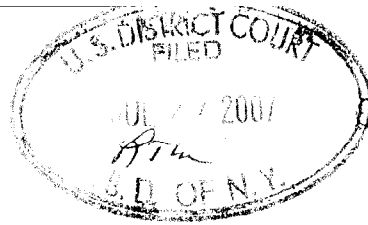


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July 10, 2007

MEMORANDUM TO: JUDGE WILLIAM H. PAULEY III
FROM: FRANCIS E. MCGOVERN *Francis E. McGovern*
SUBJECT: In Re MDL No. 1409 Special Master Report

Purpose:

The parties to this lawsuit entered into the Stipulation and Agreement of Settlement on July 20, 2006. On November 8, 2006, the Hon. William H. Pauley III, United States District Court Judge for the Southern District of New York, entered an Order preliminarily approving the Settlement Agreement. The Settlement Agreement is still subject to final approval by the Court.

The plaintiffs challenged the setting and disclosure of markups and fees imposed on transactions made in a foreign currency or a foreign country. Foreign transactions made on Visa- and MasterCard-branded credit cards (including charge cards) and debit/ATM cards (including stored value and payroll cards), and Diners Club-branded credit cards (including charge cards) were included in the lawsuit.

The settlement allows any person who held a Visa-, MasterCard- or Diners Club-branded credit, charge or debit card issued in the United States as of November 8, 2006 to be a member of the Settlement Injunctive Class. Those persons who made a foreign transaction on at least one of those cards between February 1, 1996 and November 8, 2006 are members of the Settlement Damages Class. Only members of the Settlement Damages class may seek refunds by submitting a claim. The defendants have created a settlement fund of \$336,000,000 to pay valid claims, attorneys' fees and expenses, any service awards to class representatives ordered by the Court, and the costs of administering the settlement and notice.

At a hearing on May 11, 2007, the Court considered the submissions of counsel for the parties addressing concerns raised by putative class members and concluded that the appointment of a Special Master might be warranted to assist the Court and the parties in devising and implementing the fairest and most effective notice and claim procedure consistent with the parties' proposed settlement.

On May 18, 2007, counsel for the parties agreed to the appointment of Professor Francis E. McGovern as Special Master in this action to work with the parties to review and amend, as appropriate, the parties' plan for class notice and distribution of the Net Settlement Fund and to determine whether the proposed settlement agreement was fair,

adequate, and reasonable with respect to all class members. The Court ordered the appointment on June 8, 2007.

Background:

Since his appointment, the Special Master has had numerous meetings and conference calls with all parties, as well as the Claims Administrator. All parties have been extremely cooperative and have provided the information and responses requested in a timely fashion. In addition, the Claims Administrator has participated in these meetings and conferences and has also been most cooperative and responsive.

The Special Master considered a wide range of documents and materials from the record in the Consolidated Action, including, without limitation: Court orders, correspondence and submissions from putative class members and third parties and motions, submissions, filings, correspondence and other information provided by plaintiffs and defendants related to the proposed settlement, the settlement notice and claims administration process and preliminary approval thereof.

When the notification process began, the defendant banks identified approximately forty-two million current and former accounts that had at least one foreign transaction. Twenty million of the accounts received an initial notice in their monthly billing statement. The Administrator scheduled to send a notice to the remaining twenty-two million accounts, but that mailing has not yet been sent and has been put on hold by the Court. This second group of twenty-two million included current accounts that were not billed during the notice period as well as non-current accounts. In addition, it is estimated that 30% of the potential claimant universe have accounts with non-defendant banks.

As of June 30, 2007, approximately 90,000 individuals, governments, or businesses have filed claims involving over 140,000 accounts. 58% of forms received to date are paper filings and the remaining are electronic filings. The average claim value of claims filed to date is approximately \$110 per claimant (assuming a 1% transaction fee), although the overwhelming majority of claims have a value of \$25 or less, an indication that a small percentage of claims (1%) may account for a substantial portion (>40%) of the total transactions for which claims were filed with respect to currency conversion fees levied. The claims with large transaction amounts tend to be heavily weighted toward governmental and corporate entities. Table 1 illustrates the nature of claim filings to date.

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Available Data:

The amount of account/claimant-related information available from the defendant banks varies. This is primarily due to differences in the number of credit/debit card portfolios managed by the bank and the automation methods used within each portfolio. Each defendant bank may have multiple portfolios. For example, one defendant bank has separate Visa, MasterCard, and Diners Club portfolios, as well as portfolios within each card portfolio that were constructed and maintained by different corporate entities.

Each bank portfolio can (and, in many instances, does) have a separate data structure. In addition, not all data within a portfolio is maintained in an analyzable format. Some current data may be computer analyzable, while older data may only be in an image format that is not searchable or manipulable other than by time consuming and expensive physical examination and recoding. The period for which current analyzable data is available for a portfolio will differ by portfolio and bank.

In the initial stage of implementation of the settlement, the banks identified accounts which had at least one transaction. The defendant banks were not required to (and, accordingly, did not) identify or report the total number of transactions or the total value of those transactions. When providing the data to the Administrator, the banks only provided the name and address of each cardholder. The banks were not required to, and therefore did not provide cardholders' account numbers, transaction totals, or Social Security Numbers. All banks concluded, based on privacy and security concerns, that it

would be inappropriate to provide a cardholder's full SSN or account number. Most banks have indicated a willingness to provide the last four digits of the SSN. One large bank has raised objections to providing the last 4-digits of the SSN, based on both contractual and customer confidentiality concerns. Without a unique identifier such as SSN or the last 4-digits of SSN, any attempt to accumulate an accurate list of accounts associated with a claimant would be incomplete.

The defendant banks estimate that providing total foreign transactions data for current accounts within primary portfolios would cost hundreds of thousands of dollars and require up to 7 months. Even if this project were to be undertaken, it would still not generate a complete set of data for the entire ten-year class period for all banks or all portfolios due to the lack of analyzable data covering the class period. Although it would yield a relatively complete set of foreign transactions for the defendant banks, this would be for only a relatively short period of time where the bank data overlap, and it would not provide any data as to non-defendant accounts or certain portfolios.

The Special Master met with each defendant in person and by telephone on multiple occasions and obtained a detailed statement of data availability, data cost, time for access, and data structures. This information, along with the other materials available to the Special Master, was used in analyzing alternative approaches to the notice and claims process.

Alternative Approaches:

In examining alternative approaches to structuring the claim filing, review, and payment mechanisms, eight alternative approaches were examined. These included scenarios where:

1. Claimant estimates the foreign transactions by account and by year. This is the method used in filing a claim under the original claims process.
2. Administrator calculates payment based on information from the banks for the entire class period from 2/1/96 to 11/8/06. This is the method predominantly used in the comparable LIPUMA Class Action settlement.
3. Administrator accumulates accounts and charges from reasonably accessible data maintained by the defendant banks and presents the results to the claimant, and the claimant may supplement beyond period of available data. This alternative assumes that all transaction information is not available for the full class period.
4. Administrator offers 3 or 4 categories of foreign expenditure ranges, and the claimant estimates expenditures and indicates the appropriate category.
5. Claimant selects a single "Quick Pay" amount of a fixed payment.
6. Administrator calculates payment based on claimant's answers to simple surrogate questions (e.g., number of travel days over the class period spent out of

the country) coupled with an algorithm based upon publicly available data on average expenditure per day on out-of-country travel and other empirically based methods of estimating foreign currency transactions.

7. Combination(s) of the above possibilities.

Analysis:

During meetings with the parties, assumptions and outcomes were predicted for each alternative method of claims distribution. The key assumptions and outcomes that were analyzed during this process included:

1. *Claimant Group* – Group that has received notice, the group that has not yet received notice, and group that will not receive a direct notice (e.g., claimants with cards from non-defendant banks, those whose charges with defendant banks were outside the period for which data is readily available, and those for whom current address information is unavailable).
2. *How Claimant Will Be Contacted* – Letter, postcard, internet, etc.
3. *Credit Card Accounts per Claimant* – Average number of separate accounts owned by each claimant.
4. *Size of the Potential Claimant Population* – Assuming claimants have more than one card account, how many potential individual claimants are there (e.g. what is the ratio of cards to potential claimants).
5. *Response Rate* – Percentage of the potential claimants will file a claim for each filing protocol.
6. *Average Payment per Claimant* – The average payment value per claimant for each filing protocol.
7. *Expected Total Payout* – The total amount of the total settlement corpus that will be paid to the claimants.
8. *Expected Total Cost* – The administrative, mailing, and processing costs for each filing protocol.

Clearly these assumptions are correlated. For example, the response rate will most likely depend upon the filing protocol used and how the claimants are initially contacted. Therefore, the analysis involved a large number of potential scenarios, and was intended to reflect an unbiased approach to weighing all feasible alternatives. An example of the use of this methodology in analyzing alternatives are provided in Appendix A.

Results:

The following is a discussion of the results of the Special Master's analysis of each alternative approach.

1. Claimant must estimate the foreign transactions by account and by year. This is the method used for filing a claim under the current claims process. - This approach requires the claimant to estimate annual foreign transactions for each credit/debit card account and report those estimates on a claim form. This is the process currently in use by the Administrator. To date, this approach has yielded a response rate of substantially less than 1% of the claimants who have received notice to date. Although this approach is designed to be precise, this precision comes at a price to the claimants. Estimating foreign expenditures by year for a ten-year period is a very difficult and time-consuming task. To ensure accuracy in the estimates, the claimant may want to consult credit card bills or receipts for a ten-year period, review those documents to identify the foreign transactions, total the transactions for each annual period for each credit/debit card, and report those totals on a claim form. Most claimants have multiple credit/debit cards. The majority of claimants are unlikely to maintain all credit/debit card statements or receipts for the past ten years; therefore, at least part of the detail must be estimated by the claimant, or not claimed for. Finally, the amount of effort required of the claimant is unlikely to be commensurate with the level of the recovery since the majority of payments are likely to be less than \$25. This approach tends to discourage participation as reflected in the low response rate to date.

2. Administrator calculates payment based on information from the banks for the entire class period from 2/1/96 to 11/8/06 - This approach requires much less from the claimant but much more from the defendants. This approach merely requires the claimant to allow the Administrator to calculate the level of damages from the foreign transaction information provided by their credit/debit card company. In theory, this approach would be the easiest for the claimant, as well as the most precise, in calculating certain foreign transactions. Operationally, this approach is totally dependant upon the quality and availability of foreign transaction information from the defendant banks.

This is the methodology that was predominantly used in the LIPUMA class action settlement. In that case, this methodology proved both feasible and efficient because the claims stemmed from one credit card issuer and thus the transaction information was centralized and in an analyzable, standardized format. The estimated response rate in that case had been approximately 10%.

In this matter, the transaction information derives from multiple cards, managed by multiple corporate entities, where standardization is non-existent. In addition, because not all foreign transactions subject to compensation were with defendant banks, any accumulation of data from defendant banks will be incomplete from the beginning and would create the potential for disparate treatment of class members.

As noted earlier, the amount of account/claimant-related information available from the defendant banks varies due to differences in the number of credit/debit card portfolios

managed by the bank and the automation methods used within each portfolio. Each bank portfolio can (and in many instances does) have a separate data structure. Most important, however, is that not all data within a portfolio or bank is maintained in a readily analyzable format. Some current data may be computer analyzable, while older data may only be in image format that is not searchable or manipulable other than by physical examination and recoding. The period for which current analyzable data is available for a portfolio differs by portfolio and bank, ranging from two to four years, as opposed to the ten-year class period. Putting the remainder of the data into analyzable periods would require the examination and coding of millions of individual transaction records for hundreds of thousands of claimants. This coding project would consume an extraordinary amount of time and millions of dollars, assuming the defendant banks were able to undertake the process or, alternatively, make the information required to perform the project available to the Administrator. Given the sensitive nature of the information and the confidentiality guarantees made by the banks to their consumers, obtaining and using the information would in itself be a monumental task. Finally, notwithstanding the extraordinary efforts required to create a database of analyzable foreign transactions covering the class period, such a database would still be flawed due to frequent changes in claimant names and addresses and human errors in coding and accumulating the information, and would still be incomplete because it would not contain any non-defendant-bank data. The use of an approach such as that used in the LIPUMA settlement does not appear feasible.

3. Administrator accumulates accounts and charges from available information maintained by the banks and presents the results to the claimant, and the claimant may supplement beyond the period of available data. This alternative assumes that all transaction information is not available for the full class period - This approach suffers from some of the weaknesses discussed for alternative 1 and alternative 2, in particular, cost and inherent delay. Since analyzable data are not available for the entire class period, to complete the claim process the claimant must provide an estimate of expenditures by account and by year for the period for which data are not available. The period for which the claimant will be required to estimate annual foreign transactions is the period that provides the most difficulty for the claimant, i.e. the oldest transactions. As was the case with alternative 1, the amount of effort required of the claimant is unlikely to be commensurate with the level of the recovery since the majority of payments are likely to be less than \$25. This approach tends to discourage participation as reflected in the low response rate to date using a method that requires this type of estimate by the claimant.

Even though this approach contemplates limitations of the available bank data related to the time period covered, it should be recognized that not all foreign transactions subject to compensation were with defendant banks; as a result, any accumulation of data from only defendant banks will be incomplete from the beginning.

4. Administrator will offer 3 or 4 categories of foreign expenditures specified and the claimant is required to estimate expenditures and indicate the appropriate category - This approach would require the claimant to estimate transactions using one or more

categories (e.g. \$0 to \$10,000, \$10,000 to \$25,000). Unlike the first approach, this approach requires less precision on the part of the claimant, but provides more opportunity for unintentional error as well as intentional fraud. One difficulty of this approach is that it would have to be used in combination with the first approach. It is not feasible to provide categories for all levels of transactions. For example, there are claims filed to date that encompass total transactions in excess of \$400,000. To avoid the possibility of large-scale fraud, claims with transactions above a threshold amount would still need to provide sufficiently detailed proof to justify payment. Finally, the category approach appears to be biased against those claimants at the higher end of the transaction scale. Because of the need to limit the use of the categories to lower transaction amounts, claimants are more likely to choose a categorized amount given the level of potential compensation and the convenience of filing.

5. *Single "Quick Pay" amount where the claimant is offered a fixed payment unrelated to the exact amount of the claimant's foreign transactions* - This approach can be viewed as a simple subset of the approach discussed above where 3 or 4 categories would be used to classify claims. As such, the weaknesses of this approach are the same, though amplified due to the fact that only one category is available. Based on the filings to date, it appears that the overwhelming majority of claims would have a low value (e.g. less than \$25). This would clearly be a viable alternative for those claimants, but would significantly disadvantage claimants that had substantial foreign expenditures. The principal advantage and disadvantage of a fixed payment is that it is fixed. The simplicity and guarantee of a known payment assists in increasing response rates, but there is also the risk that a high response rate might impact the amount of money available for non-fixed rate payments.

6. *Administrator calculates payment based on claimant's answers to simple surrogate questions (e.g., number of travel days over the class period spent out of the country) coupled with an algorithm (e.g., publicly available data on average expenditure per day on out-of-country travel), or some other empirically based method of estimating* - This approach can be viewed as a hybrid of alternative 3. Where alternative 3 uses reasonably available defendant bank information to calculate a portion of the total foreign transactions and requires the claimant to estimate the remainder, this approach uses reasonably available data to estimate a portion of the total foreign transactions and utilizes an algorithm whereby the Administrator can calculate the remainder. This eliminates the estimation demands on claimants required by alternative 3 and encourages claimant participation as a result of its simplicity. The primary weakness of this approach is that it relies on aggregate claims patterns and other public data to develop an algorithm that is applied to an individual claimant. The calculated claim payment, therefore, is not precise regarding an individual claimant, but rather is an estimate based on the expected foreign transactions for a similar claimant. Although the approach may estimate the transactions to be higher or lower than they might prove to be if the claimant detailed all transactions, the approach should not be systematically biased.

Recommendations:

The most productive approach for maximizing participation while insuring a fair, adequate and reasonable distribution process would be a combination of alternatives 1, 4, 5, and 6 discussed above. Using these approaches in combination would allow the claimant to select the filing method that best meets his or her needs. In addition, by using a combination of approaches, the weaknesses of any individual method can be mitigated. This strategy would let the claimant choose between three alternative methods of filing a claim:

1. Claimant estimates foreign expenditures for each card account for each year (alternative 1, current method),
2. Claimant requests the Administrator calculate payment based on claimant's answers to simple surrogate questions coupled with an algorithm (alternative 6 and alternative 4), and
3. Claimant elects a fixed \$25 per claimant payment for all of that claimant's accounts(alternative 5).

Although more complex than any single approach, this set of simple alternatives or options (full estimate, algorithmic calculation by Administrator and fixed payment) should still be claimant-friendly and operationally manageable, while hopefully encouraging substantial participation.

This new claims methodology would require a new notice/claim form. The notice/claim form would describe the settlement and offer the claimant three alternative methods for filing a claim. The notice/claim form would include three sections, one for each method of filing a claim, and the claimant would be instructed to select one – and only one – approach. An initial draft notice/claim form is under preparation and can be available after focus group testing.

Whereas the processing of claims filed under alternatives 1 and 3 is straightforward and without complication, there is some complexity in the second alternative involving how to calculate the amount of the claim from the transaction data that is readily and reasonably available from the defendant banks. Since the information available to perform this calculation varies by bank and portfolio within a bank, some method of extrapolation or estimation must be developed. There are a number of conventional methods that can be used, ranging from the transaction patterns in the current database of 90,000 claimants to methods based on publicly available information on average travel and travel expenditures outside the United States. For example, on the claim form the claimant might be asked the number of days spent outside the U.S. over the class period. An examination of public travel records might indicate that the average per diem expenditure outside the U.S. is \$400. The combination of this knowledge with the total foreign expenditures reported by the bank data for the period 2004-2006 would allow the estimation of the total amount of foreign transactions during the class period. Another example might be based on the claims filed to date. Filing data could show that 80% of

the claimants that reported \$5,000 to \$10,000 in foreign transactions during the period 2004-2006 also reported total foreign expenditures prior to 2004 of \$22,000 to \$25,000. With the data from the defendant banks showing claimants that had a total of \$5,000 to \$10,000 in foreign transactions during 2004-2006, it would be possible to estimate the pre-2004 expenditures from the pattern in the filings to date. The exact method to be used should await a detailed analysis of the current claim characteristics and an investigation and analysis of the data provided by the defendant banks, as well as what relevant data can be gathered and utilized from publicly available information. Such an approach can, however, be based on sound empirical and statistical principles.

Because this revised claims approach would be different than the claim approach contained in the notice previously provided, and thus would entail a new notice/claims form, it would be necessary to provide new mailed notice to those class members to whom such notice was or was about to be individually provided. It would help reduce the costs of such a new mailing, and the potential confusion and costs of processing multiple claim forms from a single claimant, by taking steps to minimize duplicate mailings to claimants with multiple credit/debit cards. In that regard, the defendant banks could either provide reasonably available identifying information (name, address, last 4-digits of the SSN) which would allow the Administrator to accomplish some de-duping, or, alternatively, a defendant bank could de-dupe its own lists previously provided to the Administrator. Either alternative would result in additional expenses in the form of bank employee time and computer resources devoted to additional data analysis and would delay the process by an estimated three to four months to give each bank time to complete any necessary analysis.

It is precarious to predict the response rate for the recommended approach, but it would be significantly higher than the existing response. Best estimates range from 5% to 10%. If the average payment remains at \$110, the total payment to class members would be \$165,000,000 at 5% and \$330,000,000 at 10%. The cost of the mailings, assuming two accounts per claimant, would be approximately \$14,000,000 plus the cost of the public notice communication campaign. Finally, there would be the additional cost of the new collection of amounts and aggregate data from defendant banks.

In the event that the Court does approve a revised claims process, it is also recommended that the Special Master and retained experts remain involved in the implementation to assist the parties and the Claims Administrator. In particular, it would be helpful to have this assistance in conjunction with the creation of any algorithm that might need to be developed and any new notice and claim forms that need to be produced.

In a letter to the Court on May 10, 2007, the parties offered eight action items dealing with the general administration of the settlement process. These action items represented a consensus among the parties. The Special Master has reviewed these suggestions, and with the exception of the first item dealing with a specific filing method not recommended in this report, and the fifth item dealing with postcard notices, the Special Master recommends the adoption of the remaining six items.

Appendix A

Filing Protocols:	Alternative 1 <input checked="" type="checkbox"/> X Alternative 2 Alternative 3 Alternative 4 Alternative 5 Alternative 6	
Assumptions:	Total Population: 60,000,000 Participating Bank Population: 42,000,000 Non-Participating Bank Population: 18,000,000 Cards per Person: 2 Potential Participating Bank Claimant Population: 21,000,000 Potential Non-Participating Bank Claimant Population: 9,000,000 % to Contact by Letter (only Participating Claimants): 100% Cost per Claimant Letter: \$ 0.55 Cost per Claimant Postcard: \$ - % Filing Paper Forms: 50% Processing Cost per Electronic Claim Form: 0.40 Processing Cost per Paper Claim Form: 1.25 Response Rate for Participating Bank Claimants: 1.0% Response Rate for Non-Participating Bank Claimants: 0.5% Total Amount Available to Clmts: 250,000,000 Average Payment per Participating Bank Claim: 250 Average Payment per Non-Participating Bank Claim: 100	
Results:	Potential Claimants Filing Claims: 255,000 Number Filing Paper Forms: 127,500 Calculated Total Payments to Claimants: \$57,000,000 Percentage of Full Value Payable: 439%	
Costs:	Letter mailing: \$11,550,000 Postcard mailing: \$0 Claim form processing: \$210,375 Total Cost: \$11,760,375	

Note: Cost estimates only include basic mailing and processing cost. All other costs of administration data collection, and data analysis are excluded in the analysis.