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, on behalf of themselves and 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

CLASS REPRESENTATIVES' AND CLASS COUNSEL'S UNOPPOSED MOTION FOR SERVICE PAYMENTS AND A FEE AND EXPENSE AWARD[1]

Pursuant to Federal Rule of Civil Procedure 23(e) and the Court's September 16, 2019 Order (ECF No. 30) preliminarily approving the Settlement in this matter, Class Representatives Kenneth D. Owens, Samantha A. Holley, Kara L. Gariglio, Nicoletta Pantelyat, Isabelle Scherer, Jonathan Tule, and Kelsea D. Wiggins and Class Counsel at Hedin Hall LLP and Ahdoot & Wolfson, PC respectfully submit this Unopposed Motion for Service Payments and a Fee and Expense Award (the "Motion"), and in support thereof state as follows:

I. INTRODUCTION

This consumer class action concerns Bank of America's assessment of overdraft fees on non-recurring transactions with certain Merchants. Class Counsel negotiated a Settlement that ranks, on a percentage-of-total-damages basis, among the best recoveries achieved for a class of consumers in an overdraft fee litigation. The Settlement requires Bank of America to establish a non-reversionary Settlement Fund, for the benefit of the Settlement Class, in the amount of $4.95

[1] Unless otherwise defined herein, all capitalized terms have the same force, meaning, and effect as ascribed in the "Definitions" section of the Settlement Agreement (ECF No. 27-1, ("Settlement" or "SA") ¶¶ 1-57).

million. This amount represents approximately 79% of the total revenues collected by Bank of America from Settlement Class Members ("Class Members") (approximately $6.28 million) as a result of the allegedly wrongful conduct averred in the Complaint. Moreover, unlike most class settlements where class members must submit claim forms in order to receive payments, in this case, Class Members need not submit claim forms at all to receive payments. Rather, each Class Member who does not opt out will *automatically* receive a cash payment (either by direct deposit to their bank account or *via* check to the extent their bank account is no longer open). Even after deducting all Settlement Administration Expenses, the requested Service Payments, and the Fee and Expense Award from the Settlement Fund, each Class Member is projected to automatically receive $17.53 for *each* overdraft fee incurred as a result of a debit card transaction with any of the Merchants at issue. Many Class Members will receive hundreds of dollars automatically deposited into their Bank of America accounts or sent to them by check upon the Settlement's final approval.

To achieve the Settlement, Class Counsel devoted a considerable amount of time and other resources investigating, prosecuting, and negotiating a resolution to the Action, all in the face of numerous risks of non-recovery to the Settlement Class and thus non-payment to Class Counsel. Class Representatives alleged that Bank of America breached its contract with accountholders by assessing them $35.00 fees for overdrafts caused by "non-recurring" (as opposed to "recurring") debit card transactions – a novel theory of liability that implicated many complex and uncertain issues for which limited precedent existed. But for Class Counsel's efforts identifying, investigating, and prosecuting these claims, it is unlikely that any members of the Settlement Class would have recovered any relief for these claims, much less the substantial $4.95 million recovered under the Settlement. Simply put, Class Counsel obtained an exemplary result for the Settlement Class in a case rife with risk.

Accordingly, Class Representatives and Class Counsel respectfully request that the Court approve: (1) Service Payments of $2,500 to each of the seven Class Representatives (for a total of $17,500 in Service Payments) in recognition of their important roles in this litigation; and (2) a

Fee and Expense Award to Class Counsel of $1,668,829.07, which includes one-third of the Settlement Fund ($1,650,000) and $18,829.07 in out-of-pocket litigation expenses incurred by Class Counsel. The requested awards are firmly supported by Eleventh Circuit precedent and well within the range of reasonableness for the services provided to the Settlement Class in this case.

The Motion should be granted, and the requested Service Payments and Fee and Expense Award should be approved.

II. BACKGROUND FACTS

A. Class Counsel Devoted Substantial Time and Other Resources Investigating, Commencing, and Prosecuting the Claims Alleged in this Action

Many months before the filing of this Action, Class Counsel commenced a wide-ranging pre-filing investigation into the relevant facts and law giving rise to the Class Representatives' claims. (*See* concurrently filed Declarations of Frank S. Hedin ("Hedin Decl.") ¶¶ 11-14 and Robert R. Ahdoot ("Ahdoot Decl.") ¶¶ 4-7.)

Class Counsel's investigation included, *inter alia*, interviewing dozens of Bank of America deposit account holders, analyzing hundreds of account holders' bank statements and overdraft fee notices, detailed analysis of the business practices of the Merchants for all years within the Class Period, and thoroughly reviewing various iterations of Bank of America's Deposit Agreement, the contractual document governing debit card account holders' relationships with Bank of America. (*Id.*) Class Counsel reviewed publicly accessible social media posts and complaints that consumers had "tweeted" to Bank of America regarding issues relevant to this matter, together with Bank of America's responses thereto. (*Id.*) Class Counsel made similar investigations and searches regarding the Merchants. And to gain a full picture of the financial services technologies that underlie these claims, Class Counsel conducted a detailed investigation into the technology (including publicly accessible APIs) used by various payment processors involved in the initiation, authorization, coding and classifying of the transactions in question. (*Id.*)

In developing the theory of liability in this case, Class Counsel 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 Settlement Class to maximize the likelihood of prevailing at class certification. (Hedin Decl. ¶ 12; Ahdoot Decl. ¶ 5.) Class Counsel 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.[2] (Hedin Decl. ¶ 13; Ahdoot Decl. ¶ 6.) Additionally, Class Counsel 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 Class Representatives (or any Class Members) and the Merchants whose transactions triggered the overdraft fees in this case. (Hedin Decl. ¶ 14; Ahdoot Decl. ¶ 7.)

On February 15, 2019, Class Representatives initiated this Action by filing the Complaint. (ECF No. 1.) On March 22, 2019, Bank of America filed its Answer to the Complaint. (ECF No. 10.) Bank of America denies any and all liability to Class Representatives and the Settlement Class. Bank of America has indicated, through counsel, that it believes it would ultimately prevail in its defense to the Action absent the Settlement. (Hedin Decl. ¶ 16; Ahdoot Decl. ¶ 9.)

B. Class Counsel Engaged in Arms'-Length Settlement Negotiations Over the Course of Several Months

The Settlement was reached as a result of extensive arms'-length negotiations (in conjunction with the exchange of documents and information between the Parties), over the course of many months. (Hedin Decl. ¶¶ 17-28; Ahdoot Decl. ¶¶ 10-21.) After extensive preliminary negotiations, the Parties attended two days of in-person mediation sessions in Los Angeles, California, under the supervision of a retired United States Magistrate Judge and JAMS mediator.

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[2] *See e.g. Bodnar v. Bank of America*, Case No. 5:14-cv-03224-EGS (E.D. Penn), ECF No. 73-2 (Jan. 13, 2016) (settlement agreement and release in a matter involving overdrafts charged by Bank of America on certain debit card transactions; <http://www.bankofamericaoverdraftsettlement.com/en> (last visited November 21, 2019)). This process was ongoing, and Class Counsel continued to monitor others matters that could affect the rights of the putative Class in this Action. *See e.g. Farrell v. Bank of America*, Case No. 3:16-cv-00492-L-WVG (S.D. Cal.) ECF No. 69-2 (Oct. 31, 2017) (settlement agreement and release in a matter involving "extended" overdraft charges imposed by Bank of America on deposit accounts).

(Hedin Decl. ¶ 17; Ahdoot Decl. ¶ 10.) Before and during their settlement discussions and mediations, the Parties exchanged documents and data on an arms'-length basis to enable Class Representatives and Class Counsel to adequately evaluate the scope of the potential class-wide liability, and intelligently engage in meaningful settlement discussions on behalf of the Settlement Class. (Hedin Decl. ¶ 18; Ahdoot Decl. ¶ 11.)

The Parties engaged in arms'-length negotiations through many discussions and in-person meetings, both between and after the two mediations, and ultimately agreed on the principal terms of the proposed Settlement. (Hedin Decl. ¶¶ 17-28; Ahdoot Decl. ¶¶ 10-21.) Although the Parties reached an agreement in principle, several details of the Settlement remained unresolved. The Parties thus worked diligently and expended additional time and effort to negotiate and finalize the terms of a written settlement agreement and the number of ancillary documents and the plan for Class Notice. (Hedin Decl. ¶ 24; Ahdoot Decl. ¶ 16.)

The Parties held a competitive bidding process to procure claims administration estimates from well-known settlement administration companies, at the conclusion of which the Parties selected KCC, LLC ("KCC") as the proposed Settlement Administrator. (Hedin Decl. ¶ 26; Ahdoot Decl. ¶ 18.) The Notice Plan and each document comprising the Class Notice were negotiated and exhaustively refined, with input from experts at KCC, to ensure that these materials will be clear, straightforward, and understood by members of the Settlement Class. (Hedin Decl. ¶ 27; Ahdoot Decl. ¶ 19.)

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. (Hedin Decl. ¶¶ 20-21; Ahdoot Decl. ¶¶ 13-14.) Class Counsel 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. (*Id.*) Through these discovery efforts, Class Counsel determined 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 Class Members. (Hedin Decl. ¶ 21;

Ahdoot Decl. ¶ 14.)

On June 4, 2019, after months of negotiations, the Parties executed the Settlement Agreement. (Hedin Decl. ¶ 28; Ahdoot Decl. ¶ 20.) 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. (Hedin Decl. ¶ 28; Ahdoot Decl. ¶¶ 20-21.)

C. Preliminary Settlement Approval and Implementation of the Court-Approved Notice Plan

After the lengthy process that led to finalization of the Settlement, Class Counsel prepared and filed Class Representatives' Unopposed Motion for Preliminary Approval of Class Action Settlement ("Motion for Preliminary Approval"), which included supporting documents, declarations, and exhibits. (ECF Nos. 26-29.) As discussed therein, despite the risk and uncertainty and class certification and continued litigation, the Settlement is an outstanding result for the Settlement Class.

On September 16, 2019, the Court preliminarily approved the Settlement, finding the terms of the Settlement "fair, reasonable, and adequate in light of the relevant factual, legal, practical, and procedural considerations of the Action." (ECF No. 30 ¶ 6.) After the Court preliminarily approved the Settlement, the Parties continued to work with the Settlement Administrator to supervise dissemination of Notice to Class Members. (Hedin Decl. ¶¶ 30-31; Ahdoot Decl. ¶¶ 25-26.) These efforts included review and drafting of the language and format of the Settlement Website, the script for the automated response to the toll-free number, the language and format of the Notice forms, monitoring exclusion requests and objections, and ensuring prompt response to each and every Class Member inquiry regarding the Settlement. (*Id.*)

D. Class Counsel Achieved an Excellent Result for the Settlement Class

As a result of the diligence and efficiency with which this litigation was prosecuted, Class Counsel secured a Settlement that provides *immediate* and *substantial* relief to Class Members in exchange for the Release. (*See* SA ¶¶ 51, 111-113.) The material terms of the Settlement were set

forth in Class Representatives' Motion for Preliminary Approval, are incorporated herein, and are only briefly summarized below. (ECF No. 26.)

The Settlement requires Bank of America to establish an all-cash, non-reversionary Settlement Fund in the amount of $4,950,000—a sum representing 79% of the total aggregate value of the overdraft fees paid by the Settlement Class ($6.28 million) as a result of Bank of America's allegedly wrongful conduct—which, assuming final approval is granted, will be *automatically* distributed[3] (after first deducting Administration Expenses, Service Payments, and attorneys' fees and expenses authorized by the Court) to each of the 73,235 Class Members.

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), all to be paid from the Settlement Fund. (Hedin Decl. ¶ 32; Ahdoot Decl. ¶ 27.) These amounts were disclosed to Class Members in the Class Notice. (*Id*.)

Following the dissemination of the Notice pursuant to the Settlement Agreement, no objections have yet been filed to any aspect of the Settlement or to the requested Service Payments or Fee and Expense Award. (Hedin Decl. ¶ 33; Ahdoot Decl. ¶ 28.)[4] To date, only 14 of the 73,235 Settlement Class Members have submitted requests for exclusion from the Settlement.

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[3] Unlike many class action settlements in which all claiming class members receive the same *pro rata* share of the fund (regardless of disparities in individual damages), Class Counsel negotiated a Settlement in which each Class Member will receive a payment from the Settlement that is based on the number of Merchant Overdraft Fees that he or she actually incurred. In other words, a Class Member who was charged 5 Merchant Overdraft Fees will receive five time the amount of money from the Settlement Fund as someone who incurred just one such Merchant Overdraft Fee. Not only is distribution of the Settlement Fund equitable, it occurs *automatically* and without any procedural hurdles whatsoever. Class Members need not submit a claim form or take any other action to receive payment from the Settlement.

[4] The deadline for Class Members to object to or opt out of the Settlement is December 20, 2019, ninety-five (95) calendar days after the Court's Preliminary Approval Order. (ECF No. 30 ¶¶ 11, 17.) Class Counsel will address any objections that are filed in the forthcoming Motion for Final Approval of the Settlement.

III. THE REQUESTED SERVICE PAYMENTS SHOULD BE APPROVED

Class Representatives respectfully request the Court to award modest Service Payments of $2,500 to each Class Representative, for a total of $17,500 in Service Payments.

Courts routinely award service payments to compensate named plaintiffs for their work on behalf of the class; to account for financial, personal, or reputational risks associated with litigation; and to encourage plaintiffs to step forward on behalf of unnamed class members in the future. *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1344 (S.D. Fla. 2007) ("Courts have found it appropriate to specially reward named class plaintiffs for the benefits they have conferred.").

In this case, the requested Service Payments of $2,500 for each of the seven named Class Representatives are well justified and reasonable. 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. (Hedin Decl. ¶ 41; Ahdoot Decl. ¶ 22.) Their dedication to this case is notable, particularly given the relatively small size of their personal financial stake.

Accordingly, the requested Service Payments are fair and reasonable and should be approved. *See, e.g., Chimeno-Buzzi v. Hollister Co., et al.*, No. 14-cv-23120, ECF No. 155 at 6-8 (S.D. Fla.) (Cooke, J.) (awarding service payments of $5,000 to each of two class representatives).

IV. THE REQUESTED FEE AND EXPENSE AWARD SHOULD BE APPROVED

Class Counsel respectfully request that the Court approve a total Fee and Expense Award of $1,668,829.07, which includes fees of one-third of the Settlement Fund ($1,650,000) and incurred expenses of $18,829.07.

Courts strongly encourage negotiated fee awards in class action settlements. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of the fee."). Thus, "it is well established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to an allowance of attorneys' fees based upon the benefit obtained." *Gevaerts v. TD Bank, N.A.*, No. 11:14-cv-20744-RLR, 2015 WL 6751061, at *10 (S.D. Fla. Nov. 5, 2015) (citing *Camden I Condo Ass'n v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991) ("*Camden I*")); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1358 (S.D. Fla. 2011); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

In this case, the requested Fee and Expense Award of one-third of the Settlement Fund plus unreimbursed litigation expenses, which Bank of America does not oppose, is (1) supported by Eleventh Circuit precedent and consistent with approved fee awards in similar cases in this District; and (2) reasonable in light of the additional "*Johnson*" factors that district courts of the Eleventh Circuit may also consider in awarding fees in class action settlements.

A. The Requested Award of One-Third of the Settlement Fund Plus Costs is Consistent with the "Trend in this Circuit," as Many Recent Fee Awards in this District Illustrate

Where a class suit produces a fund for the class, as is the case here, district courts of the Eleventh Circuit calculate attorneys' fees "based upon a reasonable percentage of the fund established for the benefit of the class." *Gevaerts*, 2015 WL 6751061, at *10 (quoting *Camden I,* 946 F.2d at 774); *see also see Camden I*, 946 F.2d at 774 (holding that "the percentage of the fund approach [as opposed to the lodestar approach] is the better reasoned in a common fund case").

In terms of the percentage of the fund to award, "the trend in this Circuit" is to award class counsel one-third (1/3) of the common settlement fund, in addition to out-of-pocket litigation expenses reasonably incurred by class counsel. *Reyes v. AT&T Mobility Servs., LLC*, No. 10-20837-CV, 2013 WL 12219252, at *3 (S.D. Fla. June 21, 2013) (Cooke, J.); *see also, e.g., Wolff v. Cash 4 Titles*, No. 03–22778–CIV, 2012 WL 5290155, at *4 (S.D. Fla. Sept. 26, 2012) (awarding class counsel attorneys' fees of one-third of settlement fund in addition to costs, and explaining

that "[t]he requested fee of 33% is at the market rate which the Class could have negotiated at the beginning of this matter" and "is considered standard in a contingency fee agreement"); *Atkinson v. Wal-Mart Stores, Inc.*, No. 8:08-CV-691-T-30TBM, 2011 WL 6846747, at *7 (M.D. Fla. Dec. 29, 2011) (awarding "customary fee" of one-third of the settlement fund); *Gutter v. E.I. DuPont De Nemours & Co.,* No. 1:95–cv–02152–ASG, ECF No. 626 at 7 (S.D. Fla. May 30, 2003) (same); *In re Terazosin Hydrochloride Antitrust Litig.,* No. 1:99–md–01317–PAS, ECF No. 1557 at 8–10 (S.D. Fla. Apr. 19, 2005) (same); *Cabot E. Broward 2 LLC v. Cabot,* No. 16-61218-CIV, 2018 WL 5905415, at *4 (S.D. Fla. Nov. 9, 2018) (same); *Legg v. Spirit Airlines, Inc.*, No. 14-61978-CIV, 2016 WL 8670162, at *3 (S.D. Fla. Aug. 2, 2016) (same); *Wood v. J Choo USA, Inc.*, No. 15-CV-81487, 2017 WL 4304800, at *5 (S.D. Fla. May 9, 2017) (same); *Diakos v. HSS Sys., LLC*, No. CV 14-61784-CIV, 2016 WL 3702698, at *6 (S.D. Fla. Feb. 5, 2016) (same); *Morgan v. Pub. Storage*, 301 F. Supp. 3d 1237, 1257-58 (S.D. Fla. 2016) (same); *Lunsford v. Woodforest Nat'l Bank*, No. 1:12-CV-103-CAP, 2014 WL 12740375, at *10 (N.D. Ga. May 19, 2014) (same); *Seghroughni v. Advantus Rest., Inc.*, No. 8:12-CV-2000-T-23TBM, 2015 WL 2255278, at *1 (M.D. Fla. May 13, 2015) (same); *Morefield v. NoteWorld, LLC*, No. 1:10–CV–00117, 2012 WL 1355573 (S.D. Ga. April 18, 2012) (same).

In fact, district courts of the Eleventh Circuit, including the Southern District of Florida, frequently award attorneys' fees to class counsel in excess of one-third of the common settlement fund. *Gevaerts*, 2015 WL 6751061, at *10 (explaining that "an upper limit of 50% of the fund may be stated as a general rule"); *see, e.g., Fernandez v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 15-22782-CIV, 2017 WL 7798110, at *4 (S.D. Fla. Dec. 18, 2017) (35% of $25 million settlement fund); *Barba v. Shire U.S., Inc.*, No. 13-cv-21158, ECF No. 441 (S.D. Fla. Dec. 2, 2016) (35% of $14.75 million fund); *see also, e.g., Atkinson*, 2011 WL 6846747, at *7 ("[T]he Court finds that Class Counsel's fee agreements with clients usually provide for a fee of between 33⅓% to 40% to trial, and 40% to 45% on appeal. The customary fee for the clients and the class is at least 33⅓%. The fee requested is well within the range common for class action fee awards.").

Thus, by any measure, the requested Fee and Expense Award of one-third (1/3) of the common, non-reversionary Settlement Fund (in addition to Class Counsel's out-of-pocket expenses) is fair and reasonable and should be approved. *See Camden I*, 946 F.2d at 774-775; *see also, e.g., Reyes*, 2013 WL 12219252, at *3 (Cooke, J.) (using the "percentage of recovery" method and awarding fee of one-third of common settlement fund in addition to costs to class counsel, which the court explained is "consistent with the dictates of the Eleventh Circuit") (citing *Camden I*, 946 F.2d at 771); *Chimeno-Buzzi*, No. 14-cv-23120, ECF No. 155 at 6-8 (Cooke, J.) (awarding one-third of common settlement fund to class counsel as fee award).

B. The *Johnson* Factors Confirm the Reasonableness of the Requested Fee

Moreover, each of the various *Johnson* factors that district courts of the Eleventh Circuit occasionally consider in awarding fees in class-action settlements further supports the reasonableness of the Fee and Expense Award requested in this case.

Pursuant to *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974), the Court may consider the following factors to confirm the reasonableness of the requested Fee and Expense Award of one-third of the Settlement Fund: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and the length of the professional relationship with the client; (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19; *see also Camden I*, 946 F.2d at 772 n.3.

Each of these factors weighs in favor of approving the requested Fee and Expense Award.

1. The Time and Labor Required, Preclusion from Other Employment and the Time Limits Imposed Justify the Requested Fee Amount

The first, fourth and seventh *Johnson* factors–the time and labor, preclusion of other employment, and time limitations imposed—each supports the reasonableness of the requested

Fee and Expense Award.

While Class Counsel secured the Settlement expeditiously, bringing this case to a successful resolution demanded a significant commitment of time and work by a team of experienced lawyers, beginning long before the Action was formally initiated in this Court. (Hedin Decl. ¶¶ 34-39; Ahdoot Decl. ¶¶ 30-34.) Class Counsel's efforts included, *inter alia*, an extensive pre-suit and post-filing investigation of the facts and legal issues regarding the potential claims, communications with potential plaintiffs and class members, pre-suit communications with Bank of America, in-depth analyses of voluminous sets of documents and electronically-stored data produced by Bank of America, drafting the Complaint, participating in two in-person mediation sessions, engaging in countless settlement discussions and negotiations before and after mediation, drafting the written Settlement Agreement and all of its exhibits, and drafting Class Representatives' Motion for Preliminary Approval and all supporting documents. (Hedin Decl. ¶¶ 11-31; Ahdoot Decl. ¶¶ 10-26.) Beyond settlement approval, Class Counsel have invested additional time in supervising dissemination of Class Notice and responding to Class Member inquiries and drafting this Motion. (Hedin Decl. ¶¶ 30-31; Ahdoot Decl. ¶¶ 25-26.)

All told, Class Counsel devoted substantial hours of attorney time and thousands of dollars of costs investigating, prosecuting, and resolving this litigation. Class Counsel invested these resources for the benefit of the Settlement Class, notwithstanding the many serious risks of non-recovery posed by the novel, complex, and uncertain nature of the claims alleged. (Hedin Decl. ¶¶ 34-38; Ahdoot Decl. ¶¶ 30-34.) The time and resources expended on the Action to date have forced Class Counsel to forgo representing consumers in other matters that they otherwise would have taken on. (Hedin Decl. ¶ 37; Ahdoot Decl. ¶ 30.) Moreover, Class Counsel will continue to expend substantial additional time and other resources to perform the work that remains in this case, in the Settlement approval process and beyond. (Hedin Decl. ¶ 38; Ahdoot Decl. ¶ 29.)

The substantial time and resources that Class Counsel have devoted (and will continue to devote) to this matter weigh in favor of approving the requested Fee and Expense Award. *See Thorpe v. Walter Inv. Mgmt. Corp.*, No. 1:14-CV-20880-UU, 2016 WL 10518902, at *8 (S.D. Fla.

Oct. 17, 2016) (granting request for fees equal to 33.3% of the common fund where class counsel "devoted significant time and resources to researching, investigating, and prosecuting" the case); *Yates v. Mobile Cty. Pers. Bd.*, 719 F.2d 1530, 1535 (11th Cir. 1983) ("The expenditure of 1,000 billable hours … necessarily had some adverse impact upon the ability of counsel for plaintiff to accept other work, and this factor should raise the amount of the award."); *Cabot*, 2018 WL 5905415, at *2 ("It also bears noting that Class Counsel has committed to work … to facilitate the claims process … such an additional undertaking [i]s an important factor in determining an award of attorneys' fees.").

2. This was High Risk and Undesirable Litigation that Presented Many Complex and Novel Issues and no Guarantee of Recovery

The second, sixth and tenth *Johnson* factors–the novelty and difficulty of the questions, the contingent nature of the case, and the undesirability of the case—also support the requested Fee and Expense Award.

In addition to the typical risks of non-payment present in complex class action litigation generally, the success of this Action turned on several unusually complex, novel, and difficult issues that posed many risks of non-recovery for the Settlement Class and thus non-payment for Class Counsel. Factually speaking, the claims alleged in the Action arose from the misclassification of certain Merchant debit card transactions as "recurring" on account holders' bank statements. Class Representatives' theory of liability turned not on the party responsible for actually misclassifying the transactions but on the contractual promises made in the Deposit Agreement that provided immunity to the "non-recurring" variety, regardless of the classification actually assigned to a given transaction. As a result, Class Counsel necessarily conducted an extensive investigation of Defendants' business practices, the various versions of their Deposit Agreement in existence from during the time period at issue, their methods of processing debit card transactions, and the nature of their relationships with the Merchants and other third-parties.

The case involved complex legal issues as well. Over the course of the Parties' settlement negotiations as well as in Bank of America's Answer to the Complaint, Bank of America raised a

number of defenses to Class Representatives' claims including, *inter alia*: (1) the Complaint fails to state a claim for breach of contract on the grounds that the Deposit Agreement authorized the assessment of overdraft fees where one-time debit card transactions were classified as "recurring" by Merchants (*see* ECF No. 10 (Answer) at 13, 15 (affirmative defenses one, two, fifteen, eighteen, and nineteen)); (2) Class Representatives failed to satisfy all "conditions precedent" to filing suit, including by not notifying Bank of America of the improperly-assessed overdraft fees at issue within the period of time set forth in both the "Reporting Problems" section of the Deposit Agreement and the Electronic Fund Transfer Act (*see id.* (affirmative defense seven)); (3) the claims alleged in the Complaint are preempted by the National Banking Act, 12 U.S.C. § 21, *et seq*. (*see id.* at 14 (affirmative defense ten)); and (4) Class Representatives' claims are barred by the applicable statute of limitations (*see id.* at 14 (affirmative defense twelve)). If Bank of America were to prevail on any one of the foregoing defenses, the case would be over, and Class Representatives and Class Members would be entitled to no relief.

The defenses asserted by Bank of America presented difficult legal issues on which relatively little precedent exists because, as noted above, the Action is one of the first of its kind to present a legal challenge to the propriety of certain large categories of overdraft fees assessed against consumer deposit accounts in this country. That Class Counsel achieved an excellent result in spite of these considerable open issues supports the reasonableness of the requested fees. *Ressler v. Jacobson*, 149 F.R.D. 651, 654 (M.D. Fla. 1992) ("The difficulty of the legal and factual questions presented significant hurdles in achieving this settlement [for] the Class."); *Cabot*, 2018 WL 5905415, at *3 (citing *Johnson*, 488 F.2d at 718) ("cases of first impression such as this 'generally require more time and effort on the attorney's part,' and 'he should not be penalized for undertaking a case which may 'make new law' … 'instead, he should be appropriately compensated for accepting the challenge.'").

The lack of competition among the plaintiffs' bar for control of this litigation further demonstrates the difficult, undesirable nature of the case at the outset and thus further supports the reasonableness of the requested Fee and Expense Award. In considering a fee request in a

contingency class action settlement, courts consider how the legal market would have assessed the case's risk at its inception and, in turn, how the market's risk assessment would have affected a hypothetical *ex ante* fee negotiation between counsel and potential client. *See Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007) ("In deciding fee levels in common fund cases" such as the instant matter, courts must "do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.") (quotation omitted); *Goodell v. Charter Commc'ns, LLC*, No. 08-CV-512-BBC, 2010 WL 3259349, at *1 (W.D. Wis. Aug. 17, 2010) ("The question is not how risky the case looks when it is at an end but how the market would have assessed the risks at the outset."). Both at the time Class Counsel commenced their investigation into this matter and when they initiated the Action several months later, no other case was on file against Bank of America alleging these claims. Thus, in determining whether to meet Class Counsel's fee at the outset of this case, the Settlement Class would have known that no other firm had come forward to offer its services in this matter to the Settlement Class or individual participants. Moreover, even after Class Counsel commenced the litigation and the Action was mentioned several times in the legal news journals, no other counsel came forward to compete with Class Counsel for control of the case, to propose to the Court that it be appointed lead counsel at a lower fee structure, or to offer to share in the case's risk and expense with Class Counsel.

The market thus judged this to be a high-risk case. Competition for control is brisk when lawyers think cases have significant potential to generate large recoveries and significant attorney's fees. *See In re Synthroid Marketing Litig.*, 325 F.3d 974, 979 (7th Cir. 2003). Thus, as Judge Easterbrook once observed: "Lack of competition not only implies a higher fee but also suggests that most members of the . . . bar saw this litigation as too risky for their practices." *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013). That is exactly the case here. Other attorneys and firms chose to pass on offering representation to the Settlement Class in because they found it not worth the risk, firmly establishing that Class Counsel would have been able to obtain the requested fee of one-third of the Settlement Fund plus costs in an *ex ante*

negotiation with the Settlement Class. *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1364 ("'Undesirability' and relevant risks must be evaluated from the standpoint of plaintiffs' counsel as of the time they commenced the suit, not retroactively, with the benefit of hindsight.").

Although Class Counsel knew that this litigation would be lengthy, complex, labor-intensive, and downright risky, Class Counsel accepted the case on a contingent basis and plowed forward nonetheless, expending hundreds of hours of time and incurring substantial costs for the benefit of the Settlement Class.

Class Counsel should be rewarded for taking on this case and tirelessly performing all of the important work necessary to achieve the Settlement without any guarantee of recovery for the Settlement Class or receiving payment for their services. *See Pinto*, 513 F. Supp. 2d at 1339 ("A determination of a fair fee for Class Counsel must include consideration of the contingent nature of the fee, the wholly contingent outlay of out-of-pocket sums by Class Counsel, and the fact that the risks of failure and nonpayment in a class action are extremely high."); *In re Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2013 WL 11319244, at *15 (S.D. Fla. Aug. 2, 2013) ("A contingency fee arrangement often justifies an increase in the award of attorney's fees.").

Accordingly, the second, sixth and tenth factors weigh in favor of approving the requested Fee and Expense Award.

3. Class Counsel Achieved an Excellent Result for the Settlement Class

The eighth *Johnson* factor focuses on the "monetary results achieved" for the Class. This is a major factor in assessing the reasonableness of a requested fee award. *See e.g., Hensley,*, 461 U.S. at 436 ("critical factor is the degree of success obtained"); *Pinto*, 513 F. Supp. 2d at 1342 ("The result achieved is a major factor to consider in making a fee award."); *Behrens v. Wometco Enterprises, Inc.,* 118 F.R.D. 534, 547–48 (S.D. Fla. 1988) ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained.").

The $4.95 million Settlement Fund represents approximately 79% of the total aggregate value of the overdraft fees paid by the Settlement Class ($6.28 million) as a result of Bank of America's allegedly wrongful conduct—an excellent result that ranks among the highest

recoveries, on a percentage-of-total damages basis, ever achieved in an overdraft fee class action. *Cf., e.g., In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1346 (S.D. Fla. 2011) (overdraft fee settlement against Bank of America recovering between approximately 9% and 45% of the maximum damages recoverable at trial); *Bodnar v. Bank of Am., N.A.*, No. CV 14-3224, 2016 WL 4582084, at *4 (E.D. Pa. Aug. 4, 2016) (overdraft fee settlement against Bank of America recovering between approximately 13% and 48% of the maximum damages recoverable at trial); *Farrell v. Bank of America*, Case No. 3:16-cv-00492-L-WVG (S.D. Cal.) ECF No. 69-1 at 22 (Oct. 31, 2017) (overdraft fee settlement against Bank of America recovering approximately 9% of the maximum damages recoverable at trial).

Far from the "fraction of the potential recovery" so often obtained for consumers in class action settlements (most of which are nonetheless routinely approved), *see Behrens*, 118 F.R.D. at 542, the $4.95 million Settlement in this case represents a substantial majority of the Settlement Class's potentially recoverable damages. By any reasonable measure, this is an outstanding result for the Settlement Class. That the Settlement Fund (after deducting all Settlement-related fees and expenses) will be *automatically* distributed to Class Members without requiring the filing of claims to collect Settlement benefits underscores that point.

Accordingly, this factor weighs in favor of approving the requested Fee and Expense Award.

4. The Requested Fee is Consistent with Customary Fees Awarded in Similar Cases

The fifth and twelfth *Johnson* factors – the customary fee, and awards in similar cases – also support approval of the requested Fee and Expense Award.

As previously discussed, an award of attorneys' fees to Class Counsel of one-third (1/3) the Settlement Fund is "consistent with the trend in this Circuit." *Reyes*, 2013 WL 12219252, at *3 (citing *Wolff*, 2012 WL 5290155, at *4 ("One-third of the recovery is considered standard in a contingency fee agreement.")); *see, e.g., supra* Section IV., Part A. (collecting cases). Indeed, district courts of the Eleventh Circuit, including the Southern District of Florida, frequently award

attorneys' fees to class counsel in amounts that exceed the one-third of the common Settlement Fund requested here. *See, e.g., id.* (collecting cases).

Class Counsel's requested fee award of one-third (1/3) the Settlement Fund is thus squarely in line with the customary percentage of the common fund awards to class counsel in the Eleventh Circuit and in this District. *See, e.g., Reyes*, 2013 WL 12219252, at *3 (Cooke, J.) (using the "percentage of recovery" method and awarding fee of one-third of common settlement fund in addition to costs to class counsel, which the court explained is "consistent with the dictates of the Eleventh Circuit") (citing *Camden I*, 946 F.2d at 771); *Chimeno-Buzzi*, No. 14-cv-23120, ECF No. 155 at 6-8 (Cooke, J.) (awarding one-third of common settlement fund to class counsel as fee award).

Accordingly, the fifth and twelfth factors weigh in favor of approving the requested Fee and Expense Award.

5. The Skill, Experience, Reputation, and Ability of Class Counsel

The remaining *Johnson* factors – the skill required to perform the legal services properly and the experience, reputation, ability of the attorneys, and the nature of the professional relationship with the clients – further confirm the reasonableness of the requested Fee and Expense Award.

As a threshold matter, the quality of Class Counsel's representation is best evidenced by the $4.95 million Settlement Fund, which will confer substantial monetary benefits to Class Members despite hard-fought litigation against sophisticated and well-financed Defendants represented by top-tier counsel. *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1334 (S.D. Fla. 2001) ("In assessing the quality of representation, courts have also looked to the quality of the opposition the plaintiffs' attorneys faced.").

This outstanding result was made possible by Class Counsel's extensive experience litigating class actions of similar size, scope, and complexity as this Action. (Hedin Decl. ¶¶ 2-10; Ahdoot Decl. ¶¶ 35-44 & Ex. A.) It was that experience, along with a lot of hard work, that allowed Class Counsel to develop and execute on such a comprehensive litigation strategy, overcome the significant obstacles raised by Defendants, and ultimately resolve the Action on favorable terms

for the Settlement Class.

Accordingly, the remaining *Johnson* factors weigh in favor of approving the requested Fee and Expense Award.

C. Class Counsel's Expenses Are Reasonable and Should Be Approved

Finally, the out-of-pocket litigation expenses for which Class Counsel seeks reimbursement, totaling $18,829.07, are also reasonable and should be approved.

Courts routinely note that attorneys in a class action are "entitled to reimbursement from the common fund for reasonable litigation expenses." *Fernandez*, 2017 WL 7798110, at *5; *Camden I*, 946 F.2d at 771 ("In accordance with the well-established common fund exception to the American Rule … class counsel herein are entitled to an award of their fees and expenses out of the fund that has been created for the class by their efforts."); *Ressler*, 149 F.R.D. at 657 (granting counsel's request for reimbursement of out-of-pocket costs and expenses and concluding that the "expenses were reasonable and necessary to obtain the settlement" in the case).

Class Counsel respectfully request reimbursement of reasonable litigation expenses incurred in litigating this matter in the amount of $18,829.07. This figure includes necessary filing fees, service of process fees, postage costs, investigative fees and costs, transportation costs, and professional fees paid by Class Counsel to the mediator and retained experts. (Hedin Decl. ¶ 34; Ahdoot Decl. ¶¶ 32-33.) These expenses and costs were necessary to the investigation, prosecution, and settlement of this Action and should be approved.[5] (*Id.*); *see also, e.g., Reyes*, 2013 WL 12219252, at *3 (Cooke, J.) (awarding class counsel fees of one-third of common settlement fund in addition to $23,000 in litigation costs).

V. CONCLUSION

For the foregoing reasons, Class Representatives and Class Counsel respectfully request that the Court: (i) award Service Payments of $2,500 to each of the Class Representatives (totaling $17,500 in Service Payments); and (ii) award Class Counsel a total Fee and Expense Award of

[5] Class Counsel also anticipate incurring additional expenses to see this case to completion, for which Class Counsel will not seek additional reimbursement.

$1,668,829.07, inclusive of fees of one-third of the Settlement Fund ($1,650,000) and expenses of $18,829.07.

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Respectfully submitted,

By: s/ *Frank S. Hedin*
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Counsel for the Settlement Class

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 29, 2019, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.

s/ *Frank S. Hedin*
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