UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SAUL M. KAUFMAN, and KIMBERLY STEGICH, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	No. 07-CV-1707
v.	)	Judge Joan B. Gottschall
AMERICAN EXPRESS TRAVEL RELATED RELATED SERVICES CO.,	)	CLASS ACTION
Defendant.	)	

MEMORANDUM IN SUPPORT OF LEAD CLASS COUNSEL'S AND ADDITIONAL CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES

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I. INTRODUCTION

After rigorous litigation, and with an appeal of this Court's order denying Defendant American Express Travel Related Services Co.'s ("Amex" or "Defendant") motion to compel arbitration pending in the Seventh Circuit, over eight months of settlement negotiations and discovery supervised by Court-appointed and other esteemed mediators, the parties reached a class-wide agreement. With the Court's final approval, Amex will make settlement payments to thousands of Settlement Class Members.

Lead Class Counsel request, and Amex has agreed not to oppose, a fees and costs award in the amount of $1,275,000 to be paid by Amex from the $6,753,269.50 Settlement Fund created by the Settling Parties. Likewise, additional Class Counsel request, and Amex agreed not to oppose, a fees and costs award in the amount of $250,000[1]. After deducting verifiable costs, Lead Class Counsel request $1,235,000 in attorneys' fees and additional class counsel request $241,718 in fees. These requests total 18.3% and 3.59% of the Settlement Fund, respectively, well within the range of benchmark percentages routinely upheld by the Seventh Circuit.[2] These awards are justified here, given the Settling Parties' agreement, the contingent nature of Class Counsel's representation, the substantial benefits obtained for the class, the obstacles overcome by Lead Class Counsel in fighting a motion to compel arbitration, negotiating the settlement, fending off delay tactics and responding to meritless objections by Intervenors, and the complex issues remaining if this litigation were to continue. Moreover, the fees and costs, which were negotiated by the parties ***after*** reaching an agreement regarding class relief, will be paid by

[1] These amounts do not include the $1,000 Class Counsel request be awarded to each of Plaintiffs Kaufman, Stegich, Rudd and Jarratt for their role and participation as Class Representatives. *See Joint Motion for Final Approval of Settlement*, filed May 28, 2014, p. 14, Doc. # 504.

[2] As discussed herein, these requests are less than 31% and 6.2% of the ***value*** to the Class under recent Seventh Circuit precedent.

Amex without diminishing paying Class Members' claims and were agreed upon by the parties with the assistance of an esteemed mediator.

II. THE LAW CONCERNING ATTORNEYS' FEES

The Federal Rules of Civil Procedure outline the standard regarding fee petitions in a class action. Pursuant to Rule 23(h), the court may award reasonable attorneys' fees that are authorized by law or the parties' agreement. FED. R. CIV. P. 23(h)(1).

There are two predominant methods for calculating reasonable attorneys' fees in the Seventh Circuit. *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994). The first is via the "lodestar" method, which considers "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433, (1983); *see also Spegon v. Catholic Bishop of Chi.*, 175 F.3d 544, 550 (7th Cir. 1999). The other method—which has emerged as the favored method for calculating fees in common-fund cases in this district—sets the fee award as a percentage of the recovered settlement fund, plus expenses and interest. *Dairy Farmers of America, Inc.*, 2015 WL 753946, *3, --- F.3d --- (N.D. Ill. Feb. 20, 2015) (Dow, Jr., J.).[3] In this case, an award of reasonable attorney's fees is authorized by both the parties' agreement and by case law granting attorneys' fees as a percentage of the benefits to the Class provided by the Settlement.

A. The Settling Parties Contractually Agreed to the Fees.

As part of the Settlement and subject to Court approval, Amex contractually agreed[4] to pay $1,275,000 in reasonable attorneys' fees and costs to Lead Class Counsel and $250,000 to

[3] A 2010 study on attorneys' fees in class actions confirmed that between 1993 and 2008, 61% of attorneys' fees awards in the Seventh Circuit were based on a percentage of the settlement recovery. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. Empirical Legal Studies 248 (2010).

[4] "A settlement agreement is a contract," *Laserage Technology Corp. v. Laserage Laboratories, Inc.*, 972 F.2d 799, 802 (7th Cir. 1992).

additional Class Counsel. Settlement Agreement, Doc. 311-1 at ¶ 4.2. Amex further agreed not to object to Class Counsel's application to this Court for fees. *Id.*

1. Attorneys' fees and costs do not diminish the class members' relief.

To alleviate concerns regarding collusive arrangements in class action settlements, Courts consider whether: (1) attorneys' fees and expenses diminish class relief, and (2) when the parties negotiated or discussed attorneys' fees. *Dehoyos v. Allstate Corp.*, 240 F.R.D. 269, 322-323 (W.D. Tex. 2007). The instant Settlement satisfies both prongs of this test.

Where attorneys' fees do not diminish the class benefits, "the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members." *Goodyear v. Estes Exp. Lines, Inc.*, 2008 WL 687130, * 4 (S.D. Ind. March 10, 2008) ("it is significant that no Class member's recovery will be diminished by this award"); *McBean v. City of New York*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006) ("If, however, money paid to the attorneys is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members."). *See also Dehoyos*, *supra*, 240 F.R.D. at 322.

In this case, the attorneys' fees have always been separate from the relief set aside for the settlement class members. *See* Joint Status Conference Statement, dated March 24, 2009 (Doc. # 59). Furthermore, Class Counsel have always maintained a specific dollar amount they would request in fees, and that amount will not diminish the benefits to the class. *Id.*, *see also* Doc. # 311-1 at ¶¶ 4.2, 4.3; Doc. # 102 at 9; Doc. # 311 at 7. The most recent estimates illustrate that there are sufficient funds to support Class Counsel's fee request and to satisfy Class claims and distribute funds to a *cy pres* (Doc. # 556, 556-1). Therefore no conflict exists between Class Counsel's fee request and the Class here. *McBean*, *supra.*

2. Attorneys' fees were properly negotiated.

In addition to not diminishing the class relief here, attorneys' fees were not even negotiated until after resolution of the class relief. Arms-length negotiations that occur between sophisticated counsel on both sides of the table and under the supervision of the Court "weigh strongly in favor of approval" of a fee application. *McBean, supra*. *See also Bailey v. AK Steel Corp.*, 2008 WL 553764, *1 (S.D. Ohio Feb. 28, 2008); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). Factors that also weigh in favor of arms-length negotiation and against collusion include the parties' initial reluctance to settle, the fact that a neutral third-party assists in determining the amount settled upon, and the timing of the settlement in relation to the start of litigation. *See Vollmer v. Publishers Clearing House*, 248 F.3d 698, 708 (7th Cir. 2001) ("class counsel's efforts demonstrate a zealous representation of the class's interests, sufficient to prevent any inference of collusion"); *Abrams v. Van Kampen Funds, Inc.*, 01 C 7538, 2006 WL 163023 (N.D. Ill. Jan. 18, 2006) ("Since the parties had previously indicated a reluctance to settle and the amount settled upon was based on the recommendation of a neutral third party, the circumstances of the settlement support that there was no collusion between the parties."); *Hispanics United of DuPage Cnty. v. Vill. of Addison, Ill.*, 988 F. Supp. 1130, 1169-70 (N.D. Ill. 1997) ("This Court participated as a mediator in numerous settlement conferences in this case. . . . We conclude that there is absolutely no evidence of collusion in reaching a settlement.").

Here, the Settling Parties executed a Memorandum of Understanding memorializing the material terms of relief to the settlement class two years after initiating the litigation and after eight months of settlement discussions in both a Seventh Circuit Settlement Conference and before private mediators at JAMS. *See* Doc. # 59; *see also* Dec. of Stephen B. Morris, Ex. B to *Class Counsel's Motion for Attorneys' Fees*. Moreover, the settlement discussions did not

commence until after Amex filed a notice of appeal to the Seventh Circuit appealing this Court's denial of its motion to compel individual arbitration. Doc. # 32.[5]

After reaching agreement on class-wide relief, the Settling Parties negotiated a separate agreement on fees, subject to court approval, during a mediation session with the Honorable William J. Cahill (Ret.) of JAMS. *See* Dec. of Hon. William J. Cahill (Ret.), dated May 28, 2014.[6] Because the Settling Parties did not begin negotiating Class Counsel's attorneys' fees and costs until *after* the parties had fully negotiated the relief for the Class and entered into a signed term sheet for the class relief, there was no possibility of collusion and no need to "recreate the market" because an arm's length negotiation was not only feasible, but actually occurred.[7] The fees here, negotiated and paid separate and apart from the class recovery, are thus presumed reasonable. *Dehoyos*, *supra*; *Bailey*, *supra*; *see also Cummings v. Connell*, No. CIV. S-99-2176 WBS KJM, 2006 WL 3951867, at *2 (E.D. Cal. Nov. 27, 2006).

B. Class Counsel's Fee Request Is Supported By Class Action Case Law.

The Supreme Court has held attorneys' fees in class actions where class counsel successfully obtained a money judgment for the class should be calculated based on the full amount of the judgment even though some class members may never file valid claims or collect their shares. *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). The Class's "right to share the

[5] "Contingent fees compensate lawyers for the risk of non-payment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013), *citing Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986). In light of Amex's potentially meritorious defenses and the legal challenges posed by the arbitration clause and recent case law, the Plaintiffs have faced an uphill battle proceeding to trial and, once there, obtaining relief, had Class Counsel not negotiated the instant Settlement. Moreover, Amex's appeal remains pending.

[6] Attached as Exhibit 48 to the Declaration of Richard J. Doherty, dated May 28, 2014 (Doc. # 506).

[7] In a situation involving a common fund settlement, "[t]he object in awarding a reasonable attorney's fee … is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible." *Taubenfeld v. Aon Corp.*, 415 F.3d 597, 599 (7th Cir. 2005).

harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit … created by the efforts of the class representatives and their counsel." *Id*. at 480. *See also Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (calculating attorneys' fees as a percentage of the recovery serves "as an efficient risk-shifting and litigation-financing device."). As in this case, the "harvest" created by class counsel in *Boeing* consisted of a non-reversionary lump sum. *Boeing*, 444 U.S. at 479. In *Boeing*, "[n]othing in the court's order made Boeing's liability for this amount contingent upon the presentation of individual claims." *Id.* at 480 n. 5. Courts in the Seventh Circuit have held that attorneys' fees of 30-33 1/3% of a settlement value are reasonable and typical. *Gaskill v. Gordon*, 160 F.3d at 362–63 (noting typical contingency fees are between 33% and 40%); *Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1033 (N.D. Ill. 2000) (recognizing "the established 30% benchmark for an award of fees in class actions."). The negotiated attorneys' fees here are comparable to those awarded in similar class actions.[8]

The Seventh Circuit has very recently instructed district courts that the "ratio that is relevant to assessing the reasonableness of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received." *Redman v. RadioShack*, 768 F.3d 622, 630 (7th Cir. 2014). *Redman* provides that administration and notice costs, although paid through the settlement fund, are not benefits to the class and thus not part of "what the class members received." *Id.* While Class Counsel maintain that the costs of notice and administration

[8] *See, e.g. Burkholder v. City of Ft. Wayne*, 750 F. Supp. 2d 990, 997 (N.D. Ind. 2010) (holding fee award of 33 1/3% was reasonable). *Mexico Money Transfer Litig*., 164 F. Supp. 2d 1002, 1033 (N.D. Ill. 2000), *aff'd*, 267 F.3d 743 (7th Cir. 2001) *cert. denied*, 535 U.S. 1018 (2002); *Gaskill*, *supra*, 942 F.Supp. 382 (N.D. Ill. 1996), *aff'd* 160 F.3d 361 (7th Cir. 1998) (38% of common fund for attorneys fee); *Family L.P. v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856 (N.D. Ill. 2001) (one-third of common fund for attorneys fee); *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399 (7th Cir. 2000) (25% of common fund for attorneys fee*); Nuveen Fund Lit.*, No. 94 C 360 (N.D. Ill. June 3, 1997 (one-third of fund for $8,000,000 fee); *Feldman v. Motorola, Inc.*, No. 90 C 5887 (N.D. Ill. June 28, 1995) (30% of common fund for $4,500,000 fee); *Spicer, supra*, 944 F. Supp. 1226 (N.D. Ill. 1993) (29% of common fund for $2,900,000 fee); *Goldsmith v. Technology Solutions Co.*, No. 92 C 4374, 1995 WL17009594, at *9 (N.D. Ill. Oct. 10, 1995) (one-third of fund for $1,533,333 fee).

are benefits to the class (*see Boeing*, *supra*) and that *Redman*'s instruction applies only in cases involving a fund monetized from coupon redemptions or that includes a reversionary clause—neither of which are factors in this case—Class Counsel note that their fee request is still supported by Seventh Circuit case law.

Based on recent Seventh Circuit direction, Class Counsel's fee request is reasonable relative to the total value of a class settlement, as defined as the result actually achieved for class members. *See Redman*, 768 F.3d at 629; *Pearson v. NTBY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014). *See also* Notes of Advisory Committee on Rules (2003) to Rule 23(h) ("One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members.") In this case, the value of the benefits conferred on the class members is currently ***estimated*** as follows: (i) $600,000 to satisfy claims; (ii) $162,925 to refund persons currently holding gift cards with a value under $25, to be paid outside of the Settlement Fund; (iii) an $81,437 value in waived shipping/handling fees on new gift cards requested by Class Members (Doc. # 504-2, Ex. D); (iv) as much as $1.66 million distributed via *cy pres* to an organization whose mission overlaps with the interests of the consumer Class[9]; (v) $1,525,000 attorneys' fees and costs; and (vi) additional non-monetary benefit of Amex's changed policies and procedures regarding Gift Cards. Moreover, no part of the Settlement Fund will revert to Amex. *See* Doc. 311-1, ¶ 3.3; Doc. # 539, 2-5.[10]

[9] *See* Doc. # 556. It must be noted that this amount would change drastically should the Court decide to award counsel for Intervenors and Objectors attorneys' fees.

[10] The Settlement Fund has always included the costs of notice and administration. Ex. 1, ¶¶ 3.3(a), 6.1. The Settlement Agreement does not list these costs as a "benefit" to the Class. *See id.*, ¶ 3.4 (listing the "Benefits to Be Provided to the Settlement Class and Prospective Relief.") Regardless of the number of claims, the amount spent on notice and administration, or any other factor, no money from the Settlement Fund will revert to Amex. Instead, any residual funds will be distributed as a *cy pres* award. *Id.*, ¶ 3.3(f).

The enumerated benefits of the Settlement justify the total value of the Settlement to the class. The monetary awards clearly provide direct benefit to the Class. In addition, the *cy pres* distribution is considered a valuable part of a settlement and justified as a benefit where there is no practical way to distribute the money to the class. In *Hughes v. Kore of Indiana Enterprise, Inc.*, Judge Posner explained when a *cy pres* confers a benefit on a Class:

> [When] distribution of damages to the class members would provide no meaningful relief, the best solution may be what is called (with some imprecision) a "*cy pres*" decree. Such a decree awards to a charity the money that would otherwise go to members of the class as damages, if distribution to the class is infeasible.

731 F.3d 672, 678 (7th Cir. 2013); *see also Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014) (noting that beneficiaries of *cy pres* are "entitled to receive money intended to compensate victims of consumer fraud only if it's infeasible to provide that compensation to the victims"). The practical distribution of the *cy pres* is warranted in this case given the largely anonymous nature of the Class. The Court has already recognized and acknowledged that the Class in this case is largely anonymous, given the nature of Gift Cards, which are often not used by purchasers but by anonymous third parties who are gifted the cards (Doc. # 128 at 13); *see also* Doc. # 136, ¶ 6 ("The overwhelming majority of BOL [buy on line] sales (more than 85%) are "anonymous" sales – i.e., the ultimate recipient or end user of the gift card is unknown to American Express."); (Doc. # 430 at 5) (noting "research indicates that 86.18% of American Express gift card purchasers buy the gift cards to give to others."). This fact created hurdles for the Settling Parties in providing notice and a means to distribute benefits to those not identified in any of Amex's records.

The Settling Parties initially implemented a notice plan whereby 1,279,514 households were mailed a postcard notice directing Class members to a settlement website where they could

submit claims (Doc. # 315, ¶ 9; Doc. # 387). Notice was also published in the national edition of USA Today, which had an approximate circulation of 1.7 million (Doc. # 315, ¶ 9; Doc. # 387). The notice and administration costs totaled approximately $527,580, and yielded a requested $41,510 in benefits from the 2,400 claim forms submitted (Doc. # 387; Doc. # 466-1). The Court determined that the response rate was insufficient, ordered the Settling Parties to establish a supplemental notice program, and appointed an expert in class action notification (Doc. # 387). The supplemental notice program crafted by the Settling Parties and the notice expert included direct mail, extensive publication notice, email notice, and an online media publication program (Doc. # 430 at 8). The notice expert estimated the program would reach over 70% of the estimated Settlement Class (Doc. # 449, ¶ 4)[11]. As of May 24, 2014, a total 32,571 claim forms had been submitted, requesting over $528,000 in benefits (Doc. # 504-2). The supplemental notice program cost over $1.2 million (Doc. # 556-2).

Thus, while the increased cost and effort of the supplemental notice program led to an increase in the claims rate, the claims rate is still slight compared with the estimated size of the Settlement Class.[12] It is therefore clear that due to the vast and primarily anonymous nature of the Class, no amount of additional expense and effort would provide notice sufficient to generate a high claims rate. Distributing all of the funds in the Settlement to the Class members is therefore infeasible. Under these circumstances, the *cy pres* is justified, and the Court should recognize that the *cy pres* in this case confers a benefit on consumers, including anonymous class

[11] The notice expert estimated that there are between 17.7 million and 36.9 million Settlement Class members (Doc. # 421 at 9).

[12] Approximately 70 million Amex Gift Cards were purchased during the class period (Doc. # 315 at 3). Of those 70 million cards, 14 million were subject to monthly fees and 5 million were subject to fees after failed transactions for insufficient funds (i.e., failed split-tender transactions). However, of those 5 million cards which experienced failed transactions, only 1.7 million were unable to subsequently complete a transaction (Doc. # 128 at 4).

members. *See Hughes v. Kore*, 731 F.3d at 677 ("A class action, like litigation in general, has a deterrent as well as a compensatory objective.").[13]

Finally, the Court should recognize the value of the significant non-monetary benefits Class Counsel negotiated on behalf of the Class. "[I]t is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award." Notes of Advisory Committee on Rules (2003) to Rule 23(h). *Cf. Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (cautioning in an individual case against an "undesirable emphasis" on "the importance of the recovery of damages" that might "shortchange efforts to seek effective injunctive or declaratory relief"). "Where a settlement includes substantive affirmative relief, such relief must be considered in evaluating the overall benefit to the class." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 599. *See also Redman*, 768 F.3d at 635 (discussing nonmonetary benefits of a settlement and noting, "A value must be attached to the relief obtained by the class as part of the determination of an appropriate attorneys' fee for class counsel"). Class Counsel's negotiations with Amex played a crucial role in ensuring that Amex modified its gift card policies and procedures so that Amex no longer charges customers check-

[13] Class Counsel assert that *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) is distinguishable on this point for three primary reasons. First, the Court took issue with the "reversion" or so-called "kicker" clause in the *Pearson* settlement, which purported to allow excess funds to revert to the defendant, instead of being made available for distribution to the class. *Id.* at 780. In the instant case, no funds will revert to Amex. Instead, any so-called excess funds will go towards the *cy pres* that will benefit anonymous class members. Second, the Court in *Pearson* notes that the *cy pres* doctrine "permits a benefit to be given other than to the intended beneficiary or for the intended purpose because changed circumstances make it impossible to carry out the benefactor's intent." *Id.* at 784. In *Pearson*, the Court determined that settlement funds could have been paid to the persons who purchased the defendant's allegedly defective product, and therefore could have been awarded to the intended beneficiaries, the class members. *Id.* Conversely, in the instant action, the *cy pres* award is truly and demonstrably "limited to money that can't feasibly be awarded to the intended beneficiaries, here consisting of the [anonymous] class members." *Id.* Finally, the Court criticized the parties in *Pearson* for "structur[ing] the claims process with an eye toward discouraging the filing of claims". *Id.* at 782-83. In this case, the Settling Parties worked with the Court and a notice expert to increase the claims rate, allowed claims to be processed after the deadline for submitting claims had passed, and, moreover, permitted claimants to submit Attestation Claims, which merely required claimants to attest to damages suffered to receive settlement funds. The filing of claims has not been discouraged.

issuance fees to receive unused balances on their gift cards, no longer assesses monthly fees on remaining balances, and modified its software to address the split-tender transaction problem. *See* Doc. # 136, ¶ 8 n. 4; *see also* Doc. # 117 at 8. These changes are far-reaching and prospective, and will continue to benefit consumers long after this litigation ends. The Court should take into account this affirmative relief that goes beyond the monetary recovery. *AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1035 (N.D. Ill. 2011) (awarding more in attorneys' fees than the mean and median fees awarded in cases involving comparable returns because of the significant non-monetary benefits of the settlement).

Lead Class Counsel's fee request of $1,235,000 is 30.7% of the $4,023,879 monetary value provided to the Class, without regard to the additional value provided by the non-monetary benefits achieved. Additional Class Counsel's fee request is 6.2% of the value to the Class. Given the largely anonymous class, the high risk attendant with the individual arbitration clause contained in Amex's Gift Cards, and the fact that these percentages do not include the non-monetary value to the Class, it is clear that Class Counsel's request is within the range of approval and is eminently reasonable. Moreover, the request is within the guidance set forth by the Seventh Circuit in *Pearson v. NBTY, Inc.*:

> But especially in consumer class actions, where the percentage of class members who file claims is often quite low . . . the presumption should we suggest be that attorneys' fees awarded to class counsel should not exceed a third or at most a half of the total amount of money going to class members and their counsel.

772 F.3d at 782.

In sum, the attorneys' fees requests are authorized by the parties' agreement and are within the amount authorized by law.[14]

[14] Though Class Counsel believe their fees are objectively reasonable under the relevant Seventh Circuit standard awarding counsel a percentage of a settlement fund, Lead Class Counsel's lodestar for over 7

III. Class Counsel's Fees Request is Reasonable, Appropriate and Warrants Approval.

In assessing Class Counsel's fee request, the Court should recognize the realities of the litigation, the likelihood of success on the merits and the benefits conferred upon the class, all of which have bearing on the reasonableness of a request for attorneys' fees. *See*, *e.g.*, *Synthroid Markeing Litig.*, 264 F.3d 712, 721 (7th Cir. 2013) (noting that the market rate depends "in part on [ ] the amount of work necessary to resolve the litigation"); *Isby v. Bayh*, 75 F.3d 1191, 1198-99 (7th Cir. 1996) (listing "an assessment of the likely complexity, length and expense of litigation" as factors that determine the reasonableness of a fee award); *Diary Farmers of America, Inc.*, 2015 WL 753946 at *5 (noting that facts regarding the complexity, length and expense of the litigation "buttress the reasonableness of Class Counsel's request and in no way justify a reduction of the requested one-third fee.") Given the significant amount of time and effort Class Counsel expended on the case, the significant risks attendant with the case, and the achievement gained for the Class, the Court should grant the instant motion.

A. Class Counsel's fee request is reasonable relative to the facts.

The facts of this case are detailed in the Settling Parties' 2014 *Joint Memorandum in Support of Final Approval* (Doc. # 504), and are contained in the voluminous docket. The pertinent facts include a motion to compel individual arbitration (*see* Doc. # 9) and notice of appeal to the Seventh Circuit of the Court's order denying arbitration (Doc. # 32)[15]; an alleged

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years of litigation totals $1,299,341.55. Exhibit 2 to Declaration of Jonathan B. Piper, attached as Exhibit A to *Class Counsel's Motion for Attorneys' Fees*. Similarly, Additional Class Counsel's lodestar totals $304,836.60. Declaration of Stephen B. Morris, Exhibit B thereto. Class Counsel's requested percentage is thus less than Class Counsel's lodestar, even without a multiplier. *See Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991) (remanding for reconsideration of assessing multiplier based on the risk at the outset of the litigation that there would be no recovery). Counsel note that the lodestars are reflected in summary reports but detailed billing reports are available and will be provided if the Court wishes to consider them.

[15] "[T]he Seventh Circuit recognizes that 'the higher the risk of failure the higher the contingent fee that a client would have to pay in an arm's length negotiation with the lawyer in advance of the suit.' " *Schulte*

harm to the Class found by the court to be, at most, $9,666,788 (*Kaufman v. American Express Travel Related Services Company, Inc.*, 264 F.R.D. 438, 447 (N.D. Ill. 2009) (citing Affidavit of Jerreld S. Paulson, dated February 19, 2009, ¶ 7, attached as Ex. 10 to the 2014 Doherty Declaration)); a Settlement worth over $6.75 million (*see* Doc. # 311-1); over seven years of litigation, negotiation, mediation, discovery and settlement administration; and three rounds of notice to the class members. The Class Members were apprised of these facts in the notice provided to the Class Members, the Settlement website, and in the public record. *See*, *infra*.

Class Counsel participated in seven mediation sessions before three independent mediators and the late Judge Martin C. Ashman in order to better the settlement for the Class. In 2009, Class Counsel negotiated enhancements to the original terms reached between the parties, including eliminating the claim cap, eliminating Amex's right to any credit for actual notice costs, increasing the amounts for class member refunds and attestation claims, and introducing a *cy pres* component (Doc. # 98; Doc. # 102; Doc. # 366-4, ¶ 5). In 2011, at another mediation session, Class Counsel insisted on an increase in the amount of funds set aside for class claims based on the latent service fees Amex collected since the Settlement was first entered into. *See* Doc. # 300.[16] In 2014, Class Counsel negotiated with Amex, securing Amex's waiver of verification of 50,590 claims (Doc. # 506, ¶ 20; *see also* Doc. 466; Doc. # 504 at 29). The negotiated waiver ensures that the claims filed by Class members will be maximized, and not subject to verification. Late filed claims will also be paid. *Id.*

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v. Fifth Third Bank, 805 F. Supp. 2d 560, 598 (N.D. Ill. 2011), citing *Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 746 (7th Cir. 2011).

[16] Notably, Counsel for Intervenors Goodman and Santsche refused invitations to attend mediations with Judge Cahill, lied about attending the Mikva mediation (Doc. # 361 at 3 n. 12), and admit to not negotiating at all during the Ashman mediation (Doc. # 361 at 8). For these efforts, Intervenors' counsel now request $1.5 million in fees, which is even more than the amount requested by Lead Class Counsel, who initiated the litigation and have participated in every facet of the litigation, mediation, settlement, and notice programs (Doc. # 453).

Moreover, despite the amount of time Class Counsel spent negotiating and for improvements thereto, Class Counsel's fee request has remained constant. *See* Doc. # 128 at 19; Doc. # 311-1, ¶ 4.2. In sum, as reflected in the above examples and the extensive number of Docket entries and corresponding documents filed in this case, Class Counsel's fee request is unassailably reasonable relative to the facts of this case.

B. The Class has had ample notice of the fees requests.

Information on the facts of the case has been available to the Settlement Class Members in the Notice, through the settlement website, and in the public record. *E.g.*, Doc. # 128; Doc. # 315; Doc. # 440; *see also* Doc. # 504. Class Counsel have maintained its requested fees amount throughout the entire settlement process, and the Class had notice of the fees request. Each form of notice, except the notice sent by direct mail to 1.2 million households in 2011, contained the amount Class Counsel would seek in fees. Similarly, Class Counsel's fees request was included in the earlier final approval papers (Doc. 311 at 7, 9, 15; Doc. # 356 at 13-14).

Moreover, the *basis* for Class Counsel's fees request was always provided. *E.g.*, Doc. # 311 (providing the basis for the fees as a percentage of the common fund); Doc. # 344 (providing the basis for the fees as what a lawyer would have gotten in an arm's length negotiation and as a percentage of the fund). Where, as here, the settlement creates a cash fund, the Seventh Circuit permits attorneys' fees to be calculated as a percentage of that fund, without a necessity for a lodestar analysis or lodestar cross-check. *E.g.*, *Americana Art China Co., Inc. v. Foxfire Printing and Packaging, Inc.*, 743 F.3d 243 (7th Cir. 2014); *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560 (7th Cir. 1994). Accordingly, the only requisite information for Class members is the value of the benefits to the Class and the amount of the fees requested.

IV. COSTS

In addition to its request for fees, Lead Class Counsel also seek approximately $40,000 in costs and expenses. *See* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs . . . .") Where there is an agreement between the parties, as here, Courts can give weight to those agreements, and should take into account the costs incurred by class counsel as addressed in the order appointing class counsel. Notes of Advisory Committee on Rules (2003) to Rule 23(h). It is the Court's duty to ensure that the expenses are reasonable, whereby "[i]f counsel submit bills with the level of detail that paying clients find satisfactory, a federal court should not require more." *Synthroid I,* 264 F.3d at 722. *See also Dairy Farmers of America, Inc.*, 2015 WL 753946 at *9.

V. CONCLUSION

For all these reasons, Lead Class Counsel request that the Court grant their petition for $1,235,000 in attorneys' fees and $40,000 in costs, for a total of $1,275,000, and additional Class Counsel requests this Court approve their request for fees and costs in the amount of $250,000.

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Respectfully submitted,

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