UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DAVID KARDONICK, JOHN DAVID, and MICHAEL CLEMINS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

JPMORGAN CHASE & CO. and CHASE BANK USA, N.A.

C. A. No. 1-10-cv-23235-WMH

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT[1]

Plaintiffs David Kardonick, John David, and Michael Clemins ("Plaintiffs") respectfully submit this memorandum of law in support of the joint motion for preliminary approval of the proposed settlement (the "Settlement") memorialized in the Stipulation and Agreement of Class Action Settlement (the "Stipulation") being contemporaneously filed herewith.

I. INTRODUCTION

Plaintiffs have reached a Settlement with JPMorgan Chase & Co. ("JPMorgan") and Chase Bank USA, N.A. (together with its predecessor banks "Chase") (collectively JPMorgan and Chase are referred to as "Defendants" or the "Chase Defendants") in this class action (the "Litigation") and now respectfully seek an order from the Court: (1) granting preliminary approval to the Settlement; (2) conditionally certifying, for settlement purposes only, a Settlement Class, as defined herein; (3) staying all obligations in the Litigation to file responsive

[1]Although Defendants join Plaintiffs in requesting that this Court preliminarily approve the proposed class action settlement, the Defendants do not take a position on the facts or arguments set forth herein. This memorandum is filed solely by Plaintiffs for the benefit of the Court.

pleadings, including responses to motions to dismiss, as well as any litigation involving the Released Claims by any member of the Settlement Class pending final approval of the Settlement; (4) directing that notice of the Settlement be given to the Class in the proposed form and manner, and (5) scheduling a hearing before the Court to determine whether the proposed Settlement should be finally approved. As detailed herein and in the Stipulation, the Settlement provides significant and material benefits to the Class and was reached only after extensive investigation and research and intensive arm's length negotiations between experienced and informed counsel on both sides. Accordingly, Plaintiffs respectfully submit that the Court should preliminarily approve the terms and conditions of the Settlement and provide for notice to the Class.

II. OVERVIEW OF THE LITIGATION

As set forth in the Stipulation, the following three class actions were filed against Defendants beginning on or about September 8, 2010:

(1) *Kardonick v. JPMorgan Chase & Co., et al.*, No. 1:10-cv-23235-WMH, Southern District of Florida;

(2) *David v. JPMorgan Chase & Co., et al.*, No. 4-10-cv-1415, Eastern District of Arkansas; and

(3) *Clemins v. JPMorgan Chase & Co., et al.*, No. 2:10-cv-00949-PJG, Eastern District of Wisconsin.

Each of these actions (collectively referred to as the "Related Actions") was predicated on similar facts and each contained allegations that Chase engaged in breaches of contract, breaches of an implied covenant, and violations of the unfair and deceptive acts and practices

statutes of various states, among other matters, in connection with marketing and selling debt cancellation and suspension products known as "Chase Payment Protector," "Payment Protection," and other monikers offering similar coverage.

The Chase Defendants filed a motion to dismiss in *Kardonick v. JPMorgan Chase & Co., et al.*, No. 1:10-cv-23235-WMH, Southern District of Florida. In their motion to dismiss, Defendants argue that Plaintiff Kardonick's state consumer protection claims are not actionable and that Plaintiff Kardonick's other common law claims should be dismissed for failure to sufficiently identify the provision of the contract allegedly breached. Defendants further argue that Plaintiff Kardonick's unconscionability claim is barred by the statute of limitations. Plaintiffs anticipate that similar motions would have been filed by Chase in the other Related Actions in the absence of the Settlement.

On November 10 and 11, 2010, the parties engaged in a two-day mediation, facilitated by a reputable and skilled mediator, Jonathan B. Marks. During the mediation process, counsel for the Chase Defendants provided Plaintiffs' Counsel access to non-public information and documents regarding the companies and their Payment Protection products. This exchange, coupled with the extensive investigation and research already conducted by Plaintiffs' Counsel, allowed Plaintiffs' Counsel to fully assess the strengths and weakness of both Plaintiffs' claims and the potential defenses available to Defendants. Against this background and with the aid of an experienced mediator, the parties were able to effectively engage in informed, arm's length negotiations. In this regard, the negotiations involved experienced counsel on both sides who vigorously represented their respective parties' position. On the last day of mediation, the parties reached an agreement in principle and executed a Settlement Term Sheet outlining the

Settlement. Over the next two weeks, the parties continued negotiations and worked in good faith to use the Settlement Term Sheet to develop written, mutually acceptable settlement papers. Subsequently, on November 22 and 23, 2010, the initial mediation session was followed by a second meeting. On those dates, counsel for all parties met in Washington D.C., worked to finalize the settlement papers, which led to the execution of the Stipulation dated December 20, 2010.

Moreover, to confirm the reasonableness of the Settlement's terms and conditions, Plaintiffs' Counsel engaged in confirmatory discovery. This process, which began after the parties executed the Settlement Term Sheet, included reviewing and analyzing thousands of pages of internal documents from Defendants and interviewing Chase representatives, namely the product manager of the Payment Protection program.

In accord with the terms of the Settlement, Plaintiffs are submitting herewith an Amended Complaint on behalf of the following class (the "Class"):

> All Chase credit card holders who were enrolled or billed by Chase for a Payment Protection Product[2] at any time between September 1, 2004 and November 11, 2010. Excluded from the class are all Chase cardholders whose Chase Credit Card Accounts that were enrolled or billed for a Payment Protection Product were discharged in bankruptcy.

The Amended Complaint asserts that Chase engaged in breaches of contract, breaches of implied covenant, and violations of the Truth in Lending Act of 1968, Regulation Z, and unfair and deceptive acts and practices statutes of various states, among other matters, in connection with marketing and selling Payment Protection Products.

[2]"Payment Protection Product" means the debt cancellation and suspension products offered by Chase, including Chase Payment Protector, Chase Payment Advantage, Account Protection Plan, Total Protection Plan, Account Security Plan, and Chase business card and private label account debt suspension or cancellation products. "Payment Protection Product" does not include a non-credit product offered by a Chase affiliate.

III. THE PROPOSED SETTLEMENT

In settlement of all claims in the Litigation, the Chase Defendants have agreed to create a Twenty Million Dollar ($20,00,000.00) fund to be divided, after deduction of court-awarded attorneys' fees and expenses and notice and administration costs, among Authorized Claimants, as defined in ¶II(e) of the Stipulation. Additionally, certain cardholders whose accounts were charged off will receive a credit to their balance, a significant additional value. In exchange for the consideration from the Defendants, the Litigation will be dismissed with prejudice upon final approval of the Settlement, and the Plaintiffs and Settlement Class Members shall discharge the "Released Parties," as defined in ¶II(k)(k) of the Stipulation, of all "Released Claims," as defined in ¶II(j)(j) of the Stipulation.

IV. ARGUMENT

A. Applicable Legal Standards

Rule 23(e) of the Federal Rules of Civil Procedure ("FRCP") requires judicial approval of the compromise of claims brought on a class basis. The procedure for judicial approval of a proposed class action settlement is divided into a two-step process. "Preliminary approval of a proposed settlement is the first [step]." *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). At this level, "the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing." *Manual for Complex Litigation*, § 13.14, at 173 (Federal Judicial Center, 2004); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("The Court's function now is to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing.") (citation omitted). "If the district court finds a settlement proposal 'within the

range of possible approval,' it then proceeds to the second step in the review process, the fairness hearing." *Armstrong v. Board of Sch. Dirs.*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998).[3]

At this juncture, Plaintiffs request only that the Court grant preliminary approval of the proposed Settlement and provide for notice to the Class. "Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *In re NASDAQ*, 176 F.R.D. at 102. Here, preliminary approval should be granted because the proposed Settlement and the proposed form and program of providing notice satisfy the requirements for preliminary approval in all respects.

B. <u>The Proposed Settlement Warrants Preliminary Approval</u>

As a matter of public policy, settlement is a strongly favored mechanism for resolving disputed claims. *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910). "In the class action context in particular, there is an overriding public interest in favor of settlement." *Armstrong*, 616 F.2d at 333 (citation and internal quotation marks omitted).

Turning to the specifics of this Litigation, preliminary approval of the Settlement should be granted because the Settlement is within the range of possible approval and there is no reason to doubt its fairness.

[3] It is at the fairness hearing that the Court "is to adduce all information necessary to enable [it] [ ] to rule on whether the proposed settlement is fair, reasonable, and adequate."*Armstrong*, 616 F.2d at 314 (citation omitted).

1. The Settlement Falls Within the Range of Possible Approval

The approval of the proposed settlement of a class action is a matter addressed to the discretion of the trial court. *Hills v. Equifax Consumer Servs.*, Case No. 1:04-CV-3400-TCB, 2007 U.S. Dist. LEXIS 48278, at *27 (N.D. Ga. June 12, 2007). In determining whether to preliminarily approve the Settlement terms themselves, the Court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the Settlement is in the best interests of those whose claims will be extinguished. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 312. At the preliminary approval stage, a court should examine whether the settlement is within the range of possible final approval, or, in other words, whether there is probable cause to notify the Class of the proposed settlement. *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994). In particular, a court bases its preliminary approval of a proposed settlement upon its familiarity with the issues and evidence of the case, as well as the arm's-length nature of the negotiations prior to the settlement. *In re Southern Ohio Correctional Facility*, 173 F.R.D. 205, 211 (S.D. Ohio 1997). A court must determine that the settlement is neither illegal nor collusive. *Id.*

However, courts should exercise restraint in examining a proposed settlement and recognize that "[s]ettlements, by definition, are compromises which 'need not satisfy every single concern of the plaintiff class, but may fall anywhere within a broad range of upper and lower limits.'" *In re Saxon*, (CCH) ¶ 92,414 at 92,525 (quoting *Argo v. Harris*, 84 F.R.D. 646, 647-48 (E.D.N.Y. 1979)). In addition, a court should not engage in a trial of the merits when considering the propriety of the settlement:

> The trial court should not . . . turn the settlement hearing into a trial or a rehearsal of the trial nor need it reach any dispositive conclusions on the admittedly unsettled legal issues in the case. It is not part of its duty in approving a settlement to establish that as a matter of legal certainty . . . the subject claim or counterclaim is or is not worthless or valuable.

Flinn v. FMC Corporation, 528 F.2d 1169, 1172-73 (4th Cir. 1975)(internal quotations and citations omitted)(granting final approval to settlement).

In the present case, the Settlement is a product of extensive arm's-length negotiation between counsel for the parties. Indeed, during the negotiations, each of the parties made concessions and won positions on difficult and hard fought issues. Moreover, the $20 million plus Settlement Fund represents an excellent recovery and provides the Settlement Class with immediate benefits without the costs of continued litigation. *Id.* at ¶ 5. Accordingly, the Settlement was obtained through arm's-length negotiations and falls within the range of a reasonable settlement. *See Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972) ("[I]n any case there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion."). Consequently, the Settlement should be preliminarily approved. *See Ramirez v. The Lycatel Group*, No. 07-5533 (PS), 2009 U.S. Dist. LEXIS 119630, at *3-4 (D.N.J. Dec. 18, 2009) (granting preliminary approval to class action settlement of claims based on consumer protection laws); *Bellows v. NCO Fin. Sys*., 2008 U.S. Dist. LEXIS 114451, at *25 (recommending preliminary approval of class action settlement of claims against debt collector company under consumer protection laws); *Date v. Sony Elecs., Inc*., Case No. 2:07-cv-15474 PDB RSW, 2008 U.S. Dist. LEXIS 56458, at *9-10 (E.D. Mich. July 25, 2008) (granting preliminary approval of class action settlement); *Ragsdale v. Sansai*

USA, Inc., Civil No. 07cv1246-WQH (CAB), 2008 U.S. Dist. LEXIS 113319, at *12 (S.D. Cal. Mar. 14, 2008) (recommending preliminary approval of class action settlement).

2. There is no Reason to Doubt the Fairness of the Settlement

Because the Settlement in this Litigation is the product of extensive arms' length negotiations, there is no reason to doubt its fairness. A proposed settlement that is the result of arm's length negotiations by class counsel is presumptively fair and reasonable. *See Teachers' Ret. Sys. of LA. v. A.C.L.N., Ltd.,* No. 01-CV-11814, 2004 WL 1087261, at *1 (S.D.N.Y. May 14, 2004). Here, the Settlement was reached only after Plaintiffs' Counsel conducted an extensive factual investigation into the Defendants' alleged misconduct, reviewed and analyzed pertinent non-public information and documents produced by Defendants, and interviewed the Chase employee responsible for the day to day management of Chase's Payment Protection Product. Thus, Plaintiffs' Counsel had a wealth of information at their disposal before entering into the Settlement. Consequently, Plaintiffs' Counsel were able to adequately assess the strengths and weaknesses of Plaintiffs' case and the potential defenses available to Defendants and balance the benefits of Settlement against the risks of further litigation.

Equally important, counsel for the Defendants vigorously defended their clients' position and demonstrated their commitment to litigate this Litigation to its conclusion. Hence, the proposed Settlement represents concessions by both parties after hard-fought negotiations conducted by experienced counsel on both sides who were thoroughly familiar with the factual and legal issues. In these circumstances, there can be no question that the proposed Settlement is not the product of collusion.

Moreover, the participation of a neutral mediator in the settlement process further underscores the fact that the proposed Settlement is not the product of collusion. Consequently, there is no reason to doubt the fairness of the Settlement.

C. Conditional Certification of the Settlement Class is Appropriate

In order to proceed with the preliminary approval process, it is necessary for the Court to preliminarily certify a class for purposes of the Settlement. Federal Rule 23 provides that an action may be maintained as a class action if each of the four prerequisites of Rule 23(a) is met and the action qualifies under one of the subdivisions of Rule 23(b). Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Additionally, Rule 23(b) provides, in relevant part:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and, in addition:
>
> (3) the court finds that the questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

As set forth below, all of the requirements of Rule 23 are met in this case, justifying preliminary certification of the proposed Class for settlement purposes.

1. The Class is Sufficiently Numerous

No arbitrary rules regarding the necessary size of classes have been established. *Seidman v. Am. Mobile Sys.*, 157 F.R.D. 354, 359 (E.D. Pa. 1994) ("There is no magic minimum number necessary to satisfy the Rule 23(a)(1) numerosity requirement."). Still, many courts have

determined that the numerosity requirement is satisfied when a proposed class involves at least 40 members. *See Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) ("No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met."); *see also* 1 Newberg on Class Actions 3.05, at 3-25 (3d ed. 1992) (suggesting that any class consisting of more than forty members "should raise a presumption that joinder is impracticable"); *Consol. Rail Corp. v. Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (stating that "numerosity is presumed at a level of 40 members"); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) (noting "'generally less than twenty-one is inadequate, more then forty adequate, with numbers between varying according to other factors.'" (citing 3B Moore's Federal Practice 23.05[1] at n. 7 (1978)); *Brown v. Eckerd Drugs, Inc.*, 669 F.2d 913, 917 (4th Cir. 1981) ("If the class has more than forty people in it, numerosity is satisfied." (internal quotation marks omitted)); *CE Design v. Beaty Constr., Inc.*, No. 07 C 3340, 2009 U.S. Dist. LEXIS 5842, at *6 (N.D. Ill. Jan. 26, 2009) ("Although there is no bright line test for numerosity, a class of 40 is generally sufficient.") (internal citation and quotation marks omitted).

Here, the parties have identified approximately 14.5 million potential Settlement Class members. Based on this estimate and the fact that Chase markets its credit cards throughout the country, it is reasonable to assume that the Class is geographically dispersed throughout the United States, making joinder of all members impractical. *Hammett v. American Bankers Ins. Co.*, 203 F.R.D. 690, 694 (S.D. Fla. 2001) ("There is no definite standard as to the size of a given class, and Plaintiff's estimate need only be reasonable."); *In re Anicom Inc. Sec. Litig.*, No. 00C

4391, 2002 U.S. Dist. LEXIS 5575, at *6 (N.D. Ill. March 26, 2002) ("Plaintiff need not demonstrate the exact number of class members so long as a conclusion is apparent from good-faith estimates").

Moreover, in addition to the size of the class, a court may also consider the nature of the action, the size of the individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joining all the putative class members. *Paxton v. Union Nat'l Bank,* 688 F.2d 552, 560 (8th Cir. 1982); *Morgan v. UPS of Am.,* 169 F.R.D. 349, 355 (E.D. Mo. 1996). Here, the members of the Class have suffered, on an individual basis, relatively small amounts of damage when compared to the costs of trying individual suits. Realistically, individual damages would likely be in the range of a few hundred dollars, if that, but, collectively, the members of the Settlement Class have suffered millions upon millions of dollars of damage. In sum, no single member of the Settlement Class could afford to prosecute this action on an individual basis because the costs associated with this case would far outweigh his or her individual damages.

2. Common Questions of Law or Fact Exist

To certify the Settlement Class there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The Third Circuit has held that "commonality" may be satisfied by one common issue. *In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 527 (3d Cir. 2004); *see also In re CIGNA,* 2006 U.S. Dist. LEXIS 58560, at*7. As such, "[t]he presence of some factual differences in the claims of the class [ ] does not preclude a finding of commonality." *McAdams v. Mass Mut. Life Ins. Co.,* Civil Action No. 99-30284-FHF, 2002 U.S. Dist. LEXIS

9944, at *10 (D. Mass. May 15, 2002). In this case, questions of law or fact common to the Settlement Class include, among others, the following:

a) Whether Chase's sales, billing, and marketing scheme are deceptive, unlawful, and/or unfair as alleged in the Amended Complaint;

b) Whether Chase's common and uniform sales, billing, and marketing scheme related to Payment Protection insurance as alleged in the Amended Complaint constitutes unfair or deceptive conduct within the meaning of the various state consumer protection laws.

c) Whether Plaintiffs and the Class members are entitled to restitution of all amounts acquired by Chase through its common and uniform scheme;

d) Whether Plaintiffs and the Class members are entitled to injunctive relief requiring the disgorgement of all fees wrongfully collected by Chase;

e) Whether Plaintiffs and the Class members are entitled to prospective injunctive relief enjoining Chase from continuing to engage in the deceptive, unlawful, and unfair common scheme as alleged in the Amended Complaint; and

f) Whether Plaintiffs and the Class members are entitled to recover compensatory and punitive damages as a result of Chase's wrongful scheme.

In sum, each member of the Settlement Class was subjected to the same course of conduct by Chase, involving similar marketing materials, sales agreements, and billing statements, and, therefore, their claims arise from the identical acts of Chase. Courts have recognized commonality in similar circumstances. *See Brink v. First Credit Res.*, 185 F.R.D. 567, 570 (D. Ariz. 1999) (holding, in case against credit card company, that commonality requirement was satisfied because "relief for each potential class member depends upon the common legal issue of whether Defendant violated one or more sections of the FDCPA when it mailed the credit card certificate to plaintiffs"); *Spark*, 178 F.R.D. at 435 (commonality requirement satisfied in action against credit card company for unfair and deceptive practices

where "[e]ach of the proposed plaintiffs' claims stem from the same general representation by [defendant], and the issues for each of these plaintiffs will be identical"). Accordingly, the commonality requirement has been met.

3. The Representative Plaintiffs' Claims are Typical of Those of the Class

The "typicality" prerequisite of Rule 23(a)(3) requires that "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The purpose of this requirement is "designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *In re Warfarin*, 391 F.3d at 531; *see also In re Am. Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996). "Certainly, as in this case, when the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members . . . and if it is based on the same legal theory . . .the typicality requirement is easily satisfied." *Jerry Enters. v. Allied Bev. Group, L.L.C.*, 178 F.R.D. 437, 442 (D.N.J. 1998) (internal citations and quotations omitted); *see also McAnaney v. Astoria Fin. Corp.*, No. 04-CV-1101, 2006 WL 2689621, at*4 (E.D.N.Y. Sept. 19, 2006) (quoting *DeBoer v. Mellon Mortgage. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995) ("The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff.").

In the present case, the Representative Plaintiffs' claims are typical of those of Settlement Class members because they arise from the same event, conduct or practice giving rise to the claims of absent Settlement Class members, and seek the same relief. More specifically, the claims of the Representative Plaintiffs and each of the Settlement Class members are predicated on Chase's mass marketing approach that uses standardized marketing and business practices

that are applied in a uniform manner and standardized language in representing the terms and conditions of Chase's Payment Protection Products. Additionally, the Representative Plaintiffs seek to recover damages caused by the same materially false and misleading statements and course of conduct that give rise to the claims of the Settlement Class. As such, the claim of the Representative Plaintiffs and the claims of the Settlement Class Members are so interrelated that the interests of the Settlement Class Members will be fully and adequately protected. Accordingly, the Representative Plaintiffs' claims are typical of those of the Settlement Class.

4. Plaintiffs Will Adequately Protect the Interests of the Class

This requirement of Rule 23(a)(4) "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods. v. Windsor*, 521 U.S. 591, 594 (1997). The factors relevant to a determination of adequate representation are "whether [movant] 'has the ability and incentive to represent the claims of the class vigorously, [whether it] has obtained adequate counsel, and [whether] there is a conflict between [the movant's] claims and those asserted on behalf of the class.'" *In re Cendant Corp. Litig*., 264 F.3d 201, 265 (3d Cir. 2001) (quoting *Hassine v. Jeffes*, 846 F.2d 169, 179 (3d Cir. 1988)).

Both prongs of the adequacy test have been met here. More particularly, the Representative Plaintiffs' interests, as demonstrated above, are directly aligned with, and not in conflict with, the interests of the Settlement Class members. There also can be no dispute that Plaintiffs' Counsel are capable of prosecuting this Litigation. Indeed, Plaintiffs' Counsel have extensive experience in prosecuting securities and consumer fraud class actions. *See* Firm Resumes attached as Exhibits 1 and 2 to this memorandum. As reflected in the respective firm resumes, each firm is well-established, possesses extensive knowledge of and experience in

prosecuting class actions in courts throughout the United States, and has recovered hundreds of millions of dollars for their clients. Needless to say, Plaintiffs' Counsel are qualified to represent the Settlement Class and will, along with the Representative Plaintiffs, vigorously protect the interests of the Class.

Beyond the adequacy test of Rule 23(a)(4), the Court must address Federal Rule of Civil Procedure 23(g)(1)(c), which states:

> (c) In appointing class counsel, the court
>
> (i) must consider:
> - the work counsel has done in identifying potential claims in the action,
> - counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
> - counsel's knowledge of the applicable law, and
> - the resources counsel will commit to representing the class;
>
> (ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interest of the class;
>
> (iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and
>
> (iv) may make further orders in connection with the appointment.

See also Hanlon v. Aramark Sports, LLC, 2010 U.S. Dist. LEXIS 9029, at *17-18 (W.D. Pa. Feb. 3, 2010). Plaintiffs' Counsel easily satisfy the factors set forth in Rule 23(g)(1)(c). They have performed substantial work, including reviewing thousands of pages of documents, interviewing witnesses, and researching applicable law to be able to fully assess the strengths of Plaintiffs' claims and possible defenses available to Defendants. Plaintiffs' Counsel also have served as lead counsel or co-lead counsel in numerous class actions involving complex litigation, as reflected in the respective firm resumes. *See* Firm Resumes attached as Exhibits 1 and 2 to this

memorandum. Additionally, Plaintiffs' Counsel have already committed substantial resources to litigate this case.

5. The Requirements of Rule 23(b) Are Satisfied

Certification of the Settlement Class is further appropriate because the questions of law or fact common to members of the Settlement Class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the case. *See* Fed. R. Civ. P. 23(b)(3). "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 be no trial." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

In analyzing the predominance factor, the United States Supreme Court has stated that "[p]redominance is a test *readily met in certain cases alleging consumer* or securities *fraud* or violations of the antitrust laws." *Amchem*, 521 U.S. at 625 (emphasis added). Following the Supreme Court's directive, numerous other courts have determined that common issues predominant in litigation involving oral and written misrepresentations in violation of state consumer protection laws. *See Smith v. WM Wrigley Jr. Co.*, Case No. 09-60646-CIV-COHN/SELTZER, 2010 U.S. Dist. LEXIS 67832, *14-15 (S.D. Fla. June 15, 2010) (finding predominance where "the claims of the named Plaintiffs and the Proposed Class are based on the same legal theories and the same uniform advertising."); *Spinelli v. Capital One Bank*, 265 F.R.D. 598, 601 (M.D. Fla. 2009) (finding "predominance is met because the common question of whether Defendants' Payment Protection program had any value predominates over any other issue."); *Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 317 (S.D. Fla. 2001) (certifying TILA and

pendent state law class because "Plaintiff alleges that Defendant provided the same disclosures to all class members and that those disclosures violated TILA. These common issues predominate."); *Mangone v. First USA Bank*, 206 F.R.D. 222, 236 (S.D. Ill. 2001); *Whitford v. First Nationwide Bank*, 147 F.R.D. 135, 142 (W.D. Ky. 1992); *In re Prudential Ins. Co. of America Sales Practices Litig.*, 148 F.3d 283, 315 (3d Cir. 1998) (certifying a nationwide settlement class asserting claims for, *inter alia*, unjust enrichment and violation of state consumer protection laws); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 249-50 (D. Del. 2002) (certifying nationwide class for settlement purposes on claims of unjust enrichment and consumer protection laws because "so far as differences between state laws impact only on case management, these differences are irrelevant to certification of a settlement class."); *Singer v. AT&T Corp.*, 185 F.R.D. 681, 691-92 (S.D. Fla. 1998) (certifying nationwide class for unjust enrichment because the potential application of varying state laws did not preclude class certification although it may cause trial problems; specifically holding that "at least two of [plaintiff]'s claims, breach of contract and unjust enrichment, are universally recognized causes of action that are materially the same throughout the United States.").

Here, like these cases, the issue of Chase's liability is centered on whether representations made by Chase in connection with its Payment Protection Products were misleading, deceptive and/or unconscionable, and these issues predominate over any individual issues that theoretically might exist. *See, e.g.*, *Bank One*, 2002 U.S. Dist. LEXIS 8709, at *22 ("The issues of law and fact that flow from Defendants' alleged misstatements and omissions predominate over any individual issue."); *Spinelli*, 265 F.R.D. at 601.

Furthermore, a class action is the superior vehicle for resolving Plaintiffs' claims. As noted above, the Settlement Class is estimated to include approximately 14.5 million consumers located throughout the country. Thus, as a practicable matter, it would be economically infeasible for most putative class members to retain a private attorney to pursue individual litigation against Chase for their individual compensatory recoveries. *See Amchem*, 521 U.S. at 616, ("[T]he[] interests [of individuals in conducting separate lawsuits] may be theoretic rather than practical [where] . . . the amounts at stake for individuals [are] so small that separate suits would be impractical." (quotation omitted)); 7A Wright and Miller, Federal Practice and Procedure, Sec. 1779 at 557 ("[A] group composed of consumers . . .typically will be unable to pursue their claims on an individual basis because the cost of doing so exceeds any recovery they might secure."); *Bellows v. NCO Fin. Sys*., Case No. 3:07-cv-01413-W-AJB, 2008 U.S. Dist. LEXIS 114451, at *20 (S.D. Cal. Sept. 5, 2008) ("The class action procedure is the superior mechanism for dispute resolution in this matter. . . . Through the class action procedure, these common claims can be brought in one proceeding, thereby eliminating unnecessary duplication, preserving limited judicial resources, and achieving economies of time, effort, and expense."). In short, it is evident that most putative class members have no overriding interest in conducting separate lawsuits against Chase.

What is more, superiority of the class mechanism in the present case is further highlighted by the absence of manageability issues as a settlement class does not present the issues of manageability that might arise with a litigated class. *See AmChem Prods, Inc.v. Windsor*, 117 S. Ct. 2231, 2248 (1997). Accordingly, because common questions of law and fact

predominate over individual questions, and a class action is the superior vehicle for resolving Plaintiffs' claims, Rule 23(b) is satisfied.

D. The Proposed Notice Program Is Adequate

The parties have negotiated the two-part form of notice (the "Notice") to be disseminated to the Settlement Class. The short form notice (Exhibit D to the Stipulation) will be sent by first-class mail, postage prepaid, to Settlement Class members to notify them of their rights and the basic components of the Settlement. Moreover, the short form notice will direct Settlement Class members to the website www.kardonicksettlement.com to access all settlement-related documents, including the Settlement Agreement, the short form and long form Notice and the Claim Form. Class members who do not have access to the internet may request the long form notice (Exhibit E to the Stipulation) and claim form. Finally, nationwide publication in the *USA Today* will be provided to the Settlement Class as provided in exhibit VIII(c) to the Stipulation. The Notice program is designed to maximize class members receipt of the Settlement documents while reducing the cost of mailing, which will correspondingly increase the value of the Settlement Fund for distribution.

In short, upon notification of the Settlement, Settlement Class members have three choices: (1) approve the Settlement and share in the Settlement benefits by submitting a valid claim form; (2) exclude themselves from the Settlement by "opting out" of the class, in which case they will not participate in the Settlement recovery and will retain their individual claims against the Defendants; or (3) remain in the Class but submit a written objection to the Court setting forth the reasons why the Settlement and/or the fee application is unfair. Importantly, in order to participate in the Settlement, a Settlement Class member must submit a claim form

within the time specified in the Preliminary Approval Order. Similarly, a Settlement Class member who wishes to be excluded from the Settlement must submit a timely request for exclusion, and any Settlement Class member who wishes to object to the Settlement must file and serve such objection within the time specified in the Preliminary Approval Order. Objecting parties can submit a brief in opposition to any part of the Settlement and can appear at the final approval hearing to present their arguments if they have timely filed a notice of intent to appear. This Court should find that the Notice and the procedures for its dissemination are reasonably calculated to provide notice of the Settlement to the Settlement Class, thereby, satisfying the requirements of due process. *See Winn-Dixie Stores, Inc. ERISA Litig.*, No. 3:04-cv-194-33MCR, 2008 U.S. Dist. LEXIS 21988, at *21 (M.D. Fla. March 20, 2008).

V. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the proposed Settlement be preliminarily approved by the Court, allowing notification to the Class of the terms of the Settlement and of the date of the Fairness Hearing.

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Respectfully submitted,

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