

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE VISA CHECK/MASTERMONEY
ANTITRUST LITIGATION

MASTER FILE NO. CV-96-5238
(Gleeson, J.)

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REPORT AND RECOMMENDATION

In this antitrust action, a Class of approximately five million merchants alleged, among other things, that defendants Visa U.S.A. Inc. ("Visa") and MasterCard International Incorporated ("MasterCard") were illegally tying their debit products to their credit cards, in violation of the Sherman Act. On June 4, 2003, the plaintiffs entered into preliminary settlement agreements with the defendants, agreements that provided, among other things, for the creation of a \$3.05 billion settlement fund. By Order dated February 17, 2004, Judge Gleeson appointed me Special Master to issue reports and recommendations regarding referred disputes arising out of or relating to the Visa and MasterCard Settlement Agreements.

On May 19, 2009, Class Member Enterprise Rent-A-Car Company ("Enterprise") moved to "modify the Amended Plan of Allocation to provide for interest payments necessary to treat all Class Members as though they were paid contemporaneously before remaining settlement funds are distributed on a *pro rata* basis." Motion at 2. Judge Gleeson referred the motion to me for a Report and Recommendation. I heard oral argument on September 10, 2009.

For the reasons set forth below, I respectfully recommend that this Court grant Enterprise's motion by entering an order directing that interest be paid to treat Class Members as though all claims were paid on the same date. In connection with this

recommendation, I order Lead Counsel to (1) provide notice of my recommendation by publishing this document on the case website; and (2) file with the Court, on or before November 10, 2009, a written submission detailing its proposal for how to implement my recommendation in the event this Court adopts it. Lead Counsel's written submission should include a proposed interest rate.

To the extent that Lead Counsel or any Class Member desires to object to my recommendation, they must do so by written submission filed with the Court on or before November 24, 2009. Any Class Member that intends to object to Lead Counsel's proposal for how to implement my recommendation must also file such objection on or before November 24, 2009.

BACKGROUND

In a complaint filed on October 5, 1996, the named plaintiffs "alleged that the defendants' practice of requiring merchants who accepted defendants' credit cards to also accept their debit products . . . was an illegal tying arrangement, in violation of section 1 [of the Sherman Act]." *In re: Visa Check/MasterMoney Antitrust Litigation*, 297 F. Supp. 2d 503, 507 (E.D.N.Y. 2003). They "further alleged that, through these tying arrangements and other anticompetitive conduct, the defendants attempted to monopolize the debit card market, in violation of section 2 [of the Sherman Act]." *Id.* This Court certified the Class by Order dated February 22, 2000. *Id.* The Second Circuit affirmed on October 17, 2001. *Id.* at 507-08.

After motion practice, and on the brink of trial, the plaintiffs entered into preliminary settlement agreements with each of the defendants. *Id.* at 508. These

Settlement Agreements provided, among other things, for “the creation of a \$3.05 billion settlement fund.” *Id.* at 508.

On August 18, 2003, Lead Counsel sought this Court’s approval of the Settlement Agreements and plan of allocation. *Visa Check/MasterMoney*, 297 F. Supp. 2d at 506-07. On September 25, 2003, this Court “held a fairness hearing in [the] ceremonial courtroom to hear arguments of th[e Objectors] and any others that might be raised.” *Id.* at 509. On December 19, 2003, this Court issued an Opinion and Order approving the Settlement Agreements and plan of allocation. *See id.* at 526, *aff’d*, 396 F.3d 96 (2d Cir. 2005).

According to Enterprise, Lead Counsel has, to date, made the following distributions of settlement payments:

- December 19, 2005: Lead Counsel paid approximately 23,000 claims checks, totaling \$52,729,595.18.
- June 28, 2006: 494,000 payments were made, totaling \$609,990,110.38. “These payments were distributed to certain Class Members . . . whose claim forms were submitted and approved for payment by March 31, 2006.”
- December 23, 2006: 128,436 payments were made, totaling \$317,281,533.80. Enterprise contends that these payments included claims filed and approved by March 10, 2006 “that did not involve the consolidation of multiple store locations or divisions and claims requiring consolidation that were filed and approved by October 20, 2006.” It further maintains that, “[d]ue to insufficient funds, 38,698 Approved

Claims that were ready for payment in December 2006 could not be paid and were delayed until additional funds were provided by Visa and MasterCard,” and that, “[r]ather than pay all eligible Class Members a *pro rata* portion of the available funds, Lead Counsel and the Claims Administrator paid some Class Members in full, while other Class Members were required to wait an additional twelve months to receive their initial payments.”

- December 21, 2007: Payments totaling \$185,947,129.93 were made.
- December 23, 2008: The fifth and, thus far, final distribution was made, totaling \$257,308,370.08.

Motion at 6-9 & n.13.

Enterprise filed its initial claim, for 6,024 operating locations, in late 2005.

Motion at 6. Enterprise received Visa MasterCard Consolidation report # 226901 (the “VMC”) from the Claims Administrator on September 25, 2006. That document reported the Claim Administrator’s calculation that Enterprise was entitled to receive a cash payment estimated to be \$4,047,895. Motion at 7.

Enterprise challenged the amount of its claim as calculated by the Claims Administrator. In March 2008, this Court ordered the Claims Administrator to pay the undisputed portion of Enterprise’s claim – i.e., \$4,047,895. In November 2008, Lead Counsel and Enterprise settled Enterprise’s claim for an additional \$1,711,418, which was then paid. Motion at 9.

ANALYSIS

In support of its motion, Enterprise notes “the first basic principle of finance” – that “a dollar today is worth more than a dollar tomorrow, because the dollar today can be invested to start earning interest immediately.” Motion at 10; *see also id.* at 11-12 (noting the various way that the Amended Plan of Allocation incorporates and references the concept of the time value of money). Enterprise argues that, “[f]or various reasons, the Claims Administrator has made payments to Class Members at vastly different times” and that, “[a]s a result, the later-paid Class Members have not been treated fairly and equitably when compared with the earlier paid Class Members.” Motion at 12, 13. Enterprise further maintains that, to the extent that “Class Members’ distributions were delayed due to their rightful and meritorious exercise of the appeals process set forth in the Amendment Plan, it would be particularly inequitable to deny them interest.” *Id.* It therefore asks this Court “to modify the Amended Plan of Allocation to provide for interest payments necessary to treat all Class Members as though they were paid contemporaneously before remaining settlement funds are distributed on a *pro rata* basis.” Motion at 1.

In opposing Enterprise’s motion, Lead Counsel does not dispute that some Class Members were paid at later dates than others. It acknowledges, moreover, that it is obliged to “fairly and adequately represent the interests of the Class” and therefore to ensure that payments to Class Members are “fair and equitable.” Opposition at 11 (internal quotation marks omitted). Lead Counsel maintains, however, that “[t]here is a difference . . . in treating Class Members equally – applying the administrative process uniformly, providing equal opportunities to file claims or pursue challenges – on the one

hand, and treating all Class Members as if their claim histories were identical, on the other.” Opposition at 11. Lead Counsel asserts that, in seeking interest payments to account for differing payment dates, Enterprise “fails to attribute the reasons for the pay disparities to their actual causes, which most often were the different dates on which claims were filed, inadequacies with the claims, or Claimants’ delays in providing documentation to support their challenges.” Opposition at 12.

In furtherance of its Opposition to Enterprise’s motion, Lead Counsel acknowledges that, “[a]s expected with a Class numbering in the millions, thousands of individual issues contributed to different payment dates.” Opposition at 4. Lead Counsel notes, for example, that the Claims Administrator received approximately 280,000 Signature Debit and Credit claims after the initial filing deadline (a deadline that was extended), and that “[t]he dates different claims were received affected the dates payments for those claims would be made.” Opposition at 5. According to Lead Counsel, other Signature Debit and Credit claims were allegedly deficient. These “wide-ranging” deficiencies – which also impacted payment dates – included instances where Class Members:

- (i) failed to sign claim forms;
- (ii) failed to provide adequate contact information;
- (iii) provided inadequate information for when Visa or MasterCard were accepted;
- (iv) failed to complete Section B (requiring information about the merchant);
- (v) submitted blank claim forms;
- (vi) provided inadequate information regarding PIN Debit acceptance;
- (vii) submitted a VM2 claim, but not information necessary for estimating transaction counts and therefore, award amounts;
- (viii) failed to provide information regarding U.S. based sales;
- (ix) indicated that it did not accept Visa or MasterCard during the damages period; or
- (x) used a third-party filer who failed to provide proof of authorization to act as agent.

Opposition at 5. Still other of these payments were delayed because the Class Members filed challenges to Lead Counsel's estimate and/or due to complexities that arose in connection with consolidations. Opposition at 6-7. Lead Counsel maintains, however, that "[m]ost of these claims that were not paid by December 2007 involved a problem, delay or deficiency in the challenge or consolidation request." *Id.* at 7.¹

With respect to the PIN Debit Claims, Lead Counsel states that "[t]he most recent Class-wide distribution in December 2008 was the first time that payments for PIN debit claims were made," because "calculating PIN debit payments was only possible after a hard deadline for accepting Signature Debit Claims had passed, which occurred on September 15, 2009." Opposition at 8-9.

To the extent that Enterprise's motion seeks the payment of interest to certain Class Members "based on select criteria, such as the filing date of claims," Lead Counsel opposes it on the ground that such relief would be too difficult to implement. Opposition at 1. Lead Counsel asserts that untangling the reasons for late-filed claims would "require a series of difficult, intertwining judgments":

The Claims Administrator would have to calculate these interest payments on hundreds of thousands of claims, each claim possibly requiring a separate calculation depending on what parameters would be deemed relevant.

While many claims contained no deficiencies or atypical conditions, there are tens of thousands of claims that may have to be manually reviewed in order to determine from which date the interest should accrue. For example, if a claim was filed in December of 2005, but was deficient because the Class Member did not sign the claim form until June of 2006, a decision would have to be made as to when the interest calculation would begin. And that is the most basic example.

¹ Lead Counsel asserts that "[c]lass members were notified that payments would be delayed if they challenged their estimated claims." Opposition at 7.

Opposition at 15-16; *see also id.* at 1 (this task “would require a difficult determination of what factors should be used to determine eligibility for interest payments, and then would invite a case-by-case application of those factors to thousands of claims”).

Lead Counsel acknowledges that one way to avoid this administrative burden would be to “to treat Class Members as though all claims were filed or paid on the same date.” Opposition at 1. At oral argument, I asked Lead Counsel how difficult it would be to implement this option. Mr. Shinder responded that it “would not be especially hard”² and that it would “not slow down [Lead Counsel’s] ability to get this done.”³ Lead Counsel nevertheless also opposes Enterprise’s motion to the extent that it seeks this relief. Lead Counsel argues that making an interest payment to some portion of the Class who were paid late would affect the residual recovery of those who were paid earlier – a result that (in Lead Counsel’s view) would be fundamentally unfair to “the majority of

² Tr. at 43:

MS. WILCOX: . . . What I’m saying is what is the administrative difficulty with just saying look, everyone should have gotten paid as of this date, so, you know, those who did, fine, and those who didn’t should get some extra amount. How administratively difficult would that be?

MR. SHINDER: It is doable. I think it would be profoundly unfair.

MS. WILCOX: We will talk about fairness afterwards. But how hard would that calculation be?

MR. SHINDER: If you were to wish away all the issues that I think are relevant to doing this fairly, again, you want to talk about fairness afterwards, so we are not going to crawl into why was it the case –

MS WILCOX: We are not going to crawl into that.

MR. SHINDER: We will set some deadline, whether it is December ’05, and I think the better date is June of ’06. Let’s say June of ’06 if we are going to do that. It is doable.

MS. WILCOX: I’m asking, how hard is it? How much would it cost? How administratively difficult would it be? Is that hard?

MR. SHINDER: It would not be especially hard if you were to wish away some of the issues that I think should inform how this is done. . . .

³ MR. SHINDER: I don’t think [treating Class Members as though all claims were filed or paid on the same date] will slow down – to be fair to the points that are raised here, to give you a very clear answer on the question you raised properly earlier, I don’t think it will slow down our ability to get this done. Garden City can do it.

MS. WILCOX: Is that one you want to firm up, or do you feel comfortable with that?

MR. SHINDER: The point I just made?

MS. WILCOX: Yes

MR. SHINDER: I feel comfortable saying it. If you said “Here is the date, it is June ’06,” they can do it.

Tr. at 70-71.

Class Members who timely filed their claims and, to the extent necessary, promptly provided documentation to support their requests for inclusion of additional data in their claims calculations or to support their challenges to claim amounts.” Opposition at 1. As Mr. Shinder explained at oral argument:

I think to give the[late filers] money and to take away from people who are more diligent isn't the fair result here. To cut through it all, that is our position after really thinking about this.

Tr. at 57.

When pressed, however, Mr. Shinder acknowledged that – without undertaking a review of each and every late-filed claim, an endeavor that (as discussed) Lead Counsel believes would be prohibitively burdensome and therefore opposes – Lead Counsel has no way of knowing whether it is fair to say all late-paid Class Members received their payments late because of a lack of diligence (however that concept is defined):

MS. WILCOX: Let me say this: You just said that you sort of blocked people into two categories, the diligent ones and the not diligent ones. Is that really fair to say that everyone who filed later is not diligent?

MR. SHINDER: I'm not saying that.

MS. WILCOX: You can't say that.

MR. SHINDER: When you are looking at hundreds of thousands of claims, there are outliers. I'm sure there are people who were in that late Class who can fairly come in here and say “I didn't do anything wrong.” I can ask who are these people. The bulk of them are people who created issues that caused their claims to be paid late.

Tr. at 57-58. When I asked Mr. Shinder what he meant by “creating issues,” he explained:

MR SHINDER: You had any number of things. You had complicated, large merchants, different divisions. They are saying they are owed money for different reasons. We may request for the documentation such that we could actually figure out how much they were dilatory in getting us their details, as an example.

MS. WILCOX: Let me push that a little bit further. They were dilatory because all of this happened a long time ago, it is hard to get things from the warehouse, it is hard to figure out where things are or access your computer or whatever they have to do, and that's not a lack of diligence, is it? It is just a difficulty in completing a process in your view they never should have had to do in the first place.

MR. SHINDER: But others were similarly situated and they came in 2006.

MS WILCOX: We don't know they were similarly situated. Maybe they archived things better.

MR. SHINDER: Again, I think we can both agree that we don't want to crawl into the individuals issues of these merchants.

Tr. at 59-60.

I agree with Lead Counsel that undertaking a review of the reasons for each late payment would be a difficult, time consuming and expensive proposition. To the extent Enterprise's motion seeks such relief, I respectfully recommend that it be denied.

If this Court follows this recommendation, then the Court is presented with two different alternatives. First, the Court could, as discussed above, order that interest payments be made "to treat Class Members as though all claims were filed or paid on the same date" – a remedy that would result, in Lead Counsel's view, in certain late-paid Class Members receiving interest payments notwithstanding that the late payment was due to a lack of diligence on the part of the Class Members themselves. Alternatively, the Court could deny Enterprise's motion altogether. This would have the effect of denying all late-paid Class Members any interest payment calculated to put them in the same financial position as earlier paid Class Members even in those instances where the late payment was *not* the result of a lack of diligence on the part of the late paid Class

Member. For the reasons that follow, I respectfully recommend that this Court adopt the first alternative.⁴

As Mr. Shinder acknowledged at oral argument, in Lead Counsel's view of "the perfect world, we never would have [had] to have filed this lawsuit and these overcharges wouldn't have existed." Tr. 62. In this hypothetical world, this lawsuit would never have been brought, the settlement would never have occurred, and none of these Class Members would have had to fill out any paperwork at all in order to obtain a portion of this settlement fund.

Against this background, I do not accept Lead Counsel's view that a subset of the Class should receive a diminution of their recovery amount by virtue of having been paid later than others merely because that subset includes some Class Members who, in Lead Counsel's view, were not diligent in connection with filling out the paperwork and/or collecting background documentation necessary to obtain of their portion of the settlement funds or in furtherance of their challenge to Lead Counsel's initial estimate. The simple fact is that some Class Members have claims that are more complicated than others, rendering the associated paperwork correspondingly more challenging. While it may be true that there were Class Members who succeeded in negotiating around such challenges in furtherance of filing on the earlier side, I do not agree with Lead Counsel's view that those who failed to do so should be penalized for that failure – particularly when such a result likely would also have the impact of penalizing some late paid Class Members who did *not* lack diligence, even as that concept is defined by Lead Counsel, or

⁴ A third option would be to grant Enterprise's motion as to Enterprise but not to order interest payments for any other late-paid Class Members. If this Court concludes that Enterprise, as a late-paid Class Member, is entitled to an interest payment, I see no reason why other late-paid Class Members should not also be entitled to the same relief. I therefore respectfully recommend that this Court decline to adopt this alternative.

whose lack of diligence consisted of (in my view) minor errors such as a failing initially to sign the claim form or to provide adequate contact information in the first instance.

As Lead Counsel acknowledges, this Court has previously amended the plan of allocation in ways that had the effect of rewarding later filing claimants at the expense of those who filed earlier. Specifically, “[t]he deadline for filing claims was extended two times, first to December 28, 2005, and again to September 15, 2008.” Opposition at 4 (“Likewise, the deadline for challenging estimated claims was amended each time the claims deadline was amended.”). The obvious practical effect of these deadline extensions was to ensure that those Class Members who did not meet the original deadline (no doubt, in some instances, due to a lack of diligence) could nevertheless participate and receive a portion of the settlement funds – at the expense of those who did manage to file before the original deadlines. In my view, the award of interest payments to late-paid Class Members is neither more nor less fair than these earlier deadline extensions.

At oral argument, Mr. Shinder also took the position that making this change at “the 11th hour” would be unfair. When I asked him to explain why the timing of the payment – as separated from the fact of such payment – implicates fairness concerns, he explained that it occasions “a fairly material change to this process that will affect residual payments” and therefore might “merit[] some kind of notice to the Class and an opportunity for people to object.” Tr. at 54.⁵ I agree, and believe that these concerns can

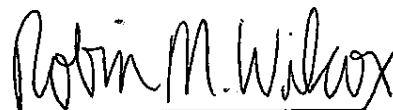
⁵ Mr. Shinder acknowledged at oral argument that, throughout the years, Lead Counsel has had discussions with some of the “bigger merchants” – discussions that were apparently initiated by those merchants – regarding the amount of the residuary payment such merchants may receive. See Tr. at 50-51 (“The bigger merchants have been all over us about ‘What do you think it is going to be?’ We have given them answers based on this or that, there is 90 cents on the dollar, but it is not sure, it depends on the securitization that comes out. We have had a fair number of those conversations. But we have not said to any of them ‘Here is your number.’ Because how could we?”); Tr. at 52 (“We have been doing this – people have been

be adequately addressed via the filing of this Report and Recommendation on ECF (which I will do) and its publication on the case website, as well as by giving all Class Members the opportunity to file an objection to this Report and Recommendation within the time periods described herein.

CONCLUSION

For the reasons set forth above, I respectfully recommend that this Court enter an order modifying the Amended Plan to pay interest in amounts necessary to treat all Class Members as though their claims were paid on the same day. In connection with this recommendation, I order Lead Counsel to (1) provide notice of my recommendation by publishing this Report and Recommendation on the case website; and (2) file with the Court, on or before November 10, 2009, a written submission detailing its proposal for how to implement my recommendation in the event this Court adopts it. Lead Counsel's written submission should include a proposed interest rate.

To the extent that Lead Counsel or any Class Member desires to object to my recommendation, they must do so by written submission filed with the Court on or before November 24, 2009. Any Class Member that intends to object to Lead Counsel's proposal for how to implement my recommendation must also file such objection on or before November 24, 2009.


Robin M. Wilcox

Dated: November 3, 2009
New York, New York

asking us about the residue for years. So those conversations certainly have predated and have probably postdated this issue materializing.”). Mr. Shinder emphasized, however, that Lead Counsel is not taking the position that “because certain large merchants have called me or my colleagues and have gotten some kind of relatively imprecise estimate of what the residue would be, that that is the reason why I think it would be unfair.” Tr. at 53 (“What I said, though, and I will say it again, and you in fact may disagree with me, that the Class sat on equal footing, you know, when the process began. We did our best to get our word out to them. Some merchants were diligent in the paperwork, and others were not diligent.”).