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The Practical Nomad: How to Travel Around the World (4th ed. 2007)
The Practical Nomad Guide to the Online Travel Marketplace (2001)
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6 July 2009

District Judge William H. Pauley, III
U.S. District Court for the Southern District of N.Y.
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl St., Rm. 2210
New York, NY 10007-1312

Re: In re Currency Conversion Fee Antitrust Litigation
(Master File No. M 21-95, MDL No. 1409)

As a member of the settlement class and an expert on the subject matter of this lawsuit, I continue to object to the proposed settlement, plan of allocation, and fee award.

In my original letter of objection of 11 February 2008, I explained "(a) that the [Option 2] algorithm is likely to be based on naïve and incorrect assumptions about the behavior, spending, and forms of payment used by different types of travellers, (b) that the algorithm is likely to result in an unnecessarily unfair allocation of the settlement, and (c) that class counsel (and perhaps whomever else is responsible for formulating the algorithm) have inadequate expertise on international travel and traveller demographics, segmentation, and patterns of behavior (including not just overall spending patterns but patterns of form of payment usage and places of payment) to formulate a fair algorithm or evaluate the fairness of a proposed algorithm. This casts further doubt on both the settlement allocation plan and the request for attorneys' fees."

The proposed plan of allocation including the Option 2 algorithm, as now revealed, confirms my fears. The plan and algorithm would be systematically unfair to some identifiable sub-groups within the class, at the expense of other such sub-groups. Class counsel and the "representational" plaintiffs have failed to represent the conflicting interests of those sub-groups.

I request that the Court not approve the proposed settlement or any proposed settlement, plan of allocation, or fee award unless and until (1) the Court has taken adequate steps to ensure that the major identifiable categories of claimants with conflicting interests are included among the representational plaintiffs and represented by separate counsel, (2) the proposed settlement has been revised to take into account adequate understanding and expertise (including the expertise profferred by members of the class), and (3) an opportunity for full briefing and further hearing on a revised settlement, plan of allocation, and fee award. I further request that, in light of the failure of class counsel to represent the entire class, the proposed fee award be substantially reduced.

The unfairness of the Option 2 algorithm and the proposed settlement allocation plan, and the erroneous and inexpert assumptions on which they are based, include the following:

(1) The algorithm assumes (without any stated basis or evidence) that "cash" spending estimated from the "In-Flight Survey of International Air Travelers" should be deducted from estimates of card usage. But the survey asks only about credit and debit card usage at the point of payment, not ATM usage. While short-term travellers may bring with them a substantial portion of the cash they spend abroad, long-term travellers and expatriates perforce obtain virtually all of their cash from foreign ATM's. Most cash spent by long-term travellers and independent expatriates, as reported on the In-Flight Survey, is withdrawn from U.S. bank accounts at foreign ATM's, in most cases with Visa- or Mastercard-branded ATM cards, subject to the fees at issue in this lawsuit. The erroneous and totally unfounded exclusion from the proposed allocation of cash obtained from ATMs abroad would result in systematic underpayments to independent long-term travellers and expatriates.

(2) The consultants developing the algorithm assumed (again without any stated basis or evidence) that "persons living abroad for extended periods obtain lodging which is not paid for with credit cards (such as apartments, ... etc.)." But people who don't have a local bank account in the country where they are staying typically pay their rent in cash obtained from an ATM (or, perhaps, with a money order or the like purchased with cash obtained from an ATM, which has the same consequences). People people who travel abroad for extended periods often don't stay in any one place long enough to rent an apartment (or do so for only part of their trip). And even where lodging is provided or paid for by some other means, it would not account for enough of total expenses to justify the proposed 90% reduction in settlement awards for longer times aboard. The reduction of settlement payments for those with more days abroad would be systematically unfair to independent expatriates and long-term travellers who didn't stay in one place or have the necessary employer or other institutional sponsorship typically needed to open a local bank account abroad.

(3) The proposed algorithm errs in basing payments on total numbers of "days" abroad, thus conflating day trips with overnight trips, and multiple short-term trips with fewer long-term trips, despite the very different payment patterns that characterize day trips, short trips, and long trips. Under the proposed algorithm, claimants who spent larger numbers of days abroad would have their payments reduced by up to 90%, meaning that the presumed trip duration – and the erroneous assumptions noted above about its relationship to *per diem* card usage subject to the fees at issue – would in the case of these claimants be the single largest factor in determining the amount of their award. The claim form could have asked, "How many day trips did you make to places in foreign countries? How many nights did you spend abroad? For those trips involving an overnight stay, what the average duration of your stay abroad?" Custom cross-tabulations, showing actual rather than presumed patterns of spending and form of payment by trip duration, could have been obtained at small cost compared to the amounts at stake here (approximately $5,000 per custom tabulation) from the contractor for the In-Flight Survey. But despite treating trip duration as the most important factor in claim awards, those devising the algorithm failed to ask about trip duration on the claim form. Instead, they asked about trip purpose, which in the proposed plan of allocation would be a less significant factor in the algorithm than (erroneously inferred) trip duration. The failure to plan the algorithm before devising the claim form and questions, inevitably resulting in a systematically unfair settlement allocation, is evidence both of lack of subject-matter expertise and of inadequate representation of the totality of the class.

Each of the errors described above would result in systematic under-allocation of settlement awards to the same sub-group within the class: Independent long-term travellers and expatriates, who either weren't staying in one place or didn't have the necessary residence or employment status to be able to open a local bank account abroad (which is typically difficult to obtain without an employer, school, or other institutional or organizational sponsor). Those who travelled less, took merely day trips, or had a foreign-currency bank account, would be overpaid.

Each of the errors above, and others which there is not space to detail in this limited brief, are obvious to members of the disaffected sub-groups and to genuine experts in international travel and spending. These errors are indicative of (a) the lack of actual expertise in those specific subjects by the consultants from the Analysis Research Planning Corporation (ARPC) led by ARPC President B. Thomas Florence who devised the proposed algorithm, and (b) the failure of class counsel and the "representational" plaintiffs adequately to understand, consider, or represent the different (and, with respect to the algorithm and allocation plan, conflicting) patterns of behavior and interests of different sub-groups within the class.

I have been unable to find any evidence on the ARPC corporate Web site, or in any of the declarations filed in the case describing their purported "expertise", of any travel-related subject-matter expertise or experience. They claim expertise in statistical modeling, but you can't model a phenomenon you don't understand. In my expert opinion, their reports and the algorithm they have proposed provide clear evidence of a lack of expertise or competence to devise an adequate model of the behavior, demographics, or segmentation of international travellers and their patterns of spending and means of making payments for international travel. (My own expertise in this subject area was briefly described in my original letter of objection. I will be happy to provide further details and documentation of my expertise and credentials to the Court on request.)

The misconceptions underlying the algorithm should have been noticed by the "representational" plaintiffs, if they actually represented the diversity of the class and the identifiable sub-groups within it. Class counsel who were looking out for the interests of all members of the class should also have noticed these problems in the algorithm. Instead, when I first asked questions about the algorithm, class counsel refused to provide what information they had about the development of the algorithm (in breach of their duty to me as one of their clients). When I and others pointed out the errors in their assumptions and their failure to understand the behaviors, demographics, and segmentation of the class, and offered our expertise to improve the algorithm, we were ignored. No attempt was made to take advantage of our expertise or insights.

The problems in the algorithm thus call into question the adequacy of the representation of the class by class counsel and the representational plaintiffs, as well as the fairness of the proposed settlement and allocation plan. For these reasons, I continue to object to the overall settlement amount and the award of fees to class counsel, as well as the settlement allocation plan, unless and until adequate representation of the class, and adequate expertise, has been obtained.

In accordance with the Court's order of 2 July 2009, I hereby notify the Court that I wish to address the Court at the hearing currently scheduled for 6 August 2009, or at whatever time and date a hearing on the proposed settlement, plan of allocation, and fee award may be rescheduled. I also request that any subsequent hearing(s) be scheduled with substantially greater notice, to make less prohibitive the cost for class members living or travelling abroad to attend.

Respectfully submitted,

_____

Edward John Hasbrouck

Certificate of Service

I, Edward John Hasbrouck, certify that I have this day served complete copies of (1) my 3-page letter dated 6 July 2009 to District Judge William H. Pauley, III, "Re: In re Currency Conversion Fee Antitrust Litigation (Master File No. M 21-95, MDL No. 1409)", and (2) this certificate of service, by (a) sending copies by electronic mail, as attachments in PDF format, to each of the e-mail addresses below and on the following 11 pages, and (b) depositing sealed envelopes with the U.S. Postal Service, with first-class postage affixed, containing a complete set of photocopies, addressed to each of the postal addresses below and on the following 11 pages.

Executed in the City and County of San Francisco, California, USA
7 July 2009

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