UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

JAMES DILLON, on Behalf of Himself and All Others Similarly Situated,	)	
Plaintiffs,	)	Case No. 13-cv-897
v.	)	Judge Catherine C. Eagles
BMO HARRIS BANK, N.A., FOUR OAKS BANK & TRUST, a North Carolina-Chartered Bank, GENERATIONS FEDERAL CREDIT UNION, and BAY CITIES BANK, a Florida State-Chartered Bank,	)	
Defendants.	)	

DEFENDANT BMO HARRIS BANK, N.A.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO TRANSFER PURSUANT TO 28 U.S.C. § 1404(a)

NATURE OF THE MATTER

This case is one of nine nearly identical putative class actions that have been filed in nine separate district courts against BMO Harris Bank, N.A. ("BMO Harris").[1] The

[1] There were originally ten cases filed against BMO Harris in ten different districts. One of the first cases filed, *Hillick v. BMO Harris Bank, N.A.*, Case No. 13-cv-1222 (N.D.N.Y. Sept. 30, 2013), was filed in the Northern District of New York. BMO Harris moved to compel arbitration and dismiss the *Hillick* case on December 3, 2013. Over the next two weeks, in large part because the *Hillick* case was one of two first-filed cases (the other being *Moss*) and the fact that *Hillick* was one of the only cases in which BMO Harris was the only named defendant, BMO Harris filed papers to transfer to the Northern District of New York in four related cases. On December 9, 2013, the *Hillick* court adjourned a Rule 16 initial conference and stayed all further discovery-related deadlines. On December 16, 2013, the day that BMO Harris's response was due in this case, the plaintiffs voluntarily dismissed their complaint in the Northern District of New York. As described further below, BMO Harris now seeks to transfer to the Eastern

named plaintiffs are all represented by the same counsel and allege that BMO Harris purportedly facilitated payday loans by providing out-of-state lenders access to the mainstream electronic payment system, the ACH network. The cases involve closely overlapping and, often, the exact same putative classes. The named plaintiffs seek the same relief—an injunction stopping BMO Harris from allegedly processing these ACH transactions and directing BMO Harris to return to borrowers any funds still in its possession, along with other alleged monetary damages.[2]

Pursuant to 28 U.S.C. § 1404(a), BMO Harris moves the Court to transfer plaintiff James Dillon's case against BMO Harris to the Eastern District of New York, where the first of the nine related cases against BMO Harris—*Moss*—was filed.[3] In addition to filing a § 1404(a) transfer motion here, BMO Harris is filing similar motions in the other

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District of New York, the court which is presiding over the other first-filed case (*Moss*). As represented to the *Moss* court on December 16, 2013, plaintiffs intend to amend the *Moss* complaint to add the *Hillick* plaintiff. BMO Harris will file the necessary supplements to its original papers in those cases in which it has already moved to transfer to be consistent with this motion.

[2] The remaining nine cases, in order of filing, are: *Moss v. BMO Harris Bank, N.A.*, Case No. 13-cv-5438 (E.D.N.Y. Sept. 30, 2013); *Graham v. BMO Harris Bank, N.A.*, Case No. 13-cv-1460 (D. Conn. Oct. 4, 2013); *Parm v. BMO Harris Bank, N.A.*, Case No. 13-cv-3326 (N.D. Ga. Oct. 4, 2013); *Dillon v. BMO Harris Bank, N.A.*, Case No. 13-cv-897 (M.D.N.C. Oct. 8, 2013); *Booth v. BMO Harris Bank, N.A.*, Case No. 13-cv-5968 (E.D. Pa. Oct. 11, 2013); *Elder v. BMO Harris Bank, N.A.*, Case No. 13-cv-3043 (D. Md. Oct. 11, 2013); *Gunson v. BMO Harris Bank, N.A.*, Case No. 13-cv-62321 (S.D. Fla. Oct. 23, 2013); *Achey v. BMO Harris Bank, N.A.*, Case No. 13-cv-7675 (N.D. Ill. Oct. 25, 2013); *Riley v. BMO Harris Bank, N.A.,* Case No. 13-cv-1677 (D.D.C. Oct. 28, 2013). The complaints are attached as Group Exhibit 1(A-I).

[3] By moving to transfer, BMO Harris is not waiving its arbitration-related rights. BMO Harris is also filing a motion to compel arbitration concurrently herewith.

seven jurisdictions asking to transfer the cases to a single forum "in the interest of justice" and "[f]or the convenience of parties and witnesses." 28 U.S.C. § 1404(a). Litigating the same issues in nine courts would be a waste of resources for the parties, the courts, and the public.

BMO Harris has filed a separate motion under Fed. R. Civ. P. 21 to dismiss or sever Dillon's claims against defendants Four Oaks Bank & Trust, Generations Federal Credit Union, and Bay Cities Bank. As discussed in BMO Harris's Rule 21 motion, these other claims all involve discrete loan transactions that are unrelated to BMO Harris. As a result, the claims do not arise from the same transaction or occurrence and therefore are not properly joined in a single action. Accordingly, for purposes of this transfer motion, BMO Harris seeks only to transfer the claims asserted against it to the Eastern District of New York.

STATEMENT OF THE FACTS

The *Moss* Complaint

Deborah Moss filed her complaint against BMO Harris and two other defendants on September 30, 2013, in the Eastern District of New York. Moss's lead counsel is Darren Kaplan of Chitwood Harley Harnes LLP, based in New York. *See Moss* Compl. at pp. 62-63.

Moss alleges that New York, like 12 other states (including North Carolina) and the District of Columbia, has banned payday loans. *Id.* ¶ 4. But some lenders, many based offshore or on Indian reservations, allegedly circumvent these laws using the Internet and

offer payday loans to borrowers in these states. *Id.* ¶ 5. According to Moss, these lenders rely on banks like BMO Harris and the other *Moss* defendants to "originate" debits and credits on the lenders' behalf in the ACH network. *Id.* ¶ 6. Moss alleges that these banks, known in the ACH network as Originating Depository Financial Institutions ("ODFIs"), purportedly act as middlemen between the lenders and the ACH network and allow lenders to transfer funds to and from borrowers' bank accounts. *Id.*

Moss alleges that she is a New York resident, she obtained three payday loans from online lenders, and BMO Harris allegedly processed a payment from her bank account on the lender's behalf to repay one of the loans. *Id.* ¶¶ 11, 76-86. As noted above, like all nine cases, there are no claims against the lenders themselves. Moss seeks relief against BMO Harris and the other defendants on behalf of herself and a putative class consisting of residents of *all 14 jurisdictions that ban payday loans, including North Carolina*. Thus, Moss seeks to represent:

> All natural persons within the states of Arizona, Arkansas, Connecticut, Georgia, Maryland, Massachusetts, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Vermont, West Virginia and the District of Columbia whose accounts were debited via an ACH entry originated by BMO Harris Bank, N.A. as an ODFI on behalf of an Out-Of-State Payday Lender in repayment of a loan which was illegal under the law of their respective state at the time of the debit (the "Class").

Id. ¶ 88(i). Moss also seeks to represent a sub-class of New York residents. *Id.* ¶ 88(ii).

Moss's lead claims are that BMO Harris allegedly violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), which makes

it unlawful to conduct or participate in an enterprise's affairs through "collection of unlawful debt," and § 1962(d), which prohibits conspiracies to violate RICO. *Moss* Compl. Counts I-II. Moss also asserts supplemental state law claims against BMO Harris for assumpsit, aiding and abetting violations of New York's civil and criminal usury statutes, unjust enrichment, and violating New York's deceptive business practice statute. *Id.* Counts VII-XI.

As relief, Moss seeks an injunction prohibiting BMO Harris from serving as an ODFI for any out-of-state payday lender making usurious payday loans and directing BMO Harris to immediately return to borrowers any funds it has debited but not yet remitted to lenders. *Id.* ¶ 189. Moss also seeks other alleged monetary damages. *Id.* at pp. 58-62.

The Remaining Complaints, Including *Dillon*

As noted above, Moss filed her complaint in the Eastern District of New York on September 30, 2013. Over the next month, other named plaintiffs filed eight more cases against BMO Harris in the District of Connecticut (*Graham*), the Northern District of Georgia (*Parm*), this Court (*Dillon*), the Eastern District of Pennsylvania (*Booth*), the District of Maryland (*Elder*), the Southern District of Florida (*Gunson*), the Northern District of Illinois (*Achey*), and the District of the District of Columbia (*Riley*). *See supra* at 2 n.2 (listing cases).

All of the named plaintiffs are represented by the same counsel, and each complaint is taken nearly verbatim from *Moss*. The statements of the nature of each case

are the same,[4] the general factual allegations describing the ACH network and the roles of payday lenders and banks serving as ODFIs are the same,[5] the lead federal RICO claims are the same,[6] the proposed class is the same (with the sub-class adjusted to reflect the state of the named plaintiff's residence),[7] and the relief sought is the same, including an injunction prohibiting BMO Harris from serving as an ODFI for out-of-state payday lenders.[8] Thus, for example, as in *Moss*, the named plaintiffs in *Dillon* and other cases seek to represent the *exact same class of persons residing in all 14 jurisdictions that ban payday loans* whose accounts were debited via an ACH entry purportedly originated by BMO Harris on behalf of an out-of-state payday lender.[9]

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[4] *Compare Moss* Compl. ¶¶ 1-10 *with Dillon* Compl. ¶¶ 1-10, *Graham* Compl. ¶¶ 1-10, *Parm* Compl. ¶¶ 1-10, *Booth* Compl. ¶¶ 1-10, *Elder* Compl. ¶¶ 1-10, *Achey* Compl. ¶¶ 1-10, *Riley* Compl. ¶¶ 1-13, *and Gunson* Compl. ¶¶ 1-10.

[5] *Compare Moss* Compl. ¶¶ 26-73 *with Dillon* Compl. ¶¶ 25-78, *Graham* Compl. ¶¶ 30-77, *Parm* Compl. ¶¶ 29-76, *Booth* Compl. ¶¶ 23-73, *Elder* Compl. ¶¶ 25-82, *Achey* Compl. ¶¶ 19-69, *Riley* Compl. ¶¶ 26-76, *and Gunson* Compl. ¶¶ 36-89.

[6] *Compare Moss* Compl. ¶¶ 96-111 *with Dillon* Compl. ¶¶ 112-27, *Graham* Compl. ¶¶ 122-37, *Parm* Compl. ¶¶ 132-47, *Booth* Compl. ¶¶ 95-110, *Elder* Compl. ¶¶ 112-27, *Achey* Compl. ¶¶ 88-103, *Riley* Compl. ¶¶ 105-20, *and Gunson* Compl. ¶¶ 119-34.

[7] *Compare Moss* Compl. ¶ 88 *with Dillon* Compl. ¶ 104, *Graham* Compl. ¶ 114, *Parm* Compl. ¶ 124, *Booth* Compl. ¶ 87, *Elder* Compl. ¶ 104, *Achey* Compl. ¶ 80, *and Riley* Compl. ¶ 97.

[8] *Compare Moss* Compl. ¶ 189 *with Dillon* Compl. ¶ 234, *Graham* Compl. ¶ 259, *Parm* Compl. ¶ 355, *Booth* Compl. ¶ 183, *Elder* Compl. ¶ 210, *Achey* Compl. ¶ 142, *Riley* Compl. ¶ 191, *and Gunson* Compl. ¶ 273.

[9] *Gunson*, which is pending in the Southern District of Florida, is the only case where the named plaintiff is *not* seeking to represent precisely the same class. The *Gunson* plaintiff alleges that Florida merely restricts, but does not ban, payday loans, and apparently as a

Dillon also asserts state law claims against BMO Harris that are substantially similar to those asserted in *Moss*, Compl. VII-XI, but are pled under the laws of North Carolina instead of New York. Thus, Dillon asserts state law claims for aiding and abetting violations of North Carolina's usury statute, violations and aiding and abetting violations of North Carolina's consumer finance statute, violations of North Carolina's unfair trade practices statute, money had and received, and unjust enrichment. *Dillon* Compl. Counts IX-XIV. The named plaintiffs in the remaining seven cases likewise assert similar supplemental state law claims under the laws of their respective states.[10]

QUESTION PRESENTED

Whether, pursuant to 28 U.S.C. § 1404(a), plaintiff James Dillon's case against BMO Harris should be transferred to the Eastern District of New York "in the interest of justice" and for "the convenience of parties and witnesses"?

ARGUMENT

Section 1404(a) provides that "a district court may transfer any civil action to any other district or division where it might have been brought" "in the interest of justice" and "[f]or the convenience of parties and witnesses." 28 U.S.C. § 1404(a). The purpose

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result, the named plaintiff in *Gunson* seeks to represent a class of Florida residents who entered into payday loans that were usurious under Florida law and had their accounts debited by ACH entries originated by BMO Harris. This is a distinction without a difference for purposes of the present motion.

[10] *Graham* Compl. Counts XIII-XVI; *Parm* Compl. Counts XXI-XXVI; *Booth* Compl. Counts VII-X; *Elder* Compl. Counts IX-XI; *Achey* Compl. Counts III-VI; *Riley* Compl. Counts VII-IX; *Gunson* Compl. Counts XI-XVI.

underlying § 1404(a) "is to prevent the waste 'of time, energy and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense.'" *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (citations omitted). As shown below, BMO Harris has met this standard, and this case should be transferred to the Eastern District of New York where the first-filed related case against BMO Harris is already pending.

I. Suit Could Have Been Brought In The Eastern District of New York.

Plaintiff Dillon's case against BMO Harris could have been filed in the Eastern District of New York. Under 28 U.S.C. § 1391(b)(1), a civil action may be brought in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located." For purposes of § 1391(b)(1), a business entity is "deemed to reside . . . in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question." *Id.* § 1391(c)(2).

In *Moss*, which *was* filed in the Eastern District of New York, the named plaintiff alleged that the court had personal jurisdiction over BMO Harris because, among other things, (i) "BMO has engaged in a continuous and systematic course of doing business in the state by, *inter alia*, maintaining a permanent office at 3 Times Square, New York, NY 10036," and (ii) "BMO transacts significant business in the state of New York and contracts to supply services in the state through its wholly-owned investment advisor 'Harris myCFO LLC.'" *Moss* Compl. ¶¶ 19-20. These allegations would be equally applicable to all of the cases against BMO Harris. As a result, Dillon's case against BMO Harris could have been filed in the Eastern District of New York, just like *Moss*.

II. Interests Of Justice And Convenience Favor Transfer.

Courts consider various public and private interest factors in deciding whether to transfer a case to another district under § 1404(a), including:

> (1) the plaintiff's initial choice of forum; (2) relative ease of access to sources of proof; (3) availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing and unwilling witnesses; (4) possibility of a view of the premises, if appropriate; (5) enforceability of a judgment, if one is obtained; (6) relative advantage and obstacles to a fair trial; (7) other practical problems that make a trial easy, expeditious, and inexpensive; (8) administrative difficulties of court congestion; (9) local interest in having localized controversies settled at home; (10) appropriateness in having a trial of a diversity case in a forum that is at home with the state law that must govern the action; and (11) avoidance of unnecessary problems with conflicts of laws.

Plant Genetic Sys., N.V. v. Ciba Seeds, 933 F. Supp. 519, 527 (M.D.N.C. 1996). *See also Inheanacho v. ABC Bus Leasing, Inc.*, 2013 WL 636876, at *3 (W.D.N.C. Feb. 20, 2013) (same).

Moreover, when multiple lawsuits involving substantially the same parties and issues are pending in different forums, "[t]he Fourth Circuit recognizes the 'first-filed' rule, which gives priority to the first suit filed absent a balance of convenience favoring the second filed." *Nexsen Pruet, LLC v. Westport Ins. Corp.*, 2010 WL 3169378, at *2 (D.S.C. Aug. 5, 2010) (citing *Ellicott Mach. Corp. v. Modern Welding Co.*, 502 F.2d 178, 180 n.2 (4th Cir. 1974)). *See also Old Republic Nat'l Title Ins. Co. v. Transcon. Title Co.*, 2007 WL 2915171, at *3 (E.D. Va. Oct. 4, 2007) ("In considering whether to apply the first to file rule, the Court must determine if the two pending actions in question are 'so

duplicative or involve such substantially similar issues that one court should decide the subject matter of both actions.' The claims being assessed do not need to be identical in order for the first to file rule to apply.") (citations omitted).

A. Judicial Economy Strongly Favors Transfer.

"As a general rule, cases should be transferred to districts where related actions are pending." *Morrow v. Vertical Doors, Inc.*, 2009 WL 1698560, at *5 (D. Ariz. June 17, 2009) (quotations and citations omitted). *See also Schiller-Pfeiffer, Inc. v. Country Home Products, Inc.*, 2004 WL 2755585, at *8-9 (E.D. Pa. Dec. 1, 2004) ("It is well-settled that the presence of a related case in the proposed transferee forum is a strong reason to grant a motion for a change of venue."). Under these circumstances, transfer "promote[s] judicial economy and efficiency." *Cent. Money Mortg. Co. v. Holman*, 122 F. Supp. 2d 1345, 1347 (M.D. Fla. 2000); *see also Jubilee House Cmty., Inc. v. Coker Int'l, Inc.*, Case No. 11-cv-45, 2013 WL 1232900, at *6 (M.D.N.C. Mar. 26, 2013) (recommending transfer to another district where "a related proceeding is now pending" because "transfer of this case would allow all related issues to be resolved consistently in a single forum"), *adopted by* Slip Op., Dkt. #36 (M.D.N.C. Apr. 23, 2013) (Eagles, J.); *Air Express Int'l Corp. v. Consol. Freightways, Inc.*, 586 F. Supp. 889, 892-93 (D. Conn. 1984) ("The court cannot conceive of an arrangement more expensive, time consuming, and inconvenient to the parties plaintiff as well as defendant, or more exhaustive of judicial resources, than . . . [t]he concurrent prosecution of these suits. . . .").

This case is plainly related to *Moss* and the other seven cases that have been filed against BMO Harris throughout the country. The central claim underlying all of the cases is that BMO Harris purportedly originates transactions on the ACH network for out-of-state payday lenders offering loans to residents in jurisdictions that either ban or tightly regulate the loans. *See, e.g., Dillon* Compl. ¶¶ 1-10; *Moss* Compl. ¶¶ 1-10. The named plaintiffs in *Moss* and *Dillon* also seek to represent the exact same class of borrowers residing in all 14 jurisdictions where payday loans are banned and whose accounts were debited via an ACH entry originated by BMO Harris on behalf of a payday lender, including residents of both North Carolina and New York. *See, e.g., Dillon* Compl. ¶ 104(i); *Moss* Compl. ¶ 88(i).

The nine complaints also allege similar legal theories and seek the same relief. In each case, the named plaintiffs allege that BMO Harris purportedly is liable under RICO, 18 U.S.C. § 1962(c), which makes it unlawful to conduct or participate in an enterprise's affairs through "collection of unlawful debt," and § 1962(d), which prohibits conspiracies to violate RICO. *See, e.g., Dillon* Compl. Counts I-II; *Moss* Compl. Counts I-II. And in each case, the named plaintiffs seek an injunction prohibiting BMO Harris from serving as an ODFI for lenders making usurious payday loans and directing BMO Harris to immediately return to borrowers any funds still in its possession, along with other alleged monetary damages. *See, e.g., Dillon* Compl. ¶ 234 & pp. 80-84; *Moss* Compl. ¶ 189 & pp. 58-62.

To be sure, there are certain state law differences between the cases. *Moss* includes supplemental state law claims against BMO Harris under New York law; *Dillon* substitutes similar claims under North Carolina law. And although the named plaintiffs in *Moss* and *Dillon* currently each seek to represent the exact same class of borrowers in all 14 jurisdictions that ban payday loans, they each include sub-classes of residents specific to their respective states.[11]

However, cases need only be related and similar, not identical, to justify transfer. Indeed, courts have repeatedly transferred similar cases—under both § 1404(a) and the "first-filed" rule—despite some differences in the parties and claims involved.

In *Byerson v. Equifax Info. Servs., LLC*, 467 F. Supp. 2d 627 (E.D. Va. 2006), the court was faced with a putative class action alleging that the defendants improperly reported credit limits for credit card holders. *Id.* at 630. The case was "very similar" to three others previously filed in South Carolina, although those cases involved different proposed class definitions. *Id.* at 630-31. Nonetheless, the court found that "[t]he class complaints are quite similar, involving the same provision of federal law and the same basic conduct by the same three defendants. To be sure, there are differences between this action and those pending in South Carolina, but the similarities are more significant than

[11] During a telephonic hearing with the *Moss* court on December 16, 2013, plaintiffs indicated that they planned to amend the *Moss* complaint so that Moss would only represent a sub-class of New York residents; the Court provided them until January 3, 2014, to amend their complaint accordingly. However, as will be demonstrated below, transfer is still appropriate in a putative class action where the cases otherwise substantially overlap, regardless of whether the putative class definitions are identical.

the differences." *Id.* at 636. The court therefore transferred the action to South Carolina under § 1404(a) in the "interest of justice." *Id.* at 637.

Courts across the country have reached the same result.[12] *E.g., Wheat v. California*, 2013 WL 450370, at *5-6 (N.D. Cal. Feb. 5, 2013) (transferring putative class action to district where prior action was pending, noting that "the interests of the classes are fundamentally the same" and that "[a] number of the allegations contained in pleadings in [the first case] are repeated verbatim . . . here"); *Wyler-Wittenberg v. Metlife Home Loans, Inc.*, 899 F. Supp. 2d 235, 244-50 (E.D.N.Y. 2012) (transferring putative class action to California, where a similar action was pending, and rejecting the plaintiffs' argument that the cases were sufficiently different because the New York case included New York state law claims while the California cases included California state law claims); *Abbate v. Wells Fargo Bank, N.A.*, 2010 WL 3446878, at *5 (S.D. Fla. Aug. 31, 2010) (finding that the putative class action was "similar enough" to prior cases to trigger the "first-filed" rule and transferring the action to California under § 1404(a)); *Fryda v. Takeda Pharm. N. Am., Inc.*, 2011 WL 1434997, at *5 (N.D. Ohio Apr. 14, 2011) (transferring putative class action alleging violations of Ohio's Minimum Fair Wage Standards Act to an Illinois district court handling a nationwide class asserting Fair Labor Standards Act claims); *Jaramillo v. DineEquity, Inc.*, 664 F. Supp. 2d 908, 916 (N.D. Ill. 2009) (transferring putative class action to Kansas where a prior action challenged the

[12] As referenced above (at n.11), these cases support that even if the plaintiffs amend the *Moss* complaint so that Moss would only represent a sub-class of New York residents, transfer under § 1404(a) is still appropriate in a putative class action because the cases so substantially overlap.

same alleged misconduct, explaining that "though the claims are based on different underlying law, they are substantially similar because they are based on the same underlying facts"); *Wiley v. Gerber Prods. Co.*, 667 F. Supp. 2d 171, 172-73 (D. Mass. 2009) (transferring putative class action to California where a prior action was filed because although "the two cases invoke the laws of different states," there were "overwhelming similarities between the two cases"); *Amazon.com v. Cendant Corp.*, 404 F. Supp. 2d 1256, 1261 (W.D. Wash. 2005) (transferring putative class action to Delaware where different plaintiffs filed a prior suit that was "similar enough that [the cases] should be considered by the same court"); *Balloveras v. Purdue Pharma Co.*, 2004 WL 1202854, at *1 (S.D. Fla. May 19, 2004) (transferring putative class action involving a Florida-only class to a New York district court that had resolved "related litigation" concerning the manufacturer's patents and was presiding over counterclaims filed by different parties "challenging the Defendants' conduct").[13]

The substantial overlap between this case and *Moss* (and the other seven cases filed against BMO Harris) weighs heavily in favor of transfer. First, the similarities in the complaints mean that the cases will require similar discovery and motion practice. For example, one of the central issues in each case will be whether and to what extent BMO Harris was processing ACH transactions on behalf of lenders who made payday loans to residents in states where payday loans are banned or restricted, and whether BMO Harris

[13] *See also Bunch v. W.R. Grace & Co.*, 2005 WL 1705745, at *4 (E.D. Ky. July 21, 2005); *Szegedy v. Keystone Food Prods.*, 2009 WL 2767683, at *6 (C.D. Cal. Aug. 26, 2009); *Am. Canine Found. v. Sun*, 2006 WL 209264, at *3 (E.D. Cal. July 27, 2006).

knew that any ACH transactions it processed involved such loans. Consolidating discovery before one district court would result in efficiencies for both the judiciary and the parties. The similar legal theories asserted in each case also mean that similar issues will arise in resolving motions to dismiss, any subsequent motions (*e.g.,* class certification and summary judgment), and any potential trials. It would be inefficient and a waste of resources to have as many as nine judges spend their time and energy resolving claims and issues that are nearly identical in each of these cases.

Second, transfer would avoid the potential for inconsistent results. In each case, BMO Harris has filed or intends to file motions to compel arbitration (relying on broad language in the loan agreements between the borrowers and their lenders) and motions to dismiss. Any subsequent motion practice and/or trial would also present similar issues that risk inconsistent results. This is especially true because in eight of the nine related cases (all except for *Gunson* in Florida, see *supra* n. 8), the named plaintiffs seek to represent precisely the same class of persons residing in all 14 jurisdictions that have banned payday loans. As *Byerson* noted, "it is essential to avoid any risk of inconsistent rulings on class action issues, such as composition of classes and sub-classes. It is thus preferable that one court assess the factors that point to factual and legal overlap and sort out the class action issues that will arise in each of the related actions." *Byerson*, 467 F. Supp. 2d at 636. "In that way, the rights of all potential class members can be fully protected and the responsibility of defendants *vis a vis* the putative class members can be properly identified and located." *Id.* In addition, "it is not unusual that class actions are

resolved by settlement, and the settlement process can be complicated and made burdensome, and even frustrated, if two courts are attempting to deal with the issues of the sort here involved, particularly with the degree of overlap here presented." *Id.*

Finally, as noted above, "courts generally give preference to the first-filed lawsuit . . . [i]f transferring one of two [or more] related cases." *Cary v. Hall*, 2006 WL 6198319, at *2 (C.D. Cal. Nov. 30, 2006). Because the *Moss* plaintiff filed her complaint first, her case should receive "preference" in making the transfer decision. *See, e.g., Reisman v. Van Wagoner Funds, Inc.*, 2002 WL 1459384, at *2 (D. Del. June 7, 2002) (transferring the case to the district where plaintiffs filed similar suit "two weeks before instant action").

B. Other Factors Also Favor Transfer Or Are Neutral.

Judicial economy alone can justify transfer. *See, e.g., Byerson*, 467 F. Supp. 2d at 637 (transferring case to district where related litigation was pending "even though [defendants] have not met their burden as to the other § 1404 factors"); *Amazon.com*, 404 F. Supp. 2d at 1261 ("Consideration of the interest of justice, which includes judicial economy, may be determinative to a particular transfer motion, even if the convenience of the parties and witnesses may call for a different result.") (quotations and citations omitted). This is especially true where multiple lawsuits are sufficiently similar to trigger the "first-filed" rule. *See, e.g., Wheat*, 2013 WL 450370, at *5-7 (transferring class action without considering § 1404(a) factors). But here, the remaining factors also either favor transfer or are neutral.

First, it would be more convenient for BMO Harris to have this case (and others) join *Moss* in the same District. As for Dillon's convenience, a plaintiff's choice of forum is afforded less deference in putative class actions, particularly where the plaintiffs are scattered in multiple states. *See Byerson*, 467 F. Supp. 2d at 633 ("In class actions, 'the named plaintiff's choice of forum is afforded little weight because in such a case, there will be numerous potential plaintiffs, each possibly able to make a showing that a particular forum is best suited for the adjudication of the class' claim.'") (citations omitted). *See also Moghaddam v. Dunkin Donuts, Inc.*, 2002 WL 1940724, at *2 (S.D. Fla. Aug. 13, 2002) ("plaintiff's choice of forum will be afforded less deference where, as here, the action is a class action"); *Wyler-Wittenberg*, 899 F. Supp. 2d at 249 ("Here, because the 'first-filed' rule favors litigation in the forum in which the first suit is brought, the Court finds that [plaintiff's] choice of forum is not entitled to substantial weight."). Moreover, BMO Harris is seeking to transfer this case to the Eastern District of New York, which is: (i) where the same counsel (based in New York) representing Dillon already elected to file *Moss*; and (ii) in one of the 14 jurisdictions that have banned payday loans and whose residents make up the putative 14-jurisdiction class in this case (and others).

Second, transfer would better serve the convenience of any non-party witnesses because they would only have to travel to one District rather than two (or nine). *See, e.g., Jolly*, 2005 WL 2439197, at *2 ("[G]iven the probable overlap between the witnesses called in Plaintiff's case and the witnesses called in the sixty-six other cases currently

pending against Purdue, the convenience of the witnesses and of the parties would be better served if all cases were within one district.").

Third, although Dillon resides in North Carolina, his complaint more broadly implicates BMO Harris's alleged practices in processing ACH transactions and the actions of out-of-state payday lenders who have no presence in North Carolina but instead use the Internet to make loans to North Carolina residents. As a result, relevant evidence in this case is likely scattered across the country. Similarly, BMO Harris is not aware of any unwilling witnesses who could be served in this District but not in the Eastern District of New York.[14]

Fourth, while this Court is no doubt more familiar with North Carolina law than the judge in *Moss*, all of the complaints raise federal RICO claims. That analysis will not change from state-to-state. Moreover, the state usury and deceptive trade practice laws at issue are not particularly complex. *See, e.g., Wyler-Wittenberg*, 899 F. Supp. 2d at 249 ("Here, claims have been asserted under both federal and state law provisions. However, New York State labor law is not so overly complex so as to unduly burden the California district court."). And because of diversity jurisdiction, "[f]ederal courts are accustomed . . . to applying laws foreign to the law of their particular state." *Cavanaugh v. Bluebeard's Castle, Inc.*, 83 F. Supp. 2d 284, 288 (D. Conn. 1999).

[14] Some of the out-of-state payday lenders—particularly those operated by Indian tribes—may assert that sovereign immunity protects them from discovery or trial subpoenas, but that issue would be the same whether this case proceeds here or in New York.

Finally, for reasons similar to those discussed above with respect to judicial economy, transfer would make litigating this dispute less expensive and more efficient for all of the parties. In class litigation in particular, consolidation of discovery can result in "economical and procedural 'savings' [that] would not only be tremendous, but would be in the interests of all parties involved." *Bunch*, 2005 WL 1705745, at *4.

CONCLUSION

In short, this motion is "not a bare request by a corporate defendant for its own convenience and standing only in the face of the Plaintiff's choice of forum, but rather one that presents an opportunity to consolidate litigation involving similar parties and issues." *Fryda*, 2011 WL 1434997, at *6. BMO Harris respectfully requests that the Court transfer Dillon's case against BMO Harris to the Eastern District of New York.

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By: */s/ Mary K. Mandeville*

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CERTIFICATE OF SERVICE

I certify that on this 16th Day of December, 2013, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of the filing to the attorneys on that system.

By: */s/ Mary K. Mandeville*
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