

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 UNOPPOSED MOTION FOR PRELIMINARY
APPROVAL OF CLASS SETTLEMENT AND FOR CERTIFICATION OF
SETTLEMENT CLASS, AND INCORPORATED MEMORANDUM OF LAW**

Plaintiffs and Class Counsel respectfully move for Preliminary Approval of the Settlement Agreement and Release attached as Exhibit A (“Settlement” or “Agreement”), which will resolve all claims against Comerica Bank (“Comerica Bank”) in the Action.¹ The Court should grant Preliminary Approval because the Settlement provides substantial relief for the Settlement Class, and because the terms of the Settlement are well within the range of reasonableness and consistent with applicable case law. Indeed, the Settlement – which secures \$14,580,000 in cash, plus Comerica Bank’s payment of all fees and costs associated with the Notice Program and administration of the Settlement – is an outstanding result for the Settlement Class. *See* Joint Declaration of Robert C. Gilbert, Russell W. Budd and Joseph G. Sauder ¶ 4

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

attached hereto as Exhibit B (“Joint Decl.”). The Settlement satisfies all Eleventh Circuit criteria for Preliminary Approval.

Accordingly, Plaintiffs and Class Counsel respectfully request that the Court take the following initial steps in the settlement approval process: (1) grant Preliminary Approval to the Settlement; (2) certify for settlement purposes the proposed Settlement Class, pursuant to Rule 23(b)(3) and (e) of the Federal Rules of Civil Procedure; (3) approve the Notice Program set forth in the Agreement and approve the form and content of the Notices attached hereto as Exhibits C - E; (4) approve and order the opt-out and objection procedures set forth in the Agreement; (5) appoint as class representatives the Plaintiffs identified in paragraph 48 of the Agreement; (6) appoint as Class Counsel and Settlement Class Counsel the law firms and attorneys listed in paragraphs 29 and 57 of the Agreement, respectively; (7) stay the Action against Comerica Bank pending Final Approval of the Settlement; and (8) schedule a Final Approval Hearing no sooner than the week of April 14 – 18, 2014, if convenient for the Court. A [Proposed] Order Preliminarily Approving Class Settlement and Certifying Settlement Class is attached hereto as Exhibit F.

I. INTRODUCTION

In 2010, Plaintiffs sued on behalf of themselves and all others similarly situated who incurred Overdraft Fees as a result of Comerica Bank’s practice of posting Debit Card Transactions to an Account in order from highest to lowest dollar amount (“High-to-Low Posting”). Plaintiffs alleged that Comerica Bank systemically engaged in High-to-Low Posting of Settlement Class Members’ 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. Joint Decl. ¶ 5.

The Action involved sharply opposed positions on several fundamental legal questions, including whether Comerica Bank breached its duty of good faith and fair dealing to its customers when it engaged in High-to-Low Posting, as well as the enforceability to a contractually-abbreviated period for bringing claims. Joint Decl. ¶¶ 3, 6. 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 by federal and/or applicable state law, and that the claims brought against it in this case were subject to a contractually-abbreviated limitations period. *Id.*

Plaintiffs and Class Counsel actively litigated the Action for nearly three years. The litigation was hard-fought. Joint Decl. ¶¶ 8 - 25. The Parties engaged in significant motion practice and extensive formal discovery, including approximately fourteen depositions and the production of more than 300,000 pages of documents and electronically stored information. *Id.* at ¶¶ 15 - 16. The Court granted a contested motion for class certification, and the Eleventh Circuit denied Comerica Bank's petition for permission to appeal pursuant to Fed. R. Civ. P. 23(f). *Id.* at ¶ 22. The Eleventh Circuit subsequently denied Comerica's motion for reconsideration of that order. *Id.* at ¶ 23. Class Counsel and their expert completed an exhaustive analysis of Comerica Bank's electronic customer data to identify all members of the certified class who sustained harm and the amount of their damages. *Id.* at ¶ 30.

Preliminary settlement discussions began in early 2012. Joint Decl. ¶ 26. The Parties participated in mediation in May 2012 with Professor Eric Green of Resolutions LLC serving as mediator. Although an agreement was not reached at that mediation session, the Parties agreed to continue settlement discussions. *Id.* at ¶ 26. In July 2013, the Parties participated in a settlement conference. *Id.* at ¶ 27. On August 7, 2013, the Parties executed a Summary

Agreement memorializing the material terms of the Settlement. *Id.* at ¶ 27. 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 requested motion on August 13, 2013 (DE # 3600). Further discussions followed to address, *inter alia*, various issues relating to approval and implementation of the Settlement. *Id.* at ¶ 27. Once those issues were resolved, the Agreement was finalized and executed by the Parties in October 2013. *Id.*

Under the Settlement, all eligible Settlement Class Members who do not opt-out will automatically receive their *pro rata* share of the Settlement Fund. Joint Decl. ¶ 29. Settlement Class Members will not be asked to prove that they were damaged as a result of the Bank's High-to-Low Posting. *Id.* at ¶ 29. Settlement Class Counsel and their experts will use available Comerica Bank data to determine which Comerica Bank Account holders were harmed by High-to-Low Posting, and will apply a formula detailed in paragraph 91 of the Agreement to calculate each Settlement Class Member's *pro rata* share of the Settlement Fund. *Id.* at ¶ 30.

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 represents approximately thirty-five percent (35%) of the most likely recovery Settlement Class Members could have achieved at trial. Joint Decl. ¶ 49. 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. Agreement ¶ 65.

Plaintiffs and Class Counsel now seek Preliminary Approval so that they can notify Settlement Class Members of the terms of the Settlement, and provide them with an opportunity

to opt out of or object to the Settlement. For the reasons set forth herein, Plaintiffs and Class Counsel respectfully request that the Court grant Preliminary Approval.

II. STATEMENT OF FACTS

A. Factual Background.

Given its extensive role presiding over MDL 2036, the Court is familiar with the facts giving rise to Plaintiffs' claims and Comerica Bank's defenses.

1. 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. ¶ 8.

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. Joint Decl. ¶ 9.

On December 6, 2010, Plaintiffs Delphia Simmons and Patricia Matlage 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).

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. ¶ 11.

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. ¶ 12.

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. ¶ 13.

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). Joint Decl. ¶ 14.

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). Joint Decl. ¶ 15. Class Counsel created a large 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. ¶ 16.

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. ¶ 17.

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. ¶ 18.

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). Joint Decl. ¶ 19.

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, 2102 the Court denied Plaintiffs' motion (DE # 2807). Joint Decl. ¶ 20.

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. ¶ 21.

On August 24, 2012, Comerica Bank filed a petition with the U.S. Court of Appeals for the Eleventh Circuit seeking leave, pursuant to Fed. R. Civ. P. 23(f), to appeal the class certification order. Plaintiff's opposed that petition, and the Eleventh Circuit denied the petition on December 13, 2012. Joint Decl. ¶ 22.

On December 26, 2012, the U.S. 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. ¶ 23. Based on *Gutierrez*, on January 3, 2013, Comerica Bank filed a motion with the Eleventh Circuit seeking reconsideration of the denial of its petition for leave to appeal. 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. ¶ 24.

2. Settlement Negotiations.

Beginning in early 2012, the Parties initiated preliminary settlement discussions that resulted in the scheduling of a formal mediation. Joint Decl. ¶ 26. The Parties participated in mediation on May 23, 2012, with Professor Eric Green of Resolutions LLC serving as mediator. Although an agreement was not reached at that mediation, the Parties agreed to continue settlement discussions. *Id.*

On July 12, 2013, the Parties participated in a settlement conference. Joint Decl. ¶ 27. On August 7, 2013, the Parties 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.*

B. Summary of the Settlement Terms.

The Settlement's terms are detailed in the Agreement. 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 for the Benefit of the Class.

The Settlement requires Comerica Bank to deposit \$14,580,000 into an Escrow Account within 14 days following Preliminary Approval. Agreement ¶ 85. That deposit will create the Settlement Fund.

Settlement Class Members do not have to submit claims or take any other affirmative step to receive relief under the Settlement. As soon as practicable (but no sooner than 90 days) from the Effective Date, Comerica Bank and the Settlement Administrator will distribute the Net Settlement Fund to all eligible Settlement Class Members who do not opt out of the Settlement. Agreement ¶¶ 93-101. Payments to Settlement Class Members who are Current Account

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.

Holders will be made by the Bank crediting such Settlement Class Members' Accounts, and notifying them of the credit. Agreement ¶ 98. Settlement Class Members who are Past Account Holders will receive payment from the Settlement Fund by checks mailed by the Settlement Administrator. Agreement ¶ 100.

Thus, all Settlement Class Members who experienced a Positive Differential Overdraft Fee will receive a *pro rata* distribution from the Net Settlement Fund. Agreement ¶ 93. 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 a posting sequence or method for Debit Card Transactions other than High-to-Low Posting, and how much in additional Overdraft Fees those Account holders paid. The calculation involves a complex multi-step process described in detail in the Agreement. Agreement ¶ 91.

The Net Settlement Fund – which will be distributed *pro rata* among eligible Settlement Class Members who do not opt-out of the Settlement – is equal to the Settlement Fund plus any accrued interest and less: (a) the amount of the Court-awarded attorneys' fees, costs and expenses to Class Counsel; (b) the amount of the Court-awarded Service Awards to the Plaintiffs; (c) a reservation of a reasonable amount for prospective costs of Settlement administration that are not Comerica Bank's responsibility; and (d) all other costs and/or expenses incurred in connection with the Settlement that are expressly provided for in the Agreement or are approved by Settlement Class Counsel and Comerica Bank. Agreement ¶ 94.

Any uncashed or returned checks will remain in the Settlement Fund for one year from the date the first Settlement Fund Payments are mailed by the Settlement Administrator, during which time the Settlement Administrator will make reasonable efforts to effectuate delivery of

the Settlement Class Member Payments. Agreement ¶ 101. Any residual funds still remaining after that period will be distributed in accord with paragraph 102 of the Agreement. Agreement ¶ 102.

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 relating to the subject matter of the Action. The detailed release language is found in Section XIV of the Agreement.

4. The Notice Program.

Comerica Bank will pay all fees, costs and expenses of the Notice Administrator and the Settlement Administrator incurred in connection with the Notice Program. Agreement ¶ 65.

The Notice Program (Agreement, Section VIII) is designed to provide the best notice practicable, and it is tailored to take advantage of the information Comerica Bank has available about Settlement Class Members. The Notice Program is reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the Action, class certification, 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, Class Counsel's Fee Application, and/or the request for Service Awards for the two Class Representatives. The Notice and Notice Program constitute sufficient notice to all persons entitled to notice. The Notice and Notice Program satisfy all applicable requirements of law including, but not limited to, Federal Rule of Civil Procedure 23 and the Constitutional requirement of due process. Joint Decl. ¶ 33.

The Notice Program is comprised of three different components: (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 is not possible or unsuccessful; and (3) a “Long Form” notice with more detail than the direct mail or publication notices, that will be available on the Settlement Website and via U.S. mail upon request. Agreement ¶ 75.

The Notice Program is designed to provide the Settlement Class with important information regarding the Settlement and their rights thereunder, including a description of the material terms 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, Class Counsel’s Fee Application and/or the request for Service Awards; the date of the Final Approval Hearing; and the address of the Settlement Website at which Settlement Class Members may access the Agreement and other important documents and information. Agreement ¶¶ 71-82.

In addition to the information described above, the Long Form Notice will also describe the procedure Settlement Class Members must use to opt out of or object to the Settlement, and/or to Class Counsel’s Fee Application and/or to the request for Service Awards. Agreement ¶¶ 72-74. All opt-outs and objections must be postmarked by last day of the Opt-Out Period. *Id.*

For an objection to be valid, it must include: the name of the Action; the objector’s name, address, and telephone number; an explanation of how the objector is a member of the Settlement Class; the basis for the objection; a description of the number of times the objector or the objector’s counsel has objected to a class settlement in the last five (5) years, the names of any such cases, and any relevant orders issued in response to such past objections; a statement confirming whether the objector will appear at the Final Approval Hearing and a description of

counsel or witnesses who will appear on behalf of the objector at the Final Approval Hearing; and the objector's signature. Agreement ¶ 74.

(a) **The Mailed Notice Program**

Within 28 days from the date that the Settlement Administrator receives the data files that identify the names and last known addresses of the identifiable Settlement Class Members, the Settlement Administrator will run such addresses through the National Change of Address Database, and will mail to all such Settlement Class Members postcards substantially in the form attached hereto as Exhibit C that contain the Mailed Notice (the "Initial Mailed Notice"). Agreement ¶ 76. The Settlement Administrator will perform reasonable address traces for all Initial Mailed Notice postcards that are returned as undeliverable. Agreement ¶ 77. No later than 70 days before the Final Approval Hearing, the Settlement Administrator will complete the Mailed Notice Program, which is composed on the Initial Mailed Notice and the re-mailing of Mailed Notice postcards to those Settlement Class Members whose new addresses were identified as of that time through address traces (the "Notice Re-mailing Process"). Agreement ¶¶ 77-78.

(b) **The Published Notice Program**

The Notice Administrator will administer the Published Notice Program in the manner set forth in the Agreement, using the Published Notice substantially in the form attached hereto as Exhibit D. Agreement ¶ 79. The Published Notice Program will be completed no later than 70 days before the Final Approval Hearing. *Id.*

(c) **The Settlement Website and Toll-Free Hotline**

The Settlement Administrator will establish a Settlement Website as a means for Settlement Class Members to obtain notice of, and information about, the Settlement. Agreement ¶ 60. The Settlement Website will be established as soon as practicable following

Preliminary Approval, but no later than before commencement of the Notice Program. *Id.* The Settlement Website will include hyperlinks to the Settlement, the Long-Form Notice substantially in the form attached hereto as Exhibit E, the Preliminary Approval Order, and such other documents as Settlement Class Counsel and counsel for Comerica Bank agree to post or that the Court orders be posted on the Settlement Website. These documents will remain on the Settlement Website at least until Final Approval. *Id.*

The Settlement Administrator will also establish and maintain 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).

5. Settlement Administration

The Settlement Administrator's responsibilities include:

- a. Obtaining Settlement Class Members' name and address information (to the extent it is available), and verify and update the addresses received through the National Change of Address database, for the purpose of mailing the Mailed Notice, and later mailing distribution checks to Past Account Holder Settlement Class Members, and to Current Account Holder Settlement Class Members where it is not feasible or reasonable for Comerica Bank to make the payment by a credit to the Settlement Class Members' Accounts;
- b. Establishing and maintaining a post office box for requests for exclusion from the Settlement Class;
- c. Establishing and maintaining the Settlement Website;
- d. Establishing and maintaining an automated toll-free telephone line for Settlement Class Members to call with Settlement-related inquiries, and answering the questions of Settlement Class Members who call with or otherwise communicate such inquiries;

- e. Responding to any mailed Settlement Class Member inquiries;
- f. Processing all requests for exclusion from the Settlement Class;
- g. Providing weekly reports and, no later than five days after the end of the Opt-Out Period, a final report to Settlement Class Counsel and counsel for Comerica Bank that summarize the number of requests for exclusion received that week, the total number of exclusion requests received to date, and other pertinent information;
- h. Performing all tax-related services for the Escrow Account as provided in this Agreement;
- i. At Settlement Class Counsel's request in advance of the Final Approval Hearing, preparing an affidavit to submit to the Court that identifies each Settlement Class Member who timely and properly requested exclusion from the Settlement Class;
- j. Processing and transmitting distributions to Settlement Class Members from the Settlement Fund;
- k. Paying invoices, expenses and costs upon approval by Settlement Class Counsel and counsel for Comerica Bank, as provided in this Agreement; and
- l. Performing the duties of Escrow Agent as described in this Agreement, and any other Settlement-administration-related function at the instruction of Settlement Class Counsel and counsel for Comerica Bank, including but not limited to, verifying that Comerica Bank has correctly made a distribution to Settlement Class Members pursuant to the Agreement.

Agreement ¶ 70.

All fees and charges of the Settlement Administrator associated with administration of the Settlement will be paid by Comerica Bank, and will not come out of the Settlement Fund. Agreement ¶ 65.

6. Settlement Termination

Either Party may terminate the Settlement if the Settlement is rejected or materially modified by the Court or by 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 equals or exceeds the number or percentage specified in the separate letter executed concurrently with the Agreement by Comerica Bank's counsel and Settlement Class Counsel. Agreement ¶ 113. The number or percentage will be confidential except to the Court, who upon request will be provided a copy of the letter for *in camera* review. *Id.*

7. Class Representative Service Awards

Class Counsel will seek and Comerica Bank will 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 is in addition to the relief the Class Representatives will be entitled to under the terms of the Settlement. *Id.* These awards will compensate the Class Representatives for their time and efforts in the Action, including preparing for and appearing at depositions, and for the risks they assumed in prosecuting the Action against Comerica Bank. Joint Decl. ¶ 42.

8. Attorneys' Fees and Costs

Comerica Bank will not oppose Class Counsel's request for 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 this agreement regarding attorneys' fees

and costs only after reaching agreement on all other material terms of this Settlement Agreement ¶ 111; Joint Decl. ¶ 43.

III. ARGUMENT

A. The Legal Standard for Preliminary Approval.

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval for the compromise of claims brought on a class basis. “Although class action settlements require court approval, such approval is committed to the sound discretion of the district court.” *In re U.S. Oil and Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992). In exercising that discretion, courts are mindful of the “strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement.” *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). The policy favoring settlement is especially relevant in class actions and other complex matters, where the inherent costs, delays and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See, e.g., Ass’n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002) (“There is an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex.”) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)); *see also 4 Newberg on Class Actions* § 11.41 (4th ed. 2002) (citing cases).

The purpose of preliminary evaluation of proposed class action settlements is to determine whether the settlement is within the “range of reasonableness.” *4 Newberg on Class Actions* § 11.26. “Preliminary approval is appropriate where the proposed settlement is the result of the parties’ good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason.” *Smith v. Wm. Wrigley Jr. Co.*, No. 09-cv-60646, 2010 WL 2401149, at *2 (S.D. Fla. June 15, 2010). Settlement negotiations that involve arm’s length, informed bargaining with the aid of experienced counsel support a preliminary finding of fairness. *See*

Manual for Complex Litigation, Third, § 30.42 (West 1995) (“A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery.”) (internal quotation marks omitted).

When determining whether a settlement is ultimately fair, adequate and reasonable, courts in this circuit have looked to six factors: “(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved.” *Bennett*, 737 F.2d at 986. Courts have, at times, engaged in a “preliminary evaluation” of these factors to determine whether the settlement falls within the range of reason at the preliminary approval stage. *See, e.g., Smith*, 2010 WL 2401149 at *2.³

The Court’s grant of Preliminary Approval will allow all Settlement Class Members to receive notice of the terms of the Settlement, and of the date and time of the Final Approval Hearing at which Settlement Class Members may be heard, and at which further evidence and argument concerning the fairness, adequacy and reasonableness of the Settlement may be presented by the Parties. *See Manual for Compl. Lit.*, §§ 13.14, 21.632. Neither formal notice nor a hearing is required at the preliminary approval stage; the Court may grant such relief upon an informal application by the settling parties, and may conduct any necessary hearing in court or in chambers, at the Court’s discretion. *Id.* § 13.14.

³ Plaintiffs do not address the fifth factor related to objections to the Settlement because, at the preliminary approval stage, notice has not yet been distributed.

B. This Settlement Satisfies the Criteria for Preliminary Approval.

Each of the relevant factors weighs heavily in favor of Preliminary Approval of this Settlement. First, the Settlement was reached in the absence of collusion, and is the product of good-faith, informed and arm's length negotiations by competent counsel. Furthermore, a preliminary review of the factors related to the fairness, adequacy and reasonableness of the Settlement demonstrates that it fits well within the range of reasonableness, such that Preliminary Approval is appropriate.

Any settlement requires the parties to balance the merits of the claims and defenses asserted against the attendant risks of continued litigation and delay. Plaintiffs and Class Counsel believe that the claims asserted are meritorious and that Plaintiffs would prevail if this matter proceeded to trial. Comerica Bank argues that Plaintiffs' claims are unfounded, denies any liability, and has shown a willingness to litigate vigorously.

The Parties concluded that the benefits of the Settlement outweigh the risks and uncertainties attendant to continued litigation that include, but are not limited to, the risks, time and expenses associated with completing discovery, pretrial motions, trial, and final appellate review, particularly in the context of a large and complex multi-district litigation. Joint Decl. ¶¶ 47-48.

1. This Settlement Is The Product Of Good Faith, Informed and Arm's Length Negotiations.

A class action settlement should be approved so long as a district court finds that "the settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *see also Lipuma v. American Express Co.*, 406 F. Supp. 2d 1298, 318-19 (S.D. Fla. 2005) (approving class settlement where

the “benefits conferred upon the Class are substantial, and are the result of informed, arms-length negotiations by experienced Class Counsel”).

The Settlement here is the result of intensive, arm’s-length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual issues of this Action. The Parties engaged in a formal mediation before an experienced and respected mediator, Professor Eric Green. The parties also participated in direct settlement negotiations. All of these negotiations were arm’s-length and extensive. Joint Decl. ¶¶ 44-46; *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”).

Furthermore, Class Counsel are particularly experienced in the litigation, certification, trial, and settlement of nationwide class action cases. Joint Decl. ¶ 44. Class Counsel zealously represented their clients throughout the litigation including, *inter alia*, defeating the motion to dismiss, prevailing on the motion for class certification and defeating Comerica Bank’s rule 23(f) petition, and throughout the discovery process, which included review of over 300,000 pages of documents and electronic data as well as taking and defending approximately fourteen depositions of party and non-party witnesses.

In negotiating this Settlement, Class Counsel had the benefit of years of experience, a familiarity with the facts of the Action, as well as with other cases involving similar claims. As detailed above, Class Counsel conducted a thorough investigation and analysis of Plaintiffs’ claims and engaged in extensive discovery with Comerica Bank. Class Counsel’s review of that discovery enabled them to gain an understanding of the evidence related to central questions in the Action, and prepared them for well-informed settlement negotiations. Joint Decl. ¶ 45; *see*

also *Francisco v. Numismatic Guaranty Corp. of America*, 2008 WL 649124, *11 (S.D. Fla. Jan. 31, 2008) (stating that “Class Counsel had sufficient information to adequately evaluate the merits of the case and weigh the benefits against further litigation” where counsel conducted two 30(b)(6) depositions and obtained “thousands” of pages of documentary discovery). Class Counsel were also 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 trial and ensuing appeal involving similar claims brought against Wells Fargo Bank in California. Joint Decl. ¶ 46.

2. The Facts Support a Preliminary Determination that the Settlement is Fair, Adequate and Reasonable.

As noted, this Court may conduct a preliminary review of the *Bennett* factors to determine whether the Settlement falls within the “range of reason” such that notice and a final hearing as to the fairness, adequacy and reasonableness of the Settlement is warranted.

(a) Likelihood of Success at Trial.

Plaintiffs and Class Counsel are confident in the strength of their case, but are also pragmatic in their awareness of the various defenses available to Comerica Bank, and the risks inherent to continued litigation. As noted above, Plaintiffs avoided dismissal on various theories advanced at the motion to dismiss stage. The success of Plaintiffs’ claims in continued litigation, however, turned on these and other questions that were certain to arise again in the context of motions for summary judgment, at trial and on an inevitable post-judgment appeal. Joint Decl. ¶¶ 47-48. Under the circumstances, Class Counsel appropriately determined that the Settlement outweighs the gamble of continued litigation. *Id.*

Even if Plaintiffs prevailed at trial, any recovery could be delayed for years by an appeal. *Lipuma*, 406 F. Supp. 2d at 1322 (likelihood that appellate proceedings could delay class

recovery “strongly favor[s]” approval of a settlement). This Settlement provides substantial relief to Settlement Class Members, without further delays.

(b) **Range of Possible Recovery and the Point on or Below the Range of Recovery at Which a Settlement Is Fair.**

When evaluating “the terms of the compromise in relation to the likely benefits of a successful trial . . . the trial court is entitled to rely upon the judgment of experienced counsel for the parties.” *Cotton*, 559 F.2d at 1330. “Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.” *Id.*

Courts have determined that settlements may be reasonable even where Plaintiffs recover only part of their actual losses. *See Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988) (“[T]he fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate”). “The existence of strong defenses to the claims presented makes the possibility of a low recovery quite reasonable.” *Lipuma*, 406 F. Supp. 2d at 1323.

The \$14,580,000 cash recovery in this case is outstanding, given the complexity of the litigation and the significant risks and barriers that loomed in the absence of Settlement: Comerica Bank’s pending motion for judgment on the pleadings (DE # 3302); motions for summary judgment and other pretrial issues following the close of discovery; trial; and appellate review following a final judgment. Based on Comerica Bank’s transactional data, the \$14,580,000 Settlement Fund 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.⁴ Joint Decl. ¶ 49.

⁴ 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. ¶ 49, n.2.

Comerica Bank's payment of all costs associated with the Notice Program and administration of the Settlement further increases the value of the Settlement. *Id.*

There can be no doubt that this Settlement is a fair and reasonable recovery for the Settlement Class in light of the Bank's defenses, and the challenging and unpredictable path of litigation Plaintiffs and all Settlement Class Members would have faced absent a settlement.

(c) **Complexity, Expense and Duration of Litigation.**

The traditional means for handling claims like those at issue here would tax the court system, require a massive expenditure of public and private resources, and, given the relatively small value of the claims of the individual class members, would be impracticable. Thus, the Settlement is the best vehicle for Settlement Class Members to receive the relief to which they are entitled in a prompt and efficient manner. Joint Decl. ¶ 50. These considerations, and the other considerations noted above, militate heavily in favor of the Settlement. *See Behrens*, 118 F.R.D. at 542 (noting likely "battle of experts" at trial regarding damages, which would pose "great difficulty" for plaintiffs).

(d) **Stage of the Proceedings.**

Courts consider the stage of proceedings at which settlement is achieved "to ensure that Plaintiffs had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation." *Lipuma*, 406 F. Supp. 2d at 1324.

1. The Settlement was reached after extensive pretrial discovery, including the production and review of more than 300,000 pages of documents produced by Comerica Bank, approximately fourteen depositions, after a litigated class was certified and the Bank's Rule 23(f) Petition was denied by the Eleventh Circuit, and after Plaintiffs' expert completed his damage analysis. Joint Decl. ¶ 51. As a result, Class Counsel were extremely well-positioned to confidently evaluate the strengths and weaknesses of Plaintiffs' claims and prospects for success

at summary judgment, at trial, and on appeal. *Id.* Class Counsel are also highly familiar with the challenged practices and defenses at issue in the Action through their experience litigating similar cases in MDL 2036 and elsewhere. Joint Decl. ¶ 52.

C. Certification of the Settlement Class Is Appropriate.

For settlement purposes, Plaintiffs and Class Counsel respectfully request that the Court certify the Settlement Class defined in paragraph 62 of the Agreement.⁵ “Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

Certification of the proposed Settlement Class will allow notice of the Settlement to issue to inform Settlement Class Members of the existence and terms of the Settlement, of their right to object and be heard on its fairness, of their right to opt out, and of the date, time and place of the Final Approval Hearing. *See Manual for Compl. Lit.*, at §§ 21.632, 21.633. For the reasons set forth below, certification is appropriate under Rule 23(a) and (b)(3).

Certification under Rule 23(a) of the Federal Rules of Civil Procedure requires that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Under Rule 23(b)(3), certification is appropriate if the questions of law or fact common to the members of the class predominate over individual issues of law or fact and if a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

⁵ The definition of the Settlement Class in paragraph 62 of the Agreement is virtually identical to the class certified by this Court for litigation purposes (DE # 2875 at 25-26), although the language used in paragraph 62 is different based on defined terms in the Agreement.

This Court previously found all of the applicable Rule 23(b) requirements satisfied in the context of Plaintiffs' motion for class certification (DE # 2875). Those findings may be adopted here for purposes of certifying the Settlement Class.

The numerosity requirement of Rule 23(a) is satisfied because the Settlement Class consists of holders of over 100,000 Comerica Bank Accounts, and joinder of all such persons is impracticable. Joint Decl. ¶ 55. *See* Fed. R. Civ. P. 23(a)(1); *Kilgo v. Bowman Trans.*, 789 F.2d 859, 878 (11th Cir. 1986) (numerosity satisfied where plaintiffs identified at least 31 class members "from a wide geographical area").

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" and the plaintiff's common contention "must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541, 2551 (2011) (citation omitted). Here, the commonality requirement is readily satisfied. There are multiple questions of law and fact – centering on Comerica Bank's practice of High-to-Low Posting – that are common to the Settlement Class, that are alleged to have injured all Settlement Class Members in the same way, and that would generate common answers central to the viability of the claims were the Action to proceed to trial. Joint Decl. ¶ 56.

For similar reasons, Plaintiffs' claims are reasonably coextensive with those of the absent class members, such that the Rule 23(a)(3) typicality requirement is satisfied. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (typicality satisfied where claims "arise from the same event or pattern or practice and are based on the same legal theory"); *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) (named plaintiffs are typical of the

class where they “possess the same interest and suffer the same injury as the class members”). Plaintiffs are typical of absent Settlement Class Members because they were subjected to the same Comerica Bank practices and claim to have suffered from the same injuries, and because they will all benefit from the relief provided by the Settlement. Joint Decl. ¶ 57.

Plaintiffs and Class Counsel also satisfy the adequacy of representation requirement. Adequacy under Rule 23(a)(4) relates to (1) whether the proposed class representatives have interests antagonistic to the class; and (2) whether the proposed class counsel has the competence to undertake this litigation. *Fabricant*, 202 F.R.D. at 314. The determinative factor “is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class.” *Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000) (internal quotation marks omitted). Plaintiffs’ interests are coextensive with, not antagonistic to, the interests of the Settlement Class, because Plaintiffs and the absent Settlement Class Members have the same interest in the relief afforded by the Settlement, and the absent Settlement Class Members have no diverging interests. Further, Plaintiffs and the Settlement Class are represented by qualified and competent Class Counsel who have extensive experience and expertise prosecuting complex class actions, including consumer actions similar to this Action. Joint Decl. ¶ 58. Class Counsel have devoted substantial time and resources to vigorous litigation of the Action. *Id.*

Rule 23(b)(3) requires that “[c]ommon issues of fact and law . . . ha[ve] a direct impact on every class member’s effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim or claims of each class member.” *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1170 (11th Cir. 2010) (internal quotation marks omitted). Plaintiffs readily satisfy the Rule 23(b)(3)

predominance requirement because liability questions common to all Settlement Class Members substantially outweigh any possible issues that are individual to each Settlement Class Member. For example, each Settlement Class Member's relationship with Comerica Bank arises from an Account agreement that is the same or substantially similar in all relevant respects to other Settlement Class Members' Account agreements. Joint Decl. ¶ 59. *See Sacred Heart Health Sys.*, 601 F.3d at 1171 ("It is the form contract, executed under like conditions by all class members, that best facilitates class treatment."). Further, resolution of thousands of claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication. *See Fed. R. Civ. P. 23(b)(3)*. For these reasons, the Court should certify the Settlement Class.

D. The Court Should Approve the Proposed Notice Program.

"Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." *Manual for Compl. Lit.* § 21.312 (internal quotation marks omitted). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). To satisfy this standard, "[n]ot only must the substantive claims be adequately described but the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action." *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998) (internal quotation marks omitted); *see also* *Manual for Compl. Lit.*, § 21.312 (listing relevant information).

The Notice Program satisfies all of these criteria. As recited in the Settlement and above, the Notice Program will inform Settlement Class Members of the substantive terms of the Settlement. It will advise Settlement Class Members of their options for remaining part of the Settlement Class, for objecting to the Settlement, Class Counsel's Fee Application and/or request for Service Awards, or for opting-out of the Settlement, and how to obtain additional information about the Settlement. The Notice Program is designed to reach a high percentage of Settlement Class Members (including most by direct mail, the best possible form of notice), and exceeds the requirements of constitutional due process. Joint Decl. ¶ 33. Therefore, the Court should approve the Notice Program and the form and content of the Notices attached to this motion as Exhibits C - E.

E. The Court Should Schedule a Final Approval Hearing.

The last step in the Settlement approval process is a Final Approval Hearing, at which the Court will hear evidence and argument necessary to make its final evaluation of the Settlement. Proponents of the Settlement may explain the terms and conditions of the Settlement, and offer argument in support of Final Approval. The Court will determine at or after the Final Approval Hearing whether the Settlement should be approved; whether to enter the Final Approval Order under Rule 23(e); and whether to approve Class Counsel's Fee Application, and request for Service Awards for the Class Representatives. Plaintiffs and Class Counsel request that the Court schedule the Final Approval Hearing for no sooner than the week of April 14 – 18, 2014, if convenient for the Court. Plaintiffs and Class Counsel will file their motion for Final Approval and Fee Application and request for Service Awards no later than 56 days prior to the Final Approval Hearing.

IV. CONCLUSION

Based on the foregoing, Plaintiffs and Class Counsel respectfully request that the Court: (1) grant Preliminary Approval to the Settlement; (2) certify for settlement purposes the proposed Settlement Class, pursuant to Rule 23(b)(3) and (e) of the Federal Rules of Civil Procedure; (3) approve the Notice Program set forth in the Agreement and approve the form and content of the Notices, attached to this motion as Exhibits C - E; (4) approve and order the opt-out and objection procedures set forth in the Agreement; (5) appoint as Class Representatives the Plaintiffs identified in paragraph 48 of the Agreement; (6) appoint as Class Counsel and Settlement Class Counsel the law firms and attorneys listed in paragraphs 29 and 57 of the Agreement, respectively; (7) stay the Action against Comerica Bank pending Final Approval of the Settlement; and (8) schedule a Final Approval Hearing no sooner than the week of April 14 – 18, 2014. A [Proposed] Order Preliminarily Approving Class Settlement and Certifying Settlement Class is attached as Exhibit F.

Dated: November 14, 2013.

Respectfully submitted,

/s/ Aaron S. Podhurst

Aaron S. Podhurst, Esquire

Florida Bar No. 063606

apodhurst@podhurst.com

Robert C. Josefsberg, Esquire

Florida Bar No. 40856

rjosefsberg@podhurst.com

Steven C. Marks, Esquire

Florida Bar No. 516414

smarks@podhurst.com

Peter Prieto, Esquire

Florida Bar No. 501492

pprieto@podhurst.com

Stephen F. Rosenthal, Esquire

Florida Bar No. 0131458

srosenthal@podhurst.com

John Gravante, III, Esquire

Florida Bar No. 617113

jgravante@podhurst.com

PODHURST ORSECK, P.A.

City National Bank Building

25 W. Flagler Street, Suite 800

Miami, FL 33130-1780

Tel: 305-358-2800

Fax: 305-358-2382

/s/ Bruce S. Rogow

Bruce S. Rogow, Esquire

Florida Bar No. 067999

brogow@rogowlaw.com

Bruce S. Rogow, P.A.

Broward Financial Center

500 East Broward Boulevard

Suite 1930

Fort Lauderdale, FL 33394

Tel: 954-767-8909

Fax: 954-764-1530

Co-Lead Counsel for Plaintiffs

/s/ Robert C. Gilbert
Robert C. Gilbert, Esquire
Florida Bar No. 561861
rcg@grossmanroth.com
Stuart Z. Grossman, Esquire
Florida Bar No. 156113
szg@grossmanroth.com
David Buckner, Esquire
Florida Bar No. 60550
dbu@grossmanroth.com
Seth E. Miles, Esquire
Florida Bar No. 385530
sem@grossmanroth.com
GROSSMAN ROTH, P.A.
2525 Ponce de Leon Boulevard
Eleventh Floor
Coral Gables, FL 33134
Tel: 305-442-8666
Fax: 305-779-9596

Coordinating Counsel for Plaintiffs

/s/ E. Adam Webb
E. Adam Webb, Esquire
Georgia Bar No. 743910
Adam@WebbLLC.com
Matthew C. Klase, Esquire
Georgia Bar No. 141903
Matt@WebbLLC.com
G. Franklin Lemond, Jr., Esquire
Georgia Bar No. 141315
FLemond@WebbLLC.com
WEBB, KLASE & LEMOND, L.L.C.
1900 The Exchange, S.E.
Suite 480
Atlanta, GA 30339
Tel: 770-444-9325
Fax: 770-444-0271

/s/ Michael W. Sobol
Michael W. Sobol, Esquire
California Bar No. 194857
msobol@lchb.com
Roger N. Heller, Esquire
California Bar No. 215348
rheller@lchb.com
Jordan Elias, Esquire
California Bar No. 228731
jelias@lchb.com
LIEFF CABRASER HEIMANN &
BERNSTEIN L.L.P.
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111
Tel: 415-956-1000
Fax: 415-956-1008

/s/ Russell W. Budd
Russell W. Budd, Esquire
Texas Bar No. 03312400
rbudd@baronbudd.com
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, TX 75219
Tel: 214-521-3605
Fax: 214-520-1181

/s/ David S. Stellings
David S. Stellings, Esquire
New York Bar No. 2635282
dstellings@lchb.com
LIEFF CABRASER HEIMANN &
BERNSTEIN L.L.P.
250 Hudson Street
8th Floor
New York, NY 10013
Tel: 212-355-9500
Fax: 212-355-9592

/s/ Ruben Honik
Ruben Honik, Esquire
Pennsylvania Bar No. 33109
rhonik@golombhonik.com
Kenneth J. Grunfeld, Esquire
Pennsylvania Bar No. 84121
kgrunfeld@golombhonik.com
GOLOMB & HONIK, P.C.
1515 Market Street
Suite 1100
Philadelphia, PA 19102
Tel: 215-985-9177
Fax: 215-985-4169

/s/ Ted E. Trief
Ted E. Trief, Esquire
New York Bar No. 1476662
ttrief@triefandolk.com
Barbara E. Olk, Esquire
New York Bar No. 1459643
bolk@triefandolk.com
TRIEF & OLK
150 E. 58th Street
34th Floor
New York, NY 10155
Tel: 212-486-6060
Fax: 212-317-2946

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 November 14, 2013, 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 in the manner specified, 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.

/s/ Robert C. Gilbert
Robert C. Gilbert, Esquire
Florida Bar No. 561861
GROSSMAN ROTH, P.A.
2525 Ponce de Leon Boulevard
Eleventh Floor
Coral Gables, FL 33134
Tel: 305-442-8666
Fax: 305-779-9596