UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

UNITED STATES' REPLY MEMORANDUM
IN SUPPORT OF GOVERNMENT MERCHANTS' PARTICIPATION
IN THE DISTRIBUTION OF NET SETTLEMENT FUNDS

In their Opposition Memorandum, Plaintiffs' Lead Counsel Constantine Cannon, P.C. concede most of the facts necessary to grant the United States equitable relief. Lead Counsel do not dispute that the Government Merchants suffered the same type of harm as other merchants. They do not dispute that, as a factual matter, Government Merchants fall within the literal Class Definition and were understood to be part of the Class by Defendants. They acknowledge that they did not share the Civil Division Letter of November 14, 2002 with the Claims Administrator, Defendants or Court. The record unequivocally establishes, and Lead Counsel admit, that even after receiving that Letter, they continued to treat Government Merchants, substantively as well as procedurally, as part of the plaintiff Class right through the mailing of claims forms.

Nor do Lead Counsel dispute most of the other points made by the United States. They do not question that Defendants were seeking "total peace" through the settlements and would be prejudiced if the Government Merchants cannot participate now in the settlements. They do not take issue with the fact that considerations of judicial economy and the public interest favor

inclusion of the Government Merchants' claims in this action. Instead, they assert without support that the inclusion of the billions of dollars in Government Merchant credit and debit card transactions in the Class Damages conferred no benefit on the Class.

The United States' Memorandum outlined the reasons why the Government Merchant claims did, in fact, increase the size of the Net Settlement Funds and why this Court both can and should permit as a matter of equity the Government Merchants to participate in the Net Settlement Funds' distribution. Lead Counsel's only real argument is that this Court cannot grant such relief. From the premise that the United States, under *United States v. Cooper*, 312 U.S. 600 (1941), is not a "person" that can sue for damages under Section 4 of the Clayton Act, Lead Counsel argue that the Court is stripped of its traditional equity power over the settlement funds, and cannot grant the relief sought by the United States. In this they are wrong. The conclusion does not follow from the premise. There is ample authority, none of it discussed by Lead Counsel, that this Court can reach the equities. Thus, the Court can, and for the six equitable factors cited in the United States' Memorandum should, exercise its discretion to remedy a problem and allow the Government Merchants to receive their share of the Net Settlement Funds.

ARGUMENT

I. THIS COURT HAS THE POWER TO GRANT EQUITABLE RELIEF.

Citing *Cooper*, Lead Counsel argue that this Court, as a matter of "well settled black letter law," cannot allow the Government Merchants to participate in the class action settlement. (Pls.' Opp'n at 1, 2, 15.) But *Cooper* does not address, much less impact, this Court's broad

equity powers under Fed. R. Civ. P. 23.[1] In focusing on *Cooper*, Lead Counsel ignore that: (i) class actions are grounded in equity[2]; (ii) in class action settlements, this Court retains special responsibility to see to the administration of justice[3]; (iii) this Court "retains its traditional equity powers" until the settlement funds are actually distributed[4]; (iv) they earlier represented that this Court has broad equitable powers over the Net Settlement Funds[5]; and (v) the January 23, 2004 Order and Final Judgment–which reserves to this Court exclusive jurisdiction over the Settlements' administration and consummation–also vests this Court with the legal authority to grant the requested relief.

A. Cooper *Does Not Impact this Court's Equitable Powers.*

Instead of addressing this authority, Lead Counsel assert that this Court cannot grant such equitable relief because under *Cooper* the United States is not a "person" as that word is used under Section 4 of the Clayton Act, 15 U.S.C. § 15, and (i) the Amended Complaint sought

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[1] U.S. Mem. at 18; *In re Orthopedic Bone Screw Products Liability Litig.*, 246 F.3d 315, 321 (3rd Cir. 2001) (settlement administration in complex class action often requires courts to use equitable powers under Rule 23 to manage disparate interests competing over finite pool of assets with which to satisfy class); *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978) (incumbent upon district court to exercise its broad supervisory powers over administration of class action settlements to allocate proceeds among claiming class members more equitably); *In re Crazy Eddie Securities Litig.*, 906 F. Supp. 840, 843 (E.D.N.Y. 1995) (same).

[2] *In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 194 n.7 (3rd Cir. 2000) (within court's general equitable powers to define scope of class action judgments and settlements, and to modify, if necessary, terms of class action settlement).

[3] *Id.* at 194.

[4] *Zients v. LaMorte*, 459 F.2d 628, 630 (2d Cir. 1972).

[5] *See* Lead Counsel's Letter to this Court, dated Mar. 1, 2006, at 3 (filed Mar. 1, 2006) (Docket No. 1267) (arguing that even if it lacks statutory legal power to grant relief, Court has broad equitable powers to grant relief).

damages solely under 15 U.S.C. § 15 and (ii) the Class Action was brought on behalf of "persons and business entities."[6]

Lead Counsel fail to establish the necessary predicates for their hard and fast rule that *Cooper* trumps this Court's equity power and precludes as a matter of law the Government Merchants from recovering.[7] In arguing that the Amended Complaint sought damages only under 15 U.S.C. § 15, and not Section 15a, Lead Counsel ignore: *first*, that the Settlement Agreements, not the complaint, are the starting point of this Court's equitable power,[8] and permitting the Government Merchants to receive their share of the settlement funds would effectuate the parties' understanding of the settlements (U.S. Mem. at 30); and *second*, even if relevant, the Amended Complaint did not seek damages solely under Section 15, but put the Defendants on notice that Plaintiffs sought broader relief including damages to redress violations of federal and state law.[9]

Lead Counsel's second predicate–that the definition of "person" in the Settlement

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[6] Pls.' Opp'n at 15-16. Lead Counsel also assert that 28 U.S.C. §§ 516 & 519 (which state who can represent the United States in court) prohibit the United States from receiving their share of the settlement funds. Pls.' Opp'n at 2, 19-21. These statutes, however, do not affect, much less diminish, this Court's traditional equity powers when the Department of Justice represents the Government Merchants and approves their participating in the Net Settlement Funds' distribution.

[7] The Court "expressly noted that the use of the word 'person' in the Sherman and Clayton Acts did not create a 'hard and fast rule of exclusion' of governmental bodies." *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 316 (1978) (quoting *Cooper*, 312 U.S. at 604-5).

[8] As discussed in U.S. Mem. at 29-30, this Court's equity powers may be constrained at times in modifying the settlement agreement's integral terms. *In re Crazy Eddie Securities Litig.*, 906 F. Supp. at 844.

[9] U.S. Mem. at 30 (quoting Am. Compl. ¶¶ 5 & D).

Agreements and Class Definition must have the same meaning as in *Cooper*–is contrary to Supreme Court precedent.[10] Whether "all persons and business entities" in the Settlement Agreements and Class Definition includes Government Merchants is determined under rules of contract interpretation, not statutory construction.[11] Morever, the Class Definition is broader than "persons" and includes all "business entities." In this context, as a factual matter, "business entities" would include the Government Merchants, who are seeking only to recover the harm suffered in their business capacity as sellers of goods and services. Consequently, Lead Counsel and Defendants proceeded to treat the Government Merchants as though they were included within the Class Definition and the settlements.[12]

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[10] *Cooper*, as the Court noted the following term, did not hold "that the word 'person,' abstractly considered, could not include a governmental body." *Georgia v. Evans*, 316 U.S. 159, 161 (1942). In *Pfizer*, the Court reiterated that "[t]he word 'person' . . . is *not* a term of art with a fixed meaning wherever it is used, nor was it in 1890 when the Sherman Act was passed." 434 U.S. at 315 (emphasis added). Thus, in holding that the Federal Trade Commission was a "person" entitled to enforce liability under a state statute, the Ninth Circuit relied on this Supreme Court precedent in rejecting defendants' claim, similar to Lead Counsel's here, that "person" is a term of art that can never include the federal government. *FTC v. MTK Marketing, Inc*., 149 F.3d 1036, 1039 (9th Cir. 1998).

[11] *Dahingo v. Royal Caribbean Cruise, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004) (class action settlements are contracts, and must be construed according to general principles of contract law). On their face, the terms of the Settlement Agreements evince the parties' intent to allow recovery by the Government Merchants. The settlement funds are to be distributed to "all persons and business entities who have accepted Visa and/or MasterCard credit cards . . ." Visa Settlement ¶ 1(c); MasterCard Settlement ¶ 1(c). This is the same definition that Defendants earlier said, and Plaintiffs never disputed, included Government Merchants. *See* U.S. Mem. at 6.

[12] Not surprisingly, many class certifications in actions seeking damages under Section 15 find it necessary to specifically exclude the United States. *See* U.S. Mem. at 30 n.58. Lead Counsel dismiss these cases (some of which went up to the Supreme Court) as "irrelevant" and the choices of class counsel in other actions. Pls.' Opp'n at 16 n.26. But Lead Counsel do not explain why Lloyd Constantine, who has "known since becoming an antitrust lawyer" about the distinction between Sections 15 and 15a (Constantine Decl. ¶ 6) (filed Apr. 20, 2006) (Docket

B. *Even When Viewed Favorably, Lead Counsel's Objections Are Technical Defects, Which this Court Can Readily Cure.*

Even if the Amended Complaint could be construed to exclude damages under Section 15a, this is at most a technical defect, which, as Lead Counsel ultimately concede, the Court can readily cure. (U.S. Mem. at 33-34; Pls.' Opp'n at 18-19.) Lead Counsel argue the Court should not, because this request comes "almost seven years after the filing of the Amended Complaint and over six years after the Class was certified," and "would achieve no purpose other than to dilute class members' recoveries."[13] Thus, it is undisputed that whatever technical defects exist, this Court can cure them under its broad equitable powers over the class settlement funds.

In addition to curing any technical defects in the pleadings, this Court has the broad equity power to permit entities to participate in a class action settlement, even where they could not, as a matter of law, assert their claims in that action. As the United States' Memorandum

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No. 1293), specifically excluded "entities and institutions of the United States government" in another antitrust class action brought under Section 15, but not here. *See New York v. Salem Sanitary Carting Corp.*, Civ. Act. No. 85-0208 (E.D.N.Y.). (A copy of the Complaint was attached as Exhibit J to Declaration of Allen P. Grunes (filed Mar. 21, 2006) [Docket No. 1274].) The only reasonable explanation consistent with Lead Counsel's public speeches and actions before this Court and the U.S. Department of the Treasury is that they originally intended to include the Government Merchants in this case and never took effective action to exclude them.

[13] Pls.' Opp'n at 18-19. As discussed below, this issue did not become ripe until Government Merchants received claims forms in the latter portion of 2005. Further, until January 23, 2006, Lead Counsel never disputed the ability of Government Merchants (apart from the USPS) to participate in the Net Settlement Funds' distribution. Supplemental Declaration of Allen P. Grunes ¶ 7 (filed May 4, 2006). Thus, there was no basis or need to raise this issue earlier. Lead Counsel's claim of dilution to non-governmental merchants' recoveries is inconsistent with the terms of the Amended Plan of Allocation, their representations to the Government Merchants, and most recently, their representations to this Court. *See* U.S. Mem. at 22-23 (citing, *inter alia*, Pls.' 2/15/06 Mem. in Supp. of Injunction at 3) (Lead Counsel representing that other Class Members' current claims "(which are based on volumes from the Visa Transactional Database) will be unaffected by the [U.S.] government's application.")

discusses and Lead Counsel ignore, the Fifth Circuit upheld in *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982) the district court's use of its broad equitable powers to permit victims of an antitrust violation to participate in the class action settlement, notwithstanding their being unable, as a matter of law, to assert their claims in federal court. (U.S. Mem. at 31-33.) Like the Government Merchants here, the indirect purchasers in *In re Chicken* had "colorable" claims, they conferred a benefit on the class, and defendants were interested in achieving total peace.[14] In *In re Agent Orange Product Liability Litig.*, both the Second Circuit and Judge Weinstein relied on *In re Chicken* to allow persons who could not meet the legal requirements for proving causation and injury to participate in the settlement, because the settlement was intended to buy peace, not generate further litigation. 611 F. Supp. 1396, 1411(E.D.N.Y. 1985), *aff'd*, 818 F.2d 179, 184 (2d Cir. 1987). In all of these cases, the courts could and did exercise their traditional equity power to permit the claimants to recover their share of the settlement funds.

II. COURT SHOULD GRANT THE EQUITABLE RELIEF HERE.

Ultimately then the issue is whether this Court should permit, as a matter of equity, the

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[14] *See also In re Remeron End-Payor Antitrust Litig.*, Civ. Act. Nos. 02-2007 FSH, 04-5126 FSH, 2005 WL 2230314, at *21 (D.N.J. Sept. 13, 2005). There, the court applied the same rationale to permit indirect purchasers to participate in an antitrust settlement, notwithstanding the objection that they could not, *as a matter of law*, assert federal antitrust damages claims:

> An 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 settlement to consummate. *See In re Chicken Antitrust Litig.*, 669 F.2d 228, 238 (5th Cir. 1982). . . . [T]he settlement fund would likely have been much smaller if endpayors from certain states [in which indirect purchasers could not assert claims] were barred from compensation (assuming the settlement would have been consummated at all).

Id.

Government Merchants to receive their share of the settlement funds. Lead Counsel do not contest five of the United States' six equitable factors that favor the Government Merchants' participation in the Net Settlement Funds' distribution:

(1) at all relevant times, Lead Counsel treated substantively and procedurally the Government Merchants as Class Members[15];

(2) Defendants were seeking "total peace" through the Settlement Agreements and would be prejudiced if the Government Merchants cannot participate[16];

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[15] U.S. Mem. at 4-17, 20-22; Middlebrook Decl. ¶¶ 2-8; Fix Decl. ¶¶ 2-13. (Attached as Exhibits E and I to Grunes Decl.) Lead Counsel do not point to any instance before January 2006 where they: (i) asserted to the Court or Defendants that the Government Merchants were not Class Members; (ii) explained why the Government Merchants as a matter of law or equity could not participate in the Net Settlement Funds' distribution; or (iii) explained why they consistently treated the Government Merchants as Class Members if they thought the contrary. Lead Counsel's one disagreement is that no one under their auspices spoke with the Treasury Department official Stephen Middlebrook in 2003. *Compare* Middlebrook Decl. ¶ 7 *with* Pls.' Opp'n at 8. While this is only one of many facts illustrating Lead Counsel's failure to exclude the Government Merchants, Mr. Constantine's Declaration does not support this assertion. *See* Constantine Decl. ¶ 24. Mr. Constantine does not deny that the 2003 conversations took place, but only that (a) he did not have such a conversation, and (b) no one he specifically asked spoke to Mr. Middlebrook during that time about the subject of the United States' damages. The first point is not surprising since Mr. Middlebrook does not believe that his conversation was with Mr. Constantine; the second point is hearsay, which may be disregarded. *See, e.g.*, *Schwimmer v. Sony Corp. of America*, 637 F.2d 41, 44-45 & n. 9 (2d Cir. 1980) (unsupported attorney's hearsay affidavit is a nullity).

[16] U.S. Mem. at 23-24. It is undisputed that Defendants settled without being told that any Government Merchant (other than United States Postal Service ["USPS"]) had excluded itself or was otherwise not a Class Member. Lead Counsel never forwarded or mentioned to Defendants the Civil Division Letter. (A copy of the Letter was attached as Exhibit F to Grunes Decl.) Lead Counsel now respond that this opt-out information was immaterial. Pls.' Opp'n at 7 n.8. Lead Counsel's immateriality argument, however, is contrary to: (i) the law, *see*, *e.g.*, *Prudential Life Ins. Co. v. Milken*, 946 F. Supp. 267, 275-76, 279 (S.D.N.Y. 1996) (settling defendants who bargained for global settlement and who assessed exposure from opt-out claims were entitled to rely on understanding that party who did not request exclusion was included in the settlement); (ii) Defendants' attestations in their March 21, 2006 filings that they reasonably relied on who was or was not in the Class when calculating the settlement figure and evaluating their exposure (*see*, *e.g.*, Declaration of Stephen V. Bomse ¶¶ 5-6 (filed Mar. 21, 2006) (Docket No. 1276)), and (iii) Lead Counsel's obligations under this Court's Order to identify each Class

(3) the Government Merchants have "colorable" claims (U.S. Mem. at 31-33);

(4) permitting the Government Merchants to participate will not prejudice the non-governmental Class Members, as they could have no reasonable expectation of partaking in the Government Merchants' share (U.S. Mem. at 22-23); and

(5) considerations of judicial economy and the public interest favor inclusion of the Government Merchants' claims in this action (U.S. Mem. at 24-25).

Lead Counsel now contest only the sixth equitable factor: namely, that the Class benefitted from the inclusion of the Government Merchants' transactions in the estimates of Class Damages and in the negotiated settlements. (U.S. Mem. at 19-20.) Lead Counsel do not dispute that the amount of Visa and MasterCard credit and debit card transactions attributable to the Government Merchants was large. In 2004, for example, the Treasury Department's PCN alone processed 48.9 million transactions worth $4.4 billion on behalf of approximately 60 federal agencies. (Middlebrook Decl. ¶ 3.) Lead Counsel concede that their expert consistently included the billions of dollars of the Government Merchants' annual Visa and MasterCard transactions in his calculations (Pls.' Opp'n at 8-9), which increased the amount of the Class Damages. Lead Counsel now assert, without offering any supporting data, that the "United States did not add any increment to the *In re Visa Check* settlement funds." (Pls.' Opp'n at 22.) But the undisputed fact remains that Lead Counsel courted the Government Merchants to increase the size of the Class and amount of Class Damages.[17] Defendants undeniably relied on

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Member that has elected to opt-out of the Rule 23(b)(3) Class. *See In re Visa Check/MasterMoney Antitrust Litig.*, 2002 WL 31528478, at *6 (E.D.N.Y. June 21, 2002).

[17] Lead Counsel (i) sent Government Merchants notices, (ii) traveled to Washington, D.C. to meet with government representatives and to encourage them to participate in the Class, (iii) included their annual transactions in estimating the Class Damages, (iv) devoted the time and resources to individually calculate their specific recovery under the Net Settlement Funds, (v) mailed the Government Merchants their calculated share of the settlements, (vi) worked with

those damages calculations in "deciding whether or not to settle and, if so, at what amount."[18] Defendants relied on Lead Counsel's earlier Class Damages and the filed opt-out list to arrive at their settlement amount. Lead Counsel's *post hoc* assertions cannot change what was agreed upon in the settlements.

Lead Counsel and their agents consistently told the Government Merchants that they could participate in the settlements,[19] and Mr. Constantine recognized the same in his 2005 and 2006 communications with Division attorneys. As recently as mid-January 2006, Lead Counsel took the position that the Government Merchants were *not* barred as a matter of law or equity

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the Government Merchants in processing their claims, and (vii) assured them that their calculated portion of the settlement funds would not be distributed to other claimants. *See* U.S. Mem. at 7-16.

[18] MasterCard Mem. in Support Of Government Merchants' Participation in the Distribution of Net Settlement Funds, at 4 (filed Mar. 21, 2006) (Docket No. 1280). In calculating the Class Damages, Lead Counsel assert that they included the debit and credit card transactions of merchants "who were not in the Class" and "thousands of merchants that had previously opted out," and Defendants should have known this. Pls.' Opp'n at 9. Lead Counsel do not identify any evidence that establishes such knowledge, and indeed, the evidence is to the contrary. Nothing in Lead Counsel's earlier filings and Expert Reports suggests that the Class Damages included damages of entities, who as Lead Counsel now assert, could not participate in the Class as a matter of law. Dr. Fisher, to the contrary, reported where he understated the Class Damages. Expert Report of Dr. Franklin M. Fisher at 132 n.337, dated April 4, 2000, *attached to* Pls' Mot. for Summary Judgment (filed Aug. 2, 2000) (Docket Nos. 361-365). With respect to opt-outs, even if Lead Counsel, for whatever reason, continued to include these merchants' damages in the Class Damages, Defendants, using Plaintiff's methodology for calculating damages, could estimate the damages attributable to Home Depot, Best Buy and other large opt-outs and deduct that figure from the overall Class Damages. But Defendants could not do so for the Government Merchants, as none of them, with the exception of the USPS, appeared on any opt-out list. In opposing class certification, Defendants argued, without opposition by Lead Counsel, that the Class included the Government Merchants; given the absence of notice to the Defendants to the contrary, their natural conclusion would be that the Government Merchants, along with millions of other merchants, remained in the Class.

[19] *See* Middlebrook Decl. ¶¶ 5-8; Fix Decl. ¶ 11.

from participating in the Net Settlement Funds' distribution. Lead Counsel discussed with the United States a Stipulation and Order to assure such payments to Government Merchants (other than the USPS) from the Net Settlement Funds.[20] Only on January 23, 2006 did Mr. Constantine for the first time argue that the Government Merchants could not receive their share of the settlements. Grunes Suppl. Decl. ¶ 7; *see also* Read Decl. ¶ 11.

III. LEAD COUNSEL'S STATEMENT OF FACTS CONTAINS SEVERAL ERRORS AND OMISSIONS.

Before filing its Memorandum, the United States provided a copy to Lead Counsel with a request that Lead Counsel correct any material errors of fact. Lead Counsel responded with a promise to correct "any egregious errors" and thereafter offered *one* correction, which the United States incorporated. *See* Grunes Suppl. Decl. ¶ 21 and Exs. J & K thereto.

On the other hand, Lead Counsel's Statement of Facts contains several errors and omissions. Rather than address the merits of the United States' equitable claims, Lead Counsel suggest that the United States has unclean hands. Lead Counsel's contentions about the conduct

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[20] Mr. Constantine's Declaration refers to, without describing, a December 1, 2005 meeting and a December 13 [*sic*], 2005 teleconference with the Division staff, which he suggests was part of a "futile process" of fielding complaints from the government about being included in the case. Constantine Decl. ¶ 35. But what Mr. Constantine actually discussed at the December 1 meeting was allowing the Government Merchants to participate in the settlements. Mr. Constantine closed the meeting by saying to the Chief of the Litigation III Section of the Antitrust Division: "Just let me know what you want." *See* Declaration of John Read ¶ 7. In a December 23 teleconference, Mr. Read told Mr. Constantine that the Division would like to proceed by a stipulated filing. Read Decl. ¶ 8. A Stipulation and Order was duly drafted and forwarded on January 19, 2006 to Mr. Constantine's office. (A copy is attached as Exhibit A to Grunes Suppl. Decl.) Mr. Constantine's major caveat was with the USPS. He stated that the USPS was differently situated from other Government Merchants, and questioned whether its claims should be paid. Grunes Suppl. Decl. ¶ 2. Thus, for almost two months, until Mr. Constantine changed his mind in late January, he raised no objection to the plan for government claims to be submitted and payment to be authorized by this Court. Grunes Suppl. Decl. ¶¶ 6-7.

of the United States, which they characterize as "beyond dispute" and part of a "disturbing course of action" (Pls.' Opp'n at 14), are contradicted by the evidence.

A. *Lead Counsel's Explanation for Their Failure to Disclose the Civil Division Letter Is Unconvincing.*

Lead Counsel acknowledge that they did not file the November 14, 2002 Civil Division Letter with the Court, forward it to the Claims Administrator, or provide a copy to Defendants. (U.S. Mem. at 9; Pls.' Opp'n at 4-5, 7-8.) Lead Counsel justify their inaction, *inter alia*, by claiming that they were complying with a request by the USPS, which was then a defendant in *Flamingo*, not to be treated as an opt-out.[21] The evidence contradicts this assertion. First, as Lead Counsel acknowledge, the USPS sent its own letter to the Claims Administrator on November 14, 2002, asking that it be *excluded* from the Class.[22] Indeed, it is the only federal government entity to appear on the opt-out list.[23] Second, after receiving the Civil Division Letter, Lead Counsel continued to treat the Government Merchants as Class Members.[24] Third,

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[21] Pls.' Opp'n at 4-5, 7-8; Constantine Decl. ¶ 10 (claiming that Walter Alesevich, a lawyer with the USPS, "stressed repeatedly" that the USPS was not a Class Member and it did not need to opt out or exclude itself). According to Lead Counsel, the USPS "would *not* opt out" since "opting out might be deemed by some, in particular the plaintiffs in *Flamingo* [*United States Postal Service v. Flamingo Indus. Ltd.*, 540 U.S. 736 (2004)], as tantamount to an admission that the USPS no longer had the status of a United States instrumentality. . . ." Pls.' Opp'n at 5.

[22] Pls.' Opp'n at 7; Letter from Mary Anne Gibbons, dated Nov. 14, 2002 to Garden City Group, a copy of which was attached as Exhibit G to Grunes Decl. Mr. Alesevich, the USPS lawyer with whom Mr. Constantine allegedly spoke, later sent Lead Counsel an e-mail, in which he characterized the USPS as having "*opted out of the class.*" *See* Exhibit A to Declaration of Amy N. Roth (filed April 20, 2006) (Docket No. 1299) (emphasis added).

[23] Ex. D at 79 to Zola Supplemental Affid. (filed Nov. 26, 2002) (Docket No. 513).

[24] U.S. Mem. at 9-17. The Civil Division Letter was addressed to almost 30 lawyers for various plaintiffs, none of whom forwarded the Letter or its information to the Claims

Lead Counsel do not explain why the USPS's putative desire to preserve its litigation posture was appropriately treated as a request by other government entities, including the Treasury Department, the Smithsonian, and the military, not to have the Civil Division Letter disclosed to the Court or Defendants. Regardless, Lead Counsel's obligation was to the Court and Defendants to notify them of excluded entities, not to follow the perceived desire of the USPS.

B. *Lead Counsel's Explanation for Their Failure to Extract Government Merchants from the Visa Transactional Database Is Unconvincing.*

Lead Counsel admit sending notices of settlement and claim forms to the Government Merchants, but argue that the Claims Administrator "could not systematically block the mailing of those forms . . . without receiving data such as merchant identification numbers and addresses from the government" and that although "thousands of merchants have provided such data to consolidate their claim forms, the United States was unwilling or unable to provide it in 2005 when it was asked to do so by Lead Counsel." (Pls.' Opp'n at 2-3; *see also* 22-23.)

The evidence, however, contradicts their explanation. First, it is undisputed that for three years–from 2002 (when the notices of pendency were mailed) until late 2005–Lead Counsel never asked the United States for any information to help them identify the Government Merchants nor did they alert the Defendants or Court of any issues with the Visa Transactional

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Administrator, the Court or Defendants; instead, Lead Counsel supported the Claims Administrator when the latter stressed the *completeness* of the exclusion list. *See* U.S. Mem. at 9-10, quoting Shapiro Decl. ¶¶ 1, 8 (where partner at Lead Counsel's firm attested to forwarding "[a]ll requests for exclusion" to the Claims Administrator) & Zola Supplemental Affid. ¶ 4 (where Claims Administrator attested that between November 2002 and February 2003 it completely audited its database to search for any names it may have left off in its earlier exclusion lists filed with the Court so as "[t]o ensure that the Court has the name of every entity ***conceivably attempting*** to exclude itself.") (Emphasis added.)

Database[25] or any other database.[26] Only in late 2005, after the Department of Justice contacted Lead Counsel about the claim forms that the Government Merchants had received, and after the Department requested that the Claims Administrator not pay these claims yet,[27] did Lead Counsel

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[25] If Lead Counsel believed, as they now assert, that the Class excluded Government Merchants, then they should have known since 2002 of the need to identify and remove the Government Merchants from the databases. The Settlement Agreements also require Defendants to cooperate with Lead Counsel to provide merchant-specific and aggregate transaction data from their databases. (Am. Plan of Allocation at 2.1.) (dated Aug. 16, 2005) (Docket No. 1177). Lead Counsel also "interviewed Visa and/or MasterCard technical personnel to determine the extent to which data from Visa and/or MasterCard's databases could be utilized for the original Plan of Allocation." (Am. Plan of Allocation at 2.1.) But Lead Counsel never raised this issue with Defendants while assuring Defendants and this Court that they have "been working with the Claims Administrator and other outside consultants to lay the groundwork for the Plan by, among other things, cross-checking the data provided by Visa and MasterCard to resolve ***any issues*** with it before the distribution proceeds." (Am. Plan of Allocation at 2.1.) (Emphasis added.) Even if it was difficult or expensive to remove Government Merchants from the database, Lead Counsel provided no evidence that they made any reasonable effort to do so until 2005. Such evidence, if it exists, would be uniquely within Lead Counsel's possession.

[26] Indeed, Lead Counsel represented that "by utilizing the data supplied by Visa and MasterCard, the Plan minimizes the burden on Class members, utilizes information more precise than any Class Member possesses and ensures that millions of small merchants will receive an accurate calculation of their claims." Pls.' Mem. of Law in Supp. of Mot. for Final Approval of Visa Settlement & MasterCard Settlement at 65 (dated Sept. 18, 2003) (Docket No. 908).

[27] As the United States explained in its Memorandum, it asked for payment to be stayed because: (i) it was unclear to the United States whether the Net Settlement Funds included the Government Merchants' estimated damages, and (ii) whether the broad release in the Settlement Agreements could harm the United States' law enforcement efforts. U.S. Mem. at 17. Robert Begleiter's Declaration selectively singles out comments allegedly made by a government lawyer, Erika Meyers, in early November 2005, at the beginning of the Division's investigation. Begleiter Decl. ¶¶ 3-4, 7 (filed Apr. 20, 2006) (Docket No. 1295). It is inappropriate to characterize these alleged remarks as the position of the Department of Justice. *See Tennessee v. Dole*, 749 F.2d 331, 337-38 (6th Cir. 1984) (no equitable estoppel based on a comment made by top ranking antitrust official during conversation with state attorney general). This is especially true when most of the facts were at that time in Lead Counsel's possession and not known to anyone at the Division. Lead Counsel appear to recognize that the Division was only beginning to gather facts in November. *See* Declaration of Michelle A. Peters ¶ 9 (filed Apr. 20, 2006) (Docket No. 1298) (Ms. Peters of Constantine Cannon quotes Ms. Meyers as saying, at the end of the month, that government's position was "under review.")

ask the United States for the data it now complains about.[28]

Third, Lead Counsel's assertions that the United States was "unwilling or unable" to provide merchant identification data when asked to do so, *see* Pls.' Opp'n at 3, and "did not provide" such data until January 27, 2006, *see* Roth Decl. ¶ 10, are incorrect. The United States, at all times, sought to cooperate in getting information to Lead Counsel, and the record shows that merchant identification data was provided to Lead Counsel on an ongoing basis.[29]

C. *USPS Is Not Before the Court.*

Lead Counsel question why the United States submitted claims on USPS's behalf only to withdraw them later. (Pls.' Opp'n at 14.) The answer is simple: Not all of the relevant facts about the USPS were known or apparent on January 27, 2006, when government claims had to be filed under the extension granted by Lead Counsel. The United States submitted the USPS claims as a protective measure so as to not inadvertently waive the USPS's rights and promptly withdrew these claims upon learning additional facts. The Division withdrew the USPS claim against the Visa Settlement Fund less than a week after the USPS brought the existence of the 2003 USPS/Visa agreement to the Division's attention. The Division withdrew the remaining

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[28] The United States' request of Lead Counsel not to pay yet the claims explains the otherwise cryptic references in the documents attached to Lead Counsel's declarations. *See, e.g.,* Ex. B to Peters Decl. (her Nov. 14, 2005 instruction to the Claims Administrator not to pay the claims "until we sort this out."); Declaration of Garden City Group Assistant Vice President Patrick Pasarella ¶ 2 (filed Apr. 20, 2006) (Docket No. 1297) (stating that on November 16, 2005, he was asked to exclude federal government claims from the December 19, 2005 distribution). It also appears that Lead Counsel informed the Claims Administrator only in November 2005 that the Government Merchants were not Class Members. *See* Pasarella Decl. ¶ 2; Peters Decl. ¶ 5.

[29] *See* Grunes Suppl. Decl. ¶¶ 4-6, and Exs. B & C. *See also* Declaration of Michael McCormack ¶ 6 (filed Apr. 20, 2006) (Docket No. 1296).

USPS claims based on information the Division obtained from Lead Counsel and MasterCard that suggested the USPS also did not have a basis to participate in the MasterCard Settlement Fund. *See* Grunes Suppl. Decl. at ¶ 9.

Moreover, the USPS is differently situated from the other Government Merchants. The USPS (i) sent its own letter to the Claims Administrator, which Lead Counsel transmitted to Defendants; (ii) was included on the opt-out list filed with the Court; (iii) negotiated its own settlement with Visa that contained a release of any claims related to complaint in this action; and (iv) was regarded by MasterCard as outside of the scope of the settlement agreement. For these reasons, the United States concluded that the USPS did not have a basis on which to participate in the distribution, and, with the USPS's consent, withdrew its claims.[30]

CONCLUSION

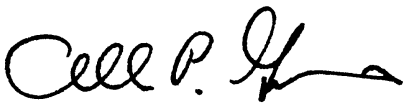
Lead Counsel's arguments are, to use their phrase, "red herrings." Their principal argument–really their only argument–is based on *Cooper*, where the Court held that the United States could not bring a damages action under then-Section 7 of the Sherman Act. But *Cooper* does not strip this Court of its traditional equity powers. Lead Counsel ignore *In re Chicken* and its progeny and assert that the Government Merchants, which were continually treated substantively and procedurally as Class Members, should bring a separate action. Such a suggestion ignores the equitable issue before the Court: the conduct of Lead Counsel combined with the understanding of the Defendants resulted in settlements that are larger because of the

[30] Mr. Constantine also asserts that "[v]irtually all requests that Lead Counsel has made for information from the United States have been refused, and most notably our request for the so-called settlement between Visa and USPS in 2003 . . . ." Constantine Decl. ¶ 40. This is false, as the United States responded to each of their requests. *See* Grunes Suppl. Decl. ¶¶ 10-18, and Exs. D-H thereto.

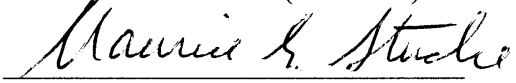
Government Merchant claims. Further, additional litigation would disrupt the finality of this settlement and the total peace expected by Defendants. Consequently, the Government Merchants (other than the USPS) should be permitted to participate in the Net Settlement Funds' distribution on the same terms and to the same extent as Class Members generally.

Dated: 4 May 2006
Washington, D.C.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on Thursday, May 4, 2006, the foregoing Reply Memorandum, Supplemental Declaration of Allen P. Grunes, and Declaration of John Read were filed with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure, and/or the Eastern District's Local Rules, and/or the Eastern District's Rules on Electronic Service upon the following parties and participants:

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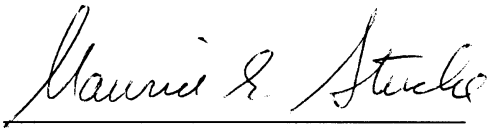
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