

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 19-20614-CIV-COOKE/GOODMAN

KENNETH D. OWENS; SAMANTHA A. HOLLEY; KARA L. GARIGLIO; NICOLETTA PANTELYAT; ISABELLE SCHERER; JONATHAN TULE; and KELSEA D. WIGGINS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

BANK OF AMERICA, N.A. and BANK OF AMERICA CORPORATION,

Defendants.

Hon. Marcia G. Cooke, Presiding

Hon. Magistrate Jonathan Goodman

DECLARATION OF FRANK S. HEDIN IN SUPPORT OF CLASS REPRESENTATIVES' AND CLASS COUNSEL'S UNOPPOSED MOTION FOR SERVICE PAYMENTS AND A FEE AND EXPENSE AWARD

I, Frank S. Hedin declare under penalty of perjury, pursuant to 28 U.S.C. § 1746 and based on my own personal knowledge, that the following statements are true:

1. Together with co-Class Counsel, I represent Plaintiffs Kenneth D. Owens, Samantha A. Holley, Kara L. Gariglio, Nicoletta Pantelyat, Isabelle Scherer, Jonathan Tule and Kelsea D. Wiggins ("Plaintiffs" or "Class Representatives") in this Action, and I respectfully submit this declaration in support of Class Representatives' and Class Counsel's Unopposed Motion for Service Payments and a Fee and Expense Award.

BACKGROUND AND EXPERIENCE

2. I am a member in a good standing of the Florida Bar and the State Bar of California; the United States District Courts for the Southern District of Florida, Middle District of Florida, Northern District of California, Southern District of California, Central District of California,

Eastern District of California, Western District of Michigan, and Western District of Wisconsin; and the United States Courts of Appeals for the Second Circuit and Seventh Circuit, and I have been admitted on a *pro hac vice* basis in numerous federal district courts across the country.

3. I received my Bachelor of Arts from University of Michigan in 2008 and my Juris Doctor, *magna cum laude*, from Syracuse University College of Law in 2012. From 2012 through 2013, I served as law clerk to the Honorable William Q. Hayes, United States District Judge for the Southern District of California. During my clerkship with Judge Hayes, I managed half of the Court's civil docket and drafted orders and opinions at all stages of litigation in a wide range of matters, including several class actions.

4. From early 2014 until early 2018, I worked as an attorney at a Miami-based boutique litigation firm, where I built the firm's class action litigation practice from the ground up and represented both plaintiffs and defendants in consumer and data-privacy class actions and employment-related collective actions throughout the country. I also represented indigent litigants in civil rights and housing matters on a pro bono basis. I was partner and head of the firm's class action litigation practice at the time of my departure.

5. My partner David W. Hall and I founded Hedin Hall LLP in March 2018. With offices in Miami, Florida and San Francisco, California, our firm focuses on class action litigation in the data-privacy, financial services, and securities realms, and regularly represents indigent litigants on a pro bono basis, *see, e.g., Groover v. U.S. Corrections, LLC, et al.*, No. 15-cv-61902-BB (S.D. Fla.) (representing plaintiff and putative class against country's largest private prisoner extradition companies in Section 1983 civil rights action alleging violations of the Eighth Amendment).

6. I have served as class counsel or lead or co-lead plaintiffs' counsel in numerous consumer class actions in state and federal courts, including in Illinois. *E.g., Farnham v. Caribou Coffee Co.*, No. 16-cv-295-wmc (W.D. Wisc.) (class counsel in consumer data-privacy class action, resolved for \$8.5 million); *Chimeno-Buzzi v. Hollister Co., et al.*, No. 14-23120-CIV, 2015 WL 9269266 (S.D. Fla. Dec. 18, 2015) (same, resolved for \$10 million); *Edwards v. Hearst*

Communications Inc., No. 15-cv-9279-AT (S.D.N.Y.) (co-plaintiffs' counsel in consumer data-privacy class action, resolved for \$50 million); *Norberg v. Shutterfly, Inc.*, No. 15-cv-5351 (N.D. Ill.); *Rivera, et al. v. Google, Inc.*, No. 16-cv-2714 (N.D. Ill.).

7. In addition to the instant matter, Hedin Hall LLP presently serves as class counsel or lead or co-lead plaintiffs' counsel in several cases against financial institutions arising from the assessment of allegedly improper fees, interest, and other charges to consumers' accounts. *E.g.*, *Liggio v. Apple Federal Credit Union*, No. 18-cv-1059-LO (E.D. Va.) (class counsel in action alleging improperly-assessed overdraft fees, settlement pending final approval); *Alfaro, et al. v. Bank of America, N.A., et al.*, No. 19-cv-22762-MGC (S.D. Fla.) (alleging improperly-assessed foreign transaction fees); *Key, et al. v. Bank of America, N.A., et al.*, No. 19-cv-23020-DPG (S.D. Fla.) (alleging various improperly-assessed service fees); *Wiggins, et al. v. Bank of America, N.A., et al.*, No. 19-cv-3223-EAS (S.D. Ohio) (alleging improperly-assessed overdraft fees).

8. My firm also currently represents plaintiffs and putative classes of consumers in a wide range of data-privacy matters. *E.g.*, *Lloyd, et al. v. Eaze Solutions, Inc.*, No. 18-cv-5176-JD (N.D. Cal.) (alleging transmission of unsolicited text messages in violation of the TCPA, class-wide settlement recently reached); *Abe v. Hyundai Motor America, Inc.*, No. 19-cv-699-JVS (C.D. Cal.) (alleging transmission of unsolicited text messages in violation of the TCPA); *Lundbom v. Schwan's Home Service, Inc.*, No. 18-cv-2187-SI (D. Or.) (same); *Hansen v. LMB Mortgage Servs., Inc.*, No. 19-cv-179-KJM (E.D. Cal.) (same); *Jara v. Redbox Automated Retain, LLC*, No. 19-cv-4532 (N.D. Ill.) (same); *Huguelet v. Maxim Inc.*, No. 19-cv-4452-ALC (S.D.N.Y.) (class action alleging disclosure of personal reading information in violation of Michigan PPPA); *Kokoszki v. Playboy Enterprises, Inc.*, No. 19-cv-10302-BAF (E.D. Mich.) (same); *Forton v. TEN: Publishing Media, LLC.*, No. 19-cv-11814-JEL (E.D. Mich.) (same); *Kittle v. America's Test Kitchen LP*, No. 19-cv-11757-TGB (E.D. Mich.) (same); *Lin v. Crain Communications Inc.*, No. 19-cv-11889-VAR (E.D. Mich.) (same); *Markham v. Nat'l Geographic Partnr's LLC*, No. 19-cv-232-JTN (W.D. Mich.) (same); *Horton v. Dow Jones & Company, Inc.*, Nos. 19-527, 19-832 (2d Cir.) (same, on appeal and cross-appeal).

9. Finally, Hedin Hall represents classes of aggrieved investors seeking to redress alleged violations of the nation's securities laws. *E.g.*, *Luczak v. Nat'l Beverage Corp.*, No. 18-cv-61631-KMM (S.D. Fla.) (court-appointed counsel for class in action alleging violations of federal securities laws, on appeal); *Hoffman v. Stephenson, et al. (In re AT&T Sec. Litig.)*, Index No. 650797/2019 (N.Y. Sup. Ct., N.Y. Cnty.) (asserting Securities Act claims arising from offering in connection with merger); *Plymouth County Retirement System v. Impinj, Inc., et al.*, Index No. 650629/2019 (N.Y. Sup. Ct., N.Y. Cnty.) (asserting Securities Act claims arising from initial and secondary public offerings); *In re Dentsply Sirona Inc. S'holders Litig.*, Index No. 155393/2018 (N.Y. Sup. Ct., N.Y. Cnty.) (asserting Securities Act claims arising from offering in connection with merger); *In re PPDAL Grp. Sec. Litig.*, Index No. 654482/2018 (N.Y. Sup. Ct., N.Y. Cnty.) (asserting Securities Act claims arising from initial public offering); *In re Altice USA, Inc. Sec. Litig.*, Index No. 711788/2018 (N.Y. Sup. Ct., Queens Cnty.) (asserting Securities Act claims arising from initial public offering); *Plutte v. Sea Ltd.*, Index No. 655436/2018 (N.Y. Sup. Ct., N.Y. Cnty.) (asserting Securities Act claims arising from initial public offering); *In re EverQuote, Inc. Sec. Litig.*, Index No. 650907/2019 (N.Y. Sup. Ct., N.Y. Cnty.) (asserting Securities Act claims arising from initial public offering); *In re Menlo Therapeutics Inc. Sec. Litig.*, Lead Case No. 18CIV06049 (Cal. Sup. Ct., San Mateo Cnty.) (asserting Securities Act claims arising from initial public offering); *Wolther v. Maheshwari (In re Veeco Instruments, Inc. Sec. Litig.)*, Lead Case No. 18CV329690 (Cal. Sup. Ct., Santa Clara Cnty.) (asserting Securities Act claims arising from offering inconnection with merger).

10. Hedin Hall LLP is well suited to continue to represent the Representative Plaintiffs and Settlement Class in this matter and is willing and able to commit all resources necessary, financial and otherwise, to steer this litigation on a prudent course.

HISTORY OF THE LITIGATION

I. Pre-Filing Investigation

11. Together with my co-Class Counsel, I commenced the investigation of this case many months before this Action was filed. This thorough pre-filing investigation and evaluation

included:

- A. Interviews with hundreds of Bank of America deposit account holders and inspection and analyses of numerous individual bank statements involving a multitude of different overdraft fees for a multitude of “recurring” and “non-recurring” charges;
- B. Researching changes in Bank of America’s business practices that became effective *circa* 2010;
- C. Researching and documenting comments and public statements made by Bank of America concerning those changes in business practices in 2010, and the effect such changes would have on consumers;
- D. Reviewing historical social media postings by consumers, and historical archives of consumer complaints made publicly available by the OCC and CFPB, in order to determine the scope and prevalence of the alleged misclassifications at issue in this Action, as identified by Class Counsel;
- E. Researching and analyzing FOIA archives containing correspondence sent by Bank of America executives to government agencies and departments, including to the OCC and other financial regulators, concerning the distinction between “recurring” and “non-recurring” debit card transactions that such entities had proposed for implementation in the lead up to the enactment of Regulation E;
- F. Analyzing CFPB enforcement proceedings against Defendants to gauge their relevance to the allegations of this case. *See, e.g.*, Consent Order, In the Matter of Bank of America, N.A.; and FIA Card Services, N.A., Case No. 2014-CFPB-0004 (US CFPB Apr. 2014) (ECF No. 1);
- G. Discovering and performing an in-depth analysis of the various and numerous iterations of the Bank of America Deposit Agreement, and Bank of America, N.A. Merchant Services Agreement (and the myriad terms and conditions therein), as well as various other contractual documents in effect since 2010;

- H. Discovery and analysis of Bank of America's lengthy Merchant Services Agreement and various iterations thereto, including review of publicly-available merchant services agreements between merchants and financial institutions other than Bank of America, and other contractual and card-related documents and policies concerning merchant charge classifications and credit and debit card transaction descriptors;
- I. Researching and analyzing the way in which Bank of America's core processing system is able to classify, and reclassify, debit card transactions in real-time;
- J. Consulting with various experts regarding the debit card payment systems and networks; and
- K. Conducting a thorough examination, investigation and evaluation of the relevant law and facts to assess the merits of the claims, causes of action, and available defenses.

12. In developing the theory of liability, my co-Class Counsel and I began by considering each of the potential avenues of recovery, carefully assessing the viability of particular claims for relief, researching and analyzing each of the various legal issues relevant to the merits of potential claims, and determining how to best present such claims on behalf of the putative Class to maximize the likelihood of prevailing at class certification.

13. We reviewed various releases of liability entered into between classes of consumers and Bank of America in prior overdraft fee settlements, to ensure there was no overlap with the claims alleged in this Action.

14. Additionally, my co-Class Counsel and I performed an in-depth analysis into the likelihood of Bank of America successfully compelling arbitration as a non-signatory to any contracts entered into between Plaintiffs (or any Settlement Class Members) and the Merchants whose transactions triggered the overdraft fees in this case.

II. Litigation of the Action

15. Following the pre-filing investigation stage, my co-Class Counsel and I commenced this Action by preparing and filing the comprehensive Class Action Complaint (ECF No. 1) on behalf of Plaintiffs Kenneth D. Owens, Samantha A. Holley, Kara L. Gariglio, Nicoletta Pantelyat, Isabelle Scherer, Jonathan Tule and Kelsea D. Wiggins (“Plaintiffs” or “Class Representatives”) and the putative Class. The Class Action Complaint filed in this Action outlines Defendants’ contractual promises made in the deposit agreement and other contractual account documents, the ways in which those promises changed over the years, and the ways in which Plaintiffs allege Defendants breached those contractual promises by charging overdraft fees as a result of debit card transactions with the Merchants.

16. On March 22, 2019, Defendants answered the Complaint, denying any and all liability to Plaintiffs or the Settlement Class. (ECF No. 10.) Bank of America has indicated, through counsel, that it believes it would ultimately prevail in its defense to the Action absent the Settlement.

III. Settlement of the Action

17. Following extensive discussions and preliminary negotiations, my co-Class Counsel and I attended two days of in-person mediation sessions with Defendants in Los Angeles, California, under the supervision of a retired United States Magistrate Judge and JAMS mediator.

18. Before entering into the Settlement, my co-Class Counsel and I conducted a thorough examination, investigation, and evaluation of the relevant law, facts, and allegations to assess the merits of the claims and potential claims to determine the strength of liability, potential remedies, and all defenses thereto.

19. We consulted with experts regarding the process by which a given transaction is classified as recurring or non-recurring, served discovery and obtained and reviewed voluminous data, documents and information from Bank of America, interviewed Bank of America employees, conducted our own independent research and evaluation regarding the facts relevant to this case, and conducted further legal research in to the claims and defenses proffered by Bank of America.

20. My co-Class Counsel also conducted confirmatory discovery to ensure that the terms of the Settlement were fair, reasonable, and adequate based on correct assumptions and facts. We verified important facts – including the size of the Settlement Class, the total fees incurred by the Settlement Class, the total number of overdrafts at issue, and the methodology utilized by Bank of America to compute those figures.

21. Through these discovery efforts, we were able to determine that Bank of America collected a total of \$6,282,360 in fees as a result of the overdrafts at issue (representing 179,496 separate overdrafts, each incurring a \$35 overdraft fee) from 73,235 Settlement Class Members.

22. Before and during all settlement discussions and mediations, my co-Class Counsel and I had the benefit of all necessary documents and information to permit us to intelligently assess the Plaintiffs' claims and potential defenses thereto, and to thus conduct meaningful and informed settlement discussions on behalf of the Settlement Class.

23. The named Plaintiffs put themselves forward in litigating this case. In addition to lending their names to this matter, and thus subjecting themselves to significant public attention, the Class Representatives were actively engaged in this Action. Among other things, they (1) provided information, including copies of bank statements, contracts, and overdraft fee notices that spanned many periods, to assist Class Counsel in investigating the underlying facts, preparing the Complaint and other filings, and successfully resolving the Action; (2) reviewed pleadings and other case documents; (3) communicated on a regular basis with Class Counsel to stay apprised of the progress of the litigation and settlement negotiations; and (4) reviewed and approved the Settlement Agreement.

24. Subsequent to the two mediations, my co-Class Counsel and I engaged Defendants' counsel in extensive additional arms-length negotiations, through many telephone discussions and a number of in-person meetings, to finalize and memorialize all aspects of the Settlement Agreement, including each of its exhibits, and the plan for Class Notice.

IV. Selection of Proposed Settlement Administrator

25. Thereafter, my co-proposed Class Counsel and I coordinated a competitive bidding

process in which three nationally recognized and experienced Settlement Administration companies submitted bids to administer the administration of the Settlement, including the Class Notice and claims disbursement processes. Plaintiffs obtained and analyzed three (3) separate bids and discussed their contents with each administrator

26. At the conclusion of this competitive bidding process, the Parties agreed to engage KCC, LLC (“KCC”) to administer the Settlement, as well as to provide the Parties advice regarding the mechanics of the Notice and disbursement aspects of the proposed Settlement. Through a number of discussions and negotiations, my co-Class Counsel and I were also able to secure KCC’s agreement to establish a maximum, not-to-exceed service fee for it to perform all of the work and expenses in this Action.

27. The Settlement and its exhibits, the Notice Plan, and each document comprising the notice were negotiated separately through many in-person and telephonic meetings, were meticulously drafted by Class Counsel, and were the subject of exhaustive negotiations and phone calls, and multiple rounds of revisions to refine each component of the Settlement. Additionally, KCC provided meaningful input on all of the notice documents, so as to ensure these materials are comprehensive and easy to read and understand by members of the Settlement Class, and that they fully comply with due process, CAFA, and all requirements of Rule 23.

28. On June 4, 2019, after months of negotiations, the Parties executed the Settlement Agreement. At all times during settlement discussions, the negotiations were at arm’s length. Furthermore, it was always Class Representatives’ and Class Counsel’s primary goal to achieve the maximum substantive relief possible for the Class.

V. Preliminary Settlement Approval and Implementation of the Notice Plan

29. My co-Class Counsel and I prepared and filed Class Representatives’ Unopposed Motion for Preliminary Approval of Class Action Settlement (“Motion for Preliminary Approval”) and all the supporting documents, declarations, and exhibits. (ECF Nos. 26-29.)

30. After the Court preliminarily approved the Settlement on September 16, 2019 (ECF No. 30), the Parties continued to work with the Settlement Administrator to supervise

dissemination of Notice to Settlement Class Members.

31. These efforts included drafting and formatting the Settlement Website, the script for the automated response to the toll-free number, and the Notice forms, as well as monitoring exclusion requests and promptly responding to each and every Settlement Class Member inquiry we received regarding the Settlement.

CLASS COUNSEL'S CONTRIBUTIONS TO THE ACTION

32. Under the Settlement, the Parties agreed that Class Counsel may file an application for a Fee and Expense Award (not to exceed one-third of the Settlement Fund (or \$1,650,000), plus reasonable out-of-pocket litigation costs (estimated at approximately \$20,000)) and for Service Payments to the Class Representatives (not to exceed \$2,500 each), which under the terms of the Settlement Agreement are to be paid from the Settlement Fund. Each of these amounts was disclosed to Settlement Class Members in the Class Notice.

33. The deadline for Settlement Class Members to opt-out of or object to the Settlement is December 20, 2019. As of the date of this Declaration, no objections have been filed to any aspect of the Settlement or to the requested Service Payments or Fee and Expense Award, and only 14 of the 73,235 Settlement Class Members have submitted requests for exclusion from the Settlement.

34. In addition to the substantial amount of attorney time HH expended prosecuting this matter, HH also incurred \$3,535.50 in out-of-pocket litigation costs in this matter. This figure includes necessary filing fees, service of process fees, postage costs, investigative fees and costs, and transportation costs. These costs and expenses were necessary to the investigation, prosecution and settlement of this Action.

35. HH represented the Class Representatives and the Settlement Class on a purely contingent basis. At the time my firm agreed to represent the Class Representatives and the then-putative Settlement Class in this matter, we faced numerous substantial risks of non-recovery to the Settlement Class (and thus non-payment for our services) given the novel and complex issues involved and the strength of the defenses raised by the Defendants, through their highly

experienced and capable counsel.

36. These risks of non-payment in this case incentivized HH, along with co-Class Counsel, to work efficiently, to prevent duplication of effort, and to advance expenses responsibly. I have made a conscious effort to minimize the duplication of work by efficiently staffing the case and avoiding multiple attorneys working on the same assignment.

37. Despite the risks we faced from the outset, my firm nonetheless devoted a substantial amount of time and other resources prosecuting this matter for the benefit of the Settlement Class, forcing us to pass on representing other clients in matters that we otherwise would have taken on.

38. Based on my experience, I anticipate expending additional time and resources to perform the work that remains in this case, in the settlement approval process and beyond.

39. As detailed above, the terms of the Settlement were negotiated at arm's length with the assistance of a neutral mediator, and the Settlement was only entered into after Class Counsel had conducted meaningful discovery, investigated the key facts underlying the claims, analyzed the applicable legal principles, fully evaluated the strength and weaknesses of the Settlement Class's claims, and thoroughly conferred with the Representative Plaintiffs concerning the foregoing and the terms of the proposed Settlement. I believe that the Settlement we negotiated in this matter confers substantial monetary relief to Class Members.

40. As I previously stated in support of the Settlement's preliminary approval, I continue to strongly believe that the proposed Settlement is fair, reasonable, and adequate, and that it constitutes an excellent result for the Settlement Class in this case.

CLASS REPRESENTATIVES' CONTRIBUTIONS TO THE ACTION

41. Each of the Class Representatives was significantly involved in this litigation from the time he or she became involved, vigorously prosecuted the action on behalf of the Settlement Class, and provided substantial assistance to my firm and our co-Class Counsel in advance of and throughout the litigation and during settlement negotiations. In particular, each of the Class Representatives: (1) provided information, including copies of bank statements and overdraft fee

notices, to assist Class Counsel in investigating the underlying facts, preparing the Complaint and other filings, and successfully resolving the Action; (2) reviewed pleadings and other case documents; (3) communicated on a regular basis with Class Counsel to stay apprised of the progress of the litigation and settlement negotiations; and (4) reviewed and approved the Settlement Agreement. But for the Representative Plaintiffs' contributions to this matter, the substantial benefits to the Settlement Class provided under the Settlement could not have been obtained.

42. Each of the Class Representatives willingly contributed his or her own time to this matter for the benefit of the Settlement Class, without receiving any payment or being promised any payment. The requested Service Awards seek only to compensate the Class Representatives for their time, effort, and substantial and meaningful contributions to this case on behalf of the Settlement Class.

I declare under penalty of perjury pursuant to the laws of the United States of America that the foregoing is true and correct. Executed this 29th day of November 2019 in Miami, Florida.


Frank S. Hedin