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9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA

10 CITY AND COUNTY OF SAN FRANCISCO

11 UNLIMITED JURISDICTION

12 COORDINATION PROCEEDING
13 SPECIAL TITLE [RULE 1550(b)]

14 CREDIT/DEBIT CARD TYING CASES

15 This Document Relates to:

16 All Actions
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J.C.C.P. No.: 4335

CLASS ACTION

PLAINTIFFS' RESPONSE TO
ATTRIDGE PLAINTIFF'S
SUPPLEMENTAL AMICUS BRIEF
IN OPPOSITION TO MOTION
FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT

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PLAINTIFFS' RESPONSE TO *ATTRIDGE* PLAINTIFF'S SUPPLEMENTAL AMICUS BRIEF IN
OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

1 **I. INTRODUCTION**

2 Plaintiffs submit this Memorandum in response to the supplemental amicus brief filed
3 by James Attridge in opposition to Plaintiffs' Motion for Preliminary Approval of Class
4 Action Settlement. Attridge has failed to establish that lead counsel or Plaintiffs are
5 inadequate representatives of the proposed settlement class.

6 First, there is no legal basis for Attridge's contention that lead counsel is inadequate
7 because it has not filed a certain collateral estoppel motion, which in any event would be
8 unlikely to succeed, and which Attridge's counsel has not even filed in his own case.

9 Second, the named Plaintiffs' interests in obtaining restitution from Defendants are
10 the same as those of the members of the proposed settlement class, including the class
11 members Attridge seeks to represent, and Plaintiffs have negotiated a settlement that will
12 benefit the entire class. The fact that Attridge is pursuing a narrower, weaker theory of
13 recovery does not create a conflict within the class or render its representatives inadequate,
14 and therefore there is no basis for the creation of the subclass that Attridge requests.

15 Finally, allowing Attridge's challenge to Plaintiffs and their counsel at this stage
16 would defeat the salutary purposes for which these actions were coordinated and lead counsel
17 appointed.

18 **II. LEAD COUNSEL CAN ADEQUATELY REPRESENT THE**
19 **PROPOSED SETTLEMENT CLASS**

20 In his supplemental amicus brief, Attridge first contends that the Plaintiffs in this
21 coordinated proceeding, and their counsel, are inadequate representatives of the putative
22 class Attridge seeks to represent, because they have not sought collateral estoppel based on
23 findings supposedly made by the court in the Justice Department action against Visa and
24 MasterCard. *See* Attridge Supp. Br. at 1-2. This argument fails.

25 Adequacy of representation "depends on whether the plaintiff's attorney is qualified
26 to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the
27 interests of the class." *McGhee v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 60 Cal.App.3d 442,
28 450 (1976) (citing cases). Attridge's assertion that the lead counsel appointed by this Court

1 lacks the ability to prosecute the action is, to put it bluntly, ludicrous. Class counsel
2 diligently pursued this case well before Attridge filed a case, and negotiated a \$31 million
3 all-cash settlement after this Court dismissed the Cartwright Act claims, a far better result
4 than what was achieved in any other indirect case in the country. This is an extraordinarily
5 successful result. Counsel did file a collateral estoppel motion, based on a summary
6 judgment ruling against the defendants in the *Wal-Mart* case, which this Court denied. In
7 counsel's judgment, the collateral estoppel motion suggested by Attridge would have had
8 almost no likelihood of success, for the reasons stated in Defendants' response to Attridge's
9 supplemental brief. If this motion is indeed the "slam dunk" that Attridge describes, and is a
10 critical issue for his case, it is extraordinary that, after almost five years of litigation, *counsel*
11 *for Attridge have not filed the motion that they now claim "any attorney" would have*
12 *brought.* In any event, Attridge's disagreement with lead counsel's legal strategy does not
13 mean that the proposed settlement class is inadequately represented. Attridge does not cite
14 any authority that would support such a proposition.

15 **III. PLAINTIFFS ARE ADEQUATE REPRESENTATIVES OF THE**
16 **PROPOSED SETTLEMENT CLASS; THERE IS NO CONFLICT**
17 **WITHIN THE CLASS THAT COULD REQUIRE SUBCLASSES**

18 Perhaps finally recognizing the lack of merit of his previous contention that the
19 putative class in *Attridge* is unrelated to the proposed settlement class here, in his
20 supplemental amicus brief Attridge switches gears and claims that there is a conflict between
21 the Plaintiffs in this coordinated proceeding and the members of his proposed class, which
22 requires the creation of a subclass of revolver credit card holders, represented of course by
23 counsel for Attridge. *See Attridge Supp. Br.* at 3-5. This alternative argument is equally
24 frivolous and should also be rejected.

25 As noted above, provided that "the plaintiff's interests are not antagonistic to the
26 interests of the class," a named plaintiff can adequately represent a class. *McGhee*, 60
27 Cal.App.3d at 450. Additionally, "only a conflict that goes to the very subject matter of the
28 litigation will defeat a party's claim of representative status." *Richmond v. Dart Indus., Inc.*,

1 29 Cal.3d 462, 470 (1981). Here, the named Plaintiffs' interests are not antagonistic to those
2 of the proposed settlement class. Plaintiffs, and all members of the class, share an interest in
3 proving a violation of the Unfair Competition Law and obtaining restitution from Visa and
4 MasterCard. Further, several named Plaintiffs have revolved balances on their credit cards,
5 and thus possess the specific overcharge claims asserted by Attridge. See Declaration of
6 Craig C. Corbitt in Support of Motion for Preliminary Approval ("Corbitt Decl.") ¶ 14. The
7 settling parties have agreed to a *cy pres* distribution of the net settlement funds, to various
8 non-profits specialized in financial literacy as well as legal aid organizations and law schools,
9 for initiatives that will benefit all members of the settlement class, particularly in these
10 difficult economic times. See Corbitt Decl., Ex. B ¶ 8(a). This plan of distribution will also
11 benefit the revolver credit card holders Attridge seeks to represent, because they are part of,
12 and subsumed in, the proposed settlement class.

13 Under these circumstances, there is no conflict. See *Blackie v. Barrack*, 524 F.2d
14 891, 909-910 (9th Cir. 1975) (Attridge's appendix of authorities, at Tab 3) (where "[e]very
15 class member shares an overriding common interest" in establishing the defendant's liability
16 and maximizing his own potential damages, any conflict regarding the appropriate measure
17 of damages was "substantially outweighed by the class members' common interests"). Not
18 every "divergence of interest among class members" means that representation is inadequate.
19 *Id.* at 910. Yet, a variation in the theory of recovery being pursued is the most Attridge can
20 conjure as a basis for finding a conflict in the proposed settlement class.¹

21 Because Attridge cannot establish the existence of a conflict, there is no basis for this
22 Court to create the subclass Attridge requests. Courts can divide a class into subclasses "so
23 as to remove any antagonism" within the class. *Richmond*, 29 Cal.3d at 470-471 (citation

24 ¹ The cases cited by Attridge to support his claim of an intra-class conflict are inapposite. For example, in
25 *Amchem Prods., Inc. v. Windsor*, the Supreme Court found a conflict within the proposed class because the goal
26 of currently-injured class members – generous immediate payments – “tugs against the interest of exposure-
27 only plaintiffs in ensuring an ample, inflation-protected fund for the future.” 521 U.S. 591, 626 (1997) (citation
28 omitted). The conflict at issue in *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000), was
even more pronounced, because some class members claimed to have been harmed by the same conduct that
benefited other members of the class.

1 omitted). *See also National Solar Equipment Owners' Ass'n, Inc. v. Grumman Corp.*, 235
2 Cal.App.3d 1273, 1286 (1991) (“the trial court could have created subclasses to deal with the
3 conflict”) (citations omitted). Here, in the absence of a conflict, a subclass is unnecessary.

4 **IV. ATTRIDGE’S CONTENTIONS ARE INCONSISTENT WITH THE**
5 **PURPOSES OF THE COORDINATION RULES**

6 Attridge’s adequacy of representation arguments are particularly misplaced under the
7 circumstances of this coordinated proceeding. Coordination “may be requested when civil
8 actions sharing a common question of fact or law are pending in different courts.” *Keenan v.*
9 *Superior Court*, 111 Cal.App.3d 336, 340 (1980). One of the principal objectives of
10 coordination is to “promote the ends of justice.” *McGhan Medical Corp. v. Superior Court*,
11 11 Cal.App.4th 804, 811 (1992) (quoting Cal. Civ. Proc. Code § 404.1). In January 2004, the
12 Chief Justice assigned this Court to hear and determine the multiple cases being filed against
13 Visa and MasterCard throughout the State in the wake of the settlement in the federal
14 merchant litigation. The Court was thus vested “great breadth of discretion . . . to ease the
15 transition through the judicial system of the logjam of cases” against Defendants. *Id.* at 812.
16 Exercising that discretion, this Court appointed the undersigned and his firm as Plaintiffs’
17 lead counsel.

18 As explained in Plaintiffs’ prior submissions, Attridge brought his case months after
19 Plaintiffs filed their Consolidated Amended Complaint, copied many of the allegations
20 therein, and managed to litigate his case separately by virtue of his peremptory challenge to
21 this Court before his case was coordinated, thus evading the coordination rules. To permit
22 someone like Attridge to file a Johnny-come-lately case, exploit a loophole in the
23 coordination rules, and attempt to derail the hard-fought settlement of these coordinated
24 cases, would frustrate the very purposes of the coordination rules, lead to untold mischief in
25 future litigation, and should not be tolerated.²

26 ² Attridge’s wild rhetoric about Lead Counsel’s “inadequate representation” and failure to do what “any
27 competent lawyer” would do is not only wrong for the reasons stated above, it is offensive. These statements
28 are particularly ironic in light of Attridge’s filing of a motion to disqualify this Court which he had no standing
or legal basis to file, and his attempt to value his case based on “damages” after his damage claim was
dismissed.

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PROOF OF SERVICE

I, Monica J. Steele, certify and declare under penalty of perjury that I: am a citizen of the United States; am over the age of 18 years; am employed by Zelle Hofmann Voelbel & Mason LLP, at the address indicated, whose members are members of the State Bar of California and at least one of whose members is a member of the Bar of each Federal District Court within California; am not a party to or interested in the cause entitled upon the document to which this Proof of Service is affixed; and that I served a true and correct copy of the following document(s) in the manner indicated below:


1. PLAINTIFFS' RESPONSE TO *ATTRIDGE* PLAINTIFF'S SUPPLEMENTAL AMICUS BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

- () by today depositing, at San Francisco, California, the said document(s) in the United States mail in a sealed envelope, with first-class postage thereon fully prepaid; (and/or)
- () by facsimile transmission to the parties listed below;
- (X) by electronic mail to the parties listed below;
- () by overnight mail to the parties listed below;
- () by today personally delivering the said document(s) to the person(s) indicated below in a manner provided by law, by handing them the documents or by leaving the said document(s) at the office(s) or usual place(s) of business, during usual business hours, of the said person(s) with a clerk or other person who was apparently in charge thereof and at least 18 years of age, whom I informed of the contents.

See Attached Service List.

Dated: October 23, 2009

Signed


Monica J. Steele

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