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Attorneys & Counselors at Law

March 5, 2010

Hon. William H. Pauley
United States District Judge
United States Courthouse
500 Pearl St.
New York, NY 10007-1312

Re: *Ross et al v. Bank of America N.A. (USA) et al*, Docket No. 1:05-cv-07116 (WHP)

Dear Judge Pauley:

We request that the Court refuse preliminary approval to the "Stipulation and Agreement of Settlement With JP Morgan Chase & Co. And Chase Bank USA, N.A.", filed on February 24, 2010 ("Proposed Settlement"), on the ground that this proposed settlement, to quote Judge Posner, sells the valuable claims of a significant portion of the class "down the river," *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004).

We represent plaintiffs in another class action, *Pillitteri v. JP Morgan Chase*, 05 Civ 1164 (GEL). *Pillitteri* arises out of Chase's promise in 1999 to Ms. Pillitteri of a lifetime interest cap of 9.9% on her credit card account. Three years later, Chase increased her credit line, and provided convenience checks to be used as cash with a low interest rate. But when she did use such a check, Chase promptly increased her interest rates, ostensibly because she had now increased her indebtedness. This was an outright breach of the 1999 Promise; worse, it was deceptive since Chase had given no such warning prior to her use of the checks. Ms. Pillitteri details other examples of Chase's unfair and deceptive practices, such as ignoring consumer disputes to charge late fees in violation of federal law, increasing interest rates unilaterally and with no advance notice, and lowering credit limits so as to pave the way for overlimit fees and other outrageous charges. As a result, consumers like Ms. Pillitteri were saddled with significant additional payments. Ms. Pillitteri asserts that Chase's conduct violated Section 349, N.Y. G.B.L., contract, and the common law.

Judge Lynch stayed the *Pillitteri* proceedings in this Court in furtherance of Chase's motion to compel arbitration, and it is currently in arbitration before retired Judge John Lifland of JAMS. Chase has disclosed that it had over 30 million cardholders at the relevant time. The exact class size in *Pillitteri* is yet to be determined, but it is clear that the number of cardholders who were overcharged/deceived is not insignificant. Equally clear is that the damages of every class member are small, and realistically, these claims can be litigated only on a class-wide basis, if at all.

Not surprisingly, Chase strenuously objected in *Pillitteri* to class-wide proceedings from the very inception. Chase's objection was based on the class action preclusion clause which is at issue here also. In December 2009, Chase moved the arbitrator to strike the class allegations on this basis.

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After we filed our opposition papers in *Pillitteri*, we came to know of the Memorandum of Settlement between Chase and Plaintiffs' counsel of November 20, 2009, in this case ("MOS"). Thereunder, Chase agreed "not to seek to enforce . . . Class Action Waiver Clause against a member of the Settlement Class based on currently existing or pre-existing consumer credit card agreements." MOS, cl. 2.

Ms. Pillitteri and the putative class in *Pillitteri* are members of the "Settlement Class" herein, and hence, Chase's agreement in the MOS to forbear enforcement of the class action preclusion clause required that Chase's motion to strike class allegations in *Pillitteri* be denied. Accordingly, by email of February 21, 2010, we informed the arbitrator of this fact. Chase's counsel requested, and we agreed, that Chase would respond to our letter by March 1, 2010.

On February 24, 2010 - three days after our letter in *Pillitteri* - the Proposed Settlement was filed in this case. In sharp contrast to the Memorandum of Settlement, this Proposed Settlement expressly permits Chase to enforce the class action preclusion clause in *Pillitteri*.

In other words, notwithstanding the fact that an MOS had been reached as to the principal terms of the settlement, in the final settlement agreement, class counsel in this case carved out – detrimentally to a significant portion of the settlement class – a lawsuit in which significant claims were being asserted. Obviously, no additional value was obtained for this carve-out which materially diminished the value of any putative value of the settlement.

Moreover, it is unclear from the Proposed Settlement whether the class claims for damages in *Pillitteri* have been released. Paragraph 2(aa) defines "Released Claims" to include all claims "which are, have been, or could have been asserted within the scope of the facts asserted in the Litigation." Proposed Settlement at 8§2(aa). While this definition might be construed to include the *Pillitteri* claims, the Proposed Settlement is silent, and disturbingly silent since no compensation whatever is provided for the *Pillitteri* claims, on this issue

As a result, the Proposed Settlement provides no benefit whatsoever to Ms. Pillitteri or the *Pillitteri* class who have, in fact, been damaged but whose right to recovery depends almost entirely on whether they can proceed as a class action. Instead, it deprives them of their valuable claims - and injunctive relief and potential treble damages - under the Sherman Act which Class Counsel asserted here, ostensibly on their behalf.

This is clearly improper, and unsustainable. It is also obvious (parenthetically) that class counsel should never have agreed to this carve out because it plainly violated class counsel's well-settled "fiduciary obligations to absentee class members," *Walter v. Palisades Collection, LLC*, 2010 WL 308978, 9 (E.D.Pa. Jan 26, 2010); *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3rd Cir. 1973) (" . . . in addition to the normal obligations of an officer of the court, and as counsel to parties to the litigation, class action counsel possess, in a very real sense, fiduciary obligations to those not before the court").

We also note that in addition to *Pillitteri*, the Proposed Settlement also exempts the *Caban* case. Both *Pillitteri* and *Caban* involve claims which are textbook illustrations of the need for and propriety of class treatment: large numbers of victims with small claims affected by a common course of conduct. *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 94 (2nd Dep't 1980) (without class action mechanism, large institutions would "operate virtually unchecked and continue to engage in 'legalized theft' which is perpetuated because the injured potential plaintiffs frequently are damaged in a small sum . . . since, realistically speaking, our legal system inhibits the bringing of suits based upon small claims.")

In other words, *Pillitteri* and *Caban* are cases where Chase faces *real* liability in serious amounts. The troubling exclusion of these cases from the Proposed Settlement reminds us of Judge Posner's observations in a similar context,

Would it be too cynical to speculate that what may be going on here is that class counsel wanted a settlement that would give them a generous fee and Fleet wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself? The settlement that the district judge approved sold these 1.4 million claimants down the river. Only if they had no claim-more precisely no claim large enough to justify a distribution to them-did they lose nothing by the settlement, and the judge made no finding that they had no such claim.

Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 785 (7th Cir. 2004). While the Proposed Settlement here does not *per se* "extinguish" the *Pillitteri* claims entirely, it does extinguish those class members' Sherman Act claims with no benefit or compensation whatsoever.

Accordingly, we request that Your Honor reject the Proposed Settlement. We are alerting Your Honor to these problems pre-emptively, prior to class notice, so that the Court and the parties may not have to expend further resources on class notice, fairness hearing, and further proceedings.

Yours truly,



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Cc: Berger & Montague, P.C. (by email)
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