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NEW YORK | WASHINGTON

November 24, 2009

BY ECF AND BY HAND DELIVERY

The Honorable John Gleeson
United States District Court Judge
U.S. District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Visa Check/MasterMoney Antitrust Litigation (CV-96-5238)(JG)(RLM)*

Dear Judge Gleeson:

Lead Counsel respectfully submits this letter in support of the methodology outlined in its proposal to make interest payments to later paid class members, dated November 10, 2009, and in reply to the November 20, 2009 objection of Enterprise Rent-A-Car Company ("Enterprise"). Lead Counsel's proposal incorporates the Special Master's November 3, 2009 Report and Recommendation that interest payments be made to treat all class members as though they were paid on the same day.

At the outset, it is important to note that Enterprise's requested "interest rate of between 6.75% and 8% or 12.3%" would increase the proposed interest payments from approximately $52 million to between $77.9 million and $144.1 million. Consistent with Lead Counsel's October 9 proposal regarding the residual distribution and the Court's November 6 Order approving that proposal, Lead Counsel has instructed the Claims Administrator to reserve $52.8 million for potential interest payments and $74.4 million for total reserves. As Enterprise's proposed interest payments would exceed the total reserves Lead Counsel set aside for the upcoming distribution, Lead Counsel and the Claims Administrator cannot proceed with the distribution until Enterprise's objection is resolved. Given the importance we attach to paying the residual as promptly as possible to get much needed funds to the class, we respectfully urge the Court to resolve Enterprise's objection as quickly as possible. As discussed more fully below, compared to Lead Counsel's reasonable proposal, the interest rates proposed by Enterprise would result in an unreasonable and unjustified windfall for the largest, best capitalized merchants (those with the lowest borrowing rates) – including Enterprise – at the expense of the smaller merchants. As such, Enterprise's proposal should be rejected.

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Lead Counsel's Proposal

In Lead Counsel's November 10 letter to Special Master Wilcox, we proposed that interest payments be made based on the actual rates earned on the MasterCard and Visa Qualified Settlement Accounts held at JPMorgan and CitiGroup for the period from January 1, 2006 to October 31, 2009 (the most recent month for which we have interest rates) and be applied from December 19, 2005 – the first date any class member was paid.

One way to assess the reasonableness of this approach, particularly in relation to the alternatives proposed by Enterprise, is to assess what would have been the most reasonable way to proceed ex ante had we been presented with the same scenario that we are addressing now, ex post. In evaluating that, it is important to note that three conditions impel and/or underpin our making interest payments to certain class members at this time. First, we have all of the Approved Claims (*i.e.* accepted and paid claims) and their claims experience in hand. Second, we know the length of time it took to pay these Approved Claims (three years, from December 2005 to December 2008). And third, pursuant to the Special Master's Report and Recommendation, we must treat all of these claims as if they were paid on the same day.

Let's now assume that prior to December 19, 2005 these conditions and requirements existed and thus, we had all of the claims in hand, knew that paying them would take three years to complete, and we would be required to treat all class members as if they were paid on the same day. Under that scenario, we almost certainly would have recommended to the Court that class members be paid 1/3 of their claim amounts each year, and that interest equal to the interest the class earned in the Settlement Accounts be added to the payments made in Years 2 and 3. In our view that would have been far and away the most, if not the only, reasonable way to proceed under those circumstances.

Since the Special Master's Report and Recommendation essentially requires Lead Counsel to implement this scenario ex post, we think replicating what we would have recommended ex ante under the same circumstances is by far and away the most reasonable way to approach this issue.

Enterprise's Opposition

Enterprise requests the Court approve an interest rate of either (a) between 6.75% and 8% (Internal Rate of Return – IRR) or (b) 12.3% (Weighted Average Cost of Capital – WACC). Both are inappropriate.

As an initial matter, Enterprise's objection necessarily raises the type of individual issues that the Special Master correctly found should be avoided. *See* Report and Recommendation at 10 (declining to examine individual issues regarding individual claims, finding it to be a

"difficult, time consuming, and expensive proposition"). Enterprise argues that "interest payments should reflect the benefit that the earlier-paid class members received from having had use of their settlement funds earlier." But how can the Court possibly adopt this logic without delving into the individual circumstances of each merchant? Some early paid class members probably took their funds and earned rates of returns well in excess of the interest rates that Lead Counsel is proposing. And some others probably took that money and lost it in the economic decline that hit many retailers last year.

If the point of this exercise is to truly make each class member "indifferent from an economic perspective" by somehow reflecting "the benefits that the earlier-paid class members received," one cannot avoid delving into the vastly different circumstances of each merchant to accomplish these objectives in a principled or disciplined way. But that is not what Enterprise is proposing. Instead, to avoid the inevitable individual issues inherent in its approach, Enterprise has selected two inapposite, class-wide metrics utilized by the Independent Expert in contexts very different than the issue at hand. If anything, Enterprise's proposals unwittingly reinforce the reasonableness of Lead Counsel's approach.

Weighted Average Cost of Capital – WACC

Enterprise first suggests that the Court adopt as the appropriate rate of interest the 12.3% rate the Independent Expert used for the Weighted Average Cost of Capital for the class. This metric is the weighted average of the costs of two components: debt and equity. WACC is most commonly used to value individual companies or to select capital investment projects in which to invest. *See, e.g.,* Shannon P. Pratt, *Cost of Capital* 3 (John Wiley & Sons, 4th ed. 2008). Consistent with that, the Court-appointed Independent Expert, Professor Bernard Black, applied WACC in his analysis of the value to the class of securitization or prepayment as opposed to continuing to receive their payments over the remaining four years of scheduled settlement payments.

This metric, however, is not well suited to determining the most reasonable rate of interest to pay class members that received claim payments later than others. To determine the economic impact of receiving claim payments at different times for the vast majority of individual class members, a more appropriate measurement would be the cost of debt, only, as opposed to the cost of both debt and equity. This is particularly true here because it is unlikely that the vast majority of class members would change their levels of equity (through issuances of stock or otherwise) to make up for the differences in the dates of distributions they received. *See* Declaration of Joshua J. Slovik, dated November 24, 2009, at ¶ 3 ("Slovik Decl.") (attached hereto). Smaller and less well capitalized merchants may indeed have been able to avoid investing additional equity in their business if they had received the distribution at an earlier date.

This is why Professor Black refers to marginal cost of capital and writes that, as Enterprise notes in its objection, "[i]t seems reasonable to me to assume that a 1% monthly cost of capital, or 12.30% bond-equivalent yield, is a reasonable average marginal Class cost of capital [WACC] for the current Visa stream of payments." But Enterprise ignores the ensuing passage from Professor Black's report where he notes that "[t]his is above the marginal cost of capital for some large, well-capitalized merchants, but likely below the marginal cost of capital for many smaller merchants." Report of Independent Expert on Visa Prepayment Proposal, dated September 14, 2009, at 6 (hereinafter "Expert Report"). Indeed, a survey performed by our consultant in March 2008 of the top 100 claims filed by public companies reflects that 99 of those claimants would have a WACC of less than 12.3%. Slovik Decl. at ¶ 2. And the one claimant with a larger WACC filed for Chapter 11 proceedings soon after we conducted the survey. *Id.*

As a result, if adopted, Enterprise's WACC approach would result in an unreasonable windfall for the largest merchants. If we apply a WACC of 12.3%, large class members, such as Enterprise, would receive the benefit of a WACC rate that is almost certainly higher than their actual WACC rates.[1] This windfall is entirely driven by the much higher WACC experienced by small merchants. Moreover, many smaller merchants would receive interest payments calculated based on a WACC rate that is lower than their actual WACC rates, receiving less interest than they would have received using their actual WACC rates. This highlights why the approach advocated by Enterprise necessarily requires an individual analysis to be implemented fairly. As such, while the class average WACC side-steps the administrative problems inherent in evaluating each claimant's situation, in doing so it results in a blatantly unfair windfall for late filing large class members. Given that it makes no logical sense from a finance perspective to incorporate the cost of equity to determine interest rates when most class members would not have altered their levels of equity, there is simply no good reason why this metric should be adopted.

Internal Rate of Return – IRR

Enterprise's proposal to use the IRR is even more logically flawed. Enterprise quotes Professor Black's report in support of this argument, noting that "Professor Black estimated the Class Prepayment IRR to be approximately 7.11% and to be within a range of 6.75% - 7.5%."[2]

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[1] Indeed, applying the 12.3% WACC rate would hardly make the larger merchants "economically indifferent" to whether they were paid in 2005 or in 2008, the standard Enterprise urges on the Court: had we given larger merchants the choice in 2005 between receiving payment or waiting to receive payment at 12.3% interest, a rate larger than their individual WACC rates, it is likely most if not all would have wanted to wait to receive payment and benefit from the larger rate.

[2] The report's full text reads: "The 7.11% Class Prepayment IRR can be understood as the effective interest rate that the Class members would receive, by retaining the status quo of annual payments instead of accepting the

But as Enterprise points out in its letter, the 7.11% rate is the discount rate associated with the Visa prepayment. The amount of the prepayment was negotiated with Visa, excludes MasterCard, and if anything it reflects, as Professor Black states, investors' perception of the market value of the four remaining payments and not an interest rate related specifically to the class. *See* Expert Report at 8-9. Nor does it relate in any way to the interest rates (or returns) the class could have received in the 2006-08 period. In short, this is a classic apples to orange comparison, which Enterprise has presumably latched onto to maximize its interest payment. It should be disregarded.

Impact of Enterprise Position on the December 7, 2009 Distribution of Residual Payments

As noted above, Enterprise's objection undermines Lead Counsel's and the Claims Administrator's ability to proceed with the proposed residual payment that the Court approved on November 6. To reserve against the possibility that the Court might adopt Enterprise's most aggressive request for a rate of interest of 12.3% would require that $144 million, approximately 13.2% of the residual distribution, be set aside and not included in the distribution. Enterprise's alternative request would also require the reserve of additional funds and any change in the reserve calculation would force the Claims Administrator to re-calculate all of the approximately 600,000 plus residual payments that were set to go out to the class beginning on December 7, 2009.

In highlighting the cloud that Enterprise's objection has put over this distribution, it is worth noting that under the plan outlined in the Zola Declaration, submitted on November 17, 2009, the Claims Administrator was set to begin an aggressive schedule of printing checks on November 30 in preparation for the December 7 distribution. To avoid the expense associated with printing checks that will need to be reprinted, Lead Counsel has instructed the Claims Administrator to not proceed with the printing process until we receive further direction from the Court. We therefore respectfully request that the Court notify Lead Counsel as soon as possible regarding whether we should proceed with the residual distribution as approved by the Court or whether we should re-calibrate the reserves to account for Enterprise's objection.[3]

* * *

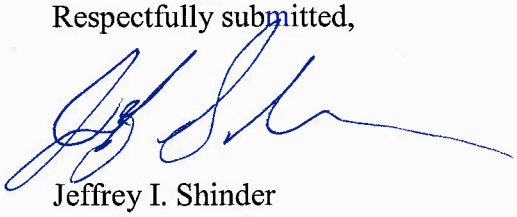
Prepayment. Assuming perfect capital markets, the Prepayment will be advantageous to the Class if this IRR is lower than the market interest rate that investors would charge to accept the current Visa stream of payments. . . . It is apparent that the estimated Class Prepayment IRR (point estimate of 7.11%; range of 6.75%-7.5%) is at or below the bottom of the range of estimated market interest rates for the current Visa payments. I therefore conclude that the Visa Prepayment is advantageous to the Class, compared to the status quo, even under the strong assumption of perfect capital markets." Expert Report at 8-9.

[3] Notice of changes to the proposed residual distribution, if received before the end of November, might still permit the Claims Administrator to develop a plan that would allow distribution of the residual before the end of 2009.

Given the problems with Enterprise's proposed alternatives, we think both should be rejected as soon as possible to enable the residual distribution to proceed before the end of the year. At the end of the day, after considering other possible methods for calculating interest payments, we chose to proceed under our proposal because it is the most defensible method of calculation. It achieves an outcome that most resembles what would have occurred had Lead Counsel made simultaneous, pro rata payments for all Approved Claims – the equivalent of all claims being treated as filed and paid on the same date. Using the actual interest accrued also treats all class members fairly because it prevents any inherent problems with using rates derived from the diverse situations of class member, such as the windfalls that would occur under Enterprise's proposals which would be inequitable. This method also avoids the need to delve into and parse individual merchant situations to tailor rates, an administrative nightmare the Special Master correctly sought to avoid.

We are available at Your Honor's convenience should the Court require further briefing or argument.

Respectfully submitted,



Jeffrey I. Shinder

cc: Special Master Robin Wilcox (by electronic mail)
Michael Kraut (by electronic mail)

Attachment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE VISA CHECK/MASTERMONEY ANTITRUST LITIGATION	: : :	MASTER FILE NO: CV-96-5238 (Gleeson, J.) (Orenstein, M.J.)
This Document Relates To All Actions:	: :	

DECLARATION OF JOSHUA J. SLOVIK

Pursuant to 28 U.S.C. § 1746, Joshua J. Slovik declares as follows:

1. I am Managing Director of Cannonade Capital LLC, the financial advisor retained by Constantine Cannon LLP ("Lead Counsel") in connection with the settlements in the above-captioned action. I am fully familiar with the facts stated herein. This declaration is submitted in support of Lead Counsel's November 24, 2009 response to the letter of Enterprise Rent-A-Car Company, dated November 20, 2009, regarding interest payments for later paid class members.

2. In March 2008, I conducted a survey of the top 100 claims filed by public companies in this case. That survey examined the publically available data to determine the weighted average cost of capital ("WACC") for each of those merchants. Of the 100 merchants, I determined that 99 would have WACC figures less than 12.3%. The one merchant with a WACC larger than 12.3% filed for Chapter 11 bankruptcy soon after I completed my calculation. This is significant because a company in relatively poor financial shape likely would have a larger WACC because of the risk associated with that company.

3. Based on my experience, it is unlikely that the vast majority of class members would change their levels of equity (through issuances of stock or otherwise) to make up for the

differences in the dates of distributions they received.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge.

Dated: November 24, 2009
San Francisco, CA

Joshua J. Slovik