

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE : MDL No. 1409  
 : M 21-95  
CURRENCY CONVERSION FEE :  
ANTITRUST LITIGATION :  
----- X  
THIS DOCUMENT RELATES TO: :  
GILBERT SCHRANK, individually :  
and on behalf of all others :  
similarly situated, : 03 Civ. 2843 (WHP)  
 :  
Plaintiff, : MEMORANDUM AND ORDER  
 :  
- against - :  
CITIBANK (SOUTH DAKOTA), N.A., :  
 :  
Defendant. :  
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WILLIAM H. PAULEY III, District Judge:

Plaintiff Gilbert Schrank (“Schrank”) brings this action individually and on behalf of a certified class of credit cardholders (collectively, “Plaintiffs”) challenging certain foreign currency conversion fees imposed by Citibank (South Dakota), N.A. (“Defendant” or “Citibank”). Presently before this Court are Citibank’s three separate motions: (1) for reconsideration of this Court’s Amended Memorandum and Order, dated July 22, 2005; (2) for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) with respect to Plaintiffs’ claim based on New York Personal Property Law (“NYPPL”), Article 10; and (3) for a stay of litigation in favor of arbitration pursuant to Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3.

For the reasons set forth below, Citibank’s motion for reconsideration is denied and its motion for judgment on the pleadings is granted. Because none of the remaining claims are arbitrable, Citibank’s motion for a stay of proceedings pending arbitration is moot.

## BACKGROUND

The relevant facts are described in detail in this Court's prior Memoranda and Orders. See Schrank v. Citibank (South Dakota), N.A., No. 03 Civ. 2843, 2005 WL 1705285 (S.D.N.Y. July 22, 2005) ("Schrank III"); Schrank v. Citibank (South Dakota), N.A., 230 F.R.D. 303 (S.D.N.Y. 2004) ("Schrank II"); Schrank v. Citibank (South Dakota), N.A., No. 1409, 21-95, 2003 WL 22097502 (S.D.N.Y. Sept. 10, 2003) ("Schrank I"); see also In re Currency Conversion Fee Antitrust Litigation, No. 1409, 21-95, 2005 WL 3304605 (S.D.N.Y. Dec. 7, 2005) ("Currency Conversion VI"); In re Currency Conversion Fee Antitrust Litig., 361 F. Supp. 2d 237 (S.D.N.Y. 2005) ("Currency Conversion III").

By Memorandum and Order, dated December 2, 2004, this Court certified a class with respect to Plaintiffs' NYPPL claim. Schrank II, 230 F.R.D. at 312-13. Thereafter, the Court modified the class to reflect its determination that Citibank waived its right to enforce its arbitration agreements with certain cardholders. Schrank III, 2005 WL 1705285, at \*4-5. The certified NYPPL claim includes the following class members:

All New York state residents issued Citibank Visa or MasterCard credit cards who were assessed a foreign currency conversion fee in violation of the New York Personal Property Law.

Schrank III, 2005 WL 1705285, at \*4-5.

## DISCUSSION

### I. Reconsideration

"[R]econsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995); see S.D.N.Y. Local Rule 6.3; Colodney v. Continuum Health Partners,

Inc., No. 03 Civ. 7276 (DLC), 2004 WL 1857568, at \*1 (S.D.N.Y. Aug. 18, 2004). Such a motion “should not be granted where the moving party seeks solely to relitigate an issue already decided.” Shrader, 70 F.3d at 257; accord Pannonia Farms, Inc. v. USA Cable, No. 03 Civ. 7841 (NRB), 2004 WL 1794504, at \*2 (S.D.N.Y. Aug. 10, 2004). Moreover, a party “cannot assert new arguments or claims which were not before the court on the original motion.” Koehler v. Bank of Bermuda, Ltd., No. M18-302 (CSH), 2005 WL 1119371, at \*1 (S.D.N.Y. May 10, 2005); accord Am. Hotel Int’l Group v. OneBeacon Ins. Co., No. 01 Civ. 0654 (RCC), 2005 WL 1176122, at \*1 (S.D.N.Y. May 18, 2005). Whether reconsideration is appropriate is “within the sound discretion of the district court.” Colodney, 2004 WL 1857568, at \*1; accord Pannonia Farms, Inc., 2004 WL 1794504, at \*2.

Citibank contends that this Court overlooked certain facts when it determined that Citibank waived its right to enforce the absent class members’ arbitration agreements. Specifically, Citibank asserts that because Schrank’s claims are not arbitrable, he has not been prejudiced by the discovery, motion practice and expense of this litigation. From that platform, Citibank makes the quantum jump that since Schrank was not prejudiced, neither was the class he represents – including class members with arbitration clauses in their cardholder agreements. This Court considered and rejected that argument when it found that Citibank waived its arbitration rights by litigating this case. Schrank III, 2005 WL 1705285, at \*4.

“No ‘bright line’ test determines the prejudice component of the waiver inquiry.” Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 25 (2d Cir. 1995). Indeed, waiver is an individualized inquiry contingent on the facts of each case. Thyssen, Inc. v. Calypso Shipping Corp., 310 F.3d 102, 104-05 (2d Cir. 2002); Cotton v. Slone, 4 F.3d 176, 179 (2d Cir. 1993); Schrank III, 2005 WL 1705285, at \*4. “Generally, waiver is more likely to be

found the longer the litigation goes on, the more a party avails itself of the opportunity to litigate, and the more that party's litigation results in prejudice to the opposing party." Thyssen, Inc., 310 F.3d at 105.

In Schrank III, this Court observed that for more than two years, Citibank defended motions for remand and class certification and availed itself of the full panoply of discovery under the Federal Rules. Throughout that time, Citibank never sought to enforce its arbitration agreements with the absent class members. Schrank III, 2005 WL 1705285, at \*4. The Second Circuit has recognized that prejudice "can be found when a party too long postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur unnecessary delay or expense." Kramer v. Hammond, 943 F.2d 176, 179 (2d Cir. 1991); Thyssen, Inc., 310 F.3d at 105. This Court rejected Citibank's similar waiver argument in Currency Conversion III, and observed that "the putative class members' rights . . . were protected as of the filing date of the complaint." Currency Conversion III, 361 F. Supp. 2d 237, 258 (S.D.N.Y. 2005); see generally, Currency Conversion VI, 2005 WL 3304605, at \*3. For the same reasons, allowing Citibank to enforce its arbitral rights at this advanced stage would unfairly prejudice the absent class members. Accordingly, Citibank's motion for reconsideration is denied.

## II. NYPPL Claim

With their NYPPL claim, Plaintiffs assert that the currency conversion fees assessed by Citibank are void because they are not expressly permitted by NYPPL Section 413. (Verified Class Action Complaint ("Complaint") ¶¶ 7-8.) Section 413 governs charges imposed in connection with credit agreements "entered into" in New York. N.Y. Pers. Prop. Law §§

401(8), 413 (McKinney 1992). Citibank argues that pursuant to the terms of the statute, its cardholder agreements are not “entered into” in New York and, therefore, Section 413 does not apply. This Court agrees.

Section 413 provides that a credit agreement is “entered into” in New York if:

[T]he financing agency delivers or mails in this state to the buyer a copy of the agreement executed by the financing agency, provided, however, that in order to reduce the potential for theft or fraud, a financing agency may mail the credit agreement from outside the state if the credit agreement is prepared and sealed in the state before mailing and prior to being transported to a location outside of the state for actual mailing.

N.Y. Pers. Prop. Law § 413(11)(e).

Citibank is a national banking association that issues its cards and extends credit from its only location in Sioux Falls, South Dakota. (Declaration of Susan Bridge, dated Feb. 18, 2004 ¶ 3.) Under Section 413, because Citibank “delivers or mails” its cardholder agreements from South Dakota, its agreements were not “entered into” in New York. N.Y. Pers. Prop. Law § 413(11)(e); see Johnson v. Chase Manhattan Bank USA, N.A., 784 N.Y.S.2d 921, 2 Misc.3d 1003 (Sup. Ct. 2004) (holding that under NYPPL Section 401(8) agreement not “entered into” in New York where “the Cardmember Agreement was entered into in Delaware, the only state in which Chase USA is located. Chase USA apparently extends credit solely from Delaware, and not from the state where the cardholder resides or uses the card to make a purchase.”)

Plaintiffs argue that their cardholder agreements were “entered into” in New York because Citibank’s parent, Citigroup, Inc., is located in New York. However, Section 413 concerns the location of the financing agency extending credit, not the parent or affiliate of such entity. N.Y. Pers. Prop. Law § 401(18) (McKinney 1992). Plaintiffs also rely on Sternberg v.

Citicorp Credit Servs., Inc., 50 N.Y.2d 856, 430 N.Y.S.2d 54 (1980), where the New York Court of Appeals affirmed summary judgment in favor of plaintiffs on their Section 413 claim against two Citibank entities located in New York. Sternberg is inapposite. As discussed above, the Citibank defendant in this action is located in South Dakota.

Finally, citing no authority, Plaintiffs argue that for purposes of Section 413, an agreement is “entered into” where it is accepted. Plaintiff’s theory contradicts the unambiguous language of the statute. Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003) (“[W]here . . . the words of the statute are unambiguous, the judicial inquiry is complete.”); Sash v. Zenk, 428 F.3d 132, 135 (2d Cir. 2005) (“If the statute is unambiguous, of course, our inquiry ends with the statute’s plain meaning.”). Accordingly, this Court concludes that judgment on the pleadings is appropriate.

Based on its determination that the NYPPL does not reach Citibank, this Court need not consider Defendant’s alternative argument that Plaintiffs’ claim is preempted by the National Bank Act. Finally, because dismissal is appropriate on Plaintiffs’ class claim and it is undisputed that Schrank’s individual claims are not subject to arbitration, Defendant’s motion for a stay of proceedings in favor of arbitration is moot.

CONCLUSION

For the reasons set forth above, Citibank's motion for reconsideration is denied, its motion for judgment on the pleadings on Plaintiffs' NYPPL claim is granted and its motion for a stay of proceedings in favor of arbitration is denied as moot.

Dated: July 20, 2006  
New York, New York

SO ORDERED:

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

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