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:	(Gleeson, J.) (Orenstein, M.J.)
ALL ACTIONS	

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

The United States, acting through its attorneys at the direction of the Attorney General, seeks a ruling based on equitable principles that would allow 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") to participate in the distribution of the Net Settlement Funds in this case.[1] All of these Government Merchants, as a factual matter, were subject to the "Honor All Cards" rules challenged in the Amended Complaint, suffered the same type of injury as alleged for other merchants, and fall within the four corners of the Class Definition.

By statute, the United States Government, including its agencies and instrumentalities, cannot involuntarily be made a class member in private class action litigation. In a letter dated November 14, 2002, the United States so notified Plaintiffs' Lead Counsel. Nonetheless, and

[1] The United States has withdrawn the claims by the United States Postal Service ("USPS") with respect to participating in the distribution of the Net Settlement Funds, and thus the USPS is not a claimant in this proceeding.

despite such notice, Plaintiffs' Lead Counsel continued to treat the Government Merchants as Class Members. Government Merchants received notice of the settlements and received copies of claims forms. Much more significantly, Lead Counsel included billions of dollars of Government Merchant Visa and MasterCard transactions in the estimates of Class damages. Those estimates formed the basis for the settlement discussions and the recoveries that Lead Counsel and Defendants agreed upon to settle the litigation.

The United States therefore seeks a ruling that, under equitable principles, the Government Merchants, having been treated as Class Members in order to increase the settlement amount, now should be deemed Class Members and permitted to participate in the distribution of the Net Settlement Funds and claim their share of damages. Although the United States believes Government Merchants can and should be deemed to be members of the Class in these limited circumstances, the unique concerns and sovereign rights of the United States dictate that these agencies and instrumentalities be represented only by the Attorney General rather than Plaintiffs' Lead Counsel.[2]

SUMMARY OF ARGUMENT

The Court has the equitable power to permit Government Merchants to participate in the distribution of the Net Settlement Funds. The balance of equities here strongly favors the Government Merchants' participation because (1) the settling parties contemplated the participation of the Government Merchants in the Settlement Agreements; (2) the Class benefitted from the inclusion of the Government Merchants' transactions in the estimates of

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[2] *See* 28 U.S.C. §§ 516 and 519; *see also* 28 C.F.R. § 0.40 (Assistant Attorney General, Antitrust Division given responsibility, *inter alia*, for "civil actions to recover . . . damages for injuries sustained by the United States as a result of antitrust law violations").

Class damages and in the negotiated settlements; (3) the Defendants were seeking "total peace" through the Settlement Agreements; and (4) the Government Merchants have "colorable" claims of their own. *See In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982); *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). Moreover, 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's share. Defendants, however, will be prejudiced if the Government Merchants cannot participate. Considerations of judicial economy and the public interest also favor inclusion of the Government Merchants' claims in this action. Given these facts and policy considerations, disallowing the Government Merchants their fair share would be unjust to the Government Merchants and to Defendants, and would represent a windfall to other claimants.

The letter of November 14, 2002 that the Civil Division of the United States Department of Justice sent to Plaintiffs' Counsel does not bar the Government Merchants' participation in the Net Settlement Funds' distribution. After receiving the Civil Division Letter, Plaintiffs' Lead Counsel continued to treat the Government Merchants as Class Members. No effort was made to identify the Government Merchants represented by the United States, to list them on any of the exclusion reports filed with the Court, or to provide a copy of the Civil Division Letter to Defendants. Indeed, of all the Government Merchants, only the United States Postal Service, which sent its own letter to the Claims Administrator, is listed on any list of exclusions or opt-outs. Plaintiffs' Lead Counsel included the Government Merchants' Visa and MasterCard transactions in its estimates of the Class damages and sent Government Merchants notices

specifying how much of the settlements had been earmarked for them. Under these circumstances, it would be manifestly unfair if Lead Counsel could now, belatedly, use the Civil Division Letter to preclude the Government Merchants' participation in the Net Settlement Funds' distribution.

The legal arguments that the Plaintiffs' Lead Counsel may raise do not bar this equitable result. The Supreme Court's decision in *United States v. Cooper*, 312 U.S. 600 (1941), does not foreclose the Government Merchants' participation in the distribution of the Net Settlement Funds. Although *Cooper* holds that, as a matter of statutory construction, the United States is not a "person" under the former section 7 of the Sherman Act (now section 4 of the Clayton Act, 15 U.S.C. § 15), that decision says nothing about whether, as a factual matter, the Government Merchants fall within the Class Definition of "all persons and business entities" and thus within the Settlement Agreements. Such a determination is made under rules of contract interpretation. Here, Plaintiffs' Lead Counsel's and Defendants' course of conduct–a guiding principle in contract interpretation–makes clear that they both understood the Government Merchants' claims to be included within the Class Definition and in the settlements.

STATEMENT OF FACTS

1. *Government Merchants Suffered Same Type of Harm as Alleged for Other Class Members.*

The Second Amended Consolidated Class Action Complaint, dated May 26, 1999 ("Amended Complaint") alleged that Visa U.S.A., Inc. ("Visa") and MasterCard International, Inc. ("MasterCard") violated the federal antitrust laws by forcing merchants who accept Visa and/or MasterCard-branded credit cards to also accept Visa and/or MasterCard-branded debit

cards, and by conspiring and attempting to monopolize a market for general purpose point-of-sale debit cards. These actions allegedly caused merchants to pay excessive fees on Visa and MasterCard signature debit and credit transactions and on on-line PIN debit transactions. Plaintiffs sought injunctive relief and monetary damages.

Government Merchants across the country accept Visa and MasterCard credit and debit cards. The Financial Management Service of the United States Department of the Treasury oversees the "Plastic Card Network" ("PCN") under which participating federal agencies accept plastic cards (including Visa and MasterCard) for goods and services sold to the public. Other agencies and instrumentalities, not part of Treasury's PCN, also accept Visa and MasterCard. For example, visitors can use Visa and MasterCard at the Smithsonian Institution's gift stores. Active duty and retired military personnel can use Visa and MasterCard at the military post-exchanges, gas stations, and other retail outlets operated within the United States Departments of Defense and Homeland Security. Anyone can purchase stamps with Visa and MasterCard at the local post office. All of these Government Merchants were subject to Defendants' "Honor All Cards" rules challenged in the Amended Complaint, and thus suffered the same type of injury as alleged for other merchants.

2. *As a Factual Matter, Government Merchants Fall Within the Definition of Class Members.*

In the Amended Complaint, Plaintiffs' Lead Counsel sought to certify the broadest possible class, consisting of:

> [a]ll 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 limitations (the "Class"). The Class does

not include the named Defendants, their directors, officers or members of their families.[3]

In opposing class certification, Defendants told this Court (and Plaintiffs did not dispute) that the putative Class would include Government Merchants:

> The proposed class of merchants alleged to have been injured by being forced to accept unwanted Visa and MasterCard debit card transactions is approximately 4 million different merchants, ranging from ***the United States Postal Service*** to Internet retailers like Amazon.com, to the local family dentist and the corner deli.[4]

Despite Defendants' opposition, on February 22, 2000, this Court certified the Class as set forth in the Amended Complaint.[5] In petitioning the Second Circuit for interlocutory review of that order, Defendants again said that the Class included Government Merchants:

> The class certified in this case includes all retail merchants – from mass merchandisers to high-end department stores, corner groceries, ***the United States Government***, internet vendors and mail order houses – in the United States who have chosen to accept Visa and/or MasterCard brand payment cards (along with, in varying degrees, cash, checks, ATM cards, etc.) as payment for their respective goods and services.[6]

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[3] Am. Compl. ¶ 33 (dated May 26, 1999) (Docket No. 163); *see also* Pls.' Mem. of Law in Supp. of Mot. for Class Certification at 11 (dated April 15, 1999) (Docket No. 263).

[4] Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Class Certification at 4 (emphasis added); *see also* Pls.' Reply Mem. of Law in Supp. of Pls.' Mot. for Class Certification at 1 (stating that putative Class included all merchants forced to accept off-line debit cards) (dated Aug. 2, 1999).

[5] *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 88, 90 (E.D.N.Y. 2000).

[6] Defs.' Pet. for Review under FRCP 23(f) at 1-2 (dated March 8, 2000) (relevant pages are attached as Exhibit A). (Emphasis added.) An antitrust trade publication repeated that this Class consists of four million retail merchants including the United States Government. BNA ANTITRUST & TRADE REG. DAILY NEWS (March 20, 2000) (a copy of the article is attached as Exhibit B). Plaintiffs embraced the view that the Class represented ***all*** U.S. merchants. Tr. of Second Circuit Oral Argument at 25-26, Feb. 5, 2001 (relevant pages are attached as Exhibit C).

The Second Circuit affirmed this Court's certification of the Class. *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001).

In a speech on April 16, 2002, Plaintiffs' Lead Counsel Lloyd Constantine described the havoc that would be unleashed if the Supreme Court granted certiorari and decertified the Class. Mr. Constantine noted that, absent class certification, Defendants would face identical lawsuits from the many merchants, including the Government Merchants:

> These Courts [the district and appellate courts] understood that with such large monetary stakes – large merchants who were deprived of a class would simply file their own virtually identical cases. So Visa and MasterCard could face a hundred or more nearly identical lawsuits from giant US merchants like, Home Depot, Kroger, [and] . . . **the US – this time for its PX system of stores on military bases and the US Postal Service, etc.** . . .[7]

On June 10, 2002, the Supreme Court denied certiorari. *Visa U.S.A., Inc. v. Wal-Mart Stores, Inc.*, 536 U.S. 917 (2002).

3. *United States Receives Notices of Class Action and Communicates with Plaintiffs' Lead Counsel.*

Between September 9 and October 14, 2002, the Claims Administrator sent "Notices of Pendency" to the millions of entities it had identified as "known members of the Class."[8] Government Merchants received these notices. The Notices of Pendency set forth detailed instructions regarding how to request exclusion from the Class.[9]

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[7] 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. (Emphasis added.)

[8] Am. Plan of Allocation at vii (dated Aug. 16, 2005) (Docket No. 1177) (*available at* <http://www.inrevisacheckmastermoneyantitrustlitigation.com/apoa.pdf>).

[9] Paragraph 14 of the Notice of Pendency provided as follows:

(continued...)

During the fall of 2002, after the Notice of Pendency of Class Action was distributed, Plaintiffs' Lead Counsel also affirmatively sought to include Government Merchants in the Class and possible settlement. Plaintiffs' Lead Counsel had several discussions with Stephen Middlebrook of the United States Department of the Treasury about the litigation. Plaintiffs' Lead Counsel explained their theory of the case to Mr. Middlebrook and sent him copies of certain pleadings. Mr. Middlebrook in turn provided Lead Counsel with information about the Treasury's Plastic Card Network credit and debit card transactions.[10]

These discussions between Plaintiffs' Lead Counsel and Treasury culminated in a meeting between Lead Counsel Lloyd Constantine and Mr. Middlebrook in Washington, D.C. on November 7, 2002. At this meeting, Lead Counsel further explained the details of Plaintiffs' theory of the case. Mr. Constantine outlined Plaintiffs' calculation of damages, and possible scenarios under which Treasury could obtain its share of the recovery. During the meeting, Mr. Middlebrook asked Mr. Constantine whether he thought the card associations would oppose the

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[9](...continued)

> If you want to be excluded from the Class, you must make a written request for exclusion bearing the title "Request for Exclusion from Class: In Re Visa Check/MasterMoney Antitrust Litigation," and send it by first class mail, postage pre-paid, to The Garden City Group, Inc., P.O. Box 9000-6014, Merrick, New York 11566-9000, Attn: In re Visa Check/MasterMoney Antitrust Litigation. Your request should provide the name, address and telephone number of the person or business entity that wishes to be excluded from the Class, contain your printed name and title (if on behalf of a business entity), and be signed by you. In order for your request to be effective, it must be postmarked on or before November 14, 2002.

A copy of a Notice sent to a Government Merchant is attached as Exhibit D.

[10] Stephen Middlebrook Decl. ¶¶ 4-6, a copy of which is attached as Exhibit E.

United States's participation in the class action. Mr. Constantine stated that he thought they would not oppose the United States's filing claims because any award of damages would be based on system-wide transaction volumes and thus payment for the United States's share would be included in that award regardless of whether the United States filed a claim for it or not. Middlebrook Decl. ¶ 6 (Ex. E).

On November 14, 2002, after Government Merchants received the Notices of Pendency, a representative of the Civil Division of the U.S. Department of Justice wrote to Plaintiffs' Counsel.[11] The Civil Division Letter advised that the United States (including any agency or instrumentality) could not participate in the class action (citing, *inter alia*, *Cooper*). The Civil Division Letter also stated that even if the United States was not barred, its participation required the consent of the Attorney General and the Attorney General did not agree to the federal government's being included as a Class Member (citing 28 U.S.C. §§ 516 and 519). Plaintiffs' Lead Counsel, however, continued to treat the United States (and its agencies and instrumentalities) as part of the Class.

4. *Court Is Advised That the Only Government Merchant That Has Excluded Itself from the Class Is the U.S. Postal Service.*

Although Lead Counsel received the Civil Division Letter, it does not appear that the Plaintiffs ever filed the Civil Division Letter with the Court, forwarded it to the Claims Administrator, or provided a copy to counsel for the Defendants. The partner at Lead Counsel's firm who was "primarily responsible for negotiating, coordinating and supervising the implementation of the Class Notice plan on behalf of plaintiffs" gave a declaration on November

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[11] Letter from Polly A. Dammann, dated Nov. 14, 2002 to Constantine & Partners, *et al.*, a copy of which is attached as Exhibit F, and hereinafter the "Civil Division Letter."

15, 2002, stating that he had forwarded "[a]ll requests for exclusion" to the Claims Administrator.[12] For whatever reason, the Civil Division Letter apparently did not find its way to the Claims Administrator.

This Court ordered Plaintiffs and the Claims Administrator to file reports, which, among other things, were to "identify each class member that has elected to opt-out of the Rule 23(b)(3) class, and certify that notice has been provided in accordance with this Order." *In re Visa Check/MasterMoney Antitrust Litig.*, 2002 WL 31528478, at *6 (E.D.N.Y. June 21, 2002). Between November 2002 and February 2003, the Claims Administrator filed a series of reports listing exclusions. "To ensure that the Court has the name of every entity conceivably attempting to exclude itself," the Claims Administrator represented, in late November 2002, that it had completely audited its database to search for any names it may have left off in its earlier reports to the Court.[13] It reported that only one Government Merchant, the U.S. Postal Service, had requested exclusion from the Class of approximately five million merchants.[14]

5. *Damages Estimates Included Government Merchants, as Did Settlement Funds.*

Throughout this litigation, Plaintiffs' Lead Counsel argued that damages could be

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[12] Shapiro Decl. ¶¶ 1, 8, *submitted with* Nov. 15, 2002 Status Report Concerning Notice to Members of Certified Class (filed Nov. 18, 2002) (Docket No. 505).

[13] Zola Supplemental Affid. ¶ 4 (filed Nov. 26, 2002) (Docket No. 513).

[14] *Id.*, Ex. D, at 79. The USPS had sent a separate letter on November 14, 2002, addressed to the Claims Administrator, and appears on subsequent exclusion reports. Letter from Mary Anne Gibbons, dated Nov. 14, 2002 to Garden City Group, a copy of which is attached as Exhibit G; Ex. 5 to Second Supplemental Affid. of Neil Zola, at 79 (filed Jan. 6, 2003) (Docket No. 530); Ex. 4 to Final Supplemental Affid. of Neil Zola, at 79 (dated Feb. 13, 2003) (Docket No. 544).

calculated on a classwide basis. In estimating the Class Members' damages, Plaintiffs' Lead Counsel and their expert Dr. Franklin Fisher included the billions of dollars of the Government Merchants' Visa and MasterCard transactions.[15]

On June 4, 2003, Plaintiffs' Lead Counsel entered into separate "Settlement Agreements" with Visa and MasterCard. The total monetary settlement, in excess of $3 billion, was tied to the amount of damages suffered by the Class. Plaintiffs' Lead Counsel and their expert concluded that the monetary portion of the Settlement Agreements should be distributed among Class Members as nearly as practicable in proportion to their individual damages, and relied upon the same methodology as they set out for calculating aggregate Class damages, which included the

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[15] To calculate Class damages, Dr. Fisher in his April 4, 2000 Expert Report used the total number and dollar amount of actual Visa and MasterCard off-line point-of-sale debit transactions. *See* Expert Report of Dr. Franklin M. Fisher, dated April 4, 2000, *attached to* Pls' Mot. for Summary Judgment, filed Aug. 2, 2000 (Docket Nos. 361-365). This data came from *The Nilson Report*. Dr. Fisher did so as the "defendants have represented that they provide authoritative figures to Nilson on a regular basis." Fisher Expert Report at 129 n.334; *see also* Fisher Supplemental Decl. in Support of Plan of Allocation ¶ 18 n.8 ("figures reported by *The Nilson Report* are obtained directly from Visa and MasterCard") (dated June 23, 2005) (*available at* <http://www.inrevisacheckmastermoneyantitrustlitigation.com/supplemental.pdf>). Likewise, Dr. Fisher also relied on *The Nilson Report* data in calculating damages attributable to higher Visa and MasterCard credit card interchange fees. Fisher Expert Report Ex. FMF-18 n.1. *The Nilson Report* data includes the Government Merchants' Visa and MasterCard transactions, and thus Plaintiffs' expert relying on this data necessarily included Government Merchants in calculating the total transaction volume of debit and credit card fees paid by merchants, and their resulting damages. Moreover, nowhere in his Expert Report does Dr. Fisher state that he is excluding from his calculations the Government Merchants' transactions. Indeed, in describing the difficulties for the Defendants to price discriminate, Dr. Fisher cites, as examples, different merchants, including the U.S. Postal Service. Fisher Expert Report ¶ 334. After the Settlement Agreements, Dr. Fisher updated the Class damages, again relying on data from *The Nilson Report*. *See* Ex. FAD-3 to Fisher Decl. in Supp. of Plan of Allocation (dated Aug. 14, 2003) (Docket No. 854).

Government Merchants' Visa and MasterCard transactions.[16]

6. *Post-Settlement Treatment of Government Merchants as Class Members.*

On June 13, 2003, this Court ordered a plan for identifying and providing notice of the settlement to the Class Members. The Stipulation and Order obligated the Claims Administrator to:

> remove from the Class Member List, and . . . not provide direct mail Notice of Settlement to, those individuals or entities who filed timely requests for exclusion and whose names appeared on the Administrator's final exclusion report dated February 13, 2003 and filed with the Court on February 18, 2003.[17]

Between June 21 and July 3, 2003, the Claims Administrator sent "'Notices of Class Action Settlement' . . . to all known members of the Class."[18]

On September 18, 2003, Plaintiffs' Lead Counsel represented to this Court that they and the Claims Administrator "have fully satisfied all of their obligations under the Settlement Notice Order,"[19] and have "removed from the Class Member List, and did not provide direct mail to, those names and addresses of the 6,041 merchants who filed timely requests for exclusion and whose names appeared on the Administrator's final exclusion report dated February 13, 2003,

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[16] Fisher Decl. in Supp. of Plan of Allocation ¶¶ 4-5, 22-23; Am. Plan of Allocation at 4, 11.

[17] Stip. & Order for Providing Not. of Settlement of Class Action to Members of Certified Class at 7 (Docket No. 807).

[18] Am. Plan of Allocation at vii; July 22, 2003 Press Release, *attached to* Decl. of Libby Holman in Support of Sept. 18, 2003 Status Report Concerning Notice of Settlement to Members of Certified Class (dated September 12, 2003) (Docket No. 918) (*available at* <http://www.inrevisacheckmastermoneyantitrustlitigation.com/iv.pdf>).

[19] Sept. 18, 2003 Status Report Concerning Notice of Settlement to Members of Certified Class, at 1 ("9/18/03 Status Report") (Docket No. 918).

and filed with the Court on February 18, 2003."[20] But among the Class Members who received the Notice of Class Action Settlement were the Government Merchants.

7. *Amended Plan of Allocation Calculated the Fair Share for Government Merchants and Other Class Members.*

The Amended Plan of Allocation, dated August 16, 2005, provided for each merchant to recover that "portion of the Net Settlement Funds, which is directly proportional to its Visa and MasterCard off-line debit and credit card purchase volume and on-line debit transactions during the Class Period."[21] Plaintiffs' Lead Counsel represented that the Plan "provides an effective mechanism to calculate fairly and accurately all Class Member claims."[22] As Plaintiffs' Lead Counsel told the Court, for "Class Members identified in the Visa Transactional Database, actual Visa debit and credit purchase volumes for the period October 1996 – July 2003 will be used by the Claims Administrator to calculate Estimated Cash Payments for overcharges associated with Visa debit and credit transactions."[23] By utilizing Visa's data, the Allocation Plan "ensures that millions of small merchants will receive an accurate calculation of their claims."[24] In estimating

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[20] Neil Zola Decl. ¶ 6, *submitted with* 9/18/03 Status Report, *available at* <http://www.inrevisacheckmastermoneyantitrustlitigation.com/ii.pdf>.

[21] Am. Plan of Allocation at iii; *see also* Pls.' Mem. of Law in Supp. of Mot. for Final Approval of Visa Settlement & MasterCard Settlement at 13, 64 (dated Sept. 18, 2003) (Docket No. 908) (*available at* <http://www.inrevisacheckmastermoneyantitrustlitigation.com/3z.pdf>).

[22] Pls.' Mem. of Law in Supp. of Mot. for Final Approval of Visa Settlement & MasterCard Settlement at 3.

[23] Am. Plan of Allocation at iv.

[24] Pls.' Mem. of Law in Supp. of Mot. for Final Approval of Visa Settlement & MasterCard Settlement at 65-66. Visa's transactional data was provided to the Claims

(continued...)

each Class Member's "fair share" of damages, the Plaintiffs' Lead Counsel and the Claims Administrator included throughout the Government Merchants' Visa and MasterCard transactions.[25]

8. *Claims Forms Sent to Government Merchants.*

In the summer of 2005, this Court asked whether the Claims Administrator's paying the claims on a rolling basis would deplete the Net Settlement Funds. Plaintiffs' Lead Counsel responded no, and gave as one reason that "the initial pro rata shares and estimated cash payments will be based on all eligible Class Members participating in the distribution."[26] This

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[24](...continued)
Administrator "on a merchant-by-merchant basis." Fisher Supplemental Decl. in Support of Plan of Allocation ¶ 11. It does not appear, however, that Plaintiffs' Lead Counsel ever excluded Government Merchants from this data set.

[25] Under Dr. Fisher's methodology, which the Claims Administrator applied, the Government Merchants' transactions were included to calculate each Class Member's recovery. The Government Merchants' transactions were included both in the numerator (the aggregate Class damages) and the denominator (the total dollar volume of off-line debit and credit card transactions and number of on-line debit transactions, which were derived from *The Nilson Report* data). Fisher Decl. in Supp. of Plan of Allocation Exs. FAD-2, -3, -4. That figure was then adjusted downward (by multiplying the ratio of the Net Settlement Funds to aggregate Class damages) and applied to each Class Member's transactions. *Id.* at ¶ 28, Ex. FAD-5. Likewise, in deriving his methodology of allocating settlement monies for certain merchants, Dr. Fisher relied in part on Visa Systems Panel Study Data, which covers 95 merchant categories. Fisher Decl. in Supp. of Plan of Allocation ¶¶ 50-54, Exs. FAD-10A, -10B, -10C, & -10D; Fisher Supplemental Decl. in Supp. of Plan of Allocation ¶¶ 21-25, Exs. FASD-5A, -5B, -5C, & -5D. Among those 95 merchant categories he cited and included in his allocation methodology are Government Merchants (*e.g.*, "Postal Service" and "Government (other than postage)"). *Id.* Dr. Fisher's declarations did not distinguish between Government and non-Government Merchants. Nor did Dr. Fisher state that the Government Merchant transactions (whether from readily identifiable Government Merchant categories or as, in many instances, when Government Merchant transactions are in categories not unique to governmental entities) were excluded from the calculations of the individualized settlements.

[26] Letter from Jeffrey I. Shinder to Hon. John Gleeson, dated July 8, 2005, at 3 (continued...)

included the Government Merchants, as in the fall of 2005, the Claims Administrator sent to the Government Merchants and other merchants: (i) the Notice of Estimated Cash Payment and Claim Form ("VM1 forms") and/or (ii) In Re VISA Check/MasterMoney Claim Forms ("VM2 forms"). The VM1 forms state, in part:

> You or your company have been identified as a member of the Class in the **Visa Check/MasterMoney Antitrust Litigation**. As a Class Member you are entitled to receive a Cash Payment which is estimated to be: $ [x].
> . . .
> The Court approved a plan for allocating and distributing this money to you and other Class Members. It is based on the dollar amount of Visa and MasterCard debit card and credit card transactions your Business, Organization or Corporation accepted from October 25, 1992 to July 31, 2003.[27]

The VM2 forms include a claim form to be completed with sales data and submitted to the Claims Administrator. Numerous Government Merchants received these forms stating that they were entitled to receive a particular amount of the Net Settlement Funds based on their volume of debit card and credit card transactions. For example, the retail stores and concessionaires of the Navy Exchange Service Command ("Navy") received at least 81 VM1 forms and 68 VM2 forms.[28]

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[26](...continued)
(Docket No. 1171).

[27] Notice of Estimated Cash Payment & Claim Form. Copies of the cited pages are attached as Exhibit H.

[28] Melanie Fix Decl. ¶ 6, a copy of which is attached as Exhibit I.

9. *Other Communications with Government Merchants Regarding Participation in Class and Settlement.*

In 2003, after the Civil Division Letter was sent to Plaintiffs' Lead Counsel and after the settlements were negotiated, Plaintiffs' Lead Counsel again contacted Mr. Middlebrook of the Treasury, and provided him with an estimate of the size of the Government Merchants' expected recovery, stating that the United States's share of the settlement funds were between $70,000,000 and $100,000,000. Middlebrook Decl. ¶ 7 (Ex. E).

Navy counsel Melanie Fix spoke to the Claims Administrator Hot Line on at least two occasions in the November-December 2005 time frame, and twice was told that the federal government was part of the Class for the purposes of the settlements.[29] On November 29, 2005, Michael McCormack, a consultant to the Plaintiffs' Lead Counsel,[30] told the Navy counsel that the money earmarked for the federal governmental entities would not be distributed to other Class Members.[31] As late as December 2005, Mr. McCormack assured the Navy's counsel that the Government Merchants would receive a portion of the settlements.[32]

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[29] Fix Decl. ¶ 9 (Ex. I).

[30] According to Mr. McCormack's declaration submitted earlier to this Court, Lead Counsel asked Mr. McCormack to interact and liaise with Class Members to help them consolidate their claim forms. Plaintiffs' Lead Counsel and the Claims Administrator referred numerous merchants to Mr. McCormack for assistance, who became "a regular point of contact regarding the distribution for many merchants." *See* McCormack Decl. ¶ 4, dated Feb. 14, 2006, *submitted with* Pls.' Mem. in Supp. of Motion for Injunctive Relief re Spectrum Settlement Recovery's Misrepresentation to Class Members Concerning Participation of United States Government in Claims Process, dated Feb. 15, 2006 ("Pls. 2/15/06 Mem. in Supp. of Injunction") (Docket No. 1254).

[31] Fix Decl. ¶ 11 (Ex. I).

[32] Fix Decl. ¶ 12 (Ex. I).

10. *Recent Developments Leading to Submission of Government Merchants' Claims.*

Beginning in or around October 2005, the Department of Justice received numerous telephone calls from Government Merchants that had received claim forms. The Department of Justice did not want the Government Merchants to submit claim forms or to yet seek payment. It was unclear whether the Settlement Funds were calculated so as to include the Government Merchants' claims. Moreover, there was the issue of whether the broad release in the Settlement Agreements could harm the United States's law enforcement efforts. Pending resolution of these concerns, the Department of Justice specifically instructed the Claims Administrator not to pay these claims.

After learning that the Settlement Funds encompassed the Government Merchants' Visa and MasterCard transactions, and after proposing to Defendants language clarifying that the release that would not compromise the United States's prosecutorial interests[33], the United States timely submitted the Government Merchants' consolidated claims to Plaintiffs' Lead Counsel.[34] Thereafter, Plaintiffs' Lead Counsel, by letter dated February 1, 2006, asked the Court to enter a briefing schedule, which led to the present Memorandum.

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[33] The Department of Justice and Defendants negotiated clarifying language, which would make clear that the release would apply to the Government Merchants' damages claims but that the government's law enforcement responsibilities would not be affected.

[34] The Department of Justice and Lead Counsel agreed that consolidated Claims could be submitted directly to Lead Counsel. Lead Counsel also granted an extension of time for the filing of claims, until January 27, 2006. Included were claims prepared by the Army and Air Force Exchange Service, the Air Force Services Agency, the Army Installation Management Agency, the Army Litigation Division, the Coast Guard, the Marine Corps Community Services, the Navy Exchange Service Command, the Navy MWR, the Army CFSC, the United States Department of the Treasury, the USPS, and the Smithsonian Institution. The claims submitted on the USPS's behalf were subsequently withdrawn.

ARGUMENT

I. AS A MATTER OF EQUITY, GOVERNMENT MERCHANTS SHOULD BE PERMITTED TO SHARE IN THE NET SETTLEMENT FUNDS.

A. *Allowing Government Merchants to Participate in Net Settlement Funds' Distribution Is Within Court's Broad Equitable Powers.*

This Court has jurisdiction to decide the Government Merchants' participation in the distribution of the Net Settlement Funds. The Order and Final Judgment reserves to this Court exclusive jurisdiction over the Settlements and Settlement Agreements, including the administration and consummation of the Settlements. It is within this Court's general equitable powers to define the scope of class action judgments and settlements, and to modify, if necessary, the terms of a class action settlement. *In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 194 (3rd Cir. 2000). Until the fund created by the settlements is actually distributed, this Court retains its traditional equity powers to protect unnamed but interested persons. *Zients v. LaMorte*, 459 F.2d 628, 630 (2nd Cir. 1972); *In re Crazy Eddie Securities Litig.*, 906 F. Supp. 840, 843 (E.D.N.Y. 1995). Moreover, in a class action settlement, this Court retains "special responsibility to see to the administration of justice." *In re Cendant Corp. Prides Litig.*, 233 F.3d at 194. Indeed, class actions themselves are grounded in equity. *Id.* at 194 n.7. In exercising their equitable powers, courts consider whether the claimant's petition is consistent with the wording of the settlement agreement and whether it would further or defeat the agreement's purpose. *See Dahingo v. Royal Caribbean Cruise, Ltd.*, 312 F. Supp. 2d 440, 446 (S.D.N.Y. 2004) (where change in allocation of settlement funds affects only the distribution among class members and not the defendant's obligations, courts will exercise their equitable powers); *Mermelstein v. Bank of New York Co., Inc.*, 985 F. Supp. 320, 322 (E.D.N.Y. 1997).

B. *Equities Support the Government Merchants' Participation in the Net Settlement Funds' Distribution.*

1. *Class Benefitted from the Inclusion of Government Merchants' Transactions.*

The Class Members and Representatives have benefitted by the inclusion of the Government Merchants' Visa and MasterCard transactions in this Class. First, the Class benefitted when Lead Counsel included the Government Merchants' transactions as part of the injury to the Class, as the Net Settlement Funds "would likely have been much smaller" if the Government Merchants "were barred from compensation (assuming the settlement would still have been consummated at all)."[35] In *In re Remeron End-Payor Antitrust Litigation*, an objector argued that end-payor purchasers from states, who were legally foreclosed from independently bringing the antitrust claim, could not participate in the settlement funds' distribution. The court rejected this objection as "without merit" given that the parties had agreed to these purchasers' participation and that the inclusion of these purchasers' claims increased the class damages. This is true here. By including the Government Merchants' transactions when calculating Class damages, Plaintiffs' Lead Counsel was able to increase the size of the Class's potential recovery. The universe of Visa and MasterCard debit and credit card transactions, which formed the basis for the settlement discussions, included the billions of dollars represented by the Government Merchants' transactions, and the millions of dollars in alleged damages suffered by the Government Merchants. Thus, the Class got more than it would have received had the parties excluded the Government Merchants' transactions from their estimates of the Class's damages. Secondly, the Class also benefitted because costs, such as attorneys fees and expert expenses,

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[35] *In re Remeron End-Payor Antitrust Litig.*, 2005 WL 2230314, at *21.

could be spread across a bigger pie, which included the alleged damages suffered by Government Merchants.[36]

2. *Plaintiffs' Lead Counsel Treated Government Merchants as Class Members.*

Plaintiffs' Lead Counsel, through their actions, at all relevant times, treated the Government Merchants *substantively* and *procedurally* as part of the Class and intended throughout the litigation for the Government Merchants to participate in any recovery.

Plaintiffs' Lead Counsel substantively treated the Government Merchants as members of the Class. It is undisputed that as a factual matter the Government Merchants fall within the scope of the Class Definition. Plaintiffs defined the putative Class by referring to a common factual characteristic: the Class consists of all persons or business entities "who have accepted Visa and/or MasterCard credit cards and therefore are required to accept *VisaCheck* and/or *MasterMoney* debit cards under the challenged tying arrangements . . ."[37] The putative Class then has three common characteristics: first, it consists of all persons or businesses–merchants–who accepted Visa or MasterCard credit cards; second, it consists of those merchants who were subject to the tying arrangements at issue in the lawsuit; and third, it expressly excludes Defendants and persons affiliated with Defendants.

Defendants believed–and argued to this Court and before the Second Circuit–that the

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[36] As Conte and Newberg recognize, "Class counsel may wish to communicate with actual class members after the exclusion period has expired in order to seek additional plaintiffs. Additional plaintiffs not only would enhance the class representation against future challenges to the class ruling but also would share in the litigation expenses." 5 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 15:16 (4th ed. 2002).

[37] Pls.' Mem. of Law in Supp. of Mot. for Class Certification at 11.

Government Merchants were included in this broad Class Definition.[38] Plaintiffs' Lead Counsel agreed for good reason: because the Class would benefit with the Government Merchants included. Even after receiving the Civil Division Letter, Plaintiffs' Lead Counsel included the billions of dollars represented by the Government Merchants' Visa and MasterCard transactions in estimating the injury to the Class, which, as discussed above, formed the basis for the settlement discussions.

After receiving the Civil Division Letter, Plaintiffs' Lead Counsel continued to procedurally treat the Government Merchants as part of the Class. Plaintiffs' Lead Counsel did not forward the Civil Division Letter to the Claims Administrator or to the Defendants' counsel. No effort was made before the end of 2005 to identify the particular "agenc[ies] or instrumentalit[ies] of the United States" referred to in the Civil Division Letter.[39] Neither Plaintiffs' Lead Counsel nor the Claims Administrator included any agency or instrumentality of the United States (other than the USPS, which submitted its own letter) on the lists of exclusions submitted to the Court. No effort was made to stop sending notices to the Government Merchants. Plaintiffs' Lead Counsel represented that all requests for exclusion had been forwarded to the Claims Administrator, and the Claims Administrator represented that its reports were complete and accurate. Plaintiffs' Lead Counsel and the Claims Administrator calculated

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[38] Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Class Certification at 4 (referencing *inter alia* USPS); Defs.' Pet. for Review under FRCP 23(f) at 1-2 (referencing *inter alia* United States Government).

[39] Plaintiffs' Lead Counsel did not contact the United States for a list of Government Merchants. In the fall of 2005, pending resolution of its concerns, the Department of Justice did not want the Government Merchants to submit claim forms or to yet seek payment, and specifically instructed the Claims Administrator during this period not to pay these claims. Only then did the Claims Administrator take steps to identify these Government Merchants.

for individual Government Merchants their share of the Net Settlement Funds. And the Claims Administrator sent notices of the settlement and claims procedures to Government Merchants, notwithstanding an order of the Court requiring the Claims Administrator to remove from the Class Member List, and not provide by direct mail Notices of Settlement to, those individuals or entities who filed timely requests for exclusion.

3. *Class Members Cannot Claim Prejudice From Loss of a Windfall.*

The Government Merchants' participation in the distribution of the Net Settlement Funds would not reduce the other Class Members' "fair share" of the Net Settlement Funds. As Plaintiffs' Lead Counsel recently admitted to this Court, the other merchants' current claims "(which are based on volumes from the Visa Transactional Database) *will be unaffected by the [U.S.] government's application.*"[40] The Amended Plan of Allocation provides that "[e]ach Class member is entitled to receive a portion of the Net Settlement Funds, which is *directly proportional* to *its* Visa and MasterCard off-line debit and credit card purchase volume and on-line debit transactions during the Class Period."[41] The Government Merchants' claim forms reflect *their* recovery based on *their* dollar volumes of *their* Visa and MasterCard transactions. Plaintiffs' representatives assured these Government Merchants that their share of the Net Settlement Funds was earmarked for them. Middlebrook Decl. ¶¶ 6-7 (Ex. E); Fix Decl. ¶ 11 (Ex. I).

Since the Government Merchants were always assumed to be part of the distribution, the

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[40] Pls. 2/15/06 Mem. in Supp. of Injunction at 3. (Emphasis added.) *See also id.* at 13 (Government's application to participate in the Net Settlement Funds' distribution "would have no effect whatsoever on the vast majority, if not the entirety, of the Class").

[41] Am. Plan of Allocation at iii. (Emphasis added.)

other merchants' claims will not be reduced. The Government Merchants will be getting the same percentage of their transaction volume as the other merchants are getting of their transaction volume–no more or less. Consequently, this situation differs from one where a non-class member seeks a portion of a settlement fund that reflects only the damages to the class members. The Class Members cannot be said to be prejudiced when the Government Merchants seek recovery of only their share of damages, and the other Class Members' shares would not be diminished. *See In re Elec. Weld Steel Tubing Antitrust Litig.*, 1982-2 Trade Cas. (CCH) ¶ 64872, 1982 WL 1873, at *3 (E.D. Pa. 1982).[42]

If the Government Merchants were denied participation in the Net Settlement Funds' distribution, and their shares were instead redistributed to the other merchants, then the other merchants would obtain a windfall–namely that part of the dollar volume represented by the billions of dollars of the Government Merchants' Visa and MasterCard transactions during the Class Period. Such redistribution would be inequitable. *See In re Orthopedic Bone Screw Products Liability Litig.*, 246 F.3d 315, 324 (3rd Cir. 2001) (loss of windfall consisting of some portion of recovery that otherwise would be owed to deserving late claimants is not prejudicial).

4. *If Government Merchants Are Not Permitted to Participate in Net Settlement Funds' Distribution, Defendants Will Be Prejudiced.*

Defendants unsuccessfully opposed the certification of a broad class, which they asserted included Government Merchants. After the opt-out period, Defendants reasonably were entitled

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[42] In addition, there can be no claim by Class Members that the Settlement Agreements created a legal right to the funds. The Settlement Agreements, except "as provided by order of the Court," do not provide Class Members with any legal interest in the Settlement Funds or any portion thereof. Visa Settlement ¶ 27 (Docket No. 812); MasterCard Settlement ¶ 29 (Docket No. 811).

to rely upon the opt-out lists filed with this Court (which, besides the USPS, did not reference any Government Merchant). Excluding the Government Merchants' claims now would undermine the benefit of the bargain Defendants presumably thought they were getting when they agreed to settle with all the persons or business entities that did not appear on the opt-out lists. "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."[43] The Second Circuit recognized why such broad class action settlements are common; the defendants "would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country," and "if the parties cannot set definitive limits on defendants' liability," such settlements will not occur.[44]

5. *Judicial Economy and Public Interest Support Government Merchants' Participation in Net Settlement Funds' Distribution.*

Public policy favors settlement, especially in the case of class actions.[45] The inclusion of

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[43] *In re Remeron End-Payor Antitrust Litig.*, 2005 WL 2230314, at *21, citing *In re Chicken Antitrust Litig.*, 669 F.2d at 238.

[44] *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 106 (2d Cir. 2005) (citation omitted); *see also Ryan v. Dow Chemical Co.*, 781 F. Supp. 902, 919-20 (E.D.N.Y. 1991) (in support of inclusion of future claimants in class, court noted that class action settlements will not occur if parties cannot set definitive limits on defendants' liability), *aff'd sub nom. In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425 (2d Cir. 1993); *cf. McCubbrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62, 69-70 (N.D. Cal. 1976) ("liberal relief from failure to follow requisite exclusion procedures will erode finality of complex adjudications, discourage class action settlements, permit return of the former option of one-way intervention, and place a burden on judicial resources").

[45] *See Wal-Mart*, 396 F.3d at 116; *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) ("There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation."); *Carnegie v. Household Intern., Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The more claimants there are, the more likely a class action

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the Government Merchants' damages claims in this action is likely to save judicial resources, as it would obviate the need for a separate damages action brought by the United States to recover those damages. Moreover, the Government Merchants' recovery would not be for parochial interests, but would be used to support sailors and their families (Fix Decl. ¶¶ 1-3 (Ex. I)) and deposited into the Treasury General Account (Middlebrook Decl. ¶ 10 (Ex. E)), where it will be available for funding government programs. Thus, considerations of public interest support the Government Merchants' participation.

II. CIVIL DIVISION LETTER DOES NOT PRECLUDE GOVERNMENT MERCHANTS FROM PARTICIPATING IN NET SETTLEMENT FUNDS' DISTRIBUTION.

Only the Department of Justice may represent the United States in the conduct of litigation in which the United States, an agency, or officer thereof, is a party or is interested.[46] Thus, the United States cannot be required to participate in a private class action, as a class member or otherwise, without the Attorney General's consent. The Civil Division Letter informed Plaintiffs' Lead Counsel of that. The Civil Division Letter asserted, first, that the United States was not a member of the Class represented by Plaintiffs' Lead Counsel; second, that even if the United States could participate, such participation required the authorization of the Attorney General under 28 U.S.C. §§ 516 and 519, and the Attorney General did not agree to the United States (including any agency or instrumentality of the United States) being included as

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[45](...continued)
is to yield substantial economies in litigation.") (Posner, J.); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation).

[46] 28 U.S.C. § 516. *See also* 28 U.S.C. § 519 (Attorney General shall supervise litigation involving the United States, an agency, or an officer thereof).

a Class Member.

Had Plaintiffs' Lead Counsel and the Claims Administrator acted on the Civil Division Letter, and, at the time, excluded the Government Merchants from the Class, then the United States would not be before this Court. It would be inappropriate for the United States to obtain money from class members by securing a portion of their recovery, which was based on those members' own Visa and MasterCard transactions. But after receiving the Civil Division Letter, Plaintiffs substantively continued to treat the Government Merchants as Class Members, by including their Visa and MasterCard transactions in the negotiation of the settlements and the estimates of claims. Procedurally, after receiving the Civil Division Letter, Plaintiffs did not treat the United States as having excluded itself. Under these circumstances, it would be manifestly unfair if Lead Counsel could now, belatedly, treat the Civil Division Letter as an effective exclusion.

III. GOVERNMENT MERCHANTS ARE NOT FORECLOSED, AS A MATTER OF LAW, FROM PARTICIPATING IN THE NET SETTLEMENT FUNDS' DISTRIBUTION.

Plaintiffs' Lead Counsel may argue that there are two related legal obstacles to the Government Merchants' participation in the distribution of the Net Settlement Funds: first, that the Supreme Court's holding in *Cooper* (that the United States is not a "person" under the Clayton Act) necessarily implies that the Government Merchants are not encompassed by the term "all persons and business entities" under the Class Definition; and second, even if the Government Merchants, as a factual matter, fall within the Class Definition, the Amended Complaint does not specifically seek damages under 15 U.S.C. § 15a, which is the statutory provision reserved to the federal government. These are not legal obstacles. And even if they

were, the Court's equitable power over the settlements gives it ample authority to permit the Government Merchants to participate in the distribution of the Net Settlement Funds.

A. Cooper *Does Not Bar the Government Merchants' Participation in the Net Settlement Funds' Distribution.*

United States v. Cooper[47] holds that, as a matter of statutory construction, the United States is not a "person" as that word is used under the former section 7 of the Sherman Act. But that holding does not preclude today the United States from bringing its own suits for antitrust injuries to its agencies and instrumentalities, or participating in the distribution of the Net Settlement Funds.

Cooper does not address the question here, namely whether the Government Merchants as an equitable matter can recover their share of the settlements. Nor does *Cooper* address whether the Government Merchants as a factual matter are encompassed by the term "all persons and business entities" in the Class Definition and the Settlement Agreements.[48] As the Supreme Court later noted, *Cooper* "did not hold that the word 'person,' abstractly considered, could not include a governmental body."[49] Indeed, the Court recognized that the word "'person,' . . . is not

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[47] 312 U.S. 600 (1941).

[48] On their face, the terms of the Settlement Agreements evince the parties' intent to allow recovery by the Government Merchants. The Net Settlement Funds provided by the Settlement Agreements are to be allocated among the "Class Members," as defined in the Settlement Agreements. *See* Visa Settlement ¶ 12(a); MasterCard Settlement ¶ 12(a). The Class Members are defined broadly as "all persons and business entities who have accepted Visa and/or MasterCard credit cards . . ." Visa Settlement ¶¶ 1(c) & (d); MasterCard Settlement ¶¶ 1(c) & (d). This is the same definition that Defendants earlier said, and Plaintiffs never disputed, included Government Merchants.

[49] *Georgia v. Evans*, 316 U.S. 159, 161 (1942); *see also Pfizer v. Gov't of India*, 434 U.S. 308, 317 (1978).

a term of art with a fixed meaning wherever it is used."[50] So instead of resting its decision upon the "bare analysis of the word 'person,'" the Court "relied instead upon the entire statutory context" to determine whether a federal, state or foreign government could or could not maintain an action for treble damages under the former Section 7 of the Sherman Act (which was repealed in 1955) or section 4 of the Clayton Act, 15 U.S.C. § 15.[51] Although the Court held that "person" did not include the federal government in *Cooper*, it later held that the term "person" could include the state government[52] or a foreign sovereign.[53]

Congress thereafter remedied the effects of *Cooper* by enacting and subsequently amending 15 U.S.C. § 15a. This statute puts the agencies and instrumentalities of the United States on the same terms as other private and governmental litigants by allowing the United States to obtain treble damages for its injuries. The rationale for distinguishing between recoveries by the United States and other persons was suspect, as Congress recognized, because it "ignores the tremendous deterrent value of treble damage actions, regardless of the status of the plaintiff."[54]

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50 *Pfizer*, 434 U.S. at 315.

51 *Id.* at 317.

52 *Evans*, 316 U.S. at 162.

53 *Pfizer*, 434 U.S. at 320.

54 S. Rep. No. 101-288 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 4119, 4119. Nor does *United States Postal Service v. Flamingo Indus. Ltd.*, 540 U.S. 736 (2004) legally bar the Government Merchants participating in the Net Settlement Funds' distribution. The Court in *Flamingo* addressed a different issue, namely whether the USPS is a "person" amenable *to being sued* under the antitrust laws. The Court said no, noting that the Sherman Act only imposes liability on a "person," as defined under then Section 7 of the Sherman Act, which Congress, in

(continued...)

Consequently, whether the United States is a "person" under the Clayton Act says nothing about how the parties here understood the term "all persons and business entities" in the Class Definition and the Settlement Agreements. It is black letter law that "where the parties [to a contract] have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning."[55] Plaintiffs' and Defendants' course of conduct throughout this litigation makes clear that they both understood the term "all persons and business entities" in the Class Definition and Settlement Agreements to include the Government Merchants.

B. *Amended Complaint Does Not Preclude Government Merchants' Participation in Net Settlement Funds' Distribution.*

Plaintiffs's Lead Counsel may argue that even if the Government Merchants, as a factual matter, fall within the Class Definition, the Amended Complaint does not specifically seek damages under 15 U.S.C. § 15a, which because of *Cooper* is the statutory provision reserved to the federal government. As the next section discusses, this is, at best, a technical defect that the Court, in exercising its equitable powers, can readily cure by, for example, amending the complaint.

But it is questionable whether the Amended Complaint's mentioning 15 U.S.C. § 15 and not specifically § 15a has any relevancy to the Government Merchants' participating in the Net Settlement Funds' distribution. The starting point for consideration of this Court's equitable

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[54](...continued)
responding to *Cooper*, did not alter.

[55] Restatement (Second) Contracts § 201(1); *see also Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990); *Hartford Acc. & Indem. Co. v. Wesolowski*, 33 N.Y.2d 169, 171-72 (1973).

authority is not the Amended Complaint, but rather the Settlement Agreements. The Settlement Agreements contain the agreement reached with Defendants to end the litigation. In exercising its equitable powers over the distribution of the settlement funds, a court should generally not modify the integral terms of a settlement agreement, except in limited circumstances. *In re Crazy Eddie Securities Litig.*, 906 F. Supp. at 844. Here, the Court's equitable powers would not be constrained, as it would give effect to the parties' understanding of the Settlement Agreements' terms, as evidenced by their course of conduct throughout this litigation.

Even if the Amended Complaint were relevant here, the Amended Complaint sought damages beyond that recoverable under section 15–as the "Retailer Plaintiffs also seek damages to redress these violations of federal and state law"[56] and the Prayer of Relief encompassed all damages "sustained by the Retailer Plaintiffs, and members of their Class, . . . in an amount to be proved at trial, to be trebled according to law . . . and such other and further relief as this Court may deem just and proper."[57]

Moreover, in many private class action antitrust cases seeking damages under 15 U.S.C. § 15, the class plaintiffs specifically exclude federal government entities from the class definition, and neither the Supreme Court, Circuit Courts, nor district courts ever suggest that such exclusion is superfluous.[58] If Plaintiffs here wanted the Government Merchants excluded, which

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[56] Am. Compl. ¶ 5.

[57] Am. Compl. ¶ D.

[58] *See, e.g., California v. ARC America Corp.*, 490 U.S. 93, 97 (1989) (excluding "Federal Government" from class definition); *In re Southern Florida Waste Disposal Antitrust Litig.*, 896 F.2d 493, 495 (11th Cir. 1990) (excluding "any unit, department or agency of the United States government"); *In re Remeron End-Payor Antitrust Litig.*, 2005 WL 2230314, at *7 (continued...)

they certainly did not, then Plaintiffs could have excluded them–as they specifically excluded from the putative Class the "named Defendants, their directors, officers or members of their families."[59]

C. *Court's Equitable Power over Settlements Gives it Ample Authority to Permit Government Merchants to Share in the Net Settlement Funds.*

Even if one assumed *arguendo* that it was relevant that the United States was not a "person" under section 15 U.S.C. § 15, or that the Complaint mentioned 15 U.S.C. § 15 and not specifically § 15a, this Court has the equitable power to allow the Government Merchants to participate in the Net Settlement Funds' distribution.

Courts have discretion to allow an entity to participate in a class settlement even if there is significant doubt as to whether that entity, as a matter of law, could have asserted its own claim for damages as part of the underlying action. *See In re Chicken Antitrust Litig.*, 669 F.2d at 238-40; *In re Remeron End-Payor Antitrust Litig.*, 2005 WL 220314, at *21. The appeal in *In*

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[58](...continued)
(excluding "all federal governmental entities, agencies, and instrumentalities"); *In re Carbon Black Antitrust Litig.*, Civ. Act. No. 03-10191-DPW, 2005 WL 102966, at *22 (D. Mass. Jan. 18, 2005) (excluding any federal government purchasers); *Holiday Wholesale Grocery Co. v. Philip Morris, Inc.*, 231 F. Supp. 2d 1253, 1263 (N.D. Ga. 2002) (excluding federal government entities); *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 378 (S.D.N.Y. 1996) (excluding any federal government purchaser); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 307, 343 (N.D. Ga. 1993) (excluding "all governmental entities" from class definition; court notes that "private class actions traditionally exclude governmental bodies"); *Troncelliti v. Minolta Corp.*, 666 F. Supp. 750, 751 (D. Md. 1987) (excluding federal government purchasers); *In re Glassine & Greaseproof Paper Antitrust Litig.*, 88 F.R.D. 302, 307 (E.D. Pa. 1980) (excluding federal government purchasers); *see also New York v. Salem Sanitary Carting Corp.*, Civ. Act. No. 85-0208 (E.D.N.Y.) (Complaint dated Jan. 22, 1985) (excluding "entities and institutions of the United States government") (a copy of which is attached as Exhibit J). The class was subsequently certified to include only non-federal government entities. *See* 1989-2 Trade Cas. (CCH) ¶ 68,691, 1989 WL 86997 (E.D.N.Y. July 24, 1989).

[59] Am. Compl. ¶ 33.

re Chicken arose out of a challenge to the participation of indirect purchasers in a settlement fund. In a price-fixing action involving chicken producers, class counsel had negotiated an interclass allocation of the expected damages, which included allocations to indirect purchasers. *Id.* at 233. By the time the case settled, the Supreme Court had decided *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which held that, with limited exceptions, indirect purchasers could not recover damages under the federal antitrust laws. In holding that the indirect purchasers could participate in the class settlement, the Fifth Circuit made several points that are directly on point. First, the settling parties had contemplated that the indirect purchasers would participate in the settlement. Second, the defendants were seeking "total peace" through the settlement; thus, they had negotiated a broad release that included all significant potential plaintiffs, including indirect purchasers. Third, the indirect purchasers had colorable claims of their own (for example, under state law that permitted indirect purchasers to sue), even if they arguably could not have asserted those claims as part of the class action. Finally, the plaintiff class benefitted by the inclusion of the indirect purchasers as the starting point for the settlement negotiations was defendants' insistence upon "total peace."[60]

This Memorandum applies the same rationale to the facts here. Indeed, the facts here are even more compelling. In *In re Chicken*, some of the participants in the settlement arguably could not, as a matter of law, have asserted damages claims of their own either under state or federal law–their only cause of action was for injunctive relief. *Id.* at 238. Here, by contrast, it is

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[60] *In re Chicken* at 238-39. Likewise, the district court in *In re Remeron End-Payor Antitrust Litigation*, allowed indirect purchasers from states whose antitrust laws do not provide for recovery to participate in the settlement funds: "An important part of a settlement like this one is that the defendants achieve 'total peace,' thus all potential plaintiffs must be compensated in order to preclude future litigation attempts . . . ." 2005 WL 2230314, at *21.

undisputed that Government Merchants can seek treble damages under 15 U.S.C. § 15a against Defendants for the same type of injury suffered by the other merchants.

The Second Circuit relied upon *In re Chicken*'s "total peace" rationale in *In re Agent Orange Product Liability Litig.*, 818 F.2d 179 (2d Cir. 1987). In affirming Judge Weinstein's decision to allow claimants to participate in the Agent Orange settlement fund without the need of making a particularized showing of individualized causation and injury, the Court of Appeals wrote:

> In sum, given the inconclusive state of the scientific evidence as to what injuries, if any, were caused by Agent Orange, the district court did not abuse its discretion in holding that all exposed veterans who have suffered nontraumatic death or disability have stated "colorable legal claims against defendants . . . [sufficient] to allow them to share in the settlement fund." *In re Chicken Antitrust Litigation American Poultry*, 669 F.2d 228, 238 (5th Cir.1982), quoted in Distribution Opinion [*In re Agent Orange Product Liability Litig.*, 611 F. Supp. 1396, 1411 (E.D.N.Y. 1985)].[61]

Moreover, the "hallmark of Rule 23 is the flexibility it affords to the courts to utilize the class device in a particular case to best serve the ends of justice for the affected parties and to promote judicial efficiencies."[62] Thus, if the Court still has any reservations about the Amended Complaint's specific citation to § 15, and not § 15a, this technical defect can, if necessary, be readily cured by several actions, such as:

(i) creating a subclass consisting of Government Merchants, represented by the Attorney General, which can participate in the distribution of the Net Settlement

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[61] *In re Agent Orange Product Liability Litig.*, 818 F.2d at 184.

[62] *Weinberger*, 698 F.2d at 72 (quoting *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 177-78 (5th Cir. 1979)).

Funds[63];

(ii) treating the Amended Complaint as if it had been brought under the appropriate section[64]; or

(iii) by amending the Amended Complaint under 28 U.S.C. § 1653 ("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts").

CONCLUSION

In seeking approval of the Settlement Agreements, Plaintiffs' Lead Counsel assured this Court that "millions of small merchants will receive their fair share of the Net Settlement Funds." (Pls.' Mem. of Law in Supp. of Mot. for Final Approval of Visa Settlement & MasterCard Settlement at 66.) Just as others are presumably receiving their "fair share" of the Net Settlement Funds, the Government Merchants should as well. The Class used the Government Merchants to increase the amount that Class Members would receive, and thus, as a matter of equity, the Government Merchants are entitled their share.

Otherwise, if the Government Merchants are denied participation in the distribution of the

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[63] It is well-settled that this Court, under Fed. R. Civ. P. 23 and its equitable powers, can fashion such a subclass. *See Carnegie*, 376 F.3d at 661 ("Rule 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues. Those solutions include . . . 'creating subclasses; or altering or amending the class.'") (quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d at 141). The Second Circuit in this case recognized subclasses as a key management tool. 280 F.3d at 140-41. *See also American Timber & Trading Co. v. First Nat. Bank of Oregon*, 690 F.2d 781, 786-87 (9th Cir. 1982) (within district court's broad powers to adopt procedural innovations to facilitate management of class action, and proper to create subclass solely to expedite case's resolution).

[64] *See, e.g., Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (7th Cir. 1992) (treating claim brought under the wrong section of ERISA as if brought under appropriate section); *Emanuel v. Barry*, 724 F. Supp. 1096, 1098 (E.D.N.Y. 1989) (where party sues under wrong section of civil rights statute, court may uphold complaint if allegations satisfy another section).

Net Settlement Funds, and their shares were instead redistributed to the other merchants, then such a windfall would be inequitable. The merchants would partake in funds earmarked for the Government Merchants, namely that part of the settlements represented by the billions of dollars of Government Merchants' Visa and MasterCard transactions during the Class Period. Defendants, who were seeking a total peace with these settlements, would be exposed to greater liability. And, in the end, the total peace envisioned by all the parties–namely to resolve all the merchants' claims–would be disrupted. To preserve this total peace and prevent any unjust enrichments, the United States respectfully requests this Court to permit the Government Merchants to participate in the Net Settlement Funds' distribution.

Dated: 21 March 2006
Washington, D.C.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on Tuesday, March 21, 2006, the foregoing Memorandum and Declaration of Allen P. Grunes 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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