Kardonick v. JP Morgan Chase & Co. et al Doc. 44

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.

Defendants.

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

RESPONSE IN OPPOSITION TO MOTION TO INTERVENE

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INTRODUCTION

Before filing the Class Action Complaint in this litigation on behalf of Plaintiff David Kardonick on September 8, 2010, various of the undersigned attorneys for the Plaintiffs – more specifically, the lawyers of Carney Williams Bates Bozeman & Pulliam, PLLC – had spent much of the previous three years litigating similar claims to a favorable outcome against Capital One Bank. Doubtlessly aware of that fact, Defendants JP Morgan Chase and Chase Bank USA, N.A. (collectively "Chase") signaled willingness to explore whether early resolution of this dispute might be possible. Always happy to entertain such overtures, yet constantly aware of their fiduciary obligation to the Class, Plaintiff *Kardonick's* lawyers agreed with Chase to schedule mediation sessions before the highly respected Jonathan B. Marks for November 10 and 11, 2010.

Naturally, Plaintiffs' Counsel had thoroughly investigated these causes of action before filing this action and related lawsuits around the country against Chase. When considered alongside the additional materials Chase produced *before* the mediation, then, Plaintiffs' Counsel certainly possessed a firm grasp of the strengths and weaknesses of their case when entering those negotiations. As is typical, Chase made certain representations during the mediation, such as the assurance that Chase – unlike Capital One Bank – did not make it a point to enroll within its Payment Protection Plan persons who are *per se* ineligible for benefits, *i.e.* persons ineligible for benefits due to status at the time of enrollment. Of course, once the parties reached an agreement in principle, statements like that were subject to confirmatory discovery – during which Plaintiffs' Counsel reviewed thousands of documents and conducted an hours-long interview with the officer responsible for Payment Protection – and were ultimately proven accurate. It was only after Plaintiffs' Counsel became satisfied that was so, through countless hours of confirmatory discovery, that they sought preliminary approval of the settlement.

The settlement ("Settlement") that this Court approved is eminently fair and reasonable. In suggesting otherwise, and taking the extraordinary step of seeking to intervene so as to oppose the settlement, the parties moving to intervene here ("Movants") have no intimate knowledge of Chase's Payment Protection product and act as though they have keen awareness of the Payment Protection practices at Chase. In actuality, though, Movants did not even file their lawsuits against Chase until *after* this Court had granted preliminary approval and expressly forbade class members from taking such action.

Let there be no mistake about it: This is an attempted money grab, plain and simple. Movants were upset that they missed out on the litigation against Chase, filed eleventh-hour, copycat complaints, and now wish to hold up the *Kardonick* Settlement in order to extort a fee from the parties. Contemptible as it is, Movants' attorneys have done this same thing in the past. *See Shaffer v. Continental Casualty Company*, No. 06-2235 PSG CPJWx (C.D. Cal. Apr. 2, 2008) (Movants' attorney used his own mother in an attempt to intervene to oppose a fair class action settlement), Exhibit A, Mem. P. & A. Supp. Landau's Mot. Intervene. This Court should follow the lead of the courts in *Shaffer*, recognize the Movants' motion for what it is, and deny the Motion to Intervene.

FACTS

The culmination of months of investigation, Plaintiffs' Counsel filed in this Court the first of a series of lawsuits against Chase on September 8, 2010. Over the next month, the same lawyers spearheaded the filing of complaints against Chase in the Eastern Districts of Arkansas and Wisconsin. *See* Exhibit B, Class Action Compl., *David v. JPMorgan Chase & Co.*, No. 4:10-cv-1415 JMM (E.D. Ark. Sept. 24, 2010); Exhibit C, Class Action Compl., *Clemins v. JPMorgan Chase & Co.*, No. 2:10-cv-00949 CNC (E.D. Wis. Oct. 21, 2010).[1] These cases pursued causes of action under the applicable state's consumer protection laws for damages caused by Chase's Payment Protection Plan, an add-on product it offered in connection with credit cards. In that sense, the litigation was a mirror image of an action Plaintiff's Counsel had prosecuted for years to successful conclusion against another credit card issuer, Capital One Bank. *See, e.g.,* Exhibit D, Notice of Removal, *Griffin v. Capital One Bank*, No. 8:08-cv-00132 VMC EAJ (M.D. Fla. Jan. 18, 2008).[2]

During their litigation of the claims against Capital One, Plaintiffs' Counsel gained a wealth of information about the Payment Protection product, including the ways in which it is administered, and the industry in general. Plaintiffs were poised to bring that knowledge and experience to bear against Chase, and the bank was most assuredly aware of that prospect when its attorneys during preliminary discussions of otherwise procedural issues raised the possibility of a global resolution of the dispute. Always mindful that "early settlements are . . . encouraged," *Mashburn v. Nat'l Healthcare, Inc.,* 684 F. Supp. 660, 669 (M.D. Ala. 1988),

[1] Each of these lawsuits asserted claims on behalf of a class of residents of the state in which the proceeding commenced.

[2] Judge Virginia Hernandez Covington of the United States District Court for the Middle District of Florida characterized the "performance" of Plaintiff's Counsel in *Capital One* as "outstanding." *See* Exhibit E, Tr. Fairness Hr'g at 52, *Spinelli v. Capital One Bank (USA), N.A.*, No. 8:08-cv-00132 VMC EAJ (M.D. Fla. Nov. 19, 2010).

Plaintiffs' Counsel agreed to engage in negotiation before Jonathan Marks, a highly regarded mediator. *See generally* http://marksadr.com/.

The lessons learned by Plaintiffs' Counsel during the lengthy, and often heated, litigation against Capital One proved valuable during the mediation with Chase. Building upon their extensive knowledge of the Payment Protection product, attorneys for the Class entered the sessions with a clear idea of the most relevant factors demanding inquiry. This resulted in a very efficient process, allowing the participants to quickly cut to the crux of the matter. One thing that was extremely important to Plaintiffs' Counsel was Chase's policy with regard to the enrollment into its Payment Protection Plan of persons who could never qualify for benefits – a group known as "*per se* ineligibles" – and the bank was adamant that it did not as a practice subscribe such people into the program.[3] On the strength of this and other representations – all of which would be tested during a period of confirmatory discovery – the parties agreed in principle to the terms of settlement at the close of two days of hard-fought mediation.

Plaintiffs' Counsel at that point turned to confirmatory discovery, with particular focus on the statements Chase had made during the mediation (such as its assertion regarding the bank's policy for *per se* ineligibles). Again, Plaintiffs' Counsel was able to draw on their efforts against Capital One when requesting documents from Chase, making sure to review crucial documents such as those substantiating the average length of time cardmembers remained enrolled in Payment Protection. At the end of this process – after countless hours reviewing many thousands of documents and an interview with the officer at Chase ultimately answerable for the Payment Protection Plan – Plaintiffs' Counsel became assured with the accuracy of the

[3] This was a significant disclosure, in that it was the group of *per se* ineligibles who stood to receive a $45 million restitution payment, representing the lion's share of the settlement, in Capital One.

statements that served as a foundation for the agreement reached at the mediation. As a result, on December 21, 2010, the Plaintiff Class and Chase jointly moved this Court for preliminary approval of the settlement.

This Court granted the joint motion on February 3, 2011. (Order Conditionally Certifying Settlement Class & Prelim. Approving Class Action Settlement ("Preliminary Approval Order"), Feb. 3, 2011.) In its Preliminary Approval Order, the Court expressly enjoined "each Settlement Class Member" from "*commencing*, pursuing, maintaining, enforcing, or prosecuting, either directly or indirectly," any Payment Protection suit against Chase. (*Id.* ¶ 28, at 9.) The Court believed this action "necessary to protect and effectuate the Settlement Agreement, the Settlement contemplated thereby, this Preliminary Approval Order, and the Court's flexibility and authority to effectuate the Settlement." (*Id.* ¶ 28, at 10.) The Court specifically ordered the injunction "in aid of [its] jurisdiction and to protect [its] judgments." (*Id.*)

In blatant disregard of this directive, Movants filed their complaints against Chase *after* entry of the Preliminary Approval Order. More specifically, Movants commenced lawsuits in the Eastern District of Arkansas and in the Southern District of California on February 7 and 11, respectively. *See Smith* Complaint, Exhibit G; *White* Complaint, Exhibit H; *Cf.* Preliminary Approval Order, ¶ 28, at 9-10 (enjoining such activity as of February 3). Not only that, they now seek to intervene in this cause, and undo the settlement, based on nothing more than unwarranted speculation and innuendo built largely upon a comparison of the present settlement to the compromise in Capital One. The settlement of any litigation derives from the circumstances in any given case, however, and Chase Bank is not Capital One. Confirmatory discovery – in which the late-coming Movants did not participate (they had not even filed a case when that

process took place) – substantiated that the banks differ in key respects. Perhaps most significantly, comprehensive review of scores of documents and an interview of the Chase officer responsible for Payment Protection demonstrated that it was never the policy of Chase, unlike Capital One, to enroll into its plan persons who were *per se* ineligible for benefits.

This Memorandum conclusively establishes that Movants' Motion to Intervene is founded upon unsubstantiated supposition, and it should be summarily denied. This is especially so in light of the track record of Movants' attorneys to shakedown parties to class action settlements in order to receive some portion of a fee. This actually occurred in the Payment Protection cases against Capital One: Many of the same law firms representing Movants appeared in the last minute with copycat complaints for the sole purpose of staking some claim to the fee. See, e.g., Exhibit F, Class Action Compl., McCoy v. Capital One Bank, Case No. 10-cv-0185 L CAB (S.D. Cal. Jan. 22, 2010) (filed by Movants' attorneys); Exhibit I, Class Action Compl., Sullivan v. Capital One Bank, Case No. 10-cv-00092 CSH (D. Conn. Jan. 21, 2010) (filed by Movants' attorneys). This type of behavior should be discouraged. This Court should deny the Movants' Motion to Intervene.

ARGUMENT

Movants seek intervention as a matter of right under Fed. R. Civ. P. 24(a)(2). Courts apply a four prong test on the application, determining whether: "(1) his application to intervene is timely; (2) he has an interest relating to the property or transaction which is the subject of the action; (3) he is so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) his interest is represented inadequately by the existing parties to the suit." *Stone v. First Union Corp.*, 371 F.3d 1305, 1308-09 (11th Cir. 2004). The Movants here fail to meet their burden and thus, the motion should be denied.

I. The Motion to Intervene is Untimely and Movants Should Not be Rewarded for Violating This Court's Stay Order

A. The Court Should not Sanction Counsel Rushing Out to File Claims After a Settlement has been Preliminarily Approved

Nowhere in the Movants' twenty page Motion to Intervene do they bother to mention that the Court issued a stay of all litigation against Chase. Movants' Complaints violated that stay. Now, these same actors ask the Court whose stay they violated to bless their bad act by granting them the right to intervene in this case and blow up the proposed settlement.[4]

As set forth in the facts section herein, after mediation and significant negotiation, the *Kardonick* Plaintiffs filed a Notice of Settlement on December 6, 2010 (the "Notice") in the publically-available docket in the *Kardonick* matter. *See* Notice of Settlement, Dkt. # 14. In the Notice, Plaintiffs specifically requested the Court enter a stay in the action. *Id.* at p. 2. Together with the Defendant, the parties re-iterated this request in their Joint Motion for Preliminary

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[4] Counsel for Movants has a history of moving to intervene to attack fair class action settlements. *See Shaffer*, at Ex. A. Using his mother as a class representative, counsel was unsuccessful bringing class claims against the defendant, but nevertheless sought to intervene in a separate case in which the defendant had agreed to a settlement. Converted to objector status, on appeal, the Ninth Circuit affirmed the approval of the settlement. *See Shaffer v. Continental Casualty Co.*, 362 Fed. Appx. 627 (9th Cir. 2010).

Approval filed publically on December 21, 2010. *See* Joint Motion, Dkt. # 19 (requesting the Court enter an order "staying . . . any litigation involving the Released Claims by any member of the Settlement Class pending final approval of the Settlement"). On February 2, 2011, the Court entered its Preliminary Approval Order,[5] which stated as follows:

> Pending the final determination of whether the Settlement should be approved, the Settlement Class Representatives and each Settlement Class Member is hereby stayed and enjoined from commencing, pursuing, maintaining, enforcing, or prosecuting, either directly or indirectly, any Released Claims in any judicial, administrative, arbitral, or other forum, against any of the Released Parties. . . . This injunction is necessary to protect and effectuate the Settlement Agreement, and the Settlement contemplated thereby, this Preliminary Approval Order, and the court's flexibility and authority to effectuate the Settlement Agreement and to enter Final Judgment when appropriate, and it is ordered in aid of this Court's jurisdiction and to protect its judgments.

See Preliminary Approval Order, Dkt. # 23, at ¶ 28.

As of the time the stay was entered, the Movants and their counsel had not filed any lawsuits against Chase regarding Payment Protection. After the stay was ordered, Movants hastily put together Complaints in order to try to cash in on the settlement.[6] In doing so, **Movants violated this Court's Preliminary Approval Order**. Movants are clearly "each Settlement Class Member(s)" as set forth above, as they themselves claim that they "squarely fit the Class definition as put forth in the settlement papers in this Action." *See* Motion to Intervene, p. 13. By filing Complaints in Arkansas and California against Chase regarding Payment Protection, they brought litigation in direct contradiction to the Court's Order. Movants

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[5] On February 11, 2011, the Court corrected its Preliminary Approval Order (the "Corrected Preliminary Approval Order, but the substantive portion of the Preliminary Approval Order regarding a stay remained the same. *See* Corrected Preliminary Approval Order, Dkt. # 24.

[6] On February 7, 2011, the *Smith* case was filed in Arkansas; on February 11, 2011, the *White* case was filed in California. *See supra* Fact section at 3, Ex's G and H.

intervention would only frustrate the Court's intent to "protect and effectuate the Settlement Agreement." *See* Preliminary Approval Order, Dkt. # 23, at ¶ 28; *see also Perkins v. Am. Nat'l Ins. Co.*, 446 F. Supp. 2d 1350 (D. Ga. 2006) (applying the first-filed rule to two identical class actions filed in different courts).

B. The Motion to Intervene is Untimely

To intervene as matter of right, parties seeking to intervene must demonstrate that their motion is timely. *See Stone*, 371 F.3d 1308-09; *In re Healthsouth Corp. Ins. Litig.*, 219 F.R.D. 688 (N.D. Ala 2004). The burden of satisfying the requirements of intervention under Rule 24(a)(2) falls on the movants for intervention. *See FTC v Med Resorts Int'l, Inc.*, 199 F.R.D. 601 (N.D. Ill. 2001). There is no bright-line rule delineating when a motion to intervene is or is not timely; timeliness is determined upon facts and circumstances of each particular case and "employed to regulate intervention in the interest of justice." *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989). Denial of intervention for untimeliness lies within the sound discretion of the court and is subject to review only for abuse of that discretion. *See NAACP v. New York*, 413 U.S. 345, 366 (1973). The factors that courts weigh when considering timeliness are:

1. The length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene.
2. The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case.
3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.
4. The existence of unusual circumstances militating either for or against a determination that the application is timely.

Stallworth v Monsanto Co., 558 F.2d 257 (5th Cir. 1977) (appeal from the Northern District of Florida). Weighing these factors, Florida courts have denied motions to intervene as untimely

and the Eleventh Circuit has affirmed such decisions. *See, i.e., Brown v. Bush,* 194 Fed. Appx. 879 (11th Cir. 2006); *Hofmann v EMI Resorts, Inc.*, 689 F. Supp. 2d 1361 (S.D. Fla. 2010); *Klaas v Donovan (In re Donovan)*, 41 B.R. 756 (S.D. Fla. 2009).

The Movants have misapplied the first factor of the timeliness test. They conveniently claim that they only learned of their interests when the Corrected Preliminary Approval Order was filed. That is doubtful and at the same time telling in the sense that they only became "aware" after they sniffed a proposed settlement and wanted to get involved in a representative capacity. "Prompt filing of a motion to intervene after the settlement does not indicate timeliness." *Heartwood, Inc. v. U.S. Forest Service*, 316 F.3d 694, 701 (7th Cir. 2003) (intervention after settlement may actually indicate an intent to block a settlement between the parties). In fact, Movants here should have known that their interests were being represented in the *Kardonick* matter as soon as they learned *Kardonick* was filed, on September 8, 2010. *See* Complaint, Dkt. # 1. Movants' five month delay is unjustified. *See, i.e. R&G Mortg. Corp. v Fed. Home Loan Mortg. Corp.,* 584 F.3d 1, 7 (1st Cir. 2009) (a delay of 2 ½ months found "inexcusable"); *Donaldson Lufkin & Jenrette Sec. Corp. v. Nat'l Gypsum Co*., No. 3:94-CV-2452-R, 1999 U.S. Dist. LEXIS 231, at *10-11 (N.D. Tex. Jan. 7, 1999) (stating delay of approximately 5 to 6 months was "inexcusable").

The second factor is particularly significant to this review because the prejudice to the *Kardonick* parties is significant. The parties met several times, conducted mediation, continued negotiations, and eventually reached a settlement for a nationwide class. In cases where a settlement has already been reached between the parties, courts are particularly inclined to deny motions to intervene. *See, i.e., Grilli v. Metropolitan Life Ins. Co.*, *Inc., et al*., 78 F.3d 1533, 1537-38 (11th Cir. 1996)(noting that the district court concluded that the petition was filed "for

the sole purpose of causing delay, derailing the proposed class action settlement and generating legal fees for the [movants'] attorney."); *Reeves v. Wilkes*, 754 F.2d 965, 971 (11th Cir. 1985)("if intervention is allowed, time and effort expended in formulating the settlement . . . ***will be for naught***") (emphasis added); *R&G Mortg. Corp.*, 584 F.3d at 7 ("motions to intervene that will have the effect of reopening settled cases ***are regarded with particular skepticism*** because such motions tend to prejudice the rights of settling parties") (emphasis added); *Heartwood, Inc.*, 316 F.3d 701; *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 172 (S.D.N.Y. 2000) ("intervention for purposes of derailing the Settlement . . . would cause intolerable delay . . . [and] certain prejudice"). The Middle District of Florida has previously denied intervention because "the parties had devoted much time, effort and expense to negotiating a settlement agreement." *Horton v. Metropolitan Life Ins. Co.*, No. 93-1849, 1994 U.S. Dist. LEXIS 21394, at * 20 (M.D. Fla. Oct. 25, 1994)(the settlement protected by the Court was preliminary and still awaited final court approval). Here, intervention will have the immediate effect of dissolving the settlement, causing significant, material prejudice upon the *Kardonick* parties because of all the effort already undertaken to resolve this complicated, nationwide class case. Movants' argument that there is no prejudice simply because notice has not already been sent out (s*ee* Motion to Intervene, p. 12) is unsupported by any case law and ignores a wealth of case law disfavoring intervention after settlement.

Third, the Movants will not suffer prejudice if their motion to intervene is denied because even if they believe their interests are not adequately represented, other accepted, adequate avenues to obtain the same relief sought are available to them. First, the time to file objections has not passed: Movants may still object to the settlement. *See Lelsz v. Kavanaugh*, 710 F.2d 1040, 1046 (5th Cir. 1983) (holding that "proposed intervenors who are also class members may

object to any settlement that in their view jeopardizes their interests"); *Weinman v Fid. Capital Appreciation Fund* (*In re Integra Realty Res., Inc.*), 354 F.3d 1246 (10th Cir. 2004) (objecting "serves the same purpose" as moving to intervene). If, after the motion to intervene is denied, the Movants still oppose the arms-length settlement reached in this matter, they may find their place as objectors, as permitted by the federal rules of evidence and contemplated under the parties proposed settlement Agreement.[7] Second, the Movants may opt-out of the Settlement. The Eleventh Circuit recognized that intervenors are not prejudiced if they maintain the ability to opt out of a settlement class and independently pursue their rights. *See Grilli*, 78 F.3d at 1536-37. It is axiomatic that, since the Movants still have these remedies available to them (*see* Motion to Intervene, p. 11), they will not be materially prejudiced by a denial of their motion.[8]

Finally, the only "unusual circumstance" presented in this instance is the fact that the Movants violated the Court's stay. *See supra* at section (I)(A). Discouraging such acts militates against a determination that the application is timely.

In this case, the Movants' late entry into this litigation warrants a finding of untimeliness. Like vultures seeking recently slaughtered prey, the Movants filed their Complaints, in violation of the Court's stay, only after an Order of preliminary settlement was entered. In filing a motion to intervene, Movants sought not to protect their interest and those of the class they purport to

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[7] Plaintiffs do not waive their right to challenge such an objection. As the Federal Judicial Center warns in its Pocket Guide for Judges for Managing Class Action Litigation, "[w]atch out, though, for 'canned objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests.'" Managing Class Action Litigation: A Pocket Guide for Judges, Rothstein & Willging, §3B5 (4th ed. 2005) (citing *O'Keefe v. Mercedes Benz, U.S.A., L.L.C.,* 214 F.R.D. 266, 295 (E.D. Pa. 2003)).

[8] Movants' assertion of prejudice is a fiction. Movants bring this case to try to obtain additional recovery from the defendant only. This is not considered prejudice under Rule 24. *See Reeves*, 754 F.2d at 971-72; *Gen. Star Indem. Co. v V.I. Port Auth.*, 224 F.R.D. 372 (D.V.I. 2004) (a "purely economic interest in outcome of litigation is insufficient to support motion to intervene.").

represent, but rather to insert themselves personally into the settlement negotiations. The intervention motion arrived on the Court's doorstep on March 9, 2011. By then, the case was already settled. The reason the Movants' delayed was because they wanted to sit back and wait for the parties to complete settlement negotiations. Since the Movants are members of the Settlement class, their interest was considered in the settlement negotiations and their rights are protected. The only prejudice at play here is to that of the *Kardonick* parties.

II. Movants Are Not So Situated That Disposition of this Action Under The Court's Preliminary Approval Order Will Impede or Impair Their Ability to Protect Their Interest Because other Avenues of Relief are Available to Them

Rule 24 also requires that proposed intervenors carry the significant burden to demonstrate that disposition of the action in which they seek to intervene, as practical matter, may impede or impair their ability to protect their interest. *See Stone*, 371 F.3d at 1308; *In re Healthsouth Corp. Ins. Litig.*, 219 F.R.D. at 692. "The mere fact that a lawsuit may impede a third party's ability to recover in a separate suit ordinarily does not give that party a right to intervene." *In re Healthsouth Corp. Ins. Litig.*, 219 F.R.D. at 692 (*quoting TIG Specialty Ins. Co. v. Fin. Web.com, Inc.*, 208 F.R.D. 336, 338 (M.D. Fla. 2002)).

Here, the *Kardonick* Settlement will not impede or impair the Movants' rights or ability to pursue what they perceive to be their interests in this case. The time to object to the Proposed Settlement has not yet run, nor has the time to opt out. *See* Preliminary Approval Order, Dkt. # 23. The right to object provides the Movants an opportunity to assert their right to oppose and better understand the settlement. Opting out of the Settlement, as provided in the Settlement documents, permits the Movants to be excluded and to pursue their own claims. *See id.* In seeking to intervene, rather than object or opt out, Movants betray their true motivations: their actions are for their own benefit, and not to vindicate the rights of some as-yet-undefined class of

persons.[9] *See R&G Mort. Corp.,* 584 F.3d 1 (1st Cir. 2009) (intervention properly denied when it was sought exclusively for proposed intervenor's benefit, not to vindicate right of public access).

III. The Kardonick Settlement was Negotiated in Good Faith and is Fair; Class Members were Adequately Represented by Counsel and Kardonick Fully Encompasses and Represents the Interests of the Movants

A. Examining the Relevant Factors, this Court Correctly Determined that Preliminary Approval of the Proposed Settlement Was Warranted

As set forth in Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Approval of Class Action Settlement ("Plaintiffs' Memorandum"), in determining whether to preliminarily approve a proposed settlement, a court, independently and objectively, analyzes the evidence and circumstances before it in order to determine whether there is probable cause to notify the Class of the proposed settlement. *See Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994). In applying these time-honored standards to the present case, this Court was presented with and considered the following points and authorities:

- Settlement is a strongly favored mechanism, especially when achieved with the assistance of a skilled and independent mediator;
- The proposed Settlement discussions were facilitated by reputable and skilled mediator Jonathan B. Marks;
- Settlements "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*, F. Sec. L. Rep. (CCH) ¶ 92,414 at 92,525 (S.D.N.Y. 1985) (quoting *Argo v. Harris*, 84 F.R.D. 646, 647-48 (E.D.N.Y. 1979));
- "[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." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972);

[9] Movants failed to attach a proposed complaint to their motion to intervene, as required by Rule 24(c), and have therefore not defined the class that they would seek to represent in this case if permitted to intervene.

- The $20 million plus Settlement Fund provides the Settlement Class with immediate benefits without the costs of continued litigation;
- The relative value of the Settlement compared to other settlements in similar litigation;
- Plaintiffs' Counsel are experienced in consumer fraud litigation, and they possess the resources and skill to perform a thorough investigation into applicable factual and legal issues;
- Plaintiffs' Counsel's knowledge and skill allowed them to adequately assess the strengths and weaknesses of the case, including the potential defenses available to Defendants, and effectively balance the benefits of settlement against the risks of further litigation;
- Counsel for the Chase Defendants provided Plaintiffs' Counsel access to non-public information and documents regarding the companies and their Payment Protection products;
- Before seeking preliminary approval of the settlement, Plaintiffs' Counsel reviewed and analyzed thousands of pages of non-public documents and interviewed key personnel, namely the product manager of the Payment Protection program who is responsible for the day to day management of Chase's Payment Protection Product;
- The conduct of counsel and party representatives was professional and adversarial throughout the litigation, including the mediation process, and each side remained steadfast in pursing this action to trial should the circumstances so dictate; and
- The Settlement Class satisfies the requirements of Rule 23(a) and (b).

Based on the foregoing, this Court correctly determined that preliminary approval of the proposed Settlement was warranted.

Despite this Court's objective and independent analyses, Movants filed the current motion, which itself exemplifies Movants' malfeasance,[10] arguing that this Court should revisit its Preliminary Approval Order based on the groundless claim that the Settlement was not negotiated by informed counsel and does not achieve meaningful relief for the Settlement Class because the Settlement does not achieve the same benefits procured in the *Capital One* Settlement. However, as demonstrated herein, Movants' arguments are fabrications that have been engineered by Movants' Counsel through fallacious deductions and hypothetical facts. To be more specific, the research, investigation, and discovery performed by Plaintiffs' Counsel in

[10] As discussed in more depth in Section (I)(A) above, Movants' current motion is the product of their own violation of this Court's order staying all litigation against Chase.

this Action, which included review of thousands of pages of documents, sufficiently gave Plaintiffs' Counsel ample opportunity to reach an informed decision concerning the adequacy of the Settlement.

The Settlement presently before this Court compares favorably to the compromise in the *Capital One* case. In particular, the investigation and discovery undertaken by Plaintiffs' Counsel revealed that the Class in this matter does not contain a subset of persons similar to those who received the much-heralded $45 Million remediation payment in *Capital One*. That is, it was not the policy and practice of Chase to enroll in its Payment Protection Plan individuals who were *per se* ineligible for benefits, and it was these people who were eligible for the remediation proceeds in the *Capital One* litigation. As among those who theoretically qualified for Payment Protection benefits, yet sustained other damages as described in the Amended Complaint – essentially the entire Class of Chase cardholders at bar – conversations between Plaintiffs' Counsel and the various settlement administrators gives rise to an expectation that an equivalent claims rate will cause authorized *Kardonick* claimants to receive compensation exceeding that received by their counterparts in the *Capital One* case. That being so, any claim that the present settlement is somehow lesser than the deal struck in *Capital One* is completely specious, and ultimately goes to show the unfamiliarity of Movants' attorneys with the relevant facts.

1. The Settlement Agreement Resulted from Arm's Length Negotiations and Was Not the Product of Collusion

Courts recognize that negotiations between counsel of "experience and ability . . . necessary to effective representation of the class's interests," is one factor in ensuring a fair resolution. *See 2 Newberg on Class Actions*, §11.41 at 11-88 (3d ed. 1992); *see also In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1333 (N.D. Ga. 2000); *Domestic Air*

Transp. Antitrust Litig., 148 F.R.D. 297, 312-13 (N.D. Ga. 1993). An equally relevant factor is having the parties negotiate the terms of the settlement "in the presence of and with the participation of an experienced, able, and independent mediator." *See Diaz v. Hillsborough Cnty. Hosp. Auth.*, No. 8:90-CV-120-T-25B, 2000 U.S. Dist. LEXIS 14061, at *16 (M.D. Fla. Aug. 7, 2000).

Here, the negotiations were conducted between experienced counsel and involved concessions on both sides with regards to difficult and hard fought issues. Further, it is undisputed that the parties negotiated the terms of the Settlement in the presence of and with the participation of an experienced, able, and independent mediator, Jonathan B. Marks. Moreover, during the mediation process, Defendants made pertinent, non-public disclosures to Plaintiffs' Counsel regarding the number of enrollees in Payment Protection, the average balance of enrollees, the average fee per $100.00, the average billed fee, the average length of time a cardholder was a payment protection member, and the reasons for claim denials. Based on these representations, along with Plaintiffs' Counsel's previous research and investigation,[11] and with the assistance of a neutral mediator, the parties were able to structure a Settlement Term Sheet. Further, the agreed-upon terms were subject to Plaintiffs' Counsel's confirmation of the data and information exchanged during the mediation. In this regard, within four days of the mediations sessions that occurred on November 10 and 11, Plaintiffs requested, *inter alia*, the following documents from Defendants: (1) scripts, marketing and other written materials used by Chase in relation to the payment protection product offered by the Private Label accounts; (2) agreements between Chase and its third party administrators during the relevant time period; and (3) reports

[11] This involved consulting with and interviewing Plaintiffs and members of the putative class, reviewing information and documents provided by Plaintiffs and some within the putative class, analyzing public documents concerning Defendants and their Payment Protection products, and conducting relevant legal research.

relating to Payment Protector benefits requested, approved and denied. Within days, Plaintiffs' Counsel began receiving Defendants' rolling production, and Plaintiffs' counsel devoted considerable time over the next few weeks thoroughly reviewing and analyzing what amounted to thousands of pages of non-public documents. Upon completion of this review, Plaintiffs' Counsel also interviewed key personnel, namely the product manager of the Payment Protection program who is responsible for the day-to-day management of Chase's Payment Protection Product. Thus, there was significant information exchanged between the parties in this Litigation. As such, and contrary to Movants' assertions, Plaintiffs and Plaintiffs' Counsel had access to sufficient material to evaluate their case and assess the adequacy of the Settlement in light of the strengths and weaknesses of their positions, as well as the potential defenses available to Defendants.[12]

Equally unavailing is Movants' suggestion that this Court should doubt the arms' length nature of the Settlement based on the fact that it was achieved at an early stage of the litigation. Indeed, it is well established that settlement is ripe at any stage of the proceedings so long as "plaintiffs had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of the settlement." *Fresco v. Auto Directions, Inc.*, No. 03-61063, 2009 U.S. Dist. LEXIS 125233, at *24 (S.D. Fla. Jan. 16, 2009); *see also Mashburn v. Nat'l Healthcare, Inc.,* 684 F. Supp. 660, 669 (M.D. Ala. 1988) ("[E]arly settlements are to be encouraged."). As discussed above, here, Defendants provided Plaintiffs and Plaintiffs' Counsel with extensive

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[12] In a similar vein, it is readily apparent that Plaintiffs' Counsel has adequately and vigorously represented the Class throughout this Litigation. Accordingly, conditional certification of the Settlement Class was proper. Moreover, Movants' reliance on *Reynolds v. Benefit Nat'l Bank*, 288 F.3d 277 (7th Cir. 2000), for the proposition that Plaintiffs' Counsel inadequately represented the Class is to no avail as that case did not involve facts in which the terms of the settlement were negotiated in the presence of and with the participation of an experienced, able, and independent mediator. Moreover, unlike the present case, the record in *Reynolds* did not reflect an extensive exchange of information.

discovery, producing thousands of documents for review and key personnel for interviews. Accordingly, notwithstanding the relatively early stage of the proceedings, Plaintiffs had access to sufficient information to make an informed decision about the merits of the Settlement. *See In re Nationwide Fin. Servs. Litig.,* No. 2:08-00249, 2009 U.S. Dist. LEXIS 126962, at *13-14 (S.D. Ohio Aug. 18, 2009) (recognizing that although the parties were able to negotiate the settlement at a relatively early stage of the proceedings, all of the parties had a clear view of the strengths and weaknesses of their cases based on factual and legal research, review of relevant documents, and the depositions of four witnesses with access to particularized information); *Palamara v. Kings Family Rests*, No. 07-317, 2008 U.S. Dist. LEXIS 33087, at *7-8 (W.D. Pa. Apr. 22, 2008) (finding that while the settlement was reached at a relatively early stage of the proceedings, defendant provided plaintiff with extensive documentation which allowed plaintiff to make an informed assessment of the value of his case); *Strang v. JHM Mort. Sec. Ltd. P'ship*, 890 F. Supp. 499, 501 (E.D. Va. 1995) (approving settlement at early stages of litigation where plaintiffs had conducted sufficient discovery and investigation to fairly evaluate the merit of defendants' positions during settlement negotiations); *Krangel v. Golden Rule Res., Ltd.,* 194 F.R.D. 501, 507 (E.D. Pa. 2000) ("The fact that [a] case is in an early stage of proceedings does not necessarily weigh against approval of the settlement.").

2. The Settlement Is Within the Range of Reasonableness

Settlements "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*, F. Sec. L. Rep. (CCH) ¶ 92,414 at 92,525 (S.D.N.Y. 1985) (quoting *Argo v. Harris*, 84 F.R.D. 646, 647-48 (E.D.N.Y. 1979)). Here, the $20 Million plus Settlement Fund clearly falls within the range of reasonableness.

Ignoring the import of analyzing a settlement given the circumstances of a particular case, Movants criticize the significant benefits achieved in this Action, not on the facts of this case but rather on the facts of the *Capital One* case. To be more specific, Movants argue that the Settlement in this Action falls outside the scope of a reasonable range because Plaintiffs' Counsel failed to obtain terms equivalent to those procured in the *Capital One* litigation. Specifically, Movants place much weight on a particular aspect of monetary relief, equaling approximately $45 Million, paid out to a category of class members who were *per se* ineligible for Capital One's products. As previously mentioned, Movants' hypothetical synopsis falls flat because no such category of enrollees exists in the present proceeding. Stated another way, the class members in *Capital One* that received a full refund were those who were *per se* ineligible for Capital One's products at the time of enrollment. Having litigated *Capital One*, Plaintiffs' Counsel were focused on this issue during confirmatory discovery, and that process revealed – consistent with Chase's representations during the mediation sessions – that no equivalent category of class members exists in the present Action; therefore, no similar payment was procured in this Action.

To put the significant results achieved in this Settlement into perspective, after deduction of reasonable fees and costs, it is anticipated that if the claims rate in the current action is equivalent to the claims rate in *Capital One*, the authorized claimants in this Action would receive more per claim than those with substantially identical injuries in *Capital One*. Accordingly, the Settlement falls squarely within the range of reasonableness.

B. The Movants' Interests Are Adequately Represented In This Case

A party seeking to intervene bears the significant burden of establishing that their interests are represented inadequately by existing parties to the suit at issue. *See In re Healthsouth Corp. Ins. Litig*. 219 F.R.D. 688. Indeed, the decision to allow intervention requires

an affirmative ruling that the moving parties' interests are not adequately represented. *See Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 691-92 (1961). Where, as here, the objectives of the would-be intervenors and the existing litigants are identical, the Eleventh Circuit presumes that the existing parties will adequately represent the intervenors' interest. *See Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 215 (11th Cir. 1993); *Jenkins v. Missouri*, 78 F.3d 1270, 1275 (8th Cir. 1996) ("There is a presumption of adequate representation when the persons attempting to intervene are members of a class already involved in the litigation or are intervening only to protect the interests of class members. A difference of opinion concerning litigation strategy or individual aspects of a remedy does not overcome the presumption of adequate representation."). To rebut this presumption, movants bear a significant burden: they must demonstrate "adversity of interest, collusion, or nonfeasance." *See Wyatt v. Hanan*, 170 F.R.D. 189, 192 (M.D. Ala. 1995) (court found movant's interest adequately represented where movant did not demonstrate collusion between the defendants and insurers, adversity to movant's position, or that defendants lacked competency).

Here, the Movants unsupported allegations do not meet the requirement that an intervenor show inadequate representation by the existing parties. *See Ordnance Container Corp. v. Sperry Rand Corp.,* 478 F.2d 844, 845 (5th Cir. 1973) (denying assignee's motion to intervene based on conclusory allegations only did not establish that assignee's interests were not adequately represented); Wright & Miller, Federal Practice and Procedure § 1909 (1986) (where the intervenor and a party to the suit share the same ultimate objective, the intervenor must generate a "concrete showing of circumstances in the particular case that make the representation inadequate."). Just because the Movants' counsel thinks they may have a better strategy does not mean intervention is appropriate. *See League of United Latin American Citizens v. Wilson*, 131

F.3d 1297, 1306 (9th Cir. 1999) (a proposed intervenor's disagreement with the existing party's litigation strategy or tactics does not make their interests adverse so as to justify intervention).

Moreover, neither the Movants nor their counsel can properly represent the Settlement Class in this case. Intervenors and their counsel cannot enter a case and purport to represent a putative class of plaintiffs if they have not represented a certified class against the defendant. *See Grilli*, 78 F.3d at 1538.

> At the time the district court ruled, neither the Pittsburgh court presiding over the Coulter's suit against MetLife, or any other court, had appointed the Coulters as the representatives of any class of purchasers of any MetLife products. Moreover, no court had appointed [the Coulter's counsel] to represent anyone with a claim against MetLife. We therefore cannot conclude that the district court's denial of intervention was erroneous.

Id. Neither the Movants' Arkansas nor California case has been certified. In fact, the Movants have done nothing in those cases other than file and serve a Complaint; Chase has not even answered or opposed. *See* Motion to Intervene, at p. 4, n.3. Further, counsel for the Movants has not been appointed to represent any class of plaintiffs in litigation against Chase. Accordingly, neither the Movants nor their counsel can adequately protect the interests of the putative class of plaintiffs against Chase in *Kardonick* and there is simply no basis to permit the proposed intervention in this case.

CONCLUSION

Based on the foregoing, Movants' Motion to Intervene should be denied.

Dated: March 28, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of March, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Brian Ku
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