UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:09-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

NOTICE OF OBJECTION OF CLASS MEMBERS RYAN WANTZ AND DAVID CURTIS AND NOTICE OF INTENT TO APPEAR

Unnamed class members RYAN WANTZ and DAVID CURTIS ("Objectors") give notice of their intent to appear at the final approval hearing. Their contact information is: Ryan Wantz, 14010 Harrisville Rd, Mt Airy, MD 21771, PNC Acct ending in 1607 and David Curtis, 9424 Gas House Pike, Frederick, MD 21701, PNC Acct ending in 8262

I.

THE *CY PRES* COMPONENT IS NOT ADEQUATELY DEFINED

Class counsel must make sure unclaimed funds are distributed for a purpose near to the legitimate objectives underlying the lawsuit and the interests of class members. The settlement fund exists to compensate all of the class members, whether they make a claim or not. Silent class members are just as important for the creation of this fund and have given up their rights against these companies to make this settlement available.

The *cy pres* component of the settlement is addressed as follows: it will "benefit consumer financial literacy education, and educate and assist consumers with financial services issues through advisory and related services." Settlement at 46, ¶118. This leaves the ultimate recipients unidentified, when the purpose of *cy pres* is to benefit non-claimant class members. The Court cannot fairly ensure that the non-claimant class members are adequately represented until the recipients are identified and there is no reason for them not to be identified before the final approval, so the court can make findings regarding the recipients' relation to the class. Identification of the recipients at this stage, rather than after approval is essential for a fair distribution to these silent class members, and under all leading authorities. *See, e.g.,* 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 10:17 (4th ed.2009); *In re Pharmaceutical Industry Average Wholesale* Price, 588 F.3d 24, 33-35 (1st Cir. 2009); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F. 3d 423, 436 (2nd Cir. 2007); *In re Ticket Com'n Antitrust Litigation*, 307 F. 3d 679, 282-83 (8th Cir. 2002); *Democratic Committee of District of Columbia v. Washington Metropolitan Area Transit Commission*, 84 F. 3d 451, 455 (D.C. Cir. 1996); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990); *Wilson v. Southwest Airlines, Inc.* 880 F.2d 807, 811 (5th Cir. 1989).

II.

THE FEE REQUEST IS UNREASONABLE

The Eleventh Circuit recognizes a "percentage of the fund" approach for awarding attorneys' fees in common fund cases. *Camden I Condominium Ass'n., Inc., v. Dunkle,* 946 F.2d 768 (11th Cir. 1991). *Dunkle* also recognizes that "judges systematically award fees in the range of twenty to twenty-five percent of the fund," and that "twenty-five percent is the benchmark." *Id.* at 774-75. Class Counsel requests thirty percent of a $90 million fund. For a case in which the same issues were tried to verdict and resulted in a plaintiff's verdict (the

Wells Fargo case), this amount seems especially high, compounded with the case having really only been litigated for less than three years. This prior *Wells Fargo* verdict also undermines Class Counsel's assertion that plaintiffs faced "major risks" in obtaining relief.

Because class members only recover a "pro rata" percentage of their losses, from funds remaining in the common fund attorney fees, costs and administrative fees, the court must closely guard class interests by awarding only a reasonable percentage of no more than twenty-five percent.

A reduced percentage would also be more in keeping with the Supreme Court's recent language in *Perdue v. Kenny A.*, 130 S.Ct. 1662 (2010), in which the court noted that "enhancements may be awarded in 'rare' and 'exceptional' circumstances." 130 S.Ct. at 1667. While this statement was made in a lodestar context rather than a percentage of the fund, whether Class Counsel has met its burden of an upward adjustment is not an obvious conclusion. A lodestar cross-check for reasonableness, with an analysis under the ubiquitous *Johnson* factors, may indicate that a twenty percent fee may well be fair, reasonable, and adequate compensation for the work performed on this matter. Every class member would benefit if the percentage were reduced to the circuit benchmark or norm of twenty to twenty-five percent.

III.

THE OBJECTION REQUIREMENTS ARE IMPROPER

The Settlement, Notice, and Preliminary Approval Order indicate that to make a valid objection, an objector must supply not just information about what the objector finds problematic, but also information about objections in other cases, and whether the objector's attorney has filed objections in other cases.

No authority prohibits filing multiple objections. The only requirement is that a class member has a problem with an objection. Requesting information beyond that undermines a

class member's rights under Rule 23, and impinges on evidentiary Rules 403 and 404, which prohibit character evidence as a basis for making a prejudicial ruling.

Every objection should be judged on its own merits. If it is frivolous or unmeritorious, the Court may overrule those objections on that basis. If the objections have merit, they should be sustained, regardless of who made them. The requirements of submitting information regarding unrelated cases and an objector's, or his attorney's, history of litigation is patently irrelevant to the merits of any objection.

Federal Rules of Evidence 403 articulates that evidence otherwise relevant may not be admissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The committee notes to Rule 403 state there are certain reasons such information is not admissible as "[t]hese circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. *Slough, Relevancy Unraveled*, 5 Kan. L. Rev. 1, 12-15 (1956); Trautman, *Logical or Legal Relevancy--A Conflict in Theory*, 5 Van. L. Rev. 385, 392 (1952); McCormick § 152, pp. 319-321." (1975 Committee Notes to Rule 403.)

Federal Rule of Evidence 404 prohibits introducing this information and it is impermissible evidence of the Objectors', or their attorney's, character. Character evidence is rarely, if ever, admitted within the realm of civil trials. Committee notes to Rule 404 state "[t]he circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. See *Michelson v. United States*, 335 U.S. 469, 476 (1948)("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues,

unfair surprise and undue prejudice."). (2006 Committee Notes to Rule 404.) (*See Generally, U.S. v. DeMarco,* 407 F.Supp. 107 (C.D.Ca. 1975) where Judge did not permit testimony against credibility of opposing counsel.)(*See also U.S. v. Frederick*, 78 F.3d 1370 C.A.9 (Ariz. 1996) where Prosecutor's comment to jury about defendant's lawyer, which was made immediately after court had sustained two other objections on ground that comments were inappropriate, constituted serious misstep; in comment prosecutor implied to jury that government and court were allied, that they were allied against the defense, and that government and court wanted jury to seek the truth by considering all the evidence, in contrast to defense attorney, who was asking jury not to see the truth.

In this case, information regarding these Objectors, their attorney, and their previous objections to Class Action settlements is not only irrelevant to this Court's decision at the upcoming fairness hearing but is proffered only to color the Court's perception of these persons and sway the Court's decision regarding these objections. This is improper and therefore the requirements in the order, settlement, and notice requiring this information should be struck.

Rule 23 provides a means for objections. To infer an objection is less meritorious merely because its author has made one before would undermine Rule 23. It is paradoxical that Class Counsel are congratulated for being "professional" class counsel, but yet the class members they are purportedly representing are prohibited from hiring an attorney to write a credible objection to counter such "professionalism." The reason Congress included a right to object is because their right is essential to ensuring the fairness of the process, and that a court is possessed of all information before approving the settlement:

> While the parties to a class action start out in an adversarial posture, once they reach the settlement stage, incentives have shifted and there is the danger of collusion. . . . Class counsel, for instance, might settle claims for significantly less than they are worth, not because they think it is in the class's best interest, but instead because they are satisfied with the fees they will take away. [Citation.] Intervenors counteract any inherent objectionable tendencies by

> reintroducing an adversarial relationship into the settlement process and thereby improving the changes that a claim will be settled for its fair value.

Vollmer v. Selden, 350 F.3d 656, 660 (7th Cir. 2003). Class Counsel's attempt to discourage objectors by requiring information not germane to this cause cannot be enforced.

WHEREFORE, Objectors respectfully request this Court:

A. Upon proper hearing, sustain these Objections;

B. Upon proper hearing, enter such Orders as are necessary and just to adjudicate these Objections and to alleviate the inherent unfairness, inadequacies and unreasonableness of the proposed settlement.

DATED: April 11, 2013

By: _____
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CERTIFICATE OF SERVICE

I certify that on April 11, 2013, I served the foregoing document on the following via U.S. Mail, postage prepaid:

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