

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In re CURRENCY CONVERSION FEE
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

: MDL Docket No. 1409
: M 21-95
:

: PLAINTIFFS' NOTICE OF
: FILING OF STATUS REPORT
: CONCERNING THE AUDITING
: OF CLAIMS AND THE
: SETTLEMENT
: ADMINISTRATION PROCESS
:

Plaintiffs submit this report concerning the status of filed claims following the expiration of the claims submission period on May 30, 2008. The report provides information on: (i) the revised number of filed claims after further de-duping by the Claims Administrator; (ii) the number and value of late-filed claims and a recommendation by counsel concerning the treatment of late claims; (iii) a description of the audit program implemented by the Claims Administrator and the results of that program as of November 14, 2008; (iv) a summary of the algorithm formulation recommended by Analysis Research Planning Corporation (“ARPC”);¹ and (v) a revised estimate of the total “face value” of the claims.

The information contained in this report provides a description of the overall status of the claims to date, including the present approximate face value of the claims. The Claims Administrator will continue to adjust the claim data as the administration process continues. The Claims Administrator does not, however, anticipate that the ongoing implementation of the de-duping and audit procedures, absent an unanticipated or unusual result from these programs, will cause a material change in the claim data presented in this report. In other words, the Claims Administrator does not anticipate that there will be a substantial change in the overall number of valid claims and their approximate face values.

I. The Revised Number Of Claims Submissions After De-Duping

The Claims Administrator continues to apply the de-duping procedure described in Plaintiffs’ July 15, 2008 Status Report (“July 15 Report”)² to identify duplicate claims. *See*

¹ B. Thomas Florence and Analysis Research Planning Corporation (collectively, “ARPC”), appointed as experts to the Special Master on August 30, 2007, have primary responsibility for developing the algorithm, in consultation with counsel for the parties, the Special Master and the Claims Administrator.

² *See* July 15 Report at 1-4 & Exhibit 1. For ease of reference, the July 15 Report and

Status Report of Edward J. Radetich, Jr., C.P.A. Regarding the Settlement Notice and Claims Process (“Radetich Report”), at ¶ 4 (dated December 5, 2008) (attached to this Report at Exhibit B). Once the auditing and claim validation procedures are completed (*see* Part III *infra*), the Claims Administrator will conduct a final de-duping review to identify and remove any additional duplicate claims. *Id.* The Claims Administrator does not, however, anticipate that the final de-duped number of claims will differ materially from the present total number of claims, as reported below. *Id.*

The Claims Administrator reports that the de-duping procedure has to date identified 156,773 duplicate claims, resulting in a total of approximately 10,000,000 timely-filed, non-duplicate claims through November 14, 2008. *See* Radetich Report ¶ 5. The total number of timely, non-duplicate claims per claim option, through November 14, 2008, is reported below:

Option 1 Claim Forms	7,157,672
Option 2 Claim Forms	2,601,683
Option 3 Claim Forms	316,177
Agency/Company Claims	<u>302</u>
Total Timely, Non-Duplicate Claim Forms Through 11/14/08	10,075,834

See id. at ¶¶ 5-8.

The Claims Administrator will issue a letter to claimants with duplicate claims informing them, by reference to Claim ID Numbers, that one of their claims will be retained and the remaining duplicate claim(s) will be disallowed. *See id.* at ¶ 5 (includes breakdown of duplicates by claim option).

accompanying exhibits are attached to this Report at Exhibit A.

II. The Number And Value Of Late-Filed Claims

The Claims Administrator has also received a number of late-filed claims after the close of the fourteen month long claim submission period. As of November 14, 2008, the Claims Administrator has received approximately 37,600 late-filed claims. See Radetich Report ¶ 9. The number of Option 1 claims, claimed days (Option 2 claims) and the claimed foreign transactions amounts (Option 3 and Agency/Company claims) for these late-filed claims is reported below:

Option 1	22,526	claims
Option 2	3,445,615	days
Option 3 & Original Forms	\$ 119,455,017	transaction amount
Agency/Company Claim	\$ 1,906,045,893	transaction amount

Id. at ¶¶ 9 & 10.

Given the extraordinary participation of the Class in this claims process, with more than 10,000,000 timely-filed claims, Plaintiffs' Co-Lead Counsel respectfully submit that all claims received after the May 30, 2008 deadline should be disallowed, except, as recommended on a case-by-case basis, those individual (non-Agency/Company) claimants who submitted with the late claim an explanation or documentation demonstrating undue hardship or inability to file a claim within the time period allowed, e.g., illness or extensive travel during the claims-filing period, and respectfully request that the Court issue guidance as to whether such rejection letters may be issued.³

³ All but two late filed Agency/Company claims (84 of 86 such late filed claims, including 19 duplicate claims) were submitted by a professional filing company on behalf of

III. The Audit Program: A Summary Description And The Current Status Of The Program

The Claims Administrator has devised a robust audit program to review and validate claims. *See generally* Radetich Report ¶¶ 11-14. This part of the report provides a summary description of the audit program followed by data on the status of the program through November 14, 2008.

A. Summary Description of the Audit Program

The Claims Administrator has developed an audit program to assist with validating claims. *See id.* at ¶ 11. This program is a multi-step process in which the Claims Administrator: (1) selects a claim for audit; (2) issues an audit letter informing the claimant of the audit and requesting supporting information and documentation; (3) analyzes the audit response information and materials provided by the claimant; (4) issues an audit result letter which informs the claimant of the claim amount that was allowed/disallowed and provides a 45 day period to object to the audit determination; and (5) conducts a final review in the event any additional supporting materials are submitted after the claimant objects to the audit determination letter. *See id.* The results of every audit are compiled in the claims database used by the Claims Administrator and these results may be used to refine the audit review process. *Id.*

A decision to audit a claim is based on various factors. *Id.* A key trigger for an audit is the size of the claim. *Id.* For example, the Claims Administrator, with the approval of the

claimants. *See* Radetich Report ¶ 10. This same professional filing company has also submitted 29 timely filed claims (including nine duplicate claims) on behalf of Agency/Company claimants during the more than fourteen month claim submission period. *Id.* It is our understanding that such professional filing companies are compensated through a set percentage of each claimant's (their client's) recovery. *See id.*

Special Master, has selected for audit all Option 2 claims claiming 3,400 travel days or more (there are 3,934 total travel days in the class period); all Option 3 claims claiming foreign transaction amounts equal to or exceeding \$400,000; and all Agency/Company claims claiming foreign transaction amounts equal to or exceeding \$100,000. *Id.* A sample of Option 2 claims claiming between 3,000 and 3,400 travel days were also audited. *Id.* The Claims Administrator has found that the percent amount disallowed for audited claims has decreased as the value of the claim decreases (*i.e.*, as the number of travel days or claimed foreign transaction amounts decrease). *Id.* Accordingly, the Claims Administrator believes that expanding the audit process to the next “tier” of claims (*e.g.*, Option 2 claims claiming between 2,501 and 2,999 days and Option 3 claims claiming foreign transaction amounts between \$300,000 and \$400,000) would not be justified under a cost/benefit analysis – this next “tier” of claims would add approximately 7,000 audits (on top of the more than 9,800 audits already undertaken by the Claims Administrator). *See id.*

The Claims Administrator has also selected for audit claims that appear to contain questionable or inconsistent information, claims that include transactions for ineligible cards (*e.g.*, American Express cards), all claims submitted by professional filing companies, and claims with incomplete information, *e.g.*, missing card number or signature. *Id.*

Each audited claimant is asked to provide supporting information and documentation within twenty days. *Id.* Typically, an Option 2 claimant is asked to provide information supporting the number of claimed travel days, and an Option 3 or Agency/Company claimant is asked to provide supporting information for transactions claimed for one or more years during the class period. *Id.* Audited claimants may speak with an audit reviewer to obtain assistance and/or an extension of time. *Id.* Where requested, audit reviewers will work with the claimant to

try to resolve the audit inquiry. *Id.*

All information and documentation submitted by an audited claimant is reviewed to determine whether all or part of the claim may be allowed. *Id.* With respect to Option 3 and Agency/Company claims, if the Claims Administrator determines that only a portion of the foreign transaction amount claimed for the audit year(s) is allowable, then the non-audited years are reduced by the same proportionate amount, *e.g.*, if the audit results in a 10% reduction in the audited year then the entire claim is reduced by 10%. *Id.* Those claimants who fail to respond to an audit request letter will have their entire claim disallowed. *Id.* at ¶ 13.

Each claimant whose claim is reduced or disallowed will receive a letter informing them of the audit determination. *Id.* at ¶ 11. Pursuant to Paragraph 5(i) of the Revised Plan of Administration and Distribution, the claimant has forty-five (45) days to contest the audit determination. *Id.* If a claimant contests an audit, the Claims Administrator will review any additional information submitted by the claimant and issue a final audit response letter. *Id.* Finally, results of completed audits are uploaded into the claims database. These results are used to modify the review and analysis of subsequent audits. *See id.*

B. Travel Booking Companies

Plaintiffs' Co-Lead Counsel respectfully recommend that the Claims Administrator disallow three (3) Agency/Company claims, totaling \$473,761,462 in claimed foreign transaction amounts, that were submitted by travel booking companies that reserve hotel rooms for travelers. *See Radetich Report* ¶ 21 (noting that one of these claims was filed late, but within fifteen days of the claim submission deadline). Plaintiffs' Co-Lead Counsel believe that these claimants did not pay the currency conversion fee. Rather, the traveling consumers, who book travel over the

internet and then are billed by these claimants for the cost of the room, plus a mark-up, pay the currency conversion fees. These claimants bill their customers on a pre-existing cost-plus contract basis where the traveling consumer is charged and pays the currency conversion fee, along with any other mark-ups, as part of the company's booking service. In these circumstances, these three (3) Agency/Company claimants have not been damaged and their claims should be disallowed, in accord with *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 732 n.12 (1977) (a "pre-existing cost-plus contract makes easy the normally complicated task of demonstrating that the overcharge has not been absorbed by the direct purchaser").

C. Current Status of the Audit Program

The results of the audit program are reported below. While the Claims Administrator is in the process of completing the audit program, the Claims Administrator does not anticipate that the final results of the audit and claims validation program will materially or substantially change the data provided here and in the Claims Administrator's accompanying declaration, with the one exception noted in Part III.B above. Radetich Report ¶ 21. Further, the Claims Administrator does not believe that expanding the scope of the audit program will produce materially different results, particularly in light of the likely substantial increase in cost to operate a broader audit program. *Id.* at ¶ 11.

As of November 14, 2008, the Claims Administrator has issued more than 9,800 audit letters to Option 2, Option 3 and Agency/Company claimants. *Id.* at ¶ 12. The results of the audit are reported below.

Option 2 Claims

Audit Request Letters Mailed	7,559
Audit Letter Responses Received	2,936

Audits Completed	1,748
Days Claimed for Completed Audits	6,685,050
Days Allowed from Completed Audits	5,336,888
Percentage Allowed	79.83 %

Option 3 Claims

Audit Request Letters Mailed	2,016
Transaction Amount of Audited Claims	\$2,242,417,583
Audit Letter Responses Received	1,280
Audits Completed	702
Dollars Claimed for Completed Audits	\$583,075,165
Dollars Allowed from Completed Audits	\$406,574,456
Percentage Allowed	69.73 %

Agency/Company Claims

Audit Request Letters Mailed	232
Transaction Amount of Audited Claims	\$4,071,052,949
Audit Letter Responses Received	204
Audits Completed	100
Dollars Claimed for Completed Audits	\$598,083,364
Dollars Allowed from Completed Audits	\$577,973,488
Percentage Allowed	96.64 %

Id.

IV. The Recommended Algorithm Or Formula For Calculating Option 2 Refund Amounts

At the request of the parties and the Special Master, ARPC undertook to develop the algorithm or formula that will be used to calculate the value of or refund amount for the Option 2 claims. In a memorandum dated July 15, 2008,⁴ ARPC detailed the methodology it used to develop the algorithm, including the data it reviewed, the various possible outcomes or formulations of the algorithm, and additional considerations concerning atypical Option 2 claims (*e.g.*, claims identifying a very high number of travel days). After consultation with the Special Master, Counsel and the Claims Administrator, ARPC recommends the algorithm or formula described in this section and summarized in greater detail in the accompanying Declaration of B. Thomas Florence (“Florence Report”), attached as Exhibit C to this Report.

By way of background, each Option 2 claimant provides two sets of data: (1) the total number of travel days during the class period; and (2) an assessment of how much of that travel was for one or more of four categories of travel purposes. The four travel purposes are: (i) Business; (ii) Visiting Friends and/or Relatives (“VFR”); (iii) Vacation/Leisure; and (iv) Other. *See* Florence Report ¶ 7. (“Other” travel includes travel for such purposes as education, military service, religious pilgrimage, etc. *See id.*) The claimant then provides a frequency of travel, ranging from Never, Rarely, Sometimes, Often to Mostly, for each of these four travel purposes. *Id.* at ¶ 8.

The first step of the algorithm or formula is to apportion the claimant’s reported travel days across the four travel purposes. *Id.* at ¶ 10. This apportionment is made by assessing a

⁴ ARPC’s July 15 Memorandum is attached at Exhibit 2 to the July 15 Report. (As referenced in note 2 *supra*, the July 15 Report is attached at Exhibit A to this Report.)

weight for each travel purpose based on the claimant's assignment of a frequency rating from Never, set to equal zero, to Mostly, set to equal four. *Id.* A weighted percentage is determined for each travel purpose based on the data provided by the claimant, and these percentages are applied to the total number of the claimant's travel days to determine the estimated number of travel days for each travel purpose for that claimant. *Id.*

The next step in the algorithm or formula is to apply the average daily spending amount assigned by ARPC to each of the four travel purposes to the claimant's reported travel days. *Id.* at ¶ 11. ARPC derived these average daily spending amounts from empirical studies containing travel and spending statistics.⁵ *See id.* To adjust for the effect of extreme values, ARPC used median daily spending amounts. *Id.* at ¶ 12. These median spending amounts were further adjusted to account for foreign spending that did not incur the currency conversion fee in this litigation, namely, Travelers' Checks, other payment cards, and cash. ARPC adjusted for this non-impacted spending by assuming: (i) 100% of Travelers' Checks spending occurred outside the United States; (ii) "other cards" (*e.g.*, American Express cards) spending constitutes approximately 22% of total foreign spending using payment cards (based on credit card market share data contained in The Nilson Report); and (iii) 75% of the cash expenditures reported in the empirical studies was spent while traveling outside the United States. *Id.* at ¶ 13. Using this methodology, ARPC determined the median daily spending amounts for the four travel purposes as follows:

⁵ The empirical studies were prepared by the U.S. Department of Commerce, Office of Travel and Tourism Industries; Statistics Canada; and Banco de Mexico and Sectur (Secretary of Tourism for Mexico). Florence Report ¶ 11.

- \$15 per day for Visiting Friends or Relatives
- \$20 per day for Leisure
- \$82 per day for Business
- \$19 per day for Other

Id. at ¶ 14.

Using this data, the algorithm or formula multiplies the estimated number of days spent traveling for each of the four travel purposes by the daily spending estimate for the appropriate travel purpose. The four resultant amounts are then summed to derive an estimated total foreign transaction amount for the claimant. *Id.* at ¶ 15. This amount is then multiplied by 1% to determine the refund amount. *Id.* at ¶ 16. If the refund amount is less than the minimum refund amount for Option 1 claimants, then the algorithm or formula adjusts the result to the minimum Option 1 refund amount. *Id.*

Finally, at the request of the parties, ARPC made a further refinement to the algorithm or formula to address instances where Option 2 claimants reported atypical numbers of travel days, such as very high travel days for claimants living or working abroad. *Id.* at ¶ 17. Upon consultation with the Special Master and Counsel, ARPC developed a discounting model to address the impact of atypical travel days. *Id.* The discount model reduces the daily spending amount for each travel purpose as the number of days reported moves farther away from the median number of reported travel days by Option 2 claimants. *Id.* The greater the distance from the median, the larger the reduction. *Id.* Reductions are increased up to 1,000 total days of claimed travel with day 1,000 and all subsequent days reduced at the same value. *Id.* The discount model, however, does not reduce any travel day to less than 10% of the full daily spending value for that travel purpose. *Id.*

In sum, the algorithm or formula used to calculate the refund amount for Option 2 claimants (i) apportions the reported number of travel days across the four travel categories based on the claimant's Option 2 claim form data, (ii) multiplies those apportioned travel days by the appropriate daily spending amount for each travel purpose; (iii) totals the amounts so calculated by multiplying the travel days by the applicable daily spending amounts, (iv) multiplies the total by 1% to determine the refund amount, except that no Option 2 refund amount is calculated at less than the minimum Option 1 refund amount (prior to any allocation or pro rata reductions), and (v) reduces the daily spending amount in accordance with the discount model in the event that the number of reported travel days exceeds the median (with the greatest reduction occurring for the largest reported travel days, but no claim is discounted below 10% of the value of the daily spending amount).

V. The Total Approximate Value, Or "Face Value," Of All Claims

The Claims Administrator and ARPC have estimated the total approximate value, or "face value", of all claims, taking into account de-duping and audits conducted to date, as well as the recommended algorithm or formula for the Option 2 claims (*see Part IV supra*). This face value total is derived solely from the claimant data, and does not take into account the effect of any allocation or proration, any award for attorneys' fees and costs, any incentive awards to the Class Representatives, or future costs of administering the settlement. Applying these further adjustments in conjunction with the estimated face value of all the claims, and other assumptions noted by the Claims Administrator (*see generally* Radetich Report ¶¶ 16-20), Plaintiffs' Co-Lead Counsel estimate that a likely refund value for Option 1 claims will be between \$15 and \$17, which amount will increase slightly as the audit and claim validation process is completed.

The total estimated face value of all claims was derived as follows. First, the estimated total face value of all claims was reduced by the de-duping process and completed audits. Second, the estimated face value total was adjusted to account for claims where the audit is in process, *i.e.*, the claimant has provided additional audit information but the Claims Administrator has not yet issued an audit determination. The Claims Administrator and ARPC applied the percentage amount allowed for all completed audits to the claims for which audits were not yet completed. Put differently, the completed audits provide an illustrative “trend” that was used to adjust the total. Third, the face value total was adjusted to reflect the predicted impact of audits in those instances where the claimant has not yet responded (which process produces a range for the face values of the Option 2, Option 3 and Agency/Company claims). *See generally* Radetich Report ¶ 17-19 & Florence Report ¶¶ 18-20 (describing methodology and values used to calculate the estimated face values of the claims). Fourth, the estimated face values for the Option 3 and Agency/Company claims was further adjusted to reflect a reduction for claimed amounts attributed to ineligible cards (*e.g.*, American Express cards). *See* Radetich Report ¶¶ 18-19.

The estimated face value of the claims using the above procedures is reported below.

Estimated "Face Value" of the Claims

Option 1 Claims (7,157,672 claims x \$25)	\$178,941,800
Option 2 Claims (for 2,601,298 claims)	\$141,367,000 to \$142,694,000
Option 3 Claims ⁶	\$173,951,089 to \$184,871,208
Agency/Company Claims	\$63,219,958 to \$70,867,344
Total Estimated "Face Value" Of All Claims	\$557,479,847 to \$577,374,352

See Radetich Report ¶¶ 16-19; Florence Report ¶¶ 18-20. Another adjustment can be made to reflect the 3 disallowed Agency/Company claims, with an estimated face value of \$8,527,706 (\$473,761,462 x 1.8%), discussed in Part III.B *supra*. Removing these claims yields an estimated Agency/Company Claims face value range of \$54,692,252 to \$62,339,638, and a total estimated face value of all the claims of \$548,952,141 to \$568,846,646.

The Claims Administrator anticipates that based upon the de-duping and auditing procedures used, and the results of those procedures to date, the estimated face value of the claims reported above will not materially change as the de-duping and auditing procedures are completed. See Radetich Report ¶ 21.

Based on this analysis of the estimated face value of all the claims submitted to date, it will be necessary to use all three tiers of the proration procedure set forth in the Revised Plan of

⁶ The foreign transaction amounts for Option 3 and Agency/Company claims is multiplied by 1.8% which is an estimated average of the refund rate to be applied to these claims based on the distribution of refund rates (generally from 1% to 3%) for the currency conversion fee levels assessed by the Defendants. See Radetich Report ¶ 18.

Administration and Distribution ¶ 6(f), approved by this Court's Order dated September 24, 2007.

The proration that will occur under the allocation plan cannot be calculated until the Claims Administrator has determined the final set of all valid claims, but an estimate of the potential distribution amount can be made using the data provided in the Radetich and Florence Reports. *See* Radetich Report ¶ 20. This estimate assumes: (i) the approximate amount available in the settlement funds is \$337,000,000 (as reported for the Third Quarter 2008, ending on September 30, 2008); (ii) that remaining settlement administration costs will be roughly equal to the amount of interest earned by the funds; (iii) that the cost to mail refund checks to claimants may be between \$7,000,000 and \$10,000,000 (the final cost will depend on the amount of applicable check processing fees and postage costs);⁷ and (iv) an award of attorneys' fees and costs as requested in Plaintiffs' Co-Lead Counsel's submission. *See id.* Based on these assumptions and the information contained in the two Reports, the Claims Administrator believes that Option 1 claimants will receive a refund amount between \$15 and \$17. This amount may increase slightly as the de-duping and audit procedures are completed.

⁷ Plaintiffs' Co-Lead Counsel believe that the cost to mail refund checks can be substantially lowered (*i.e.*, close to \$7,000,000 or less) provided that the United States Post Office allows the Claims Administrator to issue refund checks using postcard checks. Even if this cost were reduced to zero, however, it would only have a marginal effect on the refund amounts for claimants.

DATED: December 8, 2008

Respectfully submitted,

BERGER & MONTAGUE, P.C.
MERRILL G. DAVIDOFF
RUTHANNE GORDON
DAVID A. LANGER


MERRILL G. DAVIDOFF

1622 Locust Street
Philadelphia, PA 19103
Telephone: 215/875-3000
215/875-4604 (fax)

DATED: December 8, 2008

COUGHLIN STOIA GELLER RUDMAN
& ROBBINS LLP
BONNY E. SWEENEY


BONNY E. SWEENEY

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Co-Lead Counsel for Plaintiffs