UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 1:09-MD-02036-JLK

IN RE: CHECKING ACCOUNT OVERDRAFT LITIG.

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

OBJECTION TO REQUEST FOR ATTORNEYS' FEES

The following class members object to the request for attorneys' fees in this settlement:

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Estate of Ruth E. Ernsberger
Wesley Ernsberger, Executor c/o
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Each of the objectors had a PNC consumer checking account that she could access with her debit card during the Class Period, and each received direct mailed notice of this settlement. Each objector has read this objection filed on their behalf and indicated their endorsement and adoption of this objection by their signatures.

I. Class Counsel's Requested Fees Are Unreasonable for This, The Fourth Megafund Recovery In This Consolidated Litigation.

At some point, Class Counsel's lodestar and the windfall to Class Counsel must become relevant. This Court has already approved three 30% fee awards, in Bank of America, Chase and Citizens, in settlements that exceeded $100 million, without ever inquiring into the amount of Class Counsel's lodestar, or what multiplier of that lodestar the fee represented. Class Counsel has already been awarded $213 million in those three megafund settlements, plus several smaller fee awards in the non-megafund settlements. This amount vastly exceeds Class Counsel's reasonable lodestar for this entire case. Because Class Counsel has already been compensated for all of its time in these consolidated cases, plus an extremely generous multiplier of its time, Class Counsel is essentially double-dipping for this and all future fee requests.

Class Counsel should not be permitted to "recycle" the lodestar for which they have already been compensated in prior cases. To the extent that there is additional, uncompensated lodestar specifically traceable to this case, Class Counsel should be permitted to claim that lodestar in support of its fee request in this case. However, Class Counsel should not be permitted to claim lodestar that was spent pursuing this MDL action generally, including the First, Second and Third Tranche actions.

The average fee award in all cases settling for more than $100 million (so-called "megafund" cases) was 15% in 2003. *See Exhibit A*. Professor Brian Fitzpatrick's recent

empirical study demonstrates that this average has persisted through 2010. *See An Empirical Study of Class Action Settlements and Their Fee Awards*, attached hereto as *Exhibit B*, at p. 839.

> In 2004, following an examination of two data sets covering class actions from 1993 to 2002, Theodore Eisenberg and Geoffrey Miller found that, for cases with recovery ranges that exceeded $190 million..., the mean fee awarded was 12% and the median fee was 10.1% ... For Class Action Reports Data ("CAR") cases involving recoveries in excess of $190 million, Eisenberg and Miller found the mean fee to be 16.4% ... More recently, Brian Fitzpatrick studied every federal class-action settlement in 2006 and 2007... For settlements in the amount of $100 million to $250 million, he found that the mean fee was 17.9% and that the median was 16.9%.

In re AT&T Mobility Wireless Data Services Sales Tax Litig., 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011).

Despite this empirical data, this Court has awarded 30% fees in settlements greater than $100 million. Those fee awards resulted in a windfall to Class Counsel, and, rather than weighing *in favor* of the requested 30% fee award in this case, weigh against another windfall of that magnitude.

There is no reason to depart from the benchmark established by megafund cases here. During this case, class counsel was pursuing cases against other defendants in addition to PNC. The fee awards to date have substantially mitigated any risk Class Counsel bore in the remaining cases against other defendants, since it is now certain that these consolidated cases will not be a losing proposition for Class Counsel. Accordingly, a 25% fee award to class counsel would appear to be more than adequate in the circumstances of this case and the prior fee awards, and class counsel has not borne its burden of establishing that it is entitled to anything more to avoid unjust enrichment of the class.

II. A Lodestar Cross-Check Is Increasingly Important In This and Future Settlements.

Class counsel have to date requested fees without the benefit of a lodestar-cross-check. This is improper, especially in the fourth megafund settlement to date, when there is no question that Class Counsel has now been fully reimbursed for all of the time they have spent on these consolidated cases, and that any future fee awards will represent pure profit and continue to increase the lodestar-multiplier that they have already received. *See In re: Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944-945 (9th Cir. 2011) (courts required to guard against unreasonable fees by cross-checking against second method, regardless of primary method used).

Indeed, district courts in the Eleventh Circuit have routinely employed a lodestar cross-check for guidance in assessing the reasonableness of a percentage fee award. *See In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1336 (S.D. Fla. 2001) (finding that multiplier of 1.45 does not require higher percentage award, in case settled for $110 million); *Pinto v. Princess Cruise Lines Ltd.*, 513 F. Supp. 2d 1334, 1343 (S.D. Fla. 2007) (approving lodestar multiplier of 1.2 in $4.25 million settlement).

The first factor set forth in *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991), is "the time and labor required." *Id.* at 772. In this Circuit, that factor has been interpreted to mean the number of hours that class counsel spent on the case – in effect, a lodestar cross-check. Class counsel once again neglect to provide that figure in their Motion for Final Approval, instead providing a summary description of tasks performed and number of documents reviewed.[1]

[1] That number is a relatively small 360,000 documents, far fewer than were reviewed in the prior megafund settlements.

The case of *Faught v. American Home Shield Corp.*, 668 F.3d 1233 (11th Cir. 2011) makes clear that "where the requested fee exceeds 25%, the court is instructed to apply the twelve *Johnson* factors," including, most importantly, the time and labor required. *Id.* at 1242.

There are additional reasons why class counsel should be required to provide detailed information to satisfy the first factor set forth in *Camden I*, and to enable this Court to perform a lodestar cross-check. First, this is the *fourth* megafund settlement in these consolidated cases, unlike *Camden I* and *Pinto, supra*, and therefore the lodestar will provide critical information to the Court about what percentage is reasonable in the circumstances of multiple megafund settlements. Class Counsel are receiving a higher percentage fee in these consolidated cases as a result of the piecemeal settlement process. If, instead, Class Counsel waited until all of the settlements were completed before requesting a fee, as was done in *Newby v. Enron*, 586 F. Supp. 2d 732 (S.D. Tex. 2008), it would be clear that this is a billion dollar total settlement, and that a 30% fee is grossly excessive.

Courts in this Circuit have held that a lodestar multiplier of 1.45 is adequate. *See Sunbeam, supra*, 176 F. Supp. 2d at 1336. The only appropriate way to set a percentage fee in a case of this magnitude, and such short duration, is to require the percentage to be informed by the first *Camden I* factor – the time and labor required – which class counsel has improperly failed to quantify.

The Eleventh Circuit in *Faught, supra*, suggested a range of reasonable fees of 20-25%. 668 F.3d at 1242. Because this is a megafund settlement, objectors suggest that

the fee should not exceed the upper end of that range, or 25%, of the $90 million monetary fund would be reasonable here.

III. Objectors' Experience.

The objectors object to the onerous and unreasonable requirement contained in the Settlement Agreement and Preliminary Approval Order that they and their attorneys identify each time they have objected or represented an objector for the past five years. Such a requirement is designed to deter competent and counseled objections, by imposing such a burden on potential counsel that no class member can retain competent representation.

Without waiving these objections, Objectors state that they have never objected to a class action settlement before. The Objectors' counsel, Brian Silverio, represented several objectors to three prior overdraft settlements, which has allowed him to make the informed fee arguments here based on amounts already received in prior cases.

CONCLUSION

For the foregoing reasons, this Court should award class counsel no more than 25% of the monetary fund, or $22.5 million, in attorneys' fees.

Respectfully submitted,

s/ Brian M. Silverio
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Signed By:

Barbara Ernsberger
Barbara Ernsberger

Barbara Ernsberger, agent
Barbara Ernsberger as agent for Dorothy J. Butts

_____
Wesley Ernsberger

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served via transmission of Notices of Electronic Filing generated by CM/ECF on April 12, 2013, and was filed with the Clerk of Court using CM/ECF, and that as a result a copy of this filing has been served upon every counsel of record.

/s/ Brian Silverio