No. _-____

In The Supreme Court of the United States

RACHEL THREATT,

Petitioner,

v.

RYAN THOMAS FARRELL, et al., on behalf of himself and all others similarly situated, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A court may award class-action plaintiffs "reasonable attorney's fees" under Fed. R. Civ. Proc. 23(h). In interpreting this phrase in statutory contexts, this Court has disavowed "setting attorney's fees by reference to a series of sometimes subjective factors that place unlimited discretion in trial judges and produce disparate results" and required fees tied to lodestar. *Perdue v. Kenny A.*, 559 U.S. 542, 551 (2010) (cleaned up) (rejecting a 1.75 multiplier of lodestar).

Here, plaintiffs settled class-action litigation over the legality of $35 overdraft fees charged by Bank of America. The settlement would refund class members around $1.07 for each $35 fee they had paid. The district court awarded $14.5 million in fees from class members' recovery. By class counsel's own calculations, this award was for at most 2,158 hours of work, a rate of over $6,700 an hour, a multiplier of more than ten times lodestar. The district court held that it did not have to consider the lodestar in awarding a reasonable fee, and so it would not.

After objecting class members appealed, the Ninth Circuit affirmed in a 2-1 decision, holding that a district court does not have to consider the lodestar in awarding reasonable fees under Rule 23(h). The Second, Third, Fifth, and Sixth Circuits disagree. The Ninth Circuit's decision in this case thus continues a circuit split on this issue.

The question presented is:

Whether, and to what degree, a district court must consider counsel's lodestar in awarding "reasonable attorney's fees" under Rule 23(h).

PARTIES TO THE PROCEEDING

Petitioner Rachel Threatt was an objector in the district court proceedings and appellant in the court of appeals proceedings.

Respondents Ryan Thomas Farrell; Patrick Michael Farrell; Timothy Gaelan Farrell; Brooke Ann Farrell; Ronald Dinkins; Tia Little; and Larice Addamo were named plaintiffs in the district court proceedings and appellees in the court of appeals proceedings. (The Ninth Circuit incorrectly listed Joanne Farrell as appellee in the court of appeals proceedings; she was originally a lead plaintiff in the district court proceedings, but died in 2018, and the district court substituted her four children under Rule 25(a)(1). Dkt. 115; *cf.* App. 42a.)

Respondent Bank of America, N.A., was defendant in the district court proceedings and appellee in the court of appeals proceedings.

Respondents Estafania Osorio Sanchez and Amy Collins were objectors in the district court proceedings and appellants in the court of appeals proceedings.

Because Petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

In statutory contexts, this Court has repeatedly opined on the need for objective standards when courts award attorney's fees. Its jurisprudence consistently criticizes multiple-factor tests that give "very little actual guidance to district courts. Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results." *Perdue v. Kenny A.*, 559 U.S. 542, 551 (2010) (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563 (1986)); *see also Murphy v. Smith*, 138 S. Ct. 784, 790 (2018) (rejecting statutory interpretation that would have reintroduced "unguided and freewheeling" fee-setting "and the disparate results that come with it").

But when it comes to a "reasonable attorney's fee" in a class action under Fed. R. Civ. Proc. 23(h), the Court has not interpreted the phrase since it added the rule in the 2003 amendments. Disparate results are the standard in the fractured jurisprudence of lower courts. While courts agree that an award of lodestar—the number of hours the attorneys and their employees worked multiplied by the hourly rates prevailing in the community—is presumptively reasonable, they differ widely on when and what size of a multiplier is permissible, or even whether courts must consider lodestar at all. The Ninth Circuit's decision conflicts with decisions of the Second, Third, Fifth, and Sixth Circuits on the fundamental question of whether and how district courts should consider attorneys' lodestar in awarding a reasonable attorney's fee under Rule 23(h).

The Ninth Circuit's decision leads to the "disparate results" this Court has criticized elsewhere. The district court disregarded lodestar in awarding $14.5 million for

2,158 hours of work—over $6,700 an hour, and perhaps over $10,000 an hour if petitioner was correct that class counsel improperly exaggerated the submitted hours. The Ninth Circuit's reasoning would permit both an award of the original fee request of $16.65 million (and perhaps over $22 million as a percentage of the putative common fund) and an award of under a million dollars if the district court had chosen to scrutinize the submitted lodestar and refused to award a multiplier. Both a "thirty-three percent" award and a "lodestar method" are "reasonable" and within a district court's discretion in the Ninth Circuit. *In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d 539, 571 (9th Cir. 2019) (*en banc*) (citing cases). When the permissible range of "reasonable" fees has such a wide scope, then district courts have exactly the sort of "unlimited discretion" *Kenny A.* and *Delaware Valley* condemned.

The "fundamental asymmetry" between 42 U.S.C. §1988 standards in civil-rights litigation and the free-wheeling Rule 23(h) application in class-action litigation is especially problematic under the Ninth Circuit's decision. Paul D. Clement, *The Ethics of Lawyers in Government: Lawyering in the Supreme Court*, 38 Hofstra L. Rev. 909, 916 (2010). The $14.5 million fee comes from a common fund of $37.5 million intended to partially refund class members for the disputed overdraft fee—providing class members a mere $1.07 for every disputed $35 fee they paid. Class-action settlements are compromises, but the

class—lower-income bank customers paying fees for overdrafting their checking accounts[1]—is compromising 97% of their claims here without any compromise for the attorneys asking and receiving thousands of dollars an hour. Either the court is richly rewarding attorneys for a "sell-out" of their clients' meritorious claims, or attorneys are receiving millions of dollars for a nuisance settlement of meritless litigation. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (Easterbrook, J.). Courts should not encourage either behavior with massive fees, and neither scenario merits over ten times the fee that vindicating significant civil rights does.

The question is important because the resulting windfalls transfer hundreds of millions of dollars from poor and middle-class consumers to much wealthier attorneys and encourages forum shopping in the Ninth Circuit where the law allows this result.

The Court should grant certiorari to resolve the circuit conflict, provide "actual guidance to district courts" on when and to what degree multipliers of lodestar are permissible, and correct a serious abuse of the class-action mechanism. *Delaware Valley*, 478 U.S. at 563. The stark inequities of this case provide an excellent vehicle to resolve this question.

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[1] According to the Consumer Financial Protection Bureau, nine percent of all accounts pay 79% of all overdraft and non-sufficient fund fees. Matt Egan, *Banks make billions on overdraft fees. Biden could end that*, CNN Business (Oct. 12, 2020).

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 827 F. App'x 628 and reproduced at App. 1a. The opinion of the District Court for the Northern District of California is unpublished and reproduced at App. 21a.

JURISDICTION

The court of appeals entered judgment on September 2, 2020. Timely petitions for rehearing *en banc* were denied on November 6, 2020. App. 43a. Because of COVID-19, the Court extended the time to file this petition to April 5, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1). As a class member who objected to the fee request and settlement, Petitioner has standing to appeal the final judgment. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

RULE INVOLVED

Federal Rule of Civil Procedure 23 provides:

* * *

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

* * *

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

* * *

STATEMENT OF THE CASE

I. Plaintiffs settle class litigation over Bank of America's $35 "Extended Overdrawn Balance Charges."

Under Deposit Agreements with its customers, Bank of America charges a $35 fee anytime a deposit account holder writes a check against insufficient funds. When a deposit account holder thus overdrafts his or her account, the Bank has discretion over whether to honor the overdrawn check by advancing funds to the payee sufficient to cover the note. If the Bank advanced the funds, deposit account holders were obligated under the Deposit Agreement to pay back the Bank's advance plus any fees incurred. Failure to do so within five days triggers a second fee, a $35 Extended Overdrawn Balance Charge ("EOBC"). App. 21a–22a.

Several suits challenged this second fee as usurious, theorizing that the $35 EOBC exceeded the interest rate permitted by the National Banking Act, 12 U.S.C. §§85, 86. At least nine courts in six circuits agreed that EOBCs are not "interest" and dismissed these suits. App. 5a (listing cases). The district court here, however, denied the Bank's motion to dismiss, but agreed to certify an interlocutory appeal of that denial, and the Ninth Circuit granted permissive interlocutory appeal. App. 22a–23a.

While the appeal was pending and before any formal discovery, the parties settled in October 2017. App. 45a. The Bank agreed to cease charging EOBCs for five years; create a $37.5 million fund to pay attorney's fees and settlement expenses and provide partial *pro rata* refunds for about $756 million of previous EOBC charges; and formally provide $29.1 million of debt reduction to class members whose bank accounts closed with an outstanding

balance stemming from one or more EOBC's. App. 23a–24a. The roughly seven million class members (App. 26a) would release their claims. App. 56a–58a; App. 86a n.1.

Class attorneys filed a request for $16,650,000 in fees on the theory that they were entitled to 25% of the putative $66.6 million settlement value. They asserted a lodestar of $1,428,047.50 for 2,158 hours of work, acknowledging that they were requesting a multiplier of 11.66, but argued that the district court should not consider the lodestar at all. Dkt. 80-1.

II. Rachel Threatt objects.

Class member Rachel Threatt, who had paid multiple EOBCs to the Bank in the class period, timely objected to the fee request through *pro bono* counsel.

Threatt noted that a multiplier of over eleven was by itself unacceptable for a settlement that refunded such a small percentage of class members' fees because of the resulting exorbitant hourly rate. Threatt also objected that the 2,158-hour figure was exaggerated because it included 343 hours of work on two other unsuccessful cases, the hours spent on the fee application, and a bloated 561.75 hours by eight attorneys on settlement mediation, negotiation, and drafting. With a real figure of about 1,400 hours, the lodestar was about $926 thousand, and the attorneys were seeking a multiplier of over eighteen. App. 86a–98a.

Threatt also challenged the valuation of the settlement as a rationalization for the fees, arguing that the $16,650,000 request as unreasonably more than 44% of the $37.5 million in real common-fund cash value. App. 99–105. Threatt argued that the parties overstated the settlement value because the $29.1 million in "debt reduction" was illusory. The Bank did not pursue or sell the debts of former customers whose accounts it had closed with outstanding

balances. The Bank almost certainly had already written off all or most of that sum as a loss on its books. The elimination of EOBCs in the future could not support a fee award because it was compromising the claims of customers with past injuries for the benefit of different customers. And nothing stopped the Bank from offsetting the loss of EOBC revenue with a different fee schedule that might make class members worse off.

III. The district court approves the fees.

In response to objections, class counsel reduced their fee prayer to $14.5 million. App. 36a.

The district court then approved the settlement and $14.5 million fee request in full. The district court did not ask, and the Bank did not disclose, how much of the outstanding forgiven debt the Bank had already written off. It nevertheless held that the debt relief was not illusory because the Bank could hypothetically choose to start proceedings to collect, though there was no evidence the Bank ever considered doing so. App. 35a.

The court held that it "has discretion to not apply the lodestar cross check" and concluded without additional reasoning "The Court therefore finds it proper to exercise this discretion and not apply the lodestar cross check." App. 38a–39a. It thus made no findings on hours or rates, though praised class counsel's "tenacity" in a "hard fought battle." App. 38a. The court noted the "substantial risk of non-payment in confronting the adverse legal landscape." *Id.* Using the putative $66.6 million value of the settlement, the court held a 21.1% percentage-of-fund request reasonable, and awarded the full $14.5 million. App. 39a.

Threatt and two other objectors timely appealed. Appellants were supported by an amicus brief of seven state

attorneys general urging the Ninth Circuit to require lodestar crosschecks. App. 18a.

IV. Over a dissent, the Ninth Circuit affirms and holds a district court may disregard lodestar.

The Ninth Circuit affirmed. App. 1. The Court found it noteworthy that all of the previous attempts to bring identical litigation had foundered and thus it was "exceptional" for the attorneys to recover a small fraction of the disputed fees. App. 5a. Applying Ninth Circuit precedent, App. 4a, it held there was no obligation to perform a lodestar crosscheck, so there was no abuse of discretion in the district court's fee award of thousands of dollars an hour. The court concluded that "neither the settlement nor the fee award raises an eyebrow." App. 6a.

Senior Circuit Judge Kleinfeld dissented. App. 7a–20a. He agreed with objectors that the debt reduction was worth "nowhere near $29.1 million" and likely merely "a way to puff the value of the settlement by plaintiffs' counsel and the Bank, in order to get the attorneys' fees approved." App. 10a–11a. Similarly, the injunctive relief "is speculative, uncalculated, and likely to be a negligible fraction of the valuation the district court accepted"; the court should not have "attribute[ed] *any* value to the class of the injunctive relief." App. 11a–14a. The "economic reality" alone made the award an abuse of discretion even without considering lodestar. App. 14a.

The dissent also criticized any argument "justify[ing] the fee in part by the 'difficulty' of the case." App. 14a–15a. That plaintiffs had previously lost identical cases on legal grounds suggested that the case was "bad," rather than "difficult": "To treat that sort of case as justifying an extraordinarily high fee because of 'difficulty' would reward attorneys for bringing meritless cases." App. 15a.

Of most relevance to this petition, the dissent held that "The district court also erred by not considering a lodestar calculation." App. 14a–18a. "Though circuit law does not necessarily require a cross check, it probably should." App. 17a. Failing to do so "breaches the district court's fiduciary duty to the class." App. 18a. Judge Kleinfeld noted:

> Now-Justice Gorsuch has recommended reversing the trend toward percentage fees without cross checks, and scholarly literature has developed urging the necessity of a lodestar cross check, including an article co-authored by experienced district judge Vaughn Walker.

App. 18a (citing Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection* 22–23 (2005); Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases*, 18 Geo. J.L. Ethics 1453, 1454 (2005); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439, 503 (1996)).

On November 6, 2020, the Ninth Circuit denied two petitions for rehearing en banc despite Judge Kleinfeld's nonbinding recommendation of the petitions' grant. App. 43a.

This Petition followed.

REASONS FOR GRANTING THE WRIT

This petition presents an ideal and timely opportunity for the Court to resolve a deep circuit split over the use of lodestar analysis in class-action fee awards and provide much-needed guidance to the lower courts on a recurring issue of substantial importance.

I. The Ninth Circuit's decision compounds the fracture among circuits over the role of lodestar in Rule 23(h) fee awards and is inconsistent with this Court's jurisprudence.

Rule 23(h) authorizes a "reasonable attorney's fee," which is precisely the type of fee authorized under 42 U.S.C. § 1988(b) and many other statutes authorizing fee shifting. In the Section 1988 context, this Court has rejected multiple-factor tests because they give "very little actual guidance to district courts. Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results." *Kenny A.*, 559 U.S. at 551 (quoting *Delaware Valley*, 478 U.S. at 563). Thus, "the lodestar figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence," *Id.* (quoting *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002)) (cleaned up). Though the lodestar approach "is not perfect," it is "objective, and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results." *Id.* Enhancements above lodestar are permissible, but "rare and exceptional, and require specific evidence that the lodestar fee would not have been adequate to attract competent counsel." *Id.* at 554 (cleaned up).

This Court has applied the same approach in other contexts. In *Pennsylvania v. Delaware Valley Citizens'*

Council for Clean Air, 478 U.S. 546, 565 (1986), the Court incorporated the Section 1988 standards into fee awards under the Clear Air Act, 42 U.S.C. § 7401 *ff.*, noting that there was a "strong presumption that the lodestar figure-the product of reasonable hours times a reasonable rate-represents a 'reasonable fee' is wholly consistent with the rationale behind the usual fee-shifting statute...." In *Blanchard v. Bergeron*, the Court stated that "we have said repeatedly that '[t]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.'" 489 U.S. 87, 94-95 (1989) (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). Thus, the lodestar inquiry is "the guiding light of our fee shifting jurisprudence." *Burlington v. Dague*, 505 U.S. 557, 562 (1992). *See also Murphy v. Smith*, 138 S.Ct. 784, 790 (2018) (rejecting petitioner's attempt to "(re)introduce into [42 U.S.C.] §1997e(d)(2) exactly the sort of unguided and free-wheeling choice—and the disparate results that come with it—that this Court has sought to expunge from practice under §1988.").

But the Court has not interpreted Rule 23(h) since the Federal Rules added it in the 2003 amendments. And the courts of appeals are consistently inconsistent with respect to whether and to what extent district courts must consider lodestar in awarding fees under Rule 23(h). Several expressly rely on the multiple-factor test precedent that this Court has repeatedly criticized as subjective and producing "disparate results"; none follow the *Kenny A.* framework in the context of a common-fund award. *E.g.*, *In re Home Depot Inc. Customer Data Sec. Breach Litig.*, 931 F.3d 1065, 1085 (11th Cir. 2019) (citing cases); *Fresno County Employees' Ret. Ass'n v. Isaacson*, 925 F.3d 63, 68–72 (2d Cir. 2019) (same). These courts distinguish

Kenny A. without addressing that case's reasoning condemning "unlimited discretion" and "disparate results."[2]

The Ninth Circuit's decision is not only inconsistent with the Supreme Court's preference for "cabin[ing] the discretion of trial judges," but conflicts with decisions of the Second, Third, Fifth, and Sixth Circuits on the fundamental question of whether and how district courts should consider the attorneys' lodestar in awarding a reasonable attorney's fee under Rule 23(h). *See* 5 William B. Rubenstein, *et al.*, Newberg on Class Actions § 15:88 (5th ed. 2014) (identifying conflicting approaches among the Circuits). This Court's intervention is needed to establish a nationwide standard for the role of a lodestar crosscheck in Rule 23(h) awards and thereby prevent class attorneys nationwide from flocking to the Ninth Circuit at the expense of class members because its law allows them to recover fees disproportionately greater than their time and effort warrant.

This conflict is stark. The Fifth Circuit uses a mandatory approach. Like most circuits, the Fifth Circuit allows district courts to choose between the percentage method and the lodestar method as the baseline method for awarding attorney's fees from a common fund created by a class-action settlement. If a district court chooses to use the percentage method, however, the court must also apply "a meticulous *Johnson* analysis" as a "crosscheck" to ensure the fee is reasonable. *Union Asset Management Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012). The factors set forth in *Johnson v. Georgia Highway Express,*

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[2] *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980), held that attorney's fees from a common fund were appropriate, but did not discuss the appropriate methodology for calculating such fees.

Inc., 488 F.2d 714 (5th Cir. 1974), include a calculation of the time and labor, *i.e.*, lodestar, of the attorneys and, indeed, is envisioned to "be more searching than the 'lodestar cross-check' commonly referenced in other courts." *Union Asset Mgmt.*, 669 F.3d at 644 n.42. *See also In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 228 (5th Cir. 2008) ("When a district court awards attorneys' fees it must explain how each of the *Johnson* factors affects its award.").

The Second Circuit, while speaking in less mandatory terms, aligns with the Fifth Circuit in strongly preferring that district courts apply a lodestar crosscheck when awarding fees from a common fund. In *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000), the Second Circuit reaffirmed its "express goal" of "prevent[ing] unwarranted windfalls for attorneys." While allowing district courts to calculate attorney's fees using a percentage method, the court "encourage[d] the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage" and emphasized that "courts should continue to be guided" by the time and labor expended by counsel, among other relevant factors. *Id.* This holding follows the Second Circuit's long-established rule that "unless time spent and skill displayed [are] used as a constant check on applications for fees, there is a grave danger that the bar and bench will be brought into disrepute, and there will be prejudice to those whose substantive interests are at stake and who are

unrepresented except by the very lawyers who are seeking compensation." *Detroit v. Grinnell*, 495 F.2d 448, 470-71 (2d Cir. 1974).[3]

The Sixth Circuit also holds that district courts should consider the lodestar elements to determine the reasonableness of a fee awarded on a percentage basis. In *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009), the Sixth Circuit remanded an attorney's fee award in a class action even though the percentage-based award was not "on its face" unreasonable. The court held that the district court must provide its "reasons for 'adopting a particular methodology and the factors considered in arriving at the fee,'" which should "often, but not invariably" include, among other things, the lodestar value of the attorneys' services. *Id.* (quoting *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) and citing *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996)). Contrast here, where the Ninth Circuit affirmed such a fee award when the district court failed to provide reasons for its adopted methodology. App. 38a.

Similarly in tension with the Ninth Circuit standard is the Third Circuit's decision in *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005). Showing how important the crosscheck is, the Third Circuit remanded a

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[3] In practice, since *Goldberger*, "courts have generally refused multipliers as high as 2.03" in the Second Circuit. *See Fujiwara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 438 (S.D.N.Y. 2014) (cleaned up). *See also Fresno County Employees' Ret. Ass'n*, 925 F.3d at 72 ("Fee requests that deviate wildly from the unenhanced lodestar fee are unlikely to pass th[e] cross-check…."). This approach contrasts sharply with the lodestar multiplier of more than ten (and possibly more than sixteen) affirmed by the Ninth Circuit.

fee award in *Rite Aid* where the district court improperly applied the attorneys' billing rates in its lodestar crosscheck. The Third Circuit found such an improperly calculated crosscheck "inconsistent with the exercise of sound discretion." *Id.* The court held that application of a lodestar crosscheck is "sensible," reasoning that it "serves the purpose of alerting the trial judge that when the multiplier is too great." *Id.* at 306. The court thus ordered reconsideration of the fee "with an eye toward reducing the award." *Id. See also In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006) (reaffirming the "recommend[ation] that district courts use the lodestar method to cross-check the reasonableness of a percentage-of-recovery fee award" and reduce the award when the multiplier is too great).

At times, the Third Circuit has used even more forceful language, "strongly suggest[ing] that a lodestar multiplier of 3 … is the appropriate ceiling for a fee award." *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722 (3d Cir. 2001) (rejecting percentage-based fee award that was seven to ten times the lodestar); *In re Cendant Corp. Litig.*, 264 F.3d 201, 285 n.7 (3d Cir. 2001) (suggesting *Cendant PRIDES* may have elevated lodestar crosscheck from being a recommendation to a requirement).

The Ninth Circuit's approach to lodestar crosschecks joins the First, Eighth, and Eleventh Circuits on the other side of a deep fracture among the circuit courts. The First Circuit held in *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation* that "the approach of choice is to accord the district court discretion to use whichever method, [percentage-of-the-fund] or lodestar, best fits the individual case," with that discretion including the choice of whether to use a "combination" of

those methods. 56 F.3d 295, 307-08 (1st Cir. 1995). Meanwhile, the Eighth Circuit opined in *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017), that district courts need not conduct a lodestar crosscheck to verify the reasonableness of a Rule 23(h) award. *See also Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) (declining to address challenges to lodestar data because "the district court's approval of the fee under the 'percentage of the fund' approach was proper"). Even more recently, the Eleventh Circuit weighed in, noting that while courts often use a crosscheck, it is a "time-consuming exercise" and thus not "required." *Home Depot,* 931 F.3d at 1091 n.25.

The Seventh Circuit takes an idiosyncratic approach, asking courts to approximate a market-based fee and "estimate the contingent fee that the class would have negotiated with the class counsel at the outset had negotiations with clients having a real stake been feasible." *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 744 (7th Cir. 2011); *see generally In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718–20 (7th Cir. 2001). In this context, the amount of work expended by class counsel bears on the market price for legal fees. *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 833 (7th Cir. 2018). But in practice, this produces disparate results sometimes divorced from lodestar. *E.g., In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781 (N.D. Ill. 2015) (awarding over $3,600/hour for recovery of $2.72 per class member because of the lack of a "competitive market" after attorneys agreed not to compete for lead counsel status (citing Joseph Ostoyich and William Lavery, Looks Like Price-Fixing Among Class Action Plaintiffs Firms, Law360 (Feb. 12, 2014)).

The Tenth Circuit's law runs both ways, holding in different cases that courts need not evaluate time and labor

using the lodestar formulation, but also that district courts must consider all *Johnson* factors, and that a 3.16 multiplier is enough to shock the conscience. *Compare Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10th Cir. 1988), *with Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445, 1447–48 (10th Cir. 1995), *and Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455, 459 (10th Cir. 2018).

In sum, the "various federal circuits" currently "provide different directions to their district courts" and their overall approach to the topic of crosscheck multipliers under Rule 23(h) "is not particularly illuminating." Rubenstein, *et al.*, Newberg on Class Actions §15:87–88. These conflicting decisions and approaches illustrate that there is nothing to be gained by allowing the issue to further "percolate" in the lower courts. The circuit split is now well developed. Ten circuits have now opined on whether and how district courts should make use of the use of the lodestar in awarding fees under Section 23(h). The circuits are badly split with disparate reasoning and results apparent. There is no reason to allow these disparate approaches to persist. See Stephen M. Shapiro, *et al.*, Supreme Court Practice, §4.4(b) at 4-16 (11th ed. 2019) ("well-developed" circuit split consideration favoring certiorari).

II. The question presented is important and frequently recurring.

There is a remarkable discrepancy between what is a "reasonable attorney's fee" in civil rights litigation and under Rule 23(h) in the Ninth Circuit's analysis. In a §1983 case, if "a plaintiff has achieved only partial or limited success, [the lodestar figure] may be an excessive amount."

Hensley v. Eckerhart, 461 U.S. 424, 436 (1983). In comparison, the class attorneys here settled for a tiny fraction of the alleged damages under the National Bank Act, but not only obtained their full lodestar, but an extraordinary multiplier of tenfold or more. There are two possibilities. One is that class counsel brought meritorious litigation, and settled it quickly on the cheap to maximize their recovery at the expense of their clients. The other is that, as Judge Kleinfeld suggested, this is a "bad" case, App. 14a, and class counsel have cashed in a lottery ticket that resulted in huge fee award in a suit that the defendant opted to dispose of with a nuisance settlement of pennies on the dollar. *Cf. Murray*, 434 F.3d at 952. There seems to be no public-policy reason to prefer rewarding attorneys more for either scenario than for successful litigation vindicating important civil rights against the government, but the rule of the Ninth and some other Circuits creates these perverse incentives.

The windfall here is not unusual. In "class actions, effective hourly rates of tens of thousands of dollars an hour are not uncommon." Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 Wash. U. L. Q. 653, 664 (2003). An expert study showed that attorneys bringing Telephone Consumer Protection Act litigation average $1,275 an hour in fees over dozens of cases, including nuisance settlements of a few dollars per class member and losses that paid nothing. Daniel Fisher, *Lawyers Won 10x Fee Payoff By Avoiding Competition, Objector Claims,* Forbes (May 7, 2015) (discussing fee award of $3,600/hour in *Capital One* that materially raised the average).

We know that these awards of thousands of dollars an hour are windfalls beyond what courts need to encourage attorneys to engage in meritorious consumer or securities

class-action litigation. When courts require attorneys to submit competitive bids beforehand to obtain lead-counsel status, high-profile firms consistently submit bids for a fraction of what district courts award afterward. Laural L. Hooper & Marie Leary, *Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study*, Federal Judicial Center (Aug. 29, 2001) at 7-8. "[A] series of antitrust class action auctions demonstrated that qualified counsel would generally offer to represent the class for fee awards in the 10-15% range." John C. Coffee, *The PSLRA and Auctions*, N.Y.L.J., May 17, 2001, at 5. *E.g.*, *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 931 (9th Cir. 2020) (competitive bid of 12–13%); *In re Lithium Ion Batteries Antitrust Litig.*, No.13-md-2420, 2020 U.S. Dist. LEXIS 233607 (N.D. Cal. Dec. 10, 2020) (awarding just under 30% fees despite competitive bid for half that amount).

Courts resolve hundreds of class-action settlements every year. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 813 (2010). Most cases are without objection, so class counsels are effectively submitting *ex parte* applications for fees. Eighty percent of courts simply grant Rule 23(h) requests without reduction. Theodore Eisenberg *et al.*, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 954 (2017). "Only in rare instances do courts grant fees that are significantly lower than the amount requested." *Id.* This creates a ratchet of precedent increasing fees. "By submitting proposed orders masquerading as judicial opinions, and then citing to them in fee applications, the class action bar is in fact creating its own caselaw on the fees it is entitled to... No wonder that 'caselaw' is so generous to plaintiffs' attorneys." *Fujiwara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014).

Good-faith objectors are few and far between. "[I]ndividual members of the class have such a small stake in the outcome of the class action that they have no incentive to … challenge" settlements or fee awards. *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014). And successfully objecting to oversized attorney's fees on a contingency-fee basis is not a viable business model for a for-profit firm. *E.g.*, *In re Petrobras Sec. Litig.*, 828 F. App'x 754 (2d Cir. 2020) (affirming reduced lodestar award of $33 thousand in fees for successful objection winning $47 million for class after successful appeal challenging $11 thousand award).

In addition, the decision below deepened a circuit split that already created an enormous incentive for forum-shopping by plaintiffs' attorneys seeking to bring and settle nationwide class actions like this one. Exactly the same suit and result can be more profitable for attorneys in some circuits than in others, enabling a particularly "sinister" form of forum shopping. Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 765, 775 (1998). Indeed, one of the motivations for passing the Class Action Fairness Act in 2005 was to reduce, if not eliminate entirely, the problematic effects of forum shopping nationwide class actions. *See, e.g.*, S. Rep. No. 109-14, at 13-23; 151 Cong. Rec. S1225, S1228 (daily ed. Feb. 10, 2005) (statement of Sen. Orrin Hatch); 151 Cong. Rec. H723, S726 (daily ed. Feb. 17, 2005) (statement of Rep. F. James Sensenbrenner); 151 Cong. Rec. S999-02, S999 (daily ed. Feb. 7, 2005) (statement of Sen. Arlen Specter). The result costs class members money, because defendants settling class actions are indifferent between whether the allocation of the cost of settlement goes to attorneys or to class members. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014).

The decision below permits district courts to disregard the time—and the value of that time—that attorneys representing a class spend on a case in setting a reasonable fee and to do so without providing any reasoning. The result is that class counsel bringing suits in the Ninth Circuit may realize a windfall, which will come at the expense of class members whose damages claims created the common fund that pays both their own claims and the attorney's fees. Fee awards that are often a sizable multiplier of lodestar for unremarkable settlements are a gigantic wealth transfer from pension funds and poor- and middle-class consumers to millionaire attorneys.

Rule 23(h) is not yet living up to its promise as part of the "uniform system of federal procedure." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010). Guidance from this Court is thus needed to create objective standards and avoid the "disparate results" between different types of litigation and among the circuits.

III. The Ninth Circuit is wrong and this case is a good vehicle to resolve this important question.

Beyond the mature and well-developed fissure between the Circuits, this petition provides an especially good vehicle for addressing the need for a lodestar crosscheck. Experienced *pro bono* counsel represent petitioner, who has averred that she has no intention of settling her objection for any sort of personal side payment. Dkt. 85-1 ¶8.

While petitioner contends that class counsel received over $10,000/hour here,[4] even under class counsel's calculations, there is no dispute that this $14.5 million fee is at least a ten-fold multiplier on class counsel's ordinary $662/hour blended rate. On either account, Rule 23(h), interpreted correctly, precludes such an unreasonable windfall. Likewise, there is no dispute that in response to petitioner's objection, the district court simply declined to consider lodestar; it provided no justification other than "that it was not required." App. 39a. Nor is there any dispute that the panel majority endorsed the district's categorical discretion to dispense with any crosscheck of the lodestar. App. 4a. Especially in matters of class-action fee awards, it is not always so clear what standards trial and appellate courts have applied.

The panel majority asserts that the thousands of dollars an hour here for a $1.07 refund per $35 fee did not cause them to "raise[] an eyebrow." App. 6a. Respectfully, that conclusion simply demonstrates that the Ninth Circuit has become inured to inflated fee awards. In our view, a payday of over $6,700/hour (and perhaps more than $10,000/hour) for a settlement of pennies on the dollar should shock the conscience. *E.g.*, *Rosenbaum*, 64 F.3d at 1447–48 (3.16 multiplier despite district court finding that award was about 16% of estimated benefit); *Forbush v. JC Penney Co.*, 98 F.3d 817, 823 (5th Cir. 1996) (affirming district court's fee award limiting multiplier to 2 after finding

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[4] Class counsel's assertion of risk is especially ironic if one juxtaposes with their submission of hours, given that that submission was larded with hundreds of hours spent on unsuccessful litigation in other cases. App. 91–93 & n.6.

a 4.6 multiplier to be "outrageous"). Common-fund equitable fee awards must be "made with moderation and a jealous regard to the rights of those who are interested in the fund." *Trustees v. Greenough*, 105 U.S. 527, 536–37 (1881). The dissent is correct, and roughly seven million class members have at stake a sizable $14.5 million attorney's fee payment from their common fund.

While petitioner agrees that Rule 23(h) fees should be tied to actual (as opposed to hypothetical) class recovery, lodestar crosschecks have value. They prevent a trial penalty. *See Brytus v. Spang & Co.*, 203 F.3d 238, 247 (3d Cir. 2000). They discourage risk-averse counsel from entering into quick agreements that amount to a small percentage of potential recovery. They incentivize counsel to prefer meritorious litigation over lottery-ticket litigation nuisance settlements of large claims. And they foreclose hourly windfalls that a functioning marketplace would not allow.

It is no answer to say that the panel majority's opinion is unpublished. The panel majority and district court expressly relied on Ninth Circuit precedent and that precedent includes multiple published decisions, including an *en banc* decision. App. 4a, 38a–39a. Moreover, "[n]onpublication must not be a convenient means to prevent review"; such decisions often create "lingering effect[s] in the Circuit." *Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, O'Connor & Souter, JJ., dissenting from the denial of certiorari). And indeed, courts in the Ninth Circuit are already citing the panel majority opinion as support for declining to conduct a lodestar crosscheck of their own. *See Kater v. Churchill Downs Inc.*, Nos. 15-cv-00612, 19-cv-00199, 2021 U.S. Dist. LEXIS 26734 (W.D. Wash. Feb. 11, 2021) (awarding fees of $38.75 million); *Wilson v. Playtika Ltd.*, No. 18-cv-5277, 2021 U.S. Dist.

LEXIS 26678 (W.D. Wash. Feb. 11, 2021) ($9.5 million). The Ninth Circuit's attempt to shield its splintered decision from further review is "yet another disturbing aspect of the [decision], and yet another reason to grant review." *Plumley v. Austin*, 574 U.S. 1127, 1131–32 (2015) (Thomas and Scalia, JJ., dissenting from the denial of certiorari).

The Court should take this opportunity to address the circuit split and ensure that Rule 23(h) is applied uniformly and with the "interests of absent class members in close view." *Amchem Prods., Inc v. Windsor*, 521 U.S. 591, 629 (1997).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Appendix A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOANNE FARRELL; et al., Plaintiffs-Appellees, ESTAFANIA OSORIO SANCHEZ, Objector-Appellant, v. BANK OF AMERICA CORPORATION, N.A. Defendant-Appellee.	No. 18-56272 D.C. No. 3:16-CV-00492-L-WVG MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

JOANNE FARRELL; et al., Plaintiffs-Appellees, AMY COLLINS, Objector-Appellant, v. BANK OF AMERICA CORPORATION, N.A., Defendant-Appellee.	No. 18-56273 D.C. No. 3:16-CV-00492-L-WVG

JOANNE FARRELL; et al., *Plaintiffs-Appellees*, v. RACHEL THREATT, *Objector-Appellant*, v. BANK OF AMERICA CORPORATION, N.A., *Defendant-Appellee.*	No. 18-56371 D.C. No. 3:16-CV-00492-L-WVG

Appeal from the United States District Court
for the Southern District of California
M. James Lorenz, District Judge, Presiding

Argued and Submitted March 2, 2020
Pasadena, California

Filed September 2, 2020

Before: KLEINFELD and CALLAHAN, Circuit Judges, and CHRISTENSEN[**], District Judge.
Dissent by Judge KLEINFELD

Objectors-Appellants appeal from the district court's: (1) approval of a class action settlement between Defendant-Appellee Bank of America and Plaintiffs-Appellees, Bank of America account holders; and (2) $14.5 million fee award to class counsel. We review for abuse of discretion. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir. 2011). We affirm both the settlement approval and the fee award.

The district court did not err in approving the settlement over objections to the failure to create subclasses. The named plaintiffs "fairly and adequately protect[ed]

[**] The Honorable Dana L. Christensen, United States District Judge for the District of Montana, sitting by designation.

the interests of the class." Fed. R. Civ. P. 23(a)(4). No conflict of interest arose when the differences between members of class did not bear on "the allocation of limited settlement funds" and when the structure of the settlement appropriately protected "higher-value claims ... from class members with much weaker ones." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 895 F.3d 597, 605 (9th Cir. 2018).

Nor did the district court abuse its discretion in using the percentage-of-recovery method to calculate fees and refusing to conduct a lodestar crosscheck. This Court has consistently refused to adopt a crosscheck requirement, and we do so once more. *See Campbell v. Facebook*, 951 F.3d 1106, 1126 (9th Cir. 2020); *In re Hyundai & Fuel Econ. Litig.*, 926 F.3d 539, 571 (9th Cir. 2019) (en banc); *Bluetooth*, 654 F.3d at 944; *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 738–39 (9th Cir. 2016); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). The district court acted within its "discretion to choose how [to] calculate[] fees." *Bluetooth*, 654 F.3d at 944.

The district court considered the most pertinent factors influencing reasonableness, and it did not err in finding the fee award reasonable under Federal Rule of Civil Procedure 23(h). *See Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954–55 (9th Cir. 2015). The court appropriately considered: (1) "the extent to which counsel 'achieved exceptional results for the class'"; (2) "whether the case was risky for class counsel"; (3) "whether coun-

sel's performance 'generated benefits beyond the cash settlement fund'"; and (4) "the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work)." *Id.* (quoting *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir. 2002)).

Most significantly, the district court concluded that class counsel demonstrated "tenacity and great skill," achieving a "remarkable" result in a "hard fought battle" despite an "adverse legal landscape" and the "substantial risk of non-payment." Indeed, excepting the district court in this particular matter, no court has ever ruled for bank accountholders on the controlling legal issue. *Compare Farrell v. Bank of Am., N.A.*, 224 F. Supp. 3d 1016 (S.D. Cal. 2016) *with Fawcett v. Citizens Bank, N.A.*, 919 F.3d 133 (1st Cir. 2019); *Walker v. BOKF, N.A.*, No. 1:18-cv-810-JCH-JHR, 2019 WL 3082496 (D.N.M. July 15, 2019); *Johnson v. BOKF, Nat'l Ass'n*, 341 F. Supp 675 (N.D. Tex. 2018); *Moore v. MB Fin. Bank, N.A.*, 280 F. Supp. 3d 1069 (N.D. Ill. 2017); *Dorsey v. T.D. Bank, N.A.*, No. 6:17-cv-01432, 2018 WL 1101360 (D.S.C. Feb. 28, 2018); *McGee v. Bank of Am., N.A.*, No. 15-60480-CIV-COHN/SELTZER, 2015 WL 4594582 (S.D. Fla. July 30, 2015), *aff'd* 674 F. App'x 958 (11th Cir. 2017); *Shaw v. BOKF, Nat'l Ass'n*, No. 15-CV-0173-CVE-FHM, 2015 WL 6142903 (N.D. Okla. Oct. 19, 2015); *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 150 F. Supp. 3d 593, 641–42 (D.S.C. 2015). This was a "risky" case, and the result negotiated for the class was "exceptional." *Online DVD-Rental*, 779 F.3d at 954–55.

We agree with the dissent that the individual cash distributions were small, but we take a different view of the value of the injunctive relief. While it can be difficult

to value nonmonetary relief, we have no trouble finding that the value here exceeds the $29.1 million assigned to it by the parties. Even more valuable than the debt forgiveness is Defendant-Appellee's agreement to refrain from assessing the fees challenged in this lawsuit—over the five-year moratorium imposed under the settlement agreement, Defendant-Appellee will forgo assessing $1.2 billion in fees. We do not struggle to conclude, as the district court did, that counsel "generated benefits" far "beyond the cash settlement fund." *Id.* at 955.

Applying the abuse of discretion standard, as we must, we find that the district court reasonably determined that the relevant factors justified a fee award equivalent to 21.1% of the common fund. It was reasonable "not to perform a crosscheck of the lodestar in this case, given the difficulty of measuring the value of the injunctive relief." *Campbell*, 951 F.3d at 1126. What is more, the award fell under the 25% benchmark that we have encouraged district courts to use as a yardstick. *Stanger*, 812 F.3d at 738; *Online DVD-Rental*, 779 F.3d at 955. Even if we were inclined to question the district court's motive in approving the settlement and awarding fees, we note that the district court's prior order denying Defendant-Appellee's motion to dismiss is inconsistent with the dissent's suggestion that the district court streamlined its docket at the expense of faithful adherence to the law.

In short, neither the settlement nor the fee award raises an eyebrow. We have settled the issue of whether a lodestar crosscheck is required, and we would not unsettle our precedent, even if we had the authority to do so.

AFFIRMED.

KLEINFELD, Senior Circuit Judge, dissenting:

I respectfully dissent.

The district court abused its discretion regarding attorneys' fees in two respects: by overvaluing the settlement in applying the percentage method, and by failing to weigh the percentage method against the lodestar method. The consequence is an unreasonable attorneys' fee award. "Because the relationship between class counsel and class members turns adversarial at the fee-setting stage, district courts assume a fiduciary role that requires close scrutiny of class counsel's requests for fees and expenses from the common fund."[1]

Bank of America charged customers in the class $35 for each instance of writing a check against insufficient funds, and—in the event that Bank of America advanced the customer funds to honor the check—charged another $35 if the customer did not pay back the advance within five days. The second $35 fee, referred to as an "Extended Overdrawn Balance Charge" or an "EOBC," is all that the settlement in this case addressed. The initial overdraft fee was unchallenged. Plaintiffs' counsel claimed that the

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[1] *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 930 (9th Cir. 2020).

EOBC constituted usurious interest under the National Bank Act.[2]

The district court, though acknowledging that every other court to rule on the question had decided that it was not, nevertheless ruled that the EOBC did indeed constitute usurious interest under the National Banking Act. Bank of America appealed, but before any appellate decision came down, the parties settled.

As part of their settlement, plaintiffs' lawyers and Bank of America agreed to class certification if the court approved the settlement. No class had yet been certified. The class would consist of around seven million people who, between February 25, 2014, and December 30, 2017, had been assessed at least one EOBC that had not been refunded. Bank of America agreed to a "clear sailing" attorneys' fees provision, that is, that it would not oppose any application for attorneys' fees not exceeding 25% of the settlement value plus costs and expenses. Bank of America agreed to pay $37.5 million in cash into a settlement fund, to forgive uncollected EOBCs on its books in the amount of at least $29.1 million, and to quit assessing EOBCs for five years beginning December 31, 2017, after which point it could resume the EOBCs as before. Class members who had actually paid the $35 EOBC would not get their $35 back. They would get only the $37.5 million—less attorneys' fees, costs, named plaintiff additional awards, and settlement administrator hourly charges—di-

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[2] 12 U.S.C. §§ 85-86.

vided by the number of class members who had been assessed at least one EOBC which had not been refunded or charged off, and issued pro rata based on how many EOBCs each of those class members paid. At oral argument, objectors' counsel represented that this distribution worked out to be $1.07 per EOBC for qualifying class members paid. Each of these class members would thus get a little over a dollar back for each purportedly usurious $35 charge that they had paid. For class members who closed their accounts with an outstanding balance due to one or more unpaid EOBCs, Bank of America would reduce class members' indebtedness, but only by $35. This held true even if the debt exceeded that amount, as when Bank of America had assessed multiple $35 EOBCs. For this result, the district court awarded attorneys' fees of $14.5 million.

The district court's rationale for granting this attorneys' fee award was that it was 21.1% of the cash payments plus the reduction in the amount of uncollected debt. The district court did not make a lodestar calculation and did not cross check the $14.5 million against a lodestar calculation, even though class counsel submitted they had put only 2,158 hours into the case, about what a new associate at a major firm bills in a year. The $14.5 million fee amounted to a rate of over $6,700 per hour, as compared with the $250–$800 rate class counsel submitted as its rate for attorneys.

We held in *Roes v. SFBSC Management*,[3] following earlier decisions, that where a settlement is negotiated before a class has been certified, "settlement approval 'requires a higher standard of fairness' and 'a more probing inquiry,'" looking for "'subtle signs' of collusion" such as a disproportionate distribution to counsel and a clear sailing agreement for attorneys' fees,[4] both of which we have in the case before us. The district court abused its discretion by not applying this "more "exacting review.""[5]

In their settlement, plaintiffs' counsel and the Bank agreed that the "debt reduction"—that is, the amount of uncollected EOBCs that the Bank agreed not to collect—amounted to $29.1 million. The objectors argued that the $29.1 million in purported debt forgiveness was greatly exaggerated or illusory. There was no evidence that the Bank was suing anyone for or actively attempting to collect these putative debts, and the objectors pointed out that the bank was highly unlikely to try to collect the $35 "debts." Indeed, the whole benefit of a class action is that it is not worth it to most entities to sue for such small amounts, so it makes no sense to suppose that even though the Bank's account holders need a class action to make collection economically practical, the Bank does not. As the objectors suggest, the Bank's filing and service fees alone

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[3] 944 F.3d 1035 (9th Cir. 2019).

[4] *Id.* at 1048–49 (quoting *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015); *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012)).

[5] *Id.* at 1049 (quoting *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012)).

would likely exceed the amounts of the debts in each instance of attempted collection.

The district court suggested that account holders, even if they were never going to pay the $35, might benefit from improvement in their credit scores. But this was never quantified. And because the settlement limits debt forgiveness to only one $35 reduction per class member even if more than one such fee was charged, the benefit of the purported credit score improvement is especially dubious or at least highly speculative. It is worth, if anything, nowhere near $29.1 million.

The district court also suggested that even though the Bank might never attempt to collect what it had not yet collected, it might sell the debt. But as the objectors argue, the sale value of this debt would more than likely be steeply discounted from its face value because of the impracticality of collecting it. It is hard to believe that the $29.1 million in "debt reduction" is anything more than a way to puff the value of the settlement by plaintiffs' counsel and the Bank, in order to get the attorneys' fees approved. A debt that is as a practical matter uncollectible, even if multiplied by a large number of purported debtors, has negligible or no value. It was an abuse of discretion to take this pile of worthless debt at face value for purposes of assessing attorneys' fees.

The other number the district court used to justify the attorneys' fee award was the estimated value of the Bank's agreement to an injunction requiring it to stop charging the EOBCs for a five-year period, to end in 2022. The district court attributed a value of $1.2 billion to this injunctive relief based on the claimed cost to the Bank of ceasing the practice. In dismissing an objection to giving the debt

relief face value, it stated that even "assuming *arguendo* that [the value of the debt relief] was illusory, the Court finds that the staggering $1.2 billion dollars in injunctive relief is worth substantially more than $29.1 million to the denominator."

In *In re Bluetooth Headset Products Liability Litigation*, we noted the importance of comparing "the settlement's attorneys' fees award and the *benefit to the class* or degree of success in the litigation . . . ."[6] Here, no calculation was made of how many, if any, class members might benefit from this prospective relief, as opposed to non-class members. Any account holder against whom no EOBC had been charged during the class period was not in the defined class, but they would receive some of the benefit from this injunctive relief. This much of the benefit of the injunction is to persons not in the class, commensurately reducing any value to class members. For class members who no longer maintained accounts, the forward-looking injunction would have no value, since the Bank could not impose late-payment charges on people who no longer had accounts. The benefit to class members of the injunctive relief here is speculative, uncalculated, and likely to be a negligible fraction of the valuation the district court accepted.

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[6] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 943 (9th Cir. 2011) (emphasis added).

We explained in *Staton v. Boeing Co.*[7] that "[p]recisely because the value of injunctive relief is difficult to quantify, its value is also easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund."[8] Therefore, we held, "only in the unusual instance where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained may courts include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees."[9] Similarly, we held in *Roes v. SFBSC* that "because of the danger that parties will overestimate the value of injunctive relief in order to inflate fees, courts must be particularly careful when ascribing value to injunctive relief for purposes of determining attorneys' fees, and avoid doing so altogether if the value of the injunctive relief is not easily measurable."[10] Under *Staton*, the district court erred in valuing the benefit of the injunctive relief to the class at $1.2 billion based on its cost to Bank of America rather than its value to the class. Because this valuation of $1.2 billion is in error, the district court committed legal error to the extent it determined that "the staggering $1.2 billion in injunctive relief" justified the $14.5 million attorneys' fee award. Moreover,

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[7] *Staton v. Boeing Co.*, 327 F3d 938 (9th Cir 2003).

[8] *Id.* at 974.

[9] *Id.*

[10] *Roes*, 944 F.3d at 1055.

under *Staton* and *Roes*, the district court abused its discretion by attributing *any* value to the class of the injunctive relief, much less the face value claimed.

Considering the value of the settlement to the class—$37.5 million in cash plus some indeterminate and uncalculated amount in debt reduction—the attorneys' fees of $14.5 million constituted perhaps slightly less (but probably not much less) than 39% percent of the putative common fund. Our controlling authority generally sets a 25% "benchmark" for attorneys' fees calculated using the percentage method.[11] Thus the award here, even without considering the lodestar, ought to be reversed as an abuse of discretion once the economic reality of the amount is considered.

The district court, and the panel majority, justify the fee in part by the "difficulty" of the case. There are different kinds of difficult cases. One is when there is great legal complexity, or a vast amount of discovery, or coordination of many parties, or extremely complex damages. Another kind of difficulty is when it is just a bad case, perhaps a negligence case where duty and breach of the duty of care are pretty clear, but there are plainly no damages. Suppose, for example, the driver with the right of way sues the driver who ran a stop sign and almost hit him but did not, for negligence. That case would be difficult because it is meritless and should not be brought at all. It would earn a costs award against the plaintiff, not an award in favor of

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[11] *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 570 (9th Cir. 2019) (en banc).

plaintiff's attorneys. The district court explanation, accepted by the majority, of why this case was difficult, that all the other courts to consider the question had gone the other way, sounds more like the no-damages negligence case than the massive and complex but meritorious case. This case involved no difficulty at all, in the sense of how much work was needed from counsel. There was nothing to it but a legal question, whether the second fee could be considered usurious, all the established precedent said no, and plaintiff's attorney obtained a ruling from the district court, never tested on appeal, and contrary to all the established precedent. To treat that sort of case as justifying an extraordinarily high fee because of "difficulty" would reward attorneys for bringing meritless cases. Difficulty of that sort cannot justify a discretionary award of extraordinarily high attorney's fees.

The district court also erred by not considering a lodestar calculation. Its only stated justification for avoiding this cross check was that controlling law did not require cross checking against the lodestar; it did not claim that the lodestar cross check would be uninformative or unhelpful. In *Bluetooth*, we noted that the first of the twelve *Kerr* factors for evaluating the reasonableness of attorneys' fees is "the time and labor required,"[12] and we held that the district court's discretion in choosing its method of awarding attorneys' fees "must be exercised so as to

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[12] *Bluetooth*, 654 F.3d at 942 n.7 (quoting *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975)).

achieve a reasonable result."[13] Interpreting reasonableness, we held that, "for example, where awarding 25% of a 'megafund' would yield windfall profits for class counsel in light of the hours spent on the case, courts should adjust the benchmark percentage or employ the lodestar method instead."[14] In *Bluetooth*, in part because the district court did not precisely calculate what the lodestar amount would be—despite stating that it was applying the lodestar method—we vacated and remanded.[15] We faulted the district court's exercise of discretion not only because of "the absence of explicit calculation or explanation of the district court's result," but also because "the district court declined to reduce the award because the injunctive relief and *cy pres* payment provided 'at least minimal benefit'" to the class.[16] In other words, because the injunctive relief and *cy pres* payment were not calculated, "[w]ith neither a lodestar figure nor a sense of what degree of success this settlement agreement achieved, we ha[d] no basis for affirming the fee award as unreasonable under the lodestar approach."[17]

While not requiring a cross check, *Bluetooth* notes that "we have also encouraged courts to guard against an unreasonable result by cross-checking their calculations

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[13] *Bluetooth*, 654 F.3d at 942.

[14] *Id.*

[15] *Id.* at 943, 945.

[16] *Id.* at 943-944.

[17] *Id.* at 944.

against a second method."[18] We have held that "[t]he 25% benchmark rate, although a starting point for analysis, may be inappropriate in some cases,"[19] and that it "must be supported by findings that take into account all of the circumstances of the case."[20]

Our cases holding that a cross check is not necessarily required do not open the door to mechanical application of a percentage award to putative common funds that include speculative and uncalculated value in the form of debt reduction. We noted in *Bluetooth* that "even though a district court has discretion to choose how it calculates fees, we have said many times that it 'abuses that "discretion when it uses a mechanical or formulaic approach that results in an unreasonable award."'"[21] The attorneys' fee award in this case does not satisfy *Bluetooth*.

Though circuit law does not necessarily require a cross check, it probably should. We said in *Bluetooth* and in *In re Optical Disk Drive Products Antitrust Litigation* that we have "encouraged" a cross check.[22] But at least in this case, the district court chose to follow the negative pregnant—that we do not r*equire* the cross check—rather

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[18] *Id.*

[19] *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002).

[20] *Id.*

[21] *Bluetooth*, 654 F.3d at 944 (quoting *In re Mercury Interactive Corp.*, 618 F.3d 988, 992 (9th Cir. 2010)).

[22] *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d at 930; *Bluetooth*, 654 F.3d at 944.

than accept the encouragement. This is understandable. In the rare instance of a class action going to trial, the effect on the district court's docket—combined with the difficulty of trying criminal cases within the 18 U.S.C.§ 3161 statutory deadline and the press of other civil litigation—is a devastating year in the courtroom. But skipping this step breaches the district court's fiduciary duty to the class.[23]

The amicus brief in this case, by the Attorneys General of seven states—Arizona, Arkansas, Idaho, Indiana, Louisiana, Missouri, and Texas—urges that instead of merely encouraging a cross check, we ought generally to require it. Now-Justice Gorsuch has recommended reversing the trend toward percentage fees without cross checks,[24] and scholarly literature has developed urging the necessity of a lodestar cross check, including an article co-authored by experienced district judge Vaughn Walker.[25] In this case, the district court gave no reason—such as undue complexity or difficulty of calculation—for not using a lodestar cross check.

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[23] *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d at 930.

[24] Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection* 22–23 (Wash. Legal Found., Critical Legal Issues Working Paper No. 128, 2005).

[25] See Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases*, 18 GEO. J.L. ETHICS 1453, 1454 (2005); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 503 (1996).

The only justification the district court gave for not performing a lodestar cross check was that it was not required. A lodestar calculated using class counsel's own submitted numbers—2,158 hours multiplied by hourly rates from $250 to $800 for attorneys and from $180 to $200 for paralegals—amounted to $1,428,047.50. That amount of money is not an insubstantial incentive to bring claims that settle before discovery, yet the district court awarded about ten times that much to class counsel.

In conclusion, the district court abused its discretion, and we ought to reverse, as we did in *Staton*, *Bluetooth*, and *Roes*. Even without a lodestar cross check, the attorneys' fee award violated Ninth Circuit law because it overvalued the amount gained for the class. Once the economic reality of the situation is considered, the percentage fee greatly exceeded even our 25% benchmark. Because so little litigation occurred before the settlement, and the percentage fee was so high, it was an abuse of discretion not to accept the "encourage[ment]"[26] in *Bluetooth* and *In re Optical Disk Drive Products Antitrust Litigation* to perform a lodestar cross check, even though cross checks are not absolutely required.

* * *

Bank of America and class counsel did much better than the class in this case. Bank of America got much more than settlement of the claim made against them in this

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[26] *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d at 930; *Bluetooth*, 654 F.3d at 944.

case. It bought, for $37.5 million in cash, a release and covenant not to sue for usury relating to overdraft fees by anyone anywhere (who did not opt out within the allowed time period) who had been charged an EOBC between February 25, 2014, and December 30, 2017. The settlement, once approved, barred the entire class from suit, even though the class was not certified when the agreement was made.

The reason why this had considerable value to the Bank was that other class action plaintiffs' attorneys were barred from bringing class actions for the putatively usurious fees. Creating a class as part of the settlement, where none was certified before, vastly expands the value of a release. In this case, "each Class Member who has not opted out . . . releases . . . [the bank] from any and all claims . . . against [the bank] with respect to the assessment of EOBCs as well as . . . any claim . . . which was or could have been brought relating to EOBCs . . . and . . . any claim that any other overdraft charge imposed by [the bank] during the Class Period, including but not limited to EOBCs and initial overdraft fees, constitutes usurious interest." That broad release, extending to a nationwide class that had not previously been certified in order to bar such claims across the country, was indeed worth paying plaintiff's lawyers considerable money, but the case was not worth much to the class, just to the defendant and plaintiff's counsel.

Appendix B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOANNE FARRELL, et al. Plaintiffs, v. BANK OF AMERICA, N.A., Defendant.	Case No.: 3:16-cv-00492-L-WVG **ORDER GRANTING (1) MOTION [Doc. 104] FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND (2) MOTION [Doc. 80] FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE SERVICE AWARDS**

Pending before the Court are Class Counsel's unopposed motions for final approval of class action settlement and final approval of fees, costs, and service awards. The Court has considered the motions on file, all timely objections, and oral argument presented by Class Counsel, counsel for Defendant Bank of America ("BoA"), and counsel for Objector Rachael Threatt at the final approval hearing held on June 18, 2018. For the following reasons, the Court hereby GRANTS both motions.

I. PROCEDURAL BACKGROUND

This case is a putative class action focused on BoA's practice of levying $35 fees against deposit account holders for failing to rectify an overdrawn deposit account

within five days. To open a deposit account with BoA, a customer had to first execute a Deposit Agreement [Doc. 8-3]. Under the terms of the Deposit Agreement BoA charged a $35 fee anytime a deposit account holder wrote a check against insufficient funds. When a deposit account holder thus over drafted his or her account, BoA had discretion as to whether to honor the overdrawn check by advancing funds to the payee sufficient to cover the note. However BoA levied the Initial Charge whether it advanced the funds or not. In the event BoA advanced the funds, deposit account holders were obligated under the Deposit Agreement to pay back BoA's advance plus any fees incurred. Failure to do so within five days triggered a $35 Extended Overdrawn Balance Charge ("EOBC").

Plaintiff wrote some checks against insufficient funds. BoA honored the checks but charged her $35 fee for not having sufficient funds. When Plaintiff failed to remedy her negative account balance within five days, BoA levied EOBCs. Because the EOBCs, as a percentage of her negative account balance, exceeded the interest rate permitted by the National Banking Act, Plaintiff filed this putative class action against BoA, alleging violation of 12 U.S.C. §§ 85, 86 (the "NBA").

A significant amount of pretrial activity followed. BoA moved to dismiss Plaintiff's Complaint, arguing that the EOBCs were not "interest" and therefore cannot trigger the NBA. (MTD [Doc. 8].) The Court disagreed, and therefore denied BoA's motion. (MTD Order [Doc. 20].) BoA subsequently answered and then amended their answer, and Plaintiff twice moved to dismiss certain of BoA's affirmative defenses. (Docs. 25, 40, 41, 45.) In part because every other court to consider the issue had held that EOBCs do not constitute interest, this Court found that

there was substantial ground for a difference of opinion on the issue. (April 11, 2017 Order [Doc. 61].) The Court therefore granted BoA's motion for certification of an interlocutory appeal of the denial of BoA's motion to dismiss. (*Id.*)

BoA petitioned the Ninth Circuit for a permissive interlocutory appeal on April 21, 2017. (Doc. 62.) Plaintiff answered. (9th Cir. Case No. 17-80072 ["Appeal"] Doc. 4.) The Ninth Circuit Granted BoA's Petition. (Doc. 63.) While the permissive appeal was pending before the Ninth Circuit, the parties participated in settlement negotiations, exchanged informal discovery, and attended mediation before the Honorable Layn Philips (Ret.), a highly respected neutral. Through these efforts, the parties successfully reached a settlement agreement in early October 2017. After conducting confirmatory discovery and reducing terms to writing, the parties formally executed the Settlement Agreement on October 31, 2017 and requested preliminary approval. On December 21, 2017, the Court granted preliminary approval. (Prelim. Appr. [Docs. 72, 75].) Plaintiffs now move unopposed for certification of a settlement class, final approval of the settlement, final approval of attorneys' fees and costs award, and final approval of service awards for named plaintiffs.

II. THE SETTLEMENT

In exchange for the release of class members' claims, the settlement agreement ("Agreement" [Doc. 104-2]) provides four forms of consideration:

1. BoA ceases charging EOBCs for five years beginning December 31, 2017. (Agreement § 2.2(a).) BoA's obligation will terminate during this timeframe only if the

United States Supreme Court expressly holds that EOBCs or their equivalent do not constitute interest under the NBA. (*Id.*) BoA testifies that this cessation will depress their revenue (and benefit BoA deposit account holders) by approximately $20,000,000 per month, or **$1.2 billion** total over the five year period. (Bhamani Decl. [Doc. 104-4].)

2. BoA provides cash payment ("Cash Portion") of **$37.5 million** to class members who (1) were charged an EOBC and (2) did not have their EOBC refunded or charged off. (Settlement Agreement § 2.2(b)(3).) Attorneys' fees ($14.5 million), costs ($53,119.92), named plaintiff service awards ($20,000), and settlement administrator hourly charges (approximately $62,242.00 [Doc. 122-1 ¶33]) will come off the top. (*Id.* § 1.4, 1.24, 2.2(b)(3).) The residue (approximately $22,864,638) to issue pro rata based upon how many EOBC's each qualifying class member paid as a percentage of all EOBC's paid by the class during the class period. (*Id.* § 2.2(b)(3).) Class members who do not opt out will receive their payment automatically.

3. BoA provides debt reduction ("Debt Reduction") in the amount of at least **$29.1 million**. Debt Reduction will issue to class members whose BoA accounts closed with an outstanding balance stemming from one or more EOBC's levied during the class period. Each eligible class member will receive up to $35 in debt reduction. To the extent BoA reported any of this debt to the credit bureaus, BoA will update the Bureau's as to the effect of the debt reduction. This debt reduction will issue automatically to all qualifying members who do not opt out. It will apply only to debt which BoA has a legal right to collect. It will

not apply to unenforceable debt, such as debt discharged in bankruptcy. (Trial Tr.)

4. BoA is paying all settlement administration costs other than the administrator's hourly service charges. These costs are currently estimated at $2.9 million. (Doc. 122-1 ¶33.)

If there is any residual Cash Portion settlement funds after the first distribution, the residue will go to the class by way of a secondary distribution, if economically feasible. Otherwise, the residue will go to the Center for Responsible Learning as *cy pres* beneficiary. None of the settlement funds will revert to BoA.

Email and / or physical mail notices went out to 7,078,199 class members. (Doc. 122-1 ¶ 21.) Only one hundred class members opted out. (*Id.* ¶ 26.) Eleven class members have filed timely objections. (Docs. 82, 84–86, 88, 90–93, 101.) Class member Rachael Threatt ("Threatt") was the only objecting class member to appear at the final approval hearing ("Hearing"), entering an appearance through counsel Theodore Frank.

III. SETTLEMENT CLASS CERTIFICATION

Plaintiffs seek settlement only class certification under Fed. R. Civ. P. 23(a) and (b)(3) of the same settlement class the Court preliminarily certified: "All holders of [BoA] consumer checking accounts who, during the period between February 25, 2014 and December 30, 2017, were assessed at least one [EOBC] that was not refunded." (Doc. 72 § 2.)

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). "A party seeking class certification must satisfy the requirements of Federal Rule of Civil Procedure 23(a) and the requirements of at least one of the categories under Rule 23(b)." *Wang v. Chinese Daily News, Inc.*, 709 F.3d 829, 832 (9th Cir. 2013).

A. Rule 23(a)

Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. "The Rule's four requirements – numerosity, commonality, typicality, and adequate representation – effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *Dukes*, 564 U.S. at 349 (internal quotation marks and citations omitted).

1. Numerosity

The numerosity element is met if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Here, the class numbers around seven million. The numerosity element is clearly satisfied.

2. Commonality

Under Rule 23(a)(2), Plaintiffs must demonstrate that there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The Supreme Court has held that plaintiffs must demonstrate "the capacity of a classwide proceeding to generate common answers" to common questions of law or fact that are "apt to drive the resolu-

tion of the litigation." *Dukes*, 564 U.S. at 350 (internal citations and quotations marks omitted). However, "[a]ll questions of fact and law need not be common to satisfy this rule." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). "The common contention ... must be of such a nature that ... its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id.* A single common question is sufficient to satisfy the commonality element. *Dukes*, 131 S. Ct. at 2556. Here, the common, dispositive issue of whether EOBCs constitute interest for purposes of the NBA satisfies the commonality element.

3. Typicality

The typicality requirement of Rule 23(a)(3) focuses on the relationship of facts and issues between the class and its representatives.

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."

Dukes, 131 S. Ct. at 2551 n.5 (internal quotation marks and citation omitted). "[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent

class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (internal citations and quotation marks omitted). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (internal citations and quotation marks omitted).

Here, the named plaintiffs are typical of the class they seek to represent. They suffered the same injury from the same course of conduct as did unnamed members. To wit, like the unnamed members, BoA charged them with EOBCs. Named plaintiffs therefore meet the criteria of Rule 23(a)(3).[1]

4. Adequacy

To serve as class representative, one must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is aimed at protecting the due process rights of absent members who will be bound by a class action judgment. *Hanlon*, 150 F.3d at 120; *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 801 (1996). "Resolution of two questions determines legal adequacy:

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[1] Objector Sanchez seeks to raise typicality arguments for the first time in her response to the Court's Order to Show Cause, which did not request briefing on the issue of typicality. She did not raise typicality concerns in a timely objection. In any event, the Court, for the reasons stated, is satisfied that the typicality element is met.

(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 120 (citation omitted).

Named plaintiffs and Class Counsel have demonstrated their ability to vigorously prosecute this action on behalf of the class.[2]

Thus, the only question as to adequacy is whether there exists a conflict of interest between named plaintiffs and the class as a whole that would render named plaintiffs inadequate representatives. Objector Estafania Sanchez ("Sanchez") complains that the interests of the Debt Portion recipients are "entirely different" and in conflict with the interests of the Cash Portion recipients. (Sanchez Objection [Doc. 88] ¶ 3.) In support of this argument, Sanchez cites to *Amchem Products Inc. v. Windsor*, 52 U.S. 591 (1997). In *Amchem*, an asbestos exposure case, the Supreme Court held that there was an insufficient alignment of the interests of plaintiffs who presently suffered exposure related injury and plaintiffs who had no present symptoms but could potentially experience them at a later time. *Id.* at 626. To wit, the former had an interest in maximizing immediate payment while the latter had a conflicting interest in maximizing a reserve fund for future claims with built in inflation adjustments. *Id.*

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[2] The Court further elaborates on this point below under the portion of this order approving Class Counsel's fee award.

Because it seemed feasible that the Cash Portion recipients may have an interest in maximizing the cash value of the settlement while the Debt Portion recipients may have a possibly conflicting interest in maximizing the debt forgiveness, the Court ordered further briefing on this issue. (OSC [Doc. 125].) In their responsive briefing, BoA and Class Counsel cite to *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Products Liability Litig.*, 895 F.3d 597 (9th Cir. 2018), a decision that issued eleven days after the OSC.

In *Volkswagen*, the settlement at issue stemmed from Volkswagen's decision to install "defeat devices" in some of its vehicles. *Volkswagen*, 895 F.3d at 603. These defeat devices triggered during smog inspections and reduced the vehicles' emissions to a legally acceptable level. *Id.* The settlement involved making payments to class members depending in part upon to which of two subgroups a class member belongs. One subgroup consisted of class members who had not sold their vehicles. Members of this subgroup received the option to either have their vehicles fixed or to sell them back at the pre-defeat device price. *Id.* at 604. Members of this subgroup also received a cash restitution payment of at last $5,100 if they purchased their vehicle before September 18, 2015, the date the defect became publically known ("Eligible Owners"), and half that amount in cash restitution if they purchased their vehicle after that date ("Eligible New Owners"). *Id.* Another group consisted of those who had sold their vehicles after the defect became publically known ("Eligible Sellers"). Members of this group received only a restitution payment, which was equal to one half the restitution afforded to Eligible Owners and the same as that afforded to Eligible New Owners.

An objector challenged class certification on the basis of adequacy, arguing that there was a conflict of interest between owners and sellers and inadequate representation of the latter. *Volkswagen*, 895 F.3d at 606–7. As evidence of inadequate representation, the objector complained that it was unfair that Eligible Sellers received the same amount as Eligible new buyers, given that the latter made their purchase after receiving construction knowledge of the defect. *Id.* In finding that the district court did not abuse its discretion in certifying the settlement class, the Ninth Circuit reasoned that no conflict of interest existed sufficient to render the representation inadequate because (1) the Eligible Sellers had much weaker claims than the Owners and thus benefited from the bargaining power of the latter and (2) the settlement fairly compensated sellers for their actual economic losses. *Id.* at 608–9.

As with the members of the Eligible Sellers group in Volkswagen, members of the Debt Portion group here are fairly compensated for their actual economic losses stemming from unpaid EOBCs. Indeed, Debt Portion recipients will receive complete EOBC debt forgiveness. (OSC Response [Doc. 128] 8:5–6 n.3; BoA Decl. [Doc. 128–2] ¶3.) It is true that the Cash Portion recipients, by contrast, will recover less than one hundred percent of their economic loss. But this comparably less favorable treatment of Cash Portion recipients is not grounds for finding an improper conflict of interest because the named plaintiffs include only Cash Portion recipients and do not include any Debt Portion recipients. (OSC Response 7:15–25.) To the contrary, the fact that the least represented group appears to have received the more favorable treatment would seem to suggest a lack of self-dealing on the part of the named

representatives. Accordingly, the Court finds that the representation in this case satisfies Fed. R. Civ. P. 23(a)(4).

B. Rule 23(b)(3)

Plaintiff seeks class certification under Rule 23(b)(3). Where, as here, the requirements of Rule 23(a) are met, class certification is proper under Rule 23(b)(3) if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); *Wang*, 709 F.3d at 832.

Here, there is no dispute as to the fact that the legal question of whether EOBCs constitute interest predominates and a class action is the superior method by which to resolve this common question. Accordingly, the Court certifies for settlement purposes only the class as defined in paragraph 2.1 of the Settlement Agreement.

C. Notice

A prerequisite to final approval is a finding of adequate notice to the class. Fed. R. Civ. P. 23(e). In the preliminary approval order, the Court approved the form, content, and method of providing notice proposed by the Parties. The Settlement Class Notices were thereafter distributed to members of the Settlement Class pursuant to the terms of the Preliminary Approval Order. (See Docs. 104–3; 122–1.) Objector Estafania Sanchez complains that notice was inadequate because it failed to inform class members as to

how much damage the class as a whole suffered and how many class members will share in the settlement.

Both contentions lack merit. Through banking records and notices, each class member should be in a position to know, or at least learn, how much damage they personally suffered from EOBCs. Furthermore, the notice to the class informed members of the amount of the settlement as well as an estimate of the number of people in the class. (See Doc. 73–2 pp. 3–4.) Armed with this information, class members were in a position to roughly calculate the average payout and compare that to their individual damages. The Court therefore finds that the Class Notices given to Settlement Class members adequately informed Settlement Class members of all material elements of the proposed Settlement and constituted valid, due, and sufficient notice to Settlement Class members. The Court further finds that the Notice Program satisfies due process and has been fully implemented.

IV. SETTLEMENT FAIRNESS

In determining whether a class action settlement is fair, adequate, and reasonable, the Court considers what are known as the *Hanlon* factors, which are:

> (1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

Gutierrez-Rodriguez v. R.M. Galicia, Inc., No. 16-cv-00182 H-BLM (S.D. Cal. 2017) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). When a court exercises its discretion to approve a settlement, the Ninth Circuit has instructed:

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Officers for Justice v. Civil Serv. Com., 688 F.2d 615, 625 (9th Cir. 1982). "The proposed settlement is not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." *Id.* (emphasis in original).

On balance, the Court finds that the *Hanlon* factors strongly support settlement approval. As noted above, every other court to consider the question of whether EOBCs constitute interest for purposes of the usury laws has answered it in the negative. Were litigation in this case to continue, Plaintiffs would face a risk of losing at the appellate level on this legal question. Furthermore, the distance between the present posture of this case and any recovery other than by settlement is substantial. To succeed, Plaintiffs would need to defeat BoA's permissive interlocutory appeal of the EOBC/interest issue; engage in formal discovery; win a contested class certification mo-

tion; survive summary judgment; win at trial; and successfully defend on likely at least one level of post-trial appeal. Considering Bank of America is a highly sophisticated and well represented defendant, Plaintiffs would almost certainly encounter substantial difficulty and expense in fully litigating this case.

The amount offered in settlement also supports approval. Most importantly, the injunctive relief, estimated at about $1.2 billion, is substantial. Further, the $37.5 million in cash and $29.1 million in debt relief alone amounts to about nine percent of the maximum amount the Class could recover through trial. (Joint Decl. [Doc. 104–3] ¶ 30.) Compared to the risk and expense of continued litigation, a present recovery of nine percent is meaningful. It is thus not surprising that only one hundred members of the more than seven million person class elected to opt out.

Some objections complain that the $29.1 million in debt relief is illusory because (1) forgiving the debt may cost BoA very little considering it likely did not expect to recover most if not all of this debt and (2) Debt Portion recipients will benefit little from forgiveness of debt that they did not intend to pay. While it may be true that it will cost BoA very little to provide the Debt Portion relief, it does not follow that the relief is meaningless to Debt Portion recipients. This debt, at present, is legally enforceable. BoA could initiate proceedings to collect. Alternatively, BoA could sell the debt at a discount to another entity that might be more willing to undertake collection efforts. The Debt Portion relief immunizes recipients from worrying about or suffering through any efforts to collect on this debt. The Debt Portion relief will also benefit recipients in the form of the improved credit

scores some class members will realize once BoA reports the debt relief to the credit bureaus.

Finally, the quality and tenacity of Class Counsel's work on this case (discussed in more detail below) and the presence of a highly respected neutral in negotiations further satisfies the Court that this settlement was reached through arms' length negotiations and not collusion. For these reasons, the Court approves the Agreement as fair, reasonable, adequate, and in the best interest of the Settlement Class members.

V. ATTORNEYS' FEES

In their Motion for Fees and Costs, Class Counsel sought $16.65 million in fees, 25% of the 66.6 million dollar aggregated value of the cash and debt reduction payments. Class Counsel has since reduced their fee prayer to $14.5 million, which amounts to 21.1 % of the proposed cash and debt reduction payments. (Doc. 106.) The bulk of settlement objections focus on this prayer, contending it is unreasonable.

In common fund cases such as this, the Court has discretion to employ either the percentage of the fund method or the lodestar method to calculate a proper fee award. *In re Bluetooth Headset Prods. Liab. Lit.*, 654 F.3d 935, 942 (9th Cir. 2011). In determining fees, "[r]easonableness is the goal, and mechanical or formulaic application of either method, where it yields an unreasonable result, can be an abuse of discretion." *Fischel v. Equitable Life Assur. Soc'y of U.S.*, 307 F.3d 997, 1007 (9th Cir. 2002).

Under the percentage of the fund method, the Court awards some specific percentage of the fund as fees. The Ninth Circuit benchmark rate is twenty five percent. *Bluetooth*, 654 F.3d at 942. Here, Class Counsel purports to request only a 21.1% take of the common fund, which includes the Debt ($29.1 million) and Cash ($37.5 million) Portion relief (the "denominator"). Objectors contend that Class Counsel's prayer for $14.5 million is actually more than 21.1% because the Debt Portion relief is illusory and thus should not be included in the denominator. As explained above, the Court does not believe the Debt Portion relief is illusory. Furthermore, assuming arguendo that it was illusory, the Court finds that the staggering $1.2 billion dollars in injunctive relief is worth substantially more than $29.1 million to the denominator. The Court therefore calculates Class Counsel's prayer at 21.1% of the common fund.

Meeting the benchmark rate does not end the analysis because "[s]election of the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002). Factors courts commonly consider in determining a reasonable percentage include the result obtained; the reaction of the class; the effort, experience, and skill of counsel; complexity of issues; risks of nonpayment assumed by class counsel; and comparison with counsel's lodestar. *Ruiz v. Xpo Last Mile, Inc.*, 2017 WL 6513962 * 7 (S.D. Cal. 2017) (Sammartino, J.) (Internal citations and quotations omitted.)

As explained above under the settlement fairness analysis, the result obtained here by Class Counsel is remarkable. The value of the Cash Portion and Debt Portion relief alone strongly supports the requested fee. Consideration

of the $1.2 billion in injunctive relief to class members and to BoA deposit account holders generally makes the inquiry much easier. Indeed, forcing a bank of BoAs stature to cease a lucrative banking practice like charging EOBCs is a meaningful accomplishment. Which would explain why Class Members seem to have reacted very favorably–only one hundred members out of the more than seven million member class opted out. This accomplishment is made all the more remarkable by the fact that Class Counsel faced a substantial risk of non-payment in confronting the adverse legal landscape on the issue of whether EOBCs constitute interest.

Class Counsel achieved this result through tenacity and great skill. In all of their written submissions and in their presentation at the Final Approval Hearing, Class Counsel's arguments were laudably clear and precise, no small feat given the complexity of the legal questions at issue here. It is clear that substantial preparation went into all of Class Counsel's work on this case. Though Class Counsel achieved the Settlement before commencement of formal discovery, a cursory glance at the docket demonstrates that this was a hard fought battle. Class Counsel had to oppose a motion to dismiss, move twice to strike affirmative defenses; oppose a petition for interlocutory appeal; answer an appeal; engage in settlement talks and informal discovery; prepare for and attend mediation; move for preliminary approval; effectuate notice; respond to objections; prepare for and attend the Final Approval Hearing; and respond to the Court's Order to Show Cause.

Objectors contend that the Court should nevertheless apply the lodestar cross check. Here, the Court has discretion to not apply the lodestar cross check. *Bluetooth*, 654 F.3d at 942 (stating "[w]here a settlement produces a

common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or a percentage-of-recovery method); *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 748 (9th Cir. 2017) (stating "[a]lthough not required to do so, the district court took an extra step, cross checking this result by using the lodestar method."). The Court therefore finds it proper to exercise this discretion and not apply the lodestar cross check.[3] Because the requested 21.1% is significantly below the benchmark rate of 25%, and because of how high Class Counsel scores on the factors analyzed above, the Court finds that the requested fee is reasonable. The Court therefore GRANTS Class Counsel's motion for fees and awards $14.5 million.

VI. COSTS AND SERVICE AWARDS

Class Counsel seeks $53,119.92 in costs and $20,000 in service awards to the named plaintiffs. None of the objectors contest these requests. The Court finds these amounts reasonable to compensate Class Counsel for the costs expended in litigating this case and the named plaintiffs for their service to the settlement class and in this action. Class Counsel's prayer for costs and services awards is **GRANTED**.

VII. CONCLUSION AND ORDER

For the foregoing reasons, the Court **OVERRULES** all objections and **GRANTS** Class Counsel's unopposed

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[3] The Court therefore **DENIES AS MOOT** Class Counsel's Motion to Seal [Doc. 110].

motions for final approval of class action settlement and final approval of fees, costs, and service awards. The Court further orders as follows:

• The Amended Complaint (Doc. 78) is dismissed with prejudice.

• The one hundred class members who opted out are not bound by this settlement agreement. (Doc. 122-1 Attachment 5.)

• Provided it is economically feasible, should any funds remain after the initial distribution of the class member awards, the parties shall do a second distribution to Settlement Class members who received their class member awards, provided it was by direct deposit or by negotiated check. (Agreement ¶ 3.5.) Should residual funds remain following a second distribution, or in the event a second distribution is not economically feasible, the Parties shall distribute the remaining funds, if any, to *cy pres* recipient, Consumers for Responsible Lending (www.responsiblelending.org), a non-profit organization that fights against abusive financial practices.

• Objector Collins motion [Doc. 119] for leave to file an amended Reply is **DENIED**. To properly assess the fairness of the settlement and the requested fees, it is not necessary for the Court to determine whether Objector Collins' attorney verbally indicated to Class Counsel that his client was satisfied by the $2 million reduction in Class Counsel's prayer for fees. The Court assumes Collins did not retract her objection, and overrules it.

• The Court retains jurisdiction over implementation and enforcement of the Agreement.

IT IS SO ORDERED.
Dated: August 31, 2018

/s/ *M. James Lorenz*
Hon. M. James Lorenz
United States District Court Judge

Appendix C

RONALD DINKINS; TIA LITTLE; LARICE ADDAMO; PATRICK MICHAEL FARRELL; RYAN THOMAS FARRELL; TIMOTHY GAELAN FARRELL; BROOKE ANN FARRELL, *Plaintiffs*, v. BANK OF AMERICA, N.A. *Defendant.*	Civil Action No. 3:16-CV-00492-L-WVG **JUDGMENT IN A CIVIL CASE**

IT IS HEREBY ORDERED AND ADJUDGED:

That judgment is entered in accordance with all provisions set forth in the Conclusion and Order section of the Order Granting (1) Motion for Final Approval of Class Action Settlement and (2) Motion for Attorneys' Fees, Costs, and Class Representative Service Awards entered as ECF No. 133.

Date: 9/19/18

CLERK OF COURT
JOHN MORRILL, Clerk of Court
By: s/ L. Fincher
L. Fincher, Deputy

Appendix D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOANNE FARRELL; et al., Plaintiffs-Appellees, ESTAFANIA OSORIO SANCHEZ Objector-Appellant, v. BANK OF AMERICA CORPORATION, N.A., Defendant-Appellee.	No. 18-56272 D.C. No. 3:16-CV-00492-L-WVG ORDER

JOANNE FARRELL; RONALD ANTHONY DINKINS; LARICE ADDAMO, On behalf of themselves and all others similarly situated, Plaintiffs-Appellees, AMY COLLINS Objector-Appellant, v. BANK OF AMERICA CORPORATION, N.A., Defendant-Appellee.	No. 18-56273 D.C. No. 3:16-CV-00492-L-WVG

JOANNE FARRELL; RONALD ANTHONY DINKINS; LARICE ADDAMO, On behalf of themselves and all others similarly situated, Plaintiffs-Appellees, v. RACHEL THREATT, Objector-Appellant, v. BANK OF AMERICA, N.A., Defendant-Appellee.	No. 18-56371 D.C. No. 3:16-CV-00492-L-WVG

Before: KLEINFELD and CALLAHAN, Circuit Judges, and CHRISTENSEN,* District Judge.

Judges Callahan and Christensen have voted to deny the petitions for panel rehearing, which Judge Kleinfeld would grant. Judge Callahan has also voted to deny the petitions for rehearing en banc, and Judge Christensen has so recommended. Judge Kleinfeld has recommended granting the petitions for hearing en banc. The full court has been advised of the petitions and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Accordingly, the petitions for panel rehearing and rehearing en banc are DENIED.

* The Honorable Dana L. Christensen, United States District Judge for the District of Montana, sitting by designation.

Appendix E

Farrell v. Bank of America, N.A.

United States Court of Appeals for the Ninth Circuit

Appeal No. 17-55847

United States District Court for the Southern District of California

Case No. 3:16-CV-00492-L-WVG

Settlement and Release Agreement

This Settlement and Release Agreement ("Agreement") dated as of October 30, 2017 is entered into by Plaintiffs Joanne Farrell, Ronald Dinkins, Larice Addamo, and Tia Little ("Plaintiffs") on behalf of the Settlement Class defined herein, and Bank of America, N.A. ("BANA"). Plaintiffs and BANA are each individually a "Party" and are collectively the "Parties." The Parties hereby agree to the following terms in full settlement of the action titled *Farrell v. Bank of America, N.A.*, No. 3:16-CV-00492-L-WVG (S.D. Cal.) ("Action"), subject to Final Approval, as defined below, by the United States District Court for the Southern District of California ("Court").

I RECITALS

WHEREAS, on February 25, 2016, Plaintiff Farrell filed the Action and alleges in the Complaint that the EOBC, as defined below, is a form of usurious "interest" under Sections 85 and 86 of the National Bank Act ("NBA");

WHEREAS, on April 29, 2016, BANA moved to dismiss the Action on the grounds that overdraft fees, including the EOBC, are excluded as a matter of law from the definition of "interest" under the NBA, which motion was denied by the Court on December 19, 2016;

WHEREAS, on January 6, 2017, BANA filed a motion for certification of the Court's order for interlocutory appeal and to stay the case pending appeal;

WHEREAS, on March 13, 2017, Plaintiff Farrell filed an unopposed motion to amend her Complaint to add

Ronald Dinkins, Larice Addamo, and Tia Little as three additional named plaintiffs;

WHEREAS, on April 11, 2017, the Court granted BANA's motion for certification of the dismissal order for interlocutory appeal and stayed the case pending resolution by the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit");

WHEREAS, on April 21, 2017, BANA filed a petition for permission to appeal the Court's dismissal order with the Ninth Circuit;

WHEREAS, on June 14, 2017, the Ninth Circuit granted BANA's petition for permission to appeal, and the appeal is pending as of the date of this Agreement;

WHEREAS, BANA has denied, and continues to deny, each and every claim and allegation of wrongdoing asserted in the Action, and BANA believes it would ultimately be successful in its defense of all claims asserted in the Action;

WHEREAS, BANA has nevertheless concluded that because further litigation involves risks and could be protracted and expensive, settlement of the Action is advisable;

WHEREAS, Plaintiffs, individually and on behalf of the Settlement Class as defined below, believe that the claims asserted in the Action have merit and that there is evidence to support their claims;

WHEREAS, Plaintiffs nevertheless recognize and acknowledge the expense and length of continued litigation and legal proceedings necessary to prosecute the Action through trial and through any appeals; and

WHEREAS, Plaintiffs have also, in consultation with their counsel, assessed the legal risks faced in the Action, and on the basis of that assessment believe that the Settlement set forth in this Agreement and as defined below provides substantial benefits to Plaintiffs and the Settlement Class, is fair, reasonable, and adequate, and is in the best interests of Plaintiffs and the Settlement Class.

NOW THEREFORE, the Parties agree that the Action shall be fully and finally compromised, settled, released, and dismissed with prejudice, subject to the terms and conditions of this Agreement and subject to Final Approval as set forth herein.

II TERMS OF THE SETTLEMENT

Section 1. Definitions

In addition to the terms defined elsewhere in this Agreement, the following capitalized terms used in this Agreement shall have the meanings specified below:

1.1 "Administrative Costs" means all out-of-pocket costs and third-party expenses of the Administrator that are associated with providing notice of the Settlement to the Settlement Class, administering and distributing the Settlement Amount to Class Members, or otherwise administering or carrying out the terms of the

Settlement, including but not limited to postage and telecommunications costs. Administrative Costs shall not include the Administrator's Hourly Charges.

1.2 "Administrator" means Epiq Systems.

1.3 "Administrator's Hourly Charges" means any fees paid to the Administrator on an hourly basis for its services in administering the Settlement, excluding Administrative Costs, printing, postage, National Change of Address Database charges, and any other costs not customarily billed by the Administrator on an hourly basis.

1.4 "Adjustments" means, collectively, the Class Representatives Service Awards, the Fee & Expense Award, and the amount of the Administrator's Hourly Charges.

1.5 "BANA Releasees" has the meaning ascribed to it in Section 2.3(a).

1.6 "Cash Settlement Amount" has the meaning ascribed to in Section 2.2(b)(1).

1.7 "Class Counsel" means Tycko & Zavareei LLP, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Kelley Uustal, PLC, and Creed & Gowdy, P.A.

1.8 "Class Member" means a person who falls within the definition of the Settlement Class.

1.9 "Class Member Award" means an award to a Class Member of funds from the Net Cash Settlement Amount.

1.10 "Class Notices" means Exhibits B, C, and D attached hereto.

1.11 "Class Period" means the period between February 25, 2014 and December 30, 2017.

1.12 "Class Representative Service Award" has the meaning ascribed to it in Section 3.1.

1.13 "Complaint" means the complaint filed in the Action on February 25, 2016.

1.14 "Direct Deposit Payment" has the meaning ascribed to it in Section 2.6(b).

1.15 "Debt Reduction Payments" means the debt reduction payments described in Section 2.2(b)(4).

1.16 "Debt Reduction Amount" has the meaning ascribed to it in Section 2.2(b)(1).

1.17 "Effective Date" shall mean when the last of the following has occurred: (1) the day following the expiration of the deadline for appealing Final Approval if no timely appeal is filed, or (2) if an appeal of Final Approval is taken, the date upon which all appeals (including any requests for rehearing or other appellate review), as well as all further appeals therefrom (including all petitions for certiorari) have been finally resolved without material change to the Final Approval Order, as determined by BANA, and the deadline for taking any further appeals has expired such that no future appeal is possible; or (3) such date as the Parties otherwise agree in writing.

1.18 "EOBC" or, plural, "EOBCs," means the Extended Overdrawn Balance Charge that BANA applies to

a consumer checking account when that account is overdrawn by the accountholder and the account remains overdrawn for five (5) or more consecutive business days, as described in the Personal Schedule of Fees, a specimen copy of which is attached as Exhibit F hereto.

1.19 "Fee & Expense Award" has the meaning ascribed to it in Section 3.2.

1.20 "Final Approval" means entry of the Final Approval Order.

1.21 "Final Approval Hearing" means the date the Court holds a hearing on Plaintiffs' motion seeking Final Approval.

1.22 "Final Approval Order" means the document attached as Exhibit E hereto.

1.23 "National Change of Address Database" means the change of address database maintained by the United States Postal Service

1.24 "Net Cash Settlement Amount" means the Cash Settlement Amount, less the Adjustments.

1.25 "Objection Deadline" means one-hundred twenty (120) calendar days after Preliminary Approval (or other date as ordered by the Court).

1.26 "Opt-Out Deadline" means one-hundred twenty (120) calendar days after Preliminary Approval (or other date as ordered by the Court).

1.27 "Preliminary Approval" means entry of the Preliminary Approval Order.

1.28 "Preliminary Approval Order" means the document attached as Exhibit A hereto.

1.29 "Released BANA Claims" has the meaning ascribed to it in Section 2.3(a).

1.30 "Settlement" means the settlement of the Action by the Parties and the terms thereof contemplated by this Agreement.

1.31 "Settlement Amount" means Sixty-Six Million Six-Hundred Thousand Dollars ($66,600,000.00).

1.32 "Settlement Class" has the meaning ascribed to it in Section 2.1.

1.33 "Settlement Fund Account" means the account into which BANA will deposit the Cash Settlement Amount.

1.34 "Settlement Value" means, collectively, the Cash Settlement Amount, the Debt Reduction Amount, and the Administrative Costs.

1.35 "Taxes" shall have the meaning ascribed to it in Section 3.4.

Section 2. The Settlement

2.1 Conditional Certification of the Settlement Class

(a) Solely for purposes of this Settlement, the Parties agree to certification of the following Settlement Class under Fed. R. Civ. P. 23(b)(2) and (b)(3):

All holders of BANA consumer checking accounts who, during the Class Period, were assessed at least one EOBC that was not refunded.

(b) In the event that the Settlement does not receive Final Approval, or in the event the Effective Date does not occur, the Parties shall not be bound by this definition of the Settlement Class, shall not be permitted to use it as evidence or otherwise in support of any argument or position in any motion, brief, hearing, appeal, or otherwise, and BANA shall retain its right to object to the maintenance of this Action as a class action and the suitability of the Plaintiffs to serve as class representatives.

2.2 Settlement Benefits

(a) Change to Business Practices

(1) Beginning on or before December 31, 2017, BANA agrees not to implement or assess EOBCs, or any equivalent fee, in connection with BANA consumer checking accounts, for a period of five (5) years, or until December 31, 2022.

(2) Nothing in Section 2.2(a) shall require BANA to violate any law or regulation. BANA's obligation to cease assessing EOBCs as provided in this section shall be lifted in the event a United States Supreme Court decision expressly holds that EOBCs or equivalent fees are not interest under the NBA; BANA's obligation will be lifted no sooner than 6 months after any such decision.

(b) Monetary Relief

(1) Settlement Amount. BANA will provide the $66.6 million Settlement Amount as follows:

Thirty-Seven Million Five-Hundred Thousand Dollars ($37,500,000.00) of the Settlement Amount will be paid in cash (the "Cash Settlement Amount"),

and

Twenty-Nine Million One Hundred Thousand Dollars ($29,100,000.00) in currently owed debt shall be reduced by BANA (the "Debt Reduction Amount").

(2) Escrow Account. Within thirty (30) calendar days of Preliminary Approval, BANA shall deposit the Cash Settlement Amount into the Settlement Fund Account, which shall be held with BANA.

(3) Calculation of Class Member Awards. Each Class Member who paid at least one EOBC that was assessed during the Class Period and not refunded or charged off shall be entitled to receive a cash payment from the Net Cash Settlement Amount. The Net Cash Settlement Amount will be divided by the number of EOBCs collectively paid by all Class Members who paid at least one EOBC during the Class Period, to yield a per-instance figure. Each Class Member Award shall equal the per-instance figure multiplied by the number of EOBCs paid by that Class Member during the Class Period. Joint accountholders shall each be entitled to their pro rata share of a single Class Member Award.

(4) Debt Reduction Payments. For Class Members who were assessed an EOBC during the Class Period, and whose accounts were closed while an EOBC was still due and owing, the Debt Reduction Amount will be used by BANA to make Debt Reduction Payments toward the outstanding balance on the account that was closed with the EOBC still due and owing in an amount up to $35 to reflect a credit for the outstanding EOBC. If the outstanding balance exceeds $35, the Debt Reduction Payment will be $35. If the outstanding balance is less than $35, the account balance will be adjusted to zero dollars. Under no circumstances will BANA be required to make any cash payments as a result of the Debt Reduction or make Debt Reduction Payments exceeding the Debt Reduction Amount. To the extent BANA has reported the accounts to any credit bureaus, BANA will update the reporting. In the event the Debt Reduction Payment brings the account balance to zero, the reporting will be updated to state that the account was paid in full. In the event the Debt Reduction Payment does not bring the account balance to zero, the reporting will be updated only to state that a partial payment has been made on the account. No Debt Reduction Payment shall be considered an admission by any Class Member that the underlying debt is valid.

(5) For the avoidance of doubt, it is agreed by the Parties that a Class Member may qualify for relief from both the Cash Settlement Amount and Debt Reduction Amount by virtue of having paid one or more EOBCs during the Class Period that was not refunded and having been assessed at least one other EOBC during the Class Period that was still due and owing when the account was closed.

2.3 Releases.

(a) Class Member Release. Upon the Effective Date, Plaintiffs and each Class Member who has not opted out of the Settlement Class pursuant to the procedures set forth in Section 2.5 releases, waives, and forever discharges BANA and each of its present, former, and future parents, predecessors, successors, assigns, assignees, affiliates, conservators, divisions, departments, subdivisions, owners, partners, principals, trustees, creditors, shareholders, joint venturers, co-venturers, officers, and directors (whether acting in such capacity or individually), attorneys, vendors, insurers, accountants, nominees, agents (alleged, apparent, or actual), representatives, employees, managers, administrators, and each person or entity acting or purporting to act for them or on their behalf, including, but not limited to, Bank of America Corporation and all of its subsidiaries and affiliates (collectively, "BANA Releasees") from any and all claims they have or may have against the BANA Releasees with respect to the assessment of EOBCs as well as (i) any claim or issue which was or could have been brought relating to EOBCs against any of the BANA Releasees in the Action and (ii) any claim that any other overdraft charge imposed by BANA during the Class Period, including but not limited to EOBCs and initial overdraft fees, constitutes usurious interest, in all cases including any and all claims for damages, injunctive relief, interest, attorney fees, and litigation expenses (the "Released BANA Claims").

(b) Unknown Claims. With respect to the Released BANA Claims, Plaintiffs and the Class Members shall be deemed to have, and by operation of the Settlement shall have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights and benefits

of Section 1542 of the California Civil Code (to the extent it is applicable, or any other similar provision under federal, state or local law to the extent any such provision is applicable), which reads:

> **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR**

Thus, subject to and in accordance with this Agreement, even if the Plaintiffs and/or Class Members may discover facts in addition to or different from those which they now know or believe to be true with respect to the subject matter of the Released BANA Claims, Plaintiffs and each Class Member, upon entry of Final Approval of the Settlement, shall be deemed to have and by operation of the Final Approval Order, shall have, fully, finally, and forever settled and released all of the Released BANA Claims. This is true whether such claims are known or unknown, suspected, or unsuspected, contingent or non-contingent, whether or not concealed or hidden, which now exist, or heretofore have existed upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct which is negligent, intentional, with or without malice, or a breach of any duty, law, or rule, without regard to the subsequent discovery or existence of such different or additional facts.

(c) Covenant Not to Sue. Plaintiffs and the Settlement Class covenant not to sue or otherwise assert any claims for usury against BANA challenging BANA's practices

with respect to overdraft fees, including EOBCs and initial overdraft item fees, including, but not limited to, any claims arising under the NBA or any other usury statute, during the period of time the changes to business practices set forth in Section 2.2(a) remain in effect, but in no case beyond December 31, 2022.

2.4 Notice Procedures

(a) Class Action Administrator. The Administrator shall perform the duties, tasks, and responsibilities associated with providing notice and administering the Settlement. BANA shall pay all Administrative Costs. The Administrator's Hourly Charges will be paid out of the Cash Settlement Amount.

(b) Provision of Information to Administrator. Within fifteen (15) calendar days of Preliminary Approval, BANA will provide the Administrator with the following information, which will be kept strictly confidential between the Administrator and BANA, for each Class Member: (i) name; (ii) last known e-mail address; (iii) last known mailing address; (iv) the number of EOBCs that each Class Member paid during the Class Period, if any; (v) whether the account that incurred the EOBC remains open; (vi) if the account that incurred the EOBC no longer remains open, whether there was an EOBC due and owing at the time the account was closed; and (vii) if the account that incurred the EOBC no longer remains open, the balance remaining due and owing. The Administrator shall use the data provided by BANA to make the calculations required by the Settlement, and the Administrator shall share the calculations with Class Counsel. The Administrator shall use this information solely for the purpose of administering the Settlement.

(c) Class Notices. Within sixty (60) calendar days of Preliminary Approval, or by the time specified by the Court, the Administrator shall send the Class Notices in the forms attached hereto as Exhibits B, C, and D, or in such form as is approved by the Court, to the Class Members. The Administrator shall send the "Email Notice," attached hereto as Exhibit B, to all Class Members for whom BANA has provided the Notice Administrator with an e-mail address. The Administrator shall send the "Postcard Notice," attached hereto as Exhibit C, to all Class Members for whom BANA has not provided an email address and to all Class Members to whom the Administrator sent Exhibit B via email but for whom the Administrator receives notice of an undeliverable email. Exhibit C shall be mailed after the Administrator updates mailing addresses provided by BANA with the National Change of Address database and other commercially feasible means. The Administrator shall also maintain a website containing the Complaint, the "long-form notice," attached hereto as Exhibit D, Plaintiffs' motion seeking Preliminary Approval, the Preliminary Approval Order, Plaintiffs' motion seeking Final Approval, and the Final Approval Order until at least ninety (90) calendar days after Final Approval. The Administrator shall send the long-form notice by mail to any Class Member who requests a copy. It will be conclusively presumed that the intended recipients received the Class Notices if the Administrator did not receive a bounce-back message and if mailed Class Notices have not been returned to the Administrator as undeliverable within fifteen (15) calendar days of mailing.

2.5 Opt-Outs and Objections.

As set forth below, Class Members shall have the right to opt-out of the Settlement Class and this Settlement or to object to this Settlement.

(a) Requirements for Opting-Out. If a Class Member wishes to be excluded from the Settlement Class and this Settlement, that Class Member is required to submit to the Administrator at the website address listed in the Class Notices, a written, signed, and dated statement that he or she is opting out of the Settlement Class and understands that he or she will not receive a Class Member Award or a Debt Reduction Payment from the Settlement of the Action. To be effective, this opt-out statement (i) must be received by the Administrator by the Opt-Out Deadline, (ii) include the Class Member's name, last four digits of his or her social security number, and BANA account number(s), and (iii) must be personally signed and dated by the Class Member(s). The Administrator will, within five (5) business days of receiving any optout statement, provide counsel for the Parties with a copy of the opt-out statement. The Administrator will, at least five (5) court days before the Final Approval Hearing, file copies of all opt-out statements with the Court. The Settlement Class will not include any individuals who send timely and valid opt-out statements, and individuals who opt out are not entitled to receive a Class Member Award or Debt Reduction Payment under this Settlement.

(b) Objections. Any Class Member who has not submitted a timely opt-out form and who wishes to object to the fairness, reasonableness, or adequacy of the Settlement must both file a written objection with the Court by the Objection Deadline and send that written objection to

BANA's counsel and to Class Counsel at the addresses listed below.

To be valid and considered by the Court, an objection must (i) be postmarked on or before the Objection Deadline; (ii) state each objection the Class Member is raising and the specific legal and factual bases for each objection; (iii) include proof that the individual is a member of the Settlement Class; (iv) identify, with specificity, each instance in which the Class Member or his or her counsel has objected to a class action settlement in the past five (5) years, including the caption of each case in which the objector has made such objection, and a copy of any orders or opinions related to or ruling upon the objector's prior such objections that were issued by the trial and appellate courts in each listed case; (v) the identity of all counsel who represent the objector, including any former or current counsel who may be entitled to compensation for any reason related to the objection to the Settlement or fee application; (vi) any and all agreements that relate to the objection or the process of objecting – whether written or verbal – between objector or objector's counsel and any other person or entity; and (vii) be personally signed by the Class Member. All evidence and legal support a Class Member wishes to use to support an objection must be filed with the Court and sent to the Parties by the Objection Deadline.

Plaintiffs and BANA may file responses to any objections that are submitted. Any Class Member who timely files and serves an objection in accordance with this section may appear at the Final Approval Hearing, either in person or through an attorney, if the Class Member files a notice indicating that he/she wishes to appear at the Final Approval Hearing with the Clerk of Court no later

than twenty (20) calendar days before the Final Approval Hearing. A Class Member who wishes to appear at the Final Approval Hearing must also send a copy of the notice indicating that he/she wishes to appear to BANA's counsel and to Class Counsel twenty (20) calendar days before the Final Approval Hearing. Failure to adhere to the requirements of this section will bar a Class Member from being heard at the Final Approval Hearing, either individually or through an attorney, unless the Court otherwise orders.

The Parties shall have the right to take discovery, including via subpoenas *duces tecum* and depositions, from any objector.

(c) Waiver of Objections. Except for Class Members who opt-out of the Settlement Class in compliance with the foregoing, all Class Members will be deemed to be members of the Settlement Class for all purposes under this Agreement, the Final Approval Order, and the releases set forth in this Agreement and, unless they have timely asserted an objection to the Settlement, shall be deemed to have waived all objections and opposition to its fairness, reasonableness, and adequacy.

(d) No Encouragement of Objections. Neither the Parties nor any person acting on their behalf shall seek to solicit or otherwise encourage anyone to object to the Settlement or appeal from any order of the Court that is consistent with the terms of this Settlement.

2.6 Benefit Distribution

(a) Within ten (10) days of Final Approval, the Administrator shall provide to BANA: (1) for accounts entitled to

receive Class Member Awards, a list of the Class Members who are entitled to receive Class Member Awards, along with the bank account numbers for each account entitled to receive a Class Member Award and the amount of each Class Member Award due to each eligible bank account, and (2) for accounts entitled to receive a Debt Reduction Payment, a list of such accounts, along with the bank account numbers for each account entitled to receive a Debt Reduction Payment, and the amount of the Debt Reduction Payment due to each eligible bank account. The information provided by the Administrator shall be considered conclusive as to which individuals are entitled to receive a Class Member Award or Debt Reduction Payment and as to the amount of the Class Member Award and/or Debt Reduction Payment to which each Class Member is entitled.

(b) Distribution of Class Member Awards. In the event that the accounts from which Class Members paid the EOBCs and that make the Class Members eligible for Class Member Awards remain open, the Class Member Awards will be credited via direct deposit by BANA to Class Members' BANA accounts ("Direct Deposit Payments"). The Direct Deposit Payments will be accompanied by a description on bank statements to be determined by BANA after consulting with Class Counsel. BANA shall make Direct Deposit Payments to Class Members within thirty (30) calendar days of the Effective Date. Within forty-five (45) calendar days of the Effective Date, BANA shall provide to the Administrator a list of Class Members, and corresponding account numbers, to whom BANA distributed Direct Deposit Payments and the amount of each Direct Deposit Payment.

(c) Within sixty (60) calendar days of the Effective Date, the Administrator shall send Class Member Awards from the Settlement Fund Account via check to all Class Members entitled to Class Member Awards who did not receive the entirety of the Class Member Awards to which they are entitled under this Settlement via Direct Deposit Payments. If the Class Members who are entitled to Class Member Awards are joint accountholders, the Class Member Award check shall be made payable to both accountholders.

(d) Mailing Addresses. Prior to mailing Class Member Award checks, the Administrator shall attempt to update the last known addresses of the Class Members through the National Change of Address Database or similar databases. No skip-tracing shall be done as to any checks that are returned by the postal service with no forwarding address. Class Member Award checks returned with a forwarding address shall be re-mailed to the new address within seven (7) calendar days. The Administrator shall not mail Class Member Award checks to addresses from which Class Notices were returned as undeliverable.

(e) Interest. All interest on the funds in the Settlement Fund Account shall accrue to the benefit of the Settlement Class. Any interest shall not be subject to withholding and shall, if required, be reported appropriately to the Internal Revenue Service by the Administrator. The Administrator is responsible for the payment of all taxes on interest on the funds in the Settlement Fund Account.

(f) Time for Depositing Class Member Award Checks. If a Class Member's Class Member Award check is not deposited (or cashed) within one hundred and twenty (120) calendar days after the check is mailed, (a) the check will

be null and void; and (b) the Class Member will be barred from receiving a further Class Member Award under this Settlement.

(g) Distribution of Debt Reduction Payments. Within thirty (30) calendar days of the Effective Date, BANA shall make the Debt Reduction Payments as described in Section 2.2(b)(4). Within forty-five (45) calendar days of the Effective Date, the Administrator shall send notifications of such Debt Reduction Payments to each eligible Settlement Class Member, which notice shall include the amount of the Debt Reduction Payment and notification that if the Debt Reduction Payment brought the balance to zero the account will be reported as paid in full and that if the Debt Reduction Payment did not bring the balance to zero, the account will be reported as having had a partial payment made.

(h) Deceased Class Members. Any Class Member Award paid to a deceased Class Member shall be made payable to the estate of the deceased Class Member, provided that the Class Member's estate informs the Administrator of the Class Member's death at least thirty (30) calendar days before the date that Class Member Award checks are mailed and provides a death certificate confirming that the Class Member is deceased. If the Class Member's estate does not inform the Administrator of the Class Member's death at least thirty (30) calendar days before Class Member Award checks are mailed, the deceased Class Member will be barred from receiving a Class Member Award under this Settlement.

(i) Tax Obligations. The Parties shall have no responsibility or liability for any federal, state, or other taxes owed by Class Members as a result of, or that arise from,

any Class Member Awards or any other term or condition of this Agreement.

(j) Tax Reporting. The Administrator shall prepare, send, file, and furnish all tax information reporting forms required for payments made from the Settlement Fund Account as required by the Internal Revenue Service pursuant to the Internal Revenue Code and related Treasury Regulations. The Parties hereto agree to cooperate with the Administrator, each other, and their tax attorneys and accountants to the extent reasonably necessary to carry out the provisions set forth in this section.

(k) Reports. The Administrator shall provide the Parties with a reconciliation and accounting of the Settlement Fund Account at each of the following times: (i) no later than ten (10) calendar days after the Class Member Award checks are mailed, and (ii) no later than ten (10) calendar days after the expiration of the 120-day period for depositing Class Member Award checks.

Section 3. Class Representative Service Award and Class Counsel's Fee & Expense Award

3.1 Class Representative Service Awards. Plaintiffs, through their undersigned counsel, shall each be entitled to apply to the Court for an award from the Cash Settlement Amount of up to $5,000 for their participation in the Action and their service to the Settlement Class ("the Class Representative Service Award"). BANA shall not oppose or appeal such application that does not exceed $5,000. The Class Representative Service Awards shall be paid from the Settlement Fund Account. BANA shall place the Class Representative Service Awards into the

Settlement Fund Account within ten (10) days of the Effective Date.

3.2 Fee & Expense Award. The Parties consent to the Court appointing Class Counsel in this Action for purposes of the Settlement. Class Counsel shall be entitled to apply to the Court for an award from the Cash Settlement Amount not to exceed 25% of the Settlement Value to reimburse Class Counsel for attorneys' fees incurred in researching, preparing for, and litigating this Action, and Class Counsel may also apply for reimbursement for costs and expenses incurred in the Action ("the Fee & Expense Award"). BANA agrees not to oppose or appeal any such application that does not exceed 25% of the Settlement Value plus reimbursement for costs and expenses incurred in the Action. The Fee & Expense Award shall constitute full satisfaction of any obligation on the part of BANA to pay any person, attorney, or law firm for costs, litigation expenses, attorneys' fees, or any other expense incurred on behalf of Plaintiffs or the Settlement Class. The Administrator shall pay the the Fee & Expense Award to Class Counsel from the Settlement Fund Account within ten (10) days of the date the Fee & Expense Award is granted. In the event the Effective Date does not occur or the Fee & Expense Award is reduced following an appeal, Class Counsel shall repay the BANA the full amount of the Fee & Expense Award or the amount of the reduction, for which all Class Counsel shall be jointly and severally liable.

3.3 Demarcation. It is the intention of the Parties to demarcate clearly between proceeds from the Settlement in which Class Members have an interest, which may subject them to tax liability, and the Fee & Expense Award. Accordingly, the amount paid separately to Class Counsel

for the Fee & Expense Award is independent of and apart from the amounts paid to Class Members, and Class Members shall at no time have any interest in the Fee & Expense Award. The Parties make no representation regarding and shall have no responsibility for the tax treatment of the Fee & Expense Award, or any other payments paid to Class Counsel or the tax treatment of any amounts paid under this Agreement.

3.4 The funds in the Settlement Fund Account shall be deemed a "qualified settlement fund" within the meaning of United States Treasury Reg. § 1.468B-l at all times since creation of the Settlement Fund Account. All taxes (including any estimated taxes, and any interest or penalties relating to them) arising with respect to the income earned by the Settlement Fund Account or otherwise, including any taxes or tax detriments that may be imposed upon BANA, BANA's counsel, Plaintiffs and/or Class Counsel with respect to income earned by the Settlement Fund Account for any period during which the Settlement Fund Account does not qualify as a "qualified settlement fund" for the purpose of federal or state income taxes or otherwise (collectively "Taxes"), shall be paid out of the Settlement Fund Account. BANA and BANA's counsel and Plaintiffs and Class Counsel shall have no liability or responsibility for any of the Taxes. The Settlement Fund Account shall indemnify and hold BANA and BANA's counsel and Plaintiffs and Class Counsel harmless for all Taxes (including, without limitation, Taxes payable by reason of any such indemnification).

3.5 Residual. In the event that there is any residual in the Settlement Fund Account after the distributions required by this Agreement are completed, said funds shall in no circumstance revert to BANA. At the election of

Class Counsel and counsel for BANA, and subject to the approval of the Court, the funds may be distributed to Settlement Class Members via a secondary distribution if economically feasible or through a residual *cy pres* program. Any residual secondary distribution or *cy pres* distribution shall be paid as soon as reasonably possible following the completion of distribution of funds to the Settlement Class Members.

Section 4. Settlement Approval

4.1 Preliminary Approval. On or before October 31, 2017, Plaintiffs will submit for the Court's consideration a motion seeking Preliminary Approval of the Settlement and apply to the Court for entry of the Preliminary Approval Order attached as Exhibit A. In the event the Court does not enter the Preliminary Approval Order in the same form as Exhibit A, BANA has the right to terminate this Agreement and the Settlement and will have no further obligations under the Agreement unless BANA waives in writing its right to terminate the Agreement due to any changes or deviations from the form of the Preliminary Approval Order. In Plaintiffs' motion seeking Preliminary Approval, Plaintiffs shall request that the Court approve the Class Notices attached at Exhibits B, C and D. The Court will ultimately determine and approve the content and form of the Class Notices to be distributed to Class Members.

The Parties further agree that in Plaintiffs' motion seeking Preliminary Approval, Plaintiffs will request that the Court enter the following schedule governing the Settlement: (i) deadline for sending the Class Notices: sixty (60) calendar days from Preliminary Approval; (ii) deadline for filing motions for Class Representative Service

Award and Fee & Expense Award: one hundred (150) calendar days from Preliminary Approval; (iii) deadline for opting out or serving objections: one-hundred twenty (120) calendar days from Preliminary Approval; and (iv) Final Approval Hearing: one-hundred eighty (180) calendar days from Preliminary Approval.

4.2 Final Approval. Plaintiffs will submit for the Court's consideration, by the deadline set by the Court, the Final Approval Order attached as Exhibit E. The motion for Final Approval of this Settlement shall include a request that the Court enter the Final Approval Order and, if the Court grants Final Approval of the Settlement and incorporates the Agreement into the final judgment, that the Court dismiss this Action with prejudice, subject to the Court's continuing jurisdiction to enforce the Agreement. In the event that the Court does not enter the Final Approval Order in materially the same form as Exhibit E, as determined by BANA, BANA has the right to terminate this Agreement and the Settlement and will have no further obligations under the Agreement unless BANA waives in writing its right to terminate the Agreement due to any material changes or deviations from the form of the Final Approval Order. While materiality remains subject to BANA's determination in its reasonable discretion, material changes shall not include any changes to the legal reasoning or format used by the Court to justify the substantive relief sought by the Final Approval Order. In the event that the Effective Date does not come to pass, the Final Approval Order is vacated or reversed or the Settlement does not become final and binding, the Parties agree that the Court shall vacate any dismissal with prejudice.

4.3 Effect of Disapproval. If the Settlement does not receive Final Approval or the Effective Date does not come to pass, BANA shall have the right to terminate this Agreement and the Settlement and will have no further obligations under the Agreement unless BANA waives in writing its right to terminate the Agreement under this section. In addition, the Parties agree that if this Agreement becomes null and void, BANA shall not be prejudiced in any way from opposing class certification in the Action, and Plaintiffs and the Class Members shall not use anything in this Agreement, in any terms sheet, or in the Preliminary Approval Order or Final Approval Order to support a motion for class certification or as evidence of any wrongdoing by BANA. No Party shall be deemed to have waived any claims, objections, rights or defenses, or legal arguments or positions, including but not limited to, claims or objections to class certification, or claims or defenses on the merits. Each Party reserves the right to prosecute or defend this Action in the event that this Agreement does not become final and binding.

Section 5. General Provisions

5.1 Cooperation. The Parties agree that they will cooperate in good faith to effectuate and implement the terms and conditions of this Settlement.

5.2 Judicial Enforcement. If the Court enters the Final Approval Order in substantially the same form as Exhibit E to this Agreement, then the Court shall have continuing authority and jurisdiction to enforce this Agreement. The Parties shall have the authority to seek enforcement of this Agreement and any of its aspects, terms, or provisions under any appropriate mechanism, including contempt

proceedings. The Parties will confer in good faith prior to seeking judicial enforcement of this Agreement.

5.3 Effect of Prior Agreements. This Agreement constitutes the entire agreement and understanding of the Parties with respect to the Settlement of this Action, contains the final and complete terms of the Settlement of the Action and supersedes all prior agreements between the Parties regarding Settlement of the Action. The Parties agree that there are no representations, understandings, or agreements relating to the Settlement of this Action other than as set forth in this Agreement. Each Party acknowledges that it has not executed this Agreement in reliance upon any promise, statement, representation, or warranty, written or verbal, not expressly contained herein.

5.4 No Drafting Presumption. All Parties hereto have participated, through their counsel, in the drafting of this Agreement, and this Agreement shall not be construed more strictly against any one Party than the other Parties. Whenever possible, each term of this Agreement shall be interpreted in such a manner as to be valid and enforceable. Headings are for the convenience of the Parties only and are not intended to create substantive rights or obligations.

5.5 Notices. All notices to the Parties or counsel for the Parties required or desired to be given under this Agreement shall be in writing and sent by overnight mail as follows:

To Plaintiffs and the Settlement Class:

Jeffrey D. Kaliel
Tycko & Zavareei LLP
1828 L Street, NW
Suite 1000
Washington, DC 20036

Jeff Ostrow
Kopelowitz Ostrow P.A.
1 West Las Olas Blvd.
Suite 500
Fort Lauderdale, FL 33301

Bryan Gowdy
Creed & Gowdy, P.A.
865 May Street
Jacksonville, FL 32204

Cristina Pierson
John R. Hargrove
Kelley Uustal PC
500 North Federal Highway
Suite 200
Fort Lauderdale, FL 33301

To BANA:

Matthew W. Close
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071-2899

Danielle N. Oakley
O'Melveny & Myers LLP
610 Newport Center Drive, Suite 1700
Newport Beach, CA 92660

5.6 Modifications. No modifications to this Agreement may be made without written agreement of all Parties and Court approval.

5.7 No Third-Party Beneficiaries. This Agreement shall not inure to the benefit of any third party.

5.8 Execution in Counterparts. This Agreement may be executed in counterparts. Each signed counterpart together with the others shall constitute the full Agreement. Each signatory warrants that the signer has authority to bind his/her party.

5.9 CAFA. The Administrator shall timely send the notices required by 28 U.S.C. § 1715 within ten (10) calendar days after Plaintiffs files the motion seeking Preliminary Approval of the Settlement.

5.10 Deadlines. If any of the dates or deadlines specified herein falls on a weekend or legal holiday, the applicable date or deadline shall fall on the next business day.

FOR PLAINTIFFS AND THE SETTLEMENT CLASS:

/s/ Joanne Farrell
Joanne Farrell

10/30/2017
Date

/s/ Ronald Dinkins 10/30/2017
Ronald Dinkins Date

/s/ Larice Addamo 10/30/2017
Larice Addamo Date

/s/ Tia Little 10/30/2017
Tia Little Date

/s/ Jeffrey D. Kaliel 10/31/2017
Jeffrey D. Kaliel
Tycko & Zavareei LLP
1828 L Street, NW
Suite 1000
Washington, DC 20036
(202 973-0900

Jeff Ostrow
Kopelowitz Ostrow P.A.
1 West Las Olas Blvd.
Suite 500
Fort Lauderdale, FL 33301

Brian Gowdy Date
Creed & Gowdy, P.A.
865 May Street
Jacksonville, FL 32204
(904) 350-0075

John R. Hargrove
Kelley Uustal PC
500 North Federal Highway
Suite 200
Fort Lauderdale, FL 33301
(954) 522-6601

FOR BANK OF AMERICA, N.A.:

/s/ Illegible — 10/30/2017
Title: Managing Director — Date
Sr. Product Management Executive
Retail & Preferred Products

Appendix F

THEODORE H. FRANK (SBN 196332)
Competitive Enterprise Institute
Center for Class Action Fairness
1310 L Street NW, 7th Floor
Washington, DC 20005
Voice: (202) 331-2263
Email: ted.frank@cei.org
Attorney for Rachel Threatt

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOANNE FARRELL, on behalf of herself and all others similarly situated, Plaintiff, v. BANK OF AMERICA, N.A., Defendant, _____ RACHEL THREATT, Objector.	Case No. 3:16-cv-00492-L-WVG **OBJECTION OF RACHEL THREATT** Judge: Hon. M. James Lorenz Place: Courtroom 5B Hearing Date: June 18, 2018, at 11:00 a.m.

INTRODUCTION

Class counsel seek an astonishing $7,715 per hour in fees for their work over the course of a mere 20 month-litigation that settled on docket entry number 69. The work did not require a massive team of lawyers working around the clock. Rather, it was a fly-by-night operation requiring less than 2200 hours, with counsel lobbing similar actions in various other courts to see where they might succeed. *See* Fee Motion 12, 20. The fee request is audacious on its face, representing more than 11 times the claimed value of their hourly work, but it gets worse once one looks past the superficial lodestar presentation. In particular, counsel improperly seek credit in their lodestar for work on *other* litigations, future anticipated hours, and time spent on their fee request, as well as an excessive number of hours for settlement work. Once one removes those excessive hours, the fee multiplier increases to nearly 18, equal to an hourly rate of $11,894. This unreasonableness is compounded by the strong presumption set by the Supreme Court that lodestar is sufficient without a multiplier.

The class should not be billed such an excessive amount. Their claims were significantly compromised; by class counsel's own estimation, they are recovering less than 10% of the value of their claims. In other words, the class is being asked to settle, while counsel is handsomely rewarded many times over with funds that should be used to augment class members' recovery. The Court should reduce the fee award to no more than 10% of the net fund, or $6.66 million, which still amounts to a 4.75 multiplier and will return about $10 million to the class.

That counsel seeks to apply the Circuit's benchmark shows precisely why a lodestar crosscheck is important to prevent windfalls. But even when assessed on its own, 25% of $66.6 million is too high. First, the fund amount includes $29.1 million of "debt reduction," for class members whose accounts were closed with a negative balance—a structure that is less beneficial to them than cash and costs Bank of America, N.A. ("BANA") significantly less due to the unlikelihood it would ever recover anywhere close to 100% of the delinquent amounts. Second, the size of the fund is due not to the efforts of class counsel but to the size of the class. In such cases, the fee percentage should be reduced from the benchmark to account for economies of scale. Finally, the change in BANA's practice regarding extended overdrawn balance charges ("EOBCs") should be disregarded for purposes of the fee award, as it will simply shift the types of fees that BANA charges the class rather than eliminate them entirely.

In addition, the Court should strike or disregard the Declaration of Brian T. Fitzpatrick because the gist of his report constitutes inadmissible legal conclusions. The Court is solely responsible for, and fully capable of, concluding what the law is and how it applies to the applicable facts. Fitzpatrick's aggregation of the case law and opinions about the value of this particular case are unhelpful and improper.

Finally, the Settlement includes an impermissible provision giving the parties authority to decide whether to redistribute residual funds to an unnamed third party or to the class. The Court should require amendment of this *cy pres* provision before approving the settlement.

I. Rachel Threatt is a member of the class and intends to appear through counsel at the fairness hearing.

Objector Rachel Threatt is a member of the class. Her address is 304 Sunset Trail, New Lenox, IL 60451. Her telephone number is (314) 750-0921. *See* Declaration of Rachel Threatt ("Threatt Decl.") ¶ 2. Threatt holds a BANA consumer checking account. Between February 25, 2014, and December 30, 2017, she was assessed at least one EOBC that was not refunded. She received notice by postcard of the proposed settlement in this action. *Id.* ¶¶ 3-4. She has not previously filed an objection to any class action settlement. *Id.* ¶ 6.

Threatt intends to appear at the June 18, 2018, fairness hearing through her *pro bono* attorney Theodore H. Frank of the Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF"). Frank is a member of the bar of the Southern District of California. At this time, Threatt does not intend to call any witnesses at the fairness hearing, but reserves the right to make use of all documents entered on the docket by any settling party or objector and the right to cross-examine any witnesses who testify at the hearing in support of final approval.

CCAF represents class members pro bono in class actions where class counsel employs unfair class action procedures to benefit themselves at the expense of the class. Since it was founded in 2009, CCAF has "recouped more than $100 million for class members" by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE

(Dec. 17, 2017). CCAF's track record—and preemptive response to the most common false ad hominem attacks made against it by attorneys defending unfair settlements and fee requests—can be found in the Declaration of Theodore H. Frank. To avoid doubt about her motives, Threatt is willing to stipulate to an injunction prohibiting her from accepting compensation in exchange for the settlement of her objection. *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (suggesting inalienability of objections as solution to objector blackmail problem). Threatt brings this objection through CCAF in good faith to protect the interests of the class. Threat Decl. ¶8.

II. The Court owes a fiduciary duty to unnamed class members.

"Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013). Unlike ordinary settlements, "class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations…. [T]hus, there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Id.* To guard against this danger, a district court must act as a "fiduciary for the class … with 'a jealous regard'" for the rights and interests of absent class members. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (quoting *In re Washington Pub. Power Supply*

Sys. Litig. ("*WPPSS*"), 19 F.3d 1291, 1302 (9th Cir. 1994)). Threatt raises two primary objections, both of which invoke the Court's special fiduciary role: (1) the settlement's residual clause authorizes class counsel to prioritize yet-to-be-designated *cy pres* recipients ahead of class members' interests; and (2) class counsel seeks an excessive and unreasonable fee.

First, *cy pres*, "unbridled by a driving nexus between the plaintiff class and the *cy pres* beneficiaries—poses many nascent dangers to the fairness of the distribution process." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). As such, any *cy pres* provision "must be examined with great care to eliminate the possibility that it serves only the 'selfinterests' of the attorneys and the parties, and not the class, by assigning a dollar number to the fund that is fictitious." *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012).

With respect to Threatt's objection to class counsel's fee request, the need for court oversight is even more apparent. At the fee-setting stage, the relationship between class counsel and the class turns directly and unmistakably adversarial because counsel's "interest in getting paid the most for its work representing the class [is] at odds with the class' interest in securing the largest possible recovery for its members." *Mercury Interactive*, 618 F.3d at 994. Given this inherent adversity, there can be no deference to class counsel's recommendation. Meanwhile, "in most common-fund cases, defendants have little interest in challenging class counsel's timesheets." *Gutierrez v. Wells Fargo Bank, N.A.*, No. 07-cv-05923 WHA, 2015 WL 2438274, at *6 (N.D. Cal. May 21, 2015). That is the case here. The settlement permits without opposition from the

defendant, any fee request up to 25% of the gross settlement fund. Settlement § 3.2. No individual class member has the financial incentive to object to an exorbitant fee request either; "[h]is gain from a reduction, even a large reduction, in the fees awarded the lawyers would be miniscule." *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992). The district court (and good-faith public-minded objectors) serve as the last line of defense. "Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process." Advisory Committee Notes on 2003 Amendments to Rule 23.

III. Before the settlement can be approved, the parties must amend the settlement's residual clause to comport with limitations on *cy pres*.

In relevant part, the settlement provision governing the dispositive of residual settlement funds reads as follows: "At the election of Class Counsel and counsel for BANA, and subject to the approval of the Court, the funds may be distributed to Settlement Class Members via a secondary distribution if economically feasible or through a residual *cy pres* program." Settlement § 3.5. This provision suffers from two fatal defects. First, neither the settlement nor accompanying class notice identify a proposed *cy pres* beneficiary, thus rendering the settlement "unacceptably vague." *Dennis*, 697 F.3d at 867. Second, Section 3.5 permits the parties to choose between a secondary class distribution or a *cy pres* distribution at their discretion. But there should be no discretion granted; if secondary class distributions are economically feasible, the law requires them. *E.g.* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.07(b)

(2010) ("*ALI Principles*"); *In re BankAmerica Corp. Secs. Litig.*, 775F.3d 1060, 1066 (8th Cir. 2015) (finding "void ab initio" a provision that purported to override ALI Principles § 3.07(b)); *see also In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 09-md-2087- BTM, 2013 WL 6086933, at *4 (S.D. Cal. Nov. 19, 2013) (following *ALI Principles* § 3.07(b) and denying settlement approval). Simply put, *cy pres* "is not appropriate" where "the settlement is distributable to class members." *Hofmann v. Dutch LLC*, 317 F.R.D. 566, 578 (S.D. Cal. 2016).

As a threshold matter, the residual clause founders by failing to propose a "concrete, identifiable beneficiary." *Hofmann v. Dutch LLC*, No. 14-cv-02418-GPC, 2017 WL 840646, at *5 (S.D. Cal. Mar. 2, 2017). "To ensure that the settlement retains some connection to the plaintiff class and the underlying claims … a *cy pres* award must qualify as the next best distribution to giving the funds directly to class members." *Dennis*, 697 F.3d at 865. Where the parties do not establish the potential recipient has such an appropriate nexus, the settlement will not be approved. *E.g.*, *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1080 (9th Cir. 2017); *Couser v. Comenity Bank*, 2017 WL 2312080, at *4 (S.D. Cal. May 26, 2017).

Moreover, in an opt-out settlement, providing the identity of potential *cy pres* recipients preserves the right of absent class members to distance themselves from causes or institutions that they would rather not support. The information can underpin a valid objection if there is an abuse of the *cy pres* mechanism if, for example, the intended recipient is related to class counsel or a defendant, or when there is a geographic incongruence between the class and the recipient. *See Nachshin*, 663 F.3d 1034. Even

where *cy pres* only arises from residual funds, it is still "impermissible" to decline to specify a particular recipient. *Thomas v. Magnachip Semiconductor Inc.*, No. 14-cv-01160-JST, 2016 WL 1394278, at *8 (N.D. Cal. Apr. 7, 2016). The settlement's failure to designate a recipient deprives the class of its due notice and this Court of any ability to conduct the searching review necessary. "'Just trust us. Uphold the settlement now, and we'll tell you what it is later'" is not a permissible limiting principle. *Dennis*, 697 F.3d at 869.

Nor is "just trust us" an acceptable proposition for deciding whether remaining funds should go to the class or non-class third parties. "The settlement should presumptively provide for further distributions to participating class members 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." *ALI Principles* § 3.07(b). This "last resort" rule follows from the precept that "[t]he settlement-fund proceeds, … generated by the value of the class members' claims, belong solely to the class members." *Klier v. Elf Atochem N. Am.*, 658 F.3d 468, 474 (5th Cir. 2011). To serve the class's interests, *cy pres* can only be employed as a last resort upon a showing that further distributions are impossible. *BankAmerica*, 775 F.3d at 1064; *Pearson v. NBTY*, Inc., 772 F.3d 778 (7th

Cir. 2014).[1] The residual clause unlawfully gives the parties discretion to ignore the last resort rule. The Court should deny settlement approval until the parties amend Section 3.5 to conform with applicable law.

IV. The lodestar cross-check illuminates the excess of class counsel's fee request.

The Ninth Circuit encourages cross-checking any percentage-based fee request using the lodestar method to "confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 945 (9th Cir. 2011). A second method provides a "useful perspective" and enables the Court to "guard against an unreasonable result." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002); *In re Hyundai and Kia Fuel Economy Litig.*, 881 F.3d 679, 705 (9th Cir. 2018). Cross-checking becomes even more important as the size of the settlement increases. *Alexander v. FedEx Ground Package Sys.*, No. 05-cv-00038, 2016 WL 3351017, at *2 (N.D. Cal. June 15,

[1] If additional distributions would provide "a windfall to class members with liquated damages claims that were 100 percent satisfied by the initial distribution," then a *cy pres* remedy may also be proper. *BankAmerica Corp.*, 775 F.3d at 1064. But "a vague anxiety over windfalls" cannot justify preferring *cy pres* to class redistributions. Rhonda Wasserman, *Cy Pres In Class Action Settlements*, 88 S. CAL. L. REV. 97, 160 (2014). In any event, there should be no dispute here that class members are not fully compensated. Debt reduction claims are capped at $35, and the cash component of the settlement ($37 million) is less than 5% of the amount plaintiffs claim is at stake in the case ($756 million). Mot. for Prelim. App. (Dkt. 69-1) at 17.

2016); *see also WPPSS*, 19 F.3d at 1298 (describing how percentage-based awards become particularly arbitrary for large funds). Keeping in mind the Court's duty to class members, the goal is to uncover a "disparity between the percentage-based award and the fees the lodestar method would support." *Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1124 n.8 (9th Cir. 2002).

Because of the potential to discourage hasty, undervalued settlements with generous attorney payments, legal scholars, practitioners, and judges have even gone so far as to call the lodestar cross-check "essential." Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 503 (1996); *see also* Brian Wolfman, *Judges! Stop Deferring to Class-Action Lawyers*, 2 U. MICH. J. L. REFORM 80, 84-85 (2013) (describing risk of cheap, quick and undervalued settlement); Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection*, WASH. L. FOUND., 23 (2005), available at http://www.wlf.org/upload/0405WPGorsuch.pdf (lodestar cross-check is an "important safeguard"); Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases*, 18 GEO. J. LEGAL ETHICS 1453, 1454 (2005) ("[W]e argue that courts making common fund fee awards are ethically bound to perform a lodestar cross-check.").

Here, plaintiffs concede that they resolved the case at an early stage, yet they resist the application of the lodestar cross-check that is meant to safeguard the class in such situations. *Compare* Fee Motion 14-15 *with* Fee

Motion 20-21. Plaintiffs' expert Professor Fitzpatrick not only disagrees with Justice Gorsuch that the cross-check is an "important safeguard," he opines that a lodestar cross-check is affirmatively bad policy. Fitzpatrick Decl. ¶ 24. He is incorrect, mostly because he ignores the difference between employing the lodestar as baseline methodology and employing the lodestar as a backup cross-check. When used as a base methodology, lodestar occasions a misalignment between the interests of class members and their counsel, because a counsel's fees do not depend on the success its client obtains. However, when lodestar is only employed as a cross-check, the ultimate fee still depends upon the benefit conferred on class members. The cross-check resolves certain problems created by a pure percentage approach: It prevents a trial penalty,[2] it forecloses hourly windfalls that a functioning marketplace would not allow, and it discourages risk-averse[3] counsel from entering into quick agreements that amount to a small percentage of potential recovery. Fitzpatrick and plaintiffs quote out of context the Ninth Circuit's decision in *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536 (9th Cir. 2016), to claim that the lodestar cross-check is entirely discretionary. Fee Motion 20; Fitzpatrick Decl. ¶23. The full sentence from *Yamada* reads: "But where, as here, classwide benefits are not easily monetized, a cross-check is entirely discretionary." 825 F.3d at 547. *Yamada* refers only to percentage cross-checks of a base lodestar

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[2] *See Brytus v. Spang & Co.*, 203 F.3d 238, 247 (3d Cir. 2000).

[3] Because they have more at stake, class counsel are naturally more risk averse than any given absent class member. *E.g.*, *Anderson Living v. Wpx Energy Prod.*, 306 F.R.D. 312, 442 n.90 (D.N.M. 2015).

award; it is irrelevant here. What is relevant is the Ninth Circuit's general principle that "courts cannot rationally apply any particular percentage…without reference to all the circumstances of the case." *WPPSS*, 19 F.3d at 1298. "All the circumstances of the case" certainly includes the time expended by class counsel. "Without such an inquiry there is a grave danger that the bar and bench will be brought into disrepute, and there will be prejudice to those whose substantive interests are at stake and who are unrepresented except by the very lawyers who are seeking compensation." *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 128 (8th Cir. 1975) (cleaned up).

Unsurprisingly then, a large number of courts have heeded the Ninth Circuit's advice by employing a lodestar cross-check, reducing fees and augmenting class recovery, even where class counsel has requested no more than the 25% benchmark. See, *e.g.*, *In re Chiron Corp. Sec. Litig.*, 2007 WL 4249902, at *7 (N.D. Cal. Nov. 30, 2007) (refusing to grant 25% where it equated to excessive multiplier of 8-10); *Rose v. Bank of Am.*, 2014 WL 4273358, at *12-*13 (N.D. Cal. Aug. 29, 2014) (refusing to grant 25% where it equated to excessive multiplier of 8.65, instead granting multiplier of 2.59 or 7.4% of fund); *Xuechen Yang v. Focus Media Holding*, 2014 WL 4401280, at *16 (S.D.N.Y. Sept. 4, 2014) (refusing to award 25% where it amounted to a 3.99 multiplier, instead awarding 10%); *Cruz v. Sky Chefs, Inc.*, 2014 WL 7247065, at *7 (N.D. Cal. Dec. 19, 2014) (refusing to grant 25% where it would have amounted to a 1.63 multiplier; instead awarding 17% in fees for 1.12 multiplier); *Bayat v. Bank of the West*, 2015 WL 1744342, at *8-*9 (N.D. Cal. Apr. 15, 2015) (refusing to award 25% that equated to 2.76 multiplier when result was less than stellar); *Greenberg v. Colvin*, 2015 WL 4078042, at *8 (D.D.C.

July 1, 2015) (reducing fee from 25% to 20% where class counsel would have otherwise been entitled to $3,000/hour); *Fangman v. Genuine Title*, 2016 U.S. Dist. LEXIS 160434, at *36 (D. Md. Nov. 18, 2016) (refusing to grant 20% of constructive common fund with 7.5 multiplier, instead granting fees of 15% for 5.6 multiplier); *Viceral v. Mistras Group*, 2017 WL 661352, at *4 (N.D. Cal. Feb. 17, 2017) (refusing to grant 25% where 1.13 multiplier would result); *Nitsch v. DreamWorks Animation SKG*, 2017 WL 2423161 (N.D. Cal. June 5, 2017) (finding 3.91 multiplier too high(amounting to 21%), awarding 2.0 multiplier (amounting to 11%)); *Hillson v. Kelly Servs.*, 2017 WL 3446596, at *5-*6 (E.D. Mich. Aug 11, 2017) (declining to award 25% when it amounted to 4.5 multiplier; following Newberg's presumptive multiplier ceiling of 4 and awarding 21.5%).

The Court should cross-check plaintiffs' fee request using the lodestar method, and find, for reasons discussed below, that awarding class counsel the fee they seek would in fact result in the type of "exorbitant hourly rate" that the crosscheck seeks to protect against.

A. Class counsel's proclaimed lodestar includes non-compensable hours; the actual multiplier approaches 18.

Although the lodestar cross-check does not require the bean-counting that the base lodestar method entails, it would "serve[] little purpose as a crosscheck if it is accepted at face value." *In re Citigroup Inc. Secs. Litig.*, 965 F. Supp. 2d 369, 389 (S.D.N.Y. 2013). For purposes of the calculation, plaintiffs proffer that class counsel here has reasonably expended a total of 2,158 hours. Fee Motion 20.

But district courts "should exclude" "hours that were not reasonably expended" where cases are "overstaffed" and hours are "excessive, redundant or otherwise unnecessary." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). Here, the following categories of hours should be excluded entirely: (1) pre-*Farrell* time for work on other litigation (i.e. *McGee v. Bank of Am.*, N.A., 2015 WL 4594582 (S.D. Fla. July. 30, 2015); *Shaw v. BOKF, N.A.*, 2015 WL 6142903 (N.D. Okla. Oct. 19, 2015)); (2) anticipated future hours that have not yet been expended; and (3) time spent on class counsel's fee application. Additionally, time spent on settlement mediation, negotiation and drafting is excessive and should be reduced.

Contrary to Fitzpatrick's unsupported assertion,[4] attorney time is not compensable when it is "fundamentally related to a separate legal proceeding." *Lota v. Home Depot U.S.A*, 2013 WL 6870006, at *8 (N.D. Cal. Dec. 31, 2013); *In re Infospace, Inc. Secs. Litig.*, 330 F. Supp. 2d 1203, 1214 (W.D. Wash. 2004); *Parsons v. Volkswagen*, 341 P.3d 662, 667-68 (Okla. 2014). "An attorney is not entitled to be paid in [an action] for the work he or another attorney did in some other case." *ACLU v. Barnes*, 168 F.3d 423, 430 (11th Cir. 1999); cf. also *Halley v. Honeywell Int'l*, 861 F.3d 481, 501 (3d Cir. 2017) (vacating decision allowing

[4] The only case Fitzpatrick cites for the proposition that "it is not uncommon to treat time intertwined across cases as one for purposes of the lodestar crosscheck" is *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010,* 2016 WL 6215974 (E.D. La. Oct. 25, 2016). Fitzpatrick Decl. ¶26 n.6. But that decision has no analysis of the issue, nor the further problem of work expended in cases spanning multiple jurisdictions.

attorney expenses from one case to be charged in settlement of another). There is good reason to treat each litigation as its own unit. While classes may overlap across cases, they are not coextensive. For example, neither *McGee* nor *Shaw* was brought on behalf of *Farrell* class members who incurred their first extended overdrawn balance charge in 2017 (*McGee* and *Shaw* had terminated by then). Such class members should not be charged for class counsel's earlier work on behalf of other persons. More generally, it does not "confer a benefit on the class" to incur litigation costs from two duplicative parallel cases. *Drazin v. Horizon Blue Cross Blue Shield of N.J.*, 832 F. Supp. 2d 432, 443 (D.N.J. 2011), *aff'd* 528 Fed. Appx. 211 (3d Cir. 2013). Further, class counsel seek to be awarded Southern District of California rates (a blended rate of more than $660/hr)[5] for work done in less expensive forums: Ft. Lauderdale, FL (*McGee*) and Tulsa, OK (*Shaw*). Finally, paying class counsel for unsuccessful outside work undermines their fundamental argument for a lodestar multiplier: that the risk of this litigation necessitates

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[5] Although Threatt does not contest class counsel's hourly rates *per se*, a blended rate of $661/hour is likely well above the typical blended rate in this Circuit. *Bruno v. Quten Research Inst.*, 2013 WL 990495, at *4 (C.D. Cal. Mar. 13, 2013) (blended rate of $366.87/hr); *Nguyen v. BMW of N. Am.*, 2012 WL 1380276, at *3 (N.D. Cal. Apr. 20, 2012) (blended rate of $470/hr); *see also Gabriel Techs. Corp. v. Qualcomm*, 2013 WL 410103, at *9 (S.D. Cal. Feb. 1, 2013) (blended rate of $447/hr is "in line with that of the community" when compared to California peers).

a multiplier to make them whole. Thus the 343.75 hours[6] spent litigating pre-*Farrell* cases should be eliminated from the lodestar.

Second, courts do not permit attorneys to include anticipated future time in their lodestar. "The law is settled that in calculating the lodestar, the Court must use 'the number of hours reasonably **expended** on the litigation,' and the movant 'should submit evidence supporting the hours worked." *See Nat'l Alliance for Accessability v. Hull Storey Retail Group*, No. 2012 WL 3853520, at *4 (M.D. Fla. Jun 28, 2012) (quoting *Hensley*, 461 U.S. at 433 (1983) and adding emphasis); *see also 7-Eleven, Inc. v. Etwa Enter.*, 2013 WL 2947112, at *5 (D. Md. Jun. 12, 2013) ("Plaintiff has not identified any authority that would entitle it to an award of 'anticipated legal fees and costs,' nor is the court aware of any."); *St. Hilaire v. Indus. Roofing*, 346 F. Supp. 2d 212, 215 (D. Me. 2004) (rejecting "Plaintiff's bald projection of reasonable future fees without corroborating support in the record"). The 88 anticipated future hours[7] should be excluded.

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[6] *See* Decl. of Jeff Ostrow (Dkt. 80-4) ¶10.2; Decl. of Hassan Zavareei (Dkt. 80-5) ¶16.2; Decl. of Cristina M. Pierson (Dkt. 80-6) ¶6.2; Decl. of Bryan S. Gowdy (Dkt. 80-7) ¶7.2. The fact that counsel channeled more than five times greater effort into this case in comparison to the unsuccessful *McGee* and *Shaw* also demonstrates why a multiplier is not warranted.

[7] *See* Ostrow Decl. ¶¶10.15-10.16; Zavareei Decl. ¶¶16.15-16.16; Pierson Decl. ¶¶6.15- 6.16; Gowdy Decl. ¶¶7.13, 7.16.

Third, "[t]ime spent obtaining an attorneys' fee in common fund cases is not compensable because it does not benefit the plaintiff class." *WPPSS*, 19 F.3d at 1999; *accord Manner v. Gucci Am., Inc.*, 2016 WL 6025850, at *4 (S.D. Cal. Oct. 13, 2016). The 64.75[8] hours spent on the fee application should be excluded.

Fourth, class counsel includes an excessive 561.75 hours[9] spent on settlement mediation, negotiation and drafting. *See Dugan v. Lloyds Tsb Bank*, No. C 12-02549, 2014 WL 1647652, at *4 (N.D. Cal. Apr. 24, 2014) (327 hours for class settlement negotiation "is excessive"). The root of the overbilling is that plaintiffs involved at least 8 high-priced attorneys in the settlement process. *See Makaeff v. Trump Univ.*, 2015 WL 1579000, at *14 (S.D. Cal. Apr. 9, 2015) (it was "excessive to have three partners participating in the settlement conference"); *Reyes v. Bakery & Confectionary Union*, 2017 WL 6623031, at *11 (N.D. Cal. Dec. 28, 2017) ("no ... justification for having five partners attend the mediation"; reducing time by 60%). Threatt recommends that the Court reduce time spent on settlement to 300 hours to account for the duplication and inefficiency of so many attorneys.

All said, the proclaimed 2,158 hours are due to be reduced by approximately 758 hours, bringing the compensable hour count to 1399.75 hours. Keeping constant class

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[8] Ostrow Decl. ¶10.14; Zavareei Decl. ¶16.14; Pierson Decl. ¶6.14; Gowdy Decl. ¶7.14.

[9] Ostrow Decl. ¶10.10; Zavareei Decl. ¶16.10; Pierson Decl. ¶6.10; Gowdy Decl. ¶7.10.

counsel's blended rate of $661.74/hour—itself remarkably high—class counsel's actual lodestar amounts to $926,278.72, and actual requested multiplier is almost 18. In other words, class counsel seeks a total fee award equal to a fee of $11,894/hour of compensable work.

B. A multiplier of 18 or of 11 is unreasonable.

"[T]here is a strong presumption that the lodestar is sufficient" without an enhancement multiplier. *Perdue v. Kenny A*, 559 U.S. 542, 546 (2010). *Kenny A.* allocates "the burden of proving that an enhancement is necessary [to] the fee applicant." *Id.* at 553. A lodestar enhancement is only justified in "rare and exceptional" circumstances where "specific evidence" demonstrates that an unenhanced "lodestar fee would not have been adequate to attract competent counsel." *Id.* at 554; *accord Hyundai*, 881 F.3d at 706-07. Here, there was no trouble attracting counsel as there are four firms serving as class counsel who achieved a quick settlement for a small fraction of potential recovery. A multiplier of 18 or 11 is outside the permissible range of outcomes.

Kenny A's limitation on enhancements was made in the context of interpreting 42 U.S.C. § 1988's language of "reasonable" fee awards, but there's little justification for claiming that "reasonable" in § 1988 means something different than "reasonable" in class action fee awards made under Fed. R. Civ. P. 23(h). *E.g., Hyundai*, 881 F.3d at 706-07 (applying *Kenny A.* to Rule 23(h) fee award pursuant to settlement); *Bluetooth*, 654 F.3d at 942 n.7 ("the Kerr factors only warrant a departure from the lodestar figure in rare and exceptional cases") (internal quotation omitted); *In re Sears Roebuck & Co. Front-Loading*

Washer Prods. Liab. Litig., 867 F.3d 791 (7th Cir. 2017) (applying *Kenny A.* to reduce 1.75 multiplier to 1); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 361 (3d Cir. 2010) (Weis, J. concurring/dissenting) (referring to *Kenny A.* as an "analogous statutory fee-shifting case."); *Weeks v. Kellogg Co.*, 2013 WL 6531177, at *34 n.157 (C.D. Cal. Nov. 23, 2013) (citing *Kenny A.* and finding "little basis for an application of a multiplier" when calculating lodestar cross-check). All but one case cited by Fitzpatrick (Fitzpatrick Decl. ¶26) that awarded a significant multiplier predates *Kenny A.*, and that one outlier was an out-of-circuit decision that did not mention *Kenny A. Beckman v. Keybank, N.A.* 293 F.R.D. 467 (S.D.N.Y. 2013) (endorsing multiplier of 6.3). Indeed the very sentence plaintiffs rely on from *Beckman*—"courts regularly award lodestar multipliers of up to eight times lodestar, and in some cases, even higher multipliers"—has been criticized as having "made its way into many court 'decisions' in [the Second] Circuit via proposed orders drafted by plaintiffs' attorneys." *Fujiwara v. Yasuda LTD.*, 58 F. Supp. 3d 424, 437 (S.D.N.Y. 2014). But in reality, "the cases cited … in support of this proposition provide weak support for such loft multipliers." *Id.* at 438.[10]

In fact, the Third Circuit has "strongly suggest[ed]" that a multiplier of 3 is an "appropriate ceiling for a fee award." *In re Cendant Corp. PRIDES Litig.*, 243 F.3d

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[10] It is true that *Vizcaino* "noted" a multiplier as high as 19.6, but it never endorsed such a multiplier. The case involved only a 3.65 multiplier, and observed also that 83% of the multipliers it surveyed were less than 4.0. *See* 290 F.3d at 1051 n.6.

722, 742 (3d Cir. 2001) (vacating award that amounted to a multiplier of 7 or 10). Likewise, the Seventh Circuit has suggested that a multiplier of 2 might be a "sensible ceiling" to avoid unwarranted attorney windfalls." *E.g. Florin v. Nationsbank*, 34 F.3d 560, 565 (7th Cir. 1994). And while, *Vizcaino* ratified a 3.65 multiplier in 2002, the Ninth Circuit has more recently been skeptical of multipliers even less than 2. *See Hyundai*, 881 F.3d at 706-07 (doubting propriety of 1.22 multiplier); *In re Magsafe Apple Power Adapter Litig.*, 571 Fed. Appx. 560, 564 (9th Cir. 2014) (doubting propriety of 1.51 multiplier). Class counsel fail to provide a proper legal basis for the requested multiplier here. A multiplier "may not be awarded based on a factor that is subsumed in the lodestar calculation"—either in the number of hours or hourly rate. *Kenny A.*, 559 U.S. at 553. Thus, "the novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors presumably are fully reflected in the number of billable hours recorded by counsel." *Id.* (cleaned up); *accord Bluetooth*, 654 F.3d at 942 n.7; *Brown v. 22nd Dist. Agricultural Ass'n*, 2017 WL 3131557, at * 7 (S.D. Cal. Jul. 21, 2017) (quoting *Blum v. Stenson*, 465 U.S. 886, 899 (1984)). Similarly, a multiplier based on outstanding results requires "exceptional success" beyond the "expectancy of excellent or extraordinary results" already baked into high hourly rates. *WPPSS*, 19 F.3d at 1304; *accord Rodriguez v. Barrita, Inc.*, 53 F. Supp. 3d 1268, 1287 (N.D. Cal. 2014); *Brown*, 2017 WL 3131557, at * 7.

The settlement provides the class with less than 10% of its potential damages, with cash payouts of less than 5% of potential damages. Meanwhile, class counsel requests an 11 multiplier that is in reality an 18 multiplier, equating

to fees of more than $11,000/hour. "[T]he class is being asked to 'settle,' yet Class Counsel has applied for fees as if it had won the case outright." *Sobel v. Hertz*, No. 3:06-CV-00545, 2011 WL 2559565, at *14 (D. Nev. Jun. 27, 2011).

Besides outstanding results, the other basis plaintiffs offer for an enhancement multiplier is the riskiness of the litigation. Fee Motion 13-14. But "the weak strength of Plaintiffs' case should not constitute a 'special circumstance' justifying enhancement of the fee award." *Viceral*, 2017 WL 661352, at *3. "This rationale would have the perverse effect of rewarding counsel for taking on weak or otherwise dubious cases" amounting to a "no lose proposition." *Id.* Rewarding weak cases more than strong cases is, to put it nicely, an "uncomfortable rule." *Kmiec v. Powerwave Tech.*, 2016 WL 5938709, *5 (C.D. Cal. Jul. 11, 2016); *see also Hyundai*, 881 F.3d at 706-07 (rejecting multiplier based on risk and complexity of case).

Even if risk multipliers are sometimes appropriate, granting the excessive one requested here is inappropriate for several reasons. Class counsel (1) included time spent on unsuccessful outside litigation in its lodestar accounting, effectively insuring away risk by seeking compensation whether they win or lose; (2) demonstrated the ability to funnel most of its hours to successful litigation and away from unsuccessful litigation; (3) took little opportunity risk in pursuing an overdraft action, an area with which it has great familiarity, and; (4) reached an early settlement. A 10% fee award of the undiscounted overinflated settlement value ($6.66 million) still amounts to a multiplier of 4.75. That stands at the outer limits of what this Court should permit.

V. The percentage of recovery requested by class counsel is excessive and should be reduced to augment class recovery.

The fee request is excessive even if the Court relies exclusively on the percentage-of-recovery approach. Again, "courts cannot rationally apply any particular percentage—whether 13.6[%], 25[%] or any other number—in the abstract, without reference to all the circumstances of the case." *Vizcaino*, 290 F.3d at 1048 (cleaned up). Here, there are several circumstances that make a $16.6 million fee based on the 25% benchmark independently excessive.

First, the $66 million that plaintiffs use as the denominator in the calculation is not all cash and should not be valued as equivalent to such in the fee analysis. Under the settlement, BANA will pay $37.5 million in cash and reduce debt currently owed by class members whose accounts were closed while an EOBC was still due by $29.1 million. Settlement §2.2(b). This structure costs BANA and benefits class members far less than the $66.6 million aggregate figure suggests because the "debt reduction" is worth less than cash to class members and costs BANA significantly less than a cash payment. Either the percentage should be reduced or the $29.1 million of debt reduction should be heavily discounted to account for its lower value.

The parties do not disclose whether BANA has already sold any debt from the closed, overdrawn accounts or how it otherwise has accounted for the debt. BANA may have sold the debt for mere pennies on the dollar or may not expect to recover anything from the accounts and

have already written them off. (At least some of the class members with overdrawn accounts would have declared bankruptcy and had debts extinguished.) While these questions remain open, there is no question that BANA would not have recovered 100% of the $29.1 million debt eligible for reduction under the settlement. If a consumer has not paid her balance within 60 days—typically the length of time before a bank will close an overdrawn account—and has her account closed, the likelihood of later repayment is low.

At the same time, class members are worse off with debt reduction than cash. The parties do not disclose how many of these former accountholder-class members owe more than $35. (Since the $35 represents a credit of one EOBC, it is likely that many of them owe more than that amount because a negative balance is what would have triggered the EOBCs.).

As a result, it is not surprising that class attorneys commonly seek less than the 25% benchmark where the settlement relief includes debt reduction, even when courts recognize that such relief is of some benefit to class members. *E.g., Smith v. CRST Van Expedited*, 2013 WL 163293 (S.D. Cal. Jan. 14, 2013) (approving request for 33.3% of cash payment, equaling 7.5% of settlement that included $2.6 million in cash and $9 million in debt relief, without including outreach to credit agency outreach and changes to training); *Cosgrove v. Citizens Auto. Finance*, 2011 WL 3740809, at *9-*10 (E.D. Pa. Aug. 25, 2011) (approving request for 11.7% of cash and debt relief without including value of credit repair).

Second, the percentage should be reduced to account for the economies of scale represented by the large settlement fund. "Absent unusual circumstances, the percentage will decrease as the size of the fund increases." *Alexander*, 2016 WL 3351017, at *1 (quoting a previous order of the court) (cleaned up). The Ninth Circuit has thus instructed that where, for example, awarding 25% of a "megafund" settlement yields "windfall profits for class counsel in light of the hours spent on the case, courts should adjust the benchmark percentage or employ the lodestar method instead." *Bluetooth*, 654 F.3d at 942-43. This holding reflects that "[t]he existence of a scaling effect—the fee percent decreases as class recovery increases—is central to justifying aggregate litigation such as class actions. Plaintiffs' ability to aggregate into classes that reduce the percentage of recovery devoted to fees should be a hallmark of a well-functioning class action system." Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 263 (2010). Failing to apply a sliding scale will result in overcompensating law firms "who obtain huge settlements, whether by happenstance or skill, … to the detriment of the class members they represent." *Wal-Mart Stores v. Visa USA*, 396 F.3d 96, 122 (2d Cir. 2005).

At $66.6 million, this settlement at least approaches "megafund" status and, in any event, is large enough to implicate windfall concerns. Due to economics of scale, "[i]t is not [66] times more difficult to prepare, try, and settle a [$66] million case than it is to try a $1 million case. In many instances, the increase in recovery is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." *Alexander*, 2016 WL 3351017, at

*1 (cleaned up). Such is the case here. The settlement class includes approximately 5.9 million people. Notice § 5. Plaintiffs do not claim any added difficulty from the size of the class. Rather, the primary challenges were due to uncertainty over how certain legal issues involving the EOBCs would be resolved. Fee Motion 12-13. The work would have been the same whether there were 59 accountholders or 5.9 million. The 8-figure recovery is simply a result of plaintiffs targeting a large company.

No other factor justifies the windfall 25% sought by plaintiffs' counsel either. As discussed above, the result here was far from extraordinary, with class counsel compromising over 90% of the value of the class's claims. Counsel billed under 2200 hours on the case (and less than half of that on actual litigation of *this* case), settling about 20 months after filing the initial complaint. In other words, class counsel seek over $16.6 million for what amounts to barely more than one attorney-year of work. Few private attorneys, associate or partner, make an annual salary of $16.6 million. Plaintiffs try to explain away the significance of this factor, Fee Mem. 15, but, in reality, they had put little time or resources on the line by the time of settlement. *See Walsh v. Popular, Inc.*, 839 F. Supp. 2d 476, 483-84 (D.P.R. 2012) (reducing fees from 33% to 23% of $8.2 million fund where full discovery was not conducted in case involving "complicated web of jurisprudence" and motion to dismiss but no motion for summary judgment had been filed).

Further, while it is true, as reflected in class counsel's citations to cherry-picked case law, that courts have awarded fees of 25% or higher even in larger cases, empirical studies demonstrate that courts apply a sliding

scale to prevent a windfall for plaintiffs' attorneys at the expense of the class. This is reflected even in the empirical work of plaintiffs' expert. Fitzpatrick has found that "fee percentages are strongly and inversely associated with the size of the settlement" and "the age of the case is positively associated with fee percentages." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 814 (2010). For settlements in the $30 million to $72.5 million range for the study's two-year period, the scaling effect is apparent, with mean and median percentages of 22.3% and 24.9%, respectively. *Id.* at 839. *See also, e.g.*, *Allen v. Dairy Farmers of Am.*, No. 5:09-cv230, 2016 WL 3361544, at *8-*9 (D. Vt. June 14, 2016) (reducing fee from 33% to 14% of $80 million fund to augment recovery). In a short litigation such as this, where the fund is relatively large, and the class recovery relatively small compared to the amount sought by the complaint, then, a percentage further below the benchmark is appropriate.

That plaintiffs' counsel have retention agreements with the named plaintiffs setting their fees at 33.33% should not alter the Court's analysis. Such agreements "are owed little weight, given that named plaintiffs are usually paws of the class lawyers, and do not have a sufficient stake to drive a hard—or any—bargain with the lawyer[s]." *Gehrich v. Chase Bank U.S.*, 316 F.R.D. 215, 235 (N.D. Ill. 2016) (cleaned up); *Sinanyan v. Luxury Suite Int'l*, No. 2:15-cv-00225-GMN-VCF, 2016 WL 4394484, at *3 n.3 (D. Nev. Aug. 17, 2016) (court must fully assess reasonableness of fee regardless of percentage agreed to by class representative).

Finally, the change in BANA's business practices will not benefit class members and thus does not provide any support for a higher percentage of recovery. Class counsel do not directly ask for fees to be based on the espoused benefit of the change but mention "nonmonetary benefits" as a relevant consideration, and their expert opines that an upward departure where such benefits are achieved will incentivize class counsel to secure nonmonetary relief. *See* Fee Mem. 16-17; Fitzpatrick Decl. ¶21. The problem, however, is that accountholders will not actually benefit. They will not "save" the estimated hundreds of millions of dollars in EOBC fees resulting from the change in practice.

Instead, BANA will simply charge accountholders other fees to make up for the revenue loss, leaving them no better off than if EOBCs were undisturbed. The effect of the Durbin Amendment to the Dodd-Frank financial reform legislation is illustrative. That amendment capped debit card interchange fees for large banks. The cap cut the average interchange fee for covered banks by about 50% per transaction, reducing annual revenues from these fees by $6-$8 billion. The banks nevertheless found ways to recover these lost revenues. For example, they reduced the availability of free accounts, tripled the minimum holding for free accounts, and doubled the monthly fee on non-free accounts, contributing to many with lower incomes leaving the banking system. Todd J. Zywicki, et al., *Price Controls on Payment Card Interchange Fees: The U.S. Experience*, George Mason Law & Economics Research Paper No. 14-18 (2014).

Proverbially, there is no such thing as a free lunch. Accountholders who may be at risk of extended overdrawn balances will not suddenly receive a free benefit from BANA. Many of them may get frozen out of the banking system, or they will incur higher monthly account fees. Plaintiffs have not made any showing to overcome this economic reality, yet they carry the burden of showing that class members will benefit from the settlement relief and of establishing a factual basis to support the requested fees. *See Koby*, 846 F.3d at 1079; *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996). Nor have they established that BANA would not have changed its EOBC practice for business reasons and to avoid further litigation in the absence of the settlement. *Koby*, 846 F.3d at 1080.

VI. The Court should strike or disregard the Fitzpatrick Declaration.

Threatt asks the Court to strike or, in the alternative, to disregard the Fitzpatrick Declaration because it contains inadmissible legal conclusions and other legal arguments regarding the calculation of attorneys' fees. Testimony regarding matters of law is inadmissible under either Rule 701 or 702 because "[r]esolving doubtful questions of law is the distinct and exclusive province of the trial judge." *Nationwide Transport Finance v. Cass Info. Sys.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (internal quotation omitted). It is well established that "that expert testimony by lawyers, law professors, and others concerning legal issues is improper." *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1043 (D. Ariz. 2005). Such legal opinions invade this Court's province as the "sole arbiter of the law." *GPF Waikiki Galleria v. DFS*

Group, 2007 WL 3195089, at *5 (D. Haw. Oct. 30, 2007). "[T]he court is well equipped to instruct itself on the law." *Stobie Creek Invs. v. United States*, 81 Fed. Cl. 358, 361 (Ct. Fed. Cl. 2008), aff'd 608 F.3d 1366 (Fed. Cir. 2010). Having recently and successfully moved to strike expert testimony similar to Fitzpatrick's for offering legal opinions on the reasonableness of fees, class counsel should be familiar with these principles. *See Stathakos v. Columbia Sportswear*, No. 15-cv-04543, 2018 WL 1710075, at *5 n.6 (N.D. Cal. Apr. 9, 2018).

Here, the plaintiffs' expert seeks to usurp the Court's role by telling the Court which of the available methodologies it should use and how to apply it to award fees and concluding that "this fee request is within the range of reason" under his review of the law. *E.g.*, Fitzpatrick Decl. ¶¶8, 11-12, 19. The Fitzpatrick Declaration predominantly analyzes *case law*, not facts. Class counsel may argue that the declaration presents factual "empirical data," but the declaration consists of little more than discussion of Fitzpatrick's interpretation of the case law and improper legal opinion dressed up as statistics, but derived exclusively from case law. (He also usurps the Court's role by opining on the value of BANA's change in practice regarding EOBCs and the risk in litigating over EOBCs without establishing *any* authority by which to do so. *E.g., id.* ¶¶14, 19.) Citations to case law remain legal argument when the case law is averaged, and this is especially true when the averages are stretched into dubious legal conclusions. District courts often approve unopposed fee requests, and Fitzpatrick does not discuss how the characteristics of the averaged cases fare in comparison to this case. "Expert testimony" which simply surveys the law ought to be excluded under Rule 702. *See Lukov v.*

Schindler Elevator Corp., 2012 WL 2428251, at *2 (N.D. Cal. June 26, 2012) (excluding expert opinion based on "survey of state laws"); *Heighley v. J.C. Penney Life Ins. Co.*, 257 F. Supp. 2d 1241, 1260 & n.23 (C.D. Cal. 2003) (striking "interpretations of case law").

To the extent the Court considers the declaration, Fitzpatrick's opinion supports a deterrence-based class-members-don't-matter approach that would hold that it is appropriate to pay the attorneys 100% of the fund—and indeed, he has taken that position in his writings. Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2047 (2010). It is little wonder that he is willing to endorse a contingency fee that pays the attorneys over $7700/hour—despite the fact that his own empirical work shows that a sub-25% fee is more typical in a settlement of this magnitude—and to excuse those characteristics that favor a downward adjustment, such as length of litigation and double-digit lodestar multiplier. *See* Fitzpatrick, *supra*, 7 J. EMPIRICAL L. STUD. at 836, 839. This Court should join others in refusing to follow Fitzpatrick's opinion and apply its own discretion to award a more reasonable fee than the windfall requested by counsel. *E.g., In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 2017 WL 1352859, at *3 (N.D. Cal. Apr. 12, 2017).

CONCLUSION

For the foregoing reasons, the Court should deny settlement approval until the parties agree to amend the *cy pres* provision and reduce attorneys' fees to $6.66 million.

Dated: April 20, 2018

Respectfully submitted,
/s/ *Theodore H. Frank*
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Attorney for Objector Rachel Threatt

I, Rachel Threatt, am the objector. I sign my this written objection drafted by my attorneys as required by the Court's Preliminary Approval Order (Dkt. 72) ¶ 4(a)(i) and Class Notice § 14.

/s/ Rachel Threatt
Rachel Threatt