

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
IN RE : MDL No. 1409
: :
CURRENCY CONVERSION FEE : M 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. : Jury Trial Demanded
: :
-----X

**MEMORANDUM IN SUPPORT OF CLASS PLAINTIFFS'
MOTION FOR APPROVAL OF ATTORNEYS' FEES AND
REIMBURSEMENT OF LITIGATION EXPENSES PURSUANT TO
RULE 23(h) OF THE FEDERAL RULES OF CIVIL PROCEDURE**

TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | INTRODUCTION | 1 |
| II. | STATEMENT OF THE CASE..... | 3 |
| | A. Terms of the Settlements | 4 |
| | B. Benefits to the Class of the Settlement | 5 |
| | C. Negotiation of Fees and Efforts of Counsel..... | 6 |
| III. | ARGUMENT | 7 |
| | A. The Agreed Upon Payment of Attorneys' Fees Is Proper and Reasonable | 9 |
| | 1. The Settling Defendants and Class Plaintiffs Have Agreed, Subject to Court Approval, to An Award to Class Counsel of a Lump Sum Amount | 9 |
| | 2. The Agreed Upon Fee Carries a Presumption of Reasonableness..... | 10 |
| | B. A Presumptively Reasonable Fee Cross-Check Further Supports the Reasonableness of the Requested Fee Award..... | 12 |
| | 1. The Complexity and Difficulty of the Litigation..... | 14 |
| | 2. Resources Required to Prosecute the Claims Effectively..... | 14 |
| | 3. Attorney Interest and Reputational Effect | 16 |
| | 4. Counsel's Hourly Rate..... | 16 |
| | 5. Other Factors..... | 17 |
| | a. Risks of the Litigation..... | 17 |
| | b. The Quality of Representation..... | 18 |
| | c. The Relationship of the Requested Fee to the Settlement | 19 |
| | C. Class Counsel Are Entitled to Be Reimbursed for Their Reasonable Litigation Expenses | 19 |
| IV. | CONCLUSION..... | 20 |

TABLE OF AUTHORITIES

| CASES | Page(s) |
|---|---------|
| <i>In re Apple Computer, Inc. Deriv. Litig.</i> , No 06-4128, 2008 WL 4820784 (N.D. Cal. Nov. 5, 2008) | 11 |
| <i>Arbor Hill Concerned Citizens Neighborhood Assoc. v. County of Albany</i> , 522 F.3d 182 (2d Cir. 2008)..... | 13, 14 |
| <i>In re AXA Fin., Inc.</i> , No. 18268, 2002 WL 1283674 (Del. Ch. May 22, 2002)..... | 11 |
| <i>Bezio v. Gen. Elec. Co.</i> , 655 F. Supp. 2d 162 (N.D.N.Y. 2009)..... | 10 |
| <i>Cohn v. Nelson</i> , 375 F. Supp. 2d 844 (E.D. Mo. 2005)..... | 11 |
| <i>In re Cont'l Ill. Sec. Litig.</i> , 962 F.2d 566 (7th Cir. 1992) | 10 |
| <i>In re Currency Conversion Fee Antitrust Litig.</i> , 2006 WL 3247396 (S.D.N.Y. Nov. 8, 2006)..... | 14 |
| <i>DeHoyos v. Allstate Corp.</i> , 240 F.R.D. 269 (W.D. Tex. 2007) | 10 |
| <i>Dupler v. Costco Wholesale Corp.</i> , No. 06-3141, 2010 WL 1506923 (E.D.N.Y. April 15, 2010)..... | 9 |
| <i>In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.</i> , 1992 WL 226321 (C.D. Cal. June 10, 1992), <i>appeal dismissed for class member's lack of standing</i> , 33 F.3d 29 (9th Cir. 1994), <i>superseding</i> 19 F.3d 470 (9th Cir. 1994) | 10 |
| <i>In re Global Crossing Sec. and ERISA Litig.</i> , 225 F.R.D. 436 (S.D.N.Y. 2004) | 19 |
| <i>Goldberger v. Integrated Res., Inc.</i> , 209 F.3d 43 (2d Cir. 2000)..... | 11, 13 |
| <i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998) | 12 |
| <i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983)..... | 9 |

| | |
|--|-----------|
| <i>Ingram v. Coca-Cola Co.</i> , 200 F.R.D. 685 (N.D. Ga. 2001)..... | 11 |
| <i>Johnson v. Georgia Hwy. Exp., Inc.</i> , 488 F.2d 714 (5th Cir. 1974) | 9 |
| <i>M. Berenson Co., Inc. v. Faneuil Hall Marketplace, Inc.</i> , 671 F. Supp. 819 (D. Mass. 1987) | 9 |
| <i>McBean v. City of New York</i> , 233 F.R.D. 377 (S.D.N.Y. 2006) | 9, 11, 12 |
| <i>McDaniel v. County of Schenectady</i> , 595 F.3d 411 (2d Cir. 2010)..... | 13 |
| <i>In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.</i> , 2007 WL 313474 (S.D.N.Y. Feb. 1, 2007)..... | 16 |
| <i>Mitland Raleigh-Durham v. Myers</i> , 840 F. Supp. 235 (S.D.N.Y. 1993) | 19 |
| <i>Parker v. Time Warner Entertainment Co., L.P.</i> , 631 F. Supp. 2d 242 (E.D.N.Y. 2009) | 17 |
| <i>Perdue v. Kenny A.</i> , 130 S. Ct. 1662 (2010)..... | 13, 17 |
| <i>Ross v. Bank of America, N.A.</i> , 524 F.3d 217 (2d Cir. 2008)..... | 5 |
| <i>In re Sony SXRDRear Projection Television Class Action Litig.</i> , No. 06 Civ. 5173 (RPP), 2008 WL 1956267 | 9, 12 |
| <i>Steinberg v. Nationwide Mut. Ins. Co.</i> , 612 F. Supp. 2d 219 (E.D.N.Y. 2009) | 19 |
| <i>Taft v. Ackermans</i> , No. 02 Civ. 7951 (PKL), 2007 WL 414493 (S.D.N.Y. Jan. 31, 2007)..... | 18 |
| <i>Weseley v. Spear, Leeds & Kellogg</i> , 711 F. Supp. 713 (E.D.N.Y. 1989) | 14 |
| <i>Williamsburg Fair Hous. Comm. v. N.Y. City Hous. Auth.</i> , 2005 WL 736146 (S.D.N.Y. Mar. 31, 2005)..... | 16 |
| <i>In re Xcel Energy, Inc., Sec., Deriv. & “ERISA” Litig.</i> , 364 F. Supp. 2d 980 (D. Minn. 2005)..... | 13 |

FEDERAL RULES AND STATUTES

FED. R. CIV. P. 23(h)1, 6, 8, 9
Section 16 of the Clayton Act, 15 U.S.C. § 262, 8

OTHER AUTHORITIES

Billing Rates Nationwide, THE NATIONAL LAW JOURNAL, Vol. 29. No. 15, Dec. 11, 200616
Climb, THE NATIONAL LAW JOURNAL, Dec. 11, 200716
Hourly Rates, THE NATIONAL LAW JOURNAL, Vol. 32, No. 14, Dec. 7, 2009.....17
Law Firms Defy Gravity, THE NATIONAL LAW JOURNAL, Vol. 31, No. 15, Dec. 8, 200816

Plaintiffs Robert Ross, Andrea Kune, Woodrow Clark, S. Byron Balbach, Jr., Matthew Grabell, Paul Impellezzeri and Richard Mandell (collectively “Class Plaintiffs” or “Plaintiffs”) on behalf of themselves and the certified Class and Subclass (the “Class” or “Settlement Class”) respectfully submit this memorandum in support of their Motion for Approval of Attorneys’ Fees and Reimbursement of Litigation Expenses Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure.

I. INTRODUCTION

Class Plaintiffs respectfully request that the Court approve partial payment of attorneys’ fees and reimbursement of litigation expenses (including notice costs) in the amount of \$2,350,000.¹ This request for approval comes in conjunction with Class Plaintiffs’ request for final approval of settlements with four out of seven defendants in this matter.²

The request for approval of this award of fees easily satisfies the pertinent legal standards. The requested payment is eminently reasonable – indeed, it is modest. Plaintiffs’ counsel would receive less than 34.6% of the \$5,525,494 in attorneys’ fees incurred as of May 1, 2010,

¹ Of this amount, \$1,915,119 is payment for attorneys’ fees, \$303,386 is reimbursement of litigation expenses other than notice costs, and \$131,495.00 for notice costs paid from escrow.

² The Settling Defendants are (i) JP Morgan Chase & Co. and Chase Bank USA, N.A. (“Chase”); (ii) Bank of America, N.A. (USA) (n/k/a FIA Card Services, Inc.) and Bank of America, N.A. (“Bank of America”); (iii) Capital One Bank (USA), N.A. and Capital One, N.A. (“Capital One”); and (iv) HSBC Finance Corporation and HSBC Bank Nevada, N.A. (“HSBC”). One additional defendant, the National Arbitration Forum (“NAF”), has reached a tentative accord with Plaintiffs, which agreement has not received preliminary approval as of this writing. None of the payments for which notification is sought here are the subject of Plaintiffs’ agreement with NAF. The remaining defendants, who are actively litigating this case, are Citigroup Inc, Citibank (South Dakota), N.A., Citibank USA, N.A., Universal Financial Corp., Universal Bank, N.A., and Citicorp Diners Club Inc. (collectively “Citi”) and DFS Services LLC, Discover Financial Services, and Discover Bank (collectively, “Discover”).

leaving them with \$3,610,375 in uncompensated time as of that date.³ The results of counsel's efforts are excellent. The underlying settlements provide Class Plaintiffs, and those they represent, with meaningful relief that encompasses much of what they sought in their prayer for relief. Counsel have efficiently and effectively prosecuted the Class's claims, which claims raise novel legal, and complex factual, issues. In the face of tremendous risk, counsel devoted more than 15,000 hours and over \$300,000 in out-of-pocket expenses to pursuing these claims. Counsel have provided representation of the highest quality, especially in pursuing an appeal from this Court's initial dismissal of the Class's claims. The Court's initial dismissal is a sharp reminder of the risks inherent in the claims that Class Counsel have prosecuted against these defendants and are prosecuting against the remaining defendants. Counsel's request is more than justified on the present record.

These claims were brought to change defendants' conduct and not for damages. The fees and reimbursements for which approval is being sought are *not* being paid from a common fund. The agreed fees, which were negotiated after the substantive settlement terms were agreed to by the parties, do not reduce the relief provided to Plaintiffs.

The only monetary relief sought in the Complaint was the payment of fees and expenses as allowed under Section 16 of the Clayton Act, 15 U.S.C. § 26, which authorizes the award of the "cost of suit, including a reasonable attorney's fee" to plaintiffs bringing successful actions pursuant to that section. As a practical matter, counsel's potential recovery in this matter has been capped by its lodestar, while counsel faced the risk of complete non-recovery in the event that Class Plaintiffs failed to prevail. In short, counsel have expended almost six million dollars

³ In the event of further settlements (including with the NAF) or a litigated judgment against any of the remaining defendants, Class Plaintiffs intend to seek further payment for their uncompensated time.

in time and expenses, all of which was at risk, to bring these Settlements to the Class, when counsel's potential recovery was limited, and at risk. Class plaintiffs respectfully suggest that the Court should approve the present request for attorneys' fees and reimbursement of expenses.

Policy considerations strongly favor approval of this motion. The claims here were brought under the antitrust laws, which strongly favor private enforcement. These claims were brought to vindicate the rights of Class members whose right to challenge the imposition of abusive credit card provisions was curtailed – if not abrogated – through defendants' conspiracy to impose arbitration clauses and bar collective relief. Although the claims here are for injuries that are difficult to state in monetary terms, that does not mean these injuries are less pernicious. Arguably, these injuries are worse because their effect is to prevent class members from seeking relief under many federal and state statutes that have been enacted for their benefit. Those laws often include provisions for private rights of action that were utterly frustrated by the subject arbitration clauses and class action bans. The present action is thus doubly favored by public policy – first, because it is an antitrust action where federal law strongly favors private rights of action; and second, because the challenged violation throttled the bringing of claims under other laws strongly favoring private actions.

II. STATEMENT OF THE CASE

The accompanying Memorandum in Support of Class Plaintiffs' Motion for Final Approval of Class Action Settlements With Bank of America, Capital One, Chase, and HSBC describes at length the relevant procedural history of this and related matters, the negotiations between Class Plaintiffs and each of the Settling Defendants, and the terms of the Settlements. In the interest of brevity, Class Plaintiffs will only summarize the pertinent matters here and respectfully refer the Court to that memorandum for a fuller discussion.

A. Terms of the Settlements.

The Settlements here first provide that each Settling Defendant immediately cease enforcement of both its arbitration clause and its class action ban, except (i) where either an order compelling arbitration or an arbitration award had been issued or (ii) in the case of Chase and Capital One, for certain specifically identified actions.⁴ (Settlement ¶ 3⁵) Second, each Settling Defendant has removed its arbitration clause and class action ban and agreed to re-impose neither for at least three and one-half (3-1/2) years from its removal. (Settlement ¶ 3) Third, each Settling Defendant has agreed that those to whom it transfers its accounts for collection will also be bound not to enforce the issuer's (former) arbitration clause and class action ban against cardholders. (Settlement ¶ 13(b)) Equally, the Settling Defendants have each agreed that the Settlement Agreements will apply to after-acquired card portfolios during the forbearance period. (Settlement ¶ 13(a)) Each Settling Defendant will not "contract, combine or conspire" with any other issuer regarding the re-imposition or re-adoption of the arbitration clause or the class action ban. (Settlement ¶ 3(d))

Plaintiffs have achieved much of the relief they sought: class certification (Prayer ¶ A); striking arbitration clauses and class bans (Prayer ¶ D); prohibiting enforcement of arbitration clauses and class bans (Prayer ¶ F); and barring continued collusion with respect to arbitration and class action bans (Prayer ¶ C). Further, Plaintiffs sought award of counsel's fees, expenses

⁴ In these two circumstances, the Settlements preserve the parties' *status quo ante* rights to enforce or to challenge the clause.

⁵ Reference is to the paragraphs of the proposed Settlement Agreements annexed as Exhibits 1 through 4 to the Declaration of David A. Langer, Dkt Item 201, which accompanied Class Plaintiffs' Motion for Preliminary Approval of Class Action Settlements with Bank of America, Capital One, Chase and HSBC. The paragraph references are the same for each agreement.

and costs (Prayer ¶ G), which is the subject of this motion.⁶

B. Benefits to the Class of the Settlement

These Settlements are a major victory for the consumers and small businesses in the class. Beginning approximately ten years ago, the major credit card issuers imposed arbitration clauses and class action bans on their cardholders collusively. These clauses have impeded, if not precluded, these consumers' and small businesses' efforts to obtain meaningful relief against a variety of abusive practices (not least of which, their right to challenge certain issuers' alleged collusion with respect to the imposition of foreign transaction fees).

For the first time since these clauses went into effect, 175 million cardholder accounts are now freed from these clauses. This is meaningful relief. These cardholders will be able to vindicate their rights, and their fellow cardholders' rights, by challenging abusive practices through class proceedings, the only realistic means for these claims to be prosecuted. More importantly, they can be represented as absent class members in proceedings brought for their benefit, a valuable right the Court of Appeals recognized in reinstating Plaintiffs' claims following their dismissal. *See Ross v. Bank of America, N.A.*, 524 F.3d 217, 224 (2d Cir. 2008).

Regulatory authorities have not intervened to assist the private parties and their counsel who have been resisting adhesion contracts which force consumers into individual arbitrations and bar class actions. Certainly, regulatory authorities have been aware of this situation, and yet they have failed to act, leaving it to private parties and their Counsel to wage this battle. Hence,

⁶ The release provided in these Settlements is narrow. The only release here is for the Settling Defendants' liability with respect to the *inclusion* of arbitration clauses or class action bans. (Settlement ¶¶ 2(aa), 12) Class members who have been injured as a result of the actual invocation of the arbitration clause or class ban are not releasing claims for those injuries. (Settlement ¶¶ 2(h), 2(aa)) These Class members are free to seek redress for their grievances even though they will receive *all* the prospective benefits that the Settlement Agreements provide, although the Settling Defendants may defend and assert their (former) arbitration clauses against these claimants on such claims (and only on such claims).

this action was brought to reform defendants' conduct, not for monetary damages. Claims for monetary damages by individual class members previously forced into arbitration by these clauses are not barred by the proposed class release and are specifically excepted from the Settlements.

C. Negotiation of Fees and Efforts of Counsel

Fees have been negotiated with each Settling Defendant. Each was informed that (a) Plaintiffs would not discuss fees until substantive terms were agreed, (b) Plaintiffs' demand would be reasonable, with a discount to the first defendant to settle, (c) if the parties could not agree on a fee in negotiations, then Class Plaintiffs would request the Court to award a fee from that defendant to Plaintiffs. (Declaration of Merrill G. Davidoff, Esq., at ¶¶ 9, 10)⁷ Collectively, the Settling Defendants will pay \$2.35 million, with Bank of America paying \$600,000; Capital One, \$650,000; Chase, \$700,000; and HSBC, \$400,000. (Settlement ¶ 15) These figures are inclusive of the costs of notice and reimbursed litigation expenses.

Plaintiffs' counsel have thus far expended 15,172 hours in prosecution of this case, and accrued fees (at historical rates) totaling \$5,525,494, while incurring out-of-pocket litigation expenses (excluding notice costs) totaling \$303,386. In addition, notice costs for these Settlements total \$131,495. These numbers are reported in the table below on a firm-by-firm basis.

| Firm | Hours | Lodestar | Expenses |
|---|--------------|-----------------|-----------------|
| Law Offices of Brian Barry | 81.65 | \$49,085.00 | \$1,642.56 |
| Berger & Montague, P.C. | 10,035.40 | \$3,540,134.25 | \$232,673.69 |
| Berman DeValerio | 905.35 | \$286,817.00 | \$8,624.12 |
| Cohen Milstein Sellers & Toll, PLLC | 449.95 | \$127,742.50 | \$15,691.30 |
| Edelman, Combs, Lattuner & Goodwin, LLC | 111.10 | \$29,164.00 | \$1,316.88 |

⁷ The declarations relating to this motion are collected in the accompanying Compendium of Declarations Relating to Class Plaintiffs' Motion For Approval Of Attorneys' Fees and Reimbursement of Litigation Expenses Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure.

| Firm | Hours | Lodestar | Expenses |
|---|------------------|-----------------------|---------------------|
| Edelson & Associates, LLC | 849.20 | \$373,833.00 | \$10,854.04 |
| Hulett Harper Stewart LLP | 363.55 | \$159,155.25 | \$3,844.42 |
| Kaplan Fox & Kilsheimer LLP | 51.50 | \$27,870.00 | \$463.81 |
| Kohn, Swift & Graf, P.C. | 291.40 | \$102,198.50 | \$1,753.69 |
| Robbins Geller Rudman & Dowd LLP | 708.50 | \$335,720.00 | \$22,017.85 |
| Scott + Scott LLP | 1,273.55 | \$458,607.00 | \$4,494.31 |
| Steyer Lowenthal Boodrookas Alvarez & Smith, LLP | 14.00 | \$6,681.25 | \$9.15 |
| Stull, Stull & Brody | 37.25 | \$28,486.25 | \$0.00 |
| Subtotal of Expenses Before Cost of Notice | | | \$303,385.82 |
| <i>Cost of Notice (Paid From Escrow)</i> | | | \$131,495.00 |
| TOTALS | 15,172.40 | \$5,525,494.00 | \$434,880.82 |

Notice has been disseminated in two national newspapers, by PR Newswire, by mail to eight consumer advocacy groups, and by posting on the CCFSettlement.com website. The cost of this notice is \$131,495. After accounting for all expenses, including notice costs, the net award of all attorneys' fees is \$1,915,119.18, which is only partial compensation for the time expended prosecuting the claims in this matter.

III. ARGUMENT

Class Plaintiffs negotiated the amount of attorneys' fees and litigation expenses that the Settling Defendants, subject to the Court's approval, are to pay. The agreed amount, \$2.35 million, was negotiated at arm's length by sophisticated counsel only after agreement on all the substantive terms of the Settlements. The amount of attorneys' fees and expenses under the Settlements is a reasonable payment for fees and litigation expenses (including the cost of notice), and is to be paid in addition to the other relief provided under the Settlements by the Settling Defendants. The fees and expenses sought here are awarded *neither* from a common fund created

for the class *nor* against defendants pursuant to contested proceedings under a statutory fee-shifting provision.

The agreement is appropriate, and Court approval of the \$2.35 million fee and expense award is warranted. Fed. R. Civ. P. 23(h). First, the Settling Defendants have agreed to pay the award in addition to the relief provided in the Settlements. Hence, the award of fees and expenses will *not* reduce the relief to the class. Second, where sophisticated counsel have negotiated fee awards at arm's length, and those fees do not reduce the relief afforded to a class, the fee requests are reviewed less rigorously. Third, the requested fee and expense award is eminently reasonable when cross-checked under the "presumptively reasonable fee" (formerly lodestar) analysis. Accordingly, Class Counsel respectfully request that the Court approve the requested payment and reimbursement in full.

In reviewing this request, the Court should be mindful that the claims here were brought to reform defendants' conduct, with attorneys' fees to be awarded, in the event of success, under the statutory fee-shifting provisions of Section 16 of the Clayton Act, 15 U.S.C. § 26. Counsel's potential recovery in this matter is effectively capped by its lodestar, while (barring the accompanying Settlements) counsel faced the risk of complete non-recovery in the event that Class Plaintiffs failed to prevail. Counsel's motivation in representing the Class here arose in its perceived moral obligation to the Class (which overlaps significantly with the class in the initial *In re Currency Conversion Fee Antitrust Litigation* matter) and its duty to represent the Class's interests zealously. In pursuing the claims here, counsel have foregone expending their time on claims and cases that are likely to prove far more lucrative than the instant matter ever can be. Counsel have significantly succeeded in vindicating the rights of consumers and small businesses across the United States, whose rights have been impeded through the collusive imposition of

class-banning arbitration clause. For their success in delivering meaningful relief to hundreds of millions of Americans, the Court should award counsel its requested fee.

A. The Agreed Upon Payment of Attorneys' Fees Is Proper and Reasonable

1. The Settling Defendants and Class Plaintiffs Have Agreed, Subject to Court Approval, to An Award to Class Counsel of a Lump Sum Amount

The Federal Rules of Civil Procedure expressly provide that “the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.” Fed. R. Civ. P. 23(h). Federal courts at all levels encourage litigants to resolve fee issues by agreement among themselves whenever possible. “A request for attorney’s fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee.” *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *see also Johnson v. Georgia Hwy. Exp., Inc.*, 488 F.2d 714, 720 (5th Cir. 1974) (“In cases of this kind, we encourage counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorney’s fees.”) *M. Berenson Co., Inc. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 829 (D. Mass. 1987) (“Whether a defendant is required by statute or agrees as part of the settlement of a class action to pay the plaintiffs’ attorneys’ fees, ideally the parties will settle the amount of the fee between themselves.”).

Accordingly, courts regularly approve agreed attorneys’ fees paid by a defendant, rather than by class members, especially where that amount is independent of the benefit obtained for the class. *See, e.g., McBean v. City of New York*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006) (granting class counsel full amount of fees agreed to by defendant where the attorneys’ fees were separate from the class settlement and did not diminish the class settlement); *In re Sony SXRDRear Projection Television Class Action Litig.*, No. 06 Civ. 5173 (RPP), 2008 WL 1956267, at **15-16 (S.D.N.Y. May 1, 2008) (same); *Dupler v. Costco Wholesale Corp.*, No. 06-3141, 2010 WL

1506923, at *8 (E.D.N.Y. April 15, 2010) (same); *Bezio v. Gen. Elec. Co.*, 655 F. Supp. 2d 162, 167-68 (N.D.N.Y. 2009) (same); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 322 (W.D. Tex. 2007) (same).

Here, the Settling Defendants, advised by some of the nation's most skilled counsel, have agreed (subject to Court approval) to pay Class Counsel a fixed sum of \$2.35 million in attorneys' fees and litigation expenses, including the cost of notice. This payment is completely separate and apart from the other provisions of the Settlements and is without cost to the Class. Furthermore, as noted above and attested to, attorneys' fees were not negotiated or discussed until after agreement was reached between the parties on all other terms of each settlement. *See, supra*, at 6; Davidoff Decl. at ¶¶ 9, 10.

2. The Agreed Upon Fee Carries a Presumption of Reasonableness

Here, the fees and expenses requested were negotiated under those conditions most similar to market conditions: an arm's length negotiation between adverse parties. This is a process that courts have encouraged. *See In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 568-70 (7th Cir. 1992) (market factors, best known by the negotiating parties themselves, should determine the quantum of attorneys' fees). The virtue of a fee thus determined is that it is essentially a market price. Defendants have an interest in minimizing the fee; plaintiffs have an interest in maximizing the fee to compensate them (as the case law encourages) for their risk, innovation, and creativity; and the negotiations are informed by the parties' mutual knowledge of the work done and result achieved, and by their views on what the Court might award.

Courts have been less rigorous in their scrutiny when the award is requested pursuant to an agreement between the parties, when that agreement was negotiated between experienced counsel. *See In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, MDL No. 901, 1992 WL 226321, at *4 (C.D. Cal. June 10, 1992) (stating that court should be reluctant to disturb agreed

upon attorneys' fees where class counsel negotiated fee with sophisticated defense counsel who were familiar with case, risks, amount and value of class counsel's time, and nature of result obtained for class), *appeal dismissed for class member's lack of standing*, 33 F.3d 29 (9th Cir. 1994), *superseding* 19 F.3d 470 (9th Cir. 1994); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 695 (N.D. Ga. 2001) (giving "substantial weight to a negotiated fee amount"); *In re Apple Computer, Inc. Deriv. Litig.*, No 06-4128, 2008 WL 4820784, at *3 (N.D. Cal. Nov. 5, 2008) ("A court should refrain from substituting its own value for a properly bargained-for agreement."); *Cohn v. Nelson*, 375 F. Supp. 2d. 844, 861 (E.D. Mo. 2005) ("[W]here, as here, the parties have agreed on the amount of attorneys' fees and expenses, courts give the parties' agreement substantial deference."); *In re AXA Fin., Inc.*, No. 18268, 2002 WL 1283674, at *7 (Del. Ch. May 22, 2002) ("Where, as here, the fee is negotiated after the parties have reached an agreement in principle on settlement terms and is paid in addition to the benefit to be realized by the class, this court will also give weight to the agreement reached by the parties in relation to fees.").

As *McBean* explains, a court need not review an application for attorneys' fees with a heightened level of scrutiny where, as here, the parties have contracted for an award of fees that will not be paid from a common fund. "If money paid to the attorneys comes from a common fund, and is therefore money taken from the class, then the Court must carefully review the award to protect the interests of the absent class members." 233 F.R.D. at 392.⁸ To the contrary "[i]f ... money paid to the attorneys is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members." *McBean*, 233 F.R.D. at 392. *McBean* thus con-

⁸ Citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123-24 (2d Cir. 2005), and *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

cluded that the parties' agreement for attorneys' fees was objectively reasonable because it was the product of arm's length negotiations. *Id.*

*In re Sony SXR*D applied similar reasoning in awarding negotiated fees and expenses of \$1.6 million. "[R]egardless of the size of the fee award, class members who apply for recovery under the terms of the Settlement will receive the same benefit; the fee award does not reduce the recovery to the class." 2008 WL 1956267, at *15. Where the attorneys' fees are not awarded from a common fund created for the benefit of the class as a whole, "the danger of conflicts of interest between attorneys and class members is diminished." *Id.* *Sony SXR*D concluded that the parties' agreement for attorneys' fees and costs was objectively reasonable because the fees were negotiated at arm's length and negotiations commenced only after agreement had been reached on the substantive terms of the settlement benefitting the class. *Id.*

B. A Presumptively Reasonable Fee Cross-Check Further Supports the Reasonableness of the Requested Fee Award

Although the requested fee here is pursuant to Settlement Agreements with four sophisticated commercial entities, and not from a common fund or under a fee shifting statute, a "presumptively reasonable fee" (for many "lodestar") cross-check further underscores the reasonableness of the agreed amount. *See McBean*, 233 F.R.D. at 392 n. 11 ("[Class counsel's] attorneys' fees will be awarded pursuant to the settlement, not an independent lodestar calculated by the Court. However this rough [lodestar] calculation is useful to illustrate the reasonableness of the fee award negotiated in the settlement."); *In re Sony SXR*D, 2008 WL 1956267, at *16; *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (in "injunctive relief class actions, courts often use a lodestar calculation because there is no way to gauge the net value of the settlement or any percentage thereof.").

Where the presumptively reasonable fee (formerly lodestar) method is "used as a mere

cross-check, the hours documented by counsel need not be exhaustively scrutinized.” *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (citation omitted). “The lodestar cross check need entail neither mathematical precision nor bean counting but instead is determined by considering the unique circumstances of each case.” *In re Xcel Energy, Inc., Sec., Deriv. & “ERISA” Litig.*, 364 F. Supp. 2d 980, 999 (D. Minn. 2005).

In *Arbor Hill Concerned Citizens Neighborhood Assoc. v. County of Albany*, 522 F.3d 182 (2d Cir. 2008), the Court of Appeals modified the lodestar approach to determining attorneys’ fees.⁹ In its place, the Court endorsed “the use of a modified version of the lodestar approach ... [the] ‘presumptively reasonable fee.’” *McDaniel v. County of Schenectady*, 595 F.3d 411, 420 (2d Cir. 2010) (quoting *Arbor Hill*, 522 F.3d at 183). Under the “lodestar approach,” courts had “first determine[ed] the lodestar (multiplying an hourly rate by the number of hours worked) and then adjust[ed] the lodestar through a multiplicative factor to account for case-specific considerations.” Under the presumptively reasonable fee approach, in contrast, “a district court should assess case-specific considerations at the outset, [and] factor[] them into its determination of a reasonable hourly rate for the attorneys’ work.” *Id.* (citing *Arbor Hill*, 522 F.3d at 186, 190). Then, the reasonable hourly rate is multiplied by the number of hours worked, generating a “presumptively reasonable fee.” *Id.* As enumerated in *Arbor Hill*, the case-specific factors, which would lead to an adjustment of counsel’s hourly rate:

includ[e], but [are] not limited to, the complexity and difficulty of the case, the available expertise and capacity of the client’s other counsel (if any), the resources required to prosecute the case effectively (taking account of the resources being marshaled on the other side but not endorsing scorched earth tactics), the timing demands of the case, whether an attorney might have an interest (independent of that of his client) in achieving the ends of the litigation or might initiate

⁹ The Court of Appeals’ modified lodestar approach appears consistent with and unaltered by the United States Supreme Court’s decision in *Perdue v. Kenny A.*, 130 S. Ct. 1662 (2010), notwithstanding the differing terminology used by the Court of Appeals.

the representation himself, whether an attorney might have initially acted *pro bono* (such that a client might be aware that the attorney expected low or non-existent remuneration), and other returns (such as reputation, etc.) that an attorney might expect from the representation.

522 F.3d at 190. Of these *Arbor Hill* factors, the availability and expertise of the client's other counsel is inapplicable, as there is no "other" counsel here. Similarly, the "timing demands" is largely inapplicable, as this case have not involved the kind of time-sensitive practice involved in, for example, seeking a temporary restraining order or preliminary injunction. An implicit threshold factor is the reasonableness of counsel's rates in comparison to other lawyers in the same market.

1. The Complexity and Difficulty of the Litigation

As with *Currency Conversion*, "[t]his antitrust class action involves a complex factual record and novel issues of law." *In re Currency Conversion Fee Antitrust Litig.*, No. 01 MDL 1409, M-21-95, 2006 WL 3247396, at *5 (S.D.N.Y. Nov. 8, 2006). Antitrust class actions are "notoriously complex, protracted, and bitterly fought." *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989). Furthermore, prosecuting this case is particularly complex and difficult because many of the witnesses are in-house counsel of the Defendants. The parties have raised novel legal issues, including difficult privilege issues, and the case has been reviewed at the Court of Appeals, vacated and remanded. The certified Class itself is enormous, comprising tens of millions of cardholders. The magnitude and complexity of this action support the fee award sought by Class Counsel.

2. Resources Required to Prosecute the Claims Effectively

As reflected in counsel's advanced expenses and time devoted to this case, the resources required to prosecute these claims effectively have been and are tremendous. The demands of this case have been considerable and have precluded counsel from applying their efforts in cases

likely to generate monetary recovery. The time and labor expended by Class Counsel in this action is set forth in detail in the accompanying declaration and attached exhibits.¹⁰ Further, counsel have advanced over \$300,000 in expenses in this matter. The present matter has required the marshalling of enormous resources to prosecute the claims. Counsel should be acknowledged for their willingness to make the required effort and expenditure necessary to prosecute these claims and achieve these settlements.

Class Counsel thus far have devoted approximately 15,170 hours over a period of some five years to prosecuting the action to its current juncture. The major litigation events in this matter, accounting for counsel's expenditure of time, are described at length in the accompanying Memorandum in Support of Class Plaintiffs' Motion for Final Approval of Class Action Settlements with Bank of America, Capital One, Chase, and HSBC.¹¹ Plaintiffs incorporate that discussion by reference. Class Counsel were and are opposed by firms with reputations for exceptional work in defending complex civil cases and whose attorneys' efforts were aggressive and unrelenting in defending this case. The total number of hours expended in successfully and diligently prosecuting this action is fair and reasonable for the services provided.

¹⁰ See Declarations of Brian Barry (for Law Offices of Brian Barry); Charles Goodwin (for Berger & Montague, P.C.); Peter A. Pease (for Berman DeValerio); Benjamin D. Brown (for Cohen Milstein Sellers & Toll, PLLC); James O. Lattuner (for Edelman, Combs, Lattuner & Goodwin, LLC); Marc H. Edelson (for Edelson & Associates, LLC); Dennis Stewart (for Hulett Harper Stewart LLP); Gregory K. Arenson (for Kaplan Fox & Kilsheimer LLP); William E. Hoese (for Kohn, Swift & Graf, P.C.); Bonny E. Sweeny (for Robbins Geller Rudman & Dowd LLP); Christopher M. Burke (for Scott + Scott LLP); Allan Steyer (for Steyer Lowenthal Boorookas Alvarez & Smith, LLP); and Aaron Brody (for Stull, Stull & Brody).

¹¹ Because this matter remains on-going against two defendants, Class Plaintiffs are not tendering detailed billing records. Disclosure of those records could reveal Class Plaintiffs' litigation strategy to the non-settling defendants and could materially prejudice the prosecution of the claims against them. Plaintiffs, however, will provide them to the Court *in camera*, if requested.

3. Attorney Interest and Reputational Effect

Attorney interest and potential reputational benefit should not alter the award to counsel. While counsel's interest is sufficient to warrant their prosecution of this matter, with little (if any) prospect of receiving a generous fee, that interest is not so strong as to cause counsel to seek less than its lodestar in full, should it ultimately prevail. Any emoluments to counsel's reputation from any success in this case are not such that they will enhance counsel's ability to recover elsewhere for its services.

4. Counsel's Hourly Rate

Here, counsel's regular rates for their time range from \$360 to \$750 for partners, \$215 to \$425 for associates, and \$175 to \$240 for paralegals. These rates are well in line with – or below – those charged at the time by major commercial law firms to handle complex antitrust matters. Class Counsel's hourly rates are lower than the range typically charged by similarly well qualified counsel in the Eastern and Southern Districts of New York. *See, e.g., In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, Nos. 02 MDL 1484 (JFK), 02 Civ. 3176 (JFK), 02 Civ. 7854 (JFK), 02 Civ. 10021 (JFK), 2007 WL 313474, at *22 (S.D.N.Y. Feb. 1, 2007) (approving counsel's hourly rates of \$850 (partner), \$665 (partner), \$650 (partner), and \$515 (senior associate)).¹²

¹² Courts in this Circuit have relied on *National Law Journal* surveys to determine the fairness of fee rates. *See, e.g., Williamsburg Fair Hous. Comm. v. N.Y. City Hous. Auth.*, No. 76 CIV 2125 (RWS), 2005 WL 736146, at *12 (S.D.N.Y. Mar. 31, 2005) (relying in part on the 2004 survey: "a recent billing survey made by the *National Law Journal* shows that senior partners in New York City charge as much as \$750 per hour and junior partners charge as much as \$490 per hour"). *In Focus: Billing; Firm-by-Firm Sampling of Billing Rates Nationwide*, THE NATIONAL LAW JOURNAL, Vol. 29. No. 15, Dec. 11, 2006 (noting that partners in New York charge an hourly rate as high as \$800 and associates as high as \$550). The 2007 NATIONAL LAW JOURNAL notes that senior partners at least at one New York City firm charge as much as \$1,000 per hour. *See Large Firms' Billing Rates Continue to Climb*, THE NATIONAL LAW JOURNAL, Dec. 11, 2007. In 2008, attorney billing rates continued to trend up. *See In Focus: Billing; Law Firms Defy Gravity*, THE NATIONAL LAW JOURNAL, Vol. 31, No. 15, Dec. 8, 2008. Average billing

Applying Class Counsel's regular hourly rates to the number of hours worked yields a total lodestar to date of \$5,525,494.00. Thus, the requested \$1,915,119.18 attorneys' fees award represents slightly more than a third of Class Counsel's lodestar to date.

5. Other Factors

Several other factors have been traditionally considered in statutory fee cases also warrant approval of the fees requested here. Notwithstanding the stricter focus on lodestar in fee shifting cases, *see, e.g., Perdue v. Kenny A.*, 130 S. Ct. 1662 (2010). These factors are nonetheless significant.

a Risks of the Litigation

The risk involved in prosecuting a class action is an important consideration in determining an appropriate fee award. "This factor is intended to recognize that cases taken on a contingent fee basis entail risk of non-payment for the attorneys that prosecute them, and it embodies an assumption that contingency work is entitled to greater compensation than non-contingency work." *Parker v. Time Warner Entertainment Co., L.P.*, 631 F. Supp. 2d 242, 273 (E.D.N.Y. 2009). Here, Class Counsel represented the class on a contingent basis, investing a significant amount of time and money without any guarantee of compensation in a case that was vigorously defended. Further, at least until the Second Circuit vacated the district court's order granting Defendants' motion to dismiss, the prospects of negotiating a settlement with significant relief for the class was approximately nil. Throughout the litigation, therefore, Class Counsel faced a real risk of non-recovery.

rates increased modestly in 2009; *Billing Survey: Reality Dawns on Hourly Rates*, THE NATIONAL LAW JOURNAL, Vol. 32, No. 14, Dec. 7, 2009.

b. The Quality of Representation

“To determine the ‘quality of the representation,’ courts review, among other things, the recovery obtained and the backgrounds of the lawyers involved in the lawsuit.” *Taft v. Ackermans*, No. 02 Civ. 7951 (PKL), 2007 WL 414493, at *10 (S.D.N.Y. Jan. 31, 2007). Class Counsel are nationally prominent in the field of complex representative litigation, and the quality of Class Counsel’s work is high. To the extent that the Court is not already familiar with the quality of counsel’s work, the accompanying declarations supporting the fees requested include firm biographies recounting some of their accomplishments.¹³

The quality of Class Counsel’s representation is also reflected in the manner in which they prosecuted this case from the pleadings, through discovery, to the settlement negotiations. The Settlements negotiated with Defendants provides significant relief to the Class and are the direct result of the creativity, diligence, hard work, and skill brought to bear by Class Counsel at every stage of the proceedings. Throughout the litigation, Class Counsel put the best interests of the class ahead of their own, negotiating the most favorable settlement terms possible before turning to the question of attorneys’ fees, and then negotiating a fee paid directly by the Settling Defendants. Class Counsel’s exemplary prosecution of this class action weighs strongly in favor of the proposed fee award.

c. The Relationship of the Requested Fee to the Settlement

Where the relationship between the requested fee and the settlement is difficult to ascer-

¹³ See respective Exhibits 1 to Declarations of Brian Barry (for Law Offices of Brian Barry); Charles Goodwin (for Berger & Montague, P.C.); Peter A. Pease (for Berman DeValerio); Benjamin D. Brown (for Cohen Milstein Sellers & Toll, PLLC); James O. Lattuner (for Edelman, Combs, Lattuner & Goodwin, LLC); Marc H. Edelson (for Edelson & Associates, LLC); Dennis Stewart (for Hulett Harper Stewart LLP); Gregory K. Arenson (for Kaplan Fox & Kilsheimer LLP); William E. Hoese (for Kohn, Swift & Graf, P.C.); Bonny E. Sweeny (for Robbins Geller Rudman & Dowd LLP); Christopher M. Burke (for Scott + Scott LLP); Allan Steyer (for Steyer Lowenthal Boodrookas Alvarez & Smith, LLP); and Aaron Brody (for Stull, Stull & Brody).

tain because of the nature of the relief obtained in the settlement (here, for example, reforming the Settling Defendants' conduct), courts have noted with approval that the fee will be paid directly by the defendant. *See Steinberg v. Nationwide Mut. Ins. Co.*, 612 F. Supp. 2d 219, 224 (E.D.N.Y. 2009). Such is the case here. Additionally, Plaintiffs achieved much of the relief they sought in their prayer for relief.

C. Class Counsel Are Entitled to Be Reimbursed for Their Reasonable Litigation Expenses

Class Counsel also request approval of \$303,385.82 in expenses incurred while prosecuting this action. The award of costs to counsel who obtain a recovery for the class is appropriate. *See Milthead Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) (citing *Reichman v. Bonsignore, Brignati & Mazzotta, P.C.*, 818 F.2d 278, 283 (2d Cir. 1987)). The expenses incurred in this litigation are detailed in the accompanying declarations.¹⁴ The expenses are of the type typically billed by attorneys to paying clients in the marketplace and include such costs as fees paid to experts, copying fees, computerized research, storing electronically produced discovery documents and information, maintaining a computerized database for coding of discovery by attorneys, travel in connection with this litigation, and court reporting fees. These expenses were critical to Plaintiffs' success in achieving the proposed settlement. *See In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) ("The expenses incurred-which include investigative and expert witnesses, filing fees, service of process, travel, legal research

¹⁴ In particular, see Exhibit 3 Declarations of Brian Barry (for Law Offices of Brian Barry); Charles Goodwin (for Berger & Montague, P.C.); Peter A. Pease (for Berman DeValerio); Benjamin D. Brown (for Cohen Milstein Sellers & Toll, PLLC); James O. Lattuner (for Edelman, Combs, Lattuner & Goodwin, LLC); Marc H. Edelson (for Edelson & Associates, LLC); Dennis Stewart (for Hulett Harper Stewart LLP); Gregory K. Arenson (for Kaplan Fox & Kilsheimer LLP); William E. Hoese (for Kohn, Swift & Graf, P.C.); Bonny E. Sweeny (for Robbins Geller Rudman & Dowd LLP); Christopher M. Burke (for Scott + Scott LLP); Allan Steyer (for Steyer Lowenthal Boodrookas Alvarez & Smith, LLP); and Aaron Brody (for Stull, Stull & Brody).

and document production and review-are the type for which 'the paying, arms' length market' reimburses attorneys. For this reason, they are properly chargeable to the Settlement fund.”).

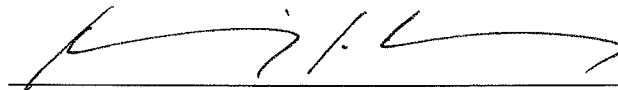
For the reasons set forth herein, Class Counsel respectfully submit that the maximum amount under the negotiated fee and expense arrangement should be approved by the Court.

IV. CONCLUSION

For the above-stated reasons, Class Plaintiffs respectfully request that the Court approve the payment of attorneys' fees in the amount of \$1,915,119.18, and reimbursement of litigation expenses in the amount of \$303,385.82, and reimbursement of notice costs of \$131,495.00, for a total award of \$2,350,000.

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Respectfully submitted,



Merrill G. Davidoff, Esquire (MD-4099)
Charles P. Goodwin, Esquire
David A. Langer, Esquire
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
215-875-3000
215-875-4673 Fax

Gregory K. Arenson, Esquire
Jason A. Zweig, Esquire
KAPLAN FOX & KILSHEIMER LLP
850 Third Avenue, 14th Floor
New York, NY 10022
212-687-1980
215-687-7714 Fax

Bonny Sweeney, Esquire
Alexandra S. Bernay, Esquire
GELLER RUDMAN ROBBINS & DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
619-231-1058
619-231-7423 Fax

Dennis Stewart, Esquire
HULETT HARPER STEWART LLP
525 B Street, Suite 760
San Diego, CA 92101
619-338-1133
619-338-1139 Fax

Christopher M. Burke, Esquire
Kristen M. Anderson, Esquire
SCOTT + SCOTT, LLP
600 B Street, Suite 1500
San Diego, CA 92101
619-233-4565
619-233-0508 Fax