UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

DAVID KARDONICK, JOHN DAVID, and MICHAEL CLEMINS, 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.

(CORRECTED) REPLY IN SUPPORT OF MOTION TO INTERVENE

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Intervenors respectfully submit this reply brief in further support of their Motion to Intervene (the "Motion"). The proposed nationwide class settlement (the "Proposed Settlement") put forth by the Settlement Proponents[1] does not warrant preliminary approval because it does not serve the interests of the class members; it is not the product of "serious, informed, non-collusive negotiations" and does not "fall[]within the range of possible approval." *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). First, the Proposed Settlement was not based on informed negotiations. Kardonick's response makes it quite clear that his counsel was willing release significant claims of 14.5 million class members -- including claims of the most aggrieved class members that are similar to those who made up the "remediation" group that received $45 million in *Spinelli v. Capital One Bank (USA),* N.A. et al. Civil Action No.: 8:08-CV-132-T-33EAJ (M.D. Fla.) -- based on Chase's "assurances" and "representations" about its lack of actionable conduct.

Kardonick's counsel apparently believes the settlement was justified because once the settlement amount was locked in, it spent "countless hours of confirmatory discovery", including a review of "scores of documents" and an "hours-long interview with the officer responsible for Payment Protection", that Kardonick counsel asserts "confirmed" that Chase did not have a "policy" or "make it a point" to enroll persons who were ineligible for benefits. But, as the materials that Chase submits in its response establish: (a) the *Spinelli* remediation class was not as narrowly defined as Kardonick claims and (b) Chase, in fact, enrolled people who paid for but were denied the full range of benefits based on their status. Kardonick's reliance on the so-called confirmatory discovery in this regard, should "impair rather than inspire, judicial confidence"

[1] "Settlement Proponents" refers to both plaintiff Kardonick and Defendants JP Morgan Chase & Co. and Chase Bank USA, N.A. ("Chase" or "Defendants").

that the settlement reached here is a fair one. *Brinckherhoff v. Tex. E. Prods. Pipeline Co., LLC*, 986 A.2d 370 (Del. Ch. 2010).

The Settlement Proponents have not met their burden of proving that the settlement falls within the range of a reasonable settlement. The Settlement Proponents do not even offer any range of potential damages for the Court to consider when evaluating whether this standard is met. The Settlement Proponents do not explain why information regarding the *Spinelli* settlement was withheld from the Court when arguing in favor of preliminary approval even though Kardonick acknowledges this is a key data point. *See* Kardonick Bf. at 15 ("the relative value of the Settlement compared to other settlements in similar litigation" is a factor that the court should consider when evaluating preliminary approval).

The Settlement Proponents' arguments opposing intervention are likewise without merit. The Settlement Proponents claim of prejudice because notice has already been mailed to the class is self-serving. Intervenors put the Settlement Proponents on notice of their objections well before notice was mailed, yet the Settlement Proponents apparently rushed to mail notice in advance of a Court hearing on the motion to intervene rather than seek a short delay in mailing notice. In any event, intervention motions have been routinely granted after notice has gone out to the class. In the event that the Court does not vacate the preliminary approval order, Intervenors should be allowed to take tailored discovery into Chase's and its administrator's Payment Protection practices, the settlement process and valuation so that the record can be complete for the final approval hearing.

Finally, Intervenors' Counsel are compelled to respond to the Settlement Proponent's *ad hominem* attacks. Contrary to the impression the Settlement Proponents would like to leave with the Court, Intervenors' counsel are not "professional objectors" who try to hold up a class action

settlement in return for a fee. Intervenors' Counsel are all experienced class action attorneys, were all co-counsel in *Spinelli* (along with some of Kardonick's counsel) and gained a great deal of information about credit card companies' business practices as a result.[2] Intervenors' Counsel would not be objecting to this settlement if they did not believe this settlement was seriously deficient and that the interests of the class members are not properly protected.[3]

ARGUMENT

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

A. The Settlement Was Not Based On Informed Negotiations, But Rather On Chase's "Assurances"

The Settlement Proponents' submissions confirm that Kardonick's counsel lacked information in several critical areas when agreeing to release the claims of 14.5 million class members. First, they released the claims of the remediation group based on Chase's say-so – not evidence. Kardonick's counsel states that it was "extremely important" to them to find out if there were Payment Protection Plan members enrolled "who could never qualify for benefits." Kardonick Bf. at 4. Despite the claimed importance of this information, however, Kardonick's

[2] The Owings Law firm served as co-lead counsel in *Spinelli* and the Carter Walker firm was appointed class counsel. *See* Ex. A (firm resumes).

[3] Kardonick's counsel falsely claim that Intervenors' counsel is simply seeking to "extort a fee from the parties" and "have done this same thing in the past," *citing Shaffer v. Continental Casualty Company*. Several of Intervenors' counsel represented Phyllis Landau in an action against CNA in Illinois and later as an objector to a settlement reached in *Shaffer*. CNA sold Mrs. Landau a "long-term care" policy year ago representing to her that her premiums would be fixed, but then raised those rates by over 50% several years after she purchased the product. Mrs. Landau was represented in the Illinois action by the law firms Garwin Gerstein & Fisher LLP (where her son, Kevin Landau, was a partner prior to founding Taus, Cebulash and Landau, LLP), Berger & Montague, and Futterman & Howard, Chtd. Counsel objected to the *Shaffer* settlement because the settlement did not provide any cash relief for the class and released claims relating to future rate increases. While that settlement was ultimately approved over Mrs. Landau's (and other's) objections, Mrs. Landau's counsel did not seek any portion of *Schaffer's* counsel's fee in that case, never asked for any portion of that fee, nor did they receive a penny from their work in that case. This is hardly extortion. Rather, it represents a situation (perhaps too rare) where lawyers were willing to fight for a principle, even if the cause was ultimately lost.

counsel was willing to enter into a settlement releasing these significant claims based solely on Chase's "representations" and "assurances" at the mediation that Chase did not have a "*policy*" and "***did not make it a point*** to enroll within its Payment Protection Plan persons who are per se ineligible for benefits." Kardonick's counsel explains that "[t]his 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." Kardonick Bf. at 4. Chase was apparently "adamant" about this, so Kardonick's counsel was willing to take the word of the bank, that they had sued three times only weeks earlier for misleading its clients and class members, and agree to enter into the settlement.[4]

Kardonick claims that the truth regarding Chase's representations were borne out during "confirmatory discovery" which involved a "comprehensive review of scores of documents" and "an hours-long interview with the [Chase] officer responsible for Payment Protection." *Id.* at 1, 4. Whether or not Chase had a "policy" or "did not make it a point" to enroll people does not answer the question of whether it, in fact, enrolled such people and then relied on post-claims underwriting procedures to deny claims. Post-claims underwriting is the practice of "enrolling" cardholders into the plan with disregard for whether they are eligible to receive benefits in the first instance, only to raise questions about eligibility for particular benefits at the time that

[4] The Settlement Proponents take issue with Intervenors' assertion that "before entering into the mediation process, Kardonick's Counsel did not possess a single shred of non-public information with which to adequately assess and evaluate the Class' claims." *See* Chase Bf. at 26 n.7. But this is precisely what Kardonick's counsel said when moving for Preliminary Approval. *See* Dec. 21, 2010 Bf. in Support of Prelim App. At 3. ("During the mediation process, counsel for the Chase Defendants provided Plaintiffs' Counsel access to non-public information and documents regarding the companies and their Payment Protection products. This exchange, coupled with the extensive investigation and research already conducted by Plaintiffs' Counsel, allowed Plaintiffs' Counsel to fully assess the strengths and weakness of both Plaintiffs' claims and the potential defenses available to Defendants.").

cardholders submit claims for benefits (after Defendants have collected their Payment Protector fees).[5]

However, as Kardonick's counsel is aware, the *Spinelli* remediation group was much broader than how Kardonick describes it here when trying to justify the Proposed Settlement.[6] As Kathy Kauffman Collier of Capital One explains the *Spinelli* remediation process:

> In my capacity as Vice President, Business Analysis in U.S. Card, I have (and have had) responsibilities relating to administering a program to remediate certain credit card customers who are or were enrolled in Payment Protection. Of the card holders whom Capital One remediated, different card holders received different types of remediation, depending on their circumstances. For example, card holders who submitted forms to activate benefits, but were denied benefits solely on employment eligibility criteria, were compensated the full amount of the benefits solely on employment eligibility criteria, were compensated the full amount of the benefits that they sought….As another example, Capital One compensated, in the full amount of their Payment Protection charges, anyone who had cancelled Payment Protection within 60 days of enrollment. As another example, Capital One compensated, in the full amount of their Payment Protection charges, anyone who had cancelled Payment Protection within six months of enrollment and who also asserted that he or she had not signed up for Payment Protection. As a further example, Capital One compensated, in the full amount of their Payment Protection charges, anyone who sought to activate benefits, but was denied benefits solely for the reason that the event occurred before the card holder enrolled in Payment Protection.

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[5] Chase claims that it is "erroneous" and "inflammatory" for Intervenors to suggest that its profit from the product were approximately 95-97%. While Chase does not make its figures public (and Chase has refused to respond to a request for information), this figure comes from page 28 of a report (attached as Ex. B) which indicates that Chase's pay-out rate was the worst in the industry at approximately 2%. Moreover the only payments Chase is required to make are the debt forgiveness amounts when a Payment Protector member dies (since the other benefits are merely deferrals). Otherwise, the fees (which likely exceed $1 billion) that Chase collected for Payment Protector products during the class period go to Chase's corporate coffers.

[6] Several of Kardonick's counsel were counsel in *Spinelli* and touted the remediation program's benefits to the court in *Spinelli* when seeking approval of the national class settlement in that case. *See* Ex. C, Co-Lead Counsel Spinelli Aff. at ¶¶ 22,43.

Chase claims that the Capital One's remediation program was not a result of settlement. Intervenor's counsel and Kardonick's counsel disagree with this assertion. *See id.* Regardless, it is beside the point. The point is that regardless of how this $45 million program came into being (after years of litigation), these class members were not asked to release their claims until they were made whole. The same is not true in connection with the instant settlement.

Even if one viewed those eligible for remediation as narrowly as Kardonick's counsel does here, the limited information Chase provides in its response indicates that there are similar class members in Chase. *See* Ex. 1 to Chase Bf., Fink Dec. ¶ 12 ("Based on these records, only a tiny percentage of these unapproved claims were not approved on the grounds that the cardmember was self-employed or retired."); *See* Ex. 3 to Chase Bf, Soukup Dec. ¶ 3 (Kardonick's counsel was provided a "breakdown of the number of requests for benefits that were denied because the cardmember was self-employed or retired.")

Kardonick's counsel also lacked adequate information regarding Assurant -- a key third party in the case that provided Chase with sales, claims processing, and claims reporting services. Upon information, belief, and experience gained in the *Spinelli* litigation, Assurant was responsible on a day to day basis for denying payment protection claims and has key information regarding class claims. Kardonick's counsel did not inquire into this crucial information held by Assurant – or inquire into Assurant's conduct - before agreeing to release 14.5 million class members' potential claims against it. While Kardonick's counsel received some documents from Assurant during confirmatory discovery, they were limited to agreements between Chase and Assurant, "documents summarizing the process Assurant used to manage requests for benefits, exemplar letters, and forms mailed to Chase payment protector enrollees." Soukup Aff. ¶5.[7] Kardonick's counsel did not meet with an Assurant representative, let alone depose one under oath or review documents in Assurant's possession, before releasing claims against Assurant. *See*

[7] Kardonick's counsel apparently did not review source documents from Assurant that show how information such as, the number of product sales, the number of cancellations, the rate of benefit approval, the rate of benefit denial, the reasons for benefit denials, the amount of money collected from payment protector, the amount of money paid out in benefits, the amount of premium refunds paid to cardholders when claims were denied, and other information that would establish potential class damages.

MANUAL FOR COMPLEX LITIGATION, 4th §21.6 (judges should be wary of proposed class action settlement that releases claims against a party without any consideration). [8]

"Confirmatory discovery" is not the panacea that the Settlement Proponents believe it to be. Kardonick's counsel was and is no longer in an adversarial position *vis-a-vis* Chase, having reached a settlement that both parties are jointly seeking to have approved by the Court. It was and is not in Kardonick's counsel's interest to further press for discovery as part of "confirmatory discovery" that could undermine the settlement. *Ginsburg v. Philadelphia Stock Exch., Inc.*, CIV.A. 2202-CC, 2007 WL 2982238 *1 (Del. Ch. Oct. 9, 2007) ("Once parties have reached a settlement, "the litigation enters into a new and unusual phase where former adversaries join forces to convince the court that their settlement is fair and appropriate…); *Saylor v. Lindsley*, 456 F.2d 896, 900-01 (2d Cir. 1972) (concluding that plaintiff's counsel had not met its obligations to the class through confirmatory discovery because "there had been no attempt to find the kind of inculpatory correspondence that so often reposes in corporate files even for the long time here involved, and refutes, or at least casts doubt upon, exculpatory testimony by the defendants of the sort here given").

This case was hardly ever adversarial since Kardonick's counsel did little more than file a total of three complaints between September 8 and October 21, 2010, get limited information hand-picked by Chase at some point (still unspecified) during the "mediation process" and then settle the case on November 11, 2010.

[8] Similarly, there is no indication that Kardonick's counsel investigated the sales and marketing practices of Chase's 26 "cobrand, private label, or other partner[s]". Apparently, the only information that they obtained for these companies – again during "confirmatory discovery" was "the number of enrollees in Chase's private label products," *See* Soukup Aff. ¶5, and "scripts, marketing and other materials used by Chase in relation to the payment protection product offered by the Private Label accounts". Kardonick Bf. at 17. This is not enough information to settle and release claims relating to these practices.

The Settlement Proponents argue that the settlement was not collusive because it was conducted in front of a mediator and therefore they have satisfied the first prong of the preliminary approval standard, i.e., that the settlement is the result of "serious, informed, non-collusive negotiations." The Settlement Proponents read the first prong of the test too narrowly. Courts have rejected settlements even in the absence of "collusion" or "fraud" as defined under the law. *See Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 283 (7th Cir. 2000) (reversing settlement and noting that "[a]lthough there is no proof that the settlement was actually collusive in the reverse-auction sense, the circumstances demanded closer scrutiny than the district judge gave it"); *Moore v. Halliburton Co.*, 3:02-CV-1152-M, 2004 WL 2092019 (N.D. Tex. Sept. 9, 2004) (refusing to approve settlement and noting that "[a]lthough the Court does not conclude that this conduct constitutes "collusion," its deficiencies certainly raise questions. '[I]n reviewing a proposed settlement the district court should always consider the possibility that an agreement reached by the class attorney is not in the best interests of the class.'")(cite omitted). The Court should carefully scrutinize the Proposed Settlement, especially in light of the quick turn-around time between filing and settling these actions and the lack of adequate information on which to settle the claims.

The questions that should be asked are these: were the interests of the absent class members adequately represented? Does the Court have enough information before it to determine whether the settlement serves the interests of the class? Intervenors submit the answer to both these questions is "no".

B. The Settlement Consideration Is Not Within The Range Of A Reasonable Settlement

The Proposed Settlement – which costs Chase a little more than $1 per class member released – is inadequate. This is a fraction of a single monthly credit protection payment.

Kardonick tacitly acknowledges that it valued the settlement based on the absence of a "remediation group" similar to the one present in *Spinelli.* As discussed above, such a group does exist.

Chase argues that unless this settlement is approved the class will recover nothing because it can claim defenses that can undermine the class claims or class certification. This is nothing more than an argument about the risks of litigation. Neither the Court nor the class members have any reliable information about the actual value of the claims so that the value of the Proposed Settlement versus the risks of litigation can be evaluated.

Moreover, Chase overstates the potency of its defenses. Contrary to Chase's assertion that the class's state law claims are preempted by the National Bank Act and OCC regulations, the Supreme Court in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007), made clear that "federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter of the general purpose of the NBA." Following *Watters*, the Supreme Court found that banking regulation is a "mixed state/federal regime[] in which the Federal Government exercises general oversight while leaving state substantive law in place." *Cuomo v. Clearing House Ass'n*, LLP., 129 S.Ct . 2710, 2718-21 (2009). These cases "caused a sea change in the perception of the preemptive effect of the NBA and the OCC regulations." *See Mwantembe v. TD Bank, N.A.*, 2009 WL 3818745, at *3 (E.D. Pa.). Since then, courts have routinely found that state laws of general applicability that impose a duty not to engage in deceptive and misleading business practices are not preempted by OCC regulations. Indeed, just recently, a California court found claims challenging Bank of America's

payment protection practices were not preempted. *Arevalo v. Bank of America Corp*, 2011 WL 1195953 * 12-13 (N.D. Cal. March 29, 2011).[9]

Similarly, Chase's contention that plaintiffs would have a difficult time obtaining class certification is without merit. In fact, the Court of the Middle District of Florida, Tampa Division Court certified a class in *Spinelli* ***that asserted claims virtually identical to the claims Kardonick asserted here***. Likewise, Chase's claim that its Payment Protection practices "comply with all applicable laws and are superior to payment protection products offered by other banks" is self-serving and have not been tested. Chase Bf. at 17. Moreover, Chase's statement – which seeks to distance itself from practices of other banks, including Capital One -- is contradicted by the affidavits that they submit which acknowledge that people are denied benefits based on job-status.[10]

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[9] *See also Mwantembe*, 2009 WL 3818745, at *7-*8 (the state consumer protection law of general applicability that was not directed at authorized national bank activity and that did not mandate what national banks can or cannot do were not preempted); *Agustin v. PNC Fin. Serv. Grp.*, 707 F.Supp.2d 1080, 1094 (D.Haw.2010) ("[T]he NBA does not expressly preempt generally applicable laws regarding unfair business practices ...."); *Jefferson v. Chase Home Finance*, No. C 06-6510, 2008 WL 1883484 * 10 (N.D. Cal. Apr. 29, 2008). ("laws of general application, which merely require all businesses (including banks) to refrain from misrepresentations and abide by contracts and representations to customers do not impair a bank's ability to exercise its lending powers" were not preempted); *Gutierrez v. Wells Fargo & Co.*, No. C 07-05923, 2010 WL 1233885 (N.D. Cal. Mar. 26, 2010) (unfair practice by Wells Fargo designed to maximize overdraft fees were not preempted by the NBA and OCC regulations).

Chase relies on the court's finding in *Spinelli* that class members' claims were preempted once Capital One became a national bank. However, the *Arevalo* court criticized the *Spinelli* opinion because it did not conduct the proper preemption analysis. Moreover, whether the OCC regulations relating to payment protection can even have preemptive effect is questionable. *See Arevalo at * 13; Smith v. BAC Home Loans Servicing, LP*, --- F. Supp. 2d ---, 2011 WL 843937 (S.D.W. Va. Mar. 11, 2011) (declining to find state law claims preempted and noting that "although Congress conferred explicit rulemaking authority on the OCC in multiple portions of the NBA, Congress did not confer any preemptive rulemaking authority on the OCC").

[10] *See* Fink Dec. ("Based on these records, only a tiny percentage of these unapproved claims were not approved on the grounds that the cardmember was self-employed or retired."); Soukup Aff. ¶ 3 (Kardonick's counsel was provided a "breakdown of the number of requests for benefits that were denied because the cardmember was self-employed or retired.").

Finally, Kardonick's counsel claims that they have "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." Kardonick Bf. at 16. Their assertion is wrong factually. First, it does not include the $45 million paid in *Spinelli* through direct credits (or check) to the remediation group. Second, it does not take into account that *Spinelli* claimants received the full value of their claims (ranging from $63 to $15) without any offsets for notice and administration costs or attorneys fees. Regrettably, it appears that Kardonick's counsel's argument for approval is based on hoping for a low claims rate, i.e., that only small fraction of class members submit claims while projecting that the overwhelming majority receive nothing under the settlement. The notice sent will likely lead to a low claims rate. It was sent to class members on a 3x5 inch index card (not "substantially in the form" that was attached to the Settlement Proponent's Preliminary Approval, which was substantially larger), without reference to Chase's 26 Private Label card partners and requires class members to take additional steps to actually obtain a claim form. In *Spinelli*, unlike here, the long-form notice and claims forms were actually mailed to all class members. Kardonick's counsel ought to have negotiated on behalf of the Chase class a way to achieve a higher response, rather than take steps likely to result in a lower response rate.

II. INTERVENORS HAVE SATISFIED THIS CIRCUIT'S REQUIREMENTS OF INTERVENTION

A. Kardonick Has Failed To Demonstrate That Intervention Was Untimely

Kardonick makes two diametrically opposing arguments concerning the timeliness of intervention. First, Kardonick argues that Intervenors should have intervened earlier than they did, and that despite ample case law to the contrary, intervention after a settlement has been

proposed is too late.[11] Second, Kardonick argues that Intervenors should wait to voice their complaints through the objection process, which does not even begin until after notice has been mailed. While Kardonick argues that Intervenors contested the Settlement too early on one hand, and too late on the other, neither argument is correct. Intervention was timely filed and the factors to evaluate timeliness are met here. *Georgia v. U.S. Army Corps of Engineers*, 302 F.3d 1242, 1259 (11th Cir. 2002). [12]

1. Intervenors Sought to Intervene Soon After Learning of Inadequate Representation

Kardonick argues that the intervention is untimely because if Intervenors were concerned about representation, they should have filed their motion soon after September 8, 2010, when Kardonick filed his complaint. Kardonick Br. at 10. But, Intervenors could not have known that the claims of class members were being extinguished for so little value until, at the earliest, after the Stipulation and Agreement of Class Action Settlement were filed on December 21, 2010.

Regardless, Courts have held that interventions in class actions are timely as long as they are commenced prior to the fairness hearing. "The time frame in which a class member may file a motion to intervene challenging the adequacy of class representation must be at least as long as the time in which s/he may opt-out of the class." *In re Community Bank of Northern Virginia*, 418 F.3d 277, 314 (3d Cir. 2005) (finding intervention in a class action timely when it was within the opt-out period, and six weeks before the final fairness hearing); *see also Howard v. McLucas*,

[11] Defendant claims that three of the six Intervenors lack standing to intervene because there is no record that three of them "have ever been responsible for paying Payment Protector fees." Def. Br. at 22. First, even assuming a*rguendo* that these Intervenors lack standing, there are still three other Intervenors whose standing is uncontested. Second, the standing of the three Intervenors whose standing is contested can be ascertained at a later stage of discovery.

[12] Even if this Court does not grant Intevenors' motion as a matter of right, it should permit permissive intervention under Rule 24(b)(1)(B) because Intervenors have "a claim or defense that shares with the main action a common question of law or fact."

782 F.2d 956, 960 (11th Cir. 1986) (intervention timely when it was done before fairness hearing); *Reynolds v. Roberts*, 846 F. Supp. 948, 953 (M.D. Ala. 1994) (same).[13]

2. The Settlement Proponents Suffer No Prejudice from the Intervention

Kardonick argues the Intervention is untimely in that "the prejudice to the Kardonick parties is significant" because "[t]he parties met several times, conducted mediation, continued negotiations, and eventually reached a settlement for a nationwide class." Kardonick Br. at 10. However, if the Settlement is adequate, it will be approved; if it is inadequate, the Court will not approve it. The Court should be informed of deficiencies. The existing parties do not suffer prejudice just because the Court is informed of the Settlement's inadequacies sooner rather than later.[14]

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[13] *Heartwood v. U.S. Forest Service*, 316 F.3d 694, 701 (7th Cir. 2003), cited by Kardonick, is inapposite. Heartwood involved a non-class case that had been pending for over a year before intervention. The Seventh Circuit remanded to determine whether intervention was timely because "there is evidence that the intervenor should have known the suit could impact its interests for some time prior to that settlement." Here, by contrast, Intervenors did not know the terms of a settlement that would extinguish their claims until after the Settlement Papers were filed.

Other cases cited by Kardonick are inapposite as well. *Brown v. Bush*, 1994 Fed Appx. 879, at *3 (11th Cir. 2006) is distinguishable because the intervenors in that case did not intervene until the fairness hearing. *Hoffman v. EMI Resorts, Inc.* 689 F. Supp. 2d 1361, 1380 (S.D. Fla. 2010) (Gold., J.) concerned a delay of at least seven months between the intervenor's knowledge of her claims and her intervention; such a lengthy time period is not present here. *In re Donovan*, 411 B.R. 756, 760-62 (S.D. Fla. 2009) concerned timeliness of intervention in a bankruptcy proceedings, which implicates federal bankruptcy laws that are irrelevant here.

[14] Kardonick's cases are distinguishable. *Grilli v. Metropolitan Life Ins. Co.*, 78 F.3d 1533, 1537-38 (11th Cir. 1996) is distinguishable because the intervenor sought to intervene after an opt-out deadline had passed; that is not the case here. *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 172 (S.D.N.Y 2000) is distinguishable because the court found that "[i]ntervention for the purposes of derailing the Settlement and adding defendants to the action at this late stage would cause intolerable delay to elderly claimants who have already endured decades of waiting for the compensation that the Settlement contemplates." By contrast here, the Kardonick litigation only commenced in September 2010 and settled in November 2010; Class members do not have the decades-long wait that was present in the *Holocaust* litigation.

3. Intervenors And The Class Will Suffer Prejudice If Intervention Is Denied

Intervenors and the Class will suffer prejudice if the Intervention is denied. Defendants have refused to give Intervenors any information or discovery regarding the settlement and value of the claims being released. Intervention would allow Intervenors to access necessary information now, ahead of the fairness hearing, so that the Court can have a full record on these issues. [15] Without intervention, the Court, Intervenors and class members will remain in the dark.[16]

B. The Presumption Of Kardonick's Counsel's Adequacy Has Been Rebutted

Intervenors have demonstrated that Kardonick's counsel is inadequate because they fail to adequately fulfill its duty of class representation. *See Clark v. Putman Cty.*, 168 F.3d 458, 461 (11th Cir. 1999) (the presumption that class counsel adequately represents the class "is weak; in effect, it merely imposes upon the proposed interveners the burden of coming forward with some evidence to the contrary."). Intervenors do not merely challenge discrete aspects of Kardonick's counsel's "strategy," they challenge the fact that Kardonick's counsel hastily entered into

[15] *Reeves v. Wilkes*, 754 F.2d 965, 971-72 (11th Cir. 1985) is distinguishable because that case concerned intervention to prevent a consent decree in an employment context. Unlike a classwide release of class members' claims, a consent decree can allow for further litigation. *See id. Gen. Star Indem. Co. v. V.I. Port Auth.*, 224 F.R.D. 372 (D.V.I. 2004) is distinguishable because intervention was not brought in the settlement context.

[16] Furthermore, any "unusual circumstances" weigh in Intervenors' favor. Kardonick argues that "the only 'unusual circumstance' present in this instance is the fact that the Movants violated the Court's stay." Intervenors have not tried to simultaneously litigate in these other jurisdictions given the stay. Accordingly, none of the existing parties have suffered any hardship through the filing of the two complaints in California and Arkansas. The only "unusual circumstance" present in this case is that, while Chase was aware of the Intervention, and the impact it might have on the existence and /or terms of the Settlement, it went ahead and printed and mailed settlement notices. The fact that Chase tried to rush the Notice process, demonstrates their desire to rush this settlement to conclusion without due consideration of the claims of the absent class members.

Settlement without the benefit of adequate information, resulting in a Settlement that is demonstrably flawed by releasing class claims without adequate compensation.[17]

III. INTERVENORS SHOULD BE PERMITTED DISCOVERY

Intervenors may be entitled to discovery if "lead counsel has not conducted adequate discovery or if the discovery conducted by lead counsel is not made available to objectors." *Community Bank*, 418 F.3d at 316; *see also In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir. 1979) (trial court abused its discretion by declining objector's request for discovery); HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 11:57 (4th ed. 2002) ("….the objector's request for discovery should be granted if he or she can demonstrate to the court that the previous discovery undertaken by the proponents was not adversarial in nature."); *See* Ex. D, January 31, 2005 Order in *Lipuma v. American Express Co*., 04-20314 (S.D. Fla.) (Altonaga/Bandstra) (granting intervenors' motion for discovery). Intervenors seek discovery in order to be able to provide this Court with further information concerning Chase's payment protection practices, the settlement process, and valuation, so that the record can be complete for the final approval hearing and so that the interests of the absent class members can be properly represented. *See* Ex. E, Intervenors' Request for Information.

Dated: April 11, 2011

BERMAN DEVALERIO

s/ Manuel J. Dominguez
Manuel J. Dominguez

[17] Chase's Counsel cites *Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981) for the proposition that class can adequately represented unless "the record points unmistakably toward the conclusion that the settlement was the product of uneducated guesswork." Chase Br. at 24. However, given the glaring deficiencies in the Settlement described by Intervenors both herein and in their Opening Brief, including Kardonick's counsel's reliance on Chase's "assurances" to not get additional consideration and releasing claims against Assurant without some much as speaking with an Assurant employee, it appears that Kardonick's Counsel necessarily used "uneducated guesswork" to enter into the Settlement.

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CERTIFICATE OF SERVICE

I herby certify that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court on April 11, 2011, by using the CM/ECF system.

s/ Manuel J. Dominguez

Manuel J. Dominguez (FBN 0054798)