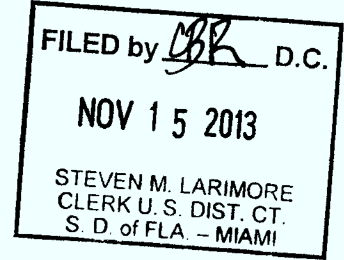

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE: :
: CASE NO. 1:09-md-2036-JLK
CHECKING ACCOUNT :
OVERDRAFT LITIGATION :

OBJECTION OF CLASS MEMBER KENDRA L. CARPENTER TO THE SETTLEMENT ENTERED INTO BETWEEN CLASS REPRESENTATIVES AND U.S. BANK

Plaintiff Class Member Kendra L. Carpenter hereby asserts the following objections to the Settlement entered into between Class Representatives and U.S. Bank:

A. The Settlement is procedurally unfair.

Ms. Carpenter objects to the Settlement because it is procedurally unfair. See e.g., *Figueroa v. Sharper Image Corp.*, 517 F.Supp.2d 1292, 1321-1323 (S.D.Fla.2007).

1. The Settlement creates a sub-class. The Settlement Agreement creates a sub-class of U.S. Bank customers who closed or abandoned an overdrawn account; members of this sub-class owe U.S. Bank money – i.e., the overdrawn amount. Common fund settlement proceeds therefore will be used to reduce the overdrawn amount, and not necessarily the overdraft fee. These sub-class members should not receive any proceeds from a common settlement fund designed to compensate Class Members for improperly charged overdraft fees.

2. The Settlement results in a direct financial benefit to U.S. Bank at the expense of the Class Members that do not have overdrawn accounts. The Settlement Agreement authorizes U.S. Bank to pay itself from the common fund.

Specifically, it authorizes U.S. Bank to apply settlement proceeds to satisfy over drafted accounts on a dollar-for-dollar basis. U.S. Bank benefits from the Settlement by having a court-approved mechanism for covering overdrawn accounts with common fund settlement proceeds.

The Settlement therefore will cause Class Members that do not have overdrawn accounts to receive less compensation from the common fund. The Class Members are effectively paying off the overdrafts incurred by members of the aforementioned sub-class. U.S. Bank directly benefits from this Settlement to the detriment of the Class Members.

3. The requirements for objecting to the Settlement are onerous and unduly burdensome. They are also intended to intimidate possible objectors. Accordingly, the Settlement is procedurally unfair, and the Court should reject it.

B. The Settlement is not substantively fair, adequate and reasonable.

"In determining whether to approve a proposed [class action] settlement, the cardinal rule is that the district court must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Perez v. Asurion Corp.,* F.Supp.2d 1360 (S.D.Fla.2007) (quoting *Cotton v. Hinton,* 559 F.2d 1326, 1330 (5th Cir.1977)). See also *Behrens v. Wometco Enters., Inc.,* 118 F.R.D. 434, 538 (S.D.Fla.1988).

The Eleventh Circuit has identified six factors that a district court should examine when assessing whether a proposed settlement is "fair, adequate and reasonable." They are: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the

point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved. *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir.1984); *Perez*, 501 F.Supp.2d at 1379-1380.

These objections focus on the *Bennett* factors that can be addressed at this time based upon currently available information.

1. The compensation offered to Class Members is too low, and therefore is below the range of possible recovery at which a settlement is fair, adequate and reasonable. See *Bennett*, 737 F.2d at 986; *Perez*, 501 F.Supp.2d at 1379-1380. See also *Behrens*, 118 F.R.D. at 541 ("The second and third considerations of the *Bennett* test are easily combined."). "A district court must first determine the appropriate standard of damages (in order to calculate a range of recovery), and then determine where in this range of recovery a fair, adequate and reasonable settlement amount lies." *Perez*, 501 F.Supp.2d at 1380 (citing *Behrens*, 118 F.R.D. at 541).

The Settlement apparently will yield a mere $25.00 per Class Member. This is less than the amount of a single overdraft fee charged by the defendant. There is scant evidence in the record to suggest that this amount is fair in the context of the reasonable range of recovery here. *Figueroa*, 517 F.Supp.2d at 1326. The potential range of recovery is zero to the full amount of improperly charged overdraft fees. For some U.S. Bank customers, that amount could be well in excess of $25.00.

2. There is no *cy pres* distribution contemplated in the Settlement Agreement. Courts routinely recognize the use of a *cy pres* distribution in cases where

it would be difficult for all class members to receive individual shares of a recovery. Consequently, parties to a class action settlement nominate one or more non-profit or governmental entities to receive unclaimed funds. See e.g., *Klewinowski v. MFP, Inc.*, 2013 WL 5653402 (M.D.Fla.2013).

The Settlement Agreement authorizes unclaimed settlement funds to revert U.S. Bank. It appears that the reverter would be used to defray the cost of settlement administration. U.S. Bank benefits from the Settlement Agreement at the expense of the Class Members.

3. The proposed compensation awarded to Class Representatives is excessive. "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *In Re Southern Ohio Correctional Facility,* 175 F.R.D. 270, 272 (S.D.Ohio 1997). Indeed, incentive awards are justified when the class representatives expend considerable time and effort on the case, especially by advising counsel, or when the representatives risk retaliation as a result of their participation. *Id.* at 273; *See also Ingram v. The Coca-Cola Co.,* 200 F.R.D. 685, 694 (N.D. Ga. 2001).

This case is one of approximately twenty-eight cases filed against financial institutions for charging improper overdraft fees and consolidated before this Court as a multi-district litigation matter. There is no evidence to suggest that the Class Representatives are anything more than average U.S. Bank customers. There certainly is no evidence to suggest that the Class Representatives rendered extraordinary service to the Class or the Class Members.

Consequently, the Class Representatives should not be compensated at a rate of $10,000.00 each. This is more than 400 times the $25.00 each Class Member may receive.

4. The proposed attorney fee award of up to 30% of the common fund is excessive. At a rate of 30%, calculated using the common fund settlement amount of $55 million, Class Counsel may receive $16,500,000.00. This potential fee award dwarfs the $25.00 payment each Class Member may receive. *Cf. Figueroa,* 517 F.Supp.2d at 1327 (finding that the proposed attorney fee award of $2 million was not fair vis-à-vis the proposed class recovery of a $19.00 coupon that had to be spent at the tortfeasor's stores).

Additionally, Class Counsel did little to prosecute this case against U.S. Bank. Class Counsel conducted two depositions and received 21,000 pages of documents. This limited, minimal discovery is no more than would occur in a single-plaintiff versus single-defendant complex commercial litigation matter. In some cases, it probably is less discovery than typically would occur. Class Counsel should not receive a windfall for such little effort.

Finally, Class Counsel should be achieving significant economies of scale by prosecuting approximately twenty-eight cases involving essentially the same facts and legal theories. They should not be compensated at the maximum allowable rate for work they are replicating over multiple, nearly identical cases for which they also will receive attorney fee awards. The Class Members should receive a more proportional benefit from this Settlement as a consequence of the economies of scale Class Counsel enjoys in repetitive litigation.

5. The expenses to which Class Counsel may be entitled have not been disclosed. There is no statement in the Settlement Agreement concerning Class Counsel's expenses. There simply is not enough information in the Settlement Agreement concerning expenses to evaluate their fairness and reasonableness. Ms. Carpenter therefore respectfully reserves her right to supplement her objections after Class Counsel discloses its expenses.

6. Expenses may unfairly diminish the common funds available to compensate Class Members. Class Counsel is involved in numerous other overdraft cases consolidated before this Court. The Settlement Agreement does not reveal the total amount of expenses or Class Counsel's apportionment of such expenses to this case as compared to the other cases in which they are involved. It therefore is not possible for Class Members to evaluate whether Class Counsel wasted resources duplicating work already done in other nearly identical cases, charged the same expenses in multiple cases without apportioning them fairly and reasonably, or otherwise engaged in wasteful or lavish spending chargeable against the common settlement fund. Ms. Carpenter therefore respectfully reserves her right to supplement her objections after Class Counsel discloses its expenses.

7. Class Members may oppose the Settlement in significant numbers. The Court should consider the number of Class Members opposed to the Settlement. *Lipuma v. American Express Co.,* 406 F.Supp.2s 1298, 1324 (S.D.FLa.2005) ("In determining whether a proposed settlement is fair, reasonable and adequate, the reaction of the class is an important factor."). That number will be known after the

November 13, 2013, deadline passes. Ms. Carpenter therefore respectfully reserves the right to seek leave to supplement her objections once that number becomes public.

Furthermore, Ms. Carpenter hereby submits the following information in compliance with the requirements for objectors set forth at www.usbankoverdraftsettlement.com/FrequentlyAskedQuestions.aspx:

1. Kendra L. Carpenter, P.O. Box 14293, Columbus, Ohio 43214. Telephone: 614-310-4135. Email address: KCarpenter@SprankleCarpenter.com.

2. I object to the Settlement in *In re: Checking Account Overdraft Litigation,* 1:09-md-2036-JLK.

3. The grounds for my objections, including citations to applicable case authorities and other information, are set forth herein.

4. Ms. Carpenter is an attorney registered to practice in the State of Ohio, and has the following Ohio Supreme Court Registration Number: 0074219; Ms. Carpenter is acting *pro se* in filing her objections. She discharged Edward Siegel on or about November 4, 2013 for reasons that will be provided in a separate statement, under seal, should the Court so require.

5. Ms. Carpenter has not objected to settlements in other class action cases.

CONCLUSION

For the foregoing reasons, Class Member Kendra L. Carpenter objects to the

Settlement and requests that it not be approved in its current form.

Respectfully submitted,

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Pro Se

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was served upon the following on this 13th day of November 2013 via FedEx:

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