

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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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 OF LAW IN SUPPORT OF CLASS PLAINTIFFS' MOTION FOR  
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT WITH THE  
NATIONAL ARBITRATION FORUM**

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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 of Law in Support of Class Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement with National Arbitration Forum.

## **I. INTRODUCTION**

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure (“Rules”), Class Plaintiffs respectfully move for the preliminary approval of a proposed settlement agreement reached with one of the seven current and former defendants in this action. The proposed settlement is with the National Arbitration Forum, Inc. (“NAF”).<sup>1</sup> This is an incremental settlement: (i) it adds one defendant to the settlements entered into by four prior defendants in this matter, and (ii) it expands the relief in the NAF’s prior settlement with the State of Minnesota to a class of cardholders – business entities – that had not been covered by that settlement. The settlement is contained in the Memorandum of Settlement with National Arbitration Forum, Inc. (“Settlement” or “Settlement Agreement”) attached as Exhibit 1 to the accompanying Declaration of David A. Langer (“Langer Decl.”).

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<sup>1</sup> The non-settling defendants are (i) Citigroup Inc, Citibank (South Dakota), N.A., Citibank USA, N.A., Universal Financial Corp., Universal Bank, N.A., Citicorp Diners Club Inc (together, “Citigroup”); and (ii) Novus Credit Services, Inc., Discover Financial Services, and Discover Bank (“Discover”).

On July 16, 2010, the Court granted final approval of settlement agreements reached with (i) JPMorgan 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 Corporate and HSBC Bank Nevada, N.A. (“HSBC”; collectively, with Citi and Discover, the “Bank Defendants”).

This Settlement warrants preliminary approval. It is well ““within the range of possible approval.”” *In re Warner Chilcott Ltd. Sec. Litig.*, 2008 WL 5110904, at \*1 (Nov. 20, 2008) (Pauley, J.) (quoting *In re Prudential Sec. Inc. Ltd. P’ship Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995) (Pollack, J.)). It was reached through arm’s-length negotiations among experienced counsel who had the benefit of extensive document discovery in this matter, as well as the complete record from *In re Currency Conversion Fee Antitrust Litigation* (“CCF I”), No. 01-md-1409 (WHP), Master File No. 21-95, and following rulings on the merits in this Court and the Court of Appeals. The Settlement delivers substantial and immediate benefits to the Class. The NAF agrees that it shall neither administer nor process any new credit card arbitration disputes involving business entities in their capacity as cardholders (“Business Card Arbitrations”), commencing on the Court’s preliminary approval of this Settlement and thereafter for a three and one-half (3.5) year “Forbearance Period.” (¶ 2)<sup>2</sup> The NAF has promised (and has provided) cooperation in discovery regarding the Class’s claims against the remaining defendants, Citigroup and Discover. (¶ 9) The NAF also agrees to stipulate to the Court’s October 6, 2009 Order certifying the Class and Subclass. (¶ 1) Finally, the NAF has agreed to pay \$125,000 to cover a portion of Plaintiffs’ attorneys’ fees and litigation expenses, including the cost of notice. (¶ 5) In addition to the Settlement, the NAF has entered into a Consent Agreement with the State of Minnesota, dated July 28, 2009 (the “Consent Judgment”), which precludes it, on or after July 24, 2009, from, *inter alia*, administering or processing any new arbitrations involving a dispute between a business entity and a private individual (“Consumer Arbitrations”) and attempting to influence the outcome of any arbitration proceedings currently pending before it.

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<sup>2</sup> Reference is to the paragraphs of the proposed Settlement Agreement annexed as Exhibit 1 to the Langer Declaration.

In return, the NAF is accepting a release from the Class that is significantly limited in scope. The Settlement releases only the *de minimis* damages claim that Class members could have asserted for the injury they incurred from the insertion and maintenance of the Bank Defendants' arbitration clauses (and class action waiver clauses) as card terms. (¶ 4(a)) The release does *not* release the NAF from claims, including claims for damages, that class members may have from the *invocation* or *use* of either the arbitration clauses or the class action waiver clauses. (¶ 4(c)) Any aggrieved member of the Class may still bring those claims. (¶ 4(c)) The release also does not alter or affect the rights of the parties in any of the following matters currently pending against the NAF: (i) *In re National Arbitration Forum Trade Practices Litigation*, MDL No. 10-2122 (PAM/JSM), and the cases coordinated thereunder; (ii) *California v. National Arbitration Forum, et al.*, Case No. CGC-08-473569 (Cal. Super. Ct., S.F. City); and (iii) *Townsend v. National Arbitration Forum, et al.*, Case No. 2:09-CV-09325-VBF-RNB (C.D. Cal.). (¶ 4(d)).

The incremental quality of the settlement, the character of the release, the injunctive nature of both the claims and the settlement, and the practical experience from the prior settlements, renders notice unnecessary under the Rules and applicable case law. Class Plaintiffs, however, have devised and propose here a limited notice program – more fully described in the Notice Plan (Exhibit 2 to the Langer Decl.) – adapted to the unique circumstances of this case. The standards of reasonable and appropriate notice in the present circumstances would be satisfied by publication notice via the existing settlement website in conjunction with direct notice to consumer advocacy organizations and to those Class Members who responded to the prior notice campaign, either formally to the Court or by email to the settlement website.

Courts in this district have held that a settlement may be approved without notice to the class when the settlement (i) provides near complete relief, (ii) provides only injunctive relief, (iii) bears no evidence of collusion among the parties, or (iv) is such that the cost of notice “would risk eviscerating” the settlement. *See Green v. American Express Co.*, 200 F.R.D. 211, 212-13 (S.D.N.Y. 2001) (Baer, J.) (injunctive settlement of TILA claims without notice); *see also Selby v. Principal Mut. Life Ins. Co.*, 2003 WL 22772330, at \*4 (S.D.N.Y. Nov. 21, 2003) (Carter, J.) (settlement of ERISA claims without notice). This Court would be well within its discretion to review the Settlement *sub judice* without notice to the class: the instant Settlement provides near complete relief and contains a narrow release, while the cost of conventional publication notice would overwhelm the recovery of attorneys’ fees and costs.<sup>3</sup>

Although omitting notice altogether meets the applicable legal standard, in deference to the class and in recognition of the *de minimis* release of claims, Plaintiffs’ Counsel propose limited publication notice (as well as direct notice to class members who have made previous written inquiry and to consumer advocacy organizations). The Court and the parties here have the benefit of experience from the prior four settlements. That experience provides that publication notice via the [arbitration.ccfsettlement.com](http://arbitration.ccfsettlement.com) website produced the best and most efficacious notice. The prior publication notice – which cost over \$130,000 to implement – produced two responses from the class, one in support of the settlement and one, which did not evidently understand the settlement, in protest. (Neither of these two responses to the Court stated where they observed notice.)

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<sup>3</sup> It should be noted that the proposed recovery of attorneys’ fees amounts to approximately 1.4% of all Plaintiffs’ counsel’s lodestar as of October 21, 2011. When combined with the prior recovery, counsel will receive less than 26% of their accrued lodestar as of that date (this figure is not adjusted to reflect that portion of the recovery paid to cover expenses). Counsel have accrued more than \$8,900,000 in fees since that date.

A “district court has virtually complete discretion as to the manner of giving notice to class members.” *Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986). Here, the pre-existing Settlement website is the appropriate manner for giving publication notice. Publication notice in this manner 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*, 787 F. 2d at 832-33; *Meacham v. Wing*, 227 F.R.D. 232, 235 (S.D.N.Y. 2005); *see generally infra* at 17-19.

The purpose of notice is to alert Class members who may have divergent viewpoints to come forward and be heard. *See Handschu*, 787 F.2d at 833; *Mendoza v. United States*, 623 F.2d 1338, 1351 (9th Cir. 1980); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 298 (W.D. Tex. 2007). The proposed notice plan should provide more than sufficient notice to provoke class members with divergent views (if there are any) to come forward and be heard. The proposed Notice Plan amply satisfies the requirements of due process and Rule 23 while ably serving the underlying purpose of notice.

In sum, this Court should preliminarily approve this Settlement because it is “sufficiently fair, reasonable and adequate....” *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 1997 WL 805062, at \*24 (S.D.N.Y. Dec. 31, 1997) (“NASDAQ”) (citation omitted).

## **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, 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 reconsid.*, 361 F.

Supp. 2d 237 & 229 F.R.D. 57 (S.D.N.Y. 2005). The settlement received final approval on October 22, 2009. Several appeals, all recently withdrawn, were taken. The *CCFI* settlement is now in distribution.

In *CCFI*, plaintiffs vigorously pursued discovery of meetings among the co-conspirators. In 2002, Chase revealed the existence of the May 25, 1999 Wilmer Cutler meeting, attended by representatives of a number of Bank Defendants at which both the FX fee and arbitration were addressed. At his deposition, American Express's in-house counsel (a co-sponsor of the May 25, 1999 meeting) revealed the existence of numerous meetings, including those of the "Arbitration Coalition." The *CCFI* plaintiffs served document requests and interrogatories targeting information about arbitration and issued 22 subpoenas to third parties on arbitration.

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 co-conspirator for collusion on both (i) the FX fees and (ii) the class-banning arbitration clauses on cardholders. On September 15, the parties there reached a settlement as to the damages claim. Preliminary approval is pending.

## **B. Statement Concerning This Matter**

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

The initial complaint was filed August 11, 2005. On November 11, 2005, the Bank Defendants moved to dismiss. 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). All Bank Defendants other than Discover answered on December 22, 2008. Discover renewed its motion to dismiss, which motion was denied on January 21, 2009. On February 23, 2009, Discover answered. On April 13, 2009, the Bank Defendants agreed that they would not oppose the certification of an injunctive relief class.

On April 15, 2009, Plaintiffs moved to amend their complaint to amplify certain allegations and to add the NAF as a defendant, which motion was ultimately unopposed by the Bank Defendants. On June 3, 2009, this Court granted Plaintiffs leave to amend. On September 18, 2009, Plaintiffs and the Bank Defendants transmitted a 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, the NAF moved to dismiss. On October 28, 2009, Plaintiffs moved for class certification as to the NAF.<sup>4</sup> On November 6, 2009, Plaintiffs opposed the NAF's motion to dismiss. On December 4, 2009, the NAF replied. On January 15, 2010, this Court denied the NAF's motion to dismiss.

Fact discovery (with certain limited exceptions) closed on October 30, 2010. The parties have responded to interrogatories and completed the first wave of document production amounting to more than 130,000 pages of production from both sides (of which, the Bank Defendants and NAF account for approximately 127,000 pages and Plaintiffs for approximately 5,000 pages). Expert discovery is completed. On November 7, 2011, the Court heard oral argument on the remaining defendants' motion for summary judgment.

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<sup>4</sup> As a provision of the Settlement, the NAF agrees to stipulate to and does not contest the findings contained in the October 6, 2009 Order certifying the Class and Subclass. It agrees to be bound by that Order and agrees to the certification of the Class and Subclass there defined regarding the claims against it. (¶ 1)

There have been four prior settlements resolving claims against Chase, Bank of America, Capital One, and HSBC. The parties submitted final settlement agreements (as contemplated in each of four memoranda of settlement) on February 24, 2010.

On February 28, 2010, Plaintiffs moved for preliminary approval of these settlements. There were two objections to preliminary approval, based on the effect of the settlement on then-pending claims against Chase, both of which were resolved by agreement between Chase and the objectors. On March 12, 2010, the Court heard argument and, on March 18, 2010, granted preliminary approval. On May 28, 2010, Plaintiffs moved for final approval and for an award of fees. There was one letter objection to these settlements and one submission in support. On July 15, 2010, the Court heard argument. On July 22, 2010, the Court granted final judgment as to Bank of America, Capital One, Chase and HSBC.

On May 10, 2011, Plaintiffs and defendants Citigroup and Discover served their respective motions for summary judgment. Briefs in opposition to summary judgment motions were served on July 12, 2011, and reply briefs were served on August 18, 2011. Oral argument on the motions was held on November 7, 2011.

**C. Proceedings in and Settlement of *Minnesota v. National Arbitration Forum, et al.*, No. 27-CV-09-18550 (Hennepin Cty., Minn.)**

On or about July 14, 2009, a little more than a month after Plaintiffs amended their complaint to add the NAF as a defendant, the State of Minnesota, by its Attorney General Lori Swanson, filed a civil complaint against the NAF and two related entities (the National Arbitration Forum LLC and Dispute Management Services, LLC, d/b/a Forthright), in an action in the Fourth Judicial District of the State of Minnesota, styled *Minnesota v. National Arbitration Forum, Inc.*, No. 27-CV-09-18550, before the Honorable John L. Holahan. (Langer Decl., Ex. 4.)

In brief, Minnesota claimed that the NAF violated Minnesota consumer protection law. Minnesota asserted that the NAF had represented itself as a neutral arbitral forum when, allegedly, it had overlapping ownership interests with certain debt collection entities and service providers, who were allegedly interested in the outcome of proceedings adjudicated by the NAF.

On July 17, 2009, Minnesota and the NAF entities agreed to enter into a consent judgment, pursuant to which the NAF entities agreed to forebear from accepting any new arbitrations “involving a dispute between a business entity and a private individual which relates to goods, services, or property of any kind allegedly provided by any business entity to the individual, or payment for such goods, services, or property[, including] any claim by a third party debt buyer against a private individual.” Consent Judgment ¶¶ 1, 2 (Langer Decl., Ex. 5.) On July 28, 2009, Judge Holahan approved entry of the consent judgment.

### **III. THE SETTLEMENT NEGOTIATIONS**

Settlement discussions with the NAF proceeded over almost a year. Initial discussions took place in July 2009 and broke off almost immediately without agreement. Talks resumed on or about November 23, 2009, and again collapsed on or about January 12, 2010. A third round of discussions began in March 2010, which ultimately led to the Settlement Agreement executed on May 19, 2010, and submitted to the Court on that date. Only after Plaintiffs and the NAF resolved *all* merits issues, did they negotiate the NAF’s payment of attorneys’ fees as a part of the settlement.

### **IV. TERMS OF THE SETTLEMENT**

Class Plaintiffs reached a separate settlement with the NAF, but the terms are similar to the four Settlement Agreements approved by the Court on July 16, 2010. The NAF Settlement delivers substantial and immediate benefits to the Class. First, the NAF agrees that it shall not administer or process any new Business Card Arbitrations, commencing on the Court’s

preliminary approval of this Settlement for a period of three and one-half (3.5) years.<sup>5</sup> (¶ 2) As to Consumer Arbitrations, the NAF entered into the Consent Judgment, which precludes it, on or after July 24, 2009, from, *inter alia*, administering new Consumer Arbitrations and attempting to influence the outcome of any arbitration proceedings currently pending before it. (¶ 2) The NAF has also stipulated to class certification and promised cooperation in discovery regarding the Class's claims against the remaining defendants, Citigroup and Discover. (¶¶ 1, 9) Finally, the NAF has agreed to pay \$125,000 to cover a portion of Plaintiffs' attorneys' fees and litigation expenses, inclusive of the cost of notice. (¶ 5) This amount, even when combined with the \$2.35 million in fees, expenses and notice costs that the Court approved on July 16, 2010, represented less than one quarter of Plaintiffs' "lodestar" and expenses to October 21, 2011.

Not only does the Settlement provide these benefits to the Class, it comes at relatively small cost to the Class. As explained below (see *infra* at § V.B.4.), the Class is receiving much of the relief it sought. Further, the Settlement interposes no obstacle to further relief for those Class members who have been injured as a result of having had his/her claim arbitrated in an NAF-administered proceeding. Such claims are beyond the scope of the release. (¶ 4(c)(i)) The release in this Settlement Agreement is limited to the NAF's liability with respect to its alleged participation in any alleged conspiracy with regard to the inclusion of arbitration clauses or class action bans in the credit card agreements between any members of the Settling Class and any defendant in this litigation. (¶ 4(b)(i)) Class Members (other than the named plaintiffs in the litigation) are free to seek redress for injuries as a result of having had their claims arbitrated in NAF-administered proceedings. (¶ 4(c)) The Settlement's release does not alter or affect the

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<sup>5</sup> The NAF reserves the right to administer or process Business Card Arbitration where a member of the Settlement Class who, after being offered the choice in writing by the claimant, opts in writing for a Business Card Arbitration to proceed or continue in arbitration rather than in court. (¶ 2)

rights of the parties in any of the following matters currently pending against the NAF: (i) *In re National Arbitration Forum Trade Practices Litigation*, MDL No. 10-2122 (PAM/JSM), and the cases coordinated thereunder; (ii) *California v. National Arbitration Forum, et al.*, Case No. CGC-08-473569 (Cal. Super. Ct., S.F. City); and (iii) *Townsend v. National Arbitration Forum, et al.*, Case No. 2:09-CV-09325-VBF-RNB (C.D. Cal.). (¶ 4(d))

## **V. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL**

Plaintiffs now respectfully request preliminary approval of the proposed Settlement. On final approval, the Court will have a comprehensive record concerning the proposed Settlement and will make a final determination as to whether the Settlement is fair, reasonable and adequate under all of the circumstances of the litigation.

### **A. Standards for Preliminary Approval**

Policy favors the settlement of disputed claims, particularly in complex class actions, so as to encourage voluntary, mutually advantageous compromises and conserve judicial and private resources. *See McReynolds*, 588 F.3d at 803; *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *Cohen v. J.P.Morgan Chase & Co.*, 262 F.R.D. 153, 157 (E.D.N.Y. 2009); *Warner Chilcott*, 2008 WL 5110904, at \*1. This policy should apply with added force in cases seeking only injunctive 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 injunctive relief that is more costly to the defendants and less beneficial to the plaintiffs than the relief that they negotiate themselves).

“[A]t the preliminary approval stage, ‘the Court need only find that the proposed settlement fits “within the range of possible approval” to proceed.’” *Warner Chilcott*, 2008 WL

5110904, at \*2 (quoting *Prudential Sec.*, 163 F.R.D. at 210). “In determining whether a settlement is fair, reasonable, and adequate, the District Court examines the ‘negotiating process leading up to the settlement[, *i.e.*, procedural fairness] as well as the settlement’s substantive terms[, *i.e.*, substantive fairness].” *McReynolds*, 588 F.3d at 803-04. The relevant substantive factors, not all of which are applicable here, are:

- i. the complexity, expense and likely duration of the litigation;
- ii. the reaction of the class;<sup>6</sup>
- iii. stage of the proceedings and the amount of discovery undertaken;
- iv. the risks of establishing liability;
- v. the risk of establishing damages;
- vi. the risk of maintaining the class action through trial;<sup>7</sup>
- vii. the ability of the defendants to withstand a greater judgment;<sup>8</sup>
- viii. the range of reasonable settlements in light of the best possible resolution; and
- ix. the range of reasonable settlements to a possible resolution in light of all the attendant risks of litigation.

*See, e.g., Wal-Mart*, 396 F.3d at 118 (2d Cir. 2005); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992); *Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974); *Warner Chilcott*, 2008 WL 5110904, at \*1; *Currency Conversion*, 2006 WL 3247396, at \*2 (S.D.N.Y. Nov. 8, 2006); *Gross v. Washington Mut. Bank, F.A.*, 2006 WL 318814, at \*4 (E.D.N.Y. Feb. 9, 2006) (Levy, M.J.); *In re Initial Public Offering Sec. Litig.*, 226 F.R.D. 186, 190 (S.D.N.Y. 2005); *Prudential Sec.*, 163 F.R.D. at 210.

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<sup>6</sup> Prior to notice, this factor is premature. *See Warner Chilcott*, 2008 WL 5110904, at \*2.

<sup>7</sup> As the NAF has stipulated to class certification, this factor is inapplicable.

<sup>8</sup> Because the Complaint seeks only injunctive relief, this factor is also inapplicable.

**B. The Applicable Factors Demonstrate that the Settlement Is Fair, Reasonable and Adequate**

**1. 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; *Wal-Mart*, 396 F.3d at 116; *Warner Chilcott*, 2008 WL 5110904, at \*1; *IPO*, 226 F.R.D. at 190. "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 the proposed Settlement is described above at Part III. Highly experienced counsel negotiated the terms, in three rounds of arm's-length discussions over a ten-month period. 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 both here and in the original *CCFI* matter.

**2. Complexity, Expense and Likely Duration of the Litigation**

As with *Currency Conversion*, "[t]his antitrust class action involves a complex factual record and novel issues of law." 2006 WL 3247396, at \*5. 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). The parties have raised novel legal issues. The case has been reviewed at the Court of Appeals, vacated and remanded. There is a voluminous record (developed both here and in *CCFI*). Without this Settlement, the NAF would continue to contest the claims against it.

The expense and delay of continued litigation of this complex antitrust class action against the NAF would be substantial. Extensive summary judgment motions practice would need to be revisited as to the NAF. 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 be likely to further delay resolution with respect to the NAF for years.<sup>9</sup>

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

Courts consider the stage of the proceedings and the discovery completed to ensure that the case has “proceeded to a stage at which counsel have demonstrated a thorough understanding of the complexity of the issues and the strengths and weaknesses of their respective claims, defenses and strategies.” *Currency Conversion*, 2006 WL 3247396, at \*5; *see also Weinberger*, 698 F.2d at 74; *Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 213-14 (S.D.N.Y. 1992).

Here, counsel unquestionably has the information necessary to evaluate the strengths and weaknesses of the claims and the Settlement. This action has been litigated for more than five years, and against the NAF for over a year. The NAF has aggressively asserted defenses and expressed its belief that Plaintiffs would not prevail. By the time the Settlement was reached,

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<sup>9</sup> *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 the Settlements”); *New York v. Nintendo, Inc.*, 775 F. Supp. 676, 681 (S.D.N.Y. 1991) (in an antitrust action, settlement agreement approved where 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.”).

Plaintiffs had conducted comprehensive document discovery, reviewed and analyzed over 130,000 pages of newly produced documents from the Defendants here, as well as hundreds of thousands of pages produced in the original *CCFI* proceedings, served expert reports, engaged in intense motion practice and successfully prosecuted an appeal in the Court of Appeals. As to the NAF, but no other defendant, Plaintiffs have had the benefit of the government action. Indeed, as of the date of this writing, Plaintiffs, Citi and Discover are in the midst of summary judgment proceedings: nothing to date has lessened Plaintiffs' belief in the fairness and adequacy of this settlement with the NAF. Plaintiffs' Counsel has a full understanding of the strengths and weaknesses of the claims and the difficulties they would face in obtaining a favorable verdict. *See Chatelain*, 805 F. Supp. at 213-14. Having sufficient information to fully evaluate the strengths and weaknesses of the Class's claims, Plaintiffs' Counsel have settled the claims against the NAF on terms very favorable to the Class.

**4. The Risks of Establishing Liability and Damages, and Comparison of the Settlement with the Likely Result of Litigation<sup>10</sup>**

When weighed against the risks of continued litigation, the proposed Settlement compares favorably with the results that could have been obtained after trial and appeal. The risks as well as the burdens of continued litigation have been recounted in discussing the complexity of this litigation.<sup>11</sup> *See supra* at § V.B.2.

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<sup>10</sup> Because litigation risks and the likely result of litigation overlap, these factors are discussed together.

<sup>11</sup> Because claims remain pending against two non-settling Defendants, Plaintiffs' Counsel do not articulate the risks of prosecuting their claims. To do so would reveal Plaintiffs' litigation strategy to the non-settling Defendants and prejudice the continued prosecution of their claims. *See Manual for Complex Litigation* § 21.651, at 329 (4th ed. 2004); *In re Fine Paper Antitrust Litig.*, 1979 WL 1743, at \*2 (E.D. Pa. Oct. 2, 1979). Further, Plaintiff Ross, represented by overlapping counsel, is 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.

Plaintiffs have obtained much of the feasible relief that the NAF could provide.<sup>12</sup> Plaintiffs have extended the relief provided consumers in the Minnesota Consent Judgment to business entities for a period of 3.5 years. This is a significant advance as small businesses and sole proprietorships are usually outside the aegis of consumer protection laws, although small businesses are often no more sophisticated than individual consumers.

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). There are strong arguments for a lengthier Forbearance Period. However, 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) (five years); *Microsoft*, 224 F. Supp. 2d at 184 (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) (three years); *Coleman v. Cannon Oil Co.*, 849 F. Supp. 1458, 1471-72 (M.D. Ala. 1993) (three years); *but see Image Technical Services, Inc. v. Eastman*

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<sup>12</sup> Many of Plaintiffs' prayers for relief were inapplicable as to the NAF: their request to enjoin the Bank Defendants' continued collusion with respect to arbitration and class action bans (Prayer ¶ C); their demand that the Bank Defendants' arbitration clauses and class bans be stricken (Prayer ¶ D); and their request that the Bank Defendants be enjoined from enforcing their arbitration clauses (Prayer ¶ F).

Three of Plaintiffs' prayers for relief are unanswered by the Settlement: their demand that 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). (The NAF has previously argued that, as a practical matter, the notification sought in Prayer ¶ E could not be made by it, inasmuch as the NAF would not have notice of actions taken by parties to arbitration agreements who, post-NAF administered hearings, have litigated issues regarding those hearings in other fora.) Settlements are compromises, reflecting concessions on both sides. Class Plaintiffs have gotten most of what they sought.

*Kodak Co.*, 125 F.3d 1195, 1227-28 (9th Cir. 1997) (ten years). In short, the injunctive relief provided gives Plaintiffs much of what they had sought and for a suitable period of time.

## VI. THE NOTICE PLAN PROVIDES REASONABLE NOTICE

The instant Class was certified pursuant to Rule 23(b)(2) governing the certification of classes seeking injunctive relief. The relevant provisions of Rule 23 regarding notice are Rules 23(c)(2)(A), 23(e)(1) and 23(h)(1). Taken together, these provisions require “reasonable notice.” Specifically, under Rule 23(c)(2)(A)’s provision for “appropriate notice,” notice of class certification is *not* required and is discretionary for classes certified under Rule 23(b)(2). *See, e.g., Finch v. N.Y. State Office of Children & Family Servs.*, 252 F.R.D. 192, 198 (S.D.N.Y. 2008) (Scheidlin, J.); *Sims v. Bank of Am. Corp.*, 2008 WL 479988, at \*9 (E.D.N.Y. Feb. 19, 2008) (Sifton, J.); *Meacham*, 227 F.R.D. at 235; FED R. CIV. P. 23(b)(2). As to settlements, Rule 23(e)(1) requires only that the court order “notice 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 added).<sup>13</sup> 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.

In certain circumstances, including those now before the Court, settlement notice may be omitted entirely. Courts have recognized “several scenarios where [settlement] notice may not be necessary. These include: (1) when the terms of the settlement provide near complete relief to the plaintiffs, (2) when the settlement provides for only injunctive relief, and, therefore, there is no potential for the named plaintiffs to benefit at the expense of the rest of the class, (3) when there is no evidence of any collusion between the parties, and (4) when the cost of notice would

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<sup>13</sup> 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 Rule 23(b)(3) damages classes. Further, Rule 23(c)(2)(B) provisions regarding the mandatory contents of notice to Rule 23(b)(3) classes are inapplicable for notice Rule 23(b)(2) classes.

risk eviscerating the settlement agreement.” *Green v. American Express Co.*, 200 F.R.D. at 212 (citing *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429, 441 (D.N.J. 2000)); *Doe v. Perales*, 782 F. Supp. 201, 206-07 (W.D.N.Y. 1991); Newberg on Class Actions § 11.72); see also *Selby*, 2003 WL 22772330, at \*4. Each of these scenarios applies here. The Settlement provides near complete relief as to the NAF. The Settlement is entirely injunctive. There has been no collusion (and there is no evidence of such) between the parties’ counsel. The cost of notice would eviscerate the Settlement: here, the cost of the prior notice campaign (over \$130,000) exceeds the amount of counsel fees and expenses to be reimbursed, which award is itself less than 1.4% of counsel’s accrued lodestar as of October 21, 2010 (without adjusting for the payment of litigation expenses).

Based on these factors in *Green*, Judge Baer authorized the settlement of TILA claims concerning the disclosure, on Amex’s cardholder statements, of the applicable interest rates without notice to the class. There, the relief involved revising the disclosure on Amex’s statements. The costs of notice, Judge Baer found, would easily outstrip the recovery limitations in TILA. 200 F.R.D. at 212-13. Similarly, in *Selby*, Judge Carter approved the settlement of ERISA claims without notice to the class. There, plaintiffs claimed that limitations in defendants’ computer systems had led its claims analysts to deny health insurance claims improperly. The Court originally certified the class as a damages class under Rule 23(b)(3). Discovery revealed that damages for the class amounted to \$22,000 per year while identifying class members would easily cost millions. The parties reached a settlement for injunctive relief removing the limitations in defendants’ computer system. Judge Carter found that the settlement would not prejudice “the rights of absent class members who,” like class members here, “effectively retain their rights to sue for any damages they may have incurred from the alleged

practice.” *Selby*, 2003 WL 22772330 at \*4. Addressing notice, Judge Carter found that both individual and publication notice prohibitively expensive – the latter because of the possible reaction of the class. *Id.* at \*5.

Although omitting notice altogether meets the applicable legal standard, in deference to the class and in recognition of the class’s *de minimis* release of claims, Plaintiffs’ Counsel propose limited publication notice (as well as direct notice to class members who have made previous inquiry and to consumer advocacy organizations). A “district court has virtually complete discretion as to the manner of giving notice to class members.” *Handschu*, 787 F.2d at 833. In the exercise of that discretion, Plaintiffs respectfully propose the Court order notice via publication on the pre-existing settlement website, direct communication with those who have previously made written inquiries concerning the settlement, and mailed notice to consumer groups and to those who contacted the Court concerning the prior settlements.

Experience with the prior settlements in this matter shows that publication notice via the [arbitration.ccfsettlement.com](http://arbitration.ccfsettlement.com) website has produced the best and most efficacious notice to the members of the Class. The prior settlements produced two written submissions to the Court – one in support, one (evidently misunderstanding the settlement) in opposition.<sup>14</sup> Notice by the website is thus “[n]otice ... ‘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

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<sup>14</sup> Because neither Class Member indicated how they became aware of the settlements, they cannot be ascribed either to the printed notice campaign or to the website.

their appearance.” *McReynolds*, 588 F.3d at 804 (quoting *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983); emendation, ellipsis supplied). While conventional publication notice is in all cases “reasonable notice” for the settlement of Rule 23(b)(2) cases,<sup>15</sup> here internet publication, on an existing website visited by Class members, fully satisfies the requirements of reasonable notice to the Class.

The Notice Plan provides that web notice includes the comprehensive posting of (i) notice of this settlement, (ii) the Settlement Agreement with the NAF (as well as the prior Settlement Agreements), (iii) the related filings, (iv) the First Amended Class Action Complaint, (v) the responsive pleadings and (vi) the Order on class certification, on the [arbitration.ccfsettlement.com](http://arbitration.ccfsettlement.com) website. (Many of these documents are already available on the website as a result of the prior settlements.) The Notice Plan also provides for direct dissemination to anyone who has expressed written interest in the prior four settlements. Finally, the Notice Plan provides for distribution of the notice to leading consumer advocacy organizations: (i) Consumer Action; (ii) Consumer Federation of America; (iii) National Association of Consumer Advocates; (iv) National Consumer Law Center; (v) National Consumers League; (vi) Public Citizen; (vii) Public Justice (formerly, Trial Lawyers for Public Justice);<sup>16</sup> and (viii) U.S. Public Interest Research Groups (“U.S. PIRG.”). These groups have

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<sup>15</sup> See *McReynolds*, 588 F.3d at 797, 804-05; *Handschu*, 787 F. 2d at 832-33; *Meacham*, 227 F.R.D. at 235; see also *Mendoza*, 623 F.2d at 1351; *DeHoyos*, 240 F.R.D. at 295-98; *Allan v. Alabama State Bd. of Educ.*, 190 F.R.D. 602, 606 (M.D. Ala. 2000); *Vaughns v. Board of Educ.*, 18 F. Supp. 2d 569, 578-79 (D. Md. 1998)

<sup>16</sup> In the interest of full disclosure, Eric L. Cramer, a shareholder of Berger & Montague, P.C., joined the Public Justice Foundation Board in July 2009. Mr. Cramer, who has had no material involvement in this matter, will recuse himself from any discussion of the instant Settlement. Additionally, one of the undersigned (Charles Goodwin) authored an *amicus* brief on behalf of Public Justice in *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 09-1403 (U.S.), and his efforts were acknowledged with an honorary membership in the organization.

established track records of advocating for and acting to protect consumers' rights. Each of these organizations has been involved in advocacy and monitoring with regard to consumer credit and credit card issues. Plaintiffs will request they share notice materials with their associates.

The purpose of providing notice to injunctive relief classes of settlements is to encourage those with divergent points of view to come forward and voice their opinion. *See Handschu*, 787 F.2d at 833; *Mendoza*, 623 F.2d at 1351; *DeHoyos*, 240 F.R.D. at 298. Here, the proposed Notice Plan ably serves that purpose. Where the website notice suffices to alert the Settlement Class, direct notice to those who have written before provides notice to those who have shown their ability to reach out either to the Court or to counsel. Finally, notice to consumer advocacy organizations serves to provide notice to those who are able to understand the implications and details of the settlement and are in a position to voice their reaction. The claims in this action involve matters – arbitration and class actions – that are undoubtedly obscure to ordinary members of the general public. Specialized knowledge is helpful to understand fully what is at issue and its significance. The Notice Plan should elicit any divergent point of view concerning the Settlement *sub judice*.

## **VII. THE PROPOSED SCHEDULE OF EVENTS**

In connection with the preliminary approval of the Settlement, the Court must set dates for (1) a final approval hearing, (2) the filing of papers in support of the Settlement and of the request for the reimbursement of attorneys' fees and litigation expenses and (3) the submission of objections to the Settlement. Plaintiffs propose the following:

- Within seven (7) business days of preliminary approval, notice shall be posted on the [arbitration.ccfsettlement.com](http://arbitration.ccfsettlement.com) website. (An 800-number previously established to receive inquiries concerning the prior settlements will continue to be available as well.)
- Between seven (7) and thirty-five (35) days after preliminary approval, Plaintiffs shall disseminate notice to responsible individuals at (i) Consumer Action; (ii) Consumer

Federation of America; (iii) National Association of Consumer Advocates; (iv) National Consumer Law Center; (v) National Consumers League; (vi) Public Citizen; (vii) Public Justice; and (viii) U.S. PIRG.

- All papers seeking final approval of the Settlement, as well as any papers seeking the Court's approval for the payment of attorneys' fees or the reimbursement of litigation expenses, shall be filed with the Court on or before eight (8) weeks following preliminary approval. Within four (4) business days of filing, these papers shall be posted, in PDF format, on the [www.arbitration.ccfsettlement.com](http://www.arbitration.ccfsettlement.com) website.
- Objections, if any, to the final approval of the Settlement, to the requests for attorneys' fees or to the requests for reimbursement of litigation expenses shall be filed with the Court on or before twelve (12) weeks following preliminary approval.
- Replies to the objections, if any, shall be filed on or before fourteen (14) weeks following preliminary approval.
- The hearing on the final approval, the payment of attorneys' fees and the reimbursement of litigation expenses will be held at least sixteen (16) weeks following preliminary approval.

#### VIII. CONCLUSION

For all the reasons set forth above, the Court's should preliminarily approve the Settlement.

DATED: November 22, 2011

Respectfully submitted,



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