EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Tornes, et al. v. Bank of America, N.A.
Yourke, et al. v. Bank of America, N.A.

Case No. 1:09-MD-02036-JLK

SUPPLEMENTAL DECLARATION OF BRIAN T. FITZPATRICK

1. I signed a declaration on September 14, 2011, opining that the 30% fee award requested by class counsel in these cases was well within the range of reasonable awards. I wish to supplement this declaration to respond to some of the objections that have been filed. In particular, I wish to correct what I believe are mischaracterizations by some of the objectors of the empirical studies and legal standards on fee awards in the Eleventh Circuit. In addition, class counsel have asked me to discuss the appropriateness of the *cy pres* distribution called for in the settlement agreement as well as to alert the court to an unfortunate phenomenon in class action litigation known as "objector blackmail."

Fee awards in the Eleventh Circuit

2. Some objectors asserted that "the mean class action fee award in Eleventh Circuit during the period 1993-2008 is 16.94%." Jenkins et al., Objections at 12 (document 1920, entered 10/3/2011). This is not correct. The study they cited for this assertion is a working paper published by Theodore Eisenberg and Geoffrey Miller. *See id*. (citing Table 4). To begin with, this working paper has now been superseded by a published paper, and the tables in the published paper were revised from those in the working paper; thus, reliance on the tables in the working paper is entirely misplaced. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys'*

Fees and Expenses in Class Action Settlements: 1993-2008, 7 J. Empirical L. Stud. 248, 260 (2010) (hereinafter "Eisenberg-Miller II"). But more importantly, the column of Table 4 from which these objectors pulled the number 16.94 (column 3) does not even purport to say what they asserted it says. Column 3 of Table 4 in both the working paper and the published paper sets forth the mean fee *award* (in millions of dollars)—not the mean fee *percentage*. *See id*. Thus, when Column 3 of Table 4 of the working paper listed 16.94 for the Eleventh Circuit, it meant the mean fee award in the Eleventh Circuit was $16.94 million, not that the mean fee percentage was 16.94%. The mean fee *percentage* is listed in *Column 1* of Table 4; in the published paper, that figure is 21%. *See id*. But, as I explained in my initial declaration, even this number is not fully representative of class action fee awards because the Eisenberg-Miller study examined only a fraction of the settlements over this period and the fraction examined was not designed to be representative of the whole. *See id*. at 253 ("[O]ur data include only opinions that were published in some readily available form. Obviously, therefore, we have not included the full universe of cases . . . . [P]ublished opinions are not necessarily representative of the universe of all cases.").

3. In order to overcome the limitations of the Eisenberg-Miller study, in my own empirical study I examined *all* settlements in the Eleventh Circuit over 2006-2007 and found that the mean fee award in the Eleventh Circuit was 28.1% and the median fee award was 30%. *See* Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811, 836 (2010) [hereinafter "Empirical Study"]. The fee requested here is obviously in line with these numbers.

4. Some objectors asserted that, although the Eleventh Circuit has said that "the majority of common fund fee awards fall between 20% and 30% of the fund," Locke et al.

Objections at 5 (document 1922, entered 10/3/2011) (citing *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991)), the Eleventh Circuit's *Camden* decision is "20 years out of date" and that "the trend in recent years has been to award more modest fees . . . ." *Id*. at 5 & n. 3. This is incorrect. *Camden* is not out of date. As I showed in my study of all federal class action settlements in 2006 and 2007, the vast majority of fee awards—both within the Eleventh Circuit and across the nation—still fall between 20% and 30% of the settlement. *See* Fitzpatrick, *Empirical Study*, *supra*, at 834. Moreover, empirical studies by Ted Eisenberg and Geoffrey Miller have found no statistically-significant change in fee percentages over time. *See* Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Studies 27, 55-57, 62 (column 4) (2008) (finding no statistically-significant variation by year in the fee percentages awarded in non-fee-shifting cases from 1992-2003); *Eisenberg-Miller II*, *supra*, at 255-56 (finding no statistically-significant variation through 2008).

5. Some objectors asserted that fee percentages should be smaller when settlements are larger, and, for this reason, the court should not award class counsel 30% in this case. *See* Locke et al. Objections at 5 (calling this a "megafund case"); Repa et al. Objections at 6-7 (document 1935, entered 10/3/11). But, as I explained in my initial declaration, although nationwide empirical data does show that courts award smaller percentages in larger settlements, *see* Fitzpatrick, *Empirical Study*, *supra*, at 838, there is no evidence they are doing so in the Eleventh Circuit. When I separated the Eleventh Circuit fee awards in my 2006-2007 dataset from the fees awarded by courts in other circuits, I found no statistically-significant effect between fee percentage and settlement size. Indeed, in the very largest Eleventh Circuit

settlement—the $1 billion-plus settlement in *Allapattah Servs. Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185 (S.D.Fla. 2006)—the court awarded 31.33% in fees.

6. Finally, some objectors asserted that class counsel's fee award should not include any percentage of the portion of the settlement fund that will be set aside for distribution *cy pres*. *See* Jenkins et al. Objections at 11; Fletcher Objection at 14-15 (document 1903, entered 9/29/11). This would be contrary to standard practice. *See* Charles B. Casper, *The Class Action Fairness Act's Impact on Settlements*, 20 Antitrust 26, 28 (2005) ("*Cy pres* relief usually has been considered in awarding attorneys' fees . . . ."). Although Congress changed this practice for coupon settlements, it did not do so for other class action settlements. *See* 28 U.S.C. § 1712(e). And this is with good reason: if class counsel were not compensated for the *cy pres* distributions they persuaded defendants to make, then they would have no incentive to seek them; but, if class counsel had no incentive to seek them, then the deterrence purposes of small-stakes class actions like this one might be undermined. As I explain below, *cy pres* distributions are commonly used when it is difficult or impossible to distribute monies to class members with small recoveries; if defendants did not pay someone—even third parties like *cy pres* charities—for such harms, then defendants would have every incentive to cause such harms in the future.

Cy Pres *Distributions*

7. Some objectors complained that the settlement provides for an award of a portion of its proceeds to non-profit organizations rather than class members. *See* Jenkins et al. Objections at 8-9. Specifically, class counsel and the defendant determined that, because the defendant no longer has the data necessary to calculate damages for claims by class members that were incurred prior to 2004, the share of the settlement attributable to these claims

(estimated to be 12.5% of the total) should be distributed instead to non-profit organizations that seek to improve the financial literacy of consumers. *See* Settlement Agreement at ¶¶ 78, 81-82, 91; Plaintiff's Motion for Final Approval of Settlement, Application for Service Awards, Class Counsel's Application for Attorneys' Fees, and Incorporated Memorandum of Law at 18 (document 1885, entered 9/16/11). It is very common in small-stakes class actions like this one for the distribution to class members of a portion of the settlement to be unduly difficult or even impossible. It is equally common in such situations for courts to approve distributing settlement monies instead to charities that will benefit class members indirectly. This practice is known as *cy pres* (French for "as near as possible") and it certainly does not render the agreement unreasonable.

8. There are a variety of reasons why it is common for the distribution to class members of settlement proceeds in small-stakes class actions to be unduly difficult or impossible: for example, in addition to the reason here, sometimes the costs of processing and mailing class members small amounts of money would eat up all of the settlement, sometimes class members do not come forward to claim their awards, and sometimes class members cannot be located. *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. Pa. L. Rev. 2043, 2079-80 (2010). When faced with monies that cannot be distributed to class members, settlement agreements employ a number of alternatives. Perhaps the most common is the one called for here: to distribute the monies *cy pres* to charities that will benefit class members indirectly. *See id.* at 2080. Other alternatives that have been employed include returning the monies to the defendant, using the monies to give even more to the class members who can be identified, and distributing the monies to the state. *See id.* at 2081.

9. With the exception of returning the monies to the defendant, all of these alternatives are, in my opinion, reasonable. As scholars have long recognized, in small-stakes cases, the most important function of the class action device is not compensation of class members but deterrence of wrongdoing. *See id*. at 2069. Thus, in such cases, the most important thing is that the defendant pays for the wrongs it has perpetrated—it is less important *who* the defendant pays. *See id.* at 2060. All of the alternatives other than returning the monies to the defendant, including *cy pres* distributions like the one here, require the defendant to pay for the wrongs it has perpetrated; thus, all of these alternatives further the deterrence purposes of small-stakes class actions equally well.

10. It is true that *cy pres* distributions have been controversial in some quarters, but this has typically been because the charities selected to receive the settlement monies have been unconnected to the subject matter of the settlement. *See id*. at 2080 & n.158. But that is not the case here: the consumer financial literacy organizations slated to receive monies under the settlement agreement are precisely the sort of organizations that can help the class members here avoid falling victim in the future to schemes like the ones for which they sued the defendant in these very cases.

Objector Blackmail

11. In 2009, I published the article *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009) [hereinafter "Objector Blackmail"]. In this article, I described an unfortunate practice known as "objector blackmail" and I discussed methods courts and class counsel might use to combat it. Objector blackmail occurs when class members file meritless objections to a settlement so that they can then appeal the approval of the settlement and thereby delay

resolution of the case. *See id*. at 1634-35. Blackmail-minded objectors hope that, by delaying the resolution of the case by appealing, class counsel will pay them a sum of money to drop their objections. *See id*. Class counsel is often willing to do this because they do not want to delay distribution of the settlement to the class and because they cannot receive the fees awarded to them by the district court until all the appeals are resolved. *See id*. This practice of objecting and settling can be so lucrative that it has given rise to "professional objectors," lawyers who travel from settlement to settlement to file objections with the purpose of delay and the hope of inducing class counsel into a side deal. *See id*. at 1637-38. This practice is unfortunate because it delays distribution of the settlement to the class without good reason and because it increases the cost of class representation without any corresponding benefit. As one district court put it:

> [O]bjectors to class action settlements can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements. The larger the settlement, the more cost-effective it is to pay the objectors rather than suffer the delay of waiting for an appeal to be resolved (even an expedited appeal). Because of these economic realities, professional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose behalf the appeal is purportedly raised, gains nothing.

Barnes v. FleetBoston Fin. Corp., No. 01-10395, 2006 U.S. Dist. LEXIS 71072, at *3–4 (D. Mass. Aug. 22, 2006).

12. There are a number of possible countermeasures that can be employed against objector blackmail. One of the most popular is called a "quick pay provision"—a clause that is

inserted into class action settlements permitting class counsel to receive their fee award as soon as it is approved by the district court and without waiting for any appeals from the settlement to be resolved. *See* Fitzpatrick, *Objector Blackmail*, *supra*, at 1641. By eliminating the delay in the receipt of fee awards that is caused by an appeal, quick-pay provisions mitigate the incentives class counsel have to pay objectors to drop their appeals, and, in doing so, mitigate the incentives that blackmail-minded class members have to file objectors in the first place. *See id*. at 1641-42. Quick-pay provisions are found in over one-third of class action settlements, *see id*. at 1643, and they are thought to be successful at eliminating much, if not all, of the blackmail threat. Unfortunately, the settlement in these cases does not include a quick-pay provision.

13. In the absence of quick-pay provisions, many courts employ two other countermeasures to combat objector blackmail. Both of these countermeasures are less effective than quick-pay provisions, but they may be better than no countermeasures at all. One countermeasure is simply to sanction class members who make frivolous objections. *See id*. at 1652. The other is to require objectors to post a bond to appeal settlements or fee awards. *See id*. at 1653-55. Many courts have required objectors to post bonds to cover 1) the increased expense in settlement administration caused by appeal, 2) any interest on the settlement or attorneys' fees that might accrue on appeal, and 3) the attorneys' fees class counsel and the defendant might expend on appeal. *See id*. Although some of these bonds have been controversial, and I myself am somewhat uncertain about them, *see id*. at 1655-56, there are good arguments both for and against the imposition of these bonds, and, perhaps most importantly, many courts impose them, including courts in the Eleventh Circuit. *See, e.g.*, *Allapattah Servs., Inc. v. Exxon Corp.*, No. 91-0986-CIV, 2006 WL 1132371, at *18 (S.D. Fla.

Apr. 7, 2006) (requiring objector to post Rule 7 bond in the amount of $13,500,000 for "damages, costs and interest that the entire class will lose as a result of the appeal").

Nashville, TN

October 19, 2011

/s/ Brian T. Fitzpatrick

Brian T. Fitzpatrick