

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO. 1:09-MD-02036-JLK

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

Casayuran, et al. v. PNC Bank, N.A.
D.N.J. Case No. 2:09-5155
S.D. Fla. Case No. 10-cv-20496-JLK

Cowen, et al. v. PNC Bank, N.A.
S.D. Fla. Case No. 10-cv-21869-JLK

Hernandez, et al. v. PNC Bank, N.A.
S.D. Fla. Case No. 10-cv-21868-JLK

**ORDER ON STIPULATION AND PROPOSAL
FOR PHASE II DISTRIBUTION OF SETTLEMENT FUNDS
TO IDENTIFIABLE SETTLEMENT CLASS MEMBERS**

On July 29, 2015, Settlement Class Counsel and PNC Bank, N.A. (“PNC”) filed a Stipulation and Proposal for Phase II Distribution of Settlement Funds to Identifiable Settlement Class Members (“Stipulation and Proposal”).¹ (DE # 4204). The Court now enters this Order based on the Stipulation and Proposal.

BACKGROUND

On August 5, 2013, this Court granted Final Approval to the Settlement with PNC. (DE # 3580). The same day, the Court entered Final Judgment incorporating the Final Approval Order. (DE # 3581). The Settlement included a Settlement Fund of \$90,000,000 to be used to pay: (i) all distributions of money to the Settlement Class; (ii) all attorneys’ fees, costs and

¹ All capitalized terms have the same meaning ascribed to them in the Settlement Agreement and Release and Amendment to Settlement Agreement and Release (collectively, the “Agreement”) attached to the Amended Motion for Final Approval (DE # 3505-1 and 3505-2) and the Final Approval Order (DE # 3505).

expenses of Class Counsel; (iii) Service Awards to the Plaintiffs; (iv) the costs of the Escrow Agent and Tax Administrator; (v) distribution of residual funds, if any, pursuant to Section XIII of the Agreement; and (vi) additional fees, costs and expenses not specifically enumerated in the Agreement, subject to approval of Settlement Class Counsel and PNC. (Agreement ¶¶ 86, 89).

Pursuant to the Agreement, PNC and the Settlement Administrator timely distributed the Net Settlement Fund to eligible, identifiable Settlement Class Members (the “Phase I Distribution”). *See* Declaration of Ricky Borges ¶¶ 3-8 (“Admin. Decl.”). The Settlement Administrator also made reasonable efforts to locate proper addresses for all eligible, identifiable Settlement Class Members whose Phase I Distribution checks were not mailed due to undeliverable addresses and/or were returned by the United States Postal Service (“USPS”) as undeliverable, and re-mailed those checks to updated addresses, if obtained. *Id.* at ¶¶ 9-10.

Following the void date for all Phase I Distribution checks, the Settlement Administrator completed a formal reconciliation, and determined that the balance remaining in the Settlement Fund is approximately \$12,932,600. Admin. Decl. at ¶ 15. This balance includes: (a) the amount associated with returned and/or uncashed Phase I Distribution checks that were mailed to eligible, identifiable Settlement Class Members but were returned by the USPS as undeliverable; (b) the amount associated with Phase I Distribution checks that could not be mailed to eligible, identifiable Settlement Class Members because the Settlement Administrator was unable to locate reasonably reliable addresses; and (c) the amount associated with Phase I Distribution checks that were mailed and not returned by the USPS, but not timely negotiated by Settlement Class Members. *Id.* at ¶¶ 8, 9, 13(c).

The Agreement provides that any residual funds remaining one year and thirty (30) days after the date the Settlement Administrator mails the first Settlement Class Member payment shall be distributed (a) first, on a *pro rata* basis to participating Settlement Class Members who

received Settlement Fund Payments pursuant to Section XIII of the Agreement, to the extent feasible and practical in light of the costs of administering such subsequent payments unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair; and (b) second, in the event the costs of preparing, transmitting and administering such subsequent payments pursuant to subparagraph 118(a) above are not feasible and practical to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair, Settlement Class Counsel and counsel for PNC shall jointly file a proposed plan for distribution of the residual funds consistent with the American Law Institute, *Principles of Aggregate Litigation* § 3.07(c), together with supporting materials, for consideration by the Court. (Agreement ¶ 118).

The Agreement also provides that all costs associated with the disposition of residual funds – whether through additional distributions to Settlement Class Members or through an alternative plan approved by the Court – shall be borne by and paid solely from the Settlement Fund. Under no circumstances shall PNC Bank have responsibility for any costs associated with the disposition of residual funds whether through additional distributions to Settlement Class Members and/or through an alternative plan approved by the Court. (Agreement ¶ 118).

Settlement Class Counsel and PNC have conferred with each other, and with the Settlement Administrator, and agree that it is feasible and practical to distribute the residual funds remaining in the Settlement Fund, on a *pro rata* basis, to Settlement Class Members who participated in the Phase I Distribution or Supplemental Phase I Distribution by receiving Settlement Class Member payments (the “Phase II Distribution”). For purposes of the Phase II Distribution, Settlement Class Counsel and PNC recommend that identifiable Settlement Class Members will be eligible to receive a *pro rata* distribution provided: (a) they participated in the

Phase I Distribution or Supplemental Phase I Distribution by receiving their *pro rata* amount of the Phase I Distribution by an automatic credit to their PNC Accounts or by timely negotiating their Phase I Distribution checks or Supplemental Phase I Distribution checks; and (b) the *pro rata* amount of their Phase II Distribution will be equal to or greater than Five Dollars (\$5.00).

FINDINGS OF FACT

Based on the information contained in the Stipulation and Proposal and the accompanying declaration of the Settlement Administrator, the Court makes the following findings:

1. Pursuant to the Agreement, PNC and the Settlement Administrator timely completed the Phase I Distribution of the Net Settlement Fund to eligible, identifiable Settlement Class Members. Admin. Decl. ¶¶ 3-8. Following the Effective Date, the Settlement Administrator and PNC distributed the Net Settlement Fund totaling \$62,793,421.28 in accord with the Settlement. *Id.* at ¶ 3. Award Amounts to Settlement Class Members who were then-current customers of PNC were effectuated through account credits applied by PNC on or about April 11, 2014 to 226,584 Accounts in the aggregate amount of \$18,353,630.23. *Id.* at ¶ 6. During April of 2014, the Settlement Administrator caused to be mailed 607,671 Phase I Distribution checks in the aggregate amount of \$43,683,511.32 to Settlement Class Members who were former customers. *Id.* at ¶ 7. A total of 19,927 checks with an aggregate amount of \$756,279.73 were not mailed to Settlement Class Members who were former customers because their addresses, after trace efforts conducted by the Settlement Administrator during the notice program, proved to be undeliverable. *Id.* at ¶ 8.

2. The Settlement Administrator also made reasonable efforts to locate proper addresses for all eligible, identifiable Settlement Class Members whose Phase I Distribution checks were not mailed due to undeliverable addresses and/or were returned by the United States

Postal Service (“USPS”) as undeliverable, and re-mailed those checks to updated addresses, if obtained. Admin. Decl. ¶¶ 9-10. Between April 25, 2014 and July 2015, tracing of undeliverable checks was conducted and the Settlement Administrator caused to be re-mailed 60,788 checks totaling \$4,282,670.70 to Settlement Class Members who were former customers. *Id.* at ¶ 10.

3. Pursuant to the Settlement, the void date for payments passed after one hundred and eighty (180) days, and following an additional thirty (30) day grace period, all initial re-mailed checks will expire in December 2015, unless negotiated by that date. Admin. Decl. ¶ 12.

4. In July 2015, following the void date for all Phase I Distribution checks, the Settlement Administrator completed a formal reconciliation, and determined that the balance remaining in the Settlement Fund is approximately \$12,932,600. Admin. Decl. at ¶ 15. This balance includes: (a) the amount associated with returned and/or uncashed Phase I Distribution checks that were mailed to eligible, identifiable Settlement Class Members but were returned by the USPS as undeliverable; (b) the amount associated with Phase I Distribution checks that could not be mailed to eligible, identifiable Settlement Class Members because the Settlement Administrator was unable to locate reasonably reliable addresses; and (c) the amount associated with Phase I Distribution checks that were mailed and not returned by the USPS, but not timely negotiated by Settlement Class Members. *Id.* at ¶¶ 8, 9, 13(c).

5. Before embarking on the proposed Phase II Distribution, the Court finds that the Settlement Administrator shall attempt to make one “Supplemental Phase I Distribution,” which will require a final attempt to obtain updated addresses for eligible, identifiable Settlement Class Members whose Phase I Distribution checks were previously returned by the USPS as undeliverable, as well as for those eligible, identifiable Settlement Class Members whose Phase I Distribution checks were not initially mailed due to previously returned notices. Admin. Decl.

at ¶ 16. The Settlement Administrator shall mail such Supplemental Phase I Distribution checks one time in the event that the Settlement Administrator is able to obtain updated addresses for these Settlement Class Members through reasonable effort and expense, and such checks will have a void date of sixty (60) days from issuance. *Id.* at ¶ 16. The Settlement Administrator has determined that, applying the foregoing criteria, Supplemental Phase I Distribution checks will be mailed to approximately 26,000 eligible, identifiable Settlement Class Members. *Id.* The fees and costs associated with the Settlement Administrator undertaking and administering a Supplemental Phase I Distribution to approximately 26,000 eligible Settlement Class Members will be \$41,000. *Id.* at ¶ 16.

6. As noted above, Phase I Distribution checks in the aggregate amount of approximately \$5,896,308.61 were either delivered to eligible identifiable Settlement Class Members, but were not timely negotiated. Admin. Decl. at ¶ 13(c). Eligible Settlement Class Members who received Phase I Distribution checks but did not timely negotiate those checks, or who will receive Supplemental Phase I Distribution checks and do not timely negotiate them, have manifested their intent *not* to participate in further distributions from this Settlement. The significant administrative costs associated with printing and mailing Phase II Distribution checks are not justified for Settlement Class Members who previously demonstrated their intent not to participate in the distributions from this Settlement by failing to timely negotiate their Phase I Distribution or Supplemental Phase I Distribution checks.

7. The administrative fees and costs associated with a Phase II Distribution are substantial and must be paid out of the residual settlement funds available for distribution to eligible Settlement Class Members. The fixed administrative fees and costs associated with a proposed Phase II Distribution process will be \$550,000. Admin. Decl. at ¶ 19. Every additional

dollar spent on administrative fees and costs means a dollar less available for the Phase II Distribution to eligible Settlement Class Members.

8. Based the administrative fees and costs associated with printing and mailing Phase II Distribution checks, the minimum amount for Phase II Distribution checks shall be Five Dollars (\$5.00). Phase II Distribution checks shall have a void date of sixty (60) days from issuance.

9. The Court recognizes that following completion of the Phase II Distribution process, there will still remain some residual funds resulting from Phase II Distribution that were not timely negotiated or deliverable. Admin. Decl. at ¶¶ 20-21.

10. The Court finds that all funds remaining following completion of the Phase II Distribution (due to uncashed or undeliverable Phase II Distribution checks) should be distributed pursuant to each applicable state's unclaimed funds laws. Unclaimed property and escheatment of intangible personal property is frequently used when the name and domicile of the property's owners are known to the parties involved in a class action settlement, as they are here. Admin. Decl. at ¶¶ 20-21. The purpose of unclaimed property laws is to reunite unclaimed funds with their rightful owners, and to prevent unjust enrichment of companies or other entities that have no interest in nor right to the unclaimed property. *Id.* The unclaimed property and escheatment process has been used in administering residual funds for numerous class action settlements, and is an appropriate and efficient method to handle the anticipated residual funds remaining following completion of the Phase II distribution process. *Id.*

11. The unclaimed property and escheatment process will be handled by the Settlement Administrator and will be based on the Phase II Distribution amounts. Admin. Decl. at ¶¶ 20-21. Under this process, the Settlement Administrator will hold whatever amount of funds remains in the Settlement Fund following completion of the Phase II Distribution process

for a period of three (3) to five (5) years, depending on and as required by the applicable state laws. *Id.* During that “dormancy period,” eligible Settlement Class Members who did not timely negotiate their Phase II Distribution checks will be able to contact the Settlement Administrator to request issuance of their funds. *Id.* At the end of the dormancy period, the Settlement Administrator will forward the remaining amounts and the names, addresses and individual Phase II Distribution award amounts to the appropriate authorities in all applicable states. *Id.* The state authorities will then hold, process and handle such funds in accordance with their respective unclaimed property and escheatment laws.

12. The fixed fees and costs associated with the Settlement Administrator’s work on the unclaimed property and escheatment process will be \$140,000, which amount will be withheld and deducted from the amount available for the Phase II Distribution. Admin. Decl. at ¶ 22.

13. Implementation of the Supplemental Phase I Distribution and Phase II Distribution, followed by the unclaimed funds and escheatment process described above, will effectuate a complete and final distribution of all remaining settlement funds to eligible identifiable Settlement Class Members.

CONCLUSIONS

Settlement Class Counsel, PNC and the Settlement Administrator have done an exemplary job in undertaking and implementing the process of distributing the proceeds of this Settlement, and in making recommendations to the Court regarding a Phase II Distribution process. The Court commends Settlement Class Counsel, PNC and the Settlement Administrator for developing and presenting a plan that will, upon completion, have distributed as much of the Net Settlement Fund as possible to eligible identifiable Settlement Class Members.

Based on the findings of fact set forth above and the recommendations of Settlement Class Counsel and PNC, the Court hereby **ORDERS AND ADJUDGES** as follows:

A. Settlement Class Counsel's and PNC's Stipulation and Proposal for Supplemental Phase I Distribution, followed by a Phase II Distribution to eligible identifiable Settlement Class Members, and for disposition of all remaining unclaimed funds and the escheatment process of the residual balance following completion of the Phase II distribution process, is **APPROVED** as set forth herein;

B. The Settlement Administrator is authorized and directed to make one final attempt to obtain updated addresses for eligible, identifiable Settlement Class Members whose Phase I Distribution checks were previously returned by the USPS as undeliverable, and for eligible, identifiable Settlement Class Members whose Phase I Distribution checks were not initially mailed due to previously undeliverable addresses;

C. The Settlement Administrator is directed to mail or re-mail Supplemental Phase I Distribution checks, with a sixty (60) day void date, to eligible identifiable Settlement Class Members for whom reasonably reliable updated addresses are obtained where such Phase I Distribution checks were previously returned by the USPS as undeliverable, or were not initially mailed due to previously undeliverable addresses;

D. The Settlement Administrator is directed to void all Supplemental Phase I Distribution checks that are not timely negotiated following expiration of the sixty (60) day void date;

E. The Settlement Administrator is directed to perform a bank reconciliation following completion of the Supplemental Phase I Distribution to determine the total amount of residual funds available for the Phase II Distribution;

F. The Settlement Administrator is directed to thereafter prepare and undertake a Phase II Distribution, on a *pro rata* basis, by issuing and mailing checks to all eligible, identifiable Settlement Class Members, except as excluded below in subparagraph (H), on a date to be determined by the Settlement Administrator, in consultation with Settlement Class Counsel and PNC;

G. The amount of the Phase II Distribution shall consist of the residual balance, less Supplemental Phase I Distribution and Phase II Distribution administrative fees and costs in the total amount of \$550,000, and fees and costs of \$140,000 associated with the unclaimed funds and escheatment of the residual balance following completion of the Phase II Distribution process;

H. The following categories of identifiable Settlement Class Members shall not be eligible to receive a Phase II Distribution: (a) Settlement Class Members whose Phase I Distribution checks and/or Supplemental Phase I Distribution checks were not mailed because the Settlement Administrator was unable to obtain valid updated addresses following reasonable effort and expense; (b) Settlement Class Members whose Phase I Distribution checks and/or Supplemental Phase I Distribution checks were mailed and returned by the USPS, where the Settlement Administrator was unable to obtain updated addresses believed to be valid following reasonable effort and expense; (c) Settlement Class Members whose Phase I Distribution checks and/or Supplemental Phase I Distribution checks were not returned by the USPS and who failed to timely negotiate such checks; and (d) Settlement Class Members whose Phase II Distribution checks would be less than a minimum threshold amount of Five Dollars (\$5.00);

I. The checks to be issued as part of the Phase II Distribution shall have an expiration date of sixty (60) days following issuance, and the Settlement Administrator is authorized to re-issue and/or re-mail Phase II Distribution checks one time only that will be valid

for thirty (30) days from the date of reissuance, provided the Phase II Distribution checks requested to be re-issued are returned as undeliverable within thirty (30) days of issuance or the Settlement Class Member contacts the Settlement Administrator within thirty (30) days after issuance of the Phase II Distribution checks to request re-issuance;

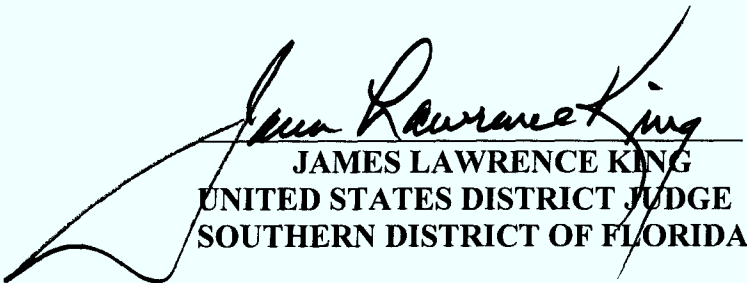
J. Within thirty (30) days following completion of the Phase II Distribution and final reconciliation by the Settlement Administrator, Settlement Class Counsel shall file a final report detailing the results of the Phase II Distribution, including the total number and amount of Phase II Distribution checks that were mailed, the total number and amount of Phase II Distribution checks that were timely negotiated, the total number and amount of Phase II Distribution checks that were not timely negotiated, and the total number and amount of Phase II Distributions that will be held by the Settlement Administrator pursuant to the unclaimed funds and escheatment process described herein;

K. Any and all residual amounts remaining following the Phase II Distribution shall be treated as unclaimed funds pursuant to the laws of the states where the intended Settlement Class Member-recipient of such Phase II Distributions are domiciled based upon their last known addresses. The Settlement Administrator shall handle the unclaimed funds and escheatment process, and the calculation of the unclaimed funds and escheatment shall be based upon the undeliverable and uncashed distribution checks from the Phase II Distribution. The Settlement Administrator shall provide Settlement Class Counsel and PNC and its counsel with periodic reports identifying the owners, their respective states of domicile, and corresponding amounts of all unclaimed funds, and such reports shall be made available to the Court for *in camera* inspection, if requested; and

L. All costs associated with the effort to undertake and complete the Supplemental Phase I Distribution, including the costs to locate updated address information for Settlement

Class Members whose Phase I Distributions were returned as undeliverable or were not mailed, , the Phase II Distribution, and the unclaimed funds and escheatment process following completion of the Phase II Distribution shall be borne by and paid solely from the Settlement Fund. PNC shall not be required, under any circumstances, to pay any additional amounts in connection with this Settlement to any Settlement Class Member, the Settlement Administrator, Class Counsel or third parties associated with the Supplemental Phase I Distribution, the Phase II Distribution, the unclaimed funds and escheatment process and any ancillary matters addressed in this Order.

DONE AND ORDERED in Chambers at the James Lawrence King Federal Justice Building and United States Courthouse in Miami, Florida, this 30th day of July, 2015.



**JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA**

cc: All Counsel of Record