UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 09-MD-02036-JLK

IN RE: CHECKING ACCOUNT OVERDRAFT LITIGATION

MDL No. 2036

THIS DOCUMENT RELATES TO: FOURTH TRANCHE ACTION

Wolfgeher v. Commerce Bank, N.A.
S.D. FL Case No. 1:10-cv-22017-JLK
W.D. MO Case No. 4:10-cv-00328-ODS

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

After more than two years of hard-fought litigation, Class Counsel negotiated the Settlement Agreement and Release ("Settlement" or "Agreement") with Defendant Commerce Bank, N.A. ("Commerce" or "Bank").[1] The Settlement – with a reliably-estimated value of $23.2 million, consists of $18.3 million in cash plus Commerce's change in its posting order for Debit Card Transactions to a Chronological Posting Order that will result in savings to Settlement Class Members of approximately $4.9 million over a two (2) year period – is an outstanding achievement that will provide immediate benefits to more than 393,000 Settlement Class Members without further risks, delays and costs.

[1] All capitalized defined terms have the same meanings ascribed in the Settlement Agreement and Release attached as Exhibit A to Plaintiffs' and Class Counsel's Motion for Final Approval of Settlement, and Application for Service Awards, Attorneys' Fees and Expenses (DE # 3190).

The overwhelming majority of Settlement Class Members do not have to do anything to receive the benefits provided by the Settlement; they will receive their settlement consideration through automatic account credits or by checks. A small minority of Settlement Class Members (who opened their Accounts in Illinois from April 6, 2000 through December 31, 2002), for whom Commerce does not have reasonably accessible data to permit Settlement Class Counsel's expert to identify them or to automatically calculate their damages pursuant to the allocation formula set forth in the Agreement, have the opportunity to file Claims seeking a distribution from the Settlement Fund under the same allocation formula being used for their fellow Settlement Class Members.[2]

Approximately 393,000 Settlement Class Members received direct mail Notice of the Settlement. The Notice approved by the Court used plain language to inform Settlement Class Members about, *inter alia*: (1) the terms of the Settlement; (2) the choices available to them – exclude themselves, object, or participate in the Settlement – including applicable deadlines and how to exercise those options; and (3) the Final Approval Hearing.

I. OVERVIEW OF THE OBJECTIONS

Out of more than 393,000 Settlement Class Members, only one (1) objection to the Settlement was timely submitted by or on behalf of individuals purporting to be Settlement Class Members. (DE # 3247). That objection was filed by lawyers who have made a career out of objecting to class action settlements. 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.

[2] The small minority of Settlement Class Members who opened their Accounts in Illinois between April 6, 2000 and December 31, 2002 (the "Claims Period") will also receive automatic distributions from the Settlement Fund if they experienced Positive Differential Overdraft Fees during the Class Period outside of the Claims Period. *See* Agreement ¶ 82.

One objection out of over 393,000 Settlement Class Members is particularly telling.[3] It evidences overwhelming support for Plaintiffs' and Class Counsel's Motion for Final Approval of the Settlement, and Application for Service Awards, Attorneys' Fees and Expenses.[4] This extraordinarily "low percentage of objections points to the reasonableness of a proposed settlement and supports its approval." *Lipuma v. American Express Co.*, 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005).

The sole objection lacks merit. It is procedurally defective and riddled with inaccuracies and misunderstandings of the Settlement. Moreover, it is substantially identical to objections previously filed by the same professional objectors to other MDL 2036 settlements. *The objectors did not even submit an expert affidavit or provide any evidence undermining the conclusions reached by Class Counsel and their nationally recognized experts that (i) this Settlement achieves an outstanding result for the Settlement Class, and (ii) Class Counsel's application for fees is reasonable and justified. See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998) (affirming final approval of nationwide class action settlement where "[t]he objectors presented no evidence" to support their arguments).

For the reasons discussed below, Plaintiffs and Class Counsel respectfully request that the Court (1) overrule the objection; (2) grant Final Approval to the Settlement; (3) approve the request for a Service Award to the Plaintiff; (4) approve Class Counsel's application for attorneys' fees and expenses; and (5) enter Final Judgment dismissing the Action with prejudice.

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[3] The average number of objections to settlements of consumer class actions is 233. In a settlement of this magnitude, the Court should expect to receive approximately 72-90 objections to the Settlement (extrapolating from the average of 4.7 objectors per $1 million in consumer recovery). *See* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529 (2004).

[4] In addition, the extremely low number of requests for exclusion (37 as of February 8, 2013) demonstrates overwhelming support for the Settlement.

II. THE PROFESSIONAL OBJECTION SHOULD BE STRICKEN OR SUMMARILY DENIED

Attorney Steve Miller and his co-counsel filed an objection on behalf of Emmylou Rieffer, Elizabeth Korte (Clements), and Sarah McGraw (the "Rieffer Objection"). (DE # 3247). Mr. Miller and his cohorts are serial objectors who make a living by filing objections to class action settlements. *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 is also known for filing 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); *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).

Mr. Miller and his co-counsel previously filed virtually identical objections to three other MDL 2036 settlements where final approval has been granted. (DE # 2133, 3031, 3032). Additionally, Mr. Miller and his cohorts recently filed yet another virtually identical objection in connection with the settlement with Citizens Financial that is pending final approval before this Court as part of MDL 2036. (DE # 3227).

In addition to its lack of substantive merit, the Rieffer Objection does not even comply with the basic procedural requirements set forth in the Preliminary Approval Order. (DE #

2883). Not surprisingly, the Rieffer Objection fails to provide the information required by paragraphs 68(g)-(k) of the Agreement, including information regarding objections filed by Mr. Miller and his co-counsel in other class action cases. *See* Rieffer Objection at p. 1. (DE # 3247). Thus, the Rieffer Objection is procedurally defective and should be stricken based on the failure to comply with the Preliminary Approval Order.

As this Court and several others have determined, serial objectors such as 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 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 1361 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, 295 n.26 (E.D. Pa. 2003).

Given who is behind this objection, it should be accorded little, if any, weight.

III. THE OBJECTION SHOULD BE OVERRULED ON THE MERITS

A. The Release is Not Overbroad.

Objectors claim that the release provided to Commerce under the Settlement is overbroad. *See* Rieffer Objection at 2-3 (DE # 3247). They are wrong.

The release in the Agreement – which is substantially identical to the form of release contained in all other MDL 2036 settlements approved by this Court – is tailored to this Action and provides, *inter alia*, that in consideration for the benefits provided under the Settlement, Settlement Class Members release Commerce from all claims and causes of action that arose or resulted from the Bank's assessment of Overdraft Fees and/or Debit Re-sequencing and/or or posting order during the Class Period. *See* Agreement ¶ 111 (DE # 3190-1). There is nothing overbroad about this language.

Recognizing the frailty of their argument, objectors "latch on" to the language in paragraph 113 to argue that Commerce is permitted to seek to collect Overdraft Fees from Settlement Class Members that were the subject of this Action and the Settlement. Nonsense. The language is paragraph 113 – which is also substantially identical to language in other MDL 2036 settlements approved by this Court – is intended to make clear that Commerce is not precluded from seeking to collect other amounts, loans or other debts that may be owed by Settlement Class Members. For example, if a Settlement Class Member overdrew his or her account by purchasing a coat for $75 and Commerce paid the $75 to the Settlement Class Member's vendor – but the Settlement Class Member failed to make a deposit to cover the $75 paid out by Commerce – this release does not preclude Commerce from seeking to collect that amount from the Settlement Class Member. Nor should it. Similarly, if a Settlement Class Member has an outstanding auto loan or mortgage with the Bank, this release does not preclude Commerce from collecting amounts owed on such loans.

Objectors' argument is nothing more than a red herring and demonstrates, yet again, why professional objectors like Mr. Miller and his co-counsel play no positive role in class action litigation and contribute no benefit to the Settlement Class.

B. The Residual *Cy Pres* Program is Reasonable and Appropriate.

Objectors claim the Settlement is unfair because it includes a *cy pres* provision relating to disposition of any residual funds that remain one year after all monies have been distributed to Settlement Class Members. *See* Rieffer Objection at 3-5 (DE # 3247). They claim – without any good faith factual or legal support – that Class Counsel and Commerce "want to see funds diverted to cy pres relief." *Id.* Their position is specious and represents a distortion of the applicable provision in the Agreement.

Contrary to the objectors' suggestion, 100% of the Net Settlement Fund (defined in paragraph 94 of the Agreement) will be distributed to Settlement Class Members who had a Positive Differential Overdraft Fee and did not timely opt out, and to Settlement Class Members whose Claims are approved by the Settlement Administrator. *See* Agreement ¶ 93. There are no funds being "held back" or "reserved" for purposes of a *cy pres* distribution.

Distributions to Settlement Class Members who are Current Account Holders will generally be made through automatic credits to their Accounts. *See* Agreement ¶ 99. Thus, there should be no residual funds remaining from the portion of the Net Settlement Fund automatically credited to the Accounts of Current Account Holders. The Agreement also provides that checks will be mailed to certain Current Account Holders where it is not feasible to credit their Accounts, and to Past Account Holders (who, by definition, no longer have Accounts with Commerce). *See* Agreement ¶¶ 99, 101. To address the fact that some checks sent by mail will be returned as undeliverable, the Agreement provides that the Settlement Administrator will make reasonable efforts to locate the proper address for any intended recipients whose checks are returned and will re-mail the checks to new addresses. *Id.*

Based on the distribution of the entire Net Settlement Fund to Settlement Class Members, it is highly unlikely there will be any significant residual amounts. Whatever amount remains a year and thirty days after the Settlement Fund Payments have been distributed should be limited to: (i) Settlement Class Members who received checks but failed to deposit or cash them within 180 days; and (ii) Past Account Holders for whom the Settlement Administrator was unable to locate updated mailing addresses for purposes of re-mailing their checks after they were initially returned as undeliverable. *See* Agreement ¶¶ 99, 101, 102.

Given the reasonably anticipated small residual monies remaining in the Settlement Fund a year after the Settlement Fund Payments have been distributed, it will not be economically viable to make a second round of distributions to over 393,000 Settlement Class Members. For that reason, the Parties agreed to distribute any leftover monies as follows: first, to pay any third parties (e.g., the Settlement Administrator) for unpaid costs related to Settlement Administration and Notice Administration that are not otherwise payable by Commerce under the Agreement; second, to Commerce to reimburse it for the actual amounts it paid to the Notice Administrator and Settlement Administrator for the costs of Class Notice and Settlement Administration; and third, any remaining funds shall be distributed through a residual *cy pres* program, to be agreed upon by Settlement Counsel and Commerce and approved by the Court, for the purpose of benefitting consumer financial literacy education and/or to educate consumers with financial issues through advisory and related services (excluding litigation). *See* Agreement ¶ 103.

Based on the provision regarding disposition of any leftover monies a year after distribution of the entire Net Settlement Fund to Settlement Class Members, it is highly unlikely that "remaining funds" will even be available for distribution through the residual *cy pres* program. Assuming any such funds remain (after satisfying the first and second levels of

distribution required under paragraph 103), it is perfectly appropriate to provide for their distribution through a residual *cy pres* program to third parties to be used for a purpose related to the class' injury. *See In re Baby Products Antitrust Litig.*, 2013 WL 599662, at *4 (3d Cir. Feb. 19, 2013); *Lane v. Facebook, Inc.*, 696 F. 3d 811, 819-20 (9th Cir. 2012); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F. 3d 24, 33-36 (1st Cir. 2009); *see also* 4 Herbert B. Newberg et al., Newberg on Class Actions § 11:20 (4th ed. 2012). Indeed, this Court recently approved a similar residual *cy pres* provision in another MDL 2036 settlement. (DE # 3134).

Objectors also claim that any residual *cy pres* distribution to "benefit consumer financial literacy education" does not satisfy any of the objectives sought in this litigation and, further, will benefit Commerce by "funneling funds into programs that will aid it in squeezing more money out of consumers." *See* Rieffer Objection at p. 4-5 (DE # 3247). Both assertions are lacking in factual or legal support. The Agreement clearly adheres to the principle that a *cy pres* award be related to the purpose of the litigation. Organizations that "benefit consumer financial literacy education" and "educate and assist consumers with financial services issues through advisory and related services" are clearly related to the underlying class' injury at issue in the litigation. Moreover, this Court will have the final say in approving or rejecting the proposed recipients of the residual *cy pres* awards. *See* Agreement ¶ 103(c). If the Court does not believe the proposed distribution to any recipient is sufficiently related to the underlying class' injury at issue in this Action, this Court will undoubtedly reject the proposed distribution.

C. The Settlement is Fair, Adequate and Reasonable.

Objectors assert that the Settlement is unfair because it does not provide a floor or a ceiling on the amounts that Settlement Class Members will receive as payments from the Net Settlement Fund. *See* Rieffer Objection at 5-6 (DE # 3247). The unsubstantiated statement by

objectors that "the amount ultimately paid will be trifling compared to the harm suffered to the class members" is contrary to the sworn declaration of a nationally recognized expert on class actions who opined that the Settlement is fair, adequate and reasonable, in large part, because it results in a recovery of 57% of the Settlement Class Members' most likely recovery *if* the Action were to successfully proceed to trial and be affirmed on appeal. *See* Declaration of Professor Brian Fitzpatrick ¶¶ 8-16 (DE # 3214-1). According to Professor Fitzpatrick, the level of recovery achieved through this Settlement is "unusually successful" in light of the risks and expense of continued class action litigation. *See* Fitzpatrick Declaration ¶ 10 (DE # 3214-1).

D. The Settlement Does Not Allow Commerce to Engage in Continued High-to-Low Posting.

Objectors argue that the Settlement is not fair because it only requires Commerce to cease the challenged High-to-Low Posting practice for a minimum of two years. *See* Rieffer Objection at 6 (DE # 3247). According to objectors, upon the expiration of the minimum two year period, "it's back to business as usual…" *Id*. Not true.

First, there has been no finding by this Court that the challenged High-to-Low Posting practice is unlawful. Commerce – and every other defendant bank in MDL 2036 and related cases brought elsewhere – has consistently argued that it was entirely permissible for it to engage in the challenged High-to-Low Posting practice at issue in this Action. Moreover, Commerce – and nearly every other bank named as a defendant in MDL 2036 – has consistently argued that the claims challenging its High-to-Low Posting practice in this Action are preempted under the National Bank Act. *See Gutierrez v. Wells Fargo Bank, N.A.*, 704 F. 3d 712 (9th Cir. 2012) (finding claims brought under California's Unfair Competition Law preempted by the National Bank Act). Indeed, in entering into the Settlement, Commerce continued to expressly dispute its liability for the claims brought against it in this Action. *See* Agreement ¶ 123 (DE # 3190-1). In

light of its position that the challenged High-to-Low Posting practice is not improper or unlawful, the Bank's agreement to discontinue the High-to-Low Posting practice for a minimum of two (2) years is quite significant. In essence, the Bank agreed to do that which it continues to claim is lawful and permissible under applicable law.

Second, objectors fail to acknowledge that the ability of Commerce – and every other national bank – to continue the challenged High-to-Low Posting practice at issue in this Action was significantly altered by the federal government's implementation of Regulation E in mid-2010. Pursuant to Regulation E, Commerce and other banks that continue to provide overdraft protection to their customers were required to obtain the express authorization of their customers to be enrolled in such programs. Failing a customer's decision to "opt-in" to overdraft protection, Commerce and other banks are prohibited from providing overdraft protection for Debit Card Transactions, thus preventing the cascade of Overdraft Fees resulting from High-to-Low Posting at issue in this Action.

Commerce's agreement to cease its High-to-Low Posting practice for a minimum of two years, coupled with the restrictions imposed under Regulation E, is an "important change" that "will create real value" for Settlement Class Members, resulting in approximately $4.9 million in savings. *See* Fitzpatrick Declaration ¶ 6 (DE # 3214-1).

E. A Fee of Thirty Percent of the $23.2 Million Common Fund Is Reasonable.

Without support, objectors argue that the requested thirty percent (30%) fee award based on the $23.2 million common fund created through this Settlement is out of line with percentages awarded in other cases. *See* Rieffer Objection at pp. 7-10 (DE # 3247). They are incorrect.

Judge Thomas E. Scott (Ret.) and Professor Fitzpatrick provided detailed factual and legal bases supporting their opinions that a fee award of thirty percent (30%) of the $23.2 million

common fund is appropriate in this Action. *See* Declaration of Thomas E. Scott ¶¶ 9-25 (DE # 3190-6); Fitzpatrick Decl. ¶¶ 17-26 (DE # 3214-1). In the words of Judge Scott (Ret.), Class Counsel's fee request of thirty percent (30%) of the $23.2 common fund is "reasonable and justified. Class Counsel undertook an incredibly risky and undesirable case, and through their diligence, perseverance and skill, obtained an outstanding result for the Settlement Class. Class Counsel are to be commended for such an excellent result, and should be compensated in accord with their request because it is warranted and reasonable given similar fee awards." *See* Scott Declaration ¶ 25 (DE # 3190-6). The opinions of Judge Scott and Professor Fitzpatrick stand *unrebutted*, in contrast to the unsupported statements made by the professional objectors.

IV. CONCLUSION

Based on the foregoing, as well as Plaintiffs' and Class Counsel's Motion for Final Settlement Approval, the Court should overrule the objections and grant Final Approval to the Settlement, approve a Service Award for the Plaintiff, approve Class Counsel's application for attorneys' fees and expenses, and enter Final Judgment dismissing the Action with prejudice.

Dated: February 25, 2013.

Respectfully submitted,

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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 February 25, 2013, 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, including all objectors, 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.

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