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

PLAINTIFFS' AND CLASS COUNSEL'S MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT, AND APPLICATION FOR SERVICE AWARDS, ATTORNEYS' FEES AND EXPENSES, AND INCORPORATED MEMORANDUM OF LAW

After more than three years of litigation, Settlement Class Counsel negotiated the Settlement Agreement and Release attached as Exhibit A ("Agreement" or "Settlement") with Defendant Comerica Bank ("Comerica Bank").[1] The Settlement – which consists of the Bank's payment of $14,580,000 in cash, plus all fees and costs associated with the Notice Program and administration of the Settlement – is an outstanding achievement that will provide immediate benefits to the Settlement Class without further risks, delays and costs. *See* Joint Declaration of Robert C. Gilbert, Russell W. Budd and Joseph G. Sauder ¶¶ 5, 56, 63, attached as Exhibit B ("Joint Decl."). The Settlement is fair, adequate and reasonable, and represents a "very impressive" result, in the opinion of one nationally recognized expert. *See* Declaration of Professor Brian T. Fitzpatrick ¶ 17 attached as Exhibit C ("Fitzpatrick Decl.").

[1] All capitalized defined terms used herein have the same meanings ascribed in the Agreement.

Plaintiffs and Class Counsel now seek Final Approval of the Settlement. Based on the controlling legal standards and supporting facts, Final Approval is clearly warranted. In addition, Class Counsel respectfully request that the Court award Service Awards to the Class Representative Plaintiffs, whose willingness to represent the Settlement Class and participation in the Action helped make possible the Settlement. Finally, Class Counsel respectfully request that the Court award attorneys' fees equal to thirty percent (30%) of the Settlement Fund to compensate us for our work in achieving the Settlement, and approve reimbursements of certain expenses incurred in prosecuting the Action and in connection with the Settlement.

I. INTRODUCTION

The Action involved sharply opposed positions on several fundamental legal questions. Plaintiffs sued on behalf of themselves and all others similarly situated who incurred Overdraft Fees as a result of Comerica Bank's 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 to the Settlement Class, were substantively and procedurally unconscionable, and resulted in conversion and unjust enrichment. Comerica Bank consistently argued 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 in this case were subject to a contractually-abbreviated limitations period.

Preliminary settlement discussions began in early 2012. Although the initial mediation session in May 2012 was unsuccessful, Settlement Class Counsel and Comerica Bank subsequently resumed direct settlement discussions. In July 2013, Settlement Class Counsel and

Comerica Bank participated in a settlement conference. As a result of those efforts, Settlement Class Counsel and Comerica Bank reached an agreement in principle in August 2013. Following months of further discussions and drafting, the Parties entered into the Agreement in October 2013. The Court entered the Preliminary Approval Order on November 15, 2013, and Notice was subsequently disseminated to the Settlement Class.

Under the Settlement, all Settlement Class Members who sustained a Positive Differential Overdraft Fee and do not opt-out will automatically receive their *pro rata* share of the Net Settlement Fund. There are no claims forms to fill out, and Settlement Class Members will not be asked to prove that they were damaged as a result of the Bank's High-to-Low Posting. Instead, Settlement Class Counsel and their expert used available Comerica Bank data to determine which Comerica Bank Account Holders were adversely affected by High-to-Low Posting, and applied the formula detailed in paragraph 91 of the Agreement to calculate each Settlement Class Member's damages under the Settlement.

A testament to the reasonableness and fairness of the Settlement is the magnitude of the Settlement Fund. Settlement Class Counsel negotiated a $14,580,000 cash payment, which is remarkable given that Comerica Bank asserted – and would continue to assert in the absence of this Settlement – 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. In the face of that risk alone, the $14,580,000 recovery secured through this Settlement clearly merits Final Approval. In addition to the $14,580,000 Settlement Fund, Comerica Bank agreed to pay all fees and costs incurred in connection with the Notice Program and administration of the Settlement, further increasing the recovery under the Settlement.

Plaintiffs and Class Counsel respectfully request that the Court: (1) grant Final Approval to the Settlement; (2) certify for settlement purposes the Settlement Class, pursuant to Rule 23(b)(3) and (e) of the Federal Rules of Civil Procedure; (3) appoint as Class Representatives the Plaintiffs listed in paragraph 48 of the Agreement; (4) appoint as Class Counsel and Settlement Class Counsel the law firms and attorneys listed in paragraphs 29 and 57 of the Agreement, respectively; (5) approve Service Awards to the Plaintiffs; (6) award Class Counsel attorneys' fees and reimbursement of certain expenses pursuant to Rule 23(h) of the Federal Rules of Civil Procedure; and (7) enter Final Judgment dismissing the Action with prejudice.

II. MOTION FOR FINAL APPROVAL

A. Procedural History

On February 17, 2010, Plaintiff Delphia Simmons commenced this 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. Joint Decl. ¶ 9. 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. *Id.* at ¶ 10. On December 6, 2010, Plaintiffs Delphia Simmons and Patricia Mattlage filed an Amended Class Action Complaint against Comerica Bank, alleging unfair assessment and collection of Overdraft Fees and seeking monetary damages, restitution, interest, attorney's fees, and equitable relief (DE # 990). *Id.* at ¶ 11.

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 at 5-6). Joint Decl. ¶ 12.

On April 21, 2011, Comerica Bank filed an answer to the operative 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. Joint Decl. ¶ 13.

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). Joint Decl. ¶ 14. 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). *Id*. at ¶ 15.

On July 27, 2011, the Parties entered into a Stipulated Protective Order relating to the production of documents and information (DE # 1774). Joint Decl. ¶ 16. During the extensive discovery that followed, Comerica Bank produced over 300,000 pages of documents (in addition to voluminous data files and spreadsheets). *Id*. Class Counsel created a document review team whose task it was to review and analyze the documents. *Id*. 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. *Id*.

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. Joint Decl. ¶ 17. Class Counsel also served and responded to interrogatories. *Id.*

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). Joint Decl. ¶ 18.

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 the 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). Joint Decl. ¶ 19.

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 that 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). Joint Decl. ¶ 20.

On March 21, 2012, Plaintiffs moved to strike Comerica Bank's class certification experts (DE # 2587). Defendant responded on June 5, 2012 (DE # 2742) and Plaintiffs replied on June 13, 2012 (DE # 2757). On July 2, 2102 the Court denied Plaintiffs' motion (DE # 2807). Joint Decl. ¶ 21.

The Court heard oral argument on class certification on July 18, 2012. On August 10, 2012, the Court issued an Order granting Plaintiffs' motion for class certification (DE # 2875). Joint Decl. ¶ 22. On August 24, 2012, Comerica Bank filed a petition with the United States Court of Appeals for the Eleventh Circuit seeking leave, pursuant to Fed. R. Civ. P. 23(f), to

appeal the class certification order. *Id*. at ¶ 23. Plaintiff's opposed that petition, and the Eleventh Circuit denied the petition on December 13, 2012. *Id*.

On December 26, 2012, the 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). Joint Decl. ¶ 24. Within days after the Ninth Circuit's decision in *Gutierrez*, Comerica Bank filed a motion with the Eleventh Circuit seeking reconsideration of the denial of its petition for leave to appeal. *Id*. That motion was denied on February 12, 2013. *Id*.

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. Joint Decl. ¶ 25.

On May 23, 2013, Class Counsel served Comerica Bank with Plaintiffs' expert report regarding damages. Joint Decl. ¶ 26.

B. Settlement Negotiations.

In early 2012, Settlement Class Counsel and Comerica Bank initiated preliminary settlement discussions that resulted in the scheduling of a formal mediation. Joint Decl. ¶ 27. Settlement Class Counsel and Comerica Bank participated in mediation on May 23, 2012, with Professor Eric Green of Resolutions, LLC, serving as mediator. When an agreement was not reached at that mediation, Settlement Class Counsel and Comerica Bank agreed to continue direct settlement discussions thereafter. *Id*.

On July 12, 2013, Settlement Class Counsel and Comerica Bank participated in a settlement conference. Joint Decl. ¶ 28. Following further discussions, on August 7, 2013, the Settlement Class Counsel and Comerica Bank executed a Summary Agreement memorializing

the material terms of the Settlement. *Id.* 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 a final settlement agreement; the Court granted the requested motion on August 13, 2013 (DE # 3600). *Id.* The Agreement was finalized and signed in October 2013. *Id.*

C. Summary of the Settlement Terms

The Settlement terms are detailed in the Agreement attached as Exhibit A. The following is a summary of the material terms of the Settlement.

1. The Settlement Class

The Settlement Class is an opt-out class under Rule 23(b)(3) of the Federal Rule of Civil Procedure. The Settlement Class is defined as:

> All holders of a Comerica Bank Account who, during the Class Period applicable to the state in which the Account was opened, incurred one or more Overdraft Fees as a result of Comerica Bank's High-to-Low Posting. Excluded from the Class are all current Comerica Bank employees, officers and directors, and the judge presiding over this Action.

Agreement ¶ 62.[2]

2. Monetary Relief

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. Joint Decl. ¶ 29.

[2] "Class Period" means: (a) for Settlement Class Members who opened accounts in Arizona, the period from February 18, 2004 through August 15, 2010; (b) for Settlement Class Members who opened accounts in California, the period from February 18, 2006 through August 15, 2010; (c) for Settlement Class Members who opened accounts in Florida, the period from February 18, 2005 through August 15, 2010; (d) for Settlement Class Members who opened accounts in Michigan, the period from February 18, 2004 through August 15, 2010; and (e) for Settlement Class Members who opened accounts in Texas, the period from February 18, 2006 through August 15, 2010. Agreement ¶ 30.

The Settlement Fund will be used to: (i) pay all Automatic Distributions of payments to 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 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 Notice Administrator and Settlement Administration other than those required 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. Agreement ¶ 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.

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.[3] Agreement Section XII. The Positive 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

[3] The Net Settlement Fund is equal to the Settlement Fund, plus interest earned (if any), less the 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.

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.

Eligible 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.

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

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. 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 Section XIII.

3. Class Release

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.

4. Settlement Notice

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 has available about Settlement Class Members. Agreement ¶¶ 71-82. Comerica Bank will pay all fees and costs of the Notice Program. *Id.* at ¶¶ 65, 81. 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 for Plaintiffs, and their rights to opt-out of the Settlement Class or object to the Settlement. *See* Declaration of Cameron Azari ¶¶ 7-8, 30-39 attached as Exhibit D ("Azari Decl."); Joint Decl. ¶ 37. The Notices and Notice Program constituted sufficient notice to all persons entitled to notice, and satisfied all applicable requirements of law including, but not limited to, Federal Rule of Civil Procedure 23 and the constitutional requirement of due process. Azari Decl. ¶¶ 36-39; Joint Decl. ¶ 37.

5. Settlement Termination

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.*

6. Service Awards

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 Class Representatives are entitled as a Settlement Class Members. *Id.* The Service 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. Joint Decl. ¶ 46.

7. Attorneys' Fees and Costs

Class Counsel are entitled to request, and Comerica Bank will not oppose, attorneys' fees of up to thirty percent (30%) of the Settlement Fund, plus reimbursement of litigation costs and expenses. Agreement ¶ 107. The Parties negotiated and reached agreement regarding attorneys' fees and costs only after reaching agreement on all other material terms of the Settlement. Agreement ¶ 111; Joint Decl. ¶ 47.

D. Argument.

Court approval is required for settlement of a class action. Fed. R. Civ. P. 23(e). The federal courts have long recognized a strong policy and presumption in favor of class settlements. The Rule 23(e) analysis should be "informed by the strong judicial policy favoring settlements as well as the realization that compromise is the essence of settlement." *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. Unit B 1982). In evaluating a proposed class settlement, the Court "will not substitute its business judgment for that of the

parties; 'the only question . . . is whether the settlement, taken as a whole, is so unfair on its face as to preclude judicial approval.'" *Rankin v. Rots*, 2006 WL 1876538, at *3 (E.D. Mich. June 28, 2006) (quoting *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971)). Indeed, "[s]ettlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and uncertainties and preventing lawsuits." *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977). Class settlements minimize the litigation expenses of the parties and reduce the strain that litigation imposes upon already scarce judicial resources. Therefore, "federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996).

The Settlement here is more than sufficient under Rule 23(e) and Final Approval is clearly warranted.

1. The Court Has Personal Jurisdiction Over the Settlement Class Because Settlement Class Members Received Adequate Notice and an Opportunity to Be Heard.

In addition to having personal jurisdiction over the Plaintiffs, who are parties to this Action, the Court also has personal jurisdiction over all members of the Settlement Class because they received the requisite notice and due process. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)); *see also In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 306 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999).

a. The Best Notice Practicable Was Furnished.

The Notice Program was comprised of three 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 available on the Settlement Website and via mail upon request. Agreement, Section VIII; Azari Decl. ¶¶ 12-27.

Each facet of the Notice Program was timely and properly accomplished. Azari Decl. ¶¶ 12-27. The Notice Administrator received data files from Comerica Bank that identified the names and last known addresses of 190,863 identifiable Settlement Class Members, ran the addresses through the National Change of Address Database, and mailed postcards to 184,731 Settlement Class Members. *Id.* The Notice Administrator received performed follow up research and attempted to re-mail postcards to Settlement Class Members whose initial postcard notices were returned by the postal service. *Id*. at ¶ 18. The Notice Administrator also mailed out 930 "Long Form" notices in response to request from Settlement Class Members. *Id*. at ¶ 19.

The Notice Administrator also performed and timely completed the Published Notice Program through advertisements in *Arizona Republic, Dallas Morning News/Briefing Combo, Detroit Free Press/News Combo, Grand Rapids Press, Houston Chronicle, Lansing State Journal, Los Angeles Times, Orlando Sentinel, Palm Beach Post, San Francisco Chronicle, Sacramento Bee, Santa Cruz Sentinel, South Florida Sun Sentinel and Union Times San Diego*. Azari Decl. ¶¶ 21-25.

The Notice Administrator also established the Settlement Website, including the "Long Form" notice, to enable Settlement Class Members to obtain detailed information about the Action and the Settlement. Azari Decl. ¶ 26. As of February 18, 2014, the Settlement Website had over 7,830 visitors. *Id*. at ¶ 27. In addition, a toll free number was established and has been operational since December 20, 2013. *Id*. at ¶ 28. By calling this number, Settlement Class

Members can listen to answers to frequently asked questions and request a copy of the "Long Form" notice. *Id*. As of February 18, 2014, the toll free number had handled 4,526 calls. *Id*.

b. The Notice and Notice Program Were Reasonably Calculated to Inform Settlement Class Members of Their Rights.

The Court-approved Notice and Notice Program satisfied due process requirements because they described "the substantive claims . . . [and] contain[ed] information reasonably necessary to make a decision to remain a class member and be bound by the final judgment." *In re Nissan Motor Corp. Antitrust Litig*., 552 F.2d 1088, 1104-05 (5th Cir. 1977). The Notice, among other things, defined the Settlement Class, described the release provided to Comerica Bank under the Settlement, as well as the amount and proposed distribution of the Settlement proceeds, and informed Settlement Class Members of their right to opt-out or object, the procedures for doing so, and the time and place of the Final Approval Hearing. It also notified Settlement Class Members that a class judgment would bind them unless they opted out, and told them where they could get more information – for example, at the Settlement Website that posts a copy of the Agreement, as well as other important documents. Further, the Notice described Class Counsel's intention to seek attorneys' fees of up to thirty percent (30%) of the $14,580,000 Settlement Fund, plus expenses, and Service Awards for the Class Representative Plaintiffs. Hence, the Settlement Class Members were provided with the best practicable notice that was "reasonably calculated, under [the] circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Shutts*, 472 U.S. at 812 (quoting *Mullane*, 339 U.S. at 314-15); *see* Azari Decl. ¶¶ 30-39.

As of February 18, 2014, the Notice Administrator had received only three (3) requests for exclusion (opt-outs). Azari Decl. ¶ 29. As of that date, no objections to the Settlement had been received. *Id*.; Joint Decl. ¶ 67.

2. The Settlement Should Be Approved as Fair, Adequate and Reasonable.

In deciding whether to approve the Settlement, the Court will analyze whether it is "fair, adequate, reasonable, and not the product of collusion." *Leverso v. Southtrust Bank*, 18 F.3d 1527, 1530 (11th Cir. 1994); *see also Bennett v. Behring Corp*., 737 F.2d 982, 986 (11th Cir. 1984). A settlement is fair, reasonable and adequate when "the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." *In re Lorazepam & Clorazepate Antitrust Litig*., MDL No. 1290, 2003 WL 22037741, at *2 (D.D.C. June 16, 2003) (quoting *Manual for Complex Litigation (Third)* § 30.42 (1995)). Importantly, the Court is "not called upon to determine whether the settlement reached by the parties is the best possible deal, nor whether class members will receive as much from a settlement as they might have recovered from victory at trial." *In re Mexico Money Transfer Litig*., 164 F. Supp. 2d 1002, 1014 (N.D. Ill. 2000) (citations omitted).

The Eleventh Circuit has identified six factors to be considered in analyzing the fairness, reasonableness and adequacy of a class settlement under Rule 23(e):

(1) the existence of fraud or collusion behind the settlement;

(2) the complexity, expense, and likely duration of the litigation;

(3) the stage of the proceedings and the amount of discovery completed;

(4) the probability of the plaintiffs' success on the merits;

(5) the range of possible recovery; and

(6) the opinions of the class counsel, class representatives, and the substance and amount of opposition to the settlement.

Leverso, 18 F.3d at 1530 n.6; *see also Bennett*, 737 F.2d at 986. The analysis of these factors set forth below shows this Settlement to be eminently fair, adequate and reasonable.

a. There Was No Fraud or Collusion.

This Court well knows the vigor with which the Parties litigated until they reached the Settlement. The sharply contested nature of the proceedings in this Action demonstrates the absence of fraud or collusion behind the Settlement. *See, e.g.*, *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1329 n.3 (S.D. Fla. 2001); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001) (court had "no doubt that this case has been adversarial, featuring a high level of contention between the parties"); *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1338 (N.D. Ga. 2000) ("This was not a quick settlement, and there is no suggestion of collusion"); *Warren v. City of Tampa*, 693 F. Supp. 1051, 1055 (M.D. Fla. 1988) (record disclosed no evidence of collusion, but to the contrary showed "that the parties conducted discovery and negotiated the terms of settlement for an extended period of time"), *aff'd*, 893 F.2d 347 (11th Cir. 1989).

Settlement Class Counsel negotiated the Settlement with similar vigor. Plaintiffs and the Settlement Class were represented by experienced counsel throughout the negotiations. Settlement Class Counsel and Comerica Bank engaged in mediation before Professor Eric Green, a nationally-recognized mediator. When mediation was not initially successful, Settlement Class Counsel and Comerica Bank agreed to continue direct settlement discussions. All negotiations were arm's-length and extensive. Joint Decl. ¶¶ 27-28, 48-51. *see also Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1384 (S.D. Fla. 2007) (concluding that class settlement was not collusive in part because it was overseen by "an experienced and well-respected mediator").

b. The Settlement Will Avert Years of Highly Complex and Expensive Litigation.

The claims and defenses are complex; litigating them is both difficult and time-consuming. Joint Decl. ¶¶ 52-58; Fitzpatrick Decl. ¶ 14. Although this Action was litigated for

over three years before the Parties resolved it, recovery by any means other than settlement would require additional years of litigation. *Id.*; *see United States v. Glens Falls Newspapers, Inc.*, 160 F. 3d 853, 856 (2d Cir. 1998) (noting that "a principal function of a trial judge is to foster an atmosphere of open discussion among the parties' attorneys and representatives so that litigation may be settled promptly and fairly so as to avoid the uncertainty, expense and delay inherent in a trial."); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 317, 325-26 & n.32 (N.D. Ga. 1993) ("[A]djudication of the claims of two million claimants could last half a millennium").

In contrast, the Settlement provides immediate and substantial benefits to approximately 190,000 Settlement Class Members, all of whom are current or former Comerica Bank customers. Joint Decl. ¶ 58. As stated in *In re Shell Oil Refinery*, 155 F.R.D. 552 (E.D. La. 1993):

> The Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, "[i]t has been held proper to take the bird in the hand instead of a prospective flock in the bush."

Id. at 560 (alterations in original) (quoting *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974)); *see also In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) (noting that complex litigation "can occupy a court's docket for years on end, depleting the resources of the parties and taxpayers while rendering meaningful relief increasingly elusive"). Particularly because the "demand for time on the existing judicial system must be evaluated in determining the reasonableness of the settlement," *Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992) (citation omitted), there can be no doubt about the adequacy of the present Settlement, which provides reasonable benefits to the Settlement Class.

c. The Factual Record Is Sufficiently Developed to Enable Class Counsel to Make a Reasoned Judgment.

Courts also consider "the degree of case development that class counsel have accomplished prior to settlement" to ensure that "counsel had an adequate appreciation of the merits of the case before negotiating." *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 813 (3d Cir. 1995). At the same time, "[t]he law is clear that early settlements are to be encouraged, and accordingly, only some reasonable amount of discovery should be required to make these determinations." *Ressler*, 822 F. Supp. at 1555.

Settlement Class Counsel negotiated the Settlement with the benefit of significant litigation before this Court and the Eleventh Circuit involving Comerica Bank (and other banks in MDL 2036), including a complete damage analysis by Class Counsel's expert based on customer data produced by Comerica Bank. Joint Decl. ¶¶ 59, 62; Declaration of Arthur Olsen ¶¶ 22-35 attached as Exhibit E ("Olsen Decl."). Settlement Class Counsel's analysis and understanding of the various legal obstacles, as well as the damage analysis, positioned them to evaluate with confidence the strengths and weaknesses of Plaintiffs' claims and defenses through the conclusion of the litigation, as well as the range and amount of damages that were potentially recoverable if the Action successfully proceeded to judgment on a class-wide basis. Joint Decl. ¶¶ 59-63; Fitzpatrick Decl. ¶¶ 10-15. "Information obtained from other cases may be used to assist in evaluating the merits of a proposed settlement of a different case." *Lipuma*, 406 F. Supp. 2d at 1325.

d. Plaintiffs Faced Significant Obstacles to Prevailing.

The "likelihood and extent of any recovery from the defendants absent . . . settlement" is another important factor in assessing the reasonableness of a settlement. *Domestic Air*, 148 F.R.D. at 314; *see also Ressler*, 822 F. Supp. at 1555 ("A Court is to consider the likelihood of

the plaintiff's success on the merits of his claims against the amount and form of relief offered in the settlement before judging the fairness of the compromise."). According to Professor Fitzpatrick: "[I]t was not at all clear that the plaintiffs would have won their cases on the merits had these suits gone forward." Fitzpatrick Decl. ¶ 11. Comerica Bank's preemption defense and, more significantly, its contractually-abbreviated limitations defense, presented serious legal issues that made success far from certain. *Id*. at ¶¶ 11-12.

Class Counsel believe that Plaintiffs had a solid case against Comerica Bank. Joint Decl. ¶ 60. Even so, we are mindful that Comerica Bank advanced significant defenses that would have been required to overcome in the absence of the Settlement. *Id*. at ¶¶ 60-61; Fitzpatrick Decl. ¶¶ 11-12. This Action involved several major litigation risks. Joint Decl. ¶¶ 60-61; Fitzpatrick Decl. ¶¶ 11-13. As this Court recognized in granting final approval to the settlement with Bank of America: "The combined risks here were real and potentially catastrophic . . . . [B]ut for the Settlement, Plaintiffs and the class faced a multitude of potentially serious, substantive defenses, any one of which could have precluded or drastically reduced the prospects of recovery." *In re Checking Account Overdraft Litig*., 830 F. Supp. 2d 1330, 1347-48 (S.D. Fla. 2011).

Apart from the risks, continued litigation would have involved substantial delay and expense, which further counsels in favor of Final Approval. Joint Decl. ¶ 58; Fitzpatrick Decl. ¶ 14. The uncertainties and delays from this process would have been significant. *Id.*

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. *See, e.g., Bennett v. Behring Corp*., 96 F.R.D. 343, 349-50 (S.D. Fla. 1982), *aff'd*, 737 F.2d 982 (11th Cir. 1984) (plaintiffs faced a "myriad of factual and legal problems" creating

"great uncertainty as to the fact and amount of damage," making it "unwise [for plaintiffs] to risk the substantial benefits which the settlement confers . . . to the vagaries of a trial").

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

In determining whether a settlement is fair given the potential range of recovery, the Court should be guided by "the fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate." *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988) (King, J.), *aff'd*, 899 F.2d 21 (11th Cir. 1990). Indeed, "[a] settlement can be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery." *Id.* This is because a settlement must be evaluated "in light of the attendant risks with litigation." *Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55, 64 (S.D.N.Y. 2003); *see also Bennett*, 737 F.2d at 986 ("[C]ompromise is the essence of settlement."). Thus, courts regularly find settlements to be fair where "[p]laintiffs have not received the optimal relief." *Warren*, 693 F. Supp. at 1059; *see, e.g.*, *Great Neck Capital Appreciation Investment P'ship, L.P. v. PriceWaterHouseCoopers, L.L.P.*, 212 F.R.D. 400, 409-10 (E.D. Wis. 2002) ("The mere possibility that the class might receive more if the case were fully litigated is not a good reason for disapproving the settlement.").

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 their litigation and settlement of similar claims reached within and outside of MDL 2036. Joint Decl. ¶ 50. Class Counsel also gained further insight into the practical and legal issues they would have continued to face litigating these claims against Comerica Bank 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). Joint Decl. ¶ 51. The United States

Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the judgment rendered in favor of the certified class of California customers in that case, vacated the $203 million restitution award, and remanded the case for further proceedings. *Gutierrez v Wells Fargo Bank, N.A.*, 704 F.3d 712 (9th Cir. 2012).

Class Counsel's damage expert's analysis of Comerica Bank's transactional data showed that the most probable sum Plaintiffs and the Settlement Class could reasonably have anticipated recovering at trial was $41,324,779 under the litigation class periods for the five (5) states where Comerica Bank operated branches during that timeframe. Olsen Decl. ¶ 34; Joint Decl. ¶ 62. Through this Settlement, Plaintiffs and the Settlement Class Members have achieved a recovery of approximately thirty-five percent (35%) of those damages, without any further risks or delays. Joint Decl. ¶ 62; Fitzpatrick Decl. ¶ 13. However, if the Bank were successful in enforcing its contractually-abbreviated statute of limitations, the most probable sum Plaintiffs and the Settlement Class could reasonably have anticipated recovering at trial was approximately $11,000,000. Joint Decl. ¶ 62; Olsen Decl. ¶ 34. Taking this into account, Plaintiffs and the Settlement Class Members achieved a recovery of approximately 133% of those damages through this Settlement. Fitzpatrick Decl. ¶ 12. This Settlement provides an extremely fair and reasonable recovery to the Settlement Class in light of Comerica Bank's defenses, as well as the challenging, unpredictable path of litigation that Plaintiffs would otherwise have continued to face in the trial and appellate courts. Joint Decl. ¶ 63; Fitzpatrick Decl. ¶ 13. The Automatic Distribution process further supports Final Approval; eligible Settlement Class Members will receive their cash benefits automatically, without needing to fill out any claim forms – or indeed to take any affirmative steps whatsoever. Joint Decl. ¶ 64; Fitzpatrick Decl. ¶ 16.

The $14,580,000 cash recovery is fair and reasonable given the obstacles confronted and the complexity of the Action, and the significant barriers that stood between the pre-settlement status of the Action and final judgment, including expert discovery, pretrial motions, motions for summary judgment, trial, and post-trial appeals. Joint Decl. ¶¶ 62-64; Fitzpatrick Decl. ¶¶ 10-16. Taking these risks into account, the Settlement "is not only fair, adequate and reasonable, but, frankly, very impressive as well." Fitzpatrick Decl. ¶ 17. Comerica Bank's agreement to pay the fees, costs and expenses of the Notice Administrator and Settlement Administrator further enhances the recovery. Joint Decl. ¶ 56; Fitzpatrick Decl. ¶ 8. Given the extraordinary obstacles that Plaintiffs faced in the litigation, this recovery is an excellent achievement by any objective measure.

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

Settlement Class Counsel fully endorse the Settlement with Comerica Bank. Joint Decl. ¶¶ 65-68. The Court should give "great weight to the recommendations of counsel for the parties, given their considerable experience in this type of litigation." *Warren*, 693 F. Supp. at 1060; *see also Domestic Air*, 148 F.R.D. at 312-13 ("In determining whether to approve a proposed settlement, the Court is entitled to rely upon the judgment of the parties' experienced counsel. '[T]he trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.'") (citations omitted).

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. Azari Decl. ¶ 29; Joint Decl. ¶ 67. Moreover, as of that date, no Settlement Class Members had objected to the Settlement. *Id.* This is another indication that the Settlement Class is satisfied with the Settlement. It is settled that "[a] small number of objectors from a plaintiff

class of many thousands is strong evidence of a settlement's fairness and reasonableness." *Association for Disabled Americans v. Amoco Oil Co.*, 211 F.R.D. 457, 467 (S.D. Fla. 2002); *also Mangone v. First USA Bank*, 206 F.R.D. 222, 227 (S.D. Ill. 2001) ("In evaluating the fairness of a class action settlement, such overwhelming support by class members is strong circumstantial evidence supporting the fairness of the Settlement."); *Austin v. Pennsylvania Dept. of Corrections*, 876 F. Supp. 1437, 1458 (E.D. Pa. 1995) ("Because class members are presumed to know what is in their best interest, the reaction of the class to the Settlement Agreement is an important factor for the court to consider.").

3. The Court Should Certify the Settlement Class.

This Court previously found the requirements of Rule 23(a) and 23(b)(3) satisfied in this Action in a litigation and settlement posture (DE # 2875, 3704), and in similar actions in MDL 2036 on contested motions for class certification [*see, e.g.*, DE # 1763 (Union Bank); DE # 2615 (TD Bank); DE # 2673 (BancorpSouth); DE # 2697 (PNC Bank); DE # 2847 (Capital One); and DE # 3559 (U.S. Bank)] and in the context of settlement [*see, e.g.*, DE # 1520, 2150 (Bank of America); DE # 2712, 3134 (JPMorgan Chase Bank); DE # 2959, 3331 (Citizens Financial)]. The Court should make the same class certification findings in granting Final Approval.

Based on the foregoing, the Settlement is fair, adequate and reasonable, and merits Final Approval.

III. APPLICATION FOR SERVICE AWARDS

Pursuant to the Settlement, Class Counsel request, and Comerica Bank does not oppose, Service Awards for the Class Representatives identified in paragraphs 31 and 48 of the Agreement. The amount of the Service Awards is $10,000 for each of the two Class Representatives. Agreement ¶ 110; Joint Decl. ¶ 69. Service awards "compensate named

plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006). "[T]here is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action." *David v. American Suzuki Motor Corp.*, 2010 WL 1628362, at *6 (S.D. Fla. Apr. 15, 2010). Courts have consistently found service awards to be an efficient and productive way to encourage members of a class to become class representatives. *See, e.g., Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (awarding class representatives $300,000 each, explaining that "the magnitude of the relief the Class Representatives obtained on behalf of the class warrants a substantial incentive award."); *Spicer v. Chicago Bd. Options Exchange, Inc.*, 844 F. Supp. 1226, 1267-68 (N.D. Ill. 1993) (collecting cases approving service awards ranging from $5,000 to $100,000, and awarding $10,000 to each named plaintiff).

The relevant factors 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. *See, e.g., Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

The above factors, as applied to this Action, demonstrate the reasonableness of the requested Service Awards to the Class Representatives. Joint Decl. ¶ 72; *see, e.g., Checking Account Overdraft*, 830 F. Supp. 2d at 1357-58 ("The Court notes that the class representatives expended time and effort in meeting their fiduciary obligations to the Class, and deserve to be compensated for it."). 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) being deposed by Comerica Bank's counsel. In so doing, the Class Representatives were integral to forming the theory of the case. Joint Decl. ¶ 72.

The Class Representatives not only devoted time and effort to the litigation, but the end result of their efforts, coupled with those of Class Counsel, provided a substantial benefit to the Settlement Class. Joint Decl. ¶ 72. If the Court approves them, the total Service Awards will be $20,000. This amount is less than 0.0014% of the Settlement Fund, a ratio that falls well below the range of what has been deemed to be reasonable. *Id.* at ¶ 73; s*ee, e.g.*, *Enter. Energy Corp. v. Columbia Gas Transmission*, 137 F.R.D. 240, 251 (S.D. Ohio 1991) (approving service awards totaling $300,000, or 0.56% of a $56.6 million settlement). The Service Awards requested here are reasonable and should be approved.

IV. APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

As indicated in the Agreement and the Notice, and consistent with standard class action practice and procedure, Class Counsel respectfully request attorneys' fees equal to thirty percent (30%) of the $14,580,000 Settlement Fund created through our efforts.[4] Agreement ¶ 107; Joint Decl. ¶ 74. Class Counsel also request reimbursement of limited out-of-pocket costs and expenses totaling $361,026.13 incurred in connection with the prosecution of the Action and in connection with the Settlement. *Id.* Settlement Class Counsel and Comerica Bank negotiated and reached agreement regarding attorneys' fees and costs only after reaching agreement on all other material terms of this Settlement. Agreement ¶ 111; Joint Decl. ¶ 74. The thirty percent (30%) fee request is within the guidelines set forth by the Eleventh Circuit in *Camden I Condo. Ass'n. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991), and adheres to this Court's prior decisions in

[4] In addition to the firms identified as Class Counsel in paragraph 29 of the Agreement, this fee request also includes Alters Law Firm, P.A.

MDL 2036 regarding attorneys' fees. Fitzpatrick Decl. ¶¶ 21-22. For the reasons detailed herein, Class Counsel submit that the requested fee is appropriate, fair and reasonable and should be approved.

A. The Law Awards Class Counsel Fees From the Common Fund Created Through Their Efforts.

It is well established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to attorneys' fees based upon the benefit obtained. *Camden I*, 946 F.2d at 771; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The common benefit doctrine is an exception to the general rule that each party must bear its own litigation costs. The doctrine serves the "twin goals of removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class and of equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts." *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1202 (N.D. Ill. 1989) (citation omitted). The common benefit doctrine stems from the premise that those who receive the benefit of a lawsuit without contributing to its costs are "unjustly enriched" at the expense of the successful litigant. *Van Gemert*, 444 U.S. at 478. As a result, the Supreme Court, the Eleventh Circuit, and courts in this District have all recognized that "[a] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as whole." *Sunbeam*, 176 F. Supp. 2d at 1333 (citing *Van Gemert*, 444 U.S. at 478); *see also Camden I*, 946 F.2d at 771 ("Attorneys in a class action in which a common fund is created are entitled to compensation for their services from the common fund, but the amount is subject to court approval."). Courts have also recognized that appropriate fee awards in cases such as this encourage redress for wrongs caused to entire classes of persons, and deter future misconduct of a similar nature. *See, e.g.*, *Mashburn*, 684 F. Supp. at

687; *see also Deposit Guar. Nat'l Bank v. Rope*, 445 U.S. 326, 338-39 (1980). Adequate compensation promotes the availability of counsel for aggrieved persons:

> If the plaintiffs' bar is not adequately compensated for its risk, responsibility, and effort when it is successful, then effective representation for plaintiffs in these cases will disappear . . . . We as members of the judiciary must be ever watchful to avoid being isolated from the experience of those who are actively engaged in the practice of law. It is difficult to evaluate the effort it takes to successfully and ethically prosecute a large plaintiffs' class action suit. It is an experience in which few of us have participated. The dimensions of the undertaking are awesome.

Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1375-76 (D. Minn. 1985).

In the Eleventh Circuit, class counsel receives a percentage of the funds obtained through a settlement. In *Camden I* – the controlling authority regarding attorneys' fees in common-fund class actions – the Eleventh Circuit held that "the percentage of the fund approach [as opposed to the lodestar approach] is the better reasoned in a common fund case. Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Camden I*, 946 F.2d at 774. This Court has applied the percentage of the fund approach in MDL 2036, holding:

> The Eleventh Circuit made clear in *Camden I* that percentage of the fund is the exclusive method for awarding fees in common fund class actions. *Camden I*, 946 F.2d at 774. Even before *Camden I*, courts in this Circuit recognized that "a percentage of the gross recovery is the only sensible method of awarding fees in common fund cases." *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 670 (M.D. Ala. 1988). More importantly, the Court observed first-hand the monumental effort exerted by Class Counsel in this case, and does not need to see timesheets to know how much work Class Counsel have put in to reach this point.

Checking Account Overdraft, 830 F. Supp. 2d at 1362.

The Court has substantial discretion in determining the appropriate fee percentage. "There is no hard and fast rule mandating a certain percentage of a common fund which may be awarded as a fee because the amount of any fee must be determined upon the facts of each case."

Sunbeam, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 774). Nonetheless, "[t]he majority of common fund fee awards fall between 20 percent to 30 percent of the fund" – though "an upper limit of 50 percent of the fund may be stated as a general rule." *Id*. (quoting *Camden I*, 946 F.2d at 774-75); *see also Waters v. Int'l Precious Metals Corp*., 190 F.3d 1291 (11th Cir. 1999), *cert. denied*, 530 U.S. 1289 (2000) (approving fee award where the district court determined that the benchmark should be 30 percent and then adjusted the fee award higher in view of the circumstances of the case).

Class Counsel's fee request falls within this accepted range and is in accord with the Court's prior fee awards in MDL 2036. Fitzpatrick Decl. ¶¶ 21-22. There is no reason for the Court to deviate from its prior fee rulings here.

B. Application of the *Camden I* Factors Supports the Requested Fee.

The Eleventh Circuit has provided a set of factors the Court should use to determine a reasonable percentage to award as an attorney's fee to class counsel in class actions:

(1) the time and labor required;

(2) the novelty and difficulty of the relevant questions;

(3) the skill required to properly carry out the legal services;

(4) the preclusion of other employment by the attorney as a result of his acceptance of the case;

(5) the customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the clients or the circumstances;

(8) the results obtained, including the amount recovered for the clients;

(9) the experience, reputation, and ability of the attorneys;

(10) the "undesirability" of the case;

(11) the nature and the length of the professional relationship with the clients; and

(12) fee awards in similar cases.

Camden I, 946 F.2d at 772 n.3 (citing factors originally set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

These twelve factors are guidelines and are not exclusive. "Other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action." *Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 775). In addition, the Eleventh Circuit has "encouraged the lower courts to consider additional factors unique to the particular case." *Camden I*, 946 F.2d at 775. As applied here, the *Camden I* factors demonstrate that the Court should approve the requested fee. Fitzpatrick Decl. ¶¶ 20-25.

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

Prosecuting and settling these claims demanded considerable time and labor, making this fee request reasonable. Joint Decl. ¶ 76; Fitzpatrick Decl. ¶ 24. 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. Joint Decl. ¶ 76. Class Counsel devoted substantial time to investigating the claims of potential plaintiffs against Comerica Bank. *Id.* at ¶ 77. Class Counsel interviewed numerous Comerica Bank customers and potential plaintiffs to gather information about Comerica Bank's conduct, both at the time

the lawsuit was filed and in the past, to determine the effect that its conduct had on consumers. *Id.* This information was essential to Class Counsel's ability to understand the nature of Comerica Bank's conduct, the language of the Account agreements at issue, and potential remedies. *Id.* Class Counsel also expended significant resources researching and developing the legal claims at issue. *Id.*

Class Counsel 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. Joint Decl. ¶ 78. Substantial time and resources were also dedicated to conducting discovery. *Id*. at ¶ 79. Class Counsel took the depositions of approximately nine Comerica Bank employees, and two of its expert witnesses. *Id*. Comerica Bank took the depositions of Plaintiffs, as well as of Plaintiffs' data expert. *Id*. Class Counsel also served and responded to interrogatories and requests for admission. *Id*.

Settlement negotiations consumed additional time and resources. Joint Decl. ¶ 80. As noted previously, preliminary settlement discussions began in early 2012 and mediation was held in May 2012. *Id.* When an agreement was not reached at mediation, Settlement Class Counsel and Comerica Bank agreed to continue direct settlement discussions thereafter. *Id.* In July 2013, Settlement Class Counsel and Comerica Bank participated in a settlement conference. *Id.* at ¶ 28, Ultimately, on August 7, 2013, Settlement Class Counsel and Comerica Bank reached an agreement in principle and executed a Summary Agreement memorializing the material terms of the Settlement, and filed a joint notice of settlement, requesting a suspension of all deadlines pending the drafting and execution of the Agreement. *Id.* Months of detailed discussions and negotiations ensued, ultimately resulting in the drafting and execution of the Agreement. *Id.*

All told, Class Counsel's coordinated work paid dividends for the Settlement Class. Each of the above-described efforts was essential to achieving the Settlement before the Court. Joint Decl. ¶ 81. The time and resources Class Counsel devoted to prosecuting and settling this Action readily justify the fee that we now request. "For all these reasons, I believe the fee award requested here is well within the range of reason. Class counsel undertook an incredibly risky and undesirable case, and through their diligence, perseverance, and skill, obtained an outstanding result for the settlement class. Class counsel should be commended for such an excellent result, and should be compensated in accord with their request because it is warranted and reasonable given similar fee awards." *See* Fitzpatrick Decl. ¶ 25.

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

The Court regularly witnessed and commented upon the high quality of our legal work, which conferred a substantial benefit on the Settlement Class in the face of significant litigation obstacles. Joint Decl. ¶ 82. Our work required the acquisition and analysis of a substantial amount of factual and legal information. *Id*. The management of this very large MDL, including the Action against Comerica Bank, also presented challenges most law firms are simply not able to meet. *Id*.

In any given case, the skill of legal counsel should be commensurate with the novelty and complexity of the issues, as well as the skill of the opposing counsel. Litigation of this Action required counsel highly trained in class action law and procedure as well as the specialized issues presented here. Class Counsel possess these attributes, and their participation added value to the representation of this large Settlement Class. Joint Decl. ¶ 83. The record demonstrates that the Action involved a broad range of complex and novel challenges, which Class Counsel met at every juncture. *Id.* at ¶ 84. "To put it succinctly, this was no ordinary class action. Indeed, I

believe this case was more risky and less desirable than most class actions. … In spite of these risks, . . . the results obtained by class counsel in this case for the settlement class are excellent." *See* Fitzpatrick Decl. ¶ 23.

In evaluating the quality of representation by Class Counsel, the Court should also consider the quality of opposing counsel. *See Camden I*, 946 F.2d at 772 n.3; *Ressler*, 149 F.R.D. at 654. Throughout the litigation, Comerica Bank was represented by extremely capable counsel. They were worthy, highly competent adversaries. Joint Decl. ¶ 85; *see also Checking Account Overdraft*, 830 F. Supp. 2d at 1348 (finding "Class Counsel confronted not merely a single large bank, but the combined forces of a substantial portion of the entire American banking industry, and with them a large contingent of some of the largest and most sophisticated law firms in the country.") (internal quotation marks and citation omitted); *Walco Invs. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997) (stating that "[g]iven the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results").

3. Class Counsel Achieved a Successful Result.

Given the significant litigation risks faced here, the Settlement represents a successful result. Fitzpatrick Decl. ¶ 23. Rather than facing more years of costly and uncertain litigation, the overwhelming majority of Settlement Class Members will receive an immediate cash benefit. Joint Decl. ¶ 86. The Settlement Fund will not be reduced by the substantial fees and costs of Notice or Settlement administration; such fees and expenses have been and will continue to be borne separately by Comerica Bank. *Id.* Moreover, payments to eligible Settlement Class Members will be forthcoming automatically, through direct deposit for current Account Holders or checks for former Account Holders. *Id.*

4. The Claims Presented Serious Risk.

The Settlement here is particularly noteworthy given the combined litigation risks. Joint Decl. ¶¶ 87-88; Fitzpatrick Decl. ¶ 23. Comerica Bank raised substantial defenses. Success under these circumstances represents a genuine milestone. Fitzpatrick Decl. ¶ 23.

Consideration of the "litigation risks" factor under *Camden I* "recognizes that counsel should be rewarded for taking on a case from which other law firms shrunk. Such aversion could be due to any number of things, including social opprobrium surrounding the parties, thorny factual circumstances, or the possible financial outcome of a case. All of this and more is enveloped by the term 'undesirable.'" *Sunbeam*, 176 F. Supp. 2d at 1336.

Further, "[t]he point at which plaintiffs settle with defendants . . . is simply not relevant to determining the risks incurred by their counsel in agreeing to represent them." *Skelton v. General Motors Corp.*, 860 F.2d 250, 258 (7th Cir. 1988). "Undesirability" and relevant risks must be evaluated from the standpoint of plaintiffs' counsel as of the time they commenced the suit – not retroactively, with the benefit of hindsight. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 112 (3d Cir. 1976); *Walco*, 975 F. Supp. at 1473.

Prosecuting the Action was risky from the outset. Joint Decl. ¶ 89; Fitzpatrick Decl. ¶ 23 ("[T]his case was more risky and less desirable than most class actions."). If Comerica Bank were successful in enforcing its contractually-abbreviated limitation period for bringing claims, the *total* damages recoverable by the certified class would have decreased to approximately $11,000,000. Joint Decl. ¶ 62; Fitzpatrick Decl. ¶ 12. Given these risks, the $14,580,000 cash recovery obtained through the Settlement is outstanding, given the complexity of the litigation and the significant risks and barriers that loomed in the absence of Settlement. These risks could

easily have impeded, if not altogether derailed, Plaintiffs' and the Settlement Class' successful prosecution of these claims at trial and in an eventual appeal.

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 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 merits defenses, and the challenging and unpredictable path of litigation Plaintiffs would have faced absent the Settlement. Joint Decl. ¶¶ 60-61; Fitzpatrick Decl. ¶¶ 14-15.

5. Class Counsel Assumed Considerable Risk to Pursue This Action on a Pure Contingency Basis.

In undertaking to prosecute this complex case entirely on a contingent fee basis, Class Counsel assumed a significant risk of nonpayment or underpayment. Joint Decl. ¶ 89; Fitzpatrick Decl. ¶ 23. That risk warrants an appropriate fee. Indeed, "[a] contingency fee arrangement often justifies an increase in the award of attorney's fees." *Sunbeam*, 176 F. Supp. 2d at 1335 (quoting *Behrens*, 118 F.R.D. at 548); *see also In re Continental Ill. Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992) (holding that when a common fund case has been prosecuted on a contingent-fee basis, plaintiffs' counsel must be adequately compensated for the risk of non-payment); *Ressler*, 149 F.R.D. at 656 ("Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award.").

Public policy concerns – in particular, ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs holding small individual claims – support the requested fee. Joint Decl. ¶ 90. In the Court's words:

> Generally, the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer. . . . A contingency fee arrangement often justifies an increase in the award of attorney's fees. This rule helps assure that the contingency fee arrangement endures. If this "bonus" methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.

Behrens, 118 F.R.D. at 548.

The progress of the Action shows the inherent risk faced by Class Counsel in accepting and prosecuting the Action on a contingency fee basis. Despite Class Counsel's effort in litigating this Action for more than three years, we remain completely uncompensated for the time invested in the Action, in addition to the expenses we advanced. Joint Decl. ¶ 91. There can be no dispute that this case entailed substantial risk of nonpayment for Class Counsel. Fitzpatrick Decl. ¶ 23.

6. The Requested Fee Comports With Fees Awarded in Similar Cases.

The fee sought here matches the fee typically awarded in similar cases. Joint Decl. ¶ 92; Fitzpatrick Decl. ¶ 22. Legions of decisions have found that a thirty percent fee is well within the range of a customary fee. *See, e.g.*, *Sunbeam*, 176 F. Supp. 2d at 1333-34. Indeed, several recent decisions within this Circuit have awarded attorneys' fees up to (or in excess of) thirty percent, confirming the fairness and reasonableness of the thirty percent fee requested here. Fitzpatrick Decl. ¶ 22.

As another member of this Court observed: "[F]ederal district courts across the country have, in the class action settlement context, *routinely* awarded class counsel fees in excess of the 25 percent 'benchmark,' even in so-called 'mega-fund' cases."[5] *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1210 (S.D. Fla. 2006) (emphasis added) (awarding fees equaling 31⅓ percent of settlement fund); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403 (S.D. Tex. 1999) (35.1 percent)); *see also Gaskill v. Gordon*, 942 F. Supp. 382, 387-88 (N.D. Ill. 1996), *aff'd*, 160 F.3d 361 (7th Cir. 1998) (finding that 33 percent is the norm, and awarding 38 percent of settlement fund); *In re Combustion, Inc.*, 968 F. Supp. 1116 (W.D. La. 1997) (36 percent); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326 (E.D.N.Y. 1993) (33.8 percent); *In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494, 498 (D.D.C. 1981) (45 percent); *Beech Cinema, Inc. v. Twentieth-Century Fox Film Corp.*, 480 F. Supp. 1195, 1199 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 1106 (2d Cir. 1980) (approximately 53 percent); *Zinman v. Avemco Corp.*, 1978 WL 5686 (E.D. Pa. Jan. 18, 1978) (Higginbotham, J.) (50 percent).

Class Counsel's fee request falls within the range of the private marketplace, where contingency fee arrangements often approach or equal forty percent of any recovery. *See Continental*, 962 F.2d at 572 ("The object in awarding a reasonable attorneys' fee . . . is to simulate the market."); *RJR Nabisco, Inc. Sec. Litig.*, Fed. Sec. L. Rep. (CCH) ¶ 94, 268 (S.D.N.Y. 1992) ("[W]hat should govern [fee] awards is . . . what the market pays in similar cases"). And, "[i]n tort suits, an attorney might receive one-third of whatever amount the Plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery."

[5] *See also* 1 *Court Awarded Attorney Fees*, ¶ 2.06[3], at 2-88 (Matthew Bender 2010) (noting that, "when appropriate circumstances have been identified, a court may award a percentage significantly higher" than 25 percent); 4 *Newberg on Class Actions*, § 14:6, at 551 (4th ed. 2002) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.").

Blum v. Stenson, 465 U.S. 886, 904 (1984) (Brennan, J., concurring); *see also Kirchoff v. Flynn*, 786 F.2d 320, 323, 325 n.5 (7th Cir. 1986) (noting "40 percent is the customary fee in tort litigation"); *In re Public Serv. Co. of N.M.*, 1992 WL 278452, at *7 (S.D. Cal. July 28, 1992) ("If this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery.").

The record here leaves no doubt that Class Counsel's fee request is appropriate and comports with attorneys' fees awarded in similar cases. Professor Fitzpatrick distilled several major empirical studies of attorneys' fees, including his own, awarded in connection with class action settlements. Fitzpatrick Decl. ¶ 22. He concluded that the empirical data from those studies supports the reasonableness of a thirty percent (30%) fee award in this case. *Id*.

Class Counsel's fee request also falls within the range of awards in numerous recent cases in this Circuit and District. Fitzpatrick Decl. ¶ 22; *see, e.g., Waters*, 190 F.3d 1291 (11th Cir. 1999) (affirming fee award of 33⅓ percent on settlement of $40 million even though most of the fund ultimately reverted to the defendant); *Gutter v. E.I. Dupont De Nemours & Co.*, 95-2152-CIV-Gold (S.D. Fla. May 30, 2003) (33⅓ percent of $77.5 million settlement); *Sands Point Partners, LP v. Pediatrix Med. Group, Inc.*, 2002 U.S. Dist. LEXIS 25721 (S.D. Fla. 2002) (30 percent of $12 million settlement); *In re CHS Elecs., Inc. Sec. Litig.*, 99-8186-CIV-Gold (S.D. Fla. 2002) (30 percent on settlement of over $11 million); *Ehrenreich v. Sensormatic Elecs. Corp.*, 95-6637-CIV-Zloch (S.D. Fla. 1998) (30 percent on settlement of over $44 million); *Tapken v. Brown*, 90-0691-CIV-Marcus (S.D. Fla. 1995) (33 percent of $10 million settlement).[6]

[6] *See also In re Friedman's, Inc. Sec. Litig.*, 2009 WL 1456698 (N.D. Ga. May 22, 2009) (30 percent); *Francisco v. Numismatic Guar. Corp. of Am.*, 2008 WL 649124 (S.D. Fla. 2008) (30 percent); *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334 (S.D. Fla. 2007) (30 percent); *In re BellSouth Corp. Sec. Litig.*, Civil Action No. 1:02-cv-2142-WSD (N.D. Ga. Apr. 9, 2007) (30 percent); *In re Cryolife, Inc. Sec. Litig.*, Civil Action No. 1:02-cv-1868-BBM (N.D.

7. The Remaining *Camden I* Factors also Favor Approving the Requested Fee.

The remaining *Camden I* factors likewise support granting Class Counsel's fee request. "[C]lass counsel count among their number some of the most experienced and highly regarded lawyers in the United States. Without doubt, they had the skill needed to perform the services required in this complex class action . . . This talented team of lawyers accomplished outstanding results for the settlement class in the face of substantial risks. Had they not had the requisite skill to perform the necessary services, it is highly doubtful the class could have achieved the results obtained in this case. In short, these are not mere "benchmark" lawyers."" *See* Fitzpatrick Decl. ¶ 24. Moreover, without adequate compensation and financial reward, cases such as this simply could not be pursued. The Court previously held that, "given the positive societal benefits to be gained from lawyers' willingness to undertake difficult and risky, yet important, work like this, such decisions must be properly incentivized. The Court believes, and holds, that the proper incentive here is a 30% fee." *Checking Account Overdraft*, 830 F. Supp. 2d at 1364. The record before the Court warrants the same outcome in this parallel MDL 2036 Action. Fitzpatrick Decl. ¶ 22.

8. The Expense Request Is Appropriate.

Class Counsel also request reimbursement for a total of $361,026.13 in certain litigation costs and expenses. Joint Decl. ¶ 94; *see Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970). This sum corresponds to certain actual out-of-pocket costs and expenses that Class Counsel necessarily incurred and paid in connection with the prosecution of the Action and the

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Ga. Nov. 9, 2005) (30 percent); *In re Profit Recovery Group Int'l, Inc. Sec. Litig.*, Civil Action No. 1:00-cv-1416-CC (N.D. Ga. May 26, 2005) (33⅓ percent plus interest and expenses); *In re Clarus Corp. Sec. Litig.*, Civil Action No. 1:00-CV-2841-CAP (N.D. Ga. Jan. 6, 2005) (33⅓ percent); *In re Pediatric Servs. of Am., Inc. Sec. Litig.*, Civil Action No. 1:99-CV-0670-RLV (N.D. Ga. Mar. 15, 2002) (33⅓ percent); *Ressler v. Jacobson*, 149 F.R.D. 651 (M.D. Fla. 1992) (30 percent).

Settlement. Joint Decl. ¶ 94. Specifically, these costs and expenses consist 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 associated with depositions and hearings in the Action; and (3) $6,575.00 in mediator's fees and expenses incurred for the services rendered by Professor Green.[7] *Id.* These out-of-pocket expenses were reasonably and necessarily incurred and paid in furtherance of the prosecution of this Action. *Id.*

VI. CONCLUSION

The Settlement with Comerica Bank securing $14,580,000 in cash compensation for the benefit of the Settlement Class represents an excellent result given the obstacles confronted in this Action. The Settlement more than satisfies the fairness and reasonableness standard of Rule 23(e), as well as the class certification requirements of Rules 23(a) and (b)(3). Further, Class Counsel's application for fees and expenses is reasonable under all the circumstances. The request satisfies the guidelines of *Camden I* given the results achieved, the notable litigation risks, the extremely complicated nature of the factual and legal issues, and the time, effort and skill required to litigate claims of this nature to a satisfactory conclusion.

Accordingly, Plaintiffs and Class Counsel respectfully request that this Court (1) grant Final Approval to the Settlement; (2) certify for settlement purposes the Settlement Class pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(3), and 23(e); (3) appoint as Class Representatives the Plaintiffs listed in paragraph 31 and 48 of the Agreement; (4) appoint as

[7] Class Counsel have limited the categories of expenses for which reimbursement is being sought to those enumerated above, and are not seeking reimbursement for thousands of dollars in other expenses that are routinely sought and recovered in common fund class actions. Joint Decl. ¶ 95.

Class Counsel and Settlement Class Counsel the law firms and attorneys listed in paragraphs 29 and 57 of the Agreement, respectively; (5) approve the requested Service Awards for the Plaintiffs; (6) award Class Counsel attorneys' fees and expenses; and (7) enter Final Judgment dismissing the Action with prejudice.

Dated: February 19, 2014.

Respectfully submitted,

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Plaintiffs' Executive Committee

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 09-MD-02036-JLK

IN RE: CHECKING ACCOUNT OVERDRAFT LITIGATION

MDL No. 2036

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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