. Mr. Johnston and his colleagues were worthy, highly competent adversaries.

3. Class Counsel Achieved a Successful Result.

86. The Settlement we achieved is excellent in light of the hurdles we faced. Instead of facing additional years of costly and uncertain litigation, all Settlement Class Members who experienced a Positive Differential Overdraft Fee and do not opt-out will receive distributions under the Settlement. Moreover, the Settlement Fund will not be diminished by the substantial fees and expenses associated with the Notice Program and Settlement administration; all such fees and expenses have been and will continue to be borne separately by Comerica Bank. Furthermore, payments to eligible Settlement Class Members will be forthcoming automatically, through direct deposit for Current Account Holders or checks for Past Account Holders. The Settlement represents an excellent result by any measure.

4. The Claims Against Comerica Bank Entailed Considerable Risk.

87. Prosecuting the Action was risky from the outset. Comerica Bank asserted that the relevant Account agreements expressly authorized it to engage in High-to-Low Posting, that Plaintiffs' state law claims for relief were preempted, and that the claims brought against it in this case were subject to a contractually-abbreviated limitations period. If the Bank were successful in their defense against the Plaintiffs and putative class members, this litigation would have ground to a halt and this Settlement would never have been achieved.

88. Each of these risks, by itself, could have impeded Plaintiffs' and the putative class's successful prosecution of these claims at trial and on appeal. Together, they clearly demonstrate that Plaintiffs' claims against Comerica Bank were far from a "slam dunk" and that, in light of all the circumstances, the Settlement achieves an excellent class-wide result.

5. Class Counsel Assumed Substantial Risk to Pursue the Action on a Pure Contingency Basis.

89. Class Counsel prosecuted the Action on a contingent fee basis. In undertaking to prosecute this complex action on that basis, we assumed a significant risk of nonpayment or underpayment. That risk favors awarding the requested attorneys' fees.

90. Public policy concerns – especially ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs whose individual claims would defy vindication – further support the requested attorneys' fees.

91. The progress of the Action to date shows the inherent risk we assumed in taking this case on a contingency fee basis. Despite our ongoing effort in litigating the Action for more than three years, we remain completely uncompensated for the substantial time and expenses incurred in this Action. There can be no dispute that the Action entailed substantial risk of nonpayment.

6. The Requested Fee Comports with Customary Fees Awarded in Similar Cases.

92. The fee requested here matches the fees typically awarded in similar cases. As numerous decisions have recognized, a fee award of thirty percent (30%) of a common fund is well within the range of a customary fee. The requested fee also falls within the range of awards in other MDL 2036 settlements approved by this Court, as well as many other cases brought in this Circuit and District.

7. Other Factors Support Approving Class Counsel's Fee Request.

93. Other factors also support granting our fee request. As noted above, the time and expense demands on us were considerable. Moreover, our fee request is firmly rooted in the economics involved in prosecuting a class action. Without adequate compensation and financial reward, cases such as this simply could not be pursued.

8. Reimbursement of Certain Costs and Expenses.

94. Class Counsel also respectfully request reimbursement of \$361,026.13, representing limited out-of-pocket costs and expenses we necessarily incurred in connection with the prosecution of the Action and the Settlement. These costs and expenses are comprised of: (1) \$317,725.64 in fees and expenses incurred for experts, principally Arthur Olsen, whose services were critical in determining the damages for the Settlement Class, in identifying Settlement Class Members, and in allocating the Settlement Fund; (2) \$36,725.49 in court reporter fees and transcripts; and (3) \$6,575.00 in mediator's fees and expenses. These costs and expenses are recorded in the books and records maintained by Plaintiffs' Coordinating Counsel, and were reasonably and necessarily incurred in furtherance of our prosecution of the Action and the Settlement.

95. We have limited the categories of expenses for which we are seeking reimbursement to those enumerated above. We are not seeking reimbursement for many thousands of dollars in other expenses, including (but not limited to) travel expenses.

* * *

I declare under penalty of perjury of the laws of Florida and the United States that the foregoing is true and correct, and that this declaration was executed in Miami, Florida, on February 19, 2014.

/s/ Robert C. Gilbert
Robert C. Gilbert

I declare under penalty of perjury of the laws of Texas and the United States that the foregoing is true and correct, and that this declaration was executed in Dallas, Texas, on February 19, 2014.

/s/ Russell W. Budd
Russell W. Budd

I declare under penalty of perjury of the laws of Pennsylvania and the United States that the foregoing is true and correct, and that this declaration was executed in Haverford, Pennsylvania on February 19, 2014.

/s/ Joseph G. Sauder
Joseph G. Sauder