EXHIBIT C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KENNETH SPINELLI,
Linda R. McCoy, Anthony Mitchell,
Elizabeth Silicato, Patricia Tinder,
Laverne Scruggs, Rose Carr,
Robin Deaver, Michael Blackie,
Trina Blackman, Alice Lewandowski
Harold Smith, Trudy Smith,
David Watlington, and Jeff Salazar
Individually and for all other persons similarly situated,

Plaintiffs

v. **Case No. 8:08-CV-132-T-33EAJ**

CAPITAL ONE BANK (USA), N.A. and
CAPITAL ONE SERVICES, LLC.,

Defendants
_____/

JOINT DECLARATION OF CURTIS L. BOWMAN, STEVEN A. OWINGS AND BRENT WALKER IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

I. DECLARATION OF CLASS COUNSEL

We, Curtis L. Bowman, Steven A. Owings and Brent Walker declare as follows:

1. Curtis L. Bowman is a member of Carney Williams Bates Bozeman & Pulliam, PLLC ("Carney Williams"), Steven A. Owings is a partner of the Owings Law Firm, and Brent Walker is a member of Carter Walker, PLLC, collectively referred to as "the undersigned" or "Class Counsel". We have been actively involved in the above-captioned action, from the initial pre-filing investigation through settlement. We have developed this case from initial interviews of Capital One cardholders questioning why their Payment Protection benefits were not honored, to a national settlement of payment protection claims. We are thus familiar with all relevant facts and the issues

raised, the work that counsel performed on behalf of the class, and the risks assumed in the prosecution of the litigation.

2. We submit this declaration pursuant to Rule 23 of the Federal Rules of Civil Procedure and Rule 408 of the Federal Rules of Evidence, in support of the approval of Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation.

3. We are fully familiar with the facts set forth herein and, if called upon, could testify competently thereto.

II. HISTORY OF THE LITIGATION

A. Initial Investigation

4. This case began with interviews of Capital One cardholders in Florida in 2006. Pursuant to this investigation it became apparent that many cardholders were being rejected for valid claims for benefits after paying for the product, and it became apparent that many cardholders with the product would never have been eligible for benefits; for instance, senior citizens that paid for the product were ineligible for job loss benefits.

5. The undersigned continued the investigation consisting of extensive interviews with cardholders, an extensive pre-filing investigation of business practices relating to the sale of Payment Protection, research that included both state and federal regulatory agencies, review and analysis of publicly available information, review and analysis of similar claims arising in the United Kingdom, legal research, and other investigation and analysis.

B. Plaintiffs' filed a proposed class action in state court

6. The undersigned filed suit on behalf of Capital One cardholders in Hillsborough County, Florida Circuit Court on or about September 28, 2007, and amended that complaint on December 13, 2007, initially alleging violations of the Florida Deceptive and Unfair Trade Practices Act in connection with Capital One's "up to" marketing of secured credit cards. On January 18,

2008, Capital One removed this case to federal court. On February 28, 2008, the Florida Plaintiffs filed their second amended complaint in this Court, alleging claims primarily based upon deceptive marketing and benefit claims under the Florida Deceptive and Unfair Trade Practices Act.

C. Motion practice, discovery and trial preparations

7. A motion to dismiss was filed by Capital One and opposed by Plaintiffs, and that motion was denied on May 20, 2008. At each stage of motion practice in this case, Plaintiffs faced formidable opposition by counsel for Capital One, including numerous motions, declarations, and requests for reconsideration filed with the Court.

8. Following the Court's Order denying Capital One's motion to dismiss, Plaintiffs engaged in discovery related to class certification. On October 30, 2008, Plaintiffs filed a motion to certify the case as a class action. On March 14, 2009, the Court denied Plaintiffs' motion to certify the class without prejudice, allowing Plaintiffs to file an amended motion to address issues related to adequacy. On September 18, 2009, the Court certified this case as a class action. Docket No. 101.

9. The parties engaged in extensive discovery over a period of approximately two years. Discovery included the Plaintiffs submitting multiple sets of interrogatories and requests for production of documents, the depositions of two proposed class representatives, depositions of key Capital One employees and product managers, as well as depositions of key Stonebridge Benefit Services employees, claims managers and business managers. Stonebridge Benefit Services is Capital One's vendor for Payment Protection marketing, product management and claims management.

10. Approximately 90,000 documents were produced by Capital One and Stonebridge Benefit Services and each document was reviewed, analyzed, sorted and categorized. Thousands of these documents were considered to be key documents and those documents were extensively

reviewed and analyzed in preparation for depositions and in preparation for trial.

11. Extensive conversations and negotiations were held with counsel for Capital One concerning the content and timing of document production, disputed areas of inquiry, defining relevant areas for discovery and many other matters related to the document production and scheduling of witnesses for deposition.

12. This case was scheduled for trial during the December, 2010 trial term, and at all times the undersigned prepared this case for trial as discovery and pretrial matters proceeded.

13. At the time settlement of this case first appeared to be possible, during the first mediation, Plaintiffs were preparing to take 3 depositions of accounting personnel, and had engaged in extensive deposition preparation and consultation with their expert witnesses and accountants.

D. Interlocutory Appeal

14. Capital One petitioned for permission to perfect a Rule 23(f) interlocutory appeal to the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") challenging class certification. On May 4, 2010, the Eleventh Circuit issued a ruling declining to hear the interlocutory appeal.

E. Third-party discovery

15. Chief among Class Counsels' third-party discovery targets was Stonebridge Benefits Services ("Stonebridge"), a vendor for the Payment Protection product that provided Capital One with Payment Protection related services and recommendations for marketing, product management, product analysis, business analysis, and claims management. Thousands of documents were provided by Stonebridge and reviewed by Class Counsel, and four employees and product managers from Stonebridge were deposed.

III. EXPERT WITNESSES

16. Class Counsel retained Vince Milano, C.P.A., of Forensic Accounting Consultants,

P.C. Mr. Milano is a recognized expert in accounting and auditing issues in banking practices and in accounting by publicly held companies. While Class Counsel were preparing for depositions, Mr. Milano provided analysis and litigation support.

17. Class Counsel retained Scott Hakala, a Ph.D. economist, a Director in CBIZ Valuation Group, LLC, a national business valuation and consulting firm. Mr. Hakala has prior experience in litigation with Capital One and provided valuable advice and analysis of business practices and accounting. Mr. Hakala conducted damages studies.

18. Class Counsel retained attorney Benjamin Hawkins who specializes in legal issues related to electronic discovery. Plaintiffs additionally engaged "Messaging Architects" to help develop deposition strategy for depositions of Capital One's technical experts in electronic matters. Messaging Architect's employee, Greg Smith, attended the deposition of Peter Olsen, data analyst for Capital One. Capital One's business records are all contained in databases and Plaintiffs sought methods for determining the content of the database and how to efficiently extract information relevant to the class claims.

19. Class Counsel retained Dr. Jeffrey Thomas, an expert in insurance for matters related to insurance products, and the state and federal regulatory structure governing insurance and insurance-like products such as debt cancellation or debt suspension products.

IV. SETTLEMENT NEGOTIATIONS AND THE SETTLEMENT AGREEMENT

20. In the midst of scheduling and taking depositions, the parties attended Court-ordered mediation before a professional mediator, Peter Grilli. The first mediation took place in Tampa, Florida on March 31, 2010. At this initial mediation session, the possibility of settling the Plaintiffs' claims on a national basis was first raised. A second mediation was held on April 20, 2010, and a third mediation was held on May 20, 2010. Each mediation was arms-length and hard fought, and significant progress was made in each mediation. Following the third in-person mediation, Mr. Grilli

continued to work on settlement by use of telephone calls, again making significant progress towards settlement. Subsequently, the undersigned traveled to San Francisco to meet with Capital One's counsel on May 26, 2010 and continue settlement negotiations. The parties reached a preliminary settlement agreement that was the subject of continuing discussion, drafting, re-drafting, and further negotiation that spanned approximately two months. On August 13, 2010, Plaintiffs filed a Motion for Leave to File a 4th Amended Complaint, and the parties jointly filed a Motion for Preliminary Approval of Class Action Settlement and a Memorandum of Law in support.

V. CLASS COUNSEL FORMED A COALITION OF ATTORNEYS TO FACILITATE NATIONWIDE SETTLEMENT

21. The parties endeavored to settle all pending litigation in the U.S. relating to the Payment Protection product, and sought inclusion of all attorneys and all pending lawsuits throughout the country in the settlement agreement. The undersigned reached out to all counsel of record in cases against Capital One in which violations of state and federal law related to the Payment Protection product were alleged. As a result of weeks of negotiations, all counsel agreed to work together to achieve a national settlement of all claims. Those cases (non Florida cases) and their respective counsel are as follows:

(1) Bailey, Perrin and Bailey, Craft Hughes Law, P.C.; and Harrison, White, Smith & Coggins P.C., *Salazar, et al. v. Capital One Bank, et al.,* U.S. Dist. Ct. South Carolina, Spartanburg Division Case C.A. No.: 7:10-cv-00021-HFF;

(2) Glancy, Binkow & Goldberg, LLP; Murray, Frank & Sailor, LLP; Taus, Cebulash and Landau, LLP, *McCoy, et al. v. Capital One Bank, et al.*, U.S. District Court, S.D. California, Case Number 3:10-cv-00185-L-CAB;

(3) Golomb and Honik, P.C., Carney Williams, PLLC, Owings Law Firm, Carter Walker, PLLC, *Carr, et al., v. Capital One Bank, et al.*, U.S. Dist. Ct., Dist. of New Jersey, Case Number 1:10-cv-01014-JS;

(4) Golomb and Honik, P.C., Carney Williams, PLLC, Owings Law Firm, Carter Walker, PLLC, *Blackie, et al. v. Capital One Bank, et al.*, U.S. Dist. Ct. E.D. Pennsylvania, Case No. 2:10-cv-00823-BMS;

(5) Jackson and McGee, LLP, Carney Williams, PLLC, Owings Law Firm, Carter Walker, PLLC, *Watlington, et al. v. Capital One Bank, et al.*, U.S. Dist. Ct. Middle District of North Carolina, Case No. 1:10-CV-00171-AU-WWD;

(6) Carney Williams, PLLC, Owings Law Firm, Carter Walker, PLLC, *Smith, et al. v. Capital One Bank, et al.*, E.D. Ark, Case No. 4-10-CV-0160SWW;

(7) Lozeau Drury, LLP, Carney Williams, PLLC, Owings Law Firm, Carter Walker, PLLC, *Mitchell, et al., v. Capital One Bank, et al.*, U.S. District Court, Central District of California, Case Number CV10-2672-SVW;

(8) Shepherd, Finkleman, Miller & Shah, LLP, Taus, Cebulash and Landau, *Murray, Frank & Sailer, LLP, Sullivan v. Capital One Bank, et al.* USDC for District of Connecticut; Case No: 3:10-cv-00092.

Each of these law firms has performed valuable work in advancing the interests of the Class, in attending mediation sessions or supporting the attorneys attending mediation sessions, and each has been instrumental in achieving resolution of the claims against Capital One.

VI. THE SETTLEMENT AGREEMENT

22. The Settlement Agreement allows Capital One cardholders to submit claims for reimbursement for fees paid for Payment Protection. Beginning in June, 2010, in response to the litigation and other factors, Capital One began a remediation program that refunded fees and supplied benefits to certain Capital One cardholders who paid for payment protection but were denied Payment Protection benefits due to status at the time of purchase of the product, among other reasons. The value of the remediation program is estimated to be $45 million dollars.

23. The settlement achieved by Class Counsel is a claims-made settlement with an estimated value of $205 million. Capital One also agreed to pay attorney fees and costs not to exceed $12.8 million in addition to the settlement for Class members. Under this agreement, attorney fees and costs will not reduce the amounts available to Class members.

24. Moreover, the settlement has additional virtues. Because the settlement allows claims back to January 1, 2005, (in Florida back to September 28, 2003), the statutes of limitations defenses available to Capital One are waived for that time period.

VII. PLAINTIFFS' RISK AND BENEFIT ANALYSIS

25. By the time the parties agreed to settle this litigation, Class Counsel had a detailed understanding of the merits of the Class's claims, the litigation risks present in the case, and the viability of Defendants' defenses. Although the case was mostly prepared for trial at the time of settlement, key depositions in the areas of accounting and damages remained to be taken and expert witnesses remained to be deposed. If the case had proceeded to trial, substantial additional expenses would have been incurred, primarily with regard to expert witnesses. This does not, of course, include the additional costs of motion practice and discovery, and the respective trials if this case had proceeded separately in each jurisdiction in which the other Payment Protection cases were filed. In light of the substantial benefits the Settlement provides, the risks Plaintiffs faced in establishing the elements of Defendants' liability, the risks inherent in proving damages, and the risk that this Court (or another trial court) or an appellate court would dismiss the claim, reverse a verdict or judgment, Class Counsel believe that the proposed Settlement is fair and adequate and in the best interest of the Class.

26. The benefit to the Class is significant. Class members in every state in the United States can receive recovery attributable to fees paid for Payment Protection from January 1, 2005 forward, statutes of limitations are waived, defenses to claims are waived, and litigation risks are

avoided. In Florida, the claims period begins on September 28, 2003 because these claims were filed years earlier than other pending claims.

27. Based on the factors set forth above, the Settlement amply satisfies the requirements of Fed. R. Civ. P. 23(a) and 23(b)(3), warranting final certification by the Court.

VIII. THE SETTLEMENT IS FAIR, REASONABLE, ADEQUATE AND WARRANTS FINAL APPROVAL

28. On the one hand, Plaintiffs believe they would have prevailed on their claims against the Defendants at trial; on the other hand, Defendants contend that Plaintiffs would fail. Considering the parties' divergent positions, the evidence in the case, the defenses available to Capital One, and other problems that might have arisen and created significant complications for Plaintiffs, it is the informed judgment of the undersigned, based upon their knowledge of all proceedings to date and their extensive experience in litigating class actions, that the proposed Settlement before this Court is fair, reasonable and adequate, in the best interests of the Class, and deserves approval.

29. Equally important, by the time the parties agreed to the Settlement, Representative Plaintiffs had a comprehensive understanding of the merits of the Class's claims, the defenses to those claims and the risks the Representative Plaintiffs and the Class faced. Indeed, prior to Settlement Class Counsel reviewed and analyzed more than 90,000 pages of documents produced by Defendants; met with experts in the fields of accounting, damages, and electronic discovery; and participated in numerous mediation sessions with an experienced mediator. Although the risks were substantial, Class Counsel were prepared to continue prosecuting the case.

30. Moreover, the magnitude and complexity of this case is remarkable. In short, the Litigation focused on the marketing and management practices of a particular product of the largest issuer of credit cards in the United States. The Litigation involved the interplay of state and federal regulatory systems, complex business practices, and novel legal issues. In this regard, proof of causation and damages at trial would have been a complex and difficult undertaking, making success

at trial far from assured. Thus, it is evident that continued litigation against Defendants would be of substantial duration and cost.

31. Further, despite the extensive amount of investigation and discovery undertaken thus far, if the Litigation were to proceed, Plaintiffs would also have to conduct further document discovery, take depositions, and designate experts. In addition, anticipated motions for summary judgment would have to be briefed and argued, a pretrial order would have to be prepared, and proposed jury instructions would have to be submitted. Finally, motions *in limine* would have to be filed and argued, followed by a trial.

32. Moreover, any trial against the Defendants would have involved dozens of witnesses and hundreds (if not thousands) of exhibits. Resolution of the expert issues alone could have required substantial *Daubert* hearings as well as lengthy pre-trial hearings. The cost of experts over the course of the litigation would have risen well into the millions of dollars. Should the case have proceeded to trial, plaintiffs expected the entire trial to take several weeks. Moreover, whatever the outcome of trial, appeal certainly would have been taken to the Eleventh Circuit and perhaps even to the United States Supreme Court. All of the foregoing would have extended the case, thus delaying the ability of the Class to recover for years, if at all, while being extremely expensive for the parties. Settlement at this juncture results in a substantial and tangible present recovery, without the attendant risk and delay of trial and appeals, as well as the associated expense.

33. In contrast, the Settlement at this juncture provides a substantial, immediate benefit to a vast number of present and former credit card holders without the attendant risk and delay of trial and appeals.

34. In short, continuing to litigate against the Defendants would mean a sharp and certain rise in litigation costs without any corresponding certainty for a sharp (or any) rise in recovery. Thus, the benefits of the Settlement clearly outweigh the risks of continued litigation and is infinitely

better than another possibility - no recovery at all.

35. In light of the substantial benefits that the Settlement provides to the Class, as well as of the substantial risks Plaintiffs faced in establishing liability and damages, discussed below, as well as the further inherent risks presented by prosecuting a complex class action before a jury, Class Counsel believes that the proposed Settlement is clearly fair, adequate in the best interests of the Class, and deserve this Court's approval.

IX THE FAVORABLE REACTION TO THE SETTLEMENT

36. Upon preliminary approval of the Settlement, the court-approved notice was mailed to approximately 9 million members of the Class. It advised the members of the Class of the Settlement and of their rights in connection therewith, including their rights to exclude themselves or to object to any aspect of the Settlement or Class Counsels' request for attorneys' fees and reimbursement of litigation expenses. As of the date of this declaration, 43 objections have been received by Class Counsel, each of which is addressed below.[1] These numbers represent a fraction of one percent of the Settlement Class. As such, Class Counsel respectfully submit that the favorable reaction of the Class validates both the extraordinary nature of the Settlement and the reasonableness of Class Counsels' fee and expense request.

37. Of the objections received, twenty-three (23) cardholders object to the individual amounts to be received by cardholders because they feel they are inadequate. *See* Appendix, Tab Nos. 1-22, and 73.

38. In a similar vein, another two (2) objections state the cardholders object on the

[1]In addition to those letters classified as objections and requests for exclusions in connection with this Settlement, Class Counsel received thirteen (13) responses that address additional concerns discussed herein, but which are included in the objection total. *See* ¶ 47 below.

grounds that they were sued by Capital One, had judgments entered against them in an amount greater than they would receive in the Settlement, and, thus, feel they are entitled to a greater pro rata share. *See* Appendix, Tab Nos. 23 and 24.

39. Thus, essentially, the above referenced twenty-five (25) objections challenge the Settlement for not achieving the ceiling in damages. However, such a position does not embody the essence of compromise, which is that the "best possible" recovery must be tempered by the risks of further litigation. *See Canupp v. Sheldon*, Case No. 2:04-cv-260-FTM-99DNF, 2009 U.S. Dist. LEXIS 113488, at *11 (M.D. Fla. Nov. 23, 2009) (noting "inherent in compromise is a yielding of absolutes and an abandoning of highest hopes"). As such, while these objections raise a legitimate interest in achieving the best possible recovery, they do not state a ground for finding the Settlement, which embodies a compromise negotiated at arms' length, deficient. *See also* ¶ 45 below.

40. Additionally, four (4) objections assert that they object on the ground that they never had to use Payment Protection services. *See* Appendix, Tab Nos. 25-28. However, this ground does not address any inadequacies in the Settlement.

41. One letter gives the reason for his objection as being that he was forced to file bankruptcy. *See* Appendix, Tab No. 29. Another gives no grounds at all (*see* Appendix Tab No. 30), while still another simply objects for not liking "any part" of the Settlement (*see* Appendix Tab No. 31). As such, these letters are conclusory at best and do not address any specific inadequacies in the Settlement.

42. Another cardholder objects to the Settlement on the ground that the amount of time to "seek legal orientation and do research for this case was not appropriate and extremely short," and the notice instructed her not to call or write the court or court clerk's office for more information.

See Appendix, Tab No. 32. While the notice did advise cardholders not to contact the court or court clerk office's for more information on the Settlement, it plainly provided, in a section entitled "Where Can I Get More Information About the Lawsuit," that additional information could be obtained through Class Counsel and set forth contact information for Class Counsel. *See* Notice at p. 6. Thus, class members were adequately notified of how to obtain information regarding the Settlement.

43. Lastly, one cardholder – Mr. Griffis – objects to the Settlement because it does not provide "automatic" relief to Settlement Class members. *See* Appendix, Tab No. 33. First, Mr. Griffis's assertion is somewhat misleading, calling for clarification. The recovery obtained as a result of this Action comes in two forms: (1) direct payment through the remediation program, and (2) claims-made payments or credits. With regard to the former, Capital One has already paid approximately $45 million through the remediation program. *See* ¶ 21 above. With regard to the latter, which has an estimated value of $205 million, class members must return a one-page claim form, signed under penalty of perjury.[2] Thus, there are no unreasonable obstacles to participating in the Settlement.[3]

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[2]Notably, this is a common and accepted practice in common fund cases.

[3]In support of his contention that the Settlement structure minimizes the number of claims, Mr. Griffis makes the blanket assertion that "given the historical claims rates of less than 10%, the failure of the Settlement Agreement to require automatic payment benefits may make as much as a 90% difference in the total value of the settlement." *See* Appendix, Tab 31 at p. 2. However, Mr. Griffis cites no authority for this position. Moreover, this argument ignores the facts that Capital One has already paid out approximately $45 million through the remediation program and that reputable mediator Peter Grilli certified that "[t]he conduct of counsel and party representatives was professional and adversarial throughout the mediation discussions. Significant disagreements surfaced requiring the scheduling of additional mediation sessions, telephone meetings and caucuses. The negotiations were complex and difficult, and conducted at arms' length and in good faith on (continued...)

44. Equally important, the Settlement ensures the best notice practicable by providing for direct mailing to approximately 9 million potential Class members. As such, all Class members will have a fair opportunity to participate in the Settlement. Structuring the Settlement in this regard allowed Class Counsel to maximize the relief available to individual class members who take the minimal steps necessary to participate. For example, in common fund cases, attorneys' fees and administrative fees are paid out of the fund, thereby reducing the relief available to class members. In comparison, here the fees and costs are being paid separately, and were negotiated only after the recovery for the Class was agreed upon.[4]

45. In short, the majority of the objection letters question the Settlement on the sufficiency of the amount being paid to each Settlement Class member. First, it is important to note that the above-referenced objections to the Settlement were received out of a total mailing of approximately 9 million, representing a fraction of one percent. *See Lipuma v. Am. Express Co.*, Case No. 04-20314-CIV-ALTONAGA, slip op. at p. 45 (S.D. Fla. Dec. 20, 2005) (noting forth-one (41) objections out of a mailing of approximately 8.8 million "militates in favor of approval"). Second, and as noted above, while Class Counsel is mindful that each member of the Settlement

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[3](...continued)
both sides." Grilli Decl. ¶ 4 (attached as Exhibit F to the Joint Declaration previously filed with the Court); *see also Lipuma v. Am. Express Co.*, Case No. 04-20314-CIV-ALTONAGA, slip op. (S.D. Fla. Dec. 20, 2005) (approving claims-made settlement despite objection that the claims-made structure should be replaced by a direct-credit format).

[4]Based on their experience, Class Counsel are mindful that some Class members may choose not to participate in claiming Settlement benefits for any number of completely legitimate reasons, including they never had to use Payment Protection and do not feel strongly either way, or they generally do not like to involve themselves in litigation. Bearing this in mind, it is Class Counsel's belief that the structure utilized in this Settlement made the settlement terms more favorable to those Class members who care to participate.

Class desires the "best possible" recovery, Class Counsel is also mindful that "a jury verdict in [plaintiffs'] favor against the settling Defendant is by no means a certainty." *Biben v. Card*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,512 at 92,330 (W.D. Mo. Dec. 10, 1991). Thus, in harmonizing these two sentiments, Class Counsel tempered the "best possible" recovery by the risks of further litigation during the negotiation process. *See Canupp v. Sheldon*, Case No. 2:04-cv-260-FTM-99DNF, 2009 U.S. Dist. LEXIS 113488, at *11 (M.D. Fla. Nov. 23, 2009) (noting "inherent in compromise is a yielding of absolutes and an abandoning of highest hopes"). In doing so, it is Class Counsels' informed belief that the immediate and substantial benefits provided in the Settlement are fair and represent a better option than no recovery at all. Third, the proposed Plan of Allocation was formulated (i) only after Class Counsel consulted with experts in the areas of accounting and damages, and (ii) in a fair and just way to ensure an equitable distribution among Class members. Fourth, it must also be noted that the objectors had the choice to opt out of the Settlement and preserve their claims but chose not to do so. Consequently, the small number of objectors have not presented a sufficient basis for this Court to reject the proposed Settlement.

46. Six (6) responses filed with the Court and labeled objections, upon further review by Class Counsel, appear not to state an objection to the Settlement, but, rather, raise other concerns or issues. More specifically, one letter indicates the cardholder does not know what to do. *See* Appendix Tab No. 34. Similarly, another cardholder simply states she does not want to do anything to jeopardize her current payment plan with Capital One. *See* Appendix Tab No. 35. In this same vein, three cardholders seem to believe the notice was a collection letter, and they write about their ability, or rather inability, to make payments. *See* Appendix Tab Nos. 36, 37 and 72. The sixth of these letters states in general terms that she just wants what belongs to her. *See* Appendix Tab Nos.

38. Nevertheless, because these six responses appear as objections on the Court's CM/ECF system, they have been included in the total number of objections received.

47. In addition to the objections set forth above, Class Counsel received responses that did not specifically state either that the cardholder was objecting or requesting to be excluded, but requested (1) additional information (*see* Appendix, Tab Nos. 39-41); (2) help with another concern and/or claim (*see* Appendix, Tab Nos. 42-46); or (3) that their account or record be cleared (*see* Appendix, Tab Nos. 47-50). In addition, one letter informed Class Counsel that the cardholder was her sister. *See* Appendix, Tab No. 51. Importantly, even assuming these letters could be construed as objections to the Settlement, the total number of objections still falls well below one percent of the Settlement Class.

48. Lastly Class Counsel received three (3) objections that made blanket objections to any award of attorneys' fees and reimbursement of litigation expenses (*see* Appendix, Tab Nos. 15, 52, and 73), three (3) objections to an award of attorneys' fees and reimbursement of litigation expenses in the amount of $12.8 million (*see* Appendix Tab Nos. 33 and 53)[5], and one objection to the award of service fees (*see* Appendix Tab No. 54). As discussed in more detail below, these objections do not raise an adequate basis for denying the requested fee award.

49. First, as stated in Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Approval of Service Payments to Class Representatives, based upon the relevant factors, Class Counsel are entitled to an award of reasonable fees and expenses. Moreover, based upon a review of fees awarded in similar cases, the fee requested in this Action is on the low

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[5]Objectors Bradley Estep and Judy Matt filed their objections jointly. *See* Appendix Tab No. 53.

end, representing less than 5% of the estimated recovery of $250 million and a lodestar multiplier of just 1.49.[6] *See In re Warner Comm. Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985) ("In view of the complexity of the case, the risk that litigation would produce no recovery and the quality of representation provided by plaintiffs' counsel, plaintiffs' counsel seek to apply a multiplier of approximately 2.26 to the lodestar. Such a multiplier appears to be at the lower end of the range of multipliers used in other large cases."). Equally important, the requested fee and expense award was negotiated after the relief to the Class was agreed to, and Capital One has agreed to pay this amount separately from the benefits achieved for the Class. Thus, the fees and expenses applied for will not reduce the value being realized by each Settlement Class member. On this additional basis, the requested fee award is fair and reasonable.

50. Second, as set forth above, there has already been a payout of $45 million, and the Claims Administrator has received over 100,000 claims with nearly two more months to submit claims. In this regard, Objector Griffis seems to concede that the requested fee and expense award

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[6]Class Counsel have provided these valuations and calculations to the Court as a percentage and lodestar cross-check in accord with applicable caselaw. At the same time, Class Counsel have consistently represented that the claims-made portion of this Settlement was just that, requiring each Eligible Class Member to submit a valid claim form. Accordingly, Objectors Estep and Matt's argument that there was no common fund created here is inapposite. In a similar vein, Objectors Estep and Matt's contention that a multiplier is inappropriate unless the Court makes a finding that the hourly rates are inadequate is without merit. *See* Appendix Tab No. 53 at p. 7. Rather, a multiplier may be applied to a lodestar calculation "to compensate for the risk associated with a contingency fee," among others. *Davis v. Locke*, 936 F.2d 1208, 1215 (11th Cir. 1991); *Harris v. Ft Myers*, 624 F.2d 1321, 1325 (5th Cir. 1980) ("The factor of contingency is ordinarily regarded as the most important single ingredient in augmenting an hourly rate."). Moreover, while Objectors Estep and Matt's reliance on claselaw out of Ohio is not controlling, it further demonstrates the reasonableness of the requested fee under a lodestar analysis. *See Shannon Van Horn et al. v. Nationwide Property & Casualty Ins. Co., et al.*, Case No. 1:08-605 (N.D. Ohio, 2010), Docket No. 308, p. 10 (awarding a lodestar multiplier of approximately 1.2).

of $12.8 million is fair and reasonable. *See* Appendix Tab No. 33 at p. 5 ("To the extent that the value of valid claims submitted in this case total at least $50 million, [Objector Griffis] has no objection to an award of $12.8 million in fees."). This is apparently because a fee and expense award of $12.8 represents approximately 25% of $50 million, which many courts recognize as falling withing the benchmark range for awarding attorneys' fees. *Camden I*, 946 F.2d at 774-75. ("The majority of common fund fee awards fall between 20% to 30% of the fund."); *see also Managed Care Litig. Class Plaintiffs v. Aetna, Inc.,* MDL No. 1334, 2003 U.S. Dist. LEXIS 27228, at *16 (S.D. Fla. Oct. 24, 2003) ("The total amount of fees requested (the fee and cost payment, less Class counsel's cost) falls withing the 'benchmark' range of 25-30% even if the settlement's value is at one objector's suggested low end . . . ."); *In re Sunbeam Sec. Litig*, 176 F.Supp. 2d 1323, 1334 (S.D. Fla 2001) (25% fee award); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999)(awarding 33 1/3%); *Diaz v. Hllsborough County Hosp. Authority*, 2000 WL 1682918 (M.D. Fla. Aug. 7, 2000)(awarding 33%).

51. Third, the requested fees and expenses were necessary to prosecute and settle this Action, and are fair and reasonable. In this regard, while Objectors Estep and Matt contend that Class Counsel's hourly rate should be limited to that which is appropriate in the Tampa area, they fail to present any evidence on approved hourly rates within the State of Florida. In contrast, Class Counsel previously supplied this Court with evidence that rates of $550 to $765 are appropriate in the State of Florida. *See* Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Approval of Service Payments to Class Representatives at p. 9; *SEC v. Mut. Benefits Corp.*, Case No. 04-60573-CIV-MORENO, 2009 U.S. Dist. LEXIS 118760, at *15 (S.D. Fla. Dec. 7, 2009) (noting rates of $550 to $765 in the State

of Florida).[7]

52. In a similar vein, Class Counsels's out-of-pocket expenses were advanced on behalf of the Class and were necessary and reasonable. Notwithstanding, Objectors Estep and Matt make blanket challenges that Class Counsel's expenses as being excessive. For example, Objectors Estep and Matt claim that out-of-expenses for advertising should be rejected because "what advertising was necessary to prosecute this case?" *See* Appendix Tab No. 53 at p. 9. To explain, in representative litigation that potentially involves millions of consumers, it is necessary for plaintiffs' attorneys to conduct a thorough investigation of the alleged facts, which includes a reasonable inquiry into the scope of the alleged wrongdoing and the extent of the alleged wrongdoing. Not being privy to the Defendants' records, Plaintiffs' Counsel in this Action participated in an advertising campaign to reach the affected class regarding the claims asserted against Capital One. Furthermore, advertising expenses frequently occur in complex class action litigation. To this end, the advertising expense in this Action was reasonable, especially given that the Class in this Action is comprised of approximately 9 million cardholders throughout the United States. Similarly,

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[7]Objectors Estep and Matt provide the cite *Carpenters Health & Welfare Fund v. Coca-Cola Co.*, 587 F. Supp. 1206 (N.D. Ga. 2008) as rejecting the inclusion of forensic accountants in a lodestar calculation; however, the citation 587 F. Supp. 1206 is to a 1984 opinion styled *United States v. Allied Chemical Corporation* out of the Northern District of California that has absolutely nothing to do with lodestar calculations. *See id* at 1206 ("This matter is before on defendant Santa Fe's motion to dismiss the fifth cause of action for failure to state a claim upon which relief may be granted and on defendant Allied Chemical Corporation's motion to dismiss the remaining four causes of action for failure to state a claim upon which relief may be granted or, in the alternative, for a more definite statement."). As such, Objectors Estep and Matt have given this Court no reason to exclude expenses for forensic accountants that performed work in connection with this Litigation. Moreover, fees for such experts are routinely held compensable in similar actions. Similarly, the expense for contract labor should also be allowed, as such employees were necessary to assist in handling the thousands of telephone calls received by Class Counsel in connection with the Settlement of this Litigation.

printing and copying charges in the amount of $31,000 for multiple law firms over a period spanning almost four years of intense litigation for the purpose of propounding and responding to discovery, getting a Class certified, responding to Defendants' motions to dismiss and permission to appeal is more than reasonable. What is more, the majority of the circuits agree that expenses for online research in performing such tasks, among others, are compensable. *See Trs. Of the Constr. Indus. & Laborers Health & Welfare Trust v. Summit Landscape Cos.*, 460 F.3d 1253, 1258 (9th Cir. 2006) (noting that the Eighth Circuit is the only circuit that has endorsed the view the "computer-based legal research must be factored into the attorneys' hourly rate," and following the majority position that "computerized research costs can, in appropriate circumstances, be recovered in addition to the hourly rates of attorneys."); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 369 F.3d 91, 98 (2d Cir. 2004) ("If [the firm] normally bills its paying clients for the cost of online research services, that expense should be included in the fee award."); *Inves Sys., Inc. v. McGraw-Hill Cos.*, 369 F.3d 16, 22 (1st Cir. 2004) ("[C]omputer-assisted research should be . . . reimbursed under attorney's fee statutes . . . so long as the research cost is in fact paid by the firm to a third-party provider and is customarily charged by the firm to its clients as a separate disbursement."); *Case by Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1257-58 (10th Cir. 1998) ("Reasonable expenses incurred in representing a client in a civil rights case [such as Westlaw charges] should be included in the attorney's fee award if such expenses are usually billed in addition to the attorney's hourly rate.").[8] Accordingly, Class Counsel are entitled to reimbursement of their out-of-pocket litigation

[8]Objectors Estep and Matt's reliance on *Friskney v. American Park and Play, Inc.*, Case No. 04-80457-CIV-RYSKAMP/VITUNAC, 2007 U.S. Dist. LEXIS 14619 (S.D. Fla. 2000) is inapposite to the present facts as that case dealt with statutory costs available under section 1920, which allows only specific enumerated costs. *Id.* at *6.

expenses.

53. Fourth, the Class Representatives in this Action played important and active roles in the prosecution of this Litigation, and fully discharged their obligations, thereby helping to effectuate the policies underlying consumer protection laws. Each Class Representative provided all necessary assistance to counsel during the prosecution of this case and actively participated in discovery, including in some instances depositions. Accordingly, they are entitled to compensation for their personal efforts on behalf of the Class.

X. THE CLASS SHOULD BE FINALLY CERTIFIED FOR SETTLEMENT PURPOSES

54. The Court's Order Preliminarily Approving the Settlement and Providing for Notice preliminarily approved a Class for settlement purposes defined as "(1) all natural persons who have or had Capital One credit card accounts in the United States and who enrolled in and were charged for Payment Protection on or after January 1, 2005 through July 31, 2010; or (2) all natural persons, who had a billing address in Florida at the time of enrollment in Payment Protection, who have or had Capital One credit card accounts and who enrolled in Payment Protection on or after September 28, 2003 through July 3, 2010. Any cardholder who filed for bankruptcy after enrolling in Payment Protection is excluded from the class."

55. The Class amply satisfies the requirements of Federal Rule of Civil Procedure 23(a) and 23(b)(3), and warrants final certification by the Court for the purpose of effectuating the Settlement.

A. The Class Satisfies the Requirements of Rule 23(a)

56. Under Rule 23(a), class certification is appropriate where:

(1) the class is so numerous that joinder of all members is impracticable,
(2) there are questions of law or fact common to the class,
(3) the claims or defenses of the representative parties are typical

of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

The Class in this Litigation easily satisfies each foregoing requirement.

1. Numerosity

57. Many courts have determined that the numerosity requirement is satisfied when a proposed class involves at least 40 members. Plaintiffs need not show that joinder is impossible; impracticability of joinder will suffice. Here, Capital One identified approximately 9 million potential Settlement Class members who were sent the court-approved Notice. Consequently, the threshold for numerosity is readily met.

58. The number of Class members in this Litigation, we estimate, well exceeds class sizes that routinely satisfy Rule 23(a)'s numerosity requirement. Thus, the Class manifestly satisfies the requirements of Rule 23(a)(1).

2. Commonality

59. Rule 23(a)(2) requires that there be common questions of law or fact, not that every question be identical or common. This criterion is satisfied where there is even one single issue common to all members of the Class, and therefore it is easily met in this case.

60. Here, Plaintiffs, as the court-appointed Class Representatives, and members of the Settlement Class all challenge the same course of conduct of Defendants. Indeed, Plaintiffs' claims and those of other Settlement Class members all arise from the same body of facts as they were all injured by the same series of misleading and deceptive statements. In addition, the claims of Plaintiffs and other Settlement Class members arise under identical legal theories. Accordingly, there are numerous common issues of law and fact in the present case, including:

a) Whether the defendants' sales, billing and marketing scheme is fraudulent, deceptive, unlawful and/or unfair;
b) Whether Capital One's common and uniform sales, billing and marketing schemes related to the Payment Protection product constitute a deceptive trade practice;
c) Whether Plaintiffs and the members of the Class are entitled to restitution of all amounts acquired by defendants through their common and uniform scheme;
d) Whether Plaintiffs and the members of the Class are entitled to injunctive relief requiring the disgorgement of all wrongfully collected fees by Capital One;
e) Whether Plaintiffs and the members of the Class are entitled to prospective injunctive relief enjoining Capital One from continuing to engage in the fraudulent, deceitful, unlawful and unfair common scheme as alleged herein; and
h) Whether Plaintiffs and the members of the Class are entitled to recover compensatory and punitive damages as a result of the defendants' wrongful scheme.

3. Typicality

61. The typicality requirement set forth in Rule 23(a)(3) requires an inquiry into whether the Representative Plaintiffs' claims are based upon a legal theory that differs from that upon which the claims of other Class members are based. "Typical" does not mean identical. Instead, the questions of law and fact merely need to arise out of the same legal or remedial theory.

62. Representative Plaintiffs' claims are typical of the claims of the members of the Class they seek to represent because Representative Plaintiffs, and the Class members each sustained damages arising out of Defendants' wrongful conduct. The Representative Plaintiffs' claims arise from the same course of conduct and are predicated on the same legal theories as the claims of other Class members, thus satisfying Rule 23(a)(3).

4. Adequacy of Representation

63. The adequacy requirement under Rule 23(a)(4) is designed to ensure that absent class

members' interests are fully protected, while serving to uncover conflicts of interest between named plaintiffs and a class. Demonstrating that the named plaintiffs adequately represent the class requires a showing that: (1) the named plaintiffs have interests in common with, and not antagonistic to, the class' interest; and (2) plaintiffs' attorneys are qualified, experienced, and generally able to conduct the litigation.

64. Here, there are no conflicts between the Representative Plaintiffs and the other Class members. More particularly, the Class Representatives' interests are directly aligned with, and not in conflict with, the interests of the Settlement Class members.

65. There also can be no dispute that Class Counsel are capable of prosecuting this litigation. Indeed, Class Counsel have extensive experience in prosecuting securities and consumer fraud class actions. *See* Firm Resumes previously filed with the Court on October 1, 2010.

66. Furthermore, the Settlement is the product of lengthy negotiations with eminently qualified defense counsel. The aggregate size of the Settlement validates the excellent quality of Class Counsel's representation of the Class.

B. Predominance of Common Questions and Superiority of the Class Action to Other Methods of Adjudication

67. Rule 23(b)(3) authorizes class certification where: (1) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Both of these circumstances are present in this Litigation.

1. Common Legal And Factual Questions Predominate Over Individual Issues

68. Here, the issue of Capital One's liability is centered on whether representations made by Capital One in connection with its Payment Protection program were misleading, deceptive and/or unconscionable, and these issues predominate over any individual issues that theoretically might exist. *See, e.g., Bank One*, 2002 U.S. Dist. LEXIS 8709, at *22 ("The issues of law and fact that flow from Defendants' alleged misstatements and omissions predominate over any individual issue."). Thus, the evidence needed to prove the claims of all Class members would be substantially the same. Accordingly, central issues therefore predominate over any individual issues that theoretically might exist in the Litigation.

2. Superiority of the Class Action to Other Methods of Adjudicating Plaintiffs' Claims

69. When confronted with a request for settlement-only class certification, it is largely unnecessary for a district court to inquire whether the case, if tried, would present intractable management problems. Nevertheless, absent class action treatment, the expense of individual litigation of the claims presented in this Litigation would likely prevent Class members from obtaining any recovery of their losses. Where, as here, each Class member suffered harm, but the possibility and amount of individual recovery may not be sufficient to make individual litigation worthwhile, a class action is the superior method for addressing these claims.

70. Based on the factors set forth above, the Class amply satisfies the requirements of Fed. R. Civ. P. 23(a) and 23(b)(3), warranting final certification by the Court.

C. Notice To the Class

71. In its Preliminary Approval Order, the Court not only granted preliminary approval

of the Settlement and conditionally certified the Class for purposes of effectuating the Settlement, but it also approved, *inter alia*, the Notice of Pendency and Settlement of Class Action (the "Notice") to be sent to all potential Class members in connection with the proposed Settlement.

72. Pursuant to the Preliminary Approval Order, the court-approved Notice was sent to approximately 9 million Capital One cardholders.

73. The Notice informed the Class of the terms of the settlement, including the proposed Plan of Allocation; an explanation regarding the attorneys' fees and costs sought; the name, telephone number, and address of Class Counsel who will be reasonably available to answer questions from class members concerning any matter contained in the Notice; a brief statement explaining the reasons why the parties propose the settlement; and the rights and options of the Settlement Class Members in relation to the Settlement. As such, the Notice fairly apprized the potential class members of the settlement and their individual rights thereto. the existence of the Settlement.

74. Moreover, copies of the Notice and Claim Forms, the Settlement Agreement, the operative Complaint, Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Approval of Service Payments to Class Representatives, and relevant Orders relating to the Settlement were posted on a website at **www.spinellisettlement.com**.

75. The Notice informed Settlement Class members that the deadline for persons to exclude themselves from or object to the Settlement was November 3, 2010.

76. Thus, the deadline for exclusions and objections has now passed. To date, out of the entire mailing of approximately 9 million individual notices to Class members, 2036 Class members

have requested exclusion from the Settlement (*see* Declaration of Settlement Administrator filed November 4, 2010 and Appendix, Tab Nos. 55-71). Another 393,007 notices have been determined to be undeliverable by the Claims Administrator, rendering these additional opt-outs by default. Lastly, forty-three (43) class members have objected to the terms of the Settlement and/or the award of attorneys' fees, reimbursement of expenses, and service payments. *See* Appendix, Tab Nos. 1-38, 52-54, and 72-73.

77. Additionally, Class Counsel fielded thousands of telephone inquiries from Class members. In this regard, Class Counsel retained bilingual call representatives to ensure that Spanish-speaking callers would be provided an adequate explanation to any questions or concerns.

XI. CONCLUSION

78. Taken together, the relevant criteria for finding a class action settlement fair and reasonable are plainly satisfied in this case and the objectors have given this Court no reason to discount these findings. The Court should accordingly give its final approval to the Settlement.

We declare under penalty of perjury that the foregoing is true and correct on this 5th day of November, 2010.

Curtis Bowman

Steve Owings

Brent Walker