UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOANNE FARRELL, et al. Plaintiffs, v. BANK OF AMERICA, N.A., Defendant.	Case No.: 3:16-cv-00492-L-WVG **ORDER TO SHOW CAUSE**

Pending before the Court are Class Counsel's unopposed motions for final approval of class action settlement and final approval of fees, costs, and service awards. The Court has considered the motions on file, all timely objections, and oral argument presented by Class Counsel, counsel for Defendant Bank of America ("BoA"), and counsel for Objector Rachel Threatt at the final approval hearing held on June 18, 2018. For the following reasons, the Court hereby orders BoA and Class Counsel to show cause as to why the absence of subclasses is not problematic for purposes of Federal Rule of Civil Procedure 23(a)(4).

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I. PROCEDURAL BACKGROUND

This case is a putative class action focused on BoA's practice of levying $35 fees against deposit account holders for failing to rectify an overdrawn deposit account within five days. To open a deposit account with BoA, a customer had to first execute a Deposit Agreement [Doc. 8-3]. Under the terms of the Deposit Agreement, BoA charged a $35 fee (the "Initial Charge") anytime a deposit account holder wrote a check against insufficient funds. When a deposit account holder thus overdrafted his or her account, BoA had discretion as to whether to honor the overdrawn check by advancing funds to the payee sufficient to cover the note. However BoA levied the Initial Charge whether it advanced the funds or not. In the event BoA advanced the funds, deposit account holders were obligated under the Deposit Agreement to pay back BoA's advance plus any fees incurred. Failure to do so within five days triggered a $35 Extended Overdrawn Balance Charge ("EOBC").

Former[1] plaintiff Joanne Farrell ("Farrell") wrote some checks against insufficient funds. BoA honored the checks but charged her $35 Initial Charges for not having sufficient funds. When Farrell failed to remedy her negative account balance within five days, BoA levied EOBCs. Because the EOBCs, as a percentage of Farrell's negative account balance, exceeded the interest rate permitted by the National Banking Act, Farrell filed this putative class action against BoA, alleging violation of 12 U.S.C. §§ 85, 86 (the "NBA"). (Compl.)

A significant amount of pretrial activity followed. BoA moved to dismiss Farrell's Complaint, arguing that the Extended Charges were not "interest" and therefore cannot trigger the NBA. (MTD [Doc. 8].) The Court disagreed, and therefore denied BoA's motion. (MTD Order [Doc. 20].) BoA subsequently answered and then amended their answer, and Farrell twice moved to dismiss some of BoA's affirmative defenses.

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[1] Ms. Joanne Farrell passed away January 18, 2018. Her four adult children now stand in her shoes with respect to her interests in this litigation. (Substitution Order [Doc. 115].)

(Answer [Doc. 25]; Am. Answer [Doc. 40]; Mots to Strike [Docs. 41, 45.) In part because every other court to consider the issue had held that EOBCs do not constitute interest, this Court found that there was substantial ground for a difference of opinion on the issue. (April 11, 2017 Order [Doc. 61].) The Court therefore granted BoA's motion for certification of an interlocutory appeal of the denial of BoA's motion to dismiss. (Id.)

BoA petitioned the Ninth Circuit for a permissive interlocutory appeal on April 21, 2017. (Doc. 62.) Farrell answered. (9th Cir. Case No. 17-80072 ["Appeal"] Doc. 4.) The Ninth Circuit Granted BoA's Petition. (Doc. 63.) While the permissive appeal was pending before the Ninth Circuit, the parties participated in settlement negotiations, exchanged informal discovery, and attended mediation before the Honorable Layn Philips (Ret.), a highly respected neutral. Through these efforts, the parties successfully reached a settlement agreement in early October 2017 ("Settlement"). After conducting confirmatory discovery and reducing terms to writing, the parties formally executed the Settlement on October 31, 2017 and requested preliminary approval. An amended complaint adding three additional named plaintiffs followed. On December 21, 2017 the Court granted preliminary approval. (Prelim. Appr. Orders [Docs. 72, 75].) Plaintiffs[2] now move unopposed for certification of a settlement class, final approval of the Settlement, final approval of attorneys' fees and costs award, and final approval of service awards for named plaintiffs.

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[2] In addition to the four children of Joanne Farrell, named plaintiffs now include Ronald Dinkins, Tia Little, and Larice Addamo.

II. THE SETTLEMENT

In exchange for the release of class members' claims, the Settlement provides four forms of consideration:

1. BoA ceases charging EOBCs for five years beginning December 31, 2017. (Settlement Agreement [Doc. 104-2] § 2.2(a).) BoA's obligation would terminate during this timeframe only if the United States Supreme Court expressly holds that EOBCs or their equivalent do not constitute interest under the NBA. (Id.) BoA testifies that this cessation will depress their revenue (and benefit BoA deposit account holders) by approximately $20,000,000 per month, or **$1.2 billion** total, over the five year period. (Bhamani Decl. [Doc. 104-4].)
2. BoA would provide cash payment ("Cash Portion") of **$37.5 million** to class members who were charged an EOBC during the class period, provided that EOBC was not refunded or charged off. (Settlement Agreement § 2.2(b)(3).) Attorneys' fees ($14.5 million), costs ($53,119.92), named plaintiff service awards ($20,000), and settlement administrator hourly charges (approximately $62,242.00 [Doc. 122-1 ¶33]) would come off the top. (Id. § 1.4, 1.24, 2.2(b)(3).) The residue (approximately $22,864,638) would issue pro rata based upon how many EOBC's each qualifying class member paid as a percentage of all EOBC's paid by the class during the class period. (Id. § 2.2(b)(3).) Class members who did not opt out would receive their payment automatically.
3. BoA provides debt reduction ("Debt Portion") in the amount of **$29.1 million**. Debt reduction will issue to class members whose BoA accounts closed with an outstanding balance stemming from one or more EOBC's levied during the class period. Each eligible class member will receive up to $35 in debt reduction. To the extent BoA reported any of this debt to the credit bureaus, BoA would update the Bureaus as to the effect of the debt reduction. This debt reduction would issue automatically to all qualifying members who did not opt out. It would apply only

to debt which BoA has a legal right to collect. (Hearing Tr. [Doc. 124].) It would not apply to unenforceable debt, such as debt discharged in bankruptcy. (Id.)

4. BoA is paying all settlement administration costs other than the administrator's hourly service charges. These costs are currently estimated at $2.9 million. (Doc. 122-1 ¶ 33.)

If there is any residual Cash Portion settlement funds after the first distribution, the residue would go to the class by way of a secondary distribution, if economically feasible. Otherwise, the residue would go to the Center for Responsible Learning as *cy pres* beneficiary. None of the settlement funds would revert to BoA.

Email and / or physical mail notices went out to 7,078,199 class members. (Doc. 122-1 ¶ 21.) Only 100 class members opted out. (Id. ¶ 26.) Eleven class members have filed timely objections. (Docs. 82, 84–86, 88, 90–93, 101.) Class member Rachel Threatt ("Threatt") was the only objecting class member to appear at the final approval hearing ("Hearing"), entering an appearance through counsel Theodore Frank.

III. DISCUSSION

Plaintiffs seek settlement only class certification under Fed. R. Civ. P. 23(a) and (b)(3) of the same settlement class the Court preliminarily certified: "All holders of [BoA] consumer checking accounts who, during the period between February 25, 2014 and December 30, 2017, were assessed at least one [EOBC] that was not refunded." (Prelim. Appr. Order [Doc. 72] § 2.)

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). "A party seeking class certification must satisfy the requirements of Federal Rule of Civil Procedure 23(a) and the requirements of at least one of the categories under Rule 23(b)." *Wang v. Chinese Daily News, Inc.*, 709 F.3d 829, 832 (9th Cir. 2013). Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. "The Rule's four requirements – numerosity,

commonality, typicality, and adequate representation – effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *Dukes*, 564 U.S. at 349 (internal quotation marks and citations omitted). In the context of settlement only class certification, courts must pay heightened attention to the requirements of Rule 23. *Amchem Products Inc. v. Windsor*, 52 U.S. 591, 620 (1997).

Here, the Court has concern as to whether the adequacy element is met. To serve as class representative, one must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is aimed at protecting the due process rights of absent members who will be bound by a class action judgment. *Hanlon,* 150 F.3d at 120; *Richards v. Jefferson Cnty.*, Ala., 517 U.S. 793, 801 (1996). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon,* 150 F.3d at 120 (citation omitted).

Named plaintiffs and Class Counsel have demonstrated their competence and ability to vigorously prosecute this action on behalf of the class. Thus, the Court's concern on the issue of adequacy focuses only on whether there exists a conflict of interest between the named plaintiffs and the class they seek to represent. Objector Estafania Sanchez ("Sanchez") complains that the interests of the Debt Portion recipients and the Cash Portion recipients are in conflict. (Sanchez Objection [Doc. 88] ¶ 3.)[3] In support of this argument, Sanchez cites to *Amchem Products Inc. v. Windsor*, 52 U.S. 591 (1997). In *Amchem*, an asbestos exposure case, the Supreme Court held that there was an insufficient alignment of the interests of plaintiffs who presently suffered exposure related injury and plaintiffs who had no present symptoms but could potentially suffer

[3] At the Hearing, Objector Rachel Threatt's counsel, Theodore Frank, also discussed disparate treatment of subgroups. The court will therefore give Objector Threatt an opportunity to file a brief responsive to Class Counsel and BoA's joint response to this order to show cause.

them at a later time. *Id.* at 626. To wit, the former had an interest in maximizing immediate payment while the latter had a conflicting interest in maximizing a reserve fund for future claims with built in inflation adjustments. *Id.*

Here too there are at least two types of harm suffered by class members. Some suffered harm by paying the EOBCs. Others were charged EOBCs and did not pay them, thus suffering harm in the form of adversely affected credit, facing collections activity, or perhaps by being nudged a step closer to bankruptcy. Some suffered both types of harm. If there exists something resembling a zero sum relationship such that every dollar BoA spends toward the Debt Portion is a dollar they are unwilling to spend towards the Cash Portion, these two groups would seem to have conflicting interests.

Additionally, it is not clear from the First Amended Complaint which varieties of harm each of the named plaintiffs suffered. To the extent named plaintiffs are not representative of any subgroup, unfavorable treatment of that subgroup could suggest the settlement negotiation process was flawed. The Court notes potentially less favorable Settlement treatment of certain subgroups in the following ways:

- Though all class members who actually paid EOBCs will receive some form of direct relief, it is not clear whether the same is true of all members who did not pay their EOBCs. Because account closure is a prerequisite for inclusion in the Debt Portion and payment is a prerequisite for inclusion in the Cash Portion, any class member with an active (non-closed) BoA deposit account who (1) was levied a class period EOBC and (2) never paid any EOBCs would benefit from the Settlement, if at all, only through the injunctive relief.
- Any class member who falls only into the Debt Portion subgroup and owed $35 or less in unpaid EOBCs will be made completely whole through the Settlement. By contrast, no Cash Portion recipients will receive one hundred percent of their damages. The Settlement thus seems to penalize some class members for paying their EOBCs.

For the foregoing reasons, the Court orders Class Counsel and BoA to file a joint brief of up to twenty five pages no later than July 30, 2018. Objectors Threatt and Sanchez may each file responsive briefs of up to twenty five pages in length no later than August 13, 2018. The Court urges counsel for Threatt and Sanchez to confer with each other in an effort to avoid duplication in briefing. No later than August 27, 2018, Class Counsel and BoA may file a joint reply of up to twenty pages in length. Briefing shall focus squarely on whether there are conflicting interests amongst subgroups of the class that require the creation of subclasses, potentially with separate representation. Especially germane to this inquiry are the following issues:

- Whether a dollar spent towards Debt Portion relief is one less dollar BoA was willing to spend towards Cash Portion relief.
- Explanation of any disparate treatment amongst subgroups.
- Whether each subgroup has representation amongst the named plaintiffs.
- The amount of EOBC caused debt owed by the Debt Portion group and the number of class members that fall into the Debt Portion group. The sum of EOBC payments made by members of the Cash Portion group and the number of members that fall into the Cash Portion group.
- Whether there are any class members with unclosed accounts who were charged EOBCs during the class period and never paid them. If so, how many such class members there are and how much class period EOBC debt they owe.

IT IS SO ORDERED.

Dated: June 28, 2018

Hon. M. James Lorenz
United States District Judge