

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

**IN RE**

**VISA CHECK/MASTERMONEY  
ANTITRUST LITIGATION**

**Civil Action No.: CV-96-5238  
(JG) (JO)**

**This Document Relates to: All Actions**

**REPLY MEMORANDUM OF DEFENDANTS VISA AND MASTERCARD  
REGARDING THE RIGHT OF U.S. GOVERNMENT TO PARTICIPATE IN  
THE DISTRIBUTION OF SETTLEMENT FUNDS**

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## INTRODUCTION

Visa U.S.A. Inc. (“Visa”) and MasterCard International Incorporated (“MasterCard”) (together “defendants”) respectfully submit this reply memorandum regarding the right of U.S. Government Merchants (excepting the U.S. Postal Service) (the “Government Merchants”) to participate in the distribution of settlement funds. Lead Counsel’s brief confirms that the appropriate result is for the Court to permit the Government Merchants to participate in the distribution of settlement proceeds.

Strikingly, Lead Counsel does not seriously disagree with the Government, Visa, or MasterCard on any legal issue. It agrees that the United States Government may be a plaintiff in an antitrust action brought under 15 U.S.C. § 15a. It agrees that the Attorney General may approve of the United States’ participation as a class member in an antitrust action. It does not dispute that the Court has the authority to see that class settlement agreements are effectuated in a just and equitable manner, including making technical changes to the pleadings or the settlement agreement to carry out its intent.

Lead Counsel also does not contest the most important element of the factual record here: that, for all outward appearances, defendants had every right to expect that the Government was in the class. Significantly, Lead Counsel does not rebut in any way defendants’ showing that they relied upon the list of opt-outs in deciding upon the terms on which they were willing to settle the case, and that they believed that Government Merchants (other than the U.S. Postal Service) were part of the class.

What Lead Counsel does argue is that it would be unfair to other merchants to allow the Government to participate and that it is too late for this Court and the parties to fix the technical defect in the complaint in order to permit such participation. But this view turns the equities on their head. It is Visa and MasterCard that would be prejudiced if the Government does not

participate. Seven years after the filing of the amended complaint, and over six years after the class was certified, is way too late to spring on defendants – which are in the process of paying over \$3 billion to buy total peace in this matter – another large merchant which might file its own claims. That not only would frustrate defendants’ undisputed expectations, it would deprive them of the peace they purchased. On the other hand, it cannot fairly be said that permitting Government merchant participation would harm the expectations of other merchant class members – fewer than one in eight of whom are even submitting claims. They made the decision to stay in the class without any knowledge as to what other merchants would or would not choose to do. The Court clearly has the discretion to allow the parties to fulfill the bargained-for terms of the settlement agreement (which included Government Merchants as class members by including “business entities” in the class definition) and permit Government Merchants to participate in the distribution of settlement funds. It should exercise that discretion in the interest of fairness and to avoid prolonging this process with further collateral proceedings that will delay final disposition of this litigation.

### **ARGUMENT**

#### **1. The Government And Its Agencies Can Participate In The Distribution Of Settlement Funds.**

Lead Counsel argues that this Court “cannot” take steps to allow Government Merchants to participate in the distribution of settlement proceeds. Brief of Lead Counsel (“LC Br.”) at 2.

This argument rests on two unstated assumptions:

1. The case proceeded only under 15 U.S.C. § 15, and not § 15a;
2. The Court lacks equitable powers to see that the terms of the settlement are implemented fairly to the parties in accord with their expectations.

Lead Counsel’s arguments *only* extend to the first of these assumptions.

Lead Counsel devotes pages and pages of argument to parsing the meaning of *United States v. Cooper Corp.*, 312 U.S. 600 (1941), and *United States Postal Service v. Flamingo Industries (USA) Ltd.*, 540 U.S. 736 (2004), even though their holdings are not in dispute here. All parties agree that the Government, which is not a “person” pursuant to 15 U.S.C. § 15, may not be a defendant in a suit for violation of antitrust laws, but may be a plaintiff in treble-damage antitrust suits pursuant to 15 U.S.C., § 15a. So the question before the Court does not turn on the meaning of “person” under 15 U.S.C. § 15, but rather whether the circumstances here warrant inclusion of the Government in the class.

Lead Counsel does not dispute the propositions advanced by the Government and defendants that, in settling cases, the parties may include entities or claims beyond those that might have been adjudicated at trial, and that courts have broad powers to see that the class action device is used to serve the ends of justice. *In re Chicken Antitrust Litig.*, 669 F.2d 228 (5th Cir. 1982); *In re Remeron End-Payor Antitrust Litig.*, 2005 WL 2230314 (D.N.J. 2005).<sup>1</sup> Indeed, Lead Counsel mostly ducks the issue.<sup>2</sup>

**2. The Equities Tilt Sharply In Favor Of Including Government Merchants.**

**a. The Parties Acted As Though Government Merchants Were Class Members.**

As detailed in the several opening memoranda of the United States, Visa, and MasterCard, all parties believed that Government Merchants which accepted Visa or MasterCard payment cards during the class period were members of the class. The record is not seriously in

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<sup>1</sup> To be sure, in footnote 28 of its papers, Lead Counsel attempts to distinguish several cases cited by the Government, but simply ignores the leading cases cited by the Government, such as *In re Chicken Antitrust Litigation* and *In re Remeron End-Payor Antitrust Litigation*.

<sup>2</sup> To the extent Lead Counsel’s papers can be read to argue that the Government could never be one of many parties to an antitrust settlement, that is plainly wrong. The U.S. Government has, in fact, participated as class member in the settlement of a private treble-damages antitrust action. *See Shaw v. Toshiba America Info. Sys., Inc., et al.*, 91 F.Supp.2d 942, 953, (E.D. TX 2000) (government entities part of the class).

dispute, as the parties repeatedly affirmed their belief that the Government Merchants were part of the class in pleadings<sup>3</sup>, speeches<sup>4</sup>, and in their post-settlement behavior.<sup>5</sup>

Even Mr. Constantine, who argues against government involvement in the settlements, concedes that it was a plausible interpretation of his statements as Lead Counsel for the class that he “thought the United States and USPS were class members.” Constantine Declaration at 3, ¶ 6. And, if and when Lead Counsel ever came to believe that the Government was not part of the class, he made no effort to communicate that contrary view to defendants.

**b. The Identities Of Opt-Outs Were Important To Defendants**

Lead Counsel does not dispute that defendants also were entitled to rely upon the list of opt-outs provided to the Court and the parties by the claims administrator. *See, e.g., Presidential Life Ins. Co. v. Michael Milken et. al.* 946 F.Supp. 267, 275-76 (S.D.N.Y. 1996) (“The Court finds that it was the expectation of the Settling Defendants that the Milken Global Settlement would have the effect of providing a total and final resolution of all Drexel-related claims against them, except as to known opt outs from *Presidential Life* or those plaintiffs in other existing actions who chose not to participate in the Milken Global Settlement.”). The Claims Administrator listed a very large Government merchant (USPS) as an opt-out, but failed to list any other Government merchant. Against the backdrop of all the prior statements by defendants and Mr. Constantine, defendants surely were entitled to conclude that, with the exception of the USPS, they were buying “total peace” against Government Merchants by settling with the class.

Not only did defendants have a **right** to rely on the opt out list, it is undisputed that they

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<sup>3</sup> *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 Government Merchants.

<sup>4</sup> *See* Opening Brief of U.S. at 7 & n. 7.

<sup>5</sup> *See* Opening Brief of U.S. at 9-14.

did rely on that list. The declaration of Stephen V. Bomse establishes that the extent and identity of the opt-outs – particularly large opt-outs who would be able to bring their own claims against Visa – was an important consideration for Visa as it considered whether to settle the litigation. *See Bomse Declaration* ¶¶ 5-10. MasterCard, too relied on the opt-out list. *See Arquit Declaration* ¶¶ 4, 6.<sup>6</sup>

**c. The Potential Harm To Defendants Is Much Greater Than The Harm Merchants Might Face.**

Lead Counsel argues in a single sentence that the real risk to the settlement lies with the fact that recoveries of other class members will be diluted if the Government is allowed to participate. *See LC Br.* at 22. While it is surely mathematically correct that permitting the Government to participate will mean that other merchants will not recover as much, it does not follow that the expectations of other merchants will be confounded if the Government participates. In fact, Lead Counsel has submitted no evidence that other merchants expected (reasonably or otherwise) that the Government would not participate in the settlement or that that had any impact on any decision any merchant has made or upon any determination that the settlement was fair to the class.

Moreover, Lead Counsel previously scoffed at the idea that Government participation is a cause for concern to other merchants in the class. In a motion to bar Spectrum Settlement Recovery LLC (“Spectrum Settlement”) from seeking to purchase the right to settlement distributions from merchants, Lead Counsel accused Spectrum Settlement of overstating the risk

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<sup>6</sup> Whether, as Mr. Constantine asserts, the specific identities of opt-outs were a topic of plaintiff-defendant discussions during settlement negotiations, or whether the very large numbers arrived at for settlement were based on a precise percentage of asserted liability, is beside the point. When settling litigation, rational parties always consider the extent of any remaining exposure, the scope of the release, and what claims, if any, will remain outstanding following the settlement. Defendants’ behavior in this regard is precisely what one would expect of entities settling claims of this size, and Lead Counsel does not present any evidence to the contrary.

to merchants posed by the Government's application. Lead Counsel argued that merchants' initial payments will be unaffected: "even if this Court allows the government to submit a claim, virtually all class members will be in line ahead of the government by late spring" Lead Counsel's February 15, 2006 Memorandum Regarding Spectrum Settlement's Solicitations at 12-13. Lead Counsel did not limit its remarks to initial payments, and went so far as to claim that the Government's application will "have no effect whatsoever on the vast majority, if not the entirety, of the Class." *Id.* at 13. Indeed, Lead Counsel rejected Spectrum Settlement's argument that merchants could be disappointed if more class members than expected participate in the settlement, noting that it is "highly unlikely" that more merchants than expected will participate: "of the 8 million potential claimants, less than 1 million are likely to participate . . . ." Lead Counsel's February 20, 2006 Reply Memo Regarding Spectrum Settlement at 5.

In fact, of course, there was no possibility that any merchant made a decision based on the expectation of what other merchants would do. Merchants had only one decision to make in the case: stay in the class or opt-out. That decision necessarily was made by each merchant without the ability to know what any other merchant would choose to do. Thus, unlike the defendants – who made their settlement decision with an opt-out list in hand, and thus were both in a position to and, on the undisputed record actually did, consider the extent of potential post-settlement liability – class members cannot claim that their reliance expectations have been frustrated.<sup>7</sup>

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<sup>7</sup> Lead Counsel disingenuously complains that it is disadvantaged because it was not shown the business terms of the Visa/USPS agreement. LC Br. at 14. This is a red-herring. Lead Counsel does not explain what information relevant to this issue could be gleaned from knowing the financial terms of the settlement. It ought to be enough to know that the issue was important enough for Visa to seek and obtain a release from the USPS as part of a negotiated acceptance agreement. Moreover, Visa offered to share with Lead Counsel information about the agreement which Lead Counsel had identified as important to it (without exposing the competitively sensitive financial terms). But rather than obtain the information, Lead Counsel

**d. Lead Counsel's Behind-the-Scenes Efforts Cannot Have Affected The Reasonable Expectations of Visa, MasterCard, or Other Merchants.**

Much of Lead Counsel's submission recites the difficulties it had in managing the class list for the mailing of settlement notices and the apparently frustrating communications it had with Government lawyers as reasons why the Court should not permit the Government to participate in the distribution of settlement funds. *See* LC Br. at 3-14. While these frustrations may well be real (though never communicated to defendants), they did nothing to change the reasonable expectations of the settling defendants, or the amount of peace they understood they were buying for \$3 billion.<sup>8</sup>

**e. The Best Solution For All Parties Is To Permit The U.S. Government To Participate In The Settlement Fund.**

If, as defendants urge, the Court finds that it has the authority to permit Government Merchants to participate, it plainly should do so. That would fulfill the reasonable expectations of defendants regarding the "total peace" they purchased by way of settlement without doing damage to merchant expectations. There are, as the Government pointed out in its opening brief, several ways of reaching this result:

- Even if the Court entertains doubts about whether the government could have participated in the case absent a technical correction to the pleadings, it may permit such a party to participate in the settlement. *See In re Chicken Antitrust Litig.*, 669 F.2d 228 at 238-40; *In re Remeron End-Payor Antitrust Litig.*, 2005 WL 2230314 at \*21.
- The Court can designate a sub-class consisting of government merchants represented by the Attorney General. *See*, United States' Opening Memorandum at 33 & fn.63.

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declared that it needed nothing more, apparently in order to preserve its ability to complain that is has been left in the dark. *See* Declaration of David C. Brownstein ¶¶ 1-7.

<sup>8</sup> Conspicuously absent from Lead Counsel's lengthy recitation of its efforts to identify and remove from the class list Government Merchants are any efforts it made to remove Government Merchants **prior** to the settlement. For example, Lead Counsel subpoenaed merchant lists from acquirers to send class notice, but those subpoenas did not ask acquirers (which, as the entities in direct contract with merchants, would be in the best position to identify merchants outside the class) to segregate Government Merchants from their lists. Brownstein Decl. ¶ 8, Exh. 2. The record thus reinforces the obvious conclusion that all parties assumed that Government Merchants were part of the class.

- The Court also can allow the amendment of the Second Amended Consolidated Class Action Complaint to cure the technical defect plaintiffs have identified. *See*, United States Opening Brief at 33, and fn.64.

Failing to exercise its discretion in one of the ways set forth above not only will lead to an unfair outcome for the defendants, but is likely to yield continuing uncertainty and prolong these proceedings to no good end. Given the wholly undisputed record regarding the parties' expectations, a decision now to exclude the Government could lead to further litigation (itself an administratively undesirable outcome) as well as to a request for reformation of the Settlement Agreement to remit to the defendants an amount equal to the Government's share as a class member. While even that would not necessarily be a wholly sufficient outcome for the defendants (unless the Government were willing to settle for its aliquot share), it is the very least that defendants' reasonably should be entitled to if it turns out that Lead Counsel is able to disavow the once-shared expectation that Government Merchants (other than the USPS) would participate in the settlement distribution process.

### **CONCLUSION**

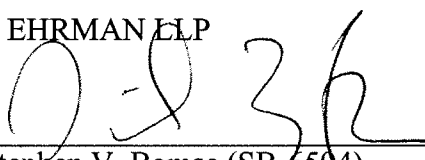
For the foregoing reasons, and for the reasons set forth in the opening papers, Visa and MasterCard respectfully submit that the Court should allow Government Merchants to participate in the distribution of settlement proceeds along with other merchant class members.

DATED: May 4, 2006

Respectfully submitted,

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