

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
1:09-md-2036-JLK**

**IN RE: CHECKING ACCOUNT  
OVERDRAFT LITIGATION**

**MDL No. 2036**

**THIS DOCUMENT RELATES TO:  
FOURTH TRANCHE ACTIONS**

*Wolfgeher v. Commerce Bank, NA*  
S.D. Fla. Case No. 1:10-cv-22017-JLK  
W.D. Mo. Case No. 4:10-cv00328-ODS

**OBJECTIONS TO SETTLEMENT AND AWARD OF ATTORNEYS' FEES BY  
CLASS MEMBERS EMMYLOU RIEFFER, ELIZABETH KORTE  
(CLEMENTS), AND SARAH MCGRAW AND INCORPORATED  
MEMORANDUM & NOTICE OF INTENT TO BE HEARD AT FAIRNESS  
HEARING**

COMES NOW, Emmylou Rieffer, St. Louis, Missouri 63116, Elizabeth Korte  
(Clements), Florissant, Missouri 63031; and Sarah McGraw, St. Peters, Missouri 63376,  
by and through their attorneys<sup>1</sup>, and Mr. Steve Miller will appear on behalf of Objectors  
at the fairness hearing, and hereby file their OBJECTIONS TO SETTLEMENT AND  
AWARD OF ATTORNEYS' FEES, objecting to the Stipulated Class Action Settlement

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<sup>1</sup> Home addresses and telephone numbers redacted pursuant to ECF redaction rules but are in the possession of objectors' counsel. None of the objectors have previously objected to any class action settlements. The undersigned attorneys represent the objectors. The Objectors object to the information sought in paragraph 68 of the Settlement Agreement as it is irrelevant and for purposes of harassment only, and that the number of objections filed by counsel of record is irrelevant and prejudicial to Objectors in that it places an improper burden on Objectors' counsel potentially limiting the ability of the objectors to retain the attorney of their choice in violation of the Fifth Amendment's guarantee of due process to those who may be deprived of a property right. Without waiving such objection, the objectors' counsel state that they have filed objections previously.

and application for attorneys' fees by settlement counsel for the following reasons:

**I. The Release is over broad, permitting Defendant to continue to collect funds from class members that is based upon the improper posting of fees to class members accounts that were the stimulus for such litigation.**

Although the class members waive any claims they have during the relevant claim period for the Defendant's improper banking practices (Stlmt Agrmt, Doc # 2879-1, par. 111), they are still subject to collection actions for debts allegedly incurred that directly relate to the improper posting of amounts to class members' accounts which resulted in the increase of the debt, or the establishment of a debt with the Defendant (Doc # 2879-1, par. 113).

Consider the following caveat to the release:

Nothing in this Agreement shall operate or be construed to release any claims or rights Commerce Bank has to recover any past, present or future amounts that may be owed by Plaintiffs or by any Settlement Class Member on his/her accounts, loans or any other debts with Commerce Bank, pursuant to the terms and conditions of such accounts, loans or any other debts.

(Doc# 2879-1, par. 113) (emphasis added). Here, even if the class members receive a credit or a check for their respective prorata share of the Settlement Fund, they are still subject to litigation or a collection action for the underlying debt that accrued as a result of the overdraft payment methodology employed by Defendant that resulted in their account being considered a "debt" by the Defendant.

Nothing prevents the Defendant from bringing an action against a class member to collect on a "debt" owed Defendant that is based in whole, or in part on

the assessment of bogus bank fees associated with the creative posting methods employed by Defendant that led to this suit being filed in the first place.

In essence, Defendant is released from liability from its predatory posting practices, but class members still have to pay the fees that were assessed. This is a “hot button indicator” for this Court, according to the Pocket Guide, for which this Court should evaluate closely and with scrutiny. The Pocket Guide warns:

At times parties have attempted to release a damages remedy without making any correlative payment to class members . . . (Pocket Guide, p. 22, “Hot Button Indicators: 7. Release of liability without remedy.”).

All claims for all class members are released-without regard to whether or not they receive payment, or the amount of payment. And yet the Defendant is permitted to initiate collection actions against these class members. This Court should deny the Settlement or require the parties to fully release each other, particularly as it relates to the overdrawn accounts of the class members.

**II. The Settlement is unfair as the likelihood of unclaimed funds will result in the establishment of a Cy Pres Fund that is unnecessary and does not benefit the Class.**

For reasons that are not disclosed to the Court, class counsel and the Defendant want to see funds diverted to cy pres relief. The only reason funds would be left over, is if the parties contemplate that many class members will not recover any payments- particularly those class members who could not locate their bank records and figure out whether or not they had a claim, or simply neglected to cash their checks, or could not be located.

Residual Cy Pres Distribution provides benefit to non-class members for issues

unrelated to this litigation, and therefore this Court should prohibit such distribution under any circumstances. According to the parties, “The purpose of any residual cy pres distribution shall be to benefit consumer financial literacy education and/or to educate consumers with financial issues through advisory and related services (excluding litigation).” (Stlmt Agrmt., Doc # 2879-1, para. 103(c)). What the parties are really saying here is that funds will be distributed to organizations that will encourage consumers to pay their credit cards instead of file bankruptcy (“educate consumers with financial issues through advisory and related services”).

This Court should prohibit requests for cy pres payments to so-called non-profits which operate to aid consumers in consolidating their consumer debt and restructuring their payments to Defendant. And what exactly is “consumer financial literacy education” anyway? It certainly does not educate consumers on how to avoid predatory banking institutions which violate their rights. Nor does it offer consumers insight into improper banking practices, or how to avoid being victimized by your financial institution. Under the Pocket Guide, this payment benefits Defendants only- and no one else. According to the Pocket Guide, “Cy pres relief must come as close as possible to the objective of the case and the interests of the class members. Question whether the class members might feasibly obtain a personal benefit.” (Pocket Guide, p. 19, Hot Button Indicators- Cy Pres relief (“fluid recovery”).

Obviously, a non-profit that is funded from the remaining proceeds of this settlement that seeks to educate and warn consumers about predatory banking practices would hit on the mark. But instead the parties seek to “benefit consumer financial literacy education”. This is not even close to the objectives sought by class counsel in

their Complaints. Class Counsel seems to have forgotten that “cy pres” means “as near as possible” to the original purpose (Pocket Guide, p. 19). The purpose of the litigation was never “to educate and assist consumers with financial services issues through advisory and related services (excluding litigation)” (Doc # 2879-1, para. 103(c)). Indeed, the fact that the cy pres cannot be established to educate consumers on litigating issues is very telling indeed as to the true motives of the establishment of the cy pres: to benefit the Defendant by funneling funds into programs that will aid it in squeezing more money out of consumers. Therefore, this Court should reject the proposed settlement because the cy pres component is not only unnecessary, but unrelated to the purposes underlying the litigation.

**III. The Settlement is unfair as it does not provide a floor or a ceiling on what a class member will receive as payment.**

Aside from Class Counsel’s firm conviction that it will take 30% of the Settlement Fund as attorneys’ fees, the class members have no additional security or any representations as to the actual cash value per class member or claim that the Settlement will provide. Basically, the parties to this settlement have absolutely no idea what will be paid, despite having made provisions to transfer the leftover settlement funds to class counsel’s and the Defendant’s agreed upon “pet charities.”

Here, given the simple mathematics of the situation, the amount ultimately paid will be trifling compared to the harm suffered to the class members. This does not even take into account the "closed accounts" or those accounts that are still subject to collection actions, and will impair class members credit rating. Because the parties cannot even articulate a dollar amount that a class member would receive, the proposed

settlement should be denied.

**IV. The Settlement is unfair because it does not protect all consumers, and still allows the Defendant to engage in the overdraft practices that were the basis of this litigation.**

What about injunctive relief? How about the Defendant no longer engaging in the overdraft practices that led to the litigation? No. Instead, “. . . Commerce Bank will change the order in which it posts debit card transactions to customer accounts for a minimum period of at least two years. (Settlement Agreement, Doc. #2879-1, para. 105). After two years, consumers are again subject to the same predatory behavior exhibited by the bank that led to this litigation. Then, it’s back to business as usual, allowing Defendant to utilize the same unfair practices that led to this litigation to recover the funds paid by Defendant to settle this matter.

The Pocket Guide warns this Court that it should “Question whether injunctive relief will truly benefit class members in the case at hand.”(Pocket Guide, p. 21., 2010 ed.). But Defendant has not agreed to stop the complained of practices. Instead, Class Members receive some unknown sum of money that class counsel cannot even divulge due to the small size that will be awarded to the class members. This is a “small award” that the Pocket Guide would have this Court avoid considering, with instead the affirmative reliance of meaningful injunctive relief:

In many cases, by putting an end to illegal practices, an injunction will benefit more class members than a small award. It will also avoid clogging the judicial system with the administration of small awards to thousands of class members. Pocket Guide, p. 21-22, 2010 ed.

Would it not be more reassuring and satisfying for the class members that are still bank customers to know that the Defendant will no longer engage in the behavior that led to the filing of these class actions? Of course it would be. Most class members would trade the small award of what is likely to be a few dollars for the reassurance that this outrageous banking practice is extinguished, along with the reassurance that the Defendant did not have the right to collect on any of the "debts" accrued by class members as a result of the Bank's predatory posting practices.

**V. The Settlement is unfair because the attorneys' fees demanded in this case are excessive when compared to the benefit received by the class members.**

The Pocket Guide advises the court that a "hot button indicator" that a settlement is unfair exists when there is "an imbalance between the cash value of the settlement to the class as a whole and the agreed amount of attorney's fees is a prime indicator of collusion by settling attorneys." (Pocket Guide "Reverse Auctions" and the like" 2010 ed. p. 20. Collusion:). This case appears to be nothing more than one of collusion between Class Counsel and Defendant to pay an exorbitant fee in exchange for leaving class members with nothing more than the promise of some remuneration, meager that it will be, while protecting the Defendants from suit and damages, permitting the Defendant to collect on its "debt" incurred by the predatory banking practices.

The Pocket Guide warns judges to be vigilant regarding Class Counsel who seek fees for what is nothing more than settlement of the case at hand, evidencing collusion or a "Reverse Auction" among the parties:

A typical element of a reverse auction is a promise to pay attorneys more than a reasonable value for the time they invested in negotiating the settlement. Generally, the overpayment of the attorneys originates in an underpayment of what the class should

receive based on an objective assessment of the merits of the class claims. (Pocket Guide, p. 21).

Here, "Commerce Bank agrees not to oppose Class Counsel's request for attorneys' fees of up to 30% of the Settlement Fund . . ." (Stlmt Agrmt, Doc # 2879-1, par. 114). The Pocket Guide cautions the judiciary to be wary of settlement where there is an "underpayment" of what the class should receive. And class counsel cannot articulate just what dollar amount, if any, the class members will receive – at minimum. Under these circumstances, the settlement should not be approved.

**VII. The Settlement is unfair in that Defendants' have agreed to not oppose the attorneys' fees requested in this settlement.**

As discussed above, Commerce Bank will not object to any fee application of up to 30%. Furthermore, regardless of the expenses presented, the Defendant agrees to sit idle and permit such reimbursement. This "Clear Sailing Provision" or "Red Carpet Treatment" is further evidence of the unfairness of the proposed settlement, that does nothing more than guarantee that class counsel receives 30% of the "Settlement Fund" while the class gets a shot at a credit to their account, or perhaps a check in the mail, while they sit on their hands watching millions of dollars paid over to the pet non-profit(s) pursuant to a nebulous cy pres provision.

**VIII. The Settlement is unfair as the requested attorneys' fees are not based upon any realistic calculation of the value of the settlement provided to the class members.**

Class Counsel has no idea what amount of money class members will receive as payment. Therefore, this Court should refrain from entertaining, or considering any



application for attorneys' fees until this Court has reviewed the claims data, showing the Court what exactly each claimant is receiving. The Pocket Guide also warns the judiciary to be leery of settlements that are presented without corresponding claims data, and advises that the recovery of class counsel should be based upon a percentage of the claims actually made:

Your appraisal of the settlement should focus on the value actually distributed to the class-based on the number and percentage of class members who have filed a claim. . . . Because there is no clear standard for predicting class response rates, consider calculating any attorney fee award as a percentage of the amount of the settlement fund that has already been distributed to claimants-even if that means deferring final determination of all or part of the fee award until the claims process is complete. (Pocket Guide, p. 16, 2010 ed).

In essence, this Court should not rubber stamp a fee application submitted by class counsel, but instead force class counsel to disclose how many class members will actually benefit, and the amount of money those class members will receive- and then determine the appropriateness of the fee application. It is proper for courts to review the actual claims made and the amount paid before calculating an attorney's fee award. *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561 (E.D. Pa. 2001); accord, *Sylvester v. CIGNA Corp.*, 369 F.Supp. 2d 34, 50-53 (D. Me. 2005). Not surprisingly, the claims administrator is not under any obligation to provide this Court with any claims data. This is suspect according to the Pocket Guide, as the best manner of determining the appropriateness of the attorneys' fee sought is to review the actual relief provided to the class members. And since at this stage of the proceedings that actual relief provided is unknown, this Court should withhold its review of the attorneys' fee application until the claims data is provided to this Court.

WHEREFORE, Objectors hereby pray that this Court deny the proposed

Settlement stipulated into between the parties and enter the following additional relief:

- (1) An Order overruling Class Counsels' application for attorney's fees of 30% of the Settlement Fund, and imposing an order that Class Counsel will receive a fee that reflects the value of the settlement provided to the class members;
- (2) In the alternative, an Order compelling Class Counsel to submit their time records to this Court to determine what hours of work performed are compensable, as time devoted to settlement is not factored into the lodestar or the percentage of the fund method;
- (3) An Order withholding the calculation of the attorney's fees until this Court makes a determination of the number of claims actually submitted and paid, and the value of each claim;
- (4) An Order denying the cy pres relief, or in the alternative, and Order that such funds be directed to a non-profit that has the purpose of educating and advising consumers on improper banking practices;
- (5) An Order requiring that the releases in this case be mutual- in that the Defendant is not permitted to undertake any collection efforts or file suit based upon any delinquent accounts that were the result of its overdraft practices;
- (6) Any further relief necessary within the premises based upon the objections set forth above and herein.

**OBJECTOR SIGNATURES ARE ATTACHED**

Dated: February 8, 2013

Respectfully submitted,

s/Steve A. Miller  
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Attorney for Objectors

**CERTIFICATE OF SERVICE**

I hereby certify that on the 8th day of February, 2013, I have filed and served via ECF Filing using the USDC SD FL ECF Electronic Filing System a true and correct copy of the foregoing and in addition have mailed a copy via the United States mail, First Class Postage Prepaid to the following:

Jeffrey M. Ostrow  
Kopelowitz Ostrow P.A.  
200 SW 1st Avenue  
Suite. 1200  
Fort Lauderdale, FL 33301

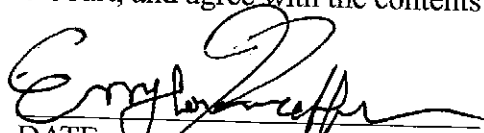
Todd W. Ruskamp  
Shook, Hardy & Bacon, L.L.P.  
2555 Grand Blvd.  
Kansas City, MO 64108

Commerce Bank Overdraft  
Settlement  
P.O. Box 3775  
Portland, OR 97208-3775

Robert C. Gilbert  
Grossman Roth, P.A.  
2525 Ponce de Leon Boulevard  
Suite 1150  
Miami, FL 33134

s/Steve A. Miller  
Steve A. Miller

I affix my signature below as required by this Court, and agree with the contents of this Objection filed on my behalf.

  
DATE: 2-8-13



8000 Forsyth Blvd  
Clayton MO 63105-1707

Emmylou Rieffer

Primary Account Number: [REDACTED]  
Statement Date:  
Page Number:

November 21, 2011  
5 of 6

**Withdrawals & Other Debits** Account # [REDACTED] (Cont.)

Description	Date Paid	Amount
Inst Xfer Paypal Trace No: 091000014303710	11-14	35.00
Service Charge	11-21	7.00
<b>Total Withdrawals &amp; Other Debits</b>		<b>\$253.15</b>

Ref Nbr: 1318002308879

**Checks Paid** Account # [REDACTED]

Date Paid	Check Number	Amount	Reference Number
11-02	1004	100.00	200094525

**Total Checks Paid**

**\$100.00**

	Total for this period	Total year-to-date
Total Overdraft Fees.....	\$0.00	\$35.00
Total Returned Items Fees.....	\$0.00	\$0.00





EMMYLOU RIEFFER

\*\*N0001368

Commerce Bank  
1000 Walnut  
Kansas City, MO 64105

SAINT LOUIS MO 63116-1814

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NOTICE OF INSUFFICIENT FUNDS

ACCOUNT: [REDACTED]

On 06/14/2011, 1 item(s) totaling \$320.00 were presented for payment. The item(s) listed were paid or returned, as indicated below. Handling fees totaling \$33.00 were charged to your account. We appreciate your prompt attention to this matter. Should you have any questions, please call our Customer Care Center at 1-800-453-2265 or stop by your nearest Commerce Bank branch.

AMOUNT	CHECK-NUMBER	STATUS	AMOUNT	CHECK-NUMBER	STATUS
\$320.00	0000001078	PAID			





EMMYLOU RIEFFER

\*\*N0001039

SAINT LOUIS MO 63116-1814

Commerce Bank, N.A.  
1000 Walnut  
Kansas City, MO 64105

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NOTICE OF INSUFFICIENT FUNDS

ACCOUNT: [REDACTED]

On 12/15/2010, 1 item(s) totaling \$69.00 were presented for payment. The item(s) listed were paid or returned, as indicated below. Handling fees totaling \$33.00 were charged to your account. We appreciate your prompt attention to this matter. Should you have any questions, please call our Customer Care Center at 1-800-453-2265 or stop by your nearest Commerce Bank branch.

AMOUNT	CHECK-NUMBER	STATUS	AMOUNT	CHECK-NUMBER	STATUS
\$69.00	0000000000	PAID			



I affix my signature below as required by this Court, and agree with the contents of this Objection filed on my behalf.

A handwritten signature in blue ink, appearing to read "Elizabeth R. Harte", written over a horizontal line.

DATE:

I affix my signature below as required by this Court, and agree with the contents of this Objection filed on my behalf.

Sarah McGraw

DATE: