

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re CURRENCY CONVERSION FEE	:	MDL Docket No. 1409
ANTITRUST LITIGATION	:	
	:	PLAINTIFFS' RESPONSE TO
	:	SUPPLEMENTAL SPECIAL MASTER
This Document Relates To:	:	REPORT AND TO FURTHER OBJECTIONS
	:	
ALL ACTIONS.	:	
	:	

Plaintiffs submit this memorandum in response to the Supplemental Special Master Report dated July 1, 2009 (“Supplemental Report”), and to comments received thereon.

I. Supplemental Special Master Report

Plaintiffs concur with the findings and recommendations in the Supplemental Report. Following the highly effective notice program and simplified claims procedure approved by this Court on November 8, 2006 and September 24, 2007, more than 10 million class members – roughly 26% of those who were mailed stuffer or stand-alone notice – have filed non-duplicate claims. The *actual* claims filing rate – while non-ascertainable – is likely considerably higher, as many claimants, despite best efforts to de-dupe, received two or more mailed copies of the notice. This claims-filing rate is far higher than in most other class actions in which the class is comprised primarily of consumers.¹ As a result, the Claims Administrator will be required to use all three pro-ration mechanisms in the Revised Plan of Allocation,² and Option 1 claimants will receive an identical refund in the range of \$15.00 to \$17.00.³

Because the tremendous response rate has necessitated a reduction in the refund of each class member who filed a timely, valid claim, and in order to prevent further reductions, Class Plaintiffs generally agree with the Special Master’s recommendation that claims postmarked after the May 30,

¹ See *Lipuma v. American Express Co.*, 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005) (9.4% claim-filing rate of 8.8 million notices mailed); see also *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1377 (S.D. Fla. 2007) (1.2% claim-filing rate of 10.3 million notices mailed).

² Revised Plan of Administration and Distribution, at 16-17, subsection 6.(f)(ii).

³ See Status Report of Edward J. Radetich, Jr., C.P.A. Regarding the Settlement Notice and Claims Process, at ¶20, December 4, 2008 (“December 2008 Radetich Report”), submitted as Exhibit B to Plaintiffs’ Notice of Filing of Status Report Concerning the Auditing of Claims and the Settlement Administration Process (“Auditing Status Report”); see also Status Report of Audit Process and Results, at 3, July 1, 2009, submitted as Exhibit 1 to the Supplemental Special Master Report (citing the same).

2008 deadline be denied, although some allowance could be made for reasonable, legitimately delayed claims (*e.g.*, due to illness or extensive travel) where contemporaneous written support for the delay was provided at the time of submission of the claim. Plaintiffs submit that the vast majority of late claims, however, should be denied because the claim filing deadline of May 30, 2008 was 16 months after the notice program began, and almost 6 months after the notice program was complete, providing more than sufficient time for class members to submit their claims.

Class Plaintiffs also concur with the Special Master's recommendation that the Court deny the claims submitted by Priceline, Travelocity and Orbitz (Orbitz also filed its claim late). Because those firms' customers – rather than the firms themselves – paid the foreign transaction fee, Priceline, Travelocity and Orbitz are not members of the class, and are not entitled to a refund.⁴ The claims should also be denied because, as evidenced by Priceline's untimely objection, Priceline engages in a unique credit and payment mechanism which is not the type of credit card transaction and credit card relationship contemplated by this case. The class in this case is defined as limited to "holders of credit cards"; a relationship that has a well understood common meaning. Priceline does not transact on a pre-existing general purpose credit card that it "holds". Priceline has a unique payment scheme whereby its bank apparently advances payment on a particular booking through a mechanism which only mimics a credit card transaction. In effect, with each booking a new and "virtual" credit card "account" is created with a number unique to that booking and payment is

⁴ These companies did not pay the currency conversion fee; they billed their customers on a pre-existing cost-plus contract basis where the traveling consumer is charged and pays the currency conversion fee, along with any other mark-ups, as part of the company's booking service. Therefore, these Agency/Company claimants have not been damaged, and their claims should be disallowed under *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 733 n.12 (1977) (a "pre-existing cost-plus contract makes easy the normally complicated task of demonstrating that the overcharge has not been absorbed by the direct purchaser").

effected through Priceline's bank on that virtual account only for that transaction. No card is ever issued; nor is there in existence prior to the transaction a card which is "held" by Priceline. Priceline is not in the class.

Finally, Class Plaintiffs concur with the Special Master's recommendation that the Court approve the algorithm for determining Option 2 claimant refunds as described in the July 15, 2008 Memorandum from B. Thomas Florence to Francis McGovern Re: Algorithm Status Report ("July 2008 Florence Report") and Declaration of B. Thomas Florence Regarding Option 2 claims and the Refund Algorithm dated December 1, 2008 ("December 2008 Florence Decl."), submitted as Exhibits 2 and C to Plaintiffs' Notice of Filing of Status Report Concerning the De-Duping of Claims and the Settlement Administration Process, dated December 8, 2008.

Relying on "*typical* foreign transaction activity" (as opposed to *actual* foreign transaction activity, which is captured in Option 3), the algorithm fairly calculates a refund amount for those class members whose foreign transactions exceeded the minimum transaction amount recommended for Option 1 claims, but who did not wish to provide the year-by-year information required for Option 3 claims. July 2008 Florence Report at 2; December 2008 Florence Decl. at ¶6.

II. Plaintiffs' Response to Comments on Special Master's Report

As of the date of this response, Plaintiffs' Counsel have received 16 letters or submissions commenting on the Supplemental Special Master Report.⁵ These comments make essentially six points. First, six individuals complain that the Option 2 refund algorithm developed by ARPC and recommended by the Special Master does not accurately reflect the spending patterns of "independent long-term travelers", which they assert is unfair. Second, eight individuals urge the

⁵ Although Selwyn Berg submitted comments one day after the deadline set by the Court, Plaintiffs considered it in this response.

Court to require another notice-and-comment period so that additional class members can object or switch their claim option. Third, eight individuals urge the Court to reduce any attorneys' fee award. Fourth, nine individuals claim that the settlement amount is inadequate. Two individuals urge the Court to accept late claims. Finally, two objectors erroneously contend that they have not been served with all relevant documents. As discussed below, none of these objections have any merit. Therefore, Plaintiffs respectfully request that the Court adopt the recommendations in the Supplemental Special Master Report, grant final approval of the settlement, award service payments to the class representatives, and approve an award of attorneys' fees and expenses, all of which are necessary to permit the Claims Administrator to distribute the net settlement fund to claimants at the conclusion of the settlement administration process.

A. The Algorithm for Option 2 Claimants Fairly Determines a Refund Value Based on Typical Foreign Transactions

Objector Edward Hasbrouck claims that the Option 2 algorithm is unfair because it makes certain assumptions that are inconsistent with his own foreign spending patterns and those of other “independent long-term travelers and expatriates, who either weren’t staying in one place or didn’t have the necessary residence or employment status to be able to open a local bank account abroad.” Hasbrouck at 2. Mr. Hasbrouck’s objection lacks merit, however, because the claim form made clear that a refund under Option 2 would be an “estimation” of the claimant’s spending, based upon “typical” foreign transaction activity, rather than atypical, extensive travel abroad.⁶ In addition,

⁶ See Refund Option 2 Claim Form (“The Total Estimation Refund is based on a 1% refund for estimates of *typical* foreign transaction activity. . .”) (emphasis added); see also December 2008 Florence Decl. at ¶17 (“Option 2 refunds were designed to reflect *typical* foreign travel; extensive travel or living abroad results in atypical spending totals”) (emphasis added); March 28, 2008 Supplemental Report, at 3 (“Preliminary estimates suggest that Option 2 electronic filers report a median of about 80 days outside of the U.S. during the Class Period. . .”); July 2008 Florence Report at 10 (“Half of the claimants report a total of 82 or fewer days of travel . . . Option 2 refunds are

Option 2 is merely one of three claim options provided to claimants. Mr. Hasbrouck and other “long-term travelers and expatriates” could have filed claims under Option 3, which required claimants to estimate their foreign transactions year-by-year. Having chosen the simplified claim method provided by Option 2, which was explicitly based upon “typical” spending patterns, and which specifically advised class members that they might prefer to use Option 3 if they “had extensive foreign travel or foreign transactions,” Mr. Hasbrouck and other atypical travelers cannot now claim that the algorithm used to calculate a claim under Option 2 is unfair.⁷

Moreover, Mr. Hasbrouck’s specific attacks on the algorithm do not withstand scrutiny. Besides conceding that his objection regarding the algorithm’s treatment of cash is applicable only to the atypical “long-term traveler” (*id.* at 2), Mr. Hasbrouck’s objection to the discount applied to extensive stays abroad also misses the mark: ARPC applied this discount because “[e]xtensive travel or living abroad results in *atypical* spending totals.” July 2008 Florence Report at 10 (emphasis added); *see also id.* (half of the Option 2 claimants reported 82 or fewer days of travel over the class period; as to the other half, if all reported days were considered, “a small number of claims [would] be paid a large proportion of the total Option 2 refunds”);” December 2008 Florence

intended to be based on ‘typical spending during travel.’ Extensive travel or living abroad results in atypical spending totals.”).

⁷ The claim forms *and* cover letters mailed to the class with the Settlement Notice (included in the Revised Claim Form) not only clearly advised claimants of their options, but repeatedly explained the differences between those options. For example, the cover letter advised claimants that Option 1 was recommended for those who traveled less than one week outside the U.S. or had less than \$2,500 in foreign transactions, that Option 2 was recommended for those who traveled for more than one week outside the U.S. or had more than \$2,500 in foreign transactions, and that Option 3 was recommended for those who had *extensive foreign travel or foreign transactions* and were willing to provide year-by-year information. Moreover, each claim form reiterated the recommendation for the particular option, and suggested that class members use Refund Option 3 if they had extensive foreign travel or transactions. *See infra* at 7.

Decl. at ¶17. Finally, Mr. Hasbrouck incorrectly claims that ARPC did not consider differences in spending patterns depending on whether the traveler is on a one-day trip or staying overnight. That difference in spending patterns was, in fact, taken into account. July 2008 Florence Report at 6 (“travelers who stay at least one night generally spend more per day than same-day travelers . . . The Option 2 algorithm explicitly considers these distinctive travel and spending patterns. . .”).⁸

B. An Additional Notice and Comment Period is Not Required and Would Be Unfair to Class Members Who Filed Valid Timely Claims

Several individuals have requested that the Court provide an additional notice-and-comment period to class members, as well as an opportunity for claimants to convert their claims from Option 1 to Option 2, or from Option 2 to Option 3. Additional notice is unnecessary, unfair to class members who filed valid, timely claims and who are awaiting distribution of the refunds, and would needlessly reduce the funds available for distribution. The notice program in this case was extensive in both scope and content, and cost more than \$15 million. The more than 38 million class notices and claim forms that were mailed directly to class members provided ample information to allow class members to make an informed choice about which claim option to use. The November 23, 2007 letter explained, for example, that Refund Option 2, the “Total Estimation Refund,” is based on “typical spending during travel.” It also advised claimants that if they “had extensive foreign travel or foreign transactions,” the more detailed refund Option 3 was preferable.

⁸ The comments received from Warwick J. Drakeford, Erin Van Rheenen, Peter H. Smith and Barbara Miller raise objections identical to Mr. Hasbrouck’s and should be rejected for the same reasons. These individuals apparently copied a proposed letter of objection posted by Mr. Hasbrouck on his website. See <http://www.hasbrouck.org/blog/index.html>. Similarly, Marguerite Hasbrouck, who states she is not a class member, urges the Court to schedule another hearing to consider the interests of the “independent, long-term travelers and travel experts,” apparently raising the same concerns as Edward Hasbrouck.

Moreover, because the algorithm could not be completed until claimants' data was analyzed, the notice and claim forms provided as much information as was possible, and far more than was required. *See, e.g., Consol. Edison, Inc. v. Northeast Utils.*, 332 F. Supp. 2d 639, 652 (S.D.N.Y. 2004) (under Rule 23(e), a settlement notice must only “fairly apprise the . . . members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings.”) (citations omitted); *see also Weinberger v. Kendrick*, 698 F. 2d 61, 70 (2d Cir. 1983) (“notices to class members can predictably contain only a limited amount of information”); *In re Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 52 (S.D.N.Y. 1993) (“settlement notices need only describe the terms of the settlement generally”).⁹

Further, the notice and claim forms explicitly advised class members that they might not receive a full refund of their foreign transaction fees. The November 23, 2007 letter to class members stated: ***“Please note that if the volume of claims is unexpectedly high, it may be necessary to adjust refund amounts.”*** Cover Letter to Revised Claim Form (emphasis added); *see also* Notice of Class Action Settlement contained in the Revised Claim Form (“The amount of your refund will depend on the bank that issued your credit or debit/ATM card and: which claim form you choose, the dollar value of your claim, and the amount of money available to pay claims and the

⁹ ARPC was appointed consultant to the Special Master and tasked with developing a mathematical formula, or algorithm, to be used to calculate the value of Option 2 claims. An essential part of the methodology used to develop the algorithm included examining actual claimant data and travel statistics (*i.e.*, the number of claimed travel days and the claimants' categorization of the four travel purposes identified on the Option 2 claim form). Additionally, ARPC needed claimant data to account for instances where Option 2 claimants reported atypical numbers of travel days.

number and total dollar value of all valid claims filed. (*You might get only a partial refund.*)” (emphasis added); *supra* n.2.¹⁰

Finally, it would not be appropriate or feasible to permit class members to switch their claim options. If class members changed their claims, the new estimated refunds (for all categories of claimants) would also change. Where, as here, the amount of a claimant’s refund depends upon other claims, there can be no certainty until the claims process is closed. Moreover, Mr. Jou’s suggestion that Option 1 claimants should be allowed to switch to Option 2 because they could recover more under that option ignores that the Option 1 refund is aimed at claimants with the least foreign transactions. The claim form recommends using the Easy Refund of \$25 if the total travel time outside the U.S. during the class period was one week or less, or if the foreign transactions during the class period were \$2,500 or less.

An additional notice-and-comment period would prejudice class members who have submitted timely, valid claims by further delaying the distribution of refunds and unnecessarily depleting the amount of funds available to class members.

C. The Court Should Approve the Requested Attorneys’ Fees

For all the reasons stated previously, this Court should approve the request for attorneys’ fees set forth in Plaintiffs’ Co-Lead Counsels’ Memorandum of Points and Authorities in Support of Motion for an Award of Attorneys’ Fees and Expenses. The objectors’ suggestion that the Court should reduce the attorneys’ fee award *because* of the extraordinary number of filed claims flies in the face of common sense and policy objectives.

¹⁰ See also Revised Publication Notice, attached as Exhibit 8 to the [Proposed] Final Judgment and Order of Dismissal (“The amount of your refund will depend on . . . the amount of total claims, the dollar value of your claim, the bank that issued your card, and the amount of money available to pay claims. You might only get a partial refund.”).

D. The Settlement Is Fair, Reasonable and Adequate

Ignoring this Court's order limiting responses to the issues raised in the Supplemental Report, the Tomlinson objectors repeat their earlier assertion that the settlement in this case – consisting of a \$336 million cash payment plus substantial future conduct consideration – is inadequate. This argument is meritless. This settlement, one of the ten largest antitrust class action settlements, was achieved without the assistance of any governmental investigation, in the face of numerous appeals, and despite the presence of arbitration clauses that purport to ban cardholders from participating in any class action. The cash settlement represents approximately 9% of the foreign transaction fees collected by defendants on all credit and debit card transactions, and more than 30% of potential damages after the Court's decision enforcing certain defendants' arbitration clauses. Far more than fair, reasonable and adequate, this settlement is, as Magistrate Judge Infante (ret.) said, an "excellent result" for the class.

Moreover, the estimated refund amounts demonstrate the adequacy of the settlement. Although Option 1 refunds are not as high as originally anticipated, the estimated refund still represents a reasonable reimbursement in light of all the facts. Option 1 claims were recommended for persons who traveled outside the country for less than 1 week and had foreign currency expenditures of \$2,500 or less. Class members were charged between 1% and 3% in currency conversion fees. A \$15.00-\$17.00 payment represents 1% of a foreign currency expenditure of \$1,500 - \$1,700 and 3% of a foreign currency expenditure of \$500 to \$567. And there is reason to believe that the actual average spends for Option 1 claimants is considerably lower. The consultant retained by the Special Master estimates the average daily foreign spend on Visa and MasterCard payment cards at between \$15 (for visiting friends and relatives) and \$82 (for business travel), or between \$105 and \$574 assuming 1 week's travel. The high end of this estimate (\$574 times 3%) would yield currency conversion fees paid of \$17.22. Taking into account that a full refund of all

fees paid would have been an extremely challenging outcome for the plaintiffs to have achieved, an Option 1 recovery of \$15.00 - \$17.00 is a very reasonable outcome.¹¹

E. The Court Should Deny Late Claims

As noted above, class members had up to 16 months to file claims. It would be unfair to more than ten million class members who filed timely claims to reduce their refund in order to accommodate all late claims. Plaintiffs' Co-Lead Counsel appreciate that the Special Master's recommendation is due to the extraordinary participation of the class in the claims process and a need to fairly treat class members who timely filed valid claims. If, however, the Court disagrees with the recommendation, Plaintiffs' Co-Lead Counsel suggest the Court only accept late claims if they were submitted by an individual (as opposed to an Agency/Company); and included (at the time of submission) an explanation or documentation demonstrating undue hardship, the sufficiency of which will be determined on a case-by-case basis by the Settlement Administrator under the supervision of Co-Lead Class Counsel.

F. Plaintiffs Properly Served All Relevant Documents on Objectors

Objectors Hasbrouck and Jou erroneously assert that they have not been served with all relevant documents. In fact, Plaintiffs served Mr. Hasbrouck and Mr. Jou with all documents

¹¹ Eight individuals (Patricia Tomlinson, Daniel Ernsberger, Rebecca Brainard, Donna Lonzo, Keith Lonzo, Kathleen McWhorter, William McWhorter and Michael J. Rinis) argue in a single submission that the settlement amount is inadequate and must be renegotiated under the purportedly analogous Fen-Phen litigation. That case is distinguishable for several reasons, including: (1) even with the addition of \$1.25 billion to the settlement, many claimants would receive reduced compensation under the amended settlement agreement; (2) unforeseen complications in addition to the unanticipated number of claims, including a 100 percent audit program and massive fraud and abuse of the claims system, contributed to the rapid depletion of the settlement fund; (3) because the case involved products liability claims that diet drugs caused valvular heart disease, the settlement agreement provided for individual payments of up to \$1.485 million, and there was no apparent proration system set up to deal with the inundation of claims. *See In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation*, 226 F.R.D. 498 (E.D. Pa. 2005).

relevant to their objections, including supplemental status reports bearing directly on the issues raised in the Special Master's July 1, 2009 Report. When Mr. Hasbrouck and Mr. Jou requested a copy of the December 8, 2008 Status Report, Plaintiffs promptly provided them with a copy of the report, although that report was already available to the public on the settlement website. Per their requests, both objectors have also received copies of quarterly reports concerning administrative costs and the settlement funds even though these reports pertain solely to administrative issues and have no bearing on their objections. In any event, prior to the July 2, 2009 Order permitting objectors to submit written comments, both Mr. Hasbrouck and Mr. Jou already possessed copies of the two reports referenced in the Special Master's Report that relate to their objections, including the December 2008 report. They were each served another copy of these reports when Plaintiffs served them with the July 2, 2009 Order because these reports are attached as exhibits to the Special Master's Report which accompanied service of the Court's Order.

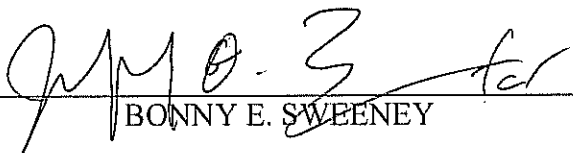
III. CONCLUSION

For all the foregoing reasons and for the reasons stated in prior submissions and in oral argument, Plaintiffs request that the Court adopt the findings and recommendations of the Special Master and approve the settlement, the revised plan of distribution, the request for an award of attorneys' fees and expenses, and the request for service awards to Representative Plaintiffs.

DATED: August 5, 2009

Respectfully submitted,

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