**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

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| In re PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION | MDL Docket No. 1720 (JG)(JO)<br><br>Judge: Honorable John Gleeson<br>Date: September 12, 2013<br>Time: 10:00 a.m.<br>Courtroom: 6C |

# REPLY MEMORANDUM IN SUPPORT OF CLASS PLAINTIFFS' JOINT MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES AND CLASS PLAINTIFFS' AWARDS

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## I. PRELIMINARY STATEMENT

The Memorandum in Support of Class Plaintiffs' Joint Motion for Award of Attorneys' Fees, Expenses and Class Plaintiffs' Awards ("Pls.' Mem.") (Dkt. No. 2113) detailed Class Counsel's and Class Plaintiffs' wide-ranging, eight-year effort to bring meaningful competition to a massive market sorely lacking for it, and secure compensation for millions of merchants who suffered as a result. The result of that effort is a settlement providing for relief that is unprecedented by several measures, including dollar figures and the relaxation of Defendants' grip on anticompetitive rules that had persisted for over 40 years.

The primary legal basis for the Motion is the Second Circuit's repeated holdings that "'market rates . . . are the ideal proxy for [class counsel's] compensation'" in common fund cases such as this one. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (quoting *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 52 (2d Cir. 2000)). That is the premise of the Declaration of Professor Charles Silver Concerning the Reasonableness of Class Counsel's Request for an Award of Attorneys' Fees ("Silver Decl.") (Dkt. No. 2113-5). *See* Pls.' Mem., Ex. 4, Silver Decl. at 3 (quoting *Goldberger*). Prof. Silver compiled substantial data showing that sophisticated clients pay contingent fees of 20 percent or more in most cases, and pay 15 percent or more in most of the remainder. *Id.* at 25-34. By that standard, Class Plaintiffs' request for just under 10 percent of the common fund in this case is well within the realm of "reasonable under the circumstances." *Goldberger*, 209 F.3d at 47.[1]

[1] As Class Counsel's lodestar is relevant to the Court's disposition of this Motion, the attached Supplemental Declaration of Thomas J. Undlin ("Undlin Decl.") (Ex. 1) details Class Counsel's efforts to refine that since filing the Motion.

The objectors' collective response to Class Plaintiffs' submissions regarding fees and expenses is most notable for what it lacks. Certain well-financed objectors have enlisted sophisticated counsel to oversee an unusually persistent, aggressive and public attack on the settlement, backed by thousands of pages of submissions and experts of their own. But those objectors have not objected to this Motion. The opposition to the Motion is limited to a relatively small number of merchants (collectively, for the purposes of this brief only, "Objectors"), whose submissions are sparse in both substance and volume. Most importantly, none of them seriously challenge the legal premise of Class Plaintiffs' submissions—i.e., market rates are the ideal basis upon which to determine class counsel's compensation—and none of them have made any meaningful effort to address Prof. Silver's report.[2]

The Objectors' response to Class Plaintiffs' request for expenses is limited to a single, misplaced argument in one brief. And their response to Class Plaintiffs' request for incentive awards is primarily an unsupported attempt to tar Class Plaintiffs with a brush applied to counsel and plaintiffs in distant courts whose conduct was demonstrably far afield of anything Class Counsel and Plaintiffs have done in this case. The Objectors have given the Court no reason to deny Class Plaintiffs' instant Motion, either in whole or in part.[3]

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[2] *See generally* Bernay Decl. (Ex. 2 to Cl. Pls' Reply Mem. Final Approval) (categorizing substance of all objectors' submissions).

[3] Although the objectors have not raised the issue and the relevant precedent does not necessarily require it, Class Counsel are reducing their fee request to account for Class Exclusion Takedown Payments that will be made to Defendants if the Court approves the settlement. *See infra* at 7.

## II. ARGUMENT

### A. The Objectors' Unsupported Claims are Irrelevant to Class Plaintiffs' Fee Request.

In *Goldberger*, the Second Circuit held that "market rates, *where available*, are the ideal proxy for [the] compensation [of class plaintiffs' counsel]." *Id.* at 52 (emphasis added). The court added that, as of 2000, "'hard data' on analogous situations—such as the fees sophisticated corporate plaintiffs typically agree to pay their attorneys—are 'sketchy.'" *Goldberger*, 209 F.3d at 52 (citation omitted). But, as Prof. Silver shows, "we know more about the fees sophisticated corporate clients pay when hiring lawyers on contingency than we did in 2000." Silver Decl. at 10. To that end, he showed that sophisticated clients normally pay contingent fees of 20 percent or more, and seldom pay less than 15 percent. *Id.* at 25-34.

The Objectors dispute none of this. Objector Zimmerman claims that *Goldberger* does not in fact sanction the use of market rates in this context. But the language in *Goldberger* that Zimmerman quotes precludes only the use of benchmarks, regardless of their purported relation to market rates. Dkt. No. 2669 at 6. Objector Optical Etc. likewise quotes a portion of the above-quoted language from *Goldberger*, but only to dispel the notion that the Court should rely on a benchmark. Dkt. No. 2666 at 4. And the Pentz Objectors embrace the notion that the Court should look to the market. Dkt. No. 2586 at 3.[4]

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[4] The Pentz Objectors' argument in this context is otherwise erroneous for its claim that the Court is bound by *Arbor Hill Concerned Citizens Neighborhood Ass'n. v. Albany*, 493 F.3d 110 (2d Cir. 2007), in which the court assessed a fee award arising from a fee-shifting statute, rather than the common fund doctrine. *See* Dkt. No. 2586 at 3-4. *See also* 1001 Property Solutions Objection (Dkt. No. 2613) at 13-14 (claiming that Supreme Court fee-shifting case from early 2010 supersedes *Goldberger*). *Cf. Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82, 86 & n.2 (2d Cir. Oct. 14, 2010) (*Goldberger* alone dictates standard in this context).

*Goldberger* further identifies "the risk of success as 'perhaps the foremost' factor to be considered in determining whether to award" a multiplier. *Id.*, 209 F.3d at 54 (citation omitted). Class Plaintiffs faced exceptional risks upon commencing the prosecution of this case. *See* Cl. Pls.' Mem. at 17-19. Prof. Silver likewise explains why risk is a key factor in establishing market rates. *See* Silver Decl. at 3 ("If lawyers working on contingency are to find cases like these financially attractive, the rewards must offset the costs and risks the lawyers have to bear. In the private market for legal services, where clients hire lawyers directly, compensation is automatically set at the level needed to do this."), 6-7 (quoting *In re Synthroid Marketing Litig.*, 264 F.3d 712 (7th Cir. 2001) (Easterbrook, J.)), 24 ("[T]he magnitude and complexity of litigation and the risk involved determine the size of contingent percentages in the private sector."), 42, 46. None of the Objectors dispute any of this.

The Court of Appeals and district courts in this Circuit have repeatedly held that "a fee award should be assessed based on scrutiny of the unique circumstances of each case." *McDaniel v. County of Schenectady*, 595 F.3d 411, 426 (2d Cir. 2010) (quoting *Goldberger*, 209 F.3d at 53). *See also* Pls.' Mem. at 14 & n.11. No Objector disputes that premise. But certain Objectors erroneously cite dicta from *Goldberger* referencing a 20-year-old study of other cases, in ostensible support of the premise that those cases—in which the courts awarded fees ranging from 11 to 19 percent—require the Court to deny Plaintiffs' request for just under 10 percent of the recovery in this case.[5] And, to the extent that other cases are relevant, the 66 cases Prof. Silver cites—with recoveries of

[5] *See* Vicente Consulting Obj. (Dkt. No. 2578) at 4; Egg Store Obj. (Dkt. No. 2647) at 3; Optical, Etc. Obj. (Dkt. No. 2666) at 4. In *Goldberger*, the court cited the older cases strictly for the purpose of rejecting the use of benchmarks, rather than as examples of what should govern subsequent cases.

at least $100 million and fee awards equal to or greater than 20 percent of those recoveries—are far more germane. Three-fourths of those cases—including eight decided by Second Circuit district courts—post-date *Goldberger*.[6]

Prof. Silver cited those cases to dispel the notion that courts must mechanically award reduced fee percentages in cases involving "megafund" settlements. "[T]he appellate courts that have examined such an approach have rejected it as a blanket rule." *In re Enron Corp. Securities, Derivative & "ERISA" Litig.*, 586 F. Supp. 2d 732, 753 (S.D. Tex. 2008) (awarding multiplier of 5.2 in $7.2 billion settlement). As the *Enron* court further held, "the megafund rule is contrary to the . . . approach that the district court scrutinize each case for the particular facts that will determine what constitutes a reasonable fee award." *Id.* at 754. That is the approach dictated by *McDaniel* and *Goldberger*, i.e., "a fee award should be assessed based on scrutiny of the unique circumstances of each case." The Objectors who claim that *Goldberger* dictates the application of a "megafund" rule are wrong.[7]

The other objections to Class Plaintiffs' fee request add nothing. The Iron Barley Objectors contend that "this court cannot approve the settlement" because a purportedly objectionable cy pres provision may bear on the distribution of a minuscule portion of the settlement fund, after the nearly all of the fund is distributed. *See* Dkt. No. 2537 at 8 (citing *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007)).[8] As they acknowledge, they can address the issue with the Court if and when it

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6 *See* Silver Rpt. at 12-16 (citing cases).

7 *See, e.g.,* Iron Barley Obj. (Dkt. No. 2537) at 13; Vicente Consulting Obj. (Dkt. No. 2578) at 3; 1001 Property Solutions Objection (Dkt. No. 2613) at 12; Egg Store Obj. (Dkt. No. 2647) at 3.

8 The Second Circuit considered the distribution of the majority of the settlement proceeds in *Masters*, and only after the claims process ended with those proceeds unclaimed.

becomes ripe. Iron Barley Obj. at 10. Jo-Ann Stores objects, absent authority, to Plaintiffs' reference to having petitioned the government on behalf of the class. Dkt. No. 2364 at 12. *See also* Pls.' Mem. at 7-9 (detailing Class Counsel's efforts and the results). That time is in fact compensable in its entirety. *See Rein v. Socialist People's Libyan Arab Jamahiriya*, 443 Fed. Appx. 612, 614 (2d Cir. 2011) (citing *Rein v. Socialist People's Libyan Arab Jamahiriya*, 568 F.3d 345, 350-51 (2d Cir. 2009), and Supreme Court precedent). Objector King charges Class Counsel with a "glaring lack of due diligence" for failing to provide for "gas station merchants [who] do not have a direct relationship with . . . credit card processor[s,] Visa or MasterCard." Dkt. No. 4214 at 5, 6. That objection is appropriately directed to the "major oil companies," who have those direct relationships, and stand to collect what those merchants view as theirs. *See id.*

The Objectors are collectively silent as to one of the factors that *Goldberger* requires the Court to consider: public policy considerations. *Id.*, 209 F.3d at 50. As to that, the Third Circuit Task Force Report—Selection of Class Counsel, 208 F.R.D. 340, is instructive: "The goal of appointment [of class counsel] should be to maximize the net recovery to the class and to provide fair compensation to the lawyer, not to obtain the lowest attorney fee. The lawyer who charges a higher fee may earn a proportionately higher recovery for the class than the lawyer who charges a lesser fee." *Id.* at 373 (footnotes omitted), *cited in* Silver Decl. at 38.[9]

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[9] *See also* 208 F.R.D. at 373 n.117 ("A smaller percentage [attorney fee] may make the class worse off if the underlying corpus is reduced because of lawyer incompetence or because of incentives not to maximize the amount to be sought in the class action.") (quoting Statement of Professor Samuel Issacharoff, submitted to the Task Force, at 5). The Task Force cited the above in rejecting the use of auctions in selecting lead counsel. *Cf.* 1001 Property Solutions Objection (Dkt. No. 2613) at 13 (claiming that "it is certain" that an auction would have resulted in "a highly-qualified low bidder . . .ask[ing] for a fraction of what class counsel does here.").

While the Objectors say nothing that would justify the Court's denying the Motion as filed, recent events have justified an amendment to the Motion. Class members accounting for 25 percent of the transaction volume at issue have opted out of the Rule 23(b)(3) class, which will result in Class Exclusion Takedown Payments to Defendants totaling $1,512,500,000. *See* Definitive Cl. Settl. Ag. (Dkt No. 1656-1) ¶¶ 1(k), 17-20. The relevant law does not require the Court to account for that on a dollar-for-dollar basis in awarding attorneys' fees, as Class Counsel's efforts made the full amount of the settlement available to the Class. *See, e.g., Masters*, 473 F.3d at 437 (fee award must be based on "the total funds made available, whether claimed or not"). However, Class Counsel will not seek fees from class members that are attributable to payments that will be removed from the fund. Accordingly, Class Counsel now amend the Motion so as to seek an award of $570 million, which is just under 10 percent of the amount that will remain available for distribution to class members. This amended request––which seeks a multiple of approximately 3.54 times Class Counsel's amended lodestar (calculated through November 30, 2012[10])––falls within any range that might govern it. *See* Pls.' Mem. at 23-24. *See also* Ex. 1, Undlin Decl. ¶ 9 (amended lodestar is $160,991,635.47).[11]

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[10] Obviously, Class Counsel have expended substantially more time and expense since that date.

[11] Class Counsel reserve the right to seek payment from class members who have opted out of the Rule 23(b)(3) class, to the extent that they rely on Class Counsel's efforts in securing their recoveries. *See, e.g., In re Zyprexa Products Liab. Litig.*, 594 F.3d 113, 128-30 (2d Cir. 2010); *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644, 668 (E.D. Pa. 2003).

### B. Class Plaintiffs are Entitled to Incentive Awards and Reimbursement for Their Expenses.

Like the objections to Class Counsel's fee request, many of the objections to Plaintiffs' request for incentive awards are based on fallacious factual and/or legal premises. But one objection stands out for its audacity, i.e., the claim that Class Counsel's request for incentive awards for Class Plaintiffs of itself necessitates rejection of the entire settlement. That claim is based on certain Objectors' erroneous assumption that the request springs from a *quid pro quo* between Class Counsel and Class Plaintiffs, requiring that Class Plaintiffs unequivocally support the settlement. Representatives of every Class Plaintiff have verified having "agreed to serve as a class representative without any promise that it would receive an incentive award if the case settled, and agreed to the settlement without any promise that it would receive an incentive award."[12]

Moreover, Objectors' claim is based on the Ninth Circuit's recent opinion in *Radcliffe v. Experian Information Solutions, Inc.*, 715 F.3d 1157 (9th Cir. 2013), in which the court rejected a settlement agreement that explicitly tied class counsel's application for incentive awards to the named plaintiffs' "support of the settlement."[13] *Id.* at 1162. No such tie exists in this case. In fact, the Settlement Agreement is silent as to incentive

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[12] *See* Archer Decl. (Ex. 3) ¶ 5; Baker Decl. (Ex. 4) ¶ 6; Goldstone Decl. (Ex. 5) ¶ 8; Harari Decl. (Ex. 6) ¶ 6; McDonald Decl. (Ex. 7) ¶ 8; Opper Decl. (Ex. 8) ¶ 5; Schumann Decl. (Ex. 10) ¶ 4;Trachtman Decl. (Ex. 11) ¶ 5; Zuritsky Decl. (Ex. 12) ¶ 5. *See also* Rivera & Andrews Decl. (Ex. 9) ¶¶ 6-8.

[13] The Objectors also rely on *Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009), and *Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012), which are even further removed from this case. Class counsel in those cases agreed with their clients before filing the cases that any incentive awards would be tied to the dollar amount of any settlement. *Ebbert v. Nassau County*, 2011 WL 6826121 (E.D.N.Y. Dec. 22, 2011), likewise has no bearing in any case in this Court. *Cf.* Supertest Obj. (Dkt. No. 2595) at 11 (citing *Ebbert* for alleged standards).

awards, other than acknowledging that the Court might award them.[14] *Cf.* Supertest Obj. (Dkt. No. 2595) at 5, 7.

Objector 1001 Property Solutions thus asserts the unfounded claim that "[t]he settlement provides payment of $1.8 million to the class plaintiffs who support the settlement, but nothing to the class plaintiffs who reject the settlement," Dkt. No. 2613 at 11, citing only the list of "Class Plaintiffs" defined in the operative Settlement Agreement. That is misleading for several reasons. First, the initial public version of the Settlement Agreement included almost all of the named plaintiffs, because Class Counsel still represented them at the time and understood that they would be parties to the Agreement. *See* Dkt. No. 1588-1 ¶ 1(m). Class Counsel was required to remove the objecting named plaintiffs from the final version of the Settlement Agreement because they had by that time retained their own counsel and withdrawn from the negotiations that resulted in that Agreement. Those plaintiffs have the option of seeking incentive awards for themselves through their current counsel. Their failure to exercise that option says nothing about the plaintiffs who have exercised it, and in no way evidences any "quid pro quo" involving others.

Objectors Supertest and Iron Barley repeatedly disregard the fact that incentive awards are not guaranteed in amount, or guaranteed at all, if the Court approves the settlement. *See* Iron Barley Obj. (Dkt. No. 2537) at 3, 4, 6, 7 ("[I]t is without question that each Class Plaintiff receives $200,000"); Supertest Obj. (Dkt. No. 2595) at 5, 7, 9

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[14] Nor does the Settlement Agreement require Class Plaintiffs' "support of the settlement." It only precludes their "object[ing] to the Court's preliminary or final approval" of the settlement. That is why Class Plaintiff Traditions, Ltd. was able to publicly question certain aspects of the settlement. *See* Dkt. No. 4351. *Cf.* Iron Barley Obj. (Dkt. No. 2537) at 4 (Class Plaintiffs have "agree[d] to remain silent").

("Plaintiffs *know* they will be getting $200,000) (emphasis in original). It is solely within the Court's discretion to grant incentive awards, as is their amount if it does. Class counsel in all cases may only suggest an award based on their knowledge of the named plaintiffs' contributions. Representatives of every Class Plaintiff have verified having "always understood that the decision whether to award incentive payments to class representatives, and the amount of any such awards, lies solely within the discretion of the District Court."[15]

The remaining objections in this context are inconsequential. Iron Barley purports to have divined that each of the Class Plaintiffs "knew that they were . . . walking away from the class members" by supporting the settlement. *See* Dkt. No. 2537 at 3. Objector Supertest makes much of the fact that the Class Plaintiffs' contributions allegedly varied, but the awards proposed for them do not. Dkt. No. 2595 at 11-15. But nothing in the record reflects that the awards will *not* vary.[16] And Objector Zimmerman claims that the proposed awards are "completely out of proportion to any recovery that

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[15] *See* Archer Decl. (Ex. 3) ¶ 6; Baker Decl. (Ex. 4) ¶ 7; Goldstone Decl. (Ex. 5) ¶ 9; Harari Decl. (Ex. 6) ¶ 7; McDonald Decl. (Ex. 7) ¶ 9; Opper Decl. (Ex. 8) ¶ 7; Rivera & Andrews Decl. (Ex. 9) ¶ 9; Schumann Decl. (Ex. 10) ¶ 5; Trachtman Decl. (Ex. 11) ¶ 6; Zuritsky Decl. (Ex. 12) ¶ 6.

[16] Supertest also questions Class Representative Traditions, Ltd. claim for reimbursement of expenses it entailed in the course of lobbying and speaking to reporters, all for the benefit of Supertest and other absent class members. That objection is akin to Jo-Ann Stores' objection to Class Counsel seeking reimbursement for doing the same. *See supra* at 6. *See also In re Washington Pub. Power Supply Sys. Sec. Litig.*, 779 F. Supp. 1063, 1218 (D. Ariz. 1990) (granting reimbursement of class counsel's lobbying expenses), *vacated in part*, 19 F.3d 1291 (9th Cir. 1994), *and aff'd in part sub nom., Class Plaintiffs v. Jaffe & Schlesinger, P.A.*, 19 F.3d 1306 (9th Cir. 1994).

a class member claimant could hope to get." Dkt. No. 2669 at 3. But even if all class members file claims, multiple merchants will recover amounts well over $1 million.[17]

## III. CONCLUSION

For all of the reasons detailed in this Memorandum and the initial Memorandum supporting the instant Motion, Class Counsel respectfully request that the Court grant Class Plaintiffs' Joint Motion for Award of Attorneys' Fees, Expenses and Class Plaintiffs' Awards.

August 16, 2013

Respectfully submitted,

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[17] The only objection to Class Counsel's request for reimbursement of expenses is based solely on the opinion of one district court in another circuit. *See* Vicente Consulting Obj. (Dkt. No. 2578) at 7-9. That objection deserves no more weight than does the case on which it relies.

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