

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
IN RE : MDL No. 1409
: :
CURRENCY CONVERSION FEE : M 21-95
ANTITRUST LITIGATION : :
: :
-----X
THIS DOCUMENT RELATES TO: : Index No. 04 CV 5723 (WHP)
: :
ROBERT ROSS and RANDALL WACHSMUTH, : Jury Trial Demanded
: :
Plaintiffs, : :
: :
-against- : :
: :
AMERICAN EXPRESS CO., et al., : :
: :
Defendants. : :
-----X

**MEMORANDUM IN SUPPORT OF CLASS PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF PARTIAL CLASS ACTION SETTLEMENT WITH
DEFENDANTS AMERICAN EXPRESS CO.,
AMERICAN EXPRESS TRAVEL RELATED SERVICES, INC. AND
AMERICAN EXPRESS CENTURION BANK**

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF THE CASE.....	4
	A. Procedural Statement	4
	1. Statement Concerning the Initial <i>CCF I</i> Matter.....	4
	2. Statement Concerning the Instant Matter	6
	3. Statement Concerning <i>Ross v. Bank of America</i>	9
	B. Settlement Negotiations in <i>Ross v. American Express</i>	10
	C. Terms of the Proposed Settlement	10
	D. The Notice Program.....	11
III.	THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL.....	12
	A. Standards for Preliminary Approval	12
	B. The Applicable Factors Demonstrate that the Settlement Is Fair, Reasonable and Adequate	13
	1. The Negotiations and the Presumption of Fairness	13
	2. Complexity, Expense and Likely Duration of the Litigation.....	14
	3. Stage of the Proceedings and the Amount of Discovery Undertaken.....	15
	4. The Risks of Establishing Liability and Damages and of Maintaining the Class Action through Trial; Comparison of the Settlement with the Likely Result of Litigation.....	16
	5. Amex’s Ability to Withstand a Greater Judgment.....	17
	6. The Proposed Settlement Realizes Enhanced Efficiencies and Cost Reduction Via Coordinated Administration With the <i>CCF I</i> Distribution Which Increases Its Value to FX Damages Class Members	18
IV.	THE PROPOSED SCHEDULE OF EVENTS	19
V.	CONCLUSION.....	20

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Chatelain v. Prudential-Bache Sec.</i> , 805 F. Supp. 209 (S.D.N.Y. 1992)	15, 16
<i>Cohen v. J.P.Morgan Chase & Co.</i> , 262 F.R.D. 153 (E.D.N.Y. 2009)	12
<i>In re Currency Conversion Fee Antitrust Litig.</i> , 2006 WL 3247396 (S.D.N.Y. Nov. 8, 2006).....	<i>passim</i>
<i>In re Currency Conversion Fee Antitrust Litig.</i> , 365 F. Supp. 2d 237 (S.D.N.Y. 2005).....	5
<i>In re Currency Conversion Fee Antitrust Litig.</i> , 2005 WL 2364969 (S.D.N.Y. Sept. 27, 2005).....	7
<i>In re Currency Conversion Fee Antitrust Litig.</i> , 224 F.R.D. 555 (S.D.N.Y. 2004)	5
<i>In re Currency Conversion Fee Antitrust Litig.</i> , 263 F.R.D. 110, 124 (S.D.N.Y. 2009)	1, 2, 6, 17
<i>Detroit v. Grinnell Corp.</i> , 495 F.2d 448 (2d Cir. 1974).....	13
<i>In re Drexel Burnham Lambert Group, Inc.</i> , 960 F.2d 285 (2d Cir. 1992).....	13
<i>Gross v. Washington Mut. Bank, F.A.</i> , 2006 WL 318814 (E.D.N.Y. Feb. 9, 2006).....	13
<i>In re Holocaust Victim Assets Litig.</i> , 2007 WL 805768 (E.D.N.Y. Mar. 15, 2007).....	14
<i>In re Currency Conversion Fee Antitrust Litig.</i> , 2009 U.S. Dist. LEXIS 53265 (S.D.N.Y. June 18, 2009).....	9
<i>In re Initial Public Offering Sec. Litig.</i> , 226 F.R.D. 186 (S.D.N.Y. 2005)	13
<i>Maley v. Del Global Techs. Corp.</i> , 186 F. Supp. 2d 358 (S.D.N.Y. 2002).....	15

<i>McReynolds v. Richards-Cantave</i> , 588 F.3d 790 (2d Cir. 2009).....	12, 13
<i>In re NASDAQ Mkt.-Makers Antitrust Litig.</i> , 1997 WL 805062 (S.D.N.Y. Dec. 31, 1997)	3
<i>New York City Mun. Secs. Litig.</i> , 87 F.R.D. 572 (S.D.N.Y. 1980)	8
<i>New York v. Nintendo, Inc.</i> , 775 F. Supp. 676 (S.D.N.Y. 1991)	15
<i>In re Prudential Sec. Inc. Ltd. Partnership Litig.</i> , 163 F.R.D. 200 (S.D.N.Y. 1995)	3, 13
<i>Ross v. American Express Co., et al.</i> , 264 F.R.D. 100 (S.D.N.Y. 2010)	8
<i>Ross v. American Express Co., et al.</i> 773 F. Supp. 2d 351 (S.D.N.Y. 2011).....	9
<i>Ross v. Bank of America, N.A.</i> , 524 F.3d 217 (2d Cir. 2008).....	9
<i>In re Visa Check/MasterMoney Antitrust Litig.</i> , 297 F. Supp. 2d 503 (E.D.N.Y. 2003)	14, 15
<i>Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.</i> , 396 F.3d 96 (2d Cir. 2005).....	12, 13
<i>In re Warner Chilcott Ltd. Sec. Litig.</i> , 2008 WL 5110904 (Nov. 20, 2008).....	3, 12, 13
<i>Weinberger v. Kendrick</i> , 698 F.2d 61 (2d Cir. 1982).....	12, 15
<i>Weseley v. Spear, Leeds & Kellogg</i> , 711 F. Supp. 713 (E.D.N.Y. 1989)	14

STATUTES & RULES

9 U.S.C. § 4.....	7
15 U.S.C. § 1.....	9
FED. R. CIV. P. 23.....	11
FED. R. CIV. P. 23(b)(2)	6, 9

FED. R. CIV. P. 23(e)1

Representative Plaintiffs Robert Ross and Randall Wachsmuth (collectively “Class Plaintiffs” or “Plaintiffs”) on behalf of themselves and the certified Class (the “Class”) respectfully submit this Memorandum of Law in Support of Class Plaintiffs’ Motion for Preliminary Approval of Partial Class Action Settlement with Defendants American Express Co., American Express Travel Related Services, Inc. and American Express Centurion Bank (collectively referred to as “Amex”).

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 (Ex.¹ 1) between Class Plaintiffs and Amex, resolving Plaintiffs’ damages claim against Amex. The instant settlement is on behalf of a Damages Class (“FX Damages Class”) that is composed of claimants on the settlement in a prior related matter, *In re Currency Conversion Fee Antitrust Litig.* (“*CCFI*”), Master File No. 21-95, No. 01-md-1409 (S.D.N.Y.) (Pauley, J.).² There are two claims in the instant matter: (1) a damages claim that Amex conspired with certain Banks³ to fix foreign transaction (“FX”) fees assessed on transactions effected with merchants abroad or in foreign currencies (Count I), and (2) an injunctive claim that Amex conspired with those Banks and certain others to impose class-barring arbitration clauses (“CBA Clauses”) on cardholders

¹ “Ex.” refers to the Exhibits to the accompanying Declaration of Charles P. Goodwin in Support of Plaintiffs’ Memorandum of Law in Support of Class Plaintiffs’ Motion for Preliminary Approval of Partial Class Action Settlement with Defendants American Express Co., American Express Travel Related Services, Inc. and American Express Centurion Bank.

² The Damages Class in *Ross v. American Express* is composed of those *CCFI* class members who made claims in the *CCFI* settlement plus approximately 48,800 claimants who filed late claims. This Court granted final approval of the *CCFI* settlement on October 22, 2009. *CCF*, 263 F.R.D. 110, 133 (S.D.N.Y. 2009).

³ At the time of suit, the “Banks” were Bank of America, Bank One/First USA, Chase, Citibank/Diners Club, MBNA, HSBC/Household and Providian.

(Count II). The first claim in *Ross v. American Express* seeks redress for the same injuries that were a basis for the claim in *CCFI*.

The proposed settlement *sub judice* provides a gross recovery of \$49.5 million in additional compensation to the FX Damages Class for their damages claim as to the FX fee. This compensation augments the \$336 million paid to this class in the *CCFI* settlement, increasing total relief to injured cardholders to \$385.5 million. The proposed settlement severs, and thus preserves for trial, the arbitration conspiracy claim (Count II).

The proposed partial settlement warrants preliminary approval. Two features of the settlement illustrate the value it provides to FX Damages Class Members: (1) the settlement increases the overall payments to be made to claimants; and (2) it achieves efficiencies and cost reductions that are unique to this settlement.

The proposed partial settlement of the damages claim here compares well with the settlement that this Court approved in the original *CCFI* matter. This Court has *already* approved – both preliminarily and finally – a settlement of \$336 million for the same injuries to the same group of claimants. 263 F.R.D. 110, 133 (S.D.N.Y. 2009); 2006 WL 3247396, at *6 (S.D.N.Y. Nov. 8, 2006). If compensation in the amount of \$336 million is fair, reasonable and adequate, it follows that increased compensation of \$385.5 million is necessarily also fair, reasonable and adequate compensation for these injuries. As discussed below, Amex’s payment here is roughly 30% of the \$164 million in payments made by the seven Banks in the *CCFI* matter.⁴

The present circumstances present an extraordinary opportunity for efficiency in the notice and settlement administration process. The Court has approved the parties’ Notice Plan

⁴ The “Network” defendants in *CCFI* supplied the balance of that settlement.

which will combine notice to the FX Damages Class with the distribution of initial payments in *CCF I*. Class members are more likely to read a notice accompanying a settlement payment, and the FX Damages Class benefits because it only incurs the modest *incremental* increase in costs for sending notice to more than 10 million class members. Because of the relationship between the *Ross v. American Express* damages class and the class in *CCF I*, the claims process is already almost completed. The FX Damages Class's claims have been fully submitted in conjunction with the *CCF I* settlement and the audit process is complete for all but approximately 48,800 of the more than 10 million claimants. Further, the parties expressly contemplate, as stated in the written settlement agreement, that distribution to the FX Damages Class will be combined with the distribution of secondary payments from the *CCF I* settlement, thereby minimizing the expense of distribution in *both* matters.

In sum, the proposed settlement 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. Partnership 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 the full pre-trial record both in this matter and from *CCF I* as well as rulings on the merits in this Court (on summary judgment) and in the Court of Appeals (on arbitration). Accordingly, this Court should preliminarily approve this partial settlement because the proposed settlement is “sufficiently fair, reasonable and adequate” to warrant preliminary approval. *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 1997 WL 805062, at *24 (S.D.N.Y. Dec. 31, 1997) (“*NASDAQ*”) (citation omitted).

II. STATEMENT OF THE CASE

A. Procedural Statement

This is the second of three related matters in MDL 1409. The first MDL 1409 matter is *In re Currency Conversion Fee Antitrust Litigation* (“*CCF I*”), Master File No. 21-95, No. 01-md-1409 (WHP) (S.D.N.Y.), where plaintiffs claimed that defendants violated antitrust and other laws by colluding to impose FX fees on their cardholders. In *this* matter, the second of the MDL 1409 matters, plaintiffs (who hold Visa and MasterCard cards issued by the *CCF I* defendant Banks) assert claims against Amex as a co-conspirator with the Banks as to collusion (i) on FX fees, and (ii) with the addition of two other banks,⁵ CBA Clauses. The third matter is *Ross v. Bank of America, N.A. (USA)*, No. 05-cv-7116 (WHP) (S.D.N.Y.). There, plaintiffs claim that the *CCF I* bank defendants, along with Discover and Capital One, conspired with Amex (among others) to impose CBA Clauses on their cardholders.

Because the FX Damages Class here is composed entirely of claimants on the *CCF I* settlement, it is helpful to begin this statement with an overview of the proceedings in the initial *CCF I* matter.

1. Statement Concerning the Initial *CCF I* Matter

In *CCF I*, plaintiffs claimed that various defendant banks, together with MasterCard and Visa, conspired to impose FX fees on cardholders. The initial consolidated complaint was filed on January 22, 2002.

Extensive discovery followed. The *CCF I* plaintiffs relentlessly investigated meetings among the co-conspirators. Chase, in late September 2002, revealed the existence of the crucial May 25, 1999 meeting at the Wilmer Cutler firm, which meeting was attended by representatives

⁵ The added banks are Discover and Capital One.

of Amex and a number of the Banks, where both the FX fee and arbitration were discussed. It wasn't until December 2002 that plaintiffs obtained documents concerning the May 1999 meeting, which revealed that Amex was one of the co-sponsors of that meeting. In February 2004, *CCFI* plaintiffs deposed Amex's in-house counsel (a co-sponsor of the May 25, 1999 meeting) who revealed the existence of other meetings leading to discovery of the "Arbitration Coalition" and related meetings.

The *CCFI* defendants strenuously contested class certification. On October 15, 2004, this Court issued a lengthy and detailed opinion rejecting their arguments and certifying a damages class. *See In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555, 562-70 (S.D.N.Y. 2004).⁶ On reconsideration, this Court ruled that a substantial portion of the *CCFI* class would be subject to arbitration defenses that were likely to require individual arbitration of those class members' claims. *See Currency Conversion*, 361 F. Supp. 2d 237 (S.D.N.Y. 2005).

While several interlocutory appeals and petitions for review were pending, the *CCFI* parties entered into a \$336 million settlement covering both the network-level (first tier) and the bank-level (second tier) FX fees. Subsequent SEC filings revealed that Visa and MasterCard paid \$172 million of the settlement and the Banks paid \$164 million. (Exs. 2, 3) This Court preliminarily approved that settlement on November 8, 2006. *See Currency Conversion*, 2006 WL 3247396 (S.D.N.Y. Nov. 8, 2006).

Under the Court's supervision and with the assistance of a Special Master, the parties undertook a thorough and pervasive notice campaign. Some 38 million separately mailed direct notices followed some 21 million inserts mailed with credit card statements,⁷ and, along with

⁶ Short form citations to these decisions will use "*Currency Conversion*" as the case name.

⁷ These were to cardholders identified as potential class members by the *CCFI* defendant banks (based on their assessment which cardholders had incurred the FX fee).

publication notice in 25 periodicals and other notice measures. Exs. 4, 5 (Dec. of Edward J. Radetich, Jr. ¶¶ 2, 4 & 7 (Jan. 21, 2008); *CCFI* Revised Class and Settlement Notice Plan, at ¶ 5). That campaign cost over \$15 million for the direct mailed notice and over \$900,000 for publication notice. Ex. 6 (Affidavit of Ronald A. Bertino, Ex. A “Expenses Paid” (Feb. 20, 2009)). The notice plan yielded more than 10 million claims, not including some 48,800 late claims, *see* Ex. 7 (Rep. of Edward J. Radetich, Jr., at ¶ 3 (Dec. 4, 2008)), estimated to comprise approximately 25-40% of the damages class in *CCFI*.

On October 22, 2009, this Court granted final approval to the *CCFI* settlement. *See* 263 F.R.D. 110 (S.D.N.Y. 2009). Eleven appeals followed. These appeals were all withdrawn or dismissed. As of this writing, the *CCFI* settlement is proceeding with distribution.

2. Statement Concerning the Instant Matter

Plaintiffs filed their complaint in this matter (the second of the three related MDL 1409 matters) on July 22, 2004. In Count I, Plaintiffs alleged a conspiracy among Amex and the *CCFI* Banks to inflate FX fees. In Count II, Plaintiffs alleged an interconnected conspiracy to impose CBA Clauses on cardholders. Amex answered on September 20, 2004.

On February 18, 2005, Plaintiffs moved to certify a Rule 23(b)(3) damages class on Count I of their Complaint and a Rule 23(b)(2) injunctive relief class on Count II, which motion was contested and fully briefed by April 25, 2005. On April 11, 2005, Amex moved (i) to dismiss or stay in favor of arbitration and (ii) for summary judgment as to Plaintiff Wachsmuth based on his wife’s holding a corporate Amex card subject to a class action settlement in an unrelated matter (*see infra* at pp. 7-8), which motions were opposed. On May 6, 2005, Amex replied on the arbitration motion but withdrew its summary judgment motion.

On September 27, 2005, this Court ruled that, while Amex could invoke the *CCFI* Banks’ arbitration clauses under the doctrine of equitable estoppel, Plaintiffs had adduced

sufficient evidence that these clauses were collusively imposed that a jury trial, under 9 U.S.C. § 4, on their legality was required prior to their enforcement. *See Currency Conversion*, 2005 WL 2364969, at *6-*9. This Court found certification of the damages class to be premature prior to that trial, *id.* at *10, but certified the injunctive relief class on the arbitration collusion claim. *Id.* at *11-*12. The injunctive relief class certified was defined as follows (at *3):

[A]ll VISA, MasterCard, Diners Club general purpose cardholders
of the [CCF I] Defendant Banks.

On October 11, 2005, Amex moved to reconsider the September 27, 2005 Order. On September 21, 2006, this Court denied reconsideration. On September 29, 2006, Amex appealed the ruling requiring a jury trial on the arbitration collusion issue. On October 12, 2006, Plaintiffs cross-appealed, contesting the application of the doctrine of equitable estoppel. On October 21, 2008, the Court of Appeals ruled that equitable estoppel did not apply and that Amex could *not* avail itself of the CCFI Banks' arbitration clauses.

On April 22, 2009, Amex moved to amend its Answer to include a defense that the release in the settlement of *LiPuma, et. al v. American Express Co., et al.*, No. 1:04-cv-20314 (S.D. Fla.), released the claims of any class members here who held Amex cards (in addition to their card issued by one of the CCFI defendant banks). Plaintiffs opposed Amex's motion to amend, on the grounds that *LiPuma* did not impair any claims in the instant matter. Also on April 22, 2009, Plaintiffs renewed their motion to certify a damages class in this matter. Amex opposed that motion on May 28, 2009. The Court heard argument on both motions on September 16, 2009.

On January 22, 2010, this Court certified a damages class for the FX fee claim and denied Amex's motion to amend its answer. The Court concluded that "the LiPuma Release cannot

include the claims asserted in this action,” rendering Amex’s proposed amendment futile. 264

F.R.D. 100, 120. The Court also certified the following class on Plaintiffs’ damages claims:

All VISA, MasterCard and Diners Club general purpose cardholders who used cards issued by any of the Co-Conspiring Banks during the Damages Period from July 22, 2000 to November 8, 2006, and were assessed a foreign transaction fee or surcharge for using such cards to purchase goods and/or services priced in foreign currencies or in foreign countries and who have submitted valid claims, regardless of timeliness in the settlement of *In re Currency Conversion Fee Antitrust Litigation*, No. 01-MD-1409 (WHP), Master File No. 21-95 (S.D.N.Y.).

The *Ross v. American Express* FX Damages Class is a subset of the *CCFI* damages class, restricted to those who made valid claims in the *CCFI* settlement plus potentially valid late claims. The FX Damages Class opening date was moved to July 22, 2000 from March 1, 1997 and the closing date was set to November 8, 2006, which is the date for preliminary approval of the *CCFI* settlement and the end of the class period in *CCFI*.⁸ In short, the net effect of these

⁸ This definition was also refined in three aspects from the definition in the *Ross v. American Express* Complaint. First, the damages period ends with the November 8, 2006 release date in the *CCFI* settlement. Second, the subject transactions were redefined to reflect the Banks’ actual practices with respect to assessing FX fees on foreign transactions. Finally, the FX Damages Class was refined to reflect the fact that the FX Damages Class here, as a subset of the largest conceivably “possible” *CCFI* damages class, had already received notice of the almost identical *CCFI* claims (without reference to Amex’s alleged participation) when they were notified of the *CCFI* settlement. Notwithstanding either the extensive notice campaign in *CCFI* (and the overwhelming response of the class) or the prospect of a recovery with simplified claim procedures, millions of addresses associated with the potential *CCFI* class did not file claims.

Some fraction, likely substantial in view of the ambitious design of the notice program, of these mailings are redundant (*e.g.*, multiple or prior address information for a single cardholder, duplicate addresses that escaped an intentionally modest de-duplication program, etc.) because the notice program was intended to saturate the *CCFI* class with direct notice to the largest extent reasonably possible.

Refining class definitions as litigation progresses is common practice in class actions and is freely allowed. *See New York City Mun. Secs. Litig.*, 87 F.R.D. 572, 580-81 (S.D.N.Y. 1980) (Owen, J.) (“[L]eave to amend the complaint to redefine the class should be freely given except when some prejudice results.... Factors bearing on the manageability of the class, including problems related to the identity of the members and class notice, may justify a modification of the class.” (citations omitted)).

changes was to add claims against an additional defendant – Amex – to those asserted by the claiming *CCFI* class members.

On April 30, 2010, Amex submitted a comprehensive motion for summary judgment as to all of Plaintiffs' claims. Plaintiffs opposed on June 10, 2010 and the Court heard argument on August 19, 2010. On March 29, 2011, this Court denied Amex's motion for summary judgment. *See* 773 F. Supp. 2d 351 (S.D.N.Y.).

3. Statement Concerning *Ross v. Bank of America*

In the third MDL 1409 matter, *Ross v. Bank of America*, the plaintiffs sued the *CCFI* Banks, Capital One and Discover for conspiring among themselves and with Amex, in violation of Section 1 of the Sherman Act, 15 U.S.C. §1, to impose CBA Clauses on their cardholders. The initial complaint there was filed August 11, 2005. On September 20, 2006, the Court dismissed for want of Article III standing. 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), *rev'g*, *Currency Conversion*, 2006 WL 2685082 (Sept. 20, 2006). On remand, the parties took fact and expert discovery. A Rule 23(b)(2) injunctive class relief class was certified pursuant to stipulation on October 6, 2009. At or about the end of 2009, all defendants, save Citigroup and Discover, settled. As of this writing, four motions for summary judgment are pending – one by each defendant seeking to dismiss for want of evidence and two by plaintiffs seeking to streamline trial by resolving certain issues.⁹

⁹ On April 17, 2009, Plaintiffs had moved to consolidate *Ross v. Bank of America* with *Ross v. American Express*. On June 18, 2009, this Court denied that motion without prejudice to its subsequent renewal as the matters grew closer to trial. 2009 U.S. Dist. LEXIS 53265.

B. Settlement Negotiations in *Ross v. American Express*

The parties initially discussed settlement in 2006, culminating in a two-day mediation on May 30 and 31, 2006. Those talks failed. More recently, from approximately May 2009 until March 29, 2011, when the Court denied Amex's summary judgment motions, Mr. Davidoff and Mr. Chesler conducted sporadic telephone discussions which did not lead to renewed, serious discussions until after March 29, 2011.

These discussions intensified over the ensuing months, concurrent with (but unrelated to) discussions with Amex about stipulating to forms of Class Notice that could be "coupled" with the *CCFI* claims distribution, and which led to several rounds of agreed forms of Notice.

Discussions between the parties continued for six months over the spring and summer by telephone. The parties met face-to-face on September 15, 2011 and reached accord on the fundamental terms of the instant proposed settlement. The parties continued to negotiate other important terms until the execution of the Stipulation and Agreement of Settlement (Ex. 1) on October 24, 2011.

C. Terms of the Proposed Settlement

The terms of the proposed settlement are straightforward. In exchange for a payment of \$49.5 million, the FX Damages Class will release Amex from claims relating to the alleged conspiracy as to FX fees. Plaintiffs' claims as to the CBA Clauses will be severed and proceed separately. In addition, both the proposed settlement and the Court-approved Notice Plan are designed to obtain administrative efficiencies and cost reductions by coordinating notice and settlement administration with the distribution of settlement checks in *CCFI* (*see infra* Parts II.D and III.B.6), which in turn, enhances the overall value of the settlement to FX Damages Class Members.

D. The Notice Program

On October 26, 2011, the Court approved the parties' Notice Plan, *i.e.*, the proposed forms of notice and the manner of dissemination of the notices, as satisfying Rule 23 of the Federal Rules of Civil Procedure. Order, dated October 26, 2011 (Ex. 8).

The parties negotiated the Notice Plan in two "phases" that occurred both before and concurrent with the settlement discussions. Initially, the parties agreed upon forms of notice informing FX Damages Class Members of the pendency of this matter that would be disseminated with the first settlement distribution in *CCF I*, along with notice and additional important information accessible on the settlement website or via a toll free phone number. Upon reaching agreement to settle Count I, the parties retained the coordinated dissemination of the notice with the *CCF I* settlement distribution, but promptly revised the notices to apprise FX Damages Claims of the settlement.

Specifically, the approved Notice Plan provides for two forms of direct notice to be distributed to the FX Damages Class, as well as publication notice. First, class members who are receiving disbursements of \$50.00 or more from the *CCF I* settlement (via a letter check) will be mailed a long-form notice (the "Class Notice"). *See* Ex. 9. This is a standard form class action notice, similar to the one that this Court previously approved for distribution to the *CCF I* settlement class. *See Currency Conversion*, 2006 WL 3247396, *3. The Class Notice will be enclosed with the letter checks containing payment from the *CCF I* settlement. This notice will also be mailed separately to those *CCF I* claimants whose claims were disallowed solely because they were untimely.

Class members receiving disbursements of less than \$50.00 from the *CCF I* settlement, will receive a "postcard check." They will also receive notice (the "Check Notice") with their payments. *See* Ex. 10 (the Check Notice will also be printed on the letter checks). The Check

Notice provides notice of key terms and matters concerning the settlement, and directs class members to the settlement web site and/or a toll free 800 number to access the Class Notice and other information and documents concerning the settlement.

Third, a short form notice (the “Summary Notice”) will be published in USA Today. *See* Ex. 11.

Additionally, Class Members can obtain information concerning the settlement and the litigation from the settlement website, www.ccfsettlement.com. The website will contain a set of Frequently Asked Questions (“FAQs”), as well as a copy of the Class Notice, the Settlement Agreement and other important documents concerning the litigation. Class Members can also access a toll free phone number to ask questions about the settlement.

III. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

Plaintiffs now respectfully request preliminary approval of the proposed settlement of the FX Damages claims (Count I). On final approval, the Court will have a more 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

Judicial 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 v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009); *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.

“[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 are:

- i. the complexity, expense and likely duration of the litigation;
- ii. the reaction of the class;
- iii. stage of the proceedings and the amount of discovery undertaken;
- iv. the risk of establishing liability;
- v. the risk of establishing damages;
- vi. the risk of maintaining the class action through trial;
- vii. the ability of the defendants to withstand a greater judgment;
- 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; *Gross v. Washington Mut. Bank, F.A.*, 2006 WL 318814, at *4 (E.D.N.Y. Feb. 9, 2006) (Levy, M.J.); *IPO*, 226 F.R.D. at 190; *Prudential Sec.*, 163 F.R.D. at 210.

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; *In re Initial Public*

Offering Sec. Litig., 226 F.R.D. 186, 190 (S.D.N.Y. 2005). “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 II.B. Highly experienced counsel on both sides negotiated the terms, in arm’s-length discussions including prior, inconclusive discussions in 2006 and discussions beginning sporadically almost two years ago but intensifying over the past seven months that led directly to the proposed settlement. Plaintiffs’ Lead 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, the completed pre-trial record and the discovery both here and in the *CCF I* matter.

2. Complexity, Expense and Likely Duration of the Litigation

As with *CCF I*, “[t]his antitrust class action involves a complex factual record and novel issues of law.” *Currency Conversion*, 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. Rulings in this case have been reviewed at the Court of Appeals, vacated and remanded. There is a voluminous record (developed both here and in *CCF I*). Absent this settlement, Amex would have continued to litigate against Plaintiffs’ Count I damages claims for years to come.

A damages trial in this complex antitrust class action would incur significant expense and delay. The parties are at the outset of final trial preparation for Plaintiffs’ damages claims. Preparation for and trial of Count I would command enormous effort and require thousands of

hours of professional time and substantial expense, likely requiring several weeks with the introduction of voluminous documentary and deposition evidence and any attendant motions practice. Final pretrial proceedings on the damages issues would embroil the Court, the parties and counsel in extensive evidentiary motions, including *Daubert* motions. Post-trial motions on the damages claim, as well as any appeals, would further delay a final resolution for years.¹⁰

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 have the information necessary to evaluate the merits and limitations of the claims and the settlement of the FX damages claims. Over the seven years plus of this litigation, including at the Court of Appeals, Amex has aggressively asserted defenses to both Counts of Plaintiffs’ claims. By the time the settlement was reached on the damages claim, Plaintiffs had conducted comprehensive document discovery both of some 76,500 pages of newly produced documents here, as well as the hundreds of thousands of pages produced in the initial *CCFI* matter. The parties have exchanged expert reports and engaged in vigorous motion practice,

¹⁰ *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.”).

including on summary judgment, and litigated the issue of the arbitrability of the FX claims before the Court of Appeals, where Plaintiffs defeated Amex's attempt to rely on the doctrine of equitable estoppel.

Plaintiffs' Lead Counsel has a full understanding of the strengths and weaknesses of the damages claims and the difficulties they would encounter in obtaining a favorable damages verdict, *see Chatelain*, 805 F. Supp. at 213-14, and based on that knowledge, they have settled the damages claims against Amex on terms very favorable to the FX Damages Class.

4. The Risks of Establishing Liability and Damages and of Maintaining the Class Action through Trial; Comparison of the Settlement with the Likely Result of Litigation¹¹

When weighed against the risks of continuing to litigate the FX Damages Class's claims through a damages trial and any post-trial proceedings, the proposed settlement compares favorably with the results that could have been obtained after trial and appeal. The burdens of a damages trial have been recounted in discussing the complexity of this litigation. *See supra* at Part III. B. 2.

A damages action involves risk. Plaintiffs shoulder the burden of establishing the existence of the conspiracy among Amex and the *CCFI* Banks, and the additional complication of explaining to a jury that Amex is liable (via its joint and several liability) on the damages claims to its competitors' cardholders (i.e., to *non-Amex* cardholders). In addition to conspiracy, Plaintiffs must establish injury, *i.e.*, class members suffered increased FX fees, and the amount of damages arising from that injury. The damages inquiry would require revision to update and revise the aggregate damages estimates for the narrowed, re-defined FX Damages Class.

¹¹ In the present procedural posture, the risks of establishing liability on the damages claim and of establishing the magnitude of damages converge with the risks of maintaining the damages class action through trial and the evaluation of possible litigation outcomes as to damages. These factors (factors iv-ix at p. 13 above) are thus discussed together.

Further, the possibility of individualized damages proceedings, if necessary, would consume a staggering level of resources for all involved and present class members with the monumental, if not impossible, task of proving damages for transactions that date back 11 years of the present writing.

Given the complexity in evaluating potential post-trial aggregate damages,¹² the \$49.5 million settlement of Count I compares favorably to the recovery in *CCF I*. This Court – both preliminarily and finally – has previously found the payment of \$336 million to the *CCF I* claimants for the same injuries to be a fair, reasonable and adequate settlement. *See Currency Conversion*, 263 F.R.D. 110, 124 (S.D.N.Y. 2009). If a \$336 million settlement is fair, reasonable and adequate compensation for these injuries, then a settlement increasing that amount by an additional \$49.5 million, which is equal to approximately 30% of the *CCF I* defendant Banks' share of the settlement, to bring total compensation to \$385.5 million, must necessarily be fair, reasonable and adequate as well.

5. Amex's Ability to Withstand a Greater Judgment

This factor is neutral. Amex unquestionably could withstand a greater judgment today. But an enforceable, final judgment would not come today. It would come years from today and must be set against the enormous systemic risk that currently permeates the financial system. In the current climate, Amex's ability to withstand a greater judgment today is little indication of Amex's ability to withstand a greater judgment in one, two or five years from now.

¹² The additional recovery here from Amex represents some 17% to 41% of Plaintiffs' Lead Counsel's internal estimates of Plaintiffs' potential, incremental single damages (after offsets from the *CCF I* recovery) recoverable from Amex at trial. However and of course, these estimates were predicated on Plaintiffs' trial theory that the entire price rise in the FX fee represented damages.

6. The Proposed Settlement Realizes Enhanced Efficiencies and Cost Reduction Via Coordinated Administration With the CCF I Distribution Which Increases Its Value to FX Damages Class Members

Unique to the present circumstances – and thus not included among the enumerated factors for evaluating whether a settlement is fair, reasonable and adequate – is the extraordinary efficiency of both the notice and claims process for FX Damages Class Members’ claims here. This efficiency is obtained via coordinated administration with the *CCF I* settlement.

Notice as to the proposed damages settlement and the distribution of its proceeds (upon final approval) will proceed in tandem with the distribution of payments from the *CCF I* settlement. The Court has already approved notice to the FX Damages Class, which evoked a record 10 million claims following a robust notice program. The Notice Plan disseminates the notices in conjunction with the first distribution of settlement funds to *CCF I* claimants. Because of that coordination, FX Damages Class Members will receive notice at a time when they are most likely to read the notice, *i.e.*, when they open their *CCF I* checks, and at a greatly reduced cost because the FX Damages Class will not incur the postage costs associated with mailing notice to more than 10 million class members. Instead, the FX Damages Class only incurs the *incremental* costs for printing and to mail the Class Notice to the approximately 48,800 late *CCF I* claimants.

When, upon final approval, a distribution is made to the FX Damages Class, additional efficiencies and cost reductions will be realized. The parties anticipate that there will be a second distribution in *CCF I* (due to uncashed checks), and expressly contemplated as part of the proposed settlement that the distribution to FX Damages Class members will be coordinated with this second *CCF I* distribution:

The Parties recognize that any distribution of the Net Settlement Fund is intended, subject to Court approval, to be combined with any second distribution from

CCF I, i.e., that the Net Settlement Fund will be combined with any residual funds remaining from the first CCF I distribution such that all of these monies will be aggregated into a single fund for purposes of coordinating their distribution, with the costs to be shared equally by, or otherwise apportioned fairly between, this Matter and CCF I.

Stipulation and Agreement of Settlement, ¶ 13 (Ex. 1). By combining the distributions in the two matters, the overall costs of settlement administration for both matters will again be substantially reduced.

Other administrative efficiencies are also gained through this proposed settlement. For example, the claims process is effectively completed as the “claims” here are those submitted as to the *CCF I* settlement. They are thus fully submitted as of this writing. The claims administrator has already audited the vast bulk of the claims, leaving only a small number (the approximately 48,800 late claims; a number of which are most likely duplicate or “re-submitted” claims) for review.

These efficiencies and cost reductions inure directly to the benefit of the FX Damages Class. The class members are those who will benefit because their distributions will be increased due to the savings realized on the reduced cost of notice and settlement administration.

IV. 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:

- Deadline for opting out of the FX Damages Class March 2, 2012

- Deadline for objecting to the Settlement, the Allocation Plan, an Attorneys' Fee and Expenses award and/or the Representative Plaintiffs' Awards March 16, 2012¹³
- Deadline for filing papers in support of the Settlement, the Allocation Plan, an Attorneys' Fee and Expenses award and the Representative Plaintiffs' Awards On or before 21 days prior to the Fairness Hearing
- Fairness Hearing Date To be set by the Court

V. CONCLUSION

For all the reasons set forth above, the Court should preliminarily approve the settlement.

DATED: October 31, 2011

Respectfully submitted,

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

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

¹³ The deadline for objections may be extended if required to provide a reasonable opportunity for class members to object to the proposed Allocation Plan.

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