1622 LOCUST STREET | PHILADELPHIA, PA 19103-6305 | phone 215/875-3000 | fax 215/875-4604 | www.bergermontague.com

Berger&Montague,P.C.
ATTORNEYS AT LAW

MERRILL G. DAVIDOFF ALSO ADMITTED IN NY

WRITER'S DIRECT DIAL | 215/875-3084
WRITER'S DIRECT FAX | 215/875-4671
WRITER'S DIRECT E-MAIL | mdavidoff@bm.net

April 14, 2008

The Honorable William H. Pauley, III
United States District Court
for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
Room 2210
New York, NY 10007-1312

Re: ***In re Currency Conversion Fee Antitrust Litigation***
Master File No. M 21-95; MDL No. 1409

Dear Judge Pauley:

At the Court's request, Plaintiffs write to answer questions your Honor raised at the March 31, 2008 Final Approval Hearing. We address the following issues: (1) whether an additional opportunity for objections and opt-out requests is warranted in the event the allocation plan is revised; (2) what potential, if any, exists for "dilution" of the settlement funds by permitting class members to file claims based on foreign transactions effected during a relatively short time period that was covered only by the statute of limitations period in *Schwartz*; (3) whether the payment by Visa and MasterCard to settle their liability for fees and costs in *Schwartz*, pursuant to an order under a fee-shifting statute, should be considered as part of the calculus for Plaintiffs' Counsel's motion for attorneys' fees in MDL 1409; and (4) the dates and scope of Skadden Arps' representation of Coughlin Stoia personnel.

I. The Impact of Potential Revisions to the Allocation Plan

At the March 31 hearing, the Court inquired what steps, if any, would be required if the plan of allocation was revised. As a threshold matter, the Court should defer a determination concerning the allocation plan until after the Court decides that the settlement is fair, reasonable and adequate. Should revising the allocation plan become necessary at a later date, then the Court may permit affected class members to be heard, including issuing these class members a notice concerning the revisions. However, class members cannot be granted a second opportunity to opt-out of the class.

Courts typically address issues of allocation or distribution of the settlement funds after determining that the overall settlement is fair and reasonable. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987).[1] When resolving allocation issues, the Court may "exercise its broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members more equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978); *see also Zients v. LaMorte*, 459 F.2d 628, 630 (2d Cir. 1972) ("Until the fund created by the settlement is actually distributed, the court retains its traditional equity powers."). Deferring the equitable allocation of settlement funds is appropriate "so long as the distribution scheme does not affect the obligations of the defendants under the settlement agreement." *Agent Orange*, 818 F.2d at 170.

Because any revisions to the allocation plan here will not affect Defendants' obligations under the settlement agreement, the Court should address the allocation plan after finding that the settlement is fair, reasonable and adequate. To the extent that any such revisions are contemplated, Plaintiffs anticipate that only a small number of class members will be affected, *i.e.*, at most hundreds up to a few thousand of extremely large Option 3 claims, many of which will be filed by corporations or agencies. Providing these class members with a summary notice of changes to the allocation plan should be manageable, and these class members may object and/or be heard at a subsequent hearing concerning the allocation plan, which the Court is presently contemplating.

Class members affected by a change to the allocation plan, however, are not permitted a second opportunity to opt-out of the class. *See Denney v. Deutsche Bank AGC*, 443 F.3d 253, 217 (2d Cir. 2006) ("Neither due process nor Rule 23(e)(3) requires, however, a second opt-out period whenever the final terms change after the initial opt-out period. Requiring a second opt-out period as a blanket rule would disrupt settlement proceedings because no certification would be final until after the final settlement terms had been reached.").

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[1] The Court of Appeals has cautioned that "impos[ing] an absolute requirement that a hearing on the fairness of a settlement follow adoption of a distribution plan would immensely complicate settlement negotiations and might so overburden the parties and the district court as to prevent either task from being accomplished. Moreover, if a hearing on a settlement must follow formulation of a distribution plan, then reversal of any significant aspect of the plan on appeal, ... would require a remand for reconsideration of the settlement, followed by yet another appeal. There is no sound reason to impose such procedural straitjackets upon the settlements of class actions." *Agent Orange*, 818 F.2d at 170.

II. Inclusion of the *Schwartz* "Stub Period" Does Not "Dilute" Class Members' Claims

Permitting class members to submit claims for foreign transactions made during a period that was covered only by the statute of limitations period in *Schwartz*, *i.e.*, from February 1, 1996 through February 28, 1997 (referred to as the "stub period"), does not dilute class members' claims for three reasons: (1) only a small number of class member claims arise solely from the stub period because of the considerable overlap between the time periods and claims in MDL 1409 and *Schwartz*; (2) only a small portion (2.2%) of the approximate total foreign transaction fee revenues for the entire class period is attributable to the stub period; and (3) the inclusion of claims based on the stub period is conceptually similar to the inclusion of claims subject to arbitration clauses, *i.e.*, defendants relinquished defenses to these claims in order to secure a release of these claims.

First, it is a virtual certainty that the vast majority of class members who could have had claims for transactions made during the *Schwartz* stub period also have claims for transactions made during the period already covered by MDL 1409,[2] as one would not expect that a significant number of people would have used a Visa or MasterCard credit card abroad only during the stub period and never again. This is important because the vast majority of claims are Option 1 and Option 2 claims, which would be unaffected by any hypothetical allocation of the settlement among the *Schwartz* stub period and the MDL 1409 original class period. To the extent any dilution may be present, it would largely affect only the Option 3 claims, which represent approximately 2.5% of the total claims received to date.

Second, the total amount of revenue generated by the foreign transaction fee during the stub period (which would involve only the 1% first tier fee) is small. Visa's total foreign transaction fee revenue during the *Schwartz* stub period was approximately $80.5 million; MasterCard's fee revenue from California cardholders was approximately $2.8 million. This amount is approximately 2.2% of the $3.8 billion in total foreign transaction fee revenues

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[2] The *Schwartz* action was filed in February 2000 and asserted claims for Visa cardholders nationwide and MasterCard cardholders in California who made foreign transactions between February 1996 and October 31, 2003 (the date of Judgment in *Schwartz). *The *Schwartz* action only challenged the 1% first tier fee. The banks were not defendants in the *Schwartz* case and they had not imposed the second tier fee during the stub period. The first case in MDL 1409 was filed in February 2001 and stated claims for transactions dating back to March 1997. Thus, had the *Schwartz* judgment been reinstated and affirmed on appeal, cardholders could potentially have recovered the 1% first tier fee for transactions from February 1996 through February 1997 in the *Schwartz* action, but not in this action as pled before the filing of the Third Amended Complaint (as part of the settlement of MDL 1409).

collected by all defendants during the class period, as defined in the Third Amended Complaint. Thus, even assuming the settlement fund were somehow "diluted" by the inclusion of cardholders with transactions from February 1996 through February 1997, any dilution is inconsequential.

Third, including claims based on transactions made during the stub period should not be viewed as having any "dilutive effect" just as allowing claims subject to an enforceable arbitration provision (in this case) as part of the settlement class should not be viewed as having any dilutive effect. Defendants, in effect, gave up their defenses to both groups in order to gain a release of their claims.

For these reasons, the issue of potential claims concerning the *Schwartz* stub period is of little significance to the fairness of the MDL 1409 settlement.

III. The Court Should Not Consider the Settlement of the *Schwartz* Fee-Shifting Order as Part of Counsel's Motion for Attorneys' Fees in MDL 1409

Plaintiffs' Counsel respectfully submit that the Court should not consider the fees to be paid pursuant to the *Schwartz* Settlement Agreement in determining the fees of MDL counsel. In this section Plaintiffs respond to issues raised by the Court, as well as related calculations offered to the Court by John J. Pentz (counsel for objectors Joel Shapiro, David T. Murray, and Marion R. Murray (collectively "Shapiro")), concerning the settlement in *Schwartz* for liability arising from an order in *Schwartz* awarding fees pursuant to a fee-shifting statute.

As discussed in the briefs, the *Schwartz* Settlement Agreement resolves Visa's and MasterCard's liability to *Schwartz* counsel for attorneys' fees and costs awarded in that case.[3] This award had no connection to the monetary relief ordered in *Schwartz* and was not to be paid from any common fund. Rather, Visa and MasterCard were required to pay that fee even if ***no*** *Schwartz* claimant ultimately claimed. Because it was a statutory fee-shifting award pursuant to

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[3] The *Schwartz* court awarded two separate components of attorneys' fees. First, the court awarded $27.6 million in fee-shifting fees for *Schwartz* counsel's role in obtaining non-pecuniary relief after a lengthy trial. The amount was equal to two times *Schwartz* counsel's lodestar from November 1999 through January 2004, a lodestar which increased significantly between that date and the time of settlement in July 2006. Under the settlement, *Schwartz* counsel is not compensated for this time. Second, the fee-shifting award was in addition to an award of 17.5% of any funds actually claimed by cardholders in any ***future*** *Schwartz* common fund, although no common fund had yet been established. *Schwartz* counsel will not receive any portion of this potential award. Order Granting Award of Attorneys' Fees and Costs at 2, Ex. 3 of Exhibit A to Stipulation of Settlement.

Cal. Code Civ. Proc. section 1021.5, payable by the defendants, it did not reduce any amount claimed by or paid to cardholders.

The *Schwartz* Settlement Agreement with Visa and MasterCard pays counsel only a compromised amount of those "private attorney general" fees awarded under California Code of Civil Procedure §1021.5 for having successfully prosecuted a case in the public interest. The *Schwartz* settlement relieves Defendants of the threat of liability for that award.

Some objectors, including Shapiro, argue that *Schwartz* counsel should submit the time spent working on the California state court action from November 1999 through the date of the *Schwartz* settlement to this Court for approval of a reasonable fee for their work and achievements in *Schwartz*.[4] That contention is flawed for at least two reasons.

First, *Schwartz* counsel do not believe they have standing to request fees from this Court for work done in the California state court action that is not part of MDL 1409.

Second, it would be improper for *Schwartz* counsel to add their lodestar to the MDL lodestar and request fees from the MDL fund. There is a fundamental difference between the common fund fees requested by counsel in this action and the fee-shifting liability under California law that Visa and MasterCard compromised in the *Schwartz* settlement. In this action, MDL counsel ask this Court to approve a reasonable percentage from the common fund as fees to the attorneys whose work created this fund.[5] The *Schwartz* settlement, in contrast, represents a compromise of a separate potential fee, cost and interest liability from the Network Defendants to *Schwartz* counsel. Having a single settlement fund was in the class' and potential claimants' best interests. The alternative, structuring the settlement as two funds, was wisely rejected by all parties and the mediator because, given the almost universal overlap, it would have served no purpose and would have been unwieldy, duplicative, more expensive and confusing. The nearly total overlap between the MDL class and *Schwartz* claimants underscores the efficiency and cost-effectiveness of this solution. For these reasons, it is neither appropriate nor necessary for this Court to receive and consider the *Schwartz* lodestar or the *Schwartz* settlement of the Network Defendants' liability in determining the MDL settlement common fund fee application.[6]

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4 At the hearing the Court asked whether *Schwartz* attorneys' fees have been paid. To clarify, *Schwartz* counsel has not received any of these funds. Rather, in September 2007, Visa and MasterCard paid the *Schwartz* settlement amount into an escrow account in favor of *Schwartz* counsel pending approval of the MDL settlement.

5 MDL counsel who did not prosecute *Schwartz* (all but four firms) will not receive any part of the *Schwartz* fee.

6 Counsel in *Schwartz*, and the related state court actions, *Shrieve* and *Mattingly*, did not submit their lodestar and expenses for these three actions. As reflected in Plaintiffs' Reply

Objector Shapiro asserted at the hearing that the Court should view MDL 1409 and *Schwartz* as one litigation and that Plaintiffs' Counsel's fee would amount to a 32.7% fee if the *Schwartz* fee is incorporated as part of the total fees. Shapiro's premise is fundamentally misguided; the Court should not simply combine these two different fees (one a fee-shifting, non fund reducing fee under California law and the other a common fund fee). Moreover, Shapiro's argument omits an important piece of the analysis. To analyze properly Shapiro's total "combined" fees approach, one would also have to factor in the risk, work, result and stage of proceedings relative not only to the MDL case but also to the *Schwartz* case. It would be unfair and contrary to controlling law to look at only one side of the equation. In other words, analysis of the *Goldberger* factors would have to be conducted in the context of both the MDL case and the *Schwartz* case.[7] Shapiro completely ignores (as do other objectors) this complicating and untenable aspect of the fee analysis under his theory of a combined total fee.[8]

Memorandum and the Supplemental Declaration of Bonny E. Sweeney in Further Support of Motions for Final Approval of Class Action Settlement and Award of Attorneys' fees and Expenses ("Sweeney Decl.", submitted herewith), the total *Schwartz* lodestar is in excess of $23 million. The total lodestar in *Schwartz*, *Shrieve* and *Mattingly* (the two other California cases litigated by *Schwartz* counsel and which are settled as part of the MDL) is over $26 million, and more than $3 million in costs were incurred in these cases. Attorneys spent approximately 58,000 hours working on these three state court actions.

[7] With respect to *Schwartz*, that case commenced in February 2000 (over eight years ago) and was litigated for over six years by four law firms entirely on a contingent basis. $3 million in costs were advanced. *Schwartz* did not settle before trial but only after *Schwartz* counsel defeated five summary judgment motions, prevailed after a six month trial, a six month post trial remedies phase, and after a complex appeals process. The case resulted in a judgment for the plaintiff of restitution of the entirety of the fees and injunctive relief. It was reversed, not on the merits, but on procedural grounds and was remanded for consideration of remedying the procedural issue through substitution of another plaintiff.

[8] Furthermore, Shapiro's calculation of a 32.7% total fee is also incorrect. Of the $32 million to be paid to *Schwartz* counsel, $3 million will reimburse counsel for expenses. Thus, the aggregate fees in *Schwartz* and those requested in the MDL would total $115.075 million, which is 29.26% of the $393 million gross settlement figure (MDL settlement of $336 million + $25 million interest + $32 million *Schwartz* settlement). Considering the state case lodestars of $26 million and adding that to the MDL lodestar of $32 million results in a multiplier of approximately 1.98 ($58 million total lodestar/$115 million total fees), through January 15, 2008 only. This percentage and this multiplier are reasonable under all the circumstances, particularly considering the very extensive efforts expended in the litigation of both the *Schwartz* and MDL actions.

For the foregoing reasons it would be inappropriate to reduce the MDL fee award on account of the *Schwartz* settlement of the fee-shifting fee liability in that case.

IV. Skadden Arps' Representation of Coughlin Stoia Personnel

The Court also asked for the specific dates during which two partners at Skadden Arps Slate Meagher & Flom LLP represented certain individuals affiliated with the (then) Lerach Coughlin firm, now Coughlin Stoia Geller Rudman & Robbins LLP. The facts are as follows:

In April or May of 2005, two lawyers at Proskauer Rose LLP, Jack Dicanio and Richard Marmaro, began representing one partner, two of-counsel, one secretary, and one office administrator at the Lerach Coughlin firm in connection with the government investigation that later resulted in the guilty plea by William Lerach. *See* Sweeney Decl. ¶5. In January of 2006, Messrs. Dicanio and Marmaro moved from the Proskauer firm to the Skadden firm and took with them the representation of those individuals. *Id.* at ¶6. The settlement in this case was signed on July 20, 2006. The Proskauer-turned-Skadden lawyers did a modest amount of additional work on the investigation between January 2006 through July 20, 2006; total bills during this period were less than $70,000. *Id.* at ¶7. Significantly, Skadden never represented the Lerach Coughlin *firm*; rather, the representation was limited to the *individuals* described above.

The foregoing representation presents no barrier to final approval of the settlement because it had no impact on the terms or fairness of the settlement. Skadden Arps was merely one of two law firms representing one of eight different sets of defendants in the litigation. Moreover, Bonny Sweeney, lead counsel for Coughlin Stoia in MDL 1409, was not even *aware* of Skadden's representation of those individuals at the time the MDL settlement was negotiated and executed. *Id.* at ¶8. She first learned of the representation by reading the Selfe objection. *Id.* Co-lead counsel Merrill Davidoff of Berger & Montague, as well as Plaintiffs' counsel at the other Plaintiffs' firms who participated actively in the mediation and settlement process, were likewise unaware of the representation.[9] Accordingly, neither the fact of the representation nor

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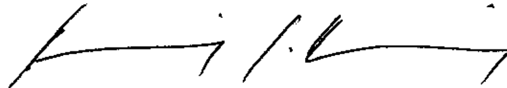
[9] The lawyers at Skadden Arps and Covington & Burling LLP who represented the Chase defendants during the period in question were likewise unaware of the existence of the representation of those individuals until they reviewed the Selfe objection.

the individuals represented by Skadden had any influence or impact on the terms of the settlement. *Id.* at ¶10.

Respectfully submitted,



Merrill G. Davidoff

Bonny E. Sweeney

Plaintiffs' Co-Lead Counsel

cc: Defendants' Counsel
Objectors

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