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

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

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF VISA SETTLEMENT AND MASTERCARD SETTLEMENT**

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Lead Counsel respectfully submits this memorandum of law (1) in support of its motion, pursuant to Fed. R. Civ. P. 23(e), for final approval of Settlement Agreements dated June 5, 2003 executed by Lead Counsel, on behalf of the Plaintiff Class, and defendants Visa U.S.A. Inc. ("Visa") and MasterCard International, Inc. ("MasterCard") and (2) in further support of its motion for approval of the Proposed Plan of Allocation (the "Plan").

Lead Counsel also respectfully submits this memorandum of law in opposition to objections, which were filed by certain purported absent Class Members, to these Settlement Agreements and the Plan. Class Counsel contemporaneously files a separate brief responding to objections to its request for fees and expenses.

## PRELIMINARY STATEMENT[1]

The Settlements -- the product of twelve years of work by Lead Counsel Constantine, nearly seven years of litigation and months of intensive mediation among the parties -- represent the largest antitrust settlement and largest federal class action settlement in history. They will "transform" the payments industry -- one that has long been distorted by the anticompetitive practices of Visa and MasterCard.[2] The relief they afford are "a grand slam for the merchants,"[3] and the day they were entered into was "a terrific day for consumers."[4]

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[1] References herein to "App. Ex. ___" refer to exhibits attached to the appendix to this motion. Attached as App. Ex. 1 are copies of the unreported decisions cited herein. References herein to "Pet. App. Ex ___" refer to exhibits attached to the appendix of Class Counsel's Fee Petition.

[2] App. Ex. 2; (Jonathan D. Epstein, *Settlement May Also Cut Consumer Costs*, The News Journal (May 2, 2003), *available at* 2003 WL 4788481) (quoting David Balto, former chief of policy office of the Federal Trade Commission).

[3] Pet. App. Ex. 25 (Robert A. Bennett, *The Retailers' Home Run*, Credit Card Management, July 2003, at 24).

[4] Pet. App. Ex. 36 (Chaka Ferguson, *Retailers Win $3B in Debit Card Lawsuit*, Associated Press, May 1, 2003 at 1) (quoting Balto)

The Settlements provide for (1) injunctive relief ending the Honor All Cards ("HAC") tying rules in force for almost thirty years -- relief most conservatively estimated at $ 25.3 billion, most confidently estimated to be worth $ 70.5 billion and potentially worth $ 87.5 billion or more,[5] and (2) $ 3.435 billion of compensatory relief (in present value terms).[6] They also provide Class Members with other significant injunctive relief, such as requiring defendants to place clear and conspicuous visual identifiers, as well as electronic identifiers, on and within their debit cards, and precluding Visa from continuing its monopolistic practices of entering into exclusive arrangements with its member/owner financial institutions for debit issuance for a period when the other core injunctive relief becomes substantially effective. In exchange for this enormous class-wide relief, defendants will be released from all claims by Class Members which had been or could have been made in this action that are related to conduct, engaged in prior to January 1, 2004, which was at issue in this litigation.

Due process was satisfied here. Over eight million copies of the court-approved Notice of Settlement (the "Settlement Notice") were distributed to the five million Class Members by the court-appointed administrator Garden City Group, Inc. The Settlement Notice summarized the Settlements' terms and the claims made in this action. It also provided instructions on how to

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[5] The HAC tying rules forced merchants to accept defendants' fraud-prone signature debit transactions as a condition of access to their dominant credit card transactions.

[6] In his August 14, 2003 declaration valuing the benefits of the Settlements, Professor Fisher estimated the value of the interim interchange rate reductions by using 2002 data published in *The Nilson Report*. Since that time, Visa and MasterCard have released their mid-year debit volumes for 2003. These figures enable a more current projection of Visa and MasterCard debit dollar volumes for the August 1-December 31, 2003 period, and therefore, a more accurate projection of the benefits of the interim interchange rate reductions. Using these figures, the projected value of the interim interchange rate reductions increases from $ 794.4 million to $ 846 million. These new figures also modestly impact the calculation of the benefits of the injunction beyond 2003, which as recalculated range from $ 25.3 billion to $ 87.5 billion, with the most likely estimate being valued at $ 70.5 billon. *See* supplemental Declaration of Franklin M. Fisher dated September 16, 2003 ("Supplemental Fisher Dec.").

review information relating to the Settlements, including Class Counsel's Fee Petition ("Fee Petition") and the Plan -- both of which were filed on August 18, 2003 pursuant to the Court's June 13, 2003 Order. (As described by the Settlement Notice, all this information was posted on the website created by Court order.) A summary notice (the "Summary Notice") was also published in numerous national newspapers, such as *The Wall Street Journal*, and magazines, such as *People, Sports Illustrated,* and *Newsweek*, and significant merchant trade press to ensure the widest notice campaign reasonably possible. The form of the Settlement Notice and Summary Notice were approved by the Court and were distributed in accordance with notice procedures ordered by the Court.

The Plan is fair and reasonable. The Plan provides each Class Member the opportunity to receive a portion of the Net Settlement Funds that is directly proportional to their Visa and MasterCard debit and credit card purchase volume and on-line debit transactions during the Class Period. The formula utilized to calculate these claims will apply equally to all class members whether small, medium or large. Moreover, to minimize the burden on Class Members, and maximize the likelihood that millions of small merchants will submit claims, the Plan will utilize merchant debit and credit data provided by Visa and MasterCard to calculate claims. In short, the Plan provides an effective mechanism to calculate fairly and accurately all Class Member claims.

In light of the economic benefits provided by the Settlements and the fair and meticulous Plan designed to minimize the burden of Class Members, especially small and medium-sized merchants, only 17 objections were filed involving 34 Class Members, *i.e.,* less than one thousandth of one percent of the Class. ***Not a single merchant in this five million member***

***Class has objected to the amount of the compensatory relief or to the core injunctive provisions provided by the Settlements.*** One objector (to the Fee Petition only) characterized the Settlements as follows:

> Objector . . . concedes that . . . this Honorable Court should approve the Settlement. The fact that the class members will be receiving approximately $3.05 billion is an excellent compromise based on the potential damages. Accordingly, there is no reason for any discussion on a formal basis as to the merits of the settlement to class members.

Objector Thomas McMackin's Memorandum of Law at 3-4.

The objections which criticize the substance of the Settlements and/or the Plan have no merit. Among these are the objections of certain Class Members who are also plaintiffs in *uncertified, putative* class actions against Visa and MasterCard.[7] They object to the scope of the releases because they are concerned that these releases will extinguish or limit their claims against Visa and MasterCard. Whether or not that concern is well-founded is irrelevant. The well-settled law shows that the releases are proper and that Class Counsel had the authority to give them, especially since there is no "claim" that these objectors have asserted against defendants in their litigations which is not also a "claim" held by all of the class representatives in this action. Any claims released by the Settlements are released for massive compensation benefitting all Class Members.

Other objectors argue that more information should have been provided in the Settlement Notice. Indeed, they argue that virtually the entirety of the hundreds of pages of the Plan and Fee Petition should have been included in the Settlement Notice, contrary to the Court's June 13 Order. However, the Settlement Notice is extremely detailed and comports with the Court's

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[7] No class certification motion has been filed in these actions.

Order, the law and the practicalities involved in providing relevant settlement information to millions of absent Class Members. Further, as referred to in the Settlement Notice and the Notice of Pendency sent last year, all pertinent information concerning the Settlements was and still is available from the Court files, Class Counsel, the Court-approved Claims Administrator, and the case website. Absent Class Members' due process rights were fully protected by the Settlement Notice.

One objector contends that the Settlement Notice violated due process because it was not also provided in Spanish. The Second Circuit authority on this issue, *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d. Cir. 1983), refutes this contention.

Three objections to the Plan claim that (1) small merchants will be disadvantaged relative to large merchants under the Plan, (2) Lead Counsel's discretion is not sufficiently subject to Court review under the Plan, and (3) "securitization" of the award will put the Settlement Funds at risk. As demonstrated below, these contentions lack merit. The Plan is fair, adequate, reasonable and was designed to ease the burden of small merchants while preserving equality of treatment among all Class Members.

Other objectors claim that Class Counsel's representation has been inadequate because, in their view, Class Counsel has colluded with defendants. Professor Eric Green of Boston University School of Law, the independent mediator in this case, refutes this argument. He states that, "this [is] one of the most intensely mediated cases of which I am aware." Declaration of Eric D. Green, sworn to on September 11, 2003 ("Green Dec."), ¶ 9. Professor Green's conclusions concerning the mediation process are as follows:

> Based on the facts and circumstances presented by this case and my experience in the mediation of anti-trust and class actions, it is my opinion that the settlement was achieved through a fair and reasonable process and is in the best interest of the class. In my opinion, the court system and the mediation process worked exactly as they are supposed to work at their best; a consensual resolution was achieved based on full information and honest negotiation between well-represented and evenly balanced parties.

Green Dec. ¶ 12.

Certain objections are nothing more than "wish lists" comprised of what the objectors or their professional objector counsel want out of the Settlements. Such "wish lists" do not negate the fairness, adequacy or reasonableness of the Settlements.

The Court should approve the Settlements as fair, adequate and reasonable for the following reasons: (1) they are procedurally fair, *e.g.*, they are the product of intense arms' length mediation between experienced counsel, (2) the terms of the Settlements, providing the most extensive relief a class has achieved by judgment or settlement in an antitrust class action, are substantively fair, (3) continued litigation would have confronted Class Members with risk and delay, (4) there is a dearth of objections and (5) the few objections asserted are meritless. Because the Plan is also fair, adequate and reasonable, Class Counsel's separate motion for approval of the Plan should be granted as well.[8]

## STATEMENT OF FACTS

### A. Procedural History

For a recitation of the relevant facts concerning the procedural history of this matter, the Court is respectfully referred to the Declaration of Lloyd Constantine dated August 17, 2003

[8] For purposes of final approval, the Court should evaluate the Plan separately from the Visa and MasterCard Settlement Agreements.

("Constantine Dec."), the Fee Petition and the Supplemental Declaration of Lloyd Constantine dated September 17, 2003 ("Supplemental Constantine Declaration").[9]

**B. The Mediation**

Professor Eric Green, the chief mediator, was retained by the parties in 2002. Green Dec. ¶ 3. The mediation included the "exchange of pertinent written information, an opportunity for both plenary and ex parte sessions with the parties, and sufficient time to have the multiple mediation sessions that a case of this complexity and magnitude required." *Id.* The parties provided Professor Green with "detailed mediation memoranda and supporting documents." *Id.* ¶ 4. "During the course of the mediation, the parties supplemented these materials with key evidentiary materials, documents, deposition transcripts, expert reports, decisional law, motion papers, court orders, and even video tapes of their own mock jury and focus group research." *Id.*

Mediation sessions were attended by attorneys representing the parties, "principals from the lead plaintiff retailers," and executives and financial institution board members of Visa and MasterCard. *Id.* ¶ 6. The mediation was characterized by the "divergent views" that the parties held "on almost every issue." *Id.* ¶ 7. Indeed, "a temporary impasse" was reached by the parties until the Court ruled on the parties' cross-motions for summary judgment. *Id.* ¶ 8.[10]

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[9] This memorandum will reference the Declaration of Harry First dated August 13, 2003 ("First Dec."); the Declaration of Arthur Miller dated August 18, 2003 ("Miller Dec."); the Declaration of John C. Coffee dated August 17, 2003 ("Coffee Dec."); and the Declaration of Franklin M. Fisher dated August 14, 2003 which quantifies the relief provided under the Settlement Agreements ("Fisher Dec.") -- all submitted in support of Class Counsel's Petition for Attorneys' Fees. This memorandum will also reference the Declaration of Franklin M. Fisher dated August 14, 2003 in support of the Plan of Allocation ("Fisher Allocation Dec."); the Declaration of Neil Zola dated September 17, 2003 ("Zola Dec."); the Declaration of Mitchell C. Shapiro dated September 17, 2003 ("Shapiro Dec."); and the Declaration of Wayne L. Pines dated September 17, 2003 ("Pines Dec.").

[10] Jonathan Marks of Marks ADR, LLC was retained to assist Prof. Green with the mediation at this point.

Between April 12 and the week of April 28, when the preliminary Settlements were reached, the parties engaged "in virtual non-stop mediation efforts." *Id.* ¶ 9. The mediation sessions engaged in at this time "often lasted long into the night and on weekends." *Id.* In this respect, Professor Green reports that "[d]uring the mediation a total of 38 ¼ days plus 35.33 hours of mediation time was charged to the parties by me and Mr. Marks, *making this one of the most intensely mediated cases of which I am aware." Id.* (emphasis added).

Based on the foregoing and the relief provided by the Settlements, Professor Green concludes:

> The mediation sessions in this case were conducted on both sides by highly experienced and capable outside and inside counsel who were fully prepared and had an excellent understanding of the strengths and weaknesses of their claims and defenses. The quality of the advocacy on both sides was extremely high. While counsel were professional and cooperative, each side zealously advanced their respective arguments in the best interests of their clients. Moreover, each side demonstrated an unquestionable willingness to go to trial rather than accept a settlement that was not in the best interest of their clients. Indeed, the parties took this case right up to jury selection and opening arguments. They were preparing witnesses and ready to go. At the same time, during the mediation, the parties exchanged many offers and counter-offers and engaged in hard-fought and painful negotiations, ultimately modifying their settlement positions, but generally only in response to powerful arguments and in exchange for offered value.
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> * * *
>
> *[I]t is my opinion that the settlement was achieved through a fair and reasonable process and is in the best interest of the class. In my opinion, the court system and the mediation process worked exactly as they are supposed to work at their best; a consensual resolution was achieved based on full information and honest negotiation between well-represented and evenly balanced parties.*

*Id.* ¶¶ 10, 12 (emphasis added).

### C. The Terms Of The Settlements [11]

The Settlements include:

1. The untying of Visa and MasterCard debit card services to merchants from Visa and MasterCard credit card services to merchants effective January 1, 2004. Visa Settlement Agreement ¶ 4; MasterCard Settlement Agreement ¶ 4.

2. The creation of a $ 3.05 billion settlement fund ("Settlement Fund"). Visa Settlement Agreement ¶ 3(a); MasterCard Settlement Agreement ¶ 3(a).

3. The requirement of clear, conspicuous and uniform visual designations on well over 200 million Visa and MasterCard-branded debit cards. Visa Settlement Agreement ¶ 5; MasterCard Settlement Agreement ¶ 5. Eighty percent of Visa and MasterCard-branded debit cards shall comply with this provision by July 1, 2005, and one hundred percent of Visa and MasterCard-branded debit cards are to bear these designations by January 1, 2007.

4. The requirement of unique electronic identifiers on well over 200 million Visa and MasterCard-branded debit cards. Visa Settlement Agreement ¶ 7; MasterCard Settlement Agreement ¶ 7. Eighty percent of Visa and MasterCard-branded debit cards will have these unique electronic identifiers by July 1, 2005, with one hundred percent of such cards to be in compliance by January 1, 2007.

5. The establishment of lower interim debit interchange rates for the period August 1, 2003 through December 31, 2003, which are substantially lower than those that prevailed on April 30, 2003. The total reduction in interchange for this five month period equals $ 846

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[11] *See also* Class Counsel Fee Pet. at 22-26 for a description of the Settlement's terms.

million. Fisher Supplemental Dec. ¶¶ 4-6.[12] These interim interchange rate reductions are and will continue to compensate merchants for the continued tied acceptance of defendants' debit products prior to the untying on January 1, 2004. Visa's interim debit interchange rates are at least 48 basis points lower for non-supermarkets and $.14 lower for supermarkets. Visa Settlement Agreement ¶ 8. MasterCard's interim debit interchange rates are at least ⅓ lower. MasterCard Settlement Agreement ¶ 8.

6. A two year prohibition on Visa from entering into exclusive arrangements with financial institutions for debit issuance. Visa Settlement Agreement ¶ 10.

7. Significant other injunctive relief ("Other Injunctive Relief") including:

   a. The provision of signage from defendants to merchants communicating the merchant's acceptance of defendants' untied debit products. Visa Settlement Agreement ¶ 6; MasterCard Settlement Agreement ¶ 6.

   b. The requirement that defendants and their member/owner banks hold merchants harmless (for a period of three years) for any charges they incur for a debit transaction that is declined or rejected because the merchant does not accept defendants' debit transactions. Visa Settlement Agreement ¶ 7(e); MasterCard Settlement Agreement ¶ 7(e).

   c. A prohibition on defendants enacting any rules that prohibit merchants from encouraging or steering customers to use forms of payment other than defendants' debit cards, including encouraging and or steering by

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[12] *See supra* footnote 6 for an explanation why Professor Fisher's valuation of the interim interchange rate reductions has changed since he filed his August 14, 2003 declaration, which quantified the relief provided by the Settlements.

discounting other forms of payment. Visa Settlement Agreement ¶ 9; MasterCard Settlement Agreement ¶ 9.[13]

d. Notice provisions requiring defendants and/or their acquirers to provide various forms of advance notice to merchants relating to defendants' different obligations under the Settlement Agreements. Visa Settlement Agreement ¶¶ 4(d); 8(a); MasterCard Settlement Agreement ¶¶ 4(d); 8(a). For example, in the period August-December 2003, no fewer than 25 million notices are being sent by Visa/MasterCard member/owner banks to merchants announcing the January 1, 2004 end of the tying arrangements. Shapiro Dec. ¶ 8.

8. The Court's continuing jurisdiction to ensure compliance with the Settlements. Visa Settlement Agreement ¶ 40; MasterCard Settlement Agreement ¶ 41.

9. In exchange for the above relief, Visa and MasterCard will be released from claims asserted or which could have been asserted by the Class ("Released Claims"). Released Claims relate to defendants' conduct at issue in this lawsuit engaged in prior to January 1, 2004.[14]

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[13] At page 3 of its objection, objector Preston Center Personal Training, Inc. argues that merchants had this right to steer even prior to settlement. This is contrary to the massive amount of evidence that plaintiffs compiled which demonstrates that merchants were precluded from attempting to steer by defendants' rules. *See* Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 64-68; Reply Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 27-28; and Plaintiffs' Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 20. The objectors' counter-factual assertion is conclusory and not supported by the evidence.

[14] Because certain deferred debit cards arguably have both debit and credit card functionality, Visa and plaintiffs agreed to exempt certain small deferred debit programs from the definition of "Visa POS Debit Device" for purposes of the prohibition against tying. These programs were listed in Exhibit H to the Visa Settlement Agreement. After June 5, 2003, Visa became aware of an additional four small deferred debit programs and the parties have agreed to amend Exhibit H to include those programs. A Stipulation and Order detailing this change has been submitted to the Court.

### D. Settlement Notice

The Settlement Notice provided information to absent Class Members, including the following: a summary of the claims made and the history of the action (¶¶ 2-7), a description of the class certification ruling and the effect of the prior Notice of Pendency sent to Class Members (¶¶ 8-11), a description of the Settlements' terms (¶¶ 12-14), pertinent information about the Plan and the Fee Petition (filed on August 18 pursuant to Court order) (¶¶ 15-17), the releases, *verbatim,* as set forth in the Settlement Agreements (¶¶ 18-19), a description of absent Class Member rights to object to the Settlements or opt out of these proceedings (to the extent that such absent Class Member began accepting Visa or MasterCard transactions after June 21, 2002 -- the date of the original Notice of Pendency) (¶¶ 20-32), and instructions on how absent Class Members could receive more information about the Settlements, including by calling a toll free number, contacting the claims administrator or Lead Counsel, or by visiting the website established by Court Order (¶¶ 33-34).[15]

[15] Attached as App. Ex. 3 is a listing of all of the various documents displayed on the case website. These documents include all of the documents submitted in support of Class Counsel's Fee Petition, all documents submitted in support of the motion for approval of the Plan, all documents related to the November 15, 2002 status report concerning notice to the members of the certified class, the operative Complaint in this matter, the class certification order and Second Circuit's affirmance of that order, the Court's summary judgment decision, and of course, the Settlement Agreements. Also on the website is a "Frequently Asked Questions" document (with answers) prepared by Lead Counsel, Constantine & Partners ("C&P"), to assist absent Class Members in their understanding of the Settlements and the Plan. C&P prepared this document even though it was not required to do so by Court order. Shapiro Dec. ¶ 4.

### E. The Plan[16]

The Plan provides each Class Member the opportunity to receive a portion of the Net Settlement Funds directly proportional to its debit and credit purchase volume and on-line debit transactions during the Class Period. It utilizes a methodology developed by Professor Fisher that estimates the amount each Class Member was damaged for each dollar of Visa and/or MasterCard debit or credit transactions, and for each on-line debit transaction, accepted during the Class Period.[17] The Claims Administrator will use this methodology to calculate Class Member damages and claims against the Net Settlement Funds by using debit and credit volumes derived or estimated from the most comprehensive Class Member specific data provided by Visa and MasterCard.[18]

## ARGUMENT

## I. STANDARDS.

Fed. R. Civ. P. 23(e) states, "A class action shall not be dismissed or compromised without the approval of the court . . . ."

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[16] The Plan defines the "Class Period" as the "period of time from October 25, 1992 to June 21, 2003." Under the Plan, "Net Settlement Funds" means the "Visa and MasterCard Gross Settlement Funds, less the amount of the Fee Award and Court-approved expenses, taxes, and costs of notice and administration." *See* Plan at pp. 2, 5.

[17] This methodology is described more fully in the Fisher Allocation Declaration.

[18] Visa and MasterCard provided the Claims Administrator with the most comprehensive merchant specific data that reasonably could be retrieved from their databases. Plan § 2.1. The database Visa provided to the Claims Administrator (hereinafter the "Visa Transactional Database") includes Visa debit and credit transaction counts and dollar volumes broken out by month for each Class Member that accepted Visa transactions at any time between October 1, 1996 and July 31, 2003. *Id.* § 2.2. As a result, the vast majority of the class are identified in this data. MasterCard provided a database that includes MasterCard debit and credit transaction counts and dollar volumes for approximately 5,500 Class Members who accepted MasterCard transactions between June 1, 2001 and June 30, 2003. *Id.* § 2.3.

In determining whether a class action settlement should be approved, the Court must decide whether "the proposed settlement . . . is fair, reasonable and adequate." *Weinberger v. Kendrick,* 698 F.2d 61, 72 (2d Cir. 1982). "The District Court determines a settlement's fairness by examining the negotiating process leading up to the settlement as well as the settlement's substantive terms." *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir. 2001). *See Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983) ("The trial judge determines fairness, reasonableness and adequacy of a proposed settlement by considering (1) the substantive terms of the settlement compared to the likely result at trial, and (2) the negotiating process, examined in light of the experience of counsel, the vigor with which the case was prosecuted and the coercion that may have marred the negotiations themselves.") (internal citations omitted); *Snapp v. Topps Company*, *Inc*., No. 93-CV-0347, 1997 WL 1068687, at *2 (E.D.N.Y. Feb. 12, 1997); *In re Int'l Murex Techs. Corp. Secs. Litig.,* No. 93-CV-336, 1996 WL 1088899, at *3 (E.D.N.Y. Dec. 4, 1996); *Slomovics v. All For A Dollar, Inc.*, 906 F. Supp. 146, 149 (E.D.N.Y. 1995).[19]

Settlement is favored in complex litigation and class action suits. *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 360 (S.D.N.Y. 2002); *In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000) (Gershon, J.) (same); *In re Medical X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL 661515, at *3 (E.D.N.Y. Aug. 7, 1998) (Sifton, J.) (same); *see also In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999) ("Federal courts look with great favor upon the voluntary resolution of litigation through settlement. . . . This rule has

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[19] "An evidentiary hearing is not required unless the objectors raise 'cogent factual objections to the settlement.'" *Malchman*, 706 F.2d at 434 (quoting *Weinberger*, 698 F.2d at 79). *See In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 760 (E.D.N.Y. 1984) (Weinstein, J.) (citations omitted) ("The court may limit its fairness proceeding to whatever is necessary to aid it in reaching a just and informed decision. An evidentiary hearing is not required."), *aff'd,* 818 F.2d 145 (2d Cir. 1987).

particular force regarding class action lawsuits.") (internal quotations and citations omitted); *In re Warner Communications*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985) ("There is little doubt that the law favors settlements, particularly of class action suits.") (citations omitted); A. Conte and H. Newberg, 4 *Newberg on Class Actions*, § 11:41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy.").[20]

"The decision to grant or deny [Rule 23(e)] approval lies within the discretion of the trial court . . ." *In re NASDAQ Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 473 (S.D.N.Y. 1998) (citing *In re Ivan Boesky Sec. Litig.,* 948 F.2d 1358, 1368 (2d Cir. 1991)). This discretion "should be exercised in light of the general policy favoring settlement." *Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003) (citing *Weinberger,* 698 F.2d at 73); *Sheppard v. Consol. Edison Co. of New York, Inc.*, No. 94-CV-0403, 2002 WL 2003206, at *3 (E.D.N.Y. Aug. 1, 2002) (Gleeson, J.) (same). Aware of this discretion, the Second Circuit has held that "[i]f the court approves a settlement based upon well-reasoned conclusions, arrived at after a comprehensive consideration of the relevant factors, the settlement is entitled to

[20] Courts, in general, favor settlement because it saves the parties the expense of trial and promotes judicial economy. *Chatelain v. Prudential Bache Sec.,* 805 F. Supp. 209, 212 (S.D.N.Y. 1992) ("In general, courts look upon the settlement of lawsuits with favor because it promotes the interests of litigants by saving them the expense of trial, and it promotes the interests of the judicial system by reducing the burdensome strain upon it.") (citing *Newman v. Stein,* 464 F.2d 689 (2d Cir. 1972); 3 *Newberg on Class Actions*, at § 9:56 and n. 1 ("In all complex litigation, including class litigation, the resolution of controversies by means of settlement among the parties is favored. . . . Settlement is generally received favorably by the judiciary. . . . There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation.") (citing A. H. Degaris, *The Role of United States District Court Judges in the Settlement of Disputes*, 176 F.R.D. 601 (1998); *Weinberger v. Kendrick*, 698 F.2d at 73).

deference upon review." *In re Warner Communications Sec. Litig.,* 798 F.2d 35, 37 (2d Cir. 1986) (citations omitted).[21]

## II. THE SETTLEMENT AGREEMENTS ARE PROCEDURALLY FAIR.

In reviewing the negotiating process, "courts have demanded that the compromise be the result of arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests." *Weinberger,* 698 F.2d at 74 (citing *Grinnell,* 495 F.2d at 463-66). *See also Trief v. Dun & Bradstreet Corp.*, 840 F. Supp. 277, 280-81 (S.D.N.Y. 1993) (same).

There is a strong initial presumption of fairness when the above factors are met. *See, e.g.*, 4 *Newberg on Class Actions*, at § 11:41; *Thompson*, 216 F.R.D. at 61 ("A strong presumption of fairness attaches to proposed settlements that have been negotiated at arms-length."); *In re Sterling Foster & Co., Inc., Secs. Litig.*, 238 F. Supp. 2d 480, 484 (E.D.N.Y. 2002) (Spatt, J.) (same); *In re Holocaust Victim Assets Litig.,* 105 F. Supp. 2d 139, 146 (E.D.N.Y. 2000) (Korman, C.J.) (same); *Manual for Complex Litigation, Third*, ¶ 30.42 (1995) (A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms-length

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[21] In its recent restatement of the rule that district courts are afforded broad discretion on a Rule 23(e) motion, the Second Circuit has held that:

> [A] trial judge's views are accorded "great weight . . . because he is exposed to the litigants, and their strategies, positions and proofs. . . . Simply stated, he is on the firing line and can evaluate the action accordingly." *The considerable deference accorded to the judgment of the district court is heightened where the trial judge's experience has imparted to the judge a particularly high degree of knowledge.*

*Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 454 (2d Cir. 1974)), *abrogated on other grounds by Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000) (emphasis added). By conducting rigorous analyses of the parties' exhaustive submissions at the class certification, summary judgment and pretrial stages, the district court has achieved such a "high degree of knowledge" on antitrust issues relating to the payments industry. The Court's already broad Rule 23(e) discretion is to be accorded heightened deference.

negotiations between experienced, capable counsel after meaningful discovery."). Because the Settlements are a product of heated arms' length negotiation and are proposed by experienced and effective plaintiffs' counsel, their fairness should be presumed.

### A. The Settlements Are A Product Of Arms' Length Negotiation.

The Settlements, reached after six-and-a-half years of hard fought litigation, were executed after months of intense arms' length bargaining presided over by renowned mediators. *See supra* part B. of the Statement of Facts. Based on his review of the parties' behavior during the mediation, Professor Green concludes:

> *[I]t is my opinion that the settlement was achieved through a fair and reasonable process and is in the best interest of the class. In my opinion, the court system and the mediation process worked exactly as they are supposed to work at their best; a consensual resolution was achieved based on full information and honest negotiation between well-represented and evenly balanced parties.*

*Id.* ¶ 12 (emphasis added). His declaration provides direct and compelling evidence that the Settlements are the result of procedural fairness.

### B. Approval Of The Settlements Is Recommended By Experienced Plaintiffs' Counsel.

#### 1. Experienced Class Counsel Effectively Represented The Class.

The experience of Class Counsel in antitrust litigation assisted it in achieving unprecedented results for the Class. For a recitation of Class Counsel's significant experience in antitrust and class action litigation, the Court is respectfully referred to pages 43-45 of Class Counsel's Fee Petition.

### 2. Class Counsel Reached Settlement After Conducting Full Discovery.

The determination to settle was only reached by Class Counsel and the class representatives after exhaustive and completed discovery, a full certification (not settlement certification) of the class, a substantial plaintiffs' victory at the summary judgment stage, extensive mediation and the impaneling of a jury. *See infra*. part III.C.

## III. THE TERMS OF THE SETTLEMENT AGREEMENTS ARE FAIR, ADEQUATE AND REASONABLE.

When evaluating the "substantive fairness" of a class action settlement, *i.e.*, whether the provisions of a settlement agreement are fair, adequate and reasonable to a class, a district court must consider the following nine factors -- first set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1994), *abrogated on other grounds by Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000) ("*Grinnell* Factors"):

(1) the complexity, expense and likely duration of the litigation;

(2) the reaction of the class to the settlement;

(3) the stage of the proceedings and the amount of discovery completed;

(4) the risks of establishing liability;

(5) the risks of establishing damages;

(6) the risks of maintaining the class action through the trial;

(7) the ability of the defendants to withstand a greater judgment;

(8) the range of reasonableness of the settlement fund in light of the best possible recovery; and

(9) the range of reasonableness of the settlement fund to a possible recovery in light of all

the attendant risks of litigation.

*See D'Amato,* 236 F.3d at 86; *Malchman,* 706 F.2d at 433-34; *Slomovics,* 906 F. Supp. at 149. "All nine factors need not be satisfied, rather, the court should consider the totality of these factors in light of the particular circumstances." *Thompson,* 216 F.R.D. at 61 (citing *D'Amato*, 236 F.3d at 86).

The level of analysis given to determining whether the terms of a proposed class action settlement are substantively fair is inherently a "limited" one. *Weinberger,* 698 F.2d at 74. In this regard, the Supreme Court has noted that, in order to conduct such an analysis, a trial judge must "apprise [] himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). In commenting on the referenced Supreme Court language, the Second Circuit has held that "'all' cannot really mean 'all'. The Supreme Court could not have intended that, in order to avoid a trial, the judge must in effect conduct one." *Weinberger*, 698 F.2d at 74; *see also, Maley,* 186 F. Supp. 2d at 361 (quoting *Grinnell*, 495 F.2d at 462) ("It is not necessary in order to determine whether an agreement of settlement and compromise shall be approved that the court try the case which is before it for settlement . . . Such procedure would emasculate the very purpose for which settlements are made."); *In re Holocaust Victim,* 105 F. Supp. 2d at 149 n.1 (Judge Korman concludes that "I do not and need not 'decide the merits of the case or resolve [the] unsettled legal questions' it presents.") (quoting *Carson v. American Brands, Inc.,* 450 U.S. 79, 88 n.14 (1981)).

### A. The Complexity, Expense And Likely Duration Of The Litigation.

"Few areas of federal antitrust law are more confusing than the law that governs tying arrangements." Herbert Hovenkamp, *Tying Arrangements and Class Actions,* 36 Vand. L. Rev. 213 (1983). Plaintiffs in tying cases, unlike plaintiffs pursuing horizontal price-fixing claims, "[do] not have the comfort of a clear *per se* rule to support their theory." First Dec. ¶ 4. In other words, "a tying arrangement is [not deemed] unreasonable 'without more.'" First Dec. ¶ 9. Rather, in order to prove *per se* liability on a tying theory, plaintiffs must present evidence -- generally in the form of expert economic analysis -- that shows that (1) the tying and tied products are distinct and (2) defendants have economic power sufficient to make forcing probable. Moreover, as Professor First notes, Second Circuit precedent interpreting the seminal Supreme Court case on tying -- *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) -- "has alternated between articulating a requirement that the plaintiff is required to prove 'anti-competitive effects in the tied market' and omitting reference to any such requirement." First Dec. ¶ 12. This Court also took note of the Second Circuit's confusion over the meaning of *Jefferson Parish* in stating that "it is not clear to me whether the Second Circuit's per se standard in fact requires proof of a fifth element, *i.e.*, foreclosure of competition or anticompetitive effect in the tied product market." *In re Visa Check/MasterMoney Antitrust Litig.,* No. 96-CV-5238, 2003 WL 1712568, at *5 (E.D.N.Y. Apr. 1, 2003) (citations omitted). For this reason (among others) and even though plaintiffs established four elements of their tying claims against Visa and three elements of their tying claims against MasterCard on summary judgment, the Court required plaintiffs to make a complex, competitive effects showing at trial. *Id.* at *5-6.

The complexity of this case is further demonstrated by the fact that tying claims have never been fully litigated in the context of the payments industry before. This Court noted this when it stated that "there are several *unique features* of this case -- the relationship between the merchants and the defendants, the relationship between the defendants themselves (and among their member banks), the nature of the tying arrangements, and the ultimate effects of these arrangements on consumers -- that will benefit from further development at trial." *Id.* at *5 (emphasis added).

These factors lead Professor First to conclude that plaintiffs had a strong, but complex case, to prove to the jury.

> The net effect of [the] developments in the law and economics of tying is that plaintiffs in tying cases cannot safely rely on *per se* presumptions to carry their case. In one way or another, a plaintiff in a tying case will be required to convince the fact finder that the tying arrangement will likely produce adverse economic effects and will need to meet the defendant's efficiency justifications for the tying arrangement. *This means that the plaintiffs' apparently simple case would not be so simple.*

First Dec. ¶ 17 (emphasis added).[22] The complexity of plaintiffs' tying case was mirrored in the plaintiffs' equally strong and complex Sherman Act Section 2 attempt to monopolize claim. This claim was based upon facts identical to plaintiffs' Section 1 claim and required a showing of anticompetitive effects and injury to competition under the rule of reason.

The fact that this case was pursued as a class action -- with the risk of possible decertification in the future -- increased the complexity of their case significantly. *See In re Visa Check/MasterMoney Antitrust Litig.,* 192 F.R.D. 68, 89 (E.D.N.Y. 2000) ("If factual or legal

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[22] *See also* First Dec. ¶ 64 ("the antitrust case plaintiffs filed against Visa and MasterCard was a very complicated one, presenting on virtually every legal point, unique issues with uncertain outcomes.")

underpinnings of the plaintiffs' successful class certification motion are undermined once they are tested under a more stringent standard . . . , a modification of the order, or perhaps decertification, might then be appropriate."); Herbert Hovenkamp, *Tying Arrangements and Class Actions,* 36 Vand. L. Rev. 213 (1983) (lawsuits alleging illegal tying arrangements that are brought as class actions "vastly complicate[] the economic analysis of the potential harms of [the questioned] tying arrangements").

While Class Counsel was successful in achieving class certification (and having the class certification Order affirmed) and having plaintiffs' motions for summary judgment substantially granted, plaintiffs would have had to overcome barriers at trial, on post-trial motion practice and on appeal to establish liability and damages on their tying and attempt to monopolize claims. Assuming a victory for plaintiffs, they would likely have had to wait, at the very least, until much later when their favorable judgment would be affirmed and a petition of *certiorari* was denied by the Supreme Court. After plaintiffs' summary judgment victory, Visa's spokesperson stated that, in the event of a ruling against Visa at trial, "the case might not be resolved until 2007, when all appeal avenues -- including the Supreme Court -- would have been exhausted." Pet. App. Ex. 38 (*Visa to Cite First Data-Concord Deal*, The American Banker, April 11, 2003, at 18.)[23] If the class had to wait until 2007 to untie debit from credit, the Class would continue to be injured substantially. Professor Fisher estimates most conservatively that the damage to the Class for being forced to accept defendants' off-line debit products in **2004, 2005 and 2006**

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[23] Based on the defendants' class certification strategy, their strategy in other antitrust cases and the massive monetary risks defendants faced in this matter, there can be no doubt that defendants would have exhausted their appellate rights if plaintiffs were victorious at trial. *Id. See, e.g., SCFC ILC, Inc. (Mountainwest) v. Visa U.S.A. Inc.,* 36 F.3d 958 (10th Cir. 1994) (Visa achieves reversal of jury verdict in antitrust case), *cert. denied*, 515 U.S. 1152 (1995).

would equal (in present value terms) approximately **$ 6.44 billion**. Supplemental Fisher Dec. Ex. FVD-2 Updated.

The fact that this matter was exceedingly complex, would be expensive to pursue and would likely not be resolved for years even in light of a plaintiff victory at trial provides additional support for approval of the Settlement Agreements. *Maley*, 186 F. Supp. 2d at 362 (approval granted where "[d]elay, not just at the trial stage but through post-trial motions and the appellate process, would cause Class Members to wait for years for any recovery, further reducing its value"), *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 2002 WL 31663577, at *22 (S.D.N.Y. Nov. 26, 2002) (approval granted where "[s]ettlement at this juncture results in a substantial and tangible present recovery, without the attendant risk of appeal and delay of trial and post-trial proceedings"), *appeal pending*, No. 03-0711 (2d Cir. argued Aug. 4, 2003); *Slomovics*, 906 F. Supp. at 149 (approval granted where "[t]he potential for this litigation to result in great expense and to continue for a long time suggest[s] that settlement is in the best interests of the Class").[24]

**B. The Reaction Of The Class To The Settlement.**

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Maley*, 186 F. Supp. 2d at 362 (citation omitted); *see* 4 *Newberg on Class Actions*, at § 11.41 ("With respect to objections to [a] settlement, a certain number of objections are to be expected in a class action with an extensive

[24] The *In re NASDAQ* court granted approval to a settlement of claims concerning horizontal price-fixing which it described as "particularly complicated." 187 F.R.D. at 477. In many ways, however, the legal and evidentiary burdens faced by plaintiffs in *In re NASDAQ* were less complex than those faced by plaintiffs here. *See, e.g.,* First Dec. ¶¶ 70, 71 (noting that, unlike the *per se* rule in tying cases, the "*per se* rule for horizontal price fixing is clear and beyond challenge" and that the "core theory for damages" asserted in *In re NASDAQ* is "well-accepted"); Fee. Pet. at 56-58.

notice campaign and a potentially large number of class members. If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.") The Second Circuit recently reaffirmed this principle. *D'Amato*, 236 F.3d at 86 (where only 18 objections were received in a class action where 27,883 notices were sent, the Second Circuit held that "[t]he District Court properly concluded that this small number of objections weighed in favor of the settlement").

In the instant case, 8,148,276 Settlement Notices were sent to approximately five million Class Members. Only 17 total objections, involving 34 objectors, were received. Accordingly, less than one thousandth of one percent of the Class Members raised objections. This exceedingly low number of objections (roughly one two hundredth of the magnitude deemed "small" in *D'Amato*) evidences the adequacy of the settlement and militates in favor of approval. *See Bell Atlantic Corp. v. Bolger,* 2 F.3d 1304, 1313 (3d Cir. 1993) (characterizing as an "infinitesimal number" the less than 30 of approximately 1.1 million class members who objected); *Sheppard*, 2002 WL 2003206 at *4 (court approved settlement when only 28 opt outs from 2,406 class members, amounting to approximately one percent of the class, and four absent class members object to settlement);[25] *Thompson*, 216 F.R.D. at 62 (court approves settlement when less than .05% of class members object to settlement). *See In re NASDAQ*, 187 F.R.D. at 479 (citing, with approval, *Stoetzner v. U.S. Steel Corp.,* 897 F.2d 115, 118-119 (3d Cir. 1990) -- a case holding that approval was warranted even where 10% of the class objected -- and *Boyd v.*

[25] One hundred fifty-four new Class Members -- those who began accepting Visa and MasterCard since June 21, 2002 chose to opt out. These new Class Members were given an opportunity to opt out of the class by September 5, 2003. *See* Judge Gleeson Order dated June 13, 2003 at 9. In total, only 6,195 Class Members chose to opt out. Zola Dec. ¶ 18.

*Bechtel Corp.,* 485 F. Supp. 610, 624 (N.D. Cal. 1979) -- a case holding that approval was warranted even where 16% of the class objected.) Most importantly, *none of the objectors have taken issue with the unprecedented and enormous compensatory relief or with the core provisions of the historic injunction which Class Counsel has secured for the benefit of the Class.*

Moreover, it is notable that, after the Settlements were reached, very large and sophisticated merchants that opted out, *i.e.,* subsidiaries of Ford Motor Company and AT&T, attempted to opt back in. Shapiro Dec. ¶ 7

**C. The Stage Of The Proceedings And The Amount Of Discovery Completed.**

The fact that this litigation settled after years of discovery, fiercely contested motion practice and the impaneling of a jury militate in favor of settlement approval.

In determining whether settlement approval is appropriate, courts have focused on whether "plaintiffs' counsel . . . have engaged in the discovery [] necessary to effective representation of the class's interests." *Weinberger,* 698 F.2d at 74 (citation omitted). *"If all discovery has been completed and the case is ready to go to trial,* the court obviously has sufficient evidence to determine the adequacy of settlement." 4 *Newberg on Class Actions*, at § 11:45 (emphasis added). *See also Slomovics*, 906 F. Supp. at 150 (court approves settlement even where "discovery was not completed").

The Constantine Declaration describes the massive and intensive discovery in the matter -- discovery which provided plaintiffs' counsel with requisite information concerning the

strengths of plaintiffs' case, the value of plaintiffs' claims and the risks of pursuing further litigation on behalf of the class.[26] These efforts included:

- a review of approximately 5 million pages of documents;
- almost 400 depositions involving more than 500 days of depositions;
- discovery from roughly 200 non-parties;
- 54 expert reports; and
- 21 expert depositions over 46 days.[27]

Moreover, the voluminous motion practice demonstrates that the Court is extremely familiar with the record. This motion practice included:

- extensive class certification briefing;
- 16 summary judgment briefs along with almost 1,800 exhibits, 38 declarations, and hundreds of additional pages in Rule 56.1 statements and other submissions;
- a motion by the United States to intervene and obtain Class Counsel's work product, a motion to dismiss Wal-Mart, a motion to sever the trials of Visa and MasterCard, a motion concerning the applicability of Visa's claim of work product privilege over a 1997 Andersen Consulting analysis that substantially confirmed plaintiffs' damages analysis, a motion for Rule 11 sanctions to preclude the operative complaint; and
- 31 motions *in limine* and 4 *Daubert* motions.[28]

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[26] The parties had also engaged in protracted mediation sessions by the time the action was settled. *See* Green Dec.; *Sheppard*, 2002 WL 2003206 at *5 (court notes that parties that had engaged in "protracted settlement negotiations," in addition to intense discovery and pretrial proceedings, "were in a position to make informed judgments about the merits of the case and the [s]ettlement").

[27] Constantine Dec. ¶¶ 7, 14-19, 23-26.

[28] Constantine Dec. ¶¶ 80, 82, 84, 86 (regarding summary judgment motions), 140-142 (regarding motions in *limine*) and 33, 93-100, 134-35 (regarding other substantive motions).

The record demonstrates that Class Counsel has sufficient knowledge regarding plaintiffs' claims to propose these Settlements. The Court, based on the voluminous motion practice, likewise has sufficient knowledge upon which to evaluate the fairness, adequacy and reasonableness of the Settlement Agreements. *See Maley*, 186 F. Supp. 2d at 363 ("To approve a settlement, [a court] need not find that the parties have [even] engaged in extensive discovery.") (quoting *In re American Bank Note Holographics, Inc. Secs. Litig.,* 127 F. Supp. 2d 418, 425-26 (S.D.N.Y. 2001)); 4 *Newberg on Class Actions*, at § 11:45 (while, in order to approve a settlement, a court must have "sufficient evidence to enable [it] to analyze intelligently the contested questions of fact . . . , [it] need not possess evidence to decide the merits of the issue . . . .").

**D. The Risks Of Establishing Liability.**

While plaintiffs are confident that they would ultimately prevail, especially in light of the summary judgment decision, there is some risk that they would not establish liability on their claims. For example, it is "unclear" whether "plaintiffs would have been able to convince the courts to apply a *per se* rule to this tying arrangement alleged in this case . . ." First Dec. ¶ 38. *See also In re Visa Check*, 2003 WL 1712568 at *5 (Court does not invoke the *per se* rule at summary judgment stage). This risk of having to establish liability under an unclear *per se* rule or under the more searching rule of reason standard (which also clearly applies to plaintiffs' attempt to monopolize claim) also militates for settlement approval. *See Robertson v. Nat'l Basketball Ass'n*, 72 F.R.D. 64, 69 (S.D.N.Y. 1976) (settlement approval granted where "[t]here are risks to the class of establishing liability absent a convincing showing that the disputed practices constitute a *per se* violation of the Sherman Act.")

### E. The Risks Of Establishing Damages.

With respect to plaintiffs' damages claims, the Court held that, for purposes of class certification, "plaintiffs have established to my satisfaction that, in the 'but for,' untied world, defendants would have been compelled to lower their interchange fees for off-line debit cards and would not have raised the credit card interchange fees." *In re Visa Check,* 192 F.R.D. at 84. At the summary judgment stage, the Court further held that "the merchants have presented a sufficiently compelling (and factually-supported) theory of damages to warrant a trial of the issue." *In re Visa Check,* 2003 WL 1712568 at *8. Nevertheless, as revealed in defendants' summary judgment briefs, their class certification submissions and the deposition of Dr. Fisher, a focal point of their trial strategy -- if not the main focus -- was going to be an attack on plaintiffs' damages theory. While Class Counsel was confident, there was risk involved in ultimately proving plaintiffs' damages to the jury's satisfaction because their antitrust damages theory was based on the construction of a hypothetical world (where defendants had not engaged in their anticompetitive conduct).[29] Indeed, because antitrust damages are typically based on such "but for" worlds, "the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." *In re NASDAQ,* 187 F.R.D. at 476. *See United States Football League v. Nat'l Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) (jury finds liability against NFL but only awards nominal damages to plaintiff), *aff'd*, 842 F.2d 1335 (2d Cir. 1988). The risk of

[29] Professor First describes plaintiffs' burden of proof on damages as follows: "To be successful [plaintiffs] not only were required to deal with the issue of whether they needed to show an increase in the package of the tying and tied product, or just the tied product, but, more importantly, they had to be able to construct a probable 'but for' world of these two markets without a contractually imposed tie between them." First Dec. ¶ 62. *See also* Supplemental Expert Report of Franklin M. Fisher dated September 23, 2002 at Part III.

establishing damages weighs in favor of settlement approval. *See Slomovics*, 906 F. Supp. at 149-150 (settlement approval granted where "even if liability is established, plaintiffs will face the problems and complexities inherent in showing damages . . . .")

**F. The Risks Of Maintaining The Class Action Through Trial.**

While the class certification order was affirmed by the Second Circuit and the Supreme Court denied *certiorari*, it is possible, although unlikely in Class Counsel's estimation, that the class could be decertified if litigation continued. This possibility was noted by the Court in its class certification order. *In re Visa Check,* 192 F.R.D. at 89 ("If factual or legal underpinnings of the plaintiffs' successful class certification motion are undermined once they are tested under a more stringent standard . . . , a modification of the order, or perhaps decertification, might then be appropriate."). Indeed, in its May 26, 2000 Order, the Court stated that it would "[a]t an appropriate time, . . . permit the defendants to make a class decertification motion." App. Ex. 4. Thus, given defendants' consistent use of every available mechanism to complicate and prolong this matter, it was inevitable that plaintiffs would face a decertification motion either in the midst of trial, post-trial or both. This additional risk factor supports settlement approval. *See In re NASDAQ,* 187 F.R.D. at 476 (settlement approved where "there is no guarantee that this class would not be decertified before or during trial").

**G. The Ability Of The Defendants To Withstand A Greater Judgment.**

The present value of the compensatory relief here equals $ 3.435 billion. This sum includes the present value of the common fund established by the Settlements, which is $ 2.589 billion (Fisher Dec. ¶¶ 47-50), and the value of the interim interchange reductions made by the banks in effect between August 1, 2003 and December 31, 2003, which is $ 846 million (Fisher

Supplemental Dec. ¶¶ 4-6). If approved, the compensatory relief "by itself" will comprise "the largest settlement ever approved by a federal court." Coffee Dec. ¶ 12. The quantified value of only some provisions of the injunctive relief achieved by the Settlements, according to Dr. Fisher, is most conservatively estimated at $ 25.3 billion, is most likely worth approximately $ 70.5 billion and could potentially be worth as much as $ 87.5 billion or more. Fisher Supplemental Dec. ¶ ¶ 7-8. "The projected benefits from this action are an order of magnitude greater than any benefits that have ever been presented to any court in the context of class action litigation." Coffee Dec. ¶ 12. S*ee also* Miller Dec. ¶ 15 ("the result achieved for the Class in this case far exceeds the recovery secured by way of settlement in all other antitrust class actions"); First Dec. ¶ 4 (the settlement constitutes "the largest private damages settlement of an antitrust case in history"). The press, banking industry and antitrust bar have heralded the magnitude of this relief as "groundbreaking,"[30] "stunning,"[31] "the stuff of dreams,"[32] "revolutionary,"[33] and "a grand slam for the merchants."[34] No Class Member has objected to the amount of compensatory relief or the core injunctive relief, *i.e.*, the new found freedom that they will have because of the elimination of the HAC tying rules.

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[30] Pet. App. Ex. 22 (James J. Daly, *Legal Overload?*, Credit Card Management, August 2003, at 4).

[31] Pet. App. Ex. 19 (Robert H . Lande, *Commentary: A New Future for Debit Cards*, The Daily Record, July 18, 2003, *available at* 2003 WL 10167680).

[32] Pet. App. Ex. 23 (Sarah Henderson, *US Swipes Card Sharps*, Herald Sun (Melbourne), May 28, 2003, at 18).

[33] Pet. App. Ex. 24 (James J. Daly, *Cards Uncorked*, Credit Card Management, July 2003, at 4).

[34] Pet. App. Ex. 25 (Robert A. Bennett, *The Retailers' Home Run*, Credit Card Management, July 2003, at 24).

All this aside, the Court should examine whether defendants could have withstood contributing an even greater amount by a judgment secured after continued litigation. In the very least, it is questionable whether defendants would have been able to pay for a greater judgment without assessing their member banks. For example, following the Settlements, Visa has imposed a "settlement service fee" on debit issuing member/owners that attempt to leave Visa or whose Visa debit card volume falls by over 10%. *See* App. Ex. 5 (Jathon Sapsford and Mitchell Pacelle*, Visa Puts Squeeze on Defectors,* The Wall Street Journal, August 5, 2003, at C12). Visa has apparently passed this rule to ensure that its operating revenue will provide it with sufficient funds to pay for the compensatory portion of the Settlement.

Moreover, noted payments industry sources have speculated that the massive damages awards sought by plaintiffs could bankrupt the associations. *See* App. Ex. 6 (*Banks Await Wal-Mart Antitrust Case Outcome With Trepidation,* The Banker, Vol. 152, Issue 917, July 1, 2002, *available at* 2002 WL 19007913) ("[t]he forthcoming court case could push Visa and MasterCard in the US into bankruptcy . . . ." )); App. Ex. 7 (Lavonne Kuykendall*, Appeal on Class Nixed, Visa/MC Suit Nears Trial,* The American Banker, Vol. 167, No. 111, June 11, 2002) (noting industry experts that state that "[i]f the merchants win, the high damages they are seeking could force Visa and MasterCard into bankruptcy")); App. Ex. 8 (John R. Wilke, *Visa, MasterCard Face Huge Potential Damages In Suit,* The Wall Street Journal, June 6, 2002, *available at* 2002 WL-WSJ 3396962) ("It's unlikely that the suit will ultimately result in Visa and MasterCard paying $39 billion. If the merchants prevail in court, the two credit-card companies could declare bankruptcy . . . .")).

Even were the Court to find that defendants had the capacity to pay a judgment greater than that achieved here, which is the largest antitrust recovery in U.S. history by settlement or judgment, this would not warrant disapproval of the Settlement Agreements. In *D'Amato,* 236 F.3d at 86, objectors argued that a settlement concerning reparations to Holocaust victims should not be approved because the Austrian bank defendants could have withstood a greater judgment. In affirming the district court's approval of that settlement, the Second Circuit held:

> The District Court explicitly acknowledged that the defendants' ability to withstand a higher judgment weighed against the settlement, but explained that this factor, standing alone, does not suggest that the settlement is unfair. This conclusion cannot be considered an abuse of discretion, given that other *Grinnell* factors weigh heavily in favor of settlement.

*Id.* (citations omitted). *See also Sheppard*, 2002 WL 2003206 at *5 (court approves settlement even though defendant "concedes that it is able to withstand a greater judgment"); *In re NASDAQ,* 187 F.R.D. at 477-78 ("[w]hile it appears that [d]efendants, which include some of Wall Street's most successful firms, would be able to pay a very substantial judgment collectively, that fact does not militate against settlement.").

### H. The Range Of Reasonableness Of The Settlement Fund In Light Of The Best Possible Recovery.

A class action "settlement may be approved if it is clear that it secures some adequate advantage for the class. The settlement does not have to be a brilliant one in order to secure judicial approval." 4 *Newberg on Class Actions,* at § 11:46. In *Grinnell,* 495 F.2d at 455 and n. 2, the Second Circuit held that settlements that provide for only a small fraction of the claimed relief can be granted approval:

> The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.
>
> * * *
>
> In fact, there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.

The Settlements confer much more than an "adequate advantage" on the Class. Rather, in addition to providing over $ 3.435 billion in compensatory relief to the Class, they "substantially remove the obstacles to competition emanating from the HAC tying rules and the exclusionary conduct that those rules enabled. This will result in substantial savings in costs to merchants extending well into the future." Fisher Dec. ¶ 14. Indeed, because "in this case . . . it is the prospective relief that represents the greatest achievement," (Coffee Dec. ¶ 13)[35] and because the prospective relief achieved accounts, in the very least, for everything that plaintiffs originally sought by way of such prospective relief, the Settlements should be approved.

The recovery -- the largest in federal class action history and in antitrust class action history -- can be presently valued as follows:

- Common Fund: $ 2.589 billion[36]
- Interim Interchange Reductions: $ 846 million[37]

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[35] *See* Pet. App. Ex. 37 (David A. Balto, *Life After the Wal-Mart Case,* Credit Card Management, Vol. 16, No. 5, August 2003, at 48) (Former head of policy office of Federal Trade Commission's Bureau of Competition contends that "[t]he centerpiece of the settlement is the elimination of the HACRs," or defendants' Honor All Cards tying arrangements).

[36] Fisher Dec. ¶¶ 47-52.

[37] Fisher Supplemental Dec. ¶¶ 4-6.

- Injunctive Relief Over Ten Years: $ 25.3 - 87.5 billion[38]

The massive relief achieved on behalf of the Class is plainly reasonable.

E*ven if the Court were only to compare the value of the compensatory relief ($3.38 billion) against the claimed damages prior to trebling ($24.9 billion to $31.6 billion)* ***and disregard the enormous injunctive relief that will be provided to the Class as a result of the Settlements***, it should conclude that the Settlements fall well within the range of reasonableness.[39] Under this measure, plaintiffs recovered between 10.7% and 13.6% of the total monetary damages sought. This is between five and seven times better than the typical 2% recovery cited by Professor Coffee concerning settlements exceeding $1 billion. Coffee Dec. ¶ 17 (citing Cornerstone Research, "Post-Reform Act Securities Case Settlements, Cases Reported through December 2002" (2003)). Another study cited by Professor Coffee "illustrate[s] just how 'off the charts' this recovery was" and shows that the recovery here is "over 600 times the average class action settlement in the most 'generous district court' in this study." *Id.* ¶ 19 (citing Thomas E. Willging, Laural L. Hooper, Robert J. Niemic, AN EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: Final Report to the Advisory Committee on Civil Rules (1996)).

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[38] Fisher Supplemental Dec. ¶¶ 7-8 (most confidently $ 70.5 billion).

[39] It is appropriate to compare the compensatory relief achieved under the Settlement Agreements to pre-trebled damages rather than post-trebled damages. *See County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1324 (2d Cir. 1990) ("we note the district judge correctly recognized that it is inappropriate to measure the adequacy of a settlement amount by comparing it to a possible trebled base recovery figure"); *Grinnell*, 495 F.2d at 458 ("[t]here are strong reasons why trebling is improper when computing a base recovery figure which will be used to measure the adequacy of a settlement offer"); *In re Domestic Air Transp. Antitrust Litig.,* 148 F.R.D. 297, 319 n.25 (N.D. Ga. 1993) ("[i]n analyzing the range of possible recoveries, the Court will consider an estimate of single, rather than treble, damages").

Finally, in comparing the settlement recovery to what could have been possibly achieved for the Class through further litigation, the Court should take account of the core untying relief and the Other Injunctive Provisions. *See supra* Statement of Facts part C. This entire package of injunctive relief will enhance competition in the credit and debit markets for the benefit of merchants and consumers.

As Professor Fisher states:

> The competitive pressure on Visa and MasterCard to reduce their interchange rates will continue to escalate after January 1, 2004 as the remainder of the injunctive relief goes into effect [*i.e.,* the injunctive relief other than the untying provision]. For example, under the Settlements, 80% of Visa and MasterCard POS Debit Devices must have visual and electronic identities distinct from Visa and/or MasterCard credit cards by July 1, 2005, with all such cards having those properties by January 1, 2007. These provisions, and the reduction and likely elimination of bank tactics to penalize on-line debit use, will eliminate the barriers that prevented merchants from cost-effectively steering transactions to on-line debit. With those barriers gone, merchants will be able to discipline debit pricing by steering transactions to lower cost networks. This trend likely will force Visa and MasterCard and the Regional networks to compete for debit volume by lowering their prices to merchants. For this reason, I have concluded that debit pricing likely will fall further over time with the rates falling below, perhaps well below, the current on-line debit rates.

Fisher Dec. ¶ 7.

## I. The Range Of Reasonableness Of The Settlement Fund To A Possible Recovery In Light Of The Attendant Risks Of Litigation.

Class action settlements should be approved when "[t]he unpredictability of a lengthy and complex trial, and the appellate process that would follow, with the risk of reversal, make the fairness of [a] substantial settlement readily apparent." *Maley*, 186 F. Supp. 2d at 366. *See, e.g.*, *In re Holocaust Victim,* 105 F. Supp. 2d at 148 (court approves settlement when measuring adequacy and reasonableness of settlement "against the practical alternative to the settlement in

the real world"). As described above, these Settlements -- the largest in antitrust class action -- offer substantial benefits to the Class Members *now* as opposed to the continued risk and delay offered by further litigation. If the Class had to wait until 2007 to untie debit from credit, as it would according to Visa's spokesman if defendants pursued an appellate strategy, it is estimated (most conservatively) that the Class would be damaged by approximately **$ 6.44 billion**. Supplemental Fisher Dec. Ex. FVD-2 Updated. The Settlements should thus be approved.

## IV. THE OBJECTIONS ARE MERITLESS.

### A. The Releases Granted Are Proper.

Absent Class Members Reyn's Pasta Bella, LLC, Jeffrey Ledon Deweese, M.D., Barry Leonard d/b/a Critter Fritters, and Hat-In-The-Ring, Inc. d/b/a Eddie Rickenbacker's (the "Pasta Bella Objectors") object to the release provisions of the Settlements as being overbroad. Absent Class Member NuCity Publications, Inc. ("NuCity") likewise objects to these provisions. As explained further below, the Pasta Bella Objectors and NuCity are plaintiffs in putative, uncertified antitrust class actions that name Visa and MasterCard as defendants.[40] The Pasta Bella Objectors and NuCity are concerned that the releases will extinguish or limit their claims. Whether that is true or not is irrelevant to the instant motion because the releases are proper.[41]

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[40] These actions will hereinafter be referred to as *Pasta Bella* and *NuCity*.

[41] Absent Class Members (1) 710 Corp., (2) Leonardo's Pizza By The Slice, Inc. ("Leonardo's Pizza") and (3) Young Pioneers, Inc., Mobil Town U.S.A., Inc., Y.P.I., Inc., John Wenturine, Joe Vaca, Inc. f/k/a X-Cel Unlimited, SG&J Enterprises, NSG Enterprises, Inc. and G&G Enterprises (collectively, "Young Pioneers") also conclusorily object to the scope of the release provisions. *See* 710 Corp. and Leonardo Pizza's Preliminary Objections to Proposed Settlement ("710 Corp./Leonardo's Pizza Obj.") at 7-8; Young Pioneers' Objections to Proposed Class Action Settlement Agreement ("Young Pioneers Obj.") at 4-5. For the reasons described herein, these objections are meritless.

### 1. The Scope And Propriety Of The Releases.

Plaintiffs granted identical *limited* releases to the defendants in the Settlements. The releases discharge all class claims:

> relating in any way to *any conduct prior to January 1, 2004 concerning any claims alleged in the Complaint or any of the complaints consolidated therein*, including, without limitation, claims which have been asserted or could have been asserted in this litigation which arise under or relate to any federal or state antitrust, unfair competition, unfair practices, or other law or regulation, or common law, including, without limitation, the Sherman Act, 15 U.S.C. § 1 et. seq.

Visa Settlement Agreement ¶ 28 (emphasis added). Accordingly, only claims that were or could have been brought that related to the "conduct" referenced in the instant action were released.[42]

Well-settled precedent demonstrates the propriety of the releases in this case. For example, the Second Circuit has held that:

> in order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action *even though the claim was not presented and might not have been presentable in the class action.*

*TBK Partners, Ltd. v. Western Union Corp.,* 675 F.2d 456, 460 (2d Cir. 1982) (emphasis added); *see also Robertson*, 622 F.2d at 35 (holding that individual claim that was a variation of antitrust claim pursued in class action was extinguished due to class action settlement release).

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[42] 710 Corp./Leonardo's Pizza argue that "some future claims which are related but may be more serious will be released allowing Class Members no relief from future damages which have not yet been detected." 710 Corp./Leonard's Pizza Obj. at 8. This is factually incorrect. The release provisions only release and discharge Visa and MasterCard from claims relating to "conduct prior to January 1, 2004 concerning any claims alleged in this Complaint or any of the complaints consolidated therein. . ." *See, e.g.,* MasterCard Settlement ¶ 30. Accordingly, Visa and MasterCard conduct unrelated to this "conduct" or related to this conduct, *but occurring on or after January 1, 2004*, are not released.

Although courts regularly uphold releases that discharge claims explicitly asserted in the settled class action litigation as well as claims that "could have" or "might have" been brought, other courts have gone further. For example, in *Matsushita Electric Indus. Co., Ltd., v. Epstein,* 516 U.S. 367, 377 (1996), the Supreme Court, following Delaware state law, held that settlements that even release claims that "could not have been raised in the court that rendered the settlement judgment" for jurisdictional reasons are appropriate. *See also Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1288 (9th Cir. 1992) (quoting *Officers for Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 632 n.18 (9th Cir. 1982) with emphasis) ("where a particular type of relief potentially available to the class members is compromised in the settlement process, *it is mainly irrelevant whether or not that relief was specifically requested in the complaint.* The breadth of [settlement] negotiations is not necessarily strictly confined by the pleadings"); *In re Corrugated Container Antitrust Litig.,* 643 F.2d 195, 221 (5th Cir. 1981) (quoting *Patterson v. Stovall*, 528 F.2d 108, 110 n.2 (7th Cir. 1976)) ("The weight of authority establishes that . . . a court may release not only those claims alleged in the complaint and before the court, but also claims which 'could have been alleged by reason of or in connection with any matter or fact set forth or referred to in' the complaint."); *City Partnership Co. v. Atlantic Acquisition Ltd. Partnership,* 100 F.3d 1041, 1044 (1st Cir. 1996) (same); *In re Lloyd's,* 2002 WL 31663577, at *11 ("[c]ourts have permitted class action settlements to release unasserted claims . . ."); *Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 470-72 (S.D. Fla. 2002) (same); *In re NASDAQ,* 187 F.R.D. at 482 ("it is not unusual for releases in class actions to cover not only the claims that have at one time or another actually been alleged, as here, but also 'all claims that might be asserted in connection with the action.'") (quoting *TBK*, 675 F.2d at 459).

Courts have recognized the rationale for providing these type of releases. In *In re Prudential Ins. Co. of Am. Sales Practice Litig.,* 261 F.3d 355, 366-67 (3d Cir. 2001), the Court reaffirmed its approval of a release provision that was "intended to be very broad." The class action settlement in *In re Prudential* released claims "that have been, could have been, may be or could be alleged or asserted now or in the future by Plaintiffs or any Class Member against the Releasees . . . on the basis of, connected with, arising out of, or related to, in whole or in part, to the Released Transactions and servicing relating to the Released Transactions. . . ." *Id.* at 367 (emphasis omitted). In noting the propriety of the release and refuting the class members' argument that the injunction stemming from the release was overbroad, the Third Circuit held that "the position urged by [the petitioning class members] would seriously undermine the possibility for settling any large, multi district class action. Defendants in such suits would always be concerned that a settlement of the federal class action would leave them exposed to countless suits . . . despite settlement of the federal claims." *Id.*

The releases are thus well supported by law.

**2. The Overlap Of *Pasta Bella*, *NuCity* And The Instant Case.**

To support their claims that the releases are overbroad, the Pasta Bella Objectors and NuCity argue that the releases discharge "conduct" of the defendants not sufficiently related to this case. The clear wording of the releases refutes this argument. And, as stated above, it is for a court -- not Class Counsel -- to decide whether the claims of the Pasta Bella Objectors or NuCity relate to "conduct" at issue in this ligation and thus, whether under the properly granted and properly circumscribed releases, some of the *Pasta Bella* and *NuCity* claims have been released.

Nevertheless, in making this argument, the Pasta Bella Objectors and NuCity argue that the factual predicates to their claims are different than those which supported the Class' claims here. *See* Objections to Settlements by Pasta Bella Objectors ("Pasta Bella Obj.") at 5 (arguing that the claims alleged in the case at bar are "clearly . . . different" from their claims in the *Pasta Bella*); NuCity Publications, Inc.'s Notice of Intention to Appear at the Fairness Hearing and Objections to the Proposed Settlements ("NuCity Obj.") at 9 (arguing that claims are "entirely different").

NuCity makes this argument, even though *the other sixteen class representatives in NuCity* -- all of whom are absent Class Members in this case -- do not.[43] In fact, in complete opposition to all of NuCity's arguments, four of its fellow *NuCity* class representatives -- Lake Shore, Parkway Drugs, 666 Drug and Wilmette-Heurbinger -- have submitted a pleading in support of this motion for final approval which states that "[w]ith regard to the scope of the validity of the release, *we respectfully submit that the position of NuCity is without merit.*" App. Ex. 14 at 2 (emphasis added).[44]

A review of the record of the three cases demonstrates that there is overlap between the facts underlying the claims asserted here and the claims asserted in *Pasta Bella* and *NuCity*.

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[43] These include Ajax of Philadelphia, Inc., New Century Wireless Communications, Inc., MJ Communications, Inc. d/b/a Let's Talk Communications, Talk with Marilyn, Inc., Queen City Coins, Inc., Warehouse of London, Inc., AAG International, Inc., Junkman, Inc. d/b/a Foley Clothing Co., Show and Tell Media, LLC, Firsh Furniture Stores, Inc., Short Hills Restaurant & Delicatessen, Inc., Rehn-Heurbinger Drug Co., Lake Shore Travel Service Holding Co. ("Lake Shore"), Parkway Drugs, Inc. ("Parkway Drugs"), 666 Drug Company ("666 Drug") and Wilmette-Heurbinger Drug Co. ("Wilmette-Heurbinger"). *See* App. Ex. 13 (*NuCity* Second Joint Consolidated Class Action Complaint (the "*NuCity* Complaint").

[44] These four *NuCity* class representatives also argue that "there is no factual or legal basis" to the assertion that the Settlements "are collusive in nature." App. Ex. 14 at 2; *See* also App. Ex. 14 for letter of Milberg Weiss Bershad Hynes & Lerach LLP, class counsel in both this case and *NuCity,* regarding the fact that it "will promptly be withdrawing as counsel" in *NuCity* because of NuCity's allegation that these Settlements were a product of collusion.

**a. *Pasta Bella***

The Pasta Bella Objectors filed a Sherman Act § 1 action against Visa, MasterCard and certain of their member/owner financial institutions, including Bank of America, Wells Fargo and U.S. Bank on June 24, 2002 – almost six years after the instant lawsuit was initiated and over two years after the Class in this case was certified. *Pasta Bella* is currently pending in the United States District Court for the Northern District of California before the Honorable Jeffrey S. White. The putative class has not been certified nor has a motion for class certification been filed.

In *Pasta Bella*, plaintiffs claim, among other things, that the setting of credit and debit card interchange fees by Visa and MasterCard on behalf of their membership constitutes price-fixing. In an order dismissing many of the *Pasta Bella* claims, the court characterizes them as follows: "[p]laintiffs claim that this agreement on uniform interchange fees amounts to horizontal price fixing in violation of the Sherman Act." *Reyn's Pasta Bella, LLC v. Visa U.S.A., Inc.,* 259 F. Supp. 2d 992, 997 (N.D. Cal. 2003).[45]

The Pasta Bella Objectors purport to represent a nationwide class of "all persons and business entities in the United States who are retailers, businesses, professions and merchants, including those 'on-line,' and presently have VISA and/or MASTERCARD merchant contracts with one or more Defendant banks pursuant to which they have 'sold' (deposited) VISA and MASTERCARD charge or debit receipts, or electronic equivalents, to one or more Defendant

[45] Defendants moved to dismiss the antitrust and other asserted claims in the *Pasta Bella* pursuant to Fed. R. Civ. P. 12(b)(6). *Id.* at 996. The only claim that survived defendants' motion was the referenced price-fixing claim. However, the court held that, unlike most price-fixing claims, these claims are subject to a full rule of reason inquiry. *Id.* at 1000.

banks for deposit in their commercial demand deposit bank account and have thereby incurred deposit fees."[46] However, as noted, the Pasta Bella Objectors have yet to file a motion for class certification.

The Pasta Bella Objectors state that they "do not contest . . . , as averred in other litigation, any tying arrangement, of the VISA and MASTERCARD debit charges with other charges." Pasta Bella Obj. at 3.

**b. *NuCity***

Objector NuCity is a plaintiff in an uncertified, putative class action pending in the United States District Court for the Southern District of New York before the Honorable Barbara S. Jones. That action, initiated on November 13, 2001 -- more than five years after the initiation of the case at bar and approximately 21 months after the Court certified the Class in this action -- is entitled *In re Visa/MasterCard Membership Rule Antitrust Litigation* and bears a Master File Number of 01-CV-10027. In *NuCity*, like *Pasta Bella*, the objector has not moved for certification of its putative class.

At Paragraph 31 of the *NuCity* Complaint, NuCity and other non-objecting class representatives challenge the "exclusionary rules" established by defendants which "prohibited" their member banks from "issuing or providing services to competing general purpose credit cards, particularly American Express and Discover cards." App. Ex. 13. These exclusionary rules, known as Visa By-law 2.10(e) and the MasterCard Competitive Programs Policy were later adjudged to violate Section 1 of the Sherman Act -- a judgment that was recently affirmed. *See*

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[46] Reyn's Pasta Bella First Amended Class Action Antitrust Complaint and Jury Demand ¶ 28.

*United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *aff'd*, Docket No. 02-6074/02-6076/02-6078 (2d Cir. September 17, 2003) (Leval, J.)

According to NuCity, "[a] purpose and effect of the exclusionary rules . . . implemented, enforced and maintained by Defendants Visa and MasterCard, is to stabilize, maintain and elevate above competitive levels the fees charged to Plaintiffs . . . ." App. Ex. 13; *NuCity* Complaint ¶ 35. In this regard, NuCity purports to represent two classes of merchants: (1) a class of all merchants that accepted Visa credit card transactions for the period of June 28, 1996 through October 9, 2001 and (2) a class of all merchants that accepted MasterCard credit card transactions for the period of June 28, 1996 through October 9, 2001. *Id.* ¶ 27.[47]

NuCity contends that its claims are factually distinct from the claims made in the instant action.

**c. The Instant Case**

In the Court's February 22, 2000 Order, the Court authorized the plaintiffs in this action to represent "a class of all persons and business entities who have accepted Visa and/or MasterCard credit cards and therefore have been required to accept Visa Check and/or MasterMoney debit cards under the challenged tying arrangements *during the fullest period permitted by the applicable statute of limitations*." *In re Visa Check,* 192 F.R.D. at 90 (emphasis

[47] As demonstrated above, the *NuCity* Complaint was filed nearly five years after the plaintiffs in the instant case alleged that these same exclusionary rules restrained trade, reinforced and exacerbated the anticompetitive effects of defendants' tying arrangements, and were part of their attempt to monopolize the debit card market. App. Ex. 9; *In re Visa Check* operative Complaint ¶ 50. Indeed, these facts were alleged in the instant case two years before they were asserted by the United States in its case, a factual overlap noted by this Court in its decision permitting the United States to intervene in this case and permitting the plaintiffs to provide the United States with privileged work product from this case. *See In re Visa Check/MasterMoney Antitrust Litig.,* 190 F.R.D. 309, 314 (E.D.N.Y. 2000) ("the Government . . . is litigating and investigating sufficiently related claims against the same defendants . . . .").

added). The class certification order authorizes plaintiffs to pursue both their Section 1 tying claims and their Section 2 claims for attempt and conspiracy to monopolize on behalf of the Class. *See id.* at 88 (noting appropriateness of Section 2 claims for certification). (For this reason, NuCity's reference to the Complaint filed herein as the "Tying Complaint" is a misnomer.) Plaintiffs contended that the defendants' HAC tying rules were supported, reinforced and exacerbated by specific additional anticompetitive conduct, such as the exclusionary rules later challenged by NuCity and the defendants so-called anti-discrimination rules. This course of conduct, including the tying arrangements, the exclusionary rules and other specific associated anticompetitive conduct, was challenged by plaintiffs from the inception of the case in 1996.[47]

As part of their attempt to monopolize claim, plaintiffs were required to prove that defendants engaged in exclusionary conduct. *See In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d 124, 133 n.5 (2d. Cir. 2001) (noting that one substantive element of an attempted monopolization claim is that "defendants have engaged in predatory or anticompetitive conduct") (citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993), *cert. denied*, 536 U.S. 917 (2002)). As part of this showing, plaintiffs argued that the implementation of defendants' exclusionary rules were such exclusionary acts.[48] As part of their Section 1 tying claim, plaintiffs

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[47] For example, in footnote 5 of Plaintiffs' Reply Memorandum of Law in Support of Plaintiffs' Motions for Summary Judgment, it was stated that, "plaintiffs have consistently argued that . . . the related anticompetitive conduct [*e.g.*, defendants' exclusionary rules] has reinforced and exacerbated the effects of the tie." Accordingly, plaintiffs' tying allegations consistently incorporated and referenced the effect of defendants' exclusionary rules.

[48] *See* Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, June 7, 2000, at 6-7, 52, 60; Plaintiffs' Reply Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, July 31, 2000, at 23 (footnote), 25 (footnote, part of the section re: V/MC entity that applies to tying and attempt to monopolize claims); Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment, December 13, 2002, at 13-14 (in the context of post-merger Star, NYCE and Pulse becoming competing national networks under the exclusionary rules).

argued that defendants' exclusionary rules created barriers to entry in the market for credit card services to merchants, thus solidifying defendants' power in that market and their ability to force merchants to accept their debit cards. For example, at Paragraph 50 of the operative Complaint, plaintiffs made the following allegations:

> Visa members collectively adopted a rule barring their members from issuing any plastic cards competitive with Visa cards. This rule exempted MasterCard, permitting Visa's dual members to continue issuing MasterCard plastic cards. Visa members then turned around and, acting as MasterCard members, adopted the same non-competition rule. The effect of these rules was to deprive existing and new competitors of a marketing outlet at the 6,000 largest and most appropriate vendors of their products, *i.e.*, the dual bank members of Visa and MasterCard.

Plaintiffs also argued that these same exclusionary rules created barriers to entry in the market for debit card services to merchants.[49]

Plaintiffs sought damages for overcharges for off-line debit, credit card and on-line debit transactions. These damages stem from defendants' anticompetitive conduct, including their fixing of supra-competitive debit and credit interchange -- a practice at issue in *Pasta Bella* -- and their exclusionary rules.[50] Class Members will receive **over $600 million in monetary relief for credit card overcharge damages** (over $500 million based on the net present value of the common fund) -- which, in and of itself, would be one of the largest antitrust recoveries in

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[49] *See* Expert Report of Franklin M. Fisher, April 4, 2000, at 9-10, p. 64 (¶¶ 139-140 re: barrier to entry in in general purpose credit card market and ¶ 141 re: barrier to entry in the debit card market); Declaration of Dr. Franklin M. Fisher in Support of Plaintiffs' Motion for Summary Judgment, July 31, 2000, at 9-10 (¶ 19 re: barrier to entry into credit and debit card markets).

[50] Expert Report of Franklin M. Fisher, April 4, 2000, at 122-145 (¶¶ 276-336); Rebuttal Expert Report of Franklin M. Fisher, April 25, 2000, at 46-55 (¶¶ 98-127); Supplemental Expert Report of Franklin M. Fisher, September 23, 2002, at 37-51 (¶¶ 73-104); Declaration of Franklin M. Fisher in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment, December 13, 2002, at 15-16

history -- caused by the HAC tying rules and "associated anticompetitive conduct," such as defendants' implementation and enforcement of their exclusionary rules. *See,* Plan § 3.1.

As previously noted, the Court recognized the inter-relationship between this case and the later filed *United States v. Visa* -- the government action upon which NuCity basis its claims for relief.[51] *See In re Visa Check/MasterMoney Antitrust Litig.,* 190 F.R.D. 309, 314 (E.D.N.Y. 2000) ("the Government . . . is litigating and investigating sufficiently related claims against the same defendants . . . .") Notably, in granting the United States' intervention in this case and permitting Class Counsel to provide the government with its work product without waiving privilege, this Court stated

> [t]he Government notes the following common issues between its case and Wal-Mart's [previously filed case] . . . *that the member banks collectively restrain network-level competition by enforcing exclusionary rules that prohibit Visa members from issuing cards on a competitive network (other than MasterCard), and prohibit MasterCard members from issuing cards on a competitive network (other than Visa).*

*Id.* at 315 n.3 (emphasis added).

### 3. The Arguments Of The Pasta Bella Objectors And NuCity Fail.

The Pasta Bella Objectors and NuCity object to the scope of the releases because they fear that the antitrust claims they asserted in *Pasta Bella* and *NuCity* will be extinguished or limited as a result of these Settlements. *See* Pasta Bella Obj. at 3-11; NuCity Obj. at 13-23. Because, as demonstrated above, the releases are proper, amply supported by consideration and

[51] The Pasta Bella Objectors also argue that *United States v. Visa* is relevant to the claims they have asserted in *Pasta Bella*. *See* Pasta Bella Obj. at 11 ("When [*United States v. Visa*] is affirmed, it will be available to many merchants to support private actions against Visa and MasterCard . . . .")

within Lead Counsel's authority to grant under the law, it is irrelevant whether or not the claims set forth in *Pasta Bella* or *NuCity* are extinguished or limited.

The authorities that the Pasta Bella Objectors and NuCity cite to support their argument about the releases are clearly inapposite. They rely on *Nat'l Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981). In that case, the class representatives -- who represented a class of purchasers of liquidated potato future contracts -- agreed to release claims concerning unliquidated potato future contracts *that only a subset of the class members held.* There, the class representatives did not "seek authority to represent members of the class with respect to claims based on unliquidated contracts," even though they attempted to release claims based on these contracts. *Id.* at 17. Unlike in the instant case, the class representatives in *Nat'l Super Spuds* did not share an interest with class members on all claims that were released.[52] As held by the Second Circuit, class representatives can only "represent a class of whom they are a part only to the extent [that] the interests they possess [are] in common with members of the class." *Id.* at 17.[53]

Similarly, *In re Auction Houses Antitrust Litig.*, No. 00-Civ. 0648, 2001 WL 170792 (S.D.N.Y. Feb. 22, 2001), *aff'd*, 42 Fed. Appx. 511, 2002 WL 1758897 (2d Cir. 2002) is inapposite. It concerned a situation where, in order to achieve settlement, the proposed releases

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[52] In *Nat'l Super Spuds,* the Second Circuit held, "We assume that a settlement could properly be framed so as to prevent class members from subsequently asserting claims relying on a legal theory different from that relied upon in the class action complaint but depending upon the very same set of facts." *Id.* at 18 n. 7.

[53] NuCity points out that the *Nat'l Super Spuds* court held that there was "no justification" for releasing claims in that suit related to unliquidated contracts because "the allocation formula determined distribution to class members 'solely on the basis of contracts they liquidated.'" NuCity Obj. at 16 (quoting *Nat'l Super Spuds* at 25). In this case, however, allocation will be made based on the Section 1 and 2 claims brought, including those portions of the claims that related to the defendants' exclusionary rules. Further, allocation will be based on credit card overcharges in addition to debit card overcharges. Plan § 3.1.

purported to extinguish claims of price-fixing not only for domestic auction house transactions (which were the subject of the action), *but also claims held by only a subset of the class members for price-fixing on foreign transactions*. Accordingly, the district court sought modification of the releases in order to approve the settlement agreements.[54]

Every class member who has claims potentially released in *Pasta Bella* and *NuCity* is a member of the certified class here and will receive enormous compensation for its claims arising from the same facts if not from the very same claims. Unlike in *Nat'l Super Spuds* and the *Auction Houses* case, the class representatives in this action are not sacrificing the claims of certain Class Members in order to strike a better bargain for themselves and the Class. *See TBK Partners,* 675 F.2d at 462 (affirming order approving release and distinguishing *Nat'l Super Spuds* on the ground that "[a]t the heart of our concern [in *Nat'l Super Spuds*] was the danger that a class representative not sharing common interests with other class members" would sacrifice the interests of those class members); *Joel A. v. Giuliani*, 218 F.3d 132, 143 (2d Cir. 2000) (also affirming order approving release and distinguishing *Nat'l Super Spuds*).

In the instant case, pursuant to the Court's class certification Order, the class representatives represent "a class of all persons and business entities who have accepted Visa and/or MasterCard credit cards . . . ." *In re Visa Check*, 192 F.R.D. at 90. The plaintiffs in *Pasta Bella* and *NuCity* purport to represent classes of merchants, who accepted Visa and MasterCard credit cards for payment, including all of the class representatives in this action. Assuming that the claims of NuCity and the Pasta Bella Objectors are viable, if they are being released as a

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[54] *NuCity* class representatives Lake Shore, Parkway Drug, 666 Drug, and Wilmette-Heurbinger contend that "there is no factual or legal basis for NuCity's assertion . . . that [the Settlements] conflict[] with principles articulated in" *Nat'l Super Spuds* and *In re Auction House*. App. Ex. 14 at 1-2.

condition of the Settlements here, *so are the claims that Wal-Mart, Sears, Safeway, The Limited, Circuit City and the other class representatives have in NuCity or Pasta Bella.* The releases granted here would not sacrifice any "claim" that either the Pasta Bella Objectors or NuCity has asserted in their respective litigations which is also not a "claim" that is held by the class representatives or any of the absent Class Members in the case at bar. *See Joel A.*, 218 F.3d at 143 (release approved where there was "no . . . clear divide between the members [of the class and] objectors" and where "it cannot be said that the settlement provides no benefit to the" objectors).[55]

The Pasta Bella Objectors also object to the releases because they release the bank defendants named in *Pasta Bella*, namely Bank of America, Wells Fargo and Bank One, although they are not defendants in this case. According to the Pasta Bella Objectors, "[t]here is no jurisdiction to release non-parties, particularly . . . [b]anks." Pasta Bella Obj. at 5. The law is quite to the contrary. "[C]ourts recognize that it is appropriate for a class action settlement to include a limited release of a non-party . . . where that non-party has contributed substantially to making the settlement possible." *In re Lloyd's,* 2002 WL 31663577 at *11; *Class Plaintiffs,* 955 F.2d at 1287-91 (Ninth Circuit permits release of State of Washington even though it is non-party to settling federal action); *In re Holocaust Victim,* 105 F. Supp. 2d at 149 (approving settlement

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[55] The Pasta Bella Objectors argue that "the classes are different" because "the time periods of the classes . . . are different." Pasta Bella Obj. at 8-9. This is a distinction without a difference. The temporal differences between the limitation periods of the actions do not undermine the factual overlap between them. In fact, it is because of this temporal difference that the claims of the Pasta Bella Objectors cannot be completely extinguished by the releases, if the releases cover their claims at all. All of the claims being released in the instant case relate to *"conduct prior to January 1, 2004 concerning any claims alleged in the Complaint or any of the complaints consolidated therein*." The applicable limitations period in *Pasta Bella* is from June 24, 1998 to the present. Accordingly, the releases are not applicable to claims arising from conduct after January 1, 2004. The Pasta Bella Objectors' claims that concern post-January 1, 2004 conduct could not be and are not barred by the limited releases.

that releases non-parties in addition to defendants); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158, 181 (E.D. Pa. 1997); 4 *Newberg on Class Actions*, at §12.16 ("A settlement may also seek to discharge parties who have not been served with process and are therefore not before the court.")

Visa and MasterCard member/owner banks not only have contributed to the Settlements, virtually all of the relief comes from them. They have already lowered their debit interchange rates as a result of the interim interchange reductions.[56] The current bank contracts with Class Members include the HAC tying rules, and it is these contracts that must change on January 1, 2004 when the tying arrangements end. These same banks may also contribute to the monetary portion of the settlement via association fees imposed on them by the defendants. *See* App. Ex. 5 (Jathon Sapsford and Mitchell Pacelle*, Visa Puts Squeeze on Defectors,* The Wall Street Journal, August 5, 2003, at C12). These banks have already begun to send 25 million notices to Class Members apprising them of the end of the tying arrangements on January 1, 2004. Shapiro Dec. ¶ 8. These banks are both physically and electronically reconfiguring and giving unique debit identifiers to more than 200 million debit cards at an enormous cost. App. Ex. 11 (MasterCard press release on new debit identifiers). Releasing these banks, who are the members and owners of Visa and MasterCard, is therefore appropriate.

[56] Indeed, one Visa member bank, TCF Financial Corporation, moved to intervene in this action in order to object to the Settlements -- a motion that was denied by the Court. App. Ex. 10 (Judge Gleeson June 12, 2003 Order). TCF moved because its revenue has been and will be substantially reduced by the interim interchange rate reductions.

### B. The Settlement Notice Was Proper.

#### 1. Standards Regarding Rule 23(e) Settlement Notice.

Fed. R. Civ. P. 23(e) states that "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner *as the court directs*." (emphasis added). *See also* 4 *Newberg on Class Actions*, at § 11.53 ("The nature and extent of Rule 23(e) class notice of a proposed settlement are left to the discretion of the trial court judge.") The Administrator sent the Court-approved Settlement Notice to absent Class Members pursuant to the Stipulation and Order for Providing Notice of Settlement of Class Action to Members of the Certified Class dated June 13, 2003. Zola Dec. ¶ 8. For this reason alone, the Settlement Notice and the notice procedures should be held to be valid. *See Langford v. Devitt*, 127 F.R.D. 41, 44 (S.D.N.Y. 1989) ("As a result of the court's role in setting notice procedures, compliance with the procedure so ordered is all that is ordinarily expected of the class counsel.")

Nevertheless, objectors Preston Center Personal Training, Inc. ("Preston Center"), NuCity, 710 Corp., Leonardo's Pizza, Armenta's Mexican Food, Inc. ("Armenta's") and Lupita Llamas ("Llamas") object to the Settlement Notice. In Preston Center's opinion, the Settlement Notice is "defective" for a variety of reasons. *See* Request To Appear And Objections To The Fairness, Reasonableness And Adequacy Of The Proposed Class Settlement And To The Reasonableness of Class Counsel's Attorneys' Fees of Preston Center ("Preston Center Obj.") at 8. NuCity objects to the Settlement Notice because, in its opinion, it "fails to explain the ramifications" of the release provisions. NuCity Obj. at 8. 710 Corp./Leonardo's Pizza object to the Settlement Notice because it does not identify the strengths and weaknesses of plaintiffs'

claims. 710 Corp./Leonardo's Pizza Obj. at 2. Armenta's and Llamas object because the Settlement Notice and other documents were not distributed in Spanish.

It is well settled that "[a]lthough no rigid standards govern the contents of notice to class members, the notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings.'" *Weinberger*, 698 F.2d at 70 (citing *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950) and quoting *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 122 (8th Cir. 1975)). *See* 3 *Newberg on Class Actions,* at § 8:32 ("The contents of a Rule 23(e) notice are sufficient if they inform the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, and that any class member may appear and be heard at the hearing.") Indeed, "[n]umerous decisions, no doubt recognizing that notices to class members can practicably contain only a limited amount of information have approved 'very general description[s] of the proposed settlement.'" *Weinberger*, 698 F.2d at 70 (quoting *Grunin*, 513 F.2d at 122 and citing cases). *See also In re Michael Milken and Assocs. Secs. Litig.*, 150 F.R.D. 46, 52 (S.D.N.Y. 1993) ("[S]ettlement notices need only describe the terms of the settlement generally.") (citations omitted); 4 *Newberg on Class Actions*, § 11.53 ("[t]he [settlement] notice need not be unduly specific").

"'Class members are not expected to rely upon the notices as a complete source of settlement information. . . .'" *O'Brien v. Nat'l Property Analysts Partners*, 739 F. Supp. 896, 901 (S.D.N.Y. 1990) (Leisure, J.) (quoting *Grunin*, 513 F.2d at 122)). The *O'Brien* court explained settlement notice requirements:

> *The notice of settlement does not have to contain all the operative details of the settlement agreement, but the notice must provide sufficient guidance as to the major terms and areas of agreement to allow class members to make further inquiry, either by examining the full settlement agreement or by appearing at the settlement hearing*. . . . The notice is meant to summarize the settlement agreement, and not to provide a *post mortem* of all issues growing out of the prior transactions between the parties.

*Id.* (emphasis added); *See In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987) (affirming district court's approval of notice of settlement and holding, for example, that "there is . . . no absolute requirement that" a plan of allocation be detailed in the settlement notice.)

**2. The Settlement Notice Was Sufficiently Detailed.**

**a. Preston Center's Objections To The Settlement Notice Are Meritless.**

Preston Center argues that the Settlement Notice is deficient in several respects. On all counts, Preston Center is wrong.

i. Preston Center argues that "the Notice [f]ails to [p]rovide a [s]tatement of the [c]onsideration [p]aid." Preston Center Obj. at 11. To the contrary, the Settlement Notice clearly identifies that "[t]he creation of two settlement funds, totaling $3.05 billion" are to be created. Settlement Notice ¶ 14(A). *See also* Pines Dec. Exs. B-T (Summary Notice detailing this amount). The Settlement Notice also identifies that "unique interim interchange rates for Visa and MasterCard debit transactions for the period from August 1, 2003 through December 31, 2003" would be established. The Settlement Notice specifically identifies that "[t]hese rates will be significantly lower than the rates currently being charged for Visa and MasterCard debit transactions (for MasterCard at least 1/3 lower aggregate effective rate, for Visa at least 48 basis

points lower for nonsupermarkets and at least 14 cents lower per transaction for supermarkets)." Settlement Notice ¶ 14(F).

Preston Center argues, however, that this description was inadequate because (1) it does not disclose the amount of attorneys fees and expenses to be paid for from the fund and (2) it does not detail the plan to securitize the common fund so as to make one lump sum payment to Class Members rather than ten. Preston Center Obj. at 12. Contrary to Preston Center's position, there is no requirement that the amount of attorneys' fees be detailed in the Settlement Notice. A notice need only "generally apprise class members that fees will be sought and awarded by the court at the settlement hearing or a subsequent hearing and indicate whether . . . the settlement fund will bear such costs." 3 *Newberg on Class Actions*, at § 8:32. The Settlement Notice complies with these requirements. *See* Settlement Notice ¶ 17 ("Also on August 18, 2003, Class Counsel will file a petition for payment of attorneys' fees, cost and expenses, and may, from time to time thereafter, petition the Court for reimbursement of fees, costs and expenses from the Settlement Funds . . .") Further, the Court required that the Fee Petition be filed after the Court-approved Settlement Notice. Accordingly, the amount of fees could not have been detailed in the Settlement Notice because the Court has yet to rule on Class Counsel's Petition.

Preston Center's contentions regarding the Settlement Notice's reference to the Plan are also in error. A notice need not detail the specifics of a plan of allocation. *In re "Agent Orange,"* 818 F.2d at 170.[57] Accordingly, the references to the later-filed Plan in the Settlement

[57] The Settlement Notice describes in simple lay terms the practical effect of securitization on Class Members. It states that settlement funds may be distributed in "two or more sets of payments to be made over a shorter period of time" rather than over ten years. Settlement Notice ¶ 15.

Notice are sufficient.[58] As with the Fee Petition, the Court ordered the Plan to be filed after the Settlement Notice was sent.

Preston Center also argues that it was improper for Class Counsel to refer Class Members to "extraneous documents" in order to get further information regarding the Plan or the Fee Petition. This position is meritless. *See O'Brien*, 739 F. Supp. at 901 ("The notice of settlement does not have to contain all the operative details of the settlement agreement, but the notice must provide sufficient guidance as to the major terms and areas of agreement to allow class members to make further inquiry . . . .")[59]

Further, Preston Center claims that certain "significant information" is neither referenced in the Settlement Notice nor in "extraneous documents." Preston Center Obj. at 13. For example, Preston Center claims that:

- *No document identifies the additional attorney fees or costs that may be sought by Class Counsel or the class representatives.* [*Id.*]

Lead Counsel Response: It is impossible to identify such expenses at this time because neither such fees nor such costs have yet been invoiced. Class Counsel cannot currently identify all of the work that it will need to do in the future to protect the integrity of the Settlements. This includes, *inter alia,* work relating to (1) ensuring defendants' compliance with the Settlement's terms, such as ensuring that all required notices and certifications are received from defendants, (2) "securitizing" the award with financial institutions for the benefit of the Class, and (3)

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[58] Preston Center argues that more detailed information regarding the consideration for the Settlements is "necessary to Objector's and other Class Members' ability to determine whether the settlement was negotiated at arms [*sic*] length, or was the result of collusion . . . ." Preston Center Obj. at 12. As stated in the Green Declaration, these Settlements were not the result of collusion.

[59] The Notice of Pendency, sent almost a year earlier, also advised Class Members to visit the case website for significant case updates. App. Ex. 12.

ensuring distributions to Class Members by overseeing the work of the claims administrator and ruling on Class Member challenges to their distributions. *See* Constantine Supplemental Dec. ¶¶ 10-27.

- *No document estimates the costs and expenses of common fund administration.* [Preston Center Obj. at 13].

Lead Counsel Response: The Declaration of Neil Zola submitted in support of the motion for approval of the Plan estimates that administration of the common fund, if not securitized, will likely cost between $62 million and $100 million. Mr. Zola's affidavit has been available on the case website since August 18.

- *No document contains a "mechanism for independently estimating the value of the injunctive relief."* [*Id.*]

Lead Counsel Response: This is false. *See* Fisher Dec. ¶¶ 15-23 (available on case website since August 18).

- *No document contains a "mechanism for independently estimating the present value of the monetary relief."* [Preston Center Obj. at 13.]

Lead Counsel Response: This is also false. *See* Fisher Dec. ¶¶ 23-25 (available on case website since August 18).

In evaluating these and other objections, the Court may wish to consider the extent to which objectors apparently failed to read publicly-available and conspicuously publicized information explaining the proposed Settlements and Plan. *See* Schonbrun Objection and Notice of Intention to Appear and be Heard on Proposed Settlement, Plan of Allocation, and Petition for Award of Attorneys' Fees and Costs and Expenses ("Schonbrun Obj.") at 2 n.1 (professional objector argues that he "may seek leave of Court to file a supplemental pleading" after "review"

of pleadings in the record, all of which are and have been publicly available for the year since Mr. Schonbrun appeared in the action).

ii. Preston Center also argues that the Settlement Notice is deficient because it "fails to provide a formula for distribution of the settlement fund." Preston Center Obj. at 14. Well-established Second Circuit precedent does not require such detail in a class settlement notice. *In re "Agent Orange,"* 818 F.2d at 170.

iii. Preston Center also argues that the Settlement Notice is deficient because it "fails to provide a formula and method for the distribution of Attorneys' Fees and Expenses." Preston Center Obj. at 15. Preston Center admits, however, that "the Notice provides that attorneys' fees and expenses will be deducted from the gross settlement fund and that Class Counsel will petition the Court for those sums." *Id.* As stated above, preeminent commentators on class actions have stated that the information contained in the Settlement Notice regarding attorneys fees is all that is required. *See* 3 *Newberg on Class Actions*, at § 8:32.

Preston Center likewise admits that the method for distribution of attorneys' fees is contained in documents referenced in the Settlement Notice and which are on the case website. Preston Center Obj. at 15*; see also* Settlement Notice ¶ 17 ("Beginning on August 18, 2003, you may visit the Website for details concerning Class Counsel's petition for payment of attorneys' fees, costs and expenses."). Accordingly, the Settlement Notice adequately apprised Class Members of Class Counsel's intention to seek fees from the common fund and to how information concerning the Fee Petition could be easily obtained.

### b. NuCity's Objection To The Settlement Notice Is Meritless.

NuCity argues that the Settlement Notice is deficient because "it fails to advise [absent Class Members] that this release could be construed to eliminate, for no further consideration, claims against these same defendants raised" in *NuCity*. NuCity Obj. at 8.[60] As the law does not require Class Counsel to notify Class Members of the existence of the putative, uncertified *NuCity* class action, this claim is in error.

Rather than merely summarize the releases' terms, the Settlement Notice sets forth the entirety of the releases *verbatim*.[61] Settlement Notice ¶ 4. This alone demonstrates that the release section of the Settlement Notice is valid. *See In re NASDAQ*, 187 F.R.D. at 482 (court approves settlement and notice where "the releases were not merely described in the Class Notices (as is often the custom); they were reprinted *verbatim* . . . in the Class Notice.") (emphasis in original).

Nevertheless, NuCity argues that *Nat'l Super Spuds* mandates that the Settlement Notice explicitly reference *NuCity*. Here, NuCity argues that Class Counsel in this case must inform putative class members in *NuCity* about that case, although counsel in *NuCity* has never done so. This is wrong. In *Nat'l Super Spuds*, the Second Circuit invalidated a notice that "did not adequately apprise" a subset of absent class members that claims that they held concerning unliquidated potato future contracts were being sacrificed in order to achieve settlement for the entire class. *Nat'l Super Spuds*, 660 F.2d at 16. This subset of class members were not

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[60] Young Pioneers apparently objects to the "language describing the scope of the release" in the Settlement Notice. Young Pioneers Obj. at 5. For the reasons stated in this section, the language describing the releases is proper.

[61] The release in the Visa Settlement Agreement and the release in the MasterCard Settlement Agreement are identical.

adequately apprised of the effects of the overbroad release because the notice of settlement sent in that case *made no mention of the release granted whatsoever*. *See id.* at 14 ("No mention was made of the provision in the settlement agreement barring all claims of class members whether or not asserted in the [*Nat'l Super Spuds*] action . . . .").

The fallacy in NuCity's position is further demonstrated by *O'Brien*, decided by Judge Leisure fourteen years after *Nat'l Super Spuds*. In *O'Brien*, the class released the defendants from "each and every claim set forth [in this Complaint], and all claims that might have been asserted therein . . . ." *O'Brien*, 739 F. Supp. at 899. Objectors in *O'Brien*, also relying on *Nat'l Super Spuds,* argued that the *O'Brien* notice was deficient because it failed to advise certain class members that they, even after settlement, would still be liable for arrearages on promissory notes taken from defendants. *Id.* at 901-02. The *O'Brien* court held that *Nat'l Super Spuds* did not apply. According to the *O'Brien* court, unlike in the case before it, "the [*Nat'l Super Spuds*] notice actually omitted to state important provisions of the release which were explicit in the settlement agreement." *Id.* at 902. In further upholding the validity of the *O'Brien* notice, the court held:

> The Court does not believe that due process requires further explanation of the effects of the release provision in addition to the clear meaning of the words of the release. In a situation such as at bar, [absent class members] had the responsibility to study the release [and] determine its effects on their personal affairs . . . .

*Id.* at 902. Likewise, in the instant case -- where the Settlement Notice provides the release provisions *verbatim*, due process does not require further explanation of the release provisions in the Settlement Notice.

NuCity also argues, without citing precedent, that Class Counsel was obligated to notify Class Members of the existence of *NuCity* because notice of pendency in the NuCity action has yet to be distributed. NuCity Obj. at 11. This argument is ridiculous. Class Counsel is not responsible for notifying members of the instant Class about a *merely putative class action* in which there may someday be a class motion which may be granted. Indeed, notice of pendency of *NuCity* under Fed. R. Civ. P. 23(c)(2) will only be authorized if the class is certified there. It is the responsibility of class counsel in that action to ensure adequate notice. If anything, informing Class Members in the *In re Visa Check/MasterMoney Antitrust Litigation* Settlement Notice about a different action with different counsel that may never be certified and which may never involve the *In re Visa Check/MasterMoney Antitrust Litigation* absent Class Members would be improper and add unnecessary confusion to the notice process.

**c. 710 Corp./Leonardo's Pizza Objections To The Settlement Notice Are Meritless.**

710 Corp./Leonardo's Pizza argue that the Settlement Notice was "insufficient" because it "lacks any information regarding the potential aggregate value of [the] class' claims if successful in litigation." 710 Corp./Leonardo's Pizza Obj. at 2. To the contrary, the Settlement Notice is not required to detail information regarding "the strengths and weaknesses of Plaintiffs' claims." *Id.* In summarizing the claims for absent class members, a notice need only provide:

> a description of the litigation [which] should contain, *in as a brief a manner as possible*, a summary of the general allegations of the complaint, the relief requested, an enumeration of the cases or docket numbers if a consolidated action is involved, a summary of the proceedings before settlement, a general identification of the defendants if multiple defendants are involved, a description of the class or subclasses involved, and an enumeration of the individual representative plaintiffs if various plaintiffs represent different subclasses. Of

course, the complexity of the litigation and the disposition of both the court and the parties involved control the length and detail of the summary.

3 *Newberg on Class Actions*, at §8:32 (emphasis added).

Also, none of the authorities cited by 710 Corp./Leonardo's Pizza support their claim. While those authorities reaffirm the well-established rule that in order to determine the fairness, adequacy and reasonableness of a settlement, a court must compare the settlement recovery to "the best possible recovery" and to "the range of . . . possible recovery in light of all attendant risks of litigation," *see, e.g., Grinnell*, 495 F.2d at 463, these authorities do not suggest that class counsel must make such a comparison in the Settlement Notice.

710 Corp./Leonardo's Pizza also argue that the Settlement Notice is deficient because:

- *It "fails to inform class members what the amount of attorneys' fees in this matter are, or will be . . . ."* [710 Corp./Leonardo's Pizza Obj. at 8.]

Lead Counsel Response: Notice of settlement need not provide such information, including that which is not ascertainable at this time (*e.g.*, future attorney fees). The amounts Class Counsel seek in attorneys fees were published in its Fee Petition which has been available on the case website since August 18. *See supra* part IV.B.2.a.

- *It "fails to inform class member as to whether the attorneys fees are based on the present value of the settlement . . . and whether the . . . fees are to be paid up front or over time."* [710 Corp./Leonardo's Pizza Obj. at 8.]

Lead Counsel Response: Notice of settlement need not provide such information. *See supra* part IV.B.2.a. This information is detailed in the Fee Petition and the Plan -- both of which have been available from multiple sources, including the case website, since August 18.

- *It "deprives unnamed class members of Due Process of law by allowing Class Counsel to file for a specific amount of attorney's fees over a month later on August 18 . . . ."*[62] [710 Corp/Leonardo's Pizza Obj. at 8.]

Lead Counsel Response: The filing of the Fee Petition was in accordance with the Court's June 13 Order.

**d. The Objections Of Armenta's And Llamas To The Settlement Notice Are Meritless.**

Armenta's and Llamas object to the Settlement Notice, Summary Notice and case website (the "Notice Documents") arguing that they "violate [] the requirements of Due Process and Rule 23" by only providing information in English "with no Spanish language option." Objections To Proposed Class Action Settlement Argument of Armenta's and Llamas ("Armenta's/Llamas Obj.") at 2-7. [63]

As explained above, the Settlement Notice does not violate Rule 23. In fact, bilingual notices are generally only ordered under Rule 23 when the "majority of the class" speaks a native language other than English. 3 *Newberg on Class Actions*, at § 8:31. Moreover, because the Settlement Notice comports with due process, as explained below, it satisfies Rule 23(e). *See id.* at § 8:18 ("the court's formulation of an adequate notice procedure under Rule 23(e) is limited only by constitutional due process considerations").

The due process objections of Armenta's and Llamas are refuted by *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983) -- a decision ignored by objectors. In *Soberal-Perez*,

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[62] 710 Corp./Leonardo's Pizza raised other similar objections to the schedule approved by the Court concerning the approval process. 710 Corp./Leonardo's Pizza Obj. at 8.

[63] There is no evidence that Armenta's and Llamas do not speak, understand or read English. Rather, they merely contend that "Spanish is their first and preferred language." Armenta's/Llamas Obj. at 7.

plaintiffs sued the Secretary of Health and Human Services for denying claims for social security benefits. 717 F.2d at 37. "Each plaintiff's dominant language [in that case was] Spanish, and each ha[d] at most a limited ability to speak and understand English. . . . All [plaintiffs] received notices of denial of their claims in English, and, allegedly because of their inability to understand these notices . . . , all waived a right to a hearing or failed to file timely appeals." *Id.* The *Soberal-Perez* plaintiffs thus argued that "the Secretary's failure to print notices and forms in Spanish . . . violated their due process" rights. *Id.* The district court rejected plaintiffs' claims and the Second Circuit affirmed. *Id.* at 43-44. In affirming, the Second Circuit held:

> While the fundamental tenets of due process require adequate notice to ensure that all parties have a meaningful opportunity to be heard, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." Rather, it calls for procedures fitted to the circumstances of particular situations. The basic standard to be applied is one of reasonableness.

717 F.2d at 43 (citations omitted). Following these principles, the Court held that "[n]otice in the English language to social security claimants residing in the United States is 'reasonably calculated' to apprise individuals of the proceedings." *Id.* The Court further held that "*[a] rule placing the burden of diligence and further inquiry on the part of a non-English-speaking individual served in this country with a notice in English does not violate any principle of due process.*" *Id*. (emphasis added). *See also Toure v. United States*, 24 F.3d 444, 446 (2d. Cir. 1994) (asset forfeiture notice in English served on French-speaking person does not violate due process); *Tineo v. Barnhart*, No. 01 CIV-11636, 2002 WL 31163889, at *5 (S.D.N.Y., Sept. 30, 2002); *Century ML-Cable Corp. v. Conjural Partnership*, 43 F. Supp. 2d 176, 181 n.7 (D.P.R. 1998) (even if person did not understand temporary restraining order written in English which

was sent to him, "this would not furnish a defense to his refusal to obey it").[64] Similarly, "placing the burden" to object or opt out on non-English speaking absent Class Members who received or reviewed the Notice Documents likewise does not violate due process.

### C. The Plan Of Allocation Is Fair and Reasonable.

"The review of the plan of allocation is squarely within the discretion of the district court." *In re Painewebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 132 (S.D.N.Y. 1997) (citing *State of West Virginia v. Pfizer & Co. Inc.*, 440 F.2d 1079, 1085 (2d Cir. 1971)), *aff'd*, 117 F.3d 721 (2d Cir. 1997). "As a general rule, the adequacy of an allocation plan turns on . . . whether the proposed apportionment is fair and reasonable" in light of the circumstances of the case. *In re Painewebber*, 171 F.R.D. at 133. The Plan clearly meets these standards and should be approved by the Court.

The Plan provides a fair and well-conceived mechanism to allocate the Net Settlement Funds, minimizing the burden on all Class Members and particularly small and medium-sized merchants. It provides each Class Member the opportunity to receive a portion of the Net Settlement Funds directly proportional to their debit and credit purchase volume and on-line debit transactions during the Class Period. Given the scope of the databases provided by Visa and MasterCard, and, in particular, the fact that Visa's data includes records for the overwhelming majority of the Class, the claims of this overwhelming majority will be calculated

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[64] The policy rationale behind this rule is sound. If the Court held that notice was mandated to be translated into Spanish, there would logically be no reason why notice would not have to be translated into Mandarin Chinese, Cantonese, French, Russian, Japanese, Greek, Arabic, etc. Indeed, to avoid opening this floodgate, the *Soberal-Perez* court held, in response to plaintiffs' Equal Protection claims asserted there, that "classifications" cannot be made based on particular languages spoken. *Soberal-Perez* at 41.

entirely from the data supplied by Visa and MasterCard.[65] Class Members, will not be required to produce detailed transaction records to show the dollar amount of Visa and/or MasterCard debit and credit card purchase volume that they received during the ten year Class Period. As detailed in the Fisher Allocation Declaration at Paragraph 11, many of the large merchant class representatives could not retrieve such records covering this entire time frame. If the largest and most sophisticated merchants could not produce these records, it would be unreasonable to require millions of small merchants in the Class to do so. Moreover, the records merchants receive in the ordinary course of business typically do not separate the merchant's Visa and/or MasterCard debit and credit transactions and dollar volumes. *Id*. In short, by utilizing the data supplied by Visa and MasterCard, the Plan minimizes the burden on Class Members, utilizes information which is more precise than any Class Member posseses and ensures that millions of small merchants will receive an accurate calculation of their claims.[66]

Among the extraordinarily small number of objections to the Settlements, only three address the Plan in any detail. They object that the Plan (i) discriminates against smaller Class

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[65] Class Members identified in the Visa Transactional Database -- which includes the vast majority of the Class -- do not need to supply any information to claim against the portion of the Net Settlement Funds that will be allocated to Visa and/or MasterCard debit and credit damages for the Class Period between October 1, 1996 and June 21, 2003. For the Class Period prior to October 1996, these Class Members must merely produce a merchant contract, processor statement or other information that shows when they accepted Visa and/or MasterCard during that time frame. As a result, the only transactional data that merchants are required to supply under the Plan is their processor statements showing the number and/or dollar volume of on-line debit transactions accepted during the Class Period. *See* Plan §§ 4-6.

[66] Young Pioneers asserts that the Settlements are unreasonable because Visa and MasterCard can charge the Settlements Funds $35,000 for their expenses in compiling the data they supplied to the claims administrator. Young Pioneers Obj. at 3. This objection ignores the fact that, given the scope of the data supplied by Visa and MasterCard, the Class will be spared expenses far exceeding $70,000. In fact, without this data, merchants would have to scour their files or request that acquirers then produce detailed records at substantial cost.

Members; (ii) confers unfettered discretion on Lead Counsel and (iii) puts Settlement Funds at risk through securitization. None of these objections have merit.

### 1. The Plan Ensures That Millions of Small Merchants Will Receive A Fair Allocation Of The Net Settlement Funds.

Even though the Plan ensures that millions of small merchants will receive their fair share of the Net Settlement Funds and, indeed, was meticulously designed to alleviate the burden of small Class Members, several objectors contend that it somehow discriminates against them.[67] Attorney Lawrence W. Schonbrun, a notorious and previously censured "professional objector" who claims to represent an alleged absent Class Member -- Roman Buhozer d/b/a The Continental Garden Restaurant, says that, unlike large Class Members, millions of small merchants will be unable to "submit appropriate information to the Claims Administrator."[68] Schonbrun Obj. at 24. This stated concern, which may be the vestige of a previous form objection, is based on an erroneous contention. The data Visa supplied to the Claims Administrator will allow an accurate computation only "for an unknown number of class members." *Id.* In truth, as the Plan clearly states, the data Visa supplied to the Claims Administrator includes all Class Members who accepted Visa transactions between October 1996 and July 31, 2003. *See* Plan at p. 6. Given the time frame it covers and the fact that virtually all

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[67] Lead Counsel's demonstrated concern for small merchants mirrors the Court's solicitude for these Class Members. *See In re Visa Check*, 192 F.R.D. at 88 ("Without class certification, . . . millions of small merchants will lose any practical means of obtaining damages for defendants' allegedly illegal conduct.")

[68] Numerous courts have criticized Schonbrun's scurrilous practices. *See Scott v. Blockbuster Inc.*, No. D 162-535, 2001 WL 1763966, at *2 (D. Tex. Dec. 21, 2001) ("The Court finds that Mr. Schonbrun has been repeatedly found by courts across the country to have filed and made frivolous, groundless, contrived, or misplaced objections to class action settlements . . . ."). *See also* Class Counsel's Response To Objections To Their Petition For Attorneys' Fees and Reimbursement For Costs And Expenses ("CC Fee Resp.") at Part 2.

merchants who accept Visa's payment transactions also accept MasterCard's, this database covers the vast majority of the Class.

Schonbrun also disregards how the Plan minimizes the data requirements on merchants. The vast majority of the Class will be identified in the Visa database and thus will not need to provide any documentation or information to claim against the Net Settlement Funds for damages associated with Visa and/or MasterCard debit and credit transactions after October 1996. For damages associated with those transactions prior to October 1996, those Class Members need only produce a merchant contract, processor statement or other information that shows when they accepted Visa and MasterCard transactions during the portion of the Class Period prior to October 1996. Given these minimal data requirements, there is simply no reason to believe that small merchants will be unable to submit the information needed to establish their claims against the Net Settlement Funds. Indeed, these minimal data requirements were designed with them in mind.

Schonbrun does not suggest an alternative approach that would be more reasonable or fair, but urges "that the Plan of Allocation be reconsidered." Schonbrun Obj. at 24. This failure to offer anything constructive is telling. It betrays both his inability to understand the Plan and his complete disregard for the interests of the Class.

Objector Young Pioneers' concerns that the Plan might harm smaller merchants are also without merit. Young Pioneers complains that because the Plan is detailed, thirty pages long and uses industry terms, such as "interchange" and "basis points," it "is too complex for the average individual to be able to comprehend." Young Pioneers Obj. at 6. It also suggests that merchants will need an accountant to understand how their claims have been calculated, and that "without a

reasonably straightforward overview explanation . . . class members are not realistically going to be able to challenge their individual claim amounts." *Id.*

This ignores the manner in which the Plan and the Fisher Declaration provide straightforward explanations to assist Class Members with the claims process. The Plan includes a ten page executive summary, which describes how it works in plain language. C&P wrote and voluntarily posted a "Frequently Asked Questions" guide on the case website to provide the Class with another straightforward explanation of how the Net Settlement Funds will be allocated. Shaprio Dec. ¶ 4. And both the Plan and the Fisher Declaration provide examples to explain how the Fisher Methodology will work when it is applied to a hypothetical merchant. *See* Plan at pp. 3-4, Fisher Allocation Dec. ¶¶ 32-33.

Class Members can easily apply the simple and simply-described methodology to calculate their claims without hiring an accountant. Once a Class Member's debit and credit dollar volumes have been calculated, the Fisher Methodology can be applied to calculate damages for the Class Member's claims. The Fisher Allocation Declaration provides tables that show how these calculations can be made. Most important and as plainly stated in the Plan, the Notice of Estimated Share of Net Settlement Funds that Class Members will receive will explain to Class Members how their Visa and/or MasterCard debit and credit volumes were calculated, as well as how the formula was applied to those volumes. This will ensure that Class Members, large and small, will have a sufficient understanding of how their claim was calculated to make a meaningful challenge, if they choose to do so.

Young Pioneers' assertion that the challenge procedure is "unduly burdensome" and "seems . . . designed to keep the individual and small business class members from asserting

their rights" also is baseless. Young Pioneers Obj. at 7-8. According to Young Pioneers, asking merchants to submit documentation to show why their claim should be increased imposes an "unfair burden." Young Pioneers Obj. at 7. Young Pioneers does not explain how the challenge procedure would work if Class Members were not required to provide supporting documentation.[69] As detailed above, Class Members will receive Notices of Estimated Shares of Settlement Funds that will explain how their Visa and/or MasterCard debit and credit dollar volumes were calculated, as well as how the formula was applied to those volumes. Class Members may challenge the calculations of their Visa and/or MasterCard debit and credit volumes by, among other things, asserting that they understate the dollar volume of the transactions that they actually received. The only fair way to permit these challenges is to require the merchant to come forward with specific information. The suggestion that these simple requirements have been crafted to discriminate against smaller merchants, when the Plan has been specifically designed to ensure that they have an equal opportunity to claim against the Net Settlement Funds, is perverse and counter-factual.[70]

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[69] In fact, the only suggestion that Young Pioneers offers to make the challenge procedure more "fair" is to extend the 30 day time period to submit a challenge. This time frame provides Class Members with ample time to compile the necessary documentation.

[70] Young Pioneers also contends that the Plan discriminates against smaller merchants by stipulating that checks less than $10 shall not be included in the *additional* pro rata distribution that may occur after all approved claims have been paid. Young Pioneers Obj. at 11; Plan § 12.6. This objection ignores the fact that, under the Plan, the Administrator will distribute checks under $10 (indeed, no matter how small) when Class Member claims against the Settlement Funds are being distributed. The Plan contemplates not mailing such small checks, which may not be cost effective to send, only during the pro rata distribution that will take place after Class Members' approved claims have been distributed. Given the costs of printing and mailing checks, and the fact that it is limited to the additional pro rata distribution, this provision is reasonable.

### 2. The Plan Does Not Give Lead Counsel Unfettered Discretion.

Several objectors state that the Plan improperly gives Lead Counsel unfettered discretion over the distribution of the Net Settlement Funds. Young Pioneers and Schonbrun, for example, object to the fact that Lead Counsel has the discretion to accept or reject late claims. Young Pioneers Obj. at 8; Schonbrun Obj. at 24 n.12. There is no requirement that the Plan permit late claims. For administrative purposes, it easily could have provided that all such claims would be rejected. However, Lead Counsel formulated a mechanism for acceptance of those claims if exceptional circumstances warrant. Neither Schonbrun nor Young Pioneers offer any basis for their unfounded assertion that Lead Counsel may improperly exercise its discretion over these claims. Lead Counsel has zealously advocated the interests of the Class throughout this case, and it will continue to do so as it oversees the Plan. Finally, the objectors ignore the fact that, under the Plan, the Claims Administrator must report all late claims to the Court, who can then accept or overrule Lead Counsel's disposition of them. *See* Plan, § 10. In other words, Lead Counsel's discretion is not unfettered; the Court is the ultimate check on Lead Counsel's discretion.

Young Pioneers similarly disregards the Court's ultimate authority for the Plan when it asserts that the Plan is unfair, inadequate and unreasonable because, after the Net Settlement Funds have been distributed, Lead Counsel can recommend to the Court how the reserve shall be applied. Young Pioneers Obj. at 9; Plan § 12.7. It is hard to see how this provision is unfair to the Class unless one believes the Court will fail to perform its function to safeguard the interests of the Class.

Young Pioneers' concern that the provision of a $10 million reserve makes the Plan unfair also is misplaced. It costs millions to print and mail checks to the approximately five

million merchants in the Class. The costs of administering the Plan -- including calculating millions of claims from the Visa and MasterCard databases and adjudicating challenges -- will undoubtedly be millions more. The Plan prudently stipulates that at least $10 million be maintained in the Settlement Fund to ensure that an adequate reserve is available to cover these costs and any unforeseen additional expenses. To do otherwise would be unfair and irresponsible to the Class, a luxury that objectors have, but Lead Counsel and the Court do not.[71]

Young Pioneers also misses the mark when it objects to the Plan because it gives Lead Counsel the discretion to determine whether an additional distribution should be made after all approved claims have been paid. Young Pioneers Obj. at 10; Plan § 12.5. Contrary to Young Pioneers' assertion, this discretion is not unfettered. First, the Plan provides the basis upon which this discretion shall be exercised; there must be sufficient funds available to make it cost-effective to spend millions to print and mail another round of checks to Class Members. Moreover, the Court is the ultimate authority on this issue. If Lead Counsel determines that there are insufficient funds to make an additional distribution, the funds will be added to the reserve, which can only be applied to purposes approved by the Court.[72]

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[71] When the funds (net of the reserve) have been distributed, Lead Counsel either will distribute the reserve pro rata to the Class Members who cashed their checks or recommend to the Court a *cy pres* fund for some appropriate purpose. The Plan gives Lead Counsel discretion on which course to recommend, as that will depend on the size of the reserve and the costs of additional mailing to Class Members, both of which cannot currently be determined. In any event, the Court will decide whether the proposal made by Lead Counsel is fair to the class.

[72] Young Pioneers' objection that the Plan is unfair because it excludes Class Members who fail to cash their checks from the additional pro rata distributions should be disregarded. Young Pioneers Obj. at 11. Given the substantial administrative costs associated with administering the Settlements and the Plan, the decision to exclude these Class Members from additional distributions is not only reasonable, but to do otherwise would be unfair to the rest of the Class.

### 3. The Proposed Securitization Will Not Put The Settlement Funds At Risk. The Contrary Is True.

Without providing any explanation, Preston Center asserts that counsel's "plan to 'securitize' the Visa and MasterCard payments places the settlement fund at risk . . . ." Preston Center Obj. at 5, 9. Not only is this not true, but securitization, if it occurs after Court approval, would eliminate the risks the Class would otherwise face over a ten year payout.

There is no final "plan" to securitize the unpaid installments. Rather, it is Lead Counsel's current intention to reduce the Visa and MasterCard unpaid installments to a single lump-sum payment. This may be accomplished by securitizing the unpaid installments or by an arrangement with Visa or MasterCard allowing them to pre-pay. The possibility of continuing to accept installments was left open as provided in the Settlement Agreements. Lead Counsel's only "plan" is to explore the possibilities and make a recommendation to the Court to further the best interests of the Class. Lead Counsel must obtain prior approval of the Court before consummating any such transaction. Plan § 11.17.

Either securitizing or allowing Visa or MasterCard to pre-pay installments in a lump-sum does not increase any risk to the Class. Absent lump-sum payments, the Class faces the risk of the erosion of the Settlement due to price inflation and to the possibility of default by either Visa or MasterCard. Fisher Dec. ¶ 81. Lump-sum payments, whether from securitization or directly from Visa or MasterCard, eliminates those risks.

### 4. Other Objections To The Plan Are Without Merit.

Schonbrun objects to the Plan because it calls for the Administrator to submit its reports on Class Members' approved claims under seal. Schonbrun Obj. at 27-28. Schonbrun ignores

that the merchant class is unique in that it includes numerous competitors. To protect the confidentiality of each Class Member's approved claim, which will reflect the relative volume of credit card and debit card transactions -- competitively sensitive information, the Plan calls for the Administrator to file the report on Class Members' approved claims under seal. This provision is fair and reasonable.

### D. Class Counsel Has Been, Is And Will Continue To Be Adequate Representatives Of The Class.

Professional Objector Schonbrun claims that Class Counsel can no longer adequately represent the Class. According to Schonbrun, (1) because Class Counsel seeks a fee (of any amount) from the Settlement Fund, it can no longer be trusted to vigorously protect the Class' interest, and (2) the Court alone is not able to protect the interests of the Class.[73] Schonbrun Obj. at 1-14.[74] Schonbrun "supports" his premises by mis-citing or mis-quoting numerous authorities. In truth, Schonbrun's arguments have been resoundly dismissed. It is common practice for Class Counsel to seek fees from a common fund, subject to a district court's ultimate determination, and still vigorously represent the interests of the class.

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[73] Schonbrun provides virtually no information concerning his "client" -- neither its address, zip code or its telephone number. This information should have been provided in the context of a verification to Class Counsel and the Court. *See* Paragraph 23 of the Court-ordered Settlement Notice ("Your objection should provide the name, address and telephone number of the person or business entity that wishes to raise the objection, contain your printed name and title (if on behalf of a business entity), verify that the objection is being raised by a Class Member, and be signed by you."). Indeed, of the 34 objectors, 18 failed to file a verification in compliance with Paragraph 23 of the Settlement Notice, including the Pasta Bella Objectors, NuCity, The Continental Gardens Restaurant/Roman Buholzer (Schonbrun's "client"), Digital Playroom, Inc., Duke Products, Inc., Kickers Corner of the Americas, Inc., MSV Records & Production, Inc., Rental Solutions,. Inc., Ron Fred, Inc. d/b/a Bailey's, Ron Jen, Inc. d/b/a The Boathouse, Round House, Inc. d/b/a Smuggler's Cove, Sound Deals, Inc., Southern Lady Flowers, Southern Network Services, Inc., and Village Fabrics and Furnishings, Inc.

[74] Schonbrun specifically argues that a "class guardian," fee expert and independent auditor should be retained to evaluate Class Counsel's petition for fees and expenses. Schonbrun Obj. at 9. Because the Court can adequately evaluate the fairness of Class Counsel's petition, this request should be denied. For a full discussion of Class Counsel's response to this request, please *see* CC Fee Resp. at part 10c.

### 1. The Contention That Class Counsel Should Have Negotiated Its Fee Directly With Defense Counsel Is Without Merit.

Schonbrun apparently wishes to outlaw the well-established practice of having Class Counsel petition the Court for a reimbursement of fees and expenses from a common fund. This professional objector favors direct negotiation of fees with defendants, who, unlike Class Counsel and the Court, have no fiduciary obligation to the Class.[75] Schonbrun's argument is contrary to the law and frivolous.

> [T]he prevailing approach to the settlement of class actions for damages is the agreement of the defendant to create a certain fund for the benefit of the class and for class counsel to look to the fund as the source for a court award of reasonable counsel fees. Once paying the fund, the defendant no longer has any interest in how much is used to pay fees, and only the court has the authority to bind the class by charging the fund with reasonable counsel fees and costs. Within the context of negotiating for a common fund settlement on behalf of a class, *class counsel would have a direct conflict with the class in negotiating for or accepting the defendant's offer for a specific fee award to be paid by the settling defendant, simultaneously with negotiating for a sum for a common recovery for the class.* Class counsel would be placed in the position of wearing two hats with contrary interests, and the court would have the almost impossible task of deciding whether the class settlement was fair and adequate or whether it should have been increased by some or all of the funds allocated by the attorneys for fees. *The courts have specifically frowned on this simultaneous or contemporaneous negotiation for a common fund settlement and for fees.*

5 *Newberg on Class Actions,* at § 15:31 (emphasis added). The payment of attorneys' fees from a common fund, contrary to Schonbrun's demand for an independent expert, can and should be decided by the Court. *See Van Gemert v. Boeing*, 590 F.2d 433, 440 n.16 (2d Cir. 1978) ("Any alleged conflict of interest between the attorneys and the unnamed plaintiffs is vitiated here, *as in*

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[75] Schonbrun specifically argues that Class Counsel should have negotiated its fee directly with defendants because, in his view, this action was brought under a fee shifting regime. Once again Schonbrun is wrong, as Class Counsel in antitrust class actions routinely recover from common funds. *See* CC Fee Resp. at part 10a.

*every class action*, by judicial supervision of the fee award") (emphasis added), *cert. granted*, 441 U.S. 942 (1979), *and judgment aff'd*, 444 U.S. 472 (1980); *Parker v. Anderson*, 667 F.2d 1204, 1214 (5th Cir. 1982) ("The evil feared in some settlements - unscrupulous attorneys negotiating large attorney's fees at the expense of an inadequate settlement for the client - can best be met by a careful district judge . . . properly evaluating the adequacy of the settlement for the class and determining and setting a reasonable attorney's fee . . . .")[76] Indeed, permitting Class Counsel to engage in fee negotiation with defendants while simultaneously negotiating a class settlement would create an inevitable conflict-of-interest, one Lead Counsel would not engage in even if the law did not frown upon this practice.

### 2. It Was Not Improper For Defendants To Agree Not To Oppose Class Counsel's Fee Request.

Schonbrun further argues that the provisions in the Settlements in which defendants agree to take no position on Class Counsel's Fee Petition to the Court "is contrary to the [C]lass's interest." Schonbrun Obj. at 12. This argument is wrong and is not supported by the snips of authority he mis-cites.[77]

Defendants, who will suffer no injury as a result of the amount awarded to Class Counsel so long as their commitment to pay the Settlement Fund is not increased (which it will not be),

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[76] In *Mars Steel Corp. v. Continental Illinois Nat'l Bank and Trust Co.,* 834 F.2d 677, 681 (7th Cir. 1987), Judge Posner states that judicial settlement approval is necessary in class actions because "[o]rdinarily the named plaintiffs are nominees, indeed pawns, of the lawyer, and ordinarily the unnamed class members have individually too little at stake to spend time monitoring the lawyer . . . ." *Id.* Here, of course, while approval of the settlement is certainly still required, it should be noted that the class representatives, including some of the largest merchants and trade associations in the world were certainly not "pawns" or "nominees" of Class Counsel, and all of them had a sufficient stake in this litigation to ensure that the settlement was fair, reasonable and adequate.

[77] Preston Center makes a similar objection, which should be denied for the reasons stated in this section. Preston Center Obj. at 16.

have no standing to object to Class Counsel's fee request. *See* Wright & Miller, 13 *Fed. Prac. & Proc. Juris.* 2d § 3531.4 (in order to have standing, a party "must show a distinct and palpable injury to himself; that this injury is caused by the challenged activity; and that this injury is apt to be redressed by a remedy that the court is prepared to give"); 5 *Newberg on Class Actions*, at § 15:31 ("[o]nce paying the fund, the defendant no longer has any interest in how much is used to pay fees . . . .").

Schonbrun, at page 13 of his Objection, mis-cites a passage from Professor Coffee's article entitled "The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation." *See* 48-SUM Law & Contemp. Probs. 5 (1985). Schonbrun misrepresents that Professor Coffee argues that agreements in which defendants will not oppose Class Counsel's request for fees in a class action are "frowned upon." This is not what Professor Coffee stated. In truth, what Professor Coffee is discussing is the "problem with the lodestar" mechanism -- problems which he also discusses in his August 17, 2003 Declaration. Set forth below is the entirety of the Coffee paragraph without Schonbrun edits.

> The real problems with the lodestar lie elsewhere. Chief among these is the inherent tendency of a time-based formula to exacerbate the problem of collusive settlements discussed earlier. By severing the size of the fee from the size of the settlement fund, the lodestar formula permits the parties to assure themselves with relative confidence what the fee award will be. In this respect, the contrast between a time formula and a percentage-of-the-recovery formula is obvious. For example, if the parties were to agree upon a primarily nonpecuniary settlement in a jurisdiction that followed the percentage-of-the-recovery system, the court might approve the settlement, but it would be hard pressed to justify awarding more than a trivial fee. Under a time formula, however, the presumption is that time expended should be compensated at the attorney's normal billing rate. If the defendant agrees not to object to the plaintiff's fee request, there is little prospect that the court will engage in an elaborate inquiry into the reasonableness of the hours expended by the plaintiff's attorney. Not only does the court have little incentive to undertake such an inquiry, but when the defendants agree not to

> oppose the plaintiff's fee request they deprive the court of the only adversary who truly knows if the time was reasonably expended. Put simply, it is the adversary and not the court who best understands the justifications (or lack thereof) for the work the plaintiff's attorney has done. Denied this information by the de facto settlement agreement, the court is itself a relatively poor and undermotivated monitor of the plaintiff attorney's performance.

Schonbrun's consistent misrepresentation of authority should not be tolerated by the Court.[78]

**E. Other Objections.**

**1. 710 Corp./Leonardo's Pizza Objection To "No Exclusivity" Provision.**

710 Corp./Leonardo's Pizza also object to the Settlements on the grounds that: the provision precluding Visa from entering into exclusive debit arrangements with member/owner financial institutions is inadequate (¶ 10 of Visa Settlement Agreement) as (a) it does not invalidate current exclusive deals which the objectors speculate that Visa has with member/owner financial institutions and (b) it is only limited to a two year period. The objectors also complain that the MasterCard Settlement Agreement does not contain a similar provision barring debit exclusives.

This "no exclusivity" provision, like the rest of the Visa Settlement, was the result of intense bargaining. *See* Green Dec. According to courts in this circuit, so long as a settlement agreement was not a product of collusion and is substantively fair, the fact that some objectors may want different terms is irrelevant:

> A number of the objections revolve around the adequacy and form of the benefits provided. . . . *Contrary to the objectors' expectations, the settlement "is not a wish-list of class members that the Defendant[] must fulfill."* These and other

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[78] On page 13 of his Objection, Schonbrun also quotes from *Malchman v. Davis,* 761 F.2d 893, 907-08 (2d Cir. 1985), *abrogated on other grounds by Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) in support of his argument that courts discourage agreements by defendants not to challenge a fee petition. He fails to mention that the quotation is not from the majority opinion.

> objectors fail to understand that the form and amounts of benefit provided were arrived at as a result of hard-fought negotiations between experienced class action attorneys. Plaintiffs' counsel, having weighed the risks of proving liability and damages at trial, negotiated . . . benefits in an amount and form that, in their judgment, would compensate plaintiffs . . . .

*Thompson*, 216 F.R.D. at 65 (citation omitted) (emphasis added). In Lead Counsel's estimation, this provision will not only assist in jump starting competition in the debit market, but it is clearly appropriate in the context of the extraordinary relief granted to the Class by these Settlements. Professor Fisher, for example, at Paragraph 22 of his Declaration, noted the benefit of this provision:

> [T]he Visa Settlement Agreement prohibits one type of scheme that Visa used in the past to hinder on-line growth: Visa is prohibited from entering into a contract with a member financial institution that prohibits the financial institution from issuing an ATM and/or debit card of any competing ATM and/or network other than one operating under a trademark owned by MasterCard. This will protect the market against Visa undermining the Settlement Agreements by excluding regional networks from Visa POS Debit devices. For [this] reason [], the Visa . . . Settlement Agreement [] will lead to further on-line debit growth.

The Visa Settlement Agreement includes a "no exclusivity" provision because of Class Counsel's knowledge of Visa's campaign to remove regional network marks from financial institution debit cards. For example, Visa's Visa Check Card II product prohibited regional marks from appearing on Visa Check Card II cards.[79] This prohibition was eliminated as a result of this lawsuit and the resulting government investigation.[80] While MasterCard also considered a campaign designed at having banks remove regional marks from their MasterCard-branded debit cards, such as its MasterCard On-Line PIN Program (MOPP), it never formally adopted such a

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[79] *See, e.g.*, Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 46.

[80] *See, e.g.*, Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 47.

campaign.[81] The difference between the Visa and MasterCard Settlements concerning this and other issues is a product of intense negotiation and Lead Counsel's intimate knowledge of Visa and MasterCard similarities and dissimilarities. Based upon this knowledge, a "no exclusivity" injunction was not necessary in the MasterCard Settlement Agreement, nor would the Court have likely granted such an injunction if plaintiffs had prevailed at trial.

In making these and similar arguments, the objectors exhibit profound disrespect for the effort of Class Counsel who achieved historic and unprecedented results for the Class in this case. Moreover, objectors are plainly ignorant of the simple fact that, if Lead Counsel had demanded some of the valueless provisions that objectors insist upon, it inevitably would have sacrificed something else of real value to the Class.

**2. Objections To Lack Of Second Opt Out Period.**

Young Pioneers objects to the fact that absent Class Members who received Notice of Pendency and did not opt out "do not now have the option of opting out and pursuing an individual claim." Young Pioneers Obj. at 4. Young Pioneers argues that a second opt-out period should be given to absent Class Members that received the original Notice of Pendency because the opt out period set forth in that notice *only* gave absent Class Members sixty-six days to opt out.

The law does not support Young Pioneers' position. In fact, "[c]ourts have routinely approved Class Notice mailings where the deadline to opt out was between thirty and sixty days." *In re Prudential Ins. Co. of Am. Sales Practices Litig.,* 177 F.R.D. 216, 240-41 (D.N.J. 1997). *See also White v. Nat'l Football League,* 41 F.3d 402, 408 (8th Cir. 1994) (notice mailed one

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[81] *See, e.g.*, Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 49.

month prior to settlement hearing is adequate), *abrogated on other grounds by Amchem Prods.*, 521 U.S. 591; *Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1375 (9th Cir. 1993) (notice mailed thirty-one days before deadline for objections is adequate).

710 Corp. and Leonardo's Pizza also request that Class Members be given a second opportunity to opt out of the Class. 710 Corp./Leonard's Pizza Obj. at 6.[82] However, because the Settlements are "fair, adequate and reasonable, due process does not afford Class Members a second opportunity to opt out." *In re Lloyd's,* 2002 WL 31663577, at *12; *Officers for Justice*, 688 F.2d at 635 (Ninth Circuit holds that due process does not afford second opportunity for opt out to absent class members).

### 3. Objection To Certification Provisions Regarding Visa Rebranding Of Debit Cards.

Young Pioneers objects because, under the Visa Settlement, "Visa is not required to independently provide written certification of its compliance" with the requirement that it cause clear and conspicuous identifiers to be placed on Visa POS Debit Devices. Young Pioneers Obj. at 2. This is a silly objection.

Paragraph 5(b) of the Visa Settlement mandates that "Visa will require issuers to have eighty percent of outstanding Visa POS Debit Devices" rebranded by July 1, 2005 and one hundred percent in compliance with this requirement by January 1, 2007. It further states that "Visa *shall provide* Plaintiffs' Co-Lead Counsel, upon written request, written certification that the eighty percent and one hundred percent compliance requirements have been reached." The

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[82] 710 Corp./Leonardo's Pizza claim that it is unfair that Class Members are not given an opportunity to opt out "once settlement terms are agreed to and known." These objectors, who have never evidenced any desire to opt out, do not have standing to raise this argument. *Id.* (emphasis eliminated).

Settlements give Lead Counsel the power to request the certifications mandated in this Paragraph.

### 4. Objection To Finality Of Settlement If Appeal Only Concerns Fee Award Or Plan.

Young Pioneers objects because "the Settlements will be final with respect to Visa and MasterCard if the filing of an appeal concerns only the award of attorneys' fees or the plan of allocation of the settlement." Young Pioneers Obj. at 1. There is no legitimate reason why a dispute over fees or the Plan should delay finality of the decrees against Visa and MasterCard.[83] To the contrary, it would be manifestly unfair to Class Members if the relief accorded in the Settlements were further delayed merely because the fees awarded to Class Counsel and features of the Plan are being appealed. This objection should be denied.

### 5. Requests For Internet Publication Of Future Court Submissions.

710 Corp./Leonardo's Pizza, at page 6 of their objection argue, that Class Counsel should "at least publish [] on the Internet" the manner in which it proposes to distribute any money remaining in the common fund after absent Class Member distributions. 710 Corp./Leonardo's Pizza also argue that any motion for "securitization" of the award be published on the case website for class review. 710 Corp./Leonardo's Pizza Obj. at 6-7. Consistent with C&P's pre-existing practice of posting significant documents on the case website, including many documents it was not required to post, C&P will publish on the case website any and all

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[83] Contrary to Young Pioneers' conclusory and unsupported assertion, the Plan is not "inextricably intertwined" with the Settlement Agreements. Young Pioneers Obj. at 2. The Court could grant final approval to the Settlement Agreements, based on the historic injunctive and monetary relief they grant the Class, even if the Plan was plainly unfair and unreasonable (which, of course, it is not). Put differently, the Class should not be prevented from receiving the benefits of the injunctive relief conferred by the Settlement Agreements because of a baseless appeal regarding the Plan. Such a result would be plainly unfair to the Class.

submissions to the Court regarding any proposed "securitization" plan or distribution of any unclaimed residue simultaneously with the filing of such papers. Shapiro Dec. ¶ 4.

## V. DISCOVERY TO ABSENT CLASS MEMBERS SHOULD NOT BE PERMITTED.

Without specifying the information he purportedly needs, Schonbrun seeks the right to "depose class counsel's experts." Schonbrun Obj. at 27. Objectors, however, do "not have an absolute right to discovery and presentation of evidence." 4 *Newberg on Class Actions,* at § 11:57. "The criteria relevant to the court's decision of whether or not to permit discovery are the nature and amount of previous discovery, reasonable basis for the evidentiary requests, and number and interests of objectors." *Id.* Schonbrun is the *only objector* seeking discovery of matters unrelated to attorneys' fees. (With respect to attorneys' fees, only one additional Class Member has sought discovery). This alone, combined with Schonbrun's record for delaying meritorious class action settlements, demonstrates that his requests for discovery should be denied.[84]

There has been exhaustive discovery and dispositive motion practice in this proceeding. Neither Schonbrun nor the Court needs further information regarding the strengths and weaknesses of plaintiffs' claims or plaintiffs' damages theory. The Court has already denied

[84] Despite the fact that Schonbrun appeared in this action almost a year ago, he did not request discovery -- or any of the materials produced in this case -- until after he had filed his objection. Indeed, he specifically elected not to receive any materials that had previously been filed or served in the case other than "court orders . . . containing substantial rulings, including scheduling rulings for significant events in the litigation." Shapiro Dec. ¶ 11

NuCity's application for discovery of settlement negotiations. *See,* Judge Gleeson August 13, 2003 Order. To the extent he seeks it, Schonbrun is not entitled to that information either.[85]

As further discovery will not assist the Court in evaluating the fairness, adequacy or reasonableness of the Settlements, discovery should be denied. *See Weinberger,* 698 F.2d at 79 (Second Circuit affirms denial of discovery to objector); *Glicken v. Bradford*, 35 F.R.D. 144, 148 (S.D.N.Y. 1964) (on motion to approve settlement of derivative action, court holds that "[c]ross-examination of the affiants was not warranted; this is not a trial and the test of the evidence which the Court should receive on a settlement is whether the proffered proof is of a nature which will aid it in passing upon the essential fairness and equity of the settlement").

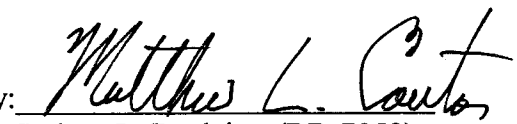
[85] Requests by absent class members for discovery of materials prepared in connection with a class action settlement are routinely denied absent a showing that the settlement was a product of collusion. *See, Mars Steel,* 834 F.2d at 684; *Thornton v. Syracuse Sav. Bank*, 961 F.2d 1042, 1046 (2d. Cir. 1992) (cross-claimant denied discovery of materials relating to class action settlement where no evidence of collusion between class plaintiffs and defendants).

## CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests that the Court grant final approval to the Settlement Agreements and the Plan of Allocation.

Dated: New York, New York
September 18, 2003

**CONSTANTINE & PARTNERS**

By: 

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