Appeal No. 18-56371
(Consolidated with Nos. 18-56272 and 18-56273)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOANNE FARRELL, ET AL.,

Plaintiff-Appellees,

v.

RACHEL THREATT,

Objector-Appellant,

v.

BANK OF AMERICA, N.A.,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA
THE HONORABLE M. JAMES LORENZ, DISTRICT JUDGE
CASE NO. 3:16-CV-00492-L-WVG

ANSWERING BRIEF OF DEFENDANT-APPELLEE BANK OF AMERICA, N.A.

MATTHEW W. CLOSE
DANIELLE N. OAKLEY
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071-2899
(213) 430-6000

BRIAN D. BOYLE
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006-4001
(202) 383-5300

Attorneys for Defendant-Appellee Bank of America, N.A.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Bank of America, N.A. hereby certifies that Bank of America, N.A. is owned, through wholly owned subsidiaries, by Bank of America Corporation. Bank of America Corporation is a publicly held company whose shares are traded on the New York Stock Exchange. It has no parent company, and no publicly held company owns more than 10% of Bank of America Corporation's shares.

Dated: July 22, 2019

O'MELVENY & MYERS LLP

By: /s/ Danielle Oakley
Danielle Oakley
Attorneys for Defendant-Appellee Bank of America, N.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Rules

Introduction

This appeal involves a narrow challenge to the amount of attorneys' fees awarded by the district court to the class counsel who litigated this case and negotiated an exceedingly generous classwide settlement with Defendant-Appellee Bank of America, N.A. ("BANA" or "the Bank"). The appeal does not seriously challenge the terms of settlement itself, which by its terms is severable from the fee award. Objector-Appellants Rachel Threatt, Estafania Osorio Sanchez, and Amy Collins (collectively, "Objectors") instead chiefly complain that the fee award takes too much *out of* an otherwise fair and adequate settlement. Reduce the fee award, Objectors say, and the settlement can stand as is.

BANA takes no position on Objectors' challenge to the severable fee award. BANA does disagree, however, with their suggestion—made only in the alternative, and in passing at best—that the size of the award could reflect a flaw in the process by which the settlement was negotiated. Specifically, Objectors suggest that if the fee award *was* properly calculated, then the named plaintiffs were inadequate class representatives, because they could have negotiated a larger cash component of the settlement than the $37.5 million payment they actually obtained. That alternative argument is incorrect. No matter how Objectors' fee challenge is resolved, the settlement reflects fair and adequate value for the class and should be affirmed.

The settlement resolves a single cause of action that challenged BANA's historic practice of charging a fee for certain account overdrafts. The claim asserted that the fee—known as the Extended Overdrawn Balance Charge or "EOBC"—constituted "interest" under the National Bank Act ("NBA") and violated limits on interest prescribed by NBA regulations. At the time, federal courts—including the Eleventh Circuit, the only federal appellate court then to have ruled on the issue—had universally rejected on the pleadings cases brought against financial institutions on the same legal theory the plaintiffs were asserting here. Adding to that overwhelming authority, the First Circuit recently agreed that fees like the EOBC do not constitute interest subject to the NBA's usury restrictions, contrary to the premise of the plaintiffs' claim. And shortly after the district court broke with the consensus and allowed the plaintiffs' usury-interest claim to proceed, this Court took the unusual step of agreeing to hear BANA's appeal on an interlocutory basis under 28 U.S.C. § 1292(b).

Against the backdrop of uniformly unfavorable judicial authority and faced with this Court's imminent review, the plaintiffs entered into settlement negotiations with BANA under the guidance of prominent mediator Layn Phillips. Despite the strength of its legal position, BANA agreed to resolve the claims classwide pursuant to a mediator's proposal, under which BANA would pay

millions of class members millions of dollars in cash payments, forgive any class member's outstanding EOBC debt, and cease its EOBC practice for a period of at least five years. Objector Sanchez has acknowledged that "the proposed settlement—without consideration of class counsel['s] requested attorney's fees—is an excellent result for the Cash Payment subgroup." (Supplemental Excerpts of Record ("SER") 43.)

Under Objectors' theory on appeal, the fee award affects the settlement at most only indirectly, as follows. The settlement includes two categories of relief: a $37.5 million cash payment to qualifying class members who paid EOBC fees and relief of the full amount of debt resulting from EOBC fees charged but not yet paid, which is approximately $30.3 million. The district court based its fee award on the total $66 million-plus value reflected in both categories.[1] Objectors, however, contend that the debt relief was effectively worthless, so that the fee award should have been calculated based solely on the $37.5 million cash component. But if the debt relief was actually worth $30.3 million to BANA,

[1] When the parties entered into the settlement in October 2017, the estimated total amount of EOBC debt owed by class members, which BANA would forgive under the terms of the settlement, was approximately $29.1 million. (SER77.) Thereafter it was determined that the total amount of EOBC debt owed by class members, which would be forgiven under the settlement, is approximately $30.3 million. (*Id.*) The district court relied on the $29.1 million estimate of EOBC-caused debt when calculating the total value of the cash and debt relief. (*See* Excerpts of Record ("ER") 4-5 & 14.)

Objectors insist, then the plaintiffs should have been able to obtain some or all of that amount as a cash payment to class members who had actually paid EOBC charges, rather than providing such valuable relief to the class members who had been charged the fees but not yet paid them. Their failure to do so exposes them as conflicted and inadequate class representatives.

Objectors advanced that argument below, and after ordering additional briefing from all parties on the issue, the district court rejected it, finding as a matter of fact that Objectors had failed to demonstrate inadequacy or conflict on the part of the class representatives. Specifically, the court held that the differences in relief afforded to class members who paid fees and those who had not yet paid properly reflected the nature of their alleged damages. The court further held that Objectors had failed to demonstrate any conflict of interest warranting subclasses, because all the class representatives had actually paid the EOBC charges, making their interests exactly aligned with those class members whom the settlement supposedly shortchanged.

Objectors do not and cannot demonstrate any error in those rulings. They do not challenge the legal standards applied by the court, and they fail to demonstrate any clear error in its factual determinations that the named plaintiffs were adequate, unconflicted class representatives. There is accordingly no basis for reversing or vacating the classwide settlement, no matter how the Court resolves

Objectors' challenge to the size of the fee award.

Issue Presented

This brief addresses the following question raised in the alternative by Objectors on appeal: Did the district court reasonably exercise its discretion in certifying the class and finding as a matter of fact that class counsel and the named plaintiffs were adequate representatives of the class, including those class members who, like the named plaintiffs, received cash relief reflecting their payments of EOBC charges?

Statement of the Case

A. History of the Litigation

In February 2016, Plaintiff Joanne Farrell filed a class action complaint against BANA seeking monetary damages, restitution, and declaratory relief based on BANA's allegedly improper assessment of EOBCs—a $35 charge levied against account holders for failing to cure negative balances on overdrawn deposit accounts within five business days. (ER3; Opening Br. at 5.) Farrell alleged that EOBCs are not a "fee," but are instead interest charges for the advancement of funds and are therefore subject to the NBA's usury restrictions. (ER3.)

BANA moved to dismiss the Complaint on the ground that EOBCs are not "interest" and are therefore not subject to the NBA's usury cap. (*Id.*) The district court denied BANA's motion to dismiss, rejecting the contrary decisions of every

other district court and one appellate court to have addressed the issue, all of which had held as a matter of law that EOBCs do not constitute "interest" under the NBA.[2] (*Id.*) BANA subsequently answered the Complaint, and Farrell twice moved to dismiss certain of BANA's affirmative defenses. (*Id.*)

In part because every other decision had squarely rejected the premise of Farrell's claim as a matter of law, the district court found there was substantial ground for difference of opinion on the issue and granted BANA's motion for certification of an interlocutory appeal of the denial of its motion to dismiss. (*Id.*) This Court subsequently granted BANA's petition for permissive interlocutory appeal. (ER4.) That appeal remains pending as case number 17-55847 in this Court. (SER95-96.) That appeal is stayed pending resolution of the settlement or further order from this Court. (*Id.*)

---

[2] Before this Action, district courts had universally dismissed multiple cases against financial institutions under the same legal theory, including a case against BANA. *See McGee v. Bank of Am., N.A.*, 2015 WL 4594582 (S.D. Fla. July 30, 2015), *aff'd* 674 F. App'x 958 (11th Cir. Jan. 18, 2017); *Shaw v. BOKF, Nat'l Ass'n*, 2015 WL 6142903 (N.D. Okla. Oct. 19, 2015); *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 150 F. Supp. 3d 593, 641-642 (D.S.C. 2015). Additional plaintiffs have lost on the same theory since then. *See Johnson v. BOKF, N.A. d/b/a Bank of Texas*, No. 3:17-cv-663, Dkt. No. 30 (N.D. Tex. Oct. 24, 2017), *appeal filed*, Case No. 18-11375 (5th Cir.); *Moore v. MB Fin. Bank, N.A.*, 280 F. Supp. 3d 1069 (N.D. Ill. 2017), *appeal dismissed* (7th Cir.); *Dorsey v. T.D. Bank, N.A.*, No. 6:17-cv-01432, Dkt. No. 30 (D.S.C. Feb. 28, 2018), *appeal filed*, Case No. 18-1356 (4th Cir.). Recently, the First Circuit joined the Eleventh Circuit in also holding as a matter of law that fees like the EOBC are not interest and therefore are not subject to the NBA's usury restrictions. *Fawcett v. Citizens Bank, N.A.*, 919 F.3d 133 (1st Cir. 2019).

B. Settlement Negotiations

While BANA's interlocutory appeal was pending, the parties participated in settlement negotiations, exchanged informal settlement-related discovery, and attended mediation before the Honorable Layn Phillips (Ret.). (SER160-61.) The parties were unable to reach an agreement at the mediation session but continued to negotiate with the mediator's assistance. During the negotiations, the parties first negotiated the amount of cash BANA would make available to class members who paid EOBCs. (SER63.) Only after class counsel believed they had maximized the amount of cash BANA was willing to pay as reimbursement for prior payments did class counsel turn to the matter of relief for class members who *owed* EOBC fees, but had not yet paid them. (*Id.*)

During the negotiations, the parties never discussed or contemplated an "all-in, cash-plus-debt relief" amount or the possibility of "an extra dollar in debt relief being added in exchange for a dollar in cash being subtracted," or vice versa. (SER63-64.) In other words, the amount of cash relief awarded to class members who were eligible for cash reimbursement did not depend in any way on, and was not restricted or reduced by, the amount of debt relief provided to class members who were eligible only for debt relief. (SER64.) Class counsel never contemplated such an arrangement. (*Id.*) Although the parties were near an agreement after separately discussing the cash and debt relief components, the

ultimate relief the parties assented to was the result of the mediator's proposal. (*Id.*) The parties successfully reached a settlement agreement in early October 2017 and formally executed the settlement agreement on October 31, 2017. (ER4.)

C. Material Settlement Terms and Preliminary Approval

In exchange for the release of class members' claims, BANA agreed to provide four forms of consideration:

1. BANA ceases charging EOBCs, or an equivalent fee, for five years beginning December 31, 2017. (ER4, ER131.) BANA's obligation will terminate during this timeframe only if the U.S. Supreme Court expressly holds that EOBCs or their equivalent do not constitute interest under the NBA. (ER4.)
2. BANA provides cash payments totaling $37.5 million to class members who paid an EOBC that was not refunded or charged off. (*Id.*) Attorneys' fees, costs, named plaintiff service awards, and settlement administrator hourly charges will be deducted from the settlement fund, resulting in approximately $22,864,638 to be distributed pro rata to class members based upon how many EOBCs each qualifying class member paid as a percentage of all EOBCs paid by the class during the class period. Class members who did not opt out will receive their payments automatically. (ER4-5.)

3. BANA forgives the total amount of EOBC debt still owed by class members—approximately $30.3 million. (ER5; SER77.) Debt relief will issue to class members whose BANA accounts closed with an outstanding balance stemming from one or more EOBCs assessed during the class period. (ER5.) Each eligible class member will receive up to $35 in debt relief—the maximum amount of outstanding EOBC debt that could be pending on any closed account. (*Id.*) To the extent BANA reported any of this debt to the credit bureaus, BANA will update its reporting to the credit bureaus to account for the debt reduction. (*Id.*) This debt relief will issue automatically to all qualifying members who did not opt out. (*Id.*) It will apply only to debt that BANA has a legal right to collect. (*Id.*) It will not apply to unenforceable debt, such as debt discharged in bankruptcy. (*Id.*)
4. BANA is paying all settlement administration costs other than the administrator's hourly service charges. (*Id.*) The administrative costs BANA is paying were estimated at $2.9 million when the district court granted final approval of the settlement. (*Id.*)

If there is any residual cash in the settlement fund after the first distribution, the residue will go the class members by way of a secondary distribution, if economically feasible. (*Id.*) Otherwise, the residue will go to the Center for

Responsible Lending as *cy pres* beneficiary. (*Id.*) None of the settlement funds will revert to BANA. (*Id.*)

On December 11, 2017, the district court granted preliminary approval of the settlement. (ER27.) Email and/or physical mail notices were then sent to 7,078,199 class members. (ER5.)

D. Initial Attorneys' Fees Request

On February 19, 2018, class counsel requested $16,650,000 in attorneys' fees, which they calculated as 25% of the value of the cash and debt relief provided by the settlement. (SER156-57.) Notwithstanding their argument that a lodestar cross-check is neither required nor appropriate in this case, SER126-131, SER175-78, class counsel provided the district court with the information required to perform one. (SER175, SER182-226.)

E. Objections to the Settlement and Attorneys' Fee Request

Only one hundred class members opted out of the settlement and only eleven class members filed timely objections. (ER44, ER53, ER73.) Objector Threatt argued, *inter alia*, that class counsel's lodestar multiplier was eighteen rather than 11.66 and that the percentage of recovery requested was excessive. (ER91-94.) Objector Collins similarly argued, *inter alia*, that class counsel's 11.66 lodestar multiplier was inflated and that a 25% recovery of the $66.6 million fund is not reasonable in this case. (ER65-67.)

Objector Sanchez argued, *inter alia*, that the attorneys' fee award was inflated because the debt relief is of illusory value, creating a conflict between the interests of cash relief recipients and debt relief recipients that required subclasses with separate class counsel and named plaintiffs. (ER48-49.)

F. Reduced Attorneys' Fees Request

On May 30, 2018, class counsel moved for final approval of the settlement and an award of attorneys' fees, costs, and service awards. (SER147.) Class counsel reduced their initial $16.65 million attorneys' fee request to $14.5 million. (SER150.) Class counsel reduced the request in an effort to satisfy objectors who participated in a pre-hearing, arms-length mediation coordinated by class counsel to discuss the objectors' concerns, but which did not result in the withdrawal of any objections. (SER121.) Class counsel also provided an updated lodestar analysis. (SER139.)

G. Final Approval Fairness Hearing

The district court held a final fairness hearing on June 18, 2018. (SER97.) Objector Threatt was the only objecting class member to appear at the final approval hearing and enter an appearance through counsel. (ER5.) At the hearing, the court's discussion on the record focused primarily on the various benefits of the settlement to the class, appropriate quantification of those benefits relative to the attorneys' fee award being requested, and whether a lodestar cross-check was

required. (*See* SER107-110.)

With respect to the debt-relief issue, BANA's counsel explained that the estimated dollar amount includes only debt that BANA can legally pursue and does not, for example, include debts that BANA is aware have been discharged through bankruptcy. (SER101.) Class counsel further explained that for the approximately 800,000 class members receiving debt relief for whom forgiveness of the EOBC debt would eliminate the class member's entire overdrawn-balance debt, elimination of the debt would make class members not previously eligible to open depository accounts with BANA eligible to do so once again. (SER104.)

Counsel for Threatt, who was objecting only to the attorneys' fee request and not to the settlement approval itself, argued that the district court should not put too much weight on the benefit to the class in terms of improved credit scores due to the forgiven debt because a $35 reduction in outstanding debt might only make up to a point or two difference in a credit score. (SER109.) Judge Lorenz disagreed, explaining that "it seems like anything helps because once you get a credit score that's down, that can be very detrimental, particularly to people that are not particularly affluent." (SER109-110.) Judge Lorenz also observed that the debt relief provides class members the additional benefit of allowing them to regain access to opening new bank accounts. (SER109.)

Notwithstanding the apparent benefits of the debt relief, Judge Lorenz

indicated that he would continue to carefully analyze how the relief should be valued. (SER107-08.)

H. Order to Show Cause

On June 28, 2018, the district court ordered the parties to submit additional briefing on specific issues to enable the court to analyze all aspects of the settlement before ruling on the motion for final approval. (ER19.) Specifically, the court ordered the parties to file memoranda focused on "whether there are conflicting interests amongst subgroups of the class that require the creation of subclasses, potentially with separate representation." (ER26.) The court's order highlighted the following issues:

- Whether a dollar spent towards debt relief is one less dollar BANA was willing to spend towards cash relief.
- Explanation of any disparate treatment amongst subgroups.
- Whether each subgroup has representation amongst the named plaintiffs.
- The amount of EOBC debt owed by class members and the number of class members who will receive debt relief.
- The sum of EOBC payments made by class members and the number of class members who will receive cash relief.
- Whether there are any class members with unclosed accounts who

> were charged EOBCs during the class period and never paid them. If so, how many such class members there are and how much class period EOBC debt they owe.

(*Id.*)

The plaintiffs and BANA filed a joint response that addressed each of these issues and unequivocally informed the district court that the settlement negotiations were not a "zero sum game" in which "a dollar spent towards Debt Portion relief is one less dollar BANA was willing to spend towards Cash Portion relief." (SER65-94.) Class counsel submitted a sworn declaration explaining how they had worked to maximize the cash portion of the settlement for class members who paid EOBCs and to maximize the debt forgiveness for class members with unpaid EOBCs. (SER62-64.) They explained how this case is analogous to *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Product Liability Litigation*, 895 F.3d 597, 610-11 (9th Cir. 2018) [hereinafter "*In re Volkswagen*"], wherein this Court affirmed approval of a settlement that involved hybrid cash and debt relief, with attorneys' fees necessarily coming out of the cash relief. (SER65-94.) As in *In re Volkswagen*, that the terms of the relief vary with class members' circumstances and claimed damages does not create a conflict of interest. (*See* SER72.)

Objectors Sanchez and Threatt used the order to show cause briefing as a

further opportunity to challenge class counsel's fee request. (SER25-64.) Their briefs focused on the value of the debt relief and how it should impact the fee award. (*Id.*) In particular, Sanchez and Threatt argued that the requested attorneys' fees were too high in light of the fact that debt relief does not cost BANA as much as cash. (*Id.*) While claiming the debt relief has "no material value," Threatt asserted "the problem with [the] settlement . . . [is] *not inadequacy of representation.*" (SER56 (emphasis added).) Sanchez did not address adequacy at all and acknowledged that the settlement "is an excellent result" for class members receiving cash. (SER43.)

I. Final Approval

On August 31, 2018, the district court entered an order granting class counsel's motions for final approval for the settlement and for attorneys' fees and costs. (ER2.) The district court's order provides detailed analysis regarding its reasons for overruling the objectors' arguments regarding adequacy of representation, the value of the settlement, and the reasonableness of class counsel's request for attorneys' fees. (ER2-17.)

Standard Of Review

This Court's review of a district court's determination to approve a class action settlement is "extremely limited." *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019) (en banc) [hereinafter "*In re Hyundai*"]. A court

of appeals should affirm a district court's approval of a class settlement "[a]s long as the district court applied the correct legal standard to findings that are not clearly erroneous . . . ." *Id.*

Summary of Argument

The district court's order granting final approval of the settlement, which the district court entered after several rounds of briefing and close scrutiny of all aspects of the settlement, should be affirmed. Objectors do not dispute the fairness of the settlement overall; nor do they contend that the district court failed to apply the correct legal standard. And the district court's conclusion that the settlement provides "substantial" and "meaningful" relief to class members finds ample support in the record and is never challenged by Objectors as clearly erroneous. (*See* ER17.) It is undisputed that the class receives substantial cash relief, debt relief for those class members who did not pay their EOBCs and therefore could not claim monetary losses, and injunctive relief for legal claims that every other court has dismissed as a matter of law.

Beyond their challenge to the severable fee award, the only aspect of the settlement itself that Objectors address is the fact that some class members (those who paid cash for their EOBCs) will receive cash refunds, whereas class members who never paid the EOBC and whose EOBC remains owing will only have their EOBC debt relieved. Objectors do not doubt the propriety of the debt relief, but

they do contend that the district court overvalued it in computing the amount of the fee award. Solely in the alternative, they contend that if the court *did* value the debt relief correctly, then it committed a *different* error, *viz.*, it failed to find that named plaintiffs are inadequate, conflicted class representatives because they failed to obtain a larger cash recovery for those class members who made EOBC payments, instead allowing "debt only" class members to receive such a valuable settlement benefit. Appellants argue that if the attorneys' fee award is not reduced then the settlement approval should be vacated so subclasses can be created.

Under this Court's precedent, subclasses are only required when a fundamental conflict exists within a class, not whenever settlement funds are allocated to align the form of compensation each class member receives with the nature of the injury each class member alleges. After ordering additional briefing on the issue, the district court reasonably found as a matter of fact that no conflicts of interest precluded class counsel or the named plaintiffs from adequately representing class members in negotiating the settlement. The district court's ruling recognizes that class counsel maximized the relief available to all class members and that differences in the relief afforded by the settlement are appropriately tailored to the nature of damages that class members allegedly suffered. Because class counsel and the named plaintiffs were not conflicted or otherwise inadequate, Objectors' alternative argument seeking vacatur and

renegotiation of the settlement should be rejected.

ARGUMENT

I. THE DISTRICT COURT DID NOT COMMIT CLEAR ERROR IN REJECTING OBJECTORS' CLAIMS THAT NAMED PLAINTIFFS WERE INADEQUATE CLASS REPRESENTATIVES

Under Federal Rule of Civil Procedure 23(a)(4), class representatives must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The district court appropriately found the representation in this case satisfies this requirement and that no conflict of interest exists. (*See* ER12-14.)

Objectors do not challenge the benefits of the settlement to the class, argue that the settlement is not a great result for the Class, or contend the district court applied the wrong legal standard. Rather, the settlement is relevant to their fee-award challenge in only one narrow respect: they contend that the district court overvalued the debt relief component of the settlement in computing the fee award, resulting in an inflated award. That argument, in turn, comes with a corollary: if the court did *not* overvalue the debt relief component, Objectors say, then the court separately erred by failing to recognize a conflict among class members requiring new subclasses and a renegotiation of the settlement. Objectors' theory is that if the debt relief is not worthless, then the named plaintiffs were obligated to obtain its equivalent value *as a cash payment for class members who paid EOBC fees*, relegating class members who only *owed* fees to a separate subclass represented by

different plaintiffs and different class counsel. The district court fully and fairly considered this contention and rejected it as a matter of fact. As the court recognized, Objectors' position relies on a false dichotomy wherein the debt relief is either worthless to class members or costs BANA $30.3 million that otherwise would have been added to the cash relief portion of the settlement. The dichotomy is wrong for multiple reasons.

First, there is no evidence in the record supporting Objectors' factual assertion that class counsel "left significant money on the table that could have been allocated to the cash subgroup." (Opening Br. at 28.) Indeed, the record establishes the opposite. Class counsel believed that they had maximized the amount of cash BANA would make available to class members who paid EOBCs before even introducing debt forgiveness relief for class members with unpaid EOBCs. (SER63-64.) The fact that BANA was willing to provide a *second*, *distinct* form of relief does not itself establish that BANA would have been willing or able to increase the cash relief. During negotiations, neither the mediator nor the parties ever addressed the possibility of "an extra dollar in debt relief being added in exchange for a dollar in cash being subtracted" or vice versa. (SER64.)

Second, there is no requirement that settlement funds be allocated equally among differently situated class members. *See In re Volkswagen*, 895 F.3d at 608-09 (finding relief tailored to the nature and extent of harm incurred does not result

in conflicts between class members). "To find that a conflict within a class is fundamental, and thus requires separate counsel, there must be some actual, apparent conflict beyond the mere unequal allocation of settlement funds." *Moore v. PetSmart, Inc.*, 728 F. App'x 671, 674 (9th Cir. 2018); *see also Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1146 (8th Cir. 1999) ("[A]lmost every settlement will involve different awards for various class members."). There is none here. *See, e.g.*, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 2016 WL 6248426, at *21 (N.D. Cal. Oct. 25, 2016) (finding no conflict where "additional benefits" provided via loan forgiveness "d[id] not reduce the benefits of other Class Members"); *see also Fleury v. Richemont N. Am., Inc.*, 2008 WL 4680033, at *4-5 (N.D. Cal. Oct. 21, 2008) (refusing to require separate counsel even though "the benefits for the consumers are different from the benefits for the watchmakers" because funds were not "diverted from the watchmaker subclass to the consumer subclass" and there was "nothing to indicate that the settlement terms of one subclass came at the expense of the other").

As the plaintiffs and BANA explained in responding to the district court's show cause order and supported through declarations, "while Class Members receiving debt forgiveness may technically receive something 'more,' that difference does not create a conflict because the amount of debt relief awarded to some Class Members does not reduce the cash benefits available to Class Members

eligible for cash." (SER86.) Objectors Sanchez and Threatt recognized as much in their own papers. (SER43 (calling settlement an "excellent result); SER48-61 (acknowledging that it is unlikely that significant cash was left on the table).)

This was not a case in which a single sum of money was allocated amongst subgroups with competing claims to the money. (SER20, SER73-74, SER82.) Instead, class counsel sought to maximize the amount class members would receive as compensation for each EOBC assessed during the class period. And the specific the form of relief provided was appropriately tailored to whether a given class member had actually paid the challenged EOBCs or not: those who paid received cash, and those who did not pay received different relief tailored to their different needs. *See In re Volkswagen*, 895 F.3d at 609 (approving disparate compensation for current and former vehicle owners and lessees that is "sensible" and "fully explicable"); *Farrell v. OpenTable, Inc.*, 2012 WL 1379661, at *3 (N.D. Cal. Jan. 30, 2012) ("it is permissible to award different relief to class members based upon objective differences in the positions of the class members.").

Third, adequacy does not require dollar-for-dollar matching between cash and non-cash relief, nor should it. *See, e.g.*, *Messineo v. Ocwen Loan Servicing, LLC*, 2017 WL 733219, at *4 (N.D. Cal. Feb. 24, 2017) (granting final approval and finding "no known conflicts of interest with proposed Class Members" where settlement provided account full adjustment relief and/or a pro rata share of the

settlement fund); *Purdie v. Ace Cash Express, Inc.*, 2003 WL 22976611 (N.D. Tex. Dec. 11, 2003) (approving cash and debt relief settlement that provided for debt relief in greater absolute value than the cash amount); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136 (E.D. Pa. 2000) (approving settlement of $5.97 million in cash and $1.3 million in loan forgiveness). This Court recognizes the discretion district courts require in evaluating proposed class settlements. *See Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) ("the district court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice'"). Such discretion is particularly necessary here where a majority of class members receiving cash relief are also current accountholders who will benefit from the injunctive relief obtained through the settlement. (*See* SER15.)

Finally, the purported conflict Objectors identify is nonsensical. Their theory is that the named plaintiffs' interests conflict with those of class members who paid EOBC fees and thus are entitled to a cash payment under the settlement. But as the district court explained, no such conflict exists because the named plaintiffs *also* paid EOBC fees—their interests are thus perfectly aligned with the class members who, according to Objectors, should have received greater cash payments. (ER14.) In other words, Objectors are really complaining that the named plaintiffs did not do more to seize benefits for themselves and other EOBC-

fee-payers and leave "debt only" class members out in the cold. As the district court observed, that outcome is essentially the opposite of a conflict: "the fact that the least represented group appears to have received the more favorable treatment would seem to suggest a lack of self-dealing on the part of the named representatives." (ER10.) There is simply no conflict of interest between the class representatives and the class members who—*just like themselves*—receive cash relief and no debt relief under the settlement.

There is certainly no merit to Objectors' suggestion that a conflict exists because the named plaintiffs will receive incentive awards under the settlement. (*Id.*) The test for adequacy is:

> (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" As to the latter question, "[t]he relevant inquiry is whether the plaintiffs maintain a sufficient interest in, and nexus with, the class so as to ensure vigorous representation."

In re Online DVD-Rental Antitrust Litig., 779 F.3d 934, 943 (9th Cir. 2015) (citation omitted). Appellants do not meaningfully argue that this test is not satisfied here. The fact that the class representatives also received incentive awards "intended to compensate class representatives for work undertaken on behalf of [the] class," *id.*, in no way explains why class representatives would prioritize the interests of class members receiving debt relief over those receiving

only cash awards.

For all these reasons, Objectors have not demonstrated the class representatives or class counsel had any conflict of interest that affected class members' rights.

CONCLUSION

In a case including over seven million class members, no one is arguing that the settlement was not fair, adequate, and reasonable or that the district court applied the wrong legal standards. The primary issue on appeal concerns whether the attorneys' fee award was appropriate. In arguing that the award was not appropriate, Objectors suggest their argument must be correct or there is a conflict of interest within the class. The district court acted well within its discretion in rejecting this false dichotomy and approving the settlement. For all the reasons stated herein, the district court's judgment should be affirmed.

Dated: July 22, 2019

Respectfully submitted,

/s/ Danielle Oakley

BRIAN D. BOYLE
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 EYE STREET, NW
WASHINGTON, D.C. 20006-4001
(202) 383-5300

DANIELLE N. OAKLEY
MATTHEW W. CLOSE
O'MELVENY & MYERS LLP
400 SOUTH HOPE STREET
LOS ANGELES, CA 90071-2899
(213) 430-6000

STATEMENT OF RELATED CASES

Farrell v. Bank of America, N.A., No. 18-56271; *Farrell v. Bank of America, N.A.*, No. 18-56272; and *Farrell v. Bank of America, N.A.*, No. 18-56273, arise from the same district court judgment, raise the similar issue of the reasonableness of the district court's fee award under Federal Rule of Civil Procedure 23(h), and have been consolidated with one another.

Farrell v. Bank of America, N.A., No. 17-55847, is a 28 U.S.C. § 1292(b) interlocutory appeal by BANA from the district court's denial of its motion to dismiss. It is currently stayed pending resolution of the settlement.

Dated: July 22, 2019

Respectfully submitted,

/s/ Danielle Oakley

BRIAN D. BOYLE
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 EYE STREET, NW
WASHINGTON, D.C. 20006-4001
(202) 383-5300

DANIELLE N. OAKLEY
MATTHEW W. CLOSE
O'MELVENY & MYERS LLP
400 SOUTH HOPE STREET
LOS ANGELES, CA 90071-2899
(213) 430-6000

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Circuit Rule 32-1 and Fed. R. App. P. 32(a)(7)(B)(i) because it contains 5,585 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: July 22, 2019

Respectfully submitted,

/s/ Danielle Oakley

DANIELLE N. OAKLEY
MATTHEW W. CLOSE
O'MELVENY & MYERS LLP
400 SOUTH HOPE STREET
LOS ANGELES, CA 90071-2899
(213) 430-6000

BRIAN D. BOYLE
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 EYE STREET, NW
WASHINGTON, D.C. 20006-4001
(202) 383-5300

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

Dated: July 22, 2019

Respectfully submitted,

/s/ Danielle Oakley

DANIELLE N. OAKLEY
MATTHEW W. CLOSE
O'MELVENY & MYERS LLP
400 SOUTH HOPE STREET
LOS ANGELES, CA 90071-2899
(213) 430-6000

BRIAN D. BOYLE
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 EYE STREET, NW
WASHINGTON, D.C. 20006-4001
(202) 383-5300