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. 1:10-24147-JLK
E.D. Wash. Case No. 2:10-00356-RMP

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

After more than three years of proceedings before this Court and the United States Court of Appeals for the Eleventh Circuit, Class Counsel negotiated the Amended and Restated Settlement Agreement and Release attached as Exhibit A ("Agreement" or "Settlement") with Defendant U.S. Bank National Association ("U.S. Bank" or the "Bank").[1] The Settlement – which consists of the Bank's payment of $55,000,000 to create a Settlement Fund, plus payment of the fees and costs associated with the Notice Program and administration of the Settlement –

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

is an outstanding achievement that will provide immediate benefits to the Settlement Class without further risks, delays and costs. *See* Joint Declaration of Aaron S. Podhurst, Bruce S. Rogow and Robert C. Gilbert ¶¶ 2, 5, 90, attached as Exhibit B ("Joint Decl."). The Settlement is fair, adequate and reasonable, and represents an "impressive" result, in the opinion of one nationally recognized expert. *See* Declaration of Professor Brian T. Fitzpatrick ¶ 17, attached as Exhibit C ("Fitzpatrick Decl.").

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

I. INTRODUCTION

The Action involved sharply opposed positions on several fundamental legal questions. Plaintiffs sued on behalf of themselves and all others similarly situated who incurred Overdraft Fees as a result of 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. The Bank argued, *inter alia*, that Plaintiffs' claims were subject to binding *individual* arbitration, that

Plaintiffs' claims were preempted by the National Bank Act ("NBA"), and that the applicable Account agreements expressly authorized its High-to-Low Posting practices.

Preliminary settlement discussions began in late 2011. Although the initial mediation session in May 2012 was unsuccessful, the Parties continued their settlement discussions with the assistance of the mediator. As a result of those efforts, Settlement Class Counsel and U.S. Bank ultimately reached an agreement in principle in June 2012. Following months of further discussions and drafting, the Parties entered into the Agreement in July 2013. The Court entered the Preliminary Approval Order on July 29, 2013, and Notice was subsequently disseminated to the Settlement Class.

Under the Settlement, all Settlement Class Members who sustained a Positive Overdraft Differential and do not opt-out will automatically receive their *pro rata* share of the Net Settlement Fund. There are no claims forms to fill out, and Settlement Class Members will not be asked to prove that they were damaged as a result of the Bank's High-to-Low Posting. Instead, Settlement Class Counsel and their expert used available U.S. Bank data to determine which U.S. Bank Account Holders were adversely affected by High-to-Low Posting, and applied the formula detailed in paragraph 106 of the Agreement to calculate each eligible Settlement Class Member's *pro rata* share of the Settlement Fund.

A testament to the reasonableness and fairness of the Settlement is the magnitude of the Settlement Fund. Settlement Class Counsel negotiated a $55,000,000 cash fund, which is remarkable given that U.S. Bank asserted – and would continue to assert in the absence of this Settlement – that Plaintiffs and all Settlement Class Members are required to *individually* arbitrate the claims asserted in the Action and, therefore, that no class could ever be certified. Thus, without the Settlement, if U.S. Bank succeeded in enforcing its arbitration rights, there

would be no further litigation in this Court on a class-wide basis and Plaintiffs and every Settlement Class Member would be required to *individually* pursue arbitration proceedings in an attempt to establish that U.S. Bank's practice of High-to-Low Posting was unlawful and to recover damages. In the face of that risk alone, the $55,000,000 recovery secured through this Settlement clearly merits Final Approval.

In addition to the Settlement Fund, U.S. Bank agreed to pay the fees, costs and charges incurred in connection with the Notice Program and administration of the Settlement. U.S. Bank also agreed to maintain its recently adopted posting order applicable to consumer checking accounts for at least two (2) years following Final Approval, subject to any alteration, modification or rescission that may be required to comply with changes in statutory, regulatory or judicial authority, or examiner guidance.

Plaintiffs and Class Counsel now respectfully request that the Court: (1) grant Final Approval to the Settlement; (2) certify for settlement purposes the Settlement Class, pursuant to Rule 23(b)(3) and (e) of the Federal Rules of Civil Procedure; (3) appoint as class representatives the Plaintiffs listed in paragraph 61 of the Agreement; (4) appoint as Class Counsel and Settlement Class Counsel the law firms and attorneys listed in paragraphs 45 and 70 of the Agreement, respectively; (5) approve Service Awards to the Plaintiffs; (6) award Class Counsel attorneys' fees and reimbursement of certain expenses pursuant to Rule 23(h) of the Federal Rules of Civil Procedure; and (7) enter Final Judgment dismissing the Action with prejudice.

II. MOTION FOR FINAL APPROVAL

A. Procedural History

Plaintiffs brought this case seeking monetary damages, restitution and declaratory relief, challenging U.S. Bank's High-to-Low Posting of Debit Card Transactions in a manner Plaintiffs contend was designed to increase the number of Overdraft Fees the Bank's customers incurred.

See generally Waters Fourth Amended Class Action Complaint (DE # 464). Plaintiffs alleged that as a result of U.S. Bank's High-to-Low Posting practice, customers' funds were depleted more rapidly than they should have been, and that Plaintiffs and Settlement Class Members paid more Overdraft Fees than they should have paid. *Id.*

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. Joint Decl. ¶ 7. 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, individually or as a class action. *Id.*

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. Joint Decl. ¶ 9. 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.

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.* Joint Decl. ¶ 10. On October 22, 2009, *Speers II* was made part of MDL 2036. *See* DE # 114. *Speers I* was thereafter dismissed without prejudice. *See* DE # 161.

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.*

Joint Decl. ¶ 11. On September 10, 2009, *Waters* was transferred to this Court and joined other actions in MDL 2036. *See* DE # 54.

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. Joint Decl. ¶ 12. On November 18, 2009, *Kimenker* was transferred to this Court and joined other actions in MDL 2036. *See* DE # 153.

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.

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

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.

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

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.

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 against U.S. Bank to those asserted in *Speers I*, *Speers II*, *Waters* and *Kimenker*. Joint Decl. ¶ 19. 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.

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.

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 that motion. *See* DE # 987.

On December 17, 2010, 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. Joint Decl. ¶ 22.

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 that 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.

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.

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.

B. <u>Settlement Negotiations</u>.

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

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] Joint Decl. ¶ 27. 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.

[2] The Eleventh Circuit extended the stay several times to allow the parties to complete the settlement process. Joint Decl. ¶ 27 n.2.

On May 10, 2012, Class Counsel and U.S. Bank participated in mediation with Professor Eric Green of Resolutions LLC. Joint Decl. ¶ 28. Although an agreement was not reached at that mediation session, both sides continued settlement discussions thereafter with the assistance of Professor Green. *Id.* On June 29, 2012, the Parties reached an agreement in principle and, shortly thereafter, executed a Summary Agreement that memorialized the material terms of the Settlement. *Id*. at ¶ 29. 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 final 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. Joint Decl. ¶ 29.

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. Joint Decl. ¶ 30.

C. Summary of the Settlement Terms

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

1. The Settlement Class

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

> All holders of a U.S. 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 U.S. Bank's High-to-Low Posting. Excluded from the Class are all current U.S. Bank employees, officers and directors, and the judge presiding over this Action.

Agreement ¶ 76.[3]

2. Monetary Relief

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. Joint Decl. ¶ 32. 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. Agreement ¶ 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.

All identifiable Settlement Class Members who experienced a Positive Overdraft Differential will receive *pro rata* distributions from the Net Settlement Fund, provided they do

[3] **"**Class Period" means, for Settlement Class Members who opened accounts in: (i) Iowa, Illinois, Indiana, Kentucky, Montana, Ohio, and Wyoming, the period from April 1, 2003 through August 15, 2010; (ii) Arkansas, Idaho, Kansas, Missouri, Nebraska, and Washington, the period from October 19, 2004 through August 15, 2010; (iii) Arizona, Minnesota, North Dakota, Nevada, Oregon, South Dakota, Tennessee, Utah, Wisconsin, the period from October 19, 2003 through August 15, 2010; (iv) California, the period from May 12, 2005 through August 15, 2010; and (v) Colorado, the period from October 19, 2006 through August 15, 2010.

not opt-out of the Settlement.[4] Agreement ¶ 108. The Positive Differential Overdraft analysis 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.

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.

Payments to Settlement Class Members who are current Account Holders will be made by crediting such Settlement Class Members' Accounts, and notifying them of the credit. Agreement ¶ 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.

[4] The Net Settlement Fund is equal to the Settlement Fund, plus interest earned (if any), less the amount of Court-awarded attorneys' fees and costs to Class Counsel, the amount of Court-awarded service awards to the Plaintiffs, a reservation of a reasonable amount of funds for prospective costs of Settlement administration that are not 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.

Any uncashed or returned checks will remain in the Settlement Fund for one year from the date the first distribution check is mailed, during which time the Settlement Administrator will make reasonable efforts to effectuate delivery of the Settlement Fund Payments. Agreement ¶ 115.

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. Agreement ¶ 116.

3. Non-Monetary Relief

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.

4. 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 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.

5. Settlement Notice

The Notice Program (Agreement, Section VIII) was designed to provide the best notice practicable, and was tailored to take advantage of the information U.S. Bank has available about Settlement Class Members. Agreement ¶¶ 86-97. U.S. Bank will pay all fees and costs of the Notice Program. *Id.* at ¶¶ 80, 96. The Notice Program was reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the Action, the terms of the Settlement, Class Counsel's Fee Application and request for Service Awards for Plaintiffs, and their rights to opt-out of the Settlement Class or object to the Settlement. *See* Declaration of Shannon R. Wheatman ¶¶ 25-33 attached as Exhibit D ("Wheatman Decl."); Joint Decl. ¶ 41. The Notices and Notice Program constituted sufficient notice to all persons entitled to notice,

and satisfied all applicable requirements of law including, but not limited to, Federal Rule of Civil Procedure 23 and the constitutional requirement of due process. Wheatman Decl. ¶¶ 9-10; 32–33; Joint Decl. ¶ 41.

6. Settlement Termination

Except as provided in paragraph 116 of the Agreement, either Party may terminate the Settlement if it is rejected or materially modified by the Court or an appellate court. Agreement ¶ 126. U.S. Bank also has the right to terminate the Settlement if the number of Settlement Class Members who timely opt out of the Settlement Class equals or exceeds the number or percentage specified in the separate letter executed concurrently with the Agreement by the Bank's counsel and Settlement Class Counsel. *Id.* at ¶ 127. The number or percentage will be confidential except to the Court, who upon request will be provided with a copy of the letter agreement for *in camera* review. *Id.*

7. Class Representative Service Awards

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 named Plaintiffs are entitled as a Settlement Class Members. *Id.* The Service Awards will compensate the named Plaintiffs for their time and effort in the Action, and for the risks they undertook in prosecuting the Action against U.S. Bank. Joint Decl. ¶ 50.

8. Attorneys' Fees and Costs

Class Counsel are entitled to request, and U.S. 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 ¶ 121. The Parties negotiated and reached agreement regarding attorneys' fees and costs only after reaching agreement on all other material terms of the Settlement. *Id.* at ¶ 125; Joint Decl. ¶ 51.

D. Argument.

Court approval is required for settlement of a class action. Fed. R. Civ. P. 23(e). The federal courts have long recognized a strong policy and presumption in favor of class settlements. The Rule 23(e) analysis should be "informed by the strong judicial policy favoring settlements as well as the realization that compromise is the essence of settlement." *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. Unit B 1982). In evaluating a proposed class settlement, the Court "will not substitute its business judgment for that of the parties; 'the only question . . . is whether the settlement, taken as a whole, is so unfair on its face as to preclude judicial approval.'" *Rankin v. Rots*, 2006 WL 1876538, at *3 (E.D. Mich. June 28, 2006) (quoting *Zerkle v. Cleveland-Cliffs Iron Co*., 52 F.R.D. 151, 159 (S.D.N.Y. 1971)). Indeed, "[s]ettlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and uncertainties and preventing lawsuits." *In re Nissan Motor Corp. Antitrust Litig*., 552 F.2d 1088, 1105 (5th Cir. 1977). Class settlements minimize the litigation expenses of the parties and reduce the strain that litigation imposes upon already scarce judicial resources. Therefore, "federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996).

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

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

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

a. The Best Notice Practicable Was Furnished.

The Notice Program was comprised of three parts: (1) direct mail postcard notice ("Mailed Notice") to all identifiable Settlement Class Members; (2) publication notice ("Published Notice") designed to reach those Settlement Class Members for whom direct mail notice was not possible; and (3) a "Long Form" notice with more detail than the direct mail or publication notices, that has been available on the Settlement Website and via mail upon request. Agreement, Section VIII; Wheatman Decl. ¶¶ 8-9, 12-13, 16-19, 21; Declaration of Ryan McNamee, ¶¶ 4, 7-8 attached as Exhibit E ("McNamee Decl.").

Each facet of the Notice Program was timely and properly accomplished. Wheatman Decl. ¶¶ 9-22; McNamee Decl. ¶¶ 4-12. The Settlement Administrator received the data files that identified the names and last known addresses of all identifiable Settlement Class Members, ran the addresses through the National Change of Address Database, and mailed postcards to 2,712,743 Settlement Class Members. McNamee Decl. ¶¶ 6-10; Wheatman Decl. ¶¶ 12-15.

The Published Notice Program was completed through advertisements in *People* and *ESPN* magazines, two weekly national publications. Wheatman Decl. ¶¶ 16-17. The Settlement Website with a "Long Form" notice was established to enable Settlement Class Members to obtain detailed information about the Action and the Settlement. McNamee Decl. ¶ 4; Wheatman Decl. ¶¶ 18-19. As of October 19, 2013, the Settlement Website had over 39,000 visitors. McNamee Decl. ¶ 4; Wheatman Decl. ¶ 20.

In addition, a toll free number was established and has been operational since September 13, 2013. McNamee Decl. ¶ 5; Wheatman Decl. ¶¶ 21-22. By calling this number, Settlement Class Members can listen to answers to frequently asked questions and request a copy of the "Long Form" notice. *Id*. As of October 19, 2013, the toll free number had handled approximately 36,000 calls. McNamee Decl. ¶ 5; Wheatman Decl. ¶ 22.

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

The Court-approved Notice and Notice Program satisfied due process requirements because they described "the substantive claims . . . [and] contain[ed] information reasonably necessary to make a decision to remain a class member and be bound by the final judgment." *In re Nissan Motor Corp. Antitrust Litig*., 552 F.2d 1088, 1104-05 (5th Cir. 1977). The Notice, among other things, defined the Settlement Class, described the release provided to U.S. Bank under the Settlement, as well as the amount and proposed distribution of the Settlement proceeds, and informed Settlement Class Members of their right to opt-out or object, the procedures for doing so, and the time and place of the Final Approval Hearing. It also notified Settlement Class Members that a class judgment would bind them unless they opted out, and told them where they could get more information – for example, at the Settlement Website that posts a copy of the Agreement, as well as other important documents. Further, the Notice described Class Counsel's

intention to seek attorneys' fees of up to thirty percent (30%) of the $55,000,000 Settlement Fund, plus expenses, and Service Awards for the Plaintiffs. Hence, the Settlement Class Members were provided with the best practicable notice that was "reasonably calculated, under [the] circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Shutts*, 472 U.S. at 812 (quoting *Mullane*, 339 U.S. at 314-15); *see* Wheatman Decl. ¶ 25.

As of October 19, 2013, the Notice Administrator had received sixty-eight (68) requests for exclusion (opt-outs). Wheatman Decl. ¶ 24; McNamee Decl. ¶ 13. As of that date, only two (2) objections to the Settlement had also been received. Wheatman Decl. ¶ 23; McNamee Decl. ¶ 14; Joint Decl. ¶ 71.

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

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

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

> (1) the existence of fraud or collusion behind the settlement;
>
> (2) the complexity, expense, and likely duration of the litigation;
>
> (3) the stage of the proceedings and the amount of discovery completed;
>
> (4) the probability of the plaintiffs' success on the merits;
>
> (5) the range of possible recovery; and
>
> (6) the opinions of the class counsel, class representatives, and the substance and amount of opposition to the settlement.

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

a. There Was No Fraud or Collusion.

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

Settlement Class Counsel negotiated the Settlement with similar vigor. Plaintiffs and the Settlement Class were represented by experienced counsel throughout the negotiations. The Parties engaged in mediation before Professor Eric Green, a nationally-recognized mediator. When mediation was not initially successful, Settlement Class Counsel and U.S. Bank continued negotiations with the assistance of Professor Green. These negotiations were arm's-length and extensive. Joint Decl. ¶¶ 26-31, 52-55. *see also Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1384 (S.D. Fla. 2007) (concluding that class settlement was not collusive in part because it was overseen by "an experienced and well-respected mediator").

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

The claims and defenses are complex; litigating them is both difficult and time-consuming. Joint Decl. ¶¶ 56-57. Although this Action was litigated for over three years before the Parties resolved it, recovery by any means other than settlement would require additional years of litigation. *Id.* at ¶ 62; *see United States v. Glens Falls Newspapers, Inc.*, 160 F. 3d 853, 856 (2d Cir. 1998) (noting that "a principal function of a trial judge is to foster an atmosphere of open discussion among the parties' attorneys and representatives so that litigation may be settled promptly and fairly so as to avoid the uncertainty, expense and delay inherent in a trial."); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 317, 325-26 & n.32 (N.D. Ga. 1993) ("[A]djudication of the claims of two million claimants could last half a millennium").

In contrast, the Settlement provides immediate and substantial benefits to approximately 2,700,000 Settlement Class Members, all of whom are current or former U.S. Bank customers. Joint Decl. ¶ 62. As stated in *In re Shell Oil Refinery*, 155 F.R.D. 552 (E.D. La. 1993):

> The Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and

> expensive litigation. In this respect, "[i]t has been held proper to take the bird in the hand instead of a prospective flock in the bush."

Id. at 560 (alterations in original) (quoting *Oppenlander v. Standard Oil Co*., 64 F.R.D. 597, 624 (D. Colo. 1974)); *see also In re U.S. Oil & Gas Litig*., 967 F.2d 489, 493 (11th Cir. 1992) (noting that complex litigation "can occupy a court's docket for years on end, depleting the resources of the parties and taxpayers while rendering meaningful relief increasingly elusive"). Particularly because the "demand for time on the existing judicial system must be evaluated in determining the reasonableness of the settlement," *Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992) (citation omitted), there can be no doubt about the adequacy of the present Settlement, which provides reasonable benefits to the Settlement Class. Fitzpatrick Decl. ¶¶ 10-16.

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

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

Settlement Class Counsel negotiated the Settlement with the benefit of significant arbitration proceedings before this Court and the Eleventh Circuit involving U.S. Bank and other banks in MDL 2036, as well as confidential Overdraft Fee data provided by U.S. Bank in advance of mediation. Joint Decl. ¶ 63. An understanding of the legal obstacles involving arbitration, as well as analysis of U.S. Bank's Overdraft Fee data positioned Settlement Class Counsel to evaluate with confidence the strengths and weaknesses of Plaintiffs' claims and

defenses relating to arbitration, as well as the range and amount of damages that were potentially recoverable if the Action successfully proceeded to judgment on a class-wide basis. *Id.* "Information obtained from other cases may be used to assist in evaluating the merits of a proposed settlement of a different case." *Lipuma*, 406 F. Supp. 2d at 1325.

d. Plaintiffs Would Have Faced Significant Obstacles to Prevailing.

The "likelihood and extent of any recovery from the defendants absent . . . settlement" is another important factor in assessing the reasonableness of a settlement. *Domestic Air*, 148 F.R.D. at 314; *see also Ressler*, 822 F. Supp. at 1555 ("A Court is to consider the likelihood of the plaintiff's success on the merits of his claims against the amount and form of relief offered in the settlement before judging the fairness of the compromise."). According to Professor Fitzpatrick: "In short, U.S. Bank's arbitration clause alone – but certainly when combined with the other uncertainties outlined above with regard to the merits – paints a very challenging picture for the class had these lawsuits gone forward." Fitzpatrick Decl. ¶ 12.

Class Counsel believe that Plaintiffs had a solid case against U.S. Bank. Joint Decl. ¶ 64. Even so, we are mindful that, in addition to arbitration, U.S. Bank advanced significant defenses that we would have been required to overcome in the absence of the Settlement. *Id.* This Action involved several major litigation risks. *Id.* As this Court recognized in granting final approval to the settlement with Bank of America: "The combined risks here were real and potentially catastrophic . . . . [B]ut for the Settlement, Plaintiffs and the class faced a multitude of potentially serious, substantive defenses, any one of which could have precluded or drastically reduced the prospects of recovery." *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1347-48 (S.D. Fla. 2011).

Apart from the risks, continued litigation would have involved substantial delay and expense, which further counsels in favor of Final Approval. Joint Decl. ¶ 65. Had Plaintiffs

defeated U.S. 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. *Id.*

Given the myriad risks attending these claims, as well as the certainty of substantial delay and expense from ongoing litigation, the Settlement cannot be seen as anything except a fair compromise. *See, e.g.*, *Bennett v. Behring Corp.*, 96 F.R.D. 343, 349-50 (S.D. Fla. 1982), *aff'd*, 737 F.2d 982 (11th Cir. 1984) (plaintiffs faced a "myriad of factual and legal problems" creating "great uncertainty as to the fact and amount of damage," making it "unwise [for plaintiffs] to risk the substantial benefits which the settlement confers . . . to the vagaries of a trial").

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

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

400, 409-10 (E.D. Wis. 2002) ("The mere possibility that the class might receive more if the case were fully litigated is not a good reason for disapproving the settlement.").

Class Counsel have a thorough understanding of the practical and legal issues they would continue to face litigating these claims against U.S. Bank based, in part, on similar claims challenging Wells Fargo's high-to-low posting practices prosecuted in *Gutierrez v. Wells Fargo Bank, N.A.*, 730 F. Supp. 2d 1080 (N.D. Cal. 2010). Joint Decl. ¶ 54. The United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the judgment rendered in favor of the certified class of California customers in that case, vacated the $203 million restitution award, and remanded the case for further proceedings. *Gutierrez v Wells Fargo Bank, N.A.*, 704 F.3d 712 (9th Cir. 2012).

Class Counsel 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. Joint Decl. ¶ 55.

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 trial was $423,927,151. Declaration of Arthur Olsen ¶ 17, attached as Exhibit F ("Olsen Decl."); Joint Decl. ¶ 66. Through this Settlement, Plaintiffs and the Settlement Class Members have achieved a recovery of approximately thirteen percent (13%) of those damages, without any further risks or delays. Joint Decl. ¶ 66. This Settlement provides 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. *Id.* at ¶67. 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. *Id.* at ¶68.

The $55,000,000 cash recovery is fair and reasonable given the obstacles confronted and the complexity of the Action, and the significant barriers that stood between the pre-settlement status of the Action and final judgment, including the prospect of being compelled to participate in *individual* arbitration proceedings, contested class certification and interlocutory Rule 23(f) proceedings challenging any order granting class certification; motions for summary judgment; trial; and post-trial appeals. Joint Decl. ¶ 61. Taking these risks into account, the Settlement "is not only fair, adequate and reasonable, but impressive as well". Fitzpatrick Decl. ¶ 17. U.S. Bank's agreement to pay the fees, costs and expenses of the Notice Administrator and Settlement Administrator further enhances the recovery. Joint Decl. ¶ 60. Given the extraordinary obstacles that Plaintiffs faced in the litigation, this recovery is a significant achievement by any objective measure.

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

Class Counsel endorse the Settlement with U.S. Bank. Joint Decl. ¶¶ 69-70. The Court should give "great weight to the recommendations of counsel for the parties, given their considerable experience in this type of litigation." *Warren*, 693 F. Supp. at 1060; *see also Domestic Air*, 148 F.R.D. at 312-13 ("In determining whether to approve a proposed settlement, the Court is entitled to rely upon the judgment of the parties' experienced counsel. '[T]he trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.'") (citations omitted).

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

Settlement Class. McNamee Decl. ¶ 13; Wheatman Decl. ¶ 24. Moreover, as of that date, only two (2) Settlement Class Members had objected to the Settlement. McNamee Decl. ¶ 14; Wheatman Decl. ¶ 23; Joint Decl. ¶ 71. This is another indication that the Settlement Class is satisfied with the Settlement. It is settled that "[a] small number of objectors from a plaintiff class of many thousands is strong evidence of a settlement's fairness and reasonableness." *Association for Disabled Americans v. Amoco Oil Co*., 211 F.R.D. 457, 467 (S.D. Fla. 2002); *also Mangone v. First USA Bank*, 206 F.R.D. 222, 227 (S.D. Ill. 2001) ("In evaluating the fairness of a class action settlement, such overwhelming support by class members is strong circumstantial evidence supporting the fairness of the Settlement."); *Austin v. Pennsylvania Dept. of Corrections*, 876 F. Supp. 1437, 1458 (E.D. Pa. 1995) ("Because class members are presumed to know what is in their best interest, the reaction of the class to the Settlement Agreement is an important factor for the court to consider.").

3. The Court Should Certify the Settlement Class.

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

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

III. APPLICATION FOR SERVICE AWARDS

Pursuant to the Settlement, Class Counsel request, and U.S. Bank does not oppose, Service Awards for the Plaintiffs identified in paragraph 61 of the Agreement. The amount of the Service Awards is $10,000 per Plaintiff, except where both spouses are named Plaintiffs, in which event the Service Awards will be $5,000 for each spouse. Agreement ¶ 124; Joint Decl. ¶ 73. Service awards "compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006). "[T]here is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action." *David v. American Suzuki Motor Corp.*, 2010 WL 1628362, at *6 (S.D. Fla. Apr. 15, 2010). Courts have consistently found service awards to be an efficient and productive way to encourage members of a class to become class representatives. *See, e.g.*, *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (awarding class representatives $300,000 each, explaining that "the magnitude of the relief the Class Representatives obtained on behalf of the class warrants a substantial incentive award."); *Spicer v. Chicago Bd. Options Exchange, Inc.*, 844 F. Supp. 1226, 1267-68 (N.D. Ill. 1993) (collecting cases approving service awards ranging from $5,000 to $100,000, and awarding $10,000 to each named plaintiff).

The relevant factors include: (1) the actions the class representatives took to protect the interests of the class; (2) the degree to which the class benefited from those actions; and (3) the amount of time and effort the class representatives expended in pursuing the litigation. *See, e.g.*, *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

The above factors, as applied to this Action, demonstrate the reasonableness of the requested Service Awards to the Plaintiffs. Joint Decl. ¶ 76; *see, e.g., Checking Account*

Overdraft, 830 F. Supp. 2d at 1357-58 ("The Court notes that the class representatives expended time and effort in meeting their fiduciary obligations to the Class, and deserve to be compensated for it."). The 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. Joint Decl. ¶ 76.

The Plaintiffs not only devoted time and effort to the litigation, but the end result of their efforts, coupled with those of Class Counsel, provided a substantial benefit to the Settlement Class. Joint Decl. ¶ 76. If the Court approves them, the total Service Awards will be $90,000. This amount is less than 0.20% of the Settlement Fund, a ratio that falls well below the range of what has been deemed to be reasonable. *Id.* at ¶ 77; s*ee, e.g.*, *Enter. Energy Corp. v. Columbia Gas Transmission*, 137 F.R.D. 240, 251 (S.D. Ohio 1991) (approving service awards totaling $300,000, or 0.56% of a $56.6 million settlement). The Service Awards requested here are reasonable and should be approved.

IV. APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

As indicated in the Agreement and the Notice, and consistent with standard class action practice and procedure, Class Counsel respectfully request attorneys' fees equal to thirty percent (30%) of the $55,000,000 Settlement Fund created through our efforts.[5] Agreement ¶ 121; Joint Decl. ¶¶ 78-79. Class Counsel also request reimbursement of limited out-of-pocket costs and expenses totaling $149.085.18 incurred in connection with the prosecution of the Action and in connection with the Settlement. *Id*. at ¶ 79. The Parties negotiated and reached agreement

[5] In addition to the firms identified as Class Counsel in paragraph 45 of the Agreement, this fee request also includes Alters Law Firm, P.A.

regarding attorneys' fees and costs only after reaching agreement on all other material terms of this Settlement. *Id*. at ¶ 78. The thirty percent (30%) fee request is within the guidelines set forth by the Eleventh Circuit in *Camden I Condo. Ass'n. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991), and adheres to this Court's prior decisions in MDL 2036 regarding attorneys' fees. *See* Declaration of Thomas E. Scott, ¶¶ 10-26, attached as Exhibit G ("Scott Decl."); Fitzpatrick Decl. ¶ 21. For the reasons detailed herein, Class Counsel submit that the requested fee is appropriate, fair and reasonable and should be approved.

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

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

common fund, but the amount is subject to court approval."). Courts have also recognized that appropriate fee awards in cases such as this encourage redress for wrongs caused to entire classes of persons, and deter future misconduct of a similar nature. *See, e.g.*, *Mashburn*, 684 F. Supp. at 687; *see also Deposit Guar. Nat'l Bank v. Rope*, 445 U.S. 326, 338-39 (1980). Adequate compensation promotes the availability of counsel for aggrieved persons:

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

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

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

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

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

The Court has substantial discretion in determining the appropriate fee percentage. "There is no hard and fast rule mandating a certain percentage of a common fund which may be awarded as a fee because the amount of any fee must be determined upon the facts of each case." *Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 774). Nonetheless, "[t]he majority of common fund fee awards fall between 20 percent to 30 percent of the fund" – though "an upper limit of 50 percent of the fund may be stated as a general rule." *Id*. (quoting *Camden I*, 946 F.2d at 774-75); *see also Waters v. Int'l Precious Metals Corp*., 190 F.3d 1291 (11th Cir. 1999), *cert. denied*, 530 U.S. 1289 (2000) (approving fee award where the district court determined that the benchmark should be 30 percent and then adjusted the fee award higher in view of the circumstances of the case).

Class Counsel's fee request falls within this accepted range and is in accord with the Court's prior fee awards in MDL 2036. Scott Decl. ¶¶ 11, 18, 24; Fitzpatrick Decl. ¶ 24. There is no reason for the Court to deviate from its prior fee rulings here.

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

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

(1) the time and labor required;

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

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

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

(5) the customary fee;

(6) whether the fee is fixed or contingent;

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

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

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

(10) the "undesirability" of the case;

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

(12) fee awards in similar cases.

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

These twelve factors are guidelines and are not exclusive. "Other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action." *Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 775). In addition, the Eleventh Circuit has "encouraged the lower courts to consider additional factors unique to the particular case." *Camden I*, 946 F.2d at 775. As applied here, the *Camden I* factors demonstrate that the Court should approve the requested fee. Scott Decl. ¶¶ 11-24; Fitzpatrick Decl. ¶¶ 19-21.

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

Prosecuting and settling these claims demanded considerable time and labor, making this fee request reasonable. Joint Decl. Decl. ¶ 80. 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. *Id*. Class Counsel spent a

substantial amount of time investigating the claims of potential plaintiffs against U.S. Bank. *Id.* at ¶ 81. Class Counsel interviewed numerous U.S. Bank customers and potential plaintiffs to gather information about U.S. Bank's conduct, both at the time the lawsuit was filed and in the past, to determine the effect that its conduct had on consumers. *Id.* This information was essential to Class Counsel's ability to understand the nature of U.S. Bank's conduct, the language of the Account agreements at issue, and potential remedies. *Id.* Class Counsel also expended significant resources researching and developing the legal claims at issue. *Id.*

Class Counsel faced a significant hurdle with the filing of U.S. Bank's repeated motions to compel arbitration. Substantial legal research and briefing was necessary to oppose those motions before this Court and the Eleventh Circuit. Joint Decl. ¶ 82.

Settlement negotiations consumed additional time and resources. Joint Decl. ¶ 83. As noted previously, preliminary settlement discussions began in late 2011 and the mediation session was held in May 2012, in Boston, Massachusetts. *Id.* at ¶¶ 26, 28, 83. Although an agreement was not reached at the mediation session, the Parties continued settlement discussions thereafter with the assistance of Professor Green. *Id.* at ¶¶ 28, 83. On July 3, 2012, the Parties executed a Summary Agreement memorializing the material terms of the Settlement, and filed a joint notice of settlement, requesting a suspension of all deadlines pending the drafting and execution of the Agreement. *Id.* at ¶ 29. Many months of detailed discussions and negotiations ensured, ultimately resulting in the drafting and execution of the Agreement. *Id.* at ¶¶ 29, 84.

All told, Class Counsel's coordinated work paid dividends for the Settlement Class. Each of the above-described efforts was essential to achieving the Settlement before the Court. Joint Decl. ¶ 85. The time and resources Class Counsel devoted to prosecuting and settling this Action readily justify the fee that we now request. "[T]he fee award requested here is within the

range of reason because nearly all of the factors listed by the Eleventh Circuit in *Camden I* suggest that this percentage should exceed the 25% benchmark." *See* Fitzpatrick Decl. ¶ 21; Scott Decl. ¶¶ 11-24.

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

The Court regularly witnessed and commented upon the high quality of our legal work, which conferred a substantial benefit on the Settlement Class in the face of significant litigation obstacles. Joint Decl. ¶ 86. Our work required the acquisition and analysis of a substantial amount of factual and legal information. *Id*. The management of this very large MDL, including the Action against U.S. Bank, also presented challenges most law firms are simply not able to meet. *Id*.

In any given case, the skill of legal counsel should be commensurate with the novelty and complexity of the issues, as well as the skill of the opposing counsel. Litigation of this Action required counsel highly trained in class action law and procedure as well as the specialized issues presented here. Class Counsel possess these attributes, and their participation added value to the representation of this large Settlement Class. Joint Decl. ¶ 87. The record demonstrates that the Action involved a broad range of complex and novel challenges, which Class Counsel met at every juncture. *Id.* at ¶ 88. "[T]his case was undesirable not because it was controversial, but because of the number of significant legal risks it presented. Very few lawyers, when this case was first brought, would have placed their reputations and finances at risk, given the obstacles in the case. That Class Counsel did so in light of those risks should weigh in favor of their fee request." Scott Decl. ¶ 22.

In evaluating the quality of representation by Class Counsel, the Court should also consider the quality of opposing counsel. *See Camden I*, 946 F.2d at 772 n.3; *Ressler*, 149

F.R.D. at 654. Throughout the litigation, U.S. Bank was represented by extremely capable counsel. They were worthy, highly competent adversaries. Joint Decl. ¶ 89; *see also Checking Account Overdraft*, 830 F. Supp. 2d at 1348 (finding "Class Counsel confronted not merely a single large bank, but the combined forces of a substantial portion of the entire American banking industry, and with them a large contingent of some of the largest and most sophisticated law firms in the country.") (internal quotation marks and citation omitted); *Walco Invs. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997) (stating that "[g]iven the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results").

3. Class Counsel Achieved a Successful Result.

Given the significant litigation risks faced here, the Settlement represents a successful result. Fitzpatrick Decl. ¶ 10. Rather than facing more years of costly and uncertain litigation, the overwhelming majority of Settlement Class Members will receive an immediate cash benefit. Joint Decl. ¶ 90. The Settlement Fund will not be reduced by the substantial fees and costs of Notice or Settlement administration; such fees and expenses have been and will continue to be borne separately by U.S. Bank. *Id.* Moreover, payments to eligible Settlement Class Members will be forthcoming automatically, through direct deposit for current Account Holders or checks for former Account Holders. *Id.*

4. The Claims Presented Serious Risk.

The Settlement here is particularly noteworthy given the combined litigation risks. Joint Decl. ¶¶ 91-94. U.S. Bank raised substantial defenses. *Id.* Success under these circumstances represents a genuine milestone. "This was no ordinary class action. The novelty and difficulty

of the issues involved created significant risks for Class Counsel." Scott Decl. ¶ 15; Fitzpatrick Decl. ¶ 23.

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

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

Prosecuting the Action was risky from the outset. Scott Decl. ¶ 15; Fitzpatrick Decl. ¶ 23; Joint Decl. ¶ 91. If U.S. Bank were successful in enforcing its arbitration agreement, the result would have effectively wiped out 100% of the value of Plaintiffs' and all Settlement Class Members' claims in the Action. Scott Decl. ¶ 15; Fitzpatrick Decl. ¶ 23; Joint Decl. ¶ 92. Moreover, the likelihood that more than a handful of Settlement Class Members could or would have successfully pursued *individual* arbitrations was virtually non-existent. *Id*. Thus, if U.S. Bank were successful in enforcing its arbitration agreements, it would have effectively spelled the "death-knell" of Plaintiffs' and every Settlement Class Members' ability to successfully recover damages arising from the Bank's High-to-Low Posting practices challenged in the

Action. *Id.* Even if arbitration were defeated, U.S. Bank's other defenses could have spelled defeat for Plaintiffs and Settlement Class Members. *Id.*

Given these risks, the $55,000,000 cash recovery obtained through the Settlement is remarkable. These risks could easily have impeded, if not altogether derailed, Plaintiffs' and the Settlement Class' successful prosecution of these claims at trial and in an eventual appeal.

The recovery achieved by this Settlement must be measured against the fact that any recovery by Plaintiffs and Settlement Class Members through continued litigation could only have been achieved if: (i) the 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 arbitration and merits defenses, and the challenging and unpredictable path of litigation Plaintiffs would have faced absent the Settlement. Joint Decl. ¶¶ 92-94.

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

In undertaking to prosecute this complex case entirely on a contingent fee basis, Class Counsel assumed a significant risk of nonpayment or underpayment. Scott Decl. ¶ 19; Fitzpatrick Decl. ¶ 23; Joint Decl. ¶ 95. That risk warrants an appropriate fee. Indeed, "[a] contingency fee arrangement often justifies an increase in the award of attorney's fees." *Sunbeam*, 176 F. Supp. 2d at 1335 (quoting *Behrens*, 118 F.R.D. at 548); *see also In re Continental Ill. Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992) (holding that when a common fund case

has been prosecuted on a contingent-fee basis, plaintiffs' counsel must be adequately compensated for the risk of non-payment); *Ressler*, 149 F.R.D. at 656 ("Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award.").

Public policy concerns – in particular, ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs holding small individual claims – support the requested fee. Fitzpatrick Decl. ¶¶ 20-23; Joint Decl. ¶ 96. In the Court's words:

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

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

The progress of the Action shows the inherent risk faced by Class Counsel in accepting and prosecuting the Action on a contingency fee basis. Despite Class Counsel's effort in litigating this Action for over three years, we remain completely uncompensated for the time invested in the Action, in addition to the expenses we advanced. Joint Decl. ¶ 97. There can be no dispute that this case entailed substantial risk of nonpayment for Class Counsel. Scott Decl. ¶ 19; Fitzpatrick Decl. ¶ 23.

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

The fee sought here matches the fee typically awarded in similar cases. Scott Decl. ¶ 24; Fitzpatrick Decl. ¶ 21; Joint Decl. ¶ 98. Legions of decisions have found that a thirty percent fee is well within the range of a customary fee. *See, e.g.*, *Sunbeam*, 176 F. Supp. 2d at 1333-34.

Indeed, several recent decisions within this Circuit have awarded attorneys' fees up to (or in excess of) thirty percent, confirming the fairness and reasonableness of the thirty percent fee requested here. Scott Decl. ¶ 24; Fitzpatrick Decl. ¶ 22; Joint Decl. ¶ 98.

As another member of this Court observed: "[F]ederal district courts across the country have, in the class action settlement context, *routinely* awarded class counsel fees in excess of the 25 percent 'benchmark,' even in so-called 'mega-fund' cases."[6] *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1210 (S.D. Fla. 2006) (emphasis added) (awarding fees equaling 31⅓ percent of settlement fund); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403 (S.D. Tex. 1999) (35.1 percent)); *see also Gaskill v. Gordon*, 942 F. Supp. 382, 387-88 (N.D. Ill. 1996), *aff'd*, 160 F.3d 361 (7th Cir. 1998) (finding that 33 percent is the norm, and awarding 38 percent of settlement fund); *In re Combustion, Inc.*, 968 F. Supp. 1116 (W.D. La. 1997) (36 percent); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326 (E.D.N.Y. 1993) (33.8 percent); *In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494, 498 (D.D.C. 1981) (45 percent); *Beech Cinema, Inc. v. Twentieth-Century Fox Film Corp.*, 480 F. Supp. 1195, 1199 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 1106 (2d Cir. 1980) (approximately 53 percent); *Zinman v. Avemco Corp.*, 1978 WL 5686 (E.D. Pa. Jan. 18, 1978) (Higginbotham, J.) (50 percent).

Class Counsel's fee request falls within the range of the private marketplace, where contingency fee arrangements often approach or equal forty percent of any recovery. Fitzpatrick Decl. ¶ 22; Scott Decl. ¶ 18; *see Continental*, 962 F.2d at 572 ("The object in awarding a reasonable attorneys' fee . . . is to simulate the market."); *RJR Nabisco, Inc. Sec. Litig.*, Fed. Sec.

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

L. Rep. (CCH) ¶ 94, 268 (S.D.N.Y. 1992) ("[W]hat should govern [fee] awards is . . . what the market pays in similar cases"). And, "[i]n tort suits, an attorney might receive one-third of whatever amount the Plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." *Blum v. Stenson*, 465 U.S. 886, 904 (1984) (Brennan, J., concurring); *see also Kirchoff v. Flynn*, 786 F.2d 320, 323, 325 n.5 (7th Cir. 1986) (noting "40 percent is the customary fee in tort litigation"); *In re Public Serv. Co. of N.M.*, 1992 WL 278452, at *7 (S.D. Cal. July 28, 1992) ("If this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery.").

The record here leaves no doubt that Class Counsel's fee request is appropriate and comports with attorneys' fees awarded in similar cases. Professor Fitzpatrick distilled several major empirical studies of attorneys' fees, including his own, awarded in connection with class action settlements. Fitzpatrick Decl. ¶¶ 18-22. He concluded that the empirical data from those studies supports the reasonableness of a thirty percent (30%) fee award in this case. *Id.*

Class Counsel's fee request also falls within the range of awards in numerous recent cases in this Circuit and District. Fitzpatrick Decl. ¶ 22; Scott Decl. ¶ 24; *see, e.g., Waters*, 190 F.3d 1291 (11th Cir. 1999) (affirming fee award of 33⅓ percent on settlement of $40 million even though most of the fund ultimately reverted to the defendant); *Gutter v. E.I. Dupont De Nemours & Co.*, 95-2152-CIV-Gold (S.D. Fla. May 30, 2003) (33⅓ percent of $77.5 million settlement); *Sands Point Partners, LP v. Pediatrix Med. Group, Inc.*, 2002 U.S. Dist. LEXIS 25721 (S.D. Fla. 2002) (30 percent of $12 million settlement); *In re CHS Elecs., Inc. Sec. Litig.*, 99-8186-CIV-Gold (S.D. Fla. 2002) (30 percent on settlement of over $11 million); *Ehrenreich v. Sensormatic Elecs. Corp.*, 95-6637-CIV-Zloch (S.D. Fla. 1998) (30 percent on settlement of

over $44 million); *Tapken v. Brown*, 90-0691-CIV-Marcus (S.D. Fla. 1995) (33 percent of $10 million settlement).[7]

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

The remaining *Camden I* factors likewise support granting Class Counsel's fee request. "I can say that class counsel count among their number some of the most experienced and highly regarded lawyers in the United States. They are not mere "benchmark" lawyers." Fitzpatrick Decl. ¶ 24. "Indeed, had class counsel not been so talented, I doubt the class would have recovered the compensation that is provided in this settlement." *Id.*; Scott Decl. ¶ 16. Moreover, without adequate compensation and financial reward, cases such as this simply could not be pursued. The Court previously held that, "given the positive societal benefits to be gained from lawyers' willingness to undertake difficult and risky, yet important, work like this, such decisions must be properly incentivized. The Court believes, and holds, that the proper incentive here is a 30% fee." *Checking Account Overdraft*, 830 F. Supp. 2d at 1364. The record before the Court compels the same outcome in this parallel MDL 2036 Action. Fitzpatrick Decl. ¶ 22; Scott Decl. ¶¶ 24-26.

[7] *See also In re Friedman's, Inc. Sec. Litig*., 2009 WL 1456698 (N.D. Ga. May 22, 2009) (30 percent); *Francisco v. Numismatic Guar. Corp. of Am*., 2008 WL 649124 (S.D. Fla. 2008) (30 percent); *Pinto v. Princess Cruise Lines, Ltd*., 513 F. Supp. 2d 1334 (S.D. Fla. 2007) (30 percent); *In re BellSouth Corp. Sec. Litig*., Civil Action No. 1:02-cv-2142-WSD (N.D. Ga. Apr. 9, 2007) (30 percent); *In re Cryolife, Inc. Sec. Litig*., Civil Action No. 1:02-cv-1868-BBM (N.D. Ga. Nov. 9, 2005) (30 percent); *In re Profit Recovery Group Int'l, Inc. Sec. Litig*., Civil Action No. 1:00-cv-1416-CC (N.D. Ga. May 26, 2005) (33⅓ percent plus interest and expenses); *In re Clarus Corp. Sec. Litig*., Civil Action No. 1:00-CV-2841-CAP (N.D. Ga. Jan. 6, 2005) (33⅓ percent); *In re Pediatric Servs. of Am., Inc. Sec. Litig*., Civil Action No. 1:99-CV-0670-RLV (N.D. Ga. Mar. 15, 2002) (33⅓ percent); *Ressler v. Jacobson*, 149 F.R.D. 651 (M.D. Fla. 1992) (30 percent).

8. The Expense Request Is Appropriate.

Class Counsel also request reimbursement for a total of $149,085.18 in certain litigation costs and expenses. Joint Decl. ¶ 100; *see Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970). This sum corresponds to certain actual out-of-pocket costs and expenses that Class Counsel necessarily incurred and paid in connection with the prosecution of the Action and the Settlement. Joint Decl. ¶ 100. Specifically, these costs and expenses consist 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 associated with depositions and hearings in the Action; and (3) $11,306.61 in mediator's fees and expenses incurred for the services rendered by Professor Green.[8] *Id.* These out-of-pocket expenses were reasonably and necessarily incurred and paid in furtherance of the prosecution of this Action. *Id.*

VI. CONCLUSION

The Settlement with U.S. Bank securing $55,000,000 in cash compensation for the benefit of the Settlement Class represents an excellent result given the obstacles confronted in this Action. The Settlement more than satisfies the fairness and reasonableness standard of Rule 23(e), as well as the class certification requirements of Rules 23(a) and (b)(3). Further, Class Counsel's application for fees and expenses is reasonable under all the circumstances. The request satisfies the guidelines of *Camden I* given the results achieved, the notable litigation risks, the extremely complicated nature of the factual and legal issues, and the time, effort and skill required to litigate claims of this nature to a satisfactory conclusion.

[8] Class Counsel have limited the categories of expenses for which reimbursement is being sought to those enumerated above, and are not seeking reimbursement for thousands of dollars in other expenses that are routinely sought and recovered in common fund class actions. Joint Decl. ¶ 101.

Accordingly, Plaintiffs and Class Counsel respectfully request that this Court (1) grant Final Approval to the Settlement; (2) certify for settlement purposes the Settlement Class pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(3), and 23(e); (3) appoint as class representatives the Plaintiffs listed in paragraph 61 of the Agreement; (4) appoint as Class Counsel and Settlement Class Counsel the law firms and attorneys listed in paragraphs 45 and 70 of the Agreement, respectively; (5) approve the requested Service Awards for the Plaintiffs; (6) award Class Counsel attorneys' fees and expenses; and (7) enter Final Judgment dismissing the Action with prejudice.

Dated: October 23, 2013.

Respectfully submitted,

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Plaintiffs' Executive Committee

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 09-MD-02036-JLK

IN RE: CHECKING ACCOUNT OVERDRAFT LITIGATION

MDL No. 2036

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 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, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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