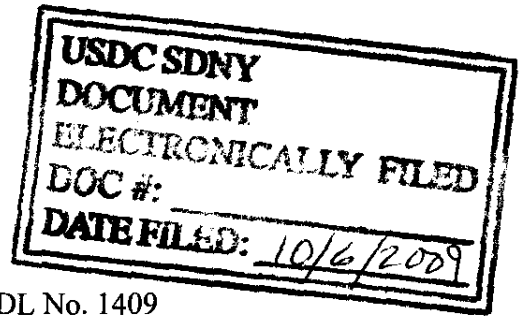


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- X
IN RE :
: MDL No. 1409
: Master File No. 21-95
CURRENCY CONVERSION FEE :
ANTITRUST LITIGATION :
: :
----- X
THIS DOCUMENT RELATES TO: :
Index No. 05 CV 7116 (WHP)
: :
ROBERT ROSS, et al., :
: :
Plaintiffs, :
: :
-against- :
: :
BANK OF AMERICA, N.A., et al., :
: :
Defendants. :
----- X

ORDER

Plaintiffs Robert Ross, Andrea Kune, Woodrow Clark, Herve Senequier, S. Byron Balbach, Jr., Matthew Grabell, Paul Impellezzeri, and Richard Mandell (collectively "Plaintiffs") bring this class action asserting Sherman Act claims against defendants JP Morgan Chase & Co., Chase Bank USA, N.A., Bank of America, N.A. (USA),¹ Bank of America, N.A., MBNA America Bank, N.A., MBNA America (Delaware), Capital One Bank, Capital One, F.S.B., Citigroup Inc, Citibank (South Dakota), N.A., Citibank USA, N.A., Universal Financial Corp., Universal Bank, N.A., Citicorp Diners Club Inc, HSBC Finance Corporation, HSBC Bank

¹ Bank of America, N.A. (USA) is now known as FIA Card Services, N.A.

Nevada, N.A., , Discover Services LLC, Discover Financial Services, and Discover Bank (collectively the “Bank Defendants”), as well as against defendant National Arbitration Forum (“NAF”). Plaintiffs’ antitrust claims arise from an alleged conspiracy to impose arbitration clauses in cardholder agreements.² Presently before the Court is Plaintiffs’ motion for class certification under Fed. R. Civ. P. Rule 23(b)(2). Plaintiffs seek only injunctive and declaratory relief, and have agreed that they will not assert any damages claims in this action. While the Bank Defendants³ dispute the merits of Plaintiffs’ claims, they have agreed not to contest the requested class certification under Rule 23(b)(2).⁴ “In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). After review of these matters and for the reasons set forth below, the Court grants Plaintiffs’ unopposed motion for class certification with respect to the claims against the Bank Defendants.

Proposed Class and Subclass Definitions

1. Plaintiffs propose to certify under Rule 23(b)(2) a class consisting of all persons holding during the period in suit a credit or charge card under a United States cardholder agreement with any of the Bank Defendants (including, among other cards, cards originally

² Use of the term cardholder agreement in this Order is not intended to reflect a finding that the various terms between card issuers and cardholders are “agreements,” either as a factual or legal matter. As such , it is not intended to preclude any party from arguing any position on this issue or to pre-judge the issue.

³ Defendant NAF has only recently been served in this action and has not joined in the agreement by the Bank Defendants and Plaintiffs. Accordingly, this Order is without prejudice to NAF’s right to contend that no class or subclass should be certified as against NAF.

⁴ While agreeing not to contest the requested class certification under Rule 23(b)(2), the Bank Defendants have reserved all defenses and rights with respect to the merits of the claims of Plaintiffs and the proposed Class and Subclass.

issued under the MBNA, Bank One, First USA and Provident brands), but not including members of the proposed Subclass, subject to an arbitration provision relating to their cards (the “Class”).

2. Plaintiffs also propose to certify under Rule 23(b)(2) a subclass consisting of all persons holding during the period in suit a credit card under a United States cardholder agreement with Discover Bank, which cardholders have not previously successfully exercised their right to opt-out of the Arbitration of Disputes Provision (the “Subclass”).⁵

Rule 23(a) Requirements

3. Under Rule 23(a), a plaintiff must satisfy the numerosity, commonality, typicality and adequacy of representation requirements. Plaintiffs’ proposed Class and Subclass satisfy the four requirements of Rule 23(a) of the Federal Rules of Civil Procedure.

4. “[T]he class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). The proposed Class and Subclass each include many millions of cardholders, making both so numerous that joinder of all members is impracticable.

5. “[T]here are questions of law and fact common to” members of the proposed Class and Subclass. Fed. R. Civ. P. 23(a)(2). Common questions include, but are not necessarily limited to, the definition of the relevant geographic and product markets with respect to Plaintiffs’ antitrust claims; whether the Bank Defendants entered into a contract, combination or conspiracy to impose arbitration clauses on cardholders; and whether the alleged contract, combination or conspiracy violated Section 1 of the Sherman Act.

⁵ Reference to Discover Bank’s opt-out provision is not intended to reflect a finding that Discover Bank’s opt-out provision was either meaningful or effective, whether as a matter of fact or as a legal issue. As such, it is not intended to preclude any party from arguing any position on this issue or to pre-judge the issue.

6. “[T]he claims and defenses of the representative parties are typical of the claims or defenses” of the proposed Class and Subclass. Fed. R. Civ. P. 23(a)(3). Each Plaintiff proposed as a representative holds one or more credit or charge cards issued by Chase Bank USA, N.A., Bank of America, N.A. (USA), Capital One Bank, Citibank (South Dakota), N.A., Citibank USA, N.A., Universal Financial Corp., Universal Bank, N.A., Citicorp Diners Club Inc, or HSBC Bank Nevada, N.A., and each is subject to an arbitration provision relating to one or more such cards. See First Am. Cplt. ¶¶ 12-19. Plaintiff Richard Mandell, the proposed representative of the Subclass, further holds a Discover-branded card issued by Discover Bank, and is subject to an arbitration provision relating to that card.

7. “[T]he representative parties will fairly and adequately protect the interests” of the Class and Subclass. Fed. Rule Civ. P. 23(a)(4). Proposed Class representative Robert Ross has previously been found adequate to represent classes of Visa and MasterCard cardholders in *In re Foreign Currency Conversion Fee Antitrust Litigation*, Master Fie No. 21-95, 01-md-1409 (WHP) and *Ross v. American Express Co.*, 04-Civ-5723 (S.D.N.Y.). Proposed Class representatives Andrea Kune, Woodrow Clark, Herve Senequier, and S. Byron Balbach have previously been found adequate to represent classes of Visa and MasterCard cardholders in *In re Foreign Currency Conversion Fee Antitrust Litigation*, Master Fie No. 21-95, 01-md-1409 (WHP). There is no reason to believe that these or any of the other proposed Class representatives (*i.e.*, Matthew Grabell, Paul Impellezzeri and Richard Mandell) are subject to any conflicts or would otherwise be inadequate to serve as Class representatives. There is also no reason to believe that Richard Mandell is not an adequate representative of the Subclass. Finally, Proposed Class Counsel are experienced and can be expected to fairly and adequately represent the interests of the proposed Class and Subclass.

Rule 23(b)(2) Requirements

8. The proposed Class and Subclass meet the requirements of Rule 23(b)(2) of the Federal Rules of Civil Procedure because Plaintiffs allege that the Bank Defendants “acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). Moreover, Plaintiffs seek no monetary relief in this action (other than costs of suit and prevailing party attorneys’ fees), and have agreed that they will not do so.

9. Plaintiffs allege that the Bank Defendants violated Section 1 of the Sherman Act by participating “in a contract, combination and conspiracy to impose or maintain compulsory arbitration clauses on their cardholders and the cardholders of their co-conspirators,” First Am. Cplt. ¶ 161, and that the Bank Defendants “have collectively refused to deal with any cardholder who refuses to accept arbitration clauses.” First Am. Cplt. ¶ 169. These are allegations that apply generally to the proposed Class and Subclass.

10. Certification of a Rule 23(b)(2) Class and Subclass in this action is also consistent with this Court’s order certifying a Rule 23(b)(2) class in *Ross v. American Express Co.*, 04-Civ-5723 (S.D.N.Y.). In that action, this Court certified an injunctive relief class under Rules 23(a) and 23(b)(2) consisting of “all VISA and MasterCard general purpose cardholders of cards issued by the Issuing Banks.” Memorandum and Order dated September 27, 2005, *Ross v. American Express Co.*, 04-Civ-5723 (S.D.N.Y.). The plaintiffs in that action have asserted a similar claim that a number of credit card issuers conspired in violation of the antitrust laws to impose mandatory arbitration clauses on cardholders.

CONCLUSION

For the reasons set forth above, Plaintiffs' motion for class certification is granted, and this Court certifies the following injunctive relief Class and Subclass pursuant to Rule 23(b)(2):

- A class consisting of all persons holding during the period in suit a credit or charge card under a United States cardholder agreement with any of the Bank Defendants (including, among other cards, cards originally issued under the MBNA, Bank One, First USA and Providian brands), but not including members of the proposed Subclass, subject to an arbitration provision relating to their cards (the "Class").
- A subclass consisting of all persons holding during the period in suit a credit card under a United States cardholder agreement with Discover Bank, which cardholders have not previously successfully exercised their right to opt-out of the Arbitration of Disputes Provision (the "Subclass")

The Court further orders that:

- each Plaintiff is hereby appointed as a representative of the Class;
- Plaintiff Richard Mandell is hereby appointed as the representative of the Subclass;
- Berger & Montague, P.C., Coughlin Stoia Geller Rudman & Robbins LLP, Hulett Harper Stewart, LLP, and SCOTT + SCOTT LLP are hereby appointed as Class Counsel and Subclass Counsel; and
- Because defendant NAF has only recently been served in this action and has not joined in the foregoing stipulation, the foregoing Class and Subclass are certified only as against the defendants other than NAF, and this Order is without prejudice to NAF's right to contend that no class or subclass should be certified as against NAF.

IT IS SO ORDERED.

Dated: October 6, 2009



Honorable William H. Pauley III
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
IN RE : MDL No. 1409
: :
CURRENCY CONVERSION FEE : Master File No. 21-95
ANTITRUST LITIGATION : :
----- X
THIS DOCUMENT RELATES TO: : Index No. 05 CV 7116 (WHP)
: :
ROBERT ROSS, et al., : :
: :
Plaintiffs, : :
: :
-against- : :
: :
BANK OF AMERICA, N.A, et al., : :
: :
Defendants. : :
----- X

**STIPULATION AND [PROPOSED] ORDER
CERTIFYING CLASS AND SUBCLASS UNDER RULE 23(b)(2)**

Plaintiffs Robert Ross, Andrea Kune, Woodrow Clark, Herve Senequier, S. Byron Balbach, Jr., Matthew Grabell, Paul Impellezzeri, and Richard Mandell (collectively “Plaintiffs”), and Defendants Bank of America, N.A. (USA), Bank of America, N.A., Capital One Bank (USA), N.A., Capital One, N.A., JP Morgan Chase & Co., Chase Bank USA, N.A., Citigroup Inc, Citibank (South Dakota), N.A., Citibank USA, N.A., Universal Financial Corp., Universal Bank, N.A., Citicorp Diners Club Inc, HSBC Finance Corporation, HSBC Bank Nevada, N.A., DFS Services LLC, Discover Financial Services, and Discover Bank (collectively the “Bank Defendants”) hereby submit this Stipulation and Proposed Order to certify a class and a subclass under Rule 23(b)(2) of the Federal Rules of Civil Procedure.

STIPULATION

WHEREAS, Plaintiffs and Bank Defendants wish to avoid unnecessary discovery and disputes; and

WHEREAS, the Court has previously certified a similar class for injunctive relief under Rule 23(b)(2) in *Ross v. American Express Co.*, 04-Civ-5723 (S.D.N.Y.); and

WHEREAS, Plaintiffs believe that similar grounds for certifying a Rule 23(b)(2) class and subclass exist in this case; and

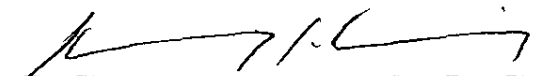
WHEREAS, the Parties acknowledge and agree that a decision certifying a class in this action in no way addresses or reflects whether the underlying claims asserted are or are not meritorious; and

WHEREAS, although the Bank Defendants deny Plaintiffs' allegations of a conspiracy to impose arbitration clauses on cardholders and reserve any and all applicable defenses on the merits of Plaintiffs' claims, including the right to take discovery from Plaintiffs, the Bank Defendants do not contest the proposed certification of a Rule 23(b)(2) class and subclass in this case, as described in the attached [Proposed] Order;

NOW, THEREFORE, Plaintiffs and the Bank Defendants hereby stipulate and agree that the Bank Defendants have no objection to and do not contest the findings contained in the attached Proposed Order. This Stipulation, however, is without effect on class certification with respect to Defendant National Arbitration Forum ("NAF"), Plaintiffs' efforts to seek such certification, or NAF's efforts to resist certification.

Respectfully Submitted,

For Plaintiffs:



Merrill G. Davidoff
Charles P. Goodwin
David A. Langer
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103
215-875-4615

Dated: Sept. 18th, 2009

Bonny Sweeney
Alexandra S. Bernay
Coughlin Stoia Geller Rudman & Robbins
LLP
655 West Broadway, Suite 1900
San Diego, CA 92101

Allan Steyer
Steyer Lowenthal Boodrookas Alvarez &
Smith LLP
One California Street, Third Floor
San Francisco, CA 94111

Dennis Stewart
Hulett Harper Stewart LLP
525 B Street, Suite 760
San Diego, CA 92101

Brian Joseph Barry
Law Office of Brian Barry
1801 Ave. of The Stars, Suite 307
Los Angeles, CA 90067

Christopher M. Burke
Kristen M. Anderson
Scott + Scott, LLP (CA)
600 B Street
Suite 1500
San Diego, CA 92101

Joseph C Kohn
Kohn, Swift & Graf, P.C.
One South Broad Street
Suite 2100
Philadelphia, PA 19107

Linda P. Nussbaum
Gregory K. Arenson
Kaplan Fox & Kilsheimer LLP
850 Third Avenue, 14th Floor
New York, NY 10022

Thomas F. Schrag
James S. Baum
Schrag & Baum P.C.
280 Panoramic Way
Berkeley, CA 94704
Mark Levine
Stull Stull & Brody
6 East 45th Street, 5th Floor
New York, NY 10017

**For JP Morgan Chase & Co. and Chase
Bank USA, N.A.**

Dated: Sept. 17, 2009

Robert D. Wilde

Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, D.C. 20004-2401

**For Bank of America, N.A. (USA),
predecessor-in-interest to FIA Card Services,
N.A., and Bank of America, N.A.**

Dated: Sept. 17, 2009

[Signature]

Morrison & Foerster LLP
1290 Avenue of the Americas
New York, New York 10104-0050

**For Capital One Bank (USA), N.A. and
Capital One, N.A.**

Dated: _____, 2009

O'Melveny & Myers LLP
Times Square Tower
7 Times Square
New York, New York 10036-6517

**For Citigroup Inc, Citibank (South Dakota),
N.A., Citibank USA, N.A., Universal
Financial Corp., Universal Bank, N.A., and
Citicorp Diners Club Inc**

Dated: _____, 2009

Sidley Austin LLP

**For JP Morgan Chase & Co. and Chase
Bank USA, N.A.**

Dated: _____, 2009

Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, D.C. 20004-2401


**For Bank of America, N.A. (USA),
predecessor-in-interest to FIA Card Services,
N.A., and Bank of America, N.A.**

Dated: _____, 2009

Morrison & Foerster LLP
1290 Avenue of the Americas
New York, New York 10104-0050

**For Capital One Bank (USA), N.A. and
Capital One, N.A.**

Dated: 9/9 _____, 2009



O'Melveny & Myers LLP
Times Square Tower
7 Times Square
New York, New York 10036-6517

**For Citigroup Inc, Citibank (South Dakota),
N.A., Citibank USA, N.A., Universal
Financial Corp., Universal Bank, N.A., and
Citicorp Diners Club Inc**

Dated: _____, 2009

Sidley Austin LLP

**For JP Morgan Chase & Co. and Chase
Bank USA, N.A.**

Dated: _____, 2009

Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, D.C. 20004-2401

**For Bank of America, N.A. (USA),
predecessor-in-interest to FIA Card Services,
N.A., and Bank of America, N.A.**

Dated: _____, 2009

Morrison & Foerster LLP
1290 Avenue of the Americas
New York, New York 10104-0050

**For Capital One Bank (USA), N.A. and
Capital One, N.A.**

Dated: _____, 2009

O'Melveny & Myers LLP
Times Square Tower
7 Times Square
New York, New York 10036-6517

**For Citigroup Inc, Citibank (South Dakota),
N.A., Citibank USA, N.A., Universal
Financial Corp., Universal Bank, N.A., and
Citicorp Diners Club Inc**

Dated: September 17, 2009

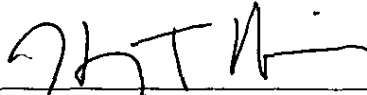


Sidley Austin LLP

One South Dearborn Street
Chicago, Illinois 60603-2301

**For HSBC Finance Corporation and HSBC
Bank Nevada, N.A.**

Dated: September 15, 2009



Morgan, Lewis & Bockius LLP
101 Park Avenue
New York, New York 10178-0600

**For DFS Services LLC, Discover Financial
Services, and Discover Bank**

Dated: _____, 2009

Winston & Strawn LLP
35 W. Wacker Drive
Chicago, Illinois 60601-9703

One South Dearborn Street
Chicago, Illinois 60603-2301


**For HSBC Finance Corporation and HSBC
Bank Nevada, N.A.**

Dated: _____, 2009

Morgan, Lewis & Bockius LLP
101 Park Avenue
New York, New York 10178-0600

**For DFS Services LLC, Discover Financial
Services, and Discover Bank**

Dated: 5/5/9, 2009



Winston & Strawn LLP
35 W. Wacker Drive
Chicago, Illinois 60601-9703