**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: THIRD TRANCHE ACTIONS**

*Duval v. Citizens Financial Group, Inc.*
N.D. Ill. Case No. 1:10-cv-00533
S.D. Fla. Case No. 1:10-cv-21080-JLK

*Daniels v. Citizens Financial Group, Inc.*
D. Mass. Case No. 10-cv-10386
S.D. Fla. Case No. 1:10-cv-22014-JLK

*Blankenship v. RBS Citizens, N.A.*
D.R.I. Case No. 10-cv-02718
S.D. Fla. Case No. 1:10-cv-22942-JLK



## OBJECTIONS OF JOHN HIGHTOWER TO SETTLEMENT

### I. SETTLEMENT CLASSES REQUIRE HEIGHTENED SCRUTINY

The proposed settlement is a "settlement only class," whereby Class Counsel seeks to certify a class for settlement purposes only. Many Circuits Courts recognize "the need for courts to be even more scrupulous than usual in approving settlements where no class has yet been formally certified." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*("G.M.C.")55 F.3d 768, 805 (3d Cir. 1995); *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co. of Chicago*, 834 F. 2d 677, 681 (7th Cir. 1987)("[W]hen class certification is deferred, a more careful scrutiny of the fairness of the settlement is required."); *Weinberger v. Kendrick*, 698 F. 2d 61, 73, (2d. Cir. 1982)("district judges who decide to employ such a procedure are bound to scrutinize the fairness of the settlement agreement with even more than the usual care... Accordingly, we will demand a clearer showing of a

settlement's fairness, reasonableness and adequacy and the propriety of the negotiations leading to it in such cases…") This is because "[p]rior to formal class certification, there is an even greater potential for breach of fiduciary duty owed the class during settlement." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F. 3d 935, 946 (9th Cir. 2011). And "[w]ithout the benefit of more extensive discovery, both sides may underestimate the strength of the plaintiffs' claims." *G.M.* 55 F. 3d at 789.

Pre-class certification settlements demonstrate that class counsel in the interest of a large fee have an "incentive to act earlier than their clients would deem optimal" in this situation. *Id.* at 802. This behavior is backed by many studies which have demonstrated that pre-class certification classes result in a class member receiving substantially less than class members in post-certified classes. See, e.g., The Federal Judicial Center, "An Empirical Study Of Class Actions In Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (Draft)" January 17, 1996. As a result, "such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." *In re Bluetooth* 654 F. 3f at 946 (citing *Hanlon v. Chrysler Corp.*, 150 F. 3d 1011, 1026 (9th Cir. 1998).

## II. CLASS COUNSEL'S FEE REQUEST IS EXCESSIVE

"For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so." *Piambino v. Bailey*, 757 F.2d 1112, 1144 (11th Cir. 1985) (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974) *abrogated by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

Class Counsel seeks an award of $41.25 million of the $137.5 million dollar settlement fund plus costs. This request is unreasonable given the circumstances of this case.

In the Eleventh Circuit, the court is guided by several non-exclusive factors when arriving at a reasonable fee award.[1]

**A. TIME AND LABOR REQUIRED**

Class Counsel thoroughly describes the rigors they've underwent to procure the settlement before this court. But conspicuously omitted from their fee petition or the attached Joint Declaration is a breakdown of the time Class Counsel actually expended on this lawsuit. This omission prevents scrutiny of the windfall Class Counsel now seeks.

A fee award in a class action lawsuit should represent the market rate for legal services. *Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 52 (2d Cir. 2000.) To arrive at a reasonable market rate, the Court *must* take into account the hours reasonably expended on the litigation, otherwise the Court risks awarding exorbitant fee awards to the detriment of the class. *See id.* After all, the purpose of the class action device is to utilize economies of scale. "It is generally not 150 times more difficult to prepare, try and settle a $150 million case than it is to try a $1 million case." *In re NASDAQ Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 486 (S.D.N.Y. 1998). "There is considerable merit to reducing the percentage as the size of the fund increases. In many instances the increase is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." *Id.* See also *In re Infospace Inc.*, 330 F. Supp. 2d 1203, 1210 (W.D. Wash. 2004) ; *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 129 (9th Cir.1994) ("WPPSSS") ("[T]here is no necessary correlation between any particular percentage and a reasonable fee.")

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[1] (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and the length of the professional relationship with the client; and (12) awards in similar cases. *In re Checking Account Overdraft Litig.,* 830 F. Supp. 2d 1330, 1359 (S.D. Fla. 2011)(citing *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 772 (11th Cir. 1991).) Other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action. In most instances, there will also be additional factors unique to a particular case which will be relevant to the district court's consideration. *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 775 (11th Cir. 1991)

By way of illustration, the following table demonstrates the absurd results that could result by such a fee award. Note that in a typical class action settlement where fees are awarded from a common fund, multiples of **1 to 4** are commonly awarded. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (emphasis added)(quoting 3 *Newberg on Class Actions § 14.03* at 14-5.)

| Hours Expended | Hourly Rate | Multiplier Based on Average Hourly Rate of $650 Per Hour |
|---|---|---|
| 2,000 | $20,625 | 31.73 |
| 3,000 | $13,750 | 21.15 |
| 4,000 | $10,312.50 | 15.86 |
| 5,000 | $8,250 | 12.69 |
| 10,000 | $4,125 | 6.34 |
| **15,865** | **$2,600** | **4** |

This table demonstrates why the Ninth Circuit continues to warn that "courts cannot rationally apply a particular percentage…in the abstract, without reference to all the circumstances of the case." *Id. at* 1048 (quoting *WPPSS*, 19 F. 3d at 1297.) Clearly, hours reasonably expended are one of those circumstances which this Court must consider.

As it stands, more diligence is required of this Court before it may dismiss this settlement as fair, adequate and reasonable. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005)( "it is "sensible" for district courts to "cross-check" the percentage fee award against the "lodestar" method."); *In re Bluetooth*, 654 F. 3d at 934-935(same); *In re Goldberger*, 209 F.3d at 50 (same); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 n.42 (5th Cir. 2012) cert. denied, 12-66, 2012 WL 2921869 (U.S. Oct. 1, 2012) (noting that a cross check in the 5th circuit is even more searching than a typical lodestar cross-check in other circuits.) Under these circumstances, such a cross-check is necessary to comply with 11th Circuit precedent and to discharge this Court's duties under Rule 23.

When checking the reasonableness of the fee against the percentage of the fund, "the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50(citing *In re Prudential Ins. Co. Am. Sales Litig.*, 148 F.3d 283, 342 (3d Cir.1998). "Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case (as well as encouraged by the strictures of Rule 11)." *Id.*

**B. THE NOVELTY AND DIFFICULTY OF THE QUESTIONS INVOLVED**

Analyzing this factor in the context of this litigation, this weighs against the requested fee award. Regardless of how novel or difficult *it would have been* to litigate this case on the merits, it didn't happen. This case settled early on. There was minimal motion work on merits of this case. Not unlike all of the other plaintiffs' lawyers who raced to the courthouse to jump in on this action, Class Counsel drafted a complaint. All of the Defendant's defenses were never raised. Class Counsel never faced the results of Defendants rigorous defense on class certification. The difficulty of the questions, then, never manifested as an obstacle.

**C. THE PRECLUSION OF OTHER WORK**

There is not sufficient evidence supporting this factor. Again, Class Counsel has not provided the court with information on the amount of time they actually expended. Without facts indicating that this lawsuit required a time commitment significant enough to preclude other profitable opportunities, the Court must weigh this factor against their fee request.

**D. THE CUSTOMARY FEE**

Class Counsel negotiated a clear sailing agreement, securing the right to an unopposed fee application of 30% of the fund. Not surprisingly, they now seek to recover the entire 30%. In the 11$^{th}$ Circuit, a 20% – 25% fee is generally deemed to be reasonable when a common fund is established. *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1242 (11th Cir. 2011). Class Counsel's requested fee falls outside of the range, subjecting it to the

scrutiny of the *Johnson* twelve-factor analysis. *Id.* Of course, the *Johnson/Camden* analysis is incomplete without any evidence of the time expended on the litigation.

## III. CLASS COUNSEL IMPERMISSIBLY SEEKS DISCOVERY FROM UNNAMED CLASS MEMBERS

According to the Notice and Order Preliminarily Approving Class Action Settlement, for an objection to be considered by the Court, the objection must also set forth:

a. the name of MDL 2036;

b. the objector's full name, address and telephone number;

c. an explanation of the basis upon which the objector claims to be a Settlement Class Member;

d. all grounds for the objection, accompanied by any legal support for the objection known to the objector or his or her counsel;

e. the number of times in which the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which the objector has made such objection and a copy of any orders or opinions related to or ruling upon the objector's prior such objections that were issued by the trial and appellate courts in each listed case;

f. the identity of all counsel who represent the objector, including any former or current counsel who may be entitled to compensation for any reason related to the objection to the Settlement or fee application;

g. the number of times in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which counsel or the law firm has made such objection and a copy of any orders related to or ruling upon counsel's or the firm's prior such objections that were issued by the trial and appellate courts in each listed case;

h. any and all agreements that relate to the objection or the process of objecting - whether written or verbal - between objector or objector's counsel and any other person or entity;

i. the identity of all counsel representing the objector who will appear at the Final Approval Hearing;

j. list of all persons who will be called to testify at the Final Approval Hearing in support of the objection;

k. a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing; and

l. the objector's signature (an attorney's signature is not sufficient).

This litany of requirements far exceeds the procedures drawn out by Rule 23, which states, "Any class member may object to the proposal if it requires court approval under this subdivision (e)." Class Counsel seeks to expand the requirements of Rule 23 and require any Class Member willing to object to submit to harassing, irrelevant and burdensome discovery.

## A. CLASS COUNSEL MUST SEEK A COURT ORDER UPON A SHOWING OF GOOD CAUSE BEFORE SEEKING DISCOVERY FROM SILENT CLASS MEMBERS

Discovery from an unnamed Class Member is not an absolute right. *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1005 (7th Cir. 1971). In fact, discovery from unnamed individual class members is not usually permitted. *See Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1556 (11th Cir. 1986); see also *On the House Syndication, Inc. v. Fed. Exp. Corp.*, 203 F.R.D. 452, 455 (S.D. Cal. 2001); see also *In re Worlds of Wonder Sec. Litig.*, C-87-5491 SC (FSL), 1992 WL 330411 (N.D. Cal. July 9, 1992) ("absent class members are not parties and separate discovery of individual class members not representatives is ordinarily not permitted"); see also *McPhail v. First Command Fin. Planning, Inc.*, 251 F.R.D. 514, 517 (S.D. Cal. 2008)(citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) ("[A]n absent class-action plaintiff is not required to do anything").

The party seeking the discovery must seek a court order from the trial judge who may only grant the discovery request that they have demonstrated a "particularized need to obtain information." *In re Carbon Dioxide Indus. Antitrust Litig.*, 155 F.R.D. 209, 212 (M.D. Fla. 1993) The risk in authorizing discovery from unnamed class members is that compelling their participation in burdensome discovery proceedings will dissuade participation and reduce class size. *Cox*, 768 F. 2d at 1556. For this reason, the burden is on the party seeking discovery to prove its propriety. *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340 (7th Cir. 1974). And, discovery should only be permitted in "special circumstances." *Bruhl v. Price Waterhousecoopers Int'l*, 03-23044-CIV, 2010 WL 5090207 (S.D. Fla. Dec. 8, 2010).

Class Members who search through Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement looking for any showing whatsoever of the requisite 'particularized need' for discovery will have done so without effect. There is no showing, and without it, the discovery cannot be permitted. Likewise, this Court has not made the proper findings to allow such discovery.

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