

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
FINAL APPROVAL OF CLASS ACTION SETTLEMENTS WITH
BANK OF AMERICA, CAPITAL ONE, CHASE, AND HSBC**

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	PROCEDURAL STATEMENT	5
	A. Statement Concerning Related MDL 1409 Matters.....	5
	B. Statement Concerning This Matter	7
III.	THE SETTLEMENT NEGOTIATIONS	9
IV.	TERMS OF THE SETTLEMENTS	11
V.	BENEFITS OF THE SETTLEMENT	13
VI.	THE PROPOSED SETTLEMENTS ARE FAIR, REASONABLE AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT	14
	A. Standards for Assessing Whether a Class Action Settlement Is Fair, Reasonable and Adequate	14
	B. The Negotiations and the Presumption of Fairness	16
	C. The Terms of the Settlements Are Fair, Reasonable, and Adequate	17
	1. Complexity, Expense and Likely Duration of the Litigation.....	17
	2. The Reaction of the Class	18
	3. Stage of the Proceedings and the Amount of Discovery Undertaken.....	18
	4. The Risks of Establishing Liability and Damages, and Comparison of the Settlement with the Likely Result of Litigation.....	20
VII.	THE NOTICE PLAN PROVIDED REASONABLE NOTICE	22
VIII.	CONCLUSION.....	25

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Allen v. Alabama State Bd. of Educ.</i> , 190 F.R.D. 602 (M.D. Ala. 2000).....	24
<i>Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.</i> , 917 F.2d 1413 (6th Cir. 1990)	21
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	9
<i>Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic</i> , 883 F. Supp. 1247 (W.D. Wis. 1995)	21
<i>Cinelli v. MCS Claim Servs., Inc.</i> , 236 F.R.D. 118 (E.D.N.Y. 2006).....	15, 17, 18, 19
<i>City of Detroit v. Grinnell Corp.</i> , 495 F.2d 448 (2d Cir. 1974).....	16
<i>Coleman v. Cannon Oil Co.</i> , 849 F. Supp. 1458 (M.D. Ala. 1993)	21
<i>In re Currency Conversion Fee Antitrust Litig.</i> , 2006 WL 2685082 (Sept. 20, 2006).....	7
<i>In re Currency Conversion Fee Antitrust Litig.</i> , 263 F.R.D. 110 (S.D.N.Y. 2009)	16, 17, 19
<i>In re Currency Conversion Fee Antitrust Litig.</i> , 229 F.R.D. 57 (S.D.N.Y. 2005)	6
<i>In re Currency Conversion Fee Antitrust Litig.</i> 361 F. Supp. 2d 237 (S.D.N.Y. 2005).....	6
<i>In re Currency Conversion Fee Antitrust Litig.</i> , 224 F.R.D. 555 (S.D.N.Y. 2004)	6
<i>D.S. v. New York City Dep't of Educ.</i> , 255 F.R.D. 59 (E.D.N.Y. 2008).....	18, 24
<i>DeHoyos v. Allstate Corp.</i> , 240 F.R.D. 269 (W.D. Tex. 2007)	4, 23, 24

<i>In re Fine Paper Antitrust Litig.</i> , 1979 WL 1743 (E.D. Pa. Oct. 2, 1979).....	20
<i>Foti v. NCO Fin. Sys., Inc.</i> , 2008 U.S. Dist. LEXIS 16511 (S.D.N.Y. Feb. 20, 2008).....	passim
<i>Green v. American Express Co.</i> , 200 F.R.D. 211 (S.D.N.Y. 2001) (Baer, J.)	25
<i>Handschu v. Special Servs. Div.</i> , 787 F. 2d 828 (2d Cir. 1986).....	3, 4, 23, 24
<i>In re Holocaust Victim Assets Litig.</i> , 2007 WL 805768 (E.D.N.Y. Mar. 15, 2007).....	16
<i>Image Tech. Servs., Inc. v. Eastman Kodak Co.</i> , 125 F.3d 1195 (9th Cir. 1997)	21
<i>Maley v. Del Global Techs. Corp.</i> , 186 F. Supp. 2d 358 (S.D.N.Y. 2002).....	18
<i>McReynolds v. Richards-Cantave</i> , 588 F.3d 790 (2d Cir. 2009).....	passim
<i>Meacham v. Wing</i> , 227 F.R.D. 232 (S.D.N.Y. 2005)	24
<i>Mendoza v. United States</i> , 623 F.2d 1338 (9th Cir. 1980)	4, 24
<i>In re Michael Milken & Assocs. Sec. Litig.</i> , 150 F.R.D. 57 (S.D.N.Y. 1993)	22
<i>In re NASDAQ Market-Makers Antitrust Litig.</i> , 187 F.R.D. 465 (S.D.N.Y. 1998)	16, 22
<i>New York v. Microsoft Corp.</i> , 224 F. Supp. 2d 76 (D.D.C. 2002)	21
<i>New York v. Nintendo, Inc.</i> , 775 F. Supp. 676 (S.D.N.Y. 1991)	18
<i>Puleo v. Chase Bank USA, N.A.</i> , 2010 WL 1838762 (3d Cir. May 10, 2010)	11
<i>Ross v. Bank of America, N.A.</i> , 524 F.3d 217 (2d Cir. 2008).....	8, 14

<i>Ross, et al. v. Bank of America, N.A. (USA), et al.</i> , 2005 WL 2364969 (S.D.N.Y. Sept. 27, 2005).....	7
<i>Selby v. Principal Mutual Life Ins. Co.</i> , 2003 WL 22772330 (S.D.N.Y. Nov. 21, 2003).....	3, 15, 22, 25
<i>In re Toys R Us Antitrust Litig.</i> , 191 F.R.D. 347 (E.D.N.Y. 2000).....	21
<i>Vaughns v. Board of Educ.</i> , 18 F. Supp. 2d 569 (D. Md. 1998).....	24
<i>In re Visa Check/MasterMoney Antitrust Litig.</i> , 297 F. Supp. 2d 503 (E.D.N.Y. 2003).....	16, 18
<i>W. Va. v. Chas. Pfizer & Co.</i> , 314 F. Supp. 710 (S.D.N.Y. 1970), <i>aff'd</i> , 440 F.2d 1079 (2d Cir. 1971).....	22
<i>Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.</i> , 396 F.3d 96 (2d Cir. 2005).....	5, 14
<i>In re Warner Chilcott Ltd. Secs. Litig.</i> , 2009 U.S. Dist. LEXIS 58843 (S.D.N.Y. July 10, 2009).....	15, 16
<i>Weinberger v. Kendrick</i> , 698 F.2d 61 (2d Cir. 1982).....	14
<i>Weseley v. Spear, Leeds & Kellogg</i> , 711 F. Supp. 713 (E.D.N.Y. 1989).....	17
<i>Whitman v. Capital One Bank (USA), N.A.</i> , No. WMN-09-1737 (D. Md.) (Nickerson, J.).....	11
<i>Women in City Gov't United v. New York</i> , 1986 WL 7018 (S.D.N.Y. June 17, 1986).....	15, 22

FEDERAL RULES AND STATUTES

FED. R. CIV. P. 12(b)(1).....	9
FED. R. CIV. P. 12(b)(6).....	9
FED. R. CIV. P. 12(f).....	9
FED. R. CIV. P. 23.....	4, 23
FED. R. CIV. P. 23(b)(2).....	passim
FED. R. CIV. P. 23(b)(3).....	23

FED. R. CIV. P. 23(c)(2)	23
FED. R. CIV. P. 23(c)(2)(b).....	23
FED. R. CIV. P. 23(c)(2)(b)(i-vii).....	23
FED. R. CIV. P. 23(e).....	1, 16
FED. R. CIV. P. 23(e)(1).....	22, 23
FED. R. CIV. P. 23(e)(1)-(2)	16
FED. R. CIV. P. 23(h)(1)	23
Section 1 of the Sherman Act, 15 U.S.C. § 1.....	7, 21

OTHER AUTHORITIES

<i>Manual for Complex Litigation</i> §21.651, at 329 (4th ed. 2004).....	20
--	----

Representative 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 Class Plaintiffs’ Motion for Final Approval of Class Action Settlements With Bank of America, Capital One, Chase, and HSBC.

I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure (“Rules”), Class Plaintiffs respectfully move for final approval of proposed settlement agreements reached with four of the seven defendants here. These proposed settlements are with (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”) (collectively, the “Settling Defendants”¹). These settlements are encompassed in four Stipulations and Agreements of Settlement (collectively, “Settlements” or “Settlement Agreements”), one each for Bank of America, Capital One, Chase and HSBC.² The Court preliminarily approved the Settlement Agreements by Order dated March 18, 2010 (“Preliminary Approval Order”). A Fairness Hearing is scheduled for July 15, 2010.

¹ The non-settling defendants are Citigroup Inc, Citibank (South Dakota), N.A., Citibank USA, N.A., Universal Financial Corp., Universal Bank, N.A., Citicorp Diners Club Inc (together, “Citigroup”); Novus Credit Services, Inc., Discover Financial Services, and Discover Bank (“Discover”); and the National Arbitration Forum (“NAF”).

² Copies of the Settlements were attached as Exhibits 1, 2, 3 and 4 to the Declaration of David A. Langer (“Langer PA”), Dkt Item 201, which accompanied Class Plaintiffs’ Motion for Preliminary Approval of Class Action Settlements with Bank of America, Capital One, Chase and HSBC.

After months of hard-fought, arm's length negotiations by highly experienced, capable counsel, Plaintiffs have reached Settlements with four Defendant groups in this litigation on behalf of the Class. The Settlements deliver substantial and immediate benefits to the Class, notably: (i) the Settling Defendants have already ceased enforcing their arbitration clauses and class action bans; (ii) each agrees to remove its arbitration clause and class action ban from its cardholder documents; and (iii) each agrees to forebear readopting arbitration clauses for three and one-half years (the "Forbearance Period") from the dates that the amended cardholder documents were sent to cardholders. Further, the Settling Defendants will apply these provisions to after-acquired card portfolios that would otherwise be unprotected and to extend these prohibitions to those who acquire their cardholders' obligations (*i.e.*, debt collectors who could otherwise use debts accumulated under the abrogated arbitration clauses as a basis for invoking the clause). The Settlements cover small businesses, as well individuals, extending the Settlements to cardholders often denied the benefits of the consumer protection laws. The Settling Defendants have agreed to cooperate in discovery regarding the Class's claims against the remaining defendants, Citigroup and Discover.³ Finally, the Settling Defendants have agreed to pay a collective \$2.35 million to cover a portion of Plaintiffs' attorneys' fees and litigation expenses, including the costs of notice.

In return, the Settling Defendants are accepting a relatively narrow release from the Class. The release here releases only the minimal damages claim that Class members could have asserted for the injury they incurred from the insertion and maintenance of the Settling Defendants' arbitration clauses (and class action bans) as card terms. The release does *not* release the Settling Defendants for claims, including for damages, that class members may have from the

³ Revealing the contours and scope of such cooperation at this juncture would be prejudicial to Plaintiffs' prosecution of this case against the remaining defendants.

invocation or *use* of either the arbitration clauses or the class action bans. Any aggrieved member of the Class may still bring those claims.

Notice of the proposed Settlements has now been widely published pursuant to the Court's Preliminary Approval Order. Class members and the general public were apprised of the Settlements by publication of the notice in the *Wall Street Journal* and *USA Today* on April 8 and 20, 2010, as well as by circulation via *PR Newswire* on April 6, 12, and 19, 2010. (Declaration of Nicholas Urban ("Urban Decl."), at ¶¶ 3-9)⁴ The notice was also published in the May 2010 edition of the *ABA Journal* to inform attorneys (who may be Class members and/or represent Class members) of the Settlements and their terms. (Urban Decl., at ¶ 10) The notice was also disseminated to eight consumer advocacy organizations⁵ on April 14, 2010 (Urban Decl., at ¶ 11) and published on the website concerning the *CCF* settlement (www.ccfsettlement.com), going live on March 25, 2010. (Urban Decl., at ¶ 12) The publication of the instant notice is consistent with the plethora of cases recognizing that publication notice is appropriate and sufficient for the settlement of claims brought under Rule 23(b)(2). See *McReynolds v. Richards-Cantave*, 588 F.3d 790, 797, 804-05 (2d Cir. 2009); *Handschu v. Special Servs. Div.*, 787 F. 2d 828, 832-33 (2d Cir. 1986); *Foti v. NCO Fin. Sys., Inc.*, 2008 U.S. Dist. LEXIS 16511, at *13 (S.D.N.Y. Feb. 20, 2008) ("Because this class action is filed under Rule 23(b)(2), due process is satisfied without individualized notice to prospective class members."); *Selby v. Principal Mutual Life Ins. Co.*, 2003 WL 22772330, at *3-*4 (S.D.N.Y. Nov. 21, 2003). The publication of the notice also amply satisfied the requirements of due process and Rule 23 and alerted

⁴ All the declarations submitted with this motion are gathered in the Compendium of Declarations Relating to Class Plaintiffs' Motion for Final Approval of Class Action Settlements With Bank of America, Capital One, Chase, and HSBC.

⁵ These organizations were Consumer Action, Consumer Federation of America, National Association of Consumer Advocates, National Consumer Law Center, National Consumers League, Public Citizen, Public Justice and United States Public Interest Research Group.

Class members who may have divergent viewpoints to come forward and be heard. *See Hand-schu*, 787 F.2d at 833; *Mendoza v. United States*, 623 F.2d 1338, 1351 (9th Cir. 1980); *Foti*, 2008 U.S. Dist. LEXIS 16511, at *13; *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 298 (W.D. Tex. 2007).

Moreover, although not an official part of the notice campaign, the Settling Defendants have by this time provided nearly all of their cardholding Class members with notice that the arbitration clause has been removed from their card terms.⁶ Specifically, on April 20, 2010, Bank of America began mailing notice of amended cardholder terms to some 48.75 million cardholders, specifically notifying them of the removal of the arbitration clause. (Declarations of Jeffrey Cooney (regarding consumer cardholders) and Bryan Reniker (regarding business cardholders)) Bank of America will substantially complete this mailing – to in excess of 99% of these cardholders – by June 23, 2010. (Declaration of Jeffrey Cooney ¶¶ 3(a) & (b).)⁷ In January and February 2010, Capital One distributed revised “Customer Agreements” to more than 32 million of its cardholders. (Declaration of Caroline P. Hillmar) Beginning In May 2010, account level notification specifically alerted cardholders to the removal of the arbitration clause. (*Id.* at ¶ 5) Chase, in January and February 2010, with a “mop up” mailing in March, distributed new terms to 78 million cardholders, with a cover letter informing them of the removal of the arbitration clause. (Declaration of Andrew T. Semmelman) And, in May, 2010, HSBC distributed revised terms to 16.5 million cardholders. (Declaration of Megan S. Webster) In total, some 175 million cardholder notices were distributed (albeit undoubtedly to some overlapping cardholders). On a practical basis, this provides more extensive notice of the changes in the Settling Defendants’

⁶ Inevitably, some fraction of these notices have been returned due to defective mailing addresses and similar circumstances.

⁷ Some 0.2% of these cardholders will receive the mailing by July 15, 2010. (*Id.* ¶ 3(c).)

conduct than is generally provided in conjunction with a Rule 23(b)(2) settlement, where there can be limited publication notice (if any) concerning defendants' change in conduct. Although these mailings are a part of the Settling Defendants' general notification to cardholders of changes to their cardholding terms, it provides notice far more direct and comprehensive than required.

The Settlements, if approved by the Court, represent an apt and responsible resolution to this complex litigation with respect to the Settling Defendants. The Settlements provide significant and prompt benefits to the Class, including the cessation of enforcement of the Settling Defendants' arbitration clauses and class action ban, removal of the arbitration clauses and class action bans from the Settling Defendants' cardholder documents and a commitment from the Settling Defendants not to readopt the arbitration clauses for a period of at least three and a half years. The Settlements were arrived at only after extensive negotiations, where the merits of the respective parties' positions were thoroughly discussed, evaluated and negotiated by experienced counsel, operating at arm's length, with extensive knowledge of the strengths and weaknesses of their respective claims and defenses. Each of the Settlement Agreements satisfies the criteria for final approval as set forth by the Second Circuit in *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005), and we respectfully submit that these Settlements should be approved by the Court.

II. PROCEDURAL STATEMENT

A. Statement Concerning Related MDL 1409 Matters

This is the third of three related matters. The first is *In re Currency Conversion Fee Antitrust Litigation*, Master File No. 21-95, No. 01-md-1409 (WHP) (S.D.N.Y.). There, plaintiffs

claimed that various defendant banks (including all but two of the Bank Defendants⁸ here), together with MasterCard and Visa, conspired to impose foreign transaction (“FX”) fees on cardholders. This Court first certified the proposed class there on October 15, 2004. *See* 224 F.R.D. 555 (S.D.N.Y. 2004), *on reconsideration*, 361 F. Supp. 2d 237 & 229 F.R.D. 57 (S.D.N.Y. 2005). The settlement received final approval on October 22, 2009 and is now on appeal.

Extensive discovery, including some discovery related to the CCF Bank Defendants’ adoption of arbitration clauses and class bans, was taken in the initial CCF matter. In December 2002, Chase first divulged the existence of the May 25, 1999 Wilmer Cutler meeting, attended by representatives of a number of Bank Defendants and where both the FX fee and arbitration issues were addressed. The CCF plaintiffs later deposed American Express’s in-house counsel (a co-sponsor of the May 25, 1999 meeting) who revealed, after repeated objections by his counsel, the existence of “a few” other meetings. The CCF plaintiffs then served follow-up document requests and interrogatories. The CCF plaintiffs also issued 22 subpoenas to third parties involved in the arbitration meetings. This CCF discovery yielded 21,000-plus pages of documents and the testimony of at least ten fact witness concerning the Bank Defendants’ imposition of class-banning arbitration clauses.

The second matter is *Ross, et al. v. American Express Co., et al.*, No. 04-cv-5723 (WHP), where plaintiffs assert claims against American Express Company, American Express Travel Related Services, Inc. and American Express Centurion Bank (collectively, “Amex”) as a conspirator for collusion on both (i) the FX fees and (ii) the class-banning arbitration clauses on cardholders. This Court certified a Rule 23(b)(2) class there on the arbitration collusion claim.

⁸ The Bank Defendants are Bank of America, Capital One, Chase, Citigroup (which includes Diners Club), Discover and HSBC. Capital One and Discover were not defendants in CCF.

2005 WL 2364969 (Sept. 27, 2005). On January 22, 2010, this Court certified a damages class for the FX fee claim. Summary judgment briefing is currently under way.

B. Statement Concerning This Matter

In this related matter, Plaintiffs allege that the Bank Defendants conspired among themselves and with certain named co-conspirators, including Defendant NAF, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, to foist on their cardholders compulsory arbitration clauses that bar collective remedies.

In their First Amended Class Action Complaint (“Complaint”) (as well as their initial complaint), Plaintiffs prayed for the following relief: (1) class certification; (2) a declaration that Defendants had violated Section 1 of the Sherman Act; (3) “[t]hat Defendants be enjoined from continuing the illegal course of conduct concerning the compulsory arbitration clauses alleged herein”; (4) “[t]hat Defendants’ arbitration clauses be invalidated, declared null and void and stricken from Defendants’ cardholder agreements”; (5) “[t]hat Defendants be required to notify all courts and arbitration forums which have enforced their respective arbitration clauses during the course of the conspiracy as to their illegal conduct in implementing these clauses”; (6) “[t]hat Defendants be required to withdraw all currently pending motions to compel arbitration;” (7) “[t]hat Plaintiffs and other members of the Class recover their costs of this suit, including reasonable attorneys’ fees, as provided by law”; and (8) “[t]hat Plaintiffs and other members of the Class be granted such other, further and different relief that is necessary to prevent a recurrence of the conspiracy.” (Langer PA, Ex. 9)

The initial complaint was filed August 11, 2005. On November 11, 2005, the Bank Defendants moved to dismiss. On January 10, 2006, the Court stayed discovery. On September 20, 2006, the Court dismissed for want of Article III standing. *See In re Currency Conversion Fee Antitrust Litig.*, 2006 WL 2685082 (Sept. 20, 2006). On April 25, 2008, the Court of Appeals

vacated and remanded. *See Ross v. Bank of America, N.A.*, 524 F.3d 217 (2d Cir. 2008). On May 21, 2008, this Court received the mandate. All Bank Defendants other than Discover answered on December 22, 2008. Discover renewed its motion to dismiss, based on its purported opt-out provision, which motion was denied on January 21, 2009. On January 23, 2009, this Court held a status conference to discuss scheduling, among other matters. On February 3, 2009, this Court held a telephonic conference to further discuss scheduling. On February 23, 2009, Discover answered. On March 9, 2009, this Court entered an initial scheduling Order.

On April 13, 2009, the Bank Defendants agreed that they would not oppose the certification of a Rule 23(b)(2) class. On April 15, 2009, Plaintiffs moved to amend their complaint to amplify certain allegations and to add NAF as a defendant, which motion was ultimately unopposed by the Bank Defendants. On June 3, 2009, this Court granted Plaintiffs leave to amend their complaint. On June 11, 2009, Plaintiffs served NAF with the amended complaint.

On April 17, 2009, Plaintiffs moved to consolidate this matter with *Ross v. American Express*, which motion was opposed on May 1, 2009, argued on May 28, 2009, and denied on June 18, 2009, without prejudice to its renewal.

On June 5, 2009, Plaintiffs served on the Bank Defendants the Declaration of Oren Bar-Gill, Plaintiffs' economic expert, concerning class certification.⁹ While Plaintiffs' Counsel was preparing briefing for what they expected to be an unopposed (but not stipulated) motion for class certification, Defendants contacted Plaintiffs to discuss a stipulated order for class certification.

On July 17, 2009, all Defendants other than NAF answered the Complaint. On July 24, 2009, Plaintiffs informed all of the Bank Defendants, except Citigroup, that they intended to

⁹ Dr. Bar-Gill holds both a doctorate in economics (from Tel Aviv University) and a law degree (from Harvard Law School) and is a Professor at the New York University School of Law.

challenge, under Rule 12(f), the adequacy of the pleading of their affirmative defenses under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). After an exchange of letters, those Defendants agreed to amend their answers and replead some of their defenses and to withdraw others. Defendants filed and served their Amended Answers on October 22, 2009.

On September 18, 2009, Plaintiffs and the Bank Defendants transmitted their stipulation on class certification and a proposed Order to the Court. On October 6, 2009, the Court entered the Order certifying the Class and Subclass against the Bank Defendants.

On September 23, 2009, NAF noticed its motion to dismiss under Rules 12(b)(1) and 12(b)(6), and submitted a supporting memorandum and affidavit. On October 28, 2009, Plaintiffs moved for class certification as to NAF. On November 6, 2009, Plaintiffs opposed NAF's motion to dismiss. On December 4, 2009, NAF replied. On January 15, 2010, this Court denied NAF's motion to dismiss in an oral opinion following argument. As of this writing, as the Court has been informed, a tentative accord has been reached between Class Plaintiffs and the NAF.

Discovery with respect to the remaining Defendants – Citigroup and Discover – is winding up. As of this writing, the parties have responded to interrogatories and completed the first wave of document production amounting to more than 120,000 pages of production from both sides (of which, the Bank Defendants account for approximately 117,000 pages and Plaintiffs for approximately 5,000 pages). Second wave document discovery, based on Plaintiffs' follow up requests, is before the Court over a discovery dispute. Deposition discovery is ongoing. Expert discovery will begin shortly.

III. THE SETTLEMENT NEGOTIATIONS

There have been intermittent settlement discussions with various Defendants in this matter. The discussions that culminated in the four proposed Settlements, however, began in or just prior to August 2009, when HSBC requested that Plaintiffs supply it with settlement terms,

which Plaintiffs did on August 19, 2009. Discussions with HSBC continued into September 2009, before breaking off due to various issues unrelated to the negotiations. (Declaration of Merrill G. Davidoff (“Davidoff Decl.”), at ¶ 3)

On or about October 26, 2009, counsel for Plaintiffs and Chase began discussions concerning settlement. From those discussions, counsel developed a ten point settlement plan, which is substantially reflected in the November 20, 2009 Memorandum of Settlement between Plaintiffs and Chase. After several telephonic negotiation sessions, the parties reached accord on or about November 13, 2009. As noted above, Plaintiffs and Chase executed a Memorandum of Settlement on November 20, 2009, which they submitted to the Court. (Davidoff Decl., at ¶ 4)

Only after Plaintiffs and Chase resolved *all* merits issues, did they discuss Chase’s payment of fees and costs as a part of the settlement.¹⁰ (Davidoff Decl., at ¶ 10)

In the next two weeks, separate discussions began with Bank of America and Capital One and resumed with HSBC. (Davidoff Decl., at ¶ 5) Terms were reached with Bank of America on December 11, 2009 and with Capital One on December 17, 2009. (Davidoff Decl., at ¶ 6) The Court was notified of each on the day of agreement. (*Id.*) Talks with HSBC continued over the Christmas Holiday. Terms were reached on December 30, 2009. The parties notified the Court on the next day. (Davidoff Decl., at ¶ 7) Each Memorandum of Settlement was adjusted to reflect issues particular to the Defendant involved. As with Chase, attorneys’ fees were not discussed until all other issues had been resolved. (Davidoff Decl., at ¶¶ 9, 10)

Further extensive, arm’s length and at times complex negotiations took place among the

¹⁰ In the interest of full disclosure, in the course of stating that Plaintiffs would not negotiate fees before resolving the merits issues, Plaintiffs informed Chase that (i) Plaintiffs’ fee and costs demand would be reasonable, (ii) if Chase were the first settling defendant, that the demand on it would be lower, and (iii) if agreement on fees and costs could not be reached, the parties would request that the Court resolve the issue. (Davidoff Decl., at ¶ 9)

settling parties in the weeks leading up to the February 24, 2010 filing of the four final Stipulations and Agreements of Settlement. (Davidoff Decl., at ¶ 8)

IV. TERMS OF THE SETTLEMENTS

Although separate Settlements were reached for each Settling Defendant, the material terms are substantially similar. First, each Settling Defendant agreed immediately to cease enforcing both its arbitration clause and its class action ban, except for certain specifically identified actions in the case of Chase and Capital One.¹¹ (Settlement¹² ¶ 3) Also excluded are pending cases where an arbitration award has already issued, where a judgment has been rendered or an order compelling arbitration has issued. (Settlement ¶ 3(c)) In these circumstances, the Settlement Agreements are intended to preserve the parties' *status quo ante* rights to enforce the clause or to challenge its enforcement.

Second, each Settling Defendant removed its arbitration clause and class action ban and agreed not to re-impose either for a period of three and one-half (3-1/2) years from its removal. (Settlement ¶ 3) The distribution of the notices of this removal is described at p. 3, *supra*.

¹¹ Chase has carved out *Puleo v. Chase Bank USA, N.A.*, No. 08-3837 (3rd Cir.) (decided May 10, 2010, reported at 2010 WL 1838762), and *Pillitteri v. JPMorgan Chase & Co. and Chase Manhattan Bank USA, N.A.*, No. 05 Civ. 1164 (SDNY), both of which concern whether a court or the arbitrator should decide whether class arbitration is allowed. *Caban v. J.P. Morgan Chase*, No. 09-12200 (11th Cir.), which had been carved out in the Chase Memorandum of Settlement, has since settled. Capital One carves out *Whitman v. Capital One Bank (USA), N.A.*, No. WMN-09-1737 (D. Md.) (Nickerson, J.); *Lee v. Capital One Bank*, No. 3:07-CV-04599 MHP (N.D. Cal.) (Patel, J.); and *McAtee v. Capital One. F.S.B.*, No. 04CC08544 (Super. Ct. Orange Co. Cal.) (Sundvold, J.). *Whitman* was ordered to arbitration on November 19, 2009, which order was not final as of the Memorandum of Settlement. *Lee*, which challenged the insertion of arbitration clauses, was dismissed for want of Article III standing, which dismissal was affirmed at the court of appeals, yet formally remains pending. *McAtee* is a "headless" class case where plaintiffs are seeking to find a new representative after the initial representative was disqualified.

¹² Reference is to the paragraphs of the proposed Settlement Agreements annexed as Exhibits 1 through 4 to the Langer PA Declaration. The paragraph references are the same for each agreement.

Third, each Settling Defendant has agreed that anyone 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)) This provision prevents collection agencies, which purchase credit card debts, from enforcing the arbitration clause (or class ban) for debts incurred when that clause was in effect. The effective date for this provision is slightly delayed from the time when the banks themselves are ceasing enforcement due to various logistical and contractual issues relating to the transfer of collectible debts. For Bank of America, this clause became effective on February 1, 2010. For Chase, it will be effective for such contracts entered into after April 1, 2010; for Capital One, on April 1, 2010; and for HSBC, on March 31, 2010.

Further, the Settling Defendants have each agreed that the Settlement Agreements will apply to card portfolios they acquire during the Forbearance Period. (Settlement ¶ 13(a)) This insures that all those who hold cards from a Settling Defendant will receive the protections of this Settlement. This provision extends the Settlement Agreement to those who become their cardholders during the Forbearance Period as well as those who are now their cardholders. It also eliminates the complexities that could arise for Class members who could otherwise have multiple cards from a Settling Defendant where some cards would be subject to the Settlement and others would not.

Finally, 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)) This prevents the re-emergence of collusion in the future.

Not only do the Settlement Agreements provide these benefits to the Class, they come at relatively small cost to the Class. The Class is receiving much of the relief it sought. Further,

the Settlements interpose no obstacle to further relief for those Class members who have been injured as a result of the actual invocation of the arbitration clause or class ban. Such claims are beyond the scope of the release. (Settlement ¶¶ 2(h), 2(aa)) The release in these Settlement Agreements is limited to the Settling Defendants' liability with respect to the *inclusion* of arbitration clauses or class action bans. 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).

The Settlements also provide for the cooperation of the Settling Defendants in the remaining discovery in this matter. (Settlement ¶ 5) Cooperation includes the offer of up to eight (8) witnesses for deposition or trial for each of the Settling Defendants. The Settlements expressly do not abrogate any legislation or regulation governing arbitration clauses or class bans between credit card issuers and their cardholders. (Settlement ¶ 11)

Finally, the Settlements provide that the Settling Defendants will make a payment to defray Plaintiffs' Counsel's attorneys' fees, expenses and notice costs. (Settlement ¶ 15) Bank of America will pay \$600,000; Capital One, \$650,000; Chase, \$700,000; and HSBC, \$400,000. These amounts are only a portion of Plaintiffs' "lodestar" to date.

V. BENEFITS OF THE SETTLEMENT

These Settlements represent a major victory for consumers and small businesses. Some ten years ago, the major credit card issuers imposed arbitration clauses and class action bans on their cardholders collusively. The effect of these clauses has been to impede, if not to preclude, these consumers and small businesses from any meaningful ability to vindicate their rights 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 transactions fees).

For the first time since these clauses went into effect, 175 million cardholder accounts – likely more than 100 million consumers and small businesses, after allowing for duplicates – are now freed from these clauses. This is meaningful relief. These cardholders now will be able to vindicate their rights, and their fellow cardholders’ rights, by challenging abusive practices through class proceedings – often, the only realistic means for these claims to be pursued. More importantly, they can be represented as absent class members in proceedings brought for their benefit, a valuable right assuring the deterrence of abusive practices, as the Court of Appeals recognized when reinstating Plaintiffs’ claims following their dismissal. *See Ross v. Bank of America, N.A.*, 524 F.3d 217, 224 (2d Cir. 2008).

VI. THE PROPOSED SETTLEMENTS ARE FAIR, REASONABLE AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT

A. Standards for Assessing Whether a Class Action Settlement Is Fair, Reasonable and Adequate

Federal courts have repeatedly and consistently recognized a universal and long-standing policy favoring the settlement of complex class actions, so as to encourage voluntary, mutually advantageous compromises and conserve judicial and private resources. *See McReynolds*, 588 F.3d at 803 (discussing the “strong judicial policy in favor of settlements, particularly in the class action context”); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) (“We are mindful of the ‘strong judicial policy in favor of settlements, particularly in the class action context.’”) (citation omitted); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (“There are weighty justifications, such as reduction of litigation and related expenses, for the general policy favoring the settlement of limitation.”) (citation omitted). This policy should apply with added force in cases seeking only conduct-related relief, as a negotiated outcome gives the parties flexibility to order the settlement to their respective advantages, where a fully litigated outcome may be unable to produce a result as well tuned to the parties’ respective interests (*i.e.*,

a litigated outcome may direct relief that is more costly to the defendants and less beneficial to the plaintiffs than the relief that they negotiate themselves).

These proposed Settlements manifestly satisfy the standards for final approval. The Court must determine whether the negotiation of the settlement was procedurally fair and the terms of the settlement are substantively fair. *In re Warner Chilcott Ltd. Secs. Litig.*, 2009 U.S. Dist. LEXIS 58843, at *5 (S.D.N.Y. July 10, 2009). The Second Circuit has set forth nine factors that a district court should generally consider in determining whether the substance of a proposed class action settlement is fair, reasonable and adequate, although not all of the factors are applicable to a settlement for conduct-based relief:

- i. the complexity, expense and likely duration of the litigation;
- ii. the reaction of the class;
- iii. stage of the proceedings and the amount of discovery undertaken;
- iv. the risks of establishing liability;
- v. the risk of establishing damages¹³;
- vi. the risk of maintaining the class action through trial¹⁴;
- vii. the ability of the defendants to withstand a greater judgment¹⁵;
- viii. the range of reasonable settlements in light of the best possible resolution; and

¹³ Because the Complaint seeks only injunctive relief, this factor is also inapplicable. *See Selby*, 2003 WL 22772330, at *2 (“Those factors most relevant to the settlement of an action seeking purely injunctive relief are the reaction of class members to the settlement, the state of the proceedings and the amount of discovery completed, the terms of the settlement, the costs and risks of continued litigation, and the likelihood of recovery.”).

¹⁴ As the Settling Defendants have stipulated to class certification, this factor is inapplicable. *See Cinelli v. MCS Claim Servs., Inc.*, 236 F.R.D. 118, 122 (E.D.N.Y. 2006) (granting final approval of a settlement in a Fair Debt Collection Practices Act case and finding that the risks of maintaining the class through trial were “a minor consideration” where it was unlikely that the defendant would have opposed class certification); *Women in City Gov’t United v. New York*, 1986 WL 7018, at *8 (S.D.N.Y. June 17, 1986) (granting final approval of a settlement where the parties stipulated as to class certification).

¹⁵ *See, supra*, n. 13.

- ix. the range of reasonable settlements to a possible resolution in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974). “A court need not find that every factor militates in favor of a finding of fairness; rather, a court ‘considers the totality of these factors in light of the particular circumstances.’” *Foti*, 2008 U.S. Dist. LEXIS 16511, at *16 (quoting *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004)). In addition to establishing the procedural and substantive fairness of the settlement, Federal Rule of Civil Procedure 23(e) requires that adequate notice of the settlement be provided and that the proposed settlement is the subject of a fairness hearing. Fed. R. Civ. P. 23(e)(1)-(2).

B. The Negotiations and the Presumption of Fairness

Class action settlements receive a presumption of fairness when they are the product of arm’s length negotiations following meaningful discovery. *See McReynolds*, 588 F.3d at 803 (“We have recognized a presumption of fairness, reasonableness, and adequacy as to the settlement where ‘a class settlement [is] reached in arm’s length negotiations between experienced, capable counsel after meaningful discovery.’”) (quoting *Wal-Mart*, 396 F.3d at 116); *Warner Chilcott*, 2009 U.S. Dist. LEXIS 58843, at *5. “So long as the integrity of the arm’s length negotiation process is preserved ... a strong initial presumption of fairness attaches to the proposed settlement.” *In re Holocaust Victim Assets Litig.*, 2007 WL 805768, at *23 (E.D.N.Y. Mar. 15, 2007) (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998)); *see also In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 510 (E.D.N.Y. 2003).

The negotiation process for these proposed Settlements is described, *supra* at III. Highly experienced counsel on both sides negotiated the terms. *See In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 122 (S.D.N.Y. 2009) (describing class and defense counsel as hav-

ing “extensive experience with class actions,” many of whom were also involved in the instant negotiations). The arm’s length settlement negotiations addressed several complicated issues in multiple telephone conferences and other communications. Plaintiffs’ Counsel were able to effectively and critically evaluate the litigation and propriety of the proposed terms, in light of the rulings from this Court and the Court of Appeals and the discovery record.

C. The Terms of the Settlements Are Fair, Reasonable, and Adequate

1. Complexity, Expense and Likely Duration of the Litigation

As the Court noted in *Currency Conversion*, “[a]ntitrust cases, by their nature, are highly complex.” *Currency Conversion*, 263 F.R.D. at 123 (quoting *Wal-Mart*, 396 F.3d at 122); *Weeseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (antitrust class actions “are notoriously complex, protracted, and bitterly fought”). *See also Cinelli*, 236 F.R.D. at 121 (“[G]iven the complexity of any class action lawsuit, it is reasonable to assume that continued litigation would have required extensive time and expense.”). The parties have raised novel legal issues. The case has been reviewed at the Court of Appeals, vacated and remanded. *See Currency Conversion*, 263 F.R.D. at 123 (referring to “complex questions about the reach of arbitration clauses embedded in cardholder agreements” that are “still percolating in the Court of Appeals...with an uncertain outcome”). There is a voluminous record. In the absence of these Settlements, this case would continue to be strenuously contested by all Defendants. All Defendants, including those now settling, have demonstrated their ability to defend this case vigorously through and beyond trial. They are represented by some of the most able counsel in the United States.

The expense and delay of continued litigation of this complex antitrust class action against the Settling Defendants would be substantial. Discovery, although advanced, is not complete. Expert discovery regarding the merits has yet to begin. Inevitably, lengthy and onerous

summary judgment proceedings would ensue. Trial preparation and trial would command even greater effort, time and expense. Trial would likely take weeks and involve a multitude of attorneys, witnesses, experts, the introduction of voluminous documentary and deposition evidence, vigorously contested motions and the expenditure of vast judicial and counsel resources. Post-trial motions and appeals would further delay resolution with respect to the Settling Defendants for years.¹⁶

2. The Reaction of the Class

The deadline for objection to the approval of these Settlements is June 11, 2010, two weeks from the date of this writing. It would be premature for Plaintiffs to evaluate this factor prior to their June 25, 2010 reply date.

To date, one objection (which was directed to the Court) has been received. The writer, Alexander MacKenzie, who seems to object to the presence of the arbitration clause, appears to believe, incorrectly, that attorneys' fees are being assessed against class members in connection with this settlement.

3. Stage of the Proceedings and the Amount of Discovery Undertaken

Courts consider the stage of the proceedings and the discovery completed "to determine whether the parties had ample information to make informed decisions as to the terms" of the settlement. *Cinelli*, 236 F.R.D. at 121; *see also D.S. v. New York City Dep't of Educ.*, 255

¹⁶ *See Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) (approval granted where "[d]elay, not just at the trial stage but through post-trial motions and the appellate process, would cause Class Members to wait years for any recovery, further reducing its value"); *Visa Check*, 297 F. Supp. 2d at 510 (fact that the class faced a long trial and the additional time it would take to exhaust all appeals "weigh[ed] heavily in favor of approving Settlements"); *New York v. Nintendo, Inc.*, 775 F. Supp. 676, 681 (S.D.N.Y. 1991) (in an antitrust action, settlement agreement approved where the court held: "If the litigation proceeds to trial, it no doubt will be complex, protracted and costly. Even if [plaintiffs] ultimately prevail, it could be years before consumers received any meaningful restitution.").

F.R.D. 59, 77 (E.D.N.Y. 2008) (determining whether “[t]he amount of discovery undertaken has provided plaintiffs’ counsel ‘sufficient information to act intelligently on behalf of the class’ in reaching a settlement”) (citation omitted); *Currency Conversion*, 263 F.R.D. at 123 (finding the parties “fully understood the factual landscape and the uncertainties confronting them”).

Here, counsel unquestionably has the information necessary to evaluate the strengths and weaknesses of the claims and the Settlements. This action has been litigated for more than four years. At every stage, Defendants have aggressively asserted defenses and expressed their belief that Plaintiffs would not prevail on their claims. By the time the Settlements were reached, Plaintiffs had conducted comprehensive document discovery, reviewed and analyzed over a 115,000 pages of newly produced documents from the Defendants here, as well as hundreds of thousands of pages produced in the initial *In re Currency Conversion Fee Antitrust* matter, served a class expert report, engaged in intense motion practice and successfully prosecuted an appeal in the Court of Appeals. Plaintiffs’ Counsel has a full understanding of the strengths and weaknesses of the claims and the difficulties a trial would entail. *See Cinelli*, 236 F.R.D. at 121. Having sufficient information to fully evaluate the strengths and weaknesses of the Class’ claims, Plaintiffs’ Counsel have settled this litigation on terms very favorable to the Class. Since the preliminary approval of the Settlements *sub judice*, discovery has continued apace as to the non-settling defendants Citigroup and Discover. This contested discovery only further reflects the vigor with which the non-settling defendants contest Plaintiffs’ claims and the strength of those defendants’ faith in their factual arguments. These Settlements reduce risk to the Class, while providing them with substantial benefits, including the elimination of 175 million arbitration clauses and class action waivers.

4. The Risks of Establishing Liability and Damages, and Comparison of the Settlement with the Likely Result of Litigation¹⁷

When weighed against the risks of continued litigation, the proposed Settlements compare favorably with the results that could have been obtained after trial and the exhaustion of appeals. The risks as well as the burdens of continued litigation have been weighed in discussing the complexity of this litigation.¹⁸ *See supra* at 15.

Plaintiffs have achieved much of the relief they sought in their prayer for relief. Plaintiffs prayed for class certification and have received it. (Prayer ¶ A) Plaintiffs demanded that Defendants' arbitration clauses and class bans be stricken (Prayer ¶ D), and they are being stricken for three and one-half years. Plaintiffs asked that Defendants be enjoined from enforcing their arbitration clauses (Prayer ¶ F), and here the Settling Defendants have agreed not to enforce their arbitration clauses until the end of the Forbearance Period. Plaintiffs sought to enjoin Defendants' continued collusion with respect to arbitration and class action bans (Prayer ¶ C), and the Settling Defendants have agreed not to "contract, combine or conspire" as to these clauses. Plaintiffs sought award of counsel's fees, expenses and costs (Prayer ¶ G), and the Settling Defendants have agreed to make a reasonable partial payment of Plaintiffs' litigation costs.¹⁹

¹⁷ Because there is substantial overlap in the discussion of the litigation risks and the likely result of litigation, these factors are discussed together for economy's sake.

¹⁸ Because claims remain pending against two non-settling Defendants, it is not reasonable for Plaintiffs' Counsel to articulate the risks they perceive in prosecuting their claims. To do so would reveal Plaintiffs' litigation strategy to the non-settling Defendants and would prejudice the continued prosecution of their claims. *See Manual for Complex Litigation* §21.651, at 329 (4th ed. 2004) ("Given that the litigation might continue against other defendants, the parties may be reluctant to disclose fully and candidly their assessment of the proposed settlement's strengths and weaknesses that led them to settle separately."); *In re Fine Paper Antitrust Litig.*, 1979 WL 1743, at *2 (E.D. Pa. Oct. 2, 1979). Further, because Plaintiff Ross and the class, represented by overlapping counsel, prosecuting related claims against alleged co-conspirator American Express in the related action *Ross, et al. v. American Express Co., et al.*, 04-CV-05723, such disclosure could prejudice those claims as well.

¹⁹ Three of Plaintiffs' prayers for relief are unanswered by the Settlements: their demand that

Plaintiffs have also achieved relief beyond that which they requested in the Complaint. The proposed Settlements bar the purchasers of card debts from invoking the Settling Defendants' arbitration clauses and class bans. The proposed Settlements also apply to after-acquired portfolios, also extending relief beyond that which could be requested in the Complaint, as it provides benefits to those who are not yet members of the Class.

The duration of the equitable relief is appropriate. In the antitrust conspiracy context, injunctions last only as long as necessary to undo the effects of the violation. *See New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 184 (D.D.C. 2002). While there are arguments for a lengthier Forbearance Period, some private antitrust cases have imposed injunctions lasting only three to five years. *See Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1447 (6th Cir. 1990) (monopolization; five years); *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 184 (D.D.C. 2002) (monopolization and § 1 tying; five years); *In re Toys R Us Antitrust Litig.*, 191 F.R.D. 347, 350 (E.D.N.Y. 2000) (§ 1 vertical and horizontal agreements; three years); *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 883 F. Supp. 1247, 1268-69 (W.D. Wis. 1995) (price-fixing; three years); *Coleman v. Cannon Oil Co.*, 849 F. Supp. 1458, 1471-72 (M.D. Ala. 1993) (price-fixing; three years); *but see Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1227-28 (9th Cir. 1997) (price-fixing & monopolization; ten years).

In short, the conduct-based relief provided – the removal of the Settling Defendants' arbitration clauses and class action waivers, their (and their assignees') refraining from enforcing those clauses and their agreement not to again violate the antitrust laws with respect to such

Defendants' collusion be declared unlawful (Prayer ¶ B); their request for additional miscellaneous relief (Prayer ¶ H); and their request that Defendants notify courts and arbitral fora that Defendants' arbitration clauses and class action bans were the product of unlawful agreement (Prayer ¶ E). Settlements are compromises, reflecting concessions on both sides. Class Plaintiffs have gotten most of what they sought.

clauses – gives Plaintiffs much of what they had sought and for a suitable period of time. *See Selby*, 2003 WL 22772330, at *3 (granting final approval of a settlement where “[t]he proposed injunctive relief adequately addresses the problem that was originally alleged”); *Women in City Gov’t United*, 1986 WL 7018, at *9 (approving a settlement for relief that provided “virtually all the relief requested”).²⁰

As the court stated in *W. Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff’d*, 440 F.2d 1079 (2d Cir. 1971):

It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced. Merely by way of example, two instances in this Court may be cited where offers of settlement were rejected by some plaintiffs and were disapproved by this Court. The trial in each case then resulted unfavorably for plaintiffs....

See also NASDAQ, 187 F.R.D. at 475; *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 65 (S.D.N.Y. 1993).

VII. THE NOTICE PLAN PROVIDED REASONABLE NOTICE

Rule 23(e)(1) requires only that notice be made in “*a reasonable manner to all class members who would be bound by the propos[ed settlement].*” FED. R. CIV. P. 23(e)(1) (emphasis

²⁰ In exchange for the substantial change in the Settling Defendants’ conduct, the Plaintiffs are agreeing to a relatively narrow release that releases only the minimal damages claim that Class members could have asserted for the injury they incurred from the insertion and maintenance of the Settling Defendants’ arbitration clauses (and class action bans) as card terms. The release preserves other claims against the Settling Defendants for claims, including for damages, that class members may have from the invocation or use of either the arbitration clauses or the class action bans. Any aggrieved member of the Class may still bring those claims. The narrowness of the release also favors approval of the settlement as fair, reasonable and adequate. *See Selby*, 2003 WL 22772330, at *3 (approving structural relief settlement that included a “very narrow release” that preserved “options to pursue claims for monetary relief through individual or class suits”); *Foti*, 2008 U.S. Dist. LEXIS 16511, at *18 (approving an “injunction-only” settlement that “does not preclude individual class members from seeking statutory damages”).

added).²¹ As to requests for attorneys' fees, Rule 23(h)(1) requires only that notice be "directed to class members in a reasonable manner" on "motions by class counsel" for the award of fees.

"Notice must be 'reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections' and must express no opinion on the merits of the settlement." *Handschu*, 787 F. 2d at 832-33 (quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950)). As the Court of Appeals has explained, "[t]he notice must be of such nature as reasonably to convey the required information ... and it must afford a reasonable time for those interested to make their appearance." *McReynolds*, 588 F.3d at 804 (quoting *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983) (emendation, ellipsis supplied). "Subject to these requirements, however, the district court has virtually complete discretion as to the manner of giving notice to class members." *Handschu*, 787 F.2d at 833. The notice need not describe the settlement in detail. *See Handschu*, 787 F.2d at 832-33; *DeHoyos*, 240 F.R.D. at 298.

The method, form and content of the notice were in accordance with the Preliminary Approval Order and exceed the requirements of Rule 23 and constitutional due process. With respect to the content, the notice contained a description of the class action and proposed Settlements, an explanation of how to object to the Settlements, and information about the scheduled

²¹ The "reasonable notice" requirement of Rule 23(e)(1) is less demanding than the "the best notice that is practicable" required under Rule 23(c)(2)(b) for damages classes certified pursuant to Rule 23(b)(3). *Compare* FED. R. CIV. P. 23(c)(2)(b) ("the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort") *with* FED R. CIV. P. 23(e)(1) ("[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal."). Further, Rule 23(c)(2) provides for mandatory contents of notice to a Rule 23(b)(3) class, including apprising class members of their right to opt out. FED. R. CIV. P. 23(c)(2)(b)(i-vii). Those requirements do not apply to Rule 23(b)(2) classes.

fairness hearing. *See D.S.*, 255 F.R.D. at 79 (granting final approval where the settlement included similar content).

As to the method, also discussed *supra* at p. 3, the notice was published in two national newspapers (*Wall Street Journal* and *USA Today*), which each have a circulation in excess of two million people, as well as the *ABA Journal*, which reaches hundreds of thousands of attorneys across the United States. In addition, the notice was distributed over *PR Newswire* and directly to consumer advocacy organizations. Although not part of the formal notice plan, the Settling Defendants also have provided or are providing cardholding Class members with individual notice of the deletion of the arbitration provision in their cardholder agreements.

The courts examining the requisite notice for Rule 23(b)(2) settlements have uniformly found that publication notice constitutes “reasonable notice.” *See McReynolds*, 588 F.3d at 797, 804-05 (approving notice by publication, posting in Children’s Services offices, and distribution to foster care agencies); *Handschu*, 787 F. 2d at 832-33 (publication notice of settlement in civil rights suit challenging police surveillance of political groups); *Meacham v. Wing*, 227 F.R.D. 232, 235 (S.D.N.Y. 2005) (approving notice by posting in public assistance offices, mailing to advocacy groups, and on website for settlement of suit challenging review procedures for public assistance); *see also Mendoza v. United States*, 623 F.2d 1338, 1351 (9th Cir. 1980) (publication notice re school discrimination suit); *DeHoyos*, 240 F.R.D. at 295-98 (approving publication notice on settlement of case alleging racial and ethnic discrimination in auto insurance rates); *Allen v. Alabama State Bd. of Educ.*, 190 F.R.D. 602, 606 (M.D. Ala. 2000) (publication notice and mail to deans of state teachers’ colleges re settlement changing method for certifying new public school teachers); *Vaughns v. Board of Educ.*, 18 F. Supp. 2d 569, 578-79 (D. Md. 1998) (publication notice regarding settlement of school discrimination suit). Indeed, where there is no

prejudice to absent class members, courts in this district have gone so far as to approve class settlement in Rule 23(b)(2) cases with *no* notice to absent class members. See *Selby*, 2003 WL 22772330, at *4 (approving settlement of ERISA claims without notice); cf. *Green v. American Express Co.*, 200 F.R.D. 211, 212-13 (S.D.N.Y. 2001) (Baer, J.) (structural Settlement of TILA claims without notice to class).

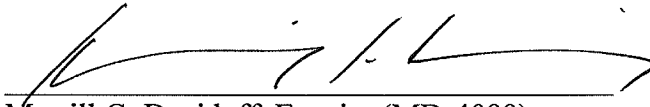
The notice program's sufficiency is further highlighted by the fact that the Settlements preserve any other claims the Class members may have against the Settling Defendants, including for damages, that they may have incurred from the invocation or use of either the arbitration clauses or the class action bans. *Foti*, 2008 U.S. Dist. LEXIS 16511, at *13 ("Because the Agreement explicitly preserves the individual rights of class members to pursue statutory damages against the defendant, and because the relief in this Rule 23(b)(2) class action is injunctive in nature, notice was not required."); *Selby*, 2003 WL 22772330, at *4 (refusing to require notice where "[s]ettlement of the instant case will not prejudice absent class members, who...effectively retain their rights to sue for any damages they may have incurred from the alleged practice").

VIII. CONCLUSION

For all the reasons set forth above, Class Plaintiffs respectfully submit that the Court should grant the motion for final approval of these Settlements.

DATED: May 28, 2010

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