

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

SAUL M. KAUFMAN,)	
KIMBERLY STEGICH, GORDON)	
JARRATT and AMANDA RUDD,)	
individually and on behalf of all others)	No. 07-CV-1707
similarly situated,)	
)	Judge Joan B. Gottschall
)	
Plaintiffs,)	Magistrate Judge Ashman
)	
v.)	CLASS ACTION
)	
AMERICAN EXPRESS TRAVEL)	Hearing Date: February 29, 2012
RELATED SERVICES CO.,)	
)	
Defendant.)	

**PLAINTIFFS' MOTION FOR FINAL APPROVAL
OF CLASS ACTION SETTLEMENT**

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I. Introduction

Plaintiffs Saul M. Kaufman, Kimberly Stegich, Gordon Jarratt, and Amanda Rudd (the “Plaintiffs”), individually and on behalf of a class of similarly situated persons, requests that the Court enter an order finally approving the Settlement Agreement (the “Settlement” or the “Agreement”) between Plaintiffs and defendant American Express Travel Related Services Co. (“Amex”). The parties’ proposed Order is attached as Exhibit A and will be submitted to the Court in electronic format.

A. Preliminary approval and dissemination of notice.

On September 21, 2011, the Court conducted a hearing on Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement Agreement and Notice to the Settlement Class. (Doc. 42). Following the hearing, the Court issued an Order of Preliminary Approval (the “Preliminary Approval Order”). (Doc. # 315).

In accordance with the Court’s Order, Class Notice was distributed to the Class Members. *See generally Notice of Filing Regarding Class Member Objections and Requests for Exclusion From Settlement.* (Doc. # 344). On November 3, 2011, the designated Claims Administrator, Rust Consulting, Inc., caused Direct Mail Notice to be sent. *See Declaration of Melissa D. Eisert*, Jan. 16, 2012, ¶4 (“*Eisert Declaration*”) (Doc. # 344-1). Furthermore, Alana Beare, the principal clerk of USA TODAY, verified that Publication Notice to the Class was published in the November 3, 2011 national edition of USA TODAY. *See Verification Re Publication of Class Notice*, Nov. 3, 2011 (Doc. # 318).

As explained in the Class Notice, objections were due to be filed by December 20, 2011. (*See* Doc. # 318 at 3); (Doc. # 344, ¶ 12). Requests for exclusion from the Settlement Class (“opt-outs”) were due by December 20, 2011 and were required to be sent in writing to Rust

Consulting and postmarked no later than December 20, 2011. (Doc. # 318 at 3); (Doc. # 344, ¶ 9).

There were no objections to the Settlement, (Doc. # 344, ¶ 12) and only seventy-nine (79) Class Members excluded themselves from the Settlement. *Id.*, ¶ 10. The very favorable response by the remainder of the Class supports approval of the Settlement.

B. Background of the Settlement.

Plaintiffs filed this action in 2007, alleging claims against Amex for: (1) breach of contract; (2) statutory fraud under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCA 505/1 *et seq.*, and the consumer protection statutes of each state in which Amex sells gift cards; and (3) unjust enrichment. Plaintiffs allege that Amex failed to notify purchasers of the full terms and conditions applicable to the gift cards prior to the purchase transaction, and difficulties in usage of the cards resulting in Amex's improper application of fees against the available funds on the gift cards. Plaintiffs sought compensatory and punitive damages, restitution, interest and attorneys' fees and costs on behalf of themselves and a nationwide class of consumers who purchased or otherwise obtained the gift cards.

Through extensive negotiations, including several formal mediation sessions in Illinois and California, Plaintiffs and Amex reached an agreement to settle this controversy on a class-wide basis. Plaintiffs' attorneys believe the Settlement is fair, reasonable, and adequate for the entire Class.

C. Status of related actions and intervenors.

On May 18, 2009, this Court permitted the plaintiffs in *Jarratt v. American Express Company*, (Cal. Sup. Ct.) and *Rudd v. American Express Travel Related Services Co., Inc.*, Case No. 09-cv-930-WQH (RBB) (S.D. Cal.) to intervene. These Plaintiffs have joined in the Settlement, and their counsel, Stephen B. Morris, has been designated as additional Class

Counsel. (*See* Doc. # 315, ¶ 6).

On March 18, 2009, a petition in intervention was filed by counsel for Plaintiff in *Kazemi v. Westfield America, Inc.*, a California state court action. This Court granted the petition. Later, the *Kazemi* Intervenors were permitted to exclude themselves from the putative Class and return to California to litigate their claims against Amex in state court. (Doc. # 205). That court found that the Kazemis' settlement with Amex provided less relief to class members than the instant Settlement. As a result, the court considerably reduced the *Kazemi* counsel's requested attorneys' fees. *See Kazemi v. Westfield America, Inc.*, No. 37-2008-00075526-CU-BT-CTL, Minute Order, at *3 (Cal. Sup. Ct. Nov. 15, 2011). Exhibit B.

On June 9, 2008, *Goodman v. American Express Travel Related Services, Co.*, Civil Action No. 08-cv-2299 (E.D.N.Y.) was filed and a petition in intervention was later granted for the *Goodman* Intervenors. (*See* Doc. # 88). The *Goodman* Intervenors' New York action was dismissed in June 2011. The *Goodman* Intervenors did not object to the Settlement and have refused to take a position on its adequacy. In its February 6, 2012 Order, the Court determined that both the *Goodman* Intervenors' motion for attorneys' fees and Plaintiffs' motion to bar same will be subject to a ruling by mail, rather than having argument heard at the Final Fairness Hearing. (*see* Doc. # 349). Having failed to object, the *Goodman* Intervenors have waived any right to argue at the Final Fairness Hearing. *See* Preliminary Approval Order, ¶ 14 (Doc. # 315). And with briefing on the attorneys' fees issue also complete, the *Goodman* Intervenors involvement in this litigation (at the District Court level, at least) has at long last come to an end.

D. The terms of the Settlement.

The Settlement's principal terms are as follows:

- Class certification: The parties stipulated to conditional certification of the

Settlement Class for settlement purposes pursuant to Fed. R. Civ. P. 23 (b) (3).

The Class is defined as follows:

All purchasers, recipients, holders and users of any and all gift cards issued by American Express from January 1, 2002 through the date of preliminary approval of the settlement, including, without limitation, gift cards sold at physical retail locations, via the Internet, or through mall co-branded programs. Notwithstanding the foregoing, the following cards are not "gift cards" for purposes of Settlement Class membership: (i) "Be My Guest" dining cards; and (ii) any and all gift cards sold at a Westfield shopping center in California (or online in California) between November 1, 2000 and October 1, 2009 and that bear the word "Westfield" or any Westfield logo.¹ [*See* Preliminary Approval Order, ¶ 3 (Doc. # 315).]

- Settlement Fund: Amex agrees to provide a \$6,753,269.50 Settlement Fund for the benefit of the Class. (*See* Settlement Agreement, Doc. # 311-1, ¶ 3.3). The

Settlement Fund provides for:

- Costs of Class Notice and Settlement Administration: (i) \$20,272.50 for Publication Notice; and (ii) a \$1,203,997 flat fee bid for services of Rust Consulting, which includes the cost of Direct Mail Notice. (*Id.*, ¶ 6.1).
- Approved Attorneys' Fees and Incentive Awards: (*Id.*, ¶¶ 4.1-4.3).
- Refunds of Monthly Fees and Check Issuance Fees: Amex will pay settlement benefits to Settlement Class Members, on a claims-made basis, up to \$20.00 per gift card or \$40.00 in total, as set forth below:
 - Split Tender Claims: Settlement Class Members can claim and receive a refund of up to \$20.00 in Monthly Fees actually paid due to refused Split Tender Transactions. (*Id.*, ¶ 3.4(c)(i)).
 - Monthly Fee Claims: Settlement Class Members can claim and

¹ Excluded from the Settlement Class are: (a) all federal court judges who have presided over this case and their spouses and anyone with three degrees of consanguinity from those judges and their spouses, (b) all persons who elect to exclude themselves from the Settlement Class, and (c) all persons who have previously executed and delivered to Amex releases of their claims.

receive a refund of up to \$8.00 in Monthly Fees actually paid. (*Id.*, ¶ 3.4(c)(ii)).

- Check Issuance Fee Claims: Settlement Class Members can claim and receive a refund of up to \$5.00 in Check Issuance Fees actually paid. (*Id.*, ¶ 3.4(c)(iii)).
- Attestation Claims: Attestation claimants can each make a single claim for up to \$5.00 of monthly fees actually paid simply by attesting to the fact that such fees were paid. (*Id.*, ¶ 3.4(c)(iv)).
- Cy Pres: Any residuals remaining after the above payments from the Settlement Fund will be contributed as cy pres to one or more charitable organization(s) as directed by the District Court. (*Id.*, ¶ 3.3(f)). No residuals will revert to Amex under any circumstances.
- Balance Refund Program: Gift card holders with gift card balances of \$25.00 or less can request a refund of their unused card balances without paying a Check Issuance Fee. (*Id.*, ¶ 3.4(a)). These refunds are to be provided by Amex and above its contributions to the Settlement Fund, and there is no cap on the number of Class Members entitled to this relief.
- Purchase Fee and Shipping/Handling Fee Waiver: Settlement Class Members can each purchase one new standard (“classic”) \$100 Gift Card without paying an up-front purchase fee (\$3.95 on Amex’s website) or shipping/handling fee (\$5.95 for mail delivery) for a period of 90 days. (*Id.*, ¶ 3.4(b)). Amex agrees to bear the cost of shipping/handling over and above its contributions to the Settlement Fund, and there is no cap on the number of Class Members entitled to this relief.

II. Final Approval is appropriate.

A court should approve a settlement if the settlement “is fair, reasonable, and adequate.” Fed. R. Civ. P. 23 (e) (1) (C). See *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 652 (7th Cir. 2006); *DHL v. Thoroughbred Tech. + Telecom.*, 309 F.3d 978, 986 (7th Cir. 2002); *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985). It is well-established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions. See *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) (“Federal courts naturally favor the settlement of class action litigation.”).

A. Factors to be considered in determining whether a settlement is fair, reasonable, and adequate.

The factors considered are: (1) the strength of the plaintiff’s case on the merits compared to the amount of the settlement; (2) the defendant’s ability to pay; (3) the likely complexity, length and expense of further litigation; (4) opposition to the settlement from members of the class; (5) evidence of collusion; (6) opinions of counsel; (7) the stage of the proceedings and the amount of discovery completed at the time of settlement; and (8) the public interest. *Isby, supra*, 75 F. 3d at 1198-1199; *GE Capital Corp. v. Lease Resolution Corp.*, 128 F. 3d 1074, 1082 (7th Cir. 1997); *Armstrong v. Bd. of Sch.l Directors*, 616 F.2d 305, 313 (7th Cir. 1980) (for factor (8)). Here, a review of all these factors shows that the Settlement should be approved.

1. Strength on the merits compared to the Settlement amount.

Generally, the most important factor in determining whether a settlement should be approved is the comparison of the terms of the settlement with the likely results of the litigation. *Hiram Walker, supra*, 768 F.2d at 889; see also *Synfuel, supra*, 463 F.3d at 653 (citations omitted). This litigation was prompted by difficulties encountered by consumers in using Amex Gift Cards in so called “split tender transactions,” prompting low balances on Gift Cards to be

consumed by service fees after a failed transaction. In response, Amex moved to compel arbitration. (Doc. # 9). On March 7, 2008, this Court denied Amex's motion. (Doc. # 31). Amex then appealed the Court's decision to the Seventh Circuit. (Doc. # 32). Subsequently, this action entered a settlement phase under the auspices of the Seventh Circuit. It has remained in that posture for nearly four years.

If individual issues pertaining to Plaintiffs' claims result in a referral to individual arbitration, Plaintiffs would have little chance of certifying the Class. This is particularly true given recent Supreme Court decisions upholding the validity of class action arbitration waivers. *See, e.g., AT&T Mobility v. Concepcion*, 563 U.S. --, 131 S.Ct. 1740 (U.S. April 27, 2011) (holding that Federal Arbitration Act preempts state law – such as Illinois law – that made class action arbitration waiver unconscionable). In contrast to dealing with the uncertainties of litigation, the Settlement Fund provides a meaningful recovery to every Class Member who submits a claim form. When weighed against the merits, the Settlement more than adequately compensates Plaintiffs and the Class.

2. Amex's ability to pay.

In the context of a classwide settlement, courts typically consider the defendant's ability to pay. *See Hispanics United of DuPage County v. Addison, Illinois*, 988 F. Supp. 1130, 1150 (N.D. Ill. 1997) (Castillo, J.). Publicly available records indicate that Amex cards account for approximately 24% of the total dollar volume of credit card transactions in the United States, the highest of any card issuer. Ability to pay is not a factor here.

3. The likely costs, complexity, and length of further litigation.

Class actions have a well-deserved reputation for complexity. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 315 (N.D. Ga. 1993) (citing *Cotton v. Hinton*, 559 F.2d 1326,

1331 (5th Cir. 1977)). This case is no exception. Plaintiffs filed their Complaint on February 14, 2007. On March 27, 2007, Amex removed this action to the District Court. On March 7, 2008, the District Court denied American Express's motion to compel arbitration. *See Kaufman v. American Express Travel Related Services Company, Inc.*, No. 07 C 1707, 2008 WL 687224 (N.D. Ill. March 7, 2008) (Doc. # 31). Amex then filed a notice of appeal. (Doc. # 32).

Beginning in April 2008, under the guidance of Rocco Spagna and the Seventh Circuit Mediation Program, Plaintiffs' counsel investigated the facts relating to the claims alleged and the underlying events and transactions and analyzed the legal principles applicable to the claims and defenses asserted. Plaintiffs' counsel and counsel for Amex have engaged in extensive, good faith arm's length negotiations concerning the Class's Gift Card related claims, including three (3) full day formal mediation sessions through the Seventh Circuit Mediation Program before the Mediator, two (2) full day mediation sessions with The Hon. William J. Cahill (Ret.) of JAMS in San Francisco, and numerous telephonic conferences and written proposals, the majority of which were overseen by Mr. Spagna. These efforts resulted in the Memorandum of Understanding ("MOU") executed on January 8, 2009 and later, after having agreed upon class relief, the Fee Agreement executed on February 10, 2009. In the MOU, Plaintiffs' counsel specifically reserved the right to conduct discovery necessary to confirm representations made by counsel for Amex during the settlement negotiations, and have done so by way of rigorous third party depositions. The parties also participated in a (1) full day mediation session with The Hon. Abner J. Mikva (Ret.), as well as a mediation before Magistrate Judge Ashman in May 2011. That mediation resulted in the current, preliminarily-approved Settlement Agreement.

Litigation of the class certification issue would require a significant commitment of time and financial resources. If litigation continues, it will necessitate an expensive and lengthy class

discovery process. In addition, in the absence of settlement, a lengthy and expensive trial would be a virtual certainty. Given the nature of the case, it is likely that post-trial appellate rights would be exercised here. The Settlement avoids the uncertainty, length of time, and high costs associated with continuing this hard-fought litigation. The Court should finally approve the Settlement because the Settlement will minimize the inevitable costs of future litigation of this matter.

4. Opposition.

A low rate of opt-outs or opposition reflects favorably on a settlement. *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1020-21 (N.D. Ill. 2001) (high acceptance rate “is strong circumstantial evidence in favor of the settlements”). There were no objections to this Settlement. Moreover, only 79 Class Members opted-out after receiving the notice of Class action Settlement. The complete lack of opposition and minimal number of requests for exclusion show that the overwhelming majority of the Class Members support the Settlement.

5. Absence of collusion.

“Settlement negotiations that are conducted at arm’s length and in good faith demonstrate that a settlement is not the product of collusion.” *Retsky Family Ltd. Partnership v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856, * 2 (N.D. Ill. Dec. 10, 2001) (Darrah, J.). The Settlement record proves that the Settlement is not the product of collusion. Plaintiffs and Amex reached this Agreement only after considering: (1) the benefits to the class; (2) the unfeasibility of individual judgments; (3) the evidence of liability in the case; and (4) the risks, costs, uncertainties, and delays of litigation.

The Settlement is the culmination of extensive and hard-fought litigation. Plaintiffs’ motion for preliminary approval of settlement went through three iterations, Amex filed a motion

to compel individual arbitration, then appealed the Court's adverse ruling on that motion to the Seventh Circuit. The Settlement terms were agreed upon only after arduous arm's-length bargaining by experienced counsel and mediation begun in April 2008 and overseen by the Seventh Circuit's Settlement Conference Program, two experienced private mediators – Judge Cahill and Judge Mikva – and Magistrate Judge Ashman. Over a period of several months beginning in May 2011, the parties exchanged numerous drafts of the Settlement before they agreed upon the now-preliminarily approved terms of the Settlement. Finally, after over three years of negotiations, on September 13, 2011, the parties executed the present Settlement Agreement.

6. Opinion of counsel.

Class Counsel believe this Settlement is fair, reasonable, and adequate. Class Counsel have litigated numerous pro-consumer class actions. Under these circumstances, Class Counsel's opinion should be given great weight because of Class Counsel's extensive experience in dealing with the myriad and complex issues involved in this case and consumer class actions generally. Previously, Class Counsel's resumes were provided as exhibits to Plaintiffs' Motion for Preliminary Approval. (Doc. # 311-3). The Court relied on these credentials in appointing the undersigned as Class Counsel at the preliminary approval stage.

7. Stage of proceedings and amount of discovery.

The stage of proceedings and amount of discovery supports final approval. The members of the Class have been identified where possible. *See Eisert Declaration*, ¶ 4 (Doc. 344-1). The parties have compiled necessary discovery, including third-party depositions of Amex employees, and exchanged documents and data sufficient for Plaintiffs and their attorneys to evaluate the strength of this case. Pursuant to the Court's instructions, Plaintiffs have amended the motion for preliminary approval three times, and the parties have litigated a hard-fought

motion to compel individual arbitration.

The law favors early settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation. *See Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) (“Federal courts naturally favor the settlement of class action litigation.”); *Airline Stewards, Etc. v. Am. Airlines*, 573 F.2d 960, 963 (7th Cir. 1978) (“settlements are entered into because of ‘the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense’”).

8. Public interest.

The public interest is best served by ending this case now. Courts have held that a settlement of class action litigation serves the public interest. *Armstrong*, 616 F.2d at 313.

III. The Court should finally approve the Notice Program.

In compliance with the Preliminary Approval Order (Doc. # 315) the parties caused the approved class notice to be disseminated to the Class Members. Rule 23 (e) (1) requires, “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal.” Under federal law, notice of the Settlement must satisfy due process. *Maher v. Zapata Corp.*, 714 F. 2d 436, 450-453 (5th Cir. 1983); *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F. 2d 956, 963 (3d Cir. 1983). The Court is vested with wide discretion both as to the manner in which notice is given and the form that notice is to take. 7B Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 1797.6 (3d ed. 2005).

In order to protect the rights of absent Class members, the Court must provide the best notice practicable to Class members. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985). Publication notice is practical to notify unidentifiable class members. ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS, § 8:04 (4th ed. Updated June 2008). Notice by first-class mail is practical where the names and addresses of the class members are

known. *See Manual for Complex Litigation* at § 30.2111. Here, the vast majority of Class Members were notified via publication notice. *See Verification Re Publication of Class Notice*. (Doc. # 318). A small fraction of the Class was individually ascertainable and notice was sent to them by first-class mail. *See Eisert Declaration*, ¶ 8. (Doc. # 344-1).

Additionally, the content of the notice complied with Fed. R. Civ. P. 23 (c) (2) (B), which requires that notice “must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23 (c) (3).” Here, the content of the class notice stated all those things. (Doc. 311-1 at internal Exhibits B-D)). The Notice meets the legal standards for appropriate notice and satisfies Rule 23. *Id.* Therefore, the Court should find that the Notice complied with the Federal Rules and Due Process.

IV. The agreed attorneys’ fees are appropriate and merit approval.

Subject to Court approval, Amex has agreed to pay \$1,275,000 in reasonable attorneys’ fees and costs to Class Counsel and \$250,000 in reasonable attorneys’ fees and costs to additional Class Counsel, for a total of \$1,525,000. In a situation involving a common fund settlement, “[t]he object in awarding a reasonable attorney’s fee ... is to give the lawyer what he would have gotten in the way of a fee in an arm’s length negotiation, had one been feasible.” *Taubenfeld v. Aon Corp.*, 415 F.3d 597, 599 (7th Cir. 2005). Calculating attorneys’ fees as a percentage of the recovery serves “not only as an efficient risk-shifting and litigation-financing device but also as a method of more closely aligning the lawyer’s interests with those of his

client by giving him a stake in a successful outcome.” *Gaskill v. Gordon*, 160 F.3d 36, 363 (7th Cir. 1998). In this Circuit, courts have held that attorneys’ fees anywhere between one-third, *In re Continental Ill. Sec. Litig.*, 962 F.2d at 572, to two-fifths (40%), *Teamsters Local Union No. 604 v. Inter-Rail Transport, Inc.*, No. 2-CV-1109, 2004 WL768658 at *1 (S.D. Ill. 2004) (Herndon, J.), are reasonable. The total value of a class settlement includes the funds available to the class, the cost of notice and settlement administration, and attorneys’ fees and costs. *See Mangone v. First Bank*, 206 F.R.D. 222, 228 (S.D. Ill. 2001).

Here, the total value of the Settlement is \$6,753,269.50, which includes: (1) the funds made available to pay Class Member claims, as well as notice and administration; (2) attorneys’ fees totaling \$1,525,000; and (3) incentive awards to the Class Representatives totaling \$4,000. Applying the one-third benchmark to the settlement value shows that a fee request of \$2,250,000 would be appropriate in this instance. Class Counsel’s and additional Class Counsel’s requested fees and costs figure of \$1,525,000 represents less than 25% of the total value of the Settlement and is eminently reasonable. Class Counsel’s request is well within the range of approval.²

V. The incentive awards to Plaintiffs are appropriate.

Additionally, the Court should approve Amex’s agreement subject to Court approval to pay \$1,000 incentive awards to Plaintiffs Kaufman and Stegich. The Court should also approve \$1,000 incentive awards to additional Plaintiffs Jarratt and Rudd. This payment is in recognition of Plaintiffs’ role and participation as Class Representatives. Courts routinely award such “incentive payments” to the persons who assume the special litigation burden of class representative and thereby benefit the entire class. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 incentive award to class representative because “a named plaintiff

² Though Class Counsel believe their fees are objectively reasonable under the relevant Seventh Circuit standard, Class Counsel’s lodestar is available upon the Court’s request.

is an essential ingredient of any class action, [and] an incentive award is appropriate if it is necessary to induce an individual to participate in the suit”); *In re Dun & Bradstreet Credit Services Customer Litig.*, 130 F.R.D. 366, 367 (S.D. Ohio 1990) (approving two incentive awards of \$55,000 and three of \$35,000 to five representatives).

Class action suits conserve judicial and litigant resources. *GMAC Mortg. Corp. v. Stapleton*, 236 Ill. App. 3d 486, 497, *citing* C. Krislov, SCRUTINY OF THE BOUNTY: INCENTIVE AWARDS FOR PLAINTIFFS IN CLASS LITIGATION, 78 Ill. B.J. 286 (June 1990). Class representatives assume the burdens of litigation that absent class members do not shoulder and do so without promise of a reward and with the risk that the litigation may not succeed. The Class Representatives in this case were no exception. But for Plaintiffs’ initiative and participation, the benefits available to all Class Members would not have been realized. The Court should approve Plaintiffs’ incentive payments.

VI. Conclusion

WHEREFORE, Plaintiffs Saul M. Kaufman and Kimberly Stegich respectfully request that the Court enter the parties’ agreed final approval order, which was attached as Exhibit F to the Settlement Agreement (Doc. 311-1) and will be electronically submitted to the Court.

Dated: February 16, 2012

Respectfully submitted,

s/Louis C. Ludwig

On behalf of Plaintiffs and the certified Class

for Plaintiffs

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

SAUL M. KAUFMAN and KIMBERLY) Case No. 1:07-cv-01707
STEGICH, individually and on behalf of)
all others similarly situated,)
)
Plaintiffs,)
)
vs.)
)
AMERICAN EXPRESS TRAVEL)
RELATED SERVICES, INC.,)
)
Defendant.)
_____)

[PROPOSED] FINAL JUDGMENT AND ORDER OF DISMISSAL
WITH PREJUDICE

Plaintiffs, on their own behalves and on behalf of all similarly situated consumers, submitted to the District Court a Motion for Final Approval of the Class Action Settlement (“Motion”) seeking final approval of the Stipulation and Agreement of Settlement, dated September __, 2011, and the Exhibits attached thereto (the “Agreement”), entered into by and between Plaintiffs and American Express. American Express does not oppose Plaintiffs’ Motion.

By Order dated _____, 2011, the District Court preliminarily approved the Agreement and conditionally certified the Settlement Class for settlement purposes only. Due and adequate notice having been given to the Settlement Class as required by the District Court (see Declaration Re Publication of Notice of Pendency and Settlement of Class Action and Hearing Thereon, filed on _____, 2011), and the District Court having considered all papers filed and proceedings had herein and otherwise being fully informed of the premises and good cause appearing therefore, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:**

1. This Judgment incorporates by reference the definitions in the Agreement, and all terms used herein shall have the same meanings as set forth in the Agreement.

2. The District Court has jurisdiction over the subject matter of the Kaufman Action and personal jurisdiction over all the parties for purposes of the Kaufman Action, including all Settlement Class Members.

3. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, and due process, the District Court hereby finally approves the Agreement and finds that the settlement consideration is fair and that said settlement is, in all respects, fair, just, reasonable and adequate to the Settlement Class.

4. The following Settlement Class, which the District Court previously certified preliminarily, is hereby finally certified for settlement purposes under Rule 23(b)(3) of the Federal Rules of Civil Procedure, the District Court having

determined that the settlement is fair, adequate and reasonable, and that the Settlement Class fully satisfies all the applicable requirements of federal law and due process:

All purchasers, recipients, holders and users of any and all gift cards issued by American Express from January 1, 2002 through the date of preliminary approval of the settlement, including, without limitation, gift cards sold at physical retail locations, via the Internet, or through mall co-branded programs. Notwithstanding the foregoing, the following cards are not “gift cards” for purposes of Settlement Class membership: (i) “Be My Guest” dining cards; and (ii) any and all gift cards sold at a Westfield shopping center in California (or online in California) between November 1, 2000 and October 1, 2009 and that bear the word “Westfield” or any Westfield logo.

5. The District Court finds and concludes that: (a) the Settlement Class Members are so numerous that joinder of all Settlement Class Members in the Kaufman Action is impracticable; (b) there are questions of law and fact common to the Settlement Class which predominate over any individual questions; (c) Plaintiffs’ claims are typical of the claims of the Settlement Class; (d) Plaintiffs, Lead Class Counsel and Additional Class Counsel have fairly and adequately represented and protected the interests of all of the Settlement Class Members; and (e) a class action is superior to other available methods for the fair and efficient adjudication of the controversy, considering: (i) the interests of the Settlement Class Members in individually controlling the prosecution of the separate actions; (ii) the extent and nature of any litigation concerning the controversy already commenced by Settlement Class Members; (iii) the desirability or undesirability of continuing the litigation of these claims in this particular forum; and (iv) the difficulties likely to be encountered in the management of the class action.

6. Except as to any individual claim of those persons (identified on Exhibit 1 hereto) who have validly and timely requested exclusion from the

Settlement Class, the District Court hereby dismisses with prejudice and without costs (except as otherwise provided in the Agreement) the Kaufman Action against American Express. As to those persons (identified on Exhibit 1 hereto) who have validly and timely requested exclusion from the Settlement Class, the Court dismisses the Kaufman Action without prejudice.

7. The District Court finds that the Settlement is fair, reasonable and adequate and in the best interests of Plaintiffs and all the Settlement Class members and finally approves the settlement in all respects, and the Parties are hereby directed to perform its terms.

8. Plaintiffs and each member of the Settlement Class (except a member of the Settlement Class who has obtained proper and timely exclusion from the settlement), their respective heirs, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, assigns, and all persons acting for or on their behalf, will be deemed to have fully released and forever discharged: (i) American Express and its present, former and future officers, directors, partners, employees, agents, attorneys, servants, heirs, administrators, executors, members, member entities, predecessors, successors, affiliates, parents and subsidiaries (whether direct or indirect), representatives, trustees, principals, insurers, vendors and assigns, or interest therein, jointly and severally, and all of the aforementioned's respective officers, directors, employees, attorneys, vendors (including processing facilities) and assigns; and (ii) any and all sellers and marketers of American Express-branded or American Express-issued Gift Cards (including, without limitation, the owners, operators and tenants of the shopping malls and mall chains described in Exhibit A to the Agreement) and their present, former and future officers, directors, partners, employees, agents, attorneys, servants, heirs, administrators, executors, members, member entities, predecessors, successors, affiliates, parents and subsidiaries (whether direct or

indirect), representatives, trustees, principals, insurers, vendors and assigns, jointly and severally, from any and all rights, duties, obligations, claims, actions, causes of action or liabilities, whether arising under local, state or federal law, whether by Constitution, statute, contract, common law or equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, that relate to any and all Gift Cards issued by American Express (or any affiliate thereof) from January 1, 2002 through the date of preliminary approval of the settlement, including, without limitation: (i) any and all claims and causes of action that arise out of or are related in any way to any or all of the acts, omissions, facts, matters, transactions or occurrences that were or could have been directly or indirectly alleged, asserted, described, set forth or referred to in the Kaufman Action; and (ii) any and all claims and causes of action that arise out of or are related in any way to the Gift Card programs, including, without limitation, claims regarding Split Tender Transactions and claims regarding the alleged impropriety of any and all fees applicable to the Gift Cards, including, among others, the Monthly Fee and the Check Issuance Fee.

Without limiting the foregoing, the Released Claims specifically extend to claims that Settlement Class Members do not know or suspect to exist in their favor at the time that the settlement, and the releases contained therein, becomes effective. This paragraph constitutes a waiver of, without limitation as to any other applicable law, Section 1542 of the California Civil Code, which provides:

**A GENERAL RELEASE DOES NOT EXTEND TO
CLAIMS WHICH THE CREDITOR DOES NOT KNOW
OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT
THE TIME OF EXECUTING THE RELEASE, WHICH IF
KNOWN BY HIM OR HER MUST HAVE
MATERIALLY AFFECTED HIS OR HER
SETTLEMENT WITH THE DEBTOR.**

Plaintiffs and each Settlement Class Member understand and acknowledge the significance of these waivers of California Civil Code Section 1542 and/or of any other applicable law relating to limitations on releases. In connection with such waivers and relinquishment, Plaintiffs and each Settlement Class Member acknowledge that they are aware that they may hereafter discover facts in addition to, or different from, those facts which they now know or believe to be true with respect to the subject matter of the settlement, but that it is their intention to release fully, finally and forever all Released Claims, and in furtherance of such intention, the release of the Released Claims will be and remain in effect notwithstanding the discovery or existence of any such additional or different facts. This release does not apply to claims for breach of the Agreement.

9. The District Court finds that the Publication Notice and the Direct Mail Notice provided to Settlement Class Members was the best notice practicable under the circumstances of the proceedings and of the matters set forth therein, and that the Class Notice fully satisfied the requirements of due process, the Federal Rules of Civil Procedure, the Illinois Rules of Civil Procedure and any other applicable laws.

10. All Released Claims, as described in this Judgment or in the Agreement, currently being asserted by or on behalf of any Settlement Class Member in any forum are hereby permanently enjoined, except as may be necessary to implement the settlement or comply with the terms of the Agreement. This injunction applies to, without limitation, all plaintiffs and plaintiffs' counsel in Goodman v. American Express Travel Related Services Company, Inc., United States District Court, Eastern District of New York, Civil Action No. 08 2299. Neither Plaintiffs nor any Settlement Class Member, either directly, representatively or in any other capacity, nor any person or entity allegedly acting on behalf of Settlement Class Members, shall commence or prosecute against

American Express, or against any of the other Released Parties, any action or proceeding in any court or tribunal asserting any of the Released Claims as described in the Agreement, provided, however, that this injunction shall not apply to individual claims of any Settlement Class Members who timely exclude themselves from the settlement. This injunction is necessary to protect and effectuate the settlement, this Final Judgment and Order of Dismissal With Prejudice, and the District Court's flexibility and authority to effectuate this settlement and to preserve Judgment and is ordered in aid of the District Court's jurisdiction and to protect its judgments pursuant to 28 U.S.C. section 1651(a).

11. The District Court hereby dismisses, on the merits and with prejudice, the Kaufman Action, including all the Released Claims.

12. Without affecting the finality of this Judgment in any way, this Court will retain jurisdiction of all matters relating to the modification, interpretation, administration, implementation, effectuation and enforcement of this Judgment, the Agreement and the settlement.

IT IS SO ORDERED.

Dated: _____

Honorable Joan B. Gottschall
United States District Judge

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

FILE 714152-0845
RECEIVED ^{U.S.} MAIL 11/16/11
POSTMARKED 11/15/11
STROOCK & STROOCK & LAVA
JBS/sjn/jxm/cal

MINUTE ORDER

DATE: 11/15/2011 TIME: 08:44:00 AM DEPT: C-71

JUDICIAL OFFICER PRESIDING: Ronald S. Prager
CLERK: Lee Ryan
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2008-00075526-CU-BT-CTL** CASE INIT.DATE: 01/11/2008
CASE TITLE: **Kazemi vs. Westfield America, Inc**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Business Tort

EVENT TYPE: Motion Hearing (Civil)

APPEARANCES

The Court, having taken the above-entitled matter under submission on 11/10/11 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The Court rules on plaintiffs Kambiz Kazemi and Katayoun Kazemi's (collectively "Plaintiffs") motion for attorney fees and reimbursement of litigation expenses as follows:

After taking the matter under submission, the Court affirms its tentative ruling.

Defendant Westfield America, Inc.'s ("Westfield") Evidentiary Objections. The objection to the MacPherson Declaration in its entirety is overruled. The objections to paragraphs 2-4 are sustained on the ground of lack of foundation.

Plaintiffs' Evidentiary Objections. The objections to portions of paragraphs 2 and 3 of the King Declaration are overruled.

This motion is granted for the reasons stated below.

Plaintiffs bring this motion for attorney fees and litigation expenses pursuant to Code of Civil Procedure section 1021.5 ("section 1021.5"). To obtain attorney fees under section 1021.5, a plaintiff must establish that it is a successful party whose action (1) "has resulted in the enforcement of an important right affecting the public interest;" (2) conferred "a significant benefit, whether pecuniary or nonpecuniary has been conferred on the general public or a large class of persons;" and, (3) "the necessity and financial burden of private enforcement are such as to make the award appropriate." (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214 (hereafter "*Whitley*"); accord *Wilson v. San*

Luis Obispo County Democratic Central Committee (2011) 192 Cal.App.4th 918, 922 (hereafter "Wilson").)

A "successful" party means a "prevailing" party i.e., one who succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." (*Bowman v. City of Berkeley* (2005) 131 Cal.App.4th 173, 178.) Here, the settlement provides that Westfield's practice of deducting a monthly fee on Westfield Gift Cards sold and/or delivered in California prior to August 31, 2008 will be halted and provides class members with the opportunity to receive cash-equivalent relief of \$5.00 for each purchaser and recipient of a Westfield Gift Card previously issued under these programs. Thus, a benefit has clearly been achieved in this action.

As to the first element, courts generally assess the importance of the right in terms of its relationship to the achievement of fundamental legislative goals. (*Ctr. for Biological Diversity v. County of San Bernadino* (2010) 185 Cal.App.4th 866, 892.) Here, Plaintiffs alleged that Defendant violated Civil Code section 1749.5. Under the settlement, no monthly fees will be deducted from the balance of Westfield Gift Cards which will result in the preservation of the full value of the purchased gift cards. (Settlement Agreement, ¶3.3(a).) Thus, it can be argued that Plaintiffs efforts to enforce a statutory right resulted in a settlement that benefitted many individuals, as estimated by Plaintiffs, who purchased Westfield Gift Cards.

As to the second element, "[t]he 'significant benefit' that will justify an attorney fee award need not represent a 'tangible' asset or a 'concrete' gain but, in some cases, may be recognized simply from the effectuation of a fundamental constitutional or statutory policy." (*County of Colusa v. California Wildlife Conservation Bd.* (2006) 145 Cal.App.4th 637, 655.) As noted above, the settlement was the result of Plaintiffs' efforts to enforce a statutory right which resulted in a settlement that halts Westfield's practice of deducting monthly fees from the balance of Westfield Gift Cards.

As to the third element, the settlement provides both pecuniary and nonpecuniary benefits to a large class spanning a 9 year class period.

As a result, Plaintiffs have established their entitlement to attorney fees under section 1021.5. However, the inquiry does not end there. Plaintiffs are also required to establish that the requested fees are reasonable based on an assessment of the lodestar. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) A court has "wide latitude in assessing the value of the attorney's services." (*Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19, 41; see also *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1173.) Thus, the fee award lies within the sound discretion of the trial judge. (*Serrano III, supra*, 20 Cal.3d at p. 49.)

Here, class counsel presented evidence that it spent 3,077.3 hours of attorney and paralegal time investigating, analyzing, litigating, and settling the claims in this action. (Krinsk Dec., ¶16, Exh. B.) The total lodestar is \$1,278,649.00. (*Id.* at ¶17.) In addition, class counsel stated that it incurred unreimbursed out-of-pocket litigation expenses of \$32,096.63 that are recoverable under Code of Civil Procedure section 1033.5. (*Id.* at ¶19.) In response, Defendant notes that plaintiff's counsel in a nationwide class action, *Kaufman v. American Express Travel Related Services, Inc.* ("*Kaufman*"), was granted fees of \$1,529,000.00 for a nationwide class action and questions the hours spent by Plaintiffs' counsel on this matter but noted that it is unable to specifically attack the fees sought given the fact that detailed time records were not provided by class counsel for review.

Plaintiffs also contend that class counsel is entitled to a multiplier of 3.5. A multiplier may be applied based upon consideration of the following factors: (1) the novelty and difficulty of the questions involved; (2) the skill displayed in presenting them; (3) the extent to which the nature of the litigation precluded

other employment by the attorneys; and, (4) the contingent nature of the fee award. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.)

As to the first factor, the Court notes that this action was one of at least 3 actions involving the issue of gift cards.

As to the second factor, Westfield pointed out that class counsel's efforts resulted in a settlement parallel to the one reached in *Kaufman* that delivered less benefits to the class than it would have received had the class been included in the *Kaufman* settlement.

Based on the foregoing, the Court finds that no multiplier is warranted and that an attorney fee award of \$500,000.00 is appropriate under the circumstances.

IT IS SO ORDERED.

Ronald S. Prager

Judge Ronald S. Prager

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO


Central
330 West Broadway
San Diego, CA 92101

SHORT TITLE: Kazemi vs. Westfield America, Inc

CLERK'S CERTIFICATE OF SERVICE BY MAIL

CASE NUMBER:
37-2008-00075526-CU-BT-CTL

I certify that I am not a party to this cause. I certify that a true copy of the attached minute order was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 11/15/2011.

Clerk of the Court, by: , Deputy

JIAE MOON
2029 CENTURY PARK EAST SUITE 1800
LOS ANGELES, CA 90067

JEFFREY R KRINSK
FINKELSTEIN & KRINSK LLP
501 W BROADWAY # 1250
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Additional names and address attached.