

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 09-MD-02036-JLK

**IN RE: CHECKING ACCOUNT
OVERDRAFT LITIGATION
MDL No. 2036**

**THIS DOCUMENT RELATES TO:
FOURTH TRANCHE ACTION**

Simmons, et al. v. Comerica Bank
N.D. Tex. Case No. 3:10-cv-326-0
S.D. Fla. Case No. 1:10-cv-22958

**PLAINTIFFS' AND CLASS COUNSEL'S RESPONSE TO OBJECTIONS
TO MOTION FOR FINAL APPROVAL OF SETTLEMENT AND CLASS
APPLICATION FOR SERVICE AWARDS AND ATTORNEYS' FEES**

After more than three years of hard-fought litigation, Class Counsel negotiated the Settlement Agreement and Release (“Settlement” or “Agreement”) with Comerica Bank (“Comerica Bank”).¹ The Settlement – which consists of a cash Settlement Fund in the amount of \$14,580,000, plus Comerica Bank’s payment of all fees and costs associated with the Notice Program and administration of the Settlement – is an outstanding achievement that will provide immediate benefits to the Settlement Class Members without further risks, delays and costs. Settlement Class Members do not have to do anything to receive the benefits of the Settlement; they will receive their settlement consideration through automatic account credits or by checks.

¹ All capitalized defined terms have the same meanings ascribed in the Settlement Agreement and Release attached as Exhibit A to Plaintiffs’ and Class Counsel’s Motion for Final Approval of Settlement, and Application for Service Awards, Attorneys’ Fees and Expenses (the “Motion”) (DE # 3783).

Approximately 185,000 Settlement Class Members were sent direct mail Notice of the Settlement. *See* Declaration of Cameron Azari (DE # 3783-4). The approved Notice used plain language to inform Settlement Class Members about, *inter alia*: (1) the terms of the Settlement; (2) the choices available to them – exclude themselves, object, or participate in the Settlement – including applicable deadlines and how to exercise those options; and (3) the Final Approval Hearing.

Out of approximately 185,000 Settlement Class Members, only two (2) objections to the Settlement were timely submitted or filed by or on behalf of individuals purporting to be Settlement Class Members: Janel Buycks and Markus Docsy (DE # 3806, 3812).

Two objections out of over 185,000 Settlement Class Members is particularly telling.² It evidences overwhelming support for Plaintiffs' and Class Counsel's Motion for Final Approval of the Settlement, and Application for Service Awards, Attorneys' Fees and Expenses.³ This extraordinarily "low percentage of objections points to the reasonableness of a proposed settlement and supports its approval." *Lipuma v. American Express Co.*, 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005).

Both objections are riddled with misunderstandings of the Settlement and basic class action jurisprudence. *Neither objector submitted an expert affidavit or provided any evidence undermining the conclusions reached by Class Counsel and their nationally recognized expert that (i) this Settlement achieves an outstanding result for the Settlement Class, and (ii) Class*

² The average number of objections to settlements of consumer class actions is 233. In a settlement of this magnitude, the Court should expect to receive around 66 objections to the Settlement (extrapolating from the average of 4.7 objectors per \$1 million in consumer recovery). *See* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529 (2004).

³ In addition, the number of timely requests for exclusion (6 as of March 12, 2014) demonstrates overwhelming support for the Settlement.

Counsel's application for fees is reasonable. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1021 (9th Cir. 1998) (affirming final approval of nationwide class action settlement where “[t]he objectors presented no evidence” to support their arguments).

For the reasons discussed below, Plaintiffs and Class Counsel respectfully request that the Court (1) overrule both objections; (2) grant Final Approval to the Settlement; (3) approve the request for Service Awards to the Plaintiffs; (4) approve Class Counsel's application for attorneys' fees and expenses; and (5) enter Final Judgment dismissing the Action with prejudice.

I. BOTH OBJECTIONS SHOULD BE OVERRULED

A. The Janel Buycks Objection.

Objector Janel Buycks is a serial objector. She previously objected to the \$410 million settlement with Bank of America, N.A. (DE # 1916). And as the Court will quickly discern by a review of Ms. Buycks' prior objection (DE #1916), she copied and repeated large portions of her prior objection here, without regard for the substantial factual differences between the cases and the settlements involving two different banks. Among other things, Ms. Buycks' "copy and paste" objection is so illogical and frivolous that it:

- includes repeated references to "objector's counsel being a former member of the Plaintiffs' Executive Committee" – even though Ms. Buycks' current objection was submitted *pro se*;
- includes repeated references to *Yourke* and *Closson*, two Bank of America-related cases that have no connection with the pending case and Settlement involving Comerica;
- claims there has been "no showing for utilizing a claims process in this settlement" – even though this Settlement does not include a claims process; and

- argues – without any factual basis – that this case is “worth more than what is claimed by Plaintiffs” and that “class counsel negotiated the proposed settlement with no reliable estimate of class members’ damages.”

Given its role presiding over MDL 2036 and this action in particular, this Court is aware of the history of this action, the details of which are discussed in the Motion (DE # 3783). Unlike Ms. Buycks’ unsupported and baseless assertions regarding how much this case is worth and the information that Class Counsel had available during settlement negotiations, the Motion and accompanying Joint Declaration of Robert C. Gilbert, Russell W. Budd and Joseph G. Sauder (DE # 3783-2) provide sworn details regarding the intense litigation efforts and the settlement negotiations. According to Professor Brian Fitzpatrick, a nationally recognized expert in class actions and Rule 23, the \$14,580,000 Settlement Fund is an “outstanding result” when considered in the context of Comerica Bank’s vigorous defenses to liability and damages. *See* Declaration of Professor Brian Fitzpatrick (DE # 3783-3).

This Court should require Ms. Buycks to demonstrate the good faith basis supporting the “facts” asserted in her objection. She cannot, and will not, because Ms. Buycks does not possess any facts to back up her illusory and unfounded claims. Ms. Buycks’ objection should be stricken or summarily denied as frivolous, and the Court should consider requiring Ms. Buycks’ to show cause why sanctions should not be imposed against her for engaging in vexatious litigation.

B. The Markus Doczy Objection.

Objector Markus Doczy complains that the requirements for submitting an objection are unfair and onerous, although these are the same requirements approved by this Court in connection with all prior settlements in MDL 2036. Mr. Doczy also complains that “key details

of the Settlement have been hidden from class members” because the number of Settlement Class Members was not disclosed. Here again, Mr. Doczy is incorrect; the number of Settlement Class Members was disclosed in the Motion and accompanying Declaration of Cameron Azari (DE # 3783-4). Finally, Mr. Doczy argues – also without support – that the request for a 30% fee award in this case is unreasonable, even though it is fully supported by the detailed information set forth in the Motion and Joint Declaration, by Professor Fitzpatrick’s analysis and application of the *Camden I* factors to the facts of this case (DE # 3783-3), and is consistent with similar fee requests approved by this Court in connection with prior MDL 2036 settlements.

CONCLUSION

Based on the foregoing, as well as the Motion, the Court should overrule the objections and grant Final Approval to the Settlement, approve the requested Service Awards for the Plaintiffs, approve Class Counsel’s application for attorneys’ fees and expenses, and enter Final Judgment dismissing the Action with prejudice.

Dated: April 2, 2014.

Respectfully submitted,

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Plaintiffs' Executive Committee

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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