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

Steen v. Capital One, N.A.
E.D. La. Case No. 2:10-cv-01505-JCZ-KWR
S.D. Fla. Case No. 1:10-cv-22058-JLK

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 four years of hard-fought litigation, Class Counsel negotiated the Settlement Agreement and Release ("Settlement" or "Agreement") with Defendant Capital One, N.A. ("Capital One" or the "Bank").[1] The Settlement, which consists of Capital One's cash payment of $31,767,200 to create a Settlement Fund, plus payment of all fees and costs associated with the Notice Program and administration of the Settlement, is an excellent result that will provide immediate benefits to over half a million Settlement Class Members without further risks, delays and costs. Eligible Settlement Class Members do not have to do anything to receive the benefits provided by the Settlement; they will receive their settlement consideration

[1] All capitalized defined terms have the same meanings ascribed in the Agreement attached as Exhibit A to Plaintiffs' and Class Counsel's Motion for Final Approval of Class Settlement, and Application for Service Awards, Attorneys' Fees and Expenses and Incorporated Memorandum of Law (the "Motion") (DE # 4092).

through automatic account credits or by checks. More than half a million Settlement Class Members received direct mail Notice of the Settlement. The Notice approved by the Court used plain language to inform Settlement Class Members about, *inter alia*: (1) the terms of the Settlement, the application for Service Awards, and Class Counsel's application for attorneys' fees and expenses; (2) the choices available to them – exclude themselves (opt-out), object, or participate in the Settlement – including applicable deadlines and how to exercise those options; and (3) the Final Approval Hearing.

I. OVERVIEW OF THE OBJECTIONS

Out of more than half a million Settlement Class Members, two (2) objections were filed by or on behalf of individuals purporting to be Settlement Class Members. (DE # 4104, 4123). Both objections were filed by lawyers and individuals who have made a career out of objecting to class action settlements. Such objectors, known as "serial" or "professional" objectors, have raised the ire of federal courts, including this Court, for playing no positive role in class action litigation and contributing no benefit to the class.

Two objections out of over half a million Settlement Class Members is particularly telling.[2] It evidences overwhelming support for the Motion.[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).

[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 145 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 extremely low number of requests for exclusion (19) demonstrates overwhelming support for the Settlement. *See* Supplemental Affidavit of Cameron Azari On Exclusion Requests and Objections. (DE # 4144)

Both objections lack merit. They are riddled with misunderstandings of the Settlement. One of the objections is substantially identical to six (6) objections previously filed by the same professional objectors in connection with other MDL 2036 settlements approved by this Court. *Neither objection included an expert affidavit or any evidence that undermined the conclusions reached by Settlement Class Counsel and their nationally recognized expert that (i) this Settlement achieves an excellent result for the Settlement Class, and (ii) Class Counsel's application for attorneys' fees is warranted and 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 the two 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.

II. THE PROFESSIONAL OBJECTIONS SHOULD BE STRICKEN OR SUMMARILY DENIED

Attorney Steve Miller and his co-counsel filed an objection on behalf of Ann Marie McVea (the "McVea Objection"). (DE # 4123). Mr. Miller and his colleagues are serial objectors who make a living filing objections to class action settlements. *See, e.g., In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, MDL No. 1532, DE # 1175 at n.22 (D. Me. Apr. 13, 2011) (rejecting Mr. Miller's "specious" arguments); *In re Am. Int'l Grp., Inc. Sec. Litig*. No. 04-cv-08141-DAB, DE # 663, 664 (S.D.N.Y. Oct. 1, 2012) (Mr. Miller withdrew his appeal of an order rejecting his objections to a settlement, without having provided any benefit to class). Mr. Miller is also known for filing objections in different cases on behalf of the same "clients." *See, e.g., Blessing v. Sirius XM Radio Inc.*, No. 09-cv-10035, DE # 167 (S.D.N.Y. Sept. 14,

2011); *In re Lawnmower Engine Horsepower Marketing & Sales Practices Litig*., MDL No. 1999, DE # 272 (E.D. Wis. June 22, 2010); *Nakash v. nVidia Corp*., No. 08-cv-04312-JW, DE # 325 (N.D. Cal. Jan. 14, 2011); *In re Mattel, Inc. Toy Lead Paint Prods. Liab. Litig*, MDL No. 1897, DE # 194 (C.D. Cal. Feb. 19, 2010); *CLRB Hanson Inds., LLC v. Google, Inc*., No. C 05-03649 JW PVT, DE # 326 (N.D. Cal. July 10, 2009).

Mr. Miller and his co-counsel previously filed virtually identical objections to at least six (6) other MDL 2036 settlements that received final approval by this Court. (*Compare* DE # 4123 with DE # 3694, 3247, 3227, 3032, 3031, 2133). In addition to its lack of substantive merit, the McVea Objection does not comply with the basic requirements set forth in the Preliminary Approval Order. (DE # 4047). The McVea Objection fails to provide the information required by paragraphs 84(f)-(k) of the Agreement, including information regarding objections filed by Mr. Miller and his co-counsel in other class action cases. The McVea Objection is therefore defective, and should be stricken based on the failure to comply with the Preliminary Approval Order. The McVea Objection also lacks substantive merit.

The other objection was filed by Rendee K. Bullard (the "Bullard Objection"). (DE # 4104) Ms. Bullard and her counsel Nikki Hurst Gibson also filed an objection to the settlement with JPMorgan Chase Bank, N.A. in MDL 2036. (DE # 3048). Like Mr. Miller and his cohorts, Ms. Bullard and Ms. Gibson are attempting to exact a fee in exchange for the withdrawal of their objection. The Bullard objection similarly lacks merit.

As this Court and others have determined, serial objectors who hold up large class action settlements for a payout, perform no constructive role in class action litigation. "[M]ost if not all . . . are motivated by things other than a concern for the welfare of the Settlement Class." *Tornes v. Bank of America, N.A.*, 830 F. Supp. 2d 1330, 1361 n.30 (S.D. Fla. 2011) (King, J.). Such

lawyers make their living "simply by filing frivolous appeals and thereby slowing down the execution of settlements." *Barnes v. FleetBoston Fin. Corp.*, 2006 U.S. Dist. LEXIS 71072, at *3-4 (D. Mass. Aug. 22, 2006). Their "sole purpose is to obtain a fee by objecting to whatever aspects of the Settlement they can latch on to" and levying "what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors." *Tornes*, 830 F. Supp. 2d at 1361 n.30 (quoting *Barnes*, 2006 U.S. Dist. LEXIS 71072, at *3-4). For this reason, "federal courts are increasingly weary of professional objectors." *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 295 n.26 (E.D. Pa. 2003).

Given who is behind these objections, they should be accorded little, if any, weight.

III. BOTH OBJECTIONS SHOULD BE OVERRULED ON THE MERITS

Both objections argue that Class Counsel's application for attorneys' fees is excessive. *See* McVea Objection at pp. 2-5 (DE # 4123); Bullard Objection at pp. 3-8 (DE # 4104). The McVea Objection also raises several other specious arguments that attorney Miller and his co-counsel raised in their prior MDL 2036 objections. *Compare* McVea Objection at pp. 5-13 (DE # 4123) with DE # 3694 at pp. 2-9; DE # 3247 at pp. 2-7; DE # 3227 at pp. 2-9; DE # 3032 at pp. 2-7; DE # 3031 at pp. 6-12.

A. A Fee of 34% of the $31.7 Million Common Fund Is Reasonable in This Case.

Both objections argue that the requested 34% fee award of the $31.7 million common fund created through this Settlement is excessive. *See* McVea Objection at pp. 2-5; Bullard Objection at pp. 3-8. They are wrong on the law and the facts.

Professor Brian Fitzpatrick, a nationally recognized scholar on class actions and attorneys' fees in class actions, provided detailed factual and legal bases supporting his opinion that a fee award of 34% of the $31.7 million common fund is "well within the range of reason"

and is "warranted and reasonable." *See* Fitzpatrick Decl. ¶¶ 18-26 (DE # 4092-3). Professor Fitzpatrick's expert opinions are *unrebutted*.

According to Professor Fitzpatrick, when fee awards are examined scientifically it becomes apparent that a 34% fee award on the $31.7 million common fund in this case is clearly reasonable and warranted. *See* Fitzpatrick Decl. ¶¶ 21-22 (DE # 4092-3). Professor Fitzpatrick concluded that a 34% fee award here is consistent with fee awards in other District Courts in Florida, and the results of several studies conducted by scholars and the Federal Judicial Center. *Id*.

In *Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185 (S.D. Fla. 2006), U.S. District Judge Alan Gold held that decreasing a fee percentage solely in light of a large settlement:

> is *antithetical* to the percentage of the recovery method adopted by the Eleventh Circuit in *Camden*, the whole purpose of which is to align the interests of Class Counsel and the Class by rewarding counsel in proportion to the result obtained. By not rewarding Class Counsel for the additional work necessary to achieve a better outcome for the class, the sliding scale approach creates the perverse incentive for Class Counsel to settle too early for too little.

Id. at 1213 (emphasis added) (citation omitted); *see also Williams v. General Elec. Capital Auto Lease*, 1995 WL 765266, at *10 (N.D. Ill. Dec. 16, 1995) ("Without significant counsel fees to encourage the pursuit of these claims, the public policy to induce compliance with the law would be disserved.").

B. The McVea Objection's Other Grounds are Specious.

The McVea Objection also argues that the Settlement is unfair because: (i) the release is overbroad; (ii) the likelihood of unclaimed funds will result in the establishment of a *cy pres* fund that is unnecessary and does not benefit the Settlement Class; (iii) it does not provide for a

floor or ceiling on what eligible Settlement Class Members will receive as payment; (iv) it does not protect all consumers and allows the Bank to continue to engage in the practices that were challenged in the Action; and (v) the Bank has a reversionary interest in any residual funds that remain following distributions to all eligible Settlement Class Members to reimburse it for third party costs and expenses it actually paid to the Notice Administrator and Settlement Administrator. *See* McVea Objection at 5-13. (DE # 4123). These are the very same arguments that attorney Miller and his colleagues raised in the objections they filed in connection with at least six prior settlements that were approved by this Court. *Compare* McVea Objection at pp. 5-13 (DE # 4123) with DE # 3694 at pp. 2-9; DE # 3247 at pp. 2-7; DE # 3227 at pp. 2-9; DE # 3032 at pp. 2-7; DE # 3031 at pp. 6-12. None of these issues has merit now, for the same reasons they had no merit when raised during prior settlement proceedings. All of these arguments are undermined by the actual provisions of the Settlement (DE # 4092-1), as well as the sworn declarations submitted by Settlement Class Counsel, Professor Fitzpatrick, and Settlement Class Counsel's data and damage expert, all of which were filed in support of the Motion (DE # 4092-2, 4092-3, 4092-5). Class Counsel will not rehash those arguments again here.

III. CONCLUSION

Based on the foregoing, as well as the facts and authorities set forth in the Motion and supporting declarations, the Court should overrule the two objections and grant Final Approval to the Settlement, approve 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 29, 2015.

Respectfully submitted,

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Plaintiffs' Executive Committee

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2015, 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, including all objectors, 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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