UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:09-MD-02036-JLK

IN RE: CHECKING ACCOUNT OVERDRAFT LITIGATION

MDL No. 2036

CATHERINE ANN CLAYTON'S OBJECTION TO THE COMPASS BANK SETTLEMENT

a. the name of the Action;

Compass Bank Overdraft Litigation, Case No. 09-2036-JLK in the Southern District of Florida.

b. the objector's full name, address and telephone number;

Catherine Ann Clayton
2700 Sowerby
Plano, Texas 75093
972-955-3917

c. an explanation of the basis upon which the objector claims to be a Settlement Class Member;

I opened a consumer checking account for Compass Bank that was opened on August 2, 1993 and closed on August 9, 1994; Account Number 0073309522; I opened a consumer checking account for Compass Bank that was opened on November 23, 1998 and closed on January 4, 2000; Account Number 0074074308; I opened a consumer checking account for Compass Bank that was opened on December 31, 1999 and closed on February 15, 2002; Account Number 0075785496; These account could be accessed with a Compass Bank debit card. I had overdraft fees charged to my account.

d. all grounds for the objection, accompanied by any legal support for the objection known to the objector or his counsel:.

Response: See below.

e. the number of times in which the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which the objector has made such objection, and a copy of any orders elated to or ruling upon the objector's prior such objections that were issued by the trial and appellate courts in each listed case;

Response: Once – I objected to the Bank of America settlement in this case.

f. the identity of all counsel who represent the objector, including any former or current counsel who may be entitled to compensation for any reason related to the objection to the Settlement or fee application;

Response: None.

g. the number of times in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which the counsel or the firm has made such objection, and a copy of any orders related to or ruling upon counsel's or the firm's prior such objections that were issued by the trial and appellate courts in each listed case;

Response: Not applicable.

h. any and all agreements that relate to the objection or the process of objecting — whether written or verbal — between objector or objector's counsel and any other person or entity;

Response: None.

i. the identity of all counsel representing the objector who will appear at the Final Approval Hearing;

Response: None.

j. a list of all persons who will be called to testify at the Final Approval Hearing in support of the objection:

Response: None.

k. a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing; and

Response: At this point in time, no.

ATTORNEYS' FEES

Class Counsel's fee request for 30% of the monetary and non-monetary relief in this settlement is excessive. At the fee determination stage, "the district judge must protect the class's interest by acting as a fiduciary for the class." *In re Rite Aid Corp. Securities Litigation,* 396 F.3d 294, 307 (3d Cir. 2005). There is a much greater conflict of interest between the members of the class and the class lawyers than there is between an individual client and his lawyer. The class members are interested in relief for the class but the lawyers are interested in their fees, and the class members' stakes in the litigation are too small to motivate them to supervise the lawyers in an effort to make sure that the lawyers will act in their best interests.

Plaintiffs sued on behalf of themselves and all others similarly situated who incurred Overdraft Fees as a result of Compass Bank's practice of sequencing all Debit Card Transactions from highest-to-lowest dollar amount. Plaintiffs alleged that Chase systemically sequenced Settlement Class Members' Debit Card transactions in highest-to-lowest order by dollar amount to maximize Chase's Overdraft Fee revenues. According to Plaintiffs, Chase's practices violated the Bank's contractual and good faith duties, were substantively and procedurally unconscionable, violated state unfair trade practices laws, and resulted in conversion and unjust enrichment.

The settlement fund is 11.5 million dollars. Pursuant to the Agreement, Compass will not oppose Class Counsel's request for attorneys fees of up to thirty percent (30%) of the value of the Settlement.

To justify this 3.45 million dollar fee fee, Class Counsel contend that they did the following:

On May 4, 2010, Plaintiff Stephen Anderson filed *Anderson v. Compass Bank*, Case No. 1 :10-cv-21 556-JLK ("*Anderson*"), a class action complaint, in the United States District Court for the Southern District of Florida, alleging improper assessment and collection of Overdraft Fees and seeking, *inter alia*, monetary damages, restitution, and equitable relief. Joint Decl.¶ 8. The case was made a part of MDL No. 2036 pursuant to Local Rule 3.8. On June 21, 2010, Compass moved to dismiss Anderson's complaint for improper venue and simultaneously moved to compel arbitration. *Id.* On July 9, 2010, Anderson filed a stipulation of dismissal without prejudice, which was granted by the Court. *Id.*

On October 22, 2010, Anderson re-filed the Action against Compass in the Northern District of Florida. On October 25, 2010, Anderson filed a Notice of Tag-Along to MDL. No. 2036 before the Judicial Panel on Multidistrict Litigation (JPML") *Id.* The Action was subsequently tagged for inclusion within MDL No. 2036, as reflected within CTO-29 issued by the JPML on November 15, 2010. On December 2, 2010, Compass opposed transfer of the Action to MDL No. 2036, filing a Motion to Vacate CTO-29 before the JPML ("Motion to Vacate"). *Id.* The Parties briefed the Motion to Vacate. The JPML denied the Motion to Vacate, and issued its final transfer order. *Id.* Compass petitioned the Eleventh Circuit for a writ of mandamus seeking relief from the JPML's final transfer order, which was denied. *Id.*

On the same day it filed its Motion to Vacate, Compass filed its second motion to compel arbitration ("Second Arbitration Motion") in the Northern District of Florida. Anderson filed his opposition to Compass's Second Arbitration Motion on January 10, 2011, and Compass replied on February 2, 2011. On February 8, 2011, before the Northern District ruled on Compass's Second Arbitration Motion, the Action was transferred to MDL No. 2036 pursuant to the JPML's final transfer order.

On July 27, 2011, Compass filed its third motion to compel arbitration. Plaintiff opposed the Third Arbitration Motion, attaching supporting factual declarations from Anderson and attorney Tod Aronovitz. Plaintiff also simultaneously moved for leave to conduct discovery of Compass's arbitration related practices, policies and procedures. Compass moved to strike Anderson's declarations and filed a brief in opposition to arbitration discovery.

On September 22, 2011, the Court denied Compass's motion to strike, and on October 4, 2011, the Court granted Anderson's motion to conduct arbitration related discovery. A ruling on Compass's Third Arbitration Motion was deferred until arbitration discovery was completed and briefed by the Parties. Anderson propounded and Compass responded to interrogatories, requests for admission, and requests for production. *Id.* Compass also made a corporate representative available in Birmingham. Alabama, for a 30(b)(6) deposition regarding Compass's arbitration practices, policies and procedures.

After the 30(b)(6) deposition was concluded in early 2012, the Parties re-initiated settlement discussions. Joint Decl. ¶ 13. The Court temporarily suspended the briefing schedule pertaining to the Third Arbitration Motion pursuant to a joint motion filed by the Parties. Following the second mediation, on April 27, 2011, the Parties simultaneously filed supplemental briefs highlighting information obtained through arbitration-related discovery. On May 1, 2012, based on the Parties' initial briefs, the Court entered an Order setting an evidentiary hearing for July 9, 2012 to determine issues of fact vital to determination of the Third Arbitration Motion. The Parties filed response briefs as contemplated by the Court's initial Order on supplemental arbitration discovery briefing.

In early 2011, the Parties initiated preliminary settlement discussions and agreed to mediate on March 8, 2011. An agreement was not reached at this first mediation session.

In early 2012, the Parties re-initiated settlement discussions and agreed to schedule a second mediation with Professor Eric Green of Resolutions, LLC. To facilitate settlement negotiations, Compass produced certain confidential overdraft data to Class Counsel for analysis prior to mediation. On April 4, 2012, the Parties participated in mediation at Professor Green's office in Boston. Massachusetts. Although an agreement was not reached at this second mediation session, the Parties continued settlement discussions thereafter with the assistance of Professor Green.

In summary, Class Counsel performed the following tasks in this case:

1. Filed a class action complaint;
2. Briefed Motion to Vacate;
3. Responded to Writ of Mandamus;
4. Filed opposition to Motion to Arbitrate;
5. Filed Motion to Conduct Arbitration related to discovery;
6. Propounded interrogatories, requests for admissions and requests for production;
7. Took one 30(b)(6) deposition regarding Compass' arbitration practices;
8. Attended two mediations.

In the Fourth version of the Manual for Complex Litigation, published in 2004, the Federal Judicial Center states that a fixed percentage award may yield a windfall fee in large fund cases:

> Accordingly, in "mega-cases" in which large settlements or awards serve as the basis for calculating a percentage, courts have often found considerably lower percentage of recovery to be appropriate. One court's survey of fee awards in class actions with recoveries exceeding $100 million found fee percentages ranging from 4.1% to 17.92%.[1]

[1] FEDERAL JUDICIAL CETNER, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.121 at 188-189 (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 339-40 (3d Cir. 1998)).

In *Goldberger* v. *Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000) the Court of Appeals held that the District court did not abuse its discretion in awarding a fee of approximately 4% of the recovery. The Court noted its "nagging suspicion that attorneys in these cases are routinely overcompensated for such things as contingency risk." The Court of Appeals noted that the point is that plaintiffs in common fund cases typically are not fully informed. Nor are they able to negotiate collectively, or at arm's length.

The Court of Appeals provided:

> We appreciate that that fixing a reasonable fee" becomes even more difficult because the adversary system is typically diluted-indeed, suspended-during fee proceedings. Defendants, once the settlement amount has been agreed to, have little interest in how it is distributed and thus no incentive to oppose the fee. See *Continental Illinois,* 962 F.2d at 572. Indeed, the same dynamic creates incentives for collusion-the temptation for the lawyers to agree to a less than optimal settlement "in exchange for red-carpet treatment on fees." *Weinberger v. Great N Nekoosa Corp,* 925 F.2d 518E 524 (1st Cir.1991) (citing John C. Coffee, Jr. *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation,* 48 Law & Contemp. Probs. 5, 26-33 (1985)). And the class members-the intended beneficiaries of the suit-rarely object. See Federal Judicial Center, Empirical Study of Class Action in Four Federal District Courts 76 (1996). Why should they? They have no real incentive to mount a challenge that would result in only a "minuscule" pro rata gain from a fee reduction. *Continental Illinois,* 962 F.2d at 573. It is not without significance that when Mr. Weiss, lead counsel on this appeal, stood up at oral argument to petition for a bigger slice of his clients' recovery, no one sat adjacent to him at opposing counsel's table.
>
> All these considerations have fed the perception among both commentators and the Congress that plaintiffs in common fund cases are mere "figureheads," and that the real reason for bringing such actions is "the quest for attorney's fees." Ralph K. Winter. *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America,* 42 Duke L.J. 945,984 (1993); see Private Securities Litigation Reform Act of 199S, H.R.Rep. No 104-31)9 (1995) passim,

> reprinted in 1995 U.S.C.C.A.N. 730, passim (criticizing abusive lawyer-driven securities class actions).
>
> This is why we continue to approach fee awards "with an eye to moderation." *Grinnell II,* 560 F.2d at 1099 (quoting *Grinnell I,* 495 F.2d at 470). *Goldberger,* 209 F.3d at 52-53.

The Court concluded that a fee award should be assessed based on scrutiny of the unique circumstances of each case, and "a jealous regard to the rights of those who are interested in the fund."

In *Cendant Corporation Prides Litigation*, 243 F.3d 722 (3d Cir. 2001) the Court of Appeals found that the District Court abused its discretion in granting a 5.7 percent attorneys' fee award in a securities fraud class action. The court reviewed similar awards including the below cases:

		Fee Awarded as Percentage of Recovery
Show v. Toshiba America Inf Sys., Inc., 91 F.Supp.2d 942 (E.D.Tex.2000)	$2.1 billion	7%
In re CopleyPharm., Inc., 1 F.Supp.2d 1407 (D.Wyo,1998)	$150 million	13%
In re Paine Webber Ltd Pships Litig., 999 F.Supp. 719 (S.D.N.Y.1998)	$200 million	13%
In re MUM Grand Hotel Fire Litig., 660 F.Supp. 522 (D.Nev.1987)	$205 million	7%

The district court in *Copley,* in granting the 13% fee award, observed that, "[d]uring expedited discovery, class counsel reviewed and analyzed more than 125,000 pages of documents and deposed roughly one hundred witnesses," 1 F.Supp.2d at 1408. The case also included 42 days of trial, and class counsel spent 48,794 hours on the case. Finally, the legal

questions involved in Copley were both novel and complex. As the court explained: "not only was the certification of this class a complex question, but this was also the first and only mass tort class action to go to trial, and the case presented complex medical and scientific issues of causation." 1 F.Supp.2d at 1413.

In *Paine Webber,* Class counsel conducted "extensive, coordinated discovery," including "coordinating discovery of hundreds of boxes of documents through the use of sophisticated computer databases, and deposing many key witnesses." 999 F.Supp. at 722. In more than two years of litigation, counsel spent "approximately 70,000 hours in heretofore uncompensated legal work in pursuit of factual investigation, drafting of documents, brief writing, document analysis, depositions, trial preparation, settlement negotiation and other tasks." 999 F.Supp. at 723. Finally, the legal issues in PaineWebber were complex, and class counsel "faced significant substantive and procedural defenses." 999 F.Supp. at 724.

In *Local* 56, the court acknowledged "the complexity of the issues in this case, the significant attendant risks of proceeding with litigation, and the tenacity and vigor with which all counsel represented their clients' interests," in this class action which lasted for four years. 954 F.Supp. at 1005. Even so, class counsel's fees amounted to only 2.8% of the total settlement.

In *In re MGM Grand Hotel,* the court considered "the particular and unique circumstances of this case," including the fact that the attorneys had recovered over 6,000 objects from the fire site and had conducted over 1,400 depositions, in granting the 7% fee award. 660 F.Supp. at 526.

Here are the settlements that have been reached in this case:

Settlements In This Case

Bank of the West	18 million
PNC	90 million
Bank of America	410 million
Compass Bank	11.3 million
Citizens Bank	137.5 million
J.P.Morgan	110 million
Great Western Bank	2.2 million
U.S. Bank	55 million
T.D. Bank	62 million
Union Bank	35 million

Total: $931 Million In Settlements

Here is a list of 26 large settlements and the respective fee amount. This table is taken from the 2009 district court decision *Carlson v. Xerox,* 596 F.Supp.2d 400 (D. Conn. 2009)

Name	Settlement Amount	Fee
1. Enron	$7,227,390,000.00	9.52%
2. Worldcom	$6,133,000,000.00	5.48%
3. Tyco	$3,200,000,000.00	14.5%
4. Cendant (2000)	$3,166,000,500.00	1.73%
5. AOL/Time Warner	$2,500,000,000.00	5.90%
6. Nortel 1	$1,142,775,308.00	3.00%
7. Royal Ahold	$1,100,000,000.00	11.8%
8. Nortel II	$1,074,265,298.00	7.74%
9. McKesson	$1,042,500,000.00	7.64%
10.Cardinal Health	$ 600,000,000.00	18.00%
11.Lucent	$ 517,000,000.00	17.00%
12. BankAmerica	$ 490,000,000.00	18.00%
13. Dynegy, Inc.	$ 474,050,000.00	8.73%
14. Adelphia Comm.	$ 460,000,000.00	21.40%
15. Raytheon	$ 460,000,000.00	9.0%
16.Waste Management II	$ 457,000,000.00	7.93%
17. Global Crossing	$ 447,800,000.00	16.04%
18. HealthSouth	$ 445,000,000.00	15.25%
19. Freddie Mac	$ 410,000,000.00	20.00%
20. Qwest	$ 400,000,000.00	15.00%
21. Cendant	$ 374,000,000.00	7.71%
22. Rite Aid	$ 319,580,000.00	25.00%
23. Williams Co.	$ 311,000,000.00	25.00%
24. Oxford	$ 300,000,000.00	28.00%
25. DaimlerChrysler	$ 300,000,000.00	22.28%
26. Bristol-Myers Squibb	$ 300,000,000.00	3.96%

In light of these numbers, Class Counsel's requested fee is excessive.

Class Counsel's attempt to collect a 30% fee shows a conflict of interest with the class. In *Faught v. American Home Shield Corp.*, 668 F.3d 1233. 1243 (11th Cir. 2012), On appeal, the 11th Circuit noted:

> "[A]ttorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Camden* I, 946 F.2d at 774. And this court has often stated that the majority of fees in these cases are reasonable where they fall between 20-25% of the claims. *Id.*

CONCLUSION

Class Counsel's Requested Fee of 30% of the Common Fund is excessive. A reasonable fee, consistent with 11th Circuit precedent is 25% of the common fund.

This objection has been sent to the following addresses:

Clerk of the Court
U.S. District Court – Southern District of Florida
James Lawrence King Federal Justice Building
99 Northeast Fourth Street
Miami, Florida 33132

Robert C. Gilbert
Grossman Roth, P.A.
2525 Ponce de Leon Blvd.
11th Floor
Coral Gables, Florida 33134

Gregory C. Cook
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, Alabama 35203

Sincerely,

Catherine Ann Clayton

Catherine Ann Clayton

RECEIVED

Clerk of the Court
U.S. District Court – Southern District of Florida
James Lawrence King Federal Justice Building
99 Northeast Fourth Street
Miami, Florida 33132