

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

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

THIS DOCUMENT RELATES TO:

Waters, et al. v. U.S. Bank, N.A.
S.D. Fla. Case No. 1:09-cv-23034-JLK
N.D. Cal. Case No. 09-2071-JSW

Speers, et al. v. U.S. Bank, N.A.
S.D. Fla. Case No. 1:09-cv-23126-JLK
D. Or. Case No. 3:09-cv-00409-HU

Brown v. U.S. Bank, N.A.
S.D. Fla. Case No. 1:10-24147-JLK
E.D. Wash. Case No. 2:10-00356-RMP

**[PROPOSED] ORDER ON JOINT REPORT ON PHASE I DISTRIBUTION OF
SETTLEMENT FUNDS AND PROPOSAL
FOR PHASE II DISTRIBUTION OF REMAINING RESIDUAL SETTLEMENT FUNDS
TO IDENTIFIABLE SETTLEMENT CLASS MEMBERS**

On August __, 2016, Settlement Class Counsel and U.S. Bank National Association (“U.S. Bank” or the “Bank”) filed a Joint Report on Phase I Distribution of Settlement Funds and Proposal for Phase II Distribution of Remaining Residual Settlement Funds to Identifiable Settlement Class Members (“Report and Proposal”).¹ (DE # ____). The Court now enters this Order based on the Report and Proposal.

BACKGROUND

On January 6, 2014, this Court granted Final Approval to the Settlement with U.S. Bank (DE # 3753). On January 15, 2014, the Court entered Final Judgment incorporating the Final Approval Order. (DE # 3763). The Settlement included a Settlement Fund of \$55,000,000 to be

¹ All capitalized terms have the same meaning ascribed to them in the Amended and Restated Settlement Agreement and Release (“Agreement”) attached to the Motion for Final Approval (DE # 3681-1) and the Final Approval Order (DE # 3753).

used to pay: (a) amounts due under the Settlement to Settlement Class Members; (b) any Court-ordered award of Class Counsel's attorneys' fees, costs and expenses; and (c) any Court-ordered service awards to Plaintiffs. (Agreement ¶ 103).

Pursuant to the Agreement, U.S. Bank and the Settlement Administrator timely distributed the Net Settlement Fund to eligible, identifiable Settlement Class Members (the "Phase I Distribution"). *See* Declaration of Ann Haan ¶¶ 4-13 ("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 ¶¶ 8-12.

In November 2015, at the Parties' request, the Settlement Administrator prepared and analyzed projections for a Supplemental Phase I Distribution based on the following criteria: Supplemental Phase I Distribution checks would be issued and mailed to those identifiable eligible Settlement Class Members who had not been previously mailed a check due to an undeliverable address (after trace efforts during the notice period), where an updated address could now be obtained. Admin. Decl at ¶ 14. In December 2015, the Settlement Administration sent 49,777 undeliverable notice addresses to batch trace and received 27,498 updated addresses. *Id.* at ¶ 15. The Settlement Administrator also sent 187 undeliverable check addresses to batch trace and received 122 updated addresses. *Id.* The Parties directed the Settlement Administrator to proceed with the Supplemental Phase I Distribution based on the results of these address updates. *Id.* In December 2015, the Settlement Administrator mailed a total of 27,663 Supplemental Phase I Distribution checks in the aggregate amount of \$497,755.79. *Id.* at ¶ 16. These checks had a 60 day stale date and were void after February 22, 2016. *Id.* On February 2,

2016, the Settlement Administrator re-mailed 56 Supplemental Phase I Distribution checks to identifiable eligible Settlement Class Members due to various reasons. *Id.* at ¶ 17. The re-issued checks had a 30 day stale date and were void after March 4, 2016. *Id.* On April 6, 2016, one additional Supplemental Phase I Distribution check totaling \$89.76 was mailed to an identifiable Settlement Class Member. *Id.* at ¶ 18.

In June 2016, following the void date for all Phase I Distribution and Supplemental Phase I Distribution checks, the Settlement Administrator completed a formal reconciliation, and determined that the balance remaining in the Settlement Fund is \$7,890,021.98. Admin. Decl. at ¶ 20. This balance includes: (a) the amount associated with returned and/or uncashed Phase I Distribution and Supplemental 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 and Supplemental 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 and Supplemental Phase I Distribution checks that were mailed and not returned by the USPS, but not timely negotiated by Settlement Class Members. *Id.* at ¶ 20.

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 may be distributed (a) first, to U.S. Bank to reimburse it for all fees and costs it paid to the Notice Administrator and Settlement Administrator associated with the Notice Program and Settlement administration; (b) second, if feasible and practical to Settlement Class Members who received Settlement Class Member payments on a *pro rata* basis; or (c) third, if a second distribution to Settlement Class Members is not feasible, through a plan proposed by Settlement

Class Counsel and counsel for U.S. Bank consistent with the American Law Institute's, *Principles of Aggregate Litigation* § 3.07(c), presented to the Court for its consideration. (Agreement ¶ 116). All costs to prepare and transmit these additional payments are to be paid from the Settlement Fund.

Settlement Class Counsel, U.S. Bank, and the Settlement Administrator have conferred regarding the reimbursement to U.S. Bank required pursuant to paragraph 116(a) of the Agreement. The Settlement Administrator's records confirm that the amount of fees and costs paid by U.S. Bank to the Notice Administrator and Settlement Administrator was \$2,810,766.53. Admin. Decl. at ¶ 21. Pursuant to the Agreement, this amount shall be reimbursed to U.S. Bank.

Settlement Class Counsel and U.S. Bank have conferred with each other, and with the Settlement Administrator, and agree that it is feasible and practical to initially 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 U.S. Bank 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 U.S. Bank Accounts or by timely negotiating their Phase I Distribution 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 Report and Proposal and the accompanying declaration of the Settlement Administrator, the Court makes the following findings:

1. Pursuant to the Agreement, U.S. Bank and the Settlement Administrator timely completed the Phase I Distribution and Supplemental Phase I Distribution of the Net Settlement Fund to eligible, identifiable Settlement Class Members. Admin. Decl. ¶¶ 4-20. Following the Effective Date, Rust Consulting and U.S. Bank distributed the Net Settlement Fund in accord with the Settlement. *Id.* at ¶¶ 5-7. Settlement Payments to Settlement Class Members who were then-current customers of U.S. Bank were effectuated through account credits applied by U.S. Bank from September 16, 2014 to October 2, 2014 in the aggregate amount of \$16,899,468.43. *Id.* at ¶ 6. From September 22, 2014 to October 29, 2014, the Settlement Administrator caused to be mailed 989,426 checks in the aggregate amount of \$20,517,896.14 to Settlement Class Members who were former customers. *Id.* at ¶ 7. A total of 50,690 checks with an aggregate amount of \$844,153.76 were initially 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 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. ¶¶ 10-12.

3. In November 2015, at the Parties’ request, the Settlement Administrator prepared and analyzed projections for a Supplemental Phase I Distribution based on the following criteria:

Supplemental Phase I Distribution checks would be issued and mailed to those identifiable eligible Settlement Class Members who had not been previously mailed a check due to an undeliverable address (after trace efforts during the notice period), where an updated address could now be obtained. Admin. Decl. ¶ 14. In December 2015, the Settlement Administrator sent 49,777 undeliverable notice addresses to batch trace and received 27,498 updated addresses. *Id.* at ¶ 15. The Settlement Administrator also sent 187 undeliverable check addresses to batch trace and received 122 updated addresses. *Id.* The Parties directed the Settlement Administrator to proceed with the Supplemental Phase I Distribution based on the results of these address updates. *Id.* In December 2015, the Settlement Administrator mailed a total of 27,663 Supplemental Phase I Distribution checks in the aggregate amount of \$497,755.79. *Id.* at ¶ 16. These checks had a 60 day stale date and were void after February 22, 2016. *Id.* On February 2, 2016, the Settlement Administrator re-mailed 56 Supplemental Phase I Distribution checks to identifiable eligible Settlement Class Members due to various reasons. *Id.* at ¶ 17. The re-issued checks had a 30 day stale date and were void after March 4, 2016. *Id.* On April 6, 2016, one additional Supplemental Phase I Distribution check totaling \$89.76 was mailed to an identifiable Settlement Class Member. *Id.* at ¶ 18.

4. In June 2016, following the void date for all Phase I Distribution and Supplemental Phase I Distribution checks, the Settlement Administrator completed a formal reconciliation, and determined that the balance remaining in the Settlement Fund is \$7,890,021.98. Admin. Decl. at ¶ 20. This balance includes: (a) the amount associated with returned and/or uncashed Phase I Distribution and Supplemental 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 and Supplemental 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 and Supplemental Phase I Distribution checks that were mailed and not returned by the USPS, but not timely negotiated by Settlement Class Members. *Id.* at ¶ 20.

5. The Settlement Administrator's records confirm that the amount of fees and costs paid by U.S. Bank to the Notice Administrator and Settlement Administrator was \$2,810,766.53. Admin. Decl. at ¶ 21. Pursuant to paragraph 116(a) of the Agreement, this amount shall be reimbursed to U.S. Bank.

6. As noted above, Phase I Distribution and Supplemental Phase I Distribution checks in the aggregate amount of approximately \$7,538,133.84 were either delivered to eligible identifiable Settlement Class Members, but were not timely negotiated, or not delivered and not timely negotiated or checks could not be mailed because current addresses were not found. Admin. Decl. at ¶ 20. Eligible Settlement Class Members who received Phase I Distribution or Supplemental Phase I Distribution checks but did not timely negotiate those checks, 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 \$311,012.00. Admin. Decl. at ¶ 24. 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 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 ¶ 25.

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 ¶ 25. 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 ¶ 26. 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 \$59,914.00, which amount will be withheld and deducted from the amount available for the Phase II Distribution. Admin. Decl. at ¶ 26.

13. Implementation of the 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, U.S. Bank 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, U.S. Bank 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 U.S. Bank, the Court hereby **ORDERS AND ADJUDGES** as follows:

A. Settlement Class Counsel's and U.S. Bank's Joint Report and Proposal for 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 directed to transfer the sum of \$2,810,766.53 from the Settlement Fund to U.S. Bank, pursuant to paragraph 116(a) of the Agreement, representing reimbursement of the Notice Administrator's and Settlement Administrator's fees and costs that were paid by U.S. Bank pursuant to the Agreement;

C. 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 U.S. Bank;

D. The amount of the Phase II Distribution shall consist of the residual balance, less the sum of \$2,810,766.53 to be reimbursed to U.S. Bank pursuant to paragraph 116(a) of the Agreement, Phase II Distribution administrative fees and costs in the total amount of \$311,012.00, and fees and costs of \$59,914.00 associated with the unclaimed funds and escheatment of the residual balance following completion of the Phase II Distribution process;

E. 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 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 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 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);

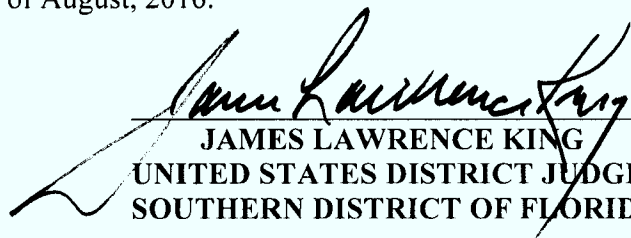
F. The checks to be issued as part of the Phase II Distribution shall have an expiration date of sixty (60) days following issuance, and the Settlement Administrator is authorized to re-issue and/or re-mail Phase II Distribution checks one time only that will be valid for thirty (30) days from the date 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;

G. Within 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 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;

H. 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-recipients 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 U.S. Bank 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

I. All costs associated with the effort to undertake and complete the Phase II Distribution, and the unclaimed funds and escheatment process following completion of the Phase II Distribution shall be paid solely from and out of the Settlement Fund. U.S. Bank 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 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 in Miami, Florida, this ____ day of August, 2016.



JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: All Counsel of Record