

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Esslinger, et al. . Docket #10-CV-3213 (BMS)
Plaintiffs, .
vs. . United States Courthouse
Philadelphia, PA
October 1, 2012
HSBC Bank USA, Inc., et al., . 9:02 a.m.
Defendants. .

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TRANSCRIPT OF FAIRNESS HEARING
BEFORE THE HONORABLE BERLE M. SCHILLER
UNITED STATES DISTRICT COURT JUDGE

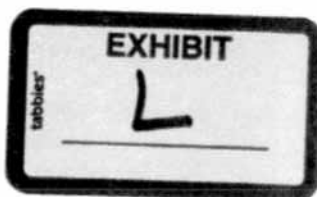
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1 THE COURT: This is a hearing in the case of
2 Esslinger et al., vs. HSBC Bank, et al., Civil #10-3213.
3 Counsel, identify yourselves for the record.

4 MR. GOLOMB: Good morning, Your Honor, Richard
5 Golomb for the Class.

6 MR. PULLIAM: Good morning, Your Honor, Randy
7 Pulliam also for the Class.

8 MR. GRUNFELD: Your Honor, Ken Grunfeld for the
9 Class.

10 THE COURT: Okay.

11 MR. GOLOMB: And Your Honor, if I may, we also have
12 Rachel Geman, and Diane Sammons, and Kevin Landau for the
13 Class.

14 THE COURT: Okay.

15 MS. STRICKLAND: Good morning, Your Honor, Julia
16 Strickland of Stroock and Stroock and Lavan on behalf of HSBC.

17 MR. YOO: Good morning, Your Honor, Jason Yoo,
18 Stroock and Stroock and Lavan, on behalf of HSBC.

19 MR. MANDIA: And Bill Mandia for Stradley Ronon on
20 behalf of HSBC.

21 THE COURT: Okay. Now, we also have some objectors
22 out here, right?

23 MR. LEWIS: Yes, Sir.

24 THE COURT: All right, let me hear from you.

25 MR. LEWIS: I'm Cam Lewis for South Carolina.

1 THE COURT: Okay. Well, what do you mean for South
2 Carolina?

3 MR. LEWIS: Well, we have a class that we have in
4 South Carolina, as well as --

5 THE COURT: You're from the South Carolina group,
6 Mr. Chastain? You represent Mr. Chastain?

7 MR. LEWIS: Yes, Sir.

8 THE COURT: Okay.

9 MR. BUDD: Russell Budd and Burton LeBlanc
10 representing the states of West Virginia, Mississippi and
11 Hawaii.

12 THE COURT: Wow. Remember this day. You can look
13 back and say, "I represented three states of the United States
14 somewhere." I hope that can give you, you know, a key to the
15 state when you fly in. Go ahead, who else? Anybody else?
16 Yes.

17 MR. ZIPKIN: Lewis Zipkin and my partner Dawn
18 Kuderna. We represent objector Peterson, Your Honor, from
19 Cleveland, Ohio.

20 THE COURT: Okay. Anyone else? Nobody? Okay,
21 please be seated.

22 MR. ZIPKIN: Your Honor, if I may, I am hearing
23 impaired so if I --

24 THE COURT: So am I. Are you wearing hearing aids?

25 MR. ZIPKIN: That's it.

1 THE COURT: Hum?

2 MR. ZIPKIN: I didn't hear what you said.

3 THE COURT: Are you wearing hearing aids?

4 MR. ZIPKIN: Two of them. They don't seem --

5 THE COURT: In the same ear or one in each ear?

6 MR. ZIPKIN: Both.

7 THE COURT: Oh, okay.

8 MR. ZIPKIN: Neither one of them do much good, Your
9 Honor.

10 THE COURT: Would it be helpful to you if you sat up
11 closer?

12 MR. ZIPKIN: Thank you, I would appreciate that.

13 THE COURT: Well, come on up. All right, good. All
14 right, Mr. Golomb, you want to start?

15 MR. GOLOMB: Yes, Sir. May it please the Court,
16 Your Honor, we're here seeking an order -- two orders, one for
17 final approval and the other for fees in this case. And I
18 think that Your Honor needs to answer the following six
19 questions. Number one is whether the settlement amount is
20 fair and reasonable.

21 THE COURT: Boy, I'm only used to answering four
22 questions, but now we have six.

23 MR. GOLOMB: Well --

24 THE COURT: Okay.

25 MR. GOLOMB: Whether the notice plan and plan of

1 allocation is appropriate, whether a final approval order and
2 judgment should be entered, whether the amount of attorneys
3 fees and costs requested is fair and reasonable, whether the
4 amount of service awards requested for the class
5 representatives is fair and reasonable, and whether the
6 objections should be overruled in this final approval order.

7 If I may suggest to Your Honor a way to go about this, if
8 it's okay with Your Honor, I hopefully will assist the Court
9 in answering the first of those five questions. With respect
10 to the objections, Mr. Pulliam will handle the objections, and
11 if we could, I'll go through the settlement and the fee
12 petition. And then I assume either the Court may have some
13 questions and then have Ms. Strickland address those issues,
14 and then have the objectors speak, and then we can respond to
15 the objectors, is that okay?

16 THE COURT: Okay.

17 MR. GOLOMB: As Your Honor knows, this is the fourth
18 of five cases that we have been litigating since 2008. The
19 first three cases that have already been settled and finally
20 approved are cases against Capital One, Discover, and Chase.
21 And the reason why I say that -- and there's a fifth case that
22 settled with BOA that has not yet been finally approved.
23 Final approval on that case is in January -- is because
24 through the course of these litigations, as you'd note in this
25 case and some other cases, the settlements came rather

1 quickly. That's because we litigated the first case through
2 class certification and were able to really get to the heart
3 of the matters. We know what documents we need, what
4 documents to review to evaluate liability, to evaluate
5 settlement. We've been working --

6 THE COURT: That was one of my questions that I
7 wanted to ask. Was sufficient information exchanged in
8 discovery between the parties to adequately evaluate the
9 strengths and weaknesses of the case?

10 MR. GOLOMB: Absolutely. We had discovery both
11 before mediation and also after mediation. Like I said, we
12 have gotten a very good list of things that we need in all
13 these cases. We know what documents we need to review for
14 liability. We know what documents we need to review for
15 settlement purposes, revenue numbers, numbers of members, in
16 what category claims, those kinds of things. So we really
17 have, since the experience in Capital One, have really been
18 able to fine tune the discovery requests to get right to the
19 heart of the matter.

20 Plus, you know, these cases, they have some very
21 significant defenses, both arbitration as well as preemption
22 defenses. In this particular case, HSBC had filed a Motion to
23 Dismiss based on federal preemption, and that issue had been
24 fully briefed, and then we went and we mediated the case. The
25 mediator that we used in this particular case is somebody that

1 we've used in a number of financial services cases, but in
2 particular, also used him in other payment protection cases.
3 So we are -- when you look at the thousands of documents that
4 we've reviewed, when you look at the interviews, the kind of
5 informal depositions --

6 THE COURT: Mr. Zipkin, can you hear?

7 MR. ZIPKIN: Barely, but I am hearing. Thank you,
8 Your Honor.

9 THE COURT: Okay, go ahead.

10 MR. ZIPKIN: If you would speak closer to the
11 microphone, that would be helpful. I'm appreciative, Your
12 Honor.

13 MR. GOLOMB: And when you look at the thousands of
14 documents that we reviewed, the preparation that went into
15 mediation, the confirmatory discovery that we did in this
16 particular case post-mediation, the negotiations, some very
17 tedious negotiations over the settlement agreement release
18 language, which you'll hear more about later, and you look at
19 this particular settlement as compared to the other cases that
20 we have already settled and have already gotten final
21 approval, we're very comfortable with the settlement and I
22 hope Your Honor is as well. I think that you'll see that it
23 is a fair and reasonable settlement that we will be seeking
24 final approval on.

25 And what you'll hear also is, you know, we had -- there

1 were three separate mediation sessions in June and July of
2 2011, and then there was an additional session with the
3 mediator to finalize the release terms. In terms of the
4 confirmatory discovery, in addition to reviewing all those
5 documents, we also conducted interviews, informal depositions
6 if you will, of two people: One was the Vice President of
7 marketing who was responsible for the ancillary products
8 including this payment protection product. And we also
9 interviewed, kind of a 30(b)(6), if you will, of Jill Dowd,
10 who is their analytics and metrics person, who discussed the
11 product.

12 So when you look at this settlement, it is, we think, is
13 very fair and reasonable. And as you know, this a claims made
14 settlement, meaning not everybody who's got the product is
15 dissatisfied with the product. Those who were dissatisfied
16 with the product who fall under one of three classes, then
17 filed a claim, and we're happy to report that with respect to
18 -- like I said, there's three separate classes, but with
19 respect to certain folks in that class, those who were slammed
20 for the products, those who unknowingly got the product, we
21 believe that they're going to get almost 75 cents on the
22 dollar of what they paid out. So I think when you compare
23 this to other settlements, it's very, very favorable. The
24 next question that Your Honor needs to answer is whether or
25 not the notice is reasonable, and there was at least one

1 objection about the notice. And by the way, this is the
2 notice that Your Honor approved, the plan of notice that Your
3 Honor approved at preliminary approval. You know, over 16
4 million individuals received notice in this case, and they
5 received notice by email, they received notice by receiving
6 written notice in their billing statements, they received
7 notice by postcard, and over \$4 million was spent already in
8 the cost of noticing this case.

9 THE COURT: You didn't text them?

10 MR. GOLOMB: No.

11 THE COURT: Oh, okay. Go ahead.

12 MR. GOLOMB: In addition to that, there was also a
13 summary notice that was published in the USA Today, and we
14 also created a web page, Esslingersettlement.com, so that
15 people could easily go on the website and have their questions
16 answered, and if need be, they could call the administrator.
17 I know that our office also received a number of calls to
18 answer questions that anybody may have. And out of over 16
19 million notices, only 800 people, approximately 800 people,
20 opted out of this settlement, including Mr. Chastain, who
21 opted out of the settlement. There were -- out of 16 million
22 people, there were --

23 THE COURT: What about Mr. Peterson? What about
24 Peterson? Peterson opt out?

25 MR. GOLOMB: Not to my knowledge.

1 THE COURT: No, Peterson's still in the class,
2 right?

3 MR. ZIPKIN: Peterson did not, unfortunately, opt
4 out. Missed the deadline.

5 THE COURT: Oh.

6 MR. GOLOMB: And at --

7 MR. ZIPKIN: Nor did she understand what that was
8 about, Your Honor.

9 THE COURT: Okay.

10 MR. GOLOMB: So out of over 16 million notices in a
11 class of over 20 million people, there were 15 objections,
12 which is .000000, that's six zeros, 9135%, obviously an
13 infinitesimal amount of people. So when you consider this
14 settlement, the notice that we provided to all these members,
15 consider the fact that obviously the law encourages
16 settlement. We think that this is a very fair and reasonable
17 settlement and certainly comports with the other cases that
18 we've handled that have already received final approval in
19 this case.

20 So I think the next question Your Honor needs to look at
21 is whether or not this settlement satisfies the criteria for
22 considering the following Girsh factors, and that is the
23 complexity, expense, and likely duration of the litigation,
24 the reaction of the class, the stage of the proceedings, the
25 risks of establishing liability, the risks of establishing

1 damages, the risks of maintaining the class through trial, the
2 ability of the Defendant to withstand a greater judgment, the
3 range of reasonableness of the settlement in light of the best
4 recovery in this case, and the range of reasonableness under
5 the settlement to a possible recovery in light of the risks of
6 litigation. And I want to address that last point first, and
7 I think I have to some extent, and that is even with, in a
8 post Concepcion world, even with the issue of arbitration out
9 there for some, not all of the class, but for some of the
10 class that is a large risk. There's about a third of the
11 class that comes -- that there is no arbitration clause that
12 would affect them. And obviously, in the post-Concepcion
13 world, they are seriously affected, it is a serious risk.

14 Federal preemption is a risk for this entire class, and that
15 is the issue that has been briefed and stayed pending the
16 mediation and settlement in this case and hopefully final
17 approval. And when I talk about the range of reasonableness,
18 as I said before, Your Honor, you know, we had estimated that
19 there were three separate sub-classes of folks here. One are
20 the people who were slammed for the product; that is, they
21 didn't know that they had the product for one reason or
22 another. Through some sort of communication with HSBC they
23 were starting to get billed the product, and when we started
24 down this settlement road, we had estimated that they would
25 receive about \$60 apiece, given the fact that they had put in,

1 on average, somewhere around 175 to \$200 per individual. But
2 as it turns out, they're going to get probably closer to the
3 max under the settlement agreement of \$150 a person.

4 The next class of individuals that we had estimated were
5 going to get about \$30. Those were people whose claims were
6 denied. We think that they're going to get closer to \$70.
7 And then there's the overwhelming majority of folks that we
8 had estimated at \$15 are going to get more like \$30, and those
9 are people who knowingly asked for the product, has never made
10 a claim, and just had to certify during the claims process for
11 whatever reason that they were dissatisfied with the product
12 and they're going to get \$30. So again, another reason why we
13 think this is a fair and reasonable settlement.

14 In terms of the complexity, expense and likely duration
15 of the litigation, you know, obviously it's a very complex
16 case. Discovery alone would cost in the, you know, the mid to
17 upper-mid six figures in just getting the discovery in this
18 case, experts in this case, et cetera. And likely duration,
19 as Your Honor know from other cases that we've had with you,
20 it could be four or five years before this case is resolved.
21 And so again, we think that with an early resolution in this
22 case, a very fair resolution, we're happy with the settlement.

23 The reaction of the class I already talked about. Over
24 16 million class members received notice in this case; 800 of
25 them have opted out, 15 of them have objected, and of those

1 objectors, three are here today. One, we believe, doesn't
2 have standing to object, and Mr. Pulliam will address that.

3 The risk of establishing liability, establishing damages,
4 maintaining the class through trial, I think that we've
5 already adequately covered that, as well as the notice in this
6 particular case.

7 As far as the plan of allocation, I discussed that. We
8 believe that rather than, as we put in our papers and in the -
9 - again, that rather than the class members getting 15, 30 and
10 \$60, based on the number of claims to date, we think it will
11 be closer to 30, 70 and 150, somewhere in that area. There
12 are about 160,000 claims to date.

13 And then the last thing I want to address, the last
14 question on the fairness of the settlement, is whether
15 certification of this settlement class is appropriate. And
16 for that Your Honor has to look at the criteria in Rule 23(a)
17 and Rule 23(b), which I'll address separately. Under 23(a),
18 we -- clearly the class is sufficiently numerous. There's,
19 again, over 20 million class members, over 16 million have
20 received notice; so clearly under 23(a)(1) the class is
21 sufficiently numerous. As we have explained in the papers,
22 there are common questions of law and fact that exist under
23 23(a)(2). The class representatives are very typical of the
24 class to satisfy 23(a)(3). And we think that the class
25 representative, and us as class counsel, have and will

1 continue to adequately protect this class.

2 On the 23(b) factors, obviously, again, the common
3 questions of law and fact predominate pursuant to 23(b). And
4 obviously in this case, the class action is a superior method
5 of resolving this claim rather than individual claims. So we
6 think that certification of the class settlement is
7 appropriate under both 23(a) and 23(b).

8 Before I move on to the fee petition and the request for
9 service awards, does Your Honor have any questions?

10 THE COURT: Before you do I want to hear from HSBC.

11 MR. GOLOMB: Okay.

12 THE COURT: There seemed to be -- in the papers you
13 both filed, you seemed to be slightly -- you differ slightly
14 on it, but I thought that was maybe you were talking past one
15 another on the preclusive effect of this settlement on states'
16 abilities to file any actions. Was I misreading that or did I
17 --

18 MR. GOLOMB: No, well, I'll let --

19 THE COURT: It looked like you were disagreeing, and
20 HSBC, in its papers, said wait a minute, if they're saying
21 this, then -- have you now gotten together on this?

22 MS. STRICKLAND: I'll address that, Your Honor.

23 THE COURT: Okay.

24 MS. STRICKLAND: The answer, Your Honor, is we do
25 not differ slightly, we differ dramatically. We would ask the

1 Court to approve the settlement, assuming that the Court
2 agrees with our reading of what we believe to be the reading
3 of the plain language of the release and the injunction to be
4 entered in connection with the final approval order.

5 THE COURT: Well, what's the disagreement then?

6 MS. STRICKLAND: The disagreement, Your Honor, is
7 with respect to how the release applies to the claims of State
8 AGs for direct relief to individual consumers who are members
9 of the class.

10 THE COURT: All right, before you go on, is it your
11 position, Mr. Golomb, that the release does not preclude the
12 Attorneys General from filing on behalf of class members?

13 MR. GOLOMB: It is, Your Honor.

14 THE COURT: And what's the basis for that?

15 MR. GOLOMB: Well, if it's okay with Your Honor, I'd
16 rather have Mr. Pulliam address that issue --

17 THE COURT: Okay.

18 MR. GOLOMB: -- after the objectors state their
19 positions, because I think once you also hear from the states
20 as well, I think it will become clearer.

21 THE COURT: All right, let me hear that first before
22 you -- I'll call you again.

23 MR. GOLOMB: You want to hear from Mr. Pulliam --

24 THE COURT: Yes, I want --

25 MR. GOLOMB: -- or from the states?

1 THE COURT: I want to know why -- what is -- go
2 ahead, let me hear from you, Mr. Pulliam.

3 MR. PULLIAM: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MR. PULLIAM: If I may, as just a preliminary issue,
6 we learned this morning that in the course of this litigation
7 over some time we believed that we had moved to pro hac me
8 into this Court, and upon a docket review, it appears that
9 that has not happened. So I can assure the Court we will move
10 this afternoon, I've appeared --

11 THE COURT: Okay.

12 MR. PULLIAM: -- in this District several times.
13 I'd just ask the right --

14 THE COURT: Go ahead.

15 MR. PULLIAM: -- to be heard.

16 THE COURT: I thought you were, but go ahead.

17 MR. PULLIAM: Your Honor, so the situation that we
18 have is that there is a dispute in three other Courts between
19 the States of West Virginia, Mississippi, and Hawaii and HSBC
20 related to actions brought by those states against the bank
21 related to payment protection, same product we have here
22 today. So the dispute has arisen as to what the effect of
23 this settlement is on those actions. Well, as a threshold
24 issue, Your Honor, until we have a settlement, the settlement
25 agreement reads that HSBC may use this settlement as a defense

1 to any later filed actions or any other actions that try and
2 bring released claims. Well, for one, they're putting the
3 cart before the horse a little bit here in that they're
4 seeking -- the position that Ms. Strickland has taken, HSBC
5 has taken, in their papers is notwithstanding the fact that
6 they negotiated a settlement, notwithstanding the fact that we
7 have clear and unambiguous release language, they're now
8 saying we will only agree to this settlement if we can go
9 ahead and get an opinion from you as to how this settlement
10 will be interpreted down the road. What should happen here,
11 Your Honor, is exactly what happened in the Spinelli matter in
12 the Middle District of Florida. Several weeks ago, Capital
13 One filed seeking to have these very states -- not West
14 Virginia, who's already settled with Capital One, but Hawaii
15 and Mississippi -- having them enjoined -- as Mr. Golomb
16 mentioned, we've already -- this is, in our minds, part of a
17 bigger litigation, and Capital One had already settled their
18 payment protection claims. Judge Covington, faced with the
19 very same issue that you have today, said that it is
20 appropriate for the respective Courts that the other
21 litigation, the second filed litigation, is in to rule on the
22 issue of what the preclusive effect of this settlement is. So
23 respectfully, Your Honor, where we are at today, this
24 settlement should be approved and with the order already
25 agreed upon by the parties and presented to the Court, and

1 then if HSBC --

2 THE COURT: Who submitted that order?

3 MR. PULLIAM: The parties jointly did. It's at
4 Exhibit, I believe, F to the preliminary approval.

5 THE COURT: Okay.

6 MR. PULLIAM: And in that order, it states -- again,
7 paragraph 13 sets out how HSBC can go about using this relief
8 -- release as a defense. HSBC has also stated in its papers
9 that it will only support settlement if the order, the
10 proposed order that I just referenced, is entered without
11 material modification. Your Honor, that's the same position
12 that we have. So I don't know if I agree with the "we differ
13 dramatically." We have worked upon, negotiated and signed
14 this order. We're each submitting the same order to you.
15 Now, HSBC has now come along and said, well, in addition, this
16 later filed -- this other litigation, we want you to go ahead
17 and tell us what will happen there. And Your Honor, that's
18 such a slippery slope because there are, no doubt, hundreds,
19 maybe thousands of collection actions and other cases that in
20 some way may be impacted by this order. All of those can't
21 come back to you. That's not what is intended by this. And I
22 will note in the very case that HSBC cited to the Court as
23 support for this, for one -- the Prudential case -- it's
24 factually different in that unlike here, where there is a
25 great dispute between these objectors, between HSBC if these

1 claims are even part of the settlement, that's in dispute. In
2 the Prudential case there was no dispute. The later filed
3 parties were class members, they even acknowledged that. But
4 in that case, the Court found any doubts as to the proprietary
5 -- propriety of a federal injunction against a State Court
6 proceeding should be resolved in favor of permitting the State
7 Courts to proceed in an orderly fashion to finally determine
8 the controversy.

9 So Your Honor, I don't know that we're that far apart.
10 We certainly stand by the order that we've negotiated. There
11 are other Judges that have this litigation that are prepared
12 to rule on it. Interestingly, Your Honor, and I think this is
13 an important note, there's nothing that this Court can do that
14 will stop that litigation because it -- even HSBC's position
15 is only relates to certain claims brought by the various AGs.
16 So even if this Court were to enjoin those certain claims, the
17 rest of the claims continue. So that -- there's no judicial
18 efficiency here at all. Those cases will continue whether
19 this order exists or not an order from you barring those
20 cases. I think what makes sense at this point and what is
21 certainly consistent with the settlement agreement that we
22 have is for Your Honor to enter the order as submitted and to
23 follow -- {clears throat} excuse me -- Judge Covington's lead
24 in the Capital One case and let the various Judges who have
25 these State AG cases and every other Judge who's ever going to

1 be presented with this settlement to rule upon the impact that
2 this settlement has.

3 THE COURT: Okay. All right.

4 MS. STRICKLAND: So Your Honor, what Mr. Pulliam has
5 just asked the Court to do is kick the can down the road,
6 which is --

7 THE COURT: Seems to be de rigeur around here.

8 MS. STRICKLAND: It's America, Your Honor. In any
9 event, let me first address the suggestion of Mr. Pulliam that
10 the issue just be deferred for another day.

11 THE COURT: Well, first of all, did you both agree
12 on the order? You submitted an order to me.

13 MS. STRICKLAND: We --

14 THE COURT: You both submitted the same order, did
15 you not?

16 MS. STRICKLAND: We did agree --

17 MR. PULLIAM: Yes, Your Honor.

18 MS. STRICKLAND: -- on the order, Your Honor, and --

19 THE COURT: Now you're trying to tell me I shouldn't
20 enter it?

21 MS. STRICKLAND: Well, I am trying to tell you that
22 you shouldn't enter it unless the order is interpreted by what
23 we believe to be its plain language, which is that --

24 THE COURT: Well, is that for me to do? I'm only
25 going to approve the settlement as being fair and reasonable

1 with the order that you both agreed on.

2 MS. STRICKLAND: Your Honor, it is for you to do.
3 The issue is squarely before Your Honor both because HSBC has
4 presented it, because the release that --

5 THE COURT: Well, that doesn't mean I have to rule
6 on it.

7 MS. STRICKLAND: Certainly the case. But HSBC has
8 squarely presented that issue and the AG objectors have
9 squarely presented that issue. And the question is what does
10 the release mean. That release is before Your Honor, as is
11 the injunction.

12 THE COURT: What State Judge -- because it'll be
13 State Judges in these different states -- is going to be bound
14 by something I say about the meaning of this agreement?

15 MS. STRICKLAND: Well, Your Honor, the issue is not
16 that, the issue is the meaning that Your Honor attributes to
17 the injunction and the release that is before Your Honor. So
18 this --

19 THE COURT: Well, shouldn't you have thought about
20 that before you submitted your order?

21 MS. STRICKLAND: Your Honor, we thought that we knew
22 what it meant. It was only the surprise that Plaintiffs
23 seemingly don't agree with us, once they went out and
24 solicited AGs to bring lawsuits. That was when we learned
25 that maybe there was not a meeting of the minds. And so, we

1 would ask --

2 THE COURT: You're saying that the Plaintiffs
3 solicited the AGs?

4 MS. STRICKLAND: Your Honor, the Golomb firm
5 actually is counsel to the AGs in the cases. And so certainly
6 that came as a huge surprise to our client. Our clients paid
7 \$23.5 million. Our client understood that it was bargaining
8 for a complete release according to the plain language of the
9 release and then the related injunction that's in the final
10 approval order, from claims by or on behalf of class members.
11 Our understanding, based on controlling law, including the 3rd
12 Circuit's decision in the EEOC versus U.S. Steel case, and the
13 2nd Circuit's decision in the Baldwin United case, both of
14 which tellingly Mr. Pulliam has not discussed with this Court.
15 Our understanding was based on those decisions that the
16 release would, in fact, extend to exactly the type of claims
17 that we're discussing with Your Honor. Let's be clear. We
18 are not challenging that the AG, in pursuit of its enforcement
19 power can seek, for example, a penalty payable to the state.
20 That isn't the issue before Your Honor. And the AGs and
21 Plaintiffs have sort of tried to blur the issues here in an
22 effort to avoid a decision from this Court. Our position is
23 very simple, which is to the extent that the AGs act in their
24 representative capacities, act on behalf of class members, act
25 derivatively, all terminology used in the cases, in the EEOC

1 versus U.S. Steel case from the 3rd Circuit, in the Prudential
2 case, in the Baldwin United case, in the Applied Card Systems
3 case, in the AmRep case. Our understanding was that to the
4 extent that there were claims brought on behalf of class
5 members, those claims would be barred. It came as a great
6 shock to us that we are paying \$23.5 million only to be sued
7 for the exact recovery that we understood was being released
8 by the class members for themselves and persons acting on
9 their behalf.

10 THE COURT: So how do you respond to that, Mr.
11 Pulliam?

12 MR. PULLIAM: Your Honor, first of all, the AG cases
13 -- all three of these AG cases existed prior to --

14 THE COURT: It doesn't matter.

15 MR. PULLIAM: It did --

16 THE COURT: How do you respond to the fact that
17 class members are giving up their rights by way of settlement?

18 MR. PULLIAM: Class members are giving up all the
19 claims that --

20 THE COURT: Well, why aren't the AGs barred from
21 representing them? They've already given up their rights.

22 MR. PULLIAM: The AGs are bringing these cases --

23 THE COURT: On behalf of who?

24 MR. PULLIAM: On behalf of the state of West
25 Virginia.

1 THE COURT: For what?

2 MR. PULLIAM: The state of Mississippi.

3 THE COURT: For what? For what?

4 MR. PULLIAM: They're bringing them for, as I
5 understand, they're bringing these cases for penalties under
6 the parens patriae --

7 THE COURT: No, there's no dispute. Penalties?

8 MR. PULLIAM: Uhm-hum.

9 THE COURT: No problem.

10 MR. PULLIAM: And then, they are bringing these
11 cases under, at least in the case of West Virginia, a specific
12 statute that allows the state to seek restitution.

13 THE COURT: But if the people have already given up
14 their right to restitution by way of settlement, why should
15 they be able to pursue it again for the same people?

16 MR. PULLIAM: Because, Your Honor, two answers.
17 One, the state --

18 THE COURT: You don't know, do you?

19 MR. PULLIAM: Well, yeah, I do.

20 THE COURT: You're fumbling around now --

21 MR. PULLIAM: I have an opinion.

22 THE COURT: -- Mr. Pulliam.

23 MR. PULLIAM: The state has rights to bring actions
24 to protect its citizens.

25 THE COURT: Of course they do.

1 MR. PULLIAM: But second --

2 THE COURT: But if the citizen has given up its
3 right, what right does the state have to do it again?

4 MR. PULLIAM: Well, Your Honor --

5 THE COURT: Isn't that a double recovery for the
6 individual?

7 MR. PULLIAM: Look at -- the state of West Virginia
8 has settled with Capital One for \$13.5 million after a release
9 was signed in the Capital One case that even included *parens*
10 *patriae* claims, the Consumer Protection and Finance --

11 THE COURT: That's between them and Capital One. I
12 can't help that.

13 MR. PULLIAM: But it's the same issue, Your Honor.
14 The --

15 THE COURT: Am I not bound by the 3rd Circuit
16 opinion?

17 MR. PULLIAM: But there's no 3rd Circuit opinion
18 that requires you to enter an order at this point that enjoins
19 these claims.

20 THE COURT: Well, I can't turn a blind eye to what
21 the law in this circuit is, can I?

22 MR. PULLIAM: But here's the other issue, Your
23 Honor. We have lumped all of the states together because they
24 have the same counsel, they filed the same objection. HSBC
25 has referred to them in general. All of those cases are

1 brought under different statutes. They --

2 THE COURT: They can be brought under 4 billion
3 statutes. The question is --

4 MR. PULLIAM: Exactly Your Honor --

5 THE COURT: -- who do they represent?

6 MR. PULLIAM: And it's up to that trial judge --

7 THE COURT: Who do they represent and for what?

8 MR. PULLIAM: It's up to that trial judge to
9 determine --

10 THE COURT: Why?

11 MR. PULLIAM: -- Your Honor. Because those are the
12 facts of that case as to whether or not --

13 THE COURT: You represented a bunch of Plaintiffs --

14 MR. PULLIAM: We did, Your Honor.

15 THE COURT: Sixteen million or whatever it is.

16 MR. PULLIAM: Uhm-hum.

17 THE COURT: And you made a deal --

18 MR. PULLIAM: We did.

19 THE COURT: -- that they gave up any rights against
20 HSBC to collect money based on this product.

21 MR. PULLIAM: We made a deal --

22 THE COURT: And now you're telling me, well yeah,
23 but they can get it again?

24 MR. PULLIAM: I'm not, Your Honor. We made a deal
25 that all claims that these individual class members possessed

1 were released. Now, it's a separate question of whether a
2 state can bring a claim for restitution.

3 THE COURT: You're saying were released, but now
4 you're saying but maybe not.

5 MR. PULLIAM: No, Your Honor, those --

6 THE COURT: What kind of deal is that?

7 MR. PULLIAM: -- claims were released.

8 THE COURT: That's an illusory bargain, isn't it?

9 MR. PULLIAM: No, Your Honor. Those claims were
10 released. And I certainly don't believe it was an illusory
11 bargain in that whether or not --

12 THE COURT: Well, if they were released --

13 MR. PULLIAM: The Federal Government --

14 THE COURT: If they were released, what right does
15 any state have to collect that same amount against HSBC for
16 the same people?

17 MR. PULLIAM: They may have a statutory right. The
18 West Virginia -- it's a separate statute --

19 THE COURT: But the people don't --

20 MR. PULLIAM: -- than what we filed --

21 THE COURT: -- have a right -- the people --

22 MR. PULLIAM: I agree.

23 THE COURT: -- don't have a right to that money.

24 MR. PULLIAM: I agree, Your Honor. But, who are we
25 if the West Virginia or any of these other AGs brings a case

1 for penalties and then chooses to set up a restitution --

2 THE COURT: Penalties is different.

3 MR. PULLIAM: But chooses to set up --

4 THE COURT: She admits that.

5 MR. PULLIAM: -- a restitution fund -- HSBC can't
6 stop where the money eventually goes. I think it's important
7 --

8 THE COURT: The penalty can be put in any fund the
9 state wants to put it in, but it's a penalty.

10 MR. PULLIAM: Yes, Your Honor.

11 THE COURT: It has nothing to do with the
12 restitution.

13 MR. PULLIAM: But the restitution also goes to the
14 state, Your Honor. Now, if the state chooses --

15 MR. GOLOMB: Your Honor, that's actually not
16 accurate. And that's why you, Your Honor, are actually making
17 the argument for us as to why -- it's not kicking the can down
18 the road, it's who's got proper jurisdiction to answer that
19 question, and you are actually making the argument as to why
20 this issue should go back to that state, because as an
21 example, in West Virginia, there is a statutory right and
22 there's case law, the CVS case, that says -- specifically says
23 -- they don't use the word "double recovery," but it
24 specifically allows for double recovery in that case. Because
25 let's remember, and that is it's that the --

1 THE COURT: Well, let me ask you, in the context of
2 this settlement, do you think that's right?

3 MR. GOLOMB: Absolutely.

4 THE COURT: Fair?

5 MR. GOLOMB: Yeah, but this --

6 THE COURT: That there should be a double recovery?

7 MR. GOLOMB: Absolutely. And it was --

8 THE COURT: There should be?

9 MR. GOLOMB: Absolutely. The state has a right to
10 collect restitution for their constituents. They have a
11 statutory right and they have a legal right.

12 THE COURT: If the constituent already recovered --

13 MR. GOLOMB: But the state didn't, and that's what
14 the --

15 THE COURT: What is the state recovering?

16 MR. GOLOMB: The state is recovering restitution --

17 THE COURT: For whom?

18 MR. GOLOMB: On behalf of their constituents.

19 THE COURT: Is the money going to the constituents?

20 MR. GOLOMB: It's up to the state as to whether they
21 want to or not.

22 THE COURT: What do you mean? The state is suing on
23 behalf of an individual --

24 MR. GOLOMB: Right.

25 THE COURT: And the individual doesn't get the money

1 the state is suing --

2 MR. GOLOMB: Whether or not --

3 THE COURT: -- on behalf of?

4 MR. GOLOMB: Whether or not the state gives the
5 money back to the individuals or uses the money for the state
6 treasury for some other consumer use is up to that individual
7 state, which is exactly why the issue with respect to West
8 Virginia should go back to the state Court in West Virginia.
9 In Hawaii, it should go back to the state Court in Hawaii.
10 And in Mississippi, the state Court, and that's what Judge
11 Covington said. And that's what we're asking you to say. And
12 that is, this is not an issue for you to decide, even on the
13 civil penalties end of it, and as Mr. Pulliam said, this
14 litigation with the AGs is gonna have to go back to that state
15 anyway, because they've gotta litigate the civil penalties
16 issues. But, again, Your Honor is really making the argument
17 as to why it should go back, not to be decided by you. I
18 mean, essentially what they're asking for --

19 THE COURT: What if I had in my order the fact that
20 any individual class member cannot collect any additional
21 money other than the amount in this settlement?

22 MR. GOLOMB: I don't think that's -- again, I don't
23 think that's for you to decide.

24 THE COURT: Why not?

25 MR. GOLOMB: Well, because --

1 THE COURT: Otherwise, why is there even -- what's a
2 settlement then?

3 MR. GOLOMB: Because essentially what they're asking
4 -- because you don't have jurisdiction over that issue. I
5 mean, essentially what they're asking for is --

6 THE COURT: Well, I can say any individual class
7 member is barred from getting anything more than this
8 settlement pays it.

9 MR. GOLOMB: Well, and -- but that the state can
10 still collect --

11 THE COURT: I'm not going to say that. That'll be
12 for the judge down the road.

13 MR. GOLOMB: Well --

14 THE COURT: But if the individual is barred from
15 receiving another same amount of money somewhere else, then
16 that's the end of it for him.

17 MR. GOLOMB: Yeah, I don't think you have
18 jurisdiction over that question.

19 THE COURT: I have jurisdiction over the class
20 member.

21 MR. GOLOMB: Well, except that the state is not a
22 class member.

23 THE COURT: I'm not talking about the state.

24 MR. GOLOMB: But it affects --

25 THE COURT: I'm talking about the individuals.

1 MR. GOLOMB: Well, then you have to be -- if you're
2 going to do that, and I don't think you should, but if you're
3 gonna do that, then you need to be clear that number one, that
4 the civil penalties claim survives, and the restitution --

5 THE COURT: No one's disagreeing with the civil
6 penalties claim.

7 MR. GOLOMB: And the restitution claim survives as
8 long as it doesn't get distributed to the individual
9 consumers, that it stays in the state treasury. If that's
10 what you're gonna do, then that -- if you're going to, on the
11 merits, if you're gonna answer that question, I think then,
12 you need to say that not only that it doesn't go to the
13 individuals, but that the restitution claim survives for the
14 state treasury purposes.

15 THE COURT: What is the purpose of the restitution
16 claim?

17 MR. GOLOMB: It's to recoup funds that were paid
18 out.

19 THE COURT: Funds that someone laid out.

20 MR. GOLOMB: Right.

21 THE COURT: Well, the person already got reimbursed
22 for that.

23 MR. GOLOMB: Well, now we're getting back into the
24 issue of what the law in each state and what the statute in
25 each state says and allows. And that's -- again, that's why I

1 don't think you have jurisdiction over this question. I mean,
2 that's what, you know, and what Judge Covington did was, and
3 you've got that order and that memorandum, and what she said
4 is, at least to her, it's obvious that those claims should not
5 be enjoined, because they are issues of individual states that
6 have individual -- that have their own claims. They didn't
7 have due process here in this Federal Court, in the Middle
8 District of Florida, because they weren't members of a class,
9 so they didn't have an opportunity to opt out. Therefore, if
10 you enjoin those claims, there's no due process.

11 THE COURT: I understand that. But I have authority
12 over the class members, and I can bar them from getting a
13 double recovery. Can't I?

14 MR. GOLOMB: I don't think you can.

15 THE COURT: Why not?

16 MR. GOLOMB: Again, because I --

17 THE COURT: They've already given up their rights
18 here in this agreement.

19 MR. GOLOMB: Because I think that you have to look -

20 -

21 THE COURT: Do you represent them?

22 MR. GOLOMB: I think you have to look at the -- do I

23 --

24 THE COURT: Did you represent them?

25 MR. GOLOMB: Do I represent the class?

1 THE COURT: Yes.

2 MR. GOLOMB: Yes.

3 THE COURT: And all the individual class members?

4 MR. GOLOMB: I do.

5 THE COURT: And you're getting their money? And
6 they're waiving --

7 MR. GOLOMB: Hopefully so.

8 THE COURT: -- their rights to any further money.

9 MR. GOLOMB: For this case here. But I do think, to
10 use your words, double recovery, I think that it, at least as
11 it relates to the West Virginia statute, that it allows for
12 that. And that is a fair fight to have in the state Court.

13 THE COURT: And they can still have that fight,
14 except that I can say that they can't get it twice. And then
15 the state can argue well, we're doing whatever we're doing.
16 They can make that argument down there in West Virginia.

17 MR. GOLOMB: Okay. Yeah, I just don't agree with
18 that last statement.

19 THE COURT: I know you don't.

20 MR. GOLOMB: Yeah.

21 THE COURT: Okay. Let me hear from Ms. Strickland
22 again. Do you have anything else to add on this?

23 MS. STRICKLAND: I do, Your Honor. I'm just writing
24 myself a note.

25 THE COURT: All right.

1 MS. STRICKLAND: I have many things to add on this
2 subject, and we've obviously fully briefed this as well. I
3 think it's instructive to read the release. So let me start
4 with that. The release "releases claims whether the released
5 claims are brought directly by or on behalf of any class
6 member in a representative action or in any other capacity
7 with respect to any form of relief, including without
8 limitations damages, restitution, disgorgement, penalties, and
9 injunctive or declaratory relief." Now, I think it's then
10 instructive to match that release up with what the AGs seek
11 and which Plaintiffs' counsel in their somewhat conflicted
12 role, are scrambling to preserve for the AGs, and there you
13 look at exactly what the AGs seek. In the West Virginia case,
14 the AG seeks "excess charges under their Consumer Protection
15 Act which specifically provides that those excess charges and
16 certain penalties are payable directly to the consumer by way
17 of a refund." Those are the class members. Not only is it a
18 double recovery, but it is also a recovery if the consumers
19 were to get money, of monies that they released a claim for
20 under the release in this case. The prayer in their complaint
21 specifically seeks the recovery of money for consumers in
22 three places; paragraphs 3, 5, and 7, where it seeks
23 restitution and disgorgement as well as penalties payable to
24 consumers. The Hawaii complaint is similar. There, in
25 paragraph 89, the state seeks to {quote}, and this is the

1 language from the complaint, "make whole the consumers," and
2 that's repeated in the prayer in paragraphs 3 and 7. And the
3 Mississippi complaint seeks restitution and disgorgement and
4 the Mississippi statute similarly provides for restitution to
5 consumers. So, what's happening here is a fair amount of
6 double talk from the Plaintiffs about the kind of relief
7 that's being sought. Plainly, the AGs are seeking restitution
8 and other recoveries such as West Virginia, which is somewhat
9 unique, because it has a penalty provision for penalties
10 payable to consumers, there's a separate penalty provision for
11 penalties payable to the state. We do not take issue with the
12 penalties payable to the state. We take issue with monies
13 payable to consumers, which we think are released.

14 THE COURT: Okay.

15 MS. STRICKLAND: So, let me also comment on a few of
16 the cases that have come up in argument. The controlling
17 cases here are the EEOC versus U.S. Steel case which says, and
18 I {quote} "when a governmental agency {quote} 'seeks to
19 represent grievance by attempting to obtain private benefits
20 on their behalf, the Doctrine of Representative Claim
21 Preclusion must be applied.'" And there, the District Court
22 decided the extent of the release. It wasn't kicked to a
23 different Court.

24 Similarly, the 2nd Circuit in Baldwin United goes through
25 the entire analysis in very much the same situation. A bunch

1 of AGs filed a bunch of lawsuits making claims that
2 intersected with claims that were released in a class action
3 settlement, and the 2nd Circuit goes through a very lengthy
4 analysis, which is, we believe, instructive here, and that
5 reasoning should be controlling here, making exactly the
6 distinction we've made, which is the release bars restitution
7 claims. It bars claims that would go to the consumers. Why
8 is that, according to the 2nd Circuit and other related cases?
9 Because if not, you could never settle a class action. And
10 the Courts, including in Baldwin United, but as well as
11 others, the Prudential case which has been cited, state that
12 "to allow a parallel state Court proceeding undermines the
13 possibility of settling any class action." I mean, the
14 logical response to what's going on in this Courtroom is why
15 would I settle the case if I think I'm buying a release from
16 class members of their monetary claims, only to discover that
17 I can be sued the next day by an AG in a different case
18 seeking to recover exactly the money that's been released by
19 the Plaintiffs? The CVS case, which I can't remember which of
20 Plaintiffs' counsel cited it, I think it was actually Mr.
21 Golomb, did not allow for double recovery. That's actually
22 misstatement of what the case held. The case was actually a
23 CAFA removal case, and the analysis in that case was whether
24 the AG's claims were in the nature of a class action subject
25 to CAFA removal, and the Court went through an analysis --

1 we've briefed this. The CAFA analysis is actually quite
2 different from a res adjudicata, you know, construction of
3 release analysis. Some Courts do a CAFA analysis on sort of
4 an over-arching basis; some on a claim-by-claim basis. The
5 res adjudicata analysis is necessarily a claim-by-claim
6 analysis of the type that we're discussing with Your Honor,
7 which is the restitution claim is barred. A disgorgement
8 claim is barred. A penalty payable to consumer is barred.
9 Penalties payable to the state, not barred. You have to look
10 at as the Baldwin United Court did in the 2nd Circuit. Claim
11 by claim, CVS is not that case, and actually doesn't say what
12 was represented to Your Honor.

13 With respect to the Spinelli case, which Plaintiffs are
14 waiving around, completely different situation. First of all,
15 it's a decision from another District Court not binding on
16 this Court. Completely different also, because in that case,
17 the settlement actually had been final for close to two years
18 and maybe more. And then Capital One went into the Court,
19 asked for broad relief, not distinguishing as we have here
20 between money payable to consumers and money payable to the
21 state, Capital One asked for sort of an over-arching order
22 barring the cases, and the Court's decision is driven by the
23 fact that the Court in that case did not retain jurisdiction,
24 and the Court said, "I didn't retain jurisdiction," and in a
25 more judicial way, but I'm going to put it in plain English, I

1 don't want to hear about it. Not my case. That's not the
2 situation in this case.

3 THE COURT: That's something I would say.

4 MS. STRICKLAND: But Your Honor, this is squarely
5 before Your Honor. And that Court expressly declined to
6 retain jurisdiction when it signed the class action settlement
7 order. That's -- we're before Your Honor. We've got matters
8 -- we're in this Court. The Court did reach conclusions with
9 respect to the scope of the release, but frankly, they're
10 dicta, and pretty irrelevant since the Court by its own
11 statement said it didn't have jurisdiction.

12 THE COURT: All right. Let me hear from you about
13 your fees.

14 MR. GOLOMB: Can we respond briefly to what was just
15 said?

16 THE COURT: Go ahead.

17 MR. GOLOMB: And if, Your Honor, could we also hear
18 from Mr. Budd, who represents the states on this issue?

19 THE COURT: Who represents the states?

20 MR. GOLOMB: Yeah. On this issue that we're talking
21 about.

22 THE COURT: Right. Who -- Mr. Budd, where are you
23 from?

24 MR. BUDD: Dallas, Texas.

25 THE COURT: Okay. Let me hear from you. I've got

1 deference for Texans. My wife's a Texan. Go ahead.

2 MR. BUDD: Thank you, Your Honor. We represent the
3 states of Mississippi, West Virginia, and Hawaii, and we
4 respectfully object to the settlement --

5 THE COURT: How'd you from Texas end up representing
6 those states?

7 MR. BUDD: {laughs} Just lucky I guess. We've had
8 some experience with representing states in financial --

9 THE COURT: Oh, okay.

10 MR. BUDD: -- and environmental claims.

11 THE COURT: All right. Go ahead.

12 MR. BUDD: We respectfully object to the proposed
13 order and ask that the states not be subject -- not be barred
14 in any way or have their actions affected in any way by this
15 settlement order. We believe that the states' claims are
16 completely separate and distinct from the consumer claims, and
17 we've brought those as separate and distinct claims from the
18 consumer claims. I think --

19 THE COURT: Well, aren't you asking for the same
20 money?

21 MR. BUDD: We're asking for restitution and
22 disgorgement as one of many different claims.

23 THE COURT: Well, I'm asking you. Why should an
24 individual class member be allowed to get paid twice?

25 MR. BUDD: Well, it's up to each of the State Courts

1 in this instance to decide --

2 THE COURT: No it's not.

3 MR. BUDD: -- if -- well if -- to decide what the
4 state law is with respect to that.

5 THE COURT: No, state law can be whatever it is, but
6 I can bar a class member from receiving any more money than is
7 allowed under this settlement. Can't I?

8 MR. BUDD: Well, I think --

9 THE COURT: Can I do that?

10 MR. BUDD: I think the Court can, as part of its
11 jurisdiction, enact whatever --

12 THE COURT: Limit the recovery of each class member
13 --

14 MR. BUDD: Limit recoveries of --

15 THE COURT: -- to what he gets in this settlement.

16 MR. BUDD: But I don't think the Court can limit
17 what the states --

18 THE COURT: The state can do whatever it wants --

19 MR. BUDD: The states can bring whatever action --

20 THE COURT: -- but I can limit --

21 MR. BUDD: -- it wants.

22 THE COURT: I can limit what each class member is
23 entitled to receive.

24 MR. BUDD: And what the Court -- what the states are
25 asking for here is simply a ruling that the states are not

1 barred or affected at all --

2 THE COURT: Ms. Strickland didn't say --

3 MR. BUDD: -- by this settlement agreement.

4 THE COURT: -- that you're barred. She says you
5 have every right to get penalties that go to the state,
6 whatever the state wants to get, but the --

7 MR. BUDD: Well, the states also --

8 THE COURT: -- class members -- but what she's
9 saying is you cannot collect on behalf of a class member and
10 pay the class member that which you might collect.

11 MR. BUDD: The states that we represent believe that
12 they have the independent right as sovereigns to bring their
13 claims under their states' statutes for whatever --

14 THE COURT: All right. Now, let me ask you --

15 MR. BUDD: -- whatever the law allows them to bring.

16 THE COURT: -- let's say Joe Schmoe is a member of a
17 Class. He also lives in one of the states you represent. And
18 by this settlement I bar Joe Schmoe from collecting any more
19 than he would get in this settlement. What do you think
20 you're going to get on behalf of Joe Schmoe?

21 MR. BUDD: The states do not ask for anything on
22 behalf of their respective Joe Schmoes. They're asking for
23 their claims brought independently as sovereigns.

24 THE COURT: And if you do that, what can you collect
25 and for whom if he's barred from getting any money?

1 MR. BUDD: For whatever the state law provides that
2 they shouldn't be allowed to collect. Again, we're not asking
3 to collect on behalf of the consumer or the citizens. We're
4 asking to collect on behalf of the state independently.

5 THE COURT: Just for the state.

6 MR. BUDD: Yes.

7 THE COURT: Not for the individuals.

8 MR. BUDD: Yes.

9 THE COURT: Ms. Strickland, what do we --

10 MS. STRICKLAND: Your Honor, I suggest that he read
11 his own complaints. That's actually not what it says, nor
12 what the statutes on which they base their complaints say. I
13 mean, I'm happy to read --

14 MR. BUDD: Your Honor --

15 MS. STRICKLAND: -- Your Honor, for example, the
16 West Virginia statute, and we can tie it down to the complaint
17 they filed. What's been said to Your Honor is actually not
18 accurate.

19 MR. BUDD: Your Honor, we specifically litigated
20 this issue before the Federal Court in West Virginia.

21 THE COURT: Right.

22 MR. BUDD: That case, our case, was filed in State
23 Court against the various credit card companies, including
24 HSBC. The credit card companies allege that we had in fact
25 brought our claims on behalf of our citizens, on behalf of

1 individual claimants and that it was in the nature of a class
2 or a mass action. It was subject to removal under the Class
3 Action Fairness Act. And we said, no, our claim is totally
4 independent. We, in our remand motion, said all the claims in
5 this action are asserted on behalf of the general public and
6 not individual claimants or members of a purported class. We
7 said in this case, there is one plaintiff. The Attorney
8 General is exercising his quasi-sovereign power on behalf of
9 the state rather than prosecuting consumers' claims.

10 THE COURT: I understand that completely and I'm not
11 --

12 MR. BUDD: And the Judge --

13 THE COURT: That's not what this discussion is
14 about. This discussion is about in your state, the capacity
15 of the state, the AG, if the individual has gotten money from
16 this settlement, why should they get any more by your AG
17 action?

18 MR. BUDD: I don't know if the individual should get
19 any more money. The state is asking that it receive the money
20 as a result of --

21 THE COURT: What money? What money?

22 MR. BUDD: For independent rights that the state
23 has.

24 THE COURT: Penalties and things like that?

25 MR. BUDD: No. Independent rights that the state

1 also has for restitution or disgorgement. If the state has an
2 --

3 THE COURT: Restitution to whom?

4 MR. BUDD: To the state, in this instance, to
5 prevent activities like this from occurring in the future.
6 The state has an independent right to ask that these
7 Defendants, for their bad acts, deliver to the state their
8 ill-gotten gains. That's what disgorgement is. And that's
9 precisely what the state has as a remedy --

10 THE COURT: Will any of the money --

11 MR. BUDD: -- on behalf of its own --

12 THE COURT: Will any of the money go to any of these
13 individual claimants who are in your state?

14 MR. BUDD: That depends, again, on the state law but
15 --

16 THE COURT: See, that's the point. That's a
17 weaselly answer.

18 MR. BUDD: Well, you know, in some instances --

19 THE COURT: If I bar any individual from getting
20 more than they get in this settlement, can I do that?

21 MR. BUDD: I think under state law, if the state has
22 an independent right to restitution or disgorgement, they
23 should be allowed to bring that claim. As far as who the --

24 THE COURT: That's not what I said.

25 MR. BUDD: Well, as far as who the money goes to --

1 THE COURT: Right.

2 MR. BUDD: -- that, again, we would respectfully
3 submit is up to the State Courts to decide based upon state
4 law.

5 THE COURT: Not if I've already barred that
6 individual from getting it twice.

7 MR. BUDD: Again, Your Honor, the states would
8 object to that but we believe --

9 THE COURT: Well, that's going to be too bad because
10 I'm going to take care of that. Okay. Anything else?

11 MR. BUDD: Well, again, we would just ask that the
12 states' rights not be affected or barred.

13 THE COURT: I don't have jurisdiction to bar a state
14 from doing whatever the statute wants, but I do have a right
15 to bar an individual from getting paid twice, otherwise they
16 shouldn't settle.

17 MR. BUDD: And again, the states didn't settle --

18 THE COURT: I understand that.

19 MR. BUDD: -- the states were not class members.

20 THE COURT: I understand that.

21 MR. BUDD: And the states' claims were not released.

22 THE COURT: I'm allowing you to make an argument
23 here --

24 MR. BUDD: Thank you.

25 THE COURT: -- and I understand what your argument

1 is.

2 MR. BUDD: Okay.

3 THE COURT: Okay, thank you.

4 MR. BUDD: Thank you, Your Honor.

5 THE COURT: Go ahead.

6 MR. GOLOMB: Also before Your Honor is our fee
7 petition and our request for the service awards. And I just
8 want to -- first of all, there are two corrections I want to
9 make in the order --

10 THE COURT: All right.

11 MR. GOLOMB: -- and that is at paragraph H on page 2
12 of the order, it says that the requested fees and expenses
13 amount in 33 $\frac{1}{3}$ of the gross. It's actually 33%, not 33 $\frac{1}{3}$, Your
14 Honor, and I'll go through the numbers. And on the last
15 paragraph, paragraph 3, it says \$2,500 for each service award.
16 And if you look in the body of our request, it's actually
17 \$3,500, not \$2,500. So what we have asked for, Your Honor, as
18 in most cases in this Circuit, we've asked for a percentage of
19 the recovery.

20 THE COURT: I notice you didn't submit a lodestar
21 comparison.

22 MR. GOLOMB: We actually did.

23 THE COURT: You did?

24 MR. GOLOMB: Yeah. There was over -- you know,
25 there's --

1 THE COURT: But it was based on an hourly rate. I -

2 -

3 MR. GOLOMB: Yeah, well that's the lodestar. That's

4 our --

5 THE COURT: I know but --

6 MR. GOLOMB: The hourly rate times hours --

7 THE COURT: Right.

8 MR. GOLOMB: -- for lodestar cross-check.

9 THE COURT: Your hourly rate --

10 MR. GOLOMB: Yeah.

11 THE COURT: -- how does it compare with the

12 comparison that we use in this District?

13 MR. GOLOMB: You're referring to the Laffey Matrix?

14 THE COURT: Right.

15 MR. GOLOMB: It's within the Laffey Matrix.

16 THE COURT: Okay.

17 MR. GOLOMB: That's what we've used in all these

18 cases.

19 THE COURT: All right. I just want to make sure

20 it's --

21 MR. GOLOMB: Yeah, it's within the Laffey Matrix,

22 Your Honor. There were 15 firms that worked on this case,

23 almost 7,500 hours. And what we're asking for is, for both

24 fees and costs, 33% or a total of 7,755,000. The actual costs

25 are just under 101,000. And so you've got the hours, and it

1 gives us a multiplier of 1.85, which is within -- on the lower
2 range, actually, of multipliers within this Circuit that have
3 recognized multipliers in the double digits. So clearly we
4 believe it's reasonable. Again, there's over 16 million
5 notices, 15 objections, and only two of those objections, even
6 in a kind of a weak way, refer to the fee and they more or
7 less are just saying that there's not enough money in the
8 fund, which I think we've already covered. Most of these
9 people, a lot of these people are going to get 70 cents on the
10 dollar back. So we think that's clearly within reason.

11 Some other factors for Your Honor to look at, and that is
12 look at the prior experience that we've had in litigating
13 these other cases, which is what really allowed us to bring
14 this case to a rather quick and efficient resolution, but
15 despite that, we also put in, these 15 firms, almost 7,500
16 hours.

17 The other factors, the complex factual and legal issues
18 that were involved in this case, the significant risk of
19 nonpayment given the defenses in this case, and, you know, the
20 percentage of the fees that we're asking for in this
21 particular case are entirely consistent with both other cases
22 in the 3rd Circuit, as well as other cases, financial services
23 cases like this litigated around the country. So we believe
24 that when you look at the, you know, the percentage of
25 recovery, as well as the lodestar cross-check, that this is

1 the fair and reasonable request. Unless Your Honor has any
2 questions --

3 THE COURT: No, I don't.

4 MR. GOLOMB: Thank you, Your Honor.

5 THE COURT: Now, we have some objectors here. Let
6 me hear from them.

7 MR. LEWIS: It'll take me just a minute.

8 THE COURT: Okay. Take as much time as you need.

9 MR. LEWIS: Well, that, by the day, gets longer.

10 THE COURT: It's all right. You'll have to start
11 earlier then. We can hear. You don't have to walk all the
12 way up if you don't -- if it's too much of a problem.

13 MR. LEWIS: I'm okay, Your Honor.

14 THE COURT: Okay.

15 MR. LEWIS: I'm glad you can hear me.

16 THE COURT: Again, for the record, your name is?

17 MR. LEWIS: Cam Lewis and I represent Mr. Chastain
18 and his class.

19 THE COURT: Okay.

20 MR. LEWIS: And I came here with a lot of good notes
21 as to what I should say, and I sat down and listened to the
22 arguments that came before me, and I was excited because I
23 think the Court needs to be reminded that this other approval
24 was a preliminary approval. There is nothing etched in stone.
25 And we come here today, and we have the two sides that are

1 supposed to be in agreement in disagreement. And I think that
2 eliminates the settlement, and I'm very excited about that
3 because there is one side that says that all the people in the
4 states of West Virginia and so forth are released, and the
5 other side says, no, we can still get money for them. And
6 they're asking you, Your Honor, in a preliminary -- after a
7 preliminary approval where this was not an issue to choose
8 sides.

9 THE COURT: That's what Judges do.

10 MR. LEWIS: No, Sir, they do not choose sides on a
11 settlement. They do not choose sides on settlement terms.
12 They approve settlement terms as reasonable. They don't force
13 settlement terms down one side or another. And so I beg to
14 differ with you on that one.

15 THE COURT: Okay.

16 MR. LEWIS: Now, my, me, my little guy, we have some
17 real -- we were I guess -- as they argue today, they agreed
18 with some things we said. My side --

19 THE COURT: Just for the record, your client has
20 opted out, has he not?

21 MR. LEWIS: He's opted out and stayed in at the same
22 time, and that's allowed. That's allowed --

23 THE COURT: He's opted out and stayed in?

24 MR. LEWIS: Sir?

25 THE COURT: He's opted out and stayed in?

1 MR. LEWIS: For this, for objecting. You can do
2 that because this Court's obligations under the law is to take
3 whatever information it had -- can get to get to determine if
4 it's a fair and reasonable settlement.

5 THE COURT: That is correct.

6 MR. LEWIS: And so it doesn't mean that I have to
7 have some particular standing to be able to argue about that.

8 THE COURT: I never stopped you from making your
9 statement --

10 MR. LEWIS: No, Sir --

11 THE COURT: -- I'm just trying to get, for the
12 record, that your client has opted out of this class.

13 MR. LEWIS: And he's objected, too.

14 THE COURT: All right.

15 MR. LEWIS: So and I appreciate that you're
16 listening to me, I really do.

17 THE COURT: Some Yankees have an open mind.

18 MR. LEWIS: Maybe.

19 (Laughter)

20 MR. LEWIS: Now, we were talking about whether or
21 not Mr. Chastain had a different position. You have to
22 remember he was sued by the bank and he -- there is no
23 arbitration or preemption with reference him and, we say, with
24 reference his class. They say that they get 75 percent --
25 cents on the dollar. He paid in about I think it was 4,000-

1 plus dollars, but and he's not going to get back but 70. Now,
2 the release -- oh, by the way, we stand on our filing of the
3 first filed document, as was already argued --

4 THE COURT: And I already disagreed with you on
5 that.

6 MR. LEWIS: Sir?

7 THE COURT: I disagreed with you on that.

8 MR. LEWIS: Yes, Sir, but we don't want to argue
9 that again.

10 THE COURT: No --

11 MR. LEWIS: No --

12 THE COURT: -- once is enough.

13 MR. LEWIS: I didn't think I'd change your mind on
14 it, Your Honor --

15 THE COURT: No.

16 MR. LEWIS: -- I didn't think so. Now, why are we
17 different? I've told you about the different defenses,
18 arbitration and preemption. Now, in South Carolina, the class
19 action rule is different than in State -- Federal Court. We
20 don't have the 26(b), which is the terrible one. So we have
21 an easier way to get to be a class action. And why is that
22 important? Well, I think that's important because in this
23 case there are quite a bit of differences between the parties.
24 How do I say that? I've never understood, Your Honor, we were
25 around, we've never been invited to a mediation, we've never

1 been invited -- we were stopped to doing any discovery to find
2 out what the basis of this settlement was. I sat here and
3 listened to the other side tell me about it, and they used
4 general words that didn't say anything. And so I don't know
5 to this day what they looked at. They kept saying they had
6 great ability to make discovery requests. They never told us
7 if they got the discovery, they never told us what they saw in
8 the discovery, they don't have any charts, they don't have any
9 statements as to liability and damages. They don't have --
10 have you heard one dollar amount of damages for this case?
11 No, Sir. I think it's not been totally open to everybody,
12 especially to my type people where I'm representing a class.
13 And I think that in of itself would require that this be
14 disapproved.

15 And finally, I wanted to make sure we understood that the
16 requirements here today -- and I heard them say something
17 different -- the requirements here today to approve a class
18 action settlement are the exact same as if it was litigated.
19 We don't get -- have an easier burden. We don't have a
20 lighter load. You have to look at all of the elements and
21 look at them and apply them just like it was litigated. And
22 if we do that and we listen to what was said today, we don't
23 even have an agreement, and they want you to choose sides, and
24 I don't think that's correct. And I'm going to pick up my
25 cane, if I can.

1 THE COURT: Wait a minute, here's your -- your
2 partner's going to pick it up for you.

3 MR. LEWIS: Thank you, Your Honor.

4 THE COURT: You can always raise cane in this
5 Courtroom.

6 (Laughter)

7 MR. LEWIS: I like your sense of humor.

8 THE COURT: There's another objector.

9 MR. PULLIAM: Your Honor, if I may, Ms. Strickland
10 and I spoke at the -- Ms. Peterson's counsel said
11 unfortunately she missed the deadline to opt out. The parties
12 are certainly agreeable, and if the Court is agreeable, for
13 this one Plaintiff to extend the deadline and to deem Ms.
14 Peterson to be an opt-out of this settlement and retain her
15 rights as such.

16 MR. ZIPKIN: I am sure, Your Honor, they would be
17 very happy if Ms. Peterson dropped out and withdrew her
18 objection. She's more concerned about pursuing her objection
19 than opting out at this point in time.

20 THE COURT: All right, proceed.

21 MR. ZIPKIN: Thank you, Your Honor. If it please
22 the Court, Plaintiff's counsel, Ms. Strickland, Defense
23 counsel. I have listened carefully to all of the arguments
24 today, and my first suggestion, Your Honor, is that the Court
25 consider sending this back to mediation. Notwithstanding all

1 that I've heard, it's clear that there's not a meeting of the
2 minds between the parties. I would like very briefly to
3 address those issues that were brought up already in today's
4 hearing immediately after I give a brief presentation. I
5 presume Your Honor has read the objections that we have filed
6 so that I do not get in --

7 THE COURT: That's correct.

8 MR. ZIPKIN: All right, so I don't want to spend a
9 lot of time on that. I want to talk about what is called a
10 protection plan, which was originally sold to cardholders, the
11 class members. The concept of that plan was to protect them
12 in the event of their injury, death or disability. Your
13 Honor's probably aware by now that there are many class
14 holders who perhaps were not employed, but that
15 notwithstanding, were sold this plan and paid for it over a
16 period of time, as Ms. Peterson did, and she paid \$700 for
17 this coverage, which didn't cover her.

18 THE COURT: Did she ever make a claim?

19 MR. ZIPKIN: Yes, she is in the midst of litigating
20 this in Shaker Heights Municipal Court, where under the Fair
21 Protection Credit Act she is entitled to \$1,000 of damages per
22 se for --

23 THE COURT: That's the statutory damages.

24 MR. ZIPKIN: Thank you, Your Honor. And she's also
25 entitled to attorney fees, and she's also entitled to recover

1 her \$700.

2 THE COURT: Well, then it made sense for her to opt
3 out, didn't it?

4 MR. ZIPKIN: Well, it might have and it might be.

5 THE COURT: Okay.

6 MR. ZIPKIN: In this case, there are numerous issues
7 which affect the validity of this protection plan. These
8 issues and allegations of fraud and misrepresentation in the
9 sale of this and similar products sold to prospective card
10 holders. As a matter of fact, the -- or a card holder may
11 very well have had significant claims against HSBC, just like
12 Ms. Peterson does, for this alleged protection plan. In the
13 instance of Peterson, who is similarly situated, as I've
14 stated, there is at least a \$2,800 claim protected by the
15 statute that vis-a-vis this plan she gives up, and she is a
16 typical card holder. So several highly skilled class action
17 lawyers around the country examined these claims, and as Your
18 Honor is aware, there are a multiplicity of class actions
19 brought. Where there's smoke there's fire. I've heard
20 counsel complain about how difficult this type of litigation
21 in fact might be against the Defendant HSBC. It's Peterson's
22 claim, Your Honor, that this is not difficult litigation, this
23 is not complex litigation, this is rather elementary and
24 simple litigation involving fraud and misrepresentation.

25 This was -- this product was called the protection plan.

1 Who was it protecting? It was actually protecting HSBC
2 because HSBC was selling this insurance so in the event the
3 cardholder or class member ran into a problem, it was covered
4 under the plan and HSBC could, in fact, get paid. Peterson
5 argues that this proposed settlement is nothing but an HSBC
6 protection plan again. It is highly self-serving, as stated
7 in the brief. And again, I don't want to get into all the
8 detail of that.

9 There are approximately 23 million cardholders. I have
10 heard how huge this 23 million settlement is. Settlement is
11 the word that's been used. Your Honor, this is not a
12 settlement. This, Your Honor, is a plan that 23 million can
13 be divided approximately 7 million to Plaintiff's counsel --
14 and I don't like to argue that Plaintiff's counsel is not
15 entitled to compensation. But if you look at the plan for \$7
16 million, HSBC takes the remaining 16 million, puts it in a
17 fund, and with that fund, Your Honor, they credit credit
18 cards. They don't pay it out. I keep hearing money being
19 paid out. A settlement means an agreement between two parties
20 where each party gives up something. What's happening in this
21 proposed settlement is that all the class members are waiving
22 their rights, rights like Ms. Peterson's, who, in Court, can
23 obtain \$2,800 statutorily, and HSBC is taking the remaining 16
24 million strictly at their option and crediting the credit
25 cards. They aren't required to pay the cash out. I keep

1 hearing money being paid. Class members aren't receiving
2 money, class members are receiving -- and I haven't heard the
3 number they are receiving, and this is a beautiful plan for
4 HSBC, it's a protection plan for them, they're receiving
5 credits, which they'll receive in the amount of about \$16
6 million on consumer credit cards, class member credit cards.

7 What is very strange about this plan -- and that was an
8 excellent word, it's a claims made plan. I don't know about
9 Your Honor, but I receive about four to five notices every
10 single month about a class action of which I'm a member. As a
11 lawyer who's involved in class action litigation, I don't read
12 probably any of them. Once in a while I'll read one. I'm a
13 lawyer familiar with class action litigation. The cardholders
14 are not lawyers, but a card member who looked at that
15 preliminary notice has no idea as to what they're agreeing to
16 or not agreeing to, and most of them don't know what's
17 involved to make a claim or how to make a claim.

18 Interestingly enough, Your Honor, in the agreement, the
19 agreement -- in the notice, the notice specifically says you
20 have to make the claim yourself, you can't have a lawyer do
21 it. It amazes me why the parties don't want lawyers to look
22 at that document. It's a basic right in this country that
23 arose here in Philadelphia years ago. Everyone's entitled to
24 have a lawyer represent him and make a claim, but in the
25 notice it says you can't have a lawyer do it. That's because

1 apparently they didn't want lawyers to come along and say,
2 well, there's a lot of issues here. Are you aware that if
3 HSBC credits your account, if your account is either three
4 years old or five years old, depending on the Virginia statute
5 that governs the law, your old debt may be revived. And in
6 fact, it is revived. Now, HSBC says, well, maybe it's revived
7 or maybe it isn't, but in their brief in opposition to our
8 brief, they didn't address that issue with all the class
9 members, they merely said as it relates to Peterson, she's not
10 part of that because it doesn't involve her.

11 Well, it does involve other class members, Your Honor,
12 and if a client came to me and said here's a notice I got,
13 what do I do with this notice, I'd look at it and I'd say,
14 well, you're giving up all of your rights and you're reviving
15 the Statute of Limitations. Well, that's not in the notice.
16 That notice needs some adjustment, and class members should be
17 told what that notice is about, and that's probably why
18 nobody's responded to it; they don't know what it's about. It
19 discloses a lot of information, but it tells you don't see a
20 lawyer, and you know something, the Statute of Limitations,
21 when your account is credited, now may no longer bar
22 collection by HSBC. They may be allowed to, and in fact
23 probably will, come after you. It's very creative.

24 The big issue in this hearing today is are class members
25 going to be better off with the settlement or are class

1 members going to be better off without the settlement. Sure,
2 there are -- what is it, 500 who filed claims? I missed the
3 number. Out of 23 million, there's a minuscule amount who
4 have responded to get some money, to get credited on their old
5 credit card. The number of persons who have responded is so
6 small that the numbers who didn't respond are now going to be
7 removed from being in a position to pursue their rights under
8 statutory law. What is interesting, again, is the Defendant
9 HSBC says we can go ahead and collect and you have no rights
10 to counterclaim anymore. Class attorneys say no, they can't
11 collect. I don't know who's right or wrong, but I believe
12 HSBC is correct that they do have the right to pursue the
13 rights they have without having a counterclaim brought against
14 them.

15 If the settlement is approved as currently designed,
16 class members take the necessary -- must take the necessary
17 affirmative action to receive this credit, and that, Your
18 Honor, certainly creates a lot of questions in a class action.
19 Why is it that both parties want affirmative action as opposed
20 to we'll credit your account? What is so amazing in this
21 case, Your Honor, in addition to what I've mentioned and what
22 my briefs have mentioned, in this case there were no
23 depositions. I've heard counsel for Plaintiff say we've
24 looked at thousands of documents; that sounds like a paper
25 dump. I don't know why they had to look at thousands of

1 documents, this is not that complex of a case. Looking at
2 thousands of documents doesn't make it determinative on what's
3 fair and reasonable for the class members. It's a relatively
4 simple case, it's not complex and what is so interesting, is
5 the documents were examined in informal interviews. There was
6 not one deposition taken. I did not hear counsel for either
7 side say there was an affidavit signed or multiple affidavits
8 signed. We don't know if the documents were accurate,
9 inaccurate. Hopefully, if there is an affidavit or
10 depositions, the Court could say, "Well, this is a case
11 involving \$23 million without one deposition, without one
12 affidavit, just informal discussions and interviews and
13 mediations." None of that should be determinative to say that
14 this is a fair and reasonable settlement. Most of the
15 discussions regarding the documents, Your Honor, are
16 "confidential" {quote, unquote}. Nobody knows the fairness of
17 the documents that were reviewed or the importance of them.
18 The worse of this is under the proposed settlement, if we're
19 approved today on October 1 and on October 2, tomorrow, the
20 Defendant could continue pursuing these practices. There's
21 absolutely no injunctive relief as there is in the case
22 against its parent company.

23 Try to be quick with my comments and what I heard. I've
24 already addressed no depositions, documents have not been
25 disclosed. Thousands of documents -- I've been in a lot

1 smaller cases where I've had thousands of documents, that
2 doesn't mean anything unless there are -- there are probably
3 very few documents that would be applicable, to the
4 substantive issues of this case. The notice misses important
5 issues like advising the tax effect because there's recapture
6 in some instances and they -- some of the class members could
7 receive a \$30 payment as what is called a settlement and the
8 IRS could come along and say, "Well, you've written off
9 \$4,000, you now have to pay taxes on that benefit." That's
10 not even addressed in the settlement agreement nor do the
11 class members know about it. Is it fair and reasonable? A
12 dollar, less than a dollar, 70 cents after legal fees per
13 class member? That doesn't sound fair and reasonable when
14 there's actually millions and millions and millions of dollars
15 beyond the 23,000,000 involved in this case. Peterson
16 submits, Your Honor, that this is a self-serving agreement to
17 help the parties, their counsel and HSBC, not to help the
18 class members. Thank you, Your Honor.

19 THE COURT: All right. Ms. Strickland, do you
20 want to respond?

21 MS. STRICKLAND: Certainly, very briefly, Your
22 Honor. We --

23 THE COURT: I'm interested in the argument that
24 somehow crediting the accounts creates a novation of some
25 kind.

1 MS. STRICKLAND: Your Honor, we don't believe that's
2 true. We actually briefed the issue. If there were a
3 voluntary payment by the Plaintiff, that might the case, but
4 that isn't the situation here. Here it's a -- an actually a
5 benefit being conferred on the card member, as opposed to a
6 Plaintiff coming from the card member which revive the debt.
7 We briefed this, we just don't think that what Ms. Peterson
8 argued is legally correct. But also, it's probably worth
9 correcting in that context, some of what may be a
10 misunderstanding of Ms. Peterson's counsel. He indicated that
11 the money was all being paid by credit, by way of credit to
12 account holders. That actually isn't accurate. HSBC has the
13 option of applying credits. But it's to be noted that of the
14 23 million accounts more or less involved in the case, that
15 only 6 million of those accounts even remained open at the
16 time of notice which was, you know, five or six months ago.
17 And 16 million were closed, so obviously to the extent that
18 there is a closed account, credit isn't even an option. So,
19 the overwhelming majority, and probably the numbers are even
20 greater now, of the numbers, are situations in which no credit
21 can be applied and just a check's going to go out.

22 THE COURT: Okay.

23 MS. STRICKLAND: It's also worth noting that with
24 respect to the amount of the settlement, we don't believe the
25 case is meritorious under any event and we believe we have

1 case dispositive defenses and that the Plaintiffs could not
2 have certified a class, a settlement class perhaps, but a
3 litigation class, no.

4 THE COURT: Okay.

5 MS. STRICKLAND: Thank you, Your Honor.

6 THE COURT: Do you have anything to say?

7 MR. PULLIAM: Very briefly, Your Honor. Regarding
8 Mr. Chastain's claims, he clearly, on page one of his filing,
9 opted out. The Court noted that he opted out. The case that
10 Mr. Chastain cites that he can both be an opt-out and an
11 objector simply doesn't stand for that proposition. In that
12 case, like this, there were a large number of people, some of
13 them opted out, some of them objected. The Court let the opt-
14 outs opt out and heard from the objectors. But they're two
15 different people. There's no case that Mr. Chastain has
16 provided that it's one person that's able to simultaneously
17 keep these role -- keep this dual role. And the other issue
18 is my disagreements with Mr. Chastain, or at least his
19 counsel, began right after he said his name. And that's when
20 he said who he represents. He does not represent a South
21 Carolina class. There is no South Carolina class, but for
22 what is consumed in our class that's already been
23 preliminarily approved. He lacks the standing to make these
24 objections. Even the objections he makes, Your Honor, it's
25 interesting, Mr. Lewis feels we didn't do enough work; Mr.

1 Zipkin feels like we did too much work. So, we're -- that's
2 in this role, where Plaintiff's counsel often finds itself.

3 Regarding -- Ms. Strickland accurately pointed out, I
4 believe, the misconceptions held by Ms. Peterson and her
5 counsel. I'll also note his statement that class members were
6 not allowed to have counsel. What the statement said is, "You
7 do not need counsel." What we found in prior of these cases
8 when we did Capital One, we did not put that on there and
9 people felt like they were -- needed to hire a lawyer and they
10 incurred expense that they didn't necessarily have to do. One
11 other very quick issue, Your Honor, there are a small handful
12 of objectors who did file, properly file the papers that are
13 not here today, there's about ten of them. I would put them
14 in sort of two categories, eight of those effectively in one
15 version or another said they wished the settlement was more.
16 I will point out, of those eight, five of them, in the
17 aggregate, spent \$81 on the product, according to HSBC. So,
18 their recovery on the settlement will actually exceed what
19 they spent or come close to it. The other objectors, there's
20 a Ms. Hunter who objects to the fact that her debt was sold
21 and feels like that that was, she was somehow prejudiced by
22 that fact and that our case didn't remedy it. And Mr.
23 Polistad is a prisoner in the State of Washington, and he
24 really wanted to be here today. So, I don't -- maybe as a
25 field trip, I don't know, but --

1 THE COURT: I didn't sign to bring down.

2 (Laughter)

3 MR. PULLIAM: So, but I think what's -- sort of in
4 summary on these objections, in the Bell Atlantic Case, the
5 3rd Circuit characterized 30 objections out of 1.1 million
6 class members as infinitesimally small. Here, we have about
7 15 objectors in 20 million people, which is 1/40th the number
8 of objectors in Bell Atlantic. So, I wouldn't even know what
9 adjective to be able to describe that, other than I think it's
10 clear that the class supports the settlement.

11 THE COURT: Is there anything else? Am I missing
12 another objector here or something? Anyone have any more --

13 MR. ZIPKIN: Yes, Sir, I'd like --

14 THE COURT: -- to say?

15 MR. ZIPKIN: -- say something in opposition to what
16 he just said about me.

17 THE COURT: Go ahead.

18 MR. ZIPKIN: May I sit here, Your Honor?

19 THE COURT: Absolutely.

20 MR. ZIPKIN: Well, I listened real carefully and he
21 doesn't want to talk about this being a preliminary -- the
22 prior hearing was preliminary, which gives everybody the right
23 to change their mind. He didn't mention the fact that they're
24 asking you to choose sides. When he came in here and he said
25 you can't be an objector and opt out. Well, what we -- maybe,

1 however you look at it, I should be able to give the Court
2 whatever I think would be helpful --

3 THE COURT: And you did.

4 MR. ZIPKIN: -- and I did, and I don't see why he's
5 complaining about it. And he said --

6 THE COURT: Maybe he thought you were too effective.

7 MR. ZIPKIN: Well, I agree with him --

8 (Laughter)

9 MR. ZIPKIN: -- and I'm sorry, if he took offense to
10 the fact that I said he didn't do enough work. I said I
11 didn't know if he did enough work because he hid it all from
12 us, just like the gentleman on the other side said. But I --
13 Your Honor, this is just a perfect example of why you have a
14 preliminary approval, you come to the final approval, things
15 happen in between and they don't agree and now Your Honor
16 should deny the approval.

17 THE COURT: Anything else?

18 MR. PULLIAM: Your Honor, if I may?

19 THE COURT: Who's that? Oh, okay.

20 MR. PULLIAM: Mr. Oreck Finneland (phonetic) is
21 here. Mr. Finneland, and he received a post card notice and
22 in an abundance of caution, he's here today to make sure he
23 wasn't summoned to Court. So, I wanted the Court to just --

24 THE COURT: Do you know what this is about, sir?

25 MR. FINNELAND: No, Sir. I'm sorry, then I got

1 lost. I was supposed to be here at 9 o'clock.

2 THE COURT: That's okay.

3 MR. FINNELAND: Okay.

4 THE COURT: At one time or other, you had an account
5 at HSBC, a credit card?

6 MR. FINNELAND: I don't know. I don't know about
7 that.

8 THE COURT: Okay, you're here because you got a
9 notice. You thought it was a summons to Court?

10 MR. FINNELAND: Yes.

11 THE COURT: It wasn't. This is about people who are
12 representing people who either had credit cards with HSBC and
13 were involved in a protection plan and they're trying to
14 settle the claims against HSBC. I don't know what your status
15 was, but -- is he part of the class? I guess he is.

16 MR. PULLIAM: Presumably, he's a putative class
17 member --

18 THE COURT: Oh.

19 MR. PULLIAM: -- and I think he may have just
20 misunderstood the notice.

21 THE COURT: Okay. All right, you can leave if you
22 want.

23 MR. FINNELAND: Thank you so much, Judge.

24 THE COURT: Okay, thank you.

25 MR. FINNELAND: Thank you.

1 MR. ZIPKIN: I can speak from here, Your Honor?

2 THE COURT: Sure.

3 MR. ZIPKIN: I just want to point out that it's not
4 the number of objectors that is important, it's the
5 significance of the objections. Neither counsel have
6 addressed the issue of no discovery, that the statute of
7 limitations is revived vis-a-vis the credit to the account and
8 the tax recapture issue.

9 THE COURT: Ms. Strickland, what's the issue with
10 the tax recapture? I don't know what that --

11 MS. STRICKLAND: Your Honor, the issue with respect
12 to tax recapture, I believe from Ms. Peterson's counsel's
13 perspective is that we should have disclosed the potential for
14 recapture. Obviously, taxation is a matter of individual
15 situations, so it's not something that we include in a notice
16 typically nor is there any need, I think it would probably
17 create more confusion than is necessary.

18 THE COURT: Okay.

19 MS. STRICKLAND: Thank you.

20 THE COURT: Now, is there anyone else who has
21 anything to say? No? All right, Ms. Strickland, I would like
22 you to propose some language for me along the lines of barring
23 individual class members from getting double recoveries. I
24 don't intend to bar Attorneys General from doing whatever they
25 think they have to do, but as far as individual class members

1 who think they might get double recovery, I want some language
2 about that.

3 MS. STRICKLAND: Thank you, Your Honor. I'll do
4 that.

5 THE COURT: You can file a response if you don't
6 like it.

7 MS. STRICKLAND: Your Honor, would you like us to do
8 that in the form of an amended final approval order?

9 THE COURT: And you can maybe agree on a particular
10 language because you know where I'm going on that.

11 MR. GOLOMB: Well, can I -- let me just ask this
12 question, then. I think we're clear that the Attorneys
13 Generals have the right to pursue the civil penalties claim.
14 I think what you're also saying is, I think is that -- that
15 the Attorney Generals do not have the right to pursue --

16 THE COURT: They have the right to do whatever they
17 want. I'm barring the individuals --

18 MR. GOLOMB: Okay.

19 THE COURT: -- from collecting any money twice --

20 MR. GOLOMB: Okay and so --

21 MR. COURT: -- for the same claims.

22 MR. GOLOMB: -- okay, but you're not barring the
23 Attorney Generals --

24 THE COURT: They can do whatever they want. I --

25 MR. GOLOMB: -- from pursuing --

1 THE COURT: -- can't control them --

2 MR. GOLOMB: -- a restitution claim?

3 THE COURT: -- they're not even parties to this
4 class action.

5 MR. GOLOMB: Okay, I but just wanted -- you're not,
6 at least you're thinking now is that you're not barring them
7 from pursuing a restitution claim. It's just they're not
8 allow to pay --

9 THE COURT: The restitution claims --

10 MR. GOLOMB: -- the consumers.

11 THE COURT: -- behalf of the State --

12 MR. GOLOMB: Okay.

13 THE COURT: -- that's their business.

14 MR. GOLOMB: All right. Your Honor, if I just --

15 THE COURT: -- but if it's --

16 MS. STRICKLAND: Your --

17 THE COURT: -- for the individuals --

18 MR. GOLOMB: Okay.

19 MS. STRICKLAND: Your Honor, we'll propose language
20 and I should not be surprised if we're back here again on this
21 exact topic --

22 THE COURT: Great, all right.

23 MS. STRICKLAND: -- judging by listening to Mr.
24 Golomb.

25 THE COURT: All right.

1 MS. STRICKLAND: So, we will propose language which
2 will be along the lines that a class member is barred from
3 recovering any monies by virtue of the AG actions for
4 restitution and other claims payable directly to class
5 members.

6 THE COURT: I understand what you're saying and
7 we'll see what the response is.

8 MR. LEWIS: Your Honor, are we all going to get
9 copied on that?

10 THE COURT: You're on the docket as a lawyer?

11 MR. LEWIS: I'm on the docket as a objector's
12 lawyer.

13 THE COURT: Well, make sure.

14 MS. STRICKLAND: Your Honor, I guess the question
15 is, I suspect what we will do is create a draft which we will
16 then run by Plaintiff's counsel --

17 THE COURT: Right.

18 MS. STRICKLAND: -- and certainly once there's
19 something filed with the Court, everyone on the docket will
20 get copied.

21 THE COURT: Okay.

22 MR. LEWIS: And will that require a new notice?

23 THE COURT: No, it won't require a new notice. All
24 I'm asking you to do is suggest language for me. That wasn't
25 in it, that's what I want.

1 MR. LEWIS: Yes, Sir.

2 THE COURT: Okay. But you'll get a copy because
3 you're on the docket. Anything else? Okay, we're adjourned,
4 thank you.

5 ALL: Thank you, Your Honor.

6 (Court adjourned)

7

8

CERTIFICATION

9 I certify that the foregoing is a correct transcript from the
10 electronic sound recording of the proceedings in the above-
11 entitled matter.

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Lewis Parham

10/4/12

Signature of Transcriber

Date