

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

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<b>IN RE</b>	:
	: <b>MASTER FILE NO. CV-96-5238</b>
<b>VISA CHECK/MASTERMONEY ANTITRUST</b>	: <b>(Gleeson, J.) (Orenstein, M.J.)</b>
<b>LITIGATION</b>	:
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<b>This Document Relates To:</b>	:
<b>All Actions</b>	:
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**MEMORANDUM OF MASTERCARD INTERNATIONAL IN  
SUPPORT OF GOVERNMENT MERCHANTS' PARTICIPATION  
IN THE DISTRIBUTION OF NET SETTLEMENT FUNDS**

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**Preliminary Statement**

MasterCard International Incorporated (“MasterCard”) respectfully submits this memorandum in support of the participation in the distribution of the Net Settlement Funds of the U.S. Governmental agencies and instrumentalities that accepted Visa and MasterCard branded debit and credit cards during the Class Period and have submitted timely claims (hereinafter “Government Merchants”).<sup>1</sup> MasterCard joins the United States Department of Justice’s arguments that as a matter of equity, Government Merchants should be permitted to share in the Net Settlement Funds (*See* U.S. Br. at 15-22.)

MasterCard settled this case on the eve of trial with the clear goal of seeking “total peace” with all possible claimants who had not opted-out of the Plaintiff Class. In order to achieve this goal, throughout the settlement negotiations with the Plaintiff Class, MasterCard relied upon the Class definition proffered by Plaintiff Class. The Government Merchants, with the exception of the United States Postal Service (“USPS”), were never included on the opt-out list, and were always understood by MasterCard to be members of the Plaintiff Class and eligible participants in the Settlement Agreement and Net Settlement Funds.

Furthermore, MasterCard had no knowledge of the November 14, 2002 letter from the United States Department of Justice Civil Division to Plaintiffs’ counsel (“DOJ Letter”) at any time before or during the settlement negotiations. Therefore, MasterCard had no notice, constructive or actual, that the settlement negotiations might not extinguish the Government Merchants’ claims. To deprive MasterCard of the finality of a settlement with all members of Plaintiff Class who did not opt-out would deprive MasterCard of the benefit of the bargain it

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<sup>1</sup> When referring to Government Merchants, MasterCard is referring to all government entities except the United States Postal Service, which was on the opt-out list and therefore not considered by MasterCard to be included in the Class.

struck with the Plaintiff Class; conversely, to allow the Government Merchants to participate in the distribution of the Net Settlement Funds *would not* deprive the other Plaintiff Class members of the benefit of the bargain they struck with MasterCard.

### Argument

MasterCard submits this brief, simultaneously with briefs submitted by Visa U.S.A. Inc. ("Visa") and the United States Government, in support of the position that the Government Merchants are Class members entitled to participate in the distribution of the Net Settlement Funds. MasterCard has always considered this Class as including the Government Merchants. Throughout this litigation, MasterCard consistently adopted the broad class definition proposed by Lead Plaintiff Counsel.<sup>2</sup> The inclusion of the Government Merchants in Lead Plaintiff Counsel's Class definition is demonstrated by Lead Counsel's own May 17, 2002 speech, in which he explained that the class certification protected Defendants MasterCard and Visa from identical lawsuits from hundreds of merchants, including United States military base PX systems and the USPS.<sup>3</sup>

MasterCard's negotiations with Plaintiff Class resulted in the settlement plan adopted by this Court on December 19, 2003. Throughout the settlement negotiations, MasterCard's intent was to settle all claims against it by all of the class members, in order to

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<sup>2</sup> "All persons and business entities who have accepted Visa and/or MasterCard credit cards and therefore are required to accept *Visa Check* and/or *MasterMoney* debit cards under the challenged tying arrangements, during the fullest period permitted by the applicable statutes of limitation (the "Class"). The Class does not include the named defendants, their directors, officers or members of their families." (Amended Compl. ¶ 33.)

<sup>3</sup> Lloyd Constantine, *Visa and MasterCard's Endgame in the Wal-Mart Litigation: "The Dance of Death,"* in *Cards International*, May 17, 2002, available at 2002 WLNR 5016709

achieve a “full and final resolution of all claims and controversies against MasterCard.” (Arquit Aff. ¶ 4, attached hereto as Exhibit A.) MasterCard relied upon the opt-out list and opt-out letters provided to it as its basis for knowing who was and was not a part of Plaintiff Class. (See Arquit Aff. ¶ 4.) MasterCard knew that the USPS had opted-out of the Plaintiff Class (see Powell Aff. ¶ 3, attached hereto as Exhibit B), but had no knowledge of the DOJ Letter regarding all other Government Merchants. (See Arquit Aff. ¶ 5; Powell Aff. ¶ 4.) In addition, in deciding whether or not to settle and, if so, at what amount, MasterCard relied upon, *inter alia*, plaintiffs’ damage calculations of MasterCard’s potential exposure that included the Government Merchants’ transactions. (See Arquit Aff. ¶ 6.)

MasterCard joins the Government in asking this Court to exercise its equitable powers to include the Government Merchants in the distribution of Net Settlement Funds.<sup>4</sup> The only way to provide “total peace” to MasterCard and to ensure that the settlement of this class action is “fair, adequate, and reasonable” is to allot the Government Merchants’ their proportionate share of the Net Settlement Funds. See Fed. R. Civ. P. 23(e)(1)(C). See *In re Chicken Antitrust Litigation American Poultry*, 669 F.2d 228, 238 (5th Cir.1982) (deeming defendants’ insistence on “total peace” to be a factor in finding that a class action settlement was fair, adequate, and reasonable); *In re Remeron End-Payor Antitrust Litigation*, Civ. Act. Nos. 02-2007 FSH, 04-5126 FSH, 2005 WL 2230314, at \*21 (D.N.J. Sept 13, 2005) (“[a]n important part of a settlement like this one is that Defendants achieve ‘total peace,’ thus all potential plaintiffs must be compensated in order to preclude future litigation attempts and allow such a

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<sup>4</sup> MasterCard believes that the Government Merchants were always part of the Plaintiff Class. Should this Court deem that it must use its equitable powers to expand the Plaintiff Class to include the Government Merchants, the Second Circuit has held that it is a reasonable objective to expand a settlement class as an inducement to defendants to settle. See *Malchman v. Davis*, 761 F.2d 893, 900 (2d Cir. 1985).

settlement to consummate.”)

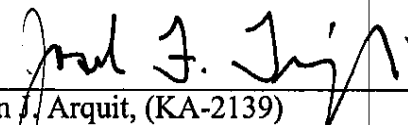
Finally, MasterCard joins in Visa’s arguments that allowing the Government Merchants to participate in the distribution of Net Settlement Funds will not deprive the other Plaintiff Class members of the benefit of their bargain in settling with Visa and MasterCard (*see* Visa Br. at 6-7), and that excluding the Government Merchants from the Plaintiff Class will deprive Visa and MasterCard of the benefit of their bargain in settling with Plaintiff Class. (*See* Visa Br. 7-8.)

**Conclusion**

For the foregoing reasons, MasterCard respectfully submits that the Government Merchants are entitled to participate in the distribution of the Net Settlement Funds in this case.

Dated: March 21, 2006

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