

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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In re PAYMENT CARD INTERCHANGE	: MDL No. 1720(MKB)(JO)
FEE AND MERCHANT DISCOUNT	: :
ANTITRUST LITIGATION	: Civil No. 05-5075(MKB)(JO)
_____	: :
This Document Relates To:	: RULE 23(b)(3) CLASS PLAINTIFFS’
	: MEMORANDUM OF LAW IN SUPPORT
	: OF MOTION FOR CLASS
ALL ACTIONS.	: REPRESENTATIVE SERVICE AWARDS
_____	: :
	X

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## **I. INTRODUCTION**

Each Class Representative in this action seeks reimbursement of its reasonable expenses incurred in the prosecution of this case plus service awards to recognize their meaningful contributions to all absent Class Members. As the Class Representatives detailed in their declarations, they collectively dedicated thousands of hours of time to the case. The Court previously granted a similar request for service awards in connection with approval of the previous settlement. *See* Service Award Ord., ECF No. 6395 (Jan. 23, 2015). This Order was later mooted by the Second Circuit's decision disapproving that settlement. 2d Cir. Mandate, ECF No. 6661 (Aug. 25, 2016); 2d Cir. Opn., 2d Cir. ECF No. 1556-1 (June 30, 2016). Now, four years and many hours of time and effort later, Rule 23(b)(3) Class Plaintiffs renew their request for awards for these Class Representatives.

Over the past 13 plus years, these Class Representatives spent thousands of hours on this case, not only participating in discovery and discharging other typical litigation obligations, but also in understanding the complex legal and factual issues in this case, and speaking to the Court, Congress, media, and public on behalf of the Class they represent. Because many of the Class Representatives are themselves entrepreneurs or small business owners, their contributions to the Class often came at the expense of time that could have been spent conducting or growing their businesses. Class Representatives, therefore, respectfully ask this Court to grant service awards that are commensurate with the efforts and sacrifices they made in this case and the result reached.

## **II. FACTUAL BACKGROUND**

### **A. The Class Representatives Took Serious Risks in Filing This Case and Made Great Sacrifices on Behalf of the Class**

The historic settlement in this lawsuit would not have occurred without the participation and the efforts of the Class Representatives. When this lawsuit was filed in 2005, Visa and Mastercard

were controlled by the largest banks in America. Because of the market power that Visa, Mastercard, and their member banks had amassed over 30 years, merchants were dependent for survival on the payment cards issued by the banks and processed over the two dominant networks. As one Class Representative testified, despite the excessive costs of accepting Visa and Mastercard cards, discontinuing acceptance was “not a viable option” because doing so would cause him to “go out of business.” Cl. Pls. Stmt. Undis. Fact, No. 96(b), ECF No. 1494 (Feb. 11, 2011) (quoting Michael Schumann).

Against this backdrop, it is not surprising that, when Class Counsel began discussing the problems of bank dominance and rising interchange fees, merchants were reluctant to step forward as plaintiffs, fearing retaliation by the networks or banks. 2d Supp. Wildfang Decl., ¶¶5-11, ECF No. 6366-2 (Jan. 12, 2015); Goldstone Decl., ¶7, ECF No. 6385-3 (Jan. 22, 2015); Schumann Decl., ¶¶7-9, ECF No. 6385-8 (Jan. 22, 2015). Class Counsel had conversations with large merchants and merchant trade associations that favored litigation against the payment-card networks and banks, but were unwilling to be the first or largest merchant to lead a challenge to the bank-dominated structure of Visa and Mastercard. ECF No. 6366-2, ¶9. This fear was greater still in the minds of internet merchants – such as Photos and Discount Optics – which were and are completely dependent upon electronic payments to survive. ECF No. 6385-3, ¶1; D. Opper Decl., ¶2, ECF No. 2113-10 (Apr. 11, 2013). Small merchants were dependent upon the Defendants not only for payment-card acceptance but also for financing of their day-to-day business operations. ECF No. 6385-3, ¶7; ECF No. 6385-8, ¶7. For them, retaliation by their banks could easily spell the end to their businesses. *See id.* In the face of these risks, the Class Representatives, beginning with Photos and Traditions LLC, stepped forward to support a cause they believed would help all merchants.

Once they agreed to pursue litigation against Visa, Mastercard and the banks, the Class Representatives undertook extraordinary efforts on behalf of the Class, going above and beyond the typical duties of a class representative. While representatives are expected to respond to discovery requests, the unusually broad and burdensome requests in this case required the Class Representatives to divert significant time away from running their businesses to: (i) engage in extensive searches for and production of documents responsive to Defendants' document requests; (ii) answer written discovery; and (iii) attend multiple depositions.<sup>1</sup> The Class Representatives were forced to engage in two rounds of invasive discovery, answering hundreds of requests from Defendants, including in the Second Phase complicated discovery regarding two-sided markets, an issue that was not part of Defendants' discovery requests during the first part of the litigation.

During the first discovery period, many of the Class Representatives sat for multiple depositions. For example, CHS produced witnesses for 12 depositions – more than all but 6 of the Defendants, even though courts recognize that in antitrust cases “the evidence is always largely in the hands of the defendants.” McDonald Decl., ¶11, ECF No. 6385-10 (Jan. 22, 2015); Long Form Wildfang Decl., Exhibits 3 & 4, ECF No. 2113-6 (Apr. 11, 2013); *cf. In re Vitamins Antitrust Litig.*, No. 99-197 (TFH), 2001 U.S. Dist. LEXIS 8904, at \*36 (D.D.C. Jun. 20, 2001). Payless searched for documents from the files of 45 employees and then searched for and produced 7.2 million pages of emails generated as a result of a nine-page list of search terms proffered by Defendants. Payless Decl., ¶¶31-52, ECF No. 6385-7 (Jan. 22, 2015). Payless then produced many more thousands of pages of documents during the second phase, answered burdensome interrogatories and prepared

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<sup>1</sup> ECF No. 6385-3, ¶¶30-34; ECF No. 6385-8, ¶¶12-13; Harari Decl., ¶¶6-10, ECF No. 6385-4 (Jan. 22, 2015); D. Opper Decl., ¶¶9, 12-14, ECF No. 6385-6 (Jan. 22, 2015); Trachtman Decl., ¶¶4-7, ECF No. 6385-9 (Jan. 22, 2015); Archer (Leon's) Decl., ¶11, ECF No. 6385-1 (Jan. 22, 2015).

several executives for depositions.<sup>2</sup> Ex. 7, Palmer-Eason Decl., ¶¶8-18. Parkway estimates that its general counsel devoted over 100 hours of time to this case. ECF No. 6385-9, ¶7(b). And Parkway and its counsel prepared a witness for another deposition during the second phase and produced thousands of pages of documents. Ex. 9, Third Trachtman Decl., ¶¶5-7. And even the Class Representatives that are small businesses – the prototypical “mom and pop” stores – provided deposition testimony, including second depositions of Leon’s, Parkway, Photos and Discount Optics.<sup>3</sup>

The smaller Class Representatives dedicated a significant portion of their high-level employees to responding to discovery requests. For example, 5 of Discount Optics’s 14 employees were closely involved in this litigation. ECF No. 6385-6, ¶¶7, 9. And Capital Audio estimates that 6 out of its 20 employees worked on matters relating to this litigation, often at the same time, which caused a significant disruption to its business. ECF No. 6385-4, ¶¶6, 9. Some of these employees – including president Abraham Harari – crawled on their hands and knees to search the basement of Capital Audio’s premises for records in an attempt to respond to Defendants’ discovery requests. *Id.*, ¶¶7-9.

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<sup>2</sup> All references to “Ex.” and Exs.” are to the supplemental Class Administrator declaration and supplemental updated Class Representative declarations, filed concurrently.

<sup>3</sup> See ECF No. 6385-8, ¶13 (3 depositions of 2 co-owners); ECF No. 6385-4, ¶¶6, 10 (3 out of 20 employees deposed); ECF No. 6385-6, ¶¶1, 5, 14 (Husband-and-wife CEO and Executive Vice President both deposed). Ex. 3, Goldstone Decl., ¶10 (Co-Founder’s Second Deposition); Ex. 2, Archer Decl., ¶5 (Leon’s Second Deposition); Ex. 6, J. Opper Decl., ¶6 (Discount Optics’ Third Deposition); and Ex. 9, Third Trachtman Decl., ¶7 (Parkway’s Fourth Deposition).

The Class Representatives played a significant role in both settlements reached in this case. Throughout both settlement discussions, the Class Representatives were involved in this process, taking part in meetings relating to settlement, and providing their input on various proposals.<sup>4</sup>

In contrast to the typical class action, the dispute between merchants and the payment-card industry played out in several fora outside of the courtroom. In Congress, for example, merchants had been unsuccessful for many years in securing interchange-fee regulation. This changed with the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act, which empowered the Federal Reserve Board to cap debit-card interchange fees and eliminated certain of the Defendants' anti-steering rules. This legislation obtained part of the reform that Class Representatives were seeking. The merchants' change of fortune in the legislative branch was no accident. It resulted from a conscious effort by Class Counsel, working together with many of the Class Representatives and others, to convince Congress to pass the Durbin Amendment. Several of the Class Representatives met with elected officials and staffers and created informative and sympathetic "faces" for the merchant community seeking reform. ECF No. 6385-8, ¶11; ECF No. 6385-1, ¶4; ECF No. 6385-7, ¶66; ECF No. 6385-3, ¶33. These reforms remain in place today.<sup>5</sup> And Class Representative Leon's was also an active named class plaintiff in the challenge to California's no-surcharging litigation. Wildfang Decl., ¶38, ECF No. 7469-3 (June 7, 2019). That

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<sup>4</sup> ECF No. 6385-3, ¶¶26-29; ECF No. 6385-8, ¶14; ECF No. 6385-10, ¶8; ECF No. 6385-7, ¶¶66-69; ECF No. 6385-6, ¶¶16-17; ECF No. 6385-1, ¶¶11(h)-(j); ECF No. 6385-9, ¶7(a).

<sup>5</sup> The Department of Justice's consent decree with Visa and Mastercard in 2010 also provided a valuable component of the relief that merchants received through the efforts of Class Counsel and Class Representatives. This relief also remains in place, despite the reversal of the earlier settlement. Fin. App. Or. at 5, 8, ECF No. 1652 (Dec. 13, 2013). Again, this was part of the reform being sought by Class Representatives. Some Class Representatives worked closely with Class Counsel to assist the Department of Justice in its investigation, such as by providing interviews and declarations to the attorneys conducting the investigation. ECF No. 6385-3, ¶33; ECF No. 6385-8, ¶11.

statute ultimately was found to be unconstitutional. *Italian Colors Rest. v. Beccera*, 878 F.3d 1165 (9th Cir. 2018); see also *Expressions Hair Design v. Schneiderman*, \_\_\_U.S.\_\_\_, 137 S. Ct. 1144 (2017).

The Class Representatives were also a key component in the media battle between merchants and the payment-card industry. This litigation drew significant press attention from the day that it was commenced. In order to counter the well-funded and professionally directed public-relations efforts of Visa, Mastercard, and the banks, it was important for the merchants to have their perspective represented in the media. Many of the Class Representatives stepped forward to provide interviews for stories relating to the issues surrounding this lawsuit. ECF No. 6385-8, ¶10; ECF No. 6385-3, ¶¶5, 10-23; ECF No. 6385-1, ¶4. One Class Representative in particular – Mitchell Goldstone of Photos – estimated that he spent nearly 4,700 hours on media activities, including speaking with reporters, blogging, and maintaining a Twitter feed. ECF No. 6385-3, ¶25. In effect, he became spokesperson for the “little guy.”

### **III. PROCEDURAL BACKGROUND**

Class Counsel first moved for service awards on April 11, 2013. On January 10, 2014, the Court denied the motion without prejudice, requesting that Class Counsel provide better evidence of the amount of each named plaintiff’s expenses, the approximate value of each named plaintiff’s claim, and each named plaintiff’s proposed service award. Mem. & Order at 16-17, ECF No. 6169 (Jan. 10, 2014). The Court further ordered Class Counsel to provide relevant factual and legal authority for the requested awards. *Id.* at 17. Class Counsel worked with each of the Class Representatives and the Claims Administrator in an effort to address the Court’s queries regarding the proposed service awards and these efforts provided a basis for awarding each of the proposed awards initially requested.

On January 12, 2015, Class Counsel submitted an additional memorandum of law that included supplemental declarations from the named plaintiffs as well as a declaration from the Class Administrator regarding potential recoveries. Service Awards Brf., ECF No. 6366-1 (Jan. 12, 2015); ECF Nos. 6385-1, 6385-3-6385-10. The Court granted the motion on January 23, 2015, ECF No. 6395. That order was subsequently mooted by the Second Circuit's reversal.

Class Counsel now renews their motion. Attached to this motion are supplemental, updated declarations touching upon the work of the Class Representatives since the last request for service awards and on updated declarations from the Claims Administrator. Exs. 1-10. These supplemental declarations, in conjunction with the original declarations, provide additional detail to assist the Court in making its determination regarding the appropriateness of the service awards requested. First, the declarations provide additional information concerning each person at each Class Representative who spent time related to prosecuting the case. Second, they provide good-faith estimates of the value of the time spent on this litigation, at hourly rates for each individual based on that person's hourly pay or annual salary. For the many Class Representatives who operate independent businesses, this was often a difficult task, owing to the fact that entrepreneurs' time is difficult to value.<sup>6</sup> Finally, each Class Representative provides a sworn statement that the hours provided were reasonably necessary to the prosecution of the action, were in furtherance of the ultimate reforms that now exist and were provided in good faith. The time spent on behalf of the Class was time taken away from the discharge of their usual duties and responsibilities for their respective companies, and resulted in lost productivity for each business – all to the benefit of the Class. This level of detail is provided to assure the Court that the requested awards are proper.

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<sup>6</sup> For the Class Representatives who are entrepreneurs, the declarations attempted in good faith to arrive at figures that approximated the value to their business of an hour of their time.

#### IV. ARGUMENT

##### A. The Class Representatives' Efforts Justify Service Awards

Courts routinely grant service awards when class representatives confer significant benefits on the class they represent, as the Class Representatives did here. *Khait v. Whirlpool Corp.*, No. 06-6381 (ALC), 2010 U.S. Dist. LEXIS 4067, at \*26-\*27 (E.D.N.Y. Jan. 20, 2010). Service awards fulfill several functions that are present in this case. These awards – sometimes referred to as “incentive awards” – provide an incentive to representatives who often are reluctant to incur the wrath and retaliation of the employers or suppliers that they sue. *See In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 751 (E.D. Pa. 2013), *aff'd*, 879 F.3d 61 (3rd Cir. 2017). “[B]y alleging antitrust violations on behalf of themselves and the class, the class representatives conceivably put their businesses in risk of potential retaliation . . . .” *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG) (VVP), 2015 U.S. Dist. LEXIS 138479, at \*144-\*145 (E.D.N.Y. Oct. 9, 2005) (granting incentive awards of \$90,000 each to the six class representatives).<sup>7</sup> They also compensate the representatives for the time and money that they expended on behalf of the class. *In*

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<sup>7</sup> *See also Karic v. Major Auto. Companies, Inc.*, No. 09 CV 5708 (CLP), 2016 U.S. Dist. LEXIS 57782, at \*24 (E.D.N.Y. Apr. 27, 2016) (“[C]ourts have held that class representatives ‘merit recognition for assuming the risk [associated with the litigation] for the sake of absent class members.’”) (quoting *Guippone v. BH S&B Holdings, LLC*, No. 09 CV 1029, 2011 U.S. Dist. LEXIS 126026, at \*20 (S.D.N.Y. Oct. 28, 2011)); *see Bozak v. FedEx Ground Package Sys., Inc.*, No. 3:11-CV-00738-RNC, 2014 U.S. Dist. LEXIS 106042, at \*11 (D. Conn. July 31, 2014) (recognizing that “[c]ourts acknowledge that named plaintiffs in class and collective actions play a crucial role in representing others” and concluding that “[e]ven where, as here, there is no evidence or indication of any retaliation by Defendant, class representatives merit recognition for assuming the risk of retaliation for the sake of absent class members”). Such recognition generally takes the form of an incentive award. *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 187 (W.D.N.Y. 2005) (“[i]ncentive awards are not uncommon in class action cases and are within the discretion of the court”); *Anwar v. Fairfield Greenwich Ltd.*, No. 09-CV-118 (VM), 2012 U.S. Dist. LEXIS 78929, at \*10 (S.D.N.Y. June 1, 2012) (“Courts consistently approve [incentive] awards in class action lawsuits to compensate named plaintiffs for the services they provide and burdens they endure during litigation”). Unless otherwise noted, citations are omitted and emphasis is added here and throughout.

*re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 501 (S.D.N.Y. 2009). Finally, service awards recognize the importance of representative plaintiffs to the vindication of private parties' rights under the antitrust laws and similar statutes by means of class actions under Fed. R. Civ. P. 23. *See* 15 U.S.C. §15(a); *see also Blue Shield of Va. v. McCready*, 457 U.S. 465, 473 (1982) (noting the “plain language and . . . broad remedial and deterrent objectives” of Section 4 of the Clayton Act).

Broadly speaking, the “existence of special circumstances” is the “guiding standard,” for determining the amount of service awards. *Khait*, 2010 U.S. Dist. LEXIS 4067, at \*26-\*27 (quoting *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 200-01 (S.D.N.Y. 1997)). While service awards may use a representative's time and expenses as a departure point, awards are not limited by the value of the representative's time or expense commitments. *See In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 U.S. Dist. LEXIS 1532, at \*57 (E.D. Pa. June 2, 2004); *In re Titanium Dioxide Antitrust Litig.*, No. 10-cv-00318 (RDB), 2013 U.S. Dist. LEXIS 176099, at \*8-\*9 (D. Md. Dec. 13, 2013) (awarding \$125,000 to lead class representative).

Courts consider several other factors when granting incentive awards, such as the “personal risk” in acting as a Class Representative, the “time and effort” that the representative devoted to the litigation, “other burdens” sustained by the representative, the degree the class benefitted from the representative's actions, the notoriety of the representative, and the ultimate result of the litigation. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *Khait*, 2010 U.S. Dist. LEXIS 4067, at \*26-\*27; *In re Plastic Tableware Antitrust Litig.*, No. 94-CV-3564, 1995 U.S. Dist. LEXIS 18166, at \*5-\*6 (E.D. Pa. Dec. 4, 1995). Class Representatives' efforts that extend beyond the litigation – such as appearing in the media – are also recognized in consideration of service awards. *See, e.g., Matheson v. T-Bone Rest., LLC*, No. 09 Civ. 4214, 2011 U.S. Dist. LEXIS 143773, at \*26 (S.D.N.Y. Dec. 13,

2011); *Wilson v. Airborne, Inc.*, No. EDCV 07-770-VAP 2008 U.S. Dist. LEXIS 110411, at \*37 (C.D. Cal. Aug. 13, 2008).

**B. The Value of the Class Representatives' Time Provides a Useful Baseline for the Expense-Based Portion of Service Awards**

In its order of January 10, 2014, the Court requested that Class Counsel support the Class Representatives' motions for service awards with better documentation of the representatives' efforts and expenditures, for which they then sought recognition. To address the Court's concerns, Class Counsel provided then and renews here a calculation for each representative that takes into account its expenditures – both in terms of out-of-pocket expenses, salaries, and owner's time, acknowledges the risks the representatives assumed in this litigation, and provides an incentive to representatives in future difficult, complex and risky cases. These types of awards are commonly granted in the class-action context.

**1. Courts Value Representatives' Contributions Based in Part on the Value of the Representatives' Time.**

In granting final approval in *In re Initial Pub. Offering*, Judge Scheindlin laid out a number of factors to support awards to various class representatives who had served in the lengthy action. 671 F. Supp. 2d at 501. Those factors provide a framework useful in determining a cost-based component for awards to the Class Representatives. While critical of some of the representations made by the representatives regarding hourly rates, the court set forth rules to ensure reasonableness of the requested awards. *Id.* First, the court limited the hours expended by each eligible representative to a median number of hours. The court then imposed a two-hundred-dollar-cap on the hourly rate of all representatives. *Id.* Those representatives who were employed for only part of the litigation without specifying the length of time employed were limited to half their reported hours. As to out-of-pocket expenses, the court declined to grant requests for expenses because there

was no itemized list of expenses, no receipts and no attestation that the expenses had not been reimbursed. *See id.* at 501-02.

In other contexts, courts often attempt to compensate individuals for lost time by determining their hourly rates. For example, in overtime cases brought under the Fair Labor Standards Act, courts examine the hourly rates of the plaintiffs to determine the measure of damages. *See, e.g., Gayle v. Harry's Nurses Registry*, No. 07-CV-4672 (NGG) (MDG), 2012 U.S. Dist. LEXIS 133279 (E.D.N.Y. Sept. 18, 2012); *Learning Annex Holdings, LLC v. Rich Global, LLC*, 860 F. Supp. 2d 237, 242 (S.D.N.Y. 2012) (“damages are generally given based on an hourly rate, except for limited exceptions where there is a ‘clear and accepted marketplace convention’ establishing compensation on a percentage basis”); *see also Carlino v. Kaplan*, 139 F. Supp. 2d 563, 566 (S.D.N.Y. 2001) (holding that, when determining damages when there was no contract, damages are measured by reasonable hourly rate).

**2. PSLRA Awards Provide a Useful Starting Point for Evaluating the Cost-Based Component of Incentive Awards in This Case**

The Private Securities Litigation Reform Act (“PSLRA”) allows class representatives to seek “reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class.” 15 U.S.C. §78u-4(a)(4). While no statute or case law limits antitrust service awards to the value of representatives’ time and out-of-pocket costs, awards under that framework provide a useful starting point for the cost-based portion of awards that the individual Class Representatives seek in this case. In PSLRA cases, courts “routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place.”

*In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510 (CPS) (SMG), 2007 U.S. Dist. LEXIS 68964,

at \*61-\*62 (E.D.N.Y. Sept. 18, 2007). Permissible reimbursement for lost wages and out-of-pocket expense includes “time expended by the Class Representative[s] and Lead Plaintiff[ ] result[ing] in actual losses, whether in the form of diminishment in wages, lost sales commissions, missed business opportunities, use of leave or vacation time or actual expenses incurred.” *Swack v. Credit Suisse First Boston LLC*, No. 02-11943-DPW, 2006 U.S. Dist. LEXIS 75470, at \*9-\*10 (D. Mass Oct. 4, 2006).

Even PSLRA awards are not rigidly limited to lost wages or other documented expenses. Compensation may be awarded in recognition of, for example, “the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise).” *Frank*, 228 F.R.D. at 187; *see also e.g., Baptista v. Mut. of Omaha Ins. Co.*, 859 F. Supp. 2d 236, 244-45 (D.R.I. 2012) (granting \$2000 incentive award to a plaintiff who spent 15-20 hours on litigation, a rate of more than \$100 per hour).

The Class Representatives in this case assisted the prosecution of this case with their unique knowledge of the payment card industry, dedication to difficult discovery and unflinching commitment to the case. The Class Representatives here have provided detailed declarations, reflecting reasonable hourly rates for their respective fields. None of the hourly rates exceeds \$219. The number of hours spent on this case while they were employed at each Class Representative appears in the declarations. All out-of-pocket expenses are cataloged in the declarations as well.

**C. This Case Presents “Special Circumstances” that Justify Awards Above the Class Representatives’ Costs Because They Went Above and Beyond Their Duties**

Courts have recognized filing suit in the face of potential retaliation by Defendants as a factor in granting service awards: the precise type of risk taken by Class Representatives here. *See In re Flonase*, 951 F. Supp. 2d at 751; *Frank*, 228 F.R.D. at 187.

The declarations submitted by the Class Representatives demonstrate the extraordinary efforts and resources that the Class Representatives committed to the Class. *See Marchbanks Truck Service, Inc. v. Comdata Network, Inc.*, No. 07-1078-JKG, 2014 U.S. Dist. LEXIS 184691, at \*11-\*12 (E.D. Pa. Jul. 14, 2014) (awarding \$150,000 service award to lead plaintiff who “was one of the driving forces behind this lawsuit being filed and prosecuted”). Representatives of Traditions and Photos provided interviews to the Department of Justice that contributed to an important component of the reforms that merchants obtained during this litigation. ECF No. 1652 at 5, 40 (listing “the alterations accomplished directly by the proposed settlement and indirectly during the course of this litigation”). Payless, Traditions, Photos and Leon’s Transmission lobbied their representatives, other members of Congress, and other elected officials to advocate for the Durbin Amendment and other merchant-friendly legislation. ECF No. 6385-7, ¶66; ECF No. 6385-1, ¶4; ECF No. 6385-8, ¶11; ECF No. 6385-3, ¶33. Traditions, Photos, and Leon’s communicated with the press, helping put a “face” on the merchant class that was litigating before the Court and advocating in Congress and to the Justice Department. ECF No. 6385-1, ¶4; ECF No. 6385-3, ¶¶10-23; ECF No. 6385-8, ¶10; *see also Matheson*, 2011 U.S. Dist. LEXIS 143773, at \*26 (“Media coverage of a class action can benefit the class, and a named plaintiffs involvement in it further supports a service award.”). Being Class Representatives in this litigation bolstered their credibility when speaking to lawmakers, the Department of Justice and the press.

The efforts that the Class Representatives took to assist Class Counsel in mediating and settling the case both initially and during the current settlement process further justify service awards. The negotiations that led to both settlements of this matter were long, arduous, and complex. As the Class Representatives demonstrate in their declarations, providing their meaningful input required many hours of reviewing pleadings, attending settlement conferences, mediation

sessions, and related meetings, and providing written and verbal feedback to Class Counsel, the mediators, and the Court.<sup>8</sup>

And while responding to discovery is ordinary, the Defendants' demands on the Class Representatives here required unusual efforts by the Class Representatives and extraordinary sacrifices to their businesses, particularly where these Class Representatives had to engage in the discovery process twice, with many of the requests during the second discovery period covering a period going back to 2000 and concerning matters – such as two-sided markets – which were not part of the discovery requests during the first discovery period. The large Class Representatives bore discovery burdens that were equal to or greater than many Defendants, producing millions of pages of documents and submitting to several depositions. ECF No. 6385-10, ¶¶9-11; ECF No. 6385-7, ¶¶21-62. And while the smaller Class Representatives produced volumes of documents that were more proportional to their size, producing those documents and sitting for depositions required engagement by large proportions of their employees at the highest levels and seriously disrupted their businesses. See ECF No. 6385-4, ¶¶6-10; ECF No. 6385-8, ¶¶12-13, 16; ECF No. 2113-10, ¶¶6, 8; *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 342 (E.D. Pa. 2007) (acknowledging the burdens on small business in granting incentive award). The contributions of the Class Representatives proved valuable to the litigation, yielding helpful evidence for class certification and issues such as Defendants' *Illinois Brick* argument. See *Bradburn*, 513 F. Supp. 2d at 322 (recognizing importance of class representatives' contributions to result obtained by class counsel).

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<sup>8</sup> The Class Representatives documented their time contributions to the settlement process in their declarations. See ECF No. 6385-1, ¶11(j); ECF No. 6385-6, ¶16; ECF No. 6385-8, ¶14; ECF No. 6385-10, ¶8; ECF No. 6385-3, ¶¶26-28; ECF No. 6385-9, ¶5; ECF No. 6385-7, ¶72; ECF No. 6385-4, Attachment B.

This Court has previously cautioned that “if class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard.” *Warren v. Xerox Corp.*, No. 01-CV-2909 (JG), 2008 U.S. Dist. LEXIS 73951, at \*20 n.3 (E.D.N.Y. Sept. 19, 2008). However, here it is abundantly clear that this concern is not present. The total settlement amount addresses any concern that the Class Representatives were tempted to accept a less favorable settlement in the hopes that they would score a big payday.<sup>9</sup> Nor do service awards set a bad precedent in this case, given the exceptional activities that the Class Representatives performed, such as advocating in the media and lobbying Congress and antitrust enforcers on behalf of the Class for more than 13 years.<sup>10</sup> It is unlikely that small businesses would be tempted to devote more than a decade of their business lives in the hope that at the end of that period they would have a chance to receive a service award of any of the amounts sought here.

To the contrary, the requested service awards set a positive precedent for future cases and potential class representatives. The Class Representatives that are independent businesses, in particular, committed the time of their founders, owners, and senior leaders to assist in the litigation and settlement of this case. *See* ECF No. 6385-8, ¶¶12, 16; ECF No. 6385-4, ¶¶9-10; ECF No. 6385-3, ¶35; ECF No. 6385-9, ¶¶4, 7; ECF No. 6385-6, ¶7. Thus, the demands on small businesses that act as Class Representatives are in many ways greater than those of large companies, which are accustomed to litigation and have well-established procedures to handle the demands that it imposes.

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<sup>9</sup> In fact, Class Representative Payless was also a class representative in another credit card case against many of the same players, *In re Visa Check/MasterMoney Antitrust Litig.*, No. 96-cv-5238 (JG) (E.D.N.Y.) in which no incentive awards were sought nor granted. Payless clearly did not get involved in this case for a potential incentive award.

<sup>10</sup> The first class action filed in this Court was commenced on June 22, 2005 on behalf of Class Representatives Photos, Traditions and CHS.

While “windfalls” to class representatives are certainly undesirable (*see Warren*, 2008 U.S. Dist. LEXIS 73951, at \*20 n.3), so too is a scenario in which small businesses cannot rationally justify the risk and time commitment to participate in class actions. *See* ECF No. 6385-8, ¶¶21-24. If rational small businesses do not find it sensible to participate in class litigation, the justice system may lose their voices in important cases. Thus, granting service awards based on the time and risk that Class Representatives commit promotes sound public policy by recognizing the contributions of small businesses to the result achieved, which should encourage future large and small businesses to take the necessary risks to participate in class litigation. *See Bradburn*, 513 F. Supp. 2d at 322.

**V. THE EXPECTED SETTLEMENT FIGURES AND THE REPRESENTATIVES’ CONTRIBUTIONS SUPPORT THE AWARDS SOUGHT**

In the Court’s January 10, 2014 Order, the Court specifically requested that Class Counsel document the approximate value of each Class Representative’s claim and each one’s proposed incentive award. ECF No. 6169 at 16-17. To accomplish this, Class Counsel worked with the Claims Administrator, Michael O’Connor, to provide the Court the required information.<sup>11</sup> O’Connor Decl., ECF No. 6385-5 (July 22, 2014). His declaration, dated July 22, 2014 was filed on January 13, 2015.

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<sup>11</sup> For a number of reasons, the figures provided here for each Class Representative are estimates only, and may not perfectly reflect what they, or other businesses with a similar amount of Visa and Mastercard transactions during the period, may receive in the settlement. First, it is not yet known what the total percentage of eligible merchants who will file claims will be. The figures presented here use an extremely conservative assumptions of 70% and of a 100% participation rates. Because 70% and 100% claims rates are being used, the actual figures for any of these merchants are likely to be higher when a pro-rata distribution occurs. There are other assumptions in the figures presented as well. ECF No. 6385-5, ¶¶3-7.

Class Counsel requested that the Claims Administrator conduct this process again and update the figures taking into account data covering the full class period, to the extent it is available. The updated declaration is attached as Ex. 1.

The table below demonstrates the incentive awards requested by each Class Representative, the anticipated value of each Representative’s claim and their out-of-pocket expenses. Information concerning the estimated value of the time that each contributed to this case is contained in the declarations of the Class Representatives. *See* ECF No. 6385-1, 6385-3 through 6385-10; Exs. 2-8.

<b>Representative</b>	<b>Out of Pocket Expenses</b>	<b>Proposed Service Award</b>	<b>Total (Award + Expenses)</b>	<b>Estimated Claim Range<sup>12</sup></b>
Traditions	\$ 8,418.49	\$ 200,000.00	\$ 208,418.49	\$ 9,659.00 – \$ 17,094.00
Photos Etc.	\$ 6,860.44	\$ 200,000.00	\$ 206,860.44	\$ 2,140.00 – \$ 3,787.00
Discount Optics	\$ 12,773.55	\$ 100,000.00	\$ 112,773.55	\$ 1,509.00 – \$ 2,670.00
Payless	N/A	\$ 100,000.00	\$ 100,000.00	\$ 1,453,408.00 – \$ 2,572,161.00
CHS	N/A	\$ 100,000.00	\$ 100,000.00	\$ 7,724,762.00 – \$ 13,670,855.00
Parkway	\$ 3,540.53	\$ 75,000.00	\$ 78,540.53	\$ 46,130.00 – \$ 81,638.00
Leon’s Transmission	\$ 450.00	\$ 75,000.00	\$ 75,450.00	\$ 6,769.00 – \$ 11,979.00
Capital Audio	\$ 3,600.00	\$ 50,000.00	\$ 53,600.00	\$ 410.00 – \$ 725.00
<b>Total</b>	\$ 35,643.01	\$ 900,000.00	\$ 935,643.01	N/A

The requested incentive awards – totaling \$900,00.00 are conservative in comparison to incentive awards that other courts have approved. The requested awards are less than two hundredths of a percent of the settlement, even if the full opt-out figure is reached. For example, courts in this district have granted service awards that constitute 4% of the total settlement. *See Gay*

<sup>12</sup> The estimated claims are based on data provided with the declarations of Michael O’Connor, subject to the caveats described in n.11, above. ECF No. 6385-5; Ex. 1, O’Connor Decl..

*v. Tri-Wire Eng'g Sols., Inc.*, No. 12-cv-2231 (KAM) (JO), 2014 U.S. Dist. LEXIS 232 (E.D.N.Y. Jan. 2, 2014); *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC) (JO), 2012 U.S. Dist. LEXIS 152275, at \*36 (E.D.N.Y. Oct. 23, 2012) (approving \$50,000 incentive awards, in light of class payments “of up to \$940,000”). *See also In re Titanium Dioxide Antitrust Litig.*, 2013 U.S. Dist. LEXIS 176099, at \*8-\*9 (approving \$125,000 service award to lead plaintiff in \$163.5 million settlement and \$25,000 awards to other representatives). Courts in the Southern District have approved awards of up to 5% of the total settlement. *See, e.g., Reyes v. Altamarea Grp., LLC*, No. 10-CV-6451 (RLE), 2011 U.S. Dist. LEXIS 115984, at \*9 (S.D.N.Y. Aug. 16, 2011) (approving service awards to four class representatives, where each individual service award of \$15,000 represented 5% of the total settlement).<sup>13</sup>

While the aggregate amount requested in this case compared to others is a useful guidepost by which to measure an appropriate award in this case, it is necessary or appropriate that the proper award for every Representative match up perfectly with the size of its claim. For example, many of the Class Representatives who spent the most time on this litigation were small businesses that had small claims. *See* Ex. 3, Goldstone Decl., ¶8 ; Ex. 8, Schumann Decl., ¶8 ; Ex. 2, Archer Decl. These merchants contributed the unique perspectives of small businesses (who make up the vast majority of the Class) to this litigation and the settlement negotiations. *See* ECF No. 6366-2, ¶21. Granting incentive awards that are proportional only to the size of these Class Representatives’

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<sup>13</sup> *See also Marchbanks Truck Service, Inc. v. Comdata Network, Inc.*, an antitrust class action where plaintiffs alleged defendants’ anti-steering restraints maintained merchant fees at artificially high levels, is instructive. 2014 U.S. Dist. LEXIS 184691. The court granted an incentive award of \$150,000 for the lead plaintiff, noting that the representative sat for three depositions (including two by its owner), assisted class counsel in the development and prosecution of the case, produced documents, and attended settlement conferences and other court hearings. *Id.* at \*12-\*14. The court concluded that an incentive award in this amount was appropriate for these activities, which took up “hundreds of hours” of the plaintiff’s employees’ time. *Id.* at \*12. The contributions and efforts of the Class Representatives in this case are similar and exceed those in *Marchbanks*.

claims would drastically undervalue their contributions. If these merchants were compensated only relative to the size of their claims, it may inadvertently send the message to other small businesses that participation in class actions is not worth the considerable effort involved. If small businesses take away this message, securing their participation – and thus their voices – in future litigation may become more difficult.

## **VI. CONCLUSION**

The extensive and wide-ranging efforts by the Class Representatives contributed significantly to the ultimate success of this litigation. The Representatives pursued the case with vigor, never losing hope that a significant result could be achieved – even after the defeat in the Second Circuit. The Representatives took great risks to participate in this litigation and, in the case of the smaller Representatives, invested significant amounts of their owners’ and executives’ time. With this motion, Class Counsel respectfully request that this Court recognize the extraordinary nature of the Class Representatives’ contributions by granting their respective motions for incentive awards that correspond to the time and effort they devoted to help advance the case and its history-making settlement.

DATED: June 7, 2019

Respectfully submitted,

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