UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

IN RE CHECKING ACCOUNT OVERDRAFT LITIGATION	)
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THIS DOCUMENT RELATES TO: FIRST TRANCHE ACTIONS	)
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Tornes, et al. v. Bank of America, N.A., S.D. Fla. Case No. 108-cv-23323-JLK	)
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Yourke, et al. v. Bank of America, N.A., S.D.Fla. Case No. 1:09-cv-21963-JLK N.D.Cal. Case No. 3:09-2186	)

NOTICE OF OBJECTION OF CLASS MEMBERS MARTIN CARAPIA AND FATIMA DOREGO AND NOTICE OF INTENT TO APPEAR

COME NOW, MARTIN CARAPIA and FATIMA DOREGO ("Objectors"), Class Members to this action, by and through their undersigned counsel, and hereby file these Objections to the Proposed Class Action Settlement, give notice of their counsel's intent to appear at the November 7, 2011, settlement hearing, and request award of an incentive fee for serving as unnamed class member objectors. Objectors' address and class member status will be provided upon request by the Court and Class Counsel.

As an initial matter, these objectors applaud the settlement's provision that class members need to do "nothing" in order to participate in any monetary benefits of the settlement.

Objectors raise the following issues with respect to the Proposed Settlement:

1. There is no information given to the class (or apparently the Court), about the value of the settlement, thereby precluding an honest assessment of the fairness to the class under Rule 23.

2. The request by class counsel for 30% of the common fund harms the class and is unreasonable in a mega-fund settlement such as this.

3. The *cy pres* component is not adequately defined.

4. The settlement, notice, and preliminary approval order contain terms regarding objections which are antithetical to the purposes of Rule 23 and 24 of the Federal Rules of Civil Procedure.

5. There is no indication that the harm complained of will be remedied.

I.

NO INFORMATION IS PROVIDED ABOUT THE ESTIMATE OF THE HARM SUFFERED BY THE CLASS, PRECLUDING A FINDING OF REASONABLENESS

Rule 23 provides that a class action settlement must be "fair, adequate, and reasonable." While Defendants are theoretically parting with $410 million, there is no information as to why this amount is an adequate settlement fund for the class. Is the perceived harm greater than that, and if so, by how much? Class Counsel asserts that this amount represents between a nine and forty-five percent recovery for the class. (Mtn for Final Approval ("MFA"), Dkt. 1885, at 27.) This is a very large variable, one that must weigh heavily when assessing whether this settlement is truly valuable to the class. Is it nine percent, or is it forty-five percent? Given that Class Counsel states that they and their experts "performed detailed work necessary to determine the exact amount of each member's damages and the proper plan of allocation," they should be able to give the class, and the Court, better information about the "exact amount of each member's damages." The class is entitled to know that number, and the relationship it bears to the overall settlement amount.

Absent this information, it appears difficult, or impossible, to determine whether this figure is reasonable. This information is essential to a court's obligation in weighing the fairness of a settlement.

II.

THE REQUESTED ATTORNEYS' FEE OF THIRTY PERCENT OF THE COMMON FUND IS UNREASONABLE

These Objectors acknowledge that the Eleventh Circuit recognizes a "percentage of the fund" approach for awarding attorneys' fees in common fund cases. *Camden I Condominium Ass'n., Inc., v. Dunkle,* 946 F.2d 768 (11th Cir. 1991). *Dunkle* also recognizes

that "judges systematically award fees in the range of twenty to twenty-five percent of the fund," and that "twenty-five percent is the benchmark." *Id.* at 774-75. Class Counsel in this matter requests not twenty, or twenty-five, but thirty percent, of a $410 million fund, or $123,000,000. For a case in which the same issues were tried to verdict and resulted in a plaintiff's verdict (the *Wells Fargo* case), this amount seems especially high, compounded with the fact that the case has really only been litigated for less than three years (2008 to present). (MFA at 4) This prior *Wells Fargo* verdict also undermines Class Counsel's assertion that plaintiffs faced "major risks" in obtaining relief. (MFA at 25)

Because class members only recover a "pro rata" percentage of their losses, from funds remaining in the common fund after $123 million is deducted, and administrative fees, a further examination by the Court is necessary. A more reasonable percentage of twenty to twenty-five would be more appropriate for the effort and time expended, and the value provided to the class.

A reduced percentage would also be more in keeping with the Supreme Court's recent language in *Perdue v. Kenny A.*, 130 S.Ct. 1662 (2010), in which the court noted that "enhancements may be awarded in 'rare' and 'exceptional' circumstances." 130 S.Ct. at 1667. While this statement was made in a lodestar context rather than a percentage of the fund, these Objectors question whether Class Counsel has met its burden of an upward adjustment from the 25% benchmark for a "rare" or "exceptional" result, given that the issues have already been adjudicated favorably for plaintiffs and less than three years have been invested in the litigation. A lodestar cross-check for reasonableness, together with an analysis under the ubiquitous *Johnson* factors, may indicate that in fact, a twenty percent fee of $82 million may very well be fair, reasonable, and adequate compensation for the work performed on this matter, and may represent, in fact, a very generous multiplier. This information not having been presented to the class for perusal, however, these Objectors are left only to speculate as to the exact amount of generosity. These Objectors are left with a nagging question as to why Class Counsel has completely failed to divulge either hourly

rates, or even lodestar summaries, to justify and support its request for $123 million, which directly and negatively impacts the class. Every class member would benefit substantially if the percentage were reduced to the circuit benchmark or norm of twenty to twenty-five percent.

III.

THE *CY PRES* COMPONENT IS NOT ADEQUATELY DEFINED

Class Counsel, in accordance with its obligation to represent the clients' best interest, must do its best to make sure the unclaimed funds are distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit and the interests of class members. This fund exists to compensate all of the class members, whether they make a claim or not. Silent class members are just as important for the creation of this fund and have given up their rights against these companies in order to make this settlement available. Therefore, to compensate the class members for the harm suffered, any unclaimed funds must go to the benefit of the class.

The *cy pres* component of the settlement is addressed as follows: it will "benefit consumer financial literacy education, and educate and assist consumers with financial services issues through advisory and related services." Settlement at 32, ¶90. This leaves the ultimate recipient unidentified, when the purpose of *cy pres* is to benefit non-claimant class members. While these Objectors do not object to the proposed concept of the recipient, the Court cannot fairly ensure that the non-claimant class members are adequately represented until the recipients are identified. Nor can Class Counsel assert that such identification is premature. Class Counsel has already determined that there is currently a *cy pres* component, and that it will reduce the common fund by about twelve percent. The recipients of these funds must be identified by the parties at this point, before approval, so that the Court, and the class, has appropriate information to ensure the best representation of those absent class members. Identification of the recipients at this stage, rather than after approval is essential for a fair distribution to these silent class members, and in accordance with all

leading authorities. *See, e.g.,* 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 10:17 (4th ed.2009); *In re Pharmaceutical Industry Average Wholesale* Price, 588 F.3d 24, 33-35 (1st Cir. 2009); Masters *v. Wilhelmina Model Agency, Inc.*, 473 F. 3d 423, 436 (2nd Cir. 2007); *In re Ticket Com'n Antitrust Litigation*, 307 F. 3d 679, 282-83 (8th Cir. 2002); *Democratic Committee of District of Columbia v. Washington Metropolitan Area Transit Commission*, 84 F. 3d 451, 455 (D.C. Cir. 1996); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990); *Wilson v. Southwest Airlines, Inc.* 880 F.2d 807, 811 (5th Cir. 1989).

IV.

THE SETTLEMENT, NOTICE, AND PRELIMINARY APPROVAL ORDER CONTAIN REQUIREMENTS FOR OBJECTORS WHICH RUN AFOUL OF RULE 23's OPTION TO OBJECT, AND FEDERAL RULES OF EVIDENCE 403 AND 404

The Settlement, Notice, and Preliminary Approval Order indicate that in order to make a valid objection, an objector must supply not just information about what the objector finds problematic, but also information about objections in other cases, and whether the objector's attorney has filed objections in other cases.

These Objectors have found no authority which prohibits the filing of multiple objections, either in statutes or case law. The only requirement is that a class member has a problem with an objection. Requesting information beyond that undermines a class member's rights under Rule 23, and impinges on evidentiary Rules 403 and 404, which prohibit character evidence as a basis for making a prejudicial ruling.

Every objection should be judged on its own merits. If it is frivolous or unmeritorious, the Court has the option of overruling those objections on that basis. If the objections have merit, they should be sustained, regardless of who made them. For those reasons, the requirements of submitting information regarding unrelated cases and an objector's, or his attorney's, history of litigation is patently irrelevant to the merits of any particular objection.

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A. Evidentiary Problems with the Requirements.

Federal Rules of Evidence 403 articulates that evidence which is otherwise relevant may not be admissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The committee notes to Rule 403 state that there are certain reasons that such information is not admissible as "[t]hese circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. *Slough, Relevancy Unraveled,* 5 Kan. L. Rev. 1, 12-15 (1956); Trautman, *Logical or Legal Relevancy--A Conflict in Theory*, 5 Van. L. Rev. 385, 392 (1952); McCormick § 152, pp. 319-321." (1975 Committee Notes to Rule 403.)

Federal Rule of Evidence 404 prohibits the introduction of this information as well as it is impermissible evidence of the Objectors', or their attorney's, character. Character evidence is rarely, if ever, admitted within the realm of civil trials. Committee notes to Rule 404 state "[t]he circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. See *Michelson v. United States*, 335 U.S. 469, 476 (1948)("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). (2006 Committee Notes to Rule 404.) (*See Generally, U.S. v. DeMarco,* 407 F.Supp. 107 (C.D.Ca. 1975) where Judge did not permit testimony against credibility of opposing counsel.)(*See also U.S. v. Frederick*, 78 F.3d 1370 C.A.9 (Ariz. 1996) where Prosecutor's comment to jury about defendant's lawyer, which was made immediately after court had sustained two other objections on ground that comments were inappropriate, constituted serious misstep; in comment prosecutor implied to jury that government and court were allied, that they were allied against the defense, and that

government and court wanted jury to seek the truth by considering all the evidence, in contrast to defense attorney, who was asking jury not to see the truth.

In this case, information regarding these Objectors, their attorney, and any of their previous objections to Class Action settlements is not only irrelevant to this Court's decision at the upcoming fairness hearing but is proffered only in an effort to color the Court's perception of these persons and, thus, sway the Court's decision regarding these objections. This is improper and therefore the requirements in the order, settlement, and notice requiring this information should be struck.

Rule 23 specifically provides a means for objections. To infer that an objection is less meritorious merely because its author has made one before is to undermine the very language of Rule 23. In fact, it seems paradoxical that Class Counsel are to be congratulated for being "professional" class counsel, but yet the class members they are purportedly representing are to be prohibited from hiring an attorney to write a credible objection to counter such "professionalism."

One judge specifically rejected the idea that attorneys who file multiple objections are to be condemned:

> I have never understood the term "professional objector." The lawyers that appear in front of me are professionals as well. I would think that if I heard the term "unprofessional objector," I would be very much concerned.

This is from a class case entitled *Credit/Debit Card Tying Cases*, JCCP No. 4335, Superior Court of California, County of San Francisco, August 6, 2010, Hon. Richard A. Kramer presiding, at page 16. In fact, the reason Congress included a right to object is because their right is essential to ensuring the fairness of the process, and that a court is possessed of all relevant information before approving the settlement:

> While the parties to a class action start out in an adversarial posture, once they reach the settlement stage, incentives have shifted and there is the danger of collusion. . . . Class counsel, for instance, might settle claims for significantly less than they are worth, not because they think it is in the class's best interest, but instead because they are satisfied with the fees they will take away. [Citation.] Intervenors counteract any inherent objectionable tendencies by reintroducing an adversarial relationship into the settlement process and thereby improving the changes that a claim will be settled for its fair value.

Vollmer v. Selden, 350 F.3d 656, 660 (7th Cir. 2003). For these reasons, Class Counsel's attempt to discourage objectors by requiring information not germane to this particular cause needs to be struck.

V.

THE ALLEGED HARM WILL APPARENTLY CONTINUE LEADING TO ADDITIONAL QUESTIONS ABOUT THE FAIRNESS OF THE SETTLEMENT

The relief provided to the class is monetary, to compensate for past "harms" of reordering large and small charges to accounts. This appears reasonable. There is no indication in the settlement, however, that the practice will be discontinued, if even for a short while. There is no injunctive component to this resolution, causing this Objector to wonder about the fairness of the settlement. If a class member receives some compensation for past "harms," but is subject to the exact same harm now and for the foreseeable future, the fairness seems illusory. Are the class members then free to file another suit in the future for this same harm, although their claims for this time period have been released?

It seems that to truly be a fair and reasonable settlement, some injunctive component must be incorporated.

WHEREFORE, These Objectors respectfully request that this Court:

A. Upon proper hearing, sustain these Objections;

B. Upon proper hearing, enter such Orders as are necessary and just to adjudicate these Objections and to alleviate the inherent unfairness, inadequacies and unreasonableness of the proposed settlement.

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C. Award an incentive fee to these Objectors for their service as a named representative of Class Members in this litigation.

DATED: October 3, 2011

By: _/s/ Patrick Sweeney_____

Patrick Sweeney
Florida Bar No. 593486
Sweeney & Sweeney, S.C.
440 Science Drive, Ste. 101
Madison, WI 53711
Phone: 608-238-4444
Fax: 608-238-8262
Email: Patrick@sweenlaw.com
Attorney for Objectors Martin Carapia and Fatima Dorego

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2011, I electronically filed the foregoing with the Clerk of the Court of the United States District Court for the Southern District of Florida Division by using the USDC CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the USDC CM/ECF system.

By: _/s/ Patrick Sweeney_____
Patrick Sweeney