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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE	:
	: Case No. 96-cv-5238
VISA CHECK/MASTERMONEY ANTITRUST	:
LITIGATION	: Hon. John Gleeson
	: Mag. J. Orenstein
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**MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE
SEEKING TO PERMIT WELLS FARGO RETAIL FINANCE II, LLC TO
PARTICIPATE IN THE CLASS ACTION SETTLEMENT AS A TIMELY FILER
AND DIRECTING LEAD COUNSEL AND THE CLAIMS ADMINISTRATOR TO
PROVIDE ALL NECESSARY INFORMATION WITH RESPECT TO THE FILING
AND PROCESSING OF CLAIMS TO SETTLEMENT PROCEEDS**

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PRELIMINARY STATEMENT

Petitioner Wells Fargo Retail Finance II, LLC (“WFRF”) respectfully submits this memorandum of law, together with the accompanying affidavits and exhibits, in support of its application for an order permitting it to participate in the class action settlement as a timely filer and directing Lead Counsel and the Claims Administrator (each, as defined below) to provide all necessary information to WFRF with respect to the filing and processing of claims to the settlement proceeds.

WFRF’s interest in the settlement proceeds from this litigation (the “Litigation Trust”) is indisputable. WFRF is the principal secured creditor to, and attorney-in-fact for, certain class members (collectively, the “Retail Borrowers”), with the right to receive proceeds from collateral pledged to WFRF by such Retail Borrowers in accordance with various financing agreements, between or among, as applicable, WFRF and such Retail Borrowers. Prior to February, 2009, neither WFRF nor its predecessors in interest were ever notified, directly or indirectly (through the Retail Borrowers), of (i) the class action settlement, (ii) the existence of the Litigation Trust, or (iii) the need to provide notice of any claims with respect to the settlement proceeds from the Litigation Trust. Accordingly, WFRF should be permitted to participate in the class action settlement because it satisfies the elements of the “excusable neglect” standard.

First, WFRF has acted in good faith. WFRF has diligently pursued its interests in the proceeds from the Litigation Trust after learning that the Retail Borrowers potentially had outstanding claims in this litigation. The affidavits submitted herewith detail the various correspondence among WFRF, and Jason Enzler (“Mr. Enzler” or “Lead Counsel”), of Constantine Cannon L.L.P., lead counsel for the Litigation Trust, and Perry Carbone (“Mr. Carbone”) and Jeff Stein (“Mr. Stein”), each, of Garden City Group (the “Claims Administrator”).

Second, approving WFRF's claims would not delay the proceedings. The final terms of the VISA Pre-Payment Plan and the MasterCard Pre-Payment Plan have not yet been determined.

Third, no prejudice will occur to the Defendants (as defined below) or the other class action plaintiffs. The Defendants have no reversionary interest in the settlement proceeds from the Litigation Trust, nor will additional payments be required of the Defendants. Moreover, the interests of the other plaintiffs in this litigation will not be affected.

Finally, the Affidavit of Patrick Norton explains that none of the Retail Borrowers was a going concern (i.e., such Retail Borrowers were either completely defunct, or were in the midst of bankruptcy proceedings), as of June, 2003, when a settlement was reached in this litigation.

WFRF seeks an Order from this Court (i) recognizing that WFRF is lawfully entitled to receive all of the class action settlement proceeds due the Retail Borrowers; provided, however, nothing therein would grant any authority of WFRF to assert any claims against the Litigation Trust or the Claims Administrator for payment of distributions previously made by the Litigation Trust; (ii) permitting WFRF to participate in the class action settlement as a timely filer, on behalf of the Retail Borrowers, with respect to seeking future distributions from the Litigation Trust; (iii) directing Lead Counsel and the Claims Administrator to provide WFRF with all information requested by WFRF, which may be necessary or helpful to WFRF asserting claims against any third parties who may have received prior distributions from the Litigation Trust, or may now be seeking future distributions from the Litigation Trust, on account of timely filed claims of the Retail Borrowers, if any, including the name, address, and other contact information of any parties to whom such distributions were paid (or who are now seeking future distributions on account of such claims), the identity of the parties who filed claims on behalf of such Retail Borrowers, the date on which such claims were filed by such parties, and the date on

which such distributions were paid by the Litigation Trust or the Claims Administrator to such parties, if applicable; (iv) directing Lead Counsel and the Claims Administrator to provide WFRF with all information requested by WFRF with respect to the processing of WFRF's late filed claims with the Litigation Trust, including, without limitation, the dollar value of the settlement proceeds to which each of the Retail Borrowers will be entitled; and (v) ordering the Claims Administrator to pay all of the proceeds from the Litigation Trust to which the Retail Borrowers would otherwise be entitled, to WFRF, as the senior secured creditor of, and attorney-in-fact for, each of the Retail Borrowers.

FACTS

A. Background

WFRF is an asset-based lender who, along with certain of its predecessor lenders, made loans to the following retailers, which retailers later went into bankruptcy: (i) Golf America Stores, Inc.; (ii) HGG Acquisition Corp., a/k/a McCrory Corporation; (iii) Aslanyan & Kocoglu, Inc., d/b/a Leathermode; (iv) Wickes Furniture Company, Inc.; (v) Gantos, Inc.; (vi) The Music Network, Inc.; and (vii) SLJ Retail, LLC (collectively, the "Retail Borrowers"). (Affidavit of Patrick Norton in Support of Order to Show Cause, dated October 6, 2009, at ¶ 2 ("Norton Aff.")) Pursuant to certain financing agreements between or among, as applicable, WFRF and each of the Retail Borrowers, WFRF and its lending predecessors (i) had first liens on all of the assets of the Retail Borrowers, and (ii) were appointed as attorneys-in-fact for each of the Retail Borrowers, with the power to collect all amounts constituting the collateral of each of the Retail Borrowers, including all proceeds thereof. (Norton Aff., ¶ 4)

Over the course of several years, beginning in 1999, each of the Retail Borrowers commenced bankruptcy proceedings. (Norton Aff., ¶ 5) Since the dismissal of the respective bankruptcy proceedings, there have been no active corporate office addresses for, or directors,

officers, or employees of, any of the Retail Borrowers, to which mail could be delivered. (Norton Aff., ¶ 5) As of the date hereof, the aggregate remaining unpaid and outstanding indebtedness owed to WFRF by the Retail Borrowers, collectively, pursuant to the financing agreements is approximately \$25,446,271.55. (Norton Aff., ¶ 52)

B. The Class Action Settlement

In October 1996, certain retailers and retail trade associations commenced this class action lawsuit against Visa U.S.A., Inc. (“Visa”) and MasterCard International Incorporated (“MasterCard”) (collectively, the “Defendants”) alleging violations of federal antitrust laws. By Order dated June 21, 2002, the Court directed a Notice of Pendency of class action be given to class members. (Affirmation of Roger J. Crane, dated October 6, 2009 (“Crane Aff.”), Exh. A) In June, 2003, a settlement was reached wherein the Defendants agreed to collectively pay approximately [\$3.05 billion] to compensate class members.¹ A Notice of Settlement was sent to class members in September, 2003, and November 28, 2005 was set as the deadline for submitting a “Claim Form.”² Per Court Order, the bar date for submission of a Claim Form was subsequently extended to September 15, 2008.³

WFRF understands that, of the original 5 million class members with potential claims in this litigation,⁴ approximately 700,000 approved claims with respect to the settlement funds have been submitted by such class members. (Decl. of Robert L. Begleiter, dated September 9, 2009, ¶ 2, Docket #1513). On August 31, 2009, Lead Counsel reached an agreement with Visa and MasterCard, wherein Visa and MasterCard agreed to make final, lump sump payments of

¹ See Visa Check/MasterMoney Antitrust Litigation, <http://www.inrevisacheckmastermoneyantitrustlitigation.com/faq.php3>

² Id.

³ <http://www.inrevisacheckmastermoneyantitrustlitigation.com/claimpastdeadline.php3>.

⁴ <http://www.inrevisacheckmastermoneyantitrustlitigation.com/history.php3>

\$682,000,000 and \$335,000,000, respectively, in full satisfaction of their payment obligations to the class members. (Crane Aff., Exhs. B, C)

C. WFRF's Lack of Notice of the Class Action Settlement and WFRF's Prompt Due Diligence

In or about February 2009, WFRF was contacted by one or more distressed debt traders who advised WFRF, for the first time, that certain of the Retail Borrowers had an interest in the settlement proceeds of this litigation. (Norton Aff., ¶ 6) WFRF immediately conducted due diligence to determine the identity of all of the Retail Borrowers entitled to settlement proceeds.

Patrick Norton, a Vice President of WFRF, subsequently engaged David Weitman ("Mr. Weitman") of K&L Gates LLP to explore the possibility that WFRF may be entitled to settlement proceeds from the Litigation Trust, as the senior secured creditor of, and attorney-in-fact for, each of the Retail Borrowers. (Affidavit of David Weitman in Support of Order to Show Cause, dated October 5, 2009, at ¶ 4 ("Weitman Aff.")) Mr. Weitman immediately contacted the Claims Administrator and left messages with its customer service "switchboard", using the 1-800-292-6069 telephone number referenced in the Litigation Trust website. (Weitman Aff., ¶ 5) None of Mr. Weitman's calls were returned. Thereafter, Mr. Weitman contacted the office of Constantine Cannon L.L.P., and was directed to speak to Mr. Enzler. (Weitman Aff., ¶ 5)

On or about April 15, 2009, Mr. Weitman spoke with Mr. Enzler. (Weitman Aff., ¶ 6) Mr. Weitman immediately provided Mr. Enzler with background information regarding (i) the relationship between WFRF and the Retail Borrowers, including a detailed explanation regarding WFRF's status as the senior secured creditor of, and attorney-in-fact for, each of the Retail Borrowers, (ii) the then-current status of each of the Retail Borrowers, and (iii) the events

surrounding the lack of notice from the Claims Administrator or Mr. Enzler, to WFRF (or its predecessors-in-interest) regarding the class action settlement. (Weitman Aff., ¶ 6)

In subsequent conversations, Mr. Enzler and Mr. Weitman discussed the documentation Mr. Enzler would need so that he and the Claims Administrator would have enough comfort to provide to WFRF all of the information regarding the Retail Borrowers' potential entitlement to share in the settlement proceeds from the Litigation Trust. (Weitman Aff., ¶ 7) In furtherance of the foregoing, Mr. Weitman informed Mr. Enzler that he would provide to Mr. Enzler and the Claims Administrator, the various loan documents to which each of the Retail Borrowers and WFRF were parties, wherein WFRF was appointed as attorney-in-fact for each of the Retail Borrowers. (Weitman Aff., ¶ 7)

Beginning on July 13, 2009 through July 21, 2009, Mr. Weitman sent to Mr. Enzler, with a copy to the Claims Administrator, copies of the various loan documents to which WFRF and each of the Retail Borrowers were parties. (Weitman Aff., ¶ 8) Such loan documents indicate, unequivocally, that (i) WFRF and its lending predecessors were granted first-priority liens on all of the assets of each of the Retail Borrowers, and (ii) WFRF was appointed as attorney-in-fact for each of the Retail Borrowers, with the power to collect all amounts constituting the collateral of each of the Retail Borrowers, including all proceeds thereof. (Weitman Aff., ¶ 8) Mr. Weitman then requested that Mr. Enzler review the various loan documents and confirm that he would be comfortable discussing, with Mr. Weitman, the matters relating to the Retail Borrowers' potential entitlement to the settlement proceeds from the Litigation Trust. (Weitman Aff., ¶ 8)

On September 3, 2009, after a period of several weeks wherein he was unable to obtain a response from Mr. Enzler with respect to the foregoing, Mr. Weitman sent Mr. Enzler a letter reiterating that (i) WFRF was granted a first lien on all the assets of each of the Retail

Borrowers, including all proceeds thereof (which includes the right to settlement proceeds from the Litigation Trust), (ii) each of the Retail Borrowers granted WFRF an irrevocable power of attorney, authorizing WFRF to, among other things, receive the settlement proceeds from the Litigation Trust, and (iii) with respect to the potential claims of each of the Retail Borrowers to the proceeds from the Litigation Trust, in each case, such claims were not filed by the Retail Borrowers because, following the respective bankruptcy proceedings, each had closed its doors, ceased its operations, liquidated its assets, and dissolved, and no mail was ever forwarded to WFRF (or its predecessors-in-interest), as the senior secured creditor of, and attorney-in-fact for, each of the Retail Borrowers. (Weitman Aff., ¶ 10)

On September 4, 2009, Mr. Weitman sent to the Claims Administrator, with a copy to Mr. Enzler, notices under Sections 9.406 and 9.607 of the Uniform Commercial Code, instructing the Claims Administrator to send all proceeds from the Litigation Trust to which any of the Retail Borrowers would otherwise be entitled, directly to WFRF. (Weitman Aff., ¶ 12) Mr. Enzler subsequently informed Mr. Weitman that he and the Claims Administrator had reviewed the powers of attorney granted by the Retail Borrowers in their respective loan documents, and that such grants did not, per se, provide Mr. Enzler or the Claims Administrator sufficient authority to disclose matters relating to the class action to WFRF. (Weitman Aff., ¶ 13) Mr. Enzler suggested that the Retail Borrowers execute “consents,” to give the Litigation Trust and the Claims Administrator sufficient comfort to discuss such matters with WFRF. (Weitman Aff., ¶ 13) Because each of the Retail Borrowers is defunct and no longer operating, none of the Retail Borrowers has any officers or directors to sign such “consents.” (Weitman Aff., ¶ 14; Norton Aff., ¶ 15)

Nonetheless, on September 8, 2009, WFRF sent to Mr. Enzler and the Claims Administrator, “consents,” authorizing disclosure to WFRF of any and all information relating to

the class action settlement. (Weitman Aff., ¶ 14) The “consents” were signed by WFRF, as attorney-in-fact for each of the Retail Borrowers, consistent with the powers of attorney granted to WFRF pursuant to the terms of the various loan documents to which the Retail Borrowers and WFRF were parties. (Weitman Aff., ¶ 14) More specifically, each “consent,” authorized Lead Counsel and the Claims Administrator to disseminate information relating to the class action to WFRF, as attorney-in-fact for each of the Retail Borrowers. (Weitman Aff., ¶ 14)

On September 14, 2009, Mr. Weitman, Mr. Enzler and the Claims Administrator participated in a conference call to discuss the matters set forth in Mr. Weitman’s September 4, 2009, and WFRF’s September 8, 2009 letters. (Weitman Aff., ¶ 15) During such call, the Claims Administrator acknowledged reviewing Mr. Weitman’s letters and consents, as well as all of the loan documents sent by Mr. Weitman. (Weitman Aff., ¶ 15) Each of the Claims Administrator and Mr. Enzler indicated that, in order to discuss the terms of the class action settlement, and most matters relating thereto, with either Mr. Weitman or WFRF, the Claims Administrator and Mr. Enzler would require a more definitive authority than the powers of attorney granted in the loan documents and the authorizations contained in WFRF’s “consents.” (Weitman Aff., ¶ 15) Essentially, Mr. Enzler and the Claims Administrator were looking for a “comfort order,” authorizing the Claims Administrator and Mr. Enzler to discuss the class action litigation with WFRF. (Weitman Aff., ¶ 15) By the end of the conversation, Mr. Enzler and Mr. Carbone indicated that an “omnibus motion” could address the issue of allowing WFRF access to information relating to the class action settlement and the Litigation Trust, as well as allowing WFRF to file late claims past the bar date, as a result of WFRF’s lack of notice from the Claims Administrator. (Weitman Aff., ¶ 15)

D. WFRF's Status As a Claimant Entitled to Receive Funds from the Litigation Trust

WFRF's status as the senior secured creditor of, and attorney-in-fact for, each of the Retail Borrowers, is undisputed and has not been challenged by the Claims Administrator or Lead Counsel. Any and all claims with respect to, and proceeds from, the Litigation Trust to which each of the Retail Borrowers would otherwise be entitled, in an amount not to exceed the indebtedness of each, constitute collateral of WFRF and are subject to the first-priority lien of, and may be negotiated, settled, and received by, WFRF, in accordance with the terms of the respective loan agreements. (Norton Aff., ¶¶ 14, 19, 26, 31, 38, 45, 51)

1. Golf America Stores, Inc.

Pursuant to a certain Loan and Security Agreement, as amended (as amended, the "Golf America Loan Agreement"), by and between WFRF, as successor-in-interest to Paragon Capital, LLC, and Golf America Stores, Inc. ("Golf America"), Golf America granted to WFRF a first-priority lien on and security interest in all presently owned and after-acquired assets of Golf America. (Norton Aff., ¶ 10) Such assets explicitly included Golf America's

Accounts⁵, accounts receivable, contracts, contract rights...General Intangibles...Chattel Paper...choses in action, and all other liabilities in whatever form owing from any person, firm or corporation or any other legal entity, to [Golf America], for goods sold by [Golf America] or services rendered by [Golf America],...and all proceeds and products [thereof].

(Norton Aff., ¶ 11) Pursuant to the Golf America Loan Agreement, WFRF (i) was granted a first lien on all the assets of Golf America, including all proceeds thereof, and (ii) was irrevocably appointed as attorney-in-fact for Golf America, with full power of substitution, whereby WFRF was authorized to, among other things,

convert the Collateral (inclusive of the settlement proceeds from the Litigation Trust) into cash...for the sole benefit of [WFRF],...prosecute, defend,

⁵ Capitalized terms used but not defined in this "Fact" Section have the meanings assigned to such terms in the respective loan agreements referenced herein.

compromise and release any claim relating to the Collateral [including all proceeds thereof],... endorse the name of [Golf America] in favor of [WFRF] upon any and all checks, drafts, notes, acceptances, or other items or instruments,...sign [Golf America's] name on any (i) notice to [Golf America's] Account Debtors, (ii) verification of the Receivables Collateral, or (iii) proof of claim,...and take all such action as may be necessary to obtain the payment of any...banker's acceptance of which [Golf America] is a beneficiary.

(Norton Aff., ¶ 11) In other words, Golf America appointed WFRF its attorney-in-fact to negotiate, settle, and receive any and all claims and payments with respect to the settlement proceeds from the Litigation Trust to which Golf America would otherwise be entitled. (Norton Aff., ¶ 11)

On August 7, 2002 – one year before the Notice of Settlement was distributed to class members – Golf America filed for bankruptcy protection in the U.S. Bankruptcy Court, District of Delaware. (Norton Aff., ¶ 12) The Order dismissing the bankruptcy action authorized Golf America “to surrender, deliver and grant to WFRF peaceful possession of any and all remaining property and assets of [Golf America] or [Golf America's] estate.” (Norton Aff., ¶ 12) Golf America's bankruptcy case was dismissed on September 9, 2004. (Norton Aff., ¶ 12) As of the date hereof, the remaining unpaid and outstanding indebtedness owed to WFRF by Golf America is approximately \$12,915,067.23. (Norton Aff., ¶ 13)

At no point prior to February, 2009, was WFRF, or, to WFRF's knowledge, its predecessor-in-interest under the Golf America Loan Agreement, Paragon Capital, LLC, alerted to Golf America's potential entitlement to the class action settlement proceeds and the need to provide notice to the Claims Administrator of any claims to such settlement proceeds from the Litigation Trust. (Norton Aff., ¶ 14).

2. HGG Acquisition Corp. (a/k/a McCrory Corporation)

WFRF, as successor-in-interest to Foothill Capital Corporation, as lender, and McCrory Corporation, as successor-in-interest to HGG Acquisition Corp. (“McCrory”), as borrower,

executed a certain Loan and Security Agreement, dated as of September 30, 1997, as amended as of December 31, 1997 (as amended, the “McCrorry Loan Agreement”). (Norton Aff., ¶ 15) Pursuant to the McCrorry Loan Agreement, WFRF (i) was granted a first-priority lien on and security interest in, all then-owned and thereafter-acquired assets of McCrorry, including, but not limited to, all accounts, contract rights, and other forms of obligations owing or arising out of the rendition of services by McCrorry, and all proceeds thereof (which includes the right to settlement proceeds from the Litigation Trust), and (ii) was irrevocably appointed as attorney-in-fact for McCrorry, whereby WFRF was authorized to, among other things,

endorse [McCrorry’s] name on any Collection item that may come into [WFRF’s] possession,...receive and open all mail addressed to [McCrorry],...settle and adjust disputes and claims respecting the Accounts directly with Account Debtors, for amounts and upon terms that [WFRF] determines to be reasonable, and [WFRF] may cause to be executed and delivered any documents and releases that [WFRF] determines to be necessary [in connection therewith].

(Norton Aff., ¶ 16) In other words, McCrorry appointed WFRF its attorney-in-fact to negotiate, settle, and receive any and all claims and payments with respect to the settlement proceeds from the Litigation Trust to which McCrorry would otherwise be entitled. (Norton Aff., ¶ 16)

On September 10, 2001 – two years before the Notice of Settlement was distributed to class members – McCrorry filed for bankruptcy protection in the U.S. Bankruptcy Court for the District of Delaware. (Norton Aff., ¶ 17) On October 7, 2001, the bankruptcy court entered a Final Financing Order, which makes clear that WFRF has “valid, binding and enforceable security interests in and liens upon all of [McCrorry’s] personal and real property, including, without limitation, all of [McCrorry’s] present and future Accounts..., General Intangibles... and all of the products and proceeds of the foregoing in any form.” (Norton Aff., ¶ 17) In accordance therewith, WFRF was permitted to pursue the collateral pledged to WFRF by McCrorry (including all proceeds thereof), in accordance with the terms of the McCrorry Loan Agreement,

which necessarily includes McCrory's interest in the settlement proceeds to which it would otherwise be entitled from the Litigation Trust.

McCrory's bankruptcy case was dismissed on February 13, 2004. As a result, the automatic stay was terminated and WFRF was entitled to exercise all of its rights and remedies against its collateral, including the settlement proceeds from the Litigation Trust. (Norton Aff., ¶ 17) As of the date hereof, the remaining unpaid and outstanding indebtedness owed to WFRF by McCrory is approximately \$1,831,751.66. (Norton Aff., ¶ 18)

At no point prior to February, 2009, was WFRF, or, to WFRF's knowledge, its predecessor-in-interest under the McCrory Loan Agreement, Foothill Capital Corporation, alerted to McCrory's entitlement to the class action settlement proceeds and the need to provide notice to the Claims Administrator of any claims to the settlement proceeds from the Litigation Trust. (Norton Aff., ¶ 19).

3. SLJ Retail, LLC

WFRF, as successor-in-interest to Wells Fargo Retail Finance, LLC, as lender, and SLJ Retail, LLC ("SLJ Retail") executed a certain Loan and Security Agreement, dated as of May 14, 2001, as amended (as amended, the "SLJ Retail Loan Agreement"). (Norton Aff., ¶ 20) Pursuant to the SLJ Retail Loan Agreement, WFRF (i) was granted a first-priority lien on and security interest in all then-owned and thereafter-acquired assets of SLJ Retail, including, but not limited to SLJ Retail's

Accounts, accounts receivable, contracts, contract rights,...General Intangibles,...Chattel Paper,...choses in action, and all other liabilities in whatever form owing from any person, firm or corporation or any other legal entity, to [SLJ Retail], for goods sold by [SLJ Retail] or services rendered by [SLJ Retail]...and all proceeds and products [thereof].

(Norton Aff., ¶ 20), and (ii) was irrevocably appointed as attorney-in-fact for SLJ Retail, whereby WFRF was authorized to, among other things

convert the Collateral into cash...for the sole benefit of [WFRF],...prosecute, defend, compromise, or release any action relating to the Collateral [inclusive of proceeds thereof],...receive and open [SLJ Retail's] mail,...endorse the name of [SLJ Retail] in favor of [WFRF] upon any and all checks, drafts, notes, acceptances, or other items or instruments,...sign [SLJ Retail's] name on any (x) notice to [SLJ Retail's] Account Debtors, (y) verification of the Receivables Collateral, or (z) proof of claim,...and take all such action as may be necessary to obtain the payment of any...banker's acceptance of which [SLJ Retail] is a beneficiary.

(Norton Aff., ¶ 21) In other words, SLJ Retail appointed WFRF its attorney-in-fact to negotiate, settle, and receive any and all claims and payments with respect to the settlement proceeds from the Litigation Trust to which SLJ Retail would otherwise be entitled. (Norton Aff., ¶ 21)

On December 21, 2001 – two years before the Notice of Settlement was distributed to class members – SLJ Retail filed for bankruptcy protection in the U.S. Bankruptcy Court for the Northern District of Georgia, Atlanta Division. (Norton Aff., ¶ 22) On December 24, 2001, the court entered an emergency interim order (the “Cash Collateral Order”), which makes clear, in part, that WFRF has valid, binding, and enforceable first-priority liens and security interests on SLJ Retail's personal and real property, including, without limitation, all of SLJ Retail's then-existing and thereafter arising accounts, general intangibles, and all of the products, proceeds, and recoveries of the foregoing in any form. (Norton Aff., ¶ 23) The Cash Collateral Order also makes clear that SLJ Retail stipulated to the validity and priority of WFRF's liens on the collateral pledged by SLJ Retail, to WFRF, as security for the obligations of SLJ Retail under the SLJ Retail Loan Agreement. (Norton Aff., ¶ 23)

SLJ Retail's bankruptcy proceeding was dismissed on April 23, 2004. (Norton Aff., ¶ 24) As a result of such dismissal, the stay was lifted and WFRF was permitted to pursue the collateral pledged to WFRF by SLJ Retail (including all proceeds thereof), which necessarily includes SLJ Retail's interest in the settlement proceeds to which it would otherwise be entitled

from the Litigation Trust. (Norton Aff., ¶ 24) As of the date hereof, the remaining unpaid and outstanding indebtedness owed to WFRF by SLJ Retail is approximately \$87,000.00. (Norton Aff., ¶ 25)

At no point prior to February 2009 was WFRF, or to WFRF's knowledge, its predecessor-in-interest under the SLJ Retail Loan Agreement, Wells Fargo Retail Finance, LLC, alerted of SLJ Retail's entitlement to the class action settlement proceeds and the need to provide notice to the Claims Administrator of any claims to the settlement proceeds from the Litigation Trust. (Norton Aff., ¶ 26).

4. Wickes Furniture Company, Inc.

WFRF, as successor-in-interest to Wells Fargo Retail Finance, LLC, as agent for the lenders identified on the signature pages thereof, and Wickes Furniture Company, Inc. ("Wickes"), as borrower, are parties to each of (i) a certain Debtor-in-Possession Financing Agreement, dated as of February 5, 2008, as amended (as amended, the "Wickes Loan Agreement"), and (ii) a Security Agreement, dated as of February 5, 2008. (Norton Aff., ¶ 27) Pursuant to the Wickes Loan Agreement, WFRF (i) was granted a first lien on all of the assets of Wickes, including but not limited to, Wickes' "accounts, other receivables, chattel paper, contract rights,...instruments,...general intangibles,...commercial tort claims,...and all substitutions, accessions and proceeds of the foregoing, including insurance or other proceeds," and (ii) was irrevocably appointed as attorney-in-fact for Wickes, whereby WFRF was authorized to, among other things,

(i) send a notice of assignment...to any and all Account Debtors, and ...collect the Accounts Receivable and payment intangibles of [Wickes], ...take possession of the Collateral and all books and records relating thereto,...(ii) endorse [Wickes'] name upon any notes, acceptances, checks, drafts, money orders or other evidences of payment relating to the Accounts Receivable or payment intangibles of [Wickes],...(iii) [sign Wickes'] name on any assignments and verifications of Accounts Receivable or payment

intangibles and notices to Account Debtors with respect to Accounts Receivable or payment intangibles of [Wickes]...[and] (iv) do all other acts and things necessary to carry out [the Wickes Loan Agreement].

(Norton Aff., ¶ 28) In other words, Wickes appointed WFRF its attorney-in-fact to negotiate, settle, and receive any and all claims and payments with respect to the settlement proceeds from the Litigation Trust to which Wickes would otherwise be entitled. (Norton Aff., ¶ 28)

On February 3, 2008, Wickes commenced an action in the United States Bankruptcy Court for the District of Delaware. (Crane Aff., Exh. D, at ¶ 1) On May 11, 2009, the Bankruptcy Court entered an order dismissing the bankruptcy case and, accordingly, the automatic stay was lifted against WFRF to exercise its rights and remedies against the collateral (including the settlement proceeds from the Litigation Trust) pledged by Wickes pursuant to the Wickes Loan Agreement. (Norton Aff., ¶ 29) As of the date hereof, the remaining unpaid and outstanding indebtedness owed to WFRF by Wickes is approximately \$2,892,943.00. (Norton Aff., ¶ 30)

At no point prior to February 2009, was WFRF, or to WFRF's knowledge, its predecessor-in-interest under the Wickes Loan Agreement, Wells Fargo Retail Finance, LLC, alerted of Wickes' entitlement to the class action settlement proceeds and the need to provide notice to the Claims Administrator of any claims to the settlement proceeds from the Litigation Trust. (Norton Aff., ¶ 31)

5. Aslanyan & Kocoglu, Inc. d/b/a Leathermode

WFRF, as successor-in-interest to Paragon Capital, LLC, as lender, and Aslanyan & Kocoglu, Inc., d/b/a Leathermode ("Leathermode"), as borrower, executed a certain Loan and Security Agreement, dated as of August 3, 1999, as amended (as amended, the "Leathermode Loan Agreement"). (Norton Aff., ¶ 32) Pursuant to the Leathermode Loan Agreement, WFRF (i) was granted a first-priority lien on and security interest in, all then-owned and thereafter-

acquired assets of Leathermode, including, but not limited to, Leathermode's "Accounts, accounts receivable, contracts, contract rights,...General Intangibles,...Chattel Paper,...choses in action, and all other liabilities in whatever form owing from any person, firm or corporation or any other legal entity...to [Leathermode], for goods sold by [Leathermode] or services rendered by [Leathermode]...and all proceeds and products [thereof]," and (ii) was irrevocably appointed as attorney-in-fact for Leathermode, with full power of substitution, whereby WFRF was authorized to, among other things,

convert the Collateral into cash...for the sole benefit of [WFRF],...prosecute, defend, compromise, or release any action relating to the Collateral (inclusive of the settlement proceeds from the Litigation Trust),...receive and open [Leathermode's] mail,...endorse the name of [Leathermode] in favor of [WFRF] upon any and all checks, drafts, notes, acceptances, or other items or instruments,...sign [Leathermode's] name on any (x) notice to [Leathermode's] Account Debtors, (y) verification of the Receivables Collateral, or (z) proof of claim,...and take all such action as may be necessary to obtain the payment of any...banker's acceptance of which [Leathermode] is a beneficiary.

(Norton Aff., ¶ 33) In other words, Leathermode appointed WFRF its attorney-in-fact to negotiate, settle, and receive any and all claims and payments with respect to the settlement proceeds from the Litigation Trust to which Leathermode would otherwise be entitled (Norton Aff., ¶ 33)

On December 5, 2001 – more than two years before the Notice of Settlement was distributed to class members – Leathermode filed for bankruptcy protection in the U.S. Bankruptcy Court for the Central District of California. (Norton Aff., ¶ 34) On January 15, 2002, the Bankruptcy Court entered a lift stay order as to WFRF so that, as Leathermode's principal secured creditor, WFRF could exercise its rights and remedies with respect to the collateral (including all proceeds thereof) pledged by Leathermode as security for its obligations under the Leathermode Loan Agreement. (Norton Aff., ¶ 35) On August 27, 2002,

Leathermode's bankruptcy proceeding was dismissed, and, by operation of law, the automatic stay terminated. (Norton Aff., ¶ 36) Thereafter, WFRF had the right to exercise its rights and remedies against all of the collateral (including all proceeds thereof) pledged by Leathermode as security for its obligations under the Leathermode Loan Agreement. (Norton Aff., ¶ 36) As of the date hereof, the remaining unpaid and outstanding indebtedness owed to WFRF by Leathermode is approximately \$73,000.00. (Norton Aff., ¶ 37)

At no point prior to February, 2009, was WFRF, or to WFRF's knowledge, its predecessor-in-interest under the Leathermode Loan Agreement, Paragon Capital, LLC, alerted of Leathermode's entitlement to the class action settlement proceeds and the need to provide notice to the Claims Administrator of any claims to the settlement proceeds from the Litigation Trust. (Norton Aff., ¶ 38)

6. The Music Network, Inc.

WFRF and The Music Network, Inc. ("Music Network") executed a certain Senior Secured Super-Priority Debtor-in-Possession Loan and Security Agreement, dated as of July 25, 2003, (as amended, the "Music Network Loan Agreement"). (Norton Aff., ¶ 39) Pursuant to the Music Network Loan Agreement, WFRF (i) was granted a first-priority lien on and security interest in all then-owned and thereafter-acquired assets of Music Network, including but not limited to, Music Network's

Accounts, Chattel Paper, Commercial Tort Claims, General Intangibles, Negotiable Collateral...money, cash,...and all proceeds and products...of any of the foregoing,"

and (ii) was irrevocably appointed as attorney-in-fact for Music Network, authorizing WFRF to, among other things,

endorse [Music Network's] name on any Collection item that may come into [WFRF's] possession...[and] settle and adjust disputes and claims respecting the Accounts, chattel paper or General Intangibles directly with

Account Debtors, for amounts and upon terms that [WFRF] determines to be reasonable, and [WFRF] may cause to be executed and delivered any documents and releases that [WFRF] determines to be necessary.

(Norton Aff., ¶¶ 39-40) In other words, Music Network appointed WFRF its attorney-in-fact to negotiate, settle, and receive any and all claims and payments with respect to the settlement proceeds from the Litigation Trust to which Music Network would otherwise be entitled. (Norton Aff., ¶ 40)

On July 21, 2003 – two months before the Notice of Settlement was distributed to class members – Music Network filed for bankruptcy protection in the U.S. Bankruptcy Court for the Northern District of Georgia, Atlanta Division. (Norton Aff., ¶ 41) On July 25, 2003, the bankruptcy court entered an Interim Financing Order (the “Financing Order”), which provides, in part:

[WFRF] has valid, binding and enforceable first-priority liens and security interests on all of [Music Network’s] personal and real property, including, without limitation, all of [Music Network’s] present and future Accounts,...General Intangibles,...and all of the products and proceeds of the foregoing in any form.

(Norton Aff., ¶ 42) The Financing Order also makes clear that WFRF had a pre-petition first-priority lien on the collateral pledged by Music Network to secure the repayment of its pre-petition obligations, in full. (Norton Aff., ¶ 42)

Music Network’s bankruptcy case was dismissed on April 4, 2004 and the automatic stay terminated by operation of law. Thereafter, WFRF was free to exercise all of its rights and remedies against the collateral (including all proceeds thereof) pledged by Music Network. Such collateral necessarily includes Music Network’s interest in the settlement proceeds to which it would otherwise be entitled from the Litigation Trust. (Norton Aff., ¶ 43) As of the date hereof, the remaining unpaid and outstanding indebtedness owed to WFRF by Music Network is approximately \$7,641,079.44. (Norton Aff., ¶ 44)

7. Gantos, Inc.

WFRF, as successor-in-interest to each of Foothill Capital Corporation and Paragon Capital, LLC, as lender, and Gantos, Inc. (“Gantos”), as borrower, executed a certain Loan and Security Agreement, dated as of November 18, 1998, as amended (as amended, the “Gantos Loan Agreement”). (Norton Aff., ¶ 46) Pursuant to the Gantos Loan Agreement, WFRF was (i) granted a first-priority lien on and security interest in, all presently owned and after-acquired assets of Gantos, including but not limited to:

Accounts,...General Intangibles,...Negotiable Collateral,...and any money or other assets that come into the possession, custody or control of [WFRF]...[and] all proceeds and products [thereof],” and (ii) irrevocably appointed attorney-in-fact for Gantos, authorizing WFRF to, among other things, “endorse [Gantos’] name on any Collection item that may come into [WFRF’s] possession...[and] settle and adjust disputes and claims respecting the Accounts directly with Account Debtors, for amounts and upon terms that [WFRF] determines to be reasonable, and [WFRF] may cause to be executed and delivered any documents and releases that [WFRF] determines to be necessary.

(Norton Aff., ¶¶ 46-47) In other words, Gantos appointed WFRF its attorney-in-fact to negotiate, settle, and receive any and all claims and payments with respect to the settlement proceeds from the Litigation Trust to which Gantos would otherwise be entitled. (Norton Aff., ¶ 47)

On December 28, 1999 – nearly three years before the Notice of Settlement was mailed to the class action plaintiffs – Gantos filed for bankruptcy protection in the U.S. Bankruptcy Court for the District of Connecticut, Bridgeport Division. (Norton Aff., ¶ 48) Such bankruptcy case was dismissed February 12, 2009. (Norton Aff., ¶ 49) Prior to dismissal, however, WFRF’s predecessors-in-interest under the Gantos Loan Agreement, Foothill Capital Corporation and Paragon Capital, LLC, jointly filed a motion (the “Motion”) for relief from automatic stay, which Motion makes clear that WFRF, on behalf of the Lenders, had “valid and

perfected first priority security interests and liens, superior to all other creditors...in and upon all of the existing and future assets and properties of [Gantos]” (Norton Aff., ¶ 49) The Bankruptcy Court granted the Motion and lifted the stay, which permitted WFRF to pursue the collateral pledged by Gantos to secure Gantos’ indebtedness under the Gantos Loan Agreement. (Norton Aff., ¶ 49) Such collateral necessarily includes Gantos’ interest in the settlement proceeds to which it would otherwise be entitled from the Litigation Trust. As of the date hereof, the remaining unpaid and outstanding indebtedness owed to WFRF by Gantos is approximately \$5,430.22. (Norton Aff., ¶ 50)

At no point prior to February, 2009, was WFRF, or to WFRF’s knowledge, either of its predecessors-in-interest under the Gantos Loan Agreement, Paragon Capital, LLC, and Foothill Capital Corporation, alerted of Gantos’ entitlement to the class action settlement proceeds and the need to provide notice to the Claims Administrator of any claims to the settlement proceeds from the Litigation Trust. (Norton Aff., ¶ 51)

ARGUMENT

WFRF SHOULD BE PERMITTED TO PARTICIPATE IN THE CLASS ACTION SETTLEMENT AS A TIMELY FILER

District courts in the Second Circuit analyze whether to permit late claims in class action settlements under the “excusable neglect” standard set out by the Supreme Court of the United States in Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P’ship, 507 U.S. 380, 391 (1993). In Pioneer, a bankruptcy case, the Supreme Court adopted an equitable balancing test for determining what constitutes “excusable neglect” under Bankruptcy Rule 9006(b)(1). The Court found that an attorney’s inadvertent failure to timely file a proof of claim can constitute excusable neglect. Id. at 382-84. Interpreting the plain meaning of the phrase, “excusable neglect,” the Supreme Court concluded, “Congress plainly contemplated that the courts would be

permitted, [when] appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." Id. at 388.

In so holding, the Supreme Court expressly rejected the view that only faultless omissions are excusable, finding instead that excusable neglect is a "somewhat elastic concept" and "is not limited strictly to omissions caused by circumstances beyond the control of the movant." Id. at 392. Thus, Pioneer expressly rejected the holding by lower courts that "excusable neglect could only be employed where the late filing was due to circumstances beyond the control of the party." In re Orthopedic Bone Screw Prods. Liab. Litig., 246 F.3d 315, 321 (3rd Cir. 2001) (citing Pioneer, 507 at 287).

Accordingly, the Supreme Court identified the following four factors to determine whether neglect is excusable: (1) the danger of prejudice to the non-movant; (2) whether the movant acted in good faith; (3) the length of the delay and its potential effect on judicial proceedings; and (4) the reason for the delay, including whether it was within the reasonable control of the movant. Id. at 395.

The "excusable neglect" standard set forth in Pioneer has been applied in a variety of circumstances, including class action settlement administration. Courts in the Second Circuit and elsewhere generally consider whether the claimant has shown "excusable neglect" in their late attempts to participate in the settlement of the action. See Zients v. La Morte, 459 F.2d 628, 630 (2d Cir. 1972); In re Orthopedic Bone Screw Prods., 246 F.3d at 321; In re Crazy Eddie Sec. Litig., 906 F. Supp. 840, 843 (E.D.N.Y. 1995). "The determination of whether to allow the participation of late claimants in a class action settlement is essentially an equitable decision within the discretion of the court." In re Crazy Eddie, 906 F. Supp. at 843. Consequently, the Pioneer factors and relevant circumstances should be weighed in determining whether to permit

a late claim. See In re Nichita Bucurescu, No. 01 Civ. 2799, 2003 U.S. Dist. LEXIS 9341, *5-6 (S.D.N.Y. June 4, 2003) (citing Pioneer, 507 U.S. at 395).

E. WFRF Has Demonstrated “Excusable Neglect”

1. WFRF Acted In Good Faith

It is undisputed that WFRF acted in good faith. In fact, Mr. Enzler agreed with Mr. Weitman that the Litigation Trust would acknowledge that Mr. Weitman’s first phone call and inquiry -- combined with the numerous loan documents sent to Mr. Enzler in April of 2009 – would be treated by the Litigation Trust as a timely notice that (i) WFRF sought information with respect to the claims of the Retail Borrowers to the settlement proceeds from the Litigation Trust and (ii) WFRF sought to obtain such settlement proceeds from the Litigation Trust, as the senior secured creditor of, and attorney-in-fact for, each of the Retail Borrowers. (Weitman Aff., ¶ 6). Mr. Enzler further agreed that neither he, as lead counsel for the Litigation Trust, nor the Claims Administrator, would argue that WFRF failed to immediately alert the Litigation Trust (and the Claims Administrator) of the Retail Borrowers’ respective claims, following WFRF’s notice of such Retail Borrowers’ potential entitlement to the settlement proceeds from the Litigation Trust. (Weitman Aff., ¶¶ 6-16).

The Affidavit of David Weitman further details WFRF’s due diligence upon being alerted of certain of the Retail Borrowers’ potential interest in the settlement proceeds from the Litigation Trust. Mr. Weitman immediately provided Mr. Enzler with information regarding (i) the relationship between WFRF and the Retail Borrowers, including a detailed explanation regarding WFRF’s status as the senior secured creditor of, and attorney-in-fact for, each of the Retail Borrowers, (ii) the then-current status of each of the Retail Borrowers, and (iii) the events surrounding the lack of notice from the Claims Administrator or Mr. Enzler, to WFRF (or its predecessors-in-interest) as attorney-in-fact for, each of the Retail Borrowers, of the class action

settlement. (Weitman Aff., ¶ 6) These documents demonstrate that the Retail Borrowers were victims of the Defendants' wrongful conduct and that WFRF, as the senior secured creditor of the Retail Borrowers, is rightfully entitled to the settlement proceeds from the Litigation Trust.

2. Approving WFRF's Claim Would Not Delay the Proceedings

The proceedings would not be delayed if WFRF's application to participate in the settlement is granted. In fact, the danger of delay does not factor into the analysis here since the Court has not yet determined whether and under which terms the final settlement distribution should be made within the context of the VISA Pre-Payment Plan and the MasterCard Pre-Payment Plan.⁶

3. No Evidence of Prejudice to the Defendants

Prejudice within the context of class action settlements focuses upon harm caused to the settling defendants. In Zients v. La Morte, the court permitted late claims because allowing "five claims would result in only a miniscule reduction in recovery by timely claimants." 459 F.2d 628, 630 (2d Cir. 1972). Similarly, in In re "Agent Orange" Prods. Liab. Litig., 689 F. Supp. 1250, 1261-63 (E.D.N.Y. 1988), the district court allowed late claims and even permitted class members who had previously opted-out to make claims on the settlement fund. Id. Since the settlement agreement had established a fixed or closed-end fund, there could be no prejudice to the defendants, and the plaintiffs who had filed timely claims had no justifiable expectation in any particular pay-out." Dahingo v. Royal Caribbean Cruises, Ltd., 312 F. Supp. 2d 440, 446 (S.D.N.Y. 2004). See also In re Cendant Corp. PRIDES Litig., 235 F.3d 176, 184 (3d Cir. 2000) (inclusion of late claimant not a detriment where the scope of liability has already been fixed).

⁶ See http://www.inrevisacheckmastermoneyantitrustlitigation.com/Visa_OSC_Merchant_Advisory.pdf

There is precedent for treating late claimants who file objections differently from other late claimants. In In re Crazy Eddie, 906 F. Supp. 840, for example, the district court treated as timely, all claims received from claimants who asserted they did not receive notice, provided that they sent in their claims notice within one year after the deadline. Claims filed within one month of the deadline without a letter of explanation, however, were disallowed because the district court could not assess the existence of excusable neglect. Id. at 846-47.

The Defendants and other timely class members will not be prejudiced if WFRF is permitted to participate in the Litigation Trust. The Defendants will not be compelled to pay additional funds into the settlement account to pay WFRF's claims. Nor do the Defendants have a reversionary interest in the settlement fund, and, therefore, the Defendants do not expect to receive any surplus of the settlement proceeds. In that regard, WFRF does not seek retroactive payments from the Litigation Trust, but merely seeks payments from future distributions to which the Retail Borrowers are entitled. Finally, preventing WFRF from asserting its claims against the settlement funds unfairly advantages "timely registrants [as] more deserving of remedy, for purposes of equity, than tardy registrants with similar claims..." In re Orthopedic Bone Screw Prods., 246 F.3d at 324.

4. WFRF Has Explained Why It Failed to Submit Timely Claims

The final Pioneer factor – the reason for the delay – has been noted by the Second Circuit as the most significant of the four factors. See Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 366 (2d Cir. 2003) (“[W]e and other circuits have focused on the third factor...”).

Nonetheless, federal courts frequently exercise their discretion to deem late acts timely where the party behaved in good faith, even in cases where the lateness was a result of a party's mere negligent or inadvertent conduct. See Raymond v. Int'l Bus. Mach. Corp., 148 F.3d 63, 66 (2d Cir. 1998); Covington v. Westchester County Jail, No. 96 Civ. 7551, 1998 U.S. Dist. LEXIS

14636, at *7-9 (S.D.N.Y. Sept. 17, 1998); Cutler v. New York Telephone Co., No. 75 Civ. 1164, 1978 U.S. Dist. LEXIS 14763, at *3 (S.D.N.Y. Oct. 24, 1978).

Also, on point is In re Cendant, 235 F.3d at 182. In that case, the district court refused to excuse a claimant's late filing because of a mailroom error internal to the claimant's organization. Id. On appeal, the Third Circuit reversed and found that the claimant's excuse justified the allowance of its claim to settlement participation where there was no evidence of bad faith, prejudice, or delay. See id. at 184 (acknowledging that delay may have been attributed to "a mailroom which did not operate as it should have in the ordinary course of business").

Here, the Affidavits of Patrick Norton and David Weitman detail, at length, the reasons why WFRF delayed in filing claims on behalf of the Retail Borrowers. Such claims were not filed by the Retail Borrowers because, following the respective bankruptcy proceedings, each had closed its doors, ceased its operations, liquidated its assets, and dissolved, and no mail was ever forwarded to WFRF (or its predecessors-in-interest). (Weitman Aff., ¶ 14; Norton Aff., ¶ 5)

Accordingly, WFRF requests an Order permitting WFRF to participate in the class action settlement as a timely filer, recognizing WFRF's lawful entitlement to the settlement proceeds due the Retail Borrowers, and directing the Lead Counsel and Claims Administrator to provide such information to WFRF as more fully described above.

Dated: New York, New York
October 6, 2009

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