

**BONNETT, FAIRBOURN, FRIEDMAN  
& BALINT, P.C.**

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REC'D OSBORN MALEDON P.A.

NOV 14 2006

*Attorneys for Plaintiff*

**IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE**

BRYAN PERRY,

Plaintiff/Appellee,

v.

MASTERCARD INTERNATIONAL,  
INC., a Delaware corporation,

Defendant/Appellant.

) Court of Appeals No. 1CA-CV 06-0635

) MARICOPA COUNTY

) SUPERIOR COURT

) CAUSE NO: CV2003-007154

) **NOTICE OF INJUNCTION AND  
MOTION FOR STAY**

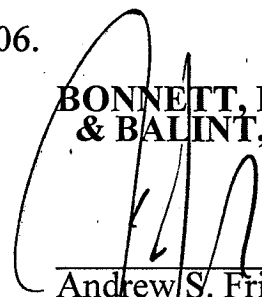
Appellant Bryan Perry respectfully notifies the Court that Appellant has been enjoined from the continued prosecution of his claims in the above-captioned action against Appellee MasterCard International Incorporated, by Paragraph 18 of the Order issued November 8, 2006 by the Honorable William H. Pauley III in *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409 (S.D.N.Y) ("the MDL Proceedings"), a copy of which is attached hereto as Exhibit A ("the MDL Injunction"). Judge Pauley's contemporaneous Memorandum and Order also issued November 8, 2006 in the MDL Proceedings, copy attached as Exhibit B, provides additional context for the MDL Injunction.

Appellant accordingly respectfully moves the Court to stay the above-captioned appeal pending the settlement approval process in the MDL Proceedings, until such time as the MDL Injunction is vacated or otherwise rendered inapplicable to Appellant.



DATED: November 13, 2006.

**BONNETT, FAIRBOURN, FRIEDMAN  
& BALINT, P.C.**



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ORIGINAL and four COPIES filed  
this 13<sup>th</sup> day of November, 2006, with:

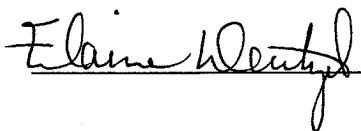
Clerk of Court  
Division One  
Arizona Court of Appeals  
1501 West Washington Street  
Phoenix, Arizona 85007

COPIES of the foregoing mailed this  
13<sup>th</sup> day of November, 2006, to:

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# **EXHIBIT A**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
: :  
IN RE : MDL No. 1409  
: M 21-95  
CURRENCY CONVERSION FEE :  
ANTITRUST LITIGATION : ORDER

-----X  
THIS DOCUMENT RELATES TO: :  
: :  
ALL CASES :  
-----X

WILLIAM H. PAULEY III, District Judge:

Upon review and consideration of the terms and conditions of the Stipulation and Agreement of Settlement, including its exhibits (the "Settlement Agreement")<sup>1</sup> dated July 20, 2006 between and among the Representative Plaintiffs and the Settlement Classes, by and through the Representative Plaintiffs and Plaintiffs' Co-Lead Counsel (collectively, "Plaintiffs"), and the Defendants, by and through their respective authorized signatories;

Upon consideration of all prior proceedings in the Consolidated Action; and

Upon consideration of the motion for Preliminary Approval of the Settlement Agreement, and the settlement contemplated thereby, and all memoranda, affidavits and other papers and arguments submitted with respect thereto;

NOW, it is hereby ORDERED as follows:

1. This Court has jurisdiction over the subject matter of the Consolidated Action and over all Parties to the Consolidated Action, including, without limitation, the members of the Settlement Classes.

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<sup>1</sup> For purposes of this Order, this Court adopts the definitions of capitalized words and terms used in the Settlement Agreement filed with this Court on August 15, 2006.

2. In conjunction with the proposed settlement, the Court hereby grants Plaintiffs leave to file, and accepts for filing, and deems filed and served on all Defendants, the Third Amended Complaint for settlement purposes only.

3. The Court hereby approves the following persons as Representative Plaintiffs of the Settlement Classes pursuant to Rule 23 of the Federal Rules of Civil Procedure, and finds that, for settlement purposes only, these Representative Plaintiffs have and will fairly and adequately protect the interests of the Settlement Classes: S. Byron Balbach, Jr., Jeanne H. Balbach, Woodrow W. Clark, Leslie Cooper, Cherie R. Donald, Andrea Kune, Pamela Meyerson, Michael H. Oshry, Camille LaPlaca-Post, Herve Senequier, Robert Ross, Randal Wachsmuth, Jeffrey Zakem, Kayta George, David Shrieve, Tara Rado, Anthony Ralphs, David Ultan, Shannon Mattingly, and Timur Nusratty.

4. The Court hereby also approves the following law firms as Settlement Classes Counsel pursuant to Rule 23 of the Federal Rules of Civil Procedure, and finds that, for settlement purposes only, these Settlement Classes Counsel have and will fairly and adequately protect the interests of the Settlement Classes:

Berger & Montague, P.C.; and Lerach Coughlin Stoia Geller Rudman & Robbins LLP.

5. The Court hereby certifies, for purposes of the preliminary approval of the settlement, the following Settlement Classes: A Settlement Damages Class, pursuant to Rule 23(a) and Rule 23(b)(3) of the Federal Rules of Civil Procedure, and a Settlement Injunctive Class, pursuant to Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure, in lieu of the currently certified classes, and defined as follows:

**SETTLEMENT DAMAGES CLASS:** all Persons who or which were holders of United States-issued MasterCard- or Visa-branded Credit or Debit Cards or United States-issued Diners Club-branded Credit Cards and made a Foreign Transaction from February 1, 1996 to the date of Preliminary Approval; and

**SETTLEMENT INJUNCTIVE CLASS:** All Persons who or which were holders of United States-issued MasterCard- or Visa-branded Credit or Debit Cards or United States-issued Diners Club-branded Credit Cards as of the date of Preliminary Approval.

Provided, however, that Defendants are not members of the Settlement Classes.

The Court hereby finds and orders that, by not objecting to the certification of these Settlement Classes, and by taking other steps to negotiate, execute and implement the Settlement Agreement, Defendants and each of them are not in any way waiving other rights, if any, they may have to require arbitration of any Claims, including, but not limited to rights, if any, they may have (a) to require arbitration of any of the Released Claims if Final Settlement Approval does not occur or if the Settlement Agreement terminates prior to Final Settlement Approval, or (b) as to any Person who timely and properly opts out of the Settlement Damages Class as permitted by the Court. In addition, neither certification of the Settlement Classes for settlement purposes only, nor any other act relating to the negotiation, execution or implementation of the Settlement Agreement, shall be considered as a factor in connection with any class certification issue(s) if the Settlement Agreement terminates or Final Settlement Approval does not occur. The Court further finds that if Final Settlement Approval does not occur or if the Settlement Agreement terminates prior to Final Settlement Approval, any Person retains the ability, if any, to oppose or challenge any claim of arbitration rights on any grounds other than any claim of waiver relating to certification of the Settlement Classes or any other act relating to the negotiation, execution or implementation of the Settlement Agreement.

6. The Court hereby preliminarily approves the Settlement Agreement, and the settlement contemplated thereby, as being a fair, reasonable and adequate settlement as to all

members of the Settlement Classes within the meaning of Rule 23 of the Federal Rules of Civil Procedure, approves the establishment and funding of the Settlement Fund under the Court's jurisdiction, and directs the Parties to proceed with said settlement pursuant to the terms and conditions of the Settlement Agreement and exhibits thereto, subject to this Court's authority to determine whether to finally approve said settlement.

7. The Court hereby finds and orders that the proposed Class and Settlement Notice Plan (attached as Exhibit G to the Settlement Agreement), including, but not limited to, the proposed mailed Notice of Pendency and Settlement of Class Action, the proposed Agency/Company Notice, and the proposed Publication Notice (respectively attached as Exhibits 1, 2 and 3 to the Class and Settlement Notice Plan, as amended in Plaintiffs' submission to the Court dated October 6, 2006), and both the contents of and plans for dissemination for said Notices to the Settlement Classes, fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, are the best notice practicable under the circumstances to the members of the Settlement Damages Class, provide individual notice to all members of the Settlement Damages Class who or which can be identified through reasonable effort, and provide Publication Notice to members of the Settlement Damages Class and Settlement Injunctive Class. The Court further approves the proposed Claim Form (attached as Exhibit 4 to the Class and Settlement Notice Plan, as amended in Plaintiffs' submission to the Court dated October 6, 2006). The Court hereby directs that the Notice of Pendency and Settlement of Class Action, the Agency/Company Notice, the Publication Notice, and the Claim Form be provided by Plaintiffs to the members of the Settlement Classes in accordance with the terms and conditions of the Class and Settlement Notice Plan; provided that the Parties, by agreement, may revise the Notices, Claim Form and other exhibits in ways that are not material, or in ways that are

appropriate to update those documents for purposes of accuracy. The Court directs (1) the Bank Defendants to issue Statement Insert Notice in a billing cycle that begins within 140 days after the entry of this order, (2) the Bank Defendants to submit information to the Claims Administrator for purposes of Stand Alone Mailings within 30 days after the conclusion of the billing cycle in which each such Bank Defendant sends Statement Insert Notice, (3) the Claims Administrator to issue Stand Alone Mailings within 45 days of receipt by the Claims Administrator of the information referenced in subsection (2) of this paragraph, and (4) the Claims Administrator and/or Settlement Classes Counsel to cause Publication Notice to be disseminated beginning in the week or month in which the Claims Administrator issues Stand-Alone Mailings, consistent with the terms of the Class and Settlement Notice Plan.

8. The Defendants have timely filed notifications of this settlement with the appropriate state and federal officials pursuant to the Class Action Fairness Act of 2005 (“CAFA”), Pub. L. No. 109-2, 119 Stat. 4, 7-8 (2005). These notifications apprised the appropriate officials that, in connection with the approval of this settlement, the Defendants would seek certification from this Court that their respective notifications complied with any applicable CAFA requirements. The Court has reviewed such notifications and accompanying materials and finds that the Defendants’ notifications comply fully with any applicable requirements of CAFA.

9. Heffler, Radetich & Saitta, L.L.P. is hereby appointed Claims Administrator to supervise and administer the settlement notice and claims process, as more fully set forth in the Settlement Agreement.

10. The Court preliminarily determines that the Plan of Administration and Distribution, attached as Exhibit H to the Settlement Agreement, fairly and adequately addresses

the matters of settlement administration and claims submission, and allocation of monetary payments among Settlement Damages Class Members.

11. The Settlement Fund, including the Gross Settlement Fund and Net Settlement Fund, shall be deemed and considered to be in custodia legis of the Court, and shall remain subject to the jurisdiction of the Court. No funds may be disbursed from the Gross Settlement Fund or Net Settlement Fund unless expressly authorized by the terms of the Settlement Agreement, and, where required by the Settlement Agreement, expressly approved in advance by the Court. Additionally, prior to the transfer of any funds from the Gross Settlement Fund or Net Settlement Fund, the Claims Administrator shall post a bond in the amount of \$5 million with the Clerk of this Court. No less frequently than once a quarter, Settlement Classes Counsel and the Claims Administrator shall together file a written report with the Court detailing the nature, amount and recipients of all Settlement Notice and Administration Costs expended, paid or incurred, together with supporting documentation.

12. Settlement Damages Class Members who or which want to seek payment from the Settlement Fund in accordance with the Plan of Administration and Distribution shall complete and submit a Claim Form in accordance with the instructions contained therein. Unless the Court orders otherwise, Claim Forms must be submitted no later than January 9, 2008, which deadline shall be set forth in the Notices.

13. Any member of the Settlement Damages Class who or which does not submit a Claim Form or file an objection to the settlement shall have the right to opt out of the Settlement Damages Class by sending a written request for exclusion from the Settlement Damages Class to the addresses listed in the Notices, postmarked no later than September 11, 2007, which deadline shall be set forth in the Notices. Exclusion requests by non-natural

Persons must: (A) include that Person's full legal name, current address and taxpayer identification number; (B) include all account numbers of that Person's Credit Card and/or Debit Card accounts for which that Person is a member of the Settlement Damages Class; (C) include an affirmation, under penalty of perjury, from an authorized representative of that Person (1) as to whether or not that Person is a co-brand or affinity contractual counterparty to any Defendant Releasee or Member Releasee, and, if so, separately identify the accounts included in respect of Subsection (B) of this Section 13 that relate to that co-brand or affinity program, and (2) that that Person has advised any and all joint account holders on any of the account(s) included in respect of Subsection (B) of this Section 13 that that Person is excluding that account(s) from the Settlement Damages Class; and (D) include the following statement from such authorized representative: "On behalf of [the non-natural Person], I request that [that Person] be excluded from the Settlement Damages Class in the Consolidated Action in In re Currency Conversion Fee Antitrust Litigation, MDL No. 1409. I affirm under penalty of perjury that: I have listed [that Person's] full name, current address, taxpayer identification number, and all account numbers of [that Person's] Credit Card and/or Debit Card accounts in relation to which [that Person] is a member of the Settlement Damages Class, I have certified that [that Person] is/is not a co-brand or affinity contractual counterparty to any Defendant Releasee or Member Releasee, [and, if it is such a counterparty, I have separately identified the accounts that relate to that co-brand or affinity program from the account numbers of [that Person's] Credit Card and/or Debit Card accounts in relation to which [that Person] is a member of the Settlement Damages Class], and I have advised any joint account holders on any of the account numbers of [that Person's] Credit Card and/or Debit Card accounts in relation to which [that Person] is a member of the Settlement

Damages Class that [that Person] is taking this action and that that account(s) will not be entitled to any payment.”

14. Exclusion requests by natural Persons must: (A) be signed by that member of the Settlement Damages Class; (B) include that Person’s full name and current address; (C) include all account numbers of that Person’s Credit Card and/or Debit Card accounts for which that Person is a member of the Settlement Damages Class, or that Person’s complete social security number; (D) include an affirmation, under penalty of perjury, that that Person has advised any and all joint account holders on any such account(s) that that Person is excluding the account(s) from the Settlement Damages Class; and (E) include the following statement: “I request to be excluded from the Settlement Damages Class in the Consolidated Action in In re Currency Conversion Fee Antitrust Litigation, MDL No. 1409. I affirm under penalty of perjury that: I have listed my full name, current address, all account numbers of my Credit Card and/or Debit Card accounts in relation to which I am a member of the Settlement Damages Class (or, in the alternative, have provided my complete social security number), and I have advised any joint account holders on such accounts that I am taking this action and that such account(s) will not be entitled to any payment.”

15. No request for exclusion will be valid unless all of the information described above is included. If a timely and valid request for exclusion is made by a member of the Settlement Damages Class, then no payment shall be made with respect to any account(s) of such Person. Settlement Classes Counsel and Defendants shall use such opt out information only for purposes of determining and/or establishing whether a Person has timely and properly opted out of the Settlement Damages Class as permitted by the Court, and shall, absent further court order, redact any social security and account number(s) before providing a request for exclusion

to any non-Party (including, without limitation, any filing with the Court), other than the issuing Member(s) that issued the respective account(s).

16. All Settlement Damages Class Members (whether or not a Claimant or Authorized Claimant, and whether or not he/she/it submits a Claim Form), and all members of the Settlement Injunctive Class (whether or not a Settlement Damages Class Member), shall be bound by all determinations and judgments concerning the Settlement Agreement and the settlement contemplated thereby. Within twenty (20) business days after the Court-ordered deadline for timely and properly opting out from the Settlement Damages Class, Settlement Classes Counsel shall provide to counsel for Defendants a list or electronic file of the names, applicable addresses, and applicable account numbers of the members of the Settlement Damages Class who or which have timely and properly opted out of the Settlement Damages Class as permitted by the Court, as well as the total number of such Persons and of their applicable accounts.

17. All further proceedings in the Litigation (including, but not limited to, any existing discovery obligations) are ordered stayed until Final Settlement Approval or termination of the Settlement Agreement, whichever occurs earlier, except for those matters necessary to obtain and/or effectuate Final Settlement Approval.

18. All Settlement Damages Class Members, and any Person actually or purportedly acting on behalf of any Settlement Damages Class Member(s), are stayed and enjoined from commencing, instituting, continuing, pursuing, maintaining, prosecuting or enforcing any Released Claim (including, without limitation, in any individual, class or putative class, representative or other action or proceeding), directly or indirectly, in any judicial, administrative, arbitral, or other forum until Final Settlement Approval or termination of the

Settlement Agreement, whichever occurs earlier; provided, that this stay and injunction shall not apply to individual claims of any member of the Settlement Damages Class who has timely and properly opted out from the Settlement Damages Class as permitted by the Court. Nothing herein shall prevent any Settlement Damages Class Member, or any Person actually or purportedly acting on behalf of any Settlement Damages Class Member(s), from taking any actions to stay and/or dismiss any Released Claim(s). This stay and injunction is necessary to protect and effectuate the Settlement Agreement, and the settlement contemplated thereby, this Preliminary Approval Order, and the Court's flexibility and authority to effectuate the Settlement Agreement and to enter Final Judgment when appropriate, and is ordered in aid of this Court's jurisdiction and to protect its judgments.

19. The Court hereby schedules a hearing on entry of a Final Judgment and Order of Dismissal (the "Fairness Hearing") for November 2, 2007 at 10:00 a.m. in Courtroom 11D at the Daniel Patrick Moynihan United States Courthouse for the Southern District of New York. At the Fairness Hearing the Court will also consider, inter alia: whether the settlement on the terms and conditions provided for in the Settlement Agreement is fair, reasonable and adequate and should be approved by the Court; whether the proposed Plan of Administration and Distribution should be approved; the amount of attorneys' fees and expenses that should be awarded to Plaintiffs' Co-Lead Counsel; and whether the requested service awards to Representative Plaintiffs should be awarded, and, if so, the amounts of such awards.

20. The date and time of the Fairness Hearing shall be set forth in, inter alia, the Notice of Pendency and Settlement of Class Action, the Agency/Company Notice, and the Publication Notice. The Court reserves the right to adjourn or continue the date of the Fairness Hearing without further notice to the members of the Settlement Classes, and retains jurisdiction

to consider all further applications arising out of or in connection with the Settlement Agreement. At or after the Fairness Hearing, the Court may approve or reject the Settlement Agreement without further notice to members of the Settlement Classes.

21. Any application by Settlement Classes Counsel for attorneys' fees and expenses, or for awards to the Representative Plaintiffs, shall be filed with the Court and served on or before August 28, 2007.

22. The issues of any application by Settlement Classes Counsel for a Fee and Expense Award, and/or awards to the Representative Plaintiffs, and the allocation of the Net Settlement Fund among Authorized Claimants, shall be heard on the same date and at the same time as scheduled for the Fairness Hearing. Those matters shall be considered and determined by the Court separately from the Court's consideration of the fairness, reasonableness and adequacy of this Settlement Agreement, and the settlement contemplated thereby.

23. Any Settlement Classes Member who or which wants to object to the approval of the Settlement Agreement, and the settlement contemplated thereby, the allocation of the Net Settlement Fund among Authorized Claimants, the application by Settlement Classes Counsel for an award of attorneys' fees and reimbursement of expenses, or the application by Settlement Classes Counsel for awards to the Representative Plaintiffs, may do so, either personally or through an attorney, by filing a written notice of objection, together with any supporting written or documentary materials with the Clerk of the Court on or before September 11, 2007. Any such written notice of objection must include (a) documents sufficient to show that (i) the Person is a member of the Settlement Injunctive Class, if such objections pertain or otherwise relate to the Settlement Injunctive Class, or (ii) the Person is a Settlement Damages Class Member, if such objections pertain or otherwise relate to the Settlement Damages Class;

(b) a detailed statement of such Settlement Classes Member's specific objections to any such matter; and (c) the grounds for such objections, as well as all documents which such Person desires the Court to consider. This written objection must also be served by hand, overnight mail, or via certified mail, return receipt requested, postmarked no later than September 11, 2007, on Settlement Classes Counsel as set forth in the Notice. Settlement Classes Counsel shall promptly, and in any event within one business day after receipt, provide copies of such written objections to counsel for Defendants. Any Settlement Classes Member who or which does not make his, her, or its objection in the manner provided for herein shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness, reasonableness, or adequacy of the proposed settlement contemplated by the Settlement Agreement, the issue of the allocation of the Net Settlement Fund among the Authorized Claimants, or the issues of any Fee and Expense Award and awards to Representative Plaintiffs. Any Settlement Classes Member who or which has timely submitted and served a written objection in accordance with the foregoing may formally appear at the Fairness Hearing either in person or through an attorney, and be heard to the extent the Court in its discretion deems appropriate at that time, provided that, at the time of filing of his, her, or its written objection, such Settlement Classes Member also files a notice of intention to appear together with his, her or its written objection.

24. All supplemental papers in support of the settlement contemplated by the Settlement Agreement, the allocation of the Net Settlement Fund among the Authorized Claimants, and the issues of any applications by Settlement Classes Counsel for a Fee and Expense Award and/or awards to the Representative Plaintiffs, and any responses to objections,

shall be filed with the Court and served on or before twenty-one (21) days prior to the Fairness Hearing.

25. None of the Defendant Releasees and Member Releasees shall have any liability or responsibility whatsoever with regard to the maintenance, preservation, investment, use, allocation, adjustment, distribution, and/or disbursement of any amount in the Gross Settlement Fund or the Net Settlement Fund.

26. The Settlement Agreement (including, without limitation, its exhibits), and any and all negotiations, documents and discussions associated with it, shall not be deemed or construed to be an admission or evidence of any violation of any statute, law, rule, regulation or principle of common law or equity, of any liability or wrongdoing, by any of the Defendants, or of the truth of any of the Claims, and evidence relating to the Settlement Agreement shall not be discoverable or used, directly or indirectly, in any way, whether in the Consolidated Action or in any other action or proceeding, except for purposes of demonstrating, describing, implementing or enforcing the terms and conditions of the Settlement Agreement, this Order and/or the Final Judgment and Order of Dismissal.

27. In the event that any of the provisions of this Preliminary Approval Order is asserted by any Defendant Releasee or Member Releasee as a defense in whole or in part to any Claim, or otherwise asserted (including, without limitation, as a basis for a stay) in any other suit, action, or other proceeding brought by a Settlement Damages Class Member or any Person actually or purportedly acting on behalf of any Settlement Damages Class Member(s), that suit, action or other proceeding shall be immediately stayed and enjoined until the Court has entered an order or judgment finally determining any issues relating to such defense or assertion and no further judicial review of such order or judgment is possible. Solely for purposes of such suit,


action, or other proceeding, to the fullest extent they may effectively do so under applicable law, the Parties irrevocably waive and agree not to assert, by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of the Court, or that the Court is, in any way, an improper venue or an inconvenient forum. These provisions are necessary to protect the Settlement Agreement, this Order and this Court's flexibility and authority to effectuate the Settlement Agreement, and is ordered in aid of this Court's jurisdiction and to protect its judgment.

28. If for any reason the Settlement Agreement terminates before Final Settlement Approval, then the filing of the Third Amended Complaint and the certification of the Settlement Damages Class and Settlement Injunctive Class shall be deemed vacated, and the operative complaint in the Consolidated Action shall be the Second Consolidated Amended Class Action Complaint filed on August 15, 2003, and the classes certified in the Consolidated Action shall be those certified in this Court's October 15, 2004 Order, as modified by this Court's March 9, 2005, June 16, 2005, and December 7, 2005 Orders, subject to any further judicial review, requests for further judicial review, and/or further decisions by the Court or the Second Circuit, and the certification of the Settlement Damages Class and the Settlement Injunctive Class for settlement purposes shall not be considered as a factor in connection with any subsequent class certification issues. In that event, the Parties shall return to the status quo ante in the Consolidated Action, without prejudice to the right of any Defendant to assert any

right or position that it could have asserted if this Settlement Agreement had never been reached  
or proposed to the Court.

Dated: November 8, 2006  
New York, New York

SO ORDERED:

  
WILLIAM H. PAULEY III  
U.S.D.J.

# **EXHIBIT B**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
IN RE

MDL No. 1409  
M 21-95

CURRENCY CONVERSION FEE  
ANTITRUST LITIGATION

:  
:  
:  
MEMORANDUM AND ORDER

-----X  
THIS DOCUMENT RELATES TO:

ALL CASES  
-----X

WILLIAM H. PAULEY III, District Judge:

These class actions, consolidated for pretrial proceedings, assert violations of the Sherman Act, 15 U.S.C. § 1 et seq., the Truth in Lending Act (“TILA”), 15 U.S.C. § 1601 et seq., and the South Dakota Deceptive Trade Practices Act (“DTPA”), arising from an alleged price-fixing conspiracy among VISA, MasterCard and their member banks (collectively “Defendants”) concerning foreign currency conversion fees. Plaintiffs move for preliminary approval of a proposed settlement with Defendants pursuant to Fed. R. Civ. P. 23(e). For the reasons set forth below, Plaintiffs’ motion is granted.<sup>1</sup>

BACKGROUND

The factual background underlying these actions is set forth in this Court’s prior opinions, familiarity with which is presumed. See In re Currency Conversion Fee Antitrust Litig., No. M 21-95, 2005 WL 3304605 (S.D.N.Y. Dec. 7, 2005); In re Currency Conversion Fee Antitrust Litig., No. M 21-95, 2005 WL 1871012 (S.D.N.Y. Aug. 9, 2005); In re Currency

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<sup>1</sup> An implementing order setting forth the particulars of class notice and other related matters has been filed simultaneously with this Memorandum and Order.

Conversion Fee Antitrust Litig., 229 F.R.D. 57 (S.D.N.Y. 2005); In re Currency Conversion Fee Antitrust Litig., 361 F. Supp. 2d 237 (S.D.N.Y. 2005); In re Currency Conversion Fee Antitrust Litig., 224 F.R.D. 555 (S.D.N.Y. 2004); In re Currency Conversion Fee Antitrust Litig., 265 F. Supp. 2d 385 (S.D.N.Y. 2003). In addition, the following facts are germane to the instant motion.

### I. Summary of Procedural History

This litigation commenced in February 2001 when the first of numerous class action complaints challenging currency conversion fees was filed. On August 23, 2001, the Judicial Panel on Multidistrict Litigation transferred the actions to this Court. After Plaintiffs moved for class certification, the Court certified a damages class, an injunctive relief class and a TILA class, but denied Plaintiffs' motion to certify a DTPA class. All cardholders whose agreements contained arbitration clauses when the first consolidated action was filed were excluded from the certified classes, and their claims were stayed pending arbitration.

Defendants Chase and Citibank appealed this Court's denial of their motions to compel arbitration for cardholders whose agreements lacked an arbitration clause when this litigation commenced. Plaintiffs filed cross-appeals and petitions for interlocutory review of the Court's ruling that certain cardholders were subject to arbitration.

The facts asserted in the Second Consolidated Amended Class Action Complaint (the "Second Amended Complaint") spawned related actions involving separate theories of liability. On April 23, 2004, Schrank v. Citibank (South Dakota), N.A., No. 03 Civ. 2843 (WHP) ("Schrank"), was transferred to this Court for coordinated pretrial proceedings. The Plaintiff in Schrank asserts that the currency conversion fees violate certain New York consumer laws and the common laws of other states. Similarly, Bildstein v. Mastercard Int'l, Inc., No. 03

Civ. 9826 (WHP) ("Bildstein"), which was transferred to this Court on December 11, 2003, involves claims asserted under New York General Business Law ("NYGBL") Section 349, as well as for unjust enrichment (collectively, the "New York Claims").

## **II. The Settlement**

The parties to MDL 1409 engaged former Magistrate Judge Edward A. Infante to preside over six mediation sessions in February 2005 and March 2006. The parties reached an agreement in principle during mediation, and continued to negotiate the terms of the settlement until July 20, 2006, when the settlement agreement (the "Settlement" or the "Settlement Agreement") was signed. The Settlement provides for the payment of \$336 million and for certain injunctive relief that runs for a five-year period beginning on July 25, 2006. (Settlement Agreement §§ 3-4.) The Settlement's injunctive provisions include the following:

1. Defendants will not contract, combine or conspire in violation of the United States antitrust laws regarding foreign transaction fees;
2. If a Bank Defendant chooses to apply foreign transaction fees on transactions on a credit card account, such Defendant will provide the following disclosures with respect to the account unless such Defendant determines that it would be prohibited by law from doing so:
  - a. With each disclosure required under 12 C.F.R. §§ 226.5a(b), 226.6 or 226.9(c), the rate applicable to such foreign transaction fee; and
  - b. With each disclosure required under 12 C.F.R. § 226.7, the amount, either individually or as a total, of all foreign transaction fees applied in connection with transactions covered by the periodic statement;
3. If a JP Morgan Chase or Bank of America Defendant chooses to apply foreign transaction fees on transactions on a debit card account, such Defendant will provide the following disclosures with respect to the account unless such Defendant determines that it would be prohibited by law from doing so:
  - a. With each disclosure required under 12 C.F.R. §§ 205.7 or 205.8(a)(i), the rate applicable to such foreign transaction fees; and

- b. With each disclosure required under 12 C.F.R. § 205.9(b), the amount, either individually or as a total, of all foreign transaction fees applied in connection with transactions covered by the periodic statement;
4. Defendants MasterCard and Visa will not, in connection with a foreign transaction, include without separate identification or itemization any currency conversion fee in the U.S. dollar transaction amount sent to issuing members in the United States;
5. If MasterCard or Visa materially modifies its current practices with regard to calculating base exchange amounts, and such modified practices include the systematic use for that purpose of exchange rates selected by it that are outside a range of wholesale or government-mandated/managed rates, then it will require its issuing members in the United States to change their current base exchange amount disclosures to conform with its modified practices with regard to calculating base exchange amounts.

(Settlement Agreement § 4.)

Because the Settlement release is broader than the claims asserted in the Second Amended Complaint, Plaintiffs request leave to file a proposed Third Consolidated Amended Class Action Complaint (the "Third Amended Complaint"). Among other allegations, the Third Amended Complaint asserts claims based on debit card fees in addition to credit card fees. (See, e.g., Third Amended Complaint ("Third Am. Compl.") ¶¶ 2, 13, 16, 21, 81, 83, 85.) It also includes claims asserted under:

state statutes relating to antitrust or unfair competition . . . , disclosure . . . , or consumer protection or unfair or deceptive acts or practices . . . , and principles of common law including . . . breach of contract, breach of duty, fraud, conversion, good faith and fair dealing, negligent representation, unconscionability and unjust enrichment . . . (the "State Claims").

(Third Am. Compl. ¶ 1.) The Third Amended Complaint specifically identifies the New York and California versions of the State Claims. (Third. Am. Compl. ¶ 1.) Finally, the Third Amended Complaint alleges that Visa and MasterCard inflated the base exchange rate applied to general purpose and debit card transactions by adding a trading spread to the rate by which they translated the value of one currency to another. (See, e.g., Third Am. Compl. ¶¶ 105, 130.)

Eleven state court actions are being settled along with MDL 1409 under separate settlement agreements. The Settlement also incorporates an action filed in California state court challenging the alleged failure to disclose the foreign transaction fees imposed on debit card transactions. See Shrieve v. Visa U.S.A. Inc., No. RG04155097 (“Shrieve”). Rather than sign a separate settlement agreement, the Shrieve plaintiffs are joined as parties in the proposed Third Amended Complaint.

### III. The Notice Program

The proposed Class and Settlement Notice Plan (the “Notice Plan”) calls for direct mail notice to class members, including a claim form sent either as a stand-alone mailing or as an insert in the members’ credit card or bank statements. The Notice Plan also provides for publication of notice in newspapers and periodicals such as USA Today, The Wall Street Journal, Financial Times, Gourmet, US Weekly, National Geographic Traveler and (to the extent possible) various airline magazines. Finally, the parties will establish a website and a toll-free telephone number as additional resources for claimants.

## DISCUSSION

### I. Motion to Amend the Complaint

Leave to amend a pleading shall be “freely given when justice so requires,” Fed. R. Civ. P. 15(a), and should not be denied unless (1) the motion is filed after undue delay, (2) the movant acts in bad faith, (3) granting the leave to amend would prejudice the adverse parties or (4) the amendment sought will be futile. Foman v. Davis, 371 U.S. 178, 182 (1962); Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110 (2d Cir. 2001). The decision to grant or deny is within the

district court's discretion. Foman, 371 U.S. at 182; United States v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago, 889 F.2d 1248, 1254 (2d Cir. 1989).

Most of the new claims asserted in the proposed Third Amended Complaint are unopposed. However, the Bildstein plaintiffs object to the addition of the State Claims, which encompass and dispose of the New York Claims. Because Bildstein's counsel was excluded from the settlement discussions, Bildstein argues that the parties negotiating the Settlement had no authority to release the New York Claims.<sup>2</sup>

"Lead counsel is expected in the ordinary course to keep other counsel for subclasses or members of the classes informed about negotiations and to consult with them regarding appropriate settlement terms . . . A failure to fulfill these duties may thwart approval of the settlement by the district court . . ." In re Ivan F. Boesky Sec. Litig., 948 F.2d 1358, 1365 (2d Cir. 1991). At the same time, the Court of Appeals has warned against "cabin[ing] the authority of lead counsel by requiring the explicit agreement of every lawyer for a named plaintiff or subclass to the proposed settlement. To empower each representative of a named plaintiff or subclass to veto the very proposal of a settlement to the district court would generally not serve the purposes of Rule 23." In re Ivan F. Boesky, 948 F.2d at 1366; see also In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 293 (2d Cir. 1992) ("Had the district court permitted each securities claimant to take part in the negotiations, it is unlikely that any

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<sup>2</sup> The defendants in Ross v. Am. Express, No. 04 Civ. 5723 (WHP) ("Ross"), were also excluded from the settlement negotiations. By letter dated September 7, 2006, the Ross defendants expressed "concern" about the proposed Settlement. Because the precise nature of their concerns could not be ascertained from that letter, this Court, by Order dated October 3, 2006, requested a more detailed submission. The Ross defendants amplified their concerns in memoranda dated October 10 and October 23, 2006. Those memoranda suggest that the Ross defendants misapprehend their status in MDL 1409. This Court's October 3 Order did not address, let alone resolve, the issue of whether the Ross defendants are parties to MDL 1409, and nothing in the October 3 Order entitles the Ross parties to submit formal objections to the proposed Settlement.

agreement at all could have been reached.”) Further, “class action releases may include claims not presented [in the complaint] and even those which could not have been presented so long as the released conduct arises out of the ‘identical factual predicate’ as the settled conduct.” Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 107 (2d Cir. 2005) (quoting TBK Partners, Ltd. v. W. Union Corp., 675 F.2d 456, 460 (2d Cir. 1982)); see also In re Global Crossing Sec. and ERISA Litig., 225 F.R.D. 436, 458 (S.D.N.Y. 2004). “A class action settlement may ‘prevent class members from subsequently asserting claims relying on a legal theory different from that relied on in the class action complaint, but depending on the very same set of facts.’” In re Worldcom, Inc. Sec. Litig., No. 02 Civ. 3288 (DLC), 2005 WL 2495554, at \*3 (S.D.N.Y. Oct. 11, 2005) (quoting Nat’l Super Spuds, Inc. v. N.Y. Mercantile Exch., 660 F.2d 9, 18 n.7 (2d Cir. 1981)).

Here, it is undisputed that the New York Claims arise from the same factual predicate as the antitrust, TILA and DTPA claims asserted in the Second Amended Complaint. The settling parties were therefore permitted to incorporate the New York Claims into the Settlement. Wal-Mart Stores, 396 F.3d at 107; TBK Partners, 675 F.2d at 460. Significantly, Bildstein does not object to the Settlement achieved by the MDL 1409 Plaintiffs; instead, he objects to the process by which the settling parties arrived at the Settlement Agreement. (Transcript of Proceedings, dated Sept. 11, 2006, at 46.) Although this Court does not necessarily condone the exclusion of certain counsel from the negotiations, any such procedural deficiency appears to have been harmless in light of the settlement reached. Cf. In re Ivan F. Boesky Sec. Litig., 948 F.2d at 1365 (finding that the most important reason for lead counsel to consult with other plaintiffs’ counsel during settlement negotiations is that “a failure to communicate and consult may result in a settlement that is unfair to some members of the classes”). Therefore, it is “in the interest of justice” to grant leave to file the proposed Third

Amended Complaint. In re Nasdaq Market-Makers Antitrust Litig., No. 94 Civ. 3996 (RWS), 1997 WL 805062, at \*7 (S.D.N.Y. Dec. 31, 1997) (granting motion to file amended complaint for purposes of class action settlement).

## II. Preliminary Approval of the Settlement

### A. Standard for Preliminary Approval

Rule 23(e) requires court approval of a class action settlement. After a proposed settlement is reached, a court must determine whether the terms of the proposed settlement warrant preliminary approval. In other words, the court must make “a preliminary evaluation” as to whether the settlement is fair, reasonable and adequate. In re Nasdaq Market-Makers Antitrust Litig., 176 F.R.D. 99, 102 (S.D.N.Y. 1997). “Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the reasonable range of approval, preliminary approval is granted.” In re Nasdaq, 176 F.R.D. at 102; accord In re Initial Pub. Offering Sec. Litig., 226 F.R.D. 186, 191 (S.D.N.Y. 2005).

After granting preliminary approval, the court “must direct the preparation of notice of the certification of the settlement class, the proposed settlement and the date of the final fairness hearing.” In re Initial Pub. Offering, 226 F.R.D. at 191. At the fairness hearing, “[c]lass members (and non-settling defendants whose rights may be affected by the proposed settlement) then have an opportunity to present their views of the proposed settlement, and the parties may present arguments and evidence for and against the terms, before the court makes a final determination as to whether the proposed settlement is ‘fair reasonable, and adequate.’” In re

Initial Pub. Offering, 226 F.R.D. at 191 (citing Manual for Complex Litigation (Fourth) § 21.632-21.635 (2004)).

**B. Fairness, Reasonableness and Adequacy**

Here, the settlement negotiations were extensive, spanning a number of months and involving various mediation sessions with former Magistrate Judge Infante. The resulting Settlement appears to be “the product of ‘serious, informed, non-collusive negotiations’” by experienced counsel. In re Initial Pub. Offering, 226 F.D.R. at 194 (quoting In re Nasdaq, 176 F.R.D. at 102); see also Gross v. Wash. Mut. Bank, No. 02 Civ. 4135 (RML), 2006 WL 318814, at \*5 (E.D.N.Y. Feb. 8, 2006). Judge Infante’s participation in the negotiations substantiates the parties’ claim that the negotiations took place at arm’s length. See In re Initial Pub. Offering, 226 F.D.R. at 194 (granting preliminary approval in part because settlement negotiations were facilitated by a former judge). Moreover, there is no evidence that the proposed settlement accords “improper[] . . . preferential treatment” to any portion of the class. In re Nasdaq, 176 F.R.D. at 102; see also Bourlas v. Davis Law Assocs., 237 F.R.D. 345, 356 (E.D.N.Y. Aug. 30, 2006).

This antitrust class action involves a complex factual record and novel issues of law. The parties have developed a familiarity with the details of the case by conducting significant discovery and engaging in motion practice over the past five years. “The litigation has thus 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.” Gross, 2006 WL 2006 WL 318814, at \*5. The expense and delay of continued litigation could be substantial. As Judge Pollack noted in granting preliminary approval of a proposed settlement in In re Prudential Sec. Inc. Ltd. P’ships Litig.:

Instead of the lengthy, costly, and uncertain course of further litigation, the settlement provides a significant and expeditious route to recovery for the Class." In the circumstances of such a case as this, it may be preferable "to take the bird in the hand instead of the prospective flock in the bush."

163 F.R.D. 200, 210 (S.D.N.Y. 1995) (quoting Oppenlander v. Standard Oil Co., 64 F.R.D. 597, 624 (D. Colo. 1974)).

Accordingly, the settlement amount falls within a reasonable range for purposes of preliminary approval. "[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." In re Ionosphere Clubs, Inc., 156 B.R. 414, 427 (S.D.N.Y. 1993) (internal quotations omitted). Here, the fund contains \$336 million, representing roughly 10-15% of the credit transaction fees collected by Defendants. No class member has objected to the size of the Settlement thus far, and Plaintiffs negotiated for injunctive relief in addition to the sizeable monetary award. See In re Initial Pub. Offering, 226 F.D.R. at 198 (noting that "this settlement is not solely . . . about monetary recovery"). Therefore, there are no "obvious deficiencies" in the settlement warranting denial of preliminary approval. In re Nasdaq, 176 F.R.D. at 102; see also In re Prudential Sec. Inc., 163 F.R.D. at 210 ("At this stage of the proceeding, the Court need only find that the proposed settlement fits within the range of possible approval, a test that the settlement here easily satisfies" (internal citation and quotations omitted)).

CONCLUSION

Accordingly, Plaintiffs' motion for preliminary approval of the Settlement is granted.

Dated: November 8, 2006  
New York, New York

SO ORDERED:

  
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WILLIAM H. PAULEY III  
U.S.D.J.