

Roger Crane (RC 0469)
K&L GATES LLP
599 Lexington Avenue
New York, New York 10022
Telephone: 212.536.3900
Facsimile: 212.536.3901

*Attorneys for
Wells Fargo Retail Finance II, LLC*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X	:	
IN RE	:	
	:	Case No. 96-cv-5238 (JG)
VISA CHECK/MASTERMONEY ANTITRUST	:	
LITIGATION	:	Hon. John Gleeson
	:	Mag. J. Orenstein
	:	
	:	
	:	
	:	
	:	
-----X	:	

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
ORDER TO SHOW CAUSE SEEKING TO PERMIT WELLS FARGO
RETAIL FINANCE II, LLC TO PARTICIPATE IN THE CLASS ACTION
SETTLEMENT AS A TIMELY FILER AND DIRECTING LEAD COUNSEL
TO PROVIDE ALL NECESSARY CLAIMS PROCESSING INFORMATION**

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
ARGUMENT	2
LEAD COUNSEL HAS FAILED TO SHOW THAT WFRF SHOULD NOT BE PERMITTED TO PARTICIPATE IN THE CLASS ACTION SETTLEMENT AS A TIMELY FILER	2
A.. Lead Counsel Has Not Demonstrated That WFRF Does Not Satisfy the Excusable Neglect Standard	2
1. WFRF Has Explained Why It Failed To Submit A Timely Claim.....	9
2. Lead Counsel Concedes That WFRF Satisfies The Other Three “Excusable Neglect” Factors.	9
B. The Equities Tip Decidedly In Favor of WFRF	11
CONCLUSION	13

TABLE OF AUTHORITIES

	Page
<u>Covington v. Westchester County Jail</u> , No. 96 Civ. 7551, 1998 US Dist. LEXIS 14636 (S.D.N.Y. Sept. 17, 1998)	8
<u>Cutler v. New York Telephone Co.</u> , No. 75 Civ. 1164, 1978 U.S. Dist. LEXIS 14763 (S.D.N.Y. Oct. 24, 1978)	8
<u>Demint v. NationsBank Corp.</u> , 208 F.R.D. 639 (M.D. Fla. 2002)	9
<u>In re Electrical Carbon Prods. Antitrust Litig.</u> , 622 F.Supp.2d 144 (D.N.J. 2007)	13
<u>Gypsum Antitrust Cases</u> , 565 F.2d 1123 (9th Cir. 1977)	8, 9
<u>Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership</u> , 507 U.S. 380 (1993).....	1, 8, 9
<u>Raymond v. Int’l Business Machines Corp.</u> , 148 F.3d 63 (2d Cir. 1998)	8
<u>Transcontinental Gas Pipeline Corp. v. Lands in the County of Kings</u> , 2007 U.S. Dist. LEXIS 78630 (E.D.N.Y. Oct. 23, 2007)	8
<u>Zients v. La Morte</u> , 459 F.2d 628 (2d Cir. 1972)	8

PRELIMINARY STATEMENT

Petitioner Wells Fargo Retail Finance II, LLC (“WFRF”) respectfully submits this reply memorandum of law in further support of its order to show cause seeking to participate in the class action settlement as a timely filer and directing Jason Enzler (“Lead Counsel”), of Constantine Cannon L.L.P., to provide all necessary claims processing information to WFRF.

In its moving papers, WFRF demonstrated that it should be permitted to participate in the class action settlement as a timely filer because (i) it has an interest in the settlement proceeds from this litigation (the “Litigation Trust”) as the senior secured lender to, and attorney-in-fact for, seven retailer borrowers (together, the “Retail Borrowers”), which Retail Borrowers later declared bankruptcy, closed their doors, and ceased operations, and (ii) WFRF satisfies the “excusable neglect” standard.

In an attempt to obfuscate the issues and distract this Court from controlling precedent, Lead Counsel ignores factors (1), (2), and (3) of the following four factors to be considered by courts when determining whether the “excusable neglect” standard has been met, to wit: (1) the danger of prejudice to the non-movant; (2) whether the movant acted in good faith; (3) the length of the delay and its potential effect on judicial proceedings; and (4) the reason for the delay, including whether it was within the reasonable control of the movant. Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 391 (1993). Instead, Lead Counsel raises ancillary issues separate and apart from the equitable balancing of the foregoing factors. As more fully set forth in WFRF’s moving papers, this reply memorandum of law, and the accompanying affidavits, since the Retail Borrowers declared bankruptcy, closed their doors, and ceased operations, and no mail addressed to the Retail Borrowers was ever forwarded to

WFRF, WFRF never received notice, and WFRF had no knowledge prior to February, 2009, that the Retail Borrowers could potentially have claims to the settlement proceeds from the Litigation Trust.

For the reasons set forth below, WFRF's motion should be granted.

ARGUMENT

LEAD COUNSEL HAS FAILED TO SHOW THAT WFRF SHOULD NOT BE PERMITTED TO PARTICIPATE IN THE CLASS ACTION SETTLEMENT AS A TIMELY FILER

A. Lead Counsel Has Not Demonstrated That WFRF Does Not Satisfy the Excusable Neglect Standard

1. WFRF Has Explained Why It Failed To Submit A Timely Claim.

It is well-settled that when a court must determine whether a party has met the excusable neglect standard, no single factor is dispositive. In re Electrical Carbon Prods. Antitrust Litig., 622 F.Supp.2d 144, 154, FN. 6 (D.N.J. 2007) (“no single factor is dispositive, including whether claimant’s own failings caused the delay.”) Nonetheless, Lead Counsel simply alleges that (i) WFRF had, through its dealings with the Litigation Trust in 2005, and parts of 2006, prior notice of the settlements, the existence of the settlement funds, and the claims process relating to the distribution of such settlement funds, and (ii) WFRF failed to timely file, on behalf of the Retail Borrowers, claims to the settlement proceeds from the Litigation Trust. Opposition Memorandum of Law (“Opp. Memo.”) at 2. By its own argument, Lead Counsel fails to address factors (1), (2), and (3) of the following four factors identified by the Supreme Court of the United States to be considered by courts when determining whether a party’s neglect is excusable: (1) the danger of prejudice to the non-movant; (2) whether the movant acted in good faith; (3) the length of the delay and its potential effect on judicial proceedings; and (4) the reason for the delay, including whether it was within the reasonable control of the movant.

Pioneer, at 391. The issue is not, as Lead Counsel contends, whether WFRF, or its outside counsel from time to time, David Weitman, knew of the existence of the Litigation Trust in 2005. The key issue to consider is whether WFRF knew that the Retail Borrowers could potentially have an interest in the settlement proceeds from the Litigation Trust prior to the September 15, 2008 deadline imposed by the Court to file a timely claim with respect thereto. The answer is an unequivocal “no.”

In 2005, David Weitman was retained by WFRF in connection with the bankruptcy proceedings of Clothestime Stores, Inc. (“Clothestime”), a retail merchant borrower of WFRF’s, not included among the Retail Borrowers. (Affidavit of David Weitman, dated November 6, 2009 (the “Weitman Aff.”), ¶2) During his representation of WFRF in connection with the Clothestime bankruptcy proceedings, David Weitman worked with Eileen Quinn (“Ms. Quinn”), while Ms. Quinn was in the Boston, Massachusetts office of WFRF.

As part of his representation of WFRF in connection with the Clothestime bankruptcy proceedings, David Weitman (a) periodically monitored the website maintained by the claims administrator (the “Claims Administrator”) for the Litigation Trust and (b) ensured that all distributions of the settlement proceeds from the Litigation Trust to which Clothestime was entitled were received by the Chapter 7 trustee appointed by the bankruptcy court in the Clothestime bankruptcy proceedings, and subsequently remitted to WFRF. (Weitman Aff., ¶5) Accordingly, David Weitman’s experience with respect to the Litigation Trust was restricted to matters relating solely to his representation of WFRF in the Clothestime bankruptcy proceedings. Thus, while David Weitman was, at times during 2005 and parts of 2006, active with respect to the eventual distribution to WFRF of settlement proceeds from the Litigation Trust to which Clothestime would otherwise be entitled, David Weitman did not know, and was not retained by

WFRF with respect thereto, in each case, until March, 2009, that additional retail borrowers of WFRF could potentially have claims to settlement proceeds from the Litigation Trust, because WFRF had no knowledge of the same until, at the earliest, February, 2009. (Weitman Aff., ¶6)

As detailed in each of the Affidavit of Michele Ayou, dated as of November 6, 2009 (the “Ayou Aff.”) and the Affidavit of Patrick Norton, dated as of November 6, 2009 (the “Norton Aff.”), WFRF learned for the first time, in or about February, 2009, when Ms. Ayou was contacted by counsel representing one of the Retail Borrowers as a debtor in bankruptcy proceedings, Wickes Furniture Company, Inc. (“Wickes Furniture”), that a claims trader wished to acquire the claims of Wickes Furniture to the settlement proceeds from the Litigation Trust. (Norton Aff., ¶3; Ayou Aff., ¶3) Such counsel acknowledged that WFRF, as a secured lender to Wickes Furniture, with liens on all of the assets of Wickes Furniture, was entitled to any and all claims of Wickes Furniture to the settlement proceeds from the Litigation Trust. (Norton Aff., ¶3; Ayou Aff., ¶3)

Immediately after the receipt by Ms. Ayou of such information, each of Ms. Ayou, Mr. Norton and a WFRF colleague, Lynn Whitmore (“Ms. Whitmore”), inquired whether other persons within the WFRF organization had experience collecting and analyzing claims similar to the claim filed by Wickes Furniture. (Norton Aff., ¶5; Ayou Aff., ¶5). Ms. Ayou and Mr. Norton were then directed to Ms. Quinn, who, since 2006, had been resident in WFRF’s New York office, and who had worked with David Weitman in pursuing proceeds from the Litigation Trust on behalf of Clothestime. (Ayou Aff., ¶5; Norton Aff., ¶5)

During conversations among Ms. Quinn, Ms. Ayou, and Mr. Norton, Ms. Quinn directed Mr. Norton and Ms. Ayou to contact David Weitman so that David Weitman could help WFRF evaluate the offer made by the claims trader who contacted Ms. Ayou in February, 2009. (Ayou

Aff., ¶5; Norton Aff., ¶5) Neither Mr. Norton nor Ms. Ayou worked on the Clothestime matter with David Weitman or Ms. Quinn. (Ayou Aff., ¶5; Norton Aff., ¶5)

Immediately thereafter, each of Mr. Norton, Ms. Ayou, and Ms. Whitmore, promptly investigated WFRF's potential interest, as a senior secured creditor of Wickes Furniture, in and to the settlement proceeds from the Litigation Trust to which Wickes Furniture would otherwise be entitled. (Norton Aff., ¶6; Ayou Aff., ¶6)

In early March, 2009, Mr. Norton engaged David Weitman to help WFRF evaluate the offer made by the claims trader to WFRF in February, 2009, for the acquisition of the claims of Wickes Furniture to the settlement proceeds from the Litigation Trust. (Weitman Aff., ¶7; Norton Aff., ¶9; Ayou Aff., ¶9)

Recognizing that there may have been other WFRF borrowers in a position similar to Wickes Furniture, each of Mr. Norton, Ms. Ayou, and Ms. Whitmore, looked into whether there were additional accounts of WFRF with respect to which the retail borrowers thereof (a) had granted a security interest in all of their respective assets, to WFRF, (b) had gone into bankruptcy, (c) had, at the time of their respective bankruptcies, substantial outstanding indebtedness still owing to WFRF, and (d) were potentially entitled to settlement proceeds from the Litigation Trust. (Weitman Aff., ¶8; Norton Aff., ¶7; Ayou Aff., ¶7)

As a result of their investigation, Mr. Norton and Ms. Ayou identified six (6) additional Retail Borrowers that could potentially be claimants with respect to settlement proceeds from the Litigation Trust. (Norton Aff., ¶8; Ayou Aff., ¶8)

In late March, 2009, Mr. Norton asked David Weitman to expand his representation of WFRF to include navigating WFRF through the process relating to the collection, on behalf of

the Retail Borrowers, of the settlement proceeds from the Litigation Trust to which such Retail Borrowers would otherwise be entitled. (Weitman Aff., ¶9; Norton Aff., ¶9; Ayou Aff., ¶9)

While David Weitman knew of the existence of the Litigation Trust based on his representation of WFRF in the Clothestime bankruptcy proceedings in 2005 and parts of 2006, prior to March, 2009, he had no knowledge that WFRF was the senior secured creditor to, and attorney-in-fact for, the Retail Borrowers, or that the Retail Borrowers could potentially have an interest in the settlement proceeds of the Litigation Trust. (Weitman Aff., ¶11). Further, prior to March, 2009, David Weitman was never retained by WFRF to help WFRF realize, on behalf of any of the Retail Borrowers, any settlement proceeds from the Litigation Trust to which such Retail Borrowers might otherwise be entitled, nor did he inquire about any matters relating to the Litigation Trust other than with respect to matters arising during his representation of WFRF in the Clothestime bankruptcy proceedings. (Weitman Aff., ¶11)

Thus, Mr. Norton and Ms. Ayou learned, for the first time, in or about February, 2009, (i) of the existence of the Litigation Trust; (ii) of the MasterCard/Visa settlement deadline; (iii) that Wickes Furniture had filed a claim to receive a distribution of the settlement proceeds from the Litigation Trust; (iv) that payments were made from the Litigation Trust on account of a distribution to Wickes Furniture,¹ and (v) that the six additional Retail Borrowers could potentially have an interest in the settlement proceeds from the Litigation Trust. (Ayou Aff., ¶4; Norton Aff., ¶4)

Accordingly, David Weitman learned, for the first time, in or about March, 2009, (i) that Wickes Furniture had filed a claim to receive a distribution of the settlement proceeds

¹ Not unlike other collections constituting WFRF's collateral, any distributions of settlement proceeds from the Litigation Trust made to Wickes Furniture were remitted to a cash management account established by WFRF and applied against the outstanding balance of the loans advanced by WFRF to Wickes Furniture, in accordance with industry standards. (Norton Aff., ¶4; Ayou Aff., ¶4)

from the Litigation Trust; (ii) that payments were made from the Litigation Trust on account of a distribution to Wickes Furniture, and (iii) that additional retail borrowers of WFRF potentially had claims to settlement proceeds from the Litigation Trust. (Weitman Aff., ¶¶6-8)

WFRF is an indirect subsidiary of Wells Fargo & Company, a publicly held company with numerous other subsidiaries, affiliated entities, and divisions, each of which provides a myriad of financial products to various customers across the U.S. Moreover, certain offices and officers of WFRF are charged with the maintenance of various loan portfolios, often times with each office or officer having little or no knowledge with respect to what types of activities other WFRF offices or officers are engaged in. Essentially, given the sheer size and the numerous offices and employees of WFRF and its affiliates and parent companies, notwithstanding the fact that one office or officer in the WFRF organization has knowledge of, or is aware of, an issue, it can hardly be assumed that knowledge or awareness of such issue is to be had by any other office, or officer, within the WFRF organization.

Had either of Mr. Norton or Ms. Ayou known prior to February, 2009, that the Retail Borrowers had claims against the Litigation Trust, then WFRF would have diligently pursued such interests at such time. WFRF has gained nothing from purportedly sitting on its rights and intentionally neglecting to pursue, on behalf of the Retail Borrowers, claims to settlement proceeds from the Litigation Trust.

The delay of WFRF's pursuit, on behalf of the Retail Borrowers, of claims to the settlement proceeds from the Litigation Trust to which the Retail Borrowers would otherwise be entitled is, at worst, a mere organizational oversight, or "omission[] caused by carelessness." Pioneer, at 388. This is precisely the type of inadvertence to which the "excusable neglect"

standard was intended to apply. In Pioneer, the Supreme Court expressly rejected a rigid application of “excusable neglect” and, instead, chose a flexible approach:

The ordinary meaning of “neglect” is “to give little attention or respect” to a matter, or, closer to the point for our purposes, “to leave undone or unattended to *especially through carelessness*.” **The word therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness.** (emphasis added)

Id. at 388. In Pioneer, the Supreme Court recognized that “excusable neglect” is “not limited to situations where the failure to timely file is due to circumstances beyond the control of the filer.”

Id. at 391. See also Transcontinental Gas Pipeline Corp. v. Lands in the County of Kings, 2007 U.S. Dist. LEXIS 78630, *7 (E.D.N.Y. Oct. 23, 2007) (“Excusable neglect is an elastic concept that takes into consideration all relevant circumstances.”) (internal citation omitted).

Here, Lead Counsel’s application of the “excusable neglect” standard would result in a patently unfair outcome. Neither the Supreme Court’s holding in Pioneer, nor Second Circuit precedent, support the rigid application of the “excusable neglect” standard proposed by Lead Counsel. Pioneer, 507 U.S. at 388-89; Raymond v. Int’l Business Machines Corp., 148 F.3d 63, 66 (2d Cir. 1998) (mere inadvertence can in some circumstances be enough to constitute excusable neglect); Zients v. La Morte, 459 F.2d 628 (2d Cir. 1972) (permitting five late-filed claims); Covington v. Westchester County Jail, No. 96 Civ. 7551, 1998 U.S. Dist. LEXIS 14636, at *7-9 (S.D.N.Y. Sept. 17, 1998) (defendant’s substantial lateness in serving jury demand was excusable neglect even though it was a result of mere inadvertence because plaintiff suffered no prejudice thereby); Cutler v. New York Telephone Co., No. 75 Civ. 1164, 1978 U.S. Dist. LEXIS 14763, at * 3 (S.D.N.Y. Oct. 24, 1978) (plaintiff permitted to file untimely notice of appeal due to ignorance of the deadline).

Furthermore, the cases cited by Lead Counsel in support of its argument that WFRF has not shown “excusable neglect” are readily distinguishable. In In re Gypsum Antitrust Cases, 565

F.2d 1123 (9th Cir. 1977), the petitioner chose not to file its claim and participate in the distribution until one year after receiving notice of the class action settlement. Conversely, in our present situation, WFRF immediately contacted Lead Counsel and the Claims Administrator upon learning that, as senior secured lender to, and attorney-in-fact for, each of the Retail Borrowers, WFRF could potentially have claims to the settlement proceeds from the Litigation Trust to which the Retail Borrowers would otherwise be entitled. (Affidavit of David Weitman, dated as of October 5, 2009, ¶5)

Another case cited by Lead Counsel, Demint v. NationsBank Corp., 208 F.R.D. 639 (M.D. Fla. 2002), is similarly inapplicable. In that case, the petitioners failed to provide an explanation for their failure to timely submit an “opt out” notice, thus precluding the court from even engaging in an “excusable neglect” analysis. Id. at 641-43. Here, WFRF has provided a detailed explanation of the facts surrounding its delay in pursuing, on behalf of the Retail Borrowers, claims to the settlement proceeds from the Litigation Trust to which the Retail Borrowers would otherwise be entitled.

2. Lead Counsel Concedes That WFRF Satisfies The Other Three “Excusable Neglect” Factors.

The fault of the untimely party is not the only consideration in determining whether a claimant should have the benefit of “excusable neglect.” Pioneer Inv. Servs. v. Brunswick Assoc., Ltd. P’ship, 507 U.S. 380 (1993). By failing to even address the three “excusable neglect” factors noted above, Lead Counsel necessarily concedes (i) that WFRF has acted in good faith; (ii) that the defendants will not be prejudiced if WFRF is permitted to file its claims on behalf of the Retail Borrowers, and (iii) the proceedings will not be delayed if the Court grants the motion of WFRF.

First, as discussed at length in its moving brief, WFRF acted in good faith by contacting Lead Counsel and the Claims Administrator immediately after learning that, as senior secured party of, and attorney-in-fact for, each of the Retail Borrowers, WFRF could potentially have interests in the settlement proceeds from the Litigation Trust. WFRF's good faith is amply supported by the affidavits of David Weitman, Mr. Norton and Ms. Ayou, each of which is submitted herewith. Immediately after learning that Wickes Furniture had an interest in, and had filed a claim with respect to, the settlement proceeds from the Litigation Trust, each of Mr. Norton and Ms. Ayou conducted an investigation and identified six additional merchants, each of whom (a) had granted a security interest in all of their respective assets, to WFRF, (b) had gone into bankruptcy, (c) had, at the time of their respective bankruptcies, substantial outstanding indebtedness still owing to WFRF, and (d) were potentially entitled to settlement proceeds from the Litigation Trust. (Weitman Aff., ¶8; Norton Aff., ¶7; Ayou Aff., ¶7) Immediately thereafter, WFRF engaged David Weitman to pursue, on behalf of WFRF, the claims of such Retail Borrowers to the settlement proceeds from the Litigation Trust. (Weitman Aff., ¶9; Norton Aff., ¶9; Ayou Aff., ¶9)

Second, prejudice to the defendants in allowing late participation is nonexistent in this case since, here, the defendants do not hold a reversionary interest in unpaid settlement funds.² Moreover, payment of WFRF's claims likely would result in a miniscule reduction of the remaining settlement funds in the Litigation Trust³, and the payment of WFRF's claims would

² Lead Counsel's reliance on In re Electrical Carbon Prods. Antitrust Litig., 622 F.Supp.2d 144 (D.N.J. 2007) is misplaced. In that case, the late-filed claims at issue would have substantially depleted the settlement funds. Here, Lead Counsel makes no such argument, nor can Lead Counsel rely on such facts.

³ According to the Claims Administrator, nearly 900,000 claims totaling approximately \$1.63 billion have been paid from the Litigation Trust. (Affidavit of Perry Carbone, dated as of October 30, 2009 ("Carbone Aff."), ¶ 8).

barely affect class members still awaiting distribution of settlement proceeds from the Litigation Trust, thousands of whom were permitted to file claims beyond the initial deadline of November 28, 2005. (Carbone Aff., ¶¶ 4-5) Based on Lead Counsel's letter to this Court, dated as of October 9, 2009, Lead Counsel has already reserved an amount sufficient to cover payment of the claims asserted by WFRF with respect to the settlement proceeds from the Litigation Trust, so the granting by this Court of the relief sought by WFRF will not have any significant impact on the pool of settlement funds to be distributed in the final distribution to class members. In any case, WFRF does not seek retroactive payments from the Litigation Trust; it is simply asking for payments that would otherwise be made to the Retail Borrowers on account of the final distribution of the settlement proceeds from the Litigation Trust. Lead Counsel and this Court have extended the deadline for filing claims with respect to the settlement proceeds from the Litigation Trust several times, and only ten claims have been filed since the September 18, 2008 deadline. (Carbone Aff., ¶¶ 3-5) In sum, a denial of WFRF's claims would cause substantial prejudice to WFRF, as WFRF would be left without recourse.

Finally, it is undisputed by Lead Counsel that no delay will occur in either the distribution of settlement funds from the Litigation Trust, or the disposition of the class action as a whole, in either case, as a result of permitting WFRF to participate in the class action settlement as a timely filer.

B. The Equities Tip Decidedly In Favor of WFRF

In a last ditch effort to divert the Court's attention from the merits of WFRF's motion, Lead Counsel has the temerity to suggest that WFRF is an "un-named co-conspirator" in this class action. (Opp. Memo. at 9) Lead Counsel's "blame the victim" tactic is a red herring intended distract the Court from the equities governing this motion. Curiously, Lead Counsel is

silent on the record as to (i) which addresses either Lead Counsel or the Claims Administrator supposedly used to give notice to the Retail Borrowers of the class action and the existence of the Litigation Trust, or whether Lead Counsel or the Claims Administrator even made any effort to locate the Retail Borrowers, (ii) whether either Lead Counsel or the Claims Administrator were informed of, or attempted to verify, any of the Retail Borrowers' respective bankruptcies, or (iii) whether either Lead Counsel or the Claims Administrator was aware that WFRF was the senior secured creditor to, and attorney-in-fact for, each of the Retail Borrowers. The equities governing this motion tip decidedly in favor of WFRF for the reasons stated above.

WFRF has explained, in detail, its "excusable neglect" in not filing a timely claim with respect to settlement proceeds from the Litigation Trust. WFRF has also demonstrated its entitlement to the settlement proceeds from the Litigation Trust, as the principal senior secured creditor of, and attorney-in-fact for, each of the Retail Borrowers. Although Lead Counsel takes no position on this issue, (Opp. Memo. at 9-10), the loan documents submitted in WFRF's moving papers demonstrate that (i) WFRF is the senior secured creditor of, and attorney-in-fact for, each of the Retail Borrowers, and (ii) each of the Retail Borrowers (A) had been involved in bankruptcy proceedings, closed their doors, and ceased operations, (B) had, at the time of their respective bankruptcies, substantial outstanding indebtedness still owing to WFRF, and (C) was potentially entitled to settlement proceeds from the Litigation Trust. Thus, WFRF's interest in the settlement proceeds from the Litigation Trust is indisputable.

CONCLUSION

For the foregoing reasons, WFRF requests that the Court grant its order to show cause seeking to permit WFRF to participate in the class action settlement as a timely filer and directing Lead Counsel to provide all necessary claims processing information to WFRF.

Dated: November 6, 2009
New York, New York

K&L GATES LLP

By:  _____

Roger Crane
599 Lexington Avenue
New York, New York 10022
Tel.: (212) 536-3900
Fax: (212) 536-3901
Attorney for Wells Fargo Retail Finance II, LLC