

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

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<b>IN RE</b>	:	<b>MASTER FILE NO.</b>
	:	<b>CV-96-5238</b>
<b>VISA CHECK/MASTERMONEY</b>	:	<b>(Gleeson, J.) (Orenstein, M.J.)</b>
<b>ANTITRUST LITIGATION</b>	:	
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<b>This Document Relates to: All Actions</b>	:	

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**MEMORANDUM OF VISA U.S.A. INC., REGARDING  
THE RIGHT OF THE U.S. GOVERNMENT TO PARTICIPATE  
IN THE DISTRIBUTION OF SETTLEMENT FUNDS**

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## INTRODUCTION

Pursuant to this Court's March 3, 2006 Order inviting interested parties to submit their views regarding the right of the United States ("Government") to participate in the distribution of settlement funds, Visa U.S.A. Inc. ("Visa") respectfully submits this memorandum in which it urges the Court to find that the Government is entitled to receive its share of the net settlement funds.

There are several reasons why the Court should allow the Government to receive settlement funds: First, the Government was treated – at least as far as defendants, the Court, and the rest of the class could see -- as though it were a class member. Second, holding that the Government is entitled to participate as a member of the class will not defeat any legitimate expectation of any other class members. Third, excluding the Government *would* substantially prejudice Visa, which at all times expected that its settlement would buy peace against the Government, excepting only the U. S. Postal Service ("USPS"), which *did* opt out of the class (and, thereafter, reached a separate agreement with Visa regarding its claim). Finally, allowing the Government to participate as a class member will avoid the need for future proceedings by Visa seeking equitable modification of the settlement agreement based upon mutual mistake of fact about the status of the Government's participation. Such ancillary proceedings should be avoided if at all possible, as they would hamper the efficient distribution of funds and speedy fulfillment of the settlement agreement. No one's interest would be served by that outcome.

## ARGUMENT

### **1. All Parties Treated The Government As A Class Member.**

As the Government's brief reviews in detail, all parties consistently treated the United States as if it was within the alleged class in this case, and as if it would participate in, and be bound by, the settlement. *See* U.S. Br. at 7-14. Thus, during

briefing on class certification, defendants asserted both to the District Court and the Second Circuit that governmental entities were members of the class. *See*, Defendants Memorandum of Law In Opposition to Plaintiffs' Motion for Class Certification at 4; Defendants' Petition for Review Under FRCP 23(f) at 1-2. Plaintiffs never asserted to the contrary, and the class certified did not exclude the U.S. Government. Moreover, in a May 2002 speech, Mr. Constantine, himself, referred to the Government as a class member. *See* U.S. Br. at 6 (and n.7).

Before argument on summary judgment, the Court established a procedure for notifying class members of their status, informing them of the procedure for opting out, and informing the parties of the number and identity of entities opting out of the class. June 21, 2002 Consent Order for Providing Notice to Members of the Certified Class ¶¶ 17 (receiving and processing requests for exclusion); 18 (“ . . . plaintiffs and the Administrator shall . . . identify each class member that has elected to opt-out of the Rule 23(b)(3) class, and certify that notice has been provided in accordance with this Order.”). Among the parties who submitted a timely notice of exclusion was the USPS, and its name was duly included on all communications enumerating the parties that elected to be excluded from the Class. However, neither the United States, as such, nor any agency or other entity thereof was so identified. To the contrary, as the United States explains in great detail (U.S. Br. at 9-14), the plaintiffs and the Claims Administrator consistently treated the Government, other than the USPS, as a Class Member throughout the settlement and claims process.

The extent and identities of the “opt-outs” was of great importance to Visa, which relied on the list of opt-outs to assist it in evaluating its exposure in the case and for evaluating possible settlement scenarios. *See* Declaration of Stephen V. Bomse (“Bomse Decl.”) ¶ 5. Thus, counsel for Visa sought from class counsel copies of all opt-out letters received, and Visa’s counsel reviewed the several boxes of letters sent by class counsel to Visa’s counsel. *Id.* Those boxes contained the opt-out letter from the USPS, but it did not include any reference to other parts of the Government, nor did it include the November 14, 2002 letter now identified by the Government in its papers as the “Civil Division Letter.” *Id.* Thus, as far as Visa was ever advised by the plaintiffs, the Government (other than the USPS) was in the class and would be bound by the outcome of the litigation. *That remained the expectation of Visa throughout the settlement process until the current issue arose late last year.* At no time did plaintiffs or class counsel ever give Visa reason to believe otherwise.

Specifically, Lead Class Counsel and the Claims Administrator filed a series of declarations and affidavits in late 2002 and early 2003, setting forth, among other things, the entities that had elected to opt-out of the litigation. *See*, November 15, 2002 Declaration of Mitchel C. Shapiro;<sup>1</sup> November 15, 2002 Affidavit of Neil L. Zola<sup>2</sup>;

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<sup>1</sup> “[Class Administrator] GCG has compiled a list of all persons and entities whose requests for exclusion from the class had been received by GCG through November 14, 2002 . . .”

<sup>2</sup>“Attached . . . is a list of all entities seeking exclusion that filed their exclusion by November 14, 2002, the opt-out deadline.”

November 26, 2002 Supplemental Affidavit of Neil L. Zola<sup>3</sup>; February 13, 2003 Final Supplemental Affidavit of Neil L. Zola.<sup>4</sup> None of them identified the Government as having opted out.<sup>5</sup> These declarations and affidavits comprise the Court-ordered record upon which the parties, the Court, and the public were informed of who had requested exclusion from the class. Each of those declarations or affidavits identified the USPS as having opted-out.

Further, as the Court is intimately aware, there were intensive settlement negotiations between the class and Visa which led to the settlement of the class' claims against Visa. During those talks (and at all other times), counsel for the class never suggested that the Government (again, with the exception of the USPS) was not a member of the class. As explained by Visa's lead counsel, Stephen Bomse:

At no time during the litigation, including any and all settlement discussions, including those with the Mediators and/or the Court, was it ever stated, suggested, or implied that the United States Government, with the exception of the United States Postal Service ("USPS"), was not a member of the Class that would participate in, and thus be bound by, any settlement reached by Visa. To the contrary, everything that occurred during the course of the litigation and the settlement process led me to the belief that the United States (except for the USPS *would* be so included.

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<sup>3</sup> "Attached . . . is a complete report of all 6,035 timely exclusions received by GCG through November 25, 2002 . . ."

<sup>4</sup> "Attached . . . is a complete and final report of all 6,041 timely exclusions received by GCG through February 12, 2003.

<sup>5</sup> Visa is in no position to discuss the meaning of the Civil Division Letter or the specifics of the communications between Class Counsel and the Government (*See Bomse Decl.* ¶ 8). Our point here is that, no matter the content of the Civil Division Letter or communications between counsel for the class and the Government, Class Counsel and the Claims Administrator treated the Government in all public ways as if it were a member of the class.

Bomse decl. ¶ 3

In sum, the record is abundantly clear that, so far as the expectations of class counsel, the Claims Administrator, Visa, and the Court are concerned, the Government was considered part of the class in this proceeding.

**2. It Is In The Interest Of All Parties To Hold That The Government Is A Member Of The Class And Is Entitled To Participate In The Distribution Of Settlement Funds.**

**a. Holding That The Government Is Entitled To Participate As A Class Member Would Not Deprive Class Members of The Benefit of Their Bargain.**

Members of the merchant class will not be deprived of the benefit of their bargain in settling this litigation if the Government is allowed to share in the settlement proceeds. At the time each notified merchant was asked to elect whether to remain in the case and be bound by its outcome, that merchant had no information about what any other notified party would do. Moreover, had any class member reviewed the record in the case in making its opt-out decision (a highly unlikely scenario), it would have found numerous references to the Government as an included class member. *See* pp. 4-5, *supra*. To be sure, it is in the economic interest of every class member today to minimize the number of other class members, so as to maximize the distribution of settlement proceeds to those remaining in the class. But receiving less money does not equal cognizable prejudice. *In re Orthopedic Bone Screw Products Liability Litigation*, 245 F.3d. 315, 324 (3d. Cir. 2001). Moreover, allowing the Government to participate could not defeat any class member's reliance interest given the fact that Lead Counsel for the class was treating the Government as part of the included class at all times up to and including settlement. If

anything, their expectations reasonably should have been that the Government – with the exception of the USPS – was going to be allotted its share of the settlement proceeds.

On the other hand, were the Government to be excluded, the remaining class members would receive settlement proceeds that include funds they should have expected the Government to receive. Those excess settlement funds would be a windfall.

**b. Excluding The Government From The Class Would Deprive Visa Of The Benefit Of Its Bargain.**

By contrast to the position of merchant class members, Visa *will* be materially harmed and *will* be deprived of the benefit of its anticipated bargain if the Government is excluded from the class bound by the settlement and Visa confronts the prospect of another large merchant “opt-out” claim.

In agreeing to “the largest antitrust settlement in history” (*In re Visa Check/MasterMoney Antitrust Litigation*, 297 F.Supp. 2d 503, 508 (E.D.N.Y. 2003), Visa sought to buy peace against all class members except those who had opted-out. Bomse Decl. ¶ 10. The identities of those entities that did opt out of the class was of intense interest to Visa, which studied the opt-out list and identified opt-outs with large sales volumes, such as Home Depot, Best Buy, Meijer Stores, Toys R Us, and the USPS, among others. *Id.* ¶ 6. The identity of these large merchants was material to Visa’s evaluation of its exposure, and to the terms on which it might reasonably consider settling. *Id.* ¶¶ 5-6. Notably, the Government was not identified as an opt-out, nor did Visa seek to reach a special agreement with the Government as it has done with all the other major opt-out merchants, save for one. *Id.* ¶¶ 6-7.

As with the other major opt-outs, Visa did seek an agreement with the USPS regarding its potential claims and debit card acceptance. As detailed in the accompanying declaration of Visa executive Rob Towne, Visa engaged in discussions with the USPS concerning an agreement that would (1) specify the terms on which the USPS would continue to accept Visa and Interlink-branded payment cards, and (2) resolve any potential claim between the USPS and Visa concerning the subject matter of the *Wal-Mart* lawsuit by having the USPS release any such claims. Towne Decl. ¶¶ 2-3. Shortly thereafter, Visa entered such an agreement with the USPS. *Id.* Visa did not, however, seek or obtain releases or special agreements with any other part of the Government following the Wal-Mart settlement because Visa believed that other government merchants were part of the class. *Id.* ¶ 4.

Visa plainly was entitled to rely on the opt-out list provided by the Claims Administrator, and to be informed about any merchant not on the opt-out list.<sup>6</sup> It would confound Visa's reasonable expectations to now have to face a potential damage claim from a large merchant whose claims Visa reasonably believed had been settled. If that is the result here, Visa will have been deprived of the benefit of the bargain it struck in 2003 to settle these claims. That alone is a powerful reason to include the Government as a party bound by the settlement in this litigation.

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<sup>6</sup> *Georgine v. Amchem Products Inc.* 1994 WL 637404, \*9 (E.D. Pa.) (“it would be unfair to permit many more individuals to opt out as the CCR defendants have a right to rely on the certainty of the settlement in all of its aspects. In this case, the total sum of the defendants’ costs may increase with each class member who opts out of the class.”).

**c. Including The Government In The Class Would Be Equitable And Would Serve The Interests Of Justice And Efficient Judicial Administration.**

Should the Government be excluded from participation in the settlement and thereafter bring opt-out claims against Visa, those actions would raise a host of issues that would be detrimental not only to Visa, but also to the Class and the interests of justice. Given the facts reviewed above, as well as the much more elaborate recitation of facts in the Government's contemporaneous submission (many of which were unknown to Visa until it received that submission in draft form within the past several days), there can be little doubt that excluding the Government's claim would be the result of a material mutual mistake by Visa and Lead Counsel for the class, thereby entitling Visa to equitable relief through reformation of the settlement, or otherwise. *See*, Bomse Decl. ¶ 11. Requiring Visa to seek such relief could hamper the orderly and efficient distribution of funds to the class, not to mention needlessly multiplying the proceedings necessary to bring this massive litigation to conclusion.

That is a result that no party should seek, particularly where it seems clear that Lead Class Counsel – with power to bind the class – was at all times either proceeding on the assumption that the Government *would* participate or (less likely, in our view) was actively concealing the communications he had with the Government in the fall of 2002 in order to mislead Visa.<sup>7</sup> Either way, however, the Class should be estopped from

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<sup>7</sup> In suggesting the possibility that Lead Counsel may have concealed facts from Visa, we do not in any way mean to impugn his integrity. To the contrary, Visa believes that Mr. Constantine was at all times proceeding on precisely the same assumption as Visa, to wit: that the Government, except for the USPS, was going to be bound by the settlement. It is difficult to

asserting a contrary position to Visa's detriment at this late date. In short, the ends of justice and the expectations of all parties are best served by permitting the Government to receive its fair share of settlement funds without further proceedings.

As the Government details in its submission (at pages 27-30), the Court has ample equitable power to permit the Government to participate in the settlement of this matter. *In re Chicken Antitrust Litig.*, 669 F.2d 228, 238-40 (5<sup>th</sup> Cir. 1982); *In re Remeron End-Payor Antitrust Litig.*, 2005 WL 2230314 (D.N.J. 2005). It is worth adding to those authorities the fact that the Court's powers also permit it ample discretion to remedy confusion or mistake that may have arisen out of the administration of the class list. While protecting against the vice of one-way intervention, courts have latitude to see that substantial justice is done in dealing with controversies over whether a party has opted-out of a class, and they weigh factors such as the lack of prejudice to Visa resulting from the Government's inclusion in the class against the prejudice Visa would suffer should it confront substantial claims by parties with whom it thought it had settled.<sup>8</sup> Here, the equities tip strongly in favor of permitting the Government to recover as part of the class,

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reach any other conclusion based on the fact that he and his firm never notified either Visa or the Claims Administrator (so far as appears) of any different position.

<sup>8</sup> See, *In re Orthopedic Bone Screw Products Liability Litigation*, 245 F.3d 315, 324 (3d Cir. 2001) (no prejudice to defendant if movant's claim considered within the settlement class); *Manual For Complex Litigation, Fourth Ed.* § 21.321 (court should weigh reasons for delay in opting out and whether prejudice would result from deciding whether to allow late decision regarding opt-out); Wright & Miller, Fed. Prac. & Proc. Civ. 3d § 1796 (flexible authority of courts to deal with problems in administration of class actions includes latitude to permit late opt-outs or even allow a party to opt-out of a rule 23(b)(1) class).

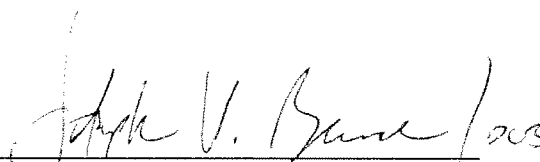
and the Court has the power to see that this sensible result is reached. Visa urges the Court to exercise that power.

**CONCLUSION**

For the foregoing reasons, Visa requests the Court to hold that the Government is entitled to participate in the distribution of settlement funds.

Respectfully submitted,

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