UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 1:10-cv-23235/HOEVELER

DAVID KARDONICK, individually and on behalf of all others similarly situated and the general public,

Plaintiff,

v.

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

Defendants.

DEFENDANTS' OPPOSITION TO MOTION TO INTERVENE

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INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant JPMorgan Chase & Co. & Chase Bank USA, N.A. (collectively, "Chase") submit this memorandum in opposition to the *Motion to Intervene* filed by six proposed intervenors in this action.

Chase offers its credit card holders the option of purchasing "payment protection" products that suspend or cancel their obligation to repay their credit card debt under certain conditions. Beginning in September 2010, Plaintiffs filed a series of class action lawsuits challenging Chase's marketing and administration of these products. Following extensive informal discovery and a two-day mediation, the parties entered into a proposed $20 million settlement of these actions ("Settlement"). This Court issued an order granting preliminary approval to the Settlement on February 2, 2011.

Six objectors to the Settlement ("Objectors") have now moved to intervene in this case and set aside this Court's preliminary approval order. Earlier, Objectors' Counsel and Settlement Class Counsel had represented a number of different plaintiffs who sued Capital One Bank over its payment protection products. When those cases settled, Objectors' Counsel shared in a multi-million dollar attorneys' fee paid as part of the settlement.

Here, Objectors' Counsel had no role in the Settlement because they had no pending claims against Chase at the time the Settlement was reached. Shortly after this Court gave preliminary approval to the Settlement, however, Objectors' Counsel served Chase with two class action lawsuits asserting claims released by the Settlement. Objectors' Counsel then contacted counsel for Chase and announced that they would intervene and oppose the Settlement unless Chase would enter into settlement discussions with them and inject more money into the

Settlement. When Chase declined this invitation, Objectors' Counsel made good on their threat. For the reasons set forth below, Objectors' motion should be denied.

1. Preliminary Approval Should Not Be Vacated.

Objectors have not made the kind of exceptional showing that would justify vacating this Court's preliminary approval order. In a strained effort to make such a showing, Objectors argue that the Settlement is not the product of arms-length bargaining by Class Counsel, but Objectors are mistaken. The Settlement is the product of informed and adversarial bargaining by experienced counsel over the course of a structured mediation conducted by noted mediator Jonathan Marks. As Mr. Marks confirms in a declaration accompanying this memorandum, the mediation involved effective advocacy on both sides, extensive exchanges of proposals and counter-proposals, and spirited arms-length negotiations. Informal discovery took place before, during, and after the in-person mediation sessions. Based on this discovery and Class Counsel's experience in other payment protection class actions, Class Counsel were well equipped to advocate the interests of the Settlement Class.

Objectors fare no better on their alternative argument that the settlement consideration is inadequate. The consideration provided by the Settlement is generous compared to the value of Plaintiffs' claims. As Chase demonstrates below, the claims asserted in this litigation are expressly preempted by federal banking law, the claims have no factual merit, and Plaintiffs would have had great difficulty prevailing on the issue of class certification. Viewed from this perspective, the $20 million in total consideration provided by the Settlement is well within the range of what is fair, reasonable, and adequate.

Objectors argue that the consideration provided by the Settlement is smaller than the consideration provided in the Capital One litigation, but that argument rests on a fictional account of the Capital One settlement. Objectors have suggested that the claims-made settlement

in the Capital One case could have had a value of more than $200 million. (Dkt. # 32, Memo. at 7.) That valuation, however, assumes that 100% of class members submitted a claim. Tellingly, Objectors' Counsel have refused to say what the actual claims rate was in the Capital One settlement, but Chase is advised that the claims rate was likely less than 5%, implying a total payment to the class of less than $10 million. Furthermore, the claims asserted against Capital One had more merit than the claims asserted here. Thus, as compared to the settlement approved in the Capital One case, the Settlement here will provide more money to a settlement class with weaker claims.

Even if Objectors had raised legitimate questions about the fairness of the Settlement (and they have not), those questions would not provide a basis for vacating this Court's preliminary approval order. At most those issues would be matters to consider at the final approval hearing scheduled for September. As a practical matter, moreover, it is already too late to vacate the preliminary approval order. The class notice process is already underway, and will likely be complete before this motion is fully briefed and decided. As a result, Objectors' untimely attempt to vacate the preliminary approval order is essentially moot.

2. Intervention Should Not Be Permitted.

This Court should also deny Objectors' request for leave to intervene. Objectors are free to opt out of the Settlement, to submit written objections to the Settlement, and to appear at the fairness hearing in opposition to the Settlement. These traditional procedures are more than adequate to protect Objectors' interests. Allowing Objectors to intervene and take discovery in addition to objecting would merely embolden Objectors' attempt to coerce Chase into reopening settlement negotiations.

Intervention should not be a means for opportunistic lawyers to try to earn themselves an attorneys' fee by double-negotiating defendants who have already compromised

in good faith. Rather, in the absence of evidence of collusion or impropriety by the settling parties, the traditional right to object or opt out of a class action settlement should be deemed sufficient, and leave to intervene should be denied. As numerous courts have recognized, any other approach would invite endless attempts to re-open properly-negotiated settlements, thus discouraging parties from settling in the first place.

Here, there is no evidence whatsoever of collusion or impropriety in the settlement process. Accordingly, Objectors' request for leave to intervene should be denied.

BACKGROUND

A. Overview of Chase Payment Protector

As a federally-charted national bank, Chase is empowered by the National Bank Act to make and collect loans and to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). One of these "incidental powers" is the power to offer a product to a consumer, for a fee, that cancels or suspends the consumer's obligation to repay a loan upon the occurrence of a specified event. *See* 12 C.F.R. § 37.1(a). These products are commonly known as debt cancellation contracts and debt suspension agreements. *See id.*

As authorized by federal law, Chase offers its credit card holders debt cancellation and debt suspension products, the best known of which is referred to as "Payment Protector." Subscribers to the product pay a fee of 89 cents per $100 of balance due on their monthly credit card statements in exchange for the right to cancel or suspend their credit card debt under a variety of circumstances. Most subscribers enroll in Payment Protector over the telephone, typically when they make their initial calls to Chase to activate their credit cards. Fink Decl., ¶ 3 (Declaration of Fink is attached hereto as Exhibit 1). Consistent with the

enrollment procedures authorized by federal law, customers who enroll by phone are read a set of mandatory short-form disclosures before they may enroll. *See id.*; 12 C.F.R. §§ 37.6, 37.7 & Appendices A & B. Chase then mails these customers a copy of the terms and conditions of the program, and the customers are given 30 days to cancel their enrollment at no charge. *See* Fink Decl., ¶¶ 3-4.

Once enrolled, customers will see a Payment Protector line item on their monthly billing statements in each month in which they incur a fee for the product. *See* Fink Decl., ¶ 5 & Ex. B, at 1. Adjacent to this line item is a toll-free telephone number that customers may call to make a benefit claim or to disenroll from the program. *Id.* Subscribers are free to disenroll at any time without penalty. *Id.*, ¶ 3.

While many banks offer products that provide payment protection only in certain narrowly-defined situations, Chase's product applies in a broad range of circumstances including: (1) business hardship (for the self-employed), (2) involuntary unemployment, (3) disability, (4) hospitalization, (5) marriage, (6) divorce, (7) birth of a child, (8) change in residence, (9) call to military service, (10) death of a spouse or domestic partner, (11) natural disaster, or (12) a once-a-year "payment holiday" selected by the cardholder. *See* Fink Decl., Ex. A, at 8, §§ 2-8. In addition, unlike many banks, Chase provides debt relief if any of these events affects either the cardholder, the cardholder's spouse or domestic partner, a higher wage earner in the cardholder's household, or an authorized user of the credit card account. *Id.*, at 7, § 1.1(b). The cardholder's payment obligations will be suspended and no interest or fees will accrue during the suspension period. *Id.*, § 1.1(c). Finally, in the event of the cardholder's death, up to $25,000 of any outstanding balance due on the account will be cancelled. *Id.*, § 11.

There are also circumstances in which certain benefits are not available, but these situations are clearly disclosed. *See generally id.* For example, the Payment Protector terms and conditions state that self-employed and retired persons "may qualify for all benefits except for Involuntary Unemployment or a Leave of Absence." *Id.*, at 7, §§ 9.4, 9.5 These limitations on benefits are disclosed not only in the terms-and-conditions document, but also in a one-page set of responses to Frequently Asked Questions provided to new enrollees. *Id.*, at 4.

Since January 2005, Chase cardmembers have made more than 1.2 million claims for payment protection benefits. Fink Decl., ¶ 11. Approximately 90% of these claims were approved. *Id.*

B. The Payment Protector Litigation

On September 8, 2010, counsel representing the Settlement Class in this case ("Class Counsel") filed a Complaint in this Court directed at Chase's payment protection products. Similar actions were filed in federal courts in Arkansas and Wisconsin. These complaints generally alleged that Chase did not adequately disclose the terms and conditions of the Payment Protector program and that the program was "virtually worthless." (Dkt. # 1, ¶ 55.)

Chase firmly believes that its Payment Protector product is lawful and proper. Nevertheless, to avoid the costs of defending its program in lawsuits filed across the country, the distractions imposed by litigation, the burdens of discovery, and potential adverse attention at a time when banks are under extraordinary scrutiny by the government and the media, Chase opted to pursue an early mediation with Class Counsel.

Before the mediation, the parties exchanged mediation briefs outlining their positions. Chase also provided documents and data on a wide variety of subjects, including:

- the number of Payment Protector enrollees;

- the average fee paid by enrollees;
- the number of enrollees who requested benefits;
- the number of enrollees who received benefits;
- the number of enrollees who were denied benefits;
- the rate at which benefits were approved;
- the reasons why benefits were denied;
- marketing materials and disclosures provided to Payment Protector enrollees;
- the telemarketing scripts employed by Chase's customer service representatives; and
- the written disclosures provided to Payment Protector enrollees.

Soukup Decl., ¶ 3.

A two-day mediation occurred in November 2010 under the supervision of Jonathan Marks, a nationally-acclaimed mediator who mediated (among other disputes) the antitrust litigation between Microsoft and the U.S. Department of Justice. During the mediation, the parties engaged in two days of hard-fought, arm's-length negotiations. Marks Decl., ¶¶ 6-23 (Declaration of Marks is attached hereto as Exhibit 2). After the mediation, Chase provided additional confirmatory discovery to satisfy Class Counsel of the truth of certain representations made at the mediation, and Class Counsel spent several hours interviewing the Chase executive responsible for overseeing Chase's payment protection products. Soukup Decl., ¶ 5 (Declaration of Soukup is attached hereto as Exhibit 3); Fink Decl., ¶ 9. These efforts culminated in a final settlement agreement signed in December 2010. (Dkt. # 16.)

Under the Settlement, Chase agreed to pay – and has paid – $20 million into an escrow fund from which class members will receive benefits. *All* of these funds will be used to provide benefits to the settlement class or to cover settlement costs or attorneys' fees; none of

these funds may revert to Chase unless the Settlement is disapproved. *Id.* at 17-20. The size of any attorneys' fee payment will be determined by the Court. *Id.* at 20-21.

A claims-made process will be used to distribute the settlement funds to class members. Although Chase believes that none of the class members suffered any actual injury, the class members with the most distinct and palpable *claim* of injury are those who (1) were ineligible for one or more forms of payment protection benefits, (2) allegedly were enrolled without their consent, or (3) were denied a benefit for which they allegedly qualified. Chase has no way of identifying these individuals or distinguishing them from the vast majority of class members who (in Chase's view) are satisfied with their payment production products. A claims process will therefore be used to channel the largest portion of the settlement funds to class members who claim to have suffered one of these forms of injury. (Dkt. # 16, at 22-25 & Ex. I.) Smaller payments will be made to those who were otherwise dissatisfied with the product. *Id.*

C. The Motion to Intervene

The Settlement was filed with this Court on December 21, 2010. On February 2, 2011, this Court granted preliminary approval to the Settlement and ordered that individual notice be provided to the class no later than April 11, 2011. (Dkt. # 23, ¶¶ 3, 12-15.) This Court's preliminary approval order included a standard provision staying all litigation of claims that would be released under the Settlement. (*Id.*, ¶ 28.)

On February 7 and 11, 2011, shortly after this Court entered its preliminary approval and stay order, Objectors filed payment protection suits against Chase in Arkansas and California. Objectors' Counsel have declined to say whether they knew about this Court's stay order at the time they filed their suits. At the latest, however, Objectors' counsel knew about the stay by February 12, 2011, when Class Counsel advised them of the stay. In knowing violation

of the stay, Objectors' Counsel proceeded to serve Summonses in the new actions the following week.[1]

On February 23, 2011, Objectors' Counsel contacted Chase's counsel and indicated that, unless Chase was prepared to re-open settlement discussions and add more money to the Settlement Fund, they intended to object to the Settlement and move to intervene. Chase declined to re-open settlement discussions, and Objectors' Counsel filed the instant motion to intervene on March 9, 2011.

According to Chase's records, three of the Objectors who propose to intervene in this action were never enrolled in or billed for a Chase payment protection product. *See* Fink Decl., ¶¶ 6-8.

D. The *Spinelli* Settlement

In their memorandum in support of the motion to intervene, the Objectors compare the Settlement to a settlement in *Spinelli v. Capital One Bank,* No. 8:08-cv-00132 (M.D. Fla.), which resolved a class action lawsuit filed against Capital One Bank. Although the claims asserted in *Spinelli* were stronger than the claims asserted against Chase, the *Spinelli* settlement likely provided *less* money to the settlement class than the proposed settlement in this action.

In *Spinelli*, after several years of litigation in which Capital One suffered setbacks including the certification of a class, Capital One eventually agreed to a nationwide settlement. The *Spinelli* settlement was a pure claims-made settlement; no settlement fund was established.

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[1] *See White, et al. v. JPMorgan Chase & Co., et al.*, No. 11-cv-00297 (S.D. Calif.) (Dkt. #'s 3, 4); *see also Smith, et al. v. JPMorgan Chase & Co., et al.*, No. 11-cv-00102 (E.D. Ark.) (Dkt. #'s 2, 5-6) (filing motions to appear *pro hac vice* nearly two weeks after conversation with Class Counsel regarding stay).

Capital One's obligations to make payments to the class thus depended entirely on the claims rate.

Objectors' Counsel have suggested that the value of the payments made through the *Spinelli* claims process could have exceeded $200 million (Memo. at 7), but that figure assumes a 100 percent claims rate. Although Objectors' Counsel were counsel to the class in *Spinelli* and know what the actual claims rate was, they have refused to disclose that information to Chase's counsel.[2] Chase's counsel are advised by a professional settlement administrator that the actual claims rate was likely less than 5 percent, in which case the payout to the *Spinelli* class was less than $10 million.

Class counsel in *Spinelli* nevertheless obtained an attorneys' fee award of $11.6 million, nearly half of which went to the law firms representing the Objectors in this action. By contrast, Objectors' Counsel were not involved in the Settlement in this action and therefore stand to receive no attorneys' fee unless they can force Chase to re-open settlement discussions.

Objectors' Counsel imply in their memorandum that the *Spinelli* settlement required Capital One to pay $45 million directly to *Spinelli* class members (Memo. at 6-7), but that is not correct. Capital One made a voluntary and unilateral decision, before it settled the *Spinelli* litigation, to refund certain fees to its payment protector subscribers and to provide certain retroactive benefits to customers who had been denied those benefits. *See* Collier Decl., ¶¶ 2-5 (Declaration of Collier is attached hereto as Exhibit 4).[3] Nothing in the *Spinelli* settlement required these payments, and no release was requested or provided in exchange for these

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[2] The *Spinelli* claims rate is not a matter of public record.

[3] For this Court's convenience, this declaration from a Capital One employee, which was originally filed in the *Spinelli* litigation, is attached hereto as Exhibit 4.

payments. Indeed, these payments had already been made before Capital One settled the *Spinelli* litigation.

ARGUMENT

I. THE REQUEST TO VACATE THE PRELIMINARY APPROVAL ORDER SHOULD BE DENIED.

A. The Request To Vacate The Preliminary Approval Order Is Untimely.

Objectors' request to vacate the preliminary approval order is untimely because the funds required for the class notice process have already been spent and the notice process is already underway. Objectors should have filed weeks earlier if they wished to interrupt the notice process.

The settlement papers in this action were filed with this Court on December 21, 2010; this Court entered its preliminary approval order on February 2, 2011; and Chase's counsel advised Objectors' Counsel on February 23 and 24, 2011 that the process of printing millions of notices was scheduled to begin the following weekend. Objectors' Counsel nevertheless waited until March 9, 2011 to file their motion to intervene and vacate the preliminary approval order. Even in the absence of any extensions of time, the briefing schedule on Objectors' motion would have run through April 7, 2011 – only two business days before the April 11, 2011 deadline for completing the class notice process.

Needless to say, the process of printing and sending 15 million individual notices to class members requires a large degree of advance planning and preparation. Accordingly, the Settlement Administrator has already printed all 15 million notices. These notices would have to be reprinted with new dates and deadlines if the class notice process were to be interrupted. Furthermore, because it is not possible to mail 15 million notices on a single day, the

Administrator began mailing notices in waves on March 31, 2011. Most or all of the notices will already have been mailed before Objectors' motion is briefed and decided.

Objectors should have filed their motion far earlier and asked for expedited treatment of their motion if they wished to obtain a ruling before the class notice process ran its course. Their failure to do so essentially moots their request for vacatur of the preliminary approval order.

B. This Court Correctly Concluded That Preliminary Approval Is Warranted.

Objectors' attacks on this Court's preliminary approval order also fail on the merits. As shown below, the Settlement was the product of informed, arm's-length bargaining by experienced counsel, and the terms of the Settlement are fair and reasonable.

1. Objectors Have Not Met The High Standard Required For Vacating A Preliminary Approval Order.

Preliminary approval is appropriate "where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *Smith v. Wm. Wrigley Jr. Co.*, No. 09-60646, 2010 WL 2401149, at *2 (S.D. Fla. Jun. 15, 2010). A decision to grant preliminary approval does not represent a final determination on a settlement's fairness; it merely "sets in motion those judicial processes that will culminate in a detailed, full, and final fairness hearing." *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 2001 WL 1842315, at *3 (N.D. Ohio Oct. 20, 2001). Vacatur of a preliminary approval order is therefore exceedingly rare. *See, e.g., Ehrheart v. Verizon Wireless, LLC*, 609 F.3d 590, 593-597 (3d Cir. 2010) (reversing district court order vacating preliminary approval order).

The only cases cited by Objectors in which courts have vacated preliminary approval orders involved circumstances very different than those existing in this case. *See*

Kessler v. Am. Resorts International's Holiday Network, Ltd., No. 05-C-5944, 2008 WL 687287 (N.D. Ill. Mar. 12, 2008); *Walker v. Liggett Group, Inc.*, 175 F.R.D. 226 (S.D. W.Va. 1997). In both of those cases, the objectors demonstrated a conflict of interest between the objectors' interests and the interests of the class representatives. Here, although the Objectors and the class representatives disagree on whether the Settlement should be approved, there is no conflict between their interests of the type that existed in *Kessler* and *Walker*. To the contrary, both Objectors and the class representatives share a common interest in maximizing their recovery from Chase. Objectors and the class representatives have a tactical disagreement on whether that goal is best accomplished by litigating or settling, but this mere tactical disagreement is not the type of conflict of interest that would justify vacating a preliminary approval order. *See, e.g., In re Diet Drugs Prods. Liab. Litig.*, No. 99-20593, 1999 WL 33644489, at *3-4 (E.D. Pa. Dec. 3, 1999) (refusing to vacate preliminary approval order when objectors presented no evidence to indicate that the settlement was not the product of arm's-length negotiations involving attorneys familiar with the litigation).

Even if Objectors had raised legitimate questions about the Settlement (and they have not), that would not justify vacating the preliminary approval order. Instead, the proper course of action would be to consider those questions at the fairness hearing, once all interested parties have had an opportunity to put their views before the Court.

2. The Settlement Was The Product Of Arm's-Length Bargaining.

Objectors' argument that the Settlement was not the product of arm's-length bargaining (Memo. at 16, 19) relies on reckless and inaccurate statements to the Court. In reality, the Settlement was the product of informed and spirited bargaining conducted under the auspices of a nationally prominent mediator. *See supra* at 6-7; Marks Decl., ¶¶ 7-23.

Objectors would have this Court believe that "before entering into the mediation process, [Class Counsel] did not ***possess a single shred of non-public information*** with which to adequately assess and evaluate the Class's claims." (Memo. at 16 (emphasis in original).) If Objectors had bothered to ask counsel for the settling parties about that assertion before making it to the Court, they would have learned that it is untrue. Prior to the two-day mediation session, Chase provided a substantial amount of informal discovery to Class Counsel. Soukup Decl., ¶ 3. Chase also provided an extensive amount of discovery during and after the mediation. *Id.*, ¶¶ 4-5. Class Counsel thus were armed with extensive information with which to evaluate the fairness of the Settlement.

Objectors suggest that the "suspicious timing" of the Settlement raises questions about the bargaining process (Memo. at 17), but these suggestions lack substance. The law does not presume that an early settlement is an improper or collusive settlement; to the contrary, Objectors continue to bear the burden of demonstrating that such a settlement was collusive or improper. *See infra* at 21-22, 25-26. Here, Objectors have not come forward with any evidence of impropriety, nor could they. *See* Marks Decl., ¶¶ 20-21. All they offer is self-serving speculation and innuendo. Objectors' speculation ignores the fact that the Settlement is the product of bargaining by experienced and reputable counsel, assisted by a highly respected mediator, and facilitated by extensive informal discovery. *See Id.*, ¶¶ 6-23; Soukup Decl., ¶¶ 3-5; Fink Decl., ¶ 9. Furthermore, Class Counsel had participated in several lawsuits challenging other banks' payment protection products, providing them with an informed basis for evaluating the strength of their claims even in the early stages of litigation. *See Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1324-25 (S.D. Fla. 2005) ("Information obtained from other cases may be used to assist in evaluating the merits of a proposed settlement of a different case."). For all

these reasons, Objectors' suggestion that the Settlement is the product of collusion or impropriety is meritless. *See* Marks Decl., ¶ 21.

3. The Proposed Settlement Is Generous Because Plaintiffs' Claims Have Very Little Value.

Objectors also overlook the fact that the claims released in the Settlement are weak on the merits. As a result, the Settlement consideration is well within the range of what is fair, adequate and reasonable.

First, Plaintiffs' claims are preempted by federal law. In 2002, the Office of the Comptroller of the Currency ("OCC") – the federal agency charged with regulating national banks – issued comprehensive regulations governing the issuance of debt cancellation contracts and debt suspension agreements by national banks. *See* 12 C.F.R. Part 37. These regulations interpret and define the federal authority conferred on national banks under the National Bank Act, a law that has unique preemptive power and scope. As the Supreme Court has recognized, the "enumerated and incidental powers" granted to national banks under the National Bank Act "ordinarily pre-empt[] contrary state law." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 12-14 (2007) (internal quotation marks omitted). Moreover, regulations interpreting the powers conferred on banks by federal law "have no less pre-emptive effect than federal statues." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

Here, the OCC's 2002 regulations were "intended to constitute the entire framework for uniform national standards for [debt cancellation contracts] and [debt suspension agreements] offered by national banks." *Debt Cancellation Contracts and Debt Suspension Agreements*, 67 Fed. Reg. 58,962, 58,964 (Sept. 19, 2002). The regulations therefore provide that "National banks' debt cancellation contracts and debt suspension agreements are governed

by this part and applicable Federal law and regulations, *and not by ... State law*." 12 C.F.R. § 37.1(c) (emphasis added).

The OCC has explicitly determined that this comprehensive set of regulations "occupies the field in [the debt suspension agreement] area and imposes uniform, nationally applicable safeguards on national banks offering this product." *Preemption Determination and Order*, 68 Fed. Reg. 46,264, 46,279 n.99 (Aug. 5, 2003).[4] Accordingly, as the court in *Spinelli* correctly found, Plaintiffs' state law claims relating to the manner in which national banks market, price, and offer their payment protection products are expressly preempted by federal law. *See Spinelli v. Capital One Bank*, 265 F.R.D. 598, 604-05 (M.D. Fla. 2009) (finding that federal law preempted state law claims relating to Capital One's payment protection products after the date that Capital One became a national bank); *see also First Nat'l Bank of E. Ark. v. Taylor*, 907 F.2d 775, 778 (8th Cir. 1990) (federal law preempted claim that debt suspension agreements were subject to state insurance laws); *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1038 (9th Cir. 2008) (holding that California consumer protection law was preempted to the extent it required national banks to include additional disclosures on convenience checks); *Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 556 (9th Cir. 2010) (finding California consumer protection claim alleging that "fees are too high" preempted because OCC

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[4] The OCC's interpretation of its own regulations is entitled to deference from the courts. *See, e.g., Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation" (internal quotation marks omitted)); *Teper v. Miller*, 82 F.3d 989, 998 (11th Cir. 1996) ("An agency . . . to which Congress has delegated broad discretion in interpreting and administering a complex federal regulatory regime[] is entitled to significant latitude when acting within its statutory authority, even in its decisions as to the scope of preemption of state law.").

regulations "clearly provided" that fee decisions are "business decision to be made by each bank").

In *Spinelli*, the court found that state law claims almost identical to those asserted here were preempted by federal law during the period that Capital One operated as a national bank. *See Spinelli*, 265 F.R.D. at 605 (observing that "forcing national banks entering into Debt Agreements to comply with the laws of the 50 states would thwart the purpose of the OCC regulations, which are aimed at providing a 'comprehensive Federal consumer protection scheme'" (quoting 67 Fed. Reg. at 58,963)). As a result, the *Spinelli* court declined to certify a class after the date that Capital One converted into a national bank, but allowed certification of a class prior to that date. *See id.* at 604-05. Here, Chase has been a national bank for the entire relevant period. Thus, in the absence of the Settlement, Plaintiffs are likely to recover nothing; all of the claims for which they might hope to certify a class are pre-empted by federal law.

Second, neither Payment Protector nor the manner in which it is marketed or administered is deceptive or misleading. Litigation involving other banks' payment protection products has focused on three issues: (i) whether the bank failed to provide adequate disclosures of the terms and conditions of its products; (ii) whether the bank enrolled individuals in payment protection products even though those individuals did not qualify for the primary benefits offered by the products; and (iii) whether the bank made it difficult to obtain payment protection benefits. Here, none of these concerns apply to Chase's products. Instead, Chase's products and practices comply with all applicable laws and are superior to payment protection products offered by other banks.

Chase follows the process mandated by OCC regulations when it enrolls customers in payment protection products over the telephone: it provides an oral set of short-

form disclosures about the product; it mails the full terms and conditions following a customer's agreement to enroll; and it provides at least 30 days from receipt of the terms and conditions in which customers may cancel their enrollment at no charge. *See* Fink Decl., ¶ 3; *compare* 12 C.F.R. § 37.6, § 37.7(b). Customers must provide a clear affirmation of their intent to enroll before they may be enrolled. Fink Decl., ¶ 3. All a customer must do in order to disenroll is call the toll-free number that appears on each monthly billing statement adjacent to the line-item charge for Payment Protector. *See id.*, ¶ 5. Furthermore, in contrast to the difficulties that customers allegedly have had in obtaining payment protection benefits from other banks, Chase customers have no difficulty obtaining such benefits. More than 1.2 million Chase customers applied for payment protection benefits over the last 6 years, and more than 90 percent of these claims were approved. *Id.*, ¶ 11.

Similarly, Plaintiffs have no viable claim that Chase enrolls customers in payment protection products even if those customers do not qualify for meaningful payment protection benefits. *See id.*, ¶ 12. For example, Capital One allegedly enrolled self-employed and retired persons in its products even though these persons did not qualify for the principal benefits provided by the product (benefits based on loss of employment). Chase, by contrast, provides an extremely broad array of benefits that offers something for everyone. *See supra* at 5. In addition, while other banks offer debt relief only if a covered event affects the *cardholder*, Chase offers relief if any of the covered events affects either the cardholder or various persons connected to the cardholder. *Id.* As a result, even if the cardholder does not qualify for a particular benefit based on his or her own status, the cardholder may still qualify based on the status of another person.

Third, although there is a "low threshold for certification of a settlement class," *Velez v. Novartis Pharm. Corp.*, No. 04-civ-09194, 2010 WL 4877852, at *9-10 (S.D.N.Y. Nov. 30, 2010), Plaintiffs faced substantial obstacles to the certification of a contested litigation class. The types of injuries alleged by plaintiffs require inquiry into questions such as what was said to consumers during oral telephone conversations with Chase customer service representatives and whether consumers received and read the written disclosures provided by Chase. These types of individualized questions do not readily lend themselves to class-wide proof. Courts faced with similar questions have therefore declined to certify deceptive practices classes. *See, e.g.*, *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 190 (3d Cir. 2001) ("[I]t has become well-settled that, as a general rule, an action based substantially on oral rather than written communications is inappropriate for treatment as a class action."); *Oshana v. Coca-Cola Co.*, 225 F.R.D. 575, 586 (N.D. Ill. 2005) (refusing to certify an Illinois consumer fraud class where proof of causation required "an individual analysis of the extent to which [the defendant's] marketing played a role in each class member's decision to purchase" the product at issue), *aff'd* 472 F.3d 506 (7th Cir. 2006). For this reason as well, the $20 million that Chase has agreed to pay into the settlement fund is fair and reasonable.

4. This Settlement Is Superior To The *Spinelli* Settlement.

The Objectors assert that the proposed Settlement is inferior to the settlement that was approved in *Spinelli*, but that assertion does not withstand scrutiny. Chase is in a far stronger position than the position that Capital One occupied for a variety of reasons including:

- Chase has a dispositive federal preemption defense for the entire period in suit, whereas Capital One had a preemption defense only for the limited period in which it operated as a national bank (*see supra* at 15-17);
- The *Spinelli* plaintiffs had a colorable argument that the Capital One product had no value to self-employed or retired persons. Here, plaintiffs have no such

argument because of the broad array of benefits provided by Chase's product and the variety ways to qualify for those benefits (*see supra* at 17-18);

- Very few individuals were denied Chase Payment Protector benefits on the ground that they were self-employed or retired (*see* Fink Decl., ¶ 12); and
- Plaintiffs here have no viable argument that it was difficult to submit a claim, to receive benefits, or to disenroll from Chase Payment Protector (*see* Fink Decl., ¶ 11).

Notwithstanding Chase's superior position as compared to Capital One, the Chase settlement will provide a larger payout to class members than the *Spinelli* settlement. Objectors' Counsel have refused to disclose the amount that was paid out under the *Spinelli* settlement, but that amount likely was less than $10 million. *See supra* at 9-10. Here, after notice and administration costs are paid, the Settlement Fund will have about $16 million available for payment of settlement benefits and attorneys' fees, and the size of any attorneys' fee will be determined by the Court (up to a cap of 25 percent). Thus, even accounting for the somewhat larger class in this case (about 14.5 million unique class members), and even though the claims asserted here are far weaker than the *Spinelli* claims, more funds are available to pay settlement benefits than in *Spinelli*.

Objectors assert that this Settlement is inferior because "nothing" is "set aside for a direct credit remediation program" (Memo. at 2), but no such program was part of the *Spinelli* settlement, either. Although Capital One undertook a voluntary remediation program under which it provided about $45 million in benefits and refunds to its cardholders, that program was not part of the *Spinelli* settlement. *See supra* at 10. Indeed, the remediation was completed *before* Capital One settled *Spinelli*. *Id.* No release was requested or provided in exchange for the remediation, and the remediation provides no part of the consideration for the releases

conferred by the *Spinelli* settlement. *See id.* Objectors' Counsel's after-the-fact attempt to take credit for the remediation is specious.

II. THE MOTION TO INTERVENE SHOULD BE DENIED.

Objectors' request for leave to intervene in this action should also be denied. Objectors seek to intervene so that they may launch discovery directed at the settlement negotiations, but courts disfavor intervention for the purpose of taking settlement-related discovery. Such discovery has a clear potential for abuse and disruption of settlements by objectors seeking to "justify an award of attorney fees to the objector's counsel." *Manual for Complex Litig.*, § 21.643 (4th ed. 2004). In part for this reason, courts routinely deny requests to intervene and take discovery regarding settlements in the absence of a showing of collusion or impropriety. *See infra* at 25-26.

Here, Objectors cannot show collusion, impropriety or other exceptional circumstances that would justify intervention. Moreover, Objectors' interests are fully protected by their right to object to the Settlement or opt out of the Settlement. For these and other reasons explained below, leave to intervene should be denied.

A. The Objectors Do Not Satisfy The Requirements For Intervention As of Right.

A person seeking to intervene as of right under Rule 24(a) must show, among other things, that (a) "he has an interest relating to the property or transaction which is the subject of the action," (b) "he is so situated that the disposition of the action, as a practical matter, may impede or impair his ability to protect that interest," and (c) "his interest is represented inadequately by the existing parties to the suit." *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989). All of these criteria must be established. *In re Domestic Air*

Transp. Antitrust Litig., 148 F.R.D. 297, 327 n.36 (N.D. Ga. 1993). Because Objectors cannot make this showing, they have no right to intervene.

1. Three Of the Objectors Lack Standing To Intervene.

As a preliminary matter, Chase has no record that three of the six Objectors—Warren Prince, Trudy Smith, or Ennis White—have ever been responsible for paying Payment Protector fees. *See* Fink Decl., ¶¶ 6-8. Accordingly, these individuals are not members of the class; they have no interest in the outcome of this litigation; and they have no right to intervene.[5] *Newberg on Class Actions*, § 16:7, at 160 (4th ed. 2002) ("Parties seeking intervention must have an interest in litigation").

2. The Objectors Have Been Adequately Represented And Cannot Show Collusion.

Courts generally presume that would-be intervenors in class action lawsuits are adequately represented by class representatives and class counsel – even when the would-be intervenor opposes a settlement and the class representatives support the settlement. *See Jenkins v. Missouri*, 78 F.3d 1270, 1275-76 (8th Cir. 1996). The party seeking intervention bears the burden of showing "specific reasons" why this representation is inadequate. *Kiamichi R.R. Co. v. Nat'l Mediation Bd.*, 986 F.2d 1341, 1345 (10th Cir. 1993).

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[5] The other three Objectors have not irrevocably indicated whether they will opt-out or whether they will remain in the class, a fact which weighs against allowing intervention. *Alaniz v. Calif. Processors, Inc.*, 73 F.R.D. 269, 289 (D. Calif. 1976) ("[T]he ability to opt out precludes the Intervenors from satisfying the impairment-of-interest test."). In any event, it is well established that absent class members may not intervene to obtain discovery for the purpose of obtaining information to inform an opt-out decision. *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 363, 367-68 (D.D.C. 2001) (denying discovery-motivated request to intervene when intervenors offered only "unsubstantiated speculation concerning Class Counsel's motives").

Proposed intervenors may overcome the presumption of adequate representation by the class representative and class counsel by showing either (1) a conflict of interest between themselves and the class representatives, or (2) "collusion or nonfeasance on the part of a party to a suit." *Domestic Air Transp.*, 148 F.R.D. at 336. Neither circumstance is present here. Objectors cannot point to any evidence of collusion or nonfeasance by Class Counsel, and their interests are not in conflict with those of the named plaintiffs since both have an interest in maximizing their recovery from Chase. *See Ordnance Container Corp. v. Sperry Rand Corp.*, 478 F.2d 844, 845 (5th Cir. 1973) (denying intervention because "the interests of [intervenors] will be adequately protected by [the plaintiff]" since both sought monetary recovery from defendant in connection with a breach-of-contract action).

Objectors are therefore reduced to arguing that intervention should be permitted because the Settlement was reached early in the litigation, before formal discovery had taken place. But courts in this Circuit have squarely rejected the suggestion that early settlements are disfavored. To the contrary, "courts favor early settlement," *Lipuma* 406 F. Supp. 2d at 1324 (approving settlement when parties exchanged informal discovery and class counsel had familiarity with issues from prior litigation), and this policy "has special importance in class actions with their notable uncertainty, difficulties of proof, and length." *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1329 (S.D. Fla. 2001).

The Fifth Circuit's decision in *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195 (5th Cir. Apr. 3, 1981), which is binding upon this Court,[6] is instructive. In *Corrugated*

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[6] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), the Eleventh Circuit adopted all decisions from the Fifth Circuit published before Sept. 30, 1981 as binding precedent.

Container, the Fifth Circuit approved a settlement even though there had been no formal discovery into the merits of the parties' claims. Observing that "plaintiffs' negotiators had access to a plethora of information regarding the facts of their case," the Fifth Circuit rejected the objectors' argument that a settlement was inadequate based on the lack of formal discovery. *Id* at 211. Unless "the record points unmistakably toward the conclusion that the settlement was the product of uneducated guesswork," the lack of formal discovery should play little weight in evaluating the merits of a settlement. *Id.*; *see also Cotton v. Hinton*, 449 F.2d 1326, 1332 (5th Cir. 1977) (observing that "informality in the discovery of information is desired," and "[i]t is too often forgotten that a conference with or telephone call to opposing counsel may often achieve the results sought by formal discovery").

There is no evidence that suggests that the Settlement in this case "was the product of uneducated guesswork." To the contrary, Chase provided extensive informal discovery before, during, and after the mediation that led to the Settlement. *See supra* at 6-7; Soukup Decl., ¶¶ 3-5. Thus, although "the proposed settlement was achieved early in the litigation," it was "not so early that Class Counsel did not have sufficient information to negotiate with." *Lipuma*, 406 F. Supp. 2d at 1324-25; *see also Corrugated Container*, 543 F.2d at 211 (when plaintiffs had access to information before entering into a settlement, "case cannot be characterized as an instance of the unscrupulous leading the blind").

In sum, because the Objectors cannot show that they were inadequately represented by Plaintiffs and Class Counsel, they have no right to intervene. *See Domestic Air Transp.*, 148 F.R.D. at 337 (denying request of class members to intervene when intervenors "presented no evidence of collusion" and "merely expressed dissatisfaction with specific aspects of the proposed settlement").

B. The Objectors Should Not Be Permitted To Intervene As A Matter Of Discretion.

In a throw-away footnote, Objectors also ask this Court to give them permission to intervene under Rule 24(b). (Memo. at 10 n.7.) A would-be intervenor, however, is not entitled to intervene simply because he or she meets the requirements of Rule 24(b). *See Chiles*, 865 F.2d at 1213. Rather, even when the requirements of Rule 24(b) are satisfied, "[t]he district court has the discretion to deny intervention." *Id.* For several reasons, this Court should not grant Objectors discretionary permission to intervene.

First, intervention is not necessary for Objectors to protect their rights. *See Manual for Complex Litig.*, § 21.643 (4th ed. 2004). The Objectors do not need to intervene in order to file objections to the Settlement, appear at the fairness hearing, or take other steps to protect their interests as class members. Alternatively, the Objectors are free to opt out of the Settlement and pursue their individual claims.

Second, Objectors' only apparent reason for seeking intervention is so that they may take discovery regarding the settlement negotiations, but such discovery is heavily disfavored. Discovery aimed at class action settlements is open to abuse and "might be undertaken primarily to justify an award of attorney fees to the objector's counsel." *Id.* Accordingly, such discovery "is proper only where the party seeking it lays a foundation by adducing from other sources evidence indicating that the settlement may be collusive." *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi.*, 834 F.2d 677, 684 (7th Cir. 1987) (Posner, J.); *see also Lobatz v. U.S. W. Cellular of Calif., Inc.*, 222 F.3d 1142, 1148 (9th Cir. 2000) (denying objector's request for discovery because the objector "made no foundational showing of collusion"); *Domestic Air Transp.*, 144 F.R.D. at 424 (denying objector's request for

discovery because the objector "neither alleged nor submitted evidence of collusion in the settlement negotiation process").

Here, Objectors have failed to provide the necessary "evidence" "from other sources" that the Settlement was collusive. Instead they rely entirely on self-serving speculation and innuendo to cast aspersions on the Settlement. According to mediator Jonathan Marks, however, there was nothing about the Settlement or the negotiations that "suggested any collusion or other untoward behavior on the part of counsel for any Party. In fact, it was apparent that this was not the case." Marks Decl., ¶ 21. Objectors' request to intervene and take discovery should therefore be denied because of the risk that it "will delay settlement, introduce uncertainty, and might be undertaken primarily to justify an award of attorney fees to the objector's counsel." *Manual for Complex Litig.*, § 21.643 (4th ed. 2004).

Finally, Objectors' Counsel have demonstrated an alarming willingness to make inaccurate representations to this Court and to violate this Court's orders. At a minimum, Objectors' Counsel committed a knowing violation of this Court's stay of litigation when they proceeded to serve their new complaints on Chase after they were specifically advised of the existence of the stay. *See supra* at 8. Similarly, Objectors have made a series of erroneous and inflammatory representations to this Court without any apparent attempt to verify the accuracy of those representations.[7] Courts faced with similar conduct have declined to permit intervention.

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[7] For example, Objectors assert that Class Counsel "did not possess a single shred of non-public information with which to adequately assess and evaluate the Class's claims" before attending the mediation. (Memo. at 7; *accord id.* at 7, 19.) That is wholly untrue. *See supra* at 6-7, 13-14. Objectors also assert that Chase "reaped profits of approximately 95-97%" of premiums collected (Memo. at 5), but this is dead wrong as well. Fink Decl., ¶ 13. Finally, Objectors imply that the value of the *Spinelli* settlement could have exceeded $250 million (continued...)

E.g., *Ciba Specialty Chems. Corp. v. Tensaw Land & Timber Co.*, 233 F.R.D. 622, 628-29 (S.D. Ala. 2005) (prohibiting named plaintiffs in one class action lawsuit from intervening in another lawsuit when "a fair reading of Intervenor's submissions suggests that they wish to inject themselves in this litigation precisely for the purpose of disrupting the nearly-concluded settlement negotiations"). This Court should do the same.

(Memo. at 7), when they know that the actual claims rate in that settlement makes this suggestion highly misleading. *See supra* at 9-10.

CONCLUSION

For the foregoing reasons, Chase respectfully requests that the Court deny the motion to intervene and the motion to vacate the preliminary approval order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 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 identified on the attached Service List 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.

By: s/ Dennis M. Campbell
DENNIS M. CAMPBELL