

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 1:10-cv-23235/HOEVELER

DAVID KARDONICK, JOHN DAVID and
MICHAEL CLEMINS, individually and on
behalf of all others similarly situated and the
general public,

Plaintiff,

v.

JPMORGAN CHASE & CO. and CHASE
BANK USA, N.A.

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF LEAD
PLAINTIFFS' APPLICATION FOR ORDER AUTHORIZING
DISTRIBUTION OF SETTLEMENT FUNDS**

Lead Plaintiffs David Kardonick, John David, and Michael Clemins (“Lead Plaintiffs”), by and through their attorneys, respectfully submit this memorandum of points and authorities in support of their Application for an Order in the above-captioned class action (the “Action”): (1) authorizing distribution of the Net Settlement Fund to approved claimants; (2) approving the payment of expenses to the Claims Administrator (as defined below);

and (3) approving payment of remaining tax expenses.¹

I. INTRODUCTION

On September 11, 2011, a hearing was held before this Court on Lead Plaintiffs' Motion for Final Approval of Class Action Settlement. Having found that due and adequate notice of the Settlement, including the terms of the Plan of Administration and Distribution, was given to the Class, this Court issued a Final Judgment and Order of Dismissal dated September 16, 2011 (the "Final Approval Order") approving the Settlement as fair and reasonable, approving the Plan of Administration and Distribution, and dismissing the action with prejudice in accordance with the terms of the Settlement and the Final Approval Order. In the Final Approval Order, the Court expressly retained jurisdiction for, among other things, determining any matters relating to the distribution of the Settlement Fund.

Pursuant to the Settlement, as Claims Administrator, Heffler, Radetich & Saitta LLP ("Heffler" or the "Claims Administrator") was charged with the responsibilities of administrating and calculating Proof of Claim forms and distributing the Net Settlement Fund, subject to court approval. In accord, Heffler has issued a report in the form of the Declaration of Ronald

¹ This Memorandum incorporates by reference the definitions in the Stipulation and Agreement of Class Action Settlement (the "Settlement") dated December 20, 2010 and all terms used herein shall have the same meanings as set forth in the Settlement.

A. Bertino, C.P.A. (the “Heffler Report”), contemporaneously submitted herewith, wherein it identified 217,023 Proof of Claim forms as payable and 18,606 Proof of Claim forms as non-payable. For the reasons set forth below, Lead Plaintiffs request this Court approve the recommendations of Heffler in accepting and rejecting claims filed in this matter and order distribution of the Settlement Fund in accord therewith.

At this time, the amount in the Settlement Fund, after prior payment of attorneys’ fees and expenses, service awards, and administration fees and expenses, is approximately \$12,077,694.87. The Claims Administrator has incurred fees and expenses above the Notice and Administration Fund provided for in the Settlement and approved by this Court in the Preliminary Approval Order and in subsequent orders.² These additional fees and expenses were incurred through the claims administration process and are itemized on an invoice from Heffler, which is attached to the Heffler Report as Exhibit C. *See* Heffler Report ¶ 17 and Ex. C. Lead Counsel has reviewed this bill and believes the fees and expenses are reasonable and appropriate; therefore, Lead Counsel recommends that such expenses be approved for payment out of the Settlement Fund. Thus, should the Court approve to pay the balance of the requested settlement administrator’s fees

² As reflected in Heffler’s invoice, the current outstanding balance owed to Heffler is \$224,346.88. *See* Heffler Report ¶ 17 and Ex. C.

and expenses, there will be approximately \$11,853,347.99 in the Settlement Fund available for distribution.

II. AMOUNTS PREVIOUSLY DEDUCTED FROM THE GROSS SETTLEMENT FUND

In the Final Approval Order, this Court awarded Lead Counsel attorneys' fees in the amount of \$3.5 million and reimbursement of litigation expenses in the amount of \$62,676.54. The Court also awarded each of the three Settlement Class Representatives a service fee in the amount of \$2,500. These amounts were paid from the Settlement Fund.

Additionally, administration expenses and fees in the amount of \$4,344,961.09 have been paid from the Settlement Fund. *See* Heffler Report ¶ 17.

III. TAXES TO BE DEDUCTED FROM THE NET SETTLEMENT FUND

Pursuant to §468 of the Internal Revenue Code, the Net Settlement Fund itself may be responsible for the payment of additional income tax on the income earned subsequent to the deposits into the Settlement Fund. Any additional tax liability the Net Settlement Fund might have will be calculated immediately prior to distribution (in order to take account of interest as it continues to accrue) and must be deducted from the Net Settlement Fund.

IV. FEES AND EXPENSES OF THE CLAIMS ADMINISTRATOR TO BE PAID FROM THE NET SETTLEMENT FUND AND ACCOUNT BALANCE

Pursuant to the Settlement, as Claims Administrator, Heffler was charged with the responsibilities of administering and calculating Proof of Claim forms and distributing the Net Settlement Fund, subject to court approval. In carrying out the administration process, the Claims Administrator has incurred fees and expenses above the Notice and Administration Fund and any other amounts previously authorized by this Court. *See* Heffler Report ¶ 17. The Claims Administrator has provided Lead Counsel with an invoice for its fees and expenses, which is attached as Exhibit C to the Heffler Report. This invoice reflects that the Claims Administrator has an outstanding balance of \$224,346.88. *See* Heffler Report at ¶ 17 and Exhibit C. Lead Counsel have reviewed the invoice and believe the fees and expenses are reasonable and appropriate and recommend that such expenses be approved for payment out of the Net Settlement Fund. Thus, should the Court approve the requested Claims Administrator's fees and expenses, there will be approximately \$11,853,347.99 in the Settlement Fund available for distribution, exclusive of any additional tax payments. *See* Heffler Report at ¶ 13.

V. **DISTRIBUTION OF THE NET SETTLEMENT FUND**

Lead Plaintiffs respectfully request that the Court authorize the distribution of the Net Settlement Fund, *i.e.*, the Settlement Fund less any further allowances for taxes and payment of the balance due to the Claims Administrator, to eligible Settlement Class Members, on a *pro rata* basis. The Heffler Report includes all of the necessary information to effectuate the distribution of the Net Settlement Fund.

A. **Summary of Payable and Non-Payable Claims**

As of October 31, 2012, Heffler has received and processed 235,629 Proof of Claim forms in accordance with the terms of the Settlement and court-approved Plan of Administration and Distribution. *See* Heffler Report ¶ 5. Of the 235,629 claims received, 217,023 claims have been adjudged as payable claims and 18,606 claims have been identified as non-payable claims. *See* Heffler Report ¶¶ 8-9. The claim numbers of these non-payable claimants, and the reason(s) Heffler has rejected these claims, are set out in the Heffler Report. In short, the 18,606 non-payable claims were rejected for one or more of the following reasons: (a) filing a duplicate claim; (b) improper information or documentation; and (c) filing after the extended claims filing deadline of September 9, 2011. *See* Heffler Report ¶¶ 5-6, and 9.

Each claimant who filed a deficient claim was sent a rejection letter advising the claimant of the reason for the rejection of his claim and allowing the claimant to respond if the claimant wished to correct the claim. *See* Heffler Report ¶¶ 6-7 and Exhibit A. A total of 1,445 corrections or responses were received by Heffler that cured deficiencies. *Id.* at ¶ 7. As such, these 1,445 claimants have been included in the payable claims.

B. Request for Approval of Heffler's Report

Pursuant to the Settlement and Plan of Administration and Distribution, Lead Counsel request that the administrative determinations of each claim listed in the Heffler Report be affirmed and approved by the Court. Each claim that has been rejected in whole or in part should be so rejected. Each claim that has been accepted in whole or in part should be so accepted.

C. Request for Distribution to Valid Claimants

Under the direction of Lead Counsel, Heffler intends to distribute the Net Settlement Fund promptly after the proposed Settlement Distribution Order becomes final. Currently, the Net Settlement Fund amounts to \$12,077,694.87. *See* Heffler Report ¶ 13. This amount is prior to the reduction of the requested fees and expenses of the Claims Administrator in the amount of \$224,346.88 and any additional income tax payment. As

noted above, the requested fees and expenses were incurred through the claims administration process and are itemized on an invoice from Heffler, which is attached to the Heffler Report as Exhibit C. *See also* Heffler Report ¶ 17. Lead Counsel have reviewed this invoice and believe the fees and expenses are reasonable and appropriate and recommend that such expenses be approved for payment out of the Net Settlement Fund. Thus, should the Court approve the requested settlement administrator's fees and expenses, there will be approximately \$11,853,347.99 in the Net Settlement Fund available for distribution. *See* Heffler Report ¶ 13. Under the Settlement and Plan of Administration and Distribution, class members who submitted Payable Claims will receive approximately \$37.81, \$64.14, or \$151.22, depending on the nature of their claim.

Lead Counsel submit that six months after the initial distribution of the Net Settlement Fund to Authorized Claimants, it will be appropriate to distribute any unclaimed monies remaining in the Net Settlement Fund, if any, in a secondary distribution to the Class if, in Lead Counsel's discretion, there are enough monies remaining to warrant a secondary distribution.

Lead Counsel further submit that six months after the secondary distribution of the Net Settlement Fund, or, if no secondary distribution occurs, six months after the initial distribution of the Net Settlement Fund, it

will be appropriate to distribute any unclaimed monies remaining in the Net Settlement Fund to a charitable or educational entity designated by Lead Counsel and approved by counsel for the Defendants.

Lastly, Lead Counsel request the Court to permit the Claims Administrator to destroy all Proof of Claim forms and related correspondence one year after the initial distribution of the Net Settlement Fund to Authorized Claimants. The Settlement Distribution Order provides, however, that the Claims Administrator must retain all administrative records, including its copy of the Charged-Off List, Payable Claims and Non-Payable Claims, and its computer database used to create these lists for a period of three years after the initial distribution of the Net Settlement Fund to Authorized Claimants.

VI. CONCLUSION

For the foregoing reasons, Lead Counsel respectfully request that the Court grant this Motion and authorize the distribution of the Net Settlement Fund to Authorized Claimants.

DATED: November 30, 2012

/s/ Brian Ku
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been filed and served on all counsel of record on this 30th day of November 2012, via Court's CM/ECF Filing system.

/s/ Brian Ku
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