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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE: VISA CHECK/MASTER MONEY ANTI TRUST LITIGATION
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CR-96-5238
United States Courthouse
Brooklyn, New York
June 30, 2006
Ten o'clock a.m.

TRANSCRIPT OF ORAL ARGUMENT
BEFORE SPECIAL MASTER ROBIN WILCOX
UNITED STATES DISTRICT COURT

APPEARANCES:

UNITED STATES DEPARTMENT of JUSTICE
ANTI TRUST DIVISION
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LITIGATION III

JOHN R. READ, ESQ.
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5 Proceedings recorded by mechanical stenography, transcript
6 produced by computer.

7 In re: Visa check/Master Money Antitrust
8 Litigation.

9 Docket No. CR-96-5238.

10 MR. TRINGALI: Hello, How are you?

11 MR. GRUNES: It is our application.

12 SPECIAL MASTER: Exactly. So you are going to
13 start.

14 MR. GRUNES: Good morning.

15 Under the unique and special circumstances in this
16 case the United States having been treated as a class member
17 throughout the litigation should be allowed to claim against
18 the settlements. Indeed, we submit that the contrary result
19 would be inequitable. Money that has been satisfied for the
20 government based on its own Visa and Master Card transactions
21 would be distributed to other merchants as a windfall. My
22 name is Allen Grunes, and I represent the United States and
23 the government merchants. With me today is Maurice Stucke and
24 John Read.

25 Two issues before the Court are, first, does the
Court have the equitable power to allow federal government

1 merchants to participate in the settlement. Plaintiff's lead
2 counsel suggests that the Court does not have this power
3 because of the Cooper case. We believe the Court retains its
4 judicial equitable powers and class action settlements and
5 more particularly, other settlements designed to achieve
6 global peace, and Cooper does not strip the Court of that
7 power.

8 Second, should the Court exercise its equitable
9 power under the circumstances present here. We believe the
10 answer is yes, the balance of equities favors the government's
11 application.

12 Now, I want to highlight a few things. Throughout
13 this litigation the government was treated procedurally as
14 well as substantively as class members. This is discussed at
15 length in our briefs, but I will go over a few key points.
16 Procedurally we can start with the class definition.

17 SPECIAL MASTER: Don't you think we should start
18 with the amended complaint?

19 MR. GRUNES: We can start with the amended complaint
20 with the class definition, but in terms of where we fit, where
21 the government merchants fit, the initial question is are we
22 factually within the class definition, and from there we'll
23 talk about statements that have been made, perceptions that
24 would be reasonable.

25 SPECIAL MASTER: Okay. I would like to before,

1 because I do understand your argument that the government
2 merchants accepted the cards, just like everyone else, and
3 that is what the class definition is, but the amended
4 complaint did not mention 15(a), the second amended complaint,
5 and I guess my question for you is whether or not this is
6 properly seen as a question of agency. In other words, did
7 the class counsel have the apparent or actual authority to act
8 on behalf of the government, or did the defendant reasonably
9 believe -- well, I am not entirely convinced that they did,
10 given the background of Cooper, and the statutes that require
11 the Attorney General to give approval.

12 MR. GRUNES: There are a few points on that. First
13 of all, you will look in vain to see whether in Areeda or
14 Newberg, an interpretation of Cooper that says it applies to
15 class actions. Second, in terms of an action brought under
16 section 4 of the Clayton Act, as this one does, we cited in
17 the briefs I think ten federal class actions in which the
18 federal government was specifically excluded from class
19 definition. Some of those were appellate decisions, some of
20 those -- one of them I think even went to the Supreme Court.
21 Mr. Constantine himself when he was with the New York State
22 Attorney's General's Office in Salem Sanitary Carting case,
23 which was brought under Section 4 of the Clayton Act, same
24 statute, specifically excluded the federal government from the
25 class. The question is were those simply gratuitous

1 exclusions, or was there a reason to do that, and I think that
2 relates to what the reasonable impression of a party looking
3 at what the class definition would have been.

4 SPECIAL MASTER: Of a party and why a party? What
5 party, whose party, which party?

6 MR. GRUNES: Well, let's talk about the defendants'
7 perceptions. They stated in briefs in this court as well as in
8 the Second Circuit that they understood class definitions, the
9 government merchants, the United States in effect.

10 SPECIAL MASTER: They stated that, right?

11 MR. GRUNES: They did.

12 SPECIAL MASTER: But they didn't state it in a way
13 such as to present the question or to clarify the issue. They
14 sort of said it as on a list of other merchants to sort of
15 make a point to the breadth of the class action -- I am sorry
16 -- of the number of merchants who would be before the Court.

17 MR. GRUNES: I think that's right to an extent, but
18 I would go further, and add that plaintiffs, Mr. Constantine
19 himself made statements suggesting that the class included all
20 merchants. We cited his speech in Brussels where he talked
21 about how broad the class definition was and why, in fact, if
22 the supreme court had taken cert and decertified the class,
23 the result would be worse for the defendants because the
24 United States as well as other very large merchants would then
25 potentially have their own cases.

1 SPECIAL MASTER: Right. That was in Brussels,
2 right?

3 MR. GRUNES: Yes.

4 SPECIAL MASTER: And not before a court?

5 MR. GRUNES: I acknowledge that. However, it was in
6 front of a banker's group, and I think that -- I suspect that
7 Mr. Constantine through the speech was passing a message on to
8 Visa and Mastercard about their options.

9 SPECIAL MASTER: Well, is it possible that
10 Mr. Constantine hadn't focussed on this issue in the beginning
11 of his class action or maybe I shouldn't single out
12 Mr. Constantine and say class counsel hadn't focussed on this
13 issue in the beginning of this litigation?

14 MR. GRUNES: It is certainly possible.

15 SPECIAL MASTER: What if that were the case, why
16 is it his job -- I mean his job to defend it also to look into
17 and clarify who exactly they are going to be dealing with and
18 who will be bound by this -- by the result in this litigation?

19 MR. GRUNES: Absolutely true, Ms. Wilcox. I would
20 like to stress on that score the importance of the exclusion
21 or opt out procedure. It is treated in some ways as in
22 plaintiff's lead counsel's brief as if it's a technicality,
23 but in fact, exclusion list or opt out lists conform to the
24 basis of the defendants decision -- the opt out lists can lead
25 to a decision by the defendants whether or not to settle the

1 case, and there's testimony in the record that the opt out
2 list was looked at here by the prime negotiator for Mastercard
3 in connection with the decision to settle. There is also
4 testimony that because the United States Postal Service was on
5 the opt out list, that Visa viewed the United States Postal
6 Service as differently situated from other government
7 merchants, and I don't think it is just their say so because,
8 in fact, they then did negotiate a separate deal, including a
9 release which is in the record showing that they believe they
10 were not making total peace with the opt outs, including the
11 postal service, but here they were dealing with the Postal
12 Service as an entity.

13 SPECIAL MASTER: I guess one way to think about the
14 facts in this case is that that what we have here are -- I
15 mean the government -- putting your position aside for the
16 moment, you having written that you don't want to be a part of
17 the settlement and now having changed your mind, let's just
18 compare lead counsel's situation with the defendants'
19 situation. I think you said, and the defendants obviously will
20 have their own view of this and may or may not agree with
21 yours, but you've said it was to some extent their
22 responsibility to figure out who exactly was in this class,
23 and that they could have -- I don't know whether you said this
24 but I think it is true that they could have at any point in
25 this litigation raised the issue themselves, and would

1 definitely be in a better situation if they had. And then we
2 have -- on the other side we have -- since this an equitable
3 balancing, we have class counsel and the opt out list. And
4 Mr. Constantine does say that he didn't put them on the opt
5 out list because they did not opt out. They didn't consider
6 themselves to be a part of the class in the first place. He
7 doesn't say why there wasn't some -- there might not have been
8 some other reason to send it to lead counsel or whether he was
9 aware -- I am sorry -- to defendants or whether he was aware
10 the defendants were believed and I think all that points to
11 some factual disputes.

12 MR. GRUNES: Well, it may, but referring to the
13 facts in the record which we put in front of you in this
14 proceeding, you've seen that the plaintiffs' lead counsel in
15 an affidavit by Mr. Shapiro in November of 2002 highlighted
16 how all requests for exclusion were forwarded to the claims
17 administrator.

18 SPECIAL MASTER: Request for exclusion.

19 MR. GRUNES: Right. Let's assume that this was a
20 non-conforming statement that we are excluded from the --

21 SPECIAL MASTER: What do you mean by
22 "non-conforming"?

23 MR. GRUNES: It did not follow the opt out
24 procedure. It was sent to -- because you will recall the
25 civil division's letter was only sent to plaintiffs' counsel.

1 SPECIAL MASTER: Well, what I am talking about is
2 whether it really is a request for exclusion if they aren't
3 there in the first place.

4 MR. GRUNES: Well, it was construed as a statement
5 that the United States had excluded itself. I think you will
6 agree with me on that score. The lawyer for Mr. Constantine's
7 office represented --

8 SPECIAL MASTER: I don't actually necessarily agree
9 on that. Just so you know, if you want to follow up on that
10 point -- but go ahead.

11 MR. GRUNES: The lawyer from Mr. Constantine's office
12 highlighted how all requests for exclusion were submitted. I
13 assume non-conforming notices were sent, things that did not
14 follow what the class notice said, why wasn't this forwarded.
15 The claims administrator, as we said, looked for every
16 candidate conceivably attempting to exclude itself.
17 Extraordinarily broad language. That is in the Zolar
18 affidavit. Shouldn't at a minimum the United States been
19 removed from the class member list when the settlement notice
20 was sent out? If you recall, there was an affidavit -- I am
21 sorry -- stipulation and order dated June 13th, 2003.
22 Stipulation and order said we are sending out a notice of
23 settlement. We are going to send out notice to everybody who
24 is in and we are not -- lead counsel and claims administrator
25 were directed not to send notice to anyone who had timely

1 excluded themselves. If the letter was an exclusion couldn't
2 some steps have been taken? If you look at the stipulation
3 and order --

4 SPECIAL MASTER: I agree with you that it would have
5 been helpful if everyone had known the situation with respect
6 to the government merchants going forward, but I am not
7 necessarily convinced -- I have not yet figured out who is to
8 blame for that, and I guess I am not convinced that some
9 bureaucratic -- one way to think of this is -- it is a
10 bureaucratic issue, and perhaps there wasn't sufficient
11 attention paid to it, but I guess I am not convinced this
12 isn't something that can be relied upon by the government or
13 by the defendants.

14 MR. GRUNES: Well, then the question is can it be
15 relied upon by the plaintiffs because the fact is that after
16 receiving that letter they took no steps whatsoever to exclude
17 the claims of the United States. Absolutely none.

18 SPECIAL MASTER: You are right and we don't know
19 why. We don't know why. We know that -- why it wasn't put on
20 the opt out list. We know that much.

21 MR. GRUNES: We know a couple of things. We know
22 that the United States claims -- the United States Visa
23 Mastercard transactions were included in the calculation of
24 damages. We know that the United States claims were included
25 when notices of how much each class member was entitled to

1 went out, and on the letterhead it says here you are a class
2 member, you are entitled to the following share of money,
3 unless you think you are deserving of more, that the Navy --
4 NEXCOM, their service exchange group alone got 149 of those
5 notices. At a minimum, if there was a question about the
6 significance of the civil division's letter wasn't it
7 incumbent on at least one of the 20 or so plaintiffs' counsel
8 who got that letter to call the civil division and say who are
9 you purporting to exclude here? The letter said we're --
10 United States agencies and instrumentalities are not class
11 members. That is point one. That was not done. The other
12 side of what was done -- the United States Postal Service --

13 SPECIAL MASTER: Let me ask you a question before
14 you get to that. Did it occur to you to send the letter to
15 the defendants?

16 MR. GRUNES: The understanding I have about the
17 purpose of sending the letter to plaintiffs' counsel was the
18 following: Government entities had received notices that said
19 you weren't in this case, if you do nothing you are bound by
20 the judgment in this case; if you do nothing you are bound by
21 any conceivable release in this case if you do nothing and you
22 consent to be represented by plaintiffs' lead counsel. The
23 civil division letter, I think, the thrust of it was to alert
24 plaintiffs' counsel to the fact that there were statutes out
25 there -- 28 USC 516 and 519. Those statutes said private

1 counsel is not the lawyer for the United States. The justice
2 department's lawyer for the United States and the justice
3 department has to supervise litigation.

4 SPECIAL MASTER: And we are not a part of any
5 settlement.

6 MR. GRUNES: And there was no settlement at that
7 point. Would I write the letter the same way, I'm not sure,
8 but it is what it is. I think the most important fact is the
9 letter went to plaintiffs' counsel and the letter was
10 completely ignored because the government was then treated
11 throughout as if it were a class member. There was no notice
12 given to defendants or the Court or the claims administrator
13 that the letter existed. Frankly, I think -- I know
14 Mr. Constantine says now that that letter simply states the
15 law, and that it was a clear statement of law, but he didn't
16 act as if it were a clear statement of law.

17 SPECIAL MASTER: So, again, my question was whether
18 there was any thought that the government should send some
19 notice to the defendants.

20 MR. GRUNES: My view, and it's an informed view, but
21 I can't speak for the intent at the time, is that there were a
22 couple of issues going on as to why it was not sent to
23 defendants. Number one, the statutes said plaintiffs' lead
24 counsel represents. That was the most important thing to say
25 is to say hang on, you don't unless we consent, and we haven't

1 consented. The letter, as you noted, preserved our rights,
2 our claims. It said we are not part of the settlement, and we
3 are not part of this case, we are not class members. As
4 Mr. Constantine pointed out, was very emphatic along those
5 lines. But that alone allowed us to preserve our rights to --
6 if the United States sought to sue the defendants, then the
7 United States could sue the defendants. The letter in essence
8 said that is a decision that the United States wants to make.
9 There is no necessary reason to send it to the defendants. Had
10 we sent it to the defendants would we be here today? Probably
11 not, but I don't think that makes it incumbent on us to send
12 it to the defendants. I don't think it, frankly, means that
13 it was a mistake not to send it to the defendants.

14 SPECIAL MASTER: Okay. So let me ask you this
15 question then. So you sent this letter saying you didn't want
16 to be a party to the settlement. Now, you've changed your
17 mind. Now, one of their responses, "their" meaning lead
18 counsel, is you know what, it is not like you are in such bad
19 shape if this application is denied. You can go bring your
20 own claim against the defendants. So leaving that aside, I am
21 sure the defendants have something to say about that, so you
22 don't have to worry about their position on that. Why is it
23 that you think you are entitled to money from this settlement?
24 Why don't you have to go out and do the work yourself to --

25 MR. GRUNES: Well, a couple of things. Number one,

1 we were treated as other class members. The suggestion was
2 why don't you file your own suits? Well, we were treated as
3 if we were other passive class members represented by the
4 plaintiffs' lead counsel. Our damages were included in the
5 pot.

6 SPECIAL MASTER: Okay. So on that point, your
7 damages being included in the pot, they were in the estimates.
8 So were people who had opted out. So the estimate it sounds
9 to me like it was hard to get -- that the data base was a mix
10 of people whose damages were going to be included and some
11 whose weren't and to some extent that it had to be factored in
12 when it came to settlement, the fact that the data base had a
13 lot of people who weren't going to be bound by this. Now,
14 defendants say they didn't realize they had to factor in the
15 government and we don't know really -- I mean, I don't know
16 whether you could say that lead counsel has stated that they
17 factored it in or not. Maybe if they thought that government
18 merchants were going to be included they would have asked for
19 more than three million dollars.

20 MR. GRUNES: But the flip side is also true, which
21 is as the case law says, the defendants have the right to rely
22 on an opt out list in deciding whether or not to settle. One
23 U.S. entity was on an opt out list. I am not saying what was
24 in their minds, but I am saying it certainly was a reasonable
25 view that if one entity was on the opt out list, but others

1 weren't, that they assumed that the others had not opted out.
2 That is a view stronger even by a little bit, not much, if you
3 look at the letters sent by the United States Postal Service
4 which says: Include us with the rest of the government,
5 unless the government does nothing, in which case exclude us,
6 and there they were excluded. Class members have looked at opt
7 out lists as well. So I think the real fact is, yes, we tried
8 to exclude ourselves, we were then not treated as if we were
9 excluded. We were treated just like any other class member.
10 The money was, in essence, earmarked -- there are statements
11 and affidavits. I don't think they are contradicted. One is
12 questioned, the other is not contradicted, that comments were
13 made to government and entities saying this money has been
14 earmarked for you. That means it was included in the pot. So
15 to answer your question, coming full circle, yes, if you deny
16 our application we could and we will seriously consider
17 whether to sue the defendants separately.

18 I would point out that one advantage of settlement
19 like this is total peace. That will go away. The other
20 advantage is conservation of judicial resources. That will go
21 away. Another is finality. There are statements in the record
22 by Visa that if we claim against them, that they may then
23 challenge the finality of the settlement. Will that happen?
24 Will they win? I don't know, but they have certainly said
25 that they are thinking about that.

1 SPECIAL MASTER: If they do that that is going to
2 raise a lot of the same questions that are at issue here
3 today.

4 MR. GRUNES: Which brings us to the ultimate point
5 and that is, the status of the U.S. was to be treated as if we
6 were class members, and what we are asking the Court to do is
7 to say, yes, now that you have the Attorney General's
8 permission to participate in this settlement, you are a class
9 member for purposes of the settlement. You should be deemed to
10 be a class member. It is an equitable argument, I agree.

11 SPECIAL MASTER: Let me ask you another question.
12 There is this thing called -- that I saw online called the
13 Doctrine of Ratification, so that if somebody -- if an agent
14 settles on behalf of a principal who hasn't given authority
15 for settlement, but then the principal then gives authority,
16 ratifies that decision, then it should go forward, what do you
17 think of that?

18 MR. GRUNES: Without looking at the case law I would
19 say that sounds like the situation we have here. We were
20 treated as if we were in a settlement. The settlement was
21 done on our behalf. We have evaluated the settlement. We
22 think Mr. Constantine did a terrific job, and we think that we
23 should now share in the settlement that he achieved for us.
24 In other words, we are ratifying --

25 MR. CONSTANTINE: Thank you, all.

1 MR. GRUNES: Legally I think that sounds right. I
2 guess that is the point.

3 SPECIAL MASTER: Well, I didn't think lead counsel
4 agrees with you.

5 MR. CONSTANTINE: I do think I did a great job.

6 SPECIAL MASTER: Lead counsel agrees with you.

7 MR. GRUNES: He agrees with parts of it.

8 SPECIAL MASTER: So just on the question of factual
9 disputes, do you have anything else you want to say on that
10 front? Do you really feel undisputed facts make clear that
11 you should prevail or --

12 MR. GRUNES: Well, I think there are some facts that
13 certainly were raised in affidavits submitted by lead counsel
14 that we would dispute; one being the process by which we've
15 gotten to where we are, have we withheld discovery, for
16 example, and as far as I know, and I am in a position to know
17 the answer to that is no we have not, other than what I said
18 to Mr. Constantine, we would not disclose which is privileged
19 communications. Another point -- there are several points
20 along those lines that were made. For example, the suggestion
21 that the government just kept flip flopping. They spent a fair
22 amount of time talking about statements made by a lawyer who
23 is no longer at the division two weeks into the investigation.
24 Frankly, I think those are ridiculous statements, but they
25 make them -- Erika Meyers.

1 SPECIAL MASTER: What about Mr. Constantine or
2 class counsel's understanding of what the defendants believed
3 as to the government merchants; is that an open question, do
4 you think?

5 MR. GRUNES: I am not aware that there is anything
6 in the record that contradicts the defendants' statements in
7 this court and in the Second Circuit that they believed the
8 government merchants were included, so I am not sure what you
9 are referring to.

10 SPECIAL MASTER: Well, that was -- you know, I
11 don't remember the exact date. That was quite a long time
12 before settlement. I am not sure whether those statements
13 were --

14 MR. GRUNES: Well, okay. I think I know where you
15 are going. Mr. Constantine says even if the government's
16 transactions were included in the calculation of damages
17 that's not -- that wasn't discussed at settlement. We didn't
18 negotiate a percentage of the total pie and we didn't -- I
19 didn't say I want ten percent and they said, no, we will give
20 you three percent. Well, I believe that. I think that is
21 true, but that doesn't really answer the question. The
22 question is was the settlement negotiated with the defendants
23 having a view of what of their universal possible exposure was
24 and was anything said by lead counsel to disabuse them,
25 assuming that what they said they meant, and they said it in

1 the briefs, so I assume that they did mean it. They weren't
2 just exaggerating. Did Mr. Constantine after getting the civil
3 division letter take any steps to disabuse them of that view
4 and the answer was no. So from an equitable standpoint what do
5 we have here? We have government treated as a class member,
6 we have government damages being calculated, no windfall to
7 other class members if you allow us to participate, because
8 they couldn't have believed that they could participate in
9 that. They got their own calculation of damages. We
10 contributed to the -- substantively to the size of the pot. We
11 certainly contributed to, you know -- you would assume the
12 largest class action in history, largest class action in
13 recovery that the defendants sincerely did believe that we are
14 buying total peace, and if we don't participate it opens it up
15 again.

16 SPECIAL MASTER: Okay. Thank you.

17 MR. GRUNES: Thank you.

18 SPECIAL MASTER: I think I would like them to go
19 next.

20 MR. CONSTANTINE: Since I have, like, all of the
21 facts from the beginning, indeed, all the way back to my
22 pre-history when I was in the New York AG's office it might be
23 a good idea for me to just get all the facts out.

24 SPECIAL MASTER: I think we know the facts from the
25 briefs.

1 MR. CONSTANTINE: Okay. All right.

2 MR. TRINGALI: Joseph Tringali for Mastercard and
3 Visa. I will speak on behalf of Mastercard, Visa. Mr. Bomse
4 may then supplement on behalf of Visa. Let me address this
5 issue of whether or not the defendants had some earlier belief
6 and that that was later changed. You have before you both the
7 affidavits --

8 SPECIAL MASTER: I don't know what you are
9 referring to at this point. What you just said doesn't accord
10 with my understanding of what was --

11 MR. TRINGALI: There was a question to Mr. Grunes
12 about -- that the position that the defendants had taken with
13 regard to the government merchants were included in the class,
14 that was early on and did that continue to be their belief.

15 SPECIAL MASTER: No, that was not my point,
16 actually. My point was that lead counsel may have believed
17 one thing and may have not focussed on the government from the
18 beginning. I don't think that there is anything in the record
19 suggesting that you didn't in the settlement believe that the
20 government merchants were covered.

21 MR. TRINGALI: I misunderstood your question because
22 I was going to cite to you affidavits from --

23 SPECIAL MASTER: Don't worry about that.

24 MR. TRINGALI: That is fine. With regard to the
25 equities then, the issue was raised as to whether the

1 defendants should have done something, and independently
2 determine the government merchants were not included as part
3 of the class. I think that would be a strange way of looking
4 at the equities. This is an enormous class action. We had
5 taken the position very publicly that the government merchants
6 were included. Mr. Constantine -- the class had taken a
7 position very publicly that the government merchants were
8 included.

9 SPECIAL MASTER: That was actually getting to my
10 point, the point I made earlier, which is that perhaps Mr.
11 Constantine or class counsel at the time these things were
12 written didn't notice that because it hadn't occurred to them
13 at that point and were later educated to the facts by the
14 government.

15 MR. TRINGALI: And that may well be true, but then
16 with regard to the equities, with regard to the defendants, if
17 he was in the same position as us, and had no reason to
18 understand that the government merchants should not have been
19 included, when he was then put on notice in November 2002 he
20 did not provide that notice to us. So to say that we had a
21 burden to find that out for ourselves would be tremendously
22 unfair, given that what we had and what is undisputed we
23 relied on.

24 There are two things that are undisputed here.
25 Number one, that we were never told about the government

1 merchant -- the government's letter to Mr. Constantine, and
2 the legal issue that was being raised, and number two, that we
3 relied on the opt out list in settling the negotiation, and
4 other United States Postal Service, no government merchant was
5 included on that list, and I don't see how one can suggest
6 under equitable principles that if both plaintiffs and
7 defendants operated under the assumption going into litigation
8 -- through the litigation, that government merchants were
9 included in the class, and that the plaintiff, and only the
10 plaintiff was aware of the fact that the government was taking
11 the position that it may not be included as part of the class
12 and that was not communicated to the defendants which,
13 obviously, the plaintiff had every opportunity to do, nor was
14 it communicated to the Garden City, so they put them on the
15 opt out list or even had that issue raised by Judge Gleeson or
16 otherwise, to suggest that then the defendants for some reason
17 when they thought they were achieving total peace by entering
18 into a settlement agreement based on an opt out list should
19 have done research and should have known an issue that was
20 never disclosed to the them by anyone.

21 Now, whether Mr. Constantine should have told us,
22 whether the government should have told us, I don't think that
23 is the issue with regard to the defendants. With regard to the
24 defendants the issue is no one told us, we had no reason to
25 believe it, we always operated under that assumption that the

1 government merchants were included. We were public about
2 that and at no time did anyone tell us that our position was
3 no longer an operative position to hold because of this letter
4 that had come in. So, I think that's the equitable principles
5 with regard to the defendants in this case, that there is no
6 reason for them to have been -- had any knowledge.

7 SPECIAL MASTER: There is Cooper.

8 MR. TRINGALI: That is absolutely right, but there
9 was Cooper -- -

10 SPECIAL MASTER: There are also those statutes. I
11 don't remember them off-hand.

12 MR. TRINGALI: There were cases --there are the
13 Toshiba cases cited where there were government entities
14 included in the settlement class.

15 SPECIAL MASTER: Right. I have not read Toshiba.
16 Is there some discussion of whether it was brought under 15(a)
17 or --

18 MR. TRINGALI: I don't believe it was brought under
19 15 (a). I don't know whether the issue was raised. I am just
20 saying that it was government entities were included in that
21 class. There is also an issue as to whether this issue that
22 the government raises in its brief as to whether there is a
23 distinction between the United States suing as the United
24 States versus government merchants suing, and whether
25 government merchants would be included as persons or business

1 entities under 15 as opposed to 15(a), but those are not
2 issues that we addressed, that we looked at. We operated
3 under the assumption that the government merchants were in the
4 class. There were various examples where government
5 merchants, including Mr. Constantine, and apparently discussed
6 this, where people had a class definition that excludes the
7 government merchants. That was not done in this case, but
8 there is no -- neither Visa nor Mastercard to my knowledge --

9 SPECIAL MASTER: Those cases were available to
10 everyone, right?

11 MR. TRINGALI: They were available.

12 SPECIAL MASTER: They perhaps raised the issue if
13 somebody had seen them, you know, you point to Toshiba, but
14 there are these other cases that make it clear there may be an
15 issue here.

16 MR. TRINGALI: And I -- but the issue is were we on
17 notice of that in any way. So if we were given the
18 government's letter, for example, then for us to come before
19 you and say we continue to operate under that assumption, we
20 never looked at Cooper, we didn't rely on it in any way, we
21 distinguish it in some way, that is one thing; but to suggest
22 that for under equitable principles, that there's
23 conversations going on between both plaintiff and the
24 Department of Justice that are not disclosed to the
25 defendants, that we independently should know about Cooper

1 when clearly the plaintiffs didn't apparently know about
2 Cooper and the implications of it when it was operated under
3 the assumptions that the government merchants were included as
4 part of the class, no one -- there is no suggestion in the
5 record before you, nor is there any suggestion period whether
6 it is before you or not, that either Visa or Mastercard had
7 knowledge of this issue, and in any way believed that the
8 government merchants other than the U.S. Postal Service --

9 SPECIAL MASTER: I agree with that.

10 MR. TRINGALI: So it is not as if we had done the
11 research, knew about it, but for some reason didn't raise it.
12 I suspect if we had known the issue, one of the things we
13 would have done was sought to exclude the government merchants
14 from the class on that basis and that was not done.

15 SPECIAL MASTER: Am I right in remembering some
16 mention in the brief -- I don't remember -- that you had
17 subsequently entered into some --

18 MR. TRINGALI: Visa entered into agreement with the
19 United States Postal Service.

20 SPECIAL MASTER: No, that is not what I am
21 referring to. Some language or letters about the release in
22 the settlement agreement with the government?

23 MR. TRINGALI: That was in connection with this
24 motion, the government wanted to be clear that the release --

25 SPECIAL MASTER: So isn't that sort of -- I mean, I

1 realize that it was after the settlement, but it is sort of
2 underscores the notion that -- I think that Mr. Constantine
3 could act on behalf of the government. Is that sort of big
4 assumption that could bind the government that this release --
5 you did have to go back to them and say they want to clarify.
6 Oh, by the way, we have these enforcement things going on here
7 and we don't want to --

8 MR. TRINGALI: Presumably, as a class member they
9 could have come in with an objection at the time of the
10 fairness hearing before Judge Gleeson and raised that issue
11 that with regard to the government merchants -- that with
12 regard to the government as an enforcement agency, that they
13 needed that clarifying language. I don't think it goes to
14 whether or not they could have been members of the class.

15 SPECIAL MASTER: Well, you could have as well. I
16 guess my point is this, it is a big assumption when you think
17 about it and I can understand you didn't at the beginning.
18 Apparently, neither did lead counsel, but to assume that Mr.
19 Constantine was acting on behalf of the United States
20 government, given the background of the statutes and Cooper,
21 is a fairly big assumption, isn't it?

22 MR. TRINGALI: Well, it is an assumption knowing
23 what we know now. I am not sure it is a big assumption
24 knowing what we knew during that litigation, and the fact that
25 every one was taking that position and no one was raising any

1 issue with it whatsoever. Now, there may be a reason --

2 SPECIAL MASTER: They didn't and you didn't. No
3 one raised it. No one clarified it, which would have been
4 great. If someone had clarified it we wouldn't be here today.
5 So then the question is you didn't know, they were educated by
6 the government, and for reasons that are only partially
7 articulated they didn't share their education with you, and
8 you -- maybe it was Visa made some assertions in their brief
9 about why they didn't share it. One of them was a mutual
10 mistake or they were withholding it. It seems to me there may
11 be others.

12 MR. TRINGALI: I think the reason is irrelevant,
13 quite frankly. I think the fact with regard to what you are
14 determining in terms of equitable issues, the essential fact
15 is it was not disclosed, and the essential fact is that at the
16 time of settlement we legitimately rely on who was and who was
17 not in the class and desire for three billion dollars plus
18 additional non-monetary consideration that both Judge Gleeson
19 and lead counsel have estimated to be multiples of the three
20 billion dollars actually paid, sought to achieve total peace,
21 and that would not be achieved if the government merchants are
22 now new plaintiffs on a new opt out list that never existed.

23 SPECIAL MASTER: You say that you could move to
24 reform settlement agreement.

25 MR. TRINGALI: That is correct. I am not suggesting

1 -- what I am saying is that the total peace -- I mean you get
2 there the same way, whether it is reformation of
3 the settlement --

4 SPECIAL MASTER: If they sued you -- the government
5 sued you because Judge Gleeson denied your -- denied the
6 government's application, would you have any defenses above
7 and beyond those that were asserted and would have been
8 asserted in this litigation?

9 MR. TRINGALI: It is a statute of limitations issue
10 as to --

11 SPECIAL MASTER: So it is possible that they
12 actually, if they sued you, would not necessarily get a
13 smaller amount than they might otherwise have been entitled to
14 if they sued --

15 MR. TRINGALI: We are still paying more than we
16 were paying.

17 SPECIAL MASTER: Right, but you can at that point if
18 that happens, if you end up paying -- if you end up paying
19 money to the government you can move to reform in the
20 contract?

21 MR. TRINGALI: Well, one can do it that way or one
22 can put the government in the case today, in which case we
23 don't have to deal with whether it is going to be a new round
24 of litigation, and from that new round of litigation there is
25 going to be then another action, another proceeding here

1 challenging the settlement.

2 SPECIAL MASTER: So is your position that would be
3 in the exact same state, so the statute of limitations aside,
4 they would get the same -- they would get exactly the same
5 amount of the settlement if they went that route as if they
6 went this route?

7 MR. TRINGALI: No, because if there is no settlement
8 --

9 SPECIAL MASTER: Well, there might be a settlement.

10 MR. TRINGALI: They could ask for more than what
11 they would get under the current settlement agreement. They
12 could go to trial and get a verdict. So one cannot predict or
13 not.

14 SPECIAL MASTER: Or you could prevail at trial?

15 MR. TRINGALI: Right. One could not predict what it
16 would be, but what one can predict you do not have for the
17 defendants the peace that they thought they were achieving and
18 there's nothing said in this entire record, either from lead
19 counsel, government or anyone else, to suggest that the
20 defendants had anything but an objective to achieve total
21 peace based on an opt out list, whether the government
22 merchants other than the postal service were not included.

23 SPECIAL MASTER: Did either you or Visa actually
24 see the United States postal letter, the letter itself, as
25 opposed to seeing it on a list?

1 MR. TRINGALI: I don't believe we got the letters
2 from Garden City. I am not sure. I wasn't involved in the
3 case at the time. I know they were on the opt out list. I
4 don't know whether the letters were actually made public or
5 not to us.

6 SPECIAL MASTER: Okay.

7 MR. TRINGALI: Thank you.

8 MR. BOMSE: Good morning.

9 SPECIAL MASTER: Good morning.

10 MR. BOMSE: I am not sure I heard the last question.

11 SPECIAL MASTER: Whether anyone at Visa or
12 Mastercard saw the U.S. Postal Service letter as opposed to
13 seeing the U.S. Postal Service on the opt out list.

14 MR. BOMSE: Yes, we did. We saw it for a particular
15 reason, because we were very interested in who opted out. We,
16 in fact, had a fight over getting all of the -- all of the opt
17 out. Why did we do that? Well, because we were trying to
18 decide what you are going to do. You wanted to know what your
19 exposure is. I am want to try, if I can, to answer some of the
20 things that you have asked which were obviously on your mind
21 and I think fairly on your mind, but I want to try and do it
22 if I can within the following framework. It seems to me there
23 are two issues in front of us. One is, is there some reason
24 why this court can't allow the postal -- I mean the United
25 States government now to participate as opposed to why it

1 shouldn't as an equitable matter do that. It seems to me that
2 if we get over the first and then the second one really ought
3 to be quite easy and I am happy to go back through all of
4 those reasons, although I think they are pretty clearly
5 spelled out in the papers. I think your questions tend to go,
6 by and large, to the first question. That is, you begin with
7 the question of the complaint and the class definition. Well,
8 that is important because class actions are a particular and a
9 peculiar procedural device. They are a situation in which a
10 lawyer purports to say I am going to bring a lawsuit, not only
11 on behalf of some people who have come to see me, but on
12 behalf of some other people who I believe are in the same
13 situation, and that lawyer -- the plaintiffs' lawyer has the
14 burden of defining who he purports to represent. In this case
15 that was persons and business entities.

16 Now, somehow the word persons has taken on a mythic
17 significance by discussions that have been had mainly by
18 others about Cooper and Flamingo and Pfizer and India and
19 cases like that, but we ignore the fact that the word persons,
20 which is only part of the class definition to begin with, has
21 an ordinary meaning. Talks about natural people and that is
22 why you would distinguish if you are writing about it between
23 persons and business entities. You are not using -- persons
24 does not have a fixed meaning for all purposes under the
25 anti-trust law. It has an ordinary meaning. That is how we

1 took it, and I can say we took it because I was involved from
2 the very beginning.

3 The notion here that we did not reasonably think
4 that the government was in the case is simply not tenable in
5 terms of what we actually thought of it. Now, I am not going
6 to stand here and tell you that we spent a lot of time
7 thinking about that, but I think it is pretty clear because in
8 very casual ways in writing about it we described the
9 government as being part --

10 SPECIAL MASTER: I agree with you.

11 MR. BOMSE: As being part of the class.

12 SPECIAL MASTER: I agree with you that is what you
13 believe.

14 MR. BOMSE: But I would say and while, you know,
15 we've got a big federal deficit to reduce, I would like to see
16 the government get money, I am concerned here about Visa, and
17 from Visa's standpoint we had not only no reason not to think
18 that the government was being included, but every reason to
19 think that they were. I mean we have a class definition here
20 that came up with something that apparently included them.
21 There's nothing in the law that says that they can't, and by
22 the way, even if there had been something in the law that said
23 they can't, we could have decided to waive it. We didn't.
24 Again, I am not going to over-represent. It is not like we
25 said, ah-ha, they've defined the class they can't define, but

1 people do that all the time, and unless it goes to the court
2 subject matter jurisdiction you are not -- we can decide, you
3 know, we would love to get -- we are going to settle this case
4 someday and boy, we don't want to be left out there with the
5 claim by the United States government. We are really delighted
6 they did that. So when Mr. Constantine by our assumption and
7 by the natural words and as the master of his own complaint
8 defining the class said this is the class. There was no
9 reason why you couldn't do that. 516 and 519 don't say that
10 the government can't be a represented class member as I read
11 it. I am not aware of any law. Nobody cited you any law
12 saying that they couldn't do just what they were doing and
13 just what I think -- and my clear assumption is Lloyd had the
14 same view we did. He probably hadn't focused on it. I mean he
15 says it himself. I don't think he is going to stand up and
16 say at the time he gave it a contrary view. Obviously, when
17 he was in Brussels, again, he wasn't thinking about it any
18 more than we were focusing on it. It was reflecting the
19 mindset that we all had. Did he have apparent or actual
20 authority to do that? You bet he did. He's the master of his
21 complaint. That's the point. It comes to the court. We did not
22 have, with all respect, we didn't have an obligation to come
23 forward and clarify this. Even if it had occurred to us that
24 we wanted to do that, that's not the burden of the defendant.
25 We can accept that now.

1 SPECIAL MASTER: So is that true? I mean -- I am
2 not -- I don't know whether that is true. I am not saying
3 that you had a burden but you certainly wouldn't be in a
4 position -- better -- you would be in a better position now if
5 you had done it and the question is you could have this
6 background assuming that the law is such -- I am not saying
7 that this is the view that I am taking, but I am just going to
8 put it out there as a hypothetical. The law is out there,
9 background, that's what you read the complaint against. The
10 complaint makes no mention of 15(a) and Cooper says 15 isn't
11 available for the government. So, therefore, it is just sort
12 of assumed with the background of this law that the government
13 isn't participating and if you thought, well, maybe, there's
14 -- the government is, you should have perhaps clarified that.

15 MR. BOMSE: We could have, and it could have been
16 strategic that we didn't. As it turns out, it wasn't
17 strategic that we didn't. It was a mutual shared assumption
18 throughout.

19 SPECIAL MASTER: Mutual meaning?

20 MR. BOMSE: Mutual meaning the following: Mutual
21 meaning it was our understanding. As it turned out,
22 serendipitously, we didn't go out, we didn't refer to the
23 postal service or to the Navy or something in our papers in
24 order to trap Lloyd into somehow getting them.

25 SPECIAL MASTER: It would have been a bad trap.

1 MR. BOMSE: Well, I don't know if it would have been
2 a bad trap or a good trap. It would have been dependent on
3 what the trap was trying, but it wasn't a trap. It was an
4 observation. It was an observation about how we were all
5 proceeding. That was an observation that then has things piled
6 on top of it and top of it and top of it, and I'm not now just
7 talking about the early references but I am talking about what
8 happens when we finally get into the settlement process and
9 the opt out process.

10 SPECIAL MASTER: So are you saying that you relied
11 on him not having corrected you?

12 MR. BOMSE: No, we didn't. Yes, we relied in the
13 following sense: We are coming up to settlement negotiations
14 in -- towards the end of the litigation and one of the things
15 that you are looking at, and I put it in my declaration, you
16 look at, okay, what's left once we are done? That's why we
17 went out and got all of those several boxes of opt out
18 documents and we had to go and talk to the clients when they
19 are saying, well, shall we settle, shall we agree to pay this
20 much for that much? And they said who is going to be left?
21 And we said, well, Home Depot is out there and they are a big
22 claimant and there were about four or five others. Top of that
23 list had it been -- had it been on our mind would have been,
24 oh, yeah, and the United States government, one of the two or
25 three biggest merchants as it turns out in this entire class.

1 So we definitely relied in that sense. Everybody was
2 proceeding I suggest -- everybody was proceeding on the
3 assumption that the United States was going to be included,
4 and the one thing that I think is clear is that we did get as
5 part of this and we affirmatively sought it out -- not because
6 we were looking for the government, but because we were
7 looking for what is going to be left -- was we got the opt
8 outs and we looked and we found that the United States Postal
9 Service, one part of the government, so we did report on that
10 to Visa. One part of the United States government said we
11 want to be excluded, and when we saw that it didn't cause us
12 to say, gee, I wonder if they could have been a class member
13 all along. Everybody assumed they were a class member all
14 along, and they had decided they were going to opt out. So
15 here was yet further confirmation.

16 Now, at that time, and indeed, until this whole set
17 of conversations that I now learned about as part of these
18 proceedings came up, I had no idea that there had been any
19 communication between Lloyd and his colleagues on the one
20 hand, and the government on the other about the issue that
21 brings us here. Nobody, nobody thought that they should
22 mention this to us. Now, I am not in a position to say he
23 said, and she said, and who said and what happened between
24 those folks, and you know, I can read the papers the same as
25 you can, but I can certainly say, and I think we can all

1 certainly say, that at some point this kind of became top of
2 mind for Lloyd and his colleagues because he was having these
3 meetings and he was having these discussions, and yet, he
4 never said a word to us and now I am getting to equities here.

5 SPECIAL MASTER: Yes, I think that is where you
6 should be.

7 MR. BOMSE: And at the point where we get to
8 equities I think that scale which maybe you can balance one
9 way or another just goes clunk. I mean how in the world do you
10 not at that point, when it has become a big issue in your
11 mind, how do you let this go? How do you not say a thing to
12 the claims administrator, how do you not say a thing to us,
13 how do you not send along the letter? Well, I didn't send
14 along the letter because I was asked for opt out letters. No,
15 no. We are looking for who's not going to be -- who's going
16 to be left. He knows that. Lloyd is a defense lawyer as
17 well. He's a good lawyer. I mean, we are all working on the
18 assumption that they are in. And it seems to me that if you
19 even get close to the position where you say, you know, this
20 is an equitable proceeding and there's lots of opportunity for
21 courts to do things to help achieve total peace, nobody
22 disputes, obviously, that is what we are seeking here, and
23 that is what we thought we got. Other than as to the real opt
24 outs, that courts have all sorts of ability to let people do
25 things to achieve what everybody thought and certainly what

1 the defendant -- because the rules are rules for our benefit.
2 If the United States government brings a lawsuit -- first of
3 all, I hope they get to participate. I think they should on
4 the record I see, but for whatever reason they don't and they
5 do bring a lawsuit, one of the things we were certainly going
6 to say is uh-uh, you were a member of the class other than the
7 postal service because you didn't exclude yourself, in
8 addition to saying that this agreement has to be reformed to
9 meet the clear mutual mistake. And when you say are the same
10 issues in front of you, yes, implicitly at one level they are.
11 But I don't think, unless Lloyd is prepared to get up here,
12 and I hope maybe he will, and say, yes, there was a mutual
13 mistake between us, because everybody was plainly operating on
14 the assumption that the government is going to be -- maybe the
15 government wasn't, but Visa certainly had no reason to have
16 any different expectation, that you can't make the factual
17 findings that would need to be made in a reformation
18 proceeding if he disputes it. I hope we never get to that
19 point. I think it is time to bring this to an end.

20 SPECIAL MASTER: Can you talk a little bit about
21 the statute of limitations?

22 MR. BOMSE: I want to talk about the statute of
23 limitations. I also want to talk about the question you asked
24 Mr. Tringali about the subsequent agreement we entered into.
25 I think it supports us not --

1 SPECIAL MASTER: All right.

2 MR. BOMSE: If they weren't a class member, which is
3 what you would have -- weren't and couldn't be made a class
4 member, then they have not gotten the benefit of any tolling,
5 so unlike people who opted out and who get a tolling benefit,
6 their claim is being reducing pro tanto but it is still an
7 additional claim. I mean if we don't get reformation and if we
8 face a lawsuit we face additional liability --

9 SPECIAL MASTER: You are not asking for reformation
10 here?

11 MR. BOMSE: No, no, we are not, but at the end of
12 day -- if at the end of the day we can't end up with something
13 that protects us, Visa will have ended up paying more than the
14 amount of money it thought it was going to have to pay for the
15 amount of peace it got.

16 SPECIAL MASTER: What about this, maybe the
17 government who said they didn't want to participate in the
18 settlement and now changed their mind and got back in, maybe
19 one of their reasons and I actually -- I am not saying -- this
20 is a hypothetical, but maybe one of their reasons is that if
21 they actually sued you they would get less money, and in that
22 case why should the class members have to give up their
23 portion?

24 MR. BOMSE: I am not sure, less money.

25 SPECIAL MASTER: I don't know how the statute of

1 limitations would play out here, but suppose that there -- if
2 the -- I don't know the statute of limitations. I am sure you
3 all do and that is one of the reasons I am asking you. Maybe
4 as a result of the statute of limitations their claim would be
5 significantly reduced if they actually sued you and they would
6 have less of a recovery than if they just said we want our
7 share from the settlement. We want to participate in the
8 settlement.

9 MR. BOMSE: But if they even get one dollar --

10 SPECIAL MASTER: Then you bring a motion to reform
11 and I don't know whether you win it or not but you bring a
12 motion.

13 MR. BOMSE: Well, it depends on what the
14 reformation would be. If it is really rescission and reformation
15 which, Heaven forbid, we will all come back and it will
16 litigate.

17 SPECIAL MASTER: I assume rescission is not going to
18 be granted.

19 MR. BOMSE: Nor is it going to be sought, but the
20 question is merely getting reformation, which would get us
21 back the amount of money that was paid, if that is all the
22 government's claim was and it also covered Visa's attorneys'
23 fees, then Visa might not end up at the end of the day being
24 worse off. I would assume that if the government chooses to
25 litigate it will assert a vigorous aggressive claim and they

1 will say that their actual recoverable damages exceed by some
2 measure the amount that they would have gotten in the
3 settlement because -- just to put some numbers on it without
4 endorsing them -- the theory was that the defendants were
5 going to be jointly and severally liable for hundred billion
6 dollars if we had lost the case. If you assume the
7 government's purchases are on the order of three percent of
8 that, you can see that the claim we would face would be well
9 in excess of the three percent of those hypothetical damages
10 that we would have faced. Even if you say half of them went
11 away you are still facing a much larger claim. So we get into
12 settlement negotiations with the government and then they say,
13 well, you know you are facing a claim here of a billion
14 dollars, maybe you ought to pay us thirty percent, after all,
15 we are the United States government.

16 SPECIAL MASTER: If you reform and you win you are
17 in a bad position.

18 MR. BOMSE: That is why we are here.

19 SPECIAL MASTER: I understand that. If you reform,
20 if you win, and I am not saying you necessarily would, but
21 let's say you bring a motion to reform, and you win that, then
22 the class would be in a worse position than if they had just
23 -- if the Judge had just said, all right, the government can
24 participate.

25 MR. BOMSE: If some of the money goes to the

1 government instead of the class members who had filed claims,
2 then mathematically, yes, of course. Even if it's by a nickel
3 each class member will get something less, although I am not
4 quite sure what caused Mr. Constantine then to represent in
5 connection with the Spectrum proceeding that there wasn't
6 going to be in effect, but that is not my problem here, but
7 mathematically that might be true. But as Mr. Tringali, I
8 think, quite accurately pointed out, the one thing that will
9 not do is defeat any expectation interest that a class member
10 had because no class member could know in advance, A, who was
11 going to opt out or what the amount of the settlement would be
12 and who would file the claim. So they could have no
13 expectation interest. We, on the other hand, not only could
14 but in the record which is uncontested before you did have an
15 expectation interest, and that's the interest that would be
16 defeated.

17 SPECIAL MASTER: What I am trying to get at is the
18 class. In other words, what portion -- I know what Mr.
19 Constantine said in his spectrum brief. There will be money
20 taken from class members whether or not, you know, whether or
21 not it is going to be redistributed at the end and it is above
22 and beyond what the communications they are getting right now,
23 or not. If money is given to the government it will not be
24 given -- it will be instead of giving it to class members.

25 MR. BOMSE: That is mathematically unanswerable, of

1 course.

2 SPECIAL MASTER: Exactly, so let's say that that
3 amount is X. If Judge Gleeson grants the application and he
4 says, government, you can participate, that means the
5 government is going to X amount.

6 MR. BOMSE: Yes.

7 SPECIAL MASTER: Okay. Let's assume a different
8 situation. Let's assume that, instead, Judge Gleeson says,
9 you know what, no, you said you didn't want to participate,
10 you don't get to participate, you have to go out, and you have
11 to do the work, take the risk of bringing your own lawsuit,
12 which is what Mr. -- lead counsel did, right? Why shouldn't
13 they? So they do that, and as a result of it, either by
14 settlement, or by litigation and a jury verdict they get an
15 amount that is Y. Now the question is, is Y going to be -- can
16 we know whether Y would be more or less than X?

17 MR. BOMSE: No.

18 SPECIAL MASTER: Can we discuss that at all?

19 MR. BOMSE: We can discuss it the way I have
20 discussed it, which is if you assume, and it is just an
21 assumption, I don't believe the United States government will
22 do this, but if you assume that they were to endorse the same
23 theory, hire the same expert, have the same damage thesis,
24 their damage claim would be vastly, vastly larger than the
25 amount that they will get if Judge Gleeson allows them to

1 partici pate.

2 SPECIAL MASTER: And that is notwithstanding the
3 statute of limitations defense?

4 MR. BOMSE: Yes, it will be. As I said, let's
5 assume that it's half. It would still be vastly -- maybe I
6 shouldn't say it in a softer voice this time, but it would
7 still be much larger than the amount of their claim. So we
8 will face -

9 SPECIAL MASTER: So that is if there was a trial
10 and verdict?

11 MR. BOMSE: Right.

12 SPECIAL MASTER: That is the worst case scenario
13 for you or for --

14 MR. BOMSE: Of course, but one settles because of
15 worst case scenarios, and it is the risk of this which is, as
16 I have described, enlarged, and it is the certain consequence
17 that Visa will end up spending more attorneys' fees to defend
18 that case, which we absolutely know, which causes us to say
19 that this is highly inequitable to put us in that position and
20 even though we think we would be entitled to reformation I
21 doubt very much that reformation could buy us total protection
22 against the things that I have just tried to described to you
23 as the risks we would face, which is one reason why we are
24 here now trying to cut this at the pass.

25 SPECIAL MASTER: Okay. Do you want to talk about

1 the relief?

2 MR. BOMSE: Well, the changes we made. The changes
3 we made were basically to recite what the law is. What we
4 said is that we are not claiming that if you were allowed to
5 participate in this agreement, that somehow that gives up any
6 of the rights which you uniquely as a government have, that
7 is, your sovereign rights to bring an action in your
8 government capacity that doesn't depend upon your being the
9 purchaser at all. That is something that Mr. Constantine as a
10 matter of subject matter jurisdiction could not have brought.
11 So to merely reconfirm, which was as far as we were willing to
12 go with the government, that we are not going to contend
13 somehow that you have waived your law enforcement part of this
14 by participating in your business entity part of this, we are
15 not in any way suggesting that we recognize that they couldn't
16 have been part of this proceeding. So I think that is
17 entirely consistent with the position that we are taking now,
18 which was plainly the position on which everybody was
19 proceeding, and when I say everybody I am saying us, because I
20 know it, because I was there, Mr. Constantine, because I think
21 the record is quite clear about what his expectations were at
22 least going in and as far as we knew right through the end
23 because the effort was made to inform us. I am not sure that
24 there was anything you had asked of others that I have not
25 talked about, but thank you.

1 SPECIAL MASTER: Thank you.

2 MR. CONSTANTINE: Let me address the first question
3 or proposition that Mr. Bomse raised when he got up to speak,
4 and I just sort of like to preface this by saying I've viewed
5 this proceeding and you see this in the papers to some extent
6 as being sort of non-traditional proceeding. Sort of an
7 attempt to try to get the right thing done here, and we have
8 waived privilege on certain documents, so that we can just get
9 the facts out. So I will be making this argument. It is not
10 in the sort of a straight adversarial posture, and you will
11 see that as I go along, but the first question that Mr. Bomse
12 posed when he got up is that is there some reason why the
13 Court can't exercise its equitable powers to do what both Visa
14 and Mastercard and the government want them to do, which is to
15 cut them in for part of the settlement here, and I think there
16 is clear answer to that. Yes, there is a reason why the Court
17 can't do that, and that is, because the Court can only
18 exercise its equitable powers in that respect, and the cases
19 point to this where the government had some, you know,
20 plausible colorable claim to these settlement proceedings. The
21 cases that are cited, to some extent they rely on the Agent
22 Orange case and on the Chickens anti trust litigation, and I
23 would like to read from both of those cases.

24 In the Chickens case indirect purchasers who had
25 been, you know -- and the court says: Of course, had indirect

1 purchasers been completely without any colorable legal claims
2 against the defendants would have been an abuse of the court's
3 discretion to allow them to share in the settlement funds.

4 Similarly --

5 SPECIAL MASTER: But they have 15(a). I mean just
6 because it wasn't cited doesn't mean it is not available.

7 MR. CONSTANTINE: Well, yes. It is available but
8 just not in this case. Not in this case. Yes, and it has
9 been quite obvious since day one that they had a right to sue
10 Visa and Mastercard over the same conduct which was asserted
11 in this case, but just not in this case. Now, we've gotten
12 around this and Mr. Bomse has gotten around this and
13 Mr. Tringali has gotten around this, but the understanding and
14 the knowledge of the statute -- of the separate statutory
15 provision which gives the United States the right to vindicate
16 its interest in cases like this or in situations like this to
17 address conduct like this, and the Cooper decision and the
18 other decisions and ultimately the Flamingo decision, but what
19 those all stand for is the proposition that from day one this
20 case, the case that I'm lead counsel in, was not a vehicle
21 that they could ever have been participants in. They simply
22 could not.

23 SPECIAL MASTER: Well, I mean that may be true.

24 MR. CONSTANTINE: That is true, actually.

25 SPECIAL MASTER: Okay, fine, as a legal matter that

1 is true, but it doesn't seem to have been the understanding of
2 the defendants and it doesn't seem to have been your
3 understanding for at least part --

4 MR. CONSTANTINE: Let me address that. And I have
5 tried my best to try to recreate what exactly I was thinking
6 when I got up, you know, in Brussels and made that speech, and
7 I think it is an absolutely fair interpretation of what I
8 said. At that moment I thought that the United States and its
9 entities were members of the class. You know, it is not an
10 unavoidable conclusion because I am sort of embarrassed about
11 it because well before that I knew about 15(a). I was
12 actually asked to testify in the United States senate when
13 they were changing 15(a) from A -- it had been a single damage
14 provision. The United States -- after Cooper, Congress
15 addressed this issue: How come the government can't sue when
16 it's hurt. Okay. So they then gave the government a single
17 damage provision. So when I started working in the anti trust
18 area the State of New York had sued for treble damages and all
19 persons could sue for treble damages, but for some reason
20 uniquely the United States could only sue for single damages
21 and that was seen to be a bad provision, a gap in the law, and
22 Congress decided to change that and give them treble damage
23 authority, and I was actually asked to testify in support of
24 that, but for some reason I didn't testify. So I certainly
25 was aware of that separate provision, and I was aware of

1 Cooper, but on that day when I gave that speech obviously I
2 had totally forgotten it and --

3 SPECIAL MASTER: And when you were there and you
4 read their briefs?

5 MR. CONSTANTINE: I am going to be really clear about
6 this, I don't ever remember this in their briefs, but I now
7 being refreshed by my own transcript in Brussels, I did say
8 exactly what I thought, and I am sure that I thought that, you
9 know, if the Supreme Court took cert in this case and
10 decertified the class that what would follow would be one
11 hundred or a thousand lawsuits and Home Depot would file one
12 and the PXs would file one, but something happened after that.
13 I got called by the federal government. And by the way, our
14 participation and collaboration with the federal government
15 goes way back before that and I think that is important to
16 say. My first contact with the federal government on this case
17 actually begins before the case was even filed. I briefed the
18 anti trust division on what we were about to do. To some
19 extent I actually asked them to bring a case of their own and
20 I did the same thing with the federal trade commission. I met
21 with the head of the anti trust division. After we filed the
22 case I made a series of trips at the anti trust division's
23 request to go to Washington to brief them on the case, and
24 also, to some extent, to help them with the case that they
25 were germinating themselves, that they were thinking about

1 bringing, which they ultimately brought against Visa and
2 Mastercard in October of 1998 on different theories.

3 I must have gone to Washington a half dozen times,
4 met with predecessors of Mr. Read, with -- I remember Read
5 being with M.J. Mul tonberry and other people within the
6 anti trust division. So they knew about this case and whatever
7 my understanding or whatever loss of memory I had in Brussels,
8 you know in the middle of eating all of that great food, they
9 certainly at the anti trust division always knew they had a
10 statute which was designed specifically -- specifically for
11 them to vindicate the United States' interest precisely in the
12 manner that was intended by Congress.

13 So all the way back to October of 1996 they knew
14 they had their own cause of action under their own special
15 statute, and as has been impressed upon me and everybody else,
16 only they could bring that. And in a letter from the civil
17 division it is not simply they are -- they didn't say we are
18 excluding ourselves. The United States is not a member of the
19 class. The rights of the United States are not affected in any
20 way by any settlement in this case.

21 And by the way, if you were thinking, Lloyd, that
22 you could treat us as passive class members, please be
23 disabused of that because they cited 28 USC 516 and 519, and
24 said you can do that with anybody else but you cannot do that
25 with us.

1 SPECIAL MASTER: So why didn't you forward that to
2 the defendants?

3 MR. CONSTANTINE: I will tell you exactly why I did
4 or didn't do that. I went down to Washington several times at
5 the request of various parts of the United States government
6 to talk about my case, and I had one very clear thing in mind.
7 I wanted to get a witness from some branch of the federal
8 government to come up and say at trial, you know, it is not
9 just, you know, Wal-Mart from Bentonville, Arkansas, or Sears
10 Roebuck from Hoffman Estates, Illinois, but the United States
11 and its various entities, Post Office, the PXs, Smithsonian,
12 etcetera, we are also harmed by this conduct. So that's what
13 I was looking for. This was in the fall of 2002. Judge
14 Gleeson had given us a firm trial date of April 28th, 2003,
15 and I was preparing for trial. And right in the midst of that
16 I get a call, and when the federal government wants to meet
17 with you they don't come to your office, they say you come to
18 Washington, Lloyd. Okay. So I got on the Metroline and I
19 went down to Washington. I met with them a couple of times.
20 I spoke with Mr. Middlebrook at the Treasury Department and I
21 met several times with Mr. Alesevich at the United States P.S.
22 and in particular, you know, Mr. Alesevich said, hey, look, I
23 -- I said -- what do you want? I said I want a witness. And I
24 said so what is your interest in this. He said, well, my
25 interest in this is very clear. The United States cannot

1 participate in this case and somebody, Flamingo folks, are
2 saying unlike the rest of the United States the USPS now
3 because of the Postal Reorganization Act of 1971 is no longer
4 the United States for the purposes of 15(a). That has a
5 separate status, and so that the Law of Cooper which says
6 United States can't be sued, the United States can't sue,
7 they're saying that that's no longer true and it has not been
8 true since 1971 with respect to the postal service, and we are
9 saying quite the opposite. We are saying we are still the
10 United States for the purposes of Cooper, we are still the
11 United States for the purposes of 15 USC Section 15(a). So
12 when this opt out period comes you are not going to see us opt
13 out because to opt out would be to say to the plaintiffs in
14 Flamingo, and also, the other would be plaintiffs that are
15 seeking to sue the United States Postal Service that we are
16 persons, and we are not. The United States is not a person,
17 no entity of the United States is not a person and the Postal
18 Service is one of those entities and that is very important to
19 us, and so the United States was making a very specific point
20 to me. So the reason that I didn't do anything with that
21 letter is that I did not in any way, shape or form want to do
22 any violence to a position that the United States was seeking
23 to preserve, and that is not part of the answer, that's the
24 entire answer.

25 SPECIAL MASTER: So that is why you didn't put it

1 on the opt out list or in the opt out box?

2 MR. CONSTANTINE: Because they were not opt out.

3 SPECIAL MASTER: I understand that, completely
4 understand, but that doesn't mean that you couldn't call the
5 government -- I am sorry -- the defendant and --

6 MR. CONSTANTINE: Absolutely didn't mean I could have
7 picked up the phone and called Steve and said, by the way,
8 Steve, you know, this is no skin off your nose because you are
9 not the plaintiff in Flamingo and you are not -- I assume you
10 are not representing the FEDEX or UPS, or looking, because
11 that was the real concern.

12 Let's really understand what is going on here. The
13 real concern was not that the United States was really worried
14 about a claim that they were monopolizing the mailbag market.
15 There were more serious potential claims that could have been
16 filed against the United States Postal Service at the behest
17 of FEDEX and UPS and DHL, etcetera, and that is what they were
18 concerned about and they very specifically articulated that
19 concern to me.

20 SPECIAL MASTER: I understand.

21 MR. CONSTANTINE: So I could have but -- I, you know,
22 I could have called Steve but I didn't and it didn't -- it
23 wasn't because I was trying to hide anything from him, you
24 know. This was not, you know, top of mind, middle of mind or
25 bottom of mind to me. The only thing that I was trying to

1 achieve in what I did and what I didn't do was simply to
2 faithfully try to not do violence to a position that the
3 United States was seeking to assert or to protect in other
4 litigation. At the same time I was still saying give me a
5 witness, give me a witness, I want a witness, you know, can I
6 get a witness. There is a song. And so that is all I was
7 doing. I wasn't trying to hide the ball. And you know,
8 Mr. Bomse and Mr. Tringali will get up and tell you that that
9 is just not what I do. I was not trying to hide the ball from
10 them. I simply was trying to do what I was trying to do. I
11 was trying to prepare for trial and to some extent I was
12 trying to honor a request --

13 SPECIAL MASTER: I don't think that is what they
14 are trying to say either. I do think that what they are
15 trying to say is that, fine, but our shoe is being pinched
16 here. I mean --

17 MR. CONSTANTINE: And let me address that, and I
18 think it goes right back to the legal question. I think this
19 whole proceeding that has been brought by the United States
20 government should be an embarrassment to Steve Bomse and me,
21 because we are supposed to be two really smart, famous and
22 trustworthy lawyers and yet, I think it has been absolutely
23 made clear that we both forgot some very basic law that we
24 certainly knew or should have known or certainly knew it
25 before this, in the middle of this and after this. We knew

1 that there was a special statute for the federal government,
2 that the federal government can't participate in these cases,
3 but it is absolutely clear that that day in Brussels that
4 knowledge simply, you know, escaped me, and at some point, you
5 know, it escaped him, and it escaped the equally great lawyers
6 at Clifford Chance and Simpson Thatcher and all of the, you
7 know, high priced lawyers. We all forgot that, but it doesn't
8 change the situation that I think -- and I think this is very
9 important, that there was never a day when the United States
10 could ever have been a member of this class. Never. And the
11 United States knew that ten years ago. They could have
12 brought their own case. They knew that. What we did, by the
13 way in the context of this proceeding, is we waived. We
14 waived privilege. So you now have the memos that I sent to my
15 clients. I said I went down to Washington and I met with
16 these guys, and then I said I met with Middlebrook and I met
17 with Alesevich and this is what he said and this is what the
18 other guy said, and then after I got the letter from the
19 justice department --

20 SPECIAL MASTER: So you are saying you could not
21 have pled this and gotten approval? If you had pled it under
22 15(a) and gotten the requisite approval you couldn't have
23 brought it under government -- it is impossible?

24 MR. CONSTANTINE: The way I understand your question,
25 is if when I was doing all the those meetings with the justice

1 department at their request and talking to them about Visa and
2 Mastercard and this case and their case and all that, if I
3 had said to my colleagues at the anti trust division, by the
4 way, you know, I have got this case, I would like to amend the
5 class definition and amend the complaint to include a claim
6 under 15(a), I know that this statute says that only you can
7 represent the government, but certainly, you can hire me. You
8 know, you've hired other lawyers in the past. You know,
9 you've hired David Boies to represent you in some case, will
10 you hire me so that I can prosecute your 15(a) action? Sure,
11 I could have done that, and they could have probably approved
12 it, but this was a brooding omnipresence during all of these
13 meetings. Everybody at the anti trust division, at top of mind
14 they knew that they had the right to bring a 15(a) action and
15 so, you know, because you have my memos to my clients exactly
16 what was going on. You don't have the memos from the
17 interagency agency memos saying shall we bring a 15(a) action
18 or not, should we do this, how much is our claim, what can we
19 get, you know, we got more important things to do, we have to
20 against the petroleum companies, we have to do something with
21 cable TV. You don't have that, but there is no doubt that
22 there is a stream of memos over there where they quite
23 consciously knew that they had their own independent causes of
24 action, and for whatever reason -- and I am not going to
25 second guess the anti trust division -- for whatever reason,

1 they chose not to do it. And you have this process going all
2 the way into 2005 and we weren't treating them as class
3 members when claim forms got sent to them and the claim forms
4 didn't say you are class members. It said we believe you are
5 a class member. It has been explained very specifically in my
6 declaration and other the declarations why non-class members,
7 including some government entities, got claim forms, you know.
8 And then when we went to the government, said help us fix this
9 mess, okay, help us, because it was bitter complaints. We told
10 you we are not class members, we told you that you shouldn't
11 do this. So we said, okay. Can you please help us because we
12 -- we just -- we will correct this if you give us the names of
13 all of the entities.

14 SPECIAL MASTER: All right. I understand that. It
15 is all in your papers. I guess to me the crux of this dispute
16 seems to come down to who should bear the cost of this error,
17 if you say it is an error, and you said it was an
18 embarrassment. I am not sure Mr. Bomse agrees with you on
19 that one, but let's assume --

20 MR. CONSTANTINE: It certainly is -- when I am
21 giving this speech in Brussels, and if I don't really
22 understand what the legal significance of this is. I mean I
23 guess where I come from I represent my clients, the government
24 represents their client, and Steve and Joe represent their
25 clients and we all are supposed to know what our clients'

1 rights, duties and responsibilities are. So I am not quite
2 sure what the significance of me telling the CFO of Deutsche
3 bank what will befall Visa and Mastercard if the Supreme Court
4 grants cert, etcetera, that something is going to happen. I
5 don't know what significance that has but it certainly does
6 demonstrate that on that day, you know, I flunked some part of
7 some test, but I don't think that has anything to do with the
8 basic question here which is whether this Court can begin to
9 exercise equitable powers when there never was any colorable
10 claim that the United States could have asserted in this case.
11 They had a right to assert a different claim in a different
12 case. They could have, as you say, they could have come to me
13 and said, Lloyd, you are doing a good job, will you throw in a
14 15(a) claim and will you represent us and we'll authorize you
15 to do that, but those were options that they had, and they
16 chose not to take that, and there's just absolutely no equity
17 whatsoever with respect to the United States.

18 Now, I think Visa and Mastercards are in a different
19 position, okay.

20 SPECIAL MASTER: Yes, I agree.

21 MR. CONSTANTINE: A very different position. What we
22 are seeing with respect to Visa and Mastercard is that and
23 I'll admit it, I forgot about Cooper, and I forgot about the
24 15(a) probably at some point in this thing, and you know, he
25 probably, you know, he should have known that, too, but I

1 don't think that, you know, I don't think -- first of all, my
2 error, you know, it was in any way, shape or form translated
3 into something that I did in the litigation as opposed to a
4 speech in Brussels, something that I did in the litigation to
5 actively mislead anybody or something that I didn't do which
6 wound up misleading somebody. I was under no obligation
7 whatsoever to in the guise of an exclusion list to report an
8 entity that had not been excluded. I was not in the guise of
9 an opt out list to report to somebody -- report to them
10 somebody who had not opted out and this was very clear.

11 SPECIAL MASTER: Let's talk about settlement
12 negotiations.

13 MR. CONSTANTINE: Okay.

14 SPECIAL MASTER: Let's talk about a hypothetical
15 settlement.

16 MR. CONSTANTINE: Before we start the settlement --

17 SPECIAL MASTER: No, no, I would like actually to
18 ask a question.

19 MR. CONSTANTINE: Okay.

20 SPECIAL MASTER: In a settlement negotiation --
21 let's just not even talk about the Visa, Mastercard, anti-trust
22 litigation, just any old non-class action settlement
23 negotiation, the defendants and the plaintiffs, suppose the
24 defendants said, and I am not saying this happened here, but
25 said -- makes a statement of law or fact that is false, and

1 the defendant doesn't know it but the plaintiff does know it,
2 or should know it.

3 MR. CONSTANTINE: We are about to get to where I
4 think we are going to get to and I just want you to know we
5 are about to talk about settlement negotiations, and the
6 United States may wind up litigating this case, so I don't
7 think that they should hear what I am about to tell you, but
8 if you think so, it is okay with me.

9 SPECIAL MASTER: Well, I have no idea what you are
10 about to say, so I can't make --

11 MR. CONSTANTINE: I am going to talk to you about
12 settlement negotiations which are -- -

13 SPECIAL MASTER: I did not make a decision on that
14 because I don't know what you are going to say. Does anyone
15 have a view on that?

16 MR. CONSTANTINE: I did all the settlement
17 negotiations. I was present at every second of the settlement
18 negotiations and Steve was pretty much present, certainly from
19 the Visa side. He wasn't present at the Mastercard side. If
20 Joe had said to me during the settlement, well, we are paying
21 an awful lot of money here one billion twenty-five million
22 dollars, but at least it buys us total peace, and we won't
23 have to deal with the case, you know, from the United States,
24 I think it would have been my obligation to say, you know,
25 Joe, the United States may well --

1 SPECIAL MASTER: Let's just keep this in the realm
2 of a hypothetical and say that you are saying that you had no
3 -- is it your state of mind, then, sort of the question here,
4 then, I mean so you are saying here you had no idea that they
5 were assuming that?

6 MR. CONSTANTINE: Absolutely. I had absolutely no
7 idea. Look, I don't think this is just a question in a
8 settlement negotiations, I think it is true in court. I think
9 it is true -- you know, I don't -- I know these two guys well
10 enough to know that they subscribe to the same thing. You
11 don't either affirmatively misrepresent anything, nor do you
12 misrepresent something by leaving out salient facts. I have
13 dealt with Mr. Bomse for more than twenty years and he's never
14 done that and I have dealt with Mr. Tri ngali for a bunch of
15 years and he's never done that and I don't do that.

16 SPECIAL MASTER: No, I understand that, but there
17 is also the question that sometimes it just a should have
18 known situation. So, in other words, they should have known
19 but perhaps you should have known that they didn't know. I
20 mean they did say it in their briefs and you did get this
21 letter clari fyi ng?

22 MR. CONSTANTINE: But here is where I think exactly
23 what happened, settlement and the way it occurred is
24 important. Okay. Why this issue, you know, this fact which
25 could have been revealed, was not revealed, etcetera, and it

1 is really completely irrelevant.

2 SPECIAL MASTER: My question is this. I don't want
3 you to talk about settlement. It is more the question of
4 whether or not this is a fact issue, something that needs to
5 be --

6 MR. CONSTANTINE: I don't believe so --

7 SPECIAL MASTER: Talked out in a different
8 proceeding than this one.

9 MR. CONSTANTINE: I don't believe so. I don't
10 believe -- while I think, again, if Steve had said to me,
11 Lloyd, you're taking our shirt off here but at least I won't
12 get sued by the federal government after this is all over, I
13 think absolutely at that point I would have been duty bound as
14 an officer of the court in which you are whether or not you
15 are in the court -- we happened to be in the courthouse
16 because Judge Gleeson locked up us up for negotiation, but as
17 an officer of the court I have to say to him, Steve, you're
18 wrong about that because I got a letter from the Justice
19 Department where they made one thing perfectly clear, they are
20 not class members, and two, I can't represent them, so I am
21 not representing them and they are not class members, so you
22 may well get sued by them, but having said that, okay --

23 SPECIAL MASTER: So you told me the situation where
24 he affirmatively stated during the settlement negotiations --

25 MR. CONSTANTINE: No, I am going to get to that.

1 Okay. I don't think that -- I think that if I had done -- if
2 he had said that to me and I failed to disclose that fact it
3 might have given rise to something, but I don't think that it
4 allows the court, you know, to exercise its equitable powers
5 with respect to this case where they could never be class
6 members and say we are going to disregard the United States
7 Supreme Court settled law and we are going to disregard
8 statutory law, and because you said that -- because of this
9 dirty thing that you did with Steve Bomse, you guys, you know,
10 are cut in for a settlement that you are under completely
11 illegal incapacity to participate in.

12 SPECIAL MASTER: So what about their reformation
13 idea? So what about their reformation idea then? I mean your
14 class could be in a worse position if Judge Gleeson said,
15 sorry, they can't participate, and if they then bring suit,
16 and if they get a big judgment, bigger than they would have
17 gotten, if the application is granted and if they succeed in
18 --which is a lot of ifs I agree, but then your class could be
19 in a worse position, class members; is that right, do you
20 agree with that, that it could be in a worse position if all
21 those ifs were to occur?

22 MR. CONSTANTINE: I don't agree a bit. I have
23 researched the law with respect to the pending motion and I am
24 very confident that the Court cannot utilize the principles of
25 equity in a situation where the United States has no colorable

1 claim to participate in this.

2 Now, I have not gone so far as to think through and
3 brief the next motion which may occur when and if the Court
4 does something or doesn't do something. I do know that if that
5 hypothesis which I raised and I did either affirmatively
6 misrepresent or misrepresented by failing to disclose that,
7 that might give rise to something, you know, and probably
8 something harsh with respect to me personally, but I don't
9 know whether it gives them any basis for reformation of the
10 settlement, no. I don't know. I just don't know. And I don't
11 come to court with the law on that and I will simply be
12 speaking off the top of my head, so I am not -- I am not going
13 to opine on it because it is not the motion that's before the
14 Court at this point. I don't know.

15 SPECIAL MASTER: Well, it is an equitable motion
16 and really the people that we are talking about are the class
17 members, right? I mean to some extent the question is are we
18 going to take away three percent of their --

19 MR. CONSTANTINE: Yes, and the premise of the
20 question --

21 SPECIAL MASTER: Certainly, let me just finish
22 that. Certainly, we'd rather take three percent away than ten
23 percent or whatever the number would be if all those ifs that
24 I went through -- I mean you'd rather that as a representative
25 of them, the class, wouldn't you rather that?

1 MR. CONSTANTINE: I am very, very, certain,
2 Special Master, that the Court has no authority to either --
3 utilizing its equitable powers to allow the United States to
4 participate in this settlement or -- and again, having just
5 said I haven't looked through the reformation, but I don't
6 believe that the Court has the authority to do that in any
7 way, shape or form, so it is not a matter which causes me any
8 great concern. I don't think it is going to be three percent,
9 I don't think it is go to be ten percent, I don't think it is
10 going to be one percent, I don't think it is going to be any
11 percent. I think this is a situation where the United States
12 for the last ten years has known that it had a cause of action
13 which it could assert against Visa and Mastercard, that it
14 quite consciously decided not to assert that cause of action.
15 It also said very clearly you don't represent us, class
16 counsel doesn't represent us, lead counsel doesn't represent
17 us, and we are not members of this class. And if even as we
18 stand here today, they still have the authority and the right
19 to do that. And for whatever reason they have done what they
20 have done, they have not done what they have not done, and
21 they will do what they want to do in the future. But I don't
22 think that there is any authority under any body of law that I
23 have looked at which gives the Court the authority to simply
24 disregard, you know, settled Supreme Court precedent and
25 statutory precedent, especially in the face of what they did,

1 especially since they vigorously -- this is not a situation
2 where they were like Bomse and me who one day forgot about
3 this. They were obviously aware of this.

4 SPECIAL MASTER: So are you saying that if this
5 claim is denied you don't think that they are going to be able
6 to get anything against the defendants?

7 MR. CONSTANTINE: They are going to be able to get a
8 lot from the defendants. They are going to be able to bring
9 their own case and by the way, I should address something.

10 SPECIAL MASTER: I know you think it is a very
11 strong case.

12 MR. CONSTANTINE: It is very strong case. They will
13 have the benefit of all the good hard work that we have done,
14 and they will go into court, and I don't know whether you were
15 involved in the opt out cases, but the opt out cases went in,
16 you know, with 97 percent of their work done and they will be
17 able to utilize all of that, and they will go in with
18 tremendous -- two legs, two arms and their neck up in that
19 case, and they will be able to do that if they choose to do
20 it. And the question is then, whether or not, you know, Visa
21 and Mastercard will have any right to reform the settlement. I
22 don't believe that they will, but again, I don't come to court
23 ready to argue that motion because that is not the motion that
24 we are here to argue. I don't think that the fact that on a
25 particular day in Brussels that I forget about settled

1 precedent and clear statute or that Mr. Bomse and Mr. Tringali
2 forgot about it some day, I don't think that that changes the
3 basic incapacity of this case to ever be the vehicle for the
4 United States to vindicate its rights.

5 Now, I want to just -- I want to address one thing
6 that you kept on saying in all of your questions, and you kept
7 on saying they chose not to be class members, they chose not
8 to be class members. It is not that they chose. It wasn't a
9 choice. They could not be class members and they made that
10 absolutely clear. They could not be class members and indeed -

11 SPECIAL MASTER: I totally understand that but I
12 also understand that they might have hired you and I am sure
13 you would not have said no to that.

14 MR. CONSTANTINE: I probably would have not. I
15 would have said yes because I'm a patriotic boy.

16 SPECIAL MASTER: So let's assume that you went home
17 today and you did a little research on reformation and you
18 thought, you know what -- I have not done much research on
19 reformation either, so I don't know whether this would be the
20 case, but suppose you said to yourself you know what, they
21 could win that, they meaning the defendants, and then we are
22 talking about a lot of money.

23 MR. CONSTANTINE: I guess the question -- premise of
24 that question is if I had done something -- again, I start out
25 with the premise that it is my job to represent my client. It

1 is their job to represent their clients and that picture might
2 change if I had affirmatively misled them, or by failing to
3 say something which was posed in a question to me, or
4 obviously should have been disclosed then I start to be
5 concerned.

6 SPECIAL MASTER: Without knowing the law you are
7 saying you don't think the reformation would succeed either;
8 is that what you are saying?

9 MR. CONSTANTINE: I am saying I don't think there is
10 any -- again, without having exhaustively looked at the law
11 or even inexhaustibly looked at the law I don't think there is
12 any basis for reformation here, but we reserve the right to
13 look at the law there.

14 SPECIAL MASTER: What does that mean?

15 MR. CONSTANTINE: What it means is that is not the
16 motion before you today and I don't believe there is any basis
17 for a claim for reformation here but I would like to have --

18 SPECIAL MASTER: You are right, but they have
19 mentioned it in their briefs, and as I said, what we should be
20 concerned with probably at the top are the class members and
21 if they would face a worse result down the line than they
22 would here then perhaps that's not --

23 MR. CONSTANTINE: Upper most in my mind is the worst
24 result that this motion poses. The worst result that this
25 motion poses is that the money that the United States

1 improperly is seeking to get right now is money that I am
2 going to send to the members of the class. Today, yesterday
3 and the day before we caused -- I caused on my signature four
4 hundred ninety-four thousand checks to be sent to members of
5 the class. That is happening over the last three days, and I
6 am going to do it again in December of this year and I am
7 going to do it until the last penny is gone. If the United
8 States improperly gets any of this money, then that is money
9 that I cannot send to my clients, and that is what is upper
10 most in my mind, and that is what I am here to defend today.

11 SPECIAL MASTER: How long is this whole
12 disbursement process going to be going on and there are
13 different stages?

14 MR. CONSTANTINE: There are two alternate worlds. In
15 one world Visa and Mastercard are obligated to make payments
16 each year for the next six years.

17 SPECIAL MASTER: I understand.

18 MR. CONSTANTINE: In the alternate world, and we are
19 right now in the process of attempting to securitize the flow
20 of payments so that we will have all the money in hand and
21 that six year period will be significantly shortened into the
22 expectation that we can get this all done by next year. So
23 under one world 2007 is the end of it, under the alternative
24 world we may be doing this all the way until 2012. So we are
25 attempting and getting --

1 SPECIAL MASTER: So you are saying under that world
2 in 2007 there would be no money left?

3 MR. CONSTANTINE: It is more complicated than that.
4 What I am saying is that in either event we are going to get
5 all of the money back to the class, but that amount of money
6 will be diminished either in 2007 or at the end of the
7 process -- the end of the process should either occur in 2007
8 or 2012. If we securitize it will likely be in 2007. If we
9 don't securitize it will likely be in the year 2012. In either
10 event --

11 SPECIAL MASTER: They are still obligated to pay a
12 certain amount every six years --

13 MR. CONSTANTINE: Every year. They are very good
14 about meeting their obligations.

15 SPECIAL MASTER: Good.

16 MR. CONSTANTINE: Now, there was only one other thing
17 that I thought I should sort of affirmatively -- well, there
18 are a couple of things. Mr. Bomse made a point about the class
19 definition. It was persons and business entities, but it is
20 very clear that the only business entities that have a right
21 to sue under 15 USC section 15 are business entities that
22 constituted persons within the meaning of 15 USC Section 15(c)
23 and 15 USC Section 15, and the United States is not one of
24 those persons as determined by the Supreme Court, as
25 recognized by the United States Congress, as recognized by the

1 Justice Department when they kept on reminding me of this.
2 And they kept on reminding me of this not just in what is now
3 been euphemistically called the civil division letter, you
4 know. It was a letter from the Justice Department, and then
5 we were re-reminded of that early and often just a few months
6 ago: We are not members of this class, we can't be members of
7 this class, leave us alone, you can't represent us. So it is
8 not just the law. It is their quite conscious understanding
9 of the law, and their insistent enforcement of the law, and
10 their constant, you know, reminding us of that law. Now,
11 whether or not they did that, it is still the law.

12 Couple of other points, please. I think I have
13 addressed the issue to the extent to which they were or were
14 not treated as class members and exactly why what happened
15 happened. Since I think a lot of your questions suggest there
16 is really a factual issue here I am going to make a
17 suggestion. What we have done, and what I have attempted to
18 do in briefing this to the Court, is that I have just tried to
19 both in my declaration and in our search of the files and in
20 what I have said to you today is just basically tell you what
21 happened; not with any nuance, not with any particular
22 objective, but just tell you what happened, you know. So that
23 is why we have waived privilege on the memos to the clients
24 and all of that. What I have suggested if you want to really
25 get at the facts here you ask the United States to waive their

1 privilege on all of the deliberations that they had about
2 their prerogatives and their ability to file their own action
3 under 15(a), and I'd ask the defendants to produce any
4 internal memoranda or any internal communications about what's
5 going to happen with the United States and I think -- that's
6 what we have done, okay. That's what you have from us. You
7 have a complete picture, and you are either very lucky or very
8 unlucky that I am the person who knows the entire picture from
9 the point of view of the class because I was there on day
10 minus one and I am here -- I am still here today. So I have
11 all of the facts at my disposal. All of the errors are mine.
12 All of the, you know, it is -- I did it. Okay.

13 What you don't have is the -- what you are getting
14 from the government and Visa and Mastercard are arguments, are
15 characterizations. What you have gotten from me is exactly
16 what happened. What I am suggesting is that you ask them to
17 do exactly what we have done, which is show what the clients
18 knew about this. That is all I have to say.

19 Thank you.

20 SPECIAL MASTER: Thank you.

21 MR. GRUNES: I am not going to try to cover all the
22 points that Mr. Constantine raised, but I do want to cover a
23 couple of things.

24 The first point is that when claims forms came to
25 government entities, that was brought to our attention. We

1 spoke up. If we hadn't spoken up claims forms, which contrary
2 to what Mr. Constantine says, do say you are a class member.
3 If we've submitted one, you can read it yourself, you are a
4 class member, and you are entitled to X dollars. If we hadn't
5 spoken up, if we had simply said nothing, those claims forms
6 would have been paid. I don't think there is anything in the
7 record that suggests otherwise.

8 Okay. So, you know, it is an important point from
9 our standpoint. So it is just that sending the civil division
10 a letter was an important point saying there are statutes out
11 there. You put us in a Hobson's choice, but you should know
12 that there are statutes out there that say only the --

13 SPECIAL MASTER: You put us in a Hobson's choice --

14 MR. GRUNES: You put us in a choice of either opting
15 out according to procedure or being bound by a judgment. It's
16 a choice that the United States should not have to be in. It
17 is the wrong choice for the United States. So we sent a letter
18 which said there are statutes out there which say you can't
19 represent us. There's a statute that we have been talking
20 about that says the United States has its own statute to bring
21 a case. No question. But the point is we spoke of now do we
22 have colorable claims? I really think that legally that is
23 where we come into in this. When Mr. Constantine came in
24 December, and this isn't contradicted anywhere in the record,
25 but when we met with Mr. Constantine in December we discussed

1 the fact that the government's status in this litigation other
2 than the USPS was uncertain. That was our position. We
3 articulated it to him. His response, which is in my --

4 SPECIAL MASTER: When are you talking about now?
5 This is post settlement?

6 MR. GRUNES: This is after the claims forms came,
7 after we spoke up and said don't pay them, after what they are
8 now complaining about that we didn't give them enough help
9 allegedly to stop payment, which I frankly don't understand,
10 since we are the ones who didn't want them paid, but that is
11 what their affidavits say, he came in, and he did come to
12 Washington because I was there. Mr. Constantine came to
13 Washington. We sat in the room, and he said -- and it's in my
14 affidavit and I remember it -- that United States Postal
15 Service may be distinct from other government entities because
16 it had taken "more definite action to exclude itself from
17 participation and class B member status. " "More definite
18 action. "

19 He's come here today and said that civil division
20 letter, the post office had its own litigation going on. I
21 got the civil division letter. The reason I did what I did was
22 to help the post office -- postal service in its litigation.
23 Okay. Well, guess what happened? Postal service sends it own
24 letter to follow the opt out procedure. It got on the opt out
25 list. What rationale he had at that time I will credit it. I

1 have no reason to doubt that there was a conversation between
2 Mr. Alesevich of the postal service and Mr. Constantine in
3 which Mr. Alesevich said we are looking at cert in a very
4 important case to us where the issues are, are we a person or
5 are we not a person. Please don't do anything that somebody
6 could use against us. I will assume that that happened. But
7 then what happened? Within weeks of that the U.S. Postal
8 Service was on the opt out list. They sent a letter. The
9 letter went to the claims administrator. I reminded
10 Mr. Constantine of this when I discovered it, that the U.S.
11 Postal Service did, in fact, opt out and Mr. Alesevich who is
12 the person that Mr. Constantine says was most worried about
13 not being considered an opt out, okay, when the claims notices
14 go out in late 2005 and he says the government complained
15 vociferously, all right, some of this is in the record,
16 Mr. Alesevich sent an e-mail. We opted out. We, the postal
17 service, opted out. You are confusing us. It was a very
18 emotional letter or e-mail by Mr. Alesevich, but the fact is,
19 just coming full circle, do we have colorable claims. That is
20 really the legal issue.

21 SPECIAL MASTER: Colorable claims where?

22 MR. GRUNES: Do we have a colorable claim, and that
23 is what I am going to get to. I think the answer is do we
24 have a colorable claim of our own, not necessarily in this
25 proceeding, okay. But I want to say -- I want to say two

1 things. One, we do have a colorable claim in this proceeding
2 because I have heard it. Could we have hired him, could he
3 have amended the claim, sure. I mean that is acknowledged. We
4 do have a colorable claim, but I don't think that is what
5 Chicken is about, the in re: Chicken, and here is why. This is
6 actually kind of interesting. I always thought it was
7 interesting. When the Chicken case was pending the Supreme
8 Court decided Illinois Brick. Illinois Brick, believe it or
9 not, is talking about the same statute we are, Section 4 of
10 the Clayton Act, Section 15 of 15 USC. It is talking about
11 the same statute. It is talking about a different part of the
12 statute. It is talking about antitrust injury. The statute is
13 all persons injured in their business or property. Illinois
14 Brick talks about what is injured in the business or property
15 mean. Okay. Cooper talks about what does all persons mean.
16 All right. The Supreme Court said indirect purchasers, you are
17 out. You are not putative class members any more. You are
18 out. Okay. That meant they had no claim as a litigant in that
19 case -- in the Chicken case, but they had colorable claims,
20 not necessarily in that case. They had --

21 SPECIAL MASTER: State law.

22 MR. GRUNES: State law, injunction claims, or
23 whatever. That's the real test. Frankly, you know, I like the
24 pun in defendants' brief: Plaintiffs' lead counsel has ducked
25 Chicken. The Chicken case seems to me and Remiron and then

1 Chicken was adopted in the circuit, at least as I read it, by
2 Agent Orange by the Second Circuit, and Judge Weinstein, but
3 Chicken seems to me to say in a settlement designed for total
4 peace --

5 SPECIAL MASTER: --I understand -- -

6 MR. GRUNES: -- you have the power. You have the
7 power and you should use it.

8 The only other thing I would say is I really do
9 think the status of the United States is not quite as
10 clear-cut as you suggest in terms of would we be taking money
11 from the pie belonging to other people. Our position, I think
12 we have set it out with some force in the briefs, is that
13 money was literally earmarked for the United States.

14 SPECIAL MASTER: I understand. Thank you.

15 MR. READ: My name is John Read. I have asked for
16 permission to speak for one minute on behalf of the government
17 about this reform idea.

18 SPECIAL MASTER: Yes.

19 MR. READ: I just wanted you to have a couple of
20 thoughts about that as you played out the consequences of
21 either allowing the government to participate in the
22 settlement or not. You raised some good questions about how
23 class members might be affected if we aren't allowed to
24 participate, sue Visa and Mastercard and move forward from
25 there. Two additional thoughts to what you raised. The first,

1 the payout system is likely to be effective. There's a risk
2 that the class members will have to pay reimbursement to Visa
3 and Mastercard for anything they pay us. If that payout system
4 is not affected, and the money is not there, Visa and
5 Mastercard will be out. So either the payout system is
6 affected and class members don't get this money as quickly or
7 Visa and Mastercard will be affected. So some reserve would
8 have to be maintained.

9 Second, as Visa and Mastercard negotiate settlement
10 with the Department of Justice, think about how their
11 incentives are different if they have a high likelihood or
12 reasonable likelihood of having to be reimbursed from the
13 class for what they paid. Normally, that's money directly out
14 of their pocket. Now there is a chance it might be somebody
15 else that is footing the bill. So as you think of the
16 alternative world and reformation I would encourage you to
17 think about those things.

18 SPECIAL MASTER: Thank you.

19 MR. READ: Third, on the statute of limitations
20 point, most of the merchant transactions were in the recent
21 years. There were very few merchants transactions in the
22 early years. So when the statute of limitation has run, the
23 vast majority of transactions are within the statute of
24 limitations, and so we believe that the ad danum clause would
25 not be altered by much.

1 SPECIAL MASTER: Thank you.

2 MR. TRINGALI: I will take a minute. First, with
3 regard to Mr. Constantine's position that we have raised
4 argument as opposed to presenting you with facts, we did put
5 in two affidavits.

6 SPECIAL MASTER: Yes, you did.

7 MR. TRINGALI: In the affidavit the person who was
8 principally responsible for the opt out issue, and he made
9 clear in his affidavit that it was always his understanding of
10 who was and was not part of this class.

11 SPECIAL MASTER: I did read that.

12 MR. TRINGALI: Number two, with regard to equities,
13 I want to focus on the class and then Visa and Mastercard. You
14 have heard not a word that any class member has relied on
15 whether the government merchants were part of the class or not
16 part of the class in deciding whether or not they would be
17 part of the settlement or object to the settlement in any
18 matter. On the other hand, you have heard very clearly and
19 undisputed that both Visa and Mastercard in settling this case
20 relied on the fact who was included and who was not included
21 on the opt out list, so there is no equity on the side of the
22 class members.

23 SPECIAL MASTER: It is a little bit of a false
24 distinction. I mean they weren't in the class. That is the
25 point of the class action is they don't come in and talk and

1 hear. I mean they are -- Mr. Constantine is acting on their
2 behal f.

3 MR. TRINGALI: Well, they had full opportunity
4 before Judge Gleeson and many members did appear in the
5 fair ness heari ng.

6 SPECIAL MASTER: Before there was any -- this issue
7 had been rai sed.

8 MR. TRINGALI: But the point that I am trying to
9 make is that no class member was -- and you have seen nothing
10 by way of affi davi t or otherwise -- relied on whether the
11 government merchants were i ncluded or not i ncluded. No one
12 knew. Hi s clients didn' t, the class did not know who the
13 people were who were i ncluded or not i ncluded. They said they
14 would have known, they would have i ncluded, they would have
15 known only that the opt out list -- they would have had the
16 same i nformation we have. So it wasn' t as if the class
17 members knew about the government merchants.

18 SPECIAL MASTER: That' s a point -- it' s a little
19 bit of a slippy slope, though. I mean if you have a
20 fair ness hearing and you decide -- that' s one of the ways that
21 I i n my mi nd di stinguish from Remeron and Chicken. That whole
22 analysis about these end purchasers took place i n the context
23 of deci ding whether the settlement was adequate. Here we
24 decided the settlement was adequate and now after the fact we
25 are now talking about government merchants, a big claim that

1 you say you thought was there, Mr. Constantine says he always
2 knew it wasn't there.

3 MR. TRINGALI: But my point simply with regard to
4 the class members, other than the government merchants, there
5 is nothing whatsoever to suggest that they had any view one
6 way or the other the government merchants were in or not in
7 the class, and I know of nothing to suggest that any
8 government -- that any class member decided to be part of this
9 class. I think it was a fair resolution based on the fact
10 that the government merchants were excluded from the class,
11 and in fact, at the time of the settlement no one knew which
12 members of the class would actually submit claims and not
13 submit claims. They didn't know what piece of the pie they
14 were going to actually participate in to begin with. So in
15 terms of equities and in terms of reliance, I think there is
16 no reliance on the part of class members and there was clear
17 reliance on the part of Visa and Mastercard.

18 SPECIAL MASTER: I understand.

19 MR. BOMSE: Your Honor, I would like to also very
20 briefly talk about two things. I don't come here to defend the
21 outcome of Mr. Constantine's supposed success in the merits of
22 the case, nor to defend my own abilities or lack of abilities
23 as a lawyer, but what I want to talk about is what the record
24 shows here in terms of the standard he set up and then I want
25 to go to, as you said what you think is the crux of the

1 question, I want to talk about the crux of the question.

2 Mr. Constantine begins with the notion that somehow
3 maybe the government's position ought to be improved here as
4 long as it had, and I think I am quoting him correctly, some
5 plausible colorable claim. Well, the answer is that is a
6 standard that is pretty easily met here. You've heard about a
7 whole bunch of ways in which that could get there, and this is
8 the one place on which Mr. Constantine and perhaps the
9 government may be closer to the same position than I am. I
10 think that, in fact, this issue of whether or not the
11 government can be represented, not bring a case, but be
12 represented as an absent passive class member in an action
13 like this is absolutely undecided. It is not decided by
14 Cooper. It is not decided by Flamingo any more than it is
15 decided by the government of India or Georgia and Evans which
16 took very different views about what the word person means. I
17 mean if you go back to the statute which, as was suggested,
18 was the same issue in Illinois Brick, same issue in this case,
19 and same issue in Associated General Contractors, Associated
20 General Contractors being a case that is not mentioned but it
21 is the leading case on an anti trust standing, which I hasten
22 to add is not constitutional standing because it has actually
23 some relevance, there is a long, long discussion in there
24 about the language of Section 4 of the Clayton Act in which
25 the court explains it can't possibly mean what it literally

1 means. It has to be defined and limited and so it is limited
2 in context.

3 Now, if we were actually litigating this as an issue
4 about the government's right to participate or if, for
5 example, we had been sent that November 14th letter, I think
6 we would have taken the position: What do you mean you can't
7 be a class member. Of course, you can be a class member in
8 this case. Never came up because we never got the letter.
9 Never came up because the issue wasn't otherwise raised, it
10 was simply a mutual assumption not only, with all respect, in
11 Brussels but time and time again as things were piling up, but
12 I don't think there is any precedent which begins to suggest
13 that there could not be some plausible colorable claim that
14 the government could be a class member, and in fact, we had
15 every reason to believe right up until this dispute arose that
16 the government was of the same view because the only word we
17 had from the government was in the form of the U.S. Postal
18 Service letter saying "we exclude ourselves." It wasn't just
19 a brain melt one day in Brussels. In the record here, and
20 again, it doesn't -- we don't need to have anything more than
21 what is on the record. All of the things that happened
22 showing that people for all intents and purposes were of
23 exactly the same view that we were, and I guess that is what
24 brings me to what you said is the crux of the question, that
25 is, if there's an error who should bear the cost of the error.

1 Now, I don't think there is an error because I think we've met
2 easily enough the standard of plausible claims here which
3 brings us to -- actually, I don't think there is an error at
4 all, but if there is it seems to me quite plainly that the one
5 people or the one group of entities that should not be bear
6 the cost of this should be Visa and Mastercard. We have a case
7 here essentially for estoppel. And Mr. Constantine, I
8 thought, was quite candid in saying that if there was some --
9 if I even felt not merely that Mr. Bomse came in and said, you
10 know, the government is in this case, that he would have felt
11 an obligation, but if there were some reason why Mr. Bomse
12 reasonably might have been of that view. Well, believe me,
13 Mr. Bomse was of that view from the class definition, from all
14 of the representations that have been made along the way
15 showing that we were of that view.

16 SPECIAL MASTER: So your representation, when you
17 say all of the representations you mean Brussels?

18 MR. BOMSE: Brussels is him. I am talking about
19 our affirmative statements but more the process of the class
20 administration, the postal service letter saying excluded.
21 Excluded has a meaning. I am in and I choose not to be in. You
22 don't exclude if you are not. I mean, that says to me that at
23 that point we are all operating under this, and then, although
24 we didn't know it at the time, and whether Mr. Constantine
25 and I am sure it is he is telling the truth when he says, you

1 know, I didn't have top, middle or bottom of mind about this
2 issue, but I mean in terms of who ought to bear the burden,
3 this is now a big deal issue for a huge, huge claimant and he
4 is spending all of this time talking about it, and it seems to
5 me at this point you need to make sure that you are not
6 letting people on the other side operate under a
7 misimpression.

8 Now, there is a part of the record that has not been
9 referred to here which I think has some importance, which is
10 when there is a long discussion about the claims administrator
11 process, and we know that nothing was ever said to the claims
12 administrator either about the government. That's admitted. We
13 weren't involved in any of that, but there is an interesting
14 part in which Mr. Constantine said, you know, there were
15 problems with the list and some of the big opt outs people who
16 weren't -- who have opted out, Home Depot I will take as an
17 example -- showed up on some of these lists. So we went to
18 the claims administrator and we told them to do what you can
19 to get that out. Now, why are you doing that? You are doing
20 that because you are supposed to be telling everybody who gets
21 to play and who doesn't get to play. Well, there's no reason
22 at that point why he wouldn't have said and you ought to do
23 the same thing to the best of your ability, at least, with all
24 of these government entities and he doesn't do that. The pile
25 of things that put him on the kind of notice that he said

1 himself should have triggered an obligation to say something
2 and if not, therefore, he and the class, and I will get to
3 that in a moment, it is all one side, undisputed.

4 I also do want to suggest you are quite right, of
5 course, in saying that there is a concern here for the class
6 and protecting the class and they could end up worse off, but
7 I would like to suggest, respectfully, that the procedures of
8 rule 23 and the equitable part, equity isn't only class based,
9 that is, protect the class, it is also defendant based. And
10 we have very strong, indeed, uniquely one sided equities here,
11 and I think, and I am not going to repeat what Mr. Tringali
12 said about how there couldn't possibly have been reliance by
13 class members which would have affected the fairness hearing
14 or otherwise, but again, Mr. Constantine on many, many, many
15 occasions has talked, extolled the importance of his authority
16 to speak for and by the class. I think he has to stand by
17 that now and the class has to take it. If they have some claim
18 against him because of something he should not have done, that
19 is one thing, but we are entitled to deal with him. That is
20 what a class action is, and also, when he comes before this
21 Court and says in his, albeit, unrelated spectrum piece and
22 says it's no big deal, it seems to me he doesn't get to then
23 come back here and say something different today.

24 SPECIAL MASTER: Thank you.

25 MR. BOMSE: Thank you, for your time and thank you,

1 for your patience.

2 Mr. Constantine: On the point, for example, in the
3 fall of 2005 when we found out that the claims administrator
4 was about to mail out claim forms to merchants that had opted
5 out of the class we spotted that. We saw Home Depot there and
6 we knew it was a conspicuous name, you know, and we said what
7 are they doing on this list. We called up the claims
8 administrator and asked what are you doing. We found out they
9 had failed to scrub because we got the mailing list from Visa
10 and Mastercard databases and so we said scrub those, those
11 were opt outs, take them out of there. And what we got back
12 was, okay, we will do the best that we can, but if you want to
13 have all of the opt outs scrubbed with absolute certainty --

14 SPECIAL MASTER: You are going have to err on the
15 side --

16 MR. CONSTANTINE: Right. And we are in a situation
17 where now a greater and greater amount of time from the time
18 of the settlement and from the time of notice of pendency and
19 all of that, and we know -- and this is my responsibility, I
20 know that as each day goes by roughly one thousand class
21 members go out of business. And so the longer it takes for me
22 to get that money back, the longer it takes for me it get the
23 claims forms out there the less likelihood that the class
24 member that is entitled to the claim will get their money. So
25 I made a decision. I made a decision. I said do the best that

1 you can, scrub it the best that you can and let's let them
2 fly, and then we will do -- we will rely upon safeguards
3 within the system to take care of businesses or merchants that
4 inadvertently and improperly got class notices.

5 Now, there is nothing that in any way, shape or form
6 which affects their reliance because this is all now in 2005.
7 If they have an argument about anything about reliance, it
8 goes back to the time of settlement.

9 Now, I can't really do the settlement process with
10 the government here they may be in litigation but what I will
11 tell, you since I was present at every moment of the
12 negotiations with Visa, with Mastercard, when the Judge was
13 present, when the Judge was not present, when the mediators
14 were present, when they weren't present, this issue did not
15 explicitly or implicitly arise in any way, shape or form, and
16 if this goes all the way, it will become very clear that the
17 presence or absence of the United States, you know, within
18 this class could not have in any way, shape or form affected
19 the ultimate resolution of the settlement.

20 I mean to just try to give you one point of what
21 could be a very, very extensive illustration of that is that
22 we settled first with Mastercard on the morning that the jury
23 was empanelled. We then settled with Visa almost starting
24 again in the next two days, and it was totally based on the
25 Mastercard settlement and how the Mastercard settlement

1 translated into a Visa settlement, and how it didn't and how
2 that would simply translate into a somewhat bigger entity.
3 Either explicitly or implicitly, the presence or absence of
4 the United States and the damage estimates or any other way,
5 shape or form had absolutely nothing to do with the settlement
6 of the case, and there was absolutely -- and there could not
7 have been any reliance upon their presence or absence in any
8 way, shape or form.

9 SPECIAL MASTER: I understand.

10 Mr. Constantine: Excuse me.

11 I want to go just for a second, just two more
12 documents. One is Mr. Grunes' supplemental declaration and
13 there's something that was made about I came to Washington and
14 once again, at their request I met with them, etcetera. I
15 think the very same day I was meeting with another branch of
16 the government. I think it was SEC wanted to know how to
17 treat these payments for accounting purposes, but in any
18 event, in Mr. Grunes' supplemental declaration is the single
19 most important thing that I said at the meeting that I had
20 with Mr. Grunes and with Mr. Read and with their colleagues at
21 the anti trust division and he says quote: I recall
22 Mr. Constantine stating that he was willing to facilitate the
23 participation of the federal governmental entities in the
24 settlement distribution if it was consistent with the law for
25 him to do so. Okay. That was my position then, that is what my

1 position is now. I believe it is inconsistent with the law for
2 them to do so.

3 The last thing I would like to just point to is, and
4 you know, something has been made about the postal service.
5 Since it is very short I will read you the entire letter.

6 SPECIAL MASTER: I read the letter many times. You
7 don't have to read it.

8 Mr. Constantine: But here is the point. The first
9 sentence is the United States Postal Service will be included
10 in any determination made by the United States government. On
11 the very same day the United States government made a
12 determination. It made a determination that for it and for
13 all of the instrumentalities and entities of the United States
14 they were not class members, they were not going to be
15 excluded, they had never been class members, and plaintiffs'
16 counsel and I could not represent them. Therefore, the second
17 part of this two sentence letter is to the extent that the
18 United States government takes no action the United States
19 Postal Service states that it should be excluded, that second
20 sentence really should never have come into play. In other
21 words, if the United States government has made a
22 determination we are bound by that.

23 SPECIAL MASTER: But it did and ended up on the opt
24 out list.

25 MR. CONSTANTINE: And we know why and we now how, but

1 if we are talking about what should have been done and who
2 should have thought, one, if I am reading a list and they made
3 very clear they got this letter and they read it, it is only
4 two sentences long, the first sentence says: The United
5 States Postal Services will be included in any determination
6 by the United States government. Did the United States
7 government make a determination? Did anybody, you know, seek
8 to ask anybody what the United States, did they call the
9 anti trust division, did they have you know that hypothetical
10 conversation that Steve and I could have had which is, hey,
11 Lloyd, did you hear from the federal government? I mean they
12 were -- you know --

13 SPECIAL MASTER: I understand your point.

14 MR. CONSTANTINE: I have enough problems trying to
15 take care of my millions of class members, okay. I really
16 don't believe it is my job to represent the United States
17 which has its own statute and its own right to sue, and to
18 take care of lawyering for them as well.

19 SPECIAL MASTER: Mr. Bomse, I am assuming that you
20 are going to say what you said before, which is there is a
21 long record suggesting that you believed and that he should
22 have known that you believed?

23 MR. BOMSE: I am going to say --

24 SPECIAL MASTER: Can you say it quickly.

25 MR. BOMSE: In two sentences. I am going to say,

1 first of all, Mr. Constantine is exactly right as to Visa, I
2 can't speak for Mastercard, about what was or was not said
3 about the United States government during the settlement
4 negotiation, and he is absolutely wrong in trying to say what
5 I would have done had I not been under the firm and justified
6 view of --

7 SPECIAL MASTER: Got it.

8 MR. BOMSE: The second thing is that what the first
9 sentence of that letter that was brought up says is that you
10 should have sent us that November 14th letter. As far as we
11 knew, there was no determination made by the United States
12 government. It was only in these proceedings that we first
13 learned of it.

14 SPECIAL MASTER: So I think we are done then.

15 MR. CONSTANTINE: I just want to note for the record
16 there is no period between the first and second sentence.
17 Therefore, it is a run-on sentence.

18 SPECIAL MASTER: Thank you.

19 (Proceedings adjourned as above set forth)

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