

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

IN RE	:	MASTER FILE NO.
		CV-96-5238
VISA CHECK/MASTERMONEY	:	(Gleeson, J.) (Orenstein, M.J.)
ANTITRUST LITIGATION	:	
	:	
This Document Relates to: All Actions	:	

DECLARATION OF STEPHEN V. BOMSE

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Counsel for Defendant Visa U.S.A. Inc.

1. I am an attorney authorized to appear in the above-entitled litigation *pro hac vice* and was counsel for Visa U.S.A. Inc. ("Visa") in that litigation. The matters stated hereafter are known personally to me and, if sworn, I would be competent to testify thereto. I submit this declaration as part of the submission of Visa regarding the request of the United States to be allowed to participate in the Net Distribution of Settlement Funds in the above-entitled actions.

2. I was the lead outside lawyer for Visa in connection with both the litigation and its settlement. In the latter regard, I was the outside lawyer who met with Visa's in-house legal staff and with members of its management and Board with regard to settlement issues. I also was present during all, or substantially all, settlement discussions involving Visa that took place with the mediators, Eric Green and Jonathon Marks, or with the Court. I also had substantial direct communication throughout the litigation with Lloyd Constantine, Lead Counsel for the Class.

3. At no time during the litigation, including any and all settlement discussions, including those with the Mediators and/or the Court, was it ever stated, suggested, or implied that the United States Government, with the exception of the United States Postal Service ("USPS"), was not a member of the Class that would participate in, and thus be bound by, any settlement reached by Visa. To the contrary, everything that occurred during the course of the litigation and settlement process led me to the belief that the United States (except for the USPS) *would* be so included.

4. During the class certification phase of the litigation, for example, defendants asserted both to the District Court and the Second Circuit that governmental entities were members of the class. *See*, Defendants Memorandum of Law In Opposition to Plaintiffs' Motion for Class Certification at 4; Defendants' Petition for Review Under FRCP 23(f) at 1-2. Plaintiffs never asserted to the contrary, and the class certified did not exclude the U.S. Government. Moreover, in a May 2002 speech, Mr. Constantine, himself, referred to the Government as a class member. *See* U.S. Br. at 6-7 (and n.7).

5. After class notice was sent out and the opt-out period concluded, Visa was extremely interested in knowing the identities of the merchants that had elected to exclude themselves from the class since that would have a material bearing on Visa's damage exposure in the litigation and, for the same reason, the terms on which it might be reasonable for Visa to settle. To that end, members of the Visa team in our office asked for a full list of opt-outs from plaintiffs, who initially objected to providing such information, but ultimately agreed to provide copies of all opt-out letters received. The letters provided by class counsel included an opt-out letter from the USPS, but not one from any other part of the U.S. Government.

6. Visa was concerned with the identities of the merchants who had opted-out because they were aware that they could face individual lawsuits from merchants with large purchase volume. That list included, among others, Home Depot, Best Buy, Meijer Stores, Toys R Us, and the USPS, among others. The nature of major opt-outs and the

implications of the decision to opt-out was studied by the Visa internal legal staff and with management and the Board.

7. Because the USPS did opt out, Visa actually sought it out and reached a separate agreement with it--as it later did with all of the major opt-outs except for GMRI, Inc. (with which Visa is still in litigation). However, with these exceptions, Visa was of the view that it had achieved full and binding peace with every major merchant in the United States that accepted its cards during the period covered by the litigation. It is not my testimony that Visa specifically focused on the United States. Rather, since it was not on the opt-out list received from plaintiffs or the Claims Administrator, Visa simply proceeded in reliance on the fact that it, like all other non-opt out merchants, would be bound by any settlement, and that was Visa's assumption and expectation throughout the settlement discussions and in executing the Settlement Agreement.

8. I have been furnished with, and been given an opportunity to review, the papers that are being filed by the United States in connection with this motion. Prior to reading those papers, I was unaware of any of the discussions between the United States and the plaintiffs referred to by the United States and I am confident that no one else at, or representing, Visa, was aware of such discussions. Visa also was never advised by the Claims Administrator that the United States (other than the USPS) was not included in the Class. If it was, in fact, the understanding and expectation of Lead Counsel that the United States, as a whole, was not going to be included in the class, then I would have expected him or others representing the class to advise Visa of the discussions between

Lead Counsel and the U.S., and I certainly would have expected counsel to insure that the Claims Administrator was so advised. I also would have expected him, or others in his firm, to take prompt steps to correct the omission of the United States as a class member by the Claims Administrator.

9. While I, of course, cannot make any statements regarding the undisclosed state of mind of Class Counsel, it is my opinion that if Mr. Constantine did not expect and intend the United States to be a claimant, he would have taken prompt steps to make that position clear, which--according to everything that I am aware of, or that I have read in the submission of the United States--he did not do.

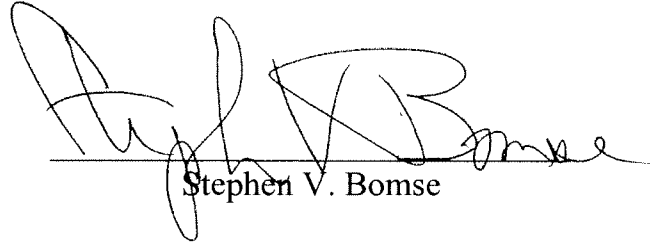
10. It was at all times Visa's intention and expectation that, in settling, it was buying peace against litigation based on the claims that were the subject of the Settlement Agreement and the litigation against all entities described in the class definition and in the Settlement Agreement, except those who had timely requested exclusion from the litigation. The list of parties bound includes the United States, except the USPS, and the list of the parties seeking exclusion does not include the United States, other than the USPS.

11. If the United States is not allowed to participate in the distribution of Net Settlement Funds, and is not bound by the Settlement Agreement, it is my view that that result is the product of a material mistake of fact which, I further believe, was mutual between Visa and the Class. Should Visa thereafter be sued by the United States on account of this mutual mistake, Visa should be entitled to reformation of the agreement to

exclude from the settlement payments to be made by Visa, any amount that otherwise would have been paid to the United States had it been included in the class.

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct.

Executed at San Francisco, California this 21st day of March, 2006.



Stephen V. Bomse

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