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

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

PETITION OF COUNSEL FOR INTERVENORS GOODMAN & SANTSCHE FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

INTRODUCTION

The lawyers who have represented Intervenors Goodman and Santsche ("Intervenors" or "Objectors"), namely, Greenfield & Goodman, LLC, The Law Office of Daniel Cobrinik and The Law Offices of Daniel Harris (collectively, "Objectors' Counsel"), pursuant to the leave granted by this Court on August 9, 2013 and thereafter, hereby petition the Court for an award attorneys' fees and reimbursement of expenses based upon their contribution to enhancing the settlement fund being made available to members of the Class (the "Fee Petition").[1] Objectors' Counsel respectfully petition this Court for an award of $1,500,000 in attorneys' fees and expenses, which represents slightly more than collective lodestar of $1,434,932.50 and expenses

[1] Intervenors continue to object to the fairness and reasonableness of the most recent iteration of the proposed settlement. Nevertheless, in recognition of the fact that the Court may not reject the proposed settlement, as Intervenors will request, their counsel will seek an award of fees and reimbursement of expenses to compensate them for the valuable services they have rendered to the members of the Class as will be set forth in further detail in their fee petition.

incurred of $20,249.68 in this case alone from November 1, 2008 through July 31, 2015. The award is well-justified because almost all of the value of the current proposed settlement is attributable to the efforts of Objectors' Counsel in opposing earlier, essentially worthless proposed settlements starting with the one set forth in the January 8, 2009 Memorandum of Understanding ("MOU") (Dkt. #455, Ex. A) and to this Court's decisions effectively refusing to permit them to proceed.

This fact is evident from a simple comparison of the proposed settlement set forth in the MOU *negotiated* by counsel for Defendant American Express Travel Related Services Company, Inc. ("Amex") and Class Counsel. The MOU required Amex to create a claimed $3 million settlement fund for the purported benefit of Class members. However, as the Court will recall, the settlement fund was illusory because (1) Amex was not required to send individual notice to any Class members and was only required to provide a summary form of notice by publication of advertisements clearly not calculated, as the Court noted, to be read by Class members; (2) only Class members who submitted claims arising from a select number of the claims to be released were to be paid, with a maximum limit of $40 per Class member for those Class members who lost money on multiple Amex Gift Cards and a maximum of $25 for those Class members who lost money on only one Gift Card; and (3) any unclaimed funds reverted to Amex. After attorneys' fees Amex had agreed to pay to Class Counsel and the modest expense for publishing the advertisements, it was anticipated that the bulk of the settlement fund would be returned to Amex. Thus, that initially proposed settlement would have cost Amex barely more that its promise to Class Counsel a generous fee for little substantive achievement. Objectors objected to these and other aspects of the original proposed settlement. The MOU did not even provide for a

cy pres (which was proposed by Objectors' Counsel to prevent the reversion of the bulk of the settlement fund to Amex). Given the typical infinitesimally small response rate to publication notice, particularly of the sort proposed by the settling parties, it is likely that Class members would have received next to nothing.

Thus, the terms that class counsel accepted would have provided Amex with an incredibly broad release but was virtually worthless as far as the Class was concerned.

THE ESSENCE OF THE ENTITLEMENT OF INTERVENORS' COUNSEL TO FEES AND REIMBURSEMENT OF EXPENSES

The Court of Appeals has made it clear that counsel for objectors who improve a class action settlement are entitled to fair compensation. *See In re Trans Union Corporation Privacy Litigation*, 629 F.3d 741, 743 (7th Cir. 2011). Given the risk of nonpayment that Objectors' Counsel have faced and the seven years of time they have spent litigating this matter without compensation (except for an award of discovery sanctions against Amex), a slight multiplier of over their lodestar represents reasonable compensation for their efforts.[2] *See Americana Art China Company v. Foxfire Printing and Packaging, Inc.*, 743 F.3d 243, 247, 248 (7th Cir. 2014) (approving fee award of 1.5 times lodestar to class counsel, even though fee award was more than twice money actually received by class: "The district court did not err, much less abuse its discretion, by choosing the lodestar method in this case" * * * "Because the district court in this case applied the lodestar method and not the percentage method, the total benefit rule is clearly

[2] It is anticipated that by the time of the final settlement hearing on January 22, 2016, the multiplier will be negative.

inapplicable"); *In re Southwest Airlines Voucher Litigation*, 2013 U.S. Dist. LEXIS 143146, *40 (N.D. Ill. Oct. 3, 2013) (awarding class counsel a fee of 1.5 times lodestar based on "relative lack of complexity; a success whose actual value was modest; the vindication of the public interest; and the risk of an effective defeat if class certification were denied"). Here, of course, notwithstanding the fees to which they would be otherwise entitled, Objectors' Counsel are only petitioning for what amounts to a slight multiplier of their aggregate lodestar of $1,434,932.50.

TIME AND EXPENSES OF OBJECTORS' COUNSEL

Set forth below, based upon the Declarations of Richard D. Greenfield, Daniel Cobrinik and Daniel Harris filed concurrently herewith, is a summary schedule of the services rendered by each of their firms and the lodestar value of such time expended in connection with this litigation during the period November 1, 2008 through July 31, 2015. Similarly, following such schedule is a summary of the out-of-pocket expenses incurred by each such firm in connection with this litigation.

	Time	Lodestar
Greenfield & Goodman, LLC	1,035.15 hrs.	$ 954,380.00
Law Office of Daniel Cobrinik	568.50 hrs.	$ 251,037.50
Law Offices of Daniel Harris	492.35 hrs.	$ 229,515.00
Totals	2,096.10 hrs.	$1,434,932.50

	Expenses Incurred
Greenfield & Goodman, LLC	$ 19,341.27
Law Office of Daniel Cobrinik	$ 908.41
Law Offices of Daniel Harris	——-
Totals	$ 20,249.68

Counsel wish to make it clear that Objectors continue to object to the fairness and reasonableness of the most recent iteration of the proposed settlement. Nevertheless, in recognition of the fact that the Court may not reject the proposed settlement, Objectors' Counsel seek an award of fees and reimbursement of expenses to compensate them for the valuable services they have rendered to the members of the Class. In further support of this motion, Objectors' Counsel state as follows:

ARGUMENT

I. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE

A. Legal Standards

It is well-established that attorneys whose work creates a common class action settlement fund are "entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. at 478; *see also Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007) ("this payment scheme is based on the equitable notion that those who have benefited from litigation should share in its costs.") (internal quotation marks and citations omitted); *In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992) ("Having employed their professional skills to create a cornucopia for the class, the lawyers for the class were entitled under the principles of restitution to suitable compensation for their efforts."); Fed. R. Civ. P. 23(h) (authorizing reasonable fee awards to class counsel). As pointed out above, these same principles are applicable where objectors effectively generate the fund from which attorneys' fees are to be paid. See *In re Trans Union, supra.*

Courts in the Seventh Circuit take a market-based approach in evaluating class action fee requests. See, e.g., *Americana Art China Co., Inc. v. Foxfire Printing and Packaging, Inc.,* 743 F.3d 243, 246-47 (7th Cir. 2014) ("because we always seek to replicate the market value of an attorney's services—and because the market would assign value up front—a district court that leaves the matter of fees until the end of the litigation process must set a fee by approximating the terms that would have been agreed to ex ante, had negotiations occurred.") (internal quotation marks and citations omitted); *In re Trans Union, supra* (same); *Williams v. Rohm and Haas Pension Plan*, 658 F.3d 629, 635-36 (7th Cir. 2011) (same).

Relevant considerations include, *inter alia*, the ordinary market rate for class counsel's services, fee awards in similar matters, the nature of the particular case (including the risks of non-recovery), and the amount and quality of class counsel's work. See, e.g., *In re Synthroid Marketing Litig*., 264 F.3d 712, 718 (7th Cir. 2001) ("courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time."); id. at 721 ("The market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case."); see also *Taubenfeld v. Aon Corp*., 415 F.3d 597, 600 (7th Cir. 2005) (affirming fee award based on "awards made by courts in other class actions"; "the quality of legal services rendered"; and "the contingent nature of the case"); *Williams*, 658 F.3d at 636 (7th Cir. 2011) (affirming award based on "available market evidence"; "the amount of work involved, the risks of non-payment, and the quality of representation").

Balancing these and any case-specific factors is a matter committed to the sound discretion of the trial court. See, e.g., *Americana Art*, 743 F.3d at 246 (court of appeals reviews attorney fee methodology de novo and reviews trial court's application of an accepted methodology for abuse of discretion).

B. **The Requested Fees Are Fair and Reasonable as a Percentage of the Fund**

Two approaches are commonly used in awarding class action attorneys' fees: (i) the "percentage of recovery" method, under which the Court awards a percentage of the total common settlement fund; and (ii) the "lodestar" method, under which the fee award is a function of class counsel's lodestar (*i.e.*, reasonable hourly rates multiplied by the hours devoted to the case) times a "multiplier" adjustment to account for risk, quality, and outcome. See, generally, *Pearson v. NBTY, Inc.*, No. 11 CV 7972, 2014 WL 30676, *5-6 (N.D. Ill. Jan. 3, 2014). The Court has discretion to apply either method, *see Americana Art*, 743 F.3d at 247, but because the requested fee here falls squarely within the customary range of outcomes in similar cases, the Court should reach the same conclusion regardless of the methodology used. The "percentage of recovery" method is a framework accepted by the private market and often used by courts in consumer class actions, particularly where, as here, class counsel secures an all-cash settlement fund for the benefit of the class. *See, In re ShagrinGas Co. v. BP Products*, No. 1:06-cv-03621, Dkt. No. 209 (N.D. Ill. June 24, 2010) (applying percentage methodology) (copy attached as Ex. 5); *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, Dkt. Nos. 693 and 701 (N.D. Ill. 2014) (awarding one-third percentage fee in similar antitrust class action involving $128 million in total settlements); *see generally Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) ("When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a

percentage of the fund[.]"). Here, of course, Objectors' Counsel have been the only effective "lawyers for the Class" and deserve to be compensated for their long-term and persistent efforts on behalf of the Class.

The percentage of recovery method has many advantages, including ease of administration, consistency with traditional "common fund" principles, and alignment of class/lawyer interests. *See, e.g., Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994) ("there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration"); *Blum v. Stenson*, 465 U.S. 886, 890 n.16 (1984) ("under the common fund doctrine . . . a reasonable fee is based on a percentage of the fund bestowed on the class"); *Kirchoff v. Flynn,* 786 F.2d 320, 326 (7th Cir. 1986) (contingent percentage fee "automatically aligns interests of lawyer and client, rewards exceptional success, and penalizes failure").[3]

---

th

[3] *See also* Federal Judicial Center, *Manual For Complex Litigation* § 14.121 (4 ed. 2004) ("the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases" in part because "[i]n practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation" and "creates inherent incentive to prolong the litigation"

As explained in more detail below, the fee request of Objectors' Counsel is consistent with and, indeed, well-below, market rates for comparable legal services as demonstrated by fee awards in other class actions. Furthermore, the fee sought by Objectors' Counsel (less than 25% of the settlement fund) does not even remotely compensate them for the risks of the case, the amount and quality of their work, and the success achieved on behalf of the Class, particularly where they faced already entrenched Class Counsel and Amex, who obstructed every effort to interfere with each iteration of their proposed settlements beginning with the one reflected in the MOU.

1. Under Ordinary Circumstances, a One-Third Contingent Fee is Consistent with Market Rates.

Where, as here, a proposed contingent case involves large claims against sophisticated parties such as Amex, Objectors' Counsel (as well as other experienced counsel of comparable stature) would typically be able to negotiate for (i) full reimbursement of all litigation expenses, either concurrently or from any settlement or judgment and (ii) a percentage of recovery fee in the range of 25-50%. The amount Objectors' Counsel seek (including $ 20,249.68 in out-of-pocket expenses) falls well below that range and is both standard and accepted by the market. See, e.g., Montgomery v. Aetna Plywood, Inc., 231 F.3d 399, 408 (7th Cir. 2000) (one "measure of what is reasonable is what an attorney would receive from a paying client in a similar case.").

2. A One-Third Contingent Fee is Consistent with the Market Rate Approved by Courts in Similar Cases.

"[A]ttorneys' fees from analogous class action settlements" can be used to evaluate the market rate for legal services, *Taubenfeld*, 415 F.3d at 600, and further demonstrate the reasonableness of Class Counsel's requested fee.

In fact, "[c]ourts throughout the Seventh Circuit routinely . . . conclude that a one-third contingency fee is standard" in class actions. *City of Greenville v. Syngenta Crop Prot., Inc.*, 904 F. Supp. 2d 902, 909 (S.D. Ill. 2012) (collecting cases and awarding one-third fee from $105 million settlement fund). *Accord In re ShagrinGas Co.*, No. 1:06-cv-03621, Dkt. No. 209 (N.D. Ill. June 24, 2010) (Zagel, J.) (crediting plaintiffs' evidence "that the market range for legal service in a contingency matter such as this . . . is 30-33%") (Ex. 5); *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, 1:09-cv-07666, Dkt. Nos. 693, 697, 697-1 and 701 (N.D. Ill. 2014) (awarding one-third fee from settlements totaling $128 million) (Ex. 2); *Gaskill*, 160 F.3d at 364 (7th Cir. 1998) (affirming 38% fee award); *cf. Pearson*, 2014 WL 30676, at *6 (noting that 25% is the benchmark but special risks and circumstances can justify a higher award). *See also Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 598 (N.D. Ill. 2011) ("common-fund cases from within the Seventh Circuit show that an award of 33.3% of the settlement fund is within the reasonable range."); *Retsky Family Ltd. Partnership v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) (in a complex class action, "[a] customary contingency fee would range from 33 1/3% to 40%"); *Goldsmith v. Tech. Solutions Co.*, 92 C 4374, 1995 WL 17009594, at *8 (N.D. Ill. Oct. 10, 1995) ("courts in this District commonly award attorneys' fees equal to approximately one-third or more of the recovery"); *Heekin v. Anthem, Inc.*, No. 1:05-CV-01908-TWP-TAB, 2012 WL 5878032 (S.D. Ind. Nov. 20, 2012) (reviewing Seventh Circuit authority and awarding one-third fee from $90 million settlement fund).

This authority confirms that a one-third fee award would be within the range of reasonableness in class litigation, and less than 25% of the settlement fund, as actually sought by Objectors' Counsel, is bell-below such a "yardstick." The entitlement of Objectors' Counsel is particularly justified given the case-specific risks they have faced as described below.

3. The Contingent Fee Sought by Objectors' Counsel is Justified by the Risks of the Litigation.

The Seventh Circuit has emphasized that fee awards must be evaluated "in light of the risk of nonpayment," *Synthroid*, 264 F.3d at 718, and that "a higher risk of loss does argue for a higher fee." *In re Trans Union*, 629 F.3d at 746. *See also Florin*, 34 F.3d at 565 ("a court must assess the riskiness of the litigation by measuring the probability of success of this type of case *at the outset* of the litigation.") (emphasis in original). Here, of course, "the outset" was, in practical terms, when Objectors first became involved in this already-settled litigation and thereafter sought intervention.

The risk here was significant. As indicated above, there was a settlement in place as reflected by the MOU. Since intervention was approved by the Court, Objectors and their counsel were "stonewalled" at every turn, whether in opposing the first purported notice to Class members, whether seeking discovery as to the legitimacy of the supposedly "negotiated" settlements and otherwise. Even though the Court remained skeptical of the various notice and settlement proposals proferred by the settling parties, it nevertheless left Class Counsel entrenched in its position as the only lawyers with whom Amex would "negotiate" and left in place an excessively broad definition of the Class with respect to the claims to be released. While, ultimately, after persistent criticism of the notice methodology proposed by the settling parties, the Court agreed

with Objectors' Counsel and appointed its own expert, Todd Hilsee, notice is again being provided to Class members and there is a new settlement proposal "on the table," Objectors' Counsel continue to face continuing obstacles in their efforts to improve the benefits to the Class.

Given these obstacles, the *ex ante* risk of the case justifies a substantial fee award to compensate Objectors' Counsel for pursuing the claims in the first instance, litigating effectively for seven years without compensation, financing substantial out-of-pocket litigation expenses with no guarantee of reimbursement, and ultimately achieving a substantial improvement over the benefits that were originally destined to be received by Class members pursuant to the MOU and later settlement iterations. *See, e.g., Syngenta*, 904 F. Supp. 2d at 909 ("Given the extreme difficulty presented by this matter and the attendant risk in investing years of attorney time carrying millions of dollars in litigation expenses with no guarantee of recovery, a substantial risk multiplier is warranted" and a "fee award of one-third of the fund is thus appropriate[.]").

4. The Requested Fee Is Supported by the Amount and Quality of the Work and the Results Achieved by Objectors' Counsel for the Benefit of the Class.

The Court should further consider the amount and quality of the work by Objectors' Counsel in its fee analysis, *Synthroid*, 264 F.3d at 721, as well as "the litigation's ultimate degree of success." *Americana Art*, 743 F.3d at 247 (court is permitted to consider success of the case as another factor supporting fee award). *Accord In re Brand Name Prescription Drugs*, 2000 WL 204112, at *2 ("There is no question that the results achieved by class counsel were extraordinary and that they are entitled to a substantial award."). Both factors fully support the fee Objectors' Counsel are seeking.

A large volume of work supports the requested fee. Reaching this point has required almost seven years and more than 2,096 hours of time expended by Objectors' Counsel to July 31, 2015 to reach the point that this still inadequate settlement is reaching the Court for consideration as to final approval. The Court is well aware of the many docket entries that comprise only the most public aspects of the litigation.

The quality of the services of Objectors' Counsel and the outcome achieved to date also supports the fee they seek. On each and every issue addressed by Objectors' Counsel, they have argued their case professionally and skillfully.

Objectors' Counsel respectfully submit that their representation of Objectors (and indeed, all members of the Class) has been vigorous, efficient and effective, and that the facts, arguments and credibility they developed over the almost seven years before this Court played the central role in substantially improving the settlements for the benefit of the Class. As such, the quality of the representation of the interests of the Class by Objectors' Counsel supports the requested fee.

Finally, Objectors' Counsel believe the results speak for themselves. *Id.* at *5 ("The result achieved is the clearest reflection of petitioners' skill and expertise."). Although the presently proposed settlement still falls far short of one which Objectors believe should be approved, it represents a very substantial improvement of the one envisioned by the settling parties in their first MOU, where the bulk of the settlement fund would either revert to Amex and be paid to Class Counsel. Under such proposal, Class members would have received, at most, a few thousand dollars from the first settlement which Objectors opposed.

Accordingly, for all the reasons stated herein, Objectors' Counsel have delivered to date a significant improvement in the common fund benefit for Class members, which increase would not have occurred but for the services rendered .

C. **Lodestar/Multiplier Analysis Supports the Requested Fee Award**

The Court may also "cross-check a percentage of recovery fee award with the lodestar method" to confirm its reasonableness. *Pearson*, 2014 WL 30676, at *6 (citing *Synthroid*, 264 F. 3d at 718). As explained above, the lodestar method involves multiplying the hours devoted to the case by the relevant professional's hourly rate, then applying a case-specific "multiplier" to compensate counsel for risk, outcome, and quality of work. *Id*. The hourly rates on which this calculation is based are the same rates charged to paying clients for similar work. *See Jeffboat, LLC v. Dir., Office of Workers' Comp. Programs*, 553 F.3d 487, 489-90 (7th Cir. 2009) (recognizing "presumption that an hourly rate is reasonable where the attorney demonstrates that the hourly rate she has requested is in line with what she charges other clients for similar work."). Here, of course, as reflected in the accompanying Declarations of Objectors' Counsel, the hourly rates charged, by Messrs. Greenfield and Cobrinik, are the same charged to clients in non-contingent matters.

When using the lodestar method, a multiplier is generally "mandated" in successful contingent cases in which counsel bore the risk of loss. *See, e.g., Florin*, 34 F.3d at 565; *Continental*, 962 F.2d at 659 ("the need for such an adjustment is particularly acute in class action suits"); *Florin II*, 60 F.3d 1245, 1247 (7th Cir. 1995) ("court[s] must also be careful to sustain the incentive for attorneys to continue to represent such clients on an 'inescapably contingent' basis");

Skelton v. Gen. Motors Corp., 860 F.2d 250, 253 (7th Cir. 1988) ("the higher the risk . . . the greater the multiplier necessary to compensate plaintiff's attorney for bringing the action").

Typical multipliers range from 1-4 depending on the facts. *See, e.g., Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991) (multipliers from 1-4 have been approved); *Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at * 4 (awarding one-third fee and "multiplier of 1.9, clearly within, but in the bottom half of, the range of typical lodestar multipliers"); *Skelaxin Antitrust Litig.,* 2014 WL 2946459, at *2 (collecting cases and awarding "multiplier between 2.1 and 2.5," which is "reasonable in light of what has been routinely accepted as fair and reasonable in complex matters such as this one"); *Flonase Antitrust Litig.*, 951 F. Supp. 2d at 750-51 ([m]ultipliers of 1-4 are common in antitrust cases, and awarding one- third fee and 2.99 multiplier); *Newberg on Class Actions* §14.6 (4ed. 2009) ("multiples ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied."). Based upon the unique circumstances of this case, due to the relatively modest amount of the settlement fund, Objectors' Counsel seek what amounts to a negative multiplier, which, if awarded by the Court, will result in their being paid far less than their hourly charges for the services rendered.

The Declarations of Objectors' Counsel set forth the respective current billing rates of the professionals who have rendered services. The use of current billing rates is permitted under Seventh Circuit authority to account for the delay of payment in a protracted case (as distinct from the risk of loss, which is compensated by the "multiplier"). *Smith v. Vill. of Maywood*, 17 F. 3d 219, 221 (7th Cir. 1994). The Court has discretion to rely on either current or historical rates in its lodestar analysis, *Mather v. Board of Trustees of Southern Illinois University*, 317 F.3d 738, 744-45 (7th Cir. 2003), but Objectors' Counsel respectfully submit that, after almost seven years

of litigation, the use of current rates is appropriate to account for the passage of time without payment. *See, e.g., In re Southwest Airlines Voucher Litig.*, 11-cv-8176, 2014 WL 2809016, at *5 n.2 (N.D. Ill. June 20, 2014) (using current rates to account for payment delay and awarding multiplier on current rates to compensate for risk); *Smith*, 17 F.3d at 221 (reversing fee award for failure to compensate for delay in payment). Regardless, the requested multiplier is reasonable under either approach.

Whether based on current or historical rates, the fee being sought by Objectors' Counsel is well within the range of reasonableness and would compensate them, however modestly, for bearing the significant litigation risks described above. Success did not come easy in this matter and still remains elusive. After almost seven years, substantial out-of-pocket expenses, substantial professional time, material risk at every step, and substantial results for the members of the Class, Objectors' Counsel believe that an award of $1,500,000 including all out-of-pocket expenses, is fair and reasonable, particularly since Class Counsel may also be awarded fees from the settlement fund.

THE COURT'S ALLOCATION OF FEES BETWEEN CLASS COUNSEL AND OBJECTORS' COUNSEL

This Court has both the right and responsibility to ensure that attorneys fees in a class action are allocated fairly among counsel, based on the benefits which the various counsel have conferred on the Class. *See Cook v. Niedert,* 142 F.3d 1004, 1011 (7th Cir.1998) (when allocating attorneys' fees out of a class action common fund "'court becomes the fiduciary for the fund's beneficiaries'").

The fact that Amex has only agreed to pay fees to class counsel is irrelevant. In class actions, it is the Court, and not the defendant, who determines how the settlement *res* is to be allo-

cated. As this Court has said previously: **"the court, and not American Express or the *Kaufman* plaintiffs, awards attorneys' fees."** *Kaufman v. American Exp. Travel Related Services Co., Inc.*, 264 F.R.D. 438, 443 n.2 (N.D. Ill.2009)(emphasis added).

Similarly, Objectors' forthcoming objections to the proposed settlement is not a valid reason to deny fees to their counsel. Because the Court is acting as a fiduciary for Class members, the test for awarding fees out of a class action common fund is the benefit conferred on Class members, not cooperativeness with the defendant. Limiting fees to those who support a settlement would be inconsistent with this principle. Indeed, the Court of Appeals for the Ninth Circuit recently rejected a class action settlement because class counsel conditioned incentive awards to class representatives on their support of settlement approval. *See Radcliffe v. Experian Information Solutions, Inc.*, 715 F.3d 1157 (9th Cir.2013). The Court of Appeals held that placing such a condition on the award of monies was inconsistent with fiduciary responsibilities to class members. *See id*. at 1164.

Because the services of Objectors' Counsel have brought about material improvements to the still inadequate and unfair settlement, they should be compensated for their efforts should the settlement be approved. As the Court of Appeals held in *In Re Trans Union Corporation*, *supra*, "given the role of such interlopers in preventing cozy deals that favor class lawyers and defendants at the expense of class members, their requests for fees must not be slighted." *Id*. at 743. [emphasis added]

In the case at bar, as pointed out above, the substantial and persistent efforts of Objectors' Counsel (sustained by rulings of this Court) have greatly improved the proposed settlement, despite its continuing infirmities, by comparing it with not only the initial proposed settlement re-

flected by the MOU but each unsuccessful iteration thereafter. None of these improvements would likely have taken place but for the aggressive litigation on behalf of the Class by Objectors' Counsel.

After some improvements generated by Objectors' persistent efforts, a modified settlement, including the elimination of the reversion to Amex and a replacement with a *cy pres* alternative, was forthcoming and was presented by the settling parties for consideration. In the face of Objectors' continued opposition, including continued objection to the form and manner of notice, the Court denied its approval.

The current proposed settlement (which still does not warrant the Court's approval) is certainly more favorable for the Class, thanks largely to the efforts of Counsel' Counsel. There is now a settlement fund with a claimed value of more than $6 million, although the exact amount of the settlement fund remains elusive. Those Class members who can now be individually identified are to receive individual notice as well as other means of notice and improvements to the claims process so that at least some Class members will be able to submit individual claims and actually get paid. In addition, due to the efforts of Objectors' Counsel (which led to the Court's retention of its own expert, Todd B. Hilsee, as to notice and claims procedures), and Orders of this Court, there will be new and substantially improved procedures so that more Class members have the opportunity to learn of the settlement and will be more likely to submit claims for a share of the fund created.[4] Moreover, unclaimed settlement funds will go to charity rather than

[4] Objectors have previously objected to various aspects of the notice program and will continue to assert such objections at the appropriate time.

revert to Amex. Lastly, Amex has committed to paying up to $1,529,000 in counsel fees (to be sought by Class Counsel) as part of the settlement fund, subject to Court approval.

As noted above, the decision of the Seventh Circuit, *In Re Trans Union, supra*, discusses the allocation of fees in a class action as between class counsel and objectors' counsel where the objectors' counsel caused an increase in the settlement *res*. In *Trans Union*, a class action settlement was improved following an objection. The district court determined under the circumstances of that case, the increased value was the joint product of class counsel and objectors' counsel and that each was entitled to 50% of the attorneys' fees attributable to the increase. *See id*. at 747. The Court of Appeals said this allocation was fair and indicated the importance of providing fair compensation to counsel for objectors. *See id*. Here, there has never been anything placed in the record by Class Counsel, at least to date, evidencing what they did with respect to any of the various proposed settlements that the Court was asked to consider…other than making sure that the provision for them to be paid substantial fees. Indeed, from the original MOU, where Class members would have received virtually nothing and thereafter, notwithstanding the Court's admonition that it would determine Class Counsel's fees, if any, each proposed settlement provided for them to be paid.

In this case, the increase in value of the proposed settlement -- from virtually nothing to an apparent value of more than $6 million -- is a product of joint action by Objectors' Counsel and Class Counsel, although it can fairly be argued the entire improvement in the value of the present settlement over and above the original, near worthless one, was only due to the sustained efforts of Objectors' Counsel.

Since Objectors' Counsel deserve substantial credit for the value of the proposed settlement, they should be awarded the bulk of any fees awarded by the Court for the particularized reasons set forth below.

OBJECTORS AND THEIR COUNSEL ARE RESPONSIBLE FOR ALL VIRTUALLY ALL IMPROVEMENTS TO THE PROPOSED SETTLEMENT

1. The Original Settlement Agreement

As indicated above, on January 8, 2009, Class Counsel and Amex signed the MOU, which set forth the terms of a then-proposed settlement of this nationwide class action. Six months later, on or about July 12, 2009, Plaintiffs and Amex signed a settlement agreement based on the MOU.

This Original Settlement Agreement provided for a settlement fund capped at $3 million. From this fund, Amex agreed to pay attorneys' fees and costs to Class Counsel in the amount of $1,278,000, and to pay additional incentive awards to multiple Plaintiffs. Amex was permitted to deduct up to $650,000 more from this settlement fund as reimbursement of its administrative and notice expenses. In fact, given the minimal publication notice that was to be provided to members of the Class, most of such money would have reverted to Amex.

Thus, after paying for the nominal publication notice and whatever amount the Court approved for the fees of Class Counsel, the settlement fund would have more than half remaining to pay actual claims by Class members, an amount which the settling parties had to have known would be minimal at best due to the inadequate notice procedures.[5]

---

[5] As the Court noted in its December 22, 2009 Memorandum Opinion & Order, notice was to be published in not-so-major metropolitan areas (e.g. Abilene, Texas, Jacksonville, North Carolina and Greenville, North Carolina) and not in much larger metropolitan areas (e.g. Orlando, Pittsburgh and Columbus). *See Kaufman v. American Exp. Travel Related Services Co., Inc.*, 264 F.R.D. 438, 446, fn. 7 (N.D. Ill.2009).

If anything, the Original Settlement Agreement gave Amex the right to continue the very wrongful conduct which gave rise to this action: indeed, it allowed Amex to continue imposing its $2 "service fees" against Class members forever, and to continue collecting up front charges from Gift Card buyers who never suspected that some of their Gift Card balances would likely revert to Amex. The Original Settlement Agreement never addressed the multiple other claims of Class members. Class Counsel was prepared to release these very substantial and never quantified claims for no consideration whatsoever.

2. **First Amended Settlement Agreement**

After Objectors objected to the Original Settlement Agreement, Amex made some improvements to its offer and the settling parties asked the Court to approve a revised settlement. Inasmuch as Class Counsel had no objections to the Original Settlement Agreement, the only motive which Amex could have had for improving the Original Settlement Agreement was to avoid the Objectors' objections at a minimal cost.

Like the Original Settlement Agreement, the First Amended Settlement Agreement also had a $3 million cap and provided for payment of $1,278,000 in attorneys' fees and costs to Class Counsel and additional incentive awards to be paid to the individual Plaintiffs. Like the Original Settlement Agreement, the First Amended Settlement Agreement allowed Amex to deduct up to $650,000 as a reimbursement of notice and administrative costs. The primary change from the Original Settlement Agreement was some minor improvements to the notice and required that the first $200,000 in unclaimed funds be paid out to a *cy pres*.[6]

[6] Any unclaimed funds that remained after Amex was reimbursed $650,000 for notice and claims administration would also go to a *cy pres*.

Once again, Class Counsel had no problems with Amex's proposed revision to the settlement. Objectors, however, continued to challenge the proposed settlement and notice procedures as inadequate and potentially collusive. According to the testimony of Amex employee Jerrold S. Paulson, there might be 15 million Class members who suffered an average loss of $6.30 each in unwarranted $2 fees imposed monthly by Amex, **exclusive of the massive and far more significant additional damages for which there was no consideration whatsoever in the proposed settlement**. The average individual recovery under the First Amended Settlement Agreement was less than Sixteen Cents ($.16) per Class member, or approximately 3% of the potential claims of Class members, based solely on one of the broad panoply of claims that were to be released. Amex would keep approximately 97% of its improper $2 per month charged by it to Gift Card holders, plus untold millions of additional and unwarranted charges and other damages incurred, which Class members paid when they purchased and/or used their Gift Cards. Based on affidavits submitted by Amex employees, Objectors estimated that if solely the Class $2 per month claims had any merit – and Amex has never adduced any evidence to the contrary – those claims would have a litigation value approaching $100 million with perhaps hundreds of millions of dollars of additional damages flowing from the purchase and use of Amex Gift Cards.

3. Objectors' Efforts

While Class Counsel agreed to whatever Amex offered, Objectors' Counsel challenged the same major shortcomings in the First Amended Settlement Agreement that they found in the Original Settlement Agreement, and pushed to improve the settlement. Notwithstanding the far greater advocacy of Objectors' Counsel in the ultimate interests of the members of the Class, and

probably because of it, Amex refused to negotiate with Objuectors' Counsel to further improve the settlement.

In response to Intervenors' objections regarding the paucity of the First Amended Settlement Agreement, the Court held "the relatively high attorneys' fees, the unchanged amount of the Settlement Fund, unsupported awards to named plaintiffs, and American Express's right to reimbursement from the Settlement Fund are all common indicia of collusion between a class action defendant and the named parties." *Kaufman v. American Exp. Travel Related Services Co., Inc.*, 264 F.R.D. 438, 449 (N.D. Ill.2009).

In response to Objectors' concerns about how the First Amended Settlement was reached, the Court noted in the same Memorandum Opinion & Order: "More troublingly, [Objectors] point out that the Settlement Fund was agreed to before any discovery had been taken, and the amount has not changed since the close of discovery. This is disconcerting given the inherent potential for collusion in class actions." *Id*. at 447.

Objectors also challenged the incentive awards to the named plaintiffs. The Court addressed the objection as follows:

> "Here, plaintiffs have brought suits that could lead to the recovery of small and hard-to-recover fees. . . . the court is unsure of the extent of the *Kaufman, Jarratt,* and *Rudd* plaintiffs' involvement in the litigation itself. The court is particularly doubtful that all four plaintiffs for whom awards are sought have merited such awards by their contributions to the prosecution of this case or to its resolution. After all, there is no indication that any plaintiff has even been deposed.
>
> Moreover, these awards are disproportionate to the likely recovery of other members of the Class. The $2,500 which plaintiffs Kaufman and Jarratt request is 125 times greater that the $20 maximum that any similar Class member could recover based on one Gift Card."

Id. at 448.

In response to Intervenors' objections concerning the manner of notice in small market newspapers, the Court noted concern "that the parties propose publication of the Notice in some not-so-major metropolitan areas . . . while omitting other much larger metropolitan areas . . . without justification." *Id* at 446, fn. 7. The Court went on to note that the parties' representations concerning these publications "call into question the accuracy of the parties' data." *Id*.

Following the Court's December 22, 2009 Memorandum Opinion and Order, it became apparent that Amex had some customer-identifying information in its possession which had been concealed from the Court and Intervenors' counsel. Further, it was revealed that Amex purged the mass of customer-identifying data, long after the commencement of the litigation through at least 2010.[7] Amex nevertheless continued to argue that individual notice was unreasonable and prohibitively expensive, notwithstanding its easy access to the e-mail addresses of Class members that it continued to possess, a material fact also concealed by its counsel from the Court and Intervenors' counsel. Further, Amex and Class Counsel made the preposterous argument that individual notice would be ineffective to notify the end users of the **gift cards** when the release also covered the claims of purchasers. Intervenors alone argued that personal notice was required, to the extent feasible, pursuant to Rule 23 of the Federal Rules of Civil Procedure while "the *Kaufman* plaintiffs appear[ed] to acquiesce to American Express's desire not to provide in-

[7] This fact was later verified by Mr. Hilsee as to massive numbers of e-mail addresses that Amex disingenuously claimed did not exist. Amex further claimed that the information it "purged" was not, in fact, eliminated, but made no effort to utilize such data in the notice process. Indeed, Class Counsel appeared to have no interest in notice to the members of the Class and went along with whatever Amex said and proposed. Until the existence of substantial customer-identifying data was brought to the surface by Objectors' counsel and Mr. Hilsee, counsel for Amex withheld its existence from the Court. While the Court initially believed that there had been no spoliation of Class member identifying data based upon the information available at the time, Mr. Hilsee's exposed Amex's "hide the ball" strategy.

dividual notice to Class Members." *Kaufman v. American Exp. Travel Related Services Co., Inc.*, 2010 WL 3365921,*7 (N.D.Ill. August 9, 2010)[8]

On August 19, 2010 – in response solely to Intervenors' objections -- this Court found that Amex was not excused from providing individual notice. It held: "With respect to the information that American Express has deleted … the court may consider imposing a remedy in any finding regarding the fairness of the settlement." *Kaufman*, 2010 WL 3365921 at *5 (N.D.Ill. August 9, 2010). The Court also ruled that Amex was not entitled to self-reimbursement from the Settlement Fund for costs associated with notice and claims administration. *See id.* at *7.

After the Court's Memorandum Opinion and Order of August 19, 2010, Intervenors sought to discover information concerning the customer identifying information that Amex had acknowledged it "purged." On January 14, 2011, the Court issued an Order sanctioning Amex for failing to respond to legitimate discovery requests concerning the possibility of giving individual notice to Class members. The Court recognized that Amex had not even attempted to comply with its discovery obligations, noting that Amex "does not contend that it has produced all documents that are responsive to Intervenors' requests. Rather, Amex argued that the Siebert affidavit and deposition developed the record enough to determine whether individual notice was required and that it did not spoil evidence." January 14, 2011 Order, p. 4.

Plaintiffs did not argue that Amex should have to comply with its discovery obligations, even though the interests of all Class members would obviously be served by such disclosure.

---

[8] By this point, it became obvious to Intervenors' counsel that Amex had been destroying or concealing its possession of customer-identifying information from the outset of the litigation at least through early 2010. It only came out following prodding by Intervenors' Counsel and Mr. Hilsee, that Amex had retained customer e-mail addresses and that individual notice to Class members would have been a relatively simple and inexpensive exercise.

Only Intervenors pursued this line of inquiry. Thereafter, in the face of Intervenors' continuing discovery efforts, the parties abandoned their proposed settlement and asked the Court to refer the matter to mediation under the auspices of Magistrate Judge Ashman.

4. **Second Amended Settlement Agreement**

In May 2011, Judge Ashman conducted a settlement conference. Intervenors' counsel personally appeared at the conference and, while their objections to the settlement were not resolved, the settlement conference did result in an improved proposal. Not surprisingly, Amex's counsel refused to negotiate with Intervenors' counsel with respect to any of the issues that had been previously raised or otherwise.

The Second Amended Settlement Agreement provided for a settlement fund of $6,753,269.50, including attorneys' fees for Class Counsel and incentive awards, all of which totaled $1,533,000. *See* Plaintiffs' Motion for Final Approval of Class Action Settlement, Dkt. #356, p. 5,13 (January 26, 2012). All notice and administrative claims were to be paid from the settlement fund. Unlike the First Amended Settlement Agreement, all unclaimed funds in the settlement fund were to be paid to a *cy pres,* thanks to Intervenors' previous input.[9] The total $6,753,269.50 stated value of that proposed settlement was far better than the Original Settlement Agreement, which would have provided essentially nothing for Class members in exchange for a broad release of their rights. The improvement in real value of the settlement is more than $6 million; even the nominal value of this settlement is more than double the nominal value of the settlement originally proposed to this Court.

---

[9] Although Judge Mikva submitted a Declaration regarding the *cy pres* proposal, he was unaware of its origin with Intervenors' Counsel, made shortly before the mediation session had begun.

CONCLUSION

For the reasons set forth above, should the Court approve the proposed settlement as fair and reasonable, it should award attorneys fees to Objectors' Counsel commensurate with their contributions to date including, *inter alia*, substantially improving the value of the settlement and improving Class notice from what was provided in the Original Settlement Agreement and the First Amended Settlement Agreement, and to Intervenors' Counsel such other and further relief as this Court deems just and proper. Objectors' Counsel also request that the Court hear this motion at the final approval hearing presently scheduled for January 22, 2016.

Date: August 12, 2015

Respectfully submitted by:

GREENFIELD & GOODMAN, LLC
By:__/s/Richard D. Greenfield_____
Richard D. Greenfield
250 Hudson Street, 8th Floor
New York, NY 10013
917-495-4446

THE LAW OFFICES OF DANIEL HARRIS
Daniel Harris
Anthony Valach
150 N. Wacker Drive, Suite 3000
Chicago, IL 60606
312-960-1802

LAW OFFICE OF DANIEL COBRINIK
(Admitted *Pro Hac Vice*)
276 Fifth Avenue Suite 405
New York, New York 10001
212-725-6888

Objectors' Counsel

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, together with the contemporaneously filed Declarations of Richard D. Greenfield, Daniel Cobrinik, Daniel Harris and Anthony Valach have been served upon all counsel of record by and through the Court's ECF system.

August 12, 2015 /s/Richard D. Greenfield

CERTIFICATE OF SERVICE

I, Anthony P. Valach, hereby certify that on this 3rd day of October 2013, a true and correct copy of the **MOTION BY INTERVENORS' COUNSEL FOR AN AWARD OF ATTORNEYS' FEES** was served, via the court's electronic filing system and email, upon counsel of record.

/s/ Anthony P. Valach
Anthony P. Valach