UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE	:	MDL No. 1409
	:	M 21-95
CURRENCY CONVERSION FEE ANTITRUST LITIGATION	:	MEMORANDUM AND ORDER

WILLIAM H. PAULEY III, District Judge:

These class actions are consolidated for pretrial proceedings. Plaintiffs allege violations of the Sherman Act, 15 U.S.C. § 1 et seq., the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq., and the South Dakota Deceptive Trade Practices Act ("DTPA"), arising from an alleged price-fixing conspiracy among VISA and MasterCard (the "network defendants") and their member banks concerning foreign currency conversion fees. Plaintiffs move, pursuant to 28 U.S.C. § 1292(b), for certification of an interlocutory appeal from this Court's Memoranda and Orders dated March 9, 2005 and June 16, 2005. For the reasons set forth below, plaintiffs' motion is granted.

BACKGROUND

The factual background underlying these actions is set forth in this Court's prior opinions. See In re Currency Conversion Fee Antitrust Litig., --- F.R.D. ---, 2005 WL 1405993 (S.D.N.Y. June 16, 2005) ("Currency Conversion IV"); In re Currency Conversion Fee Antitrust Litig., 361 F. Supp. 2d 237 (S.D.N.Y. 2005) ("Currency Conversion III"); In re Currency Conversion Fee Antitrust Litig., 224 F.R.D. 555 (S.D.N.Y. 2004) ("Currency Conversion II"); In re Currency Conversion Fee Antitrust Litig., 265 F. Supp. 2d 385 (S.D.N.Y. 2003) ("Currency Conversion I").

PROCEDURAL HISTORY

On November 12, 2003, plaintiffs moved for class certification. Defendants opposed plaintiffs' motion, arguing, inter alia, that "most putative class members voluntarily signed a binding arbitration agreement with their credit card issuers" that precludes their participation in the defined classes. Currency Conversion II, 224 F.R.D. at 569. Defendants contended that cardholders with binding arbitration agreements are contractually bound to arbitrate with their card issuing banks and should be estopped from litigating their claims against other card issuing banks and the network defendants. Currency Conversion II, 224 F.R.D. at 570. On October 15, 2004, this Court granted class certification and declined to estop plaintiffs from proceeding against the non-issuing banks because they "were not parties to those agreements, and the contract provisions did not extend to them." Currency Conversion II, 224 F.R.D. at 570.

On November 3, 2004, defendants moved for reconsideration of this Court's class certification ruling, arguing that the Second Circuit's intervening decision in JLM Industries, Inc. v. Stolt-Nielsen SA, 387 F.3d 163 (2d Cir. 2004), required this Court to apply the estoppel doctrine to claims against the non-issuing banks and the network defendants. In addition, defendants jointly moved to stay the litigation pending arbitration. This Court agreed, holding that based on the estoppel doctrine enunciated in JLM, the "arbitration agreements entered into before this litigation are enforceable against the cardholders by the signatories, network defendants and the non-signatory banks." Currency Conversion III, 361 F. Supp. 2d at 245. Relying on JLM, this Court held that cardholders with binding arbitration agreements were estopped from avoiding arbitration with the network defendants and the non-issuing banks because: (1) the network defendants and the non-issuing banks each have a close relationship

with the issuing banks; (2) plaintiffs' claims of joint and several liability concerns that relationship; and (3) the claims are intertwined with the cardholder agreements. Currency Conversion III, 361 F. Supp. 2d at 262-65.

With respect to the network defendants, this Court held that plaintiffs had depicted a "close relationship" between the network defendants and the issuing banks by alleging, inter alia, that the networks are "membership corporations created, owned, governed and operated by their member financial institutions through a joint venture, and that the issuing bank defendants are among the banks which owned and controlled the operations of [the network defendants]." Currency Conversion III, 361 F. Supp. 2d at 262 (internal quotations omitted). "Because the networks have no direct contact with cardmembers, their currency conversion fee is imposed through the issuing banks," making "the 'close relationship' between the issuing banks and the network defendants . . . integral to plaintiffs' price-fixing claims against the networks." Currency Conversion III, 361 F. Supp. 2d at 263. This Court further held that the plaintiffs' claims against the network defendants were closely linked to the cardholder agreements because the claims "stem from the cardholder agreements issued by the bank defendants." Currency Conversion III, 361 F. Supp. 2d at 263.

Further, "[i]n the same way that the issuing banks and the network defendants are closely aligned entities, the Complaint connects the bank defendants to each other through membership in the network associations." Currency Conversion III, 361 F. Supp. 2d at 264. "The Complaint alleges that the issuing banks operate collectively through the network associations and that this relationship incubated the conspiracy." Currency Conversion III, 361 F. Supp. 2d at 264. Finally, "plaintiffs' claims against the non-signatory bank defendants [were] 'closely linked' to their claims against their issuing banks because both are intertwined with the

cardholder agreements. Because plaintiffs allege that non-signatory banks conspired with plaintiffs' issuing banks concerning the fees charged, those claims arise under the 'subject matter' of the underlying agreement between plaintiffs and the issuing banks." Currency Conversion III, 361 F. Supp. 2d at 264-65 (internal quotations and alterations omitted).

Plaintiffs moved for reconsideration of certain portions of Currency Conversion III. This Court denied plaintiffs' motion by Memorandum and Order dated June 16, 2005, i.e., Currency Conversion IV. Plaintiffs now move for certification of an interlocutory appeal from Currency Conversion III and Currency Conversion IV.[1]

DISCUSSION

I. Standard for Certification of an Interlocutory Appeal

A district court has the power to certify an order for immediate interlocutory appeal under 28 U.S.C. § 1292(b). See Padilla ex rel. Newman v. Rumsfeld, 256 F. Supp. 2d 218, 222-24 (S.D.N.Y. 2003); Romea v. Heiberger & Assocs., 988 F. Supp. 715, 716-18 (S.D.N.Y. 1998). Section 1292(b) permits a district court to certify an order that is otherwise not eligible for interlocutory appeal if the district court discerns that "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The determination of whether Section 1292(b) certification is appropriate lies within the discretion of the district court. See Ferraro v. Sec'y of U.S. Dep't of Health & Human Servs., 780 F. Supp. 978, 979 (E.D.N.Y. 1992).

[1] This Court notes that on June 30, 2005, plaintiffs filed with the Second Circuit a petition for leave to appeal the class certification order excluding certain cardholders, pursuant to Rule 23(f) of the Federal Rules of Civil Procedure.

Section 1292(b) is to be applied rarely: "Only 'exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.'" Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 25 (2d Cir. 1990) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978)). Such exceptional circumstances exist only "where an intermediate appeal may avoid protracted and expensive litigation and [Section 1292(b)] is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation." Telectronics Proprietary, Ltd. v. Medtronic, Inc., 690 F. Supp. 170, 172 (S.D.N.Y. 1987) (internal quotations omitted). An order may be certified for interlocutory appeal when the issues raised are novel and complex and where the practical effect of the order may be dispositive. See Klinghoffer, 921 F.2d at 25 (granting interlocutory review when district court certified that issues were "difficult and of first impression"); Padilla, 256 F. Supp. 2d at 222-24; Romea, 988 F. Supp. at 716-18; Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1190, 1244 (E.D. Pa. 1980) ("[O]ur decision to certify our order is prompted in large part by the exceptional novelty and complexity of the legal question here presented. Moreover, a prompt and authoritative disposition of the question is extremely important to the prudent management of the litigation.").

Finally, a district court must consider the institutional efficiency of the federal judiciary when considering an application for Section 1292(b) certification. The efficiency of both the district court and the appellate court should be considered. Balancing these efficiencies, the benefit to the district court of obviating needless trial time must outweigh the inefficiency to the Court of Appeals in hearing multiple appeals in the same case. See Harriscom Svenska AB v. Harris Corp., 947 F.2d 627, 631 (2d Cir. 1991) ("It does not normally advance the interests of sound judicial administration or efficiency to have piecemeal appeals that require two (or more)

three-judge panels to familiarize themselves with a given case, instead of having the trial judge, who sits alone and is intimately familiar with the whole case, revisit a portion of the case if he or she has erred in part and that portion is overturned following the adjudication of the whole case.").

Even if this Court certifies an order for interlocutory appeal, the Court of Appeals may decline the district court's invitation for review. See 28 U.S.C. § 1292(b); Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 81 (2d Cir. 2002) ("Upon entry of . . . an order [certifying interlocutory appeal], the court of appeals has the discretion to accept or decline jurisdiction.").

II. Certification of an Interlocutory Appeal of This Court's Orders

Plaintiffs argue that this Court's March 9, 2005 and June 16, 2005 rulings involve a controlling question of law over which there is substantial ground for difference of opinion. (Letter to Court from Merrill G. Davidoff, Esq., dated July 18, 2005 ("Davidoff Letter") at 1.) They contend that this Court's reading of JLM was too expansive and also "counter-intuitive" because it requires arbitration of claims against non-signatories on the basis of their alleged price-fixing relationship with the signatory issuing banks, when that relationship was unknown to plaintiffs at the time of acceptance of the contract. (Davidoff Letter at 3.)

Defendants oppose certification of an interlocutory appeal. They contend that "[t]here is no genuine dispute about the principles of law that govern this case; plaintiffs' disagreement with this Court's order relates instead to the application of agreed controlling principles to the specific facts of this case." (Letter to Court from Christopher R. Lipsett, Esq., dated July 22, 2005 ("Lipsett Letter") at 1.) They further argue that this Court's application of

JLM was correct, and therefore a certification of an interlocutory appeal would be inappropriate. (Lipsett Letter at 2-6.) Finally, defendants argue that an interlocutory appeal would not materially advance the ultimate termination of this litigation. (Lipsett Letter at 6-7.)

In JLM and, more recently, in Denney v. BDO Seidman, L.L.P., 412 F.3d 58 (2d Cir. 2005), the Second Circuit examined the operation of equitable estoppel as to alleged co-conspirators. However, in neither opinion did the Second Circuit enunciate the minimum level of intertwined-ness necessary for estoppel.

In JLM, a group of chemical traders ("JLM") claimed that the shipping companies with whom they contracted had engaged in an antitrust conspiracy to fix the freight rates they charged for transporting chemicals. 387 F.3d at 167-68. For each transaction with the various shipping companies, JLM signed the same standard-form charter. JLM, 387 F.3d at 167. That contract contained a broad arbitration clause through which the parties agreed to arbitrate "[a]ny and all differences and disputes of whatsoever nature arising out of this Charter." JLM, 387 F.3d at 167. However, the JLM defendants were not the signatories to the shipping charters but were the parent corporations ("Owners") of the signatories. JLM, 387 F.3d at 167. Nonetheless, the Owners moved to compel JLM to arbitrate its claims against them. The Court of Appeals held that JLM was estopped from avoiding arbitration based on the agreements it entered with the Owners' subsidiaries. The Second Circuit concluded that "it is the fact of JLM's entry into the charters containing allegedly inflated price terms that gives rise to the claimed injury." JLM, 387 F.3d at 178. In particular, the Second Circuit found that JLM was estopped from arguing against arbitration because "[t]he questions the Owners seek to arbitrate are undeniably intertwined with the charters." JLM, 387 F.3d at 178. While it noted that the "estoppel inquiry is fact-specific" and that the Second Circuit has "had no occasion to specify the minimum quantum of

'intertwined-ness' required to support a finding of estoppel," the court had "no difficulty concluding that [the minimum quantum of intertwined-ness was] present here." JLM, 387 F.3d at 178.

After JLM, the Second Circuit considered equitable estoppel again in Denney. The Court of Appeals held that where a plaintiff alleges concerted misconduct between a signatory and nonsignatory, such concerted misconduct could be the basis for a finding of close relationship between the signatory and nonsignatory. Denney, 412 F.3d at 70-71. In Denney, plaintiffs asserted RICO claims against BDO Seidman, L.L.P. ("BDO") and other defendants in connection with certain tax transactions. Plaintiffs entered into consulting agreements with BDO that included an arbitration provision. Denney, 412 F.3d at 61-62. On appeal, the Second Circuit held that Deutsche Bank, which was a nonsignatory to the consulting agreements, had the close relationship necessary for invoking the BDO arbitration clauses:

> Having alleged in this RICO action that the Deutsche Bank and BDO defendants acted in concert to defraud plaintiffs, . . . and that defendants' fraud arose in connection with BDO's tax strategy advice, . . . plaintiffs cannot now escape the consequences of those allegations by arguing that the Deutsche Bank and BDO defendants lack the requisite close relationship, or that plaintiffs' claim against the Deutsche Bank defendants are not connected to Deutsche Bank's relationship with BDO.

Denney, 412 F.3d at 70 (citing Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524, 527 (5th Cir. 2000); MS Dealer Serv. Corp. v. Franklin, 117 F.3d 942, 947 (11th Cir. 1999)). However, based on the record, the Second Circuit was unable to address the issue of "whether plaintiffs' claims against the Deutsche Bank defendants [were] so 'intimately founded in' or 'intertwined with' the underlying obligations of the consulting agreements as to allow the non-signatory Deutsche Bank defendants to compel arbitration." Denney, 412 F.3d at 70. Thus, the Court of Appeals remanded the case to determine "whether the issues the Deutsche Bank

defendants seek to arbitrate are indeed intertwined with the consulting agreements." Denney, 412 F.3d at 70.

Thus, while this Court found "intertwined-ness," the Second Circuit has not had occasion to "specify the minimum quantum of 'intertwined-ness' required to support a finding of estoppel." JLM, 387 F.3d at 178. Because the facts relating to the equitable estoppel issue have been fully developed in this action, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is warranted.[2] See Klinghoffer, 921 F.2d at 25; Padilla, 256 F. Supp. 2d at 222-24; Romea, 988 F. Supp. at 716-18; Zenith Radio, 494 F. Supp. at 1244.

Further, resolution of the equitable estoppel issue is critical to the progress of this multi-district litigation. An interlocutory appeal to obtain appellate guidance on the threshold issue of class composition would materially advance the ultimate resolution of this litigation, particularly if the Court's interpretation of the law is incorrect. See, e.g., Mayo v. Hartford Life Ins. Co., 214 F.R.D. 458, 461 (S.D. Tex. 2002). Additionally, in view of Chase and Citibank's appeal of this Court's denial of their motions to compel arbitration and stay this litigation, consideration of plaintiffs' appeal would promote judicial economy.[3] See Johnson v. Burken, 930 F.2d 1202, 1206 (7th Cir. 1991) ("Practical considerations well illustrated by this case show that the standard [for granting interlocutory appeal] should be kept flexible. If we don't decide the validity of the first service, the case may go through to judgment, followed by an appeal that will result (as we are about to see) in throwing the case out for want of proper service–thus

[2] Although this issue meets the requirements of Section 1292(b), the Second Circuit "may address any issue fairly included within the certified order because 'it is the order that is appealable, and not the controlling question identified by the district court.'" Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 205 (1996) (emphasis in original) (quoting 9 J. Moore & B. Ward, Moore's Federal Practice ¶ 110.25[1], at 300 (2d ed.1995)).

[3] Because this Court's June 16, 2005 Memorandum and Order clarifies the March 9, 2005 Memorandum and Order, this Court certifies an interlocutory appeal from both rulings.

requiring a remand for determination of the validity of the second attempt at service, followed possibly by another appeal."); see also Harriscom, 947 F.2d at 631. Certification of an interlocutory appeal advances "the interests of sound judicial economy" by having one three-judge panel familiarize itself with this case, instead of having "piecemeal appeals that require two (or more) three-judge panels." Harriscom, 947 F.2d at 631.

CONCLUSION

This Court's March 9, 2005 and June 16, 2005 Memoranda and Orders involve a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from the rulings may materially advance the ultimate termination of this multi-district litigation. Accordingly, this Court certifies an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), from this Court's March 9, 2005 and June 16, 2005 Memoranda and Orders. Additionally, because 28 U.S.C. § 1292(b) states that the prior orders of this Court must themselves contain the certification, the Memoranda and Orders entered in this case on March 9, 2005 and June 16, 2005 are deemed amended to include the discussion set forth above. See Fed. R. App. P. 5(a)(3).

Dated: August 9, 2005
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

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