UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION This Document Relates to All Class Actions.	Case No. MDL No. 05-1720 (JG) (JO)

OPPOSITION OF OBJECTOR JON M. ZIMMERMAN TO PLAINTIFFS' JOINT MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES AND CLASS PLAINTIFFS' AWARDS

[FILED CONCURRENTLY WITH STATEMENT OF OBJECTIONS OF JON M. ZIMMERMAN]

Joshua R. Furman
JOSHUA R. FURMAN LAW CORP.
15260 Ventura Boulevard, Suite 2250
Sherman Oaks, California 91403
(818) 646-4300
Pro Hac Vice Pending

Hendrick Vandamme
VANDAMME LAW FIRM
149 Madison Avenue, 11th Floor
New York, New York 10016
(212) 851-6916

Attorneys for Objector
JON M. ZIMMERMAN

May 28, 2013

Objector JON M. ZIMMERMAN respectfully submits his opposition to Class Plaintiffs' joint motion for attorneys' fees and incentive awards as follows:

I.

INTRODUCTION

Class Counsel and Class Plaintiffs' ask for a windfall award from the net cash settlement fund in this case based on a settlement value that is at best questionable. Class Plaintiffs' individual award requests of $200,000 per class representative (Appendix F1-2) are totally improper because, in addition to being outrageously high, the fee requests cannot be compared to the class member claimant recovery (which is unknown and likely to vary wildly) in order to provide a touchstone for the proper incentive award analysis.

When class counsel and class representatives negotiate windfalls for themselves into a class action settlement, the Court must be careful to ensure that there is no conflict of interest at play. When the proposed class representative award is an order of magnitude beyond the potential recovery for an individual claimant, the Court should infer self-dealing and reject the settlement, or at least deny the award.

II.

LEGAL ARGUMENT

A. Disproportionate Incentive Awards to Class Representatives are Subject to Close Scrutiny and Unjustifiable Here

1. $200,000 Incentive Awards Are Excessive

Class representatives are not entitled to receive incentive fees in exchange for their agreement to serve as class representative. *See Flinn v. FMC Corp.*, 528 F.2d 1169, 1176 (4th Cir. 1975) ("class representatives 'chose to bring their action as a class action … In so doing,

they disclaimed any right to a preferred position in the settlement.'"). *See also Kincade v. General Tire and Rubber Co.*, 635 F.2d 501, 506, n.5 (5th Cir. 1981); *Staton v. Boeing*, 327 F.3d 938, 976 ("Generally, when a person joins in bringing an action as a class action he has disclaimed any right to a preferred position in the settlement") (internal quotations omitted). Indeed, incentive awards are ***not*** granted in 72 percent of class action settlements. *See* Theodore Eisenberg and Geoffrey Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study* (2006) 53 UCLA L. Rev. 1303, 1307.

Here the Class Representatives seek a substantial windfall of $200,000 each. The proposed incentive award is well beyond the range of approvable awards. The award is completely out of proportion to any recovery that a class member claimant could hope to get. At a minimum, the Court and class members do not have any information from Class Plaintiffs about how many claimants there are going to be, or how much any claimant could hope to recover under the pro rata claimant fund-sharing scheme in the settlement agreement. However, it is highly unlikely that any claimant, let alone an average claimant, could hope to receive even a measurable percentage of the award requested by Class Plaintiffs.

By way of comparison, the Ninth Circuit has held that incentive fee awards that are 16 times higher than compensation to average class members are excessive. *Staton*, 327 F.3d at 977–978. As a general guideline, incentive fees that are 4 times, 16 times, 100 times, or even higher than absent class member compensatory awards are excessive. *Staton*, 327 F.3d at 946, 975; *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 952 (7th Cir. 2006); *Gulino v. Symbol Technologies, Inc*., 2007 U.S. Dist. LEXIS 76915 (E.D.N.Y. Oct. 17, 2007); *Sheppard v. Consolidated Edison Co.*, 2000 U.S. Dist. LEXIS 20629 (E.D.N.Y. Dec. 21, 2000).

Here, even in the absence of concrete information about average class member recovery,

the proposed incentive awards are disproportionate to the maximum amount that could be awarded to each class member. Under the circumstances, these class representatives had a powerful incentive to trade away the rights of absent class members in exchange for a high incentive fee for themselves. As a matter of the facts in this case, and as a matter of public policy, these incentive awards cannot be approved.

2. Class Plaintiffs Provide No Evidence of Extraordinary Efforts or Risk Justifying a Disproportionate Incentive Award

The proposed incentive award has not been supported by any evidence that the class representatives have exerted any labor (other than providing basic discovery responses and attending depositions), suffered any risk of retaliation, or otherwise put the sweat of their collective brow to work on behalf of the class. While any out-of-pocket expense substantiated by the Class Plaintiffs' declarations in support of the motion is properly subject to reimbursement, the basic litigation duties documented in the declarations identify nothing to justify a massive $200,000 windfall.

Class Representatives have the burden of showing their entitlement to an award. *Matter of Continental Illinois Securities Litig*., 962 F.2d 566, 572 (7th Cir. 1992) ("The plaintiff has failed to prove his entitlement to a fee"); Jocelyn Larkin, *Incentive Awards to Class Representatives in Class Action Settlements,* (The Impact Fund, 2008), *available at* www.impactfund.org (last viewed on Feb. 15, 2012), at 3 ("counsel must anticipate and carefully prepare to justify named plaintiff incentive bonuses as part of any class action fairness process under Fed. R. Civ. Proc. Rule 23(e)").

The class representatives' failure to meet their burden requires this court to deny the proposed fee. *Armstrong v. Mazo* 380 U.S. 545, 551 [85 S.Ct. 1187, 14 L.Ed.2d 62] (1965)

("For it is plain that where the burden of proof lies may be decisive of the outcome") (internal quotations omitted).

Denying incentive fees ensures that the interests of a class representative are aligned with the interests of absent class members:

> Such individual class members who have actively participated in the litigation are the ones likely to be most aware of the dynamic at the negotiating table, the strength of the class claims, and the costs of pursuing the litigation. If they support the settlement agreement ***and*** are treated equally in that agreement with other class members making similarly strong claims, the likelihood that the settlement is forwarding the class's interests to the maximum degree practically possible increases.

(*Staton*, 327 F.3d at 977 [emphasis in original].)

The speculative business losses claimed by the Class Plaintiffs are not helpful to their cause. Any litigant takes time out of his or her life to deal with the scheduling needs occasioned by discovery and the court's orders—including making themselves available for trial. No other litigant is entitled to compensation for these collateral costs of enforcing their rights, and Class Representatives are not entitled to a special claim for additional awards here.

The Class Plaintiffs chosen to ***dis***-align their interests from those of other class members by requesting a fee that is exceptionally disproportionate to any award a class member could hope to get. This creates a corresponding likelihood that the settlement does not represent the class's best interests. In any event, the amount of incentive awards provided by the settlement is simply beyond the pale and, if the settlement is otherwise approved, should be reduced and transferred to the common fund for the benefit for the class.

B. The Requested Attorneys' Fees Are Excessive and Unsupported

The fundamental problem with the fee award request by Class Counsel is that it is based on a percentage of recovery calculation where the amount of recovery for a substantial number of class members is uncertain, and where a substantial number of class members will be unable to benefit from the settlement—specifically the Rule 23(b)(2) settlement—because the complexity of its rules eliminates any recovery for merchants that must accept American Express.

Turning first to the evidence provided in support of the motion, the declaration of Professor Silver encourages the Court, at great length, to consider the market value of Class Counsel's services and to ensure that a sufficient multiplier is applied to encourage beneficial litigation like this. However, *Goldberger*, relied upon by Class Counsel, cautions against "[t]his routine largesse … justified on the theory that a reasonable fee should reflect prevailing rates in the relevant market." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 51 (2d Cir. 2000) (rejecting the concept of benchmark percentage fees based on market rates).

In *Goldberger*, the court found that no multiplier was necessary at all, despite the fact that the case was taken on a contingency and the fee awarded amounted to four percent of the recovery. *Id*. at 54–56. Even with a good result for the class, the court held, "a big recovery does not necessarily justify a quality multiplier" and refused to apply one. *Id*. at 56.

As a second matter, however, the problem with Class Counsel's valuation of the case upon which to base its proposed fee recovery lacks support. As set forth in Objector Zimmerman's Objections to the Settlement, filed concurrently, the evidence in support of the valuation does not permit the conclusion that the settlement actually has the value Class Plaintiffs' advocate for. At a minimum, the substantial elements of the settlement award are illusory and fail to benefit the class membership on the whole.

Under these circumstances, even if the settlement stands, the attorneys' fees should not be greater than a properly supported lodestar. Where there are a large number of claimants resulting in a substantial settlement, and where the liability is relatively clear-cut, *Goldberger* does not permit a substantial multiplier on the lodestar.

III.

CONCLUSION

In light of the foregoing, Objector Zimmerman respectfully requests the Court deny the attorneys' fees requested by Class Counsel and the incentive awards requested by Class Plaintiffs.

Dated: May 28, 2013

VANDAMME LAW FIRM

By: /s/ Hendrick Vandamme
Hendrick Vandamme
Attorneys for Objector
JON M. ZIMMERMAN

CERTIFICATE OF SERVICE

I, Hendrick Vandamme, hereby certify that on May 28, 2013, a true and correct copy of the foregoing document was served upon Counsel of Record via the Court's ECF system.

Dated: May 28, 2013

VANDAMME LAW FIRM

By: /s/ Hendrick Vandamme
Hendrick Vandamme
Attorneys for Objector
JON M. ZIMMERMAN