UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

IN RE: CHECKING ACCOUNT OVERDRAFT LITIGATION

MDL No. 2036

THIS DOCUMENT RELATES TO: FOURTH TRANCHE ACTIONS

Dee v. Bank of the West
N.D. Cal. Case No. 4:10-cv-02736
S.D. Fla. Case No. 1:10-cv-22985-JLK

Orallo v. Bank of the West
C.D. Cal. Case No. 2:10-cv-2469
S.D. Fla. Case No. 1:10-cv-22931-JLK

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

On October 22, 2012, Plaintiffs and Class Counsel filed their Motion for Final Approval of Settlement, and Application for Service Awards, Attorneys' Fees and Expenses, and Incorporated Memorandum of Law (DE # 3015) ("Motion"), seeking Final Approval of the Settlement with Bank of the West ("BOW" or "Bank").[1] In support, Plaintiffs and Class Counsel filed an affidavit from a well-known expert in class action law (DE # 3015–3), as well as three affidavits supplementing the factual record, to enable the Court to evaluate the fairness and

[1] This Order incorporates the definitions of terms used in the Settlement Agreement and Release of June 26, 2012 ("Agreement" or "Settlement") (DE # 3015–1).

adequacy of this Settlement (DE # 3015–2, DE # 3015–4, DE # 3015–5). Settlement Class Members submitted three (3) objections to the Settlement. (DE # 3032, 3033, 3077, 3095). Prior to the Final Approval Hearing, the objecting Settlement Class Members filed notices of withdrawal of the three objections. (DE # 3075, 3100, 3107). In addition, two Settlement Class Members served an Emergency Motion to Remove Restrictions on Viewing Motion to Certify dated December 6, 2012 and a Motion to Intervene dated December 7, 2012 (neither motion has, to date, been docketed on the CM/ECF system). Both motions were also withdrawn before the Final Approval Hearing. (DE # 3107-1).

This matter came before the Court on December 10, 2012, for a Final Approval Hearing pursuant to the Court's Order Preliminarily Approving Class Action Settlement, Certifying the Settlement Class, and Providing For Notice to the Settlement Class ("Preliminary Approval Order") dated July 13, 2012 (DE # 2832). The Court reviewed all of the filings relating to the Settlement, and heard argument on the Motion.

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

The present evidentiary record is more than adequate for the Court to consider the fairness, reasonableness, and adequacy of the Settlement. A fundamental question is whether the district judge has sufficient facts before him to evaluate and intelligently and knowledgeably

approve or disapprove the settlement. *In re Gen. Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1084 n.6 (6th Cir. 1984) (citing *Detroit v. Grinnell*, 495 F.2d 448, 463-68 (2d Cir. 1974)). In this case, the Court clearly has such facts before it in considering the Motion, including the evidence and opinions of Class Counsel and their experts.

After careful consideration of the presentations of the Parties, the Court approves the withdrawal of the three objections and the two motions filed by Settlement Class Members, and concludes that this Settlement provides a reasonable recovery for Settlement Class Members ($18 million, or 52% of the likely value of their claims) and constitutes a very good result given all of the circumstances and challenges presented by the Action. The Court specifically finds that the Settlement is fair, reasonable and adequate, and a satisfactory compromise of the Settlement Class Members' claims. The Settlement fully complies with Federal Rule of Civil Procedure 23(e), and, thus, the Court grants Final Approval of the Settlement, and awards the fees and costs requested by Class Counsel, as well as the requested Service Awards for the three (3) representative Plaintiffs.

BACKGROUND

1. Factual and Procedural Background of the Action.

Plaintiffs brought this Action seeking monetary damages, restitution and declaratory relief based on BOW's Debit Re-sequencing that Plaintiffs claim was designed to increase the number of Overdraft Fees its customers incurred. *See generally* Consolidated Amended Class Action Complaint (DE # 998). Plaintiffs alleged that, as a result of BOW's manipulation of the order in which customers' Debit Card Transactions were posted, customers' funds were depleted more rapidly than they should have been, and Plaintiffs and persons in the Settlement Class paid more Overdraft Fees than they should have paid. *Id.*

BOW denied all of Plaintiffs' allegations. The Bank consistently defended its conduct by, *inter alia*, highlighting language in the relevant account agreements that it contends expressly advises customers of, and permits, the Debit Re-sequencing at issue. (Joint Declaration of Robert C. Gilbert, Michael W. Sobol, Jeffrey M. Ostrow and Elaine Ryan ¶ 5 ("Joint Decl.") (DE # 3015–2)). In addition, BOW advanced several other defenses, including that Plaintiffs cannot maintain common law unconscionability, conversion or unjust enrichment claims, and that Plaintiffs' state statutory claims fail. *See generally* Answer to Consolidated Amended Class Action Complaint (DE # 1092).

2. Settlement Negotiations and Proceedings.

Beginning in the fourth quarter of 2011, Class Counsel and BOW engaged in preliminary settlement discussions. Joint Decl. ¶ 76. On January 6, 2012, they participated in a formal mediation session before the Honorable Edward A. Infante (Ret.) of JAMS. *Id.* ¶ 77. Prior to the mediation, BOW provided Class Counsel with sample customer transactional data and aggregate information regarding its Overdraft Fee revenues from Debit Card Transactions. Class Counsel and their expert analyzed this data. *Id.* ¶ 76; Declaration of Arthur Olsen ¶ 17. (DE # 3015–4).

As a result of the January 6, 2012 mediation, the Parties signed a memorandum of understanding, which memorialized – subject to negotiation and execution of the Agreement, and subject to Preliminary Approval and Final Approval by the Court as required by Federal Rule of Civil Procedure 23 – the Parties' good faith intention to fully, finally and forever resolve, discharge and release all rights and claims of Plaintiffs and the Settlement Class Members in exchange for BOW's agreement to pay $18,000,000 to create a common fund for the benefit of the Settlement Class, and to separately pay the costs of class notice and settlement

administration. Joint Decl. ¶ 20. Several months of detailed discussions and negotiations followed concerning the specific terms of the Agreement. *Id.* ¶ 21. The Agreement was completed and signed on June 26, 2012. *Id.*

On July 11, 2012, Plaintiffs filed their Motion for Preliminary Approval of the Settlement. (DE # 2823). On July 13, 2012, the Court entered a Preliminary Approval Order. (DE # 2832). In the Preliminary Approval Order, the Court determined that the Settlement is "fair, reasonable and adequate. The Court found that the Settlement was reached in the absence of collusion, is the product of informed, good-faith, arms-length negotiations between the Parties and their capable and experienced counsel, and was reached with the assistance of a well-qualified and experienced mediator . . . ." (DE # 2832 at 9, ¶ 10).

Pursuant to the Preliminary Approval Order, Notice of the Settlement was mailed on September 19, 2012 to 386,113 persons in the Settlement Class. *See* Declaration of Tore Hodne ¶ 9 ("Hodne Decl.") (DE # 3015–5). Additionally, Notice of the Settlement was published on August 8, 2012, in *USA Today*, the *Los Angeles Times*, the *San Francisco Chronicle*, and the *San Diego Union-Tribune*. *Id.* Finally, the Settlement Website, www.bankofthewestoverdraftsettlement.com, which became operational on August 7, 2012, provides details about the Settlement and links to numerous court documents. *Id.* ¶ 4.

As discussed below, the Court finds that the Notice Program was properly effectuated, and that it was more than adequate to put the Settlement Class on notice of the terms of the Settlement, the procedures for objecting to and opting out of the Settlement, and the rights that the Settlement Class Members gave up by remaining part of the Settlement Class.

3. Summary of the Settlement Terms.

The Settlement's terms are set forth in the Agreement. (DE # 3015–1). The Court now provides a summary of the material terms.

a. The Settlement Class.

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

> All Bank of the West customers in the United States who had one or more Accounts and who, during the Class Period, incurred an Overdraft Fee as a result of Bank of the West's Debit Re-sequencing.

Agreement ¶ 44. The Class Period is defined as the period from June 1, 2005 through and including July 1, 2011. Agreement ¶ 20.

b. Monetary Relief for the Benefit of the Class.

On July 27, 2012, BOW deposited $18 million into the Escrow Account, thereby creating the Settlement Fund. Joint Decl. ¶ 28. Settlement Class Members will not submit claims or take any other affirmative step to receive relief under the Settlement. Instead, within 30 days of the Effective Date of the Settlement, BOW and the Settlement Administrator will distribute the Net Settlement Fund to all Settlement Class Members. Agreement ¶ 78. Payments to Settlement Class Members who are Current Account Holders will be made either by BOW crediting such Settlement Class Members' Accounts and notifying the Settlement Class Members of the credit or by mailed check from the Settlement Administrator in those circumstances where it is not feasible or reasonable for BOW to make the payment by a credit. *Id.* ¶ 82. Settlement Class Members who are Past Account Holders will receive payment by checks mailed by the Settlement Administrator. *Id.* ¶ 84.

Thus, all identifiable Settlement Class Members who experienced a Positive Differential Overdraft Fee will *automatically* receive a *pro rata* distribution of the Net Settlement Fund. Agreement ¶¶ 77–84. The Positive Differential Overdraft Fee analysis determines, among other things, which Settlement Class Members were assessed additional Overdraft Fees that would not

have been assessed had BOW employed a posting sequence for Debit Card Transactions other than ordering them from highest to lowest dollar amount, and how much in additional Overdraft Fees those Settlement Class Members would have incurred. *Id.* ¶ 77. The calculation involves a complex multi-step process detailed in paragraph 77 of the Agreement. The Net Settlement Fund – which will be distributed *pro rata* to identifiable Settlement Class Members – equals the Settlement Fund plus any accrued interest, minus (a) the amount of Court-awarded Service Awards to Plaintiffs, (b) the amount of Court-awarded attorneys' fees and cost reimbursements to Class Counsel, and (c) any costs associated with taxes and investments relating to the Settlement Fund. *Id.* ¶ 31. All fees and charges otherwise related to settlement administration have been and will be paid by BOW, and will not come out of the $18 million Settlement Fund. *Id.* ¶ 53.

Any uncashed or returned checks will remain in the Settlement Fund for one year from the date on which the first distribution check is mailed, during which time the Settlement Administrator will make reasonable efforts to effectuate delivery of the Settlement Class Member Payments. Agreement ¶ 86. Any residue still remaining after the one-year period plus thirty days will either be distributed to Settlement Class Members on a *pro rata* basis, if feasible and practical in light of the costs of administering such payments or, alternatively, through a residual *cy pres* program subject to Court approval. *Id.* ¶ 87.

c. Class Release.

In exchange for the benefits conferred by the Settlement, all Settlement Class Members will be deemed to have released BOW from claims relating to the subject matter of the Action. Agreement § XIV. The Court expressly adopts and incorporates the Releases in its separately entered Final Judgment.

DISCUSSION

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

As explained below, the Settlement here is more than sufficient under Rule 23(e). It creates an $18 million Settlement Fund for the benefit of the Settlement Class; and each Settlement Class Member will receive recovery as a matter of course, without needing to take any action, based on an analysis by Class Counsel's expert of information in BOW's possession.

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

In addition to having personal jurisdiction over the Plaintiffs and BOW, who are parties to this litigation, the Court also has personal jurisdiction over all Settlement Class Members because they have received the requisite notice and due process. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)); *see also In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148

F.3d 283, 306 (3d Cir. 1998). The Court has subject matter jurisdiction over the Action pursuant to 28 U.S.C. §§ 1332(d)(2) and (6) and 28 U.S.C. § 1407.

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

As discussed above, Notice of the Settlement in the forms approved by the Court was mailed to over 380,000 persons in the Settlement Class. Hodne Decl. ¶ 9. (DE # 3015–5). Notice of the Settlement was also published in *USA Today*, the *Los Angeles Times*, the *San Francisco Chronicle*, and the *San Diego Union-Tribune*. *Id.* In addition, the Settlement Website was established to enable the Settlement Class to learn about the Action and the Settlement. *Id.* ¶ 4.

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

The Court-approved Notice satisfies the due process requirements because it described "the substantive claims . . . [and] contained information reasonably necessary to make a decision to remain a class member and be bound by the final judgment."[2] *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d at 1104-05. The Notice, among other things, defined the Settlement Class; described the release provided to BOW under the Settlement, as well as the amount, method of allocating, and proposed distribution of the Settlement proceeds; and informed persons in the the Settlement Class of their right to opt-out and object, the procedures for doing so, and the time and place of the Final Approval Hearing. Further, the Notice stated that Class Counsel intended to seek attorneys' fees of up to thirty percent (30%) of the Settlement Fund.

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[2] *See* Preliminary Approval Order (DE # 2832 at 2) (finding "the proposed Notice Program and proposed forms of Notice satisfy Federal Rule of Civil Procedure 23 and constitutional due process requirements, and are reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the Action . . . .").

In addition to disclosing these material terms, the Notice informed Settlement Class Members that a final judgment would bind them unless they opted out, and told them where they could obtain more information – for example, at the Settlement Website that posts a copy of the fully executed Agreement, as well as other important court documents, such as the Motion that contains Class Counsel's considered opinion that the Settlement represents a significant amount of approximately fifty-two percent (52%) of the most probable damages Plaintiffs and the Settlement Class could recover at trial. Joint Decl. ¶ 51. The disclosure of this percentage was sufficient to put the Settlement Class on notice of their potential recovery based on their personal history with BOW and to allow them to make an informed decision about whether to accept the Settlement, object to it or opt out of it.

The Court finds that the Settlement Class was provided with the best practicable notice; the notice was "reasonably calculated, under [the] circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Shutts*, 472 U.S. at 812 (quoting *Mullane*, 339 U.S. at 314-15).

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

In determining whether to approve the Settlement, the Court considers whether it is "fair, adequate, reasonable, and not the product of collusion." *Leverso v. SouthTrust Bank of Al., N.A.*, 18 F.3d 1527, 1530 (11th Cir. 1994); *see also Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). A settlement is fair, reasonable and adequate when "the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." *In re Lorazepam & Clorazepate Antitrust Litig.*, MDL No. 1290, 2003 WL 22037741, at *2 (D.D.C. June 16, 2003) (quoting *Manual for Complex Litigation* (Third) § 30.42 (1995)). However, the Court is "not called upon to determine whether the settlement reached by the parties is the best

possible deal, nor whether class members will receive as much from a settlement as they might have recovered from victory at trial." *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1014 (N.D. Ill. 2000) (citations omitted).

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

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

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

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

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

(5) the range of possible recovery; and

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

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

a. There Was No Fraud or Collusion.

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

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

This case involves over 380,000 persons in the Settlement Class and alleged wrongful Overdraft Fees in the tens of millions of dollars. The claims and defenses are complex, and litigating them has been difficult and time consuming. Although the Action has been pending for over two years, recovery by any means other than settlement would require additional years of litigation in this Court and others, including appellate courts. *See U.S. v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 856 (2d Cir. 1998) (noting that "a principal function of a trial judge is to foster an atmosphere of open discussion among the parties' attorneys and representatives so that litigation may be settled promptly and fairly so as to avoid the uncertainty, expense and delay inherent in a trial"); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 317, 325-26 & n.32 (N.D. Ga. 1993) ("[A]djudication of the claims of two million claimants could last half a millennium").

The Settlement provides immediate and substantial benefits to over 380,000 current and former BOW customers. *See In re Shell Oil Refinery*, 155 F.R.D. 552, 560 (E.D. La. 1993) ("The Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation.") (alterations in original) (quoting *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974)); *see also In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) (noting that complex litigation "can occupy a court's docket for years on end, depleting the resources of the parties and taxpayers while rendering meaningful relief increasingly elusive"). Particularly because the "demand for time on the existing judicial system must be evaluated in determining the reasonableness of the settlement," *Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992) (citation omitted), there can be no reasonable doubt as to

the adequacy of the Settlement.

The amount of the recovery is very reasonable in light of the risks Plaintiffs faced. The combined risks here were real – and potentially catastrophic for the Settlement Class. For example, high-to-low posting of Debit Card Transactions is not clearly unlawful. The UCC permits the reordering of checks, and BOW's deposit account agreement arguably authorizes Debit Re-sequencing. A fact-finder may have been persuaded that, due to these disclosures, BOW customers who incurred overdraft fees received notice of the risks of proceeding with Debit Card Transactions such that they could not recover damages. Additionally, BOW likely would have opposed certification of a multi-state class on several grounds, including manageability. Had BOW succeeded with any of the above, the value of this case would have decreased to near zero.

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

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

The Settlement was reached after two lengthy and important depositions of Bank personnel had been taken, over a million pages of documents produced, and a Motion for Class Certification filed. Joint Decl. ¶ 45. Discovery afforded Class Counsel insight into the strengths and weaknesses of the claims against BOW. *Id.* Prior to settling, Class Counsel developed

ample information and performed analyses from which "to determine the probability of . . . success on the merits, the possible range of recovery, and the likely expense and duration of the litigation." *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 669 (M.D. Ala. 1988). Joint Decl. ¶ 45.

Thus, the stage of the proceedings in this Action when the Parties reached the Settlement supports granting Final Approval.

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

The Court also considers "the likelihood and extent of any recovery from the defendants absent . . . settlement." *In re Domestic Air Transp.*, 148 F.R.D. at 314; *see also Ressler*, 822 F. Supp. at 1555 ("A Court is to consider the likelihood of the plaintiff's success on the merits of his claims against the amount and form of relief offered in the settlement before judging the fairness of the compromise.").

Plaintiffs note that they faced several major risks in this litigation, including those stated above relating to BOW's deposit account agreement and certification of a multi-state class. Absent this Settlement, this litigation likely would have continued for additional years, at tremendous expense to the Parties. Given the serious risks attending these claims, the Settlement is a fair compromise. *See, e.g.*, *Bennett*, 96 F.R.D. 343, 349-50 (S.D. Fla. 1982), aff'd, 737 F.2d 982 (11th Cir. 1984) (plaintiffs faced a "myriad of factual and legal problems" that led to "great uncertainty as to the fact and amount of damage," which made it "unwise [for plaintiffs] to risk the substantial benefits which the settlement confers . . . to the vagaries of a trial"), *aff'd*, 737 F.2d 982 (11th Cir. 1984).

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

In determining whether a settlement is fair in light of the potential range of recovery, the Court is guided by the "important maxim[]" that "the fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate." *Behrens v. Wometco Enters, Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988), aff'd, 899 F.2d 21 (11th Cir. 1990). This is because a settlement must be evaluated "in light of the attendant risks with litigation." *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 64 (S.D.N.Y. 2003); *see Bennett*, 737 F.2d at 986 ("[C]ompromise is the essence of settlement."); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("[T]he very essence of a settlement is . . . a yielding of absolutes and an abandoning of highest hopes.") (internal quotation omitted). Thus, courts regularly find settlements to be fair where "[p]laintiffs have not received the optimal relief." *Warren,* 693 F. Supp. at 1059; *see, e.g.*, *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PriceWaterHouseCoopers, L.L.P.,* 212 F.R.D. 400, 409-410 (E.D. Wis. 2002) ("The mere possibility that the class might receive more if the case were fully litigated is not a good reason for disapproving the settlement.").

The Settlement provides substantial value to the Settlement Class. Under the Settlement, Plaintiffs and the Settlement Class Members have recovered $18 million, which represents a substantial portion of the most probable aggregate damages that Plaintiffs believe they could have recovered at a trial. This is an "outstanding result" given that "[m]any class actions – especially consumer class actions – generate only a small fraction of the total damages." Declaration of Professor Geoffrey Miller in Support of Motion for Final Approval ¶ 30 ("Miller Decl."). (DE # 3015–3). The absence of a claims-made process further supports the conclusion that the Settlement is reasonable. *Id.* ¶ 32 (noting that direct distribution "is highly beneficial

because it ensures that class members will receive the settlement benefits without having to undertake any affirmative action – thus optimizing class recovery").

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

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

Class Counsel and Plaintiffs believe that this Settlement is deserving of Final Approval, and the Court agrees. Furthermore, the Court also finds it telling that, of the approximate 380,000 Settlement Class Members, only three objections to the Settlement were filed. The fact that there are only three objections before this Court strongly supports the propriety of Final Approval. Indeed, near "unanimous approval . . . by the class members is entitled to nearly dispositive weight in this court's evaluation of the proposed settlements." *In re Art Materials Antitrust Litig.*, MDL No. 436, 100 F.R.D. 367, 372 (N.D. Ohio 1983); *see also Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005) (finding that a low percentage of objections "points to the reasonableness of a proposed settlement and supports its approval").

3. The Settlement Class.

This Court has previously found the requirements of Rule 23(a) and 23(b)(3) satisfied in this Action and has certified the Settlement Class, which is defined above, as well as in the separately entered Final Judgment and in paragraph 44 of the Settlement Agreement. The twenty-nine (29) individuals listed in Exhibit A to the Final Judgment timely elected to opt-out of the Settlement. The Court therefore finds and decrees that they are not part of the Settlement Class, are not bound by the Settlement or Release contained therein, and will not receive any distribution from the Settlement Fund. The Court hereby reiterates its findings that: (a) the Settlement Class Members are so numerous that joinder of them is impracticable; (b) there are questions of law and fact common to the Settlement Class Members that predominate over any individual questions; (c) the claims of the representative Plaintiffs are typical of the claims of the Settlement Class Members; (d) the representative Plaintiffs and Class Counsel fairly and adequately represent and protect the interests of the Settlement Class Members; and (e) a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

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

Service awards "compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006). "[T]here is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action." *David v. Am. Suzuki Motor Corp.*, 2010 WL 1628362, at *6 (S.D. Fla. Apr. 15, 2010). Courts have consistently found service awards to be an efficient and productive way to encourage

members of a class to become class representatives. *See, e.g., Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (awarding class representatives $300,000 each, explaining that "the magnitude of the relief the Class Representatives obtained on behalf of the class warrants a substantial incentive award"); *Spicer v. Chi. Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1267-68 (N.D. Ill. 1993) (collecting cases approving service awards ranging from $5,000 to $100,000, and awarding $10,000 to each named plaintiff).

The factors for determining a service award include: (a) the actions the class representatives took to protect the interests of the class; (b) the degree to which the class benefited from those actions; and (c) the amount of time and effort the class representatives expended in pursuing the litigation. *See, e.g., Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

The Court finds that the three (3) named Plaintiffs/class representatives expended substantial time and effort in representing the Settlement Class and deserve to be compensated for such time and effort on behalf of the Settlement Class. Therefore, the Court approves the requested Service Awards of $5,000 for each of the three (3) named Plaintiffs/class representatives to be paid from the Settlement Fund.

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

Class Counsel request a fee equal to thirty percent (30%) of the common fund created through their efforts in litigating this case and reaching the Settlement. The Court analyzes this fee request under *Camden I Condominium Ass'n. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991). As set forth below, the Court concludes that each of the *Camden I* factors supports Class Counsel's fee request, and the Court accordingly awards the fee sought.

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

It is well established that, when a representative party has conferred a substantial benefit upon a class, counsel is entitled to attorneys' fees based upon the benefit obtained. *Camden I*, 946 F.2d at 771; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The common benefit doctrine is an exception to the general rule that each party must bear its own litigation costs. The doctrine serves the "twin goals of removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class and of equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts." *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1202 (N.D. Ill. 1989) (citation omitted). The common benefit doctrine stems from the premise that those who receive the benefit of a lawsuit without contributing to its costs are "unjustly enriched" at the expense of the successful litigant. *Van Gemert*, 444 U.S. at 478. As a result, the Supreme Court, the Eleventh Circuit, and courts in this District have all recognized that "[a] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as whole." *In re Sunbeam*, 176 F. Supp. 2d at 1333 (citing *Van Gemert*, 444 U.S. at 478); *see also Camden I*, 946 F.2d at 771 ("Attorneys in a class action in which a common fund is created are entitled to compensation for their services from the common fund, but the amount is subject to court approval.").

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

774.

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

Based on the findings below, the Court finds that Class Counsel are entitled to an award of 30% of the Settlement Fund. Class Counsel achieved a very good result and overcame numerous procedural and substantive hurdles to obtain this Settlement. Class Counsel undertook a risky and undesirable case and, through diligence, perseverance and skill, obtained an outstanding result. They should be compensated in accordance with their request, which is both warranted and reasonable given similar fee awards. The Court firmly believes this kind of initiative and skill must be adequately compensated to iensure that counsel of this caliber is available to undertake these kinds of risky but important cases in the future. *See Muehler v. Land O'Lakes, Inc.*, 617 F. Supp. 1370, 1375-76 (D. Minn. 1985).

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

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

(1) the time and labor required;

(2) the novelty and difficulty of the questions involved;

(3) the skill requisite to perform the legal service properly;

(4) the preclusion of other employment by the attorney due to acceptance of the case;

(5) the customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) the amount involved and the results obtained;

(9) the experience, reputation, and ability of the attorneys;

(10) the "undesirability" of the case;

(11) the nature and the length of the professional relationship with the client; and

(12) awards in similar cases.

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

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

i. The Claims Against BOW Required Substantial Time and Labor.

Prosecuting and settling the claims against BOW demanded considerable time and work, making this fee request reasonable. Joint Decl. ¶ 65. Throughout the pendency of this Action, the internal organization of Class Counsel, including assignments of work, weekly conference calls, and oversight of task-oriented subcommittees, ensured that Class Counsel were engaged in coordinated, productive work efforts to maximize efficiency and minimize duplication of effort. *Id.* ¶ 66. To the same ends, in-person meetings of Class Counsel were also held several times during the course of the litigation. *Id.* Class Counsel spent substantial time investigating the claims of many potential plaintiffs against BOW. *Id.* ¶ 67. Class Counsel interviewed numerous BOW customers and potential plaintiffs to gather information about BOW's conduct and its effect on consumers. *Id.* This information was essential to Class Counsel's ability to understand the nature of BOW's conduct, the language of the account agreements at issue, and potential remedies. *Id.* Class Counsel also expended significant resources researching and developing the legal claims at issue. *Id.* ¶ 68. For example, state-by-state legal surveys were necessary to determine which state common law doctrines and consumer protection statutes provided Plaintiffs with viable claims. *Id.*

After BOW filed its Answer and affirmative defenses on January 24, 2011, time-consuming discovery followed. Joint Decl. ¶ 69. On May 23, 2011, Plaintiffs propounded their initial discovery, and followed up with a second request for production of documents on October 13, 2011. *Id.* ¶ 69. On July 12 and November 14, 2011, BOW served responses to Plaintiffs' written discovery. *Id.* ¶ 12. BOW ultimately produced more than a million pages of documents to Plaintiffs. *Id.* ¶ 16. Class Counsel established a large document review team of attorneys tasked with reviewing, sorting, and coding those BOW documents. *Id.* ¶ 25. To make the

review and subsequent litigation more efficient, Class Counsel instituted uniform coding procedures for electronic review of the documents BOW produced, and the attorneys remained in constant contact with each other to ensure that they all became aware of significant emerging evidence in real time. *Id.* ¶ 25.

Class Counsel also expended significant efforts to prepare responses to BOW's requests for documents maintained by Plaintiffs, and to litigate certain discovery matters before this Court. Joint Decl. ¶ 26. In addition, Class Counsel took lengthy, detailed depositions of two key BOW corporate representatives. *Id.* ¶ 73. Class Counsel's discovery efforts were necessary and accounted for a substantial amount of the attorney time expended in this Action. *Id.* ¶ 74. Class Counsel also devoted extensive time and effort to researching and preparing the Motion for Class Certification. *Id.* ¶ 75.

Settlement negotiations consumed additional time and resources. Class Counsel and BOW engaged in preliminary settlement discussions beginning in the Fall of 2011. (Joint Decl. ¶ 76). Prior to the formal mediation, BOW provided Class Counsel with sample customer transactional data and aggregate information regarding its Overdraft Fee revenues from Debit Card Transactions, which Class Counsel and their expert analyzed at considerable length. *Id.* ¶ 76. The Honorable Edward A. Infante (Ret.) presided over the mediation session on January 6, 2012, which resulted in an agreement in principle to resolve these claims. *Id.* ¶ 77. This mediation required substantial preparation and follow-up work. *Id.* After the Parties executed the memorandum of understanding, several months of detailed negotiations concerning the specific terms of the Settlement followed. Class Counsel also engaged in additional settlement-related investigation to determine, among other things, the most appropriate method for implementing the plan for direct allocation of the Net Settlement Fund to Settlement Class

Members. *Id.* ¶ 78. The ongoing settlement proceedings in this Court consumed further resources. *Id.* ¶ 79.

All told, Class Counsel's coordinated work paid great dividends for the Settlement Class Members. The Court finds that each of the above-described efforts was essential to achieving the Settlement, and that the time and resources Class Counsel devoted to litigating and settling this Action support the requested fee.

In view of the results obtained here, the Court deems it unnecessary to scrutinize Class Counsel's timesheets. The Eleventh Circuit made clear in *Camden I* that percentage of the fund is the exclusive method for awarding fees in common fund class actions.[3] *Camden I*, 946 F.2d at 774. Even before *Camden I*, courts in this Circuit recognized that "a percentage of the gross recovery is the only sensible method of awarding fees in common fund cases." *Mashburn*, 684 F. Supp. at 690. More importantly, the Court observed firsthand the effort exerted by Class Counsel in this case and the other bank cases, and, given the results achieved here, does not find it necessary or useful to review Class Counsel's lodestar records.

Lodestar "creates an incentive to keep litigation going in order to maximize the number of hours included in the court's lodestar calculation." *In re Quantum Health Resources, Inc.*, 962 F. Supp. 1254, 1256 (C.D. Cal. 1997). In *Camden I*, the Eleventh Circuit criticized lodestar and the inefficiencies that it creates. 946 F.2d at 773-75. In so doing, the Court "mandate[d] the *exclusive* use of the percentage approach in common fund cases, reasoning that it more closely aligns the interests of client and attorney, and more faithfully adheres to market practice."

[3] The Court applies Eleventh Circuit law to this request for attorneys' fees. *See Allapattah*, 454 F. Supp. 2d at 1200 (holding that a "district court presiding over a diversity-based class action pursuant to Fed. R. Civ. P. 23 has equitable power to apply federal common law in determining fee awards irrespective of state law").

Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 50 (2d Cir. 2000) (emphasis added); *see also* Alba Conte, *Attorney Fee Awards* § 2.7, at 91 fn. 41 ("The Eleventh . . . Circuit[] repudiated the use of the lodestar method in common-fund cases"). Under *Camden I*, courts in this Circuit regularly award fees based on a percentage of the recovery, without discussing lodestar at all. *See, e.g.*, *David*, 2010 WL 1628362.[4] "[A] common fund is itself the measure of success and represents the benchmark on which a reasonable fee will be awarded. . . . In this context, monetary results achieved predominate over all other criteria." *Camden I*, 946 F.2d at 774 (citations and alterations omitted). This Court will not deviate from that sound approach.

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

The attorneys on both sides of this case displayed a very high level of skill. *See Walco Invs. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997) (explaining that "[g]iven the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results"); *see also Camden I*, 946 F.2d at 772 n.3 (in assessing the quality of representation by class counsel, Court also should consider the quality of their opposing counsel); *Johnson*, 488 F.2d at 718; *Ressler*, 149 F.R.D. at 654.

Class Counsel's work is emblematic of the effort and outcomes witnessed by this Court on a regular basis in this MDL. There can be no legitimate dispute that, given the novel and complex issues confronted by Class Counsel, detailed here and elsewhere, an extraordinary group of lawyers was required to litigate this case. The Court knows many of these lawyers from years of presiding over cases in this District, and has come to expect this level of performance

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

from them. That is not to say, however, that such performance should be taken for granted. Instead, the fact that this level of legal talent was available to the Settlement Class Members is another compelling reason in support of the fee requested. As with most things, you get what you pay for, and the Settlement Class Members received an impressive amount and quality of legal services. *See* Miller Decl. ¶ 58 (DE # 3015–3) (noting "the high levels of energy, diligence and skill displayed by counsel" for Plaintiffs). In the private marketplace, counsel of exceptional skill commands a significant premium. So it must be here.

iii. The Claims Against BOW Entailed Considerable Risk.

The risks facing the Plaintiffs in this case have been discussed above, in the Motion, and elsewhere. There were myriad ways in which Plaintiffs could have lost this case – yet they managed to achieve a successful settlement. A large amount of the credit for this outcome must be accorded to Class Counsel as a result of their strategic choices, effort and legal prowess.

"A court's consideration of this factor recognizes that counsel should be rewarded for taking on a case from which other law firms shrunk. Such aversion could be due to any number of things, including social opprobrium surrounding the parties, thorny factual circumstances, or the possible financial outcome of a case. All of this and more is enveloped by the term 'undesirable.'" *In re Sunbeam*, 176 F. Supp. 2d at 1336. Moreover, as Professor Miller points out, "[a]warding a higher fee for higher risk is simply common sense: doing so both rewards counsel for excellent success and also incentivizes them to undertake socially valuable litigation in the future." Miller Decl. ¶ 56. In addition, "[t]he point at which plaintiffs settle with defendants . . . is simply not relevant to determining the risks incurred by their counsel in agreeing to represent them." *Skelton v. Gen. Motor Corp.*, 860 F.2d 250, 258 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989). "Undesirability" and relevant risks must be evaluated from the

standpoint of plaintiffs' counsel as of the time they commenced the suit, not retroactively, with the benefit of hindsight. *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 112 (3d Cir. 1976); *Walco*, 975 F. Supp. at 1473.

The most undesirable aspect of this Action was the long odds on success. While the Court expresses no opinion on the merits of the arguments by this or any other defendant, the Court notes that, among other challenges, Class Counsel had to contend with the disclosures in BOW's deposit account agreement, and fight the perception that serial overdrafters bore responsibility for their own insufficient funds transactions. Given the positive societal benefits to be gained from Class Counsel's willingness to undertake this kind of difficult and risky, yet important, work, such decisions must be properly incentivized. The Court believes, and holds, that the proper incentive here is a thirty percent (30%) fee.

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

Class Counsel litigated the Action entirely on a contingent fee basis. Joint Decl. ¶ 92. In undertaking to litigate this complex action on that basis, Class Counsel assumed a significant risk of nonpayment or underpayment. *Id.*

Numerous cases recognize such a risk as an important factor in determining a fee award. "A contingency fee arrangement often justifies an increase in the award of attorney's fees." *In re Sunbeam*, 176 F. Supp. 2d at 1335 (quoting *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990)); *see also In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992) (holding that, when a common fund case has been prosecuted on a contingent basis, plaintiffs' counsel must be compensated adequately for the risk of non-payment); *Ressler*, 149 F.R.D. at 656; *Walters v. Atlanta*, 652 F. Supp. 755, 759 (N.D. Ga.

1985), *modified*, 803 F.2d 1135 (11th Cir. 1986); *York v. Al. State Bd. of Educ.*, 631 F. Supp. 78, 86 (M.D. Ala. 1986).

Public policy concerns – in particular, ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs holding small individual claims – support the requested fee here. *See, e.g.*, *Behrens*, 118 F.R.D. at 548. The risks assumed by Class Counsel have already been discussed. It is uncontroverted that the attorney time spent on the Action was time that could not be spent on other matters. Joint Decl. ¶ 95. Consequently, this factor supports the requested fee.

v. Class Counsel Achieved a Superb Result.

The Court finds that this Settlement is excellent. Rather than facing more years of costly and uncertain litigation, approximately 380,000 Settlement Class Members will receive an immediate cash benefit from the Settlement Fund. Joint Decl. ¶ 85. The Settlement Fund will not be reduced by the costs of Notice or settlement administration expenses; such expenses have been and will continue to be borne separately by BOW. *Id.* Moreover, payments to Settlement Class Members will be forthcoming automatically, through direct deposit (for Current Account Holders) or checks (for Past Account Holders). *Id.* Finally, in light of regulatory development and in connection with Class Counsel's litigation of this Action, BOW changed its high-to-low posting order to a more consumer-friendly chronological or low-to-high order for debit and ATM transactions. *Id.*

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

In MDL 2036 this Court awarded thirty percent (30%) of the common settlement fund to attorneys' fees in the Bank of America case (*In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1359 (S.D. Fla. 2011)); the Bank of Oklahoma case (DE # 2949); and the Union

Bank case (DE # 2986); and twenty-seven-and-one-half percent (27.5%) in the Iberiabank case (DE # 2657). Similarly, numerous recent decisions within this Circuit have awarded attorneys' fees up to and in excess of thirty percent. *See Allapattah Servs.*, 454 F. Supp. 2d at 1185 (awarding fees of 31 1/3 % of $1.06 billion); *In re: Terazosin Hydrochloride Antitrust Litig.*, 99-1317-MDL-Seitz (S.D. Fla. Apr. 19, 2005) (awarding fees of 33 1/3 % of settlement of over $30 million); *In re: Managed Care Litig. v. Aetna*, MDL No. 1334, 2003 WL 22850070 (S.D. Fla. Oct. 24, 2003) (awarding fees and costs of 35.5% of settlement of $100 million); *Gutter v. E.I. Dupont De Nemours & Co.*, 2003 U.S. Dist. LEXIS 27238 (S.D. Fla. May 30, 2003) (awarding fees of 32 1/3 % of settlement of $77.5 million); *Waters*, 190 F.3d at 1291 (affirming fee award of 33 1/3 % of settlement of $40 million).

The Court finds that a fee of thirty percent (30%) plus expenses is appropriate here and comports with customary fee awards in similar cases. In his expert declaration, Professor Miller distilled several major empirical studies of attorneys' fees awarded in connection with class action settlements. Miller Decl. ¶¶ 44–54. (DE # 3015–3). Professor Miller's own published studies, for instance, found that the median fee award since 1974 in such cases is exactly 30 percent, with the median award in consumer cases slightly lower at 25 percent. *Id.* ¶¶ 49–50. Based on these empirical findings, Professor Miller concluded that the fee requested by Class Counsel in this case "is easily within the range of reason when judged by this data." *Id.* ¶ 52. The Court agrees, and finds that the risks of this litigation, considered against the favorable result, easily justify a thirty percent fee.

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

The Court finds that the remaining *Camden I* factors further support Class Counsel's fee request, and so holds. The burdens of this litigation and the relatively small size of most of the

firms representing Plaintiffs lend support to the fee awarded. This fee is firmly rooted in "the economics involved in prosecuting a class action." *In re Sunbeam*, 176 F. Supp. 2d at 1333. The Court is convinced by its many years of presiding over significant cases like this one that proper incentives must be maintained to ensure that attorneys of this caliber are available to take on cases of significant public importance like this one. The factual record in this case, and the Court's own observations, all of which are incorporated herein, compel the result required by this Order.

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

Finally, the Court finds that Class Counsel's request for reimbursement of $183,435.30, representing certain out-of-pocket costs and expenses that Class Counsel incurred during the prosecution and settlement of this Action gainst BOW is reasonable and justified. These costs and expenses consist of: (1) $171,573.90 in fees and expenses for experts; (2) $5,161.40 in court reporter fees and transcripts; and (3) $6,700.00 in mediator's fees. Joint Decl. ¶ 97. The Court hereby approves Class Counsel's request for reimbursement of these costs and expenses. *See Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970). These costs and expenses, advanced by Class Counsel for the benefit of the Settlement Class, were necessarily incurred in furtherance of the litigation of the Action and its settlement. Joint Decl. ¶¶ 97–99. Accordingly, reimbursement of costs and expenses in the amount of $183,435.30 shall be made from the Settlement Fund following disbursement of attorneys' fees.

CONCLUSION

For the foregoing reasons, the Court: (1) grants Final Approval of the Settlement; (2) appoints Plaintiffs Betty Orallo, Saynyonoh Dee, and Michele Draper as class representatives for this Settlement; (3) appoints as Class Counsel and Settlement Class Counsel the attorneys and

law firms listed in paragraphs 19 and 45 of the Agreement, respectively; (4) approves the withdrawal of the three objections and two related motions filed by Settlement Class Members; (5) awards Service Awards to the three (3) named Plaintiffs/class representatives in the amount of $5,000 each; (6) awards Class Counsel attorneys' fees equal to thirty percent (30%) of the Settlement Fund, plus reimbursement of costs and expenses in the amount of $183,435.30; (7) directs Class Counsel, Plaintiffs, and BOW to implement and consummate the Settlement pursuant to its terms and conditions; (8) retains continuing jurisdiction over Plaintiffs, the Settlement Class Members, and BOW to implement, administer, consummate and enforce the Settlement and this Final Approval Order; and (9) will separately enter Final Judgment dismissing the Action with prejudice.

DONE and ORDERED in Chambers at the James Lawrence King Federal Justice Building and United States Courthouse in Miami, Florida, this 18th day of December, 2012.

James Lawrence King

JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: All Counsel of Record