UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

IN RE: CHECKING ACCOUNT OVERDRAFT LITIGATION

MDL No. 2036

THIS DOCUMENT RELATES TO: FOURTH TRANCHE ACTION

Casayuran, et al. v. PNC Bank, N.A.
D.N.J. Case No. 2:09-5155
S.D. Fla. Case No. 10-cv-20496-JLK

Cowen, et al. v. PNC Bank, N.A.
S.D. Fla. Case No. 10-cv-21869-JLK

Hernandez, et al. v. PNC Bank, N.A.
S.D. Fla. Case No. 10-cv-21868-JLK

ORDER GRANTING CLASS CERTIFICATION

THIS CAUSE is before the Court upon Plaintiffs' Motion for Class Certification and Incorporated Memorandum of Law (DE #2276) (the "Motion"). The Court has carefully considered the Motion, response, reply, and the documents attached to them, as well as Plaintiffs' voluminous evidentiary submission.[1] Upon careful consideration of the record, and for the reasons explained more fully below, the Court grants Plaintiffs' Motion.

I. Background

Plaintiffs Michael Cowen, Nicole Cowen, Michael Dorney, April Dorney, and Virgilio Casayuran Jr. (collectively, "Plaintiffs") allege that, through the use of specially designed

[1] Plaintiffs' evidentiary submission is attached to the Motion at Appendices I–IV. (*See* DE #2277–80; 2287–88). Defendant responded on February 3, 2012 (DE #2450) and Plaintiffs replied on March 21, 2012 (DE #2589).

software programs, Defendant PNC Bank, N.A. ("PNC") engaged in a systematic scheme to extract the greatest possible number of overdraft fees from Plaintiffs and similarly situated PNC customers across the country. (*See generally* Compl.).[2] PNC allegedly collected hundreds of millions of dollars in excessive overdraft fees as a result of this systematic scheme, much of it, according to Plaintiff, from PNC's most vulnerable customers. (*Id.* at ¶¶ 4–5, 112). To carry out this scheme, Plaintiffs allege that PNC manipulated debit card transactions by, among other things, employing a bookkeeping trick to re-sequence the transactions from highest-to-lowest dollar amount at the time of posting. (*Id.* at ¶¶ 28, 30). Plaintiffs allege that these account manipulations, which PNC deponents testified were applied in the same manner to all class members as a result of PNC's standardized computer software, caused funds in customer accounts to be depleted more rapidly, resulting in more overdrafts and, consequently, more overdraft fees. (Compl. ¶¶ 38–54; *see also* Ex. 1 at 16:20–25).[3] Plaintiffs further allege that, in many instances, overdraft fees were levied at times when, but for PNC's manipulation, there would have been sufficient funds in the customers' accounts. (*Id.* at ¶¶ 54–58, 98). Plaintiffs allege that PNC did not fairly disclose its manipulations, took active steps to keep them secret, and engaged in these manipulations despite recognizing that it harmed its own customers. (*Id.* at ¶¶ 29, 43, 93). PNC disputes that it has manipulated account transactions and that it has committed any violations of law. (*See* Answer).[4]

After approximately one year of class discovery, Plaintiffs filed the instant Motion seeking class certification of their claims for breach of contract and the breach of the duty of good faith and fair dealing, unconscionability, unjust enrichment, and violation of the

[2] References to "Compl." are to Plaintiffs' Consolidated Amended Class Action Complaint (DE #991) filed December 6, 2010. As all discovery and matters pertaining to Defendant National City Bank have been stayed by this Court (*see* DE #2138), this Motion does not pertain to National City.
[3] References to "Ex." are to exhibits in Appendix III (DE #2279, 2287) to Plaintiffs' Motion.
[4] References to "Answer" are to Defendant's Answer and Affirmative Defenses (DE #1362), filed April 21, 2011.

Pennsylvania Unfair Trade Practices and Consumer Protection Law, and violation of the New Jersey Consumer Fraud Act.[5]

II. Rule 23 Standard & Analysis

Questions concerning class certification are left to the sound discretion of the district court, which must undertake a rigorous analysis to insure that each and every element of Rule 23 is established at the time of certification. *Klay v. Humana*, Inc., 382 F.3d 1241, 1250 (11th Cir. 2004). In making the decision, the court does not determine whether plaintiffs will ultimately prevail on the merits, but it may consider the factual record in deciding whether the requirements of Rule 23 are satisfied. *Valley Drug. Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1188 n.15 (11th Cir. 2003).

In reviewing a motion for class certification, courts are generally bound to take the substantive allegations of the complaint as true. *Moreno Espinosa v. J & J AG Prods., Inc.*, 247 F.R.D. 686 (S.D. Fla. 2007). The Court undertakes "an analysis of the issues and the nature of required proof at trial to determine whether the matters in dispute and the nature of plaintiffs' proofs are principally individual in nature or are susceptible of common proof equally applicable to all class members." *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 334 (E.D. Mich. 2001) (quoting *Little Caesar Enters., Inc. v. Smith*, 172 F.R.D. 236, 241 (E.D. Mich. 1997)). In other words, courts "formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." *Waste Mgmt. Holdings v. Mowbray*, 208 F.3d 288, 298 (1st Cir. 2000). A district court may certify a class only if, after "rigorous analysis," it determines that the party seeking certification has met its burden of a preponderance of the evidence. *See Gen. Tel. Co. of the SW. v. Falcon,* 457 U.S. 147, 158–

[5] Plaintiffs do not seek to certify for class treatment the claim for conversion at this time.

61 (1982); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 202–04 (2d Cir. 2008).

A. Class Definition

"A plaintiff seeking certification of a claim for class treatment must propose an adequately defined class that satisfies the requirements of Rule 23." *Kelecseny v. Chevron, U.S.A., Inc.*, 262 F.R.D. 660, 667 (S.D. Fla. 2009). With the instant Motion, Plaintiffs asks the Court to certify the following class:

> All PNC Bank customers in the United States who, within the applicable statute of limitations preceding the filing of this action to August 13, 2010 (the "Class Period"), incurred an overdraft fee as a result of PNC's practice of re-sequencing debit card transactions from highest to lowest.
>
> Excluded from the Class are PNC Bank, its parents, subsidiaries, affiliates, officers and directors; any entity in which PNC Bank has a controlling interest; all customers who make a timely election to be excluded; and all judges assigned to this litigation and their immediate family members.[6]

(Motion, at 1).[7]

Upon consideration of the proposed definition, the Court finds that the class is adequately defined and readily ascertainable. It is well settled that "where damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods, the fact that damages must be calculated on an individual basis is no impediment to class certification." *Klay*, 382 F.3d at 1259–60 (footnotes omitted). Thus, "the implicit definition requirement does not require an overly strict degree of certainty and is to be liberally applied." *Singer v. AT&T Corp.*, 185 F.R.D. 681, 685 (S.D. Fla. 1998); *see also* 7A Wright, Miller & Kane, *Federal Practice & Procedure: Civil 3d* § 1760 (3d ed. 2005) ("If the general outlines of

[6] As discussed below, Plaintiffs also seek the certification of subclasses for specific claims as set forth in Plaintiffs' Proposed Trial Plan for Trial of Class Claims (DE #2277) (the "Trial Plan").

[7] References to "Motion" are to citations from Plaintiffs' Motion for Class Certification (DE #2276), filed December 20, 2011.

the membership of the class are determinable at the outset of the litigation, a class will be deemed to exist."); *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1133 n.16 (11th Cir. 2004) (noting that "class definitions may undergo modification, possibly several times, during the course of a class action.").

PNC argues certification is inappropriate because membership of the proposed class cannot be determined without a trial on the merits. Specifically, PNC argues that the proposed class definition fails because it does not proffer an alternative posting order and/or compare the overdraft fees an individual incurred under high-to-low posting to the fees incurred under the alternative method. (Opp. at 25–27).[8] However, as this Court has previously recognized in *Larsen* and subsequent decisions, including its denial of Defendant's *Daubert* Motion to Strike Olsen's Declaration (*see* DE #2650), specifying the alternative posting order is not necessary at the class certification stage; what matters for present purposes is that Plaintiffs have shown that the class can be identified through objective means. *See In re Checking Acct. Overdraft Litig.--Larsen v. Union Bank* ("*Larsen*"), 275 F.R.D. 666, 672–73 (S.D. Fla. 2011).[9] The fact-finder's subsequent determination of the appropriate alternative posting order to measure damages will only affect which class members are entitled to recover and how much, not who is part of the class. *Id.* at 673.[10]

---

[8] References to "Opp." are to PNC's Response to Plaintiff's Motion (DE #2450).

[9] PNC claims that this Court should not rely on *Larsen* in considering Plaintiffs' Motion because Plaintiffs informed the Eleventh Circuit in their response to Union Bank's Rule 23(f) Petition that *Larsen* would not serve as a "binding template" for other certification motions in other banks. (*See* Opp. at 2). While it is true that *Larsen* does not bind the Court to approve Plaintiffs' Motion, it, like *Gutierrez*, is persuasive authority given the extremely similar facts and legal claims at issue.

[10] Although such inquiries are premature at this stage, Plaintiffs have previously alleged an alternative posting order in their Complaint. Specifically, Plaintiffs allege PNC customers who were charged additional overdraft fees, as compared to what they would have been charged under a low-to-high posting practice, were harmed by PNC's reordering scheme. (Compl. ¶¶ 52, 98). Record evidence, including the deposition testimony of PNC's Rule 30(b)(6) witness, supports this allegation. *See, e.g.*, Ex. 1 at 26:10–27:5. Using that implicit alternative posting order in the class definition leaves no ambiguity about class membership: those customers who incurred additional overdrafts as a result of the high-to-low posting, as compared to low-to-high posting, which are readily ascertainable through

Plaintiffs propose to have expert Arthur Olsen ("Olsen") mine PNC's data to determine who the members of the class are. Olsen can identify which PNC customers incurred additional overdraft fees as a result of high-to-low re-sequencing of debit transactions by comparing that re-sequencing to each of the alternative posting scenarios. (Olsen Decl. ¶¶ 46, 49–52).[11] While the finder of fact will ultimately have to decide which of these scenarios is most consistent with PNC's duty of good faith and fair dealing, Olsen will be able, at the outset, to identify all of PNC's customers who were harmed as compared to each of these alternative scenarios. The exact damages due each member of the class will then be calculated by Mr. Olsen once the fact finder has chosen the appropriate posting methodology. (*Id.* at ¶ 46). Olsen has already applied his reliable methodology to calculate the named Plaintiffs' damage. (*Id.* at ¶ 52(a)–(c)). A total class damage number will be calculated after calculating each class member's damage amount. (*Id.* at ¶¶ 37–46; *see also* Trial Plan, at 9–10). This method of determining class membership has been accepted by this and other courts. *See, e.g., Larsen*, 275 F.R.D. at 673.[12]

PNC has not put forward any evidence or expert testimony to in any way rebut Olsen's findings and conclusions. PNC fails to adequately dispute Olsen's ability to calculate damages on an account-by-account basis using PNC's own computerized records, a method upon which

---

PNC's own records. A judgment for Plaintiffs using a different comparator (say, chronological) would still bind all members of the class.

[11] References to "Olsen Decl." are to the Declaration of Arthur Olsen included in Appendix IV to Plaintiffs' Motion for Class Certification (DE #2280).

[12] Olsen's methodology is similar, if not identical, to the methodology proposed in *Larsen*, which this Court accepted for class certification purposes relying on *Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923, 2008 WL 4279550, at *17 (N.D. Cal. Sept. 11, 2008). *Cf. also, e.g., Sadler v. Midland Credit Mgmt.*, No. 06 C 5045, 2009 WL 901479, at *2 (N.D. Ill. Mar. 31, 2009) (automated query of defendants' database would yield "objective criteria" necessary to ascertain the class); *Stern v. AT&T Mobility Corp.*, No. CV 05-8842 CAS, 2008 WL 4382796, at *5 (C.D. Cal. Aug. 22, 2008) (defendants' business records provided sufficient information to identify individuals who purchased cellular telephone service and were enrolled in either one of the challenged services without ever having requested the service); *In re Diet Drugs Prods. Liab. Litig.*, No. CIV. A. 98–20626, 1999 WL 673066, at *13–14 (E.D. Pa. Aug. 26, 1999) (finding class definition was adequate because there were reliable means to determine who had actually taken the drug where fact sheets, prescription records, and records of medical treatment were available to verify consumption).

Olsen previously relied, with court approval, in *Gutierrez v. Wells Fargo Bank, N.A.*, 730 F. Supp. 2d 1080, 1138–40 (N.D. Cal. 2010).[13]

B. Rule 23(a)

There are four prerequisites for class certification under Rule 23(a): (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequacy of representation. *Klay*, 382 F.3d at 1250. However, "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule–that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *see also London v. Wal-Mart Stores,* 340 F.3d 1246, 1253 (11th Cir. 2003) (noting that party moving for class certification bears the burden of establishing each element of Rule 23(a)).

(i) Numerosity[14]

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." Impracticable does not mean impossible, only that it would be difficult or inconvenient to join all members of the class. *Hammett v. Am. Bankers Ins. Co. of Fla.*, 203 F.R.D. 690, 694 (S.D. Fla. 2001). Certainly, such factors as size of the class and geographic location of the would-be class members are relevant to any consideration of practicality. *In re Recoton Corp. Secs. Litig.*, 248 F.R.D. 606, 616–17 (M.D. Fla. 2006). The focus of the numerosity inquiry is not whether the number of proposed class members is "too few" to satisfy the Rule, but "whether joinder of proposed class members is impractical." *Armstead v. Pingree,* 629 F. Supp. 273, 279 (M.D. Fla. 1986). Parties seeking class certification do not need to know

[13] In *Gutierrez*, Olsen withstood Wells Fargo's *Daubert* challenge to his methodology and conclusions. At the conclusion of the trial, Judge Alsup found Olsen's methodology to be "professional" and "careful," and the Court concluded that Olsen had "convincingly" identified the class members and isolated the amounts that were wrongfully taken by Wells Fargo from the class. *Gutierrez*, 730 F. Supp. 2d at 1139.

[14] PNC does not challenge the elements of numerosity or adequacy of counsel. (*See* Opp. at 28–39).

the "precise number of class members," but they "must make reasonable estimates with support as to the size of the proposed class." *Fuller v. Becker & Poliakoff, P.A.*, 197 F.R.D. 697, 699 (M.D. Fla. 2000).

In general terms, the Eleventh Circuit has found that "less than twenty-one [prospective class members] is inadequate, [while] more than forty [is] adequate." *Cheney v. Cyberguard Corp.*, 213 F.R.D. 484, 490 (S.D. Fla. 2003) (quoting *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986)). Courts in the Southern District and the Middle District of Florida have found numerosity where the class numbered 500, 4,700, and 9,000. *See Brown v. SCI Funeral Servs. of Fla., Inc.*, 212 F.R.D. 602, 604 (S.D. Fla. 2003) (9,000); *Miles v. America Online, Inc.*, 202 F.R.D. 297 (M.D. Fla. 2001) (4,700); *CV Reit, Inc. v. Levy*, 144 F.R.D. 690, 696 (S.D. Fla. 1992) (500); *Larsen*, 275 F.R.D. at 671 (certifying proposed class in the tens or hundreds of thousands). Thus, the "sheer number of potential class members may warrant a conclusion that Rule 23(a)(1) is satisfied." *LaBauve v. Olin Corp.*, 231 F.R.D. 632, 665 (S.D. Ala. 2005) (citing *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir.2004)).

As this Court is required to do even where a requirement for class certification is not contested, it has independently considered the prospective numerosity of the putative class members. *See Valley Drug Co.*, 350 F.3d at 1188 (noting court's independent obligation to examine elements of Rule 23); *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1216 n.37 (11th Cir. 2003) (same). The proposed number of class members on these facts easily exceeds the minimum threshold recognized by the Eleventh Circuit.[15] Although the exact number of class members is not presently known, the proposed class appears to number in the

[15] PNC has a substantial banking presence in Delaware, Florida, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, Ohio, Pennsylvania, Virginia, West Virginia, Wisconsin, and the District of Columbia, and provides checking and debit card services to approximately 5.7 million customers through approximately 2,500 branches. *See* Ex. 1 at 7:17–25; Ex. 2 at 1–2.

hundreds-of-thousands of PNC customers who are geographically dispersed across 15 states and the District of Columbia, making joinder of them all impracticable if not impossible. *See, e.g., Kilgo v. Bowman Transp., Inc.*, 789 F.3d 859, 878 (11th Cir. 1986) (numerosity satisfied by class of 31 members who were geographically dispersed across Florida, Georgia, and Alabama). Accordingly, the Court finds that the numerosity requirement of Rule 23(a) is satisfied.

(ii) Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Specifically, the plaintiff has the burden to "demonstrate that the class members 'have suffered the same injury.'" *Dukes*, 131 S. Ct. at 2550–51(quoting *Gen. Telephone Co. of SW v. Falcon*, 457 U.S. 147, 157 (1982)). Where the defendant is alleged to have "engaged in a standardized course of conduct that affects all class members," commonality is satisfied. *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 685–86 (S.D. Fla. 2004); *see also In re Recoton*, 248 F.R.D. at 618 (holding that, where a "common scheme of deceptive conduct" has been alleged, the commonality requirement should be satisfied).

As a basis for commonality, Plaintiffs provide evidence of a common corporate policy or practice, namely, PNC's systematic and uniform manipulation and re-ordering of debit card transactions to increase the number of overdraft fees imposed. In particular, the common issues of law and fact in this case include whether PNC:

- Disclosed and/or refused to allow Class members to opt out of the overdraft protection;
- Failed to alert Class members that a debit card transaction would trigger an overdraft fee if processed or provide them with an opportunity to cancel the transaction;
- Manipulated and re-ordered transactions in order to increase the number of overdraft fees imposed;

- Imposed overdraft fees when, but for re-sequencing, there would be sufficient funds in the account;
- Failed to provide Class members with accurate balance information;
- Failed to disclose the Matrix line of credit;
- Charged overdraft fees to Class Members even when sufficient funds were in the account to cover all posted transactions; and
- Breached its covenant of good faith and fair dealing with Plaintiffs and the Class; engaged in practices that were substantively and procedurally unconscionable; was unjustly enriched at the expense of Plaintiffs and the Class; and violated the unfair and deceptive trade practices acts of certain states.

(Motion, at 27).

PNC argues that the common questions of fact and law offered by Plaintiffs here are like the questions that the Supreme Court rejected as insufficient in *Dukes*, 131 S. Ct. at 2541. (*See* Opp. at 28–33). However, unlike the questions presented by plaintiffs in *Dukes*, the common questions here are "capable of classwide resolution." *Dukes*, 131 S. Ct. at 2551. In other words, commonality is met because "the classwide proceeding will be able to generate common answers apt to drive the resolution of the litigation." *Id.*

The plaintiffs in *Dukes* brought a Title VII employment discrimination case on behalf of the defendant's female employees and moved to certify a class under Rule 23(b)(2). The Supreme Court held that "a 'common contention' was lacking . . . because the basis for liability–the 'glue' holding all of the individual class member's claims together–was not merely disfavor in pay and promotion, but the *reason why* each class member was disfavored." *Jermyn v. Best Buy Stores, L.P.*, No. 08 Civ. 214, 2011 WL 4527429, *170 (S.D.N.Y. Sept. 15, 2011) (quoting *Dukes*, 131 S. Ct. at 2561) (emphasis in the original). Here, unlike the "why" behind the employment decisions in *Dukes*, the "why" behind Defendant's wrongful conduct is irrelevant because all class members were subject to the same corporate policy. *See id.* at 172 ("In the

deceptive business practice context, by contrast, the 'why' is less relevant, if it is relevant at all."); *see also* Standards Order (DE #1016), at 11 (holding "'expectations' are entirely immaterial"). The practices that Plaintiffs challenge are standardized and apply on a uniform basis to all class members.

Plaintiffs allege and provide significant evidence that PNC uniformly manipulated debit and re-ordered card transactions to increase the number of overdraft fees imposed. [16] That is the common contention that applies to all Class members that drives the resolution of this litigation. Moreover, the eight common questions presented in Plaintiffs' Motion are exactly the types of questions contemplated by the Supreme Court in *Dukes* as satisfying the commonality requirement. (*See* Motion, at 27). Indeed, this Court has already found that substantially similar questions satisfied the commonality standard in *Larsen* and subsequent class certification orders, all of which were issued after *Dukes*. *See Larsen*, 275 F.R.D. at 673–74. Each of these questions concerns PNC's uniform conduct, not each customer's understanding of it. The Court therefore finds that the Rule 23(a)(2) requirement of commonality is met.

(iii) Typicality[17]

Rule 23(a)(3)'s typicality requirement is satisfied where "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "Typicality" measures whether a "sufficient nexus" exists between the claims of the named representatives and those of the class at large. *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d

[16] *See, e.g.*, Ex. 1 at 16:20–17:8 (PNC's singular posting order is formulaic, automated, and applied to all debit transactions and to all PNC customers in a uniform manner); *id.* at 45:1–22, 46:5–17 (Matrix process applied to all customers across PNC customer base in uniform and automated way).

[17] "The typicality and commonality requirements are distinct but interrelated, as the Supreme Court made clear: 'The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Cooper v. Southern Co.*, 390 F.3d 695, 713 (11th Cir. 2004) (quoting *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982)), *overruled on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006).

1332, 1337 (11th Cir. 1984) (stating that "a sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory"); *see also Singer,* 185 F.R.D. at 689; *CV Reit,* 144 F.R.D. at 697. Typicality, however, does not require that plaintiffs and the class possess identical claims or defenses, nor do they need to have been affected in exactly the same way by the defendant's conduct. *Brown*, 212 F.R.D. at 604–05. Instead, the critical issue in determining typicality is whether the class representative's claims have a strong similarity to those of the class, even where factual differences exist. *See Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985) (concluding that concluded that "a strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences"); *see also Davis v. S. Bell Tel. & Tel. Co.*, No. 89-2839, 1993 WL 593999, *4 (S.D. Fla. Dec. 23, 1993) (holding that if "the same unlawful conduct was directed at or affected both the class representatives and the class itself, the typicality requirement is usually met irrespective of varying fact patterns which underlie the individual claims.").

The Court finds that the claims of the proposed Class Representatives are not factually distinguishable from the claims of the class members. Each Plaintiff's claim arises from the same course of conduct engaged in by PNC. That is, Plaintiffs and members of the proposed class, whose accounts were governed by common and materially uniform agreements, were subjected to PNC's practice of re-sequencing debit card transactions from high-to-low, and Plaintiffs allege that they and all members of the proposed class were assessed additional overdraft fees as a result.[18] Each claim is also based on the same legal theories of federal and statutory law violations. Plaintiffs propose discrete multi-state subclasses for some of the state law claims to ensure that the proposed class representatives' claims are materially identical to all other class

[18] *See* Trial Plan, at 3–9 (presentation of common proof for each cause of action).

members that they seek to represent.[19] Therefore, the Court finds that the typicality exists within the meaning of Rule 23(a)(3).

(iv) Adequacy

Rule 23(a)(4)'s adequacy requirement is satisfied when (i) the class representatives have no interests conflicting with the class; and (ii) the representatives and their attorneys will adequately prosecute the action. *Valley Drug*, 350 F.3d at 1189; *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). Both prongs are satisfied here.

The Court finds that neither Plaintiffs nor their counsel have any interests that are antagonistic to those of the absent class members. The central issues in this case–the existence, unlawfulness and effect of PNC's scheme to manipulate debit card transactions and increase the number of overdraft fees assessed–are common to the claims of Plaintiffs and the other members of the class. Representative Plaintiffs, like each absent class member, have a strong interest in proving PNC's scheme, establishing its unlawfulness, demonstrating the impact of the illegal conduct, and obtaining redress. Plaintiffs thus "share the true interests of the class." *Texas Air*, 119 F.R.D. at 459; *see also Tefel v. Reno*, 972 F. Supp. 608, 617 (S.D. Fla. 1997) (the "common goal of each member of the class" is to remedy the unlawful conduct, and "[i]f the Plaintiffs succeed, the benefits will inure to all class members.").

The law firms seeking to represent the class here include qualified and experienced lawyers. The Court has reviewed the firm resumes setting forth their experience and expertise in class actions. In addition, the Court is familiar with many of the lawyers seeking to represent the class, as they have appeared before the Court a number of times. The Court is satisfied that the lead Plaintiffs and the firms seeking appointment as class counsel will properly and adequately prosecute this case. The Court therefore appoints Plaintiffs as representatives of the class, and

[19] *Id.* at 10–16 (applying multi-state law).

appoints the following firms as class counsel pursuant to Fed. R. Civ. P. 23(g): Bruce S. Rogow, P.A.; Podhurst Orseck, P.A.; Grossman Roth, P.A.; Webb, Klase & Lemond, LLC; Baron & Budd, P.C.; Golumb & Honik, P.C.; Lieff Cabraser Heimann & Bernstein LLP; and Trief & Olk.

C. Rule 23(b) Certification

In addition to meeting the requirements under Rule 23(a), Plaintiffs also must show that they satisfy at least one of the conditions of Rule 23(b). *Klay*, 382 F.3d at 1250. Plaintiffs seek certification under Rule 23(b)(3). Thereunder, certification is appropriate if: (1) common questions of law or fact predominate over questions affecting the individual class members; and (2) class treatment is superior to other methods available for adjudicating the controversy. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

(i) Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem,* 521 U.S. at 623. The question of predominance presumes the overriding existence of common issues; thus, a mere showing of commonality as in Rule 23(a) is not enough. *Hanlon v. Chrysler Corp*, 150 F.3d 1011, 1022 (9th Cir. 1998); *see also Amchem,* 521 U.S. at 624–25 (predominance criterion is "far more demanding" than Rule 23(a)'s commonality requirement). "Common issues of fact and law predominate if they 'have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief.'" *Klay*, 382 F.3d at 1255 (quoting *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 699 (N.D. Ga. 2001)). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022. Moreover, a

scheme "perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class." Advisory Committee Notes to Rule 23(b)(3). Indeed, predominance is "a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem*, 521 U.S. at 625.

The Court finds that predominance is satisfied in this case. It is clear that "irrespective of the individual issues which may arise, the focus of the litigation" concerns "the alleged common course" of unfair conduct embodied in PNC's alleged scheme to maximize overdraft fees through the hidden reordering of transactions at account posting. *Sargent v. Genesco, Inc.*, 75 F.R.D. 79, 86 (M.D. Fla. 1977). Any analysis of this scheme will thus depend on common evidence relating to the standardized form account agreement and bank practices affecting all class members in a uniform manner.

Specifically, Plaintiffs allege that PNC's course of conduct commonly and adversely affected the entire class and have submitted evidence supporting that allegation. The class members are similarly situated with regard to the readily determined, allegedly excess fees they incurred as a result of a standardized process. The class is unified by both common questions and a common interest. The evidence necessary to establish Plaintiffs' claims is common to both Plaintiff and all members of the class; they all seek to prove that PNC's high-to-low re-sequencing practice was wrongful. That evidentiary presentation involves the same evidence of: (i) PNC's form contracts, with similar terms, applicable to Plaintiffs and class members; (ii) PNC's systematic re-sequencing of debt transactions from high-to-low for Plaintiffs and class

members through its automated software programs; and (iii) the line of credit that PNC secretly established for Plaintiffs and class members in order to charge them overdraft fees.

Further, the evidence to be presented by Plaintiffs has a direct impact on each class member's effort to establish liability and on each class member's entitlement to relief. *Klay*, 382 F.3d at 1255. It has been held that where corporate policies "constitute the very heart of the plaintiffs' . . . claims," as they do here, common issues will predominate because those policies "would necessarily have to be re-proven by every plaintiff." *Id.* at 1257; *see also Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003), *aff'd*, 545 U.S. 546 (2005); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 236 F.R.D. 62, 70 (D.N.H. 2006) (varying degrees of knowledge among class members do not present an obstacle to class certification where other common issues unite the class).

The Court also notes that the problems plaguing the proposed classes in *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159 (11th Cir. 2010), and *Klay* are not present here. In *Klay*, the court ultimately found certification of the breach of contract claims inappropriate given the individualized issues of fact they entailed, even though questions of contract law were common to the whole class. *Id.* at 1261. There were many different defendants with many different contracts with many different provider groups. Moreover, because the defendants breached the contracts through a variety of means and differing computer algorithms that were not subject to generalized proof, each physician would have to prove a variety of individual circumstances leading to the breach. *Id.* at 1263–64. Similar problems precluded certification in *Sacred Heart*, where there were substantial variations in the terms of over 300 hospital contracts that were individually negotiated, leading the court to find that "the diversity of the material terms is overwhelming." *Sacred Heart*, 601 F.3d at 1171–

72. In contrast, the agreements at issue here are uniform form contracts offered on a take-it-or-leave it basis and were not the product of any individual negotiation. *See id.* at 1171 ("It is the form contract, executed under like conditions by all class members, that best facilitates class treatment."). Nor do Plaintiffs have to prove a variety of individual circumstances supporting the breach, as PNC's standard re-sequencing policy resulted in uniform conduct directed at all members of the class.

In addition, the district court's certification in *Gutierrez* is instructive. *See Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923, 2008 WL 4279550 (N.D. Cal. Sept. 11, 2008). Wells Fargo, like PNC, also contends that individual issues would predominate, but the court in that case found the "challenged practice is a standardized one applied on a routine basis to all customers." *Id.* at *17. Thus, while "there will be some individual issues . . . these individual variations will not predominate over the pervasive commonality of the highest-to-lowest method and its adverse impact on hundreds of thousands of depositors." *Id.* Here, as in *Gutierrez*, Plaintiffs allege that PNC exercised its discretion in bad faith by re-sequencing debit card transactions posted to their checking accounts from highest to lowest in order to maximize overdraft penalties against customers. Moreover, as in *Gutierrez*, PNC's "challenged practice is a standardized one applied on a routine basis to all customers." *Id.* Any individual issues will "not predominate over the pervasive commonality of the highest-to-lowest method and its adverse impact on hundreds of thousands of depositors." *Id.*

As discussed above, class members are readily ascertainable through objective criteria: PNC's own records of individuals who were assessed overdraft fees. Plaintiffs' expert will formulate calculations that can identify members of the class by running queries in PNC's computer records. Such calculations will be merely ministerial in nature, and will not be plagued

by resolution of individual class member issues. Damages will be calculated using the same PNC records used to identify the class members. These facts make this case manageable as a class action.

Nor do PNC's affirmative defenses defeat predominance. In this Court, affirmative defenses must meet the pleading standards of *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). *See Castillo v. Roche Laboratories, Inc.*, No. 10-20876-CIV, 2010 WL 3027726, at *2 (S.D. Fla. Aug. 2, 2010) (noting that "a majority of district courts in Florida have applied this heightened pleading standard to affirmative defenses"). PNC's defenses here generally lack sufficient detail or foundation, making it difficult to discern what facts (if any) support them. For instance, PNC's fourth affirmative defense merely states that Plaintiffs' claims are barred "by the applicable statutes of limitation and laches," while its fifth affirmative defense argues they are barred by the "doctrine of estoppel," and its sixth affirmative defense claims they "are barred by the doctrine of waiver." (Answer, at 31–32). *Cf., e.g., Torres v. TPUSA, Inc.*, 2009 U.S. Dist. LEXIS 22033, at *3–5 (M.D. Fla. Mar. 19, 2009) (holding that defenses that simply claim "statute of limitations," "waiver," and "estoppel" are insufficient). Likewise, PNC's boilerplate defenses of "failure to state a claim" and "preemption" have already been denied by this Court under a Rule 12(b)(6) standard. *See* DE #1305; *see also Grovenor House, L.L.C. v. E.I. DuPont De Nemours & Co.*, 2010 U.S. Dist. LEXIS 91905, at *10 (S.D. Fla. Aug. 12, 2010) (noting that a "Motion to Dismiss addressing these exact arguments" was denied and thus the affirmatives defenses were "clearly invalid as a matter of law" and dismissing them "with prejudice").

Moreover, many of PNC's defenses, such as statute of limitations, waiver and voluntary payment, apply equally to all members of the proposed Class. This leads courts to find that

affirmative defenses do not upset the predominance of common issues as long as a sufficient constellation of common issues binds the class together. *See, e.g., Waste Mgmt. Holdings*, 208 F.3d at 296 (statute of limitations defenses do not vitiate Rule 23(b)(3) predominance); *Smilow v. SW Bell Mobile, Sys., Inc.*, 323 F.3d 32, 39 (1st Cir. 2003) ("Courts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members") (waiver defense common to the class); *Allapattah Servs.*, 333 F.3d at 1262–63 (jury was instructed on statute of limitations and law of fraudulent concealment in 35 states); *Miller v. Optimum Choice, Inc.*, No. DKC 2003-3653, 2006 WL 2130640, *7 (D. Md. July 28, 2006) ("Because the affirmative defenses are common across the putative class members, the defenses would not operate to destroy the predominance of common questions across the class, but would instead provide an additional link of commonality between the class members."). Thus, if PNC can present sufficient facts to survive a motion for summary judgment, the jury can readily decide their application on a class-wide basis. (*See, e.g.,* Answer, at 31 (statute of limitations); *id.* at 33 (PNC's actions adequately disclosed in contracts); *id.* (PNC acted in good faith)).[20]

Other defenses such as setoff, accord and satisfaction, ratification, waiver, mitigation, and voluntary payment, can be dealt with, if need be, during the claims process. *See Allapattah*

[20] Although PNC argues that its affirmative defenses require individualized proof and preclude certification because they rely on evidence of Plaintiffs' subjective knowledge and expectations, (Opp. at 54–58), Plaintiffs' subjective expectations are not necessary to prove any of PNC's defenses. As this Court held in *Larsen*, Plaintiff's good-faith-and-fair-dealing, unconcionability and unjust enrichment claims "may be shown by class-wide evidence of a defendant's subjective bad faith or objectively unreasonable conduct." *Larsen*, 275 F.R.D. at 680. Similarly, this Court has found that the uniformity of a bank's representations to members of the class, through the account agreement, and the focus on its conduct, renders claims under state consumer protection statutes appropriate for certification. *Id.* Moreover, many of PNC's defenses stem from PNC's allegation that some Plaintiffs continued to pay overdraft fees after learning about PNC's policies and practices. To the extent that PNC could prove that some customers learned of their Matrix or their ability to opt out, yet continued to incur and pay overdraft fees, the presence of individualized defenses as to a small number of class members would not destroy the predominance of common liability questions. *See id.* at 677–78 (citing *Smilow v. Southwestern Bell Mobile, Sys., Inc.*, 323 F.3d 32, 39 (1st Cir. 2003); *Dupler v. Costco Wholesale Corp.*, 249 F.R.D. 29, 45 (E.D.N.Y. 2008); *Robin Drug Co. v. Pharmacare Mgmt. Servs., Inc.*, No. Civ. 033397, 2004 WL 1088330, at *5 (D. Minn. May 13, 2004)).

Servs., 333 F.3d at 1259 (holding that, if liability is established, set-off claims can be handled on a class member-by-class member basis during claims administration); *Sacred Heart*, 601 F.3d at 1178 (individual issues relating to damages do not defeat certification); *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 116 (S.D.N.Y. 2010) (mitigation of damages not a barrier to certification).

(ii) Superiority

Finally, the Court now turns to the issue of superiority under Rule 23(b)(3). The four factors identified by Rule 23 requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis. *See Walco Invs., Inc. v. Thenen*,168 F.R.D. 315, 337(S.D. Fla. 1996). Plaintiffs contend that a class action is superior to separate actions for each member of the putative class. Citing the factors identified by Rule 23(b)(3), Plaintiffs claim that the class action vehicle provides the most efficient, effective, and economic means of settling the controversy.

When considered in light of Rule 23(b)(3), the Court finds that Plaintiffs have met this burden in demonstrating the superiority of class action; and, indeed, it may be the only realistic way these claims can be adjudicated. "Separate actions by each of the class members would be repetitive, wasteful, and an extraordinary burden on the courts." *Kennedy v. Tallant*, 710 F.2d 711, 718 (11th Cir. 1983). The class action fills an essential role when the plaintiffs would not have the incentive or resources to prosecute relatively small claims in individual suits, leaving the defendant free from legal accountability.

The Supreme Court has long recognized that where, as here, "it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual

suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980). Thus, the Court's jurisprudence demonstrates the "recognition that the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages done to any single individual or entity are too small to justify bringing an individual action." *In re Am. Express Merchants' Litig.*, 634 F.3d 187, 194 (2d Cir. 2011); *see, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (noting that the class action mechanism may empower "plaintiffs to pool claims which would be uneconomical to litigate individually," such as when most of them "would have no realistic day in court if a class action were not available."); *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1154 (11th Cir. 1983) (describing "the policies of Rule 23" and observing "the individual might be unable to obtain counsel to prosecute his action when the amount of individual damages is relatively small") (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1220 n.80 (5th Cir. 1978)).

Class treatment is superior to other available methods for the fair and efficient adjudication of this controversy. Nearly all of the class members in this case have claims that are so small that it would cost them much more to litigate an individual case than they could ever hope to recover in damages, and thus there is no reason to believe that the putative class members in this case have any particular interest in controlling their own litigation. Concentrating the litigation in this forum is logical and desirable. And as noted above, this case is eminently manageable as a class action. Accordingly, the Court finds that Plaintiffs have met the superiority requirement of Rule 23(b)(3).

(iii) Subclasses

"When appropriate, a class may be divided into subclasses that are each treated as a class under this rule." Fed. R. Civ. P. 23(c)(5). The party seeking certification of a class for which the laws of several states potentially apply bears the burden of demonstrating a suitable and realistic plan for trial of the class claims and must submit an extensive analysis showing that there are no material variations among the law of the states for which certification is sought. *Klay*, 382 F.3d at 1262. "[I]f the applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards, then certification of subclasses embracing each of the dominant legal standards can be appropriate." *Id.* The court may thus authorize aggregate treatment of multiple claims, or of a common issue therein, by way of a class action if the court determines that:

> (1) a single body of law applies to all such claims or issues;
>
> (2) different claims or issues are subject to different bodies of law that are the same in functional content; or
>
> (3) different claims or issues are subject to different bodies of law that are not the same in functional content but nonetheless present a limited number of patterns that the court . . . can manage by means of identified adjudicatory procedures."

American Law Institute, *Principles of the Law: Aggregate Litigation* § 2.05(b) (2010).

Plaintiffs have submitted, through their Trial Plan, an extensive analysis of state law breach of contract/breach of the duty of good faith and fair dealing, unjust enrichment, unconscionability, and violation of certain unfair and deceptive trade practices acts. (*See* Trial Plan, at Exs. A–D). Plaintiffs' Trial Plan proposes a discrete number of subclasses to ensure the predominance of common legal issues, and offers jury instructions and verdict forms demonstrating in concrete fashion how a trial on the alleged causes of action would be tried. As the surveys and proposed special verdict forms illustrate, variations among the potentially

applicable state laws are not material and can be managed to permit a fair and efficient adjudication by the fact finder at trial. Each subclass will have its own start date linked to the statute of limitations for each of those claims. Each subclass groups the laws of the relevant states accordingly. The Court therefore finds that the creation of subclasses to address variations in state law is appropriate here, and will make this case manageable as a class action.[21] The Court accordingly certifies Plaintiffs' eleven proposed subclasses: three breach of contract and implied duty of good faith and fair dealing subclasses,[22] three unjust enrichment subclasses,[23] three unconscionability subclasses,[24] and the New Jersey and Pennsylvania Deceptive Trade Practices Act subclasses.[25]

III. Conclusion

In accordance with the findings above, it is hereby **ORDERED, ADJUDGED and DECREED** that Plaintiff's Motion for Class Certification (DE #2276) be, and the same is hereby, **GRANTED**.[26] The Court certifies the following class:

> All PNC customers in the United States who had one or more consumer accounts and who, from applicable statutes of limitation through August 13, 2010 (the "Class Period"), incurred an overdraft fee as a result of PNC's practice of sequencing debit card transactions from highest to lowest.

---

[21] PNC argues that certain subclasses cannot be certified because none of the Plaintiffs reside in one of the states that make up that subclass. (Opp. at 40–41). However, Plaintiffs' Trial Plan indicates they will necessarily prove the claims of the class members from all of the other subclass states because they will be proving all of the same elements and the finder of fact will so indicate on a special verdict form laying out each of those elements separately. The Trial Plan demonstrates that the law of certain states is essentially the "lesser include" version of the same cause of action in other states. The class representative claims are thus typical of those of these "lesser included" states.

[22] *See* Trial Plan, at 13–15 & Ex. A.

[23] *See id.* at 15–16 & Ex. B.

[24] *See id.* at 16–18 & Ex. C.

[25] *See id.* at 18 & Ex. D; *see also* Ex. E.

[26] Accordingly, Defendant's Motion for Hearing (DE #2451) is **DENIED as moot**.

It is further **ORDERED, ADJUDGED and DECREED** that Plaintiffs' Motion for the creation of eleven subclasses included in its Motion for Class Certification be, and the same is hereby, **GRANTED**. The Court certifies the following subclasses:

> Three good faith and fair dealing subclasses (one encompassing Delaware, Missouri, New Jersey and Wisconsin, one encompassing the District of Columbia, Illinois, Indiana, Kentucky, Maryland, Michigan, New York, Ohio, Virginia and West Virginia, and the other encompassing Florida and Pennsylvania); three unjust enrichment subclasses (one encompassing the District of Columbia, Illinois, Maryland, Michigan and West Virginia, one encompassing Florida, Kentucky, Pennsylvania, Virginia and Wisconsin, and the other encompassing Delaware, New Jersey, New York, and Ohio); three unconscionability subclasses (one encompassing Delaware, District of Columbia, Florida, Maryland, Michigan, New Jersey, Ohio, Pennsylvania, Wisconsin and West Virginia, one encompassing New York and Virginia, and the other encompassing Illinois, Kentucky and Missouri); and two subclasses for Plaintiffs' New Jersey and Pennsylvania Unfair and Deceptive Trade Practices Act claims.

The Court appoints Plaintiffs Michael Cowen, Nicole Cowen, Michael Dorney, April Dorney, and Virgilio Casayuran, Jr. as representatives of the Class. The Court further appoints Virgilio Casayuran, Jr. as representative of the proposed first good faith and fair dealing subclass; Michael and April Dorney and Michael and Nicole Cowen as representatives of the proposed second and third good faith and fair dealing subclasses; Virgilio Casayuran, Jr., Michael and April Dorney, and Michael and Nicole Cowen as representatives of the proposed first unjust enrichment subclass; Michael and April Dorney and Michael and Nicole Cowen as representatives of the proposed second unjust enrichment subclass; Virgilio Casayuran, Jr., Michael and April Dorney, and Michael and Nicole Cowen as representatives of the proposed three unconscionability subclasses; Virgilio Casayuran, Jr. as representative of the proposed New Jersey Unfair and Deceptive Trade Practices Act subclass; and Michael and April Dorney and Michael and Nicole Cowen as representatives of the proposed Pennsylvania Unfair and Deceptive Trade Practices Act. The Court also appoints the following firms as Class Counsel pursuant to Fed. R. Civ. P. 23(g): Bruce S. Rogow, P.A.; Podhurst Orseck, P.A.; Grossman Roth,

P.A.; Webb, Klase & Lemond, LLC; Baron & Budd, P.C.; Golomb & Honik, P.C.; Lieff Cabraser Heimann & Bernstein LLP; and Trief & Olk.[27]

DONE AND ORDERED in Chambers at the James Lawrence King Federal Justice Building and United States Courthouse in Miami, Florida this 16th day of May, 2012.

JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

Copies furnished to:
Counsel of Record

[27] The Court will address the procedure for providing notice to class members regarding the certification of the class and these claims separately.