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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOANNE FARRELL, on behalf of herself and all others similarly situated,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

CASE NO. 3:16-cv-00492-L-WVG

PLAINTIFFS' AND DEFENDANT'S JOINT REPLY TO THE COURT'S ORDER TO SHOW CAUSE

Judge: Hon. M. James Lorenz

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I. INTRODUCTION

The Parties reached an intensely negotiated settlement in this case when the Ninth Circuit was poised to review the legal viability of Plaintiffs' claims—after every other court, including the Eleventh Circuit, had rejected the viability of identical claims. Plaintiffs and the Settlement Class bore a significant risk of obtaining nothing. Against this backdrop, Class Counsel negotiated a settlement whereby Class Members who paid EOBCs will receive $37.5 million in cash, Class Members who did not pay EOBCs will have 100% of their EOBC debt waived ($30,272,419.32) (the most those Class Members could have obtained had they prevailed at trial), and BANA agreed to cease assessing EOBCs for five years (approximately $1.2 billion), despite many of BANA's competitors continuing to assess extended overdraft fees. The Settlement is far more than "fair, adequate, and free from collusion," and thus should be approved. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 895 F.3d 597, 610-11 (9th Cir. 2018) ("A proposed settlement that is 'fair, adequate and free from collusion' will pass judicial muster. . . . [T]he underlying question remains this: Is the settlement fair? . . . Deciding whether a settlement is fair is ultimately 'an amalgam of delicate balancing, gross approximations and rough justice'").

Recognizing the significant value achieved for the Settlement Class when considering Plaintiffs' likelihood of success on the merits, this Court noted at the Final Approval hearing that "I have to say that there's been a great deal accomplished for the class," and "that an amazing job has been done by the parties," while understanding that "[t]here was a great risk in this case because you never know what is going to happen." Ex. A, Tr. at 26-27. After the hearing, the Court posed five discreet questions to the Parties, designed to confirm that there was no conflict between Class Members. The Parties provided sworn declarations providing further detail regarding the negotiation process, and confirming that the Settlement provides the maximum possible cash relief and debt relief that the Parties could have negotiated. For all the reasons set forth in the

Final Approval briefing, and as the Court acknowledged at the Final Approval hearing, the Settlement is fair and provides substantial value to the Settlement Class. Furthermore, as the Parties' responses to the Court's five inquiries further demonstrate, there is no conflict between Class Members.

The Court gave two objectors—Estefania Osorio Sanchez and Rachel Threatt (collectively, the "Objectors")—the opportunity to address potential conflict of interest issues, but both essentially concede that no conflict exists. Instead, knowing they cannot in good faith assert there is a conflict, they attempt to divert the Court's attention to an entirely different issue: the value of the debt relief and how it should impact the Fee Application of Class Counsel. That issue is entirely irrelevant to the Court's decision to grant final approval, which is not dependent on the amount of the attorneys' fee awarded. It is also beyond the scope of the briefing that the Court requested.

In short, the Objectors fail to establish a conflict of interest among Class Members, and therefore the Court should grant the pending motions for Final Approval of the Settlement and for attorneys' fees, expenses, and Class Representative Service Awards.

II. LEGAL ARGUMENT

A. The Plaintiffs and Class Counsel Have Adequately Represented the Rights of the Absent Class Members, and There is No Conflict of Interest.

After the Final Approval hearing, the Court re-opened briefing on a limited issue: whether there was a potential conflict of interest that might have rendered the Plaintiffs or Class Counsel inadequate under Fed. R. Civ. 23(a)(4). (Dkt. 125 at 6.) The Court thus ordered additional briefing to "*focus squarely* on whether there are *conflicting interests* amongst subgroups of the class that require the creation of subclasses." (*Id.* at 8 (emphasis added).) The Court also listed five sub-issues for the Parties to address. (*Id.*) The Parties responded and demonstrated that there are no conflicting interests and the Settlement deserves Final Approval. Neither Objector addresses the controlling legal rules for determining whether a conflict exists. The reason for this oversight is obvious: Ninth Circuit precedent

establishes that there is no conflict here.

The Court need look no further than the Ninth Circuit's recent and on-point decision in *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 895 F.3d at 606-09. *In re Volkswagen*, like this case, involved hybrid cash and debt relief, where the attorneys' fees necessarily came out of the cash, and the Ninth Circuit affirmed the district court's final approval order. Similarly, in *Purdie v. Ace Cash Express, Inc.*, No. Civ.A 301CV1754L, 2003 WL 22976611 (N.D. Tex. Dec. 11, 2003), and *Desantis v. Snap-On Tools Co., LLC*, No. 06-cv-2231 (DMC), 2006 WL 3068584 (D.N.J Oct. 27, 2006), both of which Objector Sanchez cites, involved class members who would receive differently tailored remedies, yet the courts did not require the creation of subclasses and approved the settlements. Indeed, in *Desantis*, as in the instant case, there was not a class representative getting each type of relief. *Desantis*, 2006 WL 3068584, at *2-3. These courts are not alone in approving class settlements with both monetary and nonmonetary relief and without creating subclasses. *See, e.g., White v. Experian Info. Sols., Inc.*, 8:05-CV-01070, 2018 WL 1989514, at *1 (C.D. Cal. Apr. 6, 2018); *Allen v. Labor Ready Sw., Inc.*, 209CV04266DDPAGR, 2016 WL 9024598 (C.D. Cal. Sept. 30, 2016), *aff'd by Bedolla v. Allen*, 16-56621, __ Fed. Appx. __, 2018 WL 2292907 (9th Cir. May 18, 2018) (unpublished).

As described in the Parties' Joint Response, Class Counsel obtained the maximum cash relief BANA was willing to pay, and Class Members receiving debt relief will be receiving the maximum possible relief they could have obtained had they succeeded at trial: forgiveness of 100% of their pending EOBC debt.[1] Where both groups obtained the maximum possible value they could have received under the Settlement, there cannot be a conflict of interest. Neither Objector argues otherwise.

[1] Sanchez seems to complain that there is no relief on the $35 Initial Overdraft Fee (rather than the $35 EOBC) that Class Members had to pay. (Dkt. 130, at 8.) But this lawsuit never alleged the Initial Overdraft Fee was unlawful and never sought any relief for the Class Members' payments of the Initial Overdraft Fee.

1. The Objectors Essentially Concede There is No Conflict of Interest or Adequacy Problem.

Neither Objector meaningfully argues that there exists a conflict of interest or an adequacy issue here. Threatt concedes at the outset that "If the value of the debt relief is immaterial as [she] suspects, then there is *not a fundamental conflict between the cash subgroup and debt forgiveness subgroup*." (Dkt. 130, at 2 (emphasis added).) She then dedicates her brief to arguing that the attorneys' fees sought are too high in light of the fact that debt relief does not cost BANA as much as cash. Her strained effort to tie together what she wants to discuss (the value of debt relief, for purposes of attacking the requested attorneys' fee award) and what the Court wanted her to address (adequacy/conflict of interest) completely falls apart. While claiming the debt relief purportedly has "no material value," Threatt asserts "the problem with [the] settlement . . . [is] *not inadequacy of representation*." (*Id.* at 9 (emphasis added).) Having made this concession, Threatt should have said no more.

Sanchez's response ignored adequacy altogether, making no arguments relating to any perceived conflict of interest between Class Members receiving cash and those receiving debt relief. Instead, she primarily argues about the typicality requirement under Fed. R. Civ. P. 23(a)(3) and standing under Article III of the Constitution. (Dkt. 130, at 5-6, 10, 13, 14-22.) Having failed to address the issue of adequacy/conflict of interest, as ordered by the Court, Sanchez's response should be stricken.[2]

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[2] The Court did not re-open all briefing. Indeed, in its order preliminarily approving the Settlement, the Court had already given objectors 130 days to file their objections and the opportunity to appear at the Final Approval hearing to further voice any objections. (Dkt. 72, at 6.) The Objectors, however, have not complied with the Order to Show Cause and instead argue issues that do not "focus squarely"—or even remotely—on the adequacy/conflict-of-interest issue. Any arguments that do not address what the Court requested should be stricken and disregarded. Insofar as the Objectors' arguments were not authorized by this Court's Order to Show Cause to raise new arguments different than those raised in their objections, the arguments, in effect, are untimely objections and may be stricken *See, e.g., In re Quaker Oats Labeling Litig.*, C 10-0502 RS, 2014 WL 12616763, at *1 (N.D. Cal. July 29, 2014) (granting parties' joint motion to strike an untimely objection

Both Objectors appear to recognize that Class Counsel secured the highest possible cash settlement amount for the Settlement Class. Sanchez acknowledges that the proposed settlement "is an excellent result" for those receiving cash. (Dkt. 130 at 15.) Threatt also concludes that it is unlikely that Class Counsel "left significant value on the table in the first 'cash negotiation' stage." (Dkt. 129 at 2 (emphasis added).) As for debt relief, Threatt concedes that if debt relief is of minimal value, there can be no conflict of interest. Thus, while she later suggests (without citing any supporting authority) that there could be a conflict if the debt relief was actually valuable to BANA (*id.* at 8), Threatt ignores the critical fact that BANA is relieving 100% of outstanding EOBC debt. By definition, because she admits no cash was left on the table and the debt relief was fully maximized, the Settlement could not have been negotiated more effectively for the benefit of the Settlement Class, regardless of its absolute value, and thus there is no conflict. Accordingly, neither Objector has identified a conflict of interest or a Rule 23(a)(4) adequacy issue.

2. Even if the Monetary Value of the Debt Relief Were Relevant to the Adequacy Inquiry, the Value to the Settlement Class Controls.

As an initial matter, the monetary value of the debt relief provided for in the Settlement is irrelevant to the Court's adequacy inquiry. Rather, the Objectors raise the monetary value of the debt relief for purposes of attacking the requested attorneys' fee award. (*E.g.*, Dkt. 129 at 2, 7; Dkt. 130 at 3, 4, 7, 19.) Regardless of the monetary value of the debt relief, there cannot have been a conflict of interests between Class Members receiving cash relief and those receiving debt relief where Class Counsel received for the class all of the cash BANA was willing to pay, and also received for the debt-relief recipients the full relief to which they would have been entitled had they prevailed at trial.

Nevertheless, the Objectors make a variety of unsubstantiated claims regarding the

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to class certification). Insofar as the Objectors' arguments were not authorized and raise arguments already raised in the prior objections, the arguments are redundant and may be stricken. *See, e.g., Bearchild v. Cobban*, CV 14-12-H-DLC-JTJ, 2017 WL 1390142, at *2 (D. Mont. Apr. 18, 2017) (striking unauthorized briefing that was redundant of prior briefing).

value of the debt relief to BANA. (Dkt. 129 at 5-7; Dkt. 130 at 4-5.) Threatt suggests that the debt relief is a "*de minimus*" "throw-in" by BANA, claiming that the Court must assess the "accounting value for the debt forgiveness" to BANA to assess the Settlement's fairness. Sanchez similarly argues that the "final cost" to BANA of reducing Class Members' debt and correcting credit reporting "will not be even a significant fraction of $29.1 million." (Dkt. 130 at 5.) But this focus on the need for BANA to be "harmed" or "punished" by the Settlement runs contrary to the class settlement approval standard and further ignores that BANA is providing injunctive relief whereby it is foregoing $1.2 billion in EOBC revenue over a five-year period.

Thus, while Threatt fully ignores that lost 10-figure revenue to BANA due to the injunctive relief, even if BANA may have been more easily convinced to agree to debt relief as opposed to paying cash, that does not render the debt relief any less valuable to Class Members who still owe EOBCs. That debt will be forgiven (with the concomitant opportunity to move closer to gaining access to the banking system created by updated credit reporting). Herein lies the logical fallacy in the Objectors' arguments. They falsely suggest that whether there is a conflict turns on some absolute value that must be attributed to the debt relief, without acknowledging that the debt relief is exactly what Class Members who had not paid their EOBCs could hope for in this class action.

In an article co-authored by an experienced ADR practitioner and professor and the former dean of Texas Tech University School of Law and Texas Wesleyan University School of Law, the authors discussed how "[e]ven in pure distributive bargaining, there are opportunities for value-creating trades." Kay Elkins-Elliott & Frank W. Elliott, Settlement Advocacy, 11 Tex. Wesleyan L. Rev. 7, 24 (2004). The authors set forth a divorce law exemplar wherein the spouse receiving alimony clearly benefited by receiving money, but the spouse paying the alimony also derived a tax benefit. *Id.* Thus, the tax savings created by the alimony payment meant that the true cost to the paying spouse was less than the benefit derived by the receiving spouse. *Id.*

Analogously, although class settlement approval jurisprudence focuses exclusively on the benefit realized by the class and not the cost to the defendant, these general settlement negotiation principles reaffirm that it is perfectly acceptable that the "offering party" not be harmed in a settlement to the same degree that the "receiving party" benefits. Indeed, it is even permissible for the offering party to derive a benefit (i.e., a release). And although Threatt's insistence that BANA must be punished in the Settlement is simply wrong, she fully ignores that, in addition to the cash and debt relief, BANA is foregoing $1.2 billion in EOBC revenue over a five-year period.

Consistent with these general settlement principles, the Ninth Circuit's class settlement approval standard does not include "cost," "harm," or "punishment" *to the defendant* as a factor for settlement approval. Rather, courts examine the benefit *to the class*. *E.g.*, *Dalton v. Lee Publ'ns, Inc.*, No. 08-CV-1072 GPC NLS, 2015 WL 11582842, at *6 (S.D. Cal. Mar. 6, 2015) (listing "benefits to Class Members" among factors); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 229 F. Supp. 3d 1052, 1067 (N.D. Cal. 2017), (crediting class counsel's judgment that "the Settlement provides more than adequate benefits to Class Members"); *Kent v. Hewlett-Packard Co.*, No. 5:09-cv-05341-JF (HRL), 2011 WL 4403717, at *2 (N.D. Cal. Sept. 20, 2011) (approving settlement in part because defendant "offered effective remedies in settlement that benefit the class"). Especially here with the Ninth Circuit having accepted interlocutory review and all other courts rejecting Plaintiffs' theory of liability, these benefits must be evaluated in light of the possibility of the Settlement Class receiving nothing. *Dennis v. Kellogg Co.*, No. 09-CV-1786-L WMC, 2013 WL 6055326, at *3 (S.D. Cal. Nov. 14, 2013) ("[I]t is plainly reasonable for the parties at this stage to agree that the actual recovery realized and risks avoided here outweigh the opportunity to pursue potentially more favorable results through full adjudication.").

Because the value to the Settlement Class is the only relevant concern, the accounting value of the debt relief to BANA, on which Threatt focuses, is irrelevant.

Indeed, if the accounting value to a defendant were relevant to final approval of a settlement or determining an attorneys' fee award, courts would routinely inquire into whether a settlement was being funded by a defendant's insurer. But courts do not reject settlements where insurance funds the class's relief, nor do courts reduce a settlement's value in proportion to a defendant's insurance coverage for purposes of approving a settlement or determining attorneys' fees. The two cases cited by Threatt do not suggest otherwise. *See Greenberg v. Procter & Gamble Co. (In re Dry Max Pampers Litig.)*, 724 F.3d 713 (6th Cir. 2013); *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071 (9th Cir. 2017). Rather, they support the Parties' position that it is the value to the Settlement Class, not BANA, that this Court must consider. The cases are also distinguishable in that they involved absent class members giving up their rights to seek damages in exchange for injunctions that provided nothing of value to the class members.

For example, in *Greenberg*, customers could only benefit from the program offering a refund for one box of diapers if they had "retained their original receipt and Pampers-box UPC code, in some instances for diapers purchased as long ago as August 2008." 724 F.3d at 718. Furthermore, the refund program had already been voluntarily offered for 29 of the 38 months encompassed by the class definition before the litigation. Thus, the settlement imposed high transaction costs and attorneys' fees at the class members' expense for a refund that they were already offered without the need to be settlement class members. *Id.* at 719. The *Pampers* court also found the injunctive relief to be illusory because it required Pampers to place certain language on the diaper boxes and website that "to the extent it amounts to anything—amounts to little more than an advertisement for Pampers." *Id.* In so holding, the court rejected an argument by plaintiff's counsel that this relief was valuable because it interfered with the defendant's marketing plans, reasoning that "'[t]he fairness of the settlement must be evaluated primarily based on how it *compensates class members*.'" *Id.* (emphasis in original) (quoting *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006)). This decision says nothing about

the cost to the defendant, the issue pressed by Threatt.

Similarly, the Ninth Circuit rejected an injunctive relief settlement in a Fair Debt Collections Practices Act ("FDCPA") case as worthless to the class members. The settlement dictated disclosures that were required in *future* debt collection voicemail messages when the class was defined to include those who had suffered *past* wrongs by receiving debt collection voicemails that did not comply with the FDCPA. *Koby*, 846 F.3d at 1079. The *Koby* court further found that the injunction had no real value because defendant was not obligated to do anything it was not already doing, as it required the defendant "to continue using the same voicemail message it voluntarily adopted back in 2011," which it adopted "for its own business reasons (presumably to avoid further litigation risk), not because of any court-or settlement-imposed obligation." *Id.* at 1080. Again—unlike Threatt's arguments—these decisions were based on the illusory value of the benefits to the class, not the cost to the defendants. Here, the Parties have demonstrated the debt relief is not illusory.

Equally baseless is Threatt's insinuation that Plaintiffs did not adequately perform their fiduciary duties to the Class Members. (Dkt. 129, at 12 (citing *In re Chiron Corp. Sec. Litig.*, No. C-04-4293, 2007 WL 4249902, at *11 (N.D. Cal. Nov. 30, 2007)). She fails to and cannot articulate any basis to analogize the instant case to *In re Chiron*. She admits she is "unaware of any evidence of an improper relationship between the named plaintiffs and class counsel or other structural inadequacy." (Dkt. 129, at 12.) Therefore, the Court should conclude there was no breach of fiduciary duty.

In short, the cost of the debt relief to BANA—whether large or small—is not a factor in the settlement approval analysis. The debt relief represents the maximum that Class Members could receive for EOBCs they never paid. As discussed at length in the Parties' final approval briefing, responses to objections, and Joint Response, there is no reason to reject the excellent Settlement procured here. Even if the debt relief is not valued dollar-for-dollar the same as the cash relief for purposes of calculating attorneys' fees, case

law establishes that differences in the amount of relief alone do not create a conflict of interest requiring separate subclasses or counsel. (*See* Dkt 128 at 2-3, 11, 14-16, 21.) And as the Joint Response explains, it is undisputed that this was not a case in which the Parties allocated a limited pot of money amongst competing subgroups, resolving the potential concern raised in the Order to Show Cause. (*Id.* at 4-5, 13.) Rather, a significant portion of those who will receive debt relief will also receive a cash award. (*Id.*) And a majority of the Class Members who receive the cash benefit (51.1%) are current accountholders and thus will also benefit from the $1.2 billion in injunctive relief obtained through the Settlement, which Objectors continue to ignore entirely.

Sanchez speculates that separate counsel "would have addressed the question of whether BOA would set off the entire debt regarding the closed account" (Dkt. 130 at 3), an irrelevant question (and unreasonable demand) given that Class Members that owe EOBCs could never claim entitlement to such relief under the National Bank Act ("NBA"). Moreover, BANA is forgiving the entire amount of the unpaid EOBC debt.[3] (Dkt. 128 at 13 (explaining that all outstanding EOBC debt owed by Class Members will be forgiven when the Settlement Agreement becomes effective, not just the $29.1 million that was calculated at the time the Settlement Agreement was executed)). To the extent any Class Member receiving debt relief has a remaining negative balance after Final Approval, this debt is not attributable to an EOBC, as all outstanding EOBC debt will be forgiven. Thus, those Class Members receiving only debt relief are getting everything they

[3] Sanchez appears to have missed this point in further speculating, without offering any evidence, that it is unlikely any Class Members will have their entire debt to BANA forgiven such that they would "receive any benefit from the credit bureau reporting portion of the proposed settlement." (Dkt. 130 at 9.) Likewise, Threatt's suggestion that Class Members will not benefit from debt relief because "[b]anks that report to credit bureaus already have a legal obligation to correct reported information" (Dkt. 129 at 6), fully misses the point, as it is the debt relief component of the Settlement that gives rise to BANA's reporting obligation. Without it, whether or not BANA had a legal obligation, there would be no reporting because there would be no debt relief.

could have hoped for in this NBA usury litigation.

There is no reason to create a subclass of debt-relief-only Class Members for the false opportunity of an increased recovery, and this Court should ignore the red-herring that the debt relief did not cost BANA the full $29.1 million. It is worth $30,272,419.32 to the Class Members, which is the relevant inquiry.

3. The Settlement Appropriately Tailors Relief to Each Class Member's Injury.

Far from creating a conflict of interest between Class Members who paid EOBCs and will receive cash under the Settlement and those who left their EOBC debt unpaid and will receive debt relief, the Settlement appropriately tailors relief to Class Members based on the nature of their alleged damages in a manner that is consistent with relief provided by the NBA. (*Id.* at 1-2, 11, 16.) In evaluating a proposed class settlement, "the district court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.'" *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). Indeed, the question "is not whether the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). As even Threatt recognizes, "the Court may permit efficiency concerns to override 'fine lines'" when faced with "immaterial conflicts or allocations." (Dkt. 129 at 7 (citing *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 747 (7th Cir. 2001) (Easterbrook, J.))).

B. The Court May Not Modify the Settlement Terms as the Objectors Have Suggested.

Both Objectors propose different settlement terms than those to which the Parties agreed, but re-trading the deal is not an option available to the Court. As the Ninth Circuit has held, a court may not "delete, modify or substitute certain provisions" of a settlement; rather, "[t]he settlement must stand or fall in its entirety." *Hanlon*, 150 F.3d at 1026; *Jeff D. v. Andrus*, 899 F.2d 753, 758 ("[C]ourts are not permitted to modify settlement terms or in

any manner to rewrite agreements reached by parties. The court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement."); *see also Evans v. Jeff D.*, 475 U.S. 717, 726 (1986) ("Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed."); 4 Newberg on Class Actions § 13:46 (5th ed.); Manual for Complex Litigation, Fourth, § 21.61.

Threatt suggests that this Court should ask the Parties to "reduc[e] the debt relief and increas[e] the cash payment" in order to determine whether "$1 of debt relief is equal to a $1 cash payment." (Dkt. 129 at 7.) That simply changes the negotiated bargain for no good reason. Similarly, Sanchez suggests the Settlement Class definition could "be revised to exclude the Debt Relief absent class members." (Dkt. 129 at 8.) To the extent the Objectors are offering this as an intellectual exercise, it proves nothing. As discussed above, class settlement approval analysis focuses on the benefit to the class members (not the cost to the defendant), and a good negotiation is one in which the "giving party" (here, BANA) may also derive a benefit. Thus, whether such a redistribution of the cash and debt relief costs more to the Bank is beside the point. But, more importantly, decreasing the debt relief will not make more cash available, and carving out the debt relief altogether would leave approximately 7.5% of the Settlement Class without any relief whatsoever. Objectors' proposals, whether or not well-intentioned, threaten the entire Settlement to the detriment of all Class Members. The Settlement Agreement allows BANA to terminate the Settlement, should the Court change the terms of the Settlement, leaving the entire Settlement Class at risk of getting nothing. (*See* Dkt. 104-2 ¶ 4.2.)

C. Sanchez's Article III Standing and Typicality Arguments Must be Rejected.

Sanchez also argues that Plaintiffs lack standing to represent Class Members receiving debt relief, and that Plaintiffs' claims are not typical of the claims of Class Members receiving debt relief because those receiving debt relief have suffered an injury

that "is not congruent with the injury to the [representative]." (Dkt. 130 at 5 (citing *Ogden v. Bumble Bee Foods, LLC*, Case No. C-12-1828 LHK, 292 F.R.D. 620, 623 (N.D. Cal. 2013)). Both arguments are misplaced.

Plaintiffs plainly have Article III standing, as they were charged and paid EOBCs. And as *Ogden* holds—in agreement with many courts—the issue of whether a representative's injury is "congruent" to the injuries suffered by absent class members is properly considered only under the Fed. R. Civ. P. 23 requirements for class certification, not Article III's constitutional requirement of a case or controversy (i.e., standing). *See id.* at 623-24.

In any event, whether considered under Article III or Rule 23, Sanchez is wrong when she asserts that the named Plaintiffs cannot represent the absent Class Members entitled to debt relief. (Dkt. 130 at 6.) The named Plaintiffs' claims and injuries are "congruent" with the claims and injuries of all absent Class Members—both those entitled to money damages and those entitled to debt relief. Each Class Member holds a present claim against BANA because BANA assessed EOBCs against their accounts, with the only material difference being whether the Class Member paid some or all of the EOBC(s), or failed to do so and had his or her account closed while still owing money to BANA." (Dkt. 128 at 28.)

Additionally, the named Plaintiffs' claims are typical of those who are entitled to debt relief because the question of liability in this case was the same for every Class Member. That question of liability turned on whether BANA's EOBC could be considered "interest" under 12 U.S.C. § 85, the NBA usury statute. In contrast, the remedy for BANA's alleged violation of the usury statute (§ 85) is prescribed by a different statute, 12 U.S.C. § 86. Section 86 prescribes two remedies: (1) for those that have not paid the EOBC (debt relief), there would be entitlement to forfeiture of the entire amount of interest agreed to be paid, and (2) for those that have paid the EOBC (cash relief), there would be entitlement to damages for such EOBC payments.

The fact that the NBA prescribes different remedies for those customers who have paid and who have yet to pay the interest does not create a conflict between these two subgroups or defeat typicality or class certification. In a similar vein, a court rejected the argument that a class representative's claim was not typical of the absent class members' claims simply because he "[was] ineligible for one of several damage remedies sought." *Whiteway v. FedEx Kinko's Office & Print Services, Inc.*, C 05-2320 SBA, 2006 WL 2642528, at *7 (N.D. Cal. Sept. 14, 2006). A "representative's claims are typical," the court explained, "if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Id.* (quoting *Hanlon,* 150 F.3d at 1020). The same is true here. Plaintiffs are not eligible for debt relief because they have no unpaid EOBCs, and do not require forfeiture of the EOBC. But Plaintiffs' claims are "reasonably co-extensive" with—though the relief they need is not identical to—the claims of Class Members needing debt relief. *See id.*

D. Objectors' Arguments of Disparate Treatment with Respect to Payment of Attorneys' Fees Should be Rejected.[4]

Objectors suggest that those Class Members receiving cash payments are unfairly bearing the cost of paying attorneys' fees, service awards, and the costs of administration, with Sanchez making this a significant focus of her brief. (Dkt. 129 at 8; Dkt. 130 at 7-9.) This is ultimately irrelevant to the Court's inquiry about whether the Settlement should be approved. The Fee Application is an independent matter. Indeed, while Threatt briefly discusses the Rule 23(a)(4) adequacy standard (Dkt. 129 at 3-5), she ultimately concedes that "the problem with the settlement likely arises from the illusory debt relief, not inadequacy of representation." (*Id.* at 5.) But, as discussed herein, because the debt relief is *not* illusory, Threatt's own words make it clear that she is making arguments disconnected from the Order to Show Cause.

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[4] BANA takes no position with respect to the attorneys' fee award. This section of the Parties' submission reflects Plaintiffs' position only, which BANA does not oppose.

In any event, Objectors' arguments run contrary to well-established case law that instructs courts to value the Settlement as a whole, including injunctive relief, which by its nature is never used to pay attorneys' fees and costs in the way the Objectors advocate for here. *E.g.*, *Allen v. Bedolla*, 787 F.3d 1218, 1225 (9th Cir. 2015) (explaining that "express findings about the value of injunctive relief" should be used to support a fee award); *Lane v. Facebook, Inc.*, 696 F.3d 811, 826 (9th Cir. 2012) (noting that plaintiffs' attorneys should be compensated for having obtained a "judicially-enforceable agreement" requiring the defendant to change its practices); *Pokorny v. Quixtar, Inc.,* 2013 WL 3790896, *1 (N.D. Cal. July 18, 2013), *appeal dismissed* (Sept. 13, 2013) ("The court may properly consider the value of injunctive relief obtained as a result of settlement in determining the appropriate fee."); *Miller v. Ghirardelli Chocolate Co.*, No. 12-cv-04936-LB, 2015 WL 758094, at *4-5 (N.D. Cal. Feb. 20, 2015) (considering value of product label changes when awarding attorneys' fees). The Joint Response cites approved settlements in which (i) some class members received cash and others received debt relief, (ii) subclasses were not necessary, and (iii) courts awarded attorneys' fees. (Dkt. 128 at 21.)[5] No court in any of those numerous settlements found it inappropriate that the fees or costs were coming from the cash portion of the settlement. While most of the decisions did not discuss the issue, at least one of them explicitly involved some class members receiving only cash and others receiving only debt relief. *See Purdie v. Ace Cash Express, Inc.*, No. Civ.A 301CV1754L, 2003 WL 22976611, at *7 (N.D. Tex. Dec. 11, 2003) (discussing settlement providing cash to class members with paid payday loans and debt forgiveness to class members with outstanding obligations on loans).

The Objectors' arguments of disparate treatment in this regard are baseless. They

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[5] *See, e.g.*, *In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. MDL 2672 CRB (JSC), 2016 WL 6248426, at *21 (N.D. Cal. Oct. 25, 2016), *aff'd sub nom.*, No. 16-17035, 2018 WL 3341912 (9th Cir. July 9, 2018); *Case v. French Quarter III LLC*, No. 9:12-cv-02804-DCN, 2015 WL 12851717, at *2 (D.S.C. July 27, 2015); *Purdie*, 2003 WL 22976611, at *7; *Cullen v. Whitman Med. Group*, 197 F.R.D. 136, 147 (E.D. Pa. 2000).

cite no case law in support of their claimed conflict on this because courts have not engaged in the analysis they urge on this Court.[6] Furthermore, even if the debt relief component of the Settlement was reduced in value for purposes of determining an appropriate fee award—it should not be—the Objectors continue to ignore the $1.2 billion in benefits to the Settlement Class obtained from BANA's policy change eliminating EOBCs. Including the value of injunctive relief supports Class Counsel's fee request even if there were no debt relief afforded to any Class Member.

Unlike instances where the benefit from injunctive relief is not objectively quantifiable, here customers would have been assessed approximately $20 million per month in EOBCs, leading to the quantifiable five-year $1.2 billion valuation. (Dkt. No. 69-1 at 22-23; Dkt. No. 69-3 ¶ 24; Dkt. No. 104-4 ¶ 8.) This amount may thus properly be included in the total settlement value against which to adjudge Class Counsel's requested fee. *See, e.g., Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003) ("[W]here the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained . . . courts [may] include such relief as part of the value of a common fund for purposes of applying the percentage method."); *see also* Principles of the Law of Aggregate Litigation, § 3.13(b) (American Law Institute, 2010) ("[A] percentage of the fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and nonmonetary value of the judgment or settlement."). Including the value of injunctive relief, the total settlement value is $1,270,772,419.32.[7]

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[6] Sanchez cites to *Redman v. Radio Shack Corp.*, 768 F.3d 622 (7th Cir. 2014), as part of a general description of the Court's role in reviewing attorneys' fees. (Dkt. 130 at 8-9.) But *Redman* does not adopt the method for calculating attorneys' fees that Sanchez urges, and the outcome disapproved of by the court in that case was a coupon settlement in which $1 million in attorneys' fees were being paid to class counsel when only $830,000 worth of coupons were claimed. 768 F.3d at 629. There is little comparison between that case and this one, where the Settlement Class is receiving tens of millions of dollars in direct relief, in addition to injunctive relief worth over $1 billion.

[7] This figure includes the cash payments and the updated debt relief amount of $30,272,419.32 noted in the Joint Response (as opposed to the $29.1 million amount).

So even if the Court ignored the value of the debt relief (*it should not*), the tremendous injunctive relief renders the attorneys' fee request more than reasonable. (*See* Dkt. 106 at 14, 17-19.) Sanchez's proposed "solution" of reducing Class Counsel's attorneys' fees and the administrative costs by 43.7% (Dkt. 130 at 7-8) completely misconstrues the economic realities of this case as it is based on the faulty premise that the total value awarded to the cash subgroup is 56.3% of the Settlement. Sanchez ignores (i) that BANA is separately paying notice and administration costs for the benefit of the entire Class, (ii) that 40.3% of the debt relief subgroup is also receiving cash, and (iii) the $1.2 billion value of injunctive relief, which inures to the benefit of current accountholder Class Members who are only receiving cash. (*See* Dkt. 128 at 4; Dkt. 104-2 at 9.)

Excluding the approximately $30 million in debt relief would thus still leave approximately $1,240,500,000.00 in benefits to those Class Members receiving cash payments. In other words, following the Objectors' faulty logic to its ultimate conclusion, those Class Members receiving debt relief only stand to receive approximately 2% of the total Settlement value, meaning that if this Court were to agree with Sanchez that the common fund should only be used to pay attorney's fees for the percentage benefit accruing to those Class Members receiving cash, then Class Counsel's fee request should only be reduced by 2%. However, the Court should not reduce the fee award given that Class Counsel has already agreed to a sizeable reduction that exceeds the 2%. Rather, this Court should reject what appears to be an effort by Objectors to change the law and, without further delay, approve the Settlement, as well as Class Counsel's request for reimbursement of attorneys' fees and costs, service awards, and administration costs.

III. CONCLUSION

Based on the above arguments, and those made in the Joint Response and the Motion for Final Approval, the Parties respectfully submit that the adequacy requirement

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(Dkt. 128 at 13.) However, it does not include the notice and administration costs which are estimated to be $3 million. (Ex. A, Tr. at 8.)

of the class certification standard has been met, and this Court should grant Final Approval of the proposed Settlement.

Dated: August 25, 2018

Respectfully submitted,

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Class Counsel

EXHIBIT A

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JOANNE FARRELL, on behalf of herself and all others similarly situated,	.
Plaintiff,	. Docket No. 16-cv-00492-L-WVG
v.	. June 18, 2018 . 11:00 a.m.
BANK OF AMERICA, N.A.,	.
Defendant.	. San Diego, California

TRANSCRIPT OF FINAL APPROVAL HEARING
BEFORE THE HONORABLE M. JAMES LORENZ
UNITED STATES DISTRICT JUDGE

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SAN DIEGO, CALIFORNIA; JUNE 18, 2018; 11:00 A.M.

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THE CLERK: Attorneys, please state your names for the record.

MR. OSTROW: For class counsel and plaintiffs, Jeff Ostrow.

MR. ZAVAREEI: Hassan Zavareei, Your Honor, on behalf of plaintiffs and class counsel.

MR. HARGROVE: And likewise, on behalf of plaintiffs, John Hargrove.

MS. PIERSON: Cristina Pierson, also on behalf of class counsel.

MR. GOWDY: Bryan Gowdy on behalf of class counsel and plaintiffs.

THE COURT: Okay.

MS. OAKLEY: Good morning, Your Honor. Danielle Oakley on behalf of Bank of America.

MR. CLOSE: Good morning, Your Honor. Matthew Close, also for Bank of America.

THE COURT: All right. Very good.

MR. FRANK: Theodore Frank on behalf of Objector Rachel Threatt.

THE COURT: Okay. All right. This is primarily to hear from the parties and objectors as to the proposed agreement, which I am familiar with. It's pretty hard to

switch from criminal to civil just like that all the time.

In any case, that being said, let's start with class counsel and anything they want to add.

MR. OSTROW: Good morning, Your Honor. Jeff Ostrow for class counsel and plaintiffs.

We represent the named plaintiffs in this class that you provisionally certified -- it is a settlement class -- back in December of 2017. Thank you for doing our substitution of our original named plaintiff the other day and for the other housekeeping on the orders yesterday.

Obviously, we are here today for final approval of our class settlement as well as to have the Court make a determination as to the reasonableness of our fee application, service awards, and cost reimbursement.

The Court just told us that it's very familiar with the settlement. How would the Court like me to proceed this morning? I can go through the settlement in detail and all the elements of why this is appropriate for a class settlement for certification, or I can answer specific questions with respect to the settlement.

When we are done with that aspect, my co-counsel, Hassan Zavareei, will be handling the objections that were filed, or the responses to the objections.

THE COURT: I will leave it up to you. Between my clerks and myself, I think we are pretty familiar with all of

the facts. No need to go into great detail, but if there are a couple of things you want to stress, rather than go through the whole thing.

MR. OSTROW: That will be fine. I will avoid talking about procedural history and the actual claim itself and talk more about the actual settlement and why this is what I believe and my co-counsel believe to be an excellent class settlement.

In support of our motion for settlement, we have filed a number of declarations, as the Court knows. We filed declarations from the bank, which discussed the damages, which I think was important to the Court to understand how we calculated the damages and how we got to the percentage that we settled for. We have declarations filed by the administrator, Epic Systems; Cameron Azari, which discussed the notice plan and how we implemented what the Court had ordered in the original order.

We were very pleased to announce we had -- 93 percent of the class was notified by direct postcard notice as well as e-mail notice, and that information came directly from the bank, where we were able to get the contact information and send notice directly. Co-counsel and I have handled probably 50 cases against banks in the last ten years, Your Honor, and this is probably the best notice type of that you could possibly have, so we are pleased to announce that to the Court.

There was a declaration of CAFA notice that was sent out.

I think that's particularly important and it's become more important recently in that it gives an opportunity for the Department of Justice, as well as the attorney general of each state, including the District of Columbia, to analyze the settlement, and recently, they have been objecting to settlements. So they have an opportunity, on behalf of all the people in their state, to review the terms of the settlement, the fee application, and there have been courts that have halted approvals based on that. I think you are going to start seeing that a lot more. There's not a single objection filed by any of those.

We filed a declaration for the timely exclusions. There were only 100 opt-outs out of seven million. I think that says a lot about the settlement itself. We had 11 timely objections. Co-counsel will speak to those, but those mostly related to the fees.

We had a fee expert file a declaration in support of our application. He is the premier expert from Vanderbilt University, Brian Fitzpatrick.

And we recently filed a declaration of Deborah Goldstein, from the Center for Responsible Lending, which is our proposed *cy pres* recipient in the event that there are any funds left over after a second distribution.

So, just some of the heights of this case, Your Honor, without talking about procedural history, the reason why this

is extraordinary is because there have been seven cases -- six have been dismissed -- on the same exact theory, one of them against the same bank, in the Southern District of Florida, went up to the Eleventh Circuit, and it was dismissed and affirmed and basically said, "You have no case."

Your Honor ruled on the motion to dismiss. We survived that. They attempted to appeal it. The case was stayed. And we ultimately reached a settlement.

When we set out to bring these cases for fees against banks, Your Honor, our primary goal is to stop the practice. This is, in our opinion, an awful practice. It was yielding $20 million a month in revenue to the bank. And our first and foremost goal was to stop it because these are the people, the customers of the bank, that are paying the most amount of money back in fees and the people that have the least amount of money.

So we were extremely pleased that they have committed to a five-year cessation of the practice, have $1.2 billion, and there's been a declaration by the bank filed in support of that. And I think that is a monumental, huge goal, and we are very pleased to say we have made incredible changes in the banking industry for the better, including this one, and that's in the face of all those dismissals.

The cash portion of this and the debt relief portion, which we look at as almost one and the same because whether you

are getting money or you have had the ability of not having to pay money you owe, is what I consider gravy on the dinner, here, because the cessation of the practice is what we were after, and the cash and the debt relief of $66.6 million in itself I think is fantastic, but that is just a little bit extra for the class members to have. When you look at it in the totality, it is an average between the two of $10 per person they are going to get back, and that's gross, before any fees are deducted from there.

The notice administration costs are approximately two, and recently have been updated to possibly $3 million. Those are paid separately by the bank. That is another benefit that is to the settlement class. It is not something that we have calculated in our fee application, but it's something that's real, and the bank will tell you those dollars -- they have been paying them and will continue to pay them.

Some other highlights of this settlement that you don't see in a lot of other ones, there's no claims process. This is a direct distribution, pro rata, based upon the number of EOBC -- which the Court is probably familiar with that definition by now -- that each class member incurred. So you are either going to get a direct deposit into your account, if you are a current account holder, or you are going to get a hard-copy check sent to you, or you are going to get your debt wiped off of their books if you have less than $35 that you

owed at the time that you left the bank, or if you have in excess of 35, you will get a full $35.

Your Honor, I will finish up by saying we originally asked, in our notice to the class, for the ability to come before Your Honor to ask for 25 percent of the settlement value, which was $66.6 million. In actuality -- and that's what is in our paper -- the settlement value is $69.6 million, because you need to add in the notice and administration costs.

When you do that, our application, which we originally said we were going to come before the Court and ask for $16.5 million -- Mr. Zavareei will talk about that those objections -- but we voluntarily agreed to come before you and ask for $14.5 million. That is roughly 21 percent of the settlement value. When you add in the injunctive relief value of 1.2 billion real dollars -- which courts have awarded fees on injunctive relief, the value, when you can quantify it, which we clearly did -- you are looking at one percent.

And I think, after the monumental changes that were made in this industry, the real dollars that are going to these people, that our request is fair and reasonable.

In addition, Your Honor, we have asked for a service award for the named plaintiffs of $5,000 each. A couple of days ago, you substituted, for one of our deceased plaintiffs, the four adult children. With respect to those four, they would split the $5,000; $1,250 each.

We have advanced costs in expenses in this case below north of $53,000, Your Honor, and we believe that those expenses are fair and reasonable. We took all our travel and hotel accommodations -- we don't go out and drink bottles of wine and do any of those fancy things -- and we cut them straight up in half so that nobody can contest the reasonableness of those. And we also didn't charge for certain internal things, copying charges, phone calls, things like that.

We when we come before a Court, we take our obligation on behalf of the class extremely seriously. We expect, when you have a class against the second largest bank in the country, with seven million class members, you are going to get some objections. We believe it is opportunistic. My co-counsel will talk more about that. But we are extremely pleased, and we take our obligations seriously, and we have come before courts around the country with very, very fine settlements such this. We know we have made some serious changes, and we think our fee application is reasonable.

THE COURT: 14.5 million, that was after some meet-and-confer? Is that how that resolved? Because you were first, originally, at 16 million or thereabouts.

MR. OSTROW: Yes. After the objection period closed and we realized which parties were objecting, we were able to determine what the issues were, and 99 percent of the issues

related to fees or things that are totally outside the scope of the settlement. We did something that I think is pretty unique. In 20-something years of practicing, I have never done it before, and I think there's some value in it. We reached out to every one of the objectors, if they were pro se, or their counsel, and invited them to a mediation. And we did it in Washington, D.C. And we were there; objectors, or their -- pro se, could appear by phone. Mr. Frank had an opportunity to appear. He didn't want to appear.

And we basically said, "Let's talk about your objections." And they wanted to talk about fees. And we suggested, "If we reduced the fee a couple of million dollars to the class, is that something, at 14.5, you all would find reasonable?" And we believe that we left with a consensus -- I can't say that for Mr. Frank because he wasn't there -- that the consensus was, "Yes, that is reasonable."

So we decided that we would, in our final application, modify and come before you and ask for that number. We know that that's just kind of eliminating some of the background noise. This Court -- it is up to you to determine what is appropriate, fair, and reasonable, and we are going to go with what you do. But we figured we would try to resolve any issues as it relates to that.

So that process, to the extent that we got a consensus -- even though I believe there was a filing saying there wasn't --

we believe should be helpful for this Court, when you realize out of seven million people, you have now eliminated all but perhaps one or two that are objecting, and you can, I guess, decide what the purpose of them remaining or standing on their objections are.

THE COURT: All right. Very good. Thank you.

Yes. I won't really get into any questions at the moment because you apparently indicated you have someone who will respond to the objections. In the analysis, obviously, to a certain degree, how you treat that $29 million in debt relief, that kind of plays into the configuration of percentage.

But I have already seen the responses at this point, but notwithstanding that, I will let anyone else now -- anybody on your side want to add anything at this point, or do you want to get over --

MR. OSTROW: I think Mr. Zavareei would, but just a last comment on the debt relief. I know the objectors would like to claim it's not real relief.

THE COURT: My thought would be to let them go first and then let you respond. Okay. I am somewhat familiar because, obviously, in the paperwork, it did include that. But I will give you the opportunity now to put some meat on the bones, so to speak.

MR. OSTROW: Understood. Thank you for your time.

THE COURT: Sure. Let's have the bank go first.

MS. OAKLEY: Thank you, Your Honor.

We agree with class counsel that there is significant value to this settlement in the forms that he enumerated and discussed and are before the Court in the papers, the injunctive relief, cash component, debt relief.

I would like to offer just a couple of points of clarification. One goes to debt relief. The other goes to the effectiveness of the notice in this particular case.

With respect to the debt relief, the $29.1 million figure was arrived at excluding getting credit for folks as to whom the bank could not have pursued collection of those amounts in any capacity. Debts that the bank is aware had been discharged through bankruptcy, for example, amounts that were not actually collectible anymore are not included in the 29.1. So it is not illusory relief to people as to whom there could not have been any recourse. So that's not included in the 29.1 million.

THE COURT: Okay.

MS. OAKLEY: Class counsel also referred to a class member being entitled to cash relief or debt relief. Depending on the circumstance of each class member, a class member could receive both components of relief. If they had paid an EOBC out of pocket, they would be entitled to cash relief for that. And separately, if thereafter their account had been closed, with a different EOBC still pending, they would also get the debt relief. So people who fall into both camps get both forms

of relief.

The other clarification I want to make regards the effectiveness of the notice. As Epic's declaration set forth, the anticipated deliverable rate is 93 percent. I just want to point out there were only -- of just shy of 7.1 million class members, there were only six people to whom notice could not be provided either by e-mail or mail, which I think is extraordinary and worth pointing out. I think the notice protocol in this case was particularly strong.

THE COURT: Very good. Thank you.

MR. FRANK: Thank you, Your Honor.

Our only objection to the settlement related to the *cy pres*. They did exactly what we asked. They are going to provide additional distributions to the class. That resolves the 23(e) objection, so all that's left is the dispute over fees.

With respect to the percentage of the funds, we presented evidence that the $1.2 billion figure was not an accurate accounting of the benefit to the class because we presented evidence that the decline in EOBCs would be offset by increased fees elsewhere. Nobody disputed that. Nobody even responded to that. There's not actually a true benefit to the class with respect to that. The class will be paying higher fees elsewhere.

That leaves the 29.1 million. We are hearing now that

people who are bankrupt, people whose debts are not collectible, are not included in the 29.1 million. That does address some of our concerns, but it does raise new concerns, which is how are those people in the class being compensated? If they are not eligible for the debt relief, maybe they are getting cash relief. But if they don't have an account and their debts are uncollectible, are they getting any benefit, or are they waiving their claims for nothing?

I did not hear about this until now. It wasn't addressed in Docket 105, the responses to the objections. So that is an interesting question.

We have no objection to a reasonable percentage of the 37.7 million. We ask that the Court apply Ninth Circuit law regarding cross-checks. We have cited law. They have cited law. I think our explanation is accurate.

They make a lot of personal attacks on me. I don't need to get into that unless the Court would like me to.

I will say that there's a substantial difference between this case and *Eubank*, in that *Eubank* was a case that was fully litigated by the objectors and won 100 percent of what they were seeking; whereas here, this is a compromise, and therefore the cross-check is much more important. The class is compromising its claims at ten cents on the dollar. And we are not saying that that's not fair, but at the same time, it is a compromise, and therefore the avoidance of a windfall is much

more important.

And in *Eubank*, we documented the risk we undertook; whereas, here, there is no documentation of the risk, and in fact, the attorneys are including within their lodestar hundreds of hours for cases that they lost, which is the opposite of risk, because they are seeking to be paid for hours where they lost a case.

I am happy to answer any questions the Court might have.

THE COURT: I will wait until I hear the other side and then I may have some. Thank you very much.

MR. FRANK: Thank you.

I apologize. One more thing.

For the first time today, and in their reply brief -- they did not raise it before the objection deadline -- they asked for credit for the $3 million in notice and administration fees. It is within the Court's discretion to do that under Ninth Circuit law. That's the *Online DVD* case.

We would argue that it is inappropriate and the Court should exercise its discretion not to do that. And the case we would cite for that proposition is *Redman v. Radio Shack*, 768 F.3d. 622.

Thank you, Your Honor.

THE COURT: Thank you.

MR. ZAVAREEI: Good morning, Your Honor. Hassan Zavareei, on behalf of the class.

I am going to first respond to a couple of things that Mr. Frank said, and then there are a couple of other arguments I would like to make regarding his papers.

First, Mr. Frank argued that we presented -- I am sorry -- that he presented evidence that the 1.2 billion was illusory. If you look at his brief, that evidence consisted of conjecture that the bank could simply reinstate another fee and that that's all the banks really do. And he said we didn't respond to that. That's not true. We did respond to that. We pointed to the settlement agreement that says that, "Beginning on or before December 31, 2017, BANA agrees not to implement" -- it says, "EOBCs or any equivalent fee for five years."

And, Your Honor, we are not babes in the woods, here, with respect to banks and overdraft litigation. We have litigated against banks a number of times and a number of different theories related to overdraft fees. If they implement another unlawful fee, we will be there, Your Honor, just as we were when they engaged in overdraft fees for high-to-low reordering.

It is complete conjecture by Mr. Frank. It is not evidence. And we did respond to that. So the idea that there's no value to the 1.2 billion has no merit.

Your Honor, Mr. Frank also said that he has no objection to a percentage of the 37.5 million but that he believes that a lodestar cross-check is appropriate. Essentially, in his papers, what he is trying to do, Your Honor, is completely

inconsistent with the arguments he made in his *Eubank* case. We attached his brief there. And the law in this circuit is very clear that a lodestar cross-check is discretionary. There are a number of factors that you need to look at, and a lodestar cross-check is something the Court may look at.

But the appropriate analysis in the Ninth Circuit is to start -- when you have a common fund of identifiable funds, where the money can be readily quantified, you start with the 25 percent benchmark. And there is no question here, Your Honor, that the 3 million in notice and administration costs, the 37.1 million in cash benefits, and the 29.1 million in debt relief are readily quantifiable and are real benefits to the class.

And 25 percent, Your Honor, of that number would amount to over 17 million. And we are seeking much less than that, Your Honor. We are seeking 14.5 million, which amounts to -- once you add in the additional 1 million in notice and admin, it adds up to 20.8 percent of the entire cash value to the class.

And Mr. Frank did mention the *In Re: Online DVD* case. In that case, he argued that the Ninth Circuit should adopt a new rule and should not count those notice and admin costs. The Seventh Circuit has that rule, and the Ninth Circuit rejected that and said it is appropriate to consider those, because those are benefits to the class.

And again, we have done a lot of cases, set a lot of cases

with the bank. This is a big case with a lot of class members. It was very important to us that that money be included so that the cost of notice and administration did not dilute the funds that were available for the class members.

So, Your Honor, if I can, I want to talk for a minute, before I go into the various factors, with respect to how you adjust the 25 percent benchmark. Before I do, I want to talk about the lodestar and how that would play in here.

If the rule was, as Mr. Frank is advocating, that our fee should be based predominantly on a lodestar multiplier, that would create the exact wrong incentives in a case like this, Your Honor. This was a very important case, but I think, as my co-counsel pointed out, this is one of -- I think Your Honor was the only one to have the wisdom to get it right, in my view; but in the views of a lot of other judges, we were wrong, and there was a substantial risk that we could lose at the Ninth Circuit, a risk that we believed that the defendant valued at about what we settled this case for. And the predominant benefit to that was cessation of the practice and the cash relief to the class.

If the rule was what Mr. Frank was arguing for, we probably wouldn't have settled then, or at least there would have been inappropriate pressure to drive up our lodestar. That's what the Ninth Circuit talks about in the *Vizcaino* case, where it says, "It is widely recognized that the lodestar

method creates incentives for counsel to expend more hours than may be necessary." So while this Court does have the discretion to include that, Your Honor, I would suggest to you that the way that the Court includes that is to determine whether to and how far to depart from the benchmark.

So if we start at the benchmark, Your Honor, this Court has identified a number of different factors that the Court should look at, including the results achieved, the risk involved in the litigation, the skill and quality of the work, the contingent nature of the fee and the financial burden carried by the plaintiffs and awards made in similar cases.

I am not going to belabor the benefits to the class. I think my co-counsel already spoke to this and I think the bank spoke to this. But again, we are talking about massive injunctive relief with a readily quantifiable value. This is not hypothetical. It is not a coupon. It is not a new notice. It is not a change in disclosures. This is real money that would come out of the pockets of class members and non-class members.

And then there's the cash component; there's the 3 million in notice and admin; and then there's the very significant debt relief.

Your Honor, I know you raised a question about the debt relief issue. This is the second case in which I have been able to obtain debt relief for my class clients. In the other

case, which was in state court in Ohio, we were able to get a significant amount of debt relief, very similar to this. After all the money was distributed and after the debt relief was completed, we received a lot of positive feedback from the class.

This is valuable because, Your Honor, once -- for a lot of those people who have less than $35, their debt is going to be completely closed out. The bank is also obligated to notify check systems that that debt has been paid off, and they are going to do that for everybody. That's another value to the class. Once they do that, Your Honor, these people can now go open another bank account.

For the most part, if you have an outstanding balance with your bank, it's virtually impossible to open a bank account. You have got a lot of working poor, students, elderly, who have small balances with the banks. We are talking about 800,000 people, who it's almost impossible for them to open another bank account, and this will allow them to do that.

So this idea that this debt relief does not confer substantial, quantifiable value, Your Honor, I believe is incorrect. So that factor weighs heavily in favor of sticking to the 25 percent benchmark or moving up.

Similarly, Your Honor, awards in similar cases. We presented in our brief a list of overdraft cases that involved the high-to-low reordering, some of which we were involved in

and some of which we were not. In those cases, the lowest award that we have been able to find is 25 percent, and it goes all the way up to 44 percent. So, if you look at that factor, which is clearly one of the factors in this Court, the 25 percent is low.

With respect to the risk and complexity of the case, Your Honor, frankly, I think that the record of all the other cases which we have set forth shows the real risk here. Mr. Frank argues there is no risk here because the case was weak and cites to a quote that says that.

Your Honor, that's the opposite. When the case is weak, your risk is higher. In his appellate argument, he said he took on a lot of risks because he hardly ever gets awarded fees. But Your Honor, he gets a salary. The Competitive Enterprise Institute is not a contingency law firm, like our firms are. It is a nonprofit, aimed at objecting to certain class settlements they find objectionable. So that is not a real risk. What we are talking about is the people on this team who risk their livelihoods, who risk everything that they do in order to get benefits for the class.

And, Your Honor, another factor, the last factor, is the skill and quality of the work. Your Honor, I think when we brought this case, we sort of had two teams converging here, the Florida folks, from Mr. Hargrove, Ms. Pierson, Mr. Gowdy, they had litigated the case in Florida that went up to the

Eleventh Circuit, and we teamed up with them. We lost a similar case against Bank of Oklahoma. We thought, "Let's pool our resources. There is a lot of risk here. Let's pool our resources and see what we can do."

Bryan Gowdy is an accomplished appellate lawyer. Mr. Ostrow and I have been litigating overdraft cases for years. Mr. Hargrove had been litigating class actions and Ms. Pierson had been litigating class actions together for decades. So Your Honor, I would submit to you -- and you can be the judge of the quality of our work and the quality of our presentation, but I would submit to you, Your Honor, the skill required and the quality of the work has been exceptional.

So where do we go with the lodestar cross-check? Again, the Ninth Circuit has cautioned that the cross-check is entirely discretionary. And what that means, Your Honor, is it is just like any of these other factors. You are free to look at it. And it is high, here, although, what I would say, Your Honor, is currently it's -- as we submitted our papers, it is 8.8. If you include the time through to today -- and we only allotted one hour for this hearing -- it goes down to 8.1.

If there is an appeal, as there almost certainly will be -- and the reason we will be is not necessarily because of Mr. Frank's objection, but because of the objections of the professional objectors. They always appeal, Your Honor, and then what they do is they ask for payment to dismiss their

appeal. So we are going to have to have an appeal in this case. So that 8.1 multiplier is going to go down even lower.

So, Your Honor, to the extent that the Court feels it is important to use a lodestar cross-check -- and again, we argue it is not necessary -- if the Court does so, we believe that a reduction of 4 percent or a little bit more than 4 percent is more than sufficient to account for the high lodestar multiplier. Your Honor, the Ninth Circuit has made clear, class counsel should not be punished for getting a great result early. If that was the case and if that was the law, and that's the law that Mr. Frank is advocating for, that would have turned things on its head and create perverse incentives for class counsel.

The Ninth Circuit has clearly made law on this issue. We are not supposed to start with lodestar. It can be something you look at, but it should not be dispositive, and our fee should not be based on some sort of numerical analysis of what our lodestar multiplier is.

Your Honor, that's all I have for my presentation, but if you have any questions, I am happy to answer them now.

THE COURT: That's fine. Thank you.

I will hear from Mr. Frank if he wants to respond.

MR. FRANK: Thank you, Your Honor.

First of all, *Pella* was not a Competitive Enterprise Institute case. It was not a nonprofit case. It was done back

when I had a private practice outside of my nonprofit work. So I was not paid a salary for that case.

With respect to Ninth Circuit law, we are happy for you to look at the cases and see that the Ninth Circuit does require a cross-check. For example, in *Bluetooth*, 654 F.3d. 935, it talks about the importance of the cross-check to prevent windfalls. It is ironic because they accuse us of trying to change the law, and here they are arguing public policy and complaining that we are asking for an application of the law. Maybe the law is wrong. Maybe there would be a better law. They are welcome to make that argument to the Ninth Circuit.

I am happy to answer any questions you might have.

THE COURT: I don't really have -- I mean, I have your briefs, which are pretty thorough. There's really nothing in -- you have covered some of the thoughts I had as to the percentage-of-fund method and the lodestar.

And I will say that, as far as cross-checking, and I have been debating. I would have done some of that anyway. But how it comes out, to a certain degree, depends on other issues of which you have both discussed and vary on as to how you really treat the 29 million debt relief and some of the class who may have already alleviated any form of payment through bankruptcy or they just haven't paid. Some of that gets buried. So the nuances of that have to be looked at, and I plan on doing that further. We have been already looking at it from the

standpoint of a cross-check.

My understanding of the law in California -- I will look at the *Bluetooth* case. My understanding is it's not required under Ninth Circuit law. But I will look again, on *Bluetooth*.

But from the standpoint of the nuances, you have pretty well covered them.

Either way, I think that an amazing job has been done by the parties. The fact is that it took a lot of thought to uphold this considering our review of the other non-published decisions that have gone against us, and where I believe that the plaintiff's position is the right one. But the risk is great -- there's no question -- as was pointed out. There was a great risk in this case because you never know what is going to happen.

So I am going to look at it really closely. I don't really need anything further. Because between what you have said here today -- and I am going to get a transcript of that -- and your filings, I think I have the viewpoint all the way across the board.

The percentage-of-fund aspect of it, I have to say, in further review, if the debt relief is to be treated exactly as the class, the plaintiff's class, has analyzed it, then I think that that would be the way to go. If I look at it closer and I see that the debt relief issues are a little more nuanced, that might make a difference. I can go that way, too.

But I have to say that there's been a great deal accomplished for this class. I mean, they are going to have -- the credit scores are going to be eliminated or at least corrected based on the fact that the bank is going to take the necessary steps to alleviate any credit reporting. It allows them to get different bank accounts at different banks which would otherwise probably be precluded, along with a number of the other aspects of it.

So that's really all I have to say at this point.

In closing, I would say if you have any quick thoughts you want to add to this on either side, I am willing to listen because I am going to get a copy of the transcript. I think it's important to see what your exact points are. Sometimes you get it clearer when you are verbally indicating it than you do in papers.

MR. FRANK: I wouldn't put too much weight on the credit score, Your Honor. If somebody owes the bank $300 and that's on their credit report, and they are getting $30 debt reduction that's reported to the credit agency, they are going to owe the bank $270. And that's going to be reported as unpaid. That might make a point or two difference in a FICO score, but I don't even think it will make that much of a difference.

THE COURT: It's true. It's interesting that you say that. That's not the position of class counsel, at least in

the papers. It sounds to me like it's considered a plum, to a certain degree. And 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.

Anyway, that's my thoughts, but I will take a lot of time to look at. It took a lot of time to decide this to begin with. We will do that.

MR. FRANK: Thank you, Your Honor.

THE COURT: Anything else you want to add?

MR. OSTROW: Just a couple of things, Your Honor.

We filed a declaration of Riaz Bhamani from Bank of America, which is that declaration that I spoke of with respect to the damages. The debt relief portion is specifically discussed in there, so you will be able to reinforce, hopefully, your consensus that this is significant and real relief, and it should be treated as equal as cash.

With respect to that, while you are considering that, please don't forget that the cases that we have cited from Professor Fitzpatrick, that he cited that we are relying on, as well as a number of the overdraft cases that we had in MDL 2036 in the Southern District of Florida, they awarded cash on the quantifiable injunctive relief. So I am not -- and they are in that brief, so don't take my word for it; read those opinions if you would like.

They didn't award a full 25 or 35 percent, but I believe there may have been 15 percent of the value of that injunctive relief, they gave out of the cash settlement fund. So that should make you comfortable to the extent that you don't think that a full 25 percent of that debt relief is appropriate, even though we do believe it is.

Finally, I will just say that I want to thank you for your time, for recognizing the risk that we took, for taking the time that you spent at the initial stage to rule in favor of the plaintiffs. We believe it is the right ruling. We haven't been successful elsewhere, but we hope if this gets finally approved, there will be other banks that want to follow suit knowing that one of the giants did it and it is the right thing for them to do as well.

So I finalize by saying we hope that you will issue a final approval, that you will award the fees that we are requesting, of 14.5 million, which is 21 percent of the settlement value; that you appoint our plaintiffs as class representatives, us as class counsel; that you deny the objections; service awards of $5,000 each, except for the four new participants, who will split the 5,000; reimbursement of litigation costs and expenses of $53,119.92; and enter a final judgment for us. Thank you.

THE COURT: Thank you very much. You have been actually very succinct in narrowing your issues in a very

cogent way. With that, thank you, and we will be back with you in a written order. Okay.

ALL: Thank you, Your Honor.

(End of proceedings at 11:50 a.m.)

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C-E-R-T-I-F-I-C-A-T-I-O-N

I hereby certify that I am a duly appointed, qualified and acting official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause; that said transcript is a true and correct transcription of my stenographic notes; and that the format used herein complies with rules and requirements of the United States Judicial Conference.

DATED: June 22, 2018, at San Diego, California.

/s/ Chari L. Bowery
_____
Chari L. Bowery
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOANNE FARRELL, on behalf of herself and all others similarly situated,

Plaintiffs,

vs.

BANK OF AMERICA, N.A.,

Defendant.

CASE NO. 3:16-cv-00492-L-WVG

CERTIFICATE OF SERVICE

I, Hassan A. Zavareei, on this 27th day of August, 2018, hereby certify that the Plaintiffs and Defendant's Joint Reply in Support of Their Response to the Court's Order to Show Cause was filed via the Court's CM ECF system, thereby causing a true and correct copy to be sent to all ECF-registered counsel of record.

Dated: August 27, 2018

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