UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

IN RE: CHECKING ACCOUNT OVERDRAFT LITIGATION

MDL No. 2036

THIS DOCUMENT RELATES TO: FOURTH TRANCHE ACTIONS

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

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

PLAINTIFFS' RESPONSE TO OBJECTIONS TO FINAL APPROVAL OF SETTLEMENT AND TO CLASS COUNSEL'S APPLICATION FOR SERVICE AWARDS AND FOR ATTORNEYS' FEES AND EXPENSES

After more than two years of hard-fought litigation, Class Counsel negotiated a Settlement with Defendant Bank of the West, N.A. ("BOW") under which BOW will pay $18 million in cash to the Settlement Class. This represents approximately 52% of the most probable recovery that Class Members could have obtained at trial. Upon approval, the net proceeds of the Settlement will immediately be distributed *pro rata* to every Settlement Class member; none of the proceeds will revert back to BOW. The Settlement is an excellent result in light of serious litigation risks.

Of the 386,113 Settlement Class members, only four (4) timely objected to the

settlement.[1] Such an infinitesimal number demonstrates that the overwhelming majority of the Settlement Class approve of the Settlement, indicating that it is fair, reasonable, and adequate. *Cf. Lipuma v. American Express Co.*, 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005).

The objections that were filed lack credibility. The four Objectors submitted objections in two batches, which are located at DE # 3032 – objections filed by Jeannie Ladd, Adrian M. Snow, and Autumn Grace Snow ("the Ladd Group") – and DE # 3033 – objections filed by Ryan Phillips ("Objector Phillips"). All four Objectors are represented by lawyers who have made a career out of objecting to class action settlements to extort money from class counsel and settling defendants. Such Objectors, known as "serial" or "professional" objectors, have raised the ire of federal courts, including this Court, for playing no positive role in class action litigation, and contributing no benefit to the class.

It comes as no surprise that these objections lack merit. They are riddled with misunderstandings of the Settlement Agreement and basic class action jurisprudence. Several of the objections are identical to objections this Court has already considered and rejected in approving other MDL 2036 settlements. Not a single Objector submitted an expert affidavit or provided any evidence undermining the conclusion reached by Class Counsel and their experts that this Settlement achieves a strong result for the Settlement Class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998) (affirming final approval of nationwide class action

[1] A fifth Settlement Class Member, Martha Bronson, acting *pro se*, served on Settlement Class Counsel an untimely objection that was postmarked on November 15, 2012, well past the November 6, 2012, deadline. As such, Ms. Bronson's objections are not separately addressed herein and should be summarily rejected by the Court. Notwithstanding, most of her objections overlap with those filed by the other Objectors in this case and therefore are addressed in this response. Should the Court consider her remaining points, it should conclude that the Ms. Bronson's arguments are belied by the motions and supporting declarations and affidavits filed in connection with preliminary and final approval of this Action. (DE # 2823 and 3015). Further, many of the same arguments were previously raised and rejected in the context of the Bank of America settlement in MDL 2036. *See Tornes v. Bank of America, N.A.*, 830 F. Supp. 2d 1330 (S.D. Fla. 2011).

settlement where "[t]he objectors presented no evidence" to support their arguments).

While Objector Phillips may be right that a form of heightened scrutiny applies where a case is settled before a litigated class certification decision (DE # 3033 at 1–2), this is not a situation where the parties settled soon after the complaint was filed. To the contrary, Class Counsel conducted substantial discovery and briefed class certification prior to negotiating and entering into the Settlement. *See* Joint Declaration of Robert C. Gilbert, Michael W. Sobol, Jeffrey M. Ostrow and Elaine Ryan ¶¶ 11-17 ("Joint Decl.") (DE # 3015–2); *see also* pages 19-20, *infra*. Moreover, this Court has already concluded that the settlement negotiations with BOW – overseen by the Honorable Edward A. Infante (Ret.) of JAMS – were at arms' length. *See* Preliminary Approval Order, ¶ 10 (DE # 2832). The Settlement is therefore entitled to a presumption of fairness. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (citing Manual for Complex Litig., Third, § 30.42 (1995)). The Objectors' reckless and unfounded charges of collusion do nothing to rebut this presumption of fairness. (DE # 3032 at 8–9). Instead, such charges reflect poorly on the professional objector lawyers who are once again wasting this Court's time.

For the reasons set forth below, Plaintiffs and Class Counsel respectfully request that the Court (1) overrule the objections; (2) grant Final Approval to the Settlement; (3) approve the requested service awards to the Class Representatives; (4) award the requested attorneys' fees and expenses; and (5) enter Final Judgment dismissing these Actions with prejudice.

I. THE OBJECTORS LACK CREDIBILITY

Although his declaration was filed by attorney Patrick Sweeney, Objector Phillips purports in his declaration to be represented by attorney Joseph Darrell Palmer. (DE # 3033–2, ¶ 1). The two attorneys often act as cohorts – for example, Mr. Palmer has represented Mr. Sweeney as an objector in other proceedings. *See, e.g.*, *Arthur v. Sallie Mae, Inc.*, 2012 U.S.

Dist. LEXIS 3313 (W.D. Wash. Jan. 10, 2012). Mr. Sweeney is a serial objector who previously objected to another MDL 2036 settlement approved by this Court. (DE # 1936). *See also Kardonick v. JPMorgan Chase & Co.*, No. 10-cv-23235, DE # 357 (S.D. Fla. Aug. 19, 2011). As for Mr. Palmer, he, too, is a serial objector, whose objections have been described as "absurd" and as showing "little respect for the intelligence of this Court." *In re Dell Sec. Litig*., No. A-06-CV-726-SS, DE # 342 (W.D. Tex. Jan. 11, 2011); *see also Gemelas v. Dannon Co*., 2010 U.S. Dist. LEXIS 99503, at *5 (N.D. Ohio Aug. 31, 2010) (describing Mr. Palmer as a "serial objector"); *City of Roseville Empls. Ret. Sys. v. Orloff*, 2012 U.S. App. LEXIS 11512, at *7-8 (9th Cir. June 7, 2012) (finding Mr. Palmer's appeal of an award of attorneys' fees to be "meritless" and based on misapprehensions of the law).

In an apparent attempt to hide Mr. Palmer's past, Mr. Sweeney filed the objections on behalf of Objector Phillips, even though Objector Phillips averred that it was Mr. Palmer, not Mr. Sweeney, whom Objector Phillips authorized to file them. (DE # 3033–2, ¶ 1). This discrepancy, at minimum, is highly suspicious.

The Court should be aware that Mr. Palmer is a convicted felon, who was disbarred for a period of time from the State Bars of California, Arizona, and Colorado, and who has been reprimanded by several courts for intentionally failing to mention such facts in *pro hac vice* applications. *See Arthur v. Sallie Mae, Inc*., No. C10-0198JLR, Tr. of Hrg. at 7:7–10:22 (W.D. Wash. Sept. 14, 2012), attached as Exhibit A hereto (granting plaintiffs' motion for revocation of Mr. Palmer's *pro hac vice* application because of his fraud on the court); *Herfert v. Crayola, LLC*, No. C11-1301-JCC, DE # 74 (W.D. Wash. Aug. 17, 2012) (denying Mr. Palmer's *pro hac vice* application in light of his material nondisclosures, and noting that "any professional should know better than to blame his assistant for such a serious misstatement in a document containing

his own signature").

The Ladd Group is represented by another serial objector, attorney Steve Miller. *See, e.g.*, *In re New Motor Vehicles Canadian Exp. Antitrust Litig*., MDL No. 1532, DE # 1175 at n.22 (D. Me. Apr. 13, 2011) (rejecting Mr. Miller's "specious" arguments); *In re Am. Int'l Grp., Inc. Sec. Litig*. No. 04-cv-08141-DAB, DE # 663, 664 (S.D.N.Y. Oct. 1, 2012) (Mr. Miller withdrew his appeal of an order rejecting his objections to a settlement, without having provided any benefit to class). Mr. Miller often files objections in different cases on behalf of the same clients. *See, e.g*., *Blessing v. Sirius XM Radio Inc*., No. 09-cv-10035, DE # 167 (S.D.N.Y. Sept. 14, 2011); *In re Lawnmower Engine Horsepower Marketing & Sales Practices Litig*., MDL No. 1999, DE # 272 (E.D. Wis. June 22, 2010) (objections filed on behalf of Jeannine Miller); *Nakash v. nVidia Corp*., No. 08-cv-04312-JW, DE # 325 (N.D. Cal. Jan. 14, 2011); *In re Mattel, Inc. Toy Lead Paint Prods. Liab. Litig*, MDL No. 1897, DE # 194 (C.D. Cal. Feb. 19, 2010); *CLRB Hanson Inds., LLC v. Google, Inc*., No. C 05-03649 JW PVT, DE # 326 (N.D. Cal. July 10, 2009).

As this Court and several other courts have determined, serial objectors such as Mr. Palmer, Mr. Sweeney, and Mr. Miller, who hold up large class action settlements for a payout, perform no constructive role in class action litigation. "[M]ost if not all . . . are motivated by things other than a concern for the welfare of the Settlement Class." *Tornes v. Bank of America, N.A*., 830 F. Supp. 2d 1330, 1361 at n.30 (S.D. Fla. 2011) (King, J.). Such lawyers make their living "simply by filing frivolous appeals and thereby slowing down the execution of settlements." *Barnes v. FleetBoston Fin. Corp*., 2006 U.S. Dist. LEXIS 71072, at *3-4 (D. Mass. Aug. 22, 2006). Their "sole purpose is to obtain a fee by objecting to whatever aspects of the Settlement they can latch on to" and levying "what is effectively a tax on class action

settlements, a tax that has no benefit to anyone other than to the objectors." *Tornes*, 830 F. Supp. 2d at n.30 (quoting *Barnes*, 2006 U.S. Dist. LEXIS 71072, at *3-4). For this reason, "federal courts are increasingly weary of professional objectors." *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266 n.26 (E.D. Pa. 2003).

Given who is behind these objections, they should be accorded little weight, if any.

II. THE OBJECTIONS TO THE SETTLEMENT SHOULD BE OVERRULED ON THE MERITS

A. The Class Notice Sufficiently Informed Class Members of the Settlement Amount.

Objectors contend that the Settlement should not be finally approved because, although Class Members were informed in the Class Notice that the total amount of the Settlement Fund is $18 million and that Class Counsel intend to seek attorneys' fees of up to 30% of the Settlement Fund, the Class Notice should have specified the exact individual payments that each Class Member will receive. (DE # 3032 at 5). This Court has already considered and correctly rejected this argument in connection with previously approved settlements in this MDL. As the Court recognized, "the law does not require that notice be given of the amount an individual class member will recover, either as a lump sum or as a range of potential recovery." *Tornes*, 830 F. Supp. 2d at 1343-44 (citing, *inter alia*, *Mangone v. First USA Bank*, 206 F.R.D. 222, 231-34 (S.D. Ill. 2001)).

Much like the previously approved settlements, precise Settlement Class Member payments here could not be calculated at the time Notice was mailed, because each individual amount depends on variables unknown at that time. Such unknowns reasonably include, for instance, the ultimate number of opt-outs, and the outcome of Plaintiffs' application for attorneys' fees and for service awards for Class Representatives. On the other hand, had Plaintiffs attempted to estimate each individual payment, "and that estimate turned out either to

over-estimate or under-estimate the amount of that recovery, objectors would surely come forward complaining that they were misled to their detriment by the Notice." *Tornes*, 830 F. Supp. 2d at 1342 n.10. Accordingly, this objection should be overruled.

B. Injunctive Relief Is Unnecessary.

The argument that the Settlement is inadequate due to lack of injunctive relief also fails. (DE # 3032 at 6). Injunctive relief was unnecessary here because BOW stopped engaging in the complained-of practices (admittedly in part because of this litigation) and is unlikely to repeat such practices in the future because of recently adopted federal regulations and the spotlight shown on bank overdraft policies in this MDL. As of July 1, 2011, BOW ceased posting debit transactions from high-to-low order, and instead now posts debit and ATM transactions in chronological order (when date and time information is available) or in low-to-high order (when date and time information is not available). Agreement ¶ 7 (DE # 3015–1). Further, BOW is now prohibited by federal law – specifically, by Regulation E, which took effect August 15, 2010 – from assessing overdraft fees on non-recurring debit transactions unless consumers affirmatively opt-in to such policies. *See Tornes*, 830 F. Supp. 2d at 1352 (citing 12 C.F.R. § 205.17). Therefore, BOW now has to obtain a customer's affirmative consent before it may impose any overdraft fee on a debit card transaction, even when the customer's account lacks sufficient funds to cover the attempted transaction. *See Tornes*, 830 F. Supp. 2d at 1352 (relying on Regulation E to reject a virtually identical settlement objection).

In demanding a consent decree, Objectors would have this Court supervise BOW's conduct in perpetuity. That is absurd – and the demand is particularly uncalled for here, in light of the facts and circumstances of this Action and the changed law regarding the conduct upon which the Action was premised. Thus, this objection should be overruled.

C. The Residual *Cy Pres* Program Is Reasonable and Appropriate.

Objectors erroneously assert that the "only reason" there would be funds left over for a *cy pres* distribution is if "many" Class Members will not be paid because they had negative account balances that exceed the settlement payments to which they would otherwise be entitled. (DE # 3032 at 4). Going one step further, the Objectors speculate, without any basis, that a *cy pres* distribution would be "utilized as an [*sic*] mechanism for Defendant to funnel funds to its own pet charities[.]" *Id*. Each assertion is totally incorrect.

The first assertion rests on a false premise; it wrongly assumes that any payments which are otherwise due to Settlement Class Members, but which are not distributed to them due to negative account balances, will remain undistributed in the Settlement Fund. Not true. Any such funds will be allocated *pro rata* to the *other* Settlement Class Members as part of the *initial* distribution of the Settlement Fund. Agreement ¶ 77. The Settlement Agreement, then, contemplates that all or nearly all of the Net Settlement Fund will be distributed to each and every Settlement Class Member who is entitled to relief. *Id.* Such payments will be made to Settlement Class Members who are current account holders through automatic credits to their bank accounts, while checks will be mailed to those Settlement Class Members whose BOW accounts are closed. Agreement ¶ 82. To locate Settlement Class Members for the purposes of mailing such checks, the Settlement Administrator ran BOW's Settlement Class Member address information through the National Change of Address database, a highly reliable source. Hodne Decl. ¶ 7 (DE # 3015–5); Agreement ¶ 61. With regard to any checks returned as undeliverable, the Settlement Administrator will make reasonable efforts to locate Settlement Class Members' correct addresses and will re-mail the checks. Agreement ¶¶ 82, 84. Finally, the Settlement Agreement provides 180 days for Settlement Class Members to cash their checks. Agreement ¶ 82. Thus, contrary to Objectors' assertions, every effort will be made to ensure that each

Settlement Class Member entitled to a distribution will receive one.

Notwithstanding such efforts, it is plausible that some Settlement Class Members will never be located or will never cash their checks. In that event, the Settlement Agreement provides that any remaining funds may be distributed *pro rata* to the Settlement Class in a *second* distribution, to the extent feasible. Agreement ¶ 87. This reduces the likelihood of a *cy pres* fund, but if the second distribution is infeasible, or if the cost of distributing any remaining funds in a second distribution would exceed the benefit to Settlement Class Members (*e,g.*, if the cost of mailing additional checks would exceed the amount of individual payments to Settlement Class Members), the remaining funds may alternatively be distributed *cy pres*, subject to approval by the Court. *Id.* In other words, rather than allowing such funds to revert to BOW, the Settlement allows the Parties and the Court to find a suitable *cy pres* recipient, whose mission is "as near as possible" to the goals of this action, so that any distribution of residual funds will indirectly benefit the Settlement Class. *See Tornes*, 830 F. Supp. 2d at 1355 (rejecting objections to *cy pres* procedure in MDL 2036 settlement)..

Objectors' claim, that the purpose of the *cy pres* provision in the Settlement Agreement with BOW is to "disenfranchise class members" and benefit BOW's "pet charities" (DE # 3032 at 4), is baseless, and fails to recognize the Court's important role in approving and ensuring the integrity of any *cy pres* distribution. As made clear by the Court's prior orders approving settlements in MDL 2036, this Court (and Class Counsel) understand the rudiments of the *cy pres* doctrine, including that funds should be distributed *cy pres* only when it is infeasible to distribute them to the class, and that the *cy pres* beneficiary or beneficiaries should have a mission that is congruent with the subject matter of this litigation. *See Tornes*, 830 F. Supp. 2d at 1354-57.

This objection should therefore be overruled.

D. The Release Is Narrowly Tailored and Proper.

The objection regarding the scope of the release again shows the fundamental failure to understand the Settlement, the legal claims, and the facts and circumstances of this Action. Objectors would require BOW to release any and all rights to recover any past-due amounts, arising from any charge or debit, assessed on Settlement Class Members' bank accounts or loans. [DE # 3032 at 2–3]. The argument is fatally overbroad, unrealistic, and without merit because it does not focus on overdraft fees.

First, by asserting that the lack of such a release is improper given that some Settlement Class Members may not receive payments due to their negative account balances, Objectors fail to apprehend that the allocation plan reasonably takes into account the degree of harm each Settlement Class Member suffered, as well as Settlement Class Members' likely entitlement to damages *should this Action proceed to trial.* BOW would likely have argued at trial that, pursuant to its customer agreements, it is contractually entitled to "set-off" any damages owed to Settlement Class Members whose accounts may have been written off as uncollectible due to a negative balance.[2] This Court has recognized that such a set-off defense may be available to reduce the damages of the banks defending claims in this MDL. *See Larsen v. Union Bank, N.A.*, 275 F.R.D. 666, 677 (S.D. Fla. 2011). In fact, in the only action wherein claims of this nature were tried, the court authorized accounting for "uncollectibles" in precisely the manner contemplated by the Settlement here, recognizing that this is a proper component of ascertaining individual Settlement Class Member injury and damages:

[2] The Ladd Group asserts, without support, that "millions" of Settlement Class Members, or even the "bulk" of the Settlement Class, carry a negative balance such that they will not recover anything under the Settlement. (DE # 3032 at 8–9, 11). That is simply not true.

> In situations where a Wells Fargo customer's account was closed due to a negative balance, and the negative balance was "written off" by Wells Fargo, Olsen was instructed by plaintiffs' counsel to assume that the negative balance amount was "uncollectible." In other words, the customer never paid it, and therefore, was never "harmed" by those overdraft charges. If the uncollectible amount equaled or exceeded the customer's harm, that customer was excluded as a harmed customer. Otherwise, the harm for that customer was simply reduced by the uncollectible amount.

Gutierrez v. Wells Fargo & Co., 2010 U.S. Dist. LEXIS 29117, at *19 (N.D. Cal. Mar. 26, 2010). A Settlement structure that parallels what a trial would entail is not unreasonable.

Second, the objection to the release afforded to BOW is unrealistic because, among other things, the objection ignores that BOW has already sold a portion of its "uncollectible" debt to third-party debt collectors. BOW has no control over debts sold to such third parties, and would never have agreed to a Settlement requiring it to re-negotiate its agreements with third-party debt collectors to prevent them from making any claims against Settlement Class Members. Further, it would be difficult, if not impossible, to determine with precision which uncollectible debts (a) were sold to third parties and (b) arose from overdraft fees assessed as a result of BOW's high-to-low posting practices. The data analyzed by Class Counsel's expert reasonably does not differentiate between uncollectible debts sold to third parties and uncollectible debts still owned by BOW. For many uncollectible accounts, moreover, BOW's historical account data precludes any backward-looking attempt to determine precisely how much of a given uncollectible sum stems from "additional" overdraft fees,[3] as opposed to account charges in no way related to BOW's high-to-low posting practices. Even if such information could be gleaned from the bank data, such a process would require cumbersome individualized determinations that the Court should deem unnecessary.

[3] *See* Agreement ¶ 77 (defining "Additional Overdrafts").

In sum, the Settlement release for which the Parties bargained is appropriate. Among other things, it reasonably ensures that BOW will not be precluded from seeking to recover debts unrelated to the subject of this litigation, and that BOW will not be held accountable for collection actions instigated by third parties over which it has no control. This objection should be overruled for the reasons provided.

E. The Court's Objector Disclosure Requirements Are Reasonable.

As mandated in the Preliminary Approval Order, the Settlement Class Notice reasonably required any objectors to list their contact information, an explanation of the grounds for their objections, whether they are represented by counsel, the number of times they or their counsel have objected to other recent class action settlements, the captions of those cases, and related information. (DE # 2832, ¶ 23). This information assists the Court and the Parties with understanding the objections in context. And for the vast majority of Settlement Class Members, had they chosen to object, the answers to these questions would simply be "none" or "N/A." It is only the serial objectors, such as the lawyers behind the objections here, who want to keep the requested information secret.

Objectors are incorrect that the Court's requirements constitute improper "discovery" of absent class members. (DE # 3033 at 7–8). Discovery is a mechanism utilized and served by parties to an action, substantially without court oversight. Here, the requested objector information was considered and approved by the Court in its Preliminary Approval Order. (DE # 2832, ¶ 23). This Court is hardly alone in entering such orders pursuant to its broad discretionary powers under Rule 23. *See, e.g.*, *In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d 289, 294-95 (S.D.N.Y. 2010) (discussing the basis for objector disclosure requirements and concurring "with the numerous courts that have recognized that professional objectors undermine the administration of justice by disrupting settlement in the hopes of extorting a

greater share of the settlement for themselves and their clients."); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 316 (W.D. Tex. 2007) (rejecting the argument that requiring objectors to disclose their involvement in prior class actions was improper, finding the requirement "serve[s] the purpose of providing basic information to both the parties and the Court").

Even if the requested information could somehow be construed as "discovery," it would not be improper simply because it pertains to "absent" Settlement Class Members. Courts routinely permit traditional discovery of class action settlement objectors, such as depositions. *See, e.g.*, *In re Cathode Ray Tube Antitrust Litig.,* 281 F.R.D. 531, 533 (N.D. Cal. 2012) (ordering objector to appear for a deposition to determine his role in objecting to other class action settlements and his relationship to an attorney who makes "serial" objections); *Stern v. AT&T Mobility*, No. CV 05-8842, DE # 344 (C.D. Cal. Oct. 15, 2010) (compelling depositions of six objectors to determine "whether objections in other class action cases have been made by the objectors"). *See also In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 970 (N.D. Ill. 2011) (overruling objection to class settlement notice that explained that "objectors may be subject to depositions").

Far from warning potential objectors that they might have to be deposed, this Court merely requested that they answer a few questions about their identity, the identities of their counsel, and their participation in objecting to other class action settlements. As Mr. Sweeney himself concedes (DE # 3033–1 at ¶ "g"), much of the information requested by the Court is already public, so the disclosures raise no privacy concerns – anyone can search for information regarding these lawyers' prior objections to other class action settlements on the federal courts'

PACER filing system, or in electronic state court records.[4] Most importantly, this information is *not* burdensome to submit and, even if it were, any such burden does not outweigh the burden on the Court or Class Counsel to track down such information. Consequently, this objection provides no basis for non-approval of the Settlement, and should be rejected.

III. THE REQUESTED ATTORNEYS' FEES AND COSTS ARE REASONABLE, AND THE OBJECTIONS TO THOSE REQUESTS SHOULD BE OVERRULED

The scattershot objections to Class Counsel's fee application disregard that Class Counsel achieved a strong result in the face of considerable risk, advancing significant costs, time and labor, and bypassing other profitable work to pursue these claims. As one of the country's leading experts on class action settlements opined: "[T]here were significant risk factors present in this litigation and there were many demands on class counsel. At the time counsel filed this case, on a purely contingency fee basis, the chance of recovery was far from certain. Class counsel obtained a superb result in the face of several formidable risks." Declaration of Professor Geoffrey Miller at ¶ 55 ("Miller Decl.") (DE # 3015–3). As explained below, none of the objections to the fee respectfully requested by Class Counsel has any merit.

A. A Fee of Thirty Percent of the Common Fund Is Reasonable.

Despite what Objectors would have the Court believe, a thirty percent fee corresponds both to Eleventh Circuit precedent and to the market rate for class actions like this case. Miller Decl., ¶¶ 42–43. Indeed, in approving the Bank of America settlement in MDL 2036, this Court found that "[n]umerous decisions within this circuit have awarded attorneys' fees up to (and at time in excess of) 30 percent." *Tornes*, 830 F. Supp. 2d at 1365. In so holding, the Court

[4] Mr. Sweeney refers the Court to PACER to confirm his litigious history – placing the burden on the Court to determine how many times he has objected to a class settlement within the past five years (DE # 3033–1 at ¶ "g") – while the Ladd Group states only that their attorney "has filed objections previously" (DE # 3032 at n.1). These Objectors, therefore, do not merely challenge the Court's disclosure requirements, they fail to comply with them.

pointed to multiple cases in this District that fully support the attorneys' fees requested here:

a. *Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185 (S.D. Fla. 2006) (awarding fees of 31 1/3 % of $1.06 billion);

b. *In re: Terazosin Hydrochloride Antitrust Litigation*, 99-1317-MDL-Seitz (S.D. Fla. April 19, 2005) (awarding fees of 33 1/3 % of settlement of over $30 million);

c. *In re: Managed Care Litig. v. Aetna*, MDL No. 1334, 2003 WL 22850070 (S.D. Fla. Oct. 24, 2003) (awarding fees and costs of 35.5% of settlement of $100 million);

d. *Gutter v. E.I. Dupont De Nemours & Co*., 95-2152-Civ-Gold (S.D. Fla. May 30, 2003) (awarding fees of 33 1/3 % of settlement of $77.5 million); and

e. *Waters v. Int'l Precious Metals Corp*., 190 F.3d 1291 (11th Cir. 1999) (affirming fee award of 33 1/3 % of settlement of $40 million).

Tornes, 830 F. Supp. 2d at 1365. Likewise, Professor Miller cites the attorneys' fee awards in other checking account overdraft cases, establishing that the fee requested here is fully consistent with awards in the most relevant set of similar cases:

a. *Molina v. Intrust Bank, N.A.*, No. 10-CV-3686 (Dist. Ct. Ks.) (awarding fees of 33.33% of $2.7 million);

b. *Casto v. City National Bank, N.A.*, No. 10-C-1089 (Cir. Ct. W.Va.) (awarding fees of 33% of $3 million);

c. *Schulte v. Fifth Third Bank*, No. 09-cv-6655 (N.D. Ill.) (awarding fees of 33% of $9.5 million);

d. *Larsen v. Union Bank*, No. 1:09-MD-02036-JLK (S.D. Fla.) (awarding fees of 30% of $35 million);

e. *Tornes v. Bank of America*, No. 1:09-MD-02036-JLK (S.D. Fla.) (awarding fees of 30% of $410 million);

f. *Case v. Bank of Oklahoma, N.A.*, No. 1:09-MD-02036-JLK (S.D. Fla.) (awarding fees of 30% of $19 million); and

g. *Allen v. UMB Bank*, No. 1016-CV34791 (Cir. Ct. Mo.) (awarding fees of 30% of $7.8 million).

Miller Decl., ¶ 42. A fee award of 30% is also reasonable when judged against the results of

several empirical studies that provide information about fee awards as percentages of the recovery in class action cases. *Id.* ¶¶ 44–53.

Before the Court is the *unrebutted* declaration of Professor Miller, a nationally-acclaimed scholar in the area of class action litigation, who supports Class Counsel's request for attorneys' fees comprising thirty percent (30%) of the common fund secured for the benefit of the Settlement Class. *See Hanlon*, 150 F.3d at 1021 (upholding nationwide class settlement where objectors "presented no evidence"). In describing the sound basis for the thirty percent request here, Professor Miller notes the significant risk factors that were present in this litigation and the fact that empirical studies have found that fee awards are correlated with litigation risk. Miller Decl., ¶ 54.

Objector Phillips nonetheless argues that the fact of a large settlement justifies a reduction in the percent fee awarded. However, the case at hand is *not* a "megafund" case – making the argument wholly inapposite. In any event, courts nationwide have repeatedly awarded fees of thirty percent or higher in so-called "megafund" settlements. *See, e.g., In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467 (S.D.N.Y. 2009) (33.3 percent of $510 million); *Allapattah*, 454 F. Supp. 2d 1185 (31.33 percent of $1.075 billion); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839 (D.D.C. July 16, 2001) (34.6 percent of $365 million).[5]

[5] *See also In re Linerboard Antitrust Litig.*, 2004 WL 1221350 (E.D. Pa. June 2, 2004) (30 percent of $202 million); *In re Prison Realty Sec. Litig.*, 2001 U.S. Dist. LEXIS 21942 (M.D. Tenn. Feb. 9, 2001) (30 percent of $104 million); *In re Combustion Inc.*, 968 F. Supp. 1116 (W.D. La. 1997) (36 percent of $127 million); *In re Home-Stake Prod. Co. Sec. Litig.*, MDL No. 153 (N.D. Okla. Jan. 2, 1990) (30 percent of $185 million). Objectors' megafund argument, if accepted, would have the negative effect of reducing contingent fee attorneys' incentives to bring large and important civil actions. In *Allapattah*, U.S. District Court Judge Gold noted that decreasing a fee percentage solely in light of a large settlement "is antithetical to the percentage of the recovery method adopted by the Eleventh Circuit in *Camden*, the whole purpose of which is to align the interests of Class Counsel and the Class by rewarding counsel in proportion to the result obtained. By not rewarding Class Counsel for the additional work necessary to achieve a

(*footnote continued on next page*)

B. The Analysis Under *Camden I* Demonstrates That the Requested Fee Is Reasonable and Warranted.

1. Pursuant to Controlling Precedent and the Court's Own Precedents, a Lodestar Analysis Should Not Be Performed.

Objector Phillips and the Ladd Group urge the Court to scrutinize Class Counsel's voluminous time and task records in evaluating the fee request. They would have the Court act contrary to Eleventh Circuit precedent. The Eleventh Circuit could not have been clearer:

> [T]he percentage of the fund approach [as compared with the lodestar approach is] the *better reasoned* in a common fund case. Henceforth in this circuit, attorneys' fees awarded from a common fund *shall be* based upon a reasonable percentage of the fund established for the benefit of the class.

Camden I Condominium Ass'n, Inc. v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991) ("*Camden I*") (emphasis added).[6] Even before *Camden I*, courts in this Circuit recognized that "a percentage of the gross recovery is the only sensible method of awarding fees in common fund cases." *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679, 690 (M.D. Ala. 1988). Indeed, in overruling objections to the thirty percent attorneys' fee request in the Bank of America settlement, the Court recognized that "[t]he lodestar approach should not be imposed through the back door via a 'cross-check.' Lodestar creates an incentive to keep litigation going in order to maximize the number of hours including in the court's lodestar calculation." *Tornes*, 830 F. Supp. 2d at 1363 (King, J) (internal quotation marks and citation omitted).

Thus, the Court noted the *Camden I* court's criticism of lodestar and "the inefficiencies that it creates." *Id*. (citing *Camden I*, 946 F.2d at 773-75). *Camden I* "mandate[s] the *exclusive* use of the percentage approach in common fund cases, reasoning that it more closing aligns the

(*footnote continued*)
better outcome for the class, the sliding scale approach creates the perverse incentive for Class Counsel to settle too early for too little." 454 F. Supp. 2d at 1213.

[6] Even though Eleventh Circuit attorneys' fee jurisprudence governs, Objectors fail to cite a single Eleventh Circuit case supporting their erroneous claim that a lodestar analysis is required.

interests of client and attorney, and more faithfully adheres to market practice." *Tornes*, 830 F. Supp. 2d at 1363 (citation omitted) (emphasis added); *see also* Alba Conte, *Attorney Fee Awards* § 2.7, at 91 fn. 41 ("The Eleventh Circuit . . . repudiated the use of the lodestar method in common-fund cases"). Therefore, under *Camden*, "courts in this Circuit regularly award fees based on a percentage of the recovery, without discussing lodestar at all." *Tornes*, 830 F. Supp. 2d at 1363 & n.33 (citing *David v. American Suzuki Motor Corp*., 2010 WL 1628362 (S.D. Fla. Apr. 15, 2010); *Stahl v. MasTec, Inc*., 2008 U.S. Dist. LEXIS 69132, 2008 WL 2267469 (M.D. Fla. May 20, 2008); *Sands Point Partners, L.P. v. Pediatrix Med. Grp., Inc*., 2002 U.S. Dist. LEXIS 25721, 2002 WL 34343944 (S.D. Fla. May 3, 2002); and *Fabricant v. Sears Roebuck & Co*., 2002 WL 34477904 (S.D. Fla. Sept. 18, 2002)).

The percentage-of-the-fund method is superior because "the measure of the recovery is the best determinant of the reasonableness and quality of the time expended." *Mashburn*, 684 F. Supp. at 690. As this Court held: "A common fund is itself the measure of success and represents the benchmark on which a reasonable fee will be awarded. . . . In this context, monetary results achieved predominate over all other criteria." *Tornes*, 830 F. Supp. 2d at 1363 (quoting *Camden I*, 946 F.2d at 774). Conversely, the lodestar method results in an "undue emphasis on the number of hours logged," creating "a disincentive to early settlement." *Mashburn*, 684 F. Supp. at 690.

As a result, "every Supreme Court case addressing the computation of a common fund fee award has determined such fees on a percentage of the fund basis." *Camden I*, 946 F.2d at 773; *accord*, *Phemister v. Harcourt Brace Jovanovich, Inc*., 1984 WL 21981, at *15 (N.D. Ill. Sept. 14, 1984); *Howes v. Atkins*, 668 F. Supp. 1021, 1024 (E.D. Ky. 1987). This Court should "not deviate from [the percentage of the fund] approach" here. *Tornes*, 830 F. Supp. 2d at 1363.

Applying the lodestar method would be inappropriate, would set a bad precedent, and would depart from the Court's own MDL 2036 precedents.

2. The Objections to Class Counsel's Fee Application Misapply the *Camden I* Factors.

a. The Action Against Bank of the West Required Substantial Time and Labor.

First and foremost, the sheer amount of time and work expended by Class Counsel in order to litigate and settle the claims against Bank of the West makes the fee request reasonable. Joint Decl., ¶ 65. Objector Phillips' claim to the contrary is unsubstantiated and ignores the record in this case. Class Counsel set forth in detail the considerable steps they undertook on behalf of the class in this litigation against BOW. *See* Final Approval Motion, at 24–26 (DE # 3015). It is quite clear from the record before the Court that Class Counsel needed to – and did – devote a thousands of hours to litigate the case, and then settle it on highly favorable terms. All of the evidence, and particularly the results achieved, underscore the efforts of Class Counsel in this case. As such, Objector Phillips' claim of a "windfall" lacks any merit.

b. The Issues Involved Were Novel and Difficult and Required Significant Legal Skill.

As stated in the Motion for Final Approval, this Court has regularly witnessed and commented upon the high quality of Class Counsel's work, which conferred a substantial benefit on the Settlement Class in the face of significant litigation obstacles. (DE # 3015 at 26). Objector Phillips neither disputes that the issues involved were novel and complex, nor that they required the specialized skills of Class Counsel. Rather, Objector Phillips incorrectly argues the case settled too early and that no substantive work was done on the merits of this case. (DE # 3033 at 5).

The Settlement was reached only after two lengthy depositions had been taken, a million

pages of documents had been produced, and a Motion for Class Certification had been filed. Joint Decl., ¶ 45. Most of BOW's documents were produced only after Plaintiffs obtained an order compelling their production. (DE # 2168). Such discovery gave Class Counsel insight into the strengths and weaknesses of these claims; prior to settling, Class Counsel had developed ample information and performed analyses from which "to determine the probability of . . . success on the merits, the possible range of recovery, and the likely expense and duration of the litigation." *Mashburn*, 684 F. Supp. at 669; Joint Decl., ¶¶ 45, 76. Objector Phillips overlooks all this, as well as the fact that it is very difficult to identify – let alone establish liability based upon – the Debit Re-sequencing at the heart of this case. Joint Decl., ¶ 87. It requires the acquisition and analysis of a monumental amount of bank data, and the efforts of highly skilled counsel and experts. *Id.* ¶ 81. Objector Phillips' claim that "[t]he difficulty of the questions . . . never manifested as a [sic] obstacle" is unsupported and unfounded. (DE # 3033 at 6).

Moreover, Objector Phillips ignores that this Action settled only after two years of hard-fought litigation. Most diversity class actions, by contrast, settle within two years of being filed.[7] To the extent that the Court views the Settlement here as "early," this is one of those "early resolution[s]" that "demonstrate[s] that the parties and their counsel are well prepared and well aware of the strength and weaknesses of their positions and of the interests to be served by an amicable end to the case." *AT&T Mobility Wireless*, 789 F. Supp. 2d at 967 (citations omitted).

---

[7] *See* Federal Judicial Center, *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions*, at 7 (2008) (finding that the average diversity class action settles in 21.2 months and three-quarters of diversity class actions settle within 30 months).

c. Class Counsel Assumed Substantial Risk to Pursue This Action on a Pure Contingency Basis, and Were Precluded from Other Employment as a Result.

Objector Phillips does not dispute the risk associated with Class Counsel's prosecution of this Action, or the fact that time spent on this Action precluded Class Counsel from working on other matters. Rather, Objector Phillips rehashes the same meritless argument premised on the alleged need to conduct a lodestar analysis. (DE # 3033 at 6). Hence it is uncontroverted that the time spent on this Action was time that Class Counsel could not devote to other matters, and this *Camden I* factor weighs heavily in favor of the requested fee. Joint Decl., ¶ 95.

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

Objector Phillips takes issue with certain unidentified factors he claims were not addressed by Class Counsel in the Motion for Final Approval, but, tellingly, he himself fails to provide such factors or explain why or how they support the requested fee. (DE # 3033 at 6). There can be no doubt that a contingency fee agreement is the only arrangement by which virtually all Class Members could have pursued relief. The individual claims are small, but the litigation requires substantial time and expense, including the assistance of experts. The measure of recoverable damages is uncertain, and the risk of underpayment or non-payment is very significant. Under these circumstances, it would have been financially irrational for any of the named Plaintiffs to have pursued this matter on any basis other than contingency, with expenses advanced. As such, application of the *Camden I* factors here demonstrates that the requested fee is warranted, and should be approved.

C. Class Counsel Is Not Required to Submit a Fee Application Pursuant to Local Rule 7.3.

The Ladd Group further contests the requested fee on the formalistic ground that Class

Counsel did not submit a fee application in a separate document from the Motion for Final Approval. (DE # 3032 at 7–8). Yet the Ladd Group provides no authority to support their contention that such a separate filing is required. It is not. Local Rule 7.3 does not apply in a common fund case such as the one at hand. Fixated on the notion that the Court must perform a lodestar "cross-check," the Ladd Group insists that Class Counsel violated Local Rule 7.3 by not submitting time records. (DE # 3032 at 7–8). However, as discussed above, the lodestar approach favored by Objectors is inconsistent with Eleventh Circuit precedent, and this Court has declined to undertake it in this MDL. *See* Pages 16–18, *supra*.

D. The Record Shows There Was No Fraud or Collusion.

There was no collusion in the negotiation of the Settlement with BOW. *Compare* Preliminary Approval Order, ¶ 10 (DE # 2832), *with* Ladd Group at 8–9 (DE # 3032). As this Court recognized in granting Preliminary Approval, the sharply contested nature of the proceedings in this Action demonstrates the absence of fraud or collusion behind the Settlement. The settlement discussions, including the mediation session with Judge Infante and the several months of subsequent negotiations, were hard-fought and at arms' length at all times. (DE # 2832, ¶ 10).

Absent any indicia of collusion, it is irrelevant that Defendant agreed not to oppose Class Counsel's request for attorneys' fees, especially because the Parties negotiated this provision only after reaching agreement on all other material terms of the Settlement. Joint Decl., ¶ 62; Agreement ¶¶ 96–97. Objectors' reckless charges of collusion disregard the Supreme Court's guidance that "[a] request for attorney's fees should not result in a second major litigation. *Ideally, of course, litigants will settle the amount of a fee*." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (emphasis added). A "negotiated fee amount" therefore should be accorded "substantial weight," as it "represents the parties' best efforts to understandingly,

sympathetically, and professionally arrive at a settlement as to attorney's fees." *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 695 (N.D. Ga. 2001) (citation omitted).

III. CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiffs' Motion for Final Settlement Approval, Plaintiffs respectfully request that the Court overrule the two sets of objections, approve the Settlement with Bank of the West, award Class Counsel the requested fee, and approve Service Awards for the class representatives.

Dated: November 21, 2012

Respectfully submitted,

/s/ Aaron S. Podhurst
Aaron S. Podhurst, Esq.
Florida Bar No. 063606
apodhurst@podhurst.com
Robert C. Josefsberg, Esq.
Florida Bar No. 40856
rjosefsberg@podhurst.com
Steven C. Marks, Esq.
Florida Bar No. 516414
smarks@podhurst.com
Peter Prieto, Esq,
Florida Bar No. 501492
pprieto@podhurst.com
Stephen F. Rosenthal, Esq.
Florida Bar No. 0131458
srosenthal@podhurst.com

/s/ Bruce S. Rogow
Bruce S. Rogow, Esq.
Florida Bar No. 067999
brogow@rogowlaw.com
Bruce S. Rogow, P.A.
Broward Financial Center
500 East Broward Boulevard, Suite 1930
Fort Lauderdale, FL 33394
Tel: 954-767-8909
Fax: 954-764-1530

Co-Lead Counsel for Plaintiffs

/s/ Robert C. Gilbert
Robert C. Gilbert, Esquire
Florida Bar No. 561861
rcg@grossmanroth.com
Stuart Z. Grossman, Esquire
Florida Bar No. 156113
szg@grossmanroth.com
David M. Buckner, Esquire
Florida Bar No. 60550
dbu@grossmanroth.com
Seth E. Miles, Esquire
Florida Bar No. 3855830
sem@grossmanroth.com
GROSSMAN ROTH, P.A.
2525 Ponce de Leon Boulevard
Eleventh Floor
Coral Gables, FL 33134
Tel: 305-442-8666
Fax: 305-779-9596

Coordinating Counsel for Plaintiffs

/s/ E. Adam Webb
E. Adam Webb, Esquire
Georgia Bar No. 743910
Adam@WebbLLC.com
Matthew C. Klase, Esquire
Georgia Bar No. 141903
Matt@WebbLLC.com
G. Franklin Lemond, Jr., Esquire
Georgia Bar No. 141315
FLemond@WebbLLC.com
WEBB, KLASE & LEMOND, L.L.C.
1900 The Exchange, S.E.
Suite 480
Atlanta, GA 30339
Tel: 770-444-9325
Fax: 770-444-0271

/s/ Michael W. Sobol
Michael W. Sobol, Esquire
California Bar No. 194857
msobol@lchb.com
Roger N. Heller, Esquire
California Bar No. 215348
rheller@lchb.com
Jordan Elias, Esquire
California Bar No. 228731
jelias@lchb.com
LIEFF CABRASER HEIMANN & BERNSTEIN L.L.P.
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111
Tel: 415-956-1000
Fax: 415-956-1008

/s/ Russell W. Budd
Russell W. Budd, Esquire
Texas Bar No. 03312400
rbudd@baronbudd.com
Bruce W. Steckler, Esquire
Texas Bar No. 00785039
bsteckler@baronbudd.com
Mazin A. Sbaiti, Esquire
Texas Bar No. 24058096
msbaiti@baronbudd.com
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, TX 75219
Tel: 214-521-3605
Fax: 214-520-1181

/s/ David S. Stellings
David S. Stellings, Esquire
New York Bar No. 2635282
dstellings@lchb.com
LIEFF CABRASER HEIMANN & BERNSTEIN L.L.P.
250 Hudson Street
8th Floor
New York, NY 10013
Tel: 212-355-9500
Fax: 212-355-9592

/s/ Ruben Honik
Ruben Honik, Esquire
Pennsylvania Bar No. 33109
rhonik@golombhonik.com
Kenneth J. Grunfeld, Esquire
Pennsylvania Bar No. 84121
kgrunfeld@golombhonik.com
GOLOMB & HONIK, P.C.
1515 Market Street
Suite 1100
Philadelphia, PA 19102
Tel: 215-985-9177
Fax: 215-985-4169

/s/ Ted E. Trief
Ted E. Trief, Esquire
New York Bar No. 1476662
ttrief@triefandolk.com
Barbara E. Olk, Esquire
New York Bar No. 1459643
bolk@triefandolk.com
TRIEF & OLK
150 E. 58th Street
34th Floor
New York, NY 10155
Tel: 212-486-6060
Fax: 212-317-2946

Plaintiffs' Executive Committee

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-MD-02036-JLK

IN RE: CHECKING ACCOUNT OVERDRAFT LITIGATION

MDL No. 2036

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Robert C. Gilbert
Robert C. Gilbert, Esquire
Florida Bar No. 561861
GROSSMAN ROTH, P.A.
2525 Ponce de Leon Boulevard
Eleventh Floor
Coral Gables, FL 33134
Tel: 305-442-8666
Fax: 305-779-9596