EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Waters, et al. v. U.S. Bank, N.A.
Speers v. U.S. Bank, N.A.
Brown v. U.S. Bank, N.A.

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

DECLARATION OF BRIAN T. FITZPATRICK

I. Background and qualifications

1. My name is Brian Fitzpatrick and I am a Professor of Law at Vanderbilt University in Nashville, Tennessee. I joined the Vanderbilt law faculty in 2007, after serving as the John M. Olin Fellow at New York University School of Law in 2005 and 2006. I graduated from Harvard Law School in 2000. After law school, I served as a law clerk to The Honorable Diarmuid O'Scannlain on the United States Court of Appeals for the Ninth Circuit and to The Honorable Antonin Scalia on the United States Supreme Court. I also practiced law for several years in Washington, D.C., at Sidley Austin LLP. My C.V. is attached as Appendix 1.

2. Like my research at New York University before it, my teaching and research at Vanderbilt have focused on class action litigation. I teach the Civil Procedure, Federal Courts, and Complex Litigation courses at Vanderbilt. In addition, I have published a number of articles on class action litigation in such journals as the University of Pennsylvania Law Review, the Journal of Empirical Legal Studies, and the Vanderbilt Law Review. My work has been cited by numerous courts, scholars, and popular media outlets, such as the New York Times, USA Today, and Wall Street Journal. I am also frequently invited to speak at symposia and other events about class action litigation, such as the ABA National Institute on Class Actions in 2011 and the ABA

Annual Meeting in 2012. Since 2010, I have also served on the Executive Committee of the Litigation Practice Group of the Federalist Society for Law & Public Policy Studies.

3. In December 2010, I published an article in the Journal of Empirical Legal Studies entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (hereinafter "Empirical Study"). This article is what I believe to be the most comprehensive examination of federal class action settlements and attorneys' fees that has ever been published. Unlike other studies of class actions, which have been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as settlements approved in published opinions), my study attempted to examine *every* class action settlement approved by a federal court over a two-year period, 2006-2007. *See id*. at 812-13. As such, not only is my study an unbiased sample of settlements, but the number of settlements included in my study is several times the number of settlements per year that has been identified in any other empirical study of class action settlements: over this two-year period, I found 688 settlements, including 54 from the Eleventh Circuit alone. *See id*. at 817. I presented the findings of my study at the Conference on Empirical Legal Studies at the University of Southern California School of Law in 2009, the Meeting of the Midwestern Law and Economics Association at the University of Notre Dame in 2009, and before the faculties of many law schools in 2009 and 2010. This study has been relied upon by a number of courts, scholars, and testifying experts. *See*, *e.g.*, *Silverman v. Motorola Solutions, Inc.*, 2013 WL 4082893, at *2 (7th Cir., Aug. 14, 2013) (relying on article to assess fees); *In re Vioxx Products Liability Litigation*, 2013 WL 5295707, at *3-4 (E.D. La., Sep. 18, 2013) (same); *In re Black Farmers Discrimination Litigation*, --- F.Supp.2d ----, 2013 WL 3480346, at *15 (D.D.C., July 11, 2013) (same); *In re Southeastern Milk Antitrust Litigation*, 2013 WL 2155387, at *2 (E.D. Tenn., May 17, 2013) (same); *In re Heartland Payment*

Sys., Inc. Customer Data Sec. Breach Litig., 851 F. Supp. 2d 1040, 1081 (S.D. Tex. 2012) (same); *Pavlik v. FDIC*, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 40 (D.D.C. 2011) (same); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011) (same); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (same).

4. I have been asked by class counsel to opine on whether the settlement they have asked the court to approve is fair, adequate, and reasonable, and whether the attorneys' fees they have requested are reasonable. In order to formulate my opinion, I reviewed a number of documents provided to me by class counsel; I have attached a list of these documents (and noted how I refer to these documents herein) in Appendix 2. As I explain, based on my study of settlements across the country and in the Eleventh Circuit in particular, I believe both the settlement agreement and fee request here are within the range of reason.

II. Case background

5. These lawsuits allege that U.S. Bank National Association (hereinafter "U.S. Bank") breached the covenant of good faith and fair dealing and other state laws of general application through its practice of sequencing customers' debit-card transactions from the largest amount to the smallest amount in order to maximize the number of overdraft fees it could charge its customers. The first of these lawsuits was filed on April 17, 2009. The parties have now moved the court to certify a settlement class and approve a settlement. The court preliminarily did so on July 29, 2013.

6. The settlement class includes, with minor exceptions, all holders of U.S. Bank consumer accounts who, from various dates (depending on the state in which they held their

accounts) through August 15, 2010, "incurred one or more Overdraft Fees as a result of U.S. Bank's High-to-Low Posting." U.S. Bank Settlement Agreement ¶¶ 46, 76. Pursuant to the settlement agreement, the settlement class will release U.S. Bank from any and all claims pertaining to matters during the class period that "were or could have been alleged" in these lawsuits, including any claims arising out of "the assessment of one or multiple Overdraft Fees and/or sustained Overdraft Fees," "the amount of one or more Overdraft Fees and/or sustained Overdraft Fees," and "High-to-Low Posting or posting order . . . ." *See id*. at ¶ 117. In exchange, U.S. Bank will pay the class $55 million, to be distributed *pro rata* (after deducting attorneys' fees, expenses, and service awards to the named plaintiffs), and with no amount reverting to U.S. Bank (except, if residual funds remain following distributions to class members, to reimburse it for the costs of settlement notice and administration that U.S. Bank is obligated to pay pursuant to the settlement). *See id*. at ¶¶ 78, 106, 108-112, 116. All settlement class members will receive their cash distributions automatically, without the need to file claim forms. *See id*. at ¶¶ 105, 113. In addition to this cash compensation, U.S. Bank has agreed to pay all of the costs associated with administering and notifying the class of the settlement, *see id.* at ¶ 80, and to continue for at least two years certain recent changes it made to its posting order on consumer accounts, *see id.* at ¶ 79.

7. Plaintiffs and class counsel are now moving for final approval of the settlement and class counsel are moving for an award of fees equal to thirty percent (30%) of the settlement.

III. Assessment of the reasonableness of the settlement

8. Under Federal Rule of Civil Procedure 23, class actions can be settled "only with the court's approval," Fed. R. Civ. P. 23(e), and only if the settlement is "fair, reasonable, and

adequate," Fed. R. Civ. P. 23(e)(2). The court is given this responsibility because the interests of class counsel, the class representatives, and the defendant can diverge from the interests of absent class members, and the court must ensure that the absent class members are treated fairly before they are bound to the agreement. *See, e.g.*, Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623, 1630 (2009) (hereinafter "Objector Blackmail").

9. Courts usually examine a number of factors in discharging this duty. In the Eleventh Circuit, courts have been instructed to consider at least six factors: "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) the opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved." *Faught v. Amer. Home Shield Corp.*, 668 F.3d 1233, 1240 (11th Cir. 2012); *see also Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). Although it is not possible to fully assess the fifth factor yet because the deadline for objections to the settlement has not yet passed, the number of objections (2) and opt-outs (fewer than 100) submitted to date (October 19, 2013) are *de minimis* in a settlement covering more than 2.5 million class members.[1] *See* McNamee Declaration at ¶¶13-14. But, as I explain below, all of the other factors clearly counsel in favor of approving the settlement.

10. Consider first the factors "(1) the likelihood of success at trial," "(2) the range of possible recovery," and "(3) the range of possible recovery at which a settlement is fair, adequate, and reasonable." These factors together ask the court to assess whether the settlement is a fair

[1] It is important to note that, even if there is opposition to the settlement from class members, not all opposition is created equal. Although some class members file objections because they sincerely believe there is something amiss in the settlement, many others do so only to try to delay final resolution of the case and to use that delay to extract side payments from class counsel. This phenomenon is known as objector blackmail, and courts are wise to stand guard against it. *See generally* Fitzpatrick, *Objector Blackmail*, *supra*.

value in light of the risks presented by the litigation. That is, these factors ask the court to compare the relief called for in the settlement with the relief the class might have recovered had the case gone forward, discounted by the risks of no or reduced recovery. According to class counsel's damages expert, the $55 million cash component of the settlement constitutes approximately 13% of the wrongful overdraft fees the settlement class members were charged, *see* U.S. Bank Joint Declaration ¶ 73. In light of the risks and expense of class action litigation, this level of recovery can be quite successful. *See, e.g., In re Cendant Corp. Litig.*, 264 F.3d 201, 241 & n.22 (3d Cir. 2001) (citing securities class action settlements with recoveries between 1.6% and 14% of damages). Indeed, as I explain below, I believe the recovery here is fair value in light of the substantial risks presented by the litigation.

11. First, it was not at all clear that the plaintiffs would have won their cases on the merits had these suits gone forward. Like most of the other banks in this MDL, U.S. Bank contends that federal banking laws preempt the plaintiffs' claims. Although the court rejected these arguments, *see* Omnibus Motion to Dismiss Order at 9-16, this outcome was far from certain, and it is not clear the Eleventh Circuit would have come out the same way if these suits had gone forward and been appealed. Indeed, late last year, the United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part a class action judgment in a similar overdraft fee case brought against Wells Fargo Bank, on the ground that California's Unfair Competition Law was preempted by the National Bank Act. *See Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712 (9th Cir. 2012). Although there are grounds on which *Gutierrez* can be distinguished from the case at hand (and, of course, it is not controlling in the Eleventh Circuit), there is little doubt that U.S. Bank would have raised *Gutierrez* in support of its preemption defense in the absence of this settlement. In addition, U.S. Bank asserted a number of other defenses under state law. Although

the court here has thus far rejected these arguments in this MDL, other courts have not, *see* Omnibus Motion to Dismiss Order at 18-46, and, again, it is not at all clear how the Eleventh Circuit would ultimately rule on these issues in a post-judgment appeal.

12. Second—and more importantly—the account agreements between U.S. Bank and the class members, including the plaintiffs, apparently contain an arbitration clause that includes a provision prohibiting them from suing U.S. Bank on a class-wide basis. If U.S. Bank were permitted to enforce these provisions, each member of the proposed class here would be compelled to proceed individually against U.S. Bank in arbitration, something few would do because the small individual recoveries at issue would make doing so cost prohibitive. In other words, if U.S. Bank were permitted to enforce these provisions, it would effectively insulate U.S. Bank from most, if not all, liability for the overdraft fee practices challenged here. It is for this reason that many courts have held that these so-called "class action waivers" are unconscionable under state contract law. *See, e.g.*, *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005). The United States Supreme Court, however, recently held that the Federal Arbitration Act preempted state unconscionability laws, thereby rendering class action waivers enforceable. *See AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011). This decision, and a number of decisions that have applied *Concepcion* over the past two years, raise questions about whether the class members would be able to recover anything at all in this case. 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.

13. Third, especially given the added risks associated with arbitration, the percentage recovery in this settlement is commensurate with the other settlements in this MDL that have already been approved by the court or for which final approval is pending. In Table 1, I set forth

each of these settlements, the sum of the cash and any valued policy changes called for in the settlement as a percentage of the class's damages (using chronological ordering as the baseline), whether the defendant had invoked arbitration with a class action waiver,[2] the approximate number of states comprising the plaintiff classes in each case,[3] and any other obvious considerations relevant to the risk and recovery in these suits. As this table shows, most of the settlements to date in this MDL recovered (or are poised to recover, if not yet finally approved) between 40% and 65% of the damages estimated by class counsel's expert, with the variation largely dependent on how likely the prospects for class certification appeared (including the prospects of surviving an appeal under Fed. R. Civ. P. 23(f) to review class certification). The exceptions have been the Bank of America settlement, the Chase settlement, the M&I settlement, the Compass settlement, and the settlement here. In my opinion, other factors justify the lower percentage recoveries in these settlements. As I alluded to in the table, the low-end percentage recovered against Bank of America was impressive because class counsel estimated that approximately 80% of the value of the claims there had already been settled and released in state court in California; although class counsel were challenging that settlement, they had been rebuffed by the trial court and there was substantial doubt they would have had any more success on appeal. With regard to the settlements with Chase, M&I, Compass, and the one here, the lower percentage recoveries are well justified, in my opinion, by the fact that the defendant banks invoked arbitration in these cases; as I explained above, arbitration clauses create great risks that the account holders might not recover anything at

[2] As I noted above, this factor is important because the Supreme Court recently held that class action waivers imbedded in arbitration agreements are enforceable over state unconscionability laws, and the presence of such a waiver is one of the most significant risk factors in the lawsuits in this MDL. *See AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

[3] These numbers were provided to me by class counsel. This factor is important because the lawsuits in this MDL are based on state law claims and the laws of the states vary to some extent. This is a risk factor because the greater the number of states comprising the class, the greater the risk posed by the predominance requirement under Fed. R. Civ. P. 23(b)(3).

all. In my opinion, the doubts created by the arbitration issues place the risk-recovery tradeoff here well in line with the other settlements approved by the court in this MDL where the issue of arbitration was a factor.

Table 1: Settlements in *In re: Checking Account Overdraft Litigation*, MDL No. 2036

Defendant	Final approval	Recovery as % of damages	Arbitration invoked?	No. of states	Other factors
U.S. Bank[4]	Pending	13%	Yes	24	
Bank of America[5]	11/22/11	9-45%	No	50	Prior settlement
Bank of OK[6]	9/13/12	46%	No	9	
Union[7]	10/4/12	63%	No	3	Certified, 23(f) denied
Bank of the West[8]	12/18/12	52%	No	19	
Chase[9]	12/19/12	21%	Yes	25	
Citizens[10]	3/12/13	42%	No	13	
TD[11]	3/18/13	42%	No	14	Certified, 23(f) pending
Associated[12]	8/2/13	50+%	No	4	
Commerce[13]	8/2/13	57%	No	6	
Great Western[14]	8/2/13	50+%	No	7	
M & I[15]	8/2/13	25+%	Yes	10	
Harris[16]	8/5/13	65+%	No	10	
PNC[17]	8/5/13	45+%	No	14	Certified, recon. pending
Compass[18]	8/7/13	16%	Yes	7	

[4] *See* U.S. Bank Joint Declaration ¶ 73.

[5] *See* Bank of America Joint Declaration ¶¶ 24-30, 68.

[6] *See* Bank of Oklahoma Joint Declaration ¶25.

[7] *See* Union Bank Joint Declaration ¶¶ 15, 49.

[8] *See* Bank of the West Joint Declaration ¶ 46.

[9] *See* Chase Joint Declaration ¶ 29. The $110 million cash portion of the settlement constituted 14% of the class's estimated damages; the valuation of the defendant's changed practices constituted the remainder.

[10] *See* Citizens Financial Joint Declaration ¶ 65.

[11] *See* TD Bank Joint Declaration ¶¶ 25-27, 54.

[12] *See* Associated Bank Joint Declaration ¶ 50. The percentage number listed in the table is based solely on the cash portion of the settlement; the total percentage recovery is unknown because the changed practices the bank agreed to as part of the settlement were not valued.

[13] *See* Commerce Bank Joint Declaration ¶¶ 21, 45. The $18.3 million cash portion of the settlement constituted 45% of the class's estimated damages; the valuation of the defendant's changed practices constituted the remainder.

[14] *See* Great Western Joint Declaration ¶ 50. The percentage number listed in the table is based solely on the cash portion of the settlement; the total percentage recovery is unknown because the changed practices the bank agreed to as part of the settlement were not valued.

[15] *See* M&I Joint Declaration ¶¶ 9, 39. The percentage number listed in the table is based solely on the cash portion of the settlement; the total percentage recovery is unknown because the changed practices the bank agreed to as part of the settlement were not valued.

[16] *See* Harris Bank Joint Declaration ¶ 38. The percentage number listed in the table is based solely on the cash portion of the settlement; the total percentage recovery is unknown because the changed practices the bank agreed to as part of the settlement were not valued.

[17] *See* PNC Joint Declaration ¶ 62. The percentage number listed in the table is based solely on the cash portion of

14. Consider next the factor "(4) the anticipated complexity, expense, and duration of litigation." This factor asks the court to assess whether the risk-recovery trade-off identified by the above factors might be further justified by the savings in time and expense that the settlement brings. At the time of settlement, the parties were in the midst of an appeal before the Eleventh Circuit and litigation before this court over the arbitration issues I discussed above (*see* U.S. Bank Settlement Agreement ¶¶ 19, 27). If the arbitration issues were ultimately decided in favor of the plaintiffs and this case ended up staying in court, the parties would then have to engage in merits discovery, litigate class certification (which would have led to another interlocutory appeal, as was the case with other cases in this MDL where a class was certified before settlement, see Table 1), litigate summary judgment and pretrial motions, prepare for trial, complete trial and all that goes with it, litigate post-trial motions, and then litigate any appeals on the merits. All of this would have probably consumed millions of dollars of class counsel's time and delay any payments to class members for several years. As such, this factor further supports the settlement in this case.

15. Consider next the factor "(6) the stage of proceedings at which the settlement was achieved." This factor asks the court to satisfy itself that class counsel have dug far enough into the case to know what the case is worth and to enable the court to assess what the case is worth using the factors discussed above; it is largely a procedural consideration rather than a substantive one. Here, the case has transpired well over three years, most of which has been consumed by litigation over arbitration. Although this case was settled before significant merits discovery and before class certification, *see* U.S. Bank Joint Declaration ¶ 38, it has had the benefit of decisions

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the settlement; the total percentage recovery is unknown because the changed practices the bank agreed to as part of the settlement were not valued.

[18] *See* Compass Joint Declaration ¶ 65.

by the court here and others in related litigation. The lawsuits in this MDL are at a mature stage; they have not been rushed to settlement for a quick fee award.

16. Consider finally one other factor that I believe should be examined in order to complete a thorough assessment of the fairness of this settlement: *all* settlement class members here will *automatically* receive their share of the settlement; they will not have to submit claim forms. *See* U.S. Bank Settlement Agreement ¶¶ 105, 113. This feature of the settlement is very unusual in my experience (although, it is common in this MDL), and it is another reason to look favorably on the settlement.

17. For all these reasons, I believe this settlement is not only fair, adequate and reasonable, but impressive as well.

IV. Assessment of the reasonableness of the request for attorneys' fees

18. This is a so-called "common fund" settlement, where the efforts by attorneys for the plaintiffs have created a common fund for the benefit of class members, but, because this is a class action and there is no fee-shifting statute applicable, the attorneys can be compensated only from the fund they have created. At one time, courts that awarded fees in common fund class actions did so using the familiar lodestar approach. *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043, 2051 (2010) (hereinafter "Class Action Lawyers"). Under this approach, courts awarded class counsel a fee equal to the number of hours they worked on the case (to the extent the hours were reasonable), multiplied by a reasonable hourly rate as well as by a discretionary multiplier that courts often based on the risk of non-recovery and other factors. *See id.* Over time, however, the lodestar approach fell out of favor in common fund class actions because it was difficult to calculate the lodestar (courts had to review

voluminous time records and the like) and the method did not align the interests of class counsel with the interests of the class (because class counsel's recovery did not depend on how much the class recovered). *See id.* at 2051-52; *Camden I Condominium Ass'n v. Dukle*, 946 F.2d 768, 771-74 (11th Cir. 1991). According to my empirical study, the lodestar method is now used to award fees in only a small percentage of class action cases. *See* Fitzpatrick, *Empirical Study*, *supra*, at 832 (finding the lodestar method used in only 12% of settlements).

19. Reflecting this trend, the Eleventh Circuit held in 1991 that courts should no longer use the lodestar method in common fund cases, and, instead, should use what is known as the percentage-of-the-fund method. *See Camden I*, 946 F.2d at 774 ("Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund . . . ."). Under this approach, courts select a percentage that they believe is fair to class counsel, multiply the settlement amount by that percentage, and then award class counsel the resulting product. The percentage-of-the-fund approach has the advantages of being easy to calculate (because courts need not review voluminous time records and the like) and of aligning the interests of class counsel with the interests of the class (because the more the class recovers, the more class counsel recovers). *See* Fitzpatrick, *Class Action Lawyers*, *supra*, at 2052.

20. Courts usually examine a number of factors when deciding what percentage to award class counsel under the percentage-of-the-fund approach. *See* Fitzpatrick, *Empirical Study*, *supra*, at 832. In the Eleventh Circuit, courts use 25% as the "'bench mark' percentage fee award" and then adjust it upward or downward "in accordance with the individual circumstances of each case." *Camden I*, 946 F.2d at 775. Although "[t]he factors which will impact upon the appropriate percentage . . . in any particular case will undoubtedly vary," the Eleventh Circuit has identified sixteen factors that it has said may be "appropriate[]" or "pertinent" to consider. *Camden I*, 946

F.2d at 775. These factors include "[1] the time required to reach a settlement, [2] whether there are any substantial objections . . ., [3] any non-monetary benefits conferred upon the class . . ., and [4] the economics involved in prosecuting a class action," *id.*, as well as the twelve factors from *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974): "[5] the time and labor required; [6] the novelty and difficulty of the questions involved; [7] the skill requisite to perform the legal service properly; [8] the preclusion of other employment by the attorney due to acceptance of the case; [9] the customary fee; [10] whether the fee is fixed or contingent; [11] time limitations imposed by the client or the circumstances; [12] the amount involved and the results obtained; [13] the experience, reputation, and ability of the attorneys; [14] the 'undesirability' of the case; [15] the nature and length of the professional relationship with the client; [and] [16] awards in similar cases." *Camden I*, 946 F.2d at 772 n.3.

21. In this case, class counsel are seeking an award of fees equal to thirty percent (30%) of the $55 million cash settlement fund. In my opinion, the 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.

22. Consider first the factors that go to the fee awards in other cases: "[9] the customary fee" and "[16] awards in similar cases." According to my empirical study, there were 35 class action cases in 2006 and 2007 in which district courts in the Eleventh Circuit used the percentage-of-the-fund method to award attorneys' fees. *See* Fitzpatrick, *Empirical Study*, *supra*, at 836. The average fee awarded in these cases was 28.1% and the median fee awarded was 30%.[19] *See id.*

[19] In their nationwide study of class action fees, Ted Eisenberg and Geoff Miller found mean and median fee awards in the Eleventh Circuit somewhat lower than those found in my study: 21% and 22%, respectively. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 248, 260 (2010). It should be noted, however, that their study was based on settlements dating back to 1993, and, as such, their data are older than mine. Moreover, their study examined only a fraction of the settlements over this period, and the fraction examined was not designed to be representative of the whole. *See id.* at 253 ("[O]ur data

These numbers are in line with the award requested here. Moreover, the award requested here is the same percentage this court has awarded in all of the other settlements approved to date in this MDL. *See, e.g., In re Checking Account Overdraft Litigation*, 830 F. Supp. 2d 1330, 1358-68 (S.D. Fla. 2011) (30%); *Case v. Bank of Oklahoma, N.A.*, No. 1:11-cv-20815-JLK (S.D. Fla., Sep. 13, 2012) (same); *Larsen et al. v. Union Bank, N.A.*, No. 1:09-cv-23235-JLK (S.D. Fla., Oct. 4, 2012) (same); *Dee v. Bank of the West, N.A.*, No. l:10-cv-22985-JLK (S.D. Fla., Dec. 18, 2012) (same); *Lopez v. JPMorgan Chase Bank, N.A.*, No. l:09-cv-23127-JLK (S.D. Fla., Dec. 19, 2012) (same); *Duval v. Citizens Financial Group, Inc.*, No. 1:10-cv-21080-JLK (S.D. Fla., Mar. 12, 2013) (same); *Mosser v. TD Bank, N.A.*, No. 10-cv-21386-JLK (S.D. Fla., Mar. 18, 2013) (same); *Wolfgeher v. Commerce Bank, N.A.*, No. 1:10-cv-22017-JLK (S.D. Fla., Aug. 2, 2013) (same); *Casayuran, et al. v. PNC Bank, N.A.*, No. 10-cv-20496-JLK (S.D. Fla., Aug. 5, 2013) (same); *Anderson v. Compass Bank*, No. 1:11-cv-20436-JLK (S.D. Fla., Aug. 7, 2013) (same). Indeed, there are many other decisions in class action cases from this district where the court awarded fees at or above the 30% requested here. *See, e.g., Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006) (awarding fees of 31.33% on settlement of $1.06 billion). Finally, even when compared to fee awards outside the Eleventh Circuit, the fee requested in this case is within the range of other awards. According to my empirical study, the most common percentages awarded by federal courts nationwide using the percentage-of-the-fund method were 25%, 30%, and 33%, with nearly two-thirds of awards between 25% and 35%, and with a mean award of

include only opinions that were published in some readily available form. Obviously, therefore, we have not included the full universe of cases . . . . [P]ublished opinions are not necessarily representative of the universe of all cases."). Indeed, one of the reasons their study may have found lower numbers than mine is because it oversampled larger cases (where the fee percentages awarded are often smaller than in other cases). *See* Fitzpatrick, *Empirical Study, supra*, at 829 (discussing the unrepresentative sampling in the Eisenberg-Miller studies).

25.4% and a median award of 25%. *See* Fitzpatrick, *Empirical Study*, at 833-34, 838. As such, these factors support the fee request here.

23. Consider next some of the factors that go to the results obtained by class counsel in light of the risks class counsel faced: "[4] the economics involved in prosecuting a class action," "[6] the novelty and difficulty of the questions involved," "[10] whether the fee is fixed or contingent," "[12] the amount involved and the results obtained," and "[14] the 'undesirability' of the case." All of these factors support exceeding the benchmark here. The novelty and difficulty of the issues involved created significant risks for class counsel; indeed, I believe these risks made this case less desirable than most class actions. As I explained above, class counsel faced serious questions whether the plaintiffs and the class would be effectively foreclosed from recovering anything at all in light of U.S. Bank's arbitration clause, let alone questions whether their claims would fail in light of U.S. Bank's federal preemption and state law defenses. Moreover, despite these risks, this case, like virtually all consumer class actions, was undertaken on a contingency basis. That is, class counsel devoted a significant amount of time in this case over the past three-plus years without receiving any compensation. Given their work and the results achieved, it is time that they be compensated appropriately. As such, these factors, too, weigh in favor of their fee request.

24. Consider finally the other *Camden* factors. Two of these factors are inapplicable here (at least as of yet)—"[2] whether there are any substantial objections" and "[3] any non-monetary benefits conferred upon the class"—but the other remaining factors look favorably on the fee award requested here. Two of these factors go to the time it took to litigate and settle these lawsuits: "[1] the time required to reach a settlement" and "[5] the time and labor required." These factors support the award requested here because, not only have these lawsuits transpired for well

over three years, but, as I noted above, this is a mature litigation, and the settlement values of the cases in this MDL have become fairly well established. The other factors go to the skills of class counsel and their relationship with the plaintiffs: "[7] the skill requisite to perform the legal service properly," "[8] the preclusion of other employment by the attorney due to acceptance of the case," "[11] time limitations imposed by the client or the circumstances," "[13] the experience, reputation, and ability of the attorneys," and "[15] the nature and length of the professional relationship with the client." Although I was not privy to the attorney-client relationships here, I can say that class counsel count among their number some of the most experienced and highly regarded lawyers in the United States. These are not mere "benchmark" lawyers. Indeed, had class counsel not been so talented, I doubt the class would have recovered the compensation that is provided in this settlement.

25. For all these reasons, I believe the fee award requested here is well within the range of reason.

26. My compensation in this matter is $595 per hour plus expenses.

Nashville, TN

October 22, 2013

Brian T. Fitzpatrick

Appendix 1

BRIAN T. FITZPATRICK

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ACADEMIC APPOINTMENTS

VANDERBILT UNIVERSITY LAW SCHOOL, *Professor*, August 2012 to present
- *Associate Professor*, 2010-2012; *Assistant Professor*, 2007-2010
- Classes: Civil Procedure, Federal Courts, Complex Litigation
- Hall-Hartman Outstanding Professor Award, 2008-2009
- Vanderbilt's Association of American Law Schools Teacher of the Year, 2009

EDUCATION

HARVARD LAW SCHOOL, J.D., *magna cum laude*, 2000
- Fay Diploma (for graduating first in the class)
- Sears Prize, 1999 (for highest grades in the second year)
- *Harvard Law Review*, Articles Committee, 1999-2000; Editor, 1998-1999
- *Harvard Journal of Law & Public Policy*, Senior Editor, 1999-2000; Editor, 1998-1999
- Research Assistant, David Shapiro, 1999; Steven Shavell, 1999

UNIVERSITY OF NOTRE DAME, B.S., Chemical Engineering, *summa cum laude*, 1997
- First runner-up to Valedictorian (GPA: 3.97/4.0)
- Steiner Prize, 1997 (for overall achievement in the College of Engineering)

CLERKSHIPS

HON. ANTONIN SCALIA, Supreme Court of the United States, 2001-2002

HON. DIARMUID O'SCANNLAIN, U.S. Court of Appeals for the Ninth Circuit, 2000-2001

EXPERIENCE

NEW YORK UNIVERSITY SCHOOL OF LAW, Feb. 2006 to June 2007
John M. Olin Fellow

HON. JOHN CORNYN, United States Senate, July 2005 to Jan. 2006
Special Counsel for Supreme Court Nominations

SIDLEY AUSTIN LLP, Washington, DC, 2002 to 2005
Litigation Associate

ACADEMIC ARTICLES

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, 98 VA. L. REV. 839 (2012)

Twombly *and* Iqbal *Reconsidered*, 87 NOTRE DAME L. REV. 1621 (2012)

An Empirical Study of Class Action Settlements and their Fee Awards, 7 J. EMPIRICAL L. STUD. 811 (2010) (selected for the 2009 Conference on Empirical Legal Studies)

Do Class Action Lawyers Make Too Little?, 158 U. PA. L. REV. 2043 (2010)

Originalism and Summary Judgment, 71 OHIO ST. L.J. 919 (2010)

The End of Objector Blackmail?, 62 VAND. L. REV. 1623 (2009) (selected for the 2009 Stanford-Yale Junior Faculty Forum)

The Politics of Merit Selection, 74 MISSOURI L. REV. 675 (2009)

Errors, Omissions, and the Tennessee Plan, 39 U. MEMPHIS L. REV. 85 (2008)

Election by Appointment: The Tennessee Plan Reconsidered, 75 TENN. L. REV. 473 (2008)

Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?, 13 MICH. J. RACE & LAW 277 (2007)

BOOK CHAPTERS

Civil Procedure in the Roberts Court in BUSINESS AND THE ROBERTS COURT (Jonathan Adler, ed., Oxford University Press, forthcoming 2014)

ACADEMIC PRESENTATIONS

Is the Future of Affirmative Action Race Neutral?, Conference on A Nation of Widening Opportunities: The Civil Rights Act at 50, University of Michigan Law School (Oct. 11, 2013)

The Mass Tort Bankruptcy: A Pre-History, The Public Life of the Private Law: A Conference in Honor of Richard A. Nagareda, Vanderbilt Law School (Sep. 28, 2013) (panelist)

Rights & Obligations in Alternative Litigation Financing and Fee Awards in Securities Class Actions, Conference on the Economics of Aggregate Litigation, Institute for Law & Economic Policy, Naples, Florida (Apr. 12, 2013) (panelist)

The End of Class Actions?, Symposium on Class Action Reform, University of Michigan Law School (Mar. 16, 2013)

Toward a More Lawyer-Centric Class Action?, Symposium on Lawyering for Groups, Stein Center for Law & Ethics, Fordham Law School (Nov. 30, 2012)

The Problem: AT & T as It Is Unfolding, Conference on *AT & T Mobility v. Concepcion*, Cardozo Law School (Apr. 26, 2012) (panelist)

Standing under the Statements and Accounts Clause, Conference on Representation without Accountability, Corporate Law Center, Fordham Law School (Jan. 23, 2012)

The End of Class Actions?, Washington University Law School (Dec. 9, 2011)

Book Preview Roundtable: Accelerating Democracy: Matching Social Governance to Technological Change, Searle Center on Law, Regulation, and Economic Growth, Northwestern University School of Law (Sep. 15-16, 2011) (participant)

Is Summary Judgment Unconstitutional? Some Thoughts About Originalism, Stanford Law School (Mar. 3, 2011)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Northwestern Law School (Feb. 25, 2011)

The New Politics of Iowa Judicial Retention Elections: Examining the 2010 Campaign and Vote, University of Iowa Law School (Feb. 3, 2011) (panelist)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Washington University Law School (Oct. 1, 2010)

Twombly *and* Iqbal *Reconsidered*, Symposium on Business Law and Regulation in the Roberts Court, Case Western Reserve Law School (Sep. 17, 2010)

Do Class Action Lawyers Make Too Little?, Institute for Law & Economic Policy, Providenciales, Turks & Caicos (Apr. 23, 2010)

Originalism and Summary Judgment, Georgetown Law School (Apr. 5, 2010)

Theorizing Fee Awards in Class Action Litigation, Washington University Law School (Dec. 11, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Conference on Empirical Legal Studies, University of Southern California Law School (Nov. 20, 2009)

Originalism and Summary Judgment, Symposium on Originalism and the Jury, Ohio State Law School (Nov. 17, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Meeting of the Midwestern Law and Economics Association, University of Notre Dame Law School (Oct. 10, 2009)

The End of Objector Blackmail?, Stanford-Yale Junior Faculty Forum, Stanford Law School (May 29, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, University of Minnesota School of Law (Mar. 12, 2009)

The Politics of Merit Selection, Symposium on State Judicial Selection and Retention Systems, University of Missouri Law School (Feb. 27, 2009)

The End of Objector Blackmail?, Searle Center Research Symposium on the Empirical Studies of Civil Liability, Northwestern University School of Law (Oct. 9, 2008)

Alternatives To Affirmative Action After The Michigan Civil Rights Initiative, University of Michigan School of Law (Apr. 3, 2007) (panelist)

OTHER PUBLICATIONS

Public Needs Voice in Judicial Process, THE TENNESSEAN (June 28, 2013)

Did the Supreme Court Just Kill the Class Action?, THE QUARTERLY JOURNAL (April 2012)

Let General Assembly Confirm Judicial Selections, CHATTANOOGA TIMES FREE PRESS (Feb. 19, 2012)

"Tennessee Plan" Needs Revisions, THE TENNESSEAN (Feb. 3, 2012)

How Does Your State Select Its Judges?, INSIDE ALEC 9 (March 2011) (with Stephen Ware)

On the Merits of Merit Selection, THE ADVOCATE 67 (Winter 2010)

Supreme Court Case Could End Class Action Suits, SAN FRANCISCO CHRONICLE (Nov. 7, 2010)

Kagan is an Intellect Capable of Serving Court, THE TENNESSEAN (Jun. 13, 2010)

Confirmation "Kabuki" Does No Justice, POLITICO (July 20, 2009)

Selection by Governor may be Best Judicial Option, THE TENNESSEAN (Apr. 27, 2009)

Verdict on Tennessee Plan May Require a Jury, THE MEMPHIS COMMERCIAL APPEAL (Apr. 16, 2008)

Tennessee's Plan to Appoint Judges Takes Power Away from the Public, THE TENNESSEAN (Mar. 14, 2008)

Process of Picking Judges Broken, CHATTANOOGA TIMES FREE PRESS (Feb. 27, 2008)

Disorder in the Court, LOS ANGELES TIMES (Jul. 11, 2007)

Scalia's Mistake, NATIONAL LAW JOURNAL (Apr. 24, 2006)

GM Backs Its Bottom Line, DETROIT FREE PRESS (Mar. 19, 2003)

Good for GM, Bad for Racial Fairness, LOS ANGELES TIMES (Mar. 18, 2003)

10 Percent Fraud, WASHINGTON TIMES (Nov. 15, 2002)

OTHER PRESENTATIONS

Judicial Selection in Historical and National Perspective, Committee on the Judiciary, Kansas Senate (Jan. 16, 2013)

The Practice that Never Sleeps: What's Happened to, and What's Next for, Class Actions, ABA Annual Meeting, Chicago, IL (Aug. 3, 2012) (panelist)

Life as a Supreme Court Law Clerk and Views on the Health Care Debate, Exchange Club of Nashville (Apr. 3, 2012)

The Tennessee Judicial Selection Process—Shaping Our Future, Tennessee Bar Association Leadership Law Retreat, Dickson, TN (Feb. 3, 2012) (panelist)

Reexamining the Class Action Practice, ABA National Institute on Class Actions, New York, NY (Oct. 14, 2011) (panelist)

Judicial Selection in Kansas, Committee on the Judiciary, Kansas House of Representatives (Feb. 16, 2011)

Judicial Selection and the Tennessee Constitution, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Mar. 24, 2009)

What Would Happen if the Judicial Selection and Evaluation Commissions Sunset?, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Feb. 24, 2009)

Judicial Selection in Tennessee, Chattanooga Bar Association, Chattanooga, TN (Feb. 27, 2008) (panelist)

Ethical Implications of Tennessee's Judicial Selection Process, Tennessee Bar Association, Nashville, TN (Dec. 12, 2007)

Appendix 2

Documents Reviewed:

- Omnibus Motion to Dismiss and/or For Judgment On the Pleadings and Incorporated Memorandum of Law in *In Re: Checking Account Overdraft Litigation*, No. 1:09-MD-02036-JLK (S.D.Fla.) (document 217, entered 12/22/09)
- Plaintiffs' Memorandum in Opposition to Defendants' Omnibus Motion to Dismiss and/or For Judgments on the Pleadings in *In Re: Checking Account Overdraft Litigation* (document 265, entered 2/5/10)
- Order Ruling on Omnibus Motion to Dismiss in *In Re: Checking Account Overdraft Litigation* (document 305, entered 3/11/10) ("Omnibus Motion to Dismiss Order")
- Motion to Clarify Court's March 11, 2010 Order Ruling on Omnibus Motion to Dismiss and/or For Judgment on the Pleadings and Incorporated Memorandum of Law in *In Re: Checking Account Overdraft Litigation* (document 325, entered 4/5/10)
- Fourth Amended Class Action Complaint in *Waters, et al. v. U.S. Bank, N.A.*, No. 09-23034-JLK (S.D. Fla.) (document 464, entered 5/14/10)
- Second Amended Class Action Complaint in *Speers v. U.S. Bank, N.A.*, No. 1:09-23126-JLK (S.D. Fla.) (document 466, entered 5/14/10)
- Defendant U.S. Bank, N.A.'s Answer to Second Amended Class Action Complaint in *Speers* (document 498, entered 5/21/10)
- Defendant U.S. Bank, N.A.'s Answer to Fourth Amended Class Action Complaint in *Waters* (document 499, entered 5/21/10)
- Defendant U.S. Bank National Association's Memorandum of Law in Support of Its Motion for an Order Compelling Arbitration and Staying Proceedings in *Speers* and *Waters* (document 632-1, entered 7/2/10)

- Plaintiffs' Response in Opposition to Defendant U.S. Bank's Motion for an Order Compelling Arbitration and Staying Proceedings in *Speers* and *Waters* (document 723, entered 7/26/10)
- Order Denying Motion to Compel Arbitration in *Speers* and *Waters* (document 855, entered 10/26/10)
- Brief for Appellant in *Speers* and *Waters* (11th Cir., No. 10-15040-D, Feb. 7, 2011)
- Brief of Appellees in *Speers* and *Waters* (11th Cir., No. 10-15040-D, Mar. 15, 2011)
- Defendant U.S. Bank National Association's Memorandum of Law in Support of its Motion to Compel Arbitration and Stay Proceedings in *Brown v. U.S. Bank, N.A.*, No. 1:10-24147-JLK (S.D. Fla.) (document 1407, entered 5/2/11)
- Motion to Dismiss Appeal in *Brown* (11th Cir., No. 11-13126-D, Jul. 29, 2011)
- Defendant's Response to this Court's Jurisdictional Question and Opposition to Plaintiffs' Motion to Dismiss Appeal for Lack of Jurisdiction in *Brown* (11th Cir., No. 11-13126-D, Aug. 2, 2011)
- Appellee's Response to Jurisdictional Question in *Brown* (11th Cir. No. 11-13126-D, Aug. 3, 2011)
- Order Granting Motion to Dismiss Appeal in *Brown* (11th Cir., No. 11-13126-D, Aug. 5, 2011)
- Brief for Appellant in *Brown* (11th Cir., No. 11-13126-DD, Aug. 29, 2011)
- Defendant U.S. Bank National Association's Memorandum of Law in Support of its Successor Motion to Compel Arbitration and Stay Proceedings in *Brown* (document 2220, entered 12/14/11)

- Plaintiffs' and Class Counsel's Unopposed Motion for Preliminary Approval of Class Settlement and for Certification of Settlement Class and Incorporated Memorandum of Law in *Waters*, *Speers*, and *Brown*, including the Settlement Agreement and Release attached as Exhibit A thereto ("U.S. Bank Settlement Agreement") (document 3543, entered 7/24/13)
- Joint Declaration of Aaron S. Podhurst, Bruce S. Rogow, and Robert C. Gilbert in Support of Plaintiffs' and Class Counsel's Unopposed Motion for Preliminary Approval of Class Settlement and for Certification of Settlement Class in *Waters*, *Speers*, and *Brown* ("U.S. Bank Joint Declaration") (document 3543-2, entered 7/24/13)
- Declaration of Ryan McNamee with Respect to the Notice Program in *Waters*, *Speers*, and *Brown* ("McNamee Declaration") (filed herwith)
- Joint Declaration of Robert C. Gilbert and Michael W. Sobol in Support of Plaintiffs' Motion for Final Approval of Settlement, Application for Service Awards, and Class Counsel's Application for Attorney's Fees in *Tornes, et al., v. Bank of America* and related cases ("Bank of America Joint Declaration") (document 1885-3, entered 9/16/11)
- Joint Declaration of Robert C. Gilbert, Michael W. Sobol, Jeffrey M. Ostrow, and Elaine Ryan in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement and Certification of Settlement Class in *Dee v. Bank of the West* and related cases ("Bank of the West Joint Declaration") (document 2823-2, entered 7/11/12)
- Joint Declaration of Robert C. Gilbert, Hassan Zavareel, Jeffrey M. Ostrow, and Burton Finkelstein in *Terry Case v. Bank of Oklahoma* ("Bank of Oklahoma Joint Declaration") (document 2843-2, entered 7/16/12)

- Joint Declaration of Robert C. Gilbert and Jeffrey M. Ostrow in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement and for Certification of Settlement Class in *Harris v. Associated Bank, N.A.* ("Associated Bank Joint Declaration") (document 2852-2, entered 7/24/12)
- Joint Declaration of Robert C. Gilbert and Michael W. Sobol in Support of Plaintiffs' Motion for Final Approval of Settlement, Application for Service Awards, and Class Counsel's Application for Attorney's Fees and Expenses in *Larsen v. Union Bank, N.A.* ("Union Bank Joint Declaration") (document 2859-2, entered 7/30/12)
- Joint Declaration of Robert C. Gilbert and Jeffrey M. Ostrow in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement and For Certification of Settlement Class in *Wolfgeher v. Commerce Bank, N.A.* ("Commerce Bank Joint Declaration") (document 2879-2, entered 8/14/12)
- Joint Declaration of Robert C. Gilbert and Jeffrey M. Ostrow in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Settlement and for Certification of Settlement Class in *McKinley v. Great Western Bank* ("Great Western Joint Declaration") (document 2912-2, entered 8/27/12)
- Joint Declaration of Aaron S. Podhurst, Robert C. Gilbert, and Ted Trief in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement and For Certification of Settlement Class in *Duval v. Citizens Financial Group, Inc.* and related cases ("Citizens Financial Joint Declaration") (document 2955-2, entered 9/18/12)
- Joint Declaration of Robert C. Gilbert and Peter Prieto in Support of Plaintiffs' and Class Counsel's Unopposed Motion for Preliminary Approval of Class Settlement and

Certification of Settlement Class in *Mosser v. TD Bank, N.A.* and related cases ("TD Bank Joint Declaration") (document 2956-2, entered 9/18/12)

- Joint Declaration of Robert C. Gilbert and Jeffrey M. Ostrow in Support of Plaintiffs' and Class Counsel's Unopposed Motion for Preliminary Approval of Class Settlement and for Certification of Settlement Class in *Blahut v. Harris Bank, N.A.* ("Harris Bank Joint Declaration") (document 2979-2, entered 10/1/12)
- Joint Declaration of Robert C. Gilbert and Jeffrey M. Ostrow in Support of Plaintiffs' and Class Counsel's Unopposed Motion for Preliminary Approval of Class Settlement and for Certification of Settlement Class in *Eno v. M&I Marshall & Ilsley Bank* ("M&I Joint Declaration") (document 2981-2, entered 10/1/12)
- Joint Declaration of Aaron S. Podhurst, Bruce S. Rogow, Robert C. Gilbert, Russell Budd, and Richard Golomb in Support of Plaintiffs' and Class Counsel's Motion for Final Approval of Settlement, and Application for Service Awards, Attorneys' Fees and Expenses in *Luquetta v. JPMorgan Chase Bank, N.A.*, and related cases ("Chase Joint Declaration") (document 3010-2, entered 10/15/12)
- Joint Declaration of Aaron S. Podhurst, Robert C. Gilbert and E. Adam Webb in Support of Plaintiffs' and Class Counsel's Unopposed Motion for Preliminary Approval of Class Settlement and for Certification of Settlement Class in *Casayuran, et al. v. PNC Bank, N.A.*, and related cases ("PNC Joint Declaration") (document 3150-2, entered 1/3/13)
- Joint Declaration of Robert C. Gilbert, G. Franklin Lemond, Jr., and Lawrence D. Goodman in Support of Plaintiff's and Class Counsel's Motion for Final Approval of Class Settlement and Application for Service Award, Attorneys' Fees and Expenses in

Anderson v. Compass Bank, No. 11-cv-20436-JLK ("Compass Joint Declaration") (document 3469-3, entered 5/16/13)