

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

IN RE: CHECKING ACCOUNT
OVERDRAFT LITIGATION

MDL No. 2036

THIS DOCUMENT RELATES TO:

Waters, et al. v. U.S. Bank, N.A.
S.D. Fla. Case No. 1:09-cv-23034-JLK
N.D. Cal. Case No. 09-2071-JSW

Speers, et al. v. U.S. Bank, N.A.
S.D. Fla. Case No. 1:09-cv-23126-JLK
D. Or. Case No. 3:09-cv-00409-HU

Brown v. U.S. Bank, N.A.
S.D. Fla. Case No. 1:10-cv-24147-JLK
E.D. Wash. Case No. 2:10-00356-RMP

**JOINT DECLARATION OF AARON S. PODHURST, BRUCE S. ROGOW,
AND ROBERT C. GILBERT IN SUPPORT OF PLAINTIFFS' AND CLASS
COUNSEL'S MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT, AND
APPLICATION FOR SERVICE AWARDS, ATTORNEYS' FEES AND EXPENSES**

Aaron S. Podhurst, Bruce S. Rogow, and Robert C. Gilbert declare as follows:

1. We are Settlement Class Counsel for Plaintiffs and the Settlement Class under the Amended and Restated Settlement Agreement and Release with U.S. Bank ("Settlement" or "Agreement") that was preliminarily approved by this Court on July 29, 2013.¹ (DE # 3559). We submit this declaration in support of Plaintiffs' and Class Counsel's Motion for Final

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

Approval of Class Settlement, and Application for Service Awards, Attorneys' Fees and Expenses. Unless otherwise noted, we have personal knowledge of the facts set forth in this declaration, and could testify competently to them if called upon to do so.

2. After more than three years of litigation and protracted settlement negotiations, Plaintiffs, Settlement Class Counsel and U.S. Bank entered into the Settlement under which U.S. Bank will (i) pay \$55,000,000 in cash to create a common fund for the benefit of the Settlement Class, (ii) pay the fees and costs of providing Notice to Settlement Class Members and associated fees and costs incurred in connection with administration of the Settlement, and (iii) adhere to its recently-adopted posting order on consumer checking accounts for a minimum of two (2) years following Final Approval. Under the Settlement, all eligible Settlement Class Members will automatically receive *pro rata* distributions from the Net Settlement Fund in proportion to the actual harm that each of them sustained.

3. The Action involved sharply opposed positions on several fundamental legal and factual issues, including: (i) whether U.S. Bank's arbitration provisions in its Account agreements were enforceable; (ii) whether the National Bank Act ("NBA") preempted Plaintiffs' claims; (iii) whether U.S. Bank breached its duty of good faith and fair dealing when it engaged in High-to-Low Posting of its customers' Debit Card Transactions; (iv) whether U.S. Bank's policies and practices involving High-to-Low Posting were unconscionable, constituted conversion and/or resulted in unjust enrichment; and (v) the appropriate methodology for establishing damages on a class-wide basis and the amount of damages to be recovered.

4. Plaintiffs maintain that the claims asserted in the Action are meritorious; that they would defeat U.S. Bank's effort to compel *individual* arbitrations; that nationwide class certification would be granted; that Plaintiffs and the Settlement Class would establish liability

and recover substantial damages if the Action proceeded to trial; and that the final judgment would be affirmed on appeal. Conversely, U.S. Bank argued that Plaintiffs' claims were subject to binding *individual* arbitration, that the NBA preempted the claims of Plaintiffs and all Settlement Class Members, and that the applicable Account agreements expressly authorized its High-to-Low Posting practices. Plaintiffs' ultimate success required them to prevail, in whole or in part, at *all* of these junctures, while U.S. Bank's success at any one of these junctures could have spelled defeat for Plaintiffs and the Settlement Class. Thus, continued litigation posed significant risks and countless uncertainties, as well as the time, expense, and delays associated with trial and appellate proceedings, particularly in the context of complex multi-district litigation.

5. In light of the risks, uncertainties and delays associated with continued litigation, the Settlement represents a significant achievement by providing guaranteed benefits to the Settlement Class in the form of direct cash compensation and other valuable relief.

A. Background of the Litigation.

6. Beginning in 2009, Plaintiffs sued on behalf of themselves and all others similarly situated who incurred Overdraft Fees as a result of U.S. Bank's High-to-Low Posting of Debit Card Transactions. Plaintiffs alleged that U.S. Bank systemically engaged in High-to-Low Posting of Debit Card Transactions to maximize the Bank's Overdraft Fee revenues. According to Plaintiffs, U.S. 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.

7. U.S. Bank denied Plaintiffs' allegations of wrongdoing. U.S. Bank initially asserted that Plaintiffs' claims were preempted by the NBA and advanced a medley of other defenses. Ten months into the case, U.S. Bank asserted that its right to compel *individual*

arbitration precluded Plaintiffs and all Settlement Class Members from pursuing the Action in court, individually or as a class action.

B. Class Counsel's Investigation.

8. Class Counsel devoted substantial time and expended significant resources researching and developing the legal claims at issue, before and after the litigation began. Class Counsel interviewed U.S. Bank customers and potential plaintiffs to gather information about U.S. Bank's conduct and its impact upon consumers. This information was essential to Class Counsel's ability to understand the nature of U.S. Bank's conduct, the language of the Account agreements at issue, and potential claims for relief and remedies.

C. The Course of Proceedings.

9. On April 17, 2009, April Speers filed *Speers v. U.S. Bank, N.A.*, Case No. 09-cv-00409-HU ("*Speers I*") in the United States District Court for the District of Oregon, alleging improper assessment and collection of Overdraft Fees and seeking, *inter alia*, monetary damages, restitution and equitable relief. On September 10, 2009, *Speers I* was transferred to this Court where, pursuant to an order of the Judicial Panel for Multi-District Litigation ("JPML"), it was made part of MDL 2036. *See* DE # 58.

10. On October 19, 2009, Plaintiff Speers filed *Speers v. U.S. Bank, N.A.*, Case No. 09-23126-JLK ("*Speers II*") in this Court, asserting identical allegations to those asserted in *Speers I*. On October 22, 2009, *Speers II* was transferred to this Court and made part of MDL 2036. *See* DE # 114. *Speers I* was thereafter dismissed without prejudice. *See* DE # 161.

11. On May 12, 2009, Willyum Waters and Frank Smith filed *Waters et al. v. U.S. Bancorp, N.A.*, Case No. 09-cv-2071-JSW ("*Waters*") in the United States District Court for the Northern District of California, asserting substantially identical allegations to those raised in

Speers I. On September 10, 2009, *Waters* was transferred to this Court and joined other actions in MDL 2036. *See* DE # 54.

12. On October 9, 2009, Donald Kimenker filed *Kimenker v. U.S. Bancorp, N.A.*, Case No. 09-cv-2232-DMS-NLS (“*Kimenker*”) in the United States District Court for the District of New Jersey, asserting substantially identical allegations against U.S. Bank. On November 18, 2009, *Kimenker* was transferred to this Court and joined other actions in MDL 2036. *See* DE # 153.

13. On December 22, 2009, U.S. Bank and other defendants assigned to MDL 2036’s first tranche filed an omnibus motion to dismiss and/or for judgment on the pleadings. *See* DE # 217. On March 11, 2010, following extensive briefing and oral argument, the Court denied in part and granted in part the omnibus motion to dismiss. *See* DE # 305.

14. On April 12, 2010, Plaintiffs filed a Third Amended Complaint in *Waters*, adding Glenda Lawrence and Susan Ledbetter as Plaintiffs. *See* DE # 351.

15. On May 14, 2010, Plaintiff Kimenker moved for voluntary dismissal of *Kimenker* and joined the *Waters* action on the same day. *See* DE # 464, 465. On June 7, 2010, a final order of dismissal was entered in *Kimenker*. *See* DE # 562.

16. On May 14, 2010, Plaintiffs filed a Fourth Amended Complaint in *Waters*, adding Willyum Waters, Frank Smith, Shane Parkins, Kara Parkins, Steven Barnes, Carolyn Barnes, Glenda Lawrence, Susan Ledbetter and Donald Kimenker as Plaintiffs (collectively, the “*Waters* Plaintiffs”). *See* DE # 464.

17. On May 14, 2010, Plaintiff Speers filed her Second Amended Class Action Complaint in *Speers II*. *See* DE # 466.

18. On July 2, 2010, U.S. Bank filed a motion to compel arbitration and to stay proceedings as to the *Speers II* and *Waters* Plaintiffs (“*Speers II* and *Waters* Arbitration Motion”). See DE # 632. On July 16, 2010, Plaintiffs filed an omnibus motion to compel further discovery responses from U.S. Bank. See DE # 691. On July 26, 2010, the *Speers II* and *Waters* Plaintiffs filed their opposition to U.S. Bank’s *Speers II* and *Waters* Arbitration Motion. See DE # 723.

19. On October 13, 2010, Lori Brown and Mitchell Brown filed *Brown v. U.S. Bank, N.A.*, Case No. CV-10-356-RMP (“*Brown*”) in the United States District Court for the Eastern District of Washington, asserting substantially similar allegations to those asserted in *Speers I*, *Speers II*, *Waters* and *Kimenker*. On November 16, 2010, *Brown* was transferred to this Court and made part of MDL 2036, where it joined *Speers II* and *Waters* pending against U.S. Bank. See DE # 922.

20. On October 26, 2010, the Court denied U.S. Bank’s *Speers II* and *Waters* Arbitration Motion. See DE # 855. On October 27, 2010, U.S. Bank appealed the denial of its *Speers II* and *Waters* Arbitration Motion. See DE # 856. On October 29, 2010, U.S. Bank filed a motion to stay proceedings in this Court pending its appeal. See DE # 861. On November 3, 2010, the Court denied the motion to stay. See DE # 874.

21. On November 29, 2010, U.S. Bank filed a motion to compel the *Speers II* and *Waters* Plaintiffs to produce documents and answer interrogatories. See DE # 955. On December 6, 2010, the *Speers II* and *Waters* Plaintiffs filed their opposition to the Bank’s motion. See DE # 987.

22. On December 17, 2010, the United States Court of Appeals for the Eleventh Circuit granted U.S. Bank’s motion for stay pending appeal. See DE # 1019. In early 2011, U.S.

Bank and the *Speers II* and *Waters* Plaintiffs filed their respective appellate briefs in the Eleventh Circuit.

23. On May 2, 2011, U.S. Bank filed a motion to compel arbitration and stay proceedings against the *Brown* Plaintiffs (“*Brown* Arbitration Motion”). See DE # 1411. On May 17, 2011, the *Brown* Plaintiffs filed a motion to defer ruling on and their opposition to the *Brown* Arbitration Motion. See DE # 1491, 1493. On June 30, 2011, the Court granted the *Brown* Plaintiffs’ motion to defer ruling and ordered the parties to conduct limited arbitration-related discovery. See DE # 1673.

24. On June 30, 2011, U.S. Bank filed a notice of appeal of the Order deferring ruling on the *Brown* Arbitration Motion. See DE # 1676. On July 5, 2011, U.S. Bank filed a motion to stay further proceedings in *Brown* pending the outcome of its interlocutory appeal. See DE # 1682. On July 22, 2011, this Court denied U.S. Bank’s motion to stay. See DE # 2750. On October 5, 2011, the Eleventh Circuit dismissed U.S. Bank’s appeal for lack of jurisdiction.

25. On December 14, 2011, U.S. Bank filed a successor motion to compel arbitration and stay proceedings against the *Brown* Plaintiffs. See DE # 2220. On December 20, 2011, the *Brown* Plaintiffs moved to strike the Bank’s successor motion. See DE # 2282.

D. Settlement Negotiations.

26. In late 2011, Settlement Class Counsel and counsel for U.S. Bank initiated preliminary settlement discussions. The preliminary discussions resulted in the scheduling of mediation in the Spring of 2012.

27. In early 2012, the Eleventh Circuit granted the joint motion of U.S. Bank and the *Speers II* and *Waters* Plaintiffs to stay further proceedings to allow the parties to proceed with

mediation.² In late January 2012, the *Brown* Plaintiffs and U.S. Bank filed a joint motion in this Court to suspend briefing on U.S. Bank's successor motion to compel arbitration to facilitate the forthcoming mediation. *See* DE # 2412. The Court granted that joint motion, and subsequently extended the temporary suspension. *See* DE # 2417.

28. On May 10, 2012, Class Counsel and U.S. Bank participated in mediation with Professor Eric Green of Resolutions LLC. Although an agreement was not reached at that mediation session, the Parties continued their settlement discussions thereafter with the assistance of Professor Green.

29. On June 29, 2012, the Parties reached an agreement in principle and, soon thereafter, executed a Summary Agreement that memorialized the material terms of the Settlement. On July 3, 2012, the Parties filed a joint notice of settlement that requested a suspension of all deadlines pending the drafting and execution of a settlement agreement. *See* DE # 2805. On July 6, 2012, the Court entered an Order suspending deadlines for supplemental arbitration briefing pending the filing of a settlement agreement. *See* DE # 2812. Following extensive discussions, negotiations and drafting that spanned many months, the Parties resolved all remaining issues, culminating in the Agreement.

30. On July 24, 2013, Plaintiffs and Class Counsel filed their motion for preliminary approval. *See* DE # 3543. On July 29, 2013, the Court entered the Preliminary Approval Order. *See* DE # 3559. Pursuant to the Preliminary Approval Order, Notice was disseminated to the Settlement Class.

² The Eleventh Circuit extended the stay several times to allow the parties to complete the settlement process.

31. At all times throughout the mediation proceedings and subsequent settlement discussions, the negotiations were adversarial, non-collusive and at arm's length.

E. Settlement Recovery.

32. The Settlement required U.S. Bank to deposit \$55,000,000 into the Escrow Account within fourteen (14) days following entry of the Preliminary Approval Order. Agreement ¶ 100. The Bank timely deposited that sum, creating the Settlement Fund. The Settlement Fund will be used to: (i) pay all Automatic Distributions of payments to 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) reimburse U.S. Bank for the payment of costs as set forth in Section XIII of the Agreement, (v) distribute any residual funds as set forth in Section XIII; (vi) pay all Taxes pursuant to paragraph 102 of the Agreement; (vii) pay any costs of Settlement Administration other than those to be paid by U.S. Bank pursuant to Section IV of the Agreement; and (viii) pay any additional fees, costs and expenses not specifically enumerated in paragraph 103 (a)-(g) of the Agreement, subject to approval of Settlement Class Counsel and U.S. Bank. *Id.* at ¶ 103. In addition to the \$55,000,000 Settlement Fund, U.S. 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 ¶ 80.

33. All identifiable Settlement Class Members who experienced a Positive Overdraft Differential will receive *pro rata* distributions from the Net Settlement Fund, provided they do not opt-out of the Settlement.³ Agreement ¶ 108. The Positive Differential Overdraft analysis

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

determines, among other things, which U.S. Bank Account holders were assessed additional Overdraft Fees that would not have been assessed if the Bank had used an alternative posting sequence or method for posting Debit Card Transactions other than High-to-Low Posting, and how much in additional Overdraft Fees those Account holders paid. The calculation involves a multi-step process that is described in detail in the Agreement. *Id.* at ¶¶ 104-107.

34. 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 *pro rata* distributions will be determined by Settlement Class Counsel and their expert through analysis of U.S. Bank's electronic data. Agreement ¶¶ 104-107. As soon as practicable after Final Approval, but no later than 120 days from the Effective Date (Agreement ¶ 50), the Settlement Administrator will distribute the Net Settlement Fund to all eligible Settlement Class Members who had a Positive Overdraft Differential and did not timely opt out of the Settlement. *Id.* at ¶¶ 108-113.

35. Payments to Settlement Class Members who are Account Holders will be made by crediting such Settlement Class Members' Accounts, and notifying them of the credit. *Id.* at ¶ 113. U.S. Bank will then be entitled to a reimbursement for such credits from the Net Settlement Fund. *Id.* at ¶ 114. Former Account Holders (and current Account Holders whose Accounts cannot feasibly be automatically credited) will receive their payments by checks mailed by the Settlement Administrator. *Id.* at ¶¶ 113-114.

36. 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

prospective costs of Settlement administration that are not U.S. Bank's responsibility pursuant to Section IV of the Agreement, and any other costs and/or expenses incurred in connection with the Settlement that are not specifically enumerated in paragraph 109 (a)-(c) that are provided for in the Agreement and have been approved by Settlement Class Counsel and U.S. Bank. Agreement ¶ 109.

Administrator will make reasonable efforts to effectuate delivery of the Settlement Fund Payments. Agreement ¶ 115.

37. Any residual funds remaining in the Settlement Fund one year after the first Settlement Fund Payments are mailed will be distributed as follows: first, to U.S. Bank to reimburse it for all fees and costs it paid to the Notice Administrator and Settlement Administrator associated with the Notice Program and Settlement administration; second, any remaining funds will be distributed on a *pro rata* basis to participating Settlement Class Members who received an Automatic Distribution pursuant to Section XII of the Agreement, to the extent feasible and practical in light of the costs of administering such subsequent payments, unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair; or third, if the costs of preparing, transmitting and administering subsequent payments to participating Settlement Class Members are not feasible and practical to make individual distributions economically viable, or other specific reasons exist that make such further distributions impossible or unfair, Settlement Class Counsel and counsel for U.S. Bank will jointly propose a plan for distribution of the residual funds consistent with the American Law Institute, *Principles of Aggregate Litigation* § 3.07(c), and will present the plan to the Court for its consideration. After consultation with the Parties, the Court will have the discretion to approve, deny, amend or modify, in whole or in part, the proposed plan for distribution of the residual funds in a manner consistent with the American Law Institute, *Principles of Aggregate Litigation* § 3.07(c). The residual funds shall not be used for any litigation purpose or to disparage any Party. The Parties agree that the Court's approval, denial, amendment or modification, in whole or in part, of the proposed plan for distribution of the residual funds will

not constitute grounds for termination of the Settlement pursuant to paragraph 126 of the Agreement. Amendment ¶ 116.

38. As additional consideration, U.S. Bank agreed to maintain, for a period of at least two (2) years after Final Approval, its recently adopted posting order applicable to consumer checking accounts, subject to any alteration, modification or rescission that may be required to comply with any change in statutory, regulatory or judicial authority, or examiner guidance. Agreement ¶ 79.

F. Class Release.

39. In exchange for the benefits conferred by the Settlement, all Settlement Class Members who do not opt out will be deemed to have released U.S. Bank from claims related to the subject matter of the Action. The detailed release language is found in Section XIV of the Agreement. Agreement ¶¶ 117-119.

G. Settlement Notice.

40. The Notice Program (Agreement Section VIII) was designed to provide the best notice practicable, and was tailored to take advantage of the information U.S. Bank had available about Settlement Class Members. Agreement ¶¶ 86-97. U.S. Bank has and will continue to pay the fees and costs associated with the Notice Program. *Id.* at ¶¶ 80, 96.

41. 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. The Notices and Notice Program constituted sufficient notice to all persons entitled to notice. The Notices and Notice Program satisfied all applicable requirements of law, including, but not limited to, Federal Rule of Civil Procedure 23 and the constitutional requirement of due process.

42. The Notice Program was comprised of three (3) parts: (1) direct mail postcard notice (“Mailed Notice”) to all identifiable Settlement Class Members; (2) publication notice (“Published Notice”) designed to reach those Settlement Class Members for whom direct mail notice was not possible; and (3) a “Long Form” notice with more detail than the direct mail or publication notices, that has been and remains available on the Settlement Web Site and via mail upon request. Agreement, ¶ 90.

43. All forms of Notice to the Settlement Class included, among other information: a description of the Settlement; a date by which Settlement Class Members may exclude themselves from or “opt out” of the Settlement Class; a date by which Settlement Class Members may object to the Settlement; the date on which the Final Approval Hearing will occur; and the address of the Settlement Website at which Settlement Class Members may access the Agreement and other related documents and information. Agreement, ¶¶ 86-89.

44. In addition to the information described above, the “Long-Form” notice also described the procedure Settlement Class Members must use to opt out of the Settlement or to object to the Settlement, and/or to Class Counsel’s Fee Application and/or request for Service Awards. All opt-outs must be postmarked before the Opt-Out Deadline, and any objections must be postmarked by the Opt-Out deadline. 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 years, the names of any such cases, and any relevant orders issued in response to such past objections; the identity of the objector’s counsel; any agreements relating to the objection or the process of objecting between the objector or the objector’s counsel and any other person or

entity; 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 ¶ 89.

a. The Mailed Notice Program

45. The Mailed Notice Program was administered and timely completed by the Settlement Administrator.⁴ Agreement ¶ 93. Following its receipt of data files that identified the names and last known addresses of the identifiable Settlement Class Members, the Settlement Administrator ran such addresses through the National Change of Address Database, and timely mailed postcards to all such Settlement Class Members that contained the Mailed Notice. *Id.* at ¶ 91.

46. The Settlement Administrator performed reasonable address traces for all Initial Mailed Notice postcards that were returned as undeliverable. The Settlement Administrator timely completed the re-mailing of Mailed Notice postcards to those Settlement Class Members whose new addresses were identified as of that time through address traces. Agreement ¶ 92.

b. The Published Notice Program

47. The Published Notice Program was comprised of advertisements in *People* and *ESPN* magazines, two national weekly publications. Agreement ¶ 94. The Published Notice Program was timely completed.

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

48. The Settlement Administrator timely established the Settlement Website as a means for Settlement Class Members to obtain notice of, and information about, the Settlement. Agreement ¶ 73. The Settlement Website includes hyperlinks to the Settlement, the “Long-

⁴ On September 25, 2013, the Court granted the Parties' joint motion to extend the deadline for completing the Mailed Notice Program through October 18, 2013. *See* DE # 3661.

Form” notice, the Preliminary Approval Order, and such other documents as Settlement Class Counsel and counsel for U.S. Bank agreed to post on the Settlement Website. *Id.* These documents will remain on the Settlement Website at least until Final Approval. *Id.*

49. The Settlement Administrator timely established and has maintained an automated toll-free telephone line for Settlement Class Members to call with Settlement-related inquiries, and answer the questions of Settlement Class Members who call with or otherwise communicate such inquiries. Agreement ¶ 85(d).

H. Service Awards, Attorneys’ Fees and Costs

50. Class Counsel are entitled to request, and U.S. Bank will not oppose, Service Awards of \$10,000 per Plaintiff, or \$5,000 per Plaintiff for married couples in which both spouses are Plaintiffs, for each of the Plaintiffs identified in paragraph 61 of the Agreement. Agreement ¶ 124. If the Court approves them, the Service Awards will be paid from the Settlement Fund, and will be in addition to any other relief to which the Plaintiffs are entitled under the terms of the Settlement. *Id.* The awards will compensate the Plaintiffs for their time and effort in the Action, and for the risks they undertook in prosecuting the Action against U.S. Bank.

51. Class Counsel are entitled to request, and U.S. Bank will not oppose, an award of attorneys’ fees equal to thirty percent (30%) of the \$55,000,000 Settlement Fund, plus reimbursement of certain litigation costs and expenses. Agreement ¶ 121. The Parties negotiated and reached this agreement regarding attorneys’ fees and costs only after reaching agreement on all other material terms of the Settlement. *Id.* at ¶ 125.

I. Considerations Supporting Settlement.

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

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

53. As detailed above, Class Counsel conducted a thorough investigation and analysis of Plaintiffs' claims and the Bank's anticipated defenses. Class Counsel's analysis enabled them to gain an understanding of the legal and factual issues in the case, and prepared them for well-informed settlement negotiations. Prior to mediation, Settlement Class Counsel and their expert also reviewed sample Overdraft Fee data for a select number of U.S. Bank consumer accounts.

54. Class Counsel had a thorough understanding of the practical and legal issues they would continue to face litigating these claims against the 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). Wells Fargo appealed the final judgment in *Gutierrez* to the United States Court of Appeals for the Ninth Circuit, which affirmed in part and reversed in part and remanded for further proceedings. *See Gutierrez v Wells Fargo Bank, N.A.*, 704 F.3d 712 (9th Cir. 2012).

55. 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 other settlements of similar claims reached within and outside of MDL 2036.

2. Risks Associated with Trial Favor Settlement.

56. While Class Counsel are confident in the strength of Plaintiffs' case, we are also pragmatic in our awareness of the various defenses available to U.S. Bank, and the risks inherent in continued litigation. Plaintiffs' and all Settlement Class Members faced the prospect of being forced to *individually* arbitrate their claims in the event this Court and/or the Eleventh Circuit were to grant U.S. Bank's arbitration motions. In addition to the prospect of individual arbitration, Plaintiffs' faced the risks associated with the Bank's argument that all claims were preempted under the NBA, and that the language in the Account agreements themselves specifically authorized the very High-to-Low Posting practices challenged in the Action. The success of Plaintiffs' claims in future litigation would turn on these and other questions that were certain to arise in the context of class certification, summary judgment, at trial, and during a post-judgment appeal.

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

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

58. In reaching the Settlement, Settlement Class Counsel were forced to consider the potential impact of U.S. Bank's ongoing attempts to compel Plaintiffs' and all members of the Settlement Class to *individually* arbitrate their claims, in addition to all of the other litigation risks created in this complex multidistrict proceeding.

59. If the Bank were successful in enforcing its arbitration agreement, the result would have effectively wiped out 100% of the value of Plaintiffs' and every Settlement Class Members' claims in the Action. Moreover, the likelihood that more than a handful of Settlement

Class Members could or would have successfully pursued *individual* arbitrations was virtually non-existent. Thus, if U.S. Bank were successful in enforcing its arbitration agreements, it would have effectively spelled the “death-knell” of Plaintiffs’ and all Settlement Class Members’ ability to successfully recover damages arising from U.S. Bank’s High-to-Low Posting practices challenged in the Action.

60. Given these risks, the \$55,000,000 cash recovery obtained through the Settlement is outstanding. U.S. Bank’s agreement to pay the fees, costs and expenses associated with the Notice Program and administration of the Settlement – which are quite substantial – further enhances the recovery, as such amounts will not reduce the amount available for distribution to eligible Settlement Class Members.

61. 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) U.S. Bank’s effort to enforce mandatory, *individual* arbitration was defeated in its entirety in this Court and on appeal; (ii) Plaintiffs succeeded in certifying a nationwide class and the Eleventh Circuit declined to accept U.S. Bank’s inevitable Fed. R. Civ. P. Rule 23(f) petition; (iii) Plaintiffs and the certified class defeated summary judgment; (iv) Plaintiffs and the certified class established liability and recovered damages at trial; and (v) the final judgment was affirmed on appeal. The Settlement is an extremely fair and reasonable recovery for the Settlement Class in light of U.S. Bank’s defenses, and the challenging and unpredictable path of litigation Plaintiffs and the Settlement Class would have faced absent the Settlement.

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

62. The Settlement is the best vehicle for approximately 2,700,000 Settlement Class Members to receive the relief to which they are entitled in a prompt and efficient manner. Ongoing litigation would involve substantial, expensive fact and expert discovery, lengthy additional pretrial proceedings in this Court and the appellate courts and, ultimately, a trial and appeal. Absent the Settlement, the Action would likely continue for two or three more years.

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

63. Class Counsel settled the Action with the benefit of extensive briefing and decisions from this Court and the Eleventh Circuit involving other bank defendants in MDL 2036 relating to arbitration issues. Class Counsel also had the benefit of sample Overdraft Fee data produced by U.S. Bank as part of the mediation process. Analysis of the legal landscape involving arbitration and review of the sample Overdraft Fee data positioned Settlement Class Counsel to evaluate with confidence the strengths and weaknesses of Plaintiffs' claims and U.S. Bank's defenses on the issue of arbitration, as well as the range and amount of potential damages recoverable in the Action. Settlement Class Counsel, with the benefit of their experiences in MDL No. 2036, were well positioned to evaluate with confidence the strengths and weaknesses of Plaintiffs' claims and U.S. Bank's anticipated defenses on class certification, summary judgment and trial as well.

6. Plaintiffs Would Have Faced Significant Obstacles to Prevailing.

64. Protracted litigation involves risks, delay and expenses; this case is no exception. While Class Counsel believe that Plaintiffs had a solid case against U.S. Bank, we are mindful that, in addition to arbitration, U.S. Bank advanced other significant defenses that we would have

been required to overcome in the absence of the Settlement. This Action involved several major litigation risks.

65. Apart from the risks, continued litigation would have involved substantial delay and expense, which further counsels in favor of Final Approval. Had Plaintiffs defeated the Bank's motions to compel arbitration and succeeded in obtaining class certification of a nationwide class, Plaintiffs and the certified class would still have faced summary judgment, a trial on the merits, and a post-judgment appeal. The uncertainties and delays from this process would have been significant. Given the myriad risks attending these claims, as well as the certainty of substantial delay and expense from ongoing litigation, the Settlement cannot be seen as anything except a fair compromise.

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

66. This Settlement provides reasonable benefits to the Settlement Class. Our expert's analysis of U.S. Bank's transactional data showed that the most probable sum Plaintiffs and the Settlement Class could reasonably have anticipated recovering at a trial in the Action was \$423,927,151. Through Settlement, Plaintiffs and the Settlement Class Members have achieved a recovery of approximately thirteen percent (13%) of those damages without further risks or delays.

67. The \$55,000,000 cash recovery through this Settlement is an extremely fair and reasonable recovery to the Settlement Class in light of U.S. Bank's arbitration and merits defenses, as well as the challenging, unpredictable path of litigation that Plaintiffs would otherwise have continued to face in the trial and appellate courts.

68. The Automatic Distribution process for all eligible Settlement Class Members 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.

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

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

70. 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) U.S. Bank's efforts to enforce mandatory, *individual* arbitration were defeated in this Court and on appeal; (ii) Plaintiffs succeeded in certifying a nationwide class and the Eleventh Circuit declined the Bank's Rule 23(f) petition; (iii) Plaintiffs and the certified class established liability at trial; (iv) Plaintiffs and the certified class recovered damages at trial under our theory of the case; and (v) the final judgment was affirmed on appeal. Given the extraordinary obstacles that Plaintiffs faced in the litigation, this recovery is a significant achievement by any objective measure.

71. To date, there has been virtually no opposition to the Settlement. As of October 19, 2013, only sixty-eight (68) Settlement Class Members had requested to be excluded from the Settlement Class. As of the same date, there were only two (2) objections to the Settlement.

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

J. Service Awards.

73. Pursuant to the Settlement, Class Counsel request, and U.S. Bank does not oppose, Service Awards of \$10,000 per Plaintiff, or \$5,000 per Plaintiff for married couples in

which both spouses are Plaintiffs, for each of the Plaintiffs identified in paragraph 61 of the Agreement. Agreement ¶ 124. If the Court approves them, the Service Awards will be paid from the Settlement Fund, and will be in addition to any relief to which the Plaintiffs are entitled under the terms of the Settlement. *Id.* These awards will compensate the Plaintiffs for their time and effort in the Action and the risks they undertook in prosecuting the Action.

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

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

76. The above factors, as applied to this Action, demonstrate the reasonableness of Service Awards to the twelve Plaintiffs. The Plaintiffs 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) participating in conferences with Class Counsel. In so doing, Plaintiffs were integral to forming the theory of the case. The Plaintiffs not only devoted time and effort to the litigation, but the end result of their efforts, and those of Class Counsel, conferred a substantial benefit on the Settlement Class.

77. If the Court approves them, the total Service Awards will be \$90,000. This amount represents less than 0.20% of the Settlement Fund, a ratio that falls well below the range of reasonable service awards.

K. Attorneys' Fees and Expenses.

78. Pursuant to the Settlement, Class Counsel request that the Court award attorneys' fees of thirty percent (30%) of the \$55,000,000 Settlement Fund, plus reimbursement of litigation costs and expenses. Agreement ¶ 121. U.S. Bank agreed not to oppose our request for such fees and expenses. *Id.* We negotiated and reached this agreement regarding attorneys' fees and expenses only after reaching agreement on all other material terms of this Settlement. *Id.* at ¶ 125.

79. As indicated in the Court-approved notice disseminated to the Settlement Class, Class Counsel request a fee equal to thirty percent (30%) of the \$55,000,000 common fund created through our efforts in creating the Settlement, plus reimbursement of certain litigation costs and expenses totaling \$149,085.18.

1. The Claims Against U.S. Bank Required Substantial Time and Labor.

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

81. Class Counsel spent a substantial number of hours investigating the claims of potential plaintiffs against U.S. Bank. We interviewed U.S. Bank customers and potential plaintiffs to gather information about U.S. Bank's conduct and its effect on consumers. This information was essential to our ability to understand the nature of U.S. Bank's conduct, the language of the account agreements at issue, and potential remedies.

82. Class Counsel expended significant resources researching and developing the legal theories and arguments presented in our opposition to U.S. Bank's numerous arbitration motions, before this Court and the Eleventh Circuit.

83. Settlement negotiations consumed further time and resources. A lengthy mediation session was held in Boston that required substantial preparation and follow-up work. Post-mediation settlement negotiations required additional time and effort.

84. After we reached an agreement in principle, months of detailed negotiations and discussions ensued regarding specific terms of the Agreement. This work consumed a significant amount of time.

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

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

86. The Court has regularly witnessed and commented upon the high quality of our legal work, which conferred a significant benefit on the Settlement Class in the face of numerous litigation obstacles. It required the acquisition and analysis of substantial factual information and complex legal issues. Moreover, the management of this very large MDL, including the Action against U.S. Bank, among others, presented challenges that many law firms are simply not able to meet.

87. Indeed, litigation of a case like this requires counsel highly trained in class action law and procedure as well as the specialized issues these cases present. Class Counsel possess

these attributes, and their participation on the team added value to the representation of this Settlement Class consisting of approximately 2,700,000 Account holders.

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

89. In assessing the quality of representation by Class Counsel, the Court also should consider the quality of U.S. Bank's counsel. U.S. Bank was represented by extremely able and diligent attorneys, led by James R. McGuire of Morrison Forrester, LLP. Mr. McGuire and his colleagues were worthy, highly competent adversaries.

3. Class Counsel Achieved a Successful Result.

90. The Settlement we achieved is excellent in light of the hurdles we faced. Instead of facing additional years of costly and uncertain litigation, eligible Settlement Class Members will receive an immediate benefit from the \$55,000,000 Settlement Fund. Moreover, the Settlement Fund will not be diminished by the substantial fees and expenses associated with the Notice Program and Settlement administration; such fees and expenses have been and will continue to be borne separately by U.S. Bank. Furthermore, payments to eligible Settlement Class Members will be forthcoming automatically, through direct deposit for current Account Holders or checks for past Account Holders. Under the facts and circumstances, the Settlement represents an excellent result by any measure.

4. The Claims Against U.S. Bank Entailed Considerable Risk.

91. Prosecuting the Action was risky from the outset.

92. U.S. Bank asserted that Plaintiffs and every member of the putative class were required to *individually* arbitrate their claims. If the Bank were successful in enforcing arbitration against the Plaintiffs and putative class members, this litigation would have ground to a halt and this Settlement would never have been achieved.

93. Even if arbitration was defeated, U.S. Bank would have argued that the claims brought against it are preempted in their entirety by the NBA, and that the language in its Account agreement shields it from liability in the Action. The language in such agreements, U.S. Bank would have contended, expressly authorized it to engage in the challenged High-to-Low Posting and foreclosed any finding of breach of the covenant of good faith and fair dealing.

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

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

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

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

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

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

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

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

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

8. Reimbursement of Certain Costs and Expenses.

100. Class Counsel also respectfully request reimbursement of \$149,085.18, representing limited out-of-pocket costs and expenses necessarily incurred in connection with the prosecution of the Action and the Settlement. These costs and expenses are comprised of: (1) \$133,887.67 in fees and expenses incurred for expert 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) \$3,890.90 in court reporter fees and transcripts; and (3) \$11,306.61 in mediator's fees and expenses. These costs and expenses are recorded in the books and records maintained by Plaintiffs' Coordinating Counsel, and were reasonably and necessarily incurred in furtherance of our prosecution of the Action and the Settlement.

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

* * *

I declare under penalty of perjury of the laws of Florida and the United States that the foregoing is true and correct, and that this declaration was executed in Miami, Florida, on October 23, 2013.

/s/ Aaron S. Podhurst
Aaron S. Podhurst

I declare under penalty of perjury of the laws of Florida and the United States that the foregoing is true and correct, and that this declaration was executed in Ft. Lauderdale, Florida, on October 23, 2013.

/s/ Bruce S. Rogow
Bruce S. Rogow

I declare under penalty of perjury of the laws of Florida and the United States that the foregoing is true and correct, and that this declaration was executed in Coral Gables, Florida on October 23, 2013.

/s/ Robert C. Gilbert
Robert C. Gilbert