UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:09-MD-02036-JLK

IN RE: CHECKING ACCOUNT OVERDRAFT LITIGATION

MDL No. 2036

THIS DOCUMENT RELATES TO:
FIRST TRANCHE ACTIONS

Tornes, et al. v. Bank of America, N.A.
S.D. Fla. Case No. 1:08-cv-23323-JLK

Yourke, et al. v. Bank of America, N.A.
S.D. Fla. Case No. 1:09-cv-21963-JLK
N.D. Cal. Case No. 3:09-2186

DEFENDANT'S MEMORANDUM IN RESPONSE TO OBJECTIONS REGARDING FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

Defendant Bank of America, N.A. ("BANA") submits this memorandum to address various objections that have been raised to the class action settlement agreed to by Plaintiffs and BANA ("Settlement") and to demonstrate why the Settlement is fair, reasonable, and adequate, and warrants the final approval of this Court.[1]

As this Court has observed, this $410 million Settlement "is the product of informed, good-faith, arms'-length negotiations between the parties . . . , reached with the assistance of a well-qualified and experienced mediator." Order Preliminarily Approving Class Settlement (Dkt. #1520, ¶ 12). Nevertheless, certain putative class members, numbering less than 60 out of more than 13.2 million comprising the Settlement Class, have objected to the Settlement. Those objections are in numerous respects uninformed, reflect an apparent misunderstanding of key aspects of Plaintiffs' claims, and fail to appreciate the hurdles of continued litigation and appeal. Significantly, none of them is supported by any proffered evidence or expert declaration.

Absent the Settlement, there is a substantial *risk* that Plaintiffs and the members of the Settlement Class ultimately would recover nothing at all. Moreover, even if they prevailed eventually, Plaintiffs would be required to invest substantial additional resources and time litigating in this Court and on appeal. Thus, there would be years of delay before the putative class members actually received any recovery. In light of these realities, the relief afforded by the Settlement is fair and reasonable and should promptly be approved by the Court.

ARGUMENT

"[I]n light of the strong judicial policy that favors settlements," which "has special importance in class actions with their notable uncertainty, difficulties of proof, and length," *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 538 (S.D. Fla. 1988), courts review proposed class action settlements to ensure they are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). This involves consideration of, among other things, the plaintiffs' likelihood of success

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[1] Consistent with the Settlement, BANA takes no position concerning Class Counsel's requested award for fees and expenses or requested service award for Plaintiffs.

and the complexity, expense, and duration of litigation. *See, e.g.*, *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *Behrens*, 118 F.R.D. at 538 & n.2, 543.[2] In objecting to the Settlement, certain putative class members vastly overestimate (either explicitly or implicitly) Plaintiffs' likelihood of success were this case to proceed and attempt to make unexplained and unsubstantiated comparisons between this Settlement and settlements reached in other cases. Many objectors also appear to be laboring under fundamental misconceptions and misunderstandings of key aspects of the Settlement and of the case as a whole. Upon review, the objections clearly lack merit and should be denied *in toto*.

I. THE CLASS MEMBER OBJECTIONS ARE ILL-INFORMED, MISPLACED AND LACK MERIT.

A. The Validity of Overdraft Fees Is Undisputed, and the Settlement Amount and Estimated Class Size Properly Reflect What Is Actually in Dispute.

Most of the objections presuppose overdraft fees are improper *per se* and class members are somehow entitled to a refund of *all* overdraft fees they have paid. Based upon this false premise, they contend the Settlement is insufficient because it requires BANA to pay back only *some* of the overdraft fees it collected during the class period. But BANA unquestionably has *express* authority under federal law to charge overdraft fees. What has been principally at issue in this litigation are the *incremental* or *additional* overdraft fees that BANA allegedly charged as a result of its posting order and other supposed improper business practices. The fairness of the Settlement must be evaluated in *that* context.

The Office of the Comptroller of the Currency ("OCC") has explicitly determined that a national bank's practice of permitting overdrafts of a deposit account, and of imposing fees for clearing such overdrafts, is part of the exercise of the bank's express power to engage in activities incidental to "receiving deposits." *See* OCC, Interpretive Letter No. 1082, 2007 WL 3341502, at *2 & n.8 (May 17, 2007) ("[C]learing overdrafts and assessing fees" are "activities

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[2] Plaintiffs' Final Approval Motion extensively discusses all of the requisite criteria for final approval of a class action settlement. Avoiding duplication, this memorandum instead focuses specifically on objections that have been made, Plaintiffs' likelihood of success, and the inherent unmanageability of trying this nationwide case as a class action.

that have long been considered as associated with (as well as necessary to) the administration of deposit accounts."). The OCC also has prescribed, by formal regulation, that a "[a] national bank may charge its customers non-interest charges and fees, including deposit account service charges." 12 C.F.R. § 7.4002(a). Applying this regulation, the courts have repeatedly held that overdraft fees are an authorized type of "non-interest charges and fees." *See Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041, 1051 (S.D. Fla. 1998), *aff'd*, 205 F.3d 1358 (11th Cir. 2000); *Terrell v. Hancock Bank*, 7 F. Supp. 2d 812, 816 (S.D. Miss. 1998).

Plaintiffs have never contended to the contrary. What Plaintiffs *have* alleged is that BANA's practices, including posting debit transactions from highest to lowest dollar amount, *increased* the number of overdraft fees charged on deposit accounts. Any damages that could be awarded in this case, therefore, would have to be measured by the *amount of that increase – i.e.*, the portion of total overdraft fees that would not have been assessed but for BANA's allegedly unlawful posting-order and other practices. That *increment* is only a small subset of the total number of overdraft fees assessed and paid. *See, e.g.*, *Gutierrez v. Wells Fargo Bank, N.A.*, 730 F. Supp. 2d 1080, 1093-94 (N.D. Cal. 2010) (finding that of the eight charges of overdraft fees for a named plaintiff, posting in chronological rather than high-to-low order would have avoided at most three), *appeal pending*, No. 10-16959 (9th Cir. 2010); *see also id.* at 1095 n.7 ("[T]he amount of restitution ordered herein will be strictly limited to overdraft penalties caused by high-to-low posting. Restitution will not be awarded for any overdraft fees that would have been assessed regardless of the bank's posting order."). This Settlement fairly and adequately accounts for the *incremental* number of overdraft fees attributable to BANA's allegedly unlawful practices.

In a similar vein, a number of objectors also complain that the Settlement Class size of 13.2 million is "too small" and fails to include all customers who paid overdraft fees. However, their thinking suffers from the same defect identified above. The only BANA customers who have a purported claim are those who paid *additional* overdraft fees caused by allegedly wrongful business practices, including posting order, and the class consists of this subset of

customers. Specifically, as provisionally certified by the Court, the Settlement Class consists of those BANA deposit account customers "who . . . incurred one or more Overdraft Fees *as a result of Debit Re-sequencing*." Preliminary Approval Order (Dkt. #1520) ¶ 5 (emphasis added). And the class size of roughly 13.2 million identifiable members was determined through an actual analysis of individual customer account records performed by Class Counsel's expert. (Dkt. #1471, Ex. A, ¶¶ 77, 79.)

B. Injunctive Relief Is Neither Necessary Nor Warranted As Part of the Settlement.

Certain objectors also protest that the Settlement fails to include injunctive relief. Repa Obj. at 8-9 (Dkt. #1935); Carapia Obj. at 8 (Dkt. #1936); S. Jones Obj. at 2 (Dkt. #1953). But there is no requirement that a settlement must provide for injunctive relief. Objectors certainly cite no authority for their contention; they merely complain that BANA should be required to change its overdraft practices and that the Settlement itself does not force the Bank to do so.

These objectors overlook the fact that, during the pendency of this litigation, banks were required by *federal law* to eliminate practices of which Plaintiffs complain. Thus, pursuant to 12 C.F.R. Part 205 ("Regulation E"), as revised effective July 2010, BANA has been required to obtain a customer's affirmative consent prior to imposing *any* fee or charge for overdraft services associated with one-time (non-recurring) debit card transactions. 12 C.F.R. § 205.17(b)(1). Revised Regulation E also requires BANA to inform each customer who provides such consent that the customer has the right to revoke that consent at any point in the future. *Id.*

In short, federal law, as revised during the course of this litigation, has *already* provided the very type of "injunctive relief" objectors suggest the Settlement lacks: BANA may not assess overdraft fees for non-recurring debit card transactions unless the customer "opts-in" to overdraft services as prescribed by Regulation E. Consequently, no grounds exist for objecting to this Settlement as inadequate for lack of injunctive mandates.

C. There Is No "Reverter" of Any Part of the Settlement Sum to BANA.

One objector charges that the value of the Settlement is "overstated" because BANA will

supposedly "recoup" a portion of the settlement sum under paragraph 88 of the Settlement Agreement. J. Brown Obj. at 1-2. That assertion is flatly and totally wrong, and evidently results from the objector's fundamental misreading or misunderstanding of both that paragraph and the overall framework of the Settlement. *There is no reverter to BANA*.

Pursuant to the Settlement Agreement and in accordance with the Court's express orders, BANA has already provisionally paid the entire $410 million settlement sum into an Escrow Account with a neutral third party to hold and disburse as provided in the Settlement. (Dkt. #1471, Ex. A, ¶¶ 23, 24, 40, 47, 50; Dkt. #1520, ¶¶ 12, 14, 27; Dkt. #1572.) More particularly, the funds have been deposited at Northern Trust in accounts under the control of the Court-approved Settlement Administrator and Escrow Agent, Rust Consulting, Inc. (Dkt. #1572.)

If the Settlement is finally approved by the Court and becomes effective according to its terms, the Settlement Fund will be paid to Settlement Class Members as provided in Section XII of the Settlement Agreement. (Dkt. #1471, Ex. A.) Specifically, Settlement Class Member Payments to Current Account Holders generally will be paid by BANA through issuance of a monetary credit to their respective BANA accounts, while Settlement Class Member Payments to Past Account Holders will be paid through issuance by the Settlement Administrator and Escrow Agent of checks drawn against the Escrow Account. (Dkt. #1471, Ex. A, ¶¶ 87, 89.)

Since BANA has already provisionally paid the *full* settlement sum in cash into the Escrow Account, when BANA issues account credits to Current Account Holders after the Effective Date, it will then have paid substantially *more* than the $410 million provided for in the Settlement (*i.e.*, the $410 million previously paid into the Escrow Account *plus* the value of the account credits). However, the Settlement clearly provides that BANA's total monetary contribution to the Settlement will not exceed $410 million. (Dkt. #1471, Ex. A, ¶ 47.)

Therefore, to implement the $410 million settlement figure, paragraph 88 of the Settlement Agreement properly and necessarily provides that BANA will be reimbursed from the Settlement Fund in an amount exactly equal to the value of the account credits it will have issued to Settlement Class Members who are Current Account Holders. Only by receiving such

reimbursement will BANA's monetary contribution to the Settlement be equal to and remain at the $410 million specified in the Settlement Agreement. Otherwise, the account credits would push BANA's monetary contribution far above the $410 million, in violation of the Settlement.

In short, contrary to the objector's assertions, paragraph 88 of the Settlement Agreement operates to keep BANA's total payment at $410 million – not higher and not lower. And, except in the event the Settlement does not become effective or terminates, regardless of what occurs in the future, no part of the $410 million reverts to BANA. (Dkt. #1471, Ex. A, ¶ 93.)

D. The Content of the Class Notice Was Perfectly Appropriate.

A few objectors contend that the Class Notice was deficient because it did not inform *each* of the more than 13.2 million Settlement Class Members precisely how much money he or she will receive from the Settlement Fund in the event the Settlement becomes effective. Hastings Obj. at 9-10 (Dkt. #1916); Jordan Obj. at 2 (Dkt. #1941). The simple answer is that no such requirement exists, and if the Class Notice had endeavored to do more than accurately explain the manner in which the award would be calculated and apportioned, the additional information inevitably would have been doomed to inaccuracy and complaint.

The Class Notice *accurately* stated the amount BANA was paying to create the Settlement Fund ($410 million), and explained that the amount of the distributions to Settlement Class Members will be "based on the number of people in the Settlement Class and the amount of additional overdraft fees each Settlement Class Member paid as a result of Bank of America's posting order." (Dkt. #1471-2 at 36.) For additional information about the Settlement terms, the Class Notice directed recipients to the Settlement Website and to the toll-free number maintained by the Settlement Administrator. *Id.* The Settlement Website included "long-form notice" and Q&A, *id.* at 41-48, as well as the entire Settlement Agreement and other pertinent information. That information included the percentage of the Settlement Fund that Class Counsel would be requesting as an award of fees and costs, the fact that such award would be paid out of the Settlement Fund, and the exact formula by which the Net Settlement Fund is to be allocated among Settlement Class Members. (Dkt. #1471, Ex. A, ¶¶ 79, 102, 106; Dkt. #1471-2 at 46.)

Moreover, the irreducible fact is that, at the time the Class Notice was transmitted to Settlement Class Members, the exact amount each class member would receive from the Settlement was *not* known or determinable. That is because such distribution amounts are directly and materially affected by, among other factors, the amount of the court-awarded fees and costs to Class Counsel, the amount of the court-approved service awards to Plaintiffs, the amount of settlement administration expenses, and the number of Settlement Class Members who elect to opt out of the Settlement. (Dkt. #1471, Ex. A, ¶¶ 82, 84-86.) All of those amounts are not *yet* known; they certainly were not known on July 8, 2011, when the Class Notices were transmitted.

It is easy enough for objectors to pontificate that Settlement Class Members could have been given at least an estimate of their future distributions. But if such estimates had been on the high-side, Settlement Class Members would surely have complained that they were misled into participating in the Settlement; and if such estimates were on the low-side, they would have complained that they were induced to opt out, when they otherwise would have remained in the class. Moreover, the sheer cost of customizing each of the more than 13.2 million Class Notices to provide individualized estimates would have substantially increased the costs of notice and correspondingly depleted the Settlement Fund to the detriment of the Settlement Class.

In the final analysis, providing a precise and accurate distribution amount to each Settlement Class Member at the time of Class Notice was (and generally would be) impossible. That is undoubtedly the reason settlements like this one, providing allocations to class members from a common fund, never (or almost never) provide such information in the class notices, and the law does not require the settling parties to do so.

E. The *Closson* Release Was a Formidable Defense for the Bank That Would Have Barred Most of the Settlement Class's Claims.

Another argument posited by some objectors is that the potential adverse impact of the *Closson* release on the claims asserted in this litigation has been significantly overstated in the settlement calculus. *See, e.g.*, Hastings Obj. at 14-15 (Dkt. #1916); Fletcher Obj. at 22 (Dkt.

#1903). To the contrary, except for this Settlement, the *Closson* release was likely to bar all overdraft fee claims of a substantial majority of the putative class members in these cases.

Closson was a California state court case filed against BANA in 2004, alleging claims, like those asserted here, that BANA's use of a high-to-low posting order for debit card transactions (and other business practices) was improper and had the effect of unduly increasing the number of overdraft fees that customers paid. BANA settled that case on a class-wide basis in 2008, before the *Tornes* and *Yourke* cases were commenced, and that settlement was finally approved by the trial court in mid-2009, just as these MDL proceedings were first getting underway. The settlement, not surprisingly, included a broad release of posting order and overdraft fee claims against BANA by members of the *Closson* settlement class. Following final approval of the *Closson* settlement, a number of objectors, including Tornes, filed timely appeals, and those appeals were still pending and undecided at the time the Settlement before this Court was reached. Therefore, the potential impact of the *Closson* release, in the event the judgment approving the *Closson* settlement were affirmed on appeal, properly occupied a very material place for both sides in the negotiations.

Objectors appear to proceed on this supposed issue from the twin premises that the scope of the *Closson* release is relatively narrow and, as a result, that the *Closson* settlement was not a "serious" defense to BANA's alleged liability. They are demonstrably wrong on both counts.

The *Closson* release is given by and binding upon each member of the *Closson* settlement class, which is basically defined as any BANA account holder who, between December 6, 2000 and December 31, 2007, paid at least one overdraft fee in close proximity to the posting of a debit card transaction. (Tornes Dkt. #20, Ex. 7, ¶ 8.) The *Closson* settlement class is thus limited to customers who paid an overdraft fee between late 2000 and the end of 2007, and, within that time period, it almost entirely overlaps with the putative classes alleged in this litigation. Indeed, any putative class member in this litigation who had paid at least one overdraft fee to BANA between 2000 and 2007, was probably a member of the *Closson* settlement class. Stated differently, essentially the only putative class members here who were

not also members of the *Closson* settlement class and subject to the *Closson* release, were those who were new customers to BANA in or after 2008, and those existing customers who had never paid an overdraft fee to BANA before 2008.

Furthermore, contrary to objectors' *assumptions*, the *Closson* release is broadly worded and directed at *precisely* the type of posting order and overdraft fee claims asserted here. The *Closson* release, by its terms and as finally approved by the court in that case, covers *any claim* prior to the "effective date" related to or arising out of the order in which transactions are posted to and debited from BANA accounts and "any fees or charges resulting from or relating to Bank of America debit card transactions." *Id.* ¶ 13. Therefore, the *Closson* release would clearly *bar* the claims of putative class members here, which are ultimately directed at the recovery of overdraft fees due to posting order – one of the exact subject matters subsumed within the *Closson* release.

And, significantly, the *Closson* release extends to any overdraft fees resulting from debit card transactions prior to the "effective date" of the *Closson* settlement which, due to the lengthy appeals in *Closson*, is this year. *Id.* In other words, if a BANA deposit account customer paid an overdraft fee in or prior to 2007, he or she would likely be a *Closson* settlement class member bound by the release, and the release, in turn, bars the claims of such person to recover *any and all* overdraft fees paid prior to the *Closson* settlement's "effective date." In short, if the *Closson* settlement were affirmed on appeal, the effect would be to eliminate all claims in this litigation by any putative class member who had paid at least one overdraft fee to BANA in or before 2007 – that would clearly be a substantial majority of the putative class.

The impact of the *Closson* release on this litigation becomes even clearer through several examples:

- Assume BANA Customer A paid five debit card-related overdraft fees prior to December 31, 2007. Customer A fits squarely within the *Closson* settlement class definition and released all of his claims relating to posting order and the assessment of overdraft fees. If the *Closson* settlement were affirmed, Customer A, and all others similarly situated to him, would have no claim at all against BANA in these cases.

- Assume BANA Customer B paid ten debit card-related overdraft fees between 2004 and 2007, and also paid one such fee in 2009. Again, Customer B satisfies the *Closson* settlement class definition. Thus, any claim of hers to recover debit card-related overdraft fees paid prior to December 31, 2007, are barred by the *Closson* release. Moreover, since the 2009 overdraft fee was also paid prior to the "effective date" of the *Closson* settlement, her claim to recover that fee is also released. Customer B, and all others similarly situated to her, would have no claim at all against BANA in these cases.

- Assume BANA Customer C paid one debit card-related overdraft fee in 2005, and paid ten such fees in 2010. Customer C is in exactly the same position as Customer B for purposes of this analysis. Since she paid at least one debit card-related overdraft fee prior to December 31, 2007, she is a member of the *Closson* settlement class. And since all of her fees were paid prior to the *Closson* "effective date," any claim of hers (or of others similarly situated to her) to recover any of those fees in this litigation is likewise barred by the *Closson* release.

Essentially, the only putative class members here who would not be subject to the *Closson* release and would not have their claims barred, are those BANA customers who either did not pay *any* overdraft fees to BANA until after December 31, 2007 (and, hence, are not members of the *Closson* settlement class), or did not open their BANA accounts until after that date (in which event, they are also not *Closson* settlement class members). Given the explicit wording of the *Closson* class definition and the *Closson* release, it is difficult to fathom how any objector could seriously claim the *Closson* release was immaterial to the settlement calculus here and should not have played an important factor in the settlement negotiations.

Nor are the above arguments regarding the scope and impact of the *Closson* release newly-minted for the purpose of defending against objections to this Settlement. To the contrary, they were fully disclosed and aired in *Closson* itself. In particular, the scope and effect of the *Closson* release was an issue raised by several objectors in *Closson* prior to and at the final approval hearing. In specific response to those objections, both BANA and *Closson* class counsel confirmed in open court their mutual understanding that *Closson* settlement class members were releasing all claims arising from posting order and overdraft fees relating to conduct occurring prior to the effective date. And after considering the explanation of the parties, as well as the concerns of the *Closson* objectors, including Tornes, the *Closson* trial court expressly approved the *Closson* release.

In addition, BANA certainly did not wait for the instant final approval motion or for the objections to the Settlement to assert the *Closson* settlement and release as a defense in this litigation. Rather, at all times during the pendency of these cases, BANA continuously, vigorously and openly relied on the *Closson* settlement and release, expressly raising them in its initial motion to stay or dismiss the *Tornes* action, pleading them as affirmative defenses in its answers, and emphasizing them throughout the settlement negotiations with Class Counsel. *See* (Tornes Dkt. #18); (MDL Dkt. #345 at 48). And properly so. As demonstrated above, for any putative class members who had paid one or more overdraft fees to BANA prior to December 31, 2007, the *Closson* release bars their claims to recover *all* such overdraft fees. Only the minority of putative class members who did not pay even a *single* overdraft fee until on or after January 1, 2008, are not barred by the *Closson* release. And given the high recidivism rate among customers who overdraw their accounts, even this group is largely limited to new customers who first opened their BANA deposit accounts in or after 2008.

Importantly, the appeal of the *Closson* settlement was still pending when this Settlement was reached. The *Closson* appellants, like any appellants from the approval of a class action settlement, faced an uphill battle. The basic standard of appellate review in California is "abuse of discretion" which strongly favors affirmance of settlements. *See Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 52 (2008) (court must determine "whether the record discloses a clear abuse of discretion by the trial court"); *7-Eleven Owners For Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1146 (2000) ("To merit reversal, both an abuse of discretion by the trial court must be 'clear' and the demonstration of it on appeal 'strong.' ").

Consequently, the likelihood of the *Closson* settlement being affirmed was very substantial, and, if affirmed, the settlement would eviscerate the claims of the alleged putative class. Under such circumstances, BANA and Class Counsel would have broken with reality if they did not attach overwhelming importance to the *Closson* settlement and release.

F. The Release in This Settlement Is Perfectly Appropriate.

The release in this Settlement is also attacked by a few objectors. *See* Fletcher Obj. at 13

(Dkt. #1903); Saro Obj. at 2 (Dkt. #1933); Jenkins Obj. at 13 (Dkt. #1920). These objectors contend the release is overbroad for three separate reasons. First, they allege the release improperly includes claims unrelated to the subject matter of the litigation. Not so. By its own terms, the release is specifically limited to claims that relate to or arise out of conduct that is the subject matter of the complaints. (Dkt. #1471, Ex. A, ¶ 98.) Second, these objectors assert the release inappropriately includes a release of "hidden" or "concealed" claims. Incorrect. It is perfectly appropriate, routine even, for a release that is limited to the subject matter of the action being settled, as it is here, to encompass unknown claims that were not, but could have been, raised. *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 106-08 (2d Cir. 2005). Third, objectors argue that Settlement Class Members who are not receiving a payment from the common fund cannot provide a release. What objectors do not understand, however, is that these *unidentifiable* class members are still receiving a benefit under the settlement, albeit indirectly, in the form of a contribution to the *cy pres* fund. Therefore, they can and should provide a release as part of the Settlement. (Dkt. #1471, Ex. A, ¶ 81.) In short, the release in this case is completely appropriate, unremarkable and valid.

G. The *Cy Pres* Fund Is an Appropriate Substitute for Distribution to Settlement Class Members Who Cannot Be Identified.

Certain objectors contend the *cy pres* program established by the Settlement should not be approved because (1) the funds earmarked for the benefit of unidentifiable Settlement Class Members should instead go to the identified members of the Settlement Class, and (2) the specific recipients of the *cy pres* funds were not disclosed in the Class Notice. Fletcher Obj. at 15 (Dkt. #1903); Carapia Obj. at 4 (Dkt. #1936); Finn Obj. at 1. Neither contention has merit. First, the *cy pres* program is an appropriate substitute for directly compensating unidentifiable Settlement Class Members – who otherwise would receive no compensation from this Settlement. Second, there simply is no requirement that the identity of the specific *cy pres* recipients be disclosed in the Class Notice. To the extent these objectors suggest the *cy pres* funds may be used for improper purposes, that suggestion is readily quashed by the language of

the Settlement Agreement itself, which sets forth strict criteria for both the selection of *cy pres* recipients and the specific purposes for which the *cy pres* funds may be used.

The *cy pres* doctrine has routinely been used in the class action settlement context when, among other circumstances, "class members are difficult to identify." *Powell v. Ga.-Pac. Corp.*, 119 F.3d 703, 706 (8th Cir. 1997). In such cases, the doctrine permits the settlement funds to be used for the "next best" purpose. *See*, *e.g.*, *Democratic Cent. Comm. v. Wash. Metro. Area Transit Comm'n*, 84 F.3d 451, 455 (D.C. Cir. 1996) ("The object of applying the funds to the 'next best' class is to . . . maximiz[e] the number of plaintiffs compensated."). When the *cy pres* doctrine is employed by settling parties, the funds "should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated." *In re Infant Formula Multidistrict Litig.*, No. 4:91-CV-00878-MP, 2005 WL 2211312, at *1 (N.D. Fla. Sept. 8, 2005); *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d. 679, 683 (8th Cir. 2002).

The *cy pres* program in this case readily meets all of these criteria. The Settlement Agreement provides that a *cy pres* program will be established upon final approval of the Settlement "[f]or the benefit of those unidentifiable Settlement Class Members who were assessed an Overdraft Fee as a result of Debit Re-Sequencing during the period January 1, 2001 through December 31, 2003" and for whom BANA does not have sufficient information to identify the specific amounts they may be due from the Settlement Fund. (Dkt. #1471, Ex. A, ¶ 81.) The Settlement thus allocates a percentage of the Settlement Fund to provide an indirect – or "next best" – benefit to those Settlement Class Members who cannot be identified.

Moreover, the funds distributed through the *cy pres* program must be used "to benefit consumer financial literacy education, and to educate and assist consumers with financial services issues through advisory and related services (excluding litigation)." (Dkt. #1471, Ex. A, ¶ 91.) Thus, the *cy pres* funds will be spent on programs that are closely tailored to the subject matter of this lawsuit: helping consumers learn to manage their financial accounts and thereby to avoid the imposition of overdraft fees.

Finally, the Settlement Agreement also puts to rest any concern that the *cy pres* funds will go to a "secret fund" or a "pet charity" of any of the parties or counsel. In addition to the requirement that each *cy pres* recipient must be a provider of consumer financial literacy education or services, the recipients must also be approved by this Court. (Dkt. #1471, Ex. A, ¶ 91.) In short, the challenges to the *cy pres* fund are wholly misguided and should be rejected.

II. ABSENT THE SETTLEMENT, THERE IS A SIGNIFICANT RISK THAT PLAINTIFFS WOULD NOT SUCCEED.

As part of evaluating the fairness and adequacy of the Settlement, the Court should consider the very significant *risks* Plaintiffs face absent settlement, taking into account BANA's various defenses and the vagaries of litigation and appeal. The Court need not, *and should not* now, make any rulings on the *merits* of any claims or defenses. *Behrens*, 118 F.R.D. at 539 (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). The relevant point is rather that BANA's defenses are serious and substantive, and pose a substantial risk to Plaintiffs (and the putative class) that justifies the compromises inherent in the Settlement. Certain of BANA's defenses were detailed in the Omnibus Motion To Dismiss (Dkt. #217) ("Motion to Dismiss").[3] And although the Court denied that Motion in substantial part, *see* Order Ruling On Omnibus Motion to Dismiss (Dkt. #305) ("Order"), the Court expressly noted in the Order that it might well rule differently based on the evidence produced going forward. Moreover, any final ruling on the merits by this Court would be subject to inevitable appeal.

Nonetheless, playing the role of "arm-chair quarterbacks," many of the objectors assert that Plaintiffs' claims were worth more and that proof of liability was "in the bag." Such allegations are, of course, easy to make, especially by those having no responsibility whatsoever for the actual handling of these cases, but, tellingly, the objectors fail to support their assertions with any *evidence* or expert opinion that the Settlement is inadequate or untoward in any respect. They also seek to disparage the Settlement through a haze of unexplained percentages and

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[3] Although the Motion to Dismiss was filed by multiple defendants and the Order applied to all of those defendants, for purposes of simplicity, this memorandum refers to that motion and the Order in connection with BANA only.

supposed comparisons to other settlements in other cases. However, in the one case that involved claims parallel to those asserted here, the district court, after thoroughly analyzing the terms of the class action settlement with Fifth Third Bank and the applicable law, and after carefully considering all of the objections, including to the "adequacy" of the settlement, finally *approved* a monetary settlement both sides acknowledged represented less than 10% of Fifth Third's potential exposure, and that settlement has now become final. *Schulte v. Fifth Third Bank,* _ F. Supp. 2d_, No. 09-cv-6655, 2011 WL 3269340, at *6-7, *14 (N.D. Ill. July 29, 2011) (finally approving $9.5 million settlement on a monetary exposure assumed to be around $96.5 million).[4]

A. Plaintiffs Could Lose on the Merits Either Before or in Trial.

BANA's position throughout has been, and but for the Settlement would continue to be, that Plaintiffs cannot prevail on their claims and successfully defend any judgment in their favor on appeal, for the following reasons, among others:

<u>First</u>, BANA would present evidence that Plaintiffs' claims are preempted by federal law. In denying the Motion to Dismiss with respect to BANA's preemption defenses, this Court was careful to limit its decision to Plaintiffs' facial allegations. *See* Order at 9 (Dkt. #305) ("[T]he Court finds Defendants' arguments on preemption [do not prevail] . . . *at this procedural state of the case* . . . ." (emphasis added)). Under the reasoning of the Order, the tests for preemption under both the National Bank Act ("NBA"), 12 U.S.C. § 21 *et seq.*, and regulations of the OCC require an inquiry into the effect of a state law claim on a national bank's exercise of its federally-granted banking powers. Although evidence is by no means required for a court to

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[4] Even based upon the most extreme assertions of the *objectors*, this Settlement is still in precisely the same range as that approved by the court in *Schulte*. However, when the bar potentially created by the *Closson* release, as well as BANA's other defenses, are factored into the equation, this Settlement is *far more favorable* than Fifth Third's in *Schulte*. Moreover, the settlement terms here are more "friendly" to the Settlement Class: unlike in *Schulte* where class members had to submit claims to share in the settlement fund, Settlement Class Members here did not have to file any claim or take any action at all to receive a distribution from the Settlement Fund. Hence, this Settlement will confer monetary benefits on a substantially higher percentage of the Settlement Class than the Fifth Third settlement does.

find preemption, *see, e.g.*, *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1196 (11th Cir. 2011); *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1038 n.4 (9th Cir. 2008), evidence developed during discovery would help demonstrate conclusively that Plaintiffs' attempted application of state law to BANA in this litigation would "impair significantly," or more than incidentally affect, BANA's ability to exercise its deposit-taking powers and is, therefore, preempted. *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 516 U.S. 25, 33 (1996).

Second, BANA would introduce evidence, either on summary judgment or at trial, demonstrating that Plaintiffs cannot recover amounts paid "under a claim of right to payment" in light of the "voluntary payment" doctrine. *Spivey v. Adaptive Marketing LLC*, 622 F.3d 816, 822 (7th Cir. 2010) (O'Connor, J.). Indeed, in approving the settlement of the parallel posting order case against Fifth Third Bank, the court expressly referred to the voluntary payment doctrine as a potential obstacle to recovery if the case were not settled. *Schulte*, 2011 WL 3269340, at *16.

Third, with respect to Plaintiffs' contract claims, BANA would present evidence showing that it acted in good faith, which the Court has expressly acknowledged BANA would be entitled to do. Order at 23 (Dkt. #305) ("[D]iscovery may make clear that [BANA] complied with its obligations in good faith . . . ."); *id.* ("At this stage in the proceedings the Court determines that whether the banks are acting in good faith is a question of fact which should be deferred until discovery is taken and the facts before the Court further developed.").

Fourth, BANA expects that Plaintiffs' unjust enrichment claim would be dismissed based on evidence demonstrating that the legal relationship between BANA and Plaintiffs for purposes of this litigation is governed by the contracts between the parties. *See, e.g.*, *Hassler v. Sovereign Bank*, 644 F. Supp. 2d 509, 519 (D.N.J. 2009) ("[T]he enrichment of one party at the expense of the other is not unjust where it is permissible under the terms of an express contract."), *aff'd*, 374 F. App'x 341 (3d Cir. 2010).

Fifth, BANA would present evidence demonstrating that its practices were not deceptive or unfair, and thus that it cannot be liable under certain states' consumer protection statutes that have been invoked by Plaintiffs. Indeed, the Court specifically contemplated that this might be

the case. *See* Order at 41 (Dkt. #305) ("*[A]t the motion to dismiss stage the Court must accept all of Plaintiffs' allegations as true*. Plaintiffs are alleging that the actions of Defendant banks, in manipulating and reordering Plaintiffs' debit transactions, are deceptive and do *not* comply with the terms of the contract." (first emphasis added)).

B. There Is Also a Significant Risk That Plaintiffs Could Lose on Appeal.

Even assuming Plaintiffs were to obtain a judgment in their favor at trial, there is a significant risk that the Eleventh Circuit (or, as appropriate, the Ninth Circuit) would reverse that judgment. That risk is evident from, among other things, the fact that the Order relied on several legal conclusions about which reasonable jurists could disagree and which have not yet been definitely addressed by the appellate courts.[5]

First, reasonable jurists disagree about whether state laws of general application, such as those relied on by Plaintiffs, are or can be preempted by the NBA and OCC regulations. *See, e.g.*, *Baptista*, 640 F.3d at 1196 (holding the plaintiff's unjust enrichment claim against a national bank was preempted on its face);[6] *Wells Fargo Bank of Tex. NA v. James*, 321 F.3d 488, 492-93 (5th Cir. 2003) (rejecting an argument "that Congress has not indicated an intention that the NBA should supplant state laws of general application"); *Reyes v. Downey Sav. & Loan Ass'n, F.A.*, 541 F. Supp. 2d 1108, 1113 (C.D. Cal. 2008) ("[W]hen plaintiffs rely on state laws of general application, their claims are preempted if the state laws, *as applied* . . . , require affirmative action by [a federally chartered financial institution] or other behavior specific to [banking] activity."); *see also* Mot. to Dismiss at 19-34 (Dkt. #217).

Second, reasonable jurists may disagree with this Court's conclusion that Plaintiffs' claims, as pleaded, are not preempted under the OCC's regulation authorizing non-interest fees, 12 C.F.R. § 7.4002. The OCC has expressly found that regulation authorizes national banks to

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[5] For example, the trial court's decision in *Gutierrez* rejecting Wells Fargo's preemption defenses is currently on appeal (9th Cir. No. 10-16959), with the preemption issues very much front and center.

[6] Although this Court denied a motion for reconsideration of the Order based on the Eleventh Circuit's ruling in *Baptista* (Dkt. #1725), the *Baptista* decision nevertheless signals serious and continuing risk for Plaintiffs on appeal on preemption grounds.

charge overdraft fees and, as part of that authority, to decide the manner in which transactions are posted. OCC, Interpretive Letter No. 1082, 2007 WL 3341502, at *2 & n.8. As the Eleventh Circuit and other circuit courts have recognized, *any* application of state law that would interfere with a national bank's ability to exercise this federally-granted authority is preempted. *See Baptista*, 640 F.3d at 1197-98 & n.2; *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 284 (6th Cir. 2009) (holding that Section 7.4002 preempts any requirement that "mandates the order in which . . . [national] banks carry out their daily account-balancing and account-management functions"); *Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 556 (9th Cir. 2010) (finding preemption because Section 7.4002 "clearly provided how the fees are to be determined" and reserved fee-setting as "business decisions to be made by each bank").

Third, reasonable jurists do disagree about how the OCC's express preemption regulation regarding deposit-taking should be interpreted and applied to claims based on state laws of general application. That regulation, 12 C.F.R. § 7.4007, like the OCC's parallel preemption regulations 12 C.F.R. § 7.4008 and § 34.4, includes two key subsections: (1) a subsection listing types of national bank activities as to which state laws *categorically* are preempted (such as state law limitations concerning "checking accounts" and "disclosure requirements"); and (2) a subsection listing types of state laws that generally are not preempted as applied to national banks *unless* they more than "incidentally affect the exercise of national banks' [banking] powers." 12 C.F.R. §§ 7.4007(b), (c); 7.4008(d), (e); 34.4(a), (b) (2010). Although this Court limited its inquiry to an analysis under the second subsection, Order at 15 (Dkt. #305), many other courts have taken a different approach, holding that if a particular *application* of a state law falls within the first subsection – providing for categorical preemption – the preemption inquiry ends there. *See Casey v. FDIC*, 583 F.3d 586, 593-95 (8th Cir. 2009);[7] *see also O'Donnell v. Bank of Am., N.A.*, No. C-07-04500 RMW, 2010 WL 934153, at *5 (N.D. Cal. Mar. 15, 2010) .

[7] *Casey* involved a parallel preemption regulation promulgated by the Office of Thrift Supervision ("OTS"). The OCC modeled its preemption regulations after the OTS regulations so that national banks and federal savings associations would be subject to state laws to the same extent. *See Bank Activities and Operations*, 69 Fed. Reg. 1904, 1912, 1914 (Jan. 13, 2004). Courts therefore should apply the two sets of regulations in the same manner.

Fourth, with respect to Plaintiffs' breach of contract claims, *see* Mot. to Dismiss at 40-55 (Dkt. #217), several courts have agreed that a plaintiff cannot maintain such causes of action against a bank for "reordering" transactions where the bank's contract with the plaintiff expressly allowed for such reordering. *See e.g. Hassler v. Sovereign Bank*, 374 F. App'x 341, 344 (3d Cir. 2010) (affirming dismissal of breach of contract, consumer fraud, and unjust enrichment claims); *Fetter v. Wells Fargo Bank Tex., N.A.*, 110 S.W.3d 683, 691 (Tex. App. 2003) (affirming summary judgment against breach of implied duty of good faith and fair dealing claim). Although this Court distinguished these cases, *see* Order at 20-22 (Dkt. #305), the Eleventh Circuit may disagree. Indeed, in approving a settlement in the nearly-identical *Schulte* case against Fifth Third Bank, the court cited these (and other) authorities as potential obstacles to the plaintiffs' recovery if the case had not settled. 2011 WL 3269340, at *15, *17.

Fifth, with respect to Plaintiffs' unconscionability claim, *see* Mot. to Dismiss at 55-61 (Dkt. #217), the Eleventh Circuit has held that unconscionability can only be asserted as a defense to enforcement of a contract, not as an independent cause of action. *Cowin Equip. Co. v. Gen. Motors Corp.*, 734 F.2d 1581, 1582 (11th Cir. 1984); *see also Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 766 (1989) (holding statute codifying unconscionability doctrine did not create an affirmative cause of action).

Sixth, the Eleventh Circuit might also agree with BANA that Plaintiffs cannot state a claim for conversion. *See* Mot. to Dismiss at 61-65 (Dkt. #217). Several courts have held that a bank customer cannot assert a conversion claim based on money deposited in a bank because the customer does not have title to the funds deposited. *See Gutierrez v. Wells Fargo & Co.*, 622 F. Supp. 2d 946, 956 (N.D. Cal. 2009) ("A bank may not be sued for conversion of funds deposited with the bank."); *Medilink Ins. Co. v. Comerica Bank*, No. 09-13692, 2011 WL 1103644, at *11 (E.D. Mich. Mar. 23, 2011) (same). Although this Court found other authorities more persuasive at the motion to dismiss stage, Order at 34 (Dkt. #305), these cases demonstrate that reasonable jurists may disagree on the matter.

Seventh, regarding Plaintiffs' UDAP claims, *see* Mot. to Dismiss at 67-87 (Dkt. #217),

BANA would argue on appeal, if necessary, that the consumer protection statutes for several states authorize the practices about which Plaintiffs complain. For example, the commercial codes for several states that are patterned after the Uniform Commercial Code expressly allow banks to post various "items" to a customer's account "in any order." *See, e.g.*, Cal. Com. Code § 11504(a); 810 Ill. Comp. Stat. 5/4-303(b) (UCC § 4-303(b)). In the parallel *Schulte* case, the court identified the Illinois version of the UCC as a potential obstacle to the plaintiffs' recovery, which strongly supported its approval of a settlement for much less than the full amount of the damages the plaintiffs had pleaded. 2011 WL 3269340, at *16. BANA also would argue its alleged posting practice is not, and cannot be, unfair or fraudulent because BANA fully disclosed the practice, *In re Late Fee & Over-Limit Litig.*, 528 F. Supp. 2d 953, 965-66 (N.D. Cal. 2007), and the disclosures were unlikely to deceive a reasonable person, *Kunert v. Mission Fin. Servs. Corp.*, 110 Cal. App. 4th 242, 264-65 (2003). *See, e.g.*, *Evans v. Chase Manhattan Bank USA, N.A.*, C-05-3968 SC, 2006 WL 213740, at *6 (N.D. Cal. Jan. 27, 2006) (dismissing consumer fraud and CLRA claims on the basis that "because Chase was acting under the fully-disclosed terms of the contract, its actions cannot plausibly be labeled a deception"), *aff'd*, 267 F. App'x 692 (9th Cir. 2008).

In light of these (and other) potential arguments, supported by substantial case law adverse to Plaintiffs' claims, Plaintiffs would face a *substantial risk* of losing either at trial or on appeal on the merits of each of their claims for relief.

III. MANAGEABILITY CONCERNS MAY PREVENT A CLASS FROM BEING CERTIFIED FOR TRIAL.

In addition to the obstacles facing their claims on the merits if this litigation were to proceed, Plaintiffs would face a fundamental obstacle to nationwide class certification under Federal Rule of Civil Procedure 23(b)(3): the variations among state laws applicable to claims with respect to the members of Plaintiffs' putative *nationwide* class.[8] As this Court

[8] The Court has limited Plaintiffs' statutory consumer protection claims to those states in which a named Plaintiff resides. *See* Order at 40 (Dkt. # 305). For purposes of this Memorandum, and since the Court has not yet ruled otherwise to BANA's knowledge, BANA

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acknowledged when it denied in part the Motion to Dismiss, "[t]he common law claims asserted [by Plaintiffs] are, of course, claims that are defined and construed by the courts of the several states." Order at 17 (Dkt. #305). The Court therefore recognized "that it may be necessary in the future to apply a particular state's law to a particular Plaintiff." *Id.* Indeed, the particular state-law standards for each of Plaintiffs' claims differ for putative class members state by state. The same is true for many of BANA's defenses. And even where certain states share some or all standards applicable to one type of claim or defense, they frequently conflict with respect to the standards governing other claims or defenses.

In seeking class certification for purposes of trial, therefore, Plaintiffs would face the difficult, and potentially insurmountable, task of attempting to "demonstrate the homogeneity of different states' laws, or at least . . . show that any variation they contain is manageable." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1180 (11th Cir. 2010).[9] It is questionable Plaintiffs could succeed in this attempt. Despite this Court's ability and willingness (indeed, commitment) to expend considerable judicial time, resources, and energy to this case, as the Eleventh Circuit has recognized, if "more than a few of the laws of the fifty states differ, the district judge would face an impossible task . . . ." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1262 (11th Cir. 2004) (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996)); *see also Krueger v. Nw. Mutual Life Ins. Co.*, No. 1:10-CV-00128-SPM, 2011 WL 2938273, at *4-7 (N.D. Fla. July 21, 2011) (denying motion for class certification involving the varying law of contracts of 35 separate jurisdictions despite the presence of only two types of annuity contracts). Nor is the Court's decision certifying a class in the action against Union Bank predictive of class certification in this case: the Union Bank case involved

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assumes (without conceding) that the *other* claims are being asserted on behalf of putative class members in at least the 38 states and the District of Columbia where it offers deposit accounts.

[9] Although demonstrating the manageability of a class action is not required for a class to be certified for *settlement* purposes, it is required for purposes of trial. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

application of the laws of only three states.[10] In this case, the state-law differences are so numerous, so pronounced, and so complex that a class action trial is much more difficult to conceive. Moreover, at the time this Settlement was agreed upon, this Court had not yet ruled on any class certification motion in this MDL litigation; therefore, it was unknown whether *any* class would be certified in any of these cases.[11]

A. Substantial State-Law Differences Exist with Respect to the Causes of Action in the Complaint.

There are multiple layers of state-law differences underlying each of Plaintiffs' claims, including, but by no means limited to, the following:

Unjust Enrichment

There are several material variations among state standards governing claims of unjust enrichment. First, the limitations period for filing such claims ranges anywhere from two to ten years. *See, e.g.*, *Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 870 (Tex. 2007) (two years); *Safeco Ins. Co. v. Farm Bureau Ins. Cos.*, 490 So. 2d 565, 570 (La. Ct. App. 1986) (ten years). Second, the number of elements that must be shown to prove unjust enrichment varies: 24 states and the District of Columbia require three elements;[12] 16 states require two elements;[13] 5 states require four elements;[14] and 4 states require five elements.[15]

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[10] Moreover, this Court has repeatedly made clear that its decision on class certification vis-à-vis one bank is not precedent in the cases involving another bank, especially when relevant circumstances differ materially.

[11] BANA notes that, at the outset of *Tornes*, it made a motion to compel individual arbitration with the plaintiff and to dismiss the class allegations (*Tornes* Dkt. #23-25), and that it subsequently asserted an affirmative defense based upon arbitration in its Answers (MDL Dkt. #496, ¶¶ 268-70; Dkt. #497, ¶¶ 187-89).

[12] Alaska, Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Missouri, Nebraska, Nevada, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, and Wisconsin.

[13] Alabama, California, Georgia, Hawaii, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Mexico, North Carolina, Oklahoma, Texas, and West Virginia.

[14] Arkansas, New Jersey, Tennessee, Virginia, and Wyoming.

[15] Arizona, Delaware, Louisiana, and North Dakota.

Third, within nearly all of these groups, there are material variations in the specific elements required. Fourth, several (but not all) states require a showing of tortious or fraudulent conduct, and these states vary widely in terms of the precise showing required.[16] Finally, the states differ as to whether there is an express state of mind requirement, or whether state of mind is merely one of the equitable considerations in determining whether a particular transaction was "unjust."

In light of these differences affecting manageability, courts have routinely refused to certify proposed nationwide classes asserting state law claims of unjust enrichment.[17]

Unconscionability

The variations among states in how they address claims of unconscionability are at least as pronounced as those involving unjust enrichment. As a threshold matter, there are significant state-by-state variations in terms of whether a plaintiff may even assert a claim for unconscionability as a basis for *affirmative* relief. Many states allow litigants to assert unconscionability only as a defense to a breach of contract claim.[18] In contrast, a number of states may permit unconscionability to be asserted as an affirmative cause of action. *See, e.g.*, *Davis v. Cash For Payday, Inc.*, 193 F.R.D. 518, 522 (N.D. Ill. 2000).

Even in states where a plaintiff might be able to assert an unconscionability claim, there are significant differences in the law. First, there are significant variances among the statutes of limitations, not only with respect to the limitations period (ranging from 3 to 15 years), but also

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[16] *See, e.g.*, *Zoeller v. East Chi. Second Century, Inc.*, 904 N.E.2d 213, 221 (Ind. 2009) (requiring plaintiff to establish fraud or breach of a duty arising out of a confidential or fiduciary relationship); *First Nat'l Bank of St. Paul v. Ramier*, 311 N.W.2d 502, 504 (Minn. 1981) (requiring proof that defendant acted "illegally" or "unlawfully"); *Rolla Lumber Co. v. Evans*, 482 S.W.2d 519, 522 (Mo. Ct. App. 1972) (requiring misconduct, fault, or undue advantage by one of the parties).

[17] *See, e.g.*, *Tyler v. Alltel Corp.*, 265 F.R.D. 415, 428 (E.D. Ark. 2010); *Spencer v. Hartford Fin. Servs. Grp., Inc.*, 256 F.R.D. 284, 305 (D. Conn. 2009); *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 551 (W.D. Wash. 2008); *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 147-48 (S.D.N.Y. 2008); *Thompson v. Jiffy Lube Int'l, Inc.*, 250 F.R.D. 607, 626, 629-30 (D. Kan. 2008); *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 214 (D. Minn. 2003).

[18] *See, e.g.*, *Dean Witter*, 211 Cal. App. 3d at 766; *Whitman v. Conn. Bank & Trust Co.*, 400 F. Supp. 1341, 1346 (D. Conn. 1975); *Sitogum Holdings, Inc. v. Ropes*, 800 A.2d 915, 922 n.14 (N.J. Super. Ct. Ch. Div. 2002); *Oden v. Vanguard Car Rental USA, Inc.*, Civil Action No. 2:07CV261, 2008 WL 901325, at *2-3 (E.D. Tex. Mar. 31, 2008).

with respect to whether a residual, contract, or tort statute of limitations applies to unconscionability claims. *Compare Johnson v. Long Beach Mortg. Loan Trust 2001-4*, 451 F. Supp. 2d 16, 41 (D.D.C. 2006) (residual), *with Ackoff-Ortega v. Windswept Pac. Entm't Co.*, 120 F. Supp. 2d 273, 284 (S.D.N.Y. 2000) (contract), *and Price v. EquiFirst Corp.*, No. 1:08-CV-1860, 2009 WL 917950, at *8 (N.D. Ohio Apr. 1, 2009) (tort). Second, the laws of the states differ on whether both procedural and substantive unconscionability must be proven, with most states requiring a showing of both, but others dispensing with procedural unconscionability.[19] Third, some states permit a defense of waiver or ratification of an otherwise unconscionable contract, whereas others do not, or have not ruled one way or the other. Finally, the factors that courts look to in assessing whether an agreement was "unconscionable" differ across the states, both with respect to the process of formation and the substance of the transaction. *See, e.g.*, *NEC Techs., Inc. v. Nelson*, 478 S.E.2d 769, 772 (Ga. 1996) (listing factors for court to consider).

<u>Conversion</u>

The law of conversion also varies widely across the states. Some states do not even recognize a conversion claim for deposited funds and/or overdraft fees assessed against such funds. *See, e.g.*, *McCammon-Chase v. Circle Family Care, Inc.*, No. 09 C 7450, 2010 WL 2925893, at *7 (N.D. Ill. June 23, 2010) ("McCammon-Chase's conversion claim is nothing more than a breach of contract claim, or a claim 'for money represented by a general debt or obligation.' It is not a claim for conversion."). In addition, some states have "demand and refusal" requirements in which the person complaining of the conversion must demand return of the property allegedly converted along with the defendant's refusal to comply with such a demand. *See White v. Wachovia Bank, N.A.*, 563 F. Supp. 2d 1358, 1371 (N.D. Ga. 2008).[20]

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[19] Moreover, some states allow a showing of unconscionability on substance alone only under certain limited circumstances, *see, e.g.*, *Nw. Acceptance Corp. v. Almont Gravel, Inc.*, 412 N.W.2d 719, 723 (Mich. Ct. App. 1987), requiring a further state-specific analysis based on unique considerations.

[20] Significant state-law variations also exist regarding BANA's affirmative defenses, including, without limitation, the voluntary payment doctrine. *Compare Mount Airy Ins. Co. v. Doe Law Firm*, 668 So. 2d 534, 538 (Ala. 1995), *and Weiss v. Chavers*, 357 Ark. 607, 614 (Ark. 2004), *with Skyland Metro. Dist. v. Mountain W. Enter., LLC*, 184 P.3d 106, 127 (Colo. App.

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B. The Creation of Subclasses Would Not Solve the Manageability Obstacles to Adjudication of Plaintiffs' Claims Through a Nationwide Class Action.

The manageability problems inherent in this case could not be solved by creating subclasses. In *Sacred Heart*, the court recognized that the state-law variation issue could "only be resolved by first specifically identifying the applicable state law variations and then determining whether such variations can be effectively managed through creation of a small number of subclasses grouping the states that have similar legal doctrines." 601 F.3d at 1180 (quoting *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986)). The court ultimately reversed an order granting class certification where six state subclasses were proposed because they did not adequately account for the differences among state laws applicable to the plaintiff's two claims – in particular, differences with respect to the defenses of waiver and ratification. *See id.* at 1176, 1183.

Here, there is far more variation in state law than was present in *Sacred Heart* – and far more than existed in *Larsen v. Union Bank, N.A.*, __ F.R.D. __, No. 1:09-MD-02036-JLK, 2011 WL 3158998 (S.D. Fla. July 25, 2011), in which the Court found that the creation of four subclasses would make class adjudication manageable. In *Larsen*, the laws of only three states were involved; here, Plaintiffs have invoked the law of at least 39 jurisdictions. Attempting to sort through, segregate, and properly apply the various state standards applicable to each of Plaintiffs' multiple claims and each of BANA's multiple defenses would require the creation of potentially *dozens* of subclasses. The resulting complexity would effectively defeat "the judicial efficiency sought to be achieved through certification." *Andrews v. AT&T Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996) (citing *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 188-89 (4th Cir. 1993)); *accord In re Paxil Litig.*, 212 F.R.D. 539, 545 (C.D. Cal. 2003) (denying class certification where there was a risk of 14 subclasses, "turning what is already a 13-subclass

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2007), *and Cridlebaugh v. Putnam Cnty. State Bank of Milan*, 192 S.W.3d 540, 544 (Mo. Ct. App. 2006). The same is true for ratification and waiver. *Compare Wilart Assocs. v. Kapiolani Plaza, Ltd.*, 766 P.2d 1207, 1210-11 (Haw. Ct. App. 1988), w*ith Dirienzo v. Steel Partners Holdings, L.P.*, Civil Action No. 4506-CC, 2009 WL 4652944, at *4 (Del. Ch. Dec. 8, 2009).

certification into something *even more* unwieldy" (emphasis added)). As the Eleventh Circuit has specifically instructed, a "court must be careful not to certify too many groups." *Klay*, 382 F.3d at 1262 (quoting *In re Am. Med. Sys.*, 75 F.3d at 1085).

Given the inherent manageability issues of adjudicating Plaintiffs' state law claims on a class-wide, nationwide basis, a very significant risk exists that Plaintiffs might not be able pursue this litigation as class action against BANA, irrespective of the alleged merits of their claims.

CONCLUSION

For all these reasons, all of the objections to the Settlement should be denied and rejected, and the Motion for Final Approval of the Settlement should be granted.

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Respectfully submitted,

s/Laurence J. Hutt

Laurence J. Hutt (*pro hac vice*)
Arnold & Porter LLP
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017-5844
Telephone: 213.243.4000
Facsimile: 213.243.4199

Sharon D. Mayo (*pro hac vice*)
Arnold & Porter LLP
One Embarcadero Center, 22nd Floor
San Francisco, California 94111-3711
Telephone: 415.356.3000
Facsimile: 415.356.3099

Attorneys for Defendant
BANK OF AMERICA, N.A.