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 ACTIONS

Casayuran, et al. v. PNC Bank, N.A.
D.N.J. Case No. 2:09-5155
S.D. Fla. Case No. 10-cv-20496-JLK

Cowen, et al. v. PNC Bank, N.A.
S.D. Fla. Case No. 10-cv-21869-JLK

Hernandez, et al. v. PNC Bank, N.A.
S.D. Fla. Case No. 10-cv-21868-JLK

PLAINTIFFS' AND CLASS COUNSEL'S RESPONSE TO OBJECTIONS TO MOTION FOR FINAL APPROVAL OF SETTLEMENT AND 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 PNC Bank, N.A. ("PNC" or the "Bank").[1] The Settlement – which consists of a cash Settlement Fund in the amount of $90,000,000, PNC's payment of all fees and costs associated with the Notice Program and administration of the Settlement, and the Bank's change of the order in which it posts Debit

[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 # 3350-1).

Card Transactions from highest-to-lowest dollar amount to time-ordered posting based on the date and time stamp information provided to PNC – is an outstanding achievement that will provide immediate benefits to the Settlement Class Members without further risks, delays and costs. 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 (current customers) or by checks (former customers). A small minority of Settlement Class Members, for whom PNC does not have reasonably accessible electronic data to permit Settlement Class Counsel's expert to identify them and/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 under the same allocation formula being used for their fellow Settlement Class Members. Approximately one million 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 approximately one million Settlement Class Members, four (4) objections to the Settlement were timely submitted by or on behalf of individuals purporting to be Settlement Class Members. (DE # 3328, 3425, 3428, 3440). Three (3) of the objections were filed by lawyers who have made a career out of objecting to class action settlements. (DE # 3425, 3428, 3440). 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. The fourth objection was filed by *pro se* individuals (DE # 3328).

Four objections out of nearly one million Settlement Class Members is particularly telling.[2] 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 ("Motion").[3] 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).

All of the objections lack merit. The purported Settlement Class Members named in one of the objections (DE # 3425) are not even members of the Settlement Class and, therefore, do not have standing to object to the Settlement. The other three objections (DE # 3328, 3428, 3440) are riddled with inaccuracies and/or misunderstandings of the Settlement and basic class action jurisprudence. *Not a single objector submitted an expert affidavit or provided any evidence undermining the conclusions reached by Settlement 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*. *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).

[2] 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 423 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).

[3] In addition, the extremely low number of requests for exclusion (42 as of March 19, 2013) demonstrates overwhelming support for the Settlement.

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

II. THE PROFESSIONAL OBJECTIONS SHOULD BE STRICKEN OR SUMMARILY DENIED

Attorney Steve Miller and his co-counsel filed an objection on behalf of Janice Pastolic, Shawn M. Pastolic and Jill L. Fry ("Pastolic Objection"). (DE # 3425). Mr. Miller and his co-counsel are serial objectors who make a living filing objections to class action settlements, including filing virtually identical objections to a number of other MDL 2036 settlements. (DE # 2133, 3031, 3032, 3227, 3247). *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); *Nakash v. nVidia Corp.*, No. 08-cv-04312-JW, DE # 325 (N.D. Cal. Jan. 14, 2011).

The Pastolic Objection is fatally deficient. The electronic database maintained by the Settlement Administrator does not contain the names of the three individuals identified in the Pastolic Objection – Janice Pastolic,[4] Shawn M. Pastolic and Jill L. Fry – which means that these individuals were not identified by Settlement Class Counsel's expert as current or former PNC

[4] The database contains the name Janice Patsolic (not Pastolic), but this individual is not listed as residing in Reminderville, Ohio, 44202, as indicated on page 1 of the Pastolic Objection.

Account holders who, during the Class Period, sustained Differential Overdraft Fees based on the detailed formula set forth in paragraph 92 of the Agreement, and were not sent direct notice of the Settlement.[5] *See* Declaration of Robert Oseas Regarding Objections to Settlement ¶ 3(a) attached as Exhibit A ("Oseas Declaration"). Therefore, the three individuals identified in the Pastolic Objection as purported Settlement Class Members are *not* members of the Settlement Class, and do *not* have standing to object to the Settlement. Accordingly, the Pastolic Objection should be dismissed or stricken in its entirety.

A second objection was filed by attorney Patrick Sweeney, on behalf of Ryan Wantz and David Curtis (the "Wantz Objection"). (DE # 3440). Like Messrs. Miller, Mr. Sweeney is another serial objector who filed objections to a number of the settlements previously approved in MDL 2036. (See, e.g., DE # 3082). David Curtis, one of the two individuals identified in the Wantz Objection as a purported Settlement Class Member, is also *not* a member of the Settlement Class and, therefore, does *not* have standing to object to the Settlement.[6] *See* Oseas Declaration ¶ 3(b).

A third objection was filed by attorney Brian M. Silverio, on behalf of Dorothy J. Butts, Barbara Ernsberger and Estate of Ruth E. Ernsberger (the "Butts Objection"). (DE # 3428). Mr. Silverio is another serial objector who filed objections to a number of settlements previously

[5] Had these objectors provided the information required of all objectors under paragraph 34(iii) of the Preliminary Approval Order (DE # 3151) (an explanation of the basis upon which the objectors claim to be Settlement Class Members), it would have revealed that they are not members of the Settlement Class and do not have standing to participate in or object to the Settlement. Instead, they refused to provide such basic information. *See* Pastolic Objection at n. 1. (DE # 3425). The Pastolic Objection should be stricken based on the failure to comply with the Preliminary Approval Order.

[6] If the Wantz Objection had provided the information required of all objectors under paragraph 34(iii) of the Preliminary Approval Order (DE # 3151) (an explanation of the basis upon which the objectors claim to be Settlement Class Members), it would have revealed that Mr. Curtis is not a member of the Settlement Class and does not have standing to participate in or object to the Settlement. Instead, like the Pastolic Objection, these objectors refused to provide such basic information. *See* Wantz Objection at pp. 3-6. (DE # 3440). The Wantz Objection should be stricken based on the failure to comply with the Preliminary Approval Order.

approved in MDL 2036. (DE # 1922, 3030, 3196). Like Messrs. Miller and Sweeney, Mr. Silverio is attempting to exact a fee in exchange for the withdrawal of his objection.

As this Court and several others have determined, serial objectors such as Messrs. Miller, Sweeney and Silverio, 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).

III. THE OBJECTIONS SHOULD BE OVERRULED ON THE MERITS[7]

A. The Objection to the Residual *Cy Pres* Program is Moot.

The Wantz Objection claims that the residual *cy pres* program set forth in paragraph 118 of the Agreement is not adequately defined because it does not identify the ultimate recipients of residual funds that remain after distributions have been made to Settlement Class Members. *See* Wantz Objection at pp. 1-2 (DE #3440). The Wantz Objection does *not* object to the use of a

[7] Plaintiffs and Class Counsel do not address the "merits" of the Pastolic Objection based on these objectors' *prima facie* lack of standing. In the event any or all of these objectors properly establish their membership in the Settlement Class, Plaintiffs and Class Counsel will file a supplemental response addressing their objections to the Settlement.

residual *cy pres* program but, rather, only to the fact that the ultimate recipients of such residual funds are not identified at this stage of the proceedings.

This objection is moot based on the Court's recent Orders entered in connection with other MDL 2036 settlements addressing the issue of distribution of any residual settlement funds. As indicated in the Joint Motion to Reschedule Final Approval Hearing and Reset Deadline to Respond to Objections (DE # 3454), the Parties are working cooperatively to draft an Amendment to the Settlement addressing the issue of distribution of any residual settlement funds that will replace the residual *cy pres* provision currently set forth in paragraph 118 of the Agreement.

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

Without evidentiary support, some objectors argue that the requested thirty percent fee award of the $90 million common fund created through this Settlement is out of line with percentages awarded in other cases. *See* Butts Objection (DE # 3428); Wantz Objection at pp.2-3 (DE # 3440). They are incorrect.

Professor Fitzpatrick and Judge Thomas E. Scott (Ret.) provided detailed factual and legal bases supporting their opinions that, given the complex legal and factual issues addressed in his case, a fee award of thirty percent of the $90 million common fund is reasonable and well justified. *See* Declaration of Professor Brian Fitzpatrick ¶¶ 17-28 ("Fitzpatrick Decl.") (DE # 3350-3); Declaration of Thomas E. Scott ¶¶ 10-25 ("Scott Decl.") (DE # 3350-6). The opinions of Professor Fitzpatrick and Judge Scott are *unrebutted*.

Moreover, contrary to the Butz Objection, Professor Fitzpatrick opined that when fee awards are examined scientifically, it becomes apparent that a thirty percent fee award on the $90 million common fund in this case is consistent with fee awards by District Courts in the

Eleventh Circuit, where the average fee awarded was 28.1% and median fee awarded was 30%. *See* Fitzpatrick Decl. ¶¶ 22, 24 (DE # 3350-3). Professor Fitzpatrick also concluded that a thirty percent fee award in this case is consistent with the results in: (i) other checking account overdraft fee cases (within MDL 2036 and elsewhere); (ii) fee awards in other District Courts in the Eleventh Circuit; and (iii) the results of several studies conducted by scholars. *Id*. at ¶¶ 22-25.

Judge Scott reached the same conclusion – a thirty percent fee award on the $90 million common fund in this case is well justified. *See* Scott Declaration ¶¶ 10, 26. (DE # 3350-6). Applying the relevant *Camden I* factors, Judge Scott offered great detail and concluded that these factors "strongly support[s]" the requested thirty percent fee award in this case. *Id*. at ¶¶ 13-24.

The position espoused by these objectors is also undermined by *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), where U.S. District Judge Alan Gold held 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 better outcome for the class, the sliding scale approach creates the perverse incentive for Class Counsel to settle too early for too little.

Id. at 1213 (emphasis added) (citation omitted); *see also Williams v. General Elec. Capital Auto Lease*, 1995 WL 765266, at *10 (N.D. Ill. Dec. 16, 1995) ("Without significant counsel fees to encourage the pursuit of these claims, the public policy to induce compliance with the law would be disserved.").

The same objectors also contend that it would be unreasonable for the Court to award Class Counsel a fee without first considering and checking their lodestar. *See* Butts Objection at pp. 4-6 (DE # 3428); Wantz Objection at p. 3 (DE # 3440). This position is at odds with the law of this Circuit and this Court's established practice in prior MDL 2036 settlements.

In *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991), the Eleventh Circuit held that district courts should award fees in class actions using the percentage-of-the-fund method, rather than the lodestar method. Although some district courts in the Eleventh Circuit "crosscheck" these fee percentages with class counsel's lodestar, many others do not (including this Court in the previously approved MDL 2036 settlements). *See, e.g., David v. Am. Suzuki Motor Corp.*, 2010 WL 1628362 (S.D. Fla., Apr. 15, 2010); *Noell v. Suncruz Casinos*, 2009 WL 541329 (M.D. Fla., Mar. 4, 2009); *Stahl v. MasTec, Inc.*, 2008 WL 2267469 (M.D. Fla., May 20, 2008); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006); *In re: Managed Care Litig., Class Plaintiffs v. Aetna Inc., and Aetna – US*, 2003 WL 22850070 (S.D. Fla., Oct. 24, 2003); *Fabricant v. Sears Roebuck & Co.*, 2002 WL 34477904 (S.D. Fla., Sept. 18, 2002).

The Eleventh Circuit has never held that district courts abuse their discretion by choosing not to employ a "lodestar crosscheck." As Professor Fitzpatrick and other scholars have explained, the lodestar crosscheck can effectively cap the amount of compensation class counsel can receive from a settlement and thereby blunt their incentives to achieve the largest possible award for the class. *See* Supplemental Declaration of Professor Brian Fitzpatrick, ¶¶ 17-18 (DE # 3350-3); Myriam Gilles & Gary Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 140-45 (2006). As such, employing the "lodestar crosscheck" can reintroduce the very same undesirable consequences of

the lodestar method that the percentage-of-the-fund method was designed to correct in the first place. *See Camden I*, 946 F.2d at 771-74 (citing the difficulty of administering the lodestar method and its failure to align class counsel's interests with the class's interests).

C. The Claims Process is Reasonable.

Finally, the *pro se* objectors argue that the Alternative Claims Process provided under Section XII of the Agreement is unfair and/or burdensome. *See* Objection of George and Brenda Davis ("Davis Objection") (DE # 3328). Respectfully, Mr. and Mrs. Davis are incorrect. In granting final approval to two other recent MDL 2036 settlements, the Court approved the very same alternative claims process. (DE # 3134, 3331).

As discussed in the Motion, the overwhelming majority of Settlement Class Members have been identified through an analysis of certain types of PNC's electronic data, enabling Settlement Class Counsel's expert to calculate the amount of the distribution to which each such person is entitled under the Settlement. *See* Motion at p. 12. However, for discrete limited portions of the Class Period, PNC lacks certain reasonably accessible electronic data that would enable Settlement Class Counsel's expert to identify all Account holders affected by PNC's High-to-Low Posting practices and/or automatically calculate their damages through electronic means. *Id*.

The Alternative Claims Process provided under Section XII of the Agreement is designed to afford those limited number of Settlement Class Members the opportunity to submit Claims seeking a *pro rata* distribution from the Settlement Fund by providing the same type of information that Settlement Class Counsel's expert used in determining the amount of Automatic Distributions from the Settlement Fund. *Id*. at p. 13. The Alternative Claims Process is the best solution under the circumstances.

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 Service Awards for the Plaintiffs, approve Class Counsel's application for attorneys' fees and expenses, and enter Final Judgment dismissing the Action with prejudice.

Dated: May 3, 2013.

Respectfully submitted,

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Plaintiffs' Executive Committee

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MIAMI DIVISION

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MDL No. 2036

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 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, 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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EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
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S.D. Fla. Case No. 10-cv-21868-JLK

DECLARATION OF ROBERT OSEAS REGARDING OBJECTIONS TO SETTLEMENT

I, Robert Oseas, declare as follows:

1. I am over the age of eighteen and have personal knowledge of the facts set forth in this Declaration. If called to testify as a witness in this proceeding, I could and would competently testify to the facts set forth below.

2. I am a Senior Project Manager for Epiq Class Action & Claims Solutions ("Epiq"). Pursuant to the Settlement Agreement and Release ("Agreement") (DE # 3150-1) and the Court's Order Preliminarily Approving Class Settlement and Certifying Settlement Class ("Preliminary Approval Order") (DE # 3151), Epiq was appointed as the Settlement

Administrator in connection with this Settlement. Pursuant to the Agreement and the Preliminary Approval Order, Epiq maintains the electronic database containing the names of all Settlement Class Members who were identified by Settlement Class Counsel and their expert as having a Differential Overdraft Fee pursuant to paragraph 92 of the Agreement, and who were sent direct mail notice of the Settlement. Between February 11 and February 15, 2013, Epiq mailed postcards to 960,534 unique Settlement Class Members identified in the electronic database records.

3. Four (4) objections were submitted to the Settlement (DE # 3328, 3425, 3428, 3440). I researched the electronic database of identifiable Settlement Class Members to determine whether the individuals identified in the four (4) objections to the Settlement are included in the Settlement Class. As a result of my research, I report as follows:

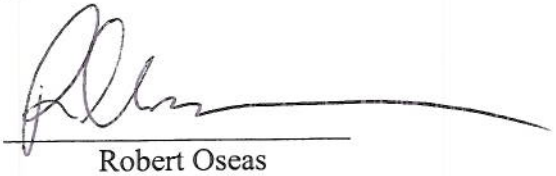
a. Janice Pastolic of Reminderville, Ohio, Shawn M. Pastolic of Reminderville, Ohio, and Jill L. Fry of Twinsburg, Ohio, who submitted an objection (DE # 3425), are not included in the electronic records of Settlement Class Members. There is a listing for Janice Patsolic, but this individual is not shown as residing in Reminderville, Ohio;

b. David Curtis of Frederick, Maryland, who submitted an objection (DE # 3440), is not included in the electronic records of Settlement Class Members.

4. None of the individuals named in the preceding paragraph have submitted a Claim Form.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 3, 2013.



Robert Oseas