UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ELIZABETH GOODALL, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs, Case No.

v.

TORONTO-DOMINION BANK and TD BANK, N.A.,

Defendants.
_____/

CLASS ACTION COMPLAINT

Plaintiff, Elizabeth Goodall, individually and on behalf of all others similarly situated, alleges for his Class Action Complaint against Defendant The Toronto-Dominion Bank and Defendant TD Bank, N.A. ("TD Bank") (collectively referred to herein as "Defendants"), as follows:

PRELIMINARY STATEMENT

1. This is a class action seeking monetary damages, restitution, and declaratory relief from Defendants, notably arising from their practice of engaging in unfair and deceptive trade practices in connection with Defendants' marketing and administration of accounts and the subsequent assessment and collection of improper and excessive overdraft fees.

2. Plaintiff Elizabeth Goodall is a customer of TD Bank which has 1300 branches in the United States, including branches in Florida. TD Bank is a wholly owned

subsidiary of Toronto-Dominion Bank.

3. The Toronto-Dominion Bank is headquartered in Toronto, Canada, with more than 85,000 employees in offices around the world. Toronto-Dominion Bank operates as TD Bank Group. TD Bank Group is comprised of The Toronto-Dominion Bank and multiple wholly owned subsidiaries of The Toronto-Dominion Bank, including TD Bank, N.A.

4. TD Bank has already been sued regarding its overdraft practices. The several cases filed against TD Bank were settled as part of a multidistrict litigation proceeding known as *In re Checking Account Overdraft Litigation* in the United States District Court for the Southern District of Florida. *See* Order of Final Approval of Settlement, Authorizing Service Awards, and Granting Application for Attorneys' Fees, and Final Judgment, combined and attached hereto as Exhibit A.

5. The cases alleged that TD Bank improperly assessed excessive overdraft fees by reordering debit card transactions from highest dollar amount to lowest dollar amount and then charging fees even when accounts were not actually overdrawn in violation of the bank's account agreements. *Id*. at 8-9. Claims were raised for breach of contract, including violations of good faith and fair dealing, unconscionability, unjust enrichment, and conversion. *Id*. at 5.

6. TD Bank settled the case for $62,000,000, an amount paid to victims of the bank's practices during the accepted class period, from December 1, 2003 to August 15, 2010. *Id*. at 9. The Toronto-Dominion Bank disclosed this settlement in its 2012 Annual Report detailing the acts giving rise to the lawsuit.

7. Nevertheless, Defendants continued many of the challenged practices, even after the class action settlement. Significantly, Defendants continue to assess overdraft fees based on the improper reordering of debit card transactions from highest to lowest amount and to assess fees even at times when customers would, but for the reordering, have sufficient funds in their account to cover all merchant requests for payment.

8. Unlike nearly all other banks sued in MDL, *In re Checking Account Overdraft Litigation*, Defendants have continued these practices even after it settled claims of wrongdoing based on these very same practices. *See* Final Approval Order (failing to include non-monetary relief, such as practice change); also *id*. at 9-11 (establishing that only monetary relief would be afforded as class-wide relief).

9. Plaintiff seeks to represent a class of all TD Bank customers who have been improperly assessed overdraft fees since the end of the class period covered by the TD Bank Settlement in *In re Checking Account Overdraft Litigation*, Exhibit A, pp. 8-9.

10. Defendants' overdraft fees on debit card transactions that were assessed after August 16, 2010 also violated federal law. Starting in August of that year, the Federal Reserve implemented Regulation E (12 C.F.R. § 205.17) ("Reg E") under the Electronic Funds Transfer Act, and banks were obligated to obtain customers' affirmative consent before assessing overdraft fees on debit card transactions.

11. Accordingly, Defendants did not comply with Reg E and has continued to overdraft fees on debit card transactions in violation of federal law.

12. In the era of electronic banking and the ubiquitous use of debit cards, the assessment of overdraft fees has become a major profit center for United States banks,

including Defendants. For years, banks covered customers who occasionally bounced checks and even did so for a time for customers using debit cards, without charging their accounts. Since the early 1990's, however, banks have devised methods to provide overdraft "protection" for customers and charge them in each instance.

13. In 2007, banks collected more than $17 billion in overdraft fees. The number nearly doubled in 2008, as more and more consumers struggled to maintain positive checking account balances. In 2009, banks brought in $37.1 billion in overdraft charges alone. TD Bank has over $200 billion in assets and over 1300 branches, and has been a notable beneficiary of these staggering overdraft charges.

14. Almost by definition, these fees disproportionately affect the poor, who are most likely to maintain low balances. Moebs Services, a research company that has conducted studies for the government as well as banks, estimates that 90 percent of overdraft fees are paid by the poorest 10 percent of banks' customer base. Moreover, these fees have the tendency to create a domino effect, because the imposition of a fee on an account with a negative balance will make it less likely that the account holder's balance will reach positive territory, resulting in more fees. Before debit cards existed, banks occasionally extended the courtesy of honoring paper checks written on overdrawn or otherwise deficient accounts for customers who were typically in good standing. Banks extended this courtesy largely because third parties involved in the sales transactions allowed the customer to pay by check, expecting funds to be available and the check to clear. For example, if a customer wrote a check to purchase groceries, the grocery store would only know whether the check cleared

after the groceries had been purchased. The same considerations are not present when customers use debit cards.

15. Banks can simply decline or honor debit or point of sale transactions where accounts lack sufficient funds to execute the transactions. Retail and service transactions could still be executed if consumers presented an alternative form of payment. Automated teller machine ("ATM") transactions could still proceed if banks provided a warning that an overdraft fee would be assessed, and customers nevertheless chose to proceed with the withdrawal. In fact, until a few years ago, most banks simply declined debit transactions that would overdraw an account.

16. Instead of declining debit transactions when there are insufficient funds, or warning customers that an overdraft fee will be assessed if they proceed with the transaction, TD Bank has routinely processed such transactions and then charged customers an overdraft fee. Thus, TD Bank's automatic, fee-based overdraft scheme was and is intentionally designed to maximize overdraft fee revenue.

17. In many instances, these overdraft fees cost account holders of TD Bank accounts hundreds of dollars in a matter of days, or even hours. Even more egregious, customer accounts may not actually be overdrawn at the time the overdraft fees are charged, or at the time of the debit transaction. In these instances, TD Bank manipulates and alter the timing of the customer's transactions, in a manner inconsistent with TD Bank's contractual obligations, in order to maximize overdraft fees imposed on the customer.

18. In response to the rampant abuse of overdraft charges by banks, the Board of Governors of the Federal Reserve System updated and implemented Regulation E (12 C.F.R.

§ 205.17) ("Reg E") to amend the Electronic Funds Transfer Act to include notice requirements for banks concerning overdraft charges.

19. Under Reg E, a financial institution may not assess a fee or charge on a consumer's account for paying an ATM or one-time debit card transaction pursuant to the financial institution's overdraft program unless the financial institution provides the customer with written notice, separate from all other information, that describes the institution overdraft program and obtain the customer's affirmative consent to the institution's payment of ATM or one-time debit card transactions that would incur an overdraft fee, and provides written confirmation of the consumer's consent along with a statement of informing the consumer of the right to revoke this consent. 12 C.F.R. § 205.17(b)(1).

20. For consumers with an account at a financial institution prior to July 1, 2010, the institution could not assess any fees on a consumer's account on or after August 15, 2010, for paying an ATM or one-time debit card transaction pursuant to the overdraft service unless the institution has complied with 12 C.F.R. § 205.17(b)(1). 12 C.F.R. § 205.17(c)(1).

21. For accounts opened on or after July 1, 2010, including the Plaintiff's account, the financial institution could not assess any fees on a consumer's account for paying an ATM or one-time debit card transaction pursuant to the overdraft service unless the institution has complied with 12 C.F.R. § 205.17(b)(1). 12 C.F.R. § 205.17(c)(2).

22. The debit card transaction and point of sale transactions described herein qualify as an "electronic funds transfer" under the Electronic Funds Transfer Act. TD Bank qualifies as a financial institution that provides an overdraft service as contemplated by the Electronic Funds Transfer Act.

23. TD Bank made public statements that it planned to stop the practice of reordering its customers' transactions and instead would begin to post most account transactions chronologically. TD Bank's senior vice president of day-to-day product management, Matthew Chevalier, admitted that posting transactions in the order in which they actually occur is "much more predictable, fair and transparent." Yet Defendants continue to reorder customer transactions in a manner which reaps massive profits for the Bank at the expense of its customers.

PARTIES

24. Plaintiff Elizabeth Goodall is a resident and citizen of the State of Florida.

25. TD Bank, N.A. is a corporate citizen of New Jersey for purposes of 28 U.S.C. § 1332 because it is a national bank with its designated main office in the State of New Jersey. TD Bank, N.A., is a wholly owned subsidiary of The Toronto-Dominion Bank, a Canadian chartered bank, the stock of which is traded on the Toronto and New York Stock Exchanges under the symbol "TD." TD Bank, N.A. can be served at 1701 Route 70 East, Cherry Hill, New Jersey, 08034. TD Bank, N.A. regularly and systematically conducts business throughout Florida, including in this district.

26. Defendant The Toronto-Dominion Bank is a Canadian-chartered bank subject to the provisions of the Bank Act (Canada). The Toronto-Dominion Bank has more than 85,000 employees in offices around the world.

27. According to Defendant The Toronto-Dominion Bank, "The Toronto-

Dominion Bank and its subsidiaries are collectively known as TD Bank Group (TD).[1]" Furthermore, Defendant states "TD offers a full range of financial products and services to approximately 22 million customers worldwide through three key business lines:

- **Canadian Retail** including TD Canada Trust, TD Commercial Banking, TD Auto Finance (Canada), TD Wealth (Canada) and TD Insurance
- **U.S. Retail** including TD Bank, America's Most Convenient Bank, TD Auto Finance (U.S.), TD Wealth (U.S.) and TD's investment in TD Ameritrade
- **Wholesale Banking** including TD Securities[2]

28. Defendant Toronto-Dominion Bank is responsible for Plaintiff's damages and the damages of the putative class because: (1) it was responsible for the violations described herein by its own actions; (2) its agents committed these violations within the scope of their authority; (3) it is a co-conspirator or co-participant in the deceptive scheme complained of herein; and/or (4) it or its agents actively participated in such scheme. Toronto-Dominion Bank maintained control over its subsidiaries and agents and had knowledge of the violations alleged herein and TD Bank, N.A.'s direct involvement or complicity in these violations. In particular, The Toronto-Dominion Bank maintained such control over the actions of its subsidiary that it should be considered as an alter ego, joint enterprise, and/or as jointly controlled, and it would be unfair to recognize their separate corporate existence vis-à-vis the claims made by Plaintiff and the putative class in this complaint. The Toronto-Dominion Bank has transacted business and engaged in tortious and fraudulent conduct, by affirmative act or omission, in this state such that it reasonably anticipated being subject to personal jurisdiction before the courts of this State. The Toronto-Dominion Bank has also transacted

1 *See* http://www.td.com/about-tdbfg/corporate-information/corporate-profile/profile.jsp. Last visited on December 2, 2014.

2 *Id.*

business and engaged in tortious and fraudulent conduct, by affirmative act or omission, outside of this State whereby it reasonable anticipated that injury would result and has, in fact, resulted upon persons within this State. As such, this Court has personal jurisdiction over The Toronto-Dominion Bank.

29. According to Defendants, TD Bank Group is a marketing term used to describe the Toronto-Dominion Bank and its affiliates, including T.D. Bank, N.A. *See* Dkt 17 *Global Sessions LP, et al. v. TD Bank Group, et al.* Case No. 1:13-cv-00692-SS. According to Defendants, The Toronto-Dominion Bank, "TD Bank Group offers a full range of financial products and services through the following business: […] TD Bank, America's Most Convenient Bank."[3]

JURISDICTION AND VENUE

30. This Court has jurisdiction over this matter pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d) in that:

(a) this is a nationwide class action involving 100 or more class members;

(b) at least one member of the class of Plaintiffs is a citizen of a State different from any Defendant; and

(c) the amount in controversy exceeds five million dollars ($5,000,000.00), exclusive of interest and costs.

31. This Court also has original jurisdiction of this action under 28 U.S.C. §§ 1331 and 1337 because the claims arise under the laws of the United States, including the Electronic Funds Transfer Act, 15 U.S.C. § 1693, et seq.

3 Welcome to TD. Available online at http://www.td.com/about-tdbfg/our-business/index.jsp. Last visited on December 2, 2014.

32. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because (a) Defendants are subject to personal jurisdiction here, (b) regularly conducts substantial business in this District, and (c) a substantial part of the events or omissions giving rise to the claims asserted herein occurred and continue to occur in this district.

CLASS ACTION ALLEGATIONS

33. Plaintiff brings this action individually and on behalf of all other similarly situated ("the Class") pursuant to Rule 23 of the Federal Rules of Civil Procedure.

34. This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of Federal Rules of Civil Procedure Rule 23(a) and (b).

Plaintiff proposes the following classes:

> All customers of TD Bank, N.A., who, from August 16, 2010 to the date of class certification, incurred an overdraft fee as a result of TD Bank, N.A.'s, practices of resequencing debit card transactions from highest to lowest, debiting items for which no time-stamp exists before debit card transactions for which a time-stamp exists, or assessing overdraft fees even when a customer has sufficient funds in their account to cover all merchant requests for payment (hereinafter referred to as "the Breach Class").

> All customers of TD Bank, N.A., who were assessed an overdraft fee for an ATM or debit card transaction after July 1, 2010, if the account was opened on or after July 1, 2010, or August 15, 2010, if the account was opened prior to July 1, 2010, even though TD Bank failed to comply with the Electronic Funds Transfer Act (hereinafter referred to as "the EFTA
> Class").

35. Plaintiff reserves the right to modify or amend the definitions of the proposed Classes before the Court determines whether certification is appropriate and as the Court may otherwise allow.

36. Excluded from the Classes are:

a. Defendants and any entities in which Defendants have a controlling interest;

b. Any entities in which Defendants' officers, directors, or employees are employed and any of the legal representatives, heirs, successors, or assigns of Defendants;

c. The Judge(s) to whom this case or any transferred case is assigned and any member of the Judges' immediate family and any other judicial officer assigned to this case or any transferred case;

d. Persons or entities with claims for personal injury, wrongful death, and/or emotional distress;

e. All persons or entities that properly execute and timely file a request for exclusion from the Class;

f. Any attorneys representing the Plaintiff or the Class; and

g. All governmental entities.

37. Numerosity - Fed. R. Civ. P. 23(a)(1). The members of the Classes are so numerous that joinder of all members would be impracticable. The Classes each consist of thousands of members and the identity of those persons is within the knowledge of and can be ascertained by resorting to Defendants' records.

38. Commonality - Fed. R. Civ. P. 23(a)(2) and (b)(3). There are questions of law and fact common to the Class, which predominate over any questions affecting only individual Class members.

39. Among the questions of law and fact common to the Breach Class are whether:

a. TD Bank approved debit card transactions, including cash transactions at ATMs owned by TD Bank, which were going to trigger an overdraft fee;

b. TD Bank failed to inform customers that a transaction would trigger an overdraft fee or provide customers with an opportunity to cancel such transactions;

c. TD Bank reordered transactions causing an increase in the number of overdraft fees imposed on customers;

d. TD Bank reordered debit transactions from the highest monetary value to lowest monetary value in order to maximize the number of overdrafts and, consequently, the amount of overdraft fees charged to customers;

e. TD Bank charged overdrafts and overdraft fees even when there were sufficient funds in customer accounts;

f. TD Bank failed to provide customers with accurate balance information which encouraged debit card transactions even when TD BANK knew an overdraft would occur based on the bank's calculation of "available balance";

g. TD Bank breached its contract with its customers and/or the covenant of good faith and fair dealing through its overdraft policies and practices;

h. TD Bank failed to obtain affirmative consent from customers prior to processing transactions that would result in overdraft fees;

i. TD Bank required customers to enter into standardized account agreements which included unconscionable provisions;

j. TD Bank converted money belonging to Plaintiff and other members of the Classes through its overdraft policies and practices;

k. TD Bank was unjustly enriched through its overdraft policies and practices;

l. TD Bank's practice of reordering transactions causing an increase in the number of overdraft fees imposed on customers was unfair or deceptive;

m. TD Bank's practice of reordering debit transactions from the highest monetary value to lowest monetary value in order to maximize the number of overdrafts and, consequently, the amount of overdraft fees charged to customers was unfair or deceptive;

n. TD Bank's practice of charging overdrafts and overdraft fees even when there were sufficient funds in customer accounts was unfair or deceptive;

o. TD Bank's practice of approving debit card transactions, including cash transactions at ATMs owned by TD Bank, when TD Bank knew sufficient funds were not available to cover the transaction and would trigger and overdraft fee was unfair or deceptive;

p. Defendants used unfair and deceptive trade practices to market and sell the TD Bank accounts and overdraft related products to customers;

q. Defendants used unfair and/or misleading tactics and information in connection with the offering of accounts and overdraft related products;

r. The Toronto-Dominion Bank offers accounts and overdraft related products that are unfairly designed to manipulate transactions, resulting in maximization of the number of overdrafts, and consequently, the overdraft fees charged to customers;

s. The Toronto-Dominion Bank participated in the unfair and deceptive practice of reordering debit transactions from the highest monetary value to the lowest monetary value in order to maximize the number of overdrafts, and, consequent, the overdraft fees charged to customers; and

t. The Toronto-Dominion Bank participated in the unfair and deceptive practice of charging overdrafts and overdraft fees even when there were sufficient funds in customer accounts.

40. Among the questions of law and fact common to the to the EFTA Class are whether TD Bank, N.A.:

a. Provided customers with a notice describing its overdraft services that complied with 12 C.F.R. §§ 205.17(b)(1)(i), (d);

b. Provided customers with a reasonable opportunity to affirmatively consent, or opt-in, to overdraft services in accordance with 12 C.F.R. § 205.17(b)(1)(ii);

c. Obtained customers' affirmative consent, or opt-in, to overdraft services in accordance with 12 C.F.R. § 205.17(b)(1)(iii);

d. Provided customers with confirmation of their consent in accordance with 12 C.F.R. § 205.17(b)(1)(iv); and

e. Assessed overdraft fees in violation of EFTA.

41. Typicality – Fed. R. Civ. P. 23(a)(3). Plaintiff asserts claims that are typical of the entire Class, having all been targeted by Defendants as consumers who were improperly assessed one or more overdraft charges and overdraft fees whether by reordering transactions, by failing to notify consumers that approving a debit would result in an overdraft charge, or failing to comply with the Electronic Funds Transfer Act. Plaintiff and the Class members have similarly suffered harm arising from Defendants violations of the law as alleged in this Complaint.

42. Adequacy of Representation - Fed. R. Civ. P. 23(a)(4); 23(g)(1). Plaintiff is an adequate representative of the Classes because Plaintiff fits within the class definition and Plaintiff's interests do not conflict with the interests of the Members of the Classes Plaintiff seeks to represent. Plaintiff is passionate about this litigation personally and will prosecute this action vigorously for the benefit of the entire Class. Plaintiff is represented by experienced and able attorneys from coordinated law firms that will collectively and jointly serve as class counsel. Class counsel has litigated numerous class actions, and Plaintiff's counsel intends to prosecute this action vigorously for the benefit of the entire Class. Plaintiff and class counsel can fairly and adequately protect the interests of all of the Members of the Class.

43. Superiority of Class Action - Fed. R. Civ. P. 23(b)(3). The class action is the best available method for the efficient adjudication of this litigation because individual litigation of Class Members' claims would be impracticable and individual litigation would be unduly burdensome to the courts. Plaintiff and members of the Class have suffered irreparable harm as a result of Defendants' fraudulent, deceitful, unlawful, and unfair conduct. Because of the size of the individual Class members' claims, no Class members could afford to seek legal redress for the wrongs identified in this Complaint. Without the class action vehicle, the Class members would have no reasonable remedy and would continue to suffer losses, as Defendants continue to engage in the unlawful, unfair, and unconscionable conduct that is the subject of this Complaint, and Defendants would be permitted to retain the proceeds from their continued violations of law. Further, individual litigation has the potential to result in inconsistent or contradictory judgments. A class action in this case presents fewer management problems and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court. There will be no difficulty in the management of this action as a class action.

44. Injunctive and Declaratory Relief - Fed. R. Civ. P. 23(b)(2). Defendants' omissions are uniform as to all members of the Class. Defendants have refused to act on grounds that apply generally to the Class, so that final injunctive relief or declaratory relief is appropriate with respect to the Class as a whole.

COMMON FACTUAL ALLEGATIONS

45. Defendants are in the business of offering and providing customers with a variety of banking products and services. Customers who open a checking account are

provided with a debit card, also known as a check card or ATM card. Through such debit cards, customers can engage in transactions using funds which are withdrawn from their accounts by engaging in "debit" or "point of sale" ("POS") transactions, or may withdraw money from their accounts at ATMs. Whether the card is used to execute POS transactions or to withdraw cash from ATMs, the transaction is processed electronically. As a result, TD Bank is notified instantaneously when the card is swiped, and have the option to accept or decline transactions at such time. TD Bank retains a time-stamp that records the exact time of the vast majority of debit card transactions.

46. TD Bank employs sophisticated software to automate its overdraft systems. These programs maximize the number of overdrafts, and thus, the amount of overdraft fees charged per customer. TD Bank utilizes this sophisticated software to generate overdraft fees. As a result of TD Bank's manipulation and alteration of customers' transaction records, funds in a customer's account are depleted more rapidly and more overdraft fees are likely to be charged. Indeed, overdraft charges are likely to occur at times, when but for the manipulation and alteration, there would be funds in the account and no overdraft would occur.

47. TD Bank has also utilized its software to set up a hidden arrangement where it intentionally approves debit card transactions even though it knows full well that such transactions will result in the assessment of an overdraft fee.

48. In addition, TD Bank continues to assess overdrafts even at times when customers have a sufficient balance of actual funds in their account to cover all merchant requests for payment.

49. These and other practices and fees are not contemplated in the parties' agreements nor are they authorized under the plain contractual terms. Thus, TD Bank's conduct violates several express contractual provisions, the covenant of good faith and fair dealing, and common law.

50. The Account Agreement, posted online by The Toronto-Dominion Bank, offers incomplete or unduly ambiguous disclosures as to its actual practices. The Toronto-Dominion Bank may contend that it may assess fees that are not authorized in the Account Agreement based on the provision which states: "You also agree to pay any additional reasonable charges we may impose for services you request which are not contemplated by this Agreement but are disclosed in our Personal Fee Schedule which may be amended from time to time." Account Agreement, p. 2 (using page numbers from original document as shown at the bottom of each page). The evidence will show, however, that TD's unanticipated charges are neither "reasonable" nor "requested" by customers.

51. The Account Agreement, posted online by The Toronto-Dominion Bank, only contemplates the assessment of overdraft fees in the following circumstances: "Overdraft fees may be assessed on items presented for payment that bring your Account into a negative balance, as well as any subsequent transactions presented for payment while the Account has a negative balance." *Id*. at 12-13. Despite this plain language, Defendants assessed overdraft fees in numerous other instances.

52. Nevertheless, instead of assessing fees based on the "balance" as stated, TD Bank has programmed its system to base fees on a customer's "available balance," which is a term of art defined by the bank to be equal to or lower than a customer's actual balance of

real money. Although Defendants define "available balance" – essentially a customer's actual balance minus authorized debit card transactions – such calculation is only to be used to "determine the amount available to pay other items presented against your account." *Id*. at 12. This term of art is not included in the allowance for the bank to assess overdraft fees. Defendants are very clear ton when the "available balance" applies as opposed to "balance." Thus, overdraft fees based on "available balance" violate the Account Agreement. Fees assessed in this manner are neither "reasonable" nor "requested" by customers, and thus are not allowed as "additional reasonable charges" by the Account Agreement.

53. The Account Agreement, posted online by The Toronto-Dominion Bank, repeatedly suggests that debit card transactions which would push the account below zero will not be approved. Significantly, the Account Agreement states that the bank uses the "available balance" (which is always equal to or lower than the real balance) to "determine the amount available to pay other items presented against your account." *Id*. at 12. It also says that "WE MAY REFUSE TO PAY A CHECK OR OTHER ITEM WHICH: . . . b) is drawn in an amount of funds then available for withdrawal in your Account (*see* the Funds Availability Policy) or which would, if paid, create an overdraft . . . ." *Id*. at 13. The Funds availability Policy does not vary these terms. *Id*. at 31-33. Although Defendants ambiguously offer that some transactions may not be rejected, rather the bank may decide to "advance" funds and charge an overdraft fee, this pointedly does not refer to all items, including debit card transactions. *Id*. at 14 ("advances" allowed only for "check, in-person withdrawal, ATM withdrawal, or a withdrawal by other electronic means from your

Account"); *id*. at 12 (showing text when all items to be included: "all other items, including checks, ATM transactions, and debit card transactions").

54. Despite these contractual provisions, TD Bank has adopted a hidden practice of intentionally approving debit card transactions that it knows will result in overdraft fees. As a result of TD Bank's improper conduct in direct violation of the parties' agreements and common law, Plaintiff and the proposed Class would not have been assessed improper overdraft fees.

55. Plaintiff and the proposed Class have been assessed overdrafts in violation of the plain terms of EFTA. If TD Bank had not violated EFTA, Plaintiff and the proposed Class would not have been assessed improper overdraft fees.

56. In this lawsuit, Plaintiff does not challenge all of the overdraft fees assessed. Rather, Plaintiff, individually and on behalf of the proposed Class, challenges only those fees that occurred as a direct result of improper practices of TD Bank.

57. TD Bank never notified Plaintiff at the time it executed the purported insufficient funds transactions that their checking account was overdrawn or that they would be charged an overdraft fee as a result of the transactions. Furthermore, TD Bank paid, rather than returned, all of the debit card transactions described above, even though Plaintiff's account purportedly lacked sufficient funds to cover the transactions.

58. The overdraft fees assessed upon Plaintiff are representative of millions of dollars of overdraft fees that TD Bank wrongfully assessed and deducted from customer accounts. These wrongful takings are especially egregious considering the fact that the bank

approved each transaction and knew at the time of approval whether there were sufficient funds in the account to cover the transaction.

59. Because of TD Bank's overdraft policies and practices, Plaintiff and the proposed Class have been wrongfully forced to pay overdraft fees. TD Bank has improperly deprived Plaintiff and the Class of significant funds, causing ascertainable monetary losses and damages.

60. Plaintiff had sufficient funds to cover at least some of the transactions for which Plaintiff and the Class were charged overdraft fees. Plaintiff and the Class either had adequate funds to cover transactions posted to their accounts, or the accounts were allowed to become overdrawn exclusively so that Defendants could impose these wrongful charges. In many instances, TD Bank's manipulation of the process for imposing overdraft fees triggered a cascade of charges that exponentially added to the charges collected from Plaintiff and the members of the Class.

61. Under EFTA, financial institutions such as TD Bank– as of July 1, 2010, if an account was opened on or after July 1, 2010, or August 15, 2010 if an account was opened prior to July 1, 2010 – may not assess an overdraft fee to a consumer customer for paying an ATM or one-time debit card transaction unless the institution first (i) provided the customer with notice of the overdraft "services," (ii) provided the customer with an opportunity to opt-in to such service, (iii) obtained the customer's affirmative consent to opt-in, and (iv) provided confirmation of the customer's consent and a statement informing the customer of the right to revoke such consent. E.g., 12 C.F.R. § 205.17(b)(1)(i)-(iv).

62. TD Bank failed to comply with these and other EFTA requirements. See 15 U.S.C. §§ 1693b, 1693c; 12 C.F.R. § 205.17. Nonetheless, after the Effective Dates, Defendants, in direct violation of EFTA, and to the detriment of Plaintiff and the EFTA Class, continued to assess overdraft fees on ATM and one-time debit card transactions.

PLAINTIFF-SPECIFIC FACTS

63. At all relevant times, Plaintiff Elizabeth Goodall has been a TD Bank account holder.

64. In connection with her account, TD Bank issued a debit card or cards to Plaintiff Elizabeth Goodall. A debit card allows customers to access their checking account funds by using the card to execute a transaction. The charge is processed electronically, and TD Bank has the option to accept or decline the transaction at the point of sale.

65. Defendants wrongfully charged Plaintiff Elizabeth Goodall multiple overdraft fees after manipulating and reordering her transactions from highest to lowest. For example, on September 29, 2014, Plaintiff Elizabeth Goodall was charged approximately $175 in wrongful overdraft fees after Defendants re-ordered five transactions.

66. Defendants failed to notify Plaintiff Elizabeth Goodall that she could incur overdraft fees on transactions even though there were insufficient funds in the checking account to cover the transaction at the time the transaction was executed. In addition, Defendants never notified Plaintiff Elizabeth Goodall, at the time she executed the purported insufficient funds transactions described above, that Plaintiff's checking account was or would be overdrawn or that Plaintiff would be charged an overdraft fee as a result of the transactions. Further, Defendants paid, rather than returned, all debit card charges described

above, even though Plaintiff Elizabeth Goodall's accounts purportedly lacked sufficient funds to cover the transactions.

67. Furthermore, if Defendants had not manipulated and reordered Plaintiff Elizabeth Goodall's transactions from highest to lowest, Plaintiff Elizabeth Goodall would have incurred fewer overdraft fees.

68. Based on information and belief, the overdraft charges incurred by Plaintiff Elizabeth Goodall are representative of hundreds of millions of dollars of overdraft fees that Defendants wrongfully assessed and deducted from its customers' accounts. These wrongful takings are especially egregious considering the fact that Defendants approved each transaction and knew at the time of approval whether there were sufficient funds in the account to cover the transaction. Plaintiff Elizabeth Goodall was charged and paid overdraft fees as a result of Defendants' unfair and/or deceptive practices described herein.

69. Defendants' wrongful overdraft policies and practices described above are illustrative of the harm caused to all Plaintiffs and members of the Class.

COUNT I
Breach of Contract
TD Bank
(On Behalf of Plaintiff and the Breach Class)

70. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

71. Plaintiff and TD Bank have contracted for banking services, to include checking and ATM and debit card services.

72. TD Bank's actions have violated the specific terms of the account agreements with customers, including other documents referenced therein. TD Bank is liable for the

losses of Plaintiff and the proposed Breach Class that have resulted from TD Bank's breaches of the parties' contractual agreements.

73. TD Bank violated the TD Agreement by instituting a range of overdraft practices that were never requested by customers as would have been required by contract. Several of the express contractual provisions which TD Bank breached from the TD Agreement effective as of March of 2011 are included above. These secretive practices included, but are by no means limited to:

a. The authorization of debit card transactions which TD Bank knew would result in an overdraft fee;

b. The adoption of a line of credit or spending limit up to which TD Bank would authorize debit card transactions;

c. The reordering of debit card transactions by TD Bank's posting software to increase overdraft fees; and/or

d. The decision to assess overdraft fees even when funds remained in customer accounts.

74. Plaintiff and members of the Breach Class have sustained damages as a result of TD Bank's breaches of the account agreements.

COUNT II
Breach of the Duty of Good Faith and Fair Dealing
TD Bank
(On Behalf of Plaintiff and the Breach Class)

75. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

76. Plaintiff and TD Bank have contracted for banking services, to include checking and ATM and debit card services.

77. Good faith is an element of the contract that Plaintiff and the proposed Breach Class had with TD Bank. Whether by common law or statute, all such contracts impose upon each party a duty of good faith and fair dealing. Good faith and fair dealing, in connection with executing contracts and discharging performance and other duties according to their terms, means preserving the spirit—not merely the letter—of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms constitute examples of bad faith in the performance of contracts.

78. TD Bank has breached the covenant of good faith and fair dealing through its overdraft policies and practices as alleged herein.

79. Plaintiff and the proposed Breach Class have performed all, or substantially all, of the obligations imposed on them under the account agreements.

80. Plaintiff and members of the proposed Breach Class have sustained damages as a result of Defendant's breaches of the covenant of good faith and fair dealing.

COUNT III
Unconscionability
The Toronto-Dominion Bank and TD Bank, N.A.
(On Behalf of Plaintiff and the Breach Class)

81. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

82. Defendants' policies and practices are substantially and procedurally unconscionable in the following respects, among others:

a. Using unfair and deceptive trade practices to market and sell the TD Bank accounts and overdraft related products to customers;

b. Defendants used unfair and/or misleading tactics and information in connection with the offering of accounts and overdraft related products;

c. TD Bank does not alert customers that a debit card transaction will trigger an overdraft, and did not provide the customer the opportunity to cancel the transaction, before incurring an overdraft fee. This violates the Account Agreement, posted online by The Toronto-Dominion Bank or is allowed by an unconscionable provision thereof;

d. TD Bank did not obtain affirmative consent from checking account customers prior to processing a transaction that would overdraw the account and result in an overdraft fee;

e. TD Bank uses unduly discretionary power to assess fees even when no economic argument could be made for such fees. This violates the TD Agreement or is allowed by unconscionable provisions thereof;

f. The Account Agreement and the related documents referenced therein are contracts of adhesion in that they are standardized forms, imposed and drafted by TD Bank, which is of vastly superior bargaining strength, and only allows the customer the opportunity to adhere to them or reject them entirely; and

g. The account agreements provided to customers are ambiguous, deceptive, unfair, and misleading to any extent they allowed Defendants to perpetrate the grossly improper acts described herein.

83. Considering the great business acumen and experience of Defendants in relation to Plaintiff and the members of the Breach Class, the great disparity in the parties' relative bargaining power, the inconspicuousness and incomprehensibility of the contract language at issue, the oppressiveness of the terms, the commercial unreasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns, these provisions are unconscionable and, therefore, unenforceable as a matter of law.

84. The imposition of overdraft charges which exceed the amount overdrawn (*e.g.*, the imposition of a $35 charge on an overdraft of less than $35) is itself unconscionable. Such charges are not reasonably related to the Defendants' cost of covering the overdraft and/or its risk of nonpayment (where the Bank pays the overdraft), or to Defendants' cost of returning the item unpaid (where the Bank does not pay the overdraft).

85. Plaintiff and members of the proposed Breach Class have sustained damages as a result of Defendants' unconscionable policies and practices as alleged herein.

Count IV
Violations of Florida Deceptive and Unfair Trade Practices Act ("FDUTPA")
Fla. Stat. § 501.201 *et seq.*
TD Bank, N.A.
(On Behalf of Plaintiff and the Classes)

86. Plaintiff restates and realleges the preceding paragraphs of this Complaint as though set out here word for word.

87. TD Bank, N.A. committed an unfair or deceptive practice by engaging in one or more of the following actions:

a. offering accounts and overdraft related products that are unfairly designed to manipulate transactions, resulting in maximization of the number of overdrafts, and consequently, the overdraft fees charged to customers;

b. participating in the unfair and deceptive practice of reordering debit transactions from the highest monetary value to the lowest monetary value in order to maximize the number of overdrafts, and, consequent, the overdraft fees charged to customers; and

c. participating in the unfair and deceptive practice of charging overdrafts and overdraft fees even when there were sufficient funds in customer accounts.

d. approving debit card transactions, including cash transactions at ATMs owned by TD Bank, without informing the customer that there were

insufficient funds in the customer's account to cover the transaction thereby resulting in an overdraft fee;

e. reordering customer transactions causing an increase in the number of overdraft fees imposed on customers;

f. charging overdraft fees even though there were sufficient funds in customer accounts to cover transactions;

g. failing to provide customers with accurate balance information thereby causing customers to overdraft their accounts and incur overdraft fees; and

h. failing to obtain affirmative consent from customers prior to processing transactions that would result in overdraft fees.

88. Plaintiff and the proposed Classes were misled by Defendants' practices in that a reasonable consumer would assume transactions were debited from the account in the order they occur—not that the transactions would be reordered by TD Bank thereby causing an increase in overdraft fees. Plaintiff and the proposed Classes were further mislead by Defendants' approval of debit card transactions without informing the customer that there were insufficient funds to cover the transaction. Additionally, Plaintiff and the proposed Classes were mislead by Defendants' marketing of the accounts in question, suggesting that TD Bank is America's Most Convenient Bank when it is not.

89. As a result of Defendants' deceptive or unfair practice, Plaintiff and the proposed Classes paid overdraft fees that Defendants were not permitted to charge and customers should not have been required to pay. Plaintiff and the proposed Classes were damaged as a result of Defendants' practices.

COUNT V
Violations of Florida Deceptive and Unfair Trade Practice Act ("FDUTPA")
Fla. Stat. § 501.201 *et seq.*
The Toronto-Dominion Bank
(On behalf of Plaintiff and the Classes)

90. Plaintiff restates and realleges the preceding paragraphs of this Complaint as though set here word for word.

91. The Toronto-Dominion Bank offers accounts and overdraft related products through marketing materials, including marketing materials on TDBank.com which is owned by The Toronto-Dominion Bank, that are unfairly designed to manipulate transactions, resulting in maximization of the number of overdrafts, and consequently, the overdraft fees charged to customers.

92. The Toronto-Dominion Bank participates in the unfair and deceptive practice of reordering debit transactions from the highest monetary value to the lowest monetary value in order to maximize the number of overdrafts, and, consequent, the overdraft fees charged to customers.

93. The Toronto-Dominion Bank participates in the unfair and deceptive practice of charging overdrafts and overdraft fees even when there were sufficient funds in customer accounts.

94. The Toronto-Dominion Bank is a Canadian-chartered bank that does not have a registered office in the United States. Thus, upon information and belief, FUDTPA applies to The Toronto-Dominion Bank because The Toronto-Dominion bank is not regulated by "The Office of Financial Regulation of the Financial Services Commission" nor a "federal agency" within the meaning of the statute.

95. Toronto-Dominion Bank is involved in the determination and implementation of the overdraft practices and procedures for TD Bank. Specifically, Toronto-Dominion Bank makes company-wide decisions on whether TD Bank participates in certain overdraft practices.

96. Toronto-Dominion Bank was also involved in any litigation related to TD Bank's overdraft practices. For example, Toronto-Dominion Bank was aware and participated in the decisions to settle all claims against TD Bank in the MDL. In fact, it reported the details of that settlement, including the factual allegations giving raise to that litigation, in its 2012 Annual Report.

97. Despite being fully aware and participating in the prior MDL settlement, Toronto-Dominion continues to allow and itself participates in the unfair, unconscionable, and/or deceptive practices of TD Bank related to the overdraft program and mislead its customers, including plaintiff and the proposed Classes, as outlined in the preceding paragraphs.

98. As a direct result of Toronto-Dominion's practice, plaintiff and the proposed Classes were charged and paid overdraft fees they should not have been charged or required to pay. Plaintiff and the proposed Classes were damages as a result of Toronto-Dominion's practice.

COUNT VI
Conversion
TD Bank
(On Behalf of Plaintiff and the Classes)

99. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

100. TD Bank had and continues to have a duty to maintain and preserve customers' checking accounts and prevent their diminishment through its own wrongful acts.

101. TD Bank has wrongfully collected overdraft fees from Plaintiff and the members of the Classes, and has taken specific and readily identifiable funds from their accounts in payment of these fees in order to satisfy them.

102. TD Bank has, without proper authorization, assumed and exercised the right of ownership over these funds, in hostility to the rights of Plaintiff and the members of the Classes, without legal justification.

103. TD Bank continues to retain these funds unlawfully without the consent of Plaintiff or the members of the Classes.

104. TD Bank intended to permanently deprive Plaintiff and the members of the Classes of these funds.

105. These funds were properly owned by Plaintiff and the members of the Classes, not TD Bank which now claims that it is entitled to its ownership, contrary to the rights of Plaintiff and the members of the Classes.

106. Plaintiff and the members of the Classes are entitled to the immediate possession or repossession of these funds.

107. TD Bank has wrongfully converted these specific and readily identifiable funds.

108. TD Bank's wrongful conduct is continuing.

109. As a direct and proximate result of this wrongful conversion, Plaintiff and the members of the Classes have suffered and continue to suffer damages.

110. By reason of the foregoing, Plaintiff and the members of the Classes are entitled to recover from the TD Bank all damages and costs permitted by law, including all amounts that Defendant had wrongfully converted.

COUNT VII
Violation of the Electronic Funds Transfer Act (15 U.S.C. § 1693) and Regulations Promulgated Thereunder, e.g,. 12 C.F.R. § 205
TD Bank
(On Behalf of Plaintiff and the EFTA Class)

111. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

112. Plaintiff alleges this claim on behalf of himself and the EFTA Class members who have been assessed one or more overdraft fees or charges based on ATM or debit card transactions.

113. Plaintiff, on behalf of himself and the EFTA Class, asserts the TD Bank failed to:

a. Provide customers with a notice describing its overdraft services that complies with 12 C.F.R. §§ 205.17(b)(1)(i), (d);

b. Provide customers with a reasonable opportunity to affirmatively consent, or opt-in, to overdraft services in accordance with 12 C.F.R. § 205.17(b)(1)(ii);

c. Obtain customers' affirmative consent, or opt-in, to overdraft services in accordance with 12 C.F.R. § 205.17(b)(1)(iii); or

d. Provide customers with confirmation of their consent in accordance with 12 C.F.R. § 205.17(b)(1)(iv).

114. Nevertheless, TD Bank imposed overdraft fees on them based on ATM or debit card transactions in violation of 12 C.F.R. §§ 205.17(b), (c).

115. Because of TD Bank's violation of EFTA, Defendant is liable to Plaintiff and the EFTA Class for actual statutory damages pursuant to 15 U.S.C. § 1693m and to recover costs of suit and reasonable attorneys' fees and costs.

PRAYER FOR RELIEF

WHEREFORE, as to each of the foregoing Counts, Plaintiff, individually and on behalf of all others similarly situated, respectfully seek the following relief against Defendants:

A. An Order declaring that this action is a proper class action, certifying the Classes as requested herein, designating Plaintiff as Class Representatives and appointing the undersigned counsel as Class Counsel;

B. An Order issuing a preliminary injunction enjoining Defendants and all others, known and unknown, from continuing to take illegal action as set forth in this Complaint;

C. An Order issuing a permanent injunction enjoining Defendants and all others, known and unknown, from continuing to take illegal action as set forth in this Complaint;

D. A Judgment awarding Plaintiff and the Classes compensatory, consequential, and statutory damages, including, without limitation, the loss of monies paid to Defendants as overdraft charges and fees related thereto;

E. A Judgment awarding Plaintiff and the Classes restitution of all fees paid;

F. A Judgment awarding Plaintiff and the Class Members actual damages and equitable monetary relief from Defendants;

G. A Judgment awarding Plaintiff and the Classes punitive and exemplary damages;

H. A Judgment awarding Plaintiff and the Classes injunctive relief as permitted by law or equity, including enjoining Defendants from continuing the unlawful practices as set forth herein, and ordering Defendants to engage in a corrective advertising campaign;

I. A Judgment awarding Plaintiff and the Classes reasonable attorneys' fees and litigation costs;

J. An Oder that Defendants to pay both pre- and post-judgment interest on any amounts awarded; and

K. Such other and further relief as may be just and proper under the circumstances.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all issues so triable.

/s/ Jason Whittemore
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EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

IN RE: CHECKING ACCOUNT OVERDRAFT LITIGATION

MDL No. 2036

THIS DOCUMENT RELATES TO:

Mosser v. TD Bank, N.A.
E.D. Pa. Case No. 2:10-cv-00731
S.D. Fla. Case No. 10-cv-21386-JLK

Mazzadra, et al v. TD Bank, N.A.
S.D. Fla. Case No. 1:10-cv-21870-JLK

Hughes, et al. v. TD Bank, N.A.
D.N.J. Case No. 11-7257
S.D. Fla. Case No. 12-22372-JLK

ORDER OF FINAL APPROVAL OF SETTLEMENT, AUTHORIZING SERVICE AWARDS, AND GRANTING APPLICATION FOR ATTORNEYS' FEES

On January 10, 2013, Plaintiffs and Class Counsel filed their Motion for Final Approval of Settlement, and Application for Service Awards, Attorneys' Fees and Expenses, and Incorporated Memorandum of Law ("Motion"), seeking Final Approval of the Settlement Agreement and Release ("Agreement" or "Settlement") with TD Bank, N.A. ("TD Bank" or "the Bank").[1] (DE # 3158). In support, Plaintiffs filed declarations from experts in class action law and attorneys' fees, as well as several other declarations supplementing the factual record to enable the Court to evaluate the fairness and adequacy of this Settlement. (DE # 3158-2, 3158-3,

[1] This Order incorporates the definitions of terms used in the Agreement attached to the Motion (DE #3158).

3158-4, 3158-5, 3158-6).

This matter came before the Court on March 7, 2013, for a Final Approval Hearing pursuant to the Court's Preliminary Approval Order dated September 19, 2012. (DE # 2960). The Court reviewed all of the filings related to the Settlement and heard argument on the Motion.

After careful consideration of the presentations of the Parties, the Court concludes that this Settlement provides a fair, reasonable and adequate recovery for Settlement Class Members, representing approximately forty-two percent (42%) of the most probable recoverable damages based on the creation of a $62,000,000 common fund. The Settlement constitutes an excellent result for the Settlement Class under the circumstances and challenges presented by the Action. The Court specifically finds that the Settlement is fair, reasonable and adequate, and a satisfactory compromise of the Settlement Class Members' claims. The Court overrules the two remaining objections to the Settlement.[2] The Settlement fully complies with Fed. R. Civ. P. 23(e), and, thus, the Court grants Final Approval to the Settlement, certifies the Settlement Class, and awards the fees and costs requested by Class Counsel as well as the requested Service Awards for the eight (8) representative Plaintiffs.

BACKGROUND

The Court is familiar with the history of this consumer class action brought against TD Bank, having presided over MDL 2036 for over three years. During that time, the Court has had ample opportunity to observe Class Counsel and TD Bank's counsel in action. These attorneys, several of whom have practiced before this Court for many years, are extremely skilled advocates, and vigorously litigated the Action up to the time of the Settlement. The Settlement is quite obviously the result of arm's-length negotiations, and the Court so finds.

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[2] On March 7, 2013, the Court entered an Order (DE # 3315) approving the withdrawal of two objections (DE # 3222, 3223) to the Settlement.

The present evidentiary record is more than adequate for the Court to consider the fairness, reasonableness and adequacy of the Settlement. A fundamental question is whether the district judge has sufficient facts before him to evaluate and intelligently and knowledgeably approve or disapprove the settlement. *In re General Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1084 n.6 (6th Cir. 1984) (citing *Detroit v. Grinnell*, 495 F.2d 448, 463-68 (2d Cir. 1974)). In this case, the Court clearly has such facts before it in considering the Motion, including the evidence and opinions of Class Counsel and their experts.

1. Factual and Procedural Background of the Action.

On December 15, 2009, Plaintiff Carly A. Dwyer filed *Dwyer v. Toronto-Dominion Bank* Case No. 1:09-cv-12118-RBC ("*Dwyer*") in the United States District Court for the District of Massachusetts. On January 8, 2010, Plaintiff Anne-Marie Mascaro filed *Mascaro v. TD Bank, Inc. and John Does 1-50*, Case No. 1:10-cv-00040-ESH ("*Mascaro*") in the United States District Court for the District of Columbia. On January 11, 2010, Plaintiff Donald Kimenker filed *Kimenker v. TD Bank, N.A. and TD Bank Financial Group*, Case No. 1:10-CV-00136-NLS-JS ("*Kimenker*") in the United States District Court for the District of New Jersey. On February 19, 2010, Plaintiff Todd M. Mosser filed *Mosser v. TD Bank, N.A.*, Case No. 2:10-CV-00731-PD ("*Mosser*") in the United States District Court for the Eastern District of Pennsylvania. All of the aforementioned actions sought, *inter alia*, monetary damages, restitution, and equitable relief arising from TD Bank's alleged improper assessment and collection of Overdraft Fees. *See* Joint Declaration of Robert C. Gilbert and Peter Prieto ¶¶ 8-11 ("Joint Decl.") (DE # 3158-2).

On March 19, 2010, the *Dwyer* and *Mascaro* actions were transferred to this Court for inclusion in MDL 2036. On April 6, 2010, the *Kimenker* action was transferred to this Court for inclusion in MDL 2036. The *Mosser* action was also transferred to this Court on April 23, 2010 for inclusion in MDL 2036. *See* Joint Decl. ¶ 12.

On June 7, 2010, Plaintiffs Dwyer, Mosser and Mascaro filed a Consolidated Amended Class Action Complaint, alleging improper assessment and collection of Overdraft Fees and seeking, *inter alia*, monetary damages, restitution, and equitable relief from TD Bank and TD Bank Financial Group. Also on June 7, 2010, Plaintiffs Gregory D. Carcaci, James E. Daniels, Kelli Herd, Gary L. Mazzadra, Lucy Nico, Leonardo Rubio and Paige Schwartzman filed *Mazzadra, et al v. TD Bank, N.A.* and *TD Bank Financial Group,* Case No. 10-21870-JLK ("*Mazzadra*") in the United States District Court for the Southern District of Florida, alleging improper assessment and collection of Overdraft Fees and seeking, *inter alia*, monetary damages, restitution, and equitable relief. On June 9, 2010, Donald Kimenker filed a notice of voluntary dismissal without prejudice, and on June 10, 2010, the Court issued a final order of dismissal without prejudice with respect to the *Kimenker* action. On June 14, 2010, the *Mazzadra* action was joined with other actions in MDL 2036. *See* Joint Decl. ¶¶ 13-15.

On July 6, 2010, Plaintiffs Carcaci, Daniels, Dwyer, Herd, Mascaro, Mazzadra, Mosser, Nico, Rubio and Schwartzman filed a Second Consolidated Amended Class Action Complaint, alleging improper assessment and collection of Overdraft Fees and seeking, *inter alia*, monetary damages, restitution, and equitable relief. On July 7, 2010, the Parties filed a stipulation to dismiss without prejudice defendants other than TD Bank from the *Dwyer*, *Mascaro*, *Kimenker*, *Mosser* and *Mazzadra* actions. The stipulation was approved and adopted as an Order of the Court on July 8, ~~2011~~ 2010. *See* Joint Decl. ¶¶ 16-17.

On July 9, 2010, TD Bank filed a motion to dismiss the Second Consolidated Amended Class Action Complaint. On August 9, 2010, Plaintiffs filed their opposition to the motion. On August 30, 2010, TD Bank filed its reply. On November 4, 2010, the Court denied TD Bank's motion to dismiss. *See* Joint Decl. ¶ 18.

On December 6, 2010, Plaintiffs Carcaci, Daniels, Dwyer, Herd, Mascaro, Mazzadra, Mosser, Nico, Rubio, Schwartzman, joined by new Plaintiffs Suzanne M. Hubbard, Christina Mattisz and Ian McNulty, filed a Consolidated Third Amended Class Action Complaint, alleging that TD Bank's policy and practice of High-to-Low Posting with respect to Debit Card Transactions, combined with TD Bank's alleged failure to allow customers to opt-out of overdrafts or Overdraft Fees or to publicize or disclose the ability of customers to opt-out of overdrafts or Overdraft Fees, constituted a breach of an implied covenant of good faith and unfair and deceptive acts and practices, resulted in the conversion of the customers' property, and otherwise rendered TD Bank liable for compensatory damages in the amount of all Overdraft Fees collected as a result of the challenged practices, punitive damages, injunctive relief, and attorneys' fees, costs and interest. On January 7, 2011, TD Bank answered the Consolidated Third Amended Class Action Complaint, denying any and all wrongdoing and liability and asserting various affirmative defenses. *See* Joint Decl. ¶¶ 19-20.

On January 11, 2011, the Parties entered into a Stipulated Protective Order relating to the production of documents and information. On July 28, 2011, the Parties filed a Stipulated Discovery Plan and Order for Electronically Stored Information that was approved and adopted as an Order of the Court on July 29, 2011. *See* Joint Decl. ¶ 21. Thereafter, sixteen (16) depositions were taken and over 540,000 pages of documents were reviewed. *Id.* at ¶ 54.

On June 3, 2011, TD Bank filed a joinder in JPMorgan Chase Bank, N.A.'s motion, based on recently decided Eleventh Circuit authority, to dismiss on grounds of preemption pursuant to Rule 12(c) and on further reconsideration of its earlier motion pursuant to Rule 12(b)(6), or, in the alternative for certification pursuant to 28 U.S.C. § 1292(b). Later the same day, Plaintiffs filed their opposition to TD Bank's joinder (as well as JPMorgan Chase Bank's

motion). On July 13, 2011, the Court issued an Omnibus Order Denying Defendants' Motions for Reconsideration that also denied TD Bank's joinder. *See* Joint Decl. ¶ 22.

On December 9, 2011, Plaintiffs Dwyer, Mascaro, Mattisz, Mazzadra and Rubio filed a motion for voluntary dismissal with prejudice pursuant to Rule 41(a)(2). On December 22, 2011, TD Bank filed its response. On December 28, 2011, the Court issued an Order dismissing the claims of Plaintiffs Dwyer, Mascaro, Mattisz, Mazzadra and Rubio with prejudice, and dismissing the *Dwyer* and *Mascaro* actions with prejudice with respect to the individual claims of those individuals. *See* Joint Decl. ¶ 23.

On December 14, 2011, plaintiffs Christopher Hughes and Carla Cressman filed *Hughes et al v. TD Bank, N.A.*, Case No. 11-CV-07257-JEI-KMW ("*Hughes*") in the United States District Court for the District of New Jersey, alleging improper assessment and collection of Overdraft Fees and seeking, *inter alia*, monetary damages, restitution and equitable relief from TD Bank. On May 14, 2012, *Hughes* was transferred to this Court for inclusion in MDL 2036. *See* Joint Decl. ¶ 24.

On December 16, 2011, Plaintiffs moved for class certification. On January 30, 2012, TD Bank filed its opposition to class certification, and on March 6, 2012, Plaintiffs filed their reply. On January 30, 2012, TD Bank filed a motion to strike the declaration of Arthur Olsen submitted in support of Plaintiffs' motion for class certification. Plaintiffs opposed that motion on March 6, 2012, and TD Bank replied on March 16, 2012. On March 20, 2012, the Court heard argument on TD Bank's motion to strike the declaration of Arthur Olsen, and issued a minute order denying the motion. On March 26, 2012, the Court heard argument on Plaintiffs' motion for class certification. On April 3, 2012, the Court entered an Order granting Plaintiffs' motion for class certification. *See* Joint Decl. ¶¶ 25-26.

On April 17, 2012, TD Bank filed a petition for leave to appeal the Order granting class certification with the United States Court of Appeals for the Eleventh Circuit pursuant to Rule 23(f) (the "Petition"). Plaintiffs filed their response in opposition to the Petition on April 30, 2002. On May 11, 2012, the Parties filed a joint stipulation to voluntarily dismiss the Petition, without prejudice to any party's right to pursue an appeal following entry of final judgment in this Court. The Eleventh Circuit dismissed the Petition on May 22, 2012. *See* Joint Decl. ¶ 27.

2. Settlement Negotiations and Proceedings.

Preliminary settlement discussions began in early 2012 and resulted in the scheduling of mediation and the production of certain confidential data by TD Bank to Class Counsel for analysis by their expert. On May 7, 2012, Class Counsel and TD Bank participated in mediation with Professor Eric Green of Resolutions LLC. During that mediation, Class Counsel and TD Bank reached agreement concerning the material terms of the Settlement. On May 8, 2012, Class Counsel and TD Bank executed a Summary Agreement memorializing the material terms of the Settlement. On May 11, 2012, Class Counsel and TD Bank filed a Joint Notice of Settlement that requested suspension of all deadlines pending the drafting and execution of the Agreement. This Court granted that request on May 14, 2012. *See* Joint Decl. ¶¶ 30-31.

Several months of detailed discussions followed regarding other terms of the Settlement, including issues pertaining to TD Bank's data, the identification of Settlement Class Members and the distribution of the Settlement Fund. Once Settlement Class Counsel and TD Bank resolved all remaining issues, the drafting of the Agreement was completed and the Parties executed the Agreement in late August and early September 2012. *See* Joint Decl. ¶ 32.

On September 18, 2012, Plaintiffs and Class Counsel filed their motion for preliminary approval. (DE # 2956). On September 19, 2012, the Court entered an Order Granting Preliminary Approval. (DE # 2960). In so ruling, the Court preliminarily determined that the

Settlement is "fair, reasonable and adequate" and found "that the Settlement was reached in the absence of collusion, and is the product of informed, good-faith, arms'-length negotiations between the parties and their capable and experienced counsel." (*Id.* at ¶ 11).

Pursuant to the Preliminary Approval Order, Notice of the Settlement was mailed to 1,006,309 members of the Settlement Class. *See* Declaration of Cameron Azari ¶ 18 ("Azari Decl."). Notice of the Settlement was also published in fourteen (14) of the highest daily circulation newspapers and/or newspapers that were more likely to be read by Settlement Class Members in the geographic markets where TD Bank maintained the highest number of branches during the Class Period. *Id.* at ¶¶ 23-24. Internet banner notices were placed on national online networks MSN Network and Yahoo! Network. *Id.* at ¶ 27. In addition, a special Settlement website and toll free telephone numbers were established to provide details regarding the Settlement. *Id.* at ¶¶ 28-30.

As discussed below, the Court finds that the Notice Program was properly effectuated, and that it was more than adequate to put the Settlement Class Members on notice of the terms of the Settlement, the procedures for objecting to and opting out of the Settlement, and the rights that the Settlement Class Members will give up by remaining part of the Settlement. *See* Azari Decl. at ¶¶ 16-18, 23-24, 27-30.

3. Summary of the Settlement Terms.

The Settlement's terms are set forth in the Agreement. (DE # 3158-1). The Court now provides a summary of the material terms.

A. The Settlement Class.

The Settlement Class is an opt-out class under Rule 23(b)(3) of the Federal Rule of Civil Procedure. The Settlement Class is defined as:

> All holders of a TD Bank Account who, from December 1, 2003, through and including August 15, 2010, incurred one or more Overdraft Fees as a result of TD

> Bank's practice of High-to-Low Posting. Excluded from the Class are all current TD Bank employees, officers and directors, and the judge presiding over this Action.

See Agreement ¶ 67.

B. Monetary Relief for the Benefit of the Class.

TD Bank deposited $62,000,000 into the Escrow Account following Preliminary Approval. *See* Joint Decl. ¶ 33. That deposit created the Settlement Fund, which will be used to pay: (i) all distributions to the Settlement Class; (ii) all attorneys' fees, costs and expenses of Class Counsel; (iii) all Service Awards to the Plaintiffs; (iv) any residual *cy pres* distributions; (v) any Taxes; (vi) any costs of Settlement Administration other than those to be paid by TD Bank; and (vii) additional fees, costs and expenses not specifically enumerated in the Agreement, subject to approval of Settlement Class Counsel and TD Bank. *See* Agreement ¶ 98. In addition to the $62,000,000 Settlement Fund, TD Bank is responsible for paying all costs and fees associated with Class Notice and Settlement Administration; these are estimated to be approximately $750,000. *Id.* at ¶ 70; *see also* Joint Decl. ¶ 37.

All identifiable Settlement Class members who experienced a Positive Differential Overdraft Fee (as defined in the Agreement) and did not opt-out of the Settlement will receive automatic *pro rata* distributions from the Net Settlement Fund. *See* Agreement ¶¶ 103-104. The Positive Differential Overdraft Fee analysis determines, among other things, which TD Bank Account holders were assessed additional Overdraft Fees that would not have been assessed if the Bank had used an alternative posting sequence or method for posting Debit Card Transactions other than High-to-Low Posting, and how much in additional Overdraft Fees those Account holders paid. The calculation involves a multi-step process described in detail in the Agreement. *Id.* at ¶ 95.

The Net Settlement Fund – which will be distributed *pro rata* among Settlement Class Members – is equal to the Settlement Fund, plus interest earned (if any), less Court-awarded attorneys' fees and costs, Service Awards for the Plaintiffs, and certain additional costs or expenses and reservations for prospective costs. *See* Agreement ¶ 98.

Settlement Class Members do not have to take any affirmative steps to receive relief under the Settlement. *See* Joint Decl. ¶ 34. The amount of their *pro rata* distributions will be determined by Settlement Class Counsel and their expert through analysis of TD Bank's electronic data. *Id.* Following the Effective Date, TD Bank and the Settlement Administrator will distribute the Net Settlement Fund to all Settlement Class Members who experienced a Positive Differential Overdraft Fee and did not timely opt out of the Settlement. *See* Agreement ¶¶ 40, 97. Payments to Settlement Class Members who are Current Account Holders will be made by the Bank crediting such Settlement Class Members' Accounts, and notifying them of the credit. *Id.* at ¶ 102. The funds for those payments will be provided by the Settlement Administrator to TD Bank from the Settlement Fund, and will be held by TD Bank in escrow pending distribution of account credits to the Current Account Holders. *Id.* at ¶ 103. Former Account Holders and Current Account Holders whose Accounts cannot feasibly be automatically credited will receive checks mailed by the Settlement Administrator. *Id.* at ¶ 104.

Any uncashed or returned checks will remain in the Settlement Fund for one year from the date the first Settlement Fund Payments are mailed by the Settlement Administrator, during which time the Settlement Administrator will make reasonable efforts to effectuate delivery of the Settlement Class Member Payments. *See* Agreement ¶ 105. Any residue still remaining after that period will be distributed through a residual *cy pres* program, the purpose of which shall be to benefit consumer financial literacy education and to educate and assist consumers with

financial services through advisory and related services (excluding litigation). The *cy pres* recipients and distributions will be approved by the Court. *Id.* at ¶ 106.

C. Class Release.

In exchange for the benefits conferred by the Settlement, all Settlement Class Members who do not opt out will be deemed to have released TD Bank from claims as set forth in the detailed release language found in Section XIV of the Agreement.

DISCUSSION

Federal courts have long recognized a strong policy and presumption in favor of class action settlements. The Rule 23(e) analysis should be "informed by the strong judicial policy favoring settlements as well as the realization that compromise is the essence of settlement." *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. Unit B 1982); *see also Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). In evaluating a proposed class action settlement, the Court "will not substitute its business judgment for that of the parties; 'the only question . . . is whether the settlement, taken as a whole, is so unfair on its face as to preclude judicial approval.'" *Rankin v. Rots*, 2006 WL 1876538, at *3 (E.D. Mich. June 27, 2006) (quoting *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971)). "Settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and uncertainties and preventing lawsuits." *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977).

As explained below, the Settlement here is more than sufficient under Rule 23(e). It includes a Settlement Fund of $62,000,000, plus an estimated $750,000 that TD Bank will pay for the fees and costs associated with the Notice Program and Settlement administration. *See* Joint Decl. ¶¶ 33, 37. All Settlement Class Members who experienced a Positive Differential Overdraft Fee and did not timely opt-out will automatically receive their recovery as a matter of

course, without needing to take any action, based on an analysis by Settlement Class Counsel's expert of information in TD Bank's possession. *Id.* at. ¶¶ 33-35.

1. The Court's Exercise of Jurisdiction Is Proper.

In addition to having personal jurisdiction over the Plaintiffs, who are parties to the Action, the Court also has personal jurisdiction over all members of the Settlement Class because they have received the requisite notice and due process. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)); *see also In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 306 (3d Cir. 1998). The Court has subject matter jurisdiction over the Action pursuant to 28 U.S.C. §§ 1332(d)(2) and (6).

a. The Best Notice Practicable Was Provided to the Settlement Class.

As discussed above, Notice of the Settlement in the forms approved by the Court was mailed to over 1,006,309 members of the Settlement Class. *See* Azari Decl. ¶¶ 12-18. Notice of the Settlement was also published in fourteen (14) of the highest daily circulation newspapers and/or newspapers that were more likely to be read by Settlement Class Members in the geographic markets where TD Bank maintained branches during the Class Period. *Id.* at ¶¶ 23-24. In addition, a special Settlement Website and toll-free telephone number were established to enable Settlement Class Members to obtain detailed information about the Action and the Settlement. *Id.* at ¶¶ 28-30. Internet banner notices were also placed on two popular internet web sites, MSN Network and Yahoo! Network. *Id.* at ¶ 27.

b. The Notice Was Reasonably Calculated to Inform Settlement Class Members of Their Rights.

The Court-approved Notice[3] satisfied due process requirements because it described "the substantive claims . . . [and] contained information reasonably necessary to make a decision to remain a class member and be bound by the final judgment." *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d at 1104-05. The Notice, among other things, defined the Settlement Class; described the release provided to TD Bank under the Settlement as well as the amount, manner of allocating, and proposed distribution of the Settlement proceeds; and informed Settlement Class Members of their right to opt-out and object, the procedures for doing so, and the time and place of the Final Approval Hearing. Further, the Notice stated that Class Counsel intended to seek attorneys' fees of up to thirty percent (30%) of the $62,000,000 Settlement Fund. In addition to disclosing these material terms, the Notice informed Settlement Class Members that a class judgment would bind them unless they opted out, and told them where they could get more information – for example, at the Settlement Website that posts a copy of the fully executed Agreement, as well as other important court documents such as the Motion.

The Motion and attachments thereto contain Class Counsel's considered opinion that the $62,000,000 Settlement Fund represents approximately forty-two percent (42%) of the most probable damages Plaintiffs and the Settlement Class could recover at trial. *See* Joint Decl. ¶ 56. The disclosure of this percentage was sufficient to put Settlement Class Members on notice of their potential recovery based on their personal history with TD Bank and to allow them to make an informed decision about whether to accept the Settlement, object to it or opt out of it.

[3] *See* Preliminary Approval Order at ¶ 12 (DE # 2960).

One objector has argued that he is unable to determine whether the Settlement is beneficial to him. *See* Objection of Edward D. Smith ("Smith Objection").[4] This argument is without merit. As discussed above, the Notice set forth in detail the terms of the Settlement, described the release, and informed Settlement Class Members of their rights.

The Court finds that the Settlement Class Members were provided with the best practicable notice; the notice was "reasonably calculated, under [the] circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Shutts*, 472 U.S. at 812 (quoting *Mullane*, 339 U.S. at 314-15). This Settlement with TD Bank was widely publicized, and any Settlement Class Member who wished to express comments or objections had ample opportunity and means to do so. *See* Azari Decl. ¶¶ 7-8, 32-41.

2. The Settlement Is Fair, Adequate and Reasonable, and Therefore Is Finally Approved Under Rule 23.

In determining whether to approve the Settlement, the Court considers whether it is "fair, adequate, reasonable, and not the product of collusion." *Leverso v. SouthTrust Bank of Al., N.A.*, 18 F.3d 1527, 1530 (11th Cir. 1994); *see also Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). A settlement is fair, reasonable and adequate when "the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." *In re Lorazepam & Clorazepate Antitrust Litig.*, MDL No. 1290, 2003 WL 22037741, at *2 (D.D.C. June 16, 2003) (quoting *Manual for Complex Litigation* (Third) § 30.42 (1995)). The Court is "not called upon to determine whether the settlement reached by the parties is the best possible deal, nor whether class members will receive as much from a settlement as they might have

[4] To date the two (2) remaining objections, submitted by Mr. Smith and by Andrea Barnes ("Barnes Objection") have not been entered on the CM/ECF system and, therefore, have not been assigned docket entry numbers.

recovered from victory at trial." *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1014 (N.D. Ill. 2000) (citations omitted).

The Eleventh Circuit has identified six factors to be considered in analyzing the fairness, reasonableness and adequacy of a class action settlement under Rule 23(e):

(1) the existence of fraud or collusion behind the settlement;

(2) the complexity, expense, and likely duration of the litigation;

(3) the stage of the proceedings and the amount of discovery completed;

(4) the probability of the plaintiffs' success on the merits;

(5) the range of possible recovery; and

(6) the opinions of the class counsel, class representatives, and the substance and amount of opposition to the settlement.

Leverso, 18 F.3d at 1530 n.6; *see also Bennett,* 737 F.2d at 986.

a. There Was No Fraud or Collusion.

The Court has readily concluded there was no fraud or collusion behind this Settlement. *See, e.g., In re Sunbeam Sec. Litig.,* 176 F. Supp. 2d 1323, 1329 n.3 (S.D. Fla. 2001); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001) (court had "no doubt that this case has been adversarial, featuring a high level of contention between the parties"); *In re Motorsports Merchandise Antitrust Litig.,* 112 F. Supp. 2d 1329, 1338 (N.D. Ga. 2000) ("This was not a quick settlement, and there is no suggestion of collusion."); *Warren v. City of Tampa*, 693 F. Supp. 1051, 1055 (M.D. Fla. 1988) (record showed no evidence of collusion, but to the contrary showed "that the parties conducted discovery and negotiated the terms of settlement for an extended period of time"), *aff'd,* 893 F.2d 347 (11th Cir. 1989).

b. The Settlement Will Avert Years of Highly Complex and Expensive Litigation.

This case involves over one million Settlement Class Members and alleged wrongful

Overdraft Fees exceeding $100,000,000. *See* Joint Decl. ¶ 52. The claims and defenses are complex. *Id.* Litigating them has been difficult and time consuming. *Id.* Although this litigation has been pending for over two years, recovery by any means other than settlement would require additional years of litigation in this Court and others, including appellate courts. *See United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 856 (2d Cir. 1998) (noting that "a principal function of a trial judge is to foster an atmosphere of open discussion among the parties' attorneys and representatives so that litigation may be settled promptly and fairly so as to avoid the uncertainty, expense and delay inherent in a trial."); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297 at 317, 325-26 & n.32 (N.D. Ga. 1993) ("adjudication of the claims of two million claimants could last half a millennium").

The Settlement provides immediate and substantial benefits to over one million current and former TD Bank customers. *See* Joint Decl. ¶ 52; *see In re Shell Oil Refinery*, 155 F.R.D. 552, 560 (E.D. La. 1993) ("The Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation.") (quoting *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974)); *see also In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) (noting that complex litigation "can occupy a court's docket for years on end, depleting the resources of the parties and taxpayers while rendering meaningful relief increasingly elusive"). Particularly because the "demand for time on the existing judicial system must be evaluated in determining the reasonableness of the settlement," *Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992) (citation omitted), there can be no reasonable doubt as to the adequacy of this Settlement.

The amount of the recovery is extremely reasonable in light of the risks Plaintiffs faced. *See* Joint Decl. ¶¶ 55-56; Declaration of Professor Geoffrey Miller ¶ 33 ("Miller Decl.") (DE #

3158-3). The Settlement Fund of $62,000,000 represents approximately forty-two percent (42%) of the most probable aggregate damages that Class Counsel believe could have been recovered on behalf of the Settlement Class if the Action were successful in all respects. *See* Joint Decl. ¶ 56. Approximately forty-two percent (42%) of the most probable sum Plaintiffs anticipated recovering at trial constitutes a very fair settlement. The combined risks here were real – and potentially catastrophic for the Settlement Class. *See* Miller Decl. ¶ 34.

First, TD Bank asserted that certification of the large multistate class, consisting of over 1,000,000 current and former customers from fourteen (14) states, should be denied for a variety of reasons. *See* Joint Decl. ¶ 88. Although this Court rejected TD Bank's arguments and granted class certification, if TD Bank's Petition was successful in reversing class certification, this litigation would have effectively ground to a halt and this Settlement would not have been achieved. *Id.*; Declaration of Thomas E. Scott ¶ 14 ("Scott Decl.") (DE # 3158-6).

Second, TD Bank would have continued to press its NBA preemption defense at all stages of the litigation. *See* Joint Decl. ¶ 89; Scott Decl. ¶ 14. This Court stressed that its original preemption ruling, on motions to dismiss, applied only "[a]t this stage . . ." *In re Checking Account Overdraft Litigation*, 694 F. Supp. 2d 1302, 1313 (S.D. Fla. 2010). When it subsequently approved the Bank of America settlement in MDL 2036, the Court observed that "whether Plaintiffs' claims are preempted by the NBA and related regulations remains an open question. . . . [N]o federal appeals court has yet reached the NBA preemption issue in this specific context. The preemption defense "was a 'light switch' which, if successfully turned 'on' . . . would have led to dismissal of the entire case . . . ." *Checking Account Overdraft*, 830 F. Supp. 2d at 1347 (citations omitted).

Had the Action proceeded, TD Bank would likely have raised the Ninth Circuit's recent decision in *Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712 (9th Circ. 2012) that reversed and

remanded a $203 million judgment against Wells Fargo on the ground that certain provisions of California's Unfair Competition Law are preempted by federal laws and regulations. *See* Joint Decl. ¶ 89. While Class Counsel assert that *Gutierrez* is not applicable because its preemption analysis was limited to particular provisions of California's Unfair Competition Law, and most of the claims asserted in this Action are based on allegations of bad-faith conduct brought under state laws of general application, TD Bank would have also argued that the NBA preempts these claims on the grounds that they "significantly interfere" with its federally-authorized banking powers. *Id.* Thus, there can be no doubt that the preemption issue involves complex issues of law and fact, and constituted an ongoing, major risk to Plaintiffs' and the putative class's claims. *Id.*; *see also* Tr. of Nov. 7, 2011, Final Approval Hearing Regarding Bank of America Settlement, at 114:14–18 (this Court stated that preemption "seemed to me to be a very close issue. It caused me a lot of problems").

A third major risk derives from the fact that the language in TD Bank's account agreements suggests that, to some extent, TD Bank adequately disclosed its practice of High-to-Low Posting. *See* Joint Decl. ¶ 90; Scott Decl. ¶ 14. Thus, TD Bank asserted that its disclosure was adequate and that it could not be held liable for Plaintiffs' decisions to maintain TD Bank checking accounts under a contract authorizing such practices. *Id.*

The Court rejected this argument in denying the First Tranche banks' Omnibus Motion to Dismiss, finding that Plaintiffs seek only to have the bank exercise its contractual discretion in good faith (DE # 305 at 19) and in denying TD Bank's motion to dismiss (DE # 444). Yet, TD Bank's contractual language would have enabled it to argue to the fact-finder that it told Plaintiffs exactly what it was going to do, and that it cannot be held responsible for Plaintiffs' decision to maintain TD Bank accounts under these terms and then incur Overdraft Fees arguably of their own making. *See* Joint Decl. ¶ 90; Scott Decl. ¶ 14; *see Checking Account*

Overdraft, 830 F. Supp. 2d at 1347 (noting that "high-to-low posting of debit card transactions is by no means clearly unlawful. The account agreements disclose that [the bank] may process debits out of order and/or in high-to-low order, and the Uniform Commercial Code expressly permits the reordering of checks.") (internal quotation marks and citation omitted).

c. The Factual Record is Sufficiently Developed to Enable Class Counsel to Make a Reasoned Judgment Concerning the Settlement.

The Court considers "the degree of case development that class counsel have accomplished prior to settlement" to ensure that "counsel had an adequate appreciation of the merits of the case before negotiating." *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 813 (3d Cir. 1995). At the same time, "[t]he law is clear that early settlements are to be encouraged, and accordingly, only some reasonable amount of discovery should be required to make these determinations." *Ressler*, 822 F. Supp. at 1555.

Substantial discovery occurred in this Action. The Parties settled after sixteen (16) depositions were taken and over 540,000 pages of documents were reviewed. *See* Joint Decl. ¶ 54. The course of the litigation, including information obtained through discovery, afforded Class Counsel insight into the strengths and weaknesses of the claims against TD Bank. *Id.* Prior to settling, Class Counsel developed ample information and performed analyses from which "to determine the probability of . . . success on the merits, the possible range of recovery, and the likely expense and duration of the litigation." *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 669 (M.D. Ala. 1988). That this Action was at a reasonably advanced stage when the Parties reached an agreement to settle it supports granting Final Approval. *See* Miller Decl. ¶¶ 37, 40-42.

Mr. Smith also objects to the Settlement, in part, because he has not had an opportunity to seek discovery in the Action. *See* Smith Objection at 5. This objection is likewise without merit. While individual Settlement Class Members like Mr. Smith did not individually have the right to

conduct discovery, Class Counsel conducted extensive discovery on behalf of Plaintiffs and the Settlement Class that informed their opinions regarding the likelihood of success on critical issues in the litigation and the appropriate range of settlement.

d. Plaintiffs Would Have Faced Significant Obstacles to Obtaining Relief.

The Court also considers "the likelihood and extent of any recovery from the defendants absent . . . settlement." *In re Domestic Air Transp.*, 148 F.R.D. at 314; *see also Ressler*, 822 F. Supp. at 1555 ("A Court is to consider the likelihood of the plaintiff's success on the merits of his claims against the amount and form of relief offered in the settlement before judging the fairness of the compromise."). In the words of Professor Miller: "This case presented significant risks both at the outset and throughout the litigation." Miller Decl. ¶ 26.

Plaintiffs and Class Counsel faced several major risks in this litigation, including those discussed above relating to federal preemption and *Gutierrez*. Absent this Settlement, this litigation likely would have continued for additional years, at tremendous expense to the Parties. *See* Joint Decl. ¶ 55. Given the myriad risks attending these claims, the Settlement is a fair compromise. *See, e.g., Bennett*, 96 F.R.D. at 349-50 (plaintiffs faced a "myriad of factual and legal problems" that led to "great uncertainty as to the fact and amount of damage," which made it "unwise [for plaintiffs] to risk the substantial benefits which the settlement confers . . . to the vagaries of a trial"), *aff'd*, 737 F.2d 982 (11th Cir. 1984).

e. The Benefits Provided by the Settlement Are Fair, Adequate and Reasonable When Compared to the Range of Possible Recovery.

In determining whether a settlement is fair in light of the potential range of recovery, the Court is guided by the "important maxim[]" that "the fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate." *Behrens*, 118 F.R.D. at 542. This is because a settlement must be evaluated "in light of the

attendant risks with litigation." *Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55, 64 (S.D.N.Y. 2003); *see Bennett*, 737 F.2d at 986 ("[C]ompromise is the essence of settlement."); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("[T]he very essence of a settlement is . . . a yielding of absolutes and an abandoning of highest hopes.") (internal quotation omitted). Thus, courts regularly find settlements to be fair where "[p]laintiffs have not received the optimal relief." *Warren,* 693 F. Supp. at 1059; *see, e.g.*, *Great Neck Capital Appreciation Investment P'ship, L.P. v. PriceWaterHouseCoopers, L.L.P.*, 212 F.R.D. 400, 409-410 (E.D. Wis. 2002) ("The mere possibility that the class might receive more if the case were fully litigated is not a good reason for disapproving the settlement.").

The Settlement provides substantial value to the Settlement Class. *See* Joint Decl. ¶¶ 56-59. Under the Settlement, Plaintiffs and the Settlement Class have recovered $62,000,000 in cash, which represents approximately forty-two percent (42%) of the most probable aggregate damages that Class Counsel believe Plaintiffs could have recovered at trial. *Id.* at ¶ 56. TD Bank's agreement to pay all fees, costs and expenses of the Notice Administrator and Settlement Administrator, estimated to be approximately $750,000, further enhance the Settlement. *Id.* at ¶ 86. As Professor Miller said: "This is an outstanding result. Many class actions – especially consumer class actions – generate only a small fraction of the total damages. Given the risks of this litigation, a settlement that generates a fund equal to 42% of the estimated classwide damages clearly satisfies the second *Bennett* factor." Miller Decl. ¶ 33.

Two objectors make arguments that could be interpreted as challenging the fairness and reasonableness of the benefit created by the Settlement. These arguments are without merit.

Mr. Smith claims that the Settlement should have made provision for the payment of interest on amounts unlawfully taken by TD Bank. *See* Smith Objection at p. 2. As Class Counsel point out, the Settlement does not make provision for the payment of interest because,

as is often the case involving the settlement of hotly contested litigation, TD Bank strongly contested the claims brought against it and only agreed to pay a percentage of the most likely damages that Plaintiffs could have recovered *if* they prevailed on all issues through final judgment and appeal. *See* Plaintiffs' and Class Counsel's Response to Objections to Motion for Final Approval at p. 5 ("Response") (DE # 3268).

Ms. Barnes claims that TD Bank constantly charged her Overdraft Fees that caused her to incur financial debt and perpetuated a cycle of Overdrafts in her Account. Barnes' Objection at 1. Ms. Barnes' objection highlights the very problem that Plaintiffs alleged in the Action. The Settlement achieved with TD Bank has recouped a substantial percentage (approximately 42%) of the most probable damages that Ms. Barnes and all other Settlement Class Members could have recovered *if* Plaintiffs prevailed at every juncture throughout the balance of the litigation and on appeal. While the recovery achieved through the Settlement does not achieve a 100% recovery, the $62,000,000 Settlement Fund is an "outstanding result" when considered in the context of TD Bank's vigorous defenses to liability and damages. *See* Miller Decl. ¶¶ 25-42.

f. The Opinions of Class Counsel, Class Representatives, and Absent Settlement Class Members Strongly Favor Approval of the Settlement.

The Court gives "great weight to the recommendations of counsel for the parties, given their considerable experience in this type of litigation." *Warren,* 693 F. Supp. at 1060; *see also Mashburn*, 684 F. Supp. at 669 ("If plaintiffs' counsel did not believe these factors all pointed substantially in favor of this settlement as presently structured, this Court is certain that they would not have signed their names to the settlement agreement."); *In re Domestic Air Transp.*, 148 F.R.D. at 312-13 ("In determining whether to approve a proposed settlement, the Court is entitled to rely upon the judgment of the parties' experienced counsel. '[T]he trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of

counsel.'") (citations omitted).

Class Counsel and the representative Plaintiffs believe that this Settlement is deserving of Final Approval, and the Court agrees. *See* Joint Decl. ¶¶ 60-63. Furthermore, the Court also finds it telling that, of the one million-plus Settlement Class Members, only sixty-nine (69) timely requests for exclusion from the Settlement were received, and only four (4) objections were timely submitted (two of which were later withdrawn). *Lipuma v. American Express Co.*, 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005) (finding that a low percentage of objections "points to the reasonableness of a proposed settlement and supports its approval").

g. The Residual *Cy Pres* Program is Reasonable and Appropriate.

Under this Settlement, 100% of the Net Settlement Fund (defined in paragraph 98 of the Agreement) will be distributed to Settlement Class Members who had a Positive Differential Overdraft Fee and did not timely opt out. *See* Agreement ¶ 97. Based on the plan for distribution, it is highly unlikely there will be any significant residual amounts. *See* Response at p. 6; Agreement ¶¶ 104-106. Whatever amounts remain a year and 30 days after the Settlement Fund Payments have been distributed should be limited to Past Account Holders: (i) who received checks but failed to deposit or cash them within 180 days; or (ii) for whom the Settlement Administrator was unable to locate updated mailing addresses for purposes of re-mailing their checks after they were initially returned as undeliverable. *See* Response at pp. 6-7.

Given the reasonably anticipated small amount of money that may remain in the Settlement Fund a year after Settlement Fund Payments have been distributed, it will not be economically viable to make a second round of distributions to over one million Settlement Class Members. *See* Response at p. 7. For that reason, the Parties agreed to distribute any leftover monies to organizations furthering "consumer financial literacy education, and to educate and assist consumers with financial services issues through advisory and related services (excluding

litigation)." *See* Agreement ¶ 106. It is perfectly appropriate to provide for the distribution of any leftover monies through a residual *cy pres* program to third parties to be used for a purpose related to the class' injury. *See In re Baby Products Antitrust Litig.*, 2013 WL 599662, at *4 (3d Cir. Feb. 19, 2013); *Lane v. Facebook, Inc.*, 696 F. 3d 811, 819-20 (9th Cir. 2012); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F. 3d 24, 33-36 (1st Cir. 2009); *see also* 4 Herbert B. Newberg et al., *Newberg on Class Actions* § 11:20 (4th ed. 2012).

h. The Remaining Objections Regarding the Fairness of the Settlement Are Without Merit.

The Court overrules the remaining arguments raised in the Smith Objection and the Barnes Objection. Their arguments lack merit and are riddled with misunderstandings of the Settlement and basic class action jurisprudence. Neither objector submitted an expert affidavit or provided any evidence undermining the conclusions reached by Class Counsel and their nationally recognized experts. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998) (affirming final approval of nationwide class action settlement where "[t]he objectors presented no evidence" to support their arguments).

Mr. Smith asserts that certain fees he was charged for not maintaining certain minimum daily balance amounts in his Account were unlawful, and these fees must be addressed together with Overdraft Fees because they operate in concert to amplify each other's impact. *See* Smith Objection at p. 4. He also claims that the Settlement may bind him and prejudice a future case regarding those minimum balance fees and that the release is overbroad. *Id.* at p. 3. As Class Counsel point out in the Response, the Settlement does not address certain fees relating to minimum balance requirements because those were not the subject of the claims that Plaintiffs asserted in the Action. *See* Response at p. 5. If Mr. Smith believed his participation in this Settlement somehow prejudices his rights to address certain other fees relating to minimum balance requirements, he could have timely excluded himself from the Settlement. He did not do

so.

Likewise, by its terms, the release is limited to claims that were or could have been asserted in the Action that relate to Overdraft Fees or High-to-Low Posting. *See* Agreement ¶ 107. Once again, if Mr. Smith believed that the release being provided somehow prejudices a future case that he may pursue regarding separate minimum balance fees, Mr. Smith could have timely excluded himself from the Settlement and thereby not become bound by the release. Again, he chose not to do so. In any event, the Court finds that the release is not overbroad and is limited to claims that were or could have been asserted in the Action that relate to Overdraft Fees or High-to-Low Posting. *See* Agreement ¶ 107.

3. The Settlement Class.

This Court previously found the requirements of Rule 23(a) and 23(b)(3) satisfied in this Action in a litigation and settlement posture (DE # 2615, 2960), and in similar actions in MDL 2036 on contested motions for class certification (*see*, *e.g.*, DE # 1763 (Union Bank, N.A.); DE # 2615 (TD Bank, N.A.); DE # 2697 (PNC Bank, N.A.)) and in the context of settlement (*see*, *e.g.*, DE # 1520, 2150 (Bank of America, N.A.); DE # 2712, 3134 (JPMorgan Chase Bank, N.A.)). The Court hereby reiterates its findings that: (a) the Settlement Class Members are so numerous that joinder of them is impracticable; (b) there are questions of law and fact common to the Settlement Class that predominate over any individual questions; (c) the claims of the representative Plaintiffs are typical of the claims of the Settlement Class; (d) the representative Plaintiffs and Class Counsel fairly and adequately represent and protect the interests of the Settlement Class Members; and (e) a class action is superior to other available methods for the fair and efficient adjudication of the present controversy.

The sixty-nine (69) individuals listed in Exhibit A to the Final Judgment being entered contemporaneously herewith timely elected to opt out of the Settlement. The Court therefore

finds and decrees that they are not part of the Settlement Class, are not bound by the Settlement or release contained therein, and will not receive any distribution from the Settlement Fund.

4. The Application for Service Awards to the Class Representatives Is Approved.

Service awards "compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006). "[T]here is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action." *David v. American Suzuki Motor Corp.*, 2010 WL 1628362, at *6 (S.D. Fla. Apr. 15, 2010). Courts have consistently found service awards to be an efficient and productive way to encourage members of a class to become class representatives. *See, e.g., Ingram*, 200 F.R.D. at 694 (awarding class representatives $300,000 each, explaining that "the magnitude of the relief the Class Representatives obtained on behalf of the class warrants a substantial incentive award."); *Spicer v. Chi. Bd. Options Exchange, Inc.*, 844 F.Supp. 1226, 1267-68 (N.D. Ill. 1993) (collecting cases approving service awards ranging from $5,000 to $100,000, and awarding $10,000 to each named plaintiff). The factors for determining a service award include: (1) the actions the class representatives took to protect the interests of the class; (2) the degree to which the class benefited from those actions; and (3) the amount of time and effort the class representatives expended in pursuing the litigation. *See, e.g., Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

The Court finds that the eight (8) named Plaintiffs/class representatives expended substantial time and effort in representing the Settlement Class, and deserve to be compensated for such time and effort. *See* Joint Decl. ¶¶ 67-68. Therefore, the Court approves the requested service awards of $10,000 for each of the eight (8) Plaintiffs/class representatives, or $5,000 per Plaintiff/class representative for married couples in which both spouses are representative

Plaintiffs, to be paid from the Settlement Fund.

5. Class Counsel's Application for Attorneys' Fees Is Granted.

Class Counsel request a fee equal to thirty percent (30%) of the $62,000,000 Settlement Fund created through their efforts in litigating this case and reaching the Settlement. Tellingly, only a single objection to Class Counsel's fee request has been submitted. *See* Smith Objection at p. 6. The Court analyzes Class Counsel's fee request under *Camden I Condo. Ass'n. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991). As set forth below, after considering the *Camden I* factors, the Court overrules the objection and concludes that Class Counsel's application for fees in the amount of $18,600,000, equal to thirty percent (30%) of the $62,000,000 Settlement Fund, is well justified and will be granted.

a. The Law Awards Class Counsel Fees from the Common Fund Created Through Their Efforts.

It is well established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to attorneys' fees based upon the benefit obtained. *Camden I*, 946 F.2d at 771; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The common benefit doctrine is an exception to the general rule that each party must bear its own litigation costs. The doctrine serves the "twin goals of removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class and of equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts." *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1202 (N.D. Ill. 1989) (citation omitted). The common benefit doctrine stems from the premise that those who receive the benefit of a lawsuit without contributing to its costs are "unjustly enriched" at the expense of the successful litigant. *Van Gemert*, 444 U.S. at 478. As a result, the Supreme Court, the Eleventh Circuit, and courts in this District have all recognized that "[a] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as whole."

Sunbeam, 176 F. Supp. 2d at 1333 (citing *Van Gemert*, 444 U.S. at 478); *see also Camden I*, 946 F.2d at 771 ("Attorneys in a class action in which a common fund is created are entitled to compensation for their services from the common fund, but the amount is subject to court approval.").

In the Eleventh Circuit, class counsel are awarded a percentage of the fund generated through a class action settlement. As the Eleventh Circuit held, "the percentage of the fund approach [as opposed to the lodestar approach] is the better reasoned in a common fund case. Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Camden I*, 946 F.2d at 774.

This Court has substantial discretion in determining the appropriate fee percentage awarded to counsel. "There is no hard and fast rule mandating a certain percentage of a common fund which may be awarded as a fee because the amount of any fee must be determined upon the facts of each case." *In re Sunbeam,* 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 774). However, "[t]he majority of common fund fee awards fall between 20 percent to 30 percent of the fund," although "an upper limit of 50 percent of the fund may be stated as a general rule." *Id.* (quoting *Camden I,* 946 F.2d at 774-75); *see also Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999) (approving fee award where the district court determined that the benchmark should be 30% and then adjusted the fee award higher based on the circumstances of the case).

Based on the findings below, this Court finds that Class Counsel are entitled to an award of thirty percent (30%) of the $62,000,000 Settlement Fund secured through their efforts. Class Counsel achieved an excellent result and overcame numerous procedural and substantive hurdles to obtain this Settlement benefiting the Settlement Class. *See* Scott Decl. ¶ 25. Class Counsel

undertook a risky and undesirable case and, through diligence, perseverance and skill, obtained an outstanding result. They are to be commended and should be compensated in accord with their request, which is both warranted and reasonable given similar fee awards. The Court firmly believes this kind of initiative and skill must be adequately compensated to insure that counsel of this caliber is available to undertake these kinds of risky but important cases in the future. *See Muehler v. Land O'Lakes, Inc.*, 617 F. Supp. 1370, 1375-76 (D. Minn. 1985).

b. As Applied Here, the *Camden I* Factors Demonstrate the Requested Fee Is Reasonable and Justified.

The Eleventh Circuit's factors for evaluating the reasonable percentage to award class-action counsel are:

(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; and

(12) awards in similar cases.

Camden I, 946 F.2d at 772 n.3 (citing factors originally set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

These twelve factors are guidelines; they are not exclusive. "Other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action." *Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 775). In addition, the Eleventh Circuit has "encouraged the lower courts to consider additional factors unique to the particular case." *Camden I*, 946 F.2d at 775.

i. The Claims Against TD Bank Required Substantial Time and Labor.

Investigating, prosecuting and settling these claims demanded considerable time and labor. *See* Scott Decl. ¶ 13. Throughout the pendency of the Action, the internal organization of Class Counsel, including assignments of work, weekly conference calls, and oversight of task-oriented subcommittees, ensured that Class Counsel were engaged in coordinated, productive work efforts to maximize efficiency and minimize duplication of effort. To the same ends, in-person meetings of Class Counsel were also held several times during the course of the litigation. Class Counsel devoted a substantial amount of time investigating the claims of many potential plaintiffs against TD Bank. Class Counsel interviewed numerous TD Bank customers and potential plaintiffs to gather information about TD Bank's conduct and its effect on consumers. This information was essential to Class Counsel's ability to understand the nature of TD Bank's conduct, the language of the account agreements at issue, and potential remedies. Class Counsel also expended significant resources researching, developing, pleading and prosecuting the legal claims at issue. For example, state-by-state legal surveys were necessary to determine which state common law doctrines and consumer protection statutes provided Plaintiffs with viable claims. *See* Joint Decl. ¶¶ 71-73.

Once TD Bank's motion to dismiss was denied and discovery opened, Class Counsel served written discovery requests on Citizens seeking relevant and probative documents and information. *See* Joint Decl. ¶ 74. The process of developing, refining and finalizing such discovery requests – with an eye toward class certification, summary judgment, and trial – required considerable effort. TD Bank ultimately produced approximately over 540,000 pages of internal bank documents in discovery in this Action. Class Counsel established a large document review team consisting of dozens of attorneys whose task was to review, sort, and code the produced documents. To make the review and subsequent litigation more efficient, Class Counsel instituted uniform coding procedures for electronic review of the documents produced, and team members remained in constant contact with each other to ensure that all counsel became aware of significant emerging evidence in real time. Such document review efforts and coordination were plainly necessary and accounted for a substantial amount of the attorney time expended in this Action. *Id.* at ¶¶ 28-29.

Furthermore, Class Counsel conducted depositions of eight (8) of TD Bank's current and former employees, officers, and representatives, including its expert witness. Preparing for and taking these depositions involved extensive time and effort. In addition, Class Counsel prepared and defended the eight (8) named Plaintiffs deposed by TD Bank. Class Counsel also expended significant time and effort to prepare responses to TD Bank's requests for production of documents directed to the Plaintiffs. Class Counsel also devoted extensive time and effort to significant motion practice before this Court, including the motion for class certification and analyzing TD Bank's lengthy opposition, as well as several motions involving discovery disputes. *See* Joint Decl. ¶¶ 74-78.

Settlement negotiations consumed additional time and resources. Preliminary settlement discussions began in early 2012 and mediation was held on May 7, 2012. The mediation

required substantial preparation and follow-up work. On May 11, 2012, the Parties filed a Joint Notice of Settlement (DE # 2682). Several months of detailed discussions followed concerning the specific terms of the Settlement. The drafting of the Agreement was completed and was executed in late August/early September 2012. *See* Joint Decl. ¶¶ 79-80.

Class Counsel also engaged in subsequent settlement-related investigation, to determine, among other things, the most appropriate method by which to implement the plan for direct allocation of the Settlement Fund to Settlement Class Members. *See* Joint Decl. ¶¶ 79-80.

The Eleventh Circuit made clear in *Camden I* that percentage of the fund is the exclusive method for awarding fees in common fund class actions.[5] *Camden I*, 946 F.2d at 774. Even before *Camden I*, courts in this Circuit recognized that "a percentage of the gross recovery is the only sensible method of awarding fees in common fund cases." *Mashburn*, 684 F. Supp. at 690. More importantly, the Court observed firsthand the effort exerted by Class Counsel in this case and the other bank cases, and, given the outstanding results achieved here, does not find it necessary or useful to review Class Counsel's lodestar records.

In view of the excellent results obtained here, the Court deems it unnecessary to scrutinize Class Counsel's lodestar. Lodestar "creates an incentive to keep litigation going in order to maximize the number of hours included in the court's lodestar calculation." *In re Quantum Health Resources, Inc.*, 962 F. Supp. 1254, 1256 (C.D. Cal. 1997). In *Camden I*, the Eleventh Circuit criticized lodestar and the inefficiencies that it creates. 946 F.2d at 773-75. In

[5] Eleventh Circuit attorneys' fee law governs this request. *See Allapattah*, 454 F. Supp. 2d at 1200 ("The district court presiding over a diversity-based class action pursuant to Fed. R. Civ. P. 23 has equitable power to apply federal common law in determining fee awards irrespective of state law."); *see also Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 522 n.5 (1st Cir. 1991) (recognizing that district court presiding over diversity-based class action has equitable power to apply federal common law in determining fee award, irrespective of state law); *Clark Equip. Co. v. Armstrong Equip. Co.*, 431 F.2d 54, 57 (5th Cir. 1970) (*Erie* doctrine does not deprive federal court in diversity case of power to employ equitable remedies not available under state law).

so doing, the court "mandate[d] the *exclusive* use of the percentage approach in common fund cases, reasoning that it more closely aligns the interests of client and attorney, and more faithfully adheres to market practice." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (emphasis added); *see also* Alba Conte, *Attorney Fee Awards* § 2.7, at 91 fn. 41 ("The Eleventh . . . Circuit[] repudiated the use of the lodestar method in common-fund cases"). Under *Camden I*, courts in this Circuit regularly award fees based on a percentage of the recovery, without discussing lodestar at all. *See, e.g., David v. American Suzuki Motor Corp.*, 2010 WL 1628362 (S.D. Fla. Apr. 15, 2010).[6] "[A] common fund is itself the measure of success and represents the benchmark on which a reasonable fee will be awarded. . . . In this context, monetary results achieved predominate over all other criteria." *Camden I*, 946 F.2d at 774 (citations and alterations omitted). This Court will not deviate from that sound approach.

ii. The Issues Involved Were Novel and Difficult and Required the Exceptional Skill of a Highly Talented Group of Attorneys.

The attorneys on both sides of this case displayed a very high level of skill. *See* Scott Decl. ¶ 15; Joint Decl. ¶¶ 82-85; *see Walco*, 975 F. Supp. at 1472 (explaining that "[g]iven the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results"); *see also Camden I*, 946 F.2d at 772 n.3 (in assessing the quality of representation by class counsel, Court also should consider the quality of their opposing counsel.); *Johnson,* 488 F.2d at 718; *Ressler*, 149 F.R.D. at 654. Class Counsel's work is emblematic of the effort and outcomes witnessed by this Court on a regular basis in this MDL. Nor can there be any legitimate dispute that, based on the novel and very complex issues confronted by Class Counsel in this case, detailed here and elsewhere, that

[6] *See also Stahl v. MasTec, Inc.*, 2008 WL 2267469 (M.D. Fla. May 20, 2008); *Sands Point Partners, L.P. v. Pediatrix Med. Group, Inc.*, 2002 WL 34343944 (S.D. Fla. May 3, 2002); *Fabricant v. Sears Roebuck & Co.*, 2002 WL 34477904 (S.D. Fla. Sept. 18, 2002).

an extraordinary group of lawyers was required to prosecute this case. *See* Scott Decl. ¶ 15. The Court knows many of these lawyers from years of presiding over cases in this District, and has come to expect this level of performance from them. That is not to say, however, that such performance should be taken for granted. Instead, the fact that this level of legal talent was available to the Settlement Class is another compelling reason in support of the fee requested. As with most things, you get what you pay for, and the Settlement Class received a truly impressive amount and quality of legal services. In the private marketplace, counsel of exceptional skill commands a significant premium. So too should it here.

iii. The Claims Against TD Bank Entailed Considerable Risk.

The risks facing the Plaintiffs in this case have been discussed above, in the Motion, and elsewhere. *See* Joint Decl. ¶¶ 87-91. There were myriad ways in which Plaintiffs could have lost this case – yet they managed to achieve a successful Settlement. A large amount of the credit for this must be given to Class Counsel's strategic choices, effort and legal acumen. "This was no ordinary class action. The novelty and difficulty of the issues involved created significant risks for Class Counsel." Scott Decl. ¶ 14; *see also* Miller Decl. ¶ 58-59.

"A court's consideration of this factor recognizes that counsel should be rewarded for taking on a case from which other law firms shrunk. Such aversion could be due to any number of things, including social opprobrium surrounding the parties, thorny factual circumstances, or the possible financial outcome of a case. All of this and more is enveloped by the term 'undesirable.'" *In re Sunbeam*, 176 F. Supp. 2d at 1336. In addition, "[t]he point at which plaintiffs settle with defendants . . . is simply not relevant to determining the risks incurred by their counsel in agreeing to represent them." *Skelton v. General Motor Corp.*, 860 F.2d 250, 258 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989). "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. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 112 (3d Cir. 1976); *Walco*, 975 F. Supp. at 1473.

The most undesirable aspect of this case was the long odds on success. Class Counsel had to contest class certification, federal preemption of Plaintiffs' state law claims as well as the language in TD Bank's deposit account agreement. *See* Scott Decl. ¶ 14; Miller Decl. ¶¶ 26-31. The Court expresses no opinion on the merits of these arguments by this or any other defendant. The critical point for present purposes is that, heading into this case, Class Counsel confronted these issues without any assurances as to how the Court would rule. Class Counsel nonetheless accepted the case and the risks that accompanied it. Given the positive societal benefits to be gained from attorneys' willingness to undertake this kind of difficult and risky, yet important, work, such decisions must be properly incentivized. The Court believes, and holds, that the proper incentive here is a thirty percent (30%) fee based on the $62,000,000 Settlement Fund.

iv. Class Counsel Assumed Substantial Risk to Pursue the Action on a Pure Contingency Basis, and Were Precluded From Other Employment as a Result.

Class Counsel prosecuted the Action entirely on a contingent fee basis. *See* Joint Decl. ¶ 92. In undertaking to prosecute this complex action on that basis, Class Counsel assumed a significant risk of nonpayment or underpayment. *See* Scott Decl. ¶¶ 16, 18.

Numerous cases recognize such a risk as an important factor in determining a fee award. "A contingency fee arrangement often justifies an increase in the award of attorney's fees." *In re Sunbeam*, 176 F. Supp. 2d at 1335 (quoting *Behrens*, 118 F.R.D. at 548, *aff'd*, 899 F.2d 21 (11th Cir. 1990)); *see also In re Continental Ill. Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992) (holding that when a common fund case has been prosecuted on a contingent basis, plaintiffs' counsel must be compensated adequately for the risk of non-payment); *Ressler*, 149 F.R.D. at 656; *Walters v. Atlanta*, 652 F. Supp. 755, 759 (N.D. Ga. 1985), *modified*, 803 F.2d 1135 (11th Cir. 1986); *York*

v. Alabama State Bd. of Education, 631 F. Supp. 78, 86 (M.D. Ala. 1986).

Public policy concerns – in particular, ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs holding small individual claims – support the requested fee here. As this Court has observed:

> Generally, the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer. . . . A contingency fee arrangement often justifies an increase in the award of attorney's fees. This rule helps assure that the contingency fee arrangement endures. If this "bonus" methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.

Behrens, 118 F.R.D. at 548.

The risks taken by Class Counsel have already been discussed. It is uncontroverted that the attorney time spent on the Action was time that could not be spent on other matters. *See* Joint Decl. ¶ 95. Consequently, this factor supports the requested fee.

v. Class Counsel Achieved an Excellent Result.

The Court finds that this Settlement is excellent. *See* Scott Decl. ¶ 20. The common fund created by this Settlement is $62,000,000. *Id.* at ¶ 20. Rather than facing more years of costly and uncertain litigation, over one million Settlement Class Members will receive an immediate cash benefit from the Settlement Fund representing a significant percentage of their most probable damages, *assuming* a Plaintiffs' verdict against TD Bank. The Settlement Fund will not be reduced by the costs of Notice or Settlement administration; such fees and expenses have been and will continue to be borne separately by TD Bank. Moreover, payments to the Settlement Class will be forthcoming *automatically*, through direct deposit (for Current Account Holders) or checks (for Past Account Holders). Class Counsel's efforts in pursuing and settling these consumer claims were, quite simply, outstanding. *Id.* at ¶ 25.

vi. The Requested Fee Comports with Fees Awarded in Similar Cases.

In MDL 2036, this Court awarded thirty percent (30%) in attorneys' fees in the Bank of America case (*In re Checking Account Overdraft Litigation*, 830 F. Supp. 2d 1330, 1359 (S.D. Fla. 2011)), in the Bank of Oklahoma case (DE # 2949), in the Union Bank case (DE # 2986), in the Bank of the West case (DE # 3128), and in the JPMorgan Chase case (DE # 3134). Similarly, numerous recent decisions within this Circuit have awarded attorneys' fees up to and in excess of thirty percent. *See Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006) (awarding fees of 31 1/3 % of $1.06 billion); *In re: Terazosin Hydrochloride Antitrust Litigation*, 99-1317-MDL-Seitz (S.D. Fla. April 19, 2005) (awarding fees of 33 1/3 % of settlement of over $30 million); *In re: Managed Care Litig. v. Aetna*, MDL No. 1334, 2003 WL 22850070 (S.D. Fla. Oct. 24, 2003) (awarding fees and costs of 35.5% of settlement of $100 million); *Gutter v. E.I. Dupont De Nemours & Co.*, 95-2152-Civ-Gold (S.D. Fla. May 30, 2003) (awarding fees of 33 1/3 % of settlement of $77.5 million); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999) (affirming fee award of 33 1/3 % of settlement of $40 million).

The Court finds that a fee of thirty percent (30%) of the $62,000,000 Settlement Fund, plus expenses, is appropriate here and comports with customary fee awards in similar cases. Professor Miller distilled several major empirical studies of attorneys' fees awarded in connection with class action settlements. *See* Miller Decl. ¶¶ 47-57. He found that the empirical data from other Eleventh Circuit fee awards is consistent with the award requested here. *Id.* at ¶ 46. Moreover, when compared to fee awards outside the Eleventh Circuit, the fee requested in this case is within the range of other awards. *Id.* at ¶ 49. The Court agrees, and finds that the risks of this litigation, considered against the favorable result, easily justify a thirty percent fee. *See* Scott Decl. ¶¶ 23-25.

vii. The Remaining *Camden I* Factors Also Favor Approving Class Counsel's Fee Request.

The Court finds that the remaining *Camden I* factors further support Class Counsel's fee request, and so holds. *See* Joint Decl. ¶ 97. The burdens of this litigation and the relatively small size of most of the firms representing Plaintiffs lend support to the fee awarded. This fee is firmly rooted in "the economics involved in prosecuting a class action." *In re Sunbeam*, 176 F. Supp. 2d at 1333. The Court is convinced by its many years of presiding over significant cases like this one that proper incentives must be maintained to insure that attorneys of this caliber are available to take on cases of significant public importance like this one. As Judge Scott (Ret.) correctly observed, "[u]ndoubtedly, Class Counsel had the skill required to perform the services required in this litigation." Scott Decl. ¶ 15. The factual record in this case, and the Court's own observations, all of which are incorporated herein, compel the result required by this Order.

6. Class Counsel's Application for Reimbursement of Litigation Costs and Expenses Is Approved.

Finally, the Court finds that Class Counsel's request for reimbursement of $171,234.72, representing certain out-of-pocket costs and expenses that Class Counsel incurred during the prosecution and settlement of the Action against TD Bank is reasonable and justified. These costs and expenses consist of: (1) $143,030.61 in fees and expenses for experts; (2) $21,490.50 in court reporter fees and transcripts; and (3) $6,713.61 in mediator's fees. *See* Joint Decl. ¶ 98. The Court hereby approves Class Counsel's request for reimbursement of these costs and expenses. *See Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970). These costs and expenses, advanced by Class Counsel for the benefit of the Settlement Class, were necessarily incurred in furtherance of the litigation of the Action and the Settlement. *See* Joint Decl. ¶ 98.

Accordingly, reimbursement of costs and expenses in the amount of $171,234.72 shall be made from the Settlement Fund following disbursement of attorneys' fees.

CONCLUSION

For the foregoing reasons, the Court: (1) grants Final Approval to the Settlement; (2) appoints Plaintiffs Gregory D. Caraci, James E. Daniels, Kelli Herd, Suzanne M. Hubbard, Ian McNulty, Todd M. Mosser, Lucy Nico and Paige Schartzman, as class representatives for this Settlement; (3) appoints as Class Counsel and Settlement Class Counsel the law firms and attorneys listed in paragraphs 34 and 62 of the Agreement, respectively; (4) overrules the two (2) remaining objections (Smith Objection, Barnes Objection); (5) awards Service Awards to each of the eight (8) named Plaintiffs in the amount of $10,000 each, or $5,000 per Plaintiff for married couples in which both spouses are named Plaintiffs; (6) awards Class Counsel attorneys' fees in the amount of $18,600,000, equal to thirty percent (30%) of the $62,000,000 Settlement Fund, plus reimbursement of litigation costs and expenses in the amount of $171,234.72; (7) directs Settlement Class Counsel, Plaintiffs, and TD Bank to implement and consummate the Settlement pursuant to its terms and conditions; (8) retains continuing jurisdiction over Plaintiffs, the Settlement Class, and TD Bank to implement, administer, consummate and enforce the Settlement and this Final Approval Order; and (9) will separately enter Final Judgment dismissing the Action with prejudice.

DONE and ORDERED in Chambers at the James Lawrence King Federal Justice Building and United States Courthouse in Miami, Florida, this 18th day of March, 2013.

James Lawrence King

JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: All Counsel of Record