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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

RAQUEL RUBIO, on behalf of herself and all others similarly situated.

Plaintiff,

v.

CAPITAL ONE BANK (USA), N.A. and DOE DEFENDANTS 1-10, et al.

Defendant.

Case No. CVO7-06766 ABC (CWx)

CLASS ACTION

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CERTIFICATION OF THE SETTLEMENT CLASS, SETTING A HEARING ON FINAL APPROVAL OF SETTLEMENT, AND DIRECTING NOTICE TO THE CLASS

Hon. Audrey B. Collins

DATE: October 15, 2012
TIME: 10:00 a.m.
Courtroom 680

Action Filed: October 18, 2007

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I. BACKGROUND OF LITIGATION AND SETTLEMENT

Plaintiff Raquel Rubio ("Plaintiff") respectfully submits this memorandum in support of her Motion for Preliminary Approval of Class Action Settlement under Federal Rules of Civil Procedure 23(c)(2) and (e). The Parties resolved this lawsuit (the "Action") after a Ninth Circuit appeal and Supreme Court writ petition on defendant Capital One Bank (USA), N.A.'s ("Capital One") Motion to Dismiss, extensive discovery, briefing on class certification, months of arm's length negotiation, relevant exchanges of information, and the mediation expertise of the Honorable Steven J. Stone (Ret.).

Plaintiff brought the Action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of herself and all others similarly situated, seeking to represent all persons subjected to Capital One's practice of mailing credit card solicitations to consumers of credit card services which stated in the solicitation's "Schumer Box"[1] that the annual percentage rate ("APR") on the credit card being offered was "fixed," when, according to Capital One, the APR was subject to change. [*See* Second Amended Complaint, Docket Entry ("D.E.") 20] Once these consumers had accepted Capital One's offer, Capital One subsequently sent them standardized change in terms documents offering them the choice of either accepting a higher APR on their current balances, or cancelling their credit card. (*See id.*) Like all of the Settlement Class Members she seeks to represent, Plaintiff received such a solicitation from Capital One, and accepted a higher APR after receiving a change in terms document. (*See id.*)

In her Second Amended Complaint ("SAC"), Plaintiff alleges that Capital One's conduct violated California's *Business & Professions Code* §17200 (the

[1] A "Schumer Box" is a tabular chart that must be included in credit card solicitations according to Regulation Z, the Truth in Lending Act's governing regulation, codified at 12 C.F.R. 226.5. A "Schumer Box" is required to contain certain specific disclosures to consumers about the terms of a credit card being offered, including the annual percentage rate, in both a "clear and conspicuous" manner and in a "reasonably understandable form." 12 C.F.R. § 226.5(a)(1); Truth in Lending Act, Official Staff Commentary, 12 C.F.R. pt. 226 Supp. I.

"UCL") and the Federal Truth in Lending Act. On July 21, 2010, the Ninth Circuit Court of Appeals issued its opinion in *Rubio v. Capital One Bank*, 613 F.3d 1195, 1200-05 (9th Cir. 2010) *cert. denied*, 131 S.Ct. 1817 (U.S. 2011), reversing the dismissal of Plaintiff's SAC.

Procedural History of the Mediation

In or about March 2012, Plaintiff and Capital One agreed to mediate the issues set forth in the SAC before the Honorable Steven R. Stone (Ret.). The Parties proceeded with settlement discussions, which included numerous telephonic calls, submission of mediation briefs, in addition to an in-person mediation with the Mediator on March 20, 2012. The in-person mediation was followed by significant additional negotiation through the auspices of Justice Stone. On May 9, 2012, the Parties agreed to preliminary settlement terms. Ultimately, after months of further negotiation on the final, detailed terms of the settlement, the Parties finalized the settlement agreement and exhibits, which was executed in full on August 23, 2012.

The Settlement Agreement and exhibits thereto is attached as Exhibit A to the Declaration of Behram V. Parekh in Support filed concurrently herewith (hereinafter "Parekh Decl.").

Summary of the Proposed Settlement[2]

The Parties' Settlement Agreement proposes certification of a Settlement Class in the Action pursuant to Federal Rule of Civil Procedure 23(b)(3) consisting of:

> All natural persons who have or had Capital One credit card accounts with billing addresses in California whose accounts are current, meaning they are not charged off or in bankruptcy status, as of the Effective Date, who opened an account with Capital One after October 18, 2003 in response to a solicitation describing any APR as "fixed" in the table of information included in initial disclosures as required by federal law (the "Schumer Box"), and whose fixed APR(s) were later increased for reasons other than default, and who did not opt out of the APR increase after receiving notice.

[2] All terms are given the same meaning as defined in the Parties' Settlement Agreement (Parekh Decl. Ex. A).

During discovery, Plaintiff's counsel determined that there are 131,865 members of the proposed Settlement Class, and that a calculation of UCL restitutionary damages for the entire proposed Settlement Class, i.e. the excess of any finance charges assessed at the revised APR(s) over finance charges calculated using the original fixed APR(s) for all affected customers in California as of January 31, 2012, excluding any finance charges assessed at the default APR or credited ("Incremental Finance Charges") totals $26,268,335. (Parekh Decl. ¶ 3).

Individual Class Member Benefit

The proposed settlement provides, as more fully set forth in the Settlement Agreement (Parekh Decl. Ex. A), substantial benefit to proposed Settlement Class Members, as it provides for a payment to each of a significant percentage of the difference between the finance charges assessed at the revised APR(s) over finance charges calculated using the original APR(s). Specifically, each Settlement Class Member receives a payment in the Benefit Amount: the amount of the Settlement Class Member's Incremental Finance Charges multiplied by the ratio of the Merits Amount [the entire Settlement Payment of $10,000,000 less Court-approved attorney's fees and costs and the Service Payment (one-time payment to the Class Representative)] divided by the total Incremental Finance Charges of the Settlement Class, which are $26,268,335. Notice and administration costs are paid directly by defendant and will not reduce the Benefit Amount. Essentially, each Settlement Class Member receives a proportional share of the Merits Amount, based on the Incremental Finance Charges incurred on the Settlement Class Member's account due to the increased APR(s).

Notice

The Settlement Agreement requests that notice of this proposed settlement be disseminated to proposed Settlement Class Members, at Capital One's sole expense, as follows:

MAILING PROCEDURE –

A copy of the "Legal Notice By Order of the Court" relating to the proposed class settlement substantially in the form attached to the Settlement Agreement (Parekh Decl. Ex. A) as Exhibit 1(the "Notice"), shall be mailed to the Settlement Class Members by the Settlement Administrator pursuant to the terms of sections 3.3 and 3.4 of the Settlement Agreement, which are as follows:

> **3.3 Manner of Giving Notice.** The Settlement Administrator will mail the Notice by first class mail to each Settlement Class Member at the Settlement Class Member's last-known address within 30 days of the entry of the Preliminary Approval Order by the Court. Capital One shall identify and provide a list of all Settlement Class Members and their last-known addresses to the Settlement Administrator in sufficient time to meet the mailing deadline. Before mailing the Notice to the Settlement Class Members, the Settlement Administrator shall update the Settlement Class list through the National Change of Address database.
>
> **3.4 Returned Notices.** If any notices are returned by the U.S. Postal Service as undeliverable but with a forwarding address, the Settlement Administrator will promptly re-mail the notices to the updated address provided by the U.S. Postal Service. If the returned notice does not identify any updated address, the Settlement Administrator will promptly submit the Class Member's name and address to a vendor database such as Trans Union or Lexis/Nexis for updated address information, if available. The Settlement Administrator will then promptly re-mail the notice to any new address obtained from the database. If the Settlement Administrator cannot obtain an updated address from the database, he will provide a copy of the Notice by email if Capital One has an email address for that Class Member. The email will explain that the Claims Administrator is sending the notice by email because the mailed notice was returned without forwarding address and will ask the recipient to respond by email with an updated address within 7 days. No further notice shall be required after the Court enters Final Judgment.

This manner of providing notice to Settlement Class Members is reasonable and appropriate, satisfies due process requirements, and is the best notice practicable under the circumstances, in compliance with Rules 23(c)(2)(B) and 23(e)(1) of the Federal Rules of Civil Procedure because it provides for individual notice to virtually all class members, the "gold standard" for notice.

Similarly, the manner of providing for opt-outs set forth in section 3.5.1 of the Settlement Agreement, as stated below, is also reasonable and appropriate, and satisfies Rule 23(c)(2)(B).

> **3.5.1 Procedures for Opt Outs.** Any request by a Settlement Class Member to be excluded from the Settlement Class (to "opt out") must be in writing and must include the Settlement Class Member's name, address, telephone number, and a statement that the person wishes to opt out of the Settlement Class. the opt out request must be personally signed by the Settlement Class Member who seeks to opt out; no Settlement Class Member may opt out through an actual or purported agent or attorney acting on behalf of the Settlement Class Member. No opt out request may be made on behalf of a group of Settlement Class Members. To be effective, the opt out request must be mailed to the Settlement Administrator and must be postmarked on or before the last day of the Opt-Out Period. Each Settlement Class Member who does not submit a valid request to opt out shall remain in the Settlement Class and shall be bound by the settlement and release provided in this Agreement. Within ten days of the date by which opt out requests must be postmarked set forth in the Notice, the Settlement Administrator shall send copies of all requests to opt out to Class Counsel and counsel for Capital One.

Procedures for additional opt outs are also provided for in section 3.5.2 of the Settlement Agreement (Parekh Decl. Ex. A).

Actions Requested of the Court

By this Motion, Plaintiff requests that the Court enter a "Notice Order" granting preliminary approval of the Proposed Order of Preliminary Approval of Settlement form attached as Exhibit 2 to the Settlement Agreement (Parekh Decl. Ex. A). That order would authorize the tasks necessary to allow the proposed settlement process to commence. Those tasks include: (a) conditionally certifying the Settlement Class for settlement purposes only; (b) appointing the Settlement Administrator; (c) providing for notice of the Settlement to affected persons in accordance with the terms of the Settlement Agreement; (d) establishing procedures for objections to and exclusions from the proposed Settlement; (e) sets a date for the Fairness Hearing; and (f) appoints Class Counsel and the Class Representative.

II. THE COURT SHOULD PRELIMINARILY CERTIFY THE PROPOSED SETTLEMENT CLASS

Plaintiff proposes that the Court provisionally certify this action as a class action under Rule 23 for the purpose of settlement. The Court must satisfy itself, at

least conditionally, that the requirements of Rule 23 are met, and that the named Plaintiff may properly appointed to serve as a Class Representative. *See* Manual for Complex Litigation (Fourth) § 21.632 ["The judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b)."]; 4 William B. Rubenstein, Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 11.25 (4th ed. 2010). Provisional certification is an appropriate device where an agreement to settle occurs before a class is certified for litigation. *See e.g.*, *Jaffe v. Morgan Stanley & Co., Inc.*, No. C-06-3903 THE, 2008 WL 346417, at *2-3 (N.D. Cal. Feb. 7, 2008); *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 WL 1991529, at *2-3 (N.D. Cal. June 30, 2007). Although Capital One would, if class certification were contested on the merits, argue otherwise, the Parties have agreed for purposes of settlement that the Settlement Class may be certified under Rule 23(b)(3). The Settlement Agreement and proposed Notice provide that Settlement Class Members will have the opportunity to exclude themselves from the Settlement Class as Rules 23(c)(2)(B)(v) and 23(e)(4) require.

A. <u>The Numerosity Requirement is Met</u>

Rule 23(a)(1) allows a class action to be maintained if "joinder of all members is impracticable" owing, in primary part, to the large number of people in the proposed class. Fed. R. Civ. P. 23(a)(1); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Generally, the numerosity requirement is satisfied when the class compromises 40 or more members. *See Celano v. Marriot Int'l, Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007). In this case, the proposed Settlement Class includes 131,865 persons residing in California. (Parekh Decl., ¶ 3) Size renders joinder impracticable here and, Plaintiff believes, satisfies the numerosity requirement. *See Hanlon*, 150 F.3d at 1019.

B. <u>The Commonality Requirement is Met</u>

Rule 23(a)(2) allows a class action to be maintained if "there are questions of

law or fact common to the class." "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011). In other words, the claims of the class members

> must depend on a common contention ... [which] must be of such a nature that it is capable of classwide resolution–which means that a determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Id. Here, membership in the Settlement Class means that each Settlement Class Member, by definition, opened an account with Capital One in response to a solicitation describing any APR as "fixed" in the "Schumer Box", and later had the fixed APR(s) increased for reasons other than default, and did not opt out of the APR increase after receiving notice. In the SAC, Plaintiff contends on behalf of each Settlement Class Member that Capital One's conduct was unlawful, fraudulent, and unfair under the UCL. (*See* SAC, D.E. 20) As each of the Settlement Class Members was subjected to the challenged conduct, Plaintiff believes answers to common questions, such as whether Capital One violated the UCL and whether Plaintiff and the Class Members are entitled to relief, would resolve the claim. Plaintiff contends that it is clear that the Settlement Class Members' claims "stem from the same source," and commonality exists. *Hanlon*, 150 F.3d at 1019-20.

C. <u>The Typicality Requirement is Met</u>

Rule 23(a)(3) requires "the claims or defenses of the representative parties [to be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Dukes v. Wal-Mart*, 603 F.3d 571, 613 (9th Cir. 2010)(en banc), *quoting Hanlon*, 150 F.3d at 1020, *rev'd on other grounds*, 131 S.Ct. 2541 (2011). As to the representative, "[t]ypicality requires that the named plaintiffs be

members of the class they represent." *Id.* at 613, *citing Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982). The commonality, typicality, adequacy-of-representation requirements "tend to merge" with each other. *Dukes*, 131 S.Ct. at 2551 n.5 (citing *Gen. Tel. Co. of Sw.*, 457 U.S. at 157-58).

Here, the Class Representative, like the Settlement Class Members, opened an account with Capital One in response to a solicitation describing APRs as "fixed" in the "Schumer Box," and later had her APRs increased for reasons other than default, and did not opt out of the APR increase after receiving notice. As such, the Class Representative shares an interest in redressing her claims with all Settlement Class Members. Thus, Plaintiff believes her claims are typical of those of the proposed Settlement Class, and that Fed. R. Civ. P. 23(a)(3) is met.

D. <u>The Named Plaintiff and Class Counsel Are Adequate Class Representatives</u>

Finally, Rule 23(a)(4) and Rule 23(g) together require that the named plaintiff and proposed Class Counsel be able to "fairly and adequately" protect and represent the interests of the class, respectively. "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020.

Here, there are no conflicts of interest between the Class Representative, Class Counsel, and any members of the proposed Settlement Class on any issues. Further, the Class Representative and Class Counsel have vigorously prosecuted this action on behalf of the Settlement Class already, including filing and service of the lawsuit, serving initial disclosures, opposing multiple motions to dismiss, taking the case through a Ninth Circuit appeal and Supreme Court writ petition, propounding and responding to extensive written discovery, including the production of voluminous documents, analyzing materials provided by Capital One,

presenting for a deposition, bringing a motion for class certification, engaging in settlement discussions with defense counsel, and moving the action forward to resolution. The qualifications and experience of Kirtland & Packard LLP and its attorneys are set forth in detail in the attached Declaration of Behram v. Parekh, filed concurrently herewith. (*See* Parekh Decl., ¶ 2 and Ex. B)

E. The Proposed Settlement Class Meets the Requirements of Rule 23(b)(3)

Once the prerequisites of subsection (a) are satisfied, Federal Rule of Civil Procedure 23(b)(3) provides that a class action be maintained where questions of law and fact common to members of the class predominate over any questions affecting only individuals, and the class action mechanism is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3); *Pierce v. County of Orange*, 526 F.3d 1190, 1197 n.5 (9th Cir. 2008). Because settlement is proposed, the Court need not consider manageability. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (citation omitted)("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there will be no trial.")

The predominance inquiry tests "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 594. It focuses on the relationship between common and individual issues. Common issues predominate where a common nucleus of facts and potential legal remedies dominate the litigation. *See Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 962 (9th Cir. 2005). Here, Plaintiff believes the Class Representative's claims arise out of the same uniform course of conduct that, by definition, all Settlement Class Members experienced in a uniform manner. For settlement purposes, where manageability of trying the case need not be considered, the predominance requirement is satisfied.

In addition, a class action is superior to any other method available to fairly,

adequately, and efficiently resolve the proposed Settlement Class Members' claims. Without a class action, most would find litigation costs prohibitive, and if they did sue in large numbers, multiple individual actions would be an inefficient use of the Court's and Parties' resources. Accordingly, Plaintiff believes a class action is the superior method of adjudicating this controversy.

III. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT AGREEMENT AS "FAIR, REASONABLE, AND ADEQUATE" UNDER FED. R. CIV. P. 23(e)(2)

Following certification for settlement purposes, Rule 23(e) requires that the Court make a preliminary determination of fairness.

> Review of a proposed class action settlement generally involves two hearings. First, counsel submits the proposed terms of settlement and the judge makes a preliminary fairness evaluation. In some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions or informal presentations by the parties. If the case is presented for both class certification and settlement approval, the certification hearing and preliminary fairness evaluation can usually be combined. The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of the notice of the certification, proposed settlement, and date of the final fairness hearing.

Manual for Complex Litigation (Fourth) § 21.632; *see also* 4 NEWBERG ON CLASS ACTIONS § 11.25 (4th ed. 2010).

After the preliminary fairness evaluation has been made, the class has been certified for settlement purposes, and notice has been issued, the Court holds a fairness hearing to show that the proposed settlement is truly fair, reasonable, and adequate. *See* Manual for Complex Litigation (Fourth) § 21.633-34; *see also* 4 NEWBERG ON CLASS ACTIONS § 11.25 (4th ed. 2010).

Preliminary approval requires only that the Court evaluate whether the proposed settlement: (1) was negotiated at arm's length, and (2) is within the range of possible litigation outcomes such that "probable cause" exists to disseminate notice and begin the formal fairness process. *See* Manual for Complex Litigation

(Fourth) § 21.632-33. The Ninth Circuit has identified a number of factors used to assess whether a settlement proposal is fundamentally fair, adequate and reasonable: (1) the strength of the plaintiffs' case and the risk, expense, complexity, and likely duration of further litigation; (2) the amount offered in settlement; (3) the extent of discovery completed and the stage of the proceedings; (4) the experience and views of counsel; (5) the reaction of the class members to the proposed settlement; and (6) any collusion between the parties. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458-60 (9th Cir. 2000). To preliminarily assess the reasonableness of the Parties' proposed settlement, the Court should review both the substance of the deal and the process utilized to arrive at the settlement. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) ("preliminary approval ... has both a procedural and substantive requirement"). Each relevant factor supports the conclusion that the proposed settlement is fundamentally fair, adequate and reasonable.

A. The Strength of Plaintiff's Case and the Risk, Expense, Complexity, and Likely Duration of Further Litigation

The heart of Plaintiff's claim is that Capital One's practice of mailing credit card solicitations to consumers of credit card services which stated in the solicitation's "Schumer Box" that the APR on the credit card being offered was "fixed," when, according to Capital One, the APR was subject to change, was misleading and a violation of the unfair, fraudulent, and unlawful prongs of the UCL. (*See* SAC, D.E. 20) Once these consumers had accepted Capital One's offer, Capital One subsequently sent them standardized change in terms documents offering them the choice of either accepting a higher APR on their current balances, or cancelling their credit card. (*See id.*) Customers who accepted the higher APR paid increased financed charges over the disclosed "fixed" APR. (*See id.*) While Plaintiff and Class Counsel believe her claims are meritorious and qualify for litigation on a class-wide basis, Capital One has raised, and would continue to raise,

challenges to the claims' legal and factual bases. Although the Parties differ as to the likelihood of Plaintiff ultimately prevailing after judgment and appeal, it is apparent that the proposed class has some risk with proceeding to litigate.

By contrast, the proposed settlement immediately provides the certainty of valuable benefit to the proposed Settlement Class Members. The proposed settlement offers all proposed Settlement Class Members a significant portion of the Incremental Finance Charges they incurred as a result of the challenged practice.

If this case is not settled, it would be necessary to continue prosecuting the litigation through a trial and, even if successful there, through a potential appeal. Even if Plaintiffs are eventually successful, there is still the certainty that if the case proceeds in litigation, any potential benefits to the proposed class would be delayed for many years.

This Settlement Agreement, like all settlements, strikes a balance between the maximum possible recovery that the proposed Settlement Class might obtain by pursuing litigation to the very end, and the risk of failing to obtain any recovery should Capital One prevail in litigation. In determining whether the terms of this Settlement Agreement are sufficiently fair, adequate and reasonable to justify the dissemination of the class Notice and the scheduling of a Fairness Hearing, the Court need only inquire at this juncture whether the consideration provided to the proposed settlement as the Settlement Payment falls within the reasonable range of settlement "by considering the likelihood of a plaintiffs' or defense verdict, the potential recovery, and the chances of obtaining it, discounted to present value." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009), *citing* Manual for Complex Litigation (Fourth) § 21.62. The answer to that question is most certainly "yes."

The advantages to the proposed Settlement Class Members of approving the proposed settlement and quickly distributing to them the consideration provided exceeds what is likely to occur should this case proceed on a litigation track. For

this reason, the strength of Plaintiffs' case and the risk, expense, complexity, and likely duration of further litigation suggest that the proposed settlement agreement is fair, reasonable and adequate under Fed. R. Civ. P. 23(e)(2).

B. The Amount Offered in Settlement

In light of the uncertainties of litigation, the value of the proposed settlement offer is certainly adequate. Capital One will make the Settlement Payment of $10,000,000. This amount represents almost *forty-percent* of the full damages sustained by class members. By any measure, that is a substantial recovery to class members, given the inherent risks of litigation. From the Settlement Payment amount, as would be customary even in individual contingency fee litigation, Plaintiff' attorney's fees and costs awarded by the Court, and a Service Payment for Plaintiff's time and effort, will then be deducted. The remaining amount, i.e. the Merits Payment, will then be drawn from to provide each of the proposed Settlement Class Members a payment based on the Incremental Finance Charges they incurred as a result of any increases to their APR(s). The precise calculation to determine each Settlement Class Member's Benefit Payment from the Merits Payment is as follows: the amount of the Settlement Class Member's Incremental Finance Charges multiplied by the ratio of the Merits Amount [the entire Settlement Payment of $10,000,000 less Court-appointed attorney's fees and costs and the Service Payment (one-time payment to the Class Representative)] divided by the total Incremental Finance Charges of the Settlement Class, which are $26,268,335. The Parties expect that the net Benefit Percentage (determined by dividing the amount available to be paid to Settlement Class Members by the total amount of extra finance charges incurred by Settlement Class Members) will be between 25% and 30%, so each Settlement Class Member will receive between 25% and 30% of the additional finance charges the Settlement Class Member incurred. This is valuable consideration.

Section 5.4 of the Settlement Agreement also provides for a Cy Pres distribution of the sum of any settlement checks that are not cashed within 90 days of the date of issuance, to charities designated by Class Counsel and Capital One. The Parties hereby designate Public Justice Foundation of Washington, D.C. and Public Counsel's Consumer Law Project as the Cy Pres recipients.

C. The Extent of Discovery Completed and the Stage of Proceedings

The amount of discovery obtained prior to settlement is a factor in determining the fairness of settlement. *See Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003), *cited in Rodriguez*, 563 F.3d at 963 ("the extent of discovery completed and the stage of the proceedings" are factors in considering the fairness of a proposed settlement). Here, a significant amount of discovery has been completed by the Parties. After initial disclosures were exchanged, Plaintiff propounded several sets of interrogatories and requests for production of documents on Capital One, to which it responded. Additionally, Capital One produced more than 130,000 pages of responsive documents to Plaintiff as part of that discovery, which Plaintiff's counsel analyzed and reviewed. Capital One also stipulated to a substantial number of facts as being undisputed, short-circuiting the need for voluminous additional discovery. Capital One itself propounded several sets of interrogatories and requests for production of documents on Plaintiff, to which Plaintiff responded. Capital One also deposed Plaintiff.

Plaintiff's counsel believes, based on their past experience in class action cases, and the extensive discovery that has been conducted in this case, that the proposed settlement, rather than continued litigation, is the best option for the proposed Settlement Class.

D. The Experience and Views of Counsel

Class Counsel's experience suggests that the Parties' Settlement is a strong result for the proposed Class and warrants the Court's approval. Class Counsel's support for the proposed settlement confers a presumption of correctness. *See*

Rodriguez, 563 F.3d at 965 ("This circuit has long deferred to the private consensual decision of the parties," *citing Hanlon*, 150 F.3d at 1027); *see also Linney v. Cellular Alaska P'ship*, C-96-3008 DLJ, 1997 WL 450064, *5 (N.D. Cal. July 18, 1997), *aff'd*, 151 F.3d 1234 (9th Cir. 1998) ("The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery had taken place create a presumption that the agreement is fair."); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 68 (D. Mass. 1997) (settlement is presumed fair where it is the product of arm's length negotiations); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158, 184 (E.D. Pa. 1997), *quoting Austin v. Pa. Dep't of Corrections*, 876 F. Supp. 1437, 1472 (E.D. Pa. 1995) ("Significant weight should be attributed 'to the belief of experienced counsel that the settlement is in the best interests of the class.'")

Class Counsel are experienced class action litigators who have successfully litigated numerous complex consumer protection class action cases in the past. After weighing the risks and benefits associated with litigating this case further, Class Counsel reached the opinion that the proposed settlement is in the best interests of the proposed Class. The settlement provides an almost *forty-percent* recovery of the Class Member's calculated damages. Under any circumstances, that would be considered a significant result in the context of a class action. Therefore, this factor weighs in favor of preliminarily approving the terms of the proposed settlement.

E. <u>The Reaction of Proposed Class Members to the Proposed Settlement</u>

The reaction of the class members to the proposed settlement is not as meaningful a consideration when a court is determining whether to preliminarily approve settlement because notice has not been issued and class members are, as yet, unaware of the proposed settlement. Class members will receive substantial

notice of the proposed settlement if it is preliminarily approved, and will have every opportunity to voice their opinions on the proposed settlement.

F. Lack of Collusion Between the Parties

The trial court's evaluation of the settlement "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). As discussed above, the proposed settlement is the product of extensive arms length negotiations between well-informed, sophisticated counsel. This is a common fund case, and, thus, Plaintiff's intend to request attorney's fees as percentage of the common fund. Thus, no discussion or agreement as to attorney's fees was necessary as part of the negotiation. Further, given the extensive litigation already conducted to date, including the Ninth Circuit and Supreme Court appeals, both sides have demonstrated by their actions that they were prepared to litigate this case through final judgment, if no acceptable resolution could be reached. In short, there can be no question of any collusion. Settlement negotiations were a long, drawn out process over many months, utilizing the expertise of the Honorable Steven J. Stone (Ret.). *See Satchell v. Fed. Exp. Corp.*, No. C 03-2659 SI, 2007 WL 1114010, at *4 (N.D.Cal. Apr. 13, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.")

IV. THE PROPOSED NOTICE IS ADEQUATE AND SHOULD BE APPROVED

Rule 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." The Manual for Complex Litigation recommends that "[o]nce the judge is satisfied as to the certifiability of the class and the results of the initial inquiry into the fairness, reasonableness, and adequacy of the settlement, notice of a formal Rule 23(e)

fairness hearing is given to the class members. For economy, the notice under Rule 23(c)(2) and the Rule 23(e) notice are sometimes combined." Manual for Complex Litigation (Fourth) § 21.633. Combined notice helps to avoid confusion that separate notifications of certification and settlement may produce. In evaluating a notice program, therefore, the relevant question is "whether the class as a whole had notice adequate to flush out whatever objections might reasonably be raised to the settlement." *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

Here, the Parties propose to disseminate the class Notice via U.S. Mail, and e-mail if necessary. The manner proved for giving such notice in sections 3.3 and 3.4 of the Parties' Settlement Agreement ensures that "all [class] members who can be identified through reasonable effort will be notified," and is "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). It is also inherently "reasonable". Fed. R. Civ. P. 23(e)(1). Section 3.3 provides that Capital One will identify from its records and submit a list of all Settlement Class Members and their last-known addresses to the Settlement Administrator. The Settlement Administrator will utilize the National Change of Address database to update the addresses before mailing.

Section 3.4 then provides additional safeguards to maximize receipt of class Notice by Settlement Class Members. For example, in the event a Notice is returned undeliverable, the Settlement Administrator will forward to an updated address, if provided by the U.S.P.S. If no such forwarding address is provided, the Settlement Administrator will submit the Settlement Class Member's name and address to a third party vendor database for updated address information, if available, and will promptly re-mail to that updated address. If no updated address is available, the Settlement Administrator will then obtain the Class Member's email address from Capital One, if available. The Settlement Administrator will email the Notice to the Settlement Class Member, and request a mailing address in that email. Each of these safeguards is designed to ensure that the Notice is

received by the maximum number of Settlement Class Members practicable under the circumstances.[3] *See* Fed. R. Civ. P. 23(c)(2)(B).

The Notice itself, a copy of which is attached to the Settlement Agreement (Parekh Decl. Ex. A) as Exhibit 1, contains the requisite information for proper notice of a class action settlement. *See* Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii). The Court should, therefore, approve the proposed Notice and notice plan as described in the Settlement Agreement.

V. The Court Should Adopt the Parties' Proposed Schedule for Considering Final Approval of the Settlement

The Parties propose to the Court a schedule that is reasonably expeditious, yet gives all interested persons a full opportunity to learn about the proposed Settlement and have their views considered. The Parties request the following schedule:

- All mailing of notices be completed within 30 days after entry of the Preliminary Approval Order, or November 14, 2012 if Preliminary Approval is granted on the date of the hearing;
- the deadline for Settlement Class Members to opt out be set for 61 days after the deadline for mailing the Notices, or January 14, 2013 if Preliminary Approval is granted on the date of the hearing;
- the deadline for objections to the proposed Settlement be set for 70 days after the deadline for mailing the Notices (100 days after entry of the Preliminary Approval Order), or January 23, 2013 if Preliminary Approval is granted on the date of the hearing;
- the deadline to submit notice of intention to appear at the Fairness Hearing be set no later than 21 days before the Fairness Hearing, or January 28, 2013 if Preliminary Approval is granted on the date of the hearing;
- the deadline to submit all materials in support of the request for Final Approval and Class Counsel's request for approval of attorney's fees and costs and reimbursement of expenses shall be set no later than 14 days before the Fairness Hearing, or February 4, 2013 if Preliminary Approval is granted on the date of the hearing;
- the Settlement Director be directed to file the report with the Court no later than 14 days before the Fairness Hearing, or February 4, 2013 if Preliminary Approval is granted on the date of the hearing;

[3] The entire Settlement Agreement, including the proposed Notice, will also be made available via the internet on a Settlement Web Site.

- the Fairness Hearing be set no earlier than 121 days after entry of the Preliminary Approval Order, or February 18, 2013 if Preliminary Approval is granted on the date of the hearing.

VI. CONCLUSION

For the reasons discussed above, Plaintiff requests that the Court enter the Preliminary Approval Order in the form attached as Exhibit 2 to the Settlement Agreement (Parekh Decl. Ex. A) and also lodged separately herewith.

Dated: September 13, 2012

RESPECTFULLY SUBMITTED,

KIRTLAND & PACKARD LLP

By: /s/ Behram V. Parekh
MICHAEL LOUIS KELLY
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