

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

<p>RENEE WALKER, et al.</p> <p style="text-align:right">Plaintiffs,</p> <p style="text-align:center">v.</p> <p>DISCOVER FINANCIAL SERVICES, INC., et al.,</p> <p style="text-align:right">Defendants.</p>	<p>Case no. 10 C 6994</p>
<p>KATHLEEN CALLAHAN, individually and on behalf of all others similarly situated,</p> <p style="text-align:right">Plaintiffs,</p> <p style="text-align:center">v.</p> <p>DISCOVER FINANCIAL SERVICES, INC., et al.,</p> <p style="text-align:right">Defendants.</p>	<p>Case no. 10 C 7181</p> <p>MDL No. 2217</p> <p>Hon. John W. Darrah</p>

**MEMORANDUM OF LAW OF THE CONROY,
TRIPLETT, AND CARTER PLAINTIFFS IN SUPPORT OF THEIR
MOTION TO APPOINT INTERIM CO-LEAD CLASS COUNSEL**

At the March 30, 2011 hearing, the Court advised that the various Plaintiffs groups meet and confer to negotiate a leadership structure. A face-to-face meeting was held after the hearing, followed by numerous telephone meetings, but only two of the three groups reached agreement about a leadership structure. Counsel for Plaintiffs Conroy, who asserts California claims, and Triplett and Carter, who assert Florida, Pennsylvania, and national claims, (the counsel is

collectively “Proposed Co-Lead Counsel”)¹ now ask the Court to appoint them as interim co-lead counsel to prosecute claims against Discover.² The Proposed Co-Lead Counsel is largely made of up of the lawyers who originated and successfully prosecuted the first Payment Protection class action, *Spinelli v. Capital One Bank (USA), N.A. et al.*, Civ. No.: 8:08-CV-132-T-33EAJ (M.D. Fla.). Additionally, Proposed Co-Lead Counsel is involved in litigation challenging payment protection practices of several other banks, including Citibank, First Premier and GE Money Bank.

Proposed Co-Lead Counsel respectfully submit that they can better serve the interests of the overall class than the Walker Counsel, which the Court had appointed when the case was in a different, no-longer-applicable procedural posture. Specifically, Walker’s Counsel moved to be appointed as interim co-lead counsel in this Court while at the same time seeking to have related cases transferred to this court by the Judicial Panel on Multidistrict Litigation (“JPML”). Subsequent to the creation of the MDL and after other cases (including ours) had been transferred, and after the time this Court had opened up lead counsel briefing for the MDL, Walker’s Counsel sought to quickly enter into mediation with Discover without the participation of all plaintiffs’ counsel, even though the Court had explicitly opened briefing in connection with

¹ Proposed Co-Lead Counsel consists of Murray, Frank & Sailer LLP and Carney Williams Bates Bozeman & Pulliam, PLLP. Furthermore, Proposed Co-Lead Counsel proposes that Miller Law LLC act as liaison counsel. These firms all have extensive consumer class action experience, as demonstrated by their resumes, attached as Exhibits 1-3 to the Declaration of Randall Pulliam, submitted herewith.

² The following counsel support the Proposed Co-Lead Counsel’s motion: Golomb & Honik, P.C., Lieff Cabraser Heimann & Bernstein, LLP, The Owings Law Firm, Taus Cebulash & Landau, LLP, Carter Walker, PLLC and Glancy Binkow and Goldberg, LLP. Each of these firms, while eminently qualified in their own right, stand willing to assist the Class at the direction of Proposed Co-Lead Counsel.

lead counsel issues and had rightfully requested an orderly, transparent process for case proceedings. The immediate procedural background of the mediation is set forth in the Memorandum of Plaintiff Charles Triplett in Support of His Motion To Stay Mediation Pending Selection of Interim Lead Counsel Under Rule 23(g), filed on March 24, 2011 [Dkt. No. 110]; the Memorandum of Devavani Conroy in Support of Motion to Reopen the Process for Selecting Interim Lead Counsel Under Rule 23(g) of the Federal Rules of Civil Procedure, filed on March 29, 2011 [Dkt. No. 114]; and the transcript of the March 30, 2011 proceedings before this Court.

Appointment of Proposed Co-Lead Counsel ensures that the interests of the Class are protected by experienced class counsel with the greatest knowledge and understanding of Discover's Payment Protection program in the country. Proposed Co-Lead Counsel clearly exceeds the requirements for the appointment of interim class counsel under Federal Rule of Civil Procedure 23(g) and related authority.

BACKGROUND

A. The Conroy/Triplett Actions and The MDL Transfer

On July 16, 2010, Plaintiff Conroy filed *Conroy v. Discover Financial Services, Inc. et al.*, 10cv5260, in the Central District of California, Judge Margaret M. Morrow presiding, alleging violations of the California Unfair Business Practices Act and the Consumer Legal Remedies Act, as well as a claim for unjust enrichment, on behalf of a class of California consumers. Conroy alleges what is known as a "efficacy" claim, concerning Discover's practice of selling a product without any inquiry or effort to determine if the cardholder is eligible for such a product, and without disclosing all of the policy exclusions, thereby substantially overcharging class members for the products. On September 20, 2010 Defendants filed a motion

to stay the *Conroy* Action pending the outcome of the *Walker* Action. Conroy opposed that motion, but the case transferred to this Court before that motion was decided.

On November 23, 2010, the Walker Plaintiffs filed a motion with the JPML seeking to transfer various actions involving Discover's Payment Protection program to the Northern District of Illinois. Conroy opposed this motion, on February 7, 2011, the JPML transferred the *Conroy* Action to this Court. *In re Discover Card Payment Protection Plan Marketing and Sales Practices Litig.*, MDL 2217, 2011 WL 484285, at *2 (J.P.M.L. Feb. 7, 2011).

On February 15, 2011, *Triplett v. Discover Fin. Servs., Inc.*, No. 1:11-cv-20519- AJ (S.D. Fla.) was filed. On March 8, 2011, *Carter v. Discover Fin. Servs., Inc.*, No. 2:11-cv- 01656-BMS (E.D. Pa.) was filed. Both cases were transferred to this Court pursuant to the JPML order. The legal theory in the Triplett and Carter cases concerns an "efficacy claim" that is practically identical to the theory in the *Conroy* Action. Triplett is suing on behalf of a Florida Class, alleging claims for breach of contract and breach of the implied covenant of good faith and fair dealing, unconscionability, Florida's Unfair and Deceptive Trade Practices Act, injunctive relief, declaratory relief, and unjust enrichment. Carter is suing on behalf of a national class and various state subclasses, alleging claims for breach of contract and breach of the implied covenant of good faith and fair dealing, unconscionability, the Illinois Consumer Fraud Act, various state Unfair Trade Practice Laws, injunctive relief, declaratory relief, and unjust enrichment.

B. The Walker Action

Walker v. Discover Financial Services et al, 10 c 6994 (the “Walker Action”) comes to this Court only after various previous filings and dismissals of the Walker Plaintiffs. We anticipate that the Walker’s Counsel’s primary argument for being appointed interim class counsel is the length of time their cases have been on file. However, we submit that the time was not spent on actually litigating the substantive issues, but instead on a series of filings and withdrawals. As Judge Illston explained prior to transferring the case to this Court, “[o]ne could reasonably infer forum shopping” on the part of the Walker Plaintiffs. *Walker v. Discover Financial Services, Inc., et al.*, No. C. 10-3013 SI, 2010 WL 4269193, at *3 (N.D. Cal. Oct. 25, 2010). Therefore, from a practical standpoint, the Walker Action is at its very early stages. Even further, given that the Walker Counsel seek to amend its complaint to add claims that have been alleged by the Proposed Co-Lead Counsel from the outset, the Walker action is arguably at an even earlier procedural stage than are the *Carter/Triplett* and *Conroy* actions.

C. The Walker Plaintiffs Belatedly Seek To Amend Their Complaint

The Conroy/Triplett Plaintiffs challenge the entire value of Discover’s Payment Protection product. Until recently, the Walker Plaintiffs’ claims focused on two narrow claims: 1) that Discover signed customers up for Payment Protection without prior consent, and 2) that Discover advertised that it would charge \$.89 per \$100 of credit balance but actually charged a prorated fee. These claims are what is described as “slamming” claims. The evening before the March 30, 2011 hearing, the Walker Plaintiffs sought to amend their complaint to include the same “efficacy” claims alleged in the Conroy/Triplett Action.

LEGAL STANDARD

Rule 23(g)(3) provides for the appointment of interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action. “In cases where multiple overlapping and duplicative class actions have been transferred to a single district for the coordination or pretrial proceedings, designation of interim class counsel is encouraged, and indeed is probably essential for efficient case management.” *In re Air Cargo Shipping Servs. Antitrust Litig.*, 240 F.R.D. 56, 57 (E.D.N.Y. 2006) (citing MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.11 (2004) (“MCL 4th”)) (Appointment of interim class counsel “is necessary to protect the interests of class members” because it “clarifies responsibility for protecting the interests of the class during precertification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement.”); *see also* Rule 23 Practice Commentary, (“pre-certification discovery, dispositive motions, or settlement negotiations...may have a critical bearing on the interests of the putative class members” and often necessitate the appointment of interim lead counsel).

As a basic rule, attorneys appointed to serve as interim class counsel “must fairly and adequately represent the interests of the class.” Fed. R. Civ. P. 23(g)(4). In deciding whether to appoint an applicant as interim class counsel, Rule 23(g)(1)(A) requires that the Court consider: (i) the work counsel has done in identifying or investigating potential claims in the action, (ii) counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action, (iii) counsel’s knowledge of the applicable law, and (iv) the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A); *see also* Advisory Committee Notes to the 2003 Amendments, Subdivision (g). No single factor is determinative;

all factors must be considered Advisory Committee Notes to the 2003 Amendments to Fed. R. Civ. P. 23(c)(2)(B). In addition, the Court may also “consider any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class.” Fed. R. Civ. P. 23(g)(1)(B). In this regard, courts evaluate whether proposed interim class counsel have worked cooperatively with opposing counsel and the court and whether counsel commands the respect of colleagues. MCL 4th § 10.224.

ARGUMENT

As explained below, application of specific factors enumerated by Rule 23(g) weighs strongly in favor of Proposed Co-Lead Counsel as interim class counsel. Proposed Co-Lead Counsel have notable experience litigating major class action cases and are recognized leaders in the plaintiffs class action bar. Moreover, they have specifically been at the forefront of similar lawsuits against Capital One, JPMorgan Chase, Citibank, First Premier, and GE MoneyBank. Furthermore, Co-Lead Counsel worked to achieve a significant settlement in *Spinelli*, a litigation with similar claims concerning Capital One’s payment protection program. Through these and other efforts, Proposed Co-Lead Counsel has gained the most comprehensive familiarity of the applicable law of any attorneys practicing in this area.

Additionally, Proposed Co-Lead Counsel has already committed serious resources to advancing and obtaining a favorable resolution of these lawsuits and will undoubtedly continue to do so. There can be little doubt that the appointment of Proposed Co-Lead Counsel as interim co-lead class counsel would be in the best interests of the Class.

A. Proposed Co-Lead Counsel Has Effectively Investigated And Litigated The Claims In This Action

Members of Proposed Co-Lead Counsel have, over the last eight months, investigated and litigated this action as follows:

- filed complaints in California, Florida, and Pennsylvania that alleged claims on behalf of all potential class members;
- opposed a motion to stay proceedings when the *Conroy* Action was pending in the Central District of California;
- filed briefs with and argued before the JPML in two separate MDL proceedings (MDL 2195 and MDL 2217);
- corresponded with Walker's Counsel and Discover asking them to halt their secretive mediation that sought to exclude certain counsel;
- filed a motion to reopen the appointment of Interim Lead Counsel;
- attended and participated in two mediation sessions to make sure the interests of the entire class were represented adequately; and
- filed a motion to stay further mediation sessions pending appointment of lead counsel.

B. Proposed Co-Lead Counsel's Experience In Payment Protection Litigation Supports Their Appointment As Interim Lead Counsel

Members of Proposed Co-Lead Counsel have already litigated a very similar action, *Spinelli v. Capital One*, which involved Capital One's payment protection program, and achieved an excellent settlement. During the course of the *Spinelli* case, which spanned approximately three years, members of Proposed Co-Lead Counsel, did the following, among other things:

- thoroughly investigated and researched the claims asserted by Plaintiffs and the defenses available to or raised by Defendants,
- created an effective strategy for the prosecution of the Litigation;
- drafted numerous pleadings;
- successfully defended against Defendants' motion to dismiss;
- successfully obtained certification of a class;
- reviewed and analyzed more than 70,000 pages of documents produced by Defendants and third parties;
- conducted and defended multiple depositions;
- retained experts to analyze and advise counsel as to industry practices, regulatory considerations, accounting matters and damages;
- participated in numerous mediation sessions; and
- consulted and conferred with Plaintiffs throughout the Litigation and settlement discussions.

See Pulliam Declaration, at ¶ 2-3.

Through litigation of *Spinelli*, Proposed Co-Lead Counsel gained substantial and valuable experience in depositions and document review that will benefit the Discover class members. Through *Spinelli*, members of Co-lead Counsel invested thousands of hours in litigating the claims and gained a great deal of knowledge about credit card industry business and accounting practices through depositions and document review. By contrast, Walker's Counsel has seemingly never engaged in any formal discovery in a Payment Protection credit card case, and

seek to compensate for this lack of experience with their eleventh-hour proposed complaint that includes the claims already asserted by the Conroy/Triplett plaintiffs.

Additionally, the Proposed Co-Lead Counsel have effectively litigated numerous legal issues sure to arise in this matter in other cases involving payment protection products. Only the Proposed Co-Lead Counsel have prevailed in payment protection cases in a motion for class certification (*Spinelli v. Capital One*), a motion to compel arbitration (*Kardonick v. Citi*, 1:10-cv-23023; United States District Court for the S.D. Florida) and a motion to dismiss (*Arevalo and Sandow v. Bank of America*, 2:10-cv-4959, United States District Court for the N.D. California).

C. Proposed Co-Lead Counsel Has And Will Continue To Commit Significant Resources On Behalf Of The Class

Proposed Co-Lead Counsel has already demonstrated a willingness to expend the resources necessary to properly prosecute these actions and uphold the interests of the Class. Numerous attorneys at Proposed Co-Lead Counsel's respective firms have been, and will continue to be, thoroughly committed to this litigation. Member firms have collectively devoted thousands of hours to litigation already. Proposed Co-Lead Counsel is well-aware of the time and finances required to litigate a class action of this nature and against a defendant with Discover's resources. This is especially true given their litigation experience in *Spinelli*. Proposed Co-Lead Counsel is willing and capable of expending the resources necessary to effectively prosecute these actions. As a result, Proposed Co-Lead Counsel represent the best choice for protecting the interests of the Class, and the considerations of Rule 23(g)(1)(A) are readily satisfied.

CONCLUSION

For the foregoing reasons, the Movants respectfully submit that the Court appoint the Proposed Co-Lead Counsel as interim co-lead counsel on behalf of the putative class, and that the Court further appoint Miller Law LLC to act as liaison counsel.

Dated: April 4, 2011

Respectfully submitted,

/s/ Marvin A. Miller

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