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	:	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.[1]

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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[1] 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.[2]

"Lead counsel is expected in the ordinary course to keep other counsel for sub-classes 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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[2] 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:

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