

**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**

*Casayuran, et al v. PNC Bank NA*  
D.N.J. Case No. 2:09-5155  
*Cowen, et al v. PNC Bank, NA*  
S.D. Fla. Case No. 10-cv-21869-JLK  
*Hernandez, et al. v. PNC Bank, NA*  
S.D. Fla. Case No. 10-cv-21868-JLK

**OBJECTIONS TO SETTLEMENT AND AWARD OF ATTORNEYS'  
FEES BY CLASS MEMBERS JANICE PASTOLIC,  
SHAWN M. PASTOLIC, AND JILL L. FRY**

COME NOW, Janice Pastolic, Reminderville, Ohio 44202; Shawn M. Pastolic, Reminderville, Ohio 44202; and Jill L Fry, Twinsburg, Ohio 44087, by and through counsel<sup>1</sup> and hereby file their OBJECTIONS TO SETTLEMENT AND AWARD OF ATTORNEYS' FEES, objecting to the Stipulated Class Action Settlement and application for attorneys' fees by settlement counsel. Mr. Steve Miller, counsel for

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1 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 75 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.

Objectors, will appear on behalf of Objectors at the fairness hearing. In support of their Objections, Objectors state as follow:

**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 # 3150-1, par. 119), 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 # 3150-1, par. 122).

Consider the following caveat to the release:

Nothing in this Agreement shall operate or be construed to release any claims or rights PNC 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 PNC, pursuant to the terms and conditions of such accounts, loans or any other debts. (Doc# 3150-1, par. 122) (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 to educate consumers with financial services through advisory and related services (excluding litigation).” (Stlmt Agrmt., Doc # 3150-1, para. 118). 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 and assist consumers with financial services 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 # 3150-1, para. 118). 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 Counsels’ 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 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:). 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, "PNC agrees not to oppose Class Counsel's request for attorneys' fees of up to 30% of the Settlement Fund . . ." (Stlmt Agrmt, Doc # 3150-1, par. 123). 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, PNC 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 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: April 11, 2013

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 11th day of April, 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:

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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.

*Janice Patrick*  
DATE: 4/11/2013

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

  
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